



UNIVERSITY OF CAPE TOWN

REFUGEE CHILDREN'S ACCESS TO CRITICAL HEALTHCARE SERVICES IN SOUTH AFRICA

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## Abstract

Access to socio-economic rights in a host country by refugees is important in ensuring successful integration. Despite rights being afforded to refugees in international law in theory, their practical realisation is often fraught with difficulties. This study sought to focus on the most vulnerable of the refugee population, children, and their access to critical healthcare services in South Africa. It sought to analyse refugee children's access to critical healthcare services from a human rights approach focusing on the key principles of non-discrimination and human dignity. The study found that although refugee children's access to critical healthcare services is widely provided for in theory, several barriers exist to the realisation of this right. The study concludes by making recommendations on how various parties can contribute to improving refugee children's access to critical healthcare services.

## Abbreviations

UNHCR - United Nations High Commissioner for Refugees

UDHR - Universal Declaration of Human Rights

UNCRC - United Nations Convention on the Rights of the Child

CESCR - Committee on Economic, Social and Cultural Rights

ICESCR - International Covenant on Economic Social and Cultural Rights

ICCPR - International Covenant on Civil and Political Rights

DHA - Department of Home Affairs

DOH - Department of Health

DSD - Department of Social Development

CYCC - Child and Youth Care Center

HRC - Human Rights Committee

WHO - World Health Organisation

OAU - Organisation of African Unity

ACRWC - African Charter on the Rights and Welfare of the Child

ICU - Intensive Care Unit

PICU - Paediatric Intensive Care Units

UPFS – Uniform Patient Fee Schedule

HIV/AIDS – Human Acquired Immunodeficiency Syndrome

SALC – South African Law Reform Commission

GRC – Global Compact on Refugees

CC – Constitutional Court of South Africa

SCA – Supreme Court of Appeal

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# Chapter 1

## Background and Context of the Research

### 1.1 Introduction

Every day, there are reports of protracted refugee situations and emerging conflicts from across the globe.<sup>1</sup> Millions are displaced from their homes often suddenly and violently and as a result, forced to seek refuge in areas within and outside their countries that are safer. Many refugees find themselves estranged from their home countries for decades, and unfortunately for others their lifetime lapses before conditions are suitable for return.

In some instances, when refugees arrive in host countries, rights guaranteed to them in law on condition of being physically present are restricted.<sup>2</sup> This practice fails to acknowledge that refugees have basic needs for shelter, food, and health care that must be immediately met. Whereas the rest of the rights may accrue as a refugee's relationship with the host state deepens, the fundamental rights should be met immediately.<sup>3</sup> Professor James Hathaway, a foremost scholar in refugee law, has remarked that to avoid denying the rights of the 1951 Refugee Convention relating to the Status of Refugees and its 1967 Protocol,<sup>4</sup> states should grant everyone who claims to be a refugee the “provisional benefit of those rights which are not predicated on regularisation of status, in line with the Convention's own attachment requirements.”<sup>5</sup>

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<sup>1</sup> Khan, Fatima. “In Chronic Exile: Rethinking the Legal Regime for Refugees in Protracted Refugee Situations.” *Stellenbosch law review* 30.2 (2019): 186–211.

<sup>2</sup> Madeline Garlick ‘The sharing of responsibilities for the international protection of refugees in Costello, Cathryn, Michelle Foster, and Jane McAdam. *The Oxford Handbook of International Refugee Law* ed (2001).

<sup>3</sup> Hathaway, James C. *The Rights of Refugees Under International Law*. Cambridge: Cambridge University Press, 2005.

<sup>4</sup> United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, hereafter, Refugee Convention.

<sup>5</sup> Hathaway, James C. *The Rights of Refugees Under International Law*. Cambridge: Cambridge University Press, 2005, at 154.

It is estimated that half of the world's refugee population is below the age of eighteen.<sup>6</sup> Refugee children are a vulnerable population group because of their ongoing development and reliance on adults for care and protection.<sup>7</sup> The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child were drafted specifically for the protection of the rights of children,<sup>8</sup> whereas other instruments apply to all people including children. The latter includes the Universal Declaration of Human Rights, the Covenant on Economic and Social Cultural Rights, and the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.<sup>9</sup> Despite these protections in law, many reports exist of instances where refugee children are denied their socio-economic rights in countries such as South Africa that have ratified international conventions.<sup>10</sup>

## 1.2 Healthcare for refugee children in South Africa

In South Africa, refugees live in the same communities and access the same healthcare facilities as the host population.<sup>11</sup> South Africa's refugee policy is considered exemplary on the African continent, in comparison to those of other host countries that restrict refugees to camps under squalid conditions and inadequate healthcare facilities.<sup>12</sup> This has even led some commentators to say that refugees are languishing in camps on the continent.<sup>13</sup> South Africa's relatively better conditions have resulted in it being a popular destination for forced migrants. Statistics from the

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<sup>6</sup> United Nations International Children's Fund 'Child displacement' available at <https://www.unhcr.org/figures-at-a-glance.html>, accessed on 03 June 2022.

<sup>7</sup> Gheaus, Anca, Gideon Calder, and Jurgen De Wispelaere. *The Routledge Handbook of the Philosophy of Childhood and Children* 1 ed (2019). Boca Raton, FL: Routledge, an imprint of Taylor and Francis, 2018.

<sup>8</sup> United Nations General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p 3, (CRC); Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), (Children's Charter).

<sup>9</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), hereafter UDHR; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, hereafter ICESCR.

<sup>10</sup> Meyer-Weitz, Anna, Kwaku Oppong Asante, and Bukenge J. Lukobeka. "Healthcare Service Delivery to Refugee Children from the Democratic Republic of Congo Living in Durban, South Africa: a Caregivers' Perspective." *BMC medicine* 16.1 (2018): 163–163.

<sup>11</sup> Landau, L. B. (2006). Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy. *Journal of refugee studies*, 19(3), 308-327.

<sup>12</sup> Polzer, Tara. "Negotiating Rights: The Politics of Local Integration." *Refuge (Toronto. English edition)* 26.2 (2009): 92–106.

<sup>13</sup> J Milner *Refugees, the State and the Politics of Asylum in Africa* (1st ed, 2009, Springer).

United Nations High Commissioner for Refugees (UNHCR) as of 2020, placed the approximate number of asylum seekers and refugees at 266,694.<sup>14</sup>

It is acknowledged that refugees are a vulnerable population, more so refugee children.<sup>15</sup> Refugee children are often among the first individuals to be affected by trauma, malnutrition and infectious diseases that accompany refugee movements.<sup>16</sup> As a result of economic and social hardship refugees often do not have the means to access private healthcare. As a result, in most instances they can only access the public health sector which makes provisions for people of all economic statuses. Nevertheless, refugees still face challenges such as discrimination, language, cultural, and financial barriers.<sup>17</sup> The compromised health status of refugee children and the access challenges reported make it imperative for the government to take appropriate measures to ensure that refugee children's right to healthcare is well protected.<sup>18</sup>

### 1.3 Research question

Is critical healthcare accessible to refugee children in south Africa?

### 1.4 Problem statement

Most refugee children in South Africa come from countries where there are poor healthcare systems and a high prevalence of communicable and non-communicable diseases. For instance, most refugees are from Somalia and the Democratic Republic of Congo (DRC).<sup>19</sup> The Democratic Republic of Congo's healthcare system is inadequately resourced to combat diseases such as cholera, malaria, lower respiratory infections, neonatal disorders and tuberculosis.<sup>20</sup> The United Nations International Childrens Emergency Fund (UNICEF) has raised concerns about

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<sup>14</sup> United Nations High Commissioner for Refugees (UNHCR). 2020. South Africa Representation Office Fact Sheet October–December 2020. Available at: <https://reporting.unhcr.org/sites/default/files/UNHCR%20South%20Africa%20fact%20sheet%20October%20-%20December%202020.pdf> Accessed on 23 March 2020.

<sup>15</sup> UNHCR. Ensuring Access to Health Care: Operational Guidance on Refugee Protection and Solutions in Urban Areas. Geneva: UNHCR; 2015.

<sup>16</sup> Rieder M, Choonara I. Armed conflict and child health. *Arch Dis Child*. 2012; 97:59–62.

<sup>17</sup> Op cit note 20.

<sup>18</sup> Op cit note 15.

<sup>19</sup> Bureaucratic Barriers to Social Protection for Refugees and Asylum Seekers During the COVID-19 Disaster in South Africa." *African Human Mobility Review* 7.2 (2021), p 75.

<sup>20</sup> Zou, Siyu et al. "Understanding the Context of Healthcare Utilisation for Children Under-Five with Diarrhoea in the DRC: Based on Andersen Behavioural Model." *BMC health services research* 22.1 (2022): 144–144.

the decreasing levels of immunisation which is leading the prevalence of measles, polio, and yellow fever among Congolese children.<sup>21</sup> The conditions in the country of origin and the challenges encountered whilst migrating to South Africa (rape, trauma and lack of necessities) increase the chances of refugee children having a compromised health status on arrival in South Africa.<sup>22</sup> Their physical and mental health is relatively poor compared to that of their counterparts in the country, and this makes it imperative for refugee children to be provided with health care services commensurate with their needs.<sup>23</sup>

Refugee children that seek asylum in Kenya and Zambia may face relatively greater challenges in accessing healthcare services because of encampment policies in these countries.<sup>24</sup> Comparatively, in South Africa the situation should be much better for refugee children. Firstly, even though the healthcare system is facing challenges as will be shown in the following sections it is considered the flagship national health system in sub-Saharan Africa.<sup>25</sup> Secondly, refugees are integrated into host communities, and they are guaranteed access to the national healthcare system.<sup>26</sup> However, research suggests that refugees are experiencing discrimination and language, cultural, and financial barriers in accessing the healthcare system.<sup>27</sup>

The term ‘medical xenophobia’ was coined to refer to the discrimination against refugees and migrants in accessing health care services.<sup>28</sup> As the term suggests, the problem has been seen as an extension of xenophobia into the healthcare system. Episodes of xenophobia are reported in the country, however the most devastating occurred in 2008.<sup>29</sup> The latter consisted of waves of violent attacks on migrants and refugees, and it resulted in deaths, injuries and the destruction of property.<sup>30</sup>

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<sup>21</sup>World Health Organisation ‘Immunization coverage’ available at <https://www.who.int/news-room/fact-sheets/detail/immunization-coverage> accessed on 16 January 2023.

<sup>22</sup> Allotey, Pascale. *The Health of Refugees: Public Health Perspectives from Crisis to Settlement*. Oxford: Oxford University Press, 2003. Print.

<sup>23</sup> Beirens H, Hughes N, Hek R, Spicer N. Preventing social exclusion of refugee and asylum-seeking children: building new networks. *Soc Policy Society*. 2007; 6:219–29.

<sup>24</sup> Ibid 12.

<sup>25</sup> Wachira, George Mukundi. *Migrants’ Right to Health in Southern Africa*. Pretoria: International Organization for Migration, 2009.

<sup>26</sup> Op cit note 11.

<sup>27</sup> Op cit note 10.

<sup>28</sup> Crush, Jonathan, and Godfrey Tawodzera. “Medical Xenophobia and Zimbabwean Migrant Access to Public Health Services in South Africa.” *Journal of ethnic and migration studies* 40.4 (2014): 655–670.

<sup>29</sup> Hassim, S., T. Kupe, and E. Worby, eds. 2008. *Go Home or Die Here*. Johannesburg: Wits University Press.

<sup>30</sup> Ibid.

Research conducted to investigate access to health care services by refugees and migrants has shown that there are challenges being experienced. A study conducted in Durban found that refugee parents/caregivers were dissatisfied with the healthcare services their children had received from public healthcare facilities.<sup>31</sup> They experienced discriminatory behavior and negative attitudes from healthcare workers. Vearey and Richter found that approximately one-third of non-national patients experienced difficulties in accessing anti-retroviral treatment (ART), pre-natal care, and post-natal care.<sup>32</sup> In another study, scholars reported that the xenophobia episodes of 2008 and 2015 resulted in many refugees avoiding seeking health care services regardless of the severity of their health condition due to the fear of xenophobia and possible discrimination.<sup>33</sup> Unfortunately, xenophobia persists as shown in recent acts by Operation Dudula that have come to the attention of the United Nations.<sup>34</sup> Even more worrying is the fact that these recent acts have been targeted at public healthcare institutions, because this will negatively affect refugees' health seeking behavior.<sup>35</sup>

The government has a Constitutional obligation to protect the right to healthcare for everyone in the country, however it has not responded adequately to xenophobia and health care access challenges affecting refugees.<sup>36</sup> Research conducted by the African Centre for Migration and Society and the Institute for Security Studies concluded that there was limited action by the government to curb xenophobia.<sup>37</sup> Amnesty international noted that instead of addressing the problem, senior government officials have uttered statements that incite violence and mistreatment of foreign nationals.<sup>38</sup>

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<sup>31</sup> Op cit note 10.

<sup>32</sup> Vearey, J., and M. Richter. 2008. Challenges to the Successful Implementation of Policy to Protect the Right of Access to Health for all in South Africa. Johannesburg: Report from Migrant Health Forum to Gauteng Department of Health.

<sup>33</sup> Ibid.

<sup>34</sup> United Nations 'South Africa 'on the precipice of explosive xenophobic violence', UN experts warn' available at [South Africa 'on the precipice of explosive xenophobic violence', UN experts warn | UN News](#) accessed on 16 January 2023.

<sup>35</sup> Pressreader 'Foreign Patients Turned Away' available at [PressReader.com - Digital Newspaper & Magazine Subscriptions](#) accessed on 16 January 2023.

<sup>36</sup> Ashfield, Abigail Emily. "The Plight of Refugees in South Africa." *Pretoria Student L. Rev.* 15 (2021): 127.

<sup>37</sup> Zihindula, Ganzamungu, Anna Meyer-Weitz, and Olagoke Akintola. "Lived experiences of Democratic Republic of Congo refugees facing medical xenophobia in Durban, South Africa." *Journal of Asian and African Studies* 52.4 (2017): 458-470.

<sup>38</sup> Ibid.

In September 2013, the Gauteng Department of Health issued controversial draft guidelines for the treatment of foreign nationals that were titled ‘Non-South African Citizens: (Foreign Patients) – Guidelines’.<sup>39</sup> The guidelines dictated to healthcare providers in the public sector how they should engage foreign nationals. Despite having been in draft form, the guidelines were immediately implemented, and this led to confusion, especially regarding the payment for services.<sup>40</sup> In the end many refugees and migrants were denied access to health care services.

The evidence above highlights that refugees are encountering challenges in accessing health care services. It is important to note that there is a dearth of research focusing on refugee children’s access to critical healthcare services. This is not an ideal situation considering the vulnerability of refugee children and how important it is to ensure that they are able to access health care services when need arises.

### 1.5 Rationale

Critical healthcare is in some instances referred to as intensive care. It refers to the managing or treating of illnesses and injuries that are of a serious nature and may be life-threatening.<sup>41</sup> In 2019 approximately 5.2 million children died before reaching 5 years of age and most deaths were from severe infections, haemodynamic instability, respiratory failure and other organ dysfunctions.<sup>42</sup> These are health complications that can only be dealt with through access to emergency and critical care, which highlights the importance of critical healthcare in reducing the infant mortality rate.<sup>43</sup>

As revealed in the *Soobramoney v Minister of Health* case (Soobramoney case) which was the first case in which the Constitutional Court adjudicated social-economic rights, access to critical healthcare services is a contentious issue in South Africa.<sup>44</sup> This is because to manage the limited

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<sup>39</sup> Alfaro-Velcamp, Theresa ‘Don’t Send Your Sick Here to Be Treated, Our Own People Need It More’: *Immigrants’ Access to Health Care in South Africa* (Master’s thesis, University of Cape Town) 2015; Faraaz Mahomed ‘Examining the constitutionality of South Africa’s public health policies in respect of non-nationals’ *South African Journal on Human Rights*, 32:1, 1-25.

