

Refugees' Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity



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Supervisor: Prof. Henk Botha

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FAVOURABLE TREATMENT OF REFUGEES AND ASYLUM-SEEKERS

DECLARATION

By submitting this doctoral thesis, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly stated otherwise) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Callixte Kavuro, December 2018,
Stellenbosch

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DEDICATION

To my son, Honore Mutabaruka Kavuro, whose untimely death at the tender age of five, occurred during a critical stage of writing this doctoral thesis.

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SUMMARY

The thesis deals with the question whether and to what extent refugees and asylum-seekers are entitled to socio-economic rights and benefits. This is a controversial question, which is complicated by the co-existence of different bodies of law which apply to the treatment of non-citizens, in general, and refugees and asylum-seekers, in particular. On the one hand, South Africa has acceded to international refugee treaties and incorporated these treaties into its legal system through the Refugees Act 130 of 1998 (as amended) ("Refugees Act"). This Act provides that refugees are entitled to all rights in the Bill of Rights, except those rights that are expressly reserved for citizens. Sections 26 and 27 of the Constitution of the Republic of South Africa, 1996 provide that "everyone" has the right of access to adequate housing, and access to health care services, sufficient food and water, and social security. This seems to indicate that refugees and asylum-seekers are entitled to the socio-economic rights enshrined in the Constitution. The Refugees Act, read through the lens of these constitutional provisions, signals South Africa's intention to offer effective protection to refugees and asylum-seekers, to respond to their suffering and to restore their self-reliance, participation, and agency. It does so, inter alia, by extending to them the right to have access to subsidised socio-economic goods and services.

On the other hand, refugees and asylum-seekers are, in practice, excluded from certain socio-economic rights. This exclusion stems from a number of factors. First, they are treated as temporary residents in terms of the Immigration Act 13 of 2002. For this reason, the twin principles of self-sufficiency and exclusivity are often applied to them. In terms of these principles, non-citizens are generally admitted into South Africa on the condition that they are self-supportive and self-reliant. Moreover, they are precluded from accessing socio-economic programmes designed to support citizens who are vulnerable to poverty. Secondly, legislation conferring socio-economic rights and benefits often restricts those rights to citizens and permanent residents. The legislation is thus not aligned with the Refugees Act. Thirdly, the Convention Relating to the Status of Refugees, 1951 ("the Geneva Refugee Convention") provides, in certain respects, for the same treatment of refugees as accorded to non-citizens in the same circumstances as refugees, or as accorded to non-citizens generally. Fourthly, the OAU Convention Governing the Specific

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Aspects of Refugee Problems in Africa, 1969 (“the African Refugee Convention”) requires a host state to alleviate refugees’ misery and suffering as well as to offer them opportunities to achieve a better life and future.

The thesis criticises the idea that refugees and asylum-seekers are entitled to socio-economic rights on the basis of the standard of the same treatment accorded to non-citizens. This standard is problematic, in so far as there is no other group of non-citizens whose circumstances correspond to those of refugees and asylum-seekers. Moreover, the standard legitimises the application of the twin principles of exclusivity and self-sufficiency, as contemplated by immigration law, to refugees and asylum-seekers. The thesis criticises the exclusionary approach on the basis of emerging theories, norms, standards and practices, as emanating from international refugee law, human rights law, constitutional law, domestic refugee law and foreign and international jurisprudence. It examines the vulnerability of refugees, and argues that the rights flowing from refugee status demand special and differentiated treatment from that accorded to non-citizens generally. The Refugees Act was specifically adopted to exempt refugees and asylum-seekers from the emphasis, in immigration law, on exclusion and self-reliance, and to afford them special, favourable or differentiated treatment to ensure the protection of their well-being, health and dignity. For that reason, refugee principles should be given priority over immigration principles.

The thesis examines refugees and asylum-seekers’ entitlement to socio-economic rights through the prism of the constitutional rights and values of human dignity and equality, and with reference to the standards of same treatment and favourable treatment, as used in the Geneva Refugee Convention . It argues, first, that the right and value of human dignity requires that all human beings should be in a position to live their lives in accordance with the ends that they freely chose, or as autonomous agents who have the ability to define their own destiny. No-one should be reduced to a mere object of state power, or be left without the resources needed to pursue reasonable choices or to meet their own needs. Given the unique position and vulnerability of refugees and asylum-seekers, the state is under both a negative obligation to desist from conduct that would interfere with the exercise of their rights, and a positive obligation to create conditions in which they can participate in economic and social life. Secondly, the thesis draws on the distinction between formal and substantive equality, and argues that the rights of refugees and asylum-

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seekers should be read through the prism of substantive equality. This could help enable an approach which recognises their vulnerability, and affords them differentiated and favourable treatment.

The thesis focuses on three rights: the right of access to public relief and assistance, healthcare and adequate housing. A detailed analysis is offered of the extent to which refugees and asylum-seekers are given these rights, or are excluded from their protection. The national laws granting and regulating these rights are examined, in view of refugee law, international human rights, the South African Constitution, and foreign law. To the extent that these laws exclude refugees and asylum-seekers from socio-economic rights and benefits, the thesis analyses the constitutionality of these exclusions. Recommendations are also made for the amendment of certain distributive laws, to harmonise them with the Constitution and the Refugees Act. These laws include the Housing Act 107 of 1997, the National Health Act 61 of 2003, the Social Assistance Act 13 of 2004, and related policies and strategies.

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OPSOMMING

Die proefskrif handel oor die vraag of en in watter mate vlugteling en asielsoekers op sosio-ekonomiese regte en voordele geregtig is. Dit is 'n omstrede vraag, wat bemoeilik word deur die bestaan van verskillende vertakkinge van die reg wat van toepassing is op die behandeling van nie-burgers, in die algemeen, en veral vlugteling en asielsoekers. Aan die een kant het Suid-Afrika internasionale vlugtelingeverdrae geratifiseer en hierdie verdrae in sy regstelsel geïnkorporeer deur die Wet op Vlugteling 130 van 1998 (soos gewysig) ("Wet op Vlugteling"). Hierdie Wet bepaal dat vlugteling op alle regte in die Handves van Regte geregtig is, behalwe die regte wat uitdruklik vir burgers gereserveer word. Artikels 26 en 27 van die Grondwet van die Republiek van Suid-Afrika, 1996 bepaal dat "elkeen" die reg het op toegang tot voldoende behuising, en toegang tot gesondheidsorgdienste, voldoende voedsel en water en maatskaplike sekerheid. Dit blyk dat vlugteling en asielsoekers geregtig is op die sosio-ekonomiese regte wat in die Grondwet vervat is. Die Wet op Vlugteling, gelees deur die lens van hierdie grondwetlike bepalings, dui op Suid-Afrika se voorneme om effektiewe beskerming aan vlugteling en asielsoekers te bied, om te reageer op hul lyding en om hul selfstandigheid, deelname en agentskap te herstel. Dit doen dit onder meer deur hulle die reg te gee om toegang te verkry tot gesubsidieerde sosio-ekonomiese goedere en dienste.

Aan die ander kant word vlugteling en asielsoekers in die praktyk uitgesluit van sekere sosio-ekonomiese regte. Hierdie uitsluiting kom voort uit 'n aantal faktore. Eerstens word hulle ingevolge die Immigrasiewet 13 van 2002 as tydelike inwoners beskou. Om hierdie rede word die dubbele beginsels van selfversorgendheid en eksklusiwiteit dikwels op hulle toegepas. Ingevolge hierdie beginsels word nie-burgers gewoonlik in Suid-Afrika toegelaat op voorwaarde dat hulle selfonderhoudend en selfstandig is. Daarbenewens is hulle uitgesluit van toegang tot sosio-ekonomiese programme wat ontwerp is om burgers wat kwesbaar vir armoede is, te ondersteun. Tweedens beperk wetgewing wat sosio-ekonomiese regte en voordele toeken, dikwels daardie regte tot burgers en permanente inwoners. Die wetgewing is dus nie in lyn met die Wet op Vlugteling nie. In die derde plek maak die Konvensie oor die Status van Vlugteling, 1951 ("die Geneefse Vlugteling Konvensie") in sekere opsigte voorsiening vir dieselfde behandeling van vlugteling as die behandeling wat aan nie-burgers wat in dieselfde omstandighede as

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vlugtelinge verkeer, of aan nie-burgers in die algemeen, verleen word. Vierdens vereis die OAE Konvensie oor die Spesifieke Aspekte van Vlugtelingeprobleme in Afrika, 1969 ("die Afrika Vlugtelingekonvensie"), dat 'n gasheerstaat die ellende en lyding van vlugteling verlig, asook aan hulle geleentheid bied om 'n beter lewe en toekoms te bewerkstellig.

Die proefskrif kritiseer die idee dat vlugteling en asielsoekers op sosio-ekonomiese regte geregtig is op grond van die standaard van dieselfde behandeling wat aan nie-burgers verleen word. Hierdie standaard is problematies, want daar is geen ander groep nie-burgers wie se omstandighede ooreenstem met dié van vlugteling en asielsoekers nie. Daarbenewens verleen dié standaard legitimiteit aan die toepassing van die dubbele beginsels van eksklusiwiteit en selfversorging, soos beoog in die Immigrasiewet, op vlugteling en asielsoekers. Die proefskrif kritiseer die uitsluitingsbenadering op grond van opkomende teorieë, norme, standaarde en praktyke, wat voortspruit uit die internasionale reg ten aansien van vlugteling, menseregteverdrae, staatsreg, munisipale reg ten aansien van vlugteling, buitelandse reg en volkeregtelike beginsels. Dit ondersoek die kwesbaarheid van vlugteling, en argumenteer dat die regte wat uit vlugtelingstatus voortspruit, spesiale en gedifferensieerde behandeling vereis, met ander woorde behandeling wat verskil van dié wat aan nie-burgers in die algemeen verleen word. Die Wet op Vlugteling is spesifiek aangeneem om vlugteling en asielsoekers vry te stel van die klem wat in immigrasiewetgewing op uitsluiting en selfstandigheid geplaas word, en om hulle spesiale, gunstige of gedifferensieerde behandeling te bied om die beskerming van hul welsyn, gesondheid en waardigheid te verseker. Om hierdie rede moet vlugteling-beginsels prioriteit kry bo immigrasie-beginsels.

Die proefskrif ondersoek vlugteling en asielsoekers se aanspraak op sosio-ekonomiese regte deur die prisma van die grondwetlike regte en waardes van menswaardigheid en gelykheid, en met verwysing na die standaarde vir dieselfde behandeling en gunstige behandeling, soos gebruik in die Vlugteling Konvensie. Dit argumenteer in die eerste plek dat die reg en waarde van menswaardigheid vereis dat alle mense in staat moet wees om hul lewens te leef ooreenkomstig die doelwitte wat hulle vryelik verkies het, of as outonome agente wat die vermoë het om hul eie lot te definieer. Niemand moet verminder word tot 'n blote voorwerp van staatsmag, of gelaat word sonder die nodige hulpbronne om redelike keuses te maak of om in hul eie behoeftes te voorsien nie. Gegewe die unieke posisie en kwesbaarheid van

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vlugteling en asielsoekers, is die staat onder beide 'n negatiewe verpligting om hom te weerhou van optrede wat met die uitoefening van hul regte inmeng, en 'n positiewe verpligting om omstandighede te skep waarin hulle kan deelneem aan ekonomiese en sosiale lewe. Tweedens steun die proefskrif op die onderskeid tussen formele en substantiewe gelykheid, en argumenteer dat die regte van vlugteling en asielsoekers deur die prisma van substantiewe gelykheid gelees moet word. Dit kan help om 'n benadering daar te stel wat hul kwesbaarheid erken, en hulle gedifferensieerde en gunstige behandeling bied.

Die proefskrif fokus op drie regte: die reg op toegang tot openbare verligting en hulp, gesondheidsorg en voldoende behuising. 'n Gedetailleerde analise word gebied oor die mate waarin vlugteling en asielsoekers hierdie regte kry, of uitgesluit word van hul beskerming. Die nasionale wette wat hierdie regte verleen en reguleer, word ondersoek in die lig van die reg insake vlugteling, internasionale menseregte, die Suid-Afrikaanse Grondwet en buitelandse reg. In soverre hierdie wette vlugteling en asielsoekers uitsluit van sosio-ekonomiese regte en voordele, ontleed die proefskrif die grondwetlikheid van hierdie uitsluitings. Aanbevelings word ook gemaak vir die wysiging van sekere wette wat met die verdeling van hulpbronne te doen het, om hulle te harmoniseer met die Grondwet en die Wet op Vlugteling. Hierdie wette sluit in die Wet op Behuising 107 van 1997, die Wet op Nasionale Gesondheid 61 van 2003, die Wet op Maatskaplike Bystand 13 van 2004, en verwante beleid en strategieë.

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GLOSSARY OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immune Deficiency Syndrome
AME	<i>Aide Médicale de l'État</i>
ANC	African National Congress
APS	<i>Autorisation Provisoire de Séjour</i>
ART	Anti-Retroviral Therapy
ARV	Anti-Retro-Viral
ATA	<i>Allocation Temporaire d'Attente</i>
AU	African Union
CADA	<i>Centre d'Accueil pour Demandeur d'Asile</i>
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESEDA	<i>Entrée et du Séjour des Étrangers et du Droit d'Asil</i>
CMU	<i>Couverture Maladie Universelle</i>
CoRMSA	Consortium for Refugees and Migrants South Africa
CPAM	<i>Caisse Primaire d'Assurance Maladie</i>
DHA	Department of Home Affairs
DSBD	Department of Small Business Development
EC	European Council
ECJ	European Court of Justice
ECSR	European Committee on Social Rights
ECtHR	European Court of Human Rights
EEA	Employment Equity Act
EEDBS	Enhanced Extended Discount Benefit Scheme
EHP	Emergency Housing Programme
EOIR	Executive Office for Immigration Review
ePHP	Enhanced People's Housing Process
EU	European Union
CESCR	Committee on Economic, Social and Cultural Rights
CERD	Convention on the Elimination of All Forms of Racial Discrimination

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COIDA	Compensation for Occupational Injuries and Diseases Act
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FREE	Fund for Refugee Employment and Education
FGM	Female Genital Mutilation
FOII	French Office of Immigration and Integration
HDP	Housing Development Programme
HIV	Human Immunodeficiency Virus
HRMC	Human Rights Media Centre
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross/Red Crescent
ICJ	International Court of Justice
ID	Identity Document
ILO	International Labour Organisation
INA	Immigration and Nationality Act
IOM	International Organisation for Migration
IHSP	Institutional Housing Subsidy Programme
ISP	Individual Subsidy Programme
IRDP	Integrated Residential Development Programme
MFN	Most-Favoured Nation
NGO	Non-Governmental Organisation
NHI	National Health Insurance
NHPSP	National Housing Policy and Subsidy Programmes
NHSS	National Housing Subsidy Scheme
NSW	New South Wales
OAU	Organisation of African Union
OFPRA	<i>Office Français de Protection des Réfugiés et Apatrides</i>
ORR	Office of Refugee Resettlement
PASS	<i>Permanences d'Accès Aux Soins de Santé</i>
PHP	People's Housing Process
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

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RAF	Road Accident Fund
RDP	Reconstruction and Development Programme
RHP	Rural Housing Programme
RRO	Refugee Reception Office
SADC	Southern African Development Community
SANAC	South African National Aids Council
SASSA	South African Social Security Agency
SCA	Supreme Court of Appeal
SCRA	Standing Committee for Refugee Affairs
SCUS	Supreme Court of the United States
SERI	Socio-economic Rights Institute
SHP	Social Housing Programme
SHRA	Social Housing Regulatory Authority
SMME	Small, Medium-sized and Micro-Enterprise
SRD	Social Relief and Distress
SSAP	State Social Assistance Plan
STD	Sexually Transmitted Diseases
TAC	Treatment Action Campaign
UDHR	Universal Declaration of Human Rights
UIF	Unemployment Insurance Fund
UISP	Upgrading of Informal Settlements Programme
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Education, Scientific, and Cultural Organisation
UNICEF	United Nations Children's Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UPFS	Uniform Patient Fee Schedule
US	United States
USCISB	United States Citizenship and Immigration Services Bureau
VDPA	Vienna Declaration and Programme of Action
WHO	World Health Organisation

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CHAPTER 1

INTRODUCTION

1.1 Background to the research

When South Africa became a democratic country in 1994, it expressed its desire to chart a sensible and humane policy for the protection of refugees and asylum-seekers. Driven by the need to protect human dignity and because of its history, South Africa acceded to the refugee conventions with the intent to allow victims of persecution and violence to seek a safe haven within South African borders.¹ Therefore, South Africa acceded to the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (“the African Refugee Convention”)² and the Convention Relating to the Status of Refugees (“the Geneva Refugee Convention”)³ on 15 December 1995 and on 12 January 1996, respectively. This was partly motivated by “the fact that thousands of [South Africans] have experienced the pain of destitution and homelessness” and the increasing need “to bear the mantle of champions of the oppressed”.⁴

In 1998, South Africa adopted the Refugees Act 130 of 1998 (“the Refugees Act”), which gives effect to the said refugee conventions, the South African Constitution and human rights conventions to which South Africa is a party. The Refugees Act came into operation in 2000 and has been revised several times.⁵ It provides that refugees are entitled to those rights in the Bill of Rights that apply to everyone within South Africa’s territorial jurisdiction. The Refugees Act is designed, inter alia, to alleviate the desperation and destitution suffered by refugees and asylum-seekers through the facilitation of equal access to socio-economic rights and benefits as well as other public services guaranteed by the South African Constitution. Because of its focus on equal treatment as a vehicle for the alleviation of the indignity and humiliation suffered by refugees and asylum-seekers, South Africa’s refugee regime

¹ *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC), para 140.

² 10 September 1969, 1001 U.N.T.S. 45.

³ 89 U.N.T.S. 150, entered into force April 22, 1954.

⁴ *Union of Refugee Women* para 140.

⁵ It was first revised by the Refugees Amendment Act 33 of 2008 and then by the Refugees Amendment Act 12 of 2011. At the time of writing the thesis, it was expected to be significantly revised by the Refugees Amendment Bill [B12-2016].

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has been praised by the United Nations High Commissioner for Refugees (“UNHCR”) as the most progressive in the world.⁶

Notwithstanding the progressive nature of South Africa’s refugee regime, there is conceptual confusion related to the application of immigration rules to refugees and asylum-seekers. Such confusion derives from the twin principles of exclusivity and self-sufficiency on which the Immigration Act 13 of 2002, as amended (“the Immigration Act”),⁷ is based.⁸ The twin principles imply that a non-citizen can be admitted in the country provided that he or she is self-sufficient. Accordingly, a non-citizen should not have access to social welfare unless he or she has become a permanent resident.⁹ When the Refugees Act is interpreted through the lens of such an exclusionary approach, the implication is that refugees and asylum-seekers, as temporary residents, can neither depend on state support nor have access to subsidised public goods and services.

These principles are, however, in tension with the Refugees Act. Section 27(b) of the Refugees Act provides that “[a] refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution of the Republic of South Africa, 1996, except those rights that only apply to citizens”. Section 27(f) expressly recognises refugees’ right to seek employment. Section 27A(d) further states that “an asylum-seeker is entitled to the rights contained in the Constitution of the Republic of South Africa, 1996, in so far as those rights apply to asylum-seekers”.¹⁰ It would thus seem that the Refugees Act recognises the rights of refugees, and arguably asylum-seekers, to housing, healthcare, food and water, social security,

⁶ P Rulashe “UNHCR chief commends Pretoria’s refugee policy, pledges cooperation” (27-08-2007) UNHCR <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&skip=36&docid=46cf10634&query=%22south%20africa%22> (accessed 12-07-2015). See also F Khan “Patterns and Policies of Migration in South Africa: Changing Patterns and the Need for a Comprehensive Approach” (2007) Unpublished paper drafted for discussion on Patterns on policies of migration, 03-10- 2007 (copy on file with author) 4.

⁷ By the Prevention and Combating of Corrupt Activities Act 12 of 2004; the Immigration Amendment Act 19 of 2004; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; the Immigration Amendment Act 3 of 2007; the Immigration Amendment Act 13 of 2011; and the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

⁸ A foreign national can be granted a visa if the Director-General of Home Affairs is satisfied that he or she has received guarantees to his or her satisfaction that such foreign national will support him- or herself (ss 11(1), 13(1), 17(1)(b)(ii), 18(1), 19(2), 20(1)(b), and 21(2)(b) of the Immigration Act), or will invest the prescribed financial or capital contribution in a business (s 15(1)(a) of the Immigration Act), or possesses a critical skill (s 19(4) of the Immigration Act).

⁹ S 25(1) states that “[t]he holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.”

¹⁰ As amended by the Refugees Amendment Act 33 of 2008.

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and education¹¹ on the basis that these rights reside in “everyone”.¹² Even though these provisions, which deal specifically with the rights of refugees and asylum-seekers, should be given priority over the more general provisions of the Immigration Act, the reality is that the twin principles are often applied to refugees and asylum-seekers. This stems from a number of factors, including that they are treated as temporary residents in terms of the Immigration Act and the Refugees Act and that legislation conferring socio-economic rights and benefits are not aligned with the above-mentioned provisions in the Refugees Act. The main concern is that, if the twin principles of self-sufficiency and exclusivity were to be applied to refugees and asylum-seekers on the basis that they are temporary residents, it would, as will be demonstrated, have grave implications for their dignity and rights. For this reason, it is crucial to distinguish clearly between immigration law and refugee law, and to determine whether the former can trump the latter.

When there are contrasting laws that regulate the same subject matter, the principle of *lex specialis derogat legi generali* applies.¹³ This implies that priority must be given to the legislation that is more specific to the subject matter and hence, specific law takes precedence over general law.¹⁴ The thesis proceeds from the understanding that the Immigration Act is a general law as it deals with non-citizens’ admission and treatment generally, compared to the Refugees Act which specifically deals with refugees’ recognition and treatment. The Refugees Act, as the special law, must be given priority over the Immigration Act in relation to the protection of the socio-economic rights of refugees. This priority is normatively justified on the ground that asylum law is designed to respond to the distinct nature of refugees and the particular problems experienced by them.

The thesis recognises that the interpretation and implementation of refugee rights in South Africa are riddled with difficulties. One of these problems relates to the four

¹¹ Apart from the right to healthcare, food and water, these rights are all guaranteed by the Geneva Refugee Convention. In addition, the Convention also recognises the right to public relief and assistance. Art 23 of the Geneva Refugee Convention.

¹² See ss 26, 27, 29 of the Constitution of the Republic of South Africa, 1996. See too *Khosa v Minister of Social Development* 2004 6 SA 505 (CC), para 42 (everyone is entitled to equality in respect of access to socio-economic rights and benefits).

¹³ J R de Ville *Constitutional & Statutory Interpretation* (2000) 66, 79-81, 175.

¹⁴ The principle *generalia specialibus non derogant* presumes that if lawmakers have, after considering all circumstances, adopted a special law for a particular case, such a special law was not meant to be interfered with by a law of general character. In cases such as this, “the special provision stands as an exceptional proviso upon the general.” See, for example, *Edmond v. U.S.*, 520 U.S. 651; *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653; *Seward v. Owner of "The Vera Cruz"*, (1884) 10 App Cas 59 and *the Privy Council in Barker v Edger*, [1898] AC 748.

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different standards of treatment provided for in the Geneva Refugee Convention and its Protocol.¹⁵ These are: (i) favourable treatment as accorded to citizens; (ii) the most favourable treatment as accorded to non-citizens in the same circumstances; (iii) treatment as favourable as possible, and in any event, not less favourable than that accorded to non-citizens generally; and (iv) same treatment as accorded to non-citizens generally. The African Refugee Convention is silent on these standards, which are at times difficult to interpret. It is also not immediately apparent how they relate to the rights guaranteed in the South African Constitution and the relevant provisions of the Refugees Act. The legal position is not clarified in case law beyond recognition that refugees and asylum-seekers are vulnerable people who are in need of special protection.¹⁶ Of concern is that there is no consensus among judges of the Constitutional Court about refugees' legal position with regard to those socio-economic rights which are to be accorded to them on the basis of the standard of the most favourable treatment as accorded to non-citizens in the same circumstances. The Constitutional Court had an opportunity to deal with this standard of treatment in the case of *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* ("Union of Refugee Women").¹⁷ The case dealt, among other things, with the right to engage in wage-earning employment, guaranteed by article 17(1) of the Geneva Refugee Convention. The judges disagreed whether refugees should be treated similarly to permanent or temporary residents.

A dignity-based approach to the treatment of refugees could help shed light on the problems arising from the viewpoint that refugees should be treated similarly to temporary residents. The judgment of the Supreme Court of Appeal ("SCA") in the case of *Minister of Home Affairs v Watchenuka* ("Watchenuka")¹⁸ made it clear that the application of the twin principles to refugees and asylum-seekers could, in some cases, lead to a serious impairment of their dignity by causing or perpetuating destitution.¹⁹ This should be borne in mind when determining the legal position of

¹⁵ Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.

¹⁶ *Ndikumdavyi v Valkenberg Hospital* [2012] 8 BLLR 795 (LC) para 17; and *Union of Refugee Women* para 28; affirming that "refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. They have limited resources available to them" (para 24)).

¹⁷ 2007 4 BCLR 339 (CC).

¹⁸ 2004 4 SA 326 (SCA).

¹⁹ The court held that a general prohibition, as applied to asylum-seekers, that does not allow access to employment and education in appropriate circumstances, is a material invasion of human dignity that is not justifiable in terms of section 36 of the South African Constitution. See *Watchenuka* paras 33, 38.

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refugees and asylum-seekers, when contextualising the meaning of favourable treatment, not only in terms of the Geneva Refugee Convention or the African Refugee Convention, but also within the framework of the Refugees Act, and when analysing the impact the exclusion has on refugees or asylum-seekers with regard to the rights to social assistance, healthcare and housing.

Despite the anomalies arising from the Geneva Refugee Convention, the African Refugee Convention and the Refugees Act, issues relating to favourable treatment have not been given adequate attention by South African refugee scholars, who have focussed primarily on difficulties of implementation.²⁰ They have largely overlooked the fact that the Refugees Act does not give a clear meaning to the Geneva Refugee Convention as regards the standards of favourable treatment in respect of social and economic integration. The issues that are dealt with most prominently in the literature include xenophobia, the push and pull factors of current migration flows, porous borders and deportation, documentation, corruption, crime, national security, economic development and the lack of political will to have an efficient procedural asylum system in place.²¹ Although the study engages with difficulties of implementation of the Refugees Act, its approach is distinctive compared with other implementation studies, as it explores the legal barriers arising from conditions set forth under the Immigration Act and from the interpretation of the

²⁰ See for example, J Crush “The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa” (2000) 38 *International Migration* 103 103; J Comaroff & J Comaroff “Reflection on Liberalism, Policulturalism, and ID-ology: Citizens and Differences in South Africa” (2003) 9 *Social Identities: Journal for the Study of Race, Nation and Culture* 445 446; L B Landau “Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy” (2006) 3 *Journal of Refugee Studies* 308 309 and P Rugunanan & R Smit “Seeking Refuge in South Africa: Challenges Facing a Group of Congolese and Burundian Refugees” (2011) 28 *Development Southern Africa* 705 708.

²¹ See for example, Crush (2000) *International Migration* 103-133; Landau (2006) *Journal of Refugee Studies* 308-327; A Adepoju “Continuity and Changing Configuration of Migration to and from the Republic of South Africa” (2003) 41 *International Migration* 3 3-25; J Handmaker & J Parsely “Migration, Refugees, and Racism in South Africa” (2001) 1 *Refuge* 40 40-51; J Handmaker “No Easy Walk: Advancing Refugee Protection in South Africa” (2001) 46 *Africa Today* 91 91-113; D Danso & D A McDonald “Writing Xenophobia: Immigration and Print Media in Post-Apartheid South Africa” (2001) 48 *Africa Today* 115 115-137; L B Landau & T Manson “Displacement, Estrangement and Sovereignty: Reconfiguring State Power in South Africa” (2008) 43 *Government and Opposition* 315 315-36; M Neocosmos “The Politics of Fear and the Fear of Politics: Reflection on Xenophobic Violence in South Africa” (2008) 43 *Journal of Asian and African Studies* 586 586-94; CorMSA *Protecting Refugees, Asylum-Seekers and Immigrants in South Africa* (2010) 54-85 122-130; P Vale “Migration, Xenophobia, and Security Making in the Post-Apartheid South Africa” (2002) 29 *Politikon: South African Journal of Political Studies* 7 7-29; T Polzer “Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa” (2007) 19 *International Journal of Refugee Law* 22 22-50; and H Kotze & L Hill “Emergent Migration Policy in a Democratic South Africa” (1997) 35 *International Migration* 5 5-35.

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standards set out in the Geneva Refugee Convention by the Constitutional Court. The study examines how those legal barriers can be addressed.

The study accordingly notes that refugees are faced with a plethora of challenges in turning socio-economic rights into entitlements. The factors that contribute to the difficulty of their daily struggles for survival include: (i) distributive laws, policies and strategies that are developed and designed to give priority to the socio-economic needs of historically disadvantaged groups of South African citizens;²² (ii) unjustified claims made by local or municipal authorities that refugees' social problems are matters that fall in the functional areas of the national government, resulting in their exclusion from the beneficiaries of service delivery;²³ (iii) political claims made by the executive authority that a high number of refugees is economic migrants who do not deserve international refugee protection;²⁴ (iv) the extension of immigration norms and principles to apply to refugees and asylum-seekers, with the result that they are given the same treatment accorded to non-citizens generally;²⁵ and (v) the ruling of the Constitutional Court holding that refugees and asylum-seekers should be given the same treatment accorded to temporary residents with respect to socioeconomic rights that should be enjoyed on the basis of the standard of the most favourable

²² Socio-economic laws in the context of remedial measures, for example, include the Skills Development Act 98 of 1998, the Skills Development Levies Act 9 of 1999, the Higher Education Act 101 of 1997, the National Student Financial Assistance Act 56 of 1999, the Employment Equity Act 55 of 1998, the Public Service Act 103 of 1994, the National Health Act 61 of 2003, the Housing Act 107 of 1997, the Social Housing Act 16 of 2008, the Social Assistance Act 13 of 2004, the Broad Based Black Economic Empowerment Act 53 of 2003, the Marine Living Resources Act 18 of 1998, the Mineral and Petroleum Resources Act 28 of 2002, the Competition Act 89 of 1998, and the Preferential Procurement Policy Framework Act 5 of 2000; all which prioritise the redressing of past injustices for an egalitarian society.

²³ On the denial of the social and economic services delivered by local government, see I Palmary "Refugees, Safety and Xenophobia in South African Cities: The role of local government" (2002) *Centre for the Study of Violence and Reconciliation* 1 1-24 and CorMSA *Protecting Refugees, Asylum-Seekers and Immigrants in South Africa* (2010) 47-53.

²⁴ The argument that an ineffective asylum management system facilitates the admission of a higher number of bogus refugees into the refugee system acts as a bar to extending social welfare to recognised refugees and "had been made a scapegoat by South African authority for failing to meet its international responsibility, whereby social injustice is perpetuated and uncertainties are prolonged." C Kavuro "Refugee Rights in South Africa: Addressing Social Injustices in Government Financial Assistance Schemes" (2015) 5 *J Sustain Dev Law Policy* 176 182. See also Department of Home Affairs: Green Paper on the International Migration, GN XXX, GG No. of 24 June 2016 ("the 2016 Green Paper") 29, which affirms that over 90% of a high volume of asylum-seekers are not genuine refugees.

²⁵ Kavuro (2015) *J Sustain Dev Law Policy* 176 176 argues that refugees and asylum-seekers are, for example, treated as if they are international students at higher learning institutions. See also C Kavuro "Refugees and Asylum-Seekers: Barriers to Accessing South Africa's Labour Market" (2015) 19 *Law, Democracy & Development* 232 245, who maintains that refugees and asylum-seekers are, more often, "confused or juxtaposed with economic migrants and the distinction between these two groups is progressively blurred by politicians".

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treatment.²⁶ These challenges are intensified by public support for the exclusion of refugees from socio-economic institutions. Public opinion is based on the belief that refugees and asylum-seekers are “not taxpayers”;²⁷ that they are bogus refugees in search of a better life;²⁸ and that they would be a drain on the national resources.²⁹ These views have been instrumental in the development of the exclusionary distributive justice system and in developing the refugee system, which centres on the self-integration and self-settlement approaches.

In light of the above, the present study is premised on the following underlying assumptions: First and foremost, South Africa has a duty to take reasonable measures within available resources for the progressive improvement of the quality of life of the poor and vulnerable.³⁰ Secondly, the rights contained in the Bill of Rights in the South African Constitution are, with a few exceptions, statutorily and constitutionally accorded to refugees and asylum-seekers within South Africa’s borders. The state therefore also has a duty to protect the socio-economic rights of indigent refugees and asylum-seekers.³¹ Thirdly, South Africa has an obligation to refrain from applying the twin principles of exclusivity and self-sufficiency to refugees and asylum-seekers.³² The principle that non-citizens who are likely to become a public charge can be prohibited from entering or staying in South Africa, therefore

²⁶ *Union of Refugee Women* para 61 per majority judgment held that refugees (as well as asylum-seekers) “may not be treated as permanent residents because they are not in the same circumstances for the simple reason that they have yet to meet the requirements for permanent residence.”

²⁷ S Gunn & M M Tal *Torn Apart: Thirteen Refugees Tell Their Stories* (2003) 16.

²⁸ Landau (2006) *Journal of Refugee Studies* 316. See too Danso & McDonald (2001) *Africa Today* 119.

²⁹ See, for example, Landau & Manson (2008) *Government and Opposition* 322 (refugees will multiply and increase South African population and in future, citizens will suffer); Adepoju (2003) *International Migration* 9-18 (a direct threat to citizens’ future economic well-being); Danso & McDonald (2001) *Africa Today* 116 (they are responsible for stealing opportunities and causing crime and diseases); Neocosmos (2008) *Journal of Asian and African Studies* 589 (migrants come to South Africa to take and not contribute anything).

³⁰ See ss 25(5)-29 of the Constitution of the Republic of South Africa. See also C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 1 (the purpose of including socio-economic rights in the South African Constitution was to advance “the socio-economic needs of the poor in order to uplift their human dignity”).

³¹ Ss 27(b) and 27A(d) of the Refugees Act, read together with arts 17-24 of the Geneva Refugee Convention. In particular, art 2(1) of the African Refugee Convention provides that, when an African state offers asylum to refugees, it must use the best endeavours consistent with its asylum law to receive refugees and to secure the settlement of those refugees who cannot return to their home countries or countries of origin owing to well-founded reasons.

³² The twin principles of exclusivity and self-sufficiency are laid down under ss 11- 22 of the Immigration Act, dealing with the application of a temporary residence visa. However, refugees and asylum-seekers are exempted from the twin principles by ss 27(b) and 27A(d) of the Refugees Act, read together with arts. 17-24 of the Geneva Refugee Convention.

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does not apply to refugees and asylum-seekers.³³ Finally, the problems faced by South Africa in terms of hosting refugees are not unique to it as refugee problems are matters that should be addressed on the basis of international cooperation and burden sharing among members of the international community.³⁴ On the African continent, international cooperation and burden sharing are informed by the spirit of African solidarity.³⁵

The extent to which the state is under an obligation to guarantee the socio-economic rights of refugees and asylum-seekers will be considered within the context of three specific rights, namely the rights to public relief and assistance, healthcare and housing. The scope of the thesis is limited to these three rights, since their realisation poses particular challenges. First of all, the right to public relief and assistance is not expressly protected by the South African Constitution or, by extension, the Refugees Act. Secondly, the Geneva Refugee Convention is silent in respect of the right of access to healthcare, which raises questions over refugees and asylum-seekers' entitlement to this right. Finally, although both the South African Constitution and the Geneva Refugee Convention recognise rights relating to housing accommodation, the specific South African legislation relating to housing, i.e. the Housing Act 107 of 1997 as amended ("the Housing Act"), fails to make provision for refugees and asylum-seekers. In all three cases, the uncertainty over the legal position of refugees and asylum-seekers in relation to these rights frustrates the need to confer on refugees and asylum-seekers differentiated and favourable treatment on a principled basis. Self-evidently, the question of the legal

³³ S 30(1). In particular, the Constitutional Court confirmed in the case of *Khosa* para 64, that the state can take even stricter measures to prevent immigrants from becoming financial burdens. The court stated that '[South Africa] can protect itself against [foreign nationals] becoming financial burdens by thorough, careful consideration in the admission of immigrants, or by taking adequate security from those admitted, or by demanding such security or guarantees from their sponsors at the time of [foreign nationals] are allowed into the country or are permitted to stay as permanent residents.'

³⁴ Para 2 of the Preamble to the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa ("the African Refugee Convention") provides that member states parties "recognise the need for an essentially humanitarian approach in solving the problem of refugees." Art 2(2) further provides that "the granting of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State." Moreover, the Preamble to the Geneva Refugee Convention stipulates that the Contracting parties "consider the grant of asylum may place unduly heavy burdens on the state in certain countries, and that a satisfactory solution to a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international cooperation". See, too, para 11, Recommendation 5 of the Addis Ababa Document on Refugees and Forced Population Displacements in Africa, Adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa; 8 - 10 September 1994, Addis Ababa, Ethiopia, stating that countries "should uphold the principles of...practice[ing] burden-sharing and solidarity among States."

³⁵ Art. 2(4) of the African Refugee Convention.

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position of refugees and asylum-seekers intersects with questions relating to standards of favourable treatment, the basis for differentiated treatment advancing the dignity of refugees, and a dignity-based and an equality-based interpretation of refugees' access to socio-economic rights.

Both human dignity and equality are entrenched as foundational values and fundamental rights in the South African Constitution. They are listed in section 1(a) as values upon which the Republic is founded, in section 7(1) as democratic values affirmed by the Bill of Rights, and in sections 36(1) and 39(1)(a) as values to be taken into account in determining the constitutionality of rights limitations and the interpretation of fundamental rights, respectively. They are also the first two rights guaranteed in the Bill of Rights.³⁶ Moreover, human dignity and some aspects of the right to equality are non-derogable during a state of emergency.³⁷

The creation of legislation, policies and programmes must be consistent with the constitutional object of promoting the values of human dignity, equality and freedom. It is within this context that law makers adopted the Refugees Act, which creates a special dispensation for refugees and asylum-seekers in terms of which they are to be treated equally with dignity, care, and special concern.³⁸ The thesis focuses in particular on human dignity and equality as guides to the interpretation of the Refugees Act and the resolution of disputes relating to refugees and asylum-seekers' entitlement to socio-economic rights.

Two important distinctions need to be made in addressing the question whether and to what extent dignity and equality can guide the interpretation of the socio-economic rights of vulnerable and marginalised classes of people like refugees. The first is the distinction between formal equality, on the one hand, and substantive and remedial equality, on the other. Formal equality refers to sameness of treatment without distinction of any kind.³⁹ By contrast, substantive equality and remedial equality are concerned with addressing the issues related to major inequalities in

³⁶ The right to equality is guaranteed in s 9, and the right to human dignity in s 10 of the Constitution of the Republic of South Africa, 1996.

³⁷ S 37(5)(c). The non-derogability of the right to equality is restricted to "unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language".

³⁸ Its preamble states that the passage of the Refugees Act creates an obligation to receive and treat refugees in accordance with the standards and principles established in international law.

³⁹ D Greschner "Does Law Advance the Cause of Equality?" (2001) 27 *Queen's Law Journal* 299 302. Greschner states that in terms of formal equality, what counts is to treat "like cases alike" and "unlike cases differently."

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people's resources, political and social power, and well-being.⁴⁰ They are also concerned with alleviation of inequality related to exploitation and oppression.⁴¹ Both substantive and remedial equality are achieved through the equitable distribution of rights, benefits, opportunities, burdens, and choices.⁴²

The second distinction is between negative and positive obligations relating to human dignity. The negative dimension requires the state to refrain from interfering with individuals' freedoms or to desist from denigrating human dignity⁴³ or to reduce certain individuals to mere objects.⁴⁴ The positive dimension refers to the state's obligation to take socio-economic measures that will address people's poverty, deprivation or humiliation, given that these conditions impair people's capacity to live a life of dignity.⁴⁵ These dimensions will be used to analyse the concept of favourable treatment of refugees and asylum-seekers, as contemplated in the Geneva Refugee Convention, and to argue for the differentiated treatment of refugees and asylum-seekers. The dimensions are also used to analyse and evaluate South Africa's asylum law with respect to access to socio-economic rights and benefits, in particular, social assistance, healthcare, and housing.

The African Refugee Convention framework will not be the primary focus of the study of the extent to which the state is under an obligation to guarantee the socio-economic rights of refugees and asylum-seekers. The reason is that the African Refugee Convention does not itself contain socio-economic rights and benefits. The African Refugee Convention supplements and complements the Geneva Refugee Convention.⁴⁶ More specifically, it sets forth standards that are based on African conceptions of humanitarianism and solidarity. Those standards are intertwined with the African philosophical concept of *ubuntu*, and the emphasis it places on the

⁴⁰ 303. See too I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 233 (Substantive equality requires the State to consider the actual socio-economic condition of groups and individuals in the achievement of constitutional equality).

⁴¹ 303. See too Currie & de Waal *Bill of Rights* 233.

⁴² 303. See too Currie & de Waal *Bill of Rights* 233.

⁴³ R D Glensy "The Right to Dignity" (2011) 34 *Colum Hum Rts L Rev* 65, 120-1. See too B Simmons "Civil Rights in International Law: Compliance with Aspects of the International Bill of Rights" (2009) 16 *Ind. J. Global Legal Stud.* 437, 440.

⁴⁴ H Botha "Human Dignity in Comparative Perspective" (2009) 20 *Stell LR* 171, 180.

⁴⁵ Glensy (2011) *Colum Hum Rts L Rev* 122. See too J Eckert "Legal Roots of Human Dignity in German Law" in D Kretzmer & E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 47 (the state has a mandate to improve the condition of the lower class, who had fallen into poverty and starvation).

⁴⁶ Art 8(2) of the African Refugee Convention states that "[t]he Present Convention shall be the effective regional complement in Africa of the [Geneva Refugee Convention]".

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protection of an individual's life and dignity within a given community.⁴⁷ Those standards will occasionally be referred to in situations where the standards set forth under the Geneva Refugee Convention are not of help in the contextualisation of the differentiated and favourable treatment of refugees and asylum-seekers with respect to access to the three rights under consideration. Throughout the thesis, the African Refugee Convention's standards of refugee treatment will be understood within the framework of an approach based on human dignity, as infused by the spirit of *ubuntu*.

1 2 Research questions and aims

The thesis explores the question whether and to what extent refugees and asylum-seekers should enjoy socio-economic rights in view of the constitutional values of human dignity and equality and in view of the standards of same treatment and more favourable treatment, as used in the Geneva Refugee Convention.

In addition to and following from the research question identified above, the study has a number of aims, which help to define the scope of the thesis. The main aims of the study are:

- To examine whether and to what extent refugees and asylum seekers are entitled to constitutional socio-economic rights;
- To contextualise and determine the meaning of the concepts of "same treatment" and "more favourable treatment" and to reflect on the standards of treatment, as laid down in the Geneva Refugee Convention, as a legally binding obligation on South Africa in terms of section 231 of the South African Constitution;
- To analyse the role of the values of human dignity and equality in the protection of refugees and asylum seekers with regard to access to socio-economic rights and benefits, with a view to restoring a sense of normalcy to their lives or improving their conditions;
- To illustrate that the lack of harmonisation of laws governing the distribution of socio-economic benefits with the Refugees Act has deprived refugees and asylum-seekers of socio-economic goods and services that are essential to their wellbeing;

⁴⁷ Langa J in *Makwanyane* (para 225) stated that respect for the dignity of each and every person is integral to the African philosophical concept of *ubuntu*.

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- To illustrate the manner in which same treatment to that accorded to foreign nationals in relation to socio-economic rights generally results in discrimination against refugees and asylum-seekers;
- To compare and analyse judicial interpretations of the concept of international refugee protection as it pertains to socio-economic rights and benefits, with a particular focus on South African, French and American jurisprudence;
- To explore the interplay between constitutionalism, immigration systems and the refugee conventions (i.e. the Geneva Refugee Convention and the African Refugee Convention) with a view to examine ways in which refugees are included in or excluded from socio-economic rights and benefits; and
- To offer recommendations to promote the reform of socio-economic laws, policies and strategies for ensuring optimum enforcement of the Geneva Refugee Convention and the African Refugee Convention in South Africa.

1.3 Outline of chapters

Chapter 1 introduces the topic of the thesis, and sets out the research question, the structure of the thesis and the research methods to be used. To this end, it introduces the tension between immigration law and refugee law; considers the interface between constitutional and international law requirements relating to the treatment of refugees; underscores the challenges of interpretation of the Refugees Act; and takes cognisance of constitutional provisions relating to the consideration of foreign and international law when interpreting legislation or the Bill of Rights. It thus paves the way for considering, in the remainder of the thesis, different arguments for refugees and asylum-seekers' inclusion in, or exclusion from, socio-economic schemes. It also lays the groundwork for arguing for differentiated treatment for refugees and asylum-seekers.

Chapter 2 attempts to define and contextualise the role of equality in the protection of refugees and asylum-seekers. The chapter distinguishes between formal equality and substantive equality, and examines their relation to the principles of "same treatment" and "more favourable treatment", as expressed in the Geneva Refugee Convention. It attempts to define the concept of more favourable treatment, with reference to the theories of citizenship and liberal distributive justice. Equality jurisprudence is utilised to determine whether and to what extent the principle of

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substantive equality can be used to demand differentiated treatment for refugees and asylum-seekers, and provide a principled basis for the alleviation of their socio-economic deprivation.

Chapter 3 attempts to define and contextualise the role of human dignity in the protection of refugees and asylum-seekers. Although a wider literature on the meaning and uses of dignity is consulted, the chapter focuses in particular on dignity's potential to shed light on the requirement of favourable treatment, and to guide the reform of South African asylum law, in order to make it more responsive to refugees and asylum-seekers' socio-economic deprivation. Literature and case law are consulted in order to determine the extent to which dignity can be used to contest the lumping together of refugees and other foreign nationals, and to demand differentiated treatment for refugees. The chapter also considers the capacity of dignity to guide the interpretation of specific socio-economic rights.

The next three chapters examine refugees and asylum-seekers' access to a number of selected socio-economic rights through a comparative lens. Chapter 4 focuses on public relief and assistance, chapter 5 on healthcare, and chapter 6 on adequate housing. In each of these chapters, the current legal regime governing refugees and asylum-seekers' ability to access these rights is measured against the socio-economic rights enshrined in the South African Constitution, the values of dignity and equality infusing them, and international norms, standards and practices. The legal position in South Africa is also compared to the position in France and the United States ("US"). Drawing on South Africa's constitutional jurisprudence, as well as international and comparative law, the chapter asks how refugees and asylum-seekers should be treated in comparison with citizens and non-citizens.

Chapter 7 concludes by drawing together the most important points and recommendations arrived at in the individual chapters.

1 4 Methodology

The study comprises three research components. The first is a review of academic literature related to refugee rights in respect of access to socio-economic rights and to the concepts of dignity and equality. The second comprises a comparative analysis of the constitutional and legislative frameworks governing refugees' access to socio-economic rights in the US, South Africa, and France, as well as relevant case law. Thirdly, the study is approached from the standpoint of a human rights-

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based model which is based upon the principles of social justice and human development and which is increasingly employed to demand a life in which the inherent dignity and equal worth of each human person would receive respect and protection.⁴⁸ The thesis takes into consideration that the provisions of the Refugees Act relating to the socio-economic rights of refugees and asylum-seekers should not be seen in isolation, but should be interpreted against the background of emerging norms, standards and practices, as emanating from or entrenched in international refugee law, constitutional law, human rights law, domestic refugee law and immigration law. The most significant challenges relating to the protection of the socio-economic rights of refugees and asylum-seekers stem from the relationship between those five areas or bodies of law, as these areas intersect in a variety of ways.

The study therefore attempts to do the following: First, it examines the normative framework relating to the socio-economic rights of refugees and asylum-seekers, as established by the Refugees Act, read in view of the South African Constitution and refugee conventions as well as international human rights conventions. In this regard, it focuses in particular on the rights and values of human dignity, equality and favourable treatment as interpretive guides to the question whether and to what extent refugees and asylum-seekers are entitled to these rights.

⁴⁸ See A Eide “Human Rights Requirement to Social and Economic Development” (1996) 21 *Food Policy* 23, 23 (Human rights instruments, which have been ratified by a large majority of the States, are built to ensure freedom from hunger and to promote adequate standards of living); J C Mubangizi “Know Your Rights: Exploring the Connections between Human Rights and Poverty Reduction with Specific Reference to South Africa” (2005) 21 *SAJHR* 32, 36 (Poverty is strongly linked to the deprivation of fundamental human rights, as “poverty is a condition that inflicts only human beings”); P J Nelson & E Dorsey “At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs” (2003) 31 *World Development* 2013, 2013-16 (human rights provide for standards and principles as benchmarks and a basis for accountability of state and non-state actors); J Chapman “Rights Based Development: The Challenge of Change and Power” (2005) *Global Poverty Research Group* 1 16 (rights-based approach to development can encourage more complex analysis of alleviation of both causes and symptoms of poverty); C Nyamu-Musembi “Towards an actor-oriented perspective on human rights” in N Kaber (ed) *Inclusive Citizenship and Expressions* (2005) 43-4 (there is a linkage between human rights and human development. They both share the same goals of “securing freedom for a life of dignity and expanding people’s choices and opportunities”); L VeneKlasen, V Miller, C Clark & M Reilly “Rights-Based Approach and Beyond: Linking Rights and Participation: Challenges of Current Thinking and Action” (2004) Unpublished paper drafted for A *Joint Initiative of the Participation Group-IDS and Just Associates* (available at <https://justassociates.org/sites/justassociates.org/files/rights-based-approaches-and-beyond-rights-and-participation.pdf>) 4 (human rights-based model integrates development, participation, rights and liberties into more effective social progress) and Yacoob J in *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) para 81 (stating that there is a strong *nexus* between poverty and the reduction of individuals in their human dignity, which is separate from the mere physical discomfort of deprivation).

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Secondly, the thesis juxtaposes this normative framework with the actual treatment of refugees and asylum-seekers. In this regard, two main problems are identified. The first relates to problems of implementation arising from the overlap between the Refugees Act and the Immigration Act, and the tendency of state officials to treat refugees and asylum-seekers as ordinary immigrants who are temporarily resident in South Africa, and who are subject to the principles of exclusivity and self-sufficiency. In view of this problem, the study examines the relationship between refugee law and immigration law in cases of conflict. The second problem relates to the tension between the above normative framework and laws relating to the distribution of socio-economic rights like the rights to public relief and assistance, healthcare and housing. A detailed analysis is undertaken of the extent to which these laws limit, and in some cases exclude, the entitlement of refugees and asylum-seekers to these rights.

Thirdly, the study enquires into the justifiability of these limitations of the rights of refugees and asylum-seekers. It looks at whether there is a justifiable basis for the exclusion of refugees and asylum-seekers from enjoying the rights in the South African polity or whether they should be included in enjoying those rights on the basis of human dignity or equality.

1 4 1 Constitutional law

The Constitution of South Africa states in section 2 that it is “the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” It follows that laws and state conduct depend for their validity on compliance with the Constitution. Whether or not laws, policies and state conduct which impact on the socio-economic position of refugees and asylum-seekers are consistent with the state’s obligation to “respect, protect, promote and fulfil the rights in the Bill of Rights”,⁴⁹ must be tested against the socio-economic rights provisions in the Constitution, as well as provisions such as sections 9, 10 and 36. The thesis will accordingly analyse constitutional provisions relating to access to social assistance, housing and healthcare. Particular attention will be paid to the question whether and to what extent the constitutional rights and values of human

⁴⁹ S 7(2).

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dignity and equality can assist in restoring a sense of normalcy to refugees' lives and improving their standard of living.

The Constitution also regulates the manner in which international treaties are transposed into the South African legal system. International refugee treaties were incorporated into the South African asylum system through the Refugees Act in terms of sections 231(2) and 231(4) of the South African Constitution.

1 4 2 Immigration law

The Immigration Act sets out the minimum standards of protection of non-citizens in South Africa. It is underpinned by the principles of exclusivity and self-sufficiency which denote that non-citizens with temporary residence must be excluded from social welfare. It is therefore necessary for the thesis to distinguish these principles from the norms which apply to refugees and asylum-seekers. Difficulties arise from the fact that certain immigration rules and principles are applied to refugees and asylum-seekers in certain instances.

The main objective of the Immigration Act is to protect the rights, interests and expectations of citizens by controlling, managing and administering the flow of immigration.⁵⁰ The immigration management system ensures that South African borderlines are monitored,⁵¹ that security considerations are observed when admitting non-citizens in the country⁵² and that the admitted non-citizens are capable of contributing to the South African economy through investment or employment in critical positions.⁵³ Although refugees and asylum-seekers are exempted from some of these measures by the Refugees Act, this does not imply that refugees will receive the same treatment as citizens in all matters concerning them. In ensuring that the rights, interests and expectations of citizens are protected, the South African Constitution distinguishes between citizens and non-citizens as it confines certain rights to citizens⁵⁴ and proclaims that only citizens are equally entitled to all rights, privileges and benefits contained in it.⁵⁵ Immigration law gives effect to this distinction by prescribing terms and conditions of admission and stay that generally

⁵⁰ Para (i) of the Preamble to the Immigration Act.

⁵¹ This includes administration and management of ports of entry. See paras (e) and (f) of the Preamble.

⁵² Para (b) of the Preamble.

⁵³ Para (h).

⁵⁴ *Union of Refugee Women* para 46.

⁵⁵ S 3 of the Constitution of the Republic of South Africa, 1996.

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exclude non-citizens from socio-economic entitlements. The wide acceptance of the distinction between citizens and non-citizens in relation to access to social welfare is the main reason why the Geneva Refugee Convention and African Refugee Convention speak about the favourable treatment of refugees which should, presumably, be a better standard of treatment compared to the minimum standard of treatment afforded to non-citizens generally in terms of immigration law.

In order to achieve immigration objectives, the Immigration Act requires the state to effectively detect, reduce and deter prohibited persons,⁵⁶ undesirable persons⁵⁷ and illegal non-citizens.⁵⁸ South Africa's immigration management system is designed to ensure that the said groups of non-citizens are detected and deported⁵⁹ or that effective mechanisms are put in place so as to ensure that they do not gain access to South Africa. Owing to their special socio-economic needs as indigent people, refugees and asylum-seekers appear to fall in the category of undesirable persons. Section 30 of the Immigration Act defines the term undesirable person to include "anyone who is or is likely to become a public charge". However, it would have a serious impact on refugees and asylum-seekers if they were to be treated as a potential burden on the state purse, and were to be eligible to be admitted and reside in South Africa only if they were economically stable or possessed exceptional skills or experience that would contribute to the economy of the nation.⁶⁰ The Immigration Act takes cognisance of the vulnerability of refugees and asylum-seekers and exempts them from the twin principles. Section 23 allows entry of asylum-seekers into the country subject to the provisions of the Refugees Act. The thesis will argue that the Refugees Act was enacted precisely to facilitate the entry of asylum-seekers into South Africa, to accord to them humanitarian assistance and constitutional protection,⁶¹ and to confer full legal protection on those who are formally recognised as refugees.⁶²

In analysing the impact of immigration law on the treatment of refugees, consideration will be given to trends in international migration management and conceptions of national security which result in the tightening of borders with a view

⁵⁶ S 1(xxx), s 29(1) of the Immigration Act.

⁵⁷ S 1(xli), s 30.

⁵⁸ S 1(xviii).

⁵⁹ S 2(1)(c).

⁶⁰ S 2(1)(j)(aa)-(ff).

⁶¹ Preamble, read in tandem with s 27A(d).

⁶² S 27(b).

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to protecting national interests (i.e. the national economy, national labour market and redistribution of national resources) and to maintaining territorial integrity (i.e. prevention of pollution, terrorism, organised or transnational crimes).⁶³ The exclusionary approach which underpins South African immigration law will also be considered. In terms of this approach, public benefits should not be made available to poor non-citizens because this would, in the words of Ngcobo J in *Khosa v Minister of Social Development* (“*Khosa*”),⁶⁴ “constitute an incentive for immigration to South Africa”,⁶⁵ and result in such persons becoming “a burden to the state purse”.⁶⁶

Although ensuring the security and safety of the population is important, the thesis will argue that reasons of national security or the protection of national interests cannot be relied on to tramp on the rights of refugees. The thesis will further argue that the international protection offered to refugees and asylum-seekers is not limited to individual security or physical safety (i.e. to keep them safe from attack, crime, harm, injury or danger), but also extends to human and social security (food, water, healthcare, education and a social safety net). The favourable treatment of refugees must thus be contextualised from the perspective of human dignity and human security, which underpin an individual’s freedom to fulfil his or her potential. Refugees and asylum-seekers must be seen as bearers of fundamental rights who must be given the opportunity to realise their potential for self-fulfilment, rather than simply as undesirable persons who will be a burden on state resources.⁶⁷ Against this background, the study will analyse the impact of giving refugees and asylum-seekers the same treatment as non-citizens with temporary residence status, on their rights to dignity and equality.

⁶³ R Lubber “After September 11: New Challenges to Refugee Protection” (2003) *World Refugee Survey* 1, 1 and F Duvell & B Jordan “Immigration, Asylum, and Welfare: The European Context” (2002) 22 *SAGE Publication* 498, 498.

⁶⁴ [2004] 6 SA 505 (CC).

⁶⁵ *Khosa* para 121.

⁶⁶ Para 122.

⁶⁷ A Sen *Development as Freedom* (1999) 38 argues that social good will be achieved if each person’s freedom is expanded to enable him/her to live the life he/she wishes to live. In this context, the theory of security is defined as freedom from worries of any loss or harm. On the other hand, freedom is defined by Amartya Sen as “a source of development first from individuals and second to the nation as a whole”.

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1 4 3 Refugee law

The key legislation in the protection of refugees and asylum-seekers in South Africa is the Refugees Act. The Act, firstly, notes that South Africa is under an international obligation “to receive and treat in its territory refugees in accordance with the standards and principles established in international law”.⁶⁸ According to section 6 of the Act, the applicable standards and principles are not only those contained in the refugee treaties but also those contained in relevant human rights treaties.⁶⁹ Secondly, the Act spells out the rights that accrue to refugees and asylum-seekers as well as their duties and obligations within South Africa.⁷⁰ Refugee rights are not restricted to those contained in the Bill of Rights, but also include rights guaranteed by human rights law, international refugee law and customary international law insofar as those rights are consistent with the South African Constitution.⁷¹ Thirdly, the Act confers on refugees and asylum-seekers rights flowing from their refugee status.⁷² It thus recognises that the refugee situation is unique and requires special measures to protect refugees and asylum-seekers, especially with a view to ensure that their well-being, health and dignity as well as the unity of their families are maintained.⁷³ All these features indicate that there is a need to confer on refugees the standard of favourable treatment.

The thesis will attempt to contextualise the relevant provisions of the Refugees Act with reference to the constitutional values of human dignity and equality, as well as international principles and standards pertaining to refugees and asylum-seekers. On the basis of these analyses, it will be argued that the lack of harmonisation of laws governing the distribution of socio-economic benefits with the Refugees Act results in depriving asylum-seekers of public relief and assistance and in negating refugees’ needs relating to healthcare and housing. Throughout the thesis, it is emphasised that the Refugees Act gives effect to socio-economic rights under both the South African Constitution and the Geneva Refugee Convention, and that those

⁶⁸ Preamble.

⁶⁹ These include the Geneva Refugee Convention and its Protocol, the African Refugee Convention; the 1948 Universal Declaration of Human Rights (“UDHR”); and any other relevant convention or international agreement to which the Republic is or becomes a party.

⁷⁰ Ss 27-34.

⁷¹ Ss 232, 233 of the Constitution of the Republic of South Africa, 1996.

⁷² Long title of the Refugees Act.

⁷³ Recommendation B of the Geneva Refugee Convention states, among other things, that the Contracting Parties should safeguard against any threats to the right of refugees to the unity of the family as the natural and fundamental group unit of society.

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rights are indispensable in enabling refugees and asylum-seekers to live a life consistent with human dignity.

1 4 4 International refugee law

The requirement to give favourable treatment to refugees and asylum-seekers derives from the four standards of treatment contemplated in the Geneva Refugee Convention and from the demand made by the Geneva Refugee Convention not to discriminate against refugees or asylum-seekers.⁷⁴ The need to confer on refugees and asylum-seekers favourable treatment is also reflected in the African Refugee Convention, which complements the Geneva Refugee Convention in Africa.⁷⁵ An exploration of international refugee law can assist us, firstly, in understanding the historical development of the ethical and legal commitment to the protection of refugees and the relationship between state sovereignty and refugees. This can help lay the groundwork for a critical analysis of the protection of refugees in South Africa. Secondly, it can give us a better understanding of the state's obligations towards refugees. This will provide us with a benchmark for making recommendations to promote the reform of socio-economic laws, policies and strategies which will ensure the optimum enforcement of the refugee treaties in South Africa.

The Refugees Act itself states in its long title that it aims to give effect to “international legal instruments, principles and standards relating to refugees”, and provides in article 6(1) that it must be interpreted with due regard to the Geneva Refugee Convention, the 1967 Protocol Relating to the Status of Refugees and the African Refugee Convention. Moreover, sections 27(b) and 27A(d) define the rights of refugees and asylum-seekers with reference to the rights guaranteed in the South African Constitution. These rights must, in terms of section 39(1) of the Constitution, be interpreted with due regard to international law.

Whilst the Geneva Refugee Convention provides the manner in which socio-economic rights can be accessed under national jurisdiction, the African Refugee Convention simply recognises that there is a need to address the socio-economic conditions of refugees and asylum-seekers with the aim of providing them with a

⁷⁴ Art 3 of the Geneva Refugee Convention states that “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”

⁷⁵ Art 8(2) of the African Refugee Convention states that “[t]he Present Convention shall be the effective regional complement in Africa of the [Geneva Refugee Convention]”.

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better life and future.⁷⁶ It states further that socio-economic protection should be understood in a humanitarian and African context.⁷⁷ This approach is of central significance in the interpretation of socio-economic rights of refugees in South Africa, especially, the determination of their minimum core content.

1 4 5 International human rights law

Socio-economic rights are entrenched in human rights texts which set out the basic norms and standards of treatment that apply to all people – citizens and non-citizens alike. These instruments impose on states the obligation of progressive realisation of socio-economic rights and lay down a minimum core in relation to the provision of these rights.⁷⁸ Human rights norms are regularly invoked, first to supplement the protection of refugee rights and secondly to interpret and justify favourable or differentiated treatment of refugees and asylum-seekers. The human rights-based approach to the interpretation of constitutional rights and refugees' rights is consistent with section 39(1)(b) of the South African Constitution⁷⁹ and section 6(1) of the Refugees Act.⁸⁰

Given that human rights norms play a role in supplementing favourable treatment as envisaged by international refugee treaties, they are particularly relevant in situations where the Geneva Refugee Convention and African Refugee Convention are silent. They can, for instance, be employed to justify differentiated treatment of

⁷⁶ Para 1 of the Preamble.

⁷⁷ Para 2 of the Preamble, read in tandem with art II (2).

⁷⁸ In terms of s 6 of the Refugees Act, due regard must also be given to human rights texts to which South Africa is or becomes a party. These human rights texts, for example, include the UDHR, the 1949 Geneva Conventions; the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR"); the 1966 International Covenant on Civil and Political Rights ("ICCPR"); the 1971 Declaration on the Rights of Mentally Retarded Persons; the 1975 Declaration on the Rights of Disabled Persons; the 1977 Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts; the 1979 Convention on the Elimination of All Forms of Discrimination Against Women; the 1981 African Charter on Human and People's Rights ("ACHPR"); the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1986 Declaration on the Right to Development; the 1989 Convention on the Rights of the Child; the 1993 Vienna Declaration and Programme of Action ("VDHP"); the 1999 African Charter on the Rights and Welfare of the Child. It also needs to be noted that the Constitutional Court held that any human rights text can provide guidance in interpreting the Bill of Rights, regardless of whether or not South Africa ratified it. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26, citing the case of *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

⁷⁹ It states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.

⁸⁰ It states that the Refugees Act must be interpreted and applied with due regard to the Geneva Refugee Convention and its Protocol, the African Refugee Convention, UDHR, and any other relevant convention or international agreement to which South Africa is or becomes a party.

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vulnerable groups of refugees, such as women, children, disabled people, elderly people or persons with serious illnesses. Unlike the human rights instruments, the international refugee instruments do not create a special dispensation for these vulnerable groups.

1 4 5 1 International policy and jurisprudence

Where relevant, the thesis refers to and analyses judicial opinions, observations, and general comments of international or regional bodies entrusted with the mandate to give meaning to human rights and freedoms contained in international or regional human rights texts. These bodies include the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the European Court of Justice (“ECJ”), the European Court of Human Rights (“ECtHR”), the European Committee on Social Rights (“ECSR”), the African Commission on Human and Peoples’ Rights (“the African Commission”), the Human Rights Committee, and the International Court of Justice (“ICJ”). Furthermore, in examining the core meaning of refugees’ rights, the thesis analyses the views of the *Ad Hoc* Committee on Refugees and Stateless Persons (“the Ad Hoc Committee”) which was established to close the gaps in international refugee law by establishing standards of favourable treatment of refugees, contained in the Geneva Refugee Convention.⁸¹ It also considers observations and recommendations of the UNHCR with respect to how host countries should give substance to the rights contained in the Geneva Refugee Convention, when for example developing their national asylum policies. The same approach applies to the interpretation of the enforcement of the African Refugee Convention within the framework of the African Charter on Human and Peoples’ Rights⁸² by the African Commission. Throughout the thesis, these judicial decisions and quasi-judicial decisions are employed as a benchmark to gauge the possible outcomes of different notions of differentiated and favourable treatment tailored to meet the special needs of refugees and asylum-seekers.

⁸¹ The Ad Hoc Committee was created by Resolution No. 248(IX), adopted by the Economic and Social Council on 08 August 1949.

⁸² Adopted in Banjul, 27 June 1981; OAU Doc, CAB/LEG/67/3 rev.5, 21 ILM58 (1982).

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1 4 6 Foreign law and jurisprudence

Section 39(1)(c) of the South African Constitution authorises courts to have regard to foreign law in interpreting the Bill of Rights. The thesis employs a range of principles and standards derived from foreign laws and judicial opinions with a view to comparing different approaches to the treatment of refugees and asylum-seekers. In particular, it uses foreign law to help contextualise the concept of favourable treatment. It compares South Africa's reception and treatment of refugees with two other countries that host a high number of refugees and asylum-seekers, namely the US and France.⁸³ Even though these three countries constitute the main focus of the comparative study, the legal position in other countries such as the United Kingdom ("UK"), Canada, Australia, and New Zealand will also occasionally be referred to, in order to demonstrate the tension between asylum law and immigration law, and between constitutional law and international refugee law.

1 4 6 1 The US's approach to the treatment of refugees

Consideration of the US's approach to the treatment of refugees is motivated by a number of reasons. The US is one of the countries that host a high number of refugees and asylum-seekers.⁸⁴ However, the US's Constitution and asylum law neither guarantee socio-economic rights nor explicitly protect the right to human dignity and substantive equality as South African law does. It did not ratify the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the Geneva Refugee Convention, but ratified the 1967 Protocol Relating to the Status of Refugees. Despite these shortcomings, US asylum law provides socio-economic rights protection for refugees, asylum-seekers and certain categories of "deserving" poor or vulnerable migrants.⁸⁵ It is based on the Immigration and Nationality Act of 1952 ("INA"), which initially followed article 33 of the Geneva Refugee Convention, but was radically revised by the Refugee Act of 1980 and, more recently, by the

⁸³ According to UNHCR Global Trends *A Year of Crisis* (2011), South Africa registered 107 000 asylum claims, that is, one tenth of applications for asylum globally. It was followed by the United States of America (76 000) and France (52 100).

⁸⁴ In 2011, the US was the country that registered the second highest number of refugees. See UNHCR Global Trends *A Year of Crisis* (2011).

⁸⁵ D Sainsbury "Immigrants' Social Rights in Comparative Perspective: Welfare Regimes, Forms of Immigration and Immigration Policy Regimes" (2006) 16 *Journal of European Social Policy* 229 232.

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Refugee Protection Act of 2013.⁸⁶ The US is, in terms of the 1980 statute, committed to restoring the dignity and equal worth of refugees fleeing from persecution around the world.⁸⁷ The fact that the US ratified neither the Geneva Refugee Convention nor the ICESCR does not absolve it from the obligation to accord to refugees and asylum-seekers favourable treatment. The US's accession to the Protocol to the Geneva Refugee Convention in 1968 was interpreted by the Supreme Court of the United States ("SCUS") as imposing an onerous duty on the US to comply with the Geneva Refugee Convention's provisions.⁸⁸ Again, the US's commitment to protect the dignity of refugees is influenced by historical precedents.

After World War II, the US recognised the right to seek asylum in terms of various pieces of legislation adopted between 1948 and 1957.⁸⁹ In terms of these laws, refugees and asylum-seekers had access to humanitarian relief,⁹⁰ social assistance⁹¹ and social benefits.⁹² Before the 1980 amendment, only refugees from communist nations and certain areas of the Middle East were admitted.⁹³

The 1980 statute redressed the discriminatory practices and provides for a comprehensive mechanism for the resettlement and absorption of refugees.⁹⁴ Most importantly, it authorises the allocation of public funds for the purpose of restoring their dignity, hope, and worth through resettlement and integration processes that would allow them to participate fully in American socio-economic life.⁹⁵ It also creates the Office of Refugee Resettlement ("ORR") to administer funds and oversee the integration processes.⁹⁶ There is no such institution in South Africa, as South African asylum law is arguably based on self-integration and self-settlement.

⁸⁶ C Bohmer & S Shuman *Rejecting Refugees: Political Asylum in the 21st Century* (2008) 17. See too *Sale v Haitian Centers Council, Inc* 509 US 155 (1993) (the Immigration and Nationality Act ("INA") of 1952 was amended to conform to the Geneva Refugee Convention).

⁸⁷ E M Kennedy "Refugee Act of 1980" (1981) 15 *International Migration Review* 141 143.

⁸⁸ See *INS v Cardoza-Fonseca* 480 US 421(1987) 436–437.

⁸⁹ They include the Displaced Persons Act of 1948, the INA, the Refugee Relief Act of 1953, and the Refugee-Escapee Act of 1957 and the Migration and Refugee Assistance Act of 1962.

⁹⁰ Refugee Relief Act of 1953.

⁹¹ Migration and Refugee Assistance Act of 1962.

⁹² S 412(e) of the INA enabled all vulnerable foreign nationals to have access to social benefits provided that they meet demonstrable need requirements or other eligibility requirements. See also Sainsbury (2006) *Journal of European Social Policy* 232.

⁹³ Kennedy (1981) *International Migration Review* 143.

⁹⁴ Title I of the Refugee Act of 1980. See too the Office of the Refugee Settlement ("ORR") *Report to the Congress FY 2011* (2011) 3.

⁹⁵ ORR *Report to the Congress* 1.

⁹⁶ See A Bruno "U.S. Refugee Resettlement Assistance" (2011) Unpublished paper issued by Congressional Research Service for Congress, 04-01-2011 (available at <https://fas.org/sgp/crs/row/R41570.pdf>).

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Under US jurisdiction, refugees are entitled to “favourable or equal treatment” to that accorded to American citizens in relation to all aspects of socio-economic rights and benefits. A number of laws were passed to make this a reality. They include the 1935 Social Security Act, the 1980 Refugee Education Assistance Act, the 1988 Amerasian Homecoming Act, the 2008 Consolidated Appropriations Act and the 2010 Affordable Care Act. The US asylum law, however, is not without legal deficiencies. Bohmer and Shuman demonstrate how the US system relating to asylum admission management is flawed in practice, due to the fear of granting asylum to false or bogus asylum-seekers.⁹⁷

Even though the US Constitution does not guarantee socio-economic rights, the due process and equal protection clauses in the Fourteenth Amendment can be used to challenge the exclusion of refugees and asylum-seekers from socio-economic benefits. For instance, the SCUS held in *Plyler v Doe*⁹⁸ that the denial of the right of children of illegal foreign nationals to enrol in school and the withholding of state funds for their education violated the principle of equal protection.⁹⁹ It further stated that illegal non-citizens are protected by the due process clauses of the Fifth and Fourteenth Amendments.¹⁰⁰ This case illustrates that refugee rights can be protected in view of the equal protection and due process clauses. Like South African and French courts, the SCUS, in *Plyler v Doe*, stressed that the denial of socio-economic rights can be said to be rational and thus permissible only if it furthers some substantial goal of the state.¹⁰¹ Otherwise, deprivation would impose “a lifetime hardship” or pose “an obstacle to individual achievement.”¹⁰²

The thesis will ask whether and how the equal protection and due process jurisprudence of the US can assist in the development of an equality jurisprudence that is responsive to refugees’ deprivation, and that places the demand for differentiated treatment for refugees on a principled basis. Given the study’s focus on the rights to public relief, healthcare and housing, the US’ approach to these rights will be given particular attention.

⁹⁷ See Bohmer & Shuman *Rejecting Refugees* 17.

⁹⁸ 457 US 202 (1982).

⁹⁹ *Plyler v Doe* 210-230.

¹⁰⁰ 210-216.

¹⁰¹ 210-216. For South Africa, see *Khosa* para 53 (deprivation must not be arbitrary or irrational nor must it manifest a naked preference, rather it must be reasonably designed to achieve a legitimate government purpose). For France, see *Constitutional Council*, Decision 93-325 DC of 13 August 1993, para 20 read in conjunction with para 81-88 (deprivation must be based on justifiable grounds).

¹⁰² *Plyler v Doe* at 210-216.

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1 4 6 2 France's approach to the treatment of refugees

In addition to containing a comparative analysis of the asylum policies of US, the thesis also explores the asylum policies of France. This choice is motivated by a number of reasons: South African asylum law was influenced by European asylum policies;¹⁰³ France is also a host to a high number of refugees and asylum-seekers;¹⁰⁴ and the 1789 French Revolution greatly contributed to the modern human rights paradigm.¹⁰⁵ In this regard, the French legal framework poses an interesting set of possibilities, given its placement in the European Union ("EU"), in relation to the tension between national law and international refugee law. It is however crucial to note that socio-economic rights are not expressly contained in the 1958 French Constitution; rather, the protection of these rights in the French legal order is justified on the basis of the constitutional objective of preserving and promoting a normal life.¹⁰⁶

The socio-economic protection of refugees and asylum-seekers is, since the early 1990s, "a matter of common interest" among countries of the EU.¹⁰⁷ The EU has adopted refugee laws which give effect to the Geneva Refugee Convention,¹⁰⁸ but Member States can also, individually, adopt refugee policies in conformity with their respective constitutional mandates.¹⁰⁹ In contrast to South Africa and the USA, France included the right to asylum in the 1793 Constitution, as reformed by the 1946 Constitution, to which the 1958 Constitution refers. It seeks to grant asylum to

¹⁰³ J Handmaker "No Easy Walk: Advancing Refugee Protection in South Africa" (2001) 48 *African Today* 91, 98-101 states that, in many crucial respects, South African refugee status determination mirrors that of the European Union and that the operation of temporary protection of refugees followed the approach of the European Union.

¹⁰⁴ In 2011, France was the country that recorded the third highest number of asylum-claims in the world. See UNHCR Global Trends *A Year of Crisis* (2011).

¹⁰⁵ The modern constitutional states and a number of human rights treaties and declarations were influenced by the eighteenth century French enlightenment as guided by the political thought of Charles-Louis de Secondat (Montesquieu), Jean-Jacques Rousseau, and Francois-Marie Arouet (Voltaire) to mention but a few.

¹⁰⁶ The Preamble to the 1946 French Constitution – to which the 1958 French Constitution refers – states that the French government "shall guarantee to all...protection of their health, material security, rest and leisure" and that "all people who...are incapable of working, shall have the right to receive suitable means of existence from society." See too the Constitutional Council, Decision 93-325 DC of 13 August 1993 where it stated that the protection of socio-economic rights is drawn from the constitutional objective of preserving public order, including the right to lead a normal life (paras 2-3).

¹⁰⁷ K Kerber "Temporary Protection in the European Union: A Chronology" (2000) 14 *Georgetown Immigration Law Journal* 35 41.

¹⁰⁸ Maastricht Treaty on European Union, February 7, 1992, O.J. (C191) (1992), 31 I.L.M. 247 (1992), as amended by the Treaty of Amsterdam, October 2, 1997, O.J. (C340) (1997); and the regulations of the Council of the European Union of 18 February 2003, known as "Dublin II Regulations."

¹⁰⁹ Kerber (2000) *Georgetown Immigration Law Journal* 41.

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individuals persecuted by virtue of their actions in pursuit of liberty.¹¹⁰ Furthermore, France has expressed its commitment to protecting refugees through ratification of the Geneva Refugee Convention on June 23, 1954.¹¹¹ The conditions of admission and treatment of refugees within French borders are set out under the 1952 Immigration and Asylum Code, as amended.¹¹² The immigration and asylum system creates the *Office français de protection des réfugiés et apatrides* (“OFPRA”), or in English, French Office for the Protection of Refugees and Stateless Persons, to oversee the admission of refugees and grant refugee status or subsidiary protection.

Like South Africa, France’s immigration system is grounded in the twin principles of exclusivity and self-sufficiency.¹¹³ It gives a mandate to the French administrative authority to detect and deport bogus asylum-seekers and illegal immigrants, and to ensure that they do not have access to social welfare.¹¹⁴ The *Conseil Constitutionnel* (“Constitutional Council”) cautioned that although the French authority has the right to protect France’s integrity and the interests of citizens, the principle of asylum must be respected and applied in terms of national refugee policies in conformance with the international conventions transposed into French domestic law.¹¹⁵ For that reason, non-citizens who showed their intention to apply for asylum are exempted from the restrictive immigration measures.¹¹⁶ For the protection of individuals’ dignity, the Constitutional Council places emphasis on the right to freedom, which the judicial authority has a duty to protect.¹¹⁷ Even though French laws are more often tested

¹¹⁰ It states that “any person persecuted on account of his/her actions in furtherance of freedom shall have a right of asylum in the territories of the Republic.” See too Constitutional Council, Decision 92-307 DC of 25 February 1992, para 9.

¹¹¹ The Act 54-290 of 17 March 1954 authorised ratification of the Geneva Refugee Convention and it was published by the Decree 54-1055 of 14 October 1954.

¹¹² The Act 52-893 of July 25, 1952 as amended by the Act 82-442 of 27 May 1982; the Act 98-349 of 11 May 1998; the Decree of 10 December 2003; and the Decree of 14 August 2004.

¹¹³ J Hollifield “Migrants ou Citoyens: La politique de l’immigration en France et aux Etats-Unis” (1990) 6 *Revue Européenne de Migrations Internationales* 159 165; C Escoffier, P Tainturier, A Halasa, N Baba & C Sidhom “Droits économiques et sociaux des migrants et des réfugiés dans la région Euromed: Accès aux soins de santé et au marché du travail: Etudes Des Cas: France, Jordanie et Maroc” (2008) *Réseau Euro-Méditerranéen des Droits de l’Homme* 1 40-52; G Noiriel “Représentation nationale et catégories sociales: L’exemple des réfugiés politiques” (1997) 26 *Genèses* 25 25-54; and Ordinance 45-2658 of 2 November 1945, as amended, on conditions of entry and residence for aliens in France.

¹¹⁴ *Gebremedhin [Gaberamadhien] v France* (2007) para 32-35. See too article L.742-3 of the Immigration and Asylum Code.

¹¹⁵ Constitutional Council, Decision 92-307 DC of 25 February 1992, para 8 & 9.

¹¹⁶ Constitutional Council, Decision 86-216 DC of 3 September 1986, para 3-4.

¹¹⁷ Constitutional Council, Decision 92-307 DC of 25 February 1992, para 12. See also Constitutional Council, Decision 93-325 DC of 13 August 1993, para 3, 8 and art 66 of the French Constitution of 1958.

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against the constitutional guarantee of individual freedom,¹¹⁸ they should be measured against and interpreted in terms of the ideals of freedom, equality and fraternity on which the French Constitution is based.¹¹⁹ It was held that seeking asylum “is a fundamental freedom whose corollary is the right to request refugee status”, as well as the rights attached to it.¹²⁰

In regard to socio-economic rights, France provides humanitarian support to asylum-seekers with a view to meeting their essential basic needs.¹²¹ Upon arrival, the local administrative authority (in particular, *prefecture*) issues to asylum-seekers a temporary residence card (*autorisation provisoire de séjour*) which provides access to certain socio-economic rights.¹²² The Constitutional Council held that the withdrawal, refusal or non-renewal of a temporary residence card merely on the “unjustified” ground that an asylum-seeker is illegal or constitutes a threat to the public order, might amount to a violation of the right to asylum as well as the right of refugees to a normal family life.¹²³ These decisions affirm the distinctiveness and exceptionality of refugees’ legal position that requires a more favourable approach to their humane treatment.

Asylum-seekers enjoy fewer socio-economic rights and benefits than those enjoyed by refugees and French citizens, on the one hand, and treatment as favourable as possible, when compared to non-citizens, on the other.¹²⁴ France has devised legal mechanisms aimed at the integration of refugees into French society,

¹¹⁸ Constitutional Council, Decision 93-325 DC of 13 August 1993, para 18.

¹¹⁹ See the Preamble, art 1 and 2 of the French Constitution.

¹²⁰ *Gebremedhin [Gaberamadhien]* para 65 (quoting the decision of the *Conseil d’Etat*).

¹²¹ European Migration Network *Ad-Hoc Query on Asylum Support Rates: Requested by the UK National Contact Point on 1st February 2013* Compilation produced on 4th April 2012 at 11. See too Guide for Asylum-Seeker 2009: Information and Orientation, 02 December 2009, <http://schengendangle.jogspace.net/files/2010/02/GuideAsileEN.pdf> (accessed 12-03-2014) 34.

¹²² For example, they are allowed to have access to housing and accommodation, social support (children’s schooling and healthcare services), and financial food aid. Asylum-seekers are not allowed to work except if the decision on the application of asylum has been pending for more than one year. See Guide for Asylum-Seeker 2009: Information and Orientation, 02 December 2009.

¹²³ Constitutional Council, Decision 93-325 DC of 13 August 1993, para 20 read in conjunction with para 81-88.

¹²⁴ It is crucial to point out that there are two categories of refugees: (i) individuals who meet the test of the Geneva Refugee Convention or constitutional right to asylum or article 6 and 7 of the Statute of the UNHCR and (ii) individuals who are stateless persons or who can be persecuted on the reasons of probability of facing the death penalty, torture, inhuman or degrading treatment or generalised violence. The latter is offered “a subsidiary protection”, accompanied by fewer socio-economic benefits than that accorded to the former. The first category of refugees enjoys the same socio-economic rights – that is the same treatment – enjoyed by citizens. See European Migration Network “Ad-Hoc Query on asylum support rates Requested by the UK National Contact Point on 1st February 2013 - Compilation produced on 4th April 2013” (20-02-2013) *Interieur* <www.interieur.gouv.fr> (accessed 15-03-2016); and arts L.711-1, L.712-2, L.713-2 of the Immigration and Asylum Code.

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through the provision of social support, individually tailored to meet a refugee's need.¹²⁵ The thesis will utilise the French approach to the treatment of refugees to demonstrate some of the gaps between the law and reality as regards the protection of refugees in South Africa, and to suggest ways in which those gaps can be closed. Given the study's focus on the rights to public relief, healthcare and housing, France's approach to these rights will be given particular attention.

¹²⁵ Writing in 1954, P Weis "The International Protection of Refugees" (1954) 48 *The American Journal of International Law* 193, 194 praised France for its progress in assimilating the treatment of refugees in certain social matters to that of French citizens. See too Guide for Asylum-Seeker 2009: Information and Orientation, 02 December 2009 at 43-44 and Noiriël (1997) 26 *Genèses* 38-39.

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CHAPTER 2

EQUALITY AND THE PROTECTION OF REFUGEES

2 1 Introduction

Both the refugee conventions and the South African Constitution are based on the principles of equality, dignity and freedom¹²⁶ and thus guard against unfair practices or the repetition of iniquitous actions of the past.¹²⁷ In ensuring equality in dignity and rights, the South African Constitution embraces the principle of non-discrimination¹²⁸ and guarantees, in addition to formal equality,¹²⁹ substantive and remedial equality.¹³⁰ The refugee conventions are based on the principles of non-discrimination,¹³¹ equal/same treatment¹³² and (more) favourable treatment.¹³³ In other words, the South African Constitution, the African Refugee Convention and the Geneva Refugee Convention are human rights based instruments which prohibit the unreasonable or unjustified exclusion of certain categories of people from enjoying fundamental rights. Whereas the South African Constitution is concerned with all people who live in South Africa, with a particular focus on citizens,¹³⁴ the Geneva Refugee Convention and the African Refugee Convention are concerned with the treatment of refugees and asylum-seekers within the jurisdiction of the host state.¹³⁵ Whilst the African Refugee implicitly grounds equality in the African values or ethos, the Geneva Refugee Convention obligates a host state to confer the rights contained in it on refugees (and asylum-seekers) on a par with either citizens or non-citizens, depending on the rights involved. Whether rights are conferred on refugees on a par with citizens or non-citizens, it must be done on a favourable basis.

¹²⁶ S 1(a) of the Constitution of the Republic of South Africa, 1996 proclaims that South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. The Geneva Refugee Convention is also a rights-based instrument which is underpinned by foundational values. It declares in its Preamble that it is informed by the principle, as stated in the Charter of the United Nations and the 1948 Universal Declaration of Human Rights, that “human beings shall enjoy fundamental rights and freedoms without discrimination”.

¹²⁷ S 1(b) of the Constitution provides that South Africa is founded on values of non-racialism and non-sexism. Similarly, the Convention is underpinned by the main object of both the UDHR and the Charter of the United Nations, which is to protect and promote equal and inalienable rights of all members of the human family so as to safeguard human beings against barbarous acts which have outraged the conscience of mankind (see Preambles of the UDHR and the Charter of the UN).

¹²⁸ S 9(3).

¹²⁹ S 9(1).

¹³⁰ S 9(2).

¹³¹ Art 3 of the Geneva Refugee Convention. See too art IV of the African Refugee Convention.

¹³² Arts 7(1), 13, 14, 17(3), 18, 19, 20, 21, 22(1)-(2), 23, and 24.

¹³³ Arts 17(1) and 17(3).

¹³⁴ S 3 of the Constitution.

¹³⁵ See G S Goodwin-Gill *The Refugee in International Law* (1983) 163-164.

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The Geneva Refugee Convention provides for four guiding standards of favourable treatment in relation to socio-economic rights, without prejudice to the state granting asylum to refugees. These standards of favourable treatment are: (i) favourable treatment as accorded to citizens, (ii) the most favourable treatment as accorded to non-citizens in the same circumstances, (iii) treatment as favourable as possible, and in any event, not less favourable than that accorded to non-citizens generally; and (iv) the same treatment as accorded to non-citizens generally. In light of these guiding standards, refugees are firstly entitled to “equal treatment” to that accorded to citizens in respect of artistic rights and industrial property,¹³⁶ labour recruitment,¹³⁷ rationing,¹³⁸ basic education,¹³⁹ public relief and assistance,¹⁴⁰ and labour and social security.¹⁴¹ Secondly, refugees should be given “the most favourable treatment” accorded to nationals of a foreign country in the same circumstances in relation to the right to engage in wage-earning employment.¹⁴² Thirdly, “treatment as favourable as possible, and, in any event, not less favourable than that accorded to [non-citizens] generally in the same circumstances” is provided for with regard to the acquisition of property and rights pertaining to moveable and immoveable property,¹⁴³ self-employment,¹⁴⁴ the practice of a liberal profession,¹⁴⁵ housing¹⁴⁶ and tertiary education.¹⁴⁷ Fourthly, article 7(1) of the Geneva Refugee Convention recommends the same treatment afforded to non-citizens generally in line with conditions of reciprocity.¹⁴⁸ This applies to those rights which are not entrenched in the Geneva Refugee Convention, such as the right to have access to health care services and sufficient food and water. In a nutshell, the last two standards require a host state to treat refugees in the same way as non-citizens or in a manner which is not less favourable than that accorded to non-citizens. This

¹³⁶ Art 14 of the Geneva Refugee Convention.

¹³⁷ Art 17(3).

¹³⁸ Art 20.

¹³⁹ Art 22(1).

¹⁴⁰ Art 23.

¹⁴¹ Art 24.

¹⁴² Arts 17(1) and 17(3).

¹⁴³ Art 13.

¹⁴⁴ Art 18.

¹⁴⁵ Art 19.

¹⁴⁶ Art 21.

¹⁴⁷ Art 22(2).

¹⁴⁸ Art 7(1) states that “[e]xcept where [the Refugee] Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to [non-citizens] generally”.

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minimum standard of treatment (i.e. the same or equal treatment as non-citizens) requires meticulous analysis to illustrate its dangers.

The general treatment of non-citizens is prescribed by South Africa's immigration law. It is framed within the exclusionary model espoused in terms of the twin principles of exclusivity and self-sufficiency.¹⁴⁹ The twin principles are concerned with the sovereign nation's goal of self-preservation,¹⁵⁰ which is achieved through: (i) admission of non-citizens within South African boundaries on the condition that they are self-supportive and self-reliant; and (ii) exclusion of non-citizens with temporary resident visas or permits from accessing socio-economic programmes designed to support citizens who are vulnerable to poverty.¹⁵¹ The application of the twin principles of exclusivity and self-sufficiency to refugees and asylum-seekers appears to be consistent with the standard of the same treatment with non-citizens as contemplated by the Geneva Refugee Convention. In light of immigration law, the same or equal treatment of refugees (and asylum seekers) with non-citizens renders certain socio-economic rights unrealisable to them, as will be demonstrated in detail in this chapter as well as subsequent chapters.

The chapter seeks to demonstrate that the same treatment accorded to non-citizens generally as contemplated by the Immigration Act is inconsistent with the special status of refugees; threatens to undermine certain rights and principles that are at the heart of their protection; and is also at odds with the Refugees Act. The chapter will examine these issues through the prism of equality. It will define and contextualise the role of equality in the protection of refugees and asylum-seekers, and in protecting them from destitution. In doing so, it will explore the meaning of equality under the South African Constitution, with reference to the distinction between formal equality and substantive equality. It will also examine the relation

¹⁴⁹ S 10(4) of the Immigration Act provides that "[a] visa is to be issued on terms and conditions that the holder is not or does not become ... an undesirable person". An undesirable person is defined in terms of s 30 of the Immigration Act to refer to anyone who is or is likely to become a public charge; anyone who has been judicially declared incompetent; or an un-rehabilitated insolvent. If a person becomes an undesirable person or indigent whilst staying in South Africa, such person contravenes the terms and conditions on which the visa was granted and thus becomes an illegal foreigner who must be deported.

¹⁵⁰ The notion of self-preservation inherent in sovereignty is defined to refer to the responsibilities of the state to protect its citizens as sovereign, including those duties and obligations to "secure and maintain the peace, protect individual subjects and provide and maintain the conditions necessary for a commodious life". See E Curran "Can Rights Curb the Hobbesian Sovereign? The Full Right to Self-Preservation, Duties of Sovereignty and the Limitations of Hohfeld" (2006) 25 *Law and Philosophy* 243 252-253.

¹⁵¹ S 42 of the Immigration Act provides that no one can aid, abet, assist, enable or in any manner help an illegal foreigner, save for necessary humanitarian assistance.

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between these dimensions of equality and the standards of same treatment and favourable treatment as expressed in the Geneva Refugee Convention and as given effect to by the Refugees Act. In exploring the meaning of the concept of favourable treatment, attention will be given to the notions of citizenship, self-preservation, and liberal distributive justice. The guiding standards of favourable treatment and equality will be used to analyse the relationship between the rights of refugees and the rights of citizens as it pertains to distributive justice. Moreover, it will be asked whether and to what extent the principle of substantive equality can be used to argue for treatment for refugees and asylum-seekers that is different from the treatment accorded to non-citizens in terms of the Immigration Act. The chapter will therefore consider the vulnerability and special social circumstances of refugees and asylum-seekers, as a possible basis for requiring differentiated and favourable treatment in accordance with the principle of substantive equality.

2.2 The meaning of equality within the Geneva Refugee Convention framework

Despite numerous judicial interpretations, the legal and humanitarian obligations relating to the favourable treatment of refugees have not yet been adequately defined, due to the vagueness and uncertainty of these concepts.¹⁵² To begin with, the complexity stems from the four standards of treatment which the Geneva Refugee Convention places in hierarchy. Cholewinski groups these standards into two main forms of favourable treatment: equal treatment as is accorded to citizens (or national treatment) and equal treatment as is accorded to non-citizens (or non-national treatment). He compares the latter treatment to the MFN treatment,¹⁵³ which is, as Rubinstein explains, based on the principle of reciprocity:

Each country says to the others [that] we will recognise all rights of your subjects while they are with us, on condition that you accord the same treatment to our nationals while they are with you.¹⁵⁴

¹⁵² L B Landau "Protection as Capability Expansion: Practical Ethics for Assisting Urban Refugees" in D Hollenbach (ed) *Refugee Rights: Ethics, Advocacy, and Africa* (2008) 104.

¹⁵³ R Cholewinski "Economic and Social Rights of Refugees and Asylum Seekers in Europe" (2000) 14 *Georgetown Immigration Law Journal* 709 711: Traditionally, MFN treatment is a treaty-based obligation undertaken by State A to accord nationals of State B favourable treatment in so far as labour, trade, investment, and navigation are concerned.

¹⁵⁴ J L Rubinstein "The Refugee Problem" (1939) 15 *Royal Institute of International Affairs* 716 726.

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In the case of *France v United States of America*, the International Court of Justice (“ICJ”) held that the function of the MFN standard is “to establish and maintain at all times fundamental equality without distinction” among nationals of the countries concerned.¹⁵⁵ It appears that the objective of the MFN standard is to guarantee equal treatment to the citizens of the parties to a particular agreement. The same applies to the Geneva Refugee Convention. The Geneva Refugee Convention is a multilateral agreement, which is based on the principle of equal protection, as it aims to ensure that refugees and asylum-seekers are entitled to the minimum decencies of life, or, at least, a life of comparable dignity to that of either citizens or non-citizens.

The Geneva Refugee Convention distinguishes between different categories of refugees, and vests different rights in them. These categories are *inter alia*: refugees physically in the host country, refugees lawfully in the host country, refugees lawfully staying in the host country, and those durably residing in the host country.¹⁵⁶ It has also become common to differentiate between refugees (those who are legally recognised as such) and asylum-seekers (those whose applications for asylum are still pending). Refugees are in principle entitled to socio-economic rights that enable them to participate fully in the host community or to become self-reliant.¹⁵⁷ Asylum-seekers, on the other hand, are afforded core socio-economic rights designed to meet humanitarian standards of protection. This includes the provision of emergency interventions that address social, human and emotional needs and go beyond the provision of mere material relief.¹⁵⁸ In many instances, asylum-seekers are legally prohibited from undertaking education, paid employment and self-employment whilst they wait for the finalisation of their cases.¹⁵⁹

Prior to the Geneva Refugee Convention, states tended to expel, deport or return refugees to their home countries either on the ground of the protection of the national interest and the maintenance of public order or on the basis that they were a burden on the state.¹⁶⁰ To the extent that non-citizens were entitled to equal treatment, that

¹⁵⁵ *Case concerning Rights of Nationals of the United States in Morocco (France v United States of America)*, Judgment of 27 August 1952, [1952] ICJ Reports 176, 191-2.

¹⁵⁶ Hathaway *Rights of Refugees* 171. See further discussion under sub-section 4.3.3.2.

¹⁵⁷ UNHCR Policy on Refugee Protection and Solutions in Urban Areas, September 2009, paras 176-132.

¹⁵⁸ Paras 133-134. See too UNHCR *Handbook for Emergencies* (2007) para 1.1 and 27-28.

¹⁵⁹ Para 70.

¹⁶⁰ The fear that refugees would impose an intolerable burden on the state was used to justify the expulsion of refugees. See Rubinstein (1939) *Royal Institute of International Affairs* 720-725.

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was based on the principle of reciprocity, in accordance with the conditions as set out in bilateral treaties or agreements. Because refugees had lost the protection of their home countries, they could not be accorded equal treatment in terms of conditions of reciprocity. However, conditions of reciprocity were not applied by all countries. In addition, those countries that applied them did not always do so on an equal footing. As a result, their significance and relevance differed from country to country.¹⁶¹ For instance, conditions of reciprocity played a meaningful role in countries whose law was based on the Code of Napoleon where the treatment of non-citizens depended on it. They played no role in the Anglo-Saxon countries where non-citizens were generally afforded the same civil rights as citizens.¹⁶² Nonetheless, they played a role in the establishment of international refugee protection. The need to extend the special treatment accorded to certain groups of non-citizens under conditions of reciprocity to refugees was initially recognised under the Arrangement of 30 June 1928 (article 4).¹⁶³ Article 4 of the 1928 Arrangement extended the most favourable treatment accorded to non-citizens to apply to Russian and Armenian refugees under the conditions of reciprocity in the following terms:

“It is recommended that the exercise of certain rights and the benefit of certain privileges granted to foreigners on condition of reciprocity shall not be refused to Russian and Armenian refugees on the ground that reciprocity cannot be obtained in their case.”

The principle was extended to apply to refugees without qualification under article 14 of the 1933 Convention Relating to the Status of Refugees.¹⁶⁴ The provisions of article 14 were retained verbatim under article 17 of the 1938 Convention Relating to the Status of Refugees.¹⁶⁵ Both article 14 and article 17 stipulate that:

¹⁶¹ P Weis *The Refugee Convention, 1951* (1995) 57.

¹⁶² 51,57. For this reason, it is sometimes said that the adoption of the principle of reciprocity in international refugee conventions was aimed mainly at ensuring that, in countries that applied the Napoleon Code, immigration laws were constructed in line with the conditions of reciprocity and that, in the absence of conditions of reciprocity, international customs and practices applied. Weis 56.

¹⁶³ Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees, League of Nations Treaty Series, Vol. LXXXIX, No. 2005.

