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TOWARDS A MORE EFFECTIVE GUARANTEE OF SOCIOECONOMIC RIGHTS FOR REFUGEES IN SOUTHERN AFRICA

Thesis submitted by

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Student No. 338689

In fulfilment of the degree of

Doctor of Philosophy

in the School of Law at the University of the Witwatersrand, Johannesburg under the supervision of Professors

Jonathan Klaaren and **Marius Pieterse**

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DECLARATIONS

I declare that this thesis is my own unaided work. I further declare that this thesis has never before been submitted for any degree or examination in any university.

REDSON EDWARD KAPINDU

_____

Signature: Date:

This thesis has been submitted with our permission as supervisors appointed by the University of the Witwatersrand, Johannesburg.

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PROFESSOR MARIUS PIETERSE

_____

Signature: Date:

DEDICATION

I dedicate this work to my wife Wezzie and my daughters Chisomo and Thokozani

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ABSTRACT

This thesis explores the sufficiency and effectiveness of legal guarantees for the socioeconomic rights of refugees in Southern Africa. In order to achieve effective protection of these rights for refugees, the thesis argues that legal and policy responses to refugeehood should distinguish between political and humanitarian refugees. This distinction is necessary for principled as well as pragmatic reasons. Political refugees are forced to flee from their own countries by reason of wrongful rights-violating conduct by the State; or similar conduct by non-state actors but with the acquiescence of State authorities; and they seek substitute State protection and political community membership in other countries. The thesis argues that political refugees ought to be accorded preferential treatment over other foreign nationals who are not members of the host State's political community. These include humanitarian refugees who, by contrast, are compelled to flee their country of origin due to various factors that threaten to seriously harm their lives; but which are neither directly nor indirectly attributable to wrongful State conduct. Based on this distinction, the thesis critiques international and domestic legal instruments, exploring the extent to which socioeconomic rights are guaranteed for refugees in the region. On the international plane, the thesis observes that international human rights law proceeds from the premise that nationals and foreign nationals ought to receive equal human rights guarantees, including in the sphere of socioeconomic rights, but that limitations on these rights, premised on nationality, are permissible based on reasonable and objective criteria. A problem with this position is that it makes no special case for the necessary preferential treatment that political refugees ought to receive in comparison with other foreign nationals. On the domestic front, the general position in the region is that the socioeconomic rights of foreign nationals, including refugees, are only narrowly guaranteed. This is in contrast with the general principle of international law that nationals and foreign nationals should receive equal treatment with only limited exceptions permitted. Further, this domestic position does not comport with the principled case for the preferential treatment of political refugees over other foreign nationals that the

thesis advocates. In order to achieve a more effective guarantee of socioeconomic rights for refugees in the region, the thesis recommends that States in the region should comprehensively entrench these rights in applicable Bills of Rights. It also argues that courts in the region should be more progressive in their interpretation and application of the Bills of Rights. These measures should be blended with legal provisions that provide for a split between political refugees and humanitarian refugees in terms of the standards of treatment. There is also need for the harmonisation of domestic refugee law regimes, as well as a well-defined scheme of refugee burden-sharing, in the region.

LIST OF ABBREVIATIONS

ACHPR: African Charter on Human and Peoples' Rights

ACmHPR: African Commission on Human and Peoples' Rights

AU: African Union

CC: Constitutional Court of South Africa

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

CERD: Committee on the Elimination of All Forms of Racial Discrimination

CESCR: Committee on Economic, Social and Cultural Rights

CRC: Convention on the Rights of the Child.

DHA: Department of Home Affairs (South Africa)

DRC: Democratic Republic of Congo

ECHR: European Court of Human Rights

EU: European Union

EXCOM: Executive Committee of the UNHCR

HRC: Human Rights Committee

ICCPR: International Covenant on Civil and Political Rights

ICERD: International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICJ: International Court of Justice

ISDSC: Inter-State Defence and Security Committee

ISPDC: Inter-State Politics and Diplomacy Committee

MSCA: Malawi Supreme Court of Appeal

OAU: Organisation of African Unity

OHCHR: Office of the High Commissioner for Human Rights

R2P: Responsibility to Protect

RSA: Republic of South Africa

RSD: Refugee Status Determination

SADC: Southern African Development Community

SDC: Status Determination Committee

SDO: Status Determination Officer

SOPDSC: SADC Organ on Politics, Defence and Security Co-operation

SPPDSC: SADC Protocol on Politics, Defence and Security Cooperation

UDHR: Universal Declaration of Human Rights

UNFPA: United Nations Food and Population Agency

UNGA: United Nations General Assembly.

UNHCR: United Nations High Commissioner for Refugees

US/USA: United States of America

GLOSSARY OF SOME SPECIAL TERMS

Asylum Seeker: The term ‘asylum seeker’ unless the context in the thesis otherwise expressly suggests, is used to denote a person who is seeking refugee status in a host State, or whose application for such status has not yet been determined.

Culpable conduct: Unless the context otherwise clearly shows, this expression in this thesis refers to wrongful or rights-violating conduct in broad terms, rather than its usual legal connotation of criminally liable conduct.

Foreign national: A person who is not a citizen of the host country.

National: Unless the context in the thesis otherwise expressly suggests, the term national in this study is used interchangeably with the term ‘citizen’

Non-refoulement: The prohibition of sending or sending back a refugee or other person to a State where such person would or is likely to be subjected to persecution or other serious harm.

Permanent Resident: A foreign national who has been granted the right to sojourn and to settle in the host country indefinitely.

Refugee: A person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it, or a person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality (AU definition).

State: The term ‘State’, unless the context in the thesis otherwise expressly suggests, is used interchangeably with the term ‘country’.

Travaux preparatoires: Records of discussions or negotiations leading to the adoption of an international treaty or other instrument.

Ubuntu: A principle of African philosophy that entails treating others with kindness, compassion and dignity; and the collective idea that a person is only human through other people in the community.

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CHAPTER I
INTRODUCTION

> We lost our home, which means the familiarity of daily life. We lost our occupation, which means the confidence that we are of some use in this world. We lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings. We left our lives in the ghettos...our best friends have been killed in concentration camps, and that means the rapture of our private lives. (Hannah Arendt, 1943).

1.1 Background of the study

Refugees are forced international migrants, 'forced to leave their homes, familiar environment, friends and relations, occupations, established social services and all the comforts of their country of origin, however minimal, to face an unpredictable future which holds all sorts of dangers.'[1] Whilst in the host country, whenever there are cutbacks on social services or other restrictions on socioeconomic rights, refugees as non-voters, foreigners and the uninvited, are among the first to suffer.[2] They are often destitute, many of them live in difficult psychological and material conditions; and they are open to unwarranted negative suspicions that often befall the poor, the unprotected, and those 'without papers.'[3] Refugees frequently face egregious forms of discrimination, which are often manifested in the form of xenophobic attacks or marginalization.[4] Thus refugees are a vulnerable group in society and their vulnerability is underlined by the circumstances of their displacement, the nature of their needs, and their experiences and status as

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1 EQ Blavo, *The Problems of Refugees in Africa* (1968) 20.

2 See Canadian Council for Refugees, Refugee Rights are Human Rights: How Canada Lives up, or Fails to Live up to its international human rights obligations towards refugees and other non-citizens, <http:// http://ccrweb.ca/refright.htm > (accessed on 15 July, 2012).

3 P Weis, 'The international Protection of Refugees', *48 American Journal of International Law* 193-194.

4 See T Kupe et al (eds.) *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa* (2009)

foreign nationals in the host country.[5] Emma Haddad observes that, regrettably, 'refugees represent a permanent feature of the international landscape' and that they are 'the human reminder of the failings of modern international society.'[6]

This thesis focuses on this vulnerable group of people. It examines the nature and extent of legal protection for refugees in Southern Africa in the area of social and economic rights (socioeconomic rights). The thesis also explores various measures that can be adopted in constructing a more effective scheme of legal guarantees that would be ethically sound, practically sustainable and ensure better realisation of these rights for refugees in the region.

The focus of the thesis is on the nature and extent of legal guarantees and, in the main, the thesis does not seek to address the actual enjoyment of these rights on the ground. Where the study touches on the actual enjoyment of these rights, it does so in passing and only where the context of the discussion makes such exposition essential.

The study proceeds from the assumption that generally, States treat their citizens differently from foreign nationals in so far as the guarantee of human rights, particularly socioeconomic rights, is concerned. Under this differentiated scheme, priority is given to citizens. The priority of citizens under this scheme has indeed received, to some extent, the imprimatur of international treaty law. Article 2(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

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5 Blavo (note 1 above) 31.

6 E Haddad, *The Refugee in International Society: Between Sovereigns* (2008) 3.

This provision makes it clear that the framers of the ICESCR viewed differential treatment between citizens and foreign nationals in the guarantee of economic rights by developing States as generally legitimate. It is noteworthy that none of the 160 States parties to the Covenant have entered any reservation on this provision.[7] Thus, it is arguable that article 2(3) of the ICESCR shows some discernible consensus among States on the priority to be accorded to citizens over foreign nationals, at least insofar as the guarantee of economic rights in developing States is concerned. Article 2(3) observably reflects, and is an implicit recognition of, the societal tensions that arise in respect of the guarantee of socioeconomic rights for foreign nationals in various countries. Jonathan Klaaren observes in this respect that:

> While the wisdom of allowing developing countries to exercise such an exception might be open to question, ICESCR art 2(3)...recognizes the real social and political tension that undoubtedly exists between the foreign nationals and citizens around perceptions of rights to economic benefits.[8]

Differential treatment between citizens and foreign nationals in the context of socioeconomic rights is mainly justified in relation to political and resource constraints.[9] In terms of the political constraints, it has been argued that a democratic State is politically constrained because it derives its authority from the consent of the governed and thus, to be legitimate, must, as a general rule, promote the claims and interests of its voters. Generally, these voters are citizens.[10] Sometimes the interests of the citizens include anti-immigration sentiments such as a strong clamour for restrictive admission policies and second class treatment of foreign nationals, including refugees. As a result,

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7 OHCHR, *ICESCR Status*, http: // treaties.un.org / Pages / View Details .aspx ? src = TREATY&mtdsg_no=IV-3&chapter=4&lang=en (accessed 15 July, 2012).

8 J Klaaren, 'Human Rights Protection of Foreign Nationals', 2009 30 *Industrial Law Journal* 84

9 See VP Nanda 'The African Refugee Dilemma: A Challenge for International Law and Policy' (1985) 32(1/2) *Africa Today*, 61-75.

10 See R Dixon, Review of MJ Gibney, 'The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees', (2004) in (2005) 17(2) *International Refugee Law Journal* 454.

governments in host States face the difficult and delicate task of having to strike a proper balance between ensuring the protection of foreign nationals whose lives might be in peril, such as refugees, on the one hand; and being electorally accountable to their citizens by being responsive to popular sentiment, which might include such anti-immigrant clamour, on the other.

With regard to the resource constraints, difficulties arise from the fact that the State, operating within a circumscribed territory, has to act within the absorptive capacities of its society.[11] These constraints impact very heavily on poor countries and communities because of their small or heavily burdened pools of resources.[12] The UNHCR has acknowledged this resource problem in the context of refugee protection, stating that:

> There are inevitable tensions between international obligations and national responsibilities where countries called upon to host large refugee populations, even on a temporary basis, are suffering their own severe economic difficulties, high unemployment, declining living standards, shortages in housing and land and/or continuing man-made and natural disasters.[13]

These resource constraints are also exacerbated by the prospect that, whatever choices the State has to make in admitting and protecting immigrants, there is the possibility of ripple socioeconomic effects because,

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11 Ibid.

12 As Andrew Shacknove argues, political conflicts, resource scarcity and conceptual confusion about the meaning of refugeehood, its causes, and its management conspire in contributing to the misery of both the refugee and host country, and to the inflammation of international tension – See AE Shacknove, 'Who Is a Refugee?' (1985) 95(2) *Ethics* 274-284, 276.

13 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', UN doc. EC/SPC/54, 7 July 1989, paras.8-22. Cort similarly points out that there is a 'tension existing between international instruments advocating humanitarian assistance to refugees and the growing political and economic constraints on assistance placed by both developed and less developed nations.' See *Richard AC Cort, '*Resettlement of Refugees: National or International Duty?' (1997) 32 *Texas International Law Journal* 307, 309.

among other things, a generous policy might increase demand for resources.[14]

Further, resource constraints entail that there is always competition for access to socioeconomic resources or opportunities between host populations and foreign nationals. This causes tensions between these two groups. Host populations in many cases fail to appreciate why they should compete for these resources or opportunities with foreign nationals. There is frequently a general perception that foreign nationals have their own countries to look toward; that their welfare should be the concern of the governments in their home countries; and that they therefore place an unjustifiable burden on the resource pool of the host State.

A peculiar problem arises in the specific case of refugees. Where relief aid is provided by or through organizations, it has been noted that, 'organisations that help refugees tend to be more concerned with refugees than hosts.'[15] Michael Nyinnah observes for instance that 'by virtue of UNHCR assistance, many asylum seekers in Southern Africa are materially superior to impoverished nationals.'[16] Host communities that feel neglected in this way often develop animosity towards refugees and become generally hostile towards them.[17] Betts observes in this regard, that:

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14 See Dixon (note 10 above) 454.

15 Robert Chambers, 'Hidden Losers? The Impact of Rural Refugees and Refugee Programs on Poorer Hosts' in Robert F. Gorman (Ed.), *Refugee Aid and Development: Theory and Practice* (1993), 29-43, 29

16 Michael Kingsley-Nyinah, 'Asylum, Refugee Criteria, and irregular Movements in Southern Africa' (1995) 7 *International Journal of Refugee Law* 291, 293-294.

17 Daniel Barkely points out that during periods of refugee crises 'time, energy, and resources are diverted away from national development and towards aiding refugees. This diversion from development threatens the lives of nationals and refugees alike as they compete for scarce resources. In some cases, this competition results in outright conflict between the nationals and the refugees.' - DW Barkley, 'Hope for the Hopeless: International Cooperation and the Refugee' (1989-1990) 21 *Columbia Human Rights Law Review* 319, 328, 332. Volker Türk & Frances Nicholson observe that '[x]enophobia and intolerance towards foreigners and asylum seekers have…increased in recent years and present a major problem. Certain media and politicians appear increasingly ready to exploit the situation for their own ends.'- See V Türk & F Nicholson in "Refugee protection in international law: an overall

> The problems facing African States that provide asylum for millions of refugees have over the…years become part of the common currency of international debate. There has been an increasing realisation of the risks of political tensions that may be incurred through special aid programs for tax exempt refugees settled among rural, and sometimes urban, populations who are themselves almost equally impoverished. There has been a parallel realisation and acceptance of the fact that the asylum countries cannot sustain the refugee burden without very considerable international assistance for the improvement of their infrastructures and services.[18]

In view of these constraints, structural and social challenges, it is imperative to devise a carefully constructed legal arrangement with regard to the guarantee of socioeconomic rights as they relate to citizens on the one hand, and foreign nationals on the other. Such an arrangement should not only be tailored to ensure that no person is denuded of his or her human dignity as a result of want; but also to ensure that there is harmonious co-existence between foreign nationals and host populations.

This thesis attempts to address these general immigration issues. However, the general immigration issues are addressed only for purposes of laying an appropriate theoretical foundation. The main focus of the study is on the rights of refugees as a subset of the broader category of foreign nationals.

It is also noteworthy that some major political and socioeconomic developments in the region, most significantly the Zimbabwean political and economic crisis over the past decade or so, have had the effect of blurring the distinction between those foreign nationals who are genuinely in need of international protection, based on a well-founded fear of serious harm; and those who are merely looking for better economic prospects in other

---

perspective" in E Feller et al (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003).

[18] See TF Betts, 'Evolution and Promotion of the Integrated Rural Development Approach to Refugee Policy in Africa' in Robert F. Gorman (Ed.), *Refugee Aid and Development: Theory and Practice* (1993) 27.

countries.[19] The terms 'refugees', 'economic migrants' and 'economic refugees' are all often used to describe these foreign nationals, and no systematic attempt is made to unpack the meaning of these terms. In particular, the terms economic migrants and economic refugees 'are often used interchangeably, apparently under the assumption that their meaning is self-evident.'[20] This, however, is not the case. For a person to be a refugee, as discussed more elaborately below, he or she must flee the country of origin involuntarily. If the intolerable circumstances that force him or her to flee are economic, he or she can properly be called an economic refugee. An economic migrant, by contrast, is a person who 'is moved exclusively by economic considerations'[21] and does so voluntarily 'merely to attain a "better" life'.[22]Illustratively, Foster provides the example of 'a woman who left her country [merely] because she was able to earn a higher salary as a doctor in a second country' as the classic example of an economic migrant.[23]

Further, in the case of refugees, there seems to be a lack of appreciation among policy and law makers, of the need to draw a distinction in standards of treatment between refugees who are forced out of their home countries due to the culpable conduct of their government or with its acquiescence; and those that are forced to flee as a result of a humanitarian crisis that is not directly attributable to the State.[24] These confusions have led to a rather

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19 Integrated Regional Information Networks (IRIN), *South Africa: A long awaited policy on economic migrants*, 10 April 2009, available at http://www.refworld.org/docid/49e44bd91a.html (accessed 11May 2013); F Khan, *Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach*, http: // www.refugeerights.uct.ac.za / downloads / refugeerights.uct.ac.za/patterns_policies_migration_FKhan.doc (acessed 11 May 2013)

20 M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation,* (2007) 5.

21 UHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1992), para.51.

22 Foster, (note 20 above) 6.

23 Ibid, 7.

24 Ibid.

amorphous conception of refugeehood in the region that conflates various categories of foreign nationals.

This study aims to address the confusion, and seeks to achieve conceptual clarity on the separation between refugees on the one hand, and economic (voluntary) migrants on the other. Specifically, the study seeks to clarify: (a) who exactly a refugee is, (b) what the main categories of refugees are, and (c) what entitlements they ought to have in a scheme for the guarantee of fundamental human rights generally, and socioeconomic rights in particular. In this regard, the study seeks to reconceptualise the nature of the legal guarantees for the socioeconomic rights of refugees, by critically evaluating the existing guarantees in the light of the normative (theoretical) foundations of refugeehood that the study also interrogates.

To that end, the study, for analytical purposes, splits refugees into humanitarian refugees and political refugees. This is done for purposes of coming up with a more fitting and defensible scheme for the treatment of refugees that must take into account various causes of flight and international migration. The thesis demonstrates how the broader scheme for the treatment of foreign nationals generally relates and should relate to the treatment of refugees specifically.

The study proceeds from the premise that the refugee problem is more of an international and regional problem than it is (or than it ought to be) a country-specific one; and that its solutions must reflect this international and regional character. As Emma Haddad states:

> Since it emerged as a modern 'problem' it became clear that the refugee issue was beyond the capacity of any one government to deal with effectively. As such the discipline sits between domestic and international politics and brings to the fore the interdependence between the two. How

> one country deals with the problem will have consequences for others and influence future relations between States.[25]

Haddad argues in this regard that 'there is a fundamental and mutually constitutive link between the refugee concept and international society.'[26]

The thesis, in this regard, critically engages various refugee protection regimes in Southern Africa, exploring whether refugees in the region have sufficient socioeconomic rights guarantees; and what frameworks of international cooperation exist or ought to exist in order to make the socioeconomic rights protection regime in Southern Africa better harmonised and more effective. The study proposes that relevant reforms be done under the aegis of the Southern African Development Community's (SADC) legal framework.

1.2 A synopsis of the study's argument

The thesis engages ethical and international human rights law standards, in order to investigate the extent to which refugees in Southern Africa are guaranteed protection of their socioeconomic rights. The ethical standards explored flow from a set of principles of justice that 'provide a way of assigning rights and duties in the basic institutions of society', and which 'define the appropriate distribution of the benefits and burdens of social cooperation.' [27] Several alternative political theories are examined in this regard as a foundational framework. In general, according to this foundational framework, the study accepts that there are plausible grounds for prioritizing citizens over foreign nationals in the guarantee of socioeconomic rights.

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25 Haddad, (note 6 above) 2.
26 Ibid, 1.
27 J Rawls, *A Theory of Justice* (1999) 4.

The thesis proceeds to identify refugees as occupying a unique space within the general spectrum of foreign nationals. It further argues, on principled grounds, that it is important that a distinction be drawn between humanitarian refugees and political refugees. Humanitarian refugees ought to be granted protection on the basis of humanitarian need. Political refugees on the other hand, ought to be granted protection on the basis of the need for substitute political community membership, owing to the illegitimate repudiation of their membership of their original political community (the country of origin) by (or with the acquiescence of) officials of the State.

The normative argument that underlies the investigation is that political refugees should enjoy such protection on a heightened footing than humanitarian refugees and other foreign nationals generally. It is argued that the treatment of political refugees should generally be the same as that accorded to permanent residents based on the community membership principle. The study also suggests a graduated framework from temporary protection to durable protection that should apply in the case of humanitarian refugees.

The thesis measures the extent of the guarantee of socioeconomic rights under the various international law regimes and domestic legal regimes in the countries under study, against this normative argument. The study concludes by advancing an argument that there ought to be a regional legal and policy framework on refugee protection that also deals with their socioeconomic rights; and suggests what such a framework should entail. In particular, the thesis makes a case for a systematized scheme of burden-sharing and harmonization of domestic legal regimes for the guarantee of socioeconomic rights for refugees in the SADC region.

1.3 The definition of a refugee

In order to properly conceptualise the refugee problem, it is imperative that we clearly delineate the group which is the subject of the study.[28] Emma Haddad has argued that, without a clear understanding of who broadly, we are talking about, however general we choose to keep this 'who', we cannot expect to further our grasp of how refugees emerge and how we should approach the surrounding debate.[29] The main purpose of any definition or description of the class of refugees is to facilitate, and to justify, aid and protection. In practice, satisfying the relevant criteria for refugeehood is a necessary condition to trigger entitlement to the pertinent rights or benefits.[30] Thus in this section, the study explores the various definitions of a refugee as have been adopted under various legal regimes; and it then identifies the most appropriate definition that would facilitate a more effective scheme for the guarantee of the socioeconomic rights of refugees, particularly in Southern Africa.

The discussion in this regard starts by briefly exploring the various definitions adopted under four international instruments that are either of significant or critical relevance to this discussion. These instruments are the 1950 Statute of the Office of the United Nations High Commissioner for Refugees (the UNHCR Statute);[31] the 1951 Convention Relating to the Status of Refugees (the 1951 Convention);[32] the 1967 Protocol Relating to the Status of Refugees;[33] and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Convention).[34] The discussion concludes by identifying the 1969 OAU Convention definition as the most

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28 A Grahl-Madsen, *The Status of Refugees in International Law,* (1966) 73.
29 Haddad (note 6 above) 3
30 GS Goodwin-Gill, *The Refugee in International Law* (1998) 2.
31 UNGA Resolution 428 (V) of 14 December, 1950.
32 189 *UNTS* 150. See Annexure I for a full text of the Convention.
33 606 *UNTS* 267. See Annexure II for a full text of the 1967 Protocol.
34 1000 *UNTS* 46. See Annexure III for a full text of the 1969 OAU Convention.

appropriate. In Chapter II, the study then proceeds to advance an argument in respect of the standards of treatment for refugees that ought to be adopted in respect of refugees. As will be observed, that chapter expands on the conceptual understanding of refugeehood.

1.3.1 The UNHCR Statute

The Office of the United Nations High Commissioner for Refugees (UNHCR), the UN's refugee agency, was established in 1950 by the UN General Assembly (UNGA); and the UNHCR Statute was also adopted by the UNGA under the same Resolution.[35] The functions of the UNHCR in terms of the Statute are to provide international protection and to seek durable solutions for refugees through voluntary repatriation or assimilation in new communities.[36] Thus a primary function of the UNHCR is to explore durable solutions for refugee problems. According to Article 6 of the UNHCR Statute, a refugee is defined as:

> Any person who, as a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.[37]

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35 See UNGA Res. 428(V), Annexe 1, No.3, UNGA 5th Sess., *Summary Records*, 669-80, 14 Dec. 1950. See also Goodwin-Gill (note 30 above) 7.

36 Ibid, 212.

37 See Article 6A(ii) of the Statute.

In addition, the competence of the organisation extends to:

> Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has a well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or if he has no nationality, to return to the country of his former habitual residence.[38]

The general significance of the definition of a 'refugee' under the UNHCR Statute is that the Statute applies to any member State of the UN, irrespective of whether or not it has ratified any of the international or regional refugee conventions. Coupled with this is the fact that the definition of a refugee under the Statute is much wider than the 1951 Convention definition which is discussed below. The definition of a refugee under the statute encompasses all those persons who, for reasons other than personal convenience, find themselves outside the country of their nationality or former habitual residence. As the discussion of the 1951 Convention definition below demonstrates, this is in sharp contrast with the definition under the latter which is highly circumscribed by a closed list of grounds.

The consequence of the wide definition under the UNHCR Statute is that, among other things, even those refugees who have been denied status in terms of the process of Status determination of the host country based on the 1951 Convention definition, can still be treated as refugees by the UNHCR if they satisfy the UNHCR Statute's definition. Refugees recognised by the UNHCR in terms of the Statute are called 'mandate refugees'. In such cases, the UNHCR might in turn assist mandate refugees in finding durable solutions through such measures as international resettlement. The wide definition under the Statute includes the category of what are referred to as humanitarian refugees under this study.

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[38] See Article 6B of the UNHCR Statute.

1.3.2 The 1951 Convention and the 1967 Protocol

The 1951 UN Convention Relating to the Status of Refugees (the 1951 Convention) is the framework treaty on the protection of refugees in the world. The definition of a refugee under the 1951 Convention is contained in Article 1 of the Convention. A refugee is defined as:

> Any person who, as a result of events occurring before 1 January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[39]

At the time of its adoption, this definition was subject to temporal[40] and geographical[41] limitations. However, in view of new refugee situations that had arisen around the world after 1951, it became imperative to remove these limitations. Thus the 1967 Protocol to the Convention was adopted, providing that:

> For the purpose of the present Protocol, the term 'refugee' shall…mean any person within the definition of Article 1 of the Convention as if the words 'As a result of events occurring before I January 1951…' and the words '…as a result of such events', in Article 1A(2) were omitted.[42]

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39 Art. 1(A)(2).

40 i.e events occurring before 1 January 1951.

41 Article 1B(1)(a) of the Convention, states that the words 'events occurring before 1 January 1951' in article 1, section A, shall be understood to mean… 'events occurring in Europe before 1 January 1951'; and then provided an option for states to declare, upon ratification, whether the Convention was to apply only to 'events occurring in Europe or elsewhere before 1 January 1951.'Thus it was apparent that primarily, the 1951 Convention was adopted with a view to addressing refugee problems in Europe in the aftermath of the Second World War.

42 Art. I(2) of the Protocol.

Further, Article I(3) of the 1967 Protocol provides, in part, that '[t]he present Protocol shall be applied by all States Parties hereto without any geographic limitation…' It can therefore be said, in this regard, that the treaty protection regime for refugees under the UN system only became truly global with the coming into force of the 1967 Protocol as a complement of the 1951 Convention.

The 1951 Convention all the same has still been the subject of criticism. For instance, the Convention has been criticised for being 'a very narrow instrument, protecting a very specific group of persons.'[43] The Convention is said to be narrow owing to its highly circumscribed definition of a refugee, premised on the notion of well-founded fear of persecution, that excludes from its purview some forced international migrants; who cannot demonstrate such well-founded fear, even though they might be considered to have at least a morally justifiable claim to international protection and/or assistance based on humanitarian need. It has been counter-argued though, that a wider definition, if applied without moderation, might also present both practical as well as ethical problems within the social fabric of host States. Worster for instance points out in this regard that:

> If we were motivated strictly by human-centred interests, we would find a broadening of the definition, although perhaps with limited state compliance. If we were motivated strictly by state-centred interests, we might find a narrowing of the definition, although perhaps abandoning desperate individuals truly in need.[44]

One can perhaps state that the conundrum that Worster presents here brings into sharp focus the dilemma between pragmatism and idealism when adopting measures for the protection of forced international migrants generally. It also brings into sharp focus the tension that exists between the

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[43] William Thomas Worster, 'The Evolving Definition of the Refugee In Contemporary International Law', (2012) 30(1) *Berkeley Journal of International Law* 101

[44] Ibid.

notion of universal human rights as imposing universal obligations on all States on the one hand, and the principle of state sovereignty on the other, and how these various notions ought to be balanced.

The reason for the narrowness of the definition under the 1951 Convention is that the definition is a manifestation of State interests that were prevalent at the time the Convention was adopted.[45] Whilst it reflects the desire of the States to ensure that persons fleeing egregious human rights violations had surrogate international protection; the definition also reflects that most States were, at the same time, equally focused on retaining their sovereignty over immigration control. James Hathaway has observed in this regard that:

> Current refugee law can be thought of as a compromise between the sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk. Its purpose is not specifically to meet the needs of the refugees themselves (as both the humanitarian and human rights paradigms would suggest), but rather to govern disruptions of regulated international migration in accordance with the interests of states.[46]

However, Hathaway's argument, it is submitted, is not entirely correct. The second preambular citation to the 1951 Convention explicitly states that one of the principal motivations for the adoption of the 1951 Convention was the desire of the contracting States 'to assure refugees the widest possible exercise of…fundamental rights and freedoms.' Further, as Hathaway himself observed in his subsequent work:

> The rights set by the Refugee Convention include several critical protections that speak to the most basic aspects of the refugee experience, including the need to escape, to be accepted, and to be sheltered. Under the Convention, refugees…are entitled to a number of basic survival and dignity rights, as well as

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45 JC Hathaway, *Reconceiving International Refugee Law*, (1997) xviii-xx.

46 James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', (1990) 31 *Harvard International Law Journal* 129, 133.

> the documentation of their status and access to national courts for the enforcement of their rights.'[47]

This position thus seems at odds with the argument that the 1951 Convention was adopted primarily as a means for regulating international migration, rather than to address the basic aspects of the refugee experience. The latter passage suggests that the Convention was adopted to assure refugees their basic survival and dignity rights. The most accurate position therefore seems to be that refugee law generally, and the 1951 Convention in particular, seek to achieve both ends. It is both state-centric, in seeking to ensure that State interests of immigration regulation are assured; and anthropocentric in being directly targeted at ensuring the protection of the vulnerable refugee, and to restore his or her full recognition as a human being with basic survival and dignity rights. The Convention's attempt at striking a proper balance in this regard is manifested by the narrow definition of a refugee under the 1951 Convention on the one hand; but also the wide catalogue of socioeconomic rights under the Convention on the other.

1.3.3 The 1969 OAU Convention

Among the various treaties on refugee law, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Convention) offers probably the most expansive and generous definition of a refugee. The Convention was adopted in reaction to the constantly increasing numbers of refugees in Africa, with a view to finding ways of alleviating their misery and suffering, and to provide them with a better life and future. The 1951 definition was for instance found to be inapplicable or ineffective to deal with mass population displacements, particularly where these were caused by

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[47] J Hathaway, *The Rights of Refugees Under International Law*, (2005) 94.

civil war or other disruptive events such as natural disasters.[48]As events turned out, these were incidentally the major causes of forced international displacement and migration in Africa.[49] Further, the demands and consequences of the decolonisation struggle on the continent, and the struggle against apartheid in South Africa, created a need to offer refuge to people fleeing from oppressive regimes.[50]

Article I(2) of the 1969 OAU Convention was therefore specially fashioned to address these issues. The article, that has attracted significant attention for bringing in a new definitional dimension to refugee law discourse, expands on the 1951 Convention definition by providing that:

> The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The expression 'events seriously disturbing public order' under the 1969 OAU Convention lends itself to expansive interpretation that includes events such as natural disasters that lead to massive human displacements or severe lack of the basic needs of life; as well as situations of internal armed conflict and other forms of internal strife.[51] The language of this provision is such as to even, under certain circumstances, entail an objective rather than a subjective approach to the determination of refugee status. An objective

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48 MB Rankin, 'Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on' (2005) 21 *South African Journal on Human Rights* 406.

49 M Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' 58 *McGill Law Journal* 95 (2012), 100.

50 During the OAU Conference on the Legal, Economic and Social Aspects of African Refugee Problems held in Addis Ababa from 9th to 18th October 1967, concerns had been expressed over the fact that the 1951 definition did not cover refugees 'from independent states and those from countries struggling against colonial rule or domination by a white minority.' See OAU, *Report of Conference on the Legal, Economic and Social Aspects of African Refugee Problems held in Addis Ababa*, 9-18 October 1967, para 82.

51 See Rankin (note 48 above).

approach entails that a person presenting himself or herself in a country of asylum, and who has fled from a country where it is known, objectively, that events seriously disturbing public order exist, may be viewed as a *prima facie* refugee for purposes of the Convention, without further examination as to individual (subjective) circumstances.[52]

1.3.4 Preferred definition of a refugee

The definition of a refugee under the 1951 Convention, whilst being generally satisfactory in addressing the problem of political refugeehood, has some inherent weaknesses. One of them is that it focuses on the subjective (individualised) fear of persecution based on a closed set of factors: i.e, race, religion, nationality, membership of a particular social group or political opinion. This therefore excludes from its compass, victims of major displacing events such as civil wars and natural disasters where the State is unable or unwilling to offer them the needed protection, which is a common feature in Africa. Yet another weakness is that it does not create room for group status determination and might, therefore, lead into intractable status determination complexities in cases of mass influx of refugees. The test under the UNHCR Statute on the other hand, which is premised on 'reasons other than personal convenience', has the problem that it seems too wide to be practicable. For instance, based on the UNHCR Statute test, a person who fails to secure a job in one country can claim refugee status in another on the basis that the circumstances of his/her departure from his/her country of origin were more than mere personal convenience. The concept of refugeehood however is not meant to cover such mere economic misfortunes. There must be an element of harm, the harm must attain the threshold of seriousness, and there should

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[52] See J Hyndman & BV Nyland `UNHCR and the Status of Prima Facie Refugees in Kenya' (1998) 10 *International Journal of Refugee Law* 34. See also E Arboleda 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3 *International Journal of Refugee Law* 185.

be demonstrable evidence of lack of in-country protection alternatives in order to ground a claim for refugee status.

In the final analysis, considering the various legal definitions explored above, the expanded definition under the 1969 OAU Convention sounds most attractive as it, among other things, allows for the protection of refugees who flee 'events seriously disturbing public order'. Such events could include serious disruptive economic crises that threaten livelihood to the degree that the only avenue for survival is for the people affected to seek international protection. In addition, it offers an avenue for group status determination that is unavailable under the 1951 Convention, but remains an important legal device considering the cases of mass influx that are a common feature of the African refugee landscape. This definition is therefore both usefully broader than the 1951 Convention definition, and pragmatically narrower than the UNHCR Statute definition. In the premises, the 1969 OAU Convention's definition is the preferred definition under this study.

However, it has to be acknowledged here that the 1969 Convention definition itself is not unproblematic. For instance, the definition seems to conflate flight for safety that is culpably triggered by State agents on the one hand (political refugeehood); and other forms of forced migration arising either from non-human agency or not culpably triggered or acquiesced in by State agents on the other (humanitarian refugeehood). Walker suggests that these different causes of need for surrogate State protection demand differing responses that may be allocated by the international community.[53]The 1969 OAU Convention does not allocate such differing responses.

[53] K Walker, 'Defending the 1951 Convention Definition of Refugee', (2003) 17 *Georgetown Immigration Law Journal* 583, 598.

A fuller exposition of the critique of the existing framework under the 1969 OAU Convention, and a justification for the argument advanced by Walker, as introduced here, is made in Chapter II.

1.4 Overview of the refugee problem in Southern Africa

1.4.1 The nature of the problem

International migration is one of the most pressing social phenomena in the world today. The United Nations Food and Population Agency (UNFPA) states that there are over 214 million international migrants worldwide,[54] and out of these, nearly 16 million are in African countries south of the Sahara.[55] In the context of Southern Africa, international migration has been described as a perennial and indelible part of the regional political economy.[56] There are an estimated 4.7 million international migrants in Southern Africa.[57]

The problem of refugees is part of this wider phenomenon of international migration. It is estimated that, out of the total international migrant population globally,[58] 11.8 million are refugees.[59]

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54 UNFPA, Migration: *A World on the Move*, http://www.unfpa.org/pds/migration.html (accessed 30 July 2013). The UNFPA reports here, that 'in 2010, some 214 million people – 3 per cent of the world's population, lived outside their country of origin.'

55 Africa Focus, *International Migration and Development Regional Fact Sheet:* Sub-Saharan Africa, http://www.africafocus.org/docs06/mig0609b.php (accessed 30 June 2012)

56 See LB Landau, "Regional Integration, Protection and Migration Policy Challenges in Southern Africa" in J. Handmaker et al (eds.), *Advancing Refugee Protection in South Africa*, (2008) 28.

57 United Nations, *Trends in International Migrant Stock: Migrants by Destination, UN Doc*.POP/DB/MIG/Stock/Rev.2012.

58 UNFPA (note 53 above)

59 See UNHCR, *UNHCR Population Statistics: Overview,* https://unhcr.org/PSQ_POC.aspx. (accessed 30 July 2013)

At the time of writing, the latest information from the UNHCR shows that as 'at the beginning of 2012, there were some 449,000 people of concern to UNHCR in Southern Africa, including 145,000 refugees, 245,000 asylum-seekers, 55,000 internally displaced persons (IDPs) and 4,000 returnees'.[60] The UNHCR figures however exclude Tanzania, which is classified as an East African State by the UNHCR. However, Tanzania is also sometimes politically categorized as a Southern African country; it is a member of SADC, and forms part of this study in that context. According to the UNHCR, the organisation's total population of concern in Tanzania as at the beginning of 2012 was 294,204, of whom 131,243 were recognised refugees, 705 asylum seekers, and various groups (not disaggregated and explained in specific groups by the UNHCR) comprising 162,256.[61] Thus the total population of concern in the countries under study, as at the beginning of 2012,[62] was 743,204; of whom 521,948 were recognised refugees and asylum seekers (the refugee population). It is this refugee population that this study focuses on.

The UNHCR has observed that mixed migratory movements pose the biggest challenge to refugee protection in Southern Africa generally and South Africa in particular, as it is not always easy to isolate real refugees who are in need of international protection; and mere economic migrants who are solely migrating in search for better economic opportunities elsewhere.[63] These mixed migratory movements have put a severe strain on scarce humanitarian resources in the region, and in countries such as Malawi, Zambia and Zimbabwe, this has in turn caused tensions not only between the real refugees and mere economic migrants within government established

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60 UNHCR, *2011 Regional Operations Profile – Southern Africa: Working Environment*, available at <http://www.unhcr.org/pages/49e45abb6.html> (accessed 17 January 2013)

61 UNHCR, *2013 UNHCR country operations profile - United Republic of Tanzania: Working environment*, http://www.unhcr.org/pages/49e45c736.html (accessed 17 January 2013)

62 These are the latest figures available as at May 2013.

63 UNHCR (note 60 above).

refugee camps, but also between the migrant populations generally and the surrounding host populations.[64] The UNHCR states that this problem:

> has led many governments in the region to restrict access to the asylum system by requiring travel documents at entry points and applying the 'first safe country' principle, whereby entry is refused to asylum-seekers who have travelled through a safe country prior to their arrival[65]

This trend is problematic as it puts refugees at significant risk of being exposed to the possibility of return to a country where they could face serious violations of their fundamental human rights (the risk of *refoulement*).

1.4.2 The magnitude of the problem in Southern Africa

1.4.2.1 South Africa

Regionally, in the context of immigration generally, South Africa features prominently in Southern Africa because, being Africa's biggest and most advanced economy, it acts as a magnet for various types of migrants including general migrant workers and refugees.[66] Indeed, South Africa, a developing country with a medium sized economy by global standards, has the largest number of asylum applications in the world.[67] As at the beginning of 2012, the country had a total population of 277,299 of concern to the UNHCR, including 57,899 recognised refugees and a backlog of over 219,400 asylum applications that were either awaiting decision or on

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64 Ibid.

65 UNHCR, *2013 Regional Operations – Southern Africa: Working Environment (Malawi),* http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485ba6&submit=GO (accessed 17 January 2013). The UNHCR specifically indentifies South Africa as a country that has adopted the policy of enforcing the 'first safe country' principle in refugee status determination (ibid).

66 UNHCR (note 60 above).

67 UNHCR, *2013 UNHCR country operations profile - South Africa: Working environment*, http: // www.unhcr.org/cgi-bin/texis/vtx/page ? page = 4 9e485aa6&submit=GO (accessed 17 January 2013)

appeal.[68] Most of the Applications were from Nationals of Burundi, Ethiopia, the Democratic Republic of Congo (DRC), Rwanda, Somalia and Zimbabwe; as well as some Asian countries such as China and India.[69] Most of the recognised refugees originated largely from Angola, DRC, Burundi, Rwanda and Somalia.[70]

An analysis of these source countries shows that refugees or asylum seekers in South Africa largely come from countries in which there is, or has recently been, civil strife or armed conflict. These include the DRC, Somalia and Burundi. Source countries also include those where the refugees are likely to suffer persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion.'[71]These include India, on grounds of religion or membership of a particular social group such as members of lower castes,[72] and Zimbabwe, on grounds of political opinion.[73]

Unlike most other SADC States, South Africa does not have a policy of camping refugees. Instead, it promotes their integration into local communities so that they can pursue an independent livelihood. Refugees in South Africa are formally guaranteed a wide spectrum of socioeconomic rights, including the rights to health, work and social security. However, in practice, it has been difficult for them to access these rights.[74] The UNHCR states that generally, 'competition between refugees and South African

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68 Ibid.

69 Ibid.

70 Ibid.

71 See Article 1A(2) of the 1951 Convention Relating to the Status of Refugees.

72 According to Sarkin & Koenig, 'more than 165 million people in India alone still suffer discrimination and various types of degrading treatment because of their caste associations.' J Sarkin & M Koenig, 'Ending Caste Discrimination in India: Human Rights and the Responsibility to Protect (R2P) Individuals and Groups from Discrimination at the Domestic and International Levels' (2011) 41 *The George Washington International Law Review* 541

73 See generally T Kasambala, *Crisis Without Limits: Human Rights and Humanitarian Consequences of Political Repression in Zimbabwe* (2009)

74 See F Belvedere et al, 'Realising Rights: The Development of Health and Welfare Policies for Asylum-Seekers and Refugees in South Africa' in J. Handmaker, LA de la Hunt & J Klaaren (eds.), *Advancing Refugee Protection in South Africa*, (2008)

nationals for jobs, housing, business opportunities and social services has raised tensions' between refugees and the local population.'[75]

The government of South Africa therefore finds itself in a quagmire. On the one hand, if it fully implements the wide-ranging guarantees of socioeconomic rights for refugees, it risks being seen by its citizens as failing to accord them priority over the refugees that are viewed as outsiders and therefore as less deserving of accessing socioeconomic goods and services from the State.[76] On the other hand, if it provides only minimal protection, it risks being viewed by refugees and the international community as failing to ensure that refugees enjoy the rights that are guaranteed for them under the law.[77] Faced with this conundrum, it has been observed that for obvious political reasons, the government's focus has ultimately fallen squarely on addressing the needs of its citizens first, and deferring those of other groups that might be just as vulnerable.[78] The result has been that most poor foreign nationals, and particularly political refugees (who are politically choiceless by reason of lacking effective political membership of their States of nationality), have become even more vulnerable.

The UNHCR observes that the vulnerability of refugees in South Africa is further exacerbated by the fact that they are often targeted by criminals within an environment already afflicted by high levels of crime, including violent crime, 'as well as sexual and gender-based violence, exploitation in the workplace and detention due to lack of proper documentation'.[79] Further, the UNHCR observes that 'poor socio-economic conditions among host

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75 UNHCR, *2013 Country Operations Profile – South Africa* (note 77 above).

76 See generally, Centre for Human Rights, *The Nature of South Africa's Legal Obligations to Combat Xenophobia* (2009)

77 Ibid. See also, generally, Janet McKnight, 'Through the Fear: A Study of Xenophobia in South Africa's Refugee System', (2008) 2(2) *Journal of Identity and Migration Studies,* 18; Consortium for Refugees and Migrants in South Africa (CoRMSA), *Protecting Refugees, Asylum Seekers and Immigrants in South Africa During 2010: 2011 Report*.

78 See F Belvedere (note 74 above) 248.

79 UNHCR, *2013 Country Operations Profile – South Africa* (note 67 above).

communities provide a breeding ground for xenophobia.'[80] In addition, the documentation that refugees receive from the Department of Home Affairs is of limited duration and this in turn, restricts and compromises their efforts to find secure jobs and/or generally to become self-reliant.[81]

Generally, it is apparent that notwithstanding an apparently generous constitutional and legislative framework in the guarantee of socioeconomic rights for refugees, South Africa is faced with numerous problems in the implementation of these rights due to a matrix of socioeconomic challenges.[82] Thus it is apposite to re-examine the existing framework and assess whether it could be improved or reconceptualised for better implementation.

1.4.2.2 Tanzania

Tanzania, as demonstrated by the statistics above, comes second after South Africa within the SADC region, in terms of the magnitude of the refugee and asylum seeker population. Tanzania is situated in Africa's Great Lakes Region. Whilst over the decades virtually all of its Great Lakes neighbours (Burundi, the DRC, Rwanda and Uganda) have been afflicted to different degrees by either general civil strife or intra-State and Inter-State conflicts, or both, Tanzania has remained peaceful and stable.[83] The result is that Tanzania has naturally been the first country of asylum for millions of refugees fleeing various forms of harm within that region.

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80 Ibid.

81 Ibid.

82 Brockerhoff states that among the major socioeconomic challenges that currently face South Africa are rising levels of inequality, poverty and unemployment. See Stephanie Brockerhoff 'Monitoring the Progressive Realisation of Socio-Economic Rights: a Review of the Development of Social Security Policy in South Africa', *Studies in Poverty and Inequality Institute (SPII) Report* (2011).

83 UNHCR, 2013 UNHCR Country Operations Profile – United Republic of Tanzania (note 61 above).

The UNHCR reports that 'Tanzania has been an asylum country for more than four decades during which it has hosted one of the largest refugee populations in Africa.'[84] The country, unlike South Africa, adopts an encampment policy whereby refugees are 'warehoused' in designated camps. Whilst Tanzania has historically been renowned for its generous reception and treatment of refugees, the country has shown signs of fatigue in hosting refugees in recent years, and the government has become increasingly reluctant to process asylum applications.[85] The cause for this growing reluctance is largely premised on the heavy resource burden that refugees place on the host State.

Thus for instance, whilst Tanzania has previously been renowned for its generosity towards refugees, including offering good prospects of local integration and subsequent naturalization upon durable residence, it is now closing down on the refugees' prospects for local integration and naturalization.[86] To illustrate Tanzania's retrogression in its standards for the treatment of refugees, the UNHCR reports that unlike previously when refugees could be permitted to locally integrate and to work, now the 'vast majority of the refugees, most of them Congolese in Nyarugusu which is Tanzania's only remaining refugee camp, can neither work nor move outside the camp.'[87] This obviously has significant negative implications on their enjoyment of socioeconomic rights, as work is a means towards attaining other socioeconomic capabilities.

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84 Ibid.

85 Ibid.

86 The UNHCR reports that 'the Government has clearly indicated that naturalization is not possible for Burundian refugees who arrived in the 1990s or later.'- UNHCR, *2013 UNHCR country operations profile - United Republic of Tanzania* (note 61 above)

87 Ibid.

1.4.2.3 Zambia

Zambia is third within the SADC region in terms of the numbers of refugees and asylum seekers hosted. The total population of concern for the UNHCR in Zambia, as at the beginning of 2012, was 46,653. Of these, 46632 were recognised refugees whilst 1,021were asylum seekers.[88] Just like Tanzania, Zambia borders the DRC that is the biggest country in the Great Lakes Region and the largest source country for refugees in the region. Again, like Tanzania, Zambia has 'a long tradition of hosting refugees that predates its independence'.[89] Zambia similarly adopts an encampment policy in hosting refugees. A major critique levelled against Zambia is that, unlike South Africa and Tanzania, its laws make the possibility of local integration of refugees by way of naturalisation next to impossible.[90] This policy results in prolonged dependence by the refugees on humanitarian assistance and diminishes their capacity to achieve self reliance and hence actualise their human dignity.