<sup>40</sup> Ibid.

<sup>41</sup> Matlakala, Mokgadi C., Martie C. Bezuidenhout, and Annali DH Botha. "Challenges encountered by critical care unit managers in the large intensive care units." *Curationis* 37.1 (2014): 1-7.

<sup>42</sup> World Health Organisation ‘Children: improving survival and wellbeing’ available at [Children: improving survival and well-being \(who.int\)](#), accessed on 16 January 2023.

<sup>43</sup> Ibid.

<sup>44</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

available resources some patients will be denied access to critical healthcare services, and this could lead to a loss of life. When the highest infection rates of the Corona Virus were recorded in South Africa, the demand for critical healthcare services exceeded the availability of services.<sup>45</sup> This resulted in difficult decisions having to be made regarding the rationing of available resources using triage systems. Scholars have commented that the COVID-19 triage guidelines of 2020 compiled by Critical Care Society of Southern Africa were not aligned with the Constitution of South Africa and discriminated against elderly patients in ranking them lowly in terms of admission into the ICU.<sup>46</sup> In Europe, there were reports of prejudicial treatment against disabled and elderly patients.<sup>47</sup> This problem was immediately resolved by medical authorities as legal action was already being instituted. The lesson that can be drawn from these occurrences is that triaging is of importance in managing available resources and that there are hidden social and political prejudices that exist in modern healthcare systems.<sup>48</sup> Under these circumstances it is important to assess access to critical healthcare services by refugee children who are a vulnerable population group.

## 1.6 Research methodology

This is doctrinal research and materials used were gathered from internet sources, books from the University of Cape Town library, and research databases such as EBSCOhost, Google Scholar, HeinOnline, LexisNexis Academic, and Jutastat Publications. Source materials used include peer-reviewed journals, books, research reports, newspaper articles, and seminar and conference proceedings.

## 1.7 Literature review

In international human rights law, the right to health primarily stems from article 12 of the ICESCR.<sup>49</sup> It places an obligation on State Parties to the covenant to recognise the right of everyone to the highest attainable standard of physical and mental health. Scholars and the

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<sup>45</sup> Erasmus, N. "Age Discrimination in Critical Care Triage in South Africa : the Law and the Allocation of Scarce Health Resources in the COVID-19 Pandemic." *South African medical journal* 110.12 (2020): 1172–1175.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> McKinney EL, McKinney V, Swartz L. COVID-19, disability and the context of healthcare triage in South Africa: Notes in a time of pandemic. *African Journal of Disability* 2020;9: p 766.

<sup>49</sup> Op cit note 9.

Committee on Economic Social and Cultural Rights (CESCR) have developed an understanding of the nature of the right; however, Jennifer Ruger has argued that there has been a failure to reveal the philosophical and conceptual grounding of the right.<sup>50</sup> This has led her to comment that “one would be hard pressed to find a more controversial or nebulous human right than the right to health”.<sup>51</sup>

Research shows that in developing countries, the inherent controversy shrouding the right to health has been worsened by a lack of sufficient resources to meet an increasing burden of disease, weak governance and corruption.<sup>52</sup> Africa has less than one health worker per 1000 population in comparison to a better Europe that has 10 workers for the same population.<sup>53</sup> In South Africa, public health facilities are characterised by long-waiting times, poorly maintained infrastructure, insufficient medication and equipment, and a lack of cleanliness.<sup>54</sup> In one research study it was shown that scarcity of health workers was leading to mental and physical exhaustion, and a deterioration of the health status of health workers and their ability to serve patients.<sup>55</sup> This has been accompanied by a rise in malpractice litigation. A discussion document from the Steve Biko Centre for Bioethics for a Medico-legal summit showed that unprofessional behaviour and low staff morale, a lack of equipment and human resources, and inadequate security for patient records are some of the causes.<sup>56</sup> A national health audit found that services being provided in the public health sector are failing to meet basic standards of care and the

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<sup>50</sup> Ruger, Jennifer Prah. “Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements.” *Yale journal of law & the humanities* 18.2 (2006): 3–3.

<sup>51</sup> Ibid.

<sup>52</sup> Rispel, Laetitia C, Pieter de Jager, and Sharon Fonn. “Exploring Corruption in the South African Health Sector.” *Health policy and planning* 31.2 (2016): 239–249.

<sup>53</sup> Fonn, S., Ray, S. & Blaauw, D., 2011, ‘Innovation to improve health care provision and health systems in sub-Saharan Africa – Promoting agency in mid-level workers and district managers’, *Global Public Health* 6, 657–668.

<sup>54</sup> Ana, V.V., 2013, ‘Experiences of chronic patients about long waiting time at a community health care centre in the Western Cape’, Master of Nursing Sciences in the Faculty of Health, University of Stellenbosch.

<sup>55</sup> Ibid.

<sup>56</sup> Mokone, M.A *Soaring medical malpractice litigation in South Africa and its implications for the implementation of the proposed national health insurance scheme* (Unpublished Doctoral dissertation, University of Kwazulu-Natal, 2019) 18.

expectations of patients.<sup>57</sup> This has resulted in a deterioration of the public's trust in the healthcare system to meet their needs as they arise.<sup>58</sup>

Research shows that adequate intensive care would significantly change the outcome of critically ill children.<sup>59</sup> Ashu et al., have commented that the challenges in accessing critical health care services such as dialysis, highlight the potential tension that exists between the rights of the individual, and the rights of the broader community when decisions must be made to manage the limited resources.<sup>60</sup> In addition, they also argue that in Sub-Saharan Africa, the lack of guidelines to manage the limited critical health care services leaves much discretion to clinicians and caregivers at the bedside.<sup>61</sup>

The 2019 World Health Assembly recognised that refugees and migrants are often excluded from health policies and as a result concluded that their inclusion should be a priority in all member states.<sup>62</sup> Among European Union member states, studies have shown that migrants and refugees are included in health policies at varying levels. Legal status was found to be the most significant factor in refugees' access to comprehensive healthcare services.<sup>63</sup> In South Africa, studies have shown that factors such as a lack of knowledge about the rights of refugees, language barriers, a lack of understanding of a host country's healthcare system, and low socio-economic status have a negative impact on access to healthcare by refugees.<sup>64</sup> Attitudes of health workers influence refugees' level of satisfaction with the healthcare services they receive, or that their children receive.<sup>65</sup> Attitudes of health workers were shown to be shaped by their understanding of refugee rights, level of satisfaction with their job, and their personal prejudices

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<sup>57</sup> National Department of Health, 2012, The national health care facilities baseline audit. National Summary Report, Health e-News, in R. Visser, R. Bhana & F. Monticelli (eds.), National Department of Health, Pretoria, South Africa.

<sup>58</sup> Russell, Edward W, and Dick G Bvuma. "Alternative Service Delivery and Public Service Transformation in South Africa." *The International journal of public sector management* 14.3 (2001): 241–265.

<sup>59</sup> Basnet S, Adhikari N, Koirala J. Challenges in setting up paediatric and neonatal intensive care units in a resource-limited country. *Paediatrics* 2011;128: 986–92.

<sup>60</sup> Ashu, J.T., Mwangi, J., Subramani, S. *et al.* 'Challenges to the right to health in sub-Saharan Africa: reflections on inequities in access to dialysis for patients with end-stage kidney failure' (2022) *Int J Equity Health* **21**, 126.

<sup>61</sup> *Ibid.*

<sup>62</sup> WHO. 2019. Primary Health Care on the Road to Universal Health Coverage: 2019 Global Monitoring Report-Conference Edition. Geneva: World Health Organization.

<sup>63</sup> Cimas M, Gullon P, Aguilera E et al 'Healthcare coverage for undocumented migrants in Spain: regional differences after Royal Decree Law' (2012) *Health Policy* **120**: 384–95; Geeraert J 'Healthcare reforms and the creation of ex-/included categories of patients — "irregular migrants" and the "undesirable" in the French healthcare system' (2018) *International Migration* **56**: 68–81.

<sup>64</sup> *Op cit* note 10.

<sup>65</sup> *Op cit* note 10.

and perceptions about foreign nationals.<sup>66</sup> A study which investigated the perspectives of healthcare providers pertaining to refugees' and migrants' access to healthcare services found that the majority were of the view that they should not be included in the proposed National Health Insurance (NHI) system.<sup>67</sup> They also argued that refugees and asylum seekers should access health care services from their home countries.<sup>68</sup> Vanyoro has argued that “there is more complexity, ambivalence, and a range of possible experiences of non-nationals in South Africa’s public health care system than the current extant literature on ‘medical xenophobia’ has suggested.”<sup>69</sup> Vanyoro found that in Musina health care workers were not discriminating against foreign nationals, instead through creativity, innovation, and compromise they were bypassing health systems that do not consider the difficult circumstances of migrant patients.<sup>70</sup>

## 1.8 Contextualising refugee children’s access to critical health care for refugee children in South Africa

### 1.8.1 Introduction

This section seeks to contextualise refugee children’s access to critical healthcare in South Africa. This will be done through highlighting relevant legal instruments South Africa has ratified and showing the implications of the justiciability of the right to health. Lastly, this section will set out the structure of the healthcare sector.

### 1.8.2 Refugee children’s access to healthcare services contextualised

South Africa has ratified international and regional human and refugee rights instruments. As a result, it assumed obligations to respect, protect and promote human rights. According to the Constitution, consideration must be given to international law when the Bill of Rights is being

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<sup>66</sup> Pillay R 'Work satisfaction of professional nurses in South Africa: a comparative analysis of the public and private sectors' (2009) *Human Resource Health* 7:15; Mokoena M J *Perceptions of professional nurses on the impact of shortage of resources for quality patient care in a public hospital: Limpopo Province* (unpublished Master of Arts thesis, University of South Africa, 2017).

<sup>67</sup> White, Janine A, and Laetitia C Rispel 'Policy Exclusion or Confusion? Perspectives on Universal Health Coverage for Migrants and Refugees in South Africa' (2021) *Health policy and planning* 36.8: 1292–1306.

<sup>68</sup> Ibid.

<sup>69</sup> Vanyoro, Kudakwashe P 'When They Come, We Don't Send Them Back': Counter-Narratives of 'medical Xenophobia' in South Africa's Public Health Care System' (2019) *Palgrave communications* 5.1 101–101.

<sup>70</sup> Ibid.

interpreted.<sup>71</sup> Some of the instruments South Africa has ratified include the Refugee Convention,<sup>72</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa,<sup>73</sup> ICESCR,<sup>74</sup> CRC,<sup>75</sup> Children’s Charter,<sup>76</sup> and the Organization of African Unity, African Charter on Human and Peoples' Rights.<sup>77</sup>

The Constitution states that “everyone has the right to have access to health care services including reproductive health care,” taking into consideration available resources.<sup>78</sup> The word ‘everyone’ encompasses refugees and asylum seekers. In *Khosa and Others v Minister of Social Development and Others*,<sup>79</sup> it was held that the Constitution provides for the rights of all people regardless of their nationality or legal status. Section 28(1)(c) of the Constitution guarantees children the right to basic health care services.

The National Health Act (NHA) provides a framework for the healthcare system, and it takes into consideration the obligations of the Constitution and other national, provincial, local government laws.<sup>80</sup> The NHA aligned the healthcare system which had been fragmented along racial lines during apartheid with the Constitution. Notwithstanding progress made since the end of the apartheid, the South African Lancet National Commission report showed the need for reforms to resolve challenges of quality of healthcare services, financing, and equitable distribution of healthcare services.<sup>81</sup> The imperative to realise the right to health led to the designing of the NHI policy which is at present being scrutinised before it can be fully implemented.

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<sup>71</sup> Constitution of the Republic of South Africa, 1996. Section 39.

<sup>72</sup> Op cit note 9.

<sup>73</sup> Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45, available at: <https://www.refworld.org/docid/3ae6b36018.html> [accessed 16 January 2023] (hereafter OAU Refugee Convention)

<sup>74</sup> Op cit note 9.

<sup>75</sup> Op cit note 9.

<sup>76</sup> Op cit note 9.

<sup>77</sup> Organization of African Unity *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 16 January 2023] (hereafter African Charter)

<sup>78</sup> Section 27(1)(a)

<sup>79</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004), para 47.

<sup>80</sup> National Health Act, No. 61 of 2003 (hereafter NHA)

<sup>81</sup> South African Lancet National Commission 'Confronting the Right to Ethical and Accountable Quality Health Care in South Africa: A Consensus Report' (2019) Pretoria: National Department of Health.

There are two parallel healthcare providers in South Africa, and these are the private and public healthcare sectors.<sup>82</sup> Refugee children have the right of access to the entire healthcare system. The public healthcare sector is prohibited from refusing any person medical services, whereas the private sector can only be accessed by those who can pay for services,<sup>83</sup> except for emergency medical care.<sup>84</sup> Refugees that have exhausted their medical aid scheme benefits are able to access services from the public healthcare sector. The reality is that most refugees fall into the low socio-economic strata and cannot afford private healthcare, therefore, their only option is the public healthcare system.<sup>85</sup>

It is estimated that South Africa spends approximately 8.8% of its Gross Domestic Product (GDP) on healthcare, and this is higher than the recommended level for developing countries which is 5.8%.<sup>86</sup> It is estimated that 4.1% of the funding is directed to the private sector which caters for an affluent 16.2% of the population, and the remainder is spent on the public sector which caters for 84% of the population.<sup>87</sup> As a result of the meagre budget directed to the public sector which services most of the population, the available resources must be rationed. This results in some people being denied healthcare services as the rights of the individual are weighed against those of the entire population.<sup>88</sup> Refugee children contend for the limited resources just like South African children.

## 1.9 Chapter Synopsis

This thesis consists of five chapters: Chapter One introduces the topic of the thesis and provides the rationale for the research. It also provides context and a brief insight into the implications on refugee children of the right to health as a socio-economic right. Chapter Two proposes a human rights approach (HRA) to refugee children's access to critical healthcare and offers a detailed justification, and gives an analysis of human dignity and non-discrimination, principles which

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<sup>82</sup> Op cit note 66.

<sup>83</sup> DJ Ncayiyana 'The self-destructing private sector is no less a blot on our health system than the crumbling public health system' (2012) *102 (10) SAMJ* 772.

<sup>84</sup> The Constitution 1996 s 27 (3).

<sup>85</sup> Ibid.

<sup>86</sup> MMI Health 'Funding for National Health Insurance' (2016) *Submission to Davis Tax Committee* 16.

<sup>87</sup> Ibid.

<sup>88</sup> Manake Athanasius Mokone *Soaring Medical Malpractice Litigation in South Africa and Its Implications for the Implementation of the Proposed National Health Insurance Scheme* (unpublished Master's thesis University of Kwazulu-Natal, 2020) 15

are core to the human rights approach. Chapter Three provides an overview of the international and regional normative legal framework and concludes with a look at domestic legislation relevant to refugee children's access to critical healthcare in South Africa. Guided by information provided in the previous Chapters, Chapter Four will discuss the research topic in-depth. Lastly, Chapter five will provide a conclusion and offer recommendations on how to better respect, protect and promote refugee children's right to access critical healthcare in South Africa.

## Chapter 2

# Adopting a Human Rights Approach to Refugee Children's Access to Critical Health Care Services

### 2.1 Introduction

The HRA is important to refugee children's access to critical healthcare services in South Africa. Many scholars agree that the HRA is beneficial to improving health access. Nevertheless, understandings of what it constitutes, interpretation of its elements, and how it can be best used tends to vary.<sup>89</sup> This chapter will highlight the important elements of a HRA and show their significance to refugee children's access to critical healthcare services. It will also explore the non-discrimination and human dignity principles which are indispensable to the HRA.