¹⁶⁴ Convention relating to the International Status of Refugees, 28 October 1933, League of Nations Treaty Series Vol. CLIX No. 3663.

¹⁶⁵ Convention concerning the Status of Refugees coming from Germany, 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461.

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“The enjoyment of certain rights and the benefit of certain favours accorded to foreigners subject to reciprocity shall not be refused to refugees in the absence of reciprocity.”

Article 7 of the Geneva Refugee Convention also contains provisions relating to the exemption of refugees from conditions of reciprocity. Similar to the provisions referred to above, this article requires a departure from the principle of reciprocity in the case of refugees. At the same time, it effectively extends the principle of reciprocity to refugees. Article 7(1), which requires a host state to accord to refugees the same treatment as accorded to non-citizens generally, implicitly refers to conditions of reciprocity. This approach applies in circumstances where favourable provisions of the Geneva Refugee Convention are silent, as explained further in the following section.

2 2 1 Equal treatment with non-citizens (non-national treatment)

2 2 1 1 Article 7(1)

Article 7(1) of the Geneva Refugee Convention states that “[e]xcept where [the] Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.” This provision requires a host country to provide a safe haven to refugees and asylum-seekers, by according them the same treatment accorded to non-nationals generally while they stay within its boundaries. Article 7(1) applies where rights are not guaranteed by the Geneva Refugee Convention, or where the Geneva Refugee Convention does not specify the favourable standard in terms of which they should be accorded to refugees or asylum-seekers. In other words, the article comes into play in situations where favourable treatment is not expressly provided for in the Geneva Refugee Convention.¹⁶⁶ Article 7(1) thus sets out a threshold standard, obligating the host state to define the treatment of refugees in comparison with the favourable treatment accorded to non-citizens generally.¹⁶⁷ It seeks to accord to refugees “the full protection enjoyed by other non-citizens with no special protection attached to their status.”¹⁶⁸

¹⁶⁶ Commentary on the Refugee Convention 1951, Articles 2-11, 13-37, Published by the Division of International Protection of the United High Commissioner for Refugees 1997 (“Commentary on the Refugee Convention”) 15.

¹⁶⁷ 16.

¹⁶⁸ 16.

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Traditionally, non-citizens were entitled to a minimum standard of treatment that was restricted to the protection of, at least, their physical integrity and property, in terms of customary international law.¹⁶⁹ Non-citizens could rely on the principle of diplomatic protection for the enforcement of their right to physical integrity and property.¹⁷⁰ However, refugees and asylum-seekers could not depend on diplomatic protection to enforce the said rights. Article 7(1) responds to this gap by creating a legal mechanism that could be relied on by refugees and asylum-seekers to claim certain rights, benefits and privileges enjoyed by other categories of non-citizens, either under conditions of reciprocity or under national laws establishing favourable treatment of certain groups of non-citizens.¹⁷¹ The reference to the same treatment under article 7(1) should be read to imply that refugees should be freed from discriminatory practices based on citizenship in order to ensure that they enjoy the same rights enjoyed by other non-citizens on a favourable basis.

This standard of treatment does not amount to preferential treatment. It was intended to grant to refugees “either treatment commonly enjoyed by all non-citizens, or, with regard to certain matters, treatment commensurate with their special situation”.¹⁷² It could also be used to ensure the protection of refugees or asylum-seekers from any penalisation that might be imposed on them solely because they have lost the protection of their home countries. It recognises that refugees are entitled to favours, privileges or benefits that are generally enjoyed by non-citizens, through bilateral or multilateral agreements or in any other way.¹⁷³

As indicated above, article 7(1) guarantees equal treatment with non-citizens, on the basis of conditions of reciprocity, with respect to those rights which are not contained in the Geneva Refugee Convention, but which are available in terms of domestic laws. It can therefore be used as a guide to implement, interpret or vindicate socio-economic rights that are entrenched in the South African Constitution, but are not guaranteed expressly in the Geneva Refugee Convention, such as the right to have access to healthcare services,¹⁷⁴ reproductive health

¹⁶⁹ 56.

¹⁷⁰ 56.

¹⁷¹ Commentary on the Refugee Convention 16. See also T Broude “The Most-Favoured Nation Principle, Equal Protection, and Migration Policy” (2010) 24 *Georgetown Immigration Law Journal* 553, 553-555.

¹⁷² Weis *The Refugee Convention* 51.

¹⁷³ E Larking *Refugees and the Myth of Human Rights: Life Outside the Pale of Law* (2014) 52.

¹⁷⁴ S 27(1)(a).

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care,¹⁷⁵ sufficient food and water,¹⁷⁶ and not to be refused emergency medical treatment.¹⁷⁷ Conditions of reciprocity are further required with respect to the rights of children to appropriate alternative care (when removed from their family environment),¹⁷⁸ basic nutrition,¹⁷⁹ and basic healthcare services.¹⁸⁰

The Immigration Act – which sets forth the minimum standards of treatment of non-citizens generally – envisions that socio-economic rights cannot be enjoyed at the state’s expense by non-citizens with temporary residence status. This is subject to certain exceptions. First, in terms of section 35(2)(e) of the Constitution, all detained persons (including detained temporary residents) can, at state expense, have access to social services, including “adequate accommodation, nutrition, reading material and medical treatment.” Second, there are instances in which citizens of a certain country or countries can be given access to socio-economic rights and benefits through bilateral or multilateral treaties. For instance, the SADC Protocol on Education and Training of 1997¹⁸¹ requires member states to treat SADC students as if they are citizens of the member state with respect to university tuition fees, charges and accommodation.¹⁸² South Africa implements the SADC Protocol as it pertains to SADC students. Moreover, section 2(1) of the Social Assistance Act 13 of 2004 (“Social Assistance Act”) provides that the Act applies to an individual who is a non-citizen –

“if an agreement, contemplated in section 231(2) of the Constitution, between [South Africa] and the country of which that person is a citizen makes provision for this Act to apply to a citizen of that country who resides in [South Africa].”

The adoption of the Geneva Refugee Convention and African Refugee Convention led to a recognition that refugees should be provided favourable treatment in all matters concerning them. The extension of the concept of favourable treatment beyond the traditional principle of reciprocity to apply to refugees is

¹⁷⁵ S 27(1)(a).

¹⁷⁶ S 27(1)(b).

¹⁷⁷ S 27(3).

¹⁷⁸ S 28(1)(b).

¹⁷⁹ S 28(1)(c).

¹⁸⁰ S 28(1)(c).

¹⁸¹ SADC Protocol on Education and Training of 8 September 1997.

¹⁸² Art 7(A)(5).

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strengthened by the principle of *non-refoulement*.¹⁸³ Obligations flowing from the principle of *non-refoulement* were interpreted by the British Administrative Court as requiring a host State to offer more favourable and differentiated treatment to asylum-seekers so as to avoid any possibility of putting “an altogether illegitimate pressure upon [them] to give up seeking asylum due to destitution”.¹⁸⁴ Smirarly, the African Commission interpreted such obligations as requiring a host State to refrain from creating conditions in which asylum-seekers or refugees had no choice but to return.¹⁸⁵

As noted, the principle of reciprocity serves to ensure that refugees receive favourable treatment comparable to that accorded to non-citizens generally. In the South African context, the minimum standard of the principle of reciprocity is provided for under the Immigration Act. This minimum standard of treatment accorded to non-citizens is closely tied to the twin principles, in terms of which citizens with temporary residence are expected to be economically self-sufficient. Extending this standard of treatment to refugees and asylum-seekers will put unnecessary illegitimate pressure upon them as it will result in their exclusion from subsidised social welfare programmes. This may defeat the object of the principle of *non-refoulement* in circumstances in which they are compelled to leave due to appalling conditions.¹⁸⁶ It may also result in an impairment of their human dignity, in contravention of the Constitution and the Refugees Act.¹⁸⁷

Furthermore, the twin principles are inconsistent with obligations ensuing from the African Refugee Convention to confer on refugees and asylum-seekers socio-economic protection on a humanitarian basis. According to the African Refugee Convention, refugees and asylum-seekers should – owing to their human suffering –

¹⁸³ The principle of *non-refoulement* is entrenched in art 31 to art 33 of the Geneva Refugee Convention.

¹⁸⁴ See *R (on the application of Nagatu) v SSHD* [2004] EWHC 1806 (Admin), paras 19, 21. See too *Limbuella v Secretary of State* [2004] EWCA Civ 540; and *R (Westminster City Council) v NASS* [2002] 1 WLR 2956, para 38.

¹⁸⁵ These conditions can be created under circumstances in which refugees or asylum-seekers are denied or deprived of humanitarian assistance such as water, food, clothing and toilet facilities. See *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v Ethiopia and Interights (on behalf of Pan African Movement and Inter African Group) / Eritrea*, Communications No. 233/99-234/99 (2003) AHRLR 74 (16th Activity Report, ACHPR 2003), paras 2-7.

¹⁸⁶ The SCA stated that denial of the right to work will not just diminish the humanity of refugees and asylum-seekers but also compel them to leave South African shores. See *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* 2015 1 SA 151 (SCA) paras 44-45.

¹⁸⁷ *Watchenuka* para 27.

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be differentiated from other categories of non-citizens, in accordance with the African spirit and context.¹⁸⁸

Proceeding from the above principles, it will be argued in this chapter that article 7(1), as well as the other standards provided for in the Geneva Refugee Convention, should not be applied on the basis of formal equality, but on the basis of a substantive understanding of equality which takes into account the special needs and vulnerability of refugees and asylum-seekers. Equal treatment on the basis of formal equality would mean that refugees and asylum-seekers are treated equally with non-citizens with temporary resident status, without considering their precarious situation. It will be argued that a substantive understanding of equality should be followed with regard to access to socio-economic rights, irrespective of whether these rights are specified in the Geneva Refugee Convention or not.¹⁸⁹

2 2 1 2 Treatment as favourable as possible

Equal treatment with non-citizens is required with respect to the acquisition of property and rights pertaining to moveable and immoveable property,¹⁹⁰ self-employment,¹⁹¹ the practice of a liberal profession,¹⁹² housing¹⁹³ and tertiary education.¹⁹⁴ This treatment is vaguely defined as treatment as favourable as possible and, in any event, not less favourable than that accorded to non-citizens generally in the same circumstances. There is no clear definition of what the phrase “in the same circumstances” entails. This question is considered with reference to article 6 of the Geneva Refugee Convention and in light of sections 10, 23, 25 and 26 of the Immigration Act, on the one hand and sections 22, 24, 27 and 27A of the Refugees Act, on the other.

Article 6 of the Refugees Convention serves as a point of departure for contextualising the meaning of the phrase “in the same circumstances.” Article 6 defines the phrase to refer to:

¹⁸⁸ Para 8 of the Preamble of the African Refugee Convention states that “...all the problems of our continent must be solved in the spirit of the Charter of the Organisation of African Unity and in the African context.”

¹⁸⁹ See further the discussion under subsection 2.4.1.

¹⁹⁰ Art 13.

¹⁹¹ Art 18.

¹⁹² Art 19.

¹⁹³ Art 21.

¹⁹⁴ Art 22(2).

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“any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.”

In light of the definition, the criteria for determining the meaning of “in the same circumstances” seem to be threefold: (i) conditions of stay; (ii) the length of stay; and (iii) accrual of the rights either on the basis of the length or conditions of stay. Firstly, general conditions of stay or general rules of residence are laid down under section 10 of the Immigration Act. These conditions are conceived in terms of the exclusionary model which is based on the twin principles of exclusivity and self-sufficiency,¹⁹⁵ as explained above. The Immigration Act distinguishes between temporary residents and permanent residents. However, given the special conditions, experiences and circumstances of refugees, their admission in the country is exclusively provided for under section 23 of the Immigration Act, whereas the conditions of their stay are prescribed by the Refugees Act. Although refugees are temporary residents, they are exempted from meeting the conditions of immigration rules by the Refugees Act. Upon being recognised as either asylum-seekers or refugees in terms of sections 22 and 24, respectively, they are entitled to the socio-economic rights and benefits enshrined in the Bill of Rights, with few exceptions, in terms of section 27A(d) and 27(b) of the Refugees Act, respectively. Other non-citizens with temporary residence stay subject to the twin principles of exclusivity and self-sufficiency.

Secondly, the definition of “in the same circumstances” refers to the length of stay or residence. There is no length of stay or residence that is prescribed for refugees or asylum-seekers to enjoy core constitutional rights. Asylum-seekers become beneficiaries of the core socio-economic rights contained in the Bill of Rights upon an expression of the intention to apply for asylum.¹⁹⁶ It is presumed that the application for asylum would be finalised within 180 days. Should the application for asylum be finalised within the 180 days period and the asylum-seeker is granted

¹⁹⁵ S 10 of the Immigration Act.

¹⁹⁶ The Supreme Court of Appeal in *Bula v Minister of Home Affairs* 2012 4 SA 560 (SCA) para 72 stated that “...where a foreign national indicates an intention to apply for asylum, the regulatory framework of the [Refugees Act] kicks in, ultimately to ensure that genuine asylum seekers are not turned away.”

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asylum in terms of section 24(3)(a), he or she must enjoy full legal protection. More rights, benefits and privileges are accorded to refugees after a period of five years residence, provided that they have convinced the Standing Committee for Refugee Affairs (“SCRA”) that they will be refugees indefinitely.¹⁹⁷ On the other hand, other non-citizens are required to meet certain immigration conditions for them to become beneficiaries of socio-economic rights, benefits and privileges. Those conditions include the period of five years residence and an offer of permanent employment¹⁹⁸ or being a spouse or a child of a citizen or permanent resident.¹⁹⁹ In certain circumstances, the period of five years residence is non-applicable if a non-citizen possesses extraordinary (or critical) skills or qualifications.²⁰⁰ It is evident that the Immigration Act and the Refugees Act treat non-citizens differently depending on their legal status.

Finally, whilst constitutional rights accrue to asylum-seekers upon their declaration that they are refugees, their full legal protection kicks in when they are recognised as genuine refugees and a wide range of benefits and privileges accrues to them once they are declared refugees for life. On the other hand, socio-economic rights, benefits and privileges generally accrue to other non-citizens upon being granted permanent resident status as explained above.

Drawing on the preceding assessment of the concept of “in the same circumstances”, there are no nationals of foreign countries in South Africa who are in the same situation as refugees. This was affirmed by Mokgoro and O’Regan JJ who, in their dissenting judgment in *Union of Refugee Women*, described the meaning of “in the same circumstances” as very controversial;²⁰¹ and recognised that the concept is practically difficult to implement in a South African context given that, in South Africa, there are no non-citizens “who are identically situated to refugees”.²⁰² In the South African legal system, the refugee status “is unique...and not identical to any of the other categories of [non-citizens].”²⁰³ Accordingly, a legal comparison of the treatment of refugees and other non-citizens becomes difficult. Such difficulties do not detract from the principle of equal treatment. Sachs J declared in the same

¹⁹⁷ S 27(c) of the Refugees Act, read in tandem with s 27(d) of the Immigration Act.

¹⁹⁸ S 26(a) of the Immigration Act.

¹⁹⁹ S 26(b)-(c).

²⁰⁰ S 27(b).

²⁰¹ Para 108.

²⁰² Para 108.

²⁰³ Para 108.

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case that the standard of equal treatment serves as a yardstick which safeguards refugees against “end[ing] up as pariahs at the margins of host societies.”²⁰⁴

Nonetheless, the standard invites a comparison to the treatment accorded to non-citizens. If this standard were to be applied strictly with reference to the position of temporary residents, the treatment of refugees would be grounded in the twin principles. That would defeat the objectives of both the Geneva Refugee Convention and the Refugees Act. There is a danger that these principles could be relied on, for example, to exclude refugees from access to housing programmes, from access to student financial aid in the context of higher education, and from establishing their own business in pursuance of the right to self-employment.

On the basis of the relevant provisions of the Geneva Refugee Convention, read in tandem with the provisions of the Refugees Act, it can rather be argued that refugees and asylum-seekers should be included in housing, student financial aid, and business project programmes. The Geneva Refugee Convention aims to include refugees and asylum-seekers in socio-economic designs and to safeguard against unfair discrimination. It seeks to alleviate their physical deprivation. Read in this light, it seems problematic to apply the twin principles of South Africa’s immigration system to refugees and asylum-seekers, based on the assumption that they are in the same circumstances as temporary residents. To do so would be to lose sight of their vulnerability, even though it may be in line with the requirement that they be given treatment as favourable as possible, and not less favourable than non-citizens in the same circumstances. This standard is neither recognised by the African Refugee Convention nor by the Refugees Act. Whilst the African Refugee Convention generally bases socio-economic protection on the humanitarian approach, section 27(b) of the Refugees Act extends full legal protection to refugees, including the rights contained in the Bill of Rights, except those that apply only to citizens. In addition, section 27A(d) recognises that an asylum-seeker is entitled to the rights contained in the Constitution, “insofar as those rights apply to an asylum-seeker”. It would therefore appear that the Refugees Act accords to refugees the same treatment as is accorded to citizens with respect to rights such as property, housing, tertiary education and employment. The right to employment is wide

²⁰⁴ *Union of Refugee Women* para 134.

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enough to encompass the rights under section 23 of the South African Constitution dealing with labour relations.

As the preceding discussion has shown, refugees are, in terms of legislation and the Constitution, entitled to the said rights on an equal basis with citizens. It should however be noted that the right to gain access to land on an equitable basis, as a part of immovable property, is restricted to citizens.²⁰⁵ The South African Constitution also does not guarantee the right to employment.²⁰⁶ Instead, refugees are specifically accorded this right in terms of section 27(f) of the Refugees Act. Moreover, this right was extended to apply to asylum-seekers as a result of litigation.²⁰⁷ Nonetheless, equal treatment as favourable as possible applies to self-employment, as further discussed in the next section.

2 2 1 3 The most favourable treatment

Article 17 of the Geneva Refugee Convention requires the provision to refugees lawfully staying in a country's territory of the most favourable treatment accorded to non-citizens in the same circumstances with respect to the right to work in the context of wage-earning employment. The right to work is traditionally broad enough to embrace the right to professional registration and practice, labour recruitment, self-employment and payment of unemployment benefits known as labour and social security. However, article 17 specifically only deals with the right to engage in wage-earning employment.²⁰⁸ Some of the other aspects of the right to work are dealt with in other articles, and are subject to different standards of treatment.²⁰⁹

Drawing on article 6 of the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Verdirame defines the right to work as the right "of everyone to the opportunity to gain his or her living by work which [he or she] freely

²⁰⁵ S 25(5) of the Constitution of the Republic of South Africa.

²⁰⁶ S 22, which guarantees the right to choose a trade, occupation or profession, is more limited in scope than a general right to employment. Moreover, it is restricted to citizens. S 22 of the Constitution states that "[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

²⁰⁷ According to reg 3(3) of the Refugee Regulations (Forms and Procedure) of 2000, an asylum seeker, whose application was not finalised by the Department of Home Affairs within 180 days, was permitted to apply to the Standing Committee for Refugee Affairs ("SCRA") for work or study authorisation or relief from other conditions that may have been imposed by the SCRA. The SCA in *Watchenuka* found the general prohibition of employment and study for the first 180 days after the formal recognition of an individual as an asylum-seeker to be in conflict with the Bill of Rights (para 24).

²⁰⁸ Hathaway *The Rights of Refugees* 230.

²⁰⁹ See art 18 (self-employment), art 19 (liberal professions) and art 24 (labour legislation and social security).

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chooses or accepts.”²¹⁰ The universal nature of the right to work was stressed by Ngcobo J in the case of *Affordable Medicines Trust v Minister of Health of RSA*.²¹¹ According to Ngcobo J, the right to work is firstly the foundation of an individual’s existence. Secondly, work is a part of an individual’s identity and constitutive of his or her dignity. Thirdly, it is closely linked to the human personality, which “shapes and completes an individual over a lifetime.”²¹² The right to be employed is the basis for the enjoyment of the rights to life, human security and human dignity given that the right to work is “one of the most precious liberties that an individual possesses” and that “to work means to eat and subsequently to live”.²¹³

Enjoyment of the right to work in the sense of paid employment creates opportunities for refugees or asylum-seekers to be self-reliant and productive. It enables them “to participate fully in their host community thereby lifting themselves out of poverty, increasing their wellbeing, protecting themselves against market-related economic shocks, or, alternatively, restoring their dignity”.²¹⁴ The restoration of dignity by means of paid employment is possible only if the more favourable approach is understood to imply that a host state must, first, provide “technical and vocational guidance and training programmes”.²¹⁵ Secondly, it requires the enactment of labour laws, policies and strategies aimed at ensuring the steady integration of refugees lawfully staying into socio-economic development and their full and productive employment under labour conditions that exempt them from labour and immigration restrictions imposed on other non-citizens. Labour conditions must ensure the promotion of their civil, social, and economic freedom as contemplated by the Geneva Refugee Convention. In a narrow sense, the principle of the most favourable treatment should be interpreted to mean that a host state should remove certain legal barriers hindering refugees’ favourable access to the labour market. As such, refugees and asylum-seekers should not be denied the opportunity to seek employment due to, for example, restrictive immigration and labour measures.

Article 17(2) requires a host state to refrain from applying restrictive labour measures that are applicable to non-citizens generally, to a refugee who (i)

²¹⁰ G Verdirame *Rights in Exile: Janus-Faced Humanitarianism* (2005) 215.

²¹¹ 2005 6 BCLR 529 (CC).

²¹² Paras 59-61.

²¹³ *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 64.

²¹⁴ Kavuro (2015) *Law, Democracy & Development* 234.

²¹⁵ Verdirame *Rights in Exile* 215.

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completed three years' residence in the country; (ii) is married to a citizen; or (iii) is a parent to a child possessing the nationality of the country. Measures that are imposed on non-citizens for the protection of the South African labour market should therefore not be applied to the said groups of refugees.²¹⁶ Such differentiations between different categories of refugees are not incorporated into the Refugees Act as the right to work is unqualified. However, prior to the judgment of *Watchenuka*, an asylum-seeker was prohibited from working unless his or her application for asylum was not finalised within 180 days and such asylum-seeker had successfully applied to the SCRA to lift the restriction.²¹⁷ The exclusion of asylum-seekers from employment was clearly contrary to the notion of the most favourable treatment.

Hathaway understands the principle of most favourable treatment to imply that refugees are entitled to all employment rights that a host state has granted to non-citizens in terms of its labour and immigration laws, subject to the principle of non-discrimination.²¹⁸ However, equating the right to paid employment to the right of non-citizens may create gaps and weaknesses. These gaps and weaknesses arise in situations in which the conditions on which labour rights are accorded to non-citizens are unfavourable, and where nothing has been done to exempt refugees from those conditions on account of their special situation. Yet, the principle of the most favourable treatment is still equated by some scholars to the MFN standard which is grounded in the principle of reciprocity or the minimum standard of treatment of refugees.²¹⁹

In South Africa, too, refugees should receive the most favourable treatment accorded to non-citizens in the same circumstances. Although it has been noted that the concept of "in the same circumstances" is difficult to define and that it is not immediately evident which category of non-citizens is in the same circumstances as refugees, it could be argued that refugees should be given the most favourable treatment accorded to non-citizens with permanent resident status, despite the fact that refugees are temporary residents. This is because these two categories of non-citizens are similarly entitled to constitutional rights in terms of immigration and refugee law. Section 27(b) of the Refugees Act states that "[a] refugee enjoys full legal protection, which includes the rights set out in [the Bill of Rights] and the right to

²¹⁶ Kavuro (2015) *Law, Democracy & Development* 233.

²¹⁷ *Watchenuka* para 22.

²¹⁸ Kavuro (2015) *Law, Democracy & Development* 230.

²¹⁹ 230.

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remain in the Republic in accordance with the provisions of the [Refugees Act],” whereas section 25(1) of the Immigration Act states that a non-citizen with permanent resident status “has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.” Although section 25(1) does not expressly refer to the rights in the Bill of Rights as section 27(b) does, the Bill of Rights constitutes the foundation upon which the fundamental rights and freedoms of citizens and non-citizens are based.²²⁰ Whilst different language is used in the framing of section 27(b) of the Refugees Act and section 25(1) of the Immigration Act, both refugees and permanent residents are entitled to the same constitutional socio-economic rights.

The reservation of certain employment positions for citizens and permanent residents, to the exclusion of refugees, would be problematic in view of the fact that refugees are entitled to the right to seek employment in terms of section 27(f) of the Refugees Act. The section does not qualify the right in a way that prohibits refugees from working in certain industries or sectors.²²¹ Even so, section 10 of the Public Services Act 103 of 1994 (“the Public Services Act) restricts the employment of non-citizens in the public sector to individuals with permanent resident status. The restriction is based on the conceptual ground that refugees are temporary residents, who should be employed in temporary positions.²²² This places refugees in a much weaker position than permanent residents. The thesis finds it contradictory for lawmakers to extend the right to work to refugees and, at the same time, deny them the opportunity to work in the public sector. Lawmakers should realise that it is incumbent on government to create employment positions for refugees so that they could exercise their right to work. In this regard, section 10 of the Public Service Act should be amended to offer refugees temporary employment. This approach is applied under the 2006 Policy of the Department of Health on Recruitment and Employment of Foreign Health Professionals in the Republic of South Africa. Although it restricts permanent employment to permanent residents,²²³ refugees are

²²⁰ S 7(1) of the Constitution of the Republic of South Africa, 1996.

²²¹ Both s 27(f) of the Refugees Act and reg 15(f) of the Regulations to the Refugees Act simply state that “a refugee is entitled to seek employment.”

²²² *Ndikumdavyi* paras 6, 15, 26.

²²³ Rule 3.5. See too *Ndikumdavyi* para 6.

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allowed to work on the basis of a fixed term contract or part-time employment.²²⁴ Similarly, each governmental department should identify posts that could be filled by refugees on a renewable term contract basis.

Admittedly, the constitutional right of freedom to choose a trade, occupation or profession is reserved for citizens under section 22 of the Constitution. The government tends to rely on this section to limit the right to work of non-citizens.²²⁵ However, section 22 does not require that non-citizens must be excluded from certain occupations, or from the right to seek employment. In fact, it is accepted that certain categories of non-citizens, like permanent residents, have the right to be employed in a wide variety of occupations and sectors, including work in legal practice and the private security industry.²²⁶ Secondly, despite the wording of section 22, non-citizens, or certain categories of non-citizens, may nevertheless have a constitutional right to seek employment, based on other constitutional rights such as human dignity or equality.²²⁷ Thirdly, it is clear from the *Union of Refugee Women* case that the exclusion of refugees from certain occupations must be narrowly tailored to pass constitutional muster.²²⁸ In view of this, it would be advisable to craft the restriction on the right of refugees to seek employment in the public service more narrowly, as argued above.

Because the public sector is closed to refugees, they can only seek jobs in the private sector. However, even in the private sector, refugees and asylum-seekers face substantial legal barriers that have implications for the principle of the most favourable treatment. The principle is curtailed by immigration measures which condition wage-earning employment on the possession of critical skills and the non-

²²⁴ *Ndikumdavyi* para 6.

²²⁵ *Union of Refugee Women* paras 51, 52, 111 and *Somali Association of South Africa* para 38.

²²⁶ The Private Security Industry Regulatory Service Act 59 of 2001 and the Attorneys Act 53 of 1977.

²²⁷ Nugent JA, in *Watchenuka* para 27, found the general prohibition of employment and education imposed on asylum-seekers to be unconstitutional. In invoking the right to human dignity, he stressed that “the freedom to engage in productive work...is an important component of human dignity;” hence human dignity is often associated “with being accepted as socially useful”. In *Larbi-Odam*, Mokgoro J (in a judgment concurred in by all other judges) found reg 2(2) of the regulations regarding the terms and conditions of employment of educators in terms of the Educators’ Employment Act 138 of 1994 to be invalid and unconstitutional because of (i) its inconsistency with s 8(2) of the Interim Constitution and (ii) its potential to impair the dignity of non-citizens. The regulation unfairly discriminated against permanent residents in that it prevented them from being recruited in permanent teaching positions (paras 24-26). In *Somali Association of South Africa*, Navsa ADP (all other judges concurring in the judgment) held that both refugees and asylum-seekers are entitled to the right to self-employment and that neither s 22 of the South African Constitution nor enabling legislation bars refugees and asylum-seekers from engaging in trading in spaza and tuck-shops. The prohibition of self-employment implicated and affected the right to human dignity (paras 22, 39, 43).

²²⁸ Paras 34-46.

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availability of a suitable citizen,²²⁹ and by the Employment Equity Act 55 of 1998 (“the Employment Equity Act”), which gives priority to individuals who are historically disadvantaged.²³⁰ The refugee regime is silent on whether refugees or asylum-seekers should be exempted from restrictions imposed by affirmative or remedial labour and immigration measures. This effectively limits refugees and asylum-seekers’ equal freedom to seek paid employment in private industries on a more favourable basis.

Taking into account the precarious situation of refugees, their quest for survival and the uniqueness of refugee status, in addition to the fact that the Refugees Act distinctively confers the right to work to refugees, refugees should be accorded the most favourable treatment with respect to South Africa’s employment law. Employment law is narrowly defined to refer to the Employment Equity Act, the Unemployment Insurance Act 63 of 2001, the Skills Development Act 97 of 1998, the Occupational Health and Safety Act 85 of 1993 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993.²³¹ In a wide sense, employment rules and regulations are not restricted to the said legislation but also include employment conditions set out under various other laws, policies, and strategies. For example, non-citizens, especially, temporary residents, are, under the Immigration Act, allowed to work provided that (i) they are in possession of a work permit, (ii) they are highly skilled and (iii) there is no suitable citizen to fill the vacancy.²³² As noted, this immigration rule has a severe impact on the employment of refugees and asylum-seekers as it is applied by employers when considering their applications.²³³

²²⁹ S 19(2).

²³⁰ These individuals are defined and identified as members of designated groups. See s 1 of the Employment Equity Act.

²³¹ See cl 1 of the Labour Laws and Amendment Bill [PMB6 – 2015] in GN 1171 GG 39448 of 25-11-2015 defining what employment law entails.

²³² S 19(2)(a) of the Immigration Act. A work permit or visa can be granted if no South African citizen with a qualification or skills and experience equivalent to those of the applicant can, despite a diligent search, be employed.

²³³ According to Consortium for Refugees and Migrants South Africa (“CoRMSA”) and Lanzi Mazzocchini, employers apply immigration rules to refugees and asylum-seekers or discriminate against them simply because they are not aware of or sensitized to refugee rights. CoRMSA *Protecting Refugees, Asylum-Seekers and Immigrants* (2009) 106 states that refugees and asylum-seekers are denied employment on the basis of being non-citizens. See also E M Lanzi Mazzocchini *Policy Implication Learned from the Analysis of the Integration of Refugees and Asylum seekers at Tertiary Education in Cape Town* (Unpublished, Masters thesis, University College Dublin, 2007/2008) at 43.

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3 2 2 *Equal treatment with citizens (national treatment)*

Equal treatment with citizens or national treatment is guaranteed in the Geneva Refugee Convention with respect to socio-economic rights such as benefiting from artistic and industrial property rights, labour recruitment, rationing, basic education, public relief (i.e. social assistance), labour and social security, and taxation.²³⁴ Equal treatment with citizens places an emphasis on the need to provide refugees with the same protection offered to citizens and to reject state practices which may effectively exclude refugees from social welfare. The standard of the same treatment as citizens should be understood as favourable protection under the Geneva Refugee Convention, which creates an entitlement to the right to be treated with equal concern. Equal concern or equal treatment means that there should be no differentiation between citizens and refugees at the domestic level. Put plainly, the treatment afforded to citizens by the South African Constitution or by other acts of parliament as it pertains to the aforementioned socio-economic benefits shall apply to refugees on an equal basis.

The principle of equal treatment in terms of the Geneva Refugee Convention imposes duties on the host state to refrain from discriminating against refugees and asylum-seekers. Accordingly, measures taken to advance local communities socially and economically should apply equally to refugee communities.²³⁵ Discrimination against refugees in matters related to artistic and industrial property rights, labour recruitment, rationing, basic education, social assistance, social security and taxation would give rise to unfair discrimination on the ground of nationality. It would amount to a breach of the Geneva Refugee Convention. If refugees and asylum-seekers were to receive the same treatment as citizens, they should enjoy the same entitlements with respect to socio-economic laws regulating or giving effect to labour relations (section 23), social security (section 27), education (section 29) and taxes (section 228). In this regard, the interests of refugees and asylum-seekers should be favourably catered for on the basis of national treatment under the following domestic laws: the South African Schools Act 88 of 1994 dealing with basic education; the Social Assistance Act dealing with public relief and assistance; the Unemployment Insurance Act 64 of 2001 dealing with social security; the Basic

²³⁴ Arts 14, 17(3), 20, 22, 23, 24 and 29(1). Civil rights include: religion (art 4), association (art 15) and administrative assistance (art 25(4)).

²³⁵ S 152 of the Constitution spells out the objects of local government which include, among other things, to promote the social and economic development of a local community.

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Conditions of Employment Act 75 of 1997 dealing with the basic standards for employment with regard to working hours, leave, payment, dismissal and dispute resolution; and the Income Tax Act 58 of 1962 dealing with the rate of tax to be levied in respect of taxable income of any natural person, deceased estate, insolvent estate or special trust. The same approach should apply to laws regulating properties.²³⁶

2.3 The minimum standard of treatment of non-citizens in South Africa

In South Africa, the Constitution, the Immigration Act and the Refugees Act are guiding instruments regarding the treatment of non-citizens in general and refugees in particular. Whereas the South African Constitution vests the right to equal treatment and protection of the law in everyone, without distinction based on citizenship or nationality,²³⁷ section 27(b) of the Refugees Act entitles refugees to the enjoyment of full legal protection, which includes the rights set out in the Bill of Rights.²³⁸ On the other hand, the Refugees Act does not specify in clear terms to what extent the constitutional rights of asylum-seekers should be protected. Section 27A(d) of the Refugees Act provides that an asylum-seeker “is entitled to the rights contained in the Constitution..., in so far as those rights apply to an asylum seeker”. This provision, which was incorporated in the Refugees Act in 2008, raises a number of questions relating to the extent to which asylum-seekers are protected by various rights in the Bill of Rights.

As a point of departure, it should be noted that difficulties in the determination of rights arise from the expectation that refugees and asylum-seekers must take care for their own socio-economic needs, as the Refugees Act is silent on the question

²³⁶ South African property law revolves around the following statutes: the Proclamation on Conversion of Loan Places to Quitrent Tenure of 6 August 1813; the Laws Deeds Registries Act 13 of 1918; the Notarial Bonds (Natal) Act 18 of 1932; the Deeds Registries Act 47 of 1937; the Insolvency Act 24 of 1936; the Group Areas Act 41 of 1950; the Removal of Restrictions Act 84 of 1967; the Prescription Act 68 of 1969; the Local Government Transition Act 209 of 1993; the Security by Means of Movable Property Act 57 of 1993; the Land Reform (Labour Tenants) Act 3 of 1996; Water Services Act 108 of 1997; the White Paper on SA Land Policy of April 1997; the Extension of Security of Tenure Act 62 of 1997; the Mining Titles Registration Act 16 of 1997; the National Water Act 36 of 1998; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; the Mineral and Petroleum Resources Development Act 28 of 2002; and the National Credit Act 34 of 2005.

²³⁷ S 9.

²³⁸ S 27(b) of the Refugees Act.

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whether they should benefit from state support.²³⁹ These difficulties are compounded by the fact that neither the Refugees Act nor the Regulations in terms of the Refugees Act carefully defines the rights of asylum-seekers. The most controversial rights are the rights to employment and education, to which asylum-seekers were, prior to the ruling of *Watchenuka* handed down in 2014, not entitled. It was indicated in the 2016 Green Paper on International Migration that the automatic right to work and study would be removed since asylum-seekers would be placed in a processing centre where their basic needs would be catered for.²⁴⁰

According to DHA, the court in *Watchenuka* extended these rights to asylum-seekers because there was no state support.²⁴¹ Because South Africa does not offer public relief and assistance such as basic food and accommodation, the court obliged the state to extend to them the right to earn a living and to undertake vocational training or studies. In principle, the difference between asylum-seekers and refugees in terms of enjoying constitutional rights is grounded by the Refugees Act in the conceptual notion that the SCRA is mandated to determine an asylum-seeker's conditions of stay as it may see fit. Conditions must not be in conflict with the South African Constitution.²⁴² On the other hand, refugees automatically enjoy constitutional rights on the basis of full legal protection.

A further distinction is made on the basis of refugee documentation. The exclusion of asylum-seekers from enjoying certain constitutional rights is justified on the basis that they are not entitled to a refugee identity document ("refugee ID").²⁴³ Asylum-seekers consequently "do not have access to a thirteen-digit identification number,"²⁴⁴ resulting in their exclusion from a number of rights and benefits whose accessibility is dependent on the provision of an ID. These rights and benefits include but are not limited to Unemployment Insurance Fund ("UIF") benefits and social grants.²⁴⁵ In certain hospitals or clinics, asylum-seekers are denied health

²³⁹ Legal Resource Centre (LRC) "A Practical Guide for Refugees: The Asylum Process in South Africa" 20-06-2013 *Legal Resource Centre* <<http://lrc.org.za/lrcarchive/publications/booklets/item/a-practical-guide-for-refugees-the-asylum-process-in-south-africa>> (accessed 27-07-2016) 7.

²⁴⁰ The 2016 Green Paper 12, 66-67.

²⁴¹ 12.

²⁴² *Watchenuka* para 10. See too s 21(1) of the Refugees Act.

²⁴³ Reg 15(1)(b) of Regulations to the Refugees Act, read in tandem with s 27(d), states that a refugee is entitled to a refugee identity referred to in s 30 of the Act.

²⁴⁴ LRC *A Practical Guide for Refugees* 2.

²⁴⁵ 2-3.

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services because they do not have refugee IDs.²⁴⁶ Despite these practical limitations, civil organisations such as the Legal Resources Centre (“LRC”), Scalabrini and the Children Legal Centre (“CLC”) are of the view that asylum-seekers (like refugees) are entitled to the same human rights contained in the Bill of Rights as citizens, “except for the right to vote and the right to form a political party.”²⁴⁷ The refugee ID appears to be a mechanism that is used to discriminate against asylum-seekers with respect to accessing public goods and services. In principle, once asylum-seekers are recognised as refugees, they are entitled to the refugee ID in terms of section 27(d) of the Refugees Act, read together with section 30 of the Act. To this end, asylum-seekers are excluded from certain services on the ground that they are yet to be recognised as refugees. The decisions on their applications are still pending. On this view, until their applications are successful, they can neither be entitled to the refugee ID nor be accorded the same treatment accorded to refugees.²⁴⁸ Nonetheless, refugees and asylum-seekers are accorded the same treatment with respect to the right to adequate housing. Both are excluded from accessing adequate shelter or social housing as the Housing Act 107 of 1997 (“Housing Act”) restricts the right to housing to citizens and permanent residents.²⁴⁹

Whereas the Refugees Act attempts to accord to refugees and asylum-seekers national treatment based on constitutional protection, the Immigration Act places substantial restrictions on the right to equal treatment of non-citizens. It creates a two-dimensional approach to the protection of non-citizens, which encompasses both exclusion and inclusion. The exclusionary approach applies to temporary residents, whereas the inclusive approach applies to permanent residents. Temporary residents are largely excluded from equal treatment with respect to socio-economic rights, in order to protect and preserve national interests.²⁵⁰ They can only

²⁴⁶ E J E Eghosa *Seeking Asylum in South Africa: The Experiences of Migrants from the Central Africa Region* Master Thesis University of Pretoria (2015) 53-55.

²⁴⁷ Legal Resource Centre “Rights and Duties of Asylum-seekers and Refugees in South Africa: Guide 3” (2015) <http://www.probono.org.za/Manuals/Refugee-Manual/2015_Asylum_seeker_guide_Rights_and_Duties_of_asylum_seekers.pdf> (accessed 12-07-2016) 2.

²⁴⁸ According to DHA, about 90% of asylum applications do not succeed, implying that they are individuals seeking access to education, healthcare, work or business opportunities (the 2016 Green Paper 63). See further the discussion under 4.3.1 analysing the legal position of an asylum-seeker within the asylum framework.

²⁴⁹ S 1(vi) of the Housing Act.

²⁵⁰ The exclusion of non-citizens is usually justified on the basis of self-preservation which correlates with the power of a sovereign state, in the exercise of its sovereignty, to admit into its boundaries such persons as it deems advisable. See, for example, art 1 of the Caracas Convention on Territorial

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be included in socio-economic schemes upon being granted permanent residence permits. Temporary residents are excluded from social welfare by setting out conditions upon which non-citizens can be admitted and stay in the country.²⁵¹ This comes as no surprise as it is a common practice under international law for sovereign states to exclude non-citizens with temporary status from social welfare for the protection of their own citizens.²⁵² Each state has a duty to protect its own citizens, whether they are inside or outside its own boundaries.²⁵³ The exclusion of temporary residents is justified on the ground that they do not “owe a duty of allegiance to the state”.²⁵⁴

More fundamentally, governments are, according to John Locke, established for the apolitical goal of self-preservation in that “the fundamental, sacred and unalterable law of self-preservation” requires the state to ensure safety, security, peace and social harmony for citizens’ “secure enjoyment of their properties and greater security against outsiders”.²⁵⁵ Due to the emphasis in immigration law on self-preservation, the protection of non-citizens does not, as a rule, include the equal protection of socio-economic benefits, as immigrants have been admitted on the condition that they should fend for themselves and their dependants.

The state’s power to exclude temporary residents from the treatment accorded to citizens was recognised in *Watchuneka*. In this case, the SCA referred to the maxim that “every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of non-citizens within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to describe.”²⁵⁶ The Constitutional Court, in *Union of Refugee Women*, also took account of the fact that certain constitutional and statutory rights are reserved for citizens only.²⁵⁷ The principle that all citizens should enjoy equal rights is not extended to non-citizens on an equal basis, as their own states bear the primary

Asylum, 28 March 1954, OEA/Ser.X/1. Treaty Series 34 and *Watchuneka* para 29 referring to the decision of *Nishimura Ekiu v The United States* 142 US 651, 659.

²⁵¹ Admission is granted on terms and conditions that a non-citizen proves that he or she is a law-abiding citizen and can support him- or herself and his or her dependants during the stay, see s 10(4) of the Immigration Act.

²⁵² Larking *Refugees and the Myth of Human Rights* 18.

²⁵³ 18. Whilst in South Africa, non-citizens still enjoy the protection of their states of nationality through diplomatic protection.

²⁵⁴ *Khosa* paras 59, 125, 130.

²⁵⁵ Larking *Refugees and the Myth of Human Rights* 86.

²⁵⁶ *Watchuneka* para 29 referring to the decision of *Nishimura Ekiu v The United States* 142 US 651, 659.

²⁵⁷ *Union of Refugee Women* para 46.

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responsibility to protect their rights. Drawing on these assumptions, South Africa has, in exercising its sovereignty, set out the minimum standard of treatment of non-citizens under the Immigration Act.

2 3 1 Immigration framework: Exclusionary regime

South Africa's immigration law consists of rules and norms that govern non-citizens' eligibility to be admitted into the country; to acquire temporary or permanent residence; to have access to the labour market or other socio-economic benefits and to participate in the social life of local communities. The immigration rules and norms provide for the general treatment of non-citizens. Immigration rules do not offer preferential treatment to non-citizens since they couch general treatment in exclusionary terms. The terms are developed on the basis of the twin principles of exclusivity and self-sufficiency. The self-sufficiency approach entails that non-citizens are admitted in the country on the condition that they should provide for themselves and their dependants.²⁵⁸ In this regard, section 10(4) of the Immigration Act plainly states that "[a] visa is to be issued on terms and conditions that the holder is not or does not become ... an undesirable person". The term undesirable person is defined to include those non-citizens whose financial means has been depleted to such an extent that they are no longer able to care for themselves and their dependants and that they are, as a result, a public charge.²⁵⁹ Undesirable persons include non-citizens who have been judicially declared incompetent²⁶⁰ or an un-rehabilitated insolvent.²⁶¹ It is worth reiterating that the principle of exclusivity takes root in the notion of self-sufficiency, implying that non-citizens must be financially stable and self-reliant, that they must have sufficient means to support their essential needs, and that they cannot be included in South Africa's social welfare programmes.²⁶² Those non-citizens to whom the twin principles apply are non-citizens with temporary visas or permits. They are, in law, known as temporary residents.

These twin principles have legal implications. Temporary residents who become indigent or destitute during their stay would be declared undesirable, resulting in their

²⁵⁸ Kavuro (2015) *J Sustain Dev Law Policy* 193.

²⁵⁹ S 30(1)(a) of the Immigration Act.

²⁶⁰ S 30(1)(c).

²⁶¹ S 30(1)(d).

²⁶² Kavuro (2015) *J Sustain Dev Law Policy* 193.

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visas being revoked. Once a visa is revoked, they become illegal foreigners, who are subject to expulsion or deportation.²⁶³ In other words, they must be expelled or deported since they do not meet the threshold requirements prescribed by the immigration framework. Under the immigration regime, refugees and asylum-seekers fall under the group of non-citizens with temporary residence status. They are admitted in the country in accordance with section 23 of the Immigration Act as discussed earlier. Section 23 stipulates that an asylum transit visa must be issued to “a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office (“RRO”) in order to apply for asylum”. As temporary residents, section 10(1), read together with section 10(4), subjects refugees and asylum-seekers to the twin principles of exclusivity and self-sufficiency within the immigration framework. It is within the context of this immigration framework that the proposed amendment to the Refugees Act requires the assessment of asylum-seekers “to determine [their] ability to sustain [themselves] and [their] dependants, with the assistance of family or friends, for a period of at least four months”.²⁶⁴ However, the 1950 Statute of the Office of the United Nations High Commissioner for Refugees (“the Statute of the UNHCR”) makes it clear that refugees should be admitted in the host countries irrespective of their social and economic status,²⁶⁵ whereas the Geneva Refugee Convention states that refugees should be admitted on a humanitarian basis and cannot be deported on the basis of non-compliance with the immigration rules.²⁶⁶ As noted, the admission, reception and protection of refugees must be understood as a humanitarian act in terms of the African Refugee Convention and must thus be excluded from the immigration requirements.

From an immigration policy perspective, only non-citizens with permanent residence permits are excluded from the scope of the twin principles.²⁶⁷ Of concern is that nothing in the Refugees Act stipulates that refugees or asylum-seekers must be offered humanitarian and social assistance upon their arrival in South Africa, while their application for asylum is considered, or thereafter. In this way, South

²⁶³ S 32(2) provides that “[a]ny illegal foreigners must be deported”.

²⁶⁴ S 22(6)-(7) of the Refugees Act as is suggested to be amended by cl 18 of the Refugees Amendment Bill [12-2016].

²⁶⁵ Art 8(d) of the Statute of the UNHCR.

²⁶⁶ Preamble, read in tandem with art 31 of the Geneva Refugee Convention.

²⁶⁷ S 10(1).

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Africa's asylum law is oriented towards self-integration.²⁶⁸ Notwithstanding the self-integration approach, non-citizens seeking asylum are protected by the Refugees Act upon expressing their intention to apply for asylum. As a result, they cannot be deported or expelled if they are not self-sufficient as they are protected by the principle of *non-refoulement*. This principle is entrenched under section 2 of the Refugees Act.

The immigration framework defines the minimum standard of treatment of non-citizens to mean enjoyment of civil rights to the exclusion of socio-economic benefits, advantages and privileges. Non-citizens cannot enjoy socio-economic rights at the state's expense. They cannot seek any state support to enhance or improve the quality of their lives. Whilst the state has positive constitutional obligations to subsidise public goods and services through measures aimed at promoting equal access of people who are vulnerable to poverty, these entitlements to socio-economic goods typically accrue to indigent citizens and permanent residents. Temporary residents are usually excluded from the beneficiaries of these rights, even if they are poor and vulnerable. This standard of treatment was confirmed by the Constitutional Court in *Khosa*. The court ruled that access to socio-economic schemes by non-citizens with temporary resident status "would impose an impermissibly high financial burden on the state".²⁶⁹ It is constitutionally sound to bar them from accessing social welfare. An inference that can be deduced from this approach is that those who are likely to become a burden on the state must be expelled.

The ruling of the Constitutional Court is in line with section 3 of the South African Constitution and section 25(1) of the Immigration Act. Whereas section 3 states that "all citizens are equally entitled to the rights, privileges and benefits of citizenship and equally subject to the duties and responsibilities of citizenship,"²⁷⁰ section 25(1) states that a permanent resident "has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship".²⁷¹ The Immigration Act thus

²⁶⁸ L B Landau "Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy" (2006) 3 *Journal of Refugee Studies* 308 308; and Kavuro (2015) *J Sustain Dev Law Policy* 196.

²⁶⁹ *Khosa* para 59-60.

²⁷⁰ S 3(2)(a)-(b).

²⁷¹ S 25(1).

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distinguishes between the implications of immigration law for permanent residents and for temporary residents.²⁷²

In *Union of Refugee Women*, the Constitutional Court, as per the majority judgment, ruled that the refugee and immigration laws accord refugees the same treatment as is accorded to non-citizens with temporary residence status, with certain exceptions.²⁷³ The court explained that a refugee can equally be entitled to the rights, privileges and benefits enjoyed by a permanent resident provided that he or she has acquired permanent resident status in terms of section 27(d) of the Immigration Act, read in tandem with section 27(c) of the Refugees Act. Such status can primarily be granted “when a refugee has been continuously resident in South Africa for five years after he or she was granted asylum and the SCRA has certified that he/she will remain a refugee indefinitely.”²⁷⁴ In the absence of permanent resident status, a refugee cannot be treated as if he or she is a permanent resident because the Geneva Refugee Convention does not entitle refugees to be afforded the same treatment as permanent residents.²⁷⁵

Grounding the treatment of refugees in the minimum standard accorded to temporary residents effectively deprives refugees of access to socio-economic rights. This standard cannot respond to the needs of refugees who are desperate due to their physical deprivation caused by forced migration.

2 3 2 Refugee framework: Inclusive regime

The Refugees Act is couched in the values of equality, dignity and freedom because it was crafted in line with the spirit, purport, and objects of the Bill of Rights. It is also through the Refugees Act that the principles and rules of the Geneva Refugee Convention were transposed into the South African legal order. Added to this is the spirit and object of the African Refugee Convention. The adoption of the Refugees Act has the following implications: First, it defines the standard of treatment of refugees and asylum-seekers in South Africa. Such treatment is

²⁷² *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC) paras 24-25.

²⁷³ *Union of Refugee Women* para 50.

²⁷⁴ Para 50. S 27 of the Refugees Act is expected to be amended by cl 23 of the Refugees Amendment Bill [B12-2016] in order to extend the period of five years to the period of 10 years, in which a refugee qualifies to apply for permanent residence.

²⁷⁵ Refugees “may not be treated as permanent residents because they are not in the same circumstances for the simple reason that they have yet to meet the requirements for permanent residence”. *Union of Refugee Women* paras 64-65.

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conceived in terms of equal access to the rights in the Bill of Rights, including socio-economic rights and benefits. In all refugee matters, the refugee framework supersedes immigration rules and principles, given that refugee law is special law dealing with refugees and asylum-seekers whereas immigration law deals with non-citizens generally.²⁷⁶ Second, it does not make reference to the four standards of treatment provided for by the Geneva Refugee Convention. Rather, refugee protection is founded on equal protection as is accorded to citizens with respect to all fundamental rights, except those rights reserved to citizens.²⁷⁷ Thirdly, it makes it mandatory to interpret and apply the rights of refugees in light of international refugee and human rights conventions.²⁷⁸

Although the fundamental rights enshrined in the South African Constitution appear to apply to refugees and asylum-seekers on an equal basis, the Refugees Act uses different terminology in relation to these two groups. Section 27(b) states that refugees must enjoy full legal protection, which includes the rights in the Bill of Rights, except those that only apply to citizens. On the other hand, section 27A(d) states that asylum-seekers are entitled to the rights in the Bill of Rights, insofar as those rights apply to an asylum seeker. These differences in formulation raise interpretive difficulties. For instance, section 27A(d) sounds like a tautology (asylum-seekers are entitled to the rights which apply to them), and it is not clear how the protection offered to them differs from full legal protection.

Section 27(b), with its reference to full legal protection, extends rights traditionally associated with citizenship to refugees. It does not only accord to refugees civil rights but also socio-economic rights as well as some rights which have a political dimension.²⁷⁹ These are cosmopolitan rights contained in the Bill of Rights. The notion of full legal protection led the minority judgment in *Union of Refugee Women*

²⁷⁶ According to the *maxim generalia specialibus non derogant*, it is presumed that if lawmakers have, after considering all circumstances, adopted a special law for a particular case, a law of general character would not interfere with a special law. In cases such as this, “the special provision stands as an exceptional proviso upon the general.” See, for example, *Edmond v. U.S.*, 520 U.S. 651; *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653; *Seward v. Owner of "The Vera Cruz"*, (1884) 10 App Cas 59 and *the Privy Council in Barker v Edger*, [1898] AC 748. See further JR de Ville *Interpretation* 66, 79-81, 175.

²⁷⁷ Despite the grounding of the standard of treatment in national protection, the Refugees Act appears to create two standards of treatment. The first applies to refugees, who are entitled to constitutional rights on the basis of the full legal protection principle. The second applies to asylum-seekers, and refers to something less than full legal protection, although the meaning of the standard is far from clear. See the discussion under section 2.3.

²⁷⁸ S 6.

²⁷⁹ Political rights, for example, include the right to freedom of association, the right to demonstrate and the right to freedom of expression.

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to state that refugees are accorded the same treatment as accorded to non-citizens with permanent resident status.²⁸⁰ In light of the minority judgment, the notion of full legal protection should presumably be interpreted to mean entitlement to all the rights, benefits, privileges, duties and obligations of a citizen, save for those rights, benefits, privileges, duties and obligations which a law restricts to citizens. Mokgoro and O'Regan JJ observed that:

“Refugees who have been granted asylum are a special category of foreign nationals. They are more closely allied to permanent residents than to those foreign nationals who have rights to remain in South Africa temporarily only. Permanent residents have a right to reside in South Africa and enjoy all the rights, privileges, duties and obligations of citizens save for those which a law or the Constitution explicitly ascribes to citizenship. Recognised refugees also have a right to remain in South Africa indefinitely in accordance with the provisions of the Refugees Act so their position is closer to that of permanent residents than it is to foreign nationals who have only a temporary right to be in South Africa or foreign nationals who have no right to be here at all.”²⁸¹

The special position of refugees in the South African legal system thus finds expression in the notion of full legal protection which affords refugees the same constitutional treatment as accorded to citizens or permanent residents. This principle is grounded in the South African Constitution, which recognises rights which apply universally to all people within South Africa. It is also linked to the fact that, since South Africa does not apply the Napoleonic Codes, non-citizens are traditionally not subject to the conditions of reciprocity but enjoy civil rights. The Refugees Act extends the protection traditionally given to non-citizens, by entitling refugees to access to socio-economic rights on an equal basis with citizens.

On the other hand, the Refugees Act grounds equal treatment for asylum-seekers in the recognition that they are bearers of universal constitutional rights, including socio-economic rights and benefits:

An asylum-seeker is entitled to the rights contained in the Constitution of the Republic of South Africa, 1996, in so far as those rights apply to an asylum seeker.²⁸²

²⁸⁰ *Union of Refugee Women*, paras 97-99.

²⁸¹ Para 99.

²⁸² S 27A(d) of the Refugees Act.

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It is clear that equal protection is afforded to asylum-seekers with respect to all rights in the Bill of Rights that reside in everyone. There is no doubt that there must be differentiation between asylum-seekers and other foreign nationals so as to grant them more favourable treatment than that prescribed by the Immigration Act. Deviation from the immigration exclusionary regime is a prerequisite. In a number of cases, the SCA has stressed that the duty to deviate from the same standards applied to non-citizens with temporary status should be understood with reference to the principles of human dignity and *non-refoulement*.²⁸³ Human dignity is a cornerstone of constitutional obligations to protect a human person whereas *non-refoulement* is a cornerstone of international refugee protection. *Non-refoulement* is a legal safeguard against any legal deficiency or discrimination that may give rise to constructive *refoulement*.

The need to assimilate refugee rights within legislation dealing with socio-economic rights and benefits has to a large extent been ignored. Instead, refugee rights tend to be accommodated on the same terms that apply to non-citizens with temporary residence status. This narrow interpretation of refugee rights does not address the social reality of refugees and asylum-seekers. Since asylum-seekers, like refugees, live mostly in urban areas and in abject poverty and deprivation, they cannot satisfy their basic necessities in life without positive state action.²⁸⁴ Unlike in other countries, asylum-seekers are not placed in centres where their basic needs could be attended to by the state, whilst they are awaiting decisions on their cases. In that respect, their survival is dependent on access to social and economic rights. This is important, given that the international obligation to protect refugees and asylum-seekers is not premised on their ability to demonstrate that they control sufficient available resources to maintain them during asylum. Rather, asylum is granted on the basis of the alleviation of human suffering and appalling conditions as well as protecting against human rights abuses. In order to achieve this, the Refugees Act envisages the full legal protection of refugees, which is similar to the treatment applied to permanent residents, and universal protection to asylum-

²⁸³ *Somali Association of South Africa* para 44, *Watchenuka* para 32 and *Union of Refugee Women* para 135.

²⁸⁴ Kavuro (2015) *J Sustain Dev Law Policy* 181.

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seekers, which is based inter alia on the principle of non-*refoulement* and the protection of asylum-seekers against the denial of their human dignity.

2.4 The meaning of equality under the Constitution

Equality is central to the protection of human rights.²⁸⁵ It occupies a special place in South Africa's Constitution, in view of the vast inequality and institutionalised discrimination characterising South Africa's past, and the need to achieve an egalitarian society. Equality is recognised as a constitutional right, a foundational value, and an interpretative tool.²⁸⁶ Its unique value lies at the heart of the Bill of Rights.²⁸⁷ The principle of equality permeates and defines the Bill of Rights²⁸⁸ and informs the interpretation of all Acts of Parliament, including the Refugees Act which creates a special dispensation for refugees and asylum-seekers to be treated equally with special concern.²⁸⁹ Albie Sachs maintains that the principle of equal protection was entrenched in the South African Constitution to demand "positive action on the part of the state to enable people to live in conditions consistent with the minimum standards of human dignity".²⁹⁰ Sachs views equal protection as a principled and powerful legal tool that can be used by the state to strengthen the position of those who were compelled "to live in disadvantage at the margins of society" by racial policies.²⁹¹

As observed earlier, equal treatment in respect of access to socio-economic rights for refugees and asylum-seekers is controversial, given that they are seen as temporary residents. It has been demonstrated that the state should go beyond their temporary resident status to accord to them special protection that would ensure favourable access to socio-economic rights and benefits. Treating refugees and asylum-seekers as temporary residents cannot account for their special status and

²⁸⁵ See, for example, preamble and art 1 of the 1945 Charter of United Nations; preamble and arts 1, 7 of the 1948 Universal Declaration of Human Rights; preamble and art 7 of the 1963 Declaration on the Elimination of All Forms of Racial Discrimination; preamble and art 3 of the ICESCR; preamble and arts 25(c), 26 of the ICCPR; and preamble and art 3 of the ACHPR.

²⁸⁶ Ss 1, 7, 9, 36, 39 of the Constitution.

²⁸⁷ *Khosa* para 85.

²⁸⁸ *Fraser v The Children's Court* 1996 8 BCLR 1085 (CC) para 20; *Brink v Kitshoff* 1996 4 SA 197 (CC) para 33; *S v Makwanyane* 1995 3 SA 391 (CC) paras 155 - 6 and 262; and *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC) para 26.

²⁸⁹ Its preamble states that the passage of the Refugees Act creates an obligation to receive and treat refugees in accordance with the standards and principles established in international law.

²⁹⁰ A Sachs "The Judicial Enforcement of Socio-Economic rights: The *Grootboom* Case" in P Jones & K Stokke *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 137-138.

²⁹¹ 137.

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the rights that accompany that status. The question whether they should be afforded the same treatment as citizens, permanent residents or temporary residents raises questions as to the meaning and implications of the right to equality. The fact that equality is a contested concept adds to the complexity of these questions.²⁹² Equality's meaning within concrete situations is best explained with reference to the distinction between formal and substantive equality.

2 4 1 Formal Equality

From the perspective of formal equality, equality means sameness of treatment, that is, the state must "treat people in like circumstances alike"²⁹³ or provide identical treatment to everyone.²⁹⁴ It prohibits "laws from excluding anyone or drawing any distinction between people".²⁹⁵ In this context, the question of whether laws negatively and adversely affect individuals or groups of people is irrelevant. In a complex world, what counts is to treat "like cases alike" and "unlike cases differently".²⁹⁶ In the formal equality perspective, favourable treatment on the basis of specific distinctions, such as race, sex, poverty, refugee status or asylum-seeker status is presumed arbitrary.²⁹⁷ This approach assumes that people are in an equal socio-economic position.²⁹⁸ Accordingly, it is not concerned with entrenched, systemic, systematic or structural inequality.²⁹⁹ Hence it does not seek to address or respond to actual social and economic hardships that vulnerable individuals and groups suffer from. It is based on a standard that appears to be neutral with respect to social and economic needs and experiences.³⁰⁰ Formal equality is not a proper mechanism to protect the socio-economic needs of refugees and asylum-seekers because it does not allow for a consideration of their vulnerability. Formal equality is

²⁹² It is sometimes even claimed that equality has no substantive meaning on its own and that it is not an independent right. See L W H Ackermann "Equality and Non-Discrimination: Some Analytical Thoughts" (2006) 22 *SAJHR* 597, 597, 601; H Botha "Human Dignity in Comparative Perspective" (2009) 20 *Stell LR* 171, 213; and H Botha "Equality, Dignity, and the Politics of Interpretation" (2004) 19 *SAPR/PL* 724, 746-751.

²⁹³ Currie & de Waal *Bill of Rights* 232.

²⁹⁴ D Greschner "Does Law Advance the Cause of Equality?" (2001) 27 *Queen's Law Journal* 299, 302.

²⁹⁵ 303.

²⁹⁶ 302.

²⁹⁷ 302.

²⁹⁸ C Kavuro "Refugees and Asylum Seekers: Barriers to Accessing South Africa's Labour Market" (2015) 19 *Law, Democracy & Development* 232, 253.

²⁹⁹ C Albertyn & J Kentridge "Introducing the Right to Equality in Interim Constitution" (1994) 10 *SAJHR* 149, 152.

³⁰⁰ 152.

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closely linked to a classical liberal understanding of equal opportunity,³⁰¹ which does not require the state to examine the actual conditions of individuals and groups for the purpose of addressing social and economic disparities so as to achieve a just society.³⁰² Proponents of this form of liberalism would be more inclined to question the need for social welfare programmes which are used to channel resources to the poor.

Constitutionally, a commitment to formal equality is reflected in equal access to socio-economic rights and benefits by virtue of universal entitlement. This implies that everyone – regardless of his or her socio-economic status – can theoretically claim equal access to social welfare.³⁰³ At the same time, however, socio-economic rights are applied differently to different people, depending on their circumstances. A commitment to formal equality would not change deep-rooted social inequalities but sustain them. The emphasis on addressing social inequalities led South Africa to view formal equality approach as an inappropriate tool to ensure that socio-economic disadvantages are remedied.

A formal approach to equality which is blind to the differences between people would result in an exacerbation of inequality and would prejudice vulnerable people such as refugees and asylum-seekers. An approach based on differential or favourable treatment must therefore be followed.³⁰⁴ This requires a substantive understanding of equality which requires the government to consider the social and economic vulnerabilities of individuals and groups to accord to them differential treatment for the achievement of effective economic and social equality.³⁰⁵

2 4 2 Substantive equality

Section 9(2) of the South African Constitution is underpinned by a substantive vision of equality. It is aimed at restoring the dignity of a large number of citizens who

³⁰¹ The principle of equal opportunity as advocated by philosopher Robert Nozick revolves around the notion that it is unjust for the state to distribute wealth from the rich to the poor. Distribution should come about in accordance with the rules of acquisition, transfer and rectification regardless of how unequal such distribution may be. In addition, the state should ensure equal opportunities to raise their income and to own what they make. See DD Raphael *Concept of Justice* (2001) 214-215 and C Kavuro “The South African Constitution and the Social Justice Jurisprudence of the Constitutional Court” (2012) 1 *Young African Research Journal* 100, 106-107.

³⁰² Albertyn & Kentridge (1994) *SAJHR* 152.

³⁰³ *Khosa* para 42.

³⁰⁴ S Albertyn & S Fredman “Equality beyond Dignity: Multi-dimensional Equality and Justice Langa’s Judgments” (2015) *Acta Juridica* 430, 433-435.

³⁰⁵ Albertyn & Kentridge (1994) *SAJHR* 152.

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suffered debasing treatment, discrimination and prejudice due to the unjust laws and policies of the past. With the aim of redressing the inequalities of the past, section 9(2) provides that:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

Seen from this point of view, substantive equality invokes distinction of treatment, that is, the state must ensure equality of outcome and, in so doing, must “tolerate disparity of treatment to achieve this goal”.³⁰⁶ It is concerned with addressing issues related to major inequalities in people’s resources, political and social power and well-being, or arising from exploitation and oppression, through the equitable distribution of rights, benefits, opportunities, burdens, and choices.³⁰⁷ In Albertyn and Goldblatt’s view, the doctrine of substantive equality can be used by the poor to claim “positive state action” for the protection of their dignity.³⁰⁸ This view is echoed by Moseneke J, who states that substantive equality sometimes necessitates measures that “disfavour one class to uplift another”. In light of substantive equality, socio-economic schemes must be designed to protect and advance disadvantaged groups.³⁰⁹

On this basis, the Constitutional Court has developed a substantive equality jurisprudence, laying the foundation for the transformation of South African society “from a grossly unequal society to one in which there is equality between men and women and people of all races”.³¹⁰ The Constitutional Court has, in *Port Elizabeth Municipality v Various Occupiers* (“*Port Elizabeth Municipality*”),³¹¹ reasoned that the South African society is demeaned when national measures intensify social

³⁰⁶ Currie & de Waal *Bill of Rights* 232.

³⁰⁷ Greschner (2001) *Queen’s Law Journal* 303. See too Currie & de Waal *Bill of Rights* 233 (Substantive equality requires the State to consider the actual socio-economic condition of groups and individuals in the achievement of constitutional equality).

³⁰⁸ C Albertyn & B Goldblatt “Towards a Substantive Right to Equality” in S Woolman (ed) *Constitutional Conversations* (2008) 247.

³⁰⁹ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 42-43.

³¹⁰ D Moseneke “Remarks: The 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa” (2003) *The Georgetown Law Journal* 749, 761, quoting *Bato Star Fishing v Minister of Environmental Affairs & Tourism* 2004 4 SA 490 (CC) para 74. See too *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 27 (all human beings must be accorded equal dignity, regardless of their position in a society) and *Fraser* para 20.

³¹¹ 2005 1 SA 217 (CC) (in respect of the eviction of the homeless people).

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inequality through marginalisation rather than mitigating it, or drive vulnerable people from pillar to post.³¹² In *Government of the Republic of South Africa v Grootboom* (“*Grootboom*”),³¹³ the court reasoned that socio-economic rights are personal and substantive rights that place a positive obligation on the state. In so doing, special concern must be given to the protection of the dignity of the most vulnerable people, “who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”.³¹⁴ In *Khosa*, the same court reiterated the importance of equality in respect of access to socio-economic rights, stating that the exclusion of vulnerable groups from accessing them has a detrimental effect on their dignity.³¹⁵ The court, in this case, confirmed the intersection between socio-economic rights and the values of equality, human dignity and freedom which, in the view of the court, “reinforces one another at the point of intersection”.³¹⁶

Proceeding from this line of reasoning, it is through the lens of substantive equality that the standards of favourable treatment envisaged by the Geneva Refugee Convention must be understood and applied. It has been argued throughout the chapter that standards of favourable treatment should be interpreted to mean differentiated treatment tailored to meet refugees’ and asylum-seekers’ socio-economic needs. When the Geneva Refugee Convention states that socio-economic rights must be accorded to refugees on a favourable basis, access to the said rights must then accordingly be framed in terms of substantive equality.

Despite the need for the favourable treatment of refugees, South Africa is reluctant to include refugees and asylum-seekers as co-beneficiaries of subsidised public goods and services. Owing to the twin principles, South Africa is confronted by conflicted and ambivalent attitudes towards the protection of genuine refugees and asylum-seekers, as opposed to other types of non-citizens such as economic migrants, illegal migrants and bogus asylum-seekers.³¹⁷ These categories of non-citizens fall within the ambit of undesirable persons or illegal foreigners as a result of

³¹² *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 18. See too *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23.

³¹³ 2001 1 SA 46 (CC).

³¹⁴ *Grootboom* paras 24, 45, 83, 94, 99.

³¹⁵ *Khosa* para 80.

³¹⁶ *Khosa* para 41 and *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 154.

³¹⁷ The Government does not differentiate between genuine refugees and bogus refugees and thus views all refugees as “bogus asylum-seekers and economic vultures that came into South Africa in search of a better life and thus a threat to South Africa’s security, economy, identity and sustainable development.” See Kavuro (2015) *J Sustain Dev Law Policy* 182.

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the fact that they do not meet immigration or refugee requirements.³¹⁸ These conflicted attitudes manifest themselves in the adoption of socio-economic measures that tend to distribute socio-economic rights and benefits to the advantage of South Africans and permanent residents. The exclusion of refugees and asylum-seekers from distributive measures precludes them from enjoying “favourable treatment”, as envisaged by the Geneva Refugee Convention; hence they are relegated to the same treatment accorded to temporary residents.

The exclusion is usually justified on the grounds of restrictive immigration policies, national security measures, and the empowerment of previously disadvantaged groups.³¹⁹ Irrespective of the appalling conditions in which they find themselves, refugees are viewed as people who were not disadvantaged as a result of apartheid policies. Moreover, their exclusion was consolidated by the majority judgment in *Union of Refugee Women*. The judicial debate in this case between the majority and minority on the legal position of refugees in South African society, illustrates the complexity of different approaches to equality. Whereas the minority adopted an approach based on substantive equality, the majority placed emphasis on the same treatment with temporary residents, when it stated that refugees “may not be treated as permanent residents because they are not in the same circumstances for the simple reason that they have yet to meet the requirements for permanent residence”.³²⁰ In terms of this approach, discrimination against refugees in the safety and security industry on the basis of their temporary resident status was found not to be unfair, given that such discrimination did not have the potential to impair their dignity³²¹ or impose hardship against them as temporary residents. This approach is grounded in formal equality as it views all temporary residents as people who are in identical situations.³²² It fails to come to terms with the unique position and legal status of refugees, and denies them favourable access to socio-economic rights.

³¹⁸ In principle, economic migrants are required to make use of the immigration policy which provided a mechanism to stay in the country for those in need of employment, trade, or education. Given the fact that they have no financial means to support themselves, they tend to use the asylum system to regularise their stay in cases where they could not secure visas. This is viewed by the state as abusing the asylum system.

³¹⁹ C Kavuro “Reflecting on Refugees and Asylum-Seekers Tertiary Education in South Africa: Tension between Refugee Protection and Education Transformation Policies” (2013) 4 *Global Education Magazine* 22, 24.

³²⁰ *Union of Refugee Women* para 65.

³²¹ Para 66.

³²² In terms of this approach, refugees must be treated as temporary residents simply because they are not in the same circumstances as permanent residents. See *Union of Refugee Women* para 65.

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The minority held a contrasting view. It argued that refugees should be differentiated from other non-citizens owing to the fact that refugees have a unique status in the South African legal system and that their socio-economic situation is not identical to that of any of the other categories of non-citizens.³²³ A failure to do so would effectively result in according little or no protection to refugees in relation to socio-economic rights, as temporary residents are excluded from socio-economic schemes.³²⁴ Sachs J in his concurring judgment expressed the view that the protection of refugees is grounded in the favourable treatment principle as a standard to safeguard refugees and asylum-seekers against driving them from pillar to post in a desperate need for the basic necessities of life.³²⁵

It is clear from this analysis that the standards of treatment – whether equal or favourable – should be interpreted in view of substantive equality. This approach would make sense of the Geneva Refugee Convention, which is based on the recognition of the extreme vulnerability of refugees and asylum-seekers, in view of the fact that they have lost the protection of their own state. The Geneva Refugee Convention's requirement that refugees be afforded favourable treatment in relation to certain socio-economic goods is rooted in an acknowledgment of their exceptional position. Refugees and asylum-seekers are in a different position than, say, economic migrants or undocumented migrants, and should therefore be treated differently from these groups of temporary residents. Favourable treatment under the Geneva Refugee Convention therefore overlaps with substantive equality under the South African Constitution, as both recognise the need for differentiated treatment, based on different kinds and varying degrees of disadvantage. Both these concepts are also supportive of the idea that a host state must take positive measures that promote favourable access to socio-economic rights,³²⁶ and advance the well-being of refugees and asylum-seekers. Provision of favourable or differentiated treatment on the basis of substantive equality is a central principle on which the African Refugee Convention is constituted.³²⁷

³²³ *Union of Refugee Women* para 108.

³²⁴ Para 108.

³²⁵ Para 134.

³²⁶ See the minority judgment delivered by Sachs J in *Union of Refugee Women* para 136 in which he noted that refugees “must receive legal protection and the opportunity to realise the most fulsome life possible in a foreign country”.

³²⁷ This is in line with the humanitarian approach to socio-economic problems envisaged by the African Refugee Convention.

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As we have seen, socio-economic protection in the context of substantive equality demands that policymakers pay attention to people's vulnerability and disadvantage and provide for differentiated treatment, tailored to alleviate their human suffering and poverty or to expand their freedom to live the life they wish to live.³²⁸ The obligation to provide favourable treatment does not simply amount to a duty to refrain from interference with the enjoyment of the socio-economic rights of refugees, but involves a duty to adopt legislative and other measures and programmes designed to assist the poor, vulnerable and marginalised in realising their constitutional rights. Substantive equality or favourable treatment validates preferential treatment aimed at protecting the inherent dignity and equal worth of human persons through socio-economic programmes that seek to redress poverty and deprivation.³²⁹ While there can be considerable disagreement about the best way to reconcile the rights of refugees with the rights of citizens, the state cannot justify the exclusion of refugees on the basis of claims of fraudulent applications, national security, immigration rules, or the absence of suffering from past racial practices.³³⁰ These grounds cannot be relied on to deprive refugees and asylum-seekers of measures that would create equal opportunities to live the life they value. They also cannot be invoked to deviate from international obligations to protect refugees.

2 4 3 Non-discrimination

As noted, the principle of non-discrimination plays a central role in the protection of the rights in the Bill of Rights. Under the equality clause, unfair discrimination is not allowed, but the prohibition of unfair discrimination does not rule out differentiations in treatment that are designed to remedy past discrimination. The equality clause protects individuals against unfair discrimination that may stem from differentiation based on irrational, unreasonable, illegitimate or unjustifiable grounds.³³¹ Section 9(3) of the South African Constitution provides as follows:

³²⁸ See Currie & de Waal 230-234; C Kavuro "The South African Constitution and the Social Justice Jurisprudence of the Constitutional Court" (2012) 1 *Young African Research Journal* 100, 113-115; and C Kavuro (2015) *Law Democracy & Development* 253-254.

³²⁹ Kavuro (2015) *J Sustain Dev Law Policy* 185.

³³⁰ See the minority judgment delivered by Sachs J in *Union of Refugee Women* para 136 in which he noted that "[i]t would accordingly be inappropriate for the state to act towards refugees in a manner that is consonant with the general discretionary provisions of the regime constructed upon immigration, security, and other municipal priorities, while ignoring the specific obligations that flow from the refugee regime."

³³¹ Currie & de Waal *Bill of Rights* 243.

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“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.

First, section 9(3) provides more grounds than those contained in article 3 of the Geneva Refugee Convention³³² and article 4 of the African Refugee Convention.³³³ Second, the listed grounds are not a closed list or exhaustive, meaning that there are other grounds that can be analogous to them.³³⁴ The Constitutional Court in *Harksen v Lane NO*³³⁵ defined an analogous ground as a ground that is “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner”.³³⁶ Discrimination on the basis of asylum-seeker status or refugee status or citizenship status can give rise to unfair discrimination if the discrimination or exclusion has the potential to impair the dignity of the person.

The question whether discrimination against refugees and asylum-seekers in relation to the right to work was unfair discrimination was considered in the case of *Union of Refugee Women*. The impact of such measures on the human dignity of those concerned was also considered in *Watchenuka*. In *Union of Refugee Women*, the Constitutional Court took into account that refugees and asylum-seekers experience economic distress because many of them have lost all their possessions as a result of forced displacement.³³⁷ Taking into consideration refugees’ socio-economic status, the court concluded that “discriminating against refugees involves discriminating against a vulnerable group of people such that discrimination against them will often impair their dignity or their rights in a serious manner”.³³⁸ In *Watchenuka*, the total exclusion of asylum-seekers from employment and education was found by the SCA to be constitutionally unacceptable as it rendered asylum-

³³² Listed grounds are race, religion and nationality.

³³³ Listed grounds are race, religion, nationality, membership of a particular social group and political opinions.

³³⁴ 243-244.

³³⁵ 1998 1 SA 300 (CC).

³³⁶ *Harksen* para 46.

³³⁷ *Union of Refugee Women* para 113.

³³⁸ Para 113.

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seekers destitute.³³⁹ The aggravation of destitution has the potential effect of objectifying and debasing asylum-seekers as they may be compelled to resort to crime, or to begging or foraging.³⁴⁰

Refugees and asylum-seekers may also not be discriminated against on the basis of citizenship. In *Larbi-Odam v MEC for Education (North West Province)*,³⁴¹ the Constitutional Court found that a provincial policy that barred all non-citizens (temporary and permanent residents) from being recruited in teaching positions was unfair discrimination. The ground of citizenship or nationality was found to be based on attributes and characteristics that have the potential to impair the dignity of non-citizens.³⁴² In recognising the grounds of citizenship to be analogous to those listed in section 9(3), the Constitutional Court noted with concern that the state tends to overlook the interests of non-citizens who are a minority in all countries, who have little political muscle to influence decisions of policymakers, and whose personal citizenship attributes are difficult to change.³⁴³ It also noted that, historically in South Africa, discrimination based on citizenship or nationality was often a pretext for racial discrimination.³⁴⁴ In *Khosa*, differentiation on the ground of citizenship was found to have the potential effect of relegating a vulnerable group of non-citizens (i.e. permanent residents) to the margins of society.³⁴⁵ In addition, its effect deprives the vulnerable group of what may be essential to enable it to enjoy other fundamental rights vested in it under the South African Constitution.³⁴⁶ In *Khosa*, the decision was taken after a careful consideration of the meaning of section 25(1) of the Immigration Act which confers on permanent residents socio-economic rights contained in the South African Constitution.

Socio-economic rights and benefits are vested in refugees and asylum-seekers under both the South African Constitution and sections 27(b) and 27A(d) of the Refugees Act. The exclusion of refugees or asylum-seekers from socio-economic benefits on the basis of their citizenship status could be attacked on the basis that it violates their socio-economic rights and constitutes unfair discrimination. The

³³⁹ *Watchenuka* para 32-36.

³⁴⁰ Para 32.

³⁴¹ 1998 1 SA 745 (CC).

³⁴² *Larbi-Odam* para 24-26.

³⁴³ Para 19. See too *Khosa* para 71.

³⁴⁴ Para 19. See too *Khosa* para 71.

³⁴⁵ *Khosa* paras 77, 81.

³⁴⁶ Paras 77, 81.

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principles of equal protection and non-discrimination are reinforced by the standards of full legal protection and universal protection in terms of section 27(b) and 27A(d) of the Refugees Act, respectively. There are circumstances in which it might be permissible to discriminate between different classes of people based on citizenship or immigration status. According to Sachs J, there might be “substantive grounds of an objective character that are pertinent to the nature of [the right] that could render it fair to exclude [refugees or asylum-seekers]”.³⁴⁷ Because citizenship or immigration status is an analogous ground to those listed under section 9(3), the discrimination will not be presumed to be unfair in terms of section 9(5).³⁴⁸ The onus is therefore on the person claiming that the discrimination is unfair, to prove it. This must be done with reference to the criteria laid down in case law to determine fairness, such as the nature and purpose of the discrimination, whether the class of persons negatively affected has been subject to previous discrimination, and the impact of the discrimination on the complainants’ dignity.³⁴⁹ The constitutional prohibition of unfair discrimination has particular resonance in the context of the Geneva Refugee Convention, where the listed grounds of discrimination are limited to race, religion or nationality – grounds that can be expanded in accordance with judicial decisions and domestic law as well as international human rights law.³⁵⁰ These grounds are expanded under the African Refugee Convention to include political opinion and membership of a given social group.³⁵¹

2 4 4 Citizenship and its impact on distributive justice

The term citizen is used to refer to “the permanent inhabitants of a state whose rights and duties are different from those persons who are not citizens”.³⁵² Every state is established around a political community of the people whom it recognises as its own citizens and from whom it derives just powers to protect and distribute rights and benefits. The distribution of rights and benefits should be done on the

³⁴⁷ *Union of Refugee Women* para 128.

³⁴⁸ S 9(5) of the Constitution of the Republic of South Africa states that “[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.

³⁴⁹ *Harksen v Lane NO* 1998 1 SA 300 (CC) para 54.

³⁵⁰ A host state is bound to the principle of non-discrimination beyond art 3 of the Geneva Refugee Convention by the UDHR, the ICCPR, and the Convention on the Elimination of All Forms of Racial Discrimination. See Weis *The Convention* 41.

³⁵¹ Art IV.

³⁵² I M Rautenbach & E F J Malherbe *Constitutional Law* 4 ed (2004) 53.

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basis of doing justice to others. The concept of justice is defined by Plato as “to render each their due” and by Ulpian as “to live honestly, to injure no one, and to render to each their own”.³⁵³ These equitable doctrines and procedures flow from an ideal condition of justice and fairness which the state is not allowed to wither away. While these doctrines and procedures seem to ensure equality in the treatment of all human beings, distributive justice in the nation-state is closely bound up with the notion of citizenship. Distributive justice is defined as “distribution or allotment of honour, wealth, and other divisible assets of the [political] community among its members either in equal or unequal shares”.³⁵⁴ In terms of this definition, the distribution of national resources takes place on the basis of citizenship.

The preamble of the South African Constitution proclaims that the people of South Africa adopted the Constitution to heal the divisions of the past through the establishment of social justice. The concept of social justice is defined by John Rawls to refer to “the basic structure of a society, or more exactly, the way in which major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation”.³⁵⁵ In Rawls’ view, the distribution should be carried out on the basis of the principle of fairness, implying that socio-economic rights and benefits should be re-arranged by the institution of laws to benefit everyone, with a particular focus on the least advantaged.³⁵⁶

The pertinent question is whether the term “everyone” should be interpreted to mean everyone within the state’s dominion. The traditional answer to this question is no. The moral justification of the answer is inferred from the principle of self-preservation as noted above. Precedence is always given to members of the political community over outsiders and this view is supplemented by and correlates with the principle of the social contract.³⁵⁷ The principle is premised on the liberal notion that citizens, out of their personal interest, reach an agreement, leading to the establishment of sovereign power (i.e. a state), which, in turn, protects their general

³⁵³ A Flew “Social justice isn’t any kind of justice” (1993) *Libertarian Alliance, Philosophical Notes No 27* 1, 2.

³⁵⁴ R McKeon “Philosophy and History in the Development of Human Rights” in H Kiefer & M K Munitz (eds) *Ethics and Social Justice* (1968) 316; Flew (1993) *Libertarian Alliance (Philosophical Notes No 27)* 1, 2; and Kavuro (2015) *J Sustain Dev Law Policy* 185.

³⁵⁵ J Rawls *A Theory of Justice* (1971) 7.

³⁵⁶ 15.

³⁵⁷ B H Weston “Human Rights” (1984) 6 *Human Rights Quarterly* 257, 259.

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interests.³⁵⁸ It is therefore presumed that each and every one is a citizen of a certain state enjoying the protection of the government of that state.³⁵⁹

The concept of citizenship is therefore viewed as a principled mechanism through which the relationship with a state is established or through which an individual's legal identity is recognised and rights and benefits are normatively allocated and protected.³⁶⁰ Citizenship is seen as a vehicle through which social justice is achieved. As noted, social justice is concerned with the equal distribution of public benefits and the sharing of burdens and responsibilities among citizens.³⁶¹ Shared burdens include the well-being and health of non-citizens who are in distressful and desperate situations. The citizens of a nation-state do not always appreciate that the state has a responsibility towards non-citizens, especially refugees and asylum-seekers who are resident within the state's territory. Consequently, citizens express their unhappiness when the government caters for poor non-citizens and citizens' attitude towards refugees and economic migrants "appears daily to become less welcome".³⁶² In turn, immigration and refugee laws are frequently reviewed in a way which mirrors or provides tacit support for anti-foreigner sentiments, through the introduction of more restrictive immigration and refugee measures.³⁶³ These measures severely restrict the fundamental rights and freedoms of those who are viewed as outsiders or as not belonging in the political community. In South Africa, ill-sentiment towards non-citizens is not only strong but also widespread.³⁶⁴ Intolerance towards them "cuts across virtually every socio-economic and demographic group."³⁶⁵ This is perhaps the reason why the public administration lacks commitment to implement the national refugee policy which is praised to be progressive. Regardless of public opinion, John Locke claims that the principle of the

³⁵⁸ C W Maris & F C L M Jacobs *Law, Order and Freedom: A Historical Introduction to Legal Philosophy* (2010) 10-11; Rawls *A Theory of Justice* (1999) 10; and Weston (1984) *Human Rights Quarterly* 259.

³⁵⁹ Larking *Refugees and the Myth of Human Rights* 17.

³⁶⁰ 17.

³⁶¹ Kavuro (2012) *Young African Research Journal* 100-101.

³⁶² R Black "Immigration and Social Justice: Towards a Progressive European Immigration Policy" (1996) 21 *Trans Inst Geogr* 64, 64.

³⁶³ 64.

³⁶⁴ F B Nyamnjoh *Insiders and Outsiders: Citizenship and Xenophobia in Contemporary Southern Africa* (2006) 38. A phobia about non-citizens is connected with the citizens' misconception that non-citizens are economic vultures who are in the country to "usurp jobs and resources [and to] foster crime, prostitution and disease". See J Comaroff & L Comaroff "Naturing the Nation: Aliens, Apocalypse and the Postcolonial State" (2001) 7 *Social Identities* 252.

³⁶⁵ 38.

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social contract necessarily imposes a duty on the state to protect outsiders. This duty flows from the natural duties of citizens to secure the natural rights of others.³⁶⁶

The distribution of rights and public benefits on the basis of citizenship was, however, recognised by the *Ad Hoc* Committee as follows:

“Every state protects its nationals. Its protective influence extends beyond its frontiers. The mere fact that a person possesses a nationality, i.e. that he is linked to a state by a bond of allegiance, brings him within the orbit of the law, and determines his legal status, in short it secures him a standing which the stateless person, not being a member of any national community does not enjoy”.³⁶⁷

Hathaway and Foster note that citizenship is not only a criterion according to which rights and duties are allocated under national law but also a criterion in terms of which an individual is recognised and protected under international law:

“Citizenship is a universally recognised basis for jurisdiction over individuals, who are subject to a duty of allegiance to their country of nationality. Nationality thus provides a default means by which individuals may be brought under the authority of the interstate system.”³⁶⁸

Citizenship is the basis upon which a state provides extraterritorial protection to its citizens. This takes place through diplomatic protection. Under international law, a violation of the rights of a non-citizen is treated as an injury to the state in which he or she is a citizen. The government of that state must seek a remedy for the injuries or harms suffered by that individual through diplomatic protection.³⁶⁹ It is thus self-evident that citizenship is a threshold for the protection of rights at the national and international level. The principle of diplomatic protection illustrates the difficulties of implementation of claims of equal rights. The importance of citizenship in the allocation of rights is described by Blackman as follows:

³⁶⁶ Larking *Refugees and the Myth of Human Rights* 86-87.

³⁶⁷ United Nations *Ad Hoc* Committee on Refugees and Stateless Persons “A Study of Statelessness” (1949) Lake Success, New York 23.

³⁶⁸ 50. Footnotes omitted.

³⁶⁹ Larking *Refugees and the Myth of Human Rights* 18.

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“In a state-centric international legal system, the state is still the primary vehicle by which the individual accesses the rights and protection available under international law... [J]ust as domestic citizenship is the prerequisite for acquiring and exercising civil and political rights within a state – the right to have rights – so too nationality in a state is the *sine qua non* for exercising most rights the individual has under international law.”³⁷⁰

The enforcement of the rights of refugees and asylum-seekers on an equal basis becomes problematic because they have lost the protection of the state from which they have fled. As refugees, they cannot enjoy the diplomatic protection of the government of their state of nationality. The seeking of asylum and the granting thereof provides a mechanism by which an individual rejects the protection of his or her own government and seeks the protection of the country in which he or she sought asylum. On the basis of asylum, an individual is not only provided shelter or protection against harm but also surrogate national protection.³⁷¹ Surrogate or substitute national protection implies that distributive justice must be extended to cover refugees and asylum-seekers.³⁷² Irrespective of this approach to the allocation of rights to refugees, the fact that they are citizens of another state (despite taking flight from it) makes them more vulnerable in their host society. The fact that they are offered surrogate national protection on a temporary basis also works to their disadvantage. Above this, while diplomatic protection can be enforced by the state of nationality, the international refugee protection lacks enforcing mechanisms.

Given that all systems take for granted that an individual is protected by the government of his or her own state, distributing rights and freedoms beyond citizens to include refugees or asylum-seekers has historically been a challenge. The challenge persists even in modern, liberal democratic and welfare states which “have steadily moved from citizenship to personhood”.³⁷³ The claim that fundamental rights are inborn and inalienable to humanity led political philosophers like John Locke and John Rawls³⁷⁴ to advocate liberal political theories that focussed on rights accorded

³⁷⁰ J Blackman “State Successions and Statelessness: The Emerging Right to Effective Nationality Under International Law” (1998) 19 *Mich. J. Intl. L.* 1141, 1150. See too J C Hathaway & M Foster *The Law of Refugee Status* 2 ed (2014) 51

³⁷¹ Hathaway & Foster *The Law of Refugee Status* 51.

³⁷² 51.

³⁷³ M Fix & L Laglagaron “Social Rights and Citizenship: An International Comparison” (2002) The Urban Institute, A Report of the Working Group on Social Rights and Citizenship of the Carnegie Endowment for International Peace Comparative Citizenship Project 1, 2. See too M Bethon *A Theory of Denizenship* PhD Thesis, University College London (2010) 47.

³⁷⁴ E Kofman “Rights and Citizenship” (1993) 25 *American Sociology Review* 393, 395.

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to individuals and “the duties and obligations they owe to society and state”.³⁷⁵ On this basis, rights are vested in human beings on the basis of personhood and not citizenship. Human nature is the source of fundamental rights, which implies that fundamental rights and freedoms must be equally applied to all human beings, irrespective of the dominions in which they are physically present. Immanuel Kant explained that the equal treatment of “another human being as a person, of intrinsic worth, an end in himself, is just to treat him [or her] in accordance with the moral law applicable to all rational beings on account of having their reason”.³⁷⁶

According to natural law theories, all individuals – citizens and non-citizens alike – are endowed with certain eternal and inalienable rights. Everyone is entitled to equal protection and the closely associated rights of freedom, equality and dignity. This has important implications for “the role of the state in relation to citizenship claims and guarantees”.³⁷⁷ The move from the protection of citizens to human beings implies that a variety of rights, including socio-economic rights, have been extended beyond citizens to apply to non-citizens. However, in practice a sovereign state can decide which – and to what extent – fundamental rights can be extended to non-citizens. It enjoys the power inherent in its sovereignty to determine different conditions on which rights accrue to non-citizens. These conditions are closely linked to a person’s classification as a citizen, permanent resident, refugee, asylum-seeker, economic migrant, illegal foreigner, undesirable person or prohibited person. In this context, entitlement to fundamental rights is often premised on meeting certain conditions. Rights cannot equally be claimed simply by virtue of humanity.

In this light, a cautious approach to vesting socio-economic rights in non-citizens stems from conceptions of citizenship, the social contract and distributive justice, as well as prevailing immigration rules and principles. These conceptions and principles make it easier for states to justify discrimination against non-citizens. Despite the fact that the rights of refugees are protected in terms of domestic refugee law, international refugee law and international human rights law, the distribution of rights to refugees and asylum-seekers remains controversial due to the need to preserve national resources and meet the expectations of citizens. The rights of refugees are more restricted than those of citizens simply because they are viewed as not

³⁷⁵ 395.

³⁷⁶ M MacDonald “Natural Rights” (1947) *Proceedings of the Aristotelian Society* 225, 240.

³⁷⁷ Kofman (1993) *American Sociology Review* 395.

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belonging in the political community.³⁷⁸ Agamben states that refugees and asylum-seekers find themselves outside of modern state power which is conceived in terms of the naïve political notion of “we, the people” that embraces only citizens.³⁷⁹ The notion has become a dominant mode of political organisation on the basis of which rights, privileges and benefits are equally distributed and protected.³⁸⁰ The notion was recognised with approval by the SCA and the Constitutional Court. The SCA noted that the state has a discretion to extend rights to non-citizens as it deems best³⁸¹ whereas the Constitutional Court noted that the primary duty of the state is to protect its citizens and that, drawing on the principle of the social contract, non-citizens cannot be entitled to the same benefits available to citizens.³⁸² The principle of citizenship impacts on certain refugee rights recognised by the South African Constitution and, as a result, it becomes difficult to convert them into entitlements. Citizens and refugees are thus not equally positioned.

Even though the Constitutional Court noted with approval that the state must differentiate between citizens and non-citizens, the Constitutional Court stressed that non-citizens who are statutorily and constitutionally allowed to have access to social rights cannot be side-lined from socio-economic schemes. This is because such exclusion would have two implications: First, exclusion would operate “to stamp them with a badge of inferiority”, and secondly, it would “marginalise them by sending a message of second-class status in the communities in which they reside”.³⁸³ In this context, the marginalisation of refugees can be avoided only if members of the political community are willing to view them as equal members and ultimately share social burdens caused by them. As the Court said in the context of the rights of permanent residents:

“Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of

³⁷⁸ Kavuro (2015) *J Sustain Dev Law Policy* 189.

³⁷⁹ G Agamben “Beyond Human Rights” (2008) 15 *Social Engineering* 90, 91.

³⁸⁰ 91.

³⁸¹ *Watchenuka* para 29 referring to the decision of *Nishimura Ekiu v The United States* 142 US 651, 659.

³⁸² *Khosa* para 57 referring to the decision of *Mathews v Diaz* 426 US 67, 78 (1976).

³⁸³ *Khosa* para 74 referring to the decisions in *Plessy v Ferguson* 163 US 537, 551 (1896) and *Brown v Board of Education* 347 US 483, 494 (1954), see fn 86.

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public benefits represent the extent to which poor people are treated as equal members of society.”³⁸⁴

The need to treat refugees and asylum-seekers as equal members of the South African society gives rise to normative ambivalence concerning the protection of the socio-economic rights of refugees. The political debate on the protection of refugees raises the question whether they should enjoy equal protection as citizens do. If equal protection is understood within the framework of theories of citizenship, the constitutional goal to achieve equality is viewed by the executive authority as a mere aspirational statement. As a result, the state administration overlooks the interests of refugees and disregards court judgments and binding legal rules and principles in the area of refugee law.³⁸⁵ Notwithstanding South African authorities’ ambivalent attitude, the constitutional principle of equality should guide decision-makers in interpreting and implementing the socio-economic rights of refugees. The need for equal treatment should be the conceptual basis for the favourable extension of socio-economic benefits to refugees and asylum-seekers for the protection of their moral worth and dignity. Emphasis should be placed on the contextual relationship of equality and socio-economic rights in the pursuit of an equal and just society.

2.5 Concluding remarks

The principle of equality, in the area of protection of refugees, is complex and multifaceted due to the various laws, principles and standards involved. At an international level, the Geneva Refugee Convention confers the rights contained in it on refugees and asylum-seekers on a par with either citizens or non-citizens, depending on the nature of the right involved. It provides for a four dimensional approach to the favourable protection of refugee rights. The four dimensional approach includes: (i) the most favourable treatment as accorded to citizens; (ii) the most favourable treatment as accorded to the most favoured non-citizens; (iii) treatment as favourable as possible and (iv) the same treatment as accorded to non-citizens generally. In Africa, the African Refugee Convention complements the Geneva Refugee Convention with reference to a humanitarian approach, the spirit of the Charter of the OAU and the African context. The African spirit or solidarity

³⁸⁴ *Khosa* para 74.

³⁸⁵ See Botha (2013) *The South African Law Journal* 854 and S Gloppen “Social Rights Litigation as Transformation: South African Perspective” in P Jones & K Stokke *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 176.

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derives from the African philosophical concept of ubuntu, which “means to be humane towards others.”³⁸⁶ At the domestic level, the Refugees Act seeks to give effect to the Geneva Refugee Convention and the African Refugee Convention in light of the values of the Constitution. Both the international refugee texts and the constitutional text must be taken into account in interpreting the Refugees Act. The Refugees Act should be presumed not to provide for less favourable treatment than that envisaged in the Geneva Refugee Convention.³⁸⁷ Moreover, the Act should be interpreted to give effect to constitutional values.³⁸⁸

As has been pointed out, refugees are admitted in South Africa in accordance with the Immigration Act, which classifies non-citizens into two groups, namely permanent and temporary residents. Whereas the Immigration Act confers the rights in the Bill of Rights, besides those reserved expressly for citizens, on permanent residents on a par with citizens, it excludes temporary residents from access to socio-economic rights. This creates problems because refugees and asylum-seekers are viewed as temporary residents. It has been demonstrated that, despite the fact that refugees and asylum-seekers are temporary residents, their stay in South Africa is regulated by the Refugees Act. The Act differentiates between the treatment to be accorded to refugees and asylum-seekers. Refugees are entitled to full legal protection, which includes the rights contained in the Bill of Rights, except those that apply only to citizens. Asylum-seekers, on the other hand, are entitled to the rights contained in the Constitution, in so far as those rights apply to asylum-seekers. The difficulties of interpreting the latter phrase, and of determining how the position of asylum-seekers differs from the full legal protection enjoyed by refugees, are added to by the fact that asylum-seekers are not entitled to refugee IDs, which play an important role in facilitating access to public goods and services. It has been noted that, until their

³⁸⁶ Kavuro (2015) *J Sustain Dev Law Policy* 176 176.