The UNHCR reports that 'of the 34000 refugees registered in the settlements or urban areas, 47 percent were born in Zambia while 12 per cent entered Zambia more than 15 years ago.'[91] This highlights the problem of the assumption that refugeehood should, in all cases, be considered as a temporary State of affairs, and proceeding on that assumption to develop policies that restrict the refugees' access to socioeconomic rights, among other things. As the UNHCR observes, restrictive practices adopted in Zambia, as well as many other Southern African countries, make it difficult

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88 UNHCR, *2013 UNHCR Country Operations Profile – Zambia: Working Environment,* http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485ba6&submit=GO (accessed 17 January 2013).

89 Ibid.

90 Ibid.

91 Ibid.

even for third generation refugees to envision a better future, and they are often frustrated by a lack of economic and educational prospects.[92]

Zambia also presents a stark case of the problem faced by under-resourced governments to meet minimum international standards for refugee treatment. The UNHCR reports that in Zambia, whilst the quality of assistance accorded to refugees is generally below standard, 'due both to lack of capacity of the different actors involved, and the general environment in which the refugees are accommodated, [t]he assistance provided nevertheless often exceeds the standards enjoyed by nationals in similar settings.'[93]This scenario presents another problem. The socioeconomically worse-off surrounding populations become thoroughly disaffected and resentful towards the refugees.

1.4.2.4 Malawi

Malawi follows after Zambia in terms of refugee and asylum seeker numbers in the region. As at the beginning of 2012, Malawi had a total population of 16,853 of concern to the UNHCR.[94] Of the 16,853 there were 6,308 recognised refugees whilst 10,545 were asylum seekers. During the late 1980s to early 1990s, Malawi played host to over 1 million refugees from Mozambique who were fleeing civil war in that country. Most of the Mozambican refugees were repatriated after the end of the war; but a significant number also integrated into the local population, mostly informally (i.e *de facto* rather than *de jure*) due to the homogenous languages and ethnicities of the local and refugee populations.[95] Currently, the refugees and

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92 UNHCR, *2012 Regional Operations Profile – Southern Africa: Working Environment*, http://www.unhcr.org/pages/49e45abb6.html (accessed 28 June 2012).

93 UNHCR, Zambia (note 88 above).

94 UNHCR, *2013 Regional Operations – Southern Africa: Working Environment (Malawi),* http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485ba6&submit=GO (accessed 17 January 2013).

95 J Crisp & E Kiragu, Refugee Protection and International Migration: A Review of UNHCR's Role in Malawi, Mozambique and South Africa, (2010), 5.

asylum seekers in Malawi are largely from Burundi and Rwanda, and to a significantly lesser extent, Somalia.[96]

The country adopts an encampment policy, and generally faces the same socioeconomic quagmire that Zambia faces due to lack of resource capacity by the State.[97] As further demonstrated in Chapter IV below, there are significant restrictions on socioeconomic rights for refugees. For instance, the right to work for refugees is highly constrained.[98] In addition, the legislation does not provide for any procedure through which a refugee can be naturalised. The net effect is that refugees, including political refugees, are perennially treated as community strangers of the State. A more progressive approach to the treatment of refugees in Malawi, along the pattern introduced in Chapter II and further discussed in subsequent chapters, is called for.

1.4.2.5 Other SADC States

Other countries in the region, such as Botswana,[99] Lesotho,[100] Namibia,[101] Swaziland[102] and Zimbwabwe[103]have significantly lower numbers of refugees.

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96 Ibid.

97 Crisp & Kiragu (note 95 above).

98 See Mpedi et al, 'Access to Social Services for Non-citizens and the Portability of Social Benefits within the Southern African Development Community: A Synthesis',in LG Mpedi & N Smit, *Access to Social Services for Non-citizens and the Portability of Social Benefits within the Southern African Development Community* (2011) 12.

99 UNHCR, *2012 Regional Operations – Southern Africa: Working Environment (Botswana),* http://www.unhcr.org/pages/49e4856b6.html (accessed 28 June 2012).

100 UNHCR, *2012 Regional Operations – Southern Africa: Working Environment (Lesotho).* http://www.unhcr.org/pages/49e4856b6.html (accessed 28 June 2012).

101 UNHCR, *2012 Regional Operations – Southern Africa: Working Environment (Namibia),* http://www.unhcr.org/pages/49e4856b6.html (accessed 28 June 2012).

102 UNHCR, *2012 Regional Operations – Southern Africa: Working Environment (Swaziland),* http://www.unhcr.org/pages/49e4856b6.html (accessed 28 June 2012).

103 UNHCR, *2012 Regional Operations – Southern Africa: Working Environment (Zimbabwe),* http://www.unhcr.org/pages/49e4856b6.html (accessed 28 June 2012).

i. Botswana

Botswana is host to about 3,500 refugees and asylum-seekers.[104] Most of these are from Angola, Namibia, Somalia, Zimbabwe and the Great Lakes Region.[105] Botswana's implements a strict encampment policy for refugees. As a result of this strictness, the numbers of refugees living at the Dukwi Refugee Camp have been on a steady increase, and this has put a strain on the services made available to them by the State and the UNHCR.[106]

One of the consequences of Botswana's approach, similar to the situation in other countries in the region that adopt an encampment policy, is that refugees are generally denied the enjoyment of some critical socioeconomic rights such as the right to work. In this regard, the UNHCR has indicated its resolve to continue 'advocating for the lifting of the restrictions on refugees' freedom of movement and reform of the national asylum law.'[107]

ii. Lesotho

There are about 28 refugees and asylum-seekers officially reported by the UNHCR to be in Lesotho. They are reported to be largely self-reliant.[108] Mpedi et al report that:

> [m]ost refugees in Lesotho are employed and as a result, are able to support themselves and their dependants. However, there are some refugees who have no means of income and as a result, the Government of Lesotho has put in place a social assistance benefit package for indigent refugees in the form of free health services obtainable from public health centres and public hospitals;

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104 UNHCR, *2013 UNHCR regional operations profile - Southern Africa: Working environment (Botswana)* http: // www.unhcr.org/cgi-bin/texis/vtx page? page = 49e485456&submit=GO

105 Ibid.

106 Ibid.

107 Ibid.

108 Mpedi at al, (note 98 above) 11.

> access to free primary and secondary education from public and faith-based organization schools; and a monthly grant of M400 [the equivalent of R400][109]

There is also evidence that the Lesotho Government goes as far as providing houses for homeless refugees in urban areas.[110] UNHCR continues to advocate for the Kingdom of Lesotho to grant unconditional citizenship to those refugees who have been in the country for five years or more, in accordance with national legislation.[111]

iii. Namibia

There are about 4,300 refugees and asylum-seekers formally reported to be in Namibia.[112] Most of these refugees originate from the Great Lakes region.[113] There are also some 1,600 Angolans whose refugee status ceased on 30 June 2012. UNHCR is promoting the local integration of these former refugees, given their long residence in and close ties to the country.[114]

Like most countries in the region, Namibia also adopts an encampment policy for refugees. Refugees are encamped at the Osire Camp.[115] The UNHCR observes that there has been a significant decrease in the number of refugees in Namibia, mostly because of the end of the civil war in Angola almost a decade ago.[116] Refugees at the camp are provided with basic social assistance including food, water and basic sanitation.[117]

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109 Ibid.

110 Lesotho Times, 'Refugees reject Government House'*, Lesotho Times , 2 August 2012*, http://www.lestimes.com/?p=9955 (accessed on 26 May 2013)

111 Section 4(1)(d) of the Lesotho Citizenship Act 1967.

112 UNHCR, *2013 UNHCR regional operations profile - Southern Africa: Working environment (Namibia)* http: // www.unhcr.org/cgi-bin/texis/vtx/page? page = 49e48588a7b&submit=GO (accessed 21 April 2013)

113 Ibid.

114 Ibid.

115 Ibid.

116 UNHCR, *Angolan refugees return home from Namibia ahead of June deadline*, http://www.unhcr.org/4fb617e59.html (accessed 26 May 2013).

117 Mpedi et al, (note 98 above) 12.

iv. Swaziland

Not much information is available in respect of the situation of refugees in Swaziland. With the assistance of the UNHCR, the Government of Swaziland 'provides education, health and other services to the 800 refugees in the country, originating from Burundi, the DRC, Rwanda, Somalia and Zimbabwe.'[118]Like several other countries in the region, Swaziland adopts the refugee encampment policy, and refugees are camped at the Malindza Refugee Camp.

Gumedze states that the *Refugee Section* of the Swaziland *Home Affairs Department* reports that 'The Kingdom of Swaziland upholds a generous policy towards refugees.'[119] Gumedze seems to support this position, as he argues that the country has adopted such a generous policy 'despite the fact that the Refugees Control Order of 1978 is outdated.'[120] However, neither Gumedze's paper, nor any other available literature, provides any concrete evidence of the extent of such a generous policy.[121] What is evident is that Swaziland, along with Zambia and Botswana, has very out-of-date refugee legislation, as is more elaborately argued in Chapter IV.

v. Zimbabwe

There are about 5,800 refugees and asylum-seekers formally reported to be in Zimbabwe.[122] Like most of the countries in the region, these refugees and

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118 UNHCR, *2013 UNHCR regional operations profile - Southern Africa: Working environment (Swaziland),* http: // www.unhcr.org/cgi-bin/texis/vtx/page? page = 49e485b26&submit=GO (accessed 21 April 2013)

119 S Gumedze, *Refugee Protection in Swaziland*, http://www.sarpn.org/CountryPovertyPapers/Swaziland/Refugee/Gumedze.pdf (accessed on 25 May 2013).

120 Ibid.

121 Perhaps this is an area that calls for further extensive research in Swaziland and other Southern African countries.

122 UNHCR, *2013 UNHCR regional operations profile - Southern Africa: Working environment (Zimbabwe)* http: //www.unhcr.org/cgi-bin/texis/vtx/page?page = 49e485c66&submit=GO

asylum seekers largely come from the Great Lakes region and the Horn of Africa.[123] The country is said to be significantly affected by mixed-migration movements along the north-south migratory route, which includes Tanzania, Malawi, Mozambique Zimbabwe and South Africa.[124] Zimbabwe similarly has an encampment policy for refugees; but it allows those refugees with money to invest, or who have special skills or education to reside in urban areas.[125]

Not much has been written about the treatment that refugees receive in Zimbabwe. Recently however, there have been conflicting signals on the policy of the Zambiabwean Government in treating refugees. The UNHCR Resident Representative to Zimbabwe is reported to have recently commended the Zimbabwean Government; stating that:

> UNHCR wishes to record its special thanks because despite the tremendous developmental and other challenges facing the country, both the government and people of Zimbabwe have remained committed to preserving the institution of asylum and tolerating the presence of refugees and other persons of concern on Zimbabwean territory, and most importantly, sharing the meager resources such as health and medical facilities as well as ensuring the personal security for refugees and other persons of concern.[126]

However, this statement has been criticised. It has been argued that this statement flies in the face of the lived experiences of refugees at places such as the Tongogara Refugee Camp, where the conditions have been described as 'absolutely deplorable.'[127] However, neither of these positions is supported

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123 Ibid.

124 Ibid.

125 Ibid.

126 UNHCR Country Representative to Zimbabwe, Marcellin Hepie, quoted in 'The New Zimbabwe, "Zimbabwe Government *Commended* for *Accommodating* Refugees"', *The New Zimbabwe Newspaper, Wednesday June 20, 2012* http://www.newzimbabwe.com/news/printVersion.aspx?newsID=8294 (accessed 26 May 2013)

127 Regis Manyanya, leader of the Nottingham Refugee Community, quoted in 'The Zim Eye, "False claim that Zimbabwe is generous with refugees"', *The Zim Eye Newspaper, June 21, 2012*, http://www.zimeye.org/?p=56022 (accessed 26 May 2013)

by concrete facts; and just like in most of the countries reviewed, literature on the refugees' practical experiences is sparse. Such dearth of literature calls for further research in this area, which is outside the scope of this thesis.

1.5 The basic nature of socioeconomic rights

Socioeconomic rights are empowerment rights. They allow socially vulnerable and marginalised individuals and groups to use the legal process in order to actually obtain the satisfaction of their essential socioeconomic needs.[128] These rights empower the inhabitants of a particular State to demand of the State that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, socioeconomic rights enable the subjects of the jurisdiction to hold government to account for the manner in which it seeks to pursue the achievement of social and economic welfare and development.[129] Sandra Liebenberg states that these rights are central in ensuring that significant sections of the population, especially the socially and economically vulnerable, are able to develop to their full potential, realise their life plans and participate as equals in the political, economic, social and cultural spheres in a constitutional democracy.[130] Such rights include access to adequate housing, health, education, work and social security among others.

Socioeconomic rights impose both negative and substantial positive State obligations[131]to ensure the realisation of individual rights of access to material

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128 See M Pieterse, 'Resuscitating Socio-Economic Rights: Constitutional Entitlements to Healthcare Services', (2006) 22 *South African Journal on Human Rights*, 473-502, 477.

129 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC), para. 59.

130 See S Liebenberg & B Goldblatt, 'The Interrelationship Between Equality and Socio-Economic Rights under South Africa's Transformative Constitution', (2007) *23 South African Journal on Human Rights* 335-361,337.

131 There is of course a growing school of thought, to which the author is party, that holds that in appropriate cases, non-state actors as well have positive obligations in respect of socio-economic rights. See DI Bilchitz, 'Corporate Law and the

goods and services, which enable both human survival and the individual pursuit of the good life.[132] As Mbazira argues, the realisation of these rights serves to ameliorate the conditions of the poor and heralds the beginning of a generation that is free from socioeconomic need.[133] Such realisation guarantees people entitlements that enable them to attain a series of interrelated capabilities which enable the pursuit of individual value-choices and which are often impeded or restricted by material deprivation.[134]Given the vulnerability of refugees, it is clear that socioeconomic rights are central to their protection concerns.

1.5.1 Progressive Realization and Availability of Resources

Socioeconomic rights are generally highly demanding on State resources[135] and, as such, their implementation and/or enforcement usually demands substantial allocation or redistribution of State resources. Rights such as those to have access to social security, education, housing and health, among others; require the State to engage in an exercise of weighing complex polycentric considerations in order to determine the appropriate

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Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 124 *South African Law Journal*, 754-789.

132 Ibid. See also S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 3, 9–18; S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1 at 2, 8–10, 31; JP Ruger 'Toward a theory of a right to health: Capability and incompletely theorized agreements' (2006) 18 *Yale Journal of Law & the Humanities* 273, 293–304.

133 C Mbazira, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice*, (2009) 3.

134 See M Pieterse, 'The interdependence of rights to Health and autonomy in South Africa', (2008) 125(3) *South African Law Journal* 553,554. See also See A Sen *Development as Freedom* (1999); M Nussbaum *Women and Human Development—The Capabilities Approach* (2000).

135 I Currie & J de Waal, *The Bill of Rights Handbook* (2005), 569; DI Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 128-177; M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation,* (2007) 87-155; M Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2009), 6-23.

prioritization and attendant trade-offs to be made among these different but often mutually reinforcing and inter-connected interests.[136] The situation is ever more vexing for developing countries that cannot be expected to immediately guarantee the full range of the socioeconomic rights recognized and/or guaranteed by international human rights law.[137]

Frequently, governments, especially in developing countries, have to combine the adoption of fiscal austerity measures and the re-allocation and/or re-distribution of resources in order to ensure the optimal use of State resources. In view of this recognition of the scarcity of resources; and especially the difficulties faced by developing States, the concept of progressive realization of socioeconomic rights is generally recognized and accepted around the world.[138] The UN Committee on Economic, Social and Cultural Rights (the CESCR) has stated that the concept of progressive realization represents a recognition of the fact that the full realization of all socioeconomic rights can generally not be achieved in a short period of time.[139]Progressive realisation entails the realisation of socioeconomic rights 'over time' rather than immediately. The concept is a necessary flexibility device that reflects the realities of the real world and the difficulties involved for any country to ensure full realization of socioeconomic rights.[140]

Coupled with the idea of progressive realization is the recognition that socioeconomic rights are to be realized within the confines of the availability of resources.[141] This obligation requires however, that the State should make maximum and optimal use of such resources.[142] The concept of availability of

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136 See M Cranston, 'Human Rights: Real and Supposed' in DD Raphael (ed.) *Political Theory and the Rights of Man* (1967) 51.

137 See H Steiner & P Alston, *International Human Rights in Context: Law, Politics, Morals* (2000) 300.

138 Importantly, see Art. 2(1) of the ICESCR.

139 CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), UN Doc. E/1991/23 (CESCR GC3).

140 Ibid, Para.9.

141 Ibid.

142 See also Art. 2(1) of the ICESCR.

resources is equally meant to be a flexibility device that reflects the realities of the real world where economic resources are generally scarce. It is one of the central factors that must be considered when determining the obligations of a government in the context of socioeconomic rights.[143]

A significant issue in the context of this concept relates to the question: what is the pool of resources that should be considered as available for purposes of realizing socioeconomic rights claims?[144] The term 'available resources' is interpreted broadly and objectively to include all resources available and not just the resources allocated to a particular domain by the State.[145]

Further, the CESCR has stated that 'the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.'[146] For purposes of this thesis, this issue is particularly essential in the context of Chapter V, which explores collective approaches that States in Southern Africa can take in order to enhance the guarantee and realisation of socioeconomic rights for refugees.

The CESCR has further emphasized that the obligation to ensure progressive realization applies even in times of severe resource constraints. The obligation focuses in particular on vulnerable groups in society.[147] In this regard, the CESCR has stated that the obligation to ensure progressive realisation enjoins the State to take positive action to reduce structural inequality and to give appropriate preferential treatment to vulnerable and

143 Bilchitz (note 135 above) 225.

144 Ibid, 227.

145 K McLean, 'Housing' in S Woolman et al (eds.) *Constitutional Law of South Africa: Student Edition* (2007) 55-33. See also MCR Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 137.

146 See CESCR (note 139 above) Para. 13. This requirement arises from the provisions of Art. 2(1) of the ICESCR that makes international assistance and cooperation in the realisation of socioeconomic rights an international legal obligation.

147 Ibid, Para.12.

marginalised groups in society; and that such positive action includes specially tailored measures or additional resource allocation for these groups.[148] Thus the CESCR has stressed that even in times of severe resource constraints such as economic recession, vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.[149]Thus the needs of refugees, as a vulnerable group in society, should not be pushed to the margins of the State's agenda during difficult economic times.

1.5.2 Minimum core obligations

The concept of the 'minimum core content' of socioeconomic rights imposes an obligation on the State 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.'[150]The concept of the minimum core content, as a term of art, was first used by the CESCR in the context of its interpretation of the obligations of States parties to the ICESCR under Article 2(1) of the Covenant in its General Comment No. 3, and further developed, modified, and concretized in subsequent General Comments in relation to particular rights in the Covenant.[151] The concept has been developed as a check in order to ensure that States do not interpret the concept of progressive realization in such a way as to completely denude the rights guaranteed under the ICESCR of all meaningful content. The CESCR, in justifying the concept of the minimum core, has stated that 'if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.'[152]Foster describes the minimum core as constituting an 'unrelinquishable nucleus'[153] of each

148 See CESCR, *General Comment No. 5, Persons with Disabilities*, UN doc. E/1995/22, 9 December 1994, para 9.
149 Ibid, Para. 12
150 CESCR, (note 139 above) Para. 10.
151 Bilchitz (note 135 above) 183.
152 Ibid.
153 Foster (note 20 above) 196.

socioeconomic right, and argues that in the context of the ICESCR, it has proved highly influential in defining the obligations of States; and that, in this regard, it has been engaged as the most effective method of developing the normative content of the rights therein.[154]Bilchitz adopts a similar approach, arguing that the minimum core approach is key to providing clear content to socioeconomic rights, and in ensuring that they have enforceable practical implications for government policy that benefit the worst-off in society.[155]

The concept of the minimum core content is essential for ensuring that no person in society, including refugees, is allowed to fall below the minimum essential levels of enjoyment of socioeconomic rights. Bilchitz argues that this involves 'guaranteeing the general conditions to be free from threats to survival.'[156] According to Bilchitz, a society that is committed to the principle of equality and ensuring the dignity of every person will in this regard 'prioritise the meeting of interests that are of the greatest urgency to beings.'[157] He contends that 'the most urgent interest is being free from general threats to one's survival', and that 'this interest is of the greatest urgency as the inability to survive wipes out all possibility for realizing the sources of value in the life of a being.'[158] It is this urgent survival interest that in his view, justifies the idea of maintaining a minimum core content of each of the socioeconomic rights. He argues that the minimum core concept is 'justified as a result of the greater impact that the failure to realize such a threshold has on the ability of individuals to have positive experiences and realize their purposes.'[159]

Bilchitz' justification of the minimum core content concept, to which this study subscribes, entails that the minimum core content of socioeconomic rights

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154 Ibid.
155 Bilchitz (note 135 above) 184-185.
156 Ibid,195.
157 Ibid, 86.
158 Ibid. Ibid,187.
159 Ibid,186.

must, of necessity, apply to all human beings in society, irrespective of any social status, including their nationality status.

Thus legal frameworks on the guarantee of socioeconomic rights in Southern Africa must take into account the minimum core content concept. Observably, no Southern African State under study has thus far demonstrated its acceptance or adoption and application of the minimum core concept at the domestic level. Further, as the thesis will demonstrate in Chapter IV, the various countries under study have adopted different approaches to the recognition and enforcement of socioeconomic rights . The study argues for regional harmonization of approaches in this regard.

1.6 Significance, objectives and scope of study

This thesis provides the first in-depth study of its kind on the socioeconomic rights of refugees at the African regional level, and more specifically at the Southern African sub-regional level. The Southern Africa sub-region provides a good comparative fulcrum in this area as it comprises countries that are at very different levels of development, such as South Africa that is an emerging and sizeably significant economy on the global plane on the one hand;[160] and Malawi that is a very small and fragile economy, falling in the category of least developed countries, on the other. The challenges and prospects in ensuring the realisation of socioeconomic rights of refugees in such a diverse region are therefore deserving of critical interrogation.

The study examines the refugee legal frameworks of Botswana, Lesotho, Malawi, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. These are all SADC member States. Other SADC member States, such as Angola, Mozambique and the Democratic Republic of Congo (DRC) are

[160] South Africa is a member of such powerful economic blocs such as the G20 and the BRICS (a grouping consisting of Brazil, Russia, India, China and South Africa) which are the preserve of developed and large emerging economies of the world.

excluded for linguistic reasons as most of the primary legal material available in those countries is not in the English language. Yet other member States, such as Madagascar, Mauritius and Seychelles are excluded because they are off-shore the mainland continent and they are not largely affected by the refugee movements in the sub-region. It is crucial to observe however that in respect of the refugee burden-sharing framework proposed in Chapter V, these States would have to be included as part of the sub-region's collective responsibility.

Whilst the study explores the refugee protection regimes in the listed countries, it is important to point out that in some instances; there is a slight degree of asymmetry, with more focus being placed on South Africa. South Africa is the largest economy in the region, but it also has the largest number of asylum seekers, not only in Southern Africa, but globally as well.[161] Thus the challenges and prospects it faces are in that regard be markedly different from those faced by other countries in the sub-region. Further, South Africa has been a pacesetter in developing jurisprudence on socioeconomic rights in the region, including the socioeconomic rights of refugees specifically, and therefore provides a very good basis for more extensive exploration.

With the above background, the study proceeds to firstly explore, in Chapter II, the question of whether refugees are entitled to enjoy socioeconomic rights on a different and heightened footing than other foreign nationals. The Chapter also explores the level of protection that refugees, both humanitarian and political, ought to be entitled to in comparison with citizens; and in comparison with other foreign nationals. The study in this respect critically discusses ethical and moral theories of justice and political authority. In this respect, it makes a case, first, for the general justification of differential treatment in the guarantee of rights between citizens and foreign nationals. The study then explores the special position of refugees. It provides an

[161] UNHCR, (note 65 above)

incisive distinction between refugees who simply have an urgent and pressing humanitarian need for international protection on the one hand; and those that have a political need for international protection which requires immediate substitute political community membership in the host State on the other. The study makes an argument for preferential treatment of refugees that have a political need for international protection over other foreign nationals generally, and indeed, in the first instance, preferential treatment of political refugees over those refugees who only have an urgent and pressing humanitarian need for international protection, especially in the context of socioeconomic rights. This discussion is germane in laying a theoretical foundation for the critique of the standards of treatment for refugees that have been adopted both on the international law plane and in the context of domestic laws in Southern Africa, and the ultimate recommendations made in this thesis.

The study acknowledges that this is a highly complex subject, and the author is therefore not presumptuous to argue that the approach suggested is morally or normatively unassailable in every respect. What the thesis suggests, though, is that the approach proposed in Chapter II is plausible, normatively defensible, and appropriate in framing a better scheme for the guarantee of socioeconomic rights of refugees in the region.

The study proceeds, in Chapter III, to provide a general overview of the international guarantee of socioeconomic rights of refugees under international law. Chapter III explores the question of whether the specialised international and regional protection regimes for refugees (the 1951 Convention, the 1967 Protocol and the 1969 OAU Convention) offer sufficient guarantees necessary to ensure the enjoyment of socioeconomic rights for refugees. It identifies gaps in the protection scheme in this regard and makes some proposals for reform.

In Chapter IV, the study further explores the relevant constitutional and legislative guarantees in the southern African sub-region, auditing in the process the extent to which they meet international standards in the area of refugee law, particularly in the area of the socioeconomic rights of refugees.

Chapter V generally proposes collective sub-regional legal and policy burden-sharing initiatives in addressing the issue of the guarantee of socioeconomic rights for refugees in Southern Africa. It further argues for the harmonisation of domestic laws on refugees in Southern Africa, and proposes that the adoption of a SADC Model Law on refugee protection would be germane.

Chapter VI provides the overall conclusion of the Thesis, summarises its major findings and recommendations and identifies some areas for further research.

CHAPTER II

EQUALITY AND PREFERENCE: THE TREATMENT OF FOREIGN NATIONALS AND REFUGEES IN A DEMOCRATIC POLITY

> Within an international system made up of dichotomies and grey areas between the internal and the external, the refugee brings to the fore the clash between pluralism and solidarism, communitarianism and cosmopolitanism, sovereign rights and human rights. (Emma Haddad, 2008)

2.1 Introduction

Virtually all States in the world host foreign nationals who are either voluntary or forced migrants. As discussed in the previous Chapter, this thesis focuses on the treatment of refugees as a sub-category of forced international migrants.

The study seeks to locate the place that refugees, as a special group of foreign nationals, should occupy in a social arrangement for the guarantee of socioeconomic rights within the State. To do this, this chapter first looks into the scheme of how the guarantee of rights for foreign nationals in any particular State ought to be constructed generally. From that premise, the chapter proceeds to explore the case for the special treatment of different categories of refugees.

2.2 The case for equal treatment of citizens and foreign nationals

One conception of justice in international migration theory urges for the absolute equality of treatment between citizens and foreign nationals in the

guarantee of fundamental human rights. Proponents of this conception, such as Joseph Carens,[162] often adopt, as a starting point, John Rawls's typology of the 'original position' as expressed in his seminal work: *A Theory of Justice*,[163]contextually adapted to the immigration discourse.[164]

According to Rawls, if free and rational people, being oblivious of their own personal situation, such as their class, race, ability or their conception of the good – a position he calls the 'original position'– were to choose the kind of society in which they wanted to live, they would follow self-interest to choose to live in a society in which institutions were constructed and ordered so as to benefit those who were the least advantaged.[165] He argues that since the person envisaged in the concept of justice from the original position is assumed to be unaware of the socio-economic environment around him or her, he or she is envisaged as being blinded – in the sense that he or she is free of and from any prejudices that might otherwise cloud his or her world view.

In other words, Rawls argues that such a person operates from behind a 'veil of ignorance'. This veil of ignorance, according to his thought experiment, 'ensures that no one is advantaged or disadvantaged in their choice of principles by the outcome of natural chance or the contingency of social circumstances.'[166] In the premises, the veil of ignorance enables the person

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162 JH Carens, 'Aliens and Citizens: the Case for Open Borders', in *Review of Politics* Vol.49 No.2 (1987) 252-273. Joseph Carens is one of the foremost political theorists in the area of immigration. PC Melander has stated that much of the credit for making immigration an object of theoretical inquiry must go to one man: Joseph Carens. He argues that no other person has spent as much time and thinking about immigration as Joseph Carens. See PC Melander, 'Liberalism and Open Borders: The Argument of Joseph Carens,' (1999) 33(4) *International Migration Review*, 1062-1081. Whilst the credit from Melander might be a little exaggerated, Joseph Carens' contribution to the theoretical discourse on immigration is enormous.

163 J Rawls, *A Theory of Justice* (Oxford University Press, Revised Edition, 1999)

164 See M. Weiner, 'National Sovereignty and the control of immigration', *International Migration Review*, Vol. 30. No. 1 Special Issue: Ethics, Migration and Global Stewardship (Spring, 1996) 174.

165 Ibid.

166 Rawls, 1999, (note 163 above) 11

in the original position to conceptualise principles of justice as fairness in their ideal form. Among other things, justice as fairness, as conceived by Rawls, advocates egalitarianism within a given polity. Rawls argues that his principles of justice are those which rational persons, concerned about advancing their interests, would consent to as equals.[167]

Adapting and extending Rawls' original position to the realm of immigration, Joseph Carens argues that when one considers possible restrictions on freedom from behind the 'veil of ignorance', he or she will adopt the perspective of the one who would be most disadvantaged by the restrictions. He classifies, in this regard, the immigrant as being among those most disadvantaged by the restrictions. He argues that from the original position, one would therefore insist that the right to immigrate, including the attendant rights enjoyed by citizens of the host State, be included in the system of basic rights and liberties.[168]

Premised from this conception, a school of thought referred to as global egalitarianism (globalism) has emerged in immigration discourse. Michael Dummet describes the notion of egalitarianism in this respect as 'the belief that within a just society, every individual must be accorded *absolutely equal treatment* [and that] it goes far beyond equality of opportunity.'[169] Thus his argument is that by moving, the worse-off can thereby improve their position. He contends therefore that from an egalitarian perspective, justice requires that the worse-off be allowed to freely move so as to improve their condition as of right. Notwithstanding that equal treatment between foreign nationals and citizens in such absolutist terms, particularly in respect of socioeconomic rights, might conceivably overstretch the available resources within the State

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167 Ibid.

168 Carens, 1987, (note 162 above). See also J Carens, 'Aliens and Citizens: the Case for Open Borders' in ' R. Beiner (ed.), *Theorising Citizenship* (1995) 237. Unfortunately here, Carens does not clearly elaborate on what would be the possible reasons for one to insist on the inclusion of religious freedom.

169 MAE Dummett, *On Immigration and Refugees* (2001) 23. Emphasis supplied.

to the disadvantage of existing citizens, Carens argues that consideration of the well-being of current citizens in this regard is irrelevant in the bigger scheme of things. He further argues that it is also irrelevant if open borders and the concomitant equal treatment of foreign nationals and citizens may lead to an influx of immigrants (including refugees) from other cultures or indeed if the numbers of immigrants become so large as to undermine the dominance of the existing culture in a particular society.[170] He argues that there is no logical or moral basis for according existing citizens priority over the claims of others by virtue of their citizenship.[171] In Carens' view 'Citizenship in western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely.'[172]

Myron Weiner augments Carens' argument, stating that since it is a purely fortuitous occurrence whether we are born in a country that is peaceful, democratic, and prosperous, or a country that is poor, authoritarian, and torn by civil conflict; from the premises of the original position, we would all clearly prefer to be born in the peaceful, democratic, and prosperous society. Thus he contends that from a liberal egalitarian perspective, there are no grounds for limiting membership in any society to those who happen to be born there. He states that 'birthplace and parentage are…"arbitrary from a moral point of view."' Thus Weiner supports the idea of what one might call the 'universalisation of egalitarianism' in the context of the enjoyment of fundamental human rights. He argues that, for globalists, the highest moral value is distributive justice, and that the preservation of a nation's existence, its political order, political institutions, and cultural identity, as well as the well-

170 See JH Carens, 'Aliens and Citizens: the Case for Open Borders', in *Review of Politics*, 252-273.

171 See Carens, 1995 (note 168 above) 237.

172 Ibid, 230.

being and interests of its citizens are subordinate to the goal of distributive justice.

In conclusion, globalist egalitarians arguethat in so far as all human beings are born equal in rights and dignity, and in so far as the duty to act towards one another in a spirit of brotherhood is recognised,[173] an ethical imperative of global redistribution of opportunities and resources exists that calls for open borders and absolute equal treatment of citizens and foreign nationals in as far as the enjoyment of fundamental rights, including socioeconomic rights, is concerned. In their view, the distinction in treatment between citizens and foreign nationals in respect of rights is arbitrary and unjustifiable.

2.3 The justification for differential treatment between citizens and foreign nationals

Having explored the philosophical arguments advanced in favour of equality of treatment in the guarantee of fundamental human rights between nationals and foreign-nationals, it is important to acknowledge that the principle of equality is self-evidently good.[174] It represents a virtue deeply rooted in the idea that all humans have inherent equal worth and dignity. The principle of equality therefore 'imposes upon those who wish to treat individuals differently the duty of showing cause for such differential treatment'.[175]

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173 See Art. 1 of the UDHR.

174 John Charvet lucidly expounds the 'idea that a principle of equality must constitute the basis of any good, just or fully human society'- See J Charvet, 'The Idea of Equality as a Substantive Principle of Society', (1969) 17(1), *Political Studies*,1-13, 1.

175 GS Goodwin-Gill, *International Law and the Movement of Persons Between States*, (London: Clarendon Press, 1978) 75. Jonathan Klaaren states, in the context of the treatment of citizens and foreign nationals, that: 'To a large extent, the international human rights of non-citizens are the rights that are guaranteed to all persons by those instruments. Thus, foreign nationals get all (or almost all) the international human rights law rights that citizens get. This is so because international human rights law generally requires that citizens and non-citizens be treated equally. Deviations from equal treatment of non-citizens may, however, be permissible where a legitimate state objective is served and where the deviations are proportional to that objective. This equality norm is at the heart of international human rights law.' –

To this end, in this section, the study shows the justification for differential treatment between citizens and foreign nationals based on a number of what I consider to be plausible and defensible premises. Thus, in this respect, the study generally identifies with the differential model, as opposed to the globalist egalitarian approach. However, it proceeds to argue that even though there is a case for treating nationals and foreign nationals differently, it should be recognised that refugees form a special category of foreign nationals that should generally be treated as a special case. The study, in this regard, splits refugees into two categories: 'humanitarian refugees' and 'political refugees'. The study argues, in particular, for the preferential treatment of political refugees who, it is submitted, should be accorded treatment that is as close as possible to parity with nationals in respect of the guarantee of socioeconomic rights. It further argues that humanitarian refugees on the other hand, should at first instance receive temporary protection which may or may not be upgraded to protection on preferential basis, on parity with political refugees, depending on objective factors such as the likelihood of permanence of stay and the possibility of their return to their States of nationality in safety and security.

This section begins by setting out the idea of communitarianism as an overarching basis for differential treatment between citizens and foreign nationals. It explores three arguments all premised on communitarianism. Firstly, the section explores the concept (and frequently controversial idea) of nationalism. Whilst acknowledging that there are various notions of nationalism that are pernicious, the study concludes that nationalism is not inherently and self-evidently bad; and indeed that it offers a plausible justification for differential treatment between citizens and foreign nationals. Next, the section explores the social contract theory as a theory that is also

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See J Klaaren, 'Human Rights Protection of Foreign Nationals', (2009) 30 *Industrial Law Journal* 82, 83.

grounded in communitarianism, and demonstrates that it offers another plausible basis for immigration control and differential treatment between citizens and foreign nationals. The section then examines the concept of state sovereignty, noting that it is basically the legal expression of the recognition by the international community of the essence of the political community, in this case the community of the State, under communitarianism. In this respect, state sovereignty is therefore projected as the legal basis for immigration control and differential treatment between nationals and foreign nationals. Finally, the section explores the pragmatic justification for differential treatment, arguing that some idealistic egalitarian theories, such as globalism, might be utopian but practically unworkable in the real world. In this respect, in order to have an effective scheme of guarantees of socioeconomic rights, it is necessary to be realistic and balance ideal egalitarian principles (that have worthy moral capital) on the one hand, with what might practically work, considering the configuration of the notion of the State in contemporary international law on the other.

2.3.1 Community membership and nationalism

In order to answer the question as to whether States are entitled to treat foreign migrants differently from their citizens, a number of scholars have premised their responses on the idea of community membership in the political polity (the State). Citizenship has been defined as 'both a set of practices (cultural, symbolic and economic) and a bundle of rights and duties (civil, political and social) that define an individual's membership in a polity.'[176] Put differently, 'citizenship is a legal concept conferring nationality upon a people who have fulfilled the legal requirements of belonging to a particular

[176] FF Isin & PK Wood, *Citizenship and Identity* (1999) 4.

community and the rights consequent to this, including the [right] to hold a passport.'[177]

Michael Walzer, one of the most prominent scholars on the subject, argues that there is something self-evidently good about preserving stable and well-organised communities; and that the State can be regarded as a form of a community with citizens as its members.[178] He states that restricting entry into the territory of such a community, and the resultant differential treatment between members and non-members thereof, can be justified on the basis of the need 'to defend the liberty and welfare, the politics and culture of a group of people [citizens] committed to one another and to their common life'.[179]In other words, communities have a legitimate interest in preserving their communal identity and the special relationship with, and responsibility towards one another as part of the community's unique norms and mores.

It is thus necessary to briefly explore the significance of national membership. Day and Thompson observe that central to the argument advanced by communitarians is 'the view that membership of a nation provides an important source of personal identity.'[180] The connection between community membership and the interests of nationals (as citizens) has been the main anchor of discourse on nationalism. Lea Brilmayer defines nationalism as the idea 'that one identifies with the claims of one's nation and one's co-nationals, and takes them as one's own.'[181]

Yael Tamir in her work *Liberal Nationalism* recognises that the idea of attaching significance to community membership in the context of nationalist

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177 A Babacan, 'Citizenship in Global Era: The Adequacy of International Human Rights Law in Providing Protection to Asylum Seekers', (2008) Vol.1 *USAK Yearbook of International Politics and Law*, 73, 73-74.

178 M Walzer, *Spheres of Justice* (1983) Chap. 2 *(passim).*

179 Ibid, 39

180 G Day & A Thomson, *Theorizing Nationalism*, (2004) 160.

181 L Brilmayer, 'The Moral Significance of Nationalism' (1995-1996) Vol. 71 *Notre Dame Law Review* 7, 8.

sentiment has previously been abused, leading to terrible human tragedies such as genocide.[182]This view is shared by Lea Brilmayer who observes that '[n]ationalism now tends to be associated with barbarism: with genocide, ethnic cleansing, rape and wanton murder.'[183] Some well known tragic examples of ill-conceived nationalist sentiment in modern history are the atrocities committed in Nazi Germany, the former Yugoslavia, Rwanda, and Chechnya among others.[184] This has led to high levels of skepticism about nationalism among some notable political theorists. Jürgen Habermas for instance claims that the ties of nationalism with universal democratic ideals have been shattered. He states that the nationalism of Hitler and Mussolini destroyed the precarious balance between the universalist value orientations of democracy and constitutional State on the one hand, and the particularism of a nation distinguishing itself from what is outside on the other. The Nazi nationalism, according to Habermas, released 'national egoism' altogether from its ties to the universalistic norms of the constitutional democratic State.

Thus Habermas is arguing here that nationalism has been abused so much, as exemplified by the Nazi nationalism, so that it can no longer be justified as an incident of the democratic State. Further, it is also well documented that nationalism has been used to ground claims of autochthony (which literally means 'born from the soil' or 'indigenous to the land') in an attempt to 'establish an irrefutable, primordial right to belong and to exclude outsiders'.[185] A good example can be found in the recent indigenization policies and laws adopted by the government of Zimbabwe.[186] The question

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182 IY Tamir, *Liberal Nationalism* (1993), passim.

183 Brilmayer (note 181 above).

184 Ibid.
J Habermas, *The New Conservatism: Cultural Criticism and the Historians' Debate* (1989) 255.

185 P Geschiere, *The perils of belonging: autochthony, citizenship, and exclusion in Africa and Europe* (2009)

186 Zimbabwe has adopted legislation on indigenisation, The Indegenisation and Economic Empowerment Act, Chapter 14:33 of the Laws of Zimbabwe, which is a classic piece of legislation founded on autochthonous premises. According to Section 2 of the Act, 'indigenisation means a deliberate involvement of indigenous Zimbabweans in the ecoconomic activities of the country, to which hitherto they had

however is: Is it indeed the case, as Habermas suggests, that nationalism's ties with the norms of the constitutional democratic State have been utterly destroyed?

Tamir argues that whilst nationalism has been previously abused leading to barbaric and catastrophic results, this should not be taken to suggest that the idea of nationalism itself is inherently bad.[187] She contends that nationalism does offer a sense of community that has value for humanity. By belonging to a nation and having a sense of community membership, community members (citizens or nationals) share mutual obligations and a sense of togetherness.[188] Tamir argues that if people view their community membership to the State to be a constitutive factor of who they are, then 'their self-esteem and well-being' will be 'affected by the successes and failures of their individual fellow members and the group as a whole.'[189] They will therefore have a legitimate interest to have a say regarding the admission of strangers to join their community.

Kymlicka, another leading political thinker in this area, takes Tamir's argument further, urging that in seeking to mediate the frequently conflicting interests between majority and minority populations in liberal democratic States, one has to recognise the idea that people attach importance to self and community identity which is defined by their 'cultural [community] memberships'.[190] He argues that the modern liberal democratic State is not culturally neutral as it has a vested interest in promoting a common culture. He states that this could be, for example:

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no access, so as to ensure equitable ownership of the nation's resources.' The Act has been widely criticised as being elitist, not likely to benefit and empower ordinary Zimbabweans, and scaring away investors. See E Totolo, 'Zimbabwe's 'Elite' Indigenisation Misses the Mark' *International Relations and Security Network*, www.isn.ethz.ch (accessed 22 April 2013).

187 Tamir, (note 182 above); see also Day & Thomson, (note 180 above) 151

188 Day & Thomson, (note 180 above) 151

189 Tamir (note 182 above) 96; Day & Thomson (note 180 above) 151.

190 W Kymlicka, *Multicultural Citizenship*, (1995)

> [a] culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated.[191]

It is important, however, to clarify that the concepts of nationhood and Statehood are traditionally not the same. The former concept has been traditionally linked to a politically organised, largely homogenous and self-determined, community whose members share a number of common attributes such as cultural values, race, ethnicity and/or language.[192] The latter concept, by contrast, has been understood as an international law construct constituted by an internationally defined and recognised territory, defined population and effective government.[193] However, there is a great deal of symmetry and overlap between these two concepts in the contemporary world, and the dividing line between them has become very thin. The nationalist concept of nationhood in the contemporary metropolitan and globalised world has evolved and assumed new meaning in heterogeneous metropolitan communities.

Ben-Ami states, in this respect, that nationalism has many 'faces and should not be dismissed even in the age of total media and the global village.'[194]He argues that among the various forms that nationalism takes are what he terms 'the ethnic concept of nationalism' and 'the pluralistic, multi-ethnic and multi-cultural concept presumably more adaptable to the nature of immigrant societies such as the USA, Argentina, Canada [and] Australia'[195] Indeed, it is common for citizens of highly diverse societies such as the USA to talk about

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191 Ibid, 76

192 Babacan states in this regard that the term nation has been understood to refer to people that is defined 'both on the basis of belonging to the territory of the State and of having a common cultural and ethnic background, with the State regulating most of the economic activities.' - Babacan (note 177 above) 75.

193 See Art. 1, Montevideo Convention on the Rights and Duties of States, 1933, *League of Nations Treaty Series*, vol. 165, pp. 20-43.

194 S Ben-Ami, 'Introduction', in S Ben-Ami et al (eds*.) Ethnic Challenges to the Modern Nation State* (2000)1.

195 Ibid, 6.

their common national values and the deep sense of pride and self-identity that they attach to their citizenship. Buckley for instance states that '[t]he core nationalist symbol for Americans is the idea of constitutionally protected liberties that I call liberal nationalism.'[196] This can therefore be viewed as an example of what Ben-Ami refers to as 'pluralistic' nationalism. Metropolitanism in an age of globalisation does not therefore necessarily conflict with the notion of nationalism when nationalism is understood in this multi-faceted way. [197]

Similar sentiments of nationalism are to be found in most modern societies including African States where, notwithstanding the highly heterogeneous and multi-ethnic forms that the modern State takes, citizens still retain a sense of self-identity and self-definition by reason of the fact of citizenship, as well as a deep sense of community membership in their State of nationality. This is so although most existing boundaries on the continent were colonially imposed and thus disrupted the boundaries, composition and/or political status of the original ethnic nation States. What currently obtains in these States is the pluralistic rather than ethnic nationalism.

A good example of an African polity with pluralistic nationalism is South Africa, a country in which the majority of the population suffered at the hands of a minority through a pernicious form of nationalist policy – Apartheid. That notwithstanding, the country now prides itself for being the 'Rainbow Nation'.

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196 FH Buckley, 'Liberal Nationalism', (2000-2001) 48 *UCLA Law Review* 221.

197 Soysal states that whilst others have argued that globalization has the effect of challenging the existing notion of the nation and statehood, and by necessary implication the notion of State citizenship, others have argued to the contrary. See Y Soysal, *The Limits of Citizenship*, (Chicago: The University of Chicago Press, 1994) 139-147. Further, it has been suggested that the notion of globalization itself is not always about individual human rights and equal universal treatment of people. Quite to the contrary, globalization in some cases accentuates differential treatment between citizens and foreign nationals. P Marfleet has thus stated that '[g]lobalisation is a process of social exclusion with the rules of modern migration, welcoming migrants with skills, education and capital, and closing the doors on people who do not fit in with this general category, including refugees and asylum seekers.' See P Marfleet, 'Migration and the Refugee Experience' in R Kiely & P Marfleet (eds.), *Globalisation and the Third World* (1998) 77.

As imperfect as the notion of the 'Rainbow Nation' might presently be, there is no doubt that a significant number of South Africans are proud to be associated with the multiracial and multicultural texture of the country and have a deep sense of self-identity and self-definition as South Africans by reason thereof.[198]

There are thus certain common unique and state-centric values, interests and goals that citizens in the modern African State, as elsewhere, develop with the passage of time, the preservation of which is a shared interest among all. In the result, the pluralistic view of nationalism remains relevant to the African context and is indeed appropriate in the modern democratic State.

It is therefore submitted that States do have a legitimate basis for taking into account the communitarian interests of their citizens, based on the need to maintain certain shared community values, interests and goals that they deeply cherish, as they address issues of immigration. In other words, in order for a particular community to be viable as an orderly and sustainable State; some form of control of the entry of outsiders should be permitted because without such control, society would lack stability and a common sense of identity and definition that are an essential feature of human life.[199] This is the essence of nationalism as a communitarian concept, particularly pluralistic nationalism under which most of the States under study fall.[200] Walzer astitutely summarises the essence of the connection between immigration control and communitarianism thus:

> Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character,* historically stable, ongoing associations of men

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198 See Gerson Shafir, 'Nationalism and Non-Racialism in South Africa' in S Ben-Ami et al (eds.) *Ethnic Challenges to the Modern Nation State*, (2000) 185 et seq.

199 Walzer (note 178 above) 39.

200 Perhaps the exceptions might be Lesotho and Swaziland that might loosely fit into the classification of ethnic nation States and hence be taken to apply ethnic nationalism.

> and women with some special commitment to one another and some special sense of their common life.[201]

Walzer argues that such type of closure against strangers should not be viewed as an attempt to have an exclusive community that does not accommodate strangers, but rather that it is the only way to accord value to the idea of the sovereign State; and that the stability of the sovereign State in turn provides for greater inclusiveness than would be possible if the State did not exist.[202]In the specific context of immigration law and policy, Walzer states that:

> The right to choose an admissions policy …is not merely a matter of acting in the world…and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on..[203]

Kristen Walker takes this line of argument further, stating that:

> It is legitimate for States to impose restrictions on immigration. States owe duties to their citizens - such as protection from violence, an adequate standard of living, the opportunity to participate in community decision-making and so on. States cannot fulfill these functions unless they can control who may enter and become members of the community - if the number of members becomes too great, a State may cease to be able to provide such services to all its citizens. Thus, the concern the States have with controlling immigration is a legitimate concern.[204]

Myron Weiner, building upon Walzer's argument, argues that if one attaches value to the 'community', then one must necessarily adopt a conception of justice that holds that members of a community have rights and obligations toward one another that go beyond those toward individuals who do not

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201 Ibid, 2.

