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THE DIVERGENCE BETWEEN REFUGEE LAW AND POLICY IN SOUTH AFRICA: A CRITICAL ANALYSIS OF COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

by

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Declaration

I, **Lee Stone**,

declare that this thesis is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.



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Abstract

Colonialism's *raison d'être* – underpinned by Social Darwinism – was to create a hierarchy between the "different" racial categories to privilege and secure access to status and resources by the colonists. It is argued that this was achieved through the transplant of legal principles, electoral systems and judicial institutions from the developed world despite these concepts and institutions not being suitable to the context within the colony. Empirical studies document that this is unsustainable, revealing that the inevitable consequence is a vicious cycle of violence, expropriation of assets and policies altered overnight. More succinctly, this is described as resistance to the rule of law.

Although the democracy created to transform South Africa in the 1990s was designed to assist people in authentically exercising and enjoying their constitutional rights, facilitate individual self-realisation and advance social cohesion, what has emerged is "a politics of citizenship", perpetuating colonial race classification and reifying contempt for the other. It is doubtful whether a more appropriate explanation for South Africa's challenges exists, specifically when viewed from the perspective of compliance with international refugee law obligations; the subject of the present study and one of the clearest indications that what South Africa requires is systematic decolonisation. What should have immediately preceded the transition to democracy is what is termed "creative destruction" by economists such as Joseph Schumpeter. A process such as this would have introduced inclusive economic and political institutions. Instead, the decision was taken to continue utilising the transplanted exclusive institutions that had operated since colonisation on account of their "strength". The most serious error in this regard was the failure to adequately capacitate and empower these institutions, hence South Africa followed the "path-dependent" route with fragmentation and exclusion being the enduring characteristic of South African society. The binary/dichotomous labels "friends, citizens, thieves and enemies" employed during colonisation and apartheid are a continuing feature of South Africa. Refugees suffer the worst, with 96% of refugee status applications being rejected, in defiance of the rule of law.

Detailed knowledge and understanding of South Africa's history is fundamental to the determination of South Africa's future; a future that is at present rather precarious and which

requires strategic intervention in order to secure its stability. In *The Psychology of Social Change* de la Sablonnière *et al* argue that for society to "get along and get ahead" one mechanism is to construct a historical narrative. The purpose is to re-create a precise cultural identity because this is pivotal for higher levels of self-esteem and psychological well-being. The rationale is that long term goals can be prioritised based on this cultural identity; and they can be effectively implemented. Alongise cultural identity, a culture of respect for the rule of law is imperative to avoid the continuing cycle of violence, poverty and deprivation. Developing this position, Levi and Epperly emphasise that "wide-scale compliance with the law then enhances the ability of government to provide law and other public goods that the rule of law facilitates". The argument permeating this study of South Africa's compliance with international refugee law and policy is that values inherent in our humanity – particularly ubuntu – hold the key to the termination of oppression that persists despite the transition to democracy.

CHAPTER ONE
ORIENTATION

1. Introduction and contextual background

'Friends, citizens, thieves and enemies'. These were the infamous words of Paul Kruger, the champion of Afrikaner exclusiveness and former President of the South African Republic from 1883 to 1900; and repeated in 1988 by former Minister of Foreign Affairs, Pik Botha, when addressing the Foreign Correspondents' Association.[1] These binary and dichotomous labels, reflecting 'a highly unequal society with clear group self-definitions and a tradition of political intensity and militancy'[2] apply to South Africa's past and present. It is firmly rooted in colonialism's objective and *raison d'être*: the carving up of the African continent resulting in the imposition of borders where none had existed before in pursuit of expropriation of the land, pillage of resources and exploitation of indigenous labour. The colonial powers assumed this role believing in the "truth" of Social Darwinism; the anthropological quest to establish a strict hierarchy of races with the 'civilized' located in a superior position to the 'less cultured'.[3] It was immensely damaging, denying all involved – both coloniser and the colonised – the right to their humanity and dignity.[4] In particular, as a 'perverted logic', it distorted, disfigured and destroyed the well-established identity and culture of those who were oppressed because it vitiated the sense of community and 'bonds of practical solidarity', replacing these with new – yet deep and enduring – 'social and

[1] Richard Abel *Politics by Other Means: Law in the Struggle Against Apartheid*, *1980-1994* (1995) 296.
[2] Lawrence Schlemmer 'South African society under stress: The hazards of inequality and development in a post-apartheid future' in DJ van Vuuren et al (eds) *South Africa in the Nineties* (1991) 11.
[3] Mukua wa Mutua 'Savages, victims, and saviors: the metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201; Tshepo Madlingozi '*Mayibuye iAfrika*? Disjunctive inclusions and black strivings for constitution and belonging in "South Africa"' (PhD thesis, University of London (2018)); E Tendayi Achiume 'Reimagining international law for global migration: Migration as decolonization?' (2017) 111 *American Journal of International Law* 142; Mukua wa Mutua *Human Rights: A political and cultural critique* (2002); John Murungi *African Philosophical Currents* (2018); Andile Mngxitama 'Is a decolonized university possible in a colonial society?' Olivia Rutazibwa & Robbie Shilliam (eds) *Routledge Handbook of Postcolonial Politics* (2018); Paul Rich 'Race, Science, and the Legitimization of White Supremacy in South Africa, 1902-1940' in Gregory Maddox (ed) *The Colonial Epoch in Africa* (2018) 81; David Birmingham *The Decolonization of Africa* (1995); Jay Hasbrouck *Ethnographic Thinking: From Method to Mindset* (2018) xvi.
[4] Murungi 100. At 105, Murungi describes colonisation as a disease. See also Leigh Patel *Decolonizing Educational Research* (2018) 26.

geocultural identities', having race as its axis of power.[5] Beyond the new borders were aliens and outsiders posing an existential threat that were to be violently guarded against, notwithstanding that not long before, free movement and unfettered social integration had been the norm. The African continent was thus systematically reduced to 'a concentration camp for Africans'.[6] Illustrating the continuing effects of colonisation's artificially constructed social system on subsequent generations, the result is a fundamental change in the structure of human interaction. Quijano describes it as social conflict aimed at monopolising and exploiting 'the four basic areas of human existence: sex, labor, collective authority and subjectivity/intersubjectivity, their resources and products'.[7] Stratification and segmentation of society is one of the most prominent legacies of colonialism. Colonialism is also the lens through which we see how identity has been manipulated. For colonialism's 'systematic negation of the other person and furious determination to deny the other person all attributes of humanity,'[8] the dominated inevitably constantly ask themselves: 'In reality, who am I?'[9]

Having as its purpose to infuse 'the study of international law with a sense of historical motion and political, even personal, struggle' Koskenniemi's *The Gentle Civilizer of Nations* applies the compelling methodology of analyzing the relationships between narratives and power to reveal the 'broader aspects' of the 'image of […] society'.[10] In this regard, he admits the influence of the work of the French philosopher Michel Foucault as it relates to exclusion and inclusion[11] – an inherent characteristic of the colonialist project. My initial hesitation for the prospect of Foucault's philophy exposing the impact of colonialism on society, given Foucault's preoccupation with avant-garde art, the penal system and mental illness,[12] soon gave way as I realized the clear nexus not only between Foucault's

[5] María Lugones 'Heterosexualism and the Colonial/Modern Gender System' (2007) 22(1) *Hypatia* 189-191; Frantz Fanon *The Wretched of the Earth* (1956) 9.
[6] Murungi *African Philosophical Currents* 112.
[7] Aníbal Quijano 'Colonialidad del poder, globalizacion y democracia' (September 2001-April 2002) 4(7-8) *Revista de Ciencias Sociales de la Universidad Autonoma de Nuevo Leon* 1, translated in Lugones 'Heterosexualism and the Colonial' 189.
[8] Fanon *Wretched of the Earth*.
[9] Aime Césaire is one of the more well-known African scholars to use this expression. See Cheikh Thiam *Return to the Kingdom of Childhood: Re-Envisioning the Legacy and Philosophical Relevance of Negritude* (2014) 2.
[10] Martti Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001) 2-5.
[11] Koskenniemi *Gentle Civilizer of Nations* 9.
[12] Some of the books written by Foucault during his life include *Discipline and Punish* (1977); *Madness and Civilization* (1965); and *The History of Sexuality*, *Vol 1: An Introduction* (1978).

philosophy and the effects of colonialism on South Africa, but its specific relevance to refugee law. It is Foucault's own response to the question 'who am I?' that situates my entire thesis, when he states: 'Do not ask who I am and do not ask me to remain the same … Let us leave it to our bureaucrats and our police to see that our papers are in order'.[13] It is almost as though Foucault was describing the attitude of the officials of the Department of Home Affairs and the South African Police Service who display an intense hostility towards asylum-seekers and declare them ineligible for refugee status, regardless of the circumstances surrounding their flight from the country of origin. Made explicit by this conduct is what Quijano[14] and Mignolo,[15] following him, term 'coloniality of power'; contempt for those at the bottom of the racially organised structure of society, invariably associated with impunity for the perpetration of violence, exploitation and domination over them. To illustrate how this is operationalised, the state justifies its control over the population by creating 'the politics of fear'[16] that permits it to employ 'war-like measures' to eradicate 'ever-substitutable "enemies"'.[17] It is refugees and asylum-seekers who are now the enemies.[18] Succinctly stated, refugees are 'indigenous to a world that rejects them by virtue of making them into problems'.[19] In rejecting these enemies, the rule of law becomes malleable and dysfunctional in spite of the fact that systematic failure to comply with the rule of law culminates in what was described in the *Kirland* case as 'a vortex of unpredictability, uncertainty and irrationality'.[20] Providing a context for why and when the

[13] Michel Foucault *The Archaeology of Knowledge* (1972) 17.
[14] Aníbal Quijano & Immanuel Wallerstein 'Americanity As a Concept; or, The Americas in the Modern World-System' (1992) 134 *International Social Sciences Association* 549; Aníbal Quijano 'Coloniality of Power, Eurocentrism and Latin America' (2000) 1(3) *Nepantla: Views from the South* 533.
[15] Walter Mignolo *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (2000); Walter Mignolo 'The Geopolitics of Knowledge and the Colonial Difference' (2002) 101(1) *South Atlantic Quarterly*; Walter Mignolo 'Further thoughts on (de)coloniality' in Sabine Broeck & Carsten Junker (eds) *Postcoloniality-Decoloniality-Black Critique: Joints and Fissures* (2014).
[16] Frank Furedi *The Politics of Fear: Beyond Left and Right* (2006).
[17] Ian Duncanson *Historiography, Empire and the Rule of Law: Imagined Constitutions Remembered Legalities* (2012) 93.
[18] Cristiano d'Orsi *Asylum-Seeker and Refugee Protection in Sub-Saharan Africa: The Peregrination of a Persecuted Human Being in Search of a Safe Haven* (2016) 5. At this juncture it is necessary to provide a brief outline of the distinction between an asylum-seeker and a refugee. An asylum-seeker is in a precarious position because their refugee status is still pending while the authorities determine whether the application should be accepted or rejected. A refugee, by contrast, has 'an established living situation' in the state of refuge.
[19] Lewis Gordon 'On Philosophy, in Africana Philosophy' in Li Beilei (trans) *Essays in Africana Existential Philosophy* (2020) 6.
[20] *MEC: Health, Eastern Cape & Another v Kirland Investments (Pty) Ltd* 2014 (5) BCLR 547 (CC) para 103.

rule of law would best be complied with, Brooks asserts that culture is integral to the rule of law when she claims that:

> [t]he rule of law is not something that exists "beyond culture" and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law is culture.[21]

Culture's role in the re-creation and implementation of the rule of law in South Africa is tragically unexplored and unimbricated. Some might say it has been eclipsed by the assumption that the Constitution will unquestioningly be obeyed purely because of South Africa's history and the objectives of the Constitution: a democratic, free, diverse, egalitarian, socially just state is how the Constitution of the Republic of South Africa, 1996 describes South Africa. The role of culture and identity was alluded to in that the constitutional democracy created to decisively transform South Africa in the early 1990s was designed to 'assist people in authentically exercising and enjoying their constitutional rights, and to facilitate and support individual self-realisation'.[22] In philosophical terms, this was the beginning of a process that would allow us to understand ourselves as well as 'understand what ails us as human beings and what is needed for our wellbeing'.[23] Put differently, it initiated the commencement of a return to culture by way of 'revolutionary practice in all areas of our existence'[24] so as to restore our humanity and cultural identity.[25] But what has emerged instead is 'a politics of citizenship',[26] with citizens fighting those perceived as outsiders for 'access to citizenship and national belonging'.[27] A component of the politics of citizenship is the negotiation of one's place in the nation where the pressures culminate in vehement exclusion of foreign nationals[28] and their access to resources – even simply in the form of the right to remain on the territory – 'rendered illegal'.[29] The confusion

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[21] Rosa Ehrenreich Brooks 'The New Imperalism: Violence, Norms and the Rule of Law' (2003) 101 *Michigan Law Review* 2285.
[22] Pierre de Vos & Warren Freedman (eds) et al *South African Constitutional Law in Context* (2014) 28-9 quoting s7(2) of the Constitution which stipulates that the state is bound to respect, protect, promote and fulfil the rights in the Bill of Rights. See also *Minister of Finance v van Heerden* 2004 (6) SA 121 (CC) para 24.
[23] Murungi *African Philosophical Currents* 68.
[24] Murungi *African Philosophical Currents* 62.
[25] Murungi *African Philosophical Currents* 71.
[26] Malose Langa & Peace Kiguwa 'Race-ing xenophobic violence: Engaging social representations of the black African body in post-apartheid South Africa' (2016) 108 30(2) *Agenda* 84.
[27] Kezia Batisai 'Interrogating questions of national belonging, difference and xenophobia in South Africa' (2016) 108 30(2) *Agenda* 120.
[28] Langa & Kiguwa 'Race-ing xenophobic violence' 84.
[29] Langa & Kiguwa 'Race-ing xenophobic violence' 84.

and paranoia that accompanies the recovery from colonialism and apartheid has resulted, *inter alia*, in refugees and asylum-seekers being represented as thieves and enemies. The source of this deep mis-trust between Africans is colonisation: it is 'an outcome of a long history of institutions which have undermined human and property rights in Africa'.[30] Unsurprisingly, insidious violence and chronic hatred subsist in South Africa. The truth of the matter is that South Africa is experiencing an identity crisis of unprecedented proportions and the way in which refugees and asylum-seekers are treated is a mere microcosm of the complex process of re-establishing cultural identity in postcolonial and post-apartheid South Africa. Invoking Helton's seminal study on refugee law, no one can afford to be indifferent about refugee protection.[31] Even less so, if we remain indifferent to South Africa's past, while trying to chart our way into the future, the price we will pay will be too high to bear. We must, therefore, heed Welsh's warning that 'without addressing diversity in a way that will ensure that all live together in reasonable harmony and peace', South Africa will 'haemorrhage by continuing violence'.[32] One of the more prominent sociologists, Durkheim, has even expressed this idea by stating that social cohesion and moral integration is essential to the state's existence.[33]

In the larger scheme of the myriad challenges that South Africa is facing in realizing the transformation envisaged in the early 1990s, a critical analysis of South Africa's compliance with international refugee law obligations may appear inconsequential. It is anything but inconsequential: it illustrates just how far-reaching the legacy of colonisation is with respect to South Africa's (in)ability to adhere to the rule of law and to the violent hatred expressed against anyone perceived as "other" or an "outsider". The implementation of international refugee law in South Africa highlights the fall-out that occurs when a formerly colonised state becomes a democracy, without first decolonising. In other words, when a state is at a critical juncture but fails to embrace the confluence of factors representing opportunities for

[30] Daron Acemoglu & James Robinson *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (2012) 60.
[31] Arthur Helton *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (2002).
[32] David Welsh 'Can South Africa become a nation state?' in DJ van Vuuren et al (eds) *South Africa in the Nineties* (1991) 563.
[33] Emile Durkheim *The Rules of Sociological Method* 3 ed (1962); Emile Durkheim 'The Division of Labour in Society' reprinted in Charles Lemert (ed) *Social Theory: The Multicultural, Global and Classic Readings* 5 ed (2013) 57-59.

inclusivity and pluralism,[34] the state tends to replicate the 'hierarchical, authoritarian political regimes' without prioritising the political and economic institutions that are indispensable to ensuring prosperity.[35] Mayblin is one of the few to recognise that forced migration studies have consistently been acontextual and have therefore failed to draw the link between history and refugees. She criticises refugee law scholars for their aversion to history, and accuses postcolonialism scholars of being so preoccupied with 'theory, cultural and literary analysis' that their work is not analysed in the context of relevant 'concrete events and political processes'.[36] Therefore, this study on compliance with international refugee law in South Africa is the clearest and most precise articulation or exemplification that South Africa epitomises the pathology of a postcolonial state forced to prioritise democracy over decolonisation and that 'the conditions that were the ground for colonialism's making continue to constitute a stronghold' on South Africa.[37] Predicted from this assessment is that South Africa cannot expect to thrive as a democratic state before colonisation is confronted and decisively eradicated. According to various scholars, knowledge and understanding of the historical trajectory that impacts one's situation can help to ensure psychological well-being as well as help 'focus on long-term goals'.[38] Therefore, this thesis takes the form of an articulation of the legal, political, social, psychological and economic effects of colonialism and apartheid on South African society. Principally, an elucidation of these 'historical challenges' play a pivotal role in explaining 'why things are as they are in the present'.[39] Seeking this explanation is the justification and essence of this thesis: to understand why South Africa is not complying with its international obligations relating to the protection of refugees. An angle of approach is to examine South Africa's deliberate intention to radically transform into a democracy, contrasted against the numerous paradoxes associated with the transition as these invariably had an impact on the type of society that subsists in South Africa. To be sure, the concept of human security

[34] Acemoglu & Robinson *Why Nations Fail* 364.
[35] Acemoglu & Robinson *Why Nations Fail* 61.
[36] Lucy Mayblin *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking* (2017) 22; 43.
[37] Sabelo Ndlovu-Gatsheni 'Racism and "blackism" on a world scale' in Olivia Rutazibwa & Robbie Shilliam (eds) *Routledge Handbook of Postcolonial Politics* (2018) 72.
[38] Roxane de la Sablonnière, Donald Taylor & Mathieu Caron-Diotte 'Restoring Cultural Identity Clarity in Times of Revolution: The Role of Historical Narratives' in Brady Wagoner, Fathali Moghaddam & Jaan Valsiner (eds) *The Psychology of Radical Social Change: From Rage to Revolution* (2018) 252-269.
[39] de la Sablonnière et al 'Restoring Cultural Identity' 267.

is crucial to the analysis of South Africa's history because of the pronounced measures taken to protect the security of the white colonisers, effected in a manner that was inhumane in the extreme to Africans. As one of the foundations of colonisation, it is race classification, that impedes development and social cohesion. Race – more specifically racism – is the ingredient, Ndlovu-Gatsheni argues, that is the 'fuel and justification' for the longevity of coloniality because racism is not only 'anti-human', it opposes 'genuine postracial humanism'.[40] What he conveys with these statements is that the fundamental error of the continued use of an 'invented ontological' distinction of different "races" and the application of the notions of 'nationalism, or nationstatism'[41] underpinning the transition to democracy were themselves inherited from the colonial rulers, thereby being perpetuated. Similarly, Davidson maintains that anti-colonial (and anti-apartheid) liberators 'tried to build new states from the foundation culture of colonial states' without seeking to transform those states based on 'the foundation culture of Africa's pre-colonial states'.[42] The result was a process of nation building that was fatally flawed because of its premise of homogeneity, that was itself negated by reference to race categories, and the exertion of control by 'the stifling of divisive elements'.[43]

The inherent violence associated with state formation during colonisation extended not only to physical conflict that can be attributed to 'ordinary' political processes, but certainly also involved violence aimed at eroding the dignity, agency and sense of belonging of the persons originally residing on that territory. What was thrust upon those persons was a 'problematic "liminal state of being"'; an interminable process of "becoming" a complete human being[44] particularly against the backdrop of the enormous violence of sacrifice to which the oppressed were subject. Political colonial violence thus begets 'a culture of violence' that consumes all aspects of one's existence[45] described in psychoanalytical terms by Fanon as orchestrated systems of oppression and dehumanisation that are

[40] Ndlovu-Gatsheni 'Racism and "blackism"' 72.
[41] Basil Davidson *Modern Africa: A social and political history* (1994) 262.
[42] Davidson *Modern Africa* 262.
[43] Willie Breytenbach *Democratisation in Sub-Saharan Africa* (1997) 9-10.
[44] Ndlovu-Gatsheni 'Racism and "blackism"' 72.
[45] Graeme Simpson, Steve Mokwena & Lauren Segal 'Political Violence: 1990' (1991) 2 *South African Human Rights and Labour Law Yearbook* 195.

symbolic as well as structural in nature.[46] In turn, notwithstanding the effluxion of considerable time, this cycle further reinforces the idea that one is an enemy; despised and shunned, obliging a violent response to contest the status quo and reclaim one's sense of humanity and equal worth. Consequently, independence from colonial rule has been fraught with conflict in Africa,[47] culminating in escape from persecution and civil war, across international borders. Guest states it plainly: 'no continent has been more grievously afflicted by forced migration than Africa'.[48] South Africa's own history of apartheid after colonisation has compounded the low-level conflict domestically, yet it has not escaped the steady flow of asylum-seekers from the rest of the African continent. The treatment of asylum-seekers by the bureaucracy mandated to assess their claims and by the population at large not only reflects colonial-era thinking and behaviour but proves that South Africa underinvests in its economic and political institutions, undermining the stability and integrity of the state. A juxtaposition of South Africa's past and the need to engage in 'creative destruction'[49] to chart a new path that is consistent with prosperity, adherence to the rule of law, and enhanced social cohesion is explored next.

1.1 South Africa has a past; but it also has a future

Responsibility for 'assumptions about genetic determinism' falls on early anthropologists.[50] Taking this perspective to the extreme, in 1955 Prime Minister JG Strydom declared that 'White domination or *baaskap*' should be established in South Africa. By 1966, this had developed to the conceptualisation of 'separate "nations" (including ethnic African nations)'.[51] Resistance to this imposed domination eventually forced the National Party government to capitulate. The reorientation of South Africa towards democracy officially commenced on 2 February 1990. Hirschl's description of a 'near-miraculous conversion'[52]

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[46] Fanon *Wretched of the Earth*.
[47] See generally Gregory Maddox (ed) *The Colonial Epoch in Africa* (2018).
[48] Robert Guest *The Shackled Continent: Africa's Past, Present and Future* (2004) 12.
[49] Acemoglu & Robinson *Why Nations Fail* 84. The authors refer to the economist Joseph Schumpeter who used the term 'creative destruction' to explain the replacement of inefficient economic and political institutions with inclusive ones because this promotes economic growth in addition to creating stability and respect for the law.
[50] Hasbrouck *Ethnographic Thinking* xvi.
[51] Muriel Horrell *Laws Affecting Race Relations in South Africa* (1978) 10-1.
[52] R Hirschl 'Preserving Hegemony? Assessing the Political Origins of the EU Constitution' (2005) 3(2-3) *International Journal of Constitutional Law* 269.

is enticing, but incomplete. South Africa continues to navigate the complex impact of a history of subjugation while building a sustainable future. What cannot be ignored is the practical reality that while South Africa's rebirth was just beginning, the rest of Sub-Saharan Africa was still labouring under the complications of its colonial past, with abject poverty compounding the civil conflict and persecution that had become routine. The April 1994 Genocide of the Tutsis by the Hutus in Rwanda was one of the more publicised events. The consequence of the Rwandan Genocide and civil conflict in other parts of the continent were not difficult to foretell. Thus, on 13 January 1995, the *New Age* magazine published an article in which it described refugees as 'streaming' into South Africa. Although no empirical evidence was provided to support the assertions made, the magazine claimed that it was African refugees who brought 'organized crime, drugs, and disease' into South Africa.[53]

Not long afterwards, and symbolising its newfound democratic credentials, in January 1996 South Africa bound itself to the international refugee treaties in their entirety. Ratification of the 1951 United Nations Convention Relating to the Status of Refugees,[54] the 1967 Protocol to the Convention Relating to the Status of Refugees[55] and the 1969 Organisation of African Unity Refugee Convention[56] represent an all-encompassing commitment to protect refugees. The latter treaty expands the definition of a refugee considerably to cohere with the African context because of its reference to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country of origin or nationality, as legitimate grounds for obtaining refugee status.[57] The restoration of human dignity anticipated by refugee status being granted to persons exposed to external aggression and foreign domination is echoed in South Africa's Constitution by virtue of human dignity constituting a fundamental principle upon which the state is premised. Furthering the expectation of South Africa's unequivocal intention to protect refugees, South Africa's democratically elected Parliament passed the Refugees Act in 1998.[58] Section 3 of this Act replicates, verbatim, the full definition of a refugee as

[53] Klotz *Migration and National Identity* 2.
[54] United Nations Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.
[55] Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.
[56] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 1001 UNTS 45.
[57] Art 1(2) of the Convention.
[58] Refugees Act 130 of 1998.

contained in the 1951 Refugee Convention, as read with the additional qualifying criteria effected by its 1967 Protocol; as well as the expanded definition contained in the 1969 OAU Refugee Convention that speaks to Africa's deeply oppressive history.[59] It is submitted that South Africa's refugee policy was consciously established as having numerous parallels with the fundamental values of the new state.