### 2.2 Human Rights Approach explained

The HRA has been praised by refugee scholars as the most appropriate method in addressing challenges faced by refugees.<sup>90</sup> In 1951 the International Refugee Treaty was revisited in order to ensure that asylum seekers and refugees were accorded decent and favorable treatment.<sup>91</sup> This led to the inclusion of human rights in the Refugee Convention.<sup>92</sup> Refugees are entitled to rights in the Bill of Rights to the South African Constitution.<sup>93</sup> The right of access to healthcare services is guaranteed to refugees in the Constitution and the Refugees Act 130 of 1998.<sup>94</sup>

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<sup>89</sup> London, Leslie 'What Is a Human-Rights Based Approach to Health and Does It Matter?' (2008) *Health and human rights* 10.1: 65–80.

<sup>90</sup> F Khan 'Does the right to dignity extend equally to refugees in South Africa?' (2020) 20 *African Human Rights Law Journal* 261-284.

<sup>91</sup> Callixte Kavuro 'The Value of Human Dignity in the Refugee Protection' (2021) *African Human Mobility Review* 5.1 1512.

<sup>92</sup> Ibid.

<sup>93</sup> Chapter 2 of the Constitution.

<sup>94</sup> South Africa: Act No. 130 of 1998, Refugee Act, 1998. s 27(g).

The *Government of the Republic of South Africa and Others v Grootboom and Others* (Grootboom) case is credited for setting legal precedence in establishing the justiciability of socio-economic rights.<sup>95</sup> Although it concerned the right to housing and not healthcare which is under discussion in this paper, it paved the way for claims to socio-economic entitlements in human rights law through the courts.<sup>96</sup> The case of the *Minister of Health v Treatment Action Campaign* (TAC) followed the Grootboom case, and it concerned claims to entitlements of the right to healthcare.<sup>97</sup> The Treatment Action Campaign organisation successfully challenged the government in its restrictions on providing ART drugs to HIV positive pregnant women.<sup>98</sup> An important element of the HRA that can be devised from these cases is that it defines the right holder, duty bearer, and the nature of the obligations. Norman Daniel commented that the nature of the HRA creates an opportunity for accountability especially when coupled with effective civil society mobilisation.<sup>99</sup> The HRA has over the years created opportunity for refugees and asylum seekers to make claims to Constitutional guarantees in cases involving the rights to wage earning employment, education,<sup>100</sup> and social assistance.<sup>101</sup> Therefore, there is precedence of the HRA being instrumental in protecting the rights of refugees in the country. Even in instances when claims to entitlements have not resulted in a favorable outcome for refugees, the cases were adjudicated transparently and in a manner that is consistent with human rights, and the values of a democratic society.<sup>102</sup> The role of an independent judiciary bent on upholding the values of the Constitution to the HRA should not be understated.<sup>103</sup> Such is beneficial to the protection of refugee children's right to critical healthcare because if there are violations recourse is available.

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<sup>95</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

<sup>96</sup> Klinck, Jennifer A 'Recognizing Socio-Economic Refugees in South Africa: A Principled and Rights-Based Approach to Section 3(b) of the Refugees Act' (2009) *International journal of refugee law* 21.4 : 653–699.

<sup>97</sup> *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC)

<sup>98</sup> Ahmad, Hassan 'The Treatment Action Campaign and the Three Dimensions of Lawyering: Reflections from the Rainbow Nation' *SAHARA J : journal of Social Aspects of HIV/AIDS Research Alliance* 10.1 (2013): 17–24.

<sup>99</sup> Daniels, Norman 'Just Health: Meeting Health Needs Fairly' Cambridge University Press, 2008.

<sup>100</sup> *Minister of Home Affairs and Others v. Watchenuka and Another*, (010/2003) [2003] ZASCA 142 (28 November 2003), South Africa: Supreme Court of Appeal, 28 November 2003. (Hereafter referred to as Watchenuka case)

<sup>101</sup> *Scalabrini Centre Cape Town and Another v Minister of Social Development and Others* 2021 (1) SA 553 (GP)

<sup>102</sup> *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006)

<sup>103</sup> Op cit note 98.

As aforementioned, the HRA creates an important opportunity for accountability.<sup>104</sup> However, it is crucial to note that public critique and litigation which are the common means through which governments are held accountable are adversarial approaches.<sup>105</sup> Rarely do the government and health care providers take accusations pertaining to human rights violations warmly. Research conducted in South Africa showed that health providers may be hostile towards rights because they believe they are used against them and contribute to low staff morale.<sup>106</sup> However, as London suggests, the HRA does not prescribe adversarial approaches throughout, instead collaborative action is encouraged and can be explored within the HRA framework.<sup>107</sup> Medical staff have been accused of offering a sub-standard service to refugees and migrants (often referred to under the broad term foreign nationals).<sup>108</sup> On the contrary, there is also research which argues that front-line health workers are unable to execute their duties towards patients in accordance with what the right to health demands as a result of structural problems often beyond their control, and management systems that disempower them from acting independently.<sup>109</sup> London proposes that instead of a tussle between aggrieved rights holders and disempowered medical staff, the HRA can be utilised to enlist the support of medical staff in transforming healthcare systems through the concerted challenging of the state to meet clear obligations of the right to health.<sup>110</sup> In this proposed manner, the HRA is important to refugee children's access to critical healthcare services as it provides a lens through which to view current practices and identify ways in which children may be better protected.

At present, Universal Health Coverage (UHC) is a key target of the United Nations Sustainable Development Goals (SDGs).<sup>111</sup> The catchphrase 'leave no one behind' embodies the objectives of SDGs which include eradicating health inequalities and the exclusion of individuals from health systems.<sup>112</sup> Refugees and migrants are among those most affected when it comes to

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<sup>104</sup> Op cit note 98.

<sup>105</sup> London, Leslie 'What Is a Human-Rights Based Approach to Health and Does It Matter?' (2008) *Health and human rights* 10.1: 65–80.

<sup>106</sup> London, L., Holtman, Z., Gilson, L., Erasmus, E., Khumalo, G., Oyedele, S., & Ngoma, B 'Operationalising health as a human right: monitoring tools to support implementation of the patients' rights charter in the health sector' *University of Cape Town/University of the Witwatersrand: Draft report to the Health Systems Trust*.

<sup>107</sup> Op cit note 105.

<sup>108</sup> Op cit note 10.

<sup>109</sup> Op cit note 104.

<sup>110</sup> Op cit note 105.

<sup>111</sup> Tavares, Aida Isabel *Universal Health Coverage*. Ed. Aida Isabel Tavares. London, England: IntechOpen, 2009.

<sup>112</sup> Ibid.

exclusion from health systems, and the seriousness of this issue is reflected in that at the 2019 World Health Assembly there was an agreement that the inclusion of this group is a key priority.<sup>113</sup> Pursuant to the UHC target, there are substantial shifts in health policy globally including in South Africa where the National Health Insurance Bill (NHI Bill) was introduced in 2019.<sup>114</sup> When legislation is being proposed, as at present, the HRA offers an opportunity for pro-active development of policies such that health objectives are aligned with human rights principles. Civil society through this approach has an opportunity to shape health policy and collaborate with the government.<sup>115</sup> In addition, the indivisibility of civil and political rights, and socio-economic rights means that attention must be given both to the obligation to fulfil the right to health, and to eradicating violations of dignity and non-discrimination.<sup>116</sup> The latter are integral to the HRA and crucial in protecting refugee children's access to critical healthcare services. The CRC Committee has stressed the importance of dedicating more attention to 'especially vulnerable children' within the broad category of children in setting health priorities. Children affected by armed conflict and refugee children are among the especially vulnerable children category.<sup>117</sup>

Scholars have argued that basing the right to health on human dignity which is arraigned for lacking a robust philosophical foundation has made it hard to determine its normative content and scope.<sup>118</sup> These scholars point out that human dignity has not been defined nor provided with a philosophical foundation in the UDHR, ICESCR, or in General Comment 14 which is the seminal interpretation of the right to health.<sup>119</sup> Legal scholars have countered this argument by stating that human rights conventions are not philosophical treaties intended to discern truth,

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<sup>113</sup> Op cit note 61.

<sup>114</sup> National Department of Health. 2019. National health insurance bill 2019. Government Gazette No. 42598, 1–60.

<sup>115</sup> Op cit 104.

<sup>116</sup> 6. A. Roberts 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post September 11' (2004) *European Journal of International Law* 15/4 : pp. 72

<sup>117</sup> UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, available at: <https://www.refworld.org/docid/4538834f11.html> [accessed 23 October 2022]

<sup>118</sup> Chapman, A 'The foundations of a human right to health: Human rights and bioethics in dialogue' (2015) *Health & Hum. Rights. J.*, 17, p.6.

<sup>119</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. No. E/C.12/2000/4. (2000)

rather they are simply political statements which are a product of compromise.<sup>120</sup> It is an achievement that states managed to agree on dignity as the foundation of rights, and on the content for the right to health despite pronounced diversity in culture and political orientation among states. This achievement has created a normative set of criteria from which to judge right from wrong in terms of the right to healthcare. John Tobin has argued that international human rights conventions that recognise the right to health are examples of incompletely theorised agreements.<sup>121</sup> According to Chapman the concept of an incompletely theorised agreement describes a process by which "a consensus is reached on an issue in circumstances where there is disagreement on the reasons or principles that justify the agreement."<sup>122</sup> Human dignity, which underpins human rights, is therefore crucial to the protection of refugee children's access to critical healthcare. As will be shown below, in South Africa it has been cited by the courts in cases concerning refugees and their pursuit of living a decent life in the country.

### 2.3 Human dignity

Human rights, including the right of everyone to enjoy the highest attainable standard of physical and mental health, are grounded on promoting and protecting human dignity.<sup>123</sup> Human dignity is a founding value of post-apartheid South Africa, and it is at the heart of the Bill of Rights which is stated to be the cornerstone of democracy.<sup>124</sup> It is used as an interpretive tool that gives meaning, content, substance, and scope to the rights enshrined in the Bill of Rights, and those that are not included such as refugee rights.<sup>125</sup> It is also a tool that is used to resolve constitutional value conflicts.<sup>126</sup> The courts have linked dignity to socio-economic rights for the promotion of a humane standard of living for vulnerable groups, including asylum seekers and refugees.<sup>127</sup> In addition, it has been emphasized that South Africa must fulfil its international, constitutional, and legislative obligations through treating people in a manner that shows respect, care, and concern. For example, in the *Watchenuka* case, it was held that restricting asylum

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<sup>120</sup> R. Adorno, 'International policy and a universal conception of human dignity,' in S. Dilley and N.J. Palpant (eds), *Human dignity in bioethics: From worldviews to the public square* (New York and London: Routledge, 2013), p. 136.

<sup>121</sup> Tobin, J., 2012. *The right to health in international law*. Oxford University Press.

<sup>122</sup> Op cit note 117.

<sup>123</sup> Op cit note 117.

<sup>124</sup> S 7(1) of the Constitution.

<sup>125</sup> Botha H 'Human dignity in comparative perspective' (2009) *Stellenbosch Law Review*, 20(2): 171-220

<sup>126</sup> Ibid.

<sup>127</sup> Op cit note 124.

seekers from wage earning employment without providing social assistance is violating their right to human dignity.<sup>128</sup> The judgement led to the lifting of the restriction on the enjoyment of the right to wage earning employment by asylum seekers, and it made clear that the right to human dignity can be used to limit state sovereignty.<sup>129</sup> Most recently at the start of the COVID-19 pandemic, the exclusion of asylum seekers from accessing the Social Relief of Distress Grant (SRD) was successfully challenged in the High Court and dignity and equality was cited in the case.<sup>130</sup> This jurisprudence makes clear that the HRA, which is steeped in equality in rights and dignity, is important in the protection of refugee rights, and this extends to child refugees' access to critical healthcare services.

The concept of dignity is also used to interpret the right to equality. It has been stated in *President of the Republic of South Africa v Hugo* that “at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of groups.”<sup>131</sup>

## 2.4 The right to equality

The indivisibility of human rights demands that policymakers and health authorities dedicate significant effort both to fulfilling the right to health and eliminating discrimination or any violations of dignity against refugee children.<sup>132</sup> The right to equality is indispensable to the protection of refugee children's access to critical healthcare especially in the current political climate. Since 1994, the government of South Africa has placed equity at the core of its health policy.<sup>133</sup> Access to healthcare by foreign nationals is under contestation with rising anti-immigrant sentiment in the country. For instance, members of Operation Dudula, a group peddling anti-immigrant sentiment, conducted unauthorized screenings at the Kafalong hospital

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<sup>128</sup> Op cit note 99 at para 27.

<sup>129</sup> Op cit note 29.

<sup>130</sup> Op cit note 100.

<sup>131</sup> *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997)

<sup>132</sup> Op cit note 104.

<sup>133</sup> Gilson, Lucy, and Di McIntyre 'Post-apartheid challenges: household access and use of health care in South Africa' (2007) *International Journal of Health Services* 37.4: 673-691.

entrance using language, accent, and complexion as criteria for screening.<sup>134</sup> This practice came to a stop only after the Gauteng Department of Health obtained an interdict.<sup>135</sup> In another incident, a video surfaced of the health minister of the Limpopo province berating an undocumented Zimbabwean patient as medical staff watched and laughed.<sup>136</sup> In the video the minister complained that migrants were overburdening the public healthcare system which has a constrained budget.

These events, among others, give a glimpse into what migrants and refugees are experiencing in their endeavor to exercise their right to access healthcare. Previous studies have alluded to medical xenophobia being prevalent in South Africa.<sup>137</sup> The RBA places an obligation on the state to ensure that critical healthcare services are accessible to refugee children. Accessibility in relation to the right to healthcare has been defined by the ESC Committee as constituting dimensions of non-discrimination, physical, and financial accessibility.<sup>138</sup>

Refugee children's access to rights (including critical healthcare) is affected by inefficiencies in the asylum system which are making it onerous for asylum seekers and refugees to maintain valid documentation. For example, Khan has highlighted how the asylum bureaucracy made it hard for asylum seekers to exercise their legal right to access social assistance during the COVID-19 pandemic.<sup>139</sup> Research has shown that immigrant and refugee children's life chances are potentially linked to both their legal status and that of their parents.<sup>140</sup> In the case of South Africa these life chances are bleak with legal status becoming the determinant in accessing essential services, yet ironically it has become onerous to maintain valid asylum seeker and refugee documents.<sup>141</sup> Under these circumstances, the right to equality is indispensable in challenging differential treatment that may serve to arbitrarily exclude vulnerable refugee

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<sup>134</sup> Nokukhanya Mntambo 'Operation Dudula Opens Case Against Kafalong Hospital CEO' *Eyewitness News* 1 September 2022 at 1.

<sup>135</sup> Citizen Reporter 'Gauteng Health gets interdict against protesters turning back patients at Kalafong hospital' *The Citizen* 29 August at 1.

<sup>136</sup> *Limpopo MEC under fire over comments blaming Zimbabweans for 'huge strain' on hospitals* (2022) YouTube. Available at: <https://www.youtube.com/watch?v=g7wFyPBf4jw&t=95s> (Accessed: October 23, 2022).

<sup>137</sup> Op cit note 27.

<sup>138</sup> Op cit note 120.

<sup>139</sup> Fatima Khan and Mikhail Kolabhai 'Bureaucratic Barriers to Social Protection for Refugees and Asylum Seekers During the COVID-19 Disaster in South Africa' (2021) *African Human Mobility Review* 7.2

<sup>140</sup> Oropesa, R. S., Nancy S. Landale, and Marianne M. Hillemeier. 'Legal Status and Health Care: Mexican-Origin Children in California, 2001–2014' *Population research and policy review* 35.5 (2016): 651–684.