202 Weiner (note 164 above) 175.

203 Ibid, 61-62.

204 K Walker, 'Defending the 1951 Convention Definition of Refugee', (2002-2003) 17 *Georgia Immigration Law Journal* 583, 596.

belong to the community.[205] He argues that in the real world of States, governments are morally responsible for their own citizens and to those who legally reside within their territory on the basis of community membership.[206]

He argues that the stance adopted by global egalitarians presumes a world without borders, without States, without repressive regimes, without vast differences in health, education and welfare services offered by governing authorities, and without vast differences in incomes and employment. Since this presumption is unsupportable and clearly rebutted by the real state of affairs in the world, Weiner compellingly argues that the globalists' noble vision [of absolute equality of treatment] becomes a nightmare, because the consequences of an open door approach to entry into the jurisdiction, and full entitlement to citizenship rights can, in extreme situations, be the erosion of the institutions and values that liberal democratic societies have created for themselves and which make them attractive to outsiders in the first place.[207]

2.3.2 Social contract theory and immigration control

Social contract theory offers another communitarian justification for differential treatment between citizens and foreign nationals. This is so as the theory is also based on the interests of community membership within bounded communities.

One of the leading proponents of social contract theory was Thomas Hobbes. Hobbes took the view that when people are left to their own devices without the control of a common power, they live in continual fear, and danger of violent death; and that in those circumstances, the life of man is 'solitary,

205 Ibid.
206 Weiner (note 164 above) 178.
207 Ibid, 177-178.

poor, nasty, brutish, and short.'[208] Thus they collectively cede their autonomous powers to a common power, the State, in order to receive security and maintain social order.[209] Succeeding social contract theorists such as John Locke, Jean-Jacques Rousseau and Immanuel Kant expanded Hobbes' theory, urging more rights to the individual citizen.[210] Locke's analysis is particularly relevant for the purposes of this study. Locke defined the social contract as an agreement among people 'to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties and a greater security against any that are not of it.'[211]

Thus, the social contract in this sense envisages a bounded community with defined membership and whose members have a collective right of self-determination to fashion their political and socioeconomic destiny. Under this theory, in its contemporary conception, the electorate delegates the power to govern its interests to an elected government, thereby giving rise to a duty on the part of the government to administer according to the interests and legitimate expectations of the electorate.[212] Thus, an understanding of the social contract is fundamental to the concept of representative democracy within the national polity.

Foreign nationals are, in this regard, considered to be non-members of the community of the national polity.[213]Their exclusion from basic governmental processes, according to this school of thought is, therefore, viewed not as a

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208 See T Hobbes, 'Of The Natural Condition of Mankind as Concerning their Felicity and Misery' in T Hobbes *The Leviathan* (1660), <http: // oregonstate.edu/instruct/ phl302/texts/hobbes/leviathan-contents.html> (accessed on 13 May 2009).

209 Ibid.

210 M Oschinski 'Asylum, immigration and Statehood: A Philosophical perspective' in A. Bolesta (Ed.), *Forced Migration and the Contemporary World: Challenges to the International System* – (2003) 241.

211 John Locke, *Two Treatises of Government*, Ed. P Laslett (1988) 2nd Tr., § 123.

212 This position was also adopted by John Locke in his Two Treatises on Government. See W. Ebenstein, *Great Political Thinkers: Plato to the Present*, (1969).

213 S Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (2004) 21.

deficiency in the democratic system, but as a necessary consequence of the community's process of self-definition. According to this theory, self-government, whether direct or indirect, begins by defining the scope of the community of the governed and of the governors; and non-citizens are, by definition, those outside this community.[214]

Henry Shue states in this respect that 'the proper role of every national government is primarily or exclusively to represent and advance the interests of its own nationals'. He argues that a decision by the State to sacrifice the interests of the constituents of the community (the citizens), 'or anyhow the basic interests of the nation of which the constituency is a part, would…quite literally be a betrayal of trust.'[215]

It is submitted therefore, that in terms of social contract theory, in the context of immigration, democratic governments are under a responsibility to take into account the general will of the electorate with regard to immigration issues in the design and implementation of their immigration policies and laws.

Social contract theory has however also been the subject of criticism. Martha Nussbaum, for instance, argues that 'the classic theory of the social contract […] does not suffice to ground an inclusive form of social cooperation that treats all human beings with equal respect.'[216] This is so, she argues, in light of the fact that social contract theory is based on the self-interest of the participants.[217] Nussbaum argues that giving all human beings the basic opportunities necessary to ensure a minimally just and decent world would require sacrifice from richer countries and individuals for the benefit of poorer nations and individuals. She states that, on the basis of self-interest, such

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214 *Cabell v. Chabez-Salido* 454 U.S. 432, 439-40 (1982). See also *Sugarman v. Dougall* 413 U.S 634, 642-3 (1973).

215 H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1983) 139,140.

216 MC Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, (2007) 273.

217 Ibid.

sacrifice cannot be said to be to the former's advantage. She argues that it is therefore simply not true, as Rawls argues, that cooperating with others on fair terms will be advantageous to all.[218] Thus the classical social contract theory would, in this respect, fail as a basis for ensuring both global as well as individual justice within a State based on fairness and equity. In other words, Nussbaum argues that the social contract, in its classical form, is a recipe for the marginalisation of the rights of minority and other vulnerable groups such as people with disabilities, foreign nationals, and non-human animals.

Michel Foucault also takes the view that the social contract, invoked strictly, can be the source for the marginalisation of vulnerable groups in society. He states that for this reason:

> Women, prisoners, conscripted soldiers, hospital patients, and homosexuals have now begun a specific struggle against the particularised power, the constraints and controls, that are exerted over them…They fight against the controls and constraints which serve the…system of power.[219]

Majoritarian forces invoke the social contract theory, at least in part, to legitimise such controls and constraints to the political system of power.

Notwithstanding these critiques, it is submitted that social contract theory offers a plausible basis for differential treatment between citizens, as members of the bounded political community, and foreign nationals as strangers (or outsiders as it were). It has been argued, for example, that unless responsible policy makers take heed of deeply felt public sentiments, a number of social evils might unravel.[220] For instance, others have suggested that populist extreme right-wing parties might grow by taking advantage of unaddressed anti-immigrant public sentiment; and threaten the democratic

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218 Ibid.

219 M Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews*, DF Bouchard (Trans.), (1977) 216.

220 Weiner (note 164 above) 190

system by advocating intolerant laws that take no account of universal human rights norms.[221]

In the premises, it is essential that at the very least, popular sentiment of citizens as members of the political community must be engaged and accorded serious consideration. To be clear, giving serious consideration to the popular sentiment of the citizenry does not entail subjecting the enjoyment of fundamental human rights, including rights of minority groups, to the unfettered whims of majoritarian public opinion. Rather, the process of democratic engagement entails clearly demonstrating that such majoritarian sentiment has given due consideration, and that upon such consideration, it is clear that it militates against basic fundamental and inalienable human rights and that, if such rights are to be taken seriously, such popular sentiment must necessarily give way to fundamental rights. In this sense therefore, fundamental human rights may trump public opinion.[222]

2.3.3 State sovereignty and immigration control

The principle of State sovereignty entails that there is a province of state conduct that should remain within the exclusive decisional domain of the State, interference with which is prohibited by international law. Catherine Dauvergne explains that '[a] traditional account of sovereignty emphasises control over territory[223]and includes an internal dimension - capacity to govern a particular space - and an external dimension - immunity from interference by others.'[224]

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221 Ibid. See also M C Nussbaum (note 216 above)

222 R Dworkin, 'Rights as Trumps', in J Waldron (ed.), *Theories of Rights*, (1984) 153-67.

223 J. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 *International Organization* 139,142

224 C Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67(4) *The Modern Law Review*, 588-615, 593.

Under international law, this principle has been significantly watered down since World War II, largely by the steady development of universal human rights norms that have unquestionably made the human rights question one of international concern.[225] An understanding has emerged of 'sovereignty as responsibility', which means that a State is not allowed to hide under the cloak of sovereignty in order to shirk its human rights responsibilities. However, state sovereignty still remains central in international law discourse.[226] The centrality of the principle in international law was stressed by the International Court of Justice (the ICJ) in the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (The Nicaragua Case)* where the court held that 'the whole of international law rests [on] the fundamental principle of state sovereignty'.[227] The centrality of state sovereignty has since then been emphasised in the jurisprudence of the ICJ.

One of the last bastions of State sovereignty that is jealously guarded by States is in the area of immigration control.[228] The dominant position in this regard was first laid down in the seminal case of *Nishimura Ekiu v. United States,*[229]where the Federal Supreme Court of the USA held that:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self- preservation, to forbid

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225 *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment I.C.J. Reports 1970, P. 32, paras 33-34.

226 RE Kapindu, *From the Global to the Local* (2009) 1.

227 1986 I.C.J. 14 (June 27), paras. 257-68, at para. 263.

228 Dauvergne states that: 'As globalising forces challenge and transform sovereignty, so too is the place of migration law in the nation altered. The response to this challenge among prosperous and powerful nations is to imprint even more strongly than before a sense of self identity and of essential "nation-ness" - onto the text of their migration laws. Migration law is transformed into the new last bastion of sovereignty. This has important implications for the shape these laws take in domestic settings, but also for how international influences on these laws will be interpreted and absorbed.' – Dauvergne (n 232 above) 588. See also, James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', (1990) 31 *Harvard International Law Journal* 129, 173.

229 142 U.S 651 (1892).

> the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[230]

This principle has been reaffirmed in numerous national decisions around the world and can properly be classified in international law discourse as a general principle of law recognized by civilized States.[231]

In the context of community membership, State sovereignty and immigration control, the principle of State sovereignty can be viewed as a legal attribute or manifestation of the normative communitarian basis for immigration control and differential treatment between citizens and foreign nationals. As Roth states:

> Sovereignty is a legal attribute of a territorially bounded political community enjoying full membership in the international system. Recognized exercises of sovereignty are acts legally attributed to the will of the designated territory's permanent population as a whole. From international law's external standpoint, sovereignty itself lies not in a given constitutional order (*pouvoir constitué*), but in the underlying constituency (*pouvoir constituant*) whose will to accept or repudiate that order must somehow be discerned.[232]

Roth suggests here that the concept of state sovereignty is rooted in the power of the members of the political community (the underlying constituency) of the State. His argument therefore resonates with the communitarian basis for the principle that this study espouses.

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230 Ibid, 659.

231 Art.38 of the Statute of the ICJ.

232 BR Roth, *State Sovereignty, International Legality, and Moral Disagreement*, Updated Version of Paper Presented at the Panel on "Questioning the Aspiration to Global Justice" Annual Meeting of the American Political Science Association, September 2, 2005, <http://www.lawsch.uga.edu/intl/roth.pdf>, (accessed on 5th July 2008)

2.3.4 Communitarian justification: summary

The communitarian argument for community and immigration control offers a plausible and persuasive justification for differential treatment between citizens and foreign nationals. Whilst it is conceded that some brand of communitarian nationalistic sentiment has previously been the source of some major human tragedies such as the Jewish holocaust or apartheid; failure to recognise the fact that some communitarian concerns of citizens (nationals) are legitimate; and failure in this connection to ensure, in a principled way, the priority of citizens in the guarantee of human rights, and socioeconomic rights in particular; would also be potentially destabilising in an otherwise well-ordered liberal democratic State.

The result would be that instead of building the desired modern, harmonious, multicultural, and metropolitan society; such failure (to recognise and give principled effect to communitarian concerns) might end up being the source of pent-up resentment against foreign nationals, and disturb society's stable political foundations that are in turn necessary to ensure the protection of the rights of foreign nationals in the first place. As Singer and Singer argue, States might be so open in their approach to immigration to a stage where tolerance in a multicultural society breaks down because of resentment among the resident community, and this loss of tolerance becomes a serious danger to the peace and security of all, including previously accepted foreign migrants.[233]

Therefore, the sovereignty of the State must be given due recognition, and the State must be allowed a proper margin of appreciation on decisions related to the admission of foreign migrants and the standards of treatment to be accorded to them once admitted. Further, the globalist argument, that

[233] P Singer & R Singer. 1988. 'The Ethics of Refugee Policy' in M Gibney (ed.) *Open Borders? Closed Societies?: The Ethical and Political Issues* (1988) 111-30, 127-28.

essentially urges global citizenship, is pragmatically untenable as it essentially envisages a world without borders and a global government. In a world that has for centuries been, and continues to be, characterised by communities governed within bounded sovereign territories, the prospect of a world government that is essential to effectuate the globalist ideal, is rather too remote.

2.3.5 Differential treatment: a pragmatic justification

As is apparent from the foregoing, this thesis rejects the globalist approach of absolute equal treatment of citizens and foreign nationals in all circumstances. This approach is rejected because it ignores morally legitimate and justifiable communitarian concerns discussed in the preceding Section. There are also more pragmatic justifications for differential treatment. Such justifications seek to strike a balance between the more ideological concepts of globalist egalitarianism on the one hand; and communitarianism on the other.

Max Weber has developed an ethical premise upon which to ground this pragmatic approach in a principled manner.[234] In his conceptual scheme, Weber draws a difference between two kinds of ethics: 'the ethic of principled conviction', which pursues an absolute ideal; and 'the ethic of responsibility', which requires that political leaders choose courses that are often less ideal based on pragmatic considerations. Weber argues that policymakers should not only consider whether policies are in some abstract sense moral, but also whether there is a reasonable likelihood that morally desirable objectives can be 'practically' achieved.[235] Weber states, in this regard, that in terms of the ethic of responsibility, a decision maker goes beyond ideal principles, and

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234 M Weber, 'The Profession and Vocation of Politics ("Politik als Beruf")' in P Lassman & R Speirs, *Weber: Political Writings* (1994) 309, 359-369.

235 Ibid.

factors in the actual or reasonably foreseeable consequences that such decisions may practically engender. He clarifies further that:

> [w]e have to understand that ethically oriented activity can follow two fundamentally different, irreconcilably opposed maxims. It can follow the 'ethic of principled conviction' (*Gesinnung*) or the 'ethic of responsibility'. It is not that the ethic of conviction is identical with irresponsibility, nor that the ethic of responsibility means the absence of a principled conviction – there is of course no question about that. But there is a profound opposition between acting by the maxim of the ethic of conviction…and acting by the maxim of the ethic of responsibility, which means that one must answer for the (foreseeable) consequences of one's actions.[236]

He argues that an extremist committed to the ethic of conviction might be fully aware of the adverse consequences of his actions, but 'none of this will make the slightest impression on him.'[237] Where adverse consequences flow from actions or decisions taken out of his pure conviction, he will hold the world, or the stupidity of others, or the will of God responsible and not attribute responsibility to his own actions. On the other hand, argues Weber, '[a person] who subscribes to the ethic of responsibility…will make allowances for precisely these everyday shortcomings in people…He has no right to presuppose goodness and perfection in human beings.'[238] In other words, whilst appreciating what the ideal scenario can be, Weber's ethic of responsibility calls upon the decision maker to take account of the actual realities of the world. In the context of immigration, Myron Weiner states that the difficult choices that have to be mediated as between the ideal and the pragmatic:

> arise because resources are always limited and because one person's gain often entails someone else's loss…we cannot resolve debates over migration with reference to principles of absolute justice…If immigration is not a basic

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236 Ibid, 359-360.
237 Ibid, 360.
238 Ibid.

> human right- and it cannot be as long as there are States – then each country must weigh conflicting claims and consider the consequences of alternative policies for their own citizens. It is important that we not conflate issues of public interest, public values, and fundamental human rights. Migration and refugee issues cannot simply be reduced to moral questions, but neither… are they solely questions of national sovereignty in which moral judgments play no role.[239]

Joseph Carens similarly comments that it is proper to take practical realities into account when formulating policies and laws in the area of immigration. With reference to the specific case of refugees, Carens states that 'in ideal theory, refugees simply disappear. Whatever the virtues of ideal theory [however], it is a mistake to rely on that form of thinking to make recommendations about policies and existing institutions.'[240] This is because, according to Carens, decision making in the field of immigration must not ignore the practical realities of the world.[241]

The practical reality in the world is that there are actual States with defined territories and populations which, whilst being interdependent, are disparate and sovereign. Indeed, recorded history of the human species over thousands of years shows that human communities have always lived within bounded sovereign territories. It would therefore be merely utopian, and arguably a fruitless exercise in thought experiment, to conceptualise a borderless world in the near or indeed foreseeable future. Thus Max Weber, in advancing the 'ethic of responsibility' argument, should be looked at as advocating an approach that, guided by considerations of principle and pragmatism, carefully mediates between the ideals of global egalitarianism on the one hand and actual particularistic State interests that are premised on communitarianism and closed membership of the political community of the State on the other.

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239 Weiner (note 164 above) 195.

240 Joseph H. Carens, 'Refugees and the Limits of Obligation', (1992) 6(1) *Public Affairs Quarterly* 31, 41.

241 Ibid.

The approach of blending principle and pragmatism, as argued by Weber, would also provide justification in the particular context of socioeconomic rights, which are dependent on the availability of resources. For practical reasons, beyond its obligation to ensure the minimum core content of such rights for everyone, the State would be justified to limit the extent to which it otherwise guarantees socioeconomic rights for foreign nationals. Such limitation would be well-founded if the State can demonstrate that it lacks sufficient resources to ensure the full realisation of these rights for both its nationals and foreign nationals on equal footing, immediately.

2.4 Differential treatment: which rights and why?

Having established that there are plausible premises for treating citizens and foreign nationals differently in the guarantee of fundamental human rights, the study proceeds to examine the issue at another level. Is there greater justification for the host State to adopt a differentiated model in respect of some rights as compared to others? As observed earlier, democratic States generally limit rights for foreign nationals who are geographically connected to the State's territory in two areas: Access to material resources (thus access to socioeconomic rights); and participation in the political processes that determine the functioning of the State (the enjoyment and/or exercise of political and some civil rights).[242] The question here is thus: Is there justification for this approach? Whilst the specific concerns of this thesis lie in the area of socioeconomic rights; it is relevant that we examine both these cases (access to socioeconomic rights and enjoyment of civil and political rights) in order to better appreciate what principles ought to guide a differentiated model for guaranteeing rights between the two groups of people under study.

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[242] M Tushnet, 'Immigration in Liberal Political Theory' in WF Schwartz (ed.), *Justice in Immigration*, (1995) 147.

It would appear that States tend to restrict those rights that have a more visible and direct impact on how the host State's core social arrangements are constructed, and how resources controlled by the State are distributed. For instance, in the political rights sphere, Tushnet states that a survey of liberal democracies around the world shows that 'few liberal States impose significant restrictions on the rights resident aliens have to free speech, while many do restrict access to the right to vote. This might suggest that voting is connected to membership in a liberal political community in a way that free expression is [generally] not.'[243] In other words, voting in a democratic State is a right and an act that would directly (at least more visibly so) affect the way social arrangements are constituted in the host State, much more than the mere guarantee of free speech would.

According to communitarian discourse, voting may in this regard be viewed as lying at the core of sovereignty and, as Roth puts it, the exercise of sovereignty in a liberal democratic State's political order lies 'in the underlying constituency…[the membership] whose will to accept or repudiate that order must somehow be discerned.'[244] The exercise of suffrage through voting seems to be the best way of discerning such community will.

Thus the restriction of voting rights to non-members can be viewed, from a communitarian perspective, as a legitimate way of ensuring that such core changes (to the social arrangements of the host State) should only be effected by members of the political community rather than strangers (as community outsiders). The same argument is extended to other rights of political participation, such as the right to stand for political office.

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243 Ibid.

244 BR Roth, *State Sovereignty, International Legality, and Moral Disagreement*, Updated Version of Paper Presented at the Panel on "Questioning the Aspiration to Global Justice" Annual Meeting of the American Political Science Association, September 2, 2005, <http://www.lawsch.uga.edu/intl/roth.pdf>, (accessed on 5th July 2008)

In terms of socioeconomic rights on the other hand; as much as they impose negative obligations, they are also highly demanding on State resources. As such, their implementation and/or enforcement usually demands substantial allocation or redistribution of resources. Rights such as social security, education, housing and health require the State to engage in complex and polycentric considerations in order to determine the appropriate prioritization and attendant trade-offs to be made among these different but often mutually reinforcing and inter-connected interests.[245]

Thus, the guarantee of socioeconomic rights also tends to have a more visibly direct impact on the configuration of the socioeconomic arrangements of the host State than the guarantee of civil rights with generally negative obligations, such as freedom of expression, freedom of religion or freedom of association. Undifferentiated guarantee of access to socioeconomic rights can, therefore, also engender core changes to the social arrangements of the host State. In other words, the fact that the available socioeconomic resources for ensuring that the rights of the existing community members are guaranteed are directly affected when non-members are admitted, also suggests that the members have a legitimate concern in terms of how the available resources are to be distributed and/or redistributed; and more so how these are to be made available and accessible to foreign nationals as community outsiders.

As observed above, globalists suggest that we should ignore the consequences of immigration on the availability, distribution, and/or redistribution of socioeconomic resources in the State.[246] However, the globalist approach ignores the 'ethic of responsibility' that this study espouses, by failing to take into account the possible practical adverse

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245 See M Cranston, 'Human Rights: Real and Supposed' in DD Raphael (ed.) *Political Theory and the Rights of Man* (1967) 51.

246 E.g, see Carens (note 171 above).

consequences of giving effect to absolutist egalitarian ideals in an unmitigated fashion. It is submitted that a pragmatic approach that restricts the guarantee of some rights by taking into account the possible adverse consequences of according absolute equal treatment between citizens and foreign nationals (which might result in the destabilisation and ultimate collapse of the existing scheme of socioeconomic rights guarantees) is, therefore, justified.

However, whilst differential treatment between citizens and foreign nationals generally might be justified, it will also be recalled that all socioeconomic rights have minimum core content.[247] The minimum core content is an 'unrelinquishable nucleus'[248] of each socioeconomic right, ensuring that no person in society, including foreign nationals, is allowed to fall below the minimum essential levels of enjoyment for each right. The minimum core approach has been described as the most effective method of developing the normative content of these rights.[249] This is so as the approach is key to providing clear content to socioeconomic rights, ensuring that they have enforceable practical implications for government policy that benefit the worst off, marginalised and vulnerable in society.[250]

Nussbaum, justifying the minimum core approach, argues that notions such as state sovereignty, though morally important, should not be used as an instrument for insulating the State from criticism for neglecting the plight of disadvantaged groups within each nation such as foreign nationals.[251] She argues that '[t]he situation of people (whoever they are, at any given time)' whose quality of life falls below the minimum threshold of what she terms a

247 Shue, (note 215 above).
248 Foster (note 20 above)
249 Ibid, 196.
250 Bilchitz (note 135 above) 184-185.
251 Nussbaum (note 216 above) 320.
Ibid.

'capabilities list',[252] should therefore be a persistent focus of attention of the State and the world community as a whole.[253]

Thus, whilst this study takes the view that host States are justified in imposing restrictions on the enjoyment of socioeconomic rights by foreign nationals, it also takes the view that every State must ensure that every person within its jurisdiction, including foreign nationals, is, by reason of his/her inherent human dignity,[254] guaranteed at least the minimum core content of socioeconomic rights.

2.5 The case of permanent residents

A permanent resident is defined as a foreign national 'who has been granted permission to reside in the [host] country indefinitely.'[255] Upon a survey of various Southern African immigration regimes, and similar regimes in other parts of the world, Mpedi et al point out that foreign nationals who have been granted permanent residence status 'are on the whole afforded the same treatment accorded to nationals of that State.'[256]Some political theorists have grappled with the justification for affording permanent residents such preferential treatment in comparison with other foreign nationals. As the issue of permanent residents in this study is generally on the sidelines of the core argument, the study only explores one major theorist on this issue – Joseph Carens, whose views are representative of the justification commonly provided by most political theorists. Carens begins by asking;

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252 These capabilities include life (i.e leading a life 'worth living'), good health, adequate nutrition, adequate shelter, affiliation (i.e 'being able to live with and toward others'), and control over one's environment which, for Nussbaum's purposes, includes access to material resources such as property ownership and the right to seek employment on an equal basis with others. See Nussbaum (note 216 above) 76-78.

253 Ibid, 70.

254 J Klaaren (note 8 above) 82.

255 Mpedi et al (note 98 above) 4

256 Ibid.

> What can we say about what justice requires and permits with regard to people who live in a State but are not citizens? In what way (if any) may the legal rights and obligations of permanent residents legitimately differ from those of citizens? [257]

He then answers himself thus:

> In broad outline my answer is this: Liberal democratic justice, properly understood, greatly constrains the distinctions that can be made between citizens and non-citizen residents. The longer people stay in a society, the stronger the moral claims become, and, after a while, they pass a threshold that entitles them to virtually the same legal status as citizens. Once people have been settled for an extended period, say five years or so, they are morally entitled to the same legal rights (and ought to be subject to the same legal obligations) as citizens, except for the right to vote and the right to hold public office[258]…So in my view, it is unjust to exclude permanent residents from any social programs, means tested or not.[259]

Carens further argues that 'during the early stages of settlement, it is permissible (though not required) to limit some other rights (e.g redistributive benefits and protection against deportation).'[260]

It is evident from Carens' argument that his justification for according permanent residents heightened treatment in comparison with other foreign nationals generally, and on a footing almost on parity with citizens, is premised on the notion of community membership that has been explored in this Chapter. The significance of looking at the position of permanent residents is that, as will become evident in the next section, the treatment of

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257 J Carens, 'Citizenship and Civil Society: What Rights for Residents?' in R Hansen & P Weil (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship* (2002) 101.

258 Ibid.

259 Ibid, 107.

260 Ibid.

political refugees in the host State is linked to the treatment that permanent residents receive.

2.6 The special case of refugees

As discussed in the previous chapter, this study adopts the definition of a refugee under the 1969 OAU Convention, extrapolated to the global sphere. That definition recognises a refugee as a person who is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; by reason of either a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; or for reasons of external aggression, foreign occupation or domination, or events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality.

Refugeehood is based on the principle of asylum. This principle accords every person who suffers serious human rights violation(s) or deprivation in his or her State, the right to flee to another (safe) State when circumstances become unbearable.[261] The question that arises however is: Are all refugees to be accorded the same treatment regardless of the actual cause of their flight? This question is posed in light of the fact that there are numerous factors that might render circumstances in one's State of nationality unbearable, and thereby grounding a legitimate basis for seeking international protection. Price observes for instance, that:

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[261] James Hathaway states that 'Whatever movement is made toward more effectively ending or attenuating human rights abuse in-country should *never* be at the expense of the human being's one truly autonomous remedy: flight when circumstances become unbearable.' JC Hathaway, 'New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection' (1995) Vol. 8 *Journal of Refugee Studies* 288, 293.

> Today, refugees are just as likely to be fleeing the chaotic violence that accompanies state breakdown as they are to be seeking refuge from persecution. They include not only political 'activists' or 'targets' of genocide or ethnic cleansing by state agents, but also 'victims' caught in the crossfire of generalized violence or crushed in the vise of hunger and economic distress as their state collapses around them due to disorder, corruption, or incompetent governance.

One therefore needs to enquire whether the different causes of flight and need demand different responses from the international community,[262]or whether the moral obligations to assist remain the same as long as there is a threat to life or safety since such a threat is, after all, a threat to life or safety regardless of its cause.[263]In this regard, it is necessary to disaggregate refugeehood on the basis of causal factors. To that end, a distinction between what are termed 'humanitarian refugees' and 'political refugees' is essential.

2.6.1 Humanitarian refugees

The humanitarian conception of refugeehood suggests that the refugee definition should not only be restricted to persecuted people, as is the case under the 1951 Convention, but should also encompass those people who need protection from serious harm more generally, regardless of the source of the harm.[264] Proponents of this conception argue that people who have been forced to flee their home because they lack protection from generalized violence, natural disasters, or severe economic hardship have as strong a moral claim to refugeehood as people targeted for violence by their State (persecuted by or with the acquiescence of the State). They argue therefore

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262 Kirsten Walker, 'Defending the 1951 Convention Definition of Refugee' *Georgetown Immigration Law Journal*, Vol. 17:583, 598.

263 ME. Price, 'Persecution Complex: Justifying Asylum Law's Preference for Persecuted People', *Harvard International Law Journal, Vol. 47(2)*, 413, 419.

264 Ibid, 418.

that there is no moral justification for excluding the former category and limiting entitlement to refugeehood to the latter.[265]

Price states that some scholars who have engaged with the normative framework for the persecution-based conception of refugeehood have identified what they consider to be two deep flaws; a historical one and a normative one. He states that:

> The historical claim is that the persecution criterion was 'specifically devised for a particular geographic problem at a particular time'— namely, the post–World War II European refugee problem—and 'was not a model for general application.'[266] Furthermore, its adoption was politically and ideologically driven: it was designed to call attention to Soviet mistreatment of political dissidents while deflecting attention away from the West's failure to satisfy its citizens' 'socio-economic human rights.'[267]

He proceeds to state that:

> The normative claim is that the framers of the Convention were so focused on the post-war European refugee problem that their solution had a moral blind spot: although 'persecution' aptly described the plight of the population with which they were concerned, the phrase has since led to the confusion of a symptom for the disease. Persecution is simply a manifestation of a more basic problem: individuals whose basic needs—including physical security and economic subsistence —are unmet. By remaining wedded to the persecution criterion, however, the refugee regime [has become] increasingly detached from consideration of human rights problems generally as well as . . . those of justice, peace, or development . . .[268]

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265 Ibid. See also K Walker, 'Defending the 1951 Convention Definition of Refugee' , *Georgetown Immigration Law Journal*, Vol. 17:583, 598; AE Shacknove, 'Who Is a Refugee?' (1985) 95(2),*Ethics* 274.

266 G Coles, 'Approaching the Refugee Problem Today', in Gil Loescher & Laila Monahan (eds.), *Refugees and International Relations* (1989) 373, 374.

267 Price (note 263 above) 419, citing JC. Hathaway, *Law of Refugee Status* (1991) 8.

268 Price (note 263 above).

Thus proponents of the humanitarian conception of refugeehood advocate for the widening of the scope of the refugee definition to cover all cases where people have an urgent need for international protection, which need is morally justifiable. Supporters of this conception raise issues such as: 'Why should our duty to assist someone depend on the *reason* that [he]/she is in distress? Isn't it the *fact* of distress that should matter?'[269] They argue that these are certainly the issues that matter to the victim as, for instance, it makes no difference to someone starving to death as to why there is no food. Whether there is no food because of persecutory deprivation or simply because there is famine in the land that cannot be attributed to human fault. What matters to a person is that he or she has no food and should, through one way or the other, get access to food or else face death.[270]Thus 'need' rather than 'cause' should be the basis for refugeehood.

Viewed in this light, the humanitarian conception of refugeehood suggests that the grant of refugee status is merely palliative in its intent. It has no expressive and politically condemnatory connotations towards the refugee's source country. Thus it has been emphasized that the granting of refugee status should not be viewed as an unfriendly act against the source country.[271] Hathaway adopts this view, arguing that the refugee definition should adopt a conception that is 'consonant with modern political realities, and which genuinely enables governments to conceive of refugee protection as a humanitarian act which ought not to be a cause of tension between states.'[272]

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269 Ibid, 21. (Emphasis in the original).

270 Ibid.

271 The *UN Declaration on Territorial Asylum* of 1967 states that 'the grant of asylum by a State to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State.' UNGA Resolution 2312 (XXII) 1967, adopted by the General Assembly of the United Nations on 14 December 1967, Preambular paragraph No. 4.

272 Hathaway (note 47 above) 111.

All in all, the humanitarian conception does not, therefore, concern itself with the cause behind the circumstances that have forced a person to flee from his or her country, in order to ascribe refugee status and to determine what standards of treatment ought to be guaranteed in the host State. It merely focuses on whether a pressing, urgent and morally justifiable need for international protection exists. As observed in the previous Chapter, the 1969 OAU Convention seems to embrace this conception.

2.6.2 Political refugees

The political conception of refugeehood is, in contrast with the humanitarian one, a narrow conception. It limits the guarantee of the right of asylum to persons who have a well-founded fear of persecution, or who are actually persecuted by the State or with the acquiescence of the State.

Thus whether the persecution is based on deprivation of civil and political rights or deprivation of socioeconomic rights; in both instances the deprivation must be the direct result of culpable official (State) conduct, or similar conduct by non-State actors to which the State aids and abets, or acquiesces in. This approach is in tandem with the thesis advanced by Michelle Foster who, in her book *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation,* argues that the deprivation of socioeconomic rights should, in appropriate cases, be construed as constituting 'persecution' for purposes of refugee status determination.[273] She argues for instance – and correctly so, that a child who is born 'outside the parameters of China's one-child policy, and thus subject to deprivations of economic and social rights such as education and healthcare', and thereby flees from the country, is not merely an economic migrant but a political refugee by reason of socioeconomic persecution.[274] Thus the narrow conception that only situates persecution in

[273] Foster (note 20 above) 154.
[274] Ibid, 4.

the context of the violation of civil and political rights is no longer acceptable, as it flies directly in the face of actual realities of socioeconomic persecution that people face on a daily basis in many parts of the world.

Unlike the humanitarian conception of refugeehood, the political conception is not merely palliative, but also focuses on the cause of the problem and is intended to send an expressive politically condemnatory message against the source country. As Price explains, the political conception:

> lends asylum an expressive dimension by capturing the opprobrium that attaches to a state's mistreatment of its citizens. To say that State *A* has persecuted Person *B* is to say that *A* has wrongfully inflicted harm on *B*, and it is also to express condemnation of *A*'s action.[275]

The political conception has its basis in the concept of community membership. It flows from the idea that the basis for granting asylum is primarily to provide substitute community membership to a person whose membership of his or her own community (the State) has effectively been repudiated by State authorities either directly or indirectly with their acquiescence. This idea is in turn founded on the notion that the State of nationality has the primary duty to protect the rights of its citizens, and that 'international human rights law is appropriately invoked only when a State will or cannot comply with its classical duty to defend the interests of its citizenry.'[276]

Price emphasises the requirement of the persecution element in political refugeehood. He states that its 'main thrust is that "persecution" should be interpreted in light of the membership principle.' He describes persecution, in this regard, as 'the infliction of serious harm by agents acting under the colour of state authority for reasons that deny the victim's standing as a member.'

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275 Price (note 263 above) 425.

276 Hathaway (note 47 above) 125.

He states that 'central to the inquiry whether conduct constitutes persecution, then, is the legitimacy of the State's reasons for inflicting harm on the victim, or acquiescing in the infliction of harm by others'.[277]

Where a person becomes the subject of persecution in this sense, and therefore denied community membership of the persecutory State, substitute international protection becomes in turn necessary to avoid a denial of what Hannah Arendt has described as 'the right to have rights'.[278] Arendt describes this right as 'the right of every individual to belong to humanity [which] should be guaranteed by humanity itself.' She states that the loss of the right to have rights is 'not the loss of specific rights, but the loss of a community willing and able to guarantee any rights whatsoever.'[279] Andrew Schaap argues that the 'right to have rights' as expressed by Arendt, is a primordial human right, a right more fundamental than the rights of justice and freedom.'[280]In other words, the primacy of the right to have rights flows from the fact that all the other human rights can only be guaranteed when a person is part of a political community that recognizes his or her humanity in the first place; and the fact that he or she has inherent human rights.

The right to have rights is particularly germane in grounding refugeehood. Arendt has suggested that we become aware of the existence and importance of the primordial right to have rights when we see many people, sometimes millions of people, involuntarily lose their membership to a political community because of a new political situation.[281]Thus political refugeehood can be viewed as substitute international protection granted in order to restore an individual's loss of the right to have rights through the guarantee of rights constitutive of surrogate community membership in the host State.

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277 Ibid, 457.

278 H Arendt, *The Origins of Totalitarianism*, (1973) 296.

279 Ibid, 298.

280 A Schaap, 'Enacting the right to have rights: Jacques Rancière's critique of Hannah Arendt', *European Journal of Political Theory* (2011) 10(1) 22-45, 23

281 Arendt, (note 278 above).

When the political conception is compared with the humanitarian conception of refugeehood, it is evident that under the latter conception, the loss of the Arendtian right to have rights is not a necessary feature.

In sub-Saharan indigenous African philosophy, the political conception of refugeehood also finds resonance. Of importance is the fundamental principle among the *Bantu* people of Central, Eastern and Southern Africa – the principle of *ubuntu* (or *umunthu*).[282] The principle of *ubuntu* is commonly encapsulated in the expression 'a person is a person through other persons.'[283] Cornell states that according to *ubuntu* 'human beings are intertwined in a world of ethical relations and obligations with other people from the time they are born' and that '[w]e come into the world obligated to others, and in turn these others are obligated to us'. She argues that 'the ethical, political and moral inscription of each one of us into a web of relations is fundamentally drawn from the fact that we are born into a community with others'. She concludes, therefore, that it is only through 'engagement and support of others that a person is able to realise true individuality.'[284] Thus central to the *ubuntu* principle (or philosophy) is the idea of community membership as well.

Munyaka and Motlhabi state that *ubuntu*, as conceived in the expression above, is made concrete by its constitutive elements that include 'respect for persons and the importance of community, personhood and morality.'[285] They

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282 *Umunthu* is the *Chichewa* or *Chinyanja* phonetic (the author's first language which is widely spoken in Malawi and Zambia; and significant parts of Mozambique) of the more internationally popularised term of *ubuntu*.

283 Mluleki Munyaka & Mokgethi Motlhabi, 'Ubuntu and its Socio-Moral Significance' in MF Murove (ed.), *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 65. Also see A Shutte, *African Philosophy for Africa* (Rondebosch, South Africa: UCT Press, 1993); DJ Louw, *Ubuntu and the Challenges of Multiculturalism in Post-apartheid South Africa* (2002)

284 D Cornell, 'Memorandum of 22 August 2011' quoted in L Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (2012) 80.

285 Ibid.

also state that '*ubuntu* is inclusive: Because it is manifested in living in community, it is best realised in deeds of kindness, compassion, caring, sharing, solidarity and sacrifice'.[286] These deeds have historically characterised the way African societies have dealt with foreigners or strangers. Nelson Mandela for instance has observed that in historic times 'A traveller through the country would stop at a village, and he didn't have to ask for food or for water. Once he stopped, the people gave him food, entertained him. That is one aspect of *Ubuntu*.'[287]However, this type of visitor was a temporary and friendly visitor. Munyaka & Motlhabi state that such visitors (referred to as *iindwendwe* or *abahambi* in Southern African Nguni languages), whilst being treated with respect and shown hospitality, were 'not part of the family, tribe or group' and therefore did not enjoy general rights of community membership.[288]

By contrast, the position of political refugees (referred to as *Iimbacu* in *Nguni* languages) who had been forced to leave their own societies (typically for political reasons such as banishment from their society) were also treated with compassion and kindness, just like the *iindwendwe* or *abahambi*. However, they received preferential rights in comparison with the latter. This is because they were regarded as *abantu abahlelelekileyo* (people who are forcibly deprived…);'[289] and that '[b]ecause of their deprived position, they were given special treatment, such as being allocated land. Some merged with the local people.'[290]

Thus it appears that even in traditional African societies, guided by the principle of *ubuntu*, the deprivation of community membership in one society

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286 Ibid, 74.

287 Youtube, *The Ubuntu Experience* (Nelson Mandela Interview), <www.youtube.com> (accessed 13 October 2012).

288 Mluleki & Motlhabi (note 281 above) 74. Those fleeing humanitarian crises such as hunger, were similarly treated with respect and shown hospitality, but were still viewed as temporary visitors and expected to return home once the situation improved.

289 Munyaka & Motlhabi (note 283 above) 75.

290 Ibid, 75-76.

provided the basis of being provided with rights constitutive of surrogate membership to another political community. It was not the idea of need per se, such as facing general life-threatening circumstances at home that would qualify them to receive immediate surrogate community membership, with its attendant rights and obligations; but rather the fact that such persons had effectively been ejected from membership by one political community and needed another community within which their humanity would be recognised and rights respected.

In other words, the principle that a person is a person through other persons necessarily required that if one community had banished a person, frequently as a result of the decrees of persecutory monarchic regimes then, he or she needed another community of persons in order to realise his or her humanity. Banishment in pre-colonial Africa could be viewed as one form of deprivation of the right to have rights in the Arendtian sense as discussed above.

Thus both under the Arendtian conception of the right to have rights as well as under *ubuntu* philosophy, political refugeehood merits special treatment on account of the necessity of providing substitute membership to a political community. As Stefan Heuser states:

> the right of asylum aims at reinstating…rights on individuals or smaller social groups of persons who have lost citizenship in their countries of origin. It can thus be understood as a legal institution that serves to integrate persons who have lost their rights as citizens into political communities: a specific human right to have civil rights, not just anywhere, but in the given political body that grants this right for political refugees.[291]

[291] S Heuser, 'Is There a Right to Have Rights? The Case of the Right of Asylum', (2008) 11 (1) *Ethical Theory and Moral Practice*, 3-13

Whilst Heuser seems to limit his idea of substitute community membership to 'civil rights', it is clear that the argument is equally applicable to an expansive conception that includes socioeconomic rights.

From this analysis, it is evident that in the case of humanitarian refugeehood, a person can be classified as a refugee even though his/her State of origin is willing to render protection; as long as it can be shown that such State is unable to fulfil his/her humanitarian needs. In sharp contrast, under the political conception, there must be an element either of outright persecution or the threat of persecution by the State; or of a failure of protection that arises out of unwillingness on the part of the State. Hence it is in the case of political refugeehood that the bond of protection gets repudiated and the refugee loses his/her rights of community membership. This is what provides a ground for international protection on the basis of substitute community membership.

2.6.3 Refugeehood: burdened States and outlaw States

Another analytical foundation for the differing international responses in cases of humanitarian refugeehood and political refugehood is expounded by John Rawls in his work, *The Law of Peoples.*[292] In that work, Rawls distinguishes between humanitarian refugees and political refugees. Rawls uses the typology of 'burdened societies' and 'outlaw states' to highlight this distinction.'[293] Burdened societies, he argues, recognise that their citizens are entitled to protection from harm, but due to exigencies beyond their control, are unable to provide it.[294] He argues that leaders in burdened societies are motivated by a desire to secure decent treatment for their nationals.[295] However, these societies are often too weak to possess a

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292 J Rawls, *Law of Peoples* (1999)

293 Ibid, 5.

294 MT Price, *Rethinking Asylum: History, Purpose and Limits* (2009) 73.

295 Rawls (note 292 above) 66-67.

monopoly on violence and consequently they may be wracked by civil conflict, or they may lack the infrastructure to offset food shortages, or they may lack the resources to redress severe poverty.[296] Price argues in this regard, that:

> The appropriate stance of outsiders to burdened societies is to lend assistance, not to condemn their failures. Asylum is an inappropriate tool for addressing the needs of those fleeing burdened societies. The label 'persecution' is inapposite to describe their situation; and to grant asylum would be to issue a condemnation where none is warranted. [297]

Thus because governments in burdened States take the rights of their citizens and subjects seriously, and the leaders in such societies are motivated by a desire to secure decent treatment for their citizens and subjects; although citizens of such societies might lack provision of or access to their basic rights, they still retain standing as members of their societies. The bond of protection with their State is not ruptured by a denial of the right to have rights.

On the other hand, an 'outlaw state' is described as a regime that flouts the requirements for international legitimacy by violating basic human rights, such as the peremptory human rights norms recognised by international law.[298] These include 'the prohibitions on slavery, torture, genocide, prolonged arbitrary detention, and the murder or disappearance of persons – or by

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296 Price (note 293 above).

297 Ibid, 75. Price takes the approach, to which I subscribe, that whilst it might sound politically correct to suggest that the grant of asylum is merely palliative and should not be viewed as expressive and condemnatory of the policies of the sending state; the reality is that it amounts to, at the least, an implied rebuke of those policies. He argues that by granting asylum, the receiving state not only grants the refugee protection from the insecurity that he or she faces, but also points an accusing finger at the persecutory state that is responsible. He thus states that "to view asylum as palliative – as limited to addressing the urgent needs of the asylum seeker – is thus to draw its function too narrowly" – See Price (note 293 above) 75.

298 Ibid, 73.

harming citizens for illegitimate reasons.'[299] As argued earlier, the harm could include persecutory deprivation of socioeconomic rights.

The victims of the illegitimate conduct of an outlaw State are political refugees. Asylum responds to harms perpetrated by outlaw states by providing shelter to their victims in a manner that also expresses condemnation to their State of nationality. As Guglielmo Verdirame observes:

> Implicit in any grant of [political] asylum is a censure of the country of origin of the refugee. Refugee law tries to exorcise the potential for political conflict by characterizing the grant of asylum as a 'humanitarian act.' It is a useful trick when it comes to inter-state political conflict. By obliging states not to regard foreign asylum practice as unfriendly, it limits the use they can make of this practice in open exchanges with other States…[However] the recognition of a political refugee may expose the wrongdoing of a government.[300]

Thus the Rawlsian distinction between the implications of flight from a burdened State and an outlaw State render further credence to the argument that it is important to pay attention to the various causes of forced migration when considering appropriate protection responses.

Matthew Price eruditely summarises the major differences between the political and humanitarian conceptions of refugeehood. He states that:

> The political conception differs from the humanitarian conception in at least three significant ways. First, the humanitarian conception is *fact-oriented* while the political conception is *norm-oriented*. A humanitarian looks no further than the fact that a foreigner's basic needs are unfulfilled; the reasons for this state of affairs are entirely irrelevant to the foreigner's claim to asylum. The political conception, by contrast, looks not only at the fact of need, but also evaluates its

299 Ibid.

300 G Verdirame, 'Uncovering Asylum: A Conversation on Refugee law, Sexual Orientation, and Moving Towards a Just Jurisprudence: A Friendly Act of Socio-cultural Contestation: Asylum and the Big Cultural Divide' (2012) 44 *New York University Journal of InternationalLaw and Politcs,* 559.

> *cause*, and grants asylum only to those who fear harm illegitimately inflicted by agents acting under colour of state authority...This is a predominantly normative, not factual, inquiry (though of course normative judgments are often highly fact-dependent).[301]

Secondly, Price states that:

> the two conceptions differ with respect to the importance of agency. For humanitarians, the cause of a refugee's need is irrelevant. Whether a refugee's basic needs are unmet because of "market forces," an "act of God," or simply bad luck is irrelevant to her claim for asylum. For the political conception, agency is critical. Asylum protects only those whose problems are caused by the wrongdoing of someone acting in an official capacity, or with official sanction or acquiescence.[302]

He then argues that the foregoing features of the two theories collectively present a third major difference, which is that:

> the humanitarian conception is non-political and welfarist, while the political conception endows asylum with a potent, and highly political, expressive dimension. The humanitarian project is to identify those people whose welfare fails to reach the most minimal level, and provide the goods necessary to increase their welfare above that level. Because the humanitarian conception is oriented toward facts rather than normative judgments, agnostic as to the cause of an asylum seeker's need, and exclusively focused on improving the asylum seeker's welfare, granting asylum communicates nothing other than that the recipient's basic needs were unmet. By contrast, because the political conception requires states to make critical judgments about the practices of other states and directs attention at official misconduct, granting asylum communicates condemnation. Asylum is a story of victims and perpetrators, not beggars and benefactors.[303]

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301 Price (note 263 above) 426.

302 Ibid.

303 Ibid, 427.

2.6.4 The standards of treatment for foreign nationals and refugees: Synthesis and conclusion

States are generally entitled to prioritise their own citizens over foreign nationals in the guarantee of human rights, including socioeconomic rights; principally based on the legitimacy and morality of some communitarian interests. States have legitimate (community-based) interests to preserve the stability of their social configuration. Without such stability, there is a danger that existing institutions and important social arrangements in a democracy, including the scheme for the guarantee of socioeconomic rights, might collapse to the detriment of all, including foreign migrants themselves. Communitarianism also forms the basis for the international law principle of State sovereignty that legally entitles States to assume general monopoly of control over political and other socioeconomic affairs within their territories, including the admission and nature of treatment of foreign nationals.

It is also submitted that differential treatment between citizens and foreign nationals is necessary on pragmatic grounds. This is so because we live in a world comprised of States bounded by real borders and without a global government. The reality of statehood is a millennia-old phenomenon and it makes sense to recognise it as a pragmatic premise upon which to predicate policy and laws. Max Weber has expressed this pragmatic justification in terms of what he refers to as the 'ethics of responsibility'. The pragmatic basis for differential treatment is particularly relevant in the context of the guarantee of socioeconomic rights since these rights are highly dependent on the availability of resources, and resources are scarce, especially in developing States.

