

**The right to education for refugees and asylum-seekers in
South Africa**

by

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COMPULSORY DECLARATION

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Introduction

Refugees and asylum-seekers in South Africa have a right of access to basic, secondary and tertiary education. This right is grounded in international law, most notably the 1951 Convention Relating to the Status of Refugees [1951 Convention] and the International Covenant on Economic, Social and Cultural Rights [ICESCR],¹ and domestic law, especially the Constitution of the Republic of South Africa (No. 108 of 1996). Supporting legislation elaborates on the s. 29 right to education for *everyone*, which is the strongest provision for refugees' access to education in this country.²

A refugee is someone who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.”³ An asylum-seeker is someone who has applied for official recognition and protection as a refugee, but whose status has yet to be determined. In South Africa, the Department of Home Affairs (DHA) undertakes these status determinations and issues permits indicating asylum-seeker status (Section 22) and refugee status (Section 24).

Refugees and asylum-seekers are marginalised, fragmented groups with multiple ethnic and cultural origins. The UN High Commissioner for Refugees [UNHCR] reports that at the end of 2011, refugees and applicants for asylum in South Africa came from Somalia, Angola, the Democratic Republic of Congo (DRC), Bangladesh, Ethiopia, Malawi and Zimbabwe.⁴ These groups possess little socio-political power, and therefore struggle to access rights in their host country. Socio-economic rights, of which education is one, are already an embattled category of rights for citizens. In attempting to access education, refugees of all ages and at all levels face barriers to education that limit their human rights.

Barriers to the right include the lack of enabling documentation, fees, access costs, admission policies and language difficulties. Age and grade-placing are also concerns, specifically with respect to basic education. In South Africa, refugees and asylum-seekers are fully protected under the Bill of Rights, with the same access to almost all civil-political and socio-economic rights as citizens, excluding the right to vote.⁵ The South African Constitution is an empowering and progressive document which can be used to address and ameliorate these obstacles through awareness-raising

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

2 “Everyone has the right— (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible”. Constitution of South Africa, No. 108 of 1996. s. 29(1).

3 UN General Assembly. *Convention Relating to the Status of Refugees*. United Nations: Treaty Series, vol. 189. 28 July 1951. p. 137. art. 1(A)(2).

4 UNHCR. “2013 UNHCR country operations profile - South Africa.” www.unhcr.org. n. pag. Accessed 22 Sep. 2013.

5 ARESTA. Home. www.aresta.org.za. n. pag. Accessed 21 Sep. 2013.

and strategic litigation. The 1951 Convention is also foundational, granting the right to education without discrimination to nationals and refugees alike. Together with the extensive South African jurisprudence on socio-economic rights, these two documents compose the foundation of the right to education as it is laid out in this dissertation.

Basic education is generally a strongly stated right around the world, although the provision of basic education to those who need it still lags far behind the requirements of widely-ratified conventions promoting this right. Hathaway writes that in 2002, UNHCR estimated that “fewer than half of refugee children receive[d] even elementary education”.⁶ Greater challenges exist for refugees and asylum-seekers trying to access secondary and tertiary education. Fees exemptions are not routinely available for higher levels of education, the responsibility of the state to assist is greatly reduced or non-existent, and access to enabling documentation remains a crucial difficulty for students in these circumstances.

As Liebenberg indicates, in 2010 major cases dealing with the nature and scope of the right to basic education had yet to come before the Constitutional Court, despite the strong positive obligation imposed by s. 29.⁷ In 2007, Isaacs wrote that “the Constitutional Court’s log of cases founded squarely on a violation of the right to education is blank”, and advocated effective, tangible remedies in conjunction with the courts via “a mass movement for education reform”, such as the Equal Education movement which Isaacs went on to co-found in 2008.⁸ Education is a socio-economic right, requiring positive action from government to take on the challenges of providing enabling infrastructure, learning materials, good teaching and a sound institutional framework. South Africa has a troubled, nuanced history with the realisation of socio-economic rights, resulting in many notable court cases, such as *Grootboom* (2000),⁹ *Mazibuko* (2009)¹⁰ and *Treatment Action Campaign No. 2* (2002).¹¹

Chapter 1 examines socio-economic rights as a category, using the South African Constitution as a model and expanding on judgments made by the Constitutional Court. The status of the right to education as a socio-economic right is addressed, with reference to its justiciability, as well as the ways in which socio-economic rights have been dealt with in other countries, under other constitutions. Comparisons are made with the Indian and American Constitutions, with reference to Supreme Court rulings on education cases.

6 Hathaway, James. *The Rights of Refugees under International Law*. Cambridge University Press, 2005. 585.

7 Liebenberg, Sandra. *Socio-economic Rights: adjudication under a transformative constitution*. Cape Town: Juta, 2010. 242-243.

8 Isaacs, Doron. “Interpreting, Litigating and Realising the Right to Education in South Africa.” University of Cape Town, 2007. 3.

9 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19.

10 *Mazibuko and others v City of Johannesburg and others* [2008] 4 All SA 471 (W).

11 *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15.

Chapter 2 sketches the human rights framework for the right to education. This chapter situates the right to education in international conventions, and then examines how this right applies to refugees, with particular reference to *Ndikundavyi v Valkenberg Hospital and Others* (2010).¹²

Chapter 3 looks at the state of education in South Africa. This chapter examines the legislation underlying general education and training, which equates to basic and secondary education, and further education and training (vocational or technical) and higher education (tertiary).

Chapter 4 identifies the beneficiaries of the right to education, beginning with refugees and asylum-seekers. This section uses *Minister of Home Affairs and Others v Watchenuka and Others* (2003)¹³ to work through the right to education for asylum-seekers in South Africa. Refugee children are examined as a specific class of beneficiary, given their particular vulnerability.

Chapter 5 examines barriers to access to education for refugees and asylum-seekers. This section focuses on school, college and university fees and the lack of enabling documentation, which leads to difficulties with admissions, as well as age and grade placing in basic education. Other issues identified include language barriers and xenophobia.

The conclusion offers observations and recommendations based on the available research.

Chapter 1: Education as a socio-economic right

In South Africa, social, economic and cultural rights have a powerful presence in the Bill of Rights. For this reason, the South African constitution is viewed internationally as a progressive document in the field of human rights. A significant amount of case-law on socio-economic rights has been built up via applications to the Constitutional Court, resulting in a unique, effective body of jurisprudence in this area.¹⁴

Socio-economic rights may be contrasted with civil-political rights, which include freedom of expression, the right to life, the right to political participation and the rights to equality, dignity and privacy, amongst others. By contrast, socio-economic rights include the rights to housing, health care, food, water and social security, the rights of children, the right to education, and the rights to language, culture and community. Liebenberg acknowledges that the boundaries between these categories of rights are porous, but that the historical privileging of civil-political rights has tended to de-emphasise real, everyday problems of “impoverishment and material disadvantage”. The

¹² *Ndikundavyi v Valkenberg Hospital and Others* (C970/2010) [2012] ZALCCT 15.

¹³ *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142 (28 November 2003).

¹⁴ Galliker, Doris. *The potential impact of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on the realisation of socio-economic rights in the international arena: what can be learnt from the justiciability of socio-economic rights in South Africa?* Diss. University of Cape Town, 2010. Cape Town: UCT, 2010. 1.

inclusion of socio-economic rights in the South African Constitution is an attempt at redressing this imbalance, and grants ordinary people the opportunity to contest actions or decisions that undermine their constitutional rights.¹⁵ Davis emphasises the participatory nature of the democracy built on this document, which “enshrines a principle of accountability” essential to just governance and substantive equality.¹⁶

The Constitution establishes and oversees a democracy governed by three branches: judicial, legislative and executive. In many cases over the years, the lower courts, and particularly the Constitutional Court, have taken on the role of reminding the other branches of their constitutional obligations. Raising *Glenister v President of the Republic of South Africa* and *Mazibuko v City of Johannesburg*, Davis cites s. 7(2) of the Constitution, which requires the State to “respect, protect, promote and fulfil the rights in the Bill of Rights”.¹⁷ The majority judgment in *Glenister* noted that s. 7(2) entails more than a negative obligation to avoid unjustifiably limiting a right. Instead, the State has a positive duty to “take deliberate measures to give effect to all the fundamental rights contained in the Bill of Rights”.¹⁸ This interpretation is of particular importance in a case like *Mazibuko*, which in the High Court and the Supreme Court of Appeal became an exercise in determining minimum core: in this case, the exact amount of free water in litres per month to which residents of a low economy township were entitled.¹⁹ The question arose from s. 27 of the Constitution, which ensures “[e]veryone... the right to have access to... sufficient food and water”.²⁰ However, s. 27(2) reiterates a condition attached to most socio-economic rights in this document: progressive realisation by the State, within available resources, via reasonable legislative and other measures.²¹ Discussed in more detail below, ICESCR first employed this principle of progressive realisation, which has filtered down into domestic legislation around the world. Mbazira indicates that there is “ample evidence to suggest that the drafters of the Constitution were inspired” by ICESCR, but that the Constitutional Court has not accepted some aspects of the Covenant's jurisprudence. Mbazira finds that the Court displays a “normative conception of the nature of the obligations that socio-economic rights engender”, which partially explains why South Africa has yet to ratify ICESCR.²²

15 Liebenberg, *Socio-economic Rights*, 34-36.

16 Davis, Denis. “The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: what about separation of powers?” *Potchefstroom Electronic Law Journal* 15.5 (2012): 2-14. 2.

17 SA Constitution, s. 7(2).

18 *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6. Par. 191.

19 *Mazibuko and others v City of Johannesburg and others*, editor's summary.

20 SA Constitution, s. 27(1)(b).

21 SA Constitution, s. 27(2).

22 Mbazira, Christopher. *Litigating Socio-economic Rights in South Africa: A choice between corrective and distributive justice*. Cape Town, Pretoria University Law Press: 2009. 53-54.

In the Constitutional Court, O'Regan referenced both *Grootboom* and *Treatment Action Campaign No. 2* to discuss the balancing of positive state obligations against the allowance for progressive realisation. In *Grootboom*, s. 26(2) qualified the right of access to housing such that an applicant could not simply approach the court to demand a house.²³ O'Regan applied this reasoning to the right of access to sufficient water, and found that the Court could not decide how much free water each citizen should get. In her judgment she quoted a passage from *Treatment Action Campaign No. 2*, which stated that

[c]ourts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.²⁴

O'Regan therefore rejected the idea that courts can determine the minimum core, or essential concrete content, of any given socio-economic right. While other states and convention monitoring bodies do not hold this position, O'Regan's judgment was consistent with Constitutional Court precedent, and recognised the “dialogical conception of constitutional democracy”²⁵ that exists in South Africa.

O'Regan's reasoning is also pragmatic. The Constitution allows for progressive realisation because the effective, immediate, nation-wide achievement of access to sufficient water is not a practical reality. The emphasis on socio-economic rights in the Constitution is not idealistic, but rather offers a means of holding the state accountable to the needs of its citizens.²⁶ The Court's past judgments in *Treatment Action Campaign No. 2* and *Grootboom* showed “institutional respect for the policy-making function of the two other arms of government”.²⁷ The standard to which the state is held is one of reasonableness, as determined by the Constitution. O'Regan concludes that the courts may enforce the positive obligations of s. 7(2) in the following ways.

Firstly, where the government has not acted to realise a right, the courts can require that action be taken. For example, in the most recent phase of the long-standing legal battle between Equal Education and the Minister of Basic Education, the court ordered the Minister to publish amended draft regulations for minimum uniform norms and standards for school infrastructure.²⁸ These

²³ *Mazibuko and others v City of Johannesburg and others*, par. 48.

²⁴ *Minister of Health and Others v Treatment Action Campaign and Others*, par. 38.

²⁵ Davis, “The relationship between courts and the other arms of government”, 3.

²⁶ *Mazibuko and others v City of Johannesburg and others*, par. 57-60.

²⁷ *Mazibuko and others v City of Johannesburg and others*, par. 65.

²⁸ John, Victoria. “Motshekga gazettes new norms and standards for schools.” *Mail & Guardian*. *Mail & Guardian*, 12 Sep. 2013. Web. 18 Sep. 2013.

minimum norms and standards resemble minimum core, but the Minister, not the court, is responsible for determining their content.

Secondly, where government action is unreasonable, the court can review said action and hold it to constitutional standards of reasonableness.

Thirdly, if government action includes unreasonable limitations or restrictions on a right, such as those placed on the antiretroviral rollout programme in *Treatment Action Campaign No. 2*, the courts can order such restrictions removed. *Khosa v Minister of Social Development* is a noteworthy case dealing with social security payouts to permanent residents,²⁹ where it was demonstrated that the inclusion of this group would contribute only a two percent increment to the entire social grants budget. Thus the state's defence on the grounds of lack of resources was not justified, and the Court made an order in favour of the applicants. The Canadian Supreme Court followed the same reasoning in *Eldridge and Others v British Columbia (Attorney General) and Others*, where the province of British Columbia had failed to provide translation services for deaf patients in public hospitals. The Court rejected the lack of resources defence, and found that there had been unfair discrimination, on the grounds that remedying the problem required only a proportional increment of 0.0025 percent to the entire provincial health budget.³⁰

Finally, all branches of government must keep in mind that progressive realisation is not a loophole or an excuse for inaction, but that it rather holds government to a stringent standard of progressively achieving the realisation of a right, to the fullest extent of the state's capacity and resources.³¹ This is particularly important in the context of the progressively realisable right to further education under s. 29(1)(b) of the Constitution, which requires the strategic and effective formulation of policy to promote access to higher education and training in South Africa.

The practical implementation of the duty to “respect, protect, promote and fulfil the rights in the Bill of Rights” remains a contested legal issue. To date, the state's positive obligations to realise the right to education have yet to be comprehensively tested in the jurisprudence.

Doron Isaacs recognises that “[a] court can declare the education offered in a school, province or country to fail the test of constitutionality”, but in a “failed system”, courts are not equipped to replace substandard education with something better.³² In the case of progressively realisable rights such as the rights of access to housing and health care, the Constitutional Court has been criticised for abstracting rights, rather than imbuing them with concrete content and taking steps to provide

29 *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.

30 Mbazira, *Litigating Socio-economic Rights*, 99.

31 *Eldridge and Others v British Columbia (Attorney General) and Others* [1997] 3 SCR 624, 151 D.L.R. (4th) 577.

32 *Mazibuko and others v City of Johannesburg and others*, par. 67.

33 Isaacs, “Interpreting, Litigating and Realising the Right to Education in South Africa”, 3.

beneficiaries with tangible goods and services.³⁴ As the *Mail & Guardian* reported in 2008, Irene Grootboom, the primary respondent in the ground-breaking *Grootboom* case, died “homeless and penniless” in a shack. Eight years on from the historic judgment, she was still waiting for a decent house for herself and her children.³⁵ There is, firstly, no consensus on the nature, implications and implementation of socio-economic rights;³⁶ and secondly, a crisis at state level in education or housing programmes leaves courts in the difficult situation of having to balance power dynamics amongst the branches of government, while producing effective and motivating judgments. These are the challenges facing any legal investigation into the socio-economic right to education.

Depending on the structures of their constitutions, other states have approached socio-economic rights differently. In the Indian Constitution, socio-economic rights are not justiciable. Instead, the Directive Principles of State Policy (DPSP) were crafted as guiding principles for state action towards socio-economic justice, a system Abeyratne claims originated in the Irish model.³⁷ Since the Constitution came into force in 1950, the Indian Supreme Court has increasingly defined socio-economic rights in the light of the right to life in Article 21. Reasoning that the right to life encompasses the right to dignity, the Court has found that many DPSP rights, including the rights to food and to education, are in fact justiciable via Article 21. In this context, the Court has both been accused of overreaching its authority through “judicial activism” and applauded for its strong pro-poor stance.³⁸

In *Miss Mohini Jain vs State Of Karnataka And Others*, the charging by State-recognised educational institutions of a “capitation fee” was seen as a violation of Article 14, which ensures the right of equality before the law. The fee was too high for financially disadvantaged people to afford, and thus discriminated against them. Furthermore, the state had an obligation to provide education to all its citizens within the context of the Article 21 right to life and dignity:

“Right to life” is the compendious expression for all those rights which the Court must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour [sic] to provide educational facilities at all levels to its citizens.³⁹

34 Mbazira, *Litigating Socio-economic Rights*, 56.

35 Joubert, Pearlie. “Grootboom Dies Homeless and Penniless.” *Mail & Guardian*. *Mail & Guardian*, 08 Nov. 2008. Web. 16 Sep. 2013.

36 Galliker, *The potential impact of the Optional Protocol*, 3.

37 Abeyratne, Rehan. “Socioeconomic Rights in the Indian Constitution: Towards a Broader Conception of Legitimacy.” *Brooklyn Journal of International Law (Forthcoming)*. Available at SSRN: <http://ssrn.com/abstract=2189277> or <http://dx.doi.org/10.2139/ssrn.2189277>. 25.

