

ENFORCEMENT OF REFUGEE RIGHTS IN SOUTH AFRICA THROUGH
PUBLIC INTEREST LITIGATION IN THE SPIRIT OF UBUNTU

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ABSTRACT

This master's thesis addresses the challenge of ineffective enforcement of refugee rights in South Africa, focusing on the right of refugees to seek and enjoy asylum and undergo a fair refugee status determination procedure. The dissertation proposes a solution through the exploration of public interest litigation (PIL) as a method to support refugees in asserting their rights. The central argument posits that enforcing refugee rights through PIL aligns with the African philosophy of Ubuntu, emphasizing interconnectedness and humanity. The thesis contends that PIL, deeply rooted in Ubuntu, can serve as a catalyst for change, fostering a compassionate and inclusive approach to refugee protection in South Africa. The dissertation examines the compatibility between Ubuntu and human rights principles, showcasing Ubuntu as a persuasive tool in PIL cases advocating for refugee rights. The thesis challenges critiques against the applicability of Ubuntu in a legal setting and advocates for acknowledging its potential to serve as a foundation for public morality. Utilizing Ubuntu as an interpretive instrument creates opportunities to incorporate a wide range of human rights into legal discussions, offering a guiding structure for addressing persistent disputes concerning justice. By invoking Ubuntu in PIL, legal practitioners can safeguard constitutional rights while promoting broader public interest and transformative societal change.

The research delves into the provisions of international refugee law and domestic South African law, enriched by a comprehensive review of various published articles, journals, and case law related to PIL concerning access to refugee status determination procedures in South Africa.

The thesis concludes by asserting that through justice, empathy, and solidarity, the enforcement of refugee rights becomes a manifestation of South African societal values. By embracing the spirit of Ubuntu, South Africa has the potential to emerge as a beacon of hope and a model for effective refugee protection globally.

ACRONYMS

APR – Atlantic Philanthropies Report

DHA – Department of Home Affairs

LHR – Lawyers for Human Rights

LRC – Legal Resources Centre

NGO – Non-Governmental Organisation

OAU – Organisation of African Unity

PIL – Public Interest Litigation

RRO – Refugee Reception Office

RSD – Refugee Status Determination

RSDO – Refugee Status Determination Officer

SCA – Supreme Court of Appeal

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

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1. CHAPTER ONE – INTRODUCTION

1.1 Introduction

The preservation and promotion of refugee rights have consistently been of critical concern in the field of international human rights law. By the conclusion of 2021, the global count of individuals forcibly displaced due to diverse factors such as violence, persecution, conflict, or human rights abuses reached an astonishing 89.3 million.¹ Among them, there were 27.1 million individuals recognized as refugees, 53.2 million internally displaced persons residing within their own countries, and 4.6 million individuals in pursuit of asylum.² In the face of this ongoing global crisis, it is of utmost importance to guarantee the protection and respect of refugees' fundamental rights.

South Africa, having signed and ratified the 1951 United Nations Convention on the Status of Refugees and its 1967 Protocol (UN Refugee Convention), the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) and enacting the South African Refugees Act 130 of 1998 (Refugees Act), has committed itself to uphold its obligations towards refugees under international law.³ Under the provisions of Section 3 of the Refugees Act, an individual meets the criteria for refugee status if that person:

‘(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social 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 events seriously disturbing or disrupting 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 elsewhere; or

(c) is a dependant of a person contemplated in paragraph (a) or (b).’

¹ UNHCR, ‘Refugee Statistics’.

² Ibid.

³ Khan, Schreier, in: Khan, Schreier, p. xxxv.

Section 3(a) of the Refugees Act corresponds to the refugee definition stipulated in the UN Refugee Convention, while Section 3(b) mirrors the expanded refugee definition outlined in the OAU Refugee Convention. Thus, the refugee status determination (RSD) process in South Africa includes assessing whether an asylum seeker has a valid claim based on a well-founded fear of persecution or if they were forced to flee due to general violence or war in their country of origin.⁴ The Refugees Act grants the right to seek and enjoy asylum to anyone, with the sole requirement being their physical presence at a refugee reception office (RRO) within the country.⁵

Despite the ratification of the above-mentioned key legislation aimed at protecting refugees and establishing a seemingly straightforward asylum procedure in South Africa, challenges have arisen in effectively implementing these international conventions and domestic laws.⁶ As a result, individuals seeking access to the asylum process face various barriers and difficulties. The country grapples with the rising arrival of hybrid migration streams and the subsequent strain on the asylum system, leading to significant changes in refugee law and policy. Consequently, the asylum space in South Africa has notably diminished.⁷

In theory, South Africa has implemented an urban asylum policy, which prioritizes local integration over encampment.⁸ However, the practical realization of this policy remains uncertain. The implementation of the Refugees Act by the Department of Home Affairs (DHA) is met with challenges, primarily stemming from the department's inability or unwillingness to grant refugees access to the intended status determination procedure in the first place or to ensure the legal extension of permits while their asylum applications are being processed.⁹ The urban policy needs more than just mechanically extending rights to refugees, the government should take a larger role in their integration.¹⁰ This lack of proper implementation of the provided procedures creates obstacles for asylum seekers, leaving them in a precarious position without the necessary legal documentation during the lengthy asylum determination

⁴ Khan, Schreier, in: Khan, Schreier, p. xxxvi; Maluwa, Katz, pp. 171, 189.

⁵ Section 21(1) Refugees Act.

⁶ Khan, Schreier, in: Khan, Schreier, p. xxxix, xxxv.

⁷ Ibid, p. xxxv.

⁸ Khan, Schreier, in: Khan, Schreier, p. xli; Khan, p. 271.

⁹ Khan, Schreier, in: Khan, Schreier, p. xli.

¹⁰ Khan, p. 271; Landau (2006), pp. 308ff.

process. Such hurdles undermine the safeguarding and rights of individuals seeking asylum and contribute to the overall difficulties faced by refugees in South Africa.¹¹

The dissertation aims to address the problem of ineffective enforcement of refugee rights in South Africa, focusing specifically on the right of refugees to seek and enjoy asylum and thus to receive a fair RSD procedure. Moreover, it also aims to propose a potential solution to this problem by exploring the use of public interest litigation (PIL) as a method to support refugees in asserting their rights in South Africa. PIL, also referred to as strategic litigation, serves as a legal tool enabling individuals or groups to initiate lawsuits on behalf of the broader public interest.¹² It can serve as a powerful tool for societal transformation and justice, plays an important role in holding governments accountable and advances the rights of marginalized and vulnerable populations. By employing strategic litigation strategies, public interest lawyers and organizations can challenge laws, policies, and practices that hinder the safeguarding of refugee rights and promote a more inclusive and equitable society. By analysing the role and impact of PIL in the context of refugee rights, the dissertation seeks to make a valuable contribution toward enhancing the safeguarding of refugee rights and strengthening their enforcement within the country.

The central argument of this dissertation is that the enforcement of refugee rights through PIL in South Africa is not only a highly effective legal approach but also deeply rooted in the spirit of Ubuntu. Ubuntu, as an African philosophy of interconnectedness and humanity, emphasizes the importance of recognizing and embracing the dignity and well-being of all individuals, including refugees.¹³ It is within this framework that PIL can serve as a catalyst for change, fostering a more compassionate and inclusive approach to refugee protection. Especially South Africa, a country with a rich history of struggle against discrimination and injustice, has embraced the principles of human dignity and equality enshrined in its Constitution. In the context of refugee rights, the spirit of Ubuntu holds great significance by emphasizing compassion, community, and interdependence.

¹¹ Khan, Schreier, in: Khan, Schreier, p. xxxvi.

¹² Brickhill, in: Brickhill, p. 6; Brickhill, Finn, in: Brickhill, p. 119.

¹³ Murithi, p. 282.

To explore this argument, the dissertation will begin by providing an overview of the relevant normative framework for refugee rights, both internationally and within South Africa. It will delve deeper into the right of refugees to seek and enjoy asylum, highlighting the importance of a fair and effective RSD procedure. Subsequently, the work will examine the role of PIL in enforcing these rights, analysing two illustrative cases – *Kiliko*¹⁴ and *Tafira*¹⁵ – along with the strategies employed by public interest organizations in South Africa. In the last section, this dissertation showcases the compatibility between the African philosophy of Ubuntu and human rights principles, highlighting its potential as a persuasive tool in PIL cases aimed at advocating for refugee rights in South Africa. By invoking Ubuntu in PIL, legal practitioners can not only seek to safeguard the constitutional rights of refugees but also endeavor to uphold the essence of Ubuntu, promoting the broader public interest and fostering transformative societal change beyond the scope of individual cases.

By examining the intersection of refugee rights, public interest litigation, and the spirit of Ubuntu, this dissertation aims to contribute to the discourse on refugee protection in South Africa. It seeks to demonstrate that through the pursuit of justice and the encouragement of empathy and solidarity, the enforcement of refugee rights can not only be a legal obligation but also a manifestation of the values that define the South African society. Ultimately, by embracing the spirit of Ubuntu, South Africa can serve as a beacon of hope and a model for effective refugee protection within the global community.

1.2 Statement of Problem and Research Question

After the end of Apartheid, South Africa has become a major host for refugees and asylum seekers, mainly from other African countries.¹⁶ Between 2006 and 2011, it received the world's highest annual number of new asylum applications.¹⁷ Many are drawn to South Africa due to its relative prosperity and its unique refugee determination system that doesn't involve camps, enabling asylum-seekers to move freely.¹⁸ Additionally, South Africa remains the second-largest economy on the

¹⁴ *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C).

¹⁵ *Tafira and Others v Ngozwane and Others* 2006 ZAGPHC 136.

¹⁶ Gordon, p. 1.

¹⁷ UNHCR, 'Global Trends 2012: Displacement The New 21st Century Challenge', p. 26.

¹⁸ Ruedin, pp. 1108ff.

continent (behind Nigeria).¹⁹ While the number of asylum seekers has decreased over time, addressing refugees and asylum seekers remains a challenge in South Africa, often intertwined with the contentious issue of illegal immigration.²⁰

On the surface, South Africa's legal system initially appears progressive because of its bold new Constitution including a Bill of Rights and the Refugees Act that safeguard the rights of refugees.²¹ Once in the country, refugees and asylum seekers must undergo a process called 'refugee status determination' to legally stay in the country, which will be explained in more detail in Chapter Two. If a refugee is granted asylum, they receive a permit that allows them to stay in South Africa for a specified period, typically two years. During this time, the refugee is permitted to work and study in the country, providing them with a chance to integrate into society and support the local community.²²

However, even with these forward-looking laws in place, numerous rights remain unrealized, resulting in persistent transgressions against asylum seekers and refugees. They continue to grapple with discrimination, encounters with law enforcement, and hostile attitudes fueled by xenophobia, all while facing poverty, frustration, and an inability to realize their full potential due to insufficient protection and support systems.²³ Analysis of the efficacy of the RSD system in South Africa reveals numerous flaws, including legal errors, the prioritization of irrelevant factors, inadequate explanations, lack of individualized decision-making, and a discriminatory incentive system that fosters rejections.²⁴ Furthermore, despite relevant regulations stating that decisions on asylum applications should generally be made within a reasonable time by an administrator, many asylum seekers wait for years before receiving an RSD interview.²⁵ Chapter Three will elaborate on the reasons for this disparity between the legislation and its implementation.

¹⁹ Meili, p. 192.

²⁰ Maluwa, Katz, pp. 131ff.

²¹ Meili, p. 177; Amit (2011), SAJHR, p. 9.

²² DHA, 'Refugee Status & Asylum'.

²³ Amit (2011), SAJHR, p. 9; Landau, Jacobsen, pp. 44ff; Meili, p. 202; Khan, p. 262.

²⁴ Amit (2010), pp. 22ff; Amit (2011), IJRL, pp. 458ff.

²⁵ Landau, Jacobsen, pp. 44ff; Quan, Addaney, p. 78; De Jager, in: Khan, Schreier, p. 157; Gallagher, p. 55.

Regrettably, a significant number of refugees in South Africa face barriers to accessing the legal system to address systemic shortcomings. Limited resources and a shortage of private lawyers offering pro bono or contingency services contribute to this challenge. State-funded legal assistance is frequently unavailable, as it predominantly concentrates on criminal justice issues, leaving asylum seekers and refugees with restricted support.²⁶

This dissertation therefore asks: How can public interest litigation, as a legal means of giving a voice to those who would otherwise not be heard, contribute to ensuring the effective enforcement of refugee rights in South Africa? Additionally, how might public interest litigation enhance its effectiveness by incorporating the African Ubuntu philosophy into its argumentation?

In answering these questions, the following sub-questions will be addressed:

- To elucidate the context in which PIL operates, what rights are granted to refugees under both international law and domestic South African law to seek and enjoy asylum? (Chapter Two)
- To enable a comprehensive examination of refugee issues within the RSD process through the lens of PIL, which international and domestic laws in South Africa pertain to the access of RSD procedures? (Chapter Two)
- What is public interest litigation in detail and what obstacles does it encounter? (Chapter Three)
- Is the effectiveness of PIL solely determined by winning a case? (Chapter Three)
- What is the true essence of the Ubuntu philosophy, and does it align with the principles of the human rights system? Or does the human rights system predominantly reflect Western values stemming from a Eurocentric perspective, potentially diverging from the spirit of Ubuntu? (Chapter Four)

²⁶ Cote, Van Garderen, p. 168.

- How can the enforcement of refugee rights through PIL in South Africa be aligned with the spirit of Ubuntu, fostering a more compassionate and inclusive approach to refugee protection, and thereby strengthening the enforcement of refugee rights and promoting broader societal transformation? (Chapter Four)

1.3 Research Aims and Purpose of the Study

Article 14(1) of the Universal Declaration of Human Rights (UDHR) states:

‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’

This right is a fundamental component of the global legal framework that governs how individuals seeking refuge should be treated.²⁷

In South Africa, Section 21(3) of the Constitution, guarantees:

‘Every citizen has the right to enter, stay, and reside anywhere in the Republic.’

However, individuals who are not citizens of South Africa do not possess an inherent right to enter the country automatically.²⁸ An exception is made for refugees who may enter without being penalised for illegal entry according to Section 21(4) of the Refugees Act. To realize their right to seek and enjoy asylum in South Africa, refugees must undergo the RSD procedure to legally stay in the country. Consequently, the ability to seek asylum in another country loses its meaning if individuals are unable to access the procedure of applying for refugee status.²⁹

The Refugees Act theoretically allows anyone to seek asylum by physically appearing at an RRO. Nevertheless, implementation issues surrounding the Refugees Act have complicated this seemingly straightforward procedure.³⁰ The legislation took two years to be implemented, and the subsequent regulations revealed a dysfunctional system that persists to this day.³¹ As a result, the refugee system fails to provide proper documentation and facilities for determining the refugee status of asylum seekers and refugees.³²

²⁷ Cote, in: Khan, Schreier, p. 239.

²⁸ Currie, De Waal, p. 454.

²⁹ Kerfoot, Schreier in: Khan, Schreier, p. 137.

³⁰ Ibid.

³¹ Cote, Van Garderen, p. 170.

³² Ibid, p. 175.

The issue becomes apparent when asylum seekers face difficulties in accessing proper procedures to determine their refugee status and are subjected to unlawful detention and deportation.³³ Despite court rulings that uphold the rights of refugees, their impact is limited due to the absence of a supportive socio-political framework to enforce these decisions.³⁴ Government officials do not feel compelled to strictly adhere to the law, lack incentives for compliance, and face minimal accountability for legal violations.³⁵ The Constitutional Court has acknowledged the issue of inadequate enforcement, which poses a threat to the constitutional order. In the absence of efficient remedial measures, the principles and rights protected in the Constitution cannot be adequately upheld or strengthened.³⁶

This dissertation aims to address the issue of inadequate enforcement of refugee rights in South Africa, particularly focusing on their right to seek and enjoy asylum. The thesis sheds light on the potential of PIL as a valuable solution to tackle the lack of enforcement in this area.

Furthermore, this dissertation not only seeks to present PIL as a tool and provide illustrative case law but also suggests the utilization of the African philosophy of Ubuntu as a supporting framework for the arguments presented by strategic litigation lawyers. Since the Constitutional Court has already recognized Ubuntu as the ‘underlying motif of the Bill of Rights’,³⁷ this philosophy aligns perfectly with the rationale behind PIL. Ubuntu places significant value on community and emphasizes that our actions towards others have a reciprocal impact on us through interconnected social, economic, and political relationships.³⁸ PIL seeks to achieve broader societal progress beyond individual cases, ensuring that an entire community can benefit from court decisions. This highlights the shared values between Ubuntu and strategic litigation, emphasizing the importance of a strong community that supports each individual's ability to reach their full potential and safeguards human rights, including the rights of refugees.

³³ Amit (2011), SAJHR, p. 8.

³⁴ Ibid.

³⁵ Ibid.

³⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786, para 69.

³⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), para 37.

³⁸ Murithi, pp. 281ff.

1.4 Research Methodology

This dissertation aims to investigate the protection of refugees' rights to seek and enjoy asylum, by analysing the provisions of international refugee law and domestic South African law. The research methodology will primarily involve conducting desktop research and analysing academic texts and literature on the subject matter.

The examination of international law will encompass the study of key legal instruments such as the UN Refugee Convention, the UDHR, the OAU Refugee Convention, and the African Charter on Human and Peoples' Rights (Banjul Charter), to explore the rights of refugees to seek and enjoy asylum. Moreover, the research will delve into the scrutiny of domestic laws in South Africa, including the Constitution, the Refugees Act, and the Immigration Act 13 of 2002 (Immigration Act) to assess the rights of refugees in terms of seeking asylum within the national context. Additionally, to these primary sources, various other international and national laws, policies, documents, and handbooks will be examined to provide a comprehensive understanding of the topic.

To further enrich the research, various published articles and reports will be consulted. In addition, the analysis will involve reviewing case law related to PIL concerning access to RSD procedures in South Africa.

Lastly, the thesis will delve into exploring the Ubuntu philosophy by referring to various published articles and journals. This examination aims to assess the compatibility between Ubuntu and the concept of human rights and investigate how Ubuntu can potentially support PIL in South Africa.