However, it is also significant to note that all human beings have inherent worth and dignity which form a lowest and universal common denominator of

our common humanity.[304]The notion of human dignity requires that there should be a minimal level of treatment that one receives in any State as a human being, irrespective of his/her immigration or indeed any other status.[305] This is the notion of minimum core content obligations that each State has towards people within its jurisdiction.

A question arises though: How should refugees be treated in a socio-legal arrangement of rights? Should their rights be guaranteed on the same footing and with the same emphasis as those of other foreign migrants, or should they receive priority over other foreign migrants in this regard? The foregoing discussion demonstrates that there is a plausible basis for according priority to political refugees over other foreign migrants. The study argues in this respect, that political refugees ought to be entitled to treatment that is as close as possible to that accorded to citizens. In the specific area of socioeconomic rights, such guarantee should be on par with citizens, save for exceptional cases. In other words, the study argues that political refugees should be treated like permanent residents in the guarantee of their socioeconomic rights. This is so on the grounds that both are categories of people who have assumed membership of the host State as a political community; in the case of permanent residents on the basis of the degree of their attachment to the host State through prolonged stay; whilst in the case of political refugees on the basis that the host State has accorded them substitute community membership owing to the rapture of their membership to the political community of their country of origin. As Hathaway has stated, political refugeehood 'is fundamentally a form of surrogate or substitute protection' and excludes 'those who enjoy the basic entitlements of membership in a national community, and who ought reasonably to vindicate their basic human rights against their own State.'[306] He adds that the position of political refugees within their home State community 'is not just precarious;

304 Klaaren (note 8 above).
305 Nussbaum (note 216 above) 179.
306 Hathaway (note 47 above) 135.

there is also an element of marginalisation which distinguishes them from other persons at risk of serious harm.'[307] Okoth-Obbo is therefore right when he states that the appropriate response in cases of political refugeehood should be to ensure that refugees receive legal protection and the opportunity to realise the most fulsome life possible in the host country; and to put the refugee in a situation as close as possible to that of the national of the host country.[308]

With regard to humanitarian refugees, the study argues that they can, at first instance, be treated on the same footing as other temporary foreign migrants, lawfully present or lawfully staying in the host country. It will be recalled that in the case of humanitarian refugees, the sending State is merely burdened but remains very willing to protect its own citizens. State officials in burdened States recognise the rights of their citizens; have the best intentions to ensure the protection and advancement of those rights, but lack the necessary resources to provide effective protection. This triggers the need for international protection. Since the sending State is willing, although unable, to provide protection to its citizens; the options for response from the international community are wider. They include *in situ* (in-country) assistance (since there is no bar for international assistance to be made available to the affected persons within the borders of the host State); temporary protection pending repatriation as soon as the situation in the sending State improves; and even, where appropriate, military intervention at the invitation of the host State to protect civilians in cases of civil strife. [309]

Temporary protection in refugee law is particularly vital as it is also a form of providing international refuge for humanitarian refugees in flight of serious

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307 Ibid.

308 Okoth-Obbo 'The Refugee Experience and Policy Issues in Southern Africa' in Majodina (ed), *The Challenge of Forced Migration in Southern Africa* (2001) 47.

309 See A Bellamy, 'R2P - Dead or Alive?' in M Brosig (ed.), *The Responsibility to Protect -From Evasive to Reluctant Action? The Role of Global Middle Powers*, (2012) 15.

harm or threats of serious harm. Joan Fitzpatrick states that temporary protection 'expands the protection of forced migrants who cannot satisfy the criteria under the 1951 Convention.'[310] This concept is said to have emerged:[311]

> in the discourse of reaction to the crisis in the former Yugoslavia,[312] where, as part of a "comprehensive response", it was considered a "flexible and pragmatic means of affording needed protection to large numbers of people fleeing human rights abuses and armed conflict…who might otherwise have overwhelmed asylum procedures".[313]

Goodwin-Gill states that beneficiaries of temporary protection include those who could come within the 1969 OAU Convention definition.[314] Although he observes that States have been 'less enthusiastic about committing themselves to basic standards of treatment after admission', he states that temporary protection 'allows a pragmatic, flexible, yet principled approach to the idiosyncrasies of each situation', and that 'it does not rule out eventual local integration or third country resettlement of all or a proportion of a mass influx in the State of first refuge, acting in concert with others and pursuant to principles of international solidarity and equitable burden-sharing.'[315]

Although States have not reached consensus on a uniform standard of treatment for refugees under temporary protection; the standard, viewed generally, is observably lower than the treatment accorded to political

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310 J Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' Vol.94 *American Journal of International Law* (2000) 279, 280.

311 Goodwin-Gill (note 28 above) 200.

312 See generally R Marx, 'Temporary Protection – Refugees from Former Yugoslavia: International Protection or Solution Oriented Approach?' 6 *International Journal of Refugee Law* (1994) 444 ; D Luca, 'Questioning Temporary Protection, together with a Selected Bibliography on Temporary Refuge/ Temporary Protection', 6 *Journal of International Refugee Law* (1994) 535; J Thorburn, 'Transcending Boundaries: Temporary Protection and Burden-Sharing in Europe', 7 *Journal of International Refugee Law* (1995) 459.

313 UNHCR, 'Note on International Protection', UN doc. A/AC.96/815 (1993), para. 25; 'Note on International Protection', UN doc. A/AC.96/830(1994), paras. 45-51.

314 Goodwin-Gill (note 30 above) 200.

315 Ibid, 200-201.

refugees whose treatment is as close as possible to that accorded to full members of the community of the State. The basis for such lower standard of protection is that there are alternative ways of providing humanitarian refugees with protection which is effective for the purpose, meeting minimally accepted levels of dignity, but short of surrogate community membership in another State. Their situation is presumptively more likely to change within a relatively short period of time than is presumptively the case with political refugees.

It has to be mentioned however that the differences drawn here are based on rebuttable presumptions. Such presumptions, it is submitted, are justified on account of the explanations proffered above. However, it is acknowledged that it is possible that the situation of a humanitarian refugee might eventually assume an observable degree of permanency. Based on objective considerations relating to the permanency or the possibility of permanence of stay, the standard of treatment for the humanitarian refugee can subsequently be upgraded to parity with that accorded to permanent residents. The justification here is that owing to the permanency criterion; although the humanitarian refugee's membership to his or her State of nationality has not been repudiated; he or she qualifies for admission to rights reserved for members of the host State's political community, due to a heightened degree of formal attachment constitutive of community membership.

The split between humanitarian refugees and political refugees, with the attendant differing approaches in standards of treatment, is also pragmatic in another way: It narrows the scope of asylum, on a justifiable and principled basis (Max Weber's ethic of responsibility), and such narrowing down is essential to ensure that the principle of asylum does not completely lose its essence or political legitimacy in international law. In practice, most States would most likely frown upon an international law scheme that imposes on

them the obligation to accord the full spectrum of socioeconomic rights to each and every foreign national who has a social or economic need which cannot be immediately satisfied in or by his or her own State of nationality. International law, it will be recalled, remains a body of law premised on the consent of sovereign States.

In the sphere of international law, almost invariably, the legal remains political. As John Dugard observes, 'international law - like municipal law - has no autonomy as a discipline and must be seen as an integral, and important, part of the international political process. Traditionalists ignore this truth at their peril.'[316] It is therefore essential, in order to achieve an effective scheme for the guarantee of socioeconomic rights at international law, that such a scheme should garner at least the support of the majority States. Thus, whilst such a scheme ought to be based on principle as found in the internationally agreed norms of human rights and plausible ethical, moral and fair principles of justice; it also ought to be pragmatic and politically legitimate by assuming standards that would achieve a good measure of consensus in the community of States, and which would be practically implementable given the scarcity of resources.

316 J Dugard, *International Law: A South African Perspective* (2005) 15.

CHAPTER III

THE INTERNATIONAL LEGAL FRAMEWORK FOR THE GUARANTEE OF SOCIOECONOMIC RIGHTS FOR REFUGEES

3.1 Introduction

This Chapter provides a critical discussion of the various international instruments that guarantee socioeconomic rights for refugees. The discussion starts with an exposition of the applicability of general human rights instruments, namely; the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and People's Rights (ACHPR) to refugee issues. In particular, it examines how these instruments relate to or address socioeconomic rights issues in respect of refugees. The discussion then proceeds to critically examine refugee specific instruments, with particular emphasis on the 1951 Convention regime; assessing the extent to which socioeconomic rights are guaranteed under these instruments; and interrogating the standard of treatment of refugees that is adopted. Focus is placed on the 1951 Convention because it is the framework legal instrument for international refugee protection.

3.2 Socioeconomic rights of refugees under the UDHR

The UDHR was adopted on 10 December 1948.[317] It contains a comprehensive catalogue of civil, political and socioeconomic rights.[318]

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317 UNGA Res. 217 A (III) of 10 December 1948.

318 Articles 2-15 of the UDHR provide for civil and political rights; articles 17- 28 provide for economic, social and cultural rights; articles 29 and 30 make provision for duties that individuals have towards their communities, limitations on rights, and a

Although its general character is non-binding, the UDHR is unquestionably the most influential human rights instrument in the world. [319]

Particularly significant to refugee studies is the fact that the UDHR contains an express provision on the issue of refugeehood. Article 14 provides that 'everyone has the right to seek and to enjoy in other countries asylum from persecution.' This Article has been described as the springboard of modern refugee law and of the 1951 Convention in particular. It is therefore central to the articulation of refugee rights in international human rights law. Alice Edwards emphasises the importance of Article 14(1) of the UDHR, stating that '[a]t a minimum, Article 14 places the right to seek and to enjoy asylum within the human rights paradigm and represents unanimous acceptance by States of its fundamental importance.'[320]

It is evident from the language of Article 14 that the UDHR adopts the political conception of refugeehood. This is so because it confines itself to guaranteeing the protection of persecuted refugees (this includes those with a well-founded fear of persecution), and it therefore has, at best, only limited application for humanitarian refugees.

3.3 Socioeconomic rights of refugees and the ICCPR

Although the International Covenant on Civil and Political Rights (ICCPR), as its name suggests, focuses on civil and political rights, it is also relevant to the protection of socioeconomic rights. Perhaps a good starting point in this

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prohibitions against any activities aimed at the proscription of the rights set forth under the UDHR. It is important to note that the UDHR sets forth some rights that are not provided for in the two subsequent general human rights treaties (the ICCPR and ICESCR). These include article 14 that guarantees the right to seek and enjoy asylum in other countries and article 17 that guarantees the right to property.

319 See A Eide & G Alfredsson, 'Introduction' in G Alfredsson & A Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) xxv-xxxv.l

320 A Edwards, 'Human Rights, Refugees, and The Right "To Enjoy" Asylum', (2005) 17 *International Journal of Refugee Law*, 293, 296.

regard is Article 2 as it provides for the nature of the obligations of States parties under the Covenant. The Article provides that every State party has the obligation to respect and ensure 'to all *individuals within its territory* and subject to its jurisdiction' the rights recognised in the Covenant in a non-discriminatory manner. It states that these obligations include the adoption of legislative and other measures to give effect to the rights.

The special relevance of the ICCPR in the context of the advancement of socioeconomic rights lies in the fact that some of the provisions under the Covenant can be invoked to advance socioeconomic rights. Most significant in this regard is the equality clause under Article 26 that has been invoked to ensure the equal guarantee of all rights, including socioeconomic rights, for all.[321] Hathaway observes that the uniqueness of Article 26 of the ICCPR as a non-discrimination clause lies in the fact that 'its ambit is not limited to the allocation of simply the rights found in any one instrument. Article 26 rather governs the allocation of all public goods, including rights not stipulated by the Covenant itself.'[322] The Human Rights Committee (HRC), a body established under the ICCPR to monitor the effective implementation of the Covenant,[323] has stated that 'Article 26 …prohibits discrimination in law or in fact in any field regulated by public authorities.'[324] Further, the HRC, through its decisions under the individual communications procedure,[325]has demonstrated the interplay between the equality clause under the ICCPR and socioeconomic rights guaranteed in other instruments.[326]

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321 Article 26 of the ICCPR.

322 Hathaway(note 47 above) 125.

323 The HRC is established under Art. 28 of the ICCPR.

324 HRC, *General Comment No. 18: Non-discrimination* (1989) UN. Doc. HRI/GEN1/Rev.7, May 12, 2004, at 146, para. 12.

325 The Individual Communications procedure is provided for in the 1st Optional Protocol to the ICCPR that was also adopted in 1966 (See UNGA Res. 2200 A (XXI) of 16 December 1966; UN, *Treaty Series*, Vols. No. I-14668, and also 1059, No. A-14668 (corrigendum). The 1st Optional Protocol to the ICCPR entered into force on 23 March 1976.

326 See for instance *Zwaan-de Vries v The Netherlands* Communication 182/1984, U.N. Doc. CCPR/C/OP/2 at 209 (1990), where the Human Rights Committee held that the Netherlands had violated art. 26 of the ICCPR by denying Mrs. Zwaan-de Vries, and

The HRC has evidently not yet dealt with the specific issue of refugee rights under this Article. However, from an analysis of its jurisprudence, it would appear that in appropriate cases, the Committee would be prepared to make decisions on socioeconomic rights claims of refugees, premised on Article 26 of the ICCPR, from an equal protection of the law perspective. Indeed, the principle of equal treatment of the law, as it regards non-nationals generally, has been emphasised by the HRC through its General Comments. The HRC has stated that the general requirement of non-discrimination under the ICCPR 'applies to aliens and citizens alike';[327] and that in particular, it extends to such vulnerable groups as asylum seekers and refugees.[328]

However, it is also noteworthy that through its more decisive individual communications procedure, the HRC has demonstrated that the application of the principle of equal treatment between nationals and non-nationals is limitable based on reasonable and objective grounds. [329]It has stated though, that these limitations are not to be too easily read into the non-discrimination principle in respect of nationals and non-nationals pursuant to Article 26 of the ICCPR, and that each case must be examined and determined upon its own facts.

Thus in *Karakurt v Austria*,[330] the State party had granted the applicant, a non-Austrian national, the right to work in its territory for an open-ended period. The question that arose for determination was whether there were

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similarly situated women, unemployment benefits on the grounds that she was married and was not a breadwinner, when, by contrast, men in similar circumstances (those who were married and were not bread winners) in the Netherlands would still receive unemployment social security benefits.

327 HRC, *General Comment No. 15: The Position of Aliens under the Covenant* (1986) UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, at 140 para. 2.

328 HRC, General Comment No. 31: The Nature of the General Legal Obligations of States Parties under the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para.10.

329 *Oord v Netherlands*, HRC Comm. No. 658/1995, UN Doc. CCPR/C/60/D/658/1995, para. 8.5.

330 HRC Comm. No. 965/2000, UN Doc. CCPR/C/74/D/965/2000.

reasonable and objective grounds justifying exclusion of the applicant from a core incident of his status as an employee in the State party, which incident was otherwise available to nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone. The HRC stated that no general rule could be drawn on whether differential treatment between nationals and non-nationals was justifiable in the employment sphere under Article 26 of the ICCPR. Rather, the HRC observed that it was necessary to judge every case individually and on its own facts. On the specific facts of this case, the Committee held that 'it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality.'[331]

It is submitted that the point made in the *Karakurt* case, that each case is to be decided on its own facts, is particularly relevant for refugees and more so in respect of the guarantee of socioeconomic rights. The approach would provide the HRC with greater flexibility to treat the case of refugees, particularly political refugees, as a special one that merits preferential treatment over and above the general position of other non-nationals.

Thus whilst in some instances differential treatment between nationals and foreign nationals might generally be justified on the basis that the differentiating criteria are objective and reasonable, such differentiation might as well fail to meet the test in the special case of political refugees. For instance, it might be permissible and reasonable to limit the right to wage earning employment in respect of foreign nationals generally, by for instance placing rigorous work permit requirements to be satisfied. It might similarly be permissible and reasonable to limit the right to self-employment (including commercial activity) by imposing onerous business permit requirements in order to protect the interests of local (national) entrepreneurs. However, such restrictions would not constitute reasonable and justifiable criteria in terms of

[331] Ibid.

Article 26 of the ICCPR if applied to political refugees. This is because such onerous requirements would militate against the essence of surrogate community membership and protection that grounds political refugeehood and affords such refugees legal protection and the opportunity to realise the most fulsome life possible in the host State.[332]

The relevance of the ICCPR in the context of the guarantee of socioeconomic rights for refugees also lies in the fact that, as demonstrated in the previous Chapter, political refugeehood can be engendered by the deprivation of both civil and political rights, and socioeconomic rights. Thus, where a refugee is persecuted through the deprivation of socioeconomic rights, not only is the violation founded on denial of socioeconomic rights, it also entails denial of some civil and political rights such as human dignity and life, among others, hence triggering the applicability of the ICCPR to the circumstance(s).

3.4 The ICESCR and Refugees

3.4.1 The nature of obligations under the ICESCR

The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees a wide range of socioeconomic rights including the rights to self-determination, work, fair and just conditions of employment, joining and forming trade unions, social security,housing,food,clothing, health, education, and culture. Article 2(1) of the ICESCR addresses the twin concepts of progressive realization and the availability of resources discussed earlier in Chapter I. It provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and

[332] Okoth-Obbo 'The Refugee Experience and Policy Issues in Southern Africa' in Majodina (ed), *The Challenge of Forced Migration in Southern Africa* (2001) 47.

> technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

As demonstrated in Chapter I, a body of scholarly literature and jurisprudence has been generated particularly around the concepts of availability of resources, 'progressive realisation' and 'minimum core obligations' in respect of this article.[333] The notion of progressive realization in particular stands out prominently in distinguishing the nature of State obligations in respect of the rights guaranteed under the ICCPR and those guaranteed under the ICESCR. It suggests that, unlike the duty imposed under Article 2(1) of the ICCPR that generally imposes immediate obligations, Article 2(1) of the Covenant generally requires gradual realization over time, albeit based on deliberate and targeted measures.[334]

3.4.2 Application to refugees and standards of treatment

Just like the UDHR and the ICCPR, the ICESCR has a non-discrimination clause. Article 2(2) of the Covenant provides that:

> States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Committee on Economic, Social and Cultural Rights (CESCR) has stated that non-discrimination is an immediate and cross-cutting obligation in the Covenant.[335] It has stressed that Article 2(2) requires States parties to guarantee non-discrimination in the exercise of each of the socioeconomic

333 S Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 187-198; Bilchitz (note 135 above) 178-235.

334 CESCR, GC.3, para.2.

335 See CESCR GC No. 20, para. 7

rights enshrined in the Covenant. It has further clarified that discrimination in this regard constitutes any distinction, exclusion, restriction, preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.[336]

The CESCR has specifically addressed the issue of nationality in relation to the principle of non-discrimination in its General Comment No. 20, stating that:

> The ground of nationality should not bar access to Covenant rights…The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[337]

From this authoritative interpretation, it is clear that refugees, along with other foreign nationals, are protected from discrimination under the ICESCR. However, it is pertinent here to note that this proposition is subject to the provisions of Article 2(3) of the ICESCR. The Article states that '[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.' As stated in Chapter I, Article 2(3) appears to have been a compromise provision in the negotiation process of the Covenant. It exemplifies the political tension between the interests of foreign nationals and citizens around perceptions of rights to

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336 CESCR, Ibid, para.30. A more elaborate definition of the principle of non-discrimination can be found in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Article 2 of the Convention on the Rights of Persons with Disabilities. The CESCR acknowledges that the Human Rights Committee (under the ICCPR regime) has provided similar interpretation in GC No. 18, paras. 6 and 7.

337 See also General Comment No. 30 of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens (2004).

economic benefits. Unfortunately, the CESCR has not yet provided any concrete guidance through its General Comments on the precise contours of this provision, including the extent of the margin of discretion that it entails. The Committee needs to provide guidance on the meaning of the term 'developing country' in the context of the ICESCR as there does not seem to be any universally agreed criteria that qualifies a country as a developed or developing one. However, whichever way one reads it, the Article provides at least some justification for the differential treatment of nationals and non-nationals in developing countries in terms of the economic rights guaranteed under the Covenant.

In conclusion, a reading of the ICESCR together with the interpretive General Comments of the CESCR, suggests that the covenant guarantees social rights to foreign nationals, including refugees of both categories (humanitarian and political), on the same footing as citizens. It is in respect of economic rights only that the covenant allows developing countries, which includes virtually all the countries in Southern Africa under study, to accord preferential treatment towards their citizens.

The remaining question is: How should refugees be treated under this scheme? Based on the analysis and conclusions drawn in Chapter II, it is submitted that political refugees ought to be guaranteed economic rights on the basis of substitute protection as members of the political community of the State. In other words, they ought to be accorded treatment as close as possible to the manner in which nationals are treated. In many cases, this standard could be equated to the position of permanently resident non-nationals who have assumed the domicile of the host State.[338]

[338] *Union of Refugee Women & Others v The Director: The Private Security Industry Regulatory Authority & Others*, 2007 (4) BCLR 339 (CC) para. 109, per Mokgoro & O'Regan, JJ.

The normative basis for this similarity of position between political refugees and permanent residents is that both categories of foreign nationals must necessarily be treated as members of the political community. In the case of political refugees, it is surrogate membership whereas in the case of permanent residents, it is based on their degree of attachment to the host State. Thus political refugees should be understood in this context as an exception to the general rule of differential treatment laid down in Article 2(3) of the ICESCR.

On the other hand, humanitarian refugees, as Chapter II demonstrates, can be treated differently. They could be accorded temporary protection through the provision of basic resources that ensure that they have the minimal capabilities of life that ensure their dignity, without necessarily according them treatment on the same basis as that which is afforded to permanent residents. However, should their stay assume a character of permanence, humanitarian refugees can similarly be accorded rights reflective of their community membership of the host State. In this case, economic rights for humanitarian refugees should initially be caught by the provisions of Article 2(3) of the Covenant, but depending on the degree of permanence of their stay, the application of that provision can be terminated. It is suggested that the appropriate test to gauge the longevity of stay would be to look at how long a foreign national generally has to stay in the host State in order to qualify for permanent residence.

3.5 The African Charter on Human and Peoples Rights and Refugees

The African Charter on Human and Peoples' Rights (the ACHPR)[339] expressly affirms the indivisibility and interconnectedness of all human rights. It states that 'civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.'[340] The Charter's express affirmation of this indivisibility, interconnectedness, interdependence and universality is evidently unique among human rights treaties.

The ACHPR guarantees a wide range of socioeconomic rights, including rights to work, access to healthcare services, education, and family life among others. Significantly, the ACHPR also guarantees the rights to property and development that have been excluded from some major international human rights treaties such as the ICESCR and the ICCPR.

Another interesting feature of the African Charter is the absence of a derogation clause. In this regard, the African Commission on Human and Peoples' Rights has made its position clear, holding that limitations on the rights and freedoms in the Charter cannot be justified by emergencies or special circumstances.[341]This point has special significance in relation to refugees and asylum seekers. For instance, even where the host State is involved in hostilities against the refugees' source State, the African Charter

339 See UN, *Treaty Series*, Vol. 1520, No. I-26363. The African Charter was adopted by the Assembly of Heads of State and Government of the Organization of African Unity (OAU) in Nairobi on 27 June 1981 and it came into force on 21 October 1986.

340 See Preambular para 7 of the African Charter.

341 See *Media Rights Agenda and Others v Nigeria* Communications 105/93, 128/94, 130/94 and 152/96, Twelfth Activity Report 1998-1999, Annex V (Documents of the African Commission,), 18, paras 67-70.

would still require that the host State should protect the rights of the concerned refugees.

A further unique attribute of the Charter is that, unlike the ICESCR which clearly and explicitly subjects the obligations of States parties to the availability of resources and progressive realisation,[342] the African Charter does not have a similar provision. This has led others to argue that the obligations of States with respect to these rights under the Charter must be understood as immediate.[343] This is, however, not necessarily the case.[344] In *Purohit and Moore v The Gambia*,[345]the African Commission held that there should be read into Article 16 (that guarantees the right to physical and mental health) the obligation on the part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all aspects without discrimination of any kind.[346]

Whilst the *Purohit case* related to the right to health, the reasoning of the Commission is equally applicable to all other socioeconomic rights under the Charter. It can therefore be safely stated that the concept of 'progressive realisation' with regard to socioeconomic rights is implicit under the African Charter. This is more so considering that, in terms of article 60 of the Charter, the African Commission is required to 'draw inspiration from international law

342 Art. 2(1).

343 CA Odinkalu, 'Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (Eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 196.

344 RE Kapindu, 'Policies, Aspirations or Rights? A Case for Mainstreaming Socioeconomic Rights in the Malawi Growth and Development Strategy (MGDS)', *Yale Human Rights and Development Law Journa*l Vol. XIV(2), 34-65 .

345 Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII.

346 Ibid, para. 84

on human and peoples' rights' when interpreting the obligations of States parties under the Charter.[347]

The ACHPR, just like the UDHR, makes specific provision for asylum. Article 12(3) of the ACHPR provides that '[e]very individual shall have the right, when persecuted, to seek and to obtain asylum in other countries in accordance with the laws of those countries and international conventions'. It can therefore be concluded that, in terms of this specific treaty provision on asylum, the concomitant rights under the ACHPR equally apply to refugees who have obtained asylum. It is significant to note that the ACHPR, just like the UDHR, focuses more on political refugees in comparison to humanitarian ones as it requires the presence of the persecution element in order for a person to be recognised as a refugee.

3.6 The 1951 Refugee Convention and Socioeconomic rights

3.6.1 Introduction

The Convention Relating to the Status of Refugees (the 1951 Convention)[348] is the framework international instrument for the protection of refugees under the UN human rights system. The principal objective of the 1951 Convention is to 'assure refugees the widest possible exercise of …fundamental human rights and freedoms'.[349]In order to achieve this goal, the Convention sets out a number of safeguards including the principle of *non-refoulement,* described as a core duty of States under international law,[350] as well as the guarantee of a range of civil, political, and socioeconomic rights. The Convention thus

347 Also see *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (*SERAC c*ase). Communication No. 155/96, Fifteenth Activity Report 2001-2002, Annex V, para. 49.

348 UN, *Treaty Series*, Vol. 189, No. I-2545. The Convention was adopted on 28 July 1951 in Geneva and it came into force on 22 April 1954.

349 2nd Preambular Paragraph of the 1951 Convention.

350 Art. 33 of the 1951 Convention.

entitles refugees to several basic survival and dignity rights, documentation of their status and access to courts for the enforcement of their rights.[351]

There is, however, one glaring omission under the Convention: It does not have a clause that expressly addresses the right of asylum *per se*. Whilst the *raison d'être* of the Convention centres around the question of asylum, it is curious that the 1951 Convention has no express provision that guarantees every persecuted person the right to seek and to enjoy (or obtain) asylum in other countries as is the case under Articles 14(1) of the UDHR and 12(3) of the ACHPR respectively. This is unfortunate. The right of asylum, it is submitted, is an attribute of what Arendt has referred to as the right to have rights, and it correlatively forms the basis for the obligations of countries to provide surrogate protection in terms of the Convention. By including a provision that guarantees the right of asylum, for instance as provided for under Article 12(3) of the ACHPR, the 1951 Convention could have expressed in a very direct way, the right of the refugee to escape, to be accepted, and to be sheltered. Such a right constitutes one of the critical protections that speak to the most basic aspects of the refugee experience.[352]

3.6.2 Socioeconomic rights guaranteed

In the context of the 1951 Convention, socioeconomic rights are 'of particular importance'[353]as they 'integrate refugees in the economic system of the country of asylum or settlement, enabling them to provide for their own needs.'[354] As earlier discussed, the 1951 Convention adopts the political conception of refugeehood. As such, the following discussion on specific rights under that Convention, and particularly the recommendations that follow, are premised on the understanding that it applies to political refugees.

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351 Hathaway (note 47 above) 94.
352 Ibid.
353 Ibid, 95.
354 Ibid.

3.6.2.1 The Right to Property

The right to property under the 1951 Convention is provided for in Article 13. The right extends to the acquisition of movable and immovable property and other rights pertaining thereto, as well as to leases and other contracts relating to movable and immovable property. On the international plane, it is especially significant that the right to property is provided for under the 1951 Convention. This is so because although the right is provided for under Article 17 of the UDHR, an instrument which is merely hortatory in character, provision of the right was omitted under the legally binding ICESCR and ICCPR. Thus whilst the existence of an internationally recognised right to property remains tenuous and highly contested,[355] and more so in respect of foreign nationals, the right is clearly guaranteed for refugees under the 1951 Convention.

The right to property is of special significance to refugees. Firstly, the right protects refugees against arbitrary deprivation of property that they brought along into the host State during their flight. Secondly, the right also protects refugees from arbitrary deprivation of property acquired during their period of refuge in the host State. Thus where a refugee has to be repatriated, whether voluntarily or otherwise in terms of the cessation clauses under he 1951 Convention, such a refugee should have his or her property security of tenure thereof should be assured.[356] Where possible, in the case of movable assets or other easily transferable property, the refugee should be permitted to transfer these to his or her country of origin.[357] If that is not possible, or where the refugee so elects, he or she should be allowed to either properly

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355 C Krause & G Alfredsson, 'Article 17' in G Alfredsson & A Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement (*1999) 360.

356 S Leckie (Ed.), *Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases and Materials* (2007)

357 Mpedi et al (note 98 above)

economically dispose of such property; or should otherwise be afforded adequate compensation by the State.

The standard of treatment that States parties under the Convention are enjoined to adopt in terms of Article 13 is that contracting States should accord a refugee treatment as favourable as possible and, in any event, no less favourable than that accorded to other foreign nationals[358] generally in the same circumstances. This standard provides host States with the discretion to decide whether to guarantee this right to refugees on the same footing as other foreign nationals generally, or to provide better treatment. In other words, there is no legal obligation imposed by the Convention to provide better treatment under this standard.[359]A generalised critique of the various standards of treatment adopted under the Convention is provided later in this Chapter.

3.6.2.2 The Right to work

The right to work under the 1951 Convention is guaranteed under three related articles that deal with the economic livelihood of refugees.[360] These are Articles 17, 18 and 19 that deal with the right to wage-earning employment, self-employment and the practice of liberal professions respectively.

The ability of a person to engage in activities in pursuit of a livelihood is an essential attribute of human dignity.[361] Among other things, in addition to enabling him or her to provide for life's amenities, he or she derives from such activities a special meaning for life. The right ensures that the refugee

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358 Referred to as 'aliens' under the Convention.

359 UNHCR, *Commentary on the Refugee Convention 1951: Articles 2-11, 13-37*, 1997, www.refworld.org/pdfid/4785ee9d2.pdf (acessed 26 May 2013).

360 Ibid.

361 See *Olga Tellis v Bombay Municipal Co-operation* (Olga Tellis case) 1985 (3) SCC 545.

becomes 'a whole person again, one who earns his own living and the respect of those around him.'[362]The right also helps refugees to establish themselves as fully functional members of their new communities.

The Michigan Guidelines on the Right to Work provide a lucid description of what the right to work entails. They state that:

> The right to work enshrined in international instruments is not the guarantee of a job, although some treaties, particularly the ICESCR and ILO Convention No. 122 (Employment Policy Convention, 1964), oblige states to move towards full and productive employment. At the core of the right to work is freedom to gain a living by work freely chosen or accepted. This right entails access to the labor market, as well as the ability to participate in self-employment and the liberal professions. In most human rights instruments, this freedom is expressed as a universal entitlement, and is protected on a non-discriminatory basis.[363]

However, notwithstanding the general international law principle of non-discrimination, most States treat citizens and foreign nationals differently when it comes to guaranteeing the right to work. Kent Källström and Asbjørn Eide state that:

> the State is entitled to set [as] a condition for temporary entry into the country that the person shall not have a right to work under that temporary stay. This will apply, for instance, to persons who arrive as tourists or for purposes of temporary study in the country concerned. Persons who have obtained a non-temporary right of residence [permanent residence], however, have the same right of access to work as citizens have.[364]

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362 F. Ohaegbulom, 'Human Rights and the Refugee Situation in Africa' in G Shepherd & V Nanda (eds.) *Human Rights and Third World Development* (1985), 197, as quoted in Hathaway (note 46 above) 719. See also *Minister of Home Affairs & Others v Watchenuka & Another* 2004 (4) SA 326 (SCA) [*Watchenuka case*]; R Murray, *Human Rights in Africa: From the OAU to the African Union* (2004) 210.

363 See 'Fifth Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on the Right to Work' (2009) *Michigan Journal of International Law*, 289, 294.

364 K Källström & A Eide, 'Article 23' in G Alfredsson & A Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement (*1999) 505.

The general practice around the world is that foreign nationals are required to obtain work permits in order to be allowed to engage in any form of gainful work.[365] In many jurisdictions, the situation of refugees with regard to the right to work is largely the same, and sometimes worse than, that of other foreign nationals generally. The situation becomes worse in some countries as refugees are confined to refugee camps indefinitely, thus severely limiting their work prospects. Indeed, Hathaway has observed that in most developing countries, this right 'is either denied altogether or extremely limited for refugees.'[366] He argues that '[h]ost States are often concerned that allowing refugees to work will drive down wages for their own citizens, thereby creating tensions between the refugees and their hosts.'[367] This leads to the tragic consequence that 'refugees who are unable to work may be compelled by sheer economic desperation to return to a place of persecution, resulting in violation of the obligation of *non-refoulement.*'[368] Thus, in the context of these practical refugee problems, it is significant that the 1951 Convention specifically guarantees the right of refugees to work.

Before concluding on this right, it is essential that we identify some of the differences in relation to the three aspects of work addressed under the 1951

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365 Exceptions do exist, on the basis of special treaty arrangements, such as in the case of the European Union (EU), where all EU citizens have the right to work in any EU member State. See EU, 'Consolidated Version of the Treaty on the Functioning of the European Union', *Official Journal of the European Union*, (2010) C 83, 47, Art. 45.

366 Hathaway (note 47 above) 30.

367 Ibid. In support of this proposition, Hathaway cites the UNHCR that has stated that '[t]he arrival of large numbers of asylum-seekers and the absorption of some or even all of them as refugees, even on a temporary basis, can create serious strains for host countries. This is particularly the case for poorer communities where the ability of the people and the inclination of the government to shoulder the resultant burden may be severely diminished by economic difficulties, high unemployment, declining living standard, and shortages in housing and land…Inevitably there are tensions between international obligations and national responsibilities in such circumstances, with the result, in a number of States, that priority is accorded to nationals over all aliens, including refugees, in fields such as employment.' – UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc EC/SCP/54, 7 July 1989, para.11.

368 Michigan Guidelines (note 361 above), 295, para.1.

Convention: wage-earning employment, self-employment and liberal professional practice.

First, the right of wage-earning employment entails the right of the refugee to provide his or her labour services to an employer for pay. The right to practice in liberal professions under Article 19 is basically the same as wage-earning employment, with the only difference lying in the fact that the former is limited to professional refugees that practice in the liberal professions, whilst the latter applies to all refugees. Self-employment, by contrast, as the term suggests, entails the right of the refugee to independently engage in economic activity in the host State. This right is also applicable to all refugees under the 1951 Convention.

Secondly, there are differences in terms of the standards of treatment accorded to these different aspects of work under the Convention. In terms of the right to wage earning employment under Article 17(1) of the Convention, the standard of treatment required of States is that they should accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances. By according the most favourable treatment standard, the implication is that refugees are entitled to the same treatment as permanently resident foreign nationals in the host State who, as pointed out in the previous Chapter, generally have the same right of access to work as citizens.[369]

The standard of treatment however is lower with regard to the rights to self-employment and professional practice. In both of these latter cases,[370] the Convention states that '[c]ontracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same

369 Ibid.
370 Arts. 18 & 19 of the Convention.

circumstances.' This accords the host State a wider margin of discretion. Whilst the host State is encouraged to provide more favourable treatment to convention refugees, it remains at liberty to afford refugees the same treatment as that accorded to other foreign nationals generally.

3.6.2.3 Housing

When a refugee takes refuge in another country, one of the major problems that he or she usually confronts in the new host community is to find decent housing or shelter. The UNHCR has observed that 'housing' in this regard has to be distinguished from mere 'accommodation'. It states that the right to housing has wider implications as 'it implies not only the obtaining of a dwelling place, but also participation in schemes for financing of the construction of dwelling places'.[371] It is also submitted that the right to housing should be understood to be more that mere shelter or space in a refugee camp. Whilst refugees can perhaps be 'accommodated' in a refugee camp as a preliminary protection measure immediately on arrival in the host State, they should be guaranteed the right to access housing of their own choice that meets the requirements of durability, habitability and stability.[372] Where refugee camps are established by Governments, these must not function as places of detention but only as a place of safety. Thus, the accommodation of refugees therein should not in any way prejudice their fundamental right of access to housing.

Article 21 of the Convention guarantees the right to housing. However, the scope of Article 21 is rather narrow. It provides that:

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371 See UNHCR (note 359 above).

372 See CESCR, *G.C. No.4: The right to adequate housing (Art.11 (1)), UN.Doc. E/1992/23,* para. 8; Also *Government of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (Grootboom case), para. 52.

> As regards housing, the contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Hathaway argues that the real value of this Article is limited in two fundamental ways: First, he argues, its benefit may only be claimed by refugees 'lawfully staying' and not those merely 'lawfully in' the country.[373] The difference between these two terms is that refugees 'lawfully staying' are those that have been granted some form of Status, either as recognised refugees or somehow granted temporary protection. On the other hand, refugees 'lawfully present' are those whose claims to refugeehood have been officially noted and/or registered by the State, but their status has not yet been determined such as asylum seekers. Hathaway observes that the decision to limit the enjoyment of this right only to those 'lawfully staying' might have been prompted by concern not to exacerbate housing shortages for the host State's housing shortages for their own citizens, which would likely be the result of a wider application of the right.[374] Therefore, in terms of Article 21, mere asylum seekers awaiting status determination may be disqualified from enjoying the right to housing. This position however ignores the fact that in any event, such asylum seekers would still be entitled to the minimum core of the right to housing.

Secondly, Hathaway argues that another problem is that Article 21 provides no firm qualitative guarantee of any rights over and above those which inhere in 'aliens generally in the same circumstances.'[375] This standard is vague. The right guaranteed for 'aliens generally' may in practice entail that only a very narrow and unsatisfactory catalogue of rights is guaranteed. Further, Hathaway argues that Article 21 contains no affirmative and substantive

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373 Hathaway (note 47 above) 825.
374 Ibid.
375 Ibid, 826.

content in respect of the right to housing.[376] In the result, Hathaway concludes that the guarantee of housing rights under Article 21 might, in practice, amount to a guarantee of very little, if any protection at all, in substantive terms.[377]

Whilst Hathaway's critique of Article 21 seems highly persuasive, it is still significant that an attempt at specifying the importance of the right to housing for refugees, through the explicit provision of housing under the Convention, was made. At the very least, the express provision of housing issues under the Convention provides a springboard from which matters relating to the scope of the right to housing under the Convention might be further interrogated.

3.6.2.4 Education

The right to education is an empowering right, in that it enhances a person's capabilities within society. The CESCR has stated in this regard that:

> Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.[378]

The right to education is also essential for the realization of human dignity. In the *Watchenuka* case, Nugent JA stated that the freedom to study is inherent in human dignity because, without such freedom, a person is deprived of the

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376 Ibid.

377 Ibid.

378 CESCR, *General Comment 13: The Right to Education (Article 13)* Adopted at the Twenty First Session, Geneva, 15 November-3 December 1999, UN Doc. E/C.12/1999/10, para. 1.

potential for human fulfilment.[379] For people who have been involuntarily uprooted from their homes such as refugees, access to study and to pursue other forms of education is critical for them to have a sense of human fulfillment, socioeconomic upliftment and dignity. The special significance that refugees place on education is astutely articulated by James Hathaway who states that:

> anxious for their children's studies to resume before knowledge is lost, or simply to restore a sense of purpose in a situation otherwise without hope, refugees frequently establish classes for their children immediately upon reaching safety, using whatever resources are available to them.[380]

The right to education under the 1951 Convention is provided for in Article 22 under the heading 'Public Education'. The Article provides as follows:

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

One observes from these provisions that Article 22 does not explicitly state that every refugee has the right to education, as is the case for instance under Article 13 of the ICESCR. Instead, it simply refers to the standard of treatment to be accorded to refugees in relation to education. It provides that refugees will be accorded the same rights as nationals in respect of elementary education, but that with regard to other forms of education, the standard of treatment is 'treatment as favourable as possible, and, in any

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379 *Minister of Home Affairs & Others v Watchenuka & Another* [2004] 1 All SA 21 (SCA), Para. 36.

380 Hathaway (note 47 above) 584.

event, not less favourable than that accorded to aliens generally in the same circumstances.'

The clear priority on elementary education in Article 22(1) that obliges host states to treat refugees and their own citizens on an equal footing, is significant. It ensures that the education of refugee children should not be prejudiced based on their vulnerable status.

In respect of education other than elementary education, the standard adopted under the 1951 Convention is also problematic in so far as the Convention does not accord political refugees the most favourable treatment accorded to a foreign national generally in the host State. As argued in Chapter II, there is an ethical imperative that demands that political refugees should receive such treatment in the host country, which equals that of permanent residents, particularly in the area of socioeconomic rights.

3.6.2.5 Labour and Social security

Article 24 of the 1951 Convention addresses the issue of 'Labour Legislation and Social Security' rights for refugees.[381]For the purposes of this discussion, Article 24(1) that is especially significant. This provision has two separate but related parts. The first part provides for general equality of treatment in the workplace between nationals and refugees. The UNHCR has observed that this provision is derived from standards earlier adopted by the ILO in respect of the treatment of nationals and foreign nationals in the workplace, stating that 'the placing of foreigners and national workers on the same footing not only meets the demands of equity but is in the interests of national wage-earners who might have been afraid that foreign labour, being cheaper than their own, would have been preferred.'[382]

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381 Refer to Annexure I (below) for the Full Text of the 1951 Convention.

382 See UNHCR (note 359 above) 13-37.

The second part of Article 24(1) addresses social security entitlements. It accords refugees lawfully staying in the host State the same treatment as nationals in respect of legal provisions relating to employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency covered by a social security scheme.

A deficiency with regard to Article 24 is that it limits the scope of social security to the employment sphere. Social security measures are important to a wider spectrum of people in any State, including refugees, beyond the context of labour relations. Mpedi et al provide us with this broad conception of social security, stating that:

> Social security refers to public and private, or mixed public and private measures designed to protect individuals and families against income security caused by contingencies such as employment injury, maternity sickness, invalidity, old age and death. Conceptually, social security includes social insurance, social assistance and social allowances.[383]

This entails therefore, that in the case of refugees, issues such as social allowances, such as child support or old age grants, among others, that ought not necessarily be tied to the labour market context, must be encompassed in a comprehensive social security guarantee scheme. This is particularly so in the case of political refugees who ought to be treated as members of the political community.

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383 Mpedi et al (note 98 above) 2, fn.5. See also Art. 1(5) of the *Code on Social Security in SADC*, 2007, www.ilo.org/gimi/gess/RessFileDownload.do?ressourceId+10371 (accessed 12 May 2013)

3.7 Key socioeconomic rights unaddressed

Even though the 1951 Convention is the framework instrument for the protection of the rights of refugees, and whose overarching objective is to ensure the widest possible exercise of fundamental rights and freedoms for refugees, it still falls short in certain material respects due to its failure to guarantee some key socioeconomic rights. These rights include the right of access to healthcare, the right of access to food, and the right of access to clean and potable water.

All these rights are highly significant for refugees. The right of access to healthcare, for instance, is important for refugees as in many cases; they are highly traumatised and might have been exposed to multiple health hazards during flight. In terms of the right to food, the *Jesuit Refugee Service* correctly observes that Refugees are frequently forced to flee without the basics of life, and that even where they are provided with a degree of protection in a country of asylum, they are frequently not permitted to cultivate their own food and are denied access to markets.[384]

Within such an environment, refugees must necessarily depend on the host country and the international community to provide the necessities of life which include, most fundamentally, food.[385] Without food, all the other aspects of refugee protection become almost meaningless.[386] This is why it is quite surprising, and indeed regrettable, that although the right to food is quintessential and primordial, it does not find explicit expression in the 1951 Convention.

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384 Jesuit Refugee Service, *Forced Home by Food Cuts*, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/8713014D0F97FF084925709200234F10-JRS-vaious-06Oct.pdf> (accessed 8 August 2011)

385 Ibid.

386 Ibid.

In terms of the right of access to clean and potable water, this is a right that is an essential determinant for the enjoyment of other rights such as health, food and housing.[387] The CESCR has emphasised that '[t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.'[388]

The omission of these rights under the 1951 Convention means that we need to look to broader international and regional human rights law in order to gauge the extent to which these rights are guaranteed for refugees on the international plane. The problem with that approach however is that the standard of treatment set by general international law in relation to foreign nationals generally and refugees in particular, remains unsettled. It would have been much better to explicitly guarantee these quintessential rights under the 1951 Convention, and define the standards of treatment by which they would be guaranteed for refugees.

3.8 Standards of treatment under the 1951 Convention

3.8.1 Introduction

This section examines the various standards of treatment accorded to refugees under the Convention. An examination of the convention shows that two criteria are adopted in determining the various standards of treatment. Firstly, the Convention ties the standard of treatment for refugees to their degree of attachment to the host State. Secondly, the Convention provides for different standards of treatment in respect of different rights. In the latter scenario, it seems the differential treatment is based on the nature of a specific right in issue.

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387 CESCR, *General Comment No.15*, E/C.12/2002/11, Para.1.

388 Ibid, para. 16(f).

3.8.2 Different standards according to different levels of attachment

The 1951 Convention links the extent to which refugees may enjoy various rights, to the degree of their attachment to the host State. Hathaway, classifies in this respect, the rights that refugees are guaranteed under the Convention according to four broad levels of attachment: (a) Rights of refugees physically present in the host State; (b) Rights of refugees lawfully present in the host State; (c) Rights of refugees lawfully staying in the host State; and (d) Rights of refugees with durable residence (or habitual residence) in the host State.[389] He explains that the 1951 Convention grants 'enhanced rights as the bond strengthens between the particular refugee and the State party in which he or she is present.' [390] He states that:

> While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum State. The most basic set of rights inheres as soon as a refugee comes under a State's *de jure* or *de facto* jurisdiction; a second set applies when he or she enters a State's territory; other rights inhere only when the refugee is lawfully within the State's territory; some when the refugee is lawfully staying there; and a few rights accrue only upon satisfaction of a durable residency requirement. Before any right can be claimed by a particular refugee, the nature of his or her attachment to the host State must therefore be defined.[391]

This stratification of guaranteed rights for refugees is considered to be justified notwithstanding the fact that the rights under the Convention are not dependent on the official declaration of refugee status, but rather on whether his or her *de facto* circumstances qualify him or her as a refugee.[392]The

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389 Hathaway (note 47 above) 278. See also Goodwin Gill (note 28 above) 307.
390 Hathaway (note 47 above) 154.
391 Ibid.
392 Hathaway (note 47 above) 158.

justification for the stratification lies in the fact that the rights under the 1951 Convention are reserved only for genuine convention refugees and not every person who seeks to be recognised as a refugee.[393] A balance therefore has to be maintained to ensure that whilst genuine refugees are not placed at a disadvantage by completely withholding all their convention rights pending status determination; the integrity of the refugee protection system should also be preserved by ensuring that only those who are genuine refugees actually enjoy full protection under the convention. As Carens states, it is important that:

> [i]n seeking to advance the interests of refugees and other needy people, we should be careful not to undermine the legitimacy of one of the few institutions that offer them any sort of protection and hope, however limited and inadequate it may be in many respects.[394]

Carens warns that there is greater likelihood that unguarded insistence on achieving an overly generous rights scheme for refugees and asylum seekers might in practice have the opposite outcome. Tuitt has observed, in this regard, that the modern asylum system is dogged by fraudulent economic migrants who manipulate the rules governing asylum by making bogus asylum claims.[395] If the scheme for refugee protection becomes greatly abused, the legitimacy of the whole refugee protection scheme might be undermined and States might become averse to hosting refugees. Thus the incremental scheme of rights guarantees, as outlined by Hathaway, helps to shield the refugee protection system from abuse by such fraudulent asylum applicants, who neither qualify as political or humanitarian refugees, and who simply seek to take their chances under refugee law. Such an incremental rights scheme helps to ensure that the whole system does not lose legitimacy by being over-generous to asylum seekers whose claims might eventually

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393 Ibid.

