

University of Cape Town

LLM in Social Justice



**REFUGEES AND TERTIARY EDUCATION IN SOUTH
AFRICA:**

**THE CHALLENGES TO EQUAL ACCESS TO
EDUCATION AND LIVING A DIGNIFIED LIFE**

Thesis by Callixte Kavuro

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Student number KVRICAL001

Supervised by Associate Professor Dee Smythe

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PLAGIARISM DECLARATION

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in Social Justice in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Date: 08 February 2013

Signature:.....

THIS IS JUST TO SAY

Callixte Kavuro

[1] This is just to say
That I hate my status
My refugee status:
Internationally - stateless person
Nationally - Foreigner, and
Locally – a Kwerekwere: an extraterrestrial.
For that, I am committed
And I dedicated myself
To change it.
Not the way I think it ought to be,
Rather the way you look down on me,
Your ill-sentiment and negative attitude towards me,
Attitude intends to degrade and disgrace me;
As if I am unworthy and undeserving.

[2] That is just to say,
That I am a human being – just like you,
Eager to face and take on any challenge in this world
Irrespective of who I am.
I like challenges and I hate failures,
But failures are our strengths,
Our only experiences where we draw the lessons,
To many, my status appears as one of my failures,
But not a personal failure rather a collective failure.
A failure from man-made events over our control
Thus, my status does not change my inner power,
My ability, my ambition and my dream

For having a world devoid of man-made misery and suffering.

[3] This is just to say

That I am here in South Africa – not as a thief

To steal a job,

To take your wife from you,

To have a good and quality time with your sister,

Or to enjoy the fruits of your liberation struggle.

But I am here as an asylum seeker,

A person who flees from political conflict,

From extrajudicial killings and massacres.

A person who needs your warm hospitality

But not antagonism and hostility

That I vehemently objected to and do not want to be part of

A person who needs protection and compassion.

Safety and security is all I need.

Needless to say – to live and to compete

As to make something of myself,

A vision or character that all of us share in common

Irrespective of our backgrounds

Just to change our lives as well as the world.

For the better.

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The writing up of this thesis was inspired by my own difficult learning journey and experience. Due to lack of financial means and assistances, refugees and asylum-seekers struggle to access tertiary education for them to develop their capabilities and personalities. I want to acknowledge the struggle of Unity for Tertiary Refugee Students (UTRS) to lobby and advocate for refugees and asylum-seekers' constitutional rights to further education.

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DEDICATION

This thesis is dedicated to my wife, Perpetue Mihigo, who has been there for me throughout my tertiary studies regardless of our socioeconomic status being challenged by household income economic shocks. To my three children (Umubyeyi Mihigo, Honore Mutabaruka Kavuro, Honoris Rugorirwiza Kavuro) who were born refugees in South Africa and who will, if labelled international students, struggle to access tertiary education advantages as the same as other national's children. I hope that this thesis will bring a change in education policies for them to be able to favourably access education.

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GLOSSARY OF ABBREVIATIONS

ANC	African National Congress
AFRISA	Alliance for Refugees in South Africa
ARESTA	Agency for Refugee Education, Skills Training and Advocacy
AU	African Union
BHER	Borderless Higher Education for Refugees
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CPUT	Cape Peninsula University of Technology
CTRC	Cape Town Refugee Centre
DAFI	Deutsche Akademische Flüchtlingsinitiative Albert Einstein (Albert Einstein German Academic Refugee Initiative)
DoHA	Department of Home Affairs
DoHE	Department of Higher Education
ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council
GoSA	Government of South Africa
HESA	Higher Education South Africa
ICESCR	International Covenant on Economic, Social and Cultural Rights
ID	Identification Document
IRF	International Registration Fee
JC:HEM	Jesuit Commons – Higher Education of the Margins
KU	Kenyatta University
NGO	Non-Governmental Organisation
NRF	National Research Foundation
NSFAS	National Student Financial Aid Scheme

NQF	National Qualification Framework
MU	Moi University
PRS	Protracted Refugee Situations
SADC	Southern African Development Community
SAQA	South African Qualification Authority
SCA	Supreme Court of Appeal
SU	Stellenbosch University
RDP	Reconstruction and Development Programme
UCT	University of Cape Town
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Education, Scientific, and Cultural Organisation
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNISA	University of South Africa
UWC	University of the Western Cape
WHO	World Health Organisation

CHAPTER 1

INTRODUCTION

*'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical and religious backgrounds must borne in mind, it is a duty of the state, regardless of their political, economic and cultural system, to promote all human rights and fundamental freedoms'*¹ Vienna Declaration, 25 June 1993.

*'Law and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress.'*² Martin Luther King, Jr.

1.1. Background and Outline of the Research Problem

This thesis seeks to analyse the challenges faced by recognised refugees and asylum-seekers³ in enjoying the right to education in the same way as South African students and Southern African Development Community (SADC) students do, or to be afforded “favourable treatment” in South African tertiary education systems, as the United Nations Convention Relating to the Status of Refugees of 1951 requires. It states that:

'The contracting states shall accord to refugees treatment as favourable as possible, and in any event, not less favourable than that accorded to [international students] generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign

1 Vienna Declaration and Programme of Action of 25 June 1993, adopted by the World Conference on Human Rights, Vienna, para 5.

2 Martin Luther King, Jr's 'Letter from a Birmingham Jail [King, Jr.]', available at http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html ; accessed November 2012.

3 Throughout the thesis, a recognized refugee would refer to a person who has been granted a refugee status while an asylum-seeker means a person who has lodged a claim of asylum but whose case is still pending or it has been adjudicated but rejected and the matter is before Refugee Appeal Board. A term refugees will be used to imply recognized refugees and asylum-seekers.

school certificates, diplomas and degrees, the remission of fees and charges and the awards of scholarships'.⁴

Hosting states are required to open the doors of schooling to refugees as well as to accord to them favourable access. The thesis works from presupposition that 'favourable treatment' would mean to cut down their school fees and charges; to award to them student financial assistance; and to provide access to any other education related advantages that make education available and accessible.

In order to transform this into effective protection, the Government of South Africa (GoSA) must show commitment to ensure that they gain favourable access to education and provide financial and material support to facilitate such access. On the contrary, recognised-refugees and asylum-seekers are, in practice, treated as 'international students' and this has severe implications in terms of restricting them from accessing tertiary education and financial assistance. This increases their likelihood of living in structural poverty and economic hardship.

Unlike other African countries hosting refugees, South Africa knows no refugee camps. Refugees are not housed in camps but live mostly in urban areas where they have to compete with nationals in the labour and economic markets so as to support themselves and their families.⁵ This makes it difficult for asylum-seekers who have left their home with nothing but who have to work so hard to be self-reliant and economically independent from the very first day they step on South African soil. The GoSA, instead of providing social and humanitarian assistance to new asylum-seekers, such as accommodation and food,⁶ chooses to provide work permits to them.⁷ It eventually becomes more and more difficult for those who are caught in a 'protracted refugee situations' (PRS) if, for example, they are

4 Article 22(2) of the Convention Relation to the Status of Refugees, General Assembly Resolution 429(V), 14 December 1950 hereinafter referred to as '1951 UN Refugee Convention'.

5 Landau (2006a:308).

6 UNHCR Reception Standards for Asylum Seekers in the European Union of 2000, hereinafter 'Reception Standard of Asylum-Seeker' available at <http://www.unhcr.org/refworld/docid/3ae6b3440.html> [accessed 5 February 2013] at p3 provides that 'states have a broad discretion to choose what forms and kinds of support they will offer to asylum seekers'. See further PERCO Guidelines on the Reception of Asylum Seekers for National Red Cross and Red Crescent Societies (2001) available at

<http://www.ifrc.org/Global/Publications/migration/perco/perco-asylum-en.pdf>; accessed December 2012 at p6.

7 Section 22 of Refugee Act 130 of 1998. See further ANC Policy Discussion Document: Peace and Stability of March 2012 at p5.

unemployed or unable to establish income generating activities. PRS arises where refugees have been in a country of asylum for a period of time with no end in sight while their social, economic, psychological needs are not meaningfully and effectively addressed.⁸ This description perfectly fits the recognised refugees and asylum-seekers' plight in South Africa, because they are left to sustain themselves with very minimal assistance and 'without prospect of implementing durable solutions'.⁹ If they are neither employed nor have any other means of income, their basic dignity would not be protected and thus their right to life will be threatened. Without adequate means of subsistence, other fundamental human rights will mean nothing.¹⁰

In terms of the UNHCR Reception of Refugee Standard of 2000, a state is advised to make social assistance available so as to protect the basic dignity of unemployed asylum-seekers,¹¹ who will otherwise be left in a state of material dependency and often without access to basic rights such as food, accommodation, and education.¹² As a result, their future would be uncertain and precarious without means of economic self-sufficiency. For eventual social integration, some refugees consider tertiary education to be the only hope for a better future. Education and training would increase their employability and entrepreneurship, which are means to earning a good life. Irrespective of being entitled to the right to study, they experience enormous challenges when trying to gain admission to universities and when studying, including the lack of refugee admissions policies, student financial assistance, and being treated as "international students". These examples are one of practices of keeping refugees in situations of restricting education and employment, enforced poverty and

8 Executive Committee of the High Commissioner, Standing Committee (30th Meeting), Protracted Refugee Situations EC/54/SC/CRP.14 of 10 June 2004, hereinafter 'Protracted Refugee Situations' at para 3, 'Refugee situation is defined as 'one of which refugees find themselves in a long-standing and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remained unfulfilled after years in exile'; Milner & Loescher (2011:3) define the concept of ' Protracted Refugee Situations' as 'situations where refugees have been in exile 'for 5 years or more after their initial displacement, without prospects for implementation of durables solutions' and see also MacLaren (2011:105).
9 Milner & Loescher (2011: 3): As regard durable solutions see further UNHCR Policy on Refugee Protection and Solutions in Urban Areas of 2009, at 103 and 137 where it is stated that durable solutions includes these three options: (i) local integration, (ii) resettlement in a third country, or (iii) repatriation. With respect to local integration, a refugee should 'enjoy similar standards of treatment and have equal access to durable solutions opportunities'. In South Africa, a refugee is local integrated upon being granted permanent residence.

10 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), at para at 84 herein after 'Makwanyane'. The Constitution Court held that 'life and dignity are the sources of other rights' and 'the essential content of all rights under South African Constitution'.

11 Reception Standards for Asylum-Seekers (n6) at 3.

12 Reception Standards for Asylum-Seekers (n6) at 3.

dependency. Poverty caused by forced displacement is a major challenge that hinders many refugees' access to tertiary education in South Africa. In addition, international student status deprives them student financial assistance that should have been granted to them as a vulnerable group so as to enjoy favourable access to education in the same manner as South African disadvantaged groups. Treatment as international students means the basic rights to education becomes unattainable. This treatment is thus in violation of both the Refugee Act¹³ and the 1951 UN Refugee Convention.¹⁴ Due to these challenges tertiary education is still a dream to the majority of refugees who are willing to expand their capabilities and to realise their own potential.

As will be illustrated in this thesis, it is not only the 1951 UN Refugee Convention that places a positive duty on the GoSA to improve the refugee situation. In addition to other refugee conventions,¹⁵ human rights instruments require the GoSA to do everything in its power and its available resources to alleviate poverty and to assist the poor, vulnerable and disadvantaged to expand their capabilities and to build their capacities for the purpose of national development and regional and global economic growth.¹⁶ Through the lens of a human rights paradigm, the state must promote and protect non-citizens' fundamental human rights. Scholars argue that the human rights paradigm has extended the rights, entitlements, duties, obligations, privileges and advantages traditionally associated with citizenship to settled non-citizens termed 'denizens'.¹⁷ Most of them have been extended to recognised refugees and asylum-seekers in terms of both the South African Constitution and the country's refugee regime. In the context of alleviation of poverty and regional economic development, the SADC member states have adopted the Protocol on Education and Training

13 Refugee Act 130 of 1998, as amended by Refugee Amendment Act 33 of 2008 and Refugee Amendment Act 12 of 2011, hereinafter referred to as 'Refugee Act'.

14 The 1951 UN Refugee Convention (n4).

15 Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969 hereinafter 'African Refugee Convention' and Cartagena Declaration on Refugee of 19-22 November 1984, hereinafter 'Cartagena Declaration'.

16 Regional and international human rights instruments include Charter of the United Nations of 1945, hereinafter 'UN Charter'; Universal Declaration on Human Rights 217 A (III) of 10 December 1948, hereinafter 'UDHR'; International Covenant on Economic, Social, and Cultural Rights (ICESCR), General Assembly Resolution 2200 A (XXI) of 16 December 1966; International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 of 1966, African (Banjul) Charter on Human and Peoples' Rights of 27 June 1981, OAU Doc, CAB/LEG/67/3 rev.5, 21I.L.M.58 (1982) hereinafter 'African Charter'; the Constitutive Act of African Union of 11 July 2000; and the Treaty of Southern African Development Community (SADC) of 20 July 1981.

17 Kofman (1993:395) and see also Fix & Laglagaron (2002:2). Denizens are defined as 'non-citizens who have permanently, indefinitely, or for a significant period, of time settled in a country in terms of applicable law'.

of 1997,¹⁸ which requires member states to treat SADC students as if they were citizens of the member state with respect to university tuition fees, charges and accommodation.¹⁹ South Africa implements the SADC Protocol as it pertains to SADC students but fails, as it will be established in this thesis, to implement the 1951 UN Refugee Convention in relation to refugee and asylum-seeking students.

This thesis looks at international human rights instruments that require ‘international assistance and cooperation’ or ‘African solidarity’ for the purpose of improving the refugee situation and ensuring a safe, secure, and dignified life. Then, it turns to investigate the domestic policies that hamper recognised refugees and asylum-seekers from enjoying this universally recognized right. It will go on to look at the problems that refugees face in their effort to apply for admission to undertake tertiary studies and when studying. It will particularly highlight the difficulties they encounter in their studies due to the lack of financial assistance that results from having two statuses: “refugee status” on one hand and “international status” on the other.

The thesis is innovative because it brings together a critical analysis of South African social justice in the purview of the 1951 Refugee Convention on the treatment of refugees in the South African academic community thereby highlighting the disadvantages of being treated as international students. Once the disadvantages are highlighted and clearly set out, it will conclude by providing recommendations which must be taken into account so as to ensure refugees’ right to tertiary education is promoted. These recommendations will assist university councils and the Department of Higher Education (DoHE) and, in particular, the ‘National Student Financial Aid Scheme’ (NSFAS) Board as well as the ‘National Research Foundation’ (NRF), to consider the plight of refugees and to accord to them favourable treatment with respect to scholarship awards, financial loans, reduction of fees and charges, and establishment of admission policy guidelines. I argue that recognised refugees and asylum-seekers must be considered as any other financially disadvantaged and deserving students in the NSFAS and other financial opportunities because citizenship ground have been relaxed by the 1951 UN Refugee Convention and the fact that they are vulnerable.

18 Protocol on Education and Training (SADC) of 8 September 1997, hereinafter ‘SADC Protocol’.

19 SADC Protocol, article 7(A)(5).

Concerning education, the thesis argues that education is one of the components of socioeconomic rights which should be accorded to both recognized refugees and asylum-seekers to ‘improve the quality of their lives’ and to ‘free their potential’. Indeed, education is of seminal importance as far as living a good life is concerned, since it gives to people dignity and self-confidence and strengthens ‘respect for human rights and fundamental freedoms.’²⁰ It develops or expands their capabilities in order to empower them to participate effectively in their respective hosting countries’ labour and economic markets²¹.

1.2. Research Problems and Objectives

The overall objective that this research seeks to achieve is to understand the impact of recognised refugees and asylum-seekers being regarded as ‘international students’ within an academic environment. The guiding research question is: *Are recognised refugees and asylum-seekers entitled to the right to education guaranteed under the South African Bill of Rights and related advantages that make it more accessible?* Addressing this question involves the following specific objectives:

- a) **To determine the definition of a recognised refugee, an asylum-seeker and an international student.** This is mainly to provide the distinction between an asylum-seeker, a recognised refugee and an international student and to spell out how their stays are differently regularised, how their plights differ and the advantages afforded to each.
- b) **To explain the difficulties that refugees face in their efforts to enrol at a university.** This will enable the author to reflect on his experience of enrolling at tertiary institutions; the experience that he shares with many other refugees but not with international students.
- c) **To examine the concept of social justice in relation to refugees.** This will focus mainly on redistribution of advantages in the purview of socioeconomic rights

²⁰ Devenish (1999:61) and see further ANC (1994:61).

²¹ Wong (2003:314) defines empowerment as ‘removing the barriers – political, legal, and social – that work against particular groups and builds the assets of poor people to enable them to engage effectively in markets’ and Banik (2009:127) indicates that some scholars define the concept of empowerment ‘as the restoration of a sense of one’s value and ability to tackle one’s own value and ability to tackle various problems and others define it as ‘expansion in people’s ability to make strategic life choices in context where this ability was previously denied’.

- contained in the South African Bill of Rights and whether national resources can ‘be directed to the full development’ of refugees and improvement of their situations.
- d) **To look at state obligation towards the realisation of education.** This will help us to understand the importance of education in a person and a nation’s life and national and international obligations conferred upon a state to make education available and accessible to all.
 - e) **To determine who should protect and financially assist refugees between GoSA and UNHCR.** This will help us to provide answers to key questions related to the protection of refugees and who should ensure their wellbeing and alleviation of their misery and sufferings.
 - f) **To offer recommendations regarding to the process of admission, remission of fees and awarding scholarships.** This will generally provide a detailed account of recommendations on how to deal with recognised refugees and asylum-seekers during admission process and who should provide and how financial assistance should be made available.

1.3. Methodological and Theoretical Lens

I approached this research from the standpoint of examining the distinction between a recognised refugee or an asylum-seeker and an international student. The distinction is based on their legal definitions, and the rights and entitlements that are accorded to them. They are all rights bearer but their rights differ to a great extent if one considers their rights and entitlements in terms of the domestic, regional and international legal framework. From this perspective, my analysis employs the ‘right-based approach’ which brings together human rights, socio-economic progress and development.²² A rights-based approach encompasses three distinct aspects, namely, (i) international human rights instruments; (ii) socioeconomic and political struggle of poor and vulnerable people; and (iii) the evolution of our understanding of citizenship.²³ Though the thesis focuses primarily on the distinction between an international student and a recognised-refugee or an asylum-seeker student, it pays attention to the distinction between a refugee student and South African student as regard to the national distribution of advantages.

22 Von Broembsen (2012:2). See further Chapman, Miller, Soares & Samuel (2005:16): Right-Based Approach is defined as ‘seeking solutions to poverty through establishment and enforcement of rights that entitle the poor and marginalised people to a fair share of society’s resources.’

23 Von Broembsen (2012:3) and see further Institute for Development Studies (2003:1).

A critical approach is employed throughout the writing up of this thesis. The critique is made on the basis that the universal recognition of the concept of ‘human rights applies to all people in all places at all times’²⁴ and the Constitutional Court (hereinafter ‘Concourt’) reasoning that the deprivation of socio-economic rights is a denial of human dignity to the poor and vulnerable people.²⁵ The purpose of utilising critical analysis is in order to point out the assumptions and prejudices²⁶ upon which the violation of socioeconomic rights, most precisely the effective denial of access to tertiary education, rests. The thesis seeks to illustrate how the violation should be addressed for the doors of tertiary learning to be open to all refugees who seek to undertake, continue or resume tertiary studies. The critical analysis would thus be employed in the context of the author’s reflection of his holistic experience of prejudices, xenophobic attitudes and stereotypes that are additional barriers to access to tertiary education.

24 Chapman et al (2005:4).

25 *Soobramoney v Minister of Health: KwaZulu Natal* 1997 (12) BCLR 1696 (CC), hereinafter ‘Soobramoney’ at para 8 per Chaskalson J: ‘We live in a society in which there are great disparities in wealth. Millions of people living in deplorable conditions and in great poverty... These conditions already existed when Constitution was adopted and a commitment to address them, and to transform our society into which dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hallow ring’; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), hereinafter ‘Grootboom’ at para 2,23, 44 & 83: Yacoob J held that ‘[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2’ and see also *Port Elizabeth Municipality v Various occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC), hereinafter ‘Port Elizabeth Municipality’, at para 18 per Sachs J: ‘It is not the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates marginalisation.’

26 Cryer, Hervey & Sokhi-Bulley (2011:72).

CHAPTER 2

THE CONCEPT OF A RECOGNISED REFUGEE OR AN ASYLUM-SEEKER AND AN INTERNATIONAL STUDENT

2.1. An introduction

This section sets out the fundamental distinctions between ‘a recognised refugee’ who is in South Africa or ‘an asylum-seeker’ who entered into South Africa for the purpose of seeking asylum and ‘an international student’, a foreigner who entered and resides in South Africa for the purpose of furthering their education. Refugees did not come in South Africa with aim of studying, but to seek asylum protection. However, many refugees, at a later stage, seek to resume studies that were interrupted due to the civil war or political instability that forced them to flee. Some have taken up their secondary school studies and matriculated in South Africa and now seek to further their studies. Refugees’ stay within South Africa is regulated by the Refugees Act of 1998, which gives effect to the 1951 UN Refugee Convention and African Refugee Convention,²⁷ while an international student’s stay is regulated by the Immigration Act.²⁸ This chapter lays out the distinction between these three groups.