<sup>141</sup> Op cit note 136.

children from enjoying their right to critical healthcare services. The CRC makes clear that a child's legal status or that of their parent's or legal guardian should not affect children's access to healthcare services.<sup>142</sup>

## 2.5 Conclusion

In conclusion this chapter has explained why the HRA is indispensable to the protection of refugees in general, and refugee children in their access to critical healthcare services in South Africa. Some of the factors emphasised include its ability to ensure clear roles in terms of duty bearers and those to whom the obligations are owed to. The rights to human dignity and non-discrimination consist of the core principles underpinning the HRA, therefore this chapter has shown their significance and how they can be invoked to protection refugee children's right to critical healthcare services.

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<sup>142</sup> CRC, article 2.

## Chapter 3

# International and Domestic Normative Legal Framework

### 3.1 Introduction

This chapter presents the normative legal framework for refugee children's right to access critical healthcare services. It will provide a basis from which to analyse how the right is being realised and guide on how progress can be made towards aligning current practice with the normative standard. The first section will highlight provisions from international human rights treaties that South Africa has ratified, and the second section will analyse regional human rights instruments. Lastly, I will analyse domestic legislation and policy relevant to the research paper.

### 3.2 International normative legal framework

#### 3.21 The Refugee Convention Relating to the Status of Refugees

The Refugee Convention is the cornerstone of international refugee law protection.<sup>143</sup> The Convention and its consolidating 1967 protocol provide a binding refugee definition.<sup>144</sup> Despite not explicitly mentioning children, the mandate of the Convention is age neutral.<sup>145</sup> The concept of children as rights holders was not fully developed at the time the Refugee Convention was adopted on the 28<sup>th</sup> of July in 1951, and as a result it did not fully benefit from the reasoning and sciences that culminated in the adoption of the CRC in 1989.<sup>146</sup> However, to ensure the

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<sup>143</sup> Gammeltoft-Hansen, Thomas *Refugee Protection and the Reach of the Non-Refoulement Principle Access to Asylum* (2011) 100.

<sup>144</sup> *Op cit* note 4.

<sup>145</sup> Arnold, Samantha. *Children's Rights and Refugee Law: Conceptualising Children Within the Refugee Convention* (2017)

<sup>146</sup> *Ibid.*

protection of the rights of refugee children there is interaction between provisions of the CRC and the Refugee Convention. For example, article 22 of the CRC that guarantees rights to the refugee child relies on the international and domestic law procedures.<sup>147</sup> The latter includes the definition provided in the Refugee Convention,<sup>148</sup> and when a child is in South Africa it also entails the OAU Refugee Convention,<sup>149</sup> and the Refugees Act.<sup>150</sup>

Procedural and substantive deficiencies have been highlighted in applying the Refugee Convention refugee definition to children because it was developed for adults.<sup>151</sup> In South Africa accompanied children obtain derivative status from their parents through section 3(c) of the Refugees Act and unaccompanied children will have their asylum claims assessed through the refugee status determination (RSD) process.<sup>152</sup> It is crucial that adequate care be given to the application of the refugee definition, taking into consideration child-specific persecution and the child's developmental stage.<sup>153</sup> How the RSD process is carried out has a bearing on protection of the child and their enjoyment of rights, including the right to have access to critical healthcare services in a host state. The UNHCR has attempted to consolidate these deficiencies with policies to guide adjudicators in applying the definition to children.<sup>154</sup> Jess Crisp, a former head of the UNHCR's Policy Development and Evaluation service mentioned that UNHCR policy owes an intellectual debt to the CRC.<sup>155</sup>

The right to access healthcare services is encapsulated in article 23 of the Refugee Convention which guarantees public relief.<sup>156</sup> It states that, "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals." Public relief includes hospital treatment and emergency

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<sup>147</sup> Op cit note 8, art 22.

<sup>148</sup> Op cit note 4.

<sup>149</sup> Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, hereafter OAU Convention.

<sup>150</sup> Op cit note 94, section 3.

<sup>151</sup> Smyth, Ciara" The Human Rights Approach to 'Persecution' and Its Child Rights Discontents" (2021) *International journal of refugee law* 33.2 (2021): 238–276.

<sup>152</sup> Op cit note 94.

<sup>153</sup> Bhabha, Jacqueline. "Seeking Asylum Alone: Treatment of Separated and Trafficked Children in Need of Refugee Protection." *International migration* 42.1 (2004): 141–148.

<sup>154</sup> Op cit note 152.

<sup>155</sup> J Crisp, 'Meeting the Needs and Realizing the Rights of Refugee Children and Adolescents: From Policy to Practice' (1996) 15(3) *Refugee Survey Quarterly* 1, 12.

<sup>156</sup> Op cit note 94.

relief.<sup>157</sup> The standard of according to refugees lawfully staying in a state's territory 'the same treatment as that accorded to citizens' provides superior protection to a duty to non-discrimination relative to nationals which is found, for example, in article 2 of both the ICESCR and the ICCPR<sup>158</sup> because it prohibits any justification of differential treatment between citizens and refugees.<sup>159</sup>

The standard that accords to refugees the same treatment as citizens in article 23, compensates for deficiencies of article 3 in protecting refugees against discrimination on grounds of refugee status.<sup>160</sup> The latter only prohibits discrimination in the enjoyment of Refugee Convention rights between and among refugees based on the limited grounds of race, religion, and country of origin.<sup>161</sup> Status was not included as a ground for discrimination despite its significance for the minority group of refugees. In a motion to expand Art 3 beyond its present scope, the majority voted in opposition (17-1, with 5 abstentions) and this suggests that the drafters did not intend for refugees to enjoy the benefits of a comprehensive duty of non-discrimination.<sup>162</sup> It can therefore be said that article 23 of the Convention provides stronger protection to refugee children in their right to access critical healthcare services because it demands that they be accorded equal treatment with the citizens of South Africa.<sup>163</sup> It can therefore be invoked where there is differential treatment, which research has highlighted takes place in public healthcare facilities.<sup>164</sup> The limitation of article 23 is that it only applies to refugees who are lawfully present, meaning that children seeking asylum, and those whose asylum claims have been rejected cannot fully benefit from this guarantee. However, a state party is still required to ensure a modest enjoyment of the right.<sup>165</sup>

A denial of critical healthcare services because a child has not met the standard of being lawfully present can lead to a breach of the duty of non-refoulement.<sup>166</sup> The caregiver might be forced by

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<sup>157</sup> Op cit note 5, p 800.

<sup>158</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>159</sup> Op cit note 5, p 835.

<sup>160</sup> Op cit note 5, p 835.

<sup>161</sup> Refugee Convention, article 3.

<sup>162</sup> Op cit note, p 239.

<sup>163</sup> Ibid.

<sup>164</sup> Op cit note 10.

<sup>165</sup> Op cit note 5.

<sup>166</sup> Nyawa, J. M 'The Principle of Non-Refoulement; An Inherent Obligation on a State. An Inherent Obligation on a State' (2017)

circumstances to leave the country in search of needed critical healthcare services.<sup>167</sup> Secondly, it might also contravene article 6(1) the right to life, article 9 the duty to respect physical security, and article 7 the prohibition of cruel, inhuman, or degrading treatment, or punishment of the ICCPR.<sup>168</sup> Refugee children's right to healthcare, regardless of their status, is protected under article 24, the right to health, and article 22 of the CRC (which extends the enjoyment of the rights of the CRC to refugee children) which will be discussed in detail in sections below.<sup>169</sup>

The Refugee Convention does not create a positive law regime for the protection of refugee rights, it merely restricts refolement and ensures that there is no discrimination in access to public benefits.<sup>170</sup> This approach has been critiqued as insufficient for the protection of children which requires a positive law framework, under which duties are allocated on a host state to ensure that children are adequately provided with healthcare services.<sup>171</sup> The UNHCR shares the same sentiments as it has emphasised that a positive legal regime for refugee children is crucial considering their vulnerability, dependency, and ongoing development.<sup>172</sup>

### 3.2.2 The Convention on the Rights of the Child

The adoption of the CRC marked an important milestone in the protection of the rights of refugee children as it extended the enjoyment of rights enshrined in it to all children within a State Party.<sup>173</sup> The Preamble of the CRC noted that, "in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration."<sup>174</sup> It was repeatedly emphasized in the drafting of the CRC that refugee children constituted this special group of children.<sup>175</sup> The UNHCR executive committee has expressed that the CRC is important as a normative framework for measures to protect and care for all the children that are of concern to the UNHCR.<sup>176</sup> The acknowledgement of refugee children's need

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<sup>167</sup> Ibid.

<sup>168</sup> Op cit note 159.

<sup>169</sup> Op cit note 8.

<sup>170</sup> Op cit note 5.p 238

<sup>171</sup> Op cit note, p 146.

<sup>172</sup> UNHCR Guidelines on Protection and Care, supra note 20

<sup>173</sup> Op cit note 146.

<sup>174</sup> CRC Preamble.

<sup>175</sup> Op cit note 121, p 221

<sup>176</sup> Op cit 146.

for special care and protection is also enshrined in article 22, which remains the only provision in a human rights convention dealing with the situation of refugee children.<sup>177</sup>

South Africa ratified the CRC in 1995 without reservations, meaning that all its provisions are in force, including article 24 which speaks to the right to health.<sup>178</sup> As aforementioned, article 22 does not contain the definition of a refugee, instead, it must be interpreted within the context of refugee law which provides the definition of a refugee to whom surrogate protection is owed.<sup>179</sup>

Article 22 (1) provides for the equal treatment of confirmed refugees, children seeking asylum seekers status, and those whose claims have been rejected.<sup>180</sup> This makes clear that legal status should not be a barrier to refugee children's access to critical healthcare services. Concerning children whose asylum claims have been rejected, consideration must be given to the non-refoulement obligation partially implicit in articles 6 and 37 of the CRC, and complementary protection enshrined in article 3.<sup>181</sup>

Article 24 provides that, "State Parties shall strive to ensure that no child is deprived of their right to healthcare services." The word 'shall' reflects the mandatory nature of the obligation, whilst the phrase 'to ensure that no child is deprived' makes clear that the measures must guarantee the rights to all children.<sup>182</sup> Tobin has commented that section 24 requires that refugee children, and children seeking asylum have access to the same healthcare services accorded to nationals.<sup>183</sup> In providing access consideration must be given to special circumstances of the former groups of children, such as trauma and mental and physical health matters related to conflict, and this is in line with the rights-plus framework secured by section 22 of the CRC.<sup>184</sup> In circumstances where resources are limited, South Africa is required to seek, accept, and facilitate assistance offered by UNHCR, WHO, UNICEF, and other relative organisations.<sup>185</sup>

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<sup>177</sup> CRC, article 22.

<sup>178</sup> United Nations Human Rights Treaty Bodies 'Ratification Status for South Africa' available at [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162), accessed on 16 January 2023.

<sup>179</sup> Op cit note 8.

<sup>180</sup> Op cit note 146.

<sup>181</sup> Op cit note 146.

<sup>182</sup> Op cit note 146.

<sup>183</sup> Ibid.

<sup>184</sup> Op cit note 121.

<sup>185</sup> CRC, article 4.

### 3.2.3 The International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights.

The ICESCR provides the most comprehensive expression of the right to health in international law.<sup>186</sup> The right to health is provided for under article 12, and it has its origins in the 1946 World Health Organization Constitution's article 1 which states that, "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being to be enjoyed without distinction."<sup>187</sup> Jenifer Ruger has commented that "one would be hard pressed to find a more controversial or nebulous human right than the right to health."<sup>188</sup> Despite this characterisation, much interpretation of the right has been provided through bodies such as the Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health, the Committee on the Rights of the Child (CRC Committee) and through scholarly commentary.

The Committee on Economic Social and Cultural Rights in 2000, published General Comment number 14, which highlights obligations under the right to health.<sup>189</sup> The right to health generates a tri-partite structure of duties: respect, protection, and fulfilment.<sup>190</sup> The primary duty bearer in relation to the right to health is the state as it signs the treaties, however, it is key to note that non-state actors have a crucial role in meeting these delineated duties.<sup>191</sup> In order to respect the right, states are required to refrain from discriminating and limiting equal access to the right.<sup>192</sup> The non-discrimination principle is crucial in protecting the right to critical healthcare services for refugee children, considering their vulnerability to discrimination as a result of their age (they need help in exercising their rights) and status.<sup>193</sup> Fredman suggests that at its core, non-discrimination in law seeks to ensure that people are judged according to their personal qualities,

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<sup>186</sup> Op cit note 121.

<sup>187</sup> UN General Assembly, *Entry into force of the constitution of the World Health Organization*, 17 November 1947, A/RES/131.

<sup>188</sup> Ruger, Jennifer Prah 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) *Yale journal of law & the humanities* 18.2: 273.

<sup>189</sup> ESC Committee, General Comment 14: The Right to the Highest Attainable Standard of Health, UN Doc E/C.12/2000/4 (11 August 2000)

<sup>190</sup> Op cit note 121, p 186.

<sup>191</sup> Op cit note 121, p 193.

<sup>192</sup> Report of the Special Rapporteur on the Right to Health to the Commission on Human Rights 2003, UN Doc E/CN.4/2003/58 (13 February 2003) paras 65–8

<sup>193</sup> Op cit note 146.

and it is contravened when people are judged on grounds of irrelevant characteristics or their membership to a particular group or status.<sup>194</sup> Hathaway is of the view that non-discrimination is probably the only legal guarantee that many refugees require in integrating into the host community because it is far-reaching, and it governs the allocation of public goods among inhabitants of a country.<sup>195</sup> The principle holds much value in the context of South Africa because it is deeply entrenched in policy, mainly as part of compensatory measures for the disenfranchisement that happened under Apartheid.<sup>196</sup>

The core non-discrimination guarantee is found in article 26 of the ICCPR.<sup>197</sup> Compared to article 2 of the ICCPR and the ICESCR, the applicability of section 26 is not limited to rights in the covenant it is found in. Its ambit extends to the allocation of public goods and socioeconomic rights found in other conventions.<sup>198</sup> The Human Rights Committee in General Comment number 18 states that, “article 26 does not merely duplicate the guarantee already provided for in article 2 but provides an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”<sup>199</sup> Considering this comment, it is evident that article 26 places obligations on state parties, in this case, South Africa, to ensure non-discrimination when enacting laws, and to enact laws that prohibit discrimination and provide effective protection against any form of discrimination. So, South Africa is required to respect and protect the right to health of refugee children from third-party violations.

Although there is no unanimous interpretation of article 26, commentators agree that drafters intended for this provision to be a robust guarantee for protection against discrimination for all persons.<sup>200</sup> However, the fact that it does not prohibit differential treatment and the Human Rights Committee determines whether the differential treatment of concern is ‘reasonable and objective’ detracts from its value.<sup>201</sup> The fact that the Human Rights Committee has not resisted, judging differentiation on grounds of certain categories including non-citizenship as reasonable

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<sup>194</sup> Fredman S *Human Rights Transformed: Positive Rights and Positive Duties* (2008) Oxford: OUP.

<sup>195</sup> Op cit note 5, p 123.

<sup>196</sup> Burger, Rulof, Rachel Jafta, and Dieter von Fintel. *Affirmative action policies and the evolution of post-apartheid South Africa's racial wage gap*. No. 2016/66. WIDER Working Paper, 2016.

<sup>197</sup> UN Human Rights Committee, “General Comment No. 18: Non-discrimination” (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 146, para. 12

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Nowak, Manfred *UN covenant on civil and political rights: CCPR commentary* (1993) NP Engel, 1993.