1.5 Literature Review

Numerous scholars have extensively discussed the rights of refugees to seek and enjoy asylum. The analysis of international refugee law and domestic South African law in this thesis emphasizes the host states' obligation to safeguard these rights, including ensuring a fair RSD process. Moreover, various authors have explored the potential of PIL as an effective mechanism for supporting refugees in asserting their rights.

In 'Public Interest Litigation for Refugees in South Africa and the Potential for Structural Change', *Handmaker* discusses the emergence of PIL and its relevance to refugee rights in post-1994 democratic South Africa. The author shares personal experiences as a lawyer working for Lawyers for Human Rights (LHR), a Non-Governmental Organisation (NGO) in South Africa. *Handmaker* proposes three theoretical suggestions concerning the interactions between civic actors and the state and accountability: the capability of civic actors to hold states accountable, the influence of structure on civic agency, and the mediation of global rules by civic actors in local contexts. The author illustrates these propositions through examples from refugee law and policies. Particularly, his examination of the *Kiliko* case,³⁹ which addresses the access to the RSD procedure, is crucial for this dissertation. *Handmaker* highlights the potential of PIL to drive structural changes and underscores the need for a comprehensive approach that combines litigation, advocacy, community mobilization, and policy reform to address systemic issues faced by refugees.

Meili, in 'Constitutionalized Human Rights Law in South Africa: Does It Help Asylum-Seekers?', examines the impact of South Africa's progressive constitutional human rights provisions on refugees and asylum-seekers. Despite favourable court decisions, challenges arise from xenophobia and the DHA's reluctance to follow court rulings. The study highlights refugee lawyers' strategic approaches, using broad constitutional rights creatively. *Meili* emphasizes the pivotal role of the right to human dignity within the Constitution, referring to it as the primary element in the 'human rights cocktail'. The courts have consistently interpreted this right generously, particularly in favour of refugee claimants. The finding seamlessly supports the dissertation's perspective, highlighting the profound significance of human dignity in the human rights framework, resonating with the revered value accorded to it in the African Ubuntu philosophy.

In their article 'Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest', *Cote* and *Van Garderen* rely on their extensive experience at LHR to examine the obstacles encountered in PIL. They specifically address challenges faced in Post-Apartheid South Africa, focusing

³⁹ *Kiliko* supra note 14.

on litigation related to refugee rights. Their elaboration of the *Tafira* case⁴⁰ has been integrated into this dissertation. Furthermore, *Cote* and *Van Garderen* explore external as well as internal barriers surrounding successful PIL in the South African context. Ultimately, they conclude that strategic litigation has proven to be an effective tool in shaping public policy and amplifying the voices of vulnerable and marginalized individuals and communities, which is consistent with the argumentation of this dissertation.

Dugard and *Langford* in 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' build upon a report by Atlantic Philanthropies (one of the primary financiers of human rights organizations in South Africa) that outlines factors for successful PIL. However, instead of accepting the report's premises and recommendations as definitive, the authors critically engage with them to contribute to the ongoing discussion about the adoption and value of PIL. *Dugard* and *Langford* argue that strategic litigation is inherently unpredictable and diffuse, making it challenging to assess its effectiveness by employing a methodical or evidence-based approach. Nonetheless, they contend that such litigation holds greater potential for driving societal transformation than what the report suggests. The authors propose a broader and more contextualized framework for understanding the role of PIL and evaluating its impact. This framework acknowledges and accounts for the inherent power dynamics within the structure, the agency manifested through social mobilization, and the role of PIL as a means of shaping political processes. This article is particularly relevant to this dissertation because it demonstrates that despite existing criticism surrounding the factors that contribute to optimal outcomes of strategic litigation, the authors still maintain that PIL has the potential to bring about significant social change. This supports the arguments presented in this dissertation.

In 'Winning Isn't Everything: Courts, Context, and the Barriers to Effecting Change through Public Interest Litigation', *Amit* provides a comprehensive exploration of the impact of litigation and sheds light on the specific challenges faced by public interest advocates within the South African context. *Amit* notably emphasizes the discrepancy between legal principles and their practical application, particularly concerning the rights of refugees in South Africa. The author delves into the numerous hurdles that

⁴⁰ *Tafira* supra note 15.

impede the progress of PIL, such as the judiciary's role and the lack of implementation. Nonetheless, *Amit* also underscores the tangible outcomes that litigation can yield. This is exemplified through an examination of cases involving the accessibility of the status determination process, and the detention and deportation of refugees. Among others, *Amit* utilizes the cases of *Kiliko*⁴¹ and *Tafira*⁴² as illustrative examples, which also this dissertation delves deeper into. Finally, *Amit* urges both public interest lawyers and courts to foster more innovative and efficacious strategies that can effectively surmount these constraints.

To establish a connection between the human rights system, within which PIL operates, and the African philosophy of Ubuntu, certain authors have conducted a more in-depth exploration of the essence of Ubuntu. Through their examination, they have observed that Ubuntu aligns with the concept of human rights and finds resonance within it.

Murithi presents in 'A local response to the global human rights standard: the Ubuntu perspective on human dignity' a compelling argument that human rights should not be perceived solely as Western values. He emphasizes that the African continent has its own rich traditions, exemplified by the concept of Ubuntu, a traditional African ethical code that highlights values such as hospitality, generosity, and respect for every member of the community. The author provides a concise overview of the evolution of the human rights order, addressing the criticism that it predominantly embodies Eurocentric values and that voices from marginalized communities by colonizing forces were excluded. While acknowledging these critiques, *Murithi* highlights Ubuntu as a local reception and adaptation of the global human rights framework. According to him, Ubuntu has the potential to enhance our comprehension of human rights by promoting a framework centered on human dignity and the essence of being human, which aligns with the fundamental principles of human rights. *Murithi* concludes by analysing the potential impact of Ubuntu in reshaping and strengthening practical endeavours towards establishing a more efficient and pertinent human rights system, not solely in Africa but also in other global regions. He argues that Ubuntu can play a significant role in fortifying an ethical framework in Africa, assisting in the advocacy, monitoring, and advancement of human rights throughout the continent.

⁴¹ *Kiliko* supra note 14.

⁴² *Tafira* supra note 15.

This conclusion holds significant importance for this dissertation, as it underscores the potential of Ubuntu to support the promotion of human rights and therefore also the work of PIL in the field of human and refugee rights.

In the article ‘Decoloniality, Ubuntu and human rights in South Africa: a bridge to social justice’, *Geduld* explores the interconnectedness of decoloniality, Ubuntu, and the realization of human rights in South Africa. The author highlights notable judicial observations that illustrate how the essence of Ubuntu, firmly embedded in the cultural legacy of the people, resonates throughout the constitutional framework. These observations reveal a harmonization of individual rights with a communitarian philosophy, showcasing how Ubuntu permeates the legal landscape and influences judicial reasoning. The utilization of Ubuntu as a constitutional value in South African court decisions holds significant relevance for this dissertation as it underscores that PIL lawyers can use the spirit of Ubuntu in their argumentation to enforce constitutional rights as well as refugee rights in South Africa.

Lastly, *Metz* presents in ‘Ubuntu as a moral theory and human rights in South Africa’, a moral theory based on the Southern African worldview of Ubuntu. This theory proposes a fresh understanding of human dignity, stating that individuals possess dignity due to their ability to connect with others and demonstrate solidarity. According to this perspective, violations of human rights are severe underminings of this capacity. *Metz* advocates for a legal interpretation of Ubuntu that encompasses a wide range of intuitive human rights and offers guidance for resolving contemporary justice-related conflicts. He also addresses concerns about Ubuntu being vague, collectivist, and outdated, arguing that these worries should not prevent us from considering Ubuntu as a valid foundation for public morality. *Metz*’s point of view is consistent with the present argument made in this dissertation that Ubuntu resonates with the notion of human rights.

1.6 Chapter Synopsis

Chapter One of this dissertation provides an introductory overview of the topic of the enforcement of refugee rights in South Africa through PIL in the spirit of Ubuntu. The chapter begins by defining key terms used throughout the dissertation and establishes the central argument that will be explored in detail. Furthermore, it outlines the

framework of the thesis, including the specific aims, the methodology employed, and the literature that is analysed in support of the argument. This chapter serves as a foundation for the subsequent chapters, setting the stage for the comprehensive examination of the role of PIL in promoting and protecting refugee rights in South Africa with a focus on the right to seek and enjoy asylum.

In Chapter Two, an in-depth analysis is conducted on the provisions of refugee law in both international law and domestic South African law, specifically focusing on rights of refugees to seek and enjoy asylum, to elucidate the context in which PIL operates. The primary legal sources examined include the UDHR, the UN Refugee Convention, the OAU Refugee Convention, and the Banjul Charter. Additionally, significant attention is given to scrutinizing domestic laws in South Africa, particularly the Constitution and the Refugees Act. Through the examination of these various sources of law, it becomes evident that host states bear the responsibility of safeguarding the rights of refugees, including their right to seek and enjoy asylum. This obligation necessitates the establishment of a fair process for the mandatory RSD procedure within South Africa.

Chapter Three delves into the core issue of the disparity between existing refugee laws and the practical realities experienced in South Africa. Despite the binding legal obligation to grant refugees entry into the country, provide them the chance to seek and enjoy asylum, and ensure a fair RSD procedure, these rights remain often unfulfilled. Consequently, ongoing violations of the rights of asylum seekers and refugees persist. To address this problem, the dissertation explores the potential of PIL to assist refugees in asserting their rights. This includes an examination of its components, objectives, and obstacles. Furthermore, the *Kiliko*⁴³ and the *Tafira*⁴⁴ cases are presented to illustrate instances where PIL has been employed to enforce fair access to the RSD procedure in South Africa.

Chapter Four introduces a crucial aspect of this dissertation, focusing on the African philosophy of Ubuntu. The chapter aims to demonstrate that Ubuntu aligns with the principles of human rights and, as a result, can be utilized as a persuasive argument in

⁴³ *Kiliko* supra note 14.

⁴⁴ *Tafira* supra note 15.

PIL cases to advocate for the rights of refugees in South Africa. The essence of Ubuntu, encapsulated by the principle of ‘I am because you are’, emphasizes interconnectedness and the importance of collective well-being. By invoking Ubuntu in PIL, lawyers can not only seek to protect the rights of refugees guaranteed by the Constitution but also strive to fulfil the spirit of Ubuntu, promoting the broader public interest and effecting positive societal change going beyond the individual case. The South African Constitutional Court has already recognized Ubuntu as the ‘underlying motif of the Bill of Rights’,⁴⁵ further validating its relevance and potential in supporting the argumentation of PIL lawyers concerning refugee rights.

In Chapter Five, the dissertation draws upon its key findings to provide recommendations and offer a conclusive analysis. This section presents practical suggestions and insights based on the research conducted, aiming to address the identified gaps and challenges related to the protection of refugee rights in South Africa.

2. CHAPTER TWO – REFUGEE RIGHTS NORMATIVE FRAMEWORK: CONTEXTUALIZING THE LANDSCAPE FOR PIL

2.1 Introduction

Chapter Two of the dissertation provides an overview of the normative framework for refugee law, concentrating specifically on the right of refugees to seek and enjoy asylum. This emphasis is deliberate, as regardless of the asylum procedure's outcome, it remains crucial to ensure that each refugee is afforded access to a fair asylum process, consistent with human rights and constitutional principles while upholding the human dignity of every individual. The chapter begins by discussing the existing international laws that protect refugee rights and their origins. Then, the attention will shift to South Africa's domestic legislation and its development in relation to refugee protection, as well as the RSD process overseen by the DHA.

This chapter lays the groundwork for comprehending the normative context and pertinent procedures, paving the way for the subsequent exploration of PIL and two illustrative case examples in Chapter Three. It is essential for clarifying the operational context of PIL and facilitating a thorough examination of refugee issues within the

⁴⁵ *Port Elizabeth Municipality* supra note 37, para 37.

RSD process. This connection to the normative framework will be further extended to the values of Ubuntu in Chapter Four. The ultimate aim is to underscore that this understanding can serve as a robust legal argumentation resource for public interest litigators engaged in refugee rights cases.

2.2 International Normative Framework

Throughout history, refugee law scholars have highly praised the use of a human rights-centered approach as the most suitable method for dealing with the challenges encountered by refugees.⁴⁶ Therefore, the progress of refugee rights is closely interconnected with the establishment of the broader international human rights framework, which emerged in the 20th century and was largely driven by the aftermath of the Second World War. Both, the development of refugee rights and the broader international human rights framework, were catalysed by the atrocities and displacement witnessed during this global conflict.⁴⁷ The recognition of the need to protect and support individuals fleeing persecution and violence played an essential role in shaping the contemporary understanding of refugee rights and the establishment of comprehensive human rights norms on an international scale.⁴⁸

Today, international law recognizes and defends refugee rights, which can be traced back to several origins: treaties like universal and regional conventions, established practices in customary law, general principles of law, and continually evolving standards in the actions of nations and international bodies, especially the United Nations High Commissioner for Refugees (UNHCR).⁴⁹ The UNHCR strongly advocates for the extension of human rights to refugees, especially because refugees, by definition, have been deprived of their human rights in their home countries. Ensuring that refugees are not subject to discrimination and have access to human rights is vital for their comprehensive protection.⁵⁰

It is crucial to highlight that refugee rights should not be seen as a replacement for or in opposition to universal human rights.⁵¹ Rather, they act as a way to address the

⁴⁶ Khan, p. 262.

⁴⁷ Cote, in: Khan, Schreier, p. 239; Hathaway, p. 75.

⁴⁸ Ibid.

⁴⁹ Maluwa, Katz, p. 133.

⁵⁰ Khan, p. 267.

⁵¹ Hathaway, p. 75.

unique vulnerabilities faced by refugees that might hinder their ability to receive sufficient protection within the wider human rights framework. In simpler terms, refugee rights serve as a mechanism to guarantee that refugees can fully benefit from the comprehensive system of human rights protection.⁵²

The UN Refugee Convention holds a prominent position as the primary cornerstone of international law in protecting refugee rights.⁵³ This treaty originates from Article 14 of the UDHR, which asserts the right of all individuals to seek and enjoy asylum.⁵⁴ The UN Refugee Convention represents the culmination of centuries of practices and customs involving the granting and seeking of asylum protection by states and sovereign authorities. It formalizes and codifies these long-standing traditions into a comprehensive legal framework.⁵⁵

The 1969 Vienna Convention on the Law of Treaties (Vienna Convention) established that international treaty provisions should be interpreted according to their ordinary meaning, within the overall context of the treaty's purpose, and taking into account subsequent agreements made by state parties.⁵⁶ To appropriately interpret the UN Refugee Convention and understand its goals and objectives, it is crucial to consider the International Bill of Rights. This includes significant human rights instruments such as the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties provide protection to 'everyone' or 'all persons', which naturally encompasses refugees as well.⁵⁷ By taking into account these foundational human rights documents, the proper context of the UN Refugee Convention can be established, enabling a comprehensive understanding of its provisions and ensuring a holistic approach to refugee rights.⁵⁸

⁵² Hathaway, p. 75.

⁵³ *Ibid.*

⁵⁴ Article 14 UDHR; Khan, p. 266.

⁵⁵ Cote, in: Khan, Schreier, p. 239.

⁵⁶ Khan, p. 267; Clark, Crepeau, p. 389.

⁵⁷ Khan, p. 267.

⁵⁸ Hathaway, pp. 8ff; Khan, p. 267.

To strengthen this, the UN Refugee Convention states in Article 5:

‘Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.’

This key provision offers guidance for analysing and interpreting the Convention, obligating governments to uphold all refugee rights outlined in this treaty and in other international human rights agreements.⁵⁹

The primary goal of the UN Refugee Convention is crystal clear: it seeks to ensure that refugees receive the full spectrum of their human rights, which are protected by various other treaties in international law.⁶⁰ Furthermore, the UN Refugee Convention explicitly states in its Articles 6⁶¹ and 7(1),⁶² that refugees should be treated on an equal footing with non-citizens in general, and any legal requirements must be met ‘under the same conditions’. This underscores the principle of non-discrimination, emphasizing that refugees should not face discriminatory treatment and should be provided with equal rights and opportunities as other individuals under the law.⁶³

In Africa, the UN Refugee Convention has been complemented by the OAU Refugee Convention, which acts as a valuable addition.⁶⁴ However, it is vital to recognize that the UN Refugee Convention continues to hold its position as the foremost and universally recognized legal instrument for safeguarding refugees.⁶⁵ The primary objective of the OAU Refugee Convention is to provide refuge and safeguard individuals in particular humanitarian circumstances, particularly when there are large numbers of people seeking refuge due to circumstances in their home country that align with the criteria outlined in Article 1(2) of the OAU Refugee Convention.⁶⁶ In

⁵⁹ Khan, p. 267.

⁶⁰ Edwards, p. 305.

⁶¹ **Article 6 UN Refugee Convention**

‘For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.’

⁶² **Article 7 UN Refugee Convention**

‘1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.’

⁶³ Edwards, p. 324.

⁶⁴ Khan, p. 266.

⁶⁵ UNHCR, Executive Committee Meetings, Conclusion No. 87 (L) - 1999, para (f); Conclusion No. 89 (LI) - 2000; Conclusion No. 103 (LVI) - 2005.

