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ACCESS TO JUSTICE BY REFUGEES AND ASYLUM SEEKERS IN SOUTH AFRICA

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LWLABI001

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DECLARATION

I, Abiola Okpechi, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ABIOLA OKPECHI

DEDICATION

To my husband,
Ike
and my two precious sons,
Tochi David and Kelechi Daniel

University of Cape Town

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I am extremely grateful to every single person who has helped me throughout the course of this project.

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ABSTRACT

Since refugees and asylum seekers became a significant part of South African society in the 1990s, the defining characteristic of the discourse about them has been the incongruity between the constitutional and legislative frameworks for their protection, and the actual experiences of refugees and asylum seekers. While the many rights accorded to them suggests that they occupy a reasonably comfortable position in South Africa, the reality is quite different; actual and adequate enjoyment of most of those rights remain in the realm of theoretical possibility.

Premised on the fact that access to justice is essential, if rights are to be actually enjoyed, this thesis set out to examine the extent to which refugees and asylum seekers are able to access justice in South Africa, both for the enforcement of their rights and to settle disputes or other interests at law.

In doing this, the thesis examines the obligations that South Africa owes to refugees and asylum seekers on access to justice, and how it gives effect to those obligations. Utilising three sets of evaluative criteria – international law, constitutional provisions and policy framework – the thesis demonstrates that, notwithstanding the constitutional value framework which undergirds them, the policies and programmes which are designed to promote access to justice in the country, largely ignore South Africa's obligations to refugees. Not only are those policies and programmes detached from the commitments made to refugees under international law, they fail to give effect to the cardinal principle of equality of access, which is central to the concept of access to justice under international law and the Constitution. As a result, the ability of refugees and asylum seekers to access justice in South Africa is severely curtailed.

Chapter One

Introduction

Human rights concerns go to the essence of the cause of refugee movements, as well as to the precepts of refugee protection and the solution of refugee problems.¹

1.1 INTRODUCTION

Africa currently has about 2.405 million refugees and asylum seekers,² most of whom are driven from their homes by conflicts, political persecution and natural disasters. As the continent's seemingly endless catastrophes propel its people outside their own countries, many are forced to seek protection in South Africa, one of the few countries on the continent which has a relatively strong economy, a largely stable polity, a relatively responsive government and a Constitution committed to upholding human rights, and is thus seen as a haven of peace and prosperity. According to the United Nations High Commission for Refugees (UNHCR), South Africa receives the largest number of asylum applications in the world, with 222,000 submitted in 2009.³ There are currently 47,970 recognised refugees living in South Africa as at June 2010 and another 309,800 persons are seeking asylum in the country.⁴ These refugees have come to South Africa from as far afield as Bangladesh and Pakistan.⁵ However the largest numbers are from African countries, including the Democratic Republic of Congo, Angola, Zimbabwe, Tanzania, Somalia, Burundi and Rwanda.⁶ The three countries with the largest number of recognised refugees are the Democratic Republic of

¹ Sadako Ogata in *The state of the world's refugees, 2000: Fifty years of humanitarian action* (Oxford: Oxford University Press, 2000) 150.

² United Nations High Commission for Refugees (hereinafter UNHCR) '2010 Regional Operations Profile – Africa'. Available at www.unhcr.org [Accessed 18 July 2010]. This figure does not include refugees and asylum seekers in North Africa. UNHCR groups North Africa alongside the Middle East to make up its Middle East and North Africa (MENA) regional grouping.

³ 'UNHCR Global Report 2009: South Africa' Available at www.unhcr.org [Accessed 18 July 2010].

⁴ Ibid.

⁵ Department of Home Affairs www.dha.gov.za [Accessed 18 July 2010]; See also Forced Migration Studies Programme 'Population movements in and to South Africa' *Migration Fact Sheet 1 June 2010* Forced Migration Studies Programme, University of the Witwatersrand, 2–3.

⁶ Ibid.

Congo (11,700); Somalia (9,700) and Angola (5,800). Zimbabweans make up the vast majority of asylum seekers.⁷

From its earliest origins, refugee law has recognised that ‘the characteristic and essential feature of [refugee] problem [is] that persons classed as “refugees” have no regular nationality, and are therefore deprived of the normal protection accorded to the regular citizens of a State’.⁸ They are essentially at the mercy of the foreign state in which they have sought refuge, and unlike other classes of aliens, do not have the safeguard of diplomatic protection from their home countries.⁹ The onus of protection therefore falls on the host state and its institutions. How these host states, such as South Africa, treat refugees and asylum seekers is regulated by a number of international treaties and conventions, all of which are anchored in the overarching duty of States to protect the rights of everyone within their territories as recognised in international law. This duty is entrenched in Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR),¹⁰ which states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

It is obvious in view of the universal language in which it is couched, that this provision includes refugees. But beyond this general provision, there are a number of refugee-specific instruments which define the obligations of host states as well as the status, rights and obligations of refugees and asylum seekers which will be discussed later.¹¹ The norm of

⁷ UNHCR Global Report, note 3 above.

⁸ ‘Report by the Secretary-General on the future organization of refugee work’ LN Doc.1930.XIII.2 (1930) 3.

⁹ Paul Weiss ‘The international protection of refugees’ (1954) 48 *American Journal of International Law* 193, 199; Atle Grahl-Madsen *The status of refugees in international law, Volume I: Refugee character*. (Leyden: Sijthoff, 1966) 79; Michael Reiterer *The protection of refugees by their state of asylum* (Braumüller, 1984) 16; S Prakash Sinha *Asylum and international law* (The Hague: Martinus Nijhoff, 1971) 96.

¹⁰ GA Res 2200A (XXI), 21 UN GAOR Supp. (No 16) 52, UN Doc. A/6316 (1966), 999 UNTS 171, *entered into force* 23 March, 1976.

¹¹ South Africa has ratified the following treaties regarding the treatment of refugees and asylum seekers: United Nations Convention relating to the Status of Refugees 1951 (189 UNTS 150, *entered into force* 22 April, 1954 (hereinafter UN Refugee Convention)), Protocol to the UN Convention on the Status of refugees (606 UNTS 267, *entered into force* 4 October, 1967); OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 1001 UNTS 45, *entered into force* 20 June, 1974 (hereinafter OAU Refugee

general international law, *pacta sunt servanda* requires States to fulfil in good faith their treaty and customary international law obligations, and to refrain from conduct intended to frustrate their object and purpose.¹² States must therefore ensure that their domestic legislation, policies and practices are compatible with their obligations under international law. For refugees, this translates into an obligation on the part of a host state to adopt effective legislation and practices, which ensure that refugees in its territory are treated in accordance with internationally-accepted standards, including respect for the cardinal principle of *non-refoulement*,¹³ freedom from discrimination¹⁴ and the enjoyment of civil, economic and social rights.¹⁵ One of those rights – the right of access to justice as envisaged in various international instruments¹⁶ – and how refugees experience it in South Africa – is the subject of this study.

Convention)). These treaties were ratified by the Senate on 14 September 1995, (Hansard col. 2966) and by the National Assembly on 11 October 1995, (Hansard col 4361). The government formally acceded to the OAU Refugee Convention on December 12 1995, and to the UN Refugee Convention and its Protocol on 12 January 1996.

¹² Art 26, Vienna Convention on the Law of Treaties 1155 UNTS 331, 8 ILM 679, *entered into force* 27 January, 1980 (hereinafter Vienna Convention); for discussion of *pacta sunt servanda* see Ian Brownlie *Principles of public international law* (Oxford: Oxford University Press 1998) 62.

¹³ *Non-refoulement* is a principle of international law that prohibits States from returning persons to a country where they may face persecution or danger to their lives or liberty. It is codified in Art 33(1) of the UN Refugee Convention which states: ‘No Contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. This principle is of such crucial importance to the protection of refugees that it is non-derogable and State Parties are proscribed from entering reservations to it (see Art 42(1) of the UN Refugee Convention and Article VII of the Protocol Relating to the Status of Refugees. The OAU Refugee Convention takes the principle even further by stating that this includes the duty not to reject refugees at frontiers (Art 2(3)).

¹⁴ See for instance Art 2(1) ICCPR; Art 2 African Charter on Human and Peoples Rights (OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), *entered into force* 21 October, 1986 (hereinafter ‘African Charter’)).

¹⁵ Arts 17, 21, 22, 23 and 24 of the UN Refugee Convention for instance, grant refugees the rights to wage-earning employment, housing, public education, public relief, and social security respectively.

¹⁶ These include Arts 8 and 10 of the Universal Declaration of Human Rights (GA Res. 217A (III), UN Doc A/810 at 71 (1948), hereinafter UDHR); Arts 2(3) and 14 of the ICCPR; Art 7 of the African Charter, Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5, 213 UNTS 222, *entered into force* 3 September 1953; as amended by Protocols Nos 3, 5, and 8 which *entered into force* on

1.2 SUBJECT MATTER AND PURPOSE OF THE STUDY

It is recognised that in both domestic and international law, only the availability of and access to effective judicial remedies can guarantee respect for and protection of human rights.¹⁷ For any right to be meaningful, there must be a way of enforcing it – one must be able, when that right is violated or in danger of being violated, to have recourse to an entity that is separate and independent from the alleged perpetrator of the violation.¹⁸ This tenet, rooted in the fundamental principle of the rule of law that anyone may challenge the legality of any law or conduct, is the foundation of access to justice as a human right. It is an important right, recognised in many international human rights treaties and in constitutions around the world.¹⁹

For refugees, this right takes on even more significance, because, even though the expectation behind international refugee treaties was that the primary responsibility to assist them to enforce their rights would rest with the state parties to the Conventions,²⁰ in practice, refugees often have to look to the host country's courts to secure respect for those rights.²¹ This emphasises the importance of the right of access to justice as well as the role played by courts, and the entire justice system, in ensuring that the experiences of refugees in host

21 September 1970, 20 December 1971 and 1 January 1990 respectively, hereinafter ECHR); Art 16 of the UN Refugee Convention.

¹⁷ Francesco Francioni 'The rights of access to justice under customary international law' in Francesco Francioni (ed) *Access to justice as a human right* (Oxford: Oxford University Press 2007) 1; Bertrand G Ramcharan *Contemporary human rights ideas* (Oxford: Routledge, 2008) 145.

¹⁸ Iain Currie & Johan de Waal *The Bill of Rights handbook*, 5th ed (Cape Town: Juta, 2005) 704.

¹⁹ Note 13 above; s 34 of the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter the South African Constitution); Art 36, Constitution of the Federal Republic of Nigeria CAP 24 of 1999; Arts 32 and 39 of the Constitution of India Act 45 of 1860 [examiner – should be art 32 of 1950 const]; s 24 of the Constitution Act of Canada 1982, among others.

²⁰ For a background discussion on the development of refugee law, see generally James C Hathaway 'A reconsideration of the underlying premise of refugee law' (1990) 1 *Harvard International Law Journal* 129; Peter Macalister-Smith & Gudmundur Alfredsson (eds) *The land beyond: Collected essays on refugee law and policy by Atle Grahl-Madsen* (The Hague: Kluwer Law International, 2001); Claudena M Skran 'The international refugee regime: the historical and contemporary context of international responses to asylum problems' in Gil Loescher (ed) *Refugees and the asylum dilemma in the West* (Pennsylvania State University Press, 1992).

²¹ James C Hathaway *The rights of refugees under international law* (Cambridge: Cambridge University Press 2005) 628.

countries approximate to that envisaged for them in international conventions and local legislations. Moreover, the fact that the right of access to justice developed in international law as a subset of the law of state responsibility for injury to aliens and the treatment of aliens²² further highlights its significance to refugees and asylum seekers.

Yet, there is a paucity of studies on access to justice as it relates specifically to refugees and how refugees interact with the legal system, whether in the South African context or in a global context. Discussions about refugees often revolve around the very serious social, economic and security challenges that they face around the world, detailing concerns about administrative procedures, livelihoods, resettlement and integration, mental and physical health, xenophobia, cultural challenges and security issues among others.²³ Unlike these other areas of vulnerability, research on refugees' access to the legal system (beyond status determination) is scanty. Thus, far more is known about refugees' social, economic and cultural adaptation than about what Hein and Beger²⁴ term their 'legal adaptation': the adjustment process which enables international migrants to proactively participate in the host society's legal system to seek redress for grievances.²⁵ As the law is a central institution in South Africa, like in many societies, the ability to proactively use it can affect every aspect of refugees' and asylum seekers' well-being. Their legal adaptation therefore takes on greater significance and their interaction with the justice system becomes an important subject.

This study stems from a recognition that the right of access to justice is very important to refugees in South Africa, not only for the reasons stated above, but also because it raises

²² Francioni (note 17 above) 9–15.

²³ See generally, Guy Goodwin-Gill 'Non-refoulement and the new asylum seekers' (1985–1986) 26 *Virginia Journal of International Law* 897; Human Rights Watch *South Africa, living on the margins: Inadequate protection for refugees and asylum seekers in Johannesburg* (New York: Human Rights Watch 2005); Cindy Horst 'Refugee livelihoods: Continuity and transformations' (2006) 25 *Refugee Survey Quarterly* 2; David Hollenbach *Refugee rights: Ethics, advocacy, and Africa* (Washington: Georgetown University Press, 2008); Mariano-Florentino Cuellar 'Refugee security and the organizational logic of legal mandates' (2006) 37 *Georgetown Journal of International Law* 1302; Joan Fitzpatrick 'Flight from asylum: Trends toward temporary refuge and local responses to forced migrations' (1994–1995) 35 *Virginia Journal of International Law* 13; Morton Beiser 'The mental health of refugees in resettlement countries' in Howard Adelman (ed) *Refugee policy: Canada and the United States* (Toronto: Centre for Refugee Studies, York University, 1991) 425–442.

²⁴ Jeremy Hein & Randall R Beger 'Legal adaptation among Vietnamese refugees in the United States: How international migrants litigate civil grievances during the resettlement process' (2001) 35 *International Migration Review* 420–448.

²⁵ *Ibid*, 421.

fundamental questions linked to their protection, especially in view of the xenophobic environment in which foreigners generally, and refugees in particular, live in the country. While it would be impossible to claim that merely having access to justice is the solution to all of the problems that refugees face, the fundamental nature of law and access to remedies is such that it is central to resolving the majority of the issues. The ability to resort to court, seek redress for violation of rights and other injustices, and to resolve disputes have an impact on refugees' ability to access the asylum process, enjoy the rights accorded under domestic and international law, combat xenophobia and resolve disputes within and outside their own ethnic communities.

The host state, as a primary duty bearer to refugees has important obligations to ensure that an enabling environment, necessary for such access, is made available. This study proceeds on the premise that South Africa, having adopted a rights-based approach to refugee issues, must ensure that refugees within its territory are able to enjoy those rights, and if violated, be able to access remedies. In other words, that refugees in its territory must have effective access to justice. As very little work has been done in this area, it is hoped that this study will shed new light on the subject and present a clear picture of South Africa's success and/or failings in its relationship with the refugees it hosts. It is also hoped that the results will help to inform policy changes where necessary.

1.3 SCOPE OF STUDY

This study is concerned with the issue of access to justice by refugees and asylum seekers in South Africa. In view of its status as an important refugee-receiving country in Africa, the study looks at how well South Africa meets its obligations to refugees and asylum seekers in this important area. The evaluation is done in the context of the country's international law obligations and its constitutional, legislative and policy framework on access to justice. Another aspect, the actual experiences of refugees and asylum seekers in accessing justice, helps to illustrate the challenges identified in the constitutional, legislative and policy contexts.

As a starting point, it is acknowledged that the term 'access to justice' is fraught with misunderstanding and confusion, as it is often used interchangeably to describe access to a justice *system* – courts and other formal forums; access to *justice* – fair and equitable results; or access to *legal aid* – advice and representation for the needy. This study adopts a broad meaning that encompasses all of those elements. Thus what is examined, with reference to

refugees, is the accessibility of the South African justice system, outcomes from recourse to it, parallel methods of seeking justice and the availability of assistance to facilitate access. The study aims to answer the following questions:

- What are South Africa's international law obligations to refugees and asylum seekers on access to justice?
- Do its Constitution, laws and policies live up to those obligations?
- How do refugees and asylum seekers experience justice in the country? Do they rely on the State, and if so do their experiences approximate to those envisaged under international law and the constitution? If they do not rely on the State, how do they seek justice?
- What lessons can be learned from refugees and asylum seekers access to justice in South Africa?

1.4 METHODOLOGY AND MATERIALS

This study adopts a two-pronged approach to the discussion of refugees' access to justice in South Africa. The first is an archival and library research of the scholarship relevant to the subject matter, as well as of various pieces of legislation, international instruments and jurisprudence on the subject. Source materials include books, journals, the internet, magazines, research reports, seminar and conference proceedings, among others.

The archival research involves an examination of policy documents, government gazettes, newspapers, monographs and other materials related to access to justice, immigration and refugees. It also involves an analysis of over 5000 cases in the case log of the University of Cape Town Law Clinic dating from 2005–2008. The data obtained from both the library and archival research helped to establish the theoretical framework for understanding the two key concepts that form the subject of the thesis, that is, 'refugees' and 'access to justice' and the matters they confront. It also forms the basis for answering the question whether or not South Africa's approach to access to justice conforms to international standards, and whether enough is being done to ensure that it does.

The second approach is a field research involving interviews, surveys and participant observation within the refugee community and with refugee service providers in their quest

for justice and as they interact with the justice system.²⁶ This aspect of the research was designed to provide some ‘grounding’ to the discussion, by going beyond theoretical postulations, to providing practical illustrations of how issues identified in the library and archival research affect refugees and asylum seekers in real-life situations. While this aspect of the study offers a broader insight into the subject of access to justice as it relates to refugees, it is important to enter the *caveat* that the data presented does not make any generalised claims on the subject. Scholars of forced migration are quick to point out that the diversity and size of migrant populations make representativeness of any research about them an important issue.²⁷ Therefore large-scale quantitative data is often required if one is to make any assertions or well-founded policy recommendations on migrant populations.²⁸

This obviously has an impact on the ability to generalise the findings of isolated, small-scale case studies such as this one.²⁹ That however, does not mean that the data presented in the study offers no value. On the contrary, the study provides a useful and rich store of

²⁶ Chapter five discusses in greater detail the methodology adopted for this aspect of the study, including the demographics, selection criteria and limitations.

²⁷ See generally Karen Jacobsen & Loren B Landau ‘Researching refugees: Some methodological and ethical considerations in social science and forced migration’ Working Paper No 90 (Geneva: UNHCR, 2003); Alice Bloch ‘Methodological challenges for national and multi-sited comparative survey research’ (2007) 20 *Journal of Refugee Studies* 230–247; James T Fawcett & Fred Arnold ‘The role of surveys in the study of international migration: An appraisal’ (1987) 21 (4) *International Migration Review* 1523–1540; Darshan Vigneswaran ‘Lost in space: Residential sampling and Johannesburg’s forced migrants’ Paper Submitted to the *African Migrations Workshop: Understanding migration dynamics in the continent* 18–21 September 2007, Accra, Ghana; Catriona Mackenzie *et al* ‘Beyond “Do no harm”’: The challenge of constructing ethical relationships in refugee research’ (2007) 20 (2) *Journal of Refugee Studies* 299–319; Eileen Pittaway *et al* ‘Stop stealing our stories’: The ethics of research with vulnerable groups’ (2010) 2 (2) *Journal of Human Rights Practice* 229–251; Oliver Bakewell ‘Research beyond the categories: The importance of policy irrelevant research into forced migration’ (2008) 21 *Journal of Refugee Studies* 432–453; Oliver Bakewell ‘Researching refugees: Lessons from the past, current challenges and future directions’ (2007) 26 (3) *Refugee Survey Quarterly* 6–14; Tara Polzer ‘The value of non-probability surveys: Collecting data on migrants through service provider NGOs’ Paper presented at the African Migrations Workshop, Rabat, Morocco 26–29 November 2008. Available at <http://www.imi.ox.ac.uk/pdfs/tara-polzer-amw-08> [accessed 2 February 2010].

²⁸ Jacobsen & Landau (note 27 above) 11; Vigneswaran (note 27 above) 5; Bakewell ‘Research beyond the categories’ (note 27 above) 441.

²⁹ Chapter 5 provides an extensive discussion of the methodology used for this aspect of the research, including its limitations.

descriptive and anecdotal data on how refugees perceive and experience justice in country. While not generalisable, the data establishes the existence of trends, and suggests patterns, variables and hypotheses that can serve as the basis for further study in this area. That in itself, according to scholars of forced migration, is an important aspect of scholarship, because in areas or circumstances about which little is known (such as this one), descriptive data which are obtained from in-depth interviews reveal much about how forced migrants live, the problems they encounter, their coping or survival strategies, and the shaping of their identities and attitudes.³⁰ The data therefore offers an angle to look at the subject matter in a manner that provides an insight into how access to justice is seen from a refugee's point of view. Lastly, juxtaposing practical experiences with 'what the law says' offers another option for evaluating South Africa's success or failure in the promotion, protection and realisation of the right of access to justice by refugees.

The entire study itself is structured in such a way that the evaluation of access to justice is done using two different indicators. The first barometer is, of course, compliance with international law and treaty standards. This is the most important aspect of the study, and it is here that the study answers the research questions raised earlier. The second uses the perceptions and experiences of refugees as its barometer. Informed by the legal and policy analysis undertaken in the first aspect, this second barometer relies on existing scholarship and those of the limited empirical work done for this study to evaluate if the actual experiences of refugees and asylum seekers approximate to that which is envisaged for them under international law.

1.5 BRIEF SUMMARY OF THE THESIS

Refugees have become a highly visible part of South African society over the past 15 years, but ironically, it is negative occurrences such as xenophobia and administrative inefficiency in dealing with refugees that have propelled them into the national consciousness. The irony stems from the fact that they live in the new South Africa – a country that has consistently declared and demonstrated its commitment to human rights since its emergence from apartheid.³¹ Given such commitment, it is only right to expect that the rights of refugees as a

³⁰ Jacobsen & Landau (note 27 above) 6.

³¹ Thabo Mbeki 'Statement on behalf of the African National Congress, on the occasion of the adoption by the Constitutional Assembly of "The Republic of South Africa Constitutional Bill 1996"' 8 May 1996. Available at

class of people would be protected and every effort would be made to ensure their realisation. Yet the scholarship suggests otherwise.³² While South Africa does have refugee legislation that accords them many rights, whether or not they enjoy those rights is another matter. It is trite that merely having rights in law does not automatically translate into an enjoyment of those rights, nor does it guarantee that those rights will not be violated. When rights are violated, access to justice, an essential component of the system of protection and enforcement of human rights, becomes of fundamental importance.³³ The importance of this has been alluded to, and cannot be overemphasised.

As seen above, the aim of this study is to evaluate South Africa's commitments and efforts to ensure that refugees within its territory have access to justice, and by extension are able to enjoy other rights or seek remedies for the violation of those other rights. This evaluation is done on three levels – firstly, at the constitutional level, to determine how well the right of access to justice is protected under the South African Constitution and whether this conforms to international law; secondly at the legislative, policy and programmatic level in order to see how well the guarantees are given effect; and thirdly at the level of the day-to-day experiences and real life situations of the target population, that is, refugees, to see how all of the above translate in real life.

This is a legal study that adopts, to some extent, an interdisciplinary approach. I begin by setting the context for South Africa's reception of refugees and asylum seekers. It is inevitable that, given its history and the changes that have occurred in the country's recent past, any examination of South African law, policies and practices will have an apartheid and post-apartheid context. A lot of the discussion takes that form.

<http://www.anc.org.za/ancdocs/history/mbeki/1996/sp960508.html> [Accessed 4 May 2010]; Geoff Budlender 'Human rights groups face new challenges in South Africa' (1996) 3 *Human Rights Brief* 2.

³² See eg Handmaker *et al* (eds) *Advancing refugee protection in South Africa* (New York: Berghahn Books, 2008); Loren Landua & Karen Jacobsen 'Forced migrants in the new Johannesburg' Working paper No 6, Forced Migration Studies Programme, University of the Witwatersrand; Jonathan Crush & Vincent Williams (eds) *Evaluating refugee protection in South Africa* Migration Policy Brief No 7 (Cape Town: Southern African Migration Project, 2002); Human Rights Watch "'Prohibited persons": Abuse of undocumented migrants, asylum-seekers, and refugees in South Africa' (New York: Human Rights Watch, 1998); Jean Pierre Misago 'Xenophobic violence in South Africa: Reflections on causal factors and implications' (2009) 10 *Policy Studies Bulletin of the Centre for Policy Studies* 3–9. The conditions under which refugees live in South Africa will be discussed more extensively in subsequent chapters.

³³ Francioni (note 17 above) 1.

Chapter one provides a concise overview of the historical and social frameworks within which refugees come to and remain in South Africa. By the time South Africa was welcomed back into the comity of nations in the early 1990s, significant developments had occurred around the world on the treatment of refugees. Refugee treaties had been adopted at the United Nations and regional levels. Refugee rhetoric was rapidly shifting from ‘control’ to ‘human rights’, and refugee-specific legislation had become or was becoming a feature of many countries’ *corpus juris*. Although South Africa had provided a home to refugees for decades, racial, rather than human rights or international law considerations, was the foundation of its relationship with them. It suddenly also had to deal with many legitimate refugees who had lived within its borders for years without recognition as such, and it had to deal with them in a manner consistent with international standards. How South Africa reacted to these challenges would obviously impact on the rest of the continent, for many of those refugees were coming from African countries with which it had not previously had contact. This chapter explores the dynamics of how South Africa went about dealing with this relatively new area and some of the challenges involved. Issues of access to justice that refugees may have historically had to deal with are explored.

Having entered into an era of international acceptance and recognition, South Africa went about crafting new laws and policies that conformed to international standards. It became a party to many international instruments that it had previously been precluded from. Some of these had a direct bearing on how it would treat the refugees in its territory. The next chapter, Chapter two, sets out to evaluate what obligations South Africa took on when it signed and/or ratified those treaties, and what these mean for its policy and praxis. The chapter starts with a review of some of the literature on access to justice and in the process sets the theoretical context for the concept of access to justice, its often-changing and dynamic nature, and its place as a human right. It then looks at the international human rights law regime on access to justice generally and in relation to refugees specifically. The obligations of States derived from those international treaties are examined closely as they set the context for the evaluation of South Africa’s compliance or otherwise with international law. This is particularly important given that South Africa has adopted and frequently restates its commitment to a rights-based approach to refugee issues.³⁴ This chapter provides an insight into what international law expects of States generally and serves as a benchmark by

³⁴ Note 31 above.

which South Africa's Constitution, laws and policies on access to justice for refugees can be measured.

Having determined what international human rights and refugee law expect of state parties in respect of access to justice, subsequent chapters close in on South Africa specifically. The country's effort to ensure access to justice for refugees is examined in two parts. The first part, in Chapter three, looks at the constitutional provisions on access to justice. It evaluates how well the South African Constitution responds to the principles distilled from the discussion of international law in the previous chapter. The relevant provisions of the Constitution, the jurisprudence of the Constitutional Court as well as the commentaries of respected scholars on those provisions form the basis of this discussion. It also offers an opportunity to see some of the influences of the jurisprudence of other courts, such as the European Court of Human Rights on the interpretation of the South African Constitution.

The second part, in Chapter four, looks at South African legislation, policies and programmes on access to justice. The hazard inherent in this approach is obvious, given that very many pieces of legislation and policies do have a bearing on access to justice, even when that is not their primary purpose. There is therefore the potential to enter into an endless discussion of legislation, policy documents and policy directives. In order to avoid this, only those policies and legislation having access to justice directly as their main objective will be examined. This discussion of policy also necessitates a discussion, at least on a superficial level, of programmes developed to implement those policies. In discussing these, I will focus on how they impact upon refugees specifically.

The best evaluation of any policy is the result it achieves and the next chapter deals with that. Chapter five presents the result of an empirical study on refugees' experiences with and their perceptions of the justice system in South Africa. It is based on the results of a field study in which refugees, asylum seekers and service providers were interviewed to obtain first hand reports of their experiences with seeking justice, and their interactions with the justice system. It also draws extensively on work done by other scholars, which have a bearing on the subject. The aim here is to see if those laws and policies discussed in Chapters three and four are having the desired results, or whether they fall short of their stated objectives, and if so why? The study provides practical illustrations of what the issues identified in the previous chapters mean to refugees and asylum seekers in their everyday lives.

Knowing this will help in framing recommendations and, it is hoped, will be fully taken into consideration in the ongoing work of improving refugee protection and of ensuring access to justice for the populace. In view of the broad interpretation of access to justice that the study adopts, the survey described above did not limit itself to obtaining the experiences of refugees only in specific state-sanctioned forums, but also looks at parallel methods by which they seek justice. The next chapter, chapter six, therefore also discusses the other forums in which refugees and asylum seekers seek justice and why they use those forums. The chapter will also give an insight into how refugees mobilise around social and ethnic networks for the purposes of seeking justice and what this means for the State, which is after all, the primary organ vested with the duty to administer justice.

Having evaluated refugees' access to justice on the basis of compliance with international law, and on the basis of the user-friendliness or otherwise of State efforts, the final chapter, chapter seven summarises the study and its findings.

This next section provides a historical context for refugee protection in South Africa. It traces the road South Africa has travelled to reach this point where the rights of refugees has become a significant part of the national discourse.

1.6 HISTORICAL CONTEXT

As Handmaker *et al* point out, any perspective on refugee protection in South Africa is bound to be new, not only because of the relative novelty of the experience to South Africa, but more importantly, in the way it demonstrates the close linkages to policies of international migration and to apartheid.³⁵ This history of refugee protection in South Africa is therefore also a history of its immigration policy and the role of apartheid in that policy. A parallel but cursory look at refugee policies in the rest of Southern Africa within the same period frames the somewhat unique context within which refugee protection developed in South Africa.

Unlike in most other Southern African countries, where refugee policies have undergone transformation in three phases over a long period of time, South Africa's refugee policy was more abrupt, swinging from one extreme of exclusion over decades, to a liberal,

³⁵ Handmaker *et al* (Note 32 above) 2.

rights-based approach within a few years.³⁶ The first phase of refugee policies in Southern Africa saw most countries treating refugee issues as an integral part of immigration law, which concerned itself primarily with entry and residence, but remained silent on issues of refugee protection. Refugee-specific legislation did not exist in these countries for many years.³⁷ This was also true of South Africa, although its immigration policy was more about control and deportation than planning and managed entry.³⁸

The country began receiving refugees (mostly Europeans fleeing the pogrom in Russia) since the latter part of the 19th century, but it was not until the 1990s that a proper legislative framework was put in place.³⁹ Until then, refugee reception was *ad-hoc* and very much dependent on the political anxieties of the government of the time.⁴⁰ The most pressing issue that faced the newly established Union of South Africa in 1910 was the question of how to make the country ‘a great White man’s land ... for ourselves and for generations to come’.⁴¹ Therefore, the immigration policy that emerged between 1910 and 1913 was, as one scholar puts it, more concerned at its core with exclusion rather than inclusion, characterised as it was by the racial prejudices that reflected the anxieties of the government, and were designed to control the entry of particular racial groups.⁴² It formed the basis of all immigration laws going forward. These laws, even though they regulated the presence of a group as highly

³⁶ Bonaventure Rutinwa ‘Asylum and refugee policies in Southern Africa: A historical perspective’, paper presented at the ‘Regional Integration, Migration and Poverty Conference’, Human Sciences Research Council, Pretoria, April 2002. Available at www.sarpn.org.za [Accessed 13 September, 2006].

³⁷ Ibid.

³⁸ Jonathan Crush ‘Immigration, human rights and the Constitution’ in Jonathan Crush (ed) *Beyond control: Immigration and human rights in a democratic South Africa* (Cape Town: IDASA, 1998) 2.

³⁹ Jonny Steinberg *A mixed reception: Mozambican and Congolese refugees in South Africa* (Pretoria: Institute for Security Studies, 2005) 2; Jeff Handmaker *et al* ‘Introduction’ in Handmaker *et al* (note 31 above) 2; Richard Mendelsohn & Milton Shain *The Jews in South Africa: An illustrated history* (Johannesburg: Jonathan Ball Publishers, 2008) 85; Ed Stoddard ‘Lithuanian Jews make big impact in South Africa’ Southern Africa Migration Project. Available at <http://www.queensu.ca/samp/news/artic1.htm> [Accessed 12 February 2007].

⁴⁰ Sally Peberdy *Selecting immigrants: National identity and South Africa’s immigration policies 1910–2008* (Johannesburg: Wits University Press, 2009) Chapter 3.

⁴¹ Louis Botha, at Inaugural Congress of the South African Party, Bloemfontein, cited in Daniel W Kruger (ed) *South African parties and policies, 1910–1960* (Cape Town: Human & Rousseau, 1960) 51–52.

⁴² Sally Peberdy ‘A brief history of South African immigration policy’ in Jonathan Crush & Faranaaz Veriava (eds) *Transforming South African migration and immigration policy* (Cape Town: SAMP, 1998) 23.

vulnerable as refugees, were anchored in ideologies antithetical to human rights.⁴³ They fostered a tendency to label all potential refugees as illegal immigrants with attendant consequences such as deportations. As will be seen shortly, they also severely curtailed refugees' rights of access to justice.

The main feature of the immigration laws was often the very strict criteria which prospective immigrants had to meet, failing which they were declared 'prohibited immigrants'.⁴⁴ The most important criterion was that the potential immigrant had to be 'readily assimilable with the European inhabitants of the union'.⁴⁵ By virtue of these laws therefore, only whites could be immigrants. Africans were recognised only as migrants or guest workers, who could be sent back across the border when they were no longer useful.⁴⁶ This remained the case until the dying years of apartheid.⁴⁷

Subsequent Acts were characterised by sweeping, almost despotic, powers conferred on the Minister of the Interior which enabled him to exclude entire classes of people from entering into the country as well as the discretion to allow certain classes of people entry who would otherwise have been excluded.⁴⁸ This ensured access to an African labour force to

⁴³ Crush (note 38 above) 3.

⁴⁴ Sally Peberdy & Jonathan crush 'Rooted in racism: The origins of the Aliens Control Act' in Crush (note 38 above) 20.

⁴⁵ Crush (note 38 above) 3.

⁴⁶ Marie Wentzel & Kholadi Tlabela 'Historical background to South African migration' in Pieter Kok *et al* (eds) *Migration in South and Southern Africa: Dynamics and determinants* (Cape Town: HSRC, 2006) 76; Jonathan Crush 'An historical overview of cross-border movement in Southern Africa' in David A McDonald (ed) *On borders: Perspectives on international migration in Southern Africa* (Ontario: Southern Africa Migration Project, 2000) 12, 20.

⁴⁷ Crush (note 45 above).

⁴⁸ Section 4(1)(a) of the Immigrant Regulation Act, No of 1913 (Act No 22 of 1913) for instance, provided that 'any person or class of persons deemed by the Minister on economic grounds or on account of standard or habits of life to be unsuited to the requirements of the Union, or any particular Province thereof' shall be a prohibited immigrant.' Acting under this provision, the Minister of the Interior subsequently published the following notice on 1 August 1913:

Under the powers conferred on me by paragraph (a) of sub-sec. (1) of sec. 4 of the Immigrants Regulation Act, 1913 (Act No. 2.2 of 1913), I hereby deem every Asiatic person to be unsuited on economic grounds:—

(1) to the requirements of the Union; and

(2) to the requirements of every Province of the Union;

(a) in which such person is not domiciled; or

(b) in which such person is not, under the terms of any statute of such Province, entitled to reside.

work the mines and agricultural sector while at the same time preventing them from becoming immigrants.⁴⁹ The Immigrant Regulation Act of 1913, one of the founding legislations of the Union of South Africa, remained the cornerstone of South Africa's immigration legislation into the 2000s.⁵⁰ The primary purpose of the 1913 Immigrants Regulation Act was to stem the tide of Indian immigration.⁵¹ Alarmed by the expanding Indian population and the threat posed to white businessmen and its vision of a white South Africa, the government declared its intention to exclude 'Asiatics' and this legislation was designed to achieve that.⁵²

Section 4(1)(a) of the same Act was subsequently used to exclude Jews fleeing the upheaval in Europe at the end of the First World War.⁵³ This section empowered the Minister of the Interior to deem any 'class of persons' as 'unsuited to the requirements of the Union or any Province thereof' and thus keep them out. Even though most were legitimate refugees fleeing Eastern Europe in the upheavals that followed the First World War, they were viewed as being different from the original white inhabitants of South Africa and were therefore 'a threat to the future of the nation'.⁵⁴ Sustained anti-Semitic sentiment was the inspiration for the next immigration law – the Immigration Quota Act of 1930,⁵⁵ which was modelled on

The effect of this notice should have been that all persons from Asia became prohibited immigrants under the Act. However, this was not so, as Jews and Syrians (deemed white) were admitted under this law. The provision, it was decided, applied only to 'coloured Asiatics'. See Generally *Rex v Padsha* (1923) AD 281, 287; *Gandur v Rand Township Registrar* (1913) AD 250.

⁴⁹ See note 46 above; Ruth First *Black gold: The Mozambican miner, proletarian and peasant* (New York: St. Martin Press, 1983); Peberdy & Crush (note 43 above) 20; Jonathan Crush & David A McDonald 'Introduction to special issue: Evaluating South African immigration policy after Apartheid' (2001) 48 (3) *Africa Today* 1–13.

⁵⁰ Peberdy (note 40 above) 33.

⁵¹ Eric Anderson Walker *The Cambridge history of the British Empire, Volume 7, Part 1* (Cambridge: Cambridge University Press, 1963) 656–657; Peberdy (note 40 above) 31–55.

⁵² Peberdy (note 40 above) 40.

⁵³ *Ibid*, 33.

⁵⁴ *Ibid*; Gideon Shimoni *Community and conscience: The Jews in apartheid South Africa* (Lebanon: Brandeis University Press, 2003) 11–12.

⁵⁵ Act No 8 of 1930.

similar legislations in other white settler societies at the time including the United States, Canada and Australia.⁵⁶

Hitler's rise to power in Germany and the consequent persecution of Jews led to another wave of Jewish immigration into South Africa. Again, even though these were refugees fleeing anti-Semitism and other forms of persecution, the ruling Afrikaner nationalist government, which had overt Nazi sympathies, did not extend the same welcome it had accorded to other Europeans.⁵⁷ In spite of its hostile stance, the government found the provisions of existing legislation inadequate to keep the refugees out, for under the Immigration Quota Act of 1930, they were nationals of a scheduled country (Germany), and because they were literate, often professionals and solvent, they met the entry requirements of the 1913 Act.

This created a dilemma for the government which wanted to encourage German immigration but not the immigration of German Jews. Consequently, the Aliens Act of 1937⁵⁸ (Aliens Act) was passed. It defined an alien as any person who was not a 'natural-born British subject or a Union National'.⁵⁹ This Act formed the basis of all subsequent immigration legislation, and for sometime formed the legislative framework for the reception of refugees into South Africa. It was in this Act that the word 'alien' was first used to describe unwanted immigrants, and it later became entrenched in legislation.⁶⁰ Although government policy on immigration was often changed to deal with the challenges of the times, such as World War II, apartheid, independence struggles in Africa and the Cold War, the structures established under the Aliens Act endured and were strengthened through various amendments. The Act, in its various amended versions survived into the advent of democracy.⁶¹

⁵⁶ See generally Roger Daniels *Coming to America* (New York: Harper Collins 1990); Freda Hawkins, *Critical years in immigration: Canada and Australia compared* (Quebec: McGill-Queens University Press, 1991) for similar discussions on the question of Jewish immigration to these countries.

⁵⁷ Milton Shain *The roots of anti-Semitism in South Africa* (Charlottesville: University Press of Virginia, 1994) 137–143.

⁵⁸ Act No 1 of 1937.

⁵⁹ Section 1, Aliens Act 1937.

⁶⁰ Peberdy (note 42 above) 23.

⁶¹ Peberdy & Crush (note 44 above) 33.

1.6.1 Denial of access to justice under immigration laws

A common thread that ran through these pieces of legislation was the tight leash they put on the judiciary and the direct impact this had on refugees' access to justice. Indeed some of apartheid's most effective instruments of control can be found in these laws. One of these, the 'ouster clause', was particularly popular and heavily relied upon in immigration law. Ouster clauses are provisions contained in legislation ousting or limiting the courts' jurisdiction to enquire into the legal validity of certain laws or conduct by the State. They purport to give the State a free hand to do as it pleases 'without regard for the standard of lawfulness, reasonableness and procedural fairness'.⁶² Also, they gave very wide discretion to immigration officials which meant that courts, even when they assumed jurisdiction, could not inquire into the merits of the decisions of the officials. Section 3 (1) of Immigrant Regulation Act of 1913, for instance provided:

No court of law in the Union shall except upon a question of law reserved by a board as in this section provided, have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any proceeding, act, order, or warrant of the Minister, a board, a passport control officer or a master, had, done, or issued under this Act, and relating to the restriction or detention, or to the removal from the Union or any Province, of a person who is being dealt with as a prohibited person.

Similarly couched, s 5(1) of the same Act ousted the jurisdiction of any court to interfere with the proceedings of an immigration authority relating to the restriction, detention or removal of persons who are dealt with as prohibited immigrants. Section 11 of the Admissions of Persons to the Republic Regulation Act,⁶³ which later consolidated the 1913 Immigrants Regulation Act and its various amendments, contained a similar provision.⁶⁴ Interpreting these provisions, the court in *Union Government v Fakir*,⁶⁵ held that the only grounds on which the court could interfere were cases in which there was a manifest absence of

⁶² Cora Hoexter *Administrative law in South Africa* (Cape Town: Juta, 2007) 522.

⁶³ Act No 59 of 1972.

⁶⁴ It provides:

'No court of law shall, except upon a question of law reserved by a board under sec. 12, have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any proceeding, act, order or warrant of the Minister, a board, a passport control officer or master of a ship, had, done, or issued under this Act, and which relates to the restriction or detention, or the removal from the Republic or any Province, of a person who is being dealt with as a prohibited person'.

⁶⁵ *Union Government v Fakir* (1923) AD 466, 470; See also *Narainsamy v Principal Immigration Officer* (1923) AD 673.

jurisdiction or if an order were made or obtained fraudulently. To justify such interference, however, the fraud or absence of jurisdiction that is alleged must appear from the papers. This, the court acknowledged, left it with ‘extremely limited jurisdiction’.⁶⁶

The impact of these clauses on refugees was obvious – they had no access to remedies even if their rights were violated through atrocious administrative action. Indeed, as the court noted in *Wray v Minister of the Interior and Another*⁶⁷

Unless a person being treated as a prohibited immigrant can allege and prove that the action or proposed action of the passport control officer to deport him is one for which no warrant at all exists in the Act in the sense that he has no jurisdiction at all to perform such an act, or that, having jurisdiction to deport him, it is done fraudulently or mala fide, the Court cannot interfere, even if it were for some reason illegal.⁶⁸

1.6.2 The era of refugee-specific policies

Concern about the plight of European refugees fleeing post-war Eastern Europe led to the adoption of the UN Refugee Convention and its 1967 Protocol.⁶⁹ While South Africa grappled with refugee issues under the auspices of its immigration laws, Southern Africa, like the rest of Africa, was in the grip of anti-colonial liberation struggles that gained momentum post-World War II. This gave rise to a new group of refugees fleeing persecution across borders and led to the adoption of the OAU Refugee Convention. This state of unrest also gave birth to what could be termed ‘second-generation’ refugee policies in the sub-region. The policies were characterised by laws designed to regulate selected aspects of refugee protection and were primarily aimed at controlling refugees as their long titles attested.⁷⁰ In spite of this shortcoming, they had the advantage that they were refugee specific-legislation and recognised the person of the refugee and their disadvantaged position.

This was not the case in South Africa. Neither the UN Refugee Convention nor the OAU Refugee Convention had any impact on its refugee policy. The country had by this time

⁶⁶ *Barday v Passport Control Officer* (1967) 2 SA 346 (A) 358.

⁶⁷ *Wray v Minister of the Interior and Another* 1973 (3) SA 554 (W).

⁶⁸ *Ibid*, 561.

⁶⁹ Protocol Relating to the Status of Refugees, 606 UNTS 267, *entered into force* 4 October, 1967.

⁷⁰ Eg Tanzania’s Refugee Control Act No 2 of 1966; Botswana’s Refugee (Control and Recognition) Act, (Cap 25:03) of 1968; Zambia’s Refugee (Control) Act No 40 of 1970; Swaziland’s Refugee Control Order No 5 of 1978.

become a refugee producing country as persons fleeing the apartheid regime fled to other African countries and Europe.⁷¹ On the other hand, while a number of persons fitting the definition of refugee contained in the UN Refugee Convention found refuge in South Africa, their admission was ad-hoc, race based and was facilitated under the Aliens Control Act. The broad discretion accorded by the Act continued to be used to facilitate generous entry to desirables like immigrants from Western Europe and anti-communists from Eastern Europe in the Cold War era. It also enabled the country to open its doors to receive and grant full citizenship status to a large number of mostly white persons fleeing from Rhodesia and Mozambique as the settler colonial systems in these countries crumbled in the late 1970s and early 1980s.⁷² However, the same hospitality was not extended to black Mozambicans fleeing the South African-sponsored civil war in Mozambique.⁷³ Entry of black Africans continued to be strictly limited to bi-lateral contract-labour treaties between South Africa and neighbouring countries to provide cheap labour.⁷⁴ South Africa's failure to recognise them as refugees left them vulnerable in terms of access to protection and to justice. It meant they could be and were indeed repatriated contrary to the principle of *non-refoulement* and they had no access to international assistance.⁷⁵ They could not resort to court to have their rights upheld.

South Africa's crackdown on anti-apartheid activists, the civil wars it supported in many Southern African countries, such as Mozambique, Angola, Zimbabwe and Namibia

⁷¹ Ivor C Jackson *The refugee concept in group situations* (The Hague: Kluwer Law International, 1999) 302–307.

⁷² Crush (note 46 above) 20; Lee Anne de la Hunt 'Refugee migration to South Africa' Southern Africa Migration Project Available at <http://www.queensu.ca/samp/> [Accessed 14 August 2010].

⁷³ Christina Murray 'Mozambican refugees: South Africa's responsibility' (1986) 2 *South African Journal of Human Rights* 154–163, 161; Lee Ann de la Hunt 'Refugees and immigration law in South Africa' in Crush (note 38 above) 125; Human Rights Watch *The treatment of refugees and asylum-seekers in South Africa* (New York: Human Rights Watch, 1998) 24, 29.

⁷⁴ Jeff Handmaker & Jennifer Parsley 'Migration, refugees and racism in South Africa' (2001) 20 (1) *Refuge* 40; Jonathan Crush *The struggle for Swazi labour 1890–1920* (Ontario: McGill-Queen's University 1987) 90, 93–94.

⁷⁵ Murray (note 73 above) 155, 163; Chris Dolan & Vusi Nkuna 'Refugees, illegal aliens and the labour market: The case for a rights-based approach to labour movement in South Africa' University of the Witwatersrand Rural Facility, January 1995.

continued to produce refugees fleeing across the sub-region's borders.⁷⁶ It was during this period, in the 1980s, that a third generation of refugee policies emerged in Southern Africa. They were characterised by the enactment of refugee laws modelled on and approximating the standards found in the international refugee conventions.⁷⁷ Again, South Africa lagged behind. Indeed, it refused to recognise the presence of refugees in the country even when they had become a very visible part of South African society. Most were Africans who had fled the bloody civil wars in Mozambique and Angola and sought refuge in South Africa.⁷⁸ They mostly stayed in the homelands and rural areas, and as long as they did not venture into the cities, they were left alone.⁷⁹ As the country still had not adopted any laws to deal with refugee matters, their status as refugees and asylum seekers was ignored and they were dealt with as a class of prohibited persons.⁸⁰ In 1991, all the various immigration legislation was compiled and consolidated into a single act – the Aliens Control Act of 1991.⁸¹ As apartheid died and the country moved inexorably towards democracy, the increasing number and visibility of refugees and asylum seekers made it expedient to deal with matters relating to their status determination under section 41(1) of the 1991 Aliens Control Act. The section empowered the Minister to issue temporary permits to 'prohibited persons' to enable them enter and reside in South Africa.

The whole Act itself did not provide any major shift from previous immigration laws. Section 55 for instance, continued the tradition of ouster clauses, providing that no decision of the DHA was reviewable by a court or tribunal, and persons could be held in detention

⁷⁶ Phyllis Johnson & David Martin *Apartheid terrorism: The destabilisation report* (London: Commonwealth Secretariat and James Currey, 1989) chap 1; Africa Watch *Angola: Violations of the laws of war by both sides* (New York: Human Rights Watch, 1989) 8; Alex Vines *RENAMO: From terrorism to democracy in Mozambique?* (London: James Currey, 1991) 18–19; Crush (note 45 above) 20–21.

⁷⁷ For instance Zimbabwe's Refugee Act, No 13 of 1983; Lesotho's Refugee Act, No 18 of 1983; Angola's Refugee Status Act, No 8 of 1990; Mozambique's Refugee Act, No 21 of 1991.

⁷⁸ Crush (note 46 above) 20–21.

⁷⁹ Nicola Johnston *The point of no return: Evaluating the amnesty for Mozambican refugees in South Africa* Migration Policy Brief No 6 (Cape Town: Southern African Migration Project, 2001) 1. Crush describes the actions of the South African government in causing displacement by virtue of its own policies and then deliberately keeping out the refugees as 'apartheid at its most cynical' Crush (note 45 above) 21.

⁸⁰ De la Hunt (note 73 above) 128.

⁸¹ Act No 96 of 1991.

indefinitely, without judicial review.⁸² The Act was much criticised by human rights activists and has been described as a ‘draconian apartheid throwback’ and ‘an Act rooted in racism’.⁸³ Following a spate of criticism and expressions of concern by international and local organisations⁸⁴ on the enforcement of the Aliens Control Act, particularly as they relate to refugees, the government responded by actively promoting fundamental changes in policy and legislation.⁸⁵

In the final days of apartheid, the government made rapid efforts to establish an acceptable refugee regime. It began by signing a Memorandum of Understanding (MoU) with the United Nations High Commission on Refugees (UNHCR) in 1991 on the repatriation of South African refugees from their countries of asylum.⁸⁶ These refugees, as stated earlier, were mostly members of the opposition or liberation movements who had fled the crackdown by the apartheid government. In 1993, a Tripartite Commission consisting of the UNHCR, and representatives of the South Africa and Mozambican governments signed a tripartite agreement on the repatriation of some 300,000 Mozambican refugees in South Africa.⁸⁷ Until then, these Mozambican refugees had never been officially recognised as refugees by the South African government.⁸⁸

⁸² This section was amended by the Aliens Control Amendment Act, No 76 of 1995.

⁸³ See for example Peberdy & Crush (note 44 above) 18–36.

⁸⁴ See for instance Human Rights Watch *The treatment of refugees and asylum-seekers in South Africa* (New York: Human Rights Watch, 1998) 160, which described the Act as an ‘apartheid legislation, at odds with internationally accepted human rights norms and the South African constitution’; Black Sash’s Sheena Duncan described it as a bad law whose ‘administration [was] haphazard, *ad hoc*, arbitrary and by no means transparent’. Sheena Duncan ‘Bad law: Applying the Aliens Control Act’ in Crush (note 38 above) 149.

⁸⁵ Jeff Handmaker ‘Who determines policy? Promoting the right to asylum in South Africa’ (1999) 11 *International Journal of Refugee Law* 293.

⁸⁶ Memorandum of Understanding between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees on the Voluntary Repatriation and Reintegration of South African Returnees, 4 September 1991 (1992) 31 *ILM* 522.

⁸⁷ Tri-partite Agreement between the Government of the Republic of South Africa, the Government of the Republic of Mozambique and UNHCR for the voluntary repatriation of Mozambican Refugees from RSA, Maputo, 15 October 1993. See ‘UNHCR’s repatriation operation to Mozambique’. Available at <http://www.unhcr.org/3ae6bcf90.html> [Accessed 11 August 2010].

⁸⁸ Marjoleine Zieck *UNHCR and voluntary repatriation of refugees: A legal analysis* (The Hague: Martinus Nijhoff Publishers, 1970) 339, 341.

The end of apartheid ushered in an era of public declarations of commitments to human rights, tolerance, prosperity and regional integration by the government. These commitments were expressed in the adoption of a new Constitution, the ratification of human rights treaties and an active role in the development of structures of regional integration.⁸⁹ This period of policy re-engineering in South Africa coincided with a period of great turmoil on the African continent. With about three different conflicts going on in the Great Lakes region, Somalia on the road to statelessness, the protracted conflict in Angola and horrible civil wars playing out in Liberia and Sierra Leone,⁹⁰ South Africa suddenly found itself a favoured destination for beleaguered refugees from countries with which it had previously not had much contact. Within a short period, it had moved from a refugee producing country to officially becoming a refugee receiving one. As the first MoU between the government and UNHCR did not give UNHCR access to refugees inside South Africa, a legal framework for their reception became necessary and in the absence of a refugee legislation, the government entered into a Basic Agreement with the UNHCR to enable it establish a temporary presence in South Africa and for the grant of certain diplomatic privileges to the Commission.⁹¹ The Basic Agreement allowed for the establishment of procedures for the reception, determination of refugee status and grant of asylum to refugees in South Africa.⁹² The parties agreed to ‘establish all the necessary arrangements and mechanisms for the execution of measures designed to improve the situation of asylum-seekers and refugees in South Africa’.⁹³ The government further

⁸⁹ Guy Goodwin-Gill ‘International and national responses to the challenges of mass forced displacement’ in Handmaker *et al* (note 32 above) 29.

⁹⁰ See generally Gil Loescher & James Milner *Protracted refugee situations: Domestic and international security implications* (New York: Routledge, 2005); Scott Peterson *Me against my brother: At war in Somalia, Sudan, and Rwanda: A journalist reports from the battlefields of Africa* (New York: Routledge, 2000); Desirée Nilsson *Liberia: The eye of the storm; A review of the literature on internally displaced, refugees and returnees* (Uppsala: Nordic Africa Institute, 2003) for in-depth discussions of some of these African civil wars and the resultant forced displacements they engendered.

⁹¹ Basic Agreement between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and its Personnel in the Republic of South Africa, 6 September 1993 (1992) 31 *ILM* 545.

⁹² *Ibid.*

⁹³ *Ibid.*, preamble.

agreed to ‘apply internationally accepted principles pertaining to the protection and treatment of asylum-seekers and refugees’.⁹⁴

On 12 December 1995, the government acceded to the OAU Refugee Convention, and on 12 January 1996, it acceded to both the UN Refugee Convention and its 1967 Protocol. Having launched itself into the global arena, all that was needed was legislation to give effect to the obligations that the country had committed to. However, in spite of the rapid pace at which things started, enactment of a law to protect refugees was slow, and it was not until 1998 that the a new refugee-specific Act was enacted.⁹⁵ Even so it did not become operational for another two years. This was due in part to the climate of xenophobia, exacerbated by the presence of the new immigrants from the north who did not fit into the whole new project of nation building; and bureaucratic inertia.⁹⁶

Nevertheless, the process of developing a legislative framework for refugee protection went ahead, and in a move that was inconsistent with its usual practice, the Department of Home Affairs (DHA) adopted a participatory process that encouraged civil society and the public to comment on a Draft Refugees Bill. Civil society feedback was enthusiastic.⁹⁷ Submissions supported a strong human rights and constitutional focus and emphasised protection.⁹⁸ A key feature of the consultation process was the general consensus that migration and immigration on the one hand, and refugee issues on the other, had to be dealt with as two separate subjects of legislative reform, a suggestion adopted by the DHA.⁹⁹ Unfortunately, this inclusionary process did not produce the results that civil society and

⁹⁴ Ibid.

⁹⁵ Refugees Act No 130 of 1998.

⁹⁶ Timothy R Smith ‘The making of the South African (1998) Refugees Act’ Working Paper Series No 5, 2003 Forced Migration Studies Programme, University of the Witwatersrand, 4.

⁹⁷ Ibid.

⁹⁸ The submission by Lawyers for Human Rights for instance, highlighted the lack of administrative justice for refugees, which was the norm at the time, and urged that reference be made to the principles of fairness and transparency in refugee status determination. It expressed serious concerns about the absence of clarity regarding the rights of asylum seekers, detention procedures, and the modalities provided for with regard to local integration. Human Rights Watch’s submission discouraged the introduction of refugee camps. Others called for the inclusion of specific rights, especially those mentioned under the UN Refugee Convention. See generally Smith (note 95 above) 18–20; Handmaker (note 84 above) 305–306.

⁹⁹ Jonathan Klaaren *et al* ‘Talking a new talk: A legislative history of the Refugees Act of 1998’ in Handmaker *et al* (note 32 above) 50–51.

others interested in refugee issues had hoped for; the legislation that resulted from the process was considerably weakened by last-minute intervention from ‘conservative forces within the Department of Home Affairs’¹⁰⁰ who had ‘a mentality of strong central control’.¹⁰¹ Some of the areas of concern were that grounds for exclusion were not in full compliance with international law; the Act did not include mechanisms to ensure that the Standing Committee on Refugee Affairs and the Refugee Appeal Board were independent and could act without bias; that only a limited number of rights of refugees were enumerated; and that a section allowed for detention of refugees.¹⁰²

In spite of its shortcomings, the Refugees Act that emerged has been described as an important step forward in the protection of refugees.¹⁰³ On the immigration front, a new Immigration Act was signed into law in late 2002 which laid out a more immigration-friendly framework focused on attracting skilled immigrants.¹⁰⁴ While the Refugee Act has been severely criticised¹⁰⁵ and its implementation led to several confrontations between DHA, the organ of state responsible for its implementation, and civil society, its value and progressiveness cannot be denied. It serves as the framework within which refugees and asylum seekers reside in South Africa. The Act adopts a broad definition of refugees which encompasses the definitions in both the UN Refugee Convention and the OAU Refugee Convention.¹⁰⁶

¹⁰⁰ Smith (note 96 above) 2.

¹⁰¹ Ibid, 25.

¹⁰² Ibid, 32.

¹⁰³ Jonathan Klaaren & Chris Sprigman ‘Refugee status determination in South African law’ in Handmaker *et al.*, (note 32 above) 77.

¹⁰⁴ Immigration Act, No 13 of 2002.

¹⁰⁵ Handmaker & Parsley (note 74 above) 43.

¹⁰⁶ Art 3 Refugees Act :

3. Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person –
 - (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
 - (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere: or
 - (c) is a dependant of a person contemplated in paragraph (a) or (b).

The foregoing historical and legislative context has attempted to recount sequentially, how South Africa came to be where it is in terms of refugee protection. It serves to highlight two key points, namely that:

- An ad hoc approach to refugee protection, without a proper legal framework that references international standards, has the potential to facilitate abuse of human rights, as was the case of African refugees during apartheid. Treating them as just another class of migrants while failing to recognise their unique vulnerabilities as forced migrants meant that matters crucial to refugee protection, including protection from *refoulement*, were ignored.
- Denial of access to justice is inimical to refugee protection. As the discussion of South Africa's use of ouster clauses shows, when refugees are prevented from approaching the courts, they are rendered powerless to challenge decisions and practices that could expose them to danger. They are thus, not really protected, regardless of the country's decision to allow them into its territory. This is especially so when one considers that some of the dangers they could be exposed to are similar to what they experienced or could experience in their home countries if they did not have the 'protection' of this host state.

By showing in a logical manner how things have progressed – from an era of ignoring refugee rights to one of recognition of those rights – the setting is provided for an examination of the current era, the era of rights rhetoric and compliance with international obligations, which is at the heart of this thesis. The next logical question is therefore whether refugees are able to convert those recognised legal rights into effective protection. In order to answer this question, it is necessary to take a brief look at what currently obtains – the social context in which refugees live in South Africa.

1.7 THE SOCIAL CONTEXT

Refugee settlement patterns often take one of two models. The first is a camp-based one in which refugees are restricted to specific camps. This is also referred to as 'warehousing'.¹⁰⁷ It is the model adopted by most countries in Africa and in many parts of Europe. The camps are usually run by the UNHCR with the contribution of local and international non-governmental

¹⁰⁷ Merrill Smith 'Warehousing refugees: A denial of rights, a waste of humanity'. Available at <http://www.refugees.org/data/wrs/04/pdf/38-56.pdf> [Accessed 14 March 2007].

organisations and government agencies.¹⁰⁸ The second model, more commonly found in European countries and North America is what the UNHCR refers to as the ‘urban refugee’ policy. The model essentially means that refugees are not restricted to camps and are allowed to live wherever they choose. In line with global population trends of rural to urban migration, most refugees and asylum seekers choose to stay in the urban areas which hold more promise for employment and other social benefits.¹⁰⁹ The model is predicated on the expectation that refugees would temporarily integrate into the local community.¹¹⁰ According to its 1997 Policy on Asylum Seekers and Refugees in Urban Areas,¹¹¹ UNHCR's expectations for asylum seekers and refugees in structured urban environments are that host governments should play a significant role in protecting them and searching for durable solutions to solve their problems, as opposed to the UNHCR having the principal responsibility.¹¹²

South Africa has adopted an urban refugee policy. An obvious implication of the policy is that a refugee-specific framework for service delivery (as would be the case in camp settings), does not exist and refugees have to access social and other services in much the same way as everybody else. In fact, despite its intention to protect the welfare and dignity of those seeking refugee status in South Africa, the country's refugee policy reflects almost no state obligations for providing specialised assistance. Rather, its explicit obligations are limited to bureaucratic processes intended to facilitate access and integration.¹¹³

Since refugees have to seek out necessary services by themselves, a situation of conflict has arisen in South Africa's host-refugee relations. This is manifested in resentment and

¹⁰⁸ Philip Marfleet ‘“Forgotten,” “Hidden”: Predicaments of the urban Refugee’ (2007) 24 (1) *Refuge* 36–45; Merril Smith (Note 107 above).

¹⁰⁹ Gaim Kibreab ‘Why governments prefer spatially segregated settlement sites for urban refugees’ (2007) 24 (1) *Refuge* 27, 29.

¹¹⁰ Loren Landau ‘Protection as capability expansion: Practical ethics for assisting urban refugees’ in David Hollenbach *Refugee rights: Ethics, advocacy, and Africa* (Washington: Georgetown University Press, 2008) 106.

¹¹¹ UNHCR ‘Comprehensive Policy on Urban Refugees’ 12 December 1997. Available at www.unhcr.org [Accessed 20 March 2006].

¹¹² Ibid.

¹¹³ Loren Landau ‘Protection and dignity in Johannesburg: Shortcomings of South Africa's urban refugee policy’ (2006) 19 *Journal of Refugee Studies* 308, 315.

hostility towards refugees and asylum seekers by the local population,¹¹⁴ while refugees find themselves disadvantaged in the contest for limited resources.¹¹⁵ Research in the field of forced migration in general and refugees in particular have detailed the difficulties that this arrangement raises, particularly the problems faced by refugees – pervasive xenophobia, administrative inefficiency at the DHA which make access to the Refugee Status Determination (RSD) process and documentation very difficult; difficulties in accessing jobs and other social services; pervasive discrimination by state personnel and institutions, not to mention government recalcitrance in extending any kind of benefits to refugees.¹¹⁶ On-going evaluations of asylum practices consistently show that all is not well with the system. The recurrent theme is that though refugees' rights are well defined, translating them into tangible physical benefits has been a more difficult task to accomplish.¹¹⁷ Across all spectrums of their lives, they face significant challenges; from the initial process of obtaining documentation (for which extensive delays and bribery are the norm),¹¹⁸ denial of access to banking and financial services,¹¹⁹ difficulties in accessing housing, health and educational

¹¹⁴ Ibid, 310. 316.

¹¹⁵ M Florencia Belvedere 'Insiders but outsiders: The struggle for the inclusion of asylum seekers and refugees in South Africa (2007) 24 (1) *Refugee* 57.

¹¹⁶ See generally Handmaker *et al* (Note 31 above); Jean Pierre Misago *et al* 'Towards tolerance, law, and dignity: Addressing violence against foreign nationals in South Africa' International Organization for Migration (IOM), Regional Office for Southern Africa 2009; Darshan Vigneswaran 'A foot in the door: Access to asylum in South Africa' Migration Studies Working Paper Series No 40, Forced Migration Studies Programme (University of the Witwatersrand, 2008); Consortium for Refugees and Migrants in South Africa (CoRMSA) Various newsletters and reports. Available at <http://www.cormsa.org.za> [Accessed 12 October 2010]; Landau (note 112 above); Loren Landau *et al* 'Crossing borders, accessing rights, and detention: Asylum and refugee protection in South Africa' (2005) Research Report prepared on behalf of the South African Human Rights Commission.

¹¹⁷ Landau 'Crossing borders' (note 116 above).

¹¹⁸ Tebogo Segale 'Forced migrants and social exclusion in Johannesburg' in Loren Landau (ed) *Forced migrants in the new Johannesburg: towards a local government response* (Johannesburg: Forced Migrations Studies programme, 2004) 46; Florencia Belvedere *et al* *National refugees baseline Survey: Final report* (Johannesburg: Community Agency for Social Enquiry (CASE), Japan International Cooperation and UNHCR, 2003) 6, 76.

¹¹⁹ Karen Jacobsen & Sarah K Bailey 'Micro-credit and banking for refugees in Johannesburg' in Landau (note 119 above) 99-102.

services,¹²⁰ constant harassment by law enforcement officials and xenophobia.¹²¹ Research by the Consortium on Refugees and Migrants in South Africa on refugees' access to government-funded social services, for instance, found that despite the existence of laws which entitle refugees and asylum seekers to a range of basic social services including emergency medical treatment, education, disability grants and social assistance, few Departments or public service providers have adequate policies and practices to implement this. The study found that:

- Many refugees, asylum seekers, and other migrants reported being refused access to treatment at public clinics and hospitals. Many faced discrimination and ignorance of their rights when they try to access these services.
- Refugees and asylum seekers reported being unable to access Anti-Retroviral Treatment (ART) because they did not have green, bar-coded ID documents – contrary to the provisions of the Refugees Act which makes the section 24 and section 22 permits the accepted forms of documentation for refugees and asylum seekers respectively. They are often referred out of the public sector to NGOs to access ART, despite a directive from the National Department of Health to the contrary.

¹²⁰ Abeda Bhamjee & Jonathan Klaaren 'Legal problems facing refugees in Johannesburg' in Landau (note 118 above) 54; Jennifer Greenburg & Tara Polzer 'Migrant access to housing in South African cities' Special Report No 2, Forced Migration Studies Programme, University of the Witwatersrand, 2008, 4; Sally Peberdy & Zondi Majodina 'Just a roof over my head? Housing and the Somali refugee community in Johannesburg' (2000) 11 *Urban Forum* 273–288; Rebecca Pursell *Access to health care among Somali forced migrants in Johannesburg* (Masters Diss: University of the Witwatersrand, 2005); Jo Vearey & Tara Polzer 'Key findings of research studies on migrants' access to health in South Africa: Challenging common assumptions', Presentation at Southern African Development Community (SADC) Parliamentary Forum, Johannesburg, South Africa, 21 October 2009; Lee Stone & Shani Winterstein *A right or a privilege? Access to basic education for refugee and asylum seeker children in South Africa* (Pretoria: National Consortium of Refugee Affairs, 2003).

¹²¹ Ingrid Palmay 'Refugees, safety, and xenophobia in South African cities: The role of local government' Centre for the Study of Violence and Reconciliation, 2002. Available at www.csvr.org.za [Accessed 21 July 2006]; Lee Rondganger 'Xenophobic officers tarnish image and efficiency of SAPS'. *The Star* 17 April 2006, A6; Themba Masuku 'Targeting foreigners: Xenophobia among Johannesburg's police' (2006) *Crime Quarterly* 19.

- Close to one third of school age non-national children were not enrolled in schools due to an inability to pay fees, the costs of transport, uniforms and books, or explicit exclusion by school administrators.
- Non-national children in schools reported being regularly subjected to xenophobic comments by teachers or other students.
- Despite legislative and administrative provisions for certain forms of social assistance for non nationals from the government, in practice such assistance is almost never available. The Department of Social Development had not made the provisions for refugees to access Disability Grants despite being legally compelled to do so.
- In the absence of direct assistance from the government, many non-nationals were heavily reliant on assistance from under-staffed and under-resourced NGOs, refugee self-help organisations and religious organisations.
- In terms of housing, whilst South Africa's refugee policy encourages integration, asylum seekers and refugees are completely excluded from various national housing policies. This, says CoRMSA, is an obstacle to migrants' social and economic integration into the communities in which they live. To further compound the problem, those who live in informal townships around the country are often displaced by xenophobic violence which erupts from time to time. Yet when seeking private accommodation outside townships, they are regularly discriminated against by landlords who do not distinguish between documented and undocumented foreigners. In many instances, landlords refuse to rent to non-nationals regardless of their legal status. Others take advantage of their vulnerability to charge them higher rental rates than South Africans.
- Delays in the processing of documents by the DHA greatly limits the employment opportunities for refugees and asylum seekers.
- Banks often refuse banking services and access to credit to refugees and asylum seekers due to concerns regarding the validity of their permits even though these are legal under the Refugees Act. They are therefore more likely to be victims of crime and police extortion because their assets remain in cash. Indeed this reason has been adduced by the police force and government officials on several occasions as the reason behind attacks on foreigners including refugees and asylum seekers.

- Unaccompanied minor asylum seekers from neighbouring countries often face exploitation by the police who deport them illegally or detain them in illegal conditions – such as detention with adults or for extended periods of time; many of them work in exploitative conditions in various sectors, including farming and domestic work.¹²²

These well-documented challenges stand in stark contrast to the generous protection that South Africa's Refugees Act and Constitution offers to refugees and asylum seekers. But then, as was stated at the beginning of this chapter, mere recognition of rights amounts to nothing – it is only when effective remedies for their violation are available and accessible that respect for and protection of human rights can be guaranteed.¹²³ The question therefore is whether the existence and scale of the problems highlighted above mean that effective remedies are unavailable or inaccessible to refugees and asylum seekers in South Africa? In other words, do refugees and asylum seekers enjoy the right of access to justice which is essential for vindicating their rights? This is the question that this study will attempt to answer.

1.8 CONCLUSION

The historical and social contexts set out above demonstrate the long way that refugee protection has come in South Africa, its dramatic transformation from an issue obsessively focused on exclusion,¹²⁴ to one which, in legislation at least, is focused on inclusion, on human rights and protection. The shift has been from an *ad hoc*, self-determined refugee policy regime which rigorously limited access to justice, and whose only criterion was that it sat conveniently with government agenda.

Today, South Africa's refugee policy reflects an objective set of internationally adopted standards and a coherent legislative framework is in place, but the question regarding access to justice still remains. This is not because there are any indications that odious devices, such as ouster clauses and near-despotic ministerial powers that handicap access to justice still exist in immigration or refugee laws, but because an incongruous situation exists whereby

¹²² Consortium on Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa' CoRMSA Report 2008. Available at www.cormsa.org.za [Accessed 21 July 2008].

¹²³ Francioni (note 17 above) 1.

¹²⁴ Crush & Peberdy (note 44 above).

generous rights are accorded to refugees in law, but in reality flagrant violations of those rights appear to be the order of the day.

Given the oft-stated and trite observation that it is only the availability of and access to effective judicial and other remedies that can guarantee respect for and protection of human rights,¹²⁵ the question lingers in the mind whether the reason for this situation is because refugees do not have access to said judicial remedies. If there is such a wide gap between refugees' legally enforceable rights and actual experiences, to what extent has the legal system been employed to change the situation? The fact that there is very little reported or unreported refugee case law within the *corpus juris* of South Africa seems to suggest that the answer is 'not much'. The reason for this could very well be that refugees are ignorant of their rights, including the right to challenge in courts, many of the discriminatory practises which affect their lives. On the other hand, it could be that the problem lies not with refugees and asylum seekers, but with the country's policies on access to justice or practices within the justice system.

Unfortunately, while there is an abundance of studies on the difficulties experienced by refugee and asylum seekers' in accessing social services, hardly anything has been done in relation to access to justice. What cannot be denied, however, is that the rights-based paradigm adopted by South Africa means that the government of South Africa has bound itself to a certain standard of responsibility and accountability that comes with adopting human rights standards. Just as it has certain duties with regard to core issues like the right to protect refugees and asylum seekers from *refoulement*, so it has duties with regard to the right of access to justice. What these duties are first need to be established. Thereafter, an examination of how well or how badly South Africa is doing with respect to those duties will follow. The next chapter examines what South Africa's access to justice obligations are under the international human rights treaties to which it is a party.

¹²⁵ Francioni (note 17 above) 1; Bertrand G Ramcharan *Contemporary human rights ideas* (Oxford: Routledge, 2008) 145.

Chapter Two

Conceptual and Theoretical Framework of Access to Justice

*I am not here to dispense justice. I am here to dispose of this case according to the law.
Whether this is or is not justice is a question for the legislature to determine.¹*

2.1 INTRODUCTION

This chapter examines the meaning and development of access to justice from a historical perspective. It looks at its growth and recognition as a human right and the normative framework that exists in international law on access to justice generally, and as it relates to refugees in particular. The fact that access to justice is recognised as a human right in international law is important because this helps to establish a minimum standard of accountability to which States can be held.² It serves as the foundation upon which objective answers can be found, not only to the question of whether or not a State is meeting its obligations under international law, but also what those obligations are precisely. The chapter will demonstrate that the obligation of States, in this case South Africa, extends beyond merely providing the machinery for the administration of justice. It includes an obligation to ensure that a number of other elements are guaranteed which enable persons within its territory to enjoy a certain quality of judicial protection which measures up to internationally accepted standards of fairness and equity.

Following its return to the global stage in the early 1990s, South Africa made various efforts to align its laws and policies with internationally accepted standards and human rights. It set about enacting new laws and ratifying major international treaties it had previously neglected. With regard to refugees, as was noted in the previous chapter, it has ratified two key treaties, namely UN Convention Relating to the Status of Refugees 1951³ and the OAU

¹Thomas W Taylor, Chief Justice of Manitoba (1887–99), quoted in Andrew J Roman ‘Barriers to access: Including the excluded’ in Allan C Hutchinson (ed) *Access to civil justice* (Toronto: Carswell Publishers, 1990) 177.

² Louis Henkin ‘International human rights standards in national law: The jurisprudence of the United States’ in Benedetto Conforti & Francesco Francioni (eds) *Enforcing international human rights in domestic courts* (The Hague: Martinus Nijhoff Publishers, 1997) 189.

³ United Nations Convention Relating to the Status of Refugees 1951 (189 UNTS 150, entered into force 22 April, 1954 (hereinafter UN Refugee Convention)).

Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.⁴ At the national level it has enacted laws to protect refugee rights and regulate their presence in the country.⁵ This is in addition to a number of human rights instruments that will be discussed below, which have a bearing upon the right of access to justice for both its citizens and others within its territory. South Africa's obligations deriving from the commitments it has made at the international level are therefore an appropriate vehicle for measuring its success or failure in the area of access to justice. International and comparative jurisprudence is also useful in assessing the nature and content of the right of access to justice, as are the pronouncements of important international monitoring bodies mandated to interpret international law instruments. Frequent references are therefore made to the pronouncements of bodies such as the United Nations Human Rights Committee (HRC), the African Commission on Human and Peoples' Rights (ACHPR), The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR).

2.2 WHAT IS ACCESS TO JUSTICE?

It is a truism that without the rule of law and its institutions, human rights cannot be protected or realised. The Universal Declaration of Human Rights (UDHR) recognises this vital truth in its preamble:

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind ... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...⁶

Yet the concept of the rule of law – the basic principle that citizens, government and its agencies are constrained by law, while also having effective and enforceable legal rights against one another – is itself underpinned by the right of access to justice. For without effective means for their enforcement and vindication, the rights of citizens and governments would have no value. It is no wonder therefore that it has been said the right of access to

⁴ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 1001 UNTS 45, *entered into force* 20 June, 1974 (hereinafter OAU Refugee Convention)).

⁵ Refugees Act No 130 of 1998.