2.2. A Recognised Refugee

People take flight in quest of asylum, safety and freedom in another country due to events out of their control occurring in their home country, including civil war, conflict, political instability, external aggression or occupation. Since the ancient era, people could seek refuge in another country, but the granting of safe haven was based on hospitality, humanity and compassion rather than human rights grounds. War crimes, crimes against humanity, and foreign aggression were reasons of seeking refuge.²⁹ Well before World War II, certain

27 African Refugee Convention (n15).

28 Act 13 of 2002 as amended by Immigration Amendment Act 19 of 2004 and Immigration Amendment Act 13 of 2011, hereinafter ‘Immigration Act’.

29 See, for example, the Inter-Governmental Arrangements of July 5th, 1922. Also Jaeger (2001:729) points out that ‘the refugee international agreement’ entered into before World War I in order to protect and to assist refugees are the ‘Treaty of Constantinople of 1913; the Turco-Bulgarian Treaty of 1913, and the Greek-Turkish Agreement of 1914. They were concluded to protect people who were affected by ‘tragic events in the Ottoman Empire’ and the victims of Greeks’ massacre and the Balkan and Greco-Turkish wars.

countries concluded agreements to protect and assist refugees coming from a particular country.³⁰ After World War I, these agreements could be concluded under the auspices of the League of Nations.³¹ After World War II, the family of nations recognised that a person can ‘seek and enjoy asylum from “persecution” in another country’.³² “International protection” was introduced by the International Committee of the Red Cross set up by the League of Nations³³ and the right to seek asylum was first introduced by the Universal Declaration of Human Rights (UDHR) in 1948 as a human right.³⁴ Dignity and worth of the human persons and equal rights of all are among the reasons of such introduction.³⁵

This right to asylum was universally given effect by the 1951 UN Refugee Convention.³⁶ In Africa, it was further given effect by the African Refugee Convention³⁷ and the African Charter of 1981.³⁸ The 1951 UN Refugee Convention specifies conditions that qualify the ‘fear of being persecuted.’³⁹ These conditions were extended by the African Refugee Convention to include ‘*events seriously disturbing public order*’.⁴⁰ They were also expanded to encompass ‘*massive violation of human rights*’ by the Cartagena Declaration, adopted by Latin American countries in 1984.⁴¹

30 See, for example, Convention concerning the Status of refugees coming from German of February 10th, 1938.

31 See the Inter-Governmental Arrangements of July 5th, 1922, May 31st, 1924 and June 30th, 1928. See further Convention of 28 October, 1933 relating to the International Status of Refugees, Inter-Governmental Arrangement of July 4th, 1936, and Convention concerning the Status of refugees coming from German of February 10th, 1938.

32 UDHR (n16), article 14.

33 Jaeger (2001:727).

34 UDHR (n16), article 14.

35 UDHR (n16), preamble

36 The 1951 UN Refugee Convention (n4).

37 African Refugee Convention (n15).

38 African Charter (n16), article 12 states that:

‘Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.’

39 The 1951 UN Refugee Convention (n4), article I(A)(2).

40 The 1951 UN Refugee Convention (n4), article 1(2).

41 Cartagena Declaration on Refugees of 1984 stipulates that:

‘... because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbing public order’.

Refugee conventions as well as human rights agreements became domesticated in South Africa when they were enacted into law by the Refugee Act of 1998.⁴² In order to ensure that human rights are safeguarded, the Act affords refugees basic rights contained in the Bill of Rights.⁴³ The definition of the term ‘refugee’ contained in the Refugee Act is drawn from the 1951 UN Refugee and African Refugee Conventions, and expanded to comply with the progressive South African Constitution. Therefore, a refugee status is conferred upon a person who is seeking an asylum in terms of the Refugee Act provided that he/she is qualified for refugee status if that person:

- a) *“owing to well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it, or*
- b) *owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin of nationality.”*⁴⁴

This suggests that fear of persecution of a person seeking asylum must be subjectively⁴⁵ and objectively assessed.⁴⁶ If a person has a legitimate fear he or she will be ‘*recognised as a refugee*’ and if they have no reasonable basis, their application would be rejected. Any asylum-seeker whose application is rejected has a right to appeal.⁴⁷ A person whose case is still being determined to see whether he or she is qualified to be a refugee is referred to as an ‘asylum-seeker’. This includes those whose cases are on appeal. The definition of the term refugee implies a lack of protection by the person’s state and that the person is in need of alternative ‘international protection’, the granting of which is ‘a prerogative’ of the state.⁴⁸

42 The Refugee Act 130 of 1998.

43 The Constitution of the Republic of South Africa, 1996, Chapter 2.

44 Section 3 of Refugee Act 130 of 1988. Further see section 1(vx) of the Act which defines a refugee as ‘any person who has been granted asylum in terms of the Act’.

45 The Office of the United Nations High Commissioner for Refugees, Geneva: Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, available at

<http://www.unhcr.org/refworld/pdfid/3ae6b3338.pdf> [Assessed December 2012], at para 14: A person has a subjective fear if he/she ‘believes or anticipates that he/she will be subject to that persecution’.

46 Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1, January 1992 at para 42: An asylum-seeker’s fear should, in general ‘be considered a well-founded fear if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definitions, or would for the same reasons be intolerable if he returned there.’

47 Section 24B of the Refugee Act 130 of 1998.

48 See Kourula (1997:203).

An asylum-seeker who, on balance of probabilities, proves that he or she has a ‘well-founded fear of being persecuted’, attains a ‘recognised refugee status;’ and is entitled to full protection, which includes the rights set out in the South African Bill of Rights, except those rights ascribed to citizens.⁴⁹ ‘Full protection’ is not defined in the Refugee Act but it can be interpreted to constitutionally include socioeconomic rights. In this interpretation context, socioeconomic assistance would include ‘aid provided to address the physical and material needs of their concern.’⁵⁰ The notion of full protection has not yet been interpreted by a South African court to determine its nature, scope and meaning. However, the preamble to the Refugee Act commits the South African state to treat refugees and asylum-seekers in accordance with the ‘standards and principles established in international human rights instruments.’⁵¹ In other words, the grant of refugee protection on South African territory to persons from other countries that are fleeing persecution should be read to encompass a variety of protection elements. These elements of effective protection are well described by Loren Landau as including:

*‘physical security; avoidance of torture or refoulement; and adequate and dignified means of subsistence. In the highly dynamic cities of the south, this not only means meeting basic needs, but flexibility to move, change employment, and invest in ways that can lead to a dignified life; or, at least, a life of comparable dignity to those around you.’*⁵²

The African Refugee Convention reiterates that refugees are ‘human beings’ and notes the desire to find ‘means to alleviate their misery and suffering.’⁵³ Such desire and commitment ought to be discharged through a humanitarian approach⁵⁴ and in ‘the spirit of African solidarity and international cooperation.’⁵⁵ African solidarity in the South African context can be understood in the sense of the philosophical concept of ‘*ubuntu*’, which, according to Madala J, generally permeates the South African Constitution.⁵⁶ This philosophical concept

49 Section 27(b) of the Refugees Act 130 of 1998.

50 Jastram & Achiron (2001:125): ‘Assistance may include food items, medical supplies, clothing, shelter, seeds, and tools, as well as the provision of infrastructure, such as schools and roads’. Infrastructures are usually provided to refugees who live in a refugee camps.

51 See preamble of Refugee Act 130 of 1998.

52 Landau (2006a:309) and Jastram & Achiron (2001:125).

53 African Refugee Convention (n15), preamble, at para 1.

54 African Refugee Convention (n15), preamble, at para 2 & article 2.

55 African Refugee Convention (n15), article 4.

‘carries in it the idea of social justice and fairness’.⁵⁷ As it will be demonstrated, social justice is mostly concerned with distribution of advantage, opportunities, and burdens. In this context, Sachs J, in separate concurring judgment in the case of *The Union of Refugee Women and Others v The Director: The Private Security Industry Regulatory Authority and Others*,⁵⁸ observed that refugees must ‘receive legal protection and the opportunity to realise the most fulsome life possible’ in South Africa⁵⁹ and that:

*In recreating as closely as possible the national protection lost or not claimable by a refugee, the refugee regime seeks to put refugee in a situation as close as possible to that of the national of a country of asylum’.*⁶⁰

Being recognised as a refugee recreates ‘national protection’ they have lost and their predicament calls for the enjoyment of basic human rights, which they could not enjoy in their home countries. The legal protection refugees receive is usually termed ‘international protection’ because refugee situation is a burden – responsibility – that must be shared by the family of nations in the context of ‘humanitarian action’.⁶¹ The treatment of refugees will be further articulated throughout this thesis.

2.3. An Asylum-Seeker

An asylum-seeker is a person who entered South Africa for the purpose of seeking ‘international protection’ but whose case is still being assessed and evaluated so as to determine whether he or she is qualified as a refugee or not. Whilst ‘A Handbook on Refugee Protection: A Guide to International Refugee Law’ defines an asylum-seekers as ‘a person whose request or application for asylum has not been finally decided on by a prospective country of a refuge,’⁶² the Refugee Act defines the term as ‘a person who is seeking

56 Makwanyane supra (n10) para 237, 308, Devenish (2005:32); Mokgoro (1998:4) describes this philosophical concept of ubuntu as ‘a philosophy of life, which in the most fundamental sense represents personhood, humanity, humaneness and morality.’

57 Makwanyane supra (n10) para 237.

58 CCT39/06[2006]ZACC23. Hereinafter referred to as ‘The Union of Refugee Women.’

59 The Union of Refugee Women supra (n58) para 136.

60 The Union of Refugee Women supra (n58) para 136.

61 Para 2 of Preamble read in tandem with article 2(2) of the African Refugee Convention (n15) states that member states parties ‘recognis[e] that the need for and essentially humanitarian approach in solving the problem of refugees’ and that ‘the granting of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as unfriendly act by any Member State.’ See further the Preamble of 1951 UN Refugee Convention (n4) which states that the contracting parties ‘consider the grant of asylum may place unduly heavy burdens on the state on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without an international cooperation’.

62 Jastram & Achiron (2001:125).

recognition as a refugee [in South Africa]'.⁶³ Asylum should, for the purpose of this thesis, be understood as an 'international protection', which is described as:

*'interventions by states or UNHCR on behalf of asylum-seekers and refugees to ensure that their rights, security and welfare are recognised and safeguarded in accordance with international standards. Such interventions include: ensuring respect for the principle of non-refoulement; admission to safety; access to fair procedures for the determination of refugee status; human standard of treatment; and the implementation of durable solutions.'*⁶⁴

These elements of safety, social security and welfare are further accorded to an asylum-seeker under the Refugee Amendment Act.⁶⁵ The Act states that an asylum-seeker is entitled to 'the rights contained in the South African Constitution, in so far as those rights apply to an asylum-seeker.'⁶⁶ These are basic human rights contained in the Bill of Rights, which apply to everyone. Statutorily, a recognised refugee is afforded full protection while an asylum-seeker is afforded partial protection. The UNHCR Reception of Refugee Standard of 2000 provides that partial protection must be interpreted as meaning 'assistance under the minimum threshold of an adequate standard of living.'⁶⁷ General Comment 4 of 1991 states that the right to an adequate standard of living is of central importance for the enjoyment of all socioeconomic and cultural rights.⁶⁸ These constitutional rights and entitlements are 'basic assistance and other benefits' which are described as follows:

*'Needy asylum-seekers should be given all necessary support covering the basic necessities of life, including food, clothing and basic accommodation, throughout the asylum procedure until a final decision is taken on their application. If necessary, this should also apply to asylum-seekers who are permitted to work but are unable to find adequate employment'*⁶⁹

Necessary support obviously includes the right to access education.⁷⁰ The Supreme Court of Appeal (SCA), in *Minister of Home Affairs and Others v Watchenuka and Another*,⁷¹ noted that an asylum-seeker must also enjoy the right to study, stating that '[t]he freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfilment.'⁷² In this case, the SCA held that an asylum-seeker cannot be denied the right to

63 S1(v) of the Refugee Act 130 of 1998.

64 Jastram & Achiron (2001:129).

65 Act 33 of 2008.

66 S27A(d) of the Refugee Act 130 of 1998.

67 Reception Standards for Asylum-Seekers (n6) at 13. See further the 1951 UN Refugee Convention (n4), article 31.

68 See also ICESCR General Comment No 4, contained in document dated 12/13/1991, at para 1.

69 Reception Standards for Asylum-Seekers (n6) at 12.

70 Reception Standards for Asylum-Seekers (n 6) at 13.

71 2004 (4) SA 326 (SCA); 2004 (2) BCLR 120 hereafter referred to as 'Watchenuka'.

72 Watchenuka sputa (n71) para 36.

access education. Accordingly, GoSA must protect asylum-seekers' rights and the UNHCR is required by its statute to assist in protecting them.⁷³ Like recognised refugees, an asylum-seeker must enjoy the right to education and related advantages that make it more accessible. According to UNHCR Reception of Refugee Standard of 2000, the aforementioned 'assistance must include, at minimum, what is necessary not only for survival but also for a life of dignity.'⁷⁴ As a human being, an asylum-seeker also benefits from other international and regional human rights instruments and enjoys rights accorded to everyone, in particular, rights that flow from the International Covenant on Economic, Social, and Cultural Rights (ICESCR),⁷⁵ International Covenant on Civil and Political Rights (ICCPR),⁷⁶ and African Charter on Human and Peoples Rights.⁷⁷ In the light of above, it is established that an asylum-seeker is also entitled to enjoy the right to education and international protection.

The section that follows seeks to set out who is an international student, so as to shed light on the core discussion of this project and to illustrate that international students are not entitled to the same international protection accorded to recognised refugees and asylum-seekers. It argues that international students enjoy international protection known as 'diplomatic protection'⁷⁸ which is observed and enforced in terms of international agreement between GoSA and an international student's government and that refugees protection is safeguarded by GoSA in a true spirit of cooperation with the UNHCR.

2.4. An International Student

An international student is a person who came to South Africa with the purpose of furthering their education. According to university guidelines and policies, the concept of international student is so broad as to encompass recognised refugees and asylum-seekers, SADC students,

73 Article 6(B) of the Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, hereinafter 'Statute of the Office of the UNHCR'.

74 Reception Standards for Asylum- Seekers (6) at 12.

75 ICESCR (n16).

76 ICCPR (n16).

77 African Charter (n15).

78 Dugard (2005:281-287): Diplomatic protection is defined as 'indirect state responsibility which occurs when a defendant state (eg South Africa) injures the person or property of a foreign national within its territory'.

non-SADC students or African students and non-African students.⁷⁹ Mostly, distinction is made between international students who are SADC citizens and non-SADC citizens.⁸⁰

Unlike refugees, international students are not in South Africa because they have left the country for fear of being persecuted. They do not sit for an interview to assess their fear to return. They can go back to their countries as they like and are, according to the law, expected to return upon the completion of their studies,⁸¹ while refugees are subject to voluntary repatriation ‘when there is a fundamental change’ in the conditions that caused them to flee.⁸² A foreigner, who wants to come to South Africa to study, applies for a visa to stay and study in South Africa.⁸³ The visa is applied for and granted under the Immigration Act. Once a foreigner is granted a visa to study and is within South Africa for that purpose he or she is referred to as ‘an international student’.

An international student is expected to be self-reliant. A study visa is issued provided that a person who is requesting to undertake studies in South Africa has sufficient means to support themselves during their stay⁸⁴ and are capable of paying their school fees.⁸⁵ An international student who becomes destitute while undertaking their studies will be declared ‘undesirable’ because they may become a ‘public charge’.⁸⁶ This means that an international student is not entitled to socioeconomic rights. Once they are declared ‘undesirable’, their study visa is revoked and they become an ‘illegal foreigner’ who must be deported in terms of section 32(2) of the Immigration Act.

79 At the University of the Western Cape: While Student Fees 2012 classifies international students into two groups, namely, international students with African citizenship and international students without African citizenship, the Student Fees 2013 classifies international students into two groups by differentiating between non-SADC and SADC students (see Tuition Fees – International Students); the Cape Peninsula University of Technology – Guide for International Students (2010:7) classifies international students into three groups: Refugees, international students with African citizenship and non-African international students; at the University of Cape Town, while both Undergraduate and Postgraduate Prospectus classify international students as SADC citizens/permanent residents and non-SADC citizens, the UCT website makes reference to refugees and asylum-seekers. At Stellenbosch University, there are also distinctions between SADC citizens and non-SADC citizens (see Provisional Fees Statements).

80 Ibid.

81 Section 13(1)(vi) of the Immigration Act 13 of 2002:

82 Section 5 of the Refugee Act 130 of 1998; African Refugee Convention (n34), article 5; and the 1951 UN Refugee Convention (n4), article 1C.

83 Section 13(1) of the Immigration Act 13 of 2002.

84 Ibid, section 13(1)(b)(iii).

85 Ibid, section 13(1)(b)(ii).

86 Ibid, section 30(1)(a).

Like any other person who sojourns in South Africa, an international student is protected by the GoSA in terms of personal rights and fundamental liberties⁸⁷. If these fundamental rights are infringed, they can, as any citizen, approach a court for relief.⁸⁸ However, their rights under the Bill of Rights do not include political rights. They partially enjoy socioeconomic rights, that is, the enjoyment of these rights is subject to their own expenses. If they have no financial capacity to do so, the state is not obliged to allocate national resources for the purpose of socioeconomic intervention. The Immigration Act unequivocally excludes them from enjoying socioeconomic benefits and privileges. Accordingly, the Concourt, in *Khoza v Minister of Social Development*,⁸⁹ reasoned that if non-nationals are allowed to have access to benefits and advantages, ‘this would impose an impermissibly high financial burden on the state’.⁹⁰ However, GoSA is called upon by the United Nations (UN) to admit even destitute asylum-seekers to its territory and to protect them.⁹¹ South Africa nevertheless has discretion whether to admit asylum-seekers on its territory, hence it cannot be compelled by UN to admit them.⁹²

If South Africa extends its hospitality to asylum-seekers, it consents to providing full and effective protection irrespective of their socioeconomic status.⁹³ In principle, refugees are, in terms of the Refugee Act, entitled to social and economic assistance which is aimed at alleviating the conditions of those who are destitute or financially disadvantaged.⁹⁴ In practice, the Refugee Act is neither interpreted nor implemented to include such assistance.⁹⁵ Consequently, they are effectively excluded from benefiting from the allocated national resources granted to eligible students for the purpose of ‘ensuring representivity and equal access’ to tertiary education⁹⁶ and which is administered by universities⁹⁷ or by NSAFS.⁹⁸

87 Personal rights include but are not limited to the right to equality, dignity, life, freedom and security of the person, privacy, property, freedom of religion, freedom of expression, and freedom of association.

88 Sections 34 and 38 of the Constitution of the Republic of South Africa, 1996.

89 [2004] 6 SA 505 (CC), hereinafter ‘*Khoza*’.

90 *Khoza* supra (n 89) para 60.

91 Statute of the Office of the UNHCR (n73), article 2(c).

92 Kofman (1993:403).

93 Landau (2006a:315) argues that South Africa, in that respect, assumes ‘full responsibility for protection.’

94 *Ibid*, sections 27(b), 27A(d).

95 Khan (2007:4-5).

96 Preamble & section 4(a) of the National Students Financial Aid Scheme Act 56 of 1999.

97 *Ibid*, section 20(1).

98 *Ibid*, section 3(1)-(2).

There is a perception among refugees that they are excluded from financial assistance schemes merely because they are regarded as ‘international students’ and ultimately they are presumed to be economically independent.

In reality, most of refugees are economically disadvantaged because they have lost all their belongings and there is no legal connection between them and their states.⁹⁹ Moreover, they, very often, suffer from trauma associated with forced displacement.¹⁰⁰ The fact that they sought protection of South Africa has significantly weakened the bond of nationality between them and their states which could have conferred upon them the right to be protected by their governments as international students are. According to Kondile J, the refugees’ plight calls for compassion and their condition implies ‘a special vulnerability’ in a South African society.¹⁰¹

While refugees neither enjoy the rights, entitlements, privileges and benefits of South African citizenship nor their home countries’ citizenship, international students retain their political rights; including the right to vote and choose freely their representatives in their home countries.¹⁰² They have the right to participate in the national affairs of their countries and to freely contribute to their countries’ social, cultural, and economic development.¹⁰³ They still have access to their countries public funds or services.¹⁰⁴ As regards political rights, section 33 of the South African Electoral Act,¹⁰⁵ for example, confers ‘a special vote’ to South African citizens undertaking tertiary studies in foreign countries to exercise their right to vote.¹⁰⁶

The fact that refugees have fled their countries implies that they cannot participate in their nations’ affairs because seeking asylum has the impact of cutting the tie of asylum-

99 Dugard (2005:279) posits that ‘nationality concept denotes that there is a legal connection between the individuals and the state for external purpose’ of enjoying diplomatic protection.

100 *The Union Refugee Women* supra (n58) para 28-31.

101 *The Union Refugee Women* supra (n58) para 28-31.