Compared to the other 53 states on the African continent, South Africa is widely identified as the land of prosperity, stability and hope. South Africa's radical and peaceful transformation to democracy in the early 1990s has meant that South Africa has become the victim of its own success and consequently, South Africa has borne a substantial percentage of the forced migration burden. As d'Orsi puts it: 'many communities of refugees in different regions of the continent, such as the Congolese, the Rwandans and Burundians … head[ed] to South Africa – also the preferred destination of the Angolans'.[60] Somalians, Sudanese, Ethiopians and Eritreans have sought refuge in South Africa too. Tazreiter concedes that regardless of how progressive or liberal a state's refugee policy may be, 'the crucible testing all the parties to the agreement' is the determination of who may ultimately benefit from the '"special" obligations' contained in that policy. She adds that this process 'can be physically and psychologically testing for genuine claimants'.[61] It certainly did not help that over time some Refugee Reception Offices were imposing an unlawful quota system and would only permit a maximum of 20 asylum application per day.[62] In 2005, with desperate asylum-seekers sleeping outside the Refugee Reception Offices overnight and still unable to submit applications, a riot broke out at the Cape Town Refugee Reception Office; with many asylum-seekers so seriously injured that hospitalisation was required.[63]

[59] This treaty is the 'African supplement' to international refugee law. See Frans Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 26.
[60] d'Orsi *Asylum-Seeker and Refugee Protection* 111.
[61] Claudia Tazreiter *Asylum Seekers and the State: The Politics of Protection in a Security-Conscious World* (2004) 7.
[62] Corey Johnson & Sergio Carciotto 'The State of the Asylum System in South Africa' in Maria O'Sullivan & Dallal Stevens (eds) *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (2017) 175.
[63] *Cape Times* 'Department to Tackle Refugees' Problems' (3 March 2005) referred to in *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C) para 10.

As the situation in Zimbabwe deteriorated in 2005 due to Operation Murambatzvina, between one and one and a half million Zimbabweans also fled their homeland in search of protection in South Africa. Surprisingly, however, the South African government refused to regard Zimbabweans as refugees, and instead chose to present the 'one-dimensional image' of Zimbabweans (and other African nationals) as constituting 'illegal economic migrants'.[64] The media was complicit in this endeavour. The consequence was that the government had begun to create the impression that asylum-seekers posed an 'existential threat'[65] to South Africa's sovereignty and democracy. The construction of this issue in the form of a 'threat to security' entails that 'the social boundaries in which the threat is to be perceived are at the same time established'. Essentially, it is a political technique used to prevent integration.[66] What ensues is a counterproductive vicious circle: 'policy makers tend to get into a "crisis management mode"', according to Brochmann. In turn, public attention is aroused, reinforcing the perception that the problem has indeed reached crisis proportions.[67] Nathwani adds that this is a catalyst for the outbreak of violence.[68] The spectacular xenophobic violence of May 2008 bears testimony to this fact.

The simple response to the exponential increase in asylum-seekers and their right to protection in South Africa might be that international law regulates who is entitled to refugee status, guaranteeing the protection of a person in the process of seeking asylum or once the person is a recognised refugee. But reliance on international law alone is neither feasible nor realistic. In fact, a false expectation has been created that 'law can resolve "enduring human problems" where politics, economics and morality have failed'.[69] If anything, the implementation of international law is severely 'constrained by "competing and more

[64] d'Orsi *Asylum-Seeker and Refugee Protection* 311. See also Human Rights Watch 'Neighbors in need: Zimbabweans seeking refuge in South Africa' (19 June 2008) 29-30 at *www.refworld.org/docid/485a184a2.html*.
[65] d'Orsi *Asylum-Seeker and Refugee Protection* 41.
[66] Emma Haddad *The Refugee in International Society: Between Sovereigns* (2008) 193 as cited in d'Orsi *Asylum-Seeker and Refugee Protection* 41.
[67] Grete Brochmann 'Migration policies of destination countries' *Political and demographic aspects of migration flows to Europe* (1993) 117.
[68] Nathwani *Rethinking Refugee Law* 44.
[69] Christine Chinkin & Mary Kaldor *International Law and New Wars* (2017) 104.

pragmatic economic and geopolitical considerations"'.[70] d'Orsi's compelling assessment of refugee protection across Sub-Saharan Africa highlights that there are a plethora of 'legal and practical aspects'[71] vitiating compliance with international refugee law and that 'very few complete and accurate studies have been conducted on this topical issue before'.[72] On account of the sheer size of the African continent, South Africa only features a handful of times in d'Orsi's study, but the conclusions cannot be disputed. South Africa practices 'burden shifting … admitting almost no refugee on the South African territory'.[73] In addition, Schreier describes South Africa's position as a prominent 'inconsistency of attitude',[74] while Vas Dev simply terms South Africa 'reluctant hosts'.[75] Proof to this effect is that in June 2008 Zimbabweans at the Musina border 'were subject to "serious violations of their rights including arbitrary arrest, detention, and unlawful deportation constituting refoulement"'.[76] Juxtaposed against this is the sombre warning of Brochmann that when a state begins to militarise its external borders, a possible feared outcome may be the increased militarisation of society.[77] Bluntly put, the effective implementation of the international law binding on South Africa in accordance with the human rights-oriented policy[78] associated with South Africa's new epoch is nothing less than a misnomer. Some attribute it simply to 'asylum fatigue'.[79] I argue that it is far more deep-rooted – and serious – than that. To this end, mine is the task of explaining empirical phenomena by analysing the 'multifacted relationship' between sociological factors and the implementation of international law.[80]

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[70] Yolanda Spies 'South Africa's Foreign Policy: Highlights during 2011' (2011) 36 *South African Yearbook of International Law* 328 quoting Tseliso Thipanyane 'South Africa's foreign policy under the Zuma government' (2011) 64 *African Institute of South Africa Policy Brief* 5.
[71] d'Orsi *Asylum-Seeker and Refugee Protection* 35.
[72] d'Orsi *Asylum-Seeker and Refugee Protection* 7.
[73] d'Orsi *Asylum-Seeker and Refugee Protection* 107.
[74] Tal Schreier *A Critical Examination of South Africa's Application of the Expanded OAU Refugee Definition: Is Adequate Protection Being Offered Within the Meaning of the 1969 OAU Refugee Convention?* (LLM thesis, University of Cape Town 2008) 59-60.
[75] Sanjugta Vas Dev 'Asylum in Africa: The emergence of the "reluctant host"' (2003) 46 *Development* 114.
[76] Human Rights Watch 'Neighbors in Need' 85.
[77] Brochmann 'Migration policies of destination countries' 118.
[78] Nelson Mandela proclaimed early on that South Africa's foreign policy would be guided by human rights.
[79] UNHCR '2012 Regional Operations Profile: Africa' at *www.unhcr.org/pages/4a02d7fd6.html*.
[80] Moshe Hirsch 'Core sociological theories and international law' in Moshe Hirsch & Andrew Lang (eds) *Research Handbook on the Sociology of International Law* (2018) 389-390. In this regard, sociological theories are concerned with the operation of the social world and thus lend themselves to analysing how international law is interpreted and applied by the human agents responsible for their implementation.

South Africa's response to forced migration into South African territory is revealing for a number of inter-connected and complex reasons. In the first instance, it exhibits that analysis of substantive matters that have a bearing on South Africa's domestic and international situation and obligations cannot occur abstracted from an appreciation of South Africa's particular history. With specific reference to refugees, the reification of colonial hierarchies and racial distinctions not only result in the violation of the rights of foreign nationals, but more egregiously, it illustrates the very real possibility of the state remaining in a stagnant – or worse, retrogressive – state of inequality and conflict. This is due to an 'imperial colonial logic' of race as an 'organising principle'[81] in conjunction with colonialism's legacy of unconstrained political power and massive income inequality through the looting of resources (land in particular).[82] Accordingly, although asylum-seekers and refugees are the scapegoats, they are by no means the only casualties of an oppressive system disguised as a state committed to transformation, human rights, adherence to the rule of law and the repair of the fundamental human dignity of each person within the state. Even more concerning for the long-term prospects of South Africa is Weingast's theory that developing states are 'resistant to the rule of law' on account of the transplant of institutions[83] from the erstwhile colonial rulers, without an investment by the state of sufficient resources to support the effective functioning of these institutions. South Africa's asylum system epitomises this situation.

The term rule of law is synonymous with 'all good things, including good governance, democracy, and human rights'.[84] As a goal, legal utopia is only possible where democracy and the rule of law apply,[85] thus fundamental principles of natural justice, such as *audi alteram partem* (hear the other side) are intrinsic to the rule of law. The concept is also

[81] Ndlovu-Gatsheni 'Racism and "blackism"' 73.
[82] Tom Burgis *The Looting Machine: Warlords, Tycoons, Smugglers, and the Systematic Theft of Africa's Wealth* (2015).
[83] Barry Weingast 'Why developing countries prove so resistant to the rule of law' in James Heckman, Robert Nelson & Lee Cabatingan *Global Perspectives on the Rule of Law* (2010) 28. Acemoglu & Robinson explicitly acknowledge Weingast's work in the preparation of *Why Nations Fail*.
[84] Weingast 'Why developing countries prove so resistant' 38.
[85] Bryant Garth 'Issues of empire, contestation, and hierarchy in globalization of law' in Moshe Hirsch & Andrew Lang (eds) *Research Handbook on the Sociology of International Law* (2018) 23.

routinely associated with 'the processes of democratization and economic development'.[86] Institutionally, argue Levi and Epperly, 'the rule of law consists of the laws that protect personal security and private property and the means for monitoring and enforcing obedience with those laws'.[87] Weingast puts it in a slightly different manner. On his construction, the rule of law entails that 'creating the rule of law requires two separate institutional changes: institutions to provide for the law; and a set of credible commitments that protect those institutions and ensure that they survive'.[88] Levi and Epperly describe this as the legitimacy element. Legitimacy to them means 'reasoned deference to authority'.[89] Most importantly – and this is the objective to which South Africa must aspire – they assert that when legitimacy exists, there is the

> expectation that others, including government officials and elites, should obey the law, followed by the observation that they are indeed obeying the law [that] increases the willingness of the populous to comply. Wide-scale compliance with the law then enhances the ability of government to provide law and other public goods that the rule of law facilitates. Rule of law institutions are only effective to the extent that the general public believes in the value of being law-abiding and that the powerful of the society believe they, too, are subject to the law.[90]

While the tone employed thus far may appear extreme and dramatic, or even unrealistic, a brief synopsis of Foucault's assessment of the treatment of mentally ill persons (albeit during the nineteenth century) reflects the experience of asylum-seekers entering South Africa. Pertinently, the analogy is enriched by the poignancy of Foucault's own use of the concept 'the asylum', drawing the clear correlation between "madness" and migration by referring to madness as 'an integrally human phenomenon',[91] in precisely the same way that numerous scholars describe migration.[92] Approaching the topic 'from the standpoint of the mad themselves' to reveal the reality instead of the perception,[93] Foucault sarcastically proclaims that it 'is not a free realm of observation [and] diagnosis, but a juridical space where one is accused, judged and condemned'.[94] The result is a 'conceptual as well as physical

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[86] Margaret Levi & Brad Epperly 'Principled principals in the founding moments of the rule of law' in Heckman et al *Global Perspectives on the Rule of Law* (2010) 192.
[87] Levi & Epperly 'Principled principals' 192.
[88] Weingast 'Why developing countries prove so resistant' 29.
[89] Levi & Epperly 'Principled principals' 192.
[90] Levi & Epperly 'Principled principals' 192.
[91] Gary Gutting *Foucault* (2005) 72.
[92] Edward Newman 'Refugees, international security, and human vulnerability: Introduction and survey' in Edward Newman & Joanne van Selm (eds) *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (2003) 3.
[93] Michel Foucault *The History of Madness* (2006).
[94] Michel Foucault *Madness and Civilization* (1965) 269.

exclusion of the mad from the human world' made by persons pursuing unstated and possibly ulterior motives. Foucault insists that the relationship (that is susceptible to abuse) between doctor and patient, 'is at the heart of the modern domination of the mad', because the analyst possesses supreme power:

> in the asylum, the rule is never so much by medical as by moral authority. Doctors have authority not because they have the knowledge to cure (this is haphazard at best) but because they represent the moral demands of society. … This wears the trappings of medical science, but the key to therapy remains the personal moral authority of the therapist, who serves as an instrument of social values … a Judge who punishes and rewards in a judgement that does not even condescend to language.[95]

A direct comparison can be made with the conduct of the officials within the Department of Home Affairs. In blatant disregard for the rule of law, these officials objectify asylum-seekers and accuse them of abusing the system. Amit provides empirical evidence, registering that

> officials are routinely getting the law wrong, and are issuing rote rejections that ignore stories of rape, torture and other human rights violations ... These failures mean that South Africa may be returning people to their deaths or to situations of serious human rights violations. […] Refugee status determination officers incorrectly deployed refugee law and failed to consider the details of individual claims as required in a properly administered status determination process. The result is a bureaucracy that mass-produces rejection letters without any evidence of a reasoned decision-making process.[96]

Frightening is the apparent ignorance by Refugee Status Determination Officers of the very definition of a refugee contained in section 3 of the Refugees Act. Section 3 'incorporates a provision from the Organisation of African Unity (OAU) Refugee Convention which is broader than the 1951 Refugees Convention'. This provision expressly affords asylum to persons who have had to flee because of external aggression, occupation, foreign domination and events seriously disturbing the public order. Yet, absurdly, applications have been rejected by Status Determination Officers who 'often cited British case law stating exactly the opposite proposition, that fleeing the instability of civil war does not qualify an individual for asylum'.[97] It is not surprising therefore, that in a parliamentary report

[95] Foucault *Madness and Civilization* 276-278.
[96] Romi Amit *The Star* '"Meaningless" system for asylum-seekers at mercy of poor rulings' (19 June 2012) at *www.iol.co.za/the-star/meaningless-system-for-asylum-seekers-at-mercy-of-poor-rulings-1.1321974#.UIqqM2-6dMA*.
[97] *Harerimana v Chairperson of the Refugee Appeal Board and Others* 2014 (5) SA 550 (WCC) para 41.

delivered on 5 September 2018, the Minister of Home Affairs advised that the '[g]rand total of litigation instituted by asylum seekers and refugees [between 2008 and 2018] is 7,726'.[98]

Context places the refugee status determination process in South Africa in better perspective. The colour red on the ultimate symbol of our freedom, the South African flag, has metaphorically been painted with the blood of our forebears who opposed inter-tribal persecution, mounted the struggle against colonialism and challenged apartheid, vowing that oppression of fellow human beings would never again be tolerated. However, Esterhuyse argues that 'on the level of normative political ideas and values, the political history of South Africa is characterized by polarization and fragmentation'.[99] Consequently, the bureaucratically enforced 'maintenance of a racial caste system',[100] which polarized the people on South African territory is not only a definition of apartheid; in reality it also describes contemporary South Africa: one is either a citizen or a thief and an enemy. The category 'citizen' itself is further fragmented on account of persistent inequality, with 'the main driver of inequality' being 'the intra-group divide between rich Blacks and poor Blacks' having replaced 'the Black/White divide'.[101] Decolonisation presents the only viable method of restoring a just, equitable and humane social order that is protective of citizens and refugees, given Murungi's eplanation that it

> is not one of reciprocal deprivation of any sector of humanity by another sector of humanity. It is undertaken to affirm the humanity of all human beings whether they are the colonized or the colonizers.[102] … If colonization was objectionable because it dehumanized Africans, clearly, Africans cannot pursue decolonization at the expense of the dignity of fellow Africans … Africans are not immunized from dehumanizing fellow Africans or other people. The dehumanized can become the dehumanizers. Post-colonial Africa provides ample evidence to demonstrate that this is indeed the case. Dehumanization is not an invention of the colonizers. It predates them and most likely it is bound to happen in future.[103]

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[98] Parliamentary Monitoring Group 'Question NW2246 to the Minister of Home Affairs (question asked by Mr MH Hoosen)' (5 September 2018) at *https://pmg.org.za/committee-question/9858/*.
[99] Willie Esterhuyse 'The normative dimension of future South African political development' in DJ van Vuuren et al (eds) *South Africa in the Nineties* (1991) 19.
[100] Schlemmer 'South African society under stress' 4.
[101] JP Landman et al 'Breaking the Grip of Poverty and Inequality in South Africa 2004-2014: Current trends, issues and future policy options' (EFSA Institute Research Report 2003) 7 at *https://sarpn.org/documents/d0000649/P661-Povertyreport3b.pdf*.
[102] Murungi *African Philosophical Currents* 105-6.
[103] Murungi *African Philosophical Currents* 100-1.

Compellingly, Mbembe and Ramose, prominent Africanists, argue that ubuntu is a process of community-making that is premised on respecting the humanity of others and engaging in ethical interaction with others. Their view is thus that all of us must follow the rules all of the time to illustrate our respect and concern for each other's well-being. Once a pattern forms where certain people do not follow the rules, it would be absurd to expect ethical behaviour from some but not others. On this thinking anarchy could result if we do not act ethically.[104] Therefore, intervention to restore the culture and dignity of the South African population who continue to 'seethe' at the injustices of the past[105] and the apparent failure of the state to proactively transform the nation state has become a priority of paramount importance. Re-indigenisation of the rule of law and the political architecture of the state holds the most promise to this end.[106] Former President Thabo Mbeki made this clear in a tribute to the victims of the xenophobic attacks when he said:

> We the offspring and heirs to the noble spirit and vision of African unity and solidarity advanced by our giants of thought and action, Tiyo Soga, JG Xaba and Pixley Seme, have gathered here today with heads bowed in shame, because some in our communities acted in ways that communicated the message that the values of *ubuntu* are dead, and that they lie entombed in the graves of the cadavers of people who died ostensibly solely because they came among us as travellers in search of refuge. … We must pledge that never again will we allow anybody to bring shame to our nation by betraying the values of *ubuntu* and committing crimes against our visitors and travellers, thus to besmirch the character of the eminently good human beings who constitute our nation as people afflicted by the cancerous disease of xenophobia.[107]

Despite global publication of the cruel deaths of 62 people and the displacement of 200 000 more,[108] it did not end the flow of asylum-seekers into South Africa. In 2008, the number of first-time asylum-seekers quadrupled in comparison with the previous year. Consequently, South Africa was described as 'the country with the largest number of asylum-seekers annually'.[109] South Africa became the largest recipient of individual claims for refugee

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[104] Thomas Blaser 'Africa, Continent of the Future: An Interview with Achille Mbembe' (1 December 2014) at *http://www.tlaxcala-int.org/article.asp?reference=11071;* Mogobe Ramose 'Globalisation and ubuntu' in PH Coetzee & PJ Roux (eds) *The African Philosophy Reader* 2 ed (2002) 644.
[105] *Alexandria Hotz & Others v University of Cape Town* [2016] ZACC (12 April 2017) para 33.
[106] W Alade Fawole *The Illusion of the Post-Colonial State: Governance and Security Challenges in Africa* (2018) xiv.
[107] Thabo Mbeki 'National Tribute in Remembrance of Xenophobic Attack Victims' Tshwane, 3 July 2008.
[108] Pumla Dineo Gqola 'Intimate foreigners or violent neighbours? Thinking masculinity and post-apartheid xenophobic violence through film' (2016) 108 30 (2) *Agenda* 67.
[109] UNHCR 'Statistical Yearbook' (2008) 43.

status, amounting to 207 000 applicants.[110] The Global Trends 2009 Report of the High Commissioner for Refugees (UNHCR) indicates that 'the number of individual asylum claims grew to nearly one million, of which 222 000 were made in South Africa, the single largest destination of asylum claims in the world'.[111] Asylum-seekers have continued to arrive in search of a safe home in South Africa. The former High Commissioner for Refugees, Sadako Ogata succinctly stated that 'refugees are doubly insecure: they flee because they are afraid; and in fleeing they start a precarious existence'.[112] This stark reality was captured well by Kondile J in the *Union of Refugee Women* case:[113]

> Refugees are unquestionably a vulnerable group … and their plight calls for compassion. Refugees have been forced to flee their homes as a result of persecution, human rights violations and conflict beyond their control. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.[114]

It is virtually impossible, claims Klamberg, to determine the effect of international law on state policy.[115] Yet the example of South Africa appears to reveal a correlation between the two. Throughout the tumultuous years between 2008 and 2011, the Department of International Relations and Co-operation was busy formulating South Africa's foreign policy. When it was published in May 2011, the White Paper on foreign policy was titled 'Building a Better World: The Diplomacy of Ubuntu'.[116] The White Paper's central objective was to employ ubuntu to project the 'idea that we affirm our humanity when we affirm the humanity of others'.[117] Relying on the notions of humanity and putting people first, Pan-Africanism

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[110] James Simeon 'Introduction: the research workshop on critical issue in international refugee law and strategies towards interpretative harmony' in James Simeon (ed) *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony* (2010) 1.
[111] Margaret Beukes 'Southern African Events of International Significance – 2011' (2012) *South African Yearbook of International Law* 353.
[112] Astri Suhrke 'Human security and the protection of refugees' in Newman & van Selm *Refugees and Forced Displacement* 102.
[113] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC).
[114] *Union of Refugee Women* para 26.
[115] Mark Klamberg *Power and Law in International Society: International Relations as the Sociology of International Law* (2015) 17.
[116] *White Paper on South Africa's Foreign Policy* 13 May 2011.
[117] *White Paper on Foreign Policy* 4.

and South-South solidarity were prioritized as being at the forefront of South Africa's foreign policy agenda.[118] Competing with this outward gaze, was the ambition to

> shape and strengthen our national identity; cultivate our national pride and patriotism; address the injustices of our past, including those of race and gender; bridge the divides in our society to ensure social cohesion and stability; and grow the economy for the development and upliftment of our people.[119]

The incompatibility between the foreign policy and the domestic imperatives is manifested in the hostility directed at asylum-seekers. Precisely, the policy of the state appears to be a blanket refusal to grant refugee status. Statistics indicate that 96% of asylum applications are rejected,[120] although upon closer examination, it becomes evident that the decisions are not correct in the majority of instances. South Africa has also gained a reputation as being 'very quick to detain' asylum-seekers, preferring to designate individuals as 'illegal immigrants' even when their country of origin continues to be plagued by civil conflict and ethnic persecution.[121] In the case of *Kanyo Aruforse v Minister of Home Affairs and Others*,[122] a Burundian national was arrested on 15 July 2009 and detained (without charge) at the Lindela Repatriation Centre until 12 August 2009. The Magistrates' Court extended the detention for 90 days in terms of section 34(1)(d) of the Immigration Act,[123] in spite of the applicant having applied for asylum in terms of the Refugees Act. The Department of Home Affairs argued that the situation in Burundi was safe and stable and that the asylum-seeker was to be deported to Burundi. However, in 2010 the High Court confirmed that the applicant was still entitled to 'temporary protection' in South Africa because of the dire situation pertaining in Burundi.[124]

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[118] Garth le Pere 'Ubuntu as foreign policy: The ambiguities of South Africa's brand image and identity' (2017) 39(1) *Strategic Review for Southern Africa* 93-4.
[119] *White Paper on Foreign Policy* 3.
[120] Zoë Postman '96% of refugee applications are refused, say lawyers' (8 February 2018) at *https://www.groundup.org.za/article/96-refugee-applications-are-refused-say-lawyers.* The Department of Home Affairs admitted in the case of *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others* 2010 (4) All SA 414 (WCC) at para 10 that only a small minority of asylum-seeker applications are successful. See also 'SA to send refugees home' *Times Live* (4 September 2015) at *http://www.timeslive.co.za/thetimes/ 2015/09/04/SA-to-send-refugees-home* where the figure was placed at 90% of claims being rejected.
[121] d'Orsi *Asylum-Seeker and Refugee Protection* 78.
[122] [2010] JOL 26037 (GSJ).
[123] Immigration Act 13 of 2002.
[124] d'Orsi *Asylum-Seeker and Refugee Protection* 78 citing *Aruforse v Minister of Home Affairs* para 11.