⁶ Preamble to the Universal Declaration of Human Rights (GA Res. 217A (III), UN Doc A/810 at 71 (1948)).

justice is one of the most essential features of any democracy,⁷ and if human rights norms were to be classified, the right to access justice would rank as one of the most important ones.⁸ As Cappelletti and Garth remind us,

Within the existing culture of rights ... the right of effective access to justice is of paramount importance, since the possession of rights is meaningless without the mechanisms for their effective vindication. Effective access to justice can thus be seen as the most basic requirement – the most basic ‘human right’ – of a modern egalitarian legal system which purports to guarantee and not merely proclaim the right of all.⁹

It can therefore be said the right of access to justice is not just a human right; it is a human right which exists to ensure the enjoyment of other rights. Despite its recognised importance, however, the concept of ‘access to justice’ is not easily defined. Its highly nuanced, and in many ways, subjective nature, makes a universal definition difficult.¹⁰ The United Nations Development Programme (UNDP) for instance found that when people think of ‘access to justice’, they are not necessarily thinking of the justice system. Rather, the understanding of access to justice is highly interpretative and contextual, and is linked to the specific socio-

⁷ Asbjørn Eide *et al* (eds) *The Universal Declaration of Human Rights: A commentary* (Oslo: Scandinavian University Press, 1992) 144; Bryant G Garth ‘Access to justice’ in Malcolm Rowat *et al* (eds) *Judicial reform in Latin America and the Caribbean: Proceedings of a World Bank conference* (Washington DC: World Bank, 1995) 88.

⁸ Lord Steyn ‘The centrality of the right to fair trial as a human rights norm’ in *Developing human rights jurisprudence, Vol 8: Eighth judicial colloquium on the domestic application of international human rights norms* (Commonwealth Secretariat, 2001) 64.

⁹ Mauro Cappelletti & Brian Garth ‘Access to justice: The worldwide movement to make rights effective’ in Mauro Cappelletti & Brian Garth (eds) *Access to justice – Vol 1, A world survey* (Milan: Sijthoff and Noordhoff 1978) 8.

¹⁰ Good considers the lack of a conclusive definition in itself problematic, for while it gives commentators the leeway to use the term in any way that they choose, it is unhelpful to courts seeking to determine issues on access to justice considerations and may blind them to the full potential of the term. Matthew Good ‘Access to justice, judicial economy and behavior modification: Exploring the goals of Canadian class action’ (2009) 47 (1) *Alberta Law Review* 185, 191; Richard Moorhead & Pascoe Pleasence ‘Introduction’ in Richard Moorhead & Pascoe Pleasence (eds) *Access to justice after universalism: Re-engineering access to justice* (Oxford: Blackwell Publishing (2003) 2; Pia Letto-Vanamo ‘Access to justice: A conceptual and practical analysis with implications for justice reforms (2005) 2 (1) *Voices of Development Jurists Paper Series* 4.

political conditions of people.¹¹ Thus in India, it found that whereas slum dwellers prioritised access to justice with regard to economic issues, members of marginalised castes were more concerned with the social dimensions of access, and indigenous minorities highlighted the political dimension.¹²

What cannot be denied, however, is that the phrase almost always tends to focus attention on the legal system and the administration of justice. It serves to draw attention to two basic purposes of the legal system, which are that the system must be equally accessible to all, and that it must lead to results that are individually and socially just.¹³ Still, one cannot fail to notice its somewhat political message – the implication that, somehow, there is something wrong with the current administration of justice. As Sarat puts it, access to justice advocates for greater responsiveness in the administration of the law, while at the same time being an admission that the current legal order is not sufficiently responsive.¹⁴

One could attempt a definition by focusing on the two key words that make up the phrase, ‘access’ and ‘justice’. But even though these two words are easily conceptualised in our minds, they are so aligned to various ideological leanings that a universally acceptable meaning is impractical. The word ‘access’ carries with it a political undertone that underpins much of the agitation on governance and development today. To quote Johnson,

The term ‘access’ has become shorthand for a bundle of problems and a variety of goals. In this ambiguity, it is akin to words like ‘accountability’ and ‘participation’. Everyone has his own conception of what is meant; some take a narrow view, while others encompass in that single word, nearly every problem experienced in the judicial system.¹⁵

Whether it is in respect of information, resources or justice, the word ‘access’ conjures up barriers. It is no wonder therefore, that the dictionary defines access as the ‘freedom or ability

¹¹ UNDP Programming for justice: *Access for all. A practitioner’s guide to human rights-based approach to access to justice* (Bangkok: United Nations Development Programme, Asia Pacific Rights and Justice Initiative, 2005) 4.

¹² Ibid.

¹³ Cappelletti & Garth (note 9 above) 6; Greg Connellan ‘Access to justice’ (2001) 13 *Legaldate* 5, 5.

¹⁴ Austin Sarat ‘Book review: *Access to justice* by Mauro Cappelletti and Brian Garth’ (1981) 94 (8) *Harvard Law Review* 1911, 1911.

¹⁵ Earl Johnson Jr ‘Thinking about access: A preliminary typology of possible strategies’ in Mauro Cappelletti & Brian Garth (eds) *Access To Justice: Emerging issues and perspectives* Vol III (Milan: Sijthoff and Noordhoff Publishers 1979) 5, 7–8.

to obtain or make use of' something.¹⁶ In everyday rhetoric, however, the mistake is often made of equating access with availability, missing out on the important distinction between the two: while availability refers to the question of whether a service exists or is provided for clients, access refers to the question of whether a service is actually secured by a consumer.¹⁷

The second component of the phrase 'access to justice' inevitably leads to the timeless question 'what is justice'? This question has occupied the mind of humans for ages, from Plato to modern day philosophers like John Rawls, from laymen to judges. The meaning of justice evolves as society changes,¹⁸ but the constant thread is that justice is often located within the values of fairness,¹⁹ or of equity and reasonableness combined with good morals,²⁰ and is often understood in the context of Rousseau's 'Social Contract'.²¹ In order not to get bogged down in a theoretical discussion of the meaning of 'justice', it is expedient to adopt a pragmatic approach to the term within the context of access to justice. For this purpose, 'justice' can be said to be what is right, fair and appropriate, with the redress of wrong or accountability for wrong behaviour being its core components. 'Justice' would in short, mean the negation of injustice.²² The idea of 'justice' as 'the negation of injustice' ties in well with what this thesis seeks to examine – how do refugees and asylum seekers negate the injustice that results from the violation of their rights or from the state's failure to ensure the

¹⁶ *Websters's third new international dictionary of the English language* (unabridged) (Springfield: Merriam-Webster, 2002).

¹⁷ Andrew J Roman 'Barriers to access: Including the excluded' in Hutchinson (note 1 above) 177, 180.

¹⁸ Janet Gross Stein & Adam Cook 'Speaking the language of justice' in Julia Bass *et al* (eds) *Access to justice for a new century: The way forward*. (Toronto: Law Society of Upper Canada 2005) 163.

¹⁹ John Rawls, *A theory of Justice* (Oxford: Oxford University Press 1971) 3. William E Conklin 'Wither justice: The common problematic of five models of "access to justice"' (2001) 19 *Windsor Yearbook of Access to Justice* 297; Nada Korac-Kakabadse 'Inequality of discourse: Problematic consumption of justice in the common law legal system' (2001) 16 (3) *Women in Management Review* 126–14, 127.

²⁰ DH Van Zyl 'Justice and its concomitants in a new constitutional dispensation' in Jeremy Sarkin & William Blinchy (eds) *The Administration of justice: Current themes in comparative perspective* (Dublin: Four Courts Press, 2004); Andrew J Roman 'Barriers to access: Including the excluded' in Allan C Hutchinson *supra*, (note 1 above) 180.

²¹ Rawls (note 19 above) 297.

²² Marc Galanter 'Access to Justice as a moving frontier' in Bass (note 18 above) 147–161; see also Marc Galanter 'Access to justice in a world of expanding social capability' (2010) 37 *Fordham Urban Law Journal* 115, 122–128.

realisation of those rights? How do they negate the injustices they face in everyday interactions with others in society?

Galanter, however, espouses a paradigm whereby the term ‘justice’ in the phrase ‘access to justice’ is not just a vindication of rights and entitlements or a stable and determinate concept, but rather a fluid and labile thing, which moves to include new kinds of troubles, and the troubles of new sorts of people who were previously neglected, such as people with disabilities and sexual minorities²³ – and to that one could add refugees and other migrant groups. While this understanding of access to justice may suggest greater access for a wider variety of people, since many claims that are currently seen as beyond the pale will eventually be located within the boundaries of recognised claims,²⁴ it also has implications for access to justice resources, whether it be time, personnel or infrastructure. It would, of course, be self-defeating to advocate a dormant interpretation of justice in order to avoid the difficulties that will be associated with increased resource demand, but one must also acknowledge that an expansion of valid claims would also translate into reduced access to justice as more and more claims emerge, competing for the same limited resources – thus creating a barrier and defeating the initial objective.

Using the definition of the two words above as a guide, one could define access to justice as the freedom or the ability to prevent one’s right or interest from being violated, or to obtain fair and equitable results when wronged. Subsequent discussions will show that there is more involved in access to justice than this simplistic definition covers. However, the current definition suffices for our current purposes. It also helps to establish that what is under discussion goes beyond the narrow confines of ‘access to courts’ or ‘fair trial rights’ as access to justice is sometimes referred to. This is important because as Roman observes, there is an unfortunate tendency in academic literature to equate ‘access to court’ with ‘access to justice’. Scholars and service providers in the field tend to evaluate access to justice by quantitative measures of specific units of litigation service provided, or in the case of legal aid clinics, by the statistics of case files opened and types of cases involved,²⁵ and not by the results achieved. This misses the whole point. ‘Access to court’ includes a person’s right to make use of the state’s judicial apparatus when necessary, but this does not necessarily translate into justice. Similarly, the right to a fair hearing is designed to protect individuals

²³ Galanter ‘Access to justice as a moving frontier’ (note 22 above) 155.

²⁴ Ibid.

²⁵ Roman (note 1 above) 180.

from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person.²⁶ This is mostly concerned with procedural guarantees, that may or may not translate into substantive justice, which is arguably what people seeking justice desire.²⁷ As important as access to the courts and the right of a fair trial are, it is obvious that access to justice, seen as a concept that incorporates both of these elements, goes even further. It is concerned not only with effective access to the law courts, but also with the attainment of recognised rights which are set out in existing law or the remedying of perceived wrongs, and also, for the most part, with removing the barriers to such attainment or remedy.

2.2.1 A side note: ‘The Florence Access to Justice Project’

Any discussion of access to justice today would be incomplete without reference to one of the most influential works ever done on the subject, if only to get an understanding of the evolutionary process that defined the modern day understanding of the concept. Mauro Cappelletti’s Florence Access to Justice Project,²⁸ is a comprehensive reference work of essays in four volumes which sought to map and provide a global reform agenda for access to justice. Written over 30 years ago, this work is still the most definitive reference point on access to justice today. The authors describe the evolution of the access to justice movement as having proceeded in three distinct ‘waves’ of change.²⁹ The first wave, which began in the 1960s, saw the emergence of legal aid in the form of state subsidised legal representation for the economically disadvantaged citizens.

²⁶ Lawyers Committee for Human Rights *What is a fair trial? A basic guide to legal standards and practice* (New York: Lawyers Committee for Human Rights, 2000) 1; Nsongurua J Udombana ‘The African Commission on Human and Peoples’ Rights and the development of fair trial norms in Africa’ (2006) 6 *African Human Rights Law Journal* 299.

²⁷ No clearer demonstration of the distinction between procedural and substantive justice can be found than in the words of Justice Antonin Scalia of the US Supreme Court in *re Troy Anthony Davis* (557 US ____ (2009) 2) when he stated: ‘This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent’. Available at <http://www.supremecourt.gov/opinions/08pdf/08-1443Scalia.pdf> [Accessed 15 October 2010].

²⁸ Note 9 above.

²⁹ *Ibid*; Mauro Cappelletti & Bryant Garth ‘Access to justice: The newest wave in the worldwide movement to make rights effective’ (1978) 27 *Buffalo Law Review* 181–292.

The second wave progressed from and built upon the first wave's emphasis on assuring the right to legal representation through legal aid, to an emphasis on the representation of group and collective interests. Such interests included the rights of consumers and environmentalists. By helping to develop procedural solutions to the problems of these diffuse interests, the second wave led to 'the rethinking of very basic traditional notions of civil procedure and the role of the courts'.³⁰ This wave saw the advent of public interest litigation and class action suits to address systemic problems of inequality.³¹ The third wave, which Cappelletti and Garth refer to as the emergence of a fully developed access to justice approach, saw the growth of alternative dispute resolution mechanisms which are mostly informal in nature. These mechanisms would complement the formal justice system, which would itself, be simplified to facilitate accessibility.³²

2.3 ACCESS TO JUSTICE AS A HUMAN RIGHT – ORIGINS AND DEVELOPMENT

The concept of access to justice has its origins in the following comment from the Magna Carta:³³

No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, or send upon him, except by the legal judgment of his peers or by the laws of the land, and to no one will we sell, to no one will we deny, or delay right or justice.³⁴

Sir Edward Coke, the towering jurisprudential figure, resurrected and interpreted chapter 29 of the 1297 Magna Carta, seeing these remedy provisions as jurisprudential rights.³⁵ The

³⁰ Cappelletti & Garth (note 9 above) 35.

³¹ David Trubek 'Public advocacy: Administrative government and the representation of diffuse interests' in Cappelletti & Garth (note 15 above) 445–494, 445.

³² Mauro Cappelletti 'Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement' (1993) 56 *Modern Law Review* 282–296; Cappelletti & Garth (note 29 above).

³³ See generally Deborah L Rhode *Access to justice* (Oxford: Oxford University Press, 2004) 47; James C Holt *Magna Carta* 2nd ed (Cambridge: Cambridge University Press, 1992) particularly chapters 4 and 5; Alexander AM Irvine *Human rights, constitutional law and the development of the English legal system: Selected essays* (Oxford: Hart Publishing, 2003) 251–272, 266.

³⁴ Chapter 29, Magna Carta 1297.

³⁵ Edward Coke *The second part of the institutes of the laws of England*, I, 55–56 (1642) (New York: Garland 1979) cited in Leonard W Schroeter 'The fundamental right to access to justice: The historical antecedents'.

origins of institutions for providing access to justice to citizens reach back centuries in several European countries in which craft guilds and other organizations provided assistance to members with legal problems.³⁶ Thereafter, access to justice evolved to mean an individual's formal right to make use of the government's judicial institutions in order to seek remedy against a wrong done to his person or chattel or to have his rights enforced subject to his ability to afford the related expenses.³⁷ It basically described the aggrieved individual's formal right to litigate or defend a claim without a corresponding requirement of positive action on the part of the state to ensure their protection. The theory was that while access to justice may have been a 'natural right', natural rights did not require positive state action for their protection.³⁸ Their preservation required only that the state did not allow them to be infringed by others. Essentially, the government's role was to provide the facilities and pay the salaries of court personnel. It did not have a duty to ensure that the legal system was effectively available to citizens.³⁹

Although there are many antecedents, the modern access to justice movement can be traced to the rise of the welfare state in most western countries during the immediate post-World War II era. As these new welfare states 'sought to arm individuals with substantive rights in their capacities as consumers, tenants, employees and even citizens', the right of access to justice gained attention and 'is increasingly recognized as being of paramount importance among the new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication'.⁴⁰

Today, the right of access to justice has undergone such transformation that it is no longer limited to issues of whether or not a person has the right to make use of the law courts.

Available at <http://www.wsba.org/media/publications/barnews/archives/1999/may-99fundamental.htm>. [Accessed 22 March 2007].

³⁶ Albert Currie 'Riding the third wave: Rethinking criminal legal aid within an access to justice framework' available at http://www.justice.gc.ca/en/ps/rs/rep/2003/rr03-5/rr03-5_01.html [Accessed 19 April 2007].

³⁷ Cappelletti & Garth (note 9 above) 6–8; Galanter 'Access to Justice as a Moving Frontier' (note 22 above) 147.

³⁸ Cappelletti & Garth (note 9 above); see also A John Simmons *The Lockean theory of rights* (Princeton, Princeton University Press, 1992) 68.

³⁹ Cappelletti & Garth (note 9 above) 92; Galanter '(note 22 above) 115; Gerald Friedman 'Access to justice' (1996) 113 *South African Law Journal* 335–343, 336.

⁴⁰ Ibid; Tamara Goriely 'The government's legal aid reforms' in Adrian Zuckerman & Ross Cranston (eds) *Reform of civil procedure* (Oxford: Clarendon Press, 1995) 347.

The focus is now on substantive rather than procedural justice, i.e. on access to justice as an issue about justice.⁴¹ Scholastic and policy discourses on the issue now take into consideration sociological, political, psychological and economic factors.⁴² And despite its western origins, the access to justice movement has gone beyond the confines of the wealthy welfare states of the industrialised world, and has spread to the development projects often financed by the same wealthy countries in other parts of the world.⁴³ Access to justice problems are today being addressed in its many facets: from South Africa's focus on legal aid to empower women in their fight against discriminatory practices,⁴⁴ to the establishment of arbitration structures to relieve state courts in Sri Lanka,⁴⁵ access to justice is playing an important role in the drive for social justice.

Access to justice cemented its place as a human right in the modern world when provisions related to it were included in the international human rights instruments that were adopted post-World War II.⁴⁶ As the world struggled to come to terms with the atrocities that had occurred in Nazi Germany, the desire of the international community was to establish a new world order characterised by peace, the prevention of conflicts and respect for human

⁴¹ Mary Jane Mossman & Heather Ritchie 'Access to justice: A review of Canadian legal academic scholarship, 1977–1987' in Hutchinson (note 1 above) 53–76.

⁴² See for instance Rebecca Sandefur (ed) *Access to justice: Sociology of crime, law and deviance series* Vol 12 (Bingley: Emerald Group Publishing, 2009); UNDP *Access to justice practice note* (New York: United Nations Development Programme Democratic Governance Group, 2004).

⁴³ Christina Jones-Pauly & Stefanie Elbern (eds) *Access to Justice: The role of court administrators and lay adjudicators in the African and Islamic contexts* (The Hague: Kluwer Law International, 2002) vii; Stephen Golub 'Legal empowerment: Impact and implications for the development community and the World Bank' in Caroline Sage & Michael Woolcock (eds) *The World Bank Legal Review: Law, equity, and development*, Vol 2, (Washington: Martinus Nijhoff, 2006); Benjamin Van Rooij 'Bringing justice to the poor: Bottom-up legal development cooperation' Available at <http://ssrn.com/1368185> [Accessed 12 September 2010]; Michael R Anderson 'Access to justice and legal process: Making legal institutions responsive to poor people in LDCs' IDS Working Paper, No 178 (2003).

⁴⁴ Lorenzo Cotula *Gender and law: Women's rights in agriculture*. FAO Legislative Study 76, 2007 revision (Rome: Food And Agriculture Organization of the United Nations, 2002) 156, 160–161

⁴⁵ United Nations Development Programme *Programming for justice: Access for all. A practitioner's guide to human rights-based approach to access to justice* (Bangkok: United Nations Development Programme, Asia Pacific Rights and Justice Initiative, 2005).

⁴⁶ James Spigelman 'Keynote address: Access to justice and human rights treaties' (2000) 22 (1) *Sydney Law Review* 141.

rights, one in which governments could no longer blatantly abuse the rights of their citizens and where concrete human rights standards existed to which nations could be held.⁴⁷ This led the Economic and Social Council (ECOSOC)⁴⁸ of the newly established United Nations (UN) to create the Commission on Human Rights.⁴⁹ The Commission's task was to submit proposals, recommendations and reports regarding:

- (a) an international bill of rights;
- (b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters;
- (c) the protection of minorities;
- (d) the prevention of discrimination on grounds of race, sex, language or religion.⁵⁰

The work of the Commission led to the adoption of the Universal Declaration of Human Rights (UDHR)⁵¹ on 10 December 1948. The UDHR included several provisions which recognised the right to procedural and substantive access to the administration of justice.⁵² These provisions were the first universal recognition of access to justice as a human right. The UDHR has been widely accepted since its adoption in 1948,⁵³ but it is a non-treaty

⁴⁷ Pre-ambule United Nations Charter 26 June 1945, 59 Stat 1031, TS 993, 3 Bevans 1153, *entered into force* 24 October 1945; see also Johannes Morsink *The Universal Declaration of Human Rights: Origins, drafting, and intent* (Philadelphia: University of Pennsylvania Press, 2000) in particular Chapter 2.

⁴⁸ Established under Art 61 of the UN Charter, *supra*.

⁴⁹ ECOSOC Resolution 5 (1) of 16 February 1946, E/20 15 February 1946.

⁵⁰ ECOSOC Resolution 5 (2), *supra*.

⁵¹ Note 6 above.

⁵² Arts. 8, 10, and 11.

⁵³ As evidenced by votes on its adoption (48 votes for, none against, and 8 abstentions) and also by the fact that of the over 200 declarations, conventions, protocols, charters, treaties and agreements that exist today at the international level, at least 65 mention the UDHR as a source of authority and inspiration. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, drafting, and intent* (Philadelphia: University of Pennsylvania Press, 2000) 20; See generally Gudmundur Alfredsson & Asbjørn Eide *The Universal Declaration of Human Rights: A common standard of achievement* (Hague: Kluwer Law Publishers, 1999); Krzysztof Drzewicki 'The United Nations Charter and the Universal Declaration of Human Rights' in Rajja Hanski & Markku Suksi (eds) *An introduction to the international protection of human rights: A textbook* (Åbo: Åbo Akademi University, 1999).

declaration, which means that it lacks formal binding force.⁵⁴ However, many of its provisions have become binding on states as part of customary international law.⁵⁵

With the goal of establishing mechanisms by which the rights recognised in the UDHR could be enforced, the Commission on Human Rights was mandated to draft legally binding treaties which define those rights.⁵⁶ Consequently, the International Covenant on Civil and Political Rights⁵⁷ (ICCPR) and its optional Protocols⁵⁸ and the International Covenant on Economic, Social and Cultural Rights⁵⁹ (ICESCR) came into being. Collectively known as the ‘International Bill of Human Rights’, the UDHR, the ICCPR and the ICESCR are the main sources of the modern conceptions on human rights, including the right of access to justice. Many international and regional treaties, including several to which South Africa has become party, have subsequently adopted the principles contained in the international bill of rights.

Few of these instruments use the term ‘access to justice’ in their provisions, but there is no doubt that the concept is the subject of, or lies at the core of the various provisions related to the administration of justice, due process and fair trial that they contain. Various referred to as the right to an ‘effective remedy’, ‘access to courts’, ‘right to a fair and public hearing’, ‘the right to a remedy’ and/or basic ‘common-law rights’, each of those provisions lay down minimum standards regarding recourse to mechanisms for the administration of justice for dispute resolution or for obtaining remedies for violations of rights or other interests at law,

⁵⁴ Morsink (note 53 above) 20.

⁵⁵ Theodore Meron *Human rights and humanitarian norms as customary law* (New York: Oxford University Press, 1989); HJ Steiner & Philip Alston *International human rights in context: Law, politics, morals* 2nd ed (Oxford: Oxford University Press 2000) 987.

⁵⁶ General Assembly Resolution 421 (V) of 4 December 1950 ‘Draft international covenant on human rights and measures of implementation: Future work of the Commission on Human Rights’.

⁵⁷ GA Res 2200A (XXI), 21 UN GAOR Supp. (No. 16) 52, UN Doc A/6316 (1966), 999 UNTS 171, *entered into force* 23 March 1976.

⁵⁸ First Optional Protocol to the International Covenant on Civil and Political Rights (OP), GA Res 2200A (XXI), 21 UN GAOR Supp. (No. 16) 59, UN Doc A/6316 (1966), 999 UNTS 302, *entered into force* 23 March 1976 (hereinafter First Optional Protocol to the ICCPR); Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty GA Res 44/128, annex, 44 UN GAOR Supp. (No. 49) 207, UN Doc A/44/49 (1989), *entered into force* 11 July 1991.

⁵⁹ GA Res. 2200A (XXI), 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966), 993 UNTS 3, *entered into force* 3 January 1976.

as well as how people should be treated when they are in contact with the law – all of which are central ideas of access to justice.

Since these instruments set standards that states must meet in order to be in compliance with their obligations on access to justice for citizens and others within their jurisdictions, they serve as an appropriate framework for evaluating South Africa's success or failure in meeting the rights of refugees to access justice. The next section will therefore examine the broad normative framework on access to justice generally and as it relates to refugees specifically. It will look at the obligations that South Africa as a States Party has in order to meet its obligations to ensure access to justice for citizens and non-citizens alike.

2.4 ACCESS TO JUSTICE IN INTERNATIONAL LAW

Given its pre-eminent position as the principal international treaty on human rights and its universal applicability, the provisions of the ICCPR will serve as the primary source for looking at access to justice in international law. The General Comments of the HRC, the body set up to monitor implementation of the ICCPR and its two Optional Protocols, are important interpretations of the ICCPR. So also are the Committee's decisions on individual communications under the First Optional Protocol to the ICCPR. Recourse will therefore be had to these comments and decisions. The judgments and findings of regional courts, commissions and bodies offer important guidance as to the interpretation of customary international law and the provisions of regional treaties. As a party to the African Charter on Human and Peoples' Rights (African Charter),⁶⁰ South Africa has obligations under that treaty; therefore, the provisions of the African Charter on access to justice as well as the pronouncements of ACHPR will offer guidance here.

Although the provisions of the African Charter that relate to access to justice, contained in Arts 6 and 7 have been described as incomplete⁶¹ and 'woefully inadequate',⁶² The

⁶⁰ African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), *entered into force* 21 October 1986.

⁶¹ Christof Heyns *Human rights law in Africa 1998* (The Hague: Kluwer Law International, 2001) 141.

⁶² Christof Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155, 159. Scholars are critical of many of the African Charter provisions, saying that they leave many gaps and that some of its formulations are unsatisfactory and poorly worded. See generally Fatsah Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (The Hague: Kluwer Law International, 2003) 139–141; Evelyn A

ACHPR is empowered by Articles 60 and 61 of the Charter ‘to draw inspiration from international law on human rights and to take into consideration as subsidiary measures, other general or special international conventions, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine’.⁶³

The ACHPR has often made use of articles 60 and 61⁶⁴ to develop standards, guidelines, resolutions and recommendations that fill in the gaps and bring the African Charter in line with international standards.⁶⁵ Although those resolutions, recommendations and guidelines are not hard law, they serve a very useful purpose in that they give practicality to the broad and often vague formulations contained in the African Charter. They provide useful guidelines to give operational effect to its provisions and, consequently, the expectations that can be placed on the ACHPR.⁶⁶ Frequent references to those resolutions, recommendations and guidelines have also invested them with the status of norms, though to a lesser extent than the provisions of the African Charter.⁶⁷ Discussions of the provisions of the African Charter will therefore make considerable reference to the declarations, resolutions

Ankuma *The African Commission on Human and Peoples’ Rights: Practice and procedures* (The Hague: Kluwer Law International, 1996); Christof Heyns ‘Civil and political rights in the African Charter’ in Malcolm David Evans & Rachel Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice, 1986–2000* (Cambridge: Cambridge University Press, 2002); Rachel Murray *The African Commission on Human and Peoples’ Rights and international law* (Portland: Hart Publishing, 2000) in particular Chap 2.

⁶³ Media Rights Agenda (on behalf of Niran Malaolu) v Nigeria, (2000) AHRLR 262 (ACHPR 2000) para 51.

⁶⁴ These two articles empower the ACHPR to draw inspiration from international law on human rights, including the provisions of the UDHR and other instruments adopted by the United Nations and by African countries in the field of human rights, as well as the Charters of the United Nations and the Organization of African Unity (now African Union). As subsidiary measures to help it determine the principles of law, the ACHPR is also empowered to take into consideration other general or special international conventions which lay down rules expressly recognized by member states of the AU, African practices consistent with international norms on human rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

⁶⁵ Heyns (note 61 above) 169. Heyns maintains that on the strength of these provisions, the ACHPR has ‘in substantial respects reinvented the Charter and compensated for its flaws’. The areas of access to justice, fair trial and the independence of the judiciary in particular have benefited from the Commission’s use of the discretion that Arts 60 and 61 provide. The various guidelines and resolutions passed in enhancement are discussed in further detail later on.

⁶⁶ Udombana (note 26 above) 306.

⁶⁷ Ibid.

and decisions through which the ACHPR has attempted to rectify these short-comings or fill in existing gaps.

The provisions of other regional treaties and decisions of other regional courts such as the ECtHR and the IACHR and the pronouncements of their monitoring bodies will also be referred to for guidance. While the decisions of regional courts may apply only to particular regional treaties, their jurisprudence can be applied broadly⁶⁸ and are therefore useful for this discussion.

The access to justice provisions in international law contain two distinct but related rights: the procedural right of effective access to a fair hearing as well as the substantive right to a remedy. Both encompass the minimum guarantees in the administration of justice in both the criminal and civil contexts,⁶⁹ and will now be looked at separately.

2.5 ACCESS TO REMEDIES

A basic premise of human rights law is that legal rights would be illusory without entitlement to procedural mechanisms to give them effect⁷⁰ – in other words, a right without effective remedy is not a right at all. Not surprisingly therefore, one of the first obligations that the ICCPR in Art 2(3), places upon states is in the area of access to remedies – an obligation to ensure that everyone has access to remedies for violation of any of the rights the Convention recognises. That article expands upon Art 8 of the UDHR which provides that ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law’.

These provisions⁷¹ constitute an acknowledgement by the international community that, regardless of the theoretical existence of the rights and freedoms which treaties recognise,

⁶⁸ Vincent Obisienunwo Orlu Nmehielle *The African human rights system: Its laws, practice, and institutions* (The Hague: Martinus Nijhoff Publishers, 2001) 43.

⁶⁹ Dinah Shelton *Remedies in international human rights law* (New York: Oxford University Press, 1999) 14, 182.

⁷⁰ Jan Paulsson *Denial of justice in international law* (New York: Cambridge University Press, 2005) 134.

⁷¹ There are numerous other provisions related to access to justice which are to be found in other human rights instruments not discussed here. These include: Art 6 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, *entered into force* 4 January 1969; Art 14 of the United Nations Convention against Torture and other Cruel Inhuman and Degrading Treatment, GA Res 39/46, [annex, 39 UN GAOR Supp (No. 51) 197, UN Doc A/39/51 (1984)], *entered into force* 26 June 1987; Art 40

‘their true enjoyment ultimately depends on securing the existence of an ‘effective remedy’ for anyone who claims that there has been a violation of his rights and freedoms’.⁷² In this regard, the HRC has stated in respect of the remedy provision of Art 2(3) that its enjoyment requires States Parties take steps to appropriately adapt available remedies so as to take account of the special vulnerability of certain categories of person, including, in particular, children.⁷³ It is submitted that refugees and asylum seekers fall under this category of vulnerable persons, as this thesis will later show.

The first observation to be made regarding Art 2(3) of the ICCPR and Art 8 of the UDHR is that although they link all other human rights to this one right, the rights they envisage differ to some extent. Whereas the ICCPR links the right to remedies to the rights recognised within it, the UDHR makes clear that the right is relevant to all rights recognised in constitutions and in national laws. Various regional instruments include these remedy provisions, but also differ in their wording regarding which rights they apply to. The ECHR

Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989), *entered into force* 2 September 1990.

In addition, there are other human rights standards which though non-binding, provide normative guidance on specific issues and could be considered indicative of consensus developing in the international community on those issues, and possibly the direction of future international legal framework. These usually exist in the form of principles, guidelines, rules and recommendations. They include: the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, UN Doc A/RES/60/147 (16 December 2005); the United Nations Draft Principles Governing the Administration of Justice Through Military Tribunals, UN Doc E/CN.4/2006/58 at 4 (2006); the United Nations Basic Principles on the role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc A/CONF 144/28/Rev 1 at 118 (1990); the United Nations Body of Principles for the Protection of all Persons under Any form of Detention or Imprisonment, GA Res. 43/173, annex, 43 UN GAOR Supp No 49 at 298, UN Doc A/43/49 (1988); the United Nations Standard Minimum Rules for the Treatment of Prisoners, GA Res 40/33, annex, 40 UN GAOR Supp No 53 at 207, UN Doc A/40/53(1985) ; the United Nations standard Minimum Rules for the Administration of Juvenile Justice GA Res 40/33, annex, 40 UN GAOR Supp No 53 at 207, UN Doc A/40/53 (1985); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34, annex, 40 UN GAOR Supp (No. 53) 214, UN Doc A/40/53 (1985).

⁷² Dominic McGoldrick *The Human Rights Committee: Its role in the development of the international covenant on civil and political rights* (Oxford: Clarendon Press, 1991) 279.

⁷³ Human Rights Committee *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev1/Add13 (2004) para 15.

takes a similar position to the ICCPR in that the right to a remedy is in respect of the rights contained in it.⁷⁴

The American Convention on Human Rights⁷⁵ (ACHR) on the other hand merges the approach of both the ICCPR and the UDHR. It provides for effective remedy for violation of rights recognised in constitutions and laws of contracting states as well as the rights in the Convention itself.⁷⁶ The position of the American Declaration of the Rights and Duties of Man⁷⁷ (American Declaration), is similar to the ACHR, but adopts less direct language:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.⁷⁸

In referring simply to *legal rights*, the inference here is that the provision relates to all rights recognised in constitutions and national instruments but excludes moral rights.

The African Charter on its part links the right to remedies to a wider scope of rights than those envisaged in these other instruments, including in its purview rights recognised by ‘conventions, laws, regulations and customs in force’. Unlike the other treaties above however, the African Charter does not use the term ‘right to remedy’. Instead it provides for the ‘right to an *appeal*’ to competent authorities:

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;⁷⁹

The dilemma here is that since ‘appeal’ generally refers to action taken after failure at a court or other forum of first instance, should this provision be read as referring only to appeal proceedings? Given the context and the purpose that the article wishes to achieve, it can be

⁷⁴ Art 13(1) European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5, 213 UNTS 222, *entered into force* 3 September 1953; as amended by Protocols Nos 3, 5, and 8 which *entered into force* on 21 September 1970, 20 December 1971 and 1 January 1990 respectively. (Hereinafter ECHR).

⁷⁵ OAS Treaty Series No 36, 1144 UNTS 123, *entered into force* 18 July 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser LV/II82 doc6 rev1 at 25 (1992).

⁷⁶ Art 25 ACHR.

⁷⁷ OAS Res XXX, adopted by the Ninth International Conference of American States (1948); Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc 6 rev 1 at 17 (1992).

⁷⁸ Art XVIII.

⁷⁹ Art 7 African Charter.

surmised that the section refers to access to courts of first instance, as it would be bizarre to guarantee the right to appeal a judgment, but not the right to have the matter heard in the first place. Guidance on this can be taken from the HRC which has stated in respect of Art 14 of the ICCPR, which guarantees the same rights that Art 7 of the African Charter sought to protect that the right of equal access to a court, which is embodied in Art 14(1) concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.⁸⁰ According to Art 60 of the African Charter, the ACHPR can draw inspiration from other international instruments for the protection of human and peoples' rights. This provision enables the ACHPR to be inspired, by the provisions of other treaties including the ICCPR, ECHR and ACHR among others.

As mentioned above, the ACHPR, in order to cure some of the deficiencies of the African Charter has developed various guidelines and resolutions which provide more clarity on the issue at hand. In this respect, the ACHPR has developed the 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa'⁸¹ (Guidelines on Fair Trials). Para C of the Guidelines set out the parameters of access to justice. The paragraph confers on all persons, the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter. This right applies even when the acts in question were committed by persons in an official capacity. The guidelines then define the right to an effective remedy to include (a) access to justice (b) reparation for the harm suffered and (c) access to the factual information concerning the violations.

The paragraph goes on to impose an obligation on States to ensure that persons whose rights have been violated have an effective remedy, and that such right to remedy should be determined by competent judicial, administrative or legislative authorities. It further imposes an obligation on States to ensure that remedies granted are enforced and that any organ of state against which a judicial order or other remedy has been granted complies fully with such an order or remedy. Lastly, the paragraph declares the granting of amnesty to absolve perpetrators of human rights violations from accountability as a violation of the right of

⁸⁰ Human Rights Committee *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (2007) Para 12. This General Comment replaces '*General Comment 13, Article 14 (Twenty-first session, 1984)*' U.N Doc HRI/GEN/1/Rev1 at 14 (1994).

⁸¹ African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* 2001, DOC/OS(XXX)247; 12 *International Human Rights Report* 1180 (2005).

victims to an effective remedy.⁸² These expansive provisions, in effect, bring the African Charter in line with other international human rights instruments in respect of access to remedies.

While an important aspect of access to justice, the right to remedies *per se* is not the subject of this thesis, but rather the broader concept of both remedies and procedural access. The issue of remedies is a highly developed aspect of international law, especially under the ICCPR and there is a large body of literature⁸³ which discusses the work of the HRC on remedies pursuant to provisions of the First Optional Protocol which confer on the HRC the power to hear individual complaints.⁸⁴ The remedy provisions above are minimum standards linked to other protections which are to be found in different provisions scattered around the ICCPR including, for instance, the provision on compensation in Art 14 which deals with fair trials,⁸⁵ and in other treaties referred to. As the HRC has noted, the remedy provisions of Art 2(3) relates to violations of rights and is limited to remedies after the fact:

The Covenant provides that a remedy shall be granted whenever a violation of one of the rights guaranteed by it has occurred; consequently, it does not generally prescribe preventive protection, but confines itself to requiring effective redress *ex post facto*.⁸⁶ Access to justice, however, goes beyond access to remedies after the fact. It includes the ability to obtain fair and equitable access to justice whether for determination of civil rights, administrative or in criminal matters.

2.6 ELEMENTS OF ACCESS TO JUSTICE IN INTERNATIONAL LAW

Art 14 of the ICCPR contains substantive provisions on access to justice. It goes much further than Art 2(3) in the sense that it applies to a wider range of issues than merely to the rights contained in the ICCPR. It provides:

⁸² Ibid, para C.

⁸³ Dinah Shelton (note 69 above); Christine D Gray *Judicial remedies in international law* (Oxford: Oxford University Press, 1990); Chittharanjan Félix Amerasinghe *Local remedies in international law* (Cambridge: Cambridge University Press, 2004).

⁸⁴ See Arts 1, 2 and 5 of the First Optional Protocol to the ICCPR (note 58 above).

⁸⁵ The provisions of this article are discussed in further detail later on.

⁸⁶ *CF v Canada* Communication No. 113/1981, UN Doc CCPR/C/OP/1 at 13 (1980) para 6.2.

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...

Such determination must be carried out in public unless special reasons, such as morality, public order, national security in a democratic society, or the interest of the private lives of the parties so require. The rest of the article then goes on to set out the minimum standards of protection that must be granted to persons charged with a criminal offences. This includes the right to be presumed innocent until proved guilty according to law; to have full information regarding the charge against him; to have adequate time and facilities to prepare his defence, including the right to communicate with counsel of his own choosing, and if he is unable to afford one, to have one assigned to him where the interests of justice so require; to be tried without undue delay and in his presence; to examine, or have examined, the witnesses against him; to have the free assistance of an interpreter if he cannot understand or speak the language used in court; and not to be compelled to testify against himself or to confess guilt.

The article provides for special consideration to be taken where the accused person is a minor, and for the right of all convicted persons to have their conviction reviewed by a higher tribunal according to law. Where such review or newly discovered facts reveals a wrongful conviction or a miscarriage of justice, the article provides for compensation to the victim, unless the victim was responsible for non-disclosure of the unknown fact in time. Lastly, the article prohibits double jeopardy – convicting or punishing a person again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.⁸⁷

These provisions expand upon Arts 10 and 11 of the UDHR⁸⁸ and are often referred to as ‘fair trial’ provisions – a term which describes the norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of

⁸⁷ See also Art 6 ECHR (note 74 above).

⁸⁸ Art 10:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Art 11:

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person.⁸⁹ In *P, C and S v United Kingdom*,⁹⁰ the European Court of Human Rights held that the equivalent provision in the ECHR, Art 6, contains two inter-related rights: the right of access to court, and a right to a fair trial once one is before a court.⁹¹

The HRC in its General Comment No. 32 noted that Art 14 of the ICCPR is of a complex nature, with different aspects of its provisions requiring specific comments.⁹² State Parties must respect the guarantees it contains, regardless of their legal traditions and their domestic law.⁹³ The purpose of the article, according to the HRC, is to ensure ‘the proper administration of justice and, to this end, guarantees a series of specific rights’.⁹⁴ As the subject of this thesis is access to justice generally, the focus will be on those general obligations that States have in all types of cases – whether civil, criminal, administrative or other matters.

2.6.1 Types of matters

As seen above, most of Art 14 of the ICCPR pertains to due process safeguards in criminal proceedings. It details the minimum guarantees to which an accused person is entitled and is designed to protect the personal liberty of such an accused as well as all interests that may be affected by guilty verdicts and criminal sanctions. The provisions involve consideration of a familiar triangulation: the interests of the victim, the accused and the society.⁹⁵ These guarantees include the presumption of innocence, the right to counsel, the right against self-incrimination, *ne bis in idem* principle, etc. The provisions of Art 14 of the ICCPR are often evoked in discussions about the basic minimum guarantees of how persons accused of crimes should be treated, but they go beyond the rights of an accused to guarantees which anyone approaching an adjudicative body should enjoy. They elaborate the right to a fair and public hearing in all civil and criminal cases, which, according to Nowak, is the core of the concept

⁸⁹ Lawyers Committee for Human Rights *What is a fair trial? A basic guide to legal standards and practice* (New York: Lawyers Committee for Human Rights, 2000) 1.

⁹⁰ *P, C and S v United Kingdom* (2002) 35 EHRR 31.

⁹¹ *Ibid*, paras 89 and 91.

⁹² General Comment No 32 (note 80 above) Para 3.

⁹³ *Ibid*, para 4.

⁹⁴ General Comments No 32 (note 80 above) para 2.

⁹⁵ Lord Steyn (note 8 above) 64.

of due process of law. The article contains an institutional guarantee that imposes a positive obligation on states to ensure its fulfilment – they must set up necessary structures, i.e. courts, and provide them with the competence to hear matters brought before them.⁹⁶

While it is obvious that the majority of the provisions contained in Art 14 relate to criminal proceedings, the HRC has also noted that certain aspects of it are also relevant for non-criminal matters, and apply equally to determination of rights and obligations in a suit at law'.⁹⁷ While the HRC has not defined what 'suit at law' means, its interpretation of the term shows that it hinges on the nature of the right involved or the particular adjudication forum, rather than on the status of one of the parties⁹⁸ (whether governmental, parastatal or autonomous statutory entities).⁹⁹ It includes civil as well as administrative cases. The concept of a suit-at-law has been interpreted to encompass judicial procedures aimed at determining rights and obligations in the area of private law, including contracts, property and torts. It also encompasses equivalent notions in the area of administrative law such as the termination of employment of civil servants other than for disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. It may, in addition, cover other procedures which must be assessed on a case by case basis in the light of the nature of the right in question.¹⁰⁰

In interpreting Art 6(1) of the ECHR¹⁰¹ (equivalent to Art 14(1) of the ICCPR), the jurisprudence of the European Court shows that the only clear requirement for Art 6(1) to be applicable is the existence of a dispute between parties, who can be either individuals or an

⁹⁶ Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (Strasbourg: NP Engel, 2005) 302–357, 314.

⁹⁷ General Comment 32 (note 80 above) para 15.

⁹⁸ *YL v Canada*, Communication No. 112/1981, UN Doc Supp. No. 40 (A/41/40) 145 (1986).

⁹⁹ Alex Conte & Richard Burchill *Defining civil and political rights: The jurisprudence of the United Nations Human Rights Committee* 2nd ed (Surrey, Ashgate Publishing, 2009) 160.

¹⁰⁰ General Comment 32 (note 80 above) para 16; see also McGoldrick (note 72 above) 415.

¹⁰¹ Art 6(1) of the ECHR provides:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

individual and the State. In *Ringeisen v Austria*,¹⁰² one of the issues before the Court was the meaning of the phrase ‘civil rights and obligations’ in Art 6(1) of the ECHR. The applicant had been involved in contracts for sale of land. Under the Upper Austrian Real Property Transactions Act, he had to obtain the permission of the Regional Real Property Transactions Commission in order to transfer land. His application was refused, but he continued to sell land without the required permit. He alleged that he was a victim of a violation of Art 6(1) of the ECHR in respect of the civil proceedings he had brought to challenge the authorities’ refusal to approve a contract related to the farmlands in question. The government contended that Art 6(1) was inapplicable as this was not a ‘determination of civil rights and obligations’. It argued that the proceedings before the Regional Commission was administrative and therefore did not fall within the meaning of ‘determination of ... civil rights and obligations’. Furthermore, the government contended that for this article to be applicable, both parties to the proceedings had to be private persons. The court disagreed. It was of the opinion that this article ‘covers all proceedings, the result of which is decisive for private rights and obligations’, including those before administrative bodies.¹⁰³ The characters of both the legislation which governs how the matter is to be determined and of the authority vested with jurisdiction on the matter were of little consequence.¹⁰⁴

The African Charter does not include an independent article which corresponds in all material respects with Art 14 of the ICCPR. Arts 5, 6, 7 and 26¹⁰⁵ of the African Charter, read in conjunction, are the closest that the African Charter comes to Art 14 of the ICCPR. However, even with this conjunctive reading, the African Charter falls short in many respects. It does not provide for a number of internationally recognised fair hearing guarantees, including the requirement of equality, fair and public trial before an independent and impartial tribunal established by law, or for public pronouncement of judgment. To cure this mischief, the ACHPR, recognising the importance of the right to a fair trial and legal

¹⁰² *Ringeisen v Austria* (1971) 1 EHRR 455.

¹⁰³ *Ibid*, para 94.

¹⁰⁴ *Ibid*. See also *König v Federal Republic of Germany* (1978) 2 EHRR 170, 192–193; *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 and *Deumeland v Germany* (1986) 8 EHRR 448.

¹⁰⁵ Art 26 reads:

‘States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter’.

assistance and the need to strengthen the provisions of the African Charter relating to right of access to justice, adopted the ‘Resolution on the Right to a Fair Trial and Legal Assistance in Africa’ at its 26th session in November 1999.¹⁰⁶ The Resolution included a decision to establish a Working Group on Fair Trials and formally adopted the ‘Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa’, which identified various factors militating against fair trials on the continent and made recommendations on practical steps to ensure and enhance the implementation of fair trial standards.¹⁰⁷

The Working Group established under the auspices of the Resolution was tasked with preparing a draft of general principles and guidelines on the right to a fair trial and legal assistance under the African Charter.¹⁰⁸ This task culminated in Guidelines on Fair Trials.¹⁰⁹ Viewed in the light of these Resolutions, Declarations and Guidelines, the fair trial guarantees contained in the African Charter are, as will be seen below, practically identical to those of the ICCPR.¹¹⁰ The rights guaranteed and the concomitant obligation of States will now be examined individually.

2.6.2 The right to equality before the law

Unlike Art 14 of the ICCPR, Art 7 of the African Charter does not refer to equality in the context of fair trials. However, as the jurisprudence of the ACHPR, as well as paragraph 2 of its Guidelines on Fair Trials show,¹¹¹ much thought has been given to the issue and the question of equality is incorporated in the Charter’s contemplation of fair trials.

¹⁰⁶ ACHPR/Res.41(XXVI) 99: Resolution on the Right to Fair Trial and Legal Aid in Africa (1996).

¹⁰⁷ The Right to a Fair Trial: The Dakar Declaration (2001)45 (1) *Journal of African Law* 140–142.

¹⁰⁸ Note 106 above, para 4.

¹⁰⁹ Note 81 above.

¹¹⁰ Ouguergouz (note 62 above) 143.

¹¹¹ The paragraph provides:

‘The essential elements of a fair hearing include:

(a) equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military;

(b) equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;

(c) equality of access by women and men to judicial bodies and equality before the law in any legal proceedings’.

There are two dimensions to this general principle on equality – it refers to both equal access to court¹¹² and to equal treatment by that court without any discrimination.¹¹³ This principle of equality is especially important to refugees and asylum seekers, as their status cannot be used as a reason to deny them such access or to justify any discriminatory treatment in the course of seeking justice. In General Comment No 32, the HRC made this very clear:

The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.¹¹⁴ South Africa as a State party to the ICCPR is therefore obliged to ensure that its courts are accessible to refugees, and having had such recourse, ensure that its courts do not discriminate against or between them in any way.

With regard to equality of access, the ability to go before a court is a critical element as the ECtHR has found. In *Golder v UK*,¹¹⁵ the Court was of the opinion that it would be inconceivable to allow for the situation where Art 6(1) were ‘to describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is access to court’.¹¹⁶ The aspect of equality requires that such access must not be discriminatory.

The HRC has stated that there is a violation of Art 14(1) if certain persons are barred from bringing suits against any other persons on the basis of any of the grounds for discrimination listed in Art 2(1) of the ICCPR, ie, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹¹⁷ Paragraph (b) of the Guidelines on Fair Trials also makes discrimination on those grounds a

¹¹² *Oló Bahamonde v Equatorial Guinea*, Communication No 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993). In that case the HRC said that ‘the notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of Art 14, paragraph 1’. Para 9.4.

¹¹³ General Comments 32 (note 80 above) para 8.

¹¹⁴ *Ibid*, para 9.

¹¹⁵ *Golder v UK* (1975) 1 EHRR 524.

¹¹⁶ *Ibid*, para 35.

¹¹⁷ General Comments 32 (note 80 above) para 9.

violation of the African Charter. Art 14(1) of the ICCPR also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds.¹¹⁸ The HRC found Art 168 of the Peruvian Civil Code to be in violation of the ICCPR because it limited the right to institute cases involving matrimonial property to the husband, thus denying married women the right to sue.¹¹⁹ Within the American system of human rights, the IACHR has found that laws which granted amnesty to persons who were to be tried for human rights violations in Argentina¹²⁰ and Uruguay¹²¹ breached the right of the victims and their families to have recourse to courts in respect of the wrongs done to them. These laws in effect blocked the victims from bringing any kind of claims in court. Similarly, decrees which purport to oust the jurisdiction of the courts to hear any claims related to it, especially when those claims involve the violation of rights was not only an assault on the jurisdiction of the courts, it also constitutes a violation of the right to be heard,¹²² or the right of access to the courts. ‘An attack of this sort on the jurisdiction of the courts is especially invidious’, said the ACHPR, ‘because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed’.¹²³

While the ability to gain entry and present one’s case before the courts is a critical element of this right of access to courts, the jurisprudence has tended to support the view that the concept is broader than the mere right to make use of the judicial apparatus. Decisions of the European Court on Art 6 of the ECHR are particularly useful in this regard. The Court’s interpretation shows that the article goes beyond merely guaranteeing the right of access to courts, to including a right for all persons, regardless of financial state, *effectively* to place their case before the courts. In *Airey v Ireland*,¹²⁴ the applicant wished to obtain a decree of judicial separation but was unable to afford a lawyer. As there was no legal aid for civil matters in Ireland, she alleged that her right of access to court was effectively denied to her by the Irish legal system. The government argued that the applicant in fact enjoyed the right

¹¹⁸ Ibid.

¹¹⁹ *Ato del Avelland v Peru*, Communication 202/1986, UN Doc Supp 40 (A/44/40) 196 (1988), para.10.2.

¹²⁰ *Consuelo et al v Argentina*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc 14 at 41 (1993) paras 32, 50.

¹²¹ *Mendoza et al v Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc 14 at 154 (1993).

¹²² *Civil Liberties Organisation v Nigeria* Communication No 151/96 paras 13 and 18.

¹²³ Ibid, para 13.

¹²⁴ *Airey v Ireland* (1979) 2 EHRR 305.

of access to court since she could take her case to the High Court or hire a lawyer if she could afford one. The Court rejected this argument on the ground that it took no account of the effectiveness principle. The test, according to the court, is whether the applicant would be able to present her case properly and satisfactorily. The court was of the opinion that, in view of the nature of her case and the complexity of the procedure of the Irish High Court, it was unlikely that that she could have represented herself effectively. The court said: ‘The Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective ... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial’.¹²⁵

The right of access to courts therefore means more than the legal right to bring a case before a court; it includes the ability to achieve this. The first, critical element in this regard is knowledge on the part of the would-be litigant, for in order to be able to bring a case before the courts, he or she must have knowledge of the applicable law. He or she must also be aware of the possibility of obtaining a remedy from the courts and must have some knowledge about what to do in order to gain access to the courts. Lastly, he or she must have the necessary skills to be able to initiate the case and present it to the court.¹²⁶

With regard to equal treatment, the requirement is that the parties must have procedural equality. This is not a guarantee of equality of results or absence of error on the part of the competent tribunal.¹²⁷ Furthermore, equal treatment does not mean identical treatment. Rather, it means that when objective facts are alike, the response of the judiciary should also be similar.¹²⁸ The ACHPR found in *Avocats sans Frontières (on behalf of Bwampamyé) v Burundi*,¹²⁹ that equal treatment means that both parties should argue their cases before the jurisdiction on an equal footing.¹³⁰ There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner. In that case, the ACHPR found that the Ngozi Court of Appeal in Burundi had ‘violated the right to equal treatment, one of the fundamental principles of a right to a fair trial’ when it refused the accused person’s plea for an adjournment of the proceedings owing to the absence of a lawyer,

¹²⁵ Ibid. 9 para 24.

¹²⁶ Geoff Budlender ‘Access to courts’ (2004) 121 (2) *SALJ* 339, 241.

¹²⁷ *BdB et al v The Netherlands*, Communication 273/1988, UN Doc CCPR/C/35/D/273/1988 (1989) para 6.7.

¹²⁸ *Avocats sans Frontières (on behalf of Bwampamyé) v Burundi*, (2000) AHRLR 48 (ACHPR 2000) para 27.

¹²⁹ Ibid.

¹³⁰ Ibid, para 27.

especially in view of the irreversible character of the death penalty involved, although it had earlier accepted an adjournment requested by the prosecutor.¹³¹ Similarly, in *Robinson v Jamaica*¹³² the author had been refused an adjournment to obtain legal representation even though the prosecution had already obtained several adjournments because its witnesses were unavailable or unready. The HRC was of the view that there had been a violation of Art 14(1) of the ICCPR due to inequality of arms between the parties.¹³³ The ECtHR has further explained the principle of equality contained in Art 6(1) of the ECHR to mean that ‘... each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice’.¹³⁴ The first obligation of a state party, such as South Africa therefore is to ensure that both its citizens and aliens, including refugees, are able to access its courts, and when they do, that they are treated equally.

2.6.3 Language

Linked to the notion that each party must be able to effectively place his case before the courts on an equal footing with his opponent is the issue of language proficiency. This is an issue of great importance to all persons utilising the justice system, including citizens. Since refugees and asylum seekers are, by definition, not citizens of the States in which they find refuge, there is a greater likelihood that they do not speak the local languages, and hence are more likely to find language as a problem. Art. 14(3)(f) of the ICCPR and Art 6(3)(e) of the ECHR both provide that persons accused of crimes are entitled to ‘the free assistance of an interpreter if he cannot understand or speak the language used in court’. Art 8(2)(a) of the American Convention guarantees ‘the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court’. The African Charter does not include an equivalent provision, however, Para 2(iv) of the ACHPR’s Resolution on the Right to Recourse and Fair Trial fills that gap. It provides that persons accused of a crime are entitled to ‘have the free assistance of an

¹³¹ Ibid, para 29.

¹³² *Robinson v Jamaica* Communication No 223/1987, UN Doc Supp No 40 (A/44/40) 241 (1989).

¹³³ Ibid, para 10.4.

¹³⁴ *Bulut v Austria* (1996) 24 EHRR 84, para 47.

interpreter if they cannot speak the language used in the court'. Para N of the Guidelines on Fair Trials goes even further, setting out details of what the right entails, much of which is derived from the jurisprudence of other international bodies as will be seen below.¹³⁵

As articulated in the jurisprudence of the various international bodies, this right does not confer a right to be tried in a language of one's choosing, but rather in a language that one understands. In *Dominique Guesdon v France*,¹³⁶ the author contended that the refusal of the French *Tribunal Correctionnel* to allow him to address the court and adduce evidence in Bréton, with the assistance of an interpreter, violated his right under Art 14(3)(f) of the ICCPR. The HRC disagreed. It held that since the author and his twelve witnesses were proficient in French, the official language of the court, his right to a fair trial had not been violated. Art 14(3)(f) cannot be construed as encompassing the right of the accused to express himself in the language of his choice. Only if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language, did a State Party have an obligation to provide the services of an interpreter.¹³⁷

The scope of interpretation required is not limited to oral statements made at the trial but extends to pre-trial proceedings. It also extends to the translation or interpretation of all documents or statements in the proceedings which it is necessary for a person to understand in order to have the benefit of a fair trial.¹³⁸ On this point, the ACHPR has found that the

¹³⁵ It provides:

1. The right to an interpreter:

- (a) The accused has the right to the free assistance of an interpreter if he or she cannot understand or speak the language used before the judicial body.
- (b) The right to an interpreter does not extend to the right to express oneself in the language of one's choice if the accused or the defence witness is sufficiently proficient in the language of the judicial body.
- (c) The right to an interpreter applies at all stages of the proceedings, including pre-trial proceedings.
- (d) The right to an interpreter applies to written as well as oral proceedings. The right extends to translation or interpretation of all documents or statements necessary for the defendant to understand the proceedings or assist in the preparation of a defence.
- (e) The interpretation or translation provided shall be adequate to permit the accused to understand the proceedings and for the judicial body to understand the testimony of the accused or defence witnesses.
- (f) The right to interpretation or translation cannot be qualified by a requirement that the accused pay for the costs of an interpreter or translator. Even if the accused is convicted, he or she cannot be required to pay for the costs of interpretation or translation.

¹³⁶ *Dominique Guesdon v France* Communication No 219/1986, UN Doc CCPR/C/39/D/219/1986 (1990).

¹³⁷ *Ibid*, Para 10.2; see also *Yves Cadoret, Hervé Le Bihan v France*, Communication No. 323/1988, UN Doc CCPR/C/41/D/323/1988 (1991), paras 5.6–5.8

¹³⁸ *Leudicke, Belkacem and Koc v Federal Republic of Germany* (1978) 2 *EHRR* 149, para 40; see also *Kamasinski v Austria* (1989) 13 *EHRR* 36 para. 74; General Comments 32 (note 80 above), para 40.

right to a defence includes the right to understand the charges brought against oneself, and where the accused persons did not speak the language of the court fluently, this constitutes a violation of Art 7(1)(c) of the African Charter.¹³⁹ It is clear from the use of the terms ‘free’, and ‘without charge’ in the various provisions above that the cost of such interpretation is to be borne by the State, and this is regardless of the outcome of the case.¹⁴⁰ Thus, where a German court had attributed the costs of the interpretation to the applicants, article 6(3)(e) of the Convention was found to have been violated.¹⁴¹

Most of the jurisprudence on this issue relates to criminal trials, and there are very few in the civil context. However, it this does not mean that the right to interpretation applies in criminal matters only. Some jurisprudence suggests that the same right applies in civil matters, subject to some stringent considerations,¹⁴² as well as in matters involving immigrants and asylum seekers. Asylum seekers have a right to have interpretation at State expense when he is unable to speak the language in use in the court.¹⁴³

2.6.4 Competent, independent and impartial courts or tribunal established by law

The next aspect of Art 14(1) of the ICCPR guarantees the right to ‘competent, independent and impartial’ courts or tribunal. This requirement of competence, independence and impartiality is an absolute right that is not subject to any exception,¹⁴⁴ and they apply to all courts and tribunals, whether ordinary or specialised, civilian or military.¹⁴⁵ The state’s obligation is therefore to ensure that its courts and tribunals meet these criteria. Each of the elements contained in the description of the courts are important in the proper administration of justice. There are three aspects to the notion of independence of the judiciary. First of all, the tribunal must function independently of the executive, which means it must base its

¹³⁹ *Malawi African Association and Others v Mauritania* Communication Nos 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000) para 97.

¹⁴⁰ *Leudicke, Belkacem and Koc v Federal Republic of Germany* (note 138 above) para 49–50.

¹⁴¹ *Ibid.*

¹⁴² *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.

¹⁴³ *Perera v Minister for Immigration & Multicultural Affairs* (1999) FCA 507; *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75.

¹⁴⁴ General Comments 32 (note 80 above) para 19; see also *Gonzalez del Rio v Peru*, Communication No 263/1987, UN Doc CCPR/C/46/D/263/1987 (1992) para 5.2.

¹⁴⁵ General Comment 32 (note 80 above) para 22.

decisions on its own free opinion about the facts and applicable law.¹⁴⁶ Secondly, guarantees must exist that allow the court to function independently. Such guarantees need not be that judges are appointed for life, but it should be such that they cannot be discharged at will or on improper grounds by the authorities. Lastly, any semblance of dependence must be avoided.¹⁴⁷ In its Guidelines on Fair Trials, the ACHPR describes measures that are required to ensure such independence, including that:

- judicial independence must be a constitutional requirement, i.e. State Parties must include in their constitutions and laws, provisions that guarantee the independence of the judiciary and of judicial officers;
- inappropriate or unwarranted interference with the judicial process by the executive is discouraged, as is the creation of military or other special tribunals that do not use duly established legal procedures, and which purport to displace the jurisdiction of ordinary judicial bodies;
- transparency and accountability in the process for appointments to judicial bodies must be ensured and whatever method is used in the selection of judicial officers must safeguard the independence and impartiality of the judiciary; and
- the tenure, remuneration and other conditions of service of judicial officers must be prescribed and guaranteed by law.¹⁴⁸

The principles of independence and impartiality are overlapping concepts in the sense that both are designed to ensure the separation of powers. But the notion of impartiality has another dimension designed to remove personal interest, bias or prejudice on the part of the decision maker.¹⁴⁹ It implies ‘that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties’.¹⁵⁰ In other words, it is a safeguard for objectivity.

¹⁴⁶ Pieter Dijk *et al* *Theory and practice of the European Convention on Human Rights* (The Hague: Martinus Nijhoff Publishers, 1998) 452; Francis G Jacobs & Robin CA White *The European Convention on Human Rights* (Oxford: Clarendon Press, 1996) 137–138.

¹⁴⁷ Dijk *et al* (note 146 above); see also *Campbell and Fell v UK* (1984) 7 EHRR 165 series A, No 48, para 81.

¹⁴⁸ Guidelines on Fair Trial (note 81 above) Section A, para 5.

¹⁴⁹ General Comment 32 (note 80 above) para 21.

¹⁵⁰ *Karttunen v Finland*, Communication No 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992).

The HRC has not considered the meaning of ‘competence’ in its comments, but its ordinary meaning refers to suitable qualification and experience as a consideration in the appointment of judicial officers.¹⁵¹ The Guidelines on Fair Trials expressly refer to the qualification of persons to be appointed to judicial office.¹⁵²

The issue of what constitutes a competent, independent and impartial court or forum is one on which the ACHPR has pronounced extensively – hardly surprising, given the propensity of many African dictatorships to set up special military courts in order to obtain what they consider ‘quick justice’.¹⁵³ In one such case, *International Pen and Others v Nigeria*,¹⁵⁴ the ACHPR found that special tribunals whose composition was at the discretion of the executive violate Art 7(1)(d) of the African Charter and that their very existence constituted a violation of the principles of impartiality and independence of the judiciary and of the right to a fair trial.¹⁵⁵ In *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v Nigeria*,¹⁵⁶ seven men were tried and sentenced to death by a special tribunal created under the Civil Disturbances (Special Tribunal) Act. The tribunal was composed of one judge and four members of the armed forces. The Commission noted that:

The tribunal is composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbances Act ... Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack of impartiality. It thus violates Article 7(1)(d) [of the African Charter].¹⁵⁷

¹⁵¹ Conte & Burchill (note 99 above) 165.

¹⁵² Paras: 1(i) ‘The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability ...

1(4)(a) No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions’

¹⁵³ Oji Umzurike ‘The African Charter on Human and People’s Rights’ in *Developing human rights jurisprudence*, volume 3: A third judicial colloquium on the domestic application of international human rights norms (Commonwealth Secretariat, 1991) 40.

¹⁵⁴ *International Pen and Others v Nigeria* Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998).

¹⁵⁵ *Ibid*, para 86.

¹⁵⁶ (87/93), 8th Annual Activity Report of the African Commission on Human and People’s Rights, 1994–1995, ACHPR/RPT/8th/Rev.I.;

¹⁵⁷ *Ibid*, paras 14 and 15; see also *Constitutional Rights Project (in respect of Wahab Akamu, G Adeg and Others) v Nigeria* Communication No 60/91 (1995).

Given the qualifying requirement contained in Arts 14(1) of the ICCPR and 6(1) of the ECHR that the courts and tribunals be ‘established by law’¹⁵⁸ it is worth asking the question whether non-state structures are not recognised, or if recognised, whether they are exempt from the provisions of these treaties? The HRC only made a brief reference to this issue in General Comment 32, emphasising that the notion of a ‘tribunal’ referred to in Art 14(1) designates a body that is established by law, regardless of what it is called.¹⁵⁹ The idea that non-state structures could possibly be included is effectively disproved. The Dakar Declaration, on the other hand, while not directly addressing non-state justice systems specifically, does address traditional justice systems, which by nature, could be state or non-state.¹⁶⁰ It recognised that traditional courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significant proportion of the population in African countries.¹⁶¹ It also recognised that these courts have serious shortcomings, which result in many instances in a denial of a fair trial, and that Traditional courts are not exempt from the provisions of the African Charter relating to fair trial.¹⁶²

Ancillary to the right to a hearing before a competent, independent and impartial tribunal is the requirement that the hearing must be conducted in public. This ensures

¹⁵⁸ The Guidelines on fair Trials use the term ‘legally constituted competent, independent and impartial judicial body’ Para 1.

¹⁵⁹ Para 18.

¹⁶⁰ The South African Constitution for instance recognises the role of traditional leadership and their functions as justice structures, which therefore means they are ‘forums recognised by law’. See ss. 166(e) and 211 of the Constitution of the Republic of South Africa, Act No 108 of 1996. In Mozambique on the other hand, traditional and religious courts are not recognised. The Constitution specifically ignores traditional courts, providing in Art 223 that:

1. In the Republic of Mozambique there shall be the following courts:
 - a) The Supreme Court;
 - b) The Administrative Court;
 - c) The judicial courts.
2. Other administrative, labour, fiscal, customs, maritime, arbitration and community courts can also be established’...

Art 233 Constitution of the Republic of Mozambique 16 November 2004. Community Courts are quite different from traditional courts in the sense that the judges are elected officials rather than chiefs and traditional rulers. See AfriMap/Open Society Foundation *Mozambique: Justice sector and the rule of law* (Johannesburg: Open Society Initiative for Southern Africa, 2006) specifically Chapter 6G.

¹⁶¹ Para 4.

¹⁶² Ibid.

transparency of proceedings and provides an important safeguard for the interest of the individual and of society at large.¹⁶³ There are certain conditions under which courts may exclude all or part of the public from hearings. These include reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties or the interest of minors so requires, or in special circumstances where, in the opinion of the court, publicity would be prejudicial to the interests of justice.¹⁶⁴

2.6.5 Provision of legal assistance

Art 14(3)(d) of the ICCPR provides that every accused person is entitled to defend himself in person or through legal assistance of his own choosing. If he is unable to afford legal assistance, he is entitled to have legal assistance assigned to him free of charge if the interests of justice so requires. There is thus, no doubt that there exists in international law a basic obligation on states to provide legal aid in some form in order to ensure access to justice. The ACHPR has emphasised this duty in the Dakar Declaration, stating that it is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective, and that the contribution of the judiciary, human rights NGOs and professional associations should be encouraged in this regard.¹⁶⁵

The HRC has noted that Art 14(3)(d) of the ICCPR obliges State parties to provide legal aid only within the frame work of criminal proceedings,¹⁶⁶ but the jurisprudence shows that even then, the right to free legal assistance is not unconditional. Certain criteria, such as the gravity of the offence,¹⁶⁷ the severity of the penalty involved¹⁶⁸ and the complexity of the case are to be considered in deciding whether legal assistance should be provided. Thus in *OF v Norway*,¹⁶⁹ where the accused was charged with a minor offence (speeding) which

¹⁶³ General Comments 32 (note 80 above) para 29.

¹⁶⁴ Ibid.

¹⁶⁵ Note 107 above, para 8.

¹⁶⁶ *Mr JO, Mrs ZS and their daughter SO v Belgium*, Communication No 1417/2005, UN Doc CCPR/C/85/D/1417/2005 (2005).

¹⁶⁷ *Leonard John Lindon v Australia* Communication No 646/1995, UN Doc CCPR/C/64/D/646/1995 (25 November 1998) para 6.5.

¹⁶⁸ *Robinson LaVende v Trinidad and Tobago*, Communication No. 554/1993, UN Doc CCPR/C/61/D/554/1993 (17 November 1997) para 5.8; *Aliboeva v Tajikistan* Communications No 985/2001, para 6.4; *Barno Saidova v Tajikistan*, Communication No. 964/2001, UN Doc CCPR/C/81/D/964/2001 (2004). Para 6.8.

¹⁶⁹ *OF v Norway* Communication No 158/1983, UN Doc CCPR/C/OP/2 at 44 (1990).

would have in practice only led to a small fine, the HRC found that the State was not required to provide legal assistance. The HRC has also opined that Art 14(3)(d) does not entitle the accused to choose counsel provided to him free of charge. However, the legal aid provided must be effective.¹⁷⁰

While also guaranteeing the right to free legal aid in criminal cases, the ECtHR has applied similar tests in determining whether there is a violation of Art 6(3) of the ECHR. In *Granger v United Kingdom*,¹⁷¹ the applicant was refused legal aid to appeal against a conviction for perjury following which he was sentenced to five years' imprisonment. In view of the severity of the penalty, the ECtHR noted that there could 'thus be no question as to the importance of what was at stake in the appeal'. But the severity of the sentence was not the only consideration. The court further considered that the applicant had not been in a position fully to comprehend the pre-prepared speeches submitted to the High Court of Justiciary by the Solicitor General, or the opposing arguments submitted to the court, and that even if he were, he would not have been able to make an effective reply to those arguments or to questions from the bench. The complicated nature of the case was demonstrated by the fact that one of the grounds for appeal raised an issue of complexity and importance that was so difficult that the High Court had to adjourn its hearing and call for a transcript of the evidence given at the applicant's trial, so as to be able to examine the matter more thoroughly. In view of all these considerations, the ECtHR concluded that 'it would have been in the interests of justice for free legal assistance to be given to the applicant' since this would have 'served the interests of justice and fairness by enabling the applicant to make an effective contribution to the proceedings ...'¹⁷²

On its part, the African Charter is silent on the question of legal aid, but the Guidelines on Fair Trials lays out detailed guarantees in this area. First of all, it requires States to ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind.¹⁷³ The prohibited grounds of distinction on access to lawyers include national origin, which means that such efforts on the parts of states must take into

¹⁷⁰ *Paul Kelly v Jamaica*, Communication No 253/1987, UN Doc CCPR/C/41/D/253/1987 at 60 (1991) Para 5.10.

¹⁷¹ *Granger v United Kingdom* (1990) 12 EHRR 469.

¹⁷² *Ibid*, para 46. See also *Webb v United Kingdom* (1983) 33 DR 133; *Pakelli v Germany* (1983) 6 EHRR 1

¹⁷³ Guidelines on Fair Trials *supra* (note 81 above) para G(a).

consideration the needs of refugees and asylum seekers, along with other classes of aliens. Recognising that the number of qualified lawyers is low in many state parties to the African Charter, the Guidelines encourage states to create enabling environments for para-legals to play a part in the provision of legal assistance.¹⁷⁴

In criminal matters, the Guidelines on Fair trials sets out criteria which correspond with those developed in the jurisprudence of the ECtHR and HRC for determining whether legal assistance should be provided as discussed above. What should be considered are the seriousness of the offence and the severity of the sentence.¹⁷⁵ In this regard, the ACHPR declared that the right to legal assistance is a fundamental element of the right to fair trial, and should always be available where the interests of justice demand it.¹⁷⁶

With regard to the right to legal assistance in civil case, the position under the African human rights regime is clearer than under the ICCPR and the ECHR. Civil matters are included in the ambit of cases in which State Parties to the African Charter have an obligation to provide legal assistance. This can be inferred from the Dakar Declaration which refers to ‘accused and aggrieved’ persons. More compellingly, the Guidelines on Fair Trials provides that ‘[t]he accused *or a party to a civil case* has a right to have legal assistance assigned to him or her in any case where the interests of justice so require and without payment by the accused *or party to a civil case* if he or she does not have sufficient means to pay for it’.¹⁷⁷ Thus, the deciding factor for parties to the African Charter in the determination of whether or not to provide legal aid is not the nature of the matter at stake, but rather whether ‘the interest of justice’ requires it. The Guidelines offers some parameters on the application of the ‘interest of justice’ test in respect of civil cases.¹⁷⁸ The ‘interests of justice’ are to be determined by the complexity of the case and the ability of the party to adequately represent himself or herself;¹⁷⁹ the rights that are affected;¹⁸⁰ and the likely impact of the outcome of the case on the wider community. It is apparent that these provisions are derived from the

¹⁷⁴ Ibid, para H(g)–(k).

¹⁷⁵ *Avocats sans Frontières (on behalf of Bwampamye) v Burundi* (note 128 above).

¹⁷⁶ Ibid, para 30.

¹⁷⁷ Guidelines on Fair Trials supra (note 81 above) para H(a), emphasis added.

¹⁷⁸ Ibid, para H(b)

¹⁷⁹ *Airey v Ireland* (note 124 above); *Fransson v Sweden* (2004) 39 EHRR SE1.

¹⁸⁰ *Aerts v Belgium* (1998) ECHR 64 para 59.

principles formulated by the ECtHR and HRC in their extensive jurisprudence on this matter as seen in the cases seen above.

The position of the court in *Airey* discussed above is instructive of the European position on the right to legal assistance in civil matters. Despite the fact that Art 6 of the ECHR does not make express provision for civil legal aid, *Airey* suggests that the State has an obligation to provide legal assistance where such assistance is indispensable for an effective access to court. The Court has held further, in *A v United Kingdom*,¹⁸¹ that the obligation exists in cases where ‘such assistance proves indispensable for effective access to the court, either because legal representation is rendered compulsory or by reason of the complexity of the procedure or of the case’.¹⁸² The position is given further credence in *Bobrowski v Poland*¹⁸³ where the ECtHR held that while there is no obligation to grant legal aid in all disputes, States should be guided by principles of fairness. States should ensure that a party in civil proceeding is able to participate effectively by being able to put forward arguments in support of his or her claims.¹⁸⁴

Although the HRC has stated that Art 14(3)(d) of the ICCPR obliges State parties to provide legal aid only within the frame work of criminal proceedings, as previously noted, it has also gone on to say that State Parties are encouraged to provide free legal aid in civil matters too.¹⁸⁵ In some non-criminal cases, it said, they may even be obliged to do so.¹⁸⁶ This would include for instance, a situation involving a person sentenced to death, who seeks to avail himself of available constitutional review of irregularities in a criminal trial but does not have sufficient means to pay for the legal assistance required to pursue such remedy.¹⁸⁷ This is not a criminal matter *per se*, because the issue in question is not whether the applicant was innocent or guilty of a crime, but whether his constitutional right of access to justice had been violated. The role of the Constitutional Court in such an instance is not the determination of a criminal charge, but to ensure that applicants receive a fair trial in all cases, whether criminal

¹⁸¹ *A v United Kingdom* (2003) 13 BHRC 623.

¹⁸² *Ibid*, para 96.

¹⁸³ *Bobrowski v Poland* (2008) ECHR 64916/01 (17 June 2008).

¹⁸⁴ Cf however the findings of the Court in *S and M v United Kingdom* (1993) 18 EHRR CD172 and *A v United Kingdom* *supra*, that the United Kingdom was not in breach of Art 6(1) for failing to provide legal aid for bringing and for defending libel actions.

¹⁸⁵ General Comments 32 (note 80 above) para 10.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Currie v Jamaica* Communication No 377/1989 CCPR/C/50/D/77/1989 (1994).

or civil. In this instance, the State has obligations under Arts 2(3) and 14(1) of the ICCPR to provide free legal assistance in order to make available and effective, the remedies in the Constitutional Court which address violations of fundamental rights.¹⁸⁸

For refugees, a non-criminal matter in which the State would be obliged to provide free legal assistance would be asylum proceedings, the results of which could mean that a refugee or asylum seeker faces *refoulement* to a place where his life or liberty would be in jeopardy on account of his race, religion, nationality, membership of a particular social group or political opinion. The inherent threat is similar to that of an accused persons faced with serious penalties if convicted, therefore, taking into consideration the various criteria established by the various bodies above, the obligations of the state should be the same.