<sup>201</sup> Ibid.

makes the situation worse. It risks a violation of refugees' right to health, especially in the context of scarcity of resources and an increasingly hostile environment towards refugees.<sup>202</sup>

Article 12(1) of the ICESCR recognises everyone's right to the highest attainable standard of physical and mental health. In 12(2)(a) State Parties are called upon to take measures which are necessary for the provision for "the reduction of the stillbirth rate and of infant mortality, and for the healthy development of the child."<sup>203</sup> Infant mortality has been shown to vary significantly between geographic locations (urban and rural settings) and socioeconomic statuses. Research shows that in some countries, infant mortality tends to be higher among refugee children as a result of challenges encountered in accessing basic healthcare services that can prevent death, and due to malnutrition, which accounts for 45% of all child death.<sup>204</sup> Article 12 (2) (a) read in conjunction with article 22(1) of the CRC imposes a further obligation on South Africa to consider special needs that refugee children may have as a result of distinct development needs and vulnerabilities. This is in accordance with the rights-plus framework which recognises refugee children as being entitled to special protection.<sup>205</sup> Human rights although universal, are in essence protections much needed by the vulnerable. In 12(2)(d) signatories are called to adopt measures that ensure that healthcare services are extended to all that require them in the event of sickness.<sup>206</sup>

A major obstacle to the provision of healthcare services especially in South Africa is inadequate resources.<sup>207</sup> The right to health is not absolute, and state obligations can be met progressively subject to the availability of resources.<sup>208</sup> The ICESCR in article 2(1) permits states to act within their resources as they make concrete steps towards achieving full realisation.<sup>209</sup> Despite the state being the principal duty bearer in realising the right to health, it can call on assistance from the international community, and cooperation from other entities within the country.<sup>210</sup> This is especially important in the responsibility that arises in meeting the needs of refugee children

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<sup>202</sup> Op cit note 5, p 127.

<sup>203</sup> Op cit note 9.

<sup>204</sup> Djoumessi Y F 'The impact of malnutrition on infant mortality and life expectancy in Africa' (2022) *Nutrition*, 111760.

<sup>205</sup> Pobjoy, Article 22: Refugee Children' in Tobin (ed.), *The UN Convention on the Rights of a Child: A Commentary* (2019) 818 at 824.

<sup>206</sup> Op cit note 8.

<sup>207</sup> Op cit note 67.

<sup>208</sup> Section 27(2) of The Constitution.

<sup>209</sup> Op cit note 9.

<sup>210</sup> ICESCR, article 2(1).

because ideally this responsibility should be shared by the global community.<sup>211</sup> The Global Compact on Refugees (GCR) has affirmed the urgency of ensuring equitable and predictable burden- and responsibility -sharing considering that some countries make immense contributions towards refugees from their meagre national resources.<sup>212</sup>

### 3.3 Regional normative legal framework

#### 3.3.1 Introduction

The role of the regional legal frameworks is to complement the national and global UN systems.<sup>213</sup> Whilst the global UN system sets universal human rights standards, they are in some instances not sensitive to circumstances arising in certain parts of the world therefore regional systems serve a crucial role in setting nuanced standards of protection and taming certain universal substantive norms to better respond to regional specific problems.<sup>214</sup> It is recorded that initially; the development of regional systems faced some resistance as it was feared that this would weaken the universality of human rights.<sup>215</sup> This section will focus on identifying the treaties of the African regional human rights system that have specific provisions for the right to health, and those from whose provisions refugee children's right to access critical healthcare can be deduced.

#### 3.3.2 African Charter on Human and People's Rights

The African Charter on Human and People's Rights (African Charter)<sup>216</sup> was the first human rights convention to be adopted following the formation of the Organisation of African Unity (OAU).<sup>217</sup> Its adoption was a significant milestone for Africa in that it highlighted a paradigm shift away from the concepts of sovereignty and non-interference to a willingness among state

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<sup>211</sup> Refugee Convention, preamble.

<sup>212</sup> Randall Hansen 'A Comprehensive Refugee Response Framework: A Commentary' (2018) *31 Journal of Refugee Studies*

<sup>213</sup> Mbondenyi, Morris Kiwinda *International Human Rights and Their Enforcement in Africa* (2011) 88.

<sup>214</sup> Ibid.

<sup>215</sup> OS, Oyelade 'A Critique of the Rights of Refugees under the OAU Convention Governing Specific Aspects of Refugees' Problems in Africa' (2006) *ISIL YB Int'l Human. & Refugee L.* 6

<sup>216</sup> Organization of African Unity (OAU), *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998

<sup>217</sup> Op cit note 217.

parties to accord rights and freedoms and be legally bound.<sup>218</sup> As one of the drafters of the convention, a Gambian jurist Hassan Jallow commented, “the very notion of creating machinery for the promotion and protection of human rights was itself nothing less than revolutionary in a continent where and at a time when the African states were ultra-jealous of their national sovereignty even and brooked no interference in what they regarded as their internal affairs.”<sup>219</sup> It is appropriate to state that the African Charter legitimised human rights discourse on the continent and paved the way for other conventions which guaranteed better rights and freedoms to all people including refugee children.

The general obligation on State Parties arising from the African Charter is expressed in article 1, and it reads that: “State Parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”<sup>220</sup> Based on this, states have an obligation to immediately ‘recognise’ economic social and cultural (ESC) rights through the adoption of legislative and other measures in order to prevent the violation of rights in the African Charter, including the right to health. This was confirmed by the Commission in the case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria* where it was stated that all rights generate the duties to respect, protect, promote and fulfil.<sup>221</sup>

Only a few economic, social, and cultural rights were recognised in the African Charter as there was a disposition to spare State Parties from too many obligations, except the important ones.<sup>222</sup> However, over time social and economic rights such as the rights to food, adequate housing, water and sanitation that were not included have been read into the Charter by the African Commission on Human and People’s Rights (the Commission).<sup>223</sup> The jurisprudence of the African Commission establishes that all rights under the African Charter are justiciable.<sup>224</sup>

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<sup>218</sup> Murray, Rachel ‘The African Charter on Human and People’s Rights 1987-2000: An Overview of Its Progress and Problems’ (2001) *Afr. Hum. Rts. LJ* 1

<sup>219</sup> Dersso, Solomon ‘Forty Years of the African Charter and the Reform Issues Facing the Discourse and Practice of Human Rights’ (2021) *African Human Rights Law Journal* 21.2

<sup>220</sup> African Charter.

<sup>221</sup> *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96), at 44.

<sup>222</sup> Viljoen Frans *International human rights law in Africa* (2012) OUP Oxford, p 238.

<sup>223</sup> Ssenyonjo Manisuli *Economic, social and cultural rights in international law* (2009) Bloomsbury Publishing.

<sup>224</sup> *Ibid.*

Article 16 of the African Charter protects the right to health, and it reads: “Every individual shall have the right to enjoy the best attainable state of physical and mental health”, and it proceeds to place an obligation on State Parties” to take the necessary measures to ensure that its people receive medical attention in times of sickness.”<sup>225</sup> Despite providing for the right to health, the African Charter falls short in defining the content of the right and stating the specific measures that states are required to take in realising the right.<sup>226</sup> Initially, the Commission avoided giving content to the right to health, and other economic, social and cultural rights whenever the opportunity presented itself in the form of cases brought before it.<sup>227</sup> For example, in the case of *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah vs Zaire* which concerned the right to health and education, the African commission simply stated, without sound legal reasoning, that the act in question constituted ‘serious and massive violations’ of several provisions including article 16.<sup>228</sup> The African Commission took the same approach in the *International Pen and Others vs Nigeria* and *Malawi African Association and Others vs Mauritania* despite a clear opportunity to develop normative content. However, according to Ssenyonjo there was a shift towards providing content from 2001.<sup>229</sup> For instance, in the *Centre on Housing Rights and Evictions vs The Sudan*, the Commission gave the right to health content relying on the interpretation of the right provided in international human rights law.<sup>230</sup> Borrowing the interpretation of the right to health provided in General Comment No. 14 adopted in 2000, the Commission held that the right to health constitutes four elements which are: availability, accessibility, acceptability, and quality.<sup>231</sup> Furthermore, it imposes the obligations to respect, fulfil, and protect the right. Regarding the duty to protect, the State ought to ensure that it does not violate the right through its direct action, and secondly prevent infringement by non-state actors also known as third parties.<sup>232</sup>

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<sup>225</sup> African Charter, article 16.

<sup>226</sup> Ssenyonjo, Manisuli ‘Analysing the economic, social and cultural rights jurisprudence of the African commission: 30 years since the adoption of the African charter’ (2011) *Netherlands Quarterly of Human Rights* 29.3: 358-397.

<sup>227</sup> Ibid.

<sup>228</sup> Op cit note 228, p 367.

<sup>229</sup> Op cit note 228.

<sup>230</sup> Communication Nos. 279/03 & 296/05 (2009), 28th Activity Report. Adopted during the 45th Ordinary Session, held between 13–27 May 2009, Banjul, The Gambia. The decision was not made public until July 2010.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

Whilst the African Charter does not mention the concept of 'progressive realisation' subject to 'available resources' in the *Purohit and Moore vs The Gambia* the Commission did read it into Art.16 of the Charter.<sup>233</sup> It states that, "African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right."<sup>234</sup>

Refugee children are not mentioned in the African Charter. Nevertheless, they are equally entitled to benefit from its provision including the right to health under article 16.<sup>235</sup> State Parties to the African Charter have an obligation to eliminate discrimination in the enjoyment of rights both formally (in law) and substantively (in practice). Article 2 is the non-discrimination guarantee, and it prohibits discrimination on several grounds including 'national or social origin, and other statuses.'<sup>236</sup> The Commission has stated that to determine whether discrimination has occurred, the allegation must be assessed against three tests: "Was there equal treatment? If not, was the differential treatment justifiable? Was the aim of the difference in treatment proportionate to the aim sought and means employed? These three benchmarks are cumulative requirements and hence the non-compliance with any of the three requirements makes a treatment discriminatory."<sup>237</sup>

### 3.3.3 African Charter on the Rights and Welfare of the Child

The Children's Charter was adopted on 1 July 1990 in Addis Ababa.<sup>238</sup> It has been emphasised that the CRC and the Children's Charter are not opposed to each other, but rather they are complementary, and together they build a framework for the protection of rights and welfare of the child on the African continent.<sup>239</sup> The monitoring and enforcement of the Charter is overseen by the African Committee of Experts on the Rights and Welfare of the Child.

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<sup>233</sup> Ibid.

<sup>234</sup> Op cit note 228, p 387.

<sup>235</sup> Op cit note 228.

<sup>236</sup> African Charter, article 2.

<sup>237</sup> Kenneth Good vs Republic of Botswana, Communication 313/05, (2010), 28th Activity Report, para 222.

<sup>238</sup> Olowu Dejo 'Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' *Int'l J. Child. Rts.* 10 (2002): 127.

<sup>239</sup> Ibid.

The Children's Charter is like the CRC in that four general principles underpin it. These are the rights to non-discrimination, the best interests of the child, and survival and development.<sup>240</sup> In South Africa the principles have been integrated into the Constitution and the Children's Act 38 of 2005 to the benefit of all children, including refugee children in their access to critical healthcare services.<sup>241</sup>

Article 3 guarantees all children protection from direct and indirect discrimination in enjoying the rights and freedoms that are enshrined in the Children's Charter. It protects all children "irrespective of the child or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinions, national and social origin, fortune, birth or other status."<sup>242</sup> This implies that states have an obligation to prohibit discrimination and take positive measures in pursuit of the equal enjoyment of rights in the convention by all children in their jurisdiction. Discrimination on grounds of refugee status falls under the category of 'other status' and it is prohibited by the Children's Charter.<sup>243</sup> In addition, grounds of nationality, race and ethnic group play a key role in protecting refugees from discrimination targeted against specific individuals within the greater refugee population. For example, refugees from Zimbabwe might arguably face a greater risk of discrimination under circumstances where there is an overwhelming sentiment in the country that Zimbabweans are not genuine refugees but rather economic migrants, and that they should return to their country.<sup>244</sup> States also have an obligation to take measures to ensure that children seeking asylum, or those that are refugees (accompanied or unaccompanied) enjoy rights enshrined in the Children's Charter and other internal human rights conventions and humanitarian instruments.<sup>245</sup> This provision is especially important as it draws attention to the importance of protecting the rights of refugee children.

Article 14 of the Children's Charter provides that 'every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. This provision is similar to that which is in the Convention on the Rights of the Child.<sup>246</sup> The best interests of the child principle

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<sup>240</sup> Children's Charter, articles, 3,4,5

<sup>241</sup> Section 28(2) of the Constitution.

<sup>242</sup> Children's Charter, article 3.

<sup>243</sup> Children's Charter, article 3.

<sup>244</sup> Murenje, Mutsa *Human rights and migration: Perspectives of Zimbabwean migrants living in Johannesburg, South Africa* (Unpublished PhD diss., University of Newcastle, Australia)

<sup>245</sup> Children's Charter, article 23(1).

<sup>246</sup> CRC, article 24.

is guaranteed under article 4, which states that it should be ‘the primary consideration’ in all actions concerning the child undertaken by any person or authority. The principle occupies a superior position in the Children’s Charter than in the CRC because it is the overriding consideration, as opposed to being a primary consideration among other considerations.<sup>247</sup> Herring argues that making the best interests the primary consideration is at odds with the African inclusive version of welfare that takes into consideration the interests of the children, parents and the community.<sup>248</sup> Within paediatric healthcare the best interests principle is one of the most discussed principles. It should be respected in all decisions concerning refugee children’s access to critical healthcare services, and among other things, it requires the views of the child to be considered and reflected in decisions.<sup>249</sup> Outside the medical field the best interest's principle also occupies an important role in influencing the application and interpretation of the Refugee Convention. In addition, it is also a complementary ground of protection for children, especially in cases where they fall short of meeting the refugee definition.<sup>250</sup>

Article 5(1) guarantees the right to life and places an obligation on State Parties to legislate for its protection.<sup>251</sup> In the subsequent paragraph, 5(2), State parties are obligated to ensure “to the maximum extent possible the survival, protection and development of the child”. The right to life constitutes a precondition for the enjoyment of all the other rights.<sup>252</sup> The Human Rights Committee noted that often the right to life has been narrowly defined however it should be interpreted to include positive obligations such as reducing the infant mortality rate and increasing life expectancy.<sup>253</sup> Access to critical healthcare services is important for preserving the lives of refugee children and ensuring their survival and development.

### 3.3.4 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa

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<sup>247</sup> Chirwa, Danwood Mzikenge ‘The merits and demerits of the African Charter on the Rights and Welfare of the Child’ (2020) *Int’l J. Child. Rts.* 10

<sup>248</sup> J Herring ‘Welfare principle and the rights of parents’ in A Bainham et al What is a parent? A socio-legal analysis (1999) 89 101.

<sup>249</sup> März, Julian W ‘What does the best interest's principle of the convention on the rights of the child mean for paediatric healthcare?’ (2022) *European Journal of Pediatrics* 181.11: 3805-3816.

<sup>250</sup> Agarwal, Stuti ‘Interplay between Child Rights and Refugee Law: An Analysis from the Perspective of UNCRC’ *LexForti Legal J.* 2: 21.

<sup>251</sup> Op cit note 8.

<sup>252</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982

<sup>253</sup> Ibid, at para 5.

The OAU Convention was adopted in 1969 and it came into force in 1974 to supplement the Refugee Convention.<sup>254</sup> In its Preamble (Part 9) the OAU Convention recognises the Refugee Convention as “the basic and universal instrument relating to the status of refugees” and it proceeds to define itself in article VIII (2), as “the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees,” thus complementing the Refugee Convention.<sup>255</sup> It is the only legally binding regional refugee convention that governs the protection of refugees. South Africa ratified the OAU Convention in 1995 and it included its expanded refugee definition in its Refugees Act 130 of 1998.<sup>256</sup> The expanded definition is considered one of the convention’s key contributions because it takes into consideration events natural and political that result in the displacement of people on the continent.<sup>257</sup>

Despite these positives, it failed to provide children with special protection and inadvertently left the important issue of their protection at the mercy of states and international humanitarian organisations.<sup>258</sup> The Convention is silent regarding economic, social and cultural rights, including the right to health which is important to the development of children on the continent considering infant mortality arising from malnutrition and preventable diseases.<sup>259</sup> The gap identifiable in the OAU Convention was later filled by subsequent conventions which include the Children’s Charter.<sup>260</sup>

In the preamble, the Convention “notes with concern the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future.”<sup>261</sup> The Convention does not address how the misery and suffering of refugees should be alleviated, and how a better future and life would be secured for refugees. It only obligates state parties to take a humanitarian approach towards solving refugee problems. The question is, what is a humanitarian approach?