Given the atrocities to which refugees have been subjected, it is appropriate to use the expression coined by Nathwani: 'refugees are particularly strongly motivated immigrants'.[125] The hundreds of thousands of African migrants risking their lives – many of whom perish – crossing the treacherous Mediterranean Sea in their quest to get to Europe forces us to confront this reality.[126] But it is only the 'fortunate' who have the resources to get to Europe. Therefore, notwithstanding a foreseeable inevitable struggle to claim asylum, migrants continue to make their way to South Africa. In 2012, Weiss put the figure at approximately two million recognized refugees in South Africa.[127] In blatant disregard for the steady flow of asylum-seekers into South Africa, in 2011 the Crown Mines, Johannesburg and Port Elizabeth Refugee Reception Offices were summarily closed, and in June 2012, the Cape Town Refugee Reception Office was closed, leaving asylum-seekers arriving in those cities with nowhere to lodge a claim for asylum. High Court orders demanded the re-opening of the Offices, but not without significant attempts by the Department of Home Affairs to frustrate these orders; inevitably aggravating desperate asylum-seekers, thereby exacerbating conflict between Home Affairs officials and security guards and the asylum-seekers, as witnessed at the Cape Town Refugee Office. By the end of 2014, the UNHCR reported that there were 369 393 pending asylum claims in South Africa.[128]

And so, by April 2015, xenophobic violence had flared up once again. '*Izigilamkhuba*[129] must go back to their countries',[130] '*awahambe amakwerekwere, inkosi ithe awabuyele emuva,*[131]

[125] Nathwani *Rethinking Refugee Law* 40.
[126] *Reuters* '1,500 Migrants Have Died in the Meditteranean in 2018, Italy the Deadliest Route - UN' at *https://ewn.co.za/2018/07/27/1-500-migrants-have-died-in-mediterranean-in-2018-italy-deadliest-route-un*; Desmond Oguda 'Migrants leaving Africa for Europe perish in the Mediterranean Sea, who is to blame?' at *https://www.standardmedia.co.ke/ureport/story/2000160510/migrants-leaving-africa-for-europe-perish-in-the-mediterranean-sea-who-is-to-blame*.
[127] Thomas Weiss *Humanitarian Intervention: Ideas in Action* (2012) 59.
[128] Richard Stupart 'Is South Africa home to more than a million asylum-seekers? The numbers don't add up' at *https://africacheck.org/reports/south-africa-home-million-refugees-numbers-dont-add/*.
[129] "Thugs, those who are given to doing evil".
[130] Catherine Ndinda & Tidings Ndhlovu 'Attitudes towards foreigners in informal settlements targeted for upgrading in South Africa: A gendered perspective' (2016) 108 30 (2) *Agenda* 132.
[131] "The king has said that foreigners must go back to their countries"'. See Ndinda & Ndhlovu 'Attitudes towards foreigners in informal settlements' 132.

'Fuck off back to your country'[132] and any number of similar sentiments have instead become the narrative in reference to refugees and asylum-seekers, including:

> the approach for the Somalis to come and just settle in our midst is a wrong one. Somalis should remain in their country. They shouldn't come here to multiply and increase our population, and in future we shall suffer. The more they come to South Africa to do business, the more the locals will continue killing them.[133]

On 8 September 2019, South Africans marched through the streets of central Johannesburg, looting and burning shops while chanting 'Foreigners must go back to where they came from'.[134] Two weeks later, twelve people were dead; ten of which were South Africans, prompting hundreds of Nigerian nationals to return to Nigeria. In fear for their lives, in early October 2019, migrants staged a sit-in at the UNHCR offices in Cape Town, demanding resettlement.[135] When confronted with attitudes and behaviour as articulated above, Pheko and Sebastien rightly emphasise 'the need for moral regeneration' and the stimulation of 'social conscience' in pursuit of '[r]eversing the country's historical colonial legacies'.[136] Acknowledging that South Africa does not only exist within a historical context of colonialism, but that this is overlayed by the even more complex legacy of apartheid, is imperative to finding solutions that will facilitate moral regeneration. Refugee protection is itself a moral, ethical and legal obligation. In this regard, I adopt Tazretier's conception of a refugee. According to her, refugees should be regarded 'as the furthest extension of a population movement continuum'[137] in that refugees do not have the pleasure of choosing whether they wish to cross an international border. Instead, they are compelled to do so to escape the persecution to which they have been subjected. A refugee is defined as any person who has had to flee their home country or country of habitual residence due to a well-founded fear of persecution due to their race, religion, nationality, membership of a

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[132] Margaret Chandia & Tim Hart 'An alien in the country of my birth: Xenophobia reinforcing otherness and promoting exclusion' (2016) 108 30 (2) *Agenda* 33.
[133] Langa & Kiguwa 'Race-ing xenophobic violence' 83.
[134] 'Hate thy neighbor: Xenophobic violence flares in South Africa' *The Economist* (14 September 2019) at *https://www.economist.com/middle-east-and-africa/2019/09/14/xenophobic-violence-flares-in-south-africa*.
[135] Mthuthuzeli Ntseku 'Photo Essay: Anxious refugees stage sit-in, say they want out of SA' *IOL* (10 October 2019) at *https://www.iol.co.za/capeargus/news/photo-essay-anxious-refugees-stage-sit-in-say-they-want-out-of-sa-34528289*.
[136] Liepollo Pheko & Edward Sebastien 'A Critical Historical Context on Mobilizing Social Justice' in Jeff Handmaker & Remko Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) xvii.
[137] Tazreiter *Asylum-seekers and the State* 37-8.

particular social group or political opinion and is unwilling to return to that country on account of this fear. It therefore entails both a subjective and an objective element in that the person's state of mind in regard to the future prospect of persecution must be combined with the objective element of their being a direct link with one of the bases of persecution.[138] It is a life-altering situation, compelling a person to flee in search of protection. Ngubane's articulation of ubuntu buttresses the moral imperative to protect refugees:

> Supreme virtue lay in being humane, in accepting the human being as part of yourself, with a right to be denied nothing that you possessed. It was inhuman to drive the hungry stranger from your door, for your neighbour's sorrow was yours. This code constituted a philosophy of life … the practice of being humane.[139]

The return to a state of respect for human dignity and the worth of every person is congruent with the process of decolonisation. Inspired by an understanding of the impact of colonisation, the section that follows reveals the imperative of apprehending colonisation.

1.2 To decolonise is to apprehend colonisation

Patel provocatively states that 'calling attention to something does not automatically mean its transformation'. She continues by warning that 'when material structures are not addressed centrally, they stay intact, reseating problematic uneven understandings of systemic, long-standing forms of oppression'.[140] Clarifying the material structure of colonisation, Patel declares that through 'the stratification of beingness',[141] it is the acquisition and accumulation of ownership and territoriality for some at the expense of others.[142] Patel's primary argument is that we must

> counter the built up habits of coloniality [as] [t]hese habits trundle teleologically onward, without often pausing to check coordinates of social, physical, and ethical locations, which profoundly compromise the potential for transformative change.[143]

From a sociological methodological perspective, it cannot be disputed that the process of configuring any particular legal field is contingent on the historical and social process of its

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[138] *Muberarugo v Refugee Appeal Board and Others* 2015 ZAWCHC 139 (17 August 2015) paras 10-11.
[139] Jordan Ngubane *An African Explains Apartheid* (1963) 76.
[140] Patel *Decolonizing Education Research* 2.
[141] Patel *Decolonizing Education Research* 7.
[142] Patel *Decolonizing Education Research* 8.
[143] Patel *Decolonizing Education Research* 5.

construction.[144] The legacy of colonialism and oppression is dysfunction. The long-term impact of patterns of behaviour in an iniquitous social order inevitably undermines the stability of that system due to the stress that it imparts on the oppressed. Patel's explanation for this is that: '[o]ver time, the human system that runs high on the stress from daily experiences of discrimination infests this stress biophysically'. She relies on the analogy that the consequence of daily stresses is equivalent to the constant revving of a car engine. Ultimately, 'the integrity of the engine will begin to show the signs of undue wear and tear, of abuse'.[145] So too, 'systemic factors [become] institutionalized into the daily rhythm' of the oppressed.[146] Accumulated oppression and disenfranchisement causes the affected population to internalize that oppression: they 'look to themselves first to explain their lower status … so that disenfranchised communities come to see themselves as damaged',[147] albeit that this is entirely a legacy of 'a colonially defined social system'.[148] One could call this process the acquisition of an impaired cultural identity. In *The Psychology of Radical Social Change*, the authors explain that 'a clear cultural identity is critical for the well-being of each and every group member [because it] provides a template for successfully navigating the social environment in order to "get along" and "get ahead"'.[149] Therefore, my concern is the effect of this 'abuse' and 'damage' on South Africans' ability to get along and get ahead. My intention is to contribute to the discourse on nation building and social cohesion, using refugee law as the prism. The purpose is to obtain an understanding of the past. That knowledge will reveal patterns that may inform the future.

It bears restating that in Africa, colonialism has wrought stresses – politically, socially and economically – 'crippling' most.[150] The dynamic interaction of 'multiple systems: neurological, genetic, physical, and cultural' has been described by systems biologists as producing 'particular human practices, behaviours, and tendencies'.[151] Fight or flight as the

[144] Mikael Madsen 'Reflexive sociology of international law: Pierre Bourdieu and the globalization of law' in Moshe Hirsch & Andrew Lang (eds) *Research Handbook on the Sociology of International Law* (2018) 198.
[145] Patel *Decolonizing Education Research* 25.
[146] Patel *Decolonizing Education Research* 24.
[147] Patel *Decolonizing Education Research* 26.
[148] Patel *Decolonizing Education Research* 23.
[149] de la Sablonnière et al 'Restoring Cultural Identity' 252.
[150] Maddox *The Colonial Epoch in Africa* xiii.
[151] Patel *Decolonizing Educational Research* 25.

most instinctive human response is central to the question of why a person who has been debilitated by threats, attacks and/or persecution, would opt to leave their home, usually at short notice, without their possessions, and cross an international border. All that the refugee asks is for the protection to which he is entitled. But seeking refugee status in South Africa is complicated by South Africa's own history of colonisation and apartheid. Patel incisively explains that in the context of colonisation, '[t]he most vulnerable populations', of which refugees arguably constitute the epitome, 'remain vulnerable to a society that is poised, at best, to assimilate them into dominant cultural practices, and more typically, to keep them in low-income and less safe contexts'.[152] Given that Patel was not referring to South Africa, or refugees, specifically, it is not suprising that her assessment discounts the very real risk that refugees, notwithstanding their most vulnerable status, will be excluded altogether. Linking the discussion to the South African context, it cannot be forgotten that violence is a characteristic of the making – and shaping – of the South African state. The violence of the forceful imposition of colonialism, the brutal violence of apartheid, and the smouldering inter-ethnic (and xenophobic) tensions, are all epitomised in the cruel, dehumanizing violence of the subjugation of fellow human beings. But there is a not so subtle reason why asylum-seekers are 'scapegoated',[153] denied refugee status and specifically targeted for attack: the interpretation and enforcement of legal rules is 'susceptible to influence by sociocultural factors'.[154] By highlighting 'some of the rather intricate interrelationships between the complexity of factors'[155] that arise because of the past when analysing socio-political development, the hope is that this will assist in predicting the future. The aim is to 'unscramble what often seems to be a chaotic conglomerate of contradictions'.[156] The paradoxes to be navigated at the demise of apartheid (elaborated upon in Chapter Four) highlight some of the contradictions that had the most profound impact on present-day South Africa.

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[152] Patel *Decolonizing Educational Research* 23.
[153] Yadhana Jadoo *The Citizen* 'Foreigners used as a "scapegoat" for govt's failures, say experts' (24 February 2017) at *https://citizen.co.za/news/south-africa/1438529/foreigners-used-as-a-scapegoat-for-govts-failures-say-experts/*.
[154] Moshe Hirsch 'Core sociological theories and international law' in Hirsch & Lang (eds) *Research Handbook on the Sociology of International Law* (2018) 408.
[155] HC Marais 'Preface: Setting the agenda for the nineties' *South Africa in the Nineties* (1991) xiii.
[156] Marais 'Preface' xiii.

In an attempt to view refugee law in a holistic fashion, numerous authors have produced compelling work with a view to 'reconceiving'[157] or isolating the 'critical issues' in international refugee law.[158] Even d'Orsi's broad Sub-Saharan African approach[159] to refugee protection does not quite go far enough in pursuit of understanding why compliance with international refugee law is so poor. I attribute this to Hirsch's claim that although international legal rules purport to be objective, the inextricable link between law and politics entails that legal rules are unable to be applied in a neutral fashion. In fact, he emphasises, '[l]egal arguments often conceal some struggles among groups'.[160] Worse still is when the biases of the departmental officials 'corrupt' the information and render their decisions arbitrary.[161] Illuminating these points are the publications *Advancing Refugee Protection in South Africa*[162] and *Refugee Law in South Africa.*[163] In both instances the starting premise confirms that South Africa is struggling to implement the progressive domestic refugee legislation sustained by international law and the Constitution[164] and that government experiences 'considerable challenges' in its capacity to determine refugee status.[165] Whereas Handmaker et al acknowledge a link between refugee protection in South Africa and apartheid,[166] there is no study that locates the domestic implementation of international refugee law precisely within the context of the 'memory' of South Africa's colonial and apartheid past.

Further substantiating the need for a deeply introspective, but equally urgent, analysis of South Africa's compliance with its international refugee law obligations is the government's own realisation of the need to prioritise this issue. Indeed, it is seldom (if ever) that a government will admit that it has allowed the effluxion of time and developments to overtake its obligation to ensure that legislation is fit for purpose. The South African government has

[157] James Hathaway (ed) *Reconceiving International Refugee Law* (1997).
[158] Simeon *Critical Issues in International Refugee Law*.
[159] d'Orsi *Asylum-Seeker and Refugee Protection.*
[160] Hirsch 'Core sociological theories' 410.
[161] Hirsch & Lang 'Introduction' in Hirsch & Lang (eds) *Research Handbook on the Sociology of International Law* (2018) 17.
[162] Jeff Handmaker, Lee Anne de la Hunt & Jonathan Klaaren (eds) *Advancing Refugee Protection in South Africa* (2008).
[163] Fatima Khan & Tal Schreier (eds) *Refugee Law in South Africa* (2014).
[164] Khan & Schreier *Refugee Law in South Africa* xxxv.
[165] Handmaker et al *Advancing Refugee Protection* 3.
[166] Handmaker et al *Advancing Refugee Protection* 2.

had to concede that there is an irreconcilable difference between the policy and the law with respect to refugee protection in South Africa in the White Paper on International Migration. The White Paper argues that the current international migration policy must be replaced as it does not enable South Africa to adequately embrace global opportunities while safeguarding our sovereignty and ensuring public safety and national security.[167] Specifically, the White Paper states

> It has been over 18 years since the White Paper on International Migration (approved by Cabinet in March 1999) became the basis of immigration legislation and regulations. Although there have been significant economic, social, legislative and regulatory changes since then, there has not been a comprehensive review of policy. Essentially, the country's formal international migration policy has remained in place since 1999 – despite significant changes in the country, region and world.[168]

These changes in the country, region and the world have facilitated the framing of law and politics 'in the vague and anxiety-ridden terms of "national security", "enemies", and "unusual and threatening circumstances"'.[169] It is worth bearing in mind that 'if you let all of them [asylum-seekers] stay, there is no point in having a determination procedure; but, if you force some to go, you will always make mistakes'.[170] The significance of this observation is heightened in South Africa with the overt and deliberate securitisation of the state taking place. In fact, the Department of Home Affairs now forms part of the security cluster of government departments[171] and this raises red flags regarding the state's intentions with respect to migrants. With securitisation comes a discernible closing of the borders, allegedly to protect national security and interests, albeit at the cost of making mistakes by unlawfully refouling refugees. Confirming this, the Deputy Minister of Home Affairs recently declared that 'court rulings are threatening South Africa's policy of processing refugees … which may even affect our safety'.[172] This statement by the Deputy

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[167] *White Paper on International Migration in South Africa* July 2017 2.
[168] *White Paper on International Migration* 6.
[169] Duncanson *Historiography, Empire and the Rule of Law* 3 quoting Matthew Sharpe '"Thinking of the extreme situation …": On the New Anti-Terrorism Laws, Or, Against a Recent (Theoretical) Return to Carl Schmitt' (2006) 24 *Australian Feminist Law Journal* 123.
[170] Joanne van Selm *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* 78-9.
[171] A former Minister of Home Affairs, Hlengiwe Mkhize repeatedly insisted that the Department of Home Affairs forms part of the 'security cluster' of government. Specifically, the Department of Home Affairs is one of the six members of the Justice, Crime Prevention and Security Cluster (see *https://www.gov.za/faq/guide-government/what-are-government-clusters-and-which-are-they*).
[172] Fatima Chohan *Pretoria News* 'Refugee rulings undermine policy' (16 October 2017) 7.

Minister is particularly relevant for the fact that it discloses the contradictory inner workings of the South African state. Evident is the use of law 'as a discourse of power' upon which the legitimacy of the state is constructed. There is a continual tug-of-war between the officials within the Department of Home Affairs and members of the judiciary in respect of the interpretation of the Refugees Act. But the more disconcerting location of competition is that social and historical construction of law that is produced by Home Affairs officials who have been empowered to exercise the paradigmatic symbolic power of law against asylum-seekers.[173] This relationship is inherently asymmetrical and abusive because of the nexus between the symbolic power of law and 'symbolic violence and thus other forms of violence, both physical and economic'.[174] The officials in the Department of Home Affairs have within their repertoire highly legalistic language to deny the legitimacy of applicants' claim and conceivably also intimidate the unsuccessful asylum-seeker into withdrawing from the process. This decision also opens the unsuccessful applicant up to further violence within the community notwithstanding South Africa's ratification of binding international refugee law treaties. Distinguishing the perception that South Africa is complying with its international obligations from the reality of the situation therefore constitutes the section that follows.

1.3 Selling the shadow to support the substance

I adopt the expression 'selling the shadow to the support the substance'[175] to illustrate that the outward appearance of commitment to the legal obligation to protect asylum-seekers does not translate into the reality on the ground. The shadow of compliance eliding the substance is a common feature in respect of adherence to the rule of law, of which I offer a few examples. First, with reference to South Africa's position as a democratic, sovereign

[173] Madsen 'Reflexive sociology of international law: Pierre Bourdieu and the globalization of law' in Hirsch & Lang *Research Handbook on the Sociology of International Law* (2018) 190 citing Pierre Bourdieu 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) *Hastings Law Journal* 38, 805-853.
[174] Madsen 'Reflexive sociology' 214.
[175] Zoe Black & Jesse McGleughlin 'On living as Zoe: The story of being foreign in so many way' (2016) 108 30 (2) *Agenda* 22. The phrase was used in 1864 by Sojourner Truth who produced a portrait of herself reflecting the epitome of middle-class feminine gentility (the shadow, since she was a former slave). The substance, in contrast, was her vociferous challenge to slavery and the legacy of buying and selling black people.

state, South Africa is perceived as the miracle,[176] that has undergone a complete transformation and is now once again a full member of the international community. A consequence of this is that South Africa has become a member of various international bodies and ratified a plethora of binding international treaties. South Africa routinely proclaims its commitment to its international obligations (in a manner of speaking, selling the shadow to the outside world), for the benefits that this affords, yet substantively, this is often devoid of truth. Identifying this for what it is, Friedman explains that 'states assume a "presentable" appearance which belies the substance of their regimes'; in other words, 'a plausible surface imitation of the political and economic institutions of the West.'[177] Friedman's comment accurately describes South Africa, but he takes it further when he declares that the imposition of 'the expectation of formal democratization without either the domestic resources or the political traditions with which to sustain it was an inevitable recipe for illusion'.[178] At first, the only clear objective was to prove to the world that South Africa would comply with its obligations in consonance with its new-found democratic status. However, this has unravelled in recent years. The reality is that in substance South Africa exhibits a schizophrenic relationship with legal obligations, at times even wifully contravening them.[179] Indeed, as le Pere notes in his commentary on the National Development Plan of November 2011, South Africa had to admit that it was 'viewed as Janus-faced in Africa and that its *bona fides* were suspect'.[180] Among any number of

[176] The *Financial Times* of 18 July 1994 described it as 'one of the most extraordinary political transformations of the twentieth century'. See le Pere 'Ubuntu as foreign policy' 94.
[177] Steven Friedman 'Agreeing to differ: African democracy – Its obstacles and prospects' in Mammo Muchie (ed) *The Making of the Africa-Nation: Pan-Africanism and the African Renaissance* (2003) 235.
[178] Friedman 'Agreeing to differ' 236.
[179] The refusal by the South African government to arrest Omar al-Bashir, the [former] President of Sudan, when he arrived in South Africa in June 2015 is an example. In terms of the Implementation of the Statute of the International Criminal Court Act 27 of 2002, South Africa had a legal obligation to arrest and surrender al-Bashir to the International Criminal Court. See in this regard, Lee Stone 'A Sign of the Times: South Africa's politico-legal retrogression as illustrated through the intention to withdraw from the Rome Statute' (2018) 33 (1) *Southern African Public Law.*
[180] Fombad quotes Ki-Zerbo who describes Africa as Janus-faced because it has 'one liberal, democratic, polished, refined and orthodox face looking to the outside world, and another, concealed, surly, implacable, not to say savage, looking toward the interior'. See Charles Fombad 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1010 quoting Joseph Ki-Zerbo 'African Intellectuals, Nationalism and Pan-Africanism: A Testimony' in Thandika Mkandawire (ed) (2005) *African Intellectuals: Rethinking Politics, Language, Gender and Development* 83. See also, Garth le Pere 'Ubuntu as foreign policy: The ambiguities of South Africa's Global Identity' *The Thinker* 16 at *http://www.thethinker.co.za/resources/71%20LE%20PERE.pdf*.

examples that le Pere may have relied on in his assessment, to my mind the most disturbing in the specific context of international refugee law obligations, is the statement that:

> South Africa needs to take into account the social and historical patterns of conflict, rupture and continuity on the continent. Africa is home to many landlocked countries with small populations, many of which have fragile governing structures. *Policy-making should be less concerned by notions of ideological or political solidarity, and concentrate instead on specific gains to reduce poverty and inequality in South Africa* (my emphasis).[181]

Refugee policy relates inextricably to a state's sovereignty. A sovereign state's management of the reception and treatment of asylum-seekers implicates the allocation and adjustment of resources in relation to the state's own political, economic and social circumstances. It is closely aligned with – and instrumentalises – the state's national identity because 'those seeking protection may be portrayed as violating sovereignty through incursions to territory'.[182] Therefore, to ensure that genuine refugees are not mistreated or refouled and to maintain the integrity of a state's refugee policy, there is 'the need for not only consistency but also flexibility of the bureaucracy and administrative arms of government in dealing with what are often highly complex and changing circumstances'.[183] It is argued that by implementing more restrictive policy measures, South Africa is effectively trying to deter potential asylum-seekers, impede social integration of refugees and facilitate expulsion of rejected asylum-seekers. Confirming that South Africa's *bona fides* were most definitely in question is Amit's study, revealing that 'all roads lead to rejection [due to] persistent bias and incapacity in South African refugee status determination' (the title given to her study that focused on 2011, although it also revisited some decision dating as far back as 2007).[184] Brown laments how sovereignty is used to nihilate legal obligations:

> Sovereignty is both a sign of the rule of law and supervenes the law. Or sovereignty is both the source of the law and above the law, the origin of juridicism and what resides outside it. It is all law and no law. Its every utterance is law, and it is lawless.[185]

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[181] National Development Plan, National Planning Commission (11 November 2011) 222 at *https://www.gov.za/sites/www.gov.za/files/devplan_2.pdf*.
[182] Tazreiter *Asylum-seekers and the State* 24-5.
[183] Tazreiter *Asylum-seekers and the State* 37-8.
[184] Romi Amit *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 8.
[185] Wendy Brown *Walled States, Waning Sovereignty* (2010) 53.