³⁸⁷ S 233 of the Constitution provides that: “When interpreting any legislation, every court must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” See too de Ville *Interpretation* 67, 192-193 where he states that, in interpreting a statute, it should be presumed that lawmakers did not intend to adopt legislation which is in conflict with a treaty which it gives effect to.

³⁸⁸ S 39(1). See too de Ville *Interpretation* 64-65 who states that “the primary aim of statutory interpretation [is] to ensure that the statute is in accordance with the aims and values of the Constitution.”

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applications for asylum are successful and they are granted IDs, the position of asylum-seekers is very precarious.³⁸⁹

Irrespective of the nature of the protection accorded to refugees or asylum-seekers, refugees and asylum-seekers should at least be accorded a standard of favourable treatment, rather than the treatment accorded to non-citizens who have a temporary right to stay in South Africa. In distinguishing between the rights of refugees and asylum-seekers, the UNHCR maintains that refugees should be accorded rights that would ensure their active participation in the national economy,³⁹⁰ whereas asylum-seekers must be accorded rights to protect their health and dignity.³⁹¹ In other words, the state should provide asylum-seekers with the basic necessities of life that are adequate to promote their dignity and freedom.

Although asylum-seekers and refugees cannot claim the same or equal treatment as citizens, due to their lack of membership of the South African political community, equality, as a right and foundational value, has a major role to play in ensuring that the socio-economic rights of refugees are effectively protected. It is a principled and nuanced mechanism to be used to tackle issues related to discrimination, stereotypes, prejudices, sexism, racism, ill-sentiment, or xenophobic attitudes.³⁹² The idea of substantive equality requires decision-makers to take account of the poverty, vulnerability, disadvantage and marginalisation suffered by refugees and asylum-seekers as a result of oppression, civil conflict, physical deprivation, political persecution, discriminatory practices and forced migration.³⁹³ It further requires a rational, fair and equitable approach aimed at ameliorating the conditions of refugees, improving the quality of life of citizens and alleviating systemic discrimination.³⁹⁴

³⁸⁹ See further the discussion under 4.3.1 analysing the legal position of an asylum-seeker within the asylum framework.

³⁹⁰ UNHCR Policy on Refugee Protection and Solutions in Urban Areas, September 2009, paras 176-132.

³⁹¹ Paras 133-134. See too UNHCR *Handbook for Emergencies* (2007) para 1.1 and 27-28.

³⁹² Kavuro (2012) *Young African Research Journal* 113.

³⁹³ D Brand "Introduction to socio-economic rights in the South African Constitution" in D Brand & C Heyns (ed) *Socio-economic Rights in South Africa* (2005) 3 notes that "socio-economic rights create entitlements to material conditions for human welfare". Brand argues that the duty to fulfil the rights in the Bill of Rights under s 7(2) requires the state to act in a positive way through adoption of "appropriate legislative, administrative, budgetary, judicial, promotional and other measures so that those that do not currently enjoy access to rights can gain access and so that existing enjoyment of rights is enhanced". See Brand "Introduction to socio-economic rights in the South African Constitution" in *Socio-economic Rights in South Africa* (2005) 10.

³⁹⁴ C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253, 255.

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Substantive equality provides a basis to accord to refugees and asylum-seekers favourable or differentiated treatment by demanding positive action on the part of the state to enable them to live in favourable conditions consistent, at least, with the conditions of those around them. South Africa's constitutional goal of defeating unfair discrimination, marginalisation and social oppression requires the rights of asylum seekers and refugees to be equally respected, protected, promoted and fulfilled as required by section 7(2) of the South African Constitution. The state should work towards the harmonisation of refugee rights with distributive and transformative measures taken to redress the iniquities of the past.³⁹⁵ To this end, policy makers have to consider that recognised refugees have become members of the society, whose interests must be protected by South Africa and who must be afforded favourable freedom and opportunities to be able to develop their personalities and to fulfil their potential.³⁹⁶ The state should promote constitutional norms and standards which are favourable, supportive, and complementary of refugee protection and should refrain from relying on immigration norms and policies whose result is to sustain and perpetuate refugees' and asylum seekers' intolerable conditions.

Prohibiting refugees from participating in social life is not what the refugee law intended to achieve. Rather, its aim is to promote participation in the national economy by providing favourable access to socio-economic rights and benefits. Refugees and permanent residents are equally situated as far as constitutional socio-economic rights are concerned. Their legal positions are closely similar, meaning that they should be accorded similar treatment.³⁹⁷

The wording of section 27(b) of the Refugees Act and section 25(1) of the Immigration Act is almost similar in content, scope and substance. Both section 27(b) and section 25(1) were framed in a manner that accords to refugees and permanent residents all rights and benefits contained in the Bill of Rights, except those rights and benefits that the Constitution reserves for citizens. Statutorily, they are accorded the same rights and benefits. The distinction between refugees and

³⁹⁵ S 9(2) of the Constitution mandates the State to take legislative measures "designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination".

³⁹⁶ Both Sen and Nussbaum understand distributive justice through the lens of freedom as development, noting that an egalitarian society will be achieved if distributive justice is directed at improving or enhancing the freedom of each person so as to enable him or her to live a life in accordance with his or her wish. See A Sen *Development as Freedom* (1999) and M Nussbaum *Creating Capabilities: The Human Development Approach* (2011).

³⁹⁷ The conclusion was reached by the minority decision in *Union of Refugee Women*, after comparing s 27(b) of the Refugees Act with s 25(1) of the Immigration Act (para 99).

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permanent residents is based on the nature of residence (temporary versus permanent) and on the fact that permanent residents, as per legislation, enjoy certain benefits, privileges, duties and obligations as citizens do. Notwithstanding such distinctions, affording them the same constitutional rights and benefits implies that they should receive almost similar treatment. This line of reasoning is consistent with the full legal protection framework, as contemplated by the Refugees Act. It has been argued that the Act exempts recognised or formal refugees from the principles of exclusivity and self-sufficiency.

Asylum-seekers are also excluded from the twin principles of exclusivity and self-sufficiency. It follows that asylum-seekers, unlike non-citizens with temporary resident status, are entitled to have access to certain aspects of social welfare as contemplated by the Geneva Refugee Convention and by section 27A(d) of the Refugees Act, which extends constitutional rights to them. The African Refugee Convention in its preamble also recognises the need to alleviate the misery and suffering of refugees and to provide them with a better life and future. Affording asylum-seekers the fundamental rights in the Bill of Rights is essential given that they (like refugees) do not enjoy diplomatic protection. At the same time, however, asylum-seekers do not enjoy the same measure of protection as refugees, as they are not granted full legal protection in terms of the Refugees Act. This contributes further to their vulnerability. It was argued in this chapter that, although asylum-seekers are not entitled to participate in the national economy to the same extent as refugees, they have a right to the basic necessities of life that would safeguard their health and dignity.

The right to equality and non-discrimination provides the basis for the extension of socio-economic rights to apply to refugees within the parameters of favourable treatment. As argued in this chapter, equality-based arguments should be informed in part by the fact that a primary object of asylum law is to transform the appalling conditions of refugees into adequate living conditions.³⁹⁸ Seen from this perspective,

³⁹⁸ Finding durable solutions to refugee problems is the main object of asylum law. Refugees and asylum-seekers are therefore “entitled to special protection on account of their position” (Recommendation D of the Geneva Refugee Convention). They must be afforded a conducive environment in which they can exercise the universally recognised fundamental rights and freedoms (preamble of the Geneva Refugee Convention). According to the African Refugee Convention, this can be achieved if the state having jurisdiction finds “ways and means of alleviating [refugees’] misery and suffering as well as provid[es] them with a better life and future.” It has also been argued that “the protection of inherent dignity and equal worth of human person requires the socioeconomic policies to

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constitutional equality provides a principled mechanism to strengthen the protection of both refugees and asylum-seekers, regardless of the pervasiveness of theories of citizenship and self-preservation.

Favourable treatment in the context of the Refugees Act should be understood through the lens of national treatment, as the Refugees Act distances itself from the four guiding standards of favourable treatment, envisaged by the Geneva Refugee Convention. The Refugees Act imposes an obligation on the South African government to observe refugees' and asylum-seekers' constitutional rights. The observance of fundamental rights is premised on the notion of equality in rights and dignity,³⁹⁹ and the alleviation of inequality or human suffering, based on the idea of substantive equality.⁴⁰⁰ The constitutional right and value of equality can thus be used to argue that refugees are entitled to the same socio-economic rights and benefits as needy citizens. The notion of equal treatment can also be invoked to claim core fundamental rights in the Bill of Rights so as to restore and safeguard asylum-seekers' health, well-being and dignity. The notion should imply constitutional protection against measures that would reduce them to pariahs at the margins of South African society or treat them as individuals with second class status in the communities that offered shelter to them. Asylum-seekers must be provided with the basic necessities of life, including food, water, clothing, healthcare, basic accommodation and training throughout the asylum procedure until a final decision is taken on their application. In situations where there are no state interventions, they should be permitted to engage in self-employment or paid employment and be offered vocational training.

be arranged in a manner that might not perpetually subject the poor to poverty or the vulnerable to social vulnerabilities." See Kavuro (2015) *J Sustain Dev Law Policy* 185.

³⁹⁹ Art 1 of the UDHR proclaims that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." In this light, John Rawls argues that everyone must have "an equal right" to the most extensive basic liberty compatible with a similar liberty to others. See J Rawls *A Theory of Justice* (1971) 60. Botha posits that the right to have rights implies the right to "be recognised as a person worthy of moral respect and equal protection. See H Botha "The Rights of Foreigners: Dignity, Citizenship, and the Right to Have Rights" (2013) 130 *The South African Law Journal* 237, 842.

⁴⁰⁰ In South Africa, distributive laws that give substance to socio-economic rights and benefits are informed by the notion of substantive equality and aim to ensure the elimination of inherited economic disparities and social inequality. For further details, see, discussion under 2.4.2.

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CHAPTER 3

HUMAN DIGNITY AND THE PROTECTION OF REFUGEES

3 1 Introduction

Unlike equality, human dignity is not included as one of the fundamental rights and freedoms guaranteed, either in the Geneva Refugee Convention or in the African Refugee Convention. Human dignity is rather implicit in the Geneva Refugee Convention's requirement that favourable treatment must be accorded to refugees and in the African Refugee Convention's requirement that humanitarian treatment must be accorded to refugees. It can also be inferred from provisions which confer core socio-economic rights on refugees for the enjoyment of the minimum decencies of life. This is in accordance with the idea that fundamental rights and freedoms, under both international treaties and modern constitutions, are derived from human dignity.⁴⁰¹

Human dignity is entrenched in the South African Constitution as a non-derogable right⁴⁰² and as a foundational value.⁴⁰³ It is placed at the centre of the fundamental rights jurisprudence of the Constitutional Court. The court has treated dignity as a basic norm on which all rights and freedoms are founded,⁴⁰⁴ and as an interpretive tool which provides principled guidance to resolve constitutional value conflicts.⁴⁰⁵ Equally important to this study, the court has linked dignity to socio-economic

⁴⁰¹ D Wallace "Jacques Maritain and Alasdair MacIntyre: The Person, the Common Good and Human Right" (1999) *J Martin Center* 127, 131 (basic rights take priority "over duties to the common good, for they are not granted by society but are recognized as integral to human dignity"); M A Glendon "Knowing the Universal Declaration of Human Rights" (1998) 73 *Notre Dame L Rev* 1153, 1168 (universal rights were "presented as rights of the individual, indispensable for his dignity and the free development of his personality"); and Currie & de Waal *Bill of Rights* 272-3.

⁴⁰² Ss 10; 37(5)(c).

⁴⁰³ S 1(a).

⁴⁰⁴ See, for example, *Makwanyane* para 84 (the rights to life and dignity are "the source of all other rights"); *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54 (human dignity is a founding constitutional value of the objective, normative value system); *Grootboom* para 83 ("the Constitution will be infinitely less than a paper if the reasonableness of the state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity"); *Khosa* paras 40,85 (dignity is a constitutional value that lies at the heart of the Bill of Rights); H Botha "Human Dignity in Comparative Perspective" (2009) 20 *Stell. LR* 171, 171 (human dignity is understood by the Constitutional Court as "the most fundamental norm contained in the Constitution"); J M Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1999) 329 (the right to equality and privacy, like so many other human rights, originate from respect for human dignity); S Woolman & H Botha "Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework & Hard Choices" in S Woolman & M Bishop (Eds) *Constitutional Conversations* (2008) 113, 171 (the Constitutional Court recognised human dignity as "the master concept in the Bill of Rights").

⁴⁰⁵ Botha (2009) *Stell LR* 171. See too *Dawood v Minister of Home Affairs, Shalabi v Minister of Home Affairs, Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35 (human dignity informs constitutional adjudication and interpretation of many, possibly, all rights).

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rights.⁴⁰⁶ In its view, no person should be left without the essential necessities of life needed to protect their dignity.⁴⁰⁷ It has also invoked dignity as a normative basis for uplifting the lives of the poor, vulnerable, disadvantaged and marginalised⁴⁰⁸ and for protecting refugees, asylum-seekers and migrants.⁴⁰⁹ In other words, dignity has been relied on to mediate disputes related to claims of material deprivation of essential needs and to reconcile inconsistencies between constitutional values and state actions that may potentially result in increasing marginalisation and vulnerabilities.⁴¹⁰ In circumstances such as these, the court has provided appropriate remedies that would guide the state in upholding its constitutional obligation to treat human beings with appropriate respect, dignity, care, and concern.

At the international level, dignity is also considered a core right and value which is often invoked within the context of the need to respond to, and prevent the recurrence of, past injustices caused by totalitarian politics, fascism, colonialism, oppression, and discrimination.⁴¹¹ Regardless of its prominence, human dignity is a contested concept, and it is sometimes argued that it lacks an agreed and

⁴⁰⁶ Cases dealing with socio-economic rights include *Grootboom* (in respect of adequate housing); *Khosa* (in respect of social security); *Soobramoney v Minister of Health Kwazulu Natal* 1998 1 SA 765 (CC) (in respect of emergency medical treatment); *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) (dealing with the question whether Nevirapine should be made available to pregnant women who have HIV and who gave birth in the public health sector, in order to prevent or reduce the risk of transmission of HIV to their babies); *Jafta v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) (in respect of adequate housing), *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) (in respect of having access to sufficient water); *Sidumu v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) (in respect of unfair dismissal); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) (in respect of sanitation and electricity); *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) (in respect of access to electricity); *Larbi-Odam* (in respect of employment of non-citizens in permanent teaching positions); and *Union of Refugee Women* (dealing with the rights of refugees to work in the private security industry in South Africa).

⁴⁰⁷ See, for example, *Khosa* para 52 (South African society values human beings and is committed “to ensure that people are afforded basic needs”); *Grootboom* para 24 (state action is imperative to meet the needs of vulnerable people); *Treatment Action Campaign (No 2)* para 28 (no human person “should be condemned to a life below the basic level of dignified human existence”).

⁴⁰⁸ Eide (1996) *Food Policy* 23-39 and J C Mubangizi “Know Your Rights: Exploring the Connection between Human Rights and Poverty Reduction with Specific Reference to South Africa” (2005) 21 *SAJHR* 32, 32-45.

⁴⁰⁹ See, for example, the cases of *Union of Refugee Women*; *Larbi-Odam*; *Khosa*; *Watchenuka*; *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC); and *Somali Association of South Africa*.

⁴¹⁰ *Port Elizabeth Municipality* para 18 and *Grootboom* para 24.

⁴¹¹ A W Wood “Human Dignity, Right and the Realms of Ends” in A J Barnard-Naude; D Cornell & F du Bois (eds) *Dignity, Freedom and the Post-Apartheid Legal Order* (2008) 62; Botha (2009) *Stell. LR* 177; D M Davis “Human Dignity: Lodestar for Equality in South Africa: By Laurie Ackerman (2013)” (2013) 130 *The South African Law Journal* 878, 878; and H Botha “Equality, Dignity, and the Politics of Interpretation” (2004) 19 *SAPR/PL* 724, 733.

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comprehensive meaning or definition.⁴¹² In contextualising the role of human dignity in the protection of refugees and asylum-seekers, it will be especially important to allude to its core meaning from a historical perspective.

Against this background, this chapter explores the links between human dignity, socio-economic rights and the rights of refugees, through moral, theological, political and juridical lenses. A wider literature on the meaning and uses of dignity will therefore be consulted. Particular emphasis will be placed on dignity's potential to shed light on the requirement of favourable treatment in order to guide the reform of South African asylum law for making it more responsive to refugees and asylum-seekers' socio-economic deprivation. Case law will be consulted in order to determine the extent to which dignity can be used to contest the lumping together of refugees and other non-citizens, and to demand differentiated treatment for refugees. Consideration will be given to dignity's capacity to guide the interpretation of specific socio-economic rights and to underpin the protection of vulnerable groups. Drawing on these analyses, the chapter will ask whether and to what extent respect for human dignity requires socio-economic rights to be extended to refugees and asylum-seekers.

3 2 Human dignity from a historical perspective

The meaning of human dignity is difficult to capture and contextualise in precise terms.⁴¹³ One of the reasons for this difficulty is that dignity's meaning has

⁴¹² See *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 29; Wood "Human Dignity, Right and the Realms of Ends" in *Dignity, Freedom and the Post-Apartheid Legal Order* 51; S Woolman "Dignity" in S Woolman, S Roux, J Klaaren, A Stein, M Chaskalson & M Bishops (eds) *Constitutional Law of South Africa* (2005) 36-1; Eckert "Legal Roots of Human Dignity in German Law" in *The Concept of Human Dignity in Human Rights Discourse* 655, 665, 661, 697, 698, 702, 713; S Liebenberg "The Value of Dignity in Interpreting Socio-economic Rights" (2005) 21 *S. Afr. J. on Hum. Rts.* 1, 6; and Currie & Waal *The Bill of Rights* 273.

⁴¹³ For literature, see R D Glensy "The Right to Dignity" (2011) 34 *Colum Hum Rts L Rev* 65, 67 (Dignity is "...an ethereal concept which can mean many things and therefore suffers from an inherent vagueness at its core"; Liebenberg (2005) *S. Afr. J. on Hum. Rts* 6 (dignity is a vague and multifaceted concept); C McCrudden "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *Eur. J. Int'l L.* 655, 720 (the vagueness of the concept of dignity opens the door to different interpretations and gives a wide discretion to judges); H M Kivisto "The Concept of Human Dignity in the Post-War Human Rights Debates" (2012) 27 *Res Publica: Revista de Filosofía Política* 99, 106 (dignity and the rights contained in the UDHR are "too ambiguous and [have] different meanings in different countries"); and Wood "Human Dignity, Right and the Realm of Ends" in *Dignity, Freedom and the Post-Apartheid Legal Order* 48 (the concept of dignity is regarded as pompous, platitudinous and empty). For judicial opinions, see *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *Harksen v Lane NO* 1998 1 SA 300 (CC) para 50; and *Larbi-Odam* para 17, all quoting *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5 (Dignity is an elusive concept, which needs precision and elaboration).

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undergone fundamental changes over time.⁴¹⁴ The meaning, significance and relevance of human dignity must therefore be viewed through the lens of its historical evolution. In the words of Paust, dignity's effects and ramifications must "perforce be tied to an evolving social process wedded, as law, to dynamic patterns of human expectation and interaction."⁴¹⁵ This section examines the evolution of dignity from a social status associated with excellence or a particular rank to something that is seen as inherent in all human beings, regardless of social differences.

3 2 1 Dignity as a social status in classical political thought

The concept of dignity was originally used to refer to social status and human excellence.⁴¹⁶ It was neither seen as an inalienable right inherent in all human beings, nor as a legal basis for the amelioration of the conditions of the poor. It was rather linked to institutions, offices, ranks, authority, power and the state itself.⁴¹⁷ In that way, it was recognised as *dignitas hominis*, which referred to status in classical Roman philosophy.⁴¹⁸ Dignity was grounded in social worth, social recognition or social distinction which, in turn, demanded respect.⁴¹⁹ It signified "majesty, greatness, decorum and moral and political qualities of being honourable, worthiness, worth, nobleness and excellence."⁴²⁰ This kind of dignity is described by Mette Lebech as self-imposing as people with social status or authority are honoured and respected.⁴²¹

When viewed through the lens of social status, human achievement or excellence, dignity was regarded as something that could be earned. Common people, without any social status or authority, lacked dignity. According to Milton Lewis, the pre-Enlightenment conception of dignity could be earned only by, or accorded to the

⁴¹⁴ It has been argued that the effects and ramifications of dignity vary considerably depending on "the time, place and beholder". S. Pinker "The Stupidity of Dignity: Conservative Bioethics' Latest, Most Dangerous Ploy" (2008) *The New Republic*, 28 May 2008. See too M. Dan-Cohen "A Concept of Dignity" (2011) 44 *Isr Law Rev* 8, 9.

⁴¹⁵ J. J. Paust "Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content" (1984) 27 *Howard Law Journal* 145, 147.

⁴¹⁶ McCrudden (2008) *Eur. J. Int'l L.* 657 and Wood "Human Dignity, Right and the Realm of Ends" in *Dignity, Freedom and the Post-Apartheid Legal Order* 47.

⁴¹⁷ McCrudden (2008) *Eur. J. Int'l L.* 657.

⁴¹⁸ 656. See also J. Donnelly "Human Dignity and Human Rights" (2009) *Agenda for Human Rights* 1, 17 and L. R. Barosso "Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transitional Discourse" (2012) 35 *BC Int'l & Comp L Rev* 331 at 335.

⁴¹⁹ Donnell (2009) *Agenda for Human Rights* 10 and Botha (2009) *Stell LR* 189.

⁴²⁰ McCrudden (2008) *Eur. J. Int'l L.* 657 and Wood "Human Dignity, Right and the Realm of Ends" in *Dignity, Freedom and the Post-Apartheid Legal Order* 47.

⁴²¹ M. Lebech "What is Human Dignity" (2006) *Maynooth Philosophical Papers* 1, 1.

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“upper class and high status groups.”⁴²² No (social) dignity could be accorded to women, non-citizens, serfs, slaves, villains, non-Christians, or male members of the lower orders.⁴²³ As non-citizens and, for the most part, members of a lower class, refugees or asylum-seekers could not be accorded any social dignity or social status, that is, equal honour and respect, in their host communities. No dignity was generally vested in refugees and asylum-seekers.

Conceiving dignity in terms of social status and distinction can be traced back to Marcus Cicero, who construed dignity in terms of the social nature of the human person and his or her distinctive potential, qualities and capacities for self-development or true excellence in a society.⁴²⁴ He thus defined dignity as “the honourable authority of a person, which merits attention and honour and worthy respect.”⁴²⁵ A violation of the dignity (*dignitas*) of an individual constituted both a crime and a delict.⁴²⁶ Accordingly, criminal and civil redress could be demanded if dignity in this sense was assailed.⁴²⁷ In terms of criminal law, such criminal conduct was referred to as *injuria*, whereas in terms of the law of delict, a claim for defamation could be instituted in the form of the *actio injuriarum*.⁴²⁸ Although dignity in this sense only accrued to certain individuals, that is, the upper class or high status groups, the meaning of dignity gradually started to change, and it came to be understood as inner worth that was inherent in everyone. This shift had various implications: Dignity was no longer invoked only to protect social status but also to address social inequality or economic disparities. Its effects were not confined to criminal law and the law of delict, but pervaded all branches of public and private

⁴²² M Lewis “A Brief History of Human Dignity: Idea and Application” in J Malpas & N Lickiss (eds) *Perspective on Human Dignity: Conversation* (2007) 96.

⁴²³ 96.

⁴²⁴ Donnelly (2009) *Agenda for Human Rights* 16 and Glensy (2011) *Colum Hum Rts L Rev* 74.

⁴²⁵ D P Sulmasy “Human Dignity and Bioethics: Essays Commissioned by The President’s Council on Bioethics” (2008) The President Council of Bioethics <https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/chapter18.html> (accessed 7-03-2015).

⁴²⁶ See J M Burchell *Principles of Criminal Law* 3ed (2004) 747; J van der Berg “The Criminal Act of Violation of Dignitas” (1988) 1 SACJ 351, 351; and McCrudden (2008) *Eur. J. Int’l L.* 657.

⁴²⁷ Burchell *Principles* 747; van der Berg (1988) SACJ 351; and McCrudden (2008) *Eur. J. Int’l L.* 657.

⁴²⁸ Hughes *Human Dignity* 66; J M Burchell “The Protection of Personality Rights” in R Zimmemann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 640; *Holomisa v Argus Newspapers* 1996 2 SA 588 (W) at 599-601; *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 17; and *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 62. In the latter case, Mokgoro J explained that “the law of defamation is based on the *actio injuriarum*, a flexible Roman law remedy which afforded the right to claim damages to a person whose personality rights had been impaired by another. The action is designed to afford personal satisfaction for an impairment of a personal right and became a general remedy for any vexation violation of person’s right to his dignity and reputation.” (Footnotes omitted).

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law, including international, constitutional, immigration and refugee law. The development of dignity as inherent in every human being will be traced in the next section.

3 2 2 *Dignity as inherent in every human being*

3 2 2 1 Dignity as inherent human value in theological thought

Historically, the idea that every person is entitled to respect for his or her inherent dignity owes much to theological thought. Roman Catholic philosophers and theologians like St Thomas Aquinas, Giovanni Pico della Mirandola and Pope Leo I played a particularly important role. Unlike classical political thought that defined dignity on the basis of the achievement of honours, theological thought linked dignity to the inherent value of each human being.⁴²⁹ Dignity was understood to be inherent in human nature and as closely related to the ideals of equality and freedom. These three precepts are believed to be rooted in the creation of man in the image and likeness of God.⁴³⁰ This approach grounds human dignity in the notion of *kavod* (literally meaning “honour”) and *homo imago dei* (literally meaning “likeness of God”).⁴³¹ This thinking influenced developments in international law in the early 20th century relating to the fair and humane treatment of all individuals, including refugees and asylum-seekers.⁴³²

The theory of the likeness of God served to elevate all members of the human family above the rest of nature and stressed their equal and inherent human dignity.⁴³³ Theologians argued that a human being is endowed by nature with soul, reason and conscience that enable him or her to think, deliberate and make free choices. On this basis, they presumed that a human being may not engage in evil acts towards other human beings, oppress them, or treat them in a degrading or cruel manner. Oppression and ill-treatment were accordingly viewed as immoral or sinful behaviour that impaired the value, essence, or dignity of an individual.

⁴²⁹ Botha (2009) *Stell. LR* 189.

⁴³⁰ Donnelly (2009) *Agenda for Human Rights* 18 and Glensy (2011) *Colum Hum Rts L Rev* 74-5.

⁴³¹ Botha (2009) *Stell. LR* 179; Donnelly (2009) *Agenda for Human Rights* 17-20; I England “Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework” (2000) 21 *Cardozo L Rev* 1903, 1904 and A Altmann “*Homo Imago Dei* in Jewish and Christian Theology” (1968) 48 *The Journal of Religion* 235, 235-59.

⁴³² The theological notion of human dignity may have played a major role in the reconsideration of the international legal order, which was founded on the need to maintain justice, peace and security as was evinced in the 1919 Covenant of the League of Nations.

⁴³³ O Sensen “Human Dignity in Historical Perspective: The Contemporary and Traditional Paradigms” (2011) 10 *Eur J Polit Theory* 71, 78.

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Everyone was obliged to treat other people as “we would have them treated us”⁴³⁴ and to love them equally as God loves us.⁴³⁵ Here, inherent human dignity was justified on the conceptual grounds of freedom, equality, humanity, mutual respect, God’s creation and God’s likeness.

Mediaeval theological thought held on to inegalitarian notions of human dignity. For instance, it did not view the widely divergent – and unequal – positions of men and women as inconsistent with human dignity. However, in modern theological thought, the idea that man was created in the image of God gave rise to the idea that every human being has inherent dignity regardless of sex, nationality or social status. Today, theological notions of human dignity typically require respect for every human being’s free will, and for every individual’s right to create his or her own happiness, pursue his or her own destiny and realise his or her own human fulfilment.⁴³⁶ Human dignity is perceived to be rooted in the natural, human capacity to reason and “to shape [ourselves] to a range of possibilities not available to other creatures.”⁴³⁷

3 2 2 2 Dignity as moral human worth in secular thought

Secular theories sever human dignity from its grounding in religious ideas and precepts. For example, moral philosophers like Immanuel Kant claim that every human being should live his or her life in accordance with ends that he or she freely chose.⁴³⁸ Human beings are regarded as autonomous agents who have the ability to define their own destiny independently. Kant stated that every individual has inherent moral worth.⁴³⁹ He resisted the understanding of human dignity in terms of social attributes of power from which honour, integrity and respect derive. He disagreed, for example, with Thomas Hobbes who defined human dignity as:

“The value or worth of a man, is, as of other things, his price, that is to say, so much as would be given for the use of his power, and therefore it is not absolute, but a thing

⁴³⁴ P Lee & R P George “The Nature and Basis of Human Dignity” (2008) 21 *Ratio Juris* 173, 173.

⁴³⁵ D D’Souza *What’s so Great About Christianity* (2007) 67-82.

⁴³⁶ A Vaišvila “Human Dignity and the Right to Dignity in terms of Legal Personalism (From Conception of Static Dignity to Conception of Dynamic Dignity)” (2009) 3 *Jurisprudence* 111, 120.

⁴³⁷ M Rosen *Dignity: Its History and Meaning* (2012) 15 and Lee & George (2008) *Ratio Juris* 174.

⁴³⁸ Wallace (1999) *J Martin Center* 127.

⁴³⁹ I Kant *Groundwork for the Metaphysics of Morals* (2002) 53.

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dependent on the need and judgment of another. The value of man, which is the value set on him by the Commonwealth, is that which man call dignity.”⁴⁴⁰

In Hobbes’s definition, human dignity is grounded in social recognition in accordance with the market price or value assigned to or set on an individual by the public. According to this view, the meaning of human dignity depends on “self-evaluation determined by societal evaluation,”⁴⁴¹ or alternatively, “on the inter-subjective judgment of the market.”⁴⁴² Hobbes opposed classical and theological understandings and did not link human dignity to true human excellence or one’s nature as a human being, but rather to a person’s value in his or her community.

Against Hobbes, Kant distinguished human dignity from a value or price, which is the moral value or worth set on a person by others. Dignity, in his view, is that which has no equivalent and which has no price in the market place. He understood the nature of humanity from which human dignity derives as “constitut[ing] the condition under which alone something can be an end in itself [and] does not have merely a relative worth, i.e. a price, but rather an inner worth, i.e. dignity”.⁴⁴³ This suggests that a connection exists between human dignity and the notion that a human being cannot be treated as a pure instrument of another person’s will. The Kantian notion of dignity is therefore conceived in terms of categorical imperatives which represent formulas of good action, determinable by reason, in accordance with the principle of the will. As such, the highest value of an individual demands the protection of his or her inherent moral human worth.⁴⁴⁴

Put differently, Kant distinguished between inherent human dignity, which refers to “absolute inner worth”, and price, understood as “the standard of value of the material world and man’s animal nature.”⁴⁴⁵ He explains that:

“A human being regarded as a person, that is, as the subject of morally practical reason, is exalted above price; for a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from

⁴⁴⁰ T Hobbes *Leviathan* (1991) 63-4.

⁴⁴¹ Vaišvila (2009) *Jurisprudence* 123.

⁴⁴² D P Sulmasy “Human Dignity and Bioethics” (2008) *The President Council of Bioethics* 2.

⁴⁴³ Kant *Groundwork* 53.

⁴⁴⁴ 130-4.

⁴⁴⁵ Donnelly (2009) *Agenda for Human Rights* 21.

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all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them".⁴⁴⁶

In light of this approach, human dignity is incompatible with the objectification of an individual. Refugees should not be treated as mere objects or as a means to an end, as human beings are ends in themselves who act for their own sake and are capable of autonomous choice.⁴⁴⁷ Individuals must act in such a way that they always treat human beings "as an end [and] never simply as a means."⁴⁴⁸ Objectification is connected to humiliation, degradation or inhumane treatment, which may derive from or result in economic injustice toward vulnerable people.⁴⁴⁹ Michael Sayler describes objectification as being "treated as a thing instead of an autonomous self" and as "a form of humiliation [that] may lead to the collapse of one's interpersonal world, resulting in a kind of vertigo and a combination of unexpected exposure, loss of trust, and confusion".⁴⁵⁰

3.3 Human dignity as a basis for the development of refugee protection

Despite the development of human dignity as a philosophical concept, no country was concerned about the equal moral worth of refugees prior to the establishment of the League of Nations, mostly because the protection of refugees was not considered a matter of serious national concern. The absence of concerns can be linked to the terms in which refugees were viewed and defined. In contrast to the current situation, the term "refugee" was used to refer to fugitives and those banished.⁴⁵¹ This started to change when law-abiding citizens were uprooted by the expulsion of so-called unconverted Jews from Spain and Portugal in 1492 and by the religious and political persecution of the French Huguenots in 1685.⁴⁵² These flights

⁴⁴⁶ Kant *Groundwork* 56.

⁴⁴⁷ 28-31.

⁴⁴⁸ 151.

⁴⁴⁹ M D Sayler *Humiliation and the Poor: A Study of the Management of Meaning* (unpublished PhD thesis, Fielding Graduate Institute, 2004) 13.

⁴⁵⁰ 13.

⁴⁵¹ A E Hoyt "The Natural-Law Claim to Sanctuary for Central American Refugees" (1990) 23 *Loy LA L Rev* 1023, 1026 (Historically and traditionally, asylum was granted to fugitives who sought a safe haven in a place of worship until, in the 16th century, when King Henry VIII restricted this mechanism of seeking asylum because many people escaped prosecutions).

⁴⁵² 1026. See too B S Chimni *International Refugee Law: A Reader* (2000) 91-2; A R Zolberg "The Formation of New States as a Refugee-Generating Process" (1983) 467 *Ann Am Acad Polit Soc Sci* 24, 31; and L Barnett "Global Governance and the Evolution of the International Refugee Regime" (2002) 14 *International Journal of Refugee Law* 238, 238-239.

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from certain death at home, led to the early formulation of international refugee law, established at the Peace of Westphalia in 1648. The Treaty of Westphalia⁴⁵³ called on states to open their borders for refugees to cross, but nothing contained in this treaty elaborated on how refugees should be treated by their host countries, resulting “in each nation reacting to them in its own way and on entirely *ad hoc* basis”.⁴⁵⁴

Affording protection to refugees became a national and international challenge, as rights and duties came to be gradually defined in terms of theories of citizenship.⁴⁵⁵ The emerging theories of citizenship reinforced the responsibility of states to protect their citizens and territorial boundaries. In other words, the principles of state sovereignty and territorial supremacy emerged, which resulted in a differentiation between citizens and non-citizens.⁴⁵⁶ As a result, refugees in host countries largely remained homeless; they became stateless; and they were treated as if they were sub-human.⁴⁵⁷ It is against this background that the international system started looking for ways to protect refugees and to guarantee their dignity as human beings, shortly after the First World War.⁴⁵⁸

After the said war, the international legal order was grounded in the conviction that precepts like peace, security and fair and humane treatment would diminish human suffering, thereby contributing to individual and societal prosperity. The resulting developments in public international law had a positive impact on international refugee law which deals with the rights and protection of people at grave risk in the country of asylum. The adoption of the 1919 Covenant of the League of Nations brought a dramatic change in public international law, due to its approach of extending labour rights beyond citizens to apply to non-citizens on an equal basis. This new dimension in public international law witnessed three important phases of development aimed at coping with the acute post-war refugee problem in Europe. These three phases of development are juridical/ legal status protection (1920-1935), social protection (1935-1939) and individual protection (1938-1950). The

⁴⁵³ Treaty of Westphalia (adopted on 24 October 1648, entered into force 24 October 1648) 1 Parry 271.

⁴⁵⁴ Barnett (2002) *International Journal of Refugee Law* 239-240.

⁴⁵⁵ The classical *jus gentium* (law of nations) extended protection to non-citizens on the basis of natural law principles. Prior to World War I, there was a unique set of international customs and treaties relating to the humane treatment of non-citizens. In addition to this, humane treatment of non-citizens was championed by Francisco de Victoria, Hugo Grotius, and Emmerich de Vattel. See Weston (1984) *Hum Rts Q* 257, 269-71.

⁴⁵⁶ H Lambert *International Refugee Law* (2010) vii.

⁴⁵⁷ H Arendt *The Origins of Totalitarianism* (1979) 267.

⁴⁵⁸ G S Goodwin-Gill *The Refugee in International Law* 2 ed (1996) 148.

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fourth phase of development of international refugee law, namely favourable standards of treatment (1951 and thereafter) was triggered by the adaptation of the international legal order in light of the notion of human dignity after the Second World War and the need to create mechanisms for the universal protection of refugees. This culminated in the grounding of the international legal order in equality, fundamental human rights and the dignity and worth of every human being.⁴⁵⁹ The principle of equality in rights and in dignity was given supremacy with the aim of safeguarding humanity against the recurrence of heinous acts of states that caused untold suffering and uprooted populations to become refugees or stateless persons.⁴⁶⁰ Equal dignity became an objective norm on which the international refugee protection was based.

3 3 1 Juridical or legal status protection

The first phase of evolution of international refugee law took place between 1920 and 1935. Countries recognised that in seeking asylum, an individual avails him- or herself of the protection of the country of asylum and, as a consequence, does not enjoy diplomatic protection or any other services offered by the embassy of his or her state of origin.⁴⁶¹ This created a gap in international refugee law with regard to the juridical or legal status of refugees. Surrogate national protection had to be provided to refugees who were deprived of national protection by their own governments, and were thus rendered stateless persons.⁴⁶² Louise Holborn maintains that widespread belief in equality in fundamental human rights prompted nation-states to reconsider the manner in which the conditions of refugees could be effectively relieved.⁴⁶³ However, given that no country was prepared to be responsible for refugees' welfare, the countries resolved to allow refugees to move freely in search of labour opportunities.⁴⁶⁴ The conditions of refugees were ameliorated by offering them document-based international protection. Identity

⁴⁵⁹ Preamble to the UN Charter.

⁴⁶⁰ Preamble.

⁴⁶¹ Chimni *International Refugee Law* 11. According to Holborn, the term refugee was defined to refer to "those who have left or been forced to leave their country for political reasons, who have been deprived of its diplomatic protection and have not acquired the nationality or diplomatic protection of any other state". L W Holborn "The Legal Status of Political Refugees, 1920-19382" (1938) 32 *AJIL* 680, 680.

⁴⁶² Holborn (1938) *AJIL* 680.

⁴⁶³ 681.

⁴⁶⁴ Chimni *International Refugee Law* 11.

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documents known as “Nansen Certificates” were issued to refugees, allowing them to travel anywhere.⁴⁶⁵ The holder of the Nansen Certificate did not only enjoy the right to free movement but also the right to stay in any country, the right to work in such country and the right to social security.⁴⁶⁶ The decision to offer document-based protection might have been encouraged by the fact that countries were, in the post-war era, experiencing social and economic difficulties.⁴⁶⁷

Other comprehensive rights that were associated with the juridical or legal status of refugees were, according to Jaeger, considered in the 1928 Inter-Governmental Conference which resolved that the personal status of refugees should “be determined by the law of domicile, or if they had no domicile, by the law of residence” and that refugees should enjoy basic rights accorded to non-citizens subject to the principle of reciprocity, applied on the basis of the MFN standards.⁴⁶⁸ As refugees, they could particularly enjoy the right to have access to courts, the right to legal assistance, the right to be exempted from labour restrictive measures, the right to equality in taxation, the right to relaxation of expulsion measures and the right to renew their refugee documents.⁴⁶⁹ In the social sphere, the Nansen Certificates were a passport to a dignified life, which could be achieved through exercising their human capabilities freely. Put plainly, refugees with skills or experiences needed by the national labour market could use their Nansen Certificates to travel the world in search of better employment opportunities.

3 3 2 Social protection

Between 1935 and 1939, nation-states recognised refugees as people who faced egregious social risks because they could presumably not secure meaningful protection of their dignity through employment.⁴⁷⁰ The Nansen Certificate was no longer deemed adequate due to the following reasons: First, host countries were reluctant to extend the right to work to refugees. Second, many countries expressed reservations to the right to work entrenched in the 1933 Refugee Convention. Third,

⁴⁶⁵ G Jaeger “On the History of the International Protection” (2001) *Int'l Rev Red Cross* 727 727-37 states that the international refugee agreements concluded on 5 July 1922, 31 May 1924 and 12 May 1926 dealt with Russian and Armenian refugees and provided identity certificates for protection. See also Holborn (1938) *AJIL* 683.

⁴⁶⁶ Holborn (1938) *AJIL* 683.

⁴⁶⁷ 681.

⁴⁶⁸ 681.

⁴⁶⁹ 687.

⁴⁷⁰ Rubinstein (1939) *Royal Institute of International Affairs* 729-734.

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an influx of refugees or asylum-seekers could not be assimilated into the labour market. In this sense, the second phase of the development of international refugee protection was centred on the provision of social assistance with the objective to ensure the effective protection of refugees' security, safety and wellbeing. This phase is viewed by Gilbert Jaegar as "a milestone in the protection of refugees", because it served as a guide to frame the modern international refugee regime.⁴⁷¹ According to Bhupinder Chimni, the term refugee in the social context was defined as "the helpless casualties of broadly based social or political occurrences which separate them from their home society".⁴⁷² Thus, the social phase introduced the principles of *non-refoulement* and favourable social protection related to labour conditions, industrial accidents, welfare and relief, education and fiscal regime in addition to freedom of movement.⁴⁷³

Although this new direction was very important for the protection of refugees against social vulnerabilities and other human insecurities, international refugee protection, introduced by the League of Nations, was lacking in various respects. The most important shortcoming was that the system did not impose a legal obligation on host states to provide for social assistance.⁴⁷⁴ Consequently, no social support was granted by a country of asylum, leading to charitable organisations intervening in the provision of social and humanitarian needs.⁴⁷⁵ Their interventions were, however, insignificant in responding to hardships and humiliation caused by poverty and deprivation. In reality, charitable organisations were materially and financially not well-equipped to respond to a large-scale influx of refugees and stateless persons.

The lack of governmental intervention effectively perpetuated the degradation of refugees who lived in poverty within a host society.⁴⁷⁶ Due to state inaction, refugees' social life was demeaned by poverty and as a result refugees felt that their self-worth and self-esteem were lowered. Hannah Arendt describes this situation as follows: "refugees were treated as if they had no rights at all; they were indeed viewed as the scum of the earth".⁴⁷⁷ An effort to provide social protection to refugees

⁴⁷¹ Jaegar (2001) *Int'l Rev Red Cross* 730.

⁴⁷² Chimni *International Refugee Law* 11-2.

⁴⁷³ Jaegar (2001) *Int'l Rev Red Cross* 730.

⁴⁷⁴ 727-37.

⁴⁷⁵ 728. See also Chimni *International Refugee Law* 94.

⁴⁷⁶ Arendt *Totalitarianism* 267.

⁴⁷⁷ 267.

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did not materialise due to the lack of legal obligations deriving from international refugee law. This led some commentators to state that the position of refugees revealed a serious flaw in post-Enlightenment human rights discourse, which claimed that all human beings are endowed by nature with equality in rights and in dignity.⁴⁷⁸ Insofar as refugees are concerned, the equal protection of human dignity became a matter of great controversy. The question whether a host country bore a responsibility to protect citizens of another country (even if they are refugees) persisted, irrespective of the social approach to the treatment of refugees.

3 3 3 Individualistic political protection

Issues arising from the social protection of refugees led nation-states to rethink the manner in which refugees could be protected without incurring impermissible financial costs. The preservation of national resources was given a high priority. As a result, an individualistic political approach was preferred over a communitarian social approach. In terms of an individualistic political approach, a refugee was defined as “a person in search of an escape from perceived injustice or fundamental incompatibility with his or her home state.”⁴⁷⁹ Personal freedom became the determining factor in granting asylum. Social events were no longer considered as one of the reasons driving people from their home countries and a large-scale influx of refugees could no longer be accommodated for an extended period of time. This shift to individualistic- and political-oriented approaches introduced the asylum application procedure and as a result, asylum could be granted (or denied) on the merits of each asylum-seeker’s case.⁴⁸⁰ The shift was aimed at restricting refugees to those uprooted by individual political persecution or armed inter-state conflict, thereby limiting the number of refugees entering countries for asylum, who could have access to national resources and opportunities.

Through an individualistic approach, the number of refugees who could be a public burden to a host state was reduced.⁴⁸¹ The shift in the protection of refugees was motivated by viewing the flow of refugees as a threat to national security, public order, resources and material. This new approach to defining refugees in the political

⁴⁷⁸ 267. See also Agamben (1984) *Social Engineering* 91 and Weston (1984) *Hum Rts Q* 260-62.

⁴⁷⁹ Chimni *International Refugee Law* 12.

⁴⁸⁰ 12.

⁴⁸¹ 12 and 93 (Owing to depression and mounting international tensions, the borders were everywhere closed tighter, making it difficult for genuine refugees to seek sanctuary).

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context did not affect the standard of treatment of refugees in social domains, but rather worked to reduce the number of individuals who could benefit from rights attached to refugee status. As noted, the standard of treatment of refugees in social life was built on the desire to restore the social dignity, moral worth and equal respect of refugees through labour and humanitarian protection. Humanitarian and social protection was, however, afforded to refugees by charity organisations and not by the state. Throughout these three phases of development, it is notable that a pervasive gap existed in international refugee law, because there were no legal obligations on a host state to offer social and economic protection to refugees, including responding to socio-economic disadvantage, promoting autonomy, developing human capabilities, and promoting voice and participation.

3 3 4 Favourable standard of treatment

The radical move to establish universal standards of treatment of refugees cannot be divorced from the recognition of human dignity as affirmed by the 1945 Charter of the United Nations (“the UN Charter”).⁴⁸² The same notion is also reflected in and underpins the 1948 Universal Declaration of Human Rights (“UDHR”),⁴⁸³ the Geneva Refugee Convention and the African Refugee Convention. Jacques Maritain, who was one of the drafters of the UDHR, remarked that a human being is a bearer of fundamental human rights and freedoms “because of the very fact it is a person, a whole, a master of itself and of its acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as such.”⁴⁸⁴ Maritain was a Catholic philosopher whose thought was heavily influenced by Thomas Aquinas. Today, it is recognised that international human rights was influenced both by Kantianism and by religious understandings of human dignity. In Maritain’s opinion, the dignity of a person cannot be respected and protected if there is no legal recognition of individual rights that protect the freedom of a person to be a master of him- or herself and impose an obligation on the state to create conditions in which a person can be free. This is the same primary objective that could not be achieved if the plight of a group of refugees were not taken into consideration.

⁴⁸² Adopted 24 October 1945, 1 UNTS XVI.

⁴⁸³ Adopted 10 December 1948, UNGA Res 217 (III).

⁴⁸⁴ J Maritain *The Right of Man and Natural Law* (1949) 65.

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Accordingly, shortly after the adoption of the UN Charter and the UDHR, a need arose to revisit the international refugee regime, to make it consistent with the new international legal order which was aimed at the reaffirmation of the dignity and moral worth of the human person. As a result, international refugee law was reformed in a manner that combines the liberal elements of civil, political, economic, social and cultural rights. In so doing, it introduced a number of strategies intended to provide for favourable standards of treatment for the protection of refugees' dignity.⁴⁸⁵ It created a positive obligation on the state to create and secure humane conditions under which refugees' essential needs will be responded to in accordance with the resources available, and through international cooperation.⁴⁸⁶ International refugee law was premised on the principles of: (i) cooperation between states for the protection for refugees' social needs; (ii) the facilitation of burden sharing between states;⁴⁸⁷ and (iii) finding lasting solutions to the refugee situation by encouraging voluntary repatriation, local integration or resettlement in order to ensure effective social protection.⁴⁸⁸ It recognised that refugee protection was not a matter falling squarely within the jurisdiction of a host state; rather it was a matter falling within international jurisdiction and thus required collective responsibility to be taken for its realisation. The establishment of international jurisdiction was seen as necessary for responding effectively to gaps identified in the preceding refugee law policies that left millions of refugees' dignity unprotected and uncared for.⁴⁸⁹ The moral obligations to protect were transformed into legal obligations, which require states to secure conditions in which refugees would enjoy basic human rights and freedoms.⁴⁹⁰

The positive obligations to protect refugees and asylum-seekers' dignity and moral worth, which would allow them to regain self-respect and self-esteem, were established through the incorporation of positive rights in the Geneva Refugee Convention.⁴⁹¹ The positive obligation approach is reflected in the requirement that refugees must be provided with favourable treatment with a view to the protection of

⁴⁸⁵ Art 7(1) of the UDHR.

⁴⁸⁶ The Geneva Refugee Convention states that the High Contracting Parties have agreed to accord to refugees lawfully staying in their territory the most favourable or same treatment, as regards the positive – or socio-economic – rights, including labour, rationing system, housing, basic education, tertiary education, public relief, and social security.

⁴⁸⁷ Preamble to the Geneva Refugee Convention.

⁴⁸⁸ Art 8(c) of the Statute of the United Nations High Commissioner for Refugees (adopted 14 December 1950) UN Doc No A/RES/428(V) (hereinafter, "the Statute of the UNHCR").

⁴⁸⁹ Agamben (1984) *Social Engineering* 90-95 and Arendt *Totalitarianism* 263-66.

⁴⁹⁰ Goodwin-Gill *The Refugee in International Law* 529.

⁴⁹¹ Arts 17-24 of the Geneva Refugee Convention.

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their socio-economic rights. First, the adoption of the Geneva Refugee Convention as hard law and as a non-self-executing treaty, points to an intention to recognise refugees as human beings endowed with certain inalienable rights. By recognising the necessity to protect them as humans, nation-states committed themselves to observing demands made under both the UN Charter and UDHR.⁴⁹² Second, the Geneva Refugee Convention calls upon host states to accord rights and benefits to refugees that would promote the widest possible exercise of refugees' rights and benefits contained in it.⁴⁹³ Third, the special vulnerabilities of refugees were taken into account when the said rights and benefits were conceived in social and humanitarian terms. Refugees' rights also impose a moral and legal responsibility on the host state to ensure that refugees have access to its social welfare system.⁴⁹⁴ Fourth, the positive obligations are reflected in the mandate given to the UNHCR to promote the admission of refugees, not excluding those in the most destitute categories, to the territories of states.⁴⁹⁵ Finally, the positive obligations are visible in the demands made by the UN and regional bodies to protect refugees in a humane and equitable manner. The Geneva Refugee Convention creates moral and legal obligations to protect refugees and asylum-seekers from humiliation, degradation, deprivation and poverty and requires a host state to play a major role in ensuring that refugees retain feelings of self-worth and self-esteem and move toward human fulfilment. To achieve that, it is imperative for states to give effect, substance and actual meaning to international refugee law in light of the fundamental principles underpinning their national constitutions. Courts must interpret refugee rights in a way that promotes freedom from degradation and humiliation caused either by physical deprivation or by arbitrary actions of the host state.

Proceeding from these views, international refugee law must be incorporated into the domestic legal system with a view to respond to conditions such as deprivation, disadvantage, poverty and humiliation through the inclusion of refugees in the social, labour, and economic domains. The need to adopt a national asylum law was, for example, acknowledged by the SCUS, when it affirmed that the Geneva Refugee

⁴⁹² Preamble to the Geneva Refugee Convention. See also Weis *Refugee Convention* 6-8 which states that the chief aim of the Geneva Refugee Convention is to respond to the concern of the international community for the protection of human rights and liberties without discrimination of any kind as given expression in the UDHR.

⁴⁹³ Preamble.

⁴⁹⁴ Preamble.

⁴⁹⁵ Art 8(d) of the Statute of the UNHCR.

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Convention is grounded in the non-self-executing principle, meaning it prescribes “guidelines” to develop and frame national refugee policies and strategies, which task the state to restore and observe refugees’ dignity.⁴⁹⁶ The Constitutional Court, in *Glenister v President of the Republic of South Africa*,⁴⁹⁷ confirmed that non-self-executing international agreements like the Geneva Refugee Convention bind South Africa only if they are endorsed by parliament and have been incorporated into domestic law.⁴⁹⁸ The Geneva Refugee Convention was transposed into the American and South African legal systems through the adoption of the 1980 Refugee Act and the 1998 Refugees Act, respectively.

It is important to note that the Geneva Refugee Convention does not protect human dignity as a right. Nonetheless, the notion of human dignity, in the view of scholars, encompasses both positive and negative dimensions.⁴⁹⁹ These dimensions must be equally respected and promoted. Whilst the negative dimension imposes a duty on the state and others not to interfere to prevent their access to socio-economic rights, the positive dimension requires refugees to live in an environment that is conducive to the development of their potential, self-esteem and human personality. Where individuals lack the material means to do so, the state must allocate the resources required to enhance their ability to arrange their lives in accordance with their choices.⁵⁰⁰ It follows that the underlying purpose of the standards of favourable treatment is to create spaces in which refugees can freely exercise their choice to engage in their own development and that of the host community. This would encourage their effective integration into the host communities as useful members, rather than as a burden to such communities. The aim of offering various standards of favourable treatment to refugees is to revive and promote their self-sufficiency and economic independency which are the foundations of concrete freedom. Being self-supportive is accordingly a pillar of living a life of dignity.

⁴⁹⁶ *United States v Aguilar*, 883 F.2d 662 (9th Cir. 1989), Cert denied, 498 U.S. 1046 (1991). See also *Beharry v Reno* 183 F.Supp.2d 584 (2002) (International conventions are generally treated as self-executing if they are enforceable in courts once signed and ratified. Such treaties do not have the force of domestic law before they are given effect to by national legislation).

⁴⁹⁷ 2011 3 SA 347 (CC).

⁴⁹⁸ Para 115.

⁴⁹⁹ O Schachter “Human Dignity as a Normative Concept” (1983) 77 *Am J of Int Lag* 848, 851. See discussion below under 3.6.

⁵⁰⁰ A society gives value to humanity when a human being’s deprivation is appropriately responded to. In this regard see, Liebenberg (2005) *SAJHR* 17.

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3 3 5 Treatment of refugees in the African context

Under the auspices of the OAU, African countries adopted the African Refugee Convention. The Convention created a positive obligation on African states to create and secure humane conditions under which refugees' essential socio-economic needs will be responded to in a humanitarian and African context.⁵⁰¹ The Convention was aimed at complementing the approach under the Geneva Refugee Convention towards the protection of refugees' dignity, as discussed above. Like the Geneva Refugee Convention, the African Refugee Convention premises the protection of refugees and asylum-seekers on international cooperation. In that regard, it relies on the spirit of African solidarity.⁵⁰²

The African Refugee Convention widens the definition of the term refugee to include not only persons fleeing from political persecution, but also persons who seek refuge owing to safety and security problems caused by "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole [of the country of an asylum-seeker]."⁵⁰³ The Convention further seeks to secure more favourable treatment for refugees through the obligations it imposes on host states. In this regard, it recognises that offering international refugee protection is a peaceful and humanitarian act; upholds the principle of *non-refoulement*; and makes provision for offering international refugee protection on a temporary basis. It also obliges member states to make the best efforts consistent with their asylum law to receive refugees and to secure the settlement or full integration of those refugees who cannot return. In the event that the protection of refugees becomes a burden, the state must appeal to other African countries through the OAU ("now AU") to take appropriate measures to lighten such burden in the spirit of African solidarity and international cooperation.⁵⁰⁴

The African Refugee Convention further recognises the need to create conditions in which a better life and future can be achieved by refugees.⁵⁰⁵ African values such as *ubuntu* permeate and inform these efforts to protect refugees in Africa in a humane manner. These values are grounded in the notion of equal treatment, equality in dignity, mutual respect, and mutual concern, and in the idea that a person

⁵⁰¹ Para 8 of the Preamble.

⁵⁰² Para 8 of the Preamble, read together with art 2(4).

⁵⁰³ Art 1(2).

⁵⁰⁴ Art 2.

⁵⁰⁵ Para 1 of the Preamble.

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enjoys humanity through others.⁵⁰⁶ These African values should infuse the protection of refugees' basic needs for the restoration of their dignity and hope in the future. The hope for a better future can be restored if conditions are created in which refugees and asylum-seekers can become self-reliant. Otherwise, the protection of refugees and asylum-seekers will remain a burden on the state purse if their survival relies merely on humanitarian relief and assistance.

3 3 6 Historical development of refugee law in South Africa

Asylum seeking in South Africa can be traced back to the 180 French Huguenots who fled France because of religious and political persecution, and “who settled in the Cape Colony in the late 1680s and early 1690s.”⁵⁰⁷ The movement of refugees from Europe was however understood as white people migrating to and settling in South Africa.⁵⁰⁸ No law regulating refugees or immigration existed until in the early 20th century, when South Africa took restrictive immigration measures under the Immigration Regulation Act of 1913, aimed at excluding Indian immigrants,⁵⁰⁹ followed by the adoption of the Immigration Quota Act of 1930, aimed at excluding those migrants classified as “undesirable”.⁵¹⁰ Based on this exclusionary approach, more restrictive immigration measures were imposed under the Aliens Act of 1937 and Aliens Registration Act of 1939, with a view to restricting “an influx of European refugees prior to World War II.”⁵¹¹ Later, discriminatory immigration measures were directed at the exclusion of African black people and this approach remained operational until the 1990s.⁵¹²

Klotz illustrates how the immigration laws and policies adopted by the apartheid regime were firmly underpinned by segregation, whereby a sharp ontological line between white and non-white was developed.⁵¹³ The roots of the contemporary exclusionary approach and xenophobic sentiments go back to the past immigration

⁵⁰⁶ Kavuro (2015) *J Sustain Dev Law Policy* 188-189.

⁵⁰⁷ Lambert *International Refugee Law* xi; Chimni *International Refugee Law* 91-2; Hoyt (1990) *Loyola of Los Angeles Law Review* 1026 and Vale (2002) *Politikon* 16.

⁵⁰⁸ J A Lazerson *Against the Tide: Whites in the Struggle Against Apartheid* (1994) 82-99.

⁵⁰⁹ The 2016 Green Paper 20. See too A Klotz *Migration and National Identity in South Africa, 1860-2010* (2014) 10-11.

⁵¹⁰ 20.

⁵¹¹ Comaroff & Comaroff (2001) *Social Identities* 249.

⁵¹² 249.

⁵¹³ Klotz *Migration and National Identity* 10.

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law.⁵¹⁴ For instance, between 1913 and 1986, African black people, whether refugees or not, were, in principle, not allowed to enter South Africa and could only stay in South Africa as illegal migrants and, if employed, as illegal migrant workers.⁵¹⁵ Consequently, refugees and asylum-seekers illegally resided in South Africa and had to support themselves.⁵¹⁶ The tension between this long history of an exclusionary approach and the post-apartheid commitment to the protection of human rights can still be seen in contemporary approaches to the question whether refugees and asylum-seekers should enjoy socio-economic protection.

This question remains politically contentious, even though the post-apartheid government has committed itself to uphold the equality in rights and dignity of all people living in the country. However, the need to depart from the past practices is emphasised in the 1997 Green Paper on International Migration, which pointed to the need to extend special protection to refugees and asylum-seekers in a sensible and humane manner. This resulted in the adoption of the Refugees Act 130 of 1998, which gives effect to refugee treaties, the South African Constitution and human rights law. This legislation recognises the equal dignity and worth of refugees and asylum-seekers. It thus rests on a rejection of South Africa's racist history, in which black people – citizens and non-citizens alike – were subjected to positive humiliation and degradation. The Refugees Act extends to refugees all those rights in the Bill of Rights that apply to everyone. The Act is designed to alleviate the desperation and destitution suffered by refugees and asylum-seekers prior to and after arriving in South Africa through the facilitation of equal access to subsidised public services. Despite these promises, the implementation of the refugee law highlights the tension between the protection of human rights and inherited inclinations to treat non-citizens, in particular, African black people, as a threat to national security and economic growth.⁵¹⁷

3 4 A human rights-based approach to the treatment of refugees

The favourable protection envisaged by the Geneva Refugee Convention and the African Refugee Convention is further supplemented by human rights instruments.

⁵¹⁴ 10-12

⁵¹⁵ The 2016 Green Paper 21 and Adepoju (2003) *International Migration* 4.

⁵¹⁶ T Polzer "Invisible Integration: How Bureaucratic, Academic and Social Categories Obscure Integrated Refugees" (2008) 21 *Journal of Refugee Studies* 478 480 and J Handmaker (2001) *Africa Today* 92.

⁵¹⁷ Klotz *Migration and National Identity* 171.

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Human rights law can be used as a tool to extend favourable protection to refugees in the situations where the Geneva Refugee Convention is particularly silent. Firstly, the principle of favourable protection is, in principle, not applicable to those fundamental human rights and freedoms which do not find expression in the Geneva Refugee Convention. Secondly, the principle appears to apply universally and equally to all refugees, without considering the special needs of vulnerable groups of refugees, such as women, children, disabled people, elderly people or persons with serious illness. These lacunae in the Geneva Refugee Convention can possibly be filled by relying on norms and standards enshrined in international human rights instruments as set out, for example, under the UDHR, the ICESCR, the 1966 International Covenant on Civil and Political Rights (“ICCPR”), the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), the Convention on the Rights of the Child (“CRD”) and the Convention on the Rights of Persons with Disabilities (“CRPD”). The list of human rights texts is non-exhaustive, as there are a number of other human rights texts designed to protect the dignity, health and wellbeing of the person.⁵¹⁸

The recognition of basic human rights and their protection under various human rights texts play a significant role, not only in the fight against discrimination against vulnerable categories of refugees, but also in the struggles of the needy and vulnerable to demand positive state measures that would allow them to live a life of dignity.⁵¹⁹ The need to protect and promote human rights norms and standards is linked to the alleviation of social vulnerabilities through the promotion of active participation in economic development and democratic processes. Human rights scholars argue that the human rights-based approach is a principled and viable tool to be used to claim basic human rights and to promote active participation in human,

⁵¹⁸ These include, for example, the 1946 World Health Organisation’s Constitution; the 1949 Geneva Conventions; the 1949 Migration for Employment Convention; the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms; the 1971 Declaration on the Rights of Mentally Retarded Persons; the 1975 Declaration on the Rights of Disabled Persons; the 1976 Vancouver Declaration on Human Settlements; the 1977 Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts; the 1978 Alma-Ata Primary Health Care Declaration; the ACHPR; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1986 Declaration on the Right to Development; the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the VDPA; the 1996 Istanbul Declaration on Human Settlements; and the 1999 African Charter on the Rights and Welfare of the Child.

⁵¹⁹ L VeneKlasen, V Miller, C Clark, & M Reily “Rights-Based Approaches and Beyond: Linking Rights and Participation: Challenges of Current Thinking and Action” (2004) *IDS Working Paper* 235 1, 4.

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social, political and economic development. The said approach is centred on the understanding that poor, marginalised individuals' desire for the enjoyment of a sense of dignity and for the satisfaction of their basic needs would be realised only if their rights are claimed.⁵²⁰ The recognition of international human rights is not enough in itself. What is imperative is the incorporation of the said rights into national legislation and the harmonisation of these rights with national policies, strategies and programmes. A failure to do so would render human rights inaccessible and give rise to the violation of a number of fundamental human rights and freedoms. What is further important is that vulnerable and marginalised individuals, or organisations acting on their behalf, institute legal action to ensure that the state protect and promote those internationally recognised rights.⁵²¹ The inaccessibility of essential rights has the effect of leaving and sustaining people in a marginalised and alienated position.

Basic rights are more frequently claimed under constitutional and human rights frameworks than under conventions relating to the rights of refugees. As a result, the concept of favourable treatment has not been given the required attention. Its meaning is rarely explored. This gives rise to challenges in interpreting and applying international refugee law and the socio-economic rights of refugees. Given this gap in the literature, the thesis explores the meaning of favourable treatment, consistent with human dignity, on the basis of a human rights-based approach. Three critical issues necessitate the adoption of a human rights-based approach. These are: (i) the South African government's tendency to exclude refugees and asylum-seekers from access to national welfare schemes; (ii) its failure to accord to refugees and asylum-seekers differentiated favourable treatment tailored to meet their needs; and (iii) a failure to give due regard to the social position of refugees, which is characterised by suffering, misery, limbo, despair and protracted uncertainty about their future.

It is important to note that refugees and asylum-seekers are rights-holders. However, the enjoyment and protection of their rights are problematic.⁵²² One of the main problems facing the protection of refugees is that, in the modern state, the idea of rights is closely associated with that of citizenship. The notion of citizenship

⁵²⁰ Chapman (2005) *GSDRC* 4.

⁵²¹ VeneKlasen *et al* (2004) *IDS Working Paper* 235 5 (rights to improve the quality of life are realised through dynamic processes of resistance).

⁵²² Chapman (2005) *GSDRC* 4.

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developed in close proximity to the idea of state sovereignty. The principles of citizenship and state sovereignty emerged in the late Middle Ages and had (and continue to have) various implications for the distribution of rights. Placing citizenship at the centre of the distribution of rights, benefits and privileges has the potential of diminishing the moral worth and equal respect of non-citizens. For centuries, the most affected human right has been the right to free movement. Since the Middle Ages, the right is restricted on the basis of the state's duty to protect its own citizens. It has become a norm for countries to refuse to accept responsibility to protect indigent non-citizens who live on their territory, but who are the legal responsibility of another country. In this respect, nation-states refuse to grant permission to enter their territory to persons who are likely to become public burdens. The reluctance to assume the responsibility of another country is drawn from the law of self-preservation, which is in tension with the idea of universal human rights. The law of self-preservation is the basis of the power of a sovereign state to refuse to allow non-citizens onto its territory or to admit them on certain conditions set out in its immigration and refugee law.⁵²³

The law of self-preservation informs international refugee law. It is grounded in the notions of national security and maintenance of public order.⁵²⁴ The 1954 Caracas Convention on Territorial Asylum provides:⁵²⁵

“Every state has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State.”⁵²⁶

The law of self-preservation has permeated laws regulating non-citizens and has given rise to more stringent refugee and immigration policies. Prior to the adoption of refugee and human rights treaties, the impact of the law of self-preservation on refugees was very severe. It left refugees unprotected in their host countries and

⁵²³ *Nishimura Ekiu v The United States* [1892] USSC 26, 142 US 651, quoted in the decision of *Watchenuka* para 29 to which *Union of Refugee Women* para 46 and *Somali Association of South Africa* para 25 refer. Self-preservation was impliedly noted with approval in *Khosa*, when the Constitutional Court held that the exclusion of non-citizens with temporary resident status from social welfare was legitimate because they could impose intolerable burdens on the state (para 58).

⁵²⁴ Art 32(1) of the Geneva Refugee Convention states that “[t]he Contracting States shall not expel a refugee lawfully in their territory, save on grounds of national security or public order.”

⁵²⁵ OEA/Ser.X1. Treaty Series 34, signed in Caracas on March 28, 1954 at the Tenth Inter-American Conference, entered into force on December 29, 1954.

⁵²⁶ Art 1.

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resulted in refugees living in inhuman conditions. This was due to the fact that, until the Second World War, the term refugee was “used mostly to describe a person driven to seek asylum because of some criminal acts committed or some radical political opinion held.”⁵²⁷ This definitional approach was maintained despite the fact that refugees had survived massacres during the First World War and the subsequent social unrest that swept through Europe.⁵²⁸ Furthermore, associating refugees with criminality and disobedience had the consequence that refugees were not viewed as ordinary people in search of shelter and freedom from persecutions and in need of humanitarian, social and financial assistance for the protection of their dignity, health and wellbeing.⁵²⁹ Due to these shortcomings, human rights principles were adopted to impose a legal duty on states to accord to all human beings those fundamental rights and freedoms deriving from and protecting human dignity.

The human rights-based approach provides an alternative response to protection challenges because.⁵³⁰

“Deep within [its] essence is the knowledge that ordinary people have the capacity to manage their own lives and society quite well using knowledge and resources that [the international community] have developed that must be shared freely.”

A human rights-based approach can support and strengthen asylum law in restoring a sense of normality to the lives of refugees and asylum-seekers and reviving their participation in social and economic activities. The rights of refugees must be incorporated into national laws, policies and strategies, in a manner which gives effect to human rights norms and standards and promotes human, social and economic development. This is what the favourable treatment of refugees entails or should entail in the modern human rights era.

Asbjorn Eide posits that human rights law inter-relates the promotion of human rights norms and standards with the advancement of socio-economic development. Socio-economic development is seen as a vehicle to the progressive realisation of socio-economic rights or a better life for all.⁵³¹ Observance of human rights norms

⁵²⁷ Lambert *International Refugee Law* xii and H Arendt “We Refugees” in Robinson *M Altogether Elsewhere: Writers on Exile* (1999) 253.

⁵²⁸ Arendt *Totalitarianism* 266-268 and Agamben (2008) *Social Engineering* 90 at 90-5.

⁵²⁹ Arendt “We Refugees” in *Altogether Elsewhere: Writers on Exile* 253.

⁵³⁰ E Beracochea, C Weinstein & D Evans *Rights-Based Approaches to Public Health* (2011) 5.

⁵³¹ Eide (1996) *Food Policy* 25.

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plays a crucial role in the alleviation of deprivation and poverty and is seen as a primary goal of social protection and social progress, thereby contributing to positive national economic growth.⁵³² Of concern is that refugee rights are not viewed as tenets of socio-economic development but of humanitarian protection. Likewise, human rights principles and economic development were, prior to 1990, viewed as separate disciplines that were aimed at increasing human freedom and individual autonomy. Important to the analysis of the role of human rights norms in the protection of refugees is the recent merger of these two disciplines that gave birth to the human rights-based approach, which is defined as "...seeking solutions to poverty through the establishment and enforcement of the rights that entitle the poor and marginalised people to a fair share of society's resources".⁵³³

This suggests that refugees' socio-economic rights should be conceived widely in terms of the right to development and empowerment so as to conceptualise those rights in a concrete way that responds to the position of refugees in a globalised economy. However, the idea of social empowerment and economic development should not be confused with the idea of "growth in individual or collective income or fairness to material resources or markets."⁵³⁴ Rather, it should be understood as:⁵³⁵

"increasing people's possibility and capacity to make the most of their potential to live as full creative human beings and to come together to build caring, supporting, and accountable society [and]...responding to people's basic needs for survival and aspirations for human dignity and respect."

This denotes that the potentiality of different categories of refugees (i.e. men, women, children and people with disabilities) should be developed. Although there is a tendency to associate the concept of development with citizenship and analyse it in that context, human fulfilment, active participation and development should not be denied to refugees or asylum-seekers on the ground of nationality. Because socio-economic development is part and parcel of human rights law, it is an inalienable

⁵³² 25.

⁵³³ Chapman (2005) *GSDRC* 16.

⁵³⁴ 4.

⁵³⁵ 4.

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right as explicitly contemplated by the Declaration on the Right to Development.⁵³⁶

The Declaration defines the concept of development as:⁵³⁷

“[A] comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the distribution of benefits resulting therefrom.”

In this light, all human persons are afforded the right to participate in, contribute to and enjoy socio-economic development, including cultural and political progress. It is within this context that refugee rights should be construed at the national level. This argument is supported by the fact that, apart from the right to vote and to stand for public office, refugees enjoy most civil, social, economic, cultural and political rights. These rights include the right to life, equality and human dignity – rights that are viewed as pillars of socio-economic development. There is consensus among human rights scholars that a constant improvement of the wellbeing of individuals will not be possible in circumstances in which people are stuck in poverty, are entirely deprived of basic rights or are not accorded special treatment tailored to meet their special needs.⁵³⁸ The same applies in situations in which nothing is done by the state to improve the conditions of the poor. Poverty or deprivation makes it harder for vulnerable people such as refugees, asylum-seekers and needy citizens to benefit from a range of rights. Access to socio-economic rights is central to the full realisation of human and refugee rights, as well as fundamental freedoms. Integral to human and societal development is the accessibility of socio-economic rights and benefits. Upholding refugee rights should involve more than the protection of physical safety. It needs to include a comprehensive process by which refugees should be integrated in basic socio-economic strata of society and in certain levels of socio-economic development.

Amartya Sen, who views rights and freedoms as development, maintains that equitable social transformation will be achieved if every human being has access to

⁵³⁶ Art 1 of the Declaration on the Right to Development, G.A. Resolution 41/128 of 4 December 1986.

⁵³⁷ Preamble.

⁵³⁸ S Liebenberg “The Value of Freedom in Interpreting Socio-Economic Rights” (2008) 1 *Acta Juridica* 149, 154; M Pieterse “Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited” (2007) 29 *Human Rights Quarterly* 796, 796-822; Sen *Development as Freedom* 38; and Nussbaum *Creating Capabilities* 34.

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those basic rights that increase or enhance human freedom which, in turn, enables a person to achieve his or her life goals.⁵³⁹ In the view of Martha Nussbaum, the pain and suffering associated with social inequality or physical deprivation can be eradicated through the accessibility of socio-economic rights which she views as a principled and nuanced mechanism to empower vulnerable, poor individuals to exercise their potential.⁵⁴⁰

In light of the above, the human rights-based approach is essential to the thesis' socio-economic rights analysis under chapter 4 to 6.⁵⁴¹ Firstly it presumes that human rights are universal and inalienable. They inhere in everyone. They cannot be given by a state or taken away by it. Secondly, all human rights are indivisible. Whether of a positive or negative nature, they are derived from the concept of human dignity and seek to protect the intrinsic worth of the human person. Thirdly, human rights are interdependent and interrelated. The realisation of socio-economic rights presupposes the observance of core civil and political rights such as the right to equality, human dignity and freedom from arbitrary treatment. These rights are a cornerstone of social transformation in South Africa, hence their foundational constitutional value.⁵⁴² Fourthly, all individuals are equal in dignity and rights. All human beings are entitled to fundamental human rights and freedoms without discrimination of any kind. This cosmopolitan approach informs South Africa's Bill of Rights which, in turn, underpins the provisions of the Refugees Act relating to the rights of refugees and asylum-seekers.⁵⁴³ Fifthly, all human beings are entitled to active, free and meaningful participation in social life, and to contribute to and enjoy the benefits of social, economic and cultural development, through which individual freedom and individual autonomy can be realised. Sixthly, the State has a legal duty to protect and promote fundamental human/refugee rights and freedoms. In this respect, the government of South Africa has to adhere to the norms and standards of treatment expressed in regional and international texts relating to the treatment of refugees and enshrining refugee and human rights. In sum, the connection between refugee rights and socio-economic development is expressed in terms of norms of

⁵³⁹ Sen *Development as Freedom* 38.

⁵⁴⁰ Nussbaum *Creating Capabilities* 34.

⁵⁴¹ Art 5 of the VDP.

⁵⁴² Equality, dignity and freedom are values on which South African Constitution are founded. They inform and permeate the rights in the Bill of Rights. They are used as interpretative tool by the courts and legal scholars.

⁵⁴³ S 27(b) of the Refugees Act.

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equality and dignity which engender the favourable treatment of refugees at the national level through the requirement that certain human rights norms and standards should be observed when admitting and protecting refugees in the country. The next section will explore the role of dignity in giving effect to socio-economic rights contained in the South African Constitution.

3 5 Human dignity as an interpretive tool

3 5 1 South African context

In South Africa, the value of human dignity plays an important role in the interpretation of constitutional rights in general and socio-economic rights in particular. Constitutional rights must be interpreted to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.⁵⁴⁴ The interpretation of such rights must also take into consideration international law and may give consideration to foreign law.⁵⁴⁵ Moreover, when a right in the Bill of Rights is given effect and substance through legislation, such legislation must also be interpreted in a way which is consistent with the spirit, purport and objects of the South African Constitution.⁵⁴⁶ As Froneman J held, the interpretation of constitutional rights should be directed at ascertaining foundational values inherent to the South African Constitution, whilst the interpretation of legislation should be directed at ascertaining whether it conforms with and promotes the foundational constitutional values.⁵⁴⁷ The founding values of dignity, equality and freedom must thus inform the interpretation of both the constitutional rights of refugees and of legislation that recognises, circumscribes or limits their rights.

The Constitutional Court has treated human dignity as a supreme value and an objective norm,⁵⁴⁸ and it sometimes seems as if this value is given precedence over the values of equality and freedom. Dignity is used as a guide to the interpretation of laws giving effect to socio-economic rights. Among the three foundational values, the founding value of dignity is regarded as a key value on which the South African

⁵⁴⁴ S 39(1)(a).

⁵⁴⁵ S 39(1)(b)-(c).

⁵⁴⁶ S 39(2).

⁵⁴⁷ *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE) 597.

⁵⁴⁸ Botha (2009) *Stell. RL* 181,197 and Goolam (2001) *Potchefstroom Electronic Law Journal* 1.

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Constitution is based and is interpretatively employed to acknowledge the value and moral worth of the human person in South African society.⁵⁴⁹

In scrutinising whether laws conferring socio-economic benefits are in compliance with the constitutional aim, value and standard of dignity, consideration is given to (i) the impact of socio-economic measures on individuals', groups' or communities' conditions, when determining whether such measures facilitate, promote, and expedite the eradication of deep-seated or inherited inequality;⁵⁵⁰ (ii) the reasonableness of positive measures to protect the interests of marginalised groups effectively,⁵⁵¹ and (iii) the need to redress historical, structural and systemic forms of marginalisation, discrimination, indignity or humiliation experienced by millions of black people.⁵⁵² These considerations are meant to ground the interpretation and adjudication of socio-economic rights in contextual, historical, comparative and purposive methods.⁵⁵³ The dignity-based jurisprudence is invoked to give meaning, content and substance to socio-economic rights in practical situations.

To give context to socio-economic rights, the Constitutional Court opined that it requires the consideration of two main aspects. Rights must first be understood in their textual setting and, secondly, in their social and historical context as noted above.⁵⁵⁴ In the latter context, rights must be understood against the legacy of deep

⁵⁴⁹ *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28.

⁵⁵⁰ In *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC) para 18, the Constitutional Court viewed the state and its institutions' unlawful conduct as "inimical to the Constitution and the development of a society in which dignity, equality and freedom thrive." J Kentridge "Equality" in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1996) 14-5 states that state institutions should not subject people to subordination or subjection, which undermine human dignity.

⁵⁵¹ The Constitutional Court in *Grootboom* paras 31 and 36 held that that the constitutional obligation is met if the state policy adequately addresses the needs of the most vulnerable group and if their rights are effectively protected. The obligation includes a threshold requirement to treat the poor, marginalised and the most vulnerable as human beings and ensure their access to basic services (*Grootboom* paras 44 and 82-3; *Port Elizabeth Municipality* paras 29 and 39 and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) para 76 and 210.) See too *Makwanyane* para 88: "The very reason of establishing a new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process."

⁵⁵² According to the Constitutional Court, in *Batho Star Fishing (Pty) Ltd v The Minister of Environment Affairs and Tourism* 2004 4 SA 490 (CC) para 91, quoting *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 1 SA 545 (CC) para 21, such consideration is inevitable because "the Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance." Consideration of this type of contextual interpretation is emphasised in, for example, *Soobramoney* para 8; *Grootboom* para 25; *Joe Slovo* para 162; and *Union of Refugee Women* paras 43 and 133.

⁵⁵³ De Ville *Interpretation* 41, 144.

⁵⁵⁴ *Grootboom* paras 22, 25.

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social inequalities, great disparities in wealth, deplorable conditions or great poverty.⁵⁵⁵ In the former context, socio-economic rights are textually set out as positive rights, obliging the state “to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness and intolerable housing”.⁵⁵⁶ Against the background of the adoption of the South African Constitution, the Court affirmed that socio-economic rights were guaranteed so as to commit South Africa to address the legacy of social inequality and social injustice and, in due course, to transform society into one in which there will be human dignity, freedom and equality.⁵⁵⁷ Such transformation lies at the heart of the new constitutional order.⁵⁵⁸ When analysing the socio-economic transformation, account must “be taken of the inherent dignity of human person”. A failure to do so would mean that “the [South Africa’s] Constitution will be worth infinitely less than its paper”.⁵⁵⁹ In this regard, positive state action should be directed to the protection of human dignity – simply because “human beings are required to be treated as human beings.”⁵⁶⁰

In *Grootboom*, the Constitutional Court held that it was problematic to interpret the socio-economic rights enshrined in the Constitution to impose an absolute obligation on the state to satisfy the “minimum core” of the rights in question.⁵⁶¹ In 1990, the UN Committee on Economic, Social and Cultural Rights had concluded that socio-economic rights contain a minimum core.⁵⁶² The court rejected this principle as a benchmark because the determination of a “minimum essential level” of each socioeconomic right that might be said to meet the essential needs of the protection of human dignity presents difficulties.⁵⁶³ For example, the needs of a vulnerable person vary from one person to another, depending on the particular personal facts, circumstances and social vulnerabilities.⁵⁶⁴ Yacoob J concluded that the court should rather determine whether the positive state action is consistent with the constitutional

⁵⁵⁵ Para 25. See too *Soobramoney* para 8.

⁵⁵⁶ Para 24.

⁵⁵⁷ Para 25. See too *Soobramoney* para 8.

⁵⁵⁸ Para 25. See too *Soobramoney* para 8.

⁵⁵⁹ Para 83.

⁵⁶⁰ Para 83.

⁵⁶¹ *Grootboom* paras 29-33 and 26.

⁵⁶² *Grootboom* para 29. See too CESCR General Comment 3 ‘The Nature of States Parties Obligations (Art. 2, para 1)’ of 14/12/1990, para 10.

⁵⁶³ For a discussion of the minimum core approach, see *Grootboom* paras 29-33, *Soobramoney* paras 11, 31 and *Treatment Action Campaign* paras 26-39.

⁵⁶⁴ *Khosa* para 44.

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standard of reasonableness.⁵⁶⁵ In this context, Yacoob J opined that the state was tasked to develop and implement a progressive housing policy that includes provision for emergency relief to those living in crisis or desperate situations.⁵⁶⁶ He proceeded to construe the standard of reasonableness with reference to the foundational value of human dignity.⁵⁶⁷

A dignity-based approach was invoked to help mediate disputes related to vulnerable people's access to socio-economic goods such as healthcare,⁵⁶⁸ sufficient water,⁵⁶⁹ employment,⁵⁷⁰ adequate housing in respect of sanitation/sewage,⁵⁷¹ electricity,⁵⁷² arbitrary eviction,⁵⁷³ social security⁵⁷⁴ and education.⁵⁷⁵ In these cases, the court emphasised that vulnerable people will be treated with dignity, respect, care and concern if the state devises and implements socio-economic programmes that are sufficiently flexible to respond to those in desperate need and to cater appropriately for immediate (short-term) and long-term requirements.⁵⁷⁶ In cases involving eviction, the court held that respect for human dignity obliges the parties to a dispute to meaningfully engage with each other in order to find a mutually appropriate solution.⁵⁷⁷

Dignity was central to the reasoning of the SCA in *Watchenuka*. In this case, the Minister of Home Affairs prohibited asylum-seekers from taking up employment and

⁵⁶⁵ *Grootboom* para 46.

⁵⁶⁶ Para 46.

⁵⁶⁷ Para 83.

⁵⁶⁸ *Soobramoney and Treatment Action Campaign (No 2)*.

⁵⁶⁹ *Mazibuko*.

⁵⁷⁰ *Sidumo v Rustenburg Platinum Mines* (unfair dismissal); *Larbi-Odam* (exclusion of permanent residents from education employment); *Watchenuka* (prohibition of asylum-seekers from undertaking employment); and *Union of Refugee Women* (refugees' freedom to choose their trade, occupation, or profession).

⁵⁷¹ *Nokotyana* para 25 (the Court held that the right to housing must be interpreted to include sanitation).

⁵⁷² *Nokotyana* para 25 (the Court held that the right to housing must be interpreted to include sanitation and electricity) and *Joseph* (the Court held that electricity is a component of the right to access to adequate housing).

⁵⁷³ *Port Elizabeth Municipality; Residents of Joe Slovo Community; Abahlali Basemjondolo Movement SA; and Occupiers of 51 Olivia Road, Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2010 3 SA 208 (CC).

⁵⁷⁴ *Khosa*.

⁵⁷⁵ *Watchenuka*.

⁵⁷⁶ *Port Elizabeth* para 29; *Abahlali Basemjondolo Movement SA* paras 56, 69 (there must be mechanisms of reasonable engagement before instituting eviction proceedings); *Khosa* paras 76 (the denial of the social welfare benefits impacts on the dignity of the permanent residents without other means of support), and *Grootboom* paras 93-4, 99 (a reasonable policy should be made within available resources for desperate people "who have no access to land and no roof over their heads who are living in intolerable conditions or crisis situations").

⁵⁷⁷ *Port Elizabeth Municipality* para 39; *Residents of Joe Slovo Community* paras 5, 117, 120; *Abahlali Basemjondolo Movement SA* paras 5, 11, 117.

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from studying within the period of the first six months.⁵⁷⁸ Although the state as sovereign has the power to describe the conditions for non-citizens as it deems desirable, the SCA stated that the absolute deprivation of access to education and livelihood opportunities during the first six months violated the human dignity of asylum-seekers.⁵⁷⁹ Viewing employment as an important component of living in dignity, the SCA explained that the freedom to engage in productive work ensured, at least, the minimum conditions for asylum-seekers' dignified life.⁵⁸⁰ In justifying its reasoning, the SCA went on to state that human dignity inheres in all people regardless of their nationality and that "self-esteem and a sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful."⁵⁸¹ The SCA's remarks were primarily based on the protection of the intrinsic worth of a human person. Because human dignity must be protected in every situation, the right to human dignity outweighed legislative measures which fundamentally impair the human dignity of refugees. In the context of asylum-seeking, the protection of dignity requires mechanisms that would enable asylum-seekers to survive and live a better life. Access to the labour market and education is among those mechanisms.⁵⁸² The SCA, in *Somali Association of South Africa v Limpopo, Department of Economic Development, Environment and Tourism*⁵⁸³ ("*Somali Association of South Africa*"), also invoked dignity to determine the scope and ambit of the right to seek employment contained in the Refugees Act. The court noted that the right to seek employment was wide enough to include the right to self-employment guaranteed by article 18 of the Geneva Refugee Convention. The SCA stated that:

⁵⁷⁸ Reg 7(1)(a) of the Refugee Regulations (Forms and Procedures) of 2000, read together with the form prescribed by Annexure 3, contains various conditions to be adhered to by an asylum-seeker. According to section 11 of the Refugees Act, the conditions relating to work and study ought to be determined by the Standing Committee on Refugees Affairs ("SCRA"). Instead of being determined by the SCRA, they were determined by the Minister of Home Affairs. Accordingly, the court held that the Minister went beyond the powers expressly conferred on him in terms of section 38(e) of the Refugees Act, which was limited to enacting regulations relating to the conditions to sojourn in South Africa. See *Watchenuka* paras 9, 10-15, 17, 20.

⁵⁷⁹ The SCA stated that a "general prohibition of employment and study for the first 180 days after a permit to sojourn in South Africa has been issued is in conflict with the Bill of Rights." See *Watchenuka* para 24.

⁵⁸⁰ Para 27.

⁵⁸¹ Para 27.

⁵⁸² *Watchenuka* para 26.

⁵⁸³ 2015 1 SA 151 (SCA).

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“...[I]f, because of circumstances, a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade...”⁵⁸⁴

The SCA stated that the fact that certain constitutional rights, such as the right to freely choose a trade, occupation or profession, are reserved for citizens, cannot be invoked by the state to condemn refugees or asylum-seekers to a life of humiliation and degradation.⁵⁸⁵ The dignity-based jurisprudence is therefore a powerful tool that can be used, not only to give effect to refugees’ rights, but also to extend some of the rights traditionally attached to citizenship to refugees or asylum-seekers for the protection of their welfare. It holistically connects and brings all refugee, human and constitutional rights together. It problematises the traditional distinctions between the rights of citizens and the rights of non-citizens and between needy citizens and needy refugees.

The dignity-based jurisprudence employed by the courts is significant for the interpretation and protection of refugee rights for the following reasons: First of all, the value of dignity demands that no-one should be reduced to a mere object of state power, or be left without the resources needed to live a dignified life or be deprived of autonomous choice and abilities to meet their own ends.⁵⁸⁶ Secondly, dignity has no boundaries and for that reason, it cannot be confined to citizens only.⁵⁸⁷ Thirdly, dignity, read together with the value of *ubuntu*, requires all persons to be treated humanely and demands equal treatment consistent with and infused by “values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.⁵⁸⁸ Fourthly, measures based on the twin principles of exclusivity and self-sufficiency, in cases involving destitute refugees, would not be constitutionally justified in circumstances where they have the effect of degrading refugees by

⁵⁸⁴ *Somali Association of South Africa* para 43.

⁵⁸⁵ Para 43.

⁵⁸⁶ *Soobramoney* para 25; *Grootboom* para 24; *Khosa* para 52; *Watchenuka* paras 34, 36; *Union of Refugee Women* para 113.

⁵⁸⁷ *Hugo* paras 41-3 (dignity and respect are accorded to all human beings regardless of their membership of a particular group).

⁵⁸⁸ *Makwanyane* para 308. Sachs J in *Port Elizabeth Municipality* para 37 and *Union of Refugee Women* para 145 noted that the concept of *ubuntu*, which is a “part of the deep cultural heritage of the majority of population, suffuses the whole constitutional order.”

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compelling them to resort to crime, prostitution, stealing, or begging.⁵⁸⁹ Fifthly, discrimination against this vulnerable group would amount to unfair discrimination if it has a stigmatising effect by sending out a message that this group of people is in some ways inferior to citizens or less worthy as human persons.⁵⁹⁰

3 5 2 Foreign contexts: US and France

Although the right to dignity is not contained in all democratic constitutions, dignity, as a basic principle, plays an important role in mediating legal disputes related to the interpretation of certain fundamental rights in foreign jurisdictions. The value bestowed to human dignity by, for example, the French Constitutional Council and the SCUS is consistent with the South African Constitutional Court's understanding of its relevance.

The French Constitutional Council affirmed that even though the right to human dignity is not contained in the French Constitution, the reference to human dignity in article 2 of the French Declaration of 1789 ("French Declaration") compels the State to safeguard human dignity against all forms of degradation and to protect the freedom of women.⁵⁹¹ The court went on to state that the 1946 French Constitution provides for a more nuanced textual formulation that embraces a wide protection of humanity, placing emphasis on the non-discrimination principle: all human beings, without distinction to race, religion or belief, possess inalienable and sacred rights.⁵⁹² The court makes reference to the French Declaration and the 1946 Constitution when enforcing respect for human dignity.⁵⁹³ The principle of human dignity was

⁵⁸⁹ *Watchenuka* para 32.

⁵⁹⁰ *Khosa* para 74. See too *Union of Refugee Women* para 113 (discrimination against refugees, as a vulnerable group of people, would impair their dignity or their rights in a serious manner).

⁵⁹¹ Constitutional Council, Decision 2001-446 DC, 27 Juin 2001.

⁵⁹² Constitutional Council, Decision 2009-593 DC, 19 Novembre 2009) at p110.

⁵⁹³ Constitutional Council, Decision 2001-446 DC, 27 Juin 2001 (voluntary interruption of pregnancy); Constitutional Council, Decision 2010-25 QPC, 16 September 2010; Constitutional Council, Decision 2010-80 QPC, 17 Decembre 2010 (protecting individual from judicial power); Constitutional Council, Decision 2009-593 DC, 19 Novembre 2009 (constitutional protection of human dignity); Constitutional Council, Decision 2013-320/321 QPC, 14 Juin 2013 and Constitutional Council, Decision 2014-393 QPC, 25 Avril 2014 (determination of the conditions and modalities of execution of sentences); Constitutional Council, Decision 2014-14/22 QPC, 30 Juillet 2010 (reliance on the principle of human dignity in interpreting constitutional rights); Constitutional Council, Decision 2010-612 DC, 5 Aout 2010 (competence of the French courts in matters dealing with crimes committed by a foreigner in foreign countries against a foreigner, and a criminal stays in France); Constitutional Council, Decision 94-343/344 DC, 27 Juillet 1994; Constitutional Council, Decision 2010-71 QPC, 26 Novembre 2010 (human dignity as a constitutional value); Constitutional Council, Decision 96-377 DC, 16 Juillet 1996 (human dignity of foreign nationals); Constitutional Council, Decision 2013-674 DC, 1 Aout 2013, (research on human embryo); Constitutional Council, Decision 2009-593 DC, 19 Novembre 2009

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used to resolve socio-economic rights issues in respect of employment,⁵⁹⁴ adequate housing,⁵⁹⁵ social assistance and social security,⁵⁹⁶ and the holistic and comprehensive integration of refugees and migrants in French society.⁵⁹⁷

The American jurisprudence also invoked human dignity to resolve certain disputes. However, since the right to human dignity is not expressly guaranteed in the US's Constitution, the question is raised whether national courts may invoke the principle of human dignity in the adjudication of certain constitutional matters. The SCUS responded that the concept of personal freedom entrenched in the Fourteenth Amendment traditionally forms the foundation on which the courts review laws to determine whether they afford protection to human dignity.⁵⁹⁸ Human dignity is recognised as a value underlying not only the Fourteenth Amendment, but also the First Amendment as well as the Fourth to Eighth Amendments.⁵⁹⁹ Human dignity can be invoked to protect human persons against "cruel and unusual treatment" under the Eighth Amendment.⁶⁰⁰ From this point of view, Rex Glensy argues that human dignity obliges the state to protect and promote an individual's autonomy and integrity.⁶⁰¹ The dignity-based jurisprudence was, according to Glensy, introduced into American jurisprudence by Justice Murphy's dissenting judgments in the cases of *Korematsu v United States*⁶⁰² ("*Korematsu*") and *Yamashita v Styler (Styler)*.⁶⁰³ In the *Styler* case, Justice Murphy stated that a dignity-based jurisprudence would enable American jurisprudence to contribute to "an orderly international community based upon recognition of human dignity".⁶⁰⁴

Justice Murphy was of the view that the courts should guard against the recurrence of the destruction of human dignity because invading human dignity is

(confinement and legal representation); Constitutional Council, Decision 2010-71 QPC, 26 Novembre 2010 (dignity of hospitalised person); and Constitutional Council, Decision 2003-467 DC, 13 Mars 2003 (external levies).

⁵⁹⁴ Decision 2009-584 DC, 16 Juillet 2009 and Decision 2012-278 QPC, 5 Octobre 2012 (employment).

⁵⁹⁵ Decision 94-359 DC, 19 Janvier 1995 (people without a roof over their head).

⁵⁹⁶ Decision 2006-539 DC, 20 Juillet 2006 (the modification of the social card whose foreign national is a beneficiary should be done in a manner that will not have implications on their dignity).

⁵⁹⁷ Decision 2007-557 DC, 15 Novembre 2007 (immigration, integration, asylum).

⁵⁹⁸ The Fourteenth Amendment, adopted in 1868, was against "depriv[ing] any person of life, liberty, or property, without due process of law." See *Parents Involved in Community Schools v Seattle School District No. 1*, 551 US 701, 746 (2007) and *Lawrence v Texas*, 539 US 558, 567, 575 (2003).

⁵⁹⁹ A Barak *Human Dignity: The Constitutional Value and the Constitutional Right* (2015) 198-199.

⁶⁰⁰ See *Makwanyane*.

⁶⁰¹ Glensy (2011) *Colum Hum Rts L Rev* 86. See too Barak (2015) 193.

⁶⁰² 323 U.S. 214, 240 (1944).

⁶⁰³ 327 U.S. 1 (1946).

⁶⁰⁴ *Yamashita v Styler* 29, 41 (dissenting opinion of Murphy J).

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“the basest of human activities.”⁶⁰⁵ In the American jurisprudence, dignity is not used as an objective norm; it is rather viewed as “a background principle” that mandates the State to meet certain minimum standards.⁶⁰⁶ As a background principle, human dignity has been deployed to resolve matters related to personal liberties and humanitarian needs. For instance, the court in *Hope v Pelzer*⁶⁰⁷ declared that the punishment of tying a prisoner to a hitching post in the sun for more than seven hours, supplying him with little water and preventing him from going to the toilet was “antithetical to human dignity because it was degrading and dangerous.”⁶⁰⁸ Human dignity was either impliedly or explicitly deployed in the equal protection jurisprudence to denounce discriminatory policies in the education system. Discriminatory policies were held to be denigrating to the feeling of a discriminated group⁶⁰⁹ and to demean the dignity and moral worth of the person.⁶¹⁰

It is thus apparent that human dignity has played a significant role in constitutional interpretation in various jurisdictions, even in countries whose constitutions do not expressly refer to dignity. It has been applied to promote respect for human dignity in a positive and negative way as will be explained in the next section. The principle of human dignity deployed together with equality can assist courts in giving meaning to the socio-economic rights of refugees in respect of access to public relief and assistance, healthcare and adequate housing accommodation. The thesis now turns to explore the positive and negative dimensions of dignity.

3 6 Two dimensions of human dignity

There are two dimensions of human dignity, which are reflected in court decisions and international legal instruments which seek to protect and promote each and every individual’s freedom on the basis of the principle of equal treatment.⁶¹¹ Human dignity can be claimed, enforced or protected in either a positive or a negative way, as explained below.

⁶⁰⁵ Glensy (2011) *Colum Hum Rts L Rev* 87.

⁶⁰⁶ 88.

⁶⁰⁷ 536 U.S. 730, 736 (2002).

⁶⁰⁸ *Hope v Pelzer* at 745.

⁶⁰⁹ *Brown v Board of Education*, 347 U.S. 483, 494 (1954).

⁶¹⁰ *Parents Involved in Community Schools v Settle School Dist. No. 1*, 551 U.S. 701, 746 (2007). See too *Rice v Cayetano*, 528 U.S. 495, 571 (2000).

⁶¹¹ Preambles of the UDHR and the UN Charter.