38 Abeyratne, “Socioeconomic Rights in the Indian Constitution”, 1.

39 *Miss Mohini Jain vs State Of Karnataka And Others*. Supreme Court of India. 1992 SCR (3) 658. 30 July 1992. p. 661.

Miss Mohini Jain vs State Of Karnataka is one example of how other courts have approached the right to education, in this case situating it as a justiciable socio-economic right that the state is obliged to fulfil. The order in *Miss Mohini Jain* deals fearlessly with State-authorized fees policies, striking down the allowance for capitation fees in the legislature of Karnataka State.⁴⁰ Contrast this with the Constitutional Court judgment in *Doctors for Life*, where Parliament's failure to fulfil its constitutional duty of facilitating public participation resulted in the suspension for eighteen months of two health-related Acts, in order for Parliament to "re-enact these statutes in a manner that [was] consistent with the Constitution".⁴¹ While South Africa's socio-economic rights jurisprudence is thorough and empowering, the Court has often been cautious in its actual judgments. By comparison, the Indian Supreme Court has a reputation for taking an aggressive stance on socio-economic rights. Abeyratne warns that this increase in judicial authority may come "at the expense of democratic decision-making in both the central and state governments",⁴² a concern which echoes the South African wariness surrounding any breach of separation of powers.

By contrast with the Indian DPSP model, the United States Constitution recognises no socio-economic rights apart from the right to property.⁴³ *Brown v. Board of Education* (1954) was the first major socio-economic rights case in the United States. In this case, the Supreme Court found the racial segregation of public schools unconstitutional. The Court's reasoning stemmed from the fundamental civil-political right to equality, as well as the fact that education is "a prerequisite to the meaningful exercise of other citizenship rights".⁴⁴ Today, substantive socio-economic rights are recognised mostly in individual state constitutions. Almost every state in the country has a provision on education, and Albisa and Schultz indicate that in some cases the jurisprudence has developed to the point that it demands more than the minimum core set out in Articles 13 and 14 of ICESCR, which the United States has yet to ratify.⁴⁵ In this case, socio-economic rights stem directly from the right to equality, which in the South African Constitution includes a right to substantive equality, promoting the advancement of those previously disadvantaged by unfair discrimination.⁴⁶ However, the explicit stating of socio-economic rights has permitted direct litigation on those grounds, providing a means for the least empowered people to call the state to account. Ideally, this enables

40 *Miss Mohini Jain vs State Of Karnataka And Others*, 681.

41 *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11. Par. 225(c).

42 Abeyratne, "Socioeconomic Rights in the Indian Constitution", 29.

43 Albisa, Cathy and Jessica Schultz. "The United States: A Ragged Patchwork." *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*. Ed. Malcolm Langford. Cambridge: Cambridge University Press, 2008. 230-249. 234.

44 Albisa, Cathy and Jessica Schultz, "The United States: A Ragged Patchwork", 236.

45 Albisa, Cathy and Jessica Schultz, "The United States: A Ragged Patchwork", 243.

46 SA Constitution, s. 9(2).

the transparent, participatory form of democracy envisaged by our Constitution.

The South African Constitution states the right to basic education strongly, without the caveat of progressive realisation applied to further education and other socio-economic rights. The effect of the foregoing jurisprudence on the right to education will be addressed in Chapters 3 and 4. First, it is necessary to establish the international human rights framework supporting the right to education.

Chapter 2: The human rights framework

The Right to Education

The right to education is well-established in international law and human rights conventions. Although non-binding, the Universal Declaration of Human Rights recommends free elementary and fundamental education “directed to the full development of the human personality”, although “elementary” and “fundamental” are not defined. Learning above the basic level falls into the categories of technical and professional education, to be made “generally available”, and higher education, which “shall be equally accessible to all on the basis of merit”.⁴⁷

Stemming from the UDHR, the socio-economic rights Covenant, ICESCR, presents education as essential to dignity, equality and peace.⁴⁸ Importantly, once signed and ratified, the Covenant is legally binding. Article 13 of ICESCR constitutes one of the most comprehensive provisions on education. Widely ratified, ICESCR requires contracting states to provide free and compulsory basic education⁴⁹ and to encourage fundamental education for “those persons who have not received or completed the whole period of their primary education”.⁵⁰

Secondary education, particularly technical and vocational, is to be made “generally available and accessible to all by every appropriate means”, while higher education shall be made “equally accessible to all, on the basis of capacity, by every appropriate means”. The means most favoured by the Covenant is that of the “progressive introduction of free education” in all spheres of education, not just at the elementary level.⁵¹ Article 14 enjoins states in which primary education is not yet free to draw up and implement a plan, within two years, for progressively achieving this goal within a reasonable timeframe.

The General Comments of the Committee on Economic, Social and Cultural Rights [CESCR] expand on the provisions of the Covenant. General Comment 11 is directed at states that have yet to

⁴⁷ UN General Assembly. *Universal Declaration of Human Rights*. 217 A (III). 10 December 1948. art. 26(1) and 26(2).

⁴⁸ ICESCR, art. 13(1).

⁴⁹ ICESCR, art. 13(2)(a).

⁵⁰ ICESCR, art. 13(2)(d).

⁵¹ ICESCR, art. 13(2)(b-c).

comply with the requirements of Article 14. It is to be read in conjunction with General Comment 13, which is a comprehensive and valuable extension on the Covenant's position on education. This Comment describes education as an empowerment right: both a powerful tool for accessing other rights and a rewarding end in itself.⁵²

One obstacle to realising the right to education is the definition of terms (basic, elementary, secondary, higher, technical), and the identification of respective beneficiaries. States generally have a stronger obligation to children receiving basic education, which calls for clear definitions both of “children” and the schooling to which they are entitled.

General Comment 13 isolates “primary” education as the most important part of basic education, and relies on the World Declaration on Education for All for a catalogue of needs to be met by primary education. These include “essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes)”.⁵³ In the context of refugee education discussed below, Hathaway acknowledges that the term “elementary” is not defined in the 1951 Convention Relating to the Status of Refugees either, and that varying interpretations may be more or less inclusive. The definitions provided by CESCR are useful guidelines, but may not always prove decisive. A conservative understanding may exclude anything above pre-secondary education from the definition.⁵⁴ The aim in expanding the definition here is to include and assist as many disadvantaged people as possible. The 4A approach of CESCR is also helpful, calling for all levels of education to exhibit the interrelated features of availability, accessibility, acceptability and adaptability.⁵⁵ These are “common to education in all its forms and at all levels”.

Secondary education “includes completion of basic education and consolidation of the foundations for life-long learning and human development”, as well as preparing learners for vocational and higher education opportunities. This level of education should incorporate “flexible curricula and varied delivery systems”⁵⁶ so as to be widely available and accessible to learners from different backgrounds. Secondary education should be “generally available”, that is, not dependent on a learner's perceived capacity or ability and available on the same basis to everyone.⁵⁷

Technical and vocational education (TVE) is situated between the right to education and the right to work, and informs the right to education generally. The UNESCO definition states that

52 UN Committee on Economic, Social and Cultural Rights (CESCR). General Comment 13, E/C.12/1999/10. 8 December 1999. s.1.

53 CESCR, General Comment 13, par. 9, footnote 4.

54 Hathaway, *The Rights of Refugees under International Law*, 596.

55 CESCR, General Comment 13, par. 6.

56 CESCR, General Comment 13, par. 12.

57 CESCR, General Comment 13, par. 13.

...‘technical and vocational education’ refers to all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life[.]⁵⁸

TVE is therefore viewed as contributing to a state's overall economic and social development, via enabling knowledge and skills that encourage self-reliance, productivity and employability. Retraining for adults whose technological skills are out of date is a goal, as is the promotion of TVE for “women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups”.⁵⁹

The primary difference between secondary and higher education, as argued by CESCR, is that higher education is not required to be made “generally available”, but only “equally accessible to all, on the basis of capacity”. This capacity is determined by the “relevant expertise and experience” of individuals.⁶⁰

The UN Convention on the Rights of the Child [CRC] requires states to make primary education “compulsory and available free to all”.⁶¹ ICESCR's provisions for further education are restated in the CRC without significant alteration, thus acknowledging that the accessibility of schooling beyond basic education is vital for the full, healthy development of children.

The Rights of Refugees

The 1951 Convention Relating to the Status of Refugees acts as the guiding framework for the treatment of refugees and asylum-seekers in all United Nations member states. It is complemented, subject to ratification, by international treaties like ICESCR and regional treaties such as the 1969 OAU Convention on refugees.⁶² These conventions situate and expand on a document now more than sixty years old.

The 1951 Convention addresses two distinct areas: the criteria by which an individual may qualify for refugee status and the rights that accrue to her before and after status is granted. This paper's focus is the right to education, one of a range of socio-economic rights addressed in the

58 United Nations Educational, Scientific and Cultural Organisation [UNESCO]. *Convention on Technical and Vocational Education*. 10 November 1989. Available at: <http://www.refworld.org/docid/404222e32.html> [accessed 17 September 2013]. art. 1(a).

59 CESCR, General Comment 13, par. 16(e).

60 CESCR, General Comment 13, par. 19.

61 UN General Assembly. *Convention on the Rights of the Child*. 20 November 1989, United Nations. Treaty Series vol. 1577. p. 3. Art. 28(1)(a).

62 Organization of African Unity. *Convention Governing the Specific Aspects of Refugee Problems in Africa* [OAU Convention]. 10 September 1969. 1001 U.N.T.S. 45.

Convention.

For refugees and asylum-seekers, education is a vital means of integrating into one's host state and of maintaining ties with the state of origin. Survival as a refugee often depends on one's ability to adapt, and education for children and adults is important to the assimilation process.⁶³ In this context, the provisions for public education in international, regional and domestic law are key to the well-being of refugees and asylum-seekers in every host state.

Article 22 of the 1951 Convention on public education binds contracting states to “accord to refugees the same treatment as is accorded to nationals with respect to elementary education”.⁶⁴ This article deliberately supersedes article 7(1), which states that “[e]xcept where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally”. Article 22 leaves no room for misunderstanding or derogation: refugees *must* receive the same standard of basic education as nationals.

Refugees accessing anything beyond elementary education must receive treatment “as favourable as possible”, or at least as favourable as “that accorded to aliens generally in the same circumstances”.⁶⁵

Importantly, most provisions on education encountered in international conventions expressly identify *public* education in the context of this right. Parents or guardians have the right to choose to send their children to independent schools, provided the standard of education and ethical practice of these schools are in line with the relevant conventions and national legislation on schooling. Individuals and bodies are also free to establish such schools.⁶⁶ Public education, however, is the responsibility of the state – as are refugees and asylum-seekers. The state must demonstrate compliance with its international obligations by instituting national programmes to make education available and accessible at all levels. International and local or community-based non-governmental organisations have very real roles to play in promoting and fulfilling the right to education, but “the State is the principal duty-bearer with respect to the human rights of the people living within its jurisdiction”.⁶⁷

The substantive rights of refugees occupy a key position in the 1951 Convention. States parties may not make any reservations to core provisions relating to non-discrimination, religious freedom, access to the courts and *non-refoulement*. Refugees have the same right as nationals to access the

63 Hathaway, *The Rights of Refugees under International Law*, 584.

64 1951 Convention, art. 22(1).

65 1951 Convention, art. 22(2).

66 See ICESCR, art. 13(3); CRC, 29(2).

67 Cornwall, Andrea and Celestine Nyamu-Musembi. “Putting the 'Rights-Based Approach' to Development into Perspective.” *Third World Quarterly* 25.8 (2004): 1415-1437. 1417.

host state's social security system,⁶⁸ along with basic rights to work and property. Similarly to the International Labor Organization (ILO), the 1951 Convention protects refugees against economic vulnerability and exploitation.⁶⁹ Hathaway suggests that at a fundamental level, “a guarantee of non-discrimination might in fact be virtually the only legal guarantee that many refugees require”,⁷⁰ given that this guarantee strongly promotes acceptance into the host state. Similarly, all the substantive rights guaranteed by the South African Constitution might be said to proceed from the right to equality. However, the specific, detailed provisions for a range of rights under the 1951 Convention hold states accountable to a certain standard, and give refugees some leverage when pursuing their rights.

The OAU Convention appears to rely entirely on its non-discrimination clause in this regard. Oloka-Onyango writes that although “discrimination against refugees has been one of the most enduring problems of the African refugee scene”, the 1969 OAU Convention is “equivocal” on human rights. Article IV prohibits discrimination against refugees on the grounds of “race, religion, nationality, membership of a particular social group or political opinions”, but fails to provide a specific section on refugees' rights in the host state. Oloka-Onyango suggests that the OAU Convention be read in conjunction with the 1981 African Charter on Human and People's Rights [Banjul Charter], which contains extensive articles on both civil-political and socio-economic rights. However, despite its noteworthy preamble, which sets up the realisation of socio-economic rights as integral to the full enjoyment of civil-political rights, the Banjul Charter displays some significant gaps, such as the absence of an explicit right to create trade unions within the right to freedom of association. The rights to social security, an adequate standard of living and freedom from hunger – the right to food – are all missing, and some provisions, for example the right to property, fail to take account of the continent's fraught colonial history of exploitation and unequal exchange.⁷¹ In the context of this dissertation, Article 17 of the Banjul Charter guarantees the right to education to “every individual”, a one-line provision that makes no mention of the realisation of free basic education, or the advancement by every available means of secondary, vocational, tertiary or adult education.⁷²

The OAU Convention does not offer remedies to these oversights, whether intentional or

68 1951 Convention, arts. 23 and 24(1)(b).

69 Hathaway, *The Rights of Refugees under International Law*, 95.

70 Hathaway, *The Rights of Refugees under International Law*, 123.

71 Oloka-Onyango, J. “Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa.” *California Western Law Journal* 26.1 (1995): n. pag. University of Minnesota Human Rights Library (www1.umn.edu). Web. Accessed 23 Sep. 2013.

72 Organization of African Unity (OAU). *African Charter on Human and Peoples' Rights ("Banjul Charter")*. 27 June 1981. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at: www.refworld.org/docid/3ae6b3630.html [accessed 23 September 2013]. art. 17(1).

unintentional, except in the context of voluntary repatriation, requiring countries of origin to grant returning refugees the “full rights and privileges of nationals of the country”.⁷³ The most laudable characteristic of the OAU Convention is its expanded definition of a refugee and the concomitant expanded right to *non-refoulement*. However, in its provisions for education and socio-economic rights in general, it is not as valuable or empowering an addendum to the 1951 Convention as could be hoped. Additionally, the enforcement mechanisms to encourage implementation of both documents are weak, limiting their usefulness in advocating for the socio-economic rights of refugees.⁷⁴

In UNHCR's view, the principle of *non-refoulement* has become “a norm of customary international law”.⁷⁵ Article 33(1) of the 1951 Convention states that:

No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Wouters writes that in a strict legal sense, the prohibition on *refoulement* in the 1951 Convention primarily lays negative obligations on the state not to repatriate persons at risk of harm. However, he argues that in a broader sense, the right to *non-refoulement* can entail positive obligations. As a primary example, host states have the positive obligation to admit refugees, save in a very few exceptional circumstances. Wouters argues further that states also have a duty to “provide refugees with protection that is humane”. Refugees have a “need and a right to be safe in the host country”, and thus Wouters recommends a contextual approach to the prohibition on *refoulement*.⁷⁶ Thus states have positive duties towards refugees in their territories, based on the right to *non-refoulement*, and the right to education, as well as the rights to work and self-sustenance, are included in these duties as being necessary to the humane, non-discriminatory treatment of refugees. When refugees are systematically denied documentation, recognition, social security, housing, schooling and other rights, they may well be unable to integrate into the host state. If this forces rightful refugees into returning to their home countries under duress, the right to *non-refoulement* has been violated.

ICESCR's equality clause prohibits discrimination “of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁷⁷

73 OAU Convention, art. 5(3).

74 Oloka-Onyango, “Beyond the Rhetoric”, n. pag.

75 UNHCR. *UNHCR Note on the Principle of Non-Refoulement*. November 1997. Available at: <http://www.refworld.org/docid/438c6d972.html> [accessed 23 September 2013]. B.

76 Wouters, C.W. *International Legal Standards for the Protection from Refoulement*. PhD Thesis. Leiden University, 2009. 160.

77 ICESCR, art. 2(2).

Although not explicitly recognised, refugees and asylum-seekers are covered by this clause.

Article 22 of the CRC goes further, requiring states to take measures to ensure that both refugee and asylum-seeker children “receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention” and in other ratified international human rights instruments. Another such instrument is the African Charter on the Rights and Welfare of the Child [Children's Charter], which requires state parties to “provide free and compulsory basic education”,⁷⁸ to encourage and make accessible secondary and higher education,⁷⁹ and to protect and assist refugee and asylum-seeker children in accessing their human rights.⁸⁰ These are child-specific treaties that prioritise basic education, but access to education at all levels is recognised as being in the best interests of the child.