Foucault's words in relation to the numerous errors made in refugee status determination are pertinent. Foucault declares that 'error is itself a kind of transgression, a violation of the boundaries set by our conceptual environment. It is a localized and mundane version of the cosmic lightning flashes of madness'.[186] Errors have the potential to fundamentally alter the world in which we live – often with fatal consequences. Thus, Foucault's message is that in order to achieve 'effective opposition to systems of domination', what is required is 'controlled demolition-work, not random lightning flashes' and this requires 'a specific programme'.[187] There is no denying the relevance of his theories to the implementation of refugee law in South Africa, especially in the context of the numerous 'errors' being made by those responsible for determining the fate of legitimate asylum-seekers.

Second, the shadow of a 'Rainbow Nation' that is united in its diversity and has eradicated its racialized, hierarchical past, is laid bare by the reification of apartheid-era, race-based classification.[188] Essentially, the substance of South Africa's identity remains a work in progress. Indeed, 'tensions, contradictions, psycho and social politics of identity, belonging and nationhood'[189] are synonymous with post-apartheid South Africa. Identity in this context is South Africa's identity as a nation state and its imperilled relationship with refugees through the continuation of colonialism within the postcolony.[190] More specifically, as Qambela puts it: since time immemorial, South Africa 'has been continuously engaged in "a politics of oppression" aiming to control poor people and "foreigners", not deemed to belong'.[191] As much as I was hesitant to attribute this to path dependency because it seemed too easily to excuse the conduct of the state and especially the officials within the Department of Home Affairs, it became unavoidable to recognise that path dependency does play a substantial role. Conceived by Mahoney, path dependency entails that the accumulation of sociological and cognitive biases in combination with efficiency, results in

[186] Gutting *Foucault* 78.
[187] Gutting *Foucault* 77.
[188] Lee Stone & Yvonne Erasmus 'Race-thinking and the law in post-1994 South Africa' (2012) 79 *Transformation* 121.
[189] Langa & Kiguwa 'Race-ing xenophobic violence' 80.
[190] Batisai 'Interrogating questions of national belonging' 120.
[191] Gcobani Qambela '"There is no such thing as a single-issue struggle": Xenophobia in the time of decolonization, eRhini, 2015' (2016) 108 (30) 2 *Agenda* 42.

'predictable, self-reinforcing patterns' thereby replicating the status quo.[192] Instead of applying one's mind, it is easier to simply apply the existing default rules, even if they are disadvantageous and absurd.[193] South Africa's history has established principles and precedents of hierarchy, division, exclusion, competition. It is these default precedents that are consistently and stably applied. This explains why Refugee Status Determination Officers have routinely been found to simply copy and paste new information on to existing templates/precedents, even though the decision being made is not accurate or legally sound (and is replete with errors), as detailed more fully in Chapter Seven.

The resounding echo of the remark by Abel that 'law either makes all the difference or no difference at all'[194] inspired my refusal to remain indifferent in the face of ongoing subjugation and domination; and my intention to carry out research that can have substantive effect. By ridding ourselves of the shadow of our colonial and apartheid past, by decolonising refugee law (as just one small part of the greater decolonisation project), we can reveal the true substance of our legal, social and political system. Logically, the substance of what South Africa aspires to be can only be achieved through effective decolonisation and transformation. In that process, establishing South Africa's identity will have the related significant benefit of facilitating social cohesion. Postcolonial theory, having regard to South Africa's past, presents the most relevant framework in order to analyse the reasons for South Africa's failure to fully implement international refugee law domestically. As such, the objective is to invoke postcolonialism's 'disruptive' and 'destablizing effect',[195] to produce decolonized refugee law by combining the legal authority for compliance with international refugee law, alongside its ethical, moral and humanitarian force.[196] Most importantly, postcolonialism theory is apposite because

> it stands for empowering the … dispossessed, and the disadvantaged, for tolerance of difference and diversity … within a broader framework of democratic egalitarianism that refuses

[192] Wolfgang Alschner 'Locked in language: historical sociology and the path dependency of investment treaty design' in Hirsch & Lang *Research Handbook on the Sociology of International Law* (2018) 350 relying on James Mahoney 'Path Dependence in Historical Sociology' (2000) 29 *Theory of Sociology* 507-548.
[193] Alschner 'Locked in language' 352.
[194] Abel *Politics By Other Means* 549.
[195] RJC Young *Postcolonialism* (2003) 74.
[196] Young *Postcolonialism* 112.

> to impose alienating western ways of thinking … It resists all forms of exploitation … and all oppressive conditions … [so as to] undo the hierarchies of power.[197]

The chronological narrative starting in the midst of apartheid, proceeding to South Africa's ascendancy to democracy and the difficulties it continues to face with respect to the protection of asylum-seekers and refugees provided thus far serves to lay the structural foundation and primary purpose of my thesis. By analyzing the past and present, my intention is to develop plausible, relevant and implementable solutions. These solutions apply, in the first instance, to the protection of refugees, but the issue of refugee protection forms part of a much larger matrix of fundamental issues in South Africa. Possibly the most urgent issue is that of nation building and social cohesion. A manifestation of the distinct lack of social cohesion is the xenophobia exhibited against African foreigners. For this reason, there is no question that a multi-disciplinary study must be undertaken. International refugee law is characterized as part of 'a larger mosaic' of international human rights law and international humanitarian law.[198] The analysis of compliance with refugee law must of necessity therefore take place within the substantive framework of human rights law.[199] But to consider law alone would be remiss. Refugee protection is heavily influenced by sociological, political, economic and national security considerations. Reinforcing the view that the existence of law (in isolation from other considerations) is inadequate to achieve compliance with international legal obligations, is Schklar's claim that 'law does not by itself generate institutions, cause wars to end, or states to behave as they should'.[200] Indeed, Teitel observes that compliance with the rule of law in transitional [or developing] states is impeded by the context. Teitel thus submits that 'while the rule of law in established democracies is forward-looking and continuous in its directionality, law in transitional periods is backward-looking and forward-looking, retrospective and prospective, continuous and discontinuous'.[201]

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[197] Young *Postcolonialism* 113-4.
[198] Kate Jastram & Marilyn Achiron *Refugee protection: A guide to international refugee law* (UNHCR and Inter-Parliamentary Union Committee to Promote Respect for International Humanitarian Law 2001) 18.
[199] Jastram & Achiron *Refugee protection* 18.
[200] Judith Shklar *Legalism: Law, Morals, and Political Trials* (1986) 131.
[201] Ruti Teitel *Transitional Justice* (2000) 215.

The seemingly endemic failure to comply with the rule of law in South Africa is illuminated in the message conveyed in the remarkable book *Nervous Conditions* by Dangarembga that:

> When an original culture is superimposed with a colonial or [apartheid] culture … it produces a painful nervous condition of ambivalence; uncertainty, a blurring of cultural boundaries, inside and outside, an otherness within.[202]

Dangarembga's insightful portrayal of this scenario is 'a hybridized split existence, of living as two different, incompatible people at once'.[203] It is that vortex of unpredictability and uncertainty that Cameron J warned of. But path dependence does have a good side: logically, once established precedents and principles have been developed, the result should be adherence to these precedents and this would 'give stability, consistency, and predictability to the law'.[204] Without addressing the frustrations and anxieties of past injustices, it is not only foreign nationals who will suffer in South Africa. It is my view that to achieve transformation, intervention is necessary to create alternative and decolonised epistemologies that resonate with the inextricable link between understandings of ourselves (identity) and the society in which we operate (culture). The contribution of indigenous knowledge systems to theories of self-determination and survival is crucial in eradicating the grip of colonialism.[205]

2. Literature review

A provocative starting premise when considering compliance with refugee law is the cynical perspective of Goodwin-Gill and McAdam who argue that 'refugee law … remains an incomplete legal regime of protection, imperfectly covering what ought to be a situation of exception'.[206] Highlighting the imperfections in the regime, Sztucki maintains that the definition of the term 'refugee' is arguably obsolete, as it does not give meaningful content to the quality of a refugee.[207] Feller even goes as far as likening the granting of refugee status to a 'lottery', because 'finding asylum can become a matter of chance in some

[202] Young *Postcolonialism* 23 referring to Tsitsi Dangarembga's *Nervous Conditions* (1988).
[203] Dangarembga *Nervous Conditions* 78 and 117.
[204] Alschner 'Locked in language' 351.
[205] Patel *Decolonizing Educational Research* 3.
[206] Guy Goodwin-Gill & Jane McAdam *The Refugee in International Law* (2007) 9.
[207] Jerzy Sztucki 'Who is a refugee? The Convention definition: Universal or obsolete?' in Frances Nicholson & Patrick Twomey (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 55.

regions, due to inconsistency by states in applying Convention standards'.[208] The most significant problem is that the international rule of law with respect to refugee rights is open to individual states to interpret and implement according to their own needs and perspectives.[209] What this means in practice is that while the rights of refugees are defined in international law, they are subject to state discretion as to their implementation in national legal systems. For this reason, analysis of a state's implementation and enforcement of international obligations must take place with reference to the variety of internal and external imperatives that have each to be considered by a state in the execution of its various mandates. In a country such as South Africa the internal imperatives caused by the legacy of colonialism and apartheid are epic. As such, despite South Africa's internalization of the international refugee treaties through the Refugees Act, South Africa is now reneging on the obligations undertaken because of the self-interest to preserve its limited resources and maintain national security, conveying that refugees are a burden and should be excluded from the state. Studies have however found that this 'logic of exclusion' only reinforces the perception of refugees as a burden, despite research recording that 'host societies actually benefit tremendously from their presence and contributions – economically, socially, and culturally'.[210]

Despite my initial misgivings about any possible relationship between the works of Foucault and South Africa's record of compliance with international refugee law in the context of South Africa's peculiar past, I cannot deny that it was Foucault's words that resonated most strongly with me as I scrutinized South Africa's past and present. The fulcrum of Foucault's philosophy is that '"order is what remains" when the work of law is accomplished'.[211] That South Africa has a comprehensive legal framework protecting refugees and a constitutional imperative to comply with the rule of law has evidently not been sufficient to construct order within the refugee determination process. This forced me to delve more deeply into the

[208] Erica Feller 'Statement at the 58th Session of the ExCom of the High Commissioner's Programme, agenda item 5(a)' Doc AC.96/1038, UNHCR (3 October 2007).
[209] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1979, re-edited 1992) para 28.
[210] Volker Türk 'Statement at the 66th Session of the Executive Committee of the High Commissioner's Programme (Geneva 24-26 June 2015) at *http://www.unhcr.org/559643499.html*.
[211] Michel Foucault 'Lemon and Milk' in James Faubion (ed) *Power: The Essential Works of Foucault 1954-1984, Vol 3* (2001) 437; Michel Foucault *Security, Territory, Population* 46.

possible reasons for this. Critiquing the international refugee law regime, Canefe makes what I believe to be a profound argument: he motivates that we need to 'cut short the somewhat stale conversation about treaty implementation and compliance'[212] and focus our attention on how 'the socio-political dimension' can sustain the protection of refugees instead.[213] This is consonant with Abel's opinion that sociology of law is primarily concerned with the impact and attitudes of those responsible for administering the law.[214] Yet, conspicuous in its absence is any reference whatsoever to international refugee law in the very recently published *Research Handbook on the Sociology of International Law,* notwithstanding numerous references to diverse work employing the methodology of the sociology of international law[215] and despite refugee protection giving rise to what can only be described as a crisis situation across the globe. I was thus compelled to undertake my own sociological investigation. Colonisation, I found, was the root cause of enduring oppression, necessitating an analysis of colonisation's impact on adherence to the rule of law. A point of departure was thus *Why Nations Fail* by Acemoglu and Robinson, being one of the more highly regarded studies on the relationship between freedom, inclusive systems, respect for the law and development.[216] With this background in mind, it becomes easier to appreciate the implications of empirical evidence that illustrates that the officials within the Department of Home Affairs are openly hostile to asylum-seekers. In other words, Home Affairs is colonised. Accordingly, what I offer in this thesis is answers to the vexing issue of how and why the oppressed had become the oppressors; or the colonised, the colonisers, despite 'the work of law'. Strategically, situating the study within a detailed historical context was intuitive because of the prominent reverberating memory of South Africa's history.

Contrasting the implementation of law by officials within the Department of Home Affairs against the object and purpose of international refugee law, Quijano and Mignolo's articulation of 'coloniality of power' within institutional practices best encapsulated the

[212] Nergis Canefe 'The fragmented nature of the international refugee regime and its consequences: a comparative analysis of the applications of the 1951 Convention' in Simeon *Critical Issues in International Refugee Law* 206.
[213] Canefe 'The fragmented nature' 207.
[214] Abel *Politics By Other Means* 545.
[215] Hirsch & Lang *Research Handbook on the Sociology of International Law* (2018).
[216] Acemoglu & Robinson *Why Nations Fail*.

status quo.[217] It is the coloniality of power that 'converted differences into values and hierarchies'[218] and which continues to apply in the socio-legal and political setting to the present. Stated differently, it is colonisation of the mind; an issue upon which wa Thiongo[219] and Mignolo concur. From a systemic perspective I was persuaded by Mudimbe's assertion that Africa was "invented" by colonisation.[220] Inherent in this process was the simultaneous invention of social constructs premised on difference and fear of "the Other". The structural rationality of colonisation; that is, hierarchical racialisation of identities[221] resulting in control by one group over another, subjectivity in the form of either Self or the Other; and the creation of exclusionary borders was not eradicated when South Africa became a democracy in 1994. Mignolo et al term this the coloniality of difference[222] that manifests in the coloniality of power: protracted and unceasing institutionalisation and psychology of colonisation. Best characterising the relations between South Africans and refugees or asylum-seekers is wa Thiong'o's description of 'a society of bodiless heads and headless bodies':[223] the complete dehumanisation of "the Other" accompanied by violent hatred and intent to eliminate the threat apparently posed.

No single body of work that comprehensively, and in a nuanced fashion, compares international refugee obligations with their implementation in South Africa exists. Confirming this is d'Orsi's exposition, which documents that very few 'complete and accurate studies' that have been conducted on refugee protection in Sub-Saharan Africa'. Most, he concedes, are 'merely descriptive'.[224] Literature on refugee rights in South Africa all contain quite elaborate detail on the failure of government to ensure the protection of refugees. These sources include *Refugee Law in South Africa*;[225] *Policy Shifts in the South*

[217] Quijano & Wallerstein 'Americanity As a Concept'; Quijano 'Coloniality of Power'; Mignolo 'Further thoughts'; Mignolo *Local Histories*; Mignolo 'The Geopolitics of Knowledge'.
[218] Mignolo 'The Geopolitics of Knowledge' 71.
[219] Ngũgĩ wa Thiong'o *Decolonising the Mind: The Politics of Language in African Literature* (1986).
[220] Valentin Mudimbe *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge* (1988) 27.
[221] Sabelo Ndlovu-Gatsheni 'Global Coloniality and the Challenges of Creating African Futures' (2014) 36(2) *Strategic Review for Southern Africa* 187-88.
[222] Mignolo 'The Geopolitics of Knowledge' 278-83; Madina Tlostanova & Walter Mignolo 'Global Coloniality and the Decolonial Option' (2009) 6 *Kult* 141-42.
[223] wa Thiong'o *Decolonising the Mind.*
[224] d'Orsi *Asylum-Seeker and Refugee Protection* 7.
[225] Khan & Schreier *Refugee Law in South Africa* 140.

African Asylum System: Evidence and Implications;[226] All Roads Lead to Rejection: Presistent Bias and Incapacity in South African Refugee Status Determination;[227] No refuge: Flawed status determination and failures of South Africa's refugee system to provide protection;[228] and *Advancing Refugee Protection in South Africa*.[229] I thus went in search of a determination of the impact of the human psyche on respect for the rule of law and solutions to the endemic failure of the law. From sociology, to history, to psychology, anthropology and ethnography, and even economics, the politics of law is omnipresent. As an epistemological process, it became clear that decolonisation of refugee law, with reference to other disciplines, is a *sine qua non* if we are to succeed in disrupting the denigration of refugee law's essence and purpose. Achiume's conceptualisation of international migration as decolonisation is progressive and compelling for its recognition of the material asymmetry occasioned by colonisation that has polarized those on periphery, subjugating and subordinating them to perpetual inequity by virtue of the unilateral appropriation of power and resources by those of European decent in the 1800s.[230] Decolonisation of refugee law, I argue, necessitates an offence against the colonial positioning of the centre versus the periphery precisely because colonisation has organised the world in terms of borders. Gikandi's warning provides ample motivation: 'peripheries are not muted places in which the dominated act out their resentment or even resistance; on the contrary, they are key ingredients in the making of the implosive center itself'.[231] Applying this to the attitude of Home Affairs officials, we observe that the mentality of oppression has extended to those tasked with determining refugee status: active resistance is employed, destablising not only the asylum-seekers, but society at large. For this reason, what I took seriously, is Maley's statement that 'all refugee assistance has political implications, and that to believe in "pure" humanitarianism divorced from politics is profoundly naïve'.[232]

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[226] Polzer Ngwato *Policy Shifts.*
[227] Amit 'All Roads Lead to Rejection'.
[228] Romi Amit 'No refuge: Flawed status determination and failures of South Africa's refugee system to provide protection' (2011) 23(3) *International Journal of Refugee Law* 458-488.
[229] Handmaker et al *Advancing refugee protection in South Africa* (2008).
[230] Achiume 'Reimagining International Law for Global Migration' 143.
[231] Simon Gikandi *Mapping Englishness: Writing Identity in the Culture of Colonialism* (1996) 37.
[232] William Maley 'A New Tower of Babel? Reappraising the Architecture of Refugee Protection' in Newman & van Selm *Refugees and Forced Displacement*.

In my contemplation of the gravity of the literature describing the impact of colonisation, the single principle that incessantly revealed itself as a counter-measure to the transgression, contravention or subversion of law is that immanent norm, ubuntu. Ubuntu has the potential to both anchor and transcend international human rights law with respect to refugees. Supporting this approach is Arendt's claim that human rights would have absolutely no relevance if contingent upon 'the vocabulary of citizenship' as this would undoubtedly exclude refugees.[233] Indeed, given the symbiotic relationship between refugee law and human rights law, Hathaway's *Human Rights and Refugee Law*[234] is one of the clearest indications that notwithstanding the similarities between human rights and refugee treaties, when it comes to implementation by states, refugee law is susceptible to a lack of compliance on the same basis that human rights law is – it is conceived in a Eurocentric manner and is predicated on a strict interpretation of the principle of sovereignty. Thus, I am drawn to the nuanced and inclusive approach as espoused by Canefe, closely resembling Cassel's 'rope theory', that conceivably incorporates ubuntu by suggesting that:

> Where rights have been strengthened the cause is usually not so much individual factors acting independently – whether in law, politics, technology, economics, or consciousness – but a complex interweaving of mutually reinforcing processes. What pulls human rights forward is not a series of separate, parallel cords, but a "rope" of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.[235]

As the socio-political and cultural embodiment of African values and attributes such as humanity, honour and integrity, ubuntu has the potential to inform how international refugee law should best be interpreted to produce the decolonisation of refugee law. The description by Lugones that accentuates communalism over individualism is a good translation of ubuntu: 'beings in relation rather than dichotomously split over and over in hierarchically and violently ordered fragments'.[236] For this reason I have adopted an approach which reconciles South Africa's history with the consequent socio-political situation prevailing. Following Allott, revolution is possible when it entails 'human self-creating' arising from

[233] Hannah Arendt *On Revolution* (1973).
[234] James Hathaway (ed) *Human Rights and Refugee Law, Volume II* (2013).
[235] Doug Cassel 'Does International Human Rights Law Make a Difference?' (2001) 2 *Chicago Journal of International Law* 123.
[236] María Lugones 'Toward a Decolonial Feminism' (2010) 25(4) *Hypatia* 754.

'moments of human self-enlightenment which transform the potentiality and actuality' of society.[237] Self-enlightenment involves reclaiming our cultural identity, affirming ubuntu. Interestingly, it is Tazreiter's *Asylum Seekers and the State* that illustrates the imperative of cultural identity in order to protect refugees when she states that 'the political culture of a given state can have as potent a bearing on the path through which an individual claiming asylum negotiates, as the legal framework which establishes the limits of claims'.[238] Tazreiter's contribution is the weighing up of the national interest and the burden that citizens are expected to bear in meeting the needs of asylum-seekers. In particular, she questions the 'correlation between (political) perceptions of refugees and asylum-seekers, the administrative logic applied to such perceptions, and the reality of the impact which these arrivals have.'[239] Her specific focus is the impact on refugee policy of Australia's history of colonialism and discrimination against Aborigines,[240] admitting that 'the open sore of reconciliation between black and white Australians bears a strong symbolic relationship to how asylum-seekers fare.'[241] Similarly, referring to the situation of asylum-seekers in Germany, Tazreiter declares that they join the 'significant ranks of people categorized as "foreigners" or "aliens" who find themselves as economic, social and cultural outcasts; fringe dwellers in a society undergoing its own identity crisis'.[242] The unmistakeable parallels with South Africa are pertinent.