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<sup>254</sup> Wood, Tamara ‘The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2019) *Research Handbook on International Refugee Law*. Edward Elgar Publishing, 2019. 16-30.

<sup>255</sup> Opoku Awuku, Emmanuel. “Refugee Movements in Africa and the OAU Convention on Refugees.” *Journal of African law* 39.1 (1995): 79–86.

<sup>256</sup> The Refugees Act of 1998.

<sup>257</sup> Khan, Fatima, and Tal Schreier *Refugee law in South Africa* (2014) 7

<sup>258</sup> Ndimurwimo, L. A., & Vundamina, M. N ‘The protection of refugee children in Africa: Post-convention on the rights of the child’ (2021) *Fundamina*, 27(1), 33-66.

<sup>259</sup> Okoth-Obbo, George ‘Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) *Refugee Survey Quarterly* 20.1 79-138.

<sup>260</sup> Op cit note 256.

<sup>261</sup> OAU Refugee Convention, Preamble.

Some scholars have interpreted the humanitarian approach to mean favourable treatment as is referred to in the 1951 Refugee Convention.<sup>262</sup> Concerning refugee problems, one of the most common refugee problems globally within host countries is the difficulty refugees experience in accessing social and economic rights. The UNHCR often pleads with host countries to grant refugees and asylum seekers food, water, shelter, and medical services to avoid putting them in a life-threatening situation where their basic human needs are not met.<sup>263</sup> The meaning that can be derived from these two sentences in the Preamble is that State Parties must respect, protect, and promote the rights of refugees, including the right to critical health care because a lack of such action would be contrary to the intentions of the Convention.

The Convention in article 2(4) calls upon member states finding it difficult to grant asylum to refugees to cooperate with other member states through the OAU so that there may be shared responsibility and burden in the spirit of African solidarity and cooperation.<sup>264</sup> This provision is important to the extent that it provides for the sharing of burden and responsibility among member states considering the distribution of refugees between countries is disproportionate due to geography as some countries are located near conflict zones more than others.<sup>265</sup>

### 3.4 Domestic Legislation

#### 3.4.1 The Constitution of South Africa

The right to health can be found in approximately 70 per cent of constitutions across the world in one form or another, and it is enforceable in approximately 40 per cent of constitutions.<sup>266</sup> The South African constitution recognises social and economic rights, including the right to health as enforceable.<sup>267</sup> This has contributed greatly to litigation efforts, the greatest of which includes the *Treatment Action Campaign* case.<sup>268</sup>

Children's right to healthcare is guaranteed in two sections of the Constitution. Section 27(1) expresses the right of everyone to have access to healthcare services including reproductive

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<sup>262</sup> Op cit note 260.

<sup>263</sup> Kelley, N., Sandison, P., & Lawry-White, S 'Enhancing UNHCR's capacity to monitor the protection, rights and well-being of refugees' (2021) *Geneva: UNHCR*.

<sup>264</sup> OAU Refugee Convention, article 2(4).

<sup>265</sup> Op cit note 13.

<sup>266</sup> C Jung et al, 'Economic and Social Rights in National Constitutions' (2014).

<sup>267</sup> Op cit note 259, p 221.

<sup>268</sup> Durojaye, Ebenezer *Litigating the right to health in Africa: Challenges and prospects* (2016)

healthcare services, and section 28(1)(c) guarantees every child the right to basic healthcare services. Refugee children benefit from both these provisions because they cover all the children. Whereas section 27(2) adds the qualifications of availability of resources and progressive realisation to the state's obligation to take reasonable and other measures regarding the right to health, section 28(1)(c) does not have such a qualification. This led to the reasoning that under section 28(1)(c) children are guaranteed unqualified rights.<sup>269</sup> This reasoning was rejected in the *Grootboom* case on the right to housing.<sup>270</sup> The court held that the obligations created by section 28(1)(c) must be interpreted in the context of obligations on the state created by sections 25(5), 26 and 27 which are subject to the availability of resources.<sup>271</sup> The court explained that the rejected reasoning posed the risk of giving an unfair advantage to parents with children over those without regardless of how deserving they are.<sup>272</sup> Secondly, the Constitutional Court stated that the right 'to have access to housing' under section 26 of the Constitution was different from the right to adequate housing under article 1(1) of the Covenant on Economic Social and Cultural Rights.<sup>273</sup> From this it is reasoned that the right to have access to healthcare services is different from the right to basic healthcare services.<sup>274</sup> The Court argued that 'access to' meant that it was not only the state that had the obligation to provide housing but other private entities. However, Chirwa has argued that the obligations created on the state by section 7(2) to respect, protect, and promote the socio-economic rights of the Bill of Rights made the words 'access to' superfluous as the state has the same obligation towards each of the rights regardless of the inclusion of 'access to.'<sup>275</sup>

Furthermore, the Constitutional Court held that sections 28(1)(c) and section 28(1)(d) must be read together. It held that section 28(1)(b) underscores the bearer of the responsibility to care for children, whereas section 28(1)(c) outlines the essential elements of that care.<sup>276</sup> This means that if a child is in the care of their parents, the parents have the primary responsibility to provide for

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<sup>269</sup> Op cit note 249.

<sup>270</sup> Op cit note 217, para 72.

<sup>271</sup> Ibid.

<sup>272</sup> Chirwa, Danwood Mzikenge 'Child poverty and children's rights of access to food and to basic nutrition in South Africa' *ESR Review: Economic and Social Rights in South Africa* 10.3 (2009): 2-3.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> Op cit 274.

<sup>276</sup> Ibid.

the child's needs. When a child is removed from the care of parents or is not in the care of their parents as in the case of unaccompanied children, the responsibility of care shifts to the state.<sup>277</sup>

In the Treatment Action Campaign (TAC) case, the Constitutional Court further added to its reasoning in the *Grootboom* case by stating that where parents do not have the financial means to meet their care responsibilities towards children, the state's obligation also comes into play.<sup>278</sup> Most refugees fall into the low socioeconomic status category, and the financial difficulties they experience can be a barrier to accessing healthcare services.<sup>279</sup> Therefore, the state's assistance to parents that are economically disadvantaged in meeting their children's needs will also benefit refugee children.

The right to health is linked to other rights, and this has been clarified by the CESCR in General Comment No 14.<sup>280</sup> Critical healthcare by its nature interacts immensely with the rights to life, freedom and security of the person, access to information, equality, human dignity, and the right to freedom of religion, belief and opinion.<sup>281</sup> For example, the termination of life-sustaining treatment leads to the loss of life, the administering of treatment requires consent, and lastly, religion may influence decisions regarding treatment options. Therefore, it is evident that the right to health is indivisible from other Constitutional rights, and it can only be fully realised through the realisation of other rights.

### 3.4.2 The National Healthcare Act [No. 61 of 2003]

The NHA came into effect in 2005, and it provides a comprehensive framework for the right to health that is provided in the Constitution.<sup>282</sup> It regulates the provision of healthcare and seeks to provide uniformity across the country in how services are delivered. It establishes the private and public sectors and states the rights and duties of users and healthcare providers.<sup>283</sup> It is a legislative measure by the state in its efforts to protect, respect, promote and fulfil the right to

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<sup>277</sup> Op cit note 217.

<sup>278</sup> Ibid.

<sup>279</sup> Op cit note 10.

<sup>280</sup> Op cit note 119.

<sup>281</sup> The Constitution, Sections 11,12,32,9,10 and 15 respectively.

<sup>282</sup> Kirby, N 'Access to healthcare services as a human right' (2010) *Med. & L.* 29: 487.

<sup>283</sup> Ibid.

health for all people, including refugee children as provided for in the Constitution under section 27 and section 28(1)(c).<sup>284</sup>

The NHA recognises women, children, older persons and persons with disabilities as vulnerable groups of people.<sup>285</sup> Refugees are not included; however, in the *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others case*, the High Court indicated that "refugees are unquestionably a vulnerable group in society."<sup>286</sup> Nevertheless, refugee children can benefit from their inclusion in the group of children.

The minister is given the power and responsibility to exercise oversight on how healthcare is provided within the limits of available resources.<sup>287</sup> The responsibilities include taking necessary action to ensure the protection, promotion, improvement and maintenance of healthcare services for the benefit of the population. The NHA also calls for equity in the provision of healthcare services at municipal, provincial and national levels within the limits of available resources.<sup>288</sup> This in essence guarantees protection to refugee children against being discriminated against in accessing critical healthcare services.

The NHA falls short in that it does not define the concepts of 'healthcare services' and 'basic healthcare services' which are in the Constitution and in the NHA itself.<sup>289</sup> Unfortunately, these terms are not common in international conventions and as a result, the lack of clarity on them creates a grey area that disadvantages healthcare providers in their efforts to ensure that children are provided with their constitutionally guaranteed healthcare services. This can also create room for speculation and discrimination against vulnerable groups such as refugee children.<sup>290</sup> For example, section 4(3)(c) provides that public healthcare facilities must provide pregnant and lactating women and children below the age of six years who are not members or beneficiaries of

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<sup>284</sup> Buchner-Eveleigh, Mariana 'Children's rights of access to health care services and to basic health care services: a critical analysis of case law, legislation and policy' *De Jure Law Journal* 49.2 (2016): 307-325.

<sup>285</sup> National Health Act S 2(c)(iii).

<sup>286</sup> *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006) para 28.

<sup>287</sup> National Health Act, section 3(1).

<sup>288</sup> National Health Act section 3(2).

<sup>289</sup> Op cit note 286.

<sup>290</sup> Op cit note 286.

medical aid schemes, with free health services.<sup>291</sup> Despite the generousness of the provision, the services are not defined. Instead, the minister must set the conditions, however, thus far this has not happened before.

The NHA does not have a separate section stating the rights of children as healthcare users, however, it does provide a link to the Child Care Act in its definition of a healthcare user.<sup>292</sup> The Child Care Act has since been replaced with the Children's Act and the relevant section it links with for interpretation is section 129 of the Children's Act.<sup>293</sup> The latter sets the age of consent to medical treatment and operation at 12 years, and it also takes into consideration the maturity of the child. In the provision of critical healthcare services, refugee children have the right to be provided with information pertaining to medical issues in the appropriate language and participate within the framework of the NHA and the Children Act.<sup>294</sup>

### 3.4.3 The Refugee's Act 130 of 1998

governs all matters concerning asylum seekers and refugees in the country. In its preamble, it recognises that South Africa acceded to the Refugee Convention and the OAU Convention and assumed obligations to receive and treat asylum seekers and refugees per the standards and principles set in these instruments.<sup>295</sup> Section 3 of the Act provides a refugee definition derived from the Refugee Convention and the OAU Refugee Convention. The Act was drafted from the perspective of adults, and children gain protection through derivative status from their parents or guardians.<sup>296</sup> Legal status is important for refugees in South Africa as it facilitates for successful integration and access to a wide range of rights. As Hathaway states, rights and entitlements accrue to a refugee as the nature and duration of their attachment to the host state.<sup>297</sup> Nevertheless, it is important to note that all children regardless of their legal status are entitled to critical healthcare services as provided in the CRC and underscored by the CRC Committee.<sup>298</sup>

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<sup>291</sup> National Health Act, section 4(3)(c).

<sup>292</sup> Op cit note 286.

<sup>293</sup> Op cit note 56.

<sup>294</sup> Op cit note 56.

<sup>295</sup> Refugees Act, preamble.

<sup>296</sup> Swart, Sarah 'Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law' (2009) *African human rights law journal* 9.1: 103-128.

<sup>297</sup> Op cit note 5, p 154.

<sup>298</sup> Op cit note 298.

Section 27(g) states that a refugee ‘is entitled to the same basic health services and primary education which the inhabitants of the Republic receive from time to time’. The Refugees Amendment Act 33 of 2008 retrogresses this generous provision that is in accordance with the Constitution which grants everyone the right to access healthcare services.<sup>299</sup> It makes a distinction between the rights of asylum seekers and refugees, and it does not include access to basic healthcare for asylum seekers or refugees.<sup>300</sup> By virtue of the clear Constitutional provision, the right of access to healthcare is protected. The Department of Health has also issued a national Revenue Directive which confirms the right of refugees and asylum seekers, with or without a permit, to access basic healthcare and ART on the same basis as South Africans.<sup>301</sup>

#### 3.4.4 Children’s Act 38 of 2005

In 1997 the South African Law Reform Commission (SALC) took on the task of reviewing South Africa’s Child Care Act, and in 2005 the Children’s Act was adopted and it consolidated and brought key reforms to child law.<sup>302</sup> The Act is the most comprehensive piece of legislation that governs all matters relating to children, and it provides that all actions and decisions that relate to children must respect, protect and fulfil the rights of children as provided for in the Bill of Rights.<sup>303</sup> Section 4 states that national, provincial, and local spheres of government in implementing provisions of the Act must take reasonable measures to the maximum extent of available resources to realise its provisions.<sup>304</sup> Section 4 affirms the fact that the rights of Section 28(1) (c) are subject to progressive realisation as held by the Constitutional Court in the *Grootboom* case.<sup>305</sup>

Section 189(2) provides for the assistance of illegal foreign children who appear to qualify for refugee protection, and section 150 provides that any child found to need care and protection must be referred to a social worker for further investigation and necessary action. The Children’s

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<sup>299</sup> Callixte Kavuro ‘Refugees’ Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity’ (2018) *Unpublished Doctoral Dissertation, Stellenbosch University*

<sup>300</sup> *Ibid.*

<sup>301</sup> Department of Health ‘Revenue Directive – Refugees/Asylum Seekers with or without a Permit’ (2017).

<sup>302</sup> *Op cit* note 286.

<sup>303</sup> Section 6(2).

<sup>304</sup> Section 4.

<sup>305</sup> *Op cit* note 95.

Act provides for the best interest principle and provides a list of factors to be taken into consideration in applying the principle.<sup>306</sup> The list of factors was the subject of debate during the discussions leading to the drafting of the Children's Act, as there were differing opinions on whether it was best to give content to the best interests principle or leave the standard to the courts.<sup>307</sup> The Children's Act does not refer to children's right to basic healthcare services however it does have provisions for the right to participate generally, and this encompasses participation in medical decisions,<sup>308</sup> consent to medical treatment, and surgical operation.<sup>309</sup>

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<sup>306</sup> Section 2(b)(iv) and section 7.

<sup>307</sup> SA Law Commission Discussion Paper 103 Review of the Child Care Act, 52-54 (Feb. 2002) (S. Afr.)

<sup>308</sup> Section 18 reads:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

<sup>309</sup> Sections 129 and 130.

## *Chapter 4*

# **Looking Beyond the Law**

### 4.1 Introduction

Refugee children's access to critical healthcare is guaranteed both in international human rights and refugee law under the right to health. Domestically, the right to healthcare is in the Constitution and it is guaranteed to everyone including refugees.<sup>310</sup> Despite South Africa having an inclusive and critically acclaimed Constitution, it is widely noted that there is a wide gap between what the law promises and the lived realities of people.<sup>311</sup> Poverty and inequality are prevalent in South African society.<sup>312</sup> Factors such as the availability of resources, political will, and discrimination affect the extent to which people can enjoy their Constitutionally guaranteed rights. Therefore, it is important to look beyond the legal framework and discuss how refugee children's access to critical healthcare plays out in South Africa

### 4.2 The past affecting the present

The present state of the healthcare system is a product of the policies and practices of the current ANC government, and the legacy of the apartheid.<sup>313</sup> During apartheid, the healthcare system was structured and operating in accordance with unjust discriminatory laws.<sup>314</sup> The ANC government has sought to restructure the healthcare system in pursuit of the realisation of the right to health, however, problems of inefficient management, corruption, and the poor allocation

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<sup>310</sup> The Constitution, section 27(1).