394 JH Carens, 'Refugees and the Limits of Obligation', *Public Affairs Quarterly*, (1992) Vol. 6, No. 1, 31, 41, 42.

395 P Tuitt, *False Images: Law's Construction of the Refugee* (1996) 70. See also Foster (note 20 above) 6.

turn out to be fraudulent or manifestly unfounded. As Mathew observes; if no proper mechanisms of checks and balances are adopted in this regard, 'the institution of asylum may be threatened by State policies...that are based on fear of abuse of the asylum system by so-called "economic migrants"'. [396]

Thus whilst the incremental rights scheme outlined by Hathaway has its limitations, in that genuine political refugees are denied immediate full guarantee of all convention rights pending the conclusion of status determination processes; the scheme is pragmatic and ensures that a proper balance is struck between the refugee's immediate protection needs and the host State's interests in regulating and controlling immigration.

The various categories of rights, as dependent on the refugee's degree of attachment to the host State, are outlined below.

3.8.2.1 Rights of refugees physically present in the host State

Under the convention's scheme, the guarantee of some rights is predicated merely upon the refugee's presence in the host State, irrespective of his or her legal situation in such a State.[397] The language used by the 1951 Convention in this respect is that the Convention entitles the specific rights mentioned to 'a refugee', to 'refugees within their territories', or to 'any refugee in their territory.' Instances include the right of *non-refoulement* under Article 33 of the Convention that applies to all refugees, as it simply uses the expression 'a refugee'; [398]the right to freedom of religion under Article 4 that applies to 'refugees within [the host State's territory]'; the right of access to

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396 P Mathew, 'Explanatory Note: Fifth Colloquium on Challenges in International Refugee Law – The Michigan Guidelines on the Right to Work', (2009) 31 *Michigan Journal of International Law*, 289, 290.

397 Goodwin-Gill (note 30 above) 307.

398 Ibid.

courts under Article 16(1); the right to education under Article 22; and the right to be issued with identity papers if not in possession of a valid travel document under Article 27.

Other than the right to education, most of the rights guaranteed at this level of attachment are civil and political rights. Socioeconomic rights are not mentioned. It is submitted however that a better conceptualized and effective scheme of refugee protection ought to include the guarantee of at least the minimum core content of socioeconomic rights requisite for survival such as access to housing, health, food, water and sanitation, among others.

Refugees who are merely physically present in the host State seem to be the most vulnerable category of refugees. A significant number of these are refugees referred to in Chapter I as 'those without papers.' They face the real risk of being treated as 'illegal immigrants' and thus being denied even the general standard of treatment accorded to foreign nationals in the host State as provided for under Article 7(1) of the 1951 Convention. It is therefore essential that the Convention should be explicit about, expand on the set of rights, and clarify on the standard of treatment to be accorded to refugees who are only physically present in the host State.

3.8.2.2 Rights of refugees lawfully present in the host State

A number of additional rights apply to refugees who are lawfully present in the host State. Goodwin-Gill explains that lawful presence implies admission of foreign nationals in accordance with the applicable immigration law, for a temporary purpose. He states that examples of foreign nationals lawfully present in the host State include students, visitors, or recipients of medical

attention.[399] Goodwin-Gill is unclear however on how this conception of immigrants lawfully present in the territory of the host State helps us to conceptualise who is a refugee 'lawfully present' in the host State. It is submitted that a refugee lawfully present in the host State is one who has formally presented himself or herself to the authorities of the host State, and who presence in the country is therefore acknowledged by the relevant authorities of the host State. In other words, these are asylum seekers whose refugee status is pending determination. The additional rights guaranteed to refugees falling under this category include the rights to self-employment under Article 18, freedom of movement under Article 26, and the right not to be expelled from the host State except for reasons of being a threat to national security or public order under Article 32 of the Convention.

3.8.2.3 Rights of refugees lawfully staying in the host State

Further rights, over and above those accorded to refugees who are physically present or lawfully present in the host State, are guaranteed for those refugees who are lawfully staying in the host State.[400] Most of the specific rights guaranteed under the Convention, including socioeconomic rights, apply to this category of refugees. The distinction between lawful presence and lawful residence has already been stated. It suffices to simply reiterate here, that these are refugees whose status has officially been determined by the host State.

The rights guaranteed for this group include freedom of association, under Article 15; the right to wage-earning employment under Article 17; the right to practise liberal professions under Article 19; the right to housing under Article

399 Ibid.

400 i.e those who have been granted political refugee status in accordance with relevant status determination procedures.

21; the right to public relief and assistance in times of emergency, in terms of Article 23; labour and social security rights in terms of Article 24; and the right to be issued with travel documents under Article 28 of the Convention.

3.8.2.4 Rights if refugees habitually resident in the host State

This is the last tier applying to those refugees whose stay in the host State 'is more than a stay of short duration.'[401] In other words, these are refugees who have essentially 'made a home' in the host State. It thus represents the highest degree of attachment of the refugee to the host State. However, only a few additional rights are reserved for this category of refugees.[402]These are the right to artistic and industrial (or intellectual) property under Article 14 of the Convention; the right to the same treatment as nationals in respect of access to justice that includes the right to receive legal assistance by the State, and to be exempted from *cautio judicatum solvi* (i.e to be exempted from the requirement of posting security for costs in court proceedings by reason of being a foreign national).

3.8.3 Standards of treatment and levels of attachment: A critique

The discussion above demonstrates that the degree of the refugee's attachment to the host State determines the extent to which various fundamental human rights, including socioeconomic rights, are guaranteed under the 1951 Convention. As the degree of attachment increases, the degree of guarantee gets correspondingly heightened.

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401 Goodwin-Gill (note 30 above) 310.

402 Hathaway (note 47 above) 190.

Given the legitimacy of differential treatment between citizens and foreign nationals, a structured scheme that draws a difference in the standards of treatment on the basis of the level of attachment to the host State, is generally essential. Such a scheme helps to isolate different categories of foreign nationals into those that are in immediate need of surrogate political community membership and protection; those that are merely in humanitarian need of temporary international assistance; and lastly those that do not merit any special treatment from the host State (purely voluntary and temporary foreign migrants).The last category constitutes those foreign nationals who neither have a well-founded fear of persecution, nor are victims of a dire life-threatening humanitarian situation. This category includes both those that are voluntarily and lawfully present or lawfully staying in the host country on the one hand; and those that are voluntarily but illegally present or staying in the host country on the other.

Whilst this approach seems justifiable, it is submitted that in the case of political refugees, there is no necessity for adopting the durable (or habitual) residence test as a degree of the refugee's attachment for purposes of guaranteeing certain socioeconomic rights. This is because once determined to be a political refugee through the relevant RSD process; the refugee ought to be granted substitute protection based on the community membership principle which entitles him or her to treatment that is as close as possible to national treatment.

In the situation of humanitarian refugees however, as argued in Chapter II, temporary protection should be the default position. At the same time though, it is recognised that it would be inconsistent with human dignity for such persons to be accorded lesser (temporary) protection indefinitely, merely on account of the fact that they are humanitarian refugees originating from burdened and not outlaw States. There must therefore be a scheme that ensures that the levels of guarantee of rights for humanitarian refugees get

heightened depending on the degree of attachment to the host State. In this regard, the structured approach that draws a difference between those physically present, lawfully present, lawfully staying and durably (or habitually) residing is important under this category of refugees. In this regard, it is submitted that where a humanitarian refugee's residence in the host country becomes long enough to qualify as durable residence for instance, it becomes imperative to accord him or her substitute protection in the host community based on the community membership principle. This should therefore, in turn, entitle him or her to the same high standard of guarantee as is accorded to political refugees at first instance. Substitute community membership in this instance arises from the length of lawful stay and degree of attachment, rather than as a result of having his/her membership of the State of nationality repudiated by a persecutory (outlaw) regime.

It is submitted that an effective and comprehensive legal framework for the protection of refugees must necessarily capture both the political and humanitarian aspects of refugeehood. A scheme that leaves out one aspect, such as the 1951 Convention scheme that does not capture humanitarian refugees, is deficient. However, such legal framework must not conflate the standards of treatment appropriate for these two categories. The principle of substitute membership of a political community should guide law and policy on whether a particular refugee should receive full substitute protection or temporary protection on a lesser standard.[403]

[403] In this connection, the 1969 OAU Convention definition, which appropriately captures both political and humanitarian refugees,[403]is also problematic in that it conflates the standards of treatment for humanitarian and political refugees. Whilst the Convention identifies, in separate provisions, political refugees and humanitarian refugees, it does not suggest any difference in the standards of treatment applicable to these two categories of refugees. Further, the 1969 Convention also fails to prescribe different levels of treatment depending on the nature of the refugee's attachment to the host State.

3.8.4 Different standards according to different rights

This sub-section deals with the standards of treatment that are applicable in respect of the different rights guaranteed under the 1951 Convention. Four standards of treatment have been identified in this respect. These are: (a) the same treatment as is accorded to nationals; (b) the most favourable treatment accorded to nationals of a foreign country in the same circumstances; (c) treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances; and (d) the same treatment as is accorded to aliens generally.[404]

The highest standard of treatment is treatment on the same footing as nationals of the host State. This standard applies to a range of rights including the right of access to elementary education;[405] the right of access to public relief and assistance; the right to social security (in the context of labour rights);[406] the right to the protection of literary, artistic, and scientific work;[407] and the right to protection of intellectual property including inventions, designs, trademarks. The import of this standard is rather plain: refugees must be treated in the same manner as nationals.

The second layer of treatment is the most favourable treatment accorded to nationals of a foreign country in the same circumstances as the refugees. This standard applies in respect of the right to belong to trade unions;[408] the right to belong to other non-profit organisations;[409] and the right to engage in wage-earning employment.[410] This standard essentially means that refugees should be entitled to the best treatment that the host State accords to foreign

404 See D Weissbrodt, *The Human Rights of Non-Citizens* (2008) 162.
405 Art. 22(1)
Art.23.
406 Art. Art.24.
407 Art.14.
408 Art. 15.
409 Art.15.
410 Art.17. See also Weissbrodt (note 404 above)

nationals. In many countries, permanently resident foreign nationals receive the most favourable treatment among foreign nationals in the host State.[411] It has been suggested that this standard can be interpreted to mean that refugees should be accorded treatment on the level of parity with permanent residents because both categories are essentially entitled to remain in the host State indefinitely, and have thereby essentially assumed community membership in the host country.[412]

This standard however is only reserved for a few rights under the Convention.[413] One notable thing in respect of this standard is that the provisions relating thereto have attracted the most reservations under the 1951 Convention,[414] thus casting some doubt on the level of international consensus on the essence, acceptability or legitimacy of the same. Be that as it may, this thesis argues that it is this standard that fits well into the theoretical justification for providing special treatment to political refugees as expounded in Chapter II.

The third stratum is the standard that enjoins States to ensure treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens (foreign nationals) generally in the same circumstances. This standard applies in respect of the right to property;[415] the right to practice

411 Mpedi et al (note 383 above).

412 Ibid.

413 Goodwin-Gill (note 30 above)…

414 Goodwin-Gill states that many States have 'emphasised that the reference to the most-favoured nation shall not be interpreted as entitleing refugees to the benefit of special or regional customs, or economic or political agreements.' These States include Angola, Burundi, Cape Verde, Madagascar and Uganda – Goodwin-Gill (note 33 above) Chap.8, fn. 19. He further states that 'other States have expressly rejected most-favoured-nation treatment, limiting their obligation to accord only that standard applicable to aliens generally.' These include Bahamas, Honduras, Ireland, Liechtenstein, Malawi, Mozambique, Switzerland, Zambia and Zimbabwe – Goodwin-Gill (note 30 above) Chap.8, fn. 20.

415 Art.13.

liberal professions;[416] the right to self-employment;[417] the right of access to housing[418] and the right to access to higher education.[419] This means that refugees should, in any event, not be accorded treatment that is less favourable than that accorded to other non-nationals generally, in the same circumstances. The use of the words 'treatment as favourable as possible' suggests that host States are encouraged, but not necessarily bound, to move beyond treatment that is accorded to foreign nationals generally in the same circumstances, and provide better treatment.

The lowest standard of treatment under the 1951 Convention is 'the same treatment as is accorded to aliens generally' in the host State.[420]This standard applies in respect of the right to freedom of movement and residence;[421] and the right to be exempt from reciprocity.[422]The UNHCR observes that whilst the 'expression "aliens generally" is not a well defined term…in the present context it seems to denote aliens who "could not claim the special treatment enjoyed by some foreigners under the condition of reciprocity" or by virtue of municipal laws instituting preferential treatment of certain groups of aliens.'[423] This is therefore the lowest standard of treatment that the 1951 Convention confers on refugees.

The difference between the third stratum standard described above, and the last (lowest) standard, i.e 'treatment as is accorded to aliens generally', lies in the fact that under the former, States are actively encouraged to ensure better treatment than that accorded to other foreign nationals generally; whilst under the latter, the Convention does not envisage any need for giving

416 Art.19.
417 Art.18.
418 Art.21.
419 Art.22(2). See also Weissbrodt (note 404 above)
420 Ibid, 161
421 Art.26.
422 Art.7.
423 See UNHCR (note 359 above)

refugees any form of priority in comparison with other foreign nationals in the host State.

Notwithstanding these specific Convention standards, Article 7(1) of the Convention lays down what might be termed the default (or general) standard of treatment for refugees. It provides that '[e]xcept where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.' Thus, the scheme of the Convention suggests that States parties are under a general obligation to accord treatment to refugees on the basis of parity with other foreign nationals lawfully staying in the host State.[424] The term 'aliens generally' as used here denotes those foreign nationals who cannot claim the special treatment enjoyed by some foreigners under the condition of reciprocity or by virtue of municipal laws instituting preferential treatment of certain groups of foreign nationals (such as permanent residents).[425]

This is particularly significant in respect of rights that are not specifically guaranteed under the 1951 Convention. It has been argued that the idea behind Article 7(1) is that it should apply to all fundamental rights and not merely those specified under the Convention. The purport of Article 7(1) thus seems to be that where, under an instrument such as the ICESCR, a right not covered by the 1951 Convention is guaranteed, then unless such specific instrument prescribes a special standard of treatment to be applicable to refugees, the host State would have discharged its obligations under the 1951 Convention by treating refugees on the same footing as other foreign nationals generally, who are not entitled to any form of preferential treatment.

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424 Goodwin-Gill states that '[t]he Convention…proposes, as a minimum standard, that refugees should receive at least that treatment which is accorded to aliens generally" – Goodwin-Gill (note 30 above) 298-299.

425 Ibid.

The default standard under Article 7(1) of the 1951 Convention is, however, problematic. An examination of the norms of international aliens law shows that according refugees the same treatment as is accorded to other foreign nationals generally, would not assure any meaningful protection.[426] Hathaway argues that this is because the primary responsibility to protect the interests of foreign nationals:

> lies with their State of nationality, which is expected to engage in diplomatic intervention to secure respect for the human rights of its citizens abroad. Because refugees are by definition persons whose country of nationality either cannot or will not protect them, traditional aliens law could be expected to provide them with few benefits. For this reason, an essential aspect of international refugee protection has always been to provide surrogate international protection.[427]

Thus Hathaway seems to advocate here, and appropriately so, treatment to be accorded to the political refugee that is constitutive of substitute community membership and protection. This type of protection, as shown above, entails or ought to entail the highest standard of treatment accorded to a foreign national in the host State.

In conclusion, the argument here is that the rights-contingent standards of treatment under the 1951 Convention need to be reformed. Instead of the general standard of treatment for political refugees being treatment that is accorded to other foreign nationals in the country generally as spelt out in Article 7(1) of the Convention; the appropriate general standard, consistent with the idea of surrogate community membership, ought to be the most favourable treatment accorded to a foreign national in the host State.

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426 Hathaway (note 47 above) 193.

427 Ibid.

3.9 Conclusion

This Chapter has explored a number of principal international human rights instruments, noting that all of them have significant relevance in advancing the socioeconomic rights of refugees. The general principle that emerges is that foreign nationals, including refugees are generally entitled to the same rights as citizens. Klaaren captures this postion well, stating that:

> To a large extent, the international human rights of non-citizens are the rights that are guaranteed to all persons by those instruments. Thus, foreign nationals get all (or almost all) the international human rights law rights that citizens get. This is so because international human rights law generally requires that citizens and non-citizens be treated equally. Deviations from equal treatment of non-citizens may, however, be permissible where a legitimate state objective is served and where the deviations are proportional to that objective. This equality norm is at the heart of international human rights law.[428]

Thus a number of rights, including rights of political participation are restricted to citizens, or their enjoyment by foreign nationals is highly limited. The enjoyment of economic rights is also generally limited for foreign nationals.

With specific reference to the socioeconomic rights of refugees, whilst the general international and regional human rights instruments also apply to refugees; the 1951 Convention is the principal instrument to look to when it comes to the guarantee of refugee rights in international law. Significantly, the Convention provides for various standards of treatment. An analysis of the Convention shows that the standards of treatment are highly structured; and although the *travaux preparatoires* for the Convention are rather sparse, it is evident that such complex structuralism is a reflection of the animated debates and compromises that the delegates to the Conference of Plenipotentiaries had to make on a matter as highly emotive as the hosting of

[428] Klaaren (note 8 above) 83.

refugees that impacts on immigration policy. States still jealously guard their sovereignty and the admission and hosting of foreign nationals, such as refugees, is one of the last bastions of the exercise of sovereignty. In this regard, the 1951 Convention has a two-pronged framework for determining the standards of treatment for refugees: one based on the degree of attachment to the host State, and the other on the nature of the right that is guaranteed.

In respect of the degree of attachment, the standard of treatment heightens as the level of attachment to the host State increases. This study argues that to a large extent, this approach is justifiable in order to preserve the integrity of the international refugee protection regime, shielding it from abuse by mere fortune-seekers. However, unlike the present structure that waits until a refugee is durably (habitually) resident in the host State before guaranteeing him or her the highest spectrum of socioeconomic rights, it is submitted that once a person is declared to be a recognised political refugee, based on the surrogate community membership principle, he or she should be accorded the full spectrum of socioeconomic rights at that stage.

With regard to the nature of the rights framework, it has been observed that the general standard of treatment is that refugees under the 1951 Convention will receive treatment that is similar to that of other foreign nationals generally; unless specifically provided otherwise. It is submitted however that this general principle under Article 7(1) of the Convention is inconsistent with the proposition of principle pursued in this study, which is that political refugees ought to be guaranteed rights on the basis of surrogate community membership in the host State. Based on that proposition, it is submitted that the appropriate general standard should rather be the most favourable treatment accorded to a foreign national.

CHAPTER IV

THE LEGAL GUARANTEE OF SOCIOECONOMIC RIGHTS FOR REFUGEES IN SOUTHERN AFRICAN STATES

4.1 Introduction

Refugeehood is a perennial problem in Southern Africa. In Chapter I, the study has identified refugees as one of the vulnerable groups in society; and pointed out that one of the fundamental challenges that they face in the host State is on how to realise their socioeconomic rights. This Chapter critically evaluates the extent to which domestic legal regimes in Southern Africa guarantee socioeconomic rights for refugees.

An examination of the legal regimes of Southern African States makes it clear that the significance of the refugee problem is formally recognised in the region. This is evident from the fact that all the Southern African States that have been surveyed in this study have adopted refugee-specific legislation.[429] Unlike most post-colonial pieces of legislation that were either a continuation of colonial laws or modelled along the lines of similar legislation in the former colonial powers,[430] the spring of refugee legislation in Southern Africa neither represents a continuation of such laws, nor is it modelled along similar legislation elsewhere. The adoption of these legislative measures therefore

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429 Botswana - Refugees (Recognition and Control) Act, 1968; Lesotho - Refugee Act 1983; Malawi, Refugee Act, 1989; Namibia - Namibia Refugees (Recognition and Control) Act, 1999; South Africa - Refugees Act 130 1998; Zambia - Refugee (Control) Act, 1970; and Zimbabwe - Refugee Act, 1983.

430 Munjeru has astitutely observed in this regard that 'in the African context, most legislation dates from the period of colonialism resulting in…laws that do not capture' specific values and contextualised needs of the people to whom it applies. See D Munjeru, 'Legislation and Practices: The Way Forward' in W Ndoro & G Pwiti, *Legal Frameworks for the Protection of Immovable Cultural Heritage in Africa* (2009) 1, available at www.iccrom.org/pdf/ICCROM_ICS05_LegalFrameworkAfrica_en.pdf (accessed 9 December 2011)

serves as an exemplification of the significance attached to the refugee problem in these States. It shows that the refugee-specific legislation was adopted out of specific need rather than by way of imposition by colonial powers.

Further, it is significant to observe that all these States have ratified the 1951 Convention[431] and, with the exception of Namibia,[432] they have also ratified the 1969 OAU Convention.[433] This is in addition to their general human rights obligations under various treaties, such as the ICESCR,[434] the Convention on the Rights of the Child (CRC)[435] and the African Charter on Human and Peoples' Rights (ACHPR), among others, as they relate to refugees.[436]

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431 The following is the status of ratifications/accessions of the 1951 Convention in respect of the Southern African countries under study: Botswana – 6 January 1969; Lesotho – 14 May 1981; Malawi – 10 December 1987; Namibia – 17 February 1995; South Africa – 12 January 1996; Swaziland – 14 February 2000; Tanzania – 12 May 1964; Zambia – 12 September 1969; and Zimbabwe – 25 August 1981. See UN, *Treaty Series*, Vol. 189, p.137 et seq.

432 See African Union, List of Countries Which Have Signed , Ratified/Acceded to the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, Namibia is yet to ratify/accede to this Convention. Document available on http://www.au.int/en/treaties/status (accessed on 9 December 2011).

433 The status of ratification/accession by the countries under study is as follows: Botswana – 26 February 1973; Lesotho – 18 November 1988; Malawi – 4 November 1987; Namibia – yet to ratify/accede; South Africa – 15 December 1995; Swaziland – 16 January 1989; Tanzania – 10 January 1975; Zambia – 30 July 1973; and Zimbabwe – 28 September 1985. See African Union, *List of Countries Which Have Signed , Ratified/Acceded to the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa,* available on http://www.au.int/en/treaties/status (accessed on 9 December 2011).

434 According to recent UN records, the following is the status of ratifications/accessions to the ICESCR in respect of the countries under study: Botswana – yet to ratify/accede; Lesotho – 9 September 1992; Malawi – 22 December 1993; Namibia – 28 November 1994; South Africa – signed on 3 October 1994 but is yet to ratify/accede; Swaziland – 26 March 2004; Tanzania – 11 June 1976; Zambia – 10 April 1984; and Zimbabwe – 13 May 1991 – See UN, Status of ratification: International Covenant on Economic, Social and Cultural Rights, available at http://www2.ohchr.org/english/law/cescr-ratify.htm (accessed 9 December 2011)

435 All the countries under study have ratified the Convention on the Rights of the Child. See United Nations, *Treaty Series,* Vol. 1577, p.3 et seq.

436 All the countries surveyed in this study have ratified the African Charter on Human and Peoples Rights of 1981 - African Union, *List of Countries Which Have Signed , Ratified/Acceded to the African Charter on Human and Peoples' Rights,* available on http://www.au.int/en/treaties/status (accessed on 9 December 2011).

This Chapter explores and critiques the various constitutional and statutory frameworks for the protection of socioeconomic rights in the various States in the region and how specifically these apply to, or impact on, refugee protection. The Chapter also explores the refugee status determination (RSD) schemes in the various States in the region; and highlights the interface between the RSD process and the legal guarantee of socioeconomic rights for refugees.

4.2 Constitutional frameworks for the protection of socioeconomic rights for refugees

All the countries surveyed in this study have adopted written constitutions. Observably, with the exception of Namibia, none of these constitutions explicitly deals with the issue of refugees. Even in the case of Namibia, the concept of asylum is only addressed in the non-binding 'Principles of State Policy' in Chapter 11 of the Constitution, thereby having minimal legal significance.[437] However, this general lack of specific provision for refugeehood notwithstanding, all of these constitutions guarantee human rights to varying extents. This triggers the general question of the applicability of the respective bills of rights to foreign nationals generally and refugees in particular. This issue is addressed in section 4.2.1 below.

It is also important to note that there is a great divergence in the manner in which these constitutions address socioeconomic rights. These divergences, as I shall argue below, speak directly to the impact that the nature of socioeconomic rights guarantees in a constitution can have on the actual enjoyment of these rights.

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437 Section 97 provides in this regard that 'The State shall, where it is reasonable to do so, grant asylum to persons who reasonably fear persecution on the ground of their political beliefs, race, religion or membership of a particular social group.'

4.2.1 Do the general constitutional (human rights) guarantees apply to refugees?

An analysis of the State constitutions explored in this study shows that they can, in this respect, be placed into two broad categories. First are constitutions that have a specific personal application clause (what is hereafter called a *ratione personae* application clause). The second category comprises those that have no *ratione personae* application clause.

4.2.1.1 Bills of rights with specific *ratione personae* application clauses

In respect of the constitutions with a *ratione personae* application clause, two preliminary observations can be made. Some State constitutions have striking similarities in the manner in which the relevant provisions are couched; whereas in other States, the provisions are uniquely formulated. The constitutions with striking similarities are those of Botswana, Lesotho and Zambia.[438] In addition to their clear linguistic semblance, another commonality among the *ratione personae* application provisions under these constitutions is that they all have two interrelated segments: the specific

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438 Section 3 of the Constitution of Botswana provides, in part, that 'every person in Botswana is entitled to the fundamental rights and freedoms of the individual…whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest'.
Section 4(1) of the Constitution of Lesotho provides, in part, that 'every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms' guaranteed in the Constitution.
Article 11 of the Constitution of Zambia provides, in part that: 'Every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual…whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part.'
By way of exception, a further common feature among these constitutions is that they limit the guarantee of political rights and the right of freedom of movement to 'citizens' only.

application segment and the non-discrimination segment. The specific application segment expresses the guarantee of the protected rights under the respective bills of rights as being for 'every person'. In other words, the rights guaranteed are expressed to be applicable to 'every person'. The non-discrimination segment on the other hand provides that the rights in the bill of rights are guaranteed on the basis of equality, without discrimination on such grounds as race, sex, religion or political opinion among others.

On the other hand, the constitutions with uniquely formulated *ratione personae* application clauses are those of Malawi, South Africa, Swaziland and Zimbabwe. In Malawi, the general *ratione personae* application clause is embodied in Section 12 of the Constitution that contains what are referred to as the 'Fundamental Principles' of the Constitution. Specifically, section 12(iv) provides that:

> The inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect fundamental human rights and afford the fullest protection to *the rights and views of all individuals, groups and minorities whether or not they are entitled to vote*.[439]

The language of recognition and protection of fundamental human rights under this section makes it clear that constitutional protections of human rights under the Malawian constitution must receive the widest application possible, and this extends, by necessary implication, to foreign nationals.[440] Consistent with these fundamental principles, courts in Malawi have adopted a broad approach in terms of the meaning of the words 'every person' or 'any person' as used in the bill of rights. In the case of *The Registered Trustees of*

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439 Emphasis supplied.

440 Section 12(iv) of the Constitution. This point was expressly made by Chombo J in the case of *Abdihaji & 67 Others Others v The Republic,* Criminal Appeal Case No. 74 of 2005 (LDR, unreported).

the Public Affairs Committee v Attorney General & Another (PAC Case)[441]Chipeta J held that:

> Any Person or group of persons [under the Constitution] cannot mean anything other than what it says and narrowing it to a special species of any person or group of persons violates the liberal and wide style of interpreting a Constitution.

Addressing the same point in relation to the application of the bill of rights to foreign nationals in Malawi, Mwaungulu J in *Okeke v Minister of Home Affairs and Another*,[442] in construing the meaning of the words 'any person' under section 15(2) of the Constitution, stated that 'any means any' and therefore does not exclude foreign nationals. Similarly, in *Peter Von Knipps v Attorney General*,[443] the court held that foreign nationals in Malawi are entitled to the procedural rights to fair and just administrative action in terms of section 43 of the Constitution as read with sections 41(2) and 41(3) that guarantee the rights of access to justice and effective judicial remedies respectively, and that '[t]he Constitution is generously and reasonably silent on the exclusion of aliens from enjoying those rights including recognition as a person before the law,' that are guaranteed in the bill of rights. The court also observed that the right to equality is included among the provisions under the Constitution that do not permit of any derogation, restriction or limitation.[444]

Chirwa has argued however, that when it comes to socioeconomic rights under the Malawian Constitution, particularly with regard to the positive

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441 Civil Cause No. 1861 of 2003 (HC, PR, unreported)

442 Civil Cause No. 73 of 1997, (PR) [2001] MWHC 36.

443 Miscellaneous Civil Cause No. 11 of 1998 (HC, PR unreported), per Ndovi J.

444 Section 44 (1)(g) of the Constitution. It is perhaps pertinent to mention here that whilst on its face the guarantee of the right to equality in terms of section 20 of the Malawian Constitution seems to have been elevated to the status that permits of no limitations or restrictions in terms of section 44(1) of the Constitution, the Malawi Supreme Court of Appeal held, in *Attorney General v Malawi Congress Party & Others*, MSCA Civ. App. No. 22 of 1996 (unreported), that this right admits of differential treatment of different categories of people with the ultimate aim of achieving substantive equality (in other words, the case represents an affirmation of affirmative action in Malawi).

obligations that these rights impose on the State, foreign nationals have no guarantees. He argues that:

> Although the socioeconomic rights provisions in the bill of rights do not explicitly limit the range of rights holders to citizens, some of the principles of national policy, which serve as an important interpretative aid, define these rights in relation to 'the people of Malawi' or 'citizens of Malawi'. For example, s.13 of the Constitution requires the state to 'actively promote the welfare and development of the people of Malawi'. In particular, s 13(d)(ii) obligates the state to provide a healthy living and working environment for the people of Malawi.' Furthermore, s. 13(f)(ii) requires the state to 'make primary education compulsory and free to all citizens of Malawi'. This suggests that the state's positive obligations, especially the obligation to provide, [are] intended for the benefit of Malawian citizens only.[445]

Chirwa's approach seems too narrow and is perhaps not completely in conformity with the broad and generous approach to constitutional interpretation that Malawian courts have adopted.[446] It is submitted that in making specific reference to the fullest protection of the rights of all individuals and groups; and irrespective of any person's or group's political status or eligibility to vote; section 12(iv) of the Constitution includes foreign nationals as the beneficiaries of these rights. Foreign nationals often stand at a disadvantage in terms of the guarantee of their human rights by host States by reason of their political status as they are often among 'those groups in society whose needs and wishes [political] officials have no apparent interest in attending.'[447]A broad and generous interpretation to section 12 to include foreign nationals is therefore crucial. Indeed, in *Abdihaji & 67 Others Others v The Republic*, Chombo J adopted such an approach in holding that Section

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445 DM Chirwa (2011), *Human Rights Under the Malawian Constitution*, (2011) 9.

446 See the PAC case (note 594 above). See also *Fred Nseula -v- Attorney General and Malawi Congress Party* M.S.C.A. Civil Appeal No. 32 of 1997 (SC, unreported)

447 *Andrews v Law Society of British Columbia*, (1989) 56 DLR (4th) 1, 32. This decision was cited with approval in the South African case of *Larbi-Odam v MEC for Education (North-West Province)* 1998(1) SA 745 (CC), at Para.19, per Mokgoro, J.

12 was pertinent in the interpretation and application of refugee rights in Malawi.

Further to Section 12(iv), it is also significant to note that Section 4 of the Constitution, an equal protection clause, provides that 'all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it.' Chirwa seems to premise his conclusion that socioeconomic rights under the Constitution apply to citizens only by reference to the expression 'the people of Malawi' as used in Section 13. It is noteworthy that the more specific term 'citizens of Malawi' is used only under one exception in that section, namely Section 13(f)(ii) that provides for compulsory and free primary education. Nowhere else in the constitutional principles, the principles of national policy, or the bill of rights is the term 'citizens' used to qualify the beneficiaries of human rights. This distinction shows that the legislature must have intended a substantive difference by using the specific words 'citizens of Malawi' only in one subsection, and using more generalised terms such as 'every person' in the bill of rights; or 'the people of Malawi' in the constitutional principles and the principles of national policy.[448]

Perhaps the vexing issue here is how to determine what the Constitution means by the term 'the people of Malawi'. Is this expression synonymous with 'citizens of Malawi' or it is broader? Since the Constitution does not explicitly provide an answer, we may answer this question by analysing a number of provisions. Section 12(1)(c) of the Constitution for instance, provides that 'the

[448] Kim for instance argues that the 'use of both words in the same provision can underscore their different meanings' - See Y Kim, *Statutory Interpretation: General Principles and Recent Trends: Congressional Research Service Report for Congress*, 2008, available at http://www.fas.org/sgp/crs/misc/97-589.pdf (accessed 9 December 2011), citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001) where the Federal Supreme Court held that the use by Congress 'of the permissive 'may' . . . contrasts with the legislators' use of a mandatory "shall" in the very same section' Similarly, in *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)), the US Federal Supreme Court held that 'where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'

authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice'. This Section mentions two important things for our purposes: first, it mentions 'the people of Malawi', and it then predicates the continued legitimacy of the exercise of State power on the exercise by those people, of 'informed democratic choice.' Democratic choice in turn is exercised in terms of Section 77(2)(a) of the Constitution that defines the persons that are entitled to vote. That Section provides that 'a person shall be qualified to be registered as a voter in a constituency if... at the date of the application for registration, that person is a citizen of Malawi or, if not a citizen, has been ordinarily resident in the Republic for seven years.' Thus clearly, at least non-citizens who are durably resident in the country are also entitled to vote. In terms of the constitutional principle in Section 12(1)(c), they must, therefore, be considered to be members of the community of 'the people of Malawi' as expressed in that Chapter. In this regard, it is not correct to use the expression 'the people of Malawi' as delimiting the guarantee of socioeconomic rights under the Constitution to citizens only.

Yet another dimension in addressing the issue of the application *ratione personae* of the bill of rights, and specifically socioeconomic rights, to foreign nationals under the Malawian Constitution is consideration of the country's international law obligations under the ICESCR. The CESCR has explicitly stated in its General Comment No. 20, in relation to the principle of non-discrimination, that Covenant rights apply to everyone including non-nationals such as refugees and asylum-seekers.[449]Courts in Malawi are obliged under Section 11(2)(c) of the Constitution, to have regard to applicable norms of public international law, of which the ICESCR is part.

[449] See also *General Comment No. 30* of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens (2004).

It is therefore submitted that under the Malawian Constitution, nationality should not be and is not a bar to the enjoyment of socioeconomic rights – inclusive of the positive obligations imposed by these rights. This study agrees with Chirwa, however, that there is a margin of discretion provided to developing States under Article 2(3) of the ICESCR, where such States are given some reprieve by being permitted to restrict, in appropriate cases, the enjoyment of economic rights guaranteed under the Covenant to their nationals only. It is submitted that, under section 11(2)(c) of the Malawian Constitution, the principle under Article 2(3) of the ICESCR can be invoked as an interpretative tool in excluding or restricting foreign nationals from the guarantee of economic rights under the Constitution. It must be emphasized however that the discretion under Article 2(3) of the ICESCR is narrow, applying only to economic rights and it does not extend to social rights.

Specifically in relation to refugees, the application *ratione personae* of the bill of rights was highlighted by the High Court in the case of *Aden Abdihaji & 67 Others Others v The Republic (the Aden Abdihaji case)*[450] where Chombo J held that the principle of dignity in Section 12(iv) of the Constitution guarantees refugees and asylum seekers the protection of substantive constitutional rights as well as, specifically, the right to equal protection under the Constitution. Significantly, in sharp contrast with the constitutions of most of the other countries surveyed in this study, the Malawian bill of rights does not have an explicit provision that restricts the guarantee of some specific rights, such as rights of political participation and freedom of movement to its citizens only.[451] Thus the State cannot simply exclude some people who are within the State's jurisdiction from the enjoyment of any of the rights guaranteed under the bill of rights without proper justification.[452] In this

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450 *Abdihaji* Case (note 440 above).

451 The other country that does not have such an exception is Swaziland.

452 Chirwa (note 445 above) 11.

regard, the general limitation clauses under sections 12(v), 44(2)[453] and 44(3) of the Constitution (read together) have to be sufficiently analysed and applied every time the State in Malawi seeks to exclude some persons or categories of persons from the enjoyment of the rights and freedoms guaranteed under the Constitution.[454]Given the emphasis placed on the right to equality in section 20 the Constitution, the justification for such limitation or restriction, that amounts to discrimination on the basis of nationality, must be compelling.

South Africa also has a unique ratione personae application clause. Section 7(1) of the South African Constitution provides that the bill of rights is a cornerstone of democracy, and that 'it *enshrines the rights of all people*' in the country.[455] The words 'all people' are sufficiently wide to apply to both citizens and foreign nationals.[456] In the case of *Khosa and Others v Minister*

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453 Section 44(2) in particular is the general limitation clause under the Constitution of Malawi. It provides that: 'Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.'

454 Section 12(v) provides that: 'As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society', Section 44(2) provides that: 'Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society', whilst section 44(3) states that: 'Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.'

455 Emphasis supplied.

456 Section 8 of the Constitution is the general application clause but it addresses other aspects of the application of the bill of rights that are not of direct relevance to this discussion . The Section provides as follows:
'8. Application.--(l) The Bill of Rights applies to all law, and binds the legislature, the executive, the .judiciary and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

of Social Development and Others (the Khosa case),[457] the Constitutional Court of South Africa (the Constitutional Court) expressly relied on section 7(1) of the Constitution as the primary basis for extending the applicability of bill of rights guarantees to foreign nationals in South Africa, stating that this was so 'given that the Constitution expressly provides [in section 7(1)] that the Bill of Rights enshrines the rights of "all people in our country."'[458] The Court therefore held that in the absence of any indication that the socioeconomic rights guarantees under section 27(1) of the South African Constitution were restricted to citizens as in other provisions of the Bill of Rights, the word 'everyone' in section 27(1) could not be construed as referring to citizens only.[459] In the premises, the Court held that permanently resident foreign nationals in South Africa are entitled to the socioeconomic rights guarantees under section 27 of the Constitution, on the same footing as citizens.

Just like in Malawi, courts in South Africa have adopted a broad, generous and purposive approach of constitutional interpretation.[460] South African courts have similarly linked the purposive and broad approach in matters of application *ratione personae* to the value of human dignity. Thus in *Minister of Home Affairs v Watchenuka,*[461] the Supreme Court of Appeal stated that:

> Human dignity has no nationality. It is inherent in all people — citizens and non-citizens alike — simply because they are human…[a]nd while that person

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(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

457 2004 (6) SA 505 (CC)

458 Ibid, para.47.

459 Ibid. See also M. Pieterse, 'Foreigners and socio-economic rights: Legal entitlements or wishful thinking?' 2000(63)*THRHR*, 51.

460 In *S v Mhlungu*, 1995 (3) SA 391 (CC), the Constitutional Court held that the Constitution 'must broadly, liberally and purposively be interpreted so as to avoid…"the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government.' The Court emphasised that the bill of rights has to receive 'a construction which is "most beneficial to the widest amplitude".

461 2004 (4) SA 326 (SCA)

> happens to be in this country— for whatever reason — it must be respected, and is protected, by section 10 of the Bill of Rights.[462]

Further, similar to most constitutions in the region, all the rights catalogued under the South African bill of rights are guaranteed for 'everyone', with the exception of political rights under section 19; the right to citizenship under section 20, the right to leave and to enter or re-enter the country under section 21, and the right to freedom of trade, occupation and profession under section 22. In *Lawyers for Human Rights v Minister of Home Affairs,*[463]a case dealing with the rights of detained foreigners, the Constitutional Court held that:

> Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why 'everyone' in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so. All people in this category are beneficiaries of section 12 and section 35(2).[464]

Similarly, in *Union for Refugee Women & Others v The Director: The Private Security Industry Regulatory Authority (Union of Refugee Women case)*,[465] the Constitutional Court made it plain that under the South African Constitution a foreigner who is inside the country 'is entitled to all the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens.'[466]

The conclusion therefore is drawn that the rights enshrined in the bill of rights, as a general rule, apply to citizens and foreign nationals alike, subject to (a) specific internal limitations, such as with regard to the rights to political participation rights, citizenship and the right to freely leave and enter or re-

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462 Ibid, para.25.

463 2004 (4) SA 125 (CC)

464 Ibid, para. 27 (per Yacoob J)

465 2007 (4) BCLR 339 (CC), per Kondile J, at para. 46.

466 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 27.

enter the Republic; and (b) general limitations in terms of section 36 of the Constitution.[467]

In Swaziland, a constitutional provision with similar effect is section 14(3), which provides that:

> A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.

It is submitted that adopting a broad and generous interpretative approach, the words 'a person' in this provision must be given a wide meaning to encompass all natural persons. This means that citizens as well as foreign nationals are guaranteed protection under the Swazi bill of rights and any limitations placed must be justified in terms of section 15(2) of the Constitution.

In Zimbabwe, the matter is addressed under section 11 of the Constitution. The relevant part of that section provides that '[all] persons in Zimbabwe are entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in' the bill of rights. A broad and generous interpretation of this provision similarly points to the conclusion that the general position is that foreign nationals in Zimbabwe are entitled to the rights guaranteed under the Constitution, subject to internal (i.e provision

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467 Section 36 of the South African Constitution is in the following terms: '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

specific) limitations, as well as limitations in terms of the general limitations clause.[468] In terms of the internal limitations, just like in several other countries surveyed,[469] Section 22(3)(d) of the Zimbabwean Constitution limits the guarantee of freedom of movement to citizens and permanent residents in the country.

4.2.1.2 Bills of rights with no specific *ratione personae* application clauses

As mentioned above, the second category comprises constitutions whose bills of rights do not have a specific clause on application *ratione personae*. These are the constitutions of Namibia and Tanzania. Under this category, we need to look at and analyse the specific provisions of the constitution in order to gauge whether the human rights guarantees therein can similarly be interpreted to apply to foreign nationals.

On analysis, the picture that emerges is similar to the rest of the constitutions that have already been examined. In Namibia for instance, although the Constitution does not have a specific general provision that states that the rights guaranteed under the Constitution are applicable to all persons or individuals within their jurisdictions; the scheme of the human rights guarantees, as gleaned from the tenor of the specific provisions in the bill of rights, shows that the protected rights equally apply, as a general rule, to all persons in Namibia.[470]

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468 Section 11of the Constitution of Zimbabwe recognises that permissible limitations in respect of the rights guaranteed in the Bill of Rights are those 'limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons.'

469 With the exception of Malawi and Swaziland that, as a general rule, guarantee all the rights under the Bill of Rights to all people in the country.

470 This can be seen from various constitutional provisions. E.g, Art. 7 on the right to personal liberty (the words used are: 'no persons shall be deprived'); Art. 8 on human dignity (the words used are: 'all persons'); Art. 9 on prohibition of slavery (the words used are: 'no persons'); Art. 10 on equality (the words used are: 'all persons'); Art.11

The question of the applicability of the Namibian bill of rights to foreign nationals was considered in the case of *African Personnel Services v Government of Namibia and Others.*[471] In that case, the Namibian High Court was called upon to interpret Article 21(1)(j) of the Constitution that provides that 'All persons shall have the right to practice any profession, or carry on any occupation, trade or business.' It was submitted on behalf of the State that, notwithstanding the apparent plain meaning of the words 'all persons' used in that section, the rights guaranteed therein were restricted to citizens of Namibia. Parker J rejected the State's argument, and held that:

> Concerning…the respondents' contention that the applicant has no *locus standi* to bring the application primarily on the basis that the right guaranteed by Article 21(1)(j) (hereinafter referred to as "the Article 21(1)(j) right") vests in natural persons who are Namibian citizens… I am of the view that the right which is the subject matter of the present application vests in all persons whether they are citizens or non-citizens of Namibia, but, of course nothing precludes Parliament from enacting legislation which restricts the enjoyment of the right to non-citizens who meet prescribed statutory requirements, e.g. work permits and permanent resident permits, allowing them to lawfully reside in Namibia in order to practise any profession, or carry on any occupation, trade or business.[472]

Parker J proceeded to state that:

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on arrest & detention (the words used are: 'no persons' and 'all persons'); Art. 12 on fair trial (the words used are: 'All persons'); Art.13 on privacy (the words used are: 'No persons'); Art.14 on family (the words used are: 'men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status); Art.16 on property (the words used are: 'all persons'); Art.18 on administrative justice (the words used are: 'persons'); Art.19 on culture (the words used are 'every person'); Art.20 on education (the words used are: 'all persons' and 'children'); and Art. 21 on general fundamental freedoms – including expression, conscience, assembly, association, and religion (the words used are: 'all persons').

471 Case No.: A 4/2008) [2008] NAHC 148 (1 December 2008)

472 Ibid.

> If it was the intention of the makers of the Constitution to restrict the enjoyment of all the rights in Article 21(1) to only natural persons who are Namibian citizens they would have made such of their intention known by clear words…The result is that I find that the respondents' position is indefensible and their submission baseless.[473]

A similar position obtains under the Constitution of Tanzania where, although there is no specific provision on the general application of the rights under the bill of rights, the rights under specific provisions are guaranteed for 'everyone' save in a few instances where they are limited to citizens. These exceptions include section 17(1) (the right to freely leave and enter the Republic), section 18(2) (the right to receive information on relevant social and global issues), section 21(1) (the right to participate in the affairs of governing the country), and section 22(2) (the right of equal opportunity to hold any position of employment or activity under the authority of the State).

4.2.1.3 Conclusion

What is evident from the foregoing, therefore, is that the rights guaranteed under Southern African Constitutions, as a general rule, apply to citizens and foreign nationals alike, without discrimination. It follows that refugees, as a vulnerable subcategory of foreign nationals, are also entitled, as a general rule, to the human rights guarantees under these constitutions. Courts in Malawi, South Africa and Namibia have explicitly affirmed this point.

4.3 The extent of socioeconomic rights guarantees

In this section, I proceed to explore the extent to which these constitutions guarantee socioeconomic rights. These constitutions can, in this regard, be classified into three categories. Those that have a comprehensive set of

[473] Ibid.

socioeconomic rights guarantees; those that have a bifurcated scheme where some socioeconomic rights are entrenched in the bill of rights and others contained in directive principles of State policy, and finally those that are conspicuously silent on the guarantee of socioeconomic rights.[474]

In his article on the protection of socioeconomic rights under the Malawian Constitution, Danwood Chirwa presents us with the interesting metaphor 'A Full Loaf is Better than Half' in classifying African constitutions generally into these three categories and urging for greater protection of socioeconomic rights under the Malawian Constitution.[475] Chirwa's argument is that whilst it is better to at least have a bifurcated scheme for the protection of socioeconomic rights where these are partially entrenched as enforceable rights in the bill of rights and partially provided for as non-binding principles of State policy,[476] rather than having none at all; it is even better to have a scheme where all these rights are comprehensively entrenched as enforceable rights in the bill of rights (hence the 'full loaf' of such rights).[477]

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474 DM Chirwa, 'A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi', *Journal of African Law*, 49, 2 (2005), 207–241, at 212.

475 Ibid, 207.

476 Thus entailing that only 'half of the loaf' of these rights as internationally recognised are guaranteed.

477 Chirwa states, in this regard, that: 'In general, these constitutions have followed three models of protecting these rights. The first model consists of constitutions that entrench these rights in the Bill of Rights as justiciable rights. Examples include the Constitutions of Benin (1990), Cape Verde (1990), Sao Tome and Principe (1990), Burkina Faso (1991), Gabon (1991), Madagascar (1992), Mali (1992), Niger (1992), Togo (1992), Seychelles (1993), and South Africa (1996). The second model comprises constitutions that recognize selected socio-economic rights in the Bill of Rights and the rest as directive principles of state policy in a separate chapter in the constitution. The Constitution of Malawi (1994) falls in this category, and so do the Constitutions of Namibia (1990) and Ghana (1992). The last model represents constitutions that do not contain socio-economic rights in the Bill of Rights but recognize them as directive principles of state policy only. With the exception of the Constitutions of Sierra Leone (1991) and Nigeria (1999), such constitutions are no longer common in Africa.' According to his classification, the Malawian Constitution only guarantees 'half a loaf" rather than a 'full loaf' of socioeconomic rights. See Chirwa (note 504 above) 207.