102 UDHR (n16), articles 21(1) and (3).

103 UDHR (n16), article 21(1).

104 UDHR (n16), article 21(2).

105 Act 73 of 1998.

106 Section 33(e) of the Electoral Act 73 of 1998.

seekers' country protection. If an asylum-seeker is recognised as a refugee he or she cannot 'avail themselves of the protection of their country of origin'. They cannot visit their relatives back home. If a refugee does go home, they lose their refugee status as it is deemed that they no longer harbour a fear not to go back home.¹⁰⁷ On the other hand, international students maintain a tie with their home countries. They can go back home as they please and can, while in South Africa, report back to their embassies or consulates on any difficulties they may be encountering during their stay. The embassies and consulates are there to serve their nationals and to protect them if injured through the 'diplomatic protection' mechanism.¹⁰⁸

In contrast, if the country of asylum violates refugees' rights, they can lodge complaints with the UNHCR office or seek legal assistance from local civil society organisations. In practice, these organisations lobby and advocate and may seek legal redress on their behalf¹⁰⁹ because they lack financial means to do so for themselves and 'have little political muscle'.¹¹⁰

In sum, international students situation differ from that of refugees and asylum-seekers because of the following reasons:

- (a) Their livelihoods and education dream is stable as it has not been interrupted by events out of their control such as political, religious, and ethnic/tribal conflict or civil war. Their well-being has not been shaken by forced displacement and human rights abuses;
- (b) Immigration policy requires them to be financially stable so as to satisfy their basic necessities of life, including accommodation, food, healthcare, education during their stay;
- (c) International students who come from humble families leaves their home countries when they have been awarded bursaries, scholarships, or student financial loans by their governments and they are allowed to study in South Africa if a university has

107 Section 5(1)(a)-(d) of the Refugee Act 130 Of 1998 provides that:

'A person ceases to qualify for refugee status for the purpose of this Act if:

- (a) He or she voluntarily reavails himself or herself of the protection of the country of his or her nationality; or
- (b) Having lost his or her nationality, he or she by some voluntary and formal act reacquires it; or
- (c) He or she becomes a citizens of the Republic or acquires the nationality of some other country and enjoy the protection of the country of his or her new nationality; or
- (d) He or she voluntarily reestablishes himself or herself in the country which he or she left.'

108 Dugard (2005:281-287).

109 The Union Refugee Women supra (n58) para 28, 31.

110 Khosa supra (89) para 71.

- received a guarantee that the school fees will be paid and he or she has sufficient means to support himself or herself;¹¹¹
- (d) Some international students are sent by their own states to undertake studies in disciplines that may not be available in their home countries' universities;¹¹² and
 - (e) Some are studying in South African universities on the basis of bilateral or multilateral agreements between South Africa and other states.¹¹³

Taking the above into account, I argue that recognised refugees and asylum-seekers should not be treated as international students because they are not required to be financially stable to stay in South Africa. Rather, their plight requires social, economic, emotional, and psychological support to be provided by the GoSA and UNHCR, as will be elaborated in chapter four.

The next chapter looks at the right to education and its importance in human, social, and economic development. It focuses primarily on universality of education in the purview of South African social justice. It explores the concept of social justice and further sets out the importance of education in a refugee's livelihood and wellbeing. The right to education is analysed through the lens of intensification of international cooperation and solidarity in the context of solving international refugee problems pertaining to social, economic, cultural and humanitarian concerns.

111 Section 13(1)(b)(ii)-(iii) of the Immigration Act 13 of 2002.

112 Green Paper for Post-School Education and Training, opened to public comment from January to the end of April 2012, hereinafter 'Education Green Paper' at p 52 provides that South Africa has a number of higher education programmes assisting African countries beyond SADC.

113 Education Green Paper (n112) at 52 provides that South Africa has, for instance, an agreement with Rwanda to allow Rwandan students to study in South African universities on the basis as SADC students, and has also provided study opportunities for students from other countries such as Democratic Republic of Congo and South Sudan. With regard to SADC Students, see SADC Protocol (n18).

CHAPTER 3

SOCIAL JUSTICE AND EDUCATION

3.1. Introduction to the Concept of Social Justice

Refugees are entitled to the right to education on the basis of ‘favourable treatment’ which will enable them to access education. Given that refugees are a vulnerable group, favourable treatment connotes favourable access to national resources. These resources would enable refugees to undertake or further tertiary studies. When we talk about accessibility of resources, we talk about distribution of resources and distribution is the concern of distributive justice, or more precisely social justice. Social justice is an elusive idea which is descriptively and conceptually complex. It envisages a socially and morally just society that dismisses inequality and injustice in distribution of national resources or allocation of public funds.¹¹⁴ David Miller argues that social justice is a natural result of “the wave of enlightenment” which required people to subject socioeconomic conditions to the same tests of reasonableness and justice as those by which they questioned in the past the rightfulness of political institutions’.¹¹⁵ John 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.’¹¹⁶

This definition is redefined by the University of California (Berkeley) - Social Justice Symposium as:

‘a process, not an outcome, which (1) seeks fair (re)distribution of resources, opportunities, and responsibilities; (2) challenges the roots of oppression and injustice; (3) empowers all people to exercise self-determination and realize their full potential; (4) and builds social solidarity and community capacity for collaborative action.’¹¹⁷

Viewed historically and in the context of Rawls’ definition, the basic structure of South African society under apartheid was characterised by segregation which resulted in extreme socioeconomic disparities.¹¹⁸ Rights and duties were distributed on the basis of

114 Kavuro (2012:104); Rawls (1971:1) and see further Flew (1993:3).

115 Miller (1978:4).

116 Rawls (1971:7) and Flew (1993:2).

117 Social Justice Symposium, UCB-School of Social Welfare: Our (working) Definition of Social Justice, available at <http://socialwelfare.berkeley.edu/sjs/> accessed December 2012.

118 Peberdy (2010:18). See also ANC (1994:14).

discrimination, injustice and oppression.¹¹⁹ This has had a severe impact on the majority of South African who are still challenged by poverty.¹²⁰ When in 1994, South Africans recognised the injustices of the past and, thus united in their diversity, to heal the socio-economic division, they included social justice in the new constitutional order.¹²¹ Section 2 of the Constitution was meticulously drafted to entitle all citizens to the rights, duties, privileges, benefits and responsibilities of citizenship without discrimination.¹²² Subjecting inherited disparities to the test of social justice, the substantive equality clause was drafted with aim and purpose to advance those who were historically disadvantaged so as to build and consolidate social cohesion and solidarity.¹²³

Education was also regarded as key to empowering communities towards collaborative action in responding to human resources, national development and economic growth.¹²⁴ This is well captured and reflected in the preamble of the Higher Education Act of 1997¹²⁵ which provides that South Africa seeks out:

*'...[to] redress past discrimination and ensure representivity and equal access; [to] provide optimal opportunities for learning and creation of knowledge; [to] promote the values which underlie an open and democratic society based on human dignity, equality and freedom;...[to] respect and encourage..., creativity, scholarship and research; [to] ...promote the full realisation of the potential of every student...'*¹²⁶

With aim of achieving these goals, the preamble of the Higher Education Act recognises that the awarding of scholarship is necessary to enable South African disadvantages' equal access to tertiary education.¹²⁷ The Act further requires the Minister of Higher Education to 'determine the policy on funding of tertiary education, which must include appropriate measures for' ensuring equal accessibility.¹²⁸

The legal issue that this chapter seeks to explore is whether recognised refugees or asylum-seekers can benefit from educational public funds allocated to ensure equal access to higher education and to challenge past inequities. The Social Justice Symposium definition of

119 ANC (1994:12).

120 Peberdy (2010:20).

121 Preamble of the Constitution of the Republic of South Africa, 1996.

122 The Constitution of the Republic of South Africa, 1996.

123 Section 9(2) of the Constitution of the Republic of South Africa, 1996.

124 Education White Paper 3, A Programme for Transformation of Higher Education, Notice 1196 of 1997, 24 July 1997, hereinafter 'Education White Paper 3', Foreword and see also ANC (1994:60).

125 Act 101 of 1997, hereinafter 'Higher Education Act'.

126 Preamble of the Higher Education Act 101 of 1997.

127 Ibid.

128 Ibid, section 39.

social justice can assist us to find the answer to this question. It states that social justice is ‘a process to empower all people and to realise their full potential’. The full realisation of their potentiality is a desirable goal to be achieved through education in terms of the Higher Education Act. But NSFAS and NRF exclude refugees from financial schemes and particularly universities bar financially disadvantaged students from realising their potential by charging steep fees.¹²⁹ As a result, refugees are experiencing structural injustices in the process of empowering historically disadvantaged and in the pursuit of equal representivity.

Moeketsi Letseka and Simeon Maile argue that exorbitant tertiary education fees significantly restrict disadvantaged students from equally accessing tertiary education.¹³⁰ Specifically, Lanzi Mazzocchini maintains that 98% of refugees students surveyed indicated that both recognised refugees and asylum-seekers are frequently unable to further, resume, or have had to abandon their higher studies because of financial constraints and lack of financial assistances to cover fees, charges, educational materials, and subsistence.¹³¹ Financial constraints challenge both needy South African students and refugee students. While South African students have access to available national resources through the NSFAS and the NRF, both recognised refugees and asylum-seekers are excluded from accessing it on the basis of ‘citizenship’¹³² and the GoSA has not yet allocated any funding to promote favourable access to higher education for refugees. The National Student Financial Aid Scheme Act¹³³ establishes the NSFAS Board and vests upon it the power to determine the division of national resources and advantages. In so doing, the NSFAS Board has restricted eligibility to South African students¹³⁴ and has delegated its power to universities to distribute advantages to them.¹³⁵ I therefore argue that one cannot challenge ‘the root of oppression’ by oppressing others or by depriving others their legitimate opportunities.

These ‘patterns of discrimination’ or exclusion which are obvious in the tertiary education accessibility can be removed if needy refugees are not restricted from access funding on the basis of citizenship.¹³⁶ I argue that the GoSA should discharge its international

129 Letseka & Maile (2008:3).

130 Ibid at 3,6. They argue that 70% of the families of the higher education drop out they surveyed were in the category of low socioeconomic status.

131 Lanzi Mazzocchini (2007/8:197).

132 Lanzi Mazzocchini (2007/8:197) indicates that national public funds allocated to ensure equal access to tertiary studies are open only to South Africans at the exclusion of all others.

133 Act 56 of 1999.

134 Lanzi Mazzocchini (2007/8:197).

135 Section 20(1) of the National Student Financial Aid Scheme Act 56 of 1999.

136 Lanzi Mazzocchini (2007/8: 197).

responsibilities to protect recognised refugees as well as asylum-seekers by including them into NSFAS. It is evident that social justice will not ensue if the major social institutions such as NSFAS, NRF and universities do not fairly and justly distribute resources.

The question of whether past injustices will be effectively redressed if national resources are only accessed by citizens can be understood if the concept of citizenship is examined. The next section illuminates both scholars' contentions and jurisprudential views on the concept of citizenship in context of a human rights paradigm and concludes that citizenship should not be a determinant factor of distributing resources. Adherence to human rights standards has resulted in a 'reconfiguration' of the state's relationship with both settled/permanent migrants and refugees. This has the implication of extending socioeconomic rights to refugees, who should have access to national resources.

3.2. South African Social Justice and Citizenship Discourse

The preamble of the South African Constitution provides that the people of South Africa have committed their government to challenging the social and economic disparities and injustices of their past, thereby creating 'an egalitarian society based on democratic values, social justice and fundamental human rights'.¹³⁷ They further entrusted their government with a task to 'improve the quality of life of all citizens' and to 'free the potential of each person.'¹³⁸ As social justice largely deals with the distribution of advantages, it is reflected in socioeconomic rights, namely, land,¹³⁹ housing,¹⁴⁰ healthcare,¹⁴¹ food and water,¹⁴² social welfare and security¹⁴³ and education.¹⁴⁴ Except the right to land, other rights are accorded to everyone.¹⁴⁵ In particular, the Refugee Act accords to refugee and asylum-seeker socioeconomic rights except 'the right to land' that only applies to citizens'.¹⁴⁶

137 Preamble of the Constitution of the Republic of the South Africa, 1996.

138 Ibid.

139 Ibid, section 25(5).

140 Ibid, section 26.

141 Ibid, section 27(1)(a).

142 Ibid, section 27(1)(b).

143 Ibid, section 27(1)(b).

144 Ibid, section 29.

145 Section 25(5) of the Constitution of the Republic of South Africa, 1996 provides that:

'The state must take reasonable legislative and other measures, within its available resources to foster conditions which enable citizens to gain access to land on equitable basis.'

146 Sections 27(b) and 27A(d) of the Refugee Act 130 of 1998.

Education is a social good and the South African Constitution imposes an obligation on the GoSA to employ its resources to ensure equal access to all who live in South Africa.¹⁴⁷ This obligation is not restricted to citizenship status.¹⁴⁸

‘Everyone has the right –

(a)

(b) *to further education, which the state, through reasonable measures, must make progressively available and accessible.*¹⁴⁹

The entitlement of socioeconomic rights to everyone and the desire to free the potential of each individual denotes that South Africa is a ‘welfare state’. Michael Fix and Lauren Laglagaron argue that liberal democratic and welfare states ‘have steadily moved from citizenship to personhood.’¹⁵⁰ Eleonore Kofman posits that this is a consequential outcome of the ‘liberal model derived from political philosophers such as Thomas Hobbes and John Locke’,¹⁵¹ whose political theories focus ‘on rights accorded to individuals’ and the ‘duties and obligations they owe to society and state’.¹⁵² Human rights instruments and global processes have severely impacted on the ‘role of the state in relation to citizenship claims and guarantees.’¹⁵³ The move from citizen to human being implies that entitlements and privileges, notably social rights have been extended beyond citizens to ‘settled residents’ and to what Kofman calls ‘denizens’.¹⁵⁴ This group of persons – denizens – are labelled by Fix and Laglagaron as ‘presumptively permanent non-citizens’.¹⁵⁵ In liberal and welfare states, they are only excluded from exercising political rights.¹⁵⁶ Denizens are described as: ‘long-settled non-citizens and other immigrants entitled by law to settled residence in the state’.¹⁵⁷ Denizens include settled migrants ‘who are generally eligible for’ most socioeconomic rights.¹⁵⁸

147 Currie & de Waal (2005:567).

148 Landau (2006b:1117).

149 Section 29(1) of the Constitution of the Republic of South Africa, 1996.

150 Fix & Laglagaron (2002:2).

151 Kofman (1993:395).

152 Ibid.

153 Ibid.

154 Ibid.

155 Fix & Laglagaron (2002:2).

156 Kofman (1993: 402).

157 Ibid at 395.

158 Ibid at 401; Fix & Laglagaron (2002:4) make reference to ‘presumptively permanent non citizens’ and Le Roux (2009:9-10) argues that refugees gradually turn into denizens of the city.

As indicated above, socioeconomic rights have been extended to refugees and asylum-seekers; therefore, they are, according to Tomas Hammer, denizens.¹⁵⁹ However, South African jurisprudence restricts denizenship status to recognised refugees:

*‘Refugees who have been granted asylum are special category of foreign national. They are more closely allied to permanent residents than to those foreign nationals who have rights to remain in South Africa temporarily only...Recognised refugees also have the right to remain in South Africa indefinitely in accordance with the Refugee Act.’*¹⁶⁰

This clearly illustrates the difference between international students and refugees. International students temporarily remain in South Africa while recognised refugees and asylum-seekers (if granted asylum) may remain in South Africa indefinitely. With indefinite stay, there is no doubt that that refugees ‘are most similarly situated to permanent residents’ and must be accorded the same ‘opportunities as permanent residents.’¹⁶¹ Based on this, Mokgoro J and O’Regan J are of the view that recognised refugees should particularly be treated as “permanent residents”, who are closely allied to “citizens” in terms of Immigration Act.¹⁶²

Essentially, citizens’ equal rights and advantages were incorporated in the South African Constitution as a ‘rejection of apartheid order and its racial hierarchies’ and to prohibit ‘the creation of different classes of citizens’.¹⁶³ Formal equality seeks to eradicate racism and treat all citizens as human beings. Kofman argues that globalisation and human rights have affected and changed the nature of citizenship and it is now used as ‘a form of governance in diverse society.’¹⁶⁴ ‘Denizens’ and citizens are both members of states. The contention that long-term residents should not be discriminated on the basis of citizenship status has its root in the recognition that ‘equal in dignity and rights’ are birth rights¹⁶⁵ and that the universal nature of ‘rights and fundamental freedoms’ does not know ‘territorial

159 Fix & Laglagaron (2002:27): see footnotes 3.

160 The Union of Refugee Women supra (n58) para 99.

161 The Union of Refugee Women supra (n58) para 109.

162 Section 25 of Immigration Act 13 of 2002 provides that:

‘The holder of permanent resident permit has all the rights, privileges, duties and obligation of a citizen, save for those rights, privileges, duties and obligations of a citizen which a law or the Constitution explicitly ascribes to citizenship.’

163 Currie & de Waal (2005: 473) and see also Devenish (2005:35).

164 Kofman (1993:396).

165 UDRH (n16), article 1 states that:

‘All human beings are born free and equal in dignity and rights. They are endowed with reasons and conscience and should act towards one another in a spirit of brotherhood.’

integrity.’¹⁶⁶ Refugees are entitled to equal dignity and they are endowed with inalienable rights. They cannot be deprived of their fundamental human rights.

Taking this into consideration, Fix and Laglagaron contends that it is unjust and unfair to use citizenship as criteria for the purpose of accessing national resources.¹⁶⁷ Rather, social justice requires the use of denizenship criteria in the distribution of advantages; otherwise *major* social institutions *will fail to challenge the roots of oppression and injustice*.¹⁶⁸ This view is shared by the *Khoza* judgment in which Mokgoro J cautions that citizenship should not be used as a ground of differentiation in the redistribution of advantages as it would presumably amount to unfairness.¹⁶⁹

The case of *Khoza* concerned an application of an order confirming the unconstitutionality of certain provisions of the Social Assistance Act¹⁷⁰ granted by the High Court. The impugned sections disqualified persons who are non-citizens from receiving certain social benefits and advantages. The applicants were poor Mozambican citizens living in South Africa as – denizens – permanent residents. Had they been South African citizens, they would have qualified to receive social grants in terms of the Social Assistance Act. The Concourt held that the exclusion of ‘denizens’ from the social security scheme was ‘not a reasonable way to achieve the realisation of the right to social security.’¹⁷¹ The Concourt, per Mokgoro J, was at great pains to explain that although ‘citizenship is a requirement’ for socio-economic benefits in almost all developed countries, this would not be a case in the South African context because the South African Constitution entitles everyone to have access to socioeconomic rights.¹⁷² Nevertheless, Mokgoro J recognised that classification of groups and differentiating between them is necessary to efficiently and sufficiently allocate advantages but differentiation between groups must have a rational basis and serve legitimate government purposes.¹⁷³ Mokgoro J objected to mere differentiation between citizens and

166 UDHR (n16), article 2 states that:

‘ Everyone is entitled to all 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.’

167 Fix & Laglagaron (2002:1).

168 Ibid.

169 *Khoza* supra (n89) para 68.

170 Act 59 of 1992.

171 *Khoza* supra (n89) para 56.

172 *Khoza* supra (n89) para 54.

173 *Khoza* supra (n89) para 53.

‘denizens’ and stressed that ‘denizens’ have established a strong link with South Africa, and they are, consequently, bearers of socioeconomic rights.¹⁷⁴

In this context, indefinite stay of refugees also establishes a strong link with their hosting states. Professor Le Roux posits that refugee problems have increasingly forced governments ‘to reconfigure their relationships’ with them in order to locally integrate them.¹⁷⁵ ‘Reconfiguration of relationship’ has an impact of expanding their rights and freedoms to enable them ‘to restore a position of normality’.¹⁷⁶ Professor Le Roux describes integration of refugees as ‘a process with legal, economic and social dimensions’, involving ‘what Seyla Benhabib calls disaggregation of citizenship’.¹⁷⁷

‘Disaggregation of citizenship’ is described as a ‘process whereby the cluster of rights’ and privileges of a citizen which a legal system explicitly ascribes to citizenship ‘are gradually broken apart and then distributed’ to “denizens”.¹⁷⁸ As Professor Le Roux puts it, ‘denizens’ are progressively granted ‘a wide range of rights and entitlements by a hosting state’.¹⁷⁹ For example, asylum-seekers were granted the right to study in 2003,¹⁸⁰ while refugees and permanent residents were respectively granted the right to social security.¹⁸¹ It is not only socioeconomic rights that are affected by ‘disaggregation of citizenship’. Also, the right to choose a trade, occupation and profession has been affected. In the case of *Larbi-Odam and Others v Members of the Executive Council for Education (North-West Province) and Another*¹⁸², the Concourt found that the restriction of permanent educator employment to citizens in terms of the Educators Employment Act¹⁸³ amounted to unfair discrimination.¹⁸⁴ The Concourt noted that individuals were oppressed on the basis of citizenship during the

174 Khoza supra (n89) para 59, per Mokgoro J, describes a strong link as ‘residing legally in the country for a considerable length of time resulting in a non-citizen making South Africa his or her home and to owe a duty of allegiance to the state.’

175 Le Roux (2009:2).

176 Ibid.

177 Benhabib (2007:247).

178 Ibid.

179 Le Roux (2009:2).

180 Watchenuka (n71) para 36.

181 The Concourt, in Khoza (n89) extended the right to social security to permanent resident and the Amendment of Regulation 1 of the Regulations of the Social Assistance Act 13 of 2004, as amended extended social assistance to recognized refugees (see Government Notice No 35205 of 30 March 2012).

182 (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745 (26 November 1997), hereinafter ‘*Larbi-Odam*’.

