



THE RIGHT TO EDUCATION OF ASYLUM SEEKER AND REFUGEE CHILDREN

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ACRONYMS

CRC- Convention on the Right of a Child

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

NGO- Non-Government Organisation

OAU- Organisation of African Union

SA- South Africa

SADC- Southern African Development Community

SAHRC- South African Human Rights Commission

SAPS- South African Police Service

SGB- School Governing Body

UCT- University of Cape Town

UN- United Nations

UNESCO- United Nations Educational, Scientific and Cultural Organisation

UNHCR- United Nations High Commissioner for Refugees

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ABSTRACT

This research reviews the application of the law on the right of refugee children to education and the challenges inhibiting this right. Radical changes in the legal framework protecting refugee children's right to education has occurred since South Africa became a democratic state in 1994. The enactment of international law into the 1994 Constitution contributed into the protection of various children right and insured equal access into the education system. However, refugee children have been prejudiced in the right to access education based on numerous challenges. The lack of access education for refugee children is an unconstitutional practice in schools rather than a legislative injustice.

This paper uses journal reports, newspaper articles, academic writing on both national and international perspective on the infringement of education rights on refugee children. The findings provide clarity on unconstitutional practices and the legal standpoint on such practices. The right to education constitutes a valuable foundation for integration. South Africa is obligated by both national and international law to provide immediate education to refugee children.

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1. CHAPTER ONE

1.1 INTRODUCTION

Refugees are people who flee their country of origin or place of habitual residence as a result of persecution or fear of persecution based on their race, religion, nationality or political opinion.¹ They are displaced from their usual environments and space of social interaction. They lose their sources of livelihood. Consequently, their children are forced to leave their schools and move into an entirely new society. This automatically makes them vulnerable and subject to various untoward conditions and treatments.²

Refugee children are in an even more precarious situation. They face the vulnerability of being a refugee and that of being a child. They are denied certain fundamental rights of life, including education, which give them the opportunity to rise above the crisis in which they have found themselves and be useful to themselves and to their community.

However, international and domestic law have established that refugees are entitled to certain rights irrespective of where they are physically present. A person is entitled to these rights not on the basis of their nationality but based on the common humanity shared by all human beings. One such right to which refugee children are entitled is the right to education.

International instruments such as the Universal Declaration of Human Rights of 1948,³ the United Nations Convention Relating to the Status of Refugees of 1951⁴ and the United Nations Convention on the Rights of a Child⁵ expressly provide for the right of everyone to access educational opportunities and have free elementary education. Every child is entitled to enjoy these rights irrespective of their status as a citizen or refugee.

These rights are also well provided for under the South African legal system. The South African Refugees Act⁶ and other laws and policies in the country provide for the extension of certain rights, including those under Chapter II of the Constitution of South Africa to

¹ Refugees Act 130 of 1998. at Section 3.

² United Nations High Commissioner for Refugees. Refugee Children: Guidelines on Protection and Care. Preface. Available at https://www.unicef.org/violencestudy/pdf/refugee_children_guidelines_on_protection_and_care.pdf. Accessed on 13 September 2017.

³ Universal Declaration of Human Rights 10 December 1948, 217 A (III).

⁴ Convention Relating to the Status of Refugees, 28 July 1951, UNTS vol 189.

⁵ Convention on the Rights of a Child, 20 November 1989, UNTS vol 1577.

⁶ The Refugees Act op cit note 1

refugees.⁷ Amongst other rights, Chapter II provides for the right to education. Thus, by extending this right, the law recognises that the right to education should not be limited by a person's status as a refugee.

South Africa is obligated to make education available and accessible through reasonable measures to every child within its borders.⁸ In recognition of this position, Nkabinde J held in the *Juma Masjid* Case that:

“...to understand the nature of the right to a basic education... this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education... may be limited only in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”⁹

The right to education must be prioritised regardless of the State's other budgetary commitments.¹⁰

The South African government is obliged to provide school environments that reflect: freedom, peace, tolerance, equality of sexes, and friendship among all people without regard to ethnicity, nationality or indigeneity.¹¹ This is supported by the Refugees Act which provides that an asylum seeker or a refugee is entitled to the same basic health services and basic primary education as the inhabitants of the Republic.¹² Refugees receive full protection of the Constitution upon their entrance into the Republic and the right to access education is guaranteed by South African law irrespective of documentation or the obtaining of status.¹³

Despite these statutory provisions, refugees are still being discriminated against in the South African educational system. Refugees' children continue to face difficulties gaining

⁷ The Constitution of the Republic of South Africa. 1996.

⁸ Ibid at Section 29(1) (b)

⁹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011). Para 37.

¹⁰ Ibid at 5.

¹¹ Comment 19. Annex IX General Comment No. 1 (2001) Article 29 (1): The Aims of Education. Article 29(1), Convention on the Rights of the Child.

¹² The Refugees Act op cit note 1 at section 27(g)

¹³ Refugees Act op cit note 1 at Section 27 (g)

admission in schools thus infringing upon their right to education. They are requested to meet several conditions, such as identity documentation and fees. Prior to gaining admission into schools, children have to provide these identity documents but are often unable to do so due to maladministration of the Department of Home Affairs. This not only amounts to an infringement of the right of refugee children to education and prevents their development of human personality and the strengthening of human rights¹⁴.

This work seeks to examine the extent to which international and domestic law on refugees rights protect the rights of a child to education. The purpose of this work is to show that any practice or policy which has the effect of denying refugee children access to education is incorrect. This is irrespective of whether the denial was based on: age, fees, lack of documentation, inability to comprehend the language of instruction at the school, etc.

1.2 STATEMENT OF THE PROBLEM

The right to education is a socio-economic right which is considered a positive right and imposes obligations on states.¹⁵ Unfortunately, the ability of refugee children in South Africa to enjoy this right is being violated despite the protection afforded to them under international and local statutory provisions. Factors such as fees, language, lack of documentation, limited placing, xenophobia, etc. often place barriers that deny the accessibility of education to refugees.

Khan, F has expressed the inefficiency of the government to educate or to hold those accountable in denying basic rights of refugees, including the right to access to education.

‘...South African government has done very little to educate South Africans about refugee documents and as a result refugees are severely prejudiced. Refugees thus struggle to access the most basic services such as health care, the placement of unaccompanied minors, accessing education...’¹⁶

¹⁴ Helen Suzman Foundation, Researcher Anele Mtswesi. Available at <http://hsf.org.za/resource-centre/hsf-briefs/the-right-to-basic-education>. [Accessed 01 September 2017].

¹⁵ F Khan & T Schreier *Refugee Law In South Africa* (2014) Juta & Co Ltd: Cape Town at 221.

¹⁶ F Khan ‘Local Integration: Lessons Learnt and the Way Forward’ Paper drafted for discussion on Local Integration: The Preferred Durable Solution, Geneva 26 September 2007. Available at www.refugeerights.uct.ac.za/downloads/...uct.ac.../local_intergration_sa_context.doc [accessed 18 August 2017].

International law recognises the absolute right to education. The International Covenant on Economic, Social and Cultural Rights (ICESCR) states that:¹⁷ ‘...a view to achieving the full realization of the right to education: (a) Primary education shall be compulsory and available free to all.’¹⁸ The right to access education is assured by Section 29(1)a of the Constitution,¹⁹ Section 5 of the South African Schools Act,²⁰ Art 22 of the United Nations Convention and Protocol Relating to the Status of Refugees²¹ and other international and domestic legislation in South Africa which are relevant to refugee children. By law of general application, all learners are to be admitted to school and not refused access or suspended due to non-payment of school fees.²² Unfortunately, the legislative provisions have not been able to fully mend the prejudice faced by refugee children in accessing education. South African public schools continue to engage in practices which often deny refugee children access to education. This research therefore asks whether these practices constitute a breach of the law (both domestic and international) on refugee children’s right to education. In answering this question, the following sub-questions will be addressed:

- Do the barriers on access to education of refugee children violate International Refugee Law and South African Law?
- What are the specific factors that hinder the right to access to education for refugee children?
- How can the barriers be overcome to eradicate the infringement and effects they have on the right to access education of refugee?

1.3 RESEARCH CONTEXT

Children not attending elementary and secondary education have become a global catastrophe.²³ There are about 6 million refugee children of elementary and secondary school age and 3.7 million of them are not in school. 1.75 million Refugee children are not in primary school and 1.95 million refugee adolescents are also not in secondary school. The

¹⁷ International Covenant on Economic, Social and Cultural Rights 16 December 1966, UNTS vol 993 at Article 13(2).

¹⁸ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS vol 999 at Article 13(2). Signed by South Africa on the 12th January 2015

¹⁹ Constitution at Section 29(1) a.

²⁰ South African Schools Act 84 of 1996 at Section 5.

²¹ Convention and Protocol Relating to the Status of Refugees at Article 22.

²² Sec 4 National Education Policy Act 27 of 1996; Sec 10(a) Admission Policy for Ordinary Public Schools.

²³ B Hewitt ‘When Children Don’t Attend School, Tragedy Compounds Tragedy’ available at http://www.huffingtonpost.com/up-for-school-/when-children-dont-attend_b_8656906.html accessed on 30 August 2017.

1.75 million refugee children in primary school and the 550,000 refugee adolescents in secondary education are in need of increased support to help them stay and succeed in school.²⁴

South Africa has the highest number of unresolved cases of asylum seekers in the world.²⁵ There are consequently a large number of refugee children on temporary asylum seeker permits which has hindered their right to education. South Africa grants a minimal number of refugee statuses with the Department of Home Affairs approving only 15.5% which is less than the 38% on the global scale.²⁶ In addition, refugees and asylum seekers face great difficulty in receiving assistance with regard to their documentation due the closure of refugee reception offices and the consequent non-renewal of asylum seeking permits.²⁷ The unavailability or the expiry of an asylum-seeking permit or refugee status document will adversely affect a child's right to access school.

Despite several attempts by researchers and scholars to highlight the importance of the right to education, it remains an area of uncertainty. The lack of communication between the Department of Education and the Department of Home Affairs has added to this uncertainty. This has proven prejudicial to refugee children. Refugee children are either denied access or expelled from schools in South Africa.²⁸

1.4 SIGNIFICANCE AND PURPOSE OF THE STUDY

Section 27(b) of the Refugees Act extends the protection offered under Chapter 2 of the Constitution to all refugees. It provides that a refugee '... enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act.' Chapter 2 of the Constitution

²⁴ F Grandi UN High Commissioner for Refugees. Available at <http://www.unhcr.org/introduction.html> accessed on 30 August 2017.

²⁵ R Stupart 'Is South Africa Home to More than a Million Asylum Seekers? The Numbers don't Add Up, available at <https://africacheck.org/reports/south-africa-home-million-refugees-numbers-dont-add/> accessed on 30 August 2016.

²⁶ UNHCR, 'South Africa's Flawed Asylum System' Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5187a9f74&skip=0&query=number%20of%20refugee&coi=ZAF> [accessed 14 August 2017].

²⁷ F Collins 'South Africa's Asylum Seeker Figures Questioned' available at <https://www.timeslive.co.za/news/2017-06-20-south-africas-asylum-seeker-figures-questioned/> accessed on 12 September 2017.