Lastly, it should be pointed out that even where an obligation exists to provide legal assistance, whether in civil or criminal matters, States ‘enjoy a free choice of the means to be used in guaranteeing litigants the right to a fair trial’,¹⁸⁹ and legal aid schemes are but one of those means. Furthermore, the right of access to a lawyer is not absolute and may be subject to restrictions, provided that those restrictions pursue a legitimate aim and are proportionate.¹⁹⁰

The foregoing discussion has established the international law obligations of States on access to justice. These obligations are of a general nature, applicable to all persons including refugees and asylum seekers. However, as the focus of this thesis is refugees, the next section will examine what specific obligations, if any, States have in respect of access to justice for refugees and asylum seekers within their jurisdictions.

2.7 ACCESS TO JUSTICE UNDER INTERNATIONAL REFUGEE LAW

Among the various protection that general international human rights law offers, the one with potentially the most value for refugees, is the duty of non-discrimination. As an overarching principle which is applicable on a wide variety of fronts, it is an effective means by which to empower refugees, enabling them to enjoy the rights guaranteed in various human rights instruments.¹⁹¹ The core guarantee of non-discrimination is found in Art 26 of the ICCPR.

¹⁸⁸ Ibid, para 13.4.

¹⁸⁹ *Steel and Morris v UK* (2005) ECHR 103 (15 February 2005) para 60.

¹⁹⁰ Ibid, para 62. Cf *Bobrowski v Poland* (note 183 above).

¹⁹¹ James C Hathaway *The rights of refugees under international law* (Cambridge: Cambridge University Press 2005) 123.

The HRC emphasised the universal nature of the ICCPR, making clear that its provisions do not inhere only in citizens of a State Party when it declared: ‘each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens’.¹⁹² It further reiterated and clarified this in its General Comments No 31:

The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.¹⁹³

Therefore, all of the access to justice guarantees discussed above apply equally to refugees.

Beyond these generally applicable guarantees however, there exists a refugee-specific system of rights primarily contained in the UN Refugee Convention and also to be found in regional refugee instruments such as the OAU Refugee Convention and the Cartagena Declaration on Refugees.¹⁹⁴ The rights of refugees found in these Conventions derive from the general standards of international human rights law (including those discussed above) in which they have their origins.¹⁹⁵

The OAU Refugee Convention, to which South Africa is party, is considered the most generous and flexible international agreement on refugee protection,¹⁹⁶ providing a more extensive definition of refugees than does the UN Refugee Convention and extending the

¹⁹² General Comment No 15 *The position of aliens under the Covenant* (1986) UN Doc HRI/GEN/1/Rev 1, at 18, (1994), para 2.

¹⁹³ General Comment No 31 *Nature of the general legal obligation on states parties to the Covenant* UN Doc CCPR/C/21/Rev 1/Add 13 (2004), para 10.

¹⁹⁴ OAS Doc OEA/Ser L/V/II.66/doc 10, rev 1, at 190–93 (1984–85), 17 April 1998.

¹⁹⁵ Erika Feller ‘International refugee protection 50 years on: The protection challenges of the past, present and future (2001) 843 (83) *International Review of the Red Cross - Humanitarian Debate: Law, Policy, Action* 581, 582; Hathaway argues that traditional customary international law cannot be a source for refugee rights since only very few rights are universally accepted under international law. These are the right against discrimination and the right to be free from arbitrary deprivation of life, from torture, and from genocide. He therefore suggests that the UN Refugee Convention must be the first source for the rights of refugees under international law, followed by the other international human rights treaties. Hathaway (note 191 above) 15–40.

¹⁹⁶ George Okoth-Obbo ‘OAU Convention remains a key plank of refugee protection in Africa after 40 years’ Available at <http://www.unhcr.org/4aa7b80c6.html> [accessed 10 September 2010].

guarantee of *non-refoulement* to include non-rejection at frontiers.¹⁹⁷ In this way, it covers situations specific to Africa that were not explicitly covered by the UN instrument and meant refugees from Africa could not effectively access asylum even when they had legitimate claims.¹⁹⁸ It does not in any way supersede the UN Refugee Convention. Indeed, it recognises the UN Refugee Convention as ‘the basic and universal instrument relating to the status of refugees’¹⁹⁹ and describes itself as the ‘effective regional complement in Africa’ of the UN Refugee Convention.²⁰⁰ The OAU Convention thus serves as a supplement to the UN Refugee Convention, which means that the provisions contained in the latter, including the rights contained therein, are wholly incorporated into the former and so the rights enumerated in the UN Refugee Convention also apply under the OAU Refugee Convention.

These international refugee rights instruments do not exist as alternatives to or in competition with general human rights.²⁰¹ Rather they exist as a ‘mechanism by which to answer situation-specific vulnerabilities that would otherwise deny refugees meaningful benefit of the more general system of human rights protection’.²⁰² Thus, for instance, the ICCPR, while applicable to refugees, is addressed primarily to persons who reside in their

¹⁹⁷ Other unique features of the OAU Convention include the concept of burden-sharing among member states of the OAU; the express provisions on asylum as opposed to the indirect formulations in the 1951 Convention; specific provisions on the location of refugee settlements; explicit duty on refugees and asylum seekers to abstain from subversive activities against member states including the duty of member states to prohibit such activities; and the elaborate provisions on voluntary repatriation. For in-depth discussion of the OAU Convention, see generally MR Rwelamira ‘Two decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa’ (1989) 4 (1) *International Journal of Refugee Law* 557–561; Joe Oloka-Onyango ‘Human rights, the OAU Convention and the refugee crisis in Africa: Forty years after Geneva’ (1991) 3 *International Journal of Refugee Law* 453–460.; Jennifer L Turner ‘Liberian refugees: A test of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa’ (1994) 8 *Georgetown Immigration Law Journal* 281–302; Emmanuel Opoku Awuku ‘Refugee movements in Africa and the OAU Convention on refugees’ (1995) 39 (1) *Journal of African Law* 79–86; Ebenezer Q Blavo *The problems of refugees in Africa: Boundaries and borders* (Hampshire: Ashgate, 1999); Mark Cutts *The state of the world's refugees, 2000: Fifty years of humanitarian action* (New York: Oxford University Press, 2000) 55–57.

¹⁹⁸ Gaim Kibreab *Refugees and development in Africa: The case of Eritrea* (New Jersey: Red Sea Press, 1987) 8; also references in note 197 above.

¹⁹⁹ Preamble 9, OAU Refugee Convention.

²⁰⁰ Art 8(2) OAU Refugee Convention.

²⁰¹ Hathaway (note 191 above) 75.

²⁰² *Ibid.*

state of citizenship and does not deal with refugee-specific concerns.²⁰³ Even when the subject matter of a particular provision is relevant to refugees, the rights are formulated on the basis of inappropriate assumptions say critics.²⁰⁴ The assumption with respect to judicial remedies for instance is that refugees and other aliens are able to freely invoke it like citizens do, but that is often not the case.²⁰⁵

The UN Refugee Convention attempts to fill these gaps by guaranteeing a broad range of rights applicable to refugees specifically. It defines four standards of treatment that should be applied by host states in the implementation of those rights. These are:

- Treatment as favourable as that accorded to nationals of the host state.²⁰⁶
- Treatment as favourable as that accorded to aliens generally in the same circumstances.²⁰⁷
- Most favourable treatment accorded to nationals of a foreign country or most-favoured foreigner treatment.²⁰⁸ This means that where a host state has an agreement with another country the terms of which are more favourable than those which it has with other states, refugees are to be treated at the level of the first state in question. Two rights in the Convention are guaranteed at this level – the right to freedom of non-political association and to engage in wage earning employment.²⁰⁹

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid, 121.

²⁰⁶ Arts 4 (freedom of religion); 14 (artistic rights and industrial property), 16(2) (access to legal aid and exemption from *cautio judicatum solvi*), 20 (rationing), 22(1) (elementary education), 23(public relief) 24(1) (labour legislation and social security), 29 (taxes and other fiscal charges).

²⁰⁷ Art 13 (moveable and immoveable property), 18 (self-employment), 19 (practice of liberal professions), 21 (housing), 22(2) (education other than elementary education), 26 (freedom of movement).

Art 6 defines the term ‘in the same circumstances’ to imply that ‘any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling’. Thus for instance with regard to the right to acquire movable and immoveable property under Art 13, if the law in South Africa required all non-citizens to be resident in the country for at least three years before they could buy property, then refugees would be subject to the same conditions.

²⁰⁸ Arts 15 (freedom of non-political association) and 17 (right to engage in wage-earning employment).

²⁰⁹ Ibid.

- Treatment not approximating to any defined standard.²¹⁰ These are rights not defined to require treatment at any of the three levels stated above. These rights are guaranteed absolutely to refugees and must be respected even if the citizens of the host state do not enjoy those rights.²¹¹ Some of these rights, apart from being absolute to the extent that they are not defined by any standards are also so fundamental that States cannot enter reservations to them. These rights are: protection from *non-refoulement*, protection against discrimination, religious freedom and, significantly for the purposes of this thesis, the right of access to courts.²¹²

Not only is the right of access to court non-derogable in terms of Art 42(1) of the UN Refugee Convention, the right is of such an absolute character that by it, refugees have the right of free access to courts even if the citizens of the host states do not. This is because it is one of those rights not defined by any standard of treatment.²¹³ It is provided for in Art 16 of the UN Refugee Convention:

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Article 16(1) applies to any refugee, regardless of where he has his habitual residence, even if it is not within the territory of a state party to the Convention.²¹⁴ In the event he has his habitual residence in a state that is not party to the Convention, he still has the right to access the courts of any States Party ‘subject only to the rule underlying the Convention that each Contracting State must determine for its own purposes whether a person is to be considered

²¹⁰ Arts 16(1) (access to courts), 25 (administrative assistance), 27 (identity papers), 28 (travel documents), 30 (transfer of assets), 31 (refugees illegally present) 32 (expulsion), 33 (*non-refoulement*), 34 (naturalisation).

²¹¹ Atle Grahl-Madsen *Commentary on the refugee Convention 1951* (Geneva: UNHCR, 1997) 65.

²¹² Art 42(1), 1951 UN refugee Convention.

²¹³ Grahl-Madsen (note 211 above) 65.

²¹⁴ *Ibid*, 66.

as a refugee or not'.²¹⁵ Furthermore, the right of access to court as envisaged in Art 16(1) is not limited to the courts of the country where the refugee is located, but includes access to the courts in the territory of all contracting States.²¹⁶ Thus, where a person granted refugee status in South Africa finds it necessary to sue a national of another contracting State, that other contracting State must grant him access to its courts and afford him the same treatment as that afforded to a national of South Africa with respect to legal aid and *cautio judicatum solvi*.

Lastly, the right contained in Art 16(1) is not limited to recognised refugees alone, but extends to asylum seekers as well.²¹⁷ If this were not the case, said the court in *R v Secretary of State for the Home Department, ex parte Jahangeer et al*²¹⁸ an asylum seeker 'might find that he could have no right of audience before the court because the means of establishing his status would not be available to him'.²¹⁹

Article 16(2) entitles refugees to have access to legal assistance when it is required. However, unlike the absolute nature of the right in paragraph 1, refugees are assimilated to nationals of the asylum state for purposes of assistance to access to courts including legal aid.²²⁰ Thus, refugees in South Africa would enjoy legal aid only to the extent that South African citizens do. This, however, applies only in countries where state-funded legal aid exists. Where legal aid is provided by bar associations or other bodies, the article does not apply.²²¹ This right to legal assistance would appear restricted in the light of the extremely generous nature of the absolute right of access to court. In reality, however, considering that it is the same treatment that the citizens of the host state enjoy, that is not the case. Besides, the absolute nature of the right to access to court is highly theoretical, given the unlikelihood that any country that would deny its citizens the right of access to court would offer that privilege to refugees.

Explaining why treatment equal to that of a national should be the required standard when it comes to legal assistance and technical requirements like *cautio judicatum solvi*, the Secretary General of the United Nations has stated that, while the right of refugees to sue and

²¹⁵ Ibid.

²¹⁶ Hathaway (note 191 above) 645.

²¹⁷ *R v Secretary of State for the Home Department, ex parte Jahangeer et al* (1993) Imm AR 564 (QBD).

²¹⁸ Ibid.

²¹⁹ Ibid, 566.

²²⁰ Hathaway (note 191 above) 234.

²²¹ Grahl-Madsen (note 211 above) at 67.

be sued in principle is not challenged, in practice, insurmountable difficulties to the exercise of this right by needy refugees usually exist, and these include the refusal to grant refugees the benefit of legal assistance, and a requirement to furnish *cautio judicatum solvi* – a financial guarantee that an alien is obliged to provide when bringing an action before the courts of a country against a national of that country. This security for costs is required to ensure payment of costs and damages which may result from the trial.²²²

In many countries, according to the Secretary General, legal assistance is available only to nationals and those foreigners who could invoke a treaty of reciprocity.²²³ Such difficulties he said, make the right of access to court illusory. ‘Refugees should therefore be exempted, as was done in the Conventions of 1933 and 1938, from the obligation to furnish security for costs and enjoy the benefit of legal assistance on the same conditions as nationals’.²²⁴ Therefore, by virtue of Art 16 of the UN Refugee Convention, refugees’ right to access courts is not to be blocked or limited by the requirement of a financial guarantee.²²⁵ The reference to free access, however, does not exempt refugees from payment of court fees or other charges required in order to pursue an action, but such fees and charges may not be higher than those levied on nationals and they should not be any additional obstacles for refugees.²²⁶

In the light of the *Airey* decision discussed above, even though Art 16 refers to access to courts, what is envisaged must of necessity go beyond mere ability to bring proceedings before the state’s courts system and extend to the practicalities of instituting them as well. On this point, Hathaway notes that, although Art 16 above refers only to access to courts, the qualitative dimension of that access to the courts is regulated by Art 14(1) of the ICCPR.

²²² Hathaway (note 191 above) 882.

²²³ Ibid.

²²⁴ *Memorandum by the United Nations Secretary General to the Ad Hoc Committee on Statelessness and Related Problems* 3 January 1950 UN doc E/AC32/2, at 30, cited in Hathaway supra (note 182 above) 882.

²²⁵ In *Lindon v Australia* (note 158 above) the HRC noted that such financial obstacles could give rise to a violation of Art 14 of the ICCPR. It stated that ‘if administrative, prosecutorial or judicial authorities of a State party laid such a cost burden on an individual that his access to court de facto would be prevented, then this might give rise to issues under article 14, paragraph 1’. It noted further: ‘... in particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them’. Para 6.4. See also *Anni Aarela and Jouni Nakkalajarvi v Finland* UN Doc CCPR/C/73/D/779/1997.

²²⁶ Grahl-Madsen (note 211 above) 67; Hathaway (note 191 above) 908 and footnote 894.

Thus, all of the guarantees set out in Art 14 of the ICCPR as discussed above apply to refugees also. What this means therefore, is that the bodies before which refugees are entitled to establish their claim must be established by law and they must be jurisdictionally competent, independent and impartial. They must, moreover, be positioned to deliver a fair and public hearing, meaning that access should be reasonably expeditious, the rules of natural justice respected, procedural equality between the parties ensured, it is possible reasonably to present one's case, and the hearing (or at least the judgment, where special circumstances exist) is accessible to all.²²⁷ These requirements also have implications for those states which keep refugees in camps, away from the major cities, as this could conceivably affect access if there are no courts nearby.²²⁸

Lastly, it bears pointing out that unlike the ICCPR, the UN Refugee Convention does not provide for effective remedies for violations of the rights contained in it. However, this omission need not constitute a barrier as most of the rights contained in the UN Refugee Convention are equally protected in the ICCPR, which it has been established, also applies to refugees. Refugees can therefore claim a right to a remedy under the auspices of the ICCPR.

2.8 CONCLUSION

This chapter has traced the growth and development of access to justice, from its Anglo-Saxon common law roots where it was recognised as a basic foundation of the rule of law to the present day where it holds an esteemed place as a legal right in many international human rights instruments. Yet for all of its acknowledged importance, access to justice is a complex and highly nuanced concept which is difficult to define. It is certainly impossible to discuss all of the theories and nuances related to it in the short space of a chapter in a thesis. I have, however, attempted to explore some of the factors that shape the ways in which it is understood, its history and place as a human right. It is obvious from the scholarship on the subject that access to justice can be seen both broadly and narrowly. If seen broadly, it is accepted that it means the 'ability to avail oneself of the various institutions, governmental and non-governmental, judicial and non-judicial in which a claimant might find justice',²²⁹

²²⁷ Hathaway (note 191 above) 653–655.

²²⁸ Jeremy McBride *Access to justice for migrants and asylum seekers in Europe* (Strasbourg: Council of Europe Publishing 2009) 68.

²²⁹ Galanter 'Access to Justice as a moving frontier' (note 22 above) 147.

with the obtainment of appropriate remedy being the ultimate intent. In such a view, access to justice would include issues of social, economic and environmental justice among others and include a variety of forums. Those who prefer a narrow definition on the other hand would see it in terms of access to courts. But even in this view, it is accepted that such access must involve effective and expeditious access to legal services, or state institutions. Regardless of political and ideological standpoints, access to justice is accepted as a strategy to make the quest for justice more equitable and the administration of justice more efficient and responsive to public demands. The jurisprudence certainly supports this.

The conclusion therefore is that even in international law, access to justice is less concerned with the availability of judicial infrastructure than it is with meaningful and effective access to a process that provides fair and equitable results. It is also as much about overcoming barriers as it is about the establishment of structures to facilitate access. For within any society, there are those who are disadvantaged and are more vulnerable than others and for whom achieving access to justice will be even more challenging. Among these are refugees and asylum seekers, persons who, as outsiders, may face significant difficulties in negotiating legal processes in their host country which they do not understand for a variety of reasons.²³⁰

Ideally, a system should exist that meets the peculiar needs of vulnerable persons, but this is not always possible. The practical route is usually to adapt existing rules to address the peculiar vulnerabilities in question. For refugees, the international community has established an international regime to guide how they are treated. With respect to access to justice, comprehensive guarantees exist in international law to protect refugees through the instrumentality of generally applicable international human rights instruments and their non-discrimination clauses, as well as through refugee-specific legal instruments.

A range of international norms and standards exist which oblige states to ensure that refugees within their territory have access to justice. The most obvious guarantee evinced from these provisions is the right of access to courts. It is emphasised in all the international and regional instruments referred to. But while these instruments highlight the integral nature of access to court in the pursuit of justice, it bears pointing out that the two are not exactly the same. Whereas access to courts focuses on procedural justice, access to remedies or

²³⁰ McBride (note 228 above) 5.

substantive justice is the critical element of access to justice, and as we have seen in the international instruments in question, equal credence is attached to both. The conditions necessary for refugees, like everyone else, to achieve substantive justice are set out in these instruments and include equality of arms, access to legal representation, availability of competent, independent and impartial courts and the ability to have wrongs remedied or redressed.

In view of the foregoing, it cannot be said that there is any ambiguity as to what is expected of South Africa with respect to its obligations to refugees on access to justice. The question to consider is therefore: how well is South Africa meeting these obligations? Do its laws and policies measure up to the international standards set out above and is implementation effective? If not, what are the areas that need to be addressed? The next chapter will examine South Africa's constitutional position on access to justice and see how this puts the country in compliance with international law and what implications, if any, these have on the country's sizable refugees and asylum population.

Chapter Three

The Constitutional Framework for Access to Justice in South Africa

*Our new Constitution emphasises the attainment of substantive social justice,
and not merely formal justice under the law.
It places at its forefront an overriding commitment to equality.¹*

3.1 INTRODUCTION

The preceding chapter discussed the meaning and import of the term ‘access to justice’. It was established that both scholastic and jurisprudential discourses show that any understanding of it must necessarily go beyond the mere ability to gain entry to a state-sanctioned forum for the administration of justice, to include effective and meaningful access to processes that provide fair and equitable results in the quest for justice. It was also seen that in the international sphere, there are obligations that States have in the area of access to justice. States assume some of these obligations either when they formally become parties to a particular international instrument or because some international instruments are of such a fundamental nature that States are deemed to be bound by their provisions whether or not they formally recognise them. The Universal Declaration of Human Rights is a case in point here.

In this chapter and the next, I examine how well the access to justice obligations set out in the preceding chapter find expression in South Africa’s Constitution, legislation and policy. This chapter focuses on the constitutional guarantees and the jurisprudence that has developed from them. As the supreme law of the land, the obligations the Constitution imposes must be fulfilled² and it is important to see what those obligations are and if they measure up to internationally accepted standards. I start by looking first at how South Africa came to have any obligations under international law and why it should concern itself with whether or not its constitutional guarantees meet those standards. In other words, what role, if any, does international law play in South Africa? Thereafter, I look at the constitutional guarantees on access to justice, mirroring in the constitutional context, the discussion of the

¹ Edwin Cameron ‘Academic criticism and the democratic order’ (1998) 14 (1) *South African Journal of Human Rights* 106, 108.

² Section 2, Constitution of the Republic of South Africa, Act 108 of 1996. (Hereinafter the South African Constitution).

substantive and procedural components of access to justice as was done in chapter two. As noted above, that chapter showed that the notion of access to justice under international law goes beyond mere ability to access courts. Can it also be said that the South African Constitution and the judicial interpretations of its provisions support meaningful access as opposed to access for the sake of it?

While the chapter is an examination of how the South African Constitution protects the right of access to justice generally, specific focus will be placed on how refugees and asylum seekers who are the subject of this thesis, are impacted. Thus, the chapter will pay greater attention to those elements of access to justice that are particularly significant for refugees and asylum seekers. This is not to say that there are certain elements that are important to refugees but not to other people. Rather, it is a recognition that refugees, by their very nature, are persons with unique vulnerabilities which other segments of society, including other migrants, do not share. While other migrants may be able to call upon some form of protection that comes with being citizens of a State, refugees have no such luxury. They could therefore be more significantly impacted by lack of access to justice than citizens and other migrants would be. Similarly, they could be more significantly impaired by some of the previously identified elements of access to justice than citizens would be. Challenges in language proficiency or lack of legal representation in proceedings that could result in *refoulement* are cases in point.

Thus, this chapter will not merely repeat in the constitutional context, all of the elements previously discussed in chapter two. Instead, it will point out briefly, how South Africa's constitutional provisions on access to justice guarantee those elements and meet the standard set by international law. Thereafter, it will focus on those aspects that are critical to refugees' access. This will in turn, guide the examination and critique of policy and legislation in the next chapter, as well as the analysis of the problems confronting refugees as they seek to access justice in subsequent chapters. In concluding this chapter, I will look at a few cases that demonstrate how the constitutional guarantees discussed take the issue of access to justice for refugees beyond mere abstraction that is only of academic importance, to one that has great meaning for refugees and asylum seekers in their everyday lives.

3.2 SOUTH AFRICA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Apartheid was characterised by a complete disregard for human rights at all levels – in legislation, in the judicial interpretation of legislation, in state practice and even in foreign

policy.³ The worldwide movement towards the protection of human rights, which found expression in the adoption of various human rights treaties at the international level, had very little influence on South Africa. Indeed developments in human rights were met with antagonism and aloofness,⁴ as South Africa refused to be party to any international human rights treaties⁵ and was one of only eight countries that had abstained from voting on the resolution to pass the UDHR, dismissing it as communist propaganda.⁶ Not surprisingly, therefore, one of the biggest tasks that faced the country as it emerged from over four decades of apartheid was the establishment of a new legal order in which respect for human rights, democracy and the rule of law were given the prominence they deserved. The machinery was consequently set in motion for the creation of a new Constitution, the ratification of international human rights treaties, and bringing the country's laws into compliance with international human rights standards.

Negotiations to end apartheid were long and difficult, but the one thing both sides agreed on from the outset was that the country needed a new Constitution.⁷ Previous Constitutions⁸ had maintained a principle of (white) parliamentary sovereignty and the denial of human rights to non-white South Africans.⁹ The only way forward was the adoption of a

³ John C Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (Cape Town: Juta, 2004) chapter 3; John Dugard 'The South African judiciary and international law in the apartheid era' (1998) 14 *South African Journal of Human Rights* 110, 113.

⁴ GE Devenish *A commentary on the South African Bill of Rights* (Durban: Butterworths, 1999) 1; David Black 'The long and winding road: International norms and domestic political change in South Africa' in Thomas Risse *et al* (eds) *The power of human rights: International norms and domestic change* (Cambridge: Cambridge University Press, 1999) 80.

⁵ Raylene Kneightley 'International human rights norms in a new South Africa' (1992) 8 *South African Journal of Human Rights* 171–180, 175; John Dugard 'The role of human rights treaty standards in domestic law: The Southern African experience' in Philip Alston, James Crawford (eds) *The future of UN human rights treaty monitoring* (Cambridge: Cambridge University Press, 2000) 276.

⁶ Jeremy Sarkin 'The development of a human rights culture in South Africa' (1998) 20 *Human Rights Quarterly* 628–665, 633.

⁷ John Dugard *International law: A South African perspective* 3rd ed (Cape Town: Juta, 2005) 54; Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5th ed (Cape Town: Juta, 2005) 4.

⁸ South Africa had up until then, had three previous constitutions. These were the Union Constitution (South Africa Act 1909 (9 Edw VII, c 9)) the Republic Constitution (Constitution of the Republic of South Africa, Act 32 of 1961) and the Tricameral Constitution (Constitution of the Republic of South Africa 110 of 1983).

⁹ Mubangizi, (note 3 above) 51.

new Constitution in which power was not concentrated in the hands of a few and the rights of all were respected.¹⁰ Eventually, an interim Constitution was adopted in 1993.¹¹ For the first time in its constitutional history, South Africa had a Constitution that contained a Bill of Rights which guaranteed a wide range of civil, political, economic, social and cultural rights.¹² This Constitution became the supreme law of South Africa,¹³ guiding the country through the period of transition to a democratic government and formed the basis of the final Constitution which was adopted in 1996.¹⁴ The final Constitution also included a Bill of Rights – one so extensive it has been described as one of the most progressive in the world.¹⁵ It envisages an egalitarian society ‘based on democratic values, social justice and fundamental human rights’.¹⁶ The influence of the international bill of rights is evident in both Constitutions as they imitate the language and structures of those instruments and recognise the same categories of rights contained therein.¹⁷

At the same time, as progress was being made on the constitutional front, the country set about signing, ratifying or acceding to all the major human rights treaties.¹⁸

¹⁰ Currie & de Waal, (note 7 above) 4.

¹¹ Constitution of the Republic of South Africa, Act No 200 of 1993.

¹² Mubangizi (note 3 above) 53.

¹³ Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) para 62.

¹⁴ Constitution of the Republic of South Africa, Act No 108 of 1996 (hereinafter the South African Constitution). For a detailed discussion of the process leading up to the adoption of the new constitution, see Richard Spitz & Matthew Chaskalson *The politics of transition: A hidden history of South Africa's negotiated settlement* (Oxford: Hart Publishing, 2000); Hassen Ebrahim *The soul of a nation: Constitution-making in South Africa* (Oxford: Oxford University Press, 1998).

¹⁵ Mubangizi (note 3 above) 71.

¹⁶ Preamble to the South African Constitution.

¹⁷ John Dugard ‘The role of international law in interpreting the Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 208–215, 211.

¹⁸ South Africa has ratified many of the major international human rights instruments, including the International Covenant on Civil and Political Rights, GA res 2200A (XXI) 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966) 999 UNTS 171, *entered into force* March 23, 1976 (ratified on 10 December 1998) The two Optional Protocols to this Covenant were acceded to in August 2002; International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, *entered into force* January 4, 1969 (South Africa ratified 10 December 1998); Convention for the Elimination of Discrimination Against Women GA res 34/180, 34 UN GAOR Supp (No 46) 193, UN Doc A/34/46, *entered into force* September 3, 1981 (ratified 15 December 1995); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination

Under the rules that govern international law, states are obliged to respect the treaties they enter into and give effect to them domestically.¹⁹ How they are to do this is however not prescribed in international law.²⁰ In some states, treaties are incorporated directly into municipal law once they are ratified. This position derives from the monist theory of law which views international and national law as part of a single legal order, and therefore considers that domestic courts are obliged to apply rules of international law directly without the need for any act of adoption by courts or transformation into local law by means of legislation.²¹ Some versions of monism in fact hold the view that domestic law derives its

against Women, GA res 54/4, annex, 54 UN GAOR Supp (No 49) 5, UN Doc A/54/49 (Vol I) (2000) *entered into force* December 22, 2000; Convention on the Rights of the Child GA res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) *entered into force* September 2, 1990 (ratified 16 June 1995); Convention Against Torture and other Cruel Inhuman and Degrading Treatment, GA res 39/46, annex, 39 UN GAOR Supp (No 51) 197, UN Doc A/39/51 (1984) *entered into force* June 26, 1987 (ratified 10 December 1998) and the Convention on the Rights of Persons with Disabilities GA Res 61/106, Annex I, UN GAOR, 61st Sess., Supp No 49, at 65, UN Doc A/61/49 (2006), *entered into force* May 3, 2008 (ratified November 30, 2007). It has signed but not ratified the International Covenant on Economic, Social and Cultural Rights GA res 2200A (XXI) 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966) 993 UNTS 3, *entered into force* January 3, 1976 (signed October 3 1994); the Optional Protocol to the Convention Against Torture (signed September 20 2006) the International Convention on the Protection of all Migrant Workers and Members of their Families GA res 45/158, annex, 45 UN GAOR Supp (No 49A) 262, UN Doc A/45/49 (1990) *entered into force* July 1, 2003.

¹⁹ Arts 26 and 27, Vienna Convention on the Law of Treaties (Vienna Convention) 1155 UNTS 331, 8 ILM 679, *entered into force* January 27, 1980.

²⁰ There are certain exceptions to this general rule. Art 2(2) of the ICCPR for instance, requires state parties to, in accordance with their constitutional processes and the provisions of the ICCPR, adopt legislative or other measures that may be necessary to give effect to the rights recognized in the ICCPR. Also, by virtue of Art 2(3)(b) they must ensure that persons whose rights are violated have effective remedy. Similarly, Art 2(1) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, requires each state party to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’. Art 4 also requires states to make the act of torture an offence under their criminal laws. See also Arts 4 and 5 of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (78 UNTS 277, *entered into force* January 12, 1951) for similar provisions. See also Louis Henkin ‘International human rights standards in national law: The jurisprudence of the United States’ in Benedetto Conforti & Francesco Francioni (eds) *Enforcing international human rights in domestic courts* (The Hague: Martinus Nijhoff Publishers, 1997) 189.

²¹ Myers S McDougal ‘The impact of international law upon national law: A policy-oriented perspective?’ (1959) 4 *South Dakota Law Review* 25, 27–31; JG Starke *Introduction to international law* 10th ed (London: Butterworths, 1989) 75–76.

legitimacy and validity from international law.²² Other states, of the dualist tradition, require that treaties be first incorporated into the domestic legal systems by means of legislation before they become part of the country's laws.²³ This approach considers international and national law as distinct legal orders. South Africa has historically been of the dualist tradition and so international treaties entered into required Acts of Parliament to incorporate them into municipal law. Although this remains the case under the new Constitution,²⁴ it seems more accurate to describe the approach under the Constitution as a mixed or dual approach, in the sense that while dualism is prescribed in respect of treaties,²⁵ it takes a monist approach with regard to customary international law, providing that 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.²⁶

Although incorporation of legal treaties was duly carried out under apartheid, 'international law received no constitutional recognition ... , was largely ignored by courts and lawyers ... [and] was generally viewed as an alien and hostile legal order'.²⁷ However, not only has international law received constitutional recognition in post-apartheid South Africa, it has been given prominence in the interpretation of South African law. Section 39(1) of the Constitution obliges courts to consider international law when interpreting the Bill of Rights. It goes on to provide that they may also, but are not obliged to, consider foreign law in the interpretation of the Bill of Rights, thus making a clear distinction between international law and foreign law. The Constitutional Court defined the ambit of this provision in *S v Makwanyane*.²⁸ Interpreting the equivalent provision in the interim Constitution, s 35(1), the Court stated:

In the context of s 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chap 3 can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European

²² Malcolm Nathan Shaw *International law* (Cambridge: Cambridge University Press, 2003) 122–123.

²³ Henkin (note 20 above) 189.

²⁴ S. 231 of the South African Constitution.

²⁵ *Ibid.*

²⁶ S. 233 of the South African Constitution.

²⁷ John Dugard 'International law and the South African Constitution' (1997) 1 *EJIL* 77–92, 92.

²⁸ *S v Makwanyane* 1995 (3) SA 391 (CC).

Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of chap 3.²⁹

It is therefore clear that in interpreting South Africa's laws and constitutional guarantees on access to justice, there is an imperative to consider international law and the jurisprudence of other international bodies as well. The access to justice obligations deriving under international law, as described in chapter two of this thesis, are therefore applicable and relevant to the interpretation of South Africa's guarantees on access to justice. In this regard, South Africa's access to justice obligations are referenced from the two principal international treaties as in chapter two of this thesis – the ICCPR and the African Charter.

South Africa ratified the ICCPR on 10 December 1998. By virtue of Art 49, the ICCPR entered into force in South Africa in March 1999, i.e. three months after it deposited its instrument of ratification. With its ratification, South Africa assumed the obligation 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the [ICCPR] without distinction of any kind ...'³⁰ In furtherance of this, it undertook to 'take the necessary steps, in accordance with its constitutional processes and with the provisions of the [ICCPR] to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the [ICCPR]'.³¹ South Africa signed, ratified and deposited its instrument of ratification of the African Charter on 9 July 1996. By virtue of Art 65, the African Charter entered into force in South Africa in October 1996, i.e. three months after the date it deposited its instrument of ratification. By so doing, it undertook to adopt legislative or other measures to give effect to the rights, duties and freedoms in the African Charter.³² Although South Africa is not a party to the ECtHR, as the most valuable source of international human rights law,³³ its jurisprudence offers useful guidance here and will be referred to. I will now proceed to examine the constitutional framework for South Africa's access to justice obligations.

²⁹ Ibid, 413–414.

³⁰ Art 2(1) ICCPR.

³¹ Ibid, Art 2(2).

³² Art 1 African Charter.

³³ Dugard 'Role of international law' (note 17 above) 213.

3.3 CONSTITUTIONAL PROVISIONS ON ACCESS TO JUSTICE

The South African Constitution includes in Chapter II, a Bill of Rights that contains a number of provisions bearing on access to justice. The most directly applicable are found in s. 33 (administrative justice), s. 34 (access to court), s. 35 (fair trial in criminal cases), and s. 38 (constitutional remedies and enforcement of rights). Section 9 (equality before the law) is not a direct access to justice provision. It applies in respect of all the rights contained in the Constitution. However, given that this is a discussion about a class of people who, as chapter one already showed, often face challenges specifically related to their non-citizenship status, the provisions of s. 9 are of significance to this discussion and will be referred to.

As established in chapter two, this work looks only at those access to justice guarantees which apply across board to all persons seeking justice, whether in a civil or criminal context. Therefore, the fair trial rights contained in s. 35 will not be discussed individually except insofar as they are relevant to civil matters as well. I start by setting the context in which refugees and asylum seekers can claim the right of access to justice under the Constitution. I will then look at the general aspects of the Constitutions' access to justice provisions before moving on to those aspects which are of particular significance to refugees. In order to avoid duplication, the issue of administrative justice will not be discussed here, but rather in chapter five which focuses on refugees' experiences with the justice system, including in the administrative context.

3.4 THE BILL OF RIGHTS AND ITS APPLICATION TO REFUGEES AND ASYLUM SEEKERS

In discussing refugees' and asylum seekers right of access to justice under the South African Constitution, it is important first to establish that the constitutional guarantees to be examined apply to them. According to s. 7(1) of the Constitution, the Bill of Rights applies to everyone in South Africa, regardless of their citizenship³⁴ and regardless of the legality or otherwise of their presence in the country.³⁵ This was the finding of the Constitutional Court in

³⁴ Art 7(1) provides that 'This Bill of Rights ... enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'.

³⁵ The Constitutional Court has recognized instances in which a right in the Bill of Rights would apply only to persons *legally* in the country – for instance in *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) the right of access to social security was declared to apply to all persons legally within

Mohammed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa and Another Intervening).³⁶ There the Court held that the handing over of Mohammed by South Africa to the United States for him to stand trial on criminal charges in respect of which he could, if convicted, be sentenced to death, infringed Mohammed's rights to human dignity, to life and not to be treated or punished in a cruel, inhuman or degrading way under the South African Constitution. This was regardless of the fact that Mohammed had been an illegal alien in the country. This universal applicability is important for it establishes that the rights of access to court and the right to equal protection of the law in s. 9(1) discussed below apply to refugees and asylum seekers in the country.

In respect of the right to access to justice, this universal applicability of the Bill of Rights puts South Africa in compliance with its obligations in international law as discussed in chapter two. As will be recalled, the HRC stated that the right of access to justice is not limited to citizens of States Parties, but must also be available 'to all individuals, regardless of nationality, statelessness or status, whether they are asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who find themselves in the territory or subject to the jurisdiction of the State Party'.³⁷

The right of asylum seekers to access South Africa's courts was specifically addressed in *Baramoto v Minister of Home Affairs*.³⁸ Declaring as unwarranted, a statement by the Minister of Home Affairs that the three asylum seekers' decision to approach the court was an abuse of the judicial process, the court stated that South Africa's courts are there to protect all persons and are open to all persons who find themselves in South Africa.³⁹ The applicants, who were asylum seekers, were therefore entitled to seek the protection of the court. The court stated further: 'Where it is the government that is acting against the applicants, this Court is their only refuge. Where they have sought relief from the courts, and have done so successfully as appears from this judgment, their conduct cannot by any stretch of the

South Africa. The reasoning is obvious – it would place unbearable burden on the State to expect it to provide social assistance even for people who are illegally in the country. This case is discussed in greater detail below.

³⁶ *Mohammed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 CC; See also *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).

³⁷ Human Rights Committee *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (2007) para 9.

³⁸ *Baramoto v Minister of Home Affairs* 1998 (5) BCLR 562 (W).

³⁹ *Ibid*, 566.

imagination be regarded as an abuse of the judicial process'.⁴⁰ Clearly therefore, refugees have a right to access justice in South Africa, and all of the elements required for such access apply equally to them. I will now look at those general elements of access to justice and how the interpretation given to them puts South Africa in compliance with international law.

3.5 ACCESS TO JUSTICE UNDER THE CONSTITUTION

3.5.1 *The nature of section 34*

The Constitution's substantive provision on access to justice provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.⁴¹ It will have been noticed that it refers to 'access to courts' and not 'access to justice'. As the discussion which follows will show, the argument advanced in chapter two, that even when they refer to 'access to courts', the application of similar provisions in international law shows that the substantive element is access to justice, also hold true here.

Section 34 bears some semblance to Art 14(1) of the ICCPR and Art 6(1) of the ECHR, but it should not be seen as a mere transplantation of these provisions which is meant to bring the Constitution into conformity with international law. Section 34 has at least some of its historical basis in the need to prevent the apartheid-era legislative practice of ousting the jurisdiction of courts to enquire into the validity of certain state laws and conduct – a practice which engendered much injustice and human rights violations.⁴² As was seen in chapter one, that practice had severe consequences for refugees and asylum seekers.⁴³

Section 34 is a constitutional affirmation that access to justice is an integral anchor of the rule of law. As the Constitutional Court noted in *Lesapo v North West Agricultural Bank and Another*⁴⁴ s. 34 and the access to courts it guarantees are a manifestation of a deeper principle – the rule of law – which underlies the South African democratic order.⁴⁵ In that

⁴⁰ Ibid, 566–577.

⁴¹ Section 34, South African Constitution.

⁴² Jason Brickhill & Adrian Friedman 'Access to courts' in Woolman *et al Constitutional law of South Africa* Vol. 4, 2nd ed (Cape Town: Juta 2009) 59–1, 59–2.

⁴³ See section 1.6.1.

⁴⁴ *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

⁴⁵ Ibid, 416 para 16.

case, the Constitutional Court in affirming the cardinal importance of the right of access to court, described it as a ‘bulwark against vigilantism’, one that ensures the ‘peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help’. Any reasonable and justifiable limitation to it, the court said, would require very powerful considerations.⁴⁶

In order to be effectively enjoyed, the right in s. 34 imposes a number of negative and positive obligations on the State. The first is a negative obligation not to impede access to the courts.⁴⁷ The state should therefore not pass any legislation that prohibits recourse to courts or removes the power of the courts to perform their constitutional functions.⁴⁸ It is submitted that this negative obligation extends beyond active measures prohibiting or curtailing the power of the courts, and includes failure to take action to remove existing impediments. This assertion is supported by the HRC’s finding in *Oló Bahamonde v Equatorial Guinea*.⁴⁹ There, the HRC stated that since the notion of equality before the courts and tribunals encompasses the very access to the courts, a situation in which a person’s attempts to notify the competent jurisdictions of his or her grievances are systematically frustrated runs counter to this guarantee.⁵⁰ Thus, the State has an obligation to address any situation which ‘systematically frustrates access’ if the guarantee of equal access is to be enjoyed. The ‘situation’ in question in the *Oló Bahamonde* case was one of apparent control of the judiciary by the executive. Every effort by the author to bring his grievances before the relevant judicial and administrative bodies was thwarted.

It is submitted that the types of situations contemplated would include one in which wide-spread anti-foreigner sentiment among law enforcement officials frequently leads to intimidation or victimisation of foreigners wishing to utilise the State’s justice mechanism. This is especially so if the situation is so pronounced that it causes victims of crime or injustice to avoid seeking remedies. Failure on the part of the State to take action which addresses such practices, even though it is well-known and well-documented, constitutes a

⁴⁶ Ibid, 417 para 22. See also *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) paras 61, 63.

⁴⁷ Brickhill & Friedman (note 42 above).

⁴⁸ Ibid.

⁴⁹ *Oló Bahamonde v Equatorial Guinea*, Communication No 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993).

⁵⁰ Ibid, Para 9.4. emphasis added.

violation of the State's negative obligation not to impede access. Where it is refugees who are prejudiced by such inaction on the part of the State, then the State is also in violation of its obligations under Art 16 of the UN Refugee Convention which guarantees access to courts for refugees. This is so given that access to court in criminal matters is largely dependent on the efforts of the State's law enforcement officials. As chapter five will subsequently demonstrate, this is an issue of serious concern to refugees' access to justice in South Africa, the impact of which is just as bad as positive action restricting access.

The positive obligations of the State were elaborated in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*⁵¹ as follows:

The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums provided by the State for the settlement of such disputes The mechanisms for the resolution of disputes include the legislative framework, as well as mechanisms and institutions such as the courts and an infrastructure created to facilitate the execution of court orders.⁵²

It is clearly deducible from this dictum that the duties of the State include the duty to establish and ensure the effective running of independent courts and other forums for dispute resolution, the duty to pass laws that facilitate access to those courts and the duty to establish the means by which the remedies obtained from court can be effectively enjoyed. Even though it is not mentioned, it is submitted that assistance to access those courts and such remedies is part of the 'necessary mechanisms' envisaged, for courts and laws in themselves would serve no purpose if the practical means of using them were not available. Guidance on this is taken from international law as discussed in chapter two.⁵³ As the case of *Airey* showed, instances exist where persons may have access to the courts in the sense that they can go before those courts, yet they are unable to effectively place their cases before the court without legal assistance. Where this is the case and the person is unable to afford legal assistance, the State is under obligation to provide such legal assistance. Further support is obtained from the Guidelines on Fair Trials which requires States to provide legal assistance

⁵¹ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

⁵² *Ibid*, paras 39 and 41.

⁵³ See sections 2.7.2 and 2.7.4.

in all matters in which the interest of justice requires it, but a person is unable to afford it.⁵⁴ The role of legal assistance will be discussed in greater detail further on, but first, I will briefly establish how well South Africa's constitutional guarantees on access to justice reflect the standards set under international law.

3.5.2 *The interpretation of section 34*

There is a rich store of jurisprudence on s. 34 of the Constitution, which mostly conforms to standards established in international law. The jurisprudence displays a broad interpretation of what constitutes a violation of the right of access to justice, similar to the positions taken by the HRC and ECtHR in interpreting similar provisions. Thus for instance, the court has found that marital power under customary law which, subject to certain exceptions, permits a wife to litigate only with the consent of her husband, limits the wife's access to the courts and was therefore unconstitutional.⁵⁵ This accords with the finding of the Inter-American Court of Human Rights (IACHR) in *Ato del Avelland v Peru*⁵⁶ where similar restriction in a Peruvian law was struck down.

The courts' conception of the right contained in s. 34 has also tended to validate the international law position, as effectively articulated in *Airey*.⁵⁷ The right of access to court is thus seen as going beyond the mere right to gain entry before a court, to include meaningful and effective access, as well as a remedy. The courts have reiterated several times that substantive justice, rather than textual justice is what the guarantees anticipate.⁵⁸ In *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*,⁵⁹ the Constitutional Court saw in s. 34, not merely a right of access to court, but also the right to an

⁵⁴ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2001, DOC/OS(XXX)247; 12 *International Human Rights Report* 1180 (2005) para H(a).

⁵⁵ *Prior v Battle and Others* 1999 (2) SA 850 (TK) 859.

⁵⁶ *Ato del Avelland v Peru*, Communication 202/1986, UN Doc Supp 40 (A/44/40) 196 (1988) para.10.2.

⁵⁷ *Airey v Ireland* (1979) 2 EHRR 305.

⁵⁸ See for instance *S v Zuma and Others* 1995 (4) BCLR 401 (CC) para 16; *Shaik and Others v S* 2007 (12) BCLR 1360 (CC) para 43.

⁵⁹ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (note 51 above).

effective remedy.⁶⁰ It is apparent that the court takes a position that the right goes beyond the mere ability to gain entrance to court, but also to obtain a useful result.

Even where there has been a significant departure from the position in international law, such departure has been necessitated by socio-political considerations which had important implications for nation-building. Thus, in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*,⁶¹ the applicants applied for an order declaring s. 20(7) of the Promotion of National Unity and Reconciliation Act⁶² (Reconciliation Act) unconstitutional on the grounds that it was inconsistent with the right to have justiciable disputes settled by a court of law or other independent and impartial tribunal in terms of s. 22 of the Interim Constitution (equivalent to s. 34 of the final Constitution). Section 20(7) of the Reconciliation Act empowered a committee to grant amnesty for gross violations of human rights committed during apartheid provided the applicant for amnesty made a full disclosure. The Constitutional Court found that s. 20(7) would be a violation of the constitutional right of access to courts if it were not for the fact that there was another provision in the Constitution which allowed such an amnesty.⁶³ The Court's refusal to strike down that provision in the Reconciliation Act stands in stark contrast to the rulings of the Inter-American Court of Human Rights in cases of this nature,⁶⁴ as well as to the ACHPR Guidelines on Fair Trials which specifically declares that the grant of amnesty to absolve perpetrators of human rights violations from accountability is a violation of the right of victims to an effective remedy.⁶⁵ However, the court's observation that but for the constitutional provision which protected such an amnesty, the Reconciliation Act would have been void, shows that indeed, the Court's thinking was in tandem with the position in international law. The finding of the court in this case was primarily determined by the

⁶⁰ Ibid, para 51, emphasis added.

⁶¹ *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC).

⁶² Act 34 of 1995.

⁶³ Supra paras 9–10.

⁶⁴ *Consuelo et al v Argentina*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993) paras 32, 50; and *Mendoza et al v Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993). The cases consolidated into *Consuelo* and *Mendoza* raised similar issues before the Inter American Commission on Human Rights in respect of Argentina and Uruguay.

⁶⁵ Guidelines on Fair trials (note 54 above) Para C.

particular socio-political situation prevailing in South Africa at the time. The imperative of peace and reconciliation was the deciding factor.

It has been found on several occasions that laws which do not allow sufficient time within which to file claims prevent access to court and as such constitute a material limitation on the right of access to court and are therefore unconstitutional.⁶⁶ Laws which prohibit legal representation in civil proceedings before courts applying customary law have also been found to be unconstitutional on the ground that they would render entirely nugatory the right of access to court and to having legal disputes settled by courts.⁶⁷ This right of access to court is not however a constitutional guarantee against wrong decisions,⁶⁸ nor is it a guarantee of equality of outcome.⁶⁹

3.5.3 *Types of matters*

The second issue relates to the nature of the matters that are covered by s. 34. The guarantee of access to courts or other fora embodies the requirements that there be a ‘dispute that can be resolved by the application of law’.⁷⁰ Unlike equivalent provisions in the ICCPR, the African Charter and the ECHR,⁷¹ this provision does not expressly mention criminal charges in its wording, and so there is no indication whether s. 34 applies to criminal matters. However, the Constitutional Court clarified the issue in *S v Pennington*⁷² when it noted that the words ‘any dispute’ may be wide enough to include criminal proceedings, but that that is not the way such proceedings are ordinarily referred to. Furthermore, noted Chaskalson P, that s. 34

⁶⁶ *Moise v Greater Germiston Transitional Local Council* 2001 (8) BCLR 765 (CC) para 15; *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) 764E; *Engelbrecht V Road Accident Fund and Another* 2007 (6) SA 96 (CC) 30–32.

⁶⁷ *Bangindawo and Others v Head of the Nyanda Regional Authority and Another* 1998 (3) SA 262 (TK) 277 paras E–F.

⁶⁸ *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC) 1190 para 4.

⁶⁹ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) 325 para 14.

⁷⁰ Cheryl Loots ‘Access to the courts and justiciability’ in Chaskalson *et al* (eds) *Constitutional law of South Africa (Revision Service 5)* (Juta: Cape Town 1996) 8–2.

⁷¹ Art 14(1) ICCPR refers to ‘criminal charge ... or ... rights and obligations in a suit at law’, Art 6(1) ECHR refers to ‘civil rights and obligations or of any criminal charge’. The wording of Art 7(1) African Charter does not refer to criminal charges, but subsequent paragraphs of the same article clearly indicates that it applies to criminal matters, referring, as it does, to the right to be presumed innocent.

⁷² *S v Pennington* 1997 (4) SA 1076 CC.

has no application to criminal proceedings seems to follow from the fact that s. 35 of the Constitution specifically governs the manner in which criminal proceedings are to be conducted.⁷³ It can therefore be safely said that while s. 34 applies to civil matters, criminal matters are excluded from its ambit.

Following the logic of the Constitutional Court in *Pennington*, it is submitted that the section does not refer to administrative actions either, given that s. 33 specifically governs the way administrative matters are conducted as discussed above. Further support for the notion that administrative actions are not included in the purview of this provision is found in the nature of administrative actions. While the result of an administrative action could trigger a dispute, administrative actions are not in themselves disputes. It is only when the result of such administrative action is disputed that the issue becomes a ‘dispute’ as contemplated under s. 34.⁷⁴ This notion receives support from the Constitutional Court in *Islamic Unity Convention v Minister of Telecommunications and Others*.⁷⁵

Thus while s. 34’s ‘dispute that can be resolved by the application of law’ is clearly narrower than the conception of the ‘suit at law’ under art 14 of the ICCPR, separate provisions contained in s. 33 and s. 35 of the Bill of Rights ensures that South Africa’s guarantees in respect of access to justice is not narrower than in international law.

3.5.4 Publicity of hearings, independence and impartiality of judiciary

The principle that court hearings should be in public, as opposed to in camera, is widely accepted in South African law as in international law. This keeps the public fully informed, helps to avoid the secret trials employed in totalitarian states⁷⁶ and reassures the public of the independence, integrity, impartiality and fairness of the judiciary.⁷⁷ The courts however recognise certain exceptions similar to those elaborated by the HRC in its General Comments 32.⁷⁸

⁷³ Ibid, 1093 paras 45–46.

⁷⁴ Currie & de Waal (note 7 above) 705.

⁷⁵ *Islamic Unity Convention v Minister of Telecommunications and Others* 2008 (3) SA 383 (CC) para 55.

⁷⁶ *Klink v Regional Court Magistrate* NO 1996 (3) BCLR 402 (SE).

⁷⁷ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 CC.

⁷⁸ Human Rights Committee, General Comment No. 32, Article 14: *Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 (2007) Para 12; namely reasons of morals, public order or national security in a democratic society *R v Muzorori* 1967 (2) SA 177 (RA); or when the interest of the private lives of

With respect to independence and impartiality of courts and tribunals, it will be recalled that the Guidelines on Fair Trials developed by the ACHPR requires that judicial independence be a constitutional requirement.⁷⁹ South Africa meets this requirement by virtue of s. 165(2) of the Constitution which guarantees the independence of the judiciary, making it subject only to the Constitution and the law, which must be applied impartially and without fear, favour or prejudice. Section 165(3) goes further to prohibit interference with the functioning of the courts by any person or organs of state. Conditions to ensure independence are further provided for in s. 177 of the Constitution which prescribes the process of appointment of judges, their remuneration and security of tenure. These provisions compare in all material respects with the pronouncement of the HRC in its General Comments 32⁸⁰ and with the Fair Trial Guidelines of the ACHPR⁸¹ as discussed in chapter two.⁸² So does the jurisprudence, which highlights the importance of the judiciary's independence and impartiality to the doctrine of separations of powers and for the ability of the courts to uphold the Constitution.⁸³ The court must be independent and seen to be independent⁸⁴ It is agreed among scholars that generally speaking, the South African judiciary enjoys a high level of independence as envisaged by the Constitution.⁸⁵ In a 2007 report by Transparency

the parties or the interest of minors so requires, *W v W* 1976 (2) SA 308, 310; in tax cases, or in special circumstances where, in the opinion of the court, publicity would be prejudicial to the interests of justice *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T)

⁷⁹ Section A, para 5.

⁸⁰ Paras 19 and 20.

⁸¹ Section A para 5.

⁸² See section 2.6.4.

⁸³ See generally *SA Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC); *De Lange v Smuts NO* 1998 (3) SA 785 (CC); *Van Rooyen and Others v The State and Others* (General Council of the Bar f South Africa intervening) 2002 (5) SA 246 (CC).

⁸⁴ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para 48. Cf *Karttunen v Finland*, Communication No 387/1989, UN Doc CCPR/C/46/D/387/1989 (1992); *International Pen and Others v Nigeria* (2000) AHRLR 212; Constitutional Rights Project (in respect of *Zamani Lekwot and 6 Others*) v Nigeria (87/93), 8th Annual Activity Report of the African Commission on Human and People's Rights, 1994–1995, ACHPR/RPT/8th/Rev.I.

⁸⁵ Hugh Corder 'Judicial independence and responsiveness in a changing South Africa' in Peter H Russell & David M O'Brien *Judicial independence in the age of democracy: Critical perspectives from around the world* (Charlottesville and London: University Press of Virginia, 2001) 194–206; John Orr 'South Africa' in Linda Van Der Vijver (ed) *The judicial institution in Southern Africa: A comparative study of common law*

International, South Africa ranked 9th in a measurement of the actual enjoyment of independence by the judiciary,⁸⁶ a remarkable achievement considering that it was ranked alongside more developed European countries. However in the last four years, several political cases have called this independence into question.⁸⁷

The preceding discussion has demonstrated that broadly speaking, South Africa's constitutional provisions on access to justice is generally in compliance with the requirements of international law. I will now discuss in greater detail those aspects that have unique implications for refugees and asylum seekers and which are important for the purpose of this thesis.

3.6 SPECIFIC ELEMENTS OF THE ACCESS TO JUSTICE PROVISIONS WITH UNIQUE IMPLICATIONS FOR REFUGEES AND ASYLUM SEEKERS

The defining characteristic of refugee-hood is that persons so defined are not citizens of the country in which they reside, having been forced out of their own countries because of persecution and danger to their lives and limbs.⁸⁸ They are also unable to return for the same reasons, and they cannot rely on any form of assistance from their home State, since the fact that that State is unwilling or unable to help them is what led to their becoming refugees in the first place. They are thus different from other classes of migrants. Other classes of migrants are not forced to leave their home countries, they can return if they so wish, and they can depend on their home country for some form of assistance if they get into trouble. The implication of this difference is that, when other migrants find that they are at a distinct disadvantage in the host country, they can resort to diplomatic channels for assistance or

jurisdictions (Cape Town: Siber Ink, 2006) 114–160; Amy Gordon & David Bruce 'Transformation and the independence of the judiciary in South Africa' Centre for the Study of Violence and Reconciliation. Available at <http://www.csvr.org.za/docs/transition/3.pdf> [accessed 12 September 2010]; Geoff Budlender 'Transforming the judiciary: The politics of the judiciary in a democratic South Africa' Presentation at 11th Alan Paton Lecture, University of Kwazulu-Natal 25 July 2005. Available at <http://dbnweb2.ukzn.ac.za/unp/library/alanpaton/alanpaton2005%20Budlenderpdf.pdf> [Accessed 12 September 2010].

⁸⁶ Transparency International *Global Corruption Report* (Cambridge: Cambridge University Press, 2007) 25; see also Lars Veld & Stefan Voigt 'Economic Growth and Judicial Independence: Cross-country evidence using a new set of indicators' (2003) 19 *European Journal of Political Economy* 492, 525;

⁸⁷ Gordon & Bruce (note 85 above);

⁸⁸ Article 1 UN Refugee Convention; Articles 1 and 2, OAU Refugee Convention; section 3 Refugees Act.

return home. Refugees cannot do that. They are essentially at the mercy of the country which hosts them. Their only hope then is to turn to the institutions of the host country, usually its courts, for help. But because they are not citizens, they are automatically faced with certain challenges. For instance, can they expect to be treated equally, the way citizens are? How will they put forward their cases, given the almost certain probability that they speak a different language from that spoken in the host State? Can they rely on any form of assistance? These issues are of critical importance to refugees and asylum seekers in the context of access to justice, and need to be examined in-depth. The following section addresses this.

3.6.1 Equality before the law

As previously noted above, s. 9 of the Constitution which entrenches the principle of equality before the law is not a direct access to justice provision. It applies in respect of all the rights contained in the Constitution. However, the principle of equality before the law is of great importance in any discussion about a class of people who are in the minority and face the possibility of discrimination.⁸⁹ Its implications are therefore relevant here.

One of the principal elements of access to justice, as established in chapter two, is the right of equal access. It was shown that international law recognises two dimensions to this guarantee, namely equal access to court⁹⁰ and to equal treatment by that court without any discrimination.⁹¹ Why this is important in the context of a discussion about refugees is obvious; they are, by definition, not citizens of the country that hosts them and therefore are in danger of being discriminated against. This is particularly crucial in any country which has an urban refugee policy as South Africa does. As I have previously noted in chapter one,⁹² South Africa's urban refugee policy means that a refugee-specific framework for service delivery, as would be found in a camp setting, does not exist. Thus refugees and asylum seekers have to access all services, including legal services, in much the same way as everyone else. Unfortunately, as has been shown in chapter one and will be reinforced in subsequent chapters, in the contest for limited resources, refugees and asylum seekers are

⁸⁹ Article 26 of the ICCPR includes national origin as a ground on which people could be discriminated against.

⁹⁰ *Oló Bahamonde v Equatorial Guinea*, Communication No 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993) Para 9.4.

⁹¹ General Comments 32 (note 37 above) para 8.

⁹² Page 27.

disadvantaged. Their status as non-citizens is frequently used as a reason for denying them services.⁹³ This guarantee of equality is therefore important in establishing the standard that, in the context of seeking justice, their status cannot, or should not, be used as a reason to deny them access to a court of law or to justify any discriminatory treatment while before the courts.

Section 9 is also important to the discussion of access to justice because, unlike Art 14 of the ICCPR and para 2 of ACHPR's Guidelines on Fair Trials, s. 34, which is the Constitution's substantive provision on access to justice, does not use the word 'equal' in describing access to courts. Therefore the standard of equality which this provision establishes is important in the reading of that, and other sections of the Constitution.

Given its history, it was inevitable that equality and non-discrimination would be important aspects of the new constitutional order in South Africa, and this is indeed the case. S. 9(1) of the Constitution provides a broad guarantee of equality which applies across all aspects of life, not only in respect of access to justice. The section reads: 'everyone is equal before the law and has the right to equal protection and benefit of the law'. In making everyone – government, citizens, non-citizens – equal before the law, the section highlights the supremacy of the rule of law.

In applying this section to the right of access to justice, the Constitutional Court's interpretation of s. 9 is very much in line with the conception under international law. In *Van der Walt v Metcash Trading Ltd*,⁹⁴ the court noted, per Goldstone J that '... the provision means that all persons in a similar position must be afforded the same right to access the

⁹³ For instance opening bank accounts, accessing health care services, etc. See generally Tebogo Segale 'Forced migrants and Social exclusion in Johannesburg' in Loren Landau (ed) *Forced migrants in the new Johannesburg: Towards a local government response*. (Johannesburg: Forced Migrations Studies programme, 2004); Florencia Belvedere *et al*, *National refugees baseline Survey: Final report* (Johannesburg: Community Agency for Social Enquiry (CASE) Japan International Cooperation and UNHCR, 2003); Rebecca Pursell 'Access to health care among Somali forced migrants in Johannesburg' (Unpublished Masters Diss: University of the Witwatersrand, 2005); Jo Vearey & Tara Polzer 'Key findings of research studies on migrants' access to health in South Africa: Challenging common assumptions' Presentation at Southern African Development Community (SADC) Parliamentary Forum, Johannesburg, South Africa. 21 October 2009; Lee Stone & Shani Winterstein *A right or a privilege? Access to basic education for refugee and asylum seeker children in South Africa* (Pretoria: National Consortium of Refugee Affairs, 2003).

⁹⁴ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) 325.

courts and to the same fair and just procedures with regard to such access'.⁹⁵ There is no indication that such equality is confined to matters of procedure and not substance. On the contrary, it has been suggested that the declaration in s. 9(2) that 'equality includes the full and equal enjoyment of all rights and freedoms' shows that what the Constitution envisages is substantive equality.⁹⁶ Achieving such substantive equality may sometimes necessitate disparity of treatment, if the purpose is to obtain equal results.⁹⁷ This position is not in conflict with the earlier assertion that the conception of equality under international law requires equal access to court and to equal treatment by that court without any discrimination. It must, however, be noted that the difference in treatment that is sanctioned here is that which, if not employed, would result in a situation that is detrimental to the objective of substantive equality, rather than discriminatory treatment on the basis of those non-discrimination grounds listed in s. 9.⁹⁸ An example would be a situation where a court adjourns proceedings so that interpretation can be arranged for a refugee who only speaks Swahili, but adjournment is refused so a South African citizen who is very fluent in the official language the court is using, but insists on speaking a non-official language such as Italian, and for that demands an adjournment to arrange for interpretation. In such an instance, the objective of justice would be defeated if the refugee were not granted interpretation as he could not otherwise follow proceedings and he would be placed at a disadvantage *vis-à-vis* his opponent.⁹⁹ But the same is not true of the South African citizen and he could not on that basis assert that his right to equal treatment by the court had been violated.¹⁰⁰

Thus, it can be seen that achieving equality is just as much about difference of treatment as it is about similarity of treatment. As Chaskalson *et al* put it, '[i]n certain cases it is the very essence of equality to make distinctions between groups and individuals in order

⁹⁵ Ibid para 24; similar to the equality of treatment positions taken variously by the ACHPR and the ECtHR. See generally *Avocats sans Frontières (on behalf of Bwampamyé) v Burundi* (2000) AHRLR 48 (ACHPR 2000) para 27; *Bulut v Austria* (1996) 24 EHRR 84, para 47.

⁹⁶ Currie & De Waal, (note 7 above) 233.

⁹⁷ Pierre De Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal of Human Rights* 263, 266.

⁹⁸ Currie & De Waal (note 7 above).

⁹⁹ See *Bulut v Austria* (1996) 24 EHRR 84, para 47.

¹⁰⁰ Cf *Mthethwa v De Bruin NO and Another* (1998) 3 BCLR 336 (N) discussed in section 3.6.2.1 below; See also *Guesdon v France* Communication No. 219/1986, para. 10.2.

to accommodate their different needs and interests'.¹⁰¹ The Constitutional Court has gone so far as to find that a failure to differentiate may be as discriminatory as a positive act of discrimination.¹⁰² This means that the goal of substantive equality requires a recognition that the multiplicity of circumstances represented in a society means that a single, one-size-fits-all measure may be inadequate to address everyone's needs. In respect of access to justice therefore, there is an obligation on the State to recognise the different challenges that different segments of society face in accessing court, and it has to adopt different measures which ensure that ultimately, everyone has equal access. This means that South Africa must recognise those particular issues that could stand in the way of actual and effective access to justice for refugees and asylum seekers and ensure that such issues are adequately addressed, even if this would mean that they are treated differently from the way citizens and other segments of society are treated.

Applied to the broad conception of access to justice which was adopted in chapter one, this equality provision means that South Africa is obliged to adopt measures which ensure that refugees and asylum seekers are not discriminated against and are able, to the same extent as its citizens, to access the justice *system* – its courts and other formal forums; that they have access to *justice* – i.e. that its courts provide the same fair and equitable results that a citizen would have; and that they have equal access to *legal aid* – advice and representation when required. This can only be done in the policy and through programmes adopted to give effect to the provisions of the Constitution. The next chapter will look at whether the State has taken any steps to ensure equal access for refugees.

The preceding section has established that refugees and asylum seekers have a right to equal access to justice. It has shown that the equality required is substantive, rather than formal equality, and in this regard, the State needs to take active steps to ensure such equality.

¹⁰¹ Chaskalson *et al* (Note 70 above) 14–3.

¹⁰² *Botha and Another v Mthiyane and Another* 2002 (4) BCLR 389 (W), 417; see also *Louw v Golden Arrow Bus Service (Pty) LTD* 2001 (1) SA 218 (LC) 226, para 20; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) paras 31, 45–48.

3.6.2 Language

Section 34 guarantees a fair public hearing, but does not define what ‘fair’ means. It is however certain that the term contemplates the enjoyment of each of the elements that s. 34 sets out, such as public nature of hearings, independence and impartiality of the court or forum, the beneficiaries of the right, etc. There are, however, other elements which, though not expressly stated in s. 34, have come to be accepted as requirements for the objective of fairness. The jurisprudence is very helpful in this regard. In *De Beer NO v North-Central Local Council and South-Central Local Council and Others*,¹⁰³ the Constitutional Court concerned itself with the scope of the fair hearing component of s. 34 in a court of law. One of the critical elements of fairness, the court held, is that the *audi alterem partem* rule must be respected, which requires that the other party to a proceeding must have notice of the matter against him. In pursuit of the objective of fairness, the court noted, there is a prerequisite that a person gets a court hearing before an order is made against him or her. In order to ensure this, reasonable steps must be taken to bring the hearing to the attention of the person affected.¹⁰⁴

The corollary to this principle that each party must be notified of the matter against him or her, is that such a person must also be able to understand and participate effectively in the proceedings affecting him or her. The issue of language proficiency is significant in this regard. It is important that persons involved in court proceedings are sufficiently proficient in the official language(s) of the court, otherwise they could not participate in any shape or form; they cannot follow signs or directions posted at the court, comprehend pleadings and court forms, communicate with court staff or participate in court proceedings, much less effectively present their cases.¹⁰⁵ This is true of anybody accessing the justice system, whether citizen or foreigner. It is an issue of particular importance to refugees and asylum seekers in South Africa, most of who come from countries where none of South Africa’s

¹⁰³ *De Beer No v North-Central Local Council and South-Central Local Council and Other* 2002 (1) SA 429 (CC).

¹⁰⁴ *Ibid*, para 11.

¹⁰⁵ California Commission on Access to Justice ‘Language barrier to access to justice in California’ 2005. Available at http://calbar.ca.gov/calbar/pdfs/reports/2005_Language-Barriers_Report.pdf [Accessed 3 July 2007].

official languages is spoken.¹⁰⁶ Their access to justice would be negatively impacted by inability to understand the language if adequate measures were not put in place to specifically address this issue. Chapter two has already set out the position of international law on the subject.¹⁰⁷ There, it was established that international law takes the position that the right to a defence includes the right to understand the charges brought against oneself, and where a person is tried in a language he or she does not speak fluently, this constitutes a violation of the right of access to justice. That chapter also set out the obligations of a State in respect to language proficiency. I will now look at the position under the Constitution.

The State's obligations in respect of language is well articulated in the Constitution's provisions on fair trials in the criminal context. Section 35(3)(k) of the Constitution confers upon every accused person, the right to be tried in a language he or she understands, or where this is not practicable, to have the proceedings interpreted in that language.¹⁰⁸ The Constitution further provides that arrested, detained or accused persons have the right to receive required information in a language they understand.¹⁰⁹ These provisions are comparable in most respects to the provisions of Art 14(3)(e) and (f) of the ICCPR; Art 6(3)(e) of the ECHR; Para 2 (iv) of the ACHPR's Right to Recourse and Fair Trial and Para N of the Guidelines on Fair Trials. Read in relation to refugees and asylum seekers, s. 35(3)(k) of the Constitution confers a right for them to be tried or have proceedings in a language they understand, subject to the proviso as to practicability, to which I will return later. Where it is not possible to have proceedings in a language they understand, refugees and asylum seekers have the right to receive interpretation in a language they understand. They also have the right to receive required information in a language they understand. As shown in the international context, such information would include the charges against them, evidence adduced, translation of all documents or statements etc.¹¹⁰

¹⁰⁶ Migrant Rights Monitoring Project 'National survey of the refugee reception and status determination system in South Africa' *MRMP Research Report* Forced Migration Studies Programme, University of the Witwatersrand, February 2009.

¹⁰⁷ Section 2.7.3.

¹⁰⁸ S. 35(3)(k) of the South African Constitution.

¹⁰⁹ *Ibid*, s. 35(4).

¹¹⁰ *Leudicke, Belkacem and Koc v Federal Republic of Germany* (1978) 2 EHRR 149, para 40; see also *Kamasinski v Austria* (1989) 13 EHRR 36 para. 74; *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 para 97; General Comments 32 (note 37 above), para 40.

The final Constitution does not contain an equivalent provision with respect to civil proceedings; it is interesting to note however, that the Interim Constitution had one. It provided in s. 107 that a party to litigation, an accused person or a witness may use the South African language of his or her choice during court proceedings. The person may also require such proceedings of a court in which he or she is involved to be interpreted in a language that he or she understands.¹¹¹ Does the failure to replicate this guarantee in the final Constitution or of s. 34 to specifically include language guarantees mean that the final Constitution does not provide any language guarantees in civil matters? It is submitted that in spite of this seeming shortcoming of the final Constitution, the constitutional guarantee of the right of access to courts in s. 34 includes the right to have proceedings conducted in a language understood by the parties, or at least for the parties to have competent interpretation. The provisions of s. 35(3)(k), even though articulated in the context of criminal matters, can be read into the interpretation of s. 34. This is so for several reasons. Firstly, it is illogical to argue that the mere fact that an element expressly required for a fair criminal trial has not been expressly required for a fair civil trial means it is by implication, excluded in civil trials.¹¹² Such an argument could only degenerate into absurdity – one would then also have to argue that the right to adduce evidence, which is contained in s. 35(3)(i), but not expressly stated in s. 34, is not a requirement in civil proceedings. But it is trite that the right to adduce evidence is an indispensable aspect of civil proceedings, just as the right to have proceedings in the language one understands is.

An even more compelling argument is the nature of the issue at stake. As Lamer CJ put it in the Canadian case of *R v Tran*¹¹³ ‘the very legitimacy of the justice system in the eyes of those who are subject to it, is dependent on their being able to comprehend and communicate in the language in which the proceedings are taking place’.¹¹⁴ Snyckers and Le Roux buttress this argument, contending that the provision in s. 35(3)(k) is not merely intended to ensure that accused persons understand the proceedings and are able to make informed choices and exercise their rights to defend themselves; the provision is also intended to ensure that they

¹¹¹ S. 107(1) Interim Constitution of the Republic of South Africa, Act 200 of 1993.

¹¹² Geoff Budlender ‘Access to courts’ (2004) 2 121 *SALJ* 339, 342.

¹¹³ *R v Tran* (1994) 2 SCR 951.

¹¹⁴ *Ibid*, 975.

are conscious participants in the exercise of the State's power over their persons.¹¹⁵ It affords reality to the notion of collective self-government, and enables the accused to locate the coercive power of the criminal justice system and the deprivation of his freedom within the context of participatory governance.¹¹⁶ Considering that the coercive powers of the State are inherent in the courts' mandate to hear cases, and is required for the execution of judgments in civil proceedings, the same argument holds true in respect of civil matters. It is therefore important, for the sake of the legitimacy of the court process in the eyes of those subject to it, that the language guarantees be applicable in civil matters, just as they are in criminal matters.

Lastly, one cannot argue that a person has had access to justice merely because his case was heard in court, even though his inability to understand the language used meant he was unable to take any part in the proceedings. In fact, such inability to take part in proceedings due to language incompetence has been described as being tantamount to not being present at one's trial.¹¹⁷ Given this demonstrated importance of language proficiency to access to justice, any proceedings – civil or criminal – in which a person cannot effectively take part cannot be said to comply with the requirements of fair hearing as envisaged by the Constitution and in international law.

This issue will frequently come into play in any proceedings involving refugees and asylum seekers. As the court noted in *Mponda v S*¹¹⁸ 'South Africa is ... a haven for a significant population of African refugees. Many of these people are not sufficiently proficient in any South African language to be able to use any such language should they become involved in a trial'.¹¹⁹ Given this situation, it is important that South Africa's obligations in this regard are clearly defined. As the ambit of this right is more clearly developed in the criminal context, I will use the guidelines developed in the criminal context to elaborate its implications, and such implications are deemed to apply in the civil context except where they can only apply to criminal proceedings.

¹¹⁵ Frank Snyckers & Jolandi le Roux 'Criminal procedure: Rights of arrested, detained and accused persons' in *constitutional Law of South Africa* 2nd ed (Cape Town: Juta, 2006) 51–167 – 51–168.

¹¹⁶ *Ibid.*

¹¹⁷ *Kunnath v The State* (1993) 1 WLR 1315, 1320; *AG Ontario v Reale* (1975) 2 SCR 264.

¹¹⁸ *Mponda v S* (2004) 4 All SA 229 (C).

¹¹⁹ *Ibid.*, para 18.

3.6.2.1 The right to be tried in a language they understand

It is clear from the wording of s. 35(3)(k) that it does not confer a right to be tried in one's own language, but rather a right to be tried in a language that one understands. This is the interpretation of equivalent provisions in international law as shown in chapter two.¹²⁰ Thus if a refugee understands one of South Africa's official languages, he or she can be tried in that language. The question however is, what level of understanding or proficiency is required and how is this to be determined? This is important because, while rudimentary knowledge of a language may be sufficient to get by on a day-to-day basis, it may be inadequate for effective participation in court proceedings.¹²¹

Refugees and asylum seekers in South Africa are likely to pick up one or more of the local languages with time, but rather than reducing the obligation on the State, it is submitted that this places an extra obligation on its courts to ensure that the level of proficiency is sufficient to the point where there would not be a miscarriage of justice if the matter were conducted in that language. This, in turn, places an obligation on the State to develop objective standards and guidelines on the determination of proficiency which should be applicable across all courts and all proceedings. Leaving the determination of proficiency to the discretion of individual judges could only create room for miscarriage of justice. Guidance can be taken from the case of *R v Tran*¹²² on what the standard should be. That case suggests that in determining language proficiency, the standard to be adopted by the court should be the defendant's ability to follow the proceedings to the same extent as he would have been able to if they were carried out in the language in which he had the greatest facility.¹²³ As the court held in *S v Ngubane*,¹²⁴ partial understanding of a language is inadequate to meet the standard that s. 35(3)(k) imposes. A person must fully understand the language.¹²⁵ It is therefore important that in order to meet the access to justice needs of its refugee population, South Africa must have in place an adequate language policy for use in

¹²⁰ *Dominique Guesdon v France* Communication No 219/1986, UN Doc CCPR/C/39/D/219/1986 (1990) para 10.2; *Yves Cadoret, Hervé Le Bihan v France*, Communication No. 323/1988, UN Doc CPR/C/41/D/323/1988 (1991), paras 5.6–5.8

¹²¹ *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75, 77–78.

¹²² Note 113 above.

¹²³ *Ibid*, 975.

¹²⁴ *S v Ngubane* (1995) 1 BCLR 121 (T).

¹²⁵ *Ibid*, 122.

its courts, which sets out guidelines and criteria for judges and court personnel to follow when dealing with refugees and asylum seekers. Whether or not such objective standards or policies exist will be examined in the next chapter.

Section 35(3)(k) also does not confer on a refugee or asylum seeker the right to be tried or to have proceedings held in a language of his or her choice. This was the finding of the court in *Mthethwa v De Bruin NO and Another*.¹²⁶ In that case, the trial court refused an application by the accused, a school teacher who was fluent in English, to be tried in his home language, Zulu. On appeal, he contended that the court's refusal to allow him to be tried in a language of his choice was unlawful and unconstitutional. The appellate court held that it was impracticable for him to be tried in any language other than English or Afrikaans given that the majority of magistrates, judges, court officials, and advocates in the region did not have Zulu as their home language. The court held that the section merely conferred on the accused, the right to be tried in the language he or she understands, or where impracticable, to have proceedings translated into the language he understands. This, presumably, is the standard with respect to civil proceedings too.