Also distancing himself from exclusive reliance on citizenship as the basis for rights protection and specifically invoking reference to the role of the human element, Viljoen indicates that measures to ensure compliance with rights could include (1) public opinion; (2) improvement of 'political will';[243] and (3) depoliticisation of disputes or conflict, especially where the state 'does not want to be seen to give in to a political settlement or to make a

[237] Philip Allott *The Health of Nations: Society and Law Beyond the State* (2002) 81.
[238] Tazreiter *Asylum Seekers and the State* 11-2.
[239] Tazreiter *Asylum Seekers and the State* 12.
[240] Tazreiter *Asylum-seekers and the State* 127-132.
[241] Tazreiter *Asylum-seekers and the State* 229.
[242] Tazreiter *Asylum-seekers and the State* 85.
[243] Interestingly, Troeller refers to the 'marshalling' of political will, which has a particular resonance in the South African situation in light of the dramatic transformation of South Africa's political and legal past, achieved largely by the requisite political will to achieve this end. (Gary Troeller 'Refugees and human displacement in contemporary international relations: Reconciling state and individual sovereignty' in Newman & van Selm *Refugees and Forced Displacement* 51).

politically costly concession'.[244] This is reminiscent of Neumayer's empirical study assessing whether the ratification of international human rights treaties increases respect for or compliance with human rights. Neumayer's study reveals that in most cases

> for treaty ratification to work, there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, convince, and perhaps pressure governments into translating the formal promise of better human rights protection into actual reality.[245]

To this end, in my quest to find innovative – and humanistic – approaches to refugee protection, my attention was focused on South Africa's unique situation due to its historical trajectory. Relevant here is Abel's systematic documentation of the politics of law in the struggle against apartheid. Disconcertingly, he reveals that a prolonged history of the complex nature of oppression, has 'repercussions for the entire society'.[246] To exclude society's relationship with refugees as part of these repercussions is unthinkable. Therefore, to establish South Africa's history of oppression and to assist in predicting what the future might hold, I consulted *South Africa in the Nineties*, published in 1991.[247] At 672 pages and with 25 authors, it is the most comprehensive critical analysis of South Africa's past – and particularly detailing developments on the cusp of South Africa's democracy – from a social sciences perspective. Indeed, Marais makes it clear from the outset that this resource is multi-disciplinary, acknowledging 'that no single social science is methodologically powerful enough to describe and/or explain and/or understand … completely and comprehensively complex social phenomena such as sociopolitical dynamics'.[248] The relevance of this book cannot be over-stated, recognizing as it does, that 'conflict is woven into the very fabric of society'[249] and provides insight into violence as a response to past deprivation and dehumanization.[250] The meaning of the terms violence and conflict are meticulously clarified to illustrate how the 'conditions for violence [exist]

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[244] Frans Viljoen *International Human Rights Law in Africa* (2012) 464-5.
[245] Eric Neumayer 'Do International Human Rights Treaties Improve Respect for Human Rights?' (December 2005) 49(6) *The Journal of Conflict Resolution* 952.
[246] Abel *Politics By Other Means* 545.
[247] DJ van Vuuren et al (eds) *South Africa in the Nineties*.
[248] Marais *South Africa in the Nineties* xii.
[249] Marais *South Africa in the Nineties* xv. See also David Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* (1998) 6.
[250] Omar specifically states that 'There are many striking parallels in the political history of India and South Africa, and those vying for power in the hope of achieving a peaceful South Africa could do well to heed the lessons of that country which has failed to achieve answers in the field of minority accommodation'. See Ismail Omar 'The inadequacy of the political system' *South Africa in the Nineties* 116.

within the process of violence itself'[251] that exposes the numerous and various political factors impacting on the implementation of refugee law in contemporary South Africa. Likewise, the book examines nation building, revealing that the failure to prioritise nation building in the 1990s has resulted in the perpetuation of a polarized, fragmented society,[252] with refugees being regarded as aliens in the race-based hierarchical 'system' that has been carried over from apartheid.[253] More importantly, what is discerned from the book are not-so-subtle warnings about adopting optimal strategies for transformation with specific reference to the economic effects of apartheid. Schlemmer specifically compares the effects of affirmative action in the United States, concluding that it was an absolute failure. Pertinently, he illuminates the danger of creating an affirmative action policy without being able to deliver because of the consequent frustrations that unfulfilled expectations create.[254] Against an already volatile polity, he cautions that such a situation may sow the seeds of further conflict. Given the xenophobic violence that we have witnessed, his prediction has come true. Adding to the dimension of violence, no analysis has yet been conducted on the sociological mechanism of the neutralisation of competition as it plays out between officials from the Department of Home Affairs and refugees.[255]

Moving closer towards achieving a clearer understanding of the 'institutional character of the post-apartheid state' is the work of Klotz.[256] Framing her study squarely within the ambit of xenophobia, Klotz questions how the emphasis on human rights by South Africa has 'caused' xenophobia, concluding that South Africa has always been xenophobic. Citing the study by the Comaroffs, Klotz reveals 'the proclivity of citizens of all stripes to deflect shared anxieties onto outsiders',[257] highlighting that 'concerns about undocumented population flows were a standard component of the apartheid regime's repertoire'. Klotz substantiates this view with reference to the Froneman Committee's report that specifically referred to the prospect of 'Union-born Africans' being deprived of jobs and houses by foreign

[251] CP de Kock 'South Africa in the nineties: violence as an option?' *South Africa in the Nineties* (1991) 49.
[252] Esterhuyse 'The normative dimension of future South Africa' 21-2.
[253] Welsh 'Can South Africa become a nation-state?' 556; Horrell *Laws Affecting Race Relations* 73.
[254] Schlemmer 'South African society under stress' 13.
[255] de Kock 'Violence as an option?' 40.
[256] Klotz *Migration and National Identity in South Africa, 1860-2010* (2013) 41.
[257] Klotz *Migration and National Identity* 45 quoting Jean Comaroff & John Comaroff 'Naturing the Nation: Aliens, Apocalypse and the Postcolonial State' (2001) 27(3) *Journal of Southern African Studies* 627-51.

Africans.[258] In fact, she asserts that 'the discourse of immigration' has been constant since the 1960s, attributing xenophobia to 'national distinctions in the region' that are a consequence of decolonisation. [259] However, Klotz's analysis of xenophobia is not sufficiently persuasive as it fails to consider that resistance to the rule of law (the Refugees Act especially) is not played out primarily by ordinary members of the population, but by bureaucrats[260] that are being paid a salary to implement the law. In contradistinction to Klotz, my argument is that South Africa's political, economic and administrative institutions were transplanted from the colonial powers from where they originated. Derived from societies that were based on racial categorisation and associated hierarchies, it is these institutions that have been replicating the insider/outsider labels. The essential difference, however, is that at the end of apartheid, deliberate decisions were taken for the state to continue operating with these same [extractive] institutions. So, instead of a process of creative destruction to create inclusive institutions, and somewhat analogous to the notion of path-dependency, the institutions continued operating in South Africa in a seamless fashion, perpetuating the poverty and inequality, as well as the conflict between "different" groups. The most egregious problem associated with this is that (unlike during colonisation and apartheid), the democratic state failed to adequately capacitate and resource these institutions. Consequently, the current bureaucrats exhibit pure resistance to the rule of law because they have not been sufficiently equipped and empowered to implement the law that they are responsible for. What has materialised is a fatally flawed 'legal culture' taking the form of the application of ill-conceived and biased assumptions,[261] with their roots in the knowledge that the existing economic and political institutions remain exclusionary to the general South African population. It is within the bureaucracy that the inherent conflict for economic resources is played out. Supporting my argument is Klaaren's rebuttal of Klotz's suggestion that nativism infuses state institutions, lending credence to the premise

[258] Klotz *Migration and National Identity* 43 citing Ken Owen *Foreign Africans: Summary of the Report of the Froneman Committee* (1964).
[259] Klots *Migration and National Identity* 44-45.
[260] Although Klotz refers to 'practice turn' that focuses on bureaucratized routines to attribute agency to discourse (*Migration and National Identity* 52), even citing Emmanuel Adler & Vincent Pouliot (eds) *International Practices* (2011), she does not develop this argument, instead leaving it hanging.
[261] Klotz *Migration and National Identity* 53.

that the fundamental problem is resistance to the rule of law and economic competititon,[262] and not ideological considerations. As Klaaren reveals, the issue is not whether one is native to South Africa as having been born within the territory and holding legal residence status;[263] instead, my argument goes, the issue concerns access to services and resources – and this largely unfettered power lies within the purview of the administrators within the Department of Home Affairs to decide, albeit arbitrarily, who may have access to these resources.

Substantiating my view is what Berkowitz and Weingast refer to as the 'transplant effect'.[264] Empirical studies confirm this apparent resistance to the rule of law and its consequences. Inherent in the transplant effect is the inevitable 'gap between the law on the books and law in action'[265] on account of the fact that the 'process by which the formal law was introduced to countries around the world is associated with effectiveness of law in those countries'.[266] According to the predictions emanating from these studies, 'societies that suffer from the transplant effect under-invest in formal law and legal institutions'.[267] Moreover, the central economic and political institutions so transplanted do not possess an inclusive character which is linked to increased wealth and stability. Weingast submits that the transplanting of markets, elections and judicial institutions from the developed world into developing states with no regard for the domestic circumstances is unsustainable and invariably results in a repeated cycle of 'violence, governments collapsing, rights being altered, assets expropriated, new constitutions being written, and policies altered overnight'.[268] It is the aspects of rights being altered and the alteration of policies overnight which are most evident in the context of refugee law in South Africa. Added to this are the numerous references to the need to protect national security in the 2017 White Paper on International

[262] Thabo Mbeki argued that the 2008 xenophobic attacks were rooted in urbanization. This argument has merit given the increased population figures and the failure by the state to provide adequate housing and other socio-economic rights.
[263] Jonathan Klaaren 'Citizenship, Xenophobic Violence, and Law's Dark Side' 142-3.
[264] Daniel Berkowitz 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163-203; Weingast 'Why developing countries prove so resistant' 28.
[265] Katharina Pistor, Antara Haldar & Amrit Amirapu 'Social norms, rule of law, and gender reality: An essay on the limits of the dominant rule of law paradigm' in Heckman *Global perspectives on the rule of law* 269.
[266] Pistor et al 'Social norms, rule of law' 269-70.
[267] Pistor et al 'Social norms, rule of law' 271.
[268] Weingast 'Why developing countries prove so resistant' 50.

Migration,[269] potentially diminishing the protection of refugees even further. I attribute this to the fact that adherence to the rule of law is severely constrained (if not completely impeded) by a transformation that was insufficiently organic,[270] inchoate, and did not effectively oust or overthrow the institutional memory of apartheid and colonialism.[271]

Intersecting with the socio-political and historical framework of South Africa are the obligations imposed by international refugee law. Admitting a recalcitrance to adhere to the rule of law is the government's statement that 'the 1999 White Paper [on International Migration] is essentially based on formal compliance to laws [derived from international refugee treaties] and regulation',[272] thereby justifying why it needed to be replaced. An explanation for this is proposed by Hathaway in her elaborate empirical study.[273] Hathaway concludes that ratification of international treaties does not entail that states are more likely to comply with treaty requirements incumbent upon them purely as a result of the ratification of [human rights] treaties.[274] Hathaway goes on to make an important distinction: she states that 'the question of compliance with international law should be differentiated from the question of why states commit to an agreement in the first place … because the incentive structure of states differs'.[275] This confirms one of the major flaws in the African compliance debate, which is that the large majority of African states profess grandiose ideas and will willingly ratify treaties; however, the problem arises with respect to implementation (more accurately, the failure to implement). Since the preliminary steps indicating intention to comply have been adhered to, the misleading impression is created that the state will automatically comply. Koh[276] argues that this obstacle is relatively easy to overcome: he emphasises the domestication (internalization) of norms as being imperative to ensuring compliance. However, what makes Polzer Ngwato's *Policy Shifts in the South African*

[269] *White Paper on International Migration* iii.
[270] The overwhelming weight of evidence is that the apartheid-era state and its institutions – themselves transplants from the original colonial masters – were retained in the new democratic dispensation.
[271] Ndlovu-Gatsheni 'Racism and "blackism"' 83.
[272] *White Paper on International Migration* iii.
[273] Oona Hathaway 'The cost of commitment' (1998) 55 *Stanford Law Review* 1821. Hathaway's study spanned almost 40 years and 166 states. Her objective was to investigate whether ratification of human rights treaties makes a country more likely to comply and thereby effect an improvement in the country's human rights practices.
[274] Hathaway 'The cost of commitment' 2002-20.
[275] Hathaway 'The cost of commitment' 1939.
[276] Harold Koh 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal.*

Asylum System, published by Lawyers for Human Rights in 2013, so remarkable is that it identifies the numerous – sometimes seemingly innocuous – shifts in refugee policy in South Africa and confronts each of these with a cogent analysis of the flaws in these policies. Given Lawyers for Human Rights' location as the most prolific national non-governmental organisation that litigates on behalf of refugees against the state, the evidence is undoubtedly solid. This publication arguably builds on *Advancing Refugee Protection in South Africa*, which illustrates the tangible shifts and concerns pertaining to refugee protection. These two publications assist immeasurably in ascertaining the benchmarks against which refugee protection should be measured. The latter is especially important for its inspiration to enable me to move away from the fragmented approach in which refugee rights have been understood and will instead facilitate a more considered and coherent approach to presenting the government's commitments, juxtaposed against South Africa's specific history, as far as refugee rights are concerned. Indeed, Khan and Schreier's *Refugee Law in South Africa* provides a relevant comparator against which to assess how recent policy and legislative decisions are retrogressive in nature, since it contains interesting and relevant perspectives on the incompatibility between the nascent laws and policies and the legal standards in place. Essentially, it assists in giving impetus to the concern that refugee rights are systematically disregarded, albeit that it contains very little analysis.

3. Research aims and objectives

That portion of the globe that has come to be recognised as South Africa has an early history described by Omer-Cooper as an area populated by hunter-gatherer 'Bushmen' and 'Hottentot' pastoralists, known generically as the Khoisan. Possibly having begun their migration from West Africa, Southern Bantu tribes arrived by crossing the Limpopo river somewhere during the period between 1100 and 1300. Comprising two [language] groups, the Nguni and the Sotho, the Sotho settled close to the Orange River in about 1600. The Nguni on the other hand, travelled down the low-land strip of the east coast, reaching the Umtata River in 1593 and subsequently, the Fish River in the early 1700s.[277] This natural

[277] JD Omer-Cooper *The Zulu Aftermath: A Nineteenth Century Revolution in Bantu Africa* (1972).

migration of Africans across unbounded territory epitomizes the quest for an existence that is secure and is consistent with the notion of human flourishing.[278] Juxtaposed against this is the introduction of the system of territorial sovereignty of states rooted in the Treaty of Westphalia of 1648. Without the slightest hesitation, European sovereignty was understood as permitting the exercise of power within arbitrarily determined territories in Africa. But of course, explains Butler, the reason for this is that 'there are "subjects" who are not quite – or, indeed, are never – recognized as lives'.[279] Colonisation subverted the right of Africans to be human[280] vitiating their human agency and very identity along with their history and culture.[281] For the fact that the qualities of 'stability, order and prosperity',[282] political and economic good governance, respect for human rights and respect for the rule of law[283] are the essential characteristics of a strong state, correspondingly, the very 'survival of the state'[284] is dependent on human security being manifest. The essential objective of this study is to identify 'material effects and practices'[285] flowing from colonisation because only once these have been established can they be dismantled. Inherent in this process is to affirm and re-claim pre-colonial culture, identity and humanity that is 'not about individualism, ranking, and status'.[286]

By uncovering South Africa's colonial and apartheid history in as balanced and sensitive a manner as possible, an informed understanding of the impact of this history on the form and substance of South Africa as a sovereign state in the present milieu will be established. The impact of South Africa's history on refugee protection involves a consideration of what can be done in a highly stratified and unequal society. Essentially, I argue that South Africa was forced to prioritise democratisation over decolonisation in the early 1990s. While democratisation certainly has significant merit, decolonisation – perhaps even revolution in

[278] Attributed to Aristotle, human flourishing is a concept emphasizing identity, purpose and autonomy, closely resembling human security. See for example, Edward Younkins 'Aristotle, Human Flourishing and the Limited State' (2003) 133 *Le Quebecois Libre* at *http://www.quebecoislibre.org/031122-11.htm*.
[279] Judith Butler 2009 *Frames of War: When is Life Grievable?* (2009) 4.
[280] Murungi *African Philosophical Currents* 100.
[281] Chinkin & Kaldor *International Law and New Wars* 510.
[282] Helton *The Price of Indifference. Refugees and Humanitarian Action in the New Century* (2002) 268.
[283] Anne Hammerstad 'People, States and Regions' in Anne Hammerstad (ed) *People, States and Regions: Building a collaborative security regime in Southern Africa* (2005) 6.
[284] Hammerstad 'People, States' 5.
[285] Patel *Decolonizing Educational Research* 93.
[286] Patel *Decolonizing Educational Research* 73.

the form of creative destruction – must now be prioritised, failing which we must accept the perpetuation of the 'colonisation of the mind'. If this is not confronted, violent conflict and seething anger will continue to grow. Indifference in the face of these challenges could be catastrophic. The implementation of refugee law in South Africa is the paradigm through which this analysis is conducted because it offers insights into the impact of South Africa's past on South Africa's future trajectory, particularly for the fact that the lessons learned are transferable to other government departments. Refugee law and policy is fertile ground for this critical examination on account of the thousands of cases lodged against the Department of Home Affairs that confirm the failure to implement the law correctly (often with the Department being positively definant of binding court decisions), further illustrating resistance to the rule of law[287] yet offering no solutions to the possible reasons for this.[288]

4. Methodology and approach

Given that research is 'driven by agenda, passions, choices, biases and even prejudices … the experiences, perspectives and perceptions [of the author] … will all have different nuances and consequences'.[289] Prefacing the potential 'complications with the identity of the author',[290] of a study into colonisation's impact on South Africa's ability to implement international refugee law, I am compelled by Patel's argument in favour of a

[287] *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 4 SA 125 (SCA); *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* 2015 3 SA 545 (SCA). In respect of the Department refusing to comply with regulations relating to the issuing and renewing of asylum permits see *Saidi and Others v Minister of Home Affairs and Others* 2015 ZAWCHC 201 (26 November 2015) and *Ssemakula and Others v Minister of Home Affairs and Others* 2012 ZAWCHC 398 (5 March 2012). On the superficial consideration of asylum claims and the failure to consider the prospect of refoulement, relevant cases include *Akanakimana v Chairperson of the Standing Committee for Refugee Affairs and Others* 2015 ZAWCHC 17 (18 February 2015) para 20 and *Kalisa v Chairperson of the Refugee Appeal Board and Others* 2018 ZAWCHC 156 (19 November 2018) para 38.

[288] *Tshiyombo v Members of the Refugee Appeal Board and Others* 2015 ZAWCHC 190 (17 December 2015) para 11. See also *Hossain v Minister of Home Affairs and Another* 2011 ZAECPEHC 21 (17 May 2011) para 1 where the Court commented on the 'frustration' experienced by asylum-seekers and *Somali Association of South Africa and Others v The Refugee Appeal Board and Others* 2019 ZAGPPHC 78 (30 January 2019) para 34 where the Court voiced its amazement at the fact that the Refugee Status Determination Officer claimed that the asylum-seeker should have sought refuge by relocating to safer parts of Somalia (a failed state that has been ravaged by civil conflict for approximately three decades).

[289] Pheko & Sebastien *Mobilising Social Justice* xvii-iii.

[290] Gutting *Foucault* 12.

> productive destabilization of potentially facile and deterministic readings of settler colonial structures that locate some as settlers and others not, which in turn runs the danger of locating responsibility to counter coloniality for some, namely Native peoples, rather than for all.[291]

Futhermore, for the fact that 'debate rage[s] around what and who could be termed African, and more specifically South African' [292] certain conscious choices were made while conducting the research. Despite South Africa being the land of my birth as well as that of at least two generations of my ancestors, I have deliberately chosen not to conduct empirical research with refugees and/or South African citizens as my own skin colour could fundamentally alter the responses received from respondents. Moreover, I am equally acutely aware that engaging in empirical research with extremely vulnerable persons may have the consequence of raising the expecations of that group that the research will immediately solve all of their problems. I thus sought to avoid what Newkirk calls 'seduction and betrayal'[293] and elected instead to rely on the numerous comprehensive empirical studies already conducted on refugee rights in South Africa.

As far as the approach to the research is concerned, I was influenced by the knowledge that maintaining the 'analytical border between law and politics' is difficult.[294] This is especially so in Africa, since developing states are described as resistant to the rule of law, seemingly on account of the political influence of colonialism. Accordingly, critical theory will be employed in this study. Inherent in critical theory is pursuit of social transformation which derives from social theory. Sociology of law is particularly appealing because of its reference to social categories and relational biographic method; something established by colonisation and the very cause of the reluctance to protect refugees. In addition, critical theory includes within its ambit postcolonialism. Critical theory is apposite because of its

> focus on social justice, power relations, struggles against oppression, an attempt to comprehend the relationship between knowledge formations and social power, and an effort to denaturalize oppression that often appears as natural and inevitable.[295]

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[291] Patel *Decolonizing Educational Research* 38.
[292] Pheko & Sebastien *Mobilising Social Justice* xviii.
[293] Thomas Newkirk 'Seduction and Betrayal in Qualitative Research' in P Mortensen & G Kirsch (eds) *Ethics and Representation in Qualitative Studies of Literacy* (1996) 3.
[294] Nikolas Rajkovic, Tanja Aalberts & Thomas Gammeltoft-Hansen *The Power of Legality: Practices of International Law and their Politics* (2016) 2.
[295] Kenneth Saltman *The Politics of Education* 2 ed (2018) 102.

Contrasting the conception of human security of the indigenous African population during colonisation as 'bare life', as Agamben describes,[296] I employ the interpretation of human security as 'the kind of security that individuals expect in rights-based law-governed societies where law is based on an implicit social contract among individuals, and between individuals and the state' particularly where the assumption is that 'the state will protect individuals from existential threats'. [297] Human security – in its various (evolving) manifestations – is the catalyst for South Africa's historical journey. [298] In this regard, Lauterpacht's assertion that the rule of law itself is a human good[299] substantiates the need to apply a methodology that responds to the fact that adherence to the rule of law is imperative. wa Mutua, a noted authority on studies engaging with the rule of law in Africa suggests that postcolonial theory could play a prominent role in advancing the solution to Africa's difficulties with the rule of law.[300] Similarly, Odhiambo makes it clear colonialism's legacy is the most likely culprit for the challenges that refugees and asylum-seekers are forced to endure. He thus submits that the issue of asylum must be viewed 'through a postcolonialist lens as a source of direction to their search for solutions to the crisis facing African asylum regimes'.[301] Indeed, I am responding to this call to apply postcolonial theory to refugee law.