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3 6 1 *Positive dimension*

The positive dimension of rights imposes an obligation on the state to take positive steps to protect and promote the rights in question. Rights are seen not simply as a defensive mechanism to prevent the state from interfering with individual rights and liberties, but require positive state action. It is clear from section 7(2), which provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights, that the Constitution imposes both negative and positive obligations. The same is true of section 10, which guarantees the right of every person to have his or her dignity respected and protected. In addition, certain sections in the Bill of Rights require the state to take reasonable legislative and other measures to ensure access to material resources that are important in securing a dignified existence.⁶¹²

The positive dimension of rights is closely linked to (re)distributive measures, as it requires the state to promote the equal worth of the human person by (re)distributing resources in a fair and just manner, and to act positively to uplift people from poverty or to redress disadvantage.⁶¹³ The conditions of poverty and deprivation are usually linked to the denial of human dignity – because people who live in abject conditions or who struggle to put bread on their tables cannot be said to live in dignity.⁶¹⁴ Used in this sense, the concept of human dignity is associated with socio-economic rights or second generation human rights which are, largely, conceived in positive terms.⁶¹⁵ These rights are underpinned by the belief that the protection of human dignity requires certain minimum economic and social conditions⁶¹⁶ or minimum standards of care.⁶¹⁷ They require states to direct their institutions to (re)distribute resources

⁶¹² See ss 25(5), 26(2) and 27(2).

⁶¹³ Compliance with human dignity serves as a basis for the promotion of economic, social and cultural development. These three aspects (i.e. economic, social and cultural) are viewed as indispensable for fostering the social good and human fulfilment. See, art 22 of the UDHR and Wallace (1999) *J Martin Center* 132.

⁶¹⁴ Glensy (2011) *Colum Hum Rts L Rev* 122. See too Eckert “Legal Roots of Human Dignity in German Law” in *The Concept of Human Dignity in Human Rights Discourse* 47 (the state has a mandate to improve the condition of the lower class, who had fallen into poverty and starvation).

⁶¹⁵ Motala Z & Ramaphosa C *Constitutional Law: Analysis and Cases* (2002) 390; C Mbazira *Enforcing the Economic, Social and Cultural Rights in the South Africa Constitution as Justifiable Individual Rights: The Role of Judicial Remedies* (2007) 6; D Davis “Socio-economic Rights in South Africa: The Record of the Constitutional Court after Ten Years” (2004) 5 *ESR Review* 1, 3-7; *Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) (“First Certification Case”) para 81 (in respect of the right to education); *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 637; *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) para 126; *Grootboom* para 27; and *Khosa* para 110.

⁶¹⁶ 390.

⁶¹⁷ Glensy (2011) *Colum Hum Rts L Rev* 112.

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towards raising the living standards of the poor. Socio-economic rights impose positive obligations on the state to ensure that every human being has access to social goods and public services.⁶¹⁸ These include, for example, access to adequate housing,⁶¹⁹ food security,⁶²⁰ water security,⁶²¹ social security (or a social safety net),⁶²² fair livelihood opportunities (or labour),⁶²³ education,⁶²⁴ healthcare,⁶²⁵ and land.⁶²⁶

The refugee framework encompasses most of these social goods and public benefits, and refugees must typically be given favourable access to these goods. Accessibility is thus a first priority and is dependent both on the will of the state to protect refugees' rights and on cooperation among states through the mediation of UN agencies, particularly the UNHCR.⁶²⁷ Section 7(2) of the South African Constitution imposes an obligation on the government to respect, protect, promote and fulfil the rights of refugees contained in the Bill of Rights. They include, among other things, the refugees' right to have their dignity fully respected and protected.⁶²⁸

In the socio-economic domain, claims to human dignity tend to be posed as a right to development, requiring the state to deliver public services that will enhance the progress and wellbeing of the people, thereby improving the quality of their lives. Human dignity can be relied on to argue that human capabilities should be developed by the state to enable human beings to make autonomous choices about their lives and to participate in shaping their society.⁶²⁹ The protection of refugees is

⁶¹⁸ *Grootboom* paras 38, 41. See too Liebenberg (2005) *S. Afr. J. on Hum. Rts.* 3-4 and Glensy (2011) *Colum Hum Rts L Rev* 112 who state that a positive duty is imposed on the state to provide for the basic necessities of life.

⁶¹⁹ S 26 of the Constitution. See too art 25 of the UDHR and art 11 of the ICESCR.

⁶²⁰ S 27. See too art 25 of the UDHR and art 11 of the ICESCR.

⁶²¹ S 27.

⁶²² S 27. See too art 22 of the UDHR and arts 9 and 10 of the ICESCR.

⁶²³ S 23. See too art 23 of the UDHR and arts 6, 7 and 10 of the ICESCR.

⁶²⁴ S 29. See too art 26 of the UDHR and art 13 and 14 of the ICESCR.

⁶²⁵ S 27. See too art 25 of the UDHR and art 12 of the ICESCR.

⁶²⁶ S 25(5). See too art 17 of the UDHR.

⁶²⁷ Under the preamble, state parties to the Geneva Refugee Convention note that "the [UNHCR] is charged with the task of supervising international conventions providing for protection of refugees, and [recognise] that the effective coordination of measures taken to deal with [the] problem [of refugees] will depend upon the cooperation of the states with the High Commissioner."

⁶²⁸ S 10 of the Constitution, read in tandem with section 27(b) of the Refugees Act. Whereas s 10 states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected", s 27(b) provides that "[a] refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of [the Refugees Act]."

⁶²⁹ Liebenberg (2005) *S. Afr. J. on Hum. Rts.* 7 and M C Nussbaum *Women and Human Development – The Capabilities Approach* (2000) 72.

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indeed directed to the restoration of the normality enjoyed by refugees prior to civil unrest or their forced migration.

It is sometimes claimed that it is misconceived to rely on human dignity to ground socio-economic rights. This is because human dignity is innate. It is something that cannot be given or taken away. The argument goes that vulnerable people such as refugees, asylum-seekers, homeless and needy citizens possess honour and dignity simply by virtue of being human beings, regardless of the fact that they are living in harsh, intolerable and undignified conditions.⁶³⁰ These persons still possess the inherent worth inhering in every human person because their humanity cannot be taken away by a lack of material and resources.⁶³¹ It is indeed true that poverty does not deprive its victims of inherent human dignity. From this perspective, it has been argued that individuals, as human beings with intrinsic worth, cannot, at any given time, lose their inherent human dignity even in the most brutal conditions.⁶³² No one can lose his or her inherent human dignity due to the absence of or deprivation of basic shelter, healthcare and other socio-economic rights.⁶³³ According to Drucilla Cornell, the poor or oppressed people would claim that their “conditions should be changed in the name of their dignity and not because they have lost their dignity due to those conditions.”⁶³⁴

But although human dignity is retained under conditions of extreme poverty, it is, as Sandra Liebenberg points out, the conditions of deprivation and poverty which deprive human beings of the opportunity to live in dignity and to live in conditions that enable them to advance themselves through participation in socio-economic activities.⁶³⁵ It is therefore with reference to dignity’s positive dimension that poor, vulnerable people submit that their dignity was assailed by the lack of the most essential needs for survival and demand state support or intervention for the restoration of their human dignity. The fact that all human beings have inherent human dignity, regardless of their socio-economic position, does not absolve the

⁶³⁰ For more discussion, see J O McGinnis “The Limits of International Law in Protecting Dignity” (2003) 27 *Harvard Journal of Law & Public Policy* 137, 137.

⁶³¹ McGinnis (2003) *Harvard Journal of Law & Public Policy* 137.

⁶³² D Cornell “A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity, and Reconciliation” (2004) 19 *SAPR/P* 666, 668.

⁶³³ 668.

⁶³⁴ 688.

⁶³⁵ Liebenberg (2005) *S. Afr. J. on Hum. Rts.* 2-3.

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state from its duty to take positive steps to create an enabling environment in which individuals' dignity and capacity for self-realisation can flourish.

According to the Constitutional Court in the case of *Mazibuko v City of Johannesburg*,⁶³⁶ socio-economic rights litigation can be used as a mechanism to hold the democratic institutions of the state to account.⁶³⁷ Refugees or asylum-seekers can also use this mechanism in an attempt to hold the South African government to account for the conditions in which they live. In doing so, they can rely on the idea that the state is responsible, through the implementation of socio-economic rights, to ensure that the dignity and moral worth of all people within South Africa's borders are respected.⁶³⁸

The link made in South Africa's constitutional jurisprudence between human dignity and socio-economic rights implies that socio-economic rights are also connected to the values of freedom and equality. On the one hand, poverty and deprivation are an affront to dignity to the extent that they prevent persons from freely developing their personalities and making autonomous choices. On the other hand, poverty and deprivation deny the equal dignity to which every person is entitled and result in social inequality. For these reasons, respect for human dignity requires the state to respond to human deficiencies and social inequality experienced by various vulnerable groups. Certainly, social inequalities and human deficiencies present a severe impediment to refugees' and asylum-seekers' capacity to live as free moral agents. With adequate resources and materials at their disposal, refugees and asylum-seekers can no longer be viewed as a burden, since they are able to transform their critically developed thinking into action and, as a result, shape their own fate, thereby contributing to the economy. To summarise, the positive dimension of human dignity requires the state to adopt laws which allow refugees to become involved in social and economic life. Such laws should create social conditions in which freedom is increased so as to enable vulnerable refugees and asylum-seekers to pursue their dreams.

⁶³⁶ 2010 3 BCLR 239 (CC).

⁶³⁷ *Mazibuko* para 160.

⁶³⁸ Paras 160-162.

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3 6 2 Negative dimension

The negative dimension of rights imposes an obligation on the state to refrain from actions interfering with the exercise of fundamental rights and freedoms. Political and civil rights are, for the most part, conceived in negative terms.⁶³⁹ Although these rights can also impose positive obligations,⁶⁴⁰ they predominantly require freedom from arbitrary state interference rather than positive state intervention in the quest of a dignified life. The state is thus expected to desist from denigrating human dignity⁶⁴¹ or from reducing human persons to mere objects.⁶⁴² Put differently, it must act in accordance with the Kantian notion that an individual should never be treated as a mere means to achieve a particular end. The negative dimension of human dignity adds value, content and substance to a number of rights set forth in the South African Bill of Rights, human rights texts and the Geneva Refugee Convention. Those negative rights include but are not limited to the right to life;⁶⁴³ equality;⁶⁴⁴ freedom from slavery, servitude or forced labour;⁶⁴⁵ freedom from arbitrary deprivation of liberty⁶⁴⁶ or from arbitrary arrest and detention,⁶⁴⁷ freedom from all forms of violence, freedom from torture and from cruel, inhuman, or degrading treatment or punishment.⁶⁴⁸

Importantly, socio-economic rights also have a negative dimension. The negative dimension is reflected in the principle of self-sufficiency. Being self-sufficient implies that an individual's socio-economic rights and benefits should be protected negatively from improper invasion by the state.⁶⁴⁹ The state must refrain from improper interference with existing socio-economic rights⁶⁵⁰ or from taking retrogressive measures deliberately.⁶⁵¹ It is therefore not allowed to take away a

⁶³⁹ Weston (1984) *Hum Rts* Q 264.

⁶⁴⁰ For example, the right to safety and security of the person requires the state to take positive steps to protect individuals, while the right to vote imposes duties on the state to take positive steps to ensure free and fair elections.

⁶⁴¹ Glensy (2011) *Colum Hum Rts L Rev* 120-1. See too Simmons (2009) *Ind. J. Global Legal Stud.* 440.

⁶⁴² Botha (2009) *Stell. LR* 180.

⁶⁴³ S 11 of the Constitution. See also art 3 of the UDHR and art 6(1) of the ICCPR.

⁶⁴⁴ S 9. See too arts 1 and 7 of the UDHR and art 3 of the ICCPR.

⁶⁴⁵ S 13. See too art 4 of the UDHR and art 8 of the ICCPR.

⁶⁴⁶ S 12. See too art 3 of the UDHR and art 6(1) of the ICCPR.

⁶⁴⁷ S 35. See too art 9 of the UDHR and art 9 of the ICCPR.

⁶⁴⁸ S 12. See too art 5 of the UDHR and art 7 of the ICCPR.

⁶⁴⁹ *First Certification Case* para 78. See too Currie & de Waal *Bill of Rights* 572.

⁶⁵⁰ Para 72. See too Currie & de Waal *Bill of Rights* 572.

⁶⁵¹ Currie & de Waal *Bill of Rights* 572.

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person's existing access to socio-economic rights, or to deprive a person of the opportunity or resources to meet their water, food and housing needs.⁶⁵²

The right to human dignity, in its negative dimension, was invoked inter alia in the abolition of the death penalty;⁶⁵³ the ban on corporal punishment;⁶⁵⁴ the recognition of gays' and lesbians' constitutional rights;⁶⁵⁵ the protection of institutions of marriage and family life;⁶⁵⁶ the safeguarding of a woman's freedom from domestic violence⁶⁵⁷ and abusive traditions and practices,⁶⁵⁸ children's freedom from abuse and degradation,⁶⁵⁹ and asylum-seekers' freedom to seek asylum.⁶⁶⁰ It is also, in refugee matters, invoked to determine whether the constitutional duty of the state to take a reasonable and fair administrative decision was complied with.⁶⁶¹

Not every limitation of the negative dimension of rights is unconstitutional. Limitations can be saved if they are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁶⁶² Although dignity itself can be limited, the value of human dignity plays a vital role in determining whether fundamental rights limitations are justifiable. Where a person is treated as a mere object or in a way that debases or humiliates him or her, the limitation will be subjected to a stringent standard and is unlikely to survive scrutiny.⁶⁶³ Conversely, where a person's freedom is limited, the negative dimension of dignity still dictates that he or she must be treated with humanity and with respect

⁶⁵² 572. See too *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC). In this case Mokgoro J dealt with a negative infringement of access to housing. She reasoned that, "at the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)" (para 34).

⁶⁵³ *Makwanyane* (in respect of whether death penalty is a competent sentence for murder).

⁶⁵⁴ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

⁶⁵⁵ *Du Toit v Minister of Welfare and Population Development* 2002 10 BCLR 1006 (CC) (in respect of adopting a child); *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC) (In terms of extension of the definition of marriage to include same-sex couples); *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC) (in respect of marriage); and *Gory v Kolver NO* 2007 4 SA 97 (CC) (in respect of intestate succession).

⁶⁵⁶ See *Dawood* case.

⁶⁵⁷ *S v Baloyi* 2000 1 BCLR 86 (CC); *Omar v Government of the Republic of South Africa* 2006 2 BCLR 253 (CC) (in respect of s 8 of the Domestic Violence 116 of 1998), and *S v Ngubeni* (A459/2008) [2008] ZAGPHC 178 (17 June 2008)

⁶⁵⁸ *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC).

⁶⁵⁹ *C v Department of Health and Social Development, Gauteng* 2012 2 SA 208 (CC); *S v M* 2008 3 SA 232 (CC); and *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 12 BCLR 1429 (CC).

⁶⁶⁰ *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC).

⁶⁶¹ In the cases of *Kiliko* (in respect of accepting asylum application within a reasonable time) and *Lawyers for Human Rights* (in respect of the administrative review of a deportation decision).

⁶⁶² S 36 of the Constitution.

⁶⁶³ See the discussion on the nature of the right, S Woolman & H Botha "Limitations" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2nd ed (2013) 36-55-36-58.

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for the dignity inherent in every human person.⁶⁶⁴ Refugees and asylum-seekers must also be treated in a manner that respects their intrinsic worth, and may not be subjected to objectification or arbitrary deprivations of freedom.

Although the negative dimension of dignity is not the main focus of this study, it will occasionally be referred to, to strengthen the content and substance of the positive dimension of dignity as it pertains to social and economic development. It is also worth mentioning that the distinction between the positive and negative dimensions is pragmatically blurred, mainly because these two dimensions are interrelated and dependent on one another.⁶⁶⁵

3.7 Concluding remarks

It has been demonstrated in this chapter that the notion of dignity, which was initially conceived as a social status, came to be understood as the inner moral worth possessed by every human being. This resulted in the affirmation of human dignity as a basic norm on which human rights are constituted. Today, human dignity is no longer considered an acquired or earned honour, respect or reputation, but inheres in every human person. It is a right and not a privilege or trait. It signifies equal respect and equal moral worth. It thus imposes obligations on the state to protect all human beings, including refugees and asylum-seekers, by virtue of their humanity.

The idea of dignity as a legal norm had important implications for the protection of refugees, as it helped to enable the recognition of legal obligations as opposed to mere moral obligations relating to the treatment of refugees. It also resulted in a shift away from an exclusive concern for physical safety to the protection of social rights, such as health and welfare. These transformational processes placed limits on the principle of self-preservation, as states were placed under a legal obligation to protect those seeking asylum, who are physically deprived, financially distressed, and totally impoverished. These changes were motivated by the need to prevent a variety of state practices and policies, which resulted inter alia in the non-admission, arbitrary arrest and deportation of refugees and their exclusion from social welfare, from violating their inherent human dignity and worth. It was necessary to create a

⁶⁶⁴ Art 10(1) of the ICCPR.

⁶⁶⁵ See *Khosa* para 41 (rights are intersecting and reinforce one another at the point of intersection) and *Grootboom* para 23 (both civil and political or negative rights and social and economic rights or positive rights are entrenched in the Bill of Rights and all the rights are inter-related and mutually supporting).

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right to asylum and to give effect to it, in view of the fact that, historically, the denial of asylum resulted in dehumanisation, indignity and statelessness. Nation states were obliged to welcome refugees, to respond to their essential and humanitarian needs and to treat them with respect, dignity, care and concern.

Despite these developments, it is of concern that refugees and asylum-seekers in South Africa live in a protracted state of precariousness. There is no doubt that the denial of access to socio-economic rights violates their human dignity. The principle of favourable treatment should be contextualised within the framework of dignity-based and rights-based approaches and must be infused by the African philosophical ethos of *ubuntu*. Dignity, as a right and value, should inform the interpretation of the constitutional rights of refugees and asylum-seekers, as well as the rights and benefits set forth in the Refugees Act. National distributive policies and strategies that respond to the social needs of citizens, in particular, the historically disadvantaged, need to be aligned with the Refugees Act. This should be the case, because as it has been demonstrated, the hardships and challenges faced by refugees after their arrival in host countries encouraged the international community to ground asylum law in the principle of distinctive, favourable treatment with respect to social/public goods. In a humanitarian and social context, this treatment is seen as an appropriate response to the refugee situation. The problems pertaining to refugees are a matter of international concern and cannot be resolved by individual countries. They require collective efforts. International co-operation must be established, maintained and reinforced by the government of South Africa. This makes refugee rights special and unique.

Dignity, understood negatively, requires the state not to interfere with certain refugee rights. Understood positively, it obliges the state to take positive steps to afford relief to refugees and asylum-seekers suffering from social vulnerabilities, starvation and deficiencies. If the state were to fail to act in such circumstances, it would contribute to their hopelessness and desperation. The state is under a positive obligation to alleviate the suffering caused by illness, poverty or psychological distress, or generated by the effects of prolonged warfare and stagnant exile. These situations may be worsened by unfavourable access to socio-economic rights and benefits or the absolute denial of access to these rights. An affirmative or preferential approach towards accessing the socio-economic rights and benefits becomes imperative to restore their hope and sense of humanity. This requires the state to

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make resources available to individuals who lack the means needed to turn positive rights into realities. Dignity for the poor is protected through their ability to have access to basic services.

Accessibility of refugee and constitutional rights is crucial as this will create conditions for refugees and asylum-seekers to develop their capabilities and potential for human fulfilment and raise the quality of their lives. The positive outcome of accessibility is the restoration of a life of dignity which is realised through breaking free from enforced reliance on humanitarian assistance, or hand-outs, or other external assistance. A life of dignity as self-reliance can be enhanced through the recognition of refugees as forming part of a host community and as individuals to whom distributive justice apply. As Sen puts it, people are stuck in chronic indignity, deprivation and economic hardship, not because they have little or no income, but because their exclusion and marginalisation make it difficult or impossible for them to engage in economic activities or to develop fully and be given the opportunity to use their basic talents, skills, and experiences.⁶⁶⁶ In this context, dignity is dependent on the inclusion of refugees and asylum-seekers in social welfare schemes, and in making resources available to them. The tendency of the state to disregard refugee norms and principles would, in various instances, amount to a violation of human dignity and thus be unconstitutional. Through litigation, redress can be demanded if the dignity of refugees and asylum-seekers has been assailed due to the denial of access to socio-economic rights.⁶⁶⁷ As will be discussed further in the subsequent chapters, to avoid the debasement of refugees and asylum-seekers or unnecessary litigation, laws, particularly distributive laws, ought to be designed in a way that protects their humanitarian, health, housing and other basic needs on a favourable basis. Refugees and asylum-seekers are indigent people, lacking the necessary financial means for claiming their rights through litigation.⁶⁶⁸

⁶⁶⁶ B Chimni "The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels" (2008) 1 *Law and Development Review* 1, 2. See too Kavuro (2012) *Young Africans Research Journal* 111.

⁶⁶⁷ In most cases, the State does not provide documentation that would allow refugees and asylum-seekers to sojourn in South Africa legally.

⁶⁶⁸ *Union of Refugee Women* paras 24, 89.

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CHAPTER 4

PUBLIC RELIEF AND ASSISTANCE

4 1 Introduction

This chapter deals with the question whether asylum-seekers are entitled to the right to public relief and assistance as evinced by article 23 of the Geneva Refugee Convention. This mandatory provision requires host states to confer on refugees “lawfully staying” in their territory the same public relief and assistance schemes enjoyed by citizens.⁶⁶⁹ This provision is fundamentally important to the recognition and treatment of refugees, since it is pro-poor and benefits refugees who are in the most precarious and distressful situations.

In South Africa, the right to public relief and assistance is not expressly protected by the South African Constitution or, by extension, the Refugees Act, as amended. However, section 27(1) of the South African Constitution recognises the right of everyone to have access to sufficient food, water and social security, including the right to “appropriate social assistance” where they are unable to support themselves.⁶⁷⁰ These constitutional safeguards impose an obligation on the South African government to ensure that every individual has a right to an adequate standard of living, including improvement of the quality of life.⁶⁷¹ Social assistance and social insurance (or occupational insurance, as it is also known) are social security schemes designed to protect those individuals who struggle to make ends meet.⁶⁷² The former is a non-contributory social security scheme, which is funded by the state through government revenue.⁶⁷³ It is designed to protect those who “are

⁶⁶⁹ Art 23 of the Geneva Refugee Convention.

⁶⁷⁰ S 27(1)(a)-(b). The concept of social assistance is defined under s 1 of the Social Assistance Act 13 of 2004 to mean a social grant including social relief of distress.

⁶⁷¹ Socio-economic rights impose an obligation on the state to take positive measures to ensure a life of dignity for all inhabitants of South Africa and to increase their well-being. See, for example, *Grootboom* paras 1-2.

⁶⁷² J D Triegaardt “Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa” (27-02-2006) *Development Bank of Southern Africa* <[http://www.dbsa.org/EN/About-](http://www.dbsa.org/EN/About-Us/Publications/Documents/Accomplishments%20and%20challenges%20for%20partnerships%20in%20development%20in%20the%20transformation%20of%20social%20security%20in%20South%20Africa.pdf)

[Us/Publications/Documents/Accomplishments%20and%20challenges%20for%20partnerships%20in%20development%20in%20the%20transformation%20of%20social%20security%20in%20South%20Africa.pdf](http://www.dbsa.org/EN/About-Us/Publications/Documents/Accomplishments%20and%20challenges%20for%20partnerships%20in%20development%20in%20the%20transformation%20of%20social%20security%20in%20South%20Africa.pdf)> (accessed 03-07-2015) 3 and South African Human Rights Commission “Social Security, Social Assistance, and Social Services for Children” (2000) <http://www.sahrc.org.za/home/21/files/Reports/3rd%20ESR%20report%20chapter_2.pdf> (accessed 03-07-2015) 11.

⁶⁷³ Triegaardt “Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa” (27-02-2006) *Development Bank of Southern Africa* 3. See too Currie & de Waal *Bill of Rights* 251.

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unable to support themselves and their dependants".⁶⁷⁴ The latter is a contributory social security scheme, funded by employers and employees on the basis of an agreed percentage of their wages. It is designed to safeguard employers and employees, along with their dependants, through insurance, against contingencies which disrupt their means of livelihood.⁶⁷⁵ These two forms of social security are also recognised under the Geneva Refugee Convention. Article 23, which recognises the right to public relief and assistance, can be taken to refer to non-contributory social security schemes, whereas article 24, which recognises rights relating to social security and protection against unemployment, is broad enough to encompass contributory social security schemes as well.

The Refugees Act was designed to give effect to the rights set forth in the refugee conventions,⁶⁷⁶ the UDHR, and other human rights instruments.⁶⁷⁷ Section 27(b) of the Act states that a refugee is entitled to full legal protection, which includes the rights in the Bill of Rights, while section 27A(d) provides that an asylum-seeker is entitled to the rights in the South African Constitution, in so far as those rights apply to an asylum-seeker. It was also confirmed in a number of cases that the rights contained in the Bill of Rights are applicable to refugees and asylum-seekers.⁶⁷⁸ This seems to suggest that refugees and asylum-seekers have access to the social security system by virtue of section 27 of the Constitution.

While recognised refugees can, in principle, become beneficiaries of social assistance in terms of the Social Assistance Act, the same does not apply to asylum-seekers who are unable to support themselves and their families.⁶⁷⁹ They are accordingly expected to support and integrate themselves. Despite the fact that they are in a desperate situation given that their means of livelihood have been disrupted in a fundamental way, asylum-seekers are not covered by the Social Assistance Act 13 of 2004, which is designed to secure the well-being and dignity of poor families through the provision of social grants.

⁶⁷⁴ 3. See too Currie & de Waal *Bill of Rights* 251.

⁶⁷⁵ 3. See too Currie & de Waal *Bill of Rights* 251.

⁶⁷⁶ The Geneva Refugee Convention and the African Refugee Convention.

⁶⁷⁷ For example, the ACHPR, the ICESCR and the ICCPR.

⁶⁷⁸ The rights in the Bill of the Rights apply to everyone living in South Africa irrespective of whether they are citizens or non-citizens or of whether they are legal or illegal foreign nationals or of whether a foreign national is at the port of entry. See *Tafira v Ngozwane* TPD case no 12960/06; *Tantoush v Refugee Appeal Board* TPD 11-09-2007 case no 13182/06 para 64; *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) paras 26-27; and *Watchenuka* para 25.

⁶⁷⁹ See the discussion under 4 2 below.

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Asylum-seekers' right to public relief and assistance will therefore be analysed in light of the right to have access to an adequate standard of living, guaranteed by international human rights texts,⁶⁸⁰ which is impliedly given effect by section 27 of the South African Constitution. The chapter will examine the relationship of this right with the right to appropriate social assistance, guaranteed by section 27(1)(c) of the South African Constitution and given content by the Social Assistance Act. In the course of this analysis, court judgments holding that refugee rights must be understood and applied in a humanitarian context will be taken into consideration.⁶⁸¹ Refugee rights will be analysed in view of the need to promote "human dignity, human welfare, and the alleviation of suffering",⁶⁸² and the constitutional demand to interpret legislation in a way which is consistent with the spirit, purport and objects of the South African Constitution.⁶⁸³

This chapter will outline the views of national and international courts in respect of access to social assistance (or social safety nets) for indigent and vulnerable refugees and asylum-seekers. Attention will be given to the objectives that inspired the adoption of national and international refugee texts as set forth in their preambles.⁶⁸⁴ Foreign and international refugee frameworks will also be considered to determine the nature of the treatment that should be accorded to those who are seeking asylum but are not yet recognised as refugees. It will be asked whether South Africa is bound by its own enactment of the Refugees Act to protect indigent and vulnerable asylum-seekers against humiliation and degradation caused by economic deprivation. The chapter will proceed to inquire into the constitutionality of the failure to take legislative and other measures to realise asylum-seekers' right of access to social assistance.

The chapter will argue that it is imperative to protect asylum-seekers from further social vulnerabilities, and will make recommendations as to how the social

⁶⁸⁰ See, for example, art 11 of the ICESCR and arts 6(2) and 27 of the CRC.

⁶⁸¹ *Radjabu v The Chairperson of the Standing Committee on Refugee Affairs* WCD 04-09-2014 case no 8830/2010 para 7.

⁶⁸² Para 7.

⁶⁸³ See, for example, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) paras 22-6; *De Beer NO v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)* 2002 1 SA 429 (CC) para 24; *Daniels v Campbell* NO 2004 5 SA 331 (CC) paras 43-6; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 44.

⁶⁸⁴ See the Preambles to the Refugees Act, the Geneva Refugee Convention and African Refugee Convention.

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assistance policy should be formulated and interpreted to ensure that all refugees lawfully staying in South Africa are protected.

4 2 Beneficiaries of social grants

The Social Assistance Act, which repealed the Social Assistance Act 59 of 1992 and came into operation in April 2006, was adopted to give effect to the state's obligation in terms of section 27(1)(c) of the South African Constitution. The Social Assistance Act focuses on the administration of social assistance in the form of social grants and social relief and distress ("SRD").⁶⁸⁵ The concept of a social grant refers to social protection in the sense of a non-contributory social security scheme. It is said to form part of "the government's various initiatives to improve the quality of lives of the millions of [vulnerable people] who live in abject poverty with little or no means to improve the quality of their lives".⁶⁸⁶ There are seven different categories of social grants, such as a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid.⁶⁸⁷ Social assistance schemes are, as Triegaardt explains, directed at uplifting poor families out of chronic poverty or transient poverty.⁶⁸⁸

Under section 5(1)(c) of the Social Assistance Act, social assistance schemes are limited to South African citizens and members of a group or category of persons prescribed by the Minister of Social Development.⁶⁸⁹ Nevertheless, section 2(1) of the Social Assistance Act takes into cognisance the principle of reciprocity. It states that social assistance could apply to a non-citizen in cases where an agreement contemplated under section 231(2) of the South African Constitution has been

⁶⁸⁵ S 1 of the Social Assistance Act.

⁶⁸⁶ M P Olivier *Introduction to Social Security Law* (2006) 25.

⁶⁸⁷ S 1 of the Social Assistance Act.

⁶⁸⁸ Chronic poverty is defined as an adverse outcome of "incapacity to work and earn" whereas transient poverty is defined as an adverse outcome of "a decline in the capacity [to work and earn] from a marginal situation that provides minimal means for survival with few reserves." See J D Triegaardt *Accomplishments and Challenges for Partnerships in Development in the Transformation of Social Security in South Africa* (2006) 3.

⁶⁸⁹ S 5 of the Social Assistance Act describes eligibility for social assistance as follows: A person is entitled to the appropriate social assistance if he or she (a) is eligible in terms of s 6, 7, 8, 9, 10, 11, 12 or 13; (b) subject to s 17, is resident in the Republic; (c) is a South African citizen or is a member of a group or category of persons prescribed by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette. The term South African citizen is defined under s 1 as "a person who has acquired citizenship in terms of Chapter 2 of the South African Citizenship Act 88 of 1995, and includes any person who is (a) not a South African citizen and who prior to 1 March 1996 was in receipt of a benefit similar to a grant in terms of any law repealed by s 20 of the Social Assistance Act 59 of 1992; or (b) a member of a group or category of persons determined by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette".

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entered into between South Africa and the country of which that person is a citizen, which makes provision for the Social Assistance Act to apply to citizens of that country who reside in South Africa. Although the Geneva Refugee Convention is one of the agreements contemplated under section 231(2) of the Constitution, refugees were not beneficiaries of social assistance schemes prior to the judgments handed down in the case of *Khosa*,⁶⁹⁰ *Bishogo v The Minister of Social Development*,⁶⁹¹ and *Scalabrini Centre, Cape Town v The Minister of Social Development*.⁶⁹² It was only as a result of litigation that social assistance was extended to permanent residents and refugees.

The eligibility of permanent residents and refugees for social assistance was later recognised in terms of the Regulations Relating to the Application for the Payment of Social Assistance and the Requirement or Conditions in Respect of Eligibility for Social Assistance of 2008 and of 2012, respectively (“the Regulations to the Social Assistance Act”).⁶⁹³ As from 1 April 2012, recognised refugees became co-beneficiaries of all social grants, excluding the war veteran’s grant.⁶⁹⁴ Under sections 2(e), 3(a), 6(1)(g), 7(1)(a)(i), 8(c) and 9(1)(b) of the Regulations to the Social Assistance Act, a person is eligible for an older person’s grant, a disability grant, a child support grant, a foster child grant, a care-dependency grant, and social relief of distress, respectively, if he or she is a South African citizen, a permanent resident or a refugee. Refugees who are in receipt of an older person’s grant or disability grant and are, due to their physical or mental condition, requiring regular attendance by another person, are also eligible for grant-in-aid in accordance with section 5 of the Regulations to the Social Assistance Act. However Daven Dass, Kaajal Ramjathan-

⁶⁹⁰ In *Khosa*, former Mozambican refugees who became permanent residents challenged their exclusion from social assistance schemes. The Constitutional Court ruled that the exclusion of permanent residents from government grants – solely on the basis of citizenship – was contrary to the South African Constitution. The Court found that basing exclusion solely on nationality gave rise to unfair discrimination and severely infringed the right to human dignity.

⁶⁹¹ TPD 09-2005 case no 9841/05 (consent order). In *Bishogo*, the Department of Social Development’s refusal to pay a foster care grant to refugees who provided foster care to refugee children was challenged. The Minister agreed to pay social assistance in the form of a distress grant for three months whilst the necessary change could be made to the computer system to allow the capturing of the refugee documentation number.

⁶⁹² TPD case no 32054/2005. In *Scalabrini Centre*, the exclusion of disabled refugees from receiving disability grants was challenged. The exclusion was found to be inconsistent with the constitutional rights to human dignity, equality and social assistance.

⁶⁹³ Regulation Gazette R898 GG 31356 of 22 August 2008 in respect of permanent residents and Regulation Gazette 9728 GG 35205 of 30 March 2012 in respect of refugees.

⁶⁹⁴ Regulation Gazette 9728 GG 35205 of 30 March 2012, which came into effect on 1 April 2012, amended reg 1 of Regulations to include refugees, as defined in section 1 of the Refugees Act 130 of 1998, in the beneficiaries of the social grants, more precisely, citizens and permanent residents.

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Keogh and Fatima Khan argue that these social grants are provided by the state under limited circumstances.⁶⁹⁵ Refugees who do not meet the criteria, as contemplated by the Social Assistance Act and its Regulations,⁶⁹⁶ cannot be assisted.

This chapter does not seek to address the barriers arising from the requirements of social assistance schemes. Instead, it focuses on the absolute exclusion of asylum-seekers from social grants. The chapter will accordingly investigate whether asylum-seekers fall within the scope of refugees “lawfully staying” within the South African borders as envisaged by the Geneva Refugee Convention. It will then proceed to explore whether they are entitled to equal treatment as accorded to South African citizens, permanent residents and recognised refugees as far as social security in the form of social assistance is concerned.

4 3 Nature and scope of the concept of refugees lawfully staying

The question whether asylum-seekers are entitled to the right to public relief and assistance hinges on a second question: whether asylum-seekers qualify as refugees lawfully staying in the host country. Since there is no express mention of asylum-seekers under the Geneva Refugee Convention and the African Refugee Convention, this needs to be determined with reference to academic literature and case law.

4 3 1 *The legal position of an asylum-seeker within the asylum framework*

A narrow or a broad interpretative approach can be used to determine the legal position of an asylum-seeker. The narrow interpretation is based on the definition of asylum as “[t]he grant, by a state, of protection on its territory to persons from another state who are fleeing persecution or serious danger”.⁶⁹⁷ Based on this definition, it can be argued that asylum-seekers are still in the process of seeking a country of asylum. It cannot therefore be inferred from their “mere” physical presence and residence within a country, that they have been afforded asylum, and hence the

⁶⁹⁵ D Dass, K Ramjathan-Keogh & F Khan “The Socio-economic Rights of Refugees and Asylum-seekers in South Africa” in F Khan & T Schreier (eds) *Refugee Law in South Africa* (2014) 230.

⁶⁹⁶ Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in respect of Eligibility for Social Assistance, Proc R15 in GG 28652 of 31-03-2006 as amended.

⁶⁹⁷ K Jastram & M Achiron *Refugee Protection: A Guide to International Refugee Law* (2001) 125.

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refugee rights are not applicable to them. The bottom line is that asylum-seekers cannot claim refugee rights unless they are formally recognised as refugees.

On this narrow interpretative approach, the concept “refugee” denotes a person who has been granted asylum by the state having jurisdiction and who is both a *de jure* and *de facto* refugee, while the concept “asylum-seeker” implies a person who is, at most, a *de facto* refugee. Even though an individual enjoys the right to seek asylum, it has consistently been held that it falls within “the prerogative power of the state to grant asylum”,⁶⁹⁸ and that the individual does not enjoy a “corresponding right ... to be granted asylum”.⁶⁹⁹ In other words, international refugee law does not expressly create a right to seek asylum; rather, it creates a right not to be *refouled* and then predicates certain rights that must be accorded to those seeking asylum (i.e. asylum-seekers) and to those granted asylum (i.e. refugees).⁷⁰⁰ In South Africa, the situation of asylum-seekers is problematised as follows: Asylum-seekers are admitted into the country for the purpose of processing their asylum application and may be refused asylum if their applications are found to be fraudulent, abusive, or unfounded⁷⁰¹ or if they are disqualified from refugee status in terms of section 4 or 5 of the Refugees Act. For this reason, they do not yet qualify as refugees and are not bearers of the same rights as legally recognised refugees. This approach clearly places asylum-seekers in a vulnerable position.

The broad interpretation of the legal position of an asylum-seeker, which bears more relevance to this chapter, is conceived in terms of the principle of *non-refoulement* and humane standards of treatment.⁷⁰² The former prohibits a state from returning an individual to a country in which he or she fears persecution.⁷⁰³ The latter denotes the same standard of treatment which is afforded to human beings generally – regardless of their nationality and legal status – in accordance with constitutional and human rights norms and principles. In terms of the Geneva Refugee Convention, such standard of treatment must not be less favourable than that accorded to others. It must rather be as favourable as possible and should not be

⁶⁹⁸ G Melander “Refugees with No Country of Asylum: Strategies for Third-Country Resettlement” in J R Rogge (ed) *Refugees: A Third World Dilemma* (1987) 39.

⁶⁹⁹ 39.

⁷⁰⁰ Mathew *Reworking the Relationship* 6.

⁷⁰¹ S 22(6) of the Refugees Act.

⁷⁰² Jastram & Achiron *Refugee Protection* 125.

⁷⁰³ Melander “Refugees with No Country of Asylum: Strategies for Third-Country Resettlement” in *Refugees: A Third World Dilemma* 39.

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more favourable than that accorded to citizens.⁷⁰⁴ Both the *non-refoulement* principle and the human rights standards of treatment are bases on which the rights of asylum-seekers are vindicated.

In short, the broad interpretative approach is based on the understanding that the concept of asylum, by its nature, extends core refugee rights to those individuals seeking asylum. Paul Weis posits that refugee rights that apply to refugees lawfully staying in a host country in accord with the Geneva Refugee Convention would equally apply to asylum-seekers who are lawfully authorised to stay,⁷⁰⁵ as discussed in more detail under sub-section 4.3.3. By contrast, the divergence approach discussed above may result in uncertainty pertaining to the legal position of asylum-seekers which, in turn, aggravates their social vulnerabilities.

4 3 2 The concept of asylum-seeker under the Geneva Refugee Convention

The question whether the phrase “refugees lawfully staying” contained in articles 23 and 24 of the Geneva Refugee Convention includes asylum-seekers within the ambit of the right to public relief and social security cannot be answered without understanding what the concept asylum-seeker entails. This is important given that the term asylum-seeker is contained neither in the Geneva Refugee Convention and its Protocol nor in the African Refugee Convention.⁷⁰⁶ Rather, as explained in this section, the concept refugee as it is contained in the Geneva Refugee Convention is used to apply to both asylum-seekers and recognised refugees.

To begin with, the UNHCR is of the view that there is nothing in the Geneva Refugee Convention that restricts the rights contained in it to refugees formally recognised in terms of domestic asylum processes.⁷⁰⁷ Rather, the granting of refugee

⁷⁰⁴ Weis *Refugee Convention* 376.

⁷⁰⁵ 378. See too S Bhattacharjee “Situating the Right to Work in International Human Rights Law: An Agenda for the Protection of Refugees and Asylum-Seekers” (2013) 6 *NUJS L. Rev.* 41, 48, who argues that inaccessibility of the right to work, for example, would result in compelling asylum-seekers to return and that an absolute prohibition on work might give rise to constructive *refoulement*. Moreover, see, M Ramsden & L Marsh “Refugees in Hong Kong: Developing the Legal Framework for Socio-Economic Rights Protection” (2014) 14 *Human Rights Law Review* 267, 274-275, who argue that observance of the principle of *non-refoulement* should be read to include the protection of core socio-economic rights of asylum-seekers. That is so important because deprivation of food and other life necessities would nonetheless “have the effect of sending an individual back to their countries of origin.”

⁷⁰⁶ Only the term refugee is used throughout these two texts. It also particularly important to note that s 6 the Refugees Act provides that the Act must be applied with due regard to the Geneva Refugee Convention and its Protocol as well as the African Refugee Convention.

⁷⁰⁷ UNHCR Statement on the reception conditions of asylum-seekers under the Dublin procedure (1-08-2011) (“UNHCR Comments on Dublin Procedure”) para 2.2.

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status to an asylum-seeker does not make such person a refugee but confirms him or her to be one.⁷⁰⁸ The position of an asylum-seeker within international refugee law is therefore problematic. The lack of a clear distinction between different groups of asylum-seekers, and between (recognised) refugees and asylum-seekers, makes it more difficult to contextualise the refugee rights that apply to undocumented or documented asylum-seekers in particular or conceptualise the scope of the term asylum-seeker in general. Generally, there is a tendency to compare asylum-seekers to, or even to equate them with immigrants, particularly economic migrants. However, the distinction between an immigrant and an asylum-seeker resides in the expression of the intention of seeking asylum.⁷⁰⁹ It is commonly accepted that a non-citizen would be considered an asylum-seeker upon an expression of the intention to apply for asylum and that, upon such expression, rules and principles enunciated in domestic asylum law should apply to such a person.⁷¹⁰

The term asylum-seeker is used to refer to both documented and undocumented asylum-seekers. As noted, documented asylum-seekers refer to those who have expressed the intention to seek asylum and who are granted asylum-seeker permits to sojourn in the country on conditions prescribed by law. On the other hand, undocumented asylum-seekers can be classified into two categories. The first category refers to those individuals who either illegally or legally enter into the country and who have not yet expressed their desire to apply for asylum. The second category refers to asylum-seekers who were documented, but whose documents have expired and whose stay is consequently illegal. The illegality of an

⁷⁰⁸ UNHCR Comments on Dublin Procedure, para 2.2. See too Handbook on Procedure – para 28.

⁷⁰⁹ Reg 2(2) of the Refugee Regulations (Forms and Procedures) 2000, GN R366 of 06-04-2000, provides that “any person who entered the Republic and is encountered in violation of the [Immigration Act], who has not submitted an application pursuant to reg 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Officer to complete an asylum application.” Pursuant to this Regulation, the High Court, in *Tafira v Ngozwane* at 5 and 21, held that an illegal asylum-seeker who expressed his intention to apply for asylum but who is issued with an appointment slip “remains an illegal foreigner and is liable to be arrested, detained and deported.” That is due to the fact that an appointment slip has no legal force and confers no legal protection on an applicant for asylum. It is only an asylum-seeker permit issued in terms of section 22 of the Refugees Act that affords an asylum-seeker with the necessary legal protection. On the contrary, in *Bula v Minister of Home Affairs* 2012 4 SA 560 (SCA) paras 70-72, the SCA stated that once an individual expressed an intention to apply for asylum, he or she must be recognised as an asylum-seeker. He or she must be issued with “an appropriate permit valid for 14 days, within which they were obliged to approach a Refugee Reception Office to complete an asylum application.”

⁷¹⁰ The SCA in *Bula* para 72 clearly stated that “...where a foreign national indicates an intention to apply for asylum, the regulatory framework of the [Refugees Act] kicks in, ultimately to ensure that genuine asylum seekers are not turned away.”

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asylum-seeker (as well as a refugee) does not exclude him or her from the applicability of asylum principles. However, due to the difficulties of distinguishing between undocumented asylum-seekers and economic migrants, the immigration rules are often applied to them.⁷¹¹

Still, whether or not asylum-seekers have indicated their intention to apply for a safe haven is basically irrelevant for purposes of the Geneva Refugee Convention. Usually, the Geneva Refugee Convention would apply to a large-scale influx of asylum seekers crossing the border, regardless of whether they have individually expressed their intention to seek asylum. In a similar fashion, the Refugees Act recognises the event of mass influx and thus provides for exceptional conditions of reception and accommodation of the said influx. In the event of mass influx of asylum-seekers, they should unconditionally be recognised as refugees or their recognition should be subject to well-defined exceptional conditions.⁷¹² The international obligation to protect asylum-seekers, whose intention to seek asylum was not expressed, emanates from responsibilities created by the Geneva Refugee Convention, requiring states to recognise asylum-seekers who are physically present – lawfully or unlawfully – in their territories,⁷¹³ as will be discussed later in more detail.

On the other hand, the term refugee is defined by Shacknove as “a person fleeing life-threatening conditions”⁷¹⁴ or as “a person who has crossed an international frontier because of well-founded fear of persecution.”⁷¹⁵ Mathew defines the term to refer to “a forced migrant; a person who has no meaningful choice but to stay away from the country of origin or suffer persecution, perhaps even torture or death.”⁷¹⁶ The predominant definition contained in the Geneva Refugee Convention, from

⁷¹¹ *Bula* paras, 47, 70, 72, 78 (in respect of intention to apply for asylum) and *Tafira* at 6 (in respect of rescission of the decision taken by the Refugee Determination Officer rejecting the applicant's application). See too reg 2 of the Regulations to the Refugees Act, which states that: “An application for asylum in terms of s 21 of the Act must be lodged by the applicant in person at a designated Refugee Reception Office without delay... [and that] any person who entered the Republic and is encountered in violation of the [Immigration Act], who has not submitted an application pursuant to reg 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a [RRO] to complete an asylum application.”

⁷¹² See s 35, read together with s 38(1)(a) of the Refugees Act.

⁷¹³ See Hathaway *The Rights of Refugees* 171-186. See too J C Hathaway “Refugees and Asylum” in B Opeskin; R Perruchoud & J Redpath-Cross *Foundation of International Migration Law* (2012) 191.

⁷¹⁴ A E Shacknove “Who Is a Refugee” in H Lambert (ed) *International Refugee Law* (2010) 163.

⁷¹⁵ Shacknove “Who Is a Refugee” in *International Refugee Law* 163.

⁷¹⁶ P Mathew *Reworking the Relationship Between Asylum and Employment* (2012) 4.

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which the international instruments and domestic policies derive their varying definitions of the concept refugee, identifies the refugee as an individual who:

“[O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country.”⁷¹⁷

Although this is a widely accepted definition, the term refugee is sometimes used in a more general sense to refer to all individuals who are forced to leave their home countries because their well-being and freedom are threatened – whether by political persecution, extreme poverty, environment degradation, drought, famine, generalised violence, armed conflict, or any other reasons.⁷¹⁸ Various factors cause people to flee; however, the term refugee is, under the Geneva Refugee Convention, usually not used to refer to socio-economic persecution.⁷¹⁹ Asylum is conceived in political terms and thus a strong tradition is maintained of distinguishing between economic refugees and political refugees.⁷²⁰ The definition is widened by the African Refugee Convention to include safety and security challenges caused by events disturbing or disrupting public order.⁷²¹ Redson Kapindu contends that events disturbing or disrupting public order may include crises of an economic and humanitarian nature.⁷²² On the basis of this analysis, he identifies two groups of refugees, namely, political refugees and humanitarian refugees. Political refugees are defined to refer to those individuals who:

“are forced to flee from their own countries by reason of wrongful rights-violating conduct by the state; or similar conduct by non-state actors but the acquiescence of the state

⁷¹⁷ Art 1A(2) of the Geneva Refugee Convention.

⁷¹⁸ M E Price *Rethinking Asylum: History, Purpose and Limits* (2009) 17.

⁷¹⁹ Socio-economic persecution is recognised as a ground of fleeing a country in US, UK, Canada, Australia, New Zealand and France. See the discussion under judicial interpretations (section 4 4 2 4).

⁷²⁰ M Foster *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 2-5.

⁷²¹ Art 1(2).

⁷²² R Kapindu *Towards a more effective guarantee of socio-economic rights for refugees in Southern Africa* LLD Thesis, University of Witwatersrand (2014) 19-20, 50.

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authorities; and they seek substitute state protection and political community membership in other countries.”⁷²³

This definition falls squarely with the definition contained in the Geneva Refugee Convention. From the humanitarian lens, Kapindu defines the term refugees to refer to those individuals who “are compelled to flee their country of origin due to various factors that threaten to seriously harm their lives; but which are neither directly or indirectly attributable to wrongful state conduct.”⁷²⁴ The extended definition contained in the African Refugee Convention is retained in section 3 of the Refugees Act. The provisions of the Act nevertheless do not make any distinction between refugees falling with the Geneva Refugee Convention and those under the African Refugee Convention. Of great concern is that South Africa officially tends to recognise political refugees to the exclusion of humanitarian refugees, who are viewed as bogus refugees or economic migrants. Consequently, humanitarian refugees are not recognised in South Africa, in contravention of section 3(b) of the Refugees Act.

A further difficulty with making a clear distinction between the terms refugees and asylum-seekers is that the Geneva Refugee Convention and African Refugee Convention do not define the term asylum-seeker. The term asylum-seeker can however be defined as a person who has declared his or her intention to seek asylum on the grounds of persecution but whose claim for asylum has not been finalised by a host country.⁷²⁵ In a narrow sense, an asylum-seeker is a person who is seeking recognition as a refugee in another country.⁷²⁶ From this definitional point of view, it follows that a thorough analysis is needed to determine whether an asylum-seeker – whose presence and stay are lawfully recognised – should, in the plain language of the Geneva Refugee Convention, be classified as a refugee lawfully staying in the territory of a country of asylum for eligibility for humanitarian and social protection, provided in the form of non-contributory social security schemes.

⁷²³ viii.

⁷²⁴ viii.

⁷²⁵ Price *Rethinking Asylum* 17. Jastram & Achiron *Refugee Protection* 125 define the term asylum-seeker as “a person whose request or application for asylum has not been finally decided on by a prospective country of refuge”. A Chin & K E Cortes *The Refugee/Asylum Seeker* in B R Chiswick & P W Miller (eds) *Handbook of the Economics of International Migration* (2014) 585-587 explain that an individual is typically referred to as an asylum-seeker “until [such] individual’s request for refuge has been formally processed and approved by the host country.”

⁷²⁶ S 1(v) of the Refugees Act. It should also be noted that the definition of the term asylum-seeker may vary from one jurisdiction to another.

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4 3 3 Who is a refugee “lawfully staying”?

The Geneva Refugee Convention affords protection to refugees in relation to civil and socio-economic rights. The scope is not only restricted to those individuals who are formally recognised as refugees but also includes those individuals who are seeking or applied for asylum. Seekers of or applicants for asylum are generally termed asylum-seekers. The term may also include those individuals who are either physically present in a country of asylum or, in some instances, are not physically present.⁷²⁷ The latter, for instance, includes asylum-seekers who are on the sea, on their way to a prospective country of asylum. However, countries of asylum are inclined to protect recognised refugees and asylum-seekers physically present in their territories and are emphatic in their objections to an international obligation to offer protection to asylum-seekers who have not yet gained access to their territories.⁷²⁸ More importantly, most of the rights enshrined in the Geneva Refugee Convention only come into operation once individuals seeking asylum are “either [physically] in, lawfully in, lawfully staying in, or durably residing in an asylum country.”⁷²⁹ The rights that apply to these individuals vary to a certain extent as discussed below.

4 3 3 1 Accrual of rights to a refugee

As noted above, the term refugee encompasses *de jure* refugees and *de facto* refugees. Whereas the former refers to those individuals who are recognised as refugees, the latter refers to asylum-seekers – whether they are documented or not; or whether they are within the host country or at the border or in its territorial sea. A distinction between rights accruing to *de jure* refugees and those accruing to *de facto* refugees under the Geneva Refugee Convention depends on the strengths of the bonds between the refugee and the host state. There are different levels of attachment of rights flowing from the locality of a refugee, or the legality of a refugee, or the position of a refugee in a host society. Locality refers to the jurisdiction in which a refugee is, that is, whether he or she is within the territory of the host

⁷²⁷ Hathaway *Rights of Refugees* 154-155, 161, 171.

⁷²⁸ 161.

⁷²⁹ 171.

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country, or at its border or in its territorial sea.⁷³⁰ Legality refers to lawful admission or lawful stay or both. Position refers to the legal position or legal status of a refugee, namely whether he or she is a recognised refugee, or a documented or undocumented asylum-seeker. These three factors (locality, legality and position) are important indicators of the strength of the bonds between the refugee and the host state and must, consequently, be taken into account in determining the rights which can be exercised by the refugee.

Certain core rights inhere in all refugees generally. Inherent rights accrue to all refugees in situations where the provisions of the Geneva Refugee Convention make reference to the term refugees, without qualifying it or without subjecting the enjoyment of these rights to the meeting of certain requirements. This provides us with a first category of rights which attaches to all refugees subject to the state's jurisdiction, including those who are not physically present in its territory, but at its border or in its territorial sea.⁷³¹ Under the Geneva Refugee Convention, the term refugees is applied in this sense with respect to the rights to non-discrimination,⁷³² property,⁷³³ access to court,⁷³⁴ rationing,⁷³⁵ basic education,⁷³⁶ fiscal charges,⁷³⁷ *non-refoulement*,⁷³⁸ and naturalisation.⁷³⁹ Although they are applied to all refugees, the entitlement gradually becomes stronger as certain requirements are met or as they go through admission, assimilation and naturalisation processes. For a refugee to be naturalised for example, he or she must be recognised as such and must meet certain conditions set forth under national asylum law.⁷⁴⁰ The principle of *non-*

⁷³⁰ With regard to territorial sea, art 3 of the 1982 UN Convention on the Law of the Sea states that: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention".

⁷³¹ 160-161. Refugees who are in the territory over which a state claims authority must be protected by that state. This includes the situation in which the state invades and takes control over the territory of another country or has jurisdiction over part of the *res communis*, such as the high sea.

⁷³² Art 3.

⁷³³ Art 13.

⁷³⁴ Art 16(1).

⁷³⁵ Art 20.

⁷³⁶ Art 22(1).

⁷³⁷ Art 29.

⁷³⁸ Arts 31, 32 and 33.

⁷³⁹ Art 34.

⁷⁴⁰ Art 34 states that a host state must facilitate the assimilation and naturalisation of refugees. Assimilation and naturalisation are regulated by the national asylum law. Simply put, refugees who qualify for naturalisation are those who are durably or habitually resident. In a South African context, a refugee can be naturalised after five years' period of being granted permanent resident status. However, at the time of writing of the thesis, the DHA was proposing to extend the period of five years to ten years. See Department of Home Affairs: White Paper on International Migration for South Africa, July 2017 at 41-44.

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refoulement is the cornerstone of the protection of all refugees. This principle, which prohibits returning refugees, implies that those seeking refuge should be provided with humanitarian assistance even if they are at ports of entry. The concept of humanitarian assistance or intervention is defined as “the aid and action designed to save lives, alleviate suffering and maintain and protect human dignity during and in the aftermath of man-made crises and natural disasters, as well as to prevent and strengthen preparedness for the occurrence of such situations”.⁷⁴¹ Worth noting is that the cardinal obligation in the Geneva Refugee Convention and the African Refugee Convention is the obligation to receive asylum-seekers and to provide them with a safe haven, along with humanitarian protection. This must be seen as a friendly act.⁷⁴²

By its very nature, international refugee protection is wide enough to offer provisional and special protection to an asylum-seeker not yet admitted into a country⁷⁴³ and covers asylum-seekers in situations of large-scale influx or mass exodus.⁷⁴⁴ The coverage includes persons who are either physically in the host country or not, and persons whose intention to apply for asylum was either registered or not.⁷⁴⁵

The intention to protect all the said types of refugees is eventually evident in the provisions of the Geneva Refugee Convention – particularly where the provision refers to “all refugees,” “every refugee” or “any refugee.” Under this approach, every refugee has duties to the host country⁷⁴⁶ and any refugee has a right to an identity document.⁷⁴⁷ However, all refugees are entitled to the right to be exempted from legislative reciprocity, after a period of three years’ residence⁷⁴⁸ and to have their rights with regard to wage-earning employment assimilated to those of citizens.⁷⁴⁹ Conversely, despite the universalism of those rights, some rights apply to refugees provided that certain conditions are met.

⁷⁴¹ Global Humanitarian Assistance “Defining Humanitarian Assistance” <<http://www.globalhumanitarianassistance.org/data-guides/defining-humanitarian-aid/>> (accessed on 21-09-2016).

⁷⁴² Mathew *Reworking the Relationship* 6.

⁷⁴³ Hathaway *The Rights of Refugees* 171-172.

⁷⁴⁴ B S Chimni *International Refugee Law* (2001) 189-190.

⁷⁴⁵ Weis *Refugee Convention* 160 states that “the mention of refugee without any qualifying phrase was intended to include all refugees, whether lawful or unlawful in the territory.”

⁷⁴⁶ Art 2.

⁷⁴⁷ Art 27.

⁷⁴⁸ Art 7(2).

⁷⁴⁹ Art 17(3).

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A second category refers to refugees who meet the conditions of being physically present in the host country. They are entitled to the rights to be protected against deportation or expulsion,⁷⁵⁰ to freedom of religion,⁷⁵¹ to receive identity documents (“ID”),⁷⁵² to non-penalisation for illegal entry or presence⁷⁵³ and to be subject only to constraints on freedom of movement that are necessary.⁷⁵⁴ Hathaway argues that the generous interpretation of the use of the plain language of “in” and “within” the territory is broad enough to include even undocumented asylum-seekers.⁷⁵⁵ For example, applying the physical presence approach, the English Court of Appeal in *R v. Secretary of State for the Home Department, ex parte Jahangeer*,⁷⁵⁶ held that the withholding of refugee rights until such time as an asylum-seeker is recognised as a refugee “could work a serious injustice”. The physical presence approach follows from the view that the purpose of the international refugee protection is so wide that it provides protection to *de facto* refugees.

The logic of physical presence protection requires sensitivity to the need to protect national security and to ensure the maintenance of public order. On this view, the state is obliged to distinguish between *de facto* refugees and illegal migrants. While the state must respect the principle of *non-refoulement* with respect to asylum-seekers who are individually seeking asylum and who expressed their intention to apply for asylum, or to asylum-seekers in a case of large-scale influx of refugees, there is no denying that it is difficult to apply the principle of *non-refoulement* to asylum-seekers who are individually seeking asylum, but who did not express their intention to seek asylum prior to or during the deportation process.⁷⁵⁷ In the absence of a declaration of their intention to apply for asylum, they would be treated as illegal migrants if their physical presence is otherwise unlawful.

⁷⁵⁰ Art 32 of the Geneva Refugee Convention.

⁷⁵¹ Art 4.

⁷⁵² Art 27.

⁷⁵³ Art 31(1).

⁷⁵⁴ Art 31(2).

⁷⁵⁵ Physically present in or within the territory of a country of asylum should be broadly interpreted to include asylum-seekers “who had not yet been regularly admitted into a country.” See Hathaway *Rights of Refugees* 171.

⁷⁵⁶ [1993] Imm AR 564 (Eng. QBD, June 11, 1993) at 566 (in respect of the right to access the courts).

⁷⁵⁷ See *Gravic v The Refugee Determination Officer, Cape Town Case No 3474 of 6 April 2016* (Western Cape Division) in respect of extradition. Mantame J stated that, in the case of extradition, should an accused person express an intention to apply for asylum, his intention is a factor meriting special consideration and treatment. However, it should be borne in mind that some applications are brought forward with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof. Such applications are traditionally rejected as abusive application (paras 47, 51, 54, and 57).

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A third category refers to refugees who are formally admitted and recognised or are lawfully present. Such refugees are entitled to more rights, in addition to those enjoyed by the first and second categories. These include the rights to freedom of movement within the country⁷⁵⁸ and to be self-employed.⁷⁵⁹ Lawful presence is a condition; if it is met, that would lead to recognising and granting refugee documents to an individual seeking asylum, to authorisation of his or her stay and to processing his or her application for asylum.

A fourth category refers to refugees lawfully staying in the host country. They are entitled to the right to seek employment,⁷⁶⁰ the right to housing,⁷⁶¹ the right to public relief and assistance,⁷⁶² labour and social security,⁷⁶³ and the right to travel documents.⁷⁶⁴ The term lawfully staying is difficult to define and its meaning needs to be explored.

A fifth category refers to refugees durably residing in the host country. Refugees who are durably or habitually resident are entitled to benefit from legal assistance and exemption from *cautio judicatum solvi*.⁷⁶⁵ They also benefit from exemption from requirements of legislative reciprocity⁷⁶⁶ and from any restrictive labour measures imposed on the recruitment of non-citizens.⁷⁶⁷ From the perspective of Articles 7(2) and 17(2) of the Geneva Refugee Convention, durable residence may be defined as the fulfilment of a condition of completion of three years' residence in the host country. Durable residence is not determined with reference to legal stay but with reference to continuous stay in the host state, from the date on which an asylum-seeker gained access to it.⁷⁶⁸ This implies that an asylum-seeker who is resident in South Africa for a period of three years should also enjoy the rights attached to refugees durably residing. In terms of the Refugees Act, the period of three years has been extended to five years and is subject to the condition of applying for permanent resident status.⁷⁶⁹

⁷⁵⁸ Art 26.

⁷⁵⁹ Art 18.

⁷⁶⁰ Arts 17 and 19.

⁷⁶¹ Art 21.

⁷⁶² Art 23.

⁷⁶³ Art 24.

⁷⁶⁴ Art 28.

⁷⁶⁵ Art 16(2).

⁷⁶⁶ Art 7(2).

⁷⁶⁷ Art 17(2).

⁷⁶⁸ Hathaway *Rights of Refugees* 190.

⁷⁶⁹ S 27(c) of the Refugees Act.

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4 3 3 2 *Conceptualisation of the term lawfully staying*

The Geneva Refugee Convention neither indicates what the term “lawfully staying” entails nor elaborates on its parameters. The UNHCR contextualises the term “stay” to include temporary and permanent residence,⁷⁷⁰ and interpreted the term “lawful” to refer to the legality of the stay.⁷⁷¹ Thus, account must be given of whether or not the stay in question is recognised. The stay must not be prohibited.⁷⁷²

Lawful stay appears to be underpinned by the validation or authorisation of the stay. Proceeding from this, an expression of the intention to apply for asylum, resulting in an automatic authorisation of stay as an asylum-seeker, should be interpreted to imply that they are refugees physically present in and lawfully admitted in the country. It needs be acknowledged that their stay is authorised, pending the determination of their qualification as refugees. To some, their stay or residence is durable hence they may have resided in a country of asylum for more than three years, as required by articles 7(2) and 17(2) of the Geneva Refugee Convention . Yet, the legal position of an asylum-seeker with a lawful stay status is very complex and multifaceted. The complexity is illustrated by the differing interpretations given to it by academics and researchers. Some literature states that the phrase “lawfully staying” should not be construed in the context of the said hierarchies of rights, but rather in the context of the “*de facto* circumstances of the refugee”.⁷⁷³ Other literature, in contrast, states that the phrase lawfully staying should be understood in the context of a refugee’s legal position and should not simply be understood in the context of a mere lawful presence. Instead, lawfully staying must be justified by showing valid and legitimate refugee documentation.⁷⁷⁴ In other words, an individual must be legally recognised as a person seeking asylum.

⁷⁷⁰ UNHCR “Lawfully Staying A Note on Interpretation” (03-05-1988) <http://www.unhcr.org/refworld/docid/42ad93304.html> (accessed 18-07- 2013).

⁷⁷¹ UNHCR *Lawfully Staying* para 7.

⁷⁷² Para 8.

⁷⁷³ A Eduards “Human Rights, Refugees, and the Right To Enjoy Asylum” (2005) *IJRL* 293, 322; Hathaway *Rights of Refugees* 187 and J A Dent *European Council for Refugees & Exiles, Research Paper on the Social and Economic Rights of Non-Nationals in Europe* (1998) 18.

⁷⁷⁴ Refugees lawfully staying bear onus to justify their legal stay by demonstrating “something more than mere lawful presence,” more notably refugee documentation, including “permanent, indefinite or unrestricted or other residence status, recognition as a refugee, issue of a travel document, [or asylum or entry visa].” See G Goodwin-Gill *The Refugee in International Law* (1996) 309 and Eduards (2005) *IJRL* 322.

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It is therefore true that the term lawfully staying does not simply refer to formally recognised refugees; it includes all individuals – seeking or granted asylum – who are legally allowed to enter and stay in a host country, but not those whose presence is merely physical, brief, or purely temporary.⁷⁷⁵ The term derives from the French concept *résident régulièrement*, which, if given a broad interpretation, “implies a settling down and, consequently, a certain length of residence.”⁷⁷⁶ The concept cannot be equated to domicile or permanent resident status.⁷⁷⁷ It should rather include a situation where an individual is allowed to stay in the country for the purpose of pursuing a claim of asylum, including exhaustion of review and appeal opportunities in the case where his or her application for asylum has been rejected. Excluded are those individuals whose documents are invalid because they overstayed or whose applications for extension of their stay were not approved by the relevant authority.⁷⁷⁸

In the South African context, the concept lawful stay would, if given a generous interpretation, encompass an individual who is a holder of an asylum-seeker permit, a refugee status permit or a permanent residence permit, granted in terms of section 22, 24, and 27 of the Refugees Act respectively. The concept would exclude undocumented asylum-seekers⁷⁷⁹ or those refugees who have violated the conditions of stay.⁷⁸⁰ Because the primary focus of this chapter is on asylum-seekers, it is crucial to look at how the courts contextualised the stay of an asylum-seeker who is a holder of a permit issued in terms of section 22 of the Refugees Act.

In 2005, Van Reenen J in the case of *Kiliko v Minister of Home Affairs* (“*Kiliko*”),⁷⁸¹ construed the stay of an asylum-seeker in the context of lawful stay as follows:⁷⁸²

⁷⁷⁵ R Da Costa *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations* (2006) 18 and Edwards (2005) IJRL 936-4,976,987 (“Lawfully staying” denotes permitted or regularised stay of a refugee or an asylum-seeker for the purpose of international protection). Weis *Refugee Convention* 378 (the concept lawful stay refer to any refugee who was authorised to stay in the territory of a country of asylum “otherwise than purely temporary”).

⁷⁷⁶ Hathaway *Rights of Refugees* 187 and Weis *Refugee Convention* 372, 378.

⁷⁷⁷ 186. See too Weis *Refugee Convention* 375.

⁷⁷⁸ Some refugees are holders of expired documents whereas others’ applications for asylum have been rejected and they have not yet expressed an intention to appeal against the decisions.

⁷⁷⁹ This category of persons includes individuals who have not yet had the opportunity to express their wish to apply for asylum (undocumented or illegal asylum-seekers) or those who expressed their intention to apply for asylum and, in the interim, are bearers of an appointment slip (see *Tafira* at 21-22).

⁷⁸⁰ This category includes those refugees/asylum-seekers who overstayed the period for which they were permitted to stay or have violated one or more conditions of their stay.

⁷⁸¹ 2006 4 SA 114 (C).

⁷⁸² *Kiliko* para 5.

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“Section 22 of the Refugees Act... allows the holder [of an asylum seeker permit] to sojourn in the Republic of South Africa, temporarily, subject to the conditions determined by the [SCRA] and not in conflict with the Constitution of South Africa or international law as endorsed thereon by the refugee reception officer. In terms of section 22(3)... such an officer is empowered to extend from time to time the period to which such a permit has been issued and also to amend the conditions subject to which it has been issued.”

In 2010, the SCA, in the case of *Arse v Minister of Home Affairs*,⁷⁸³ also underlined that section 22 was enacted to legalise the stay of asylum-seekers and to treat them in accordance with international refugee standards and practices:⁷⁸⁴

“[Section 22] gives effect in South Africa to international instruments and law relating to refugees and provides for the reception of asylum seekers. It was enacted to regulate applications for and recognition of refugee status and to provide for the rights flowing from that status. It must be interpreted and applied with due regard to the [Refugee Convention, its Protocol, the African Refugee Convention, the UDHR] and other human rights instruments to which South Africa is or becomes a party.”

And, in 2011, the same court, in *Bula v Minister of Home Affairs*,⁷⁸⁵ reiterated that an asylum-seeker, to a certain extent, enjoys international protection:

“In terms of [section] 22 ...an asylum seeker has the protection of the law pending the determination of his application for asylum. To that end he or she is entitled to an asylum seeker permit entitling a sojourn in South Africa.”

In light of the above judgments, it is clear that asylum-seekers are allowed to sojourn (i.e. stay) in the country lawfully, subject to certain conditions. The conditions of stay must be consistent with the South African Constitution, international refugee law and human rights law. The equal protection of the rights flowing from asylum-seeker status is a prerequisite. More succinctly, asylum-seekers, who are bearers of section 22 permits, are included within the category of refugees lawfully staying for

⁷⁸³ 2012 4 SA 544 (SCA).

⁷⁸⁴ *Arse* para 13.

⁷⁸⁵ 2012 4 SA 560 (SCA).

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enjoyment of international protection.⁷⁸⁶ As lawfully staying asylum-seekers, the right to public relief and assistance accrues to them and they are entitled to have favourable access to non-contributory social security schemes. The right can therefore be vindicated where it is denied, violated or threatened.

4 4 Human rights as the standard: Equal treatment as accorded to citizens

The primary challenge in attempting to deal with asylum-seekers is the failure to understand the situation of social vulnerability in which they find themselves. Their inability to take care of themselves and their children or, even in cases where they are allowed to work, to earn sufficient income to make ends meet, is particularly relevant. For instance, the deprivation of essential resources such as food, employment and basic accommodation draws attention to the fundamental significance of socio-economic rights obligations as a matter of human rights law and international refugee law.

4 4 1 Nature of social vulnerabilities

It is important to understand the social vulnerability of refugees and asylum-seekers. For the purpose of this thesis, social vulnerabilities refer to the degree to which refugees or asylum-seekers are susceptible to economic shocks and stresses and their incapacities to cope therewith.⁷⁸⁷ Their social vulnerabilities do not result from natural disasters or the effects of climate change but from persecution-based problems that force them to displace themselves. To a great extent, forced displacement disrupts their normal means of livelihood and their self-support and social progress are, needless to say, hindered by a lack of resources.

Asylum-seekers' vulnerabilities are evident from, *inter alia*, their susceptibility to economic deprivation, desperateness, distress, diseases, hopelessness, starvation, trauma, uncertainty, and unemployment.⁷⁸⁸ Their plight is worsened by the fact that

⁷⁸⁶ The granting of s 22 permits effectively allows asylum-seekers to stay and remain in the country until the decision on their application has been pronounced, or where applicable, until they have been given an opportunity to exhaust their right to reviews and appeals (see, for example, *Bula* para 1).

⁷⁸⁷ For a definition of social vulnerabilities, see, for example, K Pasteur *From Vulnerability to Resilience: A Framework for Analysis and Action to Build Community Resilience* (2011) 11 who defines social vulnerability as "the degree to which a population or system is susceptible to, and unable to cope with, hazards or stresses, including the effects of climate change."

⁷⁸⁸ The situation of asylum-seekers can be described as follows: They arrive in South Africa when they are thirsty and hungry because they spend days and nights walking or travelling in search of a safe haven without sufficient means to sustain themselves during their unplanned journey to exile. In

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they are politically powerless or voiceless. They are reduced to passive spectators, hence they cannot engage in the political processes in their host community, through which entitlements of socio-economic rights and benefits are determined. These processes tend to lose sight of the fact that, far from supporting themselves, the majority of asylum seekers are in need of emergency relief and essential social security aspects, such as water, food, housing accommodation, clothing, healthcare, etc. The necessity to take social and humanitarian considerations into account is clearly apparent.

In South Africa's asylum framework, a person is entitled to the right to social assistance when he or she is recognised as a refugee and is a holder of a refugee ID.⁷⁸⁹ The procedures to apply for asylum and for a refugee ID are both bureaucratically cumbersome. The processing of an asylum application may take no less than three years due to backlogs and the high number of new applications. The period may be even longer than the estimated three years due to the possibility of decisions being reviewed or appealed against. According to the case of *Kiliko*, undue delays in the processing of applications for asylum have a deleterious impact upon asylum-seekers' dignity, freedom and security of the person.⁷⁹⁰

The question that arises is whether the exclusion of asylum-seekers from social assistance schemes is constitutional. In addition, do the Geneva Refugee Convention and the Refugees Act recognise asylum-seekers as co-beneficiaries of the said schemes? The legal position of asylum-seekers is heavily contested. In order to respond to the above questions, clarity on the development of public relief and assistance is of paramount importance.

addition, they suffer from, most often than not, post-traumatic stress disorder because of the fact that persecution-based displacement, coupled with fleeing one's country to an unknown destination is a traumatic experience in itself. Some of them have spent a couple of months or years internally displaced or moving from one state to another because either they were not accepted or they did not feel secure there. J R Rogge *Refugees: A Third World Dilemma* (1987) 44, for example, explains that modern large scale refugee influx has led to the development of more restrictive criteria for granting asylum.

⁷⁸⁹ S 11 of the Regulation to the Social Assistance Act states that an ID of the applicant and of his or her spouse are essential documents to accompany an application for a social grant. An ID is defined under s 1 of the Regulation to the Social Assistance Act as "the identity card referred to in the Identification Act 68 of 1997 and unless inconsistent with the provisions of that Act, includes an identity document referred to in s 25(1) or (2) of that Act, and further includes an identity document issued to a refugee in terms of s 30 of the Refugees Act 130 of 1998".

⁷⁹⁰ *Kiliko* para 27.

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4 4 2 Evolution and essence of the right to public relief and assistance

Prior to the adoption of the Geneva Refugee Convention there was no international legal obligation on host states to provide humanitarian relief and social assistance to refugees.⁷⁹¹ As a result, humanitarian and social issues were dealt with by Non-Governmental Organisations (“NGOs”), but their interventions were insignificant due to insufficient funds.⁷⁹² Even after the adoption of the Geneva Refugee Convention, the problem persisted due to the reluctance of host countries to extend the right to work to refugees. Many of the signatories to the Geneva Refugee Convention expressed a reservation to the right to work, which automatically led to paralysing all avenues of livelihood opportunities.⁷⁹³ This adversely impacted on the worth and security of the person and perpetuated their misery, insecurity and suffering.⁷⁹⁴ Therefore, a more radical and liberal approach was required which was consistent with the UN’s highest aspirational commitment to protect humanity. To refugee communities, the universal rights and freedoms enshrined in the UN Charter and the UDHR would be meaningless if no international legal framework were adopted to address their social and economic problems.

4 4 2 1 The nature of the right to public relief and assistance

Noting the necessity to accord to refugees special protection in the social realm, the *Ad Hoc* Committee sought to close the gap in international refugee law and public international law through granting socio-economic rights and benefits to refugees.⁷⁹⁵ Included is public relief and assistance, which is afforded to refugees “lawfully staying” in the country, on an equal footing with citizens. Article 23 of the Geneva Refugee Convention provides that:

⁷⁹¹ Jaeger (2001) *Int'l Rev Red Cross* 727-37.

⁷⁹² 727-737.

⁷⁹³ Rubinstein (1939) *Royal Institute of International Affairs* 729-734.

⁷⁹⁴ 729-734.

⁷⁹⁵ In 1947, a resolution was passed by the Commission on Human Rights which recommended that the United Nations should consider the legal status of persons who lost the protection of their country of origin. Pursuant to this resolution, the Economic and Social Council requested the UN Secretary-General to undertake a study of the existing situation of refugees and stateless persons in regard to their national protection. For the study in question to be conducted, the UN Secretary-General was further requested to reconvene the ad hoc Committee on Refugees and Stateless Persons in order to prepare a revised draft of the refugee convention in light of the findings of the study, of submissions of Governments and of specialised agencies and having regard to the discussions and decisions of the Economic and Social Council.

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“The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.”

According to the *Ad Hoc* Committee, the right to public relief should be given a broad interpretation that protects refugees suffering from social vulnerabilities as a result of destitution, illness, duress, age, physical or mental impairment, or other circumstances.⁷⁹⁶ The right was derived from the emergence of social welfare states that gave precedence to social security principles. It is worth noting that social security rights originated from the idea that citizens could support themselves through work and that certain citizens (such as aged, disabled, retired and poor individuals), who were challenged by economic insecurity, had to benefit from redistributive programmes in terms of non-contributory social security schemes, such as the South African social assistance scheme.⁷⁹⁷ In accordance with this limited understanding, social security designs excluded non-citizens, as they often still do.

The social exclusion of non-citizens is an accepted norm under public international law. The norm recognises that every individual must be protected by the government of his or her country of origin even if he or she is abroad. Prior to the development of human rights norms, each country bore a responsibility to provide social assistance to its own citizens. This could be extended to citizens of another country in a situation where the MFN treatment or principle of reciprocity applied.⁷⁹⁸ Social assistance could be provided to non-citizens in exceptional circumstances. Such exceptional circumstances were usually in instances where the beneficiaries' country would cover the costs of social assistance.⁷⁹⁹ If not, destitute non-citizens were (and still are) subject to expulsion and deportation in order to guard against non-citizens becoming a public burden.⁸⁰⁰ As a rule, only emergency (or humanitarian) relief was (and still is) likely to be provided to migrants and refugees

⁷⁹⁶ UNHCR, Public Relief and Social Security <<http://www.unhcr.org/3cf33fbc4.pdf>> (accessed 10-11-2015) 215. See too Weis *Refugee Convention* 172.

⁷⁹⁷ SAHRC “Social Security, Social Assistance, and Social Services for Children” <http://www.sahrc.org.za/home/21/files/Reports/3rd%20ESR%20report%20chapter_2.pdf> (assessed 09-11-2015) 11.

⁷⁹⁸ Rubinstein (1939) *Royal Institute of International Affairs* 725 explains that certain rights were granted to foreign nationals on terms of reciprocity principles which governed the status of foreign nationals in European countries.

⁷⁹⁹ Weis *Refugee Convention* 172.

⁸⁰⁰ 172.

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on the basis of moral duty.⁸⁰¹ As noted, emergency and humanitarian relief is, for the most part, provided by charitable organisations or NGOs. Rubenstein notes that refugees' lack of self-sufficiency and economic independence was considered a good enough reason to warrant their expulsion or deportation.⁸⁰² This approach has dramatically changed due to developing human rights principles.

4 4 2 2 Exemption from the principle of reciprocity

As noted in chapter two, prior to the Geneva Refugee Convention, the expulsion, deportation, or return of refugees was justified on the basis that states would only accord socio-economic rights to non-citizens on conditions of reciprocity. These conditions were an impediment to the humane treatment of refugees who had, in principle, lost the protection of their country. The loss of the protection of and ties with their country of origin had the following severe implications:⁸⁰³ Firstly, the refugees' host country could not invoke the principle of reciprocity to request a country of origin to afford its citizens favourable treatment. A host country could afford MFN treatment to refugees on the basis of its understanding of its moral obligations without anticipation that the same treatment would be accorded to its own citizens who are staying in the refugees' country of origin. Secondly, noting that there was no reciprocal obligations to provide favourable treatment to refugees in the absence of reciprocity, state A could not refrain from providing for favourable access to social services to refugees coming from state B based on the ground that state B had suspended delivering (or did not deliver) social services to state A's citizens.

In international law, both the treatment and status of non-citizens were thus derived from the principle of reciprocity and the conditions set out in bilateral treaties or agreements. Indeed, refugees had no country that could conclude a bilateral agreement on their behalf. Nation-states took cognisance of this defect in public international law with regard to the protection of the dignity and wellbeing of refugees and asylum-seekers fleeing from persecution. There was clearly a need to conclude an agreement to address the problems of refugees at the administrative, humanitarian, social, economic and political levels. As a result, an *Ad Hoc*

⁸⁰¹ 173.

⁸⁰² Rubenstein (1939) *Royal Institute of International Affairs* 723.

⁸⁰³ 726.

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Committee was established on 8 August 1949 under the auspices of the UN.⁸⁰⁴ Among its tasks was to cure the said defect through the development of public international law. Accordingly, the *Ad Hoc* Committee negotiated and revised previous refugee conventions to establish standards of favourable treatment of refugees, contained in the current Refugee Convention,⁸⁰⁵ as elaborated in detail under 3.3.3. Prior to this, there was a huge gap in international refugee law because the principle of reciprocity adversely impacted on the realisation of refugees' core social, economic and labour rights.

4 4 2 3 *Evolution of human rights standards*

The operationalisation of the principle of reciprocity was gradually replaced through the implementation of human rights principles.⁸⁰⁶ Human rights were extended to all human beings, whether they were citizens or not. However, notwithstanding the evolvement of human rights principles, national immigration and social security laws continued to be premised on the assumption that non-citizens are protected by their home countries or countries of origin. As a result, the historical trend towards the exclusion of non-citizens from access to certain socio-economic rights and benefits remained.⁸⁰⁷

⁸⁰⁴ The *Ad Hoc* Committee was created by Resolution No. 248(IX) adopted by the Economic and Social Council on 08 August 1949.

⁸⁰⁵ After the First World War, the International Committee of the Red Cross in 1922 adopted the Arrangement with respect to the Issue of Certificates of Identity to Russian Refugees, 5 July 1922, League of Nations, Treaty Series Vol. XIII No. 355. Due to its geographical and temporal nature, the international protection of refugees was later sustained or expanded through the adoption of the Arrangement with respect to the Plan for the Issue of a Certificate of Identity to Armenian of 31 May 1924, 5 O.J.L.N. 969–970 (1924); the Arrangement Relating to the Legal Status of Russian and Armenian Refugees, 30 June 1928, League of Nations Treaty Series, Vol. LXXXIX, No. 2005; the Convention of 28 October 1933 relating to the International Status of Refugees; Provisional Arrangement concerning the Status of Refugees Coming from Germany, 4 July 1936, League of Nations Treaty Series, Vol. CLXXI, No. 3952; and the Convention concerning the Status of Refugees Coming from Germany of 10 February 1938. The 1951 Refugee Convention was adopted to provide standards of treatment applicable to refugees who were forced out of their protective boundaries by events occurring in Europe or elsewhere before January 1, 1951. These standards were extended to apply to all refugees without any geographical and temporal limitation by its 1967 Protocol. Prior to the First World War, a number of conventions dealing with the protection of refugees, who were affected by tragic events in the Ottoman Empire and the victims of the Greek massacre and the Balkan and Greco-Turkish wars, were adopted. They include the Treaty of Constantinople of 1913, the Turco-Bulgarian Treaty of 1913, and the Greek-Turkish Agreement of 1914. See Jaeger (2001) *Int'l Rev Red Cross* 729.

⁸⁰⁶ The principle of reciprocity still applies in trade and investment.

⁸⁰⁷ For example, in South Africa, immigration law is built on the twin principles of self-sufficiency and exclusivity. Moreover, the social assistance policy states that a foreign national can be socially assisted provided that there is a bilateral or multilateral agreement which makes the South African social policies to apply to him or her. The exclusion approach was confirmed by the Constitutional Court in the case of *Khosa* and by the SCA in the case of *Watchenuka*. In the former case, the

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The denial of certain socio-economic rights to refugees flies in the face of human rights and refugee principles regulating the status and treatment of refugees, holding that refugees and asylum-seekers must be given favourable treatment with regard to access to the country and its resources. As a starting point, it needs to be noted that the principle of *non-refoulement* rules out the denial of asylum-seekers' access to a prospective country of asylum on the ground of self-insufficiency or economic dependency.⁸⁰⁸ The grounds that can be invoked to expel an asylum-seeker or a refugee do not include socio-economic difficulties. Rather they are restricted to national security⁸⁰⁹ and the commission of serious non-political crimes or international crimes by asylum applicants.⁸¹⁰ Even where that is the case, they cannot be returned or extradited to a country where they will face persecution or where their life and freedom would be threatened.⁸¹¹ In particular, indigence is not a valid ground to refuse to accept asylum-seekers or grant them refugee status.⁸¹² In consideration of their insufficiency and human suffering, social intervention by a host state in the context of alleviating their predicaments is, in light of the principle of *non-refoulement*, necessarily important. Foreign jurisdictions have interpreted the denial of state support as a practice that would amount to constructive *refoulement* and that is accordingly in violation of the principle of *non-refoulement*.⁸¹³

The question whether it would be just and fair, in view of the universal nature of the human rights to equality and dignity, to exclude asylum-seekers from socio-

Constitutional Court held that the State can take restrictive measures to prevent non-citizens from becoming intolerable financial burdens (para 64). In the latter case, the court confirmed the decision of the SCUS in *Nishimura Ekiu v. The United States* 142 US 651, 659, holding that a sovereign nation has the inherent power to deny entry to certain citizens and to determine terms and conditions on which those admitted can stay (para 29).

⁸⁰⁸ *Weis Refugee Convention* 173. It needs be noted that the twin principles of exclusionary and self-sufficiency established by the Immigration Act do not apply to refugees or asylum-seekers.

⁸⁰⁹ Art 32 of the Geneva Refugee Convention states that national security reasons must be compelling.

⁸¹⁰ Art 1(f) of the Geneva Refugee Convention lays down three categories of persons to whom the provisions of the Refugee Convention do not apply. The first category includes individuals who have committed a crime against peace, a war crime, or a crime against humanity. The second category includes individuals who have committed a serious non-political crime outside the country of asylum prior to their admission to that country of asylum. The third category includes individuals who have "been guilty of acts contrary to the purpose and principles of the United Nations".

⁸¹¹ In a circumstance such as this, a country may not recognise them as refugees; rather it may prosecute them on the basis of the *aut dedere aut judicare* principle, which means "extradite or prosecute". See *Mail and Guardian Media Limited v Chipu* 2013 11 BCLR 1259 (CC) para 23. The principle is incorporated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 of 10 December 1984.

⁸¹² Factors to be taken into consideration are enumerated under art 1F of the Geneva Refugee Convention and they are extended by s 4(1) of the Refugees Act.

⁸¹³ See Cholewinski (2000) *Georgetown Immigration Law Journal* 712-713. See too Bhattacharjee (2013) 6 *NUJS L. Rev.* 48-49.

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economic rights and entitlements on the ground of their non-national status is in need of exploration. In light of the *non-refoulement* framework, the Geneva Refugee Convention and other refugee treaties encourage host countries to facilitate the entry of indigent and vulnerable asylum-seekers to their territories and to secure humane conditions. Although the causes of uprooting refugees are of a political nature, the admission of asylum-seekers and granting of asylum to them as well as problems connected therewith (or incidental to it) are recognised and understood in a social and humanitarian context.⁸¹⁴ In a humanitarian context, refugees lawfully staying should be exempted from “conditions of local affiliation or residence which may be required of nationals” to have access to any form of social security schemes.⁸¹⁵ Upon their arrival, asylum-seekers are people in an emergency situation. This is due to their flight, the loss of their sense of belonging and the loss of their capital and sources of income. The emergency situations in which they find themselves, raises questions concerning humanitarian, social and economic protection, and their need to receive public relief and assistance.⁸¹⁶ The principle of *non-refoulement* presupposes that asylum-seekers should be provided with public relief and assistance in order to avoid their return due to starvation.⁸¹⁷

The *Ad Hoc* Committee, in their *travaux préparatoires*,⁸¹⁸ were of the view that:⁸¹⁹

“The [state] parties shall grant the relief and assistance accorded to nationals to refugees, who are regularly resident in [the host countries’] territory and are unemployed, suffering from physical or mental disease and incapable because of their condition or age of earning a livelihood for themselves and their families, and also to children without support.”

The provision of compensation due to unemployment was problematic. This matter was of particular concern because, in some countries, unemployment was perceived to be part and parcel of contributory social security schemes in the context

⁸¹⁴ The preamble of the Geneva Refugee Convention states that the problem of refugees is of a social and humanitarian nature.

⁸¹⁵ Weis *Refugee Convention* 174, 376.

⁸¹⁶ Mathew *Reworking the Relationship* 11.

⁸¹⁷ 7.

⁸¹⁸ The term is used to describe the documentary evidence of the negotiation, discussions, and drafting of a final text of treaty or convention. It can also be referred to as negotiating history, drafting history, or preparatory documents.

⁸¹⁹ Weis *Refugee Convention* 172.

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of social insurance whereas, in other countries, it was covered by non-contributory social security schemes in the context of social assistance.⁸²⁰ It was then agreed that unemployment could be considered as a requirement to qualify for public relief and social assistance in limited situations.⁸²¹

Considering that asylum-seekers are unemployed and, in many countries, do not have the right to work, it seems safe to assume that asylum-seekers are often more desperate and vulnerable than refugees. It is true that they live in more precarious and uncertain conditions and are in need of basic essential necessities of life that may be availed through, among other things, accessing non-contributory social security schemes. Such necessities would in all probability enable them to adjust to their new socio-economic environment.

Worth mentioning are a number of factors that are illustrative of the importance of the right to have access to public relief and social assistance for the protection of asylum-seekers' welfare. First, asylum-seekers naturally face various predicaments in their effort to satisfy their physical and material needs upon arrival or while waiting for adjudication of their application for asylum.⁸²² These predicaments include, in addition to basic needs such as food and shelter, the reality that they cannot generally engage in livelihood activities. Second, the survival of the most vulnerable groups such as pregnant women, nursing mothers, young children, disabled people, aged people and the weak is dependent on state support and other free basic public services. Their difficulties in trying to survive without earning income should not be overlooked. Third, even where asylum-seekers are entitled to work, there are other obstacles that hinder them from meeting their basic needs, which must be taken into consideration. Account must be taken of the fact that both refugees and asylum-seekers (in the event that they are legally permitted to work) face difficulties in finding decent employment. Often, refugees and asylum-seekers are victims of exploitative labour practices, that is, they work under poor working conditions and are paid or remunerated below the minimum wage. As a result, they are incapable of supporting themselves and their families. Fourth, asylum-seekers usually cannot benefit from social insurance (i.e. contributory social security scheme) since they did

⁸²⁰ Hathaway *Rights of Refugees* 811.

⁸²¹ See UNHCR "Public Relief and Social Security" <<http://www.unhcr.org/3cf33fbc4.pdf>> (accessed 02-08-2015) 216. Unemployment can be invoked in a situation where unemployment benefits are not covered by the social insurance schemes.

⁸²² Hathaway *Rights of Refugees* 800.

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not make any financial contribution to it. These matters should be given due consideration in an attempt to guard against pervasive threats to refugees' and asylum-seekers' lives and freedoms. In fact, an asylum-seeker reception system which would result in asylum-seekers having to face, over a prolonged period of time, a real risk of starvation, undue delays in the adjudication of asylum applications and other violations of human and refugee rights entrenched in the domestic laws, in itself contravenes the asylum-seekers' basic rights.

On the other hand, although the core content of public relief and assistance may vary depending on national asylum law and constitutional law, Weis maintains that the core content should be interpreted widely to include "hospital treatment, emergency relief, relief for the blind and also the unemployed, where social security benefits are not applicable."⁸²³ More fundamentally, an asylum-seeker who has been admitted in the country should be given public relief and assistance if he or she is starving.⁸²⁴ In addition to refugee norms and standards, human rights norms and standards must also apply. They must be given due consideration for effective legal protection.

Nevertheless, Kapindu notes that the provision of public relief and assistance in poor African countries contributes to the development of ill-sentiment of citizens towards refugees and asylum-seekers.⁸²⁵ He states that the majority of citizens in Southern African countries are living in deprived and impoverished conditions. They easily feel that their governments and local/international humanitarian organisations are more concerned with indigent refugees and asylum-seekers than with them. When poor host communities feel neglected, they generally become aggressive towards refugees, asylum-seekers and economic migrants.⁸²⁶ Due to these structural and social challenges, a host country must carefully re-arrange and reengineer well-structured and effective socio-economic protections with regard to the guarantee of public relief and assistance and other core aspects of socioeconomic rights as they relate to citizens on the one hand, and refugees on the other. These protections must be tailored to ensure that there is harmonious co-existence between refugees and citizens.⁸²⁷ More importantly, they should be designed to ensure that no asylum-

⁸²³ Weis *Refugee Convention* 174.

⁸²⁴ 378.

⁸²⁵ Kapindu *Towards a More Effective Guarantee of Socio-economic Rights* 5.

⁸²⁶ 5.

⁸²⁷ 6.

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seeker is deprived of his or her human dignity as a result of socio-economic desperation or deprivation.⁸²⁸

4 4 3 Distinction between public relief and social security

The rights to social security and public relief are recognised under the 2009 Michigan Guidelines on the Right to Work as basic rights that are “particularly important to refugees, [asylum-seekers] and others who are unemployed, unable to work or underemployed.”⁸²⁹ However, the meaning of, and distinction between, the concepts of public relief and social security are shrouded in uncertainty. This is not only because these concepts are not clearly defined in the South African legal system, or because they are not explicitly entrenched in the Refugees Act, but also because South Africa’s social welfare system is not neatly designed in accordance with the Geneva Refugee Convention’s classification of socio-economic rights and benefits. The meaning of these concepts varies from one country to another, resulting in countries having different social assistance schemes.⁸³⁰ Under the Geneva Refugee Convention, the concepts of public relief and social security are aspects of a social welfare system.⁸³¹ In South Africa, the social welfare system is identified with the social security system. Its structure encompasses two schemes that are distinct in nature and substance, namely social assistance and social insurance. The former can be equated to public relief and assistance (as discussed in detail above) whereas the latter can be equated to social security (understood in terms of the Geneva Refugee Convention, as discussed in detail below).

The concept of social security is contained in article 24 of the Geneva Refugee Convention. It is used synonymously with the concept of social insurance, unemployment insurance or occupational insurance. Here social security refers to a social scheme that refugees have to contribute to, through the deduction of an agreed percentage from their salaries, for them to get financial assistance when they are incapable to work. On the other hand, asylum-seekers and refugees are entitled to public relief and assistance without having to contribute financially towards those social welfare schemes. For the purpose of clarity, the term social security, when

⁸²⁸ 6.

⁸²⁹ Para 19.

⁸³⁰ UNHCR “Public Relief and Social Security” 241.

⁸³¹ The social welfare system encompasses six aspects of concern, including; rationing, housing, public education, public relief, social security, and fair labour rights.

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used under the Geneva Refugee Convention, refers to the concept of social insurance – contributory social schemes – as it is known under South African law. On the other hand, under South African law, the term social security is applied to refer to the wider concept of social welfare as it is contained in the Geneva Refugee Convention.

Under the Geneva Refugee Convention, the right to have access to social insurance was, as it should be, linked to fair labour rights. The fair labour rights provisions expressed under article 24(1) state that:

“The [state parties] shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(a)

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitation:

- (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
- (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.”

Assuming that refugees lawfully staying in the country of asylum would be entitled to the right to work, they could also contribute to and benefit from social insurance schemes. Irrespective of this assumption, Hathaway states that the right to social security (or, in the South African context, social insurance) was recognised because refugees were, in many European countries, not in a position to benefit from social security programmes.⁸³² As non-citizens, they had no right to access these programmes unless where MFN treatment (i.e. conditions of reciprocity) applied.⁸³³

⁸³² Hathaway *Rights of Refugees* 773.

⁸³³ 773.

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In a situation where MFN treatment applied, refugees could possibly be given equal treatment similar to that accorded to non-citizens generally.

The *Ad Hoc* committee modelled the concept of social security or insurance (i.e. contributory social security) on the International Labour Organisation (“ILO”)’s Convention concerning Migration for Employment of 1949.⁸³⁴ This concept was however broadly extended, both in terms of its content and substance.⁸³⁵ The ILO’s social insurance clause restricts the protection of workers and employers to the contingency of sickness, maternity, employment injury, unemployment, invalidity, old age and death of the breadwinner.⁸³⁶ In the refugee labour protection framework, social insurance was conceptualised in a way which does not make a distinction between industrial accidents and social security and takes cognisance of temporary disability.⁸³⁷ A common understanding was created that the social insurance scheme, at national level, should encompass a range of contingencies recognised under the social security laws and their accompanying regulations.⁸³⁸

The concept of social security as understood in South Africa encompasses various aspects of the social welfare system and numerous laws were enacted to address those aspects. These aspects are far-reaching and include social assistance,⁸³⁹ social insurance,⁸⁴⁰ emergency and relief services,⁸⁴¹ children and spousal maintenance,⁸⁴² compensation for road accidents,⁸⁴³ compensation for occupational injuries and diseases,⁸⁴⁴ the national housing programme,⁸⁴⁵ primary

⁸³⁴ Adopted by 32nd ILC session on 01 Jul 1949, entry into force on 22 Jan 1952.

⁸³⁵ Hathaway *Rights of Refugees* 774.

⁸³⁶ Art 6(1)(b) of the 1949 Convention concerning Migration for Employment.

⁸³⁷ Hathaway *Rights of Refugees* 775.

⁸³⁸ 775.

⁸³⁹ Social Security Assistance Act 13 of 2004.

⁸⁴⁰ Unemployment Insurance Contributions Act 4 of 2002 and Unemployment Insurance Act 63 of 2001. The latter regulates contributions made by employers and employees in terms of the former so as to cover wage-related risks including unemployment insurance, maternity benefits, adoption benefits and dependants’ benefits.

⁸⁴¹ The Disaster Management Act 57 of 2002 creates social relief measures that will assist people and communities affected by a disaster. The term disaster in terms of s 1 of the Disaster Management Act refers to “a progressive or sudden, widespread or localised, natural or human-caused occurrence which causes (i) death, injury or disease, (ii) damage to property, infrastructure or the environment; or (iii) disruption of the life of a community; and is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.”

⁸⁴² Maintenance Act 99 of 1998.

⁸⁴³ The Road Accident Fund Act 56 of 1996 regulates payments of compensation for loss or damage wrongfully caused by the driving of motor vehicles.

⁸⁴⁴ The Occupational Injuries and Diseases Act 130 of 1993 regulates “a process which provides for payment of medical treatment and compensation for disablement caused by occupational injuries and diseases sustained by employees in the course of their employment, or for death resulting from such injuries or diseases.”