Internationally, South Africa and the United States are amongst the handful of countries that have signed but not ratified ICESCR. South Africa has, however, ratified the CRC and the Children's Charter. Crucially, our ratification of the 1951 Convention binds the state to the above standards of education for refugees at all levels. As with all human rights legislation above the national level, however, it is vital that member states adopt the agreed-upon provisions into domestic law. In Canada, domestication of the 1951 Convention takes the form of the Immigration and Refugee Protection Act of 2001. In South Africa, the Refugees Act (No. 130 of 1998) regulates the treatment of refugees and asylum-seekers, incorporating aspects of both regional and international treaties. The Act clearly indicates, however, that it must be “interpreted and applied with due regard to” the 1951 Convention and its 1967 Protocol, the OAU Convention and other relevant conventions ratified by the Republic.⁸¹ S. 27 of the Refugees Act provides that a refugee “enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution”,⁸² and “is entitled to the same... basic primary education which the inhabitants of the Republic receive”.⁸³ Added to South Africa's international obligations via the 1951 Convention, the Refugees Act places the responsibility for providing refugee children with basic education with government. However, s. 27(b) of the Refugees Act also indicates that a refugee “enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution”. Thus refugees must be afforded access to education at all levels on a basis of equality with citizens. The *Watchenuka* case, addressed in Chapter 4, further established the right to work and to post-basic education for asylum-seekers in

78 Organization of African Unity. *African Charter on the Rights and Welfare of the Child [Children's Charter]*. 11 July 1990. CAB/LEG/24.9/49 (1990). 11(3)(a).

79 Children's Charter, art. 11(3)(b-c).

80 Children's Charter, art. 23(1).

81 South African Refugees Act No. 130 of 1998. s.6(1).

82 SA Refugees Act, s. 27(b).

83 SA Refugees Act, s. 27(g).

this country. Another case, this time dealing with refugees' right to work in South Africa, *Ndikundavyi v Valkenberg Hospital and Others*, helps illustrate how South African courts have dealt with litigation relating to the socio-economic rights of refugees. The *Ndikundavyi* case also bridges the gap between education and the working world, showing how even qualified professionals educated in South Africa can be denied the right to work based on their refugee status.

Case study: Ndikundavyi

Alain Godefroid Ndikundavyi is a certified Burundian refugee who studied in South Africa and successfully obtained a nursing degree from the University of the Western Cape. His past qualifications were also recognised, and he qualified as a Foreign Health Professional in terms of National Department of Health policy. In August 2009, the Department assured him in writing of the right to work in South Africa, provided he maintained a valid refugee permit, sought employment in the South African Health Sector and submitted any job offers to the Department's Foreign Workforce Management Program (FWMP) for further endorsement. In February 2010, he was granted an annual practising certificate valid until 31 December 2010 from the South African Nursing Council (SANC), a registered Education and Training Quality Assurance (ETQA) body as laid out in Chapter 3 under "Further education and training (FET) and higher education". He was offered and accepted a job at Valkenberg Hospital, beginning 1 July 2010. However, on 20 July 2010, a policy circulated in February 2010 by the Department of Health, in conjunction with s. 10 of the Public Service Act, led to Ndikundavyi's immediate dismissal on the grounds of his refugee status.⁸⁴

The case came to the Labour Court on 2 February 2012, with Valkenberg Hospital, the Minister of Health and the MEC responsible for the Department of Health for the Province of the Western Cape as the first, second and third respondents respectively. On behalf of Ndikundavyi, the UCT Refugee Rights Clinic argued that Ndikundavyi was a recognised refugee, whose permit would be renewed in December 2010 in line with the usual procedure. As a refugee, he has the right to seek employment under s. 27(f) of the Refugees Act. Additionally, s. 27(b) of the Act affords refugees full legal protection, including the right to fair labour practices and the right not to be discriminated against on the grounds of nationality. The Refugee Rights Clinic contended that "[t]here existed a valid contract of permanent employment between the Applicant and the First Respondent which could not be lawfully withdrawn", and that the 21 July 2010 letter instructing the Applicant not to come back to work pending further notice constituted a breach of his contract and a "procedurally

⁸⁴ *Ndikundavyi v Valkenberg Hospital and Others* (C970/2010) [2012] ZALCCT 15. par. 1-6.

and substantively unfair dismissal” in terms of the Labour Relations Act (LRA) 66 of 1995.⁸⁵ The Refugee Rights Clinic argued that the dismissal constituted unfair discrimination on the grounds of nationality and refugee status in terms of s. 187(f) of the LRA, and that said discrimination stemmed from the Department of Health's policy on the recruitment and employment of foreign health professionals in the South African Health Sector, which therefore also contravened s. 187(f) of the LRA.⁸⁶ In clause 15, the Department of Health Policy in question states that

the employment of foreign health professionals recruited by the public health sector shall be limited to health facilities in designated underserved rural areas in South Africa, unless otherwise approved by the head of the provincial Department of Health and subject to endorsement by the National Department of Health. A head of a Provincial Department of Health may not delegate the responsibilities in this regard.⁸⁷

In its evaluation, the Court found that s. 187(f) of the LRA was not a prohibitory provision, and did not create positive rights. Therefore, the applicant's request for a declarator – the judicial declaration of some right or status – that the above policy constitutes unfair discrimination against refugees was found by the Court to be inapposite. By this reasoning, the Court circumvented the need to address the constitutionality of the policy altogether, and focused on the question of whether there had been a dismissal (i.e. did a valid contract exist), and if so, whether it was automatically unfair.⁸⁸ A factor weighing heavily in the favour of the Respondents was s. 10 of the Public Service Act, which states that “[n]o person shall be appointed permanently... to any post on the establishment in a department unless he or she-

(a) is a South African citizen or permanent resident; and

(b) is a fit and proper person.

The Court found that an employment contract did exist between the Applicant and the First Respondent, reaching this conclusion through a valuable and creative process of argument that made reference to “*Kylie*” v *CCMA and Others*,⁸⁹ a startling example of substantive equality in action, wherein it was ruled that “an employment relationship existed between a sex worker and her

⁸⁵ *Ndikundavyi v Valkenberg Hospital and Others*. Statement of Claim. par. 17.1-17.5.

⁸⁶ Labour Relations Act No. 66 of 1995. s. 187(f): “A dismissal is automatically unfair if... the reason for the dismissal is... (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility”.

⁸⁷ *Ndikundavyi v Valkenberg Hospital and Others*, par. 8.

⁸⁸ *Ndikundavyi v Valkenberg Hospital and Others*, par. 14.

⁸⁹ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8.

employer, even if the contract of employment was void for illegality”.⁹⁰ “Kylie” seems the natural extension of *S v Jordan*, extending the protection of the law to those most marginalised and most in need of protection.

In the final analysis, however, the First Respondent was obliged to pay the Applicant twelve months of back-pay largely because Ndikundavyi had not been given a chance to speak or to be heard regarding his dismissal. The Applicant was not reinstated, and s. 10 of the PSA and the discriminatory policy of the Department still stand. Refugees employed after the introduction of this policy may still be in danger of losing their jobs. While *Ndikundavyi* did “confirm that formal refugees must be the recipients of the rights afforded by the LRA”,⁹¹ it also confirmed that discrimination against refugees with respect to their constitutional right to work still exists at the level of national policy. When considering how to break down barriers to education for refugees, the state must also evaluate its work-related policies to ensure that any skills refugees gain through schooling can actually be put to use in the job market.

Chapter 3: Education in South Africa

As a result of Apartheid, South Africa's thoroughgoing policy of racial segregation in force from 1948 to 1994, a huge amount of funding and capacity-building is required to correct the imbalance left by years of neglect. Black schools in the townships and rural areas suffered from deliberately substandard education and lack of resources, whereas white schools received the bulk of state support and funding.⁹² Spending on education is high, accounting for 20.7% of the national budget, but Louise van Rhyn writes that in 2012, between 19 000 and 25 000 public schools were failing, undermined by a broken education system. Of the 14 million children in the system, less than 20% are getting the education they need.⁹³

According to the School Realities report published by the Department of Basic Education in 2011, in 2011 there were 25 852 schools serving 12 283 875 learners across South Africa, of which 24 365 were ordinary public schools and 1486 private or independent schools.⁹⁴ The Independent Schools Association of Southern Africa (ISASA) places the number of independent schools at more than 2500.⁹⁵ In South Africa, private schools are not entitled to state subsidies, but the state may

90 *Ndikundavyi v Valkenberg Hospital and Others*, par. 21.

91 *Ndikundavyi v Valkenberg Hospital and Others*, par. 27.

92 Stone, Lee and Winterstein, Shani. *A Right or A Privilege? Access to Basic Education for Refugee and Asylum-seeker Children in South Africa*. Lawyers for Human Rights, 2003. 25.

93 Van Rhyn, Louise. “The business of education.” *Mail & Guardian*. *Mail & Guardian*, 03 May 2012. Web. 18 Sep. 2013.

94 Department of Basic Education. “School Realities 2011.” www.education.gov.za. 1. Sep. 2011. Web. 20 Sep. 2013.

95 Bernstein, Ann. “The rise of low-fee private schools can only benefit South Africa.” *Business Day Live*. *Business Day Live*, 01 Aug. 2013. Web. 23 Sep. 2013.

choose to support them financially, provided said support does not constitute unfair discrimination.⁹⁶ Registered independent schools possess a degree of autonomy. However, the Constitution permits only independent institutions that

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.⁹⁷

The rise of low-fee private schooling and the possibilities of this form of schooling for refugees is discussed in Chapter 5 under school fees.

Many of the problems that refugees face in accessing public education in this country are also faced by nationals. With eleven official languages, the constitutional policy that “[e]veryone has the right to receive education in the official language or languages of their choice in public educational institutions”⁹⁸ can lead to problems, as in the recent *Hoërskool Fochville* case in which the Department of Basic Education ordered an Afrikaans-medium school to accept thirty-seven black, English-speaking students.⁹⁹ Mismanagement of funds, poor or non-existent infrastructure and ineffective or intermittent teaching are all problems endemic to education in South Africa. However, a strong legal system exists to promote the right to education at all levels, and NGOs, communities and individuals are able to use these provisions to pursue the right to non-discriminatory, effective education.

In the South African Constitution, *everyone* has the right to education, nationals and non-nationals alike. Basic education is an immediately realisable right, while further education is progressively realisable.¹⁰⁰ Unlike the rights to vote (s.19) or the right to freedom of trade, occupation and profession (s.22), the right to education is not limited to South African citizens alone. In the refugee context, the right to education may be interpreted similarly to the right to freedom of movement (s.21(1)), which, in conjunction with the South African Refugees Act, grants refugees and citizens alike the right to move freely through the Republic. This inclusiveness is consistent with the Constitution and a state founded on “human dignity, the achievement of equality and the advancement of human rights and freedoms”.¹⁰¹ Under s. 39(2), courts developing common or customary law also have a responsibility to “promote the spirit, purport and objects of the Bill of

⁹⁶ Liebenberg, *Socio-economic Rights*, 255.

⁹⁷ SA Constitution, s. 29(3).

⁹⁸ SA Constitution, s. 29(2).

⁹⁹ John, Victoria. “Another school in court over admissions.” *Mail & Guardian*. *Mail & Guardian*, 01 Feb. 2013. Web. 18 Sep. 2013.

¹⁰⁰SA Constitution, s. 29.

¹⁰¹SA Constitution, s. 1(a).

Rights”, which requires courts to make judgments reflecting tolerance and an understanding of substantive equality.

Under the National Qualifications Framework (NQF), education is divided into three levels or “bands”: General Education and Training (basic and secondary education, grades 0-9), which includes Adult Basic Education and Training (ABET), Further Education and Training or FET (grades 10-12 and beyond, resulting in certificates or diplomas) and Higher Education (tertiary education up to doctorate level). All levels of education excluding basic, secondary and early childhood development are overseen by the Department of Higher Education and Training, which split from the Department of Basic Education in 2009.¹⁰²

General Education and Training

In this phase, students take at least seven subjects, including two official languages, mathematics or mathematical literacy, life orientation and three electives. The passing grade is either 30% or 40% depending on subject. School attendance is compulsory from the age of six¹⁰³ to fifteen or grade nine, whichever happens first, after which students may continue into secondary education or move into further education and training. Students who successfully complete secondary education receive their National Senior Certificate, which, with a Matriculation Endorsement, constitutes the minimum academic requirement for admission into any South African higher education bachelor's degree programme.

The South African Schools Act (1996), updated by various Education Laws Amendment Acts over the years, is a primary legal resource for ensuring access to basic education for all learners without discrimination. The Schools Act sets out the governing systems of public and independent schools, as well as admission, language and fees policies of public schools. The Act also requires the Minister of Basic Education to formulate minimum norms and standards for school infrastructure and funding, paving the way for documents such as the National Norms and Standards for School Funding (1998), discussed below with relation to school fees.

Other core legislative Acts at the state level include the National Education Policy Act (1996), which gave the Minister of Education the responsibility of formulating policy throughout the schooling system, for example with relation to funding, planning and monitoring and evaluating.¹⁰⁴

The Department of Education's 2003 Plan of Action and its recent successor, the Action Plan to 2014, both address the question of how to make schooling accessible to all South African learners.

¹⁰²South Africa.info. “Education in South Africa.” <http://www.southafrica.info>. 28 Feb 2013. n. pag. Web. 19 Sep. 2013.

¹⁰³South African Schools Act No. 84 of 1996. s. 4(a)(ii). Grade 1 admission age was recently amended from seven to six.

¹⁰⁴National Education Policy Act No. 27 of 1996. 4.

The 2003 Plan of Action takes a remedial view post-Apartheid, and deals closely with resource allocation, aiming to improve the quality of schooling available to the poorest 40% of learners. The Action Plan to 2014 lists twenty-seven goals, amongst which are the improvement of teaching skills, increased access of learners to computers and textbooks, better management and monitoring, and a more effective inclusive education policy. This document describes the most recent developmental challenges facing basic education in South Africa.

The Education White Paper No. 6 on Inclusive Education (2001) provides the groundwork on the above policy. Inclusive education is aimed at supporting and enabling all learners, recognising and respecting difference without discrimination, and “acknowledg[ing] that learning also occurs in the home and community, and within formal and informal modes and structures”. This educational policy also aims to maximise learner participation, with an emphasis on “uncovering and minimising barriers to learning”.¹⁰⁵ The scope of this White Paper is favourable to refugees and asylum-seekers, who often have special learning needs related to language, integration and other factors. A creative, flexible education system that incorporates the family and the community is likely to benefit refugees in the classroom.

Further education and training (FET) and higher education

In South Africa, socio-economic policy is grounded in the Reconstruction and Development Programme (RDP) instituted by government shortly after the 1994 elections. The RDP was designed to combat the effects of forty years of segregation, and addresses health care, social security, housing, water and sanitation, energy, transport, education and a range of other needs.¹⁰⁶ In this context, the White Paper on Education and Training (No 196 of 1995) was introduced to fulfil the state's constitutional responsibility “to make adequate provision to satisfy the fundamental right of all persons to basic education and to equal access to educational institutions”.¹⁰⁷ This White Paper proposes an integrated approach to education and training that does not privilege the academic over the technical or vocational.¹⁰⁸ The policy development of this document is foundational to the two “bands” of education above primary and secondary education.

The Education White Paper 4 on the transformation of Further Education and Training (1998) gives FET a broad definition, containing a wide range of learning options for students of all ages from grade 10 up.¹⁰⁹ FET is described as “an important allocator of life chances” that “provides both

¹⁰⁵Education White Paper No. 6 on Inclusive Education (2001). 16.

¹⁰⁶Polity.org.za. *The Reconstruction and Development Programme: A Policy Framework*. 1994. 2.1.2. n. pag. Web. www.polity.org.za. Accessed 19 Sept. 2013.

¹⁰⁷White Paper on Education and Training No. 196 of 1995. 11. 7.

¹⁰⁸White Paper on Education and Training (1995), 2. 4.

¹⁰⁹Education White Paper 4: Programme for the Transformation of Further Education and Training No. 2188 of 1998.

initial and second-chance opportunities to young people and adults”.¹¹⁰ Public FET colleges are established and managed under the Further Education and Training Colleges Act 16 of 2006. According to FET Colleges, the official website for Department of Higher Education and Training FET colleges, “[t]here are fifty registered and accredited public FET Colleges in South Africa which operate close on 300 campuses spread across the rural and urban areas of the country”, servicing more than 300 000 learners. The public FET colleges are supported by an office offering specialised support in each province.¹¹¹ There are also nearly five hundred registered private FET colleges.¹¹²

In terms of adult education, the Policy Document on Adult Basic Education and Training (2003) “progressively initiates adult learners onto a path of lifelong learning and development”, moving from the basic literacy and numeracy of primary education towards FET skills or higher education.¹¹³

The Education White Paper on the transformation of Higher Education (1997) describes higher education as a tool for societal reconstruction and development, important to the distribution of opportunity and economic growth.¹¹⁴ The problems it addresses include a legacy of unequal access and opportunity for both staff and students, along lines of class, gender and race; a “shortage of highly trained graduates in fields such as science, engineering, technology and commerce”, required to meet the needs of South Africa's modern economy; “closed-system” academic practice that is not in touch with the needs and realities of civil society; and fragmented, inefficient management of higher education institutions.¹¹⁵

Providing quality control and oversight, the National Qualifications Framework (NQF) of 2008 is “a comprehensive system approved by the Minister for the classification, registration, publication and articulation of quality-assured national qualifications”.¹¹⁶ The South African Qualifications Authority (SAQA) advances the objectives of the NQF, oversees its development and coordinates the sub-frameworks, which include the Higher Education Act (101 of 1997) and the General and Further Education and Training Quality Assurance Amendment Act (No 50 of 2008).¹¹⁷ Under the South African Qualifications Authority (SAQA) Act No 58 of 1995, SAQA is obliged to formulate and publish guidelines for the registration of Education Training and Quality Assurance (ETQA) bodies. These bodies include the Council on Higher Education (CHE), established in terms of the

2.1-2.3.