Postcolonialism's intention is to combat 'institutional and legal discrimination'.[302] From the outset, postcolonialism is multi-disciplinary by nature as it 'involves issues that are often the preoccupation of other disciplines'.[303] The pervasive nature of coloniality requires distinctive sets of expertise to speak to each other to reflect how 'multiple forces interact in everyday lives'.[304] Given that postcolonialism coheres with the objective of achieving social

[296] Giorgio Agamben *Homo Sacer: Sovereign Power and Bare Life* (1998).
[297] Chinkin & Kaldor *International Law and New Wars* 490-491.
[298] I employ the term 'moment' as synonymous with the concept of 'epochs' but deploy moment to emphasise that each moment was of relatively short duration but that each of these moments had a discernible impact on South Africa, although by referring to it as a moment, I seek to negate the long-term consequences of these moments.
[299] Hersch Lauterpacht *The Function of Law in the International Community* (2011) 354.
[300] wa Mutua 'Africa and the Rule of Law'.
[301] Edwin Odhiambo-Abuya 'A Critical Analysis of Liberalism and Postcolonial Theory in the Context of Refugee Protection' (2005) 16 *King's College Law Journal* 273.
[302] Young *Postcolonialism* 116.
[303] Young *Postcolonialism* 7.
[304] Patel *Decolonizing Educational Research* 66.

justice, because it offers African refugees in South Africa a language and a politics in which their interests are preserved,[305] it will provide the foundation for the study. However, at once postcolonialism rejects certain aspects of international law and institutions[306] and 'uses the language of international law in its discourse'.[307] This apparent contradiction is easily surmounted as postcolonialism critiques these institutions in order that they may be utilised to overcome subordination. International law itself is simultaneously flexible, theoretical, ideological,[308]and 'open-textured',[309] thus being susceptible to 'multiple interpretations so that it can represent the politics behind the law'.[310] Accordingly, this will facilitate the process of decolonizing refugee law by ensuring that its primary legal and humanitarian purpose is retained. Allott's interesting analogy of the interpretation of international law is useful here. He states that law is not like a motor car and not like a poem, but it is a bit like both. It is like a motor car in that it helps us get from A to B and it is like a poem, because poets have a certain meaning in mind when they composed it, but readers give their own interpretation to it based on their experience.[311] This analogy is the essence of article 31 of the Vienna Convention on the Law of Treaties,[312] which prescribes that a treaty must be interpreted using its ordinary meaning but in the appropriate context. Context underpins Lauterpacht's conception of the humanisation of international law when arguing that treaties that have been adopted to protect the human person are of such seminal importance that they simply 'cannot be allowed to fail'.[313] The humanisation of international law thus entails, admits

[305] Young *Postcolonialism* 2.
[306] Ndlovu-Gatsheni 'Racism and "blackism"' 81.
[307] Robert Cryer, Tamara Hervey & Bal Sokhi-Bulley *Research Methodologies in EU and International Law* (2011) 69.
[308] Vassilis Tzevelekos 'Juris dicere: custom as a matrix, custom as a norm, and the role of judges and (their) ideology in custom making' in Rajkovic et al *The Power of Legality* 200.
[309] Ciaran Burke 'Law, Politics and Hard Cases' in Rajkovic et al *The Power of Legality* 150.
[310] Burke 'Law, Politics and Hard Cases' 153.
[311] Philip Allott 'New International Law' in British Institute of International and Comparative Law *Theory and International Law: An Introduction* (1991) 109 as quoted in Geoff Gilbert 'Running scared since 9/11' in Simeon *Critical Issues in International Refugee Law* 88-9.
[312] As Gilbert ('Running scared since 9/11' 88) states: 'although the VCLT only applies directly to treaties concluded by states after it came into force (Article 4), it is accepted that the VCLT reflects customary international law'.
[313] Surabhi Ranganathan 'Legality and lawfare in regime implementation' in Rajkovic et al *The Power of Legality* 299.

Lauterpacht, that 'governments cannot be permitted to discredit international law and to render it unreal … by reducing treaties to … makeshifts of political expediency'.[314]

Being a study that is evaluative in nature, the methodology I have elected to employ is postcolonial theory, complemented by the humanisation of international law (that otherwise devolves to sociology of law). The humanisation of international law, I argue, is an appropriate approach to pursue the urgent objective of decolonising refugee law as part of the process of decolonising the state because of its emphasis on the social aspects relating to how law is implemented. To be sure, colonisation impacted on the humanity and dignity of both the colonizer and the colonised. Of necessity, Murungi urges, this same humanity is fundamental to the process of decolonisation.[315] Real decolonisation is only possible if a meaningful engagement with the causes and consequences of colonisation is undertaken.[316] This methodology is entirely consistent with the traditional African concept of ubuntu, that is founded on rules governing group solidarity, compassion and survival.[317] For this methodology to be applied, knowledge of the social manifestation of the stratification of society as an impact of colonisation is imperative. Bourdieu's sociology of international law is apt.[318] Messenger describes Bourdieu's sociology well when he states that identities are formed through interaction with others in terms of the imposed structures of that society. Interests are developed during this process, causing individuals to 'use the capital they have at hand to advance their interests within the relevant social space or field'.[319] Bourdieu, Messenger claims, defines capital as including 'material conditions of

[314] Ranganathan 'Legality and lawfare' 296-300 quoting Hersch Lauterpacht 'The Covenant as Higher Law' (1936) 17 *British Yearbook of International Law* 63-64 and 'International Law Commission, *First Report on the Law of Treaties* by Hersch Lauterpacht, Special Rapporteur, A/CN.4/63, (1953) II *Yearbook of the International Law Commission* 158.
[315] Murungi 106.
[316] Tshepo Madlingozi, an advocate of decolonisation contemporary with Murungi, condemns any ahistorical attempt at analyzing South Africa. Madlingozi thus applies the methodology of historicization in various works, including 'Mayibuye iAfrika?'; 'Decolonisation is always a disruptive phenomenon: On social movements and the "decolonial turn" in constitutional theory' presented at the Human Sciences Research Council Seminar (28 January 2019).
[317] Mwiza Nkhata *Rethinking governance and constitutionalism in Africa: The relevance and viability of social trust-based governance and constitutionalism in Malawi* 34 (LLD thesis, University of Pretoria 2010) at *https://repository.up.ac.za/bitstream/handle/2263/25693/00front.pdf*.
[318] Bourdieu 'The Force of Law'.
[319] Gregory Messenger 'The practice of litigation at the ICJ: the role of counsel in the development of international law' in Hirsch & Lang *Research Handbook on the Sociology of International Law* (2018) 212.

individuals' which in turn inform identity in relation to the world around them.[320] It is not difficult to grasp the direct link with conflict. Therefore, social conflict theory provides the relevant heuristics. Social conflict theory is concerned with the intersecting aspects of 'social inequality and stratification, power relations, and social change'.[321] Much like the colonial mentality, the social groups in society 'signify and monitor group boundaries of categorical identity groups'.[322] Furthermore, because postcolonial societies are deeply unequal, there is a persistent struggle for access to resources (such as wealth, authority, political power, and cultural resources or positions).[323] These types of social orders are invariably manipulative, with dominant groups seeking to maintain control. When social change does occur, it occurs 'rapidly and in a disorderly fashion'.[324] Characteristically, conflict derives from a subordinated group's 'sense of (relative) deprivation (a sense of being underprivileged) … which leads to class consciousness'. Once the opposing groups are mobilized through material and symbolic resources at their disposal, conflict is actualised.[325] In the case of South Africa, the officials within the Department of Home Affairs manipulate the law that they have been empowered to apply, in order to eliminate the threat posed by migrants applying for asylum and seeking access to resources. This conflict is well planned and executed, providing an outlet for the aggression, albeit that the power structures in society are unchanged, thus perpetuating the disorder and disregard for the rule of law. In sum, mine is the task of sociological reconstruction of South Africa by researching the empirical data that has given rise to 'neutralizing and naturalizing discourses' establishing 'personal bonds and enmities' that permeate society.[326] Like the diffusion of people across borders, this study analyses the diffusion of international norms across borders. It considers the conflict between binding international legal norms and arbitrarily imposed bureaucratic norms, thus impoverishing refugee law.

[320] Messenger 'The practice of ligitation' 215 at footnote 46.
[321] Hirsch 'Core sociological theories' 400.
[322] Hirsch 'Core sociological theories' 402.
[323] Hirsch 'Core sociological theories' 400.
[324] Hirsch 'Core sociological theories' 391.
[325] Hirsch 'Core sociological theories' 400.
[326] Madsen 'Reflexive sociology' 204.

5. Structure of the thesis

The denial of human security is one of the primary characteristics of colonisation: indigenous people's rights to land and the food produced on that land were forcibly expropriated.[327] Liberation from colonisation has not addressed the commodification of land and resources. In fact, an almost endless list of factors, including disregard for the rule of law, the rape of constitutionalism, violent conflict, abject poverty and what is known as the 'curse' of natural resources further dehumanize and degrade Africa's people, resulting in a constant flow of refugees. Consequently, these factors contribute to what is already a 'most fragile' state of human security in Africa.[328] Given the abstract nature of the concept human security, it is defined best in an inverse fashion: human *insecurity* is evident when deprivation, poverty, exploitation and tyranny proliferate.[329] Accordingly, the notion of human security has a clear relationship with the cause of refugee movements across the African continent in the present. My invocation of human security also has another specific purpose: I use it in reference to the initial cause of instability and disregard for the rule of law in Africa. It anchors Africa's colonial history within the understanding of human security as it has evolved since at least the 1600s on account of the fact that colonisation was the means by which Europeans actively sought out land and resources that they could appropriate and exploit to secure their material wealth, in turn reducing conflict and deprivation for that group of humans who were deemed eligible to have their humanity protected; that is, Europeans exclusively. Through the application of the theory of Social Darwinism, Africans were dehumanised and relegated to the bottom of a contrived social hierarchy that would condemn them to a life of poverty, aggravated by a distinct lack of agency, autonomy and power over their own lives. So acute is this condition, that it continues to reverbate across Africa to the present day.

In South Africa specifically, apartheid represents a notable ramping up of the objective of stratifying human beings on the basis of "race", with a decidedly material purpose. As

[327] A Haroon Akram-Lodhi '"Old wine in new bottles": Enclosure, neoliberal capitalism and postcolonial politics' in OU Rutazibwa & R Shilliam (eds) *Routledge Handbook of Postcolonial Politics* (2018) 279.
[328] Chinkin & Kaldor *International Law and New Wars* 489, citing Ademola Abass *Protecting Human Security in Africa* (2010) 10.
[329] Helton *The Price of Indifference* 12.

Schlemmer declares, at its core were capitalist interests that came to fruition by regulating competition in the economy and access to resources through the regulation and behaviour of black labour. Precisely, empirical sociological and political studies of South Africa 'point to apartheid having been caused by more basic factors' than 'some form of psychosocial pathology' or 'the so-called "mentality" of the Afrikaners, the "boers" or the "racist whites"'. It was essentially founded on the maintenance of material 'competitive nationalist aspirations among a section of whites'.[330] For this objective to be realised, maintaining the strict hierarchy of "races" that had been established, was crucial. In this regard, illustrating the continuing effects of colonisation, Chapter One has provided a brief backdrop to the overarching issue of South Africa's compliance with international refugee law obligations by illuminating that South Africa is a bifurcated, fragmented and incohesive society and that refugees and asylum-seekers are given a particularly raw deal because they are viewed as competing for already scarce resources. Situating South Africa's attitude to refugee rights within the context of a colonial and apartheid past partly explains how refugees are treated in the democratic regime. However, this cannot be reconciled with a state that proclaims to be preoccupied with reputation and respect for rights and obligations since its transformation to a democracy. Moreover, the cause for alarm is because of what it says about the character of our nation. For this reason, the aim of the thesis is to establish South Africa's true character by determining the influence of history and sociology on compliance with international treaty obligations. To this end, consistent with South Africa's intention to rejoin the international community, Chapter Two explores the theories associated with compliance with international law. This chapter emphasises that the humanisation of international law is compatible with the process of decolonisation if membership of international institutions and ratification of international treaties is embraced to advance fundamental rights and human security for all, as articulated by the drafters of South Africa's Constitution.

To set up a cogent explanation of the impact of history, anthropoloy and sociology on South Africa's current strained relationship with international law, in Chapter Three I compose a contextualised and detailed, coherent trajectory of the colonisation of South Africa, the implementation of apartheid that succeeded colonisation and significant events leading to

[330] Schlemmer 'South African society under stress' 2.

the demise of apartheid. Following Foucault's formula of 'decisive, epochal breaks' in the narration of historical accounts[331] so as to produce 'a grid of historical decipherment',[332] I employed a similar style, with the exception that the concept of 'moment' supplants Foucault's 'epochs'. Motivating this type of structure is the value of collective historical narratives. Bearing three primary features, historical narratives impart the following:

> First, [they] include key historical heroes who changed the course of history for the group, and who personify the behaviours and values that define the group. Second, [they] focus on pivotal historical events, be they positive or negative, that define the group. Finally, each collective narrative has a trajectory of historical events and heroes that are linked together to arrive at a coherent and continuous cultural identity. These shared historical narratives can help traumatized group members who need to reconstruct their cultural identity. The group's historical narrative can provide a foundation for rebuilding identity through its concrete historical examples, and by offering the expanded time perspective necessary to help define long-term collective goals moving forward.[333]

It must be emphasised that South Africa's transformation did not occur as a single, definitive event. Years of negotiation and deliberation preceded the first democratic elections of 27 April 1994. Reclaiming and affirming the humanity, equality and security of all South Africans was the driving force for these negotiations. Chapter Four therefore illuminates the paradoxes that confronted the political leaders during this time. The purpose of this chapter is to establish the considerations that impacted on the options available to the leadership in determining South Africa's future structure and form. The predominant narrative is that the ANC "sold out" during these negotiations. I prove that the very nature of such complex and high-stakes negotiations inevitably results in many substantive issues not being adequately resolved prior to the transformation and this impedes the future success of any new democracy, notwithstanding the best of intentions.

For its part, Chapter Five involves a comprehensive study into the obligations which the various refugee treaties to which South Africa is party create for purposes of implementation domestically. Sought to be affirmed is that once legal obligations have been undertaken, they must be complied with by way of effective implementation. Subsequently, it is within Chapter Six that South Africa's domestic refugee law is explained from an

[331] Ben Golder & Peter Fitzpatrick *Foucault's Law* (2009) 57.
[332] Michel Foucault *The Will to Knowledge: The History of Sexuality, Vol 1* (1979) 90.
[333] de la Sablonnière et al 'Restoring Cultural Identity' 252-3.

institutional perspective. As a political institution, the Department of Home Affairs has the power 'to forge the success or failure of [the] nation'.[334] Structurally, the Department bears all of the hallmarks of an effective and efficient institution, regulated by progressive domestic law that is consistent with international refugee law norms. However, it is within this institution that prevailing social norms carried over from colonisation and apartheid are applied, to the detriment of the achievement of equality, dignity, social cohesion and economic prosperity. This chapter creates the theoretical foundation against which the practical situation in South Africa is subsequently contrasted.

Penultimately, it is in Chapter Seven that I engage in the critical analysis of South Africa's implementation of the international and domestic refugee law obligations that have been undertaken. This chapter unmistakeably demonstrates that South Africa's history fundamentally negates the protection of refugee rights and unambiguously illustrates that South Africa's international legal obligation to protect refugees is consistently undermined. The reasons for this are not difficult to fathom: an extended history of subjugation and sacrifice has left South Africans in a protracted struggle for security and survival, with access to resources at its core. In other words, there is no incentive for the Department of Home Affairs to implement the law as stated as refugees epitomise unwanted opponents seeking equal access to these limited resources. Thus, refugees must be neutralised. Better yet, they must be eliminated altogether, according to de Kock and Bourdieu's explanations of conflict as a sociological fact.[335] This conflict is facilitated and exacerbated by the Department of Home Affairs officials changing the rules when they prove inconvenient; an outcome that Weingast warns of in the context of developing states and their apparent resistance to the rule of law. South Africa is currently facing precisely what Weingast had projected would happen: egregious lack of respect for the rule of law; amendment of the Constitution because it is 'inconvenient'; leadership that lacks integrity and ethical conduct; and increasing conflict among the population, resulting in a weakened economy, thereby heightening the anxiety and causing greater conflict. Refugee protection is merely one lens through which this dangerous situation is revealed.

[334] Acemoglu & Robinson *Why Nations Fail* 43.
[335] de Kock 'Violence as an option?' 39-93; Pierre Bourdieu 'The Force of Law' 805-53.

Unsatisfied with the argument that ‘it is too difficult’ to protect refugees, Chapter Eight confirms that the decolonisation of South African society is a viable method of achieving social change, with refugee rights constituting one component of the larger process of ensuring an enduring and real transformation of society. Given the emphasis on the humanization of international law and its close relationship with ubuntu, this chapter also offers implementable solutions that propose not only to protect refugees, but also contribute to nation building and better social cohesion. Accordingly, this chapter draws the study to a close by reinforcing that South Africa will not be able to achieve political and economic prosperity unless the conflict is addressed in a productive manner. To strategise about possible future methods of conflict-resolution and peaceful co-existence, a broad, yet specific, knowledge of South Africa’s history is imperative. Methods advocated by scholars to advance social cohesion, particularly in the context of radical social change, can easily and profitably be applied in South Africa, if only the state exhibits the requisite political will.

CHAPTER TWO
INFLUENCES PROMOTING COMPLIANCE WITH INTERNATIONAL LEGAL OBLIGATIONS

1. Introduction

The rationale for this chapter is to elucidate how and why states comply with their international legal obligations. It is especially relevant to the South African context because of South Africa's ostracism from international legal institutions during apartheid and the express avowal to comply with international law when South Africa became a democracy in 1994. To illustrate the evolution of South Africa's relationship with international law, this chapter situates the subsequent critical analysis of South Africa's compliance with international refugee law within the context of South Africa's colonial and apartheid past and the complicated, multi-faceted process of transition. Congruent with liberal internationalism, which posits that 'liberal democracy is the sole legitimate system of government',[336] South Africa relinquished its former ideologies, asserting itself as a democracy. Furthermore, the transformation brought with it a clear commitment to comply with the rule of law and the protection of human rights. More precisely, it positions South Africa as a sovereign state, re-establishing its place within the international community. Accordingly, this chapter follows the following sequence: it examines the interrelationship between South Africa's policy positions at the international and domestic levels, manifested in the international treaties ratified and national legislation adopted to give meaningful effect thereto. In an ideal world, the state's internal and external utterances and actions should not only be consistent, but also mutually reinforcing. Such an attitude arguably informs the likelihood of the state complying with its international obligations.

The particular stance advanced in this chapter is that the humanisation of international law is the approach most suited to achieve the decolonisation of South Africa's legal, social and political system; a process of creative destruction one might say. Therefore, this chapter analyses how the international legal system operates with a view to ensuring that states

[336] Sundhya Pahuja *Decolonising International Law* (2011) 188.

comply with the treaties that they have ratified. This involves an investigation into the methods of interpreting international treaties, followed by an examination of the theories pertaining to how and why states adhere to the obligations that they have voluntarily undertaken. The purpose of this is to establish the prospects for South Africa's full adherence to its international legal obligations. Subsequently, this theoretical framework is applied to international refugee law as the analytical paradigm.

2. The humanisation of international law: Postcolonialism informed by ubuntu

Schotel criticizes the epistemology of the practice of law (in his words, 'the central preoccupation and *modus operandi*')[337] as being backward looking because it is invariably only triggered by an *ex post facto* violation of the law. He opines that for law to be effective, and to make society more just, it must instead be forward looking.[338] The consistent 'authoritative invocation, application and enforcement'[339] of international law is arguably compatible with a forward-looking approach because breaches of the law should not materialise in these circumstances. 'Self evident' is how the Constitutional Court, per Mogoeng CJ, describes the central role that international law has assumed in the establishment of South Africa's democracy. Qualifying this statement, the Court highlights that international law enjoys 'well-deserved prominence in the architecture of our constitutional order', imploring the application of international law in 'the development and enrichment of our constitutional jurisprudence and by extension the unarticulated pursuit of good governance'.[340] Compliance with the law is thus predicated on the assumption that law is 'capable of changing outcomes irrespective of pre-existing conditions'. Pertinently, it rests on the further, related assumption, that 'legal institutions once in place will be used in a bottom-up process of social ordering where, in principle, everyone can mobilise the law to further their ends'.[341] Violations of the law were pervasive during colonialism and apartheid

[337] Bas Schotel 'Multiple legalities and international criminal tribunals: Juridical versus political legality' in Rajkovic et al *The Power of Legality* 218.
[338] Schotel 'Multiple legalities' 223.
[339] Schotel 'Multiple legalities' 211 quoting Sarah Nouwen & Wouter Werner 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan: A Rejoinder to Bas Schotel' (2011) 22 *European Journal of International Law* 1163.
[340] *Law Society of South Africa v President of Republic of South Africa* [2018] para 4.
[341] Pistor et al 'Social norms, rule of law' 254.

in South Africa.[342] However, international law is deemed a linchpin of South Africa's future success as a nation state. Pahuja suggests that we need to strategise about how international law and its institutions can be better employed to apply to those who are 'differentially subjected to the transformative violence' of its administration.[343] A forward looking method of interpreting and applying international [refugee] law that can consciously disrupt the enduring effects of violations of the law and chart a new way forward is found in postcolonialism, as informed by the concept of ubuntu. Indeed, international law is postcolonial. Its origins relate to an undertaking by the 'civilized' Western states that it would include the members of the international community that had been granted sovereign equality and independence from the colonisers.[344]

To my mind it is here that the theory of the humanisation of international law reveals its true worth. The meaning of the humanisation of international law that is advanced to coincide with the purpose of this thesis is that the protection of the human person is one of a number of pre-eminent legal rules that are fundamental to the protection of the interests and values of the international community as a whole.[345] When understood and applied within the remit of state responsibility, refugee law's humanistic intent is achievable. This is subject only to the host state accepting that it is under a duty to prevent harm that would inevitably result should the asylum-seeker be forced to return to their country of origin (or any other country where they may face harm).[346] O'Sullivan and Stevens describe this two-layered obligation on states as obliging physical access to territory and thereafter, 'access to asylum justice'.[347] The latter layer involves the provision of a 'quality' asylum procedure. The attainment of such a system is an incremental process of development of the law. Being a social institution, Pound argued that the law may be improved by intelligent human effort in the form of the interpretation and application of legal rules that take into account the social

[342] See, for example, Abel *Politics by Other Means;* John Dugard *Human Rights and the South African Legal Order* (1978).
[343] Pahuja *Decolonising International Law* 8.
[344] Vidya Kumar 'A Proleptic Approach to Postcolonial Legal Studies? A Brief Look at the Relationship between Legal Theory and Intellectural History' (2003) 2 *Law, Social Justice & Global Development Journal* at *www.warwick.ac.uk/fac/soc/law/elj/ldg/2003_2/kumar*.
[345] Tzevelekos 'Juris, dicere: customs as matrix' 200.
[346] Guy Goodwin-Gill & Jane McAdam *The Refugee in International Law* (2007) 356.
[347] Maria O'Sullivan & Dallal Stevens 'Access to Refugee Protection: Key Concepts and Contemporary Challenges' in O'Sullivan & Stevens *States, the Law and Access to Refugee Protection* 3.

facts upon which the law is to be applied. What Pound was essentially conveying is that the life of the law is in its enforcement.[348] There is no better authority than the Vienna Convention on the Law of Treaties to support the assertions made above. Specifically, article 60(5) of the Vienna Convention relates to treaties adopted to protect the human person. Article 60(5) declares that these treaties are of such importance that they simply 'cannot be allowed to fail'.[349] Lauterpacht even went so far as to assert that the rule of law itself is a human good[350] in conveying that international treaties must be protected against disregard by states. In a sober warning, Lauterpacht stated that '[g]overnments cannot be permitted to discredit international law and to render it unreal … by reducing treaties to … makeshifts of political expediency'.[351] In this regard, compliance with international treaties is informed by articles 26 and 27 of the Vienna Convention. Article 26 governs the binding nature and 'good faith' performance of obligations,[352] encapsulated in the phrase *pacta sunt servanda*, with Cheng declaring that 'without this rule, international law … would be a mere mockery'.[353] More specifically, article 27 prohibits a state from relying on domestic law to justify the failure to perform international treaty obligations.