It is however, worth pointing out that *Mthethwa* demonstrates a lack of effort on the part of the State, specifically its Department of Justice, to meet the linguistic needs of the people it is meant to serve. The first respondent in that case averred, and it was accepted by the court, that about 98 per cent of cases brought before the courts in Kwa-Zulu Natal involved Zulu speaking persons. Yet, of the 37 judges, only four spoke Zulu. The statistic was similarly skewed in respect of court personnel and prosecutors, with a heavy preponderance of non-Zulu speakers among them. Surely, the State has a duty to ensure that its judiciary is more able to meet the needs of the people it is meant to serve, by appointing more court personnel with the required language skills? While it is accepted that the right to be tried in a language that one understands is subject to practicability, it is also true that practicability is indicative of objective facts being taken into consideration. In this regard, one of the most significant objective facts is that the Zulu language is the predominant language of the region. It should therefore not be impractical to be tried in that language. The onus is on the State to appoint more persons who speak the local language to the courts, so that 'practicability' is not used as an excuse to avoid conducting cases in languages which parties to proceedings are more comfortable speaking. This would certainly be more in the spirit of s. 6 of the Constitution

¹²⁶ *Mthethwa v De Bruin NO and Another* (1998) 3 BCLR 336 (N).

which, while giving the government the freedom to use any of the official languages, sets out certain criteria that should be taken into consideration. These are ‘usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned’.¹²⁷ Commenting on *Mthetwa*, Hlope JP, has noted that the courts have continued to lay too much emphasis on practicality, thus stifling the noble goal of language parity envisaged by the Constitution.¹²⁸

With respect to refugees and asylum seekers, the case would be understandably different. The most commonly spoken languages among South Africa’s refugees are French, Somali, Lingala and Swahili.¹²⁹ None of these is an official language in South Africa. This fact, along with the proviso as to practicability in s. 35(3)(k) and the pronouncement of the Court in *Mthetwa* make it easy to accept that a refugee in South Africa could not reasonably expect to be tried in Swahili for instance. But in view of the fact that the right to understand proceedings is a fundamental requirement of a fair hearing, whether in the civil or criminal contexts, such a refugee could reasonably expect to be provided with some interpretation in the language that he is fluent in. That such a language is not an official language in South Africa, or that it would be difficult to obtain interpretation in it, would not be an acceptable reason for denying interpretation.

3.6.2.2 The right to interpretation

Section 35(3)(k) goes on to provide that where it is impracticable to be tried in a language that one understands, there is a right to have the proceedings interpreted. This right to interpretation evolved from the same common law principle of *audi alterem partem* as mentioned above. As with the right to be tried in a language they understand, the right to interpretation is grounded in the concept of natural justice, which requires that a person be given prior notice of the charge against him and an opportunity to meet that charge.¹³⁰ The

¹²⁷ Section 6(3) of the Constitution. emphasis added.

¹²⁸ John M Hlope ‘Official languages and the courts’ (2000) 117 *SALJ* 690–696, 694. Also cf *S v Pienaar* 2000 (2) SACR 143 (NC).

¹²⁹ Migrant Rights Monitoring Project ‘National survey of the refugee reception and status determination system in South Africa’ *MRMP Research Report* Forced Migration Studies Programme, University of the Witwatersrand, February 2009.

¹³⁰ Celia Brown-Blake ‘Fair trial, language and the right to interpretation’ (2006) 13 (4) *International Journal on Minority and Group Rights* 391– 412, 393; see also the Canadian case of *Societe des Acadiens du Nouveau-*

right to interpretation raises a number of significant issues, including what aspects of proceedings require interpretation, who bears the responsibility for the cost of such interpretation and who should do the interpretation. As shown in chapter two, the right to interpretation is not limited to oral testimonies only, but includes pre-trial proceedings, communicating rights upon arrest as well as the translation of documents which allow a person to effectively understand the case against him or her.¹³¹ The interpretation of oral testimonies must be simultaneous to avoid a miscarriage of justice.¹³²

With respect to who bears the cost, s. 35(3)(k) is not as direct as equivalent international law provisions examined in chapter two. Art 14(3)(f) of the ICCPR and Art 6(3)(e) of the ECHR both refer to ‘free’ interpretation; para 2(iv) of the ACHPR’s Resolution indicates that such interpretation is to be ‘without charge’; and para N of the Guidelines on Fair Trials clearly states that assistance with interpretation is free and cannot be qualified by a requirement that the accused pay for the costs of an interpreter regardless of the outcome of the trial. It can therefore be deduced from all these that the cost of such interpretation is to be borne by the State.¹³³

It would seem logical that distinction be made in respect of who bears responsibility for the cost of interpretation in civil proceedings. Where the civil matter in question is between private parties in the determination of private interests, the logical conclusion would be that the cost should be borne by them. This however does not take into consideration the implications that such a position will have on refugees who are generally in an economically

Brunswick Inc v Association of Parents for Fairness in Education (1986) 1 SCR 549, which underlines the fact that this right is broader and more universal than a language right. Rather, the court said, it is an aspect of the right to a fair hearing and belongs to the category of rights which in the Canadian Charter are designated as legal rights (page 577).

¹³¹ *Leudicke, Belkacem and Koc v Federal Republic of Germany* (Note 110 above) para 40; *Kamasinski v Austria* (1989) 13 EHRR 36 para. 74; General Comments 32 (note 10 above), para 40. Para N of the ACHPR Guidelines on Fair Trials; *Alwen Industries Ltd and Kar Wong v Collector of Customs* (1996) 3 NZLR 226.

¹³² *S v Ngubane* 1995 (1) BCLR 121; Nico Steytler *Constitutional criminal procedure* Durban, (Butterworths, 1998) 119, 230.

¹³³ *Leudicke, Belkacem and Koc v Federal Republic of Germany* (note 110 above) para 40. See also S.24(g) of the New Zealand Bill of Rights Act No. 109 of 1990. The section provides ‘Everyone who is charged with an offence shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court’. Similar, but clearer, at least with respect to costs of interpretation.

weak position.¹³⁴ The importance of certain matters such as the determination of refugee status, suggest that in view of the far-reaching consequence of a miscarriage of justice, it is in the interest of justice that the host State bears the cost of such interpretation even in civil cases. Furthermore, such a stance waters down the responsibility that the State has to ensure access to justice. I have shown, in my argument above, that linguistic accessibility is an important aspect of access to justice. If the State is allowed to absolve itself of the obligation to provide interpretation in civil proceedings before its courts, and then refugees and asylum seekers find that their ability to avail themselves of judicial remedies is frustrated because they cannot afford the cost of interpretation, then they cannot be said to enjoy access to justice. Such a situation would in fact, fall within the concept of ‘situations which systematically frustrate access’ as articulated by the HRC in the case of *Oló Bahamonde* above.¹³⁵ It is therefore in the interest of justice that South Africa’s policy on access to justice includes the provision of court interpreters free of charge in civil cases involving refugees.

With respect to who should conduct the interpretations, it is important that interpreters be qualified and adequately competent, as serious concerns can arise in cases where non-professional interpreting or translation services are provided.¹³⁶ In some cases, miscarriages of justice can even occur where the interpretation services is inadequate or provided by an unqualified interpreter. In *S v Harksen; Harksen v President of the Republic of South Africa and Others*¹³⁷ the Constitutional Court found that because a portion of the evidence had not been properly interpreted by the interpreter, who was also unsworn, it was in the interests of justice and equity that the proceedings as a whole should be set aside.¹³⁸ In *S v Abrahams*,¹³⁹ the accused, a deaf mute, had been assisted by an interpreter who was conversant with sign language but whose Afrikaans, the language of the proceedings, was weak. The record indicated that the interpreter experienced great difficulty in understanding the accused’s evidence and translating it correctly. At one stage the interpreter had interrupted the

¹³⁴ Loren B Landau & Karen Jacobsen ‘Refugees in the new Johannesburg’ (2004) 19 *Forced Migration Review* 44-46, 46.

¹³⁵ Section 3.6.1. above

¹³⁶ Brown-Blake (note 130 above).

¹³⁷ *S v Harksen; Harksen v President of the Republic of South Africa and Others; Harksen v Wagner No and Another* 2000 (1) SA 1185 (C). Cf *Cuscani v United Kingdom* (2003) Crim L R 50.

¹³⁸ *Ibid*, para 67.

¹³⁹ *S v Abrahams* 1997 (2) SACR 47 (C).

magistrate to say that he was not following what was being said, and asked the magistrate to speak slowly. The accused was convicted. On review, the Court pointed out that s 6(2) of the Magistrates' Courts Act¹⁴⁰ required that if evidence is given in a criminal case in a language with which the accused is not in the opinion of the court, sufficiently conversant, the court must call a *competent* interpreter to translate the evidence into a language with which the accused appears to the court to be sufficiently conversant. The Court held that it is clear from this provision that the magistrate had been obliged to appoint a competent interpreter and his failure to do so constituted a serious irregularity. A prerequisite of a fair trial is that the accused understands the proceedings at all times.¹⁴¹ The Court accordingly set the conviction and sentence aside.

The logical conclusion then is that the State's obligation to provide interpretation is also qualitative; it must ensure that the interpreter is competent and that the interpretation provided is sufficient.¹⁴² This is the only way to ensure that enjoyment of the right to free interpretation is both practical and effective.¹⁴³ The competence of the interpreter and quality of interpretation is particularly significant where the matter in question involves the adjudication of a claim for asylum. The decision whether or not to grant asylum often hinges on the applicant's story, and where interpretation is inaccurate, it could mean the difference between protection and exposure to danger. For instance where an applicant for asylum says he fled his home country 'due to persecution', but the interpreter renders it as 'due to prosecution', the adjudicatory body finds itself deciding the case of a fugitive from justice rather than someone seeking protection from danger to life and limb.

The preceding discussion has highlighted the importance of linguistic accessibility as an integral aspect of access to justice for refugees and asylum seekers. There is no doubt that the constitutional provisions contain sufficient safeguards in this regard. Those safeguards in turn ascribe certain obligations to the State which need to be addressed in any policy on access to justice. Such policies must necessarily include adequate guidelines on proficiency in the language of the court and adequate guidelines on the provision and quality of

¹⁴⁰ Magistrates' Courts Act 32 of 1944.

¹⁴¹ *S v Abrahams* (note 139 above) 49.

¹⁴² Evert-Jan van der Vlis 'The right to interpretation and translation in criminal proceedings' (2010) 14 *Journal of Specialised Translation* 26, 29.

¹⁴³ *Ibid.*

interpretation services for those requiring it. The next chapter will examine whether this is indeed so.

3.6.3 *Legal representation*

One of the central themes that characterise the conception of access to justice in international law is the notion of *effective* access. As the discussion above has shown, that notion also finds expression within South Africa's jurisprudence on the matter. Intrinsicly linked to this notion of effective access is the right to legal representation. Chapter two demonstrated the existence in international law, of a basic obligation on States to provide legal assistance in some form when it is required, in order to ensure access to justice.¹⁴⁴ It was shown that this obligation is not only required to ensure equality of arms between parties, but that in fact, the very idea of 'access' depends on it in some cases. It was also shown that, subject to certain criteria such as the severity of the penalty involved and complexity of the case, there is almost always an obligation to provide legal representation in criminal matters if the accused cannot afford one. The obligation with respect to civil matters, though not clearly defined in the provisions of Art 14 of the ICCPR and Art 6 of the ECHR, has been interpreted to be somewhat similar to the standard in criminal matters albeit to a lesser degree. The right to legal assistance, the courts have found, is implicit in the right to a 'fair' trial.¹⁴⁵ The Guidelines on Fair Trials, on its part, sets out clearer and more specific provisions which are similar to the interpretations of the Art 14 of the ICCPR and Art 6 of the ECHR. Read together, these instruments place an obligation on the State to also provide legal representation in civil cases where the interests of justice and the imperative of effective access demand it.¹⁴⁶

With respect to refugees, it was established that while the provisions of the ICCPR, the African Charter and the ECHR apply equally to refugees and asylum seekers, there are even more specific guarantees to be found in refugee law on this issue.¹⁴⁷ By virtue of Art 16 of the UN Refugee Convention refugees are to be assimilated to the status of nationals of the

¹⁴⁴ See chapter two, section 2.6.5.

¹⁴⁵ *Airey v Ireland*, supra; *Fransson v Sweden* (2004) 39 EHRR SE1; *Aerts v Belgium* [1998] ECHR 64 para 59; *A v United Kingdom* (2003) 13 BHRC 623 para 96; *Bobrowski v Poland* (2008) ECHR 64916/01 (17 June 2008).

¹⁴⁶ Ibid.

¹⁴⁷ See chapter two, section 2.7.

asylum state for purposes of legal assistance. Thus in all types of matters in which South Africa would ordinarily provide legal assistance to its citizens, it is obliged to do the same for refugees.¹⁴⁸

S. 34 of the Constitution does not make any mention of legal assistance. However, that such an obligation exists in criminal matters is not in doubt. Section 35(2) and (3) make this clear. They provide that every detained or accused person, including sentenced prisoners, has the right to have a legal practitioner assigned to him or her by the State and at State expense, if substantial injustice would otherwise result. While the right to free legal assistance in criminal matters is explicit in these provisions, it is also clear that the right is not unconditional. Free legal assistance is only to be provided where ‘substantial injustice’ would result if legal representation were not available to the accused or detained person. It would appear that this restriction is related to the cost to the State of providing free legal assistance to all.¹⁴⁹ In any event, the restriction corresponds to the ‘interest of justice’ principle in international law, as outlined in chapter two.¹⁵⁰ The test for ‘substantial injustice’ in criminal cases relate to whether the accused is in danger of being imprisoned without option of fine,¹⁵¹ which, again, corresponds to the ‘severity of the penalty’ test adopted in international law.

The High Court has elucidated the position of refugees (albeit under the general term of ‘foreigners’) in respect of their right to legal assistance in criminal matters. In *S v Manuel*,¹⁵² the accused person, an Angolan refugee, was refused legal assistance by the Legal Aid Board because he was ‘not lawful in the RSA’. Thereafter, he elected to represent himself and was convicted. The High Court found that he had not made an informed decision because the magistrate had failed to explain to him his constitutional right to legal representation at State expense. The magistrate had wrongly acted on the advice of the Legal Aid Board that the refugee was not entitled to legal assistance at State expense. In overturning the conviction, the High Court stated:

¹⁴⁸ Ibid; James C Hathaway *The rights of refugees under international law* (Cambridge: Cambridge University Press, 2005) 882.

¹⁴⁹ *S v Vermaas, S v Du Plessis* 1995 (3) SA 292 (CC) para 16; Azhar Cachalia & Anton Steenkamp ‘Detained and arrested persons’ in Dennis Davis *et al* (eds) *Fundamental Rights in the Constitution: Commentary and cases* (Cape Town: Juta, 1997) 164, 191.

¹⁵⁰ Section 2.6.5.

¹⁵¹ *Legal Aid Board v Msila and Others* (1997) 2 BCLR 229 (E) 236.

¹⁵² *S v Manuel* 2001 (4) SA 1351 (W).

The equality provisions contained in s 9 of the Constitution ... read jointly with the right to legal representation in s 35(3) afforded 'every accused' also accrue to foreigners accused of criminal conduct within the borders of South Africa. An accused who is illegally present within the Republic is entitled to be treated equally with all other accused, protected against unfair discrimination because of his ethnic origin and to legal representation afforded by the Legal Aid Board in accordance with its generally accepted means tests.¹⁵³

The court thus clearly established that in criminal matters, refugees have a right to legal assistance at State expense to the same extent that citizens do. On a different note, this case offers an interesting perspective into the lack of understanding of refugee law displayed by the magistrate. As chapter five will later demonstrate, such lack of understanding is not an isolated incidence.¹⁵⁴ Apart from the erroneous assumption on the part of the Legal Aid Board, which was accepted by the magistrate, that persons unlawfully in the Republic are not entitled to legal aid, there is also a deeper, more fundamental misunderstanding of the nature of a refugee. If the accused was indeed a refugee, then he *was* lawfully in the country, and so the decision not to provide him with legal assistance should not have been based on the lawfulness or otherwise of his residence. Rather, both the Legal Aid Board and the magistrate should have recognised that he was lawfully in the country, and the magistrate should have then considered whether as a non-citizen, he was entitled to legal aid. As the dictum above shows, the result should still have been the same – that regardless of his citizenship or non-citizenship, he was entitled to legal aid. The magistrate's lack of understanding of a refugee's status could easily have resulted in the violation of the principle of *non-refoulement*. It certainly resulted in a miscarriage of justice, but for the High Court review.

It is cases like this that demonstrate how important access to legal assistance is to refugees. It is rather unfortunate that the High Court did not take the opportunity to specifically highlight the position of a refugee, as derived from international human rights law, international refugee law and domestic legislation. This would certainly have been more helpful than the general terminology of 'foreigners', and would have helped to establish that the refugee's right to legal assistance is not a gratuitous act of goodwill, but a legal obligation deriving from both South Africa's Constitution and its commitments under international law.

The issue of the right to legal representation in civil matters is, unfortunately, not as clear-cut as it is in criminal matters. But the notion of fairness in the context of a fair hearing,

¹⁵³ Ibid, para5.

¹⁵⁴ See section 5.6.

the principle of equality of arms inherent in the provisions of s. 34 – as the Constitutional Court noted in *Shilubana and Others v Nwamitwa*¹⁵⁵ – and the imperative of meeting the standards of international law, all make it worthwhile to consider whether or not there is an obligation to provide free legal assistance to refugees in civil cases. Other than the duty to provide children with legal representation in civil matters concerning them, contained in s. 28, there is no other provision in the Constitution placing a similar duty on the State in respect of civil cases. Since the Constitution does not spell out the elements of a fair civil trial as it does in respect of criminal trials, it is left for the courts to interpret s. 34 and determine whether there exists in the civil context, a right to civil legal representation at state expense.

Unfortunately, the courts have failed to do this. The Constitutional Court in particular has passed up on opportunities to pronounce on this important issue, thus missing the chance to settle once and for all, the ambit of the State's obligations with respect to legal representation in civil matters. In *S v Vermaas, S v Du Plessis*¹⁵⁶ for instance, one of the issues put before the Constitutional Court was whether the respondents were entitled to obtain legal representation at State expense in terms of s. 25(3) (e) of the Interim Constitution, which is similar to s. 35(3) of the final Constitution. The Constitutional Court chose not to address it, preferring instead to leave it to the trial judges. It did set out some parameters for when this right would apply in a criminal matter, which are similar to those established in international jurisprudence referred to previously: the ramifications and complexity or simplicity of a case; the accused person's aptitude or ineptitude to fend for himself or herself; gravity of the consequences of a conviction; and 'any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be 'substantial injustice''.¹⁵⁷ It could have gone on to elaborate the ambit of the provision in the civil context as well, but chose not to. Unfortunately, the situation remains that there is no clarity from the judiciary on whether there is a right to legal representation at State expense in civil matters.

¹⁵⁵ *Shilubana and Others v Nwamitwa* 2007 (5) SA 620 (CC). The constitutional court noted the concept of equality of arms in this case where there was relative imbalance in the legal representation available to both sides. One party was significantly under-represented at the ratio of six lawyers to his one. The court stated that equality of arms has its constitutional basis, in the civil context, in s 34's guarantee of a fair public hearing. Para 21.

¹⁵⁶ *S v Vermaas, S v Du Plessis* 1995 (3) SA 292 (CC).

¹⁵⁷ *Ibid*, para 15.

Yet, because of the far-reaching effect of some civil matters such as child-custody cases, and in view of the fact that lack of legal representation is more likely to result in adverse outcomes for the poor litigant in civil matters,¹⁵⁸ the issue of civil legal representation at State expense is very important. Clarity in this is particularly important for the access to justice needs of refugees who are often poor, and as the literature suggests, face significant problems of a civil nature. For instance, the literature shows that refugees and asylum seekers face a widespread problem of illegal evictions.¹⁵⁹ They regularly go through phases of homelessness when they are evicted, often illegally, by home owners taking advantage of their non-citizen status.¹⁶⁰ Field work undertaken for this study also shows that labour-related problems are common.¹⁶¹ In addition, there are several practices by both public and private entities which violate the rights accorded to them in law.¹⁶² No doubt, there are many other cases of a civil nature which refugees face, such as matrimonial or custody issues. Though all these cases do not carry the possibility of imprisonment, they are just as important to the well-being of refugees and asylum seekers as criminal matters. If they are to challenge these practices, they need to institute civil litigations in court, which they are ill-equipped to do without legal assistance.

The clearest interpretation of the State's obligations in respect of civil legal representation, and from which its obligations to refugees can be inferred is found in the case of *Nkuzi Development Association v Government of the Republic of South Africa and Another*.¹⁶³ There, the Land Claims Court found that persons whose right to security of tenure

¹⁵⁸ Jackie Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal of Human Rights* 214–238, 217.

¹⁵⁹ Wendy Sadie & Scott Borger 'Accessing accommodation in inner city Johannesburg' in Landau *Forced migrants in the new Johannesburg* (note 39 above); Greenburg & Polzer 'Migrant access to housing in South African cities'; Médecins Sans Frontières 'The lives of survival migrants and refugees in South Africa' Briefing Document, 12 May 2010. Available at

<http://www.doctorswithoutborders.org/publications/article.cfm?id=4465&cat=briefing-documents> [Accessed 9 January 2011]

¹⁶⁰ Ibid.

¹⁶¹ See chapter five, section 5.3.2.

¹⁶² For instance, refusal of State and non-state agencies such as banks to recognise their state issued permits when they want to access services. See chapter one, section 1.7.

¹⁶³ *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC).

in terms of the Extension of Security of Tenure Act¹⁶⁴ and the Land Reform (Labour Tenants) Act,¹⁶⁵ is threatened or has been infringed have a right to legal representation at State expense if substantial injustice would otherwise result. The conditions under which substantial injustice would result include, but are not limited to, cases where the potential consequences for the person concerned are severe, and cases where the person concerned is not likely to be able effectively to present his or her case unrepresented, having regard to the complexity of the case, the legal procedure, and the education, knowledge and skills of the person concerned.¹⁶⁶ In making the order, the court stated that ‘there is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand’.¹⁶⁷

When it applied the ‘substantial injustice’ criterion, the Court in *Nkuzi* appears to have appropriated the standard in s. 35(2) and (3) of the Constitution in respect of the right to legal assistance in criminal matters. Although there is no express constitutional backing for the Court’s approach in *Nkuzi*, and its interpretation has yet to be applied outside the context of that particular case, it is highly possible that if the matter of civil legal representation were to come up specifically, the court’s approach would receive backing. This is so for two reasons. Firstly, as noted above, it is difficult to argue that the mere fact that an element expressly required for a fair criminal trial has not been expressly required for a fair civil trial means it is by implication excluded in civil trials. Secondly, the court’s application, in the civil context, of a criterion specifically attached to the criminal context is not arbitrary. There is sufficient reference from international law to apply the substantial injustice test to a civil case as the court did in *Nkuzi*. The findings of the ECtHR in a number of cases, such as *Airey*,¹⁶⁸ *A v United Kingdom*¹⁶⁹ and *Bobrowski v Poland*,¹⁷⁰ as well as the ACHPR’s Guidelines on Fair Trials are cases in point.¹⁷¹ The interest of justice imperative that guided these cases, correspond with the avoidance of ‘substantial injustice’ proviso of s. 35 of the Constitution.

¹⁶⁴ Act 62 of 1997.

¹⁶⁵ Act 3 of 1996

¹⁶⁶ Para 6.

¹⁶⁷ *Ibid*, para 11.

¹⁶⁸ *Airey v Ireland* (1979) 2 EHRR 305.

¹⁶⁹ *A v United Kingdom* (2003) 13 BHRC 623.

¹⁷⁰ *Bobrowski v Poland* (2008) ECHR 64916/01 (17 June 2008).

¹⁷¹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (note 54 above) para G(a).

Not only that, the conditions that *Nkuzi* identified as possibly resulting in substantial injustice – severity of the damage to the unrepresented litigant, and the complexity of the case – are in the spirit of these ECtHR cases and of the Guidelines on Fair Trials, as discussed in chapter two. Lastly, the court’s decision was well within the scope of the obligation which s. 39(1) of the Constitution (as interpreted in *S v Makwanyane*¹⁷²) imposes on courts to use international law as instruments of interpretation when interpreting the Bill of Rights.¹⁷³

In view of the position in international law, it is submitted that until the position articulated in *Nkuzi* is either overturned or rejected by a higher court, the position ought to be read as being that refugees have a right to legal assistance in certain civil matters, subject to the criteria laid out in *Nkuzi*. If it is accepted, as it should be, that instances exist in which the State is obliged to provide legal assistance in civil cases, then presumably, the limitations that apply to such a right in criminal cases would also apply in civil cases. In interpreting s. 25(3)(e) of the Interim Constitution, the Constitutional Court agreed with the trial judge in *S v Du Plessis* that the section does not confer on the accused person a right to choose his own legal representative at State expense.¹⁷⁴ However, it has been suggested, that where possible there is no reason why the State should not attempt to accommodate the choice of the detainee.¹⁷⁵ The same principles would also apply in civil matters too.

The foregoing section has established that in line with the position in international law, the State has a constitutional obligation to provide free legal assistance to refugees in criminal matters. While the position regarding civil matters is not so clear cut, the literature and the jurisprudence suggest that the complexity and potential impact of some civil matters also necessitates access to free legal representation in the interest of justice. What all this means, or should mean for refugees is that if they wish to challenge actions or practices which negatively impact them, or need to defend themselves in litigations of such complexity that they cannot conduct it themselves, but cannot afford the cost, they should be able to access legal representation at State expense. Whereas the courts have not adequately taken on the challenge of establishing a clear cut standard, it is possible that this gap is addressed in the

¹⁷² *S v Makwanyane* (note 28 above)

¹⁷³ *Ibid*, 413–414.

¹⁷⁴ (note 156 above) Para 15.

¹⁷⁵ Etienne du Toit ‘Criminal procedure’ in Chaskalson *et al* (eds) *Constitutional Law of South Africa* (note 70 above) 27–5.

policy and legislation on access to justice. It therefore remains to be seen whether this is so, and this will be done in the next chapter.

3.6.4 Other tribunal or forum

Thus far, the discussion of access to justice has focused on guarantees related to the formal, State justice system. However, as was noted in chapter one, access to justice often goes beyond the administration of justice in state-sanctioned forums to include the resolution of disputes by other informal bodies. In fact, scholarly discussions about access to justice almost always refer, in one way or the other, to the role of informal justice systems. Some scholars take the position that the goal of access to justice, especially for the poorer, marginalised sections of society cannot be fully realised without the participation of non-state justice systems.¹⁷⁶ Since refugees and asylum seekers often fall into the category of ‘poorer, marginalised sections of society’, it is reasonable to assume that such informal bodies would have some bearing on this discussion of access to justice for them. It is therefore important, to examine the nature of the forums which s. 34 envisages, and to determine whether such informal bodies are within the contemplation of its guarantees.

Chapter two already showed the position of such bodies under international law, noting that since the HRC has clearly stated in General Comment 32 that the notion of a ‘tribunal’ referred to in Art 14(1) designates only forums that are established by law,¹⁷⁷ that article does not apply to informal systems. The Guidelines on Fair Trials, on the other hand, discusses extensively the position of traditional justice systems which, it was shown, could be formal or informal in nature.¹⁷⁸ Section 34 of the Constitution refers to courts or ‘another independent

¹⁷⁶ See for instance Ewa Wojkowska ‘Doing justice: How informal justice systems can contribute’ (Oslo: UNDP, Oslo Governance Centre, 2006) 13; Boyane John Tshehla ‘Non-state ordering in post-apartheid South Africa: A study of some structures of non-state ordering in the Western Cape province’ (Masters Diss. submitted to the University of Cape Town September 2001); Daniel Nina ‘Access to justice in South Africa: towards a holistic approach.’ Position paper presented to the Ministry of Justice Planning Unit, September 1997, pp. 3-4; Dharmesh Bula & Adelene Africa ‘Proposals for a national community court system’ 1995 *Occasional Paper Series* 3-95, Institute of Criminology, University of Cape Town; Bryant Garth ‘The movement toward procedural informalism in North America and Western Europe: A critical survey’ in Richard L Abel (ed) *The politics of informal justice: Vol.2 Comparative Studies* (Academic Press: New York, 1982) 183-211.

¹⁷⁷ Para 18.

¹⁷⁸ Para 4.

and impartial tribunal or forum'. Unlike Art 14(1) of the ICCPR and Art 6(1) of the ECHR, s. 34 does not include the qualification 'established by law'. Could this be read as a sanction of non-state forums – i.e. informal bodies not backed by law – or does the section refer only to State-sanctioned forums such as mediation bodies like the Commission for Conciliation, Mediation and Arbitration (CCMA)? I am not here referring to traditional or customary courts, which are recognised under s. 166(e) of the Constitution as 'other courts established by an Act of parliament', and therefore form part of the legal system of South Africa.¹⁷⁹ The Constitution recognises customary law and the institution of traditional leaders, including in the administration of justice, subject to compatibility with the Constitution.¹⁸⁰

I am here talking about those systems of justice which exist completely outside the control of the State and are often referred to as 'informal justice systems'. As Schärf notes, however, the term 'informal justice' does not suit every circumstance¹⁸¹ as it encompasses many different forms of ordering, each having its own origins, purpose and peculiarities. Schärf and Nina use the term 'non-state ordering', to label all ordering that occur outside of the State's immediate control, whether complementary to, or in opposition to the State.¹⁸² I use the term 'non-state justice systems' here to refer to all forms of justice provision bodies that are not created or controlled by the state, and it encompasses such terms as traditional justice systems, informal justice systems, non-traditional informal justice systems,¹⁸³ collective justice, people's courts and popular justice systems. These non-state justice

¹⁷⁹ TW Bennett *Customary law in South Africa* (Cape Town: Juta, 2004) 127.

¹⁸⁰ S. 211 Constitution of the Republic of South Africa.

¹⁸¹ Wilfried Schärf 'The challenges facing non-state justice systems in Southern Africa: How do and how should governments respond?' Paper presented at the 'Criminal justice at ten: Consolidating transformation conference' February 2005. Available at <http://www.csvr.org.za/confpaps/scharf.htm> [Accessed 15 April 2007].

¹⁸² Wilfried Schärf & Daniel Nina 'Introduction: The other law?' in Wilfried Schärf & Daniel Nina (eds) *The Other Law: Non-state Ordering in South Africa* (Cape Town: Juta, 2001) 10.

¹⁸³ Joanna Stevens *Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems* (London: Penal Reform International, 2000) 11. Stevens explains the different terminologies thus: while traditional justice system refers to non-state justice systems which have existed, although not without change, since pre-colonial times, informal justice system refers to those which, though out of the control of the State, are not traditional in the sense that they have no cultural connotation and are more recent developments to meet the justice needs of people. Non-traditional informal justice systems refer to alternative dispute resolution forums run by NGOs.

systems are popular in South Africa, just as they are in most African countries¹⁸⁴ and usually occur in two forms: ‘popular justice’ and ‘private justice’.¹⁸⁵ ‘Popular justice’ develops organically in communities¹⁸⁶ and its nature is captured in this description by Albie Sachs, of popular justice in Mozambique:

[P]opular justice meant justice that was popular in form, in that its language was open and accessible; popular in its functioning, in that its proceedings were based essentially on active community participation; and popular in its substance, in that judges drawn directly from the people were to give judgment in interests of the people.¹⁸⁷

‘Private justice’ on the other hand, is justice organised by the private sector, mostly NGOs, using mediation to solve interpersonal problems in the community.¹⁸⁸

It is important to determine the position of these non-state justice systems in a discussion about refugees’ access to justice, because as chapter six will subsequently demonstrate, this is an important aspect of access to justice, which has many implications both for the State and for refugees and asylum seekers themselves. This is only to be expected, as migrant populations tend to transport their cultural practices to their new homes.¹⁸⁹ These cultural practices invariably include the administration of justice and dispute resolution mechanisms,¹⁹⁰ and it is only to be expected that refugees in South Africa will have such institutions. As chapter six will show, those forums do indeed exist among

¹⁸⁴ Sandra Burman & Wilfried Schärf ‘Creating people’s justice: street committees and people’s courts in a South African city’ (1990) 24 (3) *Law & Society Review* 693–744, 693; Isaac Olawale Albert *et al Informal channels for conflict resolution in Nigeria* (Ibadan: IFRA, 1995).

¹⁸⁵ Daniel Nina & Pamela Jane Schikkard ‘The “soft vengeance” of the people: Popular justice, community justice and legal pluralism South Africa – (1996) 36 *Journal of Legal Pluralism* 69–87, 70.

¹⁸⁶ *Ibid.*

¹⁸⁷ Albie Sachs ‘Changing the terms of the debate: A visit to a Popular Justice tribunal in Mozambique’ (1984) 28 *Journal of African Law* 99–108, 99.

¹⁸⁸ Nina & Schikkard (note 185 above) 76.

¹⁸⁹ Nancy Foner ‘The immigrant family: Cultural legacies and cultural changes’ (1997) 31 (4) *International Migration Review* 962–963. Also see generally Joanne I Moore (ed) *Immigrants in courts* (Washington: University of Washington Press, 1999).

¹⁹⁰ See generally Manfred O Hinz & Helgard K Patemann (eds) *The shade of new leaves: Governance in traditional authority ; a southern African perspective* (Berlin: LIT Verlag Münster, 2006); Burman & Schärf, (note 188 above) 693; Johannes Moses Jacobus ‘People’s courts and people’s justice: A critical review of the current state of knowledge of people’s courts with a particular focus on South Africa’. (LLM Diss. Faculty of Law, University of Cape Town) 1990.

refugees in South Africa, and play an important role in their access to justice. What then is the position of such forums in relation to the constitutional guarantees on access to justice, and what does it mean for the State which is the primary organ vested with the administration of justice?

In determining what the position of these non-state justice systems is and whether the guarantees contained in s. 34 apply to them, recourse is had to the Constitutional Court case of *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*.¹⁹¹ Although that case relates to private arbitration of a commercial contract, which of course is regulated by law,¹⁹² the private arbitration itself is a private process and the arbitrators are not provided by the State but are rather, private agents employed by parties for the resolution of disputes.¹⁹³ This therefore makes them similar in most respects to the non-state justice systems under discussion here. One of the questions for determination before the court in *Lufuno* was whether the term ‘another independent and impartial tribunal’ in s. 34 includes private arbitration. The court found that it does not. In reaching this conclusion, the court, per O’Regan ADCJ emphasised the private and non-independent nature of private arbitration as the main characteristics which takes them out of the contemplation of s. 34.¹⁹⁴ The forums which s. 34 contemplate have to be public and independent. Furthermore, the questionable ‘impartiality’ of the judges in those forums, the lack of clear standards and guidelines, as well as the general lack of enforcement mechanisms are some of the general characteristics¹⁹⁵ – and criticisms – of non-state justice systems, which further differentiate them from the forums contemplated by s. 34.¹⁹⁶ In view of this, it is difficult to argue that non-state justice systems are part of the forums to which s. 34 refers. But as previously stated, this does not mean that they should be ignored. In fact, the opposite is true; it raises critical issues which are important for the State to consider in conceptualising its obligations to refugees on access to justice.

¹⁹¹ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC).

¹⁹² Arbitration Act, Act 42 of 1965.

¹⁹³ *Lufuno Mphaphuli* (note 191 above) para 212–213.

¹⁹⁴ *Ibid*, 213–214.

¹⁹⁵ United Nations Development Programme Programming for justice: Access for all. A practitioner’s guide to human rights-based approach to access to justice (Bangkok: UNDP, Asia Pacific Rights and Justice Initiative, 2005) 102–103.

¹⁹⁶ See also *Freedom of Expression Institute and Others v President of the Ordinary Court Martial NO and Others* 1999 (3) BCLR 261 (C) para 23.

Firstly, as the court noted in *Lufuno*, the effect, when a person chooses private arbitration for the resolution of a dispute, is that they have chosen not to exercise their rights under s 34.¹⁹⁷ Therefore all of the important access to justice guarantees discussed in chapter two and in this chapter are jeopardised. Refugees seeking justice before these forums may therefore find that they are subjected to a private process where they have no guarantees of due process. Lack of respect for human rights, especially the discriminatory treatment of women, is one of the major criticisms of these forums. In view of this, the State must seriously consider the implications of allowing a system to thrive within its borders, which operates outside the values of its Constitution. In order to do this, it first needs to recognise their existence. Any policy or programme on access to justice must therefore bear in mind that these forums exist, and that those who use them are virtually excluded from the safeguards of the Constitution. It is only by recognising that these forums exist among refugees that the State can engage with them and, if necessary, promote their positive aspects and ensure that they function in accordance with national laws and international human rights standards. It is important to note that the conclusion that persons who choose private arbitration have chosen to deprive themselves of the protection of s. 34 does not make the Constitution irrelevant. Arbitration agreements must not contain provisions that are in conflict with the Constitution or *contra bonos mores*,¹⁹⁸ and this must apply to the workings of non-state justice system among refugees too.

Secondly, the State needs to recognise the potential of these forums to act as instruments for improving access to justice. Despite their shortcomings, scholars recognise that non-state justice systems serve a useful purpose. They help to alleviate the courts of the workload of petty crimes and disputes which can be resolved outside the formal court system, thus freeing up scarce judicial resources and reducing delays – one of the more common access to justice problems. Scholars are further impressed by these forums emphasis on restoring social cohesion after disputes.¹⁹⁹ Their focus on reconciliation, restitution and

¹⁹⁷ Ibid, 216.

¹⁹⁸ Ibid, 220.

¹⁹⁹ Lawrence M Friedman ‘Access to justice: Social and historical context’ in Mauro Cappelletti & John Weisner (eds) *Access to Justice: Promising institutions*, Vol 2 Florence access-to-justice project. (Milan: Sijthoff and Noordhoff, 1979); Jeremy Seekings ‘The revival of people's courts: Informal justice in transitional South Africa’ (1992) 6 *South African Review* 187; South African Law Commission ‘Alternative Dispute Resolution’ 1997 *Issue paper* 8, 33–38.

rehabilitation is seen to have served justice as opposed to the formal courts' winner-takes-all-approach that leaves feelings of bitterness and injustice.²⁰⁰ It is therefore submitted that in view of their potential benefits in the overall goal of achieving access to justice, there is an imperative for the State to take positive steps to harness the power of these forums. Failure to do so would constitute a deficiency in the State's efforts to meet its obligations on access to justice for refugees. Doing so, on the other hand, would certainly be in the spirit of the conceptualisation of access to justice in the literature, in international law and in the jurisprudential discourse, as I have demonstrated up to this point. In all three areas, it is recognised that access to justice is less concerned with the availability of judicial infrastructure than it is with meaningful and effective access to a process that provides fair and equitable results. These forums could help to achieve this if properly utilised, and this ought to be addressed in any policy on access to justice. Thus in order to meet the access to justice needs of its refugee population, South Africa's policy on access to justice must recognise, address and harness the workings of these systems.

The third critical issue in respect of non-state justice systems among refugees and asylum seekers is that, regardless of how well they are harnessed or utilised, their existence cannot be construed by the State as justification to abdicate its duties to provide to refugees, an accessible justice system which meets international standards. Rather, their existence should be seen as a challenge to the State to ensure that recourse to non-state justice systems are not attributable to the inaccessibility of its own courts, but rather are a matter of (cultural) preference. In studies of refugees' access to justice in camp situations, scholars have found that States essentially abdicate their duty to provide access to justice, allowing informal justice systems to take on the primary role of the administration of justice.²⁰¹ Furthermore, when such forums acted in ways that violated rights, it was explained away as 'that is their culture'.²⁰² Clearly, such a situation goes against the obligations that the State has under international law and under its Constitution. Thus, South Africa must ensure that these forums do not become the primary means of redress for those refugees seeking justice. The

²⁰⁰ Joanna Stevens (note 183 above) 9.

²⁰¹Rosa Da Costa *The administration of justice in refugee camps: A study of practice* (Geneva: UNHCR Department of International Protection, 2006) 27; Julie Veroff 'Justice administration in Meheba Refugee Settlement: Refugee perceptions, preferences, and strategic decisions' (MPhil Diss. to the Department of International Development, Oxford University, 2009).

²⁰² Veroff (note 201 above) 4.

policy and legislation must reflect the standard that the State justice mechanism is the primary means of access to justice and include efforts to ensure that refugees are able easily to use it.

Lastly, studies show that there is a strong correlation between certain vulnerabilities (particularly poverty) and the use of non-state justice systems.²⁰³ It is the poorer, marginalised sections of society who tend to resort to non-state justice systems, and this is usually because they find the formal justice system inaccessible.²⁰⁴ Since this is the case, the State has an obligation to take steps aimed at ensuring that categories of people who face greater barriers when they seek justice, and are thus more likely to resort to non-state justice systems, are able to receive help which enables them to overcome their disadvantages.

The first step in this regard is to recognise and categorise them as vulnerable persons. This goes beyond the mere adoption of a specific nomenclature – ‘vulnerable persons’ – but rather requires a policy-making culture in which strategies and programmes on access to justice are shaped by an understanding of the challenges that specific people face and reflect practical efforts to address them. In other words, South Africa’s policy on access to justice must recognise as vulnerable persons, those people who face challenges that force them to resort to non-state justice systems because they find the State justice system inaccessible. Such policies must also include special measures designed to meet the specific challenges of these classes of people. Thus for instance, if women as a class of people are deemed to be vulnerable persons, there needs to be gender-appropriate measures which reflect sensitivity to their unique challenges.

The same holds true for refugees and asylum seekers who, it is submitted, are some of the most vulnerable classes of people in South Africa. Not only do they face the same difficult challenges faced by vulnerable South Africans such as poverty, they also are confronted with the widespread problem of discrimination and xenophobia.²⁰⁵ This is so

²⁰³ Wojkowska (note 180 above) 6; United Nations Development Programme ‘Access to Justice - UNDP Practice Note’ Available at

<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ACCESSTOJUSTICEUNDP/PRACTICENOTE.pdf> [Accessed 14 May 2011]

²⁰⁴ Ibid.

²⁰⁵ Nahla Valji ‘Creating the nation: The rise of violent xenophobia in the new South Africa’, Centre for the Study of Violence and Reconciliation. Available at www.csvr.org.za [Accessed 17 October 2009]; Jean Pierre Misago *et al* ‘Towards tolerance, law, and dignity: Addressing violence against foreign nationals in South Africa’ (Johannesburg: International Organization for Migration, 2009); Loren B Landau ‘Xenophobia and

much so that the Constitutional Court has specifically declared that non-citizens in South Africa, among who are refugees, are a vulnerable group because of the severe levels of discrimination they face.²⁰⁶ In order to adequately meet their needs therefore, the State has an obligation to recognise and classify refugees and asylum seekers as vulnerable persons who require assistance in accessing justice. Its policy on access to justice must reflect that recognition, and include specific measures designed to address the challenges that they face. Failure to do so could only lead to a situation whereby refugees and asylum seekers are forced to resort to forums where their rights could be violated. The other alternative is that they choose to forego their quest for justice altogether because they are not willing to subject themselves to the disadvantages of non-state justice forums.

The foregoing section has established that the previously discussed constitutional guarantees, though admirable and of an international standard, operate only within the framework of the State justice system. There are those who may be forced, or may choose to seek justice outside the confines of the State forums for some reason. Even then, there are implications for the State in respect of its obligations on access to justice, and these need to be addressed in its policy and legislation on the matter. The next chapter will show whether this has been adequately done.

I will now look at the last aspect of the constitutional provisions on access to justice which is of particular significance to refugees and asylum seekers. This relates to the rules of standing or *locus standi*, one of the most important ways in which the Constitution guarantees access to justice. The discussion will show how these provisions have been beneficial and have enabled refugees and asylum seekers to take advantage of the other rights recognised for them in South Africa.

3.6.5 Standing

The rules of standing or *locus standi* operate to protect the justice system from abuse, by determining which cases to allow through the doors of the court and which to keep out.²⁰⁷

problems related to it' (2004) Forced Migration Working Paper Series #13 Forced Migration Studies Programme University of the Witwatersrand.

²⁰⁶ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) 17-20, 23.

²⁰⁷ Cheryl Loots 'Standing, ripeness and mootness' in Stuart Woolman *et al* (eds) *Constitutional Law of South Africa* Vol 1 (2 ed) (Cape Town: Juta, 2005) 7-1-7-2.

Under common law, only persons who have a direct interest in a case, being personally adversely affected by it, may approach the courts for relief.²⁰⁸ This narrow approach to standing has traditionally been a barrier to access to justice in that it effectively disenfranchised persons who were unable to approach the courts by themselves for one reason or another.²⁰⁹

There are several factors which, together or alone, could make it difficult for refugees to approach the courts on their own. Poverty, which has been alluded to above,²¹⁰ is one such problem. So is lack of knowledge of rights. A study by the Human Science Research Council for instance, found that 69.5 per cent of South Africans had either not heard of or did not know the purpose of the Bill of Rights. Neither had they heard of or knew the purposes of several bodies integral to the protection of human rights.²¹¹ That study did not involve refugees, but it is quite possible that the situation is the same or even worse among them. Yet it is trite that knowledge of rights is vital in the decision whether or not to pursue a claim. In the absence of such knowledge, ascertaining whether or not a cause of action exists in a given situation would usually involve a costly visit to a lawyer, which again, speaks to the adverse socio-economic position of refugees. Thirdly, the impoverished socio-economic conditions of refugees also means that a large number of them reside in Townships, which though in urban areas, are significantly under-serviced by lawyers and courts.²¹² Geographic factors could therefore make it difficult for refugees to approach courts on their own. The effect of these factors would be to prevent refugees and asylum seekers from approaching the courts for redress. Fortunately however, certain constitutional provisions could mitigate this.

²⁰⁸ Cheryl Loots 'Access to courts and justiciability' (note 70 above) 8.2 (b).

²⁰⁹ Cheryl Loots 'Keeping Locus Standi in Chains: *National Education Crisis Committee v State President of the Republic of South Africa*' (1987) 3 *South African Journal of Human Rights* 66–76, 70; Barry Sullivan 'A liberal approach to the issue of *locus standi* and the contrasting interpretation of entitlements to civil legal aid' (2003) 2 *Galway Student Law Review* 51.

²¹⁰ Note 134 above.

²¹¹ Adam Habib and Christian M de Vos 'Human rights' in Human Sciences Research Council, *Public attitudes in contemporary South Africa - insights from an HSRC survey*, (Cape Town: HSRC Press, 2002) 153, 155.

²¹² Geoff Budlender 'Access to justice: Lessons from South Africa's land reform programme' in World Justice Project *Rule of Law Scholars Series, Volume II: Access to Justice* 2008; Hennie van As 'Legal aid in South Africa: Making justice reality' (2005) 49 (1) *Journal of African Law* 54, 66; Robert Mitchell 'Land rights legal aid' in RL Prosterman *et al* (eds) *One billion rising: Law, land and the alleviation of global poverty* in (Amsterdam: Leidam University Press, 2009) 401.

One of the most significant ways in which the Constitution facilitates access to justice is the broad approach that s. 38 brings to the rules of standing. That section introduces far-reaching changes to the common law rule on standing.²¹³ Its provisions are couched in terms liberal enough to provide access even to the most disadvantaged, such as refugees and asylum seekers. Each of the five sub-sections of s. 38 recognises a category of persons who may approach the courts for relief, namely: a person acting in his own interest; a person acting on behalf of another who cannot act for themselves, such as if the person is detained and prevented from approaching the court themselves;²¹⁴ persons acting as members of a group or class of persons; persons acting in the interest of the public and lastly an association which is acting in the interest of its members. However, it applies only in respect of violations or threatened violation of rights contained in the Bill of Rights.²¹⁵

Through its recognition of representative action (litigation on behalf of a person who cannot do so himself or herself), class action suits (litigation on behalf of an entire group of people affected by the subject matter of the case) and public interest litigation (litigation in the interest of the general public), s. 38 enhances access to justice in that it gives an aggrieved person who is unable to approach the courts by himself or herself, several avenues to do so. It also benefits the State as well, as these forms of litigation allow judicial resources to be more efficiently utilised. A single class action prevents the inefficiency of multiple judges hearing the same case and ruling on the same issues. The importance of this generous approach to standing is best appreciated from the significant body of jurisprudence that has developed as a result of persons or groups taking advantage of it, and the important, often life-changing results that have been achieved.

In *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape*²¹⁶ for instance, the court highlighted the capacity of s. 38 to enhance access to justice. In that case, the applicants brought an action on behalf of themselves and 100,000 others who had had their disability grants suspended without due process of law. Relying on s. 38, the court

²¹³ *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E) 618; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC), para 229.

²¹⁴ Currie & De Waal, (note 7 above) 87.

²¹⁵ *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) 106.

²¹⁶ *Supra* (note 213 above).

rejected the respondents' objection that the applicants did not have standing to sue on behalf of others. The court held that a flexible and generous approach to representative and class actions was called for, to make it easier for disadvantaged and poor people to approach the courts.²¹⁷ The judgement demonstrated the Constitution's intention to ensure that the right of a litigant to sue and to enjoy access to court is not undermined by poverty or technical rules which often constitute a barrier in access to justice.

For refugees and asylum seekers, who often arrive in the country of refuge 'only with the clothes on their backs', poverty stricken and without any means of support,²¹⁸ this position is especially significant. Indeed, litigation would be a daunting task for them, even without socio-economic disadvantages, considering that they are faced with the intimidating prospect of navigating a foreign legal system. Standing rules which allow others to litigate on their behalves therefore provide much needed assistance to those who cannot do so. One of the clearest demonstrations of the benefits that could accrue to refugees and asylum seekers from representative and class action suits involved the right to work. Given that the government does not provide any form of subsidies or assistance to refugees and asylum seekers in South Africa, this right is particularly important to them.

In the early days of the implementation of the Refugees Act, asylum seekers did not have the right to right to work or study pending the determination of their status. Refugees however, pursuant to s. 27 of the Act were entitled to seek employment. Asylum applicants received permits which stated: 'EMPLOYMENT AND STUDY PROHIBITED'. Only if a decision was not made within 180 days, could an applicant approach the Standing Committee for Refugee Affairs to have the prohibition against work and study lifted. Needless to say, this produced serious hardships for asylum seekers who were already disadvantaged in the job market. In 2002, an asylum seeker brought a legal challenge to this prohibition in the case of *Watchenuka and Another v Minister of Home Affairs and Others*.²¹⁹ The second applicant, the Cape Town Refugee Forum, acted on behalf of all asylum seekers in South Africa. The first applicant, Muriel Watchenuka, a widowed pharmacy technician and her disabled 20 year

²¹⁷ Ibid, 623–629; see also *Khosa and Others v Minister of Social Development and Others* (note 35 above).

²¹⁸ Community Agency for Social Enquiry (CASE) 'Realising rights: The development of health and welfare policies for asylum seekers and refugees in South Africa' May 2001. Available at <http://www.queensu.ca/samp/sampresources/migrationdocuments/documents/2001/dha.pdf> [Accessed 10 September 2010].

²¹⁹ *Watchenuka v Minister of Home Affairs* 2003 (1) SA 619 (C).

old son applied for asylum after entering South Africa from Zimbabwe. Ms Watchenuka claimed that she left Zimbabwe because she feared that her son would be forced to join militant supporters of the ruling ZANU-PF. Shortly after applying for asylum she secured a place for her son to study at a Cape Town college. Ms Watchenuka's savings had been depleted and she needed to secure employment in order to support herself and her son. She applied to the Cape High Court for an order declaring the prohibition against work and study contained in her asylum seeker permit to be in contravention of her rights to life, dignity, equality and administrative justice and therefore unconstitutional. She sought an order directing the Department of Home Affairs and the Standing Committee on Refugee Affairs to permit her and her son to be employed and to study respectively pending the finalisation of their asylum application. The High Court found in favour of the applicants, declaring the prohibitions 'inconsistent' on the grounds that the Ministers' decision to prohibit work and study had not been made in accordance with the appropriate procedure. He did not however make any rulings as to the constitutionality of the prohibitions.²²⁰ On appeal, the Supreme Court of Appeal found the prohibition of employment and study to be unconstitutional.²²¹ This judgment represented a significant improvement to the socio-economic conditions of refugee and asylum seekers. Not only has it improved their ability to survive, but is also a contribution to their sense of dignity and self-worth, as well as enabling them to participate in and contribute to their host communities.²²²

The nature of class actions and public interest litigation is such that a diverse group of people who share only one commonality, but are different in every other way, are able to enjoy the benefits of a single litigation.²²³ This characteristic greatly enhances access to justice for refugees and asylum seekers in South Africa, as it has enabled them to benefit from class action suits brought by others who are not refugees or asylum seekers, but share a similar disadvantage. A case in point is the famous case of *Minister of Health and Others v*

²²⁰ Ibid.

²²¹ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

²²² Alice Edwards 'Human rights, refugees, and the right "to enjoy" asylum' (2005) 17 *International Journal of Refugee Law* 293–305, 320.

²²³ Clive Plasket 'Representative standing in South African law' available at http://www.law.stanford.edu/display/images/dynamic/events_media/south_africa_national_report.pdf [Accessed 28 January 2011].

*Treatment Action Campaign and Others*²²⁴ which involved access to anti-retroviral drugs (ARVs). While refugees do not necessarily display higher rates of HIV infection than other segments of society, the vulnerable conditions under which they live often leaves them susceptible to diseases including HIV,²²⁵ and access to ARVs is therefore important to them. Being significantly under-resourced and unable to access private health care centres, public health facilities is their primary source of health care services and of access to ARVs if needed.²²⁶ Prior to the *Treatment Action Campaign* case, it was not possible to obtain ARVs in public health facilities, which of course had negative ramifications for refugees.

A group of NGOs acting in the public interest launched a constitutional challenge against the South African government's policy of restricting the antiretroviral drug, Nevirapine, to research sites.²²⁷ That case compelled the government to make the drug available in public hospitals and clinics, and thus led to tens of thousands of lives being saved.²²⁸ Those lives are not only those of South Africans, but also of refugees and asylum seekers. In the years following the judgment, the Department of Health has taken steps to include asylum seekers and refugees in its strategic planning and regulation. Its HIV, AIDS and STI National Strategic Plan for South Africa specifically identifies refugees, asylum seekers and foreign migrants as marginalised groups who have 'a right to equal access to interventions for HIV prevention, treatment and support'.²²⁹

²²⁴ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).

²²⁵ United Nations Integrated Regional Information Network (IRIN) 'Refugees and HIV' available at <http://www.irinnews.org/pdf/pn/Plusnews-Media-Fact-file-Refugees-and-HIV.pdf> [Accessed 18 September 2010].

²²⁶ Consortium on Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa' (Johannesburg: CoRMSA, 2008) 40.

²²⁷ Mark Heywood, national director of the TAC, provides a fascinating insight into the development of this case, including the strategies adopted by civil society in the run up to the victory at the constitutional court in 'Preventing mother-to-child HIV transmission in South Africa: Background strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal of Human Rights* 314.

²²⁸ International Network for Economic, Social & Cultural Rights (ESCR-Net) Available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=403050 [Accessed 18 September 2010].

²²⁹ Department of Health *HIV & AIDS and STI Strategic Plan for South Africa, 2007–2011* (Pretoria: Department of Health, 2007) 56; Jo Vearey & Ingrid Palmay 'Assessing non-citizen access to ART in inner-city Johannesburg' Forced Migration Studies Programme, University of the Witwatersrand 2007.

Like the *Treatment Action Campaign* case, the twin cases of *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Others v Minister of Social Development and Others*²³⁰ also demonstrate how class actions have benefitted refugees. Both cases concerned a constitutional challenge to certain provisions of the Social Assistance Act.²³¹ The Constitutional Court's finding that exclusion from access to social grants on the sole ground of citizenship amounted to unfair discrimination paved the way for refugees to access social grants.²³² The subsequent class action suit by a group of refugee foster parents in *Bishogo and Others v the Minister of Social Development and Others*²³³ enhanced their enjoyment of this right, as it removed a further barrier placed in their way by the Department of Social Services, which required beneficiaries to be in possession of a 13-digit identity book in order to access social grants.²³⁴

While these cases illustrate the important implications which the constitutional provisions on standing, representative and class actions have for refugees and asylum seekers access to justice, they also highlight the key role played by civil society organisations. By instituting litigation on behalf of refugees and asylum seekers, or supporting actions brought by them, more capable and better resourced organisations like the Cape Town Refugee Forum were able to achieve something that individual asylum seekers could probably not achieve. It is worth noting that s. 38 does not introduce public interest or class action suits to South Africa. These were already in use all during the apartheid period,²³⁵ and were in fact, one of the benefits to develop from opposition to apartheid.²³⁶ What this provision does is to give these forms of litigation constitutional backing, and to help shift the momentum, post

²³⁰ Supra (note 79 above). Both cases are jointly referred to as *Khosa*.

²³¹ Act 59 of 1992.

²³² This also put South Africa in compliance with its obligations article under Art 23 of the UN Refugee Convention in terms of which, in the provision of social grants, it is to accord to refugees the 'same treatment' as nationals.

²³³ *Bishogo and Others v the Minister of Social Development and Others* Unreported Transvaal Provincial Division case number 9841/2005.

²³⁴ Ibid.

²³⁵ Stephen Golub 'Battling apartheid, building a new South Africa' in Mary McClaymont & Stephen Golub (eds) *Many roads to justice: The law-related work of Ford Foundation grantees around the world* (New York: Ford Foundation, 2000) 25–28.

²³⁶ David McQuoid-Mason 'Access to justice in South Africa' (1999) 17 *Windsor Yearbook of Access to Justice* 245.

apartheid, to litigation whose objectives are to test and enforce constitutional rights.²³⁷ It has also helped to underline the critical role that civil society plays in the promotion of access to justice.²³⁸ As a result of the leeway that s. 38 gives to public interest groups such as NGOs, churches, and community groups to challenges the violation or non-implementation of constitutional rights, ‘the majority of the cases decided by the Constitutional Court which have made an impact on the lives of disadvantaged South Africans have been brought by organized interest groups’.²³⁹ Fortunately, there are a number of NGOs working on refugee issues which have been willing to engage in such litigations, but these are insufficient. Given the beneficial role they are capable of playing, it is obvious that one way of improving access to justice for refugees is through the participation of civil society. The implications of this for the State and its obligations on access to justice, will be discussed in chapter five.²⁴⁰

Secondly, the cases discussed above illustrate the inter-connected nature of human rights, and why the rights of refugees need to be addressed holistically in order to meet their access to justice needs, and also gives credence to the argument put forward in chapter two that access to justice enables other rights to be enjoyed. With regard to the *Watchenuka* case for instance, South Africa was well within its rights to prohibit the right to work both constitutionally and under international law and practice.²⁴¹ Section 22 of the Constitution clearly limits the right to choose a trade or profession to citizens. Critically, however, the court distinguished a situation where employment is the only reasonable means for a person’s support. According to the court, the issue then becomes not merely a restriction on a person’s capacity for self-fulfilment, but a restriction on his or her ability to live without positive humiliation and degradation.²⁴² The court noted that the freedom to engage in productive work, even where that is not required in order to survive, is an important component of human dignity, which is one of the foundational values of the Bill of Rights.²⁴³ Like the right

²³⁷ Saras Jangwath ‘Democracy, civil society and the South African Constitution: Some challenges’ *UNESCO Management of Social Transformations (MOST) Discussion Paper 65*, 16.

²³⁸ Sandra Liebenberg *Socio-economic rights in South Africa: Adjudication under a transformative Constitution* (Cape Town: Juta, 2010) 90.

²³⁹ Jangwath (note 237 above) 16.

²⁴⁰ Chapter five section 5.5.

²⁴¹ This issue is discussed at length in *Ex parte Chairperson of the constitutional Assembly: In re certification of the amended text of the Constitution of the Republic of South Africa 1996*, 1997 (2) SA 97 (CC) paras 17–21.

²⁴² *Minister of Home Affairs v Watchenuka* (note 226 above) para 32.

²⁴³ *Ibid*, para 27.

to work, the court found that the freedom to study is also inherent in human dignity ‘for without it a person is deprived of the potential for human fulfilment’.²⁴⁴ This is important for refugees and asylum seekers because one of the first things that the refugee situation threatens to strip from them, when they find themselves displaced, without the protection of their own governments and at the mercy of a foreign state is their dignity.²⁴⁵ Cases like *Watchenuka* demonstrate how access to justice for refugees and asylum seekers – whether individually or as a class of persons – not only enables them to enjoy specific human rights, but serve the more critical purpose of restoring and protecting their human dignity and affirming their worth as persons. Chapter five will subsequently demonstrate how their tenuous work situations influence refugees’ decisions on accessing justice.²⁴⁶

Thirdly, these cases demonstrate that refugee rights in South Africa is following a trend that has been on an upswing around the world in recent times – the judicialisation, or involvement of the judiciary, in refugee issues. In the past, as chapter one showed, refugee matters were treated as part of general immigration and left under the bureaucratic control of immigration administrators. The power of the courts to review such matters were usually curtailed or completely prohibited.²⁴⁷ Today however, the judiciary is often called upon to adjudicate matters pertaining to refugees and this is visible everywhere including in Europe, Canada, the United States,²⁴⁸ and as the cases above show, now in South Africa.

While the judicialisation of refugee issues was primarily only seen in the area of core refugee protection, it has now extended to issues of other rights and conditions of stay. It affirms the argument put forth in chapter one that access to justice is just as important to refugee protection as the granting refugee status is.²⁴⁹ In fact, scholars argue, domestic courts have become the primary agency for the protection of refugees and immigrant aliens because

²⁴⁴ Ibid, para 36; Cf Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999) U.N Doc. E/C.12/1999/10 (1999) para 1.

²⁴⁵ Peter Billings & Richard A Edwards ‘Safeguarding asylum seekers’ dignity: Clarifying the interface between Convention rights and asylum law’ (2004) 21 *Journal of Social Security Law* 83–111.

²⁴⁶ Section 5.4.1.

²⁴⁷ See Chapter one, page 21 for instances of previous South African immigration laws explicitly forbidding courts from hearing any matters related to refugees. Similarly, Canada’s Immigration Act of 1952, explicitly forbade the courts from reviewing immigration matters (s. 39, Immigration Act, R.S.C 1952, c. 325).

²⁴⁸ Dagmar Soenneken *The growth of judicial power over the fate of refugees: A comparison of Canada and Germany* (PhD diss., University of Toronto, 2009) 1.

²⁴⁹ Chapter one, section 1.6.

it has been the courts that have tended to open or strengthen rather than deny or curtail access to rights traditionally only granted to citizens,²⁵⁰ as seen for instance in the cases of *Watchenuka* and *Khosa*. Joppke attributes this trend to ‘independent and activist courts’, mobilising domestic law against restriction-minded, governments.²⁵¹ Gibney’s argument that legal developments that acknowledge refugees and asylum seekers as rights bearers, and vest them with new legal protections have been effective in restraining the policies of restriction in the political realm²⁵² is amply supported by the cases above. In South Africa, much of these legal developments are attributable to the use of representative and class actions as the discussion above has shown.

Compared with the position set out in chapter one, in which the default government position was to restrict access to courts, refugees and asylum seekers today certainly are in a better, more rights-enhancing position than ever before. It is therefore important that the State, in its access to justice policies and programmes should not only avoid any measures that restrict the ability of civil society to utilise their human and financial resources to litigate on behalf of disadvantaged refugees, it is also important that, in its programming for access to justice, the State’s efforts should include measures that will enhance the capacity of civil society. In this way, it would also be meeting its obligations on access to justice for refugees.

3.7 CONCLUSION

I have attempted in this chapter to look at South Africa’s constitutional provisions on access to justice. It has been established that in the main, these provisions comply with international standards and with the country’s obligations under international law. The South African Constitution is designed to address the inequality and injustice of the history that led to its

²⁵⁰ Soennecken (note 248 above) 9.

²⁵¹ Christian Joppke ‘The legal-domestic sources of immigrant rights: The United States, Germany, and the European Union’ (2001) 34 (4) *Comparative Political Studies*, 339–366, 339. Some governments have responded by attempting to use legislative measure to cut off avenues for legal appeals of asylum decisions. For example, Australia, USA and the UK. See Matthew J Gibney & Randall Hansen ‘Asylum policy in the West: Past trends, future possibilities’ Discussion Paper No. 2003/68 *World Institute for Development Economics Research (WIDER)* United Nations University, September 2003.

²⁵² See generally, Matthew J Gibney ‘The state of asylum: Democratization, judicialization and the evolution of refugee policy’ in Susan Kneebone (ed) *The Refugees Convention 50 years on: Globalisation and international law*. (Aldershot: Ashgate, 2003) 19–46.

adoption,²⁵³ and viewed in the context of that history, it is easy to see why both its provisions and the interpretations given to them by the courts have tended to place emphasis on the achievement of substantive justice and equality. The Constitution guarantees equal and unfettered access to courts for everyone within South Africa, with further guarantees to ensure that such access is to competent bodies that meet international standards. Not only that, the constitutional provisions show a leaning towards effective access as opposed to mere access to courts, and the jurisprudence further reinforces the commitment to procedural as well as substantive access to justice. I also showed that while these guarantees are important for everybody's access to justice, there are certain elements which hold specific significance for refugees and asylum seekers simply because of the nature of their relationship with the country. In this regard, I identified the issue of language competency and interpretation, access to legal assistance, recourse to non-state justice systems and the possible consequences of that, as well as the impact of standing rules on their access to justice.

The guarantees contained in s. 34 together with the broad approach to *locus standi* contained in s. 38 have had the effect of making the courts more accessible either through self-representation, class actions or public interest litigation by groups and individuals. The advantage this offers to under-resourced people, including refugees, has been enormous as it has allowed them 'to be represented by organizations with expertise, and sometimes more importantly, resources to conduct expensive and time-consuming litigation'.²⁵⁴ It is often only because of these litigations that refugees and asylum seekers have been able to enjoy some of their other constitutionally recognised rights. In this regard, the area of socio-economic rights has proved to be a fertile ground for high-impact, precedent-setting judgments which have helped to improve the lives of refugees. Although they are formally granted many of the rights afforded South African citizens including the right to health care, education and social assistance, in attempting to convert these legal rights into effective protection, refugees face significant obstacles in ways that harm them and the communities in

²⁵³ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 41.

²⁵⁴ David Cote & Jacob van Garderen 'Barriers and challenges to public interest litigation in South Africa' *Paper presented at the annual meeting of the Law and Society Association, Renaissance Chicago Hotel, Chicago, IL, May 27, 2010* Available at http://www.allacademic.com/meta/p408551_index.html [Accessed 22 September 2010].

which they live.²⁵⁵ Having access to the country's courts has helped to remove some of these obstacles.

The highlighted cases also show that in litigation involving refugees, as with other disadvantaged persons, what is often at stake is more than the particular right implicated, but also the inherent dignity and worth of the human person. As the court noted in *Watchenuka* for instance, the right to work is not merely a restriction on a person's capacity for self-fulfilment, but a restriction on his or her ability to live without positive humiliation and degradation. By being able to resort to the courts to have such a restriction removed, refugees and asylum seekers are given avenues to have their dignity restored. Access to justice for refugees and asylum seekers therefore needs to be seen within the broader context of human dignity and equality since it enables them not just to challenge injustice, but to have their worth as human beings acknowledged and upheld. Thus, when South Africa protects, promotes and fulfils refugees' right to access to justice, it is affirming their worth as persons, not as problems.

Having established in this chapter that the South African Constitution contains adequate guarantees regarding all these elements of access to justice, it is pertinent, since merely having those guarantees does not translate into automatic enjoyment, to look at the measures in place to give them effect. The next chapter therefore looks at the legislative and policy frameworks in place to facilitate access to justice for refugees in South Africa.

²⁵⁵ Landau (note 134 above) 309.

Chapter Four

Policy and Legislative Efforts on Access to Justice in South Africa

*Justice is itself the great standing policy of civil society;
any eminent departure from it lies under the suspicion of being no policy at all.*¹

4.1 INTRODUCTION

The preceding chapter established that there is a generally good convergence between South Africa's constitutional guarantees on access to justice and the standards set in international law. It was shown that the guarantees that exist are applicable to citizens and non-citizens alike, by virtue of the universal applicability of the Constitution to all persons in South Africa. The chapter went on to show that beyond the fact of their applicability to refugees however, certain aspects of the guarantees have unique implications for the access to justice needs of refugees and asylum seekers, and these need to be specifically addressed if South Africa is to meet its obligations to them. In this regard, I identified the issues of equality, proficiency in court languages, access to legal assistance, the use of non-state justice systems and the implications thereof, as well as the importance of the rules of *locus standi* contained in the Constitution. I showed that generally speaking, the constitutional guarantees on these aspects afford many rights to refugees and asylum seekers. It is trite, however, that the recognition of rights does not necessarily translate into their enjoyment – steps need to be taken to give them effect. Usually, such steps are manifested in legislation, policies and programmes. In the celebrated case of *Government of the Republic of South Africa and Others v Grootboom and Others*,² the Constitutional Court succinctly articulated this connection between the enjoyment of rights and the legislative, programmatic and policy actions of the government, when it observed:

The State is obliged to act to achieve the intended result, and ... legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also

¹ Edmund Burke *Reflections on the Revolution in France* 1791.

² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations³

This dictum establishes clearly what is expected of the State, if the rights outlined in chapters two and three of this thesis are to be enjoyed by refugees and asylum seekers. Put simply, the State needs to act. It needs to act by adopting legislation; by making policy and creating programmes; and lastly, by implementing, in a reasonable manner, those policies and programmes.

In furtherance of the objective of evaluating how well South Africa meets the access to justice needs of refugees therefore, this chapter will examine what policy, programme and legislative measures the State has taken to give effect to the guarantees contained in the Constitution. I will look specifically at how the needs of refugees and asylum seekers are articulated in the pieces of legislation, policy documents and programmes that have been adopted at various points to address access to justice in the country. The focus will be on those elements previously identified in chapter three, and reference will necessarily be made to the position in international law and the Constitution, in order to establish the strengths or weaknesses of the legislations, policies and programmes under discussion.

My main argument in this chapter is that, notwithstanding the constitutional framework which undergirds them, the policies and programmes which are meant to address problems related to access to justice largely ignore South Africa's obligations to refugees. Its commitments to refugees under international law appear to have no bearing on its programming for access to justice, and as a result, the peculiar vulnerabilities which make accessing justice difficult for refugees and asylum seekers are not addressed. It is hoped that by the end of this chapter, a clear picture will have emerged, of the shortcomings in the policy and programmes and that the picture which emerges will help one to understand the experiences which the next chapter describes.

Since South Africa only officially began receiving refugees in the 1990s, this chapter will focus only on those access to justice legislations, policies and programmes adopted since the beginning of the democratic dispensation, with brief references to previous era to provide a context for the discussion.

³ Ibid, para 42.

4.2 A HISTORICAL OVERVIEW OF POLICIES, PROGRAMMES AND LEGISLATIVE MEASURES ON ACCESS TO JUSTICE SINCE 1994

Former Justice Minister, Dullah Omar, once observed that under apartheid, the larger proportion of the South African populace was victim of the justice system rather than beneficiaries of it.⁴ The system of justice, he noted, was moulded around the needs of the white population, which made up 20 per cent of the national population, while the remaining 80 per cent had marginal services that were segregated and of a low standard.⁵ Even if there were any desires to challenge the status quo, the judiciary was significantly constrained by various laws which curtailed its powers.⁶ Courts could not declare an Act of Parliament invalid because it violated human rights. The only grounds on which they could declare an Act invalid was if it had not been passed in accordance with laid down procedure.⁷ Very little could, therefore, be achieved by recourse to the courts for violations of human rights. The whole system in short, was designed to stifle access to justice, at least with respect to human rights for some sections of society. There was therefore need, post-apartheid, to overhaul the legal system and use it to promote social justice.

The first major attempt to do this and make it more representative of the needs of the populace, came in 1997, when the then Department of Justice (DoJ) developed the ‘Justice Vision 2000’ policy framework. The framework was described as the basis for making systematic changes to the justice system in order to bring the administration of justice in line with the Constitution and the new democratic values. It laid out a five-year national strategy to identify and eliminate weaknesses in the justice system, while creating a legitimate, effective, accountable and accessible justice system.⁸ The document sought to advance a conceptualisation of justice that was predicated on the all-inclusive policy of ‘ensuring justice for all’. In keeping with the values of constitutionality, democracy and equality, the DoJ sought to move towards a human rights-based rule of law paradigm. Seven key result areas for transformation of the justice system were identified, *viz*:

- an integrated, efficient and representative Department of Justice;

⁴ Dullah A Omar *Justice Vision 2000: And justice for all – five year national strategy for transforming the administration of justice and the state legal affairs* (Pretoria: Department of Justice, 1997) iii.

⁵ *Ibid.*

⁶ Ian Currie & Johan de Waal *The Bill of Rights handbook* 5th ed (Cape Town: Juta, 2005) 3.

⁷ *Ibid.*

⁸ Justice vision 2000 (note 4 above).

- a legitimate, service-oriented and efficient system of courts and other structures administering justice that is staffed by people who represent everybody in South Africa;
- safety, security and freedom from crime for everybody in South Africa;
- fair and equal access to justice for all taking into account the diversity of people's needs;
- effective and efficient human resources development systems;
- a well trained, broadly representative, accessible and evenly distributed legal profession; and
- effective and efficient provision of legal and legislative services to the state.⁹

The Vision 2000 policy document remains South Africa's primary policy on the administration of justice in the country. Most relevant to this thesis is the fourth objective in the list above, i.e. 'fair and equal access to justice for all, taking into account the diversity of people's needs'. I will now examine how the State has given effect to it.

4.3 EQUALITY OF ACCESS

Preceding chapters have shown that both under international law and under the Constitution of South Africa, the notion of 'equality' is critical to the conceptualisation of access to justice. Chapter two established the existence of a right under international law, of everyone, 'regardless of nationality or statelessness ... whether asylum seeker or refugee' to enjoy within the territory of a State Party to the ICCPR, equal access to justice without discrimination.¹⁰ Such equal access, it was shown, has two dimensions, namely equal access to court¹¹ and to equal treatment by that court without any discrimination.¹² Chapter three then showed that the notion of equality of access also finds expression within South Africa's Constitution. The chapter discussed the equality provision contained in s. 9 of the Constitution, showing that the provision applies generally in respect of all rights contained in the Constitution, and thus includes the right of access to justice contained in ss. 33, 34, 35

⁹ Ibid.

¹⁰ Human Rights Committee General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007) para 9.

¹¹ *Oló Bahamonde v Equatorial Guinea* Communication No 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993) Para 9.4.

¹² General Comments 32 (note 10 above) para 8.

and 38 of the Constitution. In its interpretation of what that equality provision means in relation to access to justice, the Constitutional Court has stated that it means that all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access'.¹³

It was asserted in chapter three¹⁴ that in view of the foregoing, any policy designed to promote access to justice must place emphasis on equality of access, and such equality must be substantive rather than mere equality on paper. Achieving such substantive equality may require different treatment of different categories of people; a failure to differentiate may in fact, be construed as discriminatory action.¹⁵ In order to achieve substantive equality, there is therefore need to recognise the diversity of circumstances and needs represented in society, which may require the adoption of special measures to help certain categories of people. In particular, I highlighted the position of those who may be classified as vulnerable persons, such as refugees and asylum seekers, and the need to adopt measures which adequately address their vulnerabilities and ensure that they have equal access to justice.¹⁶

The language in which the goal of access to justice is formulated in the Vision 2000 policy document suggests that the State is cognisant of these issues. The goal, phrased as 'fair and equal access to justice for all, taking into account the diversity of people's needs' reflects an intention on the part of the State to act in line with the constitutional and international law standards regarding equality. The use of the word 'equal' clearly suggests that intention, and the qualifying statement '*taking into account the diversity of people's needs*' reflects cognisance of the fact that going beyond formal equality to achieving actual or substantive equality, may require taking different measures to meet different needs. The question then is: do the legislation, programmes and strategies adopted to give effect to this goal reflect that intention? Do they actually ensure equality of access for refugees and asylum seekers, who after all, are included in the term 'all'?

¹³ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) 325, para 24; similar to the equality of treatment positions taken variously by the ACHPR and the ECtHR. See generally *Avocats sans Frontières (on behalf of Bwampamyé) v Burundi* (2000) AHRLR 48 (ACHPR 2000) para 27; *Bulut v Austria* (1996) 24 EHRR 84, para 47.

¹⁴ Section 3.6.1.