183 Act 138 of 1994.

184 *Larbi-Odam* supra (n182) para 24.

apartheid era, ‘but in reality in the circumstance where citizenship was governed by race.’¹⁸⁵ The post-apartheid constitutional order challenges such unfair discrimination because it amounts to discrimination.¹⁸⁶

Mokgoro J and O’Regan J joint dissenting judgment in *The Union of Refugee Women*, with which Langa CJ and Van der Westhuizen J concurred, stressed that the restriction of work as security guards to citizens and permanent residents in terms of section 23(1)(a) of the Private Security Industry Regulation Act¹⁸⁷ violated the constitutional rights of refugees.¹⁸⁸ Kondile J delivering the majority judgment found that the private security industry regulations to be ‘narrowly tailored to the purpose of screening entrants to the industry’ rather than constituting a blanket prohibition on the registration of refugees as security service providers.¹⁸⁹

All these examples of challenging the rights saved to citizens and the distribution of them to ‘denizens’ strongly indicates that citizenship should not be used to perpetually subject refugees and asylum-seekers to poverty. The Concourt notes that discrimination on the basis of citizenship will not pass constitutional muster if it will lead to impairment of the fundamental human dignity.¹⁹⁰

The exclusion of refugees from accessing national educational funds has an adverse impact on their lives and dignities because, without education, ‘they are relegated to the margins of society’ and they cannot expand their abilities to function and improve their socioeconomic status.¹⁹¹ Taking into account the contention that ‘denizens’ rights are similar to those of a citizens with regard to socioeconomic rights, recognised refugees (denizens) must be entitled to the right to higher education including the national resources and advantages that makes it more accessible. However, it is arguable that if an asylum-seeker has spent a considerable time in South Africa, but has not been recognised as a refugee due to a fault in the Department of Home Affairs (such as backlogs, corruption and ineffectiveness),¹⁹²

185 Khoza supra (n89) para 71. See also Larbi-Odam supra (n182) para 19.

186 Khoza supra (n89) para 71. See also Larbi-Odam supra (n182) para 19.

187 Act 56 of 2001.

188 *The Union of Refugee Women* supra (n58) para 123.

189 *The Union of Refugee Women* supra (n58) para 67.

190 Khoza supra (n89) para 72.

191 Khoza supra (n89) para 81.

192 See Landau (2006a:316-324) and Landau (2006b:1121-1123) who details factors that that prevent refugees from converting their constitutional rights into entitlements.

asylum-seekers should also be considered a ‘denizen’ on the basis of the time spent in South Africa.

It has been illuminated that refugees have acquired denizenship status and that they are closely allied to permanent residents and that citizenship status cannot be used to discriminate against them as far as socioeconomic rights are concerned. Now, I turn to explore the origin of the notion that the state must make education available and accessible to all. Due to the importance of education in each person’s life, the next section concludes that the responsibility to educate people is discharged on the basis of international solidarity and cooperation.

3.3. Realisation of Education Through International Cooperation

In 1945, the United Nations (UN) reached consensus to create the conditions of stability that are necessary for peaceful and friendly relations among nations and that the UN shall ‘promote the higher standards of living, full employment, and conditions of socioeconomic progress and development.’¹⁹³ One of means to achieve this end is education. Education is an ‘empowerment right’.¹⁹⁴ As an ‘empowerment right’, it lifts the economically and socially disadvantaged out of poverty and misery since they are empowered to fully participate in their communities’ development, thereby earning a dignified living.¹⁹⁵ Education is thus a fundamental component of the right to life and dignified existence. In this modern era, an individual needs skills to be able to work and to live a better life. An individual has as much right to education and to employment as the individual has to eat, to live, to be free and to realize their own potential.

The UN Charter commits the UN to ensure educational advancement of peoples and envisages that the realization of education and peoples’ wellbeing and stability will be achieved through educational cooperation.¹⁹⁶ Education was accordingly entrenched in the

193 Article 55(a) of the UN Charter (n16).

194 Office of the High Commissioner for Human Rights, CESCR, General Comment No 13: The Right to Education (Art 13). E/C.12/1999/10 at para 1.

195 Ibid.

196 UN Charter (n16), preamble and articles 13(b), (55(b), & 57(1).

UDHR¹⁹⁷ and ICESCR.¹⁹⁸ The UDHR protects the right to tertiary education and states that it ‘shall be equally accessible to *all* on the basis of merit’¹⁹⁹ and the ICESCR requires ‘member states to ensure that tertiary education is equally accessible to all, on the basis of capacity, by every appropriate means’.²⁰⁰ The ICESCR goes further and recognizes that tertiary education should ‘progressively be made available by introducing free education’.²⁰¹ The Convention on the Elimination of Discrimination Against Women (CEDAW) places an obligation on state parties ‘to take steps to eliminate discrimination against women in education and ensure that they enjoy *equal rights* with men.’²⁰²

The UDHR was, at the continental level, given effect by the African Charter on Human and Peoples Rights of 1981. The African Charter provides that ‘every individual shall have the right to education’ and that ‘all peoples shall enjoy *the same rights*’ and that ‘nothing should justify the domination of people by another’.²⁰³ The South African Constitution, which was drafted in the light of international human rights conventions, recognizes the right to education as an individual’s basic right’.²⁰⁴ The South African Constitution therefore commits GoSA to make basic and tertiary education, through reasonable measures, progressively available and accessible to *all*.²⁰⁵ According to the South African Human Rights Third Economic and Social Rights Report of 1999/2000 accessibility means that:

*‘the state should move towards removing barriers, including discrimination, to further education. Where reasonably practicable everyone is entitled to receive education in the language of his or her choice.’*²⁰⁶

To remove barriers, it is suggested that GoSA ‘outlaws discriminatory policies’ and create differential treatment mechanisms to secure equal access and adequate advancement of students from vulnerable ‘groups who require special protection for them to be able to enjoy the right’ to tertiary education.²⁰⁷

197 UDHR (n16), article 26(1).

198 ICESCR (n16), article 13 (c).

199 Ibid.

200 ICESCR (n16), article 13 (c).

201 Ibid.

202 Article 10 of the Convention on Elimination of Discrimination Against Women of 18 December 1979.

203 The African Charter (n16), articles 17 & 19.

204 The right to education is a component of socioeconomic rights contained in the chapter 2 (Bill of Rights) of the Constitution of the Republic of South Africa, 1996.

205 Section 29(1)-(2) of the Constitution of the Republic of South Africa, 1996.

206 The South African Human Rights Third Economic and Social Rights Report of 1999/2000 at 79.

207 Ibid at 81.

To educate the population requires significant resources and certain states may not have sufficient resources to do so. Nonetheless, the UN Charter recognizes financial constraints and points out that the problems of human deprivation will be solved through international cooperation.²⁰⁸ National efforts towards the realization of socioeconomic rights, including the right to education, are emphasized under the ICESCR and, having in mind the importance of these rights, ‘international assistance and cooperation’ is recognized and stressed.²⁰⁹ International cooperation is regarded as ‘state available resources’ and both UN specialised agencies and international financial institutions are among international bodies to provide international assistance.²¹⁰

In the light of South African Constitution and conventions, it is evident that the refugees and asylum-seekers should be afforded equal treatment – as human beings - for the purpose of securing equal access to tertiary education and improving their conditions of stability and wellbeing. The UN Charter, African charter and ICESCR make reference to the educational advancement of the peoples, not citizens, while the UDHR and South African Constitution confer the right to education upon everyone. The only restriction to access tertiary education should be based on the merit and available resources.²¹¹ The more resources available the more disadvantaged students should be supported. Nevertheless, UN agencies and financial institutions can be called upon to assist GoSA to secure educational needs of all those (including refugees and asylum-seekers) who merit undertaking their tertiary studies; but who are academically deserving and financially disadvantaged.

208 Article 1 of the UN Charter (n16):

‘The purpose of the United Nations are:

1. ...
2. ...
3. To achieve international cooperation in solving international problems of an economic, social, and cultural, or humanitarian character, and in promotion, and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion, and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.’

209 ICESCR (n16), articles 1(2), 2(1) & 11(1).

210 General Comment No 13 (n194) at para 60. See also Statement by the ECOSOC: An evaluation of the obligation to take steps to the ‘maximum of available resources’ under an optional protocol to the covenant (thirty-eight session; E/C.12/2007/1), available at <http://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf> accessed December 2012, para 5: ‘The phrase ‘to the maximum of its available resources’ refer to both the resources existing within a state as well as those available from the international community through international cooperation and assistance.’

211 UDHR (n16), article 26.

In particular, the 1951 UN Refugee Convention and the 1969 African Refugee Convention require the family of the nations not to restrict the problem of refugees to a host country, but to treat it as a responsibility that must be shared among the nations and eventually ‘to do everything in their power to prevent refugee problems from becoming a “cause of tensions” or a “source of friction” between nations.’²¹²

*‘An asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the [UN] has recognized the international scope and nature cannot therefore be achieved without international cooperation’*²¹³

The African Refugee Convention dismisses the contention of ‘unduly heavy burdens’ which may be raised by an African country in the following terms:

*‘Where a Member State finds difficulty in continuing to grant asylum to refugees, such member state may appeal directly to other Members States and through the [AU], and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the member state granting asylum’*²¹⁴

Viewed from states-sharing-of-burdens perspective, the refugees who merit further higher education cannot be discriminated against. Rather, they should enjoy the same rights as people taking into account international protection accorded to them. This would be possible if international protection is not limited to physical safety, but extended to encompass economic accessibility.²¹⁵ The family of nations has agreed on sharing financial problems that arise for meeting refugees’ needs including education. Economic accessibility, according to General Comment No 13, means that tertiary education ‘must be affordable to all’ and the provision of free tertiary education to be progressively introduced²¹⁶. Free tertiary education is currently provided through scholarship awards. Affordability means ‘to be accessible by the most vulnerable, whether in law or in fact’.²¹⁷ *De facto*, refugees are vulnerable as they are living in conditions of poverty due to forced displacement that rendered them homeless. *De jure*, their non-national status excludes them from benefiting from advantages that accrue to citizenship. As it was earlier illustrated, citizenship has gradually been relaxed by human rights paradigm.

212 The 1951 UN Refugee Convention (n4), Preamble.

213 Ibid.

214 Africa Refugee Convention (n15), article 4.

215 General Comment No 13 (194) at para 6.

216 Ibid, para 6(b).

217 Ibid, para 6(b).

Still, the concept of social justice dictates that refugees should be included in the distribution of resources scheme because they have become ‘denizens’ of a hosting state and because social justice is concerned with sharing burdens and responsibilities on the basis of spirit of ‘*ubuntu*.’²¹⁸ Accessibility of resources can occur in various ways. This includes reduction of school fees, awarding of bursaries and scholarships, and financial aid and loans. The provision of such assistance will be in compliance with article 22(2) of 1951 UN Refugee Convention which requires a host state to make tertiary education favourably accessible.²¹⁹ Failure to include refugees in the financial assistance scheme, in reality, limits many indigent and vulnerable refugees from favourably accessing tertiary education. To many refugees and asylum seekers, tertiary education is physically accessible, but – economically inaccessible

It is shown that the right to education is universal and that it should be made accessible to vulnerable and disadvantaged group without discrimination. I turn now to explore two essential elements in a refugee’s life, namely, stability and wellbeing which are the measurement of standard and quality of living. This section concludes that if these two elements are threatened, the hosting state has failed to protect refugees and that these two elements are contributory factors that threaten access to tertiary education. If a refugee’s wellbeing is constantly threatened by poverty, his or her education will be also pervaded by such threats. The desire to study will fade away.

3.4. Stability and Wellbeing

Stability and wellbeing of a person and his family is a basic human right.²²⁰ Stability is, according to the dictionary, ‘the quality or state of being steady and not changing or being disturbed in any way’²²¹ while wellbeing is defined as ‘general health and happiness’.²²² A sense of wellbeing is so wide ‘to include multi-dimensions of the quality and standard of

218 Flew (1993:2).

219 The 1951 UN Refugee Convention (n4), article 22 & 23.

220 UDHR (n16) article 1.

221 Hornby (2006:1432).

222 Ibid at 167.

living.²²³ Narrowly, Amartya Sen defines wellbeing as ‘being well, in other words to be healthy, well nourished, and educated and to have freedom of choice to choose what one can become and can do.’²²⁴ A person is well and stable if they are educated, employed, have no difficulty in accessing healthcare, and food security is guaranteed.

As regard accessing education, the notion of wellbeing will be restricted to the dimensions of emotional, psychological, physical, mental, social and economic wellbeing and it will be assessed through the lens of ‘human security’. Human security is an elusive term to conceptualize. However, human security can be conceptualized as ‘... a condition or state of being characterized by freedom from pervasive threats to people’s rights, their safety or even their lives.’²²⁵ Put differently, an individual should feel happy and safe from danger and worry and feel protected. An individual’s life would be threatened by lack of basic necessities of life. It is not only physical safety that refugees enjoy that matter. A study by Hinks and Guen revealed that an educated person is happier than uneducated person.²²⁶

Though refugees’ lives have been changed in very direct ways by forced displacement, educated refugees are fortunate to easily access labour and economic markets (whether formally or informally). Lack of access to those who desire education has a severe impact to their psychological and emotional wellbeing and their human, social, and economic security.²²⁷ The failure to fund refugees’ education can be viewed as a deprivation of the right to education and, accordingly, the deprivation of dignity and other rights, such as equality, freedom to full realization of one’s potential and a standard of living. These are among fundamental human rights that must be protected.²²⁸ Education should therefore be infused with the aim and purpose set forth in the UN Charter, the UDHR and the ICESCR – to advance and protect their human security²²⁹ – and the African Refugee Convention – to alleviate their misery and sufferings.²³⁰

223 Dalton-Greyling (2008:14).

224 Ibid.

225 Mack (2004:47).

226 Dalton-Greyling (2008:14).

227 Gilman, Kawachi, Fitzmaurice & Buka (2003:1341).

228 Protracted Refugee Situations (n8) at para 9.

229 See the UN Charter (n16), the UDHR (n16), and the ICESCR (n16).

230 African Refugee Convention (n15), Preamble.

With respect to health and happiness, Inge Petersen observes that '[m]ental and behavioural health together with physical health are central for optimal human development and functioning of people in any society'.²³¹ According to Inge Petersen, mental health is multidimensional construct made up of people's above-mentioned dimensions. The World Health Organisation (WHO) defines 'mental health' as:

*'a state of wellbeing in which the individual realizes his or her own abilities, can cope with the normal stress of life, can work productively and fruitfully, and is able to make contribution to his or her community.'*²³²

In the context of this definition, some refugees and asylum-seekers, owing to financial constraints and other vulnerabilities, suffer from emotional and economic stress and, as a result, it is difficult to cope with the normal stress of life. They need humanitarian and social assistance; they need optimal human development; they need social support so as to meet their basic needs and eventually regain hope. Depression, hopelessness, and poverty are the major impediments to their access to tertiary education or to achieve sustainable livelihoods.²³³

Poverty is, according to the World Bank, a source of human insecurity. It is defined as 'lack of income and assets, voiceless and powerlessness in the situations of state and society; and vulnerability to adverse shocks, linked to inability to cope with them.'²³⁴ Refugees have lost their assets; they are not involved in political affairs or decision making process and, they are, due to the complexities of access to labour market, unable to cope with income shocks.²³⁵ Economic shocks challenge an individual who wishes to study because, as Conceição et al explain, 'the impact of economic shocks on individual's abilities is linked to his/her health, nutrition, and education'.²³⁶ With respect to education, Conceição et al argue that poor families tend to cut down their expenditure and that education is among things on which they won't spend money.²³⁷ In addition, 'negative household income shocks' lead to

231 Petersen, Bhana, Fisher, Swartz and Richer (2010:3).

232 WHO (2001:1).

233 Myer, Stein, Grimsrud, Seedat & Williams (2008:1829) and see further Gilman et al (2003:1341).

234 Protracted Refugee Situations (n8) at para 11.

235 Conceição, Kim & Zhang (2009:5) and Banik (2009:117).

236 Ibid.

237 Ibid at 15.

exploitative labour practices and to students dropping.²³⁸ This occurs because income shocks also, according to Inge Petersen et al, affect an individual's intellectual wellbeing (capacity to think, perceive and interpret adequately)²³⁹ and psychological wellbeing (belief in their self-worth and abilities).²⁴⁰ This view is echoed by Lanzi Mazzocchini who points out that insecurity, tension, and living in a state of fear significantly affect refugees' academic performance.²⁴¹ In sum, human insecurity challenges refugees' tertiary education. The universities should avail financial aid and social support. What we can learn from lack of stability and wellbeing is that an individual would not be able to live a dignified life if she/he is not empowered to attack poverty or impoverishment.

3.5 Refugees and Restoration of their Dignity

Education gives individuals dignity and the deprivation of it is a denial of dignity.²⁴² From this understanding, refugees and asylum-seekers' dignity cannot be restored if they are unable to access economic opportunities. Dignity is one of the values on which post-apartheid constitutionalism is founded and dignity is a right that must be respected and promoted.²⁴³ Everyone has inherent dignity. So do refugees and asylum-seekers. While the Concourt relies heavily on the concepts of – dignity, equality, and freedom - to interpret the substantive constitutional rights, it has not yet defined the concept of 'dignity' because 'it is a difficult concept to capture in precise term.'²⁴⁴ In Kantian philosophy, it is 'what gives individuals their intrinsic worth'²⁴⁵ According to Iain Currie and Johan de Waal, 'dignity is the source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flow.'²⁴⁶ From a socioeconomic rights perspective, Sandra Liebenberg articulates that 'inherent dignity' of individuals as a community is given a value if the state ensures 'that the material conditions exist in which [they] can develop their capabilities in shaping their society'.²⁴⁷ If they are deprived of 'these material conditions' (opportunities or advantages),

238 Ibid at 16.

239 Petersen et al (2010:3).

240 Ibid.

241 Lanzi Mazzocchini (2007/8:222-224).

242 Devenish (1999:396).

243 Sections 1(a) & 10 of the Constitution of the Republic of South Africa, 1996. See also Kavuro (2012:114-115).

244 Liebenberg (2008:168).

245 Currie & de Waal (2005:273); Liebenberg (2005:6); and Ezitonye (2012:14).

246 Currie & de Waal (2005:273) and Ezitonye (2012:5).

247 Liebenberg (2005:7,17).

‘they are denied the opportunity to survive’ or to live in a condition that will expand their capacities and exercise their abilities.²⁴⁸

The statute of the UNHCR implicitly states that refugees, if admitted to a country, must have their situations improved and dignity restored.²⁴⁹ They must not simply be given ‘hand-out foods’ rather they must be enabled to be productive and to have control over their lives.²⁵⁰ To be productive, education, in my opinion, plays a key role to expand refugees and asylum-seekers capabilities. Sen argues that poverty is a result of ‘deprivation of basic capabilities rather than having low income.’²⁵¹ The scholars agree that a person’s dignity will be threatened if their socioeconomic situation is not ‘matched by living conditions’ that expands capabilities ‘to make dignity a reality’.²⁵² Thus, the people of South Africa will not value human dignity if they do not avail material conditions needed by refugees to study.

In *Watchenuka*, the SCA emphatically expressed that ‘human dignity is inherent in all people – citizens and non-citizens alike – simply because they are human’ and that ‘human dignity has no nationality’.²⁵³ The SCA emphasized that the inherent dignity is one of the foundational values of the South African Bill of Rights.²⁵⁴ The right to life and dignity are ‘the most important of all human rights and the sources of all other personal rights’.²⁵⁵ These personal rights include the right to education. The right to education is also inherent in refugees’ dignity for without dignity they would be deprived of the potential for fulfilling their education desire.²⁵⁶ So far, the South African social justice jurisprudence has dealt with issue of asylum-seekers’ education in the view of equal accessibility (freedom to receive education that is available) but not in the economic accessibility (educational opportunities) perspective.²⁵⁷ Sen calls lack of economic accessibility ‘economic unfreedom’ and points out

248 Liebenberg (2005:23) argues that failure to value human dignity would result in individuals and groups experiencing deprivation of subsistence needs.

249 Statute of the Office of UNHCR (n73), article 2(b)-(c).

250 Dryden-Peterson (2003:14).

251 Sen (1999:20) and Sen (1989:47).

252 Liebenberg (2008:163), Liebenberg (2005:17), Sen (1989:48-49) and Nussabaum (2011:19-20, 32-33).

253 *Watchenuka* supra (n71) para 25.

254 *Watchenuka* supra (n71) para 26.

255 *Watchenuka* supra (n71) para 26 and see further *Makwanyane* supra (n10) para 44.

256 *Watchenuka* supra (n71) para 36.

257 *Watchenuka* supra (n71) para 36.

that ‘economic unfreedom’ can, in the form of appalling conditions, ‘make a person helpless prey in the violations of other kinds of freedoms’.²⁵⁸

The Concourt has, on several occasions, indicated that social transformation should aim to achieve ‘a society in which there will be dignity’ and equal treatment, and in which individuals will be equally given greater autonomy in their own lives.²⁵⁹ In the case of *Port Elizabeth Municipality*, Sachs J was of the view that people once regarded as “homeless” should be entitled to equal, ‘dignified and individualised treatment with special consideration for the most vulnerable.’²⁶⁰ Refugees are similarly situated; though they are not homeless as such, refugees who are destitute do not enjoy their constitutional right to adequate housing, and this renders them the most vulnerable.