²⁸ N Khanyile 'Immigrant Pupils Fear Expulsion, available at <http://www.news24.com/SouthAfrica/News/immigrant-pupils-fear-expulsion-20170713> accessed on 14 August 2017].

provides the right to education and at Section 27 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. The right to education is considered a fundamental human right of every child. In addition to section 27(b) of the Constitution, the Refugees Act states clearly that refugees are within the spectrum of this right as provided by the Constitution. The Refugees Act provides that a refugee is “entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.”²⁹ Refugees should therefore be granted access to education in the same manner as all other inhabitants and citizens of South Africa. The South African Schools Act also maintains this position and prohibits discrimination in the determination of school admission.³⁰ Section 5 of the Schools Act provides that a public school must admit learners and serve their educational requirements without discriminating in any way.

The 2010 Lawyers for Human Rights (LHR) and the Consortium for Refugees and Migrants in South Africa (CORMSA) Report estimated that 24% refugee and asylum-seeking children of school-going age were not in school. The purpose of this study is thus to address the denial of access to education on the basis of one’s status as a refugee child.

1.5 RESEARCH METHODOLOGY

This thesis will analyse the provisions of international refugee law and South African law, as well as international treaties and conventions, in protecting the right to access education for refugee children. The thesis will be constructed through desktop research and academic texts and literature will be analysed in this respect.

Thus, the Convention and Protocol Relating to the Status of Refugees, the ICESCR, Convention on the Rights of the Child and various South African laws will be examined in discussing the right to access education under international law and domestic law. Various published articles and journals will also be consulted. In addition, national and international case-law will be reviewed.

²⁹ Refugees Act at Section 27.

³⁰ The South African Schools Act.

1.6 LITERATURE REVIEW

Many scholars have written comprehensively on the right to education as one of the most important human rights.³¹ In light of International Refugee law, it is clear that host states must protect the right of refugees and asylum seekers. Khan F and Schreier T in the “Refugee Law in South Africa” briefly discuss the factors hindering access to education in South Africa. The discussion is narrow as it only elaborates the refugee’s right to access education in general and the barriers to access education. Foster M in “International Refugee Law and Socio-Economic Rights” states that the deprivation of education is a reinforcement of subjection to various human right violations, not only the right to education.”³² However, she only focuses on the illegality of denying the right to access education.³³

Hathaway J and Cusick AK in ‘Refugee Rights Are Not Negotiable’ writes that the infringement of the right to education is a disability to integration and socio-economic development faced by refugees.³⁴ The research explores various human rights of refugees in hosting states, however very little is discussed on the right and access to education. The work by Khan, F., ‘Local Integration: Lesson learnt and the way forward’, is relied upon in discussing the importance of refugee integration in society with education as a cornerstone for this integration.

Spreen, CA and Vally, S. discusses the benefits and challenges in obtaining education in South Africa in ‘Monitoring the right to education for refugees, migrants and asylum seekers’, the review not only evaluates the right but analyses the legal obligations of states and the usefulness of holding the host states accountable.³⁵ This review is vital and critical for this research and writing.

International conventions and South African legislation will also be analysed. The international treaties, such as the 1990 UN Convention on the Right of a Child, United

³¹ D Dass et al. ‘The socio-economic rights of refugees and asylum seekers in South Africa’ in F Khan & T Schreier (eds) *Refugee Law in South Africa* (2014) Juta & Co Ltd: Cape Town at 226.

³² M Foster in ‘*International Refugee Law and Socio-Economic Rights*’ (2009) Cambridge Studies in International and Comparative Law at 215-216.

³³ Ibid at para 3. The Economic Committee has emphasised that the obligation ‘to provide primary education for all’ is an immediate duty of all states parties.

³⁴ J C Hathaway & A K Cusick ‘*Refugee Rights Are Not Negotiable*’ (2000) University of Michigan Law School. (2000). 495.

³⁵ CA Spreen & S Vally (2012) ‘Monitoring the Right to Education for Refugees, Migrants and Asylum Seekers’ *Southern African Review of Education*, 18(2): 71-89.

Nations Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education (1960), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1981), and Convention and Protocol Relating to the Status of Refugees will be examined. Some of the domestic legislations to be examined include the Constitution of the Republic of South Africa, the South African Schools Act, the Refugees Act, and various other international and national laws, policies, documents, handbooks and articles.

1.7 CHAPTER SYNOPSIS

Chapter One of this thesis outlines the central argument of this research. It also provides a definition of key terms employed in the discussion. It examines the definition of and the criteria for the determination of refugee status under international law and national law.

Chapter Two analyses the provisions of refugee law in South Africa. The main sources of law relied upon and discussed extensively are the Constitution, the Refugees Act and the South African Schools Act. This chapter also examines various case law on the rights of refugee children towards education. The provisions of each of these sources of law lead to the inevitable conclusion that the denial of refugee children's admission to schools due to a lack of documentation amounts to a breach of the law.

Chapter Three draws the arguments together and takes a closer look at this unconstitutional policy being adopted by schools in order to deny refugee children access to education. This chapter looks at the right to education within the broader scope of integration and other socio-economic rights provided for refugees. This essay concludes with recommendations and the way forward in order to ensure that the rights of refugees are better protected. As stated earlier, South Africa is a signatory to the UN Convention Relating to the Status of Refugees and is therefore bound by both treaty and customary international laws on the rights of refugees and specifically, the rights of refugee children to education. This discussion shall form the central enquiry of chapter four of this work. This chapter concludes that the act of denying refugee children access to education is not only a breach of national law, but also a breach of international obligations to which South Africa is bound—as a signatory to the Refugee Convention.

2. CHAPTER TWO

2.1 REFUGEE RIGHTS UNDER INTERNATIONAL LAW

2.1.1 INTRODUCTION

Refugees and refugee crisis have been a part of man's history for a long time. This has led members of the international community over time to create a number of multilateral and bilateral instruments regulating the determination of refugee status and the rights accruing to such refugees. Prominent among these international legal instruments is the 1951 Convention Relating to the Status of Refugees (Refugee Convention). This convention provides for the definition of a refugee and creates certain rights which all refugees are entitled to benefit from. Among these rights is the right to education provided for in article 22 of the Refugee Convention. It provides that contracting parties shall afford the same treatment to refugees with respect to elementary education as is accorded to nationals. In other words, refugees are entitled to elementary education in the same manner as nationals of the country of refuge are entitled. This provision thus places an obligation on member states of the Refugee Convention not to discriminate against or deny refugees access to elementary education.

This chapter traces the history of refugee protection under international law and examines the various stages of development and progress which eventually led to the establishment of the 1951 Refugee Convention. The definition of a refugee under the Refugee Convention is also discussed and the necessary criterion to be met before a person is qualified as a refugee under the Convention. This chapter goes further to examine the rights of refugees under the Refugee Convention, with particular focus on the right to education. This right is discussed in light of the obligation of states to ensure that refugees within their borders are not unreasonably denied access to education.

2.2 HISTORY OF REFUGEE PROTECTION

Refugee protection has been a part of the history of nations for as far back as three thousand five hundred years ago.³⁶ This protection usually came as part of agreements between the sovereigns of states on how to handle the prisoners of war and emigrants from each state.³⁷ States did not regard the responsibility for and the accommodation of refugees as an

³⁶ United Nations High Commissioner for Refugee, *Flowing Across Borders*. Available at <http://www.unhcr.org/pages/49c3646c125.html> accessed 23/3/2017.

³⁷ Available at <https://en.wikipedia.org/wiki/Refugee> accessed 2/6/2017.

unwelcome situation.³⁸ Refugees were welcome and their arrival was seen as a contribution to enhancing the power of the host state and its economy.³⁹ State governments sought to influence and facilitate immigration into their territories while ensuring that emigration was kept to a minimum.⁴⁰

However, it was after the First World War that an awareness of the international responsibility to protect refugees began.⁴¹ During this period, the High Commissioner for Russian refugees and several other institutions were established to assist the Commissioner in ensuring that the right of refugees was protected.⁴² Institutions like the Nansen International Office for Refugees, the Office of the High Commissioner for Refugees coming from Germany, the Office of the High Commissioner of the League of Nations for Refugees and the Intergovernmental Committee on Refugees all assisted in carrying out this responsibility.⁴³ The refugee protection was however restricted to a limited category of individuals.⁴⁴ Gradually, the class of people protected became extended and began to cover more regions and more categories of people fleeing their country.⁴⁵ Eventually the international law regime relating to refugees culminated in the establishment of the United Nations Convention Relating to the Status of Refugees in 1951.⁴⁶

2.3 A REFUGEE UNDER THE REFUGEE CONVENTION

The Convention Relating to the Status of Refugees represents a commitment by states to the protection of the rights of refugees. It however firstly identifies whom it considers to be a refugee.

³⁸ J Hathaway & M Foster (2014) *The Law of Refugee Status*, Cambridge University Press: Cambridge p 1.

³⁹ Ibid.

⁴⁰ M Marrus (1985) *The Unwanted: European Refugees in the Twentieth Century*, Temple University Press: Philadelphia, PA pp 6-7.

⁴¹ E Feller (2001) "The Evolution of the International Refugee Protection Regime" *Journal of Law & Policy* Vol 5 pp 129-139 at 130.

⁴² G Jaeger (2001) 'On the History of the International Protection of Refugees' *International Review of the Red Cross*, Vol 83 pp 727-737 at 728.

⁴³ Ibid.

⁴⁴ Feller, op cit. note 43.

⁴⁵ Jaeger, op cit. note 44.

⁴⁶ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 8 July 2017]

The term ‘refugee’ under its everyday English usage conveys a variety of meanings, from a person running away from something,⁴⁷ to one who leaves his country due to expulsion,⁴⁸ to one who leaves his country in search of refuge, or one who is forced to flee his or her country because of persecution, war, or violence.⁴⁹ These usages convey a wider meaning than its normal usage in refugee law.⁵⁰ A refugee is defined by the Convention on the Status of Refugees as a person who:

‘... owing to 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 or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’⁵¹

This definition initially included a date limit which has been expunged under the 1967 Protocol to the Convention on the Status of Refugees.⁵² The Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa adopts the UN Refugee Convention definition and goes further to include:

‘... 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.’⁵³

The OAU Convention definition provides a wider definition of who a refugee is and enlarges the scope of protection to include more people than are included in the UN Refugee

⁴⁷ Refugee, *Thesaurus Dictionary*. Available at <http://www.thesaurus.com/browse/refugee> [accessed 24 March 2017].

⁴⁸ Refugee, *Encyclopedia*. Available at <http://encyclopedia2.thefreedictionary.com/refugee> [accessed 24 March 2017].

⁴⁹ Refugee, Available at <http://www.unrefugees.org/what-is-a-refugee/> [accessed 24 March 2017].

⁵⁰ G Goodwin-Gill (1996) *The Refugee in International Law*, Oxford University Press: Oxford p 3

⁵¹ UN Refugee Convention Relating to the Status of Refugees at Art 1(2). adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137 at Art. 1 (A)(2).

⁵² Protocol to the UN Refugee Convention at Art 1 (2).

⁵³ Art 1(2)) of the OAU Refugee Convention adopted on 10 September 1969 by the Assembly of Heads of State and Government CAB/LEG/24.3.