Potentially undermining Lauterpacht's argument is the recognition that international law should be deemed 'a cage, in which some movement is possible, and not as a straightjacket'.[354] The legal system could be rendered precarious if norm interpreters are permitted such a wide margin of discretion. The risk is that 'allowing a "free-for-all" [when different norm interpreters attempt to engage in extra-legal reasoning for particular ends] can only result in the eventual destruction of international law as a discipline'. [355] Nonetheless, pulling us back to the focus on interpreting international law so that it can achieve its intended purpose is context. Continuously challenging the putatively universal nature of international law is the diversity of the international community and the fact that

[348] Pound 'The Scope and Purpose of Socio-Logical Jurisprudence' 514.
[349] Ranganathan 'Legality and lawfare' 299.
[350] Lauterpacht *The Function of Law in the International Community* 354.
[351] Lauterpacht 'The Covenant as Higher Law' 63-4; Lauterpacht *First Report on the Law of Treaties* 158.
[352] 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.
[353] Burke 'Law, Politics and Hard Cases' 148 quoting Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (1987) 122.
[354] Burke 'Law, Politics and Hard Cases' 150.
[355] Burke 'Law, Politics and Hard Cases' 152.

norms and laws in certain states are culturally distinct from the norms and laws contained in international treaties. Inherent in the 'good faith' obligation of treaty interpretation is the principle *ex re se non ex nomine*. This principle has been cited by the International Court of Justice and confirms that the law must take into account the real (political) state of affairs and not only the words in the treaty.[356] In addition – of specific relevance to the protection of refugees – what must ultimately be achieved, is justice. Without this objective, international law would serve no purpose.[357] An elucidation of the theory and process of the interpretation of international treaties is necessary at this juncture. The density, confusion and technicalities of international legal treaties are ameliorated somewhat by the provisions of article 31 of the Vienna Convention, which provides some direction when determining the correct interpretation of a treaty by requiring that international law must be interpreted using its 'ordinary meaning … in context'.[358] Allott's analogy of the poem and the car referred to previously provides a good point of departure because it coheres with Burke's suggestion that the

> utilization of politics within the law, and employment of the flexibility allowed by law do not undermine law as a discipline. Rather, by arguing within the legal framework, its value is reinforced, and the international order that it underpins is confirmed as constituting a valuable end in itself.[359]

Substantiating that it is the humanisation of its international law obligations to which South Africa should aspire is the co-application of postcolonialism and ubuntu, given that ubuntu establishes the humane essence of society. A humanist approach would establish a society rooted in indigenous identity and the morality of equality. As the National Development Plan proclaims, South Africa's future trajectory should be founded on South Africa's 'emerging identity, ethics, morality, indigenous systems, struggle for liberation, the Constitution, and the creation of a non-sexist and non-racial society'.[360] As such, the starting point is postcolonialism's objective of aiding in the 'search for meanings of living in specific hierarchized and marginalising postcolonial African spaces'.[361] In particular, employing

[356] Burke 'Law, Politics and Hard Cases' 148-9.
[357] Martti Koskenniemi 'What is International Law For?' in Malcom Evans (ed) *International Law* (2003).
[358] Subart 1 reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.
[359] Burke 'Law, Politics and Hard Cases' 151-2.
[360] National Development Plan (2011) 290.
[361] Batisai 'Interrogating questions of national belonging' 120.

potcolonialism aims to realise justice and equity in human relations by altering mindsets that in turn will transform behaviour. In this regard, it is 'about the relations between ideas and practices', tracing 'a larger journey of translation, from the disempowered to the empowered'.[362] With respect to international law, in concrete terms, postcolonialism seeks to 'intervene, to force its alternative knowledge into the power structures' of the state.[363] Justice, through the consistent, predictable and reasonable application of substantively fair and equitable law, is the quintessential goal of postcolonialism. Decolonisation – of the law and the individuals administering the law – is the vehicle through which this is achievable.

The value of ubuntu in relation to Lauterpacht's contention that international human rights treaties must be respected, is illustrated by the level of 'cultural match' between the humanization of international law and ubuntu. Alkoby defines cultural match as 'the extent to which the norms introduced resonate with widely held domestic understandings, beliefs and obligations'.[364] Mokgoro's description of ubuntu is apposite: being a 'prized value' of 'humanistic orientation', 'collective unity' and facilitating order in society, it constitutes

> a basis for a morality of cooperation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood, all the time emphasising the virtues of that dignity in social relationships and practices.[365]

The argument is accordingly made that South Africa has a moral, humanitarian and legal responsibility to protect refugees arriving in the territory in search of protection. Moreover, compliance with international refugee obligations would actually constitute (not impede or deny) decolonisation of South Africa's socio-political and legal order given that universal values, such as respect for humanity, dignity, bodily integrity and life are descriptive and normative characteristics of a decolonised understanding of international law, as well as South Africa's own precolonial identity. International law would thus be able to fulfil its 'emancipatory' capacity.[366]

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[362] Young *Postcolonialism* 7-8.
[363] Young *Postcolonialism* 7.
[364] Asher Alkoby 'Theories of compliance with international law and the challenge of cultural difference' (2008) 4(1) *Journal of International Law and International Relations* 185.
[365] Yvonne Mokgoro 'Ubuntu and the law in South Africa' at *http://web.archive.org/web/20040928041520/www.puk.ac.za/law/per/documents/98v1mokg.doc*.
[366] Pahuja *Decolonising International Law* 45.

3. South Africa as a member of the international community

International law generates nation states through the recognition of those nation states. Pursuant to South Africa's quest for recognition by the international community, from the very outset, the personality South Africa sought to curate within the international community was liberal and rights-oriented. South Africa was adamant that protection of human rights and respect for the rule of law had become the primary goals of the state. The underlying strategic purpose was a fundamental transformation of South Africa's identity and reputation. This was true internally and externally: South Africa would henceforth conduct its domestic affairs consistent with the values espoused by the international community.[367] It was the newly adopted Constitution that unambiguously set the path of legal, social and political change, with the advancement of human rights, non-racialism, non-sexism and respect for human dignity at its core. At the same time, the Constitution categorically entrenched South Africa's sovereignty. In *From Apology to Utopia*, Koskenniemi dedicates an entire chapter to what he terms the 'paradoxical' concept of sovereignty and quotes Akehurst who comments that 'it is doubtful whether any single word has caused so much intellectual confusion and international lawlessness'[368] and has been 'interpreted as one of the chief reasons for the cataclysms of the present century'.[369] This is unfortunately an accurate reflection of colonialism and apartheid, with the international community powerless to do more than pass a resolution in 1973 and impose sanctions pressuring South Africa to reform. Neither of these efforts had much effect, albeit that pressure on the state was being progressively intensified.

It is well known that the international social system does not possess a central agency to enforce international law.[370] However, the fact that no enforcement mechanism exists does not imply that the norms and rules are unimportant.[371] Indeed, if the international law norms

[367] This approach is consistent with Koskenniemi's articulation of the purpose of international law in 'What is International Law For?' at 89.
[368] Martti Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (1989) 207 quoting Michael Akehurst *Modern Introduction to International Law* (1982) 15.
[369] Koskenniemi *From Apology to Utopia* 202.
[370] Markus Burgstaller *Theories of Compliance with International Law* (2005) 85.
[371] Oran Young 'Anarchy and Social Choice: Reflections on the International Polity' (1978) 30 (2) *World Politics* 242.

and rules were deemed unimportant, a sovereign state would not ratify the treaty. Notwithstanding these criticisms, in the sphere of public international law, 'states are still the most important actors in the international legal system and their sovereignty is at the core of that system'.[372] A state's attitude to the implementation of international law is invariably directly related to that state's policy position. According to Alston and Goodman, a policy statement 'outlines government's objectives, policy framework, strategy and/or a concrete plan of action to address issues under the subject'.[373] Policy, however, must be distinguished from practice, as the two often cannot be reconciled. d'Orsi clarifies state practice by stating:

> The obvious way to find out how countries are behaving is to read the newspapers, consult historical records, listen to what governmental authorities are saying and peruse the many official publications. There are also memoirs of various past leaders, official manuals on legal questions, diplomatic interchanges and the opinion of national legal advisors.[374]

d'Orsi's definition is echoed by Alston and Goodman who refer to section 102 of the Restatement (Third) of the US Foreign Relations Law, which provides that while there is no 'precise formula to indicate how widespread a practice must be', in general, the states involved in the particular acitivity should exhibit what could be regarded as clear acceptance of certain obligations. To ascertain this, state practice:

> includes diplomatic acts and instructions, public measures, and official statements, whether unilateral or in combination with other states in international organizations; … inaction may constitute state practice as when a state acquiesces in another state's conduct that affects its legal rules; … the state practice necessarily may be of "comparatively short duration".[375]

In what follows, engagement with the definition of compliance is contrasted against the state's sovereignty. This will accordingly lay the foundation to establish why and how South Africa should comply entirely with the international refugee law treaties that have been ratified in the light of South Africa's transformation to a liberal democracy.

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[372] Koskenniemi *From Apology to Utopia* 203 quoting Rosalyn Higgins 'International Law and the reasonable need of governments to govern' (Inaugural lecture London 1982).
[373] Philip Alston & Ryan Goodman *International Human Rights* (2013) 1227 citing para 18 of the Report on Indicators for Promoting and Monitoring the Implementation of Human Rights, UN Doc. HRI/MC/2008/3 (6 June 2008).
[374] d'Orsi *Asylum-Seeker and Refugee Protection* 9-10.
[375] Alston & Goodman *International Human Rights* 73.

3.1 Explaining the impact of sovereignty

The 'most accurate description'[376] of sovereignty was formulated in 1928 in the *Island of Palmas Case*.[377] In this case Max Huber, the arbitrator, explained it thus: 'Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the function of a state'.[378] Sovereignty denotes the boundaries of the modern nation-state. It defines these boundaries 'whether spatial or psychic (an "imagined community")' in order to declare 'where and to whom obligations lie [since] the idea of the bounded, sovereign "nation-state" remains the institutionalized form of organizing territory, members and resources'.[379] The phrase 'portion of the globe' as used by Huber is particularly controversial in the African context due to the fact that colonial boundaries were 'arbitrarily drawn by the colonial powers' during colonial expansion.[380] In spite of the 'scramble for Africa' the *uti possidetis* principle obliges respect for these boundaries.[381] Of particular relevance to South Africa and Africa as a whole, Tazreiter confirms that 'the morally arbitrary circumstance of which nation-state we happen to be born in determines our life chances to a significant degree'.[382]

South Africa's position as a sovereign, democratic state within the international legal system preoccupied the new government from 1994. Accordingly, the analysis of South Africa's compliance with multilateral international treaties must take place with reference to the sovereignty of the state, meaning the liberties and prerogatives accorded to the state. The two methods of interpretation of international law that give substance to these liberties and prerogatives are the principle of subsidiarity and the margin of appreciation. The latter is the logical result of the application of the principle of subsidiarity. The principle of subsidiarity devolves, distributes and delimits powers, functions and duties to the state party to an international treaty. This principle confers on the state party a largely unfettered

[376] John Dugard *International Law: A South African Perspective* 2 ed (2001) 112.
[377] *Island of Palmas Case* (Netherlands v United States) 2 RIAA 829 (1928).
[378] *Island of Palmas Case* para 838.
[379] Tazreiter *Asylum Seekers and the State* 24.
[380] See Malcolm Shaw *Title to Territory in Africa: International Legal Issues* (1986).
[381] Dugard *International Law* 93 and 116. Specifically, reference is made to OAU Resolution AHG/R.S. 16(1) of July 1964 on the Inviolability of the Frontiers Inherited from Colonization.
[382] Tazreiter *Asylum-seekers and the State* 24.

right to interpret and implement the international law at the domestic level. Explaining why the state has such a wide discretion is the margin of appreciation, providing that a state's discretion

> rests on its direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape a society.[383]

Highlighting the inherent dangers in such far-reaching discretion vested in states is Goodwin-Gill's analysis of how compliance may be severely impeded due to the

> relative imprecision of the terminology employed in standard-setting conventions; the variety of legal systems and practices of states; the role of discretion, first, in the state's initial choice of means [to enact treaty obligations], and secondly, in its privilege on occasion to require resort to such remedial measures as it may provide; and finally the possibility that the state may be entitled to avoid responsibility by providing an "equivalent alternative" to the required result.[384]

Greenwood [385] deviates somewhat from Goodwin-Gill's observations. Greenwood's sustained engagement with the question of compliance with international law has led to his conclusion that '[f]or the most part the problem today lies not with the content of the law but with ensuring that states respect it'.[386] Müllerson comes to a similar conclusion. She points out that states have 'often been ready to create legally binding norms but are rather reluctant to submit to international scrutiny [because] this is an important manifestation of state sovereignty'.[387] As such, Greenwood sums it up thus: 'the weakest part of international law has always been its methods for ensuring compliance'.[388] On a more positive note, a compelling perspective, challenging the traditional concept of sovereignty, is advanced by the Chayeses[389] who submit that 'sovereignty no longer means freedom from external interference, but freedom to engage in international relations as members of international regimes'.[390] In their view, compliance has become an interactive process of communication

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[383] *Prince v South Africa* (2004) AHRLR 105 (ACHPR) para 51.
[384] Guy Goodwin-Gill *The Refugee in International Law* (1996) 238.
[385] Christopher Greenwood 'Ensuring compliance with the law of armed conflict' in WE Butler (ed) *Control over Compliance with International Law* (1991) 200.
[386] Greenwood 'Ensuring compliance' 200.
[387] RA Müllerson 'Monitoring compliance with international human rights standards' in Butler *Control over Compliance* 125.
[388] Greenwood 'Ensuring compliance' 195.
[389] Abram Chayes & Antonia Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 123.
[390] Chayes & Chayes *The New Sovereignty* 123.

between states that involves openness and accountability by justifying their position and persuading their counterparts of the validity of that position.

3.2 Defining compliance

Compliance with law is defined as 'the degree to which state behaviour conforms to what an agreement prescribes or proscribes'.[391] Necessarily, this involves the acceptance of the international agreement by the state and the consequent translation of that agreement into the domestic context, along with the implementation thereof. Lewis argues that the term compliance is inadequate because compliance 'involves an evaluation as to whether a state's actions conform to standards contained in an agreement' but provides no qualification or substantiation as to what the extent and impact of these actions are.[392] Using the construction that true compliance with international law is better described as effectiveness of international law, the difficulties associated with compliance are compounded by the fact that there are numerous steps involved in becoming bound by international law. Accordingly, Lewis categorises these steps as ratification or accession,[393] implementation[394] and application.[395]

Burke makes the provocative statement that if states were genuinely intent on complying with legal obligations, the enforcement mechanisms within the international treaties would 'necessarily be tighter and more effective'.[396] She refers to Meyer's view on compliance:

> the international legal system – crafted by states – is not one that is interested in promoting 'compliance', strictly understood, but rather one that is interested in providing a framework, within which states maintain a substantial degree of freedom of action.[397]

Meyer and Schachter share the opinion that 'in the busy world of law-making', no serious attention was given to specific 'means of ensuring compliance'.[398] Thus, the question of

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[391] Burke 'Law, Politics and Hard Cases' 140.
[392] Corinne Lewis *UNHCR and International Refugee Law: From Treaties to Innovation* (2012) 37-38.
[393] Representing the state's commitment to the international obligations.
[394] Whether the state has incorporated the international law obligations into national law.
[395] Whether the state applies the standards in practice.
[396] Burke 'Law, Politics and Hard Cases' 143.
[397] Burke 'Law, Politics and Hard Cases' 150 quoting Timothy Meyer 'Codifying Custom' (2012) 160 *University of Pennsylvania Law Review* 1003.
[398] Oscar Schachter 'The UN Legal Order: An Overview' in Oscar Schachter & Christopher Joyner (eds) *United Nations Legal Order* (1995) 15.

how states are to comply with international obligations has been largely overlooked. Schachter's conclusion is that '[s]ome international lawyers dismissively referred to enforcement as a political matter outside the law'.[399] Interestingly, there is a vestige of truth in this statement, because politics and law, along with various other factors, converge to a considerable extent in determining compliance by a state with its international obligations. Indisputably, therefore, numerous factors have an instrumental role to play in ensuring the formulation and subsequent application domestically of international law, since at its core, compliance with international obligations is predicated on the domestication of the obligations so that they are enforceable.

In this thesis I adopt the meaning ascribed to compliance as formulated by Lewis, being 'effectiveness', for the literal meaning of compliance is too limited in scope as it simply entails 'a state of conformity or identity between an actor's behaviour and a specified rule'.[400] Effectiveness, as employed by Lewis, is 'the capacity to produce an effect or result'.[401] I prefer Lewis' construction of the term compliance because it emphasizes the measures that have to be systematically taken to make the norm effective; particularly since the objective of this study is to assess whether appropriate positive action is being taken to give meaningful effect to the legal obligations that South Africa has undertaken. It is therefore not merely the technical adherence to applicable treaty standards, 'but a more global consideration of … a state's actions'.[402] Expanding on Lewis' construction, my interpretation of compliance is that it is conveys a guarantee that legal protection will be forthcoming as a result of the implementation of the international law. Triepel describes it thus:

> To fulfil its task, international law has to turn continuously into domestic law. Without the latter it is in many respects utterly impotent … similarly a single rule of international law brings about a number of rules of domestic law, all pursuing the same end: to implement international law within the framework of states.[403]

[399] Schachter 'The UN Legal Order'.
[400] Lewis *UNHCR and International Refugee Law* 37 quoting Kal Raustiala & Anne-Marie Slaughter 'International Law, International Relations and Compliance' in W Carlsnaes, T Risse & BA Simmons (eds) *Handbook of International Relations* (2002) 538-9.
[401] Lewis *UNHCR and International Refugee Law* 38.
[402] Lewis *UNHCR and International Refugee Law* 38.
[403] Antonio Cassesse 'Modern Constitutions and International Law' (1985) 192 *Recueil des Cours* 342.

4. Transnational law: The operation of the 'two-level game'

The 'subtle and complex'[404] interplay between international law (that is perceived to fall within the public sphere) and national law (that is generally considered to be in the private domain) was termed 'transnational law' by Jessup in 1956.[405] Koh then amplified this concept by describing it as 'all law which regulates actions or events that transcend national frontiers'.[406] Stated differently, transnational legal process is the 'theory and practice of how public and private actors interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize' rules of law.[407] To put this into perspective, Meyer contends that treaty making is 'a battleground' of states competing against each other to define rules that are consistent with their own 'political and policy interests' so that they may accrue the greatest advantage.[408] Seeking to establish the real purpose of policy, Asadi contrasts the stated noble intentions (such as maintaining peace) against the reality that it appears as though they are 'designed to maintain the self-interests of a few while maintaining the image of societal prosperity by utilizing the language of inclusion and projecting the values of democracy'.[409] For this reason, states are generally quick to ratify international treaties and often feign their compliance with such treaties in the hope that the consequence will be some benefit to them (usually in the form of reputational gain, but it could also take the form of election to an international institution, such as the UN Security Council).[410]

To be sure, the means by which international obligations become binding at the national level consists of a number of stages. The first stage is interaction. The norm is created through 'a series of continuous repeated interactions' by the representatives of the members of the UN. The formal documentation of the norm in a treaty concludes the establishment of a legal rule. Thereafter, the law is interpreted and clarified to reveal its

[404] Oscar Schachter 'Philip Jessup's Life and Ideas' (1986) 80 *American Journal of International Law* 894.
[405] Cryer et al *Research Methodologies* 22 citing Philip Jessup *Transnational Law* (1956).
[406] Koh 'Why Do Nations Obey International Law?' 2626.
[407] Harold Koh 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 183-4.
[408] Meyer 'Codifying Custom' 1023-24.
[409] Neda Asadi 'Decolonizing Alberta's educational policies to make possible the integration of refugee youth learners' in AA Abdi et al (eds) *Decolonizing Global Citizenship Education* (2015) 190.
[410] Alkoby 'Theories of Compliance 162.

meaning and content. This step occurs simultaneously in any number of national and international fora.[411] For the process to be completed, that international obligation must be enforced at the domestic level.[412] Clearly, specific conditions, behaviour and actions are crucial to achieving compliance with international law. Alkoby echoes this fact by demanding that 'a close consideration of social processes, including the necessary economic, political and cultural conditions for the successful implementation of international legal commitments'[413] are integral to compliance. Tyler developed the notion of a 'culture of compliance'. He confirms that compliance is evident when the norm has been internalised.[414] In short, what is required is 'legal, social and political internalization of the norms domestically'.[415] Most importantly, political internalisation is dependent on political will[416] and takes place when political elites adopt the norm as a matter of government policy. Legal internalisation, for its part, is the 'incorporation of norms into the domestic legal system through legislation, adjudication, or executive action'.[417] Social internalisation is possible when the norm 'acquires so much public legitimacy that there is widespread general obedience to it' and compliance becomes a matter of habit.[418]

The link between international law and the domestic situation is usually made when a state engages in determining its foreign policy. This process is referred to as the 'two-level game':[419] a state invariably strategizes by considering international law and international relations simultaneously with the domestic political circumstances, although the latter is considered to varying degrees. [420] Arguments abound that it is counterintuitive or contradictory to simultaneously strategize at both levels when the objectives of each are

[411] Koh 'Why Do Nations Obey?' 2646.
[412] Koh 'Transnational Legal Process' 184.
[413] Alkoby 'Theories of Compliance' 152.
[414] Tom Tyler 'Compliance with Intellectual Property Laws: A Psychological Perspective' (1997) 29 *New York University Journal of International Law & Politics* 219.
[415] Koh 'Transnational Legal Process' 184.
[416] Alkoby 'Theories of Compliance' 185.
[417] Koh 'Transnational Legal Process' 184.
[418] Koh 'Why Do Nations Obey?' 2656.
[419] Yolanda Spies 'South Africa's Foreign Policy' (2010) *South African Yearbook of International Law* 280 quoting Robert Putnam 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42(3) *International Organization* 460.
[420] Yolanda Spies 'South Africa's Foreign Policy' (2000) *South African Yearbook of International Law* 268 quoting Alexander Wendt *Social Theory of International Politics* (1999) 2.

potentially mutually exclusive.[421] Nonetheless, Hill warns that foreign policy should not be abstracted from 'the realm of political and normative debate', because foreign policy exists 'at the hinge of domestic politics and international relations'.[422] Indeed, in South Africa, the President and Deputy President, in their capacity as head of the national executive, are responsible for the 'development and implementation of the policies of national government.'[423] Article 231 of the Constitution reveals the process to be followed to achieve this outcome:

> (1) The negotiating and signing of all international agreements is the responsibility of the national executive [the President, in consultation with the Deputy President];
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.

Parliament's acceptance of the international agreement initiates the process of domestication of the international treaty in terms of section 231(4) of the Constitution which provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation. For domestic law making to come to fruition, policy must be formulated, followed by the adoption of a Bill on the subject. The Bill is extensively scrutinised, reviewed and amended. Once there is unanimity on the content of the Bill, the State law advisors must certify that it is compatible with the Constitution.[424]

In August 1994 the close relationship between foreign and domestic policy was brought to the fore by Alfred Nzo, Minister of Foreign Affairs, who highlighted important problems that South Africa's foreign policy had to accommodate. Not surprisingly, these included

> the risks of protectionism, the undermining of the international trade system, refugees, mass migration, and the threat these issues pose to job creation; disease, drought and the occurrence of other natural disasters and their impact on economic and social development.[425]

South Africa's White Paper on Foreign Policy adopted in 2011 represents a more recent example. The White Paper's objective, as expressed in its title: 'Building a better world: The diplomacy of Ubuntu', was to employ ubuntu to project the 'idea that we affirm our humanity

[421] Spies 'South Africa's Foreign Policy' (2010) 280.
[422] Christopher Hill *The Changing Politics of Foreign Policy* (2003) 249.
[423] Roland Henwood 'South Africa's Foreign Policy' (1995) *South African Yearbook of International Law* 271.
[424] de Vos & Freedman *South African Constitutional Law* 155-6.
[425] Henwood 'South Africa's Foreign Policy' (1995) 281.

when we affirm the humanity of others'.[426] Relying on the notions of humanity and putting people first, Pan-Africanism and South-South solidarity were prioritised as being at the forefront of South Africa's foreign policy agenda.[427] Competing with this outward gaze, was the (incompatible) ambition to

> shape and strengthen our national identity; cultivate our national pride and patriotism; address the injustices of our past, including those of race and gender; bridge the divides in our society to ensure social cohesion and stability; and grow the economy for the development and upliftment of our people.[428]

It is trite that government's violation of the rules is unacceptable. To discern such violation, it is usually a court decision that provides the requisite clarity.[429] This amplifies Schotel's concern about the backward-looking nature of the epistemology of law. However, I am encouraged by the argument that a domestic system that is 'penetrated by global models', has more chance of successfully implementing the law.[430] In this respect, section 39(2) of the Constitution explicitly states that in the consideration of matters concerning the Bill of Rights, courts are mandated to consider international law. Indeed, the courts have made specific reference to the instruments that bind South Africa to its international obligations in a number of cases. When it comes to the application of international law at domestic level, section 233 of the Constitution dictates that courts are obliged to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law as envisaged in section 232 of the Constitution.