4.3.1 South Africa: a full loaf of guarantees

The South African Constitution is widely acclaimed, with good reason, for guaranteeing a comprehensive set of guarantees of socioeconomic rights in the bill of rights. The inclusion of socioeconomic rights as binding entitlements was expressly endorsed by the Constitutional Court in the *1st Certification case.*[478] Accordingly, a wide range of socioeconomic rights have been included in the South African Constitution in sections 22-31 of the Constitution.[479] The clearest affirmation that the justiciability of these rights under the South African Constitution is beyond question was expressed by the Constitutional Court in the *Grootboom case*[480]where Yacoob J stated that:

> While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment…Socioeconomic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled.[481]

Following these early landmark jurisprudential developments, the Constitutional Court has considered and pronounced its decisions on socioeconomic rights issues covering a range of subjects including

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478 *Certification of the Constitution of the Republic of South Africa (1st Certification Case)*, 1996 (4) SA 744 (CC)

479 These rights are: Freedom of trade, occupation and profession (section 22); labour rights (section 23); environmental rights (section 24); property (section 25); housing (section 26); access to health care, food, water and social security (section 27); children's rights (section 28); education (section 20); and language and culture (section 30).

480 *Government of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) *(Grootboom case)*.

481 Ibid, para.20.

emergency medical treatment,[482] access to adequate housing,[483] access to healthcare services,[484] access to social security,[485] access to sufficient water,[486] access to basic services including electricity,[487]and access to basic sanitation, among others.[488]

Sections 26(2) and 27(2) of the South African Constitution provides that the State should 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of these rights. Currie and De Waal state that the notion of progressive realisation does not entail that the State might as well simply 'postpone its obligations to some distant or unspecified time in the future.'[489] They state that the key to the justiciability of socioeconomic rights in the 1996 Constitution is the standard of reasonableness. However, the term reasonableness as used here regrettably does not yet have a precise definition. Even the *Grootboom case* in which the South African Constitutional Court first articulated this concept in the context of socioeconomic rights, did not provide such a precise definition.[490] As Currie and De Waal state, the Court instead emphasised that the enquiry of reasonableness must be conducted on a case-by-case basis; and that it is context-sensitive.[491] The Court in *Grootboom* stated that 'reasonableness must be determined on the facts of each case.'[492]

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482 *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC) *(Soobramoney case)*.

483 *Grootboom case* (note 480 above).

484 *Minister of Health and Others v Treatment Action Campaign and Others (TAC case)*, 2002 (5) SA 703.

485 Khosa *and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) *(Khosa case)*.

486 *Mazibuko and Others v City of Johannesburg and Others*, 2010 (4) SA 1 (CC).

487 *Joseph and Others v City of Johannesburg and Others*, 2010 (4) SA 55 (CC).

488 *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others*, 2010 (4) BCLR 312 (CC).

489 I Currie & J de Waal, *Bill of Rights Handbook* (Cape Town: Juta Publishing Company, 2005) 576. See also the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) para.13, www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html (accessed 26 May 2013)

490 Currie & De Waal, 578.

491 Ibid.

492 Grootboom case, (note 480 above) Para. 92.

The Court however provided some pointers that must necessarily be present if at all the measures adopted by the State are to satisfy the reasonableness test. Thus the Court in *Grootboom* stated that:

> Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

The South African understanding of socioeconomic rights does not encapsulate the notion of the minimum core content of these rights that has been discussed in previous Chapters. The Constitutional Court in the *Grootboom case*,[493] and in a series of subsequent decisions, including the *TAC case*[494]and the *Mazibuko case*,[495] has expressly rejected this notion, preferring instead to stick to the reasonableness approach. It can therefore safely be argued that South African courts have developed and crystallised their standard for measuring compliance by the State with the obligations

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493 Ibid, paras. 31 & 32.

494 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC); Paras. 34 & 38.

495 *Mazibuko and Others v City of Johannesburg and Others*, 2010 (4) SA 1 (CC), Para. 56.

imposed by socioeconomic rights on the notion of reasonableness.[496] A major problem though seems to be that South African courts have dwelt on defining the obligations of the State and not defining the content and contours of the rights.[497]

Thus the comprehensiveness of the socioeconomic rights guarantees under the South African bill of rights today is indeed beyond question and is borne out by this panoply of jurisprudence. Where debate still rages is on the adequacy of the approaches that courts have taken in adjudicating socioeconomic rights claims.

4.3.2 The 'Half Loaf' jurisdictions

A number of Southern African States have adopted constitutions in which, socioeconomic rights are guaranteed in the bill of rights, but only to a limited extent. These bills of rights are those of Lesotho, Malawi, Namibia, Swaziland, Tanzania and Zambia. These are now examined in turn.

4.3.2.1 Lesotho

The Constitution of Lesotho of 1993 contains an entrenched bill of rights. However, with the exception of the rights to family life in section 11 and property in section 17, the bill of rights only concerns itself with civil and political rights. Socioeconomic rights are consigned to a second-class status in Chapter III of the Constitution that deals with 'Principles of State Policy'. Section 25 of the Constitution explicitly states that these principles 'shall not

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496 RE Kapindu, 'The desperate left in desperation: A court in retreat - Nokotyana & Others vs Ekurhuleni Metropolitan Municipality & Others revisited', 2010 (3) *Constitutional Court Review*, 201, 201-204.

497 See for instance DI Bilchitz, 'Is the Constitutional Court wasting away the rights of the poor? Nokotyana V Ekurhuleni Metropolitan Municipality*',* (2010) No.127 *South African Law Journal*, 591-605, 594, 597.

be enforceable by any court.' The socioeconomic rights that have been relegated to this status under the Lesotho Constitution include protection of health (section 27); access to education (section 28); access to opportunities for work (section 29); just and favourable conditions of work (section 30); protection of workers' rights and interests (section 31); protection of children and young persons (section 32); rehabilitation, training and social resettlement of disabled persons (section 33); economic opportunities (section 34); participation in cultural activities (section 35); and protection of the environment (section 36).

However, significantly, like all the other constitutions in the region, the Lesotho constitution has guaranteed the right to life in section 5. Section 5(1) of the Constitution provides that 'every human being has an inherent right to life. No one shall be arbitrarily deprived of his life'. Pausing there, for reasons that will become evident shortly, it is appropriate to consider the question of the guarantee of socioeconomic rights under the Indian Constitution. In India, the Constitution has a similar scheme of rights guarantees to that of Lesotho, that is to say that socioeconomic rights provisions have been reduced to the status of non-binding directive principles of state policy. However there is a substantial corpus of jurisprudence generated by Indian courts where they have progressively and creatively interpreted the right to life guaranteed under section 21 of the Indian Constitution to include a number of core socioeconomic rights such as the rights to livelihood, food, health, and housing amongst others.[498]

With such an established corpus of jurisprudence from a major common law jurisdiction, one would have thought that given the opportunity to pronounce on similar issues, courts in other countries, such as Lesotho, would adopt a

[498] See *Olga Tellis v Bombay Municipality Corporation* [1985] 2 Supp SCR 51; ***People's Union for Civil Liberties v Union of India & Others*** (Supreme Court of India); accessible at www.righttofoodindia.org; *Mohini Jain v State of Karnataka* (1992) 3 SCC 666; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.

similar approach. This however has not been the case in Lesotho. In the case of *Khathang Tema Baitsokoli & Another v Maseru City Council & others*[499] an application was made for a declaratory order under the Constitution for the grant of permits to the applicants allowing them to trade as hawkers and street vendors along the Kingsway road in the metropolis of Maseru (the Capital City of Lesotho). The applicants argued that the refusal by city authorities to grant the permits, and the decision to remove them from the Kingsway road for purposes of trade, were unconstitutional and violated their right to life as guaranteed under section 5 of the Constitution. The court extensively considered the Indian jurisprudence that, as shown above, has read into the right to life a range of socioeconomic rights. The court proceeded to concede, in this regard, that '[t]he Indian approach to the right to life is indeed very progressive and deserves all laudation.'[500]However, notwithstanding its admiration of the Indian approach, the court decided against adopting it. Interestingly, the court expressly stated that it would rather opt for a conservative rather than a broad and generous approach. Thus the court concluded that:

> A fair reading of section 5 of our Lesotho Constitution gives one an irresistible impression that it is the "right to life" of the human being and its biological existence as a living organism that is being protected by the Constitution rather than its wellbeing, happiness or welfare. The Court comes to this somewhat restrictive interpretation because under section 5, what may be abridged under subsections 2 (a) (b) (c) and (d) is not the livelihood but the deprivation of human life itself e.g. through act of war, lawful execution (i.e. hanging) or self defence.[501]

The court took the firm approach that civil and political rights under the Constitution of Lesotho cannot be creatively interpreted to give effect to

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499 Const/C/1/2004 (unreported)

500 Ibid, para.30.

501 Ibid, para.15.

socioeconomic rights. The Court stressed that '[i]n…Lesotho…socio-economic and cultural rights are not justiciable.'[502]

The Lesotho approach brings to the fore the fact that the bifurcation of the guarantee of socioeconomic rights into entrenched rights in the bill of rights on the one hand, and non-binding principles of state policy on the other, does have a direct practical significance in the implementation and enforcement of socioeconomic rights, albeit in a negative sense. From the interpretative approach adopted in Lesotho, it is clear that the country is far from guaranteeing a comprehensive set of socioeconomic rights for its people. *Afortiori*, this bodes very negatively for refugees.

4.3.2.2 Malawi

The Malawian Constitution also bifurcates the inclusion of socioeconomic rights into entrenched rights on the one hand and directive principles of State policy on the other. Thus, whilst rights such as family life, education, culture and language, property, economic activity, development and fair and safe labour practices are clearly and separately guaranteed as entrenched justiciable rights under the bill of rights; others such as the rights to health, food and nutrition, and environmental rights are only included as non-binding directive principles of national policy.[503],

However, it is submitted that the socioeconomic rights provisions under the Malawian Constitution, whilst perhaps not as comprehensive and clear as those of South Africa, are still more progressive than other constitutions in the region. It is submitted that with a more innovative and robust approach to the interpretation of these rights, the bifurcation in the inclusion of socioeconomic

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502 Ibid, para.26.

503 Section 13 of the Constitution; C Mbazira, 'Bolstering the Protection of Economic, Social and Cultural Rights Under the Malawian Constitution' (2007) Vol. 1 (2) *Malawi Law Journal*, 220, 224.

rights provisions should have a minimal effect in the judicial enforcement of socioeconomic rights in Malawi. In particular, section 30 of the Constitution is of great significance in the scheme for the protection of socioeconomic rights as 'it provides an avenue for protecting many socio-economic rights not expressly recognized in the Malawian Constitution.'[504] Section 30(1) provides that:

> All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.

Further, section 30(2) states that:

> The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.

In addition, section 30(4) provides that: 'The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.'

Considering that Malawian courts have adopted a broad and generous approach to the interpretation of rights protected under the Constitution,[505] and that section 30(2) of the Constitution makes provision for 'access to basic resources, education, health services, food, shelter, employment and infrastructure,' a purposive and broad interpretation of this provision would ensure a significant measure of protection of these rights. This is more so when section 30 supplements other socioeconomic rights specifically provided for such as education, property, economic activity, work and the free

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504 Chirwa (note 474 above).

505 *Attorney General v Nseula & Another* (The *Nseula case*) MSCA Civ. App. No. 18 of 1996 (unreported)

pursuit of a livelihood, among others. However, the potential of this wide ranging right is yet to be exploited[506] as Malawian courts are yet to pronounce on the content of this right.

4.3.2.3 Namibia

The Namibian Constitution guarantees only a few socioeconomic rights in its bill of rights; and relegates the rest to non-binding principles of state policy.[507] John Nakuta takes the view that 'apparently, the drafters of the Constitution [of Namibia] bought into the idea that ESC rights were not true rights and that they related instead to goals, policies and programmes.'[508]The socioeconomic rights that are expressly guaranteed under the Namibian bill of rights are family rights (article 14); property (article 16); culture (article 19) and education (article 20). The Principles of State Policy are found in Chapter 11 of the Constitution. The rights included under the non-binding principles of state policy include rights relating to fair labour practices (article 95 (a)-(d); (i)); reasonable access to public facilities and services (article 95(e)); old age entitlement to receive a regular pension adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities (article 95(f)); social security for the unemployed, the incapacitated, the indigent and the disadvantaged (article 95(g)); legal aid (article 95(h)); nutrition (article 95(j)); and preservation of the natural environment (article 95(l)).

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506 Chirwa (note 474 above) 225. See also S Gloppen & FE Kanyongolo, 'Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law', (2007) 5 *International Journal of Constitutional Law*, 258,265

507 Article 101 of the Namibian Constitution defines the character of the Principles of State Policy in Chapter 11, stating that: 'The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.'

508 J Nakuta, *The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organiz*ations, https//www.kas.de/upload/ auslandshomepages/namibia/.../nakuta.pdf (accessed 26 May 2013)

However, the Namibian Constitution has a striking unique feature that can be creatively used to directly read international obligations of the State into it binding domestic socioeconomic rights obligations. Article 144 of the Namibian Constitution provides that:

> Unless otherwise provided for by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Thus in Namibia, once a treaty has been ratified or acceded to by the State; the presumption is that it forms part of the local law.[509] The presumption can only be rebutted by showing that the Constitution or specific legislation has provided that the treaty provisions in issue be excluded from national law. Whilst an argument might perhaps be made that the inclusion of socioeconomic rights in the principles of state policy means that these rights should not be inferred from treaty provisions as binding on Namibian courts; it is submitted that a generous interpretation would favour the guarantee of these rights in terms of article 144; and should only be read as excluding these rights in instances where either the Constitution or legislation has specifically and expressly excluded the application of particular treaty provisions.

It is argued that since Namibia has ratified treaties that guarantee socioeconomic rights; including the ICESCR, the CRC, the 1951 Convention, and the ACHPR, among others; unless there be a law specifically excluding these from being read as part of national law; Namibian courts are bound to

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509 This is referred to as monism under international law. See F Viljoen, *International human rights law in Africa*, (2007) 22. Dausab states that 'monists…perceive that these two legal orders [the international and the domestic] are inextricably linked, and that international law becomes part of national law upon ratification.' - *Y Dausab*, 'International law vis-à-vis municipal law: An appraisal of Article 144 of the Namibian Constitution from a human rights perspective', in A Bösl, et al (eds.) *Constitutional democracy in Namibia A critical analysis after two decades* (2010) 262.

accept them as part of binding domestic law. In the result, it is submitted that it is at least plausible to argue that the full range of socioeconomic rights guaranteed under the ICESCR forms part of Namibian law and is binding in terms of article 144 of the Constitution. This interpretation is supported by available jurisprudence. In *Kauesa v Minister of Home Affairs*[510] the High Court of Namibia considering the applicability of the African Charter on Human and Peoples' Rights in Namibia, stated that:

> The Namibian Government has, as far as can be established, formally recognized the African Charter in accordance with art 143 read with art 63(2)(d) of the Namibian Constitution. The provisions of the Charter have therefore become binding on Namibia and form part of the law of Namibia in accordance with art 143, read with art 144 of the Namibian Constitution.

This position was confirmed by the Supreme Court of Namibia in the case of *Government of the Republic of Namibia v Mwilima*[511] where Strydom, CJ, delivering judgment on behalf of the Court, after considering that Namibia had ratified the ICCPR, categorically stated that: ''[i]t is…clear that the International Covenant on Civil and Political Rights is binding upon the State and forms part of the law of Namibia by virtue of Article 144 of the Constitution'

However, the position with regard to socioeconomic rights is still not clear as Namibian courts are yet to specifically consider the position of treaty obligations in respect of these rights. In particular, courts are yet to specifically position the ICESCR in relation to article 144 of the Namibian Constitution. The reticence on the part of lawyers in Namibia to bring cases in the area of socioeconomic rights for adjudication before the courts on the basis of article 144 of the Constitution is concerning. It could perhaps be attributed to the perception that since a number of these rights are already

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510 1995(1) SA 51 (per O'Linn J)

511 (2002) AHRLR 127.

provided for in the principles of state policy, then they must necessarily be non-justiciable; and that bringing such cases before the courts would be an otiose exercise with no prospects of success. The analysis here however demonstrates that there remains potential for reading the ICESCR as part of Namibian law and using section 144 of the Constitution as a springboard for adjudicating and advancing socioeconomic rights in the country.

4.3.2.4 Swaziland, Tanzania and Zambia

Swaziland, Tanzania and Zambia also fall into the 'half loaf' category in the guarantee of socioeconomic rights. The provision of socioeconomic rights in these countries finds expression in the bill of rights to a very minimal extent; but largely so in non-binding principles of state policy.[512]

The Swazi bill of rights guarantees the rights to property (section 19) and family life (section 27). The remainder of the socioeconomic rights are provided for in the non-binding principles of state policy in Chapter 5 of the Constitution. A range of economic rights are provided for in section 59(2) of the Constitution under the heading 'Economic Objectives'. These include fair remuneration for productivity; and development, among others. Social rights, under the heading 'Social Objectives', are provided for in section 60 of the Constitution. These include social security for vulnerable groups (section 60(5); education and provision of basic health care services (section 60(8)), among others.

Similarly, under the Constitution of Tanzania, provisions on socioeconomic rights are split between entrenched rights in the bill of rights (Part III of the Constitution); and Fundamental Objectives and Directive Principles of State

[512] The three countries are listed together here because the socioeconomic rights guaranteed under their constitutions are very minimal in comparison with those under the Malawian and Namibian constitutions; and there has been no specific socioeconomic rights jurisprudence worth exploring as if the case with Lesotho.

Policy (Part II of the Constitution). As with all other constitutions examined in this study that contain similar principles, these objectives and principles of State policy are non-binding.[513] Among the entrenched socioeconomic rights are the right to work, with concomitant rights relating to the conditions and terms of work such as fair and just remuneration (articles 22 & 23); and the right to property (article 24). It can perhaps also be argued that the right to housing is guaranteed in a limited way under article 16(1) of the Constitution. The relevant part of that section provides that '[e]very person is entitled to… respect and protection of his residence.' It is submitted that, at the very least, this guarantee connotes the negative duty of the State not to interfere with the right to housing. The guarantee also entails that the State is under a positive obligation to protect a person's residence from undue interference by third parties.[514] It would appear however that this provision, by and of itself, cannot be interpreted to imply the positive duty to fulfil in respect of this right. The Tanzanian Constitution also guarantees the right to life in article 14 that, as earlier demonstrated, has been widely interpreted in other jurisdictions, to imply a wide range of socioeconomic rights that are essential for a person's livelihood. The rights that only find expression in the non-binding directive principles of State policy include the rights to education; social security for some vulnerable groups such as the elderly and people with disabilities; and the pursuit of a livelihood (article 11).

The Constitution of Zambia only guarantees the right to property in the bill of rights (article 16). Under the non-binding principles of state policy;[515]the State is enjoined to endeavour, among other things, to create conditions under

513 Art.7(2) of the Constitution of Tanzania provides that 'The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter.'

514 See *SERAC case* (note 347 above)

515 Article 111 of the Zambian Constitution provides that "The Directive Principles of State Policy set out in this Part shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court, tribunal or administrative institution or entity."

which all citizens are able to secure adequate means of livelihood and opportunity to obtain employment (article112(c)); to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities (article 112(d)); to provide equal and adequate educational opportunities in all fields and at all levels for all (article 112(e)); and to provide to persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable article 112(f));

Unlike in Lesotho, it would appear that courts in Swaziland, Tanzania and Zambia are yet to be seized of claims based on socioeconomic rights. Thus it is unclear whether they would adopt Lesotho's restrictive approach or the Indian broad and generous approach in determining such claims. It is hoped that given the opportunity, courts would adopt the Indian approach.

The general human rights protection systems in these three countries also differ from Namibia in a significant way in that whilst Namibia has adopted a monist approach to international law, Swaziland, Tanzania and Zambia, by contrast, have adopted a dualist approach. Under this approach, binding international law treaties do not automatically form part of domestic law unless specifically domesticated through legislation by way of incorporation or transformation.

The result is that the constitutional guarantee of socioeconomic rights in Swaziland, Tanzania and Zambia is generally weaker.

4.3.2.5 An empty plate of socioeconomic rights: Botswana and Zimbabwe

The third category in the schemes for the guarantee of socioeconomic rights in Southern Africa comprises those constitutions that I have classified as having an empty plate of socioeconomic rights guarantees. In this study, the constitutions identified in this regard are those of Botswana and Zimbabwe. These neither guarantee substantive socioeconomic rights in their bills of rights, nor provide for them in principles of State policy. The only socioeconomic right that finds expression under these constitutions is the right to property.[516] The inclusion of the right to property in virtually all the constitutions surveyed is quite interesting given that, as discussed in Chapter III, the recognition of the right has generated a lot of controversy on the international plane. As we have seen in that Chapter, the right is not generally recognised as a fundamental human right in international human rights law.[517]

The right is perhaps less controversial for States to guarantee because it essentially imposes negative obligations on the State against arbitrary deprivation, or deprivation without compensation, but does not impose resource-demanding positive duties of fulfilment on the State. Thus, notwithstanding that the constitutions of Zimbabwe and Botswana both guarantee the right to property, considering such special aspects of the content of the right, it is submitted that we can safely conclude that essentially, the intention of the legislature in carving out these bills of rights

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516 In Zimbabwe, the right to property, expressed in the form of the right not to be arbitrarily deprived of property, is guaranteed in section 16 of the Constitution. In Botswana, the same is provided for in section 8 of the Constitution.

517 Krause & Alfredsson point out that 'the right to property is controversial among the internationally protected human rights, and its place in the International Bill of Rights has not been seen as self-evident.' See Krause & Alfredsson (note 355 above).

was, in principle, to exclude altogether the guarantee of socioeconomic rights from their province.[518]

The question remains whether it is still possible for courts in Zimbabwe and Botswana to deal with these rights through a generous interpretation of civil and political rights such as the right to life. It would appear that this possibility is real. It appears that this will depend on the interpretative approach adopted by the courts. Courts in Botswana and Zimbabwe, upon being seized with socioeconomic rights claims, have the option of taking a conservative approach, as has been the case in Lesotho; or the broad and liberal approach as in India. In the absence of actual challenges having been brought before the courts in Botswana and Zimbabwe; it remains at this stage a matter of conjecture as to the approach that courts in the two countries are likely to adopt between these two options.

4.4 Specific socioeconomic rights guarantees for refugees: the legal framework

So far, it has been demonstrated that bills of rights in Southern Africa apply to foreign nationals, including refugees, as a general rule. It has also been shown that in various ways, socioeconomic rights are guaranteed in a number of constitutions; albeit with different degrees of emphasis and comprehensiveness. This section proceeds to examine the specific socioeconomic rights guarantees for refugees in the respective States. South Africa is examined first; because it is at the moment the foremost refugee receiving country in the region.[519]

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518 The absence of socioeconomic rights guarantees under the Constitution of Zimbabwe was expressly acknowledged by the Zimbabwean Government in its *Combined 7th, 8th, 9th & 10th Period Reports to the African Commission on Human and Peoples' Rights*, 2006, where it states that 'The Constitution of Zimbabwe does not specifically enshrine social, economic and cultural rights.' p.xlviii.

519 See UNHCR (note 359 above)

4.4.1 The Guarantee of socioeconomic rights for refugees in South Africa: The legal framework

As discussed earlier, the South African bill of rights is silent on the guarantee of refugee rights. However, it has also been demonstrated that the bill of rights applies to foreign nationals generally, including refugees, and that this application extends to the area of socioeconomic rights. The question that arises is: to what extent are socioeconomic rights guaranteed for refugees in South Africa? To answer this question, we have to consider the bill of rights, legislation and international law obligations.

The framework legislation in the area of refugee law in South Africa is the Refugees Act 130 of 1998.[520] The major aims of the Act are well summarised in the Long Title to the Act that states, in part, that the Act was passed in order:

> To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith**.**

This study focuses on how the Act provides 'for the rights…flowing from such [refugee] status'. The Act defines a refugee in section 3 of the Act and, in this regard, adopts verbatim the definitions adopted under the 1951 convention and the 1969 OAU convention respectively. No distinction is drawn between refugees falling under the 1951 Convention and those under the 1969 OAU Convention, in terms of the standards of treatment. The consequence is that the Act conflates the humanitarian and political conceptions of refugeehood. The rights and obligations of a refugee are provided for under Chapter 5 of the Act. Of crucial importance is section 27(b) of the Act that provides that 'a

[520] The Act came into force on 1 April, 2000.

refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution [the bill of rights] and the right to remain in the Republic in accordance with the provisions of this Act.' This section clearly suggests that refugees are entitled to the full range of socioeconomic rights guaranteed under the Constitution, with the exception of those rights that are guaranteed for citizens only.

Over and above the general guarantees of refugee rights in section 27(b), the Act also specifically guarantees certain rights. These guarantees are contained in section 27(f) that provides that a refugee 'is entitled to seek employment', and section 27(g) that provides that a refugee 'is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.' From this, one can conclude that the South African protection regime for the rights of refugees is very broad and generous. It is notable that no distinction is drawn in terms of the standards of treatment for humanitarian and political refugees. The lack of distinction in the standards of treatment is however less problematic in the case of South Africa than with other Southern African countries because rights for both categories are guaranteed at a sufficiently high level in comparison with other foreign nationals generally.

However, whilst the fact that the legislative guarantee for refugee rights is broad and generous is well settled; a number of court cases have shown that the implementation of the rights in some instances raises a number of critical issues for consideration. The study now explores the approach that South African courts have taken in respect of some socioeconomic rights as they relate to refugees.

4.4.1.1 The right to work

The right to work is vital for refugees. Through their engagement in productive work, they can have a renewed sense of meaning and purpose for life after what are frequently traumatic displacing circumstances that forcibly uproot them from, or prevent them from returning to, their home countries.

It has been observed however that, at the same time, the right to work 'seems to be one of the rights that have received the least judicial attention world wide'.[521] The right, that includes wage earning employment, self-employment and professional practice, is guaranteed both under the 1951 Convention in articles 17, 18 and 19 of the Convention respectively; and the ICESCR under article 6. The 1951 Convention is of particular significance here since South Africa is a party thereto. The question becomes: Does the domestic law in South Africa provide for this right – and specifically so with regard to refugees? As we have seen, the Refugees Act, save for a few rights in sections 27(f) and 27(g), does not contain specific socioeconomic rights guarantees in its text. What it does is to make a general reference to the full protection of the rights set out in the bill of rights with regard to refugees.[522]

The right to work is one of those rights that are guaranteed, in part, under the Refugees Act. Section 27(f) of the Act entitles refugees 'to seek employment' in South Africa. No distinction is made under the Act between wage-earning employment and self-employment. Thus the right guaranteed under section 27(f) of the Act in this respect extends to both wage-earning and self-employment, and is in this respect consistent with articles 17 and 18 of the 1951 Convention.

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521 G Mundlak, 'The Right to Work – The Value of Work' in D Barak-Erez & AM Gross, *Exploring Social Rights: Between Theory and Practice*, (2011) 341.

522 S.27(b)

An important case in which the issue of the right to work for refugees in South Africa was raised is *Union for Refugee Women & Others v The Director: The Private Security Industry Regulatory Authority (Union of Refugee Women case).* [523] The case is seminal under South African refugee law as it dealt with the interplay between national law and international law in terms of the standards of treatment for refugees. The applicants argued, among other things, that the exclusion of refugees from engaging in work in the private security industry was unfairly discriminatory and therefore unconstitutional. The Constitutional Court dismissed the application. The court held that the activity in issue, the provision of private security services, did not fall within a sphere of activity protected by a constitutional right available to refugees and other foreigners.[524] The Court stated in this regard that whilst 'the Refugees Act guarantees the applicants the right to seek employment', the right to 'the *choice* of vocation…is reserved only for citizens and permanent residents.'[525]

This case represents one of the exceptions to the general position under South African law, which is that refugees are entitled to full legal protection, including the guarantee of the rights provided for in the bill of rights. Refugees in this case were denied the right to work in a specific industry based on general security considerations. A thorny issue that the court had to deal with was how to justify why permanent residents were allowed to operate in the private security industry under the Private Security Industry Regulation Act 56 of 2001, whilst refugees were not allowed, notwithstanding the guarantee of the right to seek employment for refugees under section 27 of the Refugees Act. The Applicants relied on Article 17(1) of the 1951 Convention. They argued that since the standard of treatment for refugees under Article 17(1) of the 1951 Convention was the 'most favourable treatment accorded to nationals of a foreign country', refugees had to be accorded rights on the

523 2007 (4) BCLR 339 (CC)
524 Ibid, para. 54
525 Ibid.

same footing as permanent residents since the latter are the category of foreign nationals thet are accorded the most favourable treatment.

The Court rejected this argument, stating that regard should also be had to the expression 'in the same circumstances' that qualified the compass of Article 17(1). In terms of Article 6 of the 1951 Convention, the term 'in the same circumstances' means 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"

Construing Article 17(1) in the light of Article 6 of the 1951 Convention, the court concluded that refugees were not foreign nationals 'in the same circumstances' as permanent residents 'for the simple reason that they have yet to meet the requirements for permanent residence'.[526] In this regard, the Court noted that section 27(d) of the Immigration Act 2002 as read with section 27(c) of the Refugees Act provided an avenue for refugees to acquire permanent residence status in South Africa, and that in order to acquire such status, primarily a refugee should have been continuously resident in South Africa for five years after he/she was granted asylum.[527]

In their minority judgment however, Mokgoro and O'Regan JJ, emphasised the need, in addressing the issues, to have:

> some understanding of the predicament in which refugees generally find themselves. Refugees have had to flee their homes, and leave their livelihoods and often their families and possessions either because of a well-founded fear of persecution on the grounds of their religion, nationality, race or political opinion

526 Ibid, para. 65 (Per Kondile, AJ).
527 Ibid, para.50.

> or because public order in their home countries has been so disrupted by war or other events that they can no longer remain there. Often refugees will have left their homes in haste and find themselves precariously in our country without family or friends, and without any resources to sustain themselves.[528]

In this regard, they emphasised that:

> One of the most important obligations of a state in relation to refugees relates to the refugees' right to work. This is of particular importance in South Africa as no form of grant or social assistance is available to refugees and a refugee will generally have no other way of providing for the basic necessities of life unless he or she is able to find work.[529]

Mokgoro and O'Regan JJ concluded that the exclusion of refugees under section 23(1) of the Security Act, notwithstanding their vulnerable status, amounted to unfair discrimination in terms of section 9(3) of the Constitution.

In his separate opinion, Sachs J emphasised that when entertaining entitlement claims from refugees, relevant authorities should keep in mind that:

> [t]hey are responding to claims made under international and domestic law, and their discretion is bound by the need to take account of corresponding legal obligations. These obligations strongly favour acknowledging the right of refugees to seek employment in all spheres of economic activity. Only clear and specific legislatively required reasons would authorise any avenues being closed to them. In this regard the mere fact that they are non-nationals, which is built into their status as refugees, could not on its own render it fair to keep them out.

Sachs J concluded that the exclusion of refugees from the scheme of section 23(1)(a) of the Security Act was justified on objective grounds, and he agreed with the majority decision. He pointed out however that he could have been

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528 Ibid, para. 101

529 Ibid, para 107

inclined to agree with the minority decision of Mokgoro and O'Regan JJ, 'if there were no escape from the peremptory terms of section 23(1)'. He however agreed with Kondile AJ, that section 23(6) that granted the Minister discretion to grant exemptions from this restriction in appropriate cases was an escape route.

It is submitted that if one is to adopt a positivistic approach, the majority decision would represent the correct approach. Given the fact that refugees in South Africa are not automatically granted the right of indefinite residence upon the grant of refugee status,[530]and the fact that requirements have been stipulated under the Immigration Act in order for a refugee to acquire permanent residency; a reading of Article 6 of the 1951 Convention shows that refugees and permanent residents are not foreign nationals 'in the same circumstances'. Article 6 of the Convention makes it clear that if 'requirements as to length and conditions of sojourn or residence' must be satisfied as a pre-condition for the guarantee of the rights in issue, then a refugee will only be considered to be in the same circumstances with a foreign national in the most favoured category if those conditions have been satisfied. Clearly under the South African refugee law regime, viewed through a positivist's prism, a refugee is required to satisfy certain conditions relating to sojourn or residence before he/she can be admitted to permanent residence status and the rights appertaining thereto.

Normatively though, the problem is that the justification for the approaches of both the 1951 Convention, in this respect in terms of Article 17(1) as read with Article 6 of the Convention; and the Refugees Act of 1998 as read with the Immigration Act of 2002; are ethically deficient. Under the 1951 Convention, that deals only with political refugees (as discussed in Chapters I & II), Article 6 in particular does not seem to take account of the ethical imperatives of surrogate State protection and community membership.

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530 Sec. 27(c) of the Refugees Act.

The South African refugee and immigration law regimes mask the essential distinction between political and humanitarian refugees, conflating the two phenomena into one. The result is that the refugee law regime seems to proceed from an assumption of temporary refuge for all refugees, whether political or humanitarian, that can only later, upon satisfaction of some conditions of residence and sojourn, be elevated to durable protection that provides a proper sense of substitute community membership. As demonstrated in Chapter II, such masking of this essential distinction is problematic. It appears however that the Court, in the *Union of Refugee Women case*, based its understanding on this conflated understanding. To be fair on the court though, the conflation here seems to lie in the positive law, and the ultimate solution lies in legislative reform.

It is submitted that had the law, and hence the court, adopted a nuanced approach that is based on the differences between humanitarian and political refugees, it would have treated political refugees on the same footing as permanent residents right from the start; whilst humanitarian refugees could justifiably be subjected to the standards of treatment that currently prevail.

The minority decision in the *Union of Refugee Women case* suffered from a similar problem of conflating humanitarian refugeehood with political refugeehood, and hence making a blanket proposition that refugees are people who are in the same circumstances as permanent residents. That can certainly not be so, for the reasons advanced in Chapter II. Humanitarian refugees should not, necessarily, be treated as if they were in the same circumstances as permanent residents, right from the beginning. The starting point is to offer them temporary protection.

The issue of the guarantee of the right to work in respect of refugees was also in issue in the case of *Minister of Home Affairs v Watchenuka.*[531]One of the central questions that the Supreme Court of Appeal was invited to decide was on the extent to which refugees could be prohibited from being employed whilst waiting for the determination of their status as refugees by the relevant authorities. The court considered the issue from the broader premise of the right to human dignity in terms of section 10 of the Constitution. The court noted that the right to dignity could be permissibly limited on grounds of one's nationality status. The court, in this respect, began by saying that:

> the protection even of human dignity – that most fundamental of constitutional values – is not absolute and s 36 of the Bill of Rights recognises that it may be limited in appropriate circumstances… If the protection of human dignity were to be given its full effect in the present context – permitting any person at all times to undertake employment – it would imply that any person might freely enter and remain in this country so as to exercise that right. But as pointed out by the United States Supreme Court over a century ago in *Nishimura Ekiu v The United States*:[532] 'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'[533]

The Court therefore held that:

> It is for that reason, no doubt, that the right to enter and to remain in the Republic, and the right to choose a trade or occupation or profession, are restricted to citizens by ss 21 and 22 of the Bill of Rights… Those considerations alone, in my view, constitute reasonable and justifiable grounds for limiting the protection that s 10 of the Bill of Rights accords to dignity so as to exclude from its scope a right on the part of every applicant for asylum to undertake

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531 2004 (4) SA 326 (SCA)

532 142 US 651

533 Ibid, 659.

> employment – a limitation that is implied by s 27(f) of the Refugees Act, and that has been expressed in the Standing Committee's decision.[534]

However, the court concluded that this restriction did not extend to instances where the consequence of restriction or limitation of the right to dignity would be to render a person destitute. The court thus said that:

> where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation. For it is not disputed that this country, unlike some other countries that receive refugees, offers no State support to applicants for asylum.[535]

All in all, it is evident that the Supreme Court of Appeal adopted quite a restrictive approach towards the right of refugees to work in South Africa. It would appear that the court proceeded from the premise that in principle, refugees are to be treated like any other foreign nationals in the country. It is submitted that this restrictive approach is contrary to the basic essence of the principle of refugee protection. Whilst the approach can be justified in the case of humanitarian refugees generally, for the reasons advanced in Chapter II, it is inappropriate to conflate the situation of foreign nationals generally in the country, with the specific case of political refugees.

In adopting a scheme of justification for differential treatment between citizens and foreign nationals with regard to the right to work that does not recognise political refugeehood as a unique status deserving of special and preferential treatment when compared to other foreign nationals in the country generally, the approach adopted in the *Watchenuka case* does not seem to accord with

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534 *Watchenuka case* (note 362 above) Para.31.

535 The court noted that in contrast with South Africa, for instance, '[i]n the United Kingdom s 95 of the Immigration and Asylum Act 1999 authorises the Secretary of State to provide material support for asylum seekers. It was noted in *R (on the application of Q and Others) v Secretary of State for the Home Department* [2003] 2 All ER 905 (CA) that that power is exercised at an annual cost of £1 billion.'

the above theoretical principled grounding of political refugeehood. It amounts, in principle, to equal treatment of people in different circumstances which is unfair.

In conclusion, whilst the *Watchenuka* decision should be commended for the progressive statements it made in terms of the dignity of all people including foreign nationals in the country; and the fact that the applicants in the case were granted an effective remedy based on their unique circumstances, it is submitted that the court missed an opportunity to clarify the essential difference that has to be drawn in the treatment of refugees and other foreign nationals generally; and also the fact that refugees fall into different categories: humanitarian and political. The proper thing for the court to do would have been to acknowledge that as a matter of principle, refugees deserve special protection and that, whether their status has been so declared or not (asylum seekers), they should generally be allowed to exercise their right to work freely as long as their stay in the country remains lawful. However, in the case of humanitarian refugees, the host State can impose conditions to the exercise of this right as they apply to other foreign nationals generally. For those humanitarian refugees in desperate circumstances, temporary protection, as discussed in Chapter II, is germane.

4.4.1.2 The right to education

The right of access to education is clearly quintessential for refugees. As forcibly displaced people outside their home countries and without the protection of such home countries, without a guarantee for their education, their futures would clearly be doomed and their sense of marginalisation and general vulnerability perpetuated.

The right to education is another of those rights that are specifically provided for under the Refugees Act, albeit also guaranteed only in part. The relevant

part of section 27(g) of the Act provides that a refugee 'is entitled to the same…basic primary education which the inhabitants of the Republic receive from time to time.' Thus, in terms of primary education, the Refugees Act plainly requires that refugees have to be treated on the same footing as citizens. This is consistent with Article 22(1) of the 1951 Convention, which requires that States parties should accord refugees the same treatment as nationals in respect of elementary education. Under the South African Schools Act,[536] school attendance for children between the ages of seven and fifteen years is compulsory. Section 3(1) of the Act imposes a duty on every parent (including a guardian) to cause every learner within that age bracket for whom he or she is responsible to attend school from the first day of the school year. Further, section 5(1) of the Act provides that '[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way.' In addition, Section 5(3)(a) of the same Act provides that '[n]o learner may be refused admission to a public school on the grounds that his parent is unable to pay or has not paid …school fees'.

From these provisions, it is submitted that the law requires all children of the defined school going age to attend school, and that no child should be denied the right to basic primary education. This includes refugee children. This proposition is cemented by the provisions of the 1989 Convention on the Rights of the Child (CRC) to which South Africa is a party.[537] In the context of the CRC, 'a child means *every human being below the age of 18* years unless, under the law applicable to the child, majority is attained earlier.'[538] The CRC Committee has authoritatively stated that 'States parties have the

536 Act No. 84 of 1996.

537 See art.28(1)(A) of the CRC that provides that 'States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: Make primary education compulsory and available free to all'

538 Art.1 of the CRC (emphasis supplied). See also CEDAW Committee, *General recommendation No. 21: Equality in marriage and family relations*, UN. Doc. HRI/GEN/1/Rev.9 (Vol. II) page 337

obligation to ensure that *all human beings below 18 enjoy all the rights set forth in the Convention without discrimination* (art. 2).'[539]

Further, the CERD Committee has also stated in its *General Comment No. 30*, that State parties to the Convention, such as South Africa, are under an obligation to '[e]nsure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party.'[540] The reference to 'undocumented immigrants' makes it clear that the CERD Committee was making reference to those people that are commonly referred to as illegal immigrants. All in all, it seems plain that refugees (whether asylum seekers or declared refugees) are similarly entitled to the right to education.

It is therefore clear that a proper interpretation of the section 29 of the Constitution, as read with the provisions of the Refugees Act, and with due consideration of international law,[541] leads to the inescapable conclusion that refugees, particularly refugee children, should be accorded an unqualified right to basic education on equal footing with nationals.

Further, notwithstanding the narrow compass of section 27(g) of the Refugees Act that is limited to basic primary education, the deficiency is covered by section 27(b) of the Act, that entitles refugees to the full protection of the right to education as more broadly provided for under section 29 of the Constitution.

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539 CRC Committee, General comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, UN. Doc. HRI/GEN/1/Rev.9 (Vol. II) page 410, 411, para. I(2).

540 CERD Committee, GC.30, para.30. South Africa is a party to the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

541 Section 39(1)(b) of the South African Constitution obliges every court, tribunal or forum to have regard to international law when interpreting the bill of rights.

The relevant part of section 29 of the Constitution provides, in this respect, that:

> Everyone has the right-
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> a. to a basic education, including adult basic education; and
>
> b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

The question of the right to education for asylum seekers was considered in the *Watchenuka case*.[542] In that case, Nugent, JA observed that just like the right work, the right to education is also inherent in human dignity because without it a person is deprived of the potential for human fulfilment.[543] The judge further noted that the right is expressly protected by section 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, as well as the right to further education. He proceeded to point out that 'an applicant for asylum is not ordinarily entitled to take up employment or to study pending the outcome of his or her application, but that there will be circumstances in which it would be unlawful to prohibit it.'[544]In this regard, Nugent JA stated that:

> For reasons that I have already advanced that right, too, cannot be absolute, and is capable of being limited in appropriate circumstances, for I reiterate that the State cannot be obliged to permit any person to enter this country, and then to remain, in order that he or she might exercise that right. But where, for example, the person concerned is a child who is lawfully in this country to seek asylum (there could be other circumstances as well) I can see no justification for limiting that right so as to deprive him or her of the opportunity for human fulfilment at a critical period, nor was any suggested by the appellants. A general prohibition that does not allow for study to be permitted in appropriate circumstances is in my view unlawful.[545]

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542 note 477 above.
543 Ibid, para.36.
544 Ibid, para.37.
545 Ibid, para.36

The court persisted with a relatively narrow approach in recognizing the right of refugees to education, particularly as it relates to children. Firstly, the court failed to make a categorical finding that under no circumstances can a child be deprived of the right to education in South Africa, irrespective of his or her status for staying in the country. That seems to be the proper reading to be attached to section 29(1) of the Constitution, as read with sections 5(1) and 5(3) of the South African Schools Act, and the relevant international law provisions and principles spelt out above. A reading of Nugent, JA's decision, however, seems to suggest that a refugee child who is 'not lawfully in South Africa' may be denied the right of access to education.[546]This prospect renders the position adopted slightly at odds with South Africa's obligations under international law. Further, it is submitted that, just like with regard to its analysis on the right to work, the court missed an opportunity to make it clear that political refugees ought to be given preferential treatment over other foreign nationals generally. The court insisted on proceeding from the premise that there are justifiable grounds for limiting the protection of the right to education so as to exclude asylum seekers from its scope.[547] This, again, is at odds with the principled theoretical grounding for refugeehood as discussed in Chapter II.

The better approach is to reverse the general principle and instead, proceed from the premise that refugees should be treated on the same footing as, at the least, permanent residents and at best nationals when it comes to the

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546 James Hathaway states that 'the full contours of "lawful presence" are not settled' citing the English case of *Kaya v. Haringey London Borough Council* [2001] EWCA Civ 677, where the Court of Appeal stated that '[t]here is no settled international meaning of the term "lawfully", not merely in international but national law. The word is a notoriously slippery expression…one has to ask oneself why that expression is used in the Convention at all' – para.31. Hathaway however, proceeds to suggest that 'a refugee is lawfully present if admitted to a state party's territory for a fixed period of time, even if only for a few hours…his or her presence is lawful so long as it is officially sanctioned' – Hathaway (note 47 above) 174-175. It is evident that in terms of this meaning of the term, it is possible that a refugee child might be excluded from protection if Nugent, JA's approach in the *Watchenuka case* is adopted.

547 *Watchenuka case* (note 362 above) Paras. 31 & 36.

enjoyment of the right to basic education. In contrast with the *Watchenuka* approach, it is in exception to this general generous approach that one might then show justifiable grounds for limiting the protection of the right to education.

4.4.1.3 The right to housing

Unlike the rights to work and education that are, in part, specifically guaranteed under article 27 of the Refugees Act, the right to housing is not specifically provided for thereunder. However, as already demonstrated, this omission is not fatal because in terms of section 29(b) of the Refugees Act, the right to housing as guaranteed under section 26 of the Constitution is also guaranteed for refugees. Section 26 of the Constitution provides as follows:

> 1. Everyone has the right to have access to adequate housing.
> 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> 3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The right to housing is arguably the most litigated socioeconomic right in South Africa, with a comparatively rich panoply of jurisprudence developed around it.[548] The *locus classicus* in terms of this right is *Government of the*

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548 Some of the significant cases in this regard are: *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (*Olivia Road case*) 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Joe Slovo case)* 2010 (3) SA 454 (CC); *Joseph and Others v City of Johannesburg and Others*2010 (4) SA 55 (CC)*; City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*2011 (4) SA 337 (SCA); *Port Elizabeth Municipality v Various Occupiers ('Port Elizabeth Municipality')* 2005 (1) SA 217 (CC)*; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae) ('Modderklip')* 2005 (5) SA 3 (CC)

Republic of South Africa v Grootboom and Others (the Grootboom case)[549] where the Constitutional Court found that a Government housing policy that did not, among other things, take into account the immediate needs of people who were in desperate need, fell short of the requirement of reasonableness envisaged under section 26(2) of the Constitution.[550]The *Grootboom case* is significant in that it established reasonableness as the standard of review to be adopted in assessing whether Government conduct or policies comply with the constitutional obligations imposed in respect of socioeconomic rights.

The discussion in relation to the rights to work and education above has demonstrated the general approach that courts have taken in relation to the guarantee of socioeconomic rights for refugees. Notwithstanding the clearly liberal and generous language of section 27(b) of the Refugees Act that refers to the full protection of the rights in the bill of rights, courts have taken the approach that even the right to human dignity under section 10 of the Constitution is limitable for refugees, basically on the same premises as it would be limited for other foreign nationals in the country generally.

An important question in this regard is whether there is any discernible approach that South African courts have taken with regard to the right to housing for refugees. There is, however, not much guidance from jurisprudence in this respect. The only decision that stands out is that of *Mamba & Others v Minister of Social Development & Others (the Mamba case)*.[551]In May 2008, a spate of xenophobic attacks against foreign nationals from various African countries broke out in various townships across South Africa. Foreign nationals were indiscriminately targeted and attacked, and

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549 2001(1) SA 46 (CC)

550 Ibid.

551 CCT 65/08 (unreported).

many were killed in the process. Thousands of African foreign nationals, including refugees, were displaced from their residences.[552]

In response, the South African Government established temporary shelters (tent camps) for the displaced migrants, where they were provided with basic necessities such as food and water. Government made it clear that these shelters were merely temporary, and that the displaced foreign nationals, including refugees, had to find a way of quickly reintegrating themselves back into the communities. Consequently, it made a decision to close the camps by 15 August 2008, irrespective of the circumstances of the refugees. Mr.Odinga Mamba and other similarly placed recognised refugees made an urgent application to the High Court for an order that the Government be interdicted from dismantling the camps and that the camps had to remain open until the Government came up with a plan of how the applicants were to be re-integrated in society.[553]

The High Court dismissed the application, holding that the applicants had failed to show what plan they had in mind for the Government to devise; and secondly that in any case, the Refugees Act did not provide for the right of refugees to positive governmental action in the sense of coming up with such a plan. In his judgment, Makgoba J asked: 'In the circumstances, one asks oneself as to what rights have been infringed. Do [refugees] to start with, have any right at all, to claim that the Government should provide them with accommodation as they seek?' He answered this question in the negative, stating that 'I am not persuaded at all that they, as refugees, have a right, which has been infringed by the Government.' The Judge made no reference whatsoever to the provisions of section 27(b) of the Refugees Act, and why that provision could not be read to directly imply the guarantee of the right to

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552 Times Newspaper (Online Ed), *Strangers in a strange land at the mercy of our government,* (28 May 2008) <http: // www.thetimes.co.za / PrintArticle.aspx ?ID=768345> (accessed on 8th June 2008).