Convention. The fact that the OAU Convention definition extends beyond the UN Refugee Convention points to the need for a review of the Refugee Convention's definition. This will help include those who are in need of protection but remain unprotected due to the restrictive nature of the definition provided by the UN Refugee Convention. However, a critique of the definition of a refugee under the UN Refugee Convention is not within our scope of this thesis. The definition of a refugee under the UN Refugee Convention connotes that such a person must meet the following criteria:

2.3.1 HE MUST BE OUTSIDE HIS COUNTRY OF ORIGIN OR HABITUAL RESIDENCE

A refugee under the Convention must be a person who is outside his country of origin or habitual residence. A person is usually not regarded as a refugee for as long as he remains within his state. Such a person would make an application for asylum after he has left the country from which he is fleeing.⁵⁴ Asylum is only possible for a person who is outside the territory of his country.⁵⁵ He must have come within physical access of international borders which makes it possible for him to access the protection offered under the Charter. The crossing of an international border is one of the primary distinctions between a refugee and an internally displaced person.⁵⁶

2.3.2 WELL FOUNDED FEAR

A refugee is not merely one who has fled his country of nationality or of habitual residence. The flight must have been based on a well-founded fear of persecution. The fear of persecution is the distinguishing and defining factor of who is to be regarded as a refugee.⁵⁷ There are various views regarding what constitutes a well-founded fear of persecution.⁵⁸ Two consensuses can be derived from the various positions: First, that the refugee must be in 'terror of persecution' and secondly that this fear of terror is founded upon information.⁵⁹ In other words, for a determination regarding a well-founded fear of persecution to be made, the

⁵⁴ A Shacknove (1985) 'Who Is A Refugee', *Ethics*, Vol. 95(2) pp 274-284.

⁵⁵ Hathaway & Foster *op.cit.* p 17.

⁵⁶ B Chimni (2000) *International Refugee Law; A Reader*, Sage Publication: New Delhi p 390.

⁵⁷ *Ibid.* p 91.

⁵⁸ F Khan & T Schreier (2014) *Refugee Law In South Africa*, JUTA: Cape Town, p 43.

⁵⁹ Hathaway and Foster *op.cit.* p 91.

person involved must have a terror of persecution and this feeling of terror must be based upon evidence. There must be a factual basis for the fear which is held by the refugee.⁶⁰

2.3.3 GROUNDS FOR FLIGHT

Furthermore, the terror feared must be based upon the grounds stated in the UN Refugee Convention. These grounds include race, religion, nationality and/or membership of a particular social group or political opinion.⁶¹ A fear not founded upon one or more of these factors would not bring a person within the definition of a refugee as recognised under the UN Refugee Convention. According to Hathaway, these factors are directed towards fear arising based on fundamental socio-political disfranchisement.⁶² Thus, the UN Refugee Convention seeks to protect those whose fundamental rights have been breached and who have become deprived of their basic human rights.

2.3.4 CAUSAL LINK

There must be a causal link between the fear of persecution and the grounds for flight. The refugee must have fled his country due to those fears. If the fear was entertained but was not the ground for fleeing, then there would be no basis for a refugee claim. The flight must be a consequence of the fear of persecution entertained by the person in question. The phrase ‘by reasons of’ as used in the definition of a refugee in the UN Refugee Convention implies that there must be a link between the fear and one of the grounds listed in the section.⁶³ The fear of persecution and subsequent flight could be based on more than one of the listed grounds, in which case, the causal connection would be founded upon each of those grounds.⁶⁴

In the case of a person with more than one nationality, ‘the country of his nationality’ shall mean each of the countries of which he is a national. Such a person cannot claim refugee protection until he has availed himself of the protection offered by each of these countries. Only when all of these countries present him with a fear of persecution based on one or more of the Convention grounds can he then claim refugee status under the UN Refugee

⁶⁰ For further readings on the Subjective-objective debate; Hathaway pp. 91-181.

⁶¹ UN Refugee Convention at Art 1(2).

⁶² Hathaway and Foster *op.cit.* p 391.

⁶³ *Ibid.* p 363.

⁶⁴ Para 4 of the Michigan Guidelines on Nexus to a Convention Ground Available at <http://www.refworld.org/docid/3dca7b439.html> [accessed 29 March, 2016]; Hathaway and Foster *op.cit.* p 368.

Convention. It must be stated that South Africa is a signatory to the UN Refugee Convention and is thus bound by the provisions of these Convention.⁶⁵

In defining who a refugee is, under the Refugees Act of South Africa, the Act adopted the definition of the Refugee Convention and went further to include the dependants of refugees in this definition.⁶⁶ This implies that the rights and protection afforded to a refugee also applies to their dependants.

2.4 INTERNATIONAL PROTECTION FOR REFUGEES

The international community saw the need to establish a back up to the protection one would ordinarily expect from his state.⁶⁷ Refugee protection was seen as a means to provide protection to people who have had to leave their state because of certain social and political events in their states.⁶⁸ As Hathaway puts it, the primary concern of refugee law is to provide ‘a remedy to a fundamental breakdown in the relationship between an individual and her state.’⁶⁹

Thus, the goal of the UN Refugee Convention was to provide refuge for those forced to leave their country of origin or of habitual residence because their human rights can no longer be guaranteed in that country. The UN Refugee Convention thus creates a new home for those fleeing their country of nationality or habitual residence.⁷⁰ In *Horvath v. Secretary of State for the Home Department*, the House of Lords put it succinctly when it held that:

‘[T]he general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community’.⁷¹

Thus, a system for safeguarding the protection of people who have been compelled to leave their country of origin developed.⁷² It is therefore imperative that every interpretation or discussion of the UN Refugee Convention must seek to protect refugees and offer them protection has aimed at by the Convention.

⁶⁵ Preamble to the Refugee Act.

⁶⁶ Refugee Act at Section 3.

⁶⁷ *Ward v. Canada (Attorney-General)*. [1993] 2SCR 689 (Can. SC, Jun.30, 1993), at 709.

⁶⁸ Hathaway and Foster *op. cit.* P. 4.

⁶⁹ *Ibid* at 1.

⁷⁰ *Ibid*.

⁷¹ [2001] 1 AC 489 (UKHL, Jul. 6, 2000) at 495.

⁷² Hathaway and Foster p 288.

2.5 RIGHTS TO EDUCATION IN INTERNATIONAL REFUGEE LAW

The Convention Relating to the Status of Refugees predates other important human rights convention like the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷³ and the International Covenant on Civil and Political Rights (ICCPR).⁷⁴ According to article 5 of the Refugee Convention ‘nothing shall be deemed to impair any rights and benefits granted by a contracting state to refugees apart from this convention’ clearly indicating that refugees are entitled to rights in subsequent human rights documents.

The importance of education has been widely acknowledged and it is recognised that education plays a particularly significant role for children whose lives are affected by war, violence, displacement and the general disruption of normal life.⁷⁵ It offers a form of physical protection in a safe learning space away from the dangers of war and persecution, it also provides psychosocial protection in the form of interaction with other classmates and teachers with opportunities to be creative and exchange concerns and ideas.⁷⁶ The education of refugees gives them the opportunity to maximize their skills, rebuild their lives and enhance long term peace and stability both in their host country and their country of origin.⁷⁷ Education also helps to improve the mental stability of refugee children by providing an environment and structure that generates in them a sense of normalcy despite the fact that they are in an unfamiliar country and had left their home country due to crisis.⁷⁸ The overall benefit of education is also demonstrated in integration, as they are better suited to become part of a community by having increased access to job opportunities and social enhancement.⁷⁹

⁷³ 1966.

⁷⁴ 1966.

⁷⁵ J Kirk & R Winthrop (2007) ‘Promoting Quality Education in Refugee Contexts: Supporting Teacher Development in Northern Ethiopia’ 53 *International Review of Education* at 715.

⁷⁶ Ibid.

⁷⁷ J O'Rourke (2014) ‘Education for Syrian Refugees: The Failure of Second-Generation Human Rights during Extraordinary Crisis’ 78 *Alb. L. Rev.* 711 at 725.

⁷⁸ Ibid.

⁷⁹ Ibid.

Education is recognised as a basic right which every child is entitled to.⁸⁰ The former UN Special Rapporteur on the Right to Education stated in her report that ‘women, men, boys and girls of all ages and backgrounds- whether migrants, refugees, asylum-seekers, stateless persons, returnees or internally displaced persons have the right to education.’⁸¹

International law has played a very prominent role in advancing the rights of refugee children through various human rights treaties.⁸² This rights regime provided under international law provides legal protection that pre-dates the legal protection offered in some societies and offers a platform from which advocates of child rights can promote the rights of children.⁸³ Foremost among these treaties is the 1924 Declaration on the Rights of the Child which was in response to the challenges faced by children as a consequence of war.⁸⁴ The need to ensure the protection of children who are too often a major casualty of war has been extensively provided for in the Convention Relating to the Status of Refugees and the Convention on the Rights of the Child. Some international institutions such as the United Nations General Assembly, the United Nations Committee on the Rights of the Child and the United Nations High Commissioner for Refugees have also been established, with the responsibility to ensure that the protection offered by the various treaties are enjoyed by refugee children.⁸⁵

This human rights legal framework provides for the sustainability of the right to education.⁸⁶ At the core of this framework is the Universal Declaration on Human Rights which provides that ‘everyone has the right to education... and education shall be free, at least in the elementary and fundamental stages.’⁸⁷ Although the Universal Declaration on Human Rights is a declaration and it is *stricto sensu* non-binding, it was stated in 1986 at the United Nations International Conference on Human Rights that the provisions of the declaration constitute

⁸⁰ Ibid; United Nations High Commissioner for Refugees ‘Educating Refugees Around the World’ available at <http://unhcr.org>. (accessed 21 August 2017)

⁸¹ Report of the UN Special Rapporteur on the Right to Education: the Right to Education of Migrants, Refugees and Asylum-seekers 2010 available at <http://www.right-to-education.org/issue-page/marginalised-groups/migrants-refugees-and-internally-displaced-persons> (accessed 19 August 2017).

⁸² Examples include the ICESCR, ICCPR UNCAT, the UN Refugee Convention.

⁸³ B A Simmons (2009) *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press 307.

⁸⁴ Geneva Declaration on the Rights of the Child (adopted 26 September 1924) [1924] LN OJ Spec. Supp. 21, 43 (1924 Declaration).

⁸⁵ M Jason Pobjoy (2013) ‘A child’s right framework for assessing the status of refugee children’ in Satvinder Singh Juss & Colin Harvey (eds.) *Contemporary Issues in Refugee Law* Edward Elgar: Northampton 91-92.

⁸⁶ UNESCO 2017 ‘Protecting the right to education for refugees’ Paris, United Nations Educational, Scientific and Cultural Organization p 14.

⁸⁷ Universal Declaration on Human Rights at Art 26.

‘an obligation for the members of the international community.’⁸⁸ Furthermore, the Universal Declaration on Human Rights is now considered as part of customary international law and as such binding on all states.

The Refugee Convention is a direct source of protection for refugees. It provides for socio and economic rights which all contracting parties to the Refugee Convention must guarantee for refugees within their territory.⁸⁹ The right to basic education is stated at Art 22 of the Refugee Convention and provides that:

1. The contracting states shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.
2. The contracting states shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

This shows a clear commitment by contracting parties to provide at least the most basic forms of education to refugees and their children.⁹⁰ It seeks to ensure that refugees have access to education on a level of equality with the nationals of the state of refugee.⁹¹ This is unlike the earlier Refugee Conventions of 1933 and 1938 that only provided that refugees enjoy access to education in the manner enjoyed by other foreigners in the state.⁹² The Refugee Convention of 1951 thus provides that basic elementary education be provided for all without qualification and irrespective of their status as refugees. Most importantly, there should be no differentiation between lawful and unlawful refugees in the provision of education.⁹³ As a

⁸⁸ Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 2 (Rev. 1). The International Bill of Human Rights, Geneva, June 1996. Cited in: Undocumented Children in Europe: Invisible Victims of Immigration Restrictions. PICUM (Platform for International Cooperation on Undocumented Migrants), 2008, p 12.