110Education White Paper 4, 2.5.

111FET Colleges South Africa. “Public FET Colleges.” www.fetcolleges.co.za. n. pag. Web. Accessed 19 Sep. 2013.

112Department of Higher Education and Training. “The list of registered private FET colleges.” 09 Jan 2012.

<http://www.dhet.gov.za>. n. pag. Web. Accessed 19 Sep. 2013.

113Policy Document on Adult Basic Education and Training (2003). Chapter 1. n. pag.

114Education White Paper 3: Programme for the transformation of Higher Education No. 18207 of 1997. 1.3.

115Education White Paper 3, 1.4.

116National Qualifications Framework Act 67 of 2008. s. 4.

117National Qualifications Framework, s. 7.

Higher Education Act, which promotes and oversees quality assurance in public and private higher education. Within the mandate of the CHE, the Higher Education Quality Committee (HEQC) undertakes accreditation evaluations to monitor the status of higher education in South Africa and to verify institutions' capacity to offer higher education of a standard consistent with the Act.¹¹⁸

UMALUSI oversees quality assurance for FET. SAQA also registers Sector Education and Training Authorities (SETAs), formerly under the Department of Labour, which offer skills development in areas such as banking, agriculture and construction. One of SAQA's most important functions in the context of refugee rights is the evaluation of foreign qualifications that refugees regularly bring into the country. SAQA advises potential employers or institutions about “the most appropriate levels of recognition of the foreign qualifications”, and “provide[s] guidelines for placement for a range of purposes”.¹¹⁹

Chapter 4: Beneficiaries

S. 29(1) of the Constitution states that:

Everyone has the right—

(a) to a basic education, including adult basic education; and

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

Basic education occupies a privileged position in most international conventions and in the Constitution, but the requirement that further education be made progressively available and accessible places it on a level with other socio-economic rights such as access to water and housing, which precedent has shown to be real, justiciable rights. Furthermore, the Policy Document on Adult Basic Education and Training (2003) views further education as “a functional economic necessity in a changing society which requires a citizenry engaged in a lifelong process of learning”.¹²⁰ The beneficiaries of the right to education are of all ages, genders and backgrounds, but in the context of this paper, the main beneficiaries are refugees and asylum-seekers. Given the emphasis on the right to basic education, I will also examine the specific rights which accrue to refugee children, who are an especially vulnerable group.

¹¹⁸Council on Higher Education South Africa. “Mandate.” <http://www.che.ac.za>. n. pag. Web. Accessed 19 Sep. 2013.

¹¹⁹South African Qualifications Authority. Evaluation of Foreign Qualifications: Your Application.

<http://www.sqa.org.za>. n. pag. Web. Accessed 25 Sep. 2013. n. pag.

¹²⁰Policy Document on Adult Basic Education and Training, n. pag.

Refugees and asylum-seekers

In most host states, recognised refugees are likely to have more ready access to basic education than other classes of non-nationals, including asylum-seekers, migrants and illegal aliens. As Hathaway indicates, state parties do not extend all rights equally to all categories of refugees. Rather, states aim to “grant enhanced rights as the bond strengthens between a particular refugee and the state party in which he or she is present”.¹²¹ Therefore while states have a “general duty of non-discrimination”,¹²² rights beyond the core provisions such as the right to life or to non-refoulement are granted “as a function of the nature and duration of the attachment to the asylum state”.¹²³ The right to basic education of migrants and illegal aliens will be covered briefly in this paper, but the primary focus is on refugees and asylum-seekers.

Hathaway interprets Article 22 of the 1951 Convention as being very inclusive. It confers the right to basic education on “refugees”, without limiting the beneficiary class to refugees “lawfully [staying] in” the host state.¹²⁴ Drawing on the UDHR's guarantee of elementary education to “everyone” and ICESCR's article 13,¹²⁵ Hathaway finds it logically inevitable that states must provide basic education both to recognised refugees and to those “waiting for formal status determination procedures to be commenced or concluded”.¹²⁶ Anthony Sterne supports this conclusion in the context of health care rights for refugees and asylum-seekers, arguing that “by allowing a person into the country, the government accepts the obligation to extend the rights in the Bill of Rights to such a person”. Other non-permanent residents have the option to return to their countries of origin, but refugees do not, and any blanket policy based on residency is therefore unfair discrimination.¹²⁷ According to the UNHCR Handbook,

[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.¹²⁸

Using this reasoning, the meaning of “refugee” under Article 22 of the 1951 Convention clearly

¹²¹Hathaway, *The Rights of Refugees under International Law*, 154.

¹²²Hathaway, *The Rights of Refugees under International Law*, 155.

¹²³Hathaway, *The Rights of Refugees under International Law*, 154.

¹²⁴Hathaway, *The Rights of Refugees under International Law*, 597.

¹²⁵ICESCR, art. 13(1)(a): “Primary education shall be compulsory and available free to all.”

¹²⁶Hathaway, *The Rights of Refugees under International Law*, 599.

¹²⁷Sterne, Anthony. “Health care for all? Asylum seekers, refugees and health care.” *De Rebus* 42 (2013): 30-32.

¹²⁸UNHCR. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 196 Protocol relating to the Status of Refugees. HCR/IP/4/Eng/REV.1. Reedited Geneva, January 1992. <http://www.unhcr.org> [accessed 02 September 2013]. art. 28.

encompasses those individuals who fall under the definition provided in Article 1, but who have not yet been officially recognised by the host state. Asylum-seekers must therefore be entitled to the same rights and privileges as recognised refugees until such a time as their applications are proven to be unfounded or fraudulent. If their application are found to be valid, the transition to official refugee status should be seamless. Thus asylum-seekers should not face any additional barriers to education as a result of their unofficial status.

Expanding on article 22 as above, the CRC and the Children's Charter both explicitly require states to protect the convention rights of children who are either recognised refugees or who are "seeking refugee status".¹²⁹ These rights include the right to basic education.

S. 27 of the South African Refugees Act is significantly more restrictive. Under the Act definitions, "refugee" means "any person who has been granted asylum in terms of this Act".¹³⁰ According to s. 27(a), a refugee is someone who is "entitled to a formal written recognition of refugee status". In the Refugees Act, the right to basic education is only explicitly extended to formally recognised refugees. Certain protections for asylum-seekers exist in the Act, such as the extensive right of non-refoulement in s. 2 that draws on the OAU Convention. Asylum-seekers who have applied for refugee status in terms of s. 21(1) also have the right not to have proceedings brought against them as a result of illegal entry or presence in the Republic.¹³¹ In addition, registered asylum-seekers have the right to a temporary permit "subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law".¹³² Prior to the 2003 Supreme Court judgment in *Watchenuka v Minister of Home Affairs*,¹³³ this asylum-seeker or "Section 22" permit prohibited asylum-seekers from studying or working in South Africa.

Case study: Watchenuka

Mrs Watchenuka and her disabled twenty year old son applied for asylum in South Africa after entering the country from Zimbabwe in February 2002. Mrs Watchenuka claimed to have a well-founded fear that her son would be forcibly recruited by "militant supporters of the ruling political party in Zimbabwe".¹³⁴ She enrolled her son at a college in Cape Town and aimed to find employment to support herself and her son. When she discovered that her asylum-seeker permit did

¹²⁹CRC, art. 22(1) and Children's Charter, art. 23(1).

¹³⁰SA Refugees Act, s. 1(xv).

¹³¹SA Refugees Act, s. 21(4).

¹³²SA Refugees Act, s. 22(1).

¹³³*Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142 (28 November 2003).

¹³⁴*Minister of Home Affairs v Watchenuka* (2003), par. 11.

not permit work or study, she took her case to court to have the prohibition in Annexure 3 to the Minister's regulations declared unconstitutional. A 2002 High Court judgment found in favour of Mrs Watchenuka on a technicality concerning the respective powers of the Minister and the Standing Committee, finding that the Minister had acted outside of his authority in promulgating regulations beyond any determination of the Committee.¹³⁵

In the Supreme Court of Appeal, however, Nugent JA agreed that the Minister lacked the authority to make the prohibition, but explained his reasoning differently. He analysed sections 11(h)¹³⁶ and 38(e)¹³⁷ of the Refugees Act and found that the Minister was not empowered by the Act to make regulations relating to the conditions of work and study.¹³⁸ However, the Court pointed out that the Standing Committee *was* empowered to set such conditions, and had in fact done so on 18 September 2000, resolving to include a prohibition on work and study in all Section 22 permits. The restriction could be lifted on appeal if the application had not been finalised after 180 days. Thus the Court recognised that Annexure 3 to the Minister's regulations was made *ultra vires*, but that the Standing Committee's decision would have to be proved unconstitutional for the prohibition to be lifted.¹³⁹

The Court held that the Standing Committee's prohibition of work and study for the first 180 days after the issuing of an asylum-seeker permit was “in conflict with the Bill of Rights”, and founded that assertion on the constitutional right to dignity.¹⁴⁰ S. 10 of the Bill of Rights states that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”. In *S v Makwanyane*, the Constitutional Court held that the “twin rights” to life and to dignity were “the essential content of all rights under the Constitution”. The Court went so far as to suggest that these rights taken together are not subject to limitation under s. 36.¹⁴¹ The *Makwanyane* judgment found that the death penalty “annihilates human dignity” to an unjustifiable extent.¹⁴²

The right to dignity also exerts considerable power as a stand-alone right in our Constitution. “Human dignity, [the achievement of] equality and freedom” are core values underlying the Bill of Rights, and appear repeatedly.¹⁴³ In *Dawood v Home Affairs*, the Court indicated that dignity is thus asserted “to contradict our past in which human dignity for black South Africans was routinely and

¹³⁵*Watchenuka and Another v Minister of Home Affairs and Others* (1486/02) [2002] ZAWCHC 64 (15 November 2002).

¹³⁶SA Refugees Act, s. 11: “The Standing Committee... must determine the conditions relating to study or work in the Republic under which an asylum seeker permit may be issued”.

¹³⁷SA Refugees Act, s. 38: “The Minister may make regulations relating to... (e) the conditions of sojourn in the Republic of an asylum seeker”.

¹³⁸*Minister of Home Affairs v Watchenuka*, 2003, par. 20.

¹³⁹*Minister of Home Affairs v Watchenuka*, 2003, par. 22.

¹⁴⁰*Minister of Home Affairs v Watchenuka*, 2003, par. 24-25.

¹⁴¹*S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3. Par. 84.

¹⁴²*S v Makwanyane*, par. 95.

¹⁴³SA Constitution, ss. 1(a), 7(1), 36(1) and 39(1)(a).

cruelly denied”, and that the right to dignity informs and grounds many other rights. The Court also recognised dignity as “a justiciable and enforceable right that must be respected and protected” in and of itself.¹⁴⁴ In this case the right to dignity encompassed the right to family life, which is not provided for in our Constitution.¹⁴⁵ Specifically, foreign spouses of South African nationals had been barred from cohabitation in South Africa as a result of exorbitant fees and difficulties with obtaining temporary residence permits. The Court recognised this as too severe a limitation on the right to dignity. Other cases such as *Grootboom* and *Treatment Action Campaign No 2* also confirm the right to dignity in the context of the rights of access to housing and to health care.

In *Minister of Home Affairs v Watchenuka*, the Court held that while limitations on the right to employment exist in the Constitution¹⁴⁶ and are implied by s. 27 of the Refugees Act, no person should be actively denied the right to support themselves when employment is the only means of achieving that end. This constitutes positive degradation on the part of the state, which does not offer support to asylum-seekers.¹⁴⁷ Similarly, the appellants did not present any justification for limiting Mrs Watchenuka's son's right to education, and the Court therefore found no grounds for a general prohibition.¹⁴⁸

In terms of reasoning if not outcome, *Minister of Home Affairs v Watchenuka* established the right to education for asylum-seekers in South Africa. In practice, the Court recognised that the Standing Committee did have the authority to withhold the rights to work and study, and that it is still empowered by the Refugees Act to make the critical decisions listed under s. 11. The prohibition was contested on the grounds that it unjustly limited the constitutional right to dignity, but the Court found that the right to education for asylum-seekers “cannot be absolute”, and essentially ruled that Mrs Watchenuka and her son be reevaluated by the Standing Committee on an individual basis. In line with precedent set in the Constitutional Court, the Supreme Court of Appeal recognised the limits of its judicial authority and left the final decision to the Standing Committee, noting that Mrs Watchenuka's application for asylum had been refused and subsequently appealed.¹⁴⁹

The thrust of the Court's ruling was that the Standing Committee “must take account of the circumstances of the applicant, whether on a case by case basis or by formulating guidelines to be applied by Refuge Reception Officers when issuing permits in particular cases”.¹⁵⁰ Although the

144 *Dawood and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8. Par. 35.

145 Multiple international conventions ratified in SA do provide for family life, however, and make a strong argument for the protection of the right in this country.

146 The right to choose one's occupation is restricted to citizens (SA Constitution, s. 22).

147 *Minister of Home Affairs v Watchenuka*, par. 32.

148 *Minister of Home Affairs v Watchenuka*, par. 33-36.

149 *Minister of Home Affairs v Watchenuka*, par. 37.

150 *Minister of Home Affairs v Watchenuka*, par. 34.

Court found that a prohibition against employment that affects asylum-seekers whose only means of support is employment “is a material invasion of human dignity that is not justifiable in terms of s.36”,¹⁵¹ the latter half of the judgment displays a significant retreat from this strong rights-based position to the point that justice is only contemplated for “those asylum-seekers in the most desperate of situations and for those who have been able to persevere and obtain a decision in their favour from the Department”.¹⁵² The dignity-based argument for education resembles the argument of the Indian Supreme Court in *Miss Mohini Jain*, but in the final analysis, *Watchenuka* fails to carry through to the same extent.

Currently, the Standing Committee has granted a blanket permission to work and study to all asylum-seekers, given that there is no capacity to evaluate and identify the “most desperate” cases on a one-on-one basis. However, the Committee has not drawn up guidelines in line with the Court's ruling, and thus this blanket permission could be withdrawn at any time. Even if such a reversal of policy were appealed again on the grounds of dignity, the court case could linger for months or years while asylum-seekers were deprived of their rights.

Although the Standing Committee is independent of the Department of Home Affairs [DHA], it is evident from recent events that the DHA is not afraid to act on its own authority, at times in direct contravention of court orders. The recent closing of Refugee Reception Offices [RROs] in Johannesburg, Port Elizabeth and Cape Town, though successfully contested in the High Court as “irrational and materially affected by irrelevant considerations”, demonstrates this kind of unilateral decision-making. The move has been very damaging to thousands of asylum-seekers, who now cannot access the asylum system in these places, and who face real dangers of exploitation and unlawful deportation or *refoulement*.¹⁵³ These are the realities of the current system of government. In this light, the precedent set in *Watchenuka* may not prove consistently reliable into the future.

Mrs Watchenuka's son was engaged in further education and training, but the argument based on dignity for access to any level of schooling applies equally to primary education. In the *Teddy Bear Clinic* case on the criminalisation of consensual sexual activity between children or adolescents, it was argued by the applicants that under s. 10 of the Constitution, “(e)veryone has inherent dignity and the right to have their dignity respected and protected”.¹⁵⁴ Children are protected under s. 28 of the Constitution, which promotes their best interests as being of “paramount importance”.¹⁵⁵ Thus

¹⁵¹*Minister of Home Affairs v Watchenuka*, par. 33.

¹⁵²Klaaren, Jonathan and Jeff Handmaker. “Conclusion.” *Advancing Refugee Protection in South Africa*. Eds.

Handmaker, Jeff, Lee Anne de la Hunt and Jonathan Klaaren. United States, Berghahn Books: 2008. 278-290. 286.

¹⁵³Scalabrini Centre of Cape Town. “Press Release: Judgment Reserved in Cape Town Refugee Office Closure.” 4 September 2013. www.scalabrini.org.za. n. pag. Web. Accessed 18 September 2013.

¹⁵⁴*Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (HC Case No 73300/10) [2013]. par. 75.

¹⁵⁵SA Constitution, s. 28(2).

the Court's argument in *Minister of Home Affairs v Watchenuka*, founded on the right to dignity, applies equally to children, for whom the denial of education certainly constitutes positive degradation by the state. In fact, given the strong provisions in international and national law, the state's responsibility only intensifies with regards to basic education.