In regard to housing, refugees are gravely challenged by accommodation problems. Loren B. Landau pragmatically observed that it is a big challenge for refugee to convert the right to housing into reality.²⁶¹ The Human Rights Media Centre explains this situation in the following terms:

*‘Shameful also are the unscrupulous landlords and slum-lords who feed off the misery and helplessness of refugees by charging rents for rooms that can be afforded by a group of people. Large numbers of people inhabit limited space and beds, sharing meagre accommodation in shifts. Such overcrowding and meagreness tends to result in stress related illness and anti-social behaviour.’*²⁶²

Recognised refugee and asylum-seeker students, notably male students, share inadequate housing in shifts in their effort to balance accommodation and other educational needs.²⁶³ Taking into consideration the value dignity plays in South African social transformation, Sachs J was at pains to stress that it would be not, in these circumstances, only the dignity of the vulnerable – refugees/asylum seekers – that would be assailed if they live in extreme poverty, but that South African society as a whole would be demeaned.²⁶⁴ This view is

258 Sen (1999:8).

259 Soobramoney supra (n25) para 8; Khoza supra (n89) para 40; and Grootboom supra (n25) para 2,23.

260 Port Elizabeth Municipality supra (n25) para 12-13.

261 Landau (2006a:315-316).

262 Lanzi Mazzocchini (2007/8:104).

263 Ibid.

264 Port Elizabeth Municipality supra (n25) para 18.

supported by Sandra Liebenberg who contends that the people of South Africa cannot be regarded as a society that value humanity and dignity if they do not positively improve the situation of poor and vulnerable.²⁶⁵ This tells us that refugees should be not considered as – ‘a burden to the state’, ‘social nuisance’, or ‘economic bogus’ – but as equal members of South African society.²⁶⁶ Seeking resolution to their plight should be based on inclusive and comprehensive approach in conjuncture with fairness and justice. Comprehensive solution of refugee problems includes socioeconomic accessibility:

‘Respect for human dignity requires society to marshal its resources and to respond to situations in which vulnerable groups are unable to gain access to basic socioeconomic needs. The consequence of deprivation will be severe (either in terms of threats to life or health), erode the foundation for the further development of the person.’²⁶⁷

Marshalling of resources should be done in accordance with principles of fairness and equity and all members of vulnerable groups must, according to Sachs J, be treated in a dignified manner by a state in responding to their situations.²⁶⁸ Fairness and equity resonate with the absence of socially unjust or unfair distribution of resources.²⁶⁹

Discriminating against refugees in distribution will increase their hardship and, will slow social and economic integration. It will impose uneven burdens on them. According to Yacoob J, the state is mandated ‘to take positive action to meet the needs of those living in extreme conditions of poverty’ and homeless,²⁷⁰ if not, the South African Constitution ‘will be worth infinitely less than a paper’.²⁷¹ To have value, the distributive scheme ought to be determined with regard to the fundamental constitutional value of human dignity. In this context, destitute refugees and asylum-seekers’ dignity will be restored if they are accorded treatment as favourable as disadvantaged South Africans as regards socioeconomic assistance. This should, according to 1951 UN Refugee Convention, occur in the case of a

265 See Liebenberg (2005:7) ; Khoza supra (n89) para 52, 69,70,

266 Khoza supra (n89) para 74: In sharing responsibility for the problems and consequences of poverty, poor people must be treated as equal member of the society.

267 Liebenberg (2005:17).

268 Port Elizabeth Municipality supra (n25) para 41, 42. This case is concerned with poor and vulnerable people who were subjected to summary eviction and Sachs J was of the view that justice and equity oblige the state to use its resources in finding a solution to their plight, and in so doing, the state respect human dignity and ‘underlines that we all live in a shared society.’

269 Braveman & Gruskin (2003:254).

270 Grootboom supra (n25) para 24.

271 Grootboom supra (n25) para 84.

rationing system,²⁷² basic education,²⁷³ and public relief and assistance.²⁷⁴ The 1951 UN Refugee Convention emphasises favourable treatment in terms of housing²⁷⁵ and tertiary education.²⁷⁶ Transforming South African society cannot leave out refugees that they owe an international duty to protect, otherwise it can be concluded that South African society does not take cognisance of essence of human dignity that is vital in human development, and above all, challenges oppression and injustices.

The next section seeks to explore the concept of education as human right, focussing primarily on its significance to refugees, a host country, home countries and African society at large, and setting out specific reasons why refugees should be educated.

3.6. Significance of Tertiary Education to Refugees

Education is ‘both a human right in itself and an indispensable means of realising human rights.’²⁷⁷ The definition of the concept of education can assist us to capture the essence and rationale of it. Though there is no universally recognised definition, UNESCO defines it as:

*‘the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capabilities, attitudes, aptitudes and knowledge.’*²⁷⁸

The European Court of Human Rights (ECHR) defined the concept of tertiary education as ‘instrumental in the pursuit and advancement of knowledge and constitutes an exceptionally rich cultural and scientific asset for both individual and society.’²⁷⁹ The transmission of knowledge to those who have a desire for knowledge would develop their personal and intellectual abilities. Education is regarded by the World University Service of Canada as ‘a key to both individual and collective empowerment’ and ‘involving not only the transmission

272 The 1951 UN Refugee Convention (n4), article 20.

273 Ibid, article 20(1).

274 Ibid, article 23.

275 Ibid, article 21.

276 Ibid, article 22(2).

277 General Comment No. 13 (n194) at para 1.

278 Article 1(a) of UNESCO’s 1974 Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms.

279 Research Division: Cultural Rights in the Case-law of the European Court of Human Rights, January 2011, available at http://www.echr.coe.int/NR/rdonlyres/F8123ACC-5A5A-4802-86BE-8CDA93FE58DF/0/RAPPORT_RECHERCHE_Droits_culturels_EN.pdf accessed November 2012, at para 32.

of knowledge and the acquisition of skills but an awareness of the self and a capacity and a will to effect change'.²⁸⁰ The Council of Europe emphasised that tertiary education plays 'a key role in the promotion of human rights and fundamental freedoms and the strengthening of democracy.'²⁸¹ Tertiary education assists refugees to change their lives for the better and to contribute to the development of both their communities and hosting states. As Dryden-Peterson puts it, educating refugees and asylum-seekers 'is a way...to create economic opportunities that allow [them] to become self-reliant.'²⁸²

In the context of UNESCO's concept of education, education shapes individual attitudes and aptitudes and develops knowledge and capabilities. Yet, international human rights conventions lay down the importance of education, *inter alia*, development of human dignity and personality; understanding tolerance and friendship, maintenance of peace, effective participation in a free society, promotion of gender equality and respect of environment.²⁸³

In South Africa, the right to education is a basic human right and a component of socio-economic rights.²⁸⁴ While the South African Constitution and Higher Education Act spell out the duties and responsibilities of GoSA, the ICESCR also places obligations on it to dispose its wealth and resources for the realization of socioeconomic rights.²⁸⁵ Socioeconomic rights raise a controversial debate of whether a state can allocate its budget for non-citizens living in a country to realize those rights.²⁸⁶ In particular, the 1951 UN Refugee Convention places, in its chapter IV, the duty on hosting states to accord to refugees social welfare.²⁸⁷ With respect to tertiary education, it requires hosting states to provide 'favorable treatment' to them in their efforts to make education available and accessible to all.

280 Peterson (2011:112).

281 Research Division – European Court of Human Rights (n277) para 32.

282 Dryden-Peterson (2003:3).

283 UDHR (n16), article 26(2); ICESCR (n16): article 13(1); the Vienna Declaration and Programme of Action: Part I, para 33 and Part II, para 80; and 7 of the United Nations Declaration on Human Rights Education and Training, A/RES/66/137 of 2012, Preamble and articles 4(c)-(d) and 7; and the United Nations Decade for Human Rights Education, A/RES/50/177 of 1996, Preamble and article 7.

284 Section 29 of the Constitution of the Republic of South Africa, 1996.

285 ICESCR (n16), article 2.

286 Khoza supra (n88) para 132 – 134, Ngcobo J delivering minority judgment held that social assistance be restricted to citizens only and that the exclusion of non-citizens was reasonable in terms of section 36 of the Constitution.

287 The 1951 UN Refugee Convention (n4), article 20-23.

To capture the importance of education to recognised refugees and asylum-seekers, it is important to look holistically at African social, political and economic problems. The importance of education cannot be understood in isolation. Africa is challenged by forced displacement caused by poverty, political conflict and peace instability. These facts are recognised by the Constitutive Act of the African Union (AU) as ‘constitut[ing] a major impediment to the socio-economic development of the continent.’²⁸⁸ UNHCR Global Trends of 2011 indicated that there are 2, 183, 300 refugees and people in refugee-like situations in Africa,²⁸⁹ while South Africa hosts 219,366 recognised refugees and asylum-seekers.²⁹⁰ In addition to humanitarian approach in solving refugee problems, the heads of African states and governments were of the view that the promotion of socio-economic rights will bring ‘sustainable development’ in Africa and eradicate misery, suffering and conflict.²⁹¹ The Constitutive Act envisages that socioeconomic deprivation shall be addressed on the basis of ‘unity, solidarity, cohesion, and cooperation among the peoples of Africa and African states.’²⁹² This means that poor people and people who were disadvantaged by forced displacement due to political upheaval or war are the people to be given priority in addressing multifaceted and structural challenges that confront the African continent. The refugee situation is to be improved in order to contribute to African development and economic growth. In my view, the best way to do so is to educate them.

At the regional level, the Treaty of SADC clearly indicates that alleviation of poverty and misery should be done on the basis of equity, balance and mutual benefit²⁹³ with the aim and purpose of supporting the socially disadvantaged and enhancing the standard and quality of life.²⁹⁴ SADC is thus ‘determined to alleviate poverty, with the ultimate objective of its eradication, through deeper regional integration and sustainable economic growth and development.’²⁹⁵ The concept of development is defined by Sen as ‘a process of expanding the real freedom that people enjoy’²⁹⁶ and by the Declaration on the Right to Development of 1986 as:

288 Preamble of the Constitutive Act of the African Union of 11 July 2000.

289 UNHCR Global Trends (2001:13).

290 Ibid at 40.

291 Preamble & article 3(h)-(n) of the Constitutive Act of the African Union of 11 July 2000.

292 Ibid, Preamble.

293 Article 4(d) of the Treaty of the SADC (n16).

294 Ibid, article 5(1)(a).

295 Ibid, article 5(1)(a).

296 MacLaren (2011:105) and Berger (2003:626).

‘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 fair distribution of benefits resulting therefrom’²⁹⁷

Both definitions widen ‘the concept of development’ out of the ‘economic growth paradigm’ to include comprehensive economic, social, and cultural progress upon which our wellbeing depends.²⁹⁸ Real freedoms will be enjoyed if the socioeconomic arrangements are accessible.²⁹⁹ In the words of Duncan MacLaren, poverty is a source of ‘unfreedoms’³⁰⁰ and, of Landan Myer et al, of ‘psychological distress and depression’.³⁰¹ The ultimate objective of eradicating poverty and achieving sustainable development cannot discriminate against refugees. Put more clearly, eliminating the infringement of rights of peoples and individuals ‘would contribute to the establishment of circumstances propitious to the development of a great part of humankind.’³⁰² Refugees have experienced various sorts of human rights violations and they are granted asylum on the basis that they must be fully protected. UNHCR and GoSA are jointly tasked with the international mandate to assuage their impoverishment and to restore their dignity.³⁰³ If their basic needs are not catered for, their wellbeing would be at stake.

To ensure that they are economically independent, education is seen as a pillar to achieve this. Sarah Dryden-Peterson identifies four reasons why education is indispensable to refugees and asylum-seekers,³⁰⁴ namely:

- (i) Education is a human right;
- (ii) Education is a tool of protection;
- (iii) Education helps to meet psychological needs;
- (iv) Education promotes self reliance and social and economic development;

And, Duncan MacLaren identifies the fifth reason,³⁰⁵ which is:

- (v) Education is a cornerstone of any democratic society

I can add two more reasons:

297 See preamble of the Declaration on the Right to Development of 4 December 1986.

298 MacLaren (2011:105).

299 Ibid.

300 Ibid. See further Banik (2009:118) who states that if poverty persists vulnerable will not be able to enjoy their basic rights ‘or the power to exercise those rights.’

301 Myer et al (2008:1829).

302 Declaration on the Right to Development of 4 December 1986: Preamble.

303 Dryden-Peterson (2003:3) and Landau (2006:309).

304 Ibid at 5.

305 MacLaren (2011:103).

- (vi) Education restores lost dignity and hope
- (vii) Education expands their freedoms and liberates them from fear

These seven reasons are self explanatory. Nevertheless, Dryden-Peterson posits that an educated refugee can rarely ‘be exploited or abused.’³⁰⁶ Education will help refugees to understand their host society and, above all, to meet their ‘great need for structured activities that provide a sense of routine and normality.’³⁰⁷ Human capital is needed for restoring their dignity, competing on labour and economic market. In addition to this, it is needed for future reconstruction of their home countries.³⁰⁸ In particular, refugees should be prepared to serve and to participate in democratic manner because some of them are in exile because of authoritarian and dictatorial regime in place in their home countries. Education and democracy are interrelated and interconnected because, in the words of Thomas Jefferson, ‘to render democratic governments safe, the people’s minds must be improved to a certain degree’.³⁰⁹ These are some of the important reasons why recognised refugees and asylum-seekers should be included in the distribution of national resources programmes aimed at improving the minds of the South African people.

Due to disruption of refugees’ lives and human rights abuses, refugees very often suffer from post traumatic stress disorder. If nothing is done to improve their psychological, social and economic situation, they would be susceptible to mental and stress-related illness, notably psychological stress:

‘There is general consensus that social economic status plays a significant role in the aetiology of depression, through mechanisms of both increased individual vulnerability and reduced access to protective resources.’³¹⁰

Myer et al posit that anxiety disorder may be common in the socially and economically disadvantaged groups, ‘including post traumatic stress disorder, generalized anxiety disorder and different phobias’.³¹¹ Myer et al conclude that low household income is associated with ‘mental disorder’ because poverty decreases an individual social networks resulting in an ‘individual susceptibility to anxiety and depression’.³¹² Myer et al further stresses that people

306 Ibid.

307 Ibid.

308 Ibid.

309 Berger (2003:614).

310 Myer et al (2008:1829) and see further Gilman et al (2003:1341).

311 Ibid.

312 Ibid.

who experienced traumatic life events would be susceptible to psychological stress if they receive lower social support.³¹³

If refugees are not empowered to take control of their lives, their vulnerability will certainly increase. Education is indeed ‘what will prepare [them] for their future, for education is after all, the key to the future.’³¹⁴ It is a means to a better life because it develops a person’s abilities to become active member of a community. Definitely, it is one of major practical solutions to the refugee situation’.³¹⁵

I have determined the importance of education and its significance to refugees. I now turn to determine who is responsible to ensure that refugees’ wellbeing is improved and their material and economic needs are met. Little has, in previous chapters, been said on the responsibility of the UNHCR to protect recognized refugees and asylum-seekers’ socioeconomic rights. The UNHCR and a host state duties and obligations to protect have been overlapping in these discussions. The following chapter therefore seeks to clearly set out the role of UNHCR and GoSA in protecting refugees.

313 Ibid at 1833.

314 Dryden-Peterson (2003:3).

315 Dryden-Peterson (2003:14).

CHAPTER 4

INTERNATIONAL PROTECTION OF REFUGEES

4.1. UNHCR Mandate

The UNHCR was established to work under the policy directives of the Economic and Social Council (ECOSOC) by the United Nations General Assembly (UNGA) resolution 319 (IV) of 3 December 1949 as of 01 January 1951.³¹⁶ The UNHCR mandate is of an apolitical nature and its work is of a social and humanitarian nature, as it was created to ‘protect and assist refugees, and to find durable solutions to refugee problems’.³¹⁷ As the major causes of the refugee situation are political, the UNHCR involves itself in politics ‘to grasp the political significance of refugees’, and to strategically and politically find durable solutions to their plight.³¹⁸ Initially, the UNHCR mandate was limited to 3 years and it was principally mandated to ‘helping resettle 1.2 million European refugees left homeless by World War II’.³¹⁹ This mandate was ‘extended every five years up to 2004’ by the UNGA due to the expansion of refugee crises around the world.³²⁰ UNHCR mandate is no longer temporal as it has been mandated to take further on its work until world refugee problems are effectively solved. The scope of UNHCR was extended to include a broad range of people, *inter alia*, asylum-seekers, stateless persons, internally displaced persons and returnees by relevant UNGA and the ECOSOC resolutions.³²¹

The cornerstone of the UNHCR’s work is to provide ‘international protection’ to refugees, asylum-seekers, including upholding the “principle of *non-refoulement*” and to safeguard refugee’s basic human rights.³²² The ‘principle of *non-refoulement*’ means that member states may not return a refugee to a country where his or her life or freedom would

316 Statute of the Office of the UNHCR (n7): Introduction Note.

317 Ibid: Introductory note & Chapter 1.1-2.

318 Protracted Refugee Situations (n8) at para15-16.

319 The United Nations and Palestinian Refugees available at <http://www.unrwa.org/userfiles/2010011791015.pdf> , accessed November 2012 at p 9.

320 Ibid.

321 Ibid.

322 Jastram & Achiron (2001:44-45).

be threatened.³²³ Protection and assistance are interrelated because ‘assistance supports and compliments protection.’³²⁴ Assistance helps asylum-seekers to meet their physical and material needs of concern.³²⁵ The work of the UNHCR focuses largely on short (immediate) and long term (durable) solutions. Immediate solutions include provision of relief and finding ways asylum-seekers can restart their lives in a host state and become self-reliant.³²⁶ Self-reliance is a key to the improvement of refugee wellbeing and to preparing them for durable solutions. There are three major ‘durable solutions’ to refugee situations, namely, (i) ‘voluntary repatriation to and reintegration’ in their home country in safety and dignity; (ii) ‘integration in their host countries’, and (iii) ‘resettlement in third countries.’³²⁷

The Office of the United Nations High Commissioner for Refugees³²⁸ further lays down the manner in which ‘international protection’ should be provided, including:

- (a) Lobbying and advocating for states to open their doors and to protect asylum-seekers (including the most destitute) through adoption and ratification of refugee conventions, supervising their applications or monitoring their compliance, and proposing amendment to existing refugee regimes so as to meet human rights standards and practices;³²⁹
- (b) Lobbying and advocating for socioeconomic refugee situation improvement and assisting governments to satisfy refugees’ physical and material needs (human security) and to reduce the number of asylum-seekers by seeking permanent solutions to their situation;³³⁰
- (c) Transferring refugees’ assets for the purpose of ensuring a proper resettlement in a third country;³³¹
- (d) Obtaining from ‘national governments information concerning the number and conditions of refugees’; domestic refugee legislations and regulations concerning them and to report their socioeconomic conditions to ECOSOC;³³²

323 Ibid.

324 Ibid at 30.

325 Ibid. This assistance may be in the form of financial grants, food rations and equipment ‘for the purpose of restoring a sense of normalcy to life as soon as a possible.

326 UN & Palestinian Refugees (321) at p 9.

327 Ibid. See also the Statute of the Office of the UNHCR (73), articles 8(b), 8(c), article 9.

328 Statute of the Office of the UNHCR (73), article 8.

329 Jastram & Achiron (2001:40). See also the Statute of UNHCR (n73), article 8(a) &(d).

330 The Statute of the Office of UNHCR, article 8(b).

331 Ibid, article 8(e).

332 Ibid, article 8(f).

- (e) Keeping in close touch with national governments, intergovernmental organizations; institutions, and civil societies dealing with refugee questions;³³³
- (f) Inviting the cooperation of the various specialized agencies and allocating funds to, and administering such funds received by, public and private (civil) organizations and/or specialized agencies for the purpose of assisting refugees.³³⁴

UNHCR is very often seen on the ground assisting refugees, especially, in cases of emergency as the regional and international refugee conventions obligate member states to protect refugees.³³⁵ Otherwise, more involvement which makes the UNHCR visible depends upon a ‘special agreement’ entered into between the UNHCR and a refugee receiving country.³³⁶ More importantly, incorporation of international conventions into domestic legislations is important for ‘localizing international protection’ afforded to refugees and asylum-seekers. The Statute of the Office of the UNHCR implicitly states:

‘The [UNHCR], acting under authority of the General Assembly, shall assume the functions of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and seeking permanent solutions for the problem of refugees by assisting governments and subject to the approval of government concerned, private organizations to facilitate the voluntary repatriation of such refugees or assimilation within new national communities.