⁸⁹ J Hathaway (2005) *The Rights of Refugees Under International Law*. Cambridge: Cambridge University Press 594.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² United Nations Department of Social Affairs, “A Study of Statelessness,” UN Doc. E/1112, Feb. 1, 1949 (United Nations, “Statelessness”) at 58.

⁹³ Rosa de Costa (2006) ‘Rights of Refugees in the Context of Integration: Legal Standards and Recommendations’ in UNHCR, *Legal and Protection Policy Research Series* Geneva 80.

minimum standard, the Refugee Convention maintains that all foreigners should enjoy the same standard of education.⁹⁴

However, the Refugee Convention does not make any specific provision with regards to what constitutes elementary education and the specifics are usually left to each state to determine.⁹⁵ Elementary education differs from one country to another but would usually range between four to eight years.⁹⁶ The UNHCR regards standard primary education as covering grades 1 to 8 implying eight years of primary school education.⁹⁷ At any rate, the consensus among commentators and jurists agree that the minimum core content of the right to education include: the right to compulsory and free primary education; the free choice of education without interference by the state or a third party; and the right to education in the language of one's choice.⁹⁸ The treaty thus recognises the right to education as accruing to everyone and not only nationals or those who have been granted asylum status.

The ICESCR went further to provide that state parties provide compulsory primary education to all children and at zero cost. This education must be available and accessible to all children with no limit with respect to a child's nationality.⁹⁹ The ICESCR goes beyond what exists under the Refugee Convention. In Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), provides that:

‘The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.’

The ICESCR mandates all state parties to ensure that there is national plan for implementing

⁹⁴ G S Goodwin-Gill (1996) *The Refugee in International Law*, 2nd ed. Oxford: Clarendon Press, at 298-299.

⁹⁵ Robinson (1953) *Convention relating to the Status of Refugees: Its History, Contents and Interpretation*. Re-published by UNHCR, Geneva, 1997 at 103.

⁹⁶ Rosa de Costa *op. cit.*

⁹⁷ UNHCR, *Education Field Guidelines*, Geneva, February 2003, p. 21 (para. 3.1.1).

⁹⁸ F Coomans (1995) 'Clarifying the Core Elements of the Right to Education' in F. Coomans & F. van Hoof, (eds.), *The Right to Complain about Economic, Social and Cultural Rights* (1995) at 17-19.

⁹⁹ ICESCR at Art 13(2) (b).

this provision in their countries.¹⁰⁰ On its part, the Convention on the Rights of a Child (CRC) provides that state parties recognise the right of a child to education and this right shall be realised by all children on the basis of equal opportunity.¹⁰¹ The CRC places an obligation on all state parties to:

- a) make primary education compulsory and available free to all;
- b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- c) make higher education accessible to all on the basis of capacity by every appropriate means;
- d) make educational and vocational information and guidance available and accessible to all children; and
- e) take measures to encourage regular attendance at schools and the reduction of drop-out rates.

Article 28(3) of the Convention on the Right of a Child (CRC) specifically provides for international co-operation in matters relating to education in order to ensure the eradication of ignorance and illiteracy across the world. This provision emphasises the importance of education and maintains that the actualisation of this right by a child should not be limited by the child's nationality or territorial boundaries. Article 2 of the Convention on the Right of a Child (CRC) emphatically states that the rights set forth in the convention shall be enjoyed by every child with no regard to the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Thus, ensuring that all state parties guarantee the right of education under Article 28 to every child irrespective of such a child's nationality or legal status.

The Convention against Discrimination in Education¹⁰² further affirms that the principle of non-discrimination and equality applies to the right to education. This Convention prohibits any discrimination on whatsoever ground in order to make education truly accessible to all

¹⁰⁰ ICESCR at Art 14.

¹⁰¹ CRC at Art 28.

¹⁰² The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 14 November to 15 December 1960.

including refugee children.¹⁰³

It is thus evident that although legal differentiations between nationals and non-nationals may be permissible under certain international instruments and with respect to certain rights, these differentiations do not apply to the right to education.¹⁰⁴ Asylum seekers should be accorded their full rights under these instruments the same way as nationals and permanent residents.¹⁰⁵ The international legal framework shows that the right to public education is distinct from other rights enjoyed by refugees.¹⁰⁶ Unlike other social and economic rights which remain unclear whether they apply to only refugees that have been granted asylum status or to all refugees irrespective of their status, the right to education applies to all refugees irrespective of their legal status.¹⁰⁷ The enjoyment of the right to education is not dependent on the ability of a person to live in their own country and to so limit such rights would be to violate a person's fundamental human rights.¹⁰⁸ These treaties are clear in their language. The language used is inclusive showing that it applies to everyone and it is the right of every child to access free primary education wherever the child is and irrespective of his legal status in that state.¹⁰⁹ This is not to be limited by any national policy or by the fact that a refugee child does not have the necessary documentation. The right to education is absolute and should not be limited in any way whatsoever.

2.6 ACCESS TO EDUCATION

Access to education should not be limited and there shall be no impediment to the ability of refugees to have physical access to learning materials, schools and any other learning environment.¹¹⁰ However, because gaining physical access to learning facilities does not necessarily mean that a learner will engage fully in the educational programme or achieve the required measure of success, it is important that the kind of education given to refugee

¹⁰³ 1960 UNESCO Convention against Discrimination in Education at Art 1 (1).

¹⁰⁴ Rosa de Costa, *op. cit.* 81.

¹⁰⁵ *Ibid.*

¹⁰⁶ O'Rourke *op. cit.* at 728.

¹⁰⁷ Ryszard Cholewinski (2000) 'Economic and Social Rights of Refugees and Asylum Seekers in Europe', 14 *Geo. Immigr. L.J.* 709 at 711; *Ibid.*

¹⁰⁸ Luke T Lee (1986) 'The Right to Compensation: Refugees and Countries of Asylum' 80 *Am. J. Int'l L.* 532 at 539.

¹⁰⁹ O'Rourke, *op. cit.* at 728.

¹¹⁰ Su-Ann Oh, & Marc van der Stouwe, (2008) 'Education, Diversity, and Inclusion in Burmese Refugee Camps in Thailand' 52(4) *Comparative Education Review* 589 at 596.

children be suited to the specific needs of these children.¹¹¹ This will ensure the proper integration of these refugee children into society and ensure that they are not disadvantaged in comparison with other children in the state.¹¹² Such education must achieve the objectives of education as stated in article 13 of the ICESCR which is ‘...full development of individual personality and effective participation in society.’¹¹³ Thus, not only must a host state ensure equal access to education for all children irrespective of nationality and legal status, it must also ensure that it takes any educational difficulties suffered by refugee children into cognisance in providing for their education and make sure that the education provided to them does not disadvantage them from getting a job or going on to higher education.¹¹⁴

2.7 EDUCATION AS A SECOND GENERATION RIGHT UNDER INTERNATIONAL LAW AND ITS IMPLICATIONS FOR REFUGEE CHILDREN

International law classifies certain rights as first-generation and some as second-generation rights. First-generation rights are also referred to as negative rights because they prohibit the state from interfering in the right of the individual to enjoy certain liberties that are necessary for participating in political and civil society. Second-generation rights on the other hand are called positive rights and they give the individual the right to something rather than the right against something.¹¹⁵ Second-generation rights include social, economic and cultural rights, such as the right to economic security, right to health care and the right to education.¹¹⁶

Second-generation rights are less valued in comparison with first-generation rights and its violations are often left unattended to by the responsible states.¹¹⁷ Thus even though many states are signatories to the human rights instruments enumerated above, the realisation of these rights remain merely aspirational in many states both for nationals and non-nationals.¹¹⁸ This explains the use of the phrase ‘progressive realisation’ in the ICESCR. Thus, even though South Africa is a signatory to the relevant treaties, it seems that the provision of education is to be progressively achieved. However, progressive realisation of the provision of education is distinct from the exclusion of a group of people from schools. Thus, while the

¹¹¹ Ibid.

¹¹² Cholewinski, *op. cit.* at 16.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Pamela Goldberg (1997) ‘Women, Health and Human Rights’, 9 *Pace International Law Review* 271 at 278.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Comm. on Economic, Social and Cultural Rights, Rep. on its 5th Sess., Nov. 26-Dec. 14, 1990, annex III, U.N. Doc. E/1991/23 (1991) (describing the obligations of state parties to article 2 of ICESCR).

treaty encourages progressive realisation, it does not state that any group should be excluded; all groups must be given an equal opportunity to the existing schools.

2.8 CONCLUSION

The regulation of refugee flows and the need for protection has evolved from what it used to be 3500 years ago. The Refugee Convention establishes that for a person to be a refugee, he must have fled his country of origin or of habitual residence due to persecution or fear of persecution and this persecution must be as a result of his membership of a particular race, religion, nationality, social group or political opinion.

Once a person falls into this category, such a person becomes a refugee. The official declaration or documentation as a refugee recognises the refugee status but does not create it. A person is thus a refugee irrespective of whether or not he has been granted official refugee status by the host state and he is entitled to the protection and rights offered by the Convention to refugees. In addition to defining a Refugee it affords a number of rights necessary for a meaningful existence in host states. One of such rights is the right to education under article 22 of the Refugee Convention. A refugee enjoys this right irrespective of documentation and a refugee should be given access to education even where he is yet to get the official documentation as a refugee. This position is further supported by other treaties such as the Convention on the Rights of the Child, the Universal Declaration on Human Rights, the International Convention on Economic, Social and Cultural Rights and it is generally recognized that the condition of a child as a refugee should not prejudice his access to education in anyway. South Africa as a state is bound by these provisions as a signatory to both the refugee Convention and the Convention on the Rights of a Child.

3. CHAPTER THREE

3.1 INTRODUCTION

A refugee has a right to basic education like every other child and the child's status as a refugee or an asylum-seeker, does not deprive the child of his or her right to education. This is recognised and well established both under international law and under South African law. It is thus clear that any practice or subsequent policy which creates a barrier to a refugee to access education would be illegal. This chapter seeks to enumerate certain practices that have stood in the way of refugees and denied them of access to education. It establishes that these practices are illegal given the express provisions of international treaties to which South Africa is a signatory. Not only are these practices illegal under international law, they also amount to a contravention of the South African Constitution, the Refugees Act and the South African Schools Act.

3.2 RIGHT TO EDUCATION

As stated above, the right to education has been recognised by international law since the Universal Declaration of Human Rights (UDHR) in 1948. Article 26 of the UDHR provides that 'education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.'¹¹⁹ This provision establishes the necessity of free accessible education to all, regardless of their racial, religious or legal stand point in a state. In the *Brown v Board of Education of Topeka*,¹²⁰ the Supreme Court in the United States of America stated that:

‘...education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in

¹¹⁹ Universal Declaration of Human Rights 10 December 1948, 217 A (III) at Art 26. Guiding Principles on Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms.