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healthcare,⁸⁴⁶ emergency medical treatment,⁸⁴⁷ private medical health schemes,⁸⁴⁸ free basic education for the poor⁸⁴⁹ and financial aid and assistance for needy tertiary students.⁸⁵⁰

Given that the exclusion of refugees from socio-economic rights has been the subject of considerable political and judicial debate, the chapter argues that refugees can access social benefits by virtue of section 27 of the South African Constitution. That applies both to benefits under social insurance and social assistance schemes. As far as the former is concerned: where it has been established that refugees and asylum-seekers have, for example, financially contributed to the Unemployment Insurance Fund (“UIF”), they would be entitled to the right to social insurance and other unemployment benefits, provided that they are unable to continue employment due to injury or incapacitation.⁸⁵¹ Put simply, they cannot be deprived of their right to access to social insurance schemes and other special benefits which are payable entirely out of the UIF.

This chapter, notwithstanding the wide range of possible contingencies, primarily focuses on entitlements of public relief and assistance in light of South Africa’s social assistance schemes, including emergency relief or social relief and distress services. Article 24 of the Geneva Refugee Convention, which deals with social insurance in a labour rights context, is beyond the scope of this chapter. Instead, the discussion will be restricted to article 23.

4 4 4 Protection within the human rights-based context

The Geneva Refugee Convention provides for the minimum standards of treatment of asylum-seekers with regard to public relief and assistance and, for the purpose of their protection, it should remain the guiding authority. However, this right is entrenched and guaranteed by a number of human rights texts, some of which establish the international bodies which serve to interpret and oversee the implementation of fundamental human rights. Human rights treaties and declarations

⁸⁴⁵ National Housing Policy and Subsidy Programmes of February 2010.

⁸⁴⁶ National Health Insurance in South Africa: Policy Paper, GN 34523 of 12-08-2011.

⁸⁴⁷ S 27(3) of the Constitution read in conjunction with s 5 of the National Health Act 61 of 2003.

⁸⁴⁸ Medical Schemes Act 131 of 1998.

⁸⁴⁹ Learners whose parents are recipients of social grants are excluded from school fees payments.

⁸⁵⁰ The National Student Financial Aid Scheme Act 56 of 1999 regulates the granting of loans and bursaries to vulnerable students at public higher learning institutions.

⁸⁵¹ Hathaway *Rights of Refugees* 775.

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impose on states the obligation of progressive realisation of socio-economic rights and lay down a minimum core in relation to the provision of these rights.⁸⁵² Worth mentioning is that a treaty binds South Africa only after it has been approved by Parliament in accordance with section 231(2) of the South African Constitution. Consideration of treaties in the interpretation of rights in the Bill of Rights is required by section 39(1)(b) of the South African Constitution⁸⁵³ and is required by section 6(1) of the Refugees Act in the interpretation of refugees' rights.⁸⁵⁴ It is however important to point out that the right to public relief and assistance is not explicitly contained in human rights texts and declarations. Rather, it is linked to and intertwined with the right to an adequate standard of living, the right to the highest attainable standard of physical and mental health, the right to life, and the right to social security. The UDHR, in article 25, provides that:

- (1) "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.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

Article 25 is a cornerstone of the standard of treatment of poor, vulnerable individuals. In the same way, article 11 of the ICESCR protects the right to public relief and assistance by guaranteeing the right of everyone to have access to an

⁸⁵² In terms of s 6 of the Refugees Act 130 of 1998, due regard must also be given to the Universal Declaration and other human rights texts to which South Africa is or becomes party. These human rights texts, for example, include the 1949 Geneva Conventions; the ICESCR; the ICCPR; the 1971 Declaration on the Rights of Mentally Retarded Persons; the 1975 Declaration on the Rights of Disabled Persons; the 1977 Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts; the 1979 Convention on the Elimination of All Forms of Discrimination Against Women; the 1981 African Charter on Human and People's Rights; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1986 Declaration on the Right to Development; the 1989 Convention on the Rights of the Child; the VDPA; and the 1999 African Charter on the Rights and Welfare of the Child. It also needs to be noted that the Constitutional Court held that human rights treaties must be considered in the interpretation of the Bill of Rights regardless of whether or not South Africa ratified them. See *Grootboom* at para 26, citing the case of *Makwanyane* para 35.

⁸⁵³ It states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.

⁸⁵⁴ It states that the Refugees Act must be interpreted and applied with due regard to the Geneva Refugee Convention and its Protocol, the African Refugee Convention, the UDHR, and any other relevant convention or international agreement to which South Africa is or becomes a party.

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adequate standard of living. The right encompasses aspects of adequate food, clothing and housing. In particular, it seeks to ensure freedom from hunger or starvation.⁸⁵⁵ The ICESCR recognises that the family should be accorded “the widest possible protection and assistance... particularly for its establishment” and enabling it to support and take care of dependent children.⁸⁵⁶ Moreover, mothers should be accorded special protection before and after child birth.⁸⁵⁷ According to the Michigan Guidelines on the Right to Work, the provision of adequate levels of social assistance is essential in situations where it is difficult for asylum-seekers to obtain employment. This obligation specifically derives from articles 9 and 11 of the ICESCR, as well as other interdependent rights, such as the right of every individual to the enjoyment of the highest attainable standard of physical and mental health, the right to life and the prohibition of inhuman or degrading treatment.⁸⁵⁸ The state should positively adopt a policy that will lead to the fulfilment of the said obligation. Negatively, the state should refrain from taking measures that will lead to destitution through the denial of access to social security and social assistance or the labour market in the absence of other means of support.⁸⁵⁹

The right to public relief and assistance is implied in the the right of every individual to the enjoyment of the highest attainable standard of physical and mental health, which is safeguarded by article 16 of the ACHPR. The ACHPR recognises the family as the natural unit and basis of society, and obliges the state to take care of its physical health and moral.⁸⁶⁰ The state must also take special measures to protect the physical and moral needs of the aged and the disabled.⁸⁶¹ Although the right to an adequate standard of living is not explicitly contained in the ACHPR, the African Commission opined that the said right is covered by a range of rights contained under articles 5 and 14-18 of the ACHPR.⁸⁶²

⁸⁵⁵ Art 11(2) of the ICESCR.

⁸⁵⁶ Art 10(1) of the ICESCR.

⁸⁵⁷ Art 10(2).

⁸⁵⁸ Art 9 guarantees the right to social security whereas art 11 guarantees the right to adequate standard of living. Whilst the right to the enjoyment of the highest attainable standard of physical and mental health contained in the ICESCR (art 12), the right to life (art 6) and the right to prohibition of inhuman or degrading treatment (art 7) are contained in the ICCPR.

⁸⁵⁹ The Michigan Guidelines on the Right to Work, 13-15 November 2009, paras 21-22.

⁸⁶⁰ Art 18(1) of the ACHPR.

⁸⁶¹ Art 18(4).

⁸⁶² See *Social and Economic Rights Action Centre et al. v. Nigeria*, Communication No. 155/96, ACHPR 2001 (15th Annual Activity Report) where it found that Nigeria violated the right to adequate food and housing, which are not contained in the ACHPR.

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Moreover, the Human Rights Committee has interpreted the right to life contained in article 6 of the ICCPR as imposing an onerous duty on the state to take positive measures, which include reducing infant mortality and eliminating malnutrition and epidemics for increasing life expectancy.⁸⁶³ All those positive measures are integral to humanitarian relief, which must be provided to asylum-seekers given that they suffer from hunger, dehydration and diseases. The right to life is also safeguarded by the ACHPR. Under the ACHPR, the state's positive duty to protect human life is drawn from the notion that human beings are inviolable and that the life and integrity of the person shall be respected.⁸⁶⁴ According to the African Commission, the right to life should be interpreted to include the right to adequate food and housing.⁸⁶⁵ Similarly, the Constitutional Court has interpreted the right to life contained in section 11 of the Bill of Rights as imposing a duty on the state to protect and preserve life. O' Regan J explained in *Makwanyane* that the right to life is not restricted to guaranteeing physical existence but encompasses the right to human life, which implies the right to share in the experience of humanity.⁸⁶⁶ In the opinion of Chaskalson P in *Soobramoney v Minister of Health (KwaZulu Natal)* ("*Soobramoney*"),⁸⁶⁷ the right to human life includes integral aspects of socio-economic rights such as housing, food and water, employment opportunities and social security simply because those aspects enable an individual to preserve his or her life, to live as a human being, to participate in his or her community and to be part of a broader community.⁸⁶⁸ The right to public relief and assistance serves to achieve the same purposes.

These human rights provisions do not make a distinction between citizens and non-citizens or between refugees and asylum-seekers. This is emphasised by the principle that every human being is entitled to the enjoyment of fundamental human rights and freedoms enunciated in the human rights texts without discrimination or distinction of any kind.⁸⁶⁹ Proscribed grounds for discrimination are listed under the

⁸⁶³ UN Human Rights Committee ("HRC"), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, para 5.

⁸⁶⁴ Art 4 of the ACHPR.

⁸⁶⁵ See *Social and Economic Rights Action Centre et al. v. Nigeria*, Communication 155/96 (in respect of infringement of the right to adequate food and housing).

⁸⁶⁶ *Makwanyane* paras 326-327. See too *Soobramoney*, para 31, Chaskalson P quoting O' Regan J in *Makwanyane*, para 326.

⁸⁶⁷ 1997 12 BCLR 1696 (CC).

⁸⁶⁸ *Soobramoney*, paras 18-19, 31, Chaskalson P quoting O' Regan J in *Makwanyane*, para 326.

⁸⁶⁹ See, for example, art 2 of the UDHR.

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ACHPR, the ICCPR and the ICESCR as well as South Africa's Constitution.⁸⁷⁰ Under the ICCPR and ICESCR, proscribed grounds include "race, colour, sex, language, religion, political or any other opinion, national and social origin, property, birth or other status."⁸⁷¹ The ACHPR adds ethnic group and fortune to the proscribed grounds for discrimination whereas the South African Bill of Rights extends the grounds to include gender, pregnancy, marital status, sexual orientation, age, disability, conscience, belief, culture, and language.⁸⁷² In South Africa, case law recognises that grounds such as nationality, refugee status or asylum-seeker status are analogous to the constitutionally-listed grounds and can therefore also be the basis for unfair discrimination.⁸⁷³ Arguably, these analogous grounds are protected by the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"),⁸⁷⁴ which proscribes any discrimination that would have the effect of nullifying or impairing fundamental human rights and freedoms in the fields of public life.⁸⁷⁵ Although this is the case, the ICERD allows fair distinctions, exclusions, restrictions or preferences made between citizens and non-citizens.⁸⁷⁶ However, refugees and asylum-seekers cannot, in all matters concerning public relief and assistance, be excluded on the basis of non-citizenship. Article 23 of the Geneva Refugee Convention requires host states to treat refugees lawfully staying on an equal basis with citizens with respect to social assistance measures.

Certain human rights texts are designed to protect and empower vulnerable categories of people, such as women, children and the disabled. Women refugees or asylum-seekers must benefit from the protection envisaged by the CEDAW. The CEDAW affords all women substantive socio-economic rights and prohibits any

⁸⁷⁰ They include race, colour, sex, language, religion, political or any other opinion, national and social origin, fortune (or property), birth or other status. The ACHPR adds ethnic group to the proscribed grounds for discrimination whereas the South African Bill of Rights extends the grounds to include gender, sex, pregnancy, marital status, sexual orientation, age, disability, conscience, belief, culture, language and birth. See Art 2 of the ACHPR and Art 2(2) of the ICESCR, read in tandem with s 9(3) of the Constitution of the Republic of South Africa.

⁸⁷¹ Art 2(1) of the ICCPR and Art 2(2) of the ICESCR.

⁸⁷² Art 2 of the ACHPR and s 9(3) of the Constitution of the Republic of South Africa.

⁸⁷³ It was held in the case of *Khosa* (para 68) that where the alleged ground for unfair discrimination is not itself listed under section 9 of the South African Constitution but is analogous to such listed constitutional grounds, "there is no presumption in favour of unfairness and the unfairness first has to be established." The same rule was applied in a number of cases involving refugees and asylum-seekers, such as *Union of Refugee Women and Minister of Home Affairs v Somali Association of South Africa Eastern Cape (SASA EC)* 2015 3 SA 545 (SCA).

⁸⁷⁴ Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, entered into force on 4th January 1969.

⁸⁷⁵ Art 1(1) of the ICERD.

⁸⁷⁶ Art 1(2) of the ICERD.

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discrimination against them in the area of socio-economic rights and development pertaining to aspects of social assistance, dignified living conditions, and equal access to the healthcare system.⁸⁷⁷ Under article 14 of CEDAW, appropriate measures should be taken to ensure that poor, vulnerable women enjoy adequate living conditions in relation to housing, sanitation, electricity and water supply, transport and communication.

Refugees and asylum-seekers with disabilities should be eligible to receive special care and assistance and other social protection services adequate for a decent living, as guaranteed by article 28 of the ICRPD. Under article 28, the right to an adequate standard of living is protected.

The best interests of refugee or asylum-seeker children are also protected by the CRC. The CRC obligates the state to create a conducive environment that allows children to subsist and develop without any hindrance. Every child must be afforded the right of access to an adequate standard of living, which is indispensable for his or her mental, spiritual, moral and social development.⁸⁷⁸ While parents are responsible for the provision of primary care, the CRC requires intervention of the state in the child's development through the adoption of appropriate social and health measures that would assist parents in their parental duty to care. The state must, in the case of need, make available material assistance, especially with regard to such essential necessities of life as food, housing and clothing.⁸⁷⁹

Considering that asylum-seeker children live in exceptionally difficult conditions and that such children need special safeguards and care, these rights must reinforce the basic rights enshrined in the Geneva Refugee Convention . The African Charter on the Rights and Welfare of the Child ("ACRWC") notes this with concern. It states that a refugee or asylum-seeker child should be afforded appropriate protection and humanitarian assistance in the enjoyment of rights set out in human rights texts.⁸⁸⁰ This approach was confirmed in the cases of *Jacob van Garderen NO v The Refugee Appeal Board*⁸⁸¹ and *Mubake v Minister of Home Affairs*.⁸⁸² These

⁸⁷⁷ Arts 13, 14, 12, Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, December 18, 1979, entry into force September 3, 1981.

⁸⁷⁸ Arts 6(2) and 27 of the Convention on the Rights of the Child.

⁸⁷⁹ Art 27 of the CRC.

⁸⁸⁰ Art 23(1) of the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

⁸⁸¹ Case No 30720/2006.

⁸⁸² Case No 72342/2012.

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judgments place the best interests of the child principle, as evinced in section 28(2) of the South African Constitution, at the centre of disputes pertaining to refugee and asylum-seeker children.

It should be borne in mind that the peoples of Africa are, under the African Union (“AU”), determined to confront multi-faceted socio-economic challenges, including challenges posed by globalisation and the scourge of conflicts, in order to raise their living standards.⁸⁸³ Under the Southern African Development Community (“SADC”), the people of Southern Africa decisively commit themselves to ensure, through common action, their progress and well-being⁸⁸⁴ and to alleviate their poverty through sustainable, integrated economic growth.⁸⁸⁵ In terms of the vowed commitments, South Africa bears an obligation to address issues affecting destitute refugees and asylum-seekers.

It is therefore clear that the right to public relief and assistance is protected by a range of civil and socio-economic rights. Under the South African Constitution, the right is protected by implication by socio-economic rights such as the right to have access to healthcare, sufficient food and water, social security, social assistance and housing;⁸⁸⁶ and by civil rights such as the rights to life, equality, human dignity and freedom and security of the person.⁸⁸⁷ These rights are entrenched in the South African Constitution to protect and guarantee a decent standard of living for all people, with a particular focus on vulnerable categories of persons. The right should be construed, with reference to international treaties, to encompass seven major components or elements, namely adequate food, adequate clothing, basic housing, medical care, social security, special care and assistance and necessary social protection services. The seven components were given content by the Committee on Economic, Social and Cultural Rights through its General Comments. The rights to healthcare and to adequate housing will be discussed in more detail in subsequent chapters. This chapter restricts itself to the right to adequate food, adequate water and social security. Aspects related to food, water and social security will be discussed under sub-section 4.5.2.3.

⁸⁸³ Preamble of the Constitutive Act of the African Union, read together with Art 3(k).

⁸⁸⁴ Preamble of the Treaty of the SADC.

⁸⁸⁵ Preamble.

⁸⁸⁶ See ss 26 and 27 of the Constitution of South Africa, 1996.

⁸⁸⁷ See ss 9, 10, 11, and 12.

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4 5 National and international approaches to international protection

4 5 1 *Public relief and assistance under national jurisdictions*

As noted above, the right to public relief and assistance accrues to asylum-seekers by virtue of the Geneva Refugee Convention, human rights law, the South African Constitution and the Refugees Act. By its very nature, the right to public relief and assistance should be accessible to asylum-seekers upon arrival. The content and scope of the right to public relief and assistance are not clearly defined and, thus, vary to a great extent. Regardless of definitional difficulties, the accessibility of this right plays an integral role in the protection of refugees and asylum-seekers' health, well-being, dignity and in guarding them against pervasive social vulnerabilities and social pathologies. In this light, it can be stated that any treatment of asylum-seekers should be sensitive to psychological, physical and biological suffering given that asylum-seekers have often been victims of starvation, violence, abuse or torture. Some scholars have argued that the exclusion of asylum-seekers from social benefits is tantamount to subjecting them to further persecution.⁸⁸⁸

The exclusion of asylum-seekers from the right to public relief and assistance has deleterious effects for their wellbeing and freedom, including homelessness, psychological deterioration, prostitution, stress, exploitative and illegal employment, begging and the loss of their capabilities to self-support.⁸⁸⁹ To avoid further social persecution of those seeking asylum, it is advisable that national governments should adopt policies that respond to the socio-economic needs of both refugees and asylum-seekers. National policies in respect of social welfare must be consistent with human rights law, international refugee law and constitutional law.

⁸⁸⁸ M Norredam, A Mygind & A Krasnik "Access to Health Care for Asylum Seekers in the European Union: A Comparative Study of Country Policies" (2005) 16 *European Journal of Public Health* 285, 285 posit that asylum-seekers are vulnerable to pre- and post-migration persecution. Pre-migration persecution factors include massive violations of fundamental human rights, torture and refugee trauma which more often lead to physical and mental illness. Post-migration persecution factors include arbitrary detention, exclusion from social benefits, the length of the asylum procedure, living in a protracted refugee situation, restrictions on the right to work and ineligibility for access to the health care system. K Jastram "Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution" in J C Simeon *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony* (2010) 148 states that economic persecution is recognised as a ground for refugee status by case law in the United States and commonwealth countries such as United Kingdom, New Zealand and Canada and, by statute, in Australia.

⁸⁸⁹ M R von Sternberg "Reconfiguring the Law of *Non-Refoulement*: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection" (2014) 2 *Journal on Migration and Human Security* 51, 62.

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4 5 1 1 South Africa

4 5 1 1 1 *Constitutional and legislative overview*

Both the South African Constitution and the Refugees Act are worded in a manner that gives substance to human rights law in that they place human dignity, equality and freedom at the centre of the protection of individuals. In the spirit of advancing equality, ensuring the protection of human dignity and enhancing individual freedom, section 27(1) of the South African Constitution confers the right to social assistance and social security on everyone – citizens and non-citizens alike – living within the boundaries of South Africa. In giving effect to both international and constitutional obligations to promote better standards of life, these rights are statutorily afforded to refugees and asylum-seekers in terms of sections 27(b) and 27A(d) of the Refugees Act. The provisions state that refugees and asylum-seekers are entitled to enjoy constitutional rights set out in the Bill of Rights, in so far as those rights apply to everyone.⁸⁹⁰ By virtue of the Refugees Act, the right to social assistance and social security accrues to both refugees and asylum-seekers. However, the Regulations to the Social Assistance Act restrict social assistance, which refers to non-contributory social security schemes, to citizens, permanent residents and refugees.⁸⁹¹ Asylum-seekers whose refugee status are yet to be determined are excluded. This effectively deprives asylum-seekers of social assistance in the form of a social grant or of SRD. As noted, SRD and social grants are both forms of social assistance.

4 5 1 1 2 *The right to have favourable access to a SRD grant*

Section 13 of the Social Assistance Act creates the social relief and distress (“SRD”) grant. It was designed to help “the poorest of the poor and the most vulnerable households” to meet their immediate socio-economic needs for a period of three months.⁸⁹² Under certain circumstances, it may be extended for a further

⁸⁹⁰ S 27 states that a refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of the Refugees Act. S 27A states that an asylum-seeker is entitled to the rights contained in the Constitution, in so far as those rights apply to an asylum-seeker.

⁸⁹¹ Ss 2(e), 3(a), 5, 6(1)(g), 7(1)(a)(i), 8(c) and 9(1)(b) of the Regulations to the Social Assistance Act.

⁸⁹² See “Minister Clarifies Position on Social Relief of Distress Grants” (03-02-2009) <<http://www.sanews.gov.za/south-africa/minister-clarifies-position-social-relief-distress-grants>> (accessed 11-09-2015).

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period of three months.⁸⁹³ It is narrowly defined as “a temporary form of government assistance given to poor households facing undue hardship”.⁸⁹⁴ In a broad sense, the South African Social Security Agency (“SASSA”) defines it as “short term, material assistance provided to South African citizens, permanent residents or refugees, which renders them able to meet the immediate needs for themselves and their dependants”.⁸⁹⁵ Such material assistance is usually distributed in the form of food parcels, vouchers and school uniforms with a view to intensifying efforts to relieve economic stress and cushioning the poor and vulnerable people from the worst effects of rising food prices. However the SRD is not a mechanism that responds to long term and chronic poverty.⁸⁹⁶

In order to qualify for a SRD grant, applicants are subject to a means test in order to determine whether or not they, in fact, fall in the category of the poorest and vulnerable people.⁸⁹⁷ For example, individuals can qualify for a SRD grant in cases where they were affected by a disaster or crisis or where the refusal to provide material assistance would cause undue hardship.⁸⁹⁸ Refusal to provide assistance to asylum-seekers puts their lives at risk, as they have no other means of income and have lost most (or all) of their belongings. Access to the SRD should be given due consideration because asylum-seekers face socio-economic insecurity due to events beyond their control. Asylum-seekers’ exclusion from this grant will give rise to a breach of article 25 of the UDHR, read with article 23 of the Geneva Refugee Convention. It will defeat the purpose of section 27A(d), which seeks to ensure asylum-seekers’ adequate protection against starvation and indignity.

⁸⁹³ SASSA “Social Assistance for Refugees 2013-14” <<http://www.sassa.gov.za/index.php/knowledge-centre/grant-booklets/file/160-social-assistance-for-refugees-2013-14?tmpl=component>> (accessed 11-09-2015) 7.

⁸⁹⁴ See “Minister Clarifies Position on Social Relief of Distress Grants” (03-02-2009).

⁸⁹⁵ SASSA *Social Assistance for Refugees* 5-6.

⁸⁹⁶ 6.

⁸⁹⁷ To qualify, an applicant must have insufficient means. A guideline for insufficient means is a family with a monthly income of less than R800. In addition, an applicant must meet one or more of the following conditions:

- (1) Be awaiting payment of an approved social grant;
- (2) Be declared medically unfit to undertake remunerative work for a period of less than six months;
- (3) Be in a family where the breadwinner has died and application is made within three months of the date of death;
- (4) Be affected by a disaster;
- (5) Not receive maintenance from a person legally obliged to pay such maintenance, and proof of efforts made to obtain the maintenance is provided; or
- (6) Refusal to provide SRD may cause undue hardship.

⁸⁹⁸ See below.

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4 5 1 1 3 Right to favourable access to social grants

Along similar lines, access to social grants should not be restricted to citizens, permanent residents and refugees, but should be extended to asylum-seekers. Under section 1 of the Social Assistance Act, a social grant is defined to mean “a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person’s grant, a war veteran’s grant and a grant-in-aid”.⁸⁹⁹ South Africa should take seriously its humanitarian obligation to assist all type of refugees, including asylum-seekers. A social grant is, without doubt, necessary to secure the dignity and wellbeing of indigent and vulnerable asylum-seekers who cannot secure the necessities of life by themselves due to forced impoverishment. Extending social assistance or humanitarian intervention to women, children and people with disabilities is crucial. Children asylum-seekers should not be discriminated against on the basis of their asylum-seeker status. The principle of the best interest of a child should also be observed in all matters concerning a child asylum-seeker.⁹⁰⁰ Women asylum-seekers, most notably single mothers, pregnant women or breastfeeding women are in need of the SRD and other social assistance to support their families and dependants. Likewise, the elderly and infirm should be eligible for social assistance so that they can enjoy a standard of living adequate for the protection of their health.

The state’s failure to protect indigent and vulnerable asylum-seekers is contrary to the constitutional duty to protect human dignity, to preserve life, to ensure equal protection and not to treat people in a degrading way.⁹⁰¹ Put differently, deprivation of social grants flies in the face of the international responsibility to protect human beings from insecurity, more specifically, indignity, fear and want.⁹⁰² Such deprivation cannot – it is presumed – be justified on the basis of the fact that section 27(2) of the South African Constitution circumscribes the state’s obligation in that it must realise

⁸⁹⁹ As noted, neither refugees nor asylum-seekers can have access to a war veteran’s grant, which is generally reserved for a person who has attained the age of 60 years and who performed any naval, military or air force services. S 11 of the Social Assistance Act.

⁹⁰⁰ S 28(2) of the Constitution states that “[a] child’s best interests are of paramount importance in every matter concerning the child.”

⁹⁰¹ These constitutional duties are entrenched under ss 9 (equality), 10 (human dignity), 11 (life) and 12 (security of the person) of the Constitution.

⁹⁰² See the Preamble of the UDHR, which states that all human beings shall enjoy freedom from fear and want.

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the right to social assistance progressively within available resources.⁹⁰³ Whether the question of excluding asylum-seekers is reasonably justifiable either under section 27(2) or section 36 of the South African Constitution is dealt with under subsection 4.6. It is desirable to explore the extent to which the right in question is protected by foreign countries, particularly the US and France, prior to discussing the constitutionality of its limitations.

4 5 1 2 US

The US constitutional framework is conceived in terms of negative rights. In addition, the US is not a party to the Geneva Refugee Convention. It also failed to ratify the ICESCR.⁹⁰⁴ However, it acceded to the 1967 Protocol Relating to the Status of Refugees on 1 November 1968.⁹⁰⁵ In line with the purpose and objectives of the said Protocol, the US, in 1980, enacted the Refugee Act to establish a standardised refugee protection policy⁹⁰⁶ that seeks to:

“respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the [US], and transitional assistance to refugees in the [US].”

These commitments to the admission of and assistance to refugees and asylum-seekers are based on humanitarian concerns and, in certain situations, national interest.⁹⁰⁷ The central purpose of the Refugee Act is not only to provide a safe haven to people for humanitarian reasons, but also to assist them to become self-sufficient and economically independent whilst in the US. In doing so, it connects self-sufficiency with public relief and assistance, with a particular focus on

⁹⁰³ S 27(2) provides that “the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

⁹⁰⁴ The US is a signatory to the ICESCR but has not ratified it. Neither did the US sign, ratify nor accede to the Optional Protocol to the ICESCR. See “Status of Ratification, Reservations and Declarations” <<http://indicators.ohchr.org/>> (accessed 12-10-2015).

⁹⁰⁵ UNHCR “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol” <<http://www.unhcr.org/3b73b0d63.html>> (accessed 12-10-2015).

⁹⁰⁶ S 101(a) of the Refugee Act of 1980.

⁹⁰⁷ S 207(2) of the Refugee Act.

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empowering refugees to become employable in the American labour market as a fundamental goal for sustainable self-support.⁹⁰⁸

Like the Geneva Refugee Convention, the Refugee Act tacitly makes reference to asylum-seekers and does not clearly specify whether or not asylum-seekers are entitled to public relief and assistance in the form of humanitarian or transitional assistance. Within the refugee framework, two primary social schemes were created for the purpose of promoting the resettlement process with respect to enabling refugees – not asylum-seekers – to integrate into local communities and thus normalise their lives.⁹⁰⁹ These social schemes are the State Department-Funded Reception and Placement Program and the Office of Refugee Resettlement-Funded Transitional Assistance Program.⁹¹⁰ Under the former program, refugees – in the resettlement program – are eligible for social grants designed to meet their immediate socio-economic needs for the first 90 days after arrival, whereas under the latter program refugees are entitled to public relief and assistance in the form of refugee cash assistance, refugee medical assistance and livelihoods-related services.⁹¹¹ In addition, refugees, especially, those who are elderly, blind and disabled persons, are entitled to receive social security income benefits.⁹¹²

Refugee social schemes are predominantly viewed as a “form of transitional assistance” meant to help people in humanitarian concern or emergency situations to sustain themselves and, where appropriate, to ensure that they are supported if they are unable to fend for themselves and their families.⁹¹³ Asylum-seekers are not eligible for any of these public relief and assistance programs, including social security income benefits.⁹¹⁴ Yet, asylum-seekers who arrive at the US borders are increasingly detained, which effectively deprives them of the opportunity to fend for

⁹⁰⁸ A Brown “Unfulfilled Promises, Future Possibilities: The Refugee Resettlement System in the United States” (2014) 2 *Journal on Migration and Human Security* 101, 106-110.

⁹⁰⁹ Brown (2014) *Journal on Migration and Human Security* 90.

⁹¹⁰ 89-90

⁹¹¹ 90.

⁹¹² M Nezer “An Overview of Pending Asylum and Refugee Legislation in the US Congress” (2014) 2 *Journal on Migration and Human Security* 276, 293.

⁹¹³ Brown (2014) *Journal on Migration and Human Security* 90.

⁹¹⁴ Human Rights Watch “At Least Let Them Work: The Denial of Work Authorization and Assistance for Asylum Seekers in the United States” November 2013 <https://www.hrw.org/sites/default/files/reports/us1113_asylum_forUPlload.pdf > (accessed 10-11-2015) 45 states that the US bars asylum-seekers from enjoyment of the right to work and from accessing federal public relief and assistance. In essence, the US assumes that asylum-seekers have sufficient means to support themselves.

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themselves.⁹¹⁵ Moreover, non-detained asylum-seekers, pending refugee status determination, are not allowed to work:⁹¹⁶

“[Asylum-seekers] are statutorily prohibited from immediately receiving work authorisation at the same time as the filing of their asylum application. Now the asylum applicant is required to wait 150 days after the [United States Citizenship and Immigration Services Bureau (“USCIS”)] receives his/her complete asylum application before applying for work authorisation. The USCIS then has 30 days to grant or deny the request.”

These restrictions in respect of access to basic rights to social benefits have, according to the November 2013 Human Rights Watch Report, impacted on asylum-seekers’ survival. Asylum-seekers either come to depend on others for sustenance and maintenance, or engage in illegal and exploitative work.⁹¹⁷ If they undertake illegal employment, they risk becoming subject to deportation based on the ground of contravention of the US immigration laws.⁹¹⁸ In light of the above, refugee protection seems to be inadequate and difficult to access by asylum-seekers who arrive at a port of entry or are in the territory of the US. On the face of it, the US treatment of asylum-seekers could effectively compel asylum-seekers to return to where they came from. This is in contravention of the core principle of *non-refoulement*, which is a cornerstone of refugee protection.

According to McBride, the US asylum legal framework places asylum-seekers in an unfavourable position compared to the manner in which indigent and vulnerable

⁹¹⁵ For more details, see Human Rights First “U.S. Detention of Asylum Seekers Seeking Protection, Finding Prison” April 2009 – Revised June 2009 <<https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>> (accessed 09-11-2015).

⁹¹⁶ R E Wasem “U.S. Immigration Policy on Asylum Seekers” 5 May 2005, CRS Report for Congress <<https://fas.org/sgp/crs/misc/RL32621.pdf>> (accessed 15-11-2015) 6. See too Human Rights Watch *At Least Let Them Work* 1; R E Wasem “Cuban Migration to the United States: Policy and Trends” June 2009, Congressional Research Service, <<https://www.fas.org/sgp/crs/row/R40566.pdf>> (accessed 15-11-2015) 6. D Kerwin “The US Refugee Protection System on the 35th Anniversary of the Refugee Act of 1980” (2015) 3 *Journal on Migration and Human Security* 1, 28 states that an asylum-seeker has to wait for 150 days to pass after his or her application was submitted to the relevant authority which, in turn, has 30 days to accept or reject such application. Non-detained asylum-seekers have to wait for four years for their cases to be heard by an immigration court, at which point they can apply for asylum and thus begin to count down the 150-day period. Undue delays have an impact on asylum-seekers’ right to sustain themselves and their dependants. See Kerwin (2015) *Journal on Migration and Human Security* 28, 30.

⁹¹⁷ Asylum-seekers are mostly dependent on their social network, including “family members, friends, fellow refugees, charities, and other organizations – for support.” See Human Rights Watch *At Least Let Them Work* 24.

⁹¹⁸ 24.

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migrants are treated under the immigration framework.⁹¹⁹ However, asylum-seekers are, in very limited and exceptional circumstances, entitled to special federal benefits. These include emergency medical assistance,⁹²⁰ in-kind emergency disaster relief,⁹²¹ immunisation,⁹²² other social services or programmes (such as soup kitchens, crisis counselling and intervention, and short-term shelter) as determined by the Attorney-General,⁹²³ or housing assistance as determined by the Secretary of Housing and Urban Development.⁹²⁴ Moreover, not all asylum-seekers are excluded from federal social security benefits. Those individuals, who are seeking asylum because they are victims of human trafficking or torture, may be included in federal social security benefits.⁹²⁵

The exclusion of asylum-seekers from public relief and assistance and social security benefits is grounded in the understanding that “welfare benefits served as magnet for others and drained the state budget”.⁹²⁶ Modern immigration – whether in a search of better opportunities or asylum – is linked in the political imagination to the decline in living standards of Americans and widening social inequality.⁹²⁷ The US approach to the treatment of asylum-seekers falls short of the standards of favourable treatment as evinced by the Geneva Refugee Convention and of human dignity as proclaimed by the UDHR.

South Africa should not apply the US’s approach to the treatment of asylum-seekers. Unlike in the US, asylum-seekers are entitled to social assistance by virtue of the South African Constitution and Refugees Act. In addition, the foundational value of human dignity underpins the provision of social assistance for the protection of needy people’s humanitarian and social needs. This includes asylum-seekers. The government of South Africa must therefore ensure that asylum-seekers are

⁹¹⁹ M J McBride “Migrants and Asylum-seekers: Policy Responses in the United States to Immigrants and Refugees from Central America and Caribbean” (1999) 37 *International Migration* 289, 292 states that US immigration law is “rested on economic concerns and domestic pressure” whereas asylum law, though centred on humanitarian and foreign policy considerations, is more restrictive. Human Rights Watch *At Least Let Them Work* 39 also states that the path to work authorisation is much more complex and restrictive for asylum-seekers than for migrants with temporary protected status, the U-Visa for victims of violent crimes and the T-Visa for victims for human trafficking.

⁹²⁰ In accordance with United States Code Title 8: Aliens and Nationality: Section 1611(b)(1)(A).

⁹²¹ S 1611(b)(1)(B).

⁹²² S 1611(b)(1)(C).

⁹²³ S 1611(b)(1)(D).

⁹²⁴ S 1611(b)(1)(E).

⁹²⁵ See the Senior Citizens’ Freedom to Work Act of 2000 (42 USC 1305) and the Torture Victims Relief Act of 1988 (22 USC 2151), respectively.

⁹²⁶ McBride (1999) *International Migration* 297.

⁹²⁷ 299.

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socially supported and sustained in their early days of asylum and, where appropriate, ensure that their hopes are revived as, at least, France does.

4 5 1 3 France

Like the US, France is one of the drafters of the Geneva Refugee Convention. However, unlike the US, it is a party to it. It has also ratified a number of human rights treaties that protect and guarantee the right to life, human dignity, social security, an adequate standard of living and the highest attainable standard of physical and mental health. Under French jurisdiction, an asylum-seeker is therefore entitled to the right to public relief and assistance in the sense of having access to social housing, social assistance or financial aid (known as “*allocation temporaire d’attente*” or “ATA”) and access to healthcare.⁹²⁸ Generally, eligibility for these social services depends on the recognition of an asylum-seeker along with the grant of a one-month or three-month temporary residence, referred to as *Autorisation Provisoire de Séjour* (APS) and *récépissé* respectively.⁹²⁹

With regards to housing, asylum-seekers are accommodated within the reception centre for asylum-seekers or, in French, *Centre d’Accueil pour Demandeurs d’Asile* (“CADA”); however, priority is given to families with children.⁹³⁰ Under CADA programs, they do not only have access to shelter but also to food, medical and psychological services as well as legal and administrative assistance.⁹³¹ These social benefits are generally not accessed by single asylum-seekers, who may only have access to emergency accommodation.⁹³²

Due to the receipt of financial assistance as explained below, the right to work for the purpose of self-sufficiency and economic independency is restricted. An asylum-seeker is allowed to work only if he or she has been recognised as a refugee or if a year has elapsed without his or her application of asylum being finalised, whichever

⁹²⁸ Forum Réfugiés “The Asylum-seeker’s Welcome Book: Refugees must be protected” October, 2009 < www.forumrefugies.org > at p23.

⁹²⁹ 9. In practice, a holder of APS is required to apply for *récépissé* within one month. Only *récépissé* is renewable. For further details on APS and *récépissé*, see Forum Réfugiés at 10, 15,

⁹³⁰ J Freedman “Female Asylum-Seekers and Refugees in France” (2009) *Legal and Protection Policy Research Series*, PPLAS/2009/01 at 36. See too *Anglais-Guide d’asile - Claiming Asylum in France* <http://www.exiles10.org/IMG/pdf/Anglais-Guide_d_asile.pdf> (accessed 08-11-2015) at 8, which states that families with children are offered immediate accommodation whereas single people and couples without children are offered accommodation in an emergency situation.

⁹³¹ Freedman (2009) *Legal and Protection Policy Research Series* 40.

⁹³² Emergency accommodation is accessible subject to availability and receives asylum-seekers at night. It can be booked via a telephonic call. This type of accommodation does not include meals. See Freedman at 45 and Forum Réfugiés at 24.

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occurs first.⁹³³ Nevertheless, it becomes more difficult when, after the exhaustion of reviews and appeals, an application for asylum is rejected. In that case, an asylum-seeker loses such legal status and becomes a migrant to whom the terms and conditions set out under immigration laws apply.

An asylum-seeker to whom accommodation is offered receives a social grant of €100 per month per person, while a social grant (“the ATA”) of at least €340 per month per person is offered to those asylum-seekers to whom no accommodation was granted.⁹³⁴ In addition, financial aid for children and families is granted in a situation where social services and income are insufficient to meet their essential basic needs.⁹³⁵ This type of social grant is occasional and its frequency and amount vary from one local government to another.⁹³⁶

Upon arrival, asylum-seekers are entitled to have access to medical screening and are – depending on their income – eligible for the Universal Health Cover scheme, referred to as “*couverture maladie universelle*” (“CMU”). Those who have been lawfully staying in France for at least three months also benefit from the state-funded medical assistance (*aide médicale de l'état* (“AME”)).⁹³⁷

It is important to note that asylum-seekers whose claims for asylum have been rejected are ineligible for accessing the above-mentioned socio-economic benefits. Their survival is “highly dependent on support from community networks”.⁹³⁸ Where an asylum-seeker’s application for asylum is successful, he or she is entitled to enjoy the same rights, except political rights, as French nationals.⁹³⁹

In light of the above, it is clear that asylum-seekers have access to a number of elements of the right to public relief and assistance, including the following:⁹⁴⁰ (a) basic accommodation; (b) adequate food and water; (c) clothing; (d) medical, social and psychological help; (e) financial aid and assistance; (f) access to training; (g) access to legal representation; and (h) access to a voluntary return programme. All these services are offered for the purpose of alleviating human suffering and

⁹³³ Anglais-Guide d'asile - Claiming Asylum in France at 9. See too Freedman (2009) *Legal and Protection Policy Research Series* 44 and Forum Réfugiés (2009) 24.

⁹³⁴ 9. See too European Migration Network (“EMN”) “Ad-Hoc Query on Asylum Support Rates Requested by the UK National Contact Point on 1st February 2013 - Compilation Produced on 4th April 2013” <www.interieur.gouv.fr> (accessed 12-11-2015) 10.

⁹³⁵ Forum Réfugiés (2009) 27.

⁹³⁶ 27. See too EMN 2013 Ad-Hoc Query (2013) 10.

⁹³⁷ 27.

⁹³⁸ Freedman (2009) *Legal and Protection Policy Research Series* 54.

⁹³⁹ Forum Réfugiés (2009) 25.

⁹⁴⁰ EMN 2013 Ad-Hoc Query (2013) 2.

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restoring their sense of human dignity, pending the outcome of their applications for asylum.

4 5 2 Promoting coherence: Universal protection

International refugee law along with human rights law provides guidance for the treatment of refugees and asylum-seekers. These international texts are invoked in situations where national policies fall short of universally recognised standards and practices or where the core content of a certain right is ambiguous. In addition to these, the directives and comments established by the African Commission, the EU, the UNHCR and the Committee on Economic, Social, and Cultural Rights may assist in giving content and substance to the right to public relief and assistance so as to promote equal protection, coherence and uniformity.

4 5 2 1 African Commission's approach

In the African context, the right to seek asylum is protected by the ACHPR.⁹⁴¹ The socio-economic rights guaranteed by the ACHPR accrue to refugees and asylum-seekers by virtue of residing in every individual.⁹⁴² It is within the ACHPR framework that the African Refugee Convention is given effect and substance. Accordingly, refugees and asylum-seekers have approached the African Commission to claim their right to asylum.⁹⁴³ This includes the enjoyment of the right against *refoulement* – not only in accordance with the African Refugee Convention, but also in accordance with the ACHPR and the entitlements of the rights associated with *non-refoulement* obligations.⁹⁴⁴ As noted, obligations ensuing from the principle of *non-refoulement*

⁹⁴¹ Art 13(3).

⁹⁴² Arts 14-18.

⁹⁴³ See, for example, *Organisation Mondiale Contre la Torture and Others v Rwanda* Communications No. 27/89, 49/91 and 99/93 (2000) AHRLR 282 (ACHPR 1996); *Doebbler v Sudan* Communication No. 236/2000 (2003) AHRLR 153 (ACHPR 2003), *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v Ethiopia and Interights (on behalf of Pan African Movement and Inter African Group) / Eritrea*, Communications No. 233/99-234/99 (2003) AHRLR 74 (16th Activity Report, ACHPR 2003) and *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* Communication No. 249/02 (2004) AHRLR 57 (18th Activity Report, ACHPR 2004).

⁹⁴⁴ *Doebbler v Sudan* Communication No. 236/2000 (2003) AHRLR 153 (ACHPR 2003) (in respect of applicability of the cessation clause); *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v Ethiopia and Interights (on behalf of Pan African Movement and Inter African Group) / Eritrea*, Communications No. 233/99-234/99 (2003) AHRLR 74 (16th Activity Report, ACHPR 2003) (in respect of mass expulsion); and *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* Communication No. 249/02 (2004) AHRLR 57 (18th Activity Report, ACHPR 2004) (in respect of mass discrimination).

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consist of the duties to meet the humanitarian, social and economic needs of refugees and asylum-seekers and to refrain from the creation of conditions that may lead to constructive *refoulement*.

As human beings, asylum-seekers' right to the enjoyment of the highest attainable standard of physical and mental health is protected by article 16 of the ACHPR and is implied in the obligation of *non-refoulement*.⁹⁴⁵ Even so, the African Commission has interpreted the right to an adequate standard of living to be implied in a number of the rights contained in the ACHPR, inter alia, the right to the respect of the dignity inherent in a human being (article 5), the right to property (article 14), the right to work (article 16), the right to health (article 16), the right to education (article 17) and the right to family life, health and moral (article 18).⁹⁴⁶ The right to health in article 16 was interpreted by the African Commission to include obligations imposed on the state to ensure that everyone has "access to the minimum essential food which is nutritionally adequate and safe to ensure freedom from hunger...and to prevent malnutrition."⁹⁴⁷ The African Commission also recognised that the obligations flowing from the right to adequate living can fully be realised if the international community intervenes and provides the necessary assistance to refugees, asylum-seekers and internally displaced people.⁹⁴⁸ Notwithstanding the difficulties of protecting refugees and asylum-seekers, it is incumbent on the host state to take the necessary steps towards securing their humanitarian needs.⁹⁴⁹ It follows that public relief and assistance should not be denied to asylum-seekers, as the denial will give rise to a violation of the African Refugee Convention, the ACHPR and the Geneva Refugee Convention.

4 5 2 2 EU's approach

As noted previously, the EU adopted a Common European Asylum System – through its Council's Directives – under which member states operate in terms of

⁹⁴⁵ Recommendation 3 of the Resolution on Migration and Human Rights, ACHPR/Res.114(XXXII)07 of the 15-28 November 2007.

⁹⁴⁶ See *Social and Economic Rights Action Centre et al. v. Nigeria*, Communication 155/96 where it found that Nigeria violated the right to adequate food and housing, which are not contained in the ACHPR.

⁹⁴⁷ Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04 of 23rd November to 7th November 2004. See Annexure I: Pretoria Declaration on Economic, Social and Cultural Rights in Africa) para 7.

⁹⁴⁸ Resolution on the Situation in Somalia, ACHPR/Res.109(XXXI)07 of 16 to 30 May 2007.

⁹⁴⁹ Resolution on the Refugees and internally displaced persons fleeing the conflict in the north of Mali, ACHPR/Res.210 (EXT.OS/XI) 2012 of 21 February to 1 March 2012.

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affording asylum-seekers protection in the areas of freedom, security and justice. On this basis, the EU Reception Directives lay down minimum standards for the more favourable treatment of asylum-seekers which must be incorporated into domestic policies.⁹⁵⁰ This notwithstanding, member states have the power to decide on the forms and kinds of non-contributory social security or social assistance schemes – consistent with the standards of favourable treatment – to offer to asylum-seekers under their jurisdiction.⁹⁵¹ For that reason, some countries interpret the EU Reception Directives narrowly, resulting in diverging social rights and benefits across Europe. The situation with respect to protection of the right to public relief and assistance varies from one country to another.⁹⁵² Asylum-seekers are beneficiaries of social support, if they are unable to work or have inadequate resources to live, for example, in the UK, Germany, Norway, Portugal, Austria, Belgium, and Switzerland. In Spain, asylum-seekers are beneficiaries of a range of social benefits including accommodation, social assistance, healthcare services, income support, vocational training, etc. In Sweden, asylum-seekers can only apply for a daily allowance.

The 2013 EU Reception Directives, for instance, contextualise the refugee rights that apply to asylum-seekers in terms of “the minimum standard for the reception of asylum-seekers”.⁹⁵³ In a broad sense, the minimum standards conceive public relief and social assistance to include essential socio-economic rights, such as housing and food,⁹⁵⁴ education and training,⁹⁵⁵ medical care,⁹⁵⁶ social assistance⁹⁵⁷ and employment.⁹⁵⁸ In a narrow sense, the minimum standards refer to material reception conditions which are defined as:

⁹⁵⁰ Council of the European Union, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for asylum seekers, updated by European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards of reception of applicants for international protection (“2013 Council Directive”).

⁹⁵¹ Domestic asylum law within the EU countries is complex, multifaceted and continually changing. See M Norredam, A Mygind & A Krasnik (2005) 16 *European Journal of Public Health* 288.

⁹⁵² Mathew *Reworking the Relationship* 30.

⁹⁵³ See the 2013 Council Directive.

⁹⁵⁴ Art 2(g) of the 2013 Council Directive.

⁹⁵⁵ Arts 14 and 16 of the 2013 Council Directive.

⁹⁵⁶ Arts 13, 19 and 25 of the 2013 Council Directive.

⁹⁵⁷ Art 2(g) of the 2013 Council Directive.

⁹⁵⁸ Art 15 of the 2013 Council Directive.

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“[T]he reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance”.⁹⁵⁹

Generally, the minimum standards place emphasis on social protection that “suffice[s] to ensure [asylum-seekers] a dignified standard of living and comparable living conditions”.⁹⁶⁰ In particular, in terms of the material reception conditions, host states are required to adopt legislative measures that ensure adequate standards of living with respect to guaranteeing and enabling “needy” asylum-seekers’ subsistence and protecting their physical and mental health. Public relief and assistance is framed in a manner that excludes those asylum-seekers who are capable of supporting themselves and their families. However, it is extended to cover those asylum-seekers who were allowed to work but are unable to earn an adequate income.⁹⁶¹

For effective protection, a clear distinction between needy and vulnerable asylum-seekers is made. The minimum standards require all member states to pay special attention to the special needs of vulnerable asylum-seekers. This group of vulnerable asylum-seekers includes:

“Minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.”⁹⁶²

Vulnerable asylum-seekers are entitled to have access to special rights and benefits enumerated under article 23 (minors); article 24 (unaccompanied minors); and article 25 (victims of torture). The vulnerability of asylum-seekers is determined by mandated medical screening and assessment of the specific needs of asylum-seekers upon their arrival.⁹⁶³

⁹⁵⁹ Art 2(g) of the 2013 Council Directive.

⁹⁶⁰ Art 11 of the 2013 Council Directive.

⁹⁶¹ UNHCR *Reception Standards for Asylum Seekers in the European Union* (2000) 12.

⁹⁶² Art 21 of the 2013 Council Directive.

⁹⁶³ Arts 13 and 22.

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The best interest of the child is underscored with regards to the implementation of minimum standards. In terms of the best interest of the child principle, children asylum-seekers should be afforded public relief and assistance that will suffice “to ensure a standard of living adequate for the minor’s physical, mental, spiritual, moral and social development”.⁹⁶⁴ In order to ensure that unaccompanied minors are relieved of worries and human suffering, they are placed with an adult relative, with a foster family, in accommodation centres with special provisions for minors, or in other accommodation suitable for minors.⁹⁶⁵ Victims of torture and violence are entitled to receive “the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care”.⁹⁶⁶

The EU conceives the right to public relief and assistance in terms of the right to an adequate standard of living whereby essential elements of the right are made available to needy and vulnerable asylum-seekers. Alternatively, asylum-seekers are entitled to receive favourable treatment consistent with a standard of living adequate for the protection of their dignity, subsistence, and mental and physical health. This approach was confirmed in the case of *Kadi v Council of the European Union and Commission of the European Communities*,⁹⁶⁷ in which the European Court of Justice (“ECJ”) stated that respect for the right to human dignity and the right to asylum have long been accepted as general principles of EU law.⁹⁶⁸

Protection of the right to an adequate standard of living is, under the EU directives, highlighted as being indispensable for asylum-seekers’ dignity, stability, wellbeing, and the free development of their personality. The inaccessibility of this right or a lack of provision of socio-economic and psychological needs is likely to result in a vicious circle of discrimination, isolation, despair and poor prospects of integration. This will aggravate human insecurity, which have serious implications for asylum-seekers’ emotional, psychological, physical, mental, social, and economic wellbeing and may leave them demoralised and feeling abandoned by humanity.

⁹⁶⁴ Art 23(1).

⁹⁶⁵ Art 24(2).

⁹⁶⁶ Art 25(1).

⁹⁶⁷ 3 September 2008, C-402/05 P and C-415/05.

⁹⁶⁸ Para 283. See too *Meki Elgafaji & Noor Elgafaji v. Staatssecretaris van Justitie*, 9 September 2008, paragraph 21, where Advocate General Maduro emphasises that the “fundamental right to asylum... follows from the general principles of Community law.”

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4.5.2.3 UNHCR's approach

The UNHCR is entrusted by the UN General Assembly with the responsibility to find durable solutions for the plight of refugees and asylum-seekers.⁹⁶⁹ Pursuant to its statute, the UNHCR is mandated to promote “the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”.⁹⁷⁰ The UNHCR does not only propose amendments but also sets standards for the interpretation of refugee rights and for their favourable treatment.⁹⁷¹

In the context of the UNHCR's protection framework, physical protection and socio-economic assistance are intertwined and interrelated, since both humanitarian and social assistance support and complement freedom, safety and the security of a person. In ensuring human security, a host state should work towards removing the barriers to the enjoyment of socio-economic rights enshrined in international refugee law and human rights law.⁹⁷²

In its interpretation of refugee rights, the UNHCR acknowledges that the term asylum-seeker is not explicitly defined in the Geneva Refugee Convention, but notes with approval that several provisions apply to asylum-seekers.⁹⁷³ These provisions must therefore be applied parallel with a number of universal rights and benefits that “apply to everyone in all situations”.⁹⁷⁴ More particularly, they must be applied together with the rights to human dignity and freedom and security of the person, including the prohibition of inhumane or degrading treatment.⁹⁷⁵ At a minimum, the standards of favourable treatment relating to the reception conditions of asylum seekers must suffice to protect the minimum core content of human rights,⁹⁷⁶ namely:

“[A] standard of living adequate for [their] health and well-being and that of [their] families, including food, clothing, accommodation and medical care and necessary social services.”

⁹⁶⁹ Statute of the Office of the UNHCR.

⁹⁷⁰ Statute of the Office of the UNHCR, paragraph 8(a).

⁹⁷¹ For more details with regard to interpretation, see Handbook on Procedures and Criteria of Determining Refugee Status 1979, re-edited 1992 and Guidelines on International Protection.

⁹⁷² Protracted Refugee Situation para 17.

⁹⁷³ UNHCR Statement on the Reception Conditions of Asylum-seekers under the Dublin Procedure, 1 August 2011, para 1.6.

⁹⁷⁴ UNHCR Comments para 4.1.5.

⁹⁷⁵ Para 4.1.5.-4.1.7.

⁹⁷⁶ Para 4.1.5.

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The UNHCR notes that the minimum standard of living adequate for the protection of dignity should include the provision of essential social and humanitarian aspects (such as accommodation, food and clothing) to indigent and vulnerable asylum-seekers.⁹⁷⁷ In other words, the UNHCR recommends that host countries facilitate access to non-contributory social security schemes that will enable asylum-seekers to attain a dignified standard of living comparable with that of others. This cannot be possible without having access to public relief and assistance. A lack of access to the core content of the right to public relief and assistance would greatly contribute to their vulnerabilities. Furthermore, a failure to provide them with living conditions adequate for the protection of their dignity will be inconsistent with the prohibition on inhumane and degrading treatment.⁹⁷⁸ Such failure could cause aggravation of the situation of destitution and the protracted state of limbo they find themselves in. From the perspective of the Geneva Refugee Convention, accessibility would relieve some of the social, economic and psychological problems faced by asylum-seekers who have no other means of income and no hope for their future.

4 5 2 3 The Committee on Economic, Social and Cultural Rights' approach

The right to public relief and assistance is implied in the right to an adequate standard of living and cannot be divorced from it. The Committee has made general comments with regards to certain elements of the right to an adequate standard of living, including the rights to water, social security and food. These three elements are indispensable for the realisation of the right to public relief and assistance for a decent living. Also included within this broad concept are the rights to adequate housing and healthcare, which will be explored in more detail in the following chapters.

The right to water is of paramount importance as it is “essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival”.⁹⁷⁹ The right to water is implied in and related to the right to

⁹⁷⁷ Para 4.1.5.

⁹⁷⁸ Para 4.1.6. See too *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paras 232, 233, 263.

⁹⁷⁹ CESCR General Comment 15 (Twenty-ninth Session, 2002): The Right to Water (arts. 11 and 12 of the Covenant), E/2003/22 (2002) 120, para 3.

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the highest attainable standard of health,⁹⁸⁰ to food and adequate housing and is inextricably linked to the right to life and human dignity.⁹⁸¹ Water is therefore a component of the right to public relief and assistance.

The right to adequate food is another crucial human right.⁹⁸² The Committee noted that the right is “indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights”.⁹⁸³ The right cannot be separated from social justice, which imposes an obligation on the state to design appropriate socio-economic and environmental measures, oriented to the alleviation of poverty and guaranteeing “all human rights for all”.⁹⁸⁴ Poverty, hunger, malnutrition, under-nutrition and other problems caused by lack of food would be addressed only if every person, “alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement”.⁹⁸⁵ Entitlement to adequate food is an essential aspect of the concept of public relief and assistance; hence the host state cannot allow asylum-seekers to starve. In the usual cases of refugee protection, the appropriate conduct toward the victims of persecution is assistance, not condemnation to starvation.

The right to social security is an important human right that guarantees human dignity for all persons faced with circumstances that severely limit their ability to realise their fundamental freedoms or human security.⁹⁸⁶ Social security is interpreted broadly to include both contributory and non-contributory social security schemes.⁹⁸⁷ In the view of the Committee, non-contributory social schemes should be universalised for the provision of the relevant social benefits to all human beings who experience a particular risk or contingency, or should be developed to target those individuals who are in need of social assistance.⁹⁸⁸ Non-contributory social security schemes are necessarily required since it is unlikely that every person can support him- or herself or be adequately covered through contributory social security

⁹⁸⁰ ICESCR General Comment 15, para 3. See too ICESCR General Comment 6 (1995), paras 5, 32 and ICESCR General Comment 14 (2000) paras 11, 12 (a)-(b) & (d), 15, 34, 36, 40, 43, 51.

⁹⁸¹ ICESCR General Comment 15, para 3.

⁹⁸² CESCR General Comment 12 (Twentieth Session, 1999): The Right to Adequate Food (Art. 11 of the Covenant), E/C.12/1999/5, para 1.

⁹⁸³ CESCR General Comment 12, para 4.

⁹⁸⁴ Para 4.

⁹⁸⁵ Paras 5-6.

⁹⁸⁶ CESCR General Comment 19 (Thirty-ninth session, 2007): The Right to Social Security (Art. 9 of the Covenant), E/C.12/GC/19, para 1.

⁹⁸⁷ CESCR General Comment 19 para 4.

⁹⁸⁸ Para 4.

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schemes. Social security, in the context of a non-contributory social scheme, must be seen in conjunction with human dignity and as a measure aimed at the alleviation of human suffering, reduction of poverty, prevention of social exclusion, promotion of social justice and advancement of equality.⁹⁸⁹ For that reason, the state must provide for social benefits – whether in cash or in kind – adequate in amount and duration for the social protection of individuals and support of families to ensure their dignified living.⁹⁹⁰

These elements of the right to an adequate standard of living must be understood in their social and humanitarian context. Since asylum-seekers are homeless, landless and one of the most impoverished segments of the population, their entitlement to social assistance should be understood in terms of the preconditions of establishing and promoting social justice. The preconditions are fourfold: (i) ensuring a fair and just allocation of resources, advantages, opportunities, and responsibilities; (ii) challenging the causes of deprivation, destitution, oppression, inequality, discrimination and any other injustice; (iii) empowering all people (either through making resources available to them or developing their abilities) to exercise their autonomy and to realise their full potential; and (iv) building social cohesion, group solidarity, compassion and the community's capacity for active participation, collaborative action and common goals.⁹⁹¹ Therefore, the state has to work towards the establishment of an egalitarian society in which every human being is physically, psychologically and economically safe and in which all people's human dignity is secured and guaranteed and their basic economic needs are met.⁹⁹² From a social justice perspective, asylum-seekers should be protected against acute socio-

⁹⁸⁹ Para 3.

⁹⁹⁰ Para 22.

⁹⁹¹ The preconditions of social justice are drawn from the definition of the concept of social justice, which is defined by the University of California (Berkeley) – Social Justice Symposium as “a process, not an outcome, which seeks fair (re)distribution of resources, opportunities and responsibilities; challenges the roots of oppression and injustice; empowers all people to exercise self-determination and realise their full potential; and builds social solidarity and community capacity for collaborative action”. See Social Justice Symposium, UCB-School of Social Welfare: Our (working) definition of social justice, <<http://socialwelfare.berkeley.edu/social-justice-symposium-about>> (accessed 22-10-2016). They are also drawn from Rawls' and Kavuro's definitions. Rawls defines the concept of social justice as “the basic structure of society, or more exactly, the way in which more major social institutions distribute rights and duties, and determine the division of advantages from social cooperation,” see Rawls *A Theory of Justice* 7. Kavuro defines the concept as being “primarily concerned with the distribution of advantages or allocation of public benefits and sharing of burdens and responsibilities,” see Kavuro (2012) *Young African Research Journal* 101.

⁹⁹² Kavuro (2015) *J Sustain Dev Law Policy* 177; B S Levy & V W Sidel “The Nature of Social Justice and Its Impact on Public Health” in B S Levy & V W Sidel (eds) *Social Injustice and Public Health* (2005) 8 and Van Gundy A *Feminist Theory, Crime and Social Justice* (2014) 17.

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economic deprivations that would adversely impose undue economic hardships on them or make it harder for them to live a dignified life. On the face of it, the right to public relief and assistance was entrenched in the Geneva Refugee Convention in an attempt to address refugees and asylum-seekers' deplorable conditions, to safeguard their dignity and to guarantee their right to an adequate standard of living. In this way, the right is not isolated from other negative rights (i.e. life, human dignity, and security of the person) and positive rights (i.e. food, water, clothing, financial assistance or allowances, medical care, and basic accommodation).⁹⁹³ The right to public relief and assistance, which refers to non-contributory social security schemes, is not confined to financial/social assistance as guaranteed by South Africa's Social Assistance Act, but also extends to various social welfare benefits that are provided to vulnerable people free of charge.

4 5 3 Judicial interpretations: Social protection of asylum-seekers

It has been demonstrated that the right to public relief and assistance is understood in terms of the protection of a standard of living respectful of human dignity or devoid of inhumane and degrading treatment. In addition to this notion, national and international courts have given content and meaning to the favourable treatment of asylum-seekers with regards to reception conditions, based on the notion of duties of *non-refoulement* and equal protection. Although the right to public relief and assistance is among the rights afforded to asylum-seekers in terms of the Geneva Refugee Convention and South African Constitution, a case has not yet been brought in South Africa to vindicate this right. In the absence of judicial precedent, the importance of access to the right is deduced from foreign judicial opinions.

The importance of the right is, firstly, drawn from the ruling of the European Court of Human Rights ("ECtHR") that a host country should work towards ensuring access to basic social benefits, adequate for the prevention of "the risk of destitution amounting to degrading treatment".⁹⁹⁴ Immediate accessibility is crucial because

⁹⁹³ See, for example, *Grootboom* paras 23, 24 where the Constitutional Court held that all fundamental rights "are interrelated and mutually supporting" and that account must be given to their interconnectedness.

⁹⁹⁴ *M.S.S. v. Belgium and Greece* paras 263-264.

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undue delay will amount to inhumane treatment and degradation.⁹⁹⁵ To this end, denial of public relief and assistance is an inappropriate response to the threat of degradation and humiliation caused by forced displacement due to persecution and flagrant human rights abuse.

Secondly, national courts have invoked the duty of *non-refoulement* to underscore the importance of the right to public relief and assistance. For instance, a British court stated that the deprivation of essential social benefits “may put an altogether illegitimate pressure” upon asylum-seekers to opt out of pursuing asylum procedures due to destitution.⁹⁹⁶ Giving-up on seeking asylum has the potential to increase the risk of return. To prevent such a risk, public relief and assistance must be made available to and accessible by asylum-seekers. The duty of *non-refoulement*, which requires host states to refrain from establishing or taking any measure that would push refugees or asylum-seekers back home, is thus understood within the context of the provision of social and humanitarian support.

The French Constitutional Council shares the same view. The Council opined that the withdrawal, refusal or non-renewal of temporary residence cards, which allow asylum-seekers to have access to public relief and assistance, would amount to a breach of the Geneva Refugee Convention or, alternatively, article 55 of the French Constitution.⁹⁹⁷ More specifically, it would violate the rights to freedom, asylum and a normal family life. The danger is that the denial of access to basic social services, such as social assistance and benefits, food and livelihood opportunities, may leave asylum-seekers with no other option than leaving the country due to hardship. In such instances, the deprivation would amount to constructive *refoulement*, and result in severe economic disadvantage.

The SCA in *Watchenuka* and *Somali Association of South Africa* ruled that, in the absence of state support, prohibiting asylum-seekers from working would amount to the infringement of asylum-seekers’ human dignity, in that it would aggravate their situation of destitution.⁹⁹⁸ This would diminish their humanity and, as a consequence,

⁹⁹⁵ Paras 263. See too *Rahimi v. Greece*, Application no. 8687/08, Council of Europe: European Court of Human Rights, 5 April 2011, para 86.

⁹⁹⁶ See *R (on the application of Nagatu) v SSHD* [2004] EWHC 1806 (admin), para 19, 21; *Limbuela v Secretary of State* [2004] EWCA Civ 540; and *R (Westminster City Council) v NASS* [2002] 1 WLR 2956.

⁹⁹⁷ Constitutional Council, Decesion 93-325 DC of 13 August 1993, paras 20, 81-88.

⁹⁹⁸ *Watchenuka* paras 33, 38.

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induce them to leave South African shores.⁹⁹⁹ The SCA stressed that asylum-seekers should be allowed to work if public relief and assistance is not provided. However, it did not consider what types of actions should be taken by the state to guard against asylum-seekers' starvation and degradation in situations where they cannot be employed or engage in income generating activities.

Some jurisdictions regard deprivation of the benefits related to the right to public relief and assistance as economic persecution, especially in a situation where such deprivation causes a serious harm or threat to the individual's life or freedom or where the deprivation threatens the capacity to survive without positive humiliation.¹⁰⁰⁰ In this context, an Australian court found economic persecution in a situation where severe restrictions were imposed on an asylum-seeker's movement which, in the view of the court, caused "significant economic hardship that threatens his capacity to subsist".¹⁰⁰¹ An inference that can be drawn from this judgment is that the denial of social benefits and assistance to destitute asylum-seekers would similarly cause them to experience severe hardships and discrimination, which fundamentally threaten their physical and moral existence. The situation of severe deprivation of social benefits and opportunities was compared to a condemnation "to a life of humiliation and degradation"¹⁰⁰² or "economic persecution".¹⁰⁰³

The federal courts of the US are of the view that economic persecution will arise in a situation where economic deprivation or restrictions place an individual in a disadvantaged economic situation, which has a deleterious impact on his or her life

⁹⁹⁹ *Somali Association of South Africa* para 44.

¹⁰⁰⁰ Under Australian jurisdiction, economic persecution is recognised in terms of legislation as a ground for asylum. S 91R(2) of the Australia's Migration Act lists some factors to be considered for establishment of economic persecution. These factors include the following:

- (i) a threat to the person's life or liberty;
- (ii) significant physical harassment of the person;
- (iii) significant physical ill-treatment of the person;
- (iv) significant economic hardship that threatens the person's capacity to subsist;
- (v) denial of access to basic services, where the denial threatens the person's capacity to subsist;
- (vi) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

¹⁰⁰¹ *MZWPD v. Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1095 (18 Aug. 2006) paras 82, 84.

¹⁰⁰² Because of inability to earn a livelihood, refugees or asylum-seekers are "on the brink of starvation, which brings with it humiliation and degradation." Subjecting them to further deprivation of the right to social benefits and the right to work would complicate the right to life and human dignity or "be the very antithesis of the very enlightened rights culture proclaimed by our Constitution." See *Somali Association of South Africa* para 43.

¹⁰⁰³ See *In re T-Z, 24 I & N Dec.* 163 (BIA 2007) at 170-175.

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and freedom.¹⁰⁰⁴ The Board of Immigration Appeals, in the *Matter of T-Z*,¹⁰⁰⁵ noted two forms of economic persecution.¹⁰⁰⁶ The first is where the state deliberately deprives an individual of basic necessities of life, and thus subjects him or her to unnecessary economic hardship. The second is where a seizure of assets or imposition of a fine deprives a person of the means of earning a livelihood, even though the basic necessities might still be available. In such cases, economic harm in a person's country of origin could amount to persecution which entitles him or her to asylum. In a similar way, severe economic deprivation that is deliberately imposed on asylum-seekers by a host country can condemn them to a perpetual life of humiliation. The severity of economic deprivation can be determined through consideration of the following questions: (i) whether basic socio-economic rights, such as healthcare, accommodation and employment are unavailable and inaccessible; (ii) whether asylum-seekers are ineligible for social assistance and social insurance; and (iii) whether the deprivation of the afore-mentioned rights results in the infliction of undue economic hardship, which constitutes a threat to asylum-seekers' lives or freedom and which may compel them to leave their host country.

The denial of public relief and assistance could constitute a serious threat to asylum-seekers' lives, dignity and freedom where they are unable to support themselves. As has been demonstrated, asylum-seekers in South Africa and the US are subject to severe socio-economic disadvantage, which often amounts to degrading treatment or perpetual humiliation. The deliberate imposition of undue hardship on asylum-seekers, which may give rise to constructive *refoulement*, is contrary to human and refugee rights norms and principles. It is also contrary to socio-economic rights, which require vulnerable persons, including asylum-seekers, to have sustainable access to the basic necessities of life.¹⁰⁰⁷

¹⁰⁰⁴ See Foster *Socio-Economic Rights* 127-128 and, notably, her discussion under footnote 143.

¹⁰⁰⁵ 24 I&N Dec. 163 (BIA 2007).

¹⁰⁰⁶ *In re T-Z*, 24 I & N Dec. 163 (BIA 2007) at 170-175.

¹⁰⁰⁷ According to John Rawls, social justice requires the State to distribute rights, benefits and advantages to the greatest benefit of the vulnerable or least advantaged in society without distinction. For that reason, states should refrain from practices that perpetually discriminate against others in a social life or that may reduce an individual to impoverished existence. See Rawls *A Theory of Justice* 15.

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4 6 Constitutionality of the exclusion

The right to social assistance is among the rights in the Bill of Rights that apply to everyone and is accorded to asylum-seekers by virtue of the South African Constitution and the Refugees Act. Section 27A(d) of the Refugees Act, read in tandem with sections 27(1)(c) and 28(1)(c) of the South African Constitution, guarantees the right to social assistance, which is equivalent to the right to public relief and assistance under article 23 of the Geneva Refugee Convention . As noted, sections 2(e), 3(a), 5, 6(1)(g), 7(1)(a)(i), 8(c) and 9(1)(b) of the Regulations to the Social Assistance Act exclude an asylum-seeker from eligibility for social assistance in the form of an older person's grant, a disability grant, a child support grant, a foster child grant, a care-dependency grant, grant-in-aid and social relief of distress, respectively. The pertinent question is whether such exclusion amounts to unfair discrimination in terms of section 9(3) or violates the right to social security in terms of sections 27(1)(c) and 28(1)(c) of the South African Constitution. Or do they meet the reasonableness requirement under sections 27(2) and 36 of the South African Constitution?

4 6 1 Is it fair discrimination?

The test to be used to assess whether discrimination is fair or unfair was laid down in *Harksen v Lane*.¹⁰⁰⁸ The Constitutional Court held that discrimination arises if a particular law or act differentiates between people or categories of people on grounds that are listed in section 9(3), or on grounds that are not themselves specified in section 9(3), but that are analogous to the listed grounds, in that they are based on attributes that have "the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."¹⁰⁰⁹ It has been held in case law that citizenship constitutes such an analogous ground.¹⁰¹⁰ Moreover, in a case concerning the exclusion of refugees from work in the security industry, Mokgoro and O'Regan JJ opined that "discriminating against refugees involves discriminating against a vulnerable group of people such that discrimination against them will often impair their dignity or their rights in a

¹⁰⁰⁸ 1998 1 SA 300 (CC).

¹⁰⁰⁹ *Harksen v Lane* para 53.

¹⁰¹⁰ *Khosa* paras 71-72 and *Larbi-Odam* para 19.

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serious manner.”¹⁰¹¹ It is accordingly submitted that the exclusion of asylum-seekers from social assistance constitutes discrimination.

The next question is then whether such discrimination is unfair. As indicated in *Harksen*, three factors are particularly important in determining fairness, namely the position of the complainants in society and whether they have suffered from past patterns of discrimination; the nature and purpose of the provision; and the impact of the discrimination on the complainants and whether it impairs their human dignity.¹⁰¹² As has been demonstrated throughout this chapter, asylum-seekers are vulnerable, penniless, destitute and in the greatest need of care. Their exclusion from social assistance tends to condemn them to destitution, humiliation and degradation, and to aggravate social vulnerabilities like homelessness, starvation, physical deprivation, desperateness, distress, diseases, trauma and unemployment. In addition, it stigmatises asylum-seekers as undeserving of social assistance and of international refugee protection. In view of this, sections 2(e), 3(a), 5, 6(1)(g), 7(1)(a)(i), 8(c) and 9(1)(b) of the Regulations to the Social Assistance Act severely impact and damage asylum-seekers’ dignity and self-worth. Having regard to the purpose of asylum, which is to offer protection to those exposed to serious harm or abuse, the vulnerability of asylum-seekers and the impact on their human dignity, the exclusion of asylum-seekers from social assistance guaranteed by section 27(1)(c) and 28(1)(c) constitutes unfair discrimination in terms of section 9(3).

4 6 2 Is the unfair discrimination justifiable in terms of section 36?

It must also be determined if the unfair discrimination in contravention of section 9(3) can be justified in terms of section 36.¹⁰¹³ A limitation of a right may be justified under section 36 if it is in terms of law of general application (in this case, the Regulations to the Social Assistance Act) and is reasonable and justifiable in an open and democratic society.¹⁰¹⁴ Here, a proportionality test applies. Pursuant to this test, it must be asked whether the limitation, its purpose and effects are

¹⁰¹¹ *Union of Refugee Women* para 113.

¹⁰¹² *Harksen v Lane* para 51.

¹⁰¹³ Para 124.

¹⁰¹⁴ There is some uncertainty over the precise nature of the relationship between s 9(3) and s 36(1). That is because it may seem unlikely that a law which discriminates unfairly, will nevertheless be held to be reasonable and justifiable in an open and democratic society. The Constitutional Court typically considers the constitutionality of a limitation under s 36 in cases in which unfair discrimination has been found, but then comes to the conclusion that it is unjustified rather quickly, without much analysis. See Woolman & Botha “Limitations” in *Constitutional Law of South Africa* 2 ed (2013) 34:34.

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proportionate to the impairment of section 9(3).¹⁰¹⁵ In applying the test, it is crucial to have regard to the main purpose of the current limitation, which is to guard against the imposition of an impermissibly high financial burden on the state. While this is a legitimate purpose, the effect of such limitation is disproportionate as it has the potential of impairing asylum-seekers' dignity and moral worth in a serious manner and of subjecting them to destitution. This would defeat the constitutional objective to treat people with care and concern and render the protection of refugees pointless. The limitation is severe as it would induce experiences of alienation, inferiority, and helplessness. Accordingly, the impact of the limitation on section 9(3) is material and significant and cannot be justified within the meaning of section 36.

4 6 3 Does the exclusion breach section 27?

The test used by the Constitutional Court to determine whether the state has taken reasonable steps, within available resources, to give effect to the right to social security is the standard of reasonableness.¹⁰¹⁶ In the *Khosa* case, the court acknowledged that section 27(2) sets out an internal limitation on section 27(1) and that the scope of the right of access to social security cannot "be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1)."¹⁰¹⁷ The court objected to the use of the test of rationality which it viewed as a lower standard because, when it is applied, the limitation or exclusion can easily be justified by the state. By rationality, the state is required to show that there is "a rational connection between [the limitation] and the legitimate government purpose it is designed to achieve."¹⁰¹⁸ In *Grootboom*, the court defined the test of reasonableness as entailing evaluation of whether the measures that were taken by the state are reasonable.¹⁰¹⁹ They must, first, create a coherent programme aimed at the progressive realisation of the right within the state's available means and, secondly, the programme must be capable of facilitating access to and the realisation of the right. The reasonable test does not entail an investigation of "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better

¹⁰¹⁵ Para 124.

¹⁰¹⁶ *Khosa* para 67.

¹⁰¹⁷ *Khosa* para 43; *Soobramoney* para 22; *Grootboom* para 74; and *Treatment Action Campaign* paras 23, 39.

¹⁰¹⁸ *Khosa* paras 53, 66-67.

¹⁰¹⁹ *Grootboom* para 41.

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spent.”¹⁰²⁰ What might necessarily be taken into account is “[a] wide range of possible measures [that] could be adopted by the state to meet its obligations and many of these may meet the requirement of reasonableness.”¹⁰²¹ Once it has proven by the state that the measures do so, the test would be satisfied.¹⁰²²

In *Khosa*, the justifications provided by the state for the exclusion of non-citizens were twofold: the promotion of the immigration policy and the encouragement of self-sufficiency.¹⁰²³ That is what the twin principles of exclusionary and self-sufficiency aim to achieve, as discussed earlier. Drawing on the twin principles, the state argued that the exclusion of non-citizens rationally served the government’s purpose, given that the extension of section 27(1) to apply to non-citizens will “impose an impermissibly high financial burden on the state”.¹⁰²⁴ The court understandably found the argument to be rational and legitimate.¹⁰²⁵ However, the court noted that there were compelling reasons why social benefits should be made available to certain groups of non-citizens, in that case, permanent residents.

In applying the standard of reasonableness, attention should be paid to the contextual setting of the socio-economic rights. First, these rights must be understood in the context of the founding values of the South African Constitution.¹⁰²⁶ Second, the term everyone cannot be construed to refer to citizens only,¹⁰²⁷ but must be understood to mean what it says.¹⁰²⁸ Third, in situations where the rights to life, dignity and equality are implicated in constitutional disputes relating to socio-economic rights, “these rights have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness”.¹⁰²⁹ Constitutional rights are inter-related and equally important¹⁰³⁰ and for that reason, internal standards under section 27(2) should not unreasonably limit other constitutional rights.¹⁰³¹

¹⁰²⁰ Para 41.

¹⁰²¹ Para 41. See too *Khosa* para 48.

¹⁰²² Para 41. See too *Khosa* para 48.

¹⁰²³ *Khosa* para 63.

¹⁰²⁴ Paras 58, 60

¹⁰²⁵ Para 58, 64.

¹⁰²⁶ Paras 49, 101.

¹⁰²⁷ Paras 47, 54, 85. See too *Commissioner for Inland Revenue v NST Ferrochrome (Pty) Ltd* 1999 2 SA 228 (T) at 232.

¹⁰²⁸ Para 111.

¹⁰²⁹ Para 44.

¹⁰³⁰ Para 40 and *Grootboom* para 83.

¹⁰³¹ Paras 45, 49.

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The exclusion of asylum-seekers appears to be unreasonable due to the following reasons: First, the right to social assistance must be interpreted in view of the foundational values of equality, human dignity and freedom, on which the protection of asylum-seekers is fundamentally based. Secondly, the term everyone under section 27(1) of the Constitution should be construed to include asylum-seekers. Section 27A(d) of the Refugees Act confirms the lawmakers' intention to extend the right to asylum-seekers. Thirdly, asylum-seekers typically find themselves in exceptional situations in which their lives and security are at risk. The state is under an obligation, in terms of the refugee conventions, the Constitution and the Refugees Act, to make humanitarian relief and assistance available to them. Based on these reasons, it is constitutionally unreasonable to exclude them from social assistance programmes.

The exclusion is unreasonable regardless of the recognition of the court that the inclusion of certain non-citizens in social welfare would have "significant budgetary and administrative implications" for the state.¹⁰³² The same conclusion was reached by the court in *Khosa*. Given that permanent residents are entitled to the right to social security by virtue of the South African Constitution and the Immigration Act, the court reasoned that the exclusion of permanent residents in need of social security cannot be justified on the basis of the requirements of progressive realisation and available resources contemplated under sections 26(2) and 27(2). Their exclusion would compel them "into relationships of dependency upon families, friends and the community in which they live",¹⁰³³ and result in the impairment of their human dignity and a violation of equality.¹⁰³⁴ Moreover, the court was concerned about children who could be deprived of an equal opportunity to enjoy socio-economic rights solely because their primary caregivers are denied such rights. Considering the well-being of children, the court stressed that the limitation of rights that children have under section 28 was unreasonable and gave rise to unfair discrimination.¹⁰³⁵ In cases of non-citizens, the argument of excluding children with

¹⁰³² Paras 20, 58, 129.

¹⁰³³ Para 76. See also paras 77-85.

¹⁰³⁴ Para 74.

¹⁰³⁵ The Court accepted that there must be a differentiation between citizens and non-citizens, but the state did not substantiate its argument that children born in South Africa or who are citizens, but whose primary care givers or parents are not South African citizens, could be excluded from social grants. The court concluded that "citizenship was irrelevant in assessing the needs of the Children." See *Khosa* para 78.

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non-citizen status on the basis of the requirement of self-sufficiency was understandably found to be invalid in the cases of destitute children who have become part of South African society.¹⁰³⁶ Equally important, the exclusion of needy aged non-citizens who have become part of South African society would be unfair and unconstitutional.¹⁰³⁷ In light of the *Grootboom* judgment, a socio-economic policy or programme which leaves out a significant number of the most vulnerable people cannot be justified in terms of section 26(2).¹⁰³⁸

In distinguishing or comparing cases, it is important to note that asylum-seekers are entitled to social assistance by virtue of the South African Constitution and the Refugees Act. Their exclusion from social assistance is of concern because it has the potential of impairing their dignity. It is not only adult asylum-seekers who are affected, but the rights of children asylum-seekers, guaranteed under section 28(1)(c), are also trampled upon. Children seeking asylum along with their parents or relatives cannot exercise their right to have access to social services. Under the South African Constitution, the interest of children – citizens and non-citizens alike – are of paramount importance.

The reasonableness test further requires the state to consider the wellbeing of individuals “on a case-by-case-basis after an investigation of their circumstances.”¹⁰³⁹ In this regard, a distinction between asylum-seekers and other types of non-citizens is a prerequisite due to the following reasons:

- (1) Other types of non-citizens are, in principle, required to show self-sufficiency in order to be admitted in the country. By contrast, asylum-seekers are required to show that they have a reason to fear that they will be persecuted by their country of origin. For that reason, there are international obligations imposed on South Africa to provide access to social assistance to asylum-seekers who are in the greatest need of humanitarian intervention.
- (2) Whereas socio-economic rights accrue to asylum-seekers in terms of the Refugees Act, parliament has not stated its intention to accord those rights to non-citizens with temporary resident status. Accordingly, the state cannot

¹⁰³⁶ *Khosa* para 67.

¹⁰³⁷ Para 67.

¹⁰³⁸ *Grootboom* paras 41-43.

¹⁰³⁹ Para 87. In cases involving non-citizens, considerations include the purpose served by social security, the impact of the exclusion on the non-citizens concerned, the relevance of citizenship (as a ground of exclusion) to that purpose; and the impact that this has on other intersecting rights (para 49).

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make a case that asylum-seekers have no legitimate claim of access to social assistance schemes. Neither can it rely on the limitations under section 27(2) to discriminate against them.

- (3) Regard must be given to the fact that the South Africa's humanitarian protection is, according to Mokgoro J, grounded in valuing human beings and ensuring that all vulnerable people are afforded their basic needs.¹⁰⁴⁰ South Africa will not live up to its constitutional obligations to promote human dignity, equality and freedom if it fails to ensure that the basic necessities of life are accessible to all vulnerable groups in society.¹⁰⁴¹

4 7 Concluding Remarks and Recommendations

The international refugee regime was created in order to protect asylum-seekers and refugees, not only against abuse and physical harm but also against physical deterioration and economic hardship. The denial of the right to public relief and assistance has the effect of compelling asylum-seekers to depend on unsustainable and unreliable social networks – including families, friends, charities, and neighbours – for survival. The denial of this right subjects the victims to degradation and social oppression, relegates them to the margins of society and may deprive them of opportunities to pursue asylum procedures to obtain full legal protection. This is in contrast with the constitutional objective to treat everyone with care and concern and to respond to the needs of those in most desperate or emergency situations.¹⁰⁴²

Deliberate state action that deprives individuals of core socio-economic rights would give rise to human rights abuses similar to economic persecution that may cause an individual to take flight.¹⁰⁴³ The harshness of socio-economic deprivation should be understood in the context of the fact that it can be a ground for recognition

¹⁰⁴⁰ *Khosa* para 52.

¹⁰⁴¹ Para 52.

¹⁰⁴² See *Port Elizabeth Municipality* paras 18, 26, 29, 32.

¹⁰⁴³ Hathaway is the most influential advocate for the inclusion of grave violations of socioeconomic rights within the scope of persecution. See J C Hathaway *Law of Refugee Status* (1991); J C Hathaway "Reconceiving Refugee Law as Human Rights Protection" (1991) 4 *Journal of Refugee Studies* 113. Other academic scholars who share this view include, for example, Foster *International Refugee Law and Socio-Economic Rights* (2007); M E Price *Rethinking Asylum: History, Purpose and Limits* (2009) 144-155; and K Jastram "Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution" in *Critical Issues in International Refugee Law: Strategies Towards Interpretative Harmony* 143-173.

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as a refugee.¹⁰⁴⁴ Public relief and assistance is thus integral to mitigating despair, trauma and desperation; hence it plays a crucial role in bringing about social and economic change in asylum-seekers' lives.

Under international refugee law, public relief and assistance is designed to respond to the urgent needs of asylum-seekers. It is not made subject to progressive realisation in a similar fashion as in human rights treaties. In contrast to the general norm of progressive realisation, refugee law imposes immediate duties on host states to respond to the socio-economic difficulties of refugees and asylum-seekers on the basis of a common assumption that they are not in a position "to meet their own immediate substance needs".¹⁰⁴⁵

It has been demonstrated that asylum-seekers fall within the scope of refugees lawfully staying within South African borders and that the right to public relief and assistance accrues to them. However, instead of adopting the approach to the reception conditions of asylum-seekers followed in France and the UK, South Africa seems to have adopted the narrow approach to the treatment of asylum-seekers followed by the US. This approach is inconsistent with the spirit and objects of the Geneva Refugee Convention as well as human rights law. The potential risk of the US and South African approach is to deprive asylum-seekers of their refugee rights and, thus, to perpetuate destitution and social vulnerabilities which, in turn, encourage asylum-seekers to leave the shores of the country of asylum. In doing so, South Africa fails to take into account the following social vulnerabilities:

¹⁰⁴⁴ This has been recognised by a number of jurisdictions, including the United States, Canada, Australia, New Zealand, France and the United Kingdom. In the United States, economic persecution was recognised in the cases of *Gonzalez v. Immigration and Naturalisation Service*, 82 F 3d 903 (9th Cir. 1996); *Chand v. Immigration and Naturalisation Service*, 222 F 3d 1066 (9th Cir. 2000); *Singh v. Immigration and Naturalisation Service*, 1999 US App. LEXIS 33649 (9th Cir. 1999); *Samimi v. Immigration and Naturalisation Service*, 714 F 2d 992 (9th Cir. 2003); *Ubau-Marengo v. Immigration and Naturalisation Service*, 67 F 3d 750 (9th Cir. 1995); *Ouda v. Immigration and Naturalisation Service*, 324 F 3d 445 (6th Cir. 2003); and *Begzatowski v. Immigration and Naturalisation Service*, 278 F 3d 665 (7th Cir. 2002). Economic persecution was recognised in Canada in the case of *Canada (Attorney General) v. Ward* [1993] C.C.R. 689; in Australia in the case of *Minister for Immigration and Multicultural Affairs v. Khawal* [2002] H.C.A. 14 (Australia); in New Zealand, in the case of *New Zealand Refugee Status Appeal Authority*, Refugee Appeal No. 71427/99 [2001] N.Z.A.R. 545; and in the UK in the case of *Horvath v. Secretary of State for the Home Department* [2001] 1 A.C. 489 (UK). For France, see Foster *Socio-economic Rights* 109.

¹⁰⁴⁵ J C Hathaway "Refugees and Asylum" in B Opeskin; R Perruchoud & J Redpath-Cross (eds) *Foundations of International Migration Law* (2012) 198.

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- Firstly, asylum-seekers have been forced to abandon their possessions, livelihoods, families and friends and are left with no means of support.¹⁰⁴⁶ This resulted in living in impoverished, insecure and harsh conditions.
- Secondly, since asylum-seekers have lost the protection of their home countries, they no longer have access to the social security system and insurance benefits of their home countries. They have assumed the protection of a country that accepted to safeguard their wellbeing consistent with humane standards of treatment set forth in constitutions, refugee treaties and human rights conventions.
- Thirdly, asylum-seekers are in a desperate situation and are subject to great uncertainty regarding their future. Added to this, they have no influence over elected government officials who adopt national policies that provide for the terms and conditions of their stay, including their access to national resources.¹⁰⁴⁷

It can be inferred, as illustrated in this thesis, that both refugees and asylum-seekers can do little, without state support, to rise from economic deprivation or poverty to meet their basic needs. Certainly, they will face difficulties of adjustment to a new life and assimilation into the community. The hardship they face can only be mitigated by having access to human welfare and social assistance schemes within a reasonable time. The right to have access to a social welfare system is therefore an integral part of social relief of their human distress and economic deprivation. During the course of adjudication of asylum claims and local integration processes, public relief and assistance would sustain them in a dignified manner and help facilitate their integration in the national economy.

The question whether asylum-seekers are entitled to similar treatment to that accorded to citizens, permanent residents and refugees in relation to public relief and assistance, has been clarified. The denial of social grants and SRD cannot reasonably be justified on the basis of human dignity, equality and freedom, if the

¹⁰⁴⁶ The vulnerable situation of a refugee is described by the Constitutional Court in the case of *Union of Refugee Women* para 101 as follows:

“Refugees had to flee their homes, and leave their livelihoods and often their families and possessions either because of a well-founded fear of persecution on the grounds of their religion, nationality, race or political opinion or because public order in their home countries has been so disrupted by war or other events that they can no longer remain there.”

¹⁰⁴⁷ In *Larbi-Odam* para 19, Mokgoro J stated that foreign nationals are usually a minority, which has insignificant political muscle and which is vulnerable to having their rights and interests overlooked.

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purpose of the Refugees Act, reinforced by the objects of the South African Constitution, is taken into consideration. The Refugees Act was enacted to safeguard the physical safety, as well as the dignity and wellbeing of refugees and asylum-seekers.¹⁰⁴⁸ It aims to prevent the recurrence of the human suffering which refugees and asylum-seekers have experienced in their home countries. Moreover, in acceding to and ratifying the Geneva Refugee Convention and African Refugee Convention, South Africa assumed the international duty to protect asylum-seekers through the alleviation of their desperation, restoration of their dignity and upholding their basic human and refugee rights. As was emphasised, it is imperative to satisfy their social and humanitarian needs.

The right to public relief and assistance should therefore ensure that asylum-seekers enjoy adequate living conditions in relation to core aspects of the right such as food; water; clothing; medical, social and psychological assistance; administrative assistance; basic accommodation; and financial aid and assistance. Public relief and assistance is widely interpreted to include medical screening, access to training and access to legal representation. All these aspects have the potential to transform asylum-seekers' deplorable conditions into a life of hope. Drawing on the preceding critical analysis, the chapter concludes with the following recommendations:

- The eligibility clauses under the Social Assistance Act (i.e. section 5(1)(c)) and its Regulations (i.e. sections 2(e), 3(a), 5, 6(1)(g), 7(1)(a)(i), 8(c) and 9(1)(b)) should be amended to extend social assistance and benefits to asylum-seekers, subject to the same terms and conditions that apply to citizens, permanent residents and recognised refugees.
- Section 2 of the Social Assistance Act should be amended to include reference to a person who is not a South African citizen but who is eligible to social grants, provided that an international agreement contemplated in section 231(2) of the South African Constitution makes provision for social relief and assistance.
- The Regulations to the Social Assistance Act should be amended to include a reference to the vulnerable situation of refugees and asylum-seekers,

¹⁰⁴⁸ The Preamble to the Constitution proclaims that "South Africa belongs to all who live in it". Moreover, most provisions of the Bill of Rights are applicable to everyone, including non-citizens. The Constitutional Court, in *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) para 26, held that the universal rights in the Bill of Rights that apply to everyone, protect foreign nationals who are physically inside the country at border posts, seaports or airports.

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especially asylum-seeker women, children, the disabled and the aged. The term asylum-seeker should be included in the provisions that are specifically aimed at the social protection of women, children, the disabled and the aged.

- Far from supporting themselves, the majority of asylum seekers are in need of emergency relief and essential necessities of life, such as water, food, housing accommodation, clothing, and healthcare. A policy should be developed to include asylum-seekers as co-beneficiaries of SRD to respond to their social and humanitarian matters upon their arrival.
- Based on the principle of human dignity and the international responsibility to protect, the right to public relief should be incorporated into a social assistance regime for the protection of indigent and vulnerable asylum-seekers to whom South Africa has extended international protection through the ratification of international refugee and human rights texts.

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CHAPTER 5

THE RIGHT TO HEALTHCARE

5 1 Introduction

This chapter explores the question whether and to what extent refugees and asylum-seekers should enjoy the right to healthcare in South Africa. The right in question is guaranteed by sections 27(1)(a), 27(3), 28(1)(c) and 35(2)(e) of the South African Constitution. Section 27(1)(a) confers the right to have access to healthcare services, including reproductive healthcare, on every human being living within South Africa's borders.¹⁰⁴⁹ Section 27(2) imposes an obligation on the state, through reasonable legislative and other measures, to give effect to this right. This obligation is made subject to the principles of progressive realisation and the availability of resources. In addition, section 27(3) states that "[n]o one may be refused emergency medical treatment". Moreover, section 28(1)(c) protects the right of a child with respect to basic health care services, while section 35(2)(e) guarantees a detained person's or a sentenced prisoner's right to receive medical treatment.

Surprisingly, the right to health is not expressly covered by the Geneva Refugee Convention or by the Refugees Act, as amended by the Refugees Amendment Act 33 of 2008. The fact that the right is protected by neither the Geneva Refugee Convention nor the Refugees Act raises a number of issues regarding the manner in which it can be accessed by and availed to refugees and asylum-seekers in view of the standards of favourable treatment. Prior to its 2008 revision, the Refugees Act provided in section 27(g) that recognised refugees were entitled to "the same basic health services... which the inhabitants of the Republic receive from time to time". The 2008 revision repealed this provision, rendering the accessibility of basic healthcare services uncertain.¹⁰⁵⁰ Accessibility is further restricted by the health policies of certain clinics, hospitals and other institutions.¹⁰⁵¹

¹⁰⁴⁹ S 27(1)(a) of the Constitution of the Republic of South Africa, 1996 states that "[e]veryone has the right to have access to health care services, including reproductive health care".

¹⁰⁵⁰ S 21 of the Refugees Amendment Act 33 of 2008, substituting section 27 of the Refugees Act.

¹⁰⁵¹ Joint ALP / TAC Submission on Refugee Amendment Bill at 2, 11 <<http://www.tac.org.za/community/files/file/ALPTACSubmissionToParliamentOnRefugeeAmendmentBill.pdf>> (accessed 14-01-2016); IRIN "South Africa's Health System Shuns Asylum Seekers" 31 October 2014 <<http://www.irinnews.org/news/2014/10/31>> (accessed 15-01-2016); Z Venter "Somali refugee girl needs urgent operation" 17 July 2014 <http://www.iol.co.za/news/crime-courts/somali-refugee-girl-needs-urgent-op-1721220> (accessed 10-01-2016); Lawyers for Human Rights "Somali Girl to Receive Medical Treatment in SA"

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Refugees and asylum-seekers' access to healthcare services will be further frustrated by the National Health Insurance ("NHI") policy if and when it comes into operation. The NHI policy will seek to ensure that everyone has access to a defined comprehensive package of healthcare services, as part of government's effort to redress persistent patterns of past health iniquities.¹⁰⁵² The NHI policy restricts eligibility for free NHI to citizens and permanent residents.¹⁰⁵³ This begs the question whether refugees and asylum-seekers will have equal or favourable access to the right to healthcare, enunciated by the South African Constitution, for the protection of their physical and mental health.

Iain Currie and Johan de Waal maintain that the right of access to healthcare, as protected by the South African Constitution, is the equivalent of the right to the highest attainable standard of physical and mental health in international human rights law.¹⁰⁵⁴ International human rights law sets out basic minimum standards for equal access for everyone to the right to healthcare. Paul Weis posits that the basic minimum standards recognised by and defined in human rights law must be utilised as threshold components of the standards of favourable treatment under the Geneva Refugee Convention.¹⁰⁵⁵ In principle, human rights law obligates states to take positive measures to ensure that all individuals in the country "receive medical attention when they are sick."¹⁰⁵⁶ Although health is indispensable to the exercise of other basic human rights and freedoms, the right to health should, according to the Committee on Economic, Social and Cultural Rights, not be confused with a "right to be healthy".¹⁰⁵⁷ It should rather be understood as the right to have access to "a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health".¹⁰⁵⁸ This is the context in which the right to health will be analysed in this chapter.

The right of refugees and asylum-seekers to access to healthcare services intersects with two main questions: (i) the question of affording them a basic minimum standard of health, adequate to live a life in dignity; and (ii) the question of

< <http://www.enca.com/gravely-ill-somali-girl-receive-medical-treatment-sa> > (accessed 10-01-2016).

¹⁰⁵² National Health Insurance in South Africa: Policy Paper, GN 34523 of 12-08-2011, paras 66, 69, 75, 87, 120.

¹⁰⁵³ Para 64.

¹⁰⁵⁴ Currie & de Waal *Bill of Rights* 591.

¹⁰⁵⁵ Weis *Refugee Convention* ix.

¹⁰⁵⁶ Art 16(1) of the ACHPR.

¹⁰⁵⁷ General Comment No. 14 (2000) para 1, read together with para 8.

¹⁰⁵⁸ Para 8.

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affording them a minimum standard of favourable treatment, essential for the special protection of their well-being. Answers to these questions would serve as the basis for demanding differentiated treatment of refugees and asylum-seekers in respect of access to the right to health and related benefits. The chapter therefore seeks to explore in depth the importance of the right of access to healthcare in refugees' and asylum-seekers' lives, especially, their attainment of the highest standard of physical and mental health as required by international human rights law. It will proceed to determine the standard of treatment under which the right to healthcare may be accorded to refugees and asylum-seekers. In so doing, regard will be given to international human rights law, the spirit and objects of international refugee law and national asylum laws, academic views as well as judicial opinions. Foreign and international standards and practices with respect to implementation of the right to health care in relation to refugees and asylum-seekers will also be reviewed to determine the basic health services that can be availed to and accessed by refugees and asylum-seekers. The chapter will also inquire into the constitutionality of the failure to take legislative and other measures to realise refugees' right of access to healthcare. The findings will be used as a guideline to set out recommendations as to how refugees and asylum-seekers should be treated favourably in the health sector.