¹⁵ *Ibid.*

¹⁶ Chapter three, sections 3.6.1 and 3.6.4.

4.3.1 Refugees as vulnerable persons

As has been previously stated, the first step towards ensuring equal access to justice for all, is to recognise as vulnerable persons, those categories of people who face greater barriers when they attempt to access justice. The policy and programmes should then reflect practical efforts to address the challenges that they face.

There are indications that the DoJ has attempted to do this. In 2005, a ‘Chief Directorate: Promotion of the Rights of Vulnerable Groups’ was created to improve the efficiency of the court system for vulnerable persons.¹⁷ The mandate of the chief directorate was to develop policies to support the implementation of legislation and programmes to protect and promote the rights of the vulnerable in courts, to coordinate efficient and effective service delivery, to monitor and evaluate the impact of legislation and policies on courts and the justice system, and to develop effective and efficient information management systems. Vulnerable groups are defined to include women, children, the elderly and the disabled.¹⁸ In furtherance of the objective of improving access to justice for these categories of people the DoJ adopted a Gender Policy Statement to address some of the legal challenges women face, including issues of sexual and domestic violence and child maintenance; child justice issues and creation of family courts.¹⁹ It also adopted a ‘Service Charter for Victims of Crime’ in order to give additional support to victims of crime and reduce the secondary victimisation that is frequently experienced, especially by women and children, which often leads to withdrawal of charges.²⁰

Several pieces of legislation have also been passed in furtherance of the objective of improving access to justice for vulnerable persons. These include the Child Justice Act,²¹ which establishes a child justice system for children in conflict with the law. Since it applies

¹⁷ Available at www.justice.go.za [Accessed 14 November 2010].

¹⁸ Department of Justice *Annual Report 2006/2007*, Part Two (Pretoria: Justice and Constitutional Development, 2007) 59; The Department reports that R10 million was allocated for 35 buildings to be made fully accessible for the disabled and the elderly in the 2006/07 financial year.

¹⁹ Department of Justice ‘Gender policy: 1999’. Available at http://www.justice.gov.za/policy/gender/1999_GenderPolicy_CHP03e.pdf Accessed 12 October 2010.

²⁰ Department of Justice ‘*Service Charter for Victims of Crime in South Africa*’ 2007, Available at www.justice.go.za [Accessed 14 November 2010].

²¹ Act 75 of 2008.

to every child in South Africa,²² this Act applies to refugee children and asylum seeking children, whether accompanied or unaccompanied. Therefore refugee children who find themselves before South African courts have the benefit of the special treatment afforded by the Act. Before the enactment of the Child Justice Act, the Criminal Procedure Act of 1977 determined how such children were dealt with. With the coming into effect of the Child Justice Act, children accused of crimes will be treated in accordance with the child justice process that the Act establishes and not in terms of the normal criminal procedure applicable to adults. The Act aims to ensure that child justice matters are managed in a rights-based manner, and that children suspected of committing crimes receive assistance to turn their lives around and become productive members of society.²³

Other laws which have been passed in furtherance of protecting vulnerable groups and improving their access to justice include the Criminal Law (Sexual Offences and Related Matters) Amendment Act²⁴ which is designed to aid in country's fight against sexual crimes particularly vulnerable persons such as women, children and people who are mentally disabled,²⁵ the Maintenance Act²⁶ which aims to ensure a sensitive and fair approach to the determination and recovery of maintenance;²⁷ the Domestic Violence Act,²⁸ which aims to afford the victims of domestic violence the maximum protection that the law can provide and eliminate domestic violence²⁹ which is primarily perpetrated against women and has been described as 'one of the most prominent features of post-apartheid South Africa'.³⁰

Clearly these steps, particularly the creation of a directorate on vulnerable persons, represent positive action by the State to ensure equal access to justice. But what about the glaring omission of refugees and asylum seekers, or migrants generally, as a category of vulnerable persons? This omission is incomprehensible, considering the enormous amount of

²² Section 4, Child Justice Act.

²³ Department of Justice 'Child Justice Act 2008'. Available at <http://www.justice.gov.za/vg/childjustice.html> [Accessed 19 October 2010].

²⁴ Act No. 32 of 2007.

²⁵ Chapters 1-4, 7.

²⁶ Act No. 99 of 1998.

²⁷ Ibid, preamble.

²⁸ Act No. 116 of 1998.

²⁹ Ibid, preamble.

³⁰ Lisa Vetten 'Addressing domestic violence in South Africa: Reflections on strategy and practice' Centre for the Study of Violence and Reconciliation. Available at www.csvr.org.za [Accessed 23 October 2010].

evidence that shows that this group of people face significant challenges when accessing services, due to negative public perception and widespread discrimination.³¹ The Constitutional Court has gone so far as to state that in view of the severe levels of discrimination that they face, non-citizens in South Africa are a vulnerable group.³²

Even with regard to access to justice specifically, there is ample evidence to suggest that refugees and asylum seekers face significant challenges that effectively deny them any kind of access.³³ The following excerpt from a report by the Consortium for Refugees and Migrants in South Africa, describes how the actions of the communities they live in serve to deny access to justice to refugees and asylum seekers:

In many cases, victims of xenophobic violence are unable to access justice. Perpetrators are often not held accountable which results in a perception of impunity for crimes against foreign nationals. In a number of cases, victims of xenophobic violence are intimidated into dropping charges in return for reintegration or are too afraid to press charges against perpetrators. There is a need to improve the accountability of perpetrators of xenophobic violence by fast tracking such cases through the courts. This reduces the opportunity for other community members to lobby for charges to be dropped and enables plans for reintegration or other solutions to proceed.³⁴

³¹ Busani Tshabangu *et al* 'Violence against foreigners in North-West Province' *Migrants Rights Monitoring Project Occasional Report*, Forced Migration Studies Programme, University of the Witwatersrand, June 2007; Nahla Valji 'Creating the nation: The rise of violent xenophobia in the new South Africa' (Masters Diss., York University, Toronto, 2003); Jean Pierre Misago *et al* 'Towards tolerance, law, and dignity: Addressing violence against foreign nationals in South Africa' (Johannesburg: International Organization for Migration, 2009).

³² *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) 17-20, 23.

³³ Loren Landau 'Attacks on foreigners in South Africa: More than just xenophobia?' (2008) 2 *Strategic Review for Southern Africa* 1–23; Vincent Williams 'Xenophobia in South Africa: Overview and analysis' (2008) 3 *Perspectives* 2–6; Tara Polzer & Kathryn Takabvirwa 'Just crime'? Violence, xenophobia and crime: Discourse and practice (2010) 33 *SA Crime Quarterly* 3–10; Jonathan Crush 'The dark side of democracy: Migration, xenophobia and human rights in South Africa' (2000) 38 (6) *International Migration* 103–133; Jonathan Crush (ed) *The perfect storm: The realities of xenophobia in contemporary South Africa* Migration Policy Series No 50 (Cape Town: Southern Africa Migration Project, 2008); South African Human Rights Commission *Report on the SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals* (Johannesburg : South African Human Rights Commission, 2010).

³⁴ Consortium for Refugees and Migrants in South Africa 'Taking action on threats of xenophobic violence: recommendations for the Inter-Ministerial Committee' Available at <http://www.cormsa.org.za/wp-content/uploads/2010/06/recommendations-to-the-imc-on-xenophobic-violence-june-2010.pdf> [Accessed 15 October 2010].

Clearly, xenophobic actions by local communities act as a barrier to refugees' access to justice. But this problem is not a malaise that affects only ordinary members of local communities who do not know better; there is another dimension to the problem, one which shows that even the justice system itself, denies access to justice to refugees. Fuller and Valji note that African foreigners are often worst affected by violent crime and their situation is compounded by the fact that they are not afforded the same protection by the state, either because of their status or because of similarly xenophobic attitudes among officials, which leads to them being victimised.³⁵

While these attacks are obviously against foreigners of African origins generally, refugees and asylum seekers make up a large percentage of this demographic.³⁶ Facing xenophobia from the general populace and from law enforcement has the effect of twice victimising refugees and asylum seekers – xenophobic attacks harm them physically, psychologically and economically, and secondly, xenophobic tendencies prevent them from accessing justice. Further support for why South Africa needs to address the needs of refugees specifically is found in the commitments it made in international law, when it became party to the UN Refugee Convention and the OAU Refugee Convention. International law recognises refugees as a different class of migrants and the obligations that hosts states have to them is more clearly defined than economic migrants for instance. South Africa's failure to acknowledge refugees and asylum seekers as vulnerable persons in the policy is therefore, not just a matter of ignoring the scholarly or media evidence, it also represents a choice to ignore South Africa's commitments in international law.

As hosts of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance,³⁷ South Africa is well aware of, and has adopted the Durban Declaration which highlighted several steps the State needs to take in respect of access to justice for refugees and migrants. Among these, significantly enough, is paragraph 11 of the Durban Declaration, which encourages States, including South Africa, to identify

³⁵ Romi Fuller & Nahla Valji 'South Africa: Scarcity sets fire to country's xenophobic tinderbox' *Business Day* 22 May 2008.

³⁶ Marie Wentzel *et al* 'Contemporary South African migration patterns and intentions' in Pieter Kok *et al* (eds) *Migration in South and Southern Africa: Dynamics and determinants* (Cape Town: Human Sciences Research Council, 2006) 175.

³⁷ Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance UN Doc A/ CONF.189/12 (2001).

factors which prevent equal access to the administration of justice, and to take appropriate measures to remove the obstacles identified. As I have said, the first step towards doing this is to recognise in the policy that refugees constitute a vulnerable group. Paragraph 81 of the Durban Declaration also encourages States to prohibit discriminatory treatment against foreigners in access to justice. Paragraph 30(e) of the Durban Declaration also encourages South Africa to ensure that the police treat migrants in a dignified and non-discriminatory manner, in accordance with international standards. Furthermore, as a party to the International Convention on the Elimination of All Forms of Racial Discrimination,³⁸ the state has an obligation to protect persons who are facing discrimination. The first obvious step towards such protection would surely be to recognise them as a vulnerable group and ensure that they are not excluded from any efforts or initiatives to ensure vulnerable groups have access to justice.

In view of this kind of evidence, it is submitted that the failure to recognise refugees and asylum seekers as vulnerable persons constitutes a policy failure, insofar as it means that no specific measures are put in place to address the vulnerabilities which makes equal access to justice difficult for them. This is indeed the case. There is no programme within the justice system that is specifically tailored towards addressing discrimination or xenophobia towards migrants generally or refugees and asylum seekers in particular.

The situation is unfortunately the same in respect of legislation. South Africa has not adopted any legislation specifically addressing xenophobia, although by virtue of its adoption of the Durban Declaration, it ought to do so. Paragraph 68 of that Declaration encourages States to adopt and implement national legislation that expressly and specifically counters racism, racial discrimination, xenophobia and related intolerance whether direct or indirect, in all spheres of public life in accordance with their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. There is sufficient evidence to suggest that the such legislation has been under contemplation for a while. There are frequent references in speeches by officials of the DoJ to a 'Bill on the Prevention and

³⁸ GA Res 2106 (XX), Annex, 20 UN GAOR Supp (No 14) at 47, UN Doc A/6014 (1966), 660 UNTS 195, entered into force 4 January, 1969.

Combating of Hate Speech, Racial Discrimination, Xenophobia and Related Intolerance'.³⁹ But thus far, no such Bill has been placed before Parliament.

At present, all cases involving racial discrimination, hate speech and harassment are currently dealt with in terms of Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act).⁴⁰ The DoJ's goal of implementing the constitutional provisions on equality and dignity has been helped in large parts by the passage of the Equality Act which was created to deal with the issue of unfair discrimination.⁴¹ Under the Act, specialised Equality Courts were established to deal with unfair discrimination cases other than those relating to employment equity and every High Court is designated Equality Court for its area of jurisdiction.⁴² In terms of access to justice, the Equality Courts have helped to improve physical access to the country's courts for disabled persons.⁴³

Unfortunately, there are as yet no reported Equality Court cases in which refugees have taken up the issue of xenophobia in relation to access to justice. However, an ongoing case is set to change that. In fact, this case could potentially force to State to re-define its access to justice policy, such that the issue of xenophobia as a barrier to accessing justice is addressed.

³⁹ See for instance Speech by Mr. Andries Nel, MP, Deputy Minister of Justice and Constitutional Development during the Debate on Budget Vote 23: Justice and Constitutional Development in the National Assembly on Wednesday, 5 May 2010.

Available at http://www.justice.gov.za/m_speeches/2010/20100505_depmin_budgetvote.html [Accessed 29 January 2011].

⁴⁰ Act No 4 of 2000.

⁴¹ By virtue of s. 9(5) of the South African Constitution, some forms of discrimination aimed at addressing the imbalances of the past may be acceptable practices. These are deemed to be fair and lawful and are seen as positive discrimination. In determining whether a discrimination is unfair, the courts have set out some useful guides: In *Larbi-Odam v. MEC for Education (North West Province)* 1998 (1) SA 745 (CC) Mokgoro J stated the determining factor to be the impact of the discrimination on the appellants, the nature of the group affected, the nature of the power exercised and the nature of the interest involved. Para 23. And in *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC), the Constitutional Court stated that the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly the more invasive the nature of the discrimination, the more likely it will be held to be unfair. Para 112.

⁴² Department of Justice *Equality Act booklet* (Pretoria: Department of Justice and Constitutional Development, 2003).

⁴³ See Article 13 International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, GA Res 61/106, Annex I, UN GAOR, 61st Sess, Supp No 49, at 65, UN Doc A/61/49 (2006), entered into force 3 May, 2008.

The case is related to the infamous xenophobic attacks that rocked South Africa in May 2008. As can be seen from above, those attacks were neither sudden nor unprecedented, since over the years, there had been several incidents. One such incident had just occurred a couple of months before, in the Zwelethemba Township near Worcester in the Western Cape. Victims alleged that during the attacks that targeted Ethiopian and Somali traders, local police stood by and offered no assistance as shops were looted. It was alleged that some even encouraged the looters and laughed as this went on. They also alleged discrimination, saying that a number of South African-owned businesses were protected while foreigner-owned stores were ignored. Such a situation obviously goes against the spirit of s. 9(1) of the Constitution which guarantees equal protection of the law. Equal protection of the law requires that law enforcement work to protect refugees just as it does other members of society. But it was not only during the attacks that the right to ‘equal protection and benefit of the law’ for refugees was violated. Victims allege that efforts to report the matter to the police afterwards were systematically thwarted, thus denying them access to justice. They further alleged discrimination during subsequent investigations into the attacks.⁴⁴

The University of Cape Town Law Clinic (UCT Law Clinic) brought a case in the Equality Court against the Minister of Safety and Security, the national and provincial police commissioners and the station commissioners of Worcester and Zwelethemba police stations on behalf of eleven of the foreigners whose properties were destroyed in the violence. The suit, *Said and Ten Others v Minister of Safety and Security and Four Others*⁴⁵ seeks *inter alia*, a structural interdict requiring the police to establish a training program aimed at instructing police officers on dealing with the rights of refugees in a sensitive manner; an order compelling the respondents to fulfil their duties to provide safety and security to all including foreigners and to conduct a full investigation into the discriminatory practices of the police. They are also claiming R5.7 million in damages and an apology from government authorities.

From a strategic litigation perspective, the potential impact of this case is significant. The UCT Law Clinic believes that a ruling in its clients’ favour would impress upon the police and security services that their obligation to protect is not limited to South African

⁴⁴ These allegations are contained in court documents in a case instituted by victims. See note 45 below

⁴⁵ Cape Town Equality Court – Case No: EC13/08 CPD.

citizens.⁴⁶ The structural interdict in particular, if upheld, could help create a police force that is conversant with and respects the rights of refugees and asylum seekers. As the first point of contact in the quest for justice, a more tolerant police force resulting from this case would certainly improve access to justice for refugees and asylum seekers. It is hoped that this will help to bring an end to the situation described above where the justice system itself acts as a barrier to refugees in their quest for justice. Most importantly, the clinic believes that judgment in its clients' favour would help steer government towards developing the political will to deal with widespread xenophobia in both South African communities and government institutions.

4.3.2 Do measures to promote equal access to justice live up to South Africa's obligations?

Whereas the Constitution guarantees equal access to justice for all, and the Vision 2000 Policy document suggests that the State has the intention of ensuring such equal access, the evidence from the programmes and the lack of appropriate legislation demonstrated above, suggest that refugees and asylum seekers do not feature among the groups of people whose equal access the State wishes to guarantee. The failure to address xenophobia in particular is a glaring shortcoming of the State's policy and programming for access to justice. Negative perception and stereotyping of foreigners, which is prevalent in the country⁴⁷ makes recourse to the police, which is the first step to accessing the criminal justice system, an option that is not viable for refugees as it might result in further victimisation by the authorities.⁴⁸ Unfortunately, the policies and programmes on access to justice ignore this issue and as a result fail to address one of the most significant barriers to equality in access to justice for refugees and asylum seekers. The commitments made in terms of various international instruments on equality, discrimination and xenophobia and on refugees, do not appear to have had any bearing on South Africa's programming for access to justice, and as a result, the peculiar vulnerabilities which make accessing justice difficult for refugees and asylum seekers are not addressed. This is an issue of great importance to refugees access to justice

⁴⁶ Interviews with Fatima Khan, Varne Moodley, refugee attorneys at the University of Cape Town Law Clinic (12 September 2009).

⁴⁷ Bronwyn Harris 'Xenophobia: A new pathology for a new South Africa?' in Derek Hook & Gillian Eagle (eds) *Psychology and social prejudice* (Cape Town: University of Cape Town Press, 2002) 169.

⁴⁸ Ingrid Palmay 'Refugees, safety and xenophobia in South African cities: The role of local government'. Available at www.csvr.org.za [Accessed 28 July 2010].

and is discussed in greater detail in the next chapter, along with anecdotal evidence of the various forms in which it is manifested.

4.4 GREATER ACCESS TO LEGAL REPRESENTATION

Scholars generally agree that the biggest barrier to access to justice in South Africa is the high cost of legal services.⁴⁹ The average South African household would need to save a week's income in order to afford a one-hour consultation with an attorney. For black households (mostly poorer than the average), the barrier to access is even higher.⁵⁰ It is no wonder therefore, that the DoJ prioritised the improvement of access to legal assistance for the poor. This prioritisation is anchored on even stronger considerations than just a desire to help the poor – it is constitutionally mandated and has significant importance for the protection of other human rights. As was discussed in chapter three,⁵¹ s. 35(c) of the Constitution imposes a duty on the State to provide free legal representation to persons accused of a crime where substantial injustice would otherwise occur. The ruling of the court in *Nkuzi* demonstrates that there are certain instances where this duty also exists in civil cases.⁵² This is in line with the position in international law which, chapter two showed, requires States to provide legal representation in criminal matters if the accused cannot afford one, and in some civil cases if effective access to court cannot be had without it.

In South Africa, state-funded legal aid is the primary means for providing access to legal advice and representation for indigent persons who find themselves in conflict with the

⁴⁹ Afrimap 'South Africa: Justice sector and the rule of law - A discussion paper' (Johannesburg: Open Society Foundation for South Africa, 2005) 113; Jeremy Sarkin 'Promoting access to justice in South Africa: Should the legal profession have a voluntary or mandatory role in providing legal services to the poor?' (2002) 18 *South African Journal of Human Rights* 630, 630; Shadrack Gutto *Equality and non-discrimination in South Africa: The political economy of law and law-making* (Cape Town: New Africa Books, 2001) 262; Tina Kolhammar 'Poverty and legal empowerment: A minor field study of South African farm workers and dwellers' (Undated, Lund University, Sweden). Available at http://www.lucsus.lu.se/lep/Poverty_and_Legal_Empowerment_Tina_Kolhammar.pdf Accessed 22 January 2011.

⁵⁰ Afrimap (note 49 above) 262.

⁵¹ Section 3.6.3

⁵² *Ibid*; see also Jeremy Perelman 'The way ahead? Access-to-justice, public interest lawyering, and the right to legal aid in South Africa: The Nkuzi case' for an in-depth discussion on the potential impact of the Nkuzi case, and how public interest impact litigation can be used to drive the agenda of access to legal aid in South Africa' (2005) 41 *Stanford Journal of International Law* 357.

law. The body on which the duty rests to provide such representation is the Legal Aid Board (LAB). The LAB was already in existence before the adoption of both the 1996 Constitution and the Vision 2000 policy document, but to bring its operations in line with the new constitutional order, it required some overhaul. The following section provides a brief historical context for the discussion of the role of the LAB in promoting access to justice.

4.4.1 Historical background of legal aid in South Africa

As with most aspects of South African society, access to legal advice and representation and the role of the LAB has evolved in line with developments in the country's race relations.⁵³ In its early stages, the establishment of Legal Aid Bureaus was a matter of private initiative, with the South African Institute of Race Relations setting up the first legal aid offices in Johannesburg (1937) and in Cape Town (1941).⁵⁴ Others were subsequently established in Bloemfontein, Port Elizabeth, Durban Pietermaritzburg, and East London. The Bureaus were financially assisted with a grant from the Department of Social Welfare until 1 July 1953, when the Department of Justice took over control of all the Bureaus.⁵⁵ The government subsequently started a national legal aid scheme in 1962, but this never came into full operation and disintegrated fairly quickly.⁵⁶

Some of the Bureaus confined themselves to either civil or criminal cases, while the Johannesburg and Cape Town offices undertook both. The Johannesburg office extended its scope to include representation in political matters in the late 1950s and early 1960s. Given the political situation prevailing during this period, it was only a matter of time before this arrangement ran into trouble. A system that provided legal representation to persons seeking to challenge their subjugation obviously ran counter to the government's policy of elevating

⁵³ See generally Lovell Derek Fernandez *A comparison between the legal aid systems of South Africa and West Germany in theory and practice* (PhD Diss., University of the Witwatersrand, Johannesburg, 1984) 147-242.

⁵⁴ JD Hayman 'Legal aid for the poor in South Africa' (1944) 26 (3) *Journal of Comparative Legislation and International Law* 12-16.

⁵⁵ Fernandez (note 53 above) 199.

⁵⁶ GW Cook 'A history of legal aid in South Africa' in *Legal aid in South Africa* (Durban: University of Natal, 1974) 31-32; Geoff Budlender 'Lawyers and poverty: Beyond 'access to justice'' in John Hund (ed) *Law and justice in South Africa* (Cape Town & Johannesburg: Centre for Intergroup Studies and Institute for Public Interest Law and Research, 1998) 5.

one race while subjugating others – its own interpretation of justice, if the words of the then Secretary of the Cape National Party are anything to go by:

To gain a clear view regarding fair treatment and the rights of non-Europeans, we should first answer another question, and that is: do we stand for the domination and supremacy of the European or not? ... For if you stand for the domination and supremacy of the European, then everything you do must in the first place be calculated to ensure that domination.⁵⁷

The government's response to the Johannesburg Bureau's provision of legal aid in political cases was quite predictable – it terminated its subsidies as well as those of the Durban and Port Elizabeth Bureaus. The Cape office had closed earlier, having been crippled by inadequate funds. The enormity of the mass political trials led to the start of fund raising campaigns to raise money for these trials. After the trials, the South African Defence and Aid Fund was established to finance defence costs in political trials and support destitute families of political detainees. In 1966, the apartheid state outlawed the Defence and Aid Fund, on the grounds that some of its administrators were communists and it was being used for subversive activities.⁵⁸

In order to deflect political pressure occasioned by the banning of the Defence and Aid Fund, the LAB was established⁵⁹ to provide legal aid to indigent persons.⁶⁰ During its early years the LAB was grossly under-funded. It spent most of its budget on civil matters such as divorces and personal injury claims at the expense of criminal matters, and was for all intents and purposes, in hibernation.⁶¹ With the dawn of the democratic dispensation, things changed dramatically, in terms of the mandate of the Board and funding for it.⁶²

⁵⁷ Cited in Fernandez (note 53 above) 212.

⁵⁸ Cook (note 56 above) 31.

⁵⁹ By virtue of the Legal Aid Act, No 22 of 1969.

⁶⁰ Cook (note 56 above) 32; David Macquoid-Mason 'Legal aid services and human rights in South Africa' in Public Interest Law Institute *Making legal aid a reality: A resource book for policy makers and civil society* (Budapest: Public Interest Law Institute, 2009) 15.

⁶¹ Hennie van As 'Legal aid in South Africa: Making justice reality' (2005) 49 (1) *Journal of African Law* 54–72, 56.

⁶² David Macquoid-Mason 'South African models of legal aid delivery in non-criminal cases' available at www.justiceinitiative.org [Accessed 3 May 2007].

4.4.2 Statutory provisions on legal aid and mandate of the LAB

Firstly, to fully bring the LAB into compliance with the new role envisioned for it in a democratic State, its enabling Act was amended by virtue of the Legal Aid Amendment Act.⁶³ The amendment was designed to amplify the objects and powers of the Legal Aid Board, make provision for a Legal Aid Guide,⁶⁴ and set guidelines for granting legal aid. It also provided for the appointment of additional members to the Legal Aid Board.⁶⁵ The most significant purpose however, was that it made the principal legislation, the Legal Aid Act, of 1969, applicable throughout the Republic. Until the amendment, the so-called 'homelands' of the apartheid era had been excluded from its provisions. The amending Act also repealed corresponding legal aid laws of those homelands.⁶⁶

In the years since the transition to democracy, the LAB's functions have expanded tremendously, as the State has committed more resources towards ensuring that more people requiring legal assistance receive it. The exponential increase in the LAB's budget from R66.3 million in 1994-5 to about R917.4 million in the 2009/10 budget year is a clear illustration. This is largely due to the obligations that the Constitution and others pieces of legislation impose on the State to provide legal assistance. Apart from the Constitution, the other obligations for the State to provide legal assistance are further defined by the Criminal Procedure Act,⁶⁷ the Restitution of Land Rights Act,⁶⁸ the Extension of Security of Tenure Act⁶⁹ and the Child Justice Act.⁷⁰ The State endeavours to meet these obligations through the LAB. The LAB's main objective is to render or make legal aid available to indigent and vulnerable persons within its financial means⁷¹, as contemplated in the Legal Aid Act, and to provide legal representation at State expense as contemplated in the Constitution.⁷²

⁶³ Act No 20 of 1996.

⁶⁴ The Legal Aid Guide details the policies and procedures of the LAB for the provision and administration of legal aid. It is produced periodically, and the current one is *Legal Aid Guide 2009* (Cape Town: Juta, 2009).

⁶⁵ Legal Aid Amendment Act (note 63 above) Long Title.

⁶⁶ Ibid.

⁶⁷ Act No 51 of 1977, s. 73(2)

⁶⁸ Act No 22 of 1994, s. 29(2)

⁶⁹ Act No 62 of 1997.

⁷⁰ Note 21 above, s. 82.

⁷¹ Long Title, Legal Aid Act, as amended.

⁷² Annexure O, *Legal Aid Guide* (note 64 above) 268.

The term ‘indigent’ is not defined in the Legal Aid Act, but s. 3(a) empowers the LAB to publish periodically, a Legal Aid Guide that includes details of policies and procedures for providing and administering legal aid. By virtue of this, the LAB lays down a means test, which is revised from time to time. The means test determines indigence for the purposes of consideration for legal aid.⁷³ This is important, since resource constraints mean the LAB cannot provide unlimited legal aid to everyone who asks for it. Unfortunately however, critics maintain that its means test excludes large numbers of people, who though not indigent, are unable to afford private legal representation⁷⁴ – a situation that the LAB itself admits is undesirable.⁷⁵ With regard to vulnerable persons, the LAB identifies as vulnerable persons, ‘people, who may be at risk of being abused, unfairly discriminated against or exploited, eg women, children, people living with HIV, refugees, farm workers’.⁷⁶ As can be seen, refugees are classed among those who are considered vulnerable, and are therefore a target priority for the LAB’s services. How well this is demonstrated in practice will be discussed later on,⁷⁷ but first, I continue to look at the different pieces of legislation that define the mandate of the LAB in respect of different classes of matters.

4.4.2.1 *Criminal matters*

Since the introduction of the new Constitution, the LAB has had primary responsibility for providing legal aid in criminal cases where accused persons were unable to afford a lawyer because of indigence and ‘a substantial injustice would otherwise result’ if they were not represented.⁷⁸ This obligation is further defined in terms of s. 73 of the Criminal Procedures Act and ss. 82 and 83 of the Child Justice Act. The LAB has determined that the conditions

⁷³ *Legal Aid Guide* (note 64 above) 13. The current threshold is R5000 per month for individuals and R5500 per month for households.

⁷⁴ Hennie van As ‘Taking legal aid to the people: Unleashing local potential in South Africa’ (2005) 26 *Obiter* 187, 205; Jeremy Sarkin ‘Promoting access to justice in South Africa: Should the legal profession have a voluntary or mandatory role in providing legal services to the poor?’ (2002) 18 *South African Journal of Human Rights* 630, 632–633.

⁷⁵ Legal Aid Board ‘Annual Report 2006/07’ (Braamfontein: Legal Aid Board, 2007) 9.

⁷⁶ *Ibid*, 18.

⁷⁷ See section 4.4.3 below.

⁷⁸ S. 35(3)(g).

for providing legal assistance at state expense is met where the accused cannot afford the cost of legal representation and any of the following circumstances are present:

- if convicted s/he would probably receive a sentence of imprisonment of which the unsuspended portion would be more than three months, without the option of a fine, or if given the option of a fine, such fine would not be paid after two weeks from the imposition of the sentence;⁷⁹
- In criminal appeals, when a convicted person is sentenced to an effective term of imprisonment of more than 3 months and if given the option of a fine, the fine is unpaid 2 weeks after the date of sentence, and he/she is unable to afford legal representation.⁸⁰

4.4.2.2 *Civil matters*

Chapter three highlighted the fact that other than in matters affecting children, as set out in s. 28 of the Constitution, there are no other constitutional provisions which mandate the State to provide civil legal aid.⁸¹ Furthermore, there is no clarity in the jurisprudence regarding the obligations of the State with regard to civil legal since the courts have failed to delineate clear guidelines on the matter. It was, however, argued that in view of the lack of clarity in the jurisprudence regarding the right to legal assistance in civil matters, the position of the court in *Nkuzi* ought to be adopted because it fits in with the position under international law. Fortunately, the LAB has gone a step further than the courts in this regard. The Legal Aid Guide has established guidelines under which the LAB will provide legal representation in civil matters. Depending on the availability of resources and where substantial injustice would otherwise result, a litigant who is indigent in a civil matter will be granted legal aid if the matter has prospects of success, on a balance of probabilities.⁸² Specifically the following criteria will be taken into consideration:

- the seriousness of the issue for the person, for example, if the person's constitutional rights or personal rights are at risk;

⁷⁹ *Legal Aid Guide 2009* (note 63 above) Chapter 4 para 4.1.

⁸⁰ *Ibid*; para 4.1.1.

⁸¹ See chapter three, section 3.6.3

⁸² *Legal Aid Guide* (note 64 above) para 4.1.

- the complexity of the relevant law and procedure;
- the ability of the person to represent himself or herself effectively without a lawyer;
- the financial situation of the person; and
- the person's chances of success in the case.
- Whether the applicant has a substantial disadvantage compared with the other party in the case.⁸³

It is immediately obvious that the criteria set out correspond almost exactly with the guidelines laid down in international law as discussed in chapter two.⁸⁴ It also suggests that the LAB was swayed by the reasoning of the Land Claims Court in *Nkuzi*, since these criteria also reflect those set out there. This undoubtedly represents some progress in establishing clear guidelines on civil legal aid in South Africa. Unfortunately however, there is a severe shortcoming: the grant of civil legal aid, even when these criteria are met, is made subject to 'the LAB [having] the necessary resources and the other requirements of this Guide [being] met'.⁸⁵ In other words, the LAB has a wide, resource-related discretion on whether or not to grant civil legal aid. The effect of this limitation is predictable – the constitutional imperative to provide assistance in criminal cases means that the LAB's resources would be disproportionately dedicated to criminal legal aid at the expense of civil matters, and this is indeed, the case. For example, only 7 per cent (30 309) of new matters taken on by the LAB during the 2008/09 financial year were civil matters, and the rest (404 613) were criminal matters.⁸⁶ In other words, not much has changed in terms of the availability of civil legal aid.⁸⁷

Other matters in which the LAB has specific obligation to provide legal assistance are those related to children and to land matters. Its obligations to children are defined in s. 28(1)(h) of the Constitution which imposes a duty on the State 'to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result' In addition, the LAB has established a

⁸³ Ibid, para 4.9

⁸⁴ Section 2.7.5

⁸⁵ Legal Aid Guide (note 64 above) para 4.1.

⁸⁶ *South Africa Yearbook 2009/2010: Justice and Correctional Services*, (Pretoria: GCIS, 2010) 379.

⁸⁷ David Macquoid-Mason 'Access to justice in South Africa' (1999) 17 *Windsor Year Book of Access to Justice*. 230–251, 238.

unit to assist children in estate matters.⁸⁸ Its obligations in respect of land matters derive from the constitutional imperative to address the issues of land restitution and security of tenure. In terms of the Restitution of Land Rights Act and the Extension of Security of Tenure Act any party to a land restitution claim who cannot afford to pay for its legal representation before a Land Claims Court, is entitled to civil legal aid at State expense.⁸⁹ This provision has offered great advantages for land claimants, many of whom live in extreme poverty and do not have access to legal representation.⁹⁰

The section above has set out the statutory role of the LAB, as the primary means by which the State meets its obligations to provide legal assistance in terms of the Constitution and other legislation. The section below discusses how the State's obligations to refugees are met through the auspices of the LAB. The LAB's identification of refugees as a vulnerable group, and hence a priority target for its services, is the frame of reference for this discussion.

4.4.3 Access to legal aid by refugees and asylum seekers

Chapter two established the importance that international law attaches to the issue of legal assistance for refugees within the framework of access to justice.⁹¹ It was shown that, regardless of the formal recognition of their right to access to justice, refugees often face obstacles which stand in their way of getting justice. For this reason, Art 16(2) of the UN Refugee Convention confers on refugees the right to legal assistance in the territory of State Parties, to the same extent that citizens of State Parties enjoy legal assistance at State expense. The standard of treatment attached to this right is that referred to as 'treatment as favourable as that accorded to nationals of the host state'.⁹² Refugees in South Africa are thus, to be afforded the same right to legal assistance when it is required, to the same extent

⁸⁸ Legal Aid Board 'Annual Report 2009/2010' Available at <http://www.legal-aid.co.za/images/publications/annual-reports/annualreport2010.pdf> [Accessed 10 October 2010] 52.

⁸⁹ S. 29(2).

⁹⁰ Geoff Budlender 'Access to justice: Lessons from South Africa's land reform programme' in World Justice Project *Rule of Law Scholars Series, Volume II: Access to Justice* 2008.

⁹¹ Chapter two, section 2.7.

⁹² *Ibid.*

as South African citizens are.⁹³ This means that if South Africans are guaranteed a right to legal assistance in civil or in criminal matters, refugees must be entitled to the same. This would of course also mean that whatever limitations apply to citizens would also apply to refugees.

On the constitutional front, chapter two established that the right to legal representation contained s. 35 of the Constitution applies to every accused person in South Africa, including refugees and asylum seekers. This is further supported by the Refugees Act, which specifically guarantees to refugees all those rights contained in the Bill of Rights,⁹⁴ and this of course includes the right to legal representation as found in s. 35 of the Constitution. I argued that regardless of the lack of established guidelines regarding access to civil legal assistance at State expense, refugees ought to be afforded access to legal representation in civil matters, and especially so in certain cases, because of the nature of the issue at stake. Cases in point are matters relating to the adjudication of asylum, where failure could lead to *refoulement*, which for some, could be tantamount to a sentence of death or torture.⁹⁵ I have already established above that the LAB lists refugees among the categories of vulnerable persons who are its priorities. The terms under which refugees are entitled to legal aid from the LAB are discussed below.

4.4.3.1 Legal aid to refugees in criminal matters

The LAB does not have a section dedicated to refugees and asylum seekers, but matters involving them are addressed in the Legal Aid Guide. With respect to criminal matters, the Guide does make it clear that all indigent persons, including refugees and asylum seekers, who qualify for legal aid under the Guide and are physically resident in South Africa, are entitled to legal aid.⁹⁶ This provision certainly demonstrates an improvement, following the

⁹³ James Hathaway *The rights of refugees under international law* (Cambridge: Cambridge University Press 2005) 234.

⁹⁴ S. 27(b) of the Refugees Act provides:

‘ A refugee -

...

(b) 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;

⁹⁵ Chapter three, section 3.6.3

⁹⁶ Legal Aid Guide 2009 (note 64 above) para 4.2.

earlier discussed case of *S v Manuel*.⁹⁷ In that case, the LAB advised the magistrate that an accused person who was a refugee was not entitled to legal aid, following which his case was conducted without any legal representation and he was convicted. In overturning his conviction, the High Court established that all persons, including non-citizens, even if they were illegally in the country, were entitled to legal assistance in criminal cases if their right to a fair trial would be jeopardised without such representation. The position of the court in that case, which apparently has been adopted by the LAB represents the position in international law on the subject. The position of refugees and asylum seekers in respect of legal assistance in criminal matters is therefore that, where they are unable to afford private legal representation, and they pass the LAB's means test, they are entitled to have the services of a lawyer assigned to them free of charge, if substantial injustice would otherwise occur.

4.4.3.2 Legal aid to refugees in civil matters

With respect to the position of refugees and asylum seekers on civil matters other than asylum, unfortunately, the Legal Aid Guide is not as clear. Paragraph 4.2 of the Legal Aid Guide establishes clearly who qualifies for civil legal aid. It provides:

The LAB grants legal aid in civil matters to:

- All children resident in SA.
- Any indigent person who qualifies for legal aid under this Guide and who is both physically resident in the Republic of South Africa and a citizen or permanent resident of the Republic of South Africa.

Thus in order to enjoy legal aid in civil matters, a person has to be indigent in terms of the means test set out by the Legal Aid Guide; he or she needs to physically present in South Africa; *and* he or she needs to be a citizen or permanent resident of South Africa. This provision would automatically exclude all refugees and asylum seekers who are not permanent residents from accessing civil legal aid. In fact, it totally excludes every asylum seeker, because in terms of the Refugees Act, refugees need to have been so recognised for at least five years before they can apply for permanent residence.⁹⁸ Asylum seekers are persons who have not yet been recognised as refugees and so they cannot apply for permanent residence.

⁹⁷ *S v Manuel* 2001 (4) SA 1351 (W). Discussed in chapter three, section 3.6.3 of this thesis.

⁹⁸ Section 27(c) Refugees Act, No 130 of 1998.

Paragraph 4.2.1 of the Guide goes on to set out exceptions regarding residence, citizenship and permanent residence. It provides, *inter alia*, that ‘the requirement of ‘physical residence’ does not apply to cases involving *Asylum seekers* and the Hague Convention’. On the face of it, this provision appears to solve the problem that para 4.2 presents, but a closer reading shows that the wording is rather unfortunate, as it only serves to create confusion about the intentions of the LAB. Firstly, by specifically singling out *asylum seekers* for exemption from the requirement of residence, does this mean that physical residence is required for cases involving refugees? If this is the case, it would be very strange indeed. International law accords more rights to recognised refugees than it does to asylum seekers, as can be seen from the various standards of treatment that the UN Refugee Convention sets out.⁹⁹ This same approach is followed in the Refugees Act. Section 27 makes the rights contained in the Bill of Rights applicable to refugees, but not asylum seekers. For instance as noted above, refugees can apply for permanent residence, asylum seekers cannot. Refugees can apply for social grants, asylum seekers cannot. The paragraph as it stands, suggests that the LAB is turning around the different standard of treatment between both categories of people. It means that an asylum seeker who is not physically resident in South Africa (for example a Zimbabwean, newly-arrived at the Beit Bridge who applies for asylum) can receive civil legal aid in all matters in which the LAB provides such, but a refugee, who is not physically resident (for example studying on a scholarship in Botswana) cannot enjoy same.

Secondly, the phrase ‘cases involving asylum seekers’ seems to suggest that access to civil legal aid is attached to who is involved, i.e. asylum seekers, and not to the type of matter, i.e. asylum cases. Thus, it would seem that access to civil legal aid is available for an asylum seeker for matters such as divorce or evictions, for which the LAB provides legal aid.¹⁰⁰ However, this suggestion is contradicted by para 4.15 of the Legal Aid Guide. Under the heading of ‘Asylum Seekers’, it sets out the matters for which legal aid is available to asylum seekers, namely applications for asylum, determination of asylum or appealing the rejection of an application for asylum.

Given the incongruent situation between the rights of refugees and asylum seekers created by a literal reading of para 4.2.1, as well as the express enumeration of the categories

⁹⁹ Hathaway (note 93 above) 186-187.

¹⁰⁰ The civil cases for which the LAB may provide legal assistance are stated in Paras 4.9–4.19, *Legal Aid Guide 2009* (note 64 above).

of matters listed in para 4. 15, it is submitted that the wording of para 4.2.1 should be considered an unfortunate error, rather than the actual intention of the LAB. What the LAB probably intends, is to make the exception as to physical residence contained in para 4.2 applicable to ‘asylum cases’ rather than to ‘cases involving asylum seekers’, since it would not make sense to accord more rights to asylum seekers than to refugees, contrary to the positions of international law and the Refugees Act.

Even this probable reading leaves some lingering problems. If one accepts the probable explanation that what para 4.2.1 intends is that exclusion from the requirement of physical residence applies to legal aid for asylum seekers in asylum cases, rather than civil matters involving asylum seekers, then the express mention of asylum matters suggests that asylum seekers are excluded from accessing civil legal aid in all other matters. This would mean that in matters such as illegal evictions, which I have previously pointed out as a major problem for refugees and asylum seekers, they could not obtain legal aid.

Furthermore, since the exclusion contained in para 4.2.1 would apply only in respect of asylum seekers, refugees must fulfil the conditions in para 4.2 in order to qualify for civil legal aid. This means they must be indigent in terms of the means test, they must be physically resident in South Africa, and they must be citizens or permanent residents. An indigent refugee who is physically resident would *not* be able to access civil legal aid unless he is also a permanent resident. This constitutes a severe limitation on the right of refugees and, it is submitted, is a violation South Africa’s obligations under the UN Refugee Convention. As has been previously noted, Art. 16(2) of that Convention assimilates refugees to the status of nationals for the purposes of accessing legal aid. Refugees are therefore entitled to have civil legal aid when it is required, to the same extent that South African citizens do.¹⁰¹ As the primary body tasked with the provision of such assistance, the LAB ought not to exclude refugees from the services it provides in civil matters. By limiting the LAB’s assistance to processes that will lead to the grant or refusal of asylum, under para 4.15, the Guide places some severe limitations on both refugees and asylum seekers.

4.4.3.3 Legal aid to refugees in asylum matters

The importance of legal representation in asylum matters is clearly demonstrated in the literature. Various studies show that access to legal representation plays a critical role in the

¹⁰¹ Hathaway (note 93 above) 234.

outcomes of the refugee status determination process.¹⁰² Some indicate that a represented asylum seeker is four to six times more likely to win refugee recognition than an unrepresented one.¹⁰³ Another study showed that the represented applicant's chances were two times better than the unrepresented, and that even unconventional forms of legal aid, including limited services by supervised non-lawyers showed a positive impact on asylum seekers' cases.¹⁰⁴ This important connection between legal assistance and asylum is perhaps why much emphasis is placed on it in Western countries, where *pro bono* legal aid for asylum-seekers has become one of the most important developments in systematic refugee rights advocacy since the 1980s.¹⁰⁵ Refugees also usually have access to low cost legal aid, funded by the government.¹⁰⁶ The opposite is true for developing countries where refugees rarely have access to such services, although there have been recent efforts to address this. In January 2007 for instance, 15 refugee legal aid providers from developing countries met in Kenya and produced two instruments intended to spur the growth of legal aid for refugees.¹⁰⁷ Any efforts by the LAB in this regard would therefore represent positive development towards access to legal aid in asylum adjudication in Africa.

In terms of the Legal Aid Guide, the LAB provides legal representation not only for the initial application for asylum and the refugee status determination process, but also for appeals arising from asylum adjudication. The Legal Aid Guide makes allowance for the provision of legal aid to asylum seekers applying or intending to apply for asylum in terms of the Refugees Act. The criteria for accessing such legal representation are the same attached to

¹⁰² Andrew I Schoenholtz & Jonathan Jacobs 'The state of asylum representation: Ideas for change' (2002) 16 *Georgetown Immigration Law Journal* 739–772; Jonathan Klaaren & Chris Sprigman 'Refugee status determination procedures in South African law' in Handmaker *et al* (eds) *Advancing refugee protection in South Africa* (New York: Berghahn Books, 2008) 72.

¹⁰³ Schoenholtz & Jacobs (note 102 above) 739.

¹⁰⁴ Michael Kagan 'Frontier justice: Legal aid and UNHCR refugee status determination in Egypt' (2006) 19 (1) *Journal of Refugee Studies* 45–68, 54.

¹⁰⁵ *Ibid.*

¹⁰⁶ For example, Republic of Ireland has a 'Refugee Legal Service' section under its Legal Aid Board. The UK and Canada also have dedicated legal aid services for refugees and asylum seekers.

¹⁰⁷ Southern Refugee Legal Aid Conference (SRLAC) 'Model Rules of Ethics for Legal Advisors in Refugee Cases' (otherwise known as the Nairobi Code), 1 February 2007. UNHCR Refworld, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4700d1572> [Accessed 10 June 2007].

civil matters, as set out above.¹⁰⁸ However certain exceptions as to domicile and place of application are made.

Applicants for legal aid ordinarily have to be resident in South Africa,¹⁰⁹ but this restriction does not apply to asylum seekers. For this purpose of applying for legal aid in respect of an asylum matters, physical presence in South Africa at the date of application is sufficient.¹¹⁰ If the application for legal aid is in respect of the initial application for asylum in terms of Section 21 of the Refugees Act, an asylum seeker can make that application anywhere in the country. However, if the application for legal aid is for the purposes of the actual determination on refugee status in terms of S.24 of the Refugees Act; or a review of the decision regarding his refugee status by the Standing Committee on Refugee Affairs in terms of S.25 of the Refugees Act; or an appeal to the Refugee Appeal Board in terms of S.26 of the Refugees Act; such a person may also apply anywhere in South Africa, but his application will be sent to and handled only by Justice Centres in Pretoria, Johannesburg, Cape Town, Port Elizabeth or Durban since this is where the Tribunals hearing those matters are located.¹¹¹ This represents a change in the position of the LAB. Under the old Legal Aid Guide of 2002, such applications could only be made in any of those 5 cities, which meant asylum seekers applying for legal aid had to travel to any of those cities if they were to receive any assistance. This change augurs well for access to justice as it removes the barriers of distance and cost of travel for asylum seekers.

Where legal aid is granted for the purposes of the initial application for asylum in terms of Section 21 of the Refugees Act, the mandate of the legal practitioner instructed to represent the asylum seeker terminates once the application is lodged and the legal practitioner reports and accounts to the Board's Chief Executive Officer.¹¹² Considering the length of time it takes for the Department of Home Affairs to process asylum applications,

¹⁰⁸ *Legal Aid Guide 2009* (note 64 above) para 4.2

¹⁰⁹ Para 4.1

¹¹⁰ Para 4.15.1.

¹¹¹ *Legal Aid Guide 2009*, supra (note 64 above) Chapter 4 para 4.15.3. This changes the position under the old *Legal Aid Guide 2002* whereby the application could only be made in any of those 5 cities. See Peter J Brits *Legal Aid Guide 2002* (Cape Town: Juta, 2002) Chapter 3 para 12.2.

¹¹² *Ibid.* para 4.15.4.

this is a more judicious approach than to retain the practitioner until the asylum seeker's status is determined, which in the past has taken anything from six months to three years.¹¹³

Responsibility for processing applications for legal aid in respect of proceedings in terms of s. 24, s. 25 and s. 26 of the Refugees Act are vested in the legal aid officers in the Boards offices which are located in Pretoria, Johannesburg, Cape Town, Port Elizabeth and Durban. The legal aid officers then distribute legal aid instructions, giving preference firstly to co-operation partners who specialise in refugee matters, secondly to Justice Centres and thereafter to legal practitioners in private practice in accordance with the Board's applicable rotation list.¹¹⁴ The Guide makes provision for fees payable in respect of Asylum matters which are dealt with on a Judicare basis.¹¹⁵ This means that the LAB pays a private attorney a fee to represent a person who qualified for legal aid.¹¹⁶

The provisions concerning legal aid by the LAB for asylum matters appear to be well thought out and sufficient to address the needs of asylum seekers. It is rather unfortunate however, that evaluating actual performance, for the purposes of this study, has been impossible due to lack of data. In none of its annual reports over the years does the LAB feature any feedback on what legal assistance it has provided for refugees and asylum seekers. This is curious given the fact that the Board expressly describes its efforts to improve coverage to other vulnerable groups, including children, women, the rural poor, the landless and the aged.¹¹⁷ Refugees are conspicuously absent in this list. Repeated efforts to obtain data from the LAB on its refugee-related cases proved abortive. Interviews were sought with officials of the Board and despite repeated attempts, no one was willing to be interviewed. Visits to the Cape Town offices of the Board merely resulted in instructions to 'direct any enquiries to Pretoria'. Even then, repeated emails to the designated person remained unanswered. In the absence of any information, it is therefore impossible to measure any progress in this area. Given the silence of the LAB on its role in asylum matters, it can only

¹¹³ Jeff Handmaker 'Starting with a clean slate? Efforts to deal with asylum application backlogs in South Africa' in Handmaker *et al* (note 100 above) 117; Darshan Vigneswaran 'A foot in the door: Access to asylum in South Africa' *Migration Studies Working Paper Series No. 40* Forced Migration Studies Programme University of the Witwatersrand, 14.

¹¹⁴ *Legal Aid Guide 2009* (note 64 above) para 4.15.5.

¹¹⁵ *Ibid*, para 4.15.5, Annexure O.

¹¹⁶ Victor Ngaleka 'Legal Aid: The restructuring of the Legal Aid Board'. Available at http://sunsite.wits.ac.za/nadelproject/rcentre/rc_legalaid.html#custom [Accessed 6 June 2007].

¹¹⁷ See for instance annual reports 2007/08, 2008/09, 2009/10.

be assumed that this class of people do not feature highly in the groups of people to whom it provide access to legal representation.

4.4.4 Do the measures on access to legal representation meet South Africa's obligations?

It is generally accepted that access to legal representation for the poor and other vulnerable persons in South Africa is still largely inadequate,¹¹⁸ but scholars also admit that the LAB is one of the success stories of post-apartheid South Africa.¹¹⁹ Generally speaking, the statistics of service delivery alone are impressive. In the 2009/2010 financial year, it provided legal assistance in 416, 197 new legal matters, including 59, 266 matters which involved children.¹²⁰ It provided legal representation for criminal matters in every court in the country.¹²¹ The short-coming it seems lie in the provision of legal assistance in civil cases which make up only 10 per cent of its work.

However, with regard to refugees and asylum seekers, the absence of data on asylum matters suggests that LAB does not provide much in terms of legal assistance to refugees and asylum seekers. Furthermore, as the primary organ through which the State meets its obligations on free legal assistance, the LAB does not take cognisance of the fact that South Africa is obliged to treat refugees in the same way as nationals for purposes of legal assistance. This only serves to create an impression that South Africa's commitments to refugees and asylum seekers under international law, were not taken into consideration in the development of its guidelines on legal assistance. The LAB's requirement of permanent residence in respect of access to civil legal aid, and the limit of assistance to asylum matters for asylum seekers clearly demonstrate this. The unfortunate consequence of this is that, except in criminal matters, refugees and asylum seekers cannot turn to the LAB when they

¹¹⁸ Sarkin 'Promoting access to justice in South Africa' (note 73 above) 630; Lillian Artz 'Violence against women in rural Southern Cape: Exploring access to justice through a feminist jurisprudence framework'. Institute of Criminology, University of Cape Town (1999); David Macquoid-Mason 'The supply side: The role of lawyers in the provision of legal aid – some lessons from South Africa' in Penal Reform International and Bluhm Legal Clinic of the School of Law Northwestern University *Access to justice in Africa and beyond: Making the rule of law a reality* (National Institute for Trial Advocacy, 2007) 97.

¹¹⁹ International Commission of Jurists *Access to justice: Human rights abuses involving corporations – South Africa* (Geneva: International Commission of Jurists, 2010) 34.

¹²⁰ Legal Aid Board 'Annual Report 2009/2010' (note 88 above).

¹²¹ Ibid.

require legal assistance, and consequently are denied effective and equal access to justice if they cannot afford legal representation by themselves. This situation stands in stark contrast to what international law expects of South Africa, and whether or not it has any effect on refugees' access will be seen in the next chapter.

4.5 LANGUAGE AND EQUALITY OF ACCESS TO JUSTICE FOR REFUGEES

The notion of fair and equal access to justice, it was established in chapters two and three, requires that persons who are involved in court proceedings should be able to participate effectively in those proceedings. Both international law and the South African Constitution identify the issue of language proficiency as an important component of such fair and equal access.¹²² Thus, they confer on every arrested, detained or accused person, the right to be tried and to receive required information in a language that he or she understands. Where this is not possible, the State has an obligation to provide interpretation free of charge. Although this right is more properly articulated in the criminal context, it has been shown that the implications of the right for the very legitimacy of the justice system itself means that the right is not limited to criminal matters, but includes civil matters as well as those before administrative bodies.¹²³

Apart from the Constitution, there are other statutes and Rules of the Court which address the issue of language in the court system. The Magistrates' Courts Act¹²⁴ for instance provides for the provision of an interpreter if, in the opinion of the court, the accused is not sufficiently conversant in the language in which evidence is being given.¹²⁵ The High Court imposes a similar duty by virtue of Rule 61(1) of the Uniform Rules of Court which provides that where evidence in any proceedings is given in any language with which the Court or a party or his representatives is not sufficiently conversant, such evidence shall be interpreted by a competent interpreter, sworn to interpret faithfully and to the best of his ability in the

¹²² Chapter two, section 2.6.3 and chapter three section 3.6.2.

¹²³ Ibid; *R v Tran* (1994) 2 SCR 951, 975.

¹²⁴ Act 32 of 1944.

¹²⁵ Section 6(2):

If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in evidence or not.

language concerned. If in the opinion of the court it is expedient to do so, then the court may satisfy itself as to the competence and integrity of the interpreter.¹²⁶ The cost of such interpretation is borne by the State.¹²⁷

The issue of language proficiency is of particular relevance to refugees and asylum seekers in South Africa, most of whom, as stated in chapter one, come from countries where none of South Africa's official languages are spoken. The languages most commonly spoken among South Africa's refugees are French, Somali, Lingala and Swahili.¹²⁸ Thus, conducting cases in South African courts would present a significant challenge for them if competent interpretation were not available. Given this fact, it was argued in chapter three that in order to meet the access to justice needs of its refugee population, South Africa is obliged to address in its policy and programming for access to justice, any challenges which may arise as a result of linguistic limitations. Such policy and programme must consider and address issues relating to proficiency in local languages including the development of clear guidelines on this. It must also ensure adequate and competent interpretation across the entire spectrum of the justice system, from the police force, as the first point of contact in the criminal justice system, to all adjudicatory forums which s. 34 of the Constitution may cover. Such interpretation services must be available free of charge, in both civil and criminal cases, and must include measures to make would-be users aware that such services are available. I will now look at whether these issues have been addressed in the policy. I start by setting the general context of the country's policy on language use in the administration of justice.

4.5.1 Language policy in the administration of justice

Until the end of apartheid, English and Afrikaans were the official languages of the court in South Africa. With the transition to democracy and the adoption of a new Constitution, new obligations emerged for the government with regard to language use, including by the justice system. In addition to English and Afrikaans, Section 6 of the Constitution accords official language status to nine indigenous African languages whose usage and status were previously

¹²⁶ Rule 61(2), Uniform Rules of Court.

¹²⁷ Rule 61(3).

¹²⁸ Migrant Rights Monitoring Project 'National survey of the refugee reception and status determination system in South Africa' *MRMP Research Report* Forced Migration Studies Programme, University of the Witwatersrand, February 2009.

diminished.¹²⁹ All 11 are therefore, official languages of the court and may be used in proceedings, and ostensibly, as the language of record.¹³⁰

The DoJ has responsibility for developing a language policy for use in the justice system. However, as at 2010, no language policy has been adopted, although there has been talk of one for many years.¹³¹ This situation is indicative of the general government attitude, because, despite the constitutional bias towards multilingualism in South Africa, achieving it has not been a priority for the government.¹³² Several years after the advent of democracy, there is still no legislation to promote multilingualism as required by the Constitution. A South African Languages Bill has been in the pipelines since 2000, and has not yet been passed, although a recent High Court ruling which directs the government to enact a language act within two years holds out hope that that may soon change.¹³³

The absence of a policy does not mean however, that nothing has been done by the DoJ on the subject of languages to be used in the administration of justice. The DoJ has translated some laws into some or all of the 11 official languages,¹³⁴ and in 2009, it initiated an ‘Indigenous Language Pilot Project’ in 27 district courts countrywide through which it

¹²⁹ Section 6, 1996 Constitution:

1. The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
2. Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
3.
 - a. The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.
 - b. Municipalities must take into account the language usage and preferences of their residents.
4. The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

¹³⁰ In practice however, English and Afrikaans are still the only languages of record.

¹³¹ The Department’s annual reports from 2003/04 – 2009/10 all make reference to such a policy being developed.

¹³² Anne-Marie Beukes ‘The first ten years of democracy: Language policy in South Africa’ Paper read at Xth Linguapax congress on linguistic diversity, sustainability and peace, 20–23 May, 2004 Barcelona’ Available at http://www.linguapax.org/congres04/pdf/1_beukes.pdf [Accessed 19 May 2011].

¹³³ *Lourens v President van die Republiek van Suid Afrika en Andere* (49807/09) [2010] ZAGPPHC 19.

¹³⁴ Department of Justice ‘Annual Report 2009/10’ part 2, 196, Available at www.doj.gov.za [Accessed 3 March 2011].

promotes the use of indigenous languages as languages of the court and of record.¹³⁵ The project involves designating the most common language spoken by users of each court as the official language to be used in that particular court.¹³⁶

However, as laudable as these are, they do not make up for the absence of a language policy framework that enunciates the department's plans on the subject, and provides guidance on the establishment of measures that will help to improve linguistic accessibility as a component of equal access to justice. This lack of a language policy also has implications for refugees' access to justice, bearing in mind that the notion of effective access requires that a person be able to participate fully in any proceedings involving him or her. This has been expressed as the right to be tried in a language he or she understands or, where that is not possible, to have interpretation at State expense. I will now look at each of these aspects separately.

4.5.2 The right of refugees to be tried in a language they understand

The first implication of the lack of a language policy is to be found in the import of the right contained in s. 35(3)(k). That section, as established in chapter two, only confers a right to be tried in a language that one understands, not necessarily in one's language or a language of one's choice. The most important implication of this relates to proficiency in local languages. There is no doubt that the longer refugees settle in South Africa and intermingle with their hosts, the more likely that they will begin to understand some of the local languages. This then means that refugees who understand any of the official languages, can be tried in that language in court. However, in the interest of equal access to justice, it is important that all parties have enough linguistic competence that they can fully comprehend the implications of all that is being said and all that they say. As the court held in *S v Ngubane*,¹³⁷ partial understanding of a language is inadequate to meet the standard that s. 35(3)(k) imposes. A person must fully understand the language.¹³⁸ This is where the lack of a policy and established guidelines becomes a problem, for in the absence of clear guidelines, how is a refugee's proficiency in the local language to be determined? In discussing this issue, certain

¹³⁵ Ibid, 28.

¹³⁶ 2008/09 annual report, part 1, 11.

¹³⁷ *S v Ngubane* (1995) 1 BCLR 121 (T).

¹³⁸ Ibid, 122.

critical observations of scholars in this regard must be borne in mind. Moore and Mamiya for instance, note that immigrants who arrive in their new country as adults often only master the local language at a conversational level, rather than at a fully bilingual level.¹³⁹ Not only that, but the unfamiliarity, formality and the anxiety-inducing nature of court processes is such that it can have negative effects on a person's ability to express himself even in his home language, much less in a second language.¹⁴⁰ Since language is the means by which legal issues are formulated and resolved, it is very important that both sides are able to express themselves as clearly as possible, and the policy must reflect that standard.

But as already noted, no guidelines currently exist by which the proficiency of a person is tested. The closest thing to a guideline is found in the provision of the Magistrates' Court Act and the High Court Uniform rules of court referred to above.¹⁴¹ However, the standard set out there is very low. All that is required is that it should 'appear' to the magistrate that the accused is not sufficiently conversant with the language. This has been interpreted to mean that the judge or magistrate only needs to form an opinion as to whether or not the accused is conversant with the language of the witness.¹⁴² In other words, such determination is left to the discretion of each magistrate or judge, who then has to make an *ad hoc* and untrained guess as to the linguistic capacity of those appearing before them.

Not only could this situation lead to arbitrariness and the possibility of entrenching unequal access to justice for refugees and asylum seekers, it also puts judges themselves under additional pressure. Language is not simply a matter of words. It includes such things as idioms, colloquialisms, slangs and nuances that a non-native speaker may not pick up, but which are important for understanding a language.¹⁴³ Thus, not only do judges have to balance the interests of justice as guaranteed by the Constitution, they are also forced to

¹³⁹ Joanne I Moore & Ron A Mamiya 'Interpreters in court' in Joanne Moore & Margaret Fisher (eds) *Immigrants in courts* 2000 (Seattle & London: University of Washington Press, 1999) 32.

¹⁴⁰ Miguel Mendez 'Lawyers, linguists, story-tellers, and limited English-speaking witnesses' (1997) 27 *New Mexico Law Review* 77-100, 87; Sandra Del Valle *Language rights and the law in the United States: Finding our voices* (New York: Multilingual Matters, 2003) 172.

¹⁴¹ Notes 122 and 124 above.

¹⁴² *Geidel v Bosman NO and Another* 1963 (4) SA 253 (T), 255C-D; *Ohannessian v Koen NO and Another* 1964 (1) SA 663 (T) at 664.

¹⁴³ Marilyn Domas White *et al* 'Beyond dictionaries: Understanding information behavior of professional translators' (2008) 64 (4) *Journal of Documentation* 576.

undertake functions in a speciality they probably have no expertise in. Furthermore, discretion could be utilised in such a way that it goes against the principle of equal treatment.

One would expect that, especially in relation to non-citizens like refugees and asylum seekers, there would be guidelines requiring professional linguistic assessment. Guidelines help to remove arbitrariness and entrench objectivity, rather than subjectivity. They help to ensure equal treatment of all persons. This is the overall goal of the access to justice guarantees found in international law and under the Constitution. Thus, a language policy which recognises South Africa's obligations in respect of access to justice for non-citizens, including refugees and asylum seekers would address those kinds of issues. It would empower administrators to establish measures which address the need of trial judges to have effective and efficient assessment tests that will help them to determine whether a Congolese refugee who speaks Xhosa actually requires the help of an interpreter. The lack of such a policy, it is submitted constitutes a failure in this regard.

4.5.3 Is there a case for use of refugees' languages in court?

In *S v Saidi*,¹⁴⁴ the court highlighted the fact that there is 'an increasing demand for casual interpreters to render translation services for accused persons who are immigrants from other countries on the continent' and who are not proficient in any of the 11 official languages.¹⁴⁵ African migrants, said the court have become a significant feature of post-apartheid South Africa, and will invariably have encounters with the justice system.¹⁴⁶ The DoJ therefore urgently needs to address their requirements with regard to language interpretation. But should the justice system limit its intervention only to matters of interpretation? is there an argument that the DoJ ought to make provision for the use of one or more of the languages most commonly spoken by foreigners of African origins, such as Swahili or French given that they constitute a significant population group? This question is worth asking, in view of s. 6(5) of the Constitution.

That section, it is interesting to note, is a recognition by the Constitution that there are population groups within South Africa whose primary languages are none of the official languages listed in s. 6(1). It thus provides in Section 6(5)(a)¹⁴⁷ for the creation of a Pan-

¹⁴⁴ 2007 (2) SACR 637 (C).

¹⁴⁵ Ibid, para 19.

¹⁴⁶ Ibid, para 20.

¹⁴⁷ Section 6(5):

South African Language Board (PANSALB), which has the responsibility to promote and develop the country's official languages as listed in s. 6(1) as well as the Khoi, Nama, San and sign language. The Board also has the job of promoting and ensuring respect for languages 'commonly used by communities in South Africa, including German, Greek, Hindi, Portuguese, Tamil, Telegu and Urdu' as well as languages of religious significance such as Arabic, Hebrew and Sanskrit. It is clear from the wording of s. 6(5)(b)(i) that the list of languages whose use are to be promoted is not exhaustive, in that it refers to 'all languages commonly used by communities in South Africa including ...' Given the open-ended nature of the list, surely, if it can be established that French, for instance, or Swahili, is a language 'commonly used by communities in South Africa', then the PANSALB has an obligation to promote its use. An aspect of promoting the use of a language is its use in court.¹⁴⁸

Furthermore, utilising the criteria set out in s. 6(2) in respect of languages to be used by government in each province, i.e. 'taking into account the usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole' it is submitted that there is no reason why the DoJ cannot adopt one or more foreign African languages for use, if it meets that criteria. Thus, if it is established that a specific area with large migrant populations uses Swahili, court proceedings, especially in smaller courts serving those areas (such as community courts) could be conducted in such a language if it is practicable. There is an argument, deriving from the State's obligations to ensure access to justice for refugees and asylum seekers, that such a practice would better meet the goal of equality in access to justice.

However, there are several limitations to these arguments. Firstly, 'a State is never obligated to conduct all of its activities in every language which is spoken by the inhabitants of its territory'.¹⁴⁹ That would be too onerous a burden. Secondly, the State's first duty is to

A Pan South African Language Board established by national legislation must

- a. promote, and create conditions for, the development and use of
 - i. all official languages;
 - ii. the Khoi, Nama and San languages; and
 - iii. sign language ; and
- b. promote and ensure respect for
 - i. all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

¹⁴⁸ Koos Malan, Observations on the use of official languages for the recording of court proceedings (2009) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 141–145, 142.

¹⁴⁹ Fernand De Varennes *Language, minorities and human rights* (The Hague : Martinus Nijhoff, 1996) 121.

its citizens, and the focus of its efforts should be on advancing the use of South Africa's indigenous languages in courts. That is what the Constitution requires and it is quite clear that the duty of the State in respect of languages in common use is quite different to that with respect to indigenous languages. PANSALB is expected to create conditions for development of the indigenous languages, but only promote use of and respect for the languages in common use by communities. It is thus difficult to argue that there is an obligation for South Africa to use refugee languages in courts, or to establish courts which use those languages.

It does appear however that this is a possibility that the DoJ itself has considered. In its medium-term strategic framework, 2005/06-2008/09¹⁵⁰ the DoJ builds upon the goals set in the Justice Vision 2000 policy document and describes its strategy on how to deliver on its mandate going forward. One of its strategic objectives in the achievement of access to justice is the provision of services in all the official languages, as well as in sign language and Braille. Interestingly, it lists as one of its key performance indicators – the measurement of its performance/success in this regard – ‘Provinces with capability for most international and immigrant/refugee languages used in local areas by 2008/09’.¹⁵¹ Unfortunately, there is no available data on how far or how well the DoJ has done in terms of empowering all provinces to be able to use immigrant and refugee languages. According to the department, that idea is still in progress.¹⁵² It bears pointing out that while having these indicators point to the importance the DoJ attaches to the issue, the details may be a little more complicated given the fact that refugee populations vary by waves.¹⁵³ While Zimbabweans may predominate one year, the following year could be one in which Congolese refugees and asylum seekers dominate, and with them the language needs.

But while there is no obligation with regard to using the languages that refugees speak in court, there certainly is one with regard to their right to use those languages themselves

¹⁵⁰ Department of Justice ‘Medium-term strategic framework: Access to justice for all’ 2005/06 – 2008/09. [Pretoria: Department of Justice and Constitutional Development, 2005].

¹⁵¹ Ibid 21.

¹⁵² Email communication with Adv. Elias Mathe, Interpretation services, Department of Justice, Pretoria dated 23 May 2011.

¹⁵³ Loren B Landau & Aurelia Wa Kabwe Segatti ‘Human development impacts of migration: South Africa case study’ *United Nations Development Programme Human Development Reports Research Paper 2009/5* (April 2009) 14, 18.

and to be provided with interpretation that will enable them to do so. This is the second area which is affected by the lack of a language policy.

4.5.4 Refugees' right to interpretation

In terms of the Constitution, where it is impracticable to conduct a trial in a language understood by the refugee, the State has to provide interpretation free of charge. As shown in chapters two and three, the right to interpretation is not limited to oral testimonies in court but includes pre-trial proceedings, communicating rights upon arrest as well as the translation of documents which allow a person to effectively understand the case against him or her, and to have the benefit of a fair trial.¹⁵⁴ In criminal matters, this would include communication with the police and other law enforcement agents.

The South African Police Service (SAPS) forms part of the administration of justice, in view of its duties in relation to arrest, detention and trials in terms of s. 35 of the Constitution, and given that it produces documents required for court purposes. The lack of a language policy in the administration of justice therefore has implications not only in court, but also at the preliminary stages, with the police in criminal matters.

Section 35 of the Constitution entrenches several rights for accused and detained persons, each of which requires some language proficiency in order to be enjoyed. Arrested persons have the right to be informed of their right to remain silent and the consequences of not doing so; they have the right to be told why they are being detained; they have the right to be informed of their right to consult a legal practitioner, and of the right to have one assigned by the State if they cannot afford it. These rights of arrest and detention in s. 35 of the Constitution are to be read in conjunction with s. 39(2) of the Criminal Procedure Act¹⁵⁵ which require a person effecting an arrest to inform the arrested person of the reasons for his arrest. These rights are important because they enable an arrested and detained person to know the basis for his or her arrest and detention, and to challenge the lawfulness of it if they wish to do so. It also enables them to avoid self-implication and enjoy the right to be represented by a lawyer. These rights are in line with those accorded by international law,¹⁵⁶

¹⁵⁴ *Leudicke, Belkacem and Koc v Federal Republic of Germany* (1978) 2 EHRR 149, para 40; see also *Kamasinski v Austria* (1989) 13 EHRR 36 para. 74; see also General Comments 32 (note 10 above), para 40.

¹⁵⁵ Act No 51 of 1977.

¹⁵⁶ Article 4(3)(a) of the ICCPR; Para N of the Guidelines on Fair Trials; Article 6(3) of the ECHR.

and it is clear that they are supposed to enhance an arrested and detained person's ability to prepare and present his case in court. Obviously if a refugee or asylum seeker is to enjoy these rights, they need to be communicated by the police, and they must be communicated to him or her in a language s/he understands, or be interpreted into a language s/he understands. In view of the earlier described problems of police and xenophobia, the issue of language competence and interpretation becomes even more significant.

Unfortunately, the lack of a national language act or policy means that there is no overarching framework guiding how the SAPS is to address the issue of language in its interactions with the populace, citizen and non-citizen alike. However, in the absence of a language policy, the SAPS has adopted its own set of guidelines on this area.¹⁵⁷ Each police officer is supplied with a pocket book which sets out the rights on arrest and detention. The rights are printed in the 11 official languages, and an arresting officer must provide this information to the arrested person in a language s/he understands. If the police officer is unable to establish what language the arrested person understands or if the officer cannot speak the language the arrested person understands, then the rights are to be communicated in English. Upon arrival at the police station, the officer then has to inform the Community Service Centre Commander that the arrested person does not understand English. The Commander then has to ascertain what language the person speaks in order to convey the information in that language. If the commander is able to speak that language, s/he must then convey the contents of the right to the detainee. If the commander is unable to communicate in that language, then s/he must find someone who can speak that language to communicate the rights. If s/he is unable to find someone who speaks that language, then the contents of the right must be read out to the detainee in English, and then all reasonable steps must be taken to find a person who speaks that language. If it is impossible to determine any language that a person in custody understands, then such a person must be advised of his or her rights in English or any other language which the commander speaks.¹⁵⁸

The initiative of the SAPS in developing its own guidelines is commendable. The procedure suggests that efforts are to be made to ensure that foreigners, such as refugees and asylum seekers know and understand their rights when they are arrested or detained.

¹⁵⁷ Tertius Geldenhuys 'Language policy of the South African Police Service' in Kas Deprez *et al* (eds) *Multilingualism, the judiciary and security services: Belgium, Europe, South Africa, Southern Africa* (Pretoria: Van Schaik Publishers, 2001) 138.

¹⁵⁸ *Ibid.*, 138-139.

However, given the strong anti-foreigner rhetoric that surrounds crime and criminality in South Africa,¹⁵⁹ these procedures are not only patently inadequate, they are so disconnected from reality as to be construed as a deliberate violation of the rights of foreigner, including refugees and asylum seekers to access to justice. This is so because, in an environment in which foreigners, including refugees and asylum seekers, get the blame for high crime rates, African migrants make up a large percentage of police arrests.¹⁶⁰ Regardless of the fact that the main purpose of these arrests seems to be to help police officers meet their weekly arrest targets,¹⁶¹ and that most of those arrested are simply released after short periods of detention (usually after paying a bribe),¹⁶² the fact remains that as arrested and detained persons, they are entitled to the rights contained in s. 35 of the constitution. The frequency of arrests alone, is in itself, strong argument that the police has an obligation to make much better efforts to address the language needs of foreigners.

Admittedly, the rights contained in s. 35(1) only require an arresting police officer to inform the arrested person of his rights in a language s/he understands and not in his or her own language,¹⁶³ but the fact remains that they must understand it. If a significant percentage of those who are being arrested and detained do not speak the 11 official languages, then making the rights of arrested and detained persons available only in those languages serves no useful purpose. Neither does the precaution of reading the rights in English when an officer cannot determine the language of the detainee. As the court noted in *R v Lee Kun*¹⁶⁴ the effect of trying a person in a language s/he does not understand is tantamount to a trial in absentia. The effect, it is submitted, of informing a person of his or her rights in a language s/he does not understand is similar to that – it simply means that they have not been informed

¹⁵⁹ Bronwyn Harris 'A foreign experience: Violence, crime, and xenophobia during South Africa's Transition' *Violence and Transition Series 5* (Johannesburg: Centre for the Studies of Violence and Reconciliation, 2001); Jonathan Crush & Vincent Williams 'Criminal tendencies: Immigrants and illegality in South Africa' *Migration Policy Brief 10* (Cape Town: Southern Africa Migration Project, 2003); Palmay (note 47 above).

¹⁶⁰ Loren Landau 'Protection and dignity in Johannesburg: Shortcomings of South Africa's urban refugee policy' (2006) 19 *Journal of Refugee Studies* 308, 321–322.

¹⁶¹ Themba Masuku 'Targeting foreigners: Xenophobia among Johannesburg's police' (2006) *Crime Quarterly* 19, 22.

¹⁶² Landau (note 160 above) 321.

¹⁶³ *Naidenov v Minister of Home Affairs and Others* 1995 (7) BCLR 891 (T), 898.

¹⁶⁴ *R v Lee Kun* (1916) 1 KB 337 (CCA) 341-342; see also *AG Ontario v Reale* (1975) 2 SCR 264, 629; *Ebatarinja v Deland* (1998) 194 CLR 444; *Kunnath v The State* (1993) 1 WLR 1315, 1320.

of their rights. This is a clear violation of the fair trial rights contained in s. 35 of the constitution, and it means that refugees and asylum seekers' rights to equal access to justice are being violated.

The right to equality and equal protection of the law contained in s. 9 of the Constitution means that all arrested and detained persons, regardless of the language they speak, must be informed of their rights. Failure to do so could lead to violation of the many access to justice rights for refugees and asylum seekers, since they would not be able to take advantage of the right to remain silent or to have legal representation. What is expected, in view of the above is that police stations, particularly those located in areas inhabited by significant numbers of foreign persons, including refugees and asylum seekers, would employ the services of interpreters who can translate those rights into the languages mostly spoken by them, such as French, Swahili, Lingala and Somali. Even if it were impossible to retain those services on a full time basis, ad hoc access to a pool of interpreters at short notice would still be very helpful in ensuring that arrested foreigners have interpreters during questioning, but this does not appear to be the case. A 2010 investigation by the Public Service Commission for instance found that 50 per cent of sampled police stations, all located in World Cup host cities, did not have provisions for interpretation into foreign languages, even with preparation for the World Cup in top gear.¹⁶⁵ This provides an insight into what is the normal state of affairs, when an important event like the World Cup is not in the offing.