¹²⁰ *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954).

awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹²¹

The case ruled out the unconstitutionality of denial to access education based on race, and emphasised the enrichment of a state through education. Education is considered a realisation of the socio-economic advantage of a state because various human rights are interconnected to the right to education such as the right to work. Furthermore, it is evident that the right to health and because healthy living can only be exercised in a meaningful manner if a minimum of education is attained.¹²²

In South Africa, the government is constitutionally obligated to provide education within the ambit of section 29 of the Constitution.¹²³ Justice Kollapen has described the right to education as an element of freeing and unlocking the potential of each member of the society.¹²⁴ Accessibility of education is propelled by the promotion of equality in opportunities and treatment and ensuring that there is free basic education.¹²⁵ The history of the right to education in South Africa since its independence in 1994 has been hampered by various obstacles ranging from various forms of violence to sexual abuse in public schools.¹²⁶

Refugee children are removed from schools for various reasons including xenophobia, bullying, difficulty with transportation, drugs and affordability of fees. This too is a denial of the right to education because the right to access education is not just limited to the entry of school but includes the continuation of education until completion as contemplated by section 29.

¹²¹ *Ibid op cit* at 493.

¹²² Klaus Dieter Beiter (2005) *The Protection of the Right to Education by International Law*. Leiden: Martinus Nijhoff, 29.

¹²³ "Everyone has the right to; (a) To basic education, including adult basic education (b) To further education which the State through reasonable measures must make progressively available and accessible."

¹²⁴ *Section 27 and others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012). JUDGMENT. Para 3.

¹²⁵ UNESCO Convention against Discrimination in Education (CDE) at Art 4(a). Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation on 14 December 1960.

¹²⁶ Eric Berger (2003) 'The Right to Education under the South African Constitution', *Columbia Law Review* Vol. 103 at 622.

In addition to section 29, the *White paper on Education and Training* in March 1994 included international law provisions on free and equal education which recognises various cultures, religion and values democracy in education.¹²⁷

The right to access education is therefore of paramount importance. It promotes integration, job opportunities and self-reliance. Refugee children have an opportunity to actively participate in the future of the socio-economic growth of the state if they are given access to education. Despite the protection offered this vulnerable group of people under international law and under the South African Constitution and Refugees Act, refugees and asylum seekers' right to education are often infringed in South Africa. Government sector and institutions tasked with the responsibility to uphold the right to access education often engage in practices and formulate policies which in effect keep refugees out of the educational institutions. These practices and policies are outside the provisions of both domestic and international law and have no legal justification.

3.3 EDUCATION AS AN INTERNATIONAL HUMAN RIGHT FOR REFUGEES

The intention of the United Nations High Commissioner for Refugees has always been to ensure a setting for refugees capable of providing quality education similar to those of nationals by advocating that ministries of government share the responsibility in education matters relating to refugees.¹²⁸ However, even when states have the necessary legal documents and instruments advocating compulsory education, developing countries often face difficulties with providing quality education for citizens due to their poor economic situation. The law on the right to education therefore becomes redundant for most refugees and asylum seekers as a result of difficulty of accessing schools in these countries. According to the UNHCR the obstacles encountered by refugees in obtaining access to education coupled with the cultural sensitivities of association with different ethnic groups can lead to a lack of enthusiasm on the part of refugees to access schools.¹²⁹

The discussion of the right to education at the 2014 Global Education Meeting held in Oman established the inclusion of free education as a human right in the Constitutions of countries

¹²⁷ White paper on Education and Training Notice 196 of 1994 at 12.

¹²⁸ UN High Commissioner for Refugees (UNHCR), *Ensuring Access to Education: Operational Guidance on Refugee Protection and Solutions in Urban Areas*, 2011, available at: <http://www.refworld.org/docid/51ee4dd24.html> [accessed 4 September 2017].

¹²⁹ Ibid.

such as India and Indonesia.¹³⁰ Despite the codification that the denial of the right to education is deemed as inhuman and degrading to victims of discrimination and torture such as refugees, minimal progress has been made by states to combat the infringement of the right to education.¹³¹ It has been recognised internationally that even though the right exists, it is not readily accessible and available to refugee children.

3.4 GAP BETWEEN LAW AND PRACTICE

Historical and political factors continue to impede the right to access education on a regional and global scale.¹³² In South Africa most schools lack adequate resources to facilitate quality education, like school buildings, books and teachers and such schools make up the majority of schools in the country.¹³³ The lack of government intervention in resourcing schools to ensure a quality education is subject to interpretation as an infringement of the right to access education. In *Head of Department, Mpumalanga Department of Education v. Hoërskool Ermelo*,¹³⁴ the Constitutional Court made it clear that there was a need for transformation in the country's education system. Schools are made to look beyond the needs of school communities including an understanding of other children who are poor and not part of the school community. Although schools retain their admission policies and maintain rules made by governing bodies, the Head of the Department of Education may alter and override their policy if deemed unconstitutional.¹³⁵

It is important to note that the issue of denial of access to education is not merely due to dysfunctional organs of government.¹³⁶ Barrtje, Hlatshwayo, Mackay, Sibanda, Spreen and Vally explained that the unwillingness to ensure that refugees and asylum seekers' rights are

¹³⁰ Nicholas Burnett (2014) 'International Education Policies, Issues, and Challenges' in *Education, Learning, and Training: Critical Issues for Development, International Development Policy*, Series No.5, Geneva: Graduate Institute Publications, 27–36.

¹³¹ United Nations. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at Art 13. 19 November 2012. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. General Comment No. 3 of the Committee against Torture.

¹³² Open Society Foundations (OSF), Strategic Litigation Impacts: Equal Access to Quality Education, 3 April 2017, available at: <http://www.refworld.org/docid/58e23de30.html> [accessed 5 September 2017].

¹³³ Ibid.

¹³⁴ *Hoërskool Ermelo v The Head of Department of Education: Mpumalanga* (219/08) [2009] ZASCA 22 (27 MARCH 2009).

¹³⁵ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013).

¹³⁶ I Baatjes, M Hlatshwayo, K Mackay, S Sibanda, C Spreen & S Vally, (2012) 'The Education Rights of Migrants, Refugees and Asylum Seekers in South Africa', *Report to the Foundation for Human Rights. Prepared by the Centre for Education Rights and Transformation* University of Johannesburg, 22.

protected is borne out of xenophobic views that refugee children deserve less care than the locals.¹³⁷

There is a wide gap between the law, both domestic and international, and what applies in practice. There seems to be adequate national and international laws in place, creating and guaranteeing rights to refugees but the operation of these laws in practice leaves much to be desired. The level of attention given to refugee children at the international level is not the same as it is in domestic practice.¹³⁸ According to Bhabha, the focus on immigration control implies that the emphasis is placed on the child's alien and irregular status, viewed as an illegal migrant 'who has chosen, or consented to, the evasion of immigration controls in order to gain access... these children are assumed to be bogus before they are assumed to be in need of help.'¹³⁹ The law is however clear that the tension between the child as a migrant and as a person in need of care should be resolved in favour of the latter as they are first and foremost children and refugees second and as children they are in need of special protection.¹⁴⁰ This protection should not be denied to them on the basis of their migrant status. Responses should be tailored towards addressing the dual challenge faced by a child refugee: 'the helplessness of being a child and the difficulty of being a refugee'.¹⁴¹

The experience of a refugee child is often marked with the trauma and loss associated with war and the separation from family and loved ones.¹⁴² The refugee child sees herself in an environment that is both new and strange. This experience is often capable of destroying the child's self-esteem and the ability to relate with other members of the society.¹⁴³

3.5 BARRIERS TO ACCESS TO EDUCATION

The Admission Policy for Ordinary Public School 1998 provides that the South African Schools Act equally applies to non-citizens, temporary residence permit holders and

¹³⁷ Ibid.

¹³⁸ Pobjoy, *op. cit.* at 93.

¹³⁹ J Bhabha (2001) 'Minors or Aliens? Inconsistent State Intervention and Separated Child-Asylum Seekers' 3 *European Journal of Migration Law* 283 at 293-294.

¹⁴⁰ UNHCR, Preface to *Refugee Children: Guidelines on Protection and Care* (1994)

¹⁴¹ Geraldine Van Bueren (1998) *The International Law on the Rights of the Child*. London: Martinus Nijhoff, 360.

¹⁴² *A Reference Guide to Refugee Law and Issues in Southern Africa* Lusaka: Legal Resources Foundation p. 15

¹⁴³ Ibid.

permanent residents issued by the Department of Home Affairs.¹⁴⁴ Unfortunately, there are still infringements on the right to access education despite obtaining an asylum seeking permit or refugee status. The document gives the bearer various rights such as the right to health, right to security and other rights as envisaged in the Bill of Rights however these rights are far from realised.¹⁴⁵ The following sections highlight some of the practical issues that have led to the denial of access to education and with particular reference to how it affects refugees and asylum seekers.

3.5.1 FINANCIAL BARRIER

School fees exemptions are agreements entered into between parents or guardians and the schools with the purpose of improving the quality of education of learners and access to such an education.¹⁴⁶ Section 5(1) of the South African Schools Act¹⁴⁷ provides that:

“...no 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.”

A prescribed threshold determines whether a child should be exempted from the payment of fees.¹⁴⁸ South Africa has a legal obligation to provide elementary education compulsory and free, as most refugees cannot afford the school fees.¹⁴⁹

The question of financial barriers to education is also related to the matter of the employability of refugees. Since the employment of refugees is dependent upon the identity documentation issued by the Department of Home Affairs, most refugees are unable to secure employment because of the Department of Home Affairs’ failure to renew or issue

¹⁴⁴ Admission Policy for Ordinary. 06/07/27. Public Schools Notice No. 2432 OF 1998 GG 19377 (19 October 1998) Department of Education, National Education Policy Act, 1996 (Act No. 27 of 1996) Admission Policy for Ordinary Public Schools at para 19.

¹⁴⁵ Jonathan Crush, & Godfrey Tawodzera, ‘Right to the Classroom: Educational Barriers for Zimbabweans in South Africa’ *Migration Policy Series No. 45*, 10.

¹⁴⁶ Kaajal Ramjathan-Keogh, (2017) ‘The Rights of Refugees and Migrant Learners’ in *Basic Education Rights Handbook – Education Rights in South Africa*. Johannesburg: Section 27, 135-138.

¹⁴⁷ South African Schools Act 84 of 1996 at Section 5(1).

¹⁴⁸ Katharine Hall, & Sonja Giese (2009) ‘Promoting Access to Children’s Entitlements: Addressing Quality through School Fees and School Funding. Available at https://open.uct.ac.za/bitstream/item/3815/CI_chapters_sachildgauge08-09_addressingquality_2009.pdf?sequence=1 [accessed 3 September, 2017].

¹⁴⁹ United Nations. The Convention on the Right of a Child at Section 28(1)a.

identity documentation and hence their children are refused access to or expelled from schools due to the inability of their parents or guardians to pay fees.

3.5.2 XENOPHOBIA

The history of South Africa's xenophobia can be traced back to the apartheid regime when immigrants and refugees faced discrimination and violence attributed to the institutionalised racism of the time.¹⁵⁰ Contrary to expectations, xenophobic attacks increased after democracy and at least 67 people lost their lives between 2000 and 2008 in xenophobic attacks.¹⁵¹

The equality clause contemplated in Section 9 of the Constitution of South Africa prohibits discrimination of any person on grounds such as origin of birth, religion and social origin. The Promotion of Equality and the Prevention of Unfair Discrimination Act¹⁵² was drafted to give effect to the equality clause of the Constitution. Section 6 provides that 'neither the state nor any person may unfairly discriminate against any person; the state does not deem such practice innocent and may therefore reprimand those who discriminate.