⁶⁶ UNHCR Guidelines on International Protection No. 12, para 6.

the majority of cases, the definitions of a refugee outlined in both, the UN Refugee Convention and the OAU Refugee Convention, are relevant and applicable when evaluating an individual's claim for refugee status.⁶⁷ But, the OAU Refugee Convention expands the definition of a refugee so that there are limited circumstances where a person may fulfil the criteria set by the OAU Refugee Convention but not meet the specific requirements specified in the UN Refugee Convention.⁶⁸ This may occur, for instance, when there is no direct link between their fear of persecution and one of the grounds outlined in the UN Refugee Convention. In such instances, Article 1(2) of the OAU Refugee Convention broadens the potential range of individuals eligible for refugee status.⁶⁹

Furthermore, according to the Vienna Convention, a country is obligated to fulfil its international legal responsibilities in a sincere and genuine manner.⁷⁰ Regarding the OAU Refugee Convention, African Union member states have an obligation to furnish the African Union with details regarding the status of refugees, the execution of the Convention, and, more broadly, the prevailing legislation, regulations, and decrees concerning refugees.⁷¹ Additionally, member states have a duty to cooperate with the UNHCR. This cooperation ensures that the OAU Refugee Convention effectively complements the UN Refugee Convention in the African region,⁷² as well as granting the UNHCR the authority to carry out international obligations for safeguarding, as outlined in its mandate, even in countries that have not ratified the UN Refugee Convention.⁷³

In addition, a notable factor for Africa is the Banjul Charter, which has been ratified by all member states of the African Union. This charter encompasses a range of rights, encompassing civil, political, economic, social, and cultural rights that apply to all individuals, irrespective of their nationality or legal standing, and without any discriminatory treatment. Consequently, refugees are entitled to the protection

⁶⁷ UNHCR, 'Key legal considerations on the standards of treatment of refugees recognized under the 1969 OAU Refugee Convention governing the specific aspects of refugee problems in Africa', para 4.

⁶⁸ Maluwa, Katz, pp. 138, 190.

⁶⁹ UNHCR Guidelines on International Protection No. 12, para 8.

⁷⁰ Article 26 Vienna Convention on the Law of Treaties.

⁷¹ Article 7 OAU Refugee Convention.

⁷² Article 8 OAU Refugee Convention and Preamble, para 11.

⁷³ UNHCR, 'Key legal considerations on the standards of treatment of refugees recognized under the 1969 OAU Refugee Convention governing the specific aspects of refugee problems in Africa', para 11.

afforded by the Banjul Charter – except for Article 13, which specifically pertains to 'citizens'.⁷⁴

Lastly, it is important to emphasize that the UN Charter⁷⁵ holds a unique position as the exclusive accord with the ability to enforce legally obligatory human rights obligations on all UN members.⁷⁶ This binding nature can be effectively utilized through legal instruments such as PIL to demand compliance with the prescribed responsibilities and ensure compliance with the guaranteed rights and obligations.

2.3 South African Normative Framework

Having explored the international legal framework, let's now delve into a more detailed examination of South Africa. The immigration history of the country is deeply connected to its history of racial discrimination and apartheid.⁷⁷ The racially biased immigration policy, codified in the 1937 Aliens Control Act,⁷⁸ favoured white immigrants who could assimilate, while non-white migrant laborers were only allowed temporary entry through a separate process, with no path to permanent residency.⁷⁹

In the early 1990s, South Africa underwent significant political, legal, and institutional changes, marking a departure from its authoritarian and colonial past. These changes laid the foundation for a democratic government based on universal franchise, accountability, and social justice.⁸⁰ Decades of striving for social justice culminated in the end of white minority rule and the introduction of democratic elections in 1994.⁸¹

While this shift towards inclusivity and equity was transformative,⁸² it also posed new challenges, particularly in recognizing and protecting the rights of refugees and migrants.⁸³ The arrival of refugees from various African countries seeking asylum in South Africa has not only influenced the country's demographic landscape but has also

⁷⁴ UNHCR, 'Key legal considerations on the standards of treatment of refugees recognized under the 1969 OAU Refugee Convention governing the specific aspects of refugee problems in Africa', para 8.

⁷⁵ Charter of the United Nations, 1945.

⁷⁶ Hathaway, p. 33.

⁷⁷ Meili, p. 187.

⁷⁸ South African Aliens Act 1 of 1937.

⁷⁹ Ruedin, p. 1109; Meili, p. 188.

⁸⁰ Handmaker (2011), p. 69.

⁸¹ Meili, p. 193; Handmaker (2011), p. 65.

⁸² Handmaker (2011), p. 69.

⁸³ Ibid, p. 65.

had a noticeable impact on public sentiments and political discourse.⁸⁴ On one hand, South Africa transitioned from exclusionary policies to inclusive ones, guided by its new Constitution. It not only embraced international refugee laws but also enacted its own legislation to address refugee issues. This shift significantly changed the country's approach to refugee policies.⁸⁵ However, on the other hand, despite changes in racial politics, South Africa's immigration policies remained strict and were enforced rigorously. Between 1994 and 2000, the country deported over 600,000 non-citizens. The granting of rights to black South Africans in 1994 created a distinction based on citizenship, which contributed to xenophobia against non-citizens.⁸⁶

Currently, the legal framework that applies to refugees in South Africa is a combination of international and domestic law.⁸⁷ The country ratified both the UN Refugee Convention and the OAU Refugee Convention, including their optional protocols. As a result, these agreements can be directly applied and enforced within the country's national legal system.⁸⁸

On the domestic level, South Africa possesses three primary legislations that safeguard the rights of refugees, which are examined in more detail below. The first one is the Constitution, which incorporates a Bill of Rights which is applicable not only to citizens but also to refugees.⁸⁹ The second law which relates in particular to the entry, stay, and departure of non-nationals in South Africa is the Immigration Act of 2002. The third and probably most important regulation for refugees is the Refugees Act 130 of 1998, specifically enacted to address matters concerning refugees within the country.

2.3.1 Constitution of 1996

The South African Constitution, implemented in 1996, is considered by many scholars as one of the most progressive Constitutions in the world.⁹⁰ It safeguards a range of

⁸⁴ Quan, Addaney, p. 78.

⁸⁵ Khan, p. 268.

⁸⁶ Meili, p. 188.

⁸⁷ Maluwa, Katz, p. 133.

⁸⁸ Handmaker (2011), p. 70.

⁸⁹ Cote, Van Garderen, pp. 170ff; Amit (2011), SAJHR, p. 9.

⁹⁰ Meili, p. 193.

fundamental rights and aims to achieve social justice.⁹¹ The preamble explicitly states that it was adopted to:

‘Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person;
and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.’

The Constitution acts as a constraint on parliamentary power, ensuring that it operates within the framework of constitutional principles and safeguards individual rights and freedoms.⁹² To illustrate, it includes several socio-economic rights, including the right to housing, healthcare and education.⁹³ The inclusion of these rights in the Constitution has made them justiciable, meaning that individuals can bring legal claims to enforce and protect these rights which has been crucial in promoting accountability and ensuring the realization of these rights.⁹⁴

Furthermore, the Constitution embraces international human rights law in two key ways.⁹⁵ Firstly, its Bill of Rights guarantees a broad range of rights, including dignity, freedom, and just administrative action, to all individuals, including refugees.⁹⁶ The Constitutional Court delved into the matter of constitutional protections for non-citizens in its 2004 decision in the *Lawyers for Human Rights v Minister of Home Affairs* case.⁹⁷ Rooted in the principle of human dignity, the court's ruling firmly established that the Constitution safeguards all non-citizens in South Africa, irrespective of their entry status.⁹⁸ This decision paved the way for legal challenges against government policies affecting non-citizens, even those without immigration status. It underscores the court's broad interpretation of constitutional rights, especially

⁹¹ Geduld, p. 381.

⁹² Cote, Van Garderen, pp. 170ff.

⁹³ Section 26, 27 and 29 of the Constitution.

⁹⁴ Cote, Van Garderen, pp. 170ff.

⁹⁵ Meili, p. 193.

⁹⁶ Meili, pp. 180, 193; Maluwa, Katz, p. 134.

⁹⁷ *Lawyers for Human Rights and Other v Minister of Home Affairs and Other* 2004 (4) SA 125 (CC).

⁹⁸ *Ibid*, para 26.

the right to human dignity in the context of refugees.⁹⁹ Consequently, the Bill of Rights applies to everyone in South Africa, including refugees, facilitating their integration into society.¹⁰⁰

Secondly, the Constitution explicitly incorporates international law in interpreting the Constitution and legislation. This highlights the importance of international human rights law in protecting refugees within the country, especially considering the limited reliance on international law in refugee matters.¹⁰¹

Regarding PIL, the Constitution contains important provisions that are indispensable for the work of public interest litigators to effectively enforce the rights of refugees. Section 33(1) of the Constitution guarantees that:

‘Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.’

Section 34 guarantees that all individuals have the right to utilize the court system to resolve disputes that can be resolved through legal means.¹⁰² The courts in South Africa have consistently upheld that these rights apply to every individual, irrespective of their citizenship or status.¹⁰³

Additionally, a crucial tool for litigators is Section 38, titled 'Enforcement of rights', which states:

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;

⁹⁹ Meili, pp. 212ff.

¹⁰⁰ Khan, p. 271; Landau (2006), pp. 308ff.

¹⁰¹ Meili, pp. 194ff.

¹⁰² **Section 34 Constitution**

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

¹⁰³ *Lawyers for Human Rights* supra note 97, para 27; *Tafira* supra note 15.

- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.’

This provision has broadened the scope by allowing various parties, including those with greater resources than the average person, to bring applications on behalf of individuals or groups whose rights have been violated. Previously, only the person directly affected by an unlawful action had the right to bring a matter to court.¹⁰⁴ As a result, Section 38 enables organizations, advocacy groups, and entities with substantial resources to initiate legal proceedings in cases where constitutional rights are at stake.¹⁰⁵

Consequently, Section 38 serves to promote access to justice and provides a means for those who may not have the necessary resources or capacity to litigate on their own behalf. It helps to ensure that a wide range of parties can actively participate in upholding and defending constitutional rights in South Africa such as PIL organisations. The case *Lawyers for Human Rights v Minister of Home Affairs* emphasizes the importance of the South African Constitution's inclusive standing requirements as the court ruled that LHR had standing as they acted in the public interest under Section 38(d) of the Constitution, since the case was essential for freedom and dignity, particularly affecting vulnerable individuals.¹⁰⁶ This underscores the significance of Section 38, especially for asylum-seekers who rely on NGOs to litigate cases due to their limited resources.¹⁰⁷

One last notable aspect of the Constitution in the context of refugees is the absence of a specific right to seek asylum. While some legal experts believed that including such a constitutional right would restrict the government's ability to curtail the rights of asylum-seekers through policy modifications or legislative changes, others argued that the existing Refugees Act (which allows for asylum applications)¹⁰⁸ along with various other constitutional rights rendered an explicit right to seek asylum redundant.¹⁰⁹ There

¹⁰⁴ Cote, Van Garderen, pp. 170ff.

¹⁰⁵ Ibid.

¹⁰⁶ *Lawyers for Human Rights* supra note 97, paras 14-23.

¹⁰⁷ Cote, Van Garderen, pp. 170ff; Meili, p. 195.

¹⁰⁸ Sections 21-24 Refugees Act.

¹⁰⁹ Meili, p. 194.

is no need to elaborate on this dispute, since fortunately, as mentioned above, the Refugee Act addresses the right to seek asylum.

2.3.2 *Immigration Act of 2002*

The primary legislation governing the entry, stay, and exit of non-nationals in South Africa is the Immigration Act. This act replaced the Aliens Control Act of 1991 and is part of a series of laws that have regulated immigration control across South Africa's borders.¹¹⁰

It is worth noting that immigration law and refugee law are distinct systems, although there may be certain areas of overlap.¹¹¹ They should not be seen as exceptions to one another but rather as two independent systems that depend on the purpose of entry and stay in the country.¹¹² In cases where there is an overlap, the Acts provide for referral to the relevant legislation as necessary.¹¹³ The Constitutional Court declared that the Immigration Act must be read in harmony with the Refugees Act.¹¹⁴ Moreover, the court stated that the Refugees Act establishes clear and detailed provisions for processing asylum applications and determining refugee status whether the Immigration Act does not account for these provisions at all.¹¹⁵ According to the court, the high level of specificity in the Refugees Act implies that it governs asylum applications, regardless of the order in which the Acts were enacted.¹¹⁶ As a result, we are prompted to examine the Refugees Act more closely, as it can be considered as *lex specialis* specifically addressing refugee-related issues in comparison to the Immigration Act.

2.3.3 *Refugees Act 130 of 1998*

Despite having a longstanding history of migration, South Africa only commenced the formal admission of asylum seekers and the recognition of refugees by internationally recognized criteria around 1993.¹¹⁷ Prior, the country had not ratified the UN Refugee Convention, nor the OAU Refugee Convention. During that time, the country's

¹¹⁰ Cote, in: Khan, Schreier, p. 239; Maluwa, Katz, p. 134.

¹¹¹ Cote, in: Khan, Schreier, p. 240.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC), para 43.

¹¹⁵ Ibid, para 44.

¹¹⁶ Ibid.

¹¹⁷ Handmaker (2011), p. 65.

immigration policies were based on racist principles, promoting immigration from Europe and white populations from former colonies while actively discouraging the immigration of African peoples, except for labour needs in mining and farming.¹¹⁸ In rare instances, refugees were allowed into the country through exemptions to immigration legislation.¹¹⁹

In 1996, South Africa became party to the UN Refugee Convention and the OAU Refugee Convention, not long after the fall of Apartheid, and entered into an agreement with the UNHCR regarding the protection of refugees.¹²⁰ However, the documentation process for asylum seekers and refugees was still carried out as an exemption to the Aliens Control Act 3 of 1993, which, however, did not contain any specific regulations for refugees.¹²¹ Therefore, South Africa's approach to individuals from other countries indicated a belief that the rights of asylum seekers should be restricted to the greatest extent possible.¹²²

The existence of this legal loophole and the government's involvement in the field of domestic refugee law created an opening for NGOs such as LHR to actively advocate for and submit proposals for the development of new legislation.¹²³ This already demonstrates one potential form of PIL, a more direct strategic litigation form will be explored in Chapter Three.

As a result of the efforts of LHR and several other refugee advocates including the Legal Resources Centre (LRC), the Refugees Act was passed in 1998 and came into force in 2000, laying the foundation for an effective and human rights-based refugee protection framework in South Africa. This legislation represented a significant step forward in providing adequate protection and support for refugees in the country.¹²⁴

The Refugees Act is read together with and is further elaborated in detail in the Refugees Act Regulations.¹²⁵ It includes the definition of a refugee and acknowledges

¹¹⁸ Peberdy, pp. 4ff; Cote, in: Khan, Schreier, p. 239.

¹¹⁹ Cote, Van Garderen, p. 170.

¹²⁰ Meili, p. 196.

¹²¹ Cote, Van Garderen, p. 170; Maluwa, Katz, p. 204.

¹²² Maluwa, Katz, p. 204.

¹²³ Cote, Van Garderen, p. 170.

¹²⁴ Ibid.

¹²⁵ Refugee Act Regulations, GN R366 GG 21075 of 6 April 2000.

asylum based on five criteria: race, religion, nationality, political opinion, and belonging to a specific social group.¹²⁶ These criteria mirror those outlined in the UN Refugee Convention and the OAU Refugee Convention.¹²⁷

The Refugees Act acknowledges the vulnerable position of refugees and asylum-seekers, ensuring that these marginalized groups receive the types of international law protection that had long been unavailable to the black population in South Africa.¹²⁸ The preamble of the Refugees Act asserts its aim to receive and handle refugees within its borders according to the standards and principles outlined in international law. This involves, as outlined in Section 6, adhering to the provisions of the OAU Refugee Convention, the UN Refugee Convention, the UDHR, and any other pertinent human rights treaty that South Africa is a signatory to.¹²⁹ In particular, the Refugees Act explicitly embraces the OAU's expanded criteria for refugee status by including 'tribe' as a ground for persecution, enabling protection under the OAU Refugee Convention. Additionally, it incorporates 'gender' and 'sexual orientation' within the OAU Refugee Convention's definition of 'particular social group'.¹³⁰

Furthermore, alongside expanding the parameters for granting asylum, the Refugees Act enabled the inclusion of asylum-seekers into South African communities by allowing them to live in any part of the country, pursue employment, and engage in educational opportunities.¹³¹ In addition, the Act introduces various procedural safeguards to guarantee that the treatment of asylum seekers aligns with the principles of administrative justice to uphold fair and transparent processes throughout the asylum application and determination procedures.¹³²

Thus, the Refugees Act provides refugees with a wide range of rights and explicitly applies the Bill of Rights in the Constitution to them. This marks a departure from the arbitrary practices during Apartheid, which excluded many black refugees and allowed for executive abuse.¹³³ In the past, South Africa used sovereignty to decide citizenship,

¹²⁶ Section 1 Refugees Act.

¹²⁷ Maluwa, Katz, pp. 171, 189.

¹²⁸ Section 1 Refugees Act.

¹²⁹ Amit (2011), SAJHR, p. 9; Ziegler, pp. 68ff.

¹³⁰ Ibid.

¹³¹ Landau, Amit, pp. 534, 539.

¹³² Amit (2011), SAJHR, p. 9.

¹³³ Crush, Pendleton, pp. 4ff.

but now, human rights considerations are a counterbalance.¹³⁴ The Refugees Act provides a strong legal framework for the protection of refugees, encompassing both substantive and procedural safeguards that promote the rights and well-being of asylum seekers and refugees in line with international and regional standards.¹³⁵

However, despite the UNHCR's praise of the Refugees Act in 2007 as 'one of the most advanced and progressive systems of protection in the world today',¹³⁶ refugees in South Africa still face discrimination, police harassment, and xenophobic attitudes.¹³⁷ Although the Refugees Act encompasses several provisions ensuring the protection of refugees' and asylum seekers' rights, a series of amendments that were implemented in early 2020 (Refugees Amendment Act of 2017) substantially eroded these protections.¹³⁸ These amendments involve the denial of refugee status, constraints on freedom of movement, restrictions on employment opportunities, and limitations on access to education.¹³⁹ Moreover, increasing xenophobia within public institutions over the past decade has complicated the development of refugee policies in South Africa. The rising number of asylum seekers and refugees, combined with the country's existing economic and social challenges, has raised doubts about the government's capacity to effectively handle the influx of migrants in the country.¹⁴⁰

2.4 Right of Refugees to Entry and Apply for Asylum

Regarding international law on the entry of refugees into a country, it is acknowledged that each state has the right to determine who can enter its territory and under what conditions. This right stems from the principles of territorial integrity and state sovereignty.¹⁴¹ However, while states possess this right, they must exercise it in compliance with international law principles and their own domestic legislation.¹⁴²

Article 14(1) of the UDHR acknowledges and upholds the internationally recognized right of individuals to seek and enjoy asylum from persecution. Therefore, the right to

¹³⁴ Khan, p. 267.