Refugee children

Although fundamental adult education is promoted as a form of basic education in many international conventions and national policies, the primary beneficiaries of basic education are children. The CRC defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.¹⁵⁶ Of all UN member states, only Somalia and the United States have failed to ratify this convention.¹⁵⁷ The CRC is not a refugee convention, but its provisions apply to all children “without discrimination of any kind”,¹⁵⁸ including discrimination on the basis of refugee status.

With this in mind, the beneficiaries discussed in this paper must also fall into the category of refugee as defined by the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. According to this convention, as above, a refugee is someone who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.”¹⁵⁹ While not as widely accepted, the OAU Convention expands significantly on this definition, adding that “[t]he term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”¹⁶⁰

The broader context of the OAU definition favours unaccompanied minors, and the African Charter on the Rights of the Child goes so far as to extend its coverage even to “*internally displaced* children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused” [emphasis added].¹⁶¹ Refugee children are human beings under the age of eighteen who subscribe to the above definitions. Signatories to the

¹⁵⁶CRC, art. 1.

¹⁵⁷United Nations Treaty Collection. Chapter IV, no. 11. Convention on the Rights of the Child. www.treaties.un.org [accessed 2 September 2013].

¹⁵⁸CRC, art. 2(1).

¹⁵⁹1951 Refugees Convention, art. 1(A)(2).

¹⁶⁰OAU Convention, art. 1(2).

¹⁶¹Children's Charter, art. 23(4).

conventions have generally greater responsibilities to refugee children than to adults, which makes the CRC's clear distinction crucial.

The 1994 UNHCR Guidelines on the protection of and care for refugee children (reprinted 2001) emphasise that refugee children “face far greater dangers to their safety and well being than the average child”, and that there is a need to focus on “the children's developmental needs, their gender and cultural framework, the special requirements of unaccompanied minors, and the particular problems which arise in the context of repatriation and reintegration”. These guidelines outline “the goals and objectives, the principles and practical measures for the protection and assistance of refugee children”. They are not intended to function as a practice manual, but rather to help UNHCR staff, volunteer organisations and governments identify and engage with challenges related to refugee children, in order to attain policy objectives.¹⁶² In this way the guidelines resemble the UNHCR Handbook, which also has strong persuasive value without being legally binding.

The guidelines also point to the CRC as “a powerful tool for advocacy”, given the universality of its widely-ratified standards.¹⁶³ One of the primary requirements of the CRC is that parties to the convention must always make “the best interests of the child... a primary consideration”.¹⁶⁴ The guidelines recognise that the needs of children and of adults are not always the same, and require states to consider carefully how best to promote the best interests of children, whether in terms of budget allocation, legislation or administration.¹⁶⁵ The guidelines also emphasise non-discrimination, as above, and participation as core rights crucial to the “survival and development”¹⁶⁶ of children. In the section on age and grade placing below, the importance of including children and their personal accounts will be discussed as part of an effective strategy for breaking down this barrier to education. Centrally, the guidelines emphasise the participation of family and community for the realisation of children's rights. Refugee children's needs are often best met through support for their families and communities.¹⁶⁷

In the 2007 case of *S v M*, it was the Constitutional Court's responsibility to decide whether the best interests of the child had been fully and properly considered, in the course of previous courts' decisions to imprison the primary caregiver of young children. Calling both on Constitutional Court precedent and international conventions such as the CRC, Sachs J argued for the special care of children, as stipulated by s. 28 of the Constitution. This section lists parental care, nutrition, shelter,

162UNHCR. *Refugee Children: Guidelines on Protection and Care*. 1994. Available at:

<http://www.refworld.org/docid/3ae6b3470.html> [accessed 28 August 2013]. Preface and Chapter 1. n. pag.

163UNHCR, *Refugee Children: Guidelines*, Chapter 2(I). n. pag.

164CRC, art. 3(1).

165UNHCR, *Refugee Children: Guidelines*, Chapter 2(II). n. pag.

166CRC, art. 6(2).

167UNHCR, *Refugee Children: Guidelines*, Chapter 2(II). n. pag.

health care, social services and protection from exploitation as rights belonging to the child. Furthermore, s. 28 shares one of the CRC's guiding principles, namely that “[a] child’s best interests are of paramount importance in every matter concerning the child”.¹⁶⁸ Sachs' vision for the constitutional treatment of children rings true for nationals and non-nationals alike:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.¹⁶⁹

The UNHCR Policy on Refugee Children was developed from five years' experience of using the guidelines, and states that the term “refugee child” references “any child of concern to the High Commissioner, including those children who are refugees, returnees, asylum-seekers and displaced persons of concern to UNHCR”.¹⁷⁰ Refugee children are an especially vulnerable category of beneficiaries whose socio-economic rights must be protected.

Chapter 5: Barriers to education for refugees

Under international conventions, local legislation and common law, refugees and asylum-seekers in South Africa do indeed possess the right to education. The most pressing question, however, is how they can *access* that right. Barriers to basic education for refugees and asylum-seekers may include school fees and related access costs, lack of documentation, age and grade-placing, limited places at schools, language difficulties, xenophobia and a generalised mistrust and miscommunication between School Governing Boards (SGBs) and parents. Many of these barriers persist at the level of FET and tertiary education, and access to effective documentation remains a crucial difficulty. It is the state's responsibility to come up with ways to break down these barriers for nationals and non-nationals alike. This is where rights in theory must become rights in practice, via state-funded awareness and application.

Documentation and Admissions

When attempting to access socio-economic rights, refugees are often greatly disadvantaged in terms of the official documentation required to live and flourish outside their country of origin. Access to

¹⁶⁸SA Constitution, s. 28(2).

¹⁶⁹*S v M* (CCT 53/06) [2007] ZACC 18. Par. 18.

¹⁷⁰UNHCR. *UNHCR Policy on Refugee Children*. 6 August 1993. EC/SCP/82. Available at: <http://www.refworld.org/docid/3f9e6a534.html> [accessed 5 September 2013]. I(3). n. pag.

enabling documentation is perhaps the most challenging issue facing refugees around the world.

Published in 1984, the UNHCR document on Identity Documents for Refugees (EC/SCP/33) still provides an accurate summary of the difficulties involved. Refugees in a host state are usually required to carry a document establishing their identity. This document may also confirm their status as refugees or asylum-seekers, as the Section 22 permit does in South Africa. Proof of refugee status is essential in claiming the benefits of international refugee conventions and national legislation designed to assist refugees.

For the refugee, identifying documents serve the fundamental purpose of proving that one's presence in the host state is legal. Unlike other aliens, refugees are likely to arrive in the host state without ID documents or passports from their state of origin, given that refugees are often forced to leave their home countries under difficult circumstances. Refugees found without documentation of one kind or another are likely to be detained, arrested or even deported, making documentation a primary concern for this marginalised group.

Under Article 27 of the Refugees Convention, contracting states are obliged to provide refugees in their territory with identity papers, unless they already possess valid travel documents.¹⁷¹ According to the UNHCR publication on identity documents for refugees, the term “travel document” evolved from earlier provisions for “certificates of identity”, later known as “Nansen passports”. The value of these documents in allowing refugees to travel between countries was increasingly recognised in the first half of the twentieth century, leading to the introduction of Article 28 in the Convention, which deals specifically with the issuing to refugees of travel documents. However, travel documents may be withheld for “compelling reasons of national security or public order”,¹⁷² for which reason Article 27 exists to ensure that all refugees receive some form of official identifying documentation.¹⁷³

Further, Article 31 states that genuine Article 1 refugees should not suffer penalties for arriving or being present illegally in a host state, provided they “present themselves without delay to the authorities and show good cause for their illegal entry or presence”.¹⁷⁴ The protection of Article 31 extends to refugees who forge identity documents, as in the seminal 1999 *Adimi* case¹⁷⁵ or the July 2013 case *R. and Koshi Pitshou Mateta and others*.¹⁷⁶

¹⁷¹1951 Convention, art. 27.

¹⁷²1951 Convention, art. 28(1).

¹⁷³UNHCR. *Identity Documents for Refugees*. 20 July 1984. EC/SCP/33. Available at: <http://www.refworld.org/docid/3ae68cce4.html> [accessed 26 August 2013]. Par. 4-6.

¹⁷⁴1951 Convention, art. 31(1).

¹⁷⁵*R v. Uxbridge Magistrates Court and Another, Ex parte Adimi* [1999]. EWHC Admin 765 [2001] Q.B. 667. United Kingdom: High Court (England and Wales), 29 July 1999. Available at: <http://www.refworld.org/docid/3ae6b6b41c.html> [accessed 27 August 2013].

¹⁷⁶*R. and Koshi Pitshou Mateta and others* [2013]. EWCA Crim 1372. United Kingdom: Court of Appeal (England and Wales), 30 July 2013. Available at: <http://www.refworld.org/docid/5215e0214.html> [accessed 27 August 2013].

Identity documents facilitate many of the most important actions and transactions that take place in any society, including

the registration of births and deaths, contracting marriage, obtaining employment, housing, hospital care or rations, qualifying for social benefits, entering educational institutions, or requesting the issuance of official documents and permits.¹⁷⁷

The Refugee Rights Project at the University of Cape Town writes that “South Africa is an extremely identity driven society[,] and it is not possible to access any service in South Africa without an identity document – be it accessing education, health care, opening a bank account or even buying furniture”.

In South Africa, the Department of Home Affairs (DHA) is responsible for granting access to the asylum system, issuing documentation and undertaking proper status determinations.¹⁷⁸ The Refugee Rights Project is constantly working to appeal poor status determination decisions before the Refugee Appeal Board, while engaging with the Department to ensure that the rights afforded by the Refugees Act are not violated. Since 2007, the rights to work and study are clearly indicated on asylum permits. However, these permits are still not fully enabling documents. The rights they confer are regularly not recognised by prospective employers, private institutions, or public institutions such as hospitals and schools.¹⁷⁹ Asylum-seekers are guaranteed all of the socio-economic rights in the Constitution on an equal footing with citizens, but the documentation they receive from the state does not assist them in accessing these rights to the extent that it should. A large part of this is the pervasive suspicion South Africans often have of refugees and migrants, who are seen as parasites taking the jobs of citizens. This perception is contradicted time and again in the research. The Education Rights Project points out that “[m]igrants rarely use welfare services”, and that “they are mainly young and are highly motivated to work, create jobs for local people and bring new ideas about life, culture and art”.¹⁸⁰ However, discrimination against refugees in favour of citizens on these grounds persists even in official policy, as in the case of *Ndikundavyi v Valkenberg Hospital and Others* discussed above.

In this respect, it should be noted that in addition to the trauma of fleeing their home countries, often as a result of violence, refugees and asylum-seekers do continue to face hostility and instances of xenophobia in South Africa. Lawyers for Human Rights (LHR) said in June 2013 that since the

¹⁷⁷UNHCR, *Identity Documents for Refugees*, par. 1.

¹⁷⁸Khan, Fatima. “Local Integration: Lessons Learnt and the Way Forward.” Cape Town, UCT Refugee Rights Project, 2007. 4.

¹⁷⁹Khan, “Local Integration”, 5.

¹⁸⁰Motha, Sarah. “The Education Rights of Refugees, Asylum Seekers and Migrants in South Africa.” Education Rights Project, 2005. 5.

xenophobic attacks in 2008, attacks of this nature have continued, albeit on a less visible scale. UNHCR reported at least three instances of xenophobic violence in 2012 that resulted in serious injury or death. There were attacks near Johannesburg and in Port Elizabeth, often targeting Somali shopowners. David Cote, the head of LHR's strategic litigation unit, said that the government denies that xenophobia is a real threat, and drags its heels over the introduction of hate crime legislation.¹⁸¹

Given that it is state policy to allow refugees to integrate into South African communities, every day refugees face tensions related to local distrust of or even hatred for foreigners, *amakwerekwere*. The state should establish legislation and support awareness-raising campaigns to prevent a recurrence of the 2008 attacks, which killed 64 people and displaced hundreds more. Mabel Sithole writes that the refugees she interviewed generally felt welcome in the Southern Suburbs of Cape Town, but that “memories of xenophobia... cast a shadow of uncertainty over their sense of safety”.¹⁸² Stone and Winterstein write that refugee children are particularly vulnerable to hostility based on refugee status or ethnicity, and “should be allowed to enjoy their right to education in South Africa” without fear.¹⁸³

Stone and Winterstein also indicate in their 2003 report that in some cases, schools are not aware that refugee or asylum-seeker permits entitle the bearer to seek education and employment. Respectively, refugee and asylum-seeker permits may be equated with permanent and temporary residence permits, with specified time limitations. Generally speaking, these authors found that where schools were informed about the rights that accrue to documented refugees and asylum-seekers, the schools concerned recognised and assisted refugee parents and children. The authors called on the Department of Education to “realize their responsibility to educate both schools and parents on the requirements for registration”.¹⁸⁴

In 2007, the Refugee Rights Project found that “in Cape Town[,] most of the schools are aware of refugee rights regarding education”,¹⁸⁵ which is a promising development for refugees in the area. The documentation requirements for admission to public schools are laid out in the National Education Policy Act (1996) under s. 15 of the Admission Policy for Ordinary Public Schools.

When a parent applies to have his or her child admitted to a public school, the parent must submit an official birth certificate to the principal of the school. In the event that the parents cannot accomplish this, “the learner may be admitted conditionally until a copy of the birth certificate is

181Lawyers for Human Rights. “Xenophobia attacks not over: LHR.” *Times Live*. www.timeslive.co.za. 07 Jun. 2013. Web. 26 Sep. 2013.

182Sithole, Mabel D. *Child Refugee Rights in Cape Town: the right to access education*. Diss. University of Cape Town, 2012. Cape Town: UCT, 2012. 72.

183Stone and Winterstein, *A Right or a Privilege?*, 51.

184Stone and Winterstein, *A Right or a Privilege?*, 38.

185Khan, “Local Integration”, 6.

obtained from the regional office of the Department of Home Affairs”.¹⁸⁶ Furthermore, a parent applying to have her child admitted must show proof of immunisation against polio, measles, tuberculosis, diphtheria, tetanus and hepatitis B, described as “communicable diseases”. It is the principal's responsibility to advise the parent about free immunisation available at government clinics if such proof is not available.¹⁸⁷ Stone and Winterstein indicate that parents have three months in which either to finalise their child's admission or to obtain a valid inoculation certificate, depending on the documentation required.¹⁸⁸

In early 2013, a woman from Brooklyn was told by officials at the Home Affairs office in Cape Town that in order for her two children to get study permits, she would have to pay for their “medical cover”, which comes to R1800 per child. This “medical cover” is presumably the proof of immunisation required by schools, available free from government clinics. While this woman was not strictly speaking a refugee, but qualified for a work permit under the 2010 Zimbabwean Dispensation Programme, the difficulties she faced at Home Affairs and subsequently at schools who would not accept her children illustrates that documentation for non-nationals is regularly either ineffective or entirely lacking. People Against Suffering, Oppression and Poverty (PASSOP) gave her a letter explaining her difficulties, but this did not prove effective until her children had lost almost a year of primary education.¹⁸⁹

Other necessary documentation may include a transfer card, completed by the principal, which must accompany a learner's application when moving from one public school to another. If a transfer card is not available, the principal of the receiving school “may admit the learner and place the learner in a grade on the basis of the following documentation:

- (a) the last report card issued by the previous school;
- (b) other equivalent documentation from the previous school; or
- (c) a written affidavit of the parent stating the reason for not having the transfer card and the grade the learner attended at the previous school.”¹⁹⁰

According to the Admission of Learners to Public Schools (General Notice 4138 of 2001), if the above documents are not available, the principal must advise the parents on how and where to obtain the documentation, and the child must be admitted conditionally.¹⁹¹

¹⁸⁶Admission Policy for Ordinary Public Schools No. 2432 of 1998. GG 19377 (19 October 1998). s. 15.

¹⁸⁷Admission Policy for Ordinary Public Schools, s. 16.

¹⁸⁸Stone and Winterstein, *A Right or a Privilege?*, 37.

¹⁸⁹Washinyira, Tariro. “Nightmarishly difficult for some refugee children to go to school.” *AllAfrica*. 23 Jan. 2013. Web. 24 Sep. 2013.

¹⁹⁰Admission Policy for Ordinary Public Schools, s. 17-18.

¹⁹¹Admission of Learners to Public Schools (General Notice 4138 of 2001). s. 5(2).