Some measures adopted during the World Cup also give an insight into what is possible. During the tournament, SAPS established a telephone interpreting service to help stranded tourists, whereby persons who could not speak any of the official languages were assisted by interpreters over the phone. There is no reason why this cannot be adopted on a permanent basis. However, in what is somewhat indicative of the scant attention paid to the needs of African migrants, who make up the vast proportion of South Africa's refugee population, this worthy initiative was marred by the fact that the service was mostly focused on serving tourists from outside the continent. Other than French, there were hardly any

¹⁶⁵ Public Service Commission *Consolidated Report on inspections of service delivery sites: South African Police Service* (Pretoria: Public Service Commission, 2010) ix.

provisions made for African languages.¹⁶⁶ Such occurrences only serve to reinforce perceptions of discrimination against African migrants in South Africa.

Other simple, yet useful, approaches towards appraising arrested and detained refugees and asylum seekers of their rights, include translating those rights into the foreign languages and having them available in written form to be prominently displayed and also handed out to arrested and detained persons. While this cannot replace the need to orally appraise them of their rights, the information gleaned from those written materials would, in the interim, reduce the problems occasioned by an inability to find a speaker of the relevant language, as the arrested person can then choose to remain silent or request the services of a lawyer. Unfortunately, the situation is that the procedure in place does not place as much emphasis on effective communication as it does on meeting the spirit of the law, with the result that refugees and asylum seekers live in a situation where they are highly vulnerable to arrest, but do not enjoy the safeguards that the Constitution put in place to protect them in the event of such arrests. The situation of inequality that this situation engenders is obvious – while citizens can have their rights communicated to them in any of the 11 official languages, and thus given the opportunity to request the presence of a lawyer, refugees cannot enjoy the same treatment. This is yet another demonstration of how the policy falls short of the constitutional standard. The right to interpretation however, extends beyond communication with the police, to communication during trial itself. With regard to this right in court, the most important issues relate to the availability and competency of interpreters.

4.5.4.1 Availability

The question of whether or not foreign language interpretation is available in South African courts was addressed during a parliamentary question and answer session in 2003. Within a prevailing atmosphere of public hostility towards foreigners, shaped largely by the perception that the rise in crime levels was the fault of foreigners, the issue of linguistic accessibility of courts to foreigners was raised by Ms. Sheila Camerer of the Democratic Alliance who wanted to know if the DoJ employed ‘foreign language interpreters in the courts in centres like Johannesburg, where many accused speak only foreign languages; if not, why not; if so,

¹⁶⁶ South African Police Service ‘SAPS renders telephone interpreting service for the 2010 FIFA World Cup’. Available at http://www.sapsjournalonline.gov.za/dynamic/journal_dynamic.aspx?pageid=414&jid=22246 [Accessed 23 May 2011].

what are the relevant details?’ She also wanted to know if the DoJ had taken or intended to take any steps to ensure that cases against foreigners were not withdrawn because of a lack of appropriate interpreters. The then Minister of Justice, Dr Penuall M Maduna replied:

‘Yes, where required, foreign language interpreters are employed on a casual basis when there is a need. Supervisors of court interpreters in each court centre also keep a register of suitable foreign language interpreters to utilise them whenever there are cases involving foreigners.

The Department has urged supervisors of court interpreters to keep a list of foreign language interpreters to avoid withdrawal of cases when appropriate interpreters are not available. The Prosecuting Authority has been requested to give advance notice of specific requirements regarding foreign accused or witnesses that require appropriate interpreters, so that such interpreters can be appointed if required’.¹⁶⁷

The Minister’s response at that time still reflects the position regarding availability of foreign language interpreters now, i.e. that the DoJ employs on an *ad hoc* basis, foreign language interpreters when required. However, what the Minister’s response does not reflect is the fact that access to foreign African language interpreters is alarmingly inadequate. So much so, that the courts have repeatedly called on the DoJ to address the problem.¹⁶⁸ *Mponda v S*¹⁶⁹ illustrates quite well, the challenge posed by this situation. That case involved a Malawian national charged with rape. The trial court was unable to find an interpreter who spoke the accused person’s language (wrongly recorded as Nyanza and Kenyaza, but determined by the High Court to be Chichewa). Because the accused indicated that he had lived in Zimbabwe at some point, efforts were made to obtain a Zulu language interpreter because that was determined to be the language closest to isiNdebele, which is spoken in the Matabeleland area of Zimbabwe. However, the accused had lived in Harare not Matabeleland, and isiShona is the predominant language there.¹⁷⁰ Furthermore, the accused could only communicate in English at a basic and unsophisticated level.¹⁷¹ Eventually, a person from the Malawian embassy was found to act as interpreter.

The record did not show that the magistrate made any efforts to satisfy himself as to the expertise of the interpreter. Instead, what appeared from the record was that the interpreter

¹⁶⁷ Parliamentary question and answers. Available at

http://www.doj.gov.za/2004dojsite/parliament_qa/2003/pqas/qa_hr_859.htm [Accessed 12 October 2007].

¹⁶⁸ See for instance *Mponda v S* 2004 (4) All SA 229 (C); *S v Saidi* 2007 (2) SACR 637 (C).

¹⁶⁹ *Supra*.

¹⁷⁰ *Ibid*, 233-235.

¹⁷¹ *Ibid*, 240, para 43.

and the accused experienced some difficulty understanding each other, but the case was allowed to proceed anyway. Under the circumstances the High Court was not satisfied that the accused had had a fair trial. In setting aside his conviction, the court lamented the fact that a person who was in all probability, guilty, had to be let off due to such inadequacies.¹⁷² The court observed:

‘South Africa is also a haven for a significant population of African refugees. Many of these people are not sufficiently proficient in any South African language to be able to use any such language should they become involved in a trial. The difficulty reported by the attorney, together with those, described earlier, experienced by the Wynberg court in finding an appropriate foreign African language interpreter would suggest that measures are necessary to address the language interpretation requirements likely to arise in comparable cases.’¹⁷³

The court went on to suggest that the DoJ establish a panel of officially accredited *ad hoc* interpreters qualified in the various foreign African languages spoken by significant numbers of people living in South Africa so that courts and legal practitioners who required such services would have a ready means of access.¹⁷⁴ There is no reason why this cannot be done, given the considerable population of African foreigners, who, as will be demonstrated in chapter five are usually quite well educated. According to officials of the DoJ, one of the main problems is that when posts are advertised, foreign language speaking people who have proper credentials not apply for these positions.¹⁷⁵

But the fact remains that the onus is on the State to ensure that such interpretation is available. Like the SAPS, the DoJ was able, during the 2010 FIFA World Cup, to establish a corps of trained foreign language interpreters¹⁷⁶ If it saw fit to go the extra mile to obtain such services for a temporary event like the World Cup, surely the longer term presence of refugees and asylum seekers, and indeed of African migrants in general, is greater incentive to take extra, even innovative, steps to ensure that such interpretation is available. The

¹⁷² Paras 4, 55.

¹⁷³ *Mponda v S* (note 168 above) paras 18, 44.

¹⁷⁴ *Ibid*, para 44.

¹⁷⁵ Email Communication with Advocate Elias Mathe of Interpretation Services unit, dated 23 May 2011.

¹⁷⁶ *Ibid*. (DoJ annual report 2007) 29; See also Department of Justice ‘Justice on the Ball for 2010: Administration of Justice’ Available at http://www.justice.gov.za/fifa2010/docs/20100318_AdminOfJusticeBookletFINALsm.pdf [Accessed 22 May 2011]; ‘Justice College trains interpreters for swift justice in World Cup’ Available at http://www.justice.gov.za/juscol/news/20100615_fifa2010_interpreters.html [Accessed 22 May 2011].

consequence of not doing so defeats the administration of justice, as *Mponda* clearly illustrates, and it goes against the obligation that South Africa has under international law and the Constitution.

4.5.4.2 Competence

Where interpreters are available, the other issue relates to the competence of such interpreters. The principle is that persons involved in proceedings must be able to understand the proceedings at all times and the interpretation received must be as close as possible to a situation where they are in a language that he or she understands.¹⁷⁷ In order to meet this obligation it is essential that the interpreter is sufficiently competent in the languages he or she is interpreting. His or her competence will affect the testimony of witnesses, the ability of legal representatives to properly examine witnesses and make correct submissions,¹⁷⁸ as well as the outcome of the case.¹⁷⁹

As previously noted, the Magistrates' Courts Act and High Court Uniform Rules of Court require magistrates and judges to call for an interpreter if evidence is being given in a language with which the court or other participant is not sufficiently conversant. It is interesting to note that the onus on the court is not only to determine whether the accused is sufficiently proficient in the language of the court, but also to provide a 'competent' interpreter. How does the magistrate determine who is a competent interpreter? As with the issue of a person's language proficiency, there are no guidelines on this, either in the Act and Rules, or in a policy document. It is only required that the magistrate or judge be satisfied as to expertise of the interpreter and this is ordinarily achieved by swearing in the interpreter in open court, and by questioning him or her appropriately.¹⁸⁰

The failure of the DoJ 'to provide clear guidelines for the execution of interpreting in South African courts of law',¹⁸¹ has been a cause for concern for scholars, who maintain that

¹⁷⁷ Rosemary Moeketsi 'The do's and don'ts in court interpreting: A functional approach to a professional code' (2000) 31 (1) *Language Matters* 222—242.

¹⁷⁸ *S v Manzini* 2007 (2) SACR 107 (W) 109 paras F–H.

¹⁷⁹ *S v Ndala* 1996 (2) SACR 218 (C) 220.

¹⁸⁰ *Mponda v S* (note 168 above) 237, para 34.

¹⁸¹ Rosemary Moeketsi & Kim Wallmach 'From sphaza to makoya!: A BA degree for court interpreters in South Africa' (2005) 12 (1) *International Journal of Speech, Language and the Law* 77–108, 104.

this affects the quality of interpreting available.¹⁸² The quality is affected not only by the lack of guidelines, but also by the professional standard and level of training provided. Interpreters are supplied to the court from within the ranks of those employed by the DoJ,¹⁸³ and the duty to ensure that the corps of interpreters is adequately trained and sufficiently competent lies with the DoJ. However, the current standard, qualification required and level of training provided for interpreters is considered to be quite substandard.¹⁸⁴ Scholars and practitioners in the field maintain that, given the complexity of legal proceedings, the only way to attain a threshold of competence for court interpreters is for them to be well educated, preferably at a tertiary level and to have a certification system that accurately tests their skills and abilities.¹⁸⁵ But at present, the qualification required for appointment as a court interpreter is a Grade 12 certificate or equivalent and good knowledge of the languages spoken in the region where the candidate is to be appointed.¹⁸⁶

On appointment, they are provided with a six-week training course which gives them an overview of court procedures.¹⁸⁷ This training course is supposed to take place before the court interpreter is assigned to a particular court, but in some instances, court interpreters wait for up to five years before attending the course, and therefore must acquire any interpreting expertise through self-training.¹⁸⁸ Furthermore, the profession itself is not regulated by any professional code or code of conduct prescribed either by law or by a legally constituted

¹⁸² Ibid.

¹⁸³ According to its 2009/10 annual report, the DoJ employs about 2000 interpreters on a full-time basis, and a number of part-time interpreters for foreign languages (note 132 above).

¹⁸⁴ Rosemary Moeketsi & Nina Mollema 'Towards perfect practice in South African court interpreting: A quality assurance and quality management model' (2006) 13 (1) *International Journal of Speech Language and the Law* 76-88.

¹⁸⁵ Virginia Benmaman 'Legal interpreting: An emerging profession' (1992) 76 (4) *Modern Language Journal* 445-454; Utpal P Mehta 'Translating justice' (1994) *Texas Bar Journal* 1004-1007; Franklyn Salimbene 'Court interpreters: Standards of practice and standards for training' (1996-1997) 6 *Cornell Journal of Law and Public Policy* 645-672, 649.

¹⁸⁶ See various interpreter vacancies advertised by the DoJ. Available at <http://www.justice.gov.za/vacancies/2011/GP-11-068-FTC-b.pdf> [Accessed 22 May 2011].

¹⁸⁷ Moeketsi & Wallmach (note 181 above) 78.

¹⁸⁸ Ibid; The University of South Africa introduced a BA degree in court interpreting in 2005. This is however, still recent enough that the present corps of interpreters employed by the DoJ have not acquired such training. See Moeketsi & Wallmach, *supra*.

regulatory body.¹⁸⁹ This has led to situations in which ‘unscrupulous court interpreters exploit the loopholes apparent in the system, by intentionally misinterpreting the evidence in order to influence the outcome of the case’.¹⁹⁰

Unfortunately, refugees and asylum seekers are among those most likely to be affected by incompetent interpreters, because as stated above, there is a dearth of foreign African language interpreters that the DoJ has access to. Therefore, much reliance is placed on *ad hoc* interpreters, who have not had the benefit of even the limited training referred to above. Lack of competence by such interpreters could have very significant effects. This is especially so in criminal cases, as *Mponda* and *Saidi* demonstrate, as well as in cases before asylum adjudicatory bodies, where decisions turn on the oral story of the applicant. An incompetent interpreter would have a far-reaching negative effect on the outcome of an asylum seekers’ application, and consequently on his life, if as a result, he is subjected to *refoulement*. Even where there is no possibility of such a drastic outcome, the possibility of injustice remains.

During the course of the fieldwork conducted for this study, I came across several instances of problematic interpretation, which highlighted why interpreters should be adequately skilled, not just linguistically, but also in the nuances and intricacies of communication. In one such instance a French-speaking refugee testified under cross-examination that his assailants had tracked him in a car. Asked what colour the car was, he said ‘marron’ which is French for brown. The interpreter translated this as maroon. The defence lawyer asked ‘Like red?’ ‘No’, he replied, ‘like beige’, which again, for a French-speaker is more akin to brown. For the next several minutes, the cross-examination revolved around whether maroon was similar to red or beige, and therefore the accuracy of the refugee’s testimony. The anxiety that this lack of understanding caused to the refugee as he tried to explain himself was clearly visible. It was unfortunate that the interpreter did not grasp that fine detail and point out that those similar words actually have different meanings in French and English.

Such instances illustrate why it is important, in the interest of equal and effective access to justice, that interpreters be adequately trained. Such training, it is submitted, must not only

¹⁸⁹ Rosemary Moeketsi ‘The do’s and don’ts in court interpreting: a functional approach to a professional code’ (2000) 31 (1) *Language Matters* 222—242, 224.

¹⁹⁰ Rosemary Moeketsi *Discourse in a multilingual and multicultural courtroom: A court interpreter's guide*. (Pretoria: van Schaik Publishers, 1999) 124; Ellis Guinsberg ‘Court jester VII: Interpreting the interpreter’ (1993) 110 (3) *South Africa Law Journal* 599–603.

be limited to understanding legal jargon and court processes, but must also bear in mind the role of the interpreter as a bridge between the cultural gaps that exist among participants in courts.¹⁹¹ As scholars point out, competence on the part of the interpreter is not only a matter of bi-lingualism or multi-lingualism. It includes what has been described as ‘bi-cultural sensitivity’.¹⁹² This term essentially acknowledges that culture lies behind spoken words, and the norms, value systems and symbols that make up a culture shape the meaning of those words. Thus, the same words could have different meanings to persons from different cultures.¹⁹³ It is therefore important that interpreters understand ‘differences in gestures, reactions, attitudes towards time, and forms of personal address, if their interpretation is to be accurate’.¹⁹⁴ Given the cultural diversity of the refugee population in South Africa, it is important that interpreters who are appointed to interpret in cases involving them have some knowledge of their cultural backgrounds, as part of the competence required. Here, the refugee population itself serves as an important resource. If adequately trained, they would help to reduce the current shortage of interpreters and South Africa in the process will more adequately meet its obligations to provide equal access to justice for refugees and asylum seekers.

4.5.5 Do the measures on linguistic accessibility meet South Africa’s obligations to refugees and asylum?

It has been shown that equality of access, in respect of access to justice requires linguistic competence. Where a refugee’s ability to defend himself or to conduct a case in court is restricted by his or her inability to understand the language of the court, this raises serious questions about the entire justice system. Such a system is clearly not equally accessible and it is therefore incumbent on the State to address the situation. Ideally, this should be addressed in policy which set out directive principles to guide the State’s efforts. Legislation is also helpful in this regard as the sanctions and penalties which such legislation may contain

¹⁹¹ Nico Steytler ‘Implementing language rights in court: The role of the court interpreter’ (1992) 9 *South African Journal of Human Rights* 205–216, 210.

¹⁹² New Jersey Consortium of Educators in Legal Interpretation and Translation ‘Curricular guidelines for the development of legal interpreter education’ cited in Salimbene (note 183 above) 663.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

can help ensure that the policy is carried out.¹⁹⁵ Unfortunately, the government has failed to adopt an overarching policy or legislation, which would cut across all spheres, including in the administration of justice. As a result, each unit of government is left to decide its own guidelines, as the SAPS has done. As there is nothing against which to benchmark the individual policies adopted by different departments, the unfortunate fact is that guidelines that do not adequately address the language needs of refugee and asylum seekers cannot be challenged as being against State policy.

The DoJ on its part has failed to adopt any language policy at all. Issues that could have been identified and addressed by a proper policy, such as foreign language use and interpretation in court proceedings and guidelines on interpretation etc, are left unattended. As has been argued above, this only leaves room for *ad hoc* and inconsistent determinations of linguistic capability which could lead to miscarriage of justice. Thus, despite the fact that some efforts have been made, they are salutary, especially in relation to refugees and asylum seekers, and clearly, they are not enough. There needs to be clear demonstration of compliance with international and constitutional obligations, and unfortunately, a system characterised by inadequate interpretation services will not create confidence in the justice system by those refugees and asylum seekers who find themselves with language challenges. Again, this is a reflection that South Africa's programming for access to justice does not take into consideration, the obligations imposed by the commitments it made to refugees under international law.

4.6 WHAT ABOUT ALTERNATIVE JUSTICE SYSTEMS?

It is estimated that in most developing countries, non-state justice systems account for 80 per cent of total cases resolved every year,¹⁹⁶ and this is especially so in Africa.¹⁹⁷ On the position of these non-state justice systems, chapter three established that while the provisions of the South African Constitution on access to justice do not apply to justice systems

¹⁹⁵ Elana Goldberg Shohamy *Language policy: Hidden agendas and new approaches* (London & New York: Routledge, 2006) 59–60.

¹⁹⁶ Department For International Development *Justice and poverty reduction: Safety, security and access to justice for all* (London: DFID, 2000) 15.

¹⁹⁷ Joanna Stevens *Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems* (London: Penal Reform International, 2000) 1.

operating outside the control of the State, the fact remains that those systems do exist, and this fact has important implications for the State in respect of refugees' access to justice.

The first implication is that South Africa needs to recognise that such forums do exist within its borders. Its policy on access to justice must therefore reflect such recognition and include measures to engage with them, and most importantly, to address any inherent dangers related to their functioning. The most significant danger is the potential of such forums to violate human rights.¹⁹⁸ This is especially true with regard to the kinds of punishments they sanction, for instance the use of physical violence such as flogging.¹⁹⁹ Furthermore, they are characterised by an absence of set minimum standards or guidelines in their administration of justice, and so they tend to violate the right to equality and non-discrimination, especially where women are concerned.²⁰⁰ In view of these problems, and of the State's obligations to protect human rights within its borders, it is important to acknowledge these potential hazards and regulate these non-state justice systems to ensure that such abuses do not occur. To fail to do so amounts to the South Africa condoning human rights abuses in its territory.

Secondly, a proper access to justice policy needs to recognise the potential benefits of non-state justice systems in achieving the goal of access to justice. It is the view of many scholars and experts, both in South Africa and abroad, that in order to achieve the goal of access to justice, non-state forums must have a place in the administration of justice.²⁰¹ This is because these forums serve a useful purpose, in that they represent an easily accessible

¹⁹⁸ United Nations Development Programme *Programming for justice: Access for all. A practitioner's guide to human rights-based approach to access to justice* (Bangkok: UNDP, Asia Pacific Rights and Justice Initiative, 2005) 102; Stevens, (note 195 above) 2.

¹⁹⁹ Ibid; Celestine Nyamu-Musembi 'Review of experience in engaging with 'non-state' justice systems in East Africa' (2003) Institute of Development Studies, Sussex University, Available at <http://www.afrimap.org/english/images/documents/file438ef181e046b.pdf> [Accessed 24 June 2009].

²⁰⁰ Ibid.

²⁰¹ See generally Wilfried Schärf & Daniel Nina (eds) *The other law: Non-state ordering in South Africa*. (Cape Town: Juta, 2001); Marc Galanter 'Justice in many rooms: Courts, private ordering and indigenous law' (1981) 19 *Journal of Legal Pluralism*, 1–47; Rajesh Choudree 'Poverty and access to justice: An overview' UNDP Oslo Governance Centre available at <http://www.undp.org/governance/cd/documents/25.pdf> [Accessed 3 November 2007]; Cheryl Frank *et al* 'Popular participation in the administration of justice' Position paper commissioned by the Planning Unit, Ministry of Justice 1997; Dharmesh Bula & Adeline Africa 'Proposals for a national community court system' *Occasional Paper Series 3-95*, Institute of Criminology, University of Cape Town 1995; Anashri Pillay 'Accessing justice in South Africa' (2005) 17 *Florida Journal of International Law* 463.

system where simple matters can be quickly adjudicated, thus freeing up the formal courts to handle more complex cases and saving judicial resources.²⁰² They are less expensive to use, do not require the services of lawyers, and they usually conduct their business in the local language of the community, thus addressing the language problem and legal representation issues discussed above.

The existence of non-state justice systems is not in itself a violation of the Constitution, or even of international law. As the Constitutional Court noted in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*²⁰³ ‘... we need to bear in mind that litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes’.²⁰⁴ In furtherance of its goal of promoting access to justice therefore, the State is entitled to, and in fact, is obligated to harness the advantages offered by such bodies. To ignore them, while saddled with an over-burdened judiciary, a high crime rate, and an expensive justice system is unrealistic. The State would simply be turning its back on a readily available mechanism that helps it meet its obligations to the populace. The question then is whether South Africa’s access to justice policy reflects any consideration of these issues?

The Justice Vision 2000 policy document, the country’s principal access to justice policy, declares that in order to achieve the goal of improved, fair and equal access to justice for all, one of its strategies would be to ‘improve access to alternative ways of dispute resolution, including the integration of informal dispute resolution methods into both the criminal and civil justice systems’.²⁰⁵ The formulation of this strategy demonstrates that South Africa recognises the existence of non-state justice forums and that forums other than courts have a role to play in improving access to justice. It also demonstrates a recognition that the State needs to actively utilise them if it is to meet its obligations on access to justice. How then has it implemented this strategy?

²⁰² Stevens (note 197 above) 126; George B N Ayittey *Indigenous African institutions* (New York: Transnational Publishers, 1991) 104. Also see generally, TW Bennett *Human Rights and African Customary Law under the South African Constitution* (Cape Town: Juta, 1999).

²⁰³ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC).

²⁰⁴ *Supra*, para 197.

²⁰⁵ ‘Justice Vision 2000’ (note 4 above) Chapter Three.

The bulk of the responsibility of promoting the use of alternative justice systems has fallen on the South African Law Reform Commission (SALRC), the body tasked with advising the Government on the development, improvement, modernisation or reform of the law.²⁰⁶ Since 1996, the SALRC has spear-headed the country's exploration of alternative ways of dispute resolution and the use of traditional justice systems as a means of relieving the overburdened court system.²⁰⁷ As a result, it has undertaken a lot of research, received public input, made recommendations on the subject and led the efforts to create legislation and programmes that will give effect to those recommendations. Its work has resulted in some initiatives which will no doubt improve access to justice in South Africa. For instance, the final report of a project committee set up to look into the issue of informal justice recommended the incorporation of such systems into the justice system, through the mechanism of customary courts with full powers to determine cases in both criminal and civil matters subject to certain limitations.²⁰⁸ Such courts would apply customary law or other law which they may be authorised to apply.²⁰⁹ A draft Bill followed and in addition to the recommendations above, offered communication between and referrals to the customary courts by other structures in the justice system such as the Magistrates' and Small Claims Courts and the police.²¹⁰ Both the report and the Bill are still receiving attention from the SALRC²¹¹ and have full support from government.²¹² The SALRC's work has also resulted in the creation of community courts, which are 'neighbourhood-focused courts that attempt to harness the power of the justice system to address local problems, [focusing] on creative partnerships and problem solving'.²¹³ The advantages of these courts are that they are fast,

²⁰⁶ South African Law Reform Commission <http://www.justice.gov.za/salrc/> [Accessed 23 May 2011].

²⁰⁷ South Africa Law Commission 'Alternative dispute resolution' 1997 *Issue paper 8, project 94*, 11.

²⁰⁸ South African Law Commission 'Customary law report on traditional courts and the judicial function of traditional leaders' 2003 *Project 90*.

²⁰⁹ South African Law Commission S. 7 Draft Bill on Customary Courts, 2003.

²¹⁰ Wilfried Schärf 'The challenges facing non-state justice systems in Southern Africa: How do, and how should governments respond?' Available at <http://www.csvr.org.za/confpaps/scharf.htm> [Accesses 15 May 2009].

²¹¹ South Africa Law Reform Commission 'Annual Report 2006/2007', Chapter Three.

²¹² Brigitte Mabandla 'Restorative justice and community prosecution: Exploring the South African model' Address to the Restorative Justice and Community Prosecution Conference held by the National Prosecuting Authority February 2007 Available at <http://www.doj.gov.za/> [Accessed 3 November 2010].

²¹³ Centre for Court Innovation <http://www.courtinnovation.org> [Accessed 3 November 2010]

accessible by local people,²¹⁴ and adopt easy-to-follow procedures as well as alternative sentences such as community service.²¹⁵

Unfortunately, even though these initiatives are beneficial for the goal of access to justice generally, the overall strategy suffers from the same deficiency that plagues most of the other policies and programmes that have been discussed up to this point – it fails to acknowledge, much less address, how this issue affects refugees and asylum seekers, or even migrant groups generally. This is significant because, as the SALRC acknowledges following its wide-ranging research and consultations, non-state justice systems are ubiquitous and highly significant among communities in Africa.²¹⁶ Given the fact that African migrant groups, including refugees and asylum seekers, constitute a significant population in South Africa, one would expect that, as part of the State's responsibility to protect the rights of all persons in the country, some thought would be given to how those systems operate among a class of people who are acknowledged as being most likely to have them.

Furthermore, the SALRC acknowledges that non-state justice systems are mostly used by the marginalised who find it difficult to access the State justice system.²¹⁷ Since, as previously noted, it is a widely acknowledged fact, even in government circles, that migrants including refugees and asylum seekers, are some of the most marginalised groups in South Africa, it goes without saying that they are most at risk of using those systems. The SALRC in the interest of promoting equal access to justice, countering human rights abuses in the administration of justice, and promoting respect for traditional systems of justice has an obligation to address this issue as it relates to migrant groups too. Unfortunately, it has not done so, and its efforts therefore fall short of meeting South Africa's obligations to refugees. This is not an argument that the initiatives spearheaded by the SALRC as described above, do not benefit refugees. Indeed, initiatives such as community courts would certainly be beneficial to refugees and asylum seekers, provided they know about them. Rather, it is an argument that the failure to address the issue of non-state justice systems in relation to refugees constitutes inequality of treatment.

²¹⁴ Government Communication and Information Service 'Pocket guide to South Africa 2006/2007: Justice and Correctional Services' available at <http://www.gcis.gov.za/docs/> [Accessed 2 November 2007].

²¹⁵ Ibid.

²¹⁶ South African Law Reform Commission (note 207 above) 1.

²¹⁷ South Africa Law Commission (note 211 above) 14.

It is the contention of some scholars that in programming for access to justice, failure by the State to recognise justice systems other than formal, state-controlled courts, is in itself discriminatory or exclusionary, and hence inequitable.²¹⁸ Such generally discriminatory attitude towards non-state justice is clearly not the case in South Africa, as can be seen from the efforts of the SALRC. What is the case is a failure to include within its contemplation, the workings of those systems as they exist among refugee population groups, and this therefore amounts to discrimination. The nature of non-state justice systems makes it difficult to argue that current initiatives in relation to South African non-state and traditional justice systems apply equally to refugees and asylum seekers. This is because non-state justice systems generally reflect prevailing community norms and values and derive their legitimacy from the customs accepted by the particular community they serve. Difference in customs among refugee communities and South African communities would therefore defeat any generalisation. What is required is specific examination of the systems that operate among refugees and asylum seekers, just as has variously been done among South African community groups, and then efforts be put in place to regulate them. Therefore the selective engagement with non-state justice systems as they exist within South African communities, but not within migrant communities goes against the requirement of equality of treatment in access to justice as international law and the constitution requires.

In trying to regulate, and perhaps incorporate the workings of informal and non-state justice systems into the country's administration of justice, the SALRC would promote greater access to justice for those who prefer such systems or are unable to access the formal systems. At the same time, such regulation or incorporation would curb their excesses and ensure they operate within the framework of national law and international human rights norms. But leaving out those forums that are not local to South African communities, suggests not only a tacit condonation of whatever excesses or violations those forums may be guilty of, it also suggests that there is no desire to utilise such systems to improve access to justice for refugees and asylum seekers as it wishes to do for its citizens. Equal treatment requires that whatever efforts the State undertakes to promote access to justice and avoid

²¹⁸ Leila Chirayath *et al* 'Customary law and policy reform: Engaging with the plurality of justice systems' 2005 Background paper for the *World development report 2006: Equity and development*. Available at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf [23 May 2011].

human rights violations in the administration of justice for its citizens, it must do the same for refugees and asylum seekers. Clearly, the State fails in this regard.

This failure is made all the more poignant by the fact that difficulty in accessing the formal justice system because of earlier-described discrimination, makes non-state justice forums a more attractive option. The danger here is that such systems could supplant the State justice system as the primary source of justice in the view of refugees and asylum seekers. Yet, such systems would operate outside any kind of guidelines that ensure they respect the rights of those who use them. The overarching obligation of the States to ensure the protection of human rights, even by non-state bodies, requires that it engage with the non-state justice systems among refugees and asylum seekers, not only to regulate them, but also to understand why those who use them do so, and to establish the primacy of the State justice system. This would enable the State to become aware of the issues and customs, and thus be able to address them. Such knowledge would help it to effectively respond to the particular strengths and weaknesses of those systems and help it in its programming for access to justice. The failure to address this issue means that the State is unable to do any of these, and this can only have a negative effect on refugees' access to justice. whether or not this is so will be seen in chapter six.

There is no doubt that non-state justice systems within refugee communities would provide an avenue for them to resolve simpler issues, particularly simple civil matters that generally implicate fewer human rights concerns, without the disadvantages that make the state justice system unattractive. But it is important that such systems benefit from some form of State supervision or regulation. How the government does that is left for it to decide. Some scholars advocate incorporating non-state forums into the justice system, such that they are administered by the state.²¹⁹ This would combine the virtues of such systems like accessibility, informality, affordability and familiar language with those of the state legal system such as impartiality, legitimacy, and powers of enforcement. Other scholars advocate a complementary role where both the formal and the informal systems exist side by side. The best elements of both would be combined and a cross-referral and cooperative system put in place to ensure access to justice.²²⁰ Nina calls this 'the dual paradigm of justice' – a holistic approach to access to justice which recognises and frames itself within a culture of rights and

²¹⁹ Brynna Connolly 'Non-state justice systems and the state: Proposals for a recognition typology' (2005) 38 *Connecticut Law Review* 239.

²²⁰ Wilfried Scharf 'Policy options on community justice' in Schärf & Nina (note 213 above) 66.

the multiple forms of accessing justice that take place in the country.²²¹ This appears to be the model favoured by the SALRC as the traditional courts Bill suggests.

Having said all that, it is important to reiterate that the primary duty of providing access to justice rests with the State. An acknowledgement of non-state justice system cannot be construed as an excuse for the State to abdicate its duties to provide access to justice for all within its territory. Therefore, it must be accepted that the State justice mechanism is the primary means of access to justice and include efforts to ensure that refugees are able easily to use it. However, non-state justice systems are a fact that cannot be legislated or wished away. The options are either to ignore them or to regulate them. In view of the State's obligations on access to justice, the better option is to regulate them. But it would appear that South Africa has opted to ignore them and thus created a loophole in which those systems can operate outside the confines of international human rights norms and national laws.

4.6.1 Do the measures on non-state justice systems meet South Africa's obligations?

This section has attempted to evaluate how well South Africa's access to justice policy addresses the use of non-state justice systems among refugees and asylum seekers. As Budlender reminds us, access to justice is not purely a court-centred concept. If poor people are to achieve access to justice, they need effective access to the other institutions which determine whether they will receive justice.²²² This is especially so when the poor people in question also face significant challenges from discrimination by State officials in accessing the courts. Such unequal access to state justice systems drive vulnerable refugees to seek alternative ways of accessing justice. Regardless of the reasons for using them, there is an obligation on the State, as the primary agency responsible for the protection of human rights and for the administration of justice to ensure that such systems do not engender human rights abuses within its territory. Doing so requires it to acknowledge and engage with such systems. Unfortunately, South Africa's policy on access to justice does not reflect such engagement, at least with respect to refugees. What it reflects is a selective engagement, a discriminatory engagement which, while attempting to address such issues in local South African communities, completely ignores such systems among refugees. This situation falls

²²¹ Daniel Nina 'Access to justice in South Africa: Towards a holistic approach'. Position paper presented to the Ministry of Justice Planning Unit, September 1997, 3–4.

²²² Budlender (note 88 above) 11.

short of the equality standard recognised in international law and the Constitution, and needs to be addressed.

4.7 CONCLUSION

This chapter took a close look at the policies, programmes and legislative measures that have been adopted to give effect to previously discussed constitutional guarantees of refugees to access to justice in the country. The first step was a recognition that post-apartheid administration of justice had to reflect the needs of all people in South Africa rather than a select minority. Anchored on this belief, the Justice Vision 2000 policy, the principal policy guiding the administration of justice in the country, was developed. Its purpose is the achievement of 'justice for all'. The aims of the policy were informed by each of the constitutional guarantees on access to justice – and from them flowed programmes and legislations designed to meet those aims. It is within this legislative, programmatic and policy framework, that South Africa's efforts to meet the access to justice needs of refugees, is located.

Without doubt the framework and the strategies that have flowed from it are laudable and relevant to the goal of access to justice. But as former British Prime Minister Winston Churchill once said, 'however beautiful the strategy, you should occasionally look at the results'. In looking at the results, one is confronted with a number of uncomfortable gaps. Chief among this is the glaring failure to address the needs of refugees and asylum seekers in the country's programming for access to justice. This is the one thread that consistently runs through the policies and programmes examined.

Under international law, as chapter two showed, a host state is obliged to ensure unfettered and unrestricted access to courts for refugees and asylum seekers in its jurisdiction. Refugees in South Africa should therefore have unfettered access to the courts of South Africa and they should have legal representation when required, at the same level that South Africans do. Unfortunately, this standard is not reflected in the policies and programmes on access to justice. Particularly worrying is the issue of access to legal representation. As the discussion above shows, the LAB, as the State's primary instrument for providing legal assistance has an important role to play in ensuring access to justice for refugees and asylum seekers. But the LAB's mandate to refugees is significantly limited. It certainly is not at the same level as that accorded to citizens, which is the standard prescribed in international law.

The apparent limitation of its services to asylum matters, and to criminal matters as mandated by the Constitution, while ignoring civil matters constitutes a fundamental failure. This is particularly so when Art 16 of the UN Refugee Convention, the equality and non-discrimination provisions of the Constitution, and the decision in *Nkuzi* are taken into consideration.

Other issues which have been recognised as important for improving access to justice have simply failed to recognise the person of the refugee, much less adopt measure that meet their needs. In this regard, the question of linguistic capacity and its importance to access to justice is not addressed in any language policy, as the DoJ has not adopted any. Interim efforts are inadequate to meet the needs, and the jurisprudence shows that finding competent interpreters in African languages is a major challenge, which the courts repeatedly call on the DoJ to address.

Similarly, while efforts have been made to address how alternative ways of dispute resolution could be used to improve access to justice, the same has not been done in the context of refugees and asylum seekers who fall within the demographics of those most likely to use them. The result is that such systems, where they exist, are given free rein to carry on without any regulation, and the possible human rights violation that could result from that.

The preceding analysis has shown that in theory and in terms of its constitutional guarantees, South Africa is well within the framework of equality and equal access to justice which international law upholds. However, in terms of actual practice, and at the policy and programme level, the picture in South Africa is considerably less positive and falls well short of the ideals of the Constitution. Perhaps the greatest failings of government efforts is the failure to classify refugees and asylum seekers as vulnerable persons, and thus develop or modify strategies to adequately meet their needs. This failing on its own jeopardises equality of access. On the other hand, concluding that refugees and asylum seekers do not enjoy access to justice as they should, on the basis of what is not written in the policy guidelines and programmes discussed above is mischievous. The discussion of policies, programmes and legislation is but one step in the evaluation process. The best measure of how well refugees have access to justice can only be found in the factual experiences of those refugees and asylum seekers who have attempted to or have used the courts. These experiences will be discussed in detail in the next chapter.

Chapter Five

Refugees' Experiences in Accessing Justice in South Africa

5.1 INTRODUCTION

Chapter two identified and discussed the obligations that South Africa has under international law to refugees and asylum seekers in the area of access to justice. The fulfilment of those obligations, it was shown, would put refugees and asylum seekers on the same footing as everyone else in terms of access to justice. Ultimately, effective and equal access is the ideal which South Africa is expected to strive towards. Subsequent chapters then evaluated how well South Africa complies with its obligations, by looking at the constitutional guarantees and the policies and programmes in place to give them effect. It was shown that, while the Constitution lives up to the ideal of equal access to justice for all as espoused in international law, policies and programmes fall well short of achieving that standard. The main problem, it was argued in chapter four, lies in the fact that South Africa's policies and programming for justice appear to be formulated independently of the country's obligations to refugees under international law. As a result, the peculiar vulnerabilities which make equal access to justice difficult for refugees and asylum seekers are not addressed by legislation or in the policy and programmes.

This chapter continues that evaluation, utilising a different yardstick – the practical experiences of refugees and asylum seekers and those who work with them as they confront justice issues in their daily lives. My argument is that because policies and programmes do not address the question of refugees' and asylum seekers' vulnerability in accessing justice, their access to justice is significantly impaired. By detailing actual experiences in accessing justice, this chapter will serve to confirm that the shortcomings identified in the previous chapter do indeed have the effect of denying refugees equal access to justice. This chapter hopes to achieve two further objectives. Firstly, by presenting real-life access-to-justice issues as refugees and asylum seekers experience them, I hope to highlight how these correspond to or differ from the ideals contained in international law and the Constitution, as established in chapters two and three. I also hope, in the process, to highlight the factors responsible for such similarity or difference as the case may be, and thus be able to make recommendations to address them. Secondly, I hope to fill a gap in academic knowledge that

currently exists in the area of how refugees' interact with the law in an urban setting. As was noted in chapter one,¹ most of the research on refugees have focused on social and cultural areas of vulnerabilities such as access to social services, xenophobia, resettlement, cultural challenges in host communities and other challenges that refugees face. Research on refugees' access to justice (beyond status determination) is scanty, and all known ones focus on refugees in a camp situation.²

However, South Africa operates an urban refugee system, so the assumption is that the justice issues that its refugee population faces would be markedly different from those of refugees in camps. For instance, Da Costa's study found that theft and sexual and gender based violence were by far, the most prevalent legal and justice issues in all the refugee camps surveyed.³ The close quarters in which refugees in camps live is surely an important factor in this. The study also identified the remote location of refugee camps, coupled with restrictions on movement, as a major barrier to access to justice for refugees.⁴ That would not be a factor for South Africa's refugee population whose movements are not restricted and who mostly live in urban areas and not remote locations.⁵

¹ Section 1.2.

² The most definitive and expansive in terms of coverage, is a 2006 study conducted in 52 refugee camps in 13 countries for the United Nations High Commission for Refugees (UNHCR) by Rosa Da Costa. See Rosa Da Costa *The administration of justice in refugee camps: A study of practice* (Geneva: UNHCR Department of International Protection, 2006); Other studies have since been carried out, but like Da Costa's work, all focus on access to justice in camp-based situations. These include: Ilse Griek 'Access to justice in Kenyan refugee camps: Exploring the scope of protection' (MSc Diss. to the Department of Public Administration, Leiden University, Netherlands, 2007); Julie Veroff 'Justice Administration in Meheba Refugee Settlement: Refugee perceptions, preferences, and strategic decisions (MPhil Diss. to the Department of International Development, Oxford University, 2009); International Rescue Committee 'Assessment of protection issues, with a focus on access to justice and the rule of law: Mae Le Camp, Tak Province and Sites One and Two Camps, Mae Hong Son Province' (2006) cited in Veroff supra.

³ Da Costa (note 2 above) 10.

⁴ Ibid, 6; Veroff (note 2 above) 20.

⁵ Loren B Landau 'Protection and dignity in Johannesburg: Shortcomings of South Africa's urban refugee policy' (2006) 19 (3) *Journal of Refugee Studies* 308–327, 311; Fedde Groot 'Challenges of the UNHCR's programme for urban refugees in South Africa' in Loren Landau (ed) *Forced migrants in the new Johannesburg: Towards a local government response* (Johannesburg: University of the Witwatersrand, 2004) 37–42, 40.

The only people who could validly answer any questions about how refugees experience access to justice in South Africa are the refugees and asylum seekers themselves who have had the experiences, as well as those who assist them in the process. In other words, a field study was necessary in order to answer these questions. The result of that field study is what this chapter and the next one present. This chapter details the experiences of refugees and asylum seekers' when seeking to access the formal or state justice system, and shows that the guarantee of equal access which international law and the Constitution espouse are not a reality for refugees and asylum seekers in South Africa. This is followed in the next chapter with a discussion of other avenues by which they seek justice, whether as a result of exclusion or as a matter of choice. Again, their experiences in this area demonstrates the shortcomings of the South African justice system and policy in addressing the needs of refugees and asylum seekers.

This chapter is structured in the following way: the first part describes the research methodology and data sources as well as the limitations and other factors that should guide interpretation of the results presented. The second part presents the results and aims to achieve the first objective stated above.

Part I

This part sets out the methodology adopted in the fieldwork, definition of terms, selection criteria and demographics as well as the limitations of the study.

5.2 METHODOLOGY AND MATERIALS – DATA SOURCING

As was alluded to in chapter one, it is generally accepted among scholars in the field of forced migration that researching refugees and other forced migrants poses a series of common difficulties.⁶ First of all, there is the need to be sensitive to the fact that one is

⁶ See generally Karen Jacobsen & Loren B Landau 'The dual imperative in refugee research: Some methodological and ethical considerations in social science research on forced migration' (2003) 27 (3) *Disasters* 185–206; Alice Bloch 'Methodological challenges for national and multi-sited comparative survey research' (2007) 20 *Journal of Refugee Studies* 230–247; Catriona Mackenzie *et al* 'Beyond "Do no harm.": the challenge of constructing ethical relationships in refugee research' (2007) 2 *Journal of Refugee Studies* 20 299–319; Graeme Rodgers "'Hanging out" with forced migrants: Methodological and ethical challenges' (2004) 21 *Forced Migration Review* 48–49; Barbara Harrell-Bond & Eftihia Voutira 'In search of 'invisible' actors: Barriers to access in refugee research' (2007) 20 (2) *Journal of Refugee Studies* 281–298; Darshan Vigneswaran

dealing with a vulnerable group. As Turton admonishes, research into others' suffering can only be justified if alleviating that suffering is an explicit objective.⁷ One cannot therefore approach a study on refugees as a mere academic exercise without an awareness of possible negative impacts, which could be anything ranging from the psychological, such as when a respondent is forced to recall a painful incident, to the physical, such as danger to life and limb. Of major importance is the question of security. Being highly vulnerable, and often living in fear and mistrust, it is important to ensure that the identity of the research population is protected and that their safety is not jeopardised.⁸ Closely linked to this is the issue of confidentiality.⁹

Secondly, the diversity and size of migrant populations make representativeness of the research an important issue – in order to make well-founded policy recommendations about migrants, large-scale, quantitative data is often required.¹⁰ This raises major financial and logistical challenges for anyone conducting such surveys. Unless they are funded by major organisations, such surveys are usually unaffordable and are therefore few and far between.¹¹ This obviously has an impact on the ability to generalise the findings of isolated, small-scale case studies such as this one.

The methodology adopted by researchers is also identified as a major problem and this also impacts on the validity of data obtained. The key concern here is the quality of the data collection process. In this regard, the lack of a sampling frame and researchers' tendency to use unrepresentative sampling methods in order to address the lack of a sampling frame is

'Lost in space: Residential sampling and Johannesburg's forced migrants' 2007 *Migration Methods and Field Notes 4*, Forced Migration Studies Programme, University of the Witwatersrand; Dina Birman 'Ethical issues in research with immigrants and refugees' in Joseph E Trimble & Celia B Fisher (eds) *The handbook of ethical research with ethnocultural populations and communities* (Thousand Oaks: Sage, 2006); Jennifer Leaning 'Ethics of research in refugee populations' (2001) 357 *Lancet* 1432–1433.

⁷ David Turton 'Migrants and Refugees' in Tim Allen (ed) *In search of cool ground: War, flight, and homecoming in Northeast Africa* (Trenton: Africa World Press, 1996) 96–110, 96.

⁸ Patricia Hynes 'The issue of "trust" or "mistrust" in research with refugees: Choices, caveats and considerations for researchers' (2003) *New Issues in Refugee Research* UNHCR Working Paper 98.

⁹ Works in note 6 above.

¹⁰ Jacobsen & Landau (note 6 above) 195.

¹¹ Tara Polzer 'The value of non-probability surveys: Collecting data on migrants through service provider NGOs'. Paper presented at the African Migrations Workshop, Rabat, Morocco 26–29 November 2008. Available at <http://www.imi.ox.ac.uk/pdfs/tara-polzer-amw-08> [Accessed 2 February 2010].

flagged as a concern. So also is reliance on organisational gatekeepers (such as refugee service providers) for access to data, refugee clients and participants and sometimes even to identify refugees for inclusion in studies. This means that surveys with refugees will often include selection bias and gatekeeper bias.¹² Furthermore, the fact that these surveys are often conducted in areas where migrants congregate leads to the problem of a data biased towards a particular area. As most refugees in South Africa tend to stay in the large urban cities where the Refugee Reception Offices are found, the urban bias of most studies involving refugees in South Africa migrants is almost automatically a major challenge.¹³ Other challenges identified by scholars include shortage of statistically analyzable data, projecting one's bias into the study, the fact that there is often a high rate of non-response to questionnaires as well as the likelihood of dishonest and strategic responses by respondents.¹⁴

Perhaps the most basic problem identified is the non-disclosure by researchers of the methodology adopted in carrying out a study. According to Jacobsen and Landau, most studies on refugees simply proceed to state the outcomes without stating how the data was obtained. Fortunately, that is an easily avoided problem, and so in the interest of making this study as relevant as possible, it was imperative to bear in mind all of the pitfalls listed above and avoid them as much as possible. The following section presents an overview of the research methodology adopted in doing the fieldwork associated with this study. However, the nature of this study is such that many of the problems simply could not be avoided. The challenges and shortcomings are discussed below in the section on 'limitations'.

5.2.1 Definitions

To ensure conceptual clarity, the study adopted a technical/legal definition of the terms 'refugee' and 'asylum seeker' as envisaged by the Refugees Act of 1998.¹⁵ Thus only persons who had been recognised as, and were in possession of valid Refugee Status (or s. 24) permits issued by the Department of Home Affairs (DHA) were included in the study in the

¹² Jacobsen & Landau (note 6 above) 193, 195; James T Fawcett & Fred Arnold 'The role of surveys in the study of international migration: An appraisal' (1987) 21 *International Migration Review*, 1523–1540, 1531.

¹³ Polzer (note 11 above) 8; Faecett & Arnold (note 12 above) 1532.

¹⁴ All of these factors are indentified in the works cited in note 6 above.

¹⁵ Refugees Act No 130 of 1998.

category of ‘refugee’. Similarly, only persons who were in possession of valid Asylum Seeker (or s. 22) permits issued by the DHA were enlisted in the category of ‘asylum seeker’. As stated in chapter one, a broad definition of the term ‘access to justice’ is adopted in this study, and encompasses access to courts and other forums as well as access to legal representation and advice.¹⁶ The term non-state justice is adopted to include all informal justice mechanisms.¹⁷

5.2.2 Research methods – interviews, questionnaires, participant observation, archival research.

The data for this study was obtained over a period of 22 months, from February 2008 to December 2009. Four methods were used to collect data – questionnaires, interviews, participant observation and archival research. The most extensively used primary material came from the questionnaires and interviews. For this, ethical approval was sought and obtained from the University of Cape Town’s Ethics Committee. The objectives of the questionnaire and interviews were explained to participants from the beginning. Their permission was obtained to use a tape recorder and to write down their responses. Where anyone objected to tape recording, I only wrote down their responses. Respondents were assured of anonymity and their names were not included on the questionnaire or during the course of the interviews.

The questionnaire was structured to elicit information about patterns of use and perceptions of the justice system (Appendix A). Sometimes, where a participants’ experience, gleaned from responses to the questionnaire was such that it needed to be explored further, I followed up with an in-depth interview. In all, 30 refugees were interviewed to obtain their experiences with the justice system. As a number of these interviewees made copious references to their own previous experiences with non-state justice mechanisms within their own communities here in South Africa, I interviewed 5 persons involved with the workings of these informal justice systems. 10 refugee lawyers and staff of refugee legal service providers were interviewed in order to understand some of the key issues from the point of

¹⁶ Chapter one, section 1.3.

¹⁷ Difference in terminology previously discussed in chapter three, section 3.6.4.

view of a service provider. Most of the interviews took place face to face in Cape Town, but some took place over the phone.

The interviews were structured and non-structured, utilising both closed and open-ended questions. Most of the interviews were conducted at the University of Cape Town Law Clinic which has a project specifically aimed at refugees and provides legal services to the refugee community. Some were conducted at other locations including at places of work, meeting places and in a church. The interviews were conducted in English, as was the questionnaires. All of the respondents were from African countries and most spoke English to some extent. For those who did not speak English well enough, translation was provided by another refugee of the same nationality who spoke English. Fortunately, translation was only needed in Somali and French, two language groups very well represented and for which translators were easily accessible. Sometimes, however, the translators struggled with finding the right words in English, to express a Somali word for instance, and had to seek the assistance of another Somali waiting in the waiting room.

Although some respondents were initially wary, I found that participants warmed up to me as soon as they discovered I was a foreigner myself and they were more willing to take part and more candid in expressing their opinions and relating their experiences. This was also true of interviews conducted outside the Law Clinic, such as at a Congolese church and with the Somali Association. Respondents often displayed a propensity for denoting an existing affinity between them and me, describing situations in terms of 'us' (non-citizens, myself included) and 'them' (South Africans). This I believe resulted in more openness.

Participant observation occurred in courts where I had the opportunity to see how refugees related to and conducted themselves in court. I attended several court hearings in both the Magistrates Court and the High Court (sitting as the Equality Court) in Cape Town.

Archival research involved an analysis of over 5000 cases in the UCT Law Clinic's case files from 2005–2008. This data helped establish trends and provide information about the demographics and cases that the clinic has dealt with over the years. This analysis did not look at the outcomes of those cases, especially as many led to referrals.

Access to the Clinic's case log of clients obviously raises the question of privacy and confidentiality. It also brings to mind the issue of gatekeeper bias referred to above. But this was necessary because seeking refugees independently of the refugee assistance agencies would have required a serious amount of logistical and financial layout, to find willing refugees and asylum seekers all around the city, for which this study was not equipped.

Personal experience with refugee clients at the Clinic showed that, quite understandably, persons seeking assistance stopped going to the legal assistance agencies once they had received the help needed. As the study focused on persons who had had cause to resort to the legal system, it was quite likely that asking for volunteers would have meant that only current clients of the organisations would be available for interviews, with the result that the study would have a preponderance of persons who had no experience with the legal system. The question of gatekeeper bias did not arise as the Law Clinic did not in any way limit the client data I had access to or interfere in the selection process.

5.2.3 Selection criteria and demographics

Most of the refugee respondents to the questionnaire and interviews were adults who had approached the clinic for assistance with legal matters other than obtaining refugee permits or representation at appeal hearings about their status as refugees. In other words, refugee status determination (RSD) matters were excluded from the category of legal matters discussed with respondents. However, the archival research looked at all matters in the Law Clinic's case files, including RSDs. Some of the respondents were first time visitors to the Law clinic while others were repeat clients, including those who had been clients of the clinic for several years.

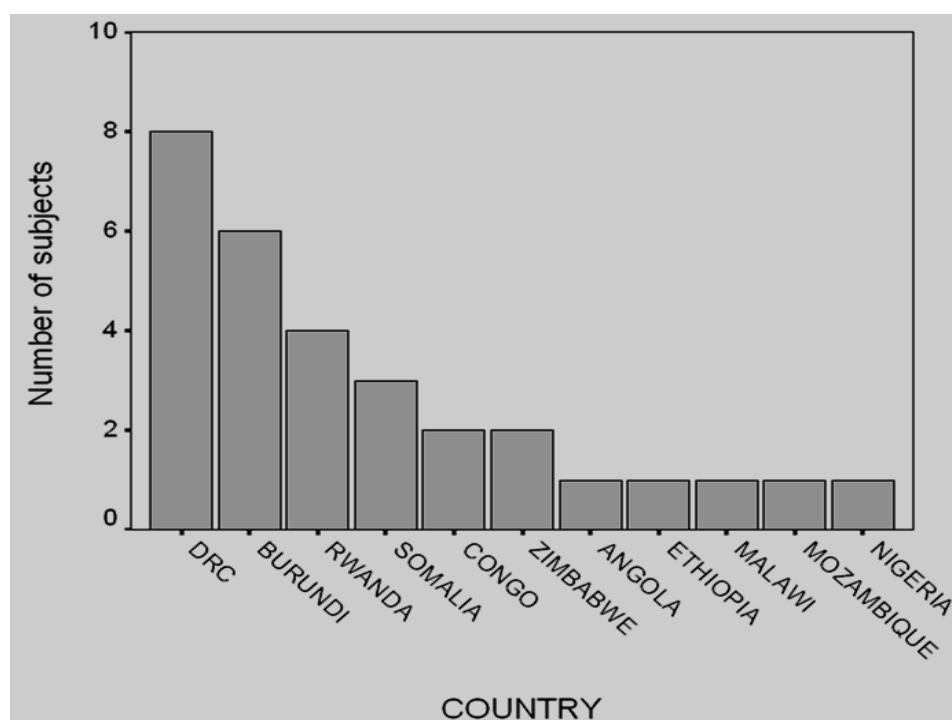
5.2.3.1 Nationality

Figure 1 below shows the nationality of participants. While it appears to fly in the face of current conventional wisdom that suggests that Zimbabweans make up the majority of South Africa's refugee population, it needs to be borne in mind that this study focuses on persons who have had interactions with the justice system. The groups most likely to fall into this category are those who have been in the country for longer periods of time, and consequently are more likely to have had their claim for asylum recognised. The Zimbabwean refugee is a more recent phenomenon, motivated by a collapsed economy, lack of jobs, hyper-inflation and human rights violations that began to characterise Zimbabwe in the early 2000s.¹⁸ Most of them fall within the 'asylum seeker' group.¹⁹

¹⁸ Alice Bloch 'Gaps in protection: Undocumented Zimbabwean migrants in South Africa' *Working Paper No. 38* Forced Migration Studies Programme, University of the Witwatersrand, Johannesburg; Lawyers for Human Rights *The documented experiences of refugees, deportees and asylum seekers in South Africa: A Zimbabwean*

The participant distribution is therefore reflective of the historical trends of South Africa's refugee population, which was largely made up of refugees from the Great Lakes region, DR Congo, Angola and Somalia.²⁰ In order to avoid having only one nationality group or the most heavily represented nationality group as the sole respondents, an effort was made to limit the number of people selected from a particular country. However, the numbers chosen for each group was greatly influenced by the ability to reach them, as explained under limitations below.

FIG 1: NATIONALITY OF RESPONDENTS



case study (Johannesburg: Lawyers for Human Rights, 2006); Monica Kiwanuka & Tamlyn Monson 'Zimbabwean migration into Southern Africa: New trends and responses' (2009) Research Report, Forced Migration Studies Programme, University of the Witwatersrand; Darshan Vigneswaran 'Special report: Fact or fiction? Examining Zimbabwean cross-border migration into South Africa', available at <http://cormsa.org.za/wp-content/uploads/Research/SADC/fmsp-2007-b-zimbabwe-border-1.pdf> [Accessed 2 June 2010].

¹⁹ Tara Polzer 'Population movements in and to South Africa' (2010) *Migration Fact Sheet 1*, Forced Migration Studies Programme, University of the Witwatersrand.

²⁰ Loren B Landau 'Protection and dignity in Johannesburg: Shortcomings of South Africa's urban refugee policy (note 5 above) 313; Baruti Amisi & Richard Ballard 'In the absence of citizenship: Congolese refugee struggle and organisation in South Africa' (2005) Centre for Civil Society and the School of Development Studies, University of KwaZulu-Natal, 1.

5.2.3.2 *Gender and age distribution*

The percentage of females amongst the respondents is low (20 per cent), but this is reflective of the general client distribution at the UCT Law clinic (19 per cent)²¹ and indeed of the general refugee population in South Africa.²² In terms of age distribution, (Table 1), most of the participants fell into the 18–39 age bracket. This again, is reflective of the general refugee population in South Africa where 90 per cent are youthful, aged between 18–39.²³

TABLE 1: AGE DISTRIBUTION

Age category (years)	Frequency	per cent
18–29	10	33.3
30–39	17	56.7
40–45	3	10.0

5.2.3.3 *Level of education*

All respondents had some level of formal education, with 76 per cent having had up to secondary education or more (Table 2). This confirms the findings of a study on Congolese refugees in Durban which found that 96.4 per cent of respondents in that study had some

²¹ Refugee Rights Project, University of Cape Town Law Clinic ‘Narrative Report for 2009’. Obtained from the Law Clinic. (Hereinafter referred to as UCT Law Clinic Narrative report).

²² Florence Belvedere *et al National Refugee Baseline Survey: Final Report, Johannesburg: (2003) Community Agency for Social Enquiry (CASE), Japan International Cooperation, and United Nations High Commissioner for Refugees; UNHCR, 2005 Statistical Year Book (South Africa) available at www.unhcr.org (Accessed 12 October 2009); Migrant Rights Monitoring Project ‘National survey of the refugee reception and status determination system in South Africa’ (2009) Research Report, Forced Migration Studies Programme, University of the Witwatersrand.*

²³ Ibid.

levels of education and 46.5 per cent had some tertiary education.²⁴ It also confirms the findings of a 2003 national survey of 15057 refugees and asylum seekers from African countries, which found that most were educated and that ‘nearly a third of refugees and asylum seekers were tertiary students before they came to South Africa’.²⁵ Various studies on the use of the formal court system suggest that education plays a key role, with the more educated, more knowledgeable sections of society being more likely to seek formal resolution of disputes.²⁶ People with no educational qualifications were less likely to take any form of legal action to deal with their problems, a survey of the ‘recourse to law’ habits of 3000 people found.²⁷

TABLE 2: LEVEL OF EDUCATION

Educational status	Frequency	per cent
Primary	7	23.3
Secondary	10	33.3
Tertiary	13	43.3

²⁴ Baruti Bahati Amisi ‘An exploration of the livelihood strategies of Durban Congolese refugees’ Working Paper No. 123, UNHCR Evaluation and Policy Analysis Unit (Geneva: United Nations High Commission for Refugees, 2006) 11; Owen Sichone ‘Together and apart: African refugees and immigrants in global Cape Town’ in David Chidester *et al* (eds) *What holds us together: Social cohesion in South Africa* (Cape Town: HSRC Press, 2003) 120–140, 132.

²⁵ Belvedere *et al* (note 22 above) 5; Loren B Landau & Karen Jacobsen ‘Refugees in the New Johannesburg’ (2004) 19 *Forced Migration Review* 44–46, 44; Mail & Guardian Online ‘National Survey: Most refugees in South Africa are skilled’ 11 December 2003, 1 (cited in Amisi, note 24 above).

²⁶ See for instance Hazel Genn *et al* *Paths to justice: What people do and think about going to law*, (Oxford: Hart, 1999) 69; La Salle Institute of Governance ‘Background paper on access to justice indicators in Asia-Pacific region’ (United Nations Development Programme, 2003).

²⁷ Genn (note 26 above) 69.

5.2.3.4 *Asylum status*

About 60 per cent of respondents were recognized refugees who had been in the country for at least three years. These recognized refugees were the most likely to have sought legal assistance for their problems, often being the complainants, rather than respondents or accused in the cases they were dealing with. This suggests a correlation between certainty of status, a better awareness of rights, and more willingness to make use of state resources including the justice system. Indeed refugee assistance organizations are finding that in terms of rights, their clients come with a knowledge of the rights afforded to them as refugees and they are seeking help to have those enforced.²⁸ This was not the case as recently as four or five years ago. But because refugees have stayed longer in the country, they have, to a certain extent, educated themselves on what their rights are and what it is they can ask for.²⁹ Conversely, asylum seekers in the country tend to lie low, and try as best as possible to remain unseen by authorities to avoid getting into trouble or being arrested and possibly deported.³⁰ This probably explains why asylum seekers interviewed were the most likely not to be seeking a judicial resolution to their legal problems, but rather other alternatives. These other alternatives are discussed in further detail in chapter six.

5.2.4 *Limitations of the study*

While the desire was to avoid all of the ethical and methodological challenges described above, the nature of this study is such that many of the pitfalls simply could not be avoided. One of the major ones is obviously the question of representativeness. Being such a small study, it cannot be generalised. In this regard, scholars note that:

One of the most significant problems of small-scale studies is that while they yield in-depth and valid information, they are not necessarily representative of the target population about which the researcher

²⁸ Telephone interview with Kaajal Ramjathan-Keogh, Lawyers for Human Rights, Johannesburg (9 December 2009); Interview with Sasha Paschke refugee lawyer, UCT Law Clinic (28 July 2008). Interview with Fatima Khan Director, Refugee Rights Project, UCT Law Clinic (12 September 2009).

²⁹ Khan (note 28 above).

³⁰ See generally Alice Bloch 'Carrying out a survey of refugees: Some methodological guidelines and considerations' (1999) 12 4 *Journal of Refugee Studies*, 367–383; Jean Pierre Misago *et al* 'Towards tolerance, law, and dignity: Addressing violence against foreign nationals in South Africa' International Organization for Migration (IOM), Regional Office for Southern Africa. Available at www.iom.org.za [Accessed 10 July 2009].

wishes to make claims. As such, they do not allow us to make accurate descriptive inferences about the groups in which we are interested.³¹

It must be stated that from the outset, in view of the financial cost and human resources that would be required to carry out a study that would provide any widely representative answers about the access to justice issues of a group of people as large and disparate as South Africa's refugee population, this project did not set out to make any definitive claims about the subject. The study was meant to be a presentation of limited research that is sufficient to provide practical illustration of issues raised, providing an insight into some of the main justice issues that refugees face, accessibility of the justice system from a refugee's point of view and how well the justice system itself is responding to the needs of a class of people it had not, until recently, had to deal with.

The original plan for the study was to conduct a random sampling of refugees, with participants selected from the database of legal assistance organisations. Indeed the research started out like that, randomly selecting every third person on the database of the UCT law clinic who had approached the clinic for assistance with some legal issue. However, the infamous xenophobic attacks of May 2008 disrupted that schedule. Persons who had been shortlisted and/or contacted for interviews were displaced and it became quite difficult to trace them. Furthermore, because of the hectic schedule thrown at the refugee assistance organisations as a result of those attacks, it became increasingly difficult to isolate persons who fit the criteria set forth initially. In the end, I resorted to purposive sampling (or purposeful sampling).³²

Social scientists define purposive sampling as a research method that requires a researcher to intentionally pick a small number of cases that will yield the most information about a particular phenomenon.³³ Typically, purposive sampling targets a particular group of people from which a small sample size that addresses the research question is selected. One of the main advantages of purposive sampling, which was important to this study, is that it

³¹ Jacobsen & Landau (note 6 above) 194–195.

³² Michael Quinn Patton *How to use qualitative methods in evaluation* (Los Angeles: SAGE Publication, 1987) 51.

³³ Abbas Tashakkori & Charles Teddlie *Foundations of mixed methods research: Integrating quantitative and qualitative approaches in the social and behavioural sciences* (Los Angeles: SAGE Publications, 2008) 178–179; Earl Babbie & Johann Mouton *The practice of social research* (Oxford: Oxford University Press, 1998) 166.

provides greater depth of information than random sampling, as the participants would usually only be people who fit the criteria sought.³⁴ In this way, a great deal more is learned by focusing on a small number of carefully selected people, than would be learned from gathering a little information from a large statistically significant sample.³⁵ Random sampling on the other hand, designed to provide greater breadth of information from a larger sample that is representative of the population of interest³⁶ may not have yielded as rich information in terms of actual experiences.

Another benefit of the purposive sampling method adopted is that it helps address the issue of bias which might otherwise raise its head in the context of the sampling frame. Since participants are deliberately selected and are expected to be, any concerns that selecting participants from the UCT Law Clinic could have raised are effectively addressed. Refugee respondents for the questionnaires and interviews were generally targeted because records showed that they had been involved in or had sought assistance for some legal problem with the UCT Law Clinic. Since those interviewed had had some experience seeking to resolve legal matters, they were best placed to answer questions on access to justice in South Africa and thus fit the criteria that the purposive sampling method required. Legal assistance providers were targeted for the obvious reason that they were best placed to provide the information sought.

As stated in the section on methodology, the interviews were conducted in English. In view of earlier chapters which identified language as a major problem, using English as my medium of interview obviously represents some sort of contradiction. However, as the section on demographics explained, participants were persons who had been in the country for significant periods of time. Many had acquired better English language skills, and combined with the simple, non-technical language adopted for the questionnaire and interview, the issue of language was not a barrier. For the few refugees who did not speak English well enough, translation was provided by another refugee of the same language who spoke English well. The risk associated with the use of translators is acknowledged. Jacobsen and Landau warn that there is a risk of biased response resulting from the use of translators or local research assistants and these could result in translation problems and inaccuracies.³⁷ On

³⁴ Ibid.

³⁵ Patton (note 32 above) 52.

³⁶ Ibid.

³⁷ Jacobsen & Landau (note 6 above) 193.

the other hand they acknowledge that using translators also increases the reliability and validity of data. The possibility of the translator projecting his own experiences or opinions into the interview participant's responses cannot be overlooked. However, as only three respondents, (two Somali-speaking and one French-speaking), required translation, I am confident that my findings are fair and accurate.

In view of the limitations laid out above, the findings of the study cannot be generalised to the entire refugee population as a whole nor are they presented as a definitive representation of the state of refugee interactions with the justice system in the entire country. Having said that, however, it is equally important to point out the significance of the study in highlighting this often-ignored aspect of refugees' lives. The purposive data-gathering method used offered an important advantage in the sense that the quality of information obtained from the carefully selected participants with relevant experience was very good. While the limited data size precludes generalisation, the study provides an insight into an important area of refugees' rights and protection that is characterised by a dearth of academic literature. The study provides a useful and rich repertoire of descriptive and anecdotal data, which suggest patterns, variables and hypotheses that can serve as the basis for further study in this area.³⁸ According to Jacobsen and Landau, in areas or circumstances about which little is known, descriptive data obtained from in-depth interviews reveal much about how forced migrants live, the problems they encounter, their coping or survival strategies, and the shaping of their identities and attitudes.³⁹ This study has succeeded in doing just that with regard to refugee interactions with the justice system. It presents a compressed and informed account of some problems confronting refugees with regard to the search for justice. In doing this, it provides an insight into the various strong barriers that prevent refugees and asylum seekers from seeing the justice system as an ally in the struggle for equality.

Part II: Survey Results

This part presents the results obtained from the field study. It details what the major legal issues are that confront refugees and asylum seekers and the challenges involved in addressing those issues. It also describes refugees' attitudes, experiences and impressions of the system, as well as the mechanisms through which they access the justice system, the

³⁸ Ibid, 190

³⁹ Ibid.

organisations that assist them and the role of courts themselves. Each of the issues discussed illustrate how the absence or inadequacy of measures to ensure access to justice for refugees affects them in real life. Given the limited nature of this field study, reliance is also placed on the work of other scholars to support the arguments made in this section.

Each section is concluded with a brief summary showing how the issues discussed interface with the access to justice guarantees contained in the Constitution which, as discussed in previous chapters, reflect international law standards. It is worth pointing out again that the findings are not presented as conclusive evidence generalisable to the entire refugee and asylum seeker population. They should rather be read primarily as illustrations of broader trends.

5.3 PREVALENT LEGAL AND JUSTICE ISSUES AMONG REFUGEES AND ASYLUM SEEKERS

Legal and justice issues among respondents vary in nature and can be broadly classified into civil, criminal and administrative justice matters. Civil matters range from cases of unfair dismissal, insurance claims, civil damages for loss suffered as a result of xenophobic attacks, unlawful arrests, detentions and police brutality. The determination of prevalent legal matters among refugees and asylum seekers was based on two sets of data: The first was from questionnaires and interviews with respondents seeking assistance for matters other than administrative issues and with refugee service providers. The second was the case log of the UCT Law Clinic for administrative matters.

A significant number of cases among respondents related to enforcement of rights. Conversely, there is a reluctance to pursue criminal matters by reporting crimes. This finding is corroborated by a refugee lawyer's description of the types of cases refugees his organisation is usually asked for help with:

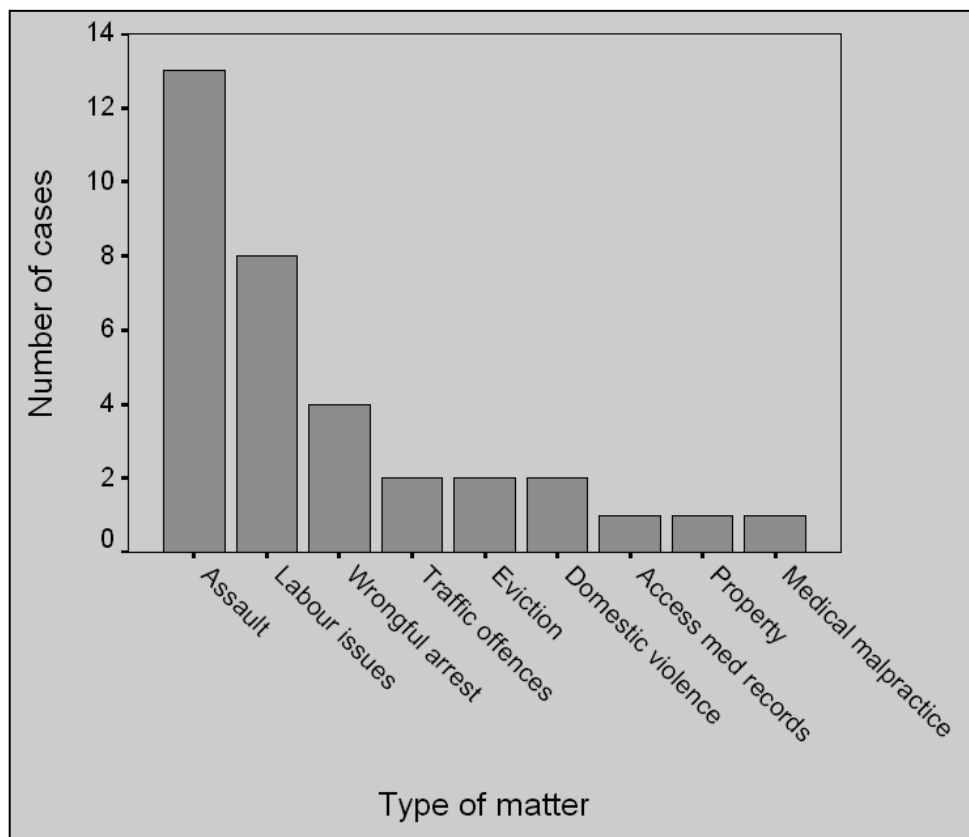
What is interesting is that [refugees] are very reluctant to charge a corrupt refugee official; they don't want to lay criminal charges against people who want to extort money from them. But on the whole they have been perfectly happy about going to court on civil matters, on matters relating to rights under the Constitution and the Refugee Act.⁴⁰

Figure 2 below depicts the types of matters that respondents in the study had sought legal assistance for. It does not include administrative matters, which as has been pointed out,

⁴⁰ Interview with William Kerfoot, Legal Resources Centre, Cape Town (12 September 2008).

virtually every client of the Law Clinic had sought assistance for at one time or the other. Administrative matters are discussed separately below.

FIG. 2 TYPES OF MATTER



5.3.1 Criminal matters

Physical assault was the major type of cases that respondents indicated that they had sought legal assistance for. Ironically, police officers were frequently the perpetrators in these cases. Of the 13 respondents who reported having been assaulted, 5 (38.5 per cent) had been assaulted by the police. Often the assault resulted from attempting to seek police assistance for other matters. Several of the respondents who have reported matters to the police found that that was as far as their matters went. Those in fact, appear to be the lucky ones. Others found that the police turned on them, made them out to be the criminals and physically assaulted them. The Law Clinic at UCT indicated that this is not unusual, as it has received many such reports: ‘We have many reports of police beating our clients. Commonly, the client reports having called for assistance from the police and, rather than getting help, they

end up getting beaten by the police'.⁴¹ Scholars assert that the reason behind such clearly illegal behaviour, which contravenes the duty to protect and violates refugees' right to access justice for infringements on their persons, is xenophobia. That xenophobia is a widespread problem within South Africa is a well documented fact.⁴² However, when it comes to access to justice, it is its manifestation among law enforcement officials that is most significant, as it has a huge effect on the criminal justice system.

5.3.1.1 Xenophobia and access to the criminal justice system

Several studies document what has been termed 'xenophobic tendencies' within the country's police force.⁴³ According to Masuku, several years since the end of apartheid, the values and attitudes of a significant proportion of police officers has yet to change. And although there are no available statistics to quantify the problem, 'studies suggest that xenophobia takes different forms and that the problem in the SAPS is not limited merely to attitudes, but often involves violence, abuse, and ill-treatment of foreigners'.⁴⁴ How these attitudes are manifested is illustrated by one of the cases that I followed in the course of this study. It was a particularly disturbing incidence of police brutality against a 28-year-old refugee from the DRC named Jonas.

Like many Congolese refugees⁴⁵ in the city, Jonas worked as an informal car guard whenever he could find an opening. One night, after trying unsuccessfully to find a car

⁴¹ UCT Law Clinic Narrative Report (note 21 above).

⁴² See chapter four, footnotes 31 & 33.

⁴³ Ingrid Palmay 'Refugees, safety and xenophobia in South African cities: The role of local government research. Available at www.csvr.org.za [Accessed on 14th July 2009]; Loren B Landau 'Urbanization, nativism and the rule of law in South Africa's "forbidden" cities' (2005) 26 *7 Third World Quarterly* 1115–1134, 1125–1126; Nyaoro Dulo 'The short arm of the law: Migrants' experiences of policing in Johannesburg' (Masters Diss. Forced Migration Programme, University of the Witwatersrand, Johannesburg 2007); David Bruce & Gareth Newham 'Racism, brutality and corruption are the key human rights challenges facing the transformation of the SAPS' in Reconstruct, *The Sunday Independent*, 10 December 2000; Lee Rondganger 'Xenophobic officers tarnish image and efficiency of SAPS'. *The Star* 17 April 2006, A6.

⁴⁴ Themba Masuku 'Targeting foreigners: Xenophobia among Johannesburg's police' (2006) *Crime Quarterly* 19–24, 19.

⁴⁵ Jesse Bernstein 'Car watch: Clocking informal parking attendants in Cape Town' (2003) *Working Paper 55*, Centre for Social Science Research, University of Cape Town; Jonny Steinberg *A mixed reception: Mozambican*

guarding position in Cape Town's Long Street, he decided to return home. An unmarked car occupied by several people (who later turned out to be plain-clothes police officers) parked beside him and the occupants began to question him as to where he was going at that time of the night. Jonas kept walking away from them, thinking they were criminals. He was then arrested and taken to the Woodstock police station where he was subjected to such brutal and sadistic assault over the course of the night that he was hospitalised. Two of the officers, both female, made him strip naked and repeatedly assaulted him with different objects. He also had his face and genitals sprayed with some 'burning chemicals'. Bleeding profusely, he was continually beaten until he lost consciousness and awoke the next morning to find himself locked up in a cell. The police officers who took over the next morning let him go. Jonas stated that during the course of his ordeal, he was continually referred to as a 'foreign criminal' even though he had committed no crime and he was not charged with any. The UCT Law Clinic assisted him to lay a criminal complaint against the two police officers.