¹³⁵ Amit (2011), SAJHR, p. 9.

¹³⁶ Meili, p. 196.

¹³⁷ Landau, Jacobsen, pp. 44ff.

¹³⁸ Meili, p. 180.

¹³⁹ Meili, p. 197; Ziegler, pp. 87-95.

¹⁴⁰ Quan, Addaney, p. 78.

¹⁴¹ Cote, in: Khan, Schreier, p. 238; Dugard, pp. 299ff.

¹⁴² Ibid.

apply for asylum should not be considered as an exception to the principle of state sovereignty but rather as an inherent component of the international legal framework that states have committed to uphold. In other words, it is a fundamental aspect of the global legal system that rules the treatment of individuals seeking refuge.¹⁴³

In a rule-of-law-based framework, like that of South Africa, the concept of state sovereignty must be balanced with the existence of fundamental rights.¹⁴⁴ While there is no inherent right to be granted asylum, there is an absolute right to apply for asylum.¹⁴⁵ In South Africa, this right is derived from the legislature's use of language that does not allow for discretion in accepting asylum applications.¹⁴⁶ The Supreme Court of Appeal (SCA) has affirmed that the wording of the Refugees Act, along with its accompanying Regulations, clearly states that once an individual expresses their intention to seek asylum, they have the right to approach an RRO.¹⁴⁷ If the person is detained, they have the right to be released to submit their asylum application.¹⁴⁸ The court has emphasized the importance of upholding these entitlements for refugees seeking asylum in South Africa.¹⁴⁹

Furthermore, under Article 33(1) of the UN Refugee Convention, states are prohibited from refusing entry to refugees. This article unequivocally forbids states from forcibly expelling or returning ('refouler') a refugee in any form to a country where they may encounter persecution due to their refugee status. The Refugees Act incorporates this principle in Section 2,¹⁵⁰ expanding protection to prevent the return of any person, regardless of whether the individual has been officially recognized as a refugee, to a

¹⁴³ Cote, in: Khan, Schreier, p. 239.

¹⁴⁴ De Jager, in: Khan, Schreier, pp. 156ff.

¹⁴⁵ Edwards, p. 300.

¹⁴⁶ *Bula and Others v Minister of Home Affairs and Others 2012 (4) SA 560 (SCA)*, para 78.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ De Jager, in: Khan, Schreier, pp. 156ff.

¹⁵⁰ **Section 2 Refugees Act**

'Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in any part or the whole of that country.'

country where they may face persecution.¹⁵¹ The courts in South Africa have consistently recognized that this principle of non-refoulement lies at the heart of the protection of refugees.¹⁵² Treating individuals with actions such as arrest, detention, and deportation under the Immigration Act in a way that denies them access to the asylum process is regarded as equivalent to refoulement. Such denial constitutes a breach of South Africa's international obligations to protect refugees.¹⁵³

Despite the principle of non-refoulement is acknowledged as crucial for the protection of refugees, this dissertation does not delve into a detailed examination of this principle. Instead, the focus of this work is on the rights of refugees to seek and enjoy asylum and their access to status determination procedures, which is examined in more detail in the subsequent section.

2.5 Refugee Status Determination Procedure

When designing its framework for refugees and asylum, South Africa chose not to create refugee camps.¹⁵⁴ Instead of adopting an exclusive approach, the country has embraced an inclusive approach by establishing an RSD procedure, at least on paper. It is a structured and legal process whereby individuals have the chance to present their claims for refugee status to an authorized official of the host state. These officials possess the authority to grant refugee status if the claim is deemed valid.¹⁵⁵

The RSD is overseen by the DHA and the process is guided by a combination of international and domestic law, like the Refugees Act, its Regulations, the Immigration Act, the Promotion of Administrative Justice Act 3 of 2000, and the Constitution.¹⁵⁶ Furthermore, the RSD process is influenced by foreign legal precedents and guidelines, like the UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (UNHCR Handbook).¹⁵⁷ While the UNHCR Handbook does not possess the legal status of binding law, it has gained significant recognition as an

¹⁵¹ Cote, in: Khan, Schreier, p. 252; Maluwa, Katz, pp. 172ff.

¹⁵² Ibid.

¹⁵³ Cote, in: Khan, Schreier, p. 253.

¹⁵⁴ Kihato, Landau, pp. 407, 410.

¹⁵⁵ De Jager, in: Khan, Schreier, p. 153.

¹⁵⁶ De Jager, in: Khan, Schreier, p. 154; Meili, p. 195.

¹⁵⁷ De Jager, in: Khan, Schreier, p. 154.

authoritative resource outlining the RSD process.¹⁵⁸ It establishes that refugee status is not granted or conferred upon an individual but is a formal recognition of their pre-existing status as a refugee.¹⁵⁹ Consequently, the rights of a refugee are not contingent upon obtaining formal refugee status but are inherent based on the individual's circumstances. The SCA stated in *Abdi and Another v Minister of Home Affairs* that potential refugees need to show no more than that they are persons who might qualify as refugees.¹⁶⁰ Additionally, the UNHCR Handbook stresses the need for qualified and knowledgeable individuals in the RSD process to prevent wrongfully rejecting refugees, as empathy plays a crucial role.¹⁶¹

After having outlined the legal framework of the RSD, now we take a closer look at the eligibility procedure for asylum status which is detailed in Sections 21 to 24 of the Refugees Act and Section 23 of the Immigration Act. It follows a three-step process that encompasses the individual's entry into the country, the assessment of their refugee status, and, if approved, the granting of refugee status, which permits them to legally remain in South Africa for a specified period, typically two years. The three steps involved are as follows:

The first step is outlined in Section 21 of the Refugees Act highlighting the key element of the system, that asylum-seekers are required to personally submit their applications 'without delay' upon their entry into the country at one of the five RROs situated in Cape Town, Durban, Musina, Port Elizabeth, and Pretoria.¹⁶² Consequently, applying for asylum outside of South Africa, such as at an embassy, is not permitted.¹⁶³ Typically, to enter South Africa, applicants present themselves at a designated port of entry, which could be a land border crossing, a harbour, or an international airport,¹⁶⁴ as stipulated in Section 9(1) of the Immigration Act. In many cases, asylum applicants arrive at the border without any documentation, including passports or visas.¹⁶⁵ Upon arrival, the applicants declare their intention to seek asylum to the immigration officer

¹⁵⁸ *Fang v Refugee Appeal Board and Others* 2007 (2) SA 447 (T); *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T).

¹⁵⁹ UNHCR Handbook, para 28.

¹⁶⁰ *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA), para 28.

¹⁶¹ UNHCR Handbook, para 190.

¹⁶² DHA, 'Refugee Status & Asylum'; Schockaert, pp. 26, 29; Maluwa, Katz, pp. 166, 173.

¹⁶³ Cote, in: Khan, Schreier, p. 250.

¹⁶⁴ *Lawyers for Human Rights* supra note 97, para 7.

¹⁶⁵ Cote, in: Khan, Schreier, p. 250.

at the port of entry. In response, the officer issues a non-renewable 'asylum transit visa' under Section 23 of the Immigration Act which refers to the terms and conditions prescribed in the Refugees Act.¹⁶⁶ This permit remains valid for 14 days only and allows the individual to travel to the nearest RRO to initiate the process of applying for asylum.¹⁶⁷

The second step involves the lodging of the asylum application at a designated RRO. A Refugee Status Determination Officer (RSDO) is responsible for verifying the proper completion of asylum applications. If required, the RSDO is obligated to aid the applicant in filling out the form and may carry out an inquiry to authenticate the information provided in the application.¹⁶⁸ Additionally, RSDOs must guarantee that applicants have a comprehensive understanding of the procedures, as well as their rights and responsibilities in the process.¹⁶⁹ During this stage, an admissibility hearing occurs, and upon its successful completion, an 'asylum seeker visa' is granted to the individual seeking asylum in accordance with Section 22 of the Refugees Act.¹⁷⁰ The permit serves as temporary documentation, providing legal status for the asylum seeker's stay in South Africa for six months. It serves to legitimize their presence while they await a final decision on their application for refugee status. If necessary, the RRO has the authority to extend the permit for an additional six-month period while the status determination process is still in progress. The Section 22 permit grants the right to work, study, and protects against deportation to their country of origin.¹⁷¹

The final step is the conclusion of the RSD process. Before the expiration of their initial permit, asylum seekers undergo a second interview at the RRO, during which an RSDO renders the final decision on their asylum status.¹⁷² If the asylum seeker is granted refugee status, they receive written recognition of their status in the form of a Section 24 permit as prescribed by the Refugees Act.¹⁷³ This permit grants the refugee

¹⁶⁶ **Section 23 Immigration Act**

'The Department may issue an asylum permit to an asylum seeker subject to the Refugees Act, 1998 (Act No. 130 of 1998), on any prescribed terms and conditions.'

¹⁶⁷ DHA, 'Refugee Status & Asylum'.

¹⁶⁸ Maluwa, Katz, p. 166.

¹⁶⁹ Ibid.

¹⁷⁰ DHA, 'Refugee Status & Asylum'.

¹⁷¹ DHA, 'Refugee Status & Asylum'; Maluwa, Katz, p. 168.

¹⁷² Schockaert, p. 29.

¹⁷³ DHA, 'Refugee Status & Asylum'; Khan, p. 279.

the right to remain in South Africa for a specific duration, typically around two years, and can be renewed through a review process.¹⁷⁴ As the SCA stated,

‘[T]imely access to an RRO is thus critical not just for asylum seekers to legalize their stay in this country, but also for the effective protection of their rights.’¹⁷⁵

While the Section 24 permit is valid, the refugee is permitted to work and study in South Africa.¹⁷⁶ This allows them the opportunity to integrate into society and make valuable contributions to the local community during their stay in the country.¹⁷⁷ In the event of a denial, the applicant has the option to appeal the decision to the Refugee Appeal Board.¹⁷⁸ These decisions can further be appealed to the High Courts, and ultimately, to either the Constitutional Court or the SCA.¹⁷⁹

To safeguard the rights of refugees, Section 21(4) of the Refugees Act stipulates, in line with Article 31 of the UN Refugee Convention, that no legal proceedings can be initiated or continued against asylum applicants who are awaiting a decision, provided they have had the opportunity to exhaust their rights to review or appeal. This protection also extends to applicants who have been granted asylum, preventing legal actions related to their unlawful entry or presence in South Africa.¹⁸⁰

Although the RSD process may be described in three steps, it cannot be characterized as an easy procedure. Instead, South Africa's system for determining refugee status is plagued by numerous issues that leave asylum-seekers without adequate protection.¹⁸¹ From the outset, much is demanded from vulnerable and often traumatized refugees upon their arrival in South Africa.¹⁸² The requirement for individual, in-person applications presents an additional challenge, as new applicants must complete a nine-page application form in English. Many refugees struggle with this process, as

¹⁷⁴ Schockaert, p. 29.

¹⁷⁵ *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* 2015 (3) SA 545 (SCA), para 4.

¹⁷⁶ DHA, ‘Refugee Status & Asylum’.

¹⁷⁷ Ibid.

¹⁷⁸ Schockaert, pp. 28ff.

¹⁷⁹ Meili, pp. 197ff; HRW, ‘Living on the Margins - Inadequate protection for refugees and asylum seekers in Johannesburg’.

¹⁸⁰ Maluwa, Katz, p. 166.

¹⁸¹ Amit (2011), IJRL, pp. 458ff.

¹⁸² Khan, p. 273.

interpreters, a crucial resource, are often in short supply.¹⁸³ Consequently, refugees frequently find it difficult to present a comprehensive claim during their initial encounter with the RSDO, highlighting the negative impact of the bureaucratic system outlined in the Refugees Act. The system imposes a significant burden on refugees, both physically and emotionally, as they endure long queues, sometimes stretching throughout the day and night, to access essential services.¹⁸⁴

Moreover, refugees report experiencing mistreatment at various points of interaction with the DHA, where officials frequently make unlawful decisions despite clear policies and legislation in place. DHA officials are known to arbitrarily deny refugees access to the asylum system, reject permit extensions, exhibit general slowness and inefficiency, and engage in malicious actions with impunity against foreigners. This behaviour, known as 'gatekeeping,' aims to keep foreigners out rather than creating a fair and transparent process.¹⁸⁵

2.6 Conclusion

In conclusion, South Africa has implemented a forward-thinking framework of norms to safeguard the rights of refugees deciding against an exclusive refugee camps policy but for a legal opportunity to enter and stay in the country under refugee status following a determined RSD procedure. The emphasis on this administrative law-based procedure should guarantee fair and just procedures throughout the asylum application and determination process, at least on paper.

In theory, the inclusive approach of adopting an RSD procedure should ensure the freedom of movement for asylum-seekers during the processing of their claims, but in reality, it has resulted in a set of intricate policies that have contributed to the imprisonment and expulsion of thousands of individuals seeking asylum.¹⁸⁶ This overlooks the significant repercussions of negative decisions, which can have severe consequences for individuals and undermine the overall principle of refugee protection. Consequently, the RSD process, often regarded as the 'doorway' to the

¹⁸³ Amit (2010), p. 36.

¹⁸⁴ De La Hunt, p. 7.

¹⁸⁵ Khan, p. 275.

¹⁸⁶ Meili, p. 197.

refugee regime,¹⁸⁷ becomes a daunting procedural hurdle that individuals must overcome to remain in South Africa during the asylum period. This contrasts with the ideal of extending a warm welcome and presenting a promising opportunity for a new, safe life free from persecution.

As already slightly outlined above and further explained in the next chapter, the country grapples with a huge gap between law and practice concerning the rights of refugees and the RSD procedure. Such a discrepancy is untenable, especially considering that, as previously highlighted, the RSD process plays a pivotal role in granting refugees access to their rights in South Africa. To align with its human rights obligations, South Africa must establish and execute a robust adjudicative system that incorporates oversight mechanisms and upholds the principles of the rule of law throughout the RSD process. To ensure this, public interest litigation can be a valuable and effective legal tool to safeguard individuals' constitutional rights throughout the RSD procedure.

3. CHAPTER THREE – PUBLIC INTEREST LITIGATION AS A POTENTIAL REMEDY FOR ENFORCEMENT GAPS

3.1 Introduction

Chapter Three will address the issue of the lack of enforcement of existing refugee laws in South Africa, highlighting a significant disparity between law and practice. Despite a historic transition from authoritarian to democratic rule in 1994,¹⁸⁸ social change and transformation have been slow, leaving many South Africans disillusioned and dissatisfied with the government's inability to bridge the social and economic divide.¹⁸⁹

In the following section of this chapter, a potential solution to the lack of enforcement is introduced: the use of public interest litigation. This legal tool's elements, objectives, and challenges are explored, with a focus on its application in South Africa's refugee law. Specific example cases will be examined, particularly those that challenge administrative law concerning refugees' right to seek asylum in South Africa. By examining refugee legal advocacy in South Africa, this dissertation delves into how

¹⁸⁷ RSD Watch, 'What is UNHCR RSD?'.
¹⁸⁸ Handmaker (2011), p. 65.
¹⁸⁹ Cote, Van Garderen, p. 167.

PIL, as a form of confrontational civic-state interaction, can bring about structural changes for refugees.

3.2 Gap between Law and Practice

At first glance, South Africa's legal system initially appears progressive because of its bold new Constitution and a Bill of Rights that ensures administrative justice and protects the rights of asylum seekers and refugees.¹⁹⁰ But despite legal protections, many refugee rights go unfulfilled, leading to ongoing violations against asylum seekers and refugees.¹⁹¹ While South African refugee legislation theoretically allows for local integration, there is a lack of a comprehensive policy to support the legal, social, and economic integration of refugees in practice – implementation often falls short of legal principles.¹⁹²

The ability to seek and enjoy asylum in another country loses its meaning if an individual seeking asylum is unable to access the process of applying for refugee status in that country.¹⁹³ In South Africa, the Refugees Act held significant potential for establishing an effective refugee protection system based on human rights principles, at least on paper.¹⁹⁴ It theoretically allows anyone to seek asylum, with the only requirement being their physical presence at an RRO. However, the seemingly straightforward procedure has been complicated by implementation issues that took two years to resolve.¹⁹⁵ Unfortunately, this marked already the initial indication of a dysfunctional and politically frustrated system. Even to this day, it has not been adequately put into practice, resulting in ongoing problems like failure to provide proper documentation and facilities for determining the refugee status of asylum seekers.¹⁹⁶ Moreover, the dysfunctional system has made refugees vulnerable to arrest, detention, and deportation.¹⁹⁷

Research indicates that a majority of RSD decisions suffer from legal errors, prioritize irrelevant factors over relevant ones, fail to provide sufficient explanations, lack

¹⁹⁰ Meili, p. 177; Amit (2011), SAJHR, p. 9.

¹⁹¹ Amit (2011), SAJHR, p. 9; Maluwa, Katz, pp. 204ff.

¹⁹² Khan, p. 271.

¹⁹³ Kerfoot, Schreier, in: Khan, Schreier, p. 137.

¹⁹⁴ Cote, Van Garderen, p. 170.

¹⁹⁵ Kerfoot, Schreier, in: Khan, Schreier, p. 137.

¹⁹⁶ Cote, Van Garderen, pp. 170, 175.

¹⁹⁷ Amit (2011), SAJHR, p. 13.

personalized decision-making, and are influenced by a biased incentive system that encourages rejections.¹⁹⁸ Authorities often categorize asylum seekers as economic migrants rather than genuine refugees deserving careful evaluation based on the criteria outlined in the relevant refugee conventions. This strategy has led to discrepancies between the legal safeguards and the actual protection provided to refugees in South Africa.¹⁹⁹ Moreover, despite regulations specifying that asylum application decisions should be made within reasonable time by an official, numerous asylum seekers endure lengthy waits, often spanning years, before they are granted an RSD interview.²⁰⁰ Beyond shortcomings during the asylum decision-making process, the government has also created barriers for asylum-seekers to initiate the process. In certain RROs, asylum-seekers face appointments scheduled as far as a year into the future.²⁰¹ The limited access to the asylum system highlights a fundamental flaw repeatedly observed by many interviewees: the lack of effective implementation.²⁰²

The disparity between legal provisions and their implementation stems from several factors. Firstly, the country's asylum system is under immense strain due to the overwhelming influx of asylum seekers, resulting in challenges accessing RROs and flawed determination procedures, compounded by the urgent need to address a substantial backlog of tens of thousands of asylum claims.²⁰³ Secondly, bureaucratic mismanagement, inefficiency, limited resources, and corruption contribute to delays, errors, and violations within the asylum system, exacerbated by insufficient funding.²⁰⁴ Thirdly, frequently inadequately trained government officials tend to overlook legal obligations, lacking incentives for compliance and facing minimal consequences for violations.²⁰⁵ Furthermore, a notable circumstance is that positive decisions, unlike negative ones, undergo mandatory review, requiring detailed justifications and creating an incentive for negative decisions.²⁰⁶

¹⁹⁸ Amit (2011), IJRL, pp. 458ff; Maluwa, Katz, pp. 204ff.