<sup>311</sup> Op cit note 57.

<sup>312</sup> Op cit note 54.

<sup>313</sup> Op cit note 82.

<sup>314</sup> Maphumulo, Winnie T., and Busisiwe R. Bhengu 'Challenges of quality improvement in the healthcare of South Africa post-apartheid: A critical review' (2019) *Curationis* 42.1: 1-9.

of resources are impeding progress.<sup>315</sup> The 2019 report of the Health Market Inquiry highlighted inequalities in healthcare provision and resource availability between the private and public sectors, and the urgent need for reforms.<sup>316</sup> The South Africa Lancet National Commission underscored the need to uphold human rights and noted that there is a need to align the healthcare system with the Universal Health Coverage (UHC) goal.<sup>317</sup> A high maternal and child mortality rate, injuries from violence, non-communicable diseases, and the HIV/AIDS and tuberculosis pandemics are straining the healthcare system.<sup>318</sup> In addition, the recent Corona Virus brought its own health challenges and added to the already existing burden on scarce public health resources.<sup>319</sup> The migration of medical staff to the private health sector and abroad has created a further deficit in resources available to meet the increasing demand for healthcare services.<sup>320</sup>

Refugee children access the same healthcare system as the local population. Most refugees lack the financial means to access the private health sector which has been shown to provide satisfactory healthcare services.<sup>321</sup> This means that they must access critical healthcare services at public healthcare facilities, where they may encounter both general challenges arising from a struggling system and challenges peculiar to refugees and migrants.<sup>322</sup> Several researchers have identified challenges such as the disjuncture between health and immigration legislation, attitudes of medical staff and delays in obtaining legal status documents from DHA as affecting refugees' access to healthcare services.<sup>323</sup> Some scholars have concluded that medical staff discriminate against foreign nationals, whereas others have argued that this is an oversimplification of the situation because there are medical staff that make a special effort to assist foreign nationals to the extent of bypassing policies that hinder access to healthcare

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<sup>315</sup> Ibid.

<sup>316</sup> Competition Commission of South Africa 'Health Market Inquiry-Final Findings and Recommendations Report. Pretoria: Competition Commission' (2019).

<sup>317</sup> Op cit note 81.

<sup>318</sup> Op cit note 316.

<sup>319</sup> Solanki, G.C et al 'Managing the Healthcare Demand-Supply Gap During and after COVID-19: the Need to Review the Approach to Healthcare Priority-Setting in South Africa' (2021) *South African medical journal* 111.1: 20–22.

<sup>320</sup> Maboya, Edwin, and Samuel T Ntuli 'Geographical Distribution and Profile of Medical Doctors in Public Sector Hospitals of the Limpopo Province, South Africa' (2017) *African journal of primary health care & family medicine* 9.1: 1–5.

<sup>321</sup> Op cit note 10.

<sup>322</sup> Op cit note 316.

<sup>323</sup> Op cit note 28.

services by foreign nationals.<sup>324</sup> What is clear from the literature is that medical staff are not a homogenous group, they behave differently towards foreign patients based on their province, personal biases and circumstances they work under. Evidence that refugees face peculiar barriers in accessing healthcare services in South Africa is undeniable. As a matter of fact, this is a global phenomenon as proved by research from other parts of the world.<sup>325</sup> At the 2019 World Health Assembly in recognising the exclusion of refugees and migrants from health policies, mainstreaming migrant and refugee health into health policies was made one of the key priorities.<sup>326</sup> The Special Rapporteur raised concerns that in South Africa xenophobia had become institutionalised in government policy in addition to being spread across society and this has resulted in violations of the rights to health, dignity, life and physical integrity.<sup>327</sup>

In 2007 the Department of Health issued a revenue directive reiterating that asylum seekers and refugees with or without a permit have the right to access public healthcare on the same basis as citizens in accordance with the provisions of the Refugees Act and the Constitution.<sup>328</sup> The issuing of the directive followed a spate of complaints about discrimination and pressure on the government from civil society organisations to decisively deal with the issue.<sup>329</sup> The African Committee of Experts on the Rights and Welfare of the Child (Children's Committee) in its concluding observations and recommendations to South Africa expressed concern over barriers and the denial of services such as education and healthcare to children.<sup>330</sup> It called upon the government to take measures to eliminate all forms of discrimination against asylum seekers, refugees, migrants and stateless children.<sup>331</sup> As rightly pointed out by the Children's Committee, the South African government must eliminate discrimination. States are the duty-bearers under international human rights law, and they have the responsibility to fulfil and respect a child's right to health by taking measures to ensure that there is no denying or limiting of equal access,

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<sup>324</sup> Op cit note 69.

<sup>325</sup> Op cit note 67.

<sup>326</sup> Op cit note 67.

<sup>327</sup> United Nations News *South Africa 'on the precipice of explosive xenophobic violence', UN experts warn* 15 July 2022 available at South Africa 'on the precipice of explosive xenophobic violence', UN experts warn | UN News/.

<sup>328</sup> Op cit note 303.

<sup>329</sup> Vearey, J., and L. Nunez 'Migration and Health in South Africa: A Review of the Current Situation and Recommendations for Achieving the World Health Assembly Resolution on the Health of Migrants' (2010) Pretoria: IOM.

<sup>330</sup> African Union 'Concluding observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of South Africa on its First Periodic Report on the implementation of the African Charter on the Rights and Welfare of the Children (2019).

<sup>331</sup> Ibid at para 9.

especially to vulnerable asylum seekers and refugees.<sup>332</sup> This is consistency with article 2 of the CRC which prohibits discrimination based on any status. In fulfilling its obligations, South Africa should heed the important guidance regarding the right to health provided by the CESCR and endorsed by the CRC Committee which emphasises that discrimination against children based on status is prohibited.<sup>333</sup>

#### 4.3 Street level bureaucrats

While refugee children's access to critical healthcare services is guaranteed in the Constitution subject to the availability of resources, medical staff have a significant impact on how healthcare services are delivered. Structural constraints negatively impact how they perform their duties; however, this does not mean that they are merely disempowered duty bearers lacking the agency for the best services possible.<sup>334</sup> Lipsky has expressed that civil servants are street-level bureaucrats and through their decisions, they influence how policy is experienced by the intended beneficiaries.<sup>335</sup> He also comments that street-level bureaucrats encounter serious dilemmas when implementing policy and their task of providing services can be difficult. The several key drivers behind these dilemmas are issues of inadequate resources, deeply held values, and complex policies they are entrusted with implementing.<sup>336</sup>

The complexity of being a street-level bureaucrat is reflected in the soaring number of medical malpractice claims against medical staff which are mostly resulting from a communication failure between the healthcare provider and the patient.<sup>337</sup> In some instances, there is a failure to obtain informed consent as a result of language barriers. Interpreters are scarce, and when they are available there is also an inherent risk of the distortion of information.<sup>338</sup> This problem affects refugees who may not be familiar with the local languages as well as English. It is also reported that at times the best interests of the child principle creates problems as it tends to challenge the rights of the parents to be informed about the medical issues affecting their child.

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<sup>332</sup> Op cit note 105.

<sup>333</sup> Op cit note 119.

<sup>334</sup> Tummers, Lars, and Victor Bekkers 'Policy Implementation, Street-Level Bureaucracy, and the Importance of Discretion' (2014) *Public management review* 16.4: 527–547.

<sup>335</sup> Lipsky, Michael. *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*. New York: Russell Sage Foundation, 1980.

<sup>336</sup> Ibid.

<sup>337</sup> Op cit note 56.

<sup>338</sup> Op cit note 56.

When a child is 12 years and older, is of sufficient maturity, and refuses to consent to the disclosure of information to parents, this may create challenges as some parents may find this unacceptable especially if from a culture that holds that children are not responsible enough to make their own decisions.<sup>339</sup>

The rising levels of medical malpractice claims and research studies which indicate that most refugees are not satisfied with the service rendered to them and their children by public healthcare workers suggest that solutions need to be identified in order to resolve the problem.<sup>340</sup> Previously the Batho-Pele Principles and the National Patient's Charter were adopted to try and improve the situation, however, reports indicate that improvements are still to be seen.<sup>341</sup> It is possible that this points to the fact that it is more effective to challenge the structural issues affecting the healthcare system. London argues that focusing on making rights claims from health workers who are frequently unable to provide good quality services as a result of structural factors outside their control makes little headway and gives the human rights approach a bad name.<sup>342</sup>

#### 4.4 Policy

It has been noted that there is a disjuncture between international treaties, the Constitution and national policies.<sup>343</sup> This has affected refugee children in their efforts to access healthcare. As mentioned before, section 27 of the Constitution guarantees the right of access to healthcare services to everyone and provides that no one may be denied emergency medical treatment. However, the Immigration Act detracts from the clear guarantee of the Constitution as it provides for staff at hospitals and clinics to ascertain the legal status of patients before providing services, and for reporting illegal foreigners.<sup>344</sup> This inconsistency has created room for discrimination against refugee children in accessing critical healthcare. Pertaining to this issue, the Children's Committee called for the removal of the requirement to produce documentation before the rendering of services in South Africa.<sup>345</sup> Firstly, the child's or their parent's legal

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<sup>339</sup> Op cit note 56.

<sup>340</sup> Op cit note 28.

<sup>341</sup> Op cit note 56.

<sup>342</sup> Op cit note 105.

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<sup>344</sup> Immigration Act No. 13 of 2002, section 44.

<sup>345</sup> Op cit note 332.

status is prohibited grounds for discrimination, and it must not be used as a factor to decide the recipients of care.<sup>346</sup> Secondly, the Department of Home Affairs which administers the asylum system has not carried out its mandate diligently. As a result, many refugees are undocumented despite their best efforts to avoid being in such a situation.<sup>347</sup> It is therefore preposterous to deny refugee children healthcare services on grounds of legal status when the government is not fulfilling its mandate of ensuring that everyone eligible for documentation is provided with it.<sup>348</sup>

Similar to the Immigration Act discussed above, the NHI Bill will create challenges for refugee children's access to critical healthcare services if it is not amended to take into consideration important concerns that have been raised.<sup>349</sup> During oral presentations before the parliamentary portfolio committee for health the Democratic Alliance, Scalabrini Centre of Cape Town, Lawyers for Human Rights and other organisations raised concerns over the exclusion of asylum seekers from the enjoyment of healthcare services, except for emergency medical services and services for notifiable conditions of public health concern.<sup>350</sup>

It has been noted that there is a lack of harmonisation between national and provincial healthcare policies relating to the right to healthcare services, and this creates confusion and leaves gaps in the protection of refugees.<sup>351</sup> Refugees are not included in the list of individuals that are poor, vulnerable, and eligible for free healthcare in the NHA. This is although in caselaw refugees have been recognised as a particularly vulnerable group.<sup>352</sup> Their exclusion as a vulnerable group is a lost opportunity for the better protection of their right to healthcare, and it also shows a lack of consistency in the understanding of the circumstances of refugees across the various government departments. Although refugees are not included, refugee children can benefit from the inclusion of children as a vulnerable group eligible for free healthcare services.<sup>353</sup>

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<sup>347</sup> Op cit note 335.

<sup>348</sup> Op cit note 140.

<sup>349</sup> Moyo PT; Botha J and Govindjee A 'The Constitutionality of the National Health Insurance Bill: The Treatment of Asylum Seekers (2022) PER / PELJ (25)

<sup>350</sup> Ibid.

<sup>351</sup> Op cit note 301.

<sup>352</sup> Op cit note 288.

<sup>353</sup> National Health Act, section 3.

The Department of Health in 2009 published a Uniform Patient Fee Schedule (UPFS policy) that classifies patients into categories according to social and economic circumstances.<sup>354</sup> The UPFS policy's purpose is to provide clarity and uniformity in terms of hospital fees across all provincial health departments. However, this has not been fulfilled in some provinces. For example, the Western Cape Government on its website creates confusion by giving contradictory information. It rightly states that refugees and asylum seekers must be afforded the same treatment as South Africans (meaning they are charged per the means test), and then proceeds to mention that non-citizens are classified as full-paying patients along with the externally funded and private healthcare patients.<sup>355</sup> This ambiguity creates the risk that refugees will be asked to pay for healthcare services in full as they are in essence, not citizens. Many refugees will not be able to afford it, and as a result, they will be unable to access healthcare services. The lack of coherence between the Constitution and hospital policies has also been reported within hospitals and clinics and it has resulted in refugees being unjustly denied assistance.<sup>356</sup>

#### 4.5 Available resources

The enjoyment of the right to healthcare is dependent on the availability of resources. This has led commentators such as Cranston to argue that economic and social rights are meaningless for developing countries considering that they lack the resources of developed states.<sup>357</sup> Cranston seems to not have considered that a state's stage of development is taken into consideration when evaluations are made on how well it is meeting its obligations, and in addition, international cooperation is encouraged to boost the resources of developing countries. When a host country faces shortages in resources to realise social and economic rights of its citizens this can pose a significant risk to the rights of refugees. As Rutinwa argues, the burden that comes with hosting

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<sup>354</sup> The three categories found in the UPFS policy are, full-paying patients, partially paying patients, and fully subsidized patients.

<sup>355</sup> Western Cape Government 'Full Paying Patients' available at [https://www.westerncape.gov.za/your\\_gov/70/documents/public\\_info/W/19578?toc\\_page=2](https://www.westerncape.gov.za/your_gov/70/documents/public_info/W/19578?toc_page=2), accessed on 16 January 2023.

<sup>356</sup> Op cit note 67.

<sup>357</sup> Maurice Cranston, 'Human Rights: Real and Supposed' in DD Raphael (ed), *Political Theory and the Rights of Man* (Macmillan, 1967) 50–1

refugees is one of the reasons why some African countries have over time become less generous in providing for refugee rights.<sup>358</sup>

South Africa spends 8.5% of its GDP on healthcare and in monetary terms, this translates to R332 billion.<sup>359</sup> Half of this amount is spent on the public health sector which serves 84% of the population. The health sector competes with other sectors such as education which are also in dire need of resources. Unfortunately, international law does not provide any explicit formula that helps with the distribution of resources between the right to health and other rights.<sup>360</sup> The challenges caused by insufficient funding for the public healthcare sector include a shortage of critical care nurses, outdated intensive care unit equipment, and a lack of enough beds to match the need for critical healthcare services.<sup>361</sup> As a result of these challenges triaging is used to manage the available resources in order to make the best use of them for the benefit of everyone in the country.

The clearest example of the impact of a lack of resources on the right to healthcare is the *Soobramoney* case.<sup>362</sup> In this case, the appellant Mr Soobramoney who was suffering from chronic kidney failure approached the court after a public hospital decided not to provide him with treatment due to budgetary constraints. The court held that as a result of scarce resources some dialysis seeking individual's requests to join the dialysis program must be turned down. The act of rationing resources is integral to the human rights approach to healthcare.<sup>363</sup> The right to health is not absolute, and the obligations placed on the state are subject to the availability of resources. as the Constitution states.<sup>364</sup>

The concept of progressive realisation has its origins in General Comment No 3 of the ESC Committee which recognises the reality that although social and economic rights are guaranteed, universal access is not always possible from the outset.<sup>365</sup> This is consistent with the intentions of the drafters of the convention who saw value in the principle, although expressing concerns that

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<sup>358</sup> Rutinwa. "The End of Asylum? The Changing Nature of Refugee Policies in Africa." *Refugee survey quarterly*. 21.1/2 (2002)

<sup>359</sup> Michel J, Tediosi F, Egger M, et al. 'Universal health coverage financing in South Africa: wishes vs reality' *Journal of Global Health Reports*. 2020;4:

<sup>360</sup> Op cit note 121, page 71.