553 *Mamba & Others v Minister of Social Development*, Case No. 36573/08 (HC, TD) *(Mamba case)*.

housing under section 26 of the Constitution for refugees. The applicants sought leave to appeal directly to the Constitutional Court. The Court however, after dealing with numerous technical preliminary issues relating to the application, made an order directing the parties to:

> engage with each other meaningfully and with all other stakeholders as soon as it is possible for them to do so in order to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters.[554]

The Court proceeded to clarify that the objective of such meaningful engagement was to secure 'the closure of the camps by no later than 30 September 2008.' Significantly, the Court further ordered Government not to 'forcefully move any resident from his or her shelter or take down such shelter other than for the purpose of consolidating camps or moving such occupants to facilities pending their repatriation.'[555]

Notwithstanding the express order that no resident was to be forcefully removed from his or her shelter, or have his or her shelter taken down without provision of alternative accommodation, the authorities proceeded to do exactly that on or about 30 September 2008. This was in view of the fact that the court order had effectively endorsed the position that the camps were to be taken down by no later than 30 September 2008, thus creating confusion on the effect of the order against forced eviction. Liebenberg correctly observes that the approach of the court in the *Mamba case* was problematic, as 'the scope of the engagement was specifically circumscribed by the requirement that its objective was "to secure the closure of the camps by no later than 30 September."'[556] She argues that 'meaningful engagement in this

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554 *Ibid*, para.1

555 Ibid, para. 5(c)

556 S Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution*, (2010) 422

context had to occur in a normative vacuum without substantive guidance from the Court on the implications of the constitutional rights and principles at stake. This raises serious questions about whether the engagement order in this case was capable of effectively vindicating the constitutional rights of the refugees.'[557]

Further, the rather ambivalent approach adopted by the Constitutional Court in the *Mamba case* left unchallenged the decision of the High Court on the matter. As shown above, the High Court took the view that the State did not have any obligations towards refugees in respect of housing. This approach is evidently troubling. Section 7(2) of the Constitution makes it clear that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights.' The duty to protect is a positive duty that obliges the State to take appropriate and effective measures to protect its subjects from violation of their rights by third parties (non-state actors).[558]The fact that all applicants before the court were either recognised refugees or documented asylum seekers was not in dispute. Neither was the fact that they were all victims of xenophobic attacks and were thus 'internally displaced refugees' as it were. Their right to housing had therefore been interfered with by third parties. This meant that Government was responsible to ensure their protection in terms of section 7(2) of the Constitution. It was therefore an error of law for the High Court to hold that Government did not have any obligation towards the refugees in respect of the forced displacement and subsequent internal resettlement. Secondly, the High Court took the view that it was incumbent upon the applicants to demonstrate to the Court specific and detailed plans and measures that the Government had to adopt in order to ensure their effective resettlement, and failure of which was fatal to their case.

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557 Ibid.

558 *SERAC case* (note 347 above) para 47.

Again this approach seems to be at odds with the standard established in the *Grootboom case*. In *Grootboom*, whilst the Court held that section 26 of the Constitution did not entitle 'the respondents to claim shelter or housing immediately upon demand', it proceeded to observe that 'section 26 does oblige the state to devise and implement a coherent, coordinated programme designed to meet its section 26 obligations.'[559] Thus if such a coherent programme (or plan) is not available in respect of the housing entitlements of a significant but vulnerable group of people in South Africa, the burden ought to lie on the State to justify the absence of such a plan. The burden should not be on the applicant to detail to the court a specific plan that could be adopted by Government. Liebenberg also argues that in such cases, the burden of proof ought to rest on the State rather than on the applicant. She states that:

> Placing the burden to present evidence and arguments in relation to the reasonableness of its measures on the State may well be critical in ensuring that socioeconomic rights litigation is practically accessible to disadvantaged groups. At the very least a failure to present such evidence should lead to negative inferences being drawn regarding the reasonableness of the State's conduct.[560]

Thus it is submitted that the approach of the High Court did not only show disturbing insensitivity towards the plight of the refugees, but was also flawed legally. One can conclude therefore, based on the courts' approach in the *Mamba case*, that the enforcement of the guarantee of the right to housing for refugees remains rather tenuous in South Africa.

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559 Ibid, para.95.

560 Liebenberg (note 556 above) 203.

4.4.1.4 The right of access to healthcare

Good health is one of the most important conditions necessary for existence and the enjoyment of a good life for every person. Gross has emphasised the importance of guaranteeing the right to health, stating that:

> any conception of human rights intended to protect the things most vital for a person's existence in the world and their ability to live a life of dignity and equality, free of degradation and with the capacity to make the most meaningful choices in life, will accord health a prominent status.[561]

This notwithstanding, not many States have entrenched the right to health as a fully justiciable right in their bills of rights. Notably, the South African constitution is one of the few constitutions in the world that contain a genuinely justiciable right to health.[562] This right is guaranteed through various constitutional provisions concerning health. One of these provisions is section 27. Section 27(1) (a) in particular, provides that 'everyone has the right to have access to health care services, including reproductive health care.' In this regard, the State is placed under an obligation to take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of this right.[563] Further, under section 27(3), the Constitution specifically emphasizes that '[n]o one may be refused emergency medical treatment.'[564] As earlier argued, since this right is guaranteed for everyone, it is applicable to refugees as well.

Other rights concerning health find expression in section 12 that guarantees, among other things, the right of everyone to bodily and psychological

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561 AM Gross, 'The Right to Health in an Era of Privatisation and Globalisation: National and International Perspectives' in D Barak-Erez & AM Gross, *Exploring Social Rights: Between Theory and Practice*, (2011) 289.

562 D. Bilchitz, 'Health' in S Woolman et al, *Constitutional Law of South Africa: Student Edition* (2007) 56A1.

563 S. 27(2).

564 S.27(3)

integrity; section 28(1)(c) that guarantees every child the right to basic health care services; section 24(a) that guarantees everyone the right 'to an environment that is not harmful to their health'; and section 35(2)(e) that guarantees every prisoner the right to be detained in conditions consistent with human dignity that include the provision of 'adequate medical treatment' at State expense.[565] Taken together, these provisions comprise a fairly comprehensive guarantee of the right to health under the South African Constitution.

Section 27(g) of the Refugees Act provides that 'a refugee is entitled to the same basic health services…which the inhabitants of the Republic receive from time to time.' It is interesting that section 27(g) of the Act limits the specific guarantee here to '*basic* health services.' Whilst basic health services have not been defined under the Act, it seems the expression 'basic health services' is synonymous with the expression 'primary health care services' as used by the CESCR under the ICESCR scheme. In this regard, the CESCR, in *General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12)*[566] has observed that:

> In the literature and practice concerning the right to health, three levels of health care are frequently referred to: primary health care typically deals with common and relatively minor illnesses and is provided by health professionals and/or generally trained doctors working within the community at relatively low cost; secondary health care is provided in centres, usually hospitals, and typically deals with relatively common minor or serious illnesses that cannot be managed at community level, using specially-trained health professionals and doctors, special equipment and sometimes in-patient care at comparatively higher cost; tertiary health care is provided in relatively few centres, typically deals with small numbers of minor or serious illnesses requiring specialty-trained health

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565 See C Ngwena & R Cook, 'Rights Concerning Health' in D Brand & C Heyns, *Socio-Economic Rights in South Africa* (Pretoria: PULP, 2005) 126.

566 UN.Doc./ E/C.12/2000/4, CESCR

> professionals and doctors and special equipment, and is often relatively expensive.[567]

Thus, it would appear that section 27(g) of the Refugees Act could be understood to mean that refugees, in terms of the Act, are entitled to the right to health on the same footing as citizens only is so far as treatment for 'common and relatively minor illnesses [which] is provided by health professionals and/or generally trained doctors working within the community at relatively low cost is concerned.'[568] When it comes to secondary and tertiary health care services, as expressed by the CESCR, the refugees' right to health could be circumscribed within the same parameters as are applicable to other foreign nationals in South Africa.

However, senior appellate courts have not yet taken any definitive position on this matter. Following the reasoning in the *Watchenuka* and *Union of Refugee Women* cases examined above, one might perhaps conclude that given the evidently narrow compass of section 27(g) of the Refugees Act, they might still come to the conclusion that as much as the right to health is guaranteed for everyone under sections 24 and 27 of the Constitution, the enjoyment of this right by refugees could as well be limited in terms of section 36 of the Constitution, on the same basis upon which the rights of other foreign nationals generally in the country are limited, save for the provision of basic healthcare services in respect of which they receive the national treatment standard.

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567 Ibid, para.9

568 Ibid.

4.4.2 The Guarantee of socioeconomic rights for refugees in Malawi: The legal framework

The framework legislation that governs the treatment of refugees in Malawi is the Refugee Act of 1989.[569] The Act, like most similar pieces of legislation in Southern Africa, adopts a definition of a refugee that is broad, combining the definitions under the 1951 Convention and under the 1969 OAU Convention.[570] However, Bonaventure Rutinwa has observed that the *Refugee Act* of Malawi is 'perhaps more notable for what it did not contain than what it provided for'.[571] Notably, like numerous other pieces of refugee legislation in Southern Africa, the Act defines a refugee, establishes various institutions for the administration of the Act and outlines their functions. It also provides for *non-refoulement* and procedures for refugee status determination, appeals and cessation of refugee status. However, the Act is conspicuously silent on substantive human rights guarantees for refugees.[572] It is therefore evident that this silence places the Malawian refugee protection regime in sharp contrast with its South African counterpart which, by contrast, has a comparatively generous scheme for the guarantee of human rights for refugees generally, including socioeconomic rights.

Further, under the Malawian scheme, in addition to the fact that the Refugee Act contains no substantive guarantees on socioeconomic rights; the country, at the time that it ratified the 1951 Convention, entered a number of reservations. These include provisions on exemption from reciprocity;[573] the right to property for refugees;[574] the right to freedom of association;[575] the

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569 Cap 15:04 of the Laws of Malawi.

570 TS Nkhoma, 'The Institution of Asylum in Malawi and International Refugee Law: A Review of the 1989 Refugee Act', (2010) *Malawi Law Journal* Vol.4, Issue 1

571 B Rutinwa 'Asylum and refugee policies in Southern Africa: A historical perspective' in Legal Resources Foundation *A reference guide to refugee law and issues in Southern Africa* (2002) 1, 4.

572 Ibid.

573 Art. 7

574 Art.13

right to wage-earning employment;[576] the right to practice by refugees of liberal professions;[577] the right of access to public education;[578] provisions on labour legislation and social security;[579] the right of freedom of movement;[580] and provisions on naturalisation and assimilation of refugees.[581] These reservations have a direct impact on the domestic guarantee of socioeconomic rights for refugees.

4.4.2.1 The right to work

Whilst the Refugee Act is silent on the guarantee of socioeconomic rights for refugees, this study has earlier demonstrated that the bill of rights, all the same, applies to refugees. The right to work is expressly provided for under the Malawian bill of rights. Section 29 of the Constitution provides that 'Every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi.' The question then is: what is the effect of this right on the status of the right to work of refugees in Malawi?

It will be recalled that Malawi entered a reservation on the right to wage-earning employment under Article 17 of the 1951 Convention. The reservation reads as follows:

> The Government of the Republic of Malawi does not consider itself bound to grant a refugee who fulfils any of the conditions set forth in subparagraphs (a) to (c) to paragraph (2) of article 17 automatic exemption for the obligation to obtain a work permit. In respect of article 17 as a whole, the Government of the

575 Art.15.
576 Art.17
577 Art.19.
578 Art.20
579 Art.22
580 Art.26.
581 Art.34.

> Republic of Malawi does not undertake to grant to refugees rights of wage earning employment more favourable than those granted to aliens generally.[582]

It would appear that the thinking behind Malawi's reservation in this regard is, at best, not to accord refugees any preferential treatment in comparison with other foreign nationals in Malawi. A related issue is whether the adoption of the 1994 Constitution in Malawi might have changed the legal significance of the reservations and the general legal landscape in relation to the right to work; regard being had to the provisions of section 29 of the Constitution set out above.

In the case of *The State vs Department of Poverty and Disaster Management Affairs and the Commissioner for Disaster Preparedness, Relief and Rehabilitation, Ex-Parte Frodovard Nsabimana & 83 Others (the Nsabimana case)*,[583]the Court was called upon to determine whether the encampment policy adopted by Government, where refugees are required to reside in designated camps outside of urban areas unless they have a special urban residence permit, was unconstitutional. The Court found that the encampment policy was reasonable, stating that this was important for reasons of security and public order, and also that the policy was 'a sound administrative measure to ensure certainty of their population, provision of basic necessities, communication of information, protection of their persons and property, facilitation of repatriation etc.' Referring to the reservation entered by Malawi in respect of Article 26 of the 1951 Convention on freedom of movement, the court observed that 'it has been further argued that…the reservation does not apply because the current Constitution embraces human rights.'[584]In response, Chinangwa J held that 'the reservation is still applicable until Malawi expressly rescinds it. As a matter of fact section 9 of the Refugees

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582 UN, 'Convention Relating to the Status of Refugees – Declarations and Reservations: Malawi', *Treaty Series*, Vol. 189, 137.

583 Misc. Civil Application No. 19 of 2006 (HC, LR)

584 Section 39 of the Malawian Constitution guarantees the right of every person to freedom of movement.

Act[585]in a way augments its validity than otherwise. The reservation is in conformity with the Constitution.'

In the light of this decision, it would appear that the court would take a similar approach in respect of the other reservations entered by Malawi including the reservation relating to the right to wage-earning employment. Indeed, the court endorsed the approach taken by the Malawi Government to subject refugees to the same procedure relating to the acquisition of work permits as it applies to other foreign nationals generally in the country. It should be pointed out that most refugees in Malawi are political refugees.[586] Bearing in mind the justification for the grant of political refugee status, and preferential treatment for such refugees over other foreign nationals, it is submitted that the approach adopted in this matter was inconsistent with the principle of surrogacy that aims to provide the refugee with an alternative membership to a political community.

The other limb of the right to work, as earlier shown, relates to the right to self-employment. The question here is: do the same limitations that relate to the right to wage-earning employment equally apply to the right to self-employment in Malawi? The answer seems to be in the negative. Whilst in the *Nsabimana case* above the court rested its justification for limiting the right to wage-earning employment and the right to freedom of movement and residence on the fact that Malawi had entered reservations in respect of Articles 17 and 26 of the 1951 Convention respectively; Malawi has not entered any reservation in respect of the right to self-employment under Article 18 of the 1951 Convention. By guaranteeing every person the right to 'pursue a livelihood' in section 29 of the Constitution, it is clear that this encompasses the refugee's right of self-employment.

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585 Sec.9 of the Refugees Act provides that 'Any person granted refugee status under this Act shall be subject to the laws of Malawi, jurisdiction of courts in Malawi and *to all measures taken for the maintenance of public order'*

586 See Crisp & Kiragu (note 95 above)

Recognising the importance of work for the realisation of human dignity and a general sense of human self-worth, it is submitted that the right to pursue a livelihood under section 29 of the Constitution, which entails self-employment among other things, should be read expansively to include, within its compass, refugees. This is more so in light of the position adopted by Malawi to exclude Article 18 of the 1951 Convention from those provisions in respect of which it entered reservations.

4.4.2.2 Other socioeconomic rights

Are there any good prospects that socioeconomic rights for refugees would more broadly receive appropriate recognition and enforcement by Malawian courts? The jurisprudence on refugee rights has thus far been a mixed bag of fortunes. The *Aden Abdihaji* case provided some promise, in so far as it demonstrated the importance of placing emphasis on human dignity for all, including refugees. The decision also affirmed the import of section 12(iv) of the Constitution, stressing that every individual, including those individuals or groups of persons that are not entitled to the vote, are entitled to the fullest protection of their rights under the Constitution.

However, the *Nsabimana case* dampened that promise by emphasizing that the reservations entered by Malawi must be strictly adhered to. The case also affirmed the encampment policy that consigns refugees to designated camps, thereby depriving them the opportunity to pursue an independent livelihood. The decision also generally affirmed the restrictive approach to the recognition of refugee rights on the purported basis of national security. Other decisions on refugees, although not specifically on socioeconomic rights, have also tended to emphasise the need for government to adopt a restrict approach in according rights to refugees on the grounds of public order and national security, without much elaboration on how these matters would be

impacted.[587] The picture that emerges therefore is that the prospects of having the socioeconomic rights of refugees effectively guaranteed through innovative, pro-rights jurisprudence by Malawian courts in the near future seem rather uncertain.

4.4.3 The Guarantee of socioeconomic rights for refugees in other Southern African countries: The legal framework

The guarantee of refugee rights in the legislative frameworks of the other Southern African countries can be categorized into two groups: those that are silent on the guarantee of substantive human rights (as is the case of Malawi above); and those that, to varying degrees make provision for at least some such guarantees. Countries that fall into the first category are Botswana, Swaziland and Zambia. Incidentally, these are among the earliest pieces of refugee legislation in the region, with Botswana's Refugees (Recognition and Control) Act having been passed in 1968; and Zambia's Refugee (Control) Act passed in 1970; whilst Swaziland's Refugees Control Order was promulgated in 1978. From the very names of these pieces of legislation, it is evident that the legislatures, and the King in the case of Swaziland, were preoccupied with ensuring that refugees were 'controlled' rather than have their substantive human rights guaranteed. The second category of countries comprises Lesotho, Namibia, Tanzania and Zimbabwe.

4.4.3.1 Botswana, Swaziland and Zambia

The Refugees (Recognition and Control) Act of Botswana,[588] as its name suggests, is more of a regulatory and control framework for refugees than it is

587 See, e.g. *Jones and Others v Refugee Co*mmittee [2005] MWHC 24

588 *Cap.25:03* [Botswana] of 5 April 1968, available online on UNHCR Refworld at: http://www.unhcr.org/refworld/docid/3ae6b4d60.html [accessed 16 September 2008]

a framework for the recognition and guarantee of refugee rights in the country. In the only instance where the Act touches on the guarantee of fundamental human rights, it takes the approach of treating all refugees on the same footing as other foreign nationals in the country. This is evident from section 14 that addresses the issue of the right to wage-earning employment for refugees. Section 14(1) of the Act states that:

> Subject to the provisions of subsection (2), sections 3 to 6 of the Employment of Visitors Act, 1968, shall apply to refugees as they apply to visitors and any regulations made under the provisions of section 7 of that Act shall, unless the context otherwise requires, apply to refugees as they apply to visitors.

Further, section 14(2) proceeds to provide that:

> Notwithstanding anything contained in subsection (1) the Minister may, in his discretion, instruct that a work permit issued to a refugee shall be renewed for such period as he may deem fit notwithstanding that any such renewal will have the effect of extending the validity of such permit for more than 12 months.

These provisions clarify at least two points in respect of the position of Botswana, specifically in relation to the right to wage-earning employment. Firstly, subsection (1) states that the refugees' right, in this regard, is on the same footing as 'visitors' generally in the country. This therefore suggests, for instance, that refugees are to be subjected to the same work permit requirements as any foreign 'visitor' to Botswana would be required to satisfy. Secondly, subsection (2) stresses that the continued validity of a work permit issued to a refugee is dependent on the exercise of ministerial discretion. The language of discretion as used in this provision is inconsistent with the conception of an entitlement on the part of a refugee to continue working in the country for as long as his or her condition of refugeehood subsists. Shorn of such an entitlement, no guaranteed right can be read into section 13 of Botswana's Refugees (Recognition and Control) Act. In the result, in the absence of general guarantees of socioeconomic rights under Botswana's

Constitution, coupled with the manifest failure of the applicable legislation to provide for such rights; it is concluded that in Botswana, the legal position on the guarantee of socioeconomic rights for refugees is, at best, highly tenuous.

The Refugees Control Order of Swaziland of 1978;[589] and the Refugee (Control) Act of Zambia of 1970[590] both contain no guarantees at all in respect of the substantive human rights of refugees. They are, just like the Botswana regime, principally instruments of regulation and control of refugees. The minor difference with Botswana, which is merely nominal, lies in the fact that the Botswana Act mentions issues relating to work for the refugee. It is a nominal difference because, as demonstrated above, the purported guarantee under section 13 of the Botswana Act is also, ultimately, effectively empty. As earlier mentioned, courts in these countries are yet to be seized of claims based on socioeconomic rights; and it is therefore unclear as to whether, when called upon to decide, they would adopt the restrictive approach that emphasises the non-binding status of these rights under the constitution; or the Indian broad and generous approach that ensures that these rights are judicially enforceable.

This lack of certainty rings loudly in view of the approach taken by Lesotho where the High Court, fully aware of the extant progressive Indian jurisprudence, decided to follow the non-justiciable route in relation to socioeconomic rights. Thus it is submitted that given the lack of certainty in terms of the constitutional status of socioeconomic rights in Swaziland and Zambia, coupled with the manifest silence in the guarantee of such rights for refugees under the applicable refugee legislation; it is reasonable to conclude that the overall guarantee of socioeconomic rights for refugees in Swaziland and Zambia is at best highly tenuous. In the case of Zambia, the situation is

589 Promulgated on 14 April 1978, available online on *UNHCR Refworld* at: http://www.unhcr.org/refworld/docid/3ae6b50a14.html [accessed 16 September 2008]

590 Adopted on 4 September 1970, available online on *UNHCR Refworld* at: http://www.unhcr.org/refworld/docid/3ae6b4d6c.html [accessed 16 September 2008]

made even more precarious in light of the various reservations that Zambia entered upon acceding to the 1951 Convention. Zambia entered similar reservations to those entered by Malawi, and the reservations of the two countries in respect of the right to wage-earning employment under Article 17 of the Convention, and the right to freedom of movement and residence in terms of Article 26 of the Convention, are identical.

4.4.3.2 Tanzania, Lesotho, Namibia and Zimbabwe

i. Tanzania

Tanzania's Refugees Act of 1998[591] replaced the Refugee Control Act of 1966. As its name suggests, the 1966 Act focused on the regulation and control of refugees rather than the guarantee of their substantive human rights.

The socioeconomic rights guarantees for refugees under the Refugees Act of 1998 of Tanzania are so perfunctory that one might even feel tempted to classify Tanzania as having no socioeconomic guarantees at all. However, the Act marks a significant positive departure from some of the earlier pieces of refugee legislation in the region, as section 31 thereof explicitly guarantees the right to basic (primary) education to all refugees in the country. This is consistent with Tanzania's obligations under the 1951 Convention (Article 22), the ICESCR (Articles 13 and 14) and the CRC (Article 28), amongst others. Of concern, however, is the fact that the right to education is not well-guaranteed when it comes to secondary and post-secondary education. The responsible Minister is granted very wide discretion to make decisions relating to the extent to which this right might be guaranteed for refugees. As

591 Act No. 9 of 1998. The Act came into force on 15 April 1999. It is available online on *UNHCR Refworld* at: http://www.unhcr.org/refworld/docid/3ae6b50bf.html [accessed 16 September 2008]

the scope and enforcement of the right in this respect rests on expansive executive discretion, its normative foundations are therefore shaky.

It has been noted that the 1951 Convention itself is also deficient in this regard in so far as it narrows the refugee's entitlement to education to primary school education, and provides a wide margin of discretion to the State in respect of higher education.[592] The ideal position is to guarantee refugees most favourable treatment accorded to foreign nationals which should be as close as possible to the treatment of citizens.

Section 32 addresses work issues in relation to refugees. It essentially requires that refugees have to satisfy work permit requirements, just like any other foreign nationals generally in the country. In this regard, the Tanzanian position largely mirrors that of Botswana. This is inconsistent with the political and ethical justification for the recognition and protection of political refugees in particular.

As is the case with Swaziland and Zambia, the Tanzanian constitutional scheme for the guarantee of socioeconomic rights generally is in the 'half loaf' category which bifurcates the guarantee of these rights into non-binding principles on the one hand and entrenched rights on the other. The justiciability of socioeconomic rights based on the constitution has not yet been judicially tested. However, at least on the basis that the right to education at the basic (primary) level is expressly guaranteed under the Refugees Act of 1998, it is submitted that this aspect of the right is not tenuous. However, although the guarantee of socioeconomic rights for refugees under the Act is more progressive than the legislative frameworks in Malawi, Swaziland and Zambia; it is still not comprehensive enough and there remains room for substantial improvement.

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592 Art. 22(2) of the 1951 Convention.

ii. Lesotho, Namibia and Zimbabwe

The specific refugee legislation in Lesotho,[593] Namibia[594]and Zimbabwe,[595]has one common positive feature: they all guarantee for refugees within their jurisdictions, the full scope of the rights contained under the 1951 Convention and the 1969 OAU Convention.[596] The express incorporation of the 1951 Convention and 1969 OAU Convention is highly significant because, as demonstrated in Chapter III, the 1951 Convention in particular has a fairly significant catalogue of socioeconomic rights. This is particularly germane for Zimbabwe because the Constitution of Zimbabwe does not guarantee socioeconomic rights. Thus, although some rights, namely the right of wage-earning employment (Article 17 of the 1951

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593 Refugee Act of 1983, Came into force on 15 January 1985, available online on UNHCR Refworld at: http://www.unhcr.org/refworld/docid/3ae6b4f024.html [accessed 16 September 2008].

594 Came into force on 19 March 1999, available online on *UNHCR Refworld* at: http://www.unhcr.org/refworld/docid/3ae6b59ac.html [accessed 16 September 2008]

595 Available online on *UNHCR Refworld* at: http://www.unhcr.org/refworld/docid/3ae6b5b44.html [accessed 16 September 2008].

596 Sec.13(2) of the Refugee Act of 1983 of Lesotho provides, in this regard, that 'Notwithstanding sub-section (1), a refugee shall enjoy the rights and be subject to the duties defined in the 1951 Convention and 1967 Protocol relating to the Status of Refugees and the 1969 OAU Convention governing the specific aspects of refugee problems in Africa.'

In Namibia, the Namibia Refugees (Recognition and Control) Act of 1999 provides, in section 18, that:

'Subject to the provisions of this Act, every recognized refugee and every protected person in Namibia-

(a) shall be entitled to the rights conferred, and be subject to the duties imposed, by-

(i) the provisions of the UN Convention on Refugees, 1951, which are set out in Part I of the Schedule to this Act; and

(ii) the provisions of the OAU Convention on Refugees, 1969, which are set out in Part II of the Schedule to this Act, as if the references therein to refugees were references to recognized refugees and protected persons;'

Finally in Zimbabwe, section 12 of the Refugee Act of 1983 provides that:

'(1)Subject to the provisions of this Act, every recognized refugee and every protected person within Zimbabwe -

(a)shall be entitled to the rights and be subject to the duties contained in -

(i)the Articles of the Convention Relating to the Status of Refugees of the 28th July, 1951, which are set out in Part 1 of the Schedule; and

(ii)the Articles of the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of the 10th September 1969, which are set out in Part II of the Schedule; as if the references therein to refugees were references to recognized refugees and protected persons'

Convention) and the right of freedom of movement and residence (Article 26 of the 1951 Convention) were expressly excluded from the incorporated provisions; the general incorporation of all the other rights under the 1951 Convention into Zimbabwe's domestic law is of great legal and socioeconomic significance for refugees in Zimbabwe.

In Lesotho, the incorporation of these instruments is similarly significant considering that the High Court established in *Khathang Tema Baitsokoli & Another v Maseru City Council & others* that socioeconomic rights are not justiciable in Lesotho. By specifically incorporating these instruments, and without excepting their justiciability, the refugee legislation has arguably placed the legal guarantee of socioeconomic rights for refugees on a significantly higher footing since a refugee can bring his or her claim directly under the Refugee Act, and rely on the convention rights as incorporated.

Finally, in the case of Namibia, which also generally incorporates the rights guaranteed under the 1951 Convention, including socioeconomic rights, there is one striking feature: the Act does not incorporate Article 22(1) of the 1951 Convention that guarantees that '[t]he Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.' It is unclear why Namibia decided to exclude this right, which has been classified by the CESCR as forming part of the minimum core obligations of all States in relation to the right to education,[597] from the incorporated rights. Be that as it may, Namibia is to be lauded for being more progressive than some countries in the region by incorporating the large part of the socioeconomic rights for refugees guaranteed under the 1951 Convention.

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[597] CESCR, *General Comment No. 13: The Right to Education (Article 13 of the Covenant)*, UN. Doc.E/C.12/1999/10

It must also be recalled that Namibia has been singled out for adopting the monist approach when it comes to the effect of treaty obligations assumed by the State. In this regard, whilst no test case has yet come before Namibian courts in respect of socioeconomic rights, it remains a significant possibility that the ICESCR, for instance, can be read as part of Namibian law. The same applies to the CRC, particularly in view of the omission of Article 22(1) of the 1951 Convention from the list of provisions directly incorporated under the Refugees (Recognition and Control) Act. Article 28(1) of the CRC that makes primary school education free and compulsory for all could be particularly useful. All in all, the picture in Namibia in relation to the guarantee of socioeconomic rights for refugees seems promising, and there are good prospects that the legal regime could be used in a manner that advances the full guarantee of socioeconomic rights for refugees. It can perhaps be safely concluded that Namibia's legal framework, in so far as the extent of guarantee of socioeconomic rights for refugees is concerned, lies only second to South Africa in the region.

4.5 Refugee status determination regimes

Another important aspect of the legal guarantee of refugee rights in Southern Africa is that of refugee status determination (RSD). RSD refers to the process whereby a government authority or the UNHCR examines whether an individual who has submitted an asylum application (an application to be granted refugee status) or has otherwise presented himself or herself to authorities of the host State for purposes of asylum, is indeed a refugee.[598] As pointed out above, refugee laws are fashioned differently in different countries in Southern Africa. These differences include how RSD is conducted. In the context of socioeconomic rights, the importance of RSD in a legal scheme for the protection of refugees lies in the fact that any special treatment that a refugee ought to receive in the guarantee of socioeconomic

[598] UNHCR, *Refugee Status Determination: Identifying who is a Refugee* (2005) 4.

rights ultimately rests on whether or not he or she indeed qualifies as a refugee within the meaning of the applicable definition. In this regard, the study provides here, a synopsis of the various RSD processes adopted in various countries under study.

In South Africa, RSD is done by the Department of Home Affairs (DHA). Until recently, the responsibility for making status determinations was, in terms of section 24 of the Refugees Act, vested in Status Determination Officers (SDOs) at the various Refugee Reception Offices established by the Minister in terms of section 8(1) of the Act. Section 24(1)(c) allowed the SDOs to 'consult with and invite a UNHCR representative to furnish information on specified matters.' The decisions of the Refugee SDOs were reviewable by the Standing Committee for Refugee Affairs established in terms of section 9 of the Act.

The situation however has substantially changed with the passing of the Refugee Amendment Act No. 12 of 2011 passed in August 2011. As a result of the August 2011 amendments, SDOs have been replaced with Status Determination Committees (SDCs) set up by the Director General of the DHA under section 8(1) of the Act. Section 8(2) empowers SDCs to set up sub-committees for their effective operation. The responsibility for RSD under section 24 of the Act now vests in the SDCs. Where the SDC makes a decision that an application is manifestly unfounded or fraudulent, section 24A(1) makes it mandatory for the Director General of the DHA to review such decision. Otherwise, where an applicant for refugee status is not content with an adverse decision made by the SDC, he or she is entitled, in terms of section 24B(1), to lodge an appeal with the Refugee Appeals Authority. The involvement of the UNHCR in the RSD process remains minimal as the SDC, just like the SDO before it, is only required to, where necessary, 'consult with and invite a UNHCR representative to furnish information on specified matters.'

In Malawi, the Refugee Committee established under section 3 of the Refugee Act of 1989 is empowered to conduct RSD and also the correlative power to 'cancel or revoke its decision granting refugee status.'[599] The committee comprises a number of senior officials from various government ministries and/or departments including the Attorney General, the Secretary for Home Affairs, the Secretary of Foreign Affairs, the head of the Malawi Police Service and a UNHCR representative as an observer.[600] Section 6, as read with section 2(1) of the Act (the definition section) shows that as a general rule, Malawi has adopted an individual status determination procedure whereby each person's application has to be dealt with separately on its merits. However, section 7(3) grants the Minister the power to, by notice published in the Gazette, 'direct that, with respect to any group of foreign nationals specified in the notice, seeking refugee status in Malawi, the Committee shall apply…group determination.' This is what is commonly referred to as *prima facie* RSD. No guarantee for legal representation at State expense, or at all, during the process of RSD is made under the Act. Broadly similar RSD processes to that of Malawi are followed in Botswana,[601] Lesotho,[602] Namibia,[603] Tanzania[604] and Zimbabwe[605]where a Government Committee is set up to consider and make determinations on RSD.

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599 S. 6 of the Act.

600 S. 6(2) of the Act. It is worth mentioning however that the Refugee Act of Malawi is currently under review and the draft Bill proposes an amendment to s. 6(2) of the Act so that it should say that the UNHCR representative, or in his o her absence the UNDP representative, 'shall be invited by the Committee to attend every meeting of the Committee to provide technical advice and as an observer but shall not have the right to vote.'

601 Ss 3 & 4 of the Refugees (Recognition and Control) Act of 1968. However, in contrast with their Malawian counterpart, the Refugee Advisory Committees established under the Botswana Act do not include a representative of the UNHCR.

602 S. 5 of the Refugee Act of 1983.

603 S. 7 of the Namibia Refugees (Recognition and Control) Act, 1999. Just like in Malawi, the UNHCR representative is included as a mere observer.

604 The National Eligibility Committee is established under section 6 of the Refugees Act of 1998. Just like in Malawi and Namibia, the UNHCR representive, in terms of section 6(2) of the Act, is only 'invited to attend the meetings of the Committee as an observer.'

605 S. 5 of the Refugee Act of 1983. However, the composition of the Zimbawean Refugees Committee, just as is the case in Botswana, does not include a

In Zambia by contrast, a very different model is adopted. Unlike all the other countries surveyed in this study, with Swaziland being the only other exception, the Refugee (Control) Act of 1970 does not provide a definition based on the 1951 and 1969 OAU Conventions. Instead, it only defines a refugee as a person belonging to a class of persons to whom a declaration has been made by the Minister under section 3 of the Act. The powers of RSD are vested in the Minister under section 3 of the Act. A similar procedure is adopted in Swaziland under the Swaziland Refugees Control Order of 1978.[606]

An analysis from this overview of RSD schemes in Southern Africa shows that there are four different RSD models in the region. The first model comprises those States where RSD is done by a committee established by or under statute and where the UNHCR is only allowed to participate as an observer. These include Lesotho, Malawi, Namibia and Tanzania. The second model comprises those States that have a similar model, but the involvement of the UNHCR is limited to only being consulted where necessary. Thus the UNHCR in this case does not even have an observer status in the RSD process as an incident of law. South Africa is a good example of this model.

The third model comprises those States that also have a government established status determination committee (under statute) but the UNHCR is not formally mentioned at all in the legal framework. It might as well be that in practice the UNHCR is involved in some form, but this is not a requirement under domestic law. These States include Botswana and Zimbabwe. All the

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representative of the UNHCR. See also Michael S Gallagher, *Refugee Status Determination in Southern Africa*, (2010), 55.

606 The definition of a refugee under section 2 of Swaziland's Refugee Control Order of 1978 are in *pari materia* with those under section 2 of Zambia's Refugee Control Act of 1970. Similarly, the Ministerial Powers declared under section 3 of the Swazi Act are again in *pari materia* with those under section 3 of the Zambian Act.

States in the above three models have adopted the refugee definitions under the 1951 Convention and the 1969 AU Convention. The fourth model comprises those States whose refugee legislative frameworks do not establish a status determination committee at all, and they also do not have a prescribed definition of a refugee. The powers to determine who is a refugee, and who should be granted refugee status, vest exclusively in the Minister responsible for home affairs (and/or internal security). These are Swaziland and Zambia.

In the next Chapter, the thesis examines some of the challenges posed by these disparate RSD processes in the region.

4.6 Conclusion

The realisation of socioeconomic rights by refugees is, among other things, dependent on host States having a comprehensive and effective legal regime that guarantees these rights. In Southern Africa, with the exception of South Africa; constitutional frameworks do not provide for a comprehensive set of socioeconomic rights guarantees. In many instances, the guarantee of these rights is bifurcated into non-binding principles of State Policy and, to a lesser extent, entrenched constitutional rights. In a few other instances, such as Botswana and Zimbabwe, the constitutions do not guarantee these rights.

An examination of the various pieces of refugee legislation in Southern Africa reveals a number of issues. First is what I call the Malawian paradox. Whilst this Chapter shows that Malawi's Constitution is generally laudable for the extent to which it has guaranteed socioeconomic rights in comparison with most constitutions in Southern Africa, the country's refugee legislation has the unpleasant credential of being 'perhaps more notable for what it did not

contain than what it provided for.'[607] The Refugee Act of 1989 is completely silent on the guarantee of rights. This is perhaps because the Act was enacted in 1989, before the progressive 1994 Constitution was adopted. Secondly, an examination of the respective pieces of refugee legislation shows that in a number of cases, the legislation has salvaged an otherwise hopeless case for the guarantee of socioeconomic rights for refugees. A classic example is Zimbabwe whose constitution is silent on the guarantee of socioeconomic rights; but whose Refugee Act of 1983 has incorporated, with minor omissions, the full range of rights guaranteed under the 1951 Convention, that include a significant amount of socioeconomic rights.

Then there is Namibia, that has a Constitution which, although on its face it bifurcates the guarantee of socioeconomic rights into non-binding directive principles of State policy on the one hand and binding rights in the bill of rights on the other, has a great potential of being read in a way that renders the full spectrum of internationally guaranteed socioeconomic rights under the ICESCR enforceable in Namibia by reason of its monist approach to international law in terms of Article 144 of the Constitution.

Further, where socioeconomic rights have not been expressly guaranteed, apart from Lesotho where courts have already considered the point; there remains a possibility of drawing inspiration from Indian jurisprudence and arguing that socioeconomic rights, including socioeconomic rights for refugees, be implied in the right to life that is guaranteed in virtually all the constitutions of the Southern African States under study.

607 Rutinwa (note 571 above).

CHAPTER V

TOWARDS A MORE EFFECTIVE HARMONISED FRAMEWORK FOR THE GUARANTEE OF SOCIOECONOMIC RIGHTS FOR REFUGEES IN SOUTHERN AFRICA

5.1 Introduction

Thus far, the study has explored and illustrated the nature and extent of the refugee problem in Southern Africa. It has also provided a theoretical framework, both ethical and legal, within which the guarantee of socioeconomic rights for refugees ought to be conceptualised and applied. Further, in the last Chapter, the study has explored the extent to which socioeconomic rights are guaranteed for refugees in Southern Africa, and the processes for refugee status determination. This Chapter proceeds to make some recommendations; both normative and institutional, on how a more effective regional framework for refugee protection generally, and specifically for the guarantee of socioeconomic rights for refugees in Southern Africa, can be constructed.

This Chapter advances two main arguments. First, it argues that in order to have a coherent and effective refugee protection regime, particularly in respect of the guarantee of socioeconomic rights, Southern African States should ensure that there is a scheme for burden-sharing of the refugee problem. This would help to ensure that no single country in the region is disproportionately over-burdened with the problem of refugees, whether by accident of geographical location or for other reasons. Secondly, the Chapter argues that in order to have such a regime in the region, it is important to ensure that the legal arrangements for the protection of refugees in the region be harmonised. In this respect, the harmonisation should entail reform of the

various domestic legislative frameworks on refugee protection. On the international law plane, the study proposes creative utilisation of the existing *SADC Organ on Politics, Defence and Security Co-operation*, and in that connection, the adoption of an operational charter relating to the status and treatment of refugees in the SADC region as a regional mechanism for addressing refugee rights issues. It also proposes the adoption of model legislation on refugee protection.

5.2 Burden sharing

> Our resources are very limited and the demands made upon us are very large. But I do not believe that dealing with the problems of 3.5 million people [African refugees] and giving them a chance to rebuild their dignity and their lives is an impossible task for 46 nations and their 350 million inhabitants.– Julius Nyerere (1979)

Perhaps the most contentious issue in devising a harmonised, coordinated and integrated regime for the protection of refugees in southern Africa is how to address the question of burden-sharing. The issue of burden sharing directly relates to the issue of resource constraints, discussed in Chapter I, that affect the way that host States treat foreign nationals generally. The UNHCR Executive Committee (the EXCOM) has observed that refugee problems throughout the world are 'grave' and 'complex';[608] and that they 'are the concern of the international community' at large.[609] The EXCOM has further stated that the resolution of refugee problems 'is dependent on the will and capacity of States to respond wholeheartedly, in a spirit of true humanitarianism and international solidarity.'[610] As discussed in Chapter I, the

608 UNHCR Executive Committee, Conclusion No 52(XXXIX) – 1988: International Solidarity and Refugee Protection, Report of the 39th Session: UN doc.A/AC.96/721, para.24.

609 Ibid.

610 Ibid.

refugee problem is an international problem.[611] It therefore requires an international response which necessarily entails, among other things, refugee burden-sharing

5.2.1 Burden sharing and the 1951 Convention

The issue of burden-sharing has not been expressly addressed in the text of the 1951 Convention. Although the Convention appropriately points out in its Preamble that the grant of asylum may place unduly heavy burdens on certain countries, and that the satisfactory solution of the refugee problem cannot be achieved without international co-operation;[612]the substantive provisions of the Convention are silent on how burden-sharing should be dealt with in addressing refugee challenges. Daniel Barkley states that this is perhaps because '[t]he Convention drafters anticipated that the refugee problem would be confined to moderately developed countries in Europe that could rely on their own resources to handle the refugees.'[613] He observes however that today, the world is experiencing mass movements of people to underdeveloped States in the third world who find it necessary to call on the international community for assistance.[614]

Although the text of the 1951 Convention does not explicitly address the issue of burden-sharing, the principle has all the same been widely embraced as an appropriate mechanism to ensure that refugee problems, which are international in character, equally assume solutions of an international character. Some challenges however are manifest in international refugee burden-sharing. One of the key challenges is the lack of willingness among States to demographically share the refugee burden. Asha Hans and Astri

611 See Haddad (note 25 above).
612 See 1951 Convention, fourth preambular citation.
613 Daniel W. Barkley, 'Hope for the Hopeless: International Cooperation and the Refugee' 21 *Columbia Human Rights Law Rev*iew 319 1989-1990, 328.
614 Ibid.

Suhrke have observed, for instance, that in both 'the UN and regional *fora*, the discussion of principled [burden] sharing with respect to refugees has focused on financial aid, rather than redistribution.'[615] This practice is generally inequitable in light of various competing considerations such as spatial, demographic, and financial disparities among States.[616] In cases of mass influx of refugees for instance, the State that is most disproportionately burdened by the refugee crisis is frequently either the neighbouring country or the nearest safe country. This has led the EXCOM to stress that situations of mass influx of refugees are the responsibility of the international community. It has stated that:

> States which because of their geographic situation, or otherwise, are faced with a large-scale influx should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing.[617]

The EXCOM has further stated that:

> As mass influx may place unduly heavy burdens on certain countries; a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international cooperation.[618]

The EXCOM has, however, also stressed that even in cases of refugee mass influx and in the light of severe resource constraints, the obligation on the part of States to maintain scrupulous observance of the principle of *non-refoulement*, including non-rejection at the frontier, should be upheld.[619]

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615 A Hans & A Suhrke, 'Responsibility Sharing' in JC Hathaway (ed.), *Reconceiving International Refugee Law*, (1997)102.

616 UNHCR, 'Sharing the Burden: Capacities and Contributions of Host Countries' in 2004 *UNHCR Statistical Yearbo*ok (Geneva: UNHCR, 2004) 51-54.

617 UNHCR EXCOM, Conclusion No. 15 (XXX) – 1979: Refugees Without an Asylum Country, Report of the 30th Session: UN Doc.A/AC.96/572, para. 72(2).

618 Ibid, para. IV(1).

619 UNHCR Executive Committee, Conclusion No.22 'Protection of Asylum-Seekers in Situations of Large-Scale Influx '(1981), para. II(A)(2).

Whilst the idea of refugee burden-sharing, broadly conceived, seems to receive general international consensus, problems arise when it comes to the practical implementation of the burden-sharing principle. Tally Kritzman-Amir observes in this regard that:

> [t]he disagreement begins when we ask the following questions: Which State will be responsible? Whose budget will bear the costs of protecting and assuring the socio-economic rights of refugees? And which State must divert resources traditionally dedicated to securing the rights of its nationals in order to secure the rights of refugees?[620]

Hans and Suhrke state that there are no easy answers to these questions, particularly when attempt is made to address them at the international level. They argue that the issue of burden-sharing on the international level poses greater challenges when compared with burden-sharing at the regional level. They observe that most regions around the word have developed mechanisms of cooperation on a wide spectrum of issues including economic and security issues. They contend that these '[e]xisting patterns of regional cooperation may be capable of extension to refugee matters.'[621] They further argue that '[t]he sense of commonality which prevails within a region will incline States to consider sharing more readily than in a situation where refugees come from outside the region.'[622] This is an important observation and it lends weight to the view, advanced below, that refugee protection in Southern Africa would be more effective if a regional grouping such as SADC

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620 Tally Kritzman-Amir, 'Not in my Backyard: On The Morality of Responsibility Sharing in Refugee Law', 34 *Brookings Journal of International L*aw 355 2008-2009, 357. Stressing the general ambivalence of States to engage in refugee burden-sharing, Kritzman-Amir states that 'David Miller discusses an analogous hypothetical in which a person has collapsed on the street. Miller argues that the victim is more likely to receive assistance if there is a single person, rather than several, passing by. This is true for several reasons, the most important of which, according to Miller, is that with several bystanders, there is no clear allocation of responsibility and no one is solely at fault should the victim die. The same phenomenon can be observed with the international community's response to the challenge of refugee policy.' – Ibid.

621 Hans & Suhrke (note 615 above) 104.

622 Ibid, 105.

came up with a concerted and harmonised legal and administrative mechanism to deal with the issue of refugees.

5.2.2 Burden-sharing obligations under other instruments

Apart from the 1951 Convention, obligations of States in respect of refugee burden-sharing can be drawn from several other instruments including the 1969 OAU Convention, the UN Charter, the ICESCR and the SADC Treaty. The 1969 OAU Convention is more explicit and substantive on the issue of burden-sharing than the 1951 Convention. Article 2(4) of the 1969 OAU Convention provides that:

> Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the [AU], and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

This provision clearly creates a collective obligation of burden-sharing on States parties to the Convention; mandating unburdened or less burdened States to 'lighten the burden' of heavily burdened host States. Although this is so, there are regrettably no formal mechanisms or institutional structures that have been set up by the AU to give effect to this important provision. The result is that, as George Okoth-Obbo observes, there has been 'relatively poor implementation' of this provision and, in practice, only a few countries have disproportionately borne the burden of hosting refugees in Africa.[623]Thus, as Peter Nobel states, it is essential that 'legal and

[623] G Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa', (2001) Vol.20, No.1 *Refugee Survey Quarterly*, 79, 93.

administrative machineries for burden-sharing must be constructed and implemented.'[624]

In addition to the 1951 Convention and the 1969 OAU Convention, there are also various instruments at international law that can be liberally interpreted to encapsulate burden-sharing responsibilities. First, the responsibility for refugee burden sharing can be inferred from the Charter of the United Nations. One of the purposes of the U.N. under Article 1 of the U.N. Charter is '[t]o achieve international cooperation in solving international problems of an economic, social, cultural and humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms.'[625] Another purpose of the organization is 'to be a centre for harmonizing the actions of nations in the attainment of these common ends.'[626] This position is reiterated in Article 55(a) of the U.N. Charter that states, among other things, that the U.N. shall promote 'solutions of international economic, social, health and related problems.'[627]

In addition, Article 56 of the U.N. Charter provides that '[a]ll members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.' These provisions impose humanitarian and human rights (including socioeconomic rights) obligations on member States of the U.N. towards the international community at large. Since refugee problems are human rights issues, the clear position is therefore that the treatment of refugees is a matter of international concern that imposes joint and several responsibilities and obligations of mutual co-operation and assistance on all member States of the UN in resolving them.[628]

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624 P Nobel, 'Refugees, Law and Development in Africa', (1982) *Michigan Yearbook of International Legal Studies*, 255, 280.

625 UN Charter, art.1(3).

626 Ibid, para.4.

627 Ibid, art.55(a)

628 *Barcelona Traction case* (note 226 above).