¹⁹⁹ Maluwa, Katz, p. 130.

²⁰⁰ De Jager, in: Khan, Schreier, p. 157; Gallagher, p. 55; Amit (2015), pp. 31ff.

²⁰¹ Meili, p. 199.

²⁰² Ibid, p. 200.

²⁰³ *Kiliko* supra note 14, para 25; Amit (2011), IJRL, p. 459; Schockaert, p. 28.

²⁰⁴ Amit (2011), SAJHR, p. 21; Handmaker, De La Hunt, Klaaren, pp. 11ff.

²⁰⁵ Amit (2011), SAJHR, p. 20.

²⁰⁶ Amit (2011), IJRL, p. 460.

Additionally, the judiciary faces institutional constraints that hinder the enforcement of legal decisions.²⁰⁷ While the Constitution empowers the judiciary to preserve the principles of legality and safeguard fundamental rights in theory, practical limitations in resources, capacity, and accountability impede their ability to effect meaningful change.²⁰⁸ Recognizing the problem, the Constitutional Court emphasizes the need to overcome enforcement limitations as it states that in the absence of adequate remedies for violations, the principles and rights enshrined in the Constitution are weakened, posing a threat to the constitutional order.²⁰⁹ Also, the High Court acknowledges the issue, emphasizing that without the effective enforcement of the rights of successful litigants, the very purpose of bringing disputes to court for resolution would lose its meaning.²¹⁰

Moreover, there is a lack of political and public support for the rights of refugees, making it challenging to prioritize and enforce necessary protections.²¹¹ The government's failure to implement the Refugees Act is seen as institutionalized xenophobia,²¹² despite the Immigration Act calls to prevent and counter xenophobia in its Preamble.²¹³ Political reluctance, lack of public support, and the conflation of refugees with economic migrants contribute to justifying the denial of asylum claims.²¹⁴ This, along with economic nationalism and poverty, fuels a significant backlash against refugees,²¹⁵ which makes it challenging to prioritize and enforce the necessary legislative and constitutional protections.²¹⁶ These challenges underscore that rights on paper don't guarantee practical enjoyment, especially when refugees are perceived as 'other,' leading to ongoing xenophobia, integration struggles, and prejudice.²¹⁷

²⁰⁷ Amit (2011), SAJHR, p. 11.

²⁰⁸ Ibid, pp. 11, 31.

²⁰⁹ *Fose v Minister of Safety and Security* 1997 (3) SA 786, para 69; Amit (2011), SAJHR, p. 11.

²¹⁰ *East London Transitional Local Council v Member of the Executive Council of the Province of the Eastern Cape for Health* 2000 ZAECHC 10, para 20.

²¹¹ Amit (2011), SAJHR, p. 9.

²¹² Mail and Guardian, 'Soweto: Violence escalates between locals and foreigners'.

²¹³ SA Government, 'National action plan to combat racism, racial discrimination, xenophobia and related intolerance 2016-2021'.

²¹⁴ Mail and Guardian, 'Soweto: Violence escalates between locals and foreigners'; Meili, p. 190; Amit (2018), pp. 153ff.

²¹⁵ Meili, p. 190.

²¹⁶ Amit (2011), SAJHR, p. 9.

²¹⁷ Khan, p. 276.

Furthermore, many individuals affected by refugee rights violations face barriers in accessing the legal system due to a scarcity of pro bono lawyers and limited state-funded legal aid, which is predominantly directed towards criminal cases.²¹⁸ The Constitutional Court states that without effective remedies, the constitutional order is threatened, especially in South Africa, where only a small fraction can afford legal relief through the judicial system.²¹⁹

This brings us to the legal tool of public interest litigation to support the effective enforcement of refugee rights in South Africa. In the subsequent section, a more comprehensive examination of this approach is undertaken. By gaining a deeper understanding of the obstacles that hinder the implementation of legal rulings, public interest lawyers can develop comprehensive strategies aimed at overcoming these barriers. This, in turn, can enhance the effectiveness of legal decisions and provide support for the enforcement of refugee rights in South Africa.²²⁰

3.3 Public Interest Litigation as One Potential Solution

Public interest litigation refers to a legal approach that goes beyond the interests of individual litigants and aims to promote the broader public interest.²²¹ Typically spearheaded by NGOs, this form of litigation, also known as ‘strategic litigation’, is particularly valuable in cases where individuals affected by rights violations lack the financial resources to pursue legal action or encounter obstacles in accessing the legal system for various reasons.²²²

In recent years, there has been a notable rise in the engagement of non-state actors in the realm of international law, whether through formal or informal means.²²³ One prevalent strategy adopted at the national level to tackle human rights violations is the filing of complaints on behalf of affected individuals. This approach relies on the expectation of a favourable court decision that has binding implications for all parties involved, which would initially help the claimant him- or herself.²²⁴ In the best case,

²¹⁸ Cote, Van Garderen, p. 168.

²¹⁹ *Fose v Minister of Safety and Security* 1997 (3) SA 786, para 69; Amit (2011), SAJHR, p. 11.

²²⁰ Amit (2011), SAJHR, p. 8.

²²¹ Brickhill, in: Brickhill, p. 6; Brickhill, Finn, in: Brickhill, p. 119.

²²² ECCHR, Term Public Interest Litigation.

²²³ De Brabandere, p. 86.

²²⁴ Brickhill, Finn, in: Brickhill, p. 105.

however, the court decision should contain ground-breaking elements beyond the individual case to serve a greater public interest, which can bring about social change. This kind of PIL is discussed in more detail below, based on the illustrative examples of the cases of *Kiliko* and *Tafira* concerning the access to RSD procedures in South Africa.

3.3.1 Development

The discussion of PIL in South Africa must recognize the nation's transition from an authoritarian system to a democratic society in 1994,²²⁵ which forms the backdrop for any examination of strategic litigation in the country.²²⁶ However, as progressive and welcome as the legal transformation was, the pace of social change and transformation has been slower, and many South Africans have not experienced the expected social benefits promised by democracy. This has led to disillusionment and discontentment with the government's failure to address the substantial social and economic disparities.²²⁷ Consequently, as communities expressed their concerns more vocally, the rise in asylum seekers and escalating tensions between civic actors and the government led to a situation where PIL became the only viable option to pursue justice.²²⁸

Over the last 25 years, South Africa has been a focal point for strategic litigation in support of refugees and asylum-seekers. Despite a progressive Constitution and active civil society involvement in PIL, the DHA consistently disregards court orders arising from these efforts.²²⁹ This defiance is fueled by widespread antipathy towards immigrants, including refugees, perpetuated by government leaders and the media.²³⁰ These conflicting dynamics create a complex environment for refugee lawyers which has led to PIL emerging as the most practical choice to advocate for refugee rights and address the deficiencies in the system.²³¹

²²⁵ Handmaker (2011), p. 65.

²²⁶ Cote, Van Garderen, p. 167.

²²⁷ Ibid.

²²⁸ Handmaker (2011), p. 65.

²²⁹ Meili, pp. 179ff.

²³⁰ Ibid.

²³¹ Cote, Van Garderen, pp. 167, 170.

Strategic litigation not only involves challenging the existing legal framework but also seeks to ‘correct’ and enhance it through the application of administrative law and international human rights law.²³² Public interest litigators have been successful in filing cases to protect refugee rights,²³³ like in the SCA ruling in *Minister of Home Affairs and Others v Watchenuka* against a blanket ban on employment and study for refugees.²³⁴ The court order was subsequently affirmed by the Constitutional Court, clarifying that the protections enshrined in the Bill of Rights extend to all individuals within the country, including undocumented foreigners and asylum seekers.²³⁵

3.3.2 Elements

The specific approach of PIL may vary from one case to another, but certain fundamental elements should always be taken into account. Presented below are these core components, as identified by various scholars and authors.

Dugard and Langford explored several factors that are crucial for the success of PIL and its potential for significant social change by examining the Atlantic Philanthropies Report (APR) by *Marcus and Budlender*.²³⁶ The study highlights several key elements that litigation strategies must encompass for victory in the courts and beyond, including: effective organization of clients; a well-defined and comprehensive long-term strategy; coordination and sharing of information among various actors involved; careful timing of case filings; thorough and in-depth research; skilful characterization of each case and diligent follow-up on the progress of cases.²³⁷ Moreover, the APR emphasizes that achieving maximum social change through litigation requires a broader approach like information campaigns, providing assistance outside the courtroom, and utilizing social mobilization and advocacy efforts.²³⁸

Despite acknowledging the fundamental aspects identified in the APR, *Dugard and Langford* argue that these elements are not sufficient and fail to capture the complete impact of PIL in society as a whole.²³⁹ They assert that strategic litigation is

²³² Handmaker (2011), p. 69.

²³³ Amit (2011), SAJHR, p. 13.

²³⁴ *Minister of Home Affairs and Others v Watchenuka and Others* 2004 1 All SA 21 (SCA).

²³⁵ *Lawyers for Human Rights* supra note 97, para 26.

²³⁶ Marcus, Budlender.

²³⁷ Marcus, Budlender, p. 117; Dugard, Langford, p. 40.

²³⁸ Ibid.

²³⁹ Dugard, Langford, pp. 55, 64.

contextually specific and cannot be wholly defined by a rigid set of legally defined criteria.²⁴⁰ This shows the importance of considering the unique circumstances of each case to maximize the effectiveness of PIL.

One of these unique circumstances is the role of the court. *Handmaker* underscores the vital role of courts in PIL and their potential to ensure government compliance with human rights obligations.²⁴¹ Also, *Amit* recognises the crucial role of the court, but stresses that court decisions can only have a meaningful effect if they are embedded in a social context where conducive political and legal conditions exist.²⁴² To overcome institutional limitations, according to *Amit*, three essential factors are necessary: adequate legal precedent or constitutional framework, substantial endorsement from other branches of the government, and widespread public backing.²⁴³

Another important circumstance is the structural context of a case. According to *Handmaker*, it is essential to recognize that state-based structural boundaries play a pivotal role as they not only influence the scope of civic agency but also provide opportunities for the improvement of these structures through interactions with civic actors.²⁴⁴ *Handmaker* states that by engaging in confrontational actions through PIL, civic actors can shed light on flaws or deficiencies in existing structures and mechanisms, thereby prompting reforms and enhancements in the governance system.²⁴⁵ He identifies three confrontational civic agency variants for enforcing government compliance: Legal review through administrative mechanisms and courts; public shaming with media collaboration; and mass mobilization and large-scale protests.²⁴⁶ Finally, *Handmaker's* research reveals that in countries with a strong rule of law, like South Africa, four principal structures – administrative; legal; democratic and constitutional monitoring; and the media – condition confrontational civic agency like PIL to hold the government accountable for human rights obligations.²⁴⁷

²⁴⁰ Dugard, Langford, p. 47.

²⁴¹ Hoexter, in: Klaaren, pp. 63ff.

²⁴² Amit (2011), SAJHR, p. 20.

²⁴³ Ibid.

²⁴⁴ Handmaker (2011), p. 72.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

A third aspect that must be considered is the strategic approach and framing of the litigation. Engaging in PIL necessitates comprehensive and strategic thinking, considering underlying structural factors.²⁴⁸ Lawyers can strategically leverage legal victories to raise public awareness and pressure the government. By reframing issues, litigators can shift focus and direct public pressure toward compliance without explicit support for asylum seekers and refugees.²⁴⁹ These efforts can also extend the focus beyond the specific case, highlighting a pattern of the government's non-compliance with the law, thereby resonating with the public and eliciting a response from the government.²⁵⁰ To counteract the impact of xenophobia on strategic litigation for non-citizens, several lawyers have advocated framing cases to advance the rights of all South Africans, irrespective of their citizenship status.²⁵¹ The case *Minister of Home Affairs and Others v Watchenuka* established that the constitutional rights to work and public education extend to asylum-seekers, because these substantive rights are integral to the right to human dignity, which, in turn, extends to all individuals.²⁵² This underscores the immense importance of the right to dignity for public interest litigators, which is examined in more detail in Chapter Four. It is described as an 'all-encompassing umbrella right'²⁵³ and constitutes a foundational principle of the Constitution, applicable to all individuals within the country's borders, not solely based on citizenship but on their humanity.²⁵⁴ The SCA supports this perspective by acknowledging that the right to dignity is so fundamental that it can be used to limit state sovereignty.²⁵⁵

Another crucial aspect to consider in each PIL case is the translation of international legal norms into local contexts.²⁵⁶ *Handmaker* highlights the indispensable role of litigators in helping individuals without legal knowledge to understand the legal landscape. Litigators need a comprehensive understanding of social, economic, and cultural dynamics within which human rights are expressed and demand a 'double

²⁴⁸ Handmaker, Berkhout, p. 11.

²⁴⁹ Amit (2011), SAJHR, p. 35.

²⁵⁰ Ibid.

²⁵¹ Meili, p. 208.

²⁵² *Watchenuka* supra note 234, paras 25-27; Meili, p. 208.

²⁵³ Meili, p. 208.

²⁵⁴ Quan, Addaney, p. 79.

²⁵⁵ Khan, pp. 262; *Watchenuka* supra note 234.

²⁵⁶ Handmaker (2011), p. 72.

consciousness' that combines international law knowledge with awareness of local contexts.²⁵⁷

Lastly, combining litigation with a well-thought-out media plan can enhance its effectiveness and extend the audience beyond South Africa.²⁵⁸ This can lead to international attention, which can serve as a powerful incentive, amplifying the impact of advocacy efforts. Linking decisions to other instances of the government's non-compliance can further bolster the impact of the litigation.²⁵⁹

3.3.3 Challenges

Having explored the various aspects of strategic litigation, the focus now shifts to the obstacles it encounters. Despite its potential for positive impact, PIL is accompanied by numerous barriers that public interest lawyers must confront. These challenges come from both external as well as internal factors.

First, the reliance on the judiciary can make PIL susceptible to political pressures and biases within the judicial system.²⁶⁰ The impartiality and independence of the judiciary may be compromised, resulting in biased rulings or delays in delivering justice.²⁶¹

Second, limited resources among the affected individuals pose a significant challenge as litigation is typically a time-consuming and costly process, with inherent risks involved.²⁶² Preparation for such complex cases can take several years, necessitating specialized expertise.²⁶³ For the affected parties, comprehending this lengthy process can be challenging. Effective communication among all involved parties is crucial to exchange mutual expectations regarding the process.²⁶⁴

Moreover, funding is a crucial aspect as legal services entail high baseline costs and prolonged legal battles also add to the mounting expenses.²⁶⁵ However, there are

²⁵⁷ Merry, p. 38.

²⁵⁸ Amit (2011), SAJHR, p. 35; Meili, p. 209.

²⁵⁹ Amit (2011), SAJHR, p. 35.

²⁶⁰ Bellamy, p. 334.

²⁶¹ Durbach, Reinecke, Dargan, p. 15; Moumita, pp. 5ff; Meili, p. 227.

²⁶² Durbach, McNamar, Rice, Rix, pp. 219ff.

²⁶³ Egenberger, pp. 63ff; Saage-Maaß, Rau, pp. 106, 108.

²⁶⁴ Ibid.

²⁶⁵ Marcus, Budlender; Brickhill, Finn, in: Brickhill, p. 122; Durbach, McNamar, Rice, Rix, p. 219.

avenues for support, such as lawyers who take on PIL cases pro bono, NGOs that cover the costs, or the establishment of funding programs and state legal aid schemes.²⁶⁶ Unlike commercial law firms, NGOs can't solely rely on internal revenue for sustainability; they depend on private donors.²⁶⁷ This gives rise to ethical dilemmas encountered by strategic litigation NGOs, prompting questions about their motivations: are they driven by genuine public interest or potential revenue?²⁶⁸ Moreover, NGOs also have to strike a balance between the interests of individual clients and the broader public interest.²⁶⁹ Open and transparent dialogue about funding constraints is essential to mitigate potential abuses of power.²⁷⁰ NGOs must approach their work with self-reflection, respect, and solidarity to reduce risks and maintain integrity.²⁷¹

Another significant challenge in PIL is finding committed clients who can see the legal process through to the end, especially when it spans several years.²⁷² This challenge is particularly pronounced when working with economically disadvantaged clients, as practical concerns may take precedence over prolonged legal battles.²⁷³ In refugee cases, lawyers strategically choose sympathetic claimants, often women and children, to counteract public hostility towards non-citizens. Statistical analyses reveal elevated success rates among female asylum-seekers and children, attributed to distinct strategic advantages stemming from their specific constitutional protections and a diminished likelihood of government demonization.²⁷⁴

One last external factor is the political and social environment. Public interest organizations must actively engage and communicate with the community to secure and sustain support for their initiatives, as initial support may diminish over time.²⁷⁵

²⁶⁶ Busch, p. 7; Fuchs, pp. 21, 33; Fuchs, in: De Nève, Olteanu, pp. 51, 55; Kaleck, Saage-Maaß (2010), JICJ, pp. 699, 722; Scott, pp. 47ff.

²⁶⁷ Cote, Van Garderen, pp. 173ff.

²⁶⁸ Cote, Van Garderen, p. 174; Brickhill, Finn, in: Brickhill, p. 119.

²⁶⁹ Brickhill, Finn, in: Brickhill, p. 119.

²⁷⁰ Brickhill, Finn, in: Brickhill, pp. 122ff; Cummings, Rhode, p. 645.