Police prejudice and denial of access to justice is not always displayed in the form of violence, however. Sometimes it is found in the not-so-subtle hints that an officer makes to a complainant. Some respondents reported being advised to 'go back to your country' when they tried to report a matter. One reported being told: 'you people are Congolese, you should solve your own problems'.⁴⁶ This finding is corroborated by the UCT Law Clinic, which reports that sometimes, its clients are given the impression that they cannot access the justice system because they are foreigners. In one such instance '... a police official advised our client that they could not get a protection order because the matter of domestic abuse should be resolved within the Somali community without calling for outside assistance'.⁴⁷ In another instance, a refugee reported a case of assault by his employers at the Wynberg police station. Rather than open a case of assault, the police officer who attended to him helped him to draft a letter to the DHA asking to go back to his country. Not being very fluent in English, he took the letter to the DHA from where he was directed to the UCT Law Clinic to have his voluntary repatriation processed. During the interview in preparation for his repatriation, he was very surprised to learn what was contained in the letter.

and Congolese refugees in South Africa (Pretoria: Institute for Security Studies, 2005); Sichone (note 24 above) 133.

⁴⁶ Respondent 11 (25 June 2008).

⁴⁷ UCT Law Clinic Narrative Report (note 21 above) 17.

Further tied to the issue of police discrimination as a barrier to justice, was the general perception among respondents that in matters affecting non-South Africans, the police is usually apathetic. They felt there was a lack of interest in taking up the matters that were reported to them, simply because they were foreigners. Interestingly, several respondents indicated that if the police had shown some interest, they would have been happy to pursue a matter and to go to court if necessary. But the overwhelming refrain was that there was simply no interest on the part of the police. Even in cases where arrests were made and perpetrators charged, there seemed to be an unwillingness to follow through with prosecutions – a state of affairs that has received media attention⁴⁸ – and is naturally cause for much dissatisfaction on the part of victims. A respondent stated:

I reported a case of [physical assault]. I was beaten by local community people because I was not from their country. What happened in the case? The police seemed to be searching for the criminals, but after a week I was watching these same guys in the city. No, I was not satisfied with the way the police handled the case, because no case was made. I was called for the case, but after four months, the guys were free.⁴⁹

Further compounding things is a strange practice that seems to have developed in the police force, whereby they tell complainants to go and look for and bring their assailants to the police station. One respondent said:

The police – they don't care. They didn't take me seriously. They said I should go and look for the person because they don't know him. Even after I gave them his name and address, they did not arrest him. I think they don't want to help because he is a South African. He is their brother. I don't know what I will do next if the police take up the matter. Maybe I will come here [UCT Law Clinic] again for further assistance.⁵⁰

The police's practice of saddling victims with the responsibility of bringing their assailants to the police station, or in effect arresting them, has been noted by the UCT Law clinic because several of their clients have reported being asked to do the same.⁵¹

Admittedly, these accusations of apathy and ineptitude are not a uniquely 'foreigner problem'. According to recent government pronouncements, South African citizens sometimes face the same problem of apathy and inept handling of cases when they go to

⁴⁸ See for instance 'One bullet and no finger prints: Why do police find it so difficult to gather evidence in cases where certain foreigners have been killed?' *Noseweek*, January 2007 4–15.

⁴⁹ Respondent 2, 9 April 2008.

⁵⁰ Respondent 9, 23 June 2008.

⁵¹ UCT Law Clinic Narrative Report (note 21 above).

police stations. So much so, that large numbers of cases go unreported because people have lost faith in the criminal justice system.⁵² However, this does not negate the fact that foreigners appear to be more disproportionately affected, and where the reasons for failure to act is linked to the complainant's non-citizen status, then that clearly is prejudice. It is rather telling that not a single respondent in this study who reported having made a complaint to the police was satisfied with the way in which the police handled the matter.

Researchers suggest that one of the main factors behind xenophobia within the SAPS is that police officers receive inadequate training on dealing with race and discrimination,⁵³ despite evidence that the responsible government departments are quite aware of the situation.⁵⁴ This, coupled with the inability of police officers to differentiate between various classes of foreigners,⁵⁵ as well as a widespread perceptions among police officers that crime is largely driven by foreigners,⁵⁶ all form perfect conditions under which asylum seekers or refugees approaching the police for help can often expect to be met with a prejudicial attitude. Landau proffers further explanations:

As police seek to overcome their apartheid-era stigma and supplement their meagre incomes, they are exploiting poor oversight, xenophobic discourses and immigrants' vulnerabilities to legitimise a set of illegal or extra-legal practices. At the most basic level, by targeting non-nationals 'the usual suspects' (refugees, asylum seekers and other immigrant groups unlikely to have proper identification documents) – police are able to meet periodic arrest targets.⁵⁷

Poorly paid and unsupervised, police officers have few incentives for promoting abstract principles of justice, Landau concludes.⁵⁸ Unfortunately, xenophobia is not merely a blight on the reputation of the police, it has severe implications for refugees and asylum seekers'

⁵² Former Deputy Justice Minister Johnny de Lange at a cabinet lekgotla, quoted in 'Our justice system is in tatters' *Pretoria News* 14 August 2008, 1.

⁵³ Masuku (note 44 above) 20.

⁵⁴ Irene Kuppam 'Police prey on refugees: Claims' Independent Online, 2 March 2007; see also Basildon Peta 'Minister slams treatment of refugees by cops' Independent Online, 6 October 2005.

⁵⁵ Palmary (note 43 above); Landau (note 43 above) 1125–1126.

⁵⁶ Loren Landau & Karen Jacobsen (note 25 above) 19; Jonathan Crush & Vincent Williams 'Making up the numbers: Measuring 'illegal immigration' to South Africa' *Migration Policy Brief No 3* (Cape Town: Southern African Migration Project, 2001); Dulo (note 43 above).

⁵⁷ Landau (note 43 above) 1126.

⁵⁸ Loren B Landau 'Democracy and discrimination: Black African migrants in South Africa' (2004) 5 *Global Migration Perspectives*, Global Commission on International Migration, 13.

access to justice. Its effect is that it prevents those who are victims of it from accessing justice, thus twice victimising them. It also has implications for South Africa, as this puts it in violation of the constitutional and international law obligations elaborated in chapters two and three.

Firstly, as was shown in chapter three, in order to be effectively enjoyed, the right of access to justice imposes both negative and positive obligations on the State. The negative obligation is a duty not to impede access to the courts and that duty binds all organs of the State.⁵⁹ That negative obligation, I argued, extends beyond active measures which curtail the powers of the courts, and includes failure to take action to remove existing impediments. This assertion is supported by the finding of the HRC in *Oló Bahamonde v Equatorial Guinea*.⁶⁰ There, the HRC stated that since the notion of equality before the courts and tribunals encompasses the very access to the courts, a situation in which a person's attempts to notify the competent jurisdictions of his or her grievances are systematically frustrated runs counter to this guarantee.⁶¹ Thus, the State has an obligation to address any situation which 'systematically frustrates access' if the guarantee of equal access is to be enjoyed. It is submitted that the types of situations which that case contemplates include one such as this, where xenophobic tendencies within the SAPS frequently leads to intimidation or victimisation of foreigners wishing to utilise the State's justice mechanism. This is especially so if the situation is so pronounced that it causes victims of crime or injustice to avoid seeking remedies, which, as will be demonstrated further on, is the case here.⁶² Failure on the part of South Africa to take action which addresses such practices, even though it is well-known and well-documented, constitutes a violation of the State's negative obligation not to impede access. Such inaction also puts the State in violation of its obligations under Art 16 of the UN Refugee Convention, to ensure unrestricted access for refugees to its courts.

Secondly, such practices go against the principle of equality and equal protection of the law as laid down in s. 9(1) of the Constitution. Equal protection of the law requires that law enforcement work to protect refugees just as it does other members of society. It also requires them to fulfil properly, their role as the gateway to the justice system. As the Constitutional

⁵⁹Jason Brickhill & Adrian Friedman 'Access to courts' in Woolman *et al Constitutional law of South Africa* Vol. 4, 2nd ed (Cape Town: Juta 2009) 59–1, 59–2.

⁶⁰ Communication No 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993).

⁶¹ *Ibid*, Para 9.4.

⁶² See section 5.4.1.2 below.

Court noted in *Van der Walt v Metcash Trading Ltd*,⁶³ ‘all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access’.⁶⁴ The test here is clearly objective – *anyone* who needs the protection of the law should get it. *Everyone* should benefit from the law, regardless of nationality or immigration status. When the police, who are the embodiment of the law and the primary instrument of the State’s protection, are themselves violators of those rights, this guarantee is ineffectual.

This situation illustrates one of the inadequacies of South Africa’s policy on access to justice, as asserted in chapter four. I argued in that chapter that by failing to recognise refugees as vulnerable persons who face difficulty in accessing justice, and thus devising measures which address their vulnerability, the access to justice policy and programmes will not achieve the ideal of equal access to justice that the Constitution upholds. Thus, what currently obtains, to paraphrase the ECtHR in *Golder v UK*,⁶⁵ is an absurd situation where the Constitution describes in detail the procedural guarantees afforded to persons seeking justice, yet there is no guarantee of that which alone makes it possible to benefit from such procedures, that is access to court.⁶⁶ This situation urgently needs to be changed. It calls for concerted and determined effort, firstly to acknowledge it and, secondly, to put measures in place to address it. The ultimate goal would be to create a police force in which discrimination has no part, which is conversant with the rights of refugees and asylum seekers and which protects those rights. The final chapter of this thesis makes recommendations in this regard.

To avoid creating an inaccurate picture, it is worth pointing out that despite being widespread, prejudicial attitudes towards non-citizens cannot be ascribed to all officers in the police force. On the contrary, in some of the matters in which respondents had decided to seek redress for abuses by police officers, it had been fellow officers, mostly from the same stations, who had advised them to do that and had even directed them to the right places where they could find help. For instance Josephine⁶⁷ a Rwandan refugee was assaulted by police officers after a tenant reported that she had locked him out. The police came to her

⁶³ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) 325.

⁶⁴ *Ibid* para 24.

⁶⁵ *Golder v UK* (1975) 1 EHRR 524.

⁶⁶ *Ibid*, para 35.

⁶⁷ Respondent 20, 13 August 2008; not real name.

house at night while she and her family were in bed. When she demanded to see a warrant, she and her husband were beaten up and the whole family, including her young children, were tear-gassed to force them into submission. She took down the number of the police van and then reported the matter at the Manenberg police station the following day. The officer who attended to her advised her to open a case and directed her to seek legal assistance from Legal Wise. Legal Wise decided to bring a case against the Minister for Safety and Security and the two officers involved.

However, when Legal Wise called the police station to get details of her police report, they were told there was no such case on their register, despite Josephine's insistence that she had given a statement and seen them take down her particulars. When she asked to see the officer who had attended to her on the day she made the report, she was told he was 'not around'. She felt that the police officers were then trying to cover up for their fellow officers. After this she became afraid that if the men involved knew she was planning on taking them to court, they could kill her. So she approached the UCT Law Clinic to help her get a protection order against them, and also to help process an application for resettlement to another country. 'I didn't flee genocide in Rwanda to come and die in South Africa' she said.⁶⁸

Similarly, in the case of Jonas described earlier, it was one of the police officers who took over the following morning that advised Jonas to lay a charge of assault against the officers involved. He referred Jonas to the UCT Law Clinic, and even called a photographer to document his injuries and then advised him to go to Groote Schuur Hospital. Unfortunately, as with Josephine, this officer who assisted him in getting help initially, later became aloof and did not want to be involved in the case. This sudden change in attitude by officers who try to do the right thing raises questions about the possibility of pressure being exerted by colleagues to toe a certain line or to shield misbehaving officers.

5.3.1.2 How police attitudes influence refugees willingness to seek remedies

Much of the literature on access to justice suggests that lack of awareness about rights is one of the main reasons people do not have recourse to the courts.⁶⁹ But in this study, respondents

⁶⁸ Ibid.

⁶⁹ Andrew J Roman 'Barriers to access: Including the excluded' in Allan C Hutchinson (ed) *Access to civil Justice* (Toronto: Carswell Publishers, 1990) 177–201, 180; Afrimap 'South Africa: Justice sector and the rule

showed a remarkable awareness of their rights, and knew they had to seek a lawyer's assistance for matters of a legal nature. Yet in many instances, there was a disconnect between knowledge of their rights and a willingness to follow through with the processes needed to see those rights enforced. Sixteen of the 30 respondents (53 per cent) said even though there had been several instances when they had felt they had legitimate claims that should be settled in court, they had not sought judicial resolution for various reasons. The main reasons expressed were fear, unwillingness by the police to follow through, or distrust of the system. One Congolese respondent stated, when asked why he had chosen not report a crime against him: 'I did not go [to report the case] because of the feeling and thought of not being helped by a South African organization to solve my problem mostly if the other party is also South African'.⁷⁰ This corroborates the findings of a 2006 survey by Wits University that forced migrants were less likely to report crimes against them to the police, mostly because they do not trust the police.⁷¹

The question arose as to what respondents would do if police officers were the perpetrators of the crime against them, a legitimate question considering the wide-spread demonstration of xenophobia on the part of the police as described earlier. In this instance there was far greater dichotomy between knowledge of rights on the one hand, and where to go for redress and willingness to seek that redress on the other. Knowledge about further sources of redress was low among respondents. Only one respondent indicated that he had tried to take a case of brutality further than the police station, reporting it to the Independent Complaints Directorate – the civilian body responsible for investigating complaints of misconduct and criminality made against members of the South African Police Service and Municipal Police Services. Other respondents had not heard of the ICD. It is probably worth pointing out that knowing where to go would not necessarily translate into getting the redress

of law: A discussion paper (Johannesburg: Open Society Foundation for South Africa, 2005) 108; Sally Lloyd-Bostock 'Fault and liability for accidents: The accident victim's perspective' in *Donald J Harris et al Compensation and support for illness and injury* (Oxford: Clarendon Press, 1984) 159; Mauro Cappelletti & Brian Garth 'Access to justice: The worldwide movement to make rights effective' in Mauro Cappelletti & Brian Garth (eds.) *Access To Justice – Vol. I A World Survey* (Milan: Sijthoff & Noordhoff 1978) 15–16; Genn *et al* (note 26 above); Janet Gross Stein & Adam Cook 'Speaking the language of justice' in Julia Bass *et al* (eds) *Access to justice for a new century: The way forward* (Toronto: Law Society of Upper Canada, 2005) 163.

⁷⁰ Respondent 6, 17 May 2008.

⁷¹ Cited in Ingrid Palmay 'City policing and forced migrants in Johannesburg' in Landau *Forced migrants in the new Johannesburg* (note 5 above) 67.

sought. Even for legal assistance agencies, accessing the available redress mechanisms on behalf of their clients can be quite onerous. According to the UCT Law clinic,

Personnel at police stations (Caledon Square and Khayelitsha) refused to open dockets for foreign nationals who alleged that they had been assaulted by police from that station ... We refer complaints to the Independent Complaints Directorate, who usually are meticulous in acknowledging the complaint. However, the rate at which we [get] results from the ICD is in direct proportion to the pressure we maintain on getting an individual case investigated. We do have some assault cases still pending from last year that are waiting to go to Court, but their progress is extremely slow.⁷²

There were other reasons for the low interest in seeking further redress among respondents, which will be discussed in the section on perception of the justice system below. The most common reason however, was widespread fear of intimidation or physical injury related to their non-citizens status. As a Somali refugee put it ‘if they know, they can kill me’.⁷³ He had been arrested at the Bellville taxi rank ‘for loitering’. During his arrest he was physically assaulted and had his arm broken. The arresting officers took him to hospital, chained him to the bed and told him he would have to appear in court after he was discharged. However, when his friend paid R1000 to the police officers, he was let off. He stated that when he complained about the fact that they had broken his arm, he was intimidated. ‘They asked me “what are you going to do about it?”’ He then decided that the best recourse was to leave the country as he could not be sure something similar would not happen to him again. I met him at the UCT Law clinic where he had gone to apply for resettlement to another country.

This man’s response is replicated many times over in the resettlement case log⁷⁴ of the UCT Law Clinic and among the respondents, and it highlights an interesting finding: many of those who had approached the Law Clinic to report cases of police brutality and unlawful arrest had not in fact gone there to seek any redress against the police. Rather, they had gone to ask to be resettled either to another part of the country or more commonly, out of South Africa. They would often state ‘I do not want to bring any case – I just want to leave this country’. This is an obvious indication of their perception of and level of confidence in the

⁷² UCT Law Clinic Narrative Report (note 21 above) 16.

⁷³ Respondent 4, 5 May 2008.

⁷⁴ Database of refugees applying to be removed to another part of the country or another country through the UNHCR refugee resettlement programme. About 40 per cent of the 1614 recognized refugees that the UCT Law Clinic assisted in the period January to June 2009 were requests for resettlement. UCT Law Clinic Narrative Report (note 21 above) 15.

South African justice system. For many, justice was not seen as bringing a perpetrator to book, but rather it was fleeing the country and going ‘where they cannot get me’.⁷⁵ Refugee lawyers who were interviewed all confirmed their clients’ general disenchantment with and apathy towards the legal system.

This apathy towards the justice system is worrying, not only because it is a manifestation of denial of access to justice, but also because it raises the spectre of subterranean forms of justice, which refugees and asylum seekers may be forced to resort to in the absence of help from the State. As the Constitutional Court noted in *Lesapo v North West Agricultural Bank and Another*,⁷⁶ the right of access to court contained in s. 34 of the Constitution is a ‘bulwark against vigilantism’, one that ensures ‘peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help’.⁷⁷ Without doubt, refugees and asylum seekers will continue to confront issues that require the justice system to resolve. But when they are unwilling to do so, as a result of police intimidation or the perception that they will not be helped, there is the possibility that they will take the law into their own hands. The police, in other words, could be inadvertently encouraging vigilantism and a resort to self-help, thus effectively undermining the purpose of s. 34 and the rule of law. Even if they do not resort to vigilantism, the probability of resorting to non-state justice systems, with the attendant risks, is increased. This issue is discussed in further detail in chapter six.

The discussion above suggests that in accessing the criminal justice system, the major problems for refugees and asylum seekers exist in the preliminary stages where they deal with law enforcement officials and those who act as the gateway into the justice system. Unfortunately, the policy and programmes on access to justice do not address this, thus confirming my earlier argument that, in so far as it fails to acknowledge refugees as a vulnerable group requiring assistance to enjoy equal access to justice, South Africa’s access to justice policies and programmes do not meet the needs of refugees and asylum seekers.

⁷⁵ Respondent 4 (note 73 above).

⁷⁶ *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

⁷⁷ *Ibid*, 417 para 22.

5.3.2 Civil matters

With respect to civil matters, there were several different kinds for which respondents had sought assistance. These included unlawful evictions, which often necessitated representations to or before a housing tribunal by the UCT Law Clinic; transfer of property; road traffic matters which essentially were cases in which the respondents had been wrongfully fined for not being possession of a licence and for which the law clinic made representations to have charges withdrawn; and lastly cases of domestic violence in which spouses or partners, often women, approached the law clinic seeking to have protection orders taken out against the other partner. One respondent had sought legal assistance to obtain access to his medical records in order to have his Unemployment Insurance Fund payout processed, and another was seeking assistance to bring medical malpractice suit against a surgeon at the Victoria Hospital in Wynberg.

The largest category of civil matters for which respondents had sought legal assistance were labour-related.⁷⁸ Refugees and asylum seekers inhabit a delicate space in relation to jobs and job opportunities in the country,⁷⁹ and some of the cases reflected those challenges. These range from unfair dismissals, employment without contracts, withheld wages, unfair discrimination, to illegitimate barriers to permanent employment, such as the requirement of a 13 digit ID document for permanent employment. The UCT Law Clinic typically referred these cases to the CCMA, the Department of Labour or to the relevant bargaining council, but in some instances represented the refugee before the CCMA until conclusion.⁸⁰ No respondent indicated they had been turned away from these bodies, and the UCT Law Clinic is not aware of any instance of a refugee or asylum seeker being turned away.⁸¹

Inability to obtain or renew necessary permits from DHA was one of the major factors in the labour cases. Many of those problems arose either from concerns by employers that they would be fined for employing ‘illegal’ immigrants since some of the workers had

⁷⁸ Figure 2 (section 5.3 above).

⁷⁹ Sichone (note 24 above) 134-135; Baruti Bahati Amisi ‘An exploration of the livelihood strategies of Durban Congolese refugees’ *UNHCR Working Paper No. 123* (UNHCR Evaluation and Policy Analysis Unit, 2006); Frederick Golooba-Mutebi & Stephen M Tollman ‘Survival to Livelihood Strategies for Mozambican Refugees in South Africa’ (2004) 20 *Forced Migration Review* 28.

⁸⁰ UCT Law Clinic Narrative Report (note 21 above).

⁸¹ Khan (note 28 above).

expired permits,⁸² or simply out of a desire to take advantage of the ‘cheap labour’ that asylum seekers in particular represent, due to the precarious nature of their legal status. They are often employed without contract and then have their employment terminated without due regard to any proper procedure. Some employers in fact refused to pay for work done, relying on the fact that the victims would be too afraid to seek help from any statutory body. Such cases were rampant in the past,⁸³ and according to some respondents and the UCT Law Clinic, still happen. The Clinic said it had noticed an increase in reporting of discrimination by South African employers, including exploitation of refugee labour.⁸⁴ But the increase in the reporting also demonstrates a greater awareness of labour rights by refugees and a desire to seek redress for unfair labour practices.

In one instance, a respondent, a 26-year-old Congolese refugee was employed by a security company without any written contract. After working for three months without being paid, he wrote to his supervisor asking for the promised salary. The company promptly fired him. He then approached the UCT Law Clinic to help him recover the wages due to him. Staff at the clinic wrote a letter of demand on his behalf, and also referred him to the CCMA to seek redress for wrongful dismissal. Thereafter, he was subjected to threat after threat of physical harm if he did not withdraw the case from CCMA.⁸⁵ He did not succumb to those threats, returning every time to the Clinic to inform his attorney of developments. This would not have been the case a few years ago, as he would have been intimidated into giving up. Khan observes that refugees and asylum seekers are more aware of rights nowadays, and of the fact that there are minimum wages below which they should not be paid, and as foreigners should not be paid less.⁸⁶ It is however, worth pointing out that labour exploitation

⁸² One such instance was of a refugee whose s. 24 permit had expired, and despite several attempts, had been unable to access the DHA offices to have it renewed. As a result, his employment was terminated *Paulo Rogeiro Baptista v Tiger Food Brands Ltd t/a Albany Bakeries*. Unreported, Commission for Conciliation Mediation and Arbitration, Case No: WECT 7854-09; UCT Law Clinic op cit.

⁸³ Human Rights Watch *Keep your head down: Unprotected migrants in South Africa* (New York: Human Rights Watch, 2007). Although this report is primarily about migrants as a general group, some of its interview participants were refugees and asylum seekers. .

⁸⁴ UCT Law Clinic Narrative Report (note 21 above).

⁸⁵ Respondent 27, June 2009.

⁸⁶ Khan (note 28 above).

reported is not unique to migrants however. Poor and vulnerable South Africans are often also similarly exploited.⁸⁷

It appears, on the strength of statements by legal service providers and refugees themselves, that in respect of labour rights and labour issues, refugees have greater access to justice, and this is due in no small part to the level of labour rights-awareness, and the commendable work of the CCMA. Scholars and practitioners are generally happy with the work of the CCMA, both in terms of accessibility and the relative speed of its processes.⁸⁸ In terms of accessibility, as noted above refugees are not turned back, and they also have access to interpretation. However, the CCMA provides interpreters in the 11 official languages only. Foreign language interpreters are allowed, but need to be arranged by the referring party at his own cost.⁸⁹ As previous chapters have established, linguistic accessibility is an important aspect of access to justice, and lack of it effectively negates equal access. The cost of providing such interpretation may prove to be a barrier to many wishing to use the system. In all likelihood, those refugees requiring interpreters would likely resort to bringing a friend or compatriot along, who speaks better English. But as chapter four demonstrated, the issue of interpreters is not limited merely to availability. It is also critically important that such interpreter be competent in order to avoid miscarriage of justice. This is an area that the DoJ would do well to look at, and on this point, it bears reiterating the recommendation of the court in *Mponda v S* that the DoJ needs to establish a panel of officially accredited *ad hoc* interpreters qualified in the various foreign African languages to which courts, legal practitioners and bodies like the CCMA, can have recourse.⁹⁰

Beyond the question of access to interpretation, the findings in relation to labour issues show that arbitral forums are beneficial in combating exploitative labour practices. The relative accessibility of the CCMA to refugees and asylum seekers demonstrates the importance of the recognition within s. 34 of the Constitution, of the role forums other than courts can play in ensuring access to justice. Certainly, in this area, the State's efforts to promote access to justice have been beneficial to refugees and asylum seekers.

⁸⁷ Human Rights Watch (note 83 above).

⁸⁸ International Commission of Jurists *Access to justice: Human rights abuses involving corporations – South Africa* (Geneva: International Commission of Jurists, 2010) 68–69.

⁸⁹ Commission for Conciliation, Mediation and Arbitration *Practice and procedure manual* 5th ed. (Johannesburg: CCMA, 2010) 504, para 5.4.13.

⁹⁰ *Mponda v S* 2004 (4) All SA 229 (C) para 44.

5.3.3 Administrative matters

Administrative justice is an important aspect of access to justice, and for refugees and asylum seekers, particularly so because their enjoyment of asylum and hence, their continued presence in South Africa is largely a result of administrative action. Access to a decision-maker may make the difference between protection and *refoulement* and the consequent danger to life and limb. However, access to justice in the administrative context is not merely a matter of having access to a decision-making body. As with criminal and civil justice, the removal of arbitrariness and ensuring respect for principles of fairness and the rule of law are integral to enjoying administrative justice. As every respondent, at one time or the other had been a subject of administrative action, the study only focuses on how practices within the administrative process affect their access to administrative justice and other areas of life. The data for this aspect of the study is based on the case logs of the UCT Law Clinic and on interviews with service providers at the Legal Resources Centre. Judging by the sheer volume of administrative matters that these legal service providers attend to, it is clear that administrative matters make up the greater proportion of issues that refugees and asylum seekers require legal assistance for. For instance, of the 4329 asylum seekers that the UCT Law Clinic attended to between January and June 2009, 3462 (80 per cent) were for administrative matters. These relate mostly to questions of legal status in the country, or compliance with administrative requirements of various professional bodies. But by far the biggest administrative matter relates to obtaining permits from the Department of Home Affairs (DHA) and appeals against rejected applications for asylum.

As has been stated, administrative justice is an important aspect of access to justice, and in order for refugees and asylum seekers to truly enjoy access to justice in the administrative context, there are three elements that must be in place: Firstly, they must have access to the administrative body. Secondly, they must have access to resources needed to navigate the administrative system, including language assistance; and thirdly, they must have access to legal or other knowledge necessary to obtain the services of that administrative body.⁹¹ I will now examine how refugees fare in respect of each of these elements.

⁹¹ Lorne Sossin 'Access to administrative justice and other worries' available at http://www.law.utoronto.ca/documents/conferences/adminjustice08_Sossin.pdf [Accessed 13 October 2010].

5.3.3.1 Access to the asylum process

South Africa's obligations to refugees in the administrative context are to be found in Arts 25, 27 and 28 of the UN Refugee Convention. Those articles require a host State to assist refugees in obtaining documents from foreign countries, to provide refugees with identity documents and to provide them with travel documents respectively. These obligations have been incorporated into South Africa's Refugees Act,⁹² which also incorporates the constitutional guarantees on administrative justice.⁹³ Those guarantees are found in s. 33 of the constitution.

Given its history of 'executive autocracy', it was important to the drafters of the Interim and Final Constitutions that South Africa avoids a repeat of the culture of administrative injustice that prevailed in the past⁹⁴ – a culture which saw the power of the courts to review administrative actions severely curtailed by the wide discretionary powers invested in government officials and by ouster clauses.⁹⁵ Consequently, the country became one of few countries in the world which makes administrative justice a constitutional right.⁹⁶ Section 33 of the Constitution recognises a right to administrative justice and sets out guarantees in this regard.⁹⁷ Those guarantees seek to ensure that persons who are subjects of administrative action enjoy procedures that are fair and in compliance with the rule of law. To give effect to this right, the Promotion of Administrative Justice Act⁹⁸ (PAJA) was enacted. PAJA elaborates on s. 33 of the Constitution, setting out specific procedures to be followed by all

⁹² Sections, 30 and 31.

⁹³ Section 24(2).

⁹⁴ Hugh Corder 'Cobwebs and crowbars: Executive autocracy and the law in South Africa' (1989) 5 *South African Journal of Human Rights* 1.

⁹⁵ Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5th ed (Cape Town: Juta, 2005) 642; Hugh Corder 'Introduction: Administrative Law reform' (1993) *Acta Juridica* 1–20, 2.

⁹⁶ Jeffrey Jowell 'The democratic necessity of administrative justice' (2006) *Acta Juridica* 13, 15.

⁹⁷ 33. Just administrative action:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

⁹⁸ Act 3 of 2000.

administrators in the public service. The manner in which the DHA is to deal with refugees is therefore guided by the provisions of PAJA.

Unfortunately, this study, and other research and media reports⁹⁹ show that the provisions of the Constitution and PAJA are not implemented as well as they should be and, as a result, the asylum determination procedure is characterised by a high degree of arbitrariness, which fails to achieve acceptable standards of administrative justice.¹⁰⁰ The problems in this regard are numerous and varied. As already alluded to above, the data suggests that one of the biggest problems is access to the asylum determination process. Asylum seekers contend that access to the system is almost impossible without a bribe, with applicants often having to queue for days on end and even sleeping in front of the offices of the DHA, a position supported by existing studies.¹⁰¹ Most respondents (56.7 per cent) had had to seek legal assistance to gain access to the asylum process.

Even after eventually gaining access to the asylum process, asylum seekers find the process characterised by so much delay that they are left in limbo for long periods of time, sometimes years. Although s. 22 of the Refugees Act¹⁰² and s. 4(1)(b) to the Refugees Act Regulations¹⁰³ require that as soon as an individual lodges a claim for asylum, the Refugee Reception Officer (RRO) should issue them with a temporary asylum seeker permit, the study found that this is often not the case. On average, as *Table 3* shows, it took respondents at least six months to obtain the relevant permits from DHA.

⁹⁹ Amisi & Ballard (note 20 above); William Kerfoot 'The lack of due process in asylum determination in South Africa' Paper presented at 'Conference on Refugees in the New South Africa' Pretoria 2001; Clive Ndou 'MPs reveal 'chaotic' conditions at refugee office' *Mail & Guardian Online* 17 October 2007. Available at <http://www.mg.co.za/> [Accessed 17 October 2007]; Lynley Donnelly & Haydee Bangerezako 'Dept of Home Affairs under fire over deportations' *Mail & Guardian* 18 August 2006.

¹⁰⁰ Jonathan Crush & Vincent Williams (eds) 'Evaluating Refugee protection in South Africa' (2002) *Migration Policy Brief No. 7*, Southern African Migration Project.

¹⁰¹ Lee Anne de la Hunt & William Kerfoot 'Due process in asylum determination in South Africa from a practitioner's perspective: Difficulties encountered in the interpretation, application and administration of the Refugees Act' in Jeff Handmaker *et al* (eds) *Advancing refugee protection in South Africa* (New York: Berghahn, 2008) 100.

¹⁰² No. 130 of 1998.

¹⁰³ Government Gazette Vol 418, No 21075, 6 April 2000; Regulation Gazette, No. 6779; General Notice No. R. 366.

TABLE 3: LENGTH OF TIME TO OBTAIN PERMIT

Time to get permit	Frequency	Per cent
< 6 months	11	36.7
> 6 months	12	40.0
Unknown	7	23.3

Practitioners have grappled with this endemic problem from as far back as 2000,¹⁰⁴ and the table above in fact, represents a massive improvement in the time-frames that other studies reveal.¹⁰⁵ This improvement is largely attributable to the fluctuating successes of the measures adopted by the DHA to address backlogs resulting from its inefficient asylum adjudication process.¹⁰⁶

The inability of DHA to deal with asylum applications in a timely manner means that thousands of asylum seekers remain undocumented for months, sometimes years, despite genuine efforts to get Section 22 permits. This has negative impacts on their abilities to get jobs, put their children in school, and it has been suggested, even makes them more vulnerable to xenophobic exploitation and pressure.¹⁰⁷ To make matters even worse, when the DHA finally gets round to processing their applications, many applicants find themselves in limbo: genuine asylum seekers find that their applications are rejected because ‘the situation in home country has improved’, yet the reasons that caused their flight in the first place remain. Others find that they eventually get their permits when they could in fact have

¹⁰⁴ Tebogo Segale ‘Forced migrants and Social exclusion in Johannesburg’ in Landau *Forced migrants in the new Johannesburg* (note 5 above); Belvedere *et al* (note 22 above) 6, 76; Works in note 98 above.

¹⁰⁵ Forced Migration Studies Programme ‘National survey of the refugee reception and status determination system in South Africa’ 2009 MRMP research report; Jeff Handmaker ‘Starting with a clean slate? Efforts to deal with asylum application backlogs in South Africa’ in Jeff Handmaker *et al* (note 100 above) 117; De la Hunt & Kerfoot (note 100 above).

¹⁰⁶ Jeff Handmaker ‘Starting with a clean slate? Efforts to deal with asylum application backlogs in South Africa’ in Handmaker *et al* (note 100 above) 117.

¹⁰⁷ Kerfoot (note 40 above).

returned home because their home situation has improved.¹⁰⁸ As if inability to gain access to the asylum process and excessive delays were not enough, the system is also plagued by other problems, such as personnel shortages¹⁰⁹ and the lack of uniformity in procedures adopted at the DHA's various offices, with each adopting whatever practices suited them, to the detriment of asylum seekers.¹¹⁰

The situation described above shows serious shortcomings in South Africa's compliance with its international law and constitutional obligations on access to administrative justice for asylum seekers. The situation goes against every principle of access to justice, as has been demonstrated in chapters two and three and amounts to a derogation of South Africa's responsibility for refugee protection generally, and to ensure access to administrative justice specifically. As Landau puts it, the situation is not one of mere administrative incompetence; it is a situation of illegality and violation of the right to human dignity.¹¹¹ It is quite clear that the problem is not attributable to a lack of adequate guarantees or adequate legislation, as the existence of s. 33 of the Constitution and the enactment of PAJA and Refugees Act negate that contention. In terms of access to the administrative process, the problem lies in the lack of implementation of those laws. The next section looks at other problems related to access to administrative justice.

5.3.3.2 *Access to language assistance*

As with understanding proceedings in courts, the issue of language is also important in the context of administrative justice. For asylum seekers and refugees, this is even more so, because the grant or refusal of asylum is largely dependent on the reasons for the applicant's

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ For example, the Rosettenville and the Marabastad Refugee Reception Offices in Pretoria had their own pre-screening procedure that is not provided for in the Refugees Act. The Wits University Law Clinic challenged the constitutionality and legality of these procedures and the court declared the procedures unlawful, ordering reviews of applications rejected under the procedure. See *Tafira and six others v Ngozwane & 5 others*. Unreported, High Court of South Africa, Transvaal Provincial Division. Case No. 12960/06; see also *Kiliko and others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C), which dealt with similar problems in Cape Town. The court found that 'the manner in which the Department [of Home Affairs] discharges its duties and obligations to refugees not only deleteriously affects the freedom and dignity of a substantial number of disadvantaged human beings, but also fails to adhere to the values embodied in the Constitution'.

¹¹¹ Loren B Landau 'Shortcomings of South Africa's urban refugee policy' (note 5 above) 317.

flight, and this is usually narrated orally. In this regard, the Refugees Act provides that the Minister of Home Affairs may make regulations for the provision of interpreters at all levels of the determination process.¹¹² Pursuant to this, s. 5 of the Refugees Act Regulations¹¹³ requires the DHA to provide interpretation services throughout the application process, where practical and necessary. However, a survey by De la Hunt¹¹⁴ showed that interpretation was a major problem for asylum seekers at the DHA. Asylum seekers either had to bring their own – untrained – interpreters or try to make the best of a situation where they could hardly communicate with their interviewers. There have been allegations that interpreters do not understand the basics of refugee law, sometimes confusing ‘persecution’ with ‘prosecution’ and oftentimes paraphrasing or reworking the asylum seeker’s story.¹¹⁵ De la Hunt’s study was carried out in 2002, and even though there are indications that things have improved in this regard, more recent studies¹¹⁶ show that access to interpretation services is still a huge challenge. The legal service providers interviewed for this study stated that their asylum seeker clients did not receive any language assistance when their initial status determination hearings were originally processed at DHA. This is also corroborated by a national survey of the refugee reception and status determination system in South Africa, conducted by the Forced Migration Project at Wits University. That survey showed that the DHA provides interpreters in only about a fifth of all cases requiring interpreters.¹¹⁷ Those who did not receive such assistance relied on social networks or private interpreters who solicit clients outside of the reception offices. Even then, 16 per cent of applicants were unable to secure interpreters, and thus went through the application process without necessarily understanding what was happening.¹¹⁸

As was established in chapters two and three, and reiterated in chapter four, linguistic accessibility is one of the critical elements of access to justice. A person who is not able to

¹¹² Section 38(f).

¹¹³ Note 102 above.

¹¹⁴ Lee Anne De la Hunt *Tracking progress: Initial experiences with the Refugees Act 130 of 1998* (Cape Town: University of Cape Town, 2002) 15.

¹¹⁵ *Ibid.*

¹¹⁶ Consortium for Refugees and Migrants in South Africa ‘*Protecting refugees and asylum seekers in South Africa*’ (Johannesburg: CORMSA, 2007); Forced Migration Studies Programme ‘National survey of the refugee reception and status determination system in South Africa’ 2009 MRMP research report, 36–38.

¹¹⁷ Forced Migration Studies Programme (note 115 above) 36.

¹¹⁸ *Ibid.*

effectively participate in an administrative process affecting him due to lack of proficiency in the language, cannot be said to have access to a fair administrative process, as required by s. 33 of the Constitution. This obviously impacts upon an important feature of administrative justice – that the subject of administrative action must have a reasonable opportunity to make representation. Not only that, it negates the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.¹¹⁹ The issue for asylum seekers, is not only the inadequate numbers of interpreters available, but also the substance and quality of the interpretation services, which is linked to the competence of the interpreter. The implications of this has previously been discussed¹²⁰ and applies equally here.

5.3.3.3 *Access to legal assistance*

The importance of access to legal assistance in the context of access to justice has been reiterated throughout the course of this thesis,¹²¹ and they also apply in the administrative context.

The application process set out by the Refugees Act and its regulations are as follows: asylum seekers are required to lodge an application at one of the five refugee reception offices in the country. At the reception office, applicants fill out an eligibility form, have their fingerprints taken and are then issued with a s. 22 asylum seeker permit. At a later stage, they are interviewed by a refugee status determination officer (RSDO), who makes a decision whether or not to grant asylum. If the decision is negative, asylum seekers are entitled to appeal to the Refugee Appeal Board.

The UNHCR, in its 2001 paper on ‘Fair and Efficient Asylum Procedures’, states that it is necessary for asylum seekers to have access to legal counsel at *all* stages of the asylum procedure, and where available, they should have access to free legal aid if needed.¹²² This is because lack of access to legal assistance at any stage of the asylum process could have dreadful implications, including the possibility of *refoulement*. However, all the refugee service providers interviewed indicated that hardly any of their clients had any legal assistance at the initial application or RSDO interview stage, and most are unaware of the

¹¹⁹ Section 33(1) of the Constitution.

¹²⁰ See chapter four, section 4.5.4.

¹²¹ Chapter 3, Section 3.6.3; chapter, section 4.4.3.

¹²² UNHCR ‘Asylum Processes (Fair and efficient asylum procedures) Global Consultations on International Protection’ (Geneva: UNHCR, 2001).

right to counsel at any stage. This is corroborated by the findings of the national survey by the Forced Migration Studies Project earlier referred to.¹²³ That survey found that 95 per cent of applicants for asylum were not told that they were allowed to have a lawyer present at their RSD interview.¹²⁴ Even if they were aware of that right, they were usually not given any notice of their interview dates and could not have brought a lawyer along if they wanted to. They simply arrived at the DHA offices to renew their permits and were told they would be interviewed on that day.¹²⁵

Beyond the RSD stage, the Refugees Act makes provision for an applicant to have legal representation both during the administrative appeals and judicial review processes if he so wishes,¹²⁶ but there is no provision for free legal assistance or even that this right should be made known to him. In spite of this, however, the picture regarding legal assistance is markedly different at the appeal stage, at least in Cape Town, where this study took place. This is because of an interesting practice that has developed at the Refugee Reception Office in Nyanga, Cape Town, whereby when asylum seekers are rejected after their RSD interviews, DHA officials would provide them with rejection letters accompanied by handwritten instructions to 'see your lawyers at UCT'. Consequently, most, if not all rejected asylum seekers are able to approach the UCT Law Clinic for assistance with their appeals. This no doubt is a major contributor to asylum seekers' access to administrative justice as it helps them avoid a situation whereby they have to conduct often complex appeals by themselves, especially as many are not even proficient in English. However, the issue of limited resources means that not everyone can be assisted by the UCT Law Clinic, and so many rejected asylum seekers end up conducting their appeals by themselves.¹²⁷

It is noteworthy that at no point during the course of this study, did I come across any refugee, asylum seeker or refugee service provider who mentioned the Legal Aid Board as a relevant institution providing legal assistance in the asylum process. It will be recalled that in chapter four, an analysis of the LAB's Legal Aid Guide, showed that it sets out in great detail, how and where it provides legal representation in asylum matters to asylum seekers.¹²⁸

¹²³ Note 115 above.

¹²⁴ Ibid, 36.

¹²⁵ Ibid, 39.

¹²⁶ Section 26(4).

¹²⁷ UCT Law Clinic Narrative Report (note 21 above).

¹²⁸ Chapter four, section 4.4.3.3.

Yet, incongruously enough, not only could I not find any evidence of that, it was strange that the DHA, a government department, chooses to refer asylum seekers to an independent non-governmental organisation, rather than a body created by the government and legally mandated to provide such services. As pointed out in chapter four,¹²⁹ no annual report of the LAB describes its activities in respect of asylum seekers, and I was unable to obtain any data from its offices despite repeated requests. The only conclusion that can be reached from all this is that the LAB does not, in fact, pay much attention to its purported role of providing legal assistance in the asylum process. This, again is another manifestation of how the experience reflects a completely different reality from that which the Constitution, the legislation and even the policy suggests.

The preceding section has demonstrated the experiences of refugees in relation to administrative justice. It has shown that asylum seekers' right to administrative justice is being violated, through administrative incompetence and a flagrant disregard for constitutional guarantees. Chapter one illustrated the danger inherent when refugees do not have access to administrative justice.¹³⁰ It was shown that this made them highly vulnerable to human rights violations and they could even be subjected to actions which endanger their lives. Administrative justice also has implications for their quality of life and their access to services.¹³¹ But while the violations that occurred in the pre-Refugee Act era could be blamed on the absence of proper legislation, or the lack of a human rights culture, the present situation cannot. There are proper legislations in PAJA and the Refugees Act, each grounded in human rights. The problem, quite obviously, lies in the lack of implementation and the political will that is required to give effect to the guarantees contained in those legislations.

5.4 FACTORS AFFECTING PERCEPTIONS OF, AND RECOURSE TO THE JUSTICE SYSTEM

In the section on criminal matters above, I discussed how prejudice within the ranks of the police force serves as a deterrent to those refugees and asylum seekers wishing to utilise the justice system. In this section, I examine other factors which shape refugees' perceptions of

¹²⁹ Ibid.

¹³⁰ Chapter one, section 1.6.1

¹³¹ Ibid; also section 1.7.

the justice system and their willingness to resort to it, whether in a criminal or civil context. What the section describes are the experiences of those respondents who have actually had occasion to go to court, as well as the opinions and impressions of legal service providers who worked with them through those processes. Among respondents who had had occasion to go to court, there was a general attitude of disaffection. Asked to describe their experiences, 66 per cent described it as unpleasant. Various factors influenced this conclusion.

5.4.1 The precarious work situations of refugees and asylum seekers in South Africa

The major reason that made the court experience unpleasant for most respondents was the effect it had on their livelihoods. Often linked to the length of time it took to conclude matters, the negative impact that court cases had on jobs was a common thread. One respondent described his court experience as ‘long and tiring’, and said that the constant adjournments affected his work.¹³² Jobs are hard for them to come by, and for those who do find jobs, the work situations are so precarious that they find themselves needing to be extra careful in order not to lose their jobs. A court hearing would often mean either not showing up for work, or showing up late, and frequently seeking permission to go to court. This leaves them vulnerable to disciplinary measures or for those who are self employed, losing out on their earnings for the day. In such instances, for many of them, the choice is between pursuing the cases until they see justice done or keeping their jobs – more often than not, the need to keep their jobs wins.¹³³

In the case of Jonas described above, while the case against the police officers who assaulted him was going on in the Cape Town Magistrate Court, he found a job with a security company. Two weeks after he resumed, he was required to be in court. He was very reluctant to have to seek an ‘off-day’ so soon after resuming work, and it was only after much persuasion from his attorney that he did. On the day, anxiety was written all over his face as he waited for the sitting to begin. Only one of the accused persons was present, and Jonas was afraid the defence would ask for another adjournment. In the event, he was right. The scenario had repeated itself so many times that he knew just what to expect. It was either the prosecutor did not show up or one of the accused did not, or when they did, there was one reason or the other why the case could not proceed. Jonas had on some occasions expressed

¹³² Respondent 26, 25 April 2009.

¹³³ Khan (note 28 above).

fear that the prosecutor was in consort with the defence. It seemed the plan was to wear him down with constant adjournments to the point where the case was eventually thrown out. According to Varne Moodley, the attorney from the UCT Law Clinic who worked on his case, this was not uncommon. What is not clear is why the magistrate allowed such blatant manipulation of the system. Even though the court was made aware of the heavy toll that the adjournments placed on Jonas, it did not seem to make a difference.

Eric another respondent, described his experience. He was assaulted by another taxi driver in what appeared to be a fight over turf. He reported the matter to police at the Table Bay police station. The police duly took his statement and documented his wounds, then sent him to Somerset hospital. When he went back the next day to follow up, he was arrested and charged with assault because the other taxi driver, a South African, had laid a counter-complaint. He approached the Legal Resources Centre for assistance and was referred to a private lawyer. Eric appeared in court on about six occasions, but the prosecutor never showed up and sometimes his lawyer did not show up. According to him, on each of those occasions, he could not work because he had to be in court. Yet he had to pay his lawyer. Eventually the case against him was withdrawn. He said:

I asked the court 'are you going to compensate me for all the time I wasted coming here and not being able to work?' The judge asked me that am I not happy that the case against me is over? Why am I still asking for compensation? Then I asked my lawyer, 'will I get my R1500 back?' But my lawyer said I should just forget about the case and get on with my life'.

Asked whether he had thought of instituting a case of unlawful arrest/prosecution against the police, he said no, he could not afford to waste any more time going to court when he should be on the road earning money to feed his family.

Adjournments are of course an inevitable aspect of the formal justice system. It is one of the major criticisms against the system, and such negative impacts on livelihoods is one of the reasons why. Quite simply, delays in the justice system put pressure on the economically weak. Even beyond the impact on livelihoods is the fact that, if frequent enough, adjournments themselves constitute a barrier to access to justice, for as the maxim goes, 'justice delayed, is justice denied'. But it is not only the refugee who bears the massive toll that adjournments take on employment. So do witnesses, who often have to leave their jobs or businesses for the day, only to be told that they would not in fact be called to the stand that day and their presence would be required again in a short while. They found this frustrating and it was a constant battle to get their attendance. For instance, Moodley reported having to

beg the photographer who initially documented Jonas' injuries to be in court every time there was to be a hearing. Legal service providers describe this as one of the major challenges that they have to deal with. According to one refugee lawyer,

[Refugees and asylum seekers] are not really eager [to go to court] because they don't understand why court processes should be so lengthy. If a person ... feels they have suffered an injury, they are looking for a quick and most immediate remedy, and court is never a quick and immediate remedy. So there is huge reluctance. Our Equality Court cases, we practically have to beg the clients. They come from far, so we literally have to beg them to come to court [for hearings]. It's extremely difficult on their part.¹³⁴

In chapter three I highlighted the interconnected nature of human rights and flagged how other rights impact on access to justice and access to justice impacts other rights.¹³⁵ This situation demonstrates clearly how the tenuous nature of refugees' employment situations negatively affects their ability to utilise the justice system. Not only that, it also demonstrates the need for the State to address its obligations to refugees holistically, realising that its failure to address one aspect has negative impacts on the other. Its shortcomings in the area of administrative justice, ie, failure to devise a system which ensures that refugees and asylum seekers are always in possession of valid permits, affects their ability to seek or keep employment.¹³⁶ At the same time, its failure to address xenophobia has the same effect.¹³⁷ Together, these factors put severe pressure on their ability or even desire to resort to the justice system. Clearly, employment problems do not affect refugees alone – disadvantaged South Africans face the same problem. However, various literature already referred to¹³⁸ show that this is more pronounced for refugees due to these two factors. Furthermore, whereas the problems with employment mostly affects the less skilled, less educated South African citizens working in the informal sector, skilled and well-educated refugees and asylum seekers face the same problem because they usually have to work in informal sectors due to inability to get their professional qualifications certified or to obtain necessary documents. Thus, although the right to access the justice system is formally accorded to them, their enjoyment of that right is negatively impacted by the dire imbalance in their socio-economic conditions.

¹³⁴ Khan (note 28 above).

¹³⁵ Section 3.6.5.

¹³⁶ See section 5.3.2 above.

¹³⁷ See section 5.4.1.1 above.

¹³⁸ Footnotes 24 and 79 above.

5.4.2 Inability to understand the justice system

Another reason respondents gave for declaring their court experiences as unpleasant was their inability to understand the proceedings. The inability of respondents to follow proceedings may have been due to absence of interpretation, although unfortunately, this was not established. Chapter four showed that, although South African courts have a tradition of providing interpreters for those who may not speak the official language of the court, there are severe limitations in this area, especially for foreign African languages. In the matters that I observed, the situation was mixed. Interpretation was provided during evidence, but where the only thing that took place on a day were motions for adjournments (and there were several), the argument back and forth as to whether or not it should be granted was not interpreted, so the refugee usually relied on his lawyer to explain to him afterwards what had happened and why the case was adjourned.

One respondent, describing his attendance at Cape Town Magistrate Court said he did not understand what was going on; he only knew that at the end, he was discharged.¹³⁹ Even though he had appeared in court several times, each time he was not sure what was going on. After about five appearances, he was told that he was free, no explanations offered. He did not try to pursue the matter beyond that, being only too relieved that his ordeal was over. Trying to seek answers, however, does not necessarily mean that he would have found them, as the case of Eric, the metered taxi driver referred to above shows.

Eric appeared in court on about six occasions during the assault case against him, but the prosecutor never showed up and sometimes his lawyer did not show up. He said he had absolutely no idea what was going on each time he was in court. Eventually the case against him was withdrawn. His lawyer never explained to him why the case had been withdrawn, though in all probability it had to do with the prosecutor's absences. As stated above, interpretation was provided to the refugee only during evidence in the matters that I observed, so this may explain why these respondents had no idea what was going on.

This practice means that affected persons find that they are not able to follow the arguments. While the technical language of the law means any lay person would probably not comprehend the arguments, even if interpretation were available, the question does plague one's mind why lawyers acting for refugees do not make any effort to ensure that their clients

¹³⁹ Respondent 10, 25 June 2008.

understand as much as possible of the whole process. Do lawyers just assume, because they are refugees whose first language is not English, that they were incapable of understanding anything? Unfortunately, this is an issue that bothered refugees enough to influence their perception of the justice system, and it is therefore important that it is addressed. The legitimacy of the justice system in the eyes of those subjected to it lies in their ability to comprehend what they are being subjected to. It is therefore important that the justice system, including lawyers paid to assist refugees, do everything in their power to make the process less mysterious. Otherwise the system, even if free and fair, would be viewed with scepticism and suspicion, and that can be seen in the examples above.

5.4.3 Fear of retribution and inability to separate the justice system from previous bad experiences

A third factor which influences refugees' perception and willingness to use the justice system is fear, and this has previously been alluded to in this chapter, in the context of dealing with the police. However, such fears are present whether the issue in question is civil or criminal. Often, such fears stems from their status as non-citizens and the belief that this made them vulnerable to retribution from ordinary citizens, from those in authority and even from fellow refugees. The fear of retribution from fellow refugees is often linked to pre-existing enmity, from their countries of origin, which are carried over and remains a part of their lives in the host country. According to Refugee lawyer, William Kerfoot of the Legal Resource Centre, this fear of harm keeps refugees from seeking justice. They worry that going to court would make them visible and put them on a collision course with these other refugees with whom some kind of inter-ethnic rivalry or other enmity exists. They would thus, rather lie low to avoid coming into contact with those perceived enemies. Kerfoot cites various examples of this, including that of a Rwandan client who had a 'stone cold case' with a high probability of victory. However, 'at the last minute when he was due to sign the affidavit, he was informed that people had found out about this – his enemies from Rwanda – and that his life would have accordingly been in danger, and he didn't come back.'¹⁴⁰

Fears of retribution from South Africans also exist. For instance, in the case of Jonas described above, for the three years that his case lasted, he was continually threatened and intimidated (including being routinely arrested and told that if he dropped the case against the

¹⁴⁰ Kerfoot (note 40 above).

two officers, his life would be better). Happily for Jonas, he persevered and the case against the officers was concluded. The officers were found guilty of assault with intent to cause grievous bodily harm, and were each sentenced to one year imprisonment and a fine of R8000.¹⁴¹ But clearly, Jonas' case is not the norm. I have previously referred above to respondents who chose not to follow through as a result of fear of retribution.¹⁴²

Psychological factors also shape refugees' perception of the justice system, and this is identified by legal service providers. Psychological factors manifest in two ways. First is a lack of trust in anything associated with the government. They hold that refugees and asylum seekers are so scarred by the government system in South Africa and by xenophobia that they often have difficulty making any distinction between various government departments – whether it is DHA or the Department of Justice.¹⁴³ Thus, they do not trust the court system because they do not think it will do anything for them, or that it is even possible to get a fair hearing within the system.¹⁴⁴

Second is what Khan describes as 'an element of temporariness in the refugee psyche' – the belief that as refugees, or 'guests' in the country, they have very limited time in the country and could not spend it involved in a court case.¹⁴⁵ Khan asserts that if refugees had a longer term view of their presence in the country, chances were higher that they would consider it important to sort out their legal problems, and would see the legal system differently.

This section has shown that the perception that refugees and asylum seekers have of the justice system is largely shaped by the negative experience they have had, and the factors responsible for such negative experiences are the same issues related to inequality of treatment and unequal access to the protection of the law which this thesis has described. Unfortunately, it has been shown, those perceptions negatively affects their willingness to utilise the justice system.

¹⁴¹ *State v Lourencia Hamilton and 1 Other* Unreported, Cape Town Magistrate Court, Case No. 25/181/2007.

¹⁴² See section 5.4.1.2 above.

¹⁴³ Note 27 above.

¹⁴⁴ Khan (note 28 above)..

¹⁴⁵ Ibid.

5.5 THE ROLE OF LEGAL ASSISTANCE AGENCIES

It will have been deduced from the foregoing discussion that civil society organisations play an important role in the lives of Cape Town's refugees and asylum seekers. In South Africa, social and legal assistance to asylum seekers and refugees is provided through a network of UNHCR-supported NGOs in the major cities around the country. Known as 'implementing partners' for the UNHCR, these NGOs provide anything from food and accommodation, to strategic legal interventions.¹⁴⁶ As these organisations also play an important role in the area of access to justice for refugees and asylum seekers, any discussion of the subject would be incomplete without reference to that role.

In looking at the work of NGOs which provide legal assistance to refugees and asylum seekers, this section argues that the primary function of meeting the access to justice needs of refugees has fallen on these NGOs because the State has failed in its obligations. In view of this situation, and given the importance of ensuring that refugees have access to justice, it is expedient for the State to re-evaluate its approach in this area, and focus instead on empowering and enhancing the capacity of NGOs to provide legal aid to refugees, while it concentrates on improving the justice system, the administrative processes and the socio-economic infrastructure. By utilising the knowledge and expertise that such a partnership will provide, the end result will be that the State is better able to meet its obligations.

Chapter three set a foundation for this discussion of the role of civil society organisations by demonstrating how, based on the generous rules of standing in s. 38 of the Constitution, these organisations have launched, or helped to launch cases whose outcomes have had positive impacts on disadvantaged groups.¹⁴⁷ In regard to refugees and asylum seekers in particular, these civil society organisations have been at the forefront of refugee rights advocacy, bringing cases whose outcomes have had tremendous impacts on the lives of refugees and asylum seekers as a group and as individuals.¹⁴⁸

¹⁴⁶ Jacob van Garderen *et al* 'Comments to refugee urban policy review' National Consortium on Refugee Affairs (now Consortium on Refugees and Migrants in South Africa) Undated paper.

¹⁴⁷ Chapter three, section 3.6.5.

¹⁴⁸ See Jeff Handmaker 'Advocating accountability: The reforming of a refugee rights discourse in South Africa' (2007) 25 (1) *Netherlands Quarterly of Human Rights* 53–71 for a discussion of how civil society has influenced the development of South Africa's refugee policy and subsequent efforts to promote refugee rights in the country.

As will have been seen in the discussion on access to administrative justice, where the State has fallen short in its obligations to provide free legal assistance, civil society has taken up the role. But it is not only in the asylum adjudication process that refugees and asylum seekers need assistance. The earlier discussion on criminal and civil matters shows that refugees and asylum seekers encounter everyday situations in which legal advice or representation is required. And like the rest of society, they have the choice of approaching private lawyers to assist them. However, the prohibitive cost of private legal representation puts this option out of the reach of most refugees and asylum seekers. In this study, only three respondents had ever directly approached private lawyers for assistance in their civil or administrative matters. However, none stayed with the lawyers until the conclusion of their cases. Each had been unable to pay the required fees and their lawyers had referred them to the UCT Law Clinic. Their reasons for choosing the lawyers they did were, in two of the cases, simply a matter of referral by the Rwandan community to whom the first belonged and by the police in the second case. The third randomly chose a lawyer.

In Cape Town, the network of refugee service providers is known as *Tutumike*.¹⁴⁹ The primary legal assistance providers in the group are the Refugee Rights Project at the University of Cape Town Law Clinic and the Legal Resources Centre. These organisations provide refugees and asylum seekers with legal advice on problems facing them, refer clients to organisations that could better meet the needs of each particular case, liaise with government departments and the UNHCR, provide representation for rejected asylum seekers at their appeal hearings and even represent refugees in courts and at the CCMA in some matters. The work of these two organisations is widely recognised among refugees and asylum seekers, as can be seen from the number of those who use them. For instance, in the period between January and September of 2008 the UCT Law Clinic provided legal assistance to over 8000 clients and the LRC attended to about 5000 refugees during the course of 2008.¹⁵⁰

Over the years, these organisations have re-invented themselves, moving from merely providing assistance to obtain permits and representing asylum seekers at appeal hearings, to actively litigating high-impact cases that have a bearing on the constitutional rights of

¹⁴⁹ Swahili for ‘Let’s work together’.

¹⁵⁰ Kerfoot (note 40 above).

refugees and asylum seekers.¹⁵¹ The work of both the UCT Law Clinic and the LRC are important examples of the benefit of s. 38 and also demonstrate the fact that, with adequate measures for their implementation, the constitutional guarantees on access to justice in South Africa are sufficient to meet the needs of refugees and asylum seekers.

5.5.1 Refugees' perception of role of civil society organisations

It can be seen from the above that the work of NGOs have improved refugees' access to justice, allowing them to be represented by organisations with expertise and resources to conduct expensive and time-consuming litigation.¹⁵² Despite the useful work that these organisations do, if refugees do not know about them, they could not serve much purpose, since knowledge of where to go for assistance is an indispensable aspect of seeking access to justice. As respondents for the study were recruited from the UCT Law Clinic, it goes without saying that all were aware of and have made use of this legal assistance agency. However, it was important to establish how they came to know about these organisations as this would give an indication as to why there is such a high level of awareness about these organisations among refugees. As can be seen from the *Table 4* below, most refugees and asylum seekers were told about these organisations by friends and compatriots they met in the queue at the DHA.¹⁵³ This would usually be after trying unsuccessfully to access the asylum adjudication process by themselves.¹⁵⁴ Others were referred to these organisations, particularly, the UCT Law Clinic, by the DHA itself.

¹⁵¹ For instance *Said and Ten Others v Minister of Safety and Security and Four Others* Cape Town Equality Court, Case No: EC13/08, discussed earlier in chapter four, section 4.3.1.1; *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C); *Watchenuka v Minister of Home Affairs* 2003 (1) SA 619 (C).

¹⁵² David Cote & Jacob van Garderen 'Barriers and challenges to public interest litigation in South Africa' *Paper presented at the annual meeting of the Law and Society Association, Renaissance Chicago Hotel, Chicago, IL, May 27, 2010* Available at http://www.allacademic.com/meta/p408551_index.html [Accessed 22 September 2010].

¹⁵³ See Table 4 below.

¹⁵⁴ Section 5.3.3 above already described the process of getting identity documents.

TABLE 4: METHOD OF REFERRAL TO THE LEGAL ASSISTANCE ORGANISATIONS*

Referral	Frequency	Per cent
Friends/Compatriots	16	53.3
DHA/UNHCR	7	23.4
Police	4	13.3
Lawyer	2	6.7

*n = 29

These responses, coupled with the sheer volume of clients that these organisations attend to each year, shows that there is a generally high level of awareness about legal assistance organisations among refugees and asylum seekers in Cape Town. As a result, it is quite clear lack of knowledge on where to go for assistance is not a barrier to their access to justice. It is again interesting to note that none of the respondents had approached the LAB for assistance. Surely if it was fulfilling its purpose, it would appear among the organisations to which refugees had been referred.

The survey also revealed that most respondents were likely to have used only one agency repeatedly for their legal matters, even though they were familiar with or had made use of the services of other legal agencies at one time or the other as well (*Table 5*). The most frequently used organisations were the UCT Law Clinic, the Legal Resources Centre and the Cape Town Refugee Centre. The Cape Town Refugee Centre only offers social services and therefore referred many respondents to other former two. Among those who have used more than one agency, the main reason has been because they were referred from the first organisation they approached. This shows that there is a good referral system among these organisations, and a habit of cooperation which clearly, works for the good of refugees and asylum seekers.

TABLE 5: NUMBER OF AGENCIES USED

Number of agencies used	Frequency	Per cent
1	19	63.3
2	10	33.3
3	1	3.3

In order to get a sense of how refugees and asylum seekers view the services offered by these organisations, respondents were asked to rate the services they had received when they approached these organisations. On the whole most respondents found these organisations very useful. As *Table 6* shows, 60 per cent found the help they received from these legal assistance organisations to be satisfactory. There was a strong correlation between those who thought the service was poor and the failure of the assistance organizations to follow up with calls as promised, or refusal to take on their case (appeal cases mostly) or length of time and number of visits it took to resolve their issues.

TABLE 6: PARTICIPANTS' RATING OF LEGAL ASSISTANCE ORGANISATIONS

Rating	Frequency	Per cent
Excellent	5	16.7
Satisfactory	18	60.0
Fair	1	3.3
Poor	3	10.0
Not Sure	3	10.0

These results show that there is adequate knowledge about and usage of the services of NGOs among refugees and asylum seekers seeking legal assistance. Coupled with the high level of satisfaction among refugees with the services of these NGOs, it is submitted that, as mechanisms for gaining access to justice in South Africa, these NGOs enjoy a greater level of legitimacy among refugees and asylum seekers, than State-established bodies like the LAB. So much so, that even a government department like the DHA prefers to send its clients to them rather than the LAB. Clearly, the LAB, despite its declared provision of assistance on asylum matters, does not appear to be doing much to help the State meet its obligations to refugees and asylum seekers.

In view of all this, coupled with the previously mentioned scepticism with which government-affiliated bodies are viewed by refugees,¹⁵⁵ it is perhaps advisable for the State to reconsider what its role ought to be if it is to meet its obligations on access to justice for refugees and asylum seekers. It is submitted that a more useful approach would be for the State to utilise the expertise and knowledge already available within these organisations to meet its obligations. Whereas the LAB could continue to focus on legal aid in criminal matters, NGOs could be provided with substantive financial and human resources to provide legal aid in civil and administrative matters to refugees. Inadequate resources is the biggest problems that these NGOs face in carrying out their functions of litigating on behalf of refugee. Both the UCT Law Clinic and the LRC expressed the frustrations of dealing with a system that required so much financial and human resources they could ill-afford. As a result, they have to limit the number refugees and asylum seekers they could assist. Where these organisations are not able to assist them free of charge, would-be refugee litigants often abandon the thoughts of instituting legal action.¹⁵⁶ In a case involving custody of a minor child for instance, the UCT Law Clinic represented the family of an orphaned refugee child who had been taken into custody by a wealthy French lady who then sought to completely exclude the family from any contact with the child. Whereas the said lady was able to pay for the services of three psychologists and other professionals to testify on her behalf, the Clinic battled to pay doctors and psychologists to testify on what was right for the child. In the end, faced with the possibility of having to pay costs if the court ruled against them, which they could not afford, the Clinic dropped the legal challenge. It is not clear why the Clinic did not

¹⁵⁵ See section 5.4.3 above

¹⁵⁶ Khan (note 28 above).

enlist the help of a state funded body like the LAB, but given in view of the evidence provided above that the LAB's work with refugees is either non-existent or extremely limited, it is hardly surprising that this avenue was not explored.

Clearly, it is a worst-case access-to-justice scenario, when refugees and asylum seekers are unable to litigate cases themselves, and at the same time cannot access State-funded legal assistance or receive any help from resource-constrained NGOs. Such severe failing on the part of the State can be mitigated, by providing resources to NGOs to provide legal aid to refugees. In doing this, the State would not be shirking its duties; as things stand, these organisations already perform those functions anyway. On the contrary, by providing resources and building capacity, the State would enable NGOs to serve greater numbers of refugees, and would thus be meeting its obligations under international law and the Constitution. It is submitted that this approach falls well within the contemplation of the requirement, both in international and under the Constitution that the State put adequate measures in place to fulfil the rights international law instruments and the Constitution protect. It would be a good example of the State 'act[ing] to achieve the intended result' as the Court noted in *Grootboom* above.¹⁵⁷

This section has examined the role of civil society in access to justice for refugees. As a highly vulnerable group which often lacks the necessary means of support, refugees and asylum seekers require some assistance as they navigate the process of recognition as refugees, as well as in utilising the courts to resolve issues that arise during the course of ordinary everyday life. The discussion thus far has shown that the State has been failing in its obligations to ensure access to justice for refugees. Furthermore, unlike in countries such as the USA and Canada with well developed pro-bono culture among lawyers, asylum seekers in South Africa find that they cannot simply walk into law firms hoping to find some pro-bono assistance, as the pro-bono culture is far less ingrained here.¹⁵⁸ It is therefore fortunate that these organisations exist, and have been playing a critical role in bridging the gaps in refugees' access to justice. Given the expertise present within these NGOs and their experience in this area, it is important that the State partners with them by providing resources to help them assist even more refugees in the area that it is falling short. In this way, the State will better meet its obligations to refugees and asylum seekers.

¹⁵⁷ See chapter four, section 4.1.

¹⁵⁸ Kerfoot (note 40 above).

5.6 COURTS' ATTITUDES TOWARDS REFUGEE MATTERS

The characteristics and compositions of courts are important aspects of access to justice, as previous discussion of the international law and constitutional provisions have shown.¹⁵⁹ In this regard, the independence, impartiality and competence of courts are the critical elements. It was shown in chapter three that, generally speaking South African courts live up to the standard set out in international law.¹⁶⁰ However, in terms of knowledge in refugee matters, – which speaks to the issue of competence – this study found some uncomfortable gaps, although there was also a lot of positives.

The study found that court attitudes towards refugee matters have been largely positive, especially on the part of the High Courts. Refugee lawyers say that High Courts have mostly welcomed refugee matters and there has been a willingness to engage and do the right thing.¹⁶¹ The judges are quite knowledgeable about refugee matters and since refugees became a visible part of the South African society, they have taken steps to familiarise themselves with the international refugee law.¹⁶² Although there is no formal or state-sponsored training on refugee issues, High Court judges receive extensive training on refugee law from different agencies – the UNHCR, International Association of Refugee Judges and the Refugee Studies Centre at York University, Toronto, Canada on an ongoing basis.¹⁶³

Problems have mostly been associated with magistrates and prosecutors in the Magistrates Courts. Practitioners say even though there is a general acceptance of refugee matters in these courts, knowledge and understanding of refugee law is very limited. Practitioners allege that some magistrates have gone so far as to make orders that violate principles of international protection and *non-refoulement* which are central to the protection of refugees and asylum seekers. According to Khan:

... Few of the magistrates, unless they have gone and had themselves educated, would be familiar with the concept of refoulement. So in a judgment that they make, they may say 'yes this man is guilty of this crime, so he is deportable'. But he is talking about a refugee now. Do they know that because he's a

¹⁵⁹ Chapter two, section 2.6.4.

¹⁶⁰ Chapter three section 3.5.4.

¹⁶¹ Interviews with Khan Moodley, Kerfoot, Ramjathan-Keogh, *supra* (note 28 above).

¹⁶² *Ibid.*

¹⁶³ Personal communication with Fatima Khan 8 March 2010.

refugee I have to look at refugee law as well, I have to look at this paramount principle? I don't think so. I don't think that they are that well educated.¹⁶⁴

Some magistrates have been known to tell refugees and asylum seekers that because they are foreigners, they are not entitled to legal aid.¹⁶⁵ In *S v Manuel*,¹⁶⁶ for instance, the magistrate agreed with the LAB that the accused, an Angolan refugee, was not entitled to Legal Aid because he was a foreigner. The High Court found that the Magistrate had violated s. 35(3) of the Constitution when he chose to proceed with the case and then sentenced the accused to a term of imprisonment even though he had had no legal representation. According to the Court, the violation had been committed by the Magistrate and not the LAB.¹⁶⁷

As worrisome as it may seem, magistrates are not entirely to blame for their lack of knowledge of refugee law. It is a relatively new area in South African law and the court system has not had enough time to familiarise itself with all the relevant concepts in the decade since refugee law came into effect. Secondly, even in countries with long histories of refugee matters, this area of law has traditionally been outside the purview of ordinary courts, and been handled by specialised courts and tribunals set up for that purpose. Hence the need for ordinary courts to keep abreast of the law has not been great.

However, the onus is on the State to ensure that its judges and magistrates are knowledgeable and competent in the matters they are presiding over. As previously stated, the guarantees on access to justice contained in international law and in the constitution impose positive obligations on the State.¹⁶⁸ Those obligations, according to Nowak, include a requirement that the State set up necessary structures, ie, courts, and provide them with the competence to hear matters brought before them.¹⁶⁹ Failure by the State to provide training and knowledge which build the competence of its magistrates on refugee law constitutes a failure to fulfil its positive obligations in relation to access to justice for refugees. Given the

¹⁶⁴ Khan (note 28 above).

¹⁶⁵ Interview with Khan (note 28 above)..

¹⁶⁶ *S v Manuel* 2001 (4) SA 1351 (W).

¹⁶⁷ Ibid, Para 12.

¹⁶⁸ Chapter three, section 3.5.1; see also *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) paras 39 and 41.

¹⁶⁹ Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (Strasbourg: NP Engel, 2005) 302–357, 314.

earlier reference to magistrates making orders that violate the State's obligations on *non-refoulement*, this is clearly something that should be addressed by the State.

Again, in the face of the State's failure in the regard, NGOs have taken the initiative. To reduce the chances of miscarriage of justice, some NGOs, such as Lawyers for Human Rights (LHR), have developed a practice whereby they make oral or written submissions to the magistrate and the prosecutor on the accused person's asylum status, what laws apply to him or her, and how a court decision could potentially impact on his or her protection rights or other rights accorded under refugee law.¹⁷⁰ These interventions to educate magistrates and prosecutors on refugee law are made even in routine matters, and are not limited to LHR clients. LHR states that it simply tries to intervene whenever it becomes aware of cases involving refugees and asylum seekers.¹⁷¹ This is yet another instance of how civil society is fulfilling the role that should be fulfilled by the State, and again demonstrates why the State could better meet its obligations if it worked in partnership with these organisations.

I found it interesting, in the course of observing cases in the Magistrate's and High Courts how individual judges and magistrates struggled to balance the need to ensure that all sides had a fair chance to make use of whatever procedures were available to them, with the need to take cognisance of the toll that excessive adjournments and prolonged processes took on the refugees and asylum seekers involved in the cases before them. A common refrain from lawyers representing the refugees was the physical and financial cost to their clients of having to travel long distances and leave their jobs to be in court. The judges were often sympathetic, trying to keep delaying tactics on the part of the defence to a minimum.

The generally positive handling of refugee matters, no doubt goes a long way towards ensuring that refugees have access to justice. However, there needs to be more concerted effort on the part of the State to ensure that its complement of personnel are well-trained, adequately informed, and conversant with refugee law. Such training should be available for not only magistrates and judges, but also to other staff within the court system, and would go a long way toward helping the State better fulfil its obligations to refugees and asylum seekers.

¹⁷⁰ Interview with Ramjathan-Keogh, (note 28 above).

¹⁷¹ Ibid.

5.7 CONCLUSION

Predicated on the trite knowledge that what prevails in practice often differs from what the law says, this chapter sought to give an insight into how refugees and asylum seekers actually experience access to justice, in view of the constitutional safeguards previously discussed. The conclusion is that the safeguards that exist in law are often over-ridden by multiple practical and psychological barriers that refugees face when attempting to access the justice system. The failure of policies and programmes to anticipate any of these means that, in reality, the issues that really matter to refugees are not adequately dealt with. The situation then is an incongruous one in which elaborate safeguards exist to ensure that when refugees appear before the country's courts, they are treated equally as citizens, but there are no guarantees to ensure that they are actually able to appear before courts. The major problem does not lie with the courts, even though there are concerns there as well, nor are they due to lack of respect for procedural guarantees contained in the law. Rather, it is at the preliminary stages – dealing with those who serve as the gateway to accessing justice – that they face the most barriers. And it is these barriers that policies, programmes and legislation fail to anticipate or address.

In analysing these barriers, the most critical issue that comes across is the idea that being a foreigner can constitute a distinct obstacle to access to justice in South Africa. The idea of 'foreignness' as a barrier to access to justice is not one often discussed in scholarly articles on the subject. While it is true that the literature often refers to lack of language proficiency as a major barrier – an issue contiguous to foreignness – this study suggests that being a foreigner in itself is a distinct obstacle, recognised by refugees themselves but not by scholars. Foreignness as a barrier to accessing justice in South Africa finds expression in personal biases or prejudice stemming from individuals' ways of thinking. It is demonstrated in refugees and asylum seekers' being denied the protection of the law on the sole ground of being foreigners. It is demonstrated in the refusal of police to open dockets for refugees, and in the practice of telling refugees that as non-citizens they had to settle matters among themselves. In other words that being non-citizens means that they have no right to access the country's courts.

Practical obstacles are manifested in the delicate balancing act required to protect tenuous sources of livelihoods while also seeking justice. These obstacles demonstrate the need for the State to recognise that its shortcomings in one area affects the rights of refugees in another area, and therefore the rights of refugees need to be addressed holistically. Unless

the dire socio-economic circumstances under which refugees and asylum seekers are forced to live is addressed, the constitutional guarantees on access to justice will have no meaning for them. Taken together, the effect of all these challenges is that refugees and asylum seekers do not have equal opportunities to utilise the justice system, the same way that citizens do. Equality of access is therefore more of a mirage than a reality.

This situation is largely a result of policy failure to pay adequate attention to the notion of substantive equality that the Constitution espouses.¹⁷² The result is a failure to recognise that refugees and asylum seekers have peculiar vulnerabilities which necessitates the adoption of specific measures or modification of existing strategies in order to adequately meet their needs. It is true that in an urban refugee model, such as that adopted by South Africa, refugees are expected to access services in the same way as everyone else, unlike what would be the case in a 'refugee camp' model. This however, does not negate this important constitutional principle. Thus, even within the framework of a general access to justice policy, the State's failure to adopt measures which address issues that matter to refugees and asylum seekers, like xenophobia, access to language services and access to legal assistance constitutes a derogation of its obligations.