According to Spreen and Vally South Africa's xenophobic attacks have highlighted the inability of the state to respond to the systematic violation of human rights which have resulted in a violation of the right to access to education.¹⁵³ The state, community and the schools must take positive measures which includes incurring expenses to allow for the enjoyment of the rights.¹⁵⁴ It is evident that the right to freedom, dignity and access to education is undermined during these xenophobic attacks.

The schools are legally required not to discriminate against children, on race, gender, social origin.¹⁵⁵ However, most refugees and asylum seekers are considered a threat and a burden to education system and other social services.¹⁵⁶

¹⁵⁰ The Week (2015) South African Xenophobia: Why is there so much hatred of foreigners? Available at <http://www.theweek.co.uk/63378/south-african-xenophobia-why-isthere-so-much-hatred-of-foreigners> [accessed 3 September 2017].

¹⁵¹ M Neocosmos (2006) *From 'Foreign Natives' to 'Native Foreigners: Explaining Xenophobia in Post-apartheid South Africa*, Dakar: CODESRIA.

¹⁵² The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁵³ Spreen & Vally, *op. cit.* note 34, 71-89.

¹⁵⁴ *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007). Para 73.

¹⁵⁵ National Education Policy Act 27 of 1996 at Section 4(a) (i).

3.5.3 LACK OF DOCUMENTATION

The need for identification is an important aspect in the daily life of most modern societies. The identity documentation is of paramount importance and crucial for various aspects in the refugees' life, including the registration of births and deaths, contracting marriages, obtaining employment, housing, hospital care or rations, qualifying for social benefits, entering educational institutions, or requesting the issuance of official documents and permits.¹⁵⁷

Refugees are often required to furnish documentation such as birth certificates or study permits.¹⁵⁸ The identity of a child becomes an obstacle since parents flee their country of persecution without any documentation.¹⁵⁹ It has been generally observed that refugees constantly face the issue of documentation in hosting countries around the world.

Despite the existence of various legislations prohibiting the infringement of the right to access education in schools, refugee children are still prejudiced because they are unable to enjoy this right. All schools request and some demand that refugee children produce identification documents. In February 2017, the Lawyers for Refugee Rights brought to light the practice at Eastleigh Primary School in Edenvale, Gauteng where migrants including undocumented and documented refugee children were refused to access school the threat that the failure to produce such documentation could result in the arrest of such children.¹⁶⁰ This not only denies them access to education but also violates the legal provision that refugees are not to be arrested or detained in the hosting state when they have informed the authorities of their asylum seeking status.¹⁶¹

Unaccompanied refugee minor children face grave infringements in accessing education; problems arise from representation or guardianship in enrolment in schools. Pertinent to the acceptance of unaccompanied refugee children in school is Article 3 of the Guidelines on

¹⁵⁶ A Morris (1998). 'Our fellow Africans makes our lives a living hell'. The lives of Congolese and Nigerians living in Johannesburg. *Ethnic and Racial Studies* 21(60) page 1116-1136

¹⁵⁷ UNHCR. *Identity Documents for Refugees*. [EC/SCP/33] para 1.

¹⁵⁸ Kaajal Ramjathan Keogh. Basic Education Rights Handbook – Education Rights in South Africa – Chapter 6: The rights of refugees and Migrant workers page 137.

¹⁵⁹ Ibid

¹⁶⁰ Lawyers for Human Rights, 'Joint Press Release: Eastleigh Primary School' available at <http://www.lhr.org.za/news/2017/joint-press-release-%E2%80%93-eastleigh-primary-school> [accessed 03 September 2017].

¹⁶¹ 1951 Convention at Art 31

unaccompanied children¹⁶² which require that an unaccompanied minor be referred to proper child care or social work to protect the rights of the child. A study showed that circumstances of unaccompanied refugee children was aggravated immensely due to lack of skills and competency by the social workers in South Africa.¹⁶³

The Public School Policy guide provides that a birth certificate, immunisation card, transfer card, last school report for a child who has been in school be presented to the administration prior to registration and enrolment.¹⁶⁴ Although there is usually provision for temporary admission without these documents given a reasonable time to furnish them, the Department of Home Affairs entrusted to provide asylum seeking and refugee status documents delays and prolongs the process to enable smooth registration.¹⁶⁵

In 2016, the Minister of the Department of Home Affairs adopted a Green Paper on International Migration Policy addressing the securities on borders.¹⁶⁶ The Green Paper recognised that the economic collapse of SADC countries lead to nationals of those countries seeking asylum in South Africa even though they did not satisfy the refugee definition.¹⁶⁷ This created a backlog in the asylum system leaving many refugees without documentation.¹⁶⁸ The Department of Home Affairs further drafted the Refugee Amendment Bill requiring asylum seekers to immediately apply for a Refugee status within 5 days of arrival in the Republic. The Refugee amendment imposed further restrictions on the refugees' right to education requiring the refugee to furnish the Department of Home Affairs with a letter of admission for school.¹⁶⁹ This amendment would therefore create a cycle of turning them away from school for lack of documentation and turning them away from the Department of Home Affairs from getting their documentation because they lack

¹⁶² Guidelines on Policies and Procedures in dealing with unaccompanied children. February 1997 at Article 3.

¹⁶³ L Magqibelo, M Londt, S September & N Roman 'Challenges Faced by Unaccompanied Minor Refugees in South Africa'. *Social Work* Vol. 52(1), 85.

¹⁶⁴ Rights and Responsibilities of Parents, Learners and Public Schools: Public School Policy Guide 2005.

¹⁶⁵ Ibid.

¹⁶⁶ Green Paper on International Migration in South Africa, 21 June 2016.

¹⁶⁷ Ibid 211 *at.* Page 12.

¹⁶⁸ Ibid 211.

¹⁶⁹ Sec 18. Substitution of Sec 22(9) of Refugee Act 130 of 1998. Government Gazette No. 39284 of 12 October 2015. REFUGEES AMENDMENT BILL.

school admission. Popo Mfubu has stated that ‘it has broadened the scope of people who can automatically be excluded from refugee or asylum statuses’.¹⁷⁰

3.5.4 LANGUAGE

South Africa has 11 official languages with English as a normative language in schools. The possibility of integration requires a refugee to speak a language of the hosting state or at least one in the community of residence of the refugee.

Refugee children have often been found to have problems in school due to the language barriers.¹⁷¹ They are unable to do well enough and usually fall below the average due to this language difference.¹⁷² The language issue is of significance in integration of not just Refugees but also the citizens. In *Head of Department, Mpumalanga Department of Education v. Hoërskool Ermelo* the court held that language is a barrier to access education and promotes inequity and perpetuates socio-economic disadvantage.¹⁷³ Most learners in the classroom are disadvantaged and unable to perform to the best of their abilities to the language barriers.¹⁷⁴ The effective communication aspect is hampered and further undermined; this disadvantage has cognitive, psychological, social, and cultural failures in the education system in South Africa.¹⁷⁵

There is a transitional relationship which exists between the refugee child’s country of origin and successful integration in a South African school.¹⁷⁶ The language barrier affects the capability of the child’s ability to speak the English language used in school. English is not the medium of instructions in a good number of countries and this inevitably creates difficulties when the child has to speak, read or write English in South African schools.¹⁷⁷

¹⁷⁰ Natalie Pertsovsky. Refugee Amendment Bill “restricts and excludes” says attorney William Kerfoot. 21 April 2017. Available at <https://www.groundup.org.za/article/ammendments-refugee-bill-still-restricts-and-excludes-says-attorney-william-kerfoot/>. (accessed on 10 September 2017)

¹⁷¹ *A Reference Guide to Refugee Law and Issues in Southern Africa* Lusaka: Legal Resources Foundation p. 15.

¹⁷² Ibid.

¹⁷³ *Hoërskool Ermelo v The Head of Department of Education: Mpumalanga* (219/08) [2009] ZASCA 22 (27 MARCH 2009) 218.

¹⁷⁴ Margie Owen-Smith. The Language Challenge in the classroom: a serious shift in thinking and action is needed’, Available at https://www.google.com/search?q=Margie+Owen-Smith.+The+Language+Challenge+in+the+classroom:+a+serious+shift+in+thinking+and+action+is+needed.+&ie=utf-8&oe=utf-8&client=firefox-b-ab&gfe_rd=cr&dcr=0&ei=LpK6WeiwKc_U8gf8x7rICA [accessed 3 September 2017].

¹⁷⁵ Ibid 220.

¹⁷⁶ Baatjes et al, *op. cit.* 27.

¹⁷⁷ Ibid 220.

Section 29(2) of the Constitution states that ‘everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.’¹⁷⁸ The surveys conducted revealed that none of the South African public schools offered a non-South African language as a medium at schools nor included it as an additional language.¹⁷⁹ This results in refugee children’s inability to fully participate and perform, creating low pass rates in schools. The state is constitutionally obligated to accommodate and provide resources for foreign languages in schools; however the progress is undoubtedly slow.

¹⁷⁸ Section 29(2) of the Constitution of 1994.

¹⁷⁹ Ibid 220.

4. CHAPTER FOUR

4.1 INTRODUCTION

Prior to 1994, the policies of the then apartheid national government of South Africa led many people to flee the country and seek asylum with other nations around Africa and across the world.¹⁸⁰ However, the transition into a democratic state in 1994 led to the gradual flow of refugees into the country.¹⁸¹ These asylum seekers left their home countries fleeing persecution and civil strife and sought refuge in South Africa. A report by the United Nations High Commissioner for refugees reveal that there are over a million asylum seekers in the country, making it the country with the highest number of unresolved asylum cases in the world.¹⁸²

At the outset of this refugee inflow, South Africa lacked the requisite laws and institutions to receive and manage the refugee process. Gradually, a legal framework was created for the protection of refugees and for the management of the refugee and asylum process.¹⁸³ The South African Refugees Act was passed into law in 1998. This legislation marked a significant point in the legal protection of refugees in South Africa.¹⁸⁴ Refugee protection became governed by the Act rather than the former Aliens Control Act which had been adopted under the apartheid regime. The Refugees Act became the parameter for measuring the rights which accrue to a refugee within South Africa. The right of refugee children to education will therefore be examined in the light of this Act and other relevant legislations in South Africa.

This chapter examines the position of the domestic law of South Africa on the status of refugees and the protection offered to them under South African law. Particular attention is paid to the provisions of the Constitution, the South African Refugee Act, the South Africa Schools Act and other government policies relating to education and the right of nationals and non-nationals to access education in the country. The concept of social justice as provided for in the preamble of the South African constitution and its implication on access to education is discussed in this chapter. Much of this discussion relies on the theory of social

¹⁸⁰ Jeff Handmaker, Lee Anne de la Hunt, & Jonathan Klaaren, (eds.) *Perspectives on Refugee Protection in South Africa* Pretoria: Lawyers for Human Rights 5.

¹⁸¹ Ibid.

¹⁸² Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' *Compilation Report Universal Periodic Review: 3rd Cycle, 27th Session*.

¹⁸³ Handmaker, de la Hunt & Klaaren, *op. cit.* 5.