²⁷¹ Ibid.

²⁷² Cote, Van Garderen, p. 174.

²⁷³ Ibid.

²⁷⁴ Meili, p. 207.

²⁷⁵ Marcus, Budlender, paras 206, 212; Cote, Van Garderen, p. 175.

Now, let's turn our attention to internal factors, which are often more challenging to manage. These factors are influenced by external issues and require organizations to engage in critical self-reflection, addressing underlying systemic and at times, social issues within their structure.²⁷⁶

First, limited funding hinders NGOs engaging in PIL from attracting experienced staff due to non-competitive salaries, leading to a scarcity of qualified professionals.²⁷⁷ High turnover among young lawyers seeking experience exacerbates resource constraints.²⁷⁸ The lack of skills also hampers strategic planning in litigation, especially when dealing with systemic issues like those in the refugee system. Implementing effective long-term litigation strategies demands experienced and committed practitioners, posing a challenge in finding skilled individuals.²⁷⁹

Second, post-litigation support is often overlooked but it involves the crucial task of ensuring the implementation of court orders, which is essential in furthering the public interest. It is vital as it determines the actual impact and effectiveness of the legal actions taken.²⁸⁰

Finally, diversity within PIL organizations is crucial for social mobilization and acceptance of foreign nationals in refugee rights issues.²⁸¹ However, resistance and frustration can arise, especially in impoverished South African townships where foreign nationals may be seen as competition for resources and contributors to crime.²⁸² NGOs working in this context are criticized for being perceived as middle-class and disconnected from community needs. Actively seeking diversity within the organization is essential to address this issue, but currently, there is an underrepresentation of black lawyers in public interest NGOs, highlighting the need for increased diversity to better serve communities.²⁸³

²⁷⁶ Cote, Van Garderen, p. 176.

²⁷⁷ Marcus, Budlender.

²⁷⁸ Cote, Van Garderen, p. 176.

²⁷⁹ Ibid, p. 177.

²⁸⁰ Ibid, p. 181.

²⁸¹ Ibid, p. 177.

²⁸² Ibid.

²⁸³ Ibid.

Lastly, despite the mentioned challenges, NGOs play a vital role in fostering public discussions, contributing to political decision-making, and promoting transparency and democratic control. Their efforts contribute significantly to building a more open and accountable society.²⁸⁴

3.3.4 Goals and Effects

Considering the numerous challenges that need to be overcome for successful legal action, it becomes essential to examine whether PIL proves effective solely when a case ends in victory. The response is quite evident: the significance of strategic litigation goes beyond merely winning cases in a court of law.²⁸⁵ Moreover, PIL seeks to accomplish multiple objectives and aims to achieve various impacts.

One main objective of PIL is to achieve justice for the individual claimant at the legal level, which includes seeking redress for past violations of rights, such as payment of compensation or provision of social services.²⁸⁶ To develop effective remedies in refugee matters in South Africa, it's not just about presenting a winning legal argument. Since issues are often rooted in the DHA, lawyers need to shape the case's remedy to protect it from the DHA's resistance.²⁸⁷

However, the essence of strategic litigation goes beyond addressing individual grievances. One key aspect of PIL is its potential to have far-reaching legal effects beyond the scope of the individual case.²⁸⁸ Strategic litigation endeavours to establish legal precedents which serve a dual purpose: firstly, it clarifies the interpretation and application of existing laws, thereby enhancing their practical effectiveness. Secondly, it highlights any weaknesses or loopholes in the legal framework, exposing the fact that current measures, including their interpretation, are insufficient in adequately addressing real problems.²⁸⁹ Through PIL, important legal changes or policy shifts can be achieved, commonly referred to as 'rule change'.²⁹⁰ This can be accomplished by challenging the constitutionality or legality of existing laws or policies, leading to

²⁸⁴ Bantekas, Oette, 3.4.3; Frantz, p. 288; Schwenger, p. 55.

²⁸⁵ Brickhill, Finn, in: Brickhill, pp. 94ff.

²⁸⁶ Ibid.

²⁸⁷ Meili, p. 210.

²⁸⁸ Saage-Maaß, Rau, pp. 106, 115.

²⁸⁹ Bantekas, Oette, 3.9.4; Busch, p. 1; Egenberger, pp. 63-68; Fuchs, in: De Nève, Olteanu, p. 51; Scott, p. 47.

²⁹⁰ Durbach, McNamar, Rice, Rix, pp. 219ff; Brickhill, Finn, in: Brickhill, pp. 94ff.

potential modifications or new legislation that better aligns with the principles of justice and human rights.²⁹¹ PIL can influence the entire legal system by connecting political, civil, economic, social, and cultural rights, driving sustainable changes, and pushing courts to address violations and uphold constitutional provisions and international legal norms.²⁹²

In addition, PIL goes beyond mere judicial decisions. By acknowledging litigation as a political and politicizing process, it becomes a potent instrument to influence the political sphere, foster accountability, and advocate for positive transformations that benefit the broader community.²⁹³ It holds the potential to drive political and even structural changes, as it empowers civil society with greater leverage in its interactions with the state.²⁹⁴

Furthermore, PIL seeks to increase public awareness and address the lack of legal knowledge among those potentially impacted by human rights violations.²⁹⁵ Strategic litigation plays a vital role in educating the public about legal mechanisms, encouraging individuals to assert their rights, and fostering a ‘mobilizing effect’ for driving social change.²⁹⁶ The goal is to go beyond merely winning the case, it is about generating social awareness, empowering civil society, prompting a re-evaluation of existing norms, leading to changes in the legal consciousness of the population and towards positive social transformation.²⁹⁷

Ultimately, it is vital to view PIL as one part of a larger social justice movement, rather than a singular remedy for substantial change.²⁹⁸ The efficacy of strategic litigation hinges on its collaboration with social movements and the media,²⁹⁹ playing a pivotal role in drawing attention to social grievances, setting precedents for future cases, and

²⁹¹ Durbach, McNamar, Rice, Rix, pp. 219ff; Brickhill, Finn, in: Brickhill, pp. 94ff.

²⁹² Laplante, pp. 141, 144; Fuchs, pp. 21, 28; Fuchs, in: De Nève, Olteanu, p. 51; Kaleck, Saage-Maaß (2010), *Juridikum*, pp. 436, 438; Saage-Maaß, Rau, pp. 106, 108; Durbach, McNamar, Rice, Rix, p. 220.

²⁹³ Dugard, Langford, pp. 56, 58; Brickhill, in: Brickhill, p. 8; Tsutsui, p. 6; Fuchs, pp. 21, 28; Fuchs, in: De Nève, Olteanu, pp. 51, 53.

²⁹⁴ Dugard, Langford, pp. 56, 58; Brickhill, in: Brickhill, p. 8; Tsutsui, p. 6.

²⁹⁵ Tsutsui, pp. 6, 21.

²⁹⁶ Brickhill, in: Brickhill, p. 8; Durbach, McNamar, Rice, Rix, pp. 219ff.

²⁹⁷ Saage-Maaß, Rau, pp. 106, 108; Fuchs, in: De Nève, Olteanu, p. 51; Dugard, Langford, p. 56; McCann, p. 283; Durbach, McNamar, Rice, Rix, pp. 219ff.

²⁹⁸ Cummings, Rhode, pp. 648ff; Tsutsui, pp. 5ff.

²⁹⁹ Brickhill, Finn, in: Brickhill, p. 133.

exerting pressure on policymakers.³⁰⁰ It is crucial to form lasting connections among activist organizations that can transcend the courtroom.³⁰¹ While litigation campaigns do not guarantee immediate social change, they have the potential to redefine the terms of the dispute among social groups, both in the short term and the long term.³⁰² Thus, PIL should be seen beyond a binary of winning or losing.³⁰³ Its true value lies in its empowering potential, which is strengthened when it is integrated with broader mobilization efforts.³⁰⁴

3.4 Cases – Access to Refugee Status Determination Procedures

In this section, two illustrative cases are showcased, providing tangible examples that exemplify the elements and objectives of the previously discussed PIL. Following the official end of Apartheid, several NGOs previously involved in the Anti-Apartheid struggle, such as LHR and the LRC, as well as community groups like the Scalabrini Centre of Cape Town, redirected their efforts towards refugee rights.³⁰⁵ The Post-Apartheid Constitution, with its rights-based approach, became the basis for strategic litigation on behalf of refugees and asylum-seekers.³⁰⁶

Despite legal efforts to protect refugees, the government fell short, displaying little interest in refugee rights.³⁰⁷ Challenges in accessing RROs in South Africa, including pre-screening procedures and corruption, stem from unauthorized practices by DHA officials, hindering asylum seekers from applying.³⁰⁸ The challenges in accessing the RSD process begin already at South Africa's borders, where a misinterpretation of the 'first safe country principle' has been utilized to deny entry to asylum seekers.³⁰⁹ Over time, the DHA's failure to adequately accommodate the large influx of asylum seekers within the formal asylum system has resulted in some asylum seekers being left undocumented for several months.³¹⁰ This situation is exemplified by the cases of *Kiliko* and *Tafira*, which are further examined in the subsequent sections.

³⁰⁰ Egenberger, pp. 63-68; Fuchs, pp. 21, 28, 33; Fuchs, in: De Nève, Olteanu, p. 51; Scott, p. 47.

³⁰¹ Rodríguez-Garavito, pp. 1669ff.

³⁰² McCann, p. 283.

³⁰³ Dugard, Langford, p. 55.

³⁰⁴ Ibid.

³⁰⁵ Meili, p. 203; Handmaker (2009), pp. 84-86.

³⁰⁶ Meili, p. 200.

³⁰⁷ Pugh, pp. 238, 241.

³⁰⁸ Kerfoot, Schreier in: Khan, Schreier, p. 140.

³⁰⁹ Amit (2012), p. 34.

³¹⁰ Ibid.

3.4.1 *Kiliko v Minister of Home Affairs*

The *Kiliko* case focused on a policy implemented by the DHA, which instructed officials to process only a limited number of 20 asylum seeker permits per day at the office in Cape Town. As a result, numerous potential applicants were turned away daily, possibly numbering in the dozens or even hundreds.³¹¹ The case was brought to court by the LRC to contest the government's restrictions on access to RSD procedures on behalf of the affected asylum seekers.³¹²

In January 2006, the High Court ruled that the practice of processing only 20 asylum-seeker permits per day violated the fundamental rights of asylum seekers and that 'foreigners' are entitled to the same constitutional rights accorded to citizens.³¹³ The court acknowledged that issuing an asylum seeker permit is crucial for asylum seekers to exercise their rights.³¹⁴ Moreover, the court ruled that the DHA was accountable for the inadequate and ineffective measures it implemented to deal with the progressively deteriorating situation. As a result of this failure, there was a lack of reasonably suitable facilities necessary for the timely processing of applications for asylum seeker permits.³¹⁵ In addition, the court took proactive action by issuing a structural interdict that demanded the DHA to provide a comprehensive report on its efforts to address issues related to receiving and processing asylum applications.³¹⁶ In 2008, the same judge referred in the same matter to the

'[G]ross inhumanity which is being meted out to asylum seekers because of the failure on the part of the South African authorities to fully adhere to the international instruments as regards the treatment of refugees assented to by the Government and to fully comply with the laws passed by it in order to give effect thereto.'³¹⁷

In the *Kiliko* case, PIL achieved more than just securing asylum application rights for the seven claimants. It led to significant advancements for all refugees in South Africa, highlighting that the effectiveness of the asylum system is intricately tied to the

³¹¹ Handmaker (2011), pp. 76ff; Meili, p. 216.

³¹² Handmaker (2011), p. 77.

³¹³ *Kiliko* supra note 14, paras 28, 31.

³¹⁴ Kerfoot, Schreier, in: Khan, Schreier, p. 138.

³¹⁵ *Kiliko* supra note 14, para 28.

³¹⁶ Ibid, para 32; Amit (2011), SAJHR, p. 13.

³¹⁷ *Kiliko v Minister of Home Affairs* 2008 ZAWCHC 124, para 8.

fundamental human rights of asylum seekers.³¹⁸ The court decision, a landmark for LRC, specifically addressed the DHA's responsibilities towards refugees, recognizing its impact on the freedom and dignity of asylum seekers as essential constitutional values.³¹⁹ As a result, the broader goal of improving the RSD process at DHA's offices for all refugees, especially the above-outlined second step of the procedure, was accomplished. By granting a structural interdict, the court expressed its commitment to address access concerns and to ensure a fair RSD procedure in compliance with international law, the Constitution, and refugee legislation in future asylum applications.³²⁰

3.4.2 Tafira v Ngozwane

In 2006, the *Tafira* case brought attention to the measures adopted by the DHA to reduce crowds outside their offices in Johannesburg and Pretoria, which inadvertently created new barriers to access, and were challenged by the Wits Law Clinic.³²¹

Even though the Refugees Act did not allow for it, the DHA began using pre-screening procedures outside the RRO's to determine eligibility for asylum applications.³²² This screening involved two questions: 'Where are you from?' and 'Why are you here?'. Applicants were not provided with legal advice or the reason for filling out the form, and if their answers were deemed unsatisfactory, they were denied the opportunity to apply for asylum.³²³ Some applicants were declared ineligible and turned away without undergoing the proper status determination interview, as required by law.³²⁴ Additionally, the DHA started giving appointment slips to applicants who wished to apply for asylum but did not provide them with an asylum-seeker permit.³²⁵ These appointment slips had no legal validity. Consequently, those who received these slips and were instructed to report back up to six months later to obtain an asylum-seeker permit faced the constant risk of arrest and deportation during that waiting period.³²⁶

³¹⁸ *Kiliko* supra note 14, para 28.

³¹⁹ *Ibid*, paras 31-32.

³²⁰ *Ibid*, para 32; Amit (2011), SAJHR, p. 14.

³²¹ *Tafira* supra note 15.

³²² Amit (2011), SAJHR, p. 14; Meili, p. 217.

³²³ *Tafira* supra note 15.

³²⁴ Amit (2011), SAJHR, p. 14.

³²⁵ *Ibid*.

³²⁶ *Ibid*.

In 2006, the High Court declared the use of pre-screening procedures and appointment slips at the RROs in Johannesburg and Pretoria as illegal and unconstitutional.³²⁷ The court emphasized that improper asylum procedures could have serious consequences for

‘[T]he Constitutional rights of such persons and more particularly their rights to human dignity, life and freedom and security of the person, as enshrined in sections 10, 11, and 12 of the Constitution.’³²⁸

Furthermore, the judge declared:

‘[T]he fact that the respondents might find it administratively difficult to deal with applications promptly, is no reason to act unlawfully and to place the rights and interests of asylum seekers in grave danger. No amount of administrative inconvenience can absolve the respondents of their legal and constitutional responsibility.’³²⁹

Thus, also the *Tafira* case is a great example of successful strategic litigation because the broader public interest in improving the application procedure, in particular the above-outlined first and second steps of the RSD process, for all refugees in South Africa was achieved. The court pointed out that the DHA had insufficient officers in the field, leading to a continuously growing backlog of asylum applications.³³⁰ The judge criticized the practice of giving asylum seekers ‘appointment slips’ and subjecting them to pre-screening procedures, both of which were deemed illegal.³³¹ As a result, the court issued an order requiring the DHA to accept and process asylum applications in a non-discriminatory and fair manner, as outlined in sections 21 and 22 of the Refugees Act.³³²

Furthermore, the court went the extra mile by laying down practical guidelines to ensure diligent adherence to the court's order. The judge appointed a *curator ad litem* so that the respondents were required to provide regular reports on the actions taken to adhere to the order, including a detailed outline of the application process.³³³ The judge emphasized the need for such a curator because the existing asylum system's violations

³²⁷ *Tafira* supra note 15, p. 13.

³²⁸ *Ibid*, pp. 12ff.

³²⁹ *Ibid*, pp. 27ff.

³³⁰ *Ibid*, pp. 22ff.

³³¹ *Ibid*, pp. 21ff.

³³² *Ibid*, p. 46.

³³³ *Ibid*, pp. 4ff.

of human dignity and freedom could lead to wrongfully rejected applications, resulting in a violation of constitutional rights and contravening the international law principle of non-refoulement.³³⁴ Furthermore, the court emphasized that the Head of Refugee Affairs was personally accountable for any failures in ensuring the lawful and proper procedures for processing asylum applications.³³⁵

3.5 Conclusion

In conclusion, these cases demonstrate that PIL can be a catalyst for significant improvements in practice. The situations concerning access to status determination procedures for asylum seekers have notably improved, with reduced wait times and the discontinuation of certain pre-screening measures.³³⁶ Moreover, both cases highlight key aspects of South African Courts interpreting constitutionally protected human rights in the refugee context. The courts ruled against the government for neglecting its constitutional responsibilities toward non-citizens, emphasizing that a lack of capacity is not an excuse.³³⁷ These obligations include protecting individuals' constitutional rights and using resources efficiently. Furthermore, the cases also stress that administrative barriers should not obstruct constitutional rights.³³⁸ Lastly, the involvement of public interest lawyers in these cases went beyond holding the government accountable; they also played a vital role as translators, ensuring that the government's international obligations were integrated into their legal arguments.³³⁹ Overall, these cases underscore the power of PIL to bring about meaningful transformation and uphold rights and responsibilities.

4. CHAPTER FOUR – UBUNTU

4.1 Introduction

The preceding chapter highlighted the potential efficacy of PIL in advancing human rights and refugee rights enforcement in South Africa. In this chapter, the dissertation seeks to demonstrate that the African Ubuntu philosophy, aligned with human rights principles, has the potential to significantly contribute to the discourse of PIL lawyers. This examination asserts that the incorporation of Ubuntu values into legal discourse

³³⁴ *Tafira* supra note 15, pp. 4ff.

³³⁵ *Ibid*, p. 8.

³³⁶ Amit (2011), SAJHR, p. 17.

³³⁷ *Kiliko* supra note 14, para 28; *Tafira* supra note 15, pp. 28ff.

³³⁸ Meili, p. 217.

³³⁹ Handmaker (2011), p. 79.

would emphasize the deep connection between human dignity, human rights, and refugee rights within African culture. As a result, it becomes imperative to advocate for these values during court proceedings, as Ubuntu has the potential to play a crucial role in promoting a just and equitable application of the law when utilized as an interpretive tool for the courts.