5 2 General state of health of refugees and asylum-seekers

The well-being of asylum-seekers and refugees is intrinsically challenged by ill health. More often than not, individuals seeking asylum carry insufficient food with them which cannot sustain them during their journey into exile or during their initial integration in a country of asylum. While walking or travelling – often through difficult terrains or open sea – to their destination, they are faced with violence, dehydration, malnutrition, hunger, exhaustion and increasing vulnerability to ill health.¹⁰⁵⁹ Prior to fleeing, some of them were victims of armed violence or suffered from trauma associated with violence, torture or displacement.¹⁰⁶⁰ All these experiences significantly contribute to post-displacement ill health or diseases.

¹⁰⁵⁹ UNHCR *Protecting Refugees: A Field Guide for NGOs* (1999) 19.

¹⁰⁶⁰ Kondile J in *Union of Refugee Women* para 28 stated that refugees...“have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.”

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Asylum-seekers are affected by war, armed conflict, civil unrest or political persecution in various ways. Certainly, war or generalised violence “disrupts or frequently destroys social life, human livelihood and the health delivery system” in the country of origin, resulting in widespread famine, disease and malnutrition.¹⁰⁶¹ For these reasons, refugees and asylum-seekers are often in a poor state of health. According to the International Organisation for Migration (“IOM”) findings, injuries (physical or mental) sustained through war or violence are leading causes of death or permanent disability, particularly if they are not appropriately attended to.¹⁰⁶²

In the countries of asylum, high levels of desperation, trauma, infirmity and destitution among refugee communities increase their individual vulnerability to diseases. The UNHCR asserts that “health-related factors, such as disease, disability and malnutrition brought on by displacement, often claim more lives and cause greater suffering than the conflict itself”.¹⁰⁶³ The health problems of refugees or asylum-seekers are not confined to these groups. They can also have a profound impact on receiving communities’ well-being, either individually or collectively. For instance, communicable diseases such as tuberculosis, HIV/AIDS, hepatitis, gonorrhoea and gastroenteritis may put members of the community as a whole at risk. Indeed, citizens would be susceptible to such communicable diseases if asylum-seekers are not medically screened for illness detection and treatment.

Health-related problems are mostly aggravated by difficulties in accessing socio-economic resources such as food, shelter, safe water, healthcare services, medical supplies and sanitation services. A lack of or limited access to these resources could lead to diseases such as cholera, dysentery, diarrhoea, hepatitis or measles.¹⁰⁶⁴ Problems such as hunger, ill health and a harmful environment typically combine and intersect to render refugees vulnerable.

Refugee women and girls are the most susceptible to diseases and the people most in need of medical attention.¹⁰⁶⁵ Their health problems are accordingly matters of serious concern given that they suffer enormous economic deprivation, including

¹⁰⁶¹ E Kalipeni & J Oppong “The Refugee Crisis in Africa and Implications for Health and Disease: A Political Ecology Approach” (1998) 46 *Soc. Sci. Med.* 1637, 1645.

¹⁰⁶² P Pace *Migration and the Right to Health: A Review of International Law* (2009) 327.

¹⁰⁶³ UNHCR “Health” Action Sheet 15 at 287 <<http://www.unhcr.org/4794b5d32.pdf>> (accessed 13-03-2016).

¹⁰⁶⁴ Kalipeni & Oppong (1998) *Soc. Sci. Med.* 1647.

¹⁰⁶⁵ Pace *Migration and the Right to Health* 21 and the 2001 UN Declaration of Commitment on HIV/AIDS state that women are today more vulnerable to infectious diseases than men and, in particular, refugee women and refugee children “are at increased risk of exposure to HIV infection.”

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loss of or separation from their breadwinners. This notwithstanding, refugee women frequently have to bear responsibility for the care of not only their own children and immediate family members, but also extended family members and children who, for whatever reason, were separated from their own parents. Hardships are unbearable, especially in situations where they were widowed by war, are pregnant or breastfeeding, and/or have been victims of sexual violence and, on top of that, have to assume the said family responsibilities.¹⁰⁶⁶ As a result, destitution may compel female refugees to rely on prostitution as an alternative mechanism of livelihood, creating increased exposure and vulnerability to sexually transmitted diseases (“STDs”).¹⁰⁶⁷ Owing to human insecurity factors like poverty, financial insecurity, physical deprivation, lack of nutrition, sexual abuse, and vulnerability to STDs, most female refugees’ health is obviously at risk. All these human insecurities severely impact on their health and thus necessitate medical attention and medical treatment. However, studies reveal that the health needs of refugee women are often the most neglected.¹⁰⁶⁸

Risks related to the neglect of women’s health typically make a significant contribution to “higher children mortality rates, unsafe abortions, increased rates of [STDs] and increased disabilities related to high fertility and poor birth spacing”.¹⁰⁶⁹ According to the New South Wales (“NSW”) Refugee Health Service, these health problems are often caused by the inability “to access adequate sexual and reproductive health care”.¹⁰⁷⁰

Children’s mortality is linked not only to the neglect of women’s health, but also to economic deprivation. Severe under-nutrition or malnourishment and exposure to a harmful environment also increase their mortality rates.¹⁰⁷¹ It is acknowledged by the World Health Organisation (“WHO”) that children’s ill health is a liability, especially to

¹⁰⁶⁶ Some female refugees have experienced sexual exploitation or violence during the civil war resulting in unwanted pregnancies and/or infection with sexually transmitted diseases (e.g. HIV/AIDS).

¹⁰⁶⁷ Women refugees may be compelled to exchange sexual favours for food. See Jastram & Achiron *Refugee Protection* 69.

¹⁰⁶⁸ A Govindjee & E A Taiwo “The protection of women refugee under the international convention” in M R Islam *An Introduction to International Refugee Law* (2013) 394.

¹⁰⁶⁹ NSW Refugee Health Service, *Refugee Women*, Fact Sheet 5, Updated March 2011 at 1.

¹⁰⁷⁰ 1.

¹⁰⁷¹ For malnourishment, see Kalipeni & Oponng (1998) *Soc. Sci. Med.* 1646 and Foster *International Refugee Law* 226 and, for harmful environment, see Hathaway *The Rights of Refugees* 507. Hathaway states that the primary cause of death among refugee children under the age of five is acute respiratory tract infection which is the result of exposure to the cold.

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their parents or those who must take care of them.¹⁰⁷² Refugee parents who live in poverty will find it difficult to meet their responsibility, because discharging their responsibilities is dependent on the enjoyment of other socio-economic rights (i.e. work, adequate food, adequate housing and education) as well as civil rights (i.e. equality, dignity and freedom and security of the person), which may not be available to them. It is trite to state that some of the refugee children do not enjoy the right to family care or parental care because they were separated from their parents or primary caregivers during civil war or armed conflict. These children are known as “unaccompanied child refugees.”¹⁰⁷³ Their ill health is a liability of the state.

It is however contentious whether separated children who seek asylum, but are in the company of and under care of their adult relatives, should be classified as the dependants of those relatives. In South Africa, prior to the judgment delivered in the case of *Mubake v Minister of Home Affairs*,¹⁰⁷⁴ separated children could not automatically be classified as dependants of their relatives. This often resulted in delaying their documentation.¹⁰⁷⁵ The delay in documenting children had the potential to render them invisible and untraceable to the immigration system.¹⁰⁷⁶ Invisibility effectively deprived those children of access to the state’s social welfare programmes, including government grants and basic health care services.¹⁰⁷⁷ After the judgment in *Mubake*, documented separated children’s healthcare is the responsibility of their relatives, who must be charged hospital fees, based on their level of income, or who should receive free medical care if they are indigent. When they have less (or no) means of income, both adult refugees or asylum-seekers and their children should receive free medical treatment in terms of the National Health Act 61 of 2003, as amended by the National Health Amendment Act 12 of 2013

¹⁰⁷² Office of the United Nations High Commission for Human Rights and World Health Organisation, “The Right to Health” Fact Sheet No 31 6.

¹⁰⁷³ In a narrow sense, the term unaccompanied child may be defined as any person under the age of 18 years, who is not in the company of his or her biological parent. In a broad sense, the term is defined by section 32 of the Refugees Act as “any child who appears to qualify for refugee status... and who is found under circumstances which clearly indicate that he or she is a child in need of care, as contemplated in the Child Care Act”. The Child Care Act 75 of 1983 has been substantively revised by the Children’s Act 38 of 2005.

¹⁰⁷⁴ GNP 09-07-2015 case no 72342/2012.

¹⁰⁷⁵ This issue was resolved in the case of *Mubake* in which the court declared that separated children should be regarded as dependants of their primary care-givers in terms of section 1 of the Refugees Act.

¹⁰⁷⁶ *Mubake* paras 15, 23.

¹⁰⁷⁷ Paras 15, 23.

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(“National Health Act”).¹⁰⁷⁸ However, free medical treatment is mostly beyond their reach, as the chapter will turn to discuss later.

The physical health problems of refugees are aggravated by mental health problems, such as depression, anxiety and post-traumatic stress disorder. The situation may also be exacerbated by insecurities caused by a lack of access to basic necessities of life, such as humanitarian assistance, social assistance, housing relief, healthcare services, and other important public services. Research conducted by the Human Rights Media Centre (“HRMC”) illustrates that the housing problems faced by refugees and asylum-seekers in South Africa significantly contribute to stress related illness.¹⁰⁷⁹

According to Tiong and others, refugee health problems – as discussed above – are similar, irrespective of the country which the refugees are fleeing from.¹⁰⁸⁰ It is widely acknowledged that refugees and asylum-seekers commonly live in precarious, vulnerable and intolerable conditions, with little or no hope of a better life. This harsh reality points to the need to provide refugees and asylum-seekers with access to healthcare, possibly through the creation of an effective national mechanism. However, it also raises the question whether or not refugees and asylum-seekers are entitled to the right to health or the right to healthcare. If yes, it will be necessary to define the scope of such right and demonstrate the feasibility of its accessibility.

It is crucial to note that ill health has an adverse impact on human capabilities to such an extent that it can, wholly or in part, restrict an individual from participating in socio-economic activities, such as studying, working, and attending to family responsibilities.¹⁰⁸¹ It deprives individuals of their ability to exercise their freedom. As indicated by the Indian Supreme Court, the right to health is a prerequisite for the right to life and human dignity.¹⁰⁸²

¹⁰⁷⁸ As discussed in more detail under sub-section 5.4, those individuals who are classified as vulnerable are entitled to free healthcare services.

¹⁰⁷⁹ Lanzi Mazzocchini *Policy implication learned from the analysis of the integration of refugees and asylum seekers at tertiary education in Cape Town* 104.

¹⁰⁸⁰ A C D Tiong, M S Patel, J Gardner, R Ryan, K S Linton, K A Walker, J Scopel & B A Biggs “Health Issues in Newly Arrived African Refugees Attending General Practice Clinics in Melbourne” (2006) *Medical Journal of Australia* 602, 602.

¹⁰⁸¹ Office of the United Nations High Commission for Human Rights and World Health Organisation “The Right to Health” Fact Sheet No 31 1.

¹⁰⁸² The Indian Supreme Court, in *Consumer Education and Resource Centre v. Union of India* AIR 1955 SC 636 held that the right to health “is essential for human existence and is, therefore an integral part of the right to life.” In particular, the right to life entails the safeguarding “of the health and

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5 2 1 Standard of same treatment and its ramifications

Irrespective of the above health problems and concerns, the Geneva Refugee Convention is silent on the right to healthcare. The reasons for leaving the right to healthcare unprotected are unclear. The silence of the Geneva Refugee Convention with respect to the right to health or healthcare leaves us with no option but to turn to the standards of favourable treatment contained in article 7 of the Geneva Refugee Convention so as to determine the manner in which the right in question can be accessed. Article 7 states that where more favourable treatment is not required and defined by the provisions of the Geneva Refugee Convention, refugees should be accorded “the same treatment” as is accorded to non-citizens generally.¹⁰⁸³ The same treatment is the minimum standard of treatment of refugees, which is defined by the Geneva Refugee Convention as “treatment as favourable as possible, and, in any event, not less favourable than that accorded to [non-citizens] generally in the same circumstances”. As discussed in chapter two above, this standard of treatment is problematic because non-citizens are generally not afforded access to socio-economic rights and benefits. In principle, non-citizens, in the socio-economic domain, are subject to the twin principles of exclusivity and self-sufficiency set forth under the Immigration Act, which regulates the conditions of admission and stay of non-citizens generally.¹⁰⁸⁴ The twin principles require non-citizens to support themselves and their families.¹⁰⁸⁵

The admission of asylum-seekers and the conditions of their stay is regulated not by the Immigration Act but by the Refugees Act. By allowing refugees and asylum-seekers to have access to socio-economic rights, the Refugees Act implicitly exempts them from the exclusionary and self-sufficiency rule.¹⁰⁸⁶ Under international refugee law, an exemption from the said rule is implied in the call made by the UN to

strength of the worker and is a minimum requirement to enable a person to live with human dignity.” Similarly, in the case of *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802, the same court understood the right to life to embrace the right to live with dignity and held that the right to health also embraces the right to healthcare and right to determinants of health such as food security, water supply, housing and sanitation etc.

¹⁰⁸³ Art 7 states that: “Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.”

¹⁰⁸⁴ The long title of the Immigration Act states: “To provide for the regulation of admission of persons to, their residence in, and their departure from the Republic; and for matters connected therewith”.

¹⁰⁸⁵ The rule “bars foreign nationals who cannot fend for themselves while staying in South Africa from admission, and authorises the deportation and expulsion of those whose financial support has depleted to such an extent that they are likely to become a public charge.” See Kavuro (2015) *Law, Democracy and Development* 249.

¹⁰⁸⁶ S 27(b) of the Refugees Act states that refugees are entitled to those rights in the Bill of Rights that apply to everyone.

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open borders to indigent and deprived asylum-seekers and to offer to them special protection essential for the protection of their health, well-being and dignity.¹⁰⁸⁷

As noted in chapter 4, the term refugee contained in the Geneva Refugee Convention and the African Refugee Convention is not restricted to recognised refugees but includes asylum-seekers. Even though some rights contained in the Geneva Refugee Convention apply to refugees to the exclusion of asylum-seekers, it would be problematic to conclude that the right to healthcare may not apply to asylum-seekers. The right to healthcare is implied in the right to public relief and assistance to which an asylum-seeker is entitled.¹⁰⁸⁸

The main concern is that it is apparent from article 7 that refugees and asylum-seekers should be accorded the same treatment accorded to other types of non-citizens and that, as stated above, the equal treatment approach may result in their total exclusion from accessing healthcare services. In view of this legal deficiency, it must be asked whether there are any other provisions in the Geneva Refugee Convention which may obligate states to afford refugees and asylum-seekers special or favourable protection. Such a duty could arguably arise on the basis of a state's obligation to act in terms of humanitarian considerations.¹⁰⁸⁹ A legal duty to offer them differentiated treatment can also be drawn from the principle underpinning the need to maintain a family unity contained in the Geneva Refugee Convention.¹⁰⁹⁰ The principle obligates host states to ensure that refugees and asylum-seekers are afforded more favourable treatment and special protection owing to the fact that their well-being is constantly threatened by and the unity of their family is always at risk due to political and economic deprivation.¹⁰⁹¹ The differentiated treatment is reflected

¹⁰⁸⁷ Art 2(c) of the Statute of the Office of the UNHCR.

¹⁰⁸⁸ For a detailed discussion, see chapter 4 of this thesis.

¹⁰⁸⁹ The States Parties to the Geneva Refugee Convention recognised that refugee problems are of a social and humanitarian nature and resolved to do everything within their power to respond to these problems so as to prevent them from becoming a cause of tension between States. See the Preamble.

¹⁰⁹⁰ The Geneva Refugee Convention: Recommendation B of the *Ad Hoc* Committee.

¹⁰⁹¹ Taking into consideration "that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and noting with satisfaction that, ...the rights granted to a refugee are extended to members of his family", the *Ad Hoc* Committee recommended "Governments to take the necessary measures for the protection of the refugee's family especially with a view to (1) ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country" and (2) ensuring that "the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption" is observed. See Recommendation B.

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and consolidated in the humanitarian approach underpinning the protection envisaged by the African Refugee Convention.

Weis maintains that the standards of favourable treatment defined in the Geneva Refugee Convention have universal application, as is reflected in the recommendations made by the *Ad Hoc* Committee in which it expressed the hope that:¹⁰⁹²

“[T]he [Refugee Convention] would have value as an example exceeding its contractual scope and that all nations would be guided by it in granting as far as possible to persons in their territory as refugees and who would not be covered by the terms of the [Refugee Convention], the treatment for which it provides.”

The main purpose of establishing the Geneva Refugee Convention was to create special protection in the form of surrogate national protection, which is not available to other types of non-citizens. Such protection is grounded in differentiated treatment, even though, in some cases, the protection is compared with or reduced to the treatment accorded to non-citizens generally. Refugees and asylum-seekers should not be given treatment that aggravates their desperation and destitution. Any treatment must mitigate the refugee's social and economic difficulties. Differentiated treatment is necessary given that the lives of refugees and asylum-seekers are at stake and an immediate and appropriate response is essential for the alleviation of their human suffering.

The distinction between refugees or asylum-seekers and various other groups of non-citizens is fundamental and should not be ignored. Apart from the fact that they have lost the protection of their country of origin, a large number of asylum-seekers are hungry, sick, wounded, depressed or frightened when they arrive in the country of asylum. Put plainly, they are generally in a more vulnerable position than other categories of non-citizens. Although article 7 accords refugees and asylum-seekers the same treatment accorded to various groups of non-citizens, differentiating refugees and asylum-seekers from these groups is indispensable in order to respond to their humanitarian and health problems adequately and effectively. It is left to the government of the host country to decide on the nature of differentiated or favourable treatment, based on humanitarian considerations. The African Refugee Convention

¹⁰⁹² Weis *Refugee Convention* ix.

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emphasises the need for a humanitarian approach towards solving the problems of refugees who seek a peaceful and normal life.¹⁰⁹³

Deborah Anker is of the opinion that differentiated treatment is a must. She states that international human rights law was created by the international community to be used as a tool to monitor and deter abuses whereas international refugee law was created to provide surrogate state protection to those who are abused or persecuted by their own states but who are able to cross borders.¹⁰⁹⁴ The Geneva Refugee Convention should be interpreted in view of this underlying intent of states parties. In South Africa, parliament's intent to accord to refugees and asylum-seekers universal rights contained in the Bill of Rights, is evident from sections 27(b) and 27A(d) of the Refugees Act. These universal rights include the right of access to health care. The Refugees Act's reference to the rights in the Bill of Rights suggests that there are statutory obligations imposed on South Africa to respond to the health problems of refugees and asylum-seekers. The responsibilities to care about them are constitutional obligations that flow from the duty imposed by section 27(1)(a) in general and sections 27(1)(c), 28(1)(c) and 35(2)(e) in particular.

Proceeding from the above analysis, refugees and asylum-seekers should, in a situation where more favourable treatment is not mandated, "be treated favourably in accordance with internationally recognised basic minimum standards".¹⁰⁹⁵ At the heart of the treatment of refugees and asylum-seekers lies the need to take positive measures towards refugee problems, thereby restoring a life of hope and dignity. It should be borne in mind that the obligations imposed on a host state in respect of refugees and asylum-seekers are not required in respect of other non-citizens, such as vulnerable economic migrants. In chapter 2, emphasis has also been placed on the need for a substantive understanding of equality which does not simply assume that refugees and asylum-seekers are in the same circumstances as other non-citizens. Such an approach will, for all intents and purposes, take into consideration refugees' unique, special and vulnerable situation.

¹⁰⁹³ Para 2 of the Preamble, read together with art 2(2) of the African Refugee Convention.

¹⁰⁹⁴ D E Anker "Refugee Law, Gender, and Human Rights Paradigm" in H Lambert (ed) *International Refugee Law* (2010) 135.

¹⁰⁹⁵ *Weis Refugee Convention* ix.

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5.3 Basic minimum standards of health and a human rights-based approach

Pursuant to the 1978 International Conference on Primary Health Care (“Alma-Ata Primary Health Care Declaration”),¹⁰⁹⁶ health is not merely the absence of disease or infirmity, but a state of complete physical, mental and social well-being.¹⁰⁹⁷ The attainment of the highest possible level of health is an important goal whose realisation requires positive state measures.¹⁰⁹⁸ The Alma-Ata Primary Health Care Declaration recognises health as a fundamental right.¹⁰⁹⁹ The right to healthcare was initially introduced by the WHO Constitution and was then entrenched under the UDHR as an element of the right to a standard of living adequate for the health and wellbeing of an individual and his or her family or dependants.¹¹⁰⁰ The right to healthcare is elaborated on under the ICESCR. According to article 12 of the ICESCR, every individual should be accorded the right to enjoy “the highest attainable standard of physical and mental health.” It is therefore imperative to prevent, treat, and control diseases, be it epidemic, endemic, or occupational. Particular emphasis is placed on the health of children. In this respect, article 12 states that it is crucial for the state to work towards the reduction of still-births and of infant mortality and improvement of the healthy development of the child. The UDHR proclaims that motherhood and childhood are entitled to special care and assistance.¹¹⁰¹ Special care cannot be separated from the right to healthcare and is implied in the right to an adequate standard of living whose realisation includes immediate and progressive positive measures to provide medical attention to those who are sick. The provision of medical care to the sick through positive measures is stressed by the ACHPR.¹¹⁰²

By virtue of being humans, refugees and asylum-seekers should benefit from proper primary health care as it is guaranteed and expounded by international human rights law. The Alma-Ata Primary Health Care Declaration states that primary health care should reflect and evolve from the economic and political conditions of the state having jurisdiction and that primary health problems should be addressed

¹⁰⁹⁶ Alma-Ata, USSR, 6-12, September 1978.

¹⁰⁹⁷ Primary Health Care Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978 (“the Primary Health Care Declaration”), para I.

¹⁰⁹⁸ Para I.

¹⁰⁹⁹ Para I.

¹¹⁰⁰ Art 25 of the UDHR.

¹¹⁰¹ Art 25.

¹¹⁰² Art 16.

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through the provision of promotive, preventive, curative, and rehabilitative services.¹¹⁰³ A new approach to health and health care should be adopted to ensure that the distribution of health resources between and within communities is fair and equitable. Because the attainment of a high level of health would allow an individual to lead a socially and economically productive life, accessibility of the right to health care would contribute to refugees and asylum-seekers' ability to become self-reliant and economically independent.

The rights to health and healthcare are not only protected by the UDHR, ICESCR and ACHPR. They are also protected, *inter alia*, by the ICERD,¹¹⁰⁴ the CEDAW,¹¹⁰⁵ the CRD¹¹⁰⁶ and the CRPD.¹¹⁰⁷ Equally, the right to health has been recognised by the Vienna Declaration and Programme of Action ("VDPA"). All these international instruments illustrate the importance of the right to health and healthcare in the development of an individual as well as his or her community.

5 3 1 Distinction between the right to health and the right to healthcare

A clear distinction between these two rights is crucial because it will help to understand the issue this chapter is addressing. The concepts of health and healthcare are distinct in nature. In a narrow sense, the concept of health is defined as the absence of disease.¹¹⁰⁸ In a broad sense, the concept is defined by the WHO as "the state of complete physical, mental, and social well-being."¹¹⁰⁹ Healthcare is therefore viewed as "an instrument for the generation of health."¹¹¹⁰

The recognition of healthcare as a right implies that an individual is entitled to have access to healthcare facilities, goods and services, which are instrumental in achieving good health. Put simply, by guaranteeing the right to health care, the state commits itself to ensuring that healthcare services are available and accessible rather than ensuring the good health of the population.¹¹¹¹ It undertakes to ensure the

¹¹⁰³ The Primary Health Care Declaration, para VII.

¹¹⁰⁴ Art 5(e)(iv).

¹¹⁰⁵ Art 11.1(f) and 12.

¹¹⁰⁶ Art 24.

¹¹⁰⁷ Art 25.

¹¹⁰⁸ K S Sandhu "A Legal Right to Health Care: What Can the United States Learn from Foreign Models of Health Rights Jurisprudence" (2007) 95 *California Law Review* 1151, 1159.

¹¹⁰⁹ 1160.

¹¹¹⁰ 1160. See too M Maruthappu, R Olugunde & A Gunarajisingam "Is Health Care a Right? Health Reforms in the USA and their Impact upon the Concept of Care" (2013) 2 *Annals of Medicine and Surgery* 15, 16.

¹¹¹¹ 1160.

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provision of immunisation against major infectious diseases; essential medicines; reproductive, maternal (pre- and post-natal) and child healthcare services; essential primary healthcare services; access to health facilities without discrimination; equitable distribution of all health facilities, goods and services; and, more importantly, the adoption of measures to prevent, treat and control epidemic and endemic diseases. The right to healthcare entitles everyone to equal access to whatever healthcare resources the society provides and, at a minimum, ensures that everyone has the opportunity to be an active agent in the community in which he or she lives.¹¹¹²

By contrast, the right to health is interpreted to mean the entitlement to “perfect health”.¹¹¹³ It is therefore argued that the right to health goes beyond the right to have access to healthcare services, and includes access to the underlying health determinants that can help individuals to lead a healthy and dignified life. Health determinant factors include safe and portable drinking water, adequate sanitation, safe food and adequate nutrition, housing, social assistance, healthy working and environmental conditions, public health services, access to medical care and medical aid, health-related education and information, gender equality, socio-economic development, genetic predisposition and individual choices.¹¹¹⁴ In practice, it is difficult to achieve perfect health; however, the progressive realisation of these factors would lead to the achievement of perfect health. Based on this distinction, the chapter deals with refugees’ and asylum-seekers’ entitlement to the right to healthcare.

5 3 2 The state’s responsibility to provide healthcare

In the aftermath of the Second World War, a new world order was established which was conceived in terms of the duty to protect humanity. Implied in this duty is the protection of every individual’s life, dignity, health and wellbeing. The provision of healthcare services is accordingly mandatory. The mandate to ensure that every human person is accorded healthcare services is linked to the recognition of fundamental human rights norms and principles which, in turn, establish a legal regime requiring positive state actions. In order to ensure that a particular state does

¹¹¹² 1160.

¹¹¹³ 1160.

¹¹¹⁴ 1160.

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not deviate from meeting its obligations, human rights enforcement mechanisms were established. Their functions include monitoring the implementation of international human rights treaties as well as giving meaning and content to the rights and freedoms contained in the treaties establishing them.¹¹¹⁵

By contrast, international refugee law does not create mechanisms to enforce refugee law. This is a notable difference between international human rights law and international refugee law, which stems from the fact that the UNHCR is not entrusted with judicial power. There is no formal mechanism established by the Geneva Refugee Convention or by the African Refugee Convention to interpret the refugee rights contained in it or to receive and to consider individual or state petitions or complaints. It could be argued that, in the absence of judicial power, the legal obligations, created by both the Geneva Refugee Convention and the African Refugee Convention, are relegated to moral obligations.

It must nevertheless be emphasised that states are not allowed to abstain from transforming refugee rights into national policies and strategies designed to achieve healthcare. The question whether the rights of refugees to healthcare are met can therefore be evaluated by examining whether the national policies and strategies deviate from or fall short of international standards, norms and practices. In answering this question, regard must be given to international bodies' interpretational approach to human rights and freedoms. It needs to be noted that a major focus of the international legal system was traditionally to hold states to account "for consequences generated by their unacceptable conduct... in international relations".¹¹¹⁶ In the human rights era, the state can be held to account for human rights abuses or irrational discriminatory policies.

Whether the state strives to meet its obligations to protect humanity is usually analysed on the basis of principles of equality, human dignity and individual freedom. In the refugee realm, these principles are supplemented by standards designed to ensure the favourable treatment of refugees. Whilst the responsibility to protect is associated, first and foremost, with the relationship between the state and its citizens, each and every state must also be held liable for its failure to discharge its

¹¹¹⁵ Most international committees are mainly entrusted with two functions: Firstly, examining periodic reports submitted by state parties to a particular convention which elaborate on the measures taken by the concerned state to convert the provisions of such convention into reality; and secondly, receiving and mediating on petitions from individuals or states concerning abuses or violations of human rights contained in a particular treaty or convention.

¹¹¹⁶ B S Chimni *International Refugee Law* (2001) 296.

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international obligations to protect non-citizens as defined by the rules and principles of international human rights law. The responsibility to protect refugees and asylum-seekers, along with other foreign nationals, stems from the theory of sovereignty and human rights norms. These norms are as follows: firstly, a sovereign state has absolute control over its territory as well as its inhabitants. According to Guy Goodwin-Gill, absolute control over a territory includes, among other things, protection of all people in or within the territory.¹¹¹⁷ Secondly, article 2(1) of the ICCPR obliges each state to respect and to ensure rights to all individuals within its territory and subject to its jurisdiction. Thirdly, in its General Comment on articles 2(1), 27 and 41, the Human Rights Committee reiterated that the universal rights contained in the ICCPR should be enjoyed by all those individuals within the territory or under the jurisdiction of the state. Fourthly, article 2(3) of the ICESCR obligates developing states to determine the extent to which socio-economic rights and benefits would be distributed to non-citizens, with due regard to human rights and the national economy. Fifthly, article 7 of the Geneva Refugee Convention defines the minimum standard of favourable treatment to be accorded to refugees and asylum-seekers within the territory of a state. More fundamentally, the state's responsibility to protect emanates from the fact that most of the rights in the human rights treaties are explicitly applicable, either to everyone, or to anyone, or to all persons or every human being. Such responsibility is consolidated nationally by entrenching certain human rights into domestic law through acts of parliament.

It is also worth underlining that the right to healthcare creates three types or levels of state responsibility. These are the obligations to respect, protect and fulfil the right in question. Firstly, respect implies that the state must refrain from denying or limiting equal access to healthcare services for all persons and from violating the right to healthcare by its actions. Secondly, protection implies a duty imposed on the state to take actions which prevent third parties from interfering with or violating the right to healthcare. Thirdly, fulfilment implies that the state must act in order to ensure that rights can be enjoyed by all persons in its territory, with a particular focus on rectifying past and/or existing discrimination or imbalances in the provision of healthcare facilities, goods and services. In this light, it can be concluded that a failure to meet international obligations for the protection of refugees and asylum-

¹¹¹⁷ 299.

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seekers would constitute a breach of the state's responsibility to protect the human dignity, inherent in every human being.¹¹¹⁸

5 3 2 1 The Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights notes various situations in which the right to healthcare can be violated by the state. It states that the right to healthcare would not be respected if, for example, the denial of access to the right to healthcare to particular individuals or groups would amount to *de jure* or *de facto* discrimination, which would, in turn, result in bodily harm, unnecessary morbidity and preventable disease.¹¹¹⁹ Violations also include the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to healthcare, the suspension of laws that guarantee such universal enjoyment¹¹²⁰ and the failure to protect women against violence or harmful traditional medical or cultural practices.¹¹²¹ In particular, the right to healthcare would not be fulfilled if the national health policy does not ensure equal access to the right to vulnerable or marginalised groups on the basis of an insufficient budget or the misallocation of public resources.¹¹²²

Do host states bear the responsibility to protect refugees and asylum-seekers? The Committee on Economic, Social and Cultural Rights responded to this question by stressing that the states parties to the ICESCR have a joint and individual responsibility to protect vulnerable people in accordance with standards enunciated in human rights law.¹¹²³ As vulnerable people, refugees and asylum-seekers are not only entitled to the right to healthcare but also to have access to health determinants, such as disaster relief and humanitarian assistance, which must be provided by the state, in times of emergency, on the basis of the notion of "cooperation."¹¹²⁴ Regardless of this notion, the state should "refrain from denying or limiting equal access for all persons"¹¹²⁵ and should "abstain from enforcing discriminatory

¹¹¹⁸ General Comment No. 14 (2000), para 39, read together with paras 50, 51 and 52.

¹¹¹⁹ Para 50.

¹¹²⁰ Para 50.

¹¹²¹ Para 51.

¹¹²² Para 52.

¹¹²³ Para 40. States parties must adhere to the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly.

¹¹²⁴ Para 40.

¹¹²⁵ Para 34. All persons include but are not limited to "prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services."

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practices as a state policy.”¹¹²⁶ In order to meet the state responsibility to protect, the state must cooperate with the UNHCR, the WHO, the United Nations Children's Fund (“UNICEF”) and the International Committee of the Red Cross/Red Crescent (“ICRC”), as well as non-governmental organizations (NGOs) and national medical associations.¹¹²⁷ It is therefore suggested that priority in the provision of essential healthcare services and goods and in the distribution and management of resources (i.e. safe and potable water, food and medical supplies, and financial aid) “should be given to the most vulnerable or marginalised groups of the population.”¹¹²⁸ Unquestionably, these groups include refugees and asylum-seekers as acknowledged by courts of South Africa.¹¹²⁹ A failure to include refugees and asylum in the national health laws and policies would amount to a serious violation of their right to healthcare.

5 3 2 2 The African Commission

Whereas the Committee on Economic, Social and Cultural Rights provides instances in which the right to health can be threatened or infringed, the African Commission sets out the state obligations flowing from the right. According to the African Commission, the right to health imposes duties on the state to ensure that all individuals – citizens and non-citizens alike – are capable of accessing affordable health facilities, goods and services of reasonable quality; the minimum essential nutritional food; basic shelter or housing; adequate supply of safe and potable water; sanitation and hygiene; reproductive, maternal and child health care; immunisation against major infectious diseases; HIV/AIDS treatment and prevention; treatment and prevention of other major killer diseases; humane and dignified care of the elderly and persons with mental and physical disabilities; and health education.¹¹³⁰ In particular, women and girls who are physically and psychologically traumatised as a

¹¹²⁶ Para 34.

¹¹²⁷ Para 65.

¹¹²⁸ Paras 40 and 65.

¹¹²⁹ The Constitutional Court in *Union of Refugee Women* (paras 24, 28-30) and the SCA in the cases of *Somali Association of South Africa* (para 33) and *Ndikumdavyi* (para 17) held that refugees as a class are a vulnerable group in South African society and the world over, whose plight calls for compassion.

¹¹³⁰ Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04 of 23rd November to 7th November 2004 (Annexure I Pretoria Declaration on Economic, Social and Cultural Rights in Africa) para 7.

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result of sexual violence are entitled “to receive adequate and accessible health care, including psychological support.”¹¹³¹

The African Commission stressed that the right to health is not only confined to a right to health care. Rather, the right “embraces all underlying aspects of health.”¹¹³² Access to medicines needed for treatment, prevention and palliative care is seen as “a necessary condition for leading a healthy and dignified life.”¹¹³³ What can be drawn from these obligations is the responsibility to take measures to ensure that refugees and asylum-seekers are favourably afforded equal access to health care and services. In order to meet the responsibility to protect refugees and asylum-seekers, the African Refugee Convention states that a host country should cooperate with other African states, the AU and the UNHCR, and that such cooperation should be exercised on the basis of the African spirit and solidarity.¹¹³⁴ With regard to effective refugee protection, the African Commission has stated that African countries should meet obligations imposed by international instruments, because when they sign or ratify these instruments, they do so willingly and in full cognisance of the obligations flowing from them.¹¹³⁵

5 3 2 3 The UNHCR

As noted, the main mandate of the UNHCR is not to interpret the rights enshrined in the Geneva Refugee Convention and its Protocol, but to assist national governments and to supervise and to coordinate national measures undertaken by national governments to address refugee problems,¹¹³⁶ including proposing amendments to the existing national refugee regime in order to meet human rights standards and practices.¹¹³⁷ These responsibilities should be discharged by the UNHCR for the purpose of meeting its core mandate to “assure refugees the widest possible exercise of [their] fundamental rights and freedoms” as codified in

¹¹³¹ Resolution on the right to a remedy and reparation for women and girls victims of sexual violence, ACHPR/Res.111(XXXII)07 of 15 - 28 November 2007.

¹¹³² Resolution on joint promotional missions, ACHPR/Res.140(XXXIV)08 of 10 to 24 November 2008.

¹¹³³ Resolution on joint promotional missions, ACHPR/Res.140(XXXIV)08 of 10 to 24 November 2008.

¹¹³⁴ Arts 2(4) and 3.

¹¹³⁵ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* Communication No. 249/02 (2004) AHRLR 57 (18th Activity Report, ACHPR 2004) para 68.

¹¹³⁶ Preamble, read together with art 3 of the Geneva Refugee Convention.

¹¹³⁷ Art 8 (a) and (d) of the Statute of the UNHCR.

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international refugee law, taking into account the dynamic development of human rights standards and practices.¹¹³⁸ Within this framework, the UNHCR has provided various recommendations or observations in relation to the manner in which socio-economic rights and benefits, including the right to healthcare, should be observed.

According to the UNHCR, refugees (and asylum-seekers) are entitled to and should benefit from the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, as explicitly codified in human rights law, regardless of their nationality or residence status.¹¹³⁹ This right imposes international obligations on states “to take steps which are necessary for the creation of conditions which would assure to all medical service and medical attention in the event of sickness.”¹¹⁴⁰ The responsibilities to respect, protect, and fulfil fundamental human rights and freedoms are primarily vested in the states and the right to healthcare is “extended to all persons within a state’s territory or subject to its jurisdiction.”¹¹⁴¹ The UNHCR notes that the right to healthcare, as other socio-economic rights, is subject to “the progressive realisation principle”. However, it states that the principle of progressive realisation “does not relieve states from the obligation to urgently, promptly and effectively addressing acute health crises and needs.”¹¹⁴² This approach is drawn from the General Comment of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health,¹¹⁴³ holding that:

“The progressive realisation of the right to health over a period of time should not be interpreted as depriving states parties’ obligations of all meaningful content. Rather, progressive realisation means that states parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of article 12.”

Notwithstanding the need for an urgent and immediate response to acute health problems, the UNHCR recognised that the realisation of the right to healthcare is

¹¹³⁸ UNHCR Antiretroviral Medication Policy for Refugees, January 2007 at 5.

¹¹³⁹ 5.

¹¹⁴⁰ Art 12(2)(d) ICESCR.

¹¹⁴¹ UNHCR Antiretroviral Medication Policy for Refugees, January 2007 at 5.

¹¹⁴² 5.

¹¹⁴³ 5. See too General Comment No 14 on the right to highest attainable standard of health (art 12), para 31.

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subject to available resources and international assistance and cooperation.¹¹⁴⁴ In matters involving refugees and asylum-seekers, the UNHCR acknowledges that its cooperation with and assistance and support offered to host governments should be considered as a form of international assistance, which “is one of means for the states to fulfil their human rights obligations.”¹¹⁴⁵ The UNHCR plays a role in ensuring that host states are not burdened by the needs of refugees and asylum-seekers. However, as noted above, the primary responsibility to protect is vested in the host states simply because, as Kimbimbi puts it, “they have means to exercise such responsibility.”¹¹⁴⁶

5 4 National laws and policies

Under section 231(2) of the Constitution, South Africa is internationally bound by a treaty when it is approved by parliament. A treaty, however, becomes part of South African domestic law when it is adopted into national legislation in terms of section 231(4). What this tells us is that the right to healthcare – guaranteed by international human rights law – should therefore be espoused under national law and policies, aimed at protecting and promoting the well-being of all inhabitants, especially, the most vulnerable and marginalised people, including refugees and asylum-seekers.

5 4 1 South Africa

5 4 1 1 *Current policy*

The right to access to healthcare is among the basic rights enshrined in the Bill of Rights. The Bill of Rights recognises and guarantees the right of everyone to access to healthcare, including emergency medical treatment, the right of detainees to receive medical treatment, and the right of the child to receive basic healthcare services. Enjoyment of the right is dependent on available resources, which must be made available as the time progresses. Section 27(2) of the South African Constitution states that:

¹¹⁴⁴ UNHCR Antiretroviral Medication Policy for Refugees, January 2007 at 5.

¹¹⁴⁵ 5.

¹¹⁴⁶ S Kimbimbi (UNHCR Regional Representative for Southern Africa)’s brief to the Department of Home Affairs Portfolio Committee on the role of the UNHCR in South Africa on refugees of 14 November 2011 <<http://www.pmg.org.za/report/20111115-regional-representativeunited-nations-commissioner-refugees-unhcr>> (accessed 14-04-2015).

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“The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right to have access to health care services, including reproductive health care].”

The state’s duty to secure the right to healthcare is thus subject to certain internal conditions set forth under section 27(2). These are: the reasonableness requirement, the availability of resources and progressive realisation. Although these internal conditions place limitations to the realisation of the right, these limitations cannot be relied on by the state to adopt healthcare measures which do not cater for the health needs of refugees and asylum-seekers. If such healthcare measures are adopted, the state would be disregarding the decision of the Constitutional Court holding that the reasonableness of a state policy is reflected in making provision for those in dire need of socio-economic rights and benefits such as social security, food, water, adequate housing, land or healthcare.¹¹⁴⁷ Drawing on this judgment, the main concern is the lack of harmonisation of the right to healthcare of refugees with the national healthcare policies, which gives rise to discrepancies in health protection of refugees and asylum-seekers. The discrepancies render some refugees and asylum-seekers under certain municipal/local jurisdiction excluded from free healthcare services, as will be explained below.

The difficulty to protect the right to have access to healthcare services also stems from issues relating to the Refugees Act. It is worth noting that, prior to the 2008 amendment to the Refugees Act, section 27(g) of the Refugees Act protected the right to healthcare, but it was explicitly accorded to formally recognised refugees to the exclusion of asylum-seekers.¹¹⁴⁸ This reference to the right to healthcare has been repealed by the 2008 Refugees Amendment Act. Although section 27(g) was repealed, those who are recognised as refugees are protected by section 27(b) which guarantees that they enjoy all rights in the Bill of Rights that are guaranteed to everyone. This means that refugees should be considered in the healthcare policies at national, provincial and local level.

¹¹⁴⁷ Yacoob J in *Grootboom* para 44 noted that the right of access to socio-economic rights is generally entrenched in the South African Constitution because South Africans “value human beings and want to ensure that they are afforded their basic human needs.” As a society that seeks to ensure that the basic necessities of life are provided to all, reasonable socio-economic measures cannot leave out those vulnerable people, “whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril.”

¹¹⁴⁸ S 27(g) states that a refugee “is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.”

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The rights of asylum-seekers are dealt with in section 27A of the Refugees Act, which was inserted into the Act by the 2008 Refugees Amendment Act. Section 27A(d) states that the rights in the Bill of Rights, in so far as those rights apply to asylum-seekers, are enjoyed by asylum-seekers. As noted in chapter 2 of this thesis, section 27A(d) suffers from a tautology (asylum-seekers are entitled to the rights which apply to them), from which it is assumed that section 27A(d) refers to rights in the Bill of Rights that apply to everyone. This assumption is based on the fact that there is no right in the Bill of Rights from which asylum-seekers are excluded, save for those rights that are expressly reserved only for citizens. Apart from those rights, the Bill of Rights contains cosmopolitan rights which apply universally to everyone within South Africa's borders. Proceeding from this premise, asylum-seekers are co-beneficiaries of the cosmopolitan right to healthcare. Even though the rights of asylum-seekers are recognised in terms of the 2008 Refugees Amendment Act, other legislation and policies relating to healthcare have not followed suit.

The National Health Act gives meaning and substance to the constitutional right to have access to healthcare. In terms of the National Health Act, the constitutional right to healthcare can be accessed on the basis of prescribed fee conditions for healthcare services.¹¹⁴⁹ In exceptional cases it provides for conditions of eligibility for free healthcare services in public health establishments, for poor and vulnerable people.¹¹⁵⁰ In prescribing those conditions, the Minister of Health is bound to consult with the Minister of Finance. After consultation, the Minister of Health must give regard to: (a) the range of existing free healthcare services; (b) the existing categories of persons receiving free healthcare services; (c) the impact of any such condition on access to healthcare services; and (d) the needs of vulnerable groups such as women, children, older persons and persons with disabilities.¹¹⁵¹ Refugees and asylum-seekers are not among the groups that are expressly recognised as vulnerable. The absence of such explicit recognition is contrary to their recognition in case law as a vulnerable group.¹¹⁵² What is therefore problematic is a lack of consistency in understanding the refugee situation. There will be consistency only if section 4(2) of the National Health Act also obligates the Minister of Health to have

¹¹⁴⁹ S 41, 90(1)(b)(i) and 90(1)(v)(ii) of the National Health Act.

¹¹⁵⁰ S 4.

¹¹⁵¹ S 4(2).

¹¹⁵² They are defined as vulnerable in South African society and elsewhere because their plight calls for compassion and they have limited resources to their disposal. See *Ndikumdavyi* para 17 and *Union of Refugee Women* paras 24, 28.

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regard to the needs of refugees whose plight calls for compassion and whose physical deprivation is associated with economic deprivation or limited resources to their disposal. Given their susceptibility to social, economic, and political vulnerabilities, national healthcare policies should ostensibly include refugees and asylum-seekers in the categories of persons to receive free healthcare services. Some policies do as this section turns to discuss in more detail.

Within the fee conditions framework, the Department of Health, in June 2009, published the User Guide – Uniform Patient Fee Schedule (“UPFS policy”), which provides a guide to the charges for healthcare services. Payable or chargeable services do not include the provision of emergency medical treatment, except for the people who can pay.¹¹⁵³ The UPFS policy classifies different fees in accordance with the type of patient and socio-economic situation and gives regard to any other relevant variables.¹¹⁵⁴ Patients are grouped into three categories: full-paying patients, partially-subsidised patients, and fully-subsidised patients.¹¹⁵⁵

Full-paying patients are defined as “patients who are either being treated by a private practitioner, or who are externally funded, or who are some types of non-South African citizens.”¹¹⁵⁶ A patient treated by a private practitioner refers to “any patient treated by his or her own private practitioner in a public health care facility [who is] liable to pay the full facility fee component for services rendered by the private practitioner at the facility and the full UPFS fee... for any other service received by the patient.”¹¹⁵⁷ An externally-funded patient is “any patient whose services are funded or partly funded in terms of the COIDA, the Road Accident Fund (“RAF”) created in terms of the Road Accident Fund Act 56 of 1996, or a medical scheme registered in terms of the Medical Schemes Act 131 of 1998”.¹¹⁵⁸ Externally-funded patients include “patients, treated on account of another state department, local authority, foreign government, or any other employer”. Excluded from a classification as full-paying patients are those non-citizens who are “in possession of

¹¹⁵³ Principle one of the UPFS proclaims that “[e]mergency medical treatment shall be afforded at any time to any patient, at any health facility, including a clinic, community health centre, or hospital.”

¹¹⁵⁴ User Guide-UPFS 2009. Department of Health of Republic of South Africa, June 2009.

¹¹⁵⁵ See, for example, the National Health Act (61/2003) Mpumalanga Province’s Amended Hospital Fees Manual in GG 2173 of 27-05-2013 (for general notice) at 10. They are patients who can only qualify for full subsidization if they are referred to hospital from primary health care services. They receive all services free of charge.

¹¹⁵⁶ 9.

¹¹⁵⁷ 9.

¹¹⁵⁸ 9.

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temporary, permanent or work permits or are citizens of SADC countries.”¹¹⁵⁹ Given that refugees and asylum-seekers are in possession of temporary permits granted in terms of section 22 and 24 of the Refugees Act, they cannot be classified as full-paying patients. The possibility of classifying them as full-paying patients is when they are benefiting from services funded by their employers (if employed) or in terms of COIDA or in terms of RAF. Another possibility is in cases where refugee patients can be treated by their own private medical practitioner. According to the Western Cape Government website, asylum-seekers and refugees must be afforded the same treatment as South Africans.¹¹⁶⁰

Patients classified as partially-subsidised patients are “those individuals whose income can partially cover costs. The level of subsidisation is therefore dependent on the assessment of their level of income or on the means test.”¹¹⁶¹ Refugees and asylum-seekers, who are employed, can be charged hospital fees depending on the assessment of their level of income or meeting the requirements of the means test.

Patients classified as fully-subsidised patients are the most vulnerable in society and are entitled to free healthcare services. They include pensioners, the unemployed, people with disabilities and individuals who cannot afford public hospital fees.¹¹⁶² Charging patients according to their level of income indicates that the South African healthcare system is a financial means-based system, which takes account of social vulnerability. Considering the vulnerability and, in many cases, poverty of refugees and asylum-seekers, they should be among the groups that are offered medical treatment free of charge. For instance, refugees who are currently recipients of social assistance grants should, for instance, automatically qualify for free services. However, the Western Cape Government website states that a non-citizen cannot be a subsidised patient in any way.¹¹⁶³

Refugees and asylum-seekers are classified by the 2007-2011 HIV & AIDS and STI National Strategic Plan for South Africa (“2007-2011 National Strategic Plan”) as marginalised groups that must be protected from discrimination.¹¹⁶⁴ The 2007-2011

¹¹⁵⁹ 9.

¹¹⁶⁰ Western Cape Government: Full-Paying Patients <https://www.westerncape.gov.za/general-publication/western-cape-government-hospital-tariffs-overview?toc_page=2 > (accessed 01-02-2016).

¹¹⁶¹ See, for example, the National Health Act (61/2003) Mpumalanga Province’s Amended Hospital Fees Manual in GG 2173 of 27-05-2013 (for general notice) at 11.

¹¹⁶² 10.

¹¹⁶³ Western Cape Government: Full-Paying Patients.

¹¹⁶⁴ HIV & AIDS and STI Strategic Plan for South Africa 2007-2011 at 56.

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National Strategic Plan states that marginalised groups “have a right to equal access to interventions for HIV prevention, treatment and support.”¹¹⁶⁵ Moreover, the 2007 ART and Revenue Directives of the National Department of Health (“the 2007 ART and Revenue Directives”) stress that refugees and asylum-seekers – with or without documents – need to be excused from paying for antiretroviral therapy services regardless of the site or level of institution where these services are offered.¹¹⁶⁶ The 2007 ART and Revenue Directives recognise the “challenges that refugees and asylum seekers face in accessing documentation from the DHA within a reasonable time period.”¹¹⁶⁷ Healthcare services are not realisable for refugees and asylum-seekers due to bureaucratic hurdles, like the requirement of being documented, unfavourable legal and economic conditions and the general requirement of paying hospital fees. Taking all these hurdles into account, the 2007 ART and Revenue Directives categorically state that it is appropriate to allow all refugees and asylum-seekers – irrespective of their legal, social and economic conditions – to have access to free antiretroviral therapy (“ART”) services, including antiretroviral (“ARV”) medicines.¹¹⁶⁸ On the basis of these two policies, refugees and asylum-seekers should have access to healthcare services on the same basis as citizens and permanent residents. They nevertheless face significant practical and legal barriers in their effort to access public health facilities and services, as discussed further below.¹¹⁶⁹

It is often argued from a legal and theoretical point of view that refugees and asylum-seekers – regardless of their sex – should enjoy free healthcare services.¹¹⁷⁰ However, their right of equal access to healthcare facilities and services, which is guaranteed in terms of the South African Constitution, is significantly limited by practical and legal barriers. Practical barriers include medical personnel’s

¹¹⁶⁵ 56.

¹¹⁶⁶ ART and Revenue Directives of the National Department of Health, BI/429/ART 20 April 2007 and BI 4/29 REFUG/ASYL 8 2007 19 September 2007. See too Joint Submission to the South African National Aids Council (“SANAC”) Plenary, 4 March 2008 at 5 and Joint ALP / TAC Submission on Refugee Amendment Bill at 11.

¹¹⁶⁷ Joint ALP / TAC Submission on Refugee Amendment Bill at 11.

¹¹⁶⁸ 11.

¹¹⁶⁹ Dass, Ramjathan-Keogh & Khan “The Socio-economic Rights of Refugees and Asylum-seekers in South Africa” in *Refugee Law in South Africa* 229 and Medecins Sans Frontieres (“MSF”) “No Refugee Access Denied: Medical and Humanitarian Needs of Zimbabweans in South Africa” June 2009 <<http://www.msf.org/article/no-refuge-access-denied-medical-and-humanitarian-needs-zimbabweans-south-africa>> (accessed 05-10-2015) 10.

¹¹⁷⁰ Hathaway *The Rights of Refugees* 509.

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xenophobic attitudes;¹¹⁷¹ language; cultural traditions; and problems relating to documentation.¹¹⁷² Legal barriers mainly stem from provincial and local governments' guidelines, known as "the Patient Classification Manuals" that were created for the purpose of governing the payment of hospital fees at provincial and local level.¹¹⁷³ These guidelines are contradictory and created the impression that asylum-seekers and refugees should be classified under full-paying patients on the basis of their non-citizenship. As a consequence, they must fully pay hospital fees. Such categorisation implies that they are not entitled to free healthcare services even if they are indigent. The impression, for example, led the Steve Biko Academic Hospital to turn away a gravely ill 12-year-old Somali girl who needed emergency medical treatment for a heart condition, including an operation. Refusal of emergency medical treatment was based on the ground that she was an undocumented asylum-seeker and that her primary caregivers – who were indigent – could not afford hospital fees. The turning away of refugees and asylum seekers, for similar reasons, is a matter of serious concern that has featured in the newspapers from time to time, but which has not been given adequate attention by academics and human rights activists.

It is important to create a refugee healthcare policy which protects refugees' equal access to free healthcare. Such a policy should be harmonised with the national, provincial and local health policies and strategies. The suggested healthcare policy for refugees and asylum-seekers must clearly articulate that these vulnerable groups have a right to healthcare and define which healthcare services they should freely have access to in public health establishments. When designing their policies or guidelines giving effect to the UPFS policy, public health establishments should take into account that refugees and asylum-seekers are recognised as vulnerable groups. In addition, it is of paramount importance to define and clarify the scope and limits of their entitlements, taking into consideration their distinct legal position in society.

¹¹⁷¹ 509.

¹¹⁷² Undocumented asylum-seekers may not receive healthcare services. Included are those refugees and asylum-seekers who are in possession of expired refugee documents or documents that are not accepted as correct or legitimate by medical personnel. For practical barriers, see HIV & AIDS and STI Strategic Plan for South Africa 2007-2011 at 38-39; A Teagle "Refugees: Out of the frying pan and into the fire of South Africa's healthcare system" <<http://www.dailymaverick.co.za/article/2014-10-16-refugees-out-of-the-frying-pan-and-into-the-fire-of-south-africas-healthcare-system/#.V-FtmPB9600>> (accessed 15-01-2016).

¹¹⁷³ Lawyers for Human Rights "South Africa Health System Shuns Asylum Seekers" <<http://www.lhr.org.za/news/2014/south-africa-health-system-shuns-asylum-seekers>> (accessed 24-01-2016) and S Stevenson, K Thomson, J Vearey & B Walker "Fact Sheet on Migration and Health in the South African Context" (2015) *Johannesburg Migration Health Forum* 1, 1-5.

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These entitlements must be in line with human rights standards concerning the provision of healthcare services and with favourable standards of treatment.

Because of the lack of a national refugee health policy, some healthcare establishments adopt policies which place refugees and asylum-seekers in a full-paying patient category, resulting in a deprivation of favourable access to healthcare services.¹¹⁷⁴ Such practices give rise to unfair discrimination, amount to a violation of human dignity and undermine the state's responsibility to protect.

5 4 1 2 Future policy: National Health Insurance

The government of South Africa has noted that the existing national health policies, regulations and strategies have done little to address the health imbalances and inequities caused by the apartheid policies, due to prevailing economic inequalities. The increasing inequity in income significantly contributed to huge inequity in access to healthcare. In an attempt to address this, the NHI policy was proposed in 2011. The policy seeks to grant everyone access to affordable, appropriate, quality healthcare services regardless of their socio-economic status or of whether they are employed or not.¹¹⁷⁵ However, the ambit of the term "everyone" is restricted to citizens and permanent residents.¹¹⁷⁶

"[NHI] will cover all South Africans and legal permanent residents. Short-term residents, foreign students and tourists will be required to obtain compulsory travel insurance and must produce evidence of this upon entry into South Africa. Refugees and asylum seekers will be covered in line with provisions of the Refugees Act, 1998 and international human rights instruments that have been ratified by the state."

Refugees and asylum-seekers are temporary residents whose right to health is not clearly protected by the Refugees Act as discussed above. The chapter works under the presupposition that both refugees and asylum-seekers should receive the same basic healthcare services that are constitutionally accorded to everyone. Legislatively, their access to healthcare services is elusive.

¹¹⁷⁴ Joint ALP / TAC Submission on Refugee Amendment Bill at 2, 11 and MSF "No Refugee Access Denied: Medical and Humanitarian Needs of Zimbabweans in South Africa" (06/2009) 10.

¹¹⁷⁵ National Health Insurance in South Africa: Policy Paper, GN 34523 of 12-08-2011, paras 1, 2, 55.

¹¹⁷⁶ Para 64.

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The NHI policy suggests an alternative mechanism through which its coverage can be extended to include those in the greatest need who have great difficulty in obtaining care.¹¹⁷⁷ It provides that the population with the greatest need should be identified in line with and on the basis of objective criteria, laid down by the NHI policy.¹¹⁷⁸ Within this framework, the policy could be extended through the suggested national refugee health policy to provide refugees and asylum-seekers with access to quality healthcare services. Failure to do that would result in the deprivation of equal access to quality healthcare services. That would be irrational and unfair, and jeopardise the rights of refugees and asylum-seekers.

Given that this chapter deals with the constitutionality of the exclusion of refugees and asylum-seekers from the provision of free healthcare services, it is crucial to consider foreign and international practices as required by section 39(1)(b)-(c) of the South African Constitution. The chapter turns to explore the manner in which refugees and asylum-seekers are treated by foreign countries with respect to the right to healthcare.

5 4 2 France

France expressed its desire to protect human rights in 1789 through the Declaration of the Rights of Man and of the Citizen. However, there was a problem with the enforceability of human rights under the 1958 Constitution, but a decision of the Constitutional Council held that the 1789 Declaration, as well as the preamble to the 1946 Constitution had been incorporated into the 1958 Constitution, and that the rights contained in these documents are accordingly legally enforceable.¹¹⁷⁹ These rights are founded on the principles of liberty (or freedom) and equality which, in turn, inform the parameters for constitutional review of any law or policy and for guarding against the invasion of human rights norms recognised under French jurisdiction.¹¹⁸⁰

¹¹⁷⁷ Para 65.

¹¹⁷⁸ Para 65.

¹¹⁷⁹ X Phillippe “The Place and Recognition of Socio-economic Rights in France” (1998) 2 *Law, Democracy & Development* 169, 169.

¹¹⁸⁰ According to the Constitutional Council, the constitutional review of statutes cannot be based on compliance with international agreements but solely on the basis of demands set out in the French Constitution. However, the fundamental rights and freedoms guaranteed by the French Constitution “must be reconciled with the constitutional objective of preserving public order, including individual freedom and suretyship, in particular... the right to lead a normal family life... [and] the right to welfare protection” . See Decision 93-325 DC of 13 August 1993, paras 2 & 3.

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Individual freedom is conceived in terms of the concept of liberty which is defined by the 1789 Declaration as follows:¹¹⁸¹

“Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.”

The legislature therefore bears a duty to regulate the conditions of entry and stay for refugees and to reconcile these conditions with the constitutional objective of the preservation of public order, the protection of individual freedom and the right to a normal family life.¹¹⁸² In France, all fundamental rights, including the right to asylum, are thought to derive from the concepts of liberty and human dignity.¹¹⁸³ Like most countries, France provides for refugee rights through national asylum law, incorporating the Geneva Refugee Convention in conformance with the French Constitution.

The right to health is provided in terms of recitals 10 and 11 of the Preamble of the 1946 French Constitution, to which the Preamble of the current Constitution refers. The said Paragraphs state that:

“The Nation shall provide the individual and the family with the conditions necessary to their development. It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society.”

The right to healthcare is given effect to by the Code of Public Health (or *le Code de la Santé Publique*). Its article L1110-1 vests the right to health and equal access

¹¹⁸¹ Art 4 of Declaration of Human and Civil Rights, 26 August 1789.

¹¹⁸² Decision 97-389 of 22 April 1997, para 36.

¹¹⁸³ A constitutional right to asylum was initially recognised by article of the 1783 Constitution and was later guaranteed by Paragraph 4 of the 1946 Constitution to which the 1958 Constitution refers. It states that “[a]nyone persecuted because of his action for freedom has a right of asylum in the territories of the Republic.” See H Lambert, F Messineo & P Tiedemann “Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?” (2003) 27 *Refugee Survey Quarterly* 16, 17.

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to it, in everyone.¹¹⁸⁴ As noted, the term “everyone” cannot always be taken to mean every human being in the logical sense of the word.

France’s equal access must be understood in the continental context. In the EU, the protection of refugee rights and freedoms is a matter of common interest.¹¹⁸⁵ This implies that refugee matters must be dealt with in compliance with the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (“the 1950 European Convention”) and the Geneva Refugee Convention as evinced by Article K.2 of the 1992 Maastricht Treaty on EU.¹¹⁸⁶ Like the Geneva Refugee Convention, these two conventions have no specific provision concerning the right to healthcare. Rather, the right to healthcare is, under the 1950 European Convention, understood to be implied in the right to respect for private and family life,¹¹⁸⁷ given that the scope of such right includes considerations for an individual’s health, including physical and moral integrity.¹¹⁸⁸ It is also understood as one of the components of the right to life¹¹⁸⁹ and of freedom from torture.¹¹⁹⁰ Nonetheless, the right to healthcare is entrenched in the 1961 European Social Charter¹¹⁹¹ and the 1996 Revised European Social Charter.¹¹⁹²

The 1997 Amsterdam Treaty, which consolidates the 1992 Maastricht Treaty, gives the power to the Council of the European Union to determine the standards of treatment of refugees, including minimum standards of reception of asylum-seekers, in member states.¹¹⁹³ The minimum standards are set out under the 2003 Dublin II Regulations¹¹⁹⁴ and other various Directives such as Dublin Transfer,¹¹⁹⁵ Reception

¹¹⁸⁴ It states that: “*Le droit fondamental à la protection de la santé doit être mis en oeuvre par tous moyens disponibles au bénéfice de toute personne. Les professionnels, les établissements et réseaux de santé, les organismes d’assurance maladie ou tous autres organismes participant à la prévention et aux soins, et les autorités sanitaires contribuent, avec les usagers, à développer la prévention, garantir l’égal accès de chaque personne aux soins nécessités par son état de santé et assurer la continuité des soins et la meilleure sécurité sanitaire possible.*”

¹¹⁸⁵ Art K.1(1) of the 1992 Maastricht Treaty on European Union, February 7, 1992, O.J. (C191) (1992), 31 I.L.M. 247 (1992).

¹¹⁸⁶ February 7, 1992, O.J. (C191) (1992), 31 I.L.M. 247 (1992).

¹¹⁸⁷ Art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 1.

¹¹⁸⁸ UNHCR *UNHCR Handbook for the Protection of Women and Girl* (2008) 88.

¹¹⁸⁹ Art 2.

¹¹⁹⁰ Art 3.

¹¹⁹¹ 18 October 1963, E.T.S 35.

¹¹⁹² 03 May 1996, E.T.S 163. The two conventions co-exist with each other as some states have signed but not ratified the revised convention.

¹¹⁹³ Art 63 of the Treaty of Amsterdam, October 2, 1997, O.J. (C340) (1997).

¹¹⁹⁴ Council Regulation (EC) No 343/2003 of 18 February 2003, known as “Dublin II Regulations.”

¹¹⁹⁵ CJEU, C-648/11, 2013 MA, BJ and DA.

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Conditions Directives,¹¹⁹⁶ Asylum Procedure Directive,¹¹⁹⁷ Qualification Directive¹¹⁹⁸ and Return Directive,¹¹⁹⁹ wherein health matters became integral to the minimum standards of treatment. Added to these directives are guidelines on the reception of asylum-seekers, suggested by the Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants. Its fifth guiding principle states that:

“Asylum seekers should be provided with all necessary support covering the basic necessities of life, such as accommodation, health care, food and clothing. The basic needs provided should reflect the situation in the host state.”¹²⁰⁰

Working towards establishing a responsibility to protect refugees and asylum-seekers on a favourable basis, France first adopted the 1952 Immigration and Asylum Code,¹²⁰¹ as amended and the 1998 Code of the Entry and Stay of Foreigners and Asylum Law.¹²⁰² Under the latter regime, the right to healthcare is accorded to non-citizens in accordance with their legal statuses and having regard to terms and conditions attached to those legal statuses.¹²⁰³

5 4 2 1 *Asylum-seekers*

France’s asylum system is constructed on the basis of two different asylum processes, namely the regular asylum process and the priority asylum process.¹²⁰⁴ The regular asylum process is applicable to those asylum-seekers who entered France legally and whose documents allow them to stay in France, whereas the

¹¹⁹⁶ Council Directive 2013/33/EU of 26 June 2013 laying down standards of reception of applicants for international protection (recast).

¹¹⁹⁷ Asylum Procedure Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

¹¹⁹⁸ Qualification Directive 2011/95/EU of European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

¹¹⁹⁹ Return Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

¹²⁰⁰ Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants “Guidelines on the reception of asylum seekers for National Red Cross and Red Crescent Societies” November 2001 31.

¹²⁰¹ J.O., 27 July 1952, 7642.

¹²⁰² Act 98-349 of 11 May 1998, J.O., 12 May 1998, 7087.

¹²⁰³ The Act regulated the conditions and terms of stay of all refugees. See Lambert, Messineo & Tiedemann 2003) *Refugee Survey Quarterly* 19-20.

¹²⁰⁴ C Salinas “Refugee Contribution to Europe: A Feasibility Study on the Establishment of a Fund for Refugee Employment and Education (FREE) in the European Union” (2002) *FREE* 1, 8-12.

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priority asylum process is applicable to proscribed asylum-seekers, especially those persons without proper documentation.¹²⁰⁵ Proscribed asylum-seekers further include persons detected in proximity to the border and detained, asylum-seekers whose applications were rejected as fraudulent or abusive, asylum-seekers who are nationals of countries classified as safe countries and asylum-seekers classified as threats to national security.¹²⁰⁶

In general, during the consideration of an application for asylum, asylum-seekers are entitled to enjoyment of the right to healthcare, which is an element of the social benefits scheme.¹²⁰⁷ They have access to three healthcare systems:

- Medical attention is afforded to every human being living in France, either with or without means of support and regardless of their socio-economic status and their legal status or nationality. From this perspective, undocumented asylum-seekers are eligible to receive free emergency medical treatment in a French hospital. In a case of emergency, they can access hospitals that have facilities, known as permanent health care access points or, in French, *Permanences d'Accès Aux Soins de Santé* (PASS).¹²⁰⁸ Medical attention includes psychological care and counselling.¹²⁰⁹ As concerns the health of new arriving asylum-seekers, it is noteworthy that upon entering France, they are subject to medical screening to determine if they have any illness. Detected illnesses are immediately and appropriately attended to.
- Once in possession of asylum documentation (which serves as an acknowledgment of an intention to apply for asylum), an asylum-seeker may be entitled to the Universal Health Cover (*couverture maladie universelle* or CMU).¹²¹⁰ Entitlement is dependent on proof of physical address and level of income. The CMU can be accessed from the date of expressing an intention to apply for asylum and has a wide medical coverage in that it covers a CMU

¹²⁰⁵ 8-10.

¹²⁰⁶ 8.

¹²⁰⁷ Social benefits scheme include access to the right to adequate housing, social assistance, and healthcare. See Forum Réfugiés "The Asylum Seekers Welcome Book: Refugees Must be Protected" October 2009 at 23.

¹²⁰⁸ Guide for Asylum-seekers 2011 at 24. See too UNHCR, *Guide for Asylum-seekers 2005* (2005) 20.

¹²⁰⁹ UNHCR Reception Standards for Asylum Seekers in the European Union of 2000 at 80.

¹²¹⁰ Forum Réfugiés *The Asylum Seekers Welcome Book* 26.

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holder and his or her dependants.¹²¹¹ The CMU covers both short and long term illnesses.¹²¹²

- As from 2000, on the same par as other illegal foreigners, proscribed asylum-seekers, who have been in France for at least three months and whose asylum requests are examined through priority asylum processes, are eligible for the state-funded medical assistance, known as *aide médicale de l'état* ("AME").¹²¹³ The AME enables its holder to have access to clinics, hospitals and pharmacies.¹²¹⁴

5 4 2 2 *Recognised refugees*

Like asylum-seekers, refugees are afforded different forms of favourable treatment, which are provided in accordance with the type of their legal status. There are three types of recognised refugees, namely, conventional refugees,¹²¹⁵ constitutional refugees¹²¹⁶ and UNHCR refugees.¹²¹⁷ There are two other groups that are classified as if they are refugees, namely subsidiary refugees¹²¹⁸ and stateless persons.¹²¹⁹ The asylum law creates different levels of protection that are afforded to them. The major difference is based on their legal positions and content of protection. First, both conventional and constitutional refugees are granted a ten-year residence permit, automatically renewable, whereas beneficiaries of subsidiary protection are granted a temporary one-year residence permit, renewable on the basis of meeting conditions on which it was initially granted. Second, in the case of conventional asylum, an individual is mainly granted a permanent right of residence, whereas in the case of constitutional asylum, an individual is granted protection

¹²¹¹ 26.

¹²¹² 26.

¹²¹³ 27.

¹²¹⁴ 27.

¹²¹⁵ Conventional refugees are those asylum-seekers who were recognised as refugees in line with requirements laid down by the Geneva Refugee Convention.

¹²¹⁶ Constitutional refugees are recognised as refugees on the basis of the constitutional right to asylum, protecting any person who was persecuted because of his or her action in favour of freedom.

¹²¹⁷ UNHCR refugees are asylum-seekers who are recognised as refugees by the UNHCR on the basis of arts 7 and 8 of its statute.

¹²¹⁸ Subsidiary refugees are offered subsidiary protection if they have established that, even though they do meet the conditions of refugee status, they would be exposed to serious abuse, such as the death penalty, torture, or generalised violence.

¹²¹⁹ Stateless persons are recognised not on the basis of persecution risks, but on the basis of an absence of citizenship. This is a situation where no other states consider them as their nationals in accordance with their national laws.

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against *refoulement* or deportation.¹²²⁰ This implies that conventional asylum is subject to cessation and exclusion clauses, whereas constitutional asylum is not subject to such clauses.¹²²¹

Despite different levels of protection, all recognised refugees are entitled to a similar range of socio-economic rights, including full access to the national healthcare system. Normally, they remain beneficiaries of all healthcare services to which they had access prior to being recognised as refugees, and they ultimately receive all healthcare services in the same way citizens do.¹²²² In this way, employed refugees would further benefit from local health insurance, known as *caisse primaire d'assurance maladie* (CPAM).¹²²³

5 4 3 US

Socio-economic rights are not recognised by the US Constitution and it has been acknowledged by the SCUS that neither the right to healthcare nor the right to health is entrenched in the US Constitution.¹²²⁴ Moreover, the international legal obligation to respect, protect and fulfil the right to health in terms of the ICESCR does not bind the US given that the US did not ratify the ICESCR. Nonetheless, the US is a state party to the 1946 WHO Constitution, which, in its preamble, recognises that:

“The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”

The US has also ratified the ICERD which recognises and guarantees the right to health.¹²²⁵ The ICERD obligates States Parties to take actions aimed at prohibiting and eliminating:

“[R]acial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law,

¹²²⁰ Lambert, Messine & Tiedemann (2003) *Refugee Survey Quarterly* 18-19.

¹²²¹ 18-19.

¹²²² Hathaway *The Rights of Refugees* 510.

¹²²³ Guide for Asylum-seekers 2013 at 30.

¹²²⁴ In *Shapiro v. Thompson* 394 US 618 (1969), the court held that the proponents of the right to health could rely on economic discrimination under the Fourteenth Amendment to demand the government to provide and protect welfare benefits (at 389).

¹²²⁵ Art 5.

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notably in the enjoyment of ... [e]conomic, social and cultural rights, in particular ... [t]he right to public health, medical care, social security and social services.”¹²²⁶

In order to give life to the right to healthcare, the US adopted a number of healthcare programs such as Medicare, Medicaid, Tricare, and the Children’s Health Insurance that create and define specific legislative rights to healthcare and obligate the state to provide healthcare services to vulnerable, medically-needy individuals. These programmes were created under the 1965 Social Security Amendments.

Medicare is a federal health insurance program that covers persons aged 65 and older, younger people with disabilities and persons living with end-stage renal disease, whereas Medicaid “is a needs-based program that provides low-income persons with broad coverage for medical services.”¹²²⁷ Tricare is a federal healthcare insurance that covers military personnel, retirees, and their dependants.¹²²⁸ Lastly, the State Children’s Health Insurance Program was enacted in 1993 to provide health insurance to families with children whose income exceeds the threshold requirement to qualify for Medicaid program.¹²²⁹ In 2010, the state adopted the Affordable Care Act,¹²³⁰ popularly known as “Obama Healthcare”, which was meant to reform the healthcare system by addressing inequities in the provision of healthcare services.¹²³¹ These inequities are alleviated by enabling the previously uninsured in every age, income group and state to afford health insurance and by expanding the Medicaid program.¹²³²

On the other hand, favourable access to the healthcare services is guaranteed by the Refugee Act 1980. The Act establishes that the right to healthcare has to be offered to refugees free of charge. It is silent on the question whether the refugee healthcare right covers asylum-seekers. The right to healthcare, as recognised and

¹²²⁶ Art 5(e)(iv).

¹²²⁷ K S Swendiman “Health Care: Constitutional Rights and Legislative Powers” (2012) *Congressional Research Service* 1, 10 (see footnotes 67 and 68). See too W J Cohen & R M Ball “Social Security Amendments of 1965: Summary and Legislative History” (1965) *Bulletin* 3, 3; and M Maruthappu, R Olugunde & A Gunarajisingam “Is Health Care a Right? Health Reforms in the USA and their Impact Upon the Concept of Care” (2013) 2 *Annals of Medicine and Surgery* 15, 15.

¹²²⁸ Maruthappu, Olugunde & Gunarajisingam (2013) *Annals of Medicine and Surgery* 15.

¹²²⁹ Swendiman (2012) *Congressional Research Service* 10 defines it as “a federal matching block grant program that provides health care services for certain uninsured children without access to Medicaid” (see footnote 69).

¹²³⁰ P.L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, P.L. 111-152.

¹²³¹ Maruthappu, Olugunde & Gunarajisingam (2013) *Annals of Medicine and Surgery* 15.

¹²³² 15. See too Swendiman (2012) *Congressional Research Service* 11.

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guaranteed by the Refugee Act, includes medical screening before integration into the American community.¹²³³ The costs of healthcare services are funded by the federal government through the ORR.

5 4 3 1 *Asylum-seekers*

The main purpose of the US's asylum law is to offer international protection by offering resettlement opportunities. From a resettlement oriented policy perspective, the US's asylum law does not create favourable mechanisms for the protection of asylum-seekers. In order to understand the legal deficiency in the protection of asylum-seekers, it is crucial to define the concept "resettlement". There is no clear definition of the concept; however, it is described as "the transfer of refugees from [the first country of asylum] in which they have sought refuge to [a third country] that has agreed to admit them."¹²³⁴ In this context, refugees are usually granted asylum or long-term residence as well as long-term resident rights and in many cases would be afforded the opportunity to become naturalised citizens.¹²³⁵ Resettlement is listed as one of three durable solutions to refugee problems and the most effective tool for the international protection of refugees.¹²³⁶

The Refugee Act is designed to protect refugees to whom the US grants asylum through resettlement programs or to whom the US grants protection whilst they are still in the first country of asylum. A serious humanitarian concern is a determinant factor for receiving the US's protection. Individuals who are resettled in the US are given an opportunity to work as soon as possible in order to become self-sufficient. For that reason, there is no explicit provision for the right to have access to healthcare services that applies with respect to those individuals who directly enter into the US to seek asylum. In principle, requests for asylum made by asylum-seekers who entered into US in contravention of immigration law are considered while detained, whereas those asylum-seekers, who enter into the US by a way of a visa, must support themselves pending the asylum application procedure.¹²³⁷

¹²³³ S 412 of the Refugee Act of 1980.

¹²³⁴ Jastram & Achiron *Refugee Protection* 132.

¹²³⁵ 132.

¹²³⁶ 132.

¹²³⁷ Asylum-seekers are mostly dependent on their social network, including "family members, friends, fellow refugees, charities, and other organizations – for support." See Human Rights Watch *At Least Let Them Work* 24.

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As vulnerable migrants, indigent asylum-seekers may be entitled to emergency medical treatment¹²³⁸ and other essential health services such as immunisation¹²³⁹ and trauma (or crisis) counselling¹²⁴⁰ in accordance with United States Code Title 8, dealing with issues related to foreigners and nationality. It seems that there is a need to regulate the manner in which asylum-seekers should be protected in the areas of healthcare. It is also apparent that asylum-seekers are not afforded favourable treatment; rather they receive the same treatment afforded to all vulnerable non-citizens.

5 4 3 2 Recognised refugees

As alluded to earlier, most of the refugees in the US are from first countries of asylum.¹²⁴¹ Before resettling them into the US, they are subject to medical screening. Through medical screening, refugees with medical conditions that may affect the public health and require treatment are identified and recorded. Medical records are sent to the local health establishment of the community in which a screened refugee would be integrated or resettled. Such refugee must be monitored to insure that he or she “receive[s] appropriate and timely treatment.”¹²⁴²

The Refugee Act does not only recognise the right to healthcare as a core refugee right, but also as integral to refugees’ ability to become self-sufficient. For that reason, it obligates the US’s federal government – through the ORR – to make grants to, and to enter into contracts with, public and private non-profit organisations for projects designed to improve the quality of life of refugees through empowerment.¹²⁴³ Empowerment is based on specific needs, which are necessary for the realisation of self-reliance and economic independency. Specific needs include physical and mental health services, social services, educational services

¹²³⁸ In accordance with United States Code Title 8: Aliens and Nationality: S 1611(b)(1)(A).

¹²³⁹ S 1611(b)(1)(C).

¹²⁴⁰ S 1611(b)(1)(D).

¹²⁴¹ Where local integration is not a viable option and where the conditions in their home country remain intolerable for refugees to return, the only viable solution is to resettle them in a third country. In principle, resettlement is considered when it transpires that a refugee is “at risk in the county of first asylum or there is no other durable solution to [his or her] plight”. See, Jastram & Achiron *Refugee Protection* 78, 91.

¹²⁴² S 412 of the Refugee Act of 1980.

¹²⁴³ S 412.

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and other special services.¹²⁴⁴ Empowerment for social progress is constructed in line with the right to health which is conceived in terms of health determinants.

Certain refugees do not qualify for free healthcare services offered under the State Social Assistance Plan (“SSAP”). The refugees who do not qualify for assistance under the SSAP are entitled to medical assistance for a one year period after entry into the US.¹²⁴⁵ On the other hand, refugee children are entitled to the right to healthcare. They are entitled to a range of welfare services, provided “during the thirty-six month period beginning with the first month in which such refugee child is in the [US].”¹²⁴⁶ Welfare services encompass a foster care maintenance grant and healthcare services.¹²⁴⁷ Only unaccompanied child refugees are beneficiaries of the above-mentioned services until they attain the age of 18. They are specifically entitled to the child’s immediate, appropriate care.¹²⁴⁸ Contextually analysed, refugees are accorded free healthcare services for a one-year period whereas refugee children who are in the care of their primary caregivers enjoy free healthcare services for a three-year period. Upon elapsing of these periods, it is presumed that refugees have become self-reliant and thus capable of affording healthcare services. Fundamentally, the US healthcare system is a healthcare insurance based system whose coverage occurs either in the form of private- or employer-based health cover.¹²⁴⁹ In that case, if they are employed, refugees would have access to healthcare services through their healthcare insurance.

5 5 Case law: Judicial review

5 5 1 EU

The ECtHR and the European Committee on Social Rights are charged with giving meaning, content and scope to the rights contained in the 1950 European Convention whereas the Committee on Economic, Social and Cultural Rights and the Human Rights Committee can consider complaints in relation to the violation of international human rights law. As will be demonstrated, their work has touched on the determination or consideration of the extent to which the socio-economic rights of refugees and asylum seekers must be protected. Whilst the ECtHR has held that the

¹²⁴⁴ S 412.

¹²⁴⁵ S 412.

¹²⁴⁶ S 412.

¹²⁴⁷ S 412.

¹²⁴⁸ S 412.

¹²⁴⁹ Maruthappu, Olugunde & Gunarajisingam (2013) *Annals of Medicine and Surgery* 15.

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1950 European Convention does not guarantee the socio-economic rights of European citizens, it interpreted article 3 of the 1950 European Convention, which guarantees the right not to be subjected to torture or to inhuman or degrading treatment or punishment, to imply a certain level of protection for refugees and asylum-seekers against the denial of socio-economic rights.

With regards to European citizens, the ECtHR, in the case of *Pančenko v. Latvia*,¹²⁵⁰ reluctantly reasoned that:

“The [European] Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a state to maintain a certain level of living.”

Furthermore, the ECtHR, in the case of *Bensaid v. the United Kingdom*,¹²⁵¹ held that the right to freedom from torture or inhumane treatment and the right to respect for one’s private life cannot be invoked for the protection of the right to have access to any particular standard of healthcare service or medical service or medical treatment.¹²⁵²

However, the ECtHR had different – if not contradictory – views with regard to the question whether or not the 1950 European Convention could be invoked to protect refugees and asylum-seekers against social vulnerabilities. The ECtHR reasoned that it will be contrary to the 1950 European Convention if refugees or asylum-seekers are denied the right to have access to essential aspects of the right to health such as sanitation, adequate water and food. In *M.S.S v Belgium and Greece*,¹²⁵³ the ECtHR stated that there is a duty on the state to provide basic accommodation and decent material conditions to indigent, unemployed asylum-seekers and that such obligation derives from the 1950 European Convention, read in conjunction with the EU directives,¹²⁵⁴ more particularly, the EU Reception Conditions Directive.¹²⁵⁵ A severe deprivation of the right to have access to adequate socio-economic rights would amount to a violation of the obligation under article 3 of the 1950 European

¹²⁵⁰ Decision of 28 October 1999, Application No. 40772/98.

¹²⁵¹ No. 44599/98, 6 February 2001.

¹²⁵² *Bensaid v. the United Kingdom* paras 32-41, 46-49.

¹²⁵³ Decision of 21 January 2011, Application no. 30696/09.

¹²⁵⁴ Para 250.

¹²⁵⁵ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] O.J. L.31/18.

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Convention. This view was confirmed in the case of *Budina v Russia*.¹²⁵⁶ The same view is reflected in a British judgment dealing with the socio-economic rights of asylum-seekers. The House of Lords – drawing on the ECtHR judgments – opined that the withdrawal of all forms of social support, together with the denial of the right to be self-reliant, would amount to a breach of the obligation under article 3 of the 1950 European Convention. Such deprivation would render an asylum-seeker to face “an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life...”¹²⁵⁷ Like South African courts, the ECtHR understood asylum-seekers as a particularly vulnerable group whose socio-economic situation demands positive measures for the protection of their dignity.¹²⁵⁸

Every asylum-seeker therefore has the right to claim a minimum standard of subsistence.¹²⁵⁹ Put succinctly, both refugees and asylum-seekers enjoy the right to claim socio-economic rights and benefits from a host state to maintain a certain level of dignified living. More fundamentally, the refusal or withdrawal of aspects of socio-economic rights, such as healthcare, would give rise to a violation of article 3 of the European Convention. The right to healthcare can be understood to be implied in article 3 of the 1950 European Convention, which protects an individual from torture or suffering inhuman or degrading treatment. For example, the Committee on Economic, Social and Cultural Rights, commenting on Germany’s and the Russian Federation’s reports on socio-economic rights, was deeply concerned with asylum-seekers’ inability to have access to adequate healthcare and social security.¹²⁶⁰ It expressed the view that asylum-seekers are entitled to equal treatment in access to healthcare, employment and social assistance.¹²⁶¹ In addition, the Human Rights Committee, in the 2011 Concluding Observations for Slovenia, observed that

¹²⁵⁶ Decision of 18 June 2009, Application No. 45603/05.

¹²⁵⁷ *R (Limbuella, Tesema & Adam) v Secretary of State for the Home Department* [2006] QB 1440, 1441.

¹²⁵⁸ *M.S.S. v Belgium and Greece* para 251 and *Orsus v Croatia*, Decision of 16 March 2010, Application No. 15766/03, para 147.

¹²⁵⁹ *M.S.S. v Belgium and Greece*, concurring judgment of Roazakis J.

¹²⁶⁰ Concluding Observations, ICESCR, Germany, UN Doc. E/C.12/DEU/CO/5 at para 13 (20 May 2011) and Concluding Observations, ICESCR, Russian Federation, UN Doc. E/C.12/RUS/CO/5 at para 21 (20 May 2011).

¹²⁶¹ Concluding Observations, ICESCR, Germany, UN Doc. E/C.12/DEU/CO/5 at para 13 (20 May 2011) and Concluding Observations, ICESCR, Russian Federation, UN Doc. E/C.12/RUS/CO/5 at para 21 (20 May 2011).

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recognised refugees must be afforded equal opportunities to access to healthcare services, housing, employment, and education.¹²⁶²

In sum, the ECtHR affirms that there is an obligation flowing from article 3 of the 1950 European Convention on the host state to provide asylum-seekers and refugees with free healthcare services. However, there is no such duty imposed on the host state to offer free medical treatment to foreigners without a right to stay within its jurisdiction. This includes cases of asylum-seekers whose application for asylum was rejected, after taking all circumstances into consideration. In the case of *N. v. the United Kingdom*,¹²⁶³ the applicant was a Ugandan asylum-seeker who was admitted to hospital days after she arrived in the UK as she was seriously ill and suffering from AIDS-related illnesses. She received free medical treatment for nine years. She was subjected to deportation when her application for asylum was, after exhaustion of domestic remedies, unsuccessful. She lodged her complaint to the ECtHR on the ground that she would be subjected to inhuman or degrading treatment if made to return home because she would not be able to get the necessary medical treatment in her home country, Uganda. The ECtHR held that the 1950 European Convention did not place an obligation on state parties to provide free and unlimited healthcare services to all foreign nationals without a right to stay within their jurisdiction. Accordingly, there was no duty imposed on the UK to continue to provide for the applicant. Her deportation to Uganda would not give rise to a violation of article 3. Similar decisions were reached in *Bensaid v. the United Kingdom*¹²⁶⁴ and *Yoh-Ekale Mwanje v. Belgium*.¹²⁶⁵ Article 3 of the 1950 European Convention is equivalent to section 12(1)(e) of the South African Constitution, which states that “[e]veryone has freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.” It is likely that the denial of free healthcare to refugees and asylum-seekers would amount to an affront to the right to freedom and security of the person, in addition to the right of access to healthcare.

¹²⁶² Concluding Observations, ICCPR, Slovakia, UN Doc. CCPR/C/SVK/CO/3, para 9 (20 April 2011).

¹²⁶³ (No. 26565/05) 27 May 2008 (Grand Chamber).

¹²⁶⁴ The ECtHR held that the expulsion of a schizophrenic would not constitute a violation of either Article 3 or Article 8 of the European Convention, despite the alleged risk of deterioration due to a lack of adequate care in the country of destination.

¹²⁶⁵ Judgment of 20 December 2011. The ECtHR held that the deportation of an applicant – who was at an advanced stage of HIV infection – would not amount to a violation of Article 3 of the European Convention.

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5 5 2 France

As noted, the right to healthcare and the right to health differ greatly in their nature and scope. According to the Constitutional Council, the French Constitution provides for the right to health, which is guaranteed under the eleventh recital of the Preamble to the 1946 Constitution to which the Constitution in force refers.¹²⁶⁶ Pursuant to the 1946 Constitution, the state “shall guarantee to all... protection of their health.” This guarantee is interpreted to impose an obligation on parliament, to take community health measures “to protect the health of individuals and societies at large.”¹²⁶⁷ Considering that the separation of powers should be observed at all times, the Constitutional Council held that it is not well-positioned to determine whether health policies are reasonable. Unlike the South African Constitutional Court which has developed the reasonableness test to assess the constitutionality of any socio-economic policy, the Constitutional Council is reluctant to review socio-economic policies on the basis of reasonableness. For instance, on the question whether the Public Health Code was rational in imposing an obligation on parents to have their children vaccinated against contagious diseases such as diphtheria, tetanus and poliomyelitis, the Constitutional Council responded that parliament is at liberty to adopt and define a vaccination policy and to amend it “in order to take account of developments in scientific, medical and epidemiological knowledge.”¹²⁶⁸ It held:¹²⁶⁹

“It is not however for the [Court], which does not have a general appreciation and decision-making power of the same nature as that of Parliament, to call into question the provisions enacted by the legislator, having regard to the state of scientific knowledge, or to attempt to ascertain whether the health protection objective set by legislator could have been achieved by alternative means, as the arrangements adopted by the Law are not manifestly inappropriate for the objective pursued.”

The judgment reflects the traditional reluctance of the Constitutional Council to engage in the review of acts of Parliament to ascertain their rationality on the ground that the question does not fall within its scope of constitutional obligations.

¹²⁶⁶ Decision No 2015-458 QPC of 20 March 2015, para 6.

¹²⁶⁷ Para 10.

¹²⁶⁸ Para 10.

¹²⁶⁹ Para 10.

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Philippe, who analysed the place and recognition of socio-economic rights in France, maintains that judicial constraints on the review of socio-economic policies can be understood from within the historical framework of the French Constitution. From a historical and traditional perspective, the French Constitution is not framed primarily to protect human rights norms and principles.¹²⁷⁰ Rather, it is framed with a view to establishing branches of government and/or organs of the state and allocating constitutional duties and power among them, thereby promoting the public good.¹²⁷¹ It thus gives priority to the doctrine of parliamentary sovereignty.¹²⁷² As a result, the judicial review of acts of parliament (or any challenge thereof) was virtually impossible. This meant that fundamental rights and freedoms could be overruled by legislative policies.¹²⁷³ Socio-economic rights were therefore viewed as general principles of law without substantive value.¹²⁷⁴ However, in 1971, the Constitutional Council reasoned that an act of parliament could be reviewed to determine whether it is consistent with the 1789 Declaration and the Preamble of the 1946 French Constitution. Such review was thus not limited to the grounds of the 1958 French Constitution.¹²⁷⁵ This reasoning had the potential of adding substantive value to socio-economic rights and making them justiciable. Following from the 1971 decision, one can analogously conclude that acts of parliament or administrative acts can also judicially be reviewed on constitutional grounds with reference to principles codified in the Geneva Refugee Convention and international human rights law as given effect by acts of parliament.¹²⁷⁶ Account must especially be given to article 66 of the French Constitution, which states that the court is the guardian of individual freedom. Individual freedom includes freedom from human suffering caused by poverty or illness or both.

¹²⁷⁰ Philippe (1998) *Law, Democracy & Development* 169.

¹²⁷¹ 169.

¹²⁷² 169.

¹²⁷³ This approach is still recognised in numerous judgments. For example, the Constitutional Council acknowledges that it is the duty of Parliament to adopt laws governing the entry and stay of non-citizens "in order to safeguard the constitutional objective of public order". See Decision 97-389 DC of 22 April 1997, para 43

¹²⁷⁴ Philippe (1998) *Law, Democracy & Development* 171.

¹²⁷⁵ CC 44 DC Freedom of Association [1971] Rec 29. See too Philippe (1998) *Law, Democracy & Development* 172.

¹²⁷⁶ Laws and policies are generally reviewed against the French Constitution, and not against international human rights law. However, in cases involving non-citizens, regard must be given to the effect of the principles enshrined by international agreements transposed into the French legal system. See Constitutional Council, Decision 93-325 DC of 13 August 1993, paras 2, 20.

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It is against this backdrop that the Constitutional Council, in 1992, recognised that an asylum-seeker, who is detained in the transit area of the port or airport for his or her departure or for the consideration of his or her asylum application, may seek the assistance of a doctor.¹²⁷⁷ One year later, the court held that the decision of the state to deny a temporary residence card to a minor asylum-seeker (or foreign national) who was deemed to constitute a threat to public order may be inimical to the French Constitution.¹²⁷⁸ The rationale behind this decision is that the temporary residence card is the only means to enable refugees and asylum-seekers to have access to essential socio-economic rights and benefits for achieving a normal family life. The Constitutional Council held that:

“Under the eleventh paragraph of the Preamble to the Constitution of 27 October 1946, confirmed by the Constitution of 4 October 1958, the Nation “shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have the right to receive suitable means of existence from society”. The legislature and the government, each in their respective areas of authority, are to determine how these principles are to be implemented in compliance with the principles set out in the eleventh paragraph of the Preamble”.¹²⁷⁹

In complying with the principles set forth in the eleventh paragraph of the preamble, the French Government has provided non-citizens with a number of social welfare schemes including “medical aid in the case of treatment by a health authority or prescriptions issued in conjunction with this, including for cases of external consultation, home help care on the condition that the parties concerned are lawfully resident in France”.¹²⁸⁰ In the view of the Constitutional Council, the French Government (particularly legislators) is, when adopting laws that apply to non-citizens, obligated to:

“[R]espect the fundamental rights and freedoms secured by the Constitution to all persons residing in the territory of the Republic; these rights and freedoms, which must

¹²⁷⁷ Constitutional Council, Decision 92-307 DC of 25 February 1992.

¹²⁷⁸ Constitutional Council, Decision 93-325 DC of 13 August 1993, paras 17-22.

¹²⁷⁹ Paras 124-125.

¹²⁸⁰ Para 126.

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be reconciled with the constitutional objective of preserving public order, include individual freedom and suretyship, in particular the freedom of personal movement, freedom of marriage and the right to lead a normal family life; aliens also enjoy the right to welfare protection, provided they are lawfully and stably resident in France; they must be able to exercise the rights of redress to enforce their rights and freedoms”.¹²⁸¹

In this view, a normal family life cannot be achieved by those who are sick and who are unable to have access to healthcare services. A failure to recognise the right of refugees and asylum-seekers to have access to the right of healthcare would be an affront to the right to lead a normal family life.

Taking the above into consideration, the court rejected the Senators’ argument that reinstatement of the provision of free access to state medical aid to illegal foreign nationals would breach “the principle of the proper use of public funds as well as the objective of constitutional standing of the fight against fraud and also breaches the principle of equality.”¹²⁸² In the view of the court, the Senators’ argument lacked a factual basis because the provision of free healthcare services to illegal foreign nationals was compatible with the eleventh recital of the preamble of the 1946 French Constitution, read together with Article L. 861-1 of the Social Security Code and article L. 251-2 of the Code of Social Action and Families.¹²⁸³ These statutes impose an obligation on the state to cover the healthcare costs of those illegal individuals “residing in France on a continuous basis for more than three months whose financial means do not exceed the threshold set by [...] the Social Security Code.”¹²⁸⁴

Although the French government is entitled to define the conditions for entry and stay of immigrants and asylum-seekers, it must conform to “international agreements which it has signed and to constitutional principles.”¹²⁸⁵ The principles include “both the right to asylum and individual freedom.”¹²⁸⁶ It can be inferred from this holding that the standards of MFT in respect of the right to healthcare services are implied in the obligations emanating from the need to grant asylum to the oppressed and persecuted and to ensure their individual freedom and their right to a normal family

¹²⁸¹ Para 3.

¹²⁸² Constitutional Council, Decision 2012-654 DC of 9 August 2012, para 64.

¹²⁸³ Paras 68-72.

¹²⁸⁴ Para 69.

¹²⁸⁵ Constitutional Council, Decision 92-307 DC of 25 February 1992, para 8.

¹²⁸⁶ Para 8.

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life. The same inference can also be drawn from the obligation imposed on the state to automatically issue a temporary residence card to a non-citizen who does not pose a threat to public order or whose state of health requires medical attention and treatment, as well as from the obligation to exempt a seriously ill non-citizen from deportation in exceptional humanitarian circumstances where it is impossible for such non-citizen to receive appropriate medical care in his or her country of origin.¹²⁸⁷

5 5 3 US

As noted, the US Constitution is often said to guarantee negative rather than positive rights. It was accepted by the SCUS that there is no specific provision guaranteeing the right to health or the right to have access to healthcare. However, in the case of *Shapiro v Thompson*,¹²⁸⁸ the SCUS opined that the right to healthcare is implied in the theory of economic discrimination entrenched under the Fourteenth Amendment which imposes an obligation on the state to make welfare available.¹²⁸⁹ It has been argued that the constitutional principles of non-discrimination and equal protection, which infuse most of the decisions of the court, are relevant to imposing obligations on the state to provide healthcare in the US.¹²⁹⁰ This view is reflected in the case of *Goldberg v. Kelly*¹²⁹¹ in which the SCUS, applying the doctrines of equal opportunity and due process, held that the basic commitment of the state:¹²⁹²

“has been to foster the dignity and well-being of all persons within its borders. Welfare, by meeting the basic demands of subsistence, can bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community... Public assistance, then is not mere charity, but a means to “promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.”

Although the SCUS, in *Goldberg v. Kelly*, dealt with the termination of welfare benefits, its reasoning based on the doctrine of equal treatment could be applied

¹²⁸⁷ Constitutional Council, Decision 2011-631 DC of 9 June 2011, paras 34-36.

¹²⁸⁸ 394 US 618 (1969).

¹²⁸⁹ At 389.

¹²⁹⁰ A E Yamin “The Right to Health under International Law and its Relevance to the United States” (2005) 95 *American Journal of Public Health* 1156, 1158.

¹²⁹¹ 397 U.S. 254 (1970).

¹²⁹² *Goldberg v. Kelly* 264-65.

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analogously to other socio-economic rights and benefits, such as healthcare benefits. In the health context, too, dignity requires the government to take positive measures that aim, first, at ensuring the right to health and, second, at ensuring access to healthcare services. Only a healthy individual can meaningfully be productive.

The SCUS has, on several occasions, recognised that the doctrines of equal opportunity and due process apply universally to all persons within the US's territorial jurisdiction without regard to nationality or lawful presence.¹²⁹³ It follows that the use of the phrase "all persons within the borders" in *Goldberg v. Kelly* suggests that, for example, the right to social, housing, or healthcare benefits extends to a much wider category of persons than citizens. The objection to confine some right to some to the exclusion of others was clearly underscored in the case of *Memorial Hospital v. Maricopa County*.¹²⁹⁴ In this case the court held that healthcare is as much a basic necessity of life to a poor, vulnerable person as social assistance.¹²⁹⁵ The court stressed that it would be unreasonable to offer social assistance grants to an indigent person but deny such a person access to the healthcare necessary to relieve him or her from illness.¹²⁹⁶ Furthermore, the court acknowledged that the provision of healthcare services to poor, vulnerable people would significantly reduce the financial burden on the state in the form of social assistance grants in the long run – simply because healthy indigent persons are more likely to support themselves.¹²⁹⁷

The asylum system seeks to enable refugees to participate actively in the US economy. Active participation will be possible if refugees are healthy. By analogy, it would be irrational to deny refugees and asylum-seekers the right to healthcare on the basis of the argument that socio-economic rights do not bind the US government. The duty to afford them the right to healthcare flows in part from the US's intent to

¹²⁹³ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Mathews v. Diaz* 426 U.S. 67, 77 (1976). See too D Cole "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?" (2003) 25 *T. Jefferson L. Rev.* 367, 370.