On the other hand, there are many positives to take away from the study – the impressive knowledge of rights displayed by respondents (cognisance is taken of the fact that the study's respondents represented the more educated category of refugees and asylum seekers); the impressive work that non-governmental organisations are doing on behalf of refugees and asylum seekers and the willingness of South African courts not only to protect, but to advance the rights of refugees and asylum seekers, are some of these. While refugees and asylum seekers face distinct challenges in accessing justice, some (probably unexpected) advantage of this is that South African civil society is using this as an opportunity to develop its engagement with the law on refugee issues. This is an opportunity for the State to better meet its own obligations to refugees, if it is willing to harness the resources that civil society organisations possess.

A peculiar aspect of this study was that it did not find a single instance of a court case involving two refugees or asylum seekers on opposite sides – whether between compatriots or other refugees of another nationality. But since common sense suggests that refugee communities are not conflict-free communities, it is only to be expected that other means

¹⁷² See discussion in chapter three, section 3.5.4.

exist through which refugees resolve issues. The next chapter therefore looks at the issue of alternative ways through which refugees and asylum seekers seek justice.

Chapter Six

Non-State Justice Systems among Refugees and Asylum Seekers in South Africa

*I'd like more access to justice and less access to the courts*¹

6.1 INTRODUCTION

The preceding chapter described some of the challenges and opportunities that define how refugees and asylum seekers experience access to justice in South Africa. It showed that despite generous provisions within the Constitution, which guarantee them equal access to justice, refugees and asylum seekers face discriminatory practices and other challenges that curtail their ability to utilise the justice system. As a result, they are in a position of inequality, *vis-a-vis* citizens, in terms of their right to access to justice.

That chapter focused primarily on refugees' and asylum seekers' interactions with the State justice system, mostly in the context of relations between them on the one hand, and South African citizens or institutions on the other. Very little reference was made to situations in which the only protagonists were refugees and asylum seekers themselves. However, one of the issues raised in that chapter is that sometimes, when refugees and asylum seekers tried to get the police involved in matters between them and a compatriot, they got responses to the effect that such matters were to be settled among themselves and not referred to South African institutions.² Clearly this amounts to discrimination, and is yet another demonstration of the unequal access that refugees and asylum seekers have to the justice system. But the issue goes beyond that; it raises other important questions. For instance, in circumstances where they are not allowed to utilise the state justice system, how do refugees resolve disputes? What alternatives are open to them, and what factors, other than discrimination, would lead them to utilise these other alternatives? Finally, what are the implications for the State when refugees and asylum seekers under its jurisdiction are forced, or choose to resort alternative ways of seeking justice?

The issue of alternative or non-state justice systems has been raised at various points during the course of this thesis. The position of such forums under international law and the

¹ Survey respondent quoted in Hazel Genn *et al*, *Paths to justice: What people do and think about going to law* (Oxford: Hart Publishing, 1999) 1.

² See page 261.

Constitution were established in chapters two and three respectively.³ It was shown that under both frameworks, the primary responsibility for providing access to justice rests with the State, thus only courts and other forums established by law, and which operate under the control of the State, are contemplated by the access to justice guarantees that have been discussed up to this point. However, chapter four showed that despite this position, non-state justice systems do play an important role in improving access to justice for some segments of society, and that the State has an important role to play in relation to ensuring that they do not become vehicles for abuse of human rights. Recognising this, South Africa has attempted to incorporate the working of a diverse range of informal and non-state justice systems within its access to justice policy. The benefits of such approach, chapter four concluded, is that it would help to curb the excesses of such forums, while also improving access to justice. The shortcoming of the approach is its failure to address non-state justice systems in relation to one of the demographics most likely to use it – refugees and asylum seekers.⁴

Having already set out in chapters three the obligations and expectations which these systems raise of the State, this chapter will focus only on the nature and role of non-state justice systems among refugees and asylum seekers. As with the previous chapter, while reference will necessarily be made to relevant international law and constitutional provisions to set the context for the discussion, the substance of this chapter derives primarily from the experiences of refugees and asylum seekers with non-state justice systems. Their experiences are gleaned from the same field study described in chapter five, therefore all preliminary matters related to the methodology of research, limitations and other caveats described in that chapter apply equally here.⁵ It is worth reiterating that these findings are not presented as broadly generalisable facts, but should rather be read primarily as illustrations of broader trends.

³ Chapter 2 section 2.6. chapter 3, section 3.6.4.

⁴ Chapter four, section 2.6.4.

⁵ See chapter five, section 5.2

6.2 BACKGROUND: SOCIAL NETWORKS AS JUSTICE MECHANISMS FOR REFUGEES AND ASYLUM SEEKERS

Migrants, forced and unforced, often transport their cultural practices to their new countries as a way of retaining some connection to their roots in an unfamiliar environment.⁶ For refugees and asylum seekers, these familiar practices bring some stability to the turmoil of their move and ensure continuity.⁷ While they often recognise that change is inevitable in their new environment, trying to balance this change with their own cultural outlook is a challenge that they face. While some embrace the change, others want to restrict and slow it down in order to maintain their pre-refugee status, ethnic identity and social equilibrium.⁸ Holding on to certain traditional practices is a way of achieving this.

It goes without saying that the observance of these traditional practices requires that a certain level of community structures, in the form of social networks, must be in place. These social networks, usually comprising others of the same nationality or ethnic background,⁹ are important to refugees and asylum seekers and are key to their livelihoods and general welfare.¹⁰ These social networks may spontaneously appear between family members, friends and colleagues as a reaction to social exclusion or be purposely organised in the form of

⁶ Janet Bauer 'Speaking of culture: Immigrants in the American legal system' in Joanne I Moore (ed) *Immigrants in courts* (Washington: University of Washington Press, 1999) 8; Richard Kolm *The change of cultural identity: An analysis of factors conditioning the cultural integration of immigrants* (New York: Arno, 1980) 67.

⁷ Pamela De Voe 'Symbolic action: Religion's role in the changing environment of young Somali women' (2002) 15 (2) *Journal of Refugee Studies* 234–246 at 236; Gary Yia Lee 'Culture and adaptation: Hmong refugees in Australia 1976–83' in Glenn L Hendricks *et al* (eds) *The Hmong in transition* (New York: Center for Migration Studies, 1986) 55–72; also see generally Moore, *Immigrants in courts* (note 6 above); 'Living between two worlds: African refugees battle cultural isolation as they try to adapt to their new home in Portland'. Available at www.streetroots.wordpress.com [Accessed 11 October 2009].

⁸ De Voe (note 7 above) 236, 243.

⁹ Massey *et al* define social networks in the context of migrants and migration as 'sets of interpersonal ties that connect migrants, former migrants and non-migrants in origin and destination areas through ties of kinship, friendship and shared community of origin'. See Douglas S Massey *et al.*, *Worlds in motion: Understanding international migration at the end of the millennium* (Oxford: Oxford University Press, 1998) 42.

¹⁰ Baruti Bahati Amisi 'An exploration of the livelihood strategies of Durban Congolese refugees' *UNHCR Working Paper No. 123* (UNHCR Evaluation and Policy Analysis Unit, 2006) 6; Nancy Farwell 'Onward through strength: Coping and psychological support among refugee youth returning to Eritrea from Sudan (2001)14 *Journal of Refugee Studies* 43–63, 57.

refugee associations, ethnic organisations, professional bodies, or as student or neighbourhood organisations for the common good.¹¹ The former type of organisations, commonly referred to as Refugee Community-based Organisations (RCOs), are usually more formal, registered entities which take on the role of advocacy on behalf of the community that they represent.¹² They are organisations rooted within and supported by the ethnic or national refugee/asylum seeker communities they serve and are established by the refugees or asylum seekers themselves – or by their pre-established communities.¹³ In addition, these community organisations perform the functions of overcoming isolation, providing material help, defending interests and promoting culture.¹⁴ They also act to integrate refugees into their new social settings while allowing for the retention of their cultural identities.¹⁵

In the South African context, the literature points to the existence of a number of RCOs and refugee groupings,¹⁶ but there is no one aggregation of refugees in South Africa that serves the common interest of all.¹⁷ Engagement between different refugee communities is informal and based on the needs at hand.¹⁸ This has been attributed to the urban refugee model operating in the country, unlike in a camp situation where all residents would be forced to work together.¹⁹ While acknowledging the roles of both formal and informal

¹¹ Amisi (note 10 above) 6.

¹² On the question of the representativeness of these organizations see generally Gail Hopkins ‘Somali community organizations in London and Toronto: Collaboration and effectiveness’ (2006) 19 (3) *Journal of Refugee Studies* 361–380; David Griffiths *et al* *Refugee community organizations and dispersal: Networks, resources and social capital* (Bristol: The Policy Press, 2005).

¹³ Roger Zetter & Martyn Pearl ‘The minority within the minority: Refugee community-based organisations in the UK and the impact of restrictionism on asylum-seekers’ (2000) 26 (4) *Journal of Ethnic and Migration Studies* 676.

¹⁴ John Rex *et al* (eds) *Immigrant associations in Europe* (Aldershot: Gower, 1987) 19.

¹⁵ *Ibid.*

¹⁶ Zaheera Jinnah & Rio Holaday ‘Migrant mobilisation: Structure and strategies in claiming rights in South Africa and Nairobi’ in Jeff Handmaker & Remko Berkhout (eds) *Mobilising social justice in South Africa: Perspectives from researchers and practitioners* (Pretoria: Pretoria University Law Press, 2010) 157; Baruti Amisi & Richard Ballard ‘In the absence of citizenship: Congolese refugee struggle and organisation in South Africa’ Centre for Civil Society and the School of Development Studies, University of KwaZulu-Natal, 2005; Amisi ‘An exploration of the livelihood strategies of Durban Congolese refugees’, *supra* (note 10 above)

¹⁷ Amisi & Ballard (note 16 above) 2.

¹⁸ *Ibid.*; Jinnah & Holaday (note 16 above) 152.

¹⁹ Amisi & Ballard (note 16 above) 8.

networks in the preservation of culture and in social integration, it is their role in the dispensation or promotion of justice that is important for the purposes of this study. Do they have any benefits for refugees and asylum seekers in the context of access to justice? If so, how? And what forms do they take? The following sections answer these questions.

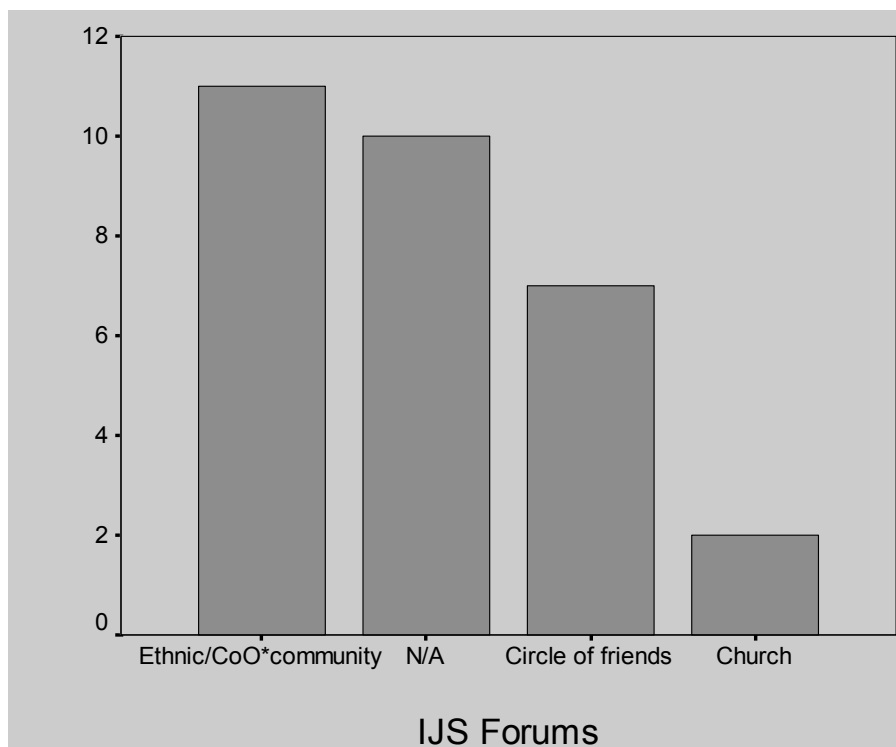
6.3 RECOURSE TO NON-STATE JUSTICE SYSTEM AMONG REFUGEES AND ASYLUM SEEKERS

Two-thirds of respondents in the study indicated that they were aware of and had resorted to some form of dispute resolution mechanism regulated by or operating within their social networks. The widespread usage is not surprising because, as chapter four already showed, informal justice systems anchored in community relationships are common across Africa.²⁰ All respondents in the study were Africans.

As *Figure 3* below shows, the makeup of the informal justice systems which respondents had been part of differed, depending on the cultural backgrounds from which each group came. Not every group had established semi-formal ‘institutions’ (churches, elders) to which they referred disputes. For some, disputes were simply brought before a respected person or persons within the disputants’ personal circle of friends. This group of people makes up 35 per cent of respondents.

²⁰ See generally Wilfried Schärf & Daniel Nina (eds) *The other law: Non-state ordering in South Africa* (Cape Town: Juta, 2001); Joanna Stevens *Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems* (London: Penal Reform International, 2000); Sandra Burman & Wilfried Schärf ‘Creating people’s justice: Street committees and people’s courts in a South African city’. (1990) 24 (3) *Law & Society Review* 693–744; Isaac Olawale Albert *et al Informal channels for conflict resolution in Nigeria* (Ibadan: IFRA 1995); Dharmesh Bula & Adelene Africa ‘Proposals for a national community court system’ (1995) Occasional Paper Series 3–95, Institute of Criminology, University of Cape Town; Daniel Nina & Pamela Jane Schwikkard ‘The “soft vengeance” of the people: Popular justice, community justice and legal pluralism South Africa’ (1996) 36 *Journal of Legal Pluralism* 69–87.

FIGURE 3: RESORT TO INFORMAL JUSTICE SYSTEMS AND TYPES



* - Ethnic and country of origin community of the respondent, including forums of tribal leaders.

N/A – No resort to Non-state justice forums forums.

Although different in composition, the general characteristics of the informal justice systems which respondents described were similar. They are usually led by respected members of the society, and their primary aim is to reconcile the different interests of disputing parties while maintaining social cohesion. Procedures and norms vary with the participants in the process, and closely resemble what other scholars²¹ have variously described. Usually they would adopt ‘procedures and norms that have proven historically acceptable to the local community rather than those defined in written laws or adopted by state sanctioned courts’.²² Community

²¹ Ewa Wojkowska *Doing justice: How informal justice systems can contribute* (Oslo: UNDP, Oslo Governance Centre, 2006); see also TW Bennett *Customary law in South Africa* (Cape Town: Juta, 2004) 164; Boyane Tshella ‘The restorative justice bug bites the South African criminal justice system’ (2004) 17 *South African Journal of Criminal Justice* 1–16, 13; Jeremy Seekings ‘The revival of people’s courts: Informal justice in transitional South Africa’ (1992) 6 *South African Review* 187; South African Law Commission ‘Alternative Dispute Resolution’ 1997 *Issue paper 8*, 33–38.

²² Reem Bahdi ‘Background Paper on Women’s Access to Justice in the MENA Region’ International Development Research Centre, Regional Consultation, 9–11 December, 2007 Cairo, Egypt. Available at www.idrc.ca [Accessed 21 May 2010]; see also Wojkowska (note 21 above) 16–23.

pressure rather than fear of State sanction, serves as the primary motivation behind parties decision to comply with the terms of resolution.²³ The types of matters they are called upon to adjudicate vary, but are usually simple civil matters such as domestic disturbances and business disagreements. However, there are also criminal matters such as petty theft, domestic violence and cases of assault.

Not all respondents in the study who were aware of the existence of alternative dispute resolution systems were interested in using them. Some said that they preferred to resort to the state justice system, even if the other party involved was a compatriot or a fellow refugee. Usually the reason for this was a lack of confidence in the impartiality of the system. A Burundian respondent for instance said he personally would not resort to any such systems put in place by Burundians because ‘Burundians are divided along ethnic lines even here in South Africa. It is every person for himself’.²⁴

6.4 FACTORS RESPONSIBLE FOR USE OF NON-STATE JUSTICE SYSTEMS

Chapter five showed that some of the problems that respondents experienced with the State justice systems related to accessibility, both in terms of gaining entrance to the system, and in terms of the difficulty of balancing precarious work situations with court attendance. There were also concerns associated with the lengthy and time consuming process of the justice system, as well as fears that they were approaching a system that was biased against them, *vis-a-vis* citizens. These problems do not confront those using the informal justice systems available within their communities, and this is one of the reasons that these informal justice systems appeal to their users.

One of the most notable draws of these systems is the accessibility of the forums to members of the community. They are popular because of their accessibility to poor and disadvantaged people and tend to be quick, cheap and provide culturally relevant solutions.²⁵ They are located within the community, close to where disputants live, thus eliminating the need for travel which was one of the main hindrances identified by respondents who had used the formal courts. Their flexibility in terms of time is another endearing factor. As one

²³ Ibid.

²⁴ Respondent 21 (13 August 2008).

²⁵ Boyane John Tshehla ‘Non-state ordering in the post-apartheid South Africa: A study of some structures of non-state ordering in the Western Cape Province’ (LLM Diss., University of Cape Town, 2001); Wojkowska *supra* (note 21 above).

respondent describes it, the elders gather together in the evenings or at anytime that is suitable for all parties concerned.²⁶ Parties do not therefore have to worry about effects on their livelihoods which, as chapter five showed, was a very important consideration for those needing to appear before formal courts.

Also important is accessibility in terms of language. The issue of linguistic accessibility has been shown to be an important aspect of access to justice, and as chapter four demonstrated, the availability of competent foreign African language interpreters is one of the major issues confronting the justice system in South Africa. For those utilising these non-state justice systems, there are no such challenges, as proceedings are conducted in the language of the parties. This eliminates the need for interpreters 'whose accuracy cannot be guaranteed, to the detriment of the [parties]'.²⁷

The non-requirement of legal representation and the costs attached thereto, which is one of the major deterrents to utilising the state justice system, is another factor that recommends non-state justice systems. While one of the key requirements in accessing the state justice system is legal representation, the situations in which the State is obliged to provide it free of charge is limited, thus in those situations where they cannot access free legal services, refugees have to bear the cost. Civil society organisations do offer a useful alternative to those refugees and asylum seekers who cannot afford the services of a private lawyer, but as was shown in chapter five, the services of those organisations are constrained by limited resources.²⁸ Thus significant numbers of refugees are still unable to access legal services. As non-state justice systems do not require lawyers, this problem is eliminated. Furthermore, cost associated with using these forums is negligible, as the need for lawyers, filing fees and other costs are eliminated. Taken together, all of these factors make for a system that is familiar to its users, culturally relevant and acceptable to them.

However, it is not only these positive factors that make respondents use them. Sometimes, it is quite simply a lack of choice. As previously stated, while some respondents would have preferred certain issues to be resolved 'legally', they have been forced to take disputes before informal forums because the police expect them to treat disputes among

²⁶ Interview with Abdi Ahmed, chairperson, Somali Association of South Africa, Western Cape branch. 21 January 2010.

²⁷ Brenda Grant & Pamela Jane Schwikkard 'People's courts?' (1991) 7 SAJHR 304, 307.

²⁸ Chapter five section 5.5.

themselves as internal issues to be addressed within the community. Reporting on this aspect of the challenges that their clients face, the UCT Law Clinic stated:

We have noticed that some of our clients who report domestic abuse to [our] staff are not aware that the South African system for dealing with such events is available to them as foreigners. In one instance ... a police official advised our client that they could not get a protection order because the matter of domestic abuse should be resolved within the Somali community without calling for outside assistance.²⁹

A Congolese respondent also indicated that he had been told that ‘you people are Congolese, you should solve your own problems’.³⁰ The consequence of such attitudes has been previously alluded to. It was argued in chapter five that such denial of access to justice leads to refugees and asylum seekers resorting to subterranean forms of justice, which as the Constitutional Court noted in *Lesapo v North West Agricultural Bank and Another*,³¹ is what the constitutional guarantees on access to justice seeks to guard against.³² As this study demonstrates, this is apparently the case.

Sometimes, the choice is forced by the consequences which users perceive they will suffer if they choose to resort to the state justice system against a compatriot. As case studies below will illustrate,³³ refugee communities often try to discourage members from taking each other to court. Choosing to do so could result in ostracism from the society. Others discourage litigation generally, seeing it as an action that would expose the community to further attacks.³⁴ It therefore appears that the loss of community approbation and the desire to avoid harm to the community are also factors that compel people who might otherwise have preferred the state justice system to resort to the alternative systems existing within their communities.

To illustrate some of the issues raised above, I will now discuss two case studies which demonstrate the workings of these systems and what impact, if any, they have in promoting access to justice for refugees and asylum seekers. The discussion will focus on the two

²⁹ Refugee Rights Project, University of Cape Town Law Clinic ‘Narrative Report for 2009’. Obtained from the Law Clinic, 17.

³⁰ Respondent 11 (25 June 2008).

³¹ *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

³² *Ibid*, 417 para 22.

³³ See sections 6.4.1 and 6.4.2 below.

³⁴ *Ibid*.

groups most well represented among respondents – Somalis and Congolese, because these were the two groups who most reported using them and were familiar with them.

6.4.1 Somalis

Somalis are one of the most highly visible groups among refugees in South Africa, both because of their distinctive physical appearance and their constant presence in the media as victims of recurrent xenophobic attacks.³⁵ They are also one of the largest and well-established refugee groups in the country. This should make them one of the best locally-integrated groups in the country, but as the frequent xenophobic attacks they suffer indicates, this is not the case. One of the enduring features of Somali communities, often discussed in the literature, is the importance of tribal or clan affiliation in everyday life.³⁶ Clan affiliation is of the utmost importance to Somalis in their homeland, to the point that civil governance has been conducted along clan lines since the implosion of the country in the early 1990s.³⁷ These affiliations are usually transported into host countries, where clan dynamics remain very much in play in the way Somalis interact with each other.³⁸

Often, however, the experience of foreignness necessitates the need to interact beyond clan affiliations, to present a united front in the face of a common enemy, so to speak. Thus, in South Africa, several umbrella bodies to ‘fight for the rights of Somalis’ regardless of clan,

³⁵ Sumayya Ismail ‘Somalis live in fear in South Africa’ *Mail & Guardian Online* 3 October 2006. Available at <http://www.mg.co.za/article/2006-10-03-somalis-live-in-fear-south-africa> [Accessed 22 February 2011]; United Nations Integrated Regional Information Network (IRIN) ‘South Africa: Fleeing war, Somalis are targets of violence in adopted home’. Available at <http://www.irinnews.org/report.aspx?reportid=61298> [Accessed 22 February 2011]; Sally Peberdy & Zondi Majodina ‘Just a roof over my head? Housing and the Somali refugee community in Johannesburg’ (2007) 11 (2) *Urban Forum* 273–88; Loren B Landau & Tamlyn Monson ‘Displacement, estrangement and sovereignty: Reconfiguring state power in urban South Africa’ (2008) 43 (2) *Government and Opposition* 315–336, 321–323.

³⁶ See generally Ioan Lewis *Understanding Somalia and Somaliland: Culture, history, society* (New York: Columbia University Press, 2008); A Osman Farah *et al* (eds) *Somalia: Diaspora and state reconstitution in the Horn of Africa* (London: Adonis & Abbey, 2007); Jeffrey Gettleman ‘Clan politics dictate the future of Somalia’ *New York Times* 22 January 2007.

³⁷ *Ibid.*

³⁸ Cindy Horst *Transnational nomads: How Somalis cope with refugee life in the Dadaab camps of Kenya* (Berghahn Books, 2006); Mulki Al-Sharmani ‘Livelihood and diasporic identity constructions of Somali refugees in Cairo’ 2004 *Working Paper No. 104*, Forced Migration and Refugee Studies Programme, American University in Cairo, Egypt; Hopkins (note 12 above).

have sprung up over the years.³⁹ The largest and most enduring, with which a fairly large number of Somalis identify, is the Somali Association of South Africa (SASA).⁴⁰ Headquartered in Johannesburg, it has branches in every province of the country where there are Somalis. It describes itself as a representative of Somali interests in the absence of a Somali diplomatic mission in South Africa.⁴¹ Among its stated objectives:

- to organize and energize the Somali community in South Africa;
- to educate the newly arrived Somalis on the dos and don'ts in South Africa by orientating them;
- to promote the ethos of self reliance and local integration;
- to promote language skills, higher education among youth, and to organise recreation facilities and health awareness;
- to combat the scourges of xenophobia, racism and all other social ills;
- to defend the rights and the welfare of the community; and
- to liaise with all relevant government institutions, national and international organizations and civil society groups.

Abdi Ahmed, president of the association in the Western Cape says the association exists simply to help members 'overcome the difficulties of being a refugee in South Africa – killings, robberies, xenophobia, etc'.⁴² Over the years, it has helped to reintegrate displaced members while working in partnership with the government of South Africa, the South African National Civic Organisation (SANCO) and the police.

While its stated objectives do not include access to justice, the dispensation of justice or dispute resolution among its objectives, it was obvious from interviews with officials and members that that is one of primary functions it carries out. SASA plays an important role in dispute resolution among individual members. It is often the forum of first resort in issues that cut across clan lines and involve resources.⁴³ For instance, a fight between two rival businessmen over turf, in which one person attempts to start a business close to an existing one, would often necessitate a report to SASA. SASA would get involved by calling the members together, trying to mediate an acceptable solution and resolving the issue. In such

³⁹ Abdi Ahmed (note 26 above)

⁴⁰ Ibid.

⁴¹ Somali Association of South Africa www.somaliassociation.org accessed [12 November 2009].

⁴² Abdi Ahmed (note 26 above).

⁴³ Ibid.

an instance, if they refuse to listen because of clan rivalry, then the elders of the clans, instead of the individuals, are called together and given the mandate to resolve it.⁴⁴ The dispute resolution format is usually very simple: The elders of the tribes to which the disputants belong convene, and each disputant is represented by someone (an elder) from his tribe, as is the opposing side and they talk through the issues. Both parties must accept the decisions reached by the elders.⁴⁵

Unlike the formal justice system which has the instruments of state law enforcement to enforce its decisions, enforcement in these cases is derived from the disputants need to conform to their societal norms, values and expectations. To refuse is to lose the community's support, approval and one's sense of belonging. But according to SASA, it is also possible that disputants reject the elders' decisions, choosing instead to resort to the state justice system. They maintained that there have been instances where disputants have chosen the formal route, reported the matter to the police and tried to resolve the issue legally instead of accepting the elders' decision. But when that happens,

... and one person says he wants to go to court or they want to go to court, we tell them it's ok they can go, but we let them know that the community is not behind them. They're on their own and we will not support them. And they cannot come back to us.⁴⁶

However, no person interviewed could give an example of a litigated case or the outcome of such a case. This statement demonstrates that compulsion is certainly one of the factors which influences the choice to resort to the State justice system.

SASA's involvement in facilitating access to justice for the Somali community extends beyond individual cases to include the Somali community as a whole. According to Ahmed, one of the ways that SASA protects its members is to ensure that they get justice from the courts, especially in cases of xenophobia against members of the community:

Q: And how do you do this?

A: We mobilise our members in the communities to attend court hearings and go in large numbers to protest against bail for the accused ...

Q: Do you think this strategy is effective?

⁴⁴ Ibid.

⁴⁵ Respondent 4 (5 May 2008).

⁴⁶ Abdi Ahmed (note 26 above).

A: Yes our strategy has huge effects. Our presence puts pressure on the court to act justly. For example in the case of Dunoon⁴⁷ we all went there whenever there is hearing. We protested and ensured they did not get bail and for the magistrate to transfer the case to the High Court which is what we wanted. Even during the Zwelethemba case,⁴⁸ we submitted a memorandum to allow SASA to appear and support the victims. So our presence, when they see us in person, it is effective and helps us.⁴⁹

Clearly, the thinking behind SASA's strategy is a recognition by a vulnerable group that accessing the justice system as individuals is problematic and difficult, but working together as a group and employing the power of the collective is more likely to yield results. While it is not possible to determine whether or not 'such public displays of protest by relatively powerless social actors [are] effective',⁵⁰ it is noteworthy that this is the perception within a group of people normally perceived as unwilling to engage with State agents or engage in any form of agitation to claim their rights because they fear deportation or victimisation.⁵¹

Within South Africa's refugee community, such large-scale mobilisation in the context of seeking justice is not common and, in fact, appears to be somewhat unique to the Somali community.⁵² There are very few studies on refugees' mobilisation to claim and access rights in South Africa, but one which looked at mobilisation within migrant communities (rather than refugees specifically), found that migrants do not generally mobilise for rights. They cite lack of documentation, discrimination and language barriers as key obstacles to claiming rights.⁵³

Within other Somali refugee communities around the world, the kind of mobilisation described by SASA is not always the norm. Hopkins' study of Somali communities in London and Toronto, for instance, found that despite the significant size of the Somali community in London, there is a low level of collective mobilisation among them. This is blamed primarily on tensions occasioned by clan dynamics, political interests and limited

⁴⁷ Dunoon is a township in the Western Cape that had witnessed several cases of attacks against the Somalis by members of the local community.

⁴⁸ Discussed in chapter four. page 181.

⁴⁹ Abdi Ahmed (note 26 above).

⁵⁰ Marco Giugni *et al* (eds) *How social movements matter* (Minneapolis: University of Minnesota Press, 1999) xi.

⁵¹ Amisi & Ballard (note 16 above)

⁵² *Ibid*; Jinnah & Holaday (note 16 above) 153.

⁵³ Jinnah & Holaday (note 16 above) 137.

funding.⁵⁴ Why they mobilise more effectively in South Africa is not known. But it is quite possible that they are motivated by the examples of high profile victories won by post-apartheid social movements such as that led by the Treatment Action Campaign (TAC) in the fight against the government and pharmaceuticals on access to anti-retrovirals.⁵⁵ These groups have achieved significant results through mobilisation against what would appear to be invincible opponents, and their methods – protests, lobbying, litigation – have been described as a model which enables the poor to claim the rights promised by democratic citizenship.⁵⁶ Yet, attempts to examine refugee communities within a ‘social movements’ framework or to describe them as such have proven difficult for researchers, primarily because the forms they take do not fit the classic definition of social movements.⁵⁷

There is no doubt, however, that SASA attempts through community mobilisation, to facilitate access to justice, or at least prevent miscarriage of justice for its members. But with no clear-cut markers to evaluate, and in the absence of an objective study, SASA’s strategy of what can only be described as ‘attempting to intimidate through physical presence’, remains in the realm of perception. There is no way of assessing whether or not they do in some way serve as a counterweight to any possibility of miscarriage of justice. It is highly improbable that magistrates would decide on the proper forum for a case based on the pressure from the community to which one of the parties involved belonged. On the other hand, their perception cannot be dismissed out of hand. Scholars maintain that social movements and interest groups do influence the outcomes in key political and social issues.⁵⁸

6.4.2 Congolese

Congolese refugees make up a large percentage of South Africa’s refugee population, and the ebb and flows of their movement to South Africa is very dependent on happenings in the

⁵⁴ Hopkins (note 12 above).

⁵⁵ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).

⁵⁶ Mark Heywood ‘Preventing mother-to-child HIV transmission in South Africa: Background strategies and outcomes of the Treatment Action Campaign case against the Minister of Health’ (2003) 19 *South African Journal of Human Rights* 314; Geoff Budlender ‘A paper dog with real teeth’ in *Mail and Guardian* 12 July 2002; Steve Friedman & Shauna Mottiar ‘A rewarding engagement? The Treatment Action Campaign and the politics of HIV/AIDS’ (2005) 33 (4) *Politics & Society* 511–565.

⁵⁷ Amisi & Ballard (note 16 above) 16.

⁵⁸ See for instance works cited in note 56 above.

home country – renewed conflicts in the country, particularly in the eastern parts, would often result in an increase in the numbers seeking asylum, and ceasefires would be followed by fewer asylum seekers.⁵⁹

Amisi and Ballard's 2005 study of mobilisation within the Congolese refugee community in South Africa found that Congolese refugees tend to congregate along ethnic lines and the provinces from which they originate.⁶⁰ These ethnic groupings combine a focus on custom and tradition with saving schemes and other local level mechanisms to ameliorate material deprivation.⁶¹ They call themselves 'tribes' or 'families' and are the basic unit of their grassroots organisation.⁶² The emphasis on ethnic groups derives from the mistrust and exclusion that characterised their relationships back home. This is further reinforced by a lack of access to social, economic and health services which they experience in South Africa.⁶³ To counter the disadvantage thus suffered, social networks of nuclear family, friends and tribe members from the DRC take on the role of social protection nets providing support against random events such as illness, police arrest and death.⁶⁴ Surprisingly, these networks are more interested in and focus more of their energies on political happenings back home, rather than on mobilising for rights within South Africa.⁶⁵ As Amisi and Ballard put it,

They express frustration, at times against the United Nations High Commission for Refugees, at times against NGOs, at times about the politics of the DRC, and against xenophobia. They generally do not, however, seek to organise to ensure that the conditions for the treatment of refugees laid out in the legislation are adhered to.⁶⁶

Not surprisingly, therefore, there was no evidence of Congolese refugees mobilising as a group to seek justice for fellow Congolese with legal problems or who had been victims in the same way that the Somalis do. Respondents attributed this to factionalism and a lack of common sense of purpose.

⁵⁹ Amisi 'Exploration of livelihood strategies of Congolese refugees in Durban' (note 10 above) 24.

⁶⁰ Amisi & Ballard (note 16 above) 2.

⁶¹ Ibid.

⁶² Amisi (note 10 above).

⁶³ Amisi & Ballard (note 16 above) 10.

⁶⁴ Ibid.

⁶⁵ Ibid, 7.

⁶⁶ Ibid, 2.

This is not to say, however, that seeking justice within the context of social networks is unknown to them. Of the social networks around which Congolese congregate, the church is one of the most important. In almost every study of Congolese refugees, the church is an important actor, playing a role in everything from the flight from the DRC,⁶⁷ to the provision of food and shelter⁶⁸ and helping to establish linkages with fellow Congolese.⁶⁹ It is therefore not surprising that the church features prominently in the search for justice among those who consider themselves brethren. As with other Congolese social networks, the churches are often linked to ethnicity, in the sense that the ethnicity of the pastor often determines the ethnicity of the congregation.⁷⁰

During interviews, the role of the church as an important actor in the dispensation of justice was frequently referred to. Although of the eight Congolese refugees interviewed, only two said they had referred disputes among them to the church, all eight respondents mentioned the church as one of the organisations they would go to if they had any disputes with a fellow Congolese. Interview with church officials at a Congolese church⁷¹ revealed that dispute resolution was one of the key functions that the church performs. Most members would not even dream of going to a lawyer or court simply because ‘it’s not in our culture’ they said. Even Congolese who are not regular church-goers, would usually approach a church for help in resolving a dispute that his group of friends have been unable to resolve.⁷² Again the conflict resolution process resembles that described above, among Somalis, except that the leading figure here is the pastor. It is worth pointing out that such religion-based organisation is not unique to the Congolese, but can be found among many migrant groups.⁷³

⁶⁷ Amisi (note 10 above) 27.

⁶⁸ Consortium for Refugees and Migrants in South Africa (CoRMSA) Newsletter edition 13–24 March 2009. Available at <http://www.cormsa.org.za> [Accessed 2 April 2010].

⁶⁹ Vedaste Nzayabino ‘The role of refugee established churches in the lives of forced migrants: A case study of Word of Life Assembly in Yeoville, Johannesburg’ (MA Diss. University of the Witwatersrand, Johannesburg, 2005).

⁷⁰ Amisi & Ballard (note 16 above).

⁷¹ Good Shepherd Christian Church, Salt River, Cape Town. 11 May 2010. I refer to them as Congolese churches because the majority of their congregations (over 70 per cent) are Congolese and they are led by Congolese pastors. The services are often conducted in French or Lingala.

⁷² Interview with Pastor Clement Mukeba Good Shepherd Christian Church, Salt River, Cape Town, *supra*.

⁷³ Jinnah & Holaday’s study in Johannesburg for instance found that 50 per cent of migrants interviewed support a religious organisation. It also found an interesting variation between national groups, thus while only 10% of

Scholars maintain that religion cross-cuts every aspect of the refugee journey, providing a place where people can gather with each other and offer emotional and material support, and is often the first port of call for the counselling on personal matters ranging from unemployment to marital problems.⁷⁴

As with Somalis, Congolese social networks seem to play two contradictory roles in the area of access to justice: they help to meet the justice needs of their members on the one hand, while at the same time deterring the use of the formal justice system on the other. One of the respondent pastors⁷⁵ stated that Congolese churches often discourage their members from resorting to legal action, even in cases against South African citizens or institutions, because they feel that this would only lead to problems for them as foreigners. They would often counsel members to rather bear the indignity than resort to legal action. Being foreigners, he said, refugees cannot help but support each other. They cannot afford to rely on South African courts to help solve problems because ‘the way they do things is different from ours. They will give you a divorce at the slightest provocation. We try to maintain the family’.⁷⁶ Again, it can be seen that the loss of community pressure and the desire to avoid harm to the community are factors that compel Congolese refugees, who might otherwise have preferred the state justice system, to resort to the alternative systems existing within their communities.

The two case studies above demonstrate that among refugees and asylum seekers, social networks are important vehicles for accessing justice in South Africa. The case studies also demonstrate the different factors responsible for this; some of it is a matter of cultural practices which users are unwilling to let go of and some of it is the easy alternative that these systems represent. It is also sometimes, a matter of compulsion – whether by the failure of the State, or by the weight of societal expectation. Regardless of the factors which dictate their use, these non-state justice systems have important implications for South Africa as a refugee host state. These implications relate to the limitations and disadvantages inherent in non-state

Somalis support a church or mosque group, 59 per cent of Mozambicans and 70 per cent of Congolese did. See Jinnah & Holaday (note 16 above) 154.

⁷⁴ Elzbieta Gozdziaik & Dianna Shandy ‘Religion and spirituality in forced migration’ (2002) 15 *Journal of Refugee Studies*, 2; Nzayabino (note 69 above).

⁷⁵ Pastor Clement Mukeba (note 72 above).

⁷⁶ Ibid.

justice systems and the way that they operate. The next section discusses these limitations and highlights the implications for the State.

6.5 LIMITATIONS OF NON-STATE JUSTICE SYSTEMS

The argument has been made in chapter four that non-state justice systems constitute a useful mechanism for improving access to justice,⁷⁷ and the section above shows this to be the case. However, despite their usefulness, these forums suffer from certain limitations. Firstly, unlike the formal system, these informal justice systems are not curtailed by any procedural guarantees that protect the rights of participants. As shown in chapters two and three, courts within the formal justice system are required to be independent, impartial and competent. Their activities should be carried out in public and those appearing before them should enjoy certain rights, including those encapsulated in the maxim *audi alterem partem*. As these non-state justice forums have no such guarantees, there is a high danger and possibility that the rights of participants will be violated.

Related to that is the often-raised criticism that they rely too heavily on customs, tradition, community pressure and too often, they sacrifice rights for the sake of consensus.⁷⁸ The concern here is that refugees and asylum seekers resorting to informal justice mechanisms are not enjoying the constitutional protection they would otherwise enjoy if a particular matter were being resolved in formal court. And it is here – the likelihood of human rights violations – that the major concerns and the implications for the State are most pronounced. The State's overarching obligation to protect human rights extends even to the operation of non-state bodies, and it is therefore important that it ensures that these forums are not violating the rights of refugees, especially those in a weaker position, such as women and children. This is especially so considering that these forums often emphasise and rely heavily on customs and traditions, many of which usually favour the socially or economically powerful party.⁷⁹ As such, a woman who finds herself in a situation such as the one the UCT

⁷⁷ Chapter four, page 229.

⁷⁸ Wojkowska, *supra* (note 21 above); Dharmesh Bula & Adelene Africa 'Proposals for a national community court system'. 1995 *Occasional Paper Series 3–95*, Institute of Criminology, University of Cape Town at 5–6.

⁷⁹ Lillian Artz 'Access to justice for rural women: Special focus on violence against women' Institute of Criminology, University of Cape Town, 1999; United Nations Development Programme *Programming for justice: Access for all. A practitioner's guide to human rights-based approach to access to justice* (Bangkok: UNDP, Asia Pacific Rights and Justice Initiative, 2005) 102; Celestine Nyamu-Musembi 'Review of experience

Law Clinic describes above, would be unlikely to get the kind of justice she needs within a community as patriarchal as the Somali community. Also of concern is the situation where preferred or customary solution directly contradicts human rights standards. For instance, whereas a custom may consider public flogging an appropriate punishment for a crime, such a punishment violates a person's right not to be subjected to torture or cruel and inhuman treatment. These limitations clearly need to be recognized by the State so that it can address them.

Secondly, even if these forums do not violate human rights, the reasons why they are used also have implications for the State. It is obvious for reasons stated above that there are some who prefer to use these forums. But what is also obvious is that some refugees and asylum seekers are compelled to use these forums against their will, because they are unable to access the State justice system, or because their customs compel them to. The danger, when resort to non-state justice forums is compelled, is that in the view of refugees and asylum seekers, such systems could supplant the State justice system as the primary source of justice. Not only is this a derogation of the State's obligations under international law and the Constitution, the further result is that the situations in which refugees can seek justice is severely curtailed. This is because any non-state justice forum, however admirable it may be, only has legitimacy within the particular framework of the community involved. Non-community members – employers, neighbours, South Africans and other nationalities, even if also refugees – can hardly be expected to subject themselves to the authority of a particular refugee's elders or church. Similarly, there is a limit on the types of cases these forums can adjudicate, and they lack enforcement capabilities, other than the loss of community approbation, as stated earlier. Thus, they cannot handle most criminal matters or impose proper sentences. Again, this translates into a limitation on the types of cases in which refugees can seek justice. This means that when they are unable to access the State justice system, refugees and asylum seekers are left with choices that significantly undermine their right to access to justice. In such instances, the options are either to drop the matter, approach non-state justice forums, or worse, resort to self-help.

However, there is no doubt that non-state justice systems within refugee communities are beneficial in the sense that they provide an avenue to resolve simpler issues. They could

in engaging with 'non-state' justice systems in East Africa' (2003) Institute of Development Studies, Sussex University, Available at <http://www.afrimap.org/english/images/documents/file438ef181e046b.pdf> [Accessed 24 June 2009].

be useful mechanism through which South Africa meets its obligations on access to justice for refugees. But they cannot be construed as an excuse for the State to abdicate its obligations on access to justice as defined in international law and the Constitution. Rather, it is important that such systems benefit from some form of state supervision or regulation. The implication then, is that the State needs to engage with the refugees and asylum seekers on the question of these forums. This will help it to effectively respond to the weaknesses of those systems while also establishing in the minds of refugees and asylum seekers, the primacy of the State justice system in access to justice. This is not a call to attempt to change cultural practices, but rather a chance to influence systems which, although problematic in some respects, are also beneficial in many respects. Chapter four has already established that in its programming for access to justice, the State has failed to include engagement with those systems among refugees as part of its strategies. There was no indication during the course of the study, that the State has ever attempted to engage with these refugee social networks in order to influence or regulate their practices in dispute resolution. As a result, it can be seen that within refugee communities, justice mechanisms which are unregulated by objective human rights standards are left to play a critical role in access to justice in South Africa, a situation which amounts to a derogation of the State's duties under international law and its Constitution, as has been set out in this thesis.

Finally, it is worth pointing out that although this study shows that non-state justice systems are popular among refugees and asylum seekers, evidence from other studies suggest that this may not continue to be so. Hein and Berger's research on the issue, for instance, suggests that the process of integration⁸⁰ shapes legal adaptation and so attitudes and preferences among migrant populations change with length of time in the host country. They found that intra-ethnic litigation developed after a considerable period of adjustment into the host society. As they integrated into American society, Vietnamese refugees and immigrants began to use the American legal system to settle disputes within their own ethnic community.⁸¹ As the nature of the particular host society is an integral factor that shapes who

⁸⁰ They use the term 'resettlement', but to avoid confusion with the UNHCR process of refugee resettlement I refer to it as integration.

⁸¹ Jeremy Hein & Randall R Beger 'Legal adaptation among Vietnamese refugees in the United States: How international migrants litigate civil grievances during the resettlement process' (2001) 35 (2) *International Migration Review* 420–448, 436–437.

refugees and asylum seekers become after long periods of integration,⁸² it is not unreasonable to suspect that non-state justice mechanisms may not continue to be the preferred forums through which refugees and asylum seekers in South Africa settle disputes among themselves. However, this can only happen if the State addresses the prevailing attitudes of discrimination which suggest to refugees and asylum seekers that as foreigners, justice issues should be resolved within their communities, without resort to South African institutions.

6.6 CONCLUSION

In discussing the role of informal justice systems, this chapter has shown that the sum total of how refugees and asylum seekers access justice in South Africa cannot be measured only within the narrow confines of what happens within the state justice system. Parallel systems do exist which meet some of the needs of the refugee in search of justice. These parallel systems, found in social networks with their shared values and experiences, play an important role in refugees and asylum seekers' access to justice and should not be ignored. However, the reasons why these systems exist and why they are utilised are just as important as the fact of their existence.

Both international law and the Constitution place specific obligations on South Africa that it has to meet in fulfilment of its duty to ensure access to justice for refugees and asylum seekers. In evaluating how well those obligations are being met, the findings of this study has led inexorably towards the conclusion that, while there are some important positives, refugees and asylum seekers in South Africa do not enjoy equal access to the state justice system. One of the reasons for this is prejudice against refugees within the ranks of those who serve as gateways to the justice system – the police. The result of such unequal access, this chapter has shown, is that refugees resort to informal justice systems within their own social networks to resolve disputes. However, this is not the only reason. Sometimes, such resort to social networks for justice is because of the consequences which users perceive they will suffer if they choose to resort to the state justice system – it could result in being ostracised from their ethnic or tribal community, or it could expose the community to attacks or hostility from their host community. Again we see the overarching effect of fear induced by xenophobia and discrimination reaching into the decisions on access to justice.

⁸² Ibid.

However, the decision to resort to non-state systems is sometimes also because those systems they represent a useful alternative, and their advantages are many. They are much more accessible system than the state justice system, with its formality, cost, language barriers and the pressure it puts on the employment or livelihoods of litigants. These systems also serve a dual purpose – they enable their users to uphold values and customs that are relevant to them, and at the same time enjoy access to justice – a basic human right that they could not otherwise adequately enjoy if they were to rely only on the State. Ideally, any justice system would conform to certain universally acceptable standards, as outlined in chapters two and three. But then justice, as it has been said, should be the product of a living community and not something imposed from above.⁸³ In claiming and owning their own forms of justice, refugee communities are able to deal effectively with disputes in a way that is relevant to their needs.

Caution is taken not to overly romanticise the existence of these systems, however, since the very reasons put forward for their existence only serve to highlight the shortcomings of the State in meeting the access to justice needs of refugees and asylum seekers. Prejudice, fear of attacks and user-unfriendliness do not represent a vote of confidence in the State justice system. Instead, these factors only demonstrate further, the need for the State to recognise the problems in its access to justice policy which fails to take into consideration, the vulnerable position of refugees and asylum seekers, nor to include any measures which address them. Clearly, this is something that the State must do, if it is to meet its obligations to ensure that refugees and asylum seekers in its territory enjoy equal and effective access to justice.

⁸³ Don Pinnock 'What kind of justice?' 1995 *Occasional Paper Series 4–95* Social Justice Resource Project, Institute of Criminology, University of Cape Town.

Chapter Seven

Summary of Findings, Recommendations and Conclusion

*The outcome of any serious research can only be to make two questions grow where only one grew before.*¹

7.1 SUMMARY OF FINDINGS

The quote at the beginning of chapter one of this study made the very salient observation that human rights concerns lie at the core of all refugee issues – the causes of refugee flows, the protection of the refugees who result from those causes, as well as the solutions to the problems that refugees face. What that quote does not say, but which this study has clearly demonstrated, is that the human rights concerns are not so much about whether the rights of refugees are recognised, as they are about whether those rights are respected.

Throughout its course, this thesis has reiterated the distinction between recognition of refugee rights and the actual enjoyment of those rights, as well as the important role that access to justice plays in such enjoyment. Without access to justice, refugee rights, and indeed all human rights, take on the characteristic of individual morality – respect for them becomes subjective, depending only on the values of each person. The worth of human rights, therefore lies not in their recognition, but in the ability to enjoy them and to obtain a remedy when they are violated or in danger of being violated. Access to justice is, in other words, the bedrock upon which the enjoyment of human rights lies.

Utilising three sets of evaluative criteria – international law, constitutional provisions and policy framework – this study examined the extent to which refugees and asylum seekers enjoy access to justice in South Africa. The importance of this evaluation is located in the nature of access to justice as described above, but for refugees, there is even more: their ability to resort to court in order to prevent or seek redress for violation of their rights, as well as to resolve disputes have an impact on their ability to enjoy asylum and the protection it offers. From that evaluation, this thesis draws the following conclusions.

South Africa's Constitution contains adequate guarantees which meet international law standards on access to justice. Chapters two and three established this fact and in the process distilled exactly what South Africa's obligations to refugees are on access to justice. The

¹ Thorstein Veblen *The place of science in modern civilization* (New Brunswick: Transaction Publishers, 1990) 33.

convergence between the Constitution and international law is seen firstly, in the characteristic with which access to justice is imbued. As in international law, the South African Constitution views access to justice not just as a concept that allows human rights to be enjoyed, but as a human right in itself. Further convergence is seen in the due process guarantees that exist to guide the administration of justice, and in the way that the South African jurisprudence mirrors the way that those guarantees have been interpreted at the international level. In this regard, the objective theory that substantive justice, as opposed to mere procedural access, is the central focus of access to justice, receives strong affirmation in the South African context. This is seen for example in the refusal of the court in *Nkuzi* to be dogmatic about the interpretation of the right to legal representation in civil matters. Most importantly, the convergence is seen in the fact that under both international law and the Constitution, the relevant guarantees are wide enough to include not just citizens, but aliens generally and in particular, refugees and asylum seekers.²

Despite this critical convergence, however, the thesis also showed that actually meeting the obligation to refugees requires more than the availability of blanket, universally-applicable guarantees. The very nature of refugee-hood means that persons so defined are not citizens of the country in which they reside, and are therefore susceptible to certain vulnerabilities, such as discrimination, language difficulties, inability to navigate foreign legal systems, or exclusion from State justice resources. Each of these vulnerabilities needs to be specifically addressed if those guarantees are to be meaningful, and they are to be addressed in such a way that ultimately, refugees and asylum seekers enjoy *equal* access to justice as envisaged under international law and the Constitution.

While this standard is straightforward enough, the implications for South Africa were shown to be a little more intricate. Chapter three of the thesis established that the equality standard imposes two somewhat contradictory, but equally important obligations on the State, namely that the State must ensure that refugees are not discriminated against, but at the same time, it needs to treat them differently in order to ensure they enjoy equal access.³ The rationale for this is located in the meaning of the constitutional provisions on equality, as interpreted in the jurisprudence. What s. 9 of the Constitution envisages, the thesis demonstrated, is *substantive* equality, the achievement of which may necessitate disparity of

² See chapter two, section 2.6.2 and chapter three, section 3.4.

³ See discussion in chapter three, section 3.6.1.

treatment, in order to obtain equal results.⁴ Thus, in some circumstances, distinctions must be made between groups and individuals in order to accommodate their different needs and interests,⁵ and a failure to differentiate may, in fact, be construed as discrimination.⁶ Achieving equality in access to justice, therefore, means that the State must recognise the different challenges that different segments of society, including refugees, face in accessing justice, and it must adopt different measures to address those challenges. Such issues can obviously only be addressed at the level in which constitutional provisions are given effect, namely in the policy, legislation and programmes on access to justice. It is in analysing these policies, legislations and programmes that the thesis reaches its other conclusions, many of which are disturbing.

The thesis demonstrated that while South Africa has adopted a significant number of Acts, policies and programmes on access to justice, the country falls far short of meeting the obligations to refugee. The inadequacies of these efforts are two-fold. Firstly, they fail to take into consideration, South Africa's commitments to refugees under international law, and secondly, they do not reflect the constitutional standard of substantive equality. With regard to the first failing, policy formulations, such as those on access to legal representation, were shown to actively contradict the country's obligations under international law. Whereas the standard set under international refugee law is that a host state is obliged to assimilate refugees to the status of citizens for the purposes of access to legal aid, the policy guidelines on legal aid in South Africa makes clear distinctions between citizens and refugees with respect to the services that each category can enjoy.

In examining the guiding policy of the Legal Aid Board (LAB), chapter four demonstrated that that policy does not take cognisance of the fact that in all instances in which South Africa provides legal aid to its citizens, it is obliged to do so for refugees too. Thus, while the LAB is mandated to provide civil legal aid in a range of matters, beneficiaries of such assistance are required to be citizens or permanent residents. This effectively disqualifies refugees from receiving civil legal aid, a situation which amounts to a derogation

⁴ Pierre De Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal of Human Rights* 263, 266.

⁵ Matthew Chaskalson *et al* (eds) *Constitutional law of South Africa (Revision Service 5)* (Juta: Cape Town 1996) 14-3.

⁶ Pages 121-122 .

of South Africa's obligations to refugees and asylum seekers.⁷ Not only that, even in areas such as asylum hearings, in which access to legal representation was shown to be critical to preventing severe repercussions like *refoulement* to a place of danger, the LAB is sadly lacking. Its guiding policy sets out elaborate guidelines on how and when it would provide assistance in such matters, yet the evidence only suggest that it does not fulfil that obligation. Perhaps most telling is the fact that refugees, practitioners and even the Department of Home Affairs (DHA) choose to resort to non-governmental organisations when legal representation is required in asylum matters, instead of the LAB which is mandated by legislation to be the primary organ through which the State meets its obligations. The unfortunate consequence of all this is that, except in criminal matters, refugees and asylum seekers cannot turn to the LAB when they require legal assistance. Consequently, if their asylum applications are unsuccessful and they cannot access private legal assistance, or cannot be helped by civil society organisations (which are perennially over-stretched) then asylum seekers face the danger of *refoulement*.

The second aspect in which the access to justice policies and programmes fall short is in the failure to uphold the principle of substantive equality set out above. It was argued in chapter three that the first step towards upholding that principle is to first recognise the diversity of needs and circumstances represented in society and to identify vulnerable persons who require assistance in accessing justice. Thereafter programmes can be devised or adapted to meet their needs. Interestingly, South Africa's primary access to justice policy, the 'Vision 2000' policy document, recognises and acknowledges the substantive equality principle. It articulates its goal of ensuring access to justice in terms that demonstrate that it will adopt strategies that address the specific challenges of specific vulnerable groups, and indeed it does that. However, while recognising a broad range of vulnerable persons, refugees are completely ignored. Chapter four argued the illogicality of such an omission, citing the overwhelming evidence, including judicial pronouncements, which show that refugees are a vulnerable group in South Africa, and that they face well-known and widely acknowledged challenges in accessing justice.⁸

As a result of the failure to recognise refugees and asylum seekers as vulnerable persons, no specific measures have been adopted to address the challenges which makes

⁷ Page 159.

⁸ *Ibid*; *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) 17-20, 23.

equal access to justice difficult for them. Such failure does not only mean that refugees are not able to enjoy equal access, it also constitutes discrimination on the part of the State against refugees. Having adopted measures to assist some categories of vulnerable persons such as women, children and the disabled, the failure to do the same for refugees amounts to discrimination between various classes of vulnerable persons. This is especially so when one takes into consideration the obligations which South Africa owes to refugees in international law. South Africa, as a State party to the UN Refugee Convention, is obliged by virtue of Art 16(2) of that Convention, to ensure that refugees enjoy access to justice even if its own citizens do not.⁹ This standard, as incongruous as it may seem, reflects the importance that international law attaches to refugees' right to access justice. While the enjoyment of most of the rights accorded to refugees are approximated to one of three standards of treatment, their right to access to justice, like the right not to be subjected to *refoulement*, is not attached to any standard. In other words, it is absolute.¹⁰ In view of this, the failure of South Africa to address the access to justice needs of refugees and the discrimination that follows from such failure constitute glaring violations of its obligations under international law.

In discussing the policies and programmes in respect of linguistic accessibility, legal assistance, and recourse to non-state justice systems – issues which have important implications for refugees' access – it was seen that the common thread running through them is the failure to address the needs of refugees, while attempting to address the needs of other vulnerable persons. How those policies and programmes are given effect significantly undermine equal access for refugees.

The position in respect of a language policy, or lack thereof, is a good case in point. Because the State has failed to adopt an overarching language policy, each unit of the State has, over the years, developed its own language policies. However, some of these are so patently unrealistic as to be construed as a deliberate violation of the rights of refugees. Of particular interest in regard to the administration of justice are the language policies of the South African Police Service (SAPS) and the Department of Justice (DoJ). While the SAPS has adopted an elaborate system of communicating the rights of arrest to arrested and detained persons in all 11 official South African languages, the evidence is that a significant proportion of arrested and detained persons are foreign African language speakers, for whom

⁹ See discussion in chapter two, section 2.7.

¹⁰ Ibid.

those 11 languages are neither home languages nor second languages in which they are sufficiently proficient. Yet, there is no evidence to suggest that efforts are made to ensure that those rights are made available in the foreign languages most commonly spoken by refugees and asylum seekers, who are among those most prone to arrest. Regardless of the fact that most of these are routine arrests designed to help police officers meet weekly arrest targets,¹¹ and that most of those arrested are released after short periods of detention, the fact remains that as arrested and detained persons, they are entitled to the rights contained in s. 35 of the Constitution. Yet these rights are flagrantly violated by the absence of efforts to ensure that they are effectively communicated.

The DoJ on the other hand has not adopted any language policy and it is plagued by an inability to provide foreign African language interpreters in courts. This situation has been blamed for miscarriages of justice and has caused a significant amount of concern to the judiciary.¹² So much so, that the courts have been forced to emphasise on more than one occasion, the fact that since South Africa is home to a significant number of African refugees who are entitled to enjoy the right of access to justice and fair trial rights contained in the Constitution, the DoJ has an obligation to maintain a corps of competent foreign African language interpreters.¹³ The failure of both the SAPS and DoJ to provide for the language needs of non-speakers of South Africa's official languages demonstrates the policy inadequacies referred to above, in the light of South Africa's obligations in respect of refugees and asylum seekers.

The only possible outcome of these policy failures, chapter four strongly asserted, is that refugees who have reason to come in contact with the justice system will find that they are either not able to access the justice system on an equal footing with citizens, or that they are denied access outright. This assertion is corroborated by the experiences of refugees and asylum seekers which were set out in chapter five. That chapter presented the result of a field study on refugees' and asylum seekers' interactions with the justice system, an area characterised by a dearth of research. In presenting how refugees and asylum seekers experience access to justice in South Africa, it was shown that the shortcomings identified in the legislation, policies and programmes, do indeed have the effect of denying refugees access to justice. The most inimical barrier to refugees' access to justice, and the most

¹¹ See chapter four, section 4.5.1.

¹² *Mponda v S* 2004 (4) All SA 229 (C); *S v Saidi* 2007 (2) SACR 637 (C).

¹³ *Ibid.* See also chapter four, section 4.5.4.1.

widespread, was shown to be discrimination based on their citizenship. Characterised as xenophobia in the literature, the problem was found to be particularly acute in the criminal justice system, where xenophobia within the police serves as a deterrent to those wishing to utilise the justice system.¹⁴ Several respondents in the study had been subjected to various kinds of abuse, including physical assault when trying to report matters to the police. Others had been given the impression that as foreigners, they were not entitled to use the South African justice system. The impact of such xenophobia goes beyond the criminal justice system, however. It was shown to have created a negative perception of the entire justice system, with the end result that, faced with matters requiring judicial resolution, refugees and asylum seekers choose not to resort to the justice system, either for fear of exposing themselves to victimisation, or just a lack of trust that they would be treated fairly.¹⁵

This situation amounts to a violation of South Africa's negative obligations not to impede access to justice.¹⁶ Anchored on the findings of the Human Rights Committee (HRC) in *Oló Bahamonde v Equatorial Guinea*,¹⁷ it was asserted that regardless of what infrastructures and mechanisms are in place for the administration of justice, if refugees are prevented from accessing those infrastructures, then South Africa is in breach of its obligations. In that case, the HRC stated that since the notion of equality before the courts and tribunals encompasses the very access to the courts, a situation in which a person's attempts to notify the competent jurisdictions of his or her grievances are systematically frustrated runs counter to this guarantee.¹⁸ Clearly then, the thesis argued, the State has an obligation to address any situation in which attempts by refugees to utilise the justice system are 'systematically frustrated' by the xenophobic practices within the police force, which is an agent of the State. And yet, the policies do not acknowledge xenophobia as a barrier to accessing the justice system, neither do programmes exist within the justice system to address the issue.

A further consequence of the policy shortcomings is that when refugees are unable to access the State justice system or to use it properly, they resort to informal justice systems

¹⁴ See chapter five, sections 5.3.1.1 and 5.3.1.2.

¹⁵ Ibid; see also section 5.4.3.

¹⁶ Chapter three, section 3.5.1.

¹⁷ *Oló Bahamonde v Equatorial Guinea* Communication No 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993).

¹⁸ Ibid, Para 9.4.

within their own social networks to resolve disputes. This was shown to be the case among respondents in the study. The thesis demonstrated that refugee communities have established dispute resolution systems and mechanisms for the dispensation of justice within their own social networks. In analysing the workings of these systems, including their advantages and the dangers inherent in them, chapter six established that the existence of such forums have implications for the State, which must ensure that they do not become avenues for violating the rights of their users. But as with other aspects of access to justice, this issue is characterised by a failure to address the position of refugees and asylum seekers. While the Vision 2000 policy document recognises that vulnerable persons faced with an inaccessible justice system are often forced to resort to subterranean forms of justice, the efforts to address non-state justice systems and their inherent dangers revolve only around how the issue affects South Africans and do not take refugees into consideration. The chapter concludes that this is an inexplicable omission, given the recognition that refugees fall into the demography most likely to resort to such systems.

Taken together, the findings of this thesis, show that despite its purported commitment to access to justice for all, the inadequacies of South Africa's policies and programmes put it in violation of its obligations to refugees and asylum seekers under international law and its own Constitution. Another consequence is that these policy failures jeopardise confidence in the judiciary, which ironically, is the only institution of government that has proven itself to be a formidable ally in the fight for refugee protection and rights. As the thesis demonstrated in chapter three, when they have had access to the courts, albeit with the assistance of civil society organisations, refugees and asylum seekers have obtained very useful results. They have seen a far-reaching ban on employment and education lifted; have been granted access to social security; have successfully challenged arbitrary arrests and deportations which bordered on a violation of the cardinal principle of *non-refoulement*; and the Department of Home Affairs has been forced to improve its asylum adjudication processes. Yet the policy failures discussed above serve only to prevent individual refugees from utilising this useful resource, and to curtail the courts' contribution to refugee protection in South Africa.

RECOMMENDATIONS

Most critical to the goal of equal and adequate access to justice for refugees and asylum seekers is the need to recognise them as vulnerable persons who require assistance in accessing justice. The distinct disadvantages that they face need to be addressed, and in

addressing them, South Africa's policies and programmes must be guided by the obligations it owes to refugees and asylum seekers under international law. Thus, the ultimate goal must be to ensure that they enjoy equal and adequate access to justice in the country, and to achieve this, the following measures are important:

In view of the overwhelming evidence, including judicial pronouncements, that refugees and asylum seekers are vulnerable persons who face significant and unique challenges in accessing services in South Africa, the policies and programmes on access to justice must recognise their status as such. Any measures designed to improve access to justice must, therefore, include refugees and asylum seekers among vulnerable groups who require assistance, with a view to addressing their peculiar vulnerabilities.

As the most invidious obstacle to refugees' access to justice, the issue of xenophobia, both within the public and within the justice system, need to be decisively dealt with. Prosecution of persons involved in xenophobic attacks is important, in order to avoid an atmosphere of impunity, which only corrodes confidence in the justice system in the minds of refugees and asylum seekers. So also is the need to train police officers on dealing with discrimination and xenophobia and the need to overcome personal biases in the course of duty. Adequate oversight is important in this regard. It is also important that means of redress are provided to refugees and asylum seekers who are victims of police discrimination. Thus it is suggested that an ombudsman be created or that the functioning of the Independent Complaints Directory should be strongly improved so that it can provide such oversight, and serve as a redress mechanism to which refugees can easily resort.

Given that the lack of a proper language policy and inadequate language resources have a negative impact on refugees in their interaction with the justice system, it is imperative that one is adopted which reflects the multilingual nature of South Africa, including foreign languages spoken in the country. Such a policy must include adequate provision to ensure that foreign language speakers who come in to contact with the justice system are able to communicate effectively both with the police and in court.

Clearer guidelines need to be developed on access to legal aid in civil matters. As it currently stands, the formulation of the Legal Aid Guide with respect to legal assistance for refugees

and asylum seekers is inadequate and unclear. Clear wording that bring the LAB's mandate in line with the obligations under UN Refugee Convention should be adopted. That would ensure that refugees enjoy legal aid in the same circumstances that citizens do, and that in critical matters like the asylum adjudication process, they have the assistance they require. Police officers, magistrates and other personnel involved in the administration of justice must also be educated on the rights of refugees in order to prevent situations in which they are denied access to services like legal aid.

Strategies to improve access to justice for refugees and asylum seekers must be done in collaboration with civil society organisations, which at present try to fill some of the gaps left by the State's failure to provide adequate legal aid. The State needs to support and partner with these organisations by providing them with resources which enhance their capacity to provide much-needed legal advice and representation, as they are currently doing. It also needs to ensure that civil society organisations are not put off valuable litigation due to the high cost of litigating cases or the threat of costs being awarded against them.

Non-state justice systems play an important complementary role to the State justice system. When utilised to resolve simpler civil matters which have fewer human rights implications, the advantage for the State is that they help to preserve judicial resources while also improving access to justice. As they are generally more accessible to refugee and asylum seekers, these systems also help to deflect the frustrations that could arise as a result of not being able to seek justice. It is therefore important that the State engages with non-state justice systems that exist among refugees, both to provide human rights training which ensures that those systems do not violate the rights of their users and to serve as a contact point through which the State familiarises itself with the needs of refugees and meet its obligations to them. However, since the purpose of the access to justice guarantees are to encourage people to refer disputes to the courts instead of resorting to extra-legal methods, the State must concurrently improve the user-friendliness of the formal justice system in order to ensure that those who resort to non-state justice systems do so as a matter of choice or cultural preference rather than because they do not have access to the formal justice system.

Lastly, this thesis has demonstrated that shortcomings in one aspect of refugee rights leads to violation of other rights and that inability to enjoy their socio-economic rights impact negatively on their access to justice. It is therefore recommended that the State begins to address the rights of refugees holistically, ensuring that improvements in access to justice is complemented by improved access to work as well as to administrative and social services.

7.2 CONCLUSION

This study has evaluated access to justice for refugees and asylum seekers in South Africa, in light of the country's obligations under international human rights law. It differs from previous studies on the subject in that, while past studies have focused on how justice is administered in camp settings, this project focused on urban refugees, a hitherto unexplored area. While the dearth of research on the matter suggests that scholars and policy makers do not often avert their minds to the need to promote refugees' right to access to justice as an integral part of refugee protection, this study has demonstrated that it is just as important. Indeed, access to justice has proven to be as significant a mechanism for refugee protection in South Africa as good legislation and international law. It has taken intervention by the courts in South Africa for the lives of refugees and asylum seekers to acquire some semblance of the dignity which international refugee law, the country's Constitution as well as the Refugees Act accord to them. The critical point, however, is that such interventions are largely attributable to the work of civil society organisations which have utilised their knowledge and resources to push for better conditions for refugees.

In spite of the apparently positive results obtained from utilising the justice system, it has proven difficult to answer in the affirmative, the central question that frames this thesis: do refugees and asylum seekers in South Africa enjoy access to justice? Rather, what this study has found is an incongruous situation characterised by deep contradictions. On the one hand, there exists a solid international and constitutional framework in place to ensure that refugees enjoy access to justice in South Africa. On the other, the experiences of refugees in accessing justice, do not approximate to what those frameworks envisage. The social conditions under which refugees live belie the vast array of rights which they are accorded in the country, but the evidence is that the justice system is not adequately utilised to challenge these. This study has shown that the primary reason for this is the deep gulf that exists between the constitutional frameworks on access to justice, and the policy, legislation and programmes needed to translate those frameworks into real life. In particular, because they

fail to reflect the cardinal principle of substantive equality, which is central to achieving adequate, effective and equal access to justice, refugees are prevented from accessing the justice system the way they should. South Africa needs to begin to address access to justice for refugees within the context of substantive equality. In so doing, it will not only be meeting its obligations under international law, it will also be affirming the dignity and worth of refugees and asylum seekers as persons, not problems.

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Consortium for Refugees and Migrants in South Africa (CoRMSA) <http://www.cormsa.org.za>

Department of Home Affairs www.dha.gov.za

Department of Justice <http://www.justice.gov.za>

Government Communication and Information Service <http://www.gcis.gov.za/docs/>

International Network for Economic, Social and Cultural Rights (ESCR-Net) <http://www.escr-net.org/>

Legal Resources Centre www.lrc.co.za

Legal Aid Board <http://www.legal-aid.co.za/>

Médecins Sans Frontières <http://www.doctorswithoutborders.org/>

Somali Association of South Africa www.somaliassociation.org

South African Police Service <http://www.sapsjournalonline.gov.za/>

Southern Africa Migration Project <http://www.queensu.ca/samp/news/artic1.htm>

United Nations Development Program (UNDP) <http://www.undp.org/>

United Nations High Commission for Refugees (UNHCR) www.unhcr.org

United Nations Integrated Regional Information Network (IRIN) <http://www.irinnews.org/>

APPENDIX A

QUESTIONNAIRE FOR REFUGEES AND ASYLUM SEEKERS.

1. Today's date: _____

2. Place: _____

3. Age (please tick only one): 0-29 30-39 40-49 50 & above

4. Occupation: _____

5. Gender (please tick only one): Female Male

6. Are you currently (please tick only one): Married Separated Widowed
Single Divorced

Background

7. Highest level of education: (please tick only one): Primary School High School
(Secondary School) University or other tertiary institution e.g technical college
Postgraduate

8. Country of origin _____

9. Apart from South Africa and your home country, in which other country have you lived? _____

10. How long did you live there? _____

11. When did you come to South Africa? _____

12. What is your status here (What kind of paper do you have from the Department of Home Affairs?) Asylum seeker (s.22) Refugee (s.24) Other (please specify) _____

13. How long, from the time you arrived in South Africa, did it take you to get your paper? _____

14. Did you seek help from anywhere before you got it? Yes, I did No, I did not

15. Why did you need help?

16. Where did you seek help?

UCT law Clinic Cape Town Refugee Centre (Forum) Legal Resources Centre
Wits Law clinic Other (please specify) _____

17. How did you know of the place?

An official at Home Affairs told me to go there Immigration officials at the border told me to go there UNHCR told me to go there Another refugee/asylum seeker told me to go there Other (please specify) _____

18. Which other help have you sought from any of the places in question 16 above?

19. When you went to the place, did you receive the help you needed? Yes No

20. In general, would you say the help you got was (*Please tick one*)

Excellent, just what I needed.....1

Satisfactory2

Good.....3

Fair.....4

Poor.....5

21. Please explain your choice in question 20 above:

22. Have you ever reported a case at a police station? Yes No

23. What was it about?

24. What happened in the case (what did the police do with the case)?

25. Were you satisfied with the way the police handled the case?

26. If not, why not?

27. If you were not satisfied with police handling of the case, did you try to take the case further?

28. What did you do?

29. Have you ever felt that you should take someone to court or other legal body, (like the CCMA for example)? Yes No Don't know

30. Did you? Yes No

31. If not, why not?
32. Have you ever been to court anywhere, for any reason? Yes No
33. Have you ever been to court in South Africa, for any reason? Yes No
34. Which court was it?
35. Why did you go to court?
36. How would you describe your court experience in South Africa:
- | | | |
|---|---|--------------------------|
| Pleasant..... | 1 | <input type="checkbox"/> |
| Fair..... | 2 | <input type="checkbox"/> |
| Unpleasant..... | 3 | <input type="checkbox"/> |
| Very unpleasant, I will not go there again..... | 4 | <input type="checkbox"/> |
| I don't know..... | 5 | <input type="checkbox"/> |
37. Please explain why?
38. If you answered yes to questions 32 & 33 above, how would you compare your court experience in South Africa and in the other country?
39. When you have a problem with someone other than an immediate member of your family, how do you resolve it?
40. Was this questionnaire easy to understand and complete? Yes No
41. If not, can you suggest ways it could have been better.

THANK YOU!

APPENDIX B

QUESTIONNAIRE FOR LEGAL ASSISTANCE AGENCIES.

Date:.....

Place:.....

1. Name of organisation:.....
2. Position in organisation:.....
3. Date established:.....
4. No. of staff:.....
5. No. of lawyers among your staff:.....
6. No. of paralegals:.....
7. Target population: whom is your organisation created to serve?
 The general populace Women and/or children only Migrants Refugees and Asylum seekers The indigent (please state criteria for indigence) Other
8. Average no of cases you deal with on a monthly basis:.....
9. Most common types of cases:
 -
 -
 -
10. Other than assistance with obtaining documentation from the Department of Home Affairs, what are the most frequent issues refugees and asylum seekers seek help with?
 -
 -
 -
11. In your opinion, what *legal* problems are refugees and asylum seekers most often confronted with?
12. Does your organisation provide legal representation to refugees and asylum seekers? Yes
No
13. If so what kind of cases do you represent them in?

14. How much of the costs do they bear? None All Part (please specify what part, e.g filing fees):
15. Out of every ten cases, how many are followed to conclusion?
16. What are the reasons for cases not followed to conclusion?
17. When refugees and asylum seekers have *legal* problems your organisation cannot help them with, where do you refer them?
18. Please specify what kind of legal matters your organisation is unable to help refugees and asylum seekers with?
19. Why is your organisation unable to help with this?
20. Is this limitation specific to refugees, or does it apply to the general populace?

PLEASE NOTE: *In questions 21–29 below, ‘courts’ and the ‘legal system’ refers to the formal state structures in which a person may seek redress in South Africa, including courts, tribunals and mediation/arbitration bodies such as the CCMA.*

21. How would you describe refugees and asylum seekers willingness to pursue legal claims in court?

Very enthusiastic.....	1 <input type="checkbox"/>
Willing.....	2 <input type="checkbox"/>
They usually require some persuasion.....	3 <input type="checkbox"/>
Unwilling.....	4 <input type="checkbox"/>
Completely opposed to it.....	5 <input type="checkbox"/>
22. Where they have been unwilling in the past to have recourse to the courts, despite having been assured of the legitimacy of their claim, what is the professed reason for their unwillingness to go to court?
23. How would you describe the accessibility of the justice system generally?
24. How would you describe the accessibility of the justice system to a refugee or asylum seeker?
25. Do you think refugees and asylum seekers have more difficulty than the general populace in accessing the justice system?
26. Please give reasons for your answer.

27. Please rate the following factors according to their importance as a barrier to refugees accessing the justice system:

	5 Has no effect	4 Unimportant	3 Mildly Important	2 Important	1 Very important
Costs					
Language					
Illiteracy					
Lack of familiarity with the legal system					
Distance to courts					
Ignorance about their rights					
Ignorance about where to seek help					
Cultural beliefs					
Insufficient number of legal aid agencies					
Inefficient bureaucratic structures (police losing dockets, lack of necessary papers from home affairs etc)					
Fear of victimisation					
Gender issues					
Xenophobia					
Time factor (Lengthy proceedings and delays)					
Other (please specify)					

28. In your opinion what should be done to make the justice system more accessible to refugees and asylum seekers?
29. Is your organisation's ability to assist refugees access the justice system impeded in any way?
30. What would you say are the major impediments?
31. Are you aware of any informal (non-state) dispute resolution/justice system that refugees and asylum seekers have recourse to? Yes, I am No, I am not
32. What is our opinion of such systems?
33. Was this questionnaire easy to understand and complete? Yes, No
34. If not, please you suggest ways it could have been better.

THANK YOU!

University of Cape Town