4.2 Definition of Ubuntu

Ubuntu is an ancient philosophy across various African societies, emphasizing caring interdependence between individuals and their communities.³⁴⁰ Ubuntu is found in versatile forms with no fixed definition and is challenging to encapsulate in a singular meaning.³⁴¹ This complexity arises from its dynamic nature and the absence of direct translations or equivalents in English and several South African languages like isiZulu or Setswana.³⁴² While Ubuntu encompasses numerous elements shared among diverse African communities, this dissertation does not aim to exhaustively list them. Instead, it will concentrate on delving into the fundamental principles at the heart of the Ubuntu philosophy.³⁴³

At its core, Ubuntu embodies principles such as humaneness, respect, moral virtue, interconnectedness, compassion, solidarity, and community-focused individualism.³⁴⁴ The philosophy seeks to capture the essence of humanity.³⁴⁵ Ubuntu is not merely a concept but a way of life deeply ingrained in the African cultural ethos, influencing every facet of daily existence.³⁴⁶ Ubuntu views individuals as integral to the community and vice versa, emphasizing shared values, care, and prioritizing the well-being of the most vulnerable for a harmonious and joyful community life.³⁴⁷ In the spirit of Ubuntu, we perceive ourselves as part of one human family, where actions towards others impact us due to the interconnected nature of the community's social, economic, and political ties – ‘I am because we are’.³⁴⁸ Coined by *Desmond Tutu* in South Africa, Ubuntu reveals that by dehumanizing others, perpetrators also diminish

³⁴⁰ Geduld, pp. 381, 386.

³⁴¹ Murithi, pp. 281ff.

³⁴² Metz (2007), p. 323; Radebe, Phooko, p. 240.

³⁴³ Radebe, Phooko, pp. 240-245.

³⁴⁴ Mokgoro, p. 2; Mphahlele, p. 135; Tshoose, p. 13; Geduld, p. 386.

³⁴⁵ Murithi, pp. 281ff.

³⁴⁶ Radebe, Phooko, p. 240.

³⁴⁷ Ibid.

³⁴⁸ Murithi, pp. 281ff; Metz (2007), p. 326.

their own humanity.³⁴⁹ Ubuntu in African communities serves as a guiding principle for responsibilities establishing an ethical framework that prioritizes the safeguarding of human dignity which aligns with the human rights system.³⁵⁰ This approach will be further examined in the subsequent section.

4.3 Ubuntu Aligns with the Concept of Human Rights and the Bill of Rights

To begin with, it is crucial to acknowledge a fundamental criticism directed against the human rights system: the contention that it may not align with deeply ingrained African cultural values. Some African leaders raise the concern that Western governments sometimes misuse the international human rights standard as a pretext to interfere in African nations, thus evading external oversight of their internal matters. They suggest that human rights are alien to Africa, leaving the impression that indigenous notions of human rights are lacking on the continent.³⁵¹ However, this section will highlight the rich and meaningful values of the African Ubuntu philosophy, which are rooted in the principles of human dignity and ‘humaneness’.³⁵²

Indeed, the critical voices are right about one thing: the current international human rights system was not the result of a comprehensive, global consultation encompassing diverse perspectives from around the world.³⁵³ Instead, certain regions, notably Sub-Saharan Africa and countries under colonization during the drafting of the UDHR, were not adequately represented.³⁵⁴

This raises the question of whether the human rights system predominantly reflects Western values rooted in a Eurocentric viewpoint, or if fundamental African principles such as the Ubuntu philosophy can be aligned with the human rights system.

4.3.1 Scholarly Perspectives on Ubuntu and Human Rights

According to *Murithi*, there are indeed significant traditions on the African continent that revolve around the concept of human dignity and the essence of being human, similar to human rights principles. Specifically, he refers to the valuable lessons that

³⁴⁹ Tutu, pp. 34ff.

³⁵⁰ Murithi, p. 281.

³⁵¹ Ibid, p. 277.

³⁵² *S v Makwanyane and Another* 1995 (3) SA 391, para 308; Murithi, p. 281.

³⁵³ Murithi, p. 277.

³⁵⁴ Ibid, p. 278.

can be derived from the African Ubuntu philosophy.³⁵⁵ In light of this viewpoint, it would be insincere for any African leader to claim that human rights concepts are foreign to the continent, as the OAU has instituted the Banjul Charter, which explicitly addresses, upholds, and safeguards human rights matters.³⁵⁶ It emphasizes the concept of ‘peoples’ to reflect the importance of community and collective well-being.³⁵⁷ The Banjul Charter recognizes that fundamental human rights are rooted in the inherent attributes of human beings, justifying their protection on both national and international levels.³⁵⁸ Although the term ‘Ubuntu’ is not explicitly mentioned in the Banjul Charter, one can discern a resonance with its principles. Regarding communal groups, Article 19 of the Banjul Charter explicitly stipulates that:

‘All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.’

Murithi asserts that a person embodying Ubuntu understands their inherent connection to a larger collective and realizes that their own sense of worth is intertwined with the well-being and respect accorded to others. He explains Ubuntu as a framework that upholds human dignity and the essence of being human, aligning harmoniously with the concept of human rights.³⁵⁹ According to *Murithi*, the wisdom of Ubuntu lies in the acknowledgment that a harmonious and peaceful community cannot be established unless the dignity of every community member is protected.³⁶⁰ This notion is encapsulated in the belief of ‘I am because we are’ which emphasizes the interdependence and interconnectedness of individuals. By embracing these principles, Ubuntu can evolve into an exemplary ethical system and a way of life,³⁶¹ aligning with human rights principles.

Thus, *Murithi* argues that Ubuntu can culturally reshape efforts to establish relevant human rights regimes globally. It offers a value system for forgiveness, facilitates human rights advancement in war-affected societies and transitional countries, and inspires ethical legislation and cooperation to address common challenges.³⁶² Its

³⁵⁵ Murithi, p. 281.

³⁵⁶ Ibid.

³⁵⁷ Murithi, p. 284; Wa Mutua, pp. 376ff.

³⁵⁸ Preamble of the Banjul Charter.

³⁵⁹ Murithi, p. 282.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

persistence in African communities underscores its potential to contribute to an ethical framework drawn from traditional values.³⁶³

Furthermore, also *Metz* shares the perspective that Ubuntu's moral theory offers a promising understanding of human dignity. He suggests that human beings possess inherent dignity through their community capacity, and violations of human rights reflect a significant degradation of this capacity.³⁶⁴ *Metz* contends that human rights are grounded in human dignity, allowing Ubuntu to explain and encompass fundamental rights. Respecting human rights involves treating individuals as having exceptional value due to their capacity for communal relationships.³⁶⁵

Metz believes that developing 'humanness' in the spirit of Ubuntu involves forming communal connections with others who share a dignity based on their capacity for communal relationships. Even those who have acted immorally retain the potential to behave differently and preserve their inherent dignity, which must be treated with equal respect.³⁶⁶ Human rights violations, according to *Metz*, disrespect people's capacity for communal relationships, undermining the essence of human dignity.³⁶⁷ In conclusion, *Metz* proposes that a suitable interpretation of Ubuntu can serve as a foundation for public morality, rooted in the value of friendship and offering a fresh understanding of human dignity that complements the explanation of human rights.³⁶⁸

Murithi and *Metz's* perspectives, emphasizing the alignment of Ubuntu with human rights standards, gain strength from the recognition that the concept of Ubuntu is enshrined in South African legislation and is invoked by the Courts,³⁶⁹ as demonstrated in the subsequent sections.

4.3.2 *Ubuntu in the South African Constitution*

Initially, it's crucial to highlight that the Final Constitution of South Africa does not explicitly reference Ubuntu. One contributing factor to its exclusion was the lack of

³⁶³ *Murithi*, p. 283.

³⁶⁴ *Metz* (2011), p. 532.

³⁶⁵ *Ibid*, pp. 541ff.

³⁶⁶ *Ibid*, p. 544.

³⁶⁷ *Ibid*, p. 545.

³⁶⁸ *Ibid*, pp. 558ff.

³⁶⁹ *Geduld*, p. 381.

consensus on whether it should be incorporated.³⁷⁰ This leads to the question of whether Ubuntu is excluded from the South African legal system due to its lack of explicit mention in the Final Constitution or if it has indeed been indirectly assimilated into the Final Constitution through Section 39.³⁷¹ This Section mandates the courts, tribunals, and forums to interpret the Bill of Rights in accordance with the principles of an open and democratic society, rooted in the values of human dignity, equality, and freedom. Furthermore, Section 39(3) stipulates that the Bill of Rights does not negate the existence of any other rights or freedoms recognized or conferred by common law, customary law, or legislation, to the extent that they align with the principles of the Bill of Rights.³⁷²

First, even though Ubuntu cannot be found in the Final Constitution of 1996, it is crucial to acknowledge that it was part of the Interim Constitution of 1993.³⁷³ Ubuntu was mentioned in Chapter 15, ‘General and Transitional Provisions’, specifically in the ‘Postamble’ titled ‘National Unity and Reconciliation’ following Section 251:

‘(...) there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for **ubuntu** but not for victimisation.’

(Emphasis added)

Furthermore, it is important to mention that the Final Constitution aligns with the values of Ubuntu: it not only prioritizes individual self-determination but also integrates a vision of collective self-determination. It emphasizes the idea that community power should be employed to achieve goals consistent with freedom, fostering conditions that enhance individual self-determination.³⁷⁴

These factors already indicate that Ubuntu has been indirectly incorporated into the Final Constitution; however, the following section will delve deeper into addressing the aforementioned question.

³⁷⁰ Radebe, Phooko, pp. 246ff.

³⁷¹ Ibid, pp. 245ff.

³⁷² Section 39 of the Constitution.

³⁷³ Constitution of the Republic of South Africa Act 200 of 1993.

³⁷⁴ Klare, pp. 153ff.

4.3.3 *Ubuntu in Constitutional Court Rulings*

Since the Constitutional Court has unmistakably affirmed Ubuntu as a constitutional value, showcasing its ability to evolve alongside other constitutional principles in numerous cases,³⁷⁵ the debates on whether Ubuntu holds constitutional significance are now obsolete.

Ubuntu played a crucial role in the landmark Constitutional Court case of *S v Makwanyane*,³⁷⁶ leading to the abolition of the death penalty. Ubuntu was employed to emphasize that no individual should be deprived of their humanity, and no person should be objectivised.³⁷⁷ The Constitutional Court unequivocally affirmed that Ubuntu is an integral component of the South African legal system.³⁷⁸

Furthermore, the constitutional value of Ubuntu was demonstrated in another case, *PE Municipality v Various Occupiers*.³⁷⁹ There, the philosophy was used to draw attention to the challenges faced by vulnerable and marginalized groups, such as the poor and homeless. The case involved 68 individuals who occupied shacks on privately owned land within the Port Elizabeth Municipality. The Municipality sought a ruling from the Constitutional Court on the grounds that it was allowed to evict the occupiers and in doing so should not be constitutionally obliged to provide replacement housing when evicting unlawfully occupied flats or properties.³⁸⁰

However, the court ruled against the Municipality's position. The judge was unconvinced that ordering the eviction of the occupiers would be considered 'just and equitable'³⁸¹ as required by Section 6(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).³⁸² The Constitutional Court pointed out:

³⁷⁵ Radebe, Phooko, p. 246.

³⁷⁶ *S v Makwanyane and Another* 1995 (3) SA 391.

³⁷⁷ *Ibid*, paras 225, 316, 374.

³⁷⁸ Radebe, Phooko, p. 246.

³⁷⁹ *Port Elizabeth Municipality* supra note 37.

³⁸⁰ *Ibid*, para 6.

³⁸¹ *Ibid*, para 59.

³⁸² **Section 6 of the PIE**

'(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is **just and equitable** to do so, after considering all the relevant circumstances, ...'

‘(...) PIE expressly requires the court to **infuse elements of grace and compassion into the formal structures of the law**. It is called upon to balance competing interests in a principled way and promote **the constitutional vision of a caring society** based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. **The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights**, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.’³⁸³

(Emphasis added)

The court provided a definition and interpretation of Ubuntu as a South African ‘culture’ and philosophy inherent to the African people. It encapsulates values of compassion, justice, reciprocity, dignity, harmony, and humanity, all aimed at fostering the construction, maintenance, and fortification of the community.³⁸⁴ Ubuntu served as an interpretive instrument for the court helping to provide context to judgments and, on occasions, preventing unfair or unjust outcomes from prevailing. In this way, Ubuntu contributes to ensuring a fair and equitable application of the law.³⁸⁵

The constitutional significance of Ubuntu was further affirmed in the case of *Bhe and Others v Khayelitsha Magistrate*, which centered around the constitutionality of the rule of primogeniture and its impact on the exclusion of extramarital children in the customary law of succession.³⁸⁶ The court asserted that the affirmative aspects of customary law, including Ubuntu, merit protection in the Constitution. Ubuntu was identified as a positive element of customary law, presenting improved alternatives for conflict resolution, and creating a more conducive environment for family structures and cooperative relationships.³⁸⁷

Hence, although Ubuntu is not explicitly stated in the Constitution, the Constitutional Court's jurisprudence acknowledges it as one of the constitutional values. This

³⁸³ *Port Elizabeth Municipality* supra note 37, para 37.

³⁸⁴ *Ibid*, paras 37, 43.

³⁸⁵ Geduld, p. 386.

³⁸⁶ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC), paras 1-7.

³⁸⁷ *Ibid*, paras 45-46.

recognition is indicative of its successful integration through Section 39. It highlights that the explicitly mentioned constitutional values are not exhaustive, and the courts are open to incorporating elements of African customary law, like Ubuntu, as long as they align with constitutional principles.³⁸⁸

4.4 Using Ubuntu in the Argumentation of PIL

After establishing that the Ubuntu philosophy aligns with the principles of human rights and the Constitution, its values can be employed as a persuasive tool in PIL. Ubuntu underscores the significance of acknowledging and valuing the dignity and well-being of all individuals, including refugees. Thus, it can act as a catalyst for change, encouraging a more empathetic and comprehensive approach to refugee protection.

Murithi explains that the ethics of Ubuntu point to the presence of universal principles in all cultures that can reinforce the idea of collective human rights which are meant for everyone. According to him, Ubuntu encourages dialogue among diverse African cultures, enhancing a shared ethical framework.³⁸⁹ Also, *Nafukho* highlights that Ubuntu is grounded in consensus building and dialogue which emphasizes the inherent capacity and willingness of African people to engage in conversation for problem resolution.³⁹⁰ Thus, Ubuntu facilitates the authentic integration of diverse cultures into global human rights standards, fostering idea exchange and cooperation for a more inclusive world.³⁹¹

An ethical framework, rooted in shared values of Ubuntu and human rights, aids in advocating, monitoring, and promoting human rights across the continent. Moreover, *Murithi* points out that adhering to the traditions of Ubuntu, recognizing our shared humanity calls for action: ‘internalize these principles and act upon them’.³⁹² According to him, this urges us to rebuild societies based on tolerance and equitable access to resources, thus enhancing our overall well-being.³⁹³

³⁸⁸ Radebe, Phooko, p. 246.

³⁸⁹ Murithi, pp. 283, 285.

³⁹⁰ Nafukho, pp. 409-411.

³⁹¹ Murithi, pp. 283, 285.

³⁹² Ibid, p. 283.

³⁹³ Ibid.

Murithi's call to action finds a fitting response in PIL, as it serves as a means of monitoring and promoting human rights. The broader objectives of PIL align harmoniously with the principles of Ubuntu philosophy, aiming to strengthen the entire community. Strategic litigation becomes a pivotal avenue to realize this objective, involving the filing of individual cases that carry significance for the broader public interest. Successful cases can set legal precedents, influencing future decisions and policies. Thus, PIL has the potential to bring about systemic change by addressing underlying issues that impact numerous individuals. This aligns with the broader transformative goals advocated not only by *Murithi* but also by the Constitution,³⁹⁴ contributing to positive societal change.

Moreover, strategic litigation often serves as a tool for marginalized or vulnerable populations who might face barriers in accessing the legal system. *Murithi's* call to action for a more inclusive approach finds resonance in PIL's capacity to provide a platform for those who may otherwise be voiceless. Additionally, strategic litigation can attract public attention and raise awareness about critical human rights which can lead to collective engagement and consciousness regarding the importance of upholding human rights within the community.

In the realm of refugee rights, the principles of Ubuntu can help to support a cultivating dialogue among various stakeholders and cultures which is of utmost importance. This involves not only collaborating with government officials in administrative procedures but also addressing any biases against refugees within the South African population. It is crucial to dispel any apprehensions that could impede political and legal advancements in navigating the difficult challenges of hosting refugees and safeguarding their right to seek and enjoy asylum. By undertaking these efforts, the common values of Ubuntu and human rights can lay the foundation for a more compassionate and fair-minded approach to the complex issue of refugee rights protection.

As already mentioned above, the Constitutional Court has actively employed Ubuntu as a guiding principle in its legal interpretations, recognizing it as a constitutional value

³⁹⁴ Preamble of the Constitution.

and labelling it a ‘unifying motif of the Bill of Rights’.³⁹⁵ Emphasizing that Ubuntu is deeply ingrained in the cultural heritage of the majority of the population, the court asserts its pervasive influence throughout the constitutional order, seamlessly blending individual rights with a communitarian philosophy. Consequently, public interest lawyers are encouraged to leverage Ubuntu as a source of inspiration when crafting compelling arguments for new cases.³⁹⁶

4.4.1 Right to Human Dignity

One essential aspect of incorporating Ubuntu into the argumentation of PIL in refugee rights cases revolves around the recognition of the right to human dignity.³⁹⁷ This right is often regarded as the paramount element within the complex framework of human rights.³⁹⁸

Regrettably, the citizenship status of refugees frequently imposes constraints on this fundamental right. Examining the lived experiences of refugees in South Africa reveals that the existing policies and safeguards are insufficient in adequately protecting refugees. Despite the presence of strong constitutional values and promising domestic refugee legislation in the country, these legal norms often fail to translate into tangible and effective protection. Refugees continue to be treated as outsiders, resulting in a frequent denial of their fundamental right to dignity.³⁹⁹

However, public interest litigators should not despair in their efforts to combat violations of the right to dignity for refugees in South Africa. A source of encouragement and empowerment lies in the ruling of the *Watchenuka* case,⁴⁰⁰ which holds particular significance in shaping the interpretation of the right to dignity for non-citizens in the country. In this landmark case, the SCA boldly asserted that ‘human dignity has no nationality’.⁴⁰¹ The court unequivocally affirmed that dignity is an inherent quality of all individuals simply by their humanity, irrespective of their citizenship status, including refugees. The court underscored the safeguarding of this

³⁹⁵ *Port Elizabeth Municipality* supra note 37, para 37.