¹²⁹⁴ 415 U.S. 250 (1974).

¹²⁹⁵ 415 U.S. 259. See too *Goldberg v. Kelly*, 397 U.S. 254, 397 U.S. 264 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 395 U.S. 340-342 (1969).

¹²⁹⁶ 415 U.S. 259-260.

¹²⁹⁷ The court stated that the lack of timely medical care could cause a patient's condition to deteriorate to a point where more expensive emergency medical treatment might be required. Untreated conditions may also deteriorate to such an extent that "the patient and his family become a burden on the State's welfare rolls for the duration of his emergency care, or permanently, if his capacity to work is impaired" (415 U.S. 265).

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transpose the Geneva Refugee Convention into domestic law. In the case of *Linton v Tennessee Commissioner of Health and Environment*,¹²⁹⁸ the court observed that once a state has taken steps to design, adopt and implement a policy – such as Medicare or Medicaid – it is the duty of the court to ensure that the implementation is done on the basis of non-discrimination. This duty would afford judicial protection to beneficiaries.

The inference that can be drawn from the above judicial opinions is that the provision of healthcare to poor, vulnerable people, such as refugees and asylum-seekers, is fundamentally important for their wellness and is a precondition for active participation and for regaining happiness, self-confidence, dignity and autonomy. To foster the dignity and well-being of the people is integral to post-apartheid transformative constitutionalism and any commitment to cherish human dignity cannot exclude a vulnerable section of society.

5 5 4 South Africa

As noted above in 5 4 1 1, the exclusion of refugees and asylum-seekers from access to healthcare in South Africa arises inter alia from uncertainty about the ambit of the term “vulnerable groups” as referred to in section 4(2)(d) of the National Health Act. Section 4(2)(d) states that, in prescribing conditions subject to which categories of persons are eligible for free healthcare services, the Minister of Health “must have regard to... the needs of vulnerable groups such as women, children, older persons and persons with disabilities.” It is uncertain from the language of this provision whether parliament intended to include refugee women, refugee children, aged refugees and refugees with disabilities, or whether vulnerable groups are restricted to citizens or to citizens and permanent residents. Regardless of these uncertainties, it would be wrong to conclude that parliament intended to exclude refugees and asylum-seekers from free healthcare services. Section 2 of the National Health Act, which sets forth the purposes of the Act, arguably, supports the view that the Act aims at protecting all vulnerable groups within the territorial jurisdiction of South Africa. Section 2 states that:

“The objects of this Act are to regulate national health and to provide in respect of health services across the nation by: (a) establishing a national health system which (i) ...; (ii)

¹²⁹⁸ 779 F Supp 925 (MD Tenn 1990); affirmed 65 F3d 508 (6th Cir, 1995).

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provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford; (b)...; (c) protecting, respecting and fulfilling the rights of: (i) the people of South Africa to the progressive realisation of the constitutional right of access to healthcare services, including reproductive healthcare services; (ii) the people of South Africa to an environment that is not harmful to their health or well-being; (iii) children to basic nutrition and basic healthcare services contemplated in section 28(1)(c) of the Constitution; and (iv) vulnerable groups such as woman, children, older persons and persons with disabilities”.

In light of this provision, the main purpose of the national healthcare system is to protect all people who live in South Africa. The phrases “the people of South Africa” and “the population of the Republic” must not be interpreted narrowly to refer to citizens only, but must be read widely to include non-citizens. In this context, there is no express provision in the National Health Act that restricts free hospital services to citizens and permanent residents. The only exception is section 61(3) of the National Health Act pertaining to the transplantation of an organ into a person.¹²⁹⁹ With regard to free healthcare services, sections 4(1)-(2) of the National Health Act gives a discretion to the Minister of Health, after consultation with the Minister of Finance, to prescribe conditions subject to which categories of persons – particularly vulnerable people – are eligible for free healthcare at public health establishments. In light of sections 4(1)-(2), the UPFS was established and the NHI policy was proposed. Whilst the UPFS policy primarily restricts free healthcare services to citizens,¹³⁰⁰ the NHI policy expressly restricts insured healthcare services to citizens and permanent residents, when and if it comes into operation.

5 5 4 1 What are vulnerable groups?

This question is important to our analysis of the constitutionality of healthcare policies given that the South African Constitution tasks the state to achieve equality by improving the lives of vulnerable people. Although this is the case, the National Health Act, the Regulations to the National Health Act and the UPFS fail to refer to refugees and asylum-seekers in unequivocal terms as vulnerable groups. They do

¹²⁹⁹ S 61(3) states that “[a]n organ may not be transplanted into a person who is not a South African citizen or a permanent resident of the Republic without the Minister’s authorisation in writing”.

¹³⁰⁰ For example, section 4 of the Regulations to the National Health Act states that “[t]he purpose of these regulations is to guide, monitor and enforce the control of critical risks to the health and safety of users by means of the required systems and relevant supportive structures within different categories of health establishments, in order to provide safe quality services to the citizens”. Emphasis added.

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not take into consideration the holding of the Constitutional Court that refugees and asylum-seekers are “particularly vulnerable members of society with limited resources available to them”¹³⁰¹ and that “their plight calls for compassion”.¹³⁰² The condition of being a refugee is described by the Constitutional Court as “implying a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse”.¹³⁰³ Furthermore, the Constitutional Court equated the granting of asylum to an individual in terms of section 3 of the Refugees Act to formal recognition of his or her vulnerabilities.¹³⁰⁴

At issue is that refugees’ and asylum-seekers’ special vulnerability is not plainly recognised by healthcare laws and policies. Firstly, the fact that refugees and asylum-seekers are not clearly included in the definition of groups of vulnerable people who qualify for free healthcare services under section 4(2)(d) of the National Health Act, creates the impression that refugees and asylum-seekers are not vulnerable. This has the potential of excluding them from having access to free healthcare services. Under sections 2(c)(iv), 4(2)(d), 39(2)(a), 39(2)(d) and 70(1)(d), the term vulnerable group is used to refer to women, children, older persons and persons with disabilities. Within these definitional parameters, refugees and asylum-seekers who are women, children, older persons and persons with disabilities should qualify for free healthcare services. However, male adults would not qualify for free healthcare services even though they are vulnerably indigent. This would be contrary to case law holding that refugees and asylum-seekers – irrespective of their gender and age – are vulnerable socially, economically and politically. On the other hand, the Regulations to the National Health Act define the term vulnerable users of public health establishments widely to encompass “the disabled, mentally disabled, orphans, elderly, reduced mobility, frail, terminally ill, HIV infected, foreigners and refugees”.¹³⁰⁵ However, it is silent on whether these vulnerable groups are entitled to free healthcare services due to their vulnerabilities.

Secondly, parliament has left the power to the Minister and healthcare institutions like hospitals and clinics to adopt policies prescribing fee conditions for healthcare

¹³⁰¹ *Union of Refugee Women* para 24.

¹³⁰² Para 28.

¹³⁰³ Para 29.

¹³⁰⁴ Para 29.

¹³⁰⁵ S 1 of the Regulations to the National Health Act, R 38486, GN R 109 of 18-02-2015.

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services.¹³⁰⁶ The prescribed fee conditions systems resulted in confusion to the extent that they created the impression that asylum-seekers and refugees should be classified under full-paying patients on the basis of their non-citizenship. Under the UPFS policy, vulnerable people fall under fully-subsidised patients and are defined as “pensioners, the unemployed, people with disabilities and individuals who cannot afford public hospital fees”.¹³⁰⁷ Those who cannot afford public hospital fees are determined on the basis of a means test.¹³⁰⁸ In this context, unemployed refugees and asylum-seekers or those who meet the requirements of the means test should be provided with healthcare services free of charge. However, non-citizens who are holders of temporary permits cannot, under the UPFS, be classified as fully subsidised patients. This gives rise to unfair discrimination against refugee patients on the basis of nationality. The discrimination is reinforced by the definition of the term vulnerable group. For instance, due to the imprecise and equivocal definition of the term “vulnerable”, local governments have established guidelines governing the payment of hospital fees at local level, known as “the Patient Classification Manuals.”¹³⁰⁹ Some of these Manuals classify refugees and asylum-seekers as non-citizens who must pay the full hospital fees, resulting in denial of free health care services.¹³¹⁰

The exclusion of refugees and asylum-seekers from free healthcare services is inconsistent with the constitutional right to equality and non-discrimination (section 9 of the South African Constitution) and with the recognition of their special vulnerability in terms of section 3 of the Refugees Act. It is also problematic in view of the right of everyone to have access to healthcare services in terms of section 27(1)(a) of the South African Constitution, read in tandem with section 27(b) and 27A(d) of the Refugees Act. It is contrary to the Constitutional Court’s reasoning in

¹³⁰⁶ Ss 41, 90(1)(b)(i) and 90(1)(v)(ii) of the National Health Act.

¹³⁰⁷ See, for example, the National Health Act (61/2003) Mpumalanga Province’s Amended Hospital Fees Manual in GG 2173 of 27-05-2013 (for general notice) 10.

¹³⁰⁸ 11.

¹³⁰⁹ Joint ALP / TAC Submission on Refugee Amendment Bill at 2,11; IRIN “South Africa Health System Shuns Asylum Seekers” 31 October 2014; Z Venter “Somali Refugee Girl Needs Urgent Operation” 17 July 2014; and Lawyers for Human Rights “Somali Girl to Receive Medical Treatment in SA”.

¹³¹⁰ K Siegfried “South Africa’s Health System Shuns Asylum Seekers” (31-10-2014) <<http://www.irinnews.org/news/2014/10/31>> states that, although refugees and asylum-seekers are entitled to free treatment, Gauteng’s provincial government adopted a set of guidelines for managing non-South African patients that appeared to have sowed confusion among healthcare providers and resulted in refugee patients being denied critical care.

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Khosa that “the constitutional reference to everyone implies that all in need must have access to the [socio-economic scheme] that the state has put in place”.¹³¹¹

The denial of free healthcare services to refugees and asylum-seekers infringes their rights to equality and non-discrimination (section 9), human dignity (section 10), life (section 11), access to healthcare (section 27) and the rights of children (section 28). The failure to secure the right to healthcare also constitutes a breach of the provisions of the Refugees Act which require the state to achieve the realisation of refugees’ access to socio-economic rights, and is inconsistent with the state’s obligations to protect refugees and asylum-seekers on a humanitarian basis and in a humane manner.

5 5 4 2 The limitation clause

It is generally accepted that rights and freedoms are not absolute; hence they may be limited in the interest of the rights of others and important social concerns.¹³¹² Section 36 of the South African Constitution lays down guidelines to determine whether or not the limitation of a right is constitutionally permissible. However, Currie and de Waal contend that where the state’s social welfare programmes fall short of the obligation imposed by constitutional socio-economic rights, the limitation clause is not a viable mechanism to determine the constitutionality of the limitation of the socio-economic right in question.¹³¹³ This is due to the absence of a law of general application. The limitation clause is usually applied where the court finds that a right in the Bill of Rights has been limited. In cases such as this, the two-stage analysis to constitutional rights applies:

“It will first have to be determined whether that right has in fact been infringed. The second stage commences once it has been shown that a right has been infringed. The respondent (usually the state) is required to show that the infringement is a justifiable limitation of the right. This entails showing that the criteria set out in s 36 are satisfied: the right has been limited by law of general application for reasons that can be considered

¹³¹¹ *Khosa* para 111. Ngcobo J stressed that “the word everyone is a term of general import and unrestricted meaning. It means what it conveys. Once the State puts in place a social welfare system, everyone has a right to have access to that system”.

¹³¹² Currie & de Waal *Bill of Rights* 163. Important social concerns include but are not limited to public order, national security, economic development and democratic values.

¹³¹³ 594.

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reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”¹³¹⁴

In our case, there is no law of general application limiting the right of refugees and asylum-seekers to the right to have access to healthcare services. Rather the violation of rights derives from a failure to develop a comprehensive and workable policy to address the health problems of refugees and asylum-seekers through a harmonisation of the Refugees Act with healthcare policies at provincial and local levels. If there is no law of general application, the adoption of provincial, municipal or hospital policies which exclude refugees and asylum-seekers from free healthcare services cannot be justified in terms of the limitation clause.

In cases like this, the justifications tendered by the state for apparent restrictions of the right of access to healthcare must be considered under the Court’s section 27(2) analysis. In the absence of a law of general application, the state will not have a second opportunity to try to justify its failure to give effect to the right, this time under section 36. There is also a second reason why section 36 may not be particularly helpful in cases dealing with the state’s positive obligation to give effect to the right of access to healthcare, even where a law of general application can be found. It seems unlikely that a court will find that the state has failed to take reasonable measures to give effect to the right, but that its actions are nevertheless reasonable and justifiable in terms of section 36. Woolman and Botha argue that, despite the Constitutional Court’s attempt in *Khosa* to come to terms with the applicability of section 36 in cases involving limitations of socio-economic rights,¹³¹⁵ the judgments in this case fail to demonstrate that section 36 can play a meaningful role in cases involving breaches of the state’s positive obligations under sections 26 and 27 of the Constitution.¹³¹⁶

5 5 4 3 The impact of the limitation on the right to equality

The South African Constitution does not confine the right to have access to healthcare services only to citizens and permanent residents. According to Mokgoro J in *Khosa*, the Bill of Rights guarantees the rights of all individuals within South

¹³¹⁴ 561.

¹³¹⁵ *Khosa* paras 80, 83-84.

¹³¹⁶ Woolman & Botha “Limitations” in *Constitutional Law of South Africa* 2 ed (2013) 34:36-37.

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Africa's borders and, in the absence of a restriction of the right to citizens as in some other provisions in the Bill of Rights, the word everyone in section 27(1) "cannot be construed as referring to citizens".¹³¹⁷ Moreover, the right of access to healthcare must be read together with the right not to be unfairly discriminated against.¹³¹⁸ The exclusion of refugees and asylum-seekers from free healthcare benefits may be inconsistent with section 9(3), in addition to section 27 of the South African Constitution. Finally, the reference in the Refugees Act to the rights in the Bill of Rights is an illustration of the intention of Parliament to afford refugees and asylum-seekers equal access to socio-economic rights.

Even though it is essential to differentiate between people and groups of people for the allocation of rights, duties, immunities, privileges, benefits and advantages, such differentiation must meet the requirements of section 9 to be constitutional. First, in terms of section 9(1) of the South African Constitution, it must be rationally connected with "the legitimate government purpose it is designed to achieve".¹³¹⁹ Secondly, it must not constitute unfair discrimination in terms of section 9(3). And thirdly, any limitation of section 9(1) or 9(3) must be reasonable and justifiable in terms of section 36.

Despite the existence of a rational connection between the differentiation and a legitimate state purpose, differentiation may still amount to unfair discrimination. Although citizenship (or nationality) and refugee (or asylum-seeker) status are not among the grounds listed in section 9(3), and therefore do not trigger the presumption of unfairness in section 9(5), they are analogous to the listed grounds. This is because differentiation based on these grounds has "an adverse effect on the dignity of the individual, or some other comparable effects".¹³²⁰ The Constitutional Court has held that the exclusion of non-citizens, who are permanently resident in South Africa, from employment or social assistance amounts to a violation of section 9(3), as it affects their dignity in a fundamental way.¹³²¹

The same reasoning could be applied to the exclusion of refugees and asylum-seekers from access to free healthcare. Here, the differentiation between different

¹³¹⁷ *Khosa* para 47.

¹³¹⁸ *Grootboom* para 23 (all fundamental rights in the Bill of Rights are mutually supporting) and *Khosa* para 69 (in determining whether discrimination is reasonable regard must be given to "the nature of the interests which have been affected by the discrimination.")

¹³¹⁹ *Khosa* para 53.

¹³²⁰ Para 70. See too *Hoffmann* paras 27, 52.

¹³²¹ *Larbi-Odam* para 20 and *Khosa* paras 79-81.

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categories of vulnerable people has a severe impact on refugees and asylum-seekers who struggle to support themselves. Excluding them from these benefits implicates the right to life as well as their dignity, as it diminishes their ability to support themselves and their dependants and makes them dependent on others for survival.¹³²² The dignity of refugee patients is seriously affected when they are turned away by clinics and hospitals on the ground of citizenship. Moreover, their lives are also potentially endangered. For these reasons, the discriminatory UPFS policy and Patient Classification Manuals amount to unfair discrimination.

The above reasoning is supported by the statement of Mokgoro and O' Regan JJ in their dissenting judgment in *Union of Refugee Women* that "discriminating against refugees involves discriminating against a vulnerable group of people such that discrimination against them will often impair their dignity or their rights in a serious manner".¹³²³ Such discrimination might be inconsistent with the overall vision of the South African Constitution to eradicate unfair discrimination and racism.¹³²⁴ It would materially and severely impact on South Africa's international obligations in terms of the Geneva Refugee Convention to provide refugees and asylum-seekers with the most favourable treatment in relation to socio-economic rights.¹³²⁵

Even the majority judgment of Kondile J in *Union of Refugee Women*, which took a more restrictive view of the constitutional rights of refugees, could be invoked to support this argument. In his judgment, Kondile J relied on the fact that the South African Constitution confines the right of occupational choice to citizens, and that in that case the restriction of the occupational choice of refugees was effected through an Act of Parliament.¹³²⁶ By contrast, section 27 of the South African Constitution extends the right to healthcare to "everyone". Moreover, the National Health Act does not exclude refugees and asylum-seekers from access to healthcare, and does not even expressly exclude them from free healthcare benefits. Rather, their exclusion results from the UPFS and Patient Classification Manuals, which do not classify them as fully-subsidised patients. This is problematic, given that the South African Constitution treats access to healthcare as a universal or cosmopolitan right which accrues to everyone, and that asylum-seekers and refugees are among the

¹³²² *Khosa* para 41; *Makwanyane* para 327 and *Dawood* para 35.

¹³²³ *Union of Refugee Women* para 113.

¹³²⁴ Para 123.

¹³²⁵ Para 114.

¹³²⁶ Para 46.

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groups that are most vulnerable and in need of free medical treatment. In view of this, one would have expected such an exclusion to be authorised by an Act of Parliament. It is, moreover, doubtful whether the UPFS and Patient Classification Manuals would qualify as law of general application in terms of section 36.

5 5 4 4 Limitations under section 27(2)

Section 27(1) of the South African Constitution guarantees the right of access to healthcare, whereas section 27(2) requires the state, through reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. It was accepted in *Khosa* that section 27(1) inter alia imposes a negative obligation, such that it requires the state to refrain from preventing or impairing the right of access to healthcare services, sufficient food and water, and social security. On the other hand, section 27(2) deals with the state's positive obligation to develop a comprehensive policy that secures and achieves the right progressively.¹³²⁷ The requirements of availability of resources and progressive realisation have the potential to restrict the positive constitutional obligations imposed on the state,¹³²⁸ particularly by giving the state the opportunity to plead a lack of resources.¹³²⁹

Integral to the conceptual application of the twin standards of available resources and progressive realisation is reasonableness, which seems to provide the threshold requirement of testing measures taken by the state. What is reasonable must be considered in light of the social, economic and historical context. It cannot be considered through enquiring into "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent".¹³³⁰ Sachs J, in *Minister of Health v New Clicks South Africa (Pty) Ltd*¹³³¹ was of the view that:

"When reasonableness is considered it becomes particularly important to ensure that vulnerable sections of the population are protected. The discretion of the rule-makers becomes attenuated to the degree that the fundamental rights of the people who are most

¹³²⁷ *Khosa* para 109.

¹³²⁸ *Grootboom* para 21. See too *TAC No 2* para 32.

¹³²⁹ Para 11. See too *TAC No 2* para 31; *Khosa* para 110; and *Grootboom* para 38.

¹³³⁰ Para 41.

¹³³¹ 2006 2 SA 311 (CC).

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disadvantaged are affected. In this regard our court has frequently pointed to the extremely uneven development of our country”.¹³³²

Compelling reasons would be needed to justify leaving vulnerable sections of society unprotected. In cases where a lack of protection results from the state’s failure to develop a comprehensive programme, the deficiency cannot be justified on the basis of a lack of resources.¹³³³

Generally speaking, the Constitutional Court understood access to socio-economic rights as a basis for the realisation of a dignified living. The deplorable conditions that existed when the South African Constitution was adopted must be rooted out. Although much has been done to address disadvantage, the state remains obliged to alleviate those conditions through acceleration of “reasonable and progressive schemes to ameliorate vast areas of deprivation afflicting millions of our people and in particular inadequate health care”.¹³³⁴ Enjoyment of the highest attainable standard of health is integral to human life and is a constitutional goal. Refugees and asylum-seekers are among the people to whom the state owes a duty to ameliorate their health conditions for attainment of the highest standard of health.

The Constitutional Court, in the case of *Soobramoney*, interpreted the right to health in the context of a utilitarian theory of justice and thus constrained the right to a larger number of the population, leaving a smaller number of society constitutionally deprived. The Court opined that the obligations imposed on the state would be met if the larger needs of society are met rather than meeting “the specific needs of particular individuals within society.”¹³³⁵ In order to reach this conclusion, reference was made to the availability of resources for the realisation of socio-economic rights.¹³³⁶ In this sense, the exclusion of certain vulnerable sections of the population from state positive measures could be justified on the basis of financial capacity.¹³³⁷ It could possibly be argued, on the basis of such an approach, that the rights of refugees and asylum-seekers should be limited in order to realise the needs of a greater number of the society.

¹³³² *New Clicks South Africa (Pty) Ltd* para 653.

¹³³³ *Grootboom* paras 47-69.

¹³³⁴ *New Clicks South Africa (Pty) Ltd* para 705 and *TAC No 2* para 36.

¹³³⁵ *Soobramoney* para 31.

¹³³⁶ Para 11.

¹³³⁷ Para 11.

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The utilitarian approach was fundamentally rejected by Yacoob J in the case of *Grootboom*.¹³³⁸ In this case, the Constitutional Court acknowledged that socio-economic rights are personal rights and that the South African Constitution commits the government to ensure that socio-economic rights are made accessible “not only to a larger number of the people but to a wide range of people as time progresses”.¹³³⁹ In so doing, regard must be paid to every person’s dignity¹³⁴⁰ and to treating every human being with care and concern.¹³⁴¹ Any measure that leaves out a significant number of a society cannot therefore be said to be reasonable and constitutional.¹³⁴² From the perspective of this judgment, treating refugees and asylum-seekers with concern and care would imply an immediate response to their health problems. That simply means an inclusion in the free healthcare programme.

The concern and care approach is also reflected in the case of *Minister of Health v Treatment Action Campaign (No 1)*¹³⁴³ in which the court upheld the Treatment Action Campaign (“TAC”)’s argument that the anti-retroviral medicine, Nevirapine – that is effective in reducing the risk of mother-to-child HIV transmission – must be made available to all HIV positive pregnant women in all public hospitals.¹³⁴⁴ In light of this decision, refugee woman would also benefit from anti-retroviral medicine.

Refugee matters related to health issues have not yet been dealt with by the court, mostly because they are resolved through settlements. For example, when a 12-year-old undocumented Somali asylum-seeker was turned away by Steve Biko Academic Hospital, Lawyers for Human Rights took the matter to the Gauteng North High Court to determine whether an undocumented asylum-seeker was entitled to the constitutional right to emergency medical treatment; however, the matter was resolved through settlement. The swift move on the side of the Department of Health to resolve legal disputes related to the question whether or not refugees and asylum-seekers are entitled to the same free healthcare services as citizens seems to acknowledge that refugees and asylum-seekers – whether their presence is lawful or unlawful – are constitutionally entitled to the right to have access to healthcare. This is confirmed by the classification of refugees and asylum-seekers as marginalised

¹³³⁸ 2000 11 BCLR 1169 (CC).

¹³³⁹ *Grootboom* para 45.

¹³⁴⁰ Para 83.

¹³⁴¹ Para 44.

¹³⁴² Para 43.

¹³⁴³ 2002 5 SA 703 (CC).

¹³⁴⁴ *Treatment Action Campaign* paras 14-15.

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groups under the National Strategic Plan and the 2007 Directives. In light of the above, the availability of resources cannot be used as a reasonable ground to limit the right of refugees and asylum-seekers to have access to free healthcare schemes.

5.6 Concluding remarks and recommendations

Being impoverished by war, political conflict or armed conflict, refugees and asylum-seekers find themselves at the lower end of the socio-economic hierarchy in the host countries. Those who find themselves in this position include the sick, the wounded, the infirm and frail who are in the greatest need of international refugee protection. The protection includes responses to their health problems as evinced in international refugee law and international human rights law.

From the perspective of respect for their dignity, refugees and asylum-seekers should be entitled to favourable and immediate access to free healthcare services, including emergency medical treatment and reproductive healthcare, given that they are amongst the most vulnerable in South African society.¹³⁴⁵ The vulnerability of refugees and asylum-seekers is largely embedded in the fact that they have “no political or social influence over the laws that govern them, often living on the margins of society, without communal support, assistance or influence to ensure compliance with the law by public officials.”¹³⁴⁶ This situation is an obvious illustration of the challenges they face in South African society.

In any discussion about the protection of refugees and asylum-seekers, illness and healthcare should be a major concern. The principle of favourable treatment requires that appropriate and favourable attention should be paid to the role of healthcare in the life of refugees. It is important that the host state understands the importance of accessing healthcare services and thus refrain from neglecting refugees' and asylum-seekers' ill-health. Many asylum-seekers are sick, wounded or traumatised when they arrive in the host country. The disappearance of their normal life, coupled with a lack of social interaction and self-sufficiency, typically leads to problems like post-traumatic stress disorder and starvation. It has been widely acknowledged that a lack of freedom from want, which leads to acute stress due to

¹³⁴⁵ *Minister of Home Affairs v Rahim* 2016 6 BCLR 780 (CC) para 23.

¹³⁴⁶ *Rahim* para 23.

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fear and anxiety about one's future, might be a source of various serious life-threatening illnesses including heart attacks, kidney disease, and cancer.¹³⁴⁷

Refugees and asylum-seekers suffer from communicable and non-communicable diseases. Whilst non-communicable diseases affect those who are suffering from them, communicable diseases could also have a serious impact on host communities. It should also be noted that good health is an "important condition of human life and a critically significant constituent of human capabilities."¹³⁴⁸ Healthy individuals are at liberty to use their human capabilities to meet their basic needs. In doing so, they contribute to the economic development of the community and ultimately to national economic growth. Health and well-being are thus integral to local integration. The duties of the South African government to ensure the meaningful integration of refugees into society flow from the idea of social justice that recognises the need for a fair distribution of resources as well as the efficient improvement of the quality of lives which cannot ignore the role played by the national health system in human life. It is essential to consider refugee health and thus provide refugees and asylum-seekers with opportunities to "achieve good health – free from escapable illness, avoidable afflictions and premature mortality".¹³⁴⁹

On the other hand, the restriction of access to healthcare services, which allows sick indigent people's ill health to deteriorate, could well result in the sick person and his or her family becoming a financial burden on the state.¹³⁵⁰ This can take place, for example, when a person's capacity to work is impaired due to protracted illness.¹³⁵¹ Sick persons can neither contribute to economic development nor integrate themselves into local communities; hence they would rely on communal support for survival.

Although the right to access to healthcare is a constitutional right which is implicitly protected by the Refugees Act, neither the National Health Act nor the Norms and Standards Regulations proclaimed in terms of the Act expressly includes refugees and asylum-seekers under vulnerable groups.¹³⁵² There is a need to

¹³⁴⁷ "What Stress Does to the Body" <<http://www.indiana.edu/~engs/hints/stress1.htm>> (accessed 12-09-2015).

¹³⁴⁸ A Sen "Why Health Equity" (2002) 11 *Health Econ.* 659, 660.

¹³⁴⁹ On the importance of healthcare services in the development of a person's capabilities, see Sen (2002) *Health Econ.* 659-666.

¹³⁵⁰ *Memorial Hospital v. Maricopa* 415 U. S. 265.

¹³⁵¹ 265.

¹³⁵² GN 109. It only defines refugees as vulnerable users, see s 1.

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harmonise the Refugees Act with the National Health Act and to differentiate between refugees and asylum-seekers, and between refugees or asylum-seekers on the one hand and other types of foreign nationals on the other. Bearing this in mind, the thesis concludes by recommending the following:

- The National Health Act should be amended so as to provide for adequate protection to refugees and asylum-seekers who – as vulnerable people – should be afforded free healthcare services. Sections 2(c)(iv), 4(2)(d), 39(2)(a), 39(2)(d) and 70(1)(d) should be amended to include refugees and asylum-seekers in the vulnerable groups.
- Section 61(3) of the National Health Act should be amended to allow a transplantation of an organ into refugee patients who are in the greatest need of such transplantation for their survival.
- A policy should be drafted to clearly define the right to have access to healthcare of refugees and asylum-seekers. The object of the policy should be to provide for favourable access to healthcare services in the public health establishment. Whilst the policy would seek to harmonise the Refugees Act with the National Health Act, it would also promote favourable access to medical care services, with special regard to vulnerable refugee groups such as the infirm, frail, women, the elderly, children and people with disabilities.
- The proposed policy should clarify that refugees and asylum-seekers should be distinguished from other types of non-citizens, who are classified as full-paying patients under the UPFS. Such classification has created some interpretation challenges as some have interpreted it to mean that refugees and asylum-seekers are – as non-citizens – not entitled to free medical services.
- As vulnerable people in society, refugee patients and asylum-seeker patients must plainly be included in the category of patients who are classified as fully-subsidised patients under the Hospital Fees Manuals. This would enable them to uniformly and consistently be entitled to free healthcare services in the public health establishment.
- The state should subject new asylum-seekers to medical screening in order to detect their diseases in order to ensure immediate and appropriate treatment.

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This practice would protect both the asylum-seeker community and the host community.

- The National Health Insurance scheme which was introduced to ensure that all vulnerable people should be accorded quality healthcare services should be extended to include those individuals who are recognised as refugees. It would be unjust and unfair to restrict the accessibility or eligibility to citizens and permanent residents.

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CHAPTER 6

THE RIGHT TO HOUSING

6 1 Introduction

This chapter deals with the question whether refugees and asylum-seekers are entitled to the right to housing as guaranteed by article 21 of the Geneva Refugee Convention. Article 21 lays down three guiding principles. The first principle provides that the right to housing shall be accorded to refugees lawfully staying in the territory of the host state. The second principle provides that a host state shall confer on the said refugees “treatment as favourable as possible and, in any event, not less favourable than that accorded to [non-citizens] generally in the same circumstances”. The third principle requires the host state to ensure that the enjoyment of the right is consistent with domestic housing laws, policies or regulations or is subject to the control of public authorities. This guiding principle qualifies the scope of application of article 21.

To a considerable extent, these guiding principles were transposed into the South African legal system through the Refugees Act, which serves to give effect to and must be interpreted in the light of the Geneva Refugee Convention and other refugee and human rights instruments to which South Africa is a signatory.¹³⁵³ Section 27(b) of the Refugees Act provides that a refugee is entitled to “full legal protection, which includes the rights set out in Chapter 2 of the [South African] Constitution, except those rights that only apply to citizens”. That the right of access to adequate housing is not reserved for citizens only is clear from section 26(1) of the South African Constitution, which vests the right in “everyone”. Section 26(2) further states that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”.¹³⁵⁴ Section 26(3) then provides that “[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances”. In addition, section 28(1)(c) of the South African Constitution guarantees the right of every child to shelter, while section 35(2)(e) recognises the right of everyone who is detained to adequate accommodation. The formulation of the beneficiaries (“everyone”, “no one”, “every child” and “every person who is

¹³⁵³ *Katabana v Chairperson of the Standing Committee for Refugee Affairs* WCC 14-12-2012 case no 25061/2011 at 6.

¹³⁵⁴ This requirement must be read together with the obligation imposed on the State to “respect, protect, promote and fulfil the rights in the Bill of Rights”, contemplated under s 7(2).

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detained”) suggests that refugees are entitled to these rights for purposes of section 27(b) of the Refugees Act. An interpretation of the said rights in view of other fundamental, interrelated, and mutually supporting rights such as the right to human dignity, equality, freedom and security of the person and other core socio-economic rights supports this reading.¹³⁵⁵

And yet, refugees and asylum-seekers are excluded from access to housing and other related rights in terms of the Housing Development Policy (“HDP”) and its programmes. The exclusion stems from the definition of housing development in the Housing Act, which restricts access to adequate housing to citizens and permanent residents in the following terms:

“Housing development means the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities and to health, educational and social amenities in which all citizens and permanent residents of the Republic will on a progressive basis have access to (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water, adequate sanitary facilities and domestic energy supply”.¹³⁵⁶

The right to housing is further limited by the 2010 National Housing Policy and Subsidy Programmes (“NHPSP”).¹³⁵⁷ The NHPSP states that only citizens and permanent residents are eligible for the national housing programme. Citizens and permanent residents can therefore benefit from the Integrated Residential Development Programme (“IRDP”),¹³⁵⁸ the Institutional Housing Subsidy Programme (“IHSP”),¹³⁵⁹ the Individual Subsidy Programme (“ISP”),¹³⁶⁰ the Rural Housing Programme (“RHP”),¹³⁶¹ and the People’s Housing Process (“PHP”).¹³⁶² These programmes are part and parcel of the HDP. Essentially, the HDP is based on the

¹³⁵⁵ *Grootboom* paras 70-79 and *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC) para 74.

¹³⁵⁶ S 1(vi).

¹³⁵⁷ Department of Human Settlement “National Housing Policy and Subsidy Programmes” February 2010.

¹³⁵⁸ NHPSP para 1.2.

¹³⁵⁹ Para 6.2.

¹³⁶⁰ Para 8.2.

¹³⁶¹ Para 9.2.

¹³⁶² Para 15.2.

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principles contained in the 1994 Reconstruction Development Programme (“RDP”) which sought to provide “citizens with a permanent residential structure with secure tenure, potable water, adequate sanitation facilities, and domestic energy supply”.¹³⁶³ Citizenship and permanent resident status are posited as requirements for access to housing subsidies.¹³⁶⁴

It is constitutionally problematic that housing legislation does not provide for housing designed to improve the quality of lives of refugees. The provision of housing is fundamentally important to the protection of the well-being and dignity of refugees and asylum-seekers. It will be demonstrated that this limitation causes refugees and asylum-seekers to live in intolerable housing conditions, which contribute to their moral and social deterioration. Their exclusion from housing programmes raises the question whether refugees should be accorded the same treatment enjoyed by non-citizens as it is defined in terms of the Immigration Act or whether they should be afforded favourable differentiated treatment adequate for the protection of their well-being. This chapter explores the essence of the right to have access to adequate housing for refugees and asylum-seekers, on the one hand, and the constitutionality of their exclusion from housing programmes, on the other. It will highlight the implications of the guiding principles for the constitutional right to housing of refugees and proceed to determine the standards of treatment under which the right to housing may be accorded to refugees and asylum-seekers. In determining the extent to which the right in question should be accorded to refugees and asylum-seekers, regard will be given to literature and foreign and international case law relating to the right in question. The findings will be used as a basis for making recommendations as to how refugees and asylum-seekers should be treated with respect to access to adequate housing.

6 2 Definition of the concept of housing

For understanding the meaning, nature, content, scope and potential of the right to housing and for claiming this right as both a human right and a refugee right, it is imperative to define the concept and to distinguish between the right to housing and housing rights. The term housing cannot be defined in precise terms. It is, for

¹³⁶³ NHPSP 44.

¹³⁶⁴ C Greyling *The RDP Housing System in South Africa* Honours thesis, University of Pretoria (2009) 10 (in respect of RDP houses).

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example, defined by the Oxford Dictionary to refer to “houses, flats or apartments, etc, that people live in, especially when referring to their type, price or condition”.¹³⁶⁵ The term housing may also be used to refer to a home, or a house, or a shelter, or an accommodation, or an upgraded shack. As noted, the South African Constitution refers both to housing and shelter and no clear distinction is made between these two terms.¹³⁶⁶ As will be demonstrated, the HDP refers to housing terms such as a home, a dwelling, a shelter and an upgraded shack whereas international law refers to housing terms such as accommodation and shelter. Drawing on a judgment of the Constitutional Court, it could be said that the aforementioned concepts are closely related; rather than referring to the most basic, rudimentary forms of housing, terms like shelter may encompass different manifestations of housing.¹³⁶⁷ Hence their aims are to provide protection to family life and dignity. They provide residential means. Put plainly, they provide families with privacy, physical safety and human security and offer families or individuals an opportunity to participate in the socio-economic development of their communities. Having a home – whether in the form of a house, a shelter, accommodation, an upgraded shack or an emergency shelter – is essential to an individual’s and community’s well-being.

6 2 1 *Defining a home*

The definition of the term home is important as it provides the parameters in which the idea of housing should be understood as a human right. In defining the term home, the Oxford Dictionary identifies two dimensions. The first dimension refers to “the house or flat or apartment that you live in, especially with your family”, whereas the second dimension refers to “a house or flat or apartment, etc, when you think of it as property that can be bought and sold”.¹³⁶⁸ The second dimension would also include the renting of a house or accommodation or flat or apartment. In the South African context, the term home is defined under the Housing Consumer Protection Measures Act 95 of 1998 as:

“[A]ny dwelling unit constructed or to be constructed by a home builder... for residential purposes or partially for residential purposes, including any structure prescribed by the

¹³⁶⁵ A S Hornby *Oxford Advanced Learner’s Dictionary of Current English 7ed* (2006) 727.

¹³⁶⁶ *Grootboom* para 73.

¹³⁶⁷ Para 73.

¹³⁶⁸ Hornby *Oxford Advanced Learner’s Dictionary* 714.

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Minister for the purposes of this definition or for the purposes of any specific provision of this Act, but does not include any category of dwelling unit prescribed by the Minister”.¹³⁶⁹

From a human rights perspective, a home is understood as a tool that offers privacy and fosters a dignified family life. In this sense, it was defined by the ECtHR, in *Moreno Gómez v Spain*,¹³⁷⁰ as “the place, the physically defined area, where private and family life develops”.¹³⁷¹

6 2 2 Defining housing

In South Africa, housing is understood as “central to providing a better life for all” whereas housing development is “recognised by the [HDP] and its programmes for the [abundant] benefits it can have for the growth and development of a country and its people”.¹³⁷² In light of this, the term housing is defined in terms of constructing, producing and providing houses to the people.¹³⁷³ Proceeding from this vein, the term house is defined by Oxford Dictionary to refer to “a building for people to live in, usually for one family”.¹³⁷⁴ Important to state is that there is no universal definition of the term housing. The term housing is, for example, defined by the United Nations Centre for Human Settlements as:

“[A] variety of processes through which habitable, stable, and sustainable public and private residential environment are created. This recognises that the environment within which a house is situated is as important as the house itself in satisfying the needs and requirements of occupants.”¹³⁷⁵

This definition was drawn upon in the 1994 White Paper on Housing¹³⁷⁶ and serves as the basis of the definition of the concept housing development contained in the Housing Act.¹³⁷⁷ The preamble to the Housing Act recognises that the term housing refers to: adequate shelter that fulfils a basic human need; a product of

¹³⁶⁹ S 1 of the Housing Consumer Protection Measures Act.

¹³⁷⁰ No. 4143/02, ECHR 2004-X.

¹³⁷¹ *Moreno Gómez v. Spain* (Application no. 4143/02) Judgment of 16 November 2004, para. 53.

¹³⁷² C Cornelissen *Moving towards humanising housing: A closer look at the issues surrounding housing provision in South Africa* Master Thesis, Stellenbosch (2001) 1.

¹³⁷³ 1.

¹³⁷⁴ Hornby *Oxford Advanced Learner's Dictionary* 726.

¹³⁷⁵ HABITAT *An Urbanising World: Global Report on Human Settlement* (1996) 203.

¹³⁷⁶ National Department of Housing “White Paper: A New Housing Policy and Strategy for South Africa” (1994) 21.

¹³⁷⁷ S 1(vi) of the Housing Act.

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human strife and innovation; an important part of integrated development planning; a key sector of the national economy; and something which has a critical role in the socio-economic life of the nation. It also refers to housing as both a product and a process.¹³⁷⁸ The emphasis on housing as a product entails that housing is something that can be marketed, sold and be bought whereas emphasis on housing as a process entails that housing is not a public service that can be delivered upon demand. Rather, housing as a process puts emphasis on the importance of housing in job creation, elimination of the housing backlog and, in the long run, economic development.¹³⁷⁹

More fundamentally, the RDP conceives housing in terms of constructing a durable structure that provides protection against weather and a reasonable living space and privacy.¹³⁸⁰ Furthermore, the Committee on Economic, Social and Cultural Rights defines the term housing in a wide sense to refer to “the right to live somewhere in security, peace and dignity”,¹³⁸¹ whereas the African Commission on Human and People’s Rights defines the term to refer to the protection of the family, including the proscription of “the wanton destruction of shelter.”¹³⁸² In a human rights context, the idea of housing could be invoked to refer to a home or house developed or upgraded at the state’s expense to provide poor, vulnerable groups with a housing environment sufficient to protect their privacy and dignity as well as to foster family life. It is within this understanding that this chapter presumes that refugees and asylum-seekers are vulnerable groups in need of housing because they are individuals who fled their homes and unexpectedly left their livelihoods and possessions, due to fear of their lives.¹³⁸³ As a result, they had to endure a desperate journey to a host country to seek shelter and thus find themselves in a precarious situation without social connection and without financial means to sustain them.¹³⁸⁴ As a vulnerable group, they should enjoy the right to housing and housing rights.

¹³⁷⁸ Preamble.

¹³⁷⁹ Cornelissen *Moving towards humanising housing* 20.

¹³⁸⁰ ANC *Reconstruction Development Programme* (1994) 23.

¹³⁸¹ Committee on Economic, Social and Cultural Rights, General Comment 4, the Right to adequate housing (Sixth Session, 1991), U.N. Doc. HR/GEN/1/Rev.6 at 18 (2003), para 7.

¹³⁸² *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* Communication No. 155/96 para 60.

¹³⁸³ *Union of Refugee Women* para 101.

¹³⁸⁴ Para 101.

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6 2 3 *Distinction between the right to housing and housing rights*

From a legal point of view, there is a need to distinguish between a right to housing and housing rights. The term “right to housing” will be used to refer to a human right to adequate housing for an adequate standard of living, as guaranteed by international and regional treaties and declarations, and incorporated into national legal frameworks through legislation, policies and strategies for realisation of the right.¹³⁸⁵ The right to housing is conceived in terms of a human rights-based approach, owing to its recognition under international and constitutional instruments as applying to every human person rather than as being restricted to individuals with citizenship or permanent resident status.¹³⁸⁶ It is acknowledged that the right may preferentially be conferred on people by virtue of their citizenship, legal status or position within a specific sovereign state. However, it cannot be denied to the homeless or those living in appalling conditions because the state is bound to ensure that they are protected and, if they are neglected, they can claim it on the basis of its character as a human right. As Jessie Hohmann explains, the entitlement to the right “springs not from the question of citizenship, but from the question of humanness or humanity and relates to a demand for the right that is audible beyond national borders and which seeks the attention of the international community as a whole”.¹³⁸⁷ The right to housing denotes “the law’s most direct and overt protection of housing and home”.¹³⁸⁸ It is a legal tool to tackle homelessness; and is based on a human rights approach that is “intuitively appealing, promising radical solutions to complex issues of housing need and social exclusion that offer to empower disadvantaged social groups and overcome the stigma of discretionary welfare assistance”.¹³⁸⁹ The state must ensure that the right to housing is delivered and enjoyed.

On the other hand, the term “housing rights” will be used to refer to legal rights codified into or arising from South Africa’s national laws, policies and strategies with the intent to protect home owners, landlords and tenants or occupiers, or to define rental procedures or the relationship between landlords and tenants, or to protect housing consumers. Housing rights refer to those rights that arise once a person

¹³⁸⁵ J Hohmann *The Right to housing: Law, Concepts and Possibilities* (2013) 6.

¹³⁸⁶ 6.

¹³⁸⁷ 6.

¹³⁸⁸ 1.

¹³⁸⁹ S Fitzpatrick & B Watts “The Right to Housing for Homeless People” in E O’Sullivan, V Busch-Geertsema, D Quilgars, & N Pleace (eds) *Homelessness Research in Europe* (2011) 106.

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occupies a land, home, house, flat or apartment, for example, the prevention of unlawful eviction.

Both the right to housing and housing rights are analysed on the basis of the notion that socio-economic rights impose binding obligations on the state to protect the dignity, health and wellbeing of human persons and to improve the quality of their lives. Bret Thiele notes that “housing conditions affect both individual and community health to a greater degree”.¹³⁹⁰ As a component of socio-economic rights, access to adequate housing enables an individual to exist in society at a certain minimum level of social dignity. Access to housing is seen as the constituting basis of not only subsistence but also self-esteem, self-respect and self-worth; as contributing to human security and community health; and as increasing the wellbeing of family and participation in the social development of a community.¹³⁹¹ It is within this context that the right to housing will be analysed. A person without a home and without a roof over his or her head is subjected to intolerable and humiliating living conditions.

6 3 Housing standards under international law frameworks

Housing refugees and asylum-seekers is one of the greatest challenges facing host countries, since it is difficult for many countries to guarantee the right to housing of their own citizens. Housing problems are acute and the matter is usually dealt with on the basis of prioritising vulnerable peoples’ needs in general and giving special attention to their circumstances in particular. Since many African countries are experiencing tremendous social and economic hardships, refugee protection is mostly restricted to refugees who live in refugee camps, where they are housed in makeshift tents.¹³⁹² Here, the survival of refugees is primarily dependent on the UNHCR and other international agencies cooperating with local authorities.¹³⁹³ South Africa has adopted a different approach.

South Africa’s liberal asylum policy is aimed at integrating refugees and asylum-seekers within its communities. The need to integrate them into local communities is partly drawn from the constitutional obligation to respect and protect human dignity, which has become a supreme principle on which the treatment of a human being

¹³⁹⁰ B Thiele “The Human Right to Adequate Housing: A Tool for Promoting and Protecting Individual and Community Health” (2002) 92 *American Journal of Public Health* 712, 714.

¹³⁹¹ Hohmann *The Right to Housing* 8.

¹³⁹² Addis Ababa Document on Refugees and Forced Population Displacement in Africa, 8-10 September 1994, para 13.

¹³⁹³ Hathaway *The Rights of Refugees* 471.

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must be based. Within this dignity-based framework, refugees seeking protection in the territory of South Africa have to be treated humanely and fairly. South Africa has to deploy its resources to treat refugees according to the standards established under international refugee law, in light of international human rights law and constitutional law. These standards are, first, the same treatment accorded to non-citizens generally in the same circumstances, as contemplated in international refugee law and, secondly, the basic minimum standards of treatment as contemplated in international human rights law.

6 3 1 Same or equal treatment as foreign nationals

Under the Geneva Refugee Convention, the right to housing is based on the principle of equal treatment. It is conceived in terms of the notion that the treatment should be as favourable as possible and, in any event, not less favourable than that accorded to non-citizens who are generally in the same circumstances.¹³⁹⁴ The right to equal protection under international refugee law was seen as a mechanism of providing favourable treatment to refugees and asylum-seekers. The requirement for equal treatment has been introduced to end the exclusion of refugees and asylum-seekers from housing accommodation programmes and to ensure that every refugee who stays lawfully has equal rights in relation to housing opportunities.¹³⁹⁵ It is worth noting that during the drafting of the Geneva Refugee Convention, the equal or same treatment with citizens was suggested by France and Yugoslavia, but the suggestions were not supported by other country members of the *Ad Hoc* Committee.¹³⁹⁶ The same treatment with non-citizens in the same circumstances was rather adopted.¹³⁹⁷

According to Hathaway, prior to the adoption of the Geneva Refugee Convention, the right to housing was not protected expressly by international refugee law, because it was viewed as being protected by property rights.¹³⁹⁸ Refugees' housing rights were thus restricted to the acquisition of housing by buying a home or renting

¹³⁹⁴ Art 21.

¹³⁹⁵ Da Costa *Rights of Refugees in the Context of Integration* 68.

¹³⁹⁶ Weis *Refugee Convention* 161-163.

¹³⁹⁷ 163.

¹³⁹⁸ Hathaway *The Rights of Refugees* 820.

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an apartment or accommodation.¹³⁹⁹ Host countries' practices of refusal or denial of rights associated with housing to refugees between the 1930s and the 1950s led the drafters of the Geneva Refugee Convention to include the right to housing.¹⁴⁰⁰ Accordingly, the right to housing is guaranteed under article 21 of the Geneva Refugee Convention. It states that:

“As regards housing, the Contracting States, in so far as the matter is regulated by law or by regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to [non-citizens] generally in the same circumstances”.

As noted in the introduction, the provision of the right to housing is based on the following three principles: (i) the right to housing shall be accorded to refugees lawfully staying in the territory of the host state, (ii) the treatment of such refugees must not be less favourable than that accorded to non-citizens in the same circumstances, and (iii) the enjoyment of the right shall be in accordance with domestic housing laws or regulations or is subject to the control of local authorities. Before the chapter turns to discuss these guidelines in depth, it should be noted that article 21 was drawn from article 6 of the 1949 Migration for Employment Convention.¹⁴⁰¹ Article 6 stated that:

“Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of....accommodation...”.

Article 6 contains the standard of the same treatment accorded to citizens, whereas article 21 of the Geneva Refugee Convention entrenches the standard of the same treatment accorded to non-citizens. Article 21 uses the term “housing”, while article 6 refers to the term “accommodation”. Drawing on article 6, Weis

¹³⁹⁹ 821. See too art 13 of the Geneva Refugee Convention which guarantees the right to acquire “movable and immovable property and other pertaining thereto, and to leases and other contracts relating to movable and immovable property.”

¹⁴⁰⁰ 821.

¹⁴⁰¹ ILO Convention No. 97.

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maintains that the term housing has “a wider connotation than accommodation”.¹⁴⁰² The term encompasses “housing schemes and allocation of premises for the exercises of one’s occupation”.¹⁴⁰³

Da Costa maintains that the term housing should be applied widely to cover the protection of issues “of rent control and assignment of apartments and premises, as well as participation in home financing schemes”.¹⁴⁰⁴ Refugees’ housing matters fall squarely within the competence of the state which has jurisdiction; hence it is equally bound by article 21 of the Geneva Refugee Convention.¹⁴⁰⁵ For that reason, the standard of treatment of refugees and asylum-seekers must be observed by all spheres of the state, that is, national, provincial and local governments. Da Costa states that housing rights must be enjoyed “subject to regulations and the control of administrative authorities”.¹⁴⁰⁶ Executive and administrative authorities are in particular obliged to “ensure that the relevant laws or regulations accord refugees the most favourable treatment possible, which should never fall below that granted to [non-citizens] generally”.¹⁴⁰⁷ This standard of treatment is problematic as will be explained in detail below.

6 3 1 1 Challenges and restraints: In the same circumstances

The protection of refugees and asylum-seekers on the basis of equal treatment with non-citizens is problematic inasmuch as states often adopt immigration measures which restrict non-citizens from enjoyment of positive rights.¹⁴⁰⁸ Immigration laws are crafted not only to manage and control immigration but also to safeguard and preserve the national resources, materials and opportunities.¹⁴⁰⁹ This is achieved through the rule of self-sufficiency. This rule is based on the notion that non-citizens must be admitted in the country upon satisfying the authorities that they control sufficient financial means to sustain themselves and their dependants during

¹⁴⁰² *Weis Refugee Convention* 163.

¹⁴⁰³ 163.

¹⁴⁰⁴ *Da Costa Rights of Refugees in the Context of Integration* 68.

¹⁴⁰⁵ *Weis Refugee Convention* 163.

¹⁴⁰⁶ *Da Costa Rights of Refugees in the Context of Integration* 68.

¹⁴⁰⁷ 68.

¹⁴⁰⁸ Kavuro (2015) *Law, Democracy and Development* 249.

¹⁴⁰⁹ 249.

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their stay.¹⁴¹⁰ On the basis of the above requirement, they are not entitled to socio-economic measures taken by the state to improve the quality of life of the poor citizens. This approach with regard to immigrants came to light after the adoption of human rights rules and principles.

The idea of treating human persons on the basis of universally accepted human rights and freedoms has had a deleterious impact on the traditional principle of reciprocity, grounded in the notion of the MFN treatment on which the stay of non-citizens was largely based. The protection of non-citizens in terms of the MFN standard implied that non-citizens of a particular state were afforded the best treatment over other non-citizens whose countries did not enter into a bilateral agreement, under which reciprocal and mutual treatment of citizens of contracting parties were defined and outlined.

The notion of equal treatment contemplated under the Geneva Refugee Convention takes root in the principle of reciprocity. As noted earlier in chapter 2 and chapter 4, socio-economic rights were accorded to non-citizens on conditions of reciprocity. Construing the treatment and legal status of non-citizens with respect to social welfare on the basis of the principle of reciprocity was rooted in the assumption that non-citizens were in normal circumstances protected by their home countries, even if they were abroad.¹⁴¹¹ The reciprocity was founded on the notion of placing citizens of state A, living in state B, in the same position in which state A placed the citizens of state B.¹⁴¹² It was this reciprocal treatment of citizens of two countries that was accorded to refugees and asylum-seekers, since it was understood that they could be treated as if they were in the same circumstances as those non-citizens who were entitled to special treatment. Weis argues that the principle of reciprocity was extended to refugees in order to guard against the possibility of placing refugees in an “unjustifiable position of inferiority with respect to other foreigners” or to guard against any possible request made by refugees “for special protection enjoyed by some non-citizens under the condition of reciprocity”.¹⁴¹³ The conditions of reciprocity have gradually vanished, due to the application of fundamental human rights standards and practices, culminating in

¹⁴¹⁰ S 30(1)(a) of the Immigration Act states that those non-citizens whose financial means have depleted to such an extent that they are likely to become a public charge must be expelled or deported.

¹⁴¹¹ *Weis Refugee Convention* 47.

¹⁴¹² 47-48.

¹⁴¹³ 48.

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immigration laws and policies based on self-reliance and self-sufficiency. Today, immigration laws are crafted to include the principle of critical skills and investment, implying that those with skills or money to invest can be admitted in the country. The principle of self-sufficiency is a cornerstone of immigration laws and policies.

Under South African immigration law, the principle of self-sufficiency bars non-citizens from being admitted in the country if they are unable to support themselves.¹⁴¹⁴ Should their financial means be depleted, they become undesirable people, who qualify for expulsion or deportation.¹⁴¹⁵ According to the exclusionary rule, non-citizens must ensure that they satisfy their own socio-economic needs, including housing accommodation. These standards of treatment cannot be said to be the same treatment contemplated by international refugee law. A refugee or an asylum-seeker may not be deported or expelled on the ground of impoverishment or physical deprivation. From the outset they are admitted into the country on humanitarian grounds, from which the protection of refugees inherently derives.¹⁴¹⁶ Given that the self-sufficiency and exclusionary rule does not apply to them, they are not in the same circumstances as other non-citizens.

Seen through a humanitarian lens, international refugee law envisages special and differentiated treatment, as Recommendation D of the Geneva Refugee Convention denotes.¹⁴¹⁷ It recommends host countries to take into account the social vulnerabilities of those individuals who leave their country of origin for reasons of persecution to seek asylum and thus accord to them special protection on account of their legal and social position.¹⁴¹⁸ It is important to give consideration to the unity of the family of a refugee which is constantly threatened by the refugee situation and to the fact that responding to their social vulnerabilities requires suitable social welfare services.¹⁴¹⁹ It should be borne in mind that a humanitarian approach, pertaining to admission in the country, does not apply to other types of non-citizens. Refugees

¹⁴¹⁴ See, for example, South Africa's Immigration Act, in particular, s 11 (visitor's visa), s 15 (business visa), s 17 (medical treatment visa), s 18 (relative's visa), s 19 (retired person visa) and s 21 (corporate visa).

¹⁴¹⁵ S 30 of the Immigration Act.

¹⁴¹⁶ Preamble of the Geneva Refugee Convention.

¹⁴¹⁷ The *Ad Hoc* Committee on Refugees and Stateless Persons adopted five recommendations covering legal matters including travel documents, asylum, NGOs, family unit and application of the Refugee Convention beyond its contractual scope. See G S Goodwill-Gill *The Refugee in International Law* (1983) 150.

¹⁴¹⁸ Recommendation D of the Geneva Refugee Convention.

¹⁴¹⁹ Recommendation E.

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and asylum-seekers must be provided with humanitarian, social and economic assistance.

The African Refugee Convention notes with concern the African countries' desire to "find ways and means of alleviating refugees' misery and suffering as well as providing them with a better life and future."¹⁴²⁰ However, nothing in the African Refugee Convention prescribes the manner in which social and economic problems would be responded to. It only recognises that host states should take a humanitarian approach towards resolving the social and economic problems of refugees.¹⁴²¹ The humanitarian dimension requires humanitarian standards that must be applied to refugees with respect to solving their housing needs, among other things. The dimension quite obviously deviates from the principle of self-sufficiency and the exclusionary rule, applicable to non-citizens generally.

The responsibility to protect refugees and asylum-seekers and the granting of asylum are understood as "a peaceful and humanitarian act" within the African Refugee Convention framework.¹⁴²² The 1994 Addis Ababa Document on Refugees and Forced Population Displacements in Africa recognises that resources should be made available by relevant stakeholders "to provide food, water, shelter, sanitation and medical services on a timely basis so that refugees and local populations alike are not put in a life-endangering situation".¹⁴²³ This is an acknowledgment that the social situation of refugees must effectively be responded to.

Bearing in mind the vanishing of the principle of reciprocity and considering the impact of the same treatment as non-citizens under immigration laws, refugees and asylum-seekers should be granted the differentiated and favourable standard of treatment with regard to housing as is, at least, accorded to permanent residents.¹⁴²⁴ There is no doubt that the most immediate needs of refugees relate to shelter, food, water and medical attention. Housing accommodation is essential in protecting the dignity of refugees or asylum-seekers.

¹⁴²⁰ Preamble.

¹⁴²¹ Preamble.

¹⁴²² Art II(2).

¹⁴²³ Para 14.

¹⁴²⁴ The most favourable treatment accorded to foreign nationals with permanent resident permits should be extended to recognised refugees who are similarly situated in South African law. See *Union of Refugee Women* para 109. Similarly, Da Costa argues that the Convention Refugee Convention requires a host state to accord to refugees "the most favourable treatment possible, and more specifically, wherever possible they should be accorded the same treatment as nationals or permanent residents." See Da Costa *Rights of Refugees in the Context of Integration* 19. See further discussion under 2.2.1 above.

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6 3 1 2 Who are refugees lawfully staying?

This question has been discussed in detail under chapter 4, dealing with the right to public relief and assistance. After an extensive analysis, the chapter concluded that the term “refugees lawfully staying” includes those asylum-seekers whose intention to apply for asylum has been expressed and registered. The term covers those asylum-seekers whose applications have not yet been finalised and those asylum-seekers whose applications are being reviewed or are before an appeal board. The term does not include asylum-seekers whose applications were unsuccessful, after exhausting all remedies available. It also does not include those asylum-seekers who are issued with a permit valid for 14 days within which they have to lodge an application for asylum¹⁴²⁵ or are issued with an appointment slip on which appears the date on which they must return to the RRO for lodging application for asylum.¹⁴²⁶ It does not apply to refugees who are ineligible for refugee status due to the commission of serious crimes contemplated under article 1F of the Geneva Refugee Convention or to whom the Geneva Refugee Convention does not apply for one or more reasons enumerated under article 1C. Finally, it does not apply to refugees whose stay is unlawful because no effort was made by a refugee to renew the validity of his or her document or because authorities, after consideration of the reasons for which it was issued, find it desirable not to renew or extend the validity of the document.¹⁴²⁷

¹⁴²⁵ Reg 2(2) of the Regulations under the Refugees Act stipulates that “any person who entered the Republic and is encountered in violation of the [Immigration Act], who has not submitted an application pursuant to reg 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a RRO to complete an asylum application.” The 14 days permit is issued to ensure that genuine asylum-seekers are not turned away. An asylum-seeker who has lodged an application of asylum and has been issued with a s 22 permit “has the protection of the law pending the determination of his or her application for asylum”. See *Bula* paras 72-44.

¹⁴²⁶ This applies to the situation where an asylum seeker visits the RRO for the first time for the purpose of applying for asylum, but is not assisted and is not issued with an asylum seeker permit or section 22 permit, but where instead he or she is merely given an appointment slip on which a return date appears on which he or she will be assisted by a refugee reception officer to lodge an application for asylum under section 21 of the Refugees Act. An appointment slip does not entitle its holder to legal protection. See *Tafira v Ngozwane* TPD 12-12-2006 case no 12960/06.

¹⁴²⁷ Para 6(1) of Schedule to the Geneva Refugee Convention states that “the renewal or extension of the validity of the document is a matter for the authority which issued it, so long as the holder has not established lawful residence in another territory and resides lawfully in the territory of the said authority. The issue of a new document is, under the same conditions, a matter for the authority which issued the former document”.

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6 3 1 3 Accrual of the right to housing in accordance with domestic housing laws

Section 39(1) of the South African Constitution provides that courts must have regard to international law, and may have regard to foreign law in determining the content, nature and scope of the rights in the Bill of Rights. International law in this context refers to those sources of international law recognised by article 38(1) of the Statute of the International Court of Justice.¹⁴²⁸ These include international treaties, international customs and practices, the general principles of laws recognised by civilised nations, judicial decisions and the teachings of the most highly regarded scholars of the various nations.¹⁴²⁹ Legal sources arising out of the comments and opinions of the committees or commissions established by international human rights treaties are also included.¹⁴³⁰ Under South African jurisdiction, rules and standards arising out of international treaties and agreements are recognised in terms of section 231(2) and become law in terms of section 231(4) of the South African Constitution. International customary law is law in South Africa in terms of section 232, unless it is inconsistent with the Constitution or an Act of Parliament. Within the context of section 39(1), the term international law has been given a wide interpretation to include treaties such as the European Convention on Human Rights, to which South Africa is not and cannot become a party.¹⁴³¹

The right to housing of refugees is contained in the Geneva Refugee Convention, which was transposed into the South African legal system in terms of section 231. In addition to the provisions of the Geneva Refugee Convention, the Refugees Act also imposes obligations on the state in relation to the right to housing of refugees and asylum-seekers, through its references to the rights enshrined in the Bill of Rights. Similar to section 39(1)(b) of the South African Constitution,¹⁴³² section 6 states that refugee rights (including the universal rights in the Bill of Rights) must be applied in light of and in accordance with international human rights norms and principles.¹⁴³³

¹⁴²⁸ Adopted in San Francisco on 24 October 1945.

¹⁴²⁹ J Dugard "The Role of International Law in Interpreting the Bill of Rights" (1994) 10 *South African Journal on Human Rights* 208, 243.

¹⁴³⁰ N Botha "International Law and the South African Interim Constitution" (1994) 9 *South African Public Law* 245, 248-252.

¹⁴³¹ Dugard (1994) *South Africa Journal on Human Rights* 212. See too *Makwanyane* para 35 where it was stated that rules of international law include those arising out of binding and non-binding treaties and that all these rules may be used as tools of interpretation.

¹⁴³² It states that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum... must consider international law."

¹⁴³³ S 6(1)(a)-(e) of the Refugees Act states that the Act must be interpreted and applied with due regard to the Geneva Refugee Convention and its Protocol, the African Refugee Convention, the

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Before the chapter turns to discuss the constitutionality of excluding refugees from the right to housing, it is crucial to examine foreign and international norms, principles and standards, as well as practices.

6 4 Basic minimum standards

6 4 1 *International human rights law*

International human rights law contemplates minimum standards of treatment that should be accorded to everyone with specific reference to the protection of vulnerable groups. The minimum standard of treatment is obviously lower than the standards of favourable treatment of refugees. It is set forth in various treaties and declarations and must be taken into consideration in applying the general principle of law relating to housing for refugees and asylum-seekers.

6 4 1 1 Standards under declarations

The most important declarations that make reference to the right to housing are the UDHR, the 1976 Vancouver Declaration on Human Settlements (known as “Habitat I”),¹⁴³⁴ the 1996 Istanbul Declaration on Human Settlements (known as “Habitat II”)¹⁴³⁵ and the 1996 Habitat Agenda.¹⁴³⁶

The UDHR in article 25(1) seeks to ensure 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”. The right to housing is seen as a component of the right to a standard of living adequate for the protection of the health, dignity and well-being of every human being. Article 25(1) not only provides an important legal protection mechanism, but also lays down a standard to be met by a host state in relation to housing.

When the UN General Assembly adopted the Habitat I, it recognised that one of the problems relating to human settlements is that people are involuntarily migrated, relocated or expelled due to political, racial and economic reasons. It further noted that, for the establishment of a just and equitable world economic order, there was a need to adopt bold, meaningful and effective human settlements policies and spatial

UDHR, and any other relevant convention or international agreement to which the Republic is or becomes a party.

¹⁴³⁴ Adopted on 31 May to 11 June 1976.

¹⁴³⁵ UNA/CONF 165/14 (part) 7 August 1996.

¹⁴³⁶ Adopted at the 18th plenary meeting, on 14 June 1996 of the UN Conference on Human Settlements.

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planning strategies realistically adopted to meet the housing needs at local level.¹⁴³⁷ In adopting the Habitat II, the UN General Assembly committed governments to the realisation of twin goals: to achieve adequate shelter for all and to ensure sustainable human settlements development.¹⁴³⁸ Equally important was the understanding of the UN General Assembly that governments should “recognise the particular needs of women, children, and youth for safe, healthy and secure living condition.”¹⁴³⁹ Governments must combat the deterioration of human settlements conditions by addressing socio-economic problems such as homelessness, poverty, unemployment, social exclusion and family instability.¹⁴⁴⁰ In relation to refugees, the 1996 Habitat Agenda notes that the refugee situation aggravates the existing shelter problems in host countries, “highlighting the need for a speedy solution to the problem on a durable basis”.¹⁴⁴¹ The needs of vulnerable people, particularly with regard to their living conditions, have to be fully taken into account and be given special attention.¹⁴⁴² On that note, the 1996 Habitat Agenda requires governments to give special consideration to the circumstances and needs of the poor, homeless, women, children, older people, indigenous people, refugees, displaced persons, migrants, persons with disabilities, and those belonging to vulnerable and disadvantaged groups.¹⁴⁴³ These declarations play an important role in interpreting or advocating for the right to housing of refugees. In light of these declarations, states are morally obliged to give special attention to the circumstances and the housing needs of refugees and asylum-seekers.

6 4 1 2 Standards under treaties or conventions

The treaties or conventions that guarantee or make reference to the right to housing or protect the right by implication are numerous. These treaties include the ICESCR, the ICCPR, the ACHPR, the CEDAW, the CRC, the ACRWC and the CERD.

Refugees and asylum-seekers can invoke the standard set forth under article 11 of the ICESCR. The article guarantees the right of everyone to an adequate standard

¹⁴³⁷ See Preamble, read in tandem with Art 1 of the Habitat I.

¹⁴³⁸ Para 1 of the Habitat II.

¹⁴³⁹ Para 7. See too Art 19 of the Habitat I.

¹⁴⁴⁰ Para 4.

¹⁴⁴¹ Preamble and para 12 of the 1996 Habitat Agenda.

¹⁴⁴² Paras 37-38.

¹⁴⁴³ Para 38.

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of living for himself and his family, including adequate food, clothing, and housing and to the continuous improvement of living conditions. Article 11(1) tasks the state having jurisdiction to take appropriate steps to ensure the realisation of the right. In this context, the state must take appropriate measures to ensure that refugees and asylum-seekers have access to adequate housing. Like under the Geneva Refugee Convention, the full realisation of the right is dependent on international cooperation.¹⁴⁴⁴ On the other hand, article 10 of the ICESCR recognises that the widest possible protection and assistance should be accorded to the family which it views as the fundamental group unit of society. The widest possible protection and assistance should be read extensively to include the provision of shelter for those in the greatest need of housing. Articles 10 and 11 are essential legal tools to ensure the protection of refugees with respect to housing.

Refugees and asylum-seekers may invoke article 7 of the ICCPR to claim the right to housing. The ICCPR does not make reference to the right to housing, but rather, requires states to treat all human beings with humanity and with respect for the inherent dignity of the human person. Article 7 provides that no-one shall be subjected to torture or to cruel, inhuman, or degrading treatment.¹⁴⁴⁵ Cruel, inhuman or degrading treatment would arise in situations where refugees' and asylum-seekers' housing needs are not catered for and, as a result, they are left with no roof over their heads. The obligations created by the ICCPR would be violated if the state that has jurisdiction, has not devised a comprehensive and workable policy aimed at the facilitation of refugees' and asylum-seekers' access to housing accommodation.¹⁴⁴⁶ The human dignity of refugees and asylum-seekers can be protected through the provision of adequate accommodation.

This approach is reflected in the ACHPR, which states that "every individual shall have the right of access to public property and services in strict equality of all persons before the law".¹⁴⁴⁷ The right to housing can be said to be implied in the obligations imposed on the state to create "a general satisfactory environment

¹⁴⁴⁴ Art 11.

¹⁴⁴⁵ Art 7.

¹⁴⁴⁶ Deprivation of the right to housing which contributes to the state of extreme poverty in which refugees and asylum-seekers live would amount to inhuman and degrading treatment within the meaning of Article 7. See also the decision of the ECtHR in *M.S.S. v Belgium and Greece* in which the court found that failure to provide accommodation to an asylum-seeker amounted to a violation of Article 3 of the European Convention on Human Rights.

¹⁴⁴⁷ Art 13(3).

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favourable to [all peoples'] development"¹⁴⁴⁸ and to assist and support the family to take care of its physical health and morals.¹⁴⁴⁹

On top of this, special measures for most vulnerable people are strongly recommended. The Office of the United Nations High Commissioner for Human Rights recognised that women are usually discriminated against simply because they are women.¹⁴⁵⁰ Other grounds of discrimination may be poverty, age, class, sexual orientation or ethnicity. The minimum standard of protection of women is set forth under articles 14(2)(h) and 15(2) of the CEDAW. Refugee women can benefit from this standard. Article 14(2)(h) of CEDAW states that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right... to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications”.

The right to housing is broad enough to encompass aspects relating to sanitation, electricity and water supply, and transport and communications. These facilities must also be available. On the other hand, article 15(2) of CEDAW states that:

“States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals”.

Article 15(2) can be used by refugee women to seek legal recourse in a court of law if they are discriminated against in the HDP. It also recognises their right to enter into lease agreements, mortgage homes, and acquire security of tenure for the purpose of controlling and managing their properties.

Refugees and asylum-seekers who are disabled – either because they were born with disabilities or were injured or maimed as a result of civil war, violence or armed conflict – are protected by the CRPD. It stresses that the inherent dignity of all

¹⁴⁴⁸ Art 24.

¹⁴⁴⁹ Art 18(1)-(2).

¹⁴⁵⁰ UNHabitat “The Right to Adequate Housing” (2009) *Fact Sheet No. 21/Rev.1* 17.

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persons with disabilities must be respected.¹⁴⁵¹ Moreover, it requires states to adopt measures to identify and eliminate obstacles and barriers to accessibility, notably in relation to housing.¹⁴⁵² These are some of the benefits refugees and asylum-seekers with disabilities can benefit from, given that article 28 states that people with disabilities are entitled to the right to “an adequate standard of living for themselves and their families, including adequate... housing, and to the continuous improvement of living conditions”. They may not be excluded from housing measures taken in order to safeguard and promote the realization of the right.¹⁴⁵³ More importantly, article 12 entrenches a powerful dual principle of equal recognition and equal treatment. The dual principle stipulates that people with disabilities should be recognised as persons before the law¹⁴⁵⁴ to whom equal rights apply.¹⁴⁵⁵ Recognising them as persons implies that they should be recognised as beneficiaries in terms of housing law. In cases where they are not recognised as such, article 12 enables them to seek a remedy from national courts and, once they are recognised as beneficiaries, to obtain security of tenure for the purpose of exercising equal rights with respect to owning or inheriting property, mortgages as well as controlling housing-related financial affairs.¹⁴⁵⁶

Children’s health, educational advancement and overall well-being are dependent on a number of factors, in particular the quality of the food they eat, the quality of education and healthcare they receive and the quality of housing in which they live. The UN notes that a lack of these essential aspects of life has a profound impact on their moral, physical and mental development.¹⁴⁵⁷ Growing up in an environment characterised by inadequate housing, forced evictions or homelessness often affects children’s growth, development and enjoyment of a whole series of rights, including the right to basic nutrition, shelter, education, healthcare and personal security or protection from maltreatment and degradation.¹⁴⁵⁸ Due to these problems, treaties were dedicated to the protection of the interests of children. The rights of a child are stipulated under the CRC and the ACRWC. Refugee children can particularly benefit

¹⁴⁵¹ Art 1.

¹⁴⁵² Art 9.

¹⁴⁵³ Art 28(1).

¹⁴⁵⁴ Art 12(1) states that “States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.”

¹⁴⁵⁵ Art 12(5).

¹⁴⁵⁶ Arts 12(2)-(5).

¹⁴⁵⁷ UNHabitat *The Right to Adequate Housing* 18.

¹⁴⁵⁸ 18.

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from these two instruments. Article 27(3) of the CRC mandates the state to take appropriate measures, in accordance with national conditions and within their means, to assist parents and others responsible for a child to implement the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. The state must, in case of need, provide material assistance and support programmes, particularly with regard to housing. In particular, there is an obligation flowing from section 22(1) of the CRC to ensure that refugee children (including asylum-seekers), whether unaccompanied or accompanied by their parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of the applicable rights set forth in international human rights or humanitarian treaties.

The same obligations are created by article 20(2)(a) of the ACRWC. In a similar fashion to article 27(3) of the CRC, article 20(2)(a) states that host countries:

“[S]hall in accordance with their means and national conditions take all appropriate measures to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to... housing.”¹⁴⁵⁹

With regard to refugee children, the ACRWC states that a host state shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or national asylum law shall, whether unaccompanied or accompanied, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in the ACRWC and other international human rights and humanitarian law.¹⁴⁶⁰

As noted earlier, the housing provision in the Geneva Refugee Convention was modelled on the right contained in article 6 of the 1949 Migration for Employment Convention. In certain situations where refugees are employed, they can also benefit from the right contained in the ILO's Convention. Under this regime, the recommended standard of treatment is the same treatment accorded to citizens. The standard is more generous than the standard of same or equal treatment accorded

¹⁴⁵⁹ Art 22(2)(a).

¹⁴⁶⁰ Art 23(1).

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to non-citizens. Although it is generous, it does not entail “equal treatment in access to home ownership and public financing schemes that may exist to facilitate it.”¹⁴⁶¹

The right to adequate housing, as a core aspect of the right to adequate living conditions, is also protected by provisions in other human rights instruments. These include: article 21 of the 1954 Convention Relating to the Status of Stateless Persons; article 5(2) of the ILO’s 1962 Convention No. 117 Concerning Basic Aims and Standards of Social Policy; articles 14, 16 and 17 of the ILO’s 1989 Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries; and article 43(1)(d) of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It is self-evident that the right to housing is extensively protected and that it is not restricted to citizens. Mostly, it is extended to include refugees, asylum-seekers and migrant workers. The major concern is the possibility of discriminating against refugees on the basis of nationality, refugee status or poverty.

Discrimination against refugees and asylum-seekers in the enjoyment of the right to housing is prohibited by implication by article 5(e)(iii) of the CERD, which is seen as complementing housing rights evinced in the above-cited international human rights treaties. Article 5(e)(iii) states that the State Parties to CERD:

“undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the... economic, social and cultural rights, in particular... the right to housing...”.

Even though refugee status appears not to be a listed ground for discrimination, it can be argued to be analogous to national or ethnic origin. Article 5(e)(iii) of the CERD provides a basis to argue equal treatment of refugees with respect to adequate housing.

6 4 2 Judicial opinions and General Comments

6 4 2 1 Committee on Economic, Social and Cultural Rights

The importance of the right to housing is reflected in the Committee on Economic, Social and Cultural Rights’ General Comment 4 regarding the right to adequate

¹⁴⁶¹ Da Costa *Rights of Refugees in the Context of Integration* 70.

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housing. The Committee states that the human right to adequate housing, which is a core element of the right to an adequate standard of living, is “of central importance for the enjoyment of all economic, social and cultural rights”.¹⁴⁶² It notes the financial difficulties faced by developing countries to respect and observe the right to housing and thus accepts that they are confronted by a lack of resources to realise the right to housing. Equally important, in the most developed countries, issues of housing remain a challenge to such an extent that “significant problems of homelessness and inadequate housing also exist”.¹⁴⁶³ Despite resources-based challenges, the right to adequate housing resides in everyone and the reference to everyone implies that “individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors”.

Regard must be given to article 2(2) of the ICESCR, which prohibits the state from subjecting the enjoyment of social, economic and cultural rights to any form of discrimination.¹⁴⁶⁴ This appears to imply that refugees and asylum-seekers may not be discriminated against on the basis of national origin or refugee status. Discrimination is proscribed because the right to housing is innately connected to and interrelated with other fundamental human rights and principles upon which the ICESCR is premised. The Committee, however, acknowledges the discretion enjoyed by the state to differentiate between people in favour of its citizens or between categories of persons in favour of vulnerable groups, provided that the differentiation is reasonable.¹⁴⁶⁵

In the Committee’s view, the right to housing derives from “the inherent dignity of the human person”. This requires the concept of housing to be interpreted in a way that takes account of a variety of other considerations.¹⁴⁶⁶ There are seven aspects that must be taken into account in any particular situation or context: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability;

¹⁴⁶² Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations, Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003), para 1.

¹⁴⁶³ Para 4.

¹⁴⁶⁴ Para 6.

¹⁴⁶⁵ *Da Costa Rights of Refugees in the Context of Integration* 68 and J A Dent “Research Paper on the Social and Economic Rights of Non-Nationals in Europe” (1998) Paper prepared for the European Council on Refugees and Exiles (ECRE), November 1998, at 108.

¹⁴⁶⁶ General Comment 4, para 7.

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habitability; accessibility; location and cultural advocacy.¹⁴⁶⁷ Within this understanding, the concept of housing cannot be defined “in a narrow or restrictive sense, which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity”.¹⁴⁶⁸ It should rather be defined in a wide sense to imply “the right to live somewhere in security, peace and dignity”.¹⁴⁶⁹ Such a home or a house must have “...adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost”.¹⁴⁷⁰ The state should devise a housing policy that would ensure that all persons, citizens and non-citizens alike, have access to adequate housing irrespective of income or access to economic resources.¹⁴⁷¹ In devising housing laws, regulations and policies, due priority must be given to vulnerable, disadvantaged or marginalised social groups living in unfavourable or intolerable conditions by giving them particular or special consideration.¹⁴⁷² Housing laws, regulations, and policies should correspondingly not be designed or re-arranged to benefit the better-off or advantaged social groups at the expense of others.¹⁴⁷³ They should be designed in a manner that contributes to the achievement of the right through a continuous improvement of living conditions of all people generally.¹⁴⁷⁴ Disadvantaged groups are defined to refer to “the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas”.¹⁴⁷⁵ Refugees and asylum-seekers are disadvantaged by or victims of manmade disasters who live in appalling conditions. They include the elderly, infirm and frail persons, women, children, disabled persons and persons with health problems.

In the view of the Committee, housing laws, regulations and policies which do not mitigate unfavourable or intolerable conditions of living, but contribute to the said

¹⁴⁶⁷ Para 7-8.

¹⁴⁶⁸ Para 7.

¹⁴⁶⁹ Para 7.

¹⁴⁷⁰ Para 7.

¹⁴⁷¹ Para 7.

¹⁴⁷² Para 11.

¹⁴⁷³ Para 11.

¹⁴⁷⁴ Para 11.

¹⁴⁷⁵ Para 7.

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conditions, would be inconsistent with the obligations under the ICESCR.¹⁴⁷⁶ The state should consider the poor and vulnerable in its housing programme. As noted, refugees and asylum-seekers must be welcomed in their host communities as vulnerable and disadvantaged social groups and may not be marginalised by their host states' housing laws. Failure to give them special consideration in housing laws and policies would give rise to a violation of the ICESCR. In cases where refugees and asylum-seekers are granted housing accommodation, they cannot be evicted arbitrarily or unlawfully.¹⁴⁷⁷

6 4 2 2 The Committee on the Rights of the Child

The Committee on the Rights of the Child recognises that, due to their refugee status, children refugees are often discriminated against and denied access to shelter, housing accommodation and other essential social services. In certain cases, discrimination may be connected to limited governmental capacity. In cases such as these, the Committee recommends that the right to an adequate standard of living can be achieved through international cooperation. The host state can collaborate with, accept and facilitate the assistance offered by UNICEF, UNESCO, UNHCR and other UN agencies within their respective mandates, as well as, where appropriate, other competent intergovernmental organizations or non-governmental organizations in order to secure an adequate standard of living for unaccompanied and separated children.¹⁴⁷⁸

6 4 2 3 European Court for Human Rights

The right to adequate housing is not contained in the European Convention on Human Rights, but is part of the right of everyone to an adequate standard of living laid down in various human rights treaties. This was confirmed by the ECtHR in *Chapman v the United Kingdom [GC]*¹⁴⁷⁹ where it stated that there is no right to

¹⁴⁷⁶ Para 11.

¹⁴⁷⁷ The question of evictions is dealt with extensively under the General Comment No 7 under which the Committee has focused as well on other specific aspects of the right to housing, including, inter alia, protection against evictions, the rights of tenants, the lack of domestic remedies, the need to construct low-income housing, and protection from discrimination.

¹⁴⁷⁸ Art. 22(2).

¹⁴⁷⁹ No. 27238/95, Judgment of 18 January 2001.

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acquire a home under the European Convention, only a right to respect for an existing one.¹⁴⁸⁰

Despite the fact that there is no right to adequate housing under the European Convention, the ECtHR was of the opinion that the refusal of Member States to make housing programmes available and accessible when they are required to do so by law, can in extreme situations, be so severe as to constitute an infringement of the prohibition of inhuman and degrading treatment under article 3 of the European Convention. This conclusion was reached in *M.S.S. v Belgium and Greece*,¹⁴⁸¹ where the court reasoned that Greece's failure, contrary to their obligations under European Council ("EC") Reception Directives, to make available adequate living conditions pertaining to housing for asylum seekers, resulting in the asylum-seeker's destitution, reached the threshold required for a violation of article 3.¹⁴⁸² The right of refugees and asylum-seekers to be protected from torture or ill-treatment imposes an obligation to provide them with adequate housing. However, the Court cautioned that:

"Article 3 cannot be interpreted as obliging the [European Countries] to provide everyone within their jurisdiction with a home.... Nor does article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living..."¹⁴⁸³

In the view of the court, the positive obligations to provide socio-economic assistance in the form of housing accommodation and decent material conditions to indigent asylum-seekers stem from the Dublin Regulation and EC Reception Directives, which were transposed into national laws.¹⁴⁸⁴ In further support of the

¹⁴⁸⁰ Para 99. The court held that "[i]t is important to recall that art 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision".

¹⁴⁸¹ Application No 30696/09, Merits, Judgment of 21 January 2011.

¹⁴⁸² Para 206-264.

¹⁴⁸³ *M.S.S.* para 249.

¹⁴⁸⁴ *M.S.S.* paras 65-86, 250. The Dublin Regulation stands for the Council Regulation No. 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the member States by a third-country national, whereas the EC Reception Directives refer to the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member States for

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inclusion of refugees in social housing schemes, the Court stressed that asylum-seekers are indeed part of “a particularly underprivileged and vulnerable population group in need of special protection” and noted “the existence of a broad consensus at the international and European level concerning this need for special protection”.¹⁴⁸⁵ The humanitarian approach to asylum encourages countries to reconsider their housing policies to guarantee the protection of refugees and asylum-seekers.

6 4 2 4 African Commission

As noted above, the ACHPR does not explicitly guarantee the right to adequate housing for the purpose of attaining an adequate standard of living. This notwithstanding, the jurisprudence of the African Commission protects the right to housing. The right is understood to be implied in the right to property guaranteed under articles 14, 16 and 18(1) of the ACHPR, dealing with the right to property, the right to highest attainable standard of mental and physical health and the right to protection of the family, respectively. Firstly, the right to property is interpreted by the African Commission to embrace equal access to housing and to acceptable living conditions in a healthy environment. Once a house has been accessed, it should not be taken away, arbitrarily.¹⁴⁸⁶ In promoting equitable access to housing, the African Commission recommends that African states should adopt positive measures which include aspects of prevention of discriminatory access of land and housing insofar as women are concerned.¹⁴⁸⁷ Secondly, the right to health was interpreted to embrace “access to basic shelter, housing and sanitation and adequate supply of safe and portable water”.¹⁴⁸⁸ Thirdly, the right to adequate housing is implied in or covered by the protection accorded to the family. Fourthly, it is further protected by article 16 of the 2012 Protocol of the African Charter on the Rights of Women in Africa, which requires African states to ensure access of women to adequate housing.¹⁴⁸⁹ The right

granting and withdrawing refugee status and the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers.

¹⁴⁸⁵ *M.S.S.* paras 232 and 251.

¹⁴⁸⁶ Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04 of 23rd November to 7th November 2004. See Annexure I: Pretoria Declaration on Economic, Social and Cultural Rights in Africa) para 7.

¹⁴⁸⁷ Para 7.

¹⁴⁸⁸ Para 7.

¹⁴⁸⁹ Resolution on the Right to Adequate Housing and Protection from Forced Evictions, ACHPR/Res.231 (LII) 2012 of 9-22 October 2012.

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to adequate housing has been interpreted with a view to guaranteeing a minimum degree of security of tenure with a particular focus on protection from forced evictions.¹⁴⁹⁰

African states obligations were further articulated by the African Commission in *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*.¹⁴⁹¹ The African Commission held that, while the right to adequate housing was not explicitly entrenched under the ACHPR, it could be inferred from other basic human rights:

“[T]he corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health,... the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing...”¹⁴⁹²

The protection of the right to housing and accommodation is thus linked to the protection of, inter alia, the right to property, to full enjoyment of the best attainable state of physical and mental health, and to protection of the family’s health and moral wellbeing. It is the full protection of these rights from which the protection of the right to housing derives. Discrimination against refugees and asylum-seekers in relation to housing programmes will give rise to a violation of the aforementioned rights.

6 4 2 5 UNHCR

When an asylum-seeker arrives in the host country, it becomes an important responsibility of the state that has jurisdiction to respond to his or her basic needs immediately and appropriately. He or she must be afforded international refugee protection, which is defined to include “a range of concrete activities that ensure that asylum-seekers and refugees have equal access to and enjoyment of their rights in accordance with international law”.¹⁴⁹³ The UNHCR notes that “the ultimate goal of these activities is to help them in permanently rebuilding their lives within a

¹⁴⁹⁰ Resolution on the Right to Adequate Housing and Protection from Forced Evictions, ACHPR/Res.231 (LII)2012 of 9-22 October 2012.

¹⁴⁹¹ Communication No. 155/96, ACHPR 2001 (15th Annual Activity Report).

¹⁴⁹² Para 60.

¹⁴⁹³ UNHCR *Handbook for Emergencies* 3ed (2007) 2.

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reasonable amount of time”.¹⁴⁹⁴ In most cases, refugees are housed in refugee camps. The UNHCR was inclined to assist those refugees and asylum-seekers who stayed in refugee camps.

Since 2008, the UNHCR recognises that refugees and asylum-seekers do not only stay in refugee camps but also live in urban areas. Those who stay in urban areas have a legitimate right to claim their rights “stemming from their status as refugees as well as those that they hold in common with all other human beings”.¹⁴⁹⁵ In the UNHCR’s view, refugees are challenged by self-integration in their host communities because their choice to stay in the urban areas, instead of refugee camps, “place[s] considerable pressure on resources and services that are already unable to meet the needs of the urban poor”.¹⁴⁹⁶ Refugees are often blamed for socio-economic ills in the host state and this is used as an excuse to deviate from international responsibilities. Politicians or officials frequently claim that they are bogus refugees and not genuine or that they are in the country in search of a better life. These claims are relied on to exclude refugees and asylum-seekers from the labour market and other social services.¹⁴⁹⁷ This typically results in threats to their personal safety and wellbeing, and aggravates problems such as unemployment, xenophobic attacks, arbitrary detention and deportation.

Refugees and asylum-seekers are, in practice, faced with difficulties of renting adequate accommodation because of their legal status. As a consequence, they are compelled to live in overcrowded and insecure conditions or to sleep in shifts and without access to adequate sanitation. Most often they have no choice but to sleep in poorly ventilated rooms, common living areas, or verandas with no regard for their privacy, health, dignity or personal safety and security.¹⁴⁹⁸ These housing challenges are, according to UNHCR, causes of a number of diseases such as acute respiratory infections, diarrhoeal diseases, worms (especially hookworms), tuberculosis, and hepatitis to mention but a few.¹⁴⁹⁹ Adequate living conditions should not be limited to housing development but should also include the provision of humanitarian

¹⁴⁹⁴ 2.

¹⁴⁹⁵ Para 14.

¹⁴⁹⁶ Para 15.

¹⁴⁹⁷ Para 15.

¹⁴⁹⁸ UNHabitat *The Right to Adequate Housing* 25.

¹⁴⁹⁹ UNHCR *Handbook for Emergencies* 3ed (2007) 17.

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interventions such as clothes, beds, blankets and food which are essential for the prevention of diseases.¹⁵⁰⁰

Given that refugees and asylum-seekers face a variety of different housing protection and welfare problems, meeting their material needs is, the UNHCR argues, a prerequisite. This is crucial in situations where they are unable to support themselves and their families or are challenged by various difficulties preventing them from becoming self-reliant and self-sufficient, and meeting their basic needs.¹⁵⁰¹ In these situations, the UNHCR recognises its role in refugee protection by noting that it has to cooperate with the host state as well as other partners in order to assist and help refugees and asylum-seekers to meet their basic housing needs. The basic needs usually “include the establishment of collective accommodation centres (as long as they meet acceptable standards), the provision of subsidised housing, as well as the distribution of free or subsidised foodstuffs and other basic necessities”.¹⁵⁰² In countries where subsidised public goods and services are provided to citizens, the UNHCR does, in practice, little to ensure that refugees and asylum-seekers are sheltered; most of its effort is rather dedicated to lobbying, advocating for and encouraging integration of refugees in welfare programmes.¹⁵⁰³ In other words, the UNHCR would request the government of the host state to incorporate refugees and asylum-seekers in the housing development, education, healthcare, social assistance and social security schemes.

In South Africa, public goods and services for the poor and vulnerable are subsidised. This provides us with an argument for the inclusion of refugees and asylum-seekers in the subsidised public goods and services. The question of whether there might be sound moral reasons to include them in the HDP and other socio-economic schemes is connected with South Africa’s non-encampment approach. South Africa is not in favour of refugee camps because, as the DHA puts it, camps would create serious logistical, security and humanitarian problems.¹⁵⁰⁴ South Africa’s asylum law is oriented towards self-integration. The Refugees Act is premised on the notion that refugees and asylum-seekers have to integrate themselves into communities and that they must be assisted in doing so through the

¹⁵⁰⁰ 82.

¹⁵⁰¹ UNHCR Policy on Refugee Protection and Solutions in Urban Areas, September 2009, para 116.

¹⁵⁰² Para 118.

¹⁵⁰³ Para 118.

¹⁵⁰⁴ For more details on the non-encampment policy, see the 2016 Green Paper 67.

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creation of adequate legal mechanisms and coordination and support by the relevant governmental departments and other actors.¹⁵⁰⁵

In the light of the UNHCR's view, humanitarian and social responses to the refugee situation must include adequate shelter, along with food, water, healthcare and sanitation, which are the most urgent survival needs of refugees and asylum-seekers.¹⁵⁰⁶ Notably, asylum law creates the state's responsibility to protect and to find a durable solution to the refugee situation in that the host state must use the means to its disposal to protect refugees effectively. The host state should therefore offer aid and assistance to help refugees to rebuild their lives. Access to adequate housing, together with other core elements of socio-economic rights, can help promote self-sufficiency and self-reliance since it provides asylum-seekers and refugees with opportunities to recover from the psychological, social and economic effects of their ordeal.¹⁵⁰⁷ The UNHCR is inclined to stress that housing assistance cannot wait until a person is recognised as a refugee to be provided to him or her. In the light of the above, South Africa should cooperate with the UNHCR on the question of housing refugees and asylum-seekers. The UNHCR should play a meaningful role in ensuring that the right to housing and other core socio-economic rights are realised.

6 5 National approaches to housing: Laws and judicial interpretations

6 5 1 *Foreign law*

The right to housing is expressly entrenched under the national Constitutions of some foreign countries so as to create constitutional obligations to provide people with housing.¹⁵⁰⁸ It is also protected by implication by certain national Constitutions in a manner suggesting that the states are under a positive obligation to ensure adequate living conditions.¹⁵⁰⁹ Some selected foreign Constitutions are worth exploring.

¹⁵⁰⁵ The 2016 Green Paper 67.

¹⁵⁰⁶ UNHCR *Handbook for Emergencies* (2007) 82.

¹⁵⁰⁷ 82-83.

¹⁵⁰⁸ They include the Constitutions of Belgium, Ecuador, Guyana, Haiti, Honduras, Iran, Maldives, Mali, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Russian Federation, Sao Tome and Principe, Seychelles, Spain and Uruguay.

¹⁵⁰⁹ They include the Constitutions of Argentina, Bangladesh, Brazil, Burkina Faso, Colombia, Costa Rica, Dominican Republic, El Salvador, Finland, Guatemala, Nepal, Netherlands, Nigeria, Pakistan, Philippines, Poland, Republic of Korea, Sri Lanka, Sweden, Switzerland, Turkey, Venezuela and Viet Nam.

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For example, the Constitution of Mexico states that “every family has the right to enjoy decent and proper housing” and that “the law shall establish the instruments and necessary supports to reach the said goal”.¹⁵¹⁰ The right to housing is not granted to everyone but to every family and is not restricted to Mexican families. The Constitution of Portugal states that “all have the right, both personally and for their family, to a dwelling of adequate size that meets satisfactory standards of hygiene and comfort and preserves personal and family privacy”.¹⁵¹¹ The Portuguese approach towards the protection of housing rights seems to reflect the minimum core approach. All people are entitled to the right to housing. The Constitution of the Russian Federation entrenches the right to housing, which bears some similarities with South Africa’s Constitution. Article 40(1) of the Constitution of the Russian Federation, 1993, states that “everyone has the right to a home” and that “no one may be arbitrarily deprived of a home”.

It is trite to state that the right to housing is not explicitly protected by the US’s and France’s Constitutions. In France, the right to housing is protected by the principles of equal treatment and individual freedom, whereas it is inferred from humanitarian obligations in the US as discussed below.

6 5 2 France

The right to housing is not expressly contained in the French Constitution. However, there are obligations defined at the European Union level to harmonise the conditions of asylum-seekers across Europe, including standardising housing conditions.¹⁵¹² Article 3(l)(h) of the 2000 Council Directive,¹⁵¹³ in particular, requires European countries to implement the principle of equal treatment between persons irrespective of racial or ethnic origin. This guiding principle stipulates that the equal treatment specifically:

¹⁵¹⁰ Art 4 of the Constitution of Mexico, 1917 (as amended in 1983).

¹⁵¹¹ Art 65 of the Constitution of Portugal, 1976 (Fourth Revision, based on Constitutional Law No. 1/97 of 20 September 1997).

¹⁵¹² Council Directive 2003/9/EC, Laying Down Minimum Standards for the Reception of Asylum Seekers, 2003 OJ L 031.

¹⁵¹³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000.

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“[S]hall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to [...] access to and supply of goods and services which are available to the public, including housing”.

The notion of equal treatment takes root in the Preamble to the 1946 French Constitution, which requires the state to “provide an individual and the family with the conditions necessary to their development” and to ensure that all people, who are incapable of working, receive suitable means of existence.¹⁵¹⁴ The notion is reflected in article 11 of the French Civil Code. The article provides that “an alien enjoys in France the same civil rights as those that are or will be granted to French persons by the treaties of the nation to which that alien belongs”. The concept of equal treatment is grounded in the principle of reciprocity.¹⁵¹⁵ It must however be noted that the right to housing is not a civil right but a social right.

France’s constitutional aspiration of treating people on an equal basis may have implications for the treatment of refugees and asylum-seekers with regard to socio-economic rights, including housing. Traditionally a difference in treatment between citizens and non-citizens is unconstitutional, unless the state resolves different situations in different ways or derogates from equality on the grounds of the general interest, provided that in both cases the differentiation “is directly related to the objective of law establishing it”.¹⁵¹⁶ Central to the protection of a human being is the right to individual freedom, which can, in certain circumstances, be limited. The limitation is permissible only if it is “necessary for and proportionate with the objective pursued”.¹⁵¹⁷ Whether individual freedom constitutionally includes positive dimensions requiring the state to take positive measures for the realisation of an individual’s economic freedom is not clear. From a dignity point of view, the Constitutional Council recognised that the enjoyment of a home is very important for individual freedom.¹⁵¹⁸

¹⁵¹⁴ Recitals 10 and 11.

¹⁵¹⁵ In Decision 98-399 DC of May 1998, para 14, the Constitutional Council notes that France exercises the principle of sovereignty and that, in so doing, it respects the rules of public international law subject to the principle of reciprocity. See too Recital 15 of the Preamble to the 1946 French Constitution.

¹⁵¹⁶ The Constitutional Council, in its Decision No 2011-631 DC of 9 June 2011, paras 38-39, considered Article 6 of the Declaration of 1789 and thus held that the law must be the same for all, whether it protects or punishes.

¹⁵¹⁷ Constitutional Council, Decision No 2011-631 DC of 9 June 2011, para 66.

¹⁵¹⁸ Constitutional Council, Decision 97-389 DC of 22 April 1997, para 3.