¹⁸⁴ Ibid.

justice as espoused by John Rawls. As a follow-up on this, the Bill of Rights under Chapter II is also discussed vis-à-vis the provision of the South African Refugee Act which extends the rights contained in this chapter to refugees. Thereafter, this chapter examines the South African Schools Act with particular reference to section 5 which provides for the non-discrimination in the admission of learners into South African public schools. Policies that have been created for the regulation of admission into schools are also discussed. This chapter establishes that the South African law is clear that all learners within the country should be given access to education and should not be discriminated against in any way.

4.2 SOCIAL JUSTICE AND THE RIGHT OF REFUGEES TO ACCESS EDUCATION

The Preamble to the Constitution of South Africa provides that the people of South Africa ‘...through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to... establish a society based on democratic values, social justice and fundamental human rights...’ This provision of the Constitution expressly provides for the establishment of a ‘society based on democratic values, social justice and fundamental human rights.’ It obliges the South African government to ensure that no form of social injustice, exclusion or deprivation is perpetuated within the Republic.¹⁸⁵ Social justice implies the existence of a country that is ‘equitable and in which all members are physically and psychologically safe [and in which] all people have a right to basic human dignity and have their basic economic needs met.’¹⁸⁶ In such a society, no member is to be discriminated against or excluded from basic socio-economic opportunities.¹⁸⁷ It is in this light that the denial of access to education or exclusion from educational opportunities must be understood as a social injustice which the South African Constitution itself prohibits and pledges to ensure it does not occur.

Social injustice guides against any form of unjustified discrimination within any community which deprives certain individuals within that society of their individual benefits.¹⁸⁸ In his book, *A Theory of Justice*, John Rawls enumerated two principles of social justice. First, there must be equal access for all individuals to ‘the most extensive basic liberty compatible with a

¹⁸⁵ Callizte Kavuro (2015) ‘Refugee Rights in South Africa: Addressing Social Injustices in Government Financial Assistance Schemes’ 5 *J. Sustainable Dev. L. & Policy* 176 at 177.

¹⁸⁶ B.S Levy & V.W Sidel, (2005) ‘The Nature of Social Justice and Its Impact on Public Health’ in Barry S. Levy and W Victor. Sidel (eds), *Social Injustice and Public Health*. New York: Oxford University Press, 8.

¹⁸⁷ Kavuro, *op. cit.* at 178; Levy & Sidel, *ibid.*

¹⁸⁸ Calizte Kavuro (2012) ‘The South African Constitution and the Social Justice Jurisprudence of the Constitutional Court’ 1 *Young African Research Journal*, 100-1.

similar liberty to others.¹⁸⁹ And secondly, socioeconomic rights must be distributed in a manner that ensures that no one is disadvantaged.¹⁹⁰ Rawls explains that a socially just society is one in which everyone is able to access certain primary goods which are necessary for sustainable socioeconomic development such as rights liberties, benefits, opportunities, income and wealth.¹⁹¹ In other words, every member of the society should have equal access to these opportunities and no group should be consciously excluded. According to Rawls, not only must the rights of citizens be protected but also every individual's basic right must be protected.¹⁹² This does not however mean absolute equality as, for example, people cannot earn the same income.¹⁹³

Social justice requires that socio-economic policies and practices ensure that the poor are not subjected to perpetual poverty or the vulnerable to continued social vulnerability.¹⁹⁴ Social justice would thus be served if everyone were given the opportunity to develop their capabilities to do or to be what they want to be and ensure that no one is unjustly excluded.¹⁹⁵ The ability of a person to function in their capability is essential to the attainment of social development and no policy or practice should deny them of this ability.¹⁹⁶ The exclusion of a group of people from anti-poverty or socio-economic measures, which includes education, amounts to social injustice and gives room for the perpetual subjugation of a group of people within the society.¹⁹⁷ A policy will thus be labelled as socially unjust when, or if, certain categories of persons enjoy fewer advantages in comparison to other members of the community and what is generally available in that society.¹⁹⁸

The South African Constitutional Court explains social justice as the relationship between reasonable state action and the need to treat human beings with the appropriate respect and care for the dignity to which they have a right as part of humanity.¹⁹⁹ The court thus upholds the notion that ensuring a socially just society transcends the constraints of nationality or refugee status. It accrues as a result of our common humanity.

¹⁸⁹ John Rawls (2005) *A Theory of Justice*. Cambridge: Harvard University Press, 38.

¹⁹⁰ Ibid at 60.

¹⁹¹ Ibid at 62.

¹⁹² Kavuro, *op. cit.* note 126 at 185.

¹⁹³ Rawls, *op. cit.* 15.

¹⁹⁴ Kavuro, *op. cit.* note 126 at 185.

¹⁹⁵ Ibid at 179.

¹⁹⁶ Sen, Amartya. (1999) *Development as Freedom*. New York: Anchor Books, 39.

¹⁹⁷ Kavuro, *op. cit.* note 126 at 179.

¹⁹⁸ Ibid at 178.

¹⁹⁹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), paras 82-83.

4.3 EDUCATION AS A MATTER OF SOCIAL JUSTICE

Education is one of the best empowerment mechanism needed for social progress and economic growth.²⁰⁰ It gives people the opportunity for a better future and for functioning to the best of their capabilities and enables those who would have otherwise been marginalised to take full part in the development of their community.²⁰¹ It is therefore necessary that refugees and asylum seekers be given access to this necessary tool in order to alleviate the economic hardship which they are usually subjected to and also give them the opportunity to participate in the social and economic activities of the society.²⁰² The importance of education was acknowledged in the Refugee Convention where the right of refugees was well provided for and upheld.²⁰³

Taking a look at the preamble of the Constitution that provides for the creation of a society where there is social justice, it becomes obvious that South Africa is bound to ensure that everyone within the country, including refugees, have access to education. The enjoyment of the right to education should however be within the available resources of the country.²⁰⁴ While the country may not be able to build special schools for refugees, they should not be excluded from existing schools and resources for education within the country.

4.4 RIGHT TO EDUCATION AND CHAPTER TWO OF THE CONSTITUTION

Chapter two of the Constitution provides for certain rights, referred to as the Bill of Rights. These rights are recognized as the necessary foundation for a 'free and democratic society.'²⁰⁵ They are understood as universal rights and with the exception of certain rights like the right to vote, they apply to all individuals.²⁰⁶ This implies that everyone who comes within the South African border is entitled to enjoy these rights irrespective of their citizenship or refugee status.²⁰⁷ In *Tantoush v Refugee Appeals Board*, the court held that the Bill of Rights applies equally to both foreigners and citizens.²⁰⁸ In essence, there should be no

²⁰⁰ Kavuro, *op. cit.* note 126 at 181.

²⁰¹ Office of the High Commissioner for Human Rights, CESCR, General Comment 13: The Right to Education (Art 13). E/C.12/1999/10, para 1.

²⁰² Kavuro, *op. cit.* note 126 at 181.

²⁰³ Much of this has been discussed in the previous chapter.

²⁰⁴ Constitution at Section 29(1)(b).

²⁰⁵ Dass, Daven et al. (2014) 'The Civil and Political Rights of Refugees and Asylum Seekers in South Africa' in Fatima Khan & Tal Schreir (eds.) *Refugee Law in South Africa. Cape Town: JUTA*, 204.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) para 65.

discrimination in ensuring that both citizens and non-citizens are able to enjoy the rights provided for in this chapter. Accordingly, the rights provided for in Chapter two of the constitution accrues to all refugees, irrespective of the status of their official application for asylum.

This is well stated in Article 27(b) of the Refugee Act which provides that all protection offered under Chapter 2 of the Constitution should be extended to all refugees. It provides that a refugee:

‘... enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to maintain in the Republic in accordance with the provisions of this Act.

One of the rights provided for under Chapter 2 of the Constitution is the right to education. Section 27 of the Constitution provides 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.

4.5 RIGHT TO EDUCATION AND REFUGEE LAW

Furthermore, Article 27(g) of the Refugees Act provides that a refugee is ‘entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.’²⁰⁹ What this means in essence is that the South African law requires that refugees should be granted access to education in the same manner as all other inhabitants and citizens of South Africa.

4.6 THE SOUTH AFRICAN SCHOOLS ACT

The South African Schools Act also maintains this position and prohibits discrimination in the determination of school admission. Section 5 of the South African Schools Act provides that:

A public school must admit learners and serve their educational requirements without unfairly discriminating in any way

²⁰⁹ Refugee Act at Section 27.

This makes access to education a primary and basic right of everyone within the shores of South Africa. There is no provision made for any kind of discrimination or exclusion either based on a child's nationality, documentation status or inability to pay fees.²¹⁰ The law simply extends this right to anyone within the physical jurisdiction of the country. A refugee is not to be denied access to education on the basis of his status as a refugee.

A policy, rule or requirement that denies them access to education on the basis of their status as refugees would be illegal and unconstitutional. The Supreme Court of South Africa in *Minister of Home Affairs v Watchenuka and Others* ruled that the Minister could not prohibit asylum seekers from working and studying while they are waiting to be recognised as refugees. The court further held that the general prohibition of employment and study by the Standing Committee for Refugee Affairs for the first 180 days after a permit has been issued is in conflict with the Bill of Rights. A general prohibition of work and study was found to be unlawful and was set aside. The court stated that while an asylum seeker is in the country, Section 10 of the Bill of Rights protects him or her. The freedom to study is inherent to human dignity, because without it, a person is deprived of the potential for human fulfilment. This right is protected by Section 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education. The court held that human dignity has no nationality. It is inherent in all people, irrespective of citizenship status, simply because they are humans and they are therefore protected by the South African Bill of Rights.

4.7 ADMISSIONS POLICY FOR SCHOOLS

Section 9 of the Admissions Policy for Ordinary Schools provides that the admission policy of a public school and the administration of admissions by an education department must not unfairly discriminate in any way against an applicant for admission. This protection applies to all learners irrespective of their citizenship status including children of asylum-seekers and refugees.²¹¹ All that is required by the Policy from an illegal alien to gain admission is proof that he has applied for the necessary permit or refugee status.²¹² The application need not have been granted before the applicant or his or her child is granted admission in a school.

²¹⁰ Daas, *op. cit.* note 146 at 232.

²¹¹ Admission Policy at Section 19.

²¹² Admission Policy at Section 21.

The Department of Education released a Public School Policy Guide that allows the school governing body (SGB) to determine the admission policy into a school but such policies must be based on the guidelines determined by the head of the provincial education department.²¹³ Asylum-seeker and refugee children should be regarded as dependents of their caregivers (who are not necessarily parents) and does not need to hold a study permit in addition to their refugee or asylum-seeker permit.²¹⁴

In the case of *Mubake v Home Affairs*, the applicants sought an order declaring that children who had been separated from their parents were dependents of their primary caregivers, in terms of the definition of ‘dependent’ in Section 1 of the Refugees Act. They contended that such children should automatically be recognised as dependents of the existing asylum seekers or refugee adults who accompany them into South Africa.²¹⁵ Initially, the applicants also sought orders against the Department of Basic Education, to provisionally allow the registration in public schools of the child applicants and other children who are dependants of asylum seekers and refugees, as well as an order for the Minister of Basic Education to review the admission policy for public schools by expressly making provision for child asylum seekers and refugees. That relief was granted by the High Court in 2013.²¹⁶ This case resolved any ambiguity that may exist in giving both refugee and asylum seeker children access to education even if they are undocumented or yet to receive official refugee status. The case clarifies the position for separated or orphaned asylum-seeker children who are not guaranteed access to asylum and to schools based on their status as asylum-seekers.²¹⁷

It is therefore clear from the foregoing that the South African government has a duty to ensure the provision of primary schooling for all children resident within its borders. Child refugees and children of refugees have a right to basic primary education. They are entitled to primary education just like any South African child and without any form of discrimination whatsoever. The Department of Education’s *Admission Policy* is to be amended to make clear with specific provisions stating that child refugees and children of refugees and asylum seekers have a right to education and must be allowed to register in public schools irrespective of their documentation. Refugees and their children have a right to education

²¹³ The Department of Education’s A Public School Policy Guide.