³⁹⁶ Metz (2011), p. 535.

³⁹⁷ Section 10 of the Constitution.

³⁹⁸ Meili, p. 208.

³⁹⁹ Khan, pp. 283ff.

⁴⁰⁰ *Watchenuka* supra note 234.

⁴⁰¹ *Ibid*, para 25.

right under Section 10 of the Constitution, emphasizing that any person within the country's borders, regardless of their reasons for being there, is entitled to respect and protection.⁴⁰²

4.4.2 Critical Voices

Nevertheless, some critics argue against using Ubuntu in legal arguments. While it's important to acknowledge their concerns, this dissertation endeavours to demonstrate that these may not be accurate.

One common criticism is that the interpretation of Ubuntu is too vague and can be subjective, making it unsuitable as a normative moral principle for guiding actions and legal decisions. Ubuntu's broad conceptualization would make it all-encompassing and, as such, should not be translated into a constitutional principle.⁴⁰³

These critics overlook that the challenge of vagueness is not uncommon, on the contrary, the law is well-acquainted with dealing with vague concepts that require individual interpretation in each case. Courts and legal professionals routinely engage in thoughtful analysis of vague principles to ensure fairness and just outcomes. A prime example can be found in the term 'just and equitable' of Section 6(1) PIE as seen in *PE Municipality v Various Occupiers* mentioned earlier. Despite its lack of a concrete definition, the courts and lawyers still interpret that notion to form their arguments. Vagueness in legal language does not hinder legal argumentation; instead, it allows for a comprehensive appreciation of each unique case with all its intricacies. Thus, Ubuntu's vagueness is at the same time an asset of adaptability, fostering inclusivity and consideration of diverse contexts, which can be beneficial in addressing complex and multifaceted issues. Its emphasis on interconnectedness and compassion promotes shared responsibility and communal well-being. Rather than dismissing it, we should engage in thoughtful discussions about its potential as a guiding moral principle, particularly in complex refugee rights issues.

A second concern is that Ubuntu's collectivist orientation may conflict with the ideal of individual freedom cherished in the liberal tradition.⁴⁰⁴ Additionally, skeptics

⁴⁰² *Watchenuka* supra note 234, para 25.

⁴⁰³ Cornell, Van Marle, p. 196.

⁴⁰⁴ Metz (2011), p. 533.

question its relevance in modern, diverse societies due to its traditional origins in small-scale, pastoral societies with spiritual beliefs.⁴⁰⁵

This critique of collectivism is based on a false premise. Ubuntu encourages individual freedom within a supportive community, emphasizing that personal autonomy is valued and respected.⁴⁰⁶ It operates under the principle of ‘together we are stronger’, emphasizing that individuals thrive when coexisting and supporting one another.⁴⁰⁷ The philosophy values both group solidarity and individual needs, with the belief that personal autonomy is respected and valued within the communal spirit.⁴⁰⁸ Even the Constitutional Court recognized that Ubuntu successfully harmonizes individuality with communitarianism.⁴⁰⁹

Additionally, the significance of Ubuntu's traditional roots in small-scale societies with spiritual convictions should not be disregarded in the context of today's modern societies. Many ethical and moral principles have their roots in historical contexts, yet they continue to remain relevant. Also, Ubuntu is not in its final state; rather, it continues to evolve and develop.⁴¹⁰ The philosophy is not bound by its historical origins but can be adapted and interpreted to suit current societal complexities. The core concept of Ubuntu centres on the understanding that humans are inherently social beings, not solitary individuals. This truth has remained constant throughout history and continues to hold true today. We see this interdependence from the earliest stages of life, where children rely on their parents for survival. Our very existence thrives on connections and communal support. In our modern, freedom-loving society, the need for community anchor points becomes even more significant. Amidst the pursuit of individual liberty, experiencing a sense of belonging and drawing strength from communal bonds becomes a vital source of energy. Ubuntu reminds us of the innate interdependency that enriches our lives, encouraging us to seek support and kinship, and fostering a deeper appreciation for the collective well-being of all individuals.

⁴⁰⁵ Lassiter, p. 10; Matolino, Kwindigwi, pp. 198, 199, 201.

⁴⁰⁶ Mokgoro, pp. 1ff; Tshoose, p. 14.

⁴⁰⁷ Ibid.

⁴⁰⁸ Nafukho, pp. 410ff.

⁴⁰⁹ *Port Elizabeth Municipality* supra note 37, paras 37, 43.

⁴¹⁰ Radebe, Phoko, p. 239.

Furthermore, Ubuntu's potential to encourage dialogue, understanding, and collaboration between diverse cultural groups makes it valuable in modern societies with pluralistic backgrounds. Lastly, Ubuntu's emphasis on recognizing the dignity and well-being of all individuals, including the vulnerable and marginalized, aligns with the principles of human rights and social justice that are pertinent in modern times.

Lastly, a third critique asserts that Ubuntu reinforces patriarchy and discriminates against the LGBTQ+ community.⁴¹¹ Additionally, it is argued that Ubuntu supports traditional values that may not ensure equality for strangers and outsiders, as African law and religion are seen to apply primarily to the African community rather than to those outside it.⁴¹²

This criticism is strongly rebutted. Ubuntu has never been implemented with the condition that individuals, whether women, children, gays and lesbians, or strangers, must adhere to predefined roles.⁴¹³ According to this philosophy, women are not discriminated against; instead, they hold an esteemed position in African societies, recognized as vital for the continuity and socioeconomic well-being of the community.⁴¹⁴ There is no evidence that gays and lesbians were mistreated in African societies under the principles of Ubuntu; rather, all individuals have traditionally been afforded equal protection.⁴¹⁵ This critique reflects a significant misunderstanding of both Ubuntu and African culture, as well as the enduring principles of African democracy.⁴¹⁶

In summary, it is difficult to align with the critical voices opposing the incorporation of Ubuntu in legal argumentation. On the contrary, employing Ubuntu as an interpretative tool opens avenues to integrate a diverse array of intuitive human rights into legal discourse, providing a guiding framework for addressing ongoing disputes related to justice.⁴¹⁷ The concerns about Ubuntu's application in a legal context should

⁴¹¹ Keevy, pp. 36-47.

⁴¹² Ibid, pp. 48-50.

⁴¹³ Williams, pp. 176-178; Nafukho, p. 411.

⁴¹⁴ Williams, pp. 127, 135, 139.

⁴¹⁵ Radebe, Phooko, p. 248; Williams, p. 178.

⁴¹⁶ Radebe, Phooko, p. 248.

⁴¹⁷ Metz (2011), p. 532.

not dissuade us from recognizing its potential to serve as a foundation for public morality.⁴¹⁸

4.5 Conclusion

In conclusion, Ubuntu emerges as a powerful and harmonious companion to the human rights system and the South African Bill of Rights. Its principles of interconnectedness, compassion, and communal well-being align seamlessly with the values enshrined in these legal frameworks, particularly the right to human dignity that extends to every individual, including refugees. By incorporating Ubuntu principles in PIL, we can advocate for a more inclusive approach to refugee protection, fostering a dialogue that addresses prejudices and fears within society. Ubuntu offers an ethical framework to navigate complex issues related to refugee rights, ensuring fair and just solutions, and upholding the universal values of human dignity and equality. Through the lens of Ubuntu, we aspire to build a society that embraces all its members, offering refuge, compassion, and support to those in search of safety and a brighter future.

5. CHAPTER FIVE – CONCLUSION

5.1 Introduction

In the preceding chapters, the thesis elucidated the legal context encompassing PIL concerning refugee rights cases in South Africa. Following that, an in-depth examination of PIL took place, shedding light on its complexities by delving into two cases that centered around the challenges faced by refugees seeking access to the RSD procedure in South Africa. This not only rendered tangible the concept of strategic litigation but also exemplified its practical implications.

Following this, the dissertation delved into the African Ubuntu philosophy, offering an insight into its principles. Furthermore, it expounded on how infusing the arguments presented in PIL cases related to refugee rights with Ubuntu values could augment their impact and influence. This integration was shown to fortify the persuasive power of such legal endeavors.

In this concluding chapter, recommendations will be provided on how to realize the central argument of this dissertation, to demonstrate that the enforcement of refugee

⁴¹⁸ Metz (2011), p. 532.

rights through PIL is not only an exceptionally effective legal strategy but is also deeply ingrained in the ethos of Ubuntu. This African philosophy highlighting interconnectedness and humanity, underscores the significance of acknowledging and embracing the dignity and well-being of all individuals, including refugees. Operating within this framework, PIL stands out as a catalyst for transformative change, fostering a more empathetic and inclusive approach to refugee protection. South Africa, with its poignant history of combating discrimination and injustice, has embraced the principles of human dignity and equality enshrined in its Constitution. In the realm of refugee rights, the spirit of Ubuntu assumes profound importance by accentuating values such as compassion, community, and interdependence.

5.2 Recommendations

Based on the foregoing, the following recommendations are proposed:

The central suggestion is to actively pursue PIL addressing refugee rights violations and bring these cases to court. PIL serves as a crucial mechanism to amplify the voices of individuals who may otherwise go unheard by the judicial system due to limited personal resources. But the absence of resources should not serve as a justification for allowing refugee rights, and consequently, human rights violations to go unpunished.

The above-illustrated cases exemplify the potential success of court proceedings in safeguarding and upholding refugee rights. The protection of the most vulnerable is deeply entrenched in the South African Constitution, aligning with the core values of Ubuntu – emphasizing humanness and interconnectedness. Although the Constitutional Court has explicitly acknowledged Ubuntu as the foundational motif of the Constitution,⁴¹⁹ the court has also emphasized that while constitutional values are crucial, they lack an inherent, standalone right.⁴²⁰ Therefore, it is imperative to translate the values of Ubuntu into concrete and tangible outcomes through court orders. A judicial decision has the power to provide legal certainty on how to incorporate the values of Ubuntu into the specific circumstances of an individual case.

⁴¹⁹ *Port Elizabeth Municipality* supra note 37, para 37.

⁴²⁰ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC), para 80.

Thus, the first crucial step is to pursue PIL for refugee rights enforcement. Following a successful outcome, the second key step is to ensure the court order's effective enforcement. According to *Amit*, clarity in the court order, with explicit requirements, is essential for easy identification of non-compliance and holding responsible parties accountable.⁴²¹ In addition, to enhance execution effectiveness, it is advisable to seek a structural interdict alongside the court order. *Amit* suggests that public interest lawyers can enhance the effectiveness of their legal actions by seeking detailed structural interdicts by the court, which simplifies contempt proceedings.⁴²² A better grasp of these challenges enables the formulation of more creative strategies to overcome legal constraints. Although the success of structural interdicts may still rely on public interest lawyers initiating contempt cases, the burden is notably lighter when the court precisely outlines the government's obligations. This approach is more effective as it demands less capacity.⁴²³

Furthermore, it is recommended that public interest lawyers don't stop monitoring the RSD procedure to enable timely intervention in case of any unlawful conduct by the DHA. Given the integral role of the RSD process in South Africa's refugee system, ensuring procedural fairness, lawful conduct, and the protection of constitutionally guaranteed rights for individuals is of paramount importance.⁴²⁴

Hence, it is recommended that public interest lawyers actively work towards enforcing key standards for the RSD procedure in South Africa, as articulated by *De Jager*.⁴²⁵ First and foremost, it must be ensured that everyone can exercise their right to apply for asylum within the country. Second, it should be safeguarded that the processing of asylum applications is conducted in a timely and efficient manner. Additionally, it is recommended to use PIL cases to guarantee that RSD procedures are conducted impartially and without discrimination, adhering to transparent and fair procedures. It needs to be ensured that each case is evaluated based on its individual merits, irrespective of the applicant's country of origin. Even if the RSDO is permitted to consider country of origin information, every applicant still must be allowed to review such information and, if prejudicial, challenge it through the submission of additional

⁴²¹ *Amit* (2011), SAJHR, p. 37.

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ *De Jager*, in: Khan, Schreier, pp. 170ff.

⁴²⁵ *Ibid.*

evidence or testimony. It needs to be ensured that the information presented by the asylum applicant is assessed within its appropriate context and that the RSDO is cautious not to focus excessively on irrelevant factors to the detriment of pertinent considerations. Additionally, in instances where language becomes a barrier, it is essential to provide asylum applicants with proper interpretation services to ensure a comprehensive understanding of their rights and facilitate active participation in their respective hearings.⁴²⁶ Moreover, it is crucial to ensure that in the absence of documentary evidence, the evaluation of credibility takes into account factors such as cultural nuances, gender distinctions, class, education, personality differences, the effects of trauma and starvation on testimony, and the potential reluctance of the asylum applicant to disclose details based on past experiences in their country of origin. Public interest lawyers should try to prevent with their cases any abuse of the RSDO's dual responsibility to receive information and to seek only relevant details essential to the asylum seeker's claim.⁴²⁷

Furthermore, it is essential to ensure – if necessary, then with the help of PIL – that RSD decisions rest on a correct interpretation of the relevant legal concepts associated with the claim. This necessitates appropriate qualifications and continuous training. Additionally, it must be safeguarded that RSD decisions are reasonable, demonstrating a logical link between the evidence and the findings of the RSDO. In cases where the decision is negative, it is crucial to guarantee that the asylum applicant is provided with comprehensive reasons that enable them to build a substantive case for the review or appeal of the decision.⁴²⁸

The final recommendation underscores the public dimension of PIL. The success of any case relies on broader public interest and the support of a social movement. Overcoming significant societal prejudices against certain refugees, rooted in a lack of knowledge and education about the reasons and elements driving asylum-seeking, poses a considerable challenge. Despite South Africa's non-encampment policy, wherein refugees live among the local population, their presence hasn't been adequately explained to the South African public. To address this, it is recommended that government officials and the public alike require more information about refugees,

⁴²⁶ De Jager, in: Khan, Schreier, pp. 170ff.

⁴²⁷ Ibid.

⁴²⁸ Ibid.

emphasizing their integration across various sectors such as education, labour markets, healthcare, and the justice system. According to the UNHCR, the formulation of policies that elucidate the rights of refugees and their coexistence with the local population is crucial for fostering a welcoming society.⁴²⁹ It is apparent that many South Africans are unaware of the full extent of socio-economic rights granted to refugees. For instance, refugees often report that potential employers lack awareness of their rights, leading to workplace exploitation and hindering their economic integration, despite their right to seek employment.⁴³⁰ According to *Khan*, to bridge this gap, the South African government must proactively communicate that welcoming refugees is an international obligation and a duty stemming from a shared humanity.⁴³¹

5.3 Conclusion

While PIL may not be a universal remedy for large-scale social change, its role is pivotal in the ongoing struggle for social justice. Demonstrating its efficacy as a tool for shaping public policy, PIL has played a crucial role in amplifying the voices of vulnerable and marginalized individuals and communities.

Nevertheless, public interest lawyers, navigating the complexities of their field, must be cognizant of both the limitations in accessing their services and the gatekeeping role they often play. Recognizing the internal and external factors influencing decision-making processes is imperative. By acknowledging the confines of judicial action and adopting a holistic approach both inside and outside the courtroom, public interest lawyers can maximize the impact of their legal victories. Moreover, the multifaceted factors contributing to the public interest underscore the importance of a strategic approach in choosing cases. Diverse factors such as individual opinions and preferences and political and economic shifts, necessitate transparent and well-crafted multimedia campaigns to accompany the efforts to bring a claim to involve the affected and interested population and ultimately contribute to a more equal society.

To achieve this goal, it is advisable to appeal to the values that already exist in the South African population, such as the values of the Ubuntu philosophy. As exemplified in the previous chapter, these values align with human rights principles, offering a

⁴²⁹ UNHCR, 'UNHCR policy on refugee protection and solutions in urban areas'.

⁴³⁰ Dass, Ramjathan-Keogh, Khan, in: Khan, Schreier, pp. 224ff.

⁴³¹ Khan, p. 272.

contextual sensitivity that enriches the argumentation of PIL cases concerning refugee rights. Highlighting the essence of humanity and the innate dignity of every individual, Ubuntu resonates harmoniously with the foundational principles of the South African Constitution. It places a strong emphasis on safeguarding fundamental rights through the acknowledgment of the inherent dignity of all people. Therefore, integrating these values into the arguments of public interest lawyers proves especially fitting. In doing so, they not only persuade society of the righteousness of their cause but also effectively make their case in the courts.

In the pursuit of narrowing the gap between legal and practical protection, successful PIL cases can enhance awareness of international and domestic refugee law among government officials responsible for processing asylum applications and refugee status determination. Although progressive, rights-oriented courts and a strong human rights framework play a crucial role, ensuring lasting protection for non-citizens necessitates continuous advocacy efforts. Therefore, strategic litigation remains a vital instrument in the ongoing enforcement of human and refugee rights. The resilience demonstrated in PIL cases on behalf of asylum-seekers, despite challenges from the DHA, underscores the importance of continued efforts. As South Africa provides examples of inspiring strategic litigation, it contributes empirical material for critical analysis of the dynamics of PIL. This collective knowledge informs practitioners about the potential of litigation to deliver structural change, ensuring that refugees and asylum-seekers in South Africa benefit from ongoing advocacy and legal intervention.

To conclude, PIL cases devoted to upholding and protecting refugee rights in South Africa extend beyond individual interests. They embody a holistic and principle-driven approach rooted in the Ubuntu philosophy. These cases aspire to not only address immediate concerns but also to contribute to broader societal enhancement, aligning with the constitutional vision articulated in the Preamble of the Constitution:

‘Heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights.’

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