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The Constitutional Council held that there is no constitutional principle or rule that provides a general, absolute right to enter and reside in France.¹⁵¹⁹ Parliament is rather obliged to reconcile refugee rights, set forth under refugee treaties, with the constitutional principles of individual freedom and family life.¹⁵²⁰ In this context, article L744-6 of the *Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile* ("CESEDA") or, in English, Code of Entry and Stay for Foreigners and the Right to Asylum, establishes a legislative mandate entrusted with the French Office of Immigration and Integration (or, in French, *Office Français de l'Immigration et de l'Intégration*) to assess material needs and social vulnerabilities of asylum-seekers within a reasonable time. The assessment of social vulnerabilities should be directed at identifying minors, non-accompanied minors, separated minors, people with disabilities, the elderly, pregnant women, victims of human trafficking, people with serious diseases, mentally ill persons, victims of torture, rape, or other forms of serious psychological or physical violence or sexual violence such as female genital mutilation ("FGM"). The assessment includes determination of special protections to be accorded to these different categories of asylum-seekers.¹⁵²¹

Article L. 744-3 of the CESEDA states that asylum-seekers are accommodated under the state-funded reception centres managed by the French Office of Immigration and Integration ("FOII"). France has adopted a refugee housing policy under which refugee accommodations were established throughout the country. Asylum-seekers who expressed their intention to apply for asylum are initially placed in transit centres and, upon being granted temporary residence permits, are transferred to the reception centre for asylum-seekers (i.e. CADA).¹⁵²² The right to housing is viewed as a component of the right to public relief and assistance as discussed under sub-section 4.4.1.3. As noted, the housing needs of families with children are prioritised,¹⁵²³ whereas single asylum-seekers have access to emergency accommodation.¹⁵²⁴ Emergency accommodation receives an asylum-

¹⁵¹⁹ Constitutional Council, Decision 93-325 DC of 13 August 1993, para 2. See too Constitutional Council, Decision 92-307 DC of 25 February 1992, para 8, which states that "the state is entitled to define the conditions of entry of [foreign nationals] into its territory subject to compliance with international agreement".

¹⁵²⁰ Constitutional Council, Decision 92-307 DC of 25 February 1992, paras 8-9.

¹⁵²¹ Art L744-6 of the CESEDA.

¹⁵²² Ministry of the Interior: Guide for Asylum Seekers in France, September 2015, 20-21.

¹⁵²³ J Freedman "Female Asylum-seekers and Refugees in France" (2009) *Legal and Protection Policy Research Policy Series*, PPLAS/2009/0 36.

¹⁵²⁴ 45.

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seeker at night, provided that he or she has booked it, and it does not provide a meal.¹⁵²⁵

It is not all asylum-seekers who enjoy the right to housing. Those individuals who arrive in France via rail, air or sea are not regarded as having entered the country.¹⁵²⁶ This has various implications.¹⁵²⁷ First, they are in principle considered to have entered a *zone d'attente* or, in English, a transit zone from which they are entitled to minimal basic human and refugee rights, including the right to apply for asylum. Secondly, while a determination is made by authorities of whether their claim for asylum is abusive or manifestly unfounded, they are detained in the waiting zone. They are permitted to enter French territory only if the authorities have established that they are genuine asylum-seekers, otherwise they are expelled or deported.¹⁵²⁸

Asylum-seekers who are recognised as refugees are entitled to the right to remain in the CADA for three months from the date on which refugee status was granted. The period of three months is, however, subject to renewal once with the agreement of the provincial authorities. Once recognised as a refugee, an individual is eligible to apply for staying in a temporary accommodation centre and, alternatively, social housing.¹⁵²⁹ The social housing is perennial if allocated to a refugee.¹⁵³⁰

6 5 3 US

Like France, the US's Constitution does not guarantee the right to housing and accommodation. Whilst the US's asylum law is based on a resettlement-oriented policy, the 1980 Refugee Act does not expressly protect the right to housing. Yet, the proposed 2013 Refugee Protection Bill amending the Immigration and Nationality Act (8 U.S.C. 1181) seeks to establish a mandate of collecting data relating to the housing needs of refugees, including (i) the number of refugees who have become homeless; and (ii) the number of refugees at severe risk of becoming homeless.¹⁵³¹

¹⁵²⁵ 45.

¹⁵²⁶ Art L.221.1 of the CESEDA.

¹⁵²⁷ Art L.221-1. See too *Gebremedhin v. France*, Application No. 25389/05, Judgment of 26 April 2007, para 60.

¹⁵²⁸ Guide for Asylum Seekers in France, September 2015, 27.

¹⁵²⁹ 20-21.

¹⁵³⁰ International Federation for Housing and Planning "Housing Refugees Report" (2015) 16 <http://www.ifhp.org/sites/default/files/staff/IFHP%20Housing%20Refugees%20Report%20-%20final.pdf> (accessed 02-11-2015).

¹⁵³¹ S 28(b) of the Refugee Protection of 2003 (S 645 IS).

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This is an indication that the US is concerned with responding to the housing needs of those who are recognised as refugees. Grounding asylum in the concept of resettlement has, however, the implication of depriving asylum-seekers of opportunities to be provided with socio-economic support or basic social benefits. As noted under chapter 4, the US's asylum law tacitly makes reference to asylum-seekers and does not clearly specify basic rights to which they are entitled. In practice, those individuals seeking asylum in the US are prohibited from enjoying the right to employment and to have access to federal public assistance. Like other types of non-citizens, asylum-seekers are treated as if they have sufficient wealth to sustain themselves and their families. Those who are incapable of supporting themselves can be assisted by private charities.

Asylum-seekers who arrive at the US borders are held or housed in detention centres, pending the determination of a credible fear.¹⁵³² Should they establish credible fear, they are referred to the Department of Justice's Executive Office for Immigration Review's ("EOIR") immigration judge for a hearing.¹⁵³³ Expedited expulsion, removal or deportation is applied to those individuals who cannot establish a credible fear.¹⁵³⁴ Asylum-seekers, admitted on the basis of meeting immigration policy conditions, apply for asylum with the US Citizenship and Immigration Services Bureau ("USCIS") or, during removal/ deportation proceedings, may seek asylum before an EOIR immigration judge.¹⁵³⁵ Asylum seekers physically present in the country, who cannot sustain themselves, "live in a state of destitution while awaiting adjudication of their asylum applications" as they are not entitled to have access to welfare schemes.¹⁵³⁶

In very limited and exceptional circumstances, asylum-seekers may be co-beneficiaries of special federal benefits under the immigration policy. These special federal benefits, which include short-term shelter or housing assistance, are normally accorded to vulnerable indigent migrants.¹⁵³⁷ Section 214 of the 1980 Housing and

¹⁵³² Human Rights First "U.S. Detention of Asylum-Seekers Seeking Protection, Finding Prison" April 2009 – Revised June 2009.

¹⁵³³ R E Wasem "U.S. Immigration Policy on Asylum-seekers" (2005) *SCR Report for Congress* 1, 1.

¹⁵³⁴ 1.

¹⁵³⁵ 1.

¹⁵³⁶ Human Rights Watch *At Least Let Them Work* 45.

¹⁵³⁷ S 1611(b)(1)(D)-(E) of the United States Code Title 8: Aliens; Nationality; McBride (1999) *International Migration* 292 and Human Rights Watch *At Least Let Them Work* 31-32.

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Community Development Act¹⁵³⁸ states that housing assistance is available to a non-citizen “if he or she:

- (i) Is admitted in the US in terms of the immigration framework;¹⁵³⁹
- (ii) Satisfies immigration requirements for eligibility for financial assistance;¹⁵⁴⁰
- (iii) Is in possession of an alien registration documentation, or other proof of immigration registration from the Immigration and Naturalization Service that contains the individual's alien admission number or alien file number, or any other document as the Secretary determines constitutes reasonable evidence indicating eligibility for financial assistance.”¹⁵⁴¹

These conditions for eligibility for housing assistance are also laid down under section 121(2) of the 1986 Immigration Reform and Control Act.¹⁵⁴² In the view of the US Supreme Court, housing assistance is a core component of social welfare that protects vulnerable indigent persons against the discomfort caused by the lack of a house or inadequate housing.¹⁵⁴³ The court has further stated that core aspects of social welfare that are necessary for basic sustenance, should be viewed not as governmental privileges, benefits or entitlements, but as social aspects with a constitutional significance.¹⁵⁴⁴

The US’s asylum law is lagging behind with regard to the protection of asylum-seekers. Only refugees are assisted to integrate into and resettle in society and the integration policy includes the provision of housing as a foundation of the facilitation of self-sufficiency and self-reliance. The 1980 Refugee Act commits the US to the promotion of local integration as a mechanism to finding durable solutions to refugee problems.¹⁵⁴⁵ Integration is defined as “a dynamic, multidirectional process in which new comers and the receiving communities intentionally work together, based on a shared commitment to tolerance and justice, to create a secure, welcoming, vibrant, and cohesive society”.¹⁵⁴⁶ The integration process is based on eight factors,

¹⁵³⁸ 42 U.S.C. 1436a.

¹⁵³⁹ S 214(1)(A).

¹⁵⁴⁰ S 214(1)(B).

¹⁵⁴¹ S 214(2)(A)-(B).

¹⁵⁴² 8 USC 1101.

¹⁵⁴³ *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974) in respect of healthcare services.

¹⁵⁴⁴ *Memorial Hosp. v. Maricopa County*; *Goldberg v. Kelly*, 397 U. S. 254, 397 U. S. 264 (1970); *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 395 U. S. 340-342 (1969).

¹⁵⁴⁵ S 101(a) of the Refugee Act 1980, Public Law 96-212-Mar, 17, 1980.

¹⁵⁴⁶ T Dwyer *Refugee Integration in the United States: Challenges and Opportunities* (2010) 12.

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including, inter alia, health (or wellbeing), language, economic opportunity, civic values (or participation or engagement), education, housing, social connections, and belonging (or safety).¹⁵⁴⁷ Social benefits for the realisation of these indicators are provided on a short-term basis since the US has no long term integration policy in place. Its current integration policy is based on the provision of “limited, time-bound assistance aimed at meeting the immediate needs of the refugees.”¹⁵⁴⁸

6 5 4 South Africa

Unlike France and the US, the Bill of Rights in South Africa’s Constitution guarantees the right of access to adequate housing,¹⁵⁴⁹ children’s rights to shelter,¹⁵⁵⁰ prisoners’ rights to accommodation,¹⁵⁵¹ and the right not to be evicted from one’s home.¹⁵⁵² The right of access to housing and non-eviction is granted to everyone, without distinction of any kind. These rights should thus also extend to refugees and asylum-seekers. This is confirmed by the Refugees Act. Section 27(b) of the Refugees Act provides that a refugee is entitled to the rights in the Bill of Rights, whereas section 27A(d) appears to provide that an asylum-seeker is entitled to the rights in the Bill of Rights, in so far as those rights apply to everyone.

In order to give effect to the constitutional right to have access to adequate housing, a number of laws and policies has been adopted. However, these laws were not reconciled with the Refugees Act, resulting in the exclusion of refugees and asylum-seekers. The housing legislative and policy framework is, for example, comprised by the Housing Act,¹⁵⁵³ the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (“PIE Act”),¹⁵⁵⁴ the Rental Housing Act,¹⁵⁵⁵ the 2000 National Housing Code, the 2007 National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed through Housing Programmes, the 2009 Revised National Housing Code, the Social Housing Act,¹⁵⁵⁶

¹⁵⁴⁷ 13.

¹⁵⁴⁸ 15.

¹⁵⁴⁹ S 26(1).

¹⁵⁵⁰ S 28(1)(c).

¹⁵⁵¹ S 35(2)(e).

¹⁵⁵² S 26(3).

¹⁵⁵³ 107 of 1997.

¹⁵⁵⁴ 19 of 1998.

¹⁵⁵⁵ 50 of 1999.

¹⁵⁵⁶ 16 of 2008.

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and Housing Development Agency Act.¹⁵⁵⁷ The framework created the National Housing Subsidy Scheme (“NHSS”), including establishment of the generic qualifying criteria for beneficiaries wishing to access state housing subsidies. The framework is dependent on or interrelated with a number of laws adopted with the aim of protecting the rights of those who occupied land such as the Land Reform (Labour Tenants) Act,¹⁵⁵⁸ the Interim Protection of Informal Land Rights Act,¹⁵⁵⁹ the Extension of Security of Tenure Act¹⁵⁶⁰ and the Restitution of Land Rights Act.¹⁵⁶¹ These laws create a web of housing protection that has substantively and positively contributed to the improved position of historically disadvantaged groups whose fundamental rights to have adequate access to land and housing were unattainable.¹⁵⁶²

The afore-mentioned housing laws and policies do not define the concept “adequate housing” because, as the Socio-Economic Rights Institute (“SERI”) puts it, the definition of the concept largely “depends on the specific context and circumstances of households and individuals, together with their needs and priorities”.¹⁵⁶³ Rather, the minimum standards of the right to housing are defined. The RDP defines the minimum standards as follows:

“As a minimum, all housing must provide protection against weather, a durable structure, and reasonable living space and privacy. A house must include sanitary facilities, storm water drainage, a household energy supply (whether linked to grid electricity supply or derived from other sources, such as solar energy), and convenient access to clean water. Moreover, it must provide secure tenure in variety of forms. Upgrading of existing housing must be accomplished with minimum standards in mind”.¹⁵⁶⁴

Key criteria for determining compliance with these minimum standards are adequacy of protection (or physical security), durability of structure, adequacy of

¹⁵⁵⁷ 23 of 2008.

¹⁵⁵⁸ 3 of 1996 (in respect of protecting occupiers of agricultural land).

¹⁵⁵⁹ 31 of 1996 (in respect of protecting occupiers of land in terms of informal land rights).

¹⁵⁶⁰ 62 of 1997 (in respect of protecting the occupation rights of individuals who occupy land with the consent of landowner).

¹⁵⁶¹ 22 of 1994 (in respect of protecting lawful and unlawful occupiers of land who have lodged a restitution claim).

¹⁵⁶² A J van de Walt “Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation” (2002) 2 *Journal of South African Law* 254, 265.

¹⁵⁶³ K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 25.

¹⁵⁶⁴ ANC *Reconstruction Development Programme* 23.

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space, adequacy of privacy, adequacy of services (water, sanitation, energy supply, etc), security of tenure and accessibility (or availability). Furthermore, the RDP states that community organisations and other stakeholders can provide definitions of “minimum standards for housing types, construction, planning and development, for both units and communities”.¹⁵⁶⁵

Access to adequate housing is linked to and bound up with access to other constitutional rights in the Bill of Rights, as well as other public socio-economic goods and amenities.¹⁵⁶⁶ The latter includes land, water, sanitation, electricity, livelihoods, transport, clinics and hospitals, schools, universities and other cultural and recreational amenities such as parks, libraries, public spaces, swimming pools, sports fields and so forth.¹⁵⁶⁷ The former includes core rights like equality, human dignity, public participation, just administrative action, freedom of expression, access to information and access to justice.¹⁵⁶⁸ A house or home is not accessible if it is situated in an area where there are no schools, no hospitals, no shops, and inadequate transport and livelihood opportunities, even if it meets the defined minimum standards. The interrelatedness and interdependency are crucial, simply because the concept housing “entails more than bricks and mortar”;¹⁵⁶⁹ it is not just about building homes or houses; rather it is “about transforming... residential areas and building communities with closer access to work and social amenities, including sports and recreation facilities”.¹⁵⁷⁰

It is clear that the realisation of the right to housing is important for the enjoyment of a host of civil, political, and socio-economic rights. Equality, dignity, freedom and other rights will be demeaned if people have no homes or have access to inadequate housing. Before this section turns to discuss the housing legislative and policy framework, it is crucial to state that refugees and asylum-seekers are constitutionally entitled to all civil, political, economic, social and cultural rights, save those rights that the South African Constitution guarantees to citizens only. The Constitution reserves political rights for citizens (section 19), as well as the rights to gain access to land (section 25(5)); to non-deprivation of citizenship (section 20); to enter, remain

¹⁵⁶⁵ 24.

¹⁵⁶⁶ Tissington *A Resource Guide to Housing* 25.

¹⁵⁶⁷ 25.

¹⁵⁶⁸ 25.

¹⁵⁶⁹ *Grootboom* para 32.

¹⁵⁷⁰ Tissington *A Resource Guide to Housing* 27, quoting the President in his 2009 Budget Vote Speech.

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in and reside anywhere in the Republic (section 21(3)); to a passport (section 21(4)); and to choose an occupation, profession and trade (section 22).

6 5 4 1 Children's rights to shelter

The South African Constitution guarantees the right of children to have access to shelter. Section 28(1)(c) extends this right to "every child". It thus has universal application and includes refugee children. The protection afforded to refugees and asylum-seekers under section 27(b) and 27A(d) of the Refugees Act is construed to include all those rights in the Bill of Rights which do not apply to citizens only. Unlike section 26(1), section 28(1)(c) refers to shelter instead of housing. The section confers the right to shelter on every child without distinction of any kind. In *Grootboom*, the Constitutional Court rejected the contention that the Constitution establishes a distinction between shelter and housing or that shelter is a rudimentary form of housing.¹⁵⁷¹ The only legal difference is that the right to shelter is not subject to the twin limitation requirements of available resources and progressive realisation. Proceeding from this, the right is subject to immediate implementation and the twin limitation requirements cannot be relied on by the state to justify a failure to meet obligations flowing from section 28(1)(c).

The Constitutional Court stated that section 28(1)(c) must be read with section 28(1)(b), which postulates that "[e]very child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment". On this reading, the parents or families bear a primary responsibility to provide care to their children, including meeting their housing needs.¹⁵⁷² The state has a responsibility to provide shelter to those children who are for example removed from the care of their parents or families. The judgment thus absolved the state from the obligation to provide shelter on demand to parents and their children.¹⁵⁷³ The court was concerned that children in the greatest need of shelter "could become stepping stones to housing for their parents instead of being valued for who they are." It reasoned that, if adequate consideration is given to the contextual need to read section 28(1)(c) together with sections 28(1)(b) and 26, 'the carefully constructed constitutional scheme for progressive realisation of socio-economic rights would

¹⁵⁷¹ Para 73.

¹⁵⁷² Para 77.

¹⁵⁷³ Para 77.

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make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand.”¹⁵⁷⁴ The state is not totally absolved from all responsibility to provide for the needs of children as their needs will often be most urgent and their rights most in peril.¹⁵⁷⁵

The treatment in *Grootboom* of the relationship between section 28(1)(c) and 26 has been subjected to much academic criticism. Critics argue that the Constitutional Court applied a horizontal interpretation to children’s right to shelter. The obligation to fulfil the right was, as a result, said to rest primarily on parents. On this interpretation, it only imposes a duty on the state in cases where parents and families are unable to care for their own children.¹⁵⁷⁶ The state thus assumes the responsibility to provide orphaned and abandoned children with alternative care.¹⁵⁷⁷ As Mbazira puts it, the state was absolved from core obligations to prioritise the provision of the minimum substantive content of the right for all children in housing need.¹⁵⁷⁸

Julia Sloth-Nielsen argues that the horizontal interpretation approach is lacking in various respects. First, it restricts the state’s obligation to a substantive positive duty to protect abandoned and orphaned children, who are usually placed under alternative care as a result of being removed from the family environment.¹⁵⁷⁹ Second, it deprives children who are living in a child-headed household of the right against the state to provide them with shelter or alternative care.¹⁵⁸⁰ Third, it is uncertain whether or not children lacking a family environment have the right to be provided with substantive alternative or institutional care on demand.¹⁵⁸¹ Fourth, section 28(1)(c) is seen as overlapping with section 26(1) and, as a consequence, section 28(1)(c) is subject to the qualification of being implemented progressively within available resources.¹⁵⁸² Fifth, the approach in *Grootboom* to children’s needs is in contradiction with the approach adopted subsequently in *Treatment Action*

¹⁵⁷⁴ Para 71.

¹⁵⁷⁵ This was emphasised in the case of *TAC* para 78.

¹⁵⁷⁶ J Sloth-Nielsen “Too Little? Too Late? The Implications of the *Grootboom* Case for State Responses to Child-headed Households” (2003) 1 *Law, Democracy & Development* 113, 120.

¹⁵⁷⁷ 118 and 121. See too *Grootboom* para 77.

¹⁵⁷⁸ Mbazira *Litigating Socio-economic Rights in South Africa* 60. See too D Brand “The Proceduralisation of South Africa Socio-Economic rights Jurisprudence, or ‘What are Socio-Economic Rights for?’” in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 48.

¹⁵⁷⁹ Sloth-Nielsen (2003) *Law, Democracy & Development* 117-119.

¹⁵⁸⁰ 121-122.

¹⁵⁸¹ 188.

¹⁵⁸² 119.

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Campaign, which holds that the state assumes obligations to care for children even if they are under the care of their parents or families, when parents or families are unable to fend for them.¹⁵⁸³

Sloth-Nielsen is of the view that the Constitutional Court could have given a vertical interpretation to section 28(1)(c). This would have resulted in the recognition that the state bears the primary responsibility towards all children living in intolerable housing conditions, and that section 28(1)(b) serves as “a defence against unwarranted state intrusion in family life.”¹⁵⁸⁴ In addition, obligations created by section 28(1)(c) are immediate and not subject to the requirement of progressive realisation.¹⁵⁸⁵

Restricting the right to shelter to abandoned and orphaned children would imply that only separated and non-accompanied refugee children have the right against the state to provide them with basic nutrition, shelter, basic health care services and social services. In the light of the *Grootboom* judgment, the responsibility to fulfil the obligations of section 28(1)(c) falls upon refugee parents or guardians irrespective of their socio-economic situation or inability to provide their children with adequate shelter. This is problematic, because both adult refugees and their children are, more often than not, dependent on humanitarian and social assistance. In view of this, the vertical approach suggested by Sloth-Nielsen is preferable.

6 5 4 2 Legislative and policy framework: Context and qualifying criteria

The RDP notes with concern South Africa’s bitter history dominated by colonialism, racism, apartheid, sexism and repressive labour policies.¹⁵⁸⁶ These practices and policies generated poverty and left deep scars of inequality and economic inefficiency.¹⁵⁸⁷ South Africans were faced by enormous socio-economic challenges, including access to adequate housing. Segregated and unequal access to socio-economic rights, benefits and privileges compelled the majority of South Africans to live in degrading and appalling conditions, especially in urban townships

¹⁵⁸³ 121 referring to the case of *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 79. In the TAC case, the court held that “the state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking.”

¹⁵⁸⁴ 117-118.

¹⁵⁸⁵ 123.

¹⁵⁸⁶ ANC *Reconstruction Development Programme* 2.

¹⁵⁸⁷ 2.

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and rural settlements. Considering the past iniquities, the RDP suggests that the principle of housing should be applied to ensure that “all South Africans have a right to secure a place in which to live in peace and dignity” and to respond to the housing needs of the homeless.¹⁵⁸⁸ Responding to the housing needs of the homeless and the poorest of South Africans must be a first priority.¹⁵⁸⁹ The RDP places citizenship at the centre of the distribution of the right to housing. The distribution of housing on the basis of citizenship goes back to the late 1970s, when townships were experiencing an influx of immigration from rural areas and neighbouring countries.¹⁵⁹⁰ Nieftagodien posits that South African black people viewed other African black people as illegal immigrants who should be expelled from townships.¹⁵⁹¹ At the time, non-South Africans were perceived as intruders who did not deserve to be beneficiaries of the housing development projects initiated by the apartheid regime. The politics of the exclusion of non-citizens from housing thus developed from the perceived need to cater for South African residents in townships.¹⁵⁹²

6 5 4 2 1 Addressing past housing challenges and constraints

In order to redress the inherited housing problems, Parliament adopted the Housing Act in 1997. The Housing Act was couched in the principles of the RDP and the 1994 White Paper on Housing.¹⁵⁹³ It was designed to ensure a sustainable housing process, setting forth general principles of the HDP in all spheres of government and the basis for financing the HDP.¹⁵⁹⁴

As a point of departure, the Housing Act defined the concept of housing (not adequate housing) in its Preamble. Housing means:

“[A]dequate shelter [which] fulfils a basic human need. [It] is both a product and a process; [it] is a product of human endeavour and enterprise; ... a vital part of integrated

¹⁵⁸⁸ 22.

¹⁵⁸⁹ 22.

¹⁵⁹⁰ N Nieftagodien “Xenophobia’s Local Genesis: Historical Constructions of Insiders and the Politics of Exclusion in Alexandra Township” in L B Landau (ed) *Exorcising the Demons Within: Xenophobia, Violence and Statecraft in Contemporary South Africa* (2011) 117-118.

¹⁵⁹¹ 117-118.

¹⁵⁹² 117-118.

¹⁵⁹³ National Department of Housing “White Paper: A New Housing Policy and Strategy for South Africa” (1994).

¹⁵⁹⁴ Title of the Housing Act.

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developmental planning; ... a key sector of the national economy; [and] ... vital to the socio-economic well-being of the nation”.¹⁵⁹⁵

The concept of housing is seen as integral to the health and prosperity of an individual, his or her family or community as well as the nation. Development of housing is a pillar to the improvement of the quality of life as well as economic growth.

Section 2(1) of the Housing Act sets forth general principles applicable to HDP. These principles commit the state to giving priority to the needs of the poor through meaningful consultation with individuals and communities affected by HDP. Section 2(1) further provides that the state must ensure that:

“[H]ousing development provides as wide a choice of housing and a tenure option as is reasonably possible; is economically, fiscally, socially and financially affordable and sustainable; is based on integrated development planning; and is administered in a transparent, accountable and equitable manner, and upholds the practice of good governance”.¹⁵⁹⁶

The principles, laid down under section 2(1)(e), further stipulate that the state must promote, among other things, conditions in which everyone meets his or her obligations in respect of housing development;¹⁵⁹⁷ the process of racial, social, economic and physical integration in urban and rural areas;¹⁵⁹⁸ measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process;¹⁵⁹⁹ the meeting of special housing needs, including, but not limited to, the needs of the disabled,¹⁶⁰⁰ marginalised women and other groups disadvantaged by unfair discrimination;¹⁶⁰¹ and the expression of cultural identity and diversity in housing development.¹⁶⁰² Section 2(1)(f) further stipulates that in administering the afore-mentioned general principles, the state must observe and adhere to the constitutional principles, in particular

¹⁵⁹⁵ Preamble.

¹⁵⁹⁶ S 2(1)(c)(i)-(iv).

¹⁵⁹⁷ S 2(1)(e)(ii).

¹⁵⁹⁸ S 2(1)(e)(iv).

¹⁵⁹⁹ S 2(1)(e)(vi).

¹⁶⁰⁰ S 2(1)(e)(viii).

¹⁶⁰¹ S 2(1)(e)(x).

¹⁶⁰² S 2(1)(e)(xi).

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principles laid down under sections 7(2) and 41(1) and comply with all other applicable provisions of the South African Constitution.

The Housing Act recognises the housing needs of the poor, the marginalised and disadvantaged but it does not define these concepts in order to determine whether they include in their ambit vulnerable individuals and communities, such as refugees and asylum-seekers. The right to housing is legislatively restricted to citizens and permanent residents, to the exclusion of refugees, asylum-seekers and other types of non-citizens. No account is given to the housing needs of refugees and asylum-seekers under national housing policies.¹⁶⁰³

Restriction of access to adequate housing to citizens and permanent residents is reflected under the 2000 National Housing Code, revised in 2009,¹⁶⁰⁴ as well as the NHPSP, adopted in 2010.¹⁶⁰⁵ Citizenship and permanent residence status are integral requirements to apply for or receive individual subsidies, integrated residential development programmes (“IRDP”), consolidation subsidies, institutional subsidies and rural subsidies. These different types of housing subsidies are national housing programmes falling under the NHSS to which the Revised National Housing Code applies.¹⁶⁰⁶ The eligibility criteria of citizenship and permanent residence status exclude refugees and asylum-seekers from having access to different types of affordable housing designed in accordance with gross monthly household income,¹⁶⁰⁷ as the thesis will turn to discuss later.

In 2008, the Social Housing Act was adopted. It provides the legal framework for the implementation of the social housing policy. The policy is implemented under the 2009 Revised National Housing Code, implying that refugees and asylum-seekers

¹⁶⁰³ S 1 of the Housing Act provides that the housing development refers to: “the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water, adequate sanitary facilities and domestic energy supply”.

¹⁶⁰⁴ The National Housing Code was published on 21 October 2000 in line with s 4 of the Housing Act and the Revised National Housing Code was published in February 2009.

¹⁶⁰⁵ See, the NHPSP paras 1.2, 6.2, 8.2, 9.2, 15.2 stating that citizens and permanent residents can benefit from the Integrated Residential Development Programme (“IRDP”), the Institutional Housing Subsidy Programme (“IHSP”), the Individual Subsidy Programme (“ISP”), the Rural Housing Programme (“RHP”) and the People’s Housing Process (“PHP”).

¹⁶⁰⁶ Tissington *A Resource Guide to Housing* 22.

¹⁶⁰⁷ For more details on qualifying criteria for subsidised housing, see Tissington *A Resource Guide to Housing* 23-24.

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are, by implication, not eligible for the Social Housing Programme (“SHP”). The policy was adopted so as to establish and promote a sustainable social housing environment and to allow for the undertaking of approved housing development projects by other delivery agents with the benefit of public money.¹⁶⁰⁸ It establishes the Social Housing Regulatory Authority (“SHRA”), whose principal function is to regulate the amount of the rental prices of the social housing available to people in low-income groups, particularly in urban areas.¹⁶⁰⁹ Social housing is contextualised to refer to:

“[A] rental or co-operative housing option for low income persons at a level of scale and built form which requires institutionalised management and which is provided by accredited social housing institutions or in accredited social housing projects in designated restructuring zones”.¹⁶¹⁰

Persons with a low income are defined as those whose income household is below R7 500.¹⁶¹¹ The Social Housing Policy is seen as a key component for the realisation of the right to housing through housing development projects directed at developing affordable housing, which the state believes would be “able to significantly contribute to urban regeneration and to urban efficiency” and could “meet objectives of good location, integration and viability.”¹⁶¹² However, refugees and asylum-seekers who are employed and whose monthly gross household income is between R3 501 and R7 500 are ineligible for social housing on account of restrictions imposed under the Housing Act along with its National Housing Code and NHPSP.¹⁶¹³

¹⁶⁰⁸ Tissington *A Resource Guide to Housing* 20.

¹⁶⁰⁹ 24.

¹⁶¹⁰ 98. According to Tissington, designated restructuring zones are geographic areas identified by local government and supported by provincial government for targeted and focused investment. As of 2006, designated restructuring zones were identified and approved in the areas of Ekurhuleni Metropolitan Municipality, City of Cape Town, City of Johannesburg, eThekweni Metropolitan Municipality (Durban), Nelson Mandela Bay Municipality (Port Elizabeth), City of Tshwane (Pretoria), Buffalo City Municipality (East London), Mangaung Local Municipality (Bloemfontein), Msunduzi Local Municipality (Pietermaritzburg), Polokwane, Potchefstroom, Kimberley and Nelspruit.

¹⁶¹¹ S 23(4) of Regulations to the Social Housing Act GN R51 in GG 34970 of 26-01-2012 states that “households earning more than R 7,500 per month are not eligible other than if it is amended in the Housing Code”.

¹⁶¹² DHS “Social Housing Policy” Part 3 Vol 6 of the National Housing Code (2009) 6.

¹⁶¹³ Eligibility for social housing is based on the condition of households earning between R 3,501 and R 7,500. See s 23(3)-(4) of Regulations to the Social Housing Act.

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6 5 4 2 2 Types of subsidised houses or dwellings

There are different types of subsidised houses, inter alia, emergency housing, upgraded informal settlement, low-income rental accommodation, affordable housing and affordable rental housing. Each type of housing is discussed separately.

6 5 4 2 2 1 Affordable housing

Affordable housing is a term used to describe “quite a specific segment of housing that comprises units valued at under R500 000, including housing in former African, coloured or Indian townships, government subsidised housing and new housing developed by the private sector”.¹⁶¹⁴ A large number of people in South Africa live in affordable houses. They are designed for households that earn between R3 500 to R8 000 in permanent jobs and they are procured by means of securing bank loans.¹⁶¹⁵ Affordable housing developments are predominantly developed for those individuals who can afford mortgage loan finance. Hence houses are not developed for leasing but rather for selling. Refugees and asylum-seekers are temporary residents who are legally offered part-time or fixed term contract employment.¹⁶¹⁶ They are ineligible for affordable housing because they are not employed in permanent jobs and are unable to secure a bank loan due to their temporary resident status. In practice, refugees and asylum-seekers face considerable challenges in opening and maintaining bank accounts due to conditions set forth under the Financial Intelligence Centre Act,¹⁶¹⁷ aimed at the prevention of money-laundering and financing of terrorist activities.¹⁶¹⁸ All these legal and practical barriers rule them out from accessing affordable housing.

6 4 4 2 2 2 Affordable rental housing

Affordable rental housing is a term used to describe the state-funded housing developments developed or administered by an institution which puts a system, policies and procedures in place for property management, that includes maintenance management, rental management and vacancy management. Affordable rental housing is developed under various programmes, including the

¹⁶¹⁴ Tissington *A Resource Guide to Housing* 40.

¹⁶¹⁵ 40.

¹⁶¹⁶ For more details on refugee employment, see Kavuro (2015) *Law, Democracy and Development* 232-260.

¹⁶¹⁷ Act 38 of 2008.

¹⁶¹⁸ S 3.

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institutional subsidy programme, the IRDP, the community residential units programme and the social housing programme (discussed above). Institutional subsidy housing is developed to meet the demands of the lower ends of the market and requirements for beneficiaries' qualification are determined by the NHSS.¹⁶¹⁹ The community residential units are developed "to provide accommodation to very low income households who are currently underserved and accessing informal rental opportunities."¹⁶²⁰ It targets persons and families earning between R800 and R3 500 per month or those whose income does not allow them to have access to the formal private rental or social housing market.¹⁶²¹ The IRDP is developed to provide for rental social, commercial, institutional housing and to cater for households earning a monthly income ranging between R3 500 and R7 000.¹⁶²² Given that affordable rental housing is developed under the HDP, refugees and asylum-seekers are not eligible beneficiaries.

6 5 4 2 2 3 Low-income rental housing

Low-income rental housing is one of the programmes identified to address appalling living conditions, especially for households living in shacks in informal settlements. According to Urban Land Mark, there is little information on the supply of low-income rental accommodation "across all sectors including public-owned, social housing and privately-owned stock".¹⁶²³ These types of housing are designed for households who earn between R1 500 and R7 500 per month.¹⁶²⁴ Refugees and asylum-seekers do not qualify, due to the fact that qualification is determined on the basis of requirements under the NHSS, taken in light of the HDP.

6 5 4 2 2 4 Upgraded informal settlement

Upgraded informal settlement refers to upgraded shacks in informal settlements so as to bring housing development to thousands of households who live in appalling and precarious housing due to poverty. In other words, it is a housing development that seeks to replace shacks for families whose sole breadwinner is unemployed or

¹⁶¹⁹ Tissington *A Resource Guide to Housing* 97.

¹⁶²⁰ 103.

¹⁶²¹ 103.

¹⁶²² 81.

¹⁶²³ Urban LandMark & SHF at 48 (see n 6).

¹⁶²⁴ 48.

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earns less than R3 500 per month.¹⁶²⁵ Given that a large number of the population live in shacks in informal settlements across the country, the state has initiated a housing development project to upgrade informal settlements in its housing plans, known as the Upgrading of Informal Settlements Programme (“UISP”). The National Housing Code defines the UISP as “one of the most important programmes of government, which seeks to upgrade the living conditions of millions of poor people by providing secure tenure and access to basic services and housing”.¹⁶²⁶ The beneficiaries of the UISP include individuals who do or do not qualify for the subsidised housing falling under the NHSS. The UISP is designed to cover all people, in that it is extended to include non-citizens irrespective of their legality. It states that:

“[I]n cases where illegal immigrants are identified in a settlement, the municipality/provincial department must report to the Department of Home Affairs who will investigate the matter and make recommendations to the developer on how to proceed and whether informal occupation rights could be awarded to such persons as an interim measure”.¹⁶²⁷

Accordingly, undocumented asylum-seekers and illegal migrants can benefit from the UISP during upgrading processes. The UISP has four processes. It is anticipated that the DHA will, during the time of upgrading, document an asylum-seeker or legalise the stay of an illegal immigrant. Should their stay not be legalised upon the completion of upgrading/developing an informal settlement, they cannot be eligible for ownership of an informal settlement.¹⁶²⁸ Seen from this viewpoint, it is presumed that refugees and asylum-seekers are beneficiaries of the informal settlement given that they are lawfully staying in the country, even though the UISP does not expressly protect refugees and asylum-seekers.

Benefiting from the UISP is very challenging. In order to benefit from the UISP, a refugee or an asylum-seeker must be the owner of a shack, not renting, for the shack to be upgraded. Unless a shack was bought by a refugee or an asylum-

¹⁶²⁵ Greyling *The RDP Housing System in South Africa* 1.

¹⁶²⁶ DHS “Simplified Guide to the Housing Code” Part 1 Vol 1 of the National Housing Code (2009) 16 and Tissington *A Resource Guide to Housing* 85-86.

¹⁶²⁷ DHS “Upgrading of Informal Settlements Programme” Part 3 Vol 4 of the National Housing Code (2009) 39-40.

¹⁶²⁸ Tissington *A Resource Guide to Housing* 88.

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seeker, it would be difficult for refugees and asylum-seekers to have land allocated to them by local government for the erection of shacks; hence they do not enjoy the right to have access to land. The reality is that most refugees and asylum-seekers that live in informal settlements are tenants who have leased shacks.

6 5 4 2 2 5 Emergency Housing

Emergency Housing is developed under the Emergency Housing Programme (“EHP”) to provide temporary relief to persons and families who find themselves in emergency situations.¹⁶²⁹ It also applies to providing the homeless with shelters as a result of disasters.¹⁶³⁰ People who live in appalling and dangerous conditions and who are in the greatest need of emergency relief are entitled to have access to emergency housing programme.¹⁶³¹ The coverage of the programme is so wide to also benefit:

“[T]hose who are evicted or threatened from imminent eviction from land, unsafe buildings or situations where pro-active steps ought to be taken to forestall such consequences; those whose houses are demolished or threatened with imminent demolition; those who are displaced or threatened with imminent displacement as a result of a state of civil conflict or unrest; those who live in conditions that pose immediate threats to their life, health and safety and require emergency assistance; and those who are in a situation of exceptional housing needs, which constitutes an emergency that can be addressed only by resettlement or other appropriate assistance, in terms of the [EHP]”.¹⁶³²

Given that refugees and asylum-seekers are in the greatest need of housing accommodation due to escaping from civil conflict or unrest in their home country, they should also benefit from the EHP. The state has not developed emergency housing for the purpose of accommodating refugees and asylum-seekers whose living conditions pose an immediate threat to their life and safety due to financial constraints caused by forced migration.

¹⁶²⁹ DHS “Emergency Housing Programme” Part 3 Vol 4 of the National Housing Code (2009) 9.

¹⁶³⁰ 15-16. See too Tissington *A Resource Guide to Housing* 94-95.

¹⁶³¹ 15-16. See too Tissington *A Resource Guide to Housing* 94-95.

¹⁶³² 15-16. See too Tissington *A Resource Guide to Housing* 94-95.

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6 5 4 2 2 6 *Other housing development programmes*

Citizens are assisted to gain access to adequate housing in different ways. These mechanisms include: (i) the individual subsidised programme where an individual is assisted to acquire an existing house or a vacant services residential stand, provided that he or she can afford mortgage loan finance;¹⁶³³ (ii) the Enhanced Extended Discount Benefit Scheme (“EEDBS”) which benefits “those individuals who have a direct housing arrangement with the State or have an outstanding debt with the municipality or the provincial department”;¹⁶³⁴ and (iii) the Enhanced People’s Housing Process (“ePHP”) which is narrowly defined as “self-build housing involving contributions of sweat equity as opposed to the use of contractors.”¹⁶³⁵ The notion of self-build housing implies that members of a particular community apply for land together with materials and funds and thus participate in the development of their own homes.¹⁶³⁶ The main object of the ePHP is to address housing challenges “in the context of other social needs and community priorities”.¹⁶³⁷

6 5 4 2 3 Protection of housing rights

Refugees and asylum-seekers do not benefit from subsidised housing development programmes. Most of them are renting privately owned houses which are placed on the market for leasing and letting. However, refugees and asylum-seekers are protected by the constitutional right prohibiting eviction from home. Housing rights are articulated under the PIE Act, the Rental Housing Act and the Housing Consumers Protection Measures Act.¹⁶³⁸

The PIE Act lays down procedures for the eviction of unlawful occupiers and prohibits the unlawful eviction of occupiers living on privately or publicly owned land or houses. The owner or landlord thus has to follow the rules of the PIE Act if he or she wishes to evict a tenant. Tenants with refugee or asylum-seeker status are protected by the PIE Act. Likewise, they are protected by the Rental Housing Act which regulates the relationship between landlords and tenants in all types of rental housing. This Act guards against discrimination that may arise in the form of unfair

¹⁶³³ DHS “Individual Subsidy Programme” Part 3 Vol 3 of the National Housing Code (2009).

¹⁶³⁴ Tissington *A Resource Guide to Housing* 75. See too DHS “Enhanced Extended Discount Benefits Scheme” Part 3 Vol 3 of the National Housing Code (2009).

¹⁶³⁵ 84.

¹⁶³⁶ DHS “Enhanced People’s Housing Process” Part 3 Vol 4 of the National Housing Code (2009).

¹⁶³⁷ Tissington *A Resource Guide to Housing* 84.

¹⁶³⁸ Act 95 of 1998.

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practices prejudicing the tenant's rights on the basis of his or her nationality or refugee status.¹⁶³⁹ The Housing Consumers Protection Measures Act was crafted to protect a housing consumer, who is defined as "a person who is in the process of acquiring or has acquired a home and includes such person's successor in title".¹⁶⁴⁰ Refugees and asylum-seekers who are capable of acquiring a home would also be protected by the Housing Consumers Protection Measures Act. The thesis is however concerned with housing assistance for refugees and asylum-seekers and not housing rights that accrue to them as occupiers of a home, house, or dwelling.

6 5 4 3 Constitutionality of the definition of housing development

South Africa is bound to protect the right to housing of refugees in terms of the Constitution, legislation and international law. Refugees and asylum-seekers are entitled to the right of access to housing under the Refugees Act, as this is one of the rights in the Bill of Rights which applies to everyone.¹⁶⁴¹ It also guarantees the rights contained in the Geneva Refugee Convention, the African Refugee Convention and human rights treaties. Notwithstanding this guarantee, section 1 of the Housing Act defines housing development in a way that excludes refugees and asylum-seekers from having access to adequate housing. Housing development projects are initiated in order to meet the housing needs of citizens and, in certain situations, those of permanent residents, to the exclusion of refugees and asylum-seekers.

South Africa's approach to the provision of adequate housing is consistent with neither the South African Constitution nor human rights law. Section 26 imposes obligations on the state "to ensure that all people living in South Africa are able to satisfy all the requirements with regard to adequacy of housing".¹⁶⁴² South Africa is obliged to adopt housing measures that would not violate refugees' and asylum-seekers' constitutional right to housing. The exclusion of refugees and asylum-seekers from the HDP would not only violate the right to adequate housing but would also have a deleterious impact on their physical integrity. Where a refugee or an asylum-seeker is denied access to adequate housing or shelter, or where the housing needs of refugees or asylum-seekers are overlooked, there could be a breach of section 26(1) or section 28(1)(c), as well as other constitutional rights such

¹⁶³⁹ S 1, read in tandem with s 15(1)(f) of the Rental Housing Act.

¹⁶⁴⁰ S 1.

¹⁶⁴¹ See the discussion of s 27(b) and 27A(d) under subsections 6 1, 6 5 4 and 6 5 4 1 above.

¹⁶⁴² Tissington *A Resource Guide to Housing* 26.

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as equality, human dignity and security of the person. These rights should be interpreted to secure dignified and secure living conditions for citizens, permanent residents, migrant workers, refugees and asylum-seekers.¹⁶⁴³ Housing programmes must be people-oriented, so as to ameliorate the conditions of the said categories of people.¹⁶⁴⁴ Special attention should be given to the particular circumstances and housing needs of all disadvantaged people, whether they were disadvantaged by apartheid policies or political events occurring in their home countries.

A failure to give refugees and asylum-seekers access to housing would give rise to a violation of both international refugee law and human rights law. South Africa is obliged to treat refugees and asylum-seekers in accordance with international obligations. These obligations are also reflected in the objects and spirit of the South African Constitution and the Refugees Act. Deprivation of access to housing or shelter is likely to be seen as a violation of the following rights: the right to an adequate standard of living for the health and well-being of refugees and asylum-seekers and their families; the right to a family life which is viewed as integral to individual and societal development; and the right to an environment that is conducive to their privacy, physical integrity and family security. The right to adequate housing is a core socio-economic right which is of central importance for the realisation of all economic, social and cultural rights.

6 5 4 3 1 Resource constraints and progressive realisation

The right of access to adequate housing is subject to conditions set forth under section 26(2) of the South African Constitution. The provision states that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” Access to this right can thus be restricted due to limited resources and financial constraints. The right is also subject to progressive realisation.

These limitations were recognised by the Committee on Economic, Social and Cultural Rights in its General Comment 3 in which it interpreted article 2(1) of the ICESCR. Article 2(1) provides that a state party to the ICESCR must take steps, “especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the

¹⁶⁴³ 26.

¹⁶⁴⁴ 26.

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[ICESCR] by all appropriate means, including particularly the adoption of legislative measures". Progressive realisation was taken by the Committee to mean that the state is under a substantive obligation to move as "expeditiously and effectively as possible towards the goal of universal realisation of rights".¹⁶⁴⁵ In this regard, any retrogressive measure has to be taken after thorough consideration.¹⁶⁴⁶ This approach was reaffirmed in *Grootboom*, where the Constitutional Court stated that progressive realisation should be interpreted to mean the removal of a range of legal, administrative, operational and financial obstacles which impact negatively on rights, and the expansion over time of such access to a larger and broader range of people.¹⁶⁴⁷ Weighty justifications are required if retrogressive measures would result in depriving the homeless, poor and other vulnerable groups of access to adequate housing.¹⁶⁴⁸

In this context, the state must provide substantial justifications why refugees and asylum-seekers are not covered by the national housing policy. It would be difficult to justify their exclusion on the basis of progressive realisation due to the minimum obligations imposed by section 26(1). Section 26(1) was interpreted by the Constitutional Court as imposing constitutional obligations on the state to take immediate steps to provide housing relief to those in urgent and desperate need and living in appalling and intolerable conditions.¹⁶⁴⁹ Although the Constitutional Court declined to identify a minimum core content of the right to housing which must be satisfied immediately, and opted instead for an approach based on reasonableness, it insisted that any government plan must make provision for those in urgent need.¹⁶⁵⁰

On the other hand, the South African Constitution recognises that there would be resources implications for the state to achieve the goal of housing its population in a way that is consistent with the protection of their human dignity. There is a need to balance housing needs and the state's resource capacity.¹⁶⁵¹ Despite financial constraints, the state must adopt housing measures calculated to respond to the

¹⁶⁴⁵ General Comment No. 3: The nature of the States parties obligations: Art 2(1) of the International Covenant on Economic, Social and Cultural Rights E/1991/23 (1991) para 9.

¹⁶⁴⁶ General Comment No. 3, para 9. See too Tissington *A Resource Guide to Housing* 28 and S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 187.

¹⁶⁴⁷ *Grootboom* para 45.

¹⁶⁴⁸ Liebenberg *Socio-Economic Rights Adjudication* 189.

¹⁶⁴⁹ *Grootboom* para 52.

¹⁶⁵⁰ Paras 30-39.

¹⁶⁵¹ Para 46.

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housing needs in an expedited and effective manner.¹⁶⁵² Besides, there would be no reasonable justification for failing to respond to the housing needs of the most vulnerable sections of society, especially in situations where the state's failure arises from the absence of a comprehensive programme.¹⁶⁵³ Accordingly, the state's failure to reconcile the housing development programmes with the Refugees Act would be difficult to justify on the basis of a lack of resources. Instead, the state bears the onus to demonstrate that it is doing its best within available resources to provide refugees and asylum-seekers with houses and homes.

6 5 4 3 2 Limitation clause analysis

Section 36 has played a very minor role in socio-economic rights adjudication, as the state tends to rely on the threshold requirements of available resources and progressive realisation in sections 26(2) and 27(2) to justify the limitation of socio-economic rights. In most cases in which the Constitutional Court found that the state failed to meet its positive obligations in terms of section 26(2) or 27(2), that was the end of its enquiry into the constitutionality of the measures in question.¹⁶⁵⁴ In other words, the Court did not proceed to a second stage, which enquires whether the limitation could be saved in terms of the limitation clause in section 36.¹⁶⁵⁵ In the *Khosa* case, the Constitutional Court did consider the relationship between sections 26(2) and 27(2), on the one hand, and section 36, on the other, and left open the possibility that laws and measures that fall foul of the positive obligations imposed by socio-economic rights provisions, can be justified in terms of section 36.¹⁶⁵⁶

Section 36(1) provides that “[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” In the present case, the right to housing of refugees and asylum-seekers has been violated by law of general application, that is, the Housing Act. The definition of housing development in section 1(vi) of the Housing Act restricts the

¹⁶⁵² Para 46.

¹⁶⁵³ Para 47-69.

¹⁶⁵⁴ *Grootboom* paras 40, 69, 96; *Soobramoney* para 11; *Treatment Action Campaign* para 7, *Treatment Action Campaign No 2* paras 23, 80; *Khosa* para 107 and Woolman & Botha “Limitations” in *Constitutional Law of South Africa* 2 ed (2013) 36:5-37.

¹⁶⁵⁵ See Currie & de Waal *Bill of Rights* 561 in relation to the two-stage process.

¹⁶⁵⁶ *Khosa* paras 80, 82-84. See too Woolman & Botha “Limitations” in *Constitutional Law of South Africa* 2 ed (2013) 36:28-29.

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right to adequate housing to citizens and permanent residents, thus resulting in the exclusion of refugees and asylum-seekers from housing programmes. The government bears the onus to provide reasons in terms of section 36 that would reasonably justify the exclusion of refugees and asylum-seekers from HDP. The criteria to be taken into consideration in analysing whether the limitation is justifiable include the nature of the right, the importance of the purpose of the limitation of the right, the nature and extent of the limitation, the relation between the limitation and purpose, and less restrictive means to achieve the purpose.¹⁶⁵⁷

The nature of the right to adequate housing has been analysed in this chapter.¹⁶⁵⁸ The right is an element of the public goods which must be accessed by everyone, including the very poor and indigent. It is integral to the protection of human dignity and its accessibility offers privacy, safety and security to an individual. A range of basic constitutional rights like the rights to healthcare, a non-harmful environment, life, equality and property are dependent on the accessibility of the right to adequate housing. Without access to adequate housing, an individual's enjoyment of other fundamental rights is also severely diminished.

Limitations of the right are usually justified on the ground of preserving national resources and material. Although the preservation of national resources intersects with the question of available resources under section 26(2), the two issues need to be considered separately. The need to exclude refugees and asylum-seekers from socio-economic rights in order to preserve national resources is reflected in most of the reasons that are provided by the state for crafting social welfare laws which do not cater for refugee interests. For instance, it is often stated that most refugees and asylum-seekers are bogus refugees or illegal foreigners or economic migrants. This presupposition is reflected in the statement of Ms Fatima Chohan, the Deputy Minister of Home Affairs, who stated that:

“South Africa has been a receiving country for refugees from the region, the continent and indeed from as far away as Bangladesh and Pakistan... South Africa has of late become the largest recipient of individual asylum seekers in the World. As a developing middle income country, South Africa now has more asylum seekers to deal with than all 27 countries of the European Union combined. It should be noted that the majority of asylum

¹⁶⁵⁷ S 36(1)(a)-(e) of the Constitution.

¹⁶⁵⁸ See discussion under 6.2.

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applicants do not qualify for refugee status. The reason that we have such a high level of applicants is partly because our asylum management process is lacking in many respects. We are alive to the weaknesses in the system and are concerned that the huge influx of applications from individuals intent on abusing the relatively simple process of regularisation that the asylum management process presents, ultimately serve to disadvantage genuine refugees, as our resources are diverted away from offering them the level of service and protection that we strive to achieve.”¹⁶⁵⁹

The belief that refugees are bogus was, for the first time, affirmed by Lindiwe Sisulu, former Minister of Home Affairs, who in 1998 stated that there was “gross abuse of the asylum system by large numbers of Africans who seek refugee status and who simply have no basis in law to claim the protection of South Africa”.¹⁶⁶⁰ For almost two decades, little has been done to establish an effective asylum system. Given that the asylum system is lacking in various respects, it is presumed that a large number of bogus asylum-seekers were recognised as refugees. In the view of the state, allowing such a large number of bogus asylum-seekers and refugees to have access to socio-economic rights would impose impermissible financial burdens on it. However, this argument was rejected in an *obiter dictum* in the case of *Somali Association of South Africa*. In this case, the SCA stated that South Africa should work towards establishing an effective asylum system that will ensure that genuine refugees are recognised within a reasonable time and are fully protected.¹⁶⁶¹ The SCA further stated that the gaps in the asylum management process cannot be used as a legitimate ground for the state to deviate from its international and constitutional obligations.¹⁶⁶² Furthermore, the frustration experienced by the state, as it deals with a large number of asylum-seekers and refugees, should not blind it to its constitutional and international obligations.¹⁶⁶³ Failure to meet the obligations to protect refugees was held to be unacceptable and contrary to the constitutional

¹⁶⁵⁹ F Chohan “Address on the Commemoration of World Refugee Day at the St Martins De Porres Catholic Church, Orlando West, Soweto” (19-06-2011) *Department Of Home Affairs* <<http://www.gov.za/address-home-affairs-deputy-minister-fatima-chohan-commemoration-world-refugee-day-st-martins-de>> (accessed 09-12-2016).

¹⁶⁶⁰ In 1998, Lindiwe Sisulu, former Minister of Home Affairs, whilst briefing the Parliament, stated that “thousands of people from across Africa are streaming to South Africa seeking refugee status, most of them under false pretences”. See Mail & Guardian “Refugees Flooding SA” 06 Nov 1998 <<http://mg.co.za/article/1998-11-06-refugees-flooding-sa>> (accessed 09-11-2015).

¹⁶⁶¹ *Somali Association of South Africa* para 44.

¹⁶⁶² Para 44.

¹⁶⁶³ Para 44.

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values of human dignity, equality and freedom.¹⁶⁶⁴ The exclusion of refugees from the right to housing on the basis of the preservation of national resources and material may have the potential of compelling refugees and asylum-seekers to live in perpetual homelessness, poverty, humiliation and degradation.

Taking into account the nature, extent and impact of the exclusion, the Constitutional Court, in dealing with the questions of emergency shelter in *Grootboom* and of social security in *Khosa*, reasoned that the state would have no legitimate reasons to justify the exclusion of those in desperate need from any social welfare scheme on the basis of either budgetary constraints or the preservation of resources if they are entitled to it in terms of law. In *Khosa*, the court took into account that the inclusion of permanent residents would not have huge budgetary implications¹⁶⁶⁵ and also made it clear that the decision to include non-citizens into social welfare scheme applied only to permanent residents, as their legal position was similar to citizens in most respects.¹⁶⁶⁶ It has however been demonstrated that refugees and asylum-seekers should, in terms of the Refugees Act, be beneficiaries of socio-economic rights and benefits, including housing.

With regard to housing protection, the Constitutional Court stated that the state is constitutionally obligated to include reasonable measures in its housing programmes “to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.”¹⁶⁶⁷ It further stated that adequate emergency housing for temporary relief must comply with “the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the [Housing Act].”¹⁶⁶⁸ In addition, section 36 obligates the state to take less restrictive means to achieve the limitation’s purpose. In this regard, there is a need to devise a reasonable plan to achieve the right to adequate housing for refugees given that they are vulnerable to intolerable conditions.

¹⁶⁶⁴ Para 44.

¹⁶⁶⁵ The Chief Director of Social Services in the National Treasury provided evidence demonstrating that “the additional annual cost of including permanent residents... could range between R243 million and R672 million. The possible range demonstrate[d] the speculative nature of the calculations, but even if they [were] taken as providing the best guide of what the cost [might] be, they [did] not support the contention that there [would] be a huge cost in making provision for permanent residents.” See *Khosa* para 62.

¹⁶⁶⁶ Like citizens, permanent residents “have made South Africa their home” and also “owe allegiance of duty to the state”. See *Khosa* para 59.

¹⁶⁶⁷ *Grootboom* paras 52, 99.

¹⁶⁶⁸ Para 52.

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With regard to the relation between the limitation and its purpose, Rautenbach stated that the term relation denotes that:

“[S]ome or other kind of link between a limitation and a purpose must exist. This rules out the possibility that a limitation can be justified if no purpose exists, or if no purpose that may be legitimately pursued exists, or if the limitation is completely incapable of promoting the purpose”.¹⁶⁶⁹

As noted, the right of access to adequate housing is limited for the purpose of safeguarding and preserving national resources and material.

The state raises a legitimate concern over the abuse of the asylum management system, more notably, the need to exclude those who abuse the asylum system from social welfare. However, the less restrictive means to achieve this purpose is not to exclude those who are recognised as refugees, as well as those who are seeking asylum. That approach would also disadvantage those who are legitimately in the country and who are in the greatest need of social protection. Those who are, for example, recognised as refugees cannot be said to be bogus refugees, and should be included in housing schemes. The unacceptable costs that might be incurred by the state would arise not from the inclusion of refugees and asylum-seekers, but from the state’s failure to establish an effective and workable asylum system.

Asylum-seekers should also benefit from the right to housing in terms of section 27A(d) of the Refugees Act, read with section 26 of the Constitution. The state should strive to establish an asylum management system that would streamline the process of application for asylum, by making it more efficient and credible for those seeking refuge in South Africa. More focus should be on expediting applications for asylum as this would help to distinguish between those who deserve asylum protection and those who abuse the asylum system. This would indicate South Africa’s commitment to the protection of refugees and asylum-seekers, as described in its own laws as well as in international conventions and protocols. It is contrary to the South African Constitution to subject those genuinely seeking asylum to long, protracted administrative processes. Irrespective of administrative hurdles, nothing

¹⁶⁶⁹ I M Rautenbach “Proportionality and the Limitation Clauses of the South African Bill of Rights” (2014) 17 *PER / PELJ* 2229, 2232.

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can justify the exclusion of asylum-seekers, whether genuine or bogus, from having access to emergency shelter or housing for relief.

Denying shelter to asylum-seekers on the ground of the application being potentially bogus, would be inimical to the decision handed down in *Grootboom*, as noted above. Besides, the Constitutional Court, in *Union of Refugee Women*, reasoned that it would be difficult for the state to justify the exclusion of refugees and asylum-seekers from rights that accrue to everyone under the Bill of Rights and that are further expressly conferred onto them under the Refugees Act or any other statute.¹⁶⁷⁰ It becomes more difficult to justify exclusion in situations where it impairs the dignity of the excluded in a serious manner,¹⁶⁷¹ or effectively condemns them to perpetual destitution and humiliation.¹⁶⁷² Such exclusion cannot be justified in terms of the grounds set forth in section 36.¹⁶⁷³ Subjecting refugees and asylum-seekers to protracted deprivation of the right to housing has a serious impact on their human dignity and on their ability to live and participate fully in their host community.

Applying the dignity-based approach, the Constitutional Court, in *Grootboom*, affirmed that any housing development that leaves out a significant number of vulnerable people cannot be justified.¹⁶⁷⁴ The exclusion of refugees and asylum-seekers does not only have an impact on their human dignity, but also has the potential of aggravating their vulnerabilities like homelessness, desperateness, distress, diseases and trauma, which will have the potential of inhibiting them from enjoying other rights in the Bill of Rights. The absolute exclusion of refugees and asylum-seekers from housing programmes cannot be justified as reasonable in an open and democratic society based on the principles of human dignity, equality and freedom, as infused by the philosophy of *ubuntu*.

6 6 Concluding remarks and recommendations

The right to adequate housing is protected under international human rights law and the South African Constitution. It is also entrenched in international refugee law as a right that must be accessed by refugees and asylum-seekers on terms that are not less favourable than that accorded to non-citizens generally in the same

¹⁶⁷⁰ *Union of Refugee Women* para 46.

¹⁶⁷¹ Para 113.

¹⁶⁷² *Somali Association of South Africa* para 44.

¹⁶⁷³ *Union of Refugee Women* para 124.

¹⁶⁷⁴ *Grootboom* paras 41-43.

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circumstances. The duty to confer on refugees and asylum-seekers the right to adequate housing arises from the obligation to respect the dignity of all persons and to protect them from inhumane conditions. It also stems from the right to equal protection, as envisaged by international conventions like the UDHR, ICESCR, ICCPR, ACHPR, CEDAW, CRPD, CRC, CERD and Refugee Convention, and as given effect to by section 9 of South African Constitution. This right is based on the notion that all people should be free from discriminatory practices that may engender marginalisation or result in degradation and humiliation.¹⁶⁷⁵ The right to housing also intersects with a range of socio-economic rights, and with the right to freedom and security of the person, which includes the right not to be subjected to debasing, demeaning or degrading treatment. In dealing with the right to housing of refugees, it is important to understand their plight. Refugees escaped from flagrant human rights abuse and came to South Africa to seek shelter, safety and security. Unless they are afforded human rights protection, in particular, socio-economic rights like housing, education, employment, social relief and assistance, healthcare, food and water, they will continue to live in intolerable and inhumane conditions.

Should refugees and asylum-seekers be afforded the same treatment accorded to foreign nationals with respect to housing, they would be excluded from the HDP. The standard of treatment entrenched under article 21 of the Geneva Refugee Convention works to disadvantage refugees and asylum-seekers, if interpreted in the light of South Africa's laws regulating the stay of foreign nationals. Under immigration law, foreign nationals are required to be self-reliant and can under no circumstances rely on state support for their well-being. By contrast, refugee laws seek to move away from a self-reliance approach towards a social and humanitarian approach which is grounded in the accessibility of public goods essential for the protection of refugees' health, dignity, safety and well-being. The right to housing serves as a foundation for the improvement of the quality of life of poor and vulnerable individuals.

As noted, the Refugees Act guarantees the right to adequate housing for refugees and asylum-seekers. This implies that refugees and asylum-seekers should be

¹⁶⁷⁵ Art 2 of the UDHR states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

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distinguished from other non-citizens. Refugees and asylum seekers should be afforded differentiated treatment in the housing sector. Notwithstanding the provisions of the Refugees Act, the Housing Act and other housing policies and strategies do not recognise refugees and asylum-seekers as beneficiaries of the right to adequate housing. In view of this, the chapter concludes by recommending the following:

- There is a need to accord to refugees the same treatment as permanent residents with respect to housing, given that the same treatment accorded to non-citizens with temporary resident status nullifies the right to adequate housing. Regard must be given to section 27(b) of the Refugees Act, which is almost equivalent to section 25(1) of the Immigration Act. This is of particular importance as Mokgoro and O'Regan JJ in *Union of Refugee Women* interpreted the conception of same treatment, envisaged by the Geneva Refugee Convention, to refer to the treatment accorded to permanent residents whose legal status "is most similar to refugees".¹⁶⁷⁶
- The right to adequate housing of refugees should be given effect to in accordance with the constitutional values of human dignity, equality and freedom and with a view to achieving social justice and advancing human rights and freedoms. Accordingly, the Refugees Act should be harmonised with housing laws, policies or regulations, in order to include refugees and asylum-seekers within housing development and the allocation of houses to them.
- It has been demonstrated that the Housing Act is constitutionally invalid due to its failure to protect refugees and asylum-seekers. This defect can be remedied by using the power of reading in.¹⁶⁷⁷ A court could use this power to read in the words "and refugees" after the words "permanent residents" in the definition of "housing development" in section 1(vi) of the Housing Act.¹⁶⁷⁸

¹⁶⁷⁶ In *Union of Refugee Women* para 109, Mokgoro and O'Regan JJ stated that those refugees who were granted refugee status "are most similarly situated to permanent residents. All other foreign nationals who are lawfully in the country only have temporary rights of residence, unlike recognised refugees who according to s 27(b) of the Refugees Act have a right to remain indefinitely in the Republic".

¹⁶⁷⁷ For a discussion of the constitutional remedy of reading in, see Currie & de Waal *Bill of Rights* 204-206.

¹⁶⁷⁸ The definition of the housing development should be amended to read as follows:
 "[T]he establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient

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- Both the NHPSP and the National Housing Code should be rectified in light of the proposed definition of housing development. These policies should state that a refugee or an asylum-seeker is entitled to the right to housing if he or she is recognised as such and is in possession of a refugee document or permit granted in terms of either section 22 or section 24 of the Refugees Act.
- A comprehensive policy on the housing of refugees and asylum-seekers should be established to determine what types of housing development refugees and asylum-seekers can have access to. Alternatively, the NHPSP may be reviewed to extend housing rights to refugees and asylum-seekers. Under the NHPSP, it should be clearly stated that refugees and asylum-seekers are eligible for the national housing programme, established under the IRDP, IHSP, ISP and RHP. Whilst asylum-seekers should be given an opportunity to have access to emergency shelter, refugees should benefit from affordable housing, affordable rental housing, and low-income rental housing. If unemployed, they should have access to emergency housing.
- There is a need to build emergency houses or shelter that would accommodate individuals who were displaced as a result of persecution or other events disrupting public order and who are in search of shelter in South Africa.
- South Africa should establish an entity or institution entrusted with assessing the housing needs and social vulnerabilities of refugees and asylum-seekers, managing their housing and, more importantly, their integration within South African communities. The assessment should be directed at identifying special protection needed by different categories of refugees and asylum-seekers, more notably, minors (separated or non-accompanied), people with disabilities, the elderly, the unemployed, people with serious diseases and mentally ill persons. Assessments in this regard could also be directed at determining the income levels of the different categories of refugees (i.e. employed, self-employed, or unemployed), with the aim of facilitating their access to different categories of subsidised housing.

access to economic opportunities and to health, educational and social amenities in which all citizens, permanent residents *and refugees* of the Republic will on a progressive basis have access to (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water adequate sanitary facilities and domestic energy supply”.

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CHAPTER 7

CONCLUSION

The thesis dealt with the question whether and to what extent refugees and asylum-seekers are entitled to the enjoyment of socio-economic rights. It engaged with several areas of the law that are relevant to this question. These include the South African Constitution, international refugee law, international human rights, national legislation relating to the position of refugees, national immigration legislation and national legislation pertaining to the distribution of socio-economic rights and benefits. The thesis highlighted several problems which complicate refugees and asylum-seekers' access to socio-economic rights. The first is uncertainty over the meaning of "same treatment" and "more favourable treatment" within the context of the Geneva Refugee Convention, and the relationship between those standards of treatment and the norms contained in the Refugees Act. The second is the relationship between immigration law, with its emphasis on the state's power to exclude non-citizens, and refugee law, which is based on the principle of *non-refoulement* and which extends full legal protection to refugees. The third is the lack of harmonisation of laws governing the distribution of social assistance, healthcare and housing with the Refugees Act, which has resulted in the denial of socio-economic rights and essential services to refugees and asylum-seekers.

In addressing these problems, the thesis emphasised the vulnerability of refugees and asylum-seekers. The need to provide them with favourable treatment, as recognised in the Geneva Refugee Convention and the African Refugee Convention, arises from their susceptibility to economic deprivation, distress, disease, hopelessness, starvation, trauma and unemployment, in addition to their lack of a voice and political power. Treating them as migrants, rather than refugees, ignores their special position, which is closely tied to their vulnerability, and fails to recognise that their conditions are in important respects different from those of other categories of non-citizens. The failure to align laws governing the distribution of socio-economic rights and benefits with the Refugees Act is similarly based on a denial of the vulnerability of refugees and asylum-seekers.

It was argued that the tension between immigration law and refugee law must be reconciled through the application of the principle of *lex specialis derogat legi generali*. The Refugees Act is a special law dealing specifically with refugees' recognition and treatment, whereas the Immigration Act deals with non-citizens'

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admission and treatment generally. Priority must be given to refugee principles over immigration principles for at least two reasons. First, refugee law is designed to respond to the distinct nature of refugees' needs and experiences. Secondly, refugees and asylum-seekers should be afforded favourable treatment in addressing their needs and experiences. This approach would rule out various arguments for the exclusion of refugees from socio-economic rights, including the argument that refugees and asylum-seekers must be afforded the same treatment accorded to non-citizens owing to the understanding that they are temporary residents.

The thesis examined the question whether refugees and asylum-seekers are entitled to socio-economic rights through the lens of human dignity and equality. The constitutional right and value of human dignity requires respect for the inherent dignity and worth of all human persons, and their capacity to determine their own ends. This raises the question whether and to what extent respect for human dignity requires the state to extend socio-economic rights and benefits to refugees and asylum-seekers. Moreover, the constitutional right and value of equality is sometimes relied on to argue for differentiated treatment for vulnerable groups of people. Reading the socio-economic rights guarantees in the South African Constitution, as well as the provisions contained in the refugee conventions relating to equal and favourable treatment through this lens, could potentially strengthen arguments for the extension of socio-economic rights and benefits to refugees and asylum-seekers.

The relationship between immigration law and refugee law was considered in Chapters One and Chapter Two, within the context of the principles of non-discrimination and same treatment. It was argued that the twin principles of exclusivity and self-sufficiency, which are foundational to immigration law, are in tension with the Refugees Act's commitment to full legal protection. The twin principles are geared towards the sovereign nation's goal of self-preservation by admitting only self-supportive and self-reliant non-citizens into the country. Viewing refugees and asylum-seekers as temporary residents who need to be self-relying, they are excluded from accessing socio-economic programmes designed to support citizens and permanent residents who are vulnerable to socio-economic

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hardships.¹⁶⁷⁹ This is contrary to the principle of full legal protection, which is conceptually and theoretically geared towards the inclusion of refugees in socio-economic programmes.

Chapter Two set out to contextualise the role of equality in the protection of refugees and asylum-seekers. It first considered equality from an international perspective. International refugee law requires refugee rights to be enjoyed on a par with either citizens or non-citizens, depending on the nature of the right involved. Equality in this context should be implemented in accordance with four standards of favourable treatment. They are (i) favourable treatment as accorded to citizens, (ii) the most favourable treatment as accorded to non-citizens, (iii) treatment as favourable as possible, and in any event, not less favourable than that accorded to non-citizens generally; and (iv) same treatment as accorded to non-citizens generally. The Refugees Act is not aligned to the four standards, but rather adopts the same treatment as accorded to citizens with respect to all rights contained in the Bill of Rights, save for those rights that the South African Constitution reserves for citizens.

The chapter then examined equality as a constitutional right and value, with reference to cases in which the Constitutional Court invoked constitutional equality as a principled and nuanced mechanism to address issues related to discrimination, exclusion, marginalisation, vulnerability, stereotypes, prejudices, sexism, racism, or xenophobic attitudes.¹⁶⁸⁰ It was argued that constitutional equality requires that socio-economic (or transformative) measures be designed in a manner that takes into consideration the vulnerability and suffering of refugees and asylum-seekers. They are among the people who should benefit from transformative measures aimed at tackling discrimination, exclusion, marginalisation and deprivation.

A distinction was made between formal and substantive equality. Formal equality, which refers to sameness of treatment, is not a nuanced tool to promote the favourable or preferential treatment that might be accorded to certain people on the basis of specific distinctions or vulnerabilities.¹⁶⁸¹ The shortcoming of formal equality is that it assumes that all individuals are in an equal socio-economic position and

¹⁶⁷⁹ S 42 of the Immigration Act provides that no one may aid, abet, assist, enable or in any manner help an illegal foreigner, save for necessary humanitarian assistance.

¹⁶⁸⁰ Equality should guide the interpretation of all rights, whether they are contained in the Bill of Rights, legislation or international law. See *Fraser v The Children's Court* para 20; *Brink v Kitshoff* para 33; *Makwanyane* paras 155 - 6 and 262; and *Shabalala v Attorney-General, Transvaal* para 26.

¹⁶⁸¹ Greschner (2007) *Queen's Law Journal* 302.

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prohibits differentiations between different classes of persons.¹⁶⁸² For this reason, the formal equality approach is an inappropriate tool to address the socio-economic disadvantages of refugees and asylum-seekers.

The thesis found substantive equality to be a more appropriate tool for addressing their inequality and vulnerability. Substantive equality is preferred because (i) it invokes distinction of treatment and (ii) is concerned with addressing issues related to inequality and disadvantage. A substantive interpretation of equality requires measures aimed at addressing the poverty, vulnerability, disadvantage and marginalisation suffered by refugees and asylum-seekers as a result of oppression, civil conflict, physical deprivation, torture, political persecution, discriminatory practices and forced migration. This approach would lead to the inclusion of refugees and asylum-seekers in social welfare programmes, so as to ameliorate their conditions and improve the quality of their lives. It would result in the relaxation of the concept of citizenship which is seen as a vehicle through which social justice or distributive justice ought to be achieved. Read through the lens of substantive equality, favourable treatment would militate against the restriction of socio-economic rights and benefits to citizens or permanent residents as contemplated by immigration law. It would require the state to take into account the interests of refugees and asylum-seekers on the basis of the principle of equity and fairness, with a particular focus on the alleviation of their human suffering. The concepts of citizenship and sovereign self-preservation would no longer be relied on to nullify the unique and special rights of refugees in social welfare schemes.

In Chapter Three, the principle of the favourable treatment of refugees and asylum-seekers was contextualised from the perspective of human dignity. The notion of dignity went through various stages of development. Dignity moved from being seen as something that denoted status or rank or that could be earned to something inherent in every human being which requires respect for every person's free will and right to pursue his or her own destiny.¹⁶⁸³ Dignity is perceived to be rooted in the natural, human capacity to reason and "to shape [ourselves] to a range of possibilities not available to other creatures."¹⁶⁸⁴ Particular attention was paid to the moral philosophy of Immanuel Kant, who posits that human dignity implies that

¹⁶⁸² Albertyn & Kentridge (1994) *SAJHR* 152.

¹⁶⁸³ Vaišvila (2009) *Jurisprudence* 120.

¹⁶⁸⁴ Rosen *Dignity: Its History and Meaning* 15 and Lee & George (2008) *Ratio Juris* 174.

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every human being should live his or her life in accordance with ends that he or she freely chose.¹⁶⁸⁵ In the Kantian view, every person is an autonomous agent who has the ability to define his or her own destiny independently. The state must desist from treating human beings as mere objects or as means to an end. Rather, they must be treated as ends in themselves who act for their own sake and are capable of autonomous choice.¹⁶⁸⁶ The Kantian notion of human dignity was relied on in the dignity-based jurisprudence of the Constitutional Court, which demands that no-one should be reduced to a mere object of state power, or be left without the resources needed to live a dignified life or be deprived of autonomous choice and abilities to meet their own ends.¹⁶⁸⁷

Human dignity has a special place in the modern international legal order. Equal respect for and the protection of the dignity of individuals is seen as closely related to the ideals of peace, security and prosperity.¹⁶⁸⁸ In this regard, international refugee law aims to protect the human dignity of refugees and asylum-seekers. In addition, the right to human dignity and related rights play a crucial role in the alleviation of poverty and economic hardship. On this basis, it was argued that respect for human dignity – and the human rights and constitutional rights flowing from it – would help to restore normalcy to the lives of refugees and asylum-seekers, and advance their social protection and social progress, thereby shaping themselves to a range of opportunities available around them. In this way, they would contribute to their individual and societal development.

Human dignity has both a positive and negative dimension. In a negative sense, human dignity requires the state to desist from taking measures that may result in denigrating human dignity¹⁶⁸⁹ or reducing human persons to mere objects.¹⁶⁹⁰ The negative dimension of human dignity dictates that an individual must be treated with humanity and with respect for the dignity inherent in every human person.¹⁶⁹¹ From this perspective, refugees and asylum-seekers must be treated in a manner that respects their intrinsic worth, and may not be subjected to objectification or arbitrary

¹⁶⁸⁵ Wallace (1999) *J Martin Center* 127.

¹⁶⁸⁶ Kant *Groundwork* 28-31.

¹⁶⁸⁷ See for example *Soobramoney* para 25, *Grootboom* para 24, *Khosa* para 52, *Watchenuka* paras 34, 36; and *Union of Refugee Women* para 113.

¹⁶⁸⁸ Maritain *The Rights of Man and Natural Law* 65.

¹⁶⁸⁹ Glensy (2011) *Colum Hum Rts L Rev* 120-1. See too Simmons (2009) *Ind. J. Global Legal Stud.* 440.

¹⁶⁹⁰ Botha (2009) *Stell. LR* 180.

¹⁶⁹¹ Art 10(1) of the ICCPR.

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deprivations of freedom. In a positive sense, human dignity requires the state to promote the equal worth of the human person by (re)distributing resources in a fair and just manner, and to act positively to address the legal barriers that vulnerable people face in their attempt to access socio-economic rights.¹⁶⁹² It must thus take positive steps to afford relief to refugees and asylum-seekers suffering from social vulnerabilities, starvation and deficiencies. Favourable treatment would imply the fair inclusion of refugees and asylum-seekers in social welfare schemes, and in making resources available to them. It was therefore argued that human dignity dictates that distributive laws ought to be harmonised with the Refugees Act for the purpose of protecting refugees' and asylum-seekers' humanitarian, health, housing and other basic needs. This was elaborated on under Chapter Four, Chapter Five and Chapter Six, which scrutinised whether the Social Assistance Act, the National Health Act and the Housing Act were designed to protect the dignity of refugees and asylum-seekers.

The next three chapters dealt with refugees and asylum-seekers' access to specific socio-economic rights in view of the values of dignity and equality. Chapter Four examined whether and to what extent asylum-seekers are entitled to the right to public relief and assistance guaranteed by article 23 of the Geneva Refugee Convention. Chapter Five explored the question whether and to what extent refugees and asylum-seekers should enjoy the right to healthcare guaranteed by human rights treaties. Finally, Chapter Six dealt with the question whether refugees and asylum-seekers are entitled to the right to housing as guaranteed by article 21 of the Geneva Refugee Convention. Refugees' and asylum-seekers' access to these rights was examined in light of the South African Constitution and the Refugees Act as well as foreign and international standards and practices.

Chapter Four explored the right to public relief and assistance. Although it does not use the same terminology as article 23 of the Geneva Refugee Convention, section 27(1) of the South African Constitution guarantees the right of everyone to have access to sufficient food, water and social security, including the right to appropriate social assistance where they are unable to support themselves.¹⁶⁹³ It

¹⁶⁹² Compliance with the standard of human dignity serves as a basis for the promotion of economic, social and cultural development. These three aspects (i.e. economic, social and cultural) are viewed as indispensable for fostering the social good and human fulfilment. See art 22 of the UDHR; and Wallace (1999) *J Martin Center* 132.

¹⁶⁹³ S 271(a)-(b).

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was argued that this provision imposes an obligation on the South African government to ensure that every individual has a right to an adequate standard of living, including improvement of conditions of life to attain a dignified life.¹⁶⁹⁴ It was further argued that whereas refugees are statutorily entitled to appropriate social assistance, social security and sufficient food and water in terms of section 27(b) of the Refugees Act, asylum-seekers are also entitled to the same rights by virtue of section 27A(d) of the Refugees Act. Foreign and international practices support asylum-seekers' access to humanitarian relief and assistance whilst waiting for the finalisation of their applications. A number of justifications were offered in support of the contention that asylum-seekers should be included in social assistance programmes. First, they fall within the ambit of refugees lawfully staying in the host country. Secondly, a human rights-based approach requires the state to afford individuals, including non-citizens, equal opportunities to have access to core socio-economic rights for the achievement of an adequate standard of living or the highest attainable standard of physical and mental health.¹⁶⁹⁵ It was argued that this could be achieved if a combination of rights is observed. These include: the right to life, the right to non-discrimination, the right to social security, the right to adequate food, the right to adequate water, the right to adequate clothing, the right to housing, the right to medical care, women's right to adequate living conditions, rights of refugee/asylum-seeker children to an adequate standard of living and appropriate protection and humanitarian assistance, and disabled persons' right to special care and assistance. In this light, it was argued that asylum-seekers should be afforded favourable access to free healthcare services and emergency housing programmes as a part of public relief and assistance.

The thesis demonstrated that it is constitutionally wrong to employ the twin principles of exclusivity and self-sufficiency as a tool to exclude asylum-seekers from social assistance, free healthcare services and emergency housing schemes. The twin principles are superseded by section 27A(d) of the Refugees Act. It was further shown that the absence of state support adversely impacts on the worth and security of asylum-seekers and perpetuates their misery, insecurity and suffering. Public relief and assistance is integral to the protection of the well-being of all refugees,

¹⁶⁹⁴ Socio-economic rights impose an obligation on the state to take positive measures to ensure a life of dignity for all inhabitants of South Africa and to promote their well-being. See, for example, *Grootboom* paras 1-2.

¹⁶⁹⁵ Art 25 of the UDHR, art 11 of the ICESCR and art 18(1) of the ACHPR.

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given their social vulnerabilities arising as a result of destitution, illness, duress, age, physical or mental impairment, or other circumstances.¹⁶⁹⁶

The inclusion of asylum-seekers in social assistance schemes was further justified on the basis of a comparative study of the approaches followed in the US and France. In Chapters Five and Six, the thesis found the French approach to the treatment of asylum-seekers to be more progressive than that of the US. France confers on asylum-seekers a range of aspects of the right to public relief and assistance, including access to social housing, financial aid, and free healthcare. Access to the right to healthcare varies considerably based on asylum-seekers' or refugees' documentation or legal status, as discussed in Chapter Five. Refugees and asylum-seekers receive favourable treatment in relation to housing, as demonstrated in Chapter Six. France has adopted a refugee housing policy in terms of which refugee accommodation was established throughout the country. Genuine asylum-seekers are housed in Processing Centres or emergency accommodation. Upon being recognised as refugees, asylum-seekers are entitled to remain in the said houses for a renewable period of three months. Once recognised as a refugee, an individual is eligible to apply for social housing. The US's approach is more progressive than the South African approach, but has fundamental shortcomings. The most serious shortcoming is that it fails to provide asylum-seekers with housing relief or emergency accommodation. The US's asylum system protects the housing needs of refugees, but not those of asylum-seekers. Asylum-seekers can, in very limited and exceptional circumstances, benefit from housing and healthcare benefits designed to assist vulnerable migrants.¹⁶⁹⁷ In this respect, they are accorded the same treatment enjoyed by other vulnerable non-citizens. As noted, the same treatment is problematic as it fails to take into account the special vulnerabilities of asylum-seekers. In the US, only individuals recognised as refugees receive the same treatment afforded to citizens with respect to housing.¹⁶⁹⁸ Housing is seen as

¹⁶⁹⁶ UNHCR, Public Relief and Social Security <<http://www.unhcr.org/3cf33fbc4.pdf>> (accessed 10-11-2015) 215. See too Weis *Refugee Convention* 172.

¹⁶⁹⁷ S 121(2) of the 1986 Immigration Reform and Control Act, read in tandem with s 214 of the 1980 Housing and Community Development Act.

¹⁶⁹⁸ S 412 of the Refugee Act of 1980.

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integral to the self-reliance of refugees and as the main pillar of their integration process.¹⁶⁹⁹

In France, the integration process starts at asylum-seeking level. Asylum-seekers are introduced to the first stage of the integration process through entitlement to public relief and assistance, which is broad enough to include access to a number of basic socio-economic services, such as basic accommodation; adequate food and water; clothing; medical, social and psychological help; financial aid and assistance; vocational training; legal representation; and voluntary return services. Given that these basic services are offered with the intent to mitigate human suffering and to restore a sense of human dignity, the thesis argued that South Africa's failure to adopt a similar approach would give rise to a material invasion of asylum-seekers' human dignity. The exclusion of asylum-seekers from these rights constitutes unfair discrimination in terms of section 9(3), as it condemns them to destitution, humiliation and degradation. It was further shown that the exclusion could not reasonably be justified in terms of section 36. The exclusion would also be inconsistent with section 27(2). The thesis further argued that the state could not justify the exclusion of asylum-seekers from social welfare on the basis of the need to guard against the imposition of a high financial burden on it.

In Chapter Five, it was established that refugees and asylum-seekers' access to the right to healthcare is impeded due to two main reasons. The first is uncertainty whether, in terms of the Geneva Refugee Convention, the right to healthcare should be enjoyed by refugees and asylum-seekers on the same basis as citizens or non-citizens. The second is uncertainty about the ambit of vulnerable groups as the term is used in section 4(2)(d) of the National Health Act, which prescribes conditions subject to which categories of vulnerable persons are eligible for free healthcare services. Given that the right to healthcare is not among the socio-economic rights expressly guaranteed in the Geneva Refugee Convention, article 7 of the Geneva Refugee Convention applies. Article 7 requires rights not protected under the Geneva Refugee Convention to be accorded to refugees and asylum-seekers on the same basis as non-citizens generally. This approach is undesirable, as it would subject refugees and asylum-seekers to the twin principles of exclusivity

¹⁶⁹⁹ It was argued that the US's asylum law is grounded in the concept of resettlement and this has the implication of depriving asylum-seekers of opportunities to be provided with socio-economic assistance and benefits.

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and self-sufficiency. Accordingly, article 7 is an inappropriate legal tool to address the problem at hand. The thesis argued that the Refugees Act is not aligned to the four standards of treatment as set out by the Geneva Refugee Convention, but rather envisions the same treatment as is accorded to citizens insofar as those rights constitutionally apply to everyone.

Section 27(g) of the Refugees Act, which stated that refugees are entitled to “the same basic health services... which the inhabitants of the Republic receive from time to time”, was repealed by the 2008 Refugees Amendment Act. However, the fact remains that, in terms of section 27(b) of the Refugees Act, refugees are entitled to full legal recognition, including all the rights in the Bill of Rights, save for those reserved for citizens only. Moreover, section 27A(d), which provides that an asylum-seeker is entitled to all the rights which apply to an asylum-seeker, should be interpreted to mean that asylum-seekers are protected by all rights in the Bill of Rights, except those expressly confined to citizens. The South African Constitution does not restrict the right of access to healthcare to citizens. Section 27(1)(a) of the Constitution provides that everyone has this right, while sections 28(1)(c) and 35(2)(e) refer to all children and all detained persons, respectively. In view of these constitutional provisions, read with sections 27(b) and 27A(d) of the Refugees Act, the chapter argued that refugees and asylum-seekers are entitled to the right of access to healthcare on the basis of same treatment offered to citizens.

Against this background, the thesis analysed the provisions of the National Health Act to determine whether it aimed to exclude refugees and asylum-seekers from accessing free healthcare services. It was found that section 4(2)(d) is not discriminatory. It rather suffers from the usage of ambiguously defined groups of vulnerable people, which gave rise to different interpretations. As a result, healthcare policies such as the UPFS and Patients Classification Manuals, which do not include refugees and asylum-seekers under vulnerable persons, were developed. These policies rendered the free health care services unavailable to them.

The failure of the UPFS and Patients Classification Manuals to recognise refugees and asylum-seekers as a vulnerable group is inconsistent with the constitutional right to equality and non-discrimination and disregards their special vulnerability, as recognised in section 3 of the Refugees Act. The exclusion of refugees and asylum-seekers from free healthcare services is contrary to their right to have access to healthcare services in terms of section 27(1)(a) of the South African Constitution,

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read in tandem with sections 27(b) and 27A(d) of the Refugees Act. It is also contrary to the Constitutional Court's reasoning in *Khosa*, in which it held that "the constitutional reference to everyone implies that all in need must have access to the [socio-economic rights] that the state has put in place".¹⁷⁰⁰

The rights of refugees and asylum-seekers must also be seen in the context of their susceptibility to ill-health. When asylum-seekers arrive in the host country, they suffer from health problems (such as hypertension, asthma, diabetes, headaches, depression and anxiety) due to stress and trauma caused by experiencing or witnessing unspeakable violence, insufficient food (or malnutrition) and financial distress. The most common illnesses suffered by refugees and asylum-seekers include cholera, dysentery, diarrhoea, hepatitis and measles.¹⁷⁰¹ Women and children are susceptible to a number of diseases.¹⁷⁰² Due to sexual violence, female asylum-seekers often suffer from STDs, HIV/AIDS and health problems related to unsafe abortions.¹⁷⁰³ These health problems necessitate special medical care and treatment if the host state has to protect not only the refugee community but also the host community into which refugees will be integrated.

The need to provide refugees and asylum-seekers with free healthcare services was further justified from a human rights-based perspective. It was argued that the minimum standard of treatment set out under human rights law obliges the state to ensure that vulnerable groups enjoy the highest attainable standard of physical and mental health. Special medical care, assistance and treatment should be afforded to women and children for the reduction of still-births and infant mortality. Favourable access to free healthcare services is mandatory owing to the need to prevent diseases from being communicated to members of the host society and to ensure that the normal family life of refugees is restored. A sense of normalcy cannot be restored if nothing is done to ensure that their illnesses are attended to. Those who are sick cannot be useful and productive.

In Chapter Six, it was established that refugees and asylum-seekers are excluded from access to housing and other related rights in terms of the Housing Act, which restricts access to adequate housing to citizens and permanent residents. The

¹⁷⁰⁰ *Khosa* para 111.

¹⁷⁰¹ Kalipeni & Oppong (1998) *Soc. Sci. Med.* 1647.

¹⁷⁰² *Pace Migration and the Right to Health* 21 and the 2001 UN Declaration of Commitment on HIV/AIDS.

¹⁷⁰³ NSW: Refugee Health Service 1.

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restriction is imposed under the definition of the concept housing development programme (“HDP”) and the National Housing Policy and Subsidy Programme (NHPSP).¹⁷⁰⁴ For this reason, refugees and asylum-seekers cannot benefit from housing programmes such as the Integrated Residential Development Programme (IRDP),¹⁷⁰⁵ the Institutional Housing Subsidy Programme (IHSP),¹⁷⁰⁶ the Individual Subsidy Programme (ISP),¹⁷⁰⁷ the Rural Housing Programme (RHP),¹⁷⁰⁸ the People’s Housing Process (PHP),¹⁷⁰⁹ the Emergency Housing Programme (EHP),¹⁷¹⁰ the Enhanced People’s Housing Process (ePHP)¹⁷¹¹ and the Enhanced Extended Discount Benefit Scheme (EEDBS).¹⁷¹² It was argued that the exclusion of refugees in the HDP is unreasonable as it is inconsistent with section 26(1) of the South African Constitution, read in tandem with sections 27(b) and 27A(d) of the Refugees Act.

The need to include refugees and asylum-seekers in housing programmes cannot be explained adequately in terms of the notions of the same treatment and “in the same circumstances”. These notions were criticised, as they are conceived in terms of the traditional principle of reciprocity, which is grounded in the MFN standard relating to the stay and treatment of non-citizens. The MFN standard is of little assistance, as it is grounded in the same treatment afforded to favoured non-citizens. There is no other category of non-citizens who are accorded special treatment in accordance with the MFN standard for purposes of comparison.

Housing relief or emergency accommodation is crucial in situations where refugees and asylum-seekers are unable to support themselves and their families or face various difficulties which prevent them from becoming economically independent and from meeting their housing and other essential needs.¹⁷¹³ A human rights-based approach to the treatment of human beings, which holds that all individuals are entitled to basic human rights, regardless of their status or nationality,

¹⁷⁰⁴ S 1(vi) of the Housing Act and Department of Human Settlement “National Housing Policy and Subsidy Programmes,” February 2010.

¹⁷⁰⁵ NHPSP para 1.2.

¹⁷⁰⁶ Para 6.2.

¹⁷⁰⁷ Para 8.2.

¹⁷⁰⁸ Para 9.2.

¹⁷⁰⁹ Para 15.2.

¹⁷¹⁰ DHS “Emergency Housing Programme” Part 3 Vol 4 of the National Housing Code (2009) 9.

¹⁷¹¹ Tissington *A Resource Guide to Housing* 84.

¹⁷¹² DHS “Enhanced Extended Discount Benefits Scheme” Part 3 Vol 3 of the National Housing Code (2009).

¹⁷¹³ UNHCR Policy on Refugee Protection and Solutions in Urban Areas para 116.

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also supports arguments in favour of the extension of housing relief to refugees and asylum-seekers. It has been argued that the minimum standard of treatment set out under human rights law obliges the state to protect the housing needs of vulnerable groups,¹⁷¹⁴ in particular, women,¹⁷¹⁵ people with disabilities¹⁷¹⁶ and children.¹⁷¹⁷ The right to housing is seen as essential for the enjoyment of other fundamental rights, hence it is understood as the enjoyment of “the right to live somewhere in security, peace and dignity”.¹⁷¹⁸ Asylum-seekers and refugees should be offered protection against human insecurities caused by the absence of basic services which seek to safeguard a minimum standard of living.

Even though refugees and asylum-seekers are both entitled to socio-economic rights and benefits, there are notable differentiations in their treatment. Asylum-seekers do not enjoy the same measure of protection as refugees, as they are not granted full legal protection in terms of the Refugees Act. It has been shown that asylum-seekers are entitled to humanitarian forms of relief adequate for the protection for their dignity and freedom. These variations are not necessarily at odds with an approach based on human dignity and substantive equality, as such an approach recognises that the precise content of socio-economic rights may vary, depending on the rights-holders’ legal status and the extent of their vulnerability. However, asylum-seekers must have access to basic necessities of life, including shelter or accommodation, food, water, clothing, healthcare and training throughout the asylum application procedure. In situations where there is no state support, they should be allowed to take up employment and studies.

7 1 Towards legal harmony

The question arises how South Africa’s distributive laws should be harmonised with the Refugees Act with a view to eradicating exclusion and discrimination. It has been stressed throughout the thesis that refugee rights will continue to be overlooked if refugees and asylum-seekers are not afforded favourable access to

¹⁷¹⁴ Arts 10 and 11(1) of the ICESCR; art 7 of the ICCPR; and arts 13(3), 18(1)-(2) and 24 of the ACHPR.

¹⁷¹⁵ Refugee women could claim the right to housing in terms of arts 12(2)(h) and 15(2) of the CEDAW.

¹⁷¹⁶ Asylum-seekers and refugees with disabilities could claim the same rights under articles 1, 9, 12, 28(1) of the CRPD.

¹⁷¹⁷ Refugee children could also invoke arts 22(1) and 27(3) of the CRC and art 20(2)(a) and 27(3) of the ACRWC so as to benefit from the housing programmes.

¹⁷¹⁸ General Comment 4 (the right to adequate housing) para 7.

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socio-economic programmes or social welfare. A number of recommendations have been made on the basis of the objectives of the Refugees Act, the need to align refugee protection with the objectives, spirit and purport of the Bill of Rights and the lessons learnt from a critical analysis of national, foreign and international standards, practices and jurisprudence. The thesis indicated that the gaps in distributive laws can only be addressed through amendments in order to ensure that the legislation, policies and programmes under discussion are consistent with the socio-economic rights enshrined in the South African Constitution, read together with the constitutional rights and values of human dignity, equality and freedom.

Chapter Four asked whether asylum-seekers are entitled to similar treatment to that accorded to citizens, permanent residents and refugees in relation to the right to public relief and assistance. It was argued that the denial of access to social grants and SRD could not reasonably be justified on the basis of the values of human dignity, equality and freedom. Drawing on these findings, the chapter recommended amendments of the Social Assistance Act. It suggested that section 5(1)(c) of the Social Assistance Act and its Regulations (i.e. sections 2(e), 3(a), 5, 6(1)(g), 7(1)(a)(i), 8(c) and 9(1)(b)) should be amended to ensure asylum-seekers' access to social grants and SRD. Section 2 of the Act should also be revised to include a reference to a person who is not a citizen but who is eligible to social grants, provided that an international agreement exists that makes provision for social relief and assistance.

Chapter Five addressed the question whether and to what extent refugees and asylum-seekers should enjoy the right to free healthcare services. The constitutional right to access to healthcare is implicitly protected by the Refugees Act. However, neither the National Health Act nor the Norms and Standards Regulations proclaimed in terms of the Act include refugees and asylum-seekers under vulnerable groups.¹⁷¹⁹ There is a need to harmonise this legislation with the Refugees Act and to differentiate between refugees and asylum-seekers, on the one hand, and other types of foreign nationals, on the other. Bearing this in mind, the thesis recommends that sections 2(c)(iv), 4(2)(d), 39(2)(d) and 70(1)(d) of the National Health Act should be revised to include refugees and asylum-seekers under vulnerable groups. In addition, section 61(3) of the Act should be amended to allow

¹⁷¹⁹ GN 109. It only defines refugees as vulnerable uses. See s 1.

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transplantation of an organ into refugee patients who are in the greatest need of such transplantation for their survival. These revisions must be followed by the creation of a national policy to clarify the right to have access to healthcare of refugees and asylum-seekers. Accordingly, the NHI, UPFS and other regulations should be revised in order to ensure that vulnerable refugees and asylum-seekers have favourable access to quality healthcare services.

In Chapter Six, it was established that refugees and asylum-seekers are not benefiting from subsidised housing programmes. Drawing on the decision in *Grootboom*, the thesis argued that there could be no reasonable justification for failing to respond to the housing needs of refugees and asylum-seekers, especially in situations where this resulted from the failure to harmonise housing laws and policies with refugee law. Accordingly, it would be difficult to justify the state's failure to include vulnerable refugees and asylum-seekers in housing programmes on the basis of a lack of resources or limited budget. The exclusion impacts on their human dignity, and has the potential to aggravate vulnerabilities like homelessness, desperateness, distress, diseases and trauma, which could inhibit them from enjoying other rights in the Bill of Rights. The thesis found that there is a need to develop emergency housing to accommodate refugees and asylum-seekers whose living conditions pose an immediate threat to their life, health, human dignity, and physical integrity. This would only be possible if the Housing Act and other housing policies (i.e. NHPSP and the National Housing Code) and strategies (i.e. the IRDP, the IHPS, the ISP, the RHP, the PHP, the EHP and the EEDBS) are harmonised with the Refugees Act. Accordingly, the thesis suggested that the definition of housing development under section 1(vi) of the Housing Act should be amended to include refugees. A comprehensive refugee policy on housing must be established to determine what types of housing development refugees and asylum-seekers can have access to. Accessibility of housing development should be managed and controlled by local/municipal authorities, together with or under the guidance of the Department of Human Settlements.

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