The Schools Act is very clear on the matter of documentation, even permitting the children of illegal immigrants to attend school, provided the parents can show proof of an application for asylum.¹⁹² In reality, access to refugee and asylum-seeker documentation through the DHA is very unreliable. Parents and children will often receive their permits at different times and out of synch as a result of short, inconsistent renewal periods. As above, the UNHCR Guidelines on how to protect and care for refugee children indicate that “the single best way to promote the psychosocial well-being of children is to support their families”.¹⁹³ In a 2012 thesis prepared for the University of Cape Town, Mabel Sithole writes that refugee parents' ability to find employment can be heavily constrained by limited access to refugee or asylum-seeker documentation. Where parents struggle to find employment, school fees and access costs cannot be paid, and the barriers to education for refugee and asylum-seeker children are compounded.¹⁹⁴

Under s. 3(3) of the Schools Act, the responsibility lies with every Member of the Executive Council (MEC) in each province to ensure that there are enough school places for every child to attend school as required by the Act. If an MEC cannot comply with s. 3(3) owing to a lack of capacity, “he or she must take steps to remedy any such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so”.¹⁹⁵

The case between Rivonia Primary School and the Gauteng Department of Education is being called a “landmark” case in the context of equal access to basic education. In 2010, the Rivonia School Governing Board (SGB) refused to admit a Grade 1 learner. The SGB's argument rested on their low learner-to-classroom ratio and their carefully maintained high quality of education. The Department forced the school to accept the learner, claiming that final power rests with the government to place all learners, as per s. 8 of the Admission Policy. The SCA ruled that SGBs are authorised by the Policy to determine their own admissions policies, and have the final say in determining when a school is full, as per s. 7 of the Policy.¹⁹⁶ The outcome of this case will clarify aspects of the Admission Policy, and may give SGBs greater authority to turn away refugee children, who often struggle with education as a result of their circumstances. However, all school admission policies must be in line with the Constitution's provisions on non-discrimination.

Refugees and asylum-seekers accessing anything above the first “band” of education defined by the NQF are guaranteed treatment “as favourable as possible”, or at least as favourable as “that

192Admission Policy for Ordinary Public Schools, s. 21: “Persons classified as illegal aliens must, when they apply for admission for their children or for themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Aliens Control Act, 1991 (No. 96 of 1991).”

193UNHCR, *Refugee Children: Guidelines*, Chapter 4(III). n. pag.

194Sithole, *Child Refugee Rights in Cape Town*, 40.

195SA Schools Act, s. 3(4).

196Jenkin, David. “Rivonia Primary School Case Heard in Con Court.” *Looklocal*. 09 May 2013. Web. 24 Sep. 2013.

accorded to aliens generally in the same circumstances” under the 1951 Convention. Article 22 makes particular mention of host states' recognition of foreign school certificates, diplomas and degrees, recognising the challenges refugees face with respect to enabling documentation, and the “remission of fees and charges and the award of scholarships”, recognising the financial obstacles refugees increasingly face when accessing further education.¹⁹⁷ SAQA evaluates foreign documentation. Refugees who wish to study further or to apply for jobs that require certain academic achievements must apply to SAQA for recognition of their past qualifications. The base cost of an application is R440, which can rapidly increase to more than R1000 if the applicant wants the process speeded up, needs to appeal a decision, or has to pay postage fees.¹⁹⁸ Refugees entering the country with nothing are therefore expected to pay a substantial fee simply to have their educational or working achievements recognised, before beginning the search for work or further education.

Nkosi writes that asylum-seekers' access to tertiary education is further compromised by reports of students being arrested outside universities and deported because their asylum-seeker applications have been rejected. Nkosi discusses the idea of “legitimate expectations”, arguing that students accepted into a tertiary institution have a legitimate expectation that they will complete their degree and gain recognition for it. In late 2011, “two University of Johannesburg immigrant students, one from Zimbabwe and the other from the Democratic Republic of Congo, faced deportation and were held at the Lindela Repatriation Centre”.¹⁹⁹ Both are potentially being denied their constitutional right to education.

Hathaway writes that when seeking secondary and university education, refugees outside of highly developed first-world nations primarily rely on an extremely limited number of scholarships offered by UNHCR and other organisations. Even in a state like South Africa where the equal right to higher education for refugees is established, authorities will often restrict refugees' access to education in favour of applicants who are citizens. In Tanzania, only two percent of the student body at post-elementary educational institutions may be non-citizens. Alongside problems with the recognition of academic credentials, Hathaway writes that refugees struggle to find out about educational opportunities, and are largely ineligible for scholarships by virtue of their non-national status.²⁰⁰ Asylum-seekers are in an even more precarious position. In the European Union, vocational training for asylum-seekers is “a matter of pure discretion for state parties”, leading to

¹⁹⁷1951 Convention, art. 22(2).

¹⁹⁸South African Government Services. Evaluate foreign qualifications: How much does it cost. www.services.gov.za. n. pag. Web. Accessed 25 Sep. 2013.

¹⁹⁹Nkosi, Bongani. “Foreigners marginalised by policy.” *Mail & Guardian*. *Mail & Guardian*, 17 Feb. 2012. Web. 21 Sep. 2013.

²⁰⁰Hathaway, *The Rights of Refugees Under International Law*, 591.

the denial of basic orientation and language classes for refugee claimants in Italy and Portugal. In Australia, asylum-seekers are also denied language training. In general, such courses aimed at teaching skills such as basic literacy and numeracy to adult refugees are not readily available.²⁰¹ One particular concern raised by Hathaway is that many of the adult-oriented educational programmes that are offered in the developed world do not take refugee women's specific needs into account, in particular “the need for access to childcare facilities”.²⁰²

Age and Grade Placement

In the UK, the real and perceived ages of children, especially unaccompanied minors, accessing the education system have led to possible abuses of refugee children's rights, and difficulties in accessing enabling education of an appropriate standard. Dorling writes that although child-specific treaties such as the UNCRC and the Children's Charter draw a clear distinction between children and adults, the reality is that chronological age is only one gauge of maturity. Age is not recorded, measured or valued in the same around the world, and millions of children in underdeveloped countries are not registered at birth.²⁰³ When unaccompanied minors arrive in the UK from Afghanistan, Iraq, Somalia or Eritrea, they have no official birth certificates to prove their date of birth. They may even be travelling on false documentation that disguises them as adults to avoid attracting attention. In these circumstances, officials trying to determine a child's age have no reliable means of doing so. Different life experiences and genetic makeup can result in “significant physical, emotional and developmental differences”, which may be further exaggerated by the kinds of deprivation and trauma to which refugee children are routinely exposed.²⁰⁴

Age is an important factor for refugees, and can affect their rights to support and protection, as well as their right to education. In the UK, it is feared that adults will pose as children to gain access to the rights that flow from the CRC and the UK's strong welfare provisions for children. Consequently, refugee children are often treated with suspicion, and presumed to be lying about their age. When an individual's age is disputed, years can be spent waiting for a resolution, during which time the individual may receive an inadequate form of support. The added stress of repeated assessments and appearing in court only compounds past trauma. A child in this position may also lose years of education.²⁰⁵

In South Africa, s. 15 of the Admission Policy states that “[t]he principal must advise parents that

²⁰¹Hathaway, *The Rights of Refugees Under International Law*, 592.

²⁰²Hathaway, *The Rights of Refugees Under International Law*, 593-594.

²⁰³Dorling, Kamena. “Happy Birthday? Disputing the age of children in the immigration system.” Coram Children's Legal Centre, 2013. www.childrenslegalcentre.com. 5-6.

²⁰⁴Dorling, “Happy Birthday?”, 6.

²⁰⁵Dorling, “Happy Birthday?”, 7.

it is an offence to make a false statement about the age of a child". Difficulties arise when refugee children become adults (over the age of eighteen), or even earlier, when they exceed the age of fifteen. In the Schools Act, this is the cut-off age for the compulsory phase of education. Liebenberg writes that it has yet to be established in the jurisprudence whether this compulsory phase equates to basic education as laid out under s. 29(1)(a).²⁰⁶

In any case, age and grade placement is an ongoing problem for refugees in South Africa. According to a report by Lawyers for Human Rights (LHR), in early 2013 more than twenty refugees' children were turned away from schools in the Western Cape because they did not possess the correct asylum documents. One man's three children aged six, twelve and sixteen could not attend school at all in 2012 because they lacked permits. When the children were finally able to return to school, "the six-year-old, who was supposed to start in grade 1, was put into grade 2. The twelve-year-old who was supposed to go to grade 7 was sent back to grade 5. The sixteen-year-old was supposed to be in grade 9 but was sent to grade 7". Their father was told that this was owing to a lack of space in the appropriate grades.²⁰⁷

S. 27 of the Admission Policy supports refugees and any learners who have been admitted to a public school at an age above the age norm for a grade. The Policy requires that a learner in this position "must, as far as possible, be placed in a fast track facility, or with his or her peer group, unless it is not in the educational interest of the learner. In the latter case the learner must be placed in a suitable lower grade, and an accelerated programme must be worked out for the learner to enable him or her to catch up with the peer group as soon as possible".²⁰⁸ Under the Admission of Learners to Public Schools (General Notice 4138 of 2001), for students more than three years above the normal grade age, the Head of Department must coordinate these "fast-track" programmes or facilities.²⁰⁹ Additionally, learners above the age of sixteen years who have never been to school or who have not made sufficient progress must be advised to enrol at an Adult Basic Education and Training (ABET) centre.²¹⁰ These provisions are of particular importance to refugees, many of whom miss out on years of schooling as a result of fleeing their state of origin, and subsequently as a result of lengthy asylum procedures. It is also vital that the state strengthens and supports ABET centres, so that they can provide elementary education of a high standard to refugees trying to establish themselves in South Africa.

²⁰⁶Liebenberg, *Socio-economic Rights*, 243.

²⁰⁷Washinyira, "Nightmarishly difficult for some refugee children to go to school", n. pag.

²⁰⁸Admission Policy for Ordinary Public Schools, s. 27.

²⁰⁹Admission of Learners to Public Schools, s. 6.

²¹⁰Admission of Learners to Public Schools, s. 8.

Language

Hathaway writes that for many refugee families, the preservation in the sphere of education of one's mother tongue is of particular importance, especially in the early grades, because it keeps the possibility and hope of repatriation alive.²¹¹ At the same time, integration into the host state requires that learners be able to speak and learn in at least one official language, of which South Africa has eleven. The language of learning and teaching (LOLT) of a school is determined by the SGB in accordance with s. 6(2) of the Schools Act.²¹² In 2007, more than 65% of learners in South Africa were learning in English, 12% in Afrikaans, 7% in isiZulu and 6% in isiXhosa.²¹³ By contrast, Arabic, French, Lingala, Swahili and Portuguese are the main languages used by refugees in South Africa.²¹⁴ English is a global language associated with economic growth. It enables progress into tertiary institutions, which are largely English-medium, and it is a common language in the working world.²¹⁵ Therefore, the ability to speak English is a priority for refugees in this country, and access to language classes for schoolchildren and adults alike is a necessity. As above, Hathaway writes that language classes are limited and not readily available to refugees, and that in some places, including the EU and Australia, asylum-seekers have been actively denied the right to participate in such classes.²¹⁶

A range of Cape Town NGOs and community organisations provide English language courses for refugees. These include the Muslim Refugee Association of South Africa (MRASA), ARESTA, the CTCRC and the Scalabrini Centre, where classes cost R200 per month.²¹⁷ Similarly in Australia, the non-profit NGO Refugee Council of Australia (RCOA) offers a free English language tuition course, the Adult Migrant English Program (AMEP), to refugees, migrants and humanitarian entrants.²¹⁸ In South Africa, the state is not obliged to assist refugees with language classes, thus indirectly limiting refugees' rights to work and to access further education.

The Schools Act prevents public schools from administering tests related to the admission of students.²¹⁹ This implies that students may be tested to determine their skillset and grade level, but that they may not be prevented from attending school as a result of failing an admission test. Many

211Hathaway, *The Rights of Refugees Under International Law*, 584.

212SA Schools Act, s. 6(2): "The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law."

213Department of Basic Education. *The Status of the Language of Learning and Teaching (LOLT) in Schools: A Quantitative Overview*. Department of Basic Education: Pretoria, 2010. 13-14.

214Motha, "The Education Rights of Refugees, Asylum Seekers and Migrants in South Africa", 17.

215Department of Basic Education, *The Status of the Language of Learning and Teaching (LOLT) in Schools*, 22.

216Hathaway, *The Rights of Refugees Under International Law*, 592.

217Scalabrini Centre of Cape Town. English School. www.scalabrini.org.za. n. pag. Web. Accessed 24 Sep. 2013.

218Refugee Council of Australia. Language Support. www.refugeecouncil.org.au. Web. Accessed 24 Sep. 2013.

219SA Schools Act, 5(2): "The governing body of a public school may not administer any test relating to the admission of a learner to a public school, or direct or authorise the principal of the school or any person to administer such a test."

schools do, however, administer English language tests to incoming learners, and cases exist wherein refugees have been denied access to schooling on the grounds that their grasp of English is too poor to facilitate effective learning. Public schools have limited facilities to assist such students, but they may not turn them away. At the very least, being in a classroom context where English or another official language is spoken every day can help refugee children learn that language, without having to attend extra lessons at night schools or ABET centres with much older adult learners.

School fees

i. Basic education

When citizens struggle to access socio-economic rights, refugees and asylum-seekers are likely to face even greater difficulties as a result of their uncertain and precarious status. In *Khosa v Minister of Social Development*, permanent residents, especially children and the aged, found themselves seriously disadvantaged by the denial of social security. In *Grootboom* or *Treatment Action Campaign No. 2*, citizens found themselves similarly disadvantaged. Many of the obstacles nationals face in accessing socio-economic rights apply equally to refugees, and schools fees are a major barrier to basic education in this regard.

ICESCR requires that basic or primary education be “available free to all”.²²⁰ Article 14 of the Covenant calls for all signatory states to draw up and implement a plan for introducing free basic education within a reasonable timeframe. CESCR's General Comment 11 reflects on Article 14, stating that school fees and access costs “constitute disincentives to the enjoyment of the right and may jeopardize its realization”.²²¹ Furthermore, this Comment recognises that indirect costs, including expensive uniforms or compulsory levies on parents, can often be “highly regressive in effect”, inhibiting the right of access to basic education. While ICESCR has not been ratified by South Africa, these principles and findings are valid, and the Covenant has been influential in the formulation of socio-economic rights policies in this country.

As above, the UN Convention on the Rights of the Child and the African Children's Charter both require contracting states to provide free basic education. South Africa ratified both conventions in 1995 and 2000 respectively.²²² Currently, no fee schools may be determined by the Minister

²²⁰ICESCR, art. 13(2)(a).

²²¹UN Committee on Economic, Social and Cultural Rights (CESCR). *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*. 10 May 1999. E/1992/23. Available at: <http://www.refworld.org/docid/4538838c0.html> [accessed 17 September 2013]. Par. 7.

²²²Department of International Relations and Cooperation (Republic of South Africa). *International Agreements and/or Conferences Signed by South Africa in Relation to the Youth, Children and People with Disabilities, Particularly with Regard to the United Nations and the African Union*. <http://www.dfa.gov.za>. n. pag. Web.

according to levels of poverty, and a list of no fee schools by province is available on the departmental website. According to Equal Education, in 2011 60% of South African public schools were no fee schools.²²³ On May 7th 2013, the Minister of Education set that figure at 82% of public schools, serving 8 million children.²²⁴ Despite these free schools and extensive legislation to protect parents and learners who cannot afford fees, the evidence shows that refugees and asylum-seekers are not benefiting as they should. Firstly, no fee schools lack both public and private funding, and so struggle to provide a high standard of education and care for individual needs.²²⁵ Secondly, Stone and Winterstein suggest that fee-charging public schools often do not act in accordance with the legislation.²²⁶ Additionally, in 2003 Fiske and Ladd found that the system of school funding and fees levying in South Africa tends to replicate Apartheid inequalities, with the former “white schools” still able to afford better quality education than the historically disadvantaged schools.²²⁷

While international legislation calls for free basic education, South African public schools that do charge fees are acting within the framework of the Schools Act. Under s. 39 of the Act, “school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents”.²²⁸ Such a resolution must provide for “equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees”.²²⁹ Furthermore, under s. 5(3), “[n]o learner may be refused admission to a public school on the grounds that his or her parent... is unable to pay or has not paid the school fees determined by the governing body under section 39”. This is confirmed in the National Education Policy Act (1996), which states that

[a] learner is admitted to the total school programme and may not be suspended from classes, denied access to cultural, sporting or social activities of the school, denied a school report or transfer certificates, or otherwise victimised on the grounds that his or her parent -
(a) is unable to pay or has not paid the required school fees[.]²³⁰

Any public school that violates the Act in this regard also violates the right to equality set out in the Constitution, which provides that “[t]he state may not unfairly discriminate directly or indirectly

223Equal Education. Youth Group Fact Sheet 1: Unequal Schools Unequal Outcomes. 2011. 2.

224Minister of Education, Angie Motshekga. Basic Education Budget Vote Speech 2013/14. National Assembly, Cape Town. <http://www.education.gov.za>. n. pag. Web. 7 May 2013. Accessed 23 May 2013.

225Equal Education, Youth Group Fact Sheet 1, 2-3.

226Stone and Winterstein, *A Right or A Privilege?*, 39.

227Fiske, Edward and Helen Ladd. “Balancing Public and Private Resources for Basic Education: School Fees in Post-Apartheid South Africa.” *Working Papers Series SAN03-03*. Duke University: Terry Sanford Institute of Public Policy, 2003. 19.