<sup>361</sup> Op cit note 41.

<sup>362</sup> Op cit note 44.

<sup>363</sup> Ibid, para 52.

<sup>364</sup> The Constitution, s 27(2).

<sup>365</sup> ESC Committee, General Comment No 3 (n 42) para 9.

the concept would be exploited by countries not making progress in the realisation of rights.<sup>366</sup> To avoid this pitfall, the ESC Committee made it clear that progressive realisation places an obligation to move expeditiously and effectively towards full realisation of rights.<sup>367</sup> In addition, the lack of health resources does not justify arbitrary discrimination, for example discrimination on grounds of refugee status.

A guarantee of non-discrimination is important to the protection of refugee children. In fact, James Hathaway has argued that it might be the only legal guarantee refugees require in circumstances where countries have signed reservations to substantive rights guaranteed by the Refugee Convention.<sup>368</sup> Commenting on this, Khan states that the non-discrimination principle has not proven to be the saving grace that Hathaway believes as the lack of resources has often led to refugee rights not being fulfilled.<sup>369</sup> The term 'available resources' means resources of the state and those it obtains within the framework of international cooperation.<sup>370</sup>

The moral and legal obligation for cooperation in the realisation of rights is core to the human rights system. For example, article 1 of the UN Charter lists one of the purposes of the UN as, "To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character . . ." <sup>371</sup> Furthermore, article 2 (1) of the ICESCR and article 4 of the CRC both speak to the matter of international cooperation despite the differences in wording. Most significant is article 24(4) which speaks to cooperation within the context of health.<sup>372</sup> The scope and nature of international cooperation remain contested under international human rights law because some states have argued that despite moral appeal, it is not a legal entitlement. Regarding refugee children's right to critical healthcare, it is more beneficial to focus on the less contested and recently revived commitment (through the Global Compact for

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<sup>366</sup> Chenwi, Lillian 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) *De Jure Law Journal*, 46(3), 742-769.

<sup>367</sup> Ibid.

<sup>368</sup> Op cit note 5, p 123.

<sup>369</sup> Khan, Fatima, and Cecile Sackeyfio. "Situating the Global Compact on Refugees in Africa: Will it Make a Difference to the Lives of Refugees?" 2021 *Journal of African Law*, 65(S1), pp.35-57.

<sup>370</sup> Op cite note, p 226.

<sup>371</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

<sup>372</sup> " States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realisation of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries."

Refugees) by state parties to share the refugee burden and responsibility within the international refugee law framework.<sup>373</sup>

There is a general acknowledgement that African countries require assistance to cope with the increasing number of refugees.<sup>374</sup> The OAU Convention speaks to this issue under article 2(4) which is on burden sharing.<sup>375</sup> It pleads with member states to support any African host state that “finds difficulty in continuing to grant asylum to refugees.” In addition, article 2(5) calls on the spirit of African solidarity and international cooperation in the facilitation of resettlement. In 2016, Ban Ki-moon, the former Secretary General of the United Nations mentioned that the refugee problem is not one of numbers per se, but rather it is a crisis of a lack of solidarity among countries.<sup>376</sup> He further mentioned that, “with equitable responsibility sharing, there would be no crisis for host countries.” The Global Compact for Refugees (GCR) which was adopted by member states in 2018 is a great stride towards the equitable responsibility sharing that was referred to by Ban Ki-moon.<sup>377</sup> It is a means through which the public healthcare sector can be strengthened to meet the needs of refugee children in relation to critical healthcare services.

Though not legally binding, the principles of the GCR are based on refugee law and human rights law, therefore its normative role is implied.<sup>378</sup> At its core the GCR introduces a paradigm shift from burden-sharing to responsibility-sharing, and as stated in its objectives it seeks to ease pressure on host countries such as South Africa and enhance self-reliance.<sup>379</sup> In December 2021 the first High-Level Officials Meeting (HLOM) mandated by the General Assembly through the GCR was held and some of the successes of the GCR were highlighted.<sup>380</sup> For example, the governments of Burkina Faso, Rwanda, and Cameroon included refugees in their national health

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<sup>373</sup> Op cit note 371.

<sup>374</sup> Ibid.

<sup>375</sup> Op cit note 150.

<sup>376</sup> Ki-moon B ‘UN Secretary-General’s Op-Ed: refugees and migrants: a crisis of solidarity’ available at [www.un.org/youthenvoy/2016/05/secretary-generals-op-ed-refugees-migrants-crisis-solidarity/](http://www.un.org/youthenvoy/2016/05/secretary-generals-op-ed-refugees-migrants-crisis-solidarity/), accessed on 16 January 2023.

<sup>377</sup> Ibid.

<sup>378</sup> M Olivier “The relevance of ‘soft law’ as a source of international human rights” (2002) 35/3 Comparative and International Law Journal of Southern Africa 289 at 296–97.

<sup>379</sup> GCR, first objective.

<sup>380</sup> UNHCR ‘Outcomes of High-Level Officials Meeting’ (2021) available at Outcomes of the High-Level Officials Meeting 2021 | The Global Compact on Refugees | UNHCR ([globalcompactrefugees.org](http://globalcompactrefugees.org)), accessed on 16 January 2023.

and education systems and policies with the support of the World Bank and the UNHCR.<sup>381</sup> This was pursuant to pledges the governments and international organisations made at the adoption of the GCR.

The HLOM report overall shows the progress and potential of the GCR; however, it is concerning that Southern Africa was the only region without a single fulfilled pledge. However, in February 2020, the SADC represented by Dr Stergomena Lawrence Tax the executive secretary reiterated its commitment to working with the UNHCR to implement the GCR and a Regional Action Plan for the SADC region.<sup>382</sup> Whilst the GCR creates an opportunity for better protection of refugee children's rights, including access to critical healthcare services its success is dependent on effective leadership and collaboration between the different states and actors in the region towards a common goal. A recommendation aligned to this was proffered by participants at the twentieth session of the Regional Coordination Mechanism for Africa which was held in Morocco in March 2019.<sup>383</sup> It was recommended that implementation of the compact requires collaborative approaches at national and regional levels. The SADC region has been marred by challenges which might negatively affect South Africa's chances of fully benefiting from the GCR. For example, corruption has been a serious concern. Most recently, public funds that were intended for South Africa's COVID-19 response measures were looted by high-level officials to date.<sup>384</sup> The International Monetary Fund and the World Bank have raised concerns over the years about issues of governance and corruption in Southern Africa.<sup>385</sup> Unfortunately, this reputation affects South Africa's ability to attract investment even for the cause of increasing resources available for ensuring that all children have better access to critical healthcare services through the GCR.

#### 4.6 Conclusion

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<sup>381</sup> Ibid.

<sup>382</sup> Southern African Development Community 'SADC – UNHCR discuss regional cooperation and the need to implement Global Compact of Refugees' (2020) available at [SADC – UNHCR discuss regional cooperation and the need to implement Global Compact of Refugees - World | ReliefWeb](#).

<sup>383</sup> Africa Union 'PRESS RELEASES Regional Coordination Mechanism for Africa (RCM-Africa) retreat commenced today' (2019) available at [Regional Coordination Mechanism for Africa \(RCM-Africa\) retreat commenced today | African Union \(au.int\)](#), accessed on 16 January 2023.

<sup>384</sup> Mokoena, Siphon K., and Collins C. Ngwakwe 'The IMF COVID-19 Financial Relief and Weak Financial Governance Commitment' (2020) *Journal of Public Administration* 55.3-1: 588-594.

<sup>385</sup> Ibid.

This chapter has shown that although refugee children's access to critical healthcare services is provided for in law, there remains challenges hindering the realisation of the right. These challenges include attitudes of healthcare workers that have the power to withhold services or have a significant impact on how patients experience the right. The chapter goes further and argues that the general lack of sufficient resources to cater for the health needs of the South African population makes it difficult for satisfactory healthcare services to be provided and refugee children will be affected by this. The burden and responsibility arising from meeting the needs of refugee children must however be shared as provided for under both human rights law and refugee law. As a result, it will take different interventions to ensure better protection of refugee children's right to access critical healthcare services without any difficulties.

## *Chapter 5*

# **Conclusion and Recommendations**

### 5.1 Final Analysis

This research has endeavoured to analyse refugee children's access to critical healthcare services in South Africa from a human rights approach perspective. It has been found that refugee children's right to access critical healthcare services is provided for by law, however, there are various barriers which are hindering access. These barriers include the lack of sufficient human and financial resources to meet healthcare needs, discrimination, and anti-immigrant sentiment which affects the accessibility of healthcare facilities, and the healthcare-seeking behaviour of refugees. In addition, challenges such as language barriers and cultural differences between refugees and the health staff result in service users not being satisfied with the services they

would have received.<sup>386</sup> Future research is needed in exploring the experiences of medical staff in assisting refugee children in accessing their right to critical healthcare services in the country.

Considering the issues raised, this thesis makes the following recommendations; It advocates for the greater involvement of civil society organisations and the UNHCR in protecting and promoting refugee children's access to critical healthcare services; responsibility and burden sharing to ease the burden on South Africa that arises from hosting refugees; and firm government action in eliminating discrimination.

## 5.2 Civil Society Organisations

An active civil society is crucial in efforts to improve refugee children's access to critical healthcare services. London states that "without an active civil society paper commitments to rights mean very little", and he illustrates this by stating that "the treatment action campaign was effective in initiating and buttressing court action around access to ART."<sup>387</sup> Most recently, in 2022, civil society pointed out at the NHI Bill public hearings that the Bill discriminates against asylum seekers and migrants from accessing healthcare services.<sup>388</sup> This is not in alignment with Section 27 of the Constitution which guarantees the right to healthcare services to everyone, and the draft migration policy framework of the African Union that recommends UHC for all migrants.<sup>389</sup> In this it can be shown that civil society is playing a crucial role by holding the government to account in meeting its obligations to respect, protect and promote the right to healthcare. It is important that civil society does not only adopt an adversarial approach which is inherent in the HRA, but rather find ways to partner with health professionals some of whom have become hostile towards human rights language and foreign nationals.<sup>390</sup> This is partly because they perceive that patient responsibilities are not given sufficient attention, so as their own rights as they work under poor conditions in the public healthcare system. Firstly, it is crucial for civil society to recognise that the primary goal is improving access to critical healthcare services for the benefit of all, and secondly that it is beneficial to enlist the help of

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<sup>386</sup> Op cit note 10.

<sup>387</sup> Op cit note 89.

<sup>388</sup> Op cit note 351.

<sup>389</sup> Op cit note 67.

<sup>390</sup> Op cit note 89.

health workers (who have unfortunately become gatekeepers) in demanding a healthcare system that meets the core standards of quality.

### 5.3 The role of the UNHCR

The main responsibility of protecting the rights of refugees in South Africa lies with the government because it has the primary responsibility to provide for everyone within its jurisdiction.<sup>391</sup> The role of the UNHCR as expressed in the Statute Adopted by the General Assembly of the United Nations in 1950 is to ensure that State Parties, in this case South Africa, takes the necessary measures to protect the rights of refugees.<sup>392</sup> Where the government falls short in meeting its international obligations pertaining to refugee children's access to healthcare services, the UNHCR must use its authority to remind the government of its obligations. In addition to advocating for the integration of refugees into national healthcare systems, it is important that the UNHCR channels funding to the public healthcare system which caters to the needs of refugees. Scholars have commented that most funding received by the UNHCR comes earmarked according to the political desires of its donors.<sup>393</sup> Through its 'supportive and catalytic' role described in the GCR, the UNHCR must ensure that it mobilises pledges and funding for countries that are often neglected when earmarked funding is allocated.<sup>394</sup> This will ensure more funds are available to support countries such as South Africa as they provide access to critical healthcare services to refugee children. A lack of support might be detrimental considering that the South African government seems bent on taking retrogressive measures of excluding refugees from previous levels of entitlement in the transition to the UHC.<sup>395</sup> Such assistance would be in line with the UNHCR's public health strategy which aims to "foster the conditions, partnerships, collaboration and approaches that enable refugees to access healthcare and essential health services."<sup>396</sup>

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<sup>391</sup> Op cit note 89.

<sup>392</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V)

<sup>393</sup> Väyrynen, Raimo 'Funding dilemmas in refugee assistance: Political interests and institutional reforms in UNHCR' (2001) *International Migration Review* 35.1: 143-167.

<sup>394</sup> GCR, para 101.

<sup>395</sup> Op cit note 351.

<sup>396</sup> UNHCR 'Access to health' available at <https://www.unhcr.org/access-to-healthcare.html>, accessed on 16 January 2023.

## 5.4 Responsibility and burden sharing

South Africa's healthcare system is struggling to meet the needs of its population, and the lack of resources is a major reason behind this.<sup>397</sup> Hosting refugees increases a government's financial burden; however, refugees also contribute to revenue through work and businesses. The GRC offers an opportunity for the pressure on South Africa to be eased with the support and assistance of the international community. For example, in countries where the CRRF has been rolled out (Chad, Djibouti, Ethiopia, Kenya, Rwanda, Uganda, and Zambia), improved protection of refugee rights has been noted in the manner of integration of refugees into host communities and the strengthening of institutions providing services to refugees among other measures.<sup>398</sup>

It is an advantage to the cause of the GRC that in South Africa refugee children's right of access to healthcare services is recognised in the Constitution and that they can access the national healthcare system.<sup>399</sup> In other countries the UNHCR is still encouraging the inclusion of refugees in national health systems. Assistance in strengthening the healthcare system through financial and technical support, among other contributions can go a long way in improving refugee children's access to critical healthcare services. This would be in line with recommendation number 10 from the High-Level Officials Meeting held on the 14th and 15th of December.<sup>400</sup> There are several good examples which highlight the potential of the GRC to improve access to healthcare services for refugees. One can be found in Uganda where Belgium through the UNHCR has contributed EUR 3.1 million to support healthcare related pledges made by Uganda.<sup>401</sup>

In light of this, it is imperative that the SADC region works together with the UNHCR, private actors and other members of the international community to improve the situation of refugees in South Africa. This is especially important now with rising complaints from different segments of the South African society around the burden of supporting migrants and refugees.<sup>402</sup>

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<sup>397</sup> Op cit note 45.

<sup>398</sup> Op cit note 371.

<sup>399</sup> Op cit note 56.

<sup>400</sup> Op cit note 382.

<sup>401</sup> UNCRH 'Pledge matched: Belgium and Uganda unite' (2021) available at [Pledge matched: Belgium and Uganda unite | The Global Compact on Refugees | UNHCR \(globalcompactrefugees.org\)](https://www.unhcr.org/press-releases/2021/12/pledge-matched-belgium-and-uganda-unite-the-global-compact-on-refugees), accessed on 16 January 2023.

<sup>402</sup> Op cit note 28.

As Hathaway notes, the Refugee Convention has not assisted countries in reconciling their domestic responsibilities with those emanating from international obligations.<sup>403</sup> The GCR offers an opportunity for equitable responsibility and burden sharing, and state parties, international organisations, CSOs, and private actors should do everything possible to push for the success of this crucial initiative. Critical healthcare services are expensive to provide and more funding to South Africa would go a long way in improving access for refugee children.<sup>404</sup>

In conclusion, this research has shown that refugee children's access to critical healthcare in South Africa is well provided for in law. Despite legal provisions there is work to be done in order to improve the public health sector and ensure that refugee children can easily access quality and adequate critical healthcare services. This research has offered recommendations for the improvement of refugee children's access to critical healthcare services that have the potential to change circumstances for better.

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<sup>403</sup> Op cit note 5, p 992.

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