.....³³⁷

The preamble of the 1951 UN Refugee Convention, notes that UNHCR is charged with assisting national governments, and supervising and coordinating domestic measures taken to deal with refugee problems.³³⁸ National governments in turn undertake to cooperate with the UNHCR.³³⁹ Based on these established parameters, Mr. Sanda Kimbimbi, UNHCR Regional Representative for Southern Africa, addressing the DoHA Portfolio Committee, stated that ‘states are primarily charged with responsibility to protect’ because they have ‘means to exercise such responsibility’.³⁴⁰ This is a view echoed by Jastram and Achiron on the UNHCR

333 Ibid, article 8(g).

334 Ibid, article 8(h)-(i).

335 Ibid, article 2(2); The 1951 Un Refugee Convention (n4), article 3; and African Refugee Convention (n15), articles 1(6), 2(1),

336 Ibid, article 8(b).

337 Ibid, article 1(1).

338 The 1951 UN Refugee Convention (n4), Preamble & article 3.

339 Article II(1) of the Protocol Relating to the Status of Refugees of 1967.

340 Sanda Kimbimbi addressing the Department of Home Affairs Portfolio Committee on 14 November 2011: ‘Role of United Nations Commissioner for Refugees (UNHCR) in South Africa on Refugees: By UNHCR Representative’, available at <http://www.pmg.org.za/report/20111115-regional-representative-united-nations-commissioner-refugees-unhcr>, accessed on November 2012.

mandate. They argue that the UNHCR should with the support of international community, provide assistance and protection to refugees and asylum-seekers at domestic level, especially in developing countries and subject to approval of a concerned hosting state.³⁴¹ For ensuring effective protection, the UNHCR works together with other UN agencies and national governments and Non-Governmental Organisations (NGOs). As Kimbimbi puts it, the UNHCR works with the government but it is not a substitute for a government.³⁴² He made it clear that the UNHCR's role is to support the national government rather than to assume its role in protecting refugees and asylum-seekers.³⁴³

The UNHCR proposes measures aimed at restoring the dignity of refugees, to protect their basic rights and to lift them out of poverty. It is challenged with the prolonged and stagnant refugee situation and seeks to permanently solve the problem by recommending to national governments steps to ensure stability and wellbeing of refugees, including the following three essential elements: (i) providing refugees with security, (ii) removing barriers to self reliance; and (iii) creating opportunities.³⁴⁴

The UNHCR describes security as 'ensuring that refugees have the necessary physical and economic security to lead productive existences and encompasses physical, legal and economic aspects'.³⁴⁵ It regards physical security as of seminal importance. The concept of security involves ensuring protection from *non-refoulement* and of asylum. Two aspects of security are further articulated: legal security is a core concern of asylum-seekers because it is about provision of legal and valid documentation, while economic security entails provision of safety nets for the purpose of meeting the basic needs of (destitute) refugees and prevents them from earning a living through illegal activities.³⁴⁶ The UNHCR notes that self-reliance is very often unattainable in many countries due to 'imposed barriers' that violate refugees' basic rights. The UNHCR can play a role in removing those barriers, but the treatment of refugees rest upon a hosting state.³⁴⁷ Further, the UNHCR describes the creation

341 Jastram & Achiron (2001:31).

342 Sanda Kimbimbi (n340).

343 Sanda Kimbimbi (n340).

344 Protracted Refugee Situations (n8) para 17.

345 Ibid at para18.

346 Ibid.

347 Ibid at para19.

of opportunities as enabling refugees to improve their material conditions and ‘lift themselves out of poverty’.³⁴⁸ This can be achieved if national governments build refugees’ capacities, expand their capabilities, or finance their income-generation projects.³⁴⁹ The UNHCR, in particular, recognizes that refugees cannot be fully integrated into labour and economic markets ‘if they find themselves in arid, poor, and inhospitable areas’ because economic independency will not, in this circumstances, be achievable.³⁵⁰

UNHCR plays a key role in educating recognized refugees and asylum-seekers because education is a tool to build refugee capacity, to create stable and viable refugee communities and to enable them to support themselves. In so doing, the UNHCR funds refugee education through public and private bodies and builds partnership with universities. For example, in the Dabaab region, Kenya, UNHCR partners with the Borderless Higher Education for Refugees (BHER) - a consortium of Canadian and African universities – and other organizations, led by York University in Canada, in collaboration with Moi University (MU) and Kenyatta University (KU) to offer onsite and on-line tertiary education to vulnerable and marginalized groups living in the camps.³⁵¹ According to Audrey Nirrengarten, UNHCR Geneva Education Officer, a campus complex has been established near Dabaab refugee camp to make educational programs available where asylum-seekers need them.³⁵² The tertiary education project is aimed at enhancing refugees’ and asylum-seekers’ employability through portable certificates, diplomas and degrees.³⁵³

Similarly, UNHCR partners with the University of South Africa (UNISA) to offer online programmes to refugees in Kenya and Botswana and has partnership with the Australian Catholic University which, for several years, provided an international academic

348 Ibid at para18.

349 Ibid at para20. This includes bank loans, land and tools.

350 Ibid at para22.

351The Borderless Higher Education for Refugees (BHER), available at <http://crs.yorku.ca/bher> accessed December 2012. These partner organisation include but not limited to African Virtual University (AVU); Centre for Refugees Studies (CRS) – York University, Inter-Agency Network for Education in Emergencies (INNE), International Rescue Committee (IRC), Kenyatta University (KU), Moi University (MU), Refugee Education Trust (RET), Refugee Research Network (RRN), University of British Columbia (UBC), Windle Trust Kenya (WTK), World University Service Canada (WUSC), and York University.

352Correspondence with Audrey Nirrengarten, Education Officer, Protection Operational Support, UNHCR Geneva (nirrenga@unhcr.org) of 09 December 2012. See further the Borderless Higher Education for Refugees (BHER), available at <http://crs.yorku.ca/bher> accessed December 2012.

353 Ibid.

programme in the camps at the border between Thailand and Myanmar.³⁵⁴ For refugees living in Kakuma (Kenya), Dzaleka (Malawi), Aleppo (Syria) and Amman (Jordan), the UNHCR partners with Jesuit Commons – Higher Education at the Margins (JC:HEM).³⁵⁵ In addition, some refugees living in camps are offered bursaries to attend tertiary studies in national universities.³⁵⁶ According to Audrey Nirrengarten, the UNHCR, in partnership with DAFI³⁵⁷ Scholarship Programme, provides scholarships to refugee students in 40 countries. However, Audrey Nirrengarten attests that ‘only a limited number of deserving students, approximately 2,000 a year, have access to this sponsorship scheme’.³⁵⁸

The issue of education remains a challenge to recognized refugees and asylum-seekers who do not live in refugee camps. For the most part refugees, who leave refugee camps in a search of a better life or those who choose to stay in cities, are not included in UNHCR assistance initiative schemes unless they have been moved by the UNHCR from refugee camps to urban areas, due to either security threats or medical emergencies.³⁵⁹ In South Africa, most refugees and asylum-seekers live in urban areas, especially industrial areas, where they can be employed to earn a living. In South Africa, there are no refugee camps and, as such, there is no social and humanitarian assistance provided by government.³⁶⁰ The UNHCR provides humanitarian assistance through NGOs. In this respect the UNHCR partners only with the Cape Town Refugee Centre (CTRC) to assist with food, shelter and medical treatment to a very limited number of the most vulnerable in the Western Cape.³⁶¹ Otherwise, it is a duty of each asylum-seeker and a refugee to support themselves and to take care of their family irrespective of their socioeconomic status.³⁶² These refugees were

354 Correspondence with Audrey Nirrengarten (n352).

355 See Jesuit Commons – Higher Education at the Margins available at <http://www.jc-hem.org> accessed December 2012.

356 Correspondence with Audrey Nirrengarten (n352); Wright & Plasterer (2012:50).

357 The acronym derives from the German name of the fund ‘Deutsche Akademische Flüchtlingsinitiative Albert Einstein’ (Albert Einstein German Academic Refugee Initiative).

358 Correspondence with Audrey Nirrengarten (n352).

359 Dryden-Peterson (2003:21).

360 Amendment of Regulation 1 of the regulations of Social Assistance Act 13 of 2004, as amended to include refugees, but not asylum seekers.

361 UNHCR Activities in South Africa, Parliament Portfolio Committee on Home Affairs, 13 November 2011, Cape Town South Africa, available at

<http://www.d2zmx6mlqh7g3a.cloudfront.net/cdn/.../EPC.../111115unhcr.ppt>, accessed January 2013.

362 See Khoza supra (n89) para 121: In this case the defendant (the Minister of Social Development) argued that immigrants within South African borders cannot depend on national resource and advantages to satisfy their basic needs but rather on their own financial means or the resources of their families or their sponsors. However, the Constitution Court did not entirely agree with this argument. The court reasoned that the state cannot take measures that would completely leave the most vulnerable in the cold.

abandoned because the UNHCR did not have a formal policy in place that caters for refugees who do not live in a refugee camp. In 2009, the UNHCR Policy and Protection of Refugees in Urban Areas was adopted to extend ‘protection space’ to urban areas.³⁶³

The fact that they are not living in the refugee camps can no longer be used as a ground to be excluded from the UNHCR social and economic schemes.³⁶⁴ The need to protect recognized refugees and asylum-seekers was motivated by the fact that those who live in urban area/cities are confronted with a range of protection risks.³⁶⁵ The UNHCR is of the view that education is among the mechanisms that can be employed to protect refugees from these risks. From this understanding, UNHCR attests that the refugees will be protected provided they have access to socioeconomic services such as healthcare and education; housing, livelihoods and the labour markets.³⁶⁶ Access to education is one of indicators to assess what the UNHCR termed ‘protection space’. It describes ‘protection space’ as ‘not static, but expands and contracts periodically according to changes in the political, economy, social and security environment.’³⁶⁷ Other indicators of assessing ‘protection space’ include but are not limited to securing documentation, residence rights, and harmonious relationship with the nationals, and UNHCR ability to identify partners and facilitation of refugee participation through meaningful dialogue.³⁶⁸

With regard to education, UNHCR partners with the DAFI Scholarship Programme and other NGOs to support refugees undertaking higher education around the world.³⁶⁹ The UNHCR DAFI Programme is aimed at ‘developing qualified human resources and to build the capacity of refugees in order for them to have a marketable skills or to increase their employability opportunities.’³⁷⁰ In 2009 and 2010, the DAFI allocated US\$333,184 and

363 Ibid.

364 Khoza supra (n88) para 14.

365 UNHCR Urban Area Policy (n9) para 5: The risks identified includes ‘the threat of arrest and detention, refoulement, harassment, exploitation, discrimination, inadequate and overcrowded shelter, as well as vulnerability to sexual and gender-based violence (SGBV), HIV-AIDS, human smuggling and trafficking’. See also the Addis Ababa Document on Refugees and Forced Population Displacements in Africa of 8-10 September 1994 at para 13.

366 Ibid para 21.

367 Ibid para 21.

368 Ibid para 21-22.

369 Annual Report on the DAFI Programme 2009: DAFI allocates funds to 20 African countries, 6 Asian countries, 6 Middle East and Saharan countries, 3 European countries and 2 Latin America.

370 Annual Report on the DAFI Programme 2009 at 4.

US\$407,470 respectively.³⁷¹ Though the number to be awarded a DAFI scholarship by the UNHCR officially stands at 14 per annum, the UNHCR awarded DAFI scholarship to 73 refugee students in South Africa in 2008.³⁷² In 2009 and 2010, the number was 75 and 71 respectively.³⁷³ This is thanks to lobbying and advocacy by the Unity for Tertiary Refugee Students (UTRS) organisation that advocated for refugee and asylum-seeker students' plight.³⁷⁴ Due to the UTRS advocacy, the UNHCR adopted a strategy of providing financial assistance to graduates with outstanding balances to avoid withholding of their degrees upon completion of their degree programmes. In the Western Cape region, 33 refugee graduates were beneficiaries in 2008, while in 2009, the number increased to 57.³⁷⁵ Though the actual number of refugee and asylum-seeker tertiary students in South Africa is not available, the number was, in 2008, approximately 600 in the Western Cape.³⁷⁶ Only three percent (3%) of refugee students in the Western Cape, who participated in Lanzi Mazzocchini Survey, were beneficiaries of UNHCR DAFI bursary.³⁷⁷

The 2009 UNHCR Policy recognises that refugees and asylum-seekers, who live in urban areas, are entitled to UNHCR protection and must be accorded their basic human rights in terms of national and international legal instruments.³⁷⁸ It was adopted to address the issues of urban refugees in a more comprehensive manner.³⁷⁹ The comprehensive approach includes the social and economic needs of refugees³⁸⁰ so as to improve the situation of refugees, particularly by means of education, vocational training, livelihood promotion and self-reliance initiatives. Access to these opportunities were identified and recognized as mechanisms that would prepare refugees and asylum-seekers for durable solutions.³⁸¹ It is evident, however, from the statistics provided that the UNHCR is not doing enough to facilitate the education of refugees and asylum-seekers in South Africa's urban areas.

371 Annual Report on the DAFI Programme 2009 at 14 and Annual Report on the DAFI Programme 2010 at 17.
372 Lanzi Mazzocchini (2007/8:190).

373 Annual Report on the DAFI Programme - 2009 at 14 and Annual Report on the DAFI Programme 2010 at 17.

374 What is Unity for Tertiary Refugee Students (2009), available at <http://www.slideshare.net/Lizpeth/what-is-unity-for-tertiary-refugee-students-utrs> accessed December 2012.

375 This information was provided by the office of the UTRS.

376 Lanzi Mazzocchini (2007/8:61). The number of recognised refugees and asylum-seekers was 545 but this number does not include recognised refugees and asylum-seekers who were studying at Stellenbosch University.

377 Ibid at 190.

378 UNHCR Urban Area policy (n9) para 25.

379 Ibid at para 8.

380 Ibid para 43.

381 Ibid para 105.

In my view, the UNHCR should enter into partnerships with local NGOs, the DoHE, civil societies or social movements, and universities to assist refugees to have a favourable access to education. Local civil organizations such as the CTTC, the Agency for Refugee Education, Skills Training and Advocacy (ARESTA); and the Alliance for Refugees in South Africa (AFRISA) have no social projects tailored to assist refugee and asylum-seeker tertiary students living in the Western Cape Province.³⁸² Considering that the UNHCR entered into partnership with NGOs and universities to educate refugees living in the camps, it should do the same with South African civil society organisations and universities so that they can provide special fees to refugees and asylum-seekers in order to assist them materially and financially. As people who live in cities, their survival depends on their skills. Obtaining skills is, as the UNHCR has noted, a way of retaining human dignity, preserving social and human capital and lessening any pressure refugees ‘might place on national services and welfare systems.’³⁸³ For that reason, a UNHCR partnership with South African academic institutions is essential.

The UNHCR cannot, nonetheless, substitute for national authorities but works hand in hand with them. It has no transnational powers. The sovereignty of a nation is respected in its operations, as it functions under the auspices of the UN.³⁸⁴ South Africa has discretion to extend its hospitality to asylum-seekers and to cooperate with UNHCR. The fact that South Africa has opened its borders to refugees means it has impliedly consented to protecting them. The next section seeks to explore South Africa’s international obligation to protect refugees and asylum-seekers in depth and to protect any vulnerable person within its borders through the lens of international cooperation, human rights, and South African policies and strategies aimed at defeating inherited socioeconomic disparities.

4.2. Duties and Obligations of the Government of South Africa

382 Lanzi Mazzocchini (2007/8:251).

383 UNHCR Urban Area policy (n9) para 105.

384 See Statute of the Office of the UNHCR (73), Chapter 1(1) and UN Charter (n16), articles 2(1) & 2(7).

It is undoubtedly true that asylum-seeker problems are an aspect of injustice and insecurity that the family of nations understood must be resolved through international cooperation in terms of economic, social, cultural, or humanitarian approaches to maintain peace and security.³⁸⁵ Undeniably, if these problems are not effectively addressed, refugees can be a source of instability and insecurity either at national level or at international level.³⁸⁶ In order to achieve peace and security, seeking asylum was recognized and, consequently, the UNGA called upon states to receive and protect refugees and to take, in cooperation with the UNHCR, necessary steps to improve the situations of refugees.³⁸⁷ The power to allow the UNHCR to operate under a national jurisdiction rests on the state having jurisdiction. The steps to improve the situation of refugees primarily rest on the state granting asylum.³⁸⁸ GoSA has jurisdiction over refugees within its jurisdiction and reserves the right to call and to direct the UNHCR on matters requiring intervention. This is done by entering into a ‘special agreement’ contemplated under article 8(b) of the Statute of the Office of the UNHCR. A special agreement was signed in terms of the Basic Agreement with the UNHCR on September 6, 1993³⁸⁹ and, subsequently, South Africa ratified the 1951 UN Refugee Convention in 1995 and African Refugee Convention in 1996 respectively.³⁹⁰

Ratification means that the UNHCR assumes responsibility to monitor refugee treatment and to report to the ECOSOC on their social and economic related conditions, including the South African economy, and if South African resources are insufficient to effectively meet asylum-seekers’ needs, how the gap can be covered or how asylum-seekers’ living conditions can be improved.³⁹¹ With this information, the ECOSOC would advise the UN to fund the UNHCR to assist GoSA to improve asylum-seekers’ living conditions. The

385 UN Charter (n16), article 1(3).

386 Wright & Plasterer (2012:44); Milner & Loescher (2011:5) point out that competition over scarce resources between refugees and citizens can be a source of insecurity and that refugees’ lack of access to national resources may compel refugee to engage in criminal activities such as ‘banditry, prostitution and petty theft’. Also, their unresolved refugee situation may lead to refugees seeking to find a solution to their extended exile problem through military intervention. See also Addis Ababa Document on Refugees (n365) at para 5.

387 Statute of the Office of the UNHCR, article 2(C).

388 See article 2(3) of ICESCR (n16) which provides that a nation-state should determine to what extent non-nationals’ national resources accessibility should be guaranteed and article 2 of ICCPR (n16) which states that a nation-state undertakes to respect and to ensure inherent dignity, human rights and freedoms of all individuals within its territory. See further Ezitonye (2012: 3) who argues that international agreement is based on ‘*pacta sunt servanda*’ principle and are binding upon state parties.

389 Minnaar (2000:5).

390 Ibid.

391 Statute of the Office of the UNHCR (72), article 8(f). See also the 1967 Protocol Relating to the Status of Refugees: art II(2).

UNGA will provide the funds.³⁹² Additional funds to finance UNHCR initiatives or projects are raised from voluntary contributions.³⁹³ In the light of above, it is clear the GoSA has to use its power and resources available to secure protection in terms of the Refugee Act even if international assistance is not available.

Refugee protection (whether full or partial) is interrelated and interconnected with the improvement of refugees' or asylum-seekers' situation 'for the purpose of restoring a sense of normalcy to life.'³⁹⁴ This connotes the provision of socioeconomic advantages to them. In terms of the ICESCR, the GoSA is obliged to, 'individually and through international assistance and cooperation', deal with the matters pertaining to social, economic and cultural development to 'the maximum of its available resources.'³⁹⁵ The phrase 'to the maximum of its available resources' has been interpreted to obligate the state to 'ensure minimum subsistence rights' for everyone within national jurisdiction, regardless of a state's level of economic growth.³⁹⁶ The guarantee of 'the minimum subsistence rights' should be exercised without discrimination of any kind.³⁹⁷ Protecting basic human rights must be interpreted to mean protection of the vulnerable regardless of their nationality and refugee status. This position was confirmed by the Concourt in *Khoza* when it stated 'that a society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.'³⁹⁸ It is evident from this analysis of international conventions that obligations and duties to protect recognised refugees and asylum-seekers vest in the GoSA.

The next section seeks to examine why the GoSA is not considering refugees in its social and economic policies and strategies to ensure equal access and representivity with respect to education and why refugees are instead viewed as a burden to South Africa.

4.3. Conflict Between Refugee Protection and Education Transformation Policies

392 Statute of the Office of the UNHCR (n73), article 20.

393 Ibid.

394 Jastram & Achiron (2001:31); Landau (2006:309) and see also Recommendation 7 of the Addis Ababa Document on Refugees (n365) at para 15.

395 ICSECR (n16), article 2(1).

396 The Limburg Principles on the Implementation of the ICESCR [UN Doc. E/CN.4/1987/17, at para 25.

397 ICSECR (n16), article 2(2).

398 *Khoza* supra (n89) para 52.

From the analysis of international and national refugee regimes, it has been established that the GoSA has national and international obligations to protect refugees and asylum-seekers. In addition, human rights instruments and social justice jurisprudence obligate South Africa to treat everyone within its border with dignity and to protect the most vulnerable. South African jurisprudence also states that GoSA measures designed to improve the situation of the poor cannot be said to be reasonable if the measures excludes segments of society.³⁹⁹ Refugees are part of South African society, as they have established a strong link with South Africa through indefinite stay or asylum. Refugees are in dire need of improved material conditions and their basic needs are, given their vulnerable position, among the most urgent. Yacoob J explains that:

‘Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.’⁴⁰⁰

In granting asylum, the GoSA is acutely conscious of social and economic consequences associated with receiving asylum-seekers *vis* protection. Protection responsibility was acknowledged by the former Deputy Minister of the DoHA, Ms Lindiwe Sisulu, when she stated that ‘because of South African history it has increasingly had to bear the mantle of champions of the oppressed’ and South Africa has had to implement international solidarity and burden-sharing, opening borders to allow refugees ‘to seek a safe haven’ in South Africa.⁴⁰¹ However, this understanding has been compromised by the policies and strategies aimed to redress the past and to economically advance the majority of South Africans who suffered from the brunt of the apartheid regime. Furthermore, South Africans’ anti-foreigner or xenophobic attitudes challenge the GoSA to defend refugees’ and migrants’ rights.⁴⁰²

399 Grootboom supra (n25) para 43.

400 Grootboom supra (n25) para 44.

401 The Union of Refugee Women supra (n58) para 140

402 Landau, Ramajathan-Keogh & Singh (2005:6) and Landau (2006a:309).

In order to defeat systemic inequalities, the post-apartheid regime adopted the Reconstruction and Development Programme (RDP) which committed the GoSA ‘to effectively address the problem of poverty and gross inequality evident in almost all aspects of South African society.’⁴⁰³ The RDP White Paper rigorously states that segregation in education and other components of socioeconomic rights and entitlements ‘left deep scars of inequality and economic inefficiency’.⁴⁰⁴ Having this in mind, it fully commits the GoSA to redress the injustices of the past by ‘providing basic services to its citizens’⁴⁰⁵ and to develop a social security net tailored ‘to enhance the psycho-social, economic and physical wellbeing of all citizens, with special emphasis on those financially and otherwise disadvantaged.’⁴⁰⁶ Crucially, the RDP Economic Policy is about empowering the historically oppressed and disadvantaged.⁴⁰⁷

The RDP regarded poverty, injustice and oppression as the main facts of socioeconomic life and the realization of the potential of South Africa’s poor and vulnerable is seen as the main mechanism for defeating them. At best improvement in access to education was proposed on the basis of the provision of tertiary education loans and bursary funds.⁴⁰⁸ The Education White Paper of 1997 which outlines tertiary education transformation was drafted in the context of the RDP. It also recognised that GoSA is challenged by ‘fragmentation, inequality and inefficiency which are the legacy of the past’ in its effort to meet pressing human resources needs, economic growth, and ‘to respond to new realities and opportunities’.⁴⁰⁹ In order to equitably redress the inequities of the past in education, the Education White Paper of 1997 suggested NSFAS and that it should aim at lifting the financial barrier, particularly to South African students from poor families.⁴¹⁰ NSFAS operates on businesslike principles and is planned and managed professionally. The Education White Paper of 1997 actually states that NSFAS is:

‘neither a substitute for responsible help for students, but a valid form of supplementary support, especially for the majority of young south Africans whose

403 White Paper on Reconstruction and Development, Government Gazette No. 16085, Notice No. 1954 of 1994, tabled in Parliament on 15 November 1994, hereinafter ‘RDP White Paper’: Summary of Government Programme to Advance the RDP - Preamble.