228SA Schools Act, 39(1).

229SA Schools Act, 39(2)(b).

230Admission Policy for Ordinary Public Schools, s. 10.

against anyone on one or more grounds, including... ethnic or social origin”.²³¹ Access to and quality of education should not be determined by personal or community wealth. Thus the state is bound to treat everyone equally before the law.²³² Further, s.9 introduces elements of substantive equality. Albertyn explains that substantive equality examines the context in which a right is violated, as well as the impact the violation has on an individual or a group. She insists that “a legal commitment to substantive equality must permit the dismantling of actual social and economic inequality, and the consequent transformation of a society”.²³³ This is an approach consistent with the vision of our Constitution, which aims not for a neutral, formal standard of equality but for its purposeful “achievement”.²³⁴ Thus s.9 echoes this commitment to the achievement of equality, and provides that “legislative and other measures... may be taken” to advance the rights of individuals or groups who have suffered unfair discrimination.²³⁵ S.5 of the Schools Act gives effect to s. 9(2) of the Constitution by addressing the needs of economically disadvantaged families. Refugees and asylum-seekers suffer intersecting forms of discrimination, and stand to benefit greatly from a substantive equality clause.

The 1998 Exemption of Parents from the Payment of School Fees Regulations addressed this aspect of non-discrimination in education in terms of s. 39(4) of the Schools Act. Levels of exemption were based on the combined annual gross income of the parents. If this amount was less than ten times the learner's annual fees, the parents qualified for a full exemption. Parents with higher income brackets could qualify for partial exemption or no exemption.²³⁶

Naledi Pandor updated these regulations in 2006 to include more sophisticated formulas for calculating exemptions.²³⁷ Additionally, the 2006 regulations are more favourable towards both refugees and citizens with limited resources. Under s.3, it is the principal's responsibility to inform parents about fees to be paid and the exemptions process,²³⁸ and a form must be filled out and signed by both parties to confirm that the parents understand their options and obligations.²³⁹ A copy of the regulations must also be displayed prominently in schools,²⁴⁰ and parents must receive copies on request.²⁴¹ These regulations also annex a detailed application for exemption form, which must

231SA Constitution, s.9(3).

232SA Constitution, s.9(1).

233Albertyn, Cathy. “Equality.” *South African Constitutional Law: The Bill of Rights*. Ed. Cheadle H., Davis D. & Haysom N. Durban: LexisNexis Butterworths, 2003. 6.

234SA Constitution, s.1(a).

235SA Constitution, s.9(2).

236Exemption of Parents from the Payment of School Fees Regulations (1998). 3(1).

237Department of Education. “Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools.” 18 October 2006. s.6.

238Exemption Regulations (2006), s.3(1)(a).

239Exemption Regulations (2006), s.3(1)(c).

240Exemption Regulations (2006), s.3(2).

241Exemption Regulations (2006), s.3(3).

be filled out and submitted by parents who wish to apply for a fees exemption.²⁴² Importantly, s.9 offers extensive assistance to parents in filling out their applications, and prohibits disqualification on the grounds of an incomplete or incorrectly completed form.²⁴³

A useful case here is *Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others* (2006).²⁴⁴ In this case, a Durban secondary school sued two black, single, poor mothers for school-fee arrears, as s.41(1) of the Schools Act permits in certain circumstances.²⁴⁵ With the help of the Centre for Applied Legal Studies (CALs), the mothers took the school, the SGB and the national and provincial ministers to court. The mothers claimed that the school had not fulfilled its full responsibility to inform them about fee exemptions. The duties of the school and the principal to assist parents are set out clearly under s.3 of the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools of 2006. The school argued that it had limited resources and was already struggling to provide learners with an adequate education. It also claimed that the mothers had been informed but had not applied for exemptions, an assertion the applicants showed was not in good faith. The High Court found that financial difficulties aside, the school had not complied with the law, and ordered it to implement the exemption policy correctly.²⁴⁶ *CALS v Hunt Road* is important for refugee parents, entrenching their identical right to be fully and accurately informed about fee exemptions. This case also illustrates that public schools can rely neither on fees from parents nor on state funding, which in 2006 was still desperately inadequate.

Beyond the basic per learner allocation under the National Norms and Standards for School Funding (1998), the state did not compensate schools for fee exemptions until the funding norms were amended in 2011 to include section 170A, which sets up a system for schools to apply to PEDs for compensation each financial year.²⁴⁷ In 2011 the Western Cape Education Department (WCED) paid out more than R20 million to assist schools that had granted fee exemptions. In 2012, a further R30 147 988 was allocated to assist 650 schools in the Western Cape.²⁴⁸ However, Times Live reported on the 2011 pay-outs and claimed that many provinces did not compensate schools sufficiently. For example, in 2010 Port Alfred High granted 172 fee exemptions amounting to R714000, but received compensation of only R784 in December 2011.²⁴⁹ This lack of state support

²⁴²Exemption Regulations (2006), s.4(1).

²⁴³Exemption Regulations (2006), s.9(1-4).

²⁴⁴*Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others*, Case No. 10091/2006. High Court of South Africa, Durban and Coast Local Division (DCLD) [Unreported].

²⁴⁵Schools Act, s.41(1): "A public school may by process of law enforce the payment of school fees by parents who are liable to pay in terms of section 40."

²⁴⁶Hall, Katharine and Sonja Giese. "Addressing quality through school fees and school funding." *South African Child Gauge*. Eds. Pendlebury S, Lake L, & Smith C. Cape Town: Children's Institute, 2009. 36.

²⁴⁷Amended National Norms and Standards for School Funding No. 33971 of 2011. 28 Jan 2011. 5.

²⁴⁸Western Cape Education. "R30 million paid out to help schools struggling with the cost of fee exemptions." South African Government Information. <http://www.info.gov.za>. n.pag. Web. 12 Nov 2012. Accessed 23 May 2013.

²⁴⁹Prega Govender. "Schools told: no refunds for no-fee pupils." *Times Live*. <http://www.timeslive.co.za>. n. pag. Web.

sets schools against parents, contributing to a climate of distrust and intimidation that is especially hostile to refugees, who already face an uncertain welcome, financial troubles and language barriers in South Africa.

In terms of fees, refugee and asylum-seeker children are a marginalised group particularly vulnerable to exploitation, neglect or abuse. The Consortium for Refugees and Migrants in South Africa (CoRMSA) indicated in an April 2011 report that “some schools do not adhere to the principle that primary education is compulsory in South Africa”.²⁵⁰ CoRMSA also drew attention to migrants being denied the opportunity to apply for fees exemptions, which suggests that many public schools are not only non-compliant with but unaware of the relevant legislation. Non-nationals trying to access basic education are often amongst the poorest members of society, and CoRMSA reiterated its 2009 finding that many are still unable to afford school fees.²⁵¹

In her independent research into refugees' access to basic education in Cape Town, Sithole found in conversation with several interview subjects that “although [parents] had not been able to pay fees, their children still attended school”. Sithole's research appears to indicate that schools are not uniformly ignorant of the right of refugees with regards to school fees, and that where schools are informed, refugee children are able to attend school without paying the fees. Various organisations including the Cape Town Refugee Centre (CTRC), ARESTA and UNHCR also assist refugee parents by paying up to half of their children's fees, although this is a very meagre amount, and only a limited number of parents can take advantage of this assistance.²⁵² It would appear that while informed schools assist refugees with exemptions, there are still cases where refugees struggle with school fees. This difficulty is directly linked to work opportunities and documentation needs for refugee parents, discussed above.

Finally, the rise of low-fee private schooling could prove as useful to refugees around the world as it has to nationals in India, where between forty and seventy percent of urban learners are enrolled in these schools. Run by “edupreneurs” who step in to meet the needs of parents and children failed by the public school system, low-fee private schools are also a growing phenomenon in Nigeria, Kenya, Ghana, Colombia and Chile. According to an Indian report cited by Bernstein, these private schools for the poor succeed because teachers are accountable to parents and managers, and can be fired, while parents can withdraw their children at any time.²⁵³ The corrupt,

5 Feb 2012.

250CoRMSA. “Protecting Refugees, Asylum Seekers and Immigrants in South Africa during 2010.” Johannesburg, April 2011. <http://www.cormsa.org.za>. 127.

251CoRMSA, “Protecting Refugees”, 128.

252Sithole, *Child Refugee Rights in Cape Town*, 43-44.

253Bernstein, Ann. “The rise of low-fee private schools can only benefit South Africa.” *Business Day Live. Business Day Live*, 01 Aug. 2013. Web. 24 Sep. 2013.

underfunded public school system is not held to the same standards. Low-fee private schools are also strategically located “in houses or office blocks near taxi ranks or stations”. In South Africa, four education companies, Curro Holdings, Spark Schools, Nova Schools and Basa, reported growth in the private school sector, with a corresponding decline in enrolment in public schools.²⁵⁴ Low-fee private schools charge less than R7500 per year, with some charging as little as R2500. Bernstein writes that this is still expensive by international standards, but that registered, nonprofit independent schools can receive state subsidies. The Department of Basic Education is, on balance, supportive of independent schools, recognising that they save costs to the government and that partnerships in education are vital to improving the system overall. However, Bernstein places the responsibility with government to make these schools more easily accessible through clearly stated public policy, particularly by a review of state subsidies.²⁵⁵

The potential of these schools to reach refugee children is immense. While the state is declaring an increasing number of schools no-fee schools, fee-paying schools are “generally the better resourced schools with better educational outcomes”. Furthermore, a study by the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand showed that “secondary costs such as uniforms and transport provide even greater barriers to an education for poor pupils than do school fees”. Veriava describes this discriminatory system as “income-based education”.²⁵⁶ Accessible, efficient low-fee private schooling has been shown to improve access to education for the poorest students, and the focused, community-based business model of these schools could be used to great effect to address the particular educational needs of refugee children.

ii. FET and Higher Education

The National Student Financial Aid Scheme [NSFAS] Act (No 56 of 1999) was established to fund historically disadvantaged students with academic ability. According to the NSFAS website, loans and bursaries are available for a wide range of universities, colleges and FET colleges across the country.²⁵⁷ These loans and bursaries are very useful for financially disadvantaged students, who otherwise could not possibly afford the high fees routinely charged by tertiary institutions in South Africa. However, Kavuro writes that “[r]efugees and asylum-seekers are excluded from this form of supplementary support on the basis of citizenship”, given that “[o]nly poor citizens are entitled to

²⁵⁴Louw, Poppy. “Budget private schools reeling in black pupils.” *Times Live. Times Live*, 06 Aug. 2013. Web. 24 Sep. 2013.

²⁵⁵Bernstein, “The rise of low-fee private schools can only benefit South Africa”, n. pag.

²⁵⁶Veriava, Faranaaz. “Righting the wrongs of school costs.” *Mail & Guardian. Mail & Guardian*, 30 Nov. 2012. Web. 24 Sep. 2013.

²⁵⁷National Student Financial Aid Scheme. “Loan and Bursary.” <http://www.nsfas.org.za>. n. pag. Web. Accessed 19 Sep. 2013.

this financial assistance in the view of alleviating inherited social inequality”.²⁵⁸ Bongani Nkosi writes that for refugees who want to study at South African universities, “funding and deportation remain formidable barriers”.²⁵⁹

Some organisations offer funding to students, both citizens and refugees, studying at a tertiary level. The HCI Foundation runs bursary programmes for undergraduates of all disciplines at any year of study, specifying that refugees “with the right to live, study and work in South Africa” are eligible on a basis of equality with citizens.²⁶⁰

The White Paper on the transformation of FET describes FET colleges as places where post-compulsory learning for learners above the age of fifteen can be undertaken amongst people of their own age.²⁶¹ This document commends “the flexibility, programme diversity, facilities and support services that a revitalised FET institution with an open learning environment could offer”. This is perhaps a situation ideal for refugees who have had to repeat a year or years of the first phase of education, and who need an accommodating environment in which to complete and further their studies. The same difficulties with fees persist at this level of education, however, with limited scholarships available from NGOs and UNHCR, which offers the DAFI scholarship.

Unity for Tertiary Refugee Students (UTRS) is a refugee-led NGO that aims to empower refugee and asylum-seeker students who struggle to access tertiary education. Funding is one of the major difficulties UTRS has identified, especially given that tertiary institutions can prevent students from graduating until their fees are paid in full. These are termed “ghost students”, refugees with outstanding fees who continue to attend classes without being officially registered. There is no recourse for students in these circumstances, who are denied qualifications they may have earned due to unpaid fees, and as a result are denied access to related employment opportunities. UTRS has helped reintegrate students who have dropped out, negotiating one-on-one with tertiary institutions on behalf of these students. UTRS also successfully raised the age limit on the DAFI bursary from 25 to 28 in 2008, and increased the number of DAFI bursaries offered by UNHCR in South Africa from 14 per year to 73 in 2008, and to more than one hundred since then.²⁶²

Funding for refugee students is available from the University of Cape Town, but it is strictly supplementary and available to a limited number of postgraduate students only.²⁶³ On the University

258Kavuro, Callixte. “Reflecting on Refugees and Asylum-Seekers Tertiary Education in South Africa: Tension Between Refugee Protection and Education Transformation Policies.” *Global Education Magazine*. 20 Jun. 2013. n. pag. Web. 19 Sep. 2013.

259Nkosi, “Foreigners marginalised by policy”, n. pag.

260HCI Foundation. “Selection Criteria: Do I Qualify for a Bursary?” www.bursary.hcifoundation.co.za. Web. Accessed 21 Sep. 2013.

261Education White Paper 4, s. 2.10.

262Unity for Tertiary Refugee Students (UTRS). History. UTRS, 2009. www.utrsafrica.co.za. n. pag. Web. Accessed 26 Sep. 2013.

263University of Cape Town. Postgraduate degree funding. www.uct.ac.za. n. pag. Web. Accessed 26 Sep. 2013.

of the Witwatersrand website, it is explained that the National Research Foundation (NRF), an independent government agency that provides hundreds of millions of rands of funding to tertiary institutions, has recently earmarked just 13% of its budget to support non-South African citizens: 4% for students from the African continent, 5% from the Southern African Development Community (SADC) and another 4% for non-Africans. Starting in 2014, SAQA-accredited refugees therefore have access to a small amount of funding through the NRF. However, the bulk of funding opportunities are available only to South African citizens.²⁶⁴

Remedies and conclusions

The UNHCR 2012-2016 Education Strategy recognises education as “a core component of UNHCR’s international protection and durable solutions mandate”, and acknowledges that many refugees do not have the access to education guaranteed them in international law. Additionally, the quality of education they do receive is often not of a high standard that permits personal development in a secure environment. Some of the goals to be achieved in this five-year period include making primary education available to three million refugee children, expanding secondary education to one million young people, making non-formal education and training available to 40% of young people, increasing the number of students enrolled in tertiary programmes by 100%, and increasing literacy rates amongst refugee adults by 50%.²⁶⁵ In order to achieve these goals, the strategy document sets out ways of breaking down barriers of access to education for refugees at all levels of schooling.²⁶⁶

At the level of primary schooling, UNHCR focuses on teacher training. Teachers must be equipped to teach literacy and numeracy effectively, to assess children's progress, to be aware of refugee-specific needs and to encourage learner participation in terms of inclusive education. There is also a move towards the increasing use of Information and Communication Technology (ICT) to aid distance learning and “quality input”, as well as teacher training.²⁶⁷ Investigating low-fee private schooling, Bernstein finds that this “innovative, experimental” sector also employs technology in classrooms “as a way to individualise teaching and reduce costs”.²⁶⁸ This form of private schooling for the poor may prove valuable for refugees into the future. In addition, UNHCR endeavours to provide intensive language training for teachers and learners alike.

In terms of secondary schooling, UNHCR identifies helping with costs and accelerated

²⁶⁴University of the Witwatersrand, Johannesburg. Scholarships. www.wits.ac.za. n. pag. Web. Accessed 26 Sep. 2013.

²⁶⁵UNHCR. *UNHCR 2012-2016 Education Strategy*. Geneva, UNHCR: 2012. www.unhcr.org. 3.

²⁶⁶Sawahel, Wagdy. “Improving access to higher education for refugees.” *University World News* 227. 20 Jun. 2012. Web. 24 Sep. 2013.

²⁶⁷UNHCR, *2012-2016 Education Strategy*, 5.

²⁶⁸Bernstein, “The rise of low-fee private schools can only benefit South Africa”, n. pag.

programmes for out-of-school children to complete primary education as two of its major goals.

Mabel Sithole writes that the policy-based remedies to the problem of access to basic education are evident in existing legislation, but that school administrators and parents need to be made more aware of these laws and policies if they are to become truly effective.²⁶⁹ Sithole calls for “greater coordination between the Department of Basic Education and the Department of Home Affairs in order to identify in policy the challenges child refugees face in accessing education”.²⁷⁰ The availability of documentation for adults affects their socio-economic standing, with direct consequences for their school-going children.