²¹⁴ Kaajal Ramjathan-Keogh (2017) ‘The Rights of Refugees and Migrant Learners’ in *Basic Education Rights Handbook – Education Rights in South Africa*. Johannesburg: Section 27, 135-138.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

which is protected in South Africa through the Constitution, the Refugees Act and the South African Schools Act.²¹⁸

Despite these clear legal provisions, there are various practices which have served as barriers in the way of refugees and their children from gaining access to education in South Africa. Some of these include school fees, language barrier, limited places at schools and the lack of documentation as discussed in the previous chapter.

4.8 CONCLUSION

The preamble to the South African Constitution declares that the South African state shall be a society where social justice is maintained. Social justice implies that everyone in the community is given equal access to the basic necessities of life and given the opportunity to develop and function in their full potential. One of the widely agreed necessities for the development of an individual and for coming to one's full potential is education; it is an important asset for personal development, for improving one's chances in the community and contributing to social and personal growth. To have a socially just country is thus to have a country where everyone has equal opportunity to access basic education without discrimination on whatsoever ground. Thus, the South African Constitution is clear that everyone within its borders shall have equal access to education as part of a socially just society.

The Refugees Act is more direct in providing that access to education shall be given to everyone within the South African borders, including refugees. It extends the rights provided for in Chapter II of the Constitution to everyone who is a refugee. These rights, provided under chapter II include the right to basic elementary education. Thus, the Refugees Acts places an obligation on the state to ensure that refugees have access to elementary education just as it would for nationals of South Africa. A refugee is not to be denied of his right to education on whatsoever ground.

²¹⁸ Daas, *op. cit.* at 233.

5. CHAPTER FIVE

5.1 INTRODUCTION

In 1993 South Africa signed an agreement (The United Nations Convention Relating to the Status of Refugees) with the United Nations High Commissioner for Refugee on issues of all persons under the age of eighteen.²¹⁹ The policy ensures access to education for refugee children, amongst other human rights.²²⁰ The case of *Motala and Another v University of Natal* defined basic education as elementary education which is free as opposed to secondary and tertiary education.²²¹ The right to basic or elementary education is recognised as an immediate right unlike further education which is subject to available resources.

The body of laws protecting the right to access education for refugee children is vast, both nationally and internationally. The protection extent provided by the laws cover almost every gap precluding refugee children from accessing education. The execution of the laws however prejudices refugee children despite South Africa's accession and ratification of many international conventions and the domestication thereof boosting the right to access education.

The United Nations High Commissioner for Refugee has made numerous efforts in advocating for the issue.²²² The practice of precluding admission does not only stem from the states inability to uphold responsibilities as required by law, but also the schools and other stakeholders refraining from acting as required by law. Non-Profit Organisations have played a major role in breaking the barriers of accessing education of refugees.

²¹⁹ 'a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. General Assembly resolution. Art 1. Convention of the Right of a Child 1989. Acceded by South Africa on October 1993.

²²⁰ General Assembly resolution. Convention of the Right of a Child 1989 at Art 24(2).

²²¹ *Motala and another v University of Natal Supreme Court, Durban and Coast Local Division* 1995 (3) BCLR 374 (D); 1995 SACLX LEXIS 256.

²²² United Nations high Commissioner for Refugee. Ensuring Access to Education Operational Guidance on Refugee Protection and Solutions in Urban Areas. Available at <http://www.unhcr.org/refugees/ensuring-access-to-education-eng.pdf> Page 9. (accessed on 12 September 2017)

The Children's Charter states that; '...children have the right to free and equal, non-racial, non-sexist and compulsory education within one department as education is a right not a privilege',²²³

Refugees are provided equal rights as provided to all citizens in the bill of rights,²²⁴ and the practice of preventing access to education practice therefore amounts to a constitutional infringement. Solutions are therefore required to address the issue with regard to the acceptance, enrolment and completion of school of refugee children.

Despite the strong Constitutional framework in South Africa its protection of human rights, the state struggles to execute the provision of social and economic rights.²²⁵ Despite the goals of White Paper 6, the Constitution of the Republic of South Africa, the Children's Act and various United Nations Conventions the state has failed to recognise, respect and promote the right to education²²⁶.

5.2 RECOMMENDATIONS

The ratification of the United Nations Convention on the Right of a Child in June 1995 places an obligation on the state to protect and execute the right to education by all means necessary. Mark Hannam stated that the Universal Declaration of Human Right must be kept in mind when dealing with the education of children. He quotes '...education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...'²²⁷

In 2012 the South African Human Rights Commission mandated itself into monitoring all organs of state in the progressive protection of Constitutional rights of children.²²⁸ The SAHRC had identified the scope and content of the right and obligations between the child

²²³ The Children's Charter of 1992 at Article 8(1).

²²⁴ Refugee Act 130 of 1998 at Sec 27(g).

²²⁵ Human Rights Watch. World Report 2013. Events of 2012. Page 159. Retrieved on September 09, 2017. Available at https://www.hrw.org/sites/default/files/wr2013_web.pdf. (accessed on 13 September 2017)

²²⁶ South African Human Rights Charter. Charter of Children's Basic Education Rights. The right of children to basic education. Adaptable Education. Page 51. Retrieved on September 09, 2017. Available on https://www.unicef.org/southafrica/SAF_resources_childrightsbasiceduc.pdf. (accessed on 13 September 2017).

²²⁷ M Hannam J & Griffin *On Human Rights*. Oxford; Oxford University Press, 2008 at Page 115.

²²⁸ Human Rights Commission, HRC, (2012). Charter of the Children's Right to Basic Education. The Right of Children to Basic Education. South African Human Rights Commission. Retrieved on September 09, 2017, Available at <https://www.sahrc.org.za/index.php/focus-areas/children-s-rights-and-basic-education/children-s-rights-and-basic-education-3>. (accessed on 14 September 2017)

and the state in basic education.²²⁹ The mandate was prescribed by the SAHRC Charter on Children's Basic Education Rights (2012) which provided a statement of what is required in legislation (both national and international) by states to propel the right to education for children in South Africa.²³⁰

In light of the above, the following is recommended:

5.2.1 REGULARLY INFORM THE STATE

It is recommended that the State is regularly informed of infringements to the right to education of any child in South Africa. Although the SAHRC did not successfully eradicate the infringement of the right to access education, they paved an opportunity for NGO's to constantly inform the state of the responsibility to promote the right to education. A shared responsibility between, the governments, the schools and stakeholders would pave a way forward since government alone is failing the responsibility. Parents have an equal responsibility of protecting and promoting the right to access education for children²³¹ with the state.

5.2.2 LEGAL COUNSELLING

Khan F commented on successes of engaging refugee issues by means of legal counselling,²³² this counselling method guided most schools in Cape Town on refugee rights and understanding the protection human rights afforded by the constitution in relation to refugees²³³. The counselling also provided parents with an insight of the rights of children and its extent in terms of the right to education.²³⁴

5.2.3 SHARED RESPONSIBILITY

Accessing education is difficult in rural areas of South Africa, in a report published in 2000 it was found that approximately 19 percent of children in rural areas including farms were not in school.²³⁵ The intervention of other sectors like the SAPS to assist in accessing and receiving an education in these area became a short-term solution, however not a long term

²²⁹ Ibid 236.

²³⁰ Ibid 236.

²³¹ Children's Act 38 of 2005 at Section 18.

²³² Khan, *op. cit.* note 16.

²³³ Ibid 241 *at* Page 6.

²³⁴ Ibid 241.

²³⁵ Human Rights Watch, *Forgotten Schools: Right to Basic Education for Children on Farms in South Africa*, 3 June 2004, A1607, available at: <http://www.refworld.org/docid/412ef4c94.html> [accessed 9 September 2017].

resolution²³⁶. The intervention proved that shared responsibilities with other sectors might not be a durable solution but a countermeasure to prevent consecutive infringement of the right to access education of children.

5.2.4 OUTREACH CAMPAIGNS

The University of Cape Town Refugee Rights Unit engaged in a series of campaigns addressing a society of refugees in South Africa; the campaign consisted of presentations to communities about various refugee rights.²³⁷ The significance of the campaign was to educate society of refugee rights, the success was realised by society of the need of moral and legal obligation to protect refugee rights in South Africa.²³⁸

5.2.5 AGENDA FOR SUSTAINABLE DEVELOPMENT

Since the infringement on the right to access education is detrimental to the 2030 Agenda for Sustainable Development, imposing new legislative measures without enforcing and effectively analysing the practicality of the existing law is rather ineffective. The success of the 2030 Agenda should be through observation of the current laws protecting education for refugees in practice. Ensuring protection of the right to education for refugees is vital for integration and fulfilment of the 2030 Agenda.²³⁹

5.2.6 INCLUSION OF VULNERABLE GROUPS IN LEGISLATION

Khan F states that South African legislation is silent in protecting vulnerable groups, e.g the Child Care Act on refugee children.²⁴⁰ The government does not act with immediate effect on issues relating to legislation protecting refugee children despite signing the Convention on the International Right of a Child.²⁴¹ It is therefore recommended that legislation that human rights advocates are vigilant with regard to the inclusion of rights for refugees in all legislation.

²³⁶ Ibid 243.

²³⁷ Khan, *op. cit.* at 7.

²³⁸ Ibid 245.

²³⁹ United Nations Economic, Scientific and Cultural Organisation. Education Sector. Protecting the right to education for refugees. Working Papers on Education Policy. Retrieved on 12 September 2017. Available at <http://unesdoc.unesco.org/images/0025/002510/251076E.pdf>. (accessed on 14 September 2017)

²⁴⁰ Khan, *op. cit.* at 4.

²⁴¹ Ibid 248.

5.3 CONCLUSION

It is evident that the legislation and other resources protecting and promoting the right to education of refugee children are inclusive. The lack of protection and promotion of the right rests largely with government and with schools in particular. However, campaigns like the UCT Refugee Rights Units educating the community and intervention of other NGO's have added to the accessibility of education for refugee children in South Africa. The obligation of schools with regard to the Bill of Rights is clear in a society that recognises equality of all people.

The Constitution states that, 'No person may unfairly discriminate directly or indirectly against anyone on one or more grounds "including place of birth". National legislation must be enacted to prevent or prohibit unfair discrimination.'²⁴²With regard to laws the Constitution states '...laws or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled...'²⁴³

The practice of denying access to education for refugee children is clearly unconstitutional. The legislative measures established by South Africa to protect and promote the right to education for refugees, means that the obligation rests with the government to ensure that the recognition of the legislation is understood and applied by schools. Intervention in annual reports and reviews by the Department of Education would inform state on efficiency of intervention.

Continuous campaigns and the training of government employees carried out through campaigns similar to the UCT Refugee Clinic elevates a consistent awareness on protection of education on the right of refugee children. The awareness must be carried to the vast education sector.

²⁴² Constitution of the Republic of South Africa of 1996 at Section 9(1).

²⁴³ Ibid 250 at Section 172(1).

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