404 RDP White Paper (n403) para 1.2.2.

405 Ibid para 3.16.

406 Ibid para 3.5.1; 3.12.2.

407 Ibid para 3.2.2.

408 Ibid at page 62.

409 Education White Paper 3 (n124) at para 1.1.

410 Ibid para 4.39.

*family support-systems can bear only a fraction of the cost of current higher education programme.*⁴¹¹

Further, NSFAS is aimed at challenging oppression and inequalities of the past and to, in the long run, bringing about an equal society. The preamble of NSFAS Act indicates that NSFAS is a financial institution where it states that ‘it is desirable to redress past discrimination...; and to establish an expanded NSFAS that is affordable and sustainable.’⁴¹² NSFAS provides loans and bursaries. Affordability applies in terms of a loan which is allocated to an ‘eligible student’ who will be able to pay it back subject to a loan agreement.⁴¹³ Bursaries are not required to be paid back in full provided that the recipient meets ‘the criteria and conditions set out in the written agreement.’⁴¹⁴ As noted earlier in this thesis, education prepares refugees to go into labour and economic market and to be economically independent. There is an assumption that NSFAS Board will not be able to recover the funds which refugees have borrowed as financial loans or granted to them as bursaries because refugees are viewed as temporary residents who can repatriate anytime once there is peace and stability in their home countries. It is in this respect that the UNHCR must enter into a partnership with NSFAS to clear that assumption by ensuring a guarantee of repayment by standing in as ‘surety’. Also, the GoSA must not restrict its resources to redress the injustices of the past by sidelining refugees and asylum-seekers. It must design measures aimed at assisting refugees to become self-sufficient, through funding their education and training.

As it will be illustrated the GoSA implements the SADC Protocol on Education and Training⁴¹⁵ but it failed to commit itself to adequately implement the Refugee Act which gives effect to the 1951 UN Refugee Convention. Failure to implement it is based on the understanding that refugees are a burden to South Africa and thus drain national resources. This is a view put forward by the first post-apartheid Minister of the DoHA, Mangosuthu Buthelezi when he stated that:

*‘If we as South Africans are going to compete for scarce resources with millions of [foreigners] who are pouring into South Africa, then we can bid goodbye to our Reconstruction and Development Programme.’*⁴¹⁶

411 Ibid para 4.39.

412 Preamble of the National Student Financial Aid Scheme Act 56 of 1999.

413 Ibid, section 21(1).

414 Ibid, section 1(vi).

415 SADC Protocol (n18).

416 Landau et al (2005:6).

Mr Buthelezi's sentiment was, in 2011, reiterated by Chairperson of the DoHA Portfolio Committee, Ms Maggie Maunye who also indicated that 'foreign nationals coming to South Africa are using up the country's resources and prevent citizens from enjoying their freedom'⁴¹⁷ A term 'foreigner' is very often used to refer to economic migrants, recognised refugees and asylum-seekers.⁴¹⁸ This category of non-citizens is 'stereotyped as being a threat' to South African citizens' socioeconomic interest.⁴¹⁹ This suggests that the UNHCR did not do enough to sensitize government officials to the plight of refugees and to meaningfully engage the GoSA to consider refugees' economic accessibility.⁴²⁰ Currently, the NSFAS, which does not cater for refugees, is considered to be a mechanism to introduce free tertiary education to South Africa's disadvantaged.⁴²¹ If free education is introduced through this channel, refugees will be left out in the cold. As the RDP envisaged, free tertiary education is viewed as an effective mechanism to address of injustice of the apartheid past and to enable all South Africans to be equally active citizens. Free education to the poor will ensure equal accessibility to and representivity in tertiary education.⁴²² The intervention will be introduced as part of government policy.⁴²³

In fact, the GoSA struggles to balance interests between provision of socioeconomic advantages and privileges to its citizens and upholding refugee international protection, which accords to recognised refugees and asylum-seekers socioeconomic rights. The majority of South Africans were disadvantaged by oppression while refugees were disadvantaged by

417 See CoRMSA welcomes the apology by Chairperson of the Portfolio Committee on Home Affairs on xenophobic comments, available at <http://www.cormsa.org.za/2011/07/04/cormsa-welcomes-the-apology-by-chairperson-of-the-portfolio-committee-on-home-affairs-on-xenophobic-comments/>, accessed November 2012.

418 Handmaker (2001:106) maintains that South African politicians use the broader issue of foreigners or migrants for political gain.

419 Ibid. See further Duvell & Jordan (2002:499) argues that there is a world trend that people seeking asylum are viewed as seeking welfare and social support.

420 F Bidandi & A Wamundiya 'Evaluating Refugee Access to Institution of Higher Learning in South Africa: The role of Government, Universities and Civil Societies Organisations, 2009 available at http://sanord.uwc.ac.za/usrfiles/users/9174080913/Conference_2009/BidandiWamundiya.pdf, accessed on November 2012 at p5: UNHCR should partner with South Africa as it did with the governments of Botswana and Kenyan 'to provide the much needed services such as education opportunities for refugees and asylum seekers'.

421 Education Green Paper (n112) at 12.

422 Ibid at viii; 4,48.

423 Ibid at 48 states that the GoSA seeks 'to progressively introduce free university education to the disadvantaged students in their final year by converting their loan into bursary if they graduate'.

political upheaval and coerced displacement. They are all vulnerable. In particular, refugees' ability to enjoy constitutional rights is 'most in peril' as they are voiceless and lack political muscles. National social and economic measures taken to advance the South African disadvantaged to the exclusion of disadvantaged refugees are arguably not justifiable. The satisfaction of the South African disadvantaged should not override the plight of refugees, which GoSA agreed to safeguard.

The next chapter will explore the existing situation related to refugees' access to tertiary education in relation to application, admission and registration process. The access will be examined in comparison with international students, in particular SADC students who are afforded preferential treatment in accordance with the SADC Protocol on Education and Training of 1997. As each university has its own admissions policy, this chapter will look at the admissions policies of the four universities in the Western Cape by drawing on similarities and contrasts in the treatment of refugees and asylum-seekers.

CHAPTER 5

DOCUMENTATION, ADMISSION PROCESS, AND POLICY GUIDELINES

5.1. Documentation and Related Problems

Being documented is a first step to integration in South African society. A person is unable to do any activity that requires any transaction without possessing a legal document. Possessing a document is thus a passport to education, employment or any other income generating activities. Most asylum-seekers enter South Africa without a valid passport as required by Immigration Act⁴²⁴ and/or without an asylum-seeker permit or visa.⁴²⁵ As a result, they are ‘illegal foreigners’ because of contravention of the Immigration Act,⁴²⁶ and they risk being apprehended and deported⁴²⁷ if they are arrested before reporting to the Refugee Reception Centre to be issued with a temporary permit allowing them to stay in South Africa while awaiting adjudication of their application.⁴²⁸ If not deported, they can be fined or imprisoned.⁴²⁹ However, the 1951 UN Refugee Convention requires a host state not to detain or impose penalties on asylum-seekers who, on account of illegal entry or presence, seek protection ‘where their life or freedom was threatened’ in their home countries, provided that they ‘show good cause for their illegal entry or presence’.⁴³⁰ In this regard, in *Bula & Others*

424 Section 9(4) of the Immigration Act 13 of 2002.

425 Ibid, section 23.

426 Ibid, section 1(1)(xviii), an illegal foreigner is ‘a foreigner who is in the Republic in the contravention of this Act and includes a prohibited person’.

427 Ibid, section 34(1): ‘Without a need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such a foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place under the control and administration of the department determined by the Director General.’

428 Section 22(1) of Refugees Act 130 of 1998.

429 Section 49(1)(a) of Immigration Act 13 of 2002 provides that ‘[a]ny who enters or remains in the Republic in contravention of this Act shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding three months.’

430 The 1951 UN Refugee Conventions (n4) article 31. See further Africa Refugee Convention (n15), article 3.

v Minister of Home Affairs & Others,⁴³¹ the SCA held that an illegal asylum-seeker must be given an opportunity to lodge an asylum claim.⁴³²

The DoHA is challenged with documenting asylum-seekers within a reasonable time. It has, since 2001, been facing a backlog. This backlog has been gradually increasing.⁴³³ By April 2000, there was a backlog of 4,864 which had increased to 34,042 in January 2005.⁴³⁴ This number was increased to a half a million (594,557) by 2008.⁴³⁵ By 2011, only 57,899 people are recognised as a refugee. According to the DoHA, the asylum management system lacks the capacity to deal with the volume of applications expeditiously and efficiently. Consequently, a person who is seeking asylum can, without fail, report on a daily basis to the Refugee Reception Offices without gaining access for more than 6 months.⁴³⁶ This has led to persons seeking asylum forcing entry into these centres, sometimes resulting in their arrest and detention.⁴³⁷ Due to this backlog, a documented asylum-seeker can report every three months, to the Refugee Reception Offices for more than 5 year without their case being adjudicated so as to determine whether they are a refugee.⁴³⁸ Asylum-seekers' lives are in limbo and rendered vulnerable due to their ghostly status, which accords to them partial protection and unclear constitutional rights.⁴³⁹

431 (589/11)ZASCA 209 (29 November 2011), hereinafter 'Bula'.

432 Bula supra (431) para 72: It was held in this case that once an asylum-seeker is arrested and indicates an intention to apply for asylum, he/she must be treated in terms of Regulation 2(2) of Refugees Act and to be issued with an appropriate permit valid for 14 days, within which he/she is obliged to approach a Refugee Reception Office to submit his/her application for an asylum.

433 Kiliko and Others v Minister of Home Affairs and Others Case No: 2730/05, hereinafter 'Kiliko' at para 25. See further Handmaker (2001:91) The Department of Home Affairs has failed to develop a workable structure to serve asylum-seekers. The development of administering refugee regime 'has been complicated by a number of factors, both policy and capacity-related'.

434 Kiliko supra (433) para 25.

435 Jones, L (2009) "Home Affairs needs 30 year to clear backlog" The article was originally published on page 21 of Tribune, on October 11, 2009. See also the report of UNHCR entitled "2010 UNHCR Country Operation Profile: South Africa" which states that the recognized refugees are 43500.

436 Kiliko supra (n433) para 10.

437 Kiliko supra (433) para 10.

438 The author arrived in South Africa in September 2004, and was able to have access to the Refugee Reception Office after a month, and his case were adjudicated in 2011, after 7 years when he was in his LLB final year and he could not secure any bursary because of his ghostly status.

439 IRIN – South Africa, "How many undocumented migrants? Pick a number" available at <http://www.irinnews.org/Report.aspx?ReportId=87032> [accessed on 17 November 2012]: The SA Police Services (SAPS) in their latest (2008/09) annual report said, "According to various estimates, the number of undocumented immigrants in South Africa may vary between three and six million people."

In order to deal with the backlog, both refugee and immigration policies were amended and now a person seeking asylum is required to report at the port of entry placed at the border in terms of South Africa's new immigration management policy.⁴⁴⁰ The amendment was, according to the former Minister of the DoHA, Dr Nkosazana Dlamini-Zuma, to assist in 'streamlin[ing] the process of application for asylum by making it more efficient, easy and credible for those seeking South African protection.'⁴⁴¹ In my view, the change in refugee and migration policies has nothing to do with improving the Refugee Reception Centre infrastructures and increasing its human resource capacity with a view to deal with the backlog efficiently and expeditiously. The literature suggests that migration management seeks to close borders and firmly restrict the influx of asylum-seekers so as to protect, among other things, labour markets, economic growth and the redistribution of resources.⁴⁴² Extension of socioeconomic rights to refugees and asylum-seekers is always problematic and amounts to a controversial debate.

Until 2003, an asylum-seeker was not allowed to undertake formal studies. The SCA found this to be in conflict with the principles and standards relating to human rights and refugees.⁴⁴³ Henceforth, an asylum-seeker is allowed to work and study. Unlike a refugee, it is not clear whether he or she is entitled to other socioeconomic rights, most precisely social welfare and security, shelter, food, and healthcare.⁴⁴⁴ A recognized refugee is entitled to socioeconomic rights, but they are not enjoying the right to housing and financial assistance which are at the heart of restoring their dignity and local integration.⁴⁴⁵ Refugees' legal documents clearly state their rights. But a refugee is issued with a maroon identification document (ID) which has seemed to be problematic and a basis of systemic discrimination. Government officials, employers, and university administrators do not recognize and accept refugee IDs as legal documents, instead requesting a green-bar-coded ID. This has implication of not delivering services to refugees contenting that their maroon IDs are not

440 Immigration Amendment Act 13 of 2011: The amendment effected includes the designation of ports of entry. It moves from immigration control policy to immigration management policy.

441 Rampersadh (2011:1).

442 Lubbers (2003:1); Duvell & Jordan (2002:498); Hawkins (1974:1); and Hailbronner & Koslowski (2008:6) indicates that borders are being closed in order to protect pollution, terrorism, organised crimes, energy resources, urban congestion, and anxiety about the nation future.

443 Watchenuka (n71) para 36.

444 See an Asylum-seeker Temporary Permit issued under section 22 of the Refugee Act No 130 of 1998.

445 See a Formal Recognition of Refugee Status in the RSA issued in terms of s24(3)(a) of Refugee Act 130 of 1998.

South African legal documents.⁴⁴⁶ This is astonishing because the maroon ID has been in use since 2000 and university staff have been attending refugees with similar documentation since that time.⁴⁴⁷

Fred Bidandi and Alice Wamundiya argue that because of xenophobic attitudes university staff provide poor advice or misinformation to recognized refugees and asylum-seekers, such as requesting them to get proof from their country embassies of who they are and whether they are qualified to undertake tertiary education – Without such proof, they won't be able to study.⁴⁴⁸ This is not a once-off incident but something that occurs every year by the same people who should be providing proper information. This raises a grave concern, as these negative attitudes have the severe implication of discouraging those individuals who are fighting to get education by treating them as if they are international students. As Bidandi and Wamundiya put it, when refugees encounter this problem, they ask themselves 'why they are being denied access to education, when their refugee statuses clearly allow them to study'.⁴⁴⁹ The recognition and acceptance of recognised refugees and asylum-seekers documents is also a major problem that amounts to unfair discrimination in accessing education. In reality, both asylum-seekers and recognised refugees meet devastating problems in documentation processes and in issued documents being accepted as legitimate and valid documents in South Africa. The next section will look at the problems encountered during admission if the documents are accepted.

5.2. Admission and Enrolment

The Lanzi Mazzocchini Survey of 2008 illustrated that 67% of refugee students who participated in her survey experienced discrimination at universities.⁴⁵⁰ Most of the discrimination and xenophobic attitudes are experienced at the first encounter with those who are assigned to deal with applications and registrations.⁴⁵¹ Once they find out that one is a

446 Lanzi Mazzocchini (2007/8:43).

447 Bidandi & Wamundiya (2009:7).

448 Ibid.

449 Ibid.

450 Lanzi Mazzocchini (2007/8:154).

451 Ibid.

refugee the first question put to him or her is whether he or she will be able to pay the university fees and how they are going to raise such money. The applicant is advised that they must pay full fees upfront and that the money must be paid in US Dollars if admitted.⁴⁵² The staff seem to regard a refugee as an individual who is seeking to take away an opportunity from a national and thus finds a way of killing their spirit and forcing them to quit the process.⁴⁵³ At the University of the Western Cape (UWC), especially in the Nursing Department, applicants are summoned for an interview in connection with their financial means for eligibility. The rationale is that if they were admitted, they would, like other refugee students facing financial difficulties, incur debt which will accumulate a huge amount of debts to the institution.⁴⁵⁴ Recognised refugee and asylum-seeking students are expected to be, like international students, self-reliant and to guarantee the universities that they will be able to pay fees.

Most of the university prospectuses say nothing about refugees. They only make reference to international students. These institutions have established international student offices⁴⁵⁵ where both international and refugee students are directed to deal with queries. In addition, there are international student organisations that assist international students. Refugees are vulnerable because there is no information made available to them that would guide them in applications. Due to the lack of support, refugees may apply for programmes they are interested in, only to be told that a non-national is not allowed to apply for such a programme.⁴⁵⁶

The Higher Education Act⁴⁵⁷ emphasises ‘equal access to tertiary education’ and seeks ‘to promote the constitutional values of human dignity, equality and freedom’. However, refugees have no such freedom to choose especially to pursue the option of their

452 Experience of the author in his attempts to pay his tuition fees. This occurred every academic year.

453 Lanzi Mazzocchini (2007/8:147-148) posits that there are stereotypes among South Africans that refugees came to steal their opportunities and advantages and that refugees are regarded as ‘gold-diggers’.

454 In his second year, UWC Student Credit Manager explained to the author that he will be registered provided that he settles all outstanding fees. However, the Student Credit Management approved his registration on the basis that arrangement was made with them. This arrangement was renewed during his third and fourth academic year registrations.

455 The UCT International Academic Programmes Office - IAPO. UWC, SU and CPUT have International Relations Offices.

456 Several incidents were reported to the UTRS, an organisation that was established to fight for the refugee students’ rights to study.

457 Act 101 of 1997.

choice in the programme they have interest.⁴⁵⁸ It is not clear whether the restriction has to do with section 22 of the South African Constitution which allows only citizens to freely choose occupation or profession.⁴⁵⁹ A university prospectus should make it clear which degree programmes are available to refugees and asylum-seekers if this is the case.

The Act vests the power in the council of a university, after consulting the senate of the university, to determine admission policy. The council has the power to establish an admission policy that will facilitate refugees or asylum-seekers' favourable access to tertiary education.⁴⁶⁰ These policies, as they pertain to refugees, are lacking at each of the institutions I have looked at. As a result, the treatment that a refugee or asylum-seeker receives differs from one staff member to the other and from one institution to the other. There is no consistency and services are uncertain and unpredictable. To illustrate, during the four years of my undergraduate tenure at UWC, I was asked to furnish documents that they never asked me to provide in previous registrations or during the application process. Every year I had to be sent from one office to the other for a confirmation that I can be registered. This occurred regardless of the fact that my academic progress report clearly reflected my promotion. I was always late registered. Due to late registration I always faced a penalty fee imposed by the university for the late-registration students. This unnecessary exercise particularly frustrates the effort of new students who are seeking to register for the first time after being admitted. Refugees found it necessary to create an organisation, Unity for Tertiary Students (UTRS), to deal with these problems when they are stuck in the middle of these processes. Although this organisation intervenes in these issues at universities in the Western Cape, it has no capacity to deal with them at other universities situated in other provinces.

The other challenge experienced by recognised refugees and asylum-seekers is evaluation of their documents. Evaluation of foreign qualifications to determine the equivalent level of South African schooling is a statutory requirement.⁴⁶¹ Evaluation is done

458 Lanzi Mazzocchini (2007/8:162-163). At University of the Western Cape, Medicine, Dentistry, and physiotherapy are opened exclusively to nationals. At Stellenbosch University, Faculty of Health Science has adopted certain criteria that restrict non-nationals to have access to it.

459 Section 22 of the Constitution of the Republic of South Africa, 1996.

460 Section 37 of the Higher Education Act 101 of 1997.

461 The South African Qualifications Authority Act 58 of 1995 and the National Qualification Framework Act 67 of 2008.

by the South African Qualification Authority (SAQA)⁴⁶² or Higher Education South Africa (HESA).⁴⁶³ These two institutions are based in Pretoria. HESA requires certified copies of transcripts, while SAQA requires originals. Understandably, refugees are reluctant to send to Pretoria their invaluable original qualification documents because of the fear that they might get lost in the process. Furthermore, these documents must be translated into English if they are in French or Portuguese. Translation and evaluation, including other related charges, costs almost R2000. This is unaffordable for a poor asylum-seeker.⁴⁶⁴

The 1951 UN Refugee Convention requires hosting states to recognise refugees or asylum-seekers' (foreign) school certificates, diplomas and degrees.⁴⁶⁵ These foreign qualifications are recognised after being evaluated and given equivalencies by either HESA or SAQA in accordance with the National Qualification Framework (NQF).⁴⁶⁶ With respect to evaluation, the Cape Peninsula University of Technology (CPUT) is the only university which offers the services of evaluating foreign qualifications. But its evaluation is not accepted by other universities, because it is not a body registered for such purpose. UNISA in Parow can do so if one has applied to study there and paid the application fees. Some refugees use this process. Also, the CTRC assists in sending documents but cannot assist with the charges involved. Evaluation of documents challenges refugees and asylum-seekers living in Western Cape. It is arguable that, like CPUT, other universities should be assisting refugees in the evaluation of their qualifications, even if this means sending them to Pretoria or having in-house services. Once a refugee has the evaluation in his or her hand, the next step is to apply. Due to the evaluation service provided by the CPUT, 80% of tertiary refugee students in the Western Cape are enrolled at the CPUT.⁴⁶⁷

I have discussed practical examples which are serious impediments to favourable tertiary education accessibility. Now I turn to look at the Education White Paper of 1997, which sought to transform tertiary education to ensure citizens' equal access to it by

462 SAQA, available at www.saqa.org.za/ , accessed November 2012.

463 HESA, available at www.hesa.org.za/ , accessed November 2012.

464 I was able to save this money after two years staying in the country because the income I could raise ended in paying rent, food and toiletries. Refugees prefer to visit these institutions physically and this costs a lot and years of raising such money.