In the Education Strategy, the most important UNHCR movement in tertiary education is towards more scholarships for refugee students in host countries, through “partnerships with donors, academic institutions, and foundations”. Recognising the above barriers of access to local higher education institutions, UNHCR aims to advocate on behalf of refugee students with Ministries of Education around the world.²⁷¹ There is also an emphasis on working with communities and local organisations to promote access to education.²⁷²

Sawahel draws on a February 2012 report by the UK-based Refugee Support Network to identify concrete ways to reduce tertiary education access barriers. Firstly, refugees and asylum-seekers should pay home fees, not the exorbitant fees charged to visiting foreigners and exchange students, to attend university in South Africa. Article 22 on public education in the 1951 Convention requires that refugees receive treatment “as favourable as possible” with respect to higher education, and refugees and citizens have the same right to further education in the South African Constitution. Many refugees and asylum-seekers have no personal funds to support a degree, and may not be eligible for student loans given the temporary nature of their permits. Thus student funding for refugees should also be more liberally available from government. Sawahel also suggests that immigration controls should be less rigid, so that situations do not arise wherein asylum-seekers are arrested and deported in the middle of a degree or diploma.²⁷³

At base, awareness campaigns funded and organised by state-NGO-community partnerships are fundamental to breaking down barriers of access to education for refugees. Recognition of the rights afforded refugees under the various international conventions and national legislation can go a long way towards improving access to education for refugees. Discriminatory attitudes towards refugees and asylum-seekers still persist strongly at the level of policy and within communities, and strategic litigation such as that undertaken by the Scalabrini centre and the Refugee Rights Project is

²⁶⁹Sithole, *Child Refugee Rights in Cape Town*, 73.

²⁷⁰Sithole, *Child Refugee Rights in Cape Town*, 72.

²⁷¹UNHCR, *2012-2016 Education Strategy*, 6.

²⁷²UNHCR, *2012-2016 Education Strategy*, 9.

²⁷³Sawahel, “Improving access to higher education for refugees”, n. pag.

essential to asserting the rights of non-nationals in this country. Access to socio-economic rights is already routinely out of reach for South African citizens, which requires advocacy on behalf of refugees to be both focused and socially aware and engaged.

Works Cited

- Abeyratne, Rehan. "Socioeconomic Rights in the Indian Constitution: Towards a Broader Conception of Legitimacy." *Brooklyn Journal of International Law (Forthcoming)*. Available at SSRN: <http://ssrn.com/abstract=2189277> or <http://dx.doi.org/10.2139/ssrn.2189277>.
- Admission of Learners to Public Schools (General Notice 4138 of 2001).
- Albertyn, Cathy. "Equality." *South African Constitutional Law: The Bill of Rights*. Ed. Cheadle H., Davis D. & Haysom N. Durban: LexisNexis Butterworths, 2003.
- Albisa, Cathy and Jessica Schultz. "The United States: A Ragged Patchwork." *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*. Ed. Malcolm Langford. Cambridge: Cambridge University Press, 2008. 230-249.
- Amended National Norms and Standards for School Funding No. 33971 of 2011. 28 Jan 2011.
- ARESTA. Home. www.aresta.org.za. Accessed 21 Sep. 2013.
- Bernstein, Ann. "The rise of low-fee private schools can only benefit South Africa." *Business Day Live*. *Business Day Live*, 01 Aug. 2013. Web. 23 Sep. 2013.
- Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others*, Case No. 10091/2006. High Court of South Africa, Durban and Coast Local Division (DCLD) [Unreported].
- Committee on Economic, Social and Cultural Rights. General Comment 13, E/C.12/1999/10. 8 December 1999.
- Constitution of the Republic of South Africa No. 108 of 1996.
- CoRMSA. "Protecting Refugees, Asylum Seekers and Immigrants in South Africa during 2010." Johannesburg, April 2011. <http://www.cormsa.org.za>.
- Cornwall, Andrea and Celestine Nyamu-Musembi. "Putting the 'Rights-Based Approach' to Development into Perspective." *Third World Quarterly* 25.8 (2004): 1415-1437.
- Council on Higher Education South Africa. "Mandate." <http://www.che.ac.za>. Web. Accessed 19 Sep. 2013.
- Davis, Denis. "The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: what about separation of powers?" *Potchefstroom Electronic Law Journal* 15.5 (2012): 2-14.
- Dawood and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8.
- Department of Basic Education. "School Realities 2011." www.education.gov.za. Sep. 2011. Web. 20 Sep. 2013.
- Department of Basic Education. *The Status of the Language of Learning and Teaching (LOLT) in*

- Schools: A Quantitative Overview*. Department of Basic Education: Pretoria, 2010.
- Department of Education. "Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools." 18 October 2006.
- Admission Policy for Ordinary Public Schools No. 2432 of 1998. GG 19377 (19 October 1998).
- Department of Higher Education and Training. "The list of registered private FET colleges." 09 Jan 2012. <http://www.dhet.gov.za>. Web. Accessed 19 Sep. 2013.
- Department of International Relations and Cooperation (Republic of South Africa). International Agreements and/or Conferences Signed by South Africa in Relation to the Youth, Children and People with Disabilities, Particularly with Regard to the United Nations and the African Union. <http://www.dfa.gov.za>. Web.
- Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11.
- Dorling, Kamena. "Happy Birthday? Disputing the age of children in the immigration system." Coram Children's Legal Centre, 2013. www.childrenslegalcentre.com.
- Education White Paper 3: Programme for the transformation of Higher Education No. 18207 of 1997.
- Education White Paper 4: Programme for the Transformation of Further Education and Training No. 2188 of 1998.
- Eldridge and Others v British Columbia (Attorney General) and Others* [1997] 3 SCR 624, 151 D.L.R. (4th) 577.
- Equal Education. Youth Group Fact Sheet 1: Unequal Schools Unequal Outcomes. 2011.
- Exemption of Parents from the Payment of School Fees Regulations (1998).
- FET Colleges South Africa. "Public FET Colleges." www.fetcolleges.co.za. Web. Accessed 19 Sep. 2013.
- Fiske, Edward and Helen Ladd. "Balancing Public and Private Resources for Basic Education: School Fees in Post-Apartheid South Africa." *Working Papers Series SAN03-03*. Duke University: Terry Sandford Institute of Public Policy, 2003.
- Galliker, Doris. *The potential impact of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on the realisation of socio-economic rights in the international arena: what can be learnt from the justiciability of socio-economic rights in South Africa?* Diss. University of Cape Town, 2010. Cape Town: UCT, 2010.
- Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6.
- Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19.

- Hall, Katharine and Sonja Giese. "Addressing quality through school fees and school funding." *South African Child Gauge*. Eds. Pendlebury S, Lake L, & Smith C. Cape Town: Children's Institute, 2009.
- Hathaway, James. *The Rights of Refugees under International Law*. Cambridge University Press, 2005.
- HCI Foundation. "Selection Criteria: Do I Qualify for a Bursary?" www.bursary.hcifoundation.co.za. Web. Accessed 21 Sep. 2013.
- Isaacs, Doron. "Interpreting, Litigating and Realising the Right to Education in South Africa." University of Cape Town, 2007.
- Jenkin, David. "Rivonia Primary School Case Heard in Con Court." *Looklocal*. 09 May 2013. Web. 24 Sep. 2013.
- John, Victoria. "Another school in court over admissions." *Mail & Guardian*. *Mail & Guardian*, 01 Feb. 2013. Web. 18 Sep. 2013.
- John, Victoria. "Motshekga gazettes new norms and standards for schools." *Mail & Guardian*. *Mail & Guardian*, 12 Sep. 2013. Web. 18 Sep. 2013.
- Joubert, Pearl. "Grootboom Dies Homeless and Penniless." *Mail & Guardian*. *Mail & Guardian*, 08 Nov. 2008. Web. 16 Sep. 2013.
- Kavuro, Callixte. "Reflecting on Refugees and Asylum-Seekers Tertiary Education in South Africa: Tension Between Refugee Protection and Education Transformation Policies." *Global Education Magazine*. 20 Jun. 2013. Web. 19 Sep. 2013.
- Khan, Fatima. "Local Integration: Lessons Learnt and the Way Forward." Cape Town, UCT Refugee Rights Project, 2007.
- 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.
- Klaaren, Jonathan and Jeff Handmaker. "Conclusion." *Advancing Refugee Protection in South Africa*. Eds. Handmaker, Jeff, Lee Anne de la Hunt and Jonathan Klaaren. United States, Berghahn Books: 2008. 278-290.
- Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8.
- Labour Relations Act 66 of 1995.
- Lawyers for Human Rights. "Xenophobia attacks not over: LHR." *Times Live*. www.timeslive.co.za. 07 Jun. 2013. Web. 26 Sep. 2013.
- Liebenberg, Sandra. *Socio-economic Rights: adjudication under a transformative constitution*. Cape Town: Juta, 2010.

- Mazibuko and others v City of Johannesburg and others* [2008] 4 All SA 471 (W).
- Mbazira, Christopher. *Litigating Socio-economic Rights in South Africa: A choice between corrective and distributive justice*. Cape Town, Pretoria University Law Press: 2009.
- Minister of Education, Angie Motshekga. Basic Education Budget Vote Speech 2013/14. National Assembly, Cape Town. <http://www.education.gov.za>. Web. 7 May 2013. Accessed 23 May 2013.
- Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15.
- Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142 (28 November 2003).
- Miss Mohini Jain vs State Of Karnataka And Others*. Supreme Court of India. 1992 SCR (3) 658. 30 July 1992.
- Motha, Sarah. "The Education Rights of Refugees, Asylum Seekers and Migrants in South Africa." Education Rights Project, 2005.
- National Education Policy Act No. 27 of 1996.
- National Qualifications Framework Act 67 of 2008.
- National Student Financial Aid Scheme. "Loan and Bursary." <http://www.nsfas.org.za>. Web. Accessed 19 Sep. 2013.
- Ndikundavyi v Valkenberg Hospital and Others* (C970/2010) [2012] ZALCCT 15.
- Nkosi, Bongani. "Foreigners marginalised by policy." *Mail & Guardian*. *Mail & Guardian*, 17 Feb. 2012. Web. 21 Sep. 2013.
- Oloka-Onyango, J. "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa." *California Western Law Journal* 26.1 (1995): University of Minnesota Human Rights Library (www1.umn.edu). Web. Accessed 23 Sep. 2013.
- Organization of African Unity (OAU). *African Charter on Human and Peoples' Rights ("Banjul Charter")*. 27 June 1981. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at: www.refworld.org/docid/3ae6b3630.html [accessed 23 September 2013].
- Organization of African Unity. *African Charter on the Rights and Welfare of the Child*. 11 July 1990. CAB/LEG/24.9/49 (1990).
- Organization of African Unity. *Convention Governing the Specific Aspects of Refugee Problems in Africa* [OAU Convention]. 10 September 1969. 1001 U.N.T.S.
- Policy Document on Adult Basic Education and Training (2003).
- Polity.org.za. *The Reconstruction and Development Programme: A Policy Framework*. 1994. 2.1.2. Web. www.polity.org.za. Accessed 19 Sept. 2013.
- Prega Govender. "Schools told: no refunds for no-fee pupils." *Times Live*.

<http://www.timeslive.co.za>. Web. 5 Feb 2012.

Refugee Council of Australia. Language Support. www.refugeecouncil.org.au. Web. Accessed 24 Sep. 2013.

R v. Uxbridge Magistrates Court and Another, Ex parte Adimi [1999]. EWHC Admin 765 [2001] Q.B. 667. United Kingdom: High Court (England and Wales), 29 July 1999. Available at: <http://www.refworld.org/docid/3ae6b6b41c.html> [accessed 27 August 2013].

R. and Koshi Pitshou Mateta and others [2013]. EWCA Crim 1372. United Kingdom: Court of Appeal (England and Wales), 30 July 2013. Available at: <http://www.refworld.org/docid/5215e0214.html> [accessed 27 August 2013].

S v M (CCT 53/06) [2007] ZACC 18.

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3.

South African Qualifications Authority. Evaluation of Foreign Qualifications: Your Application. <http://www.saqqa.org.za>. Web. Accessed 25 Sep. 2013.

Sawahel, Wagdy. "Improving access to higher education for refugees." *University World News* 227. 20 Jun. 2012. Web. 24 Sep. 2013.

Scalabrini Centre of Cape Town. English School. www.scalabrini.org.za. Web. Accessed 24 Sep. 2013.

Scalabrini Centre of Cape Town. "Press Release: Judgment Reserved in Cape Town Refugee Office Closure." 4 September 2013. www.scalabrini.org.za. Web. Accessed 18 September 2013.

Sithole, Mabel D. *Child Refugee Rights in Cape Town: the right to access education*. Diss. University of Cape Town, 2012. Cape Town: UCT, 2012.

South Africa.info. "Education in South Africa." <http://www.southafrica.info>. 28 Feb 2013. Web. 19 Sep. 2013.

South African Government Services. Evaluate foreign qualifications: How much does it cost. www.services.gov.za. Accessed 25 Sep. 2013.

South African Refugees Act No. 130 of 1998.

South African Schools Act No. 84 of 1996.

Sterne, Anthony. "Health care for all? Asylum seekers, refugees and health care." *De Rebus* 42 (2013): 30-32.

Stone, Lee and Winterstein, Shani. *A Right or A Privilege? Access to Basic Education for Refugee and Asylum-seeker Children in South Africa*. Lawyers for Human Rights, 2003.

Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (HC Case No 73300/10) [2013].

UN Committee on Economic, Social and Cultural Rights (CESCR). *General Comment No. 11:*

- Plans of Action for Primary Education (Art. 14 of the Covenant)*. 10 May 1999. E/1992/23. Available at: <http://www.refworld.org/docid/4538838c0.html> [accessed 17 September 2013].
- UN General Assembly. *Convention on the Rights of the Child*. 20 November 1989, United Nations. Treaty Series vol. 1577. p. 3.
- UN General Assembly. *Convention Relating to the Status of Refugees*. United Nations: Treaty Series, vol. 189. 28 July 1951. p. 137.
- UN General Assembly. *International Covenant on Economic, Social and Cultural Rights*. United Nations Treaty Series vol. 993. 16 December 1966.
- UN General Assembly. *Universal Declaration of Human Rights*. 217 A (III). 10 December 1948.
- UNHCR. *UNHCR Note on the Principle of Non-Refoulement*. November 1997. Available at: <http://www.refworld.org/docid/438c6d972.html> [accessed 23 September 2013].
- UNHCR. *Identity Documents for Refugees*. 20 July 1984. EC/SCP/33. Available at: <http://www.refworld.org/docid/3ae68cce4.html> [accessed 26 August 2013].
- UNHCR. *Refugee Children: Guidelines on Protection and Care*. 1994. Available at: <http://www.refworld.org/docid/3ae6b3470.html> [accessed 28 August 2013].
- UNHCR. *UNHCR Policy on Refugee Children*. 6 August 1993. EC/SCP/82. Available at: <http://www.refworld.org/docid/3f9e6a534.html> [accessed 5 September 2013]. I(3).
- UNHCR. "2013 UNHCR country operations profile - South Africa." www.unhcr.org. Accessed 22 Sep. 2013.
- UNHCR. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 196 Protocol relating to the Status of Refugees. HCR/IP/4/Eng/REV.1. Reedited Geneva, January 1992. <http://www.unhcr.org> [accessed 02 September 2013].
- UNHCR. *UNHCR 2012-2016 Education Strategy*. Geneva, UNHCR: 2012. www.unhcr.org.
- United Nations Educational, Scientific and Cultural Organisation [UNESCO]. *Convention on Technical and Vocational Education*. 10 November 1989. Available at: <http://www.refworld.org/docid/404222e32.html> [accessed 17 September 2013].
- United Nations Treaty Collection. Chapter IV, no. 11. Convention on the Rights of the Child. www.treaties.un.org [accessed 2 September 2013].
- Unity for Tertiary Refugee Students (UTRS). History. UTRS, 2009. www.utrsafrica.co.za. Web. Accessed 26 Sep. 2013.
- University of Cape Town. Postgraduate degree funding. www.uct.ac.za. Web. Accessed 26 Sep. 2013.
- University of the Witwatersrand, Johannesburg. Scholarships. www.wits.ac.za. Web. Accessed 26 Sep. 2013.

Van Rhyn, Louise. "The business of education." *Mail & Guardian*. *Mail & Guardian*, 03 May 2012. Web. 18 Sep. 2013.

Washinyira, Tariro. "Nightmarishly difficult for some refugee children to go to school." *AllAfrica*. 23 Jan. 2013. Web. 24 Sep. 2013.

Watchenuka and Another v Minister of Home Affairs and Others (1486/02) [2002] ZAWCHC 64 (15 November 2002).

Western Cape Education. "R30 million paid out to help schools struggling with the cost of fee exemptions." South African Government Information. <http://www.info.gov.za>. Web. 12 Nov 2012. Accessed 23 May 2013.

White Paper on Education and Training No. 196 of 1995.

Wouters, C.W. *International Legal Standards for the Protection from Refoulement*. PhD Thesis. Leiden University, 2009.

University of Cape Town