Secondly, for the Southern African countries that are party to the ICESCR, burden sharing responsibilities also flow from article 2(1) of the Covenant, which requires member States to cooperate with and assist each other in order to achieve the full realization of socioeconomic rights. Further, when one State in the region is faced with a situation of mass influx, it is submitted that the SADC treaty may be interpreted in such a manner as to impose a collective responsibility of international cooperation and assistance in respect of such a situation. Article 5(1)(i) of the SADC Treaty requires SADC member States to, among other things, 'secure international…co-operation and support, and mobilise the inflow of public and private resources into the region' in addressing regional problems. It is submitted that this can be properly interpreted to include general regional cooperation and support, and the pooling together of necessary resources to give effect to the socioeconomic rights of refugees in the region. Thus the UN Charter, the ICESCR and the SADC Treaty, among others, can in this regard, be mutually reinforcing in respect of the duty of States in imposing obligations for international and regional cooperation and mutual assistance including in the economic and technical assistance spheres.

5.2.3 Exploring effective ways of refugee burden sharing

Whilst the various international and regional instruments above show that an international obligation of refugee burden sharing exists; these instruments do not suggest the specific burden-sharing schemes that may be adopted. In this section, various avenues of ensuring an effective burden sharing scheme are explored.

Firstly, it is important that Southern African States should devise a mechanism for the redistribution of refugee populations within the region, particularly in cases of mass influx. It has been observed that the international

community is more amenable to providing financial and material assistance as a way of international burden sharing of the refugee problem, and that demographic redistribution is frequently not envisaged as one of the preferred and viable burden sharing options.[629] Even in cases of mass influx of refugees, where some States are disproportionately burdened in comparison with others, demographic redistribution is only sparingly explored.[630]

It is submitted that, considering the principle of equitable burden sharing as specifically articulated by the EXCOM and the 1969 OAU Convention, demographic redistribution should be one of the preferred solutions, particularly in cases of mass influx of refugees. This would help in partly addressing concerns about resource constraints and the disproportionate heavy burden borne by host States when providing the refugees with the necessary socioeconomic assistance and protection. It is axiomatic that refugee hosting, especially when there is a mass influx of refugees, takes a heavy toll on the economy (which in respect of developing countries is often fragile).[631] Refugee hosting in cases of mass influx also tends to have a negative impact on the environment, and frequently has the potential to destabilise the social configuration and values of the host society.

In the SADC region, Article 5(1)(d) of the SADC Treaty calls for 'collective self-reliance, and the interdependence of Member States' in SADC. It is submitted that equitable demographic redistribution of refugee populations, particularly in cases of mass influx of refugees, would be an example of collective self-reliance and interdependence of SADC member States, in terms of Article 5(1)(d).

One might perhaps wonder whether demographic burden-sharing is merely an idealistic notion rather than a practical possibility. It is submitted that it is a

629 See Hathaway (note 615 above)
630 Ibid.
631 UNHCR (note 616 above)

practical possibility. First, the issue of demographic burden-sharing in respect of refugees is not completely alien to southern Africa. Bonaventure Rutinwa observes, in this regard, that:

> Countries in the sub-region [historically] practised some degree of intra-regional burden-sharing. For example, in the 1970s and early 1980s, when Botswana, Lesotho and Swaziland came under intense pressure from South Africa for hosting South African refugees, they sought and obtained resettlement for these refugees in Tanzania, Zambia and Zimbabwe. Refugees were also offered limited opportunities for naturalisation.[632]

Okoth-Obbo observes that during the days of apartheid, even the frontline States of Zimbabwe, Mozambique and Zambia had to seek the assistance of other countries further-off from South Africa, to help with the burden of hosting South African refugees.[633] He states that:

> It will be recalled that, in the face of destabilization, intimidation, armed attacks and sabotage perpetrated by the apartheid regime, a number of the Frontline States in effect became unable to provide safe and secure asylum for the South African refugees arriving on their territories. However, it was possible to provide protection for these refugees principally because several countries throughout Africa agreed to receive them, even if they had not arrived directly in the latters' territory.[634]

As a matter of fact, the idea of demographic redistribution of refugees is not alien to contemporary international refugee law and refugee protection system. The UNHCR, for instance, has an established scheme of refugee resettlement through which refugees are moved from 'a transit or country of

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632 See Rutinwa, (note 571 above)

633 G Okoth-Obbo, 'Thirty Years On: A Legal Review of the1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa', (2001) Vol. 20, No. 1, *Refugee Survey Quarterly 7.*

634 Ibid, 93.

first asylum to another or third State.'[635] Goodwin-Gill properly summarises some of the major objectives of international refugee resettlement. He states that:

> Resettlement policy aims to achieve a variety of objectives, first and perhaps most fundamental being to provide a durable solution for refugees unable to return home or to remain in their country of immediate refuge. A further goal is to relieve the strain on receiving countries, sometimes in a quantitative way, at others in a political way, by assisting them in relations with countries of origin.[636]

He states that successive refugee crises around the world have underlined the necessity for States on occasion to go beyond financial assistance and to offer resettlement opportunities.[637] Thus, it is submitted that the issue of demographic redistribution of the refugee population in cases of mass influx is a matter that should be specifically addressed in Southern Africa through SADC.

The need to create such a mechanism engenders the need for Southern African States to have a coordinating institutional mechanism under which the burden sharing scheme can be implemented. This coordinating responsibility, it is submitted, can properly be read into the mandate of SADC. According to the *SADC Protocol on Politics, Defence and Security Cooperation (SPPDSC),* the *SADC Organ on Politics, Defence and Security Co-operation* (the SADC Organ) is mandated to, among other things, 'encourage the observance of universal human rights as provided for in the Charters and Conventions of the [African Union] and United Nations respectively',[638] and further, to 'enhance regional capacity in respect of disaster management and co-ordination of

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635 Goodwin-Gill (note 30 above) 276; UNHCR EXCOM, *Resettlement as an Instrument of Protection: Traditional Problems in achieving this Durable Solution and New Directions in the 1990s*, UN doc. EC/SCP/65 (9 July 1991).

636 ibid.

637 Ibid, 277.

638 Article 2(g) of the Protocol

international humanitarian assistance.'[639]Although refugee protection in some cases goes beyond mere humanitarian assistance as shown earlier in this thesis; the term 'humanitarian assistance' is frequently loosely used to include refugee protection, and the framers of the SPPDSC are likely to have considered refugee protection matters as falling within the compass of humanitarian assistance.

Various options can be weighed in this regard on the nature or character that such a coordinating institutional mechanism should take. Wary of creating further multiple institutions on the African continent in the area of human rights monitoring and enforcement, this study argues against creating a completely new institutional mechanism under SADC for this purpose. The SADC organ referred to above can be creatively used to address this issue. Article 3(1) & (2) of the SPPDSC provides that:

> 1. The Organ shall be an institution of SADC and shall report to the Summit.
> 2. The Organ shall have the following structures:
> a) the Chairperson of the Organ;
> b) the Troika;
> c) a Ministerial Committee;
> d) an Inter-State Politics and Diplomacy Committee (ISPDC);
> e) an Inter-State Defence and Security Committee (ISDSC); and
> f) such other sub-structures as may be established by any of the ministerial committees.

The issue of refugee burden-sharing and coordination can be addressed under the *Inter-State Politics and Diplomacy Committee (ISPDC),* which can in turn create a sub-structure, under Article 3(2)(f) of the SPPDSC, on the '*Movement and Treatment of Refugees in the SADC Region*'. Such a sub-structure can be located within the SADC Secretariat pursuant to Article 9 of the SPPDSC. In this way, decisions on burden sharing in cases of mass influx would be taken at the level of the *ISPDC,* which is a ministerial

639 Article 2(l) of the Protocol.

committee within SADC, and coordinated and implemented by the proposed sub-structure on the '*Movement and Treatment of Refugees in the SADC Region*'. In order to operate effectively in its coordination role, the sub-structure could then have to closely collaborate with the UNHCR Southern Africa office so as to utilise the existing skills, institutional competencies and capacities of the UNHCR. Inviting the collaboration of the UNHCR in this respect would be consistent with international practice.[640]

In addressing the issue of burden sharing, it is evident from what has been discussed earlier, that various complex and polycentric factors would have to be taken into account in order to have an effective, fair and efficient system. The Organ would have to take into account the fact that various States in Southern Africa have varying economic, demographic and spatial capacities that inform the extent to which they might be considered over-burdened by a refugee influx. As the UNHCR has noted:

> The GDP per capita is the most widely used measure of a country's wealth. By comparing the refugee population with the GDP per capita of a country, a measure is obtained of the relative burden of providing protection. If the number of refugees per 1 USD GDP per capita is high, the burden can be considered high although protection and assistance are not only a wealth issue. In contrast, if there are few refugees per 1 USD GDP per capita, the burden is considered as small.[641]

However, GDP per capita is obviously not the only consideration in the matrix of measuring the extent of the refugee burden for each State. As the UNHCR further states:

> Although less important than GDP per capita, the size of the national population nevertheless provides a useful indication of the capacity of countries to host refugees. Countries with larger populations can be

640 Goodwin-Gill (note 30 above) 33.
641 UNHCR (note 616 above) 52.

> assumed to absorb refugees more easily than countries with smaller populations.[642]

The complexity of taking into account these factors in the burden sharing matrix is exemplified by the UNHCR's observation that:

> It may be argued that the capacity to absorb refugees is higher for larger countries, both in terms of national population size and surface area, than for smaller ones. While widely available, these parameters have considerable limitations. In most countries, refugees are not evenly distributed over the national territory, but are often concentrated in border areas or cities. Applying nation-wide indicators provide therefore a very simplified picture. Similarly, the national surface area does not take into account that large areas of a country may not be available for productive use. The GDP - although the most widely available and used indicator for development - may not adequately take into account the informal economy, which tends to be sizeable in developing countries as well as other factors as reflected in the United Nations Development Programme's human development index.[643]

A comprehensive and scientific analysis and exposition of how the *ISPDC* through the proposed sub-structure on the '*Movement and Treatment of Refugees in the SADC Region*' could integrate and synthesise these complex matters for purposes of decision-making is outside the scope of this thesis, and is perhaps an area that scholars in other areas of social scientific study might wish to take up for further research. What the thesis attempts here is only to provide a proposal of an appropriate legal framework under SADC within which the issue of refugee-burden sharing in the region can operate; and the broad outlines of how the proposed sub-structure on the '*Movement and Treatment of Refugees in the SADC Region*' can effectively function.

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642 Ibid, 53.

643 Ibid, 52.

5.2.4 Conclusion

It is submitted that a collective approach to burden-sharing would address some of the simmering concerns by States of being overwhelmed by refugee flows, especially mass influxes which in turn are likely to take a heavy toll on the resources of the host State and are also likely to change the social configuration of the existing polity. A collective approach would help in reducing the incidences of refugee *refoulement* by States wary of assuming an unbearable refugee burden; and also serve as an appropriate tool for educational campaigns aimed at reducing xenophobic attitudes that are fanned by, among other things, the belief that refugees present a disproportionately heavy burden on particular individual States and not others.[644]

5.3 Harmonisation of refugee protection frameworks in Southern Africa

In order for southern African States to carve out a common and effective approach for the guarantee and implementation of the human rights of refugees, particularly socioeconomic rights; it is of the essence that they have a harmonised refugee protection system. Such a harmonised system should, firstly, provide for a common definition of who a refugee is. Secondly, it should engender a common scheme for determining refugee status. Thirdly it should address the issue of the standards of treatment, i.e determine the level at which the socioeconomic rights of refugees should be pitched. Finally, it must address the issue of burden-sharing discussed in the previous Section. Charles Mwalimu has properly captured the essence of harmonisation of refugee protection systems vis-à-vis burden-sharing, stating that:

644 See Barkely (note 17 above)

> Harmonization would have an immediate impact on refugee burden sharing. Costs of hosting refugees would be reduced in each of the countries… A synchronized regime of laws would encourage similar and more humane treatment of refugees, reflecting similar tenets, rules, and regulations requiring consistent practices in all the countries. This, in turn, would attract greater regional and international support, encouraging the pooling of resources for refugee assistance, assimilation in host countries, citizenship, and integration as the ultimate durable solution to the refugee crisis.[645]

Without a common and harmonised approach that addresses these critical issues, it would not be feasible, both legally as well as for purposes of policy planning and implementation, to have an integrated and effective refugee protection system in the region.[646]

SADC, it is submitted, is an appropriate institution to deal with such harmonisation issues through the SADC Organ. This is so because regional socioeconomic integration is one of the main objectives of SADC. Article 5(1) of the SADC Treaty states that one of the objectives of the organisation is 'to achieve complementarity between national and regional strategies and programmes',[647] and Article 5(2) provides that in order to achieve the objectives listed in Article 5(1), SADC States agree to, among other things, 'harmonise political and socio-economic policies and plans of Member States.'[648]

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645 Charles Mwalimu, 'The Legal Framework on Admission and Resettlement of African Refugees with an Emphasis on Kenya, Tanzania, and Uganda', (2004)18 *Emory International Law Review* 455, 477.

646 Charles Mwalimu states that refugee legislation in East Africa is disparate, and that laws are not harmonised. He observes that recently, Kenya and Uganda have embarked on a process of revising their refugee legislation and that efforts at harmonisation are being made. He states that: '[t]he efforts by Kenya and Uganda in their new refugee Bills are an attempt to forge the comity of laws on refugees, which is prescriptively more successful in SADC countries.' – Mwalimu (note 645 above) 455 2004. It is unclear though how SADC countries are successful in this regard. My research, as demonstrated both in this Chapter as well as Chapter IV, clearly shows that SADC countries are not any better in this regard.

647 Art.5(1)(e) of the SADC Treaty.

648 Art.5(2)(a) of the SADC Treaty.

5.3.1 Harmonisation of the refugee definition and RSD procedures

The Refugee Status Determination (RSD) process is an important gateway for the refugee to access various rights, including socioeconomic rights.[649] From the general overview of RSD processes in the region in Chapter IV, it is clear that RSD processes in different countries in the sub-region are significantly discordant. For instance, the refugee definition adopted is not always the same, raising the challenge that definitionally, a person might qualify as a refugee in one SADC State, but not in another. The composition of the status determination committees is also structurally dissimilar in different countries, with the result that the levels of expertise on these committees are bound to be significantly different. Indeed, in some countries such as Swaziland and Zambia, there is no established committee at all, and the powers of RSD are vested in a Minister who does not even have an operative legal definition of a refugee from the applicable legislation. These differences in turn impact on how RSD is ultimately done in the various countries and may result in significant variations of the conception of who, in fact and in law, qualifies as a refugee.

In order for southern African States to have a collaborative approach that ensures the effective guarantee and implementation of the human rights of refugees, particularly socioeconomic rights; it is of the essence that RSD processes be harmonized so that the region has a common system of firstly, defining who a refugee is and secondly, the structures and processes for determining refugee status. Without a common approach in this regard, it would not be feasible both legally as well as for purposes of policy and planning, to have an integrated and effective system for the guarantee of socioeconomic rights for refugees.[650]

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649 Haddad (note 6 above)

650 Mwalimu (note 645 above) 455.

In this regard it is recommended that the best approach would be for States in the region to uniformly adopt the definition under the OAU 1969 Convention that includes and expands on the definition of a refugee under the 1951 Convention. Thus, Swaziland and Zambia in particular, that do not reflect any of the definitions of a refugee at international law in their domestic legislation, ought to revise their refugee legislation in order to incorporate this definition. Secondly, these two countries also need to ensure that their legislative frameworks establish competent and independent committees to be responsible for RSD. This would help to eliminate elements of arbitrariness in status determination that would in turn adversely affect the guarantee of fundamental human rights for refugees.

Another important issue to observe is the critical role played by the UNHCR in addressing refugee issues in all the countries under study. Under the 1951 Convention and 1967 Protocol, contracting States have undertaken to cooperate with the 'UNHCR in the exercise of its functions and, in particular, to facilitate its specific duty of supervising the application of the provisions of these instruments.'[651] Indeed, the Convention itself recognizes that: 'the effective co-ordination of measures taken to deal with this [refugee] problem will depend upon the co-operation of States with the High Commissioner.'[652] Further, considering the increasing recognition of the importance of the Convention and the Protocol in the establishment of minimum standards for the treatment of refugees, it is of paramount importance that the UNHCR be actively involved in RSD processes, even in cases where (as is the case in most countries) the responsibility of conducting RSD lies with the host Government rather than the UNHCR itself.

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651 Arts 35 of the 1951 Convention. See also UNGA, Resolution 2198 (XXI): Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR),

652 Last Preambular citation to the 1951 Convention.

Involving the UNHCR in these processes would not amount to a violation of state sovereignty. By contrast, in view of the obligation to co-operate with the UNHCR in the implementation of the Convention, the inclusion of a UNHCR representative as a substantive member of a status determination committee in the host States would be consistent with their existing and voluntarily assumed obligations under international law. Practically, it is submitted that the inclusion of a UNHCR representative on such RSD committees would be important as he or she would bring the necessary refugee law, human rights and humanitarian law expertise necessary for the advancement of refugee rights, and especially so in the highly contested space of socioeconomic rights guarantees. Indeed, as the UN itself has stated, UN member 'States and the UNHCR are joined in the common pursuit of solutions for refugee problems and the international protection of the fundamental human rights of refugees'.[653] This therefore underscores the importance of ensuring a more prominent role for the UNHCR is scheming solutions for refugee problems in various countries. The involvement of a UNHCR representatives in the RSD processes would also help in ensuring uniform application of the refugee definition and the Convention generally in the region. However, although the UNHCR is central in international refugee protection, none of the countries explored in this study has included the UNHCR representative as a substantive member of the status determination committee.

Thus it is recommended that under the harmonized approach, all Southern African States should ensure that the UNHCR's role is not relegated to mere observer status or less; but rather, it should be accorded substantive membership to their respective status determination committees. Their inclusion is necessary by reason of not only the experience and expertise they bring, but also to assist in the goal of ensuring the harmonised treatment of refugees in the region.

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653 UNHCR Executive Committee, Conclusion No 52(XXXIX) – 1988: International Solidarity and Refugee Protection, Report of the 39th Session: UN doc.A/AC.96/721, para.24.

With a harmonised RSD regime in southern Africa, it should follow that once a person has been declared a refugee in one SADC State, he or she should be recognised as a refugee in all other member States. Thus there should be no need for the person to undergo another assessment and determination process should he or she move from one SADC State to another. What should matter, as this study further argues below, is firstly, the standard of treatment that a refugee should receive if he or she decides to move from one safe country to another within the sub-region. Secondly, the right of admission into another safe country can also be constrained by general immigration laws.

5.3.2 A proposed scheme for the SADC sub-structure on the Movement and Treatment of Refugees

In order to effect a harmonized and integrated scheme for the protection of refugees, this study further proposes that the sub-structure on the '*Movement and Treatment of Refugees in the SADC Region*' should have an operational *Charter on the Movement and Treatment of Refugees in the SADC Region* (the Charter) that should guide its operations. This section sketches the major highlights of the protection scheme to be adopted under the proposed Charter.

First, the Charter needs to draw a clear definitional distinction between humanitarian refugees and political refugees. It should then adopt a scheme that ensures that once a person has been determined to be a political refugee in one SADC State, he or she should be entitled to enjoy the most favourable treatment accorded to a foreign national, as a general standard of treatment, only in the host State. In all other States, such a refugee should receive treatment on the level of parity with other foreign nationals in the host country generally. However, if a political refugee has been resettled to a third State

within SADC, again the most favourable treatment standard should be guaranteed only in the State of resettlement. In all other SADC States, the refugee should be entitled only to treatment at parity with other aliens generally, complete with the necessary immigration entry, residence, work and other requirements.

Such a scheme would have a deterrent effect on refugees who keep moving around from a safe country of first asylum to other States, not necessarily in pursuit of further surrogate protection from persecution in the State of origin; but generally in pursuit of better economic opportunities. It is submitted that once a political refugee finds himself or herself in a safe host State that is able and willing to provide effective protection from persecution, the refugee should only be entitled to special treatment in that State.

In terms of the range of substantive guarantees of socioeconomic rights, the recommendations for better schemes for their guarantee, made in Chapters III and IV above, should be adopted. Any further movement of such a political refugee to third States should, logically, either render him or her as an ordinary voluntary immigrant who is merely in search of better economic opportunities; or as a humanitarian refugee who moves on to a third safe State not because the country of first asylum is unwilling to offer protection (in the sense of the Rawlsian outlaw State), but because such State lacks the resources to provide the basic minimum essentials of life requisite for a person to have the basic capabilities to live a life of dignity. In either case, as demonstrated earlier in this study, there would be justification for lowering the standard of treatment at first instance, and only to heighten the same based on objective factors such as the level of attachment to the host State (measured in terms of the degree of permanence of stay).

Practically, in the context of Southern Africa, such an approach would help limit the extent to which refugees pass through various ‘transit’ safe States in

order to come to South Africa where they essentially seek better economic opportunities. The disproportionate number of refugees who transit through various safe States in order to come and seek asylum in South Africa essentially owes to the fact that (a) South Africa has a bigger and stronger economy and hence providing more economic opportunities for the refugees; and (b) the fact that South Africa's refugee legal regime is more generous in terms of socioeconomic rights. If the scheme for the guarantee of socioeconomic rights in the region is harmonised; and also if the approach of according the most favourable treatment standard only in the first safe country within SADC is adopted, it is likely that a number of refugees might prefer to stick to a country where they are offered treatment that is as close as possible to national treatment; instead of coming to South Africa and be subjected to the stringent requirements that other foreign nationals generally have to satisfy.

In terms of this scheme, South Africa would then have to closely work with other SADC States, under the aegis of the proposed sub-structure on the '*Movement and Treatment of Refugees in the SADC Region*', to determine the extent to which refugees in other burdened Southern African States can be resettled to South Africa.

For such a system to effectively work, it would also be essential for SADC to have an integrated system of RSD that would ensure that information on decisions taken is shared among authorities in member States in real time. With such a system, it would be possible to bar refugees from making multiple asylum applications in various safe States within the sub-region as they essentially seek better economic opportunities. An integrated system of this nature is within the technological capacity of SADC States.[654]

[654] SADC States already have a common database on Driving Licences in terms of Article 6.10 of the SADC Protocol on Transport, Communications and Meteorology of 1996. Under that scheme, traffic authorities in any member State are able to electronically verify the authenticity of a Driving Licence issued within SADC.

With regard to humanitarian refugees, the Charter should be explicit that these will initially be offered temporary protection. Temporary protection would entail ensuring that the refugee receives treatment that meets the basic minimum essentials of life requisite for a person to have the basic capabilities to live a life of dignity; but generally treat such person as any other foreign national in the host State generally. Within the scheme of standards of treatment under the 1951 Convention, this would entail 'treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally.' Under this scenario, non-deportation should only be generally guaranteed in first country of refuge; or if the refugee is resettled to a third State, only in country of resettlement. Where such a refugee irregularly moves into a third safe State, they may be deported to their initial State of first refuge or resettlement as the case may be. In any event, *non-refoulement* to the State of origin, whilst the threat causing flight still subsists, should be adhered to by any host State at all times. The Charter should also have a properly developed system of burden-sharing, including demographic burden-sharing as discussed earlier in the Chapter.

5.4 Reshaping the legislative framework from a control to a rights-based approach: proposal for a model legislation

The survey of the various legislative regimes on the treatment of refugees in Chapter IV has revealed that most of the refugee regimes in SADC are in the category of 'control' rather than 'protection' frameworks.[655] The relevant pieces of refugee legislation in those countries focus of the various measures to be adopted in controlling the movement and economic activities of refugees, rather than addressing the various rights, particularly socioeconomic rights, that they ought to be entitled to in order to live lives of

[655] See Rutinwa (note 571 above)

dignity. In several cases, such as Botswana, Namibia, Swaziland and Zambia, the titles of the pieces of legislation themselves make it clear that they were designed for purposes of recognition and control. Yet others, even though their titles made no reference to the issue of control, were essentially control centred in their conceptualisation. A good example is the Malawian Refugee Act of 1989.[656]

Some of these control oriented pieces of legislation had, and still have, draconian provisions such as those authorizing confiscation of refugee property such as livestock, and vehicles without compensation and without due process.[657]They also permit the restriction of movement of refugees in the host country.[658]In addition, they do not address the issue of durable solutions for the refugee problem.[659] The refugee control approach is obviously not a human rights-oriented protection approach. Instead of being premised on the idea of substitute protection for the refugee, meant to restore the refugee's right to have rights (in the case of political refugees); it proceeds from the premise of 'otherness' and primarily seeks to ensure that the lives of refugees, irrespective of the cause or circumstances of flight, are restricted

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656 Rutinwa, (note 571 above). It is significant to note however, that a *Draft Refugees Amendment Bill (*2011) as well as a Draft Refugee Policy (2011) has been prepared by the Minister Responsible for Refugees in Malawi. Both, if passed, will represent a significant paradigm shift from the essentially refugee control approach to a refugee protection approach. In summary, they propose an incorporation of the refugee rights provided for under 'Refugee Conventions' (principally, the 1951 Convention).

657 Mwalimu (note 645 above) 464. See also Rutinwa (note 608 above) The provisions are s 8 of the Tanzanian Refugee Control Act of 1966 and the identical s 9 in the Swazi and Zambian Acts.

658 Rutinwa (note 610 above); also see Ss 9 of the Botswana Act and the identical s 12 in the Swazi, Tanzanian and Zambian Acts. In Malawi, whilst the Refugee Act is silent on the issue of freedom of movement for refugees; as pointed out in Chapter III, the country entered a reservation upon ratification of the 1951 Convention where it stated that ''In respect of article 26, the Government of the Republic of Malawi reserves its right to designate the place or places of residence of the refugees and to restrict their movements whenever considerations of national security or public order so require.' Whilst this formulation does not appear to have been a complete abrogation of the right; and left open the possibility of a more generous interpretation in view of section 39 of the 1994 Constitution that guarantees freedom of movement for every person, the High Court in the *Nsabimana case*, as Chapter IV shows, essentially affirmed the generalised restriction of refugee movements and the encampment policy. – *Nsabimana Case* (note 583 above)

659 Rutinwa (note 571 above)

within narrowly circumscribed parameters, particularly in the area of economic rights.

The legal frameworks of other southern African States however, have assumed a more protection oriented approach. These include Lesotho, Namibia, South Africa and Zimbabwe. In the case of South Africa, socioeconomic rights of refugees are comprehensively guaranteed under the Refugees Act as read with the bill of rights in the Constitution. The guarantee of such rights is premised on domestic law. In the other cases, the refugee legislation basically incorporates the protection guarantees under the 1951 Convention. As Chapter IV demonstrates, on the whole, the South African legal framework seems to provide the best guarantees in the region, notwithstanding some not so encouraging judicial pronouncements from superior courts.

In view of the foregoing discussion, it is submitted that in addition to the proposed *Charter on the Movement and Treatment of Refugees in the SADC Region*, to ensure a harmonised protection system, it would also be appropriate for SADC to adopt *'Model Legislation on Refugees'* in order to provide a standard legal framework to be used as a benchmark for the review and reform of national legislation relating to refugees in the region, in conformity with international human rights standards.[660] The model legislation should be strongly refugee protection oriented, in view of the vulnerability of refugees; whilst at the same time addressing essential national interest matters such as national security and public order. Such model legislation should address important matters of principle highlighted above in respect of the proposed Charter. Among other things, the Model legislation should draw a clear distinction between political refugees and humanitarian refugees, with

[660] This Model legislation would follow the 'Model Law on HIV in Southern Africa' that was adopted by the SADC Parliamentary Forum in November 2008. See S Ebobrah & A Tanoh (eds.) *Compendium of African Sub-regional Human Rights Documents* (2010) 465.

the appropriate standards of treatment for these two categories appropriately split, as discussed in Chapter II.

The model legislation should also ensure that local integration through the naturalisation of refugees is not made practically impossible as is the case with several countries in the region at present. As shown in Chapter I, this causes enormous hardships to refugees who have stayed in the host country for long periods, and sometimes it negatively affects generations of refugees.

CHAPTER VI

6. CONCLUSION

There is little, if any debate at all, on the general justifiability, and indeed necessity, of protecting refugees – people in flight from danger or harm in their home countries – by offering them safe refuge. However, that seems, unfortunately, to be where this global consensus stops. Further issues need to be explored and addressed if effective refugee protection is to be a reality in the contemporary world. Some of the critical issues are (a) the standard of protection (in terms of legal guarantees) that refugees should receive and the basis for such standard; (b) Whose obligation it is to provide international refugee protection; (c) Whether refugee protection should be approached individually by each State, or whether it calls for a more concerted and collaborative approach among States; and (d) If a concerted and collaborative approach is to be adopted as a requirement of international law; what the appropriate scheme of burden-sharing should be.

It has been demonstrated in this work that these are complex matters and there are no easy ways of dealing with them. As Goodwin-Gill observes in this regard, '[n]o one doubts that the protection of refugees must take place in a political world, and no one should underestimate the pressures – moral, financial [and] circumstantial' that the refugee problem imposes.[661] He states that '[d]ecisions on matters of principle are never easy, but at least one can expect that those principles should be known, and that rational justification be given.'[662] This thesis has confronted these questions, proposing a principled but pragmatic way of ensuring the effective guarantee of socioeconomic rights for refugees in Southern Africa.

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661 GS Goodwin-Gill, 'Challenges to Protection' (2001) Vol. 35, No. 1, *International Migration Review*, 130-142, 135.

662 Ibid, 136.

Conceptually, prior to engaging any of the above questions, one needs to define the contours of refugeehood by adopting a proper definition. In this regard, this study has shown that the meaning of a refugee, as provided for under the 1969 OAU Convention, is sufficiently pragmatic and progressive to provide a good definitional benchmark for purposes of harmonization in the SADC region. The definition under the 1969 Convention encompasses the other definitions adopted under other regimes, such as the 1951 Convention.[663] The thesis has advocated for a bifurcated definition of refugeehood that distinguishes political refugees from humanitarian refugees, and this distinction is encapsulated under the 1969 OAU Convention definition. Further, the thesis demonstrates, that not only does the 1969 OAU Convention create space for the group (prima facie) determination of refugee status; but also that through a purposive interpretation, it would suffice to grant refugee status to people who are faced with grave deprivations of socioeconomic rights in their home countries.[664]In the premises, this definition is an appropriate benchmark that should be adopted both in the *Charter on the Movement and Treatment of Refugees in the SADC Region* and the *Model Law on Refugees in SADC* that this study recommends.

A more complex issue however, relates to whether there is a rational basis for treating refugees preferentially over other foreign nationals in host States when it comes to the enjoyment of socioeconomic rights. The question is rather complex because State sovereignty is a central principle in contemporary international law,[665] and this principle, among other things, entails that States have the sovereign prerogative to determine who enters their territories and when they enter, the extent to which they are to be guaranteed the enjoyment of certain rights.[666] These arguments are in turn

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663 Art I(1)

664 Chapter I, page 80.

665 As Goodwin-Gill observes, in refugee discourse, '"Sovereign States" are still key actors in flight and solution.' – GS Goodwin-Gill, 'Challenges to Protection' (2001) Vol. 35, No. 1, *International Migration Review*, 130-142; 133

666 Benhabib (note 213 above) 6; Dauvergne (note 224 above) 595.

premised on communitarian, pragmatic and social justice considerations. In a real world with practical borders between States; they are arguments that cannot just be wished away.

From such analysis, an argument has been constructed in this study that differential treatment between citizens and foreign nationals generally is justified.[667] This is based on communitarian considerations; and also what I call, 'principled pragmatism' as informed by Max Weber's ethics of principled conviction and responsibility.[668] The study argues however that such differential treatment must be tempered by universal notions of human rights that are premised on the recognition that humans have human rights that are universal, based on their inherent dignity; and that wherever they may be, it behoves the authorities in control of such territories to ensure that every human being is guaranteed minimum core socioeconomic entitlements, as of right, in order for them to lead a minimally decent and dignified lives.[669]

Whilst such an approach is perhaps sufficient in respect of the treatment of foreign nationals generally; it might leave refugees in an adverse situation if they were to be treated on the basis of parity with all other foreign nationals generally. At the same time, the study recognises that there are many causes of forced migration that ground refugeehood. These include instances where refugees flee due to political reasons – classically instances where the State persecutes or acquiesces in their persecution, thereby repudiating its duty of protection towards them; and also where such persecution is non-existent but there are pressing humanitarian factors that lead to flight. In the premises, a distinction is again drawn between political and humanitarian refugees.

667 See Chapter II, pages 48-69.
668 Weber (note 234 above) 359-369.
669 Nussbaum (note 216 above) 274.

In the case of political refugees, refugees are denied what Hannah Arendt refers to as the right to have rights.[670] Based on the value of human dignity; and in order to restore their right to have rights; refugees are entitled to surrogate international protection.[671] Surrogate protection entails 'substitute' protection,[672] and it must therefore seek to bring the refugees as closely as possible to national treatment; and the study argues that the appropriate general standard for political refugees is the most favourable treatment accorded to a foreign national generally in the host country.[673] Whilst some rights can be guaranteed exclusively to citizens, such as political participation rights such as the right to vote, on the grounds enumerated in Chapter II above; this standard generally entitles refugees, on the basis of the principle of surrogacy, to socioeconomic rights on a footing that is as close as possible to that of nationals in order for them to lead a fulsome and dignified life in the host State.[674]

In respect of humanitarian refugees, the study argues that since membership to the political community of their State of origin is not repudiated; a number of protective options are available to the international community. These include in-country measures where possible; and if this is not practicable; they can be offered temporary protection in another safe State. A political decision according such refugees immediate political membership to the host State is therefore not apposite. The appropriate standard is to accord them treatment that is as favourable as possible, but in any event not lesser than treatment that is accorded to other foreign nationals in the country generally.

An analysis of the legal frameworks in various Southern African countries demonstrates that most States have adopted either the 1951 protection framework; which entails the fourfold test described above; or they have

670 Arendt (note 278 above)
671 Ibid.
672 *A v Minister of Immigration and Ethnic Affairs* (1997) 142 ALR 331
673 Türk (note 17 above) at n.41.
674 Okoth-Obbo (note 308 above) 47.

adopted the standard of the same treatment as accords to other foreign nationals generally. In the case of political refugees, it is submitted that both of these approaches are unduly restrictive in the light of the principle of surrogacy as the conceptual basis for refugehood. It is submitted, for instance, that instead of adopting the standard that accords refugees the same treatment as any other foreign nationals generally,[675] an approach more consistent with the theoretical basis for political refugeehood would guarantee them the most favourable treatment accorded to foreign nationals in the host State as the general (default) standard of treatment.

Further, most of the States in Southern Africa have expressly adopted a control approach in the protection of refugees which focuses on controlling the movement and stay of refugees, rather than a protection approach that focuses on restoring the dignity of refugees and enabling them to lead a fulsome life. It is submitted that the control approach is unsatisfactory. This thesis recommends that the legal regimes for refugee protection in Southern Africa must be reformed so that they assume a rights-based protection approach instead. In this respect, they should adopt the most favourable treatment accorded to other foreign nationals as the general standard of treatment.

However, simply guaranteeing refugees the most favourable treatment accorded to other foreign nationals in respect of their socioeconomic rights would be an exercise in futility in the absence of effective guarantees of socioeconomic rights in the respective States. In this regard, it has been observed that with the exception of South Africa, and to a slightly lesser extent Malawi and Namibia; socioeconomic rights generally are not effectively guaranteed in the sub-region. In most cases, they are provided as non-binding directive principles of State policy, and in a few cases, the constitutions are effectively silent on the guarantee of these rights. Thus it is

675 Art.7(1)

submitted that constitutional frameworks in the region ought to be reformed in order to guarantee comprehensive catalogues of these rights.

Further however, mindful of the fact that such reforms might only effectuate in the medium to long term; there is need for more robust, vigilant and bold judiciaries that are prepared to innovatively interpret other rights, such as the rights to life and human dignity that are guaranteed in all the constitutions explored; and imply in these rights the full range of socioeconomic rights as Indian courts have done. Whilst it is regrettable that in Lesotho the High Court lost an opportunity by refusing to adopt the Indian innovative approach, it is submitted that even in that country there is still hope for a different conclusion because the matter has not yet been considered by Lesotho's highest court. In addition to advocating for more progressive development of socioeconomic rights jurisprudence by judicaries; the *Charter on the Movement and Treatment of Refugees in the SADC Region* and the *Model Law on Refugees in SADC* proposed in this thesis should also provide for a comprehensive set of substantive socioeconomic rights guarantees for refugees in Southern Africa.

Whilst all States have obligations to ensure the protection of refugees; it is also a fact that States have a number of constraints when it comes to guaranteeing socioeconomic rights. These include spatial as well as economic constraints. Large numbers of refugees might strain the available resources in a particular State, to the extent that the hosting of refugees, especially good quality hosting which entails providing refugees with comprehensive soscioeconomic rights entitlements, might breed resentment and xenophobia from the host communities.[676] This study has demonstrated that the refugee problem is an international problem that is, and should be, the responsibility of the international community as a whole.

[676] Türk & Nicholson (note 17 above)

Notwithstanding this, a lacuna in the international refugee instruments is the lack of an unequivocal provision that addresses the issue of international burden-sharing.[677] The present framework of international refugee law, as Hathaway and Neve succinctly point out, is such that:

> neither the actual duty to admit refugees nor the real costs associated with their [refugees] arrival are fairly apportioned among governments. There is a keen awareness that the States in which refugees arrive presently bear sole legal responsibility for what often amounts to indefinite protection.[678]

On this basis, it is submitted that a legal scheme of refugee burden-sharing needs to be developed in Southern Africa, under the aegis of SADC. Such a scheme needs to address both instances where States are confronted with a mass influx of refugees on the one hand; and where they are faced with lesser refugee movements. The need for burden-sharing is heightened in the case of refugee mass influx, and the proposed regime should address such an issue. Chapter V has made prescriptive recommendations in terms of the precise contours that such a scheme should provide. A shared scheme for the protection of refugees would ease the asymmetrical socioeconomic burden of the refugee problem on some States in comparison with others. This is because such a scheme would include the pooling together of resources as well as, in appropriate cases, refugee resettlement within the region. This would in turn, it is hoped, also help in stemming the tide of anti-refugee sentiment that gets generally hyped up by perceptions that large numbers of refugees cause a heavy strain on host State's limited resources; to the disadvantage of citizens; and that this becomes unfair when the refugee population gets concentrated in one host State without the support of others.

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677 Barkley (note 17 above) 328.

678 JC Hathaway & RA Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', (1997) 10 *Harvard Human Rights Law Journal* 115.

The study acknowledges that the burden sharing scheme would involve complex and polycentric considerations including the sizes of the various economies, the GDP levels and GDP per capita in such States, the population sizes of the host States as well as the spatial capacities of host States, among other things. A comprehensive and scientific analysis of the how SADC will synthesise these factors together in order to carve out a fair burden sharing scheme is beyond the scope of this thesis, and it is strongly recommended that this be explored by other scholars in the social sciences.

The study further proposes that it is imperative to design a harmonised regime in order to eliminate differences that provide room for different standards of protection in different Southern African countries. Areas of critical importance that require harmonisation include the definition of a refugee; status determination; the substantive socioeconomic rights guaranteed and their scope; and the standard of treatment of refugees. It is further proposed that a salient avenue for achieving such harmonisation at the level of domestic legislation is to adopt a *Model Law on Refugees in SADC*, akin to the *Model Legislation on HIV/AIDS Law* previously adopted by SADC, along which SADC legislatures would pattern their country-specific pieces of legislation on the subject.

The study recognises that the various other recommendations made in the study for regional (SADC) law to address issues of refugee burden-sharing, and harmonisation of legal protection schemes aimed to achieve greater congruence in the treatment of refugees in terms of their socioeconomic rights guarantees in the region; are significantly far-reaching. For this reason, they might take longer and might meet more political obstacles to their implementation than the adoption of the Model legislation, which already has a precedent within SADC. Thus the adoption of this model legislation ought to be the first practical step adopted by SADC along the path of eventually

constructing an ideal regionally harmonised and effective refugee protection scheme as proposed by this thesis. It is submitted that this is a realistic pathway towards achieving a more effective and harmonized scheme for the guarantee of socioeconomic rights for refugees in the region.

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ANNEXURE I

CONVENTION RELATING TO THE STATUS OF REFUGEES, 189 U.N.T.S. 150, *ENTERED INTO FORCE* APRIL 22, 1954

PREAMBLE

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international- scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

CHAPTER I

GENERAL PROVISIONS

Article 1. - Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee,, shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before I January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before I January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before I January 1951"; or (b) "events occurring in Europe or elsewhere before I January 1951"; and each

Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2. - General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3. - Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4. - Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with

respect to freedom to practise their religion and freedom as regards the religious education of their children.

Article 5. - Rights granted apart from this Convention

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

Article 6. - The term "in the same circumstances"

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

Article 7. - Exemption from reciprocity

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

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8. - Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9. - Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10. - Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11. - Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel

documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

CHAPTER II

JURIDICAL STATUS

Article 12. - Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13. - Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14. - Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15. - Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their

territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16. - Access to courts

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.

CHAPTER III

GAINFUL EMPLOYMENT

Article 17. - Wage-earning employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(a) He has completed three years' residence in the country;

(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18. - Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19. - Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

CHAPTER IV

WELFARE

Article 20. - Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21. - Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment

as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22. - Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

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

Article 23. - Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24. - Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non- contracting States.

CHAPTER V

ADMINISTRATIVE MEASURES

Article 25. -Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or

certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26. - Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 27. - Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28. - Travel documents

1 . The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the

Contracting States in the same way as if they had been issued pursuant to this article.

Article 29. - Fiscal charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30. - Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31. - Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32. - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33. - Prohibition of expulsion or return ("refoulement")

1. 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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 34. - Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

CHAPTER VI

EXECUTORY AND TRANSITORY PROVISIONS

Article 35. - Co-operation of the national authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) The condition of refugees,

(b) The implementation of this Convention, and

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36. - Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37. - Relation to previous conventions

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between Parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

CHAPTER VII

FINAL CLAUSES

Article 38. - Settlement of disputes

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the

International Court of Justice at the request of any one of the parties to the dispute.

Article 39. - Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40. - Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall

consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 41. - Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42. - Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph I of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43. - Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44. - Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General. Article 45. - Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46. -Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(a) Of declarations and notifications in accordance with section B of article 1;

(b) Of signatures, ratifications and accessions in accordance with article 39;

(c) Of declarations and notifications in accordance with article 40;

(d) Of reservations and withdrawals in accordance with article 42;

(e) Of the date on which this Convention will come into force in accordance with article 43;

(f) Of denunciations and notifications in accordance with article 44;

(g) Of requests for revision in accordance with article 45.

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

DONE at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

ANNEXURE II

PROTOCOL RELATING TO THE STATUS OF REFUGEES, 606 U.N.T.S. 267, *ENTERED INTO FORCE* OCT. 4, 1967

The Protocol was taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of 18 November 1966 and was taken note of by the General Assembly in resolution 2198 (XXI) of 16 December 1966. In the same resolution the General Assembly requested the Secretary-General to transmit the text of the Protocol to the Stares mentioned in article 5 thereof, with a view to enabling them to accede to the Protocol

ENTRY INTO FORCE: 4 October 1967, in accordance with article 8

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before I January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline I January 1951,

Have agreed as follows:

Article 1. - General provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of

events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.

Article 2. - Co-operation of the national authorities with the United Nations

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(a) The condition of refugees;

(b) The implementation of the present Protocol;

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 3. - Information on national legislation

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article 4 - Settlement of disputes

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means

shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 5. - Accession

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 6. - Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(b) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article VII. - Reservations and declarations

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph I of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declarations made under article 40, paragraphs I and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply muratis mutandis to the present Protocol.

Article 8.- Entry into Protocol

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article 9.- Denunciation

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article 10.- Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto .

Article 11. - Deposit in the archives of the Secretariat of the United Nations

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article 5 above.

ANNEXURE III

CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA, 1001 U.N.T.S. 45, *ENTERED INTO FORCE* JUNE 20, 1974

PREAMBLE

We, the Heads of State and Government assembled in the city of Addis Ababa, from 6-10 September 1969,

1. Noting with concern the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future,

2. Recognizing the need for and essentially humanitarian approach towards solving the problems of refugees,

3. Aware, however, that refugee problems are a source of friction among many Member States, and desirous of eliminating the source of such discord,

4. Anxious to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside,

5. Determined that the activities of such subversive elements should be discouraged, in accordance with the Declaration on the Problem of Subversion and Resolution on the Problem of Refugees adopted at Accra in 1965,

6. Bearing in mind that the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

7. Recalling Resolution 2312 (XXII) of 14 December 1967 of the United Nations General Assembly, relating to the Declaration on Territorial Asylum,

8. Convinced that all the problems of our continent must be solved in the spirit of the Charter of the Organization of African Unity and in the African context,

9. Recognizing that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment,

10. Recalling Resolutions 26 and 104 of the OAU Assemblies of Heads of State and Government, calling upon Member States of the Organization who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa,

11. Convinced that the efficiency of the measures recommended by the present Convention to solve the problem of refugees in Africa necessitates close and continuous collaboration between the Organization of African Unity and the Office of the United Nations High Commissioner for Refugees,

Have agreed as follows:

Article 1

Definition of the term "Refugee"

1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is

compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

3. In the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

4. This Convention shall cease to apply to any refugee if: (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or,

(b) having lost his nationality, he has voluntarily reacquired it, or, (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or, (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or, (e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or, (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purposes and objectives of this Convention.

5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity; (d) he has been guilty of acts contrary to the purposes and principles of the United Nations.

6. For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee.

Article 2

Asylum

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.

3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or
liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

Article 3

Prohibition of Subversive Activities

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as

with measures taken for the maintenance of public order. He shall also abstain from any subersive activities against any Member State of the OAU.

2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.

Article 4

Non-Discrimination

Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.

Article 5

Voluntary Repatriation

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.

2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.

3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.

4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.

5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return.

Article 6

Travel Documents

1. Subject to Article III, Member States shall issue to refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the Schedule and Annex thereto, for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. Member States may issue such a travel document to any other refugee in their territory.

2. Where an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause.

3. Travel documents issued to refugees under previous international agreements by States Parties thereto shall be recognized and treated by Member States in the same way as if they had been issued to refugees pursuant to this Article.

Article 7

Co-operation of the National Authorities with the Organization of African Unity

In order to enable the Administrative Secretary-General of the Organization of African Unity to make reports to the competent organs of the Organization of African Unity, Member States undertake to provide the Secretariat in the appropriate form with information and statistical data requested concerning:

(a) the condition of refugees; (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 8

Cooperation with the Office of the United Nations High Commissioner for Refugees

1. Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees.

2. The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.

Article 9

Settlement of Disputes

Any dispute between States signatories to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity, at the request of any one of the Parties to the dispute.

Article 10

Signature and Ratification

1. This Convention is open for signature and accession by all Member States of the Organization of African Unity and shall be ratified by signatory States in accordance with their respective constitutional processes. The instruments of ratification shall be deposited with the Administrative Secretary-General of the Organization of African Unity.

2. The original instrument, done if possible in African languages, and in English and French, all texts being equally authentic, shall be deposited with the Administrative Secretary-General of the Organization of African Unity.

3. Any independent African State, Member of the Organization of African Unity, may at any time notify the Administrative Secretary-General of the Organization of African Unity of its accession to this Convention.

Article 11

Entry into force

This Convention shall come into force upon deposit of instruments of ratification by one-third of the Member States of the Organization of African Unity.

Article 12

Amendment

This Convention may be amended or revised if any member State makes a written request to the Administrative Secretary-General to that effect, provided however that the proposed amendment shall not be submitted to the Assembly of Heads of State and Government for consideration until all Member States have been duly notified of it and a period of one year has elapsed. Such an amendment shall not be effective unless approved by at least two-thirds of the Member States Parties to the present Convention.

Article 13

Denunciation

1. Any Member State Party to this Convention may denounce its provisions by a written notification to the Administrative Secretary-General.

2. At the end of one year from the date of such notification, if not withdrawn, the Convention shall cease to apply with respect to the denouncing State.

Article 14

Upon entry into force of this Convention, the Administrative Secretary-General of the OAU shall register it with the Secretary-General of the United Nations, in accordance with Article 102 of the Charter of the United Nations.

Article 15

Notifications by the Administrative Secretary-General of the Organization of African Unity

The Administrative Secretary-General of the Organization of African Unity shall inform all Members of the Organization: (a) of signatures, ratifications and accessions in accordance with Article X; (b) of entry into force, in accordance with Article XI; (c) of requests for amendments submitted under the terms of Article XII; (d) of denunciations, in acccordance with Article XIII.

IN WITNESS WHEREOF WE, the Heads of African State and Government, have signed this Convention.

DONE in the City of Addis Ababa this 10th day of September 1969. As of 06 January 1995