465 The 1951 UN Refugee Convention (n4), article 22(2)

466 Section 2 of the South African Qualifications Authority Act 58 of 1995.

467 Lanzi Mazzocchini (2007/8:65).

establishing a ‘single coordinated education system’, and which was regarded as a solution to systemic inequality in accessing education and other challenges. Then I will examine the policies affecting entry of international students into the system.

5.3. The Myth of a ‘Single Coordinated Education System’ and Entry Policies

The Education White Paper of 1997 envisaged that there should be ‘a single coordinated system’, in order to overcome education disparities and to succeed in addressing the present and the future challenges.⁴⁶⁸ Challenges include the problems that are encountered during application, admission, registration, and other problems related to fees and living expenses during undergraduate or postgraduate tenure. An admission guideline policy is necessary to inform prospective students with varying backgrounds, needs and interests what is required of them in order to be accommodated at a particular university. To depart from past practices, a ‘single coordinated education system’ was established so as to open its doors to ‘an expanding range of population irrespective of race, gender, age, creed or class or other forms of discrimination.’⁴⁶⁹ The management of the overwhelming demand for tertiary education is subject to institution-based planning and regulations.⁴⁷⁰ As indicated earlier, the council of a university is entrusted with the duty to determine and publish its admission policy,⁴⁷¹ as well to determine the number of the students who may be admitted.⁴⁷² The councils of universities have established guideline policies that set out the requirements for other international students who hail from SADC region, non SADC region, and non-African region.

Given a ‘higher demand for higher education’ places from local students and international students, a clear guideline is required to avoid misunderstanding in admitting refugees and asylum-seekers, SADC students, non-SADC students and non-African students in South African institutions. Lack of guidelines or policies have resulted in refugees being treated as if they are international students, particularly in terms of application, admission,

468 Education White Paper No 3 (n124) para 2.1.

469 Ibid para 1.27.2.

470 Ibid para 2.6.

471 Section 37(1) of the Higher Education Act 101 of 1997.

472 Ibid, section 37(3)(b).

registration, and financial assistance on one hand, and as if they are local students in terms of identification, fee payment, and medical insurance on the other. Refugees may fall within the scope of SADC students, non-SADC African students, or non-African students'. In some cases, refugees, asylum-seekers, and international students are required to meet the same criteria because they are all coming from foreign countries. They have to go through a number of steps to enable them to obtain an academic place at universities such as evaluation of their qualifications. All non-South Africans must qualify for exemption from the South African Matriculation Board,⁴⁷³ meet language requirements and certain minimum faculty entry requirements. Since a refugee is treated as a national at some stages, the following is the process that an international student undergoes which does not apply to recognised refugees or asylum-seekers.

An international student who wishes to pursue their studies in South Africa usually applies while they are staying in their home country.⁴⁷⁴ If their application is accepted, the next phase is to apply for a study permit/student visa before leaving the country of origin. A study visa is obtained from the South African Embassy or High Commission or Consulate. A study visa will facilitate their entry into South Africa and registration at the institution of their choice. A study visa is granted if an international student has been cleared by their local police and obtained a police clearance certificate,⁴⁷⁵ deposited a repatriation guarantee,⁴⁷⁶ and have obtained a confirmation letter to study in South Africa. Proof of medical insurance cover, vaccination and medical certificate including radiological report are required.⁴⁷⁷ In addition to these requirements, each university lays down further requirements regarding fees to be satisfied for registration eligibility. With respect to fees and charges, international students are grouped into three categories, namely, SADC students, non-SADC African

473 Matriculation Exemption may be a full, conditional, or mature age.

474 At the time of application, some may be residing in other countries. Some may be based in South Africa. But the process is still similar. Only the difference is that they may not be meeting some of these requirements.

475 Police clearance or certification of good conduct is issued by an international student's local police station in his/her home country where he/she has resided for the past 12 months as well as any other countries where he/she may have resided since the age of 18.

476 CPUT – Guide for International Students (2010:4-5): Repatriation deposit is forfeited if an international student fails to achieve satisfactory progress and, as a result, is expelled from South Africa.

477 See Medical Certificate application form (BI-811), available at <http://blogs.sun.ac.za/pds/files/2012/09/BI-811-Medical-certificate.pdf>, accessed December 2012: The medical certificate serves to confirm that an international student is not 'mentally or physically disordered and not suffering from leprosy, venereal diseases, trachoma, or other infections or contagious condition'. Radiological report certifies that an international student is not suffering from pulmonary TB. Mentally disorder includes 'all psychoses, neuroses, personality disorders, addictions, behaviour disturbances of childhood, all forms of mental retardation, epilepsy and all other forms of degeneration of the central nervous system'.

students, and non-African students. Therefore, the next section will explore how these classifications of international students are charged.

5.4. General Fees and Charges for an International Students

As noted earlier, the Southern African countries entered into an agreement known as the Protocol on Education and Training (SADC) to promote equal access to tertiary education. It requires each SADC Member State to charge SADC students as if they were their citizens.⁴⁷⁸ Before I focus on SADC students, I first examine the general fees and charges for international students. At the CPUT, an international student must ‘make an upfront payment of 50% of the fees and the balance to be paid before May’.⁴⁷⁹ Non-African students are required to pay double the general South African fees. At Stellenbosch University (SU), an international student is required to pay an international registration fee (IRF) payable annually and he or she must pay a ‘service fee for academic related services and consumable items’ in advance.⁴⁸⁰ They are ‘expected to pay their academic fees in full prior to registration’. A delay in registration is subject to a penalty fee calculated from the date of registration on the scale of interest at the prime bank rate. The prospectus and fees booklet does not say much about whether non-African students will pay double of general South African student fee. They simply indicate that the fees will be determined by academic programme. The tuition fee ranges from R21, 285 to R36, 888 depending on the programme chosen.⁴⁸¹

At the University of Cape Town (UCT), all international students, except SADC students are charged international fees. The minimum international fee in 2012 is as follows: a full-time student is expected to pay R60, 000 for undergraduate degree, R60, 000 for an Honours degree, R39, 000 for a Masters degree, and R34, 780 for a PhD degree. All these

478 SADC Protocol (n18), article 7(A)(5).

479 CPUT Guide for International Students (2010 :7).

480 University of Stellenbosch – Undergraduate International: Fees, available at <http://www0.sun.ac.za/international/degree-studies-undergraduate/degree-studies-undergraduate-fees> accessed December 2012: These services include student card, internet, photocopying quota, printing credits, washing quota, material costs, laboratory fees, etc.

481 Ibid.

fees are per annum and levied annually.⁴⁸² At the University of the Western Cape, international students from Africa pay the same tuition fees and charges as local students ‘unless otherwise stated in the brochure’.⁴⁸³ It is advised that international students consult the fees brochure but this brochure is neither attainable on line nor included in the prospectus. The tuitions fees for an international student is payable in US dollars. In 2012, the tuition fee for an undergraduate programme ranged between US\$3, 990 and US\$5, 660 per annum and; postgraduate (Masters and Doctoral programme), between US\$4, 880 and US\$9, 610.⁴⁸⁴ All Honours programmes cost US\$4, 090. All four universities exempt SADC students from international fees for the purpose of fees and accommodation.

5.5. SADC International Students’ Exemption

The member states of SADC⁴⁸⁵ agreed to ‘cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit,’ in the areas of, *inter alia*, ‘social and human development and special programmes; science and technology; natural resources and environment;’ and social welfare, information and culture.⁴⁸⁶ The SADC Protocol on Education also recognises that each member is not, ‘without cooperation with other member states, capable to offer the full range of affordable, quality and world class education and training.’⁴⁸⁷ Through regional cooperation, international students who come from the SADC region should be treated as ‘home students for the purpose of fees and accommodation.’⁴⁸⁸ In this context, South African universities regard SADC students as South Africans. The member states recognised that education and training are major contributors to tackling socioeconomic problems facing the SADC region and to the achievement of sustainable development.⁴⁸⁹ In order to address the needs of the region, member states agreed to reduce and to eventually eliminate unnecessary and costly

482 UCT – International Full Degree Students – FEES, available at , <http://www.uct.ac.za/apply/intlapplicants/degree/fees/overview/> , accessed December 2012.

483 University of the Western Cape Prospectus (2008-2009:62-63).

484 Ibid.

485 SADC member countries are Angola, Botswana, DR Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia, and Zimbabwe.

486 Article 21(1) &(3) of the Treaty of SADC.

487 SADC Protocol (n18), Preamble

488 Ibid, article 7(A)(5).

489 Ibid, Preamble

duplication of efforts in the provision of education and training to their citizens; to give preference to socially disadvantaged groups; and to provide special scholarships to them.⁴⁹⁰

The SADC Protocol on Education requires preferential treatment towards SADC students, in particular, socially and economically disadvantaged students, for the purpose of admission to the fields of study where they have not featured prominently and in terms of financial assistance so as to enable them to study under less stressed circumstances.⁴⁹¹ Normally, the threat of dropping out due to lack of financial means is a constant source of worry to every financially disadvantaged student. Differentiating SADC students from the rest-of-the-world students is done so as to give them preferential treatment required by the SADC Protocol on Education as a means by which to achieve human-centred development on one hand and to progressively alleviate poverty on the other.

Of the four universities, two of them do not make distinctions between African students. At UWC and CPUT, international students from SADC are not accorded preferential treatment against international students who come from other regions of Africa. They are all treated the same as South Africans. At UCT, only citizens and permanent residents from SADC countries are charged the same fees as local citizens.⁴⁹² Further, the requirement for repatriation fees payable by Zimbabwean students for renewal of their study permit has been relaxed.⁴⁹³ At SU, fees and charges levied of SADC international students are less than those charged of other international students, in particular, those who come from other African countries. However, the fees and charges that are required to be paid by SADC citizens are not clearly defined.

490 Ibid, article 2(d).

491 Ibid, article 7(C)(3).

492 UCT Policy on Internationalisation, available at <http://www.uct.ac.za/about/iapo/internat/>, accessed December 2012, states that UCT, on UCT Position in Africa, enrolls 'SADC students on the same terms as local students'. See also UCT Undergraduate Prospectus 2013, available at <http://www.uct.ac.za/downloads/uct.ac.za/apply/prospectus/uctugprospectus2013.pdf>, accessed January 2013 at 61.

493 See a letter from Immigration Control Officer to IAPO, available at <http://www.uct.ac.za/downloads/uct.ac.za/apply/intstud/degree/permits/CTHA-ZimRepatriationFee.pdf>, accessed December 2012.

The SADC Protocol on Education obligates state members to take all steps required to ensure that SADC students' rights that accrue to them in terms of the Protocol are protected and promoted.⁴⁹⁴ This obligation falls on the national government in the form of the DoHE, which has exclusive responsibility for tertiary/higher education, whereas this obligation to implement SADC Protocol is a concurrent responsibility of the national government and provincial government.⁴⁹⁵ Notwithstanding this constitutional responsibility, a university must take all steps to ensure that the SADC Protocol is adhered to. Higher learning institutions are independent and have autonomous power to regulate access to their education and training services. From this, it is evident that GoSA and universities are committed to implementing the SADC Protocol while the 1951 UN Refugee Convention is not given required attention. As noted earlier, the UNHCR has not engaged universities or partnered with them for the purpose of exempting refugees and asylum-seekers. The next section will explore briefly on how they are treated for the purpose of fees and charges.

5.6. Refugees' Exemption

There are several reasons why recognised refugees and asylum-seekers should be given differential and favourable treatment in accessing education. These reasons have been discussed throughout this thesis. Like the SADC Protocol, the 1951 UN Refugee Convention, which has been given effect to by Refugee Act requires member states to work towards the reduction of their school fees, award scholarships, and eliminate any constraints that may restrict refugees or asylum-seekers from access to education.⁴⁹⁶ In this respect, universities should develop and formulate a coherent entry policy regarding refugees that must be available on line, in prospectuses, booklets and brochures as a starting point for implementation of 'favourable access to education.'

Refugees' vulnerability is, by its nature, depriving recognised refugees and asylum-seekers of the ability to enjoy the right to education. Like any other South African student or SADC international student who comes from a poor family, refugees' situation is not susceptible to improvement without special assistance in terms of admission and education

494 SADC Protocol (n18), article 20.

495 Schedule 4 & 5 of the Constitution of the Republic of South Africa, 1996.

496 The 1951 UN Refugee Convention (n4), article 22(2).

expenses. Clear guidance and policy in admission reflecting their obligations and assistances made available to them would encourage and motivate refugees to come forward and apply. However, of four universities, only two universities *vis* CPUT and UCT mention refugees in the admission guideline. At CPUT, it can be presumed, based on information available, that refugees and asylum-seekers are deemed to be charged as South African students because they are exempted from paying all international fees and levies.⁴⁹⁷ The Lanzi Mazzocchini survey of 2008 indicates that the total population of international students at CPUT was standing at 2004, of which 439 (24,6%) were refugees or asylum-seekers.⁴⁹⁸

At UCT, recognised refugees and asylum-seekers would ‘be dealt with on a ‘case-by-case basis.’ A refugee is automatically qualified for local fees while an asylum-seeker qualification is judged depending on the length of stay in South Africa, which should be sufficient to believe that the period of stay has created an equivalence to ‘official refugee status’.⁴⁹⁹ Irrespective of this, the UCT website provides contradictory information that an asylum-seeker is not allowed to study because their visa prohibit this.⁵⁰⁰ This does not merely create an illusion among the UCT staff that asylum-seekers are not allowed to study, but also relays a wrong message to the asylum-seeker community that they are prohibited from studying. However, the UCT has allocated bursaries to international students, including refugees and asylum-seekers. Regardless of this, the Lanzi Mazzocchini survey of 2008 revealed an unbelievable number of refugees and asylum-seekers admitted in 2008. Out of 4300 international students, only 30 (0,6%) were refugees/asylum-seekers.⁵⁰¹ This clearly indicates that refugees are not well welcomed. A case-by-case basis may be problematic.

At UWC, all international students from African countries pay the same fees as South African students. Refugees and asylum-seekers who fall in this category are charged as if they are South Africans. However, this raises concerns of whether refugees and asylum-seekers from non-African region pay the international fees in dollars. Irrespective of applying

497 CPUT Guide for International Students (2010:7):

498 Lanzi Mazzocchini (2008:65).

499 Full Degree Study, Liability of International Fees, available at <http://www.uct.ac.za/apply/intlapplicants/degree/fees/international/> , accessed December 2012.

500 UCT – Full Degree Study, Liability for International Fees, available at <http://www.uct.ac.za/apply/intlapplicants/degree/fees/international/> accessed December 2012 provides that only recognized refugees are allowed to study.

501 Lanzi Mazzocchini (2008:66).

the same financial requirements principle, the Lanzi Mazzocchini survey of 2008 revealed that out of 1239 international students admitted, only 76 (6,1%) among these were refugees and asylum-seekers.⁵⁰²

At the SU, it is not clear how refugees are admitted and charged. The Lanzi Mazzocchini survey of 2008 could also not identify any admitted and registered refugees because no statistics was made available to her. However, a staff at the International Relation's Office, who was interviewed, confirmed that refugees are very few because of high fees, teaching taking place in Afrikaans, Stellenbosch being an expensive town to live in, and the geographic location that makes it less likely for refugees to visit the campus.⁵⁰³ Interestingly, the SU allocates bursaries to refugees and asylum-seekers.⁵⁰⁴ Regardless of this, it appears from Lanzi Mazzocchini interview that refugees are not accorded favourable treatment in relation to the reduction of charges.

Though from this analysis of international student treatment, it appears that preferential treatment is accorded to SADC students and that CPUT has higher number of refugees. The CPUT provides better access than any other university not because, as Lanzi Mazzocchini puts it in her study, it offers degree programmes in the field which are popular to refugees or with employability expectations.⁵⁰⁵ Rather, it provides better information in its prospectus. In addition to this, fees and charges are, at least, affordable and there is a varying degree of awareness of refugee rights among staffs. Also, refugee students spread information by a word of mouth.

On the hand, the UCT and SU fees and charges are very high. It seems that UCT and SU awarding scholarships to refugees and asylum-seekers does not attract them because of the fear that if they are not selected for scholarship (as it is strictly limited), they will not be able to meet their fees.

502 Ibid at 65.

503 Ibid at 66.

504 Ibid at 187.

505 Lanzi Mazzocchini (2007/8:66).

CHAPTER 6

CONCLUSION

Recognised refugees and asylum-seekers are constitutionally and statutorily accorded socioeconomic rights contained in the South African Constitution. Though recognised refugees are accorded full protection while asylum-seekers enjoy partial protection, they are all allowed to study and they do not have access to national financial resources that make education more accessible. These resources are all restricted on the basis of citizenship. In this thesis I have argued that the ‘human rights paradigm’ has the implication of extending the rights, entitlements and advantages traditionally associated with citizenship to denizens (including refugees). In particular, the ratification and domestic enactment of the 1951 UN Refugee Convention and African Refugee Convention has the impact of distributing those rights and advantages to recognised refugees and asylum-seekers. Yet, in extending hospitality to them, South Africa assumed the international obligation to protect them through empowerment and restoration of their dignity and to uphold their basic human rights.

I have also argued that both recognised refugees and asylum-seekers are vulnerable in South African society and that they were disadvantaged by forced displacement. Like disadvantaged citizens, they are to be treated favourably as far as socioeconomic rights and entitlements are concerned. Refugees’ needs are most urgent ‘in order to restore a semblance of normality’, to regain hope, and to be able to become self reliant and economically independent. To alleviate their misery and suffering, education is an essential mechanism to enable them to ‘work productively and fruitfully’ and to make a contribution to their community and South African society – to change their lives for the better. Therefore, refugee social and economic needs should ‘not be ignored by the measures aimed at’ eradicating the structural poverty and the extreme inequality in wealth generated by the apartheid system.⁵⁰⁶ GoSA, in collaboration with universities, implements the SADC Protocol on Education and Training and as a result SADC students are treated as if they are South Africans. Likewise, the 1951 UN Refugee Convention should not be ignored but be implemented, in collaboration

⁵⁰⁶ ANC (1994:79).

with universities, through partnership and cooperation with UNHCR. This would result in refugees being treated as such.

Certain interventions and recommendations have been made in the body of this thesis, however drawing on the argument made throughout this thesis, I conclude with the following recommendations:

- **Treatment as international students is a true barrier to financial assistance:** Refugees are excluded from national bursary schemes, loans, scholarships and other related financial advantages because they are viewed as if self-reliant and economically independent. Refugees live in extreme poverty and their wellbeing needs to be protected. They are people who are in need of material and social assistance to improve their situations. Universities must take cognisance of their plight and assist them financially and lobby for government, UNHCR, and other potential stakeholders' interventions to enable refugees to favourably access tertiary education.
- **Refugees were forced to displace due to insecurity and violations of human rights and they were disadvantaged by displacement:** Refugees have sought the protection of South Africa because their rights were violated and many suffer from trauma associated with such abuse. In addition, the displacement contributed to the destruction of their means of subsistence in various ways. The GoSA should take necessary measures to protect refugees and asylum-seekers with a view to ensuring that socioeconomic assistance is accessed. They should not be viewed as a people who are in the country to use up national resources for their own benefit, rather to assist them to regain a sense of normality and to be able to support themselves. Education will help them to contribute in finding a durable solution to their problems. Education is a means of empowering them to alleviate themselves out of poverty, misery and suffering.
- **Accessing bursary and financial aid administered by NSFAS and NRF:** Financial assistance is administered on the basis of business principles. This is not a private business but a government policy run in that manner. Having in mind that the GoSA has a duty to improve the situation of refugees and that this requires access to national

resources, opportunities, and advantages, the GoSA should exempt refugees in the NSFAS programme and cooperate with the UNHCR in its effort to progressively promote refugees tertiary education. Otherwise, many refugees will not 'be able to lift themselves out' of misery and poverty and will be continually subjected to suffering. Integration of refugees in the system will promote stability and wellbeing of refugees.

- **Sharing the burden of educating refugees:** Educating refugees is an obligation that must be fulfilled by GoSA, individually, and through African states solidarity or international assistance and cooperation, notably with the UNHCR. The UNHCR which administers international resources (assistance) allocated to improving refugee economic status, must distribute some to GoSA with a view to lessening the burden of educating refugees.
- **Recognition of refugee formal documentation:** Removing obstacles in the way of leading a productive and dignified life includes the provision of legal security, *vis* provision of personal documentation, is particularly important. However, both GoSA and the UNHCR must sensitise university staff to the rights of refugees and the legality of their documents. Refugee identification documents should not be a barrier to accessing tertiary education and other basic needs.
- **Establishment of policy guidelines:** Each university is independent and has autonomous power to regulate access to education including determination of admission policy. University councils must include refugees in their policy documents setting out their tuition fees and charges, as well as bursaries and scholarships available to them. The policy guidelines must indicate which degree programmes are available to refugees.
- **Implementation of the 1951 UN Refugee Conventions.** Like the SADC Protocol on Education, the 1951 UN Refugee Convention must also be implemented. It must not be ignored simply because refugees have no political muscle and are voiceless. The Convention requires reduction of tuition fees and accommodation and subsistence charges. Introduction of such mechanisms will increase favourable access to tertiary education. It is also recommended that universities facilitate favourable access by providing refugees' degree and diploma evaluation service in collaboration with HESA and SAQA.

- **Restoration of dignity and promotion of human security:** Just as with citizens, empowering refugees through education will increase their employability and establishment of income generating activities. This has the impact of decreasing human insecurity, and by this means, restoring their dignity. The GoSA, UNHCR, universities, NGOs/civil societies should work towards ensuring that refugees and asylum-seekers are able to realize their own capabilities, and can cope with the normal stress of life. The UNHCR must take the lead in partnering with local organisations to assist tertiary refugee students and should increase the number of DAFI beneficiaries.
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