A minor tangent concerning the formulation of policy is relevant at this point. Kotzé describes policy making as 'the decision to follow a particular course of action to achieve a preset goal' and affirms that it 'is one of the major objectives of any government'.[431] Involving 'the authoritative allocation of values' implicating fundamental issues, policy making is 'vital because the well-being of a whole society' is entirely dependent on it. Necessarily, policy

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[426] *White Paper on Foreign Policy* 4.
[427] le Pere 'Ubuntu as Foreign Policy' 93-4.
[428] *White Paper on Foreign Policy* 3.
[429] Tom Ginsburg 'The Politics of Courts in Democratization' in Heckman et al *Global Perspectives on the Rule of Law* 180.
[430] Alkoby 'Theories of Compliance' 176.
[431] Kotzé 'Constrained Policy Making' 135.

must relate to material services such as 'education, health, taxes, law and order, defence and social welfare'.[432] The budget, submits Kotzé, 'is the single most important policy statement of any government'.[433] Since the prevailing socio-economic environment … influences and constrains policies,[434] essentially, 'the direction given to the economy and politics by the budget is a political decision'.[435] It would be incongruent, therefore, for the President and Deputy President to have opposing policies on foreign and domestic issues if the two issues operate in a mutually-reinforcing fashion. Unfortunately, such a view is criticized for being far too idealistic. Corrigan sums it up: 'it is rare indeed for a country to demonstrate moral consistency in its diplomacy or public policy'. Supporting this averment, he quotes Huntington who declared '[d]ouble standards in practice are the unavoidable price of universal standards of principle'.[436] This reality sets the tone for the explanation of theories of compliance with international law that follows.

5. Theories of, and on, compliance with international legal obligations

Complex socio-political systems, such as South Africa, within the greater scheme of globalisation and the numerous multilateral treaties regulating all aspects of international relations to which she is party, are arguably 'bounded, rational, and purposive actors systematically organized to formal rules'[437] who adhere to a culture of compliance. However, states paying lip-service to international law is something to which we seem to have too easily become accustomed. Little attention is paid when a state's actions contradict its commitments and virtually no consequences ensue, unless the leadership of the state is democratically beholden to his constituency.[438] Inevitably, 'the right form of talk'[439] is a mere cover to ensure that a state's good reputation is upheld. Until, that is, the

[432] Kotzé 'Constrained policy making' 135.
[433] Kotzé 'Constrained policy making' 156.
[434] Kotzé 'Constrained policy making' 145.
[435] Kotzé 'Constrained policy making' 157.
[436] Terence Corrigan *Independent Online* '#PeterDutton: Australia and farmers – what is NOT being said' (21 March 2018) at *https://www.iol.co.za/news/opinion/peterdutton-australia-and-farmers-what-is-not-being-said-13958952*.
[437] Ryan Goodman & Derek Jinks 'Towards an Institutional Theory of Sovereignty' (2003) 55 *Stanford Law Review* 1762.
[438] Alkoby 'Theories of Compliance' 182.
[439] Alkoby 'Theories of Compliance' 163 quoting Jack Goldsmith & Eric Posner 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective' (2002) 31 *Journal of Legal Studies* 124.

state leaders representing the state 'self-entrap' themselves rhetorically,[440] inevitably having to resort to preference change in order to dissociate themselves from the language and actions which are defiant of compliance with norms.[441] Reputation is but one of the numerous factors which play a role in influencing the way a state behaves. Aspects such as self-interest, state/national security, political sanctions, economic sanctions and power are some of many fundamental considerations when analysing when or why a state will comply with its international obligations.[442]

Shklar admits that there are serious flaws in the theoretical understanding of what the law is and how it operates in practice. For Shklar, law is viewed in the ideological sense of being 'self-regulating, immune from the unpredictable pressures of politicians and moralists, manned by a judiciary that at least tries to maintain justice's celebrated blindness'[443] even though this is not an entirely accurate reflection of the reality of what law is. Cognisant of Shklar's criticism, I have elected to deal only with those theories of compliance with international law that have a direct discernible bearing on South Africa's specific situation and circumstances. The six relevant theories as expounded by Marsh and Stoker, and Burchill that I consider relevant to my study are constructivism, realism, institutionalism, liberalism, managerial theory and the logic of appropriateness.[444] These approaches proceed from the basis that the international order is both a legal as well as a political system[445] and that international lawyers could derive benefit from relying on theoretical approaches established in international relations and political science.[446]

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[440] Thomas Risse, Stephen Ropp & Kathryn Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (1999) 17-33.
[441] Alkoby 'Theories of Compliance' 172.
[442] Stacy-Ann Elvy 'Theories of state compliance with international law: Assessing the African Union's ability to ensure state compliance with the African Charter and Constitutive Act' (2012) 41(75) *Georgia Journal of International & Comparative Law* 82.
[443] Judith Shklar *Legalism: Law, Morals and Political Trials* (1964) 31.
[444] Marsh & Stoker list the approaches as behaviouralism, rational choice, institutionalism, feminism, interpretative theory, Marxism, and normative theory (David Marsh & Gerry Stoker *Theory and Methods in Political Science* (2002)). Burchill lists the approaches as liberalism, realism, rationalism, the English School, Marxism, historical sociology, critical theory, poststructuralism, constructivism, feminism and green politics (Scott Burchill et al *Theories of International Relations* (2009)).
[445] Cryer et al *Research Methodologies* 78.
[446] Anne-Marie Slaughter-Burley 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205-39.

5.1 Social constructivism

Social constructivism proceeds from the premise that a state is a social actor operating within a social context.[447] This theory thus introduces the importance of "social fabric", being the explanatory power of identity, culture, and norms.[448] Precisely, it is a state's cultural-institutional context that defines its identity on the basis that norms represent 'collective expectation of proper behavior in a given identity'; or a 'collective juridical conscience' that enables states 'to understand the social reality around them'[449] and to adjust its compliance with legal norms accordingly.[450]

Constructivist scholars regard international law as 'an institutionally autonomous, distinctive discourse that draws on a pre-existing set of norms'.[451] They maintain that the universally recognised norms, alongside consistent 'practices of justification' ensure that states abstain from 'the raw pursuit of power and self-interest'[452] and implement the law in a manner that is deemed internationally accepted. This thinking is synonymous with the adage that 'law is not binding because it is enforced; it is enforced because it is binding'.[453] One of the characteristics of constructivism is that it seeks 'to understand the law's role in the construction of social reality'.[454] Onuf accentuates the sociological nature of constructivism when he declares that 'people make society and society makes people'.[455] Constructivism generally entails three distinct forms or factors that induce compliance. The first – coercion – places a constraint on the state's conduct, thus there is very little choice. However, the other two, namely acculturation and persuasion, have an impact on a state's identity and preferences and are thus constitutive in nature.[456]

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[447] Sungjoon Cho 'Social constructivism and the social construction of world economic reality' in Hirsch & Lang *Research Handbook on the Sociology of International Law* 372.
[448] Cho 'Social constructivism' 373.
[449] Cho 'Social constructivism' 374-375.
[450] Cho 'Social constructivism' 375.
[451] Jutta Brunée & Stephen Toope 'Constructivism and International Law' in JL Dunoff & MA Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013).
[452] Burke 'Law, Politics and Hard Cases' 140.
[453] Schotel 'Multiple legalities' 220 quoting Christian Reus-Smit 'Obligation Through Practice' (2011) 3 *International Theory* 341.
[454] Cryer et al *Research Methodologies* 81.
[455] Nicholas Onuf 'Constructivism: A User's Manual' in V Kubálkova, N Onuf & P Kowert (eds) *International Relations in a Constructed World* (1998) 59.
[456] Alkoby 'Theories of Compliance' 154-5.

5.1.1 Coercion

States are inherently social institutions that cooperate with each other within global, regional and sub-regional political structures. A consequence of this cooperation within similar frames of reference is that a common understanding of what constitutes acceptable behaviour is developed through the process of 'social influence',[457] that alter patterns of behaviour favourably or positively.[458] However, the distinction must be made that this socialization is not comparable to coercion. Kratochwil is adamant that states do not rely on coercion as a form of social control. In actual fact, he argues, social orders based on coercion tend to collapse from their own instability.[459] Less direct forms of coercion may conceivably compel a state to comply with international norms. There are a number of instances of indirect coercion that may be successful. These include when states that have developed reputations for giving effect to international rules are rewarded;[460] when monitoring of compliance occurs within the context of an increase in relevant information placed in the public domain.[461] Cheating is also an important factor. By putting in place mechanisms to detect the possibility of cheating[462] and increasing the cost of cheating,[463] states are more likely to comply. Cheating is limited by promoting interdependence between states: increased interdependence means that the state's reputation is potentially affected more easily.[464] A further factor to encourage compliance is the reduction of 'transaction costs of individual agreements, thus making cooperation more profitable for self-interested states'. Indeed, the protection of self-interest is a dominant factor.[465] While all of these factors have significant merit, the flaws in the coercion approach have ensured that more sustainable and effective methods to ensure compliance have evolved, namely persuasion and acculturation.

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[457] Alkoby 'Theories of Compliance' 169.
[458] Alkoby 'Theories of Compliance' 169.
[459] Friederich Kratochwil 'The Force of Prescriptions' (1984) 38 *International Organizations* 690-2.
[460] Elvy 'Theories of State Compliance' 138.
[461] Elvy 'Theories of State Compliance' 98.
[462] Elvy 'Theories of State Compliance' 102.
[463] Materialist assumptions may account for the pursuit of states not to cheat. See Alkoby 'Theories of compliance' 155.
[464] Elvy 'Theories of State Compliance' 101; 153.
[465] Elvy 'Theories of State Compliance' 78-9.

5.1.2 Persuasion

State interaction is undoubtedly complicated by the plurality of cultures, legal systems, languages and beliefs. Notwithstanding these perceived impediments, constructivism's socialising ethos anticipates that dialogue among and between states and international organizations will encourage a measure of unanimity on the interpretation of norms.[466] Procedurally, the interaction and argumentation among states and organizations takes the form of dialogue, precisely because the arguments are mutually persuasive.[467] Johnston makes it abundantly clear that there is an absence of mental or material coercion in the process of persuasion. Rather, confirms Nader, it is constructed as entirely 'voluntary or consensual'.[468] Johnston defines persuasion as the ability to 'chang[e] minds, opinions, and attitudes about causality and effect (identity)'.[469] There must therefore, be a willingness on the part of the human agents representing the state, to be persuaded. These human agents are expected to 'suspend their own truth claims, respect the claims of others' and be persuaded by the 'unforced force of the better argument'.[470] Any necessary modification of a specific belief or course of action should then ensue and implementation of the treaty is an automatic consequence. Compliance is the outcome because the objective of persuasion has been achieved: the diffusion of law, 'focusing on a deliberate process of institutional admiration that leads to the reception of law partly in search of predictable outcomes'.[471] Striking from this description is the role of the bureaucracy in implementing and enforcing the international refugee law that South Africa has ratified and domesticated. Theirs is the duty to receive the application for refugee status and consider it with a mind that is open to persuasion by the arguments submitted to them. Chapter Seven reveals that this is one of the most pronounced shortcomings in South Africa.

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[466] Alkoby 'Theories of Compliance' 156-7.
[467] Alastair Johnston 'Treating International Institutions as Social Environments' (2001) 45(4) *International Studies Quarterly* 496.
[468] Laura Nader 'Law and the Frontiers of Illegalities' in F von Benda-Bechmann, K von Benda-Beckmann & A Griffiths (2009) *The Power of Law in a Transnational World: Anthropological Enquiries* 56.
[469] Johnston 'Treating International Institutions as Social Environments' 496.
[470] Andrew Linklater 'Citizenship and Sovereigny in the Post-Westphalian State' (1996) 2 *European Journal of International Relations* 86.
[471] Nader 'Law and the Frontiers of Illegalities' 56-7.

5.1.3 Acculturation

The theme of acculturation (with a decidedly negative connotation) materialised as a process by which Africans were socialized to 'unlearn' their cultural habits and sense of identity during colonialism. In international law terms, acculturation involves the socialization of states towards compliance, invariably occurring by way of the imposition of social sanctioning.[472] Thus, it is the pressure imposed either by other states or institutions[473] due to membership of international regimes, which induces a change of behaviour.[474] The UN Human Rights Council, for example, shames states in a concerted effort to encourage compliance. On the other hand, rewards for compliance take the form of back-patting and the 'benefit of mutual support', such as 'elevated social status'.[475] The 'beliefs and behavioural patterns'[476] of the state(s) being emulated are adopted and assimilation takes place. Simply stated, if a state seeks the approval of other similarly situated states, the state will ensure that its conduct conforms to that of the states from which such approval is sought.[477] Consistent conformity results in the 'identities and interests of individual states' becoming manifest over time.[478] The expectation is that internalization will occur, with compliance taking place as a matter of routine and 'unquestioned application'.[479]

The prevailing opinion is that acculturation is possible if three underlying material conditions are present. Logically, the first condition is that there should be a 'high level of precision of obligations'. This is an onerous threshold in light of the propensity for international treaties to contain complex, yet vague norms.[480] The second condition is highly inclusive membership of states within the international system. Obliquely related to this factor is

[472] Ryan Goodman & Derek Jinks 'How to Influence States: Socialization and International Human Rights Norms' (2004) 54 *Duke Law Journal* 638-642.
[473] Alkoby 'Theories of Compliance' 172.
[474] Goodman & Jinks 'How to Influence States' 654.
[475] Goodman & Jinks 'How to Influence States' 641.
[476] Goodman & Jinks 'How to Influence States' 638.
[477] Alkoby 'Theories of Compliance' 170.
[478] Alkoby 'Theories of Compliance' 155.
[479] Alkoby 'Theories of Compliance' 169.
[480] Burke 'Law, Politics and Hard Cases' 138.

Goodman and Jinks' construction of the combination of 'wide' and 'deep' compliance.[481] This entails that all the actors at the domestic level who play a role in complying with the international treaty must be involved and committed to ensuring compliance. The 'active participation of the public' is regarded as a component of the successful implementation of international treaties.[482] Preservation of reputation is the third motivating factor.[483] Reputation is 'highly valued by international actors'.[484] Guzman defines reputation as 'the reliability with which a state abides by its international commitments, which determines its value as a partner to future agreements'.[485] Thus, an overriding consideration is the state's desire to 'remain members in good standing of the international system' as Chayes and Chayes put it.[486] Publication of good and bad practices (naming and shaming) to 'change pathological behaviour' is deemed essential to this end.[487] The social norms are acquired because of a calculation of the costs and benefits of compliance with these norms. These costs and benefits constitute 'social-psychological costs of non-conformity and the social-psychological benefits of conforming to group norms and expectations'.[488] Importantly, these benefits are not material, but are predicated on the influence of maintaining reputation and/or image, aware of the 'costs' and consequences associated with non-compliance.[489] The common denominator in these conditions is legitimacy. Alkoby asserts that it is imperative to achieve an understanding of legitimacy as

> unthinking conformity, or willful emulation, rather than a reflexive engagement with the norms in question [because] acculturation that is supported by a broad legitimacy basis as a result of a genuine engagement may be seen as a normatively defensible compliance tool.[490]

Although legitimacy is predicated on common beliefs and understandings, despite vast differences in cultural perceptions and values,[491] if a state views a particular international

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[481] Ryan Goodman & Derek Jinks 'International Law and State Socialization: Conceptual, Empirical, and Normative Challenges' (2006) 54(4) *Duke Law Journal* 998.
[482] Alkoby 'Theories of Compliance' 153.
[483] Beth Simmons 'Money and the law: Why comply with public international law of money?' (2000) *Yale Journal of International Law* 325.
[484] Alkoby 'Theories of Compliance' 162.
[485] Andrew Guzman 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823.
[486] Chayes & Chayes *The New Sovereignty* 28.
[487] Alkoby 'Theories of Compliance' 173.
[488] Goodman & Jinks 'How to Influence States' 640.
[489] Alkoby 'Theories of Compliance' 162.
[490] Alkoby 'Theories of Compliance' 175.
[491] Alkoby 'Theories of Compliance' 192.

treaty or institution as legitimate, just and fair,[492] there is a figurative magnetic pull that obliges them to obey it without question.[493] Particularly pronounced in the context of common beliefs and understandings is what Goodman and Jinks call organizational cultural theory.[494] Foremost in the list of priorities of states is national security. The meaning of national security is formulated based on shared interests and security institutions are duly constructed to give effect to the prevailing concerns of states. What is immediately apparent is that 'global cultural and associational processes' shape the security objectives of states.[495] There can be no denying that the global culture of exclusion that developed as a result of colonisation will continue to have a material impact on a state's attitude to refugees entering its territory in search of protection. Some concordance exists, therefore, with the thinking that although fear of losing legitimacy or credibility (good standing) among members of the community is certainly sought to be avoided, such legitimacy will not be lost if there is a common cultural position on national security overriding refugee rights. Thus, although social sanctions which coerce non-compliant members to adhere to the international treaty are accentuated by acculturation, any social sanctioning will be mediated when the substantive issue is international refugee law. In combination with this argument is the knowledge that the constructivist theory is deficient for failing to fully acknowledge that circumstances at the domestic level vary dramatically between states[496] and that very often, domestic politics and national interest impacts most on compliance with international law. This is one of the principal arguments that I develop in Chapter Seven.

5.2 Realism

As the name implies, the realist theory of compliance with international law is predicated on a state assuming a rational perspective concerning how it will interact in the global arena. The state pursues two main goals: increased power relative to the other states party to a

[492] Thomas Franck *Fairness in International Law and Institutions* (1995) 132.
[493] Burgstaller 'Theories of Compliance' 85.
[494] Ryan Goodman & Derek Jinks 'Toward an Institutional Theory of Sovereignty' (2003) 55 *Stanford Law Review* 1749.
[495] Goodman & Jinks 'Toward an Institutional Theory' 1749.
[496] Jutta Brunée & Stephen Toope 'International Law and Constructivism' (2000-01) 39 *Columbia Journal of Transnational Law* 21.

specific human rights regime;[497] and increased security.[498] As enhanced power and security is in the state's interest, it will only cooperate when cooperation is in its self-interest. Burgstaller dismisses as an illusion the idea that rules and norms of international monitoring bodies have any effect on a state's compliance with international law. In fact, he argues that the state's economic, political and military power is decisive in determining whether a state will comply with human rights obligations.[499] This is precisely why weaker states accept international obligations: they suffer a compulsion to do so by stronger powers.[500] From a very cynical viewpoint, realists 'expect human rights violations to be pervasive, given that it is not in most states' material interests to attach sufficiently high costs to noncompliance'.[501] Employing the analogy of costs and benefits, a state will comply with its international obligations when the benefits of compliance far outweigh the cost of not complying (cheating, as it is referred to in the literature).[502] Likewise, a state will not comply with international obligations if disregard for the international obligation will proportionately advance the state's interests.[503]

5.3 Institutionalism

Similar to constructivism in its emphasis on social interaction, institutionalist theory is linked specifically with membership of regional human rights systems, which have as their objective the establishment of a uniform body of binding rules, norms and procedures applicable to all parties.[504] Respect for human rights is central in institutionalist theory. Indeed, violation of human rights will invariably occur when there are no mechanisms in place to oblige compliance, or where such mechanisms are ineffectual.[505] Therefore, compliance with human rights is only possible if the rules and norms binding upon states are

[497] Andrew Moravcsik 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 221.
[498] Burgstaller 'Theories of Compliance' 97-8.
[499] Burgstaller 'Theories of Compliance' 96.
[500] Moravcsik 'The Origins of Human Rights' 221.
[501] Elvy 'Theories of State Compliance' 792 quoting Sonia Cardenas 'Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior' (2004) 6 *International Studies Review* 219.
[502] Elvy 'Theories of State Compliance' 102, 113 and 125.
[503] Elvy 'Theories of State Compliance' 113.
[504] Elvy 'Theories of State Compliance' 111.
[505] Elvy 'Theories of State Compliance' 79.

clear and unambiguous.[506] Concomitantly, compliance with human rights norms is more likely where the supranational human rights regime is strongest. [507] The reason for this is that membership of a regional human rights system 'positively impacts a state's perception of its self-interest by creating significant incentives to comply with the international rules and norms established' by the system.[508] South Africa exemplifies a state that initially took its membership of the UN and the African Union seriously, but this membership has not proved sufficiently convincing to induce continued compliance. An example to this effect is that during the tenure of Nelson Mandela, South Africa was regarded as one of the foremost players in the international community. Thereafter, in 2006, under Mbeki, South Africa was elected to the inaugural UN Human Rights Council (UNHRC) 'to hold a one-year term so as to enable the subsequent changeover of membership to be staggered'.[509] South Africa was re-elected on 17 May 2007 as one of 14 countries (receiving 175 out of 192 votes) to serve a three-year term on the UNHRC. Incidentally, South Africa was also re-elected for the period 2013 to 2016, which supports the perception that South Africa is committed to protecting and promoting human rights, domestically and internationally.

5.4 Liberalism

Proponents of liberalism maintain that despite international treaties often being vague, ambiguous and complex, a 'consensual understanding' of the treaties is thought to be derived from 'embedded liberalism', thus inculcating compliance. Embedded liberalism is founded on the prominent role of individual beliefs, prejudices and assumptions. Extrapolating on the role of embedded liberalism, it is submitted that once the values contained in the treaties have shaped state interest, they are invested with 'legitimating power' and this informs state action at the international level.[510] It is thus crucial in the state's calculations as to whether it should comply with the international obligations or not.

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[506] Elvy 'Theories of State Compliance' 144. In the context of international refugee law, apparent ambiguityand vagueness of the norms is commonly used to justify a state's failure to comply with its obligations.
[507] Elvy 'Theories of State Compliance' 153.
[508] Elvy 'Theories of State Compliance' 78-9 quoting Catherine Powell 'United States Human Rights Policy in the 21st Century in an Age of Multilateralism' (2002) 46 *Saint Louis University Law Journal* 425.
[509] Margaret Beukes 'Southern African Events of International Significance – 2007' (2008) *South African Yearbook of International Law* 289.
[510] Suhrke 'Human security and the protection of refugees' 99.

Liberalism is largely associated with the identity that a state curates as an equal, sovereign nation state. Although the assumption exists that liberal states generally comply with international treaties better,[511] it has instead been found that the liberal nature of a state does not automatically equate to enhanced compliance. The prevailing opinion is that states behave according to 'how they are internally constituted'.[512] What liberalism overplays is the role of universalism; commonly held beliefs in fundamental rights and values. Liberalism is therefore particularly pertinent to the South African context because values are considered to be 'preexisting'.[513] Importantly, it is individuals operating on a political level within the state that bring their 'pre-existing preferences, [cultural] values and ideals' to the table, thus the intersubjective interaction of individuals gives a state its identity.[514] The impact on cultural identity and beliefs of what constitutes justice as a result of colonisation and apartheid cannot be underestimated. It is precisely this aspect that arguably plays the most important role in compliance with international obligations. If the individuals acting in the name of the state experience pervasive inequality and economic exclusion, combined with unaddressed psychological distress, this will undoubtedly taint the political decision-making that is within their power. South Africa is arguably stuck in a double-bind in that state interests and individual interests – particularly in respect of adherence with international refugee law obligations – cannot be reconciled; rendering compliance one of the biggest casualties of South Africa's identity crisis at the personal and state levels.

5.5 Managerial theory

This theory is relevant to the South African context because its underlying premise is the recognition that structural factors may contribute to the ability of a state to comply with an

[511] Alkoby 'Theories of compliance' 164-5 referring to the work of Anne-Marie Slaughter 'A Typology of Transjudicial Communication' (1995) 29 *University of Richmond Law Review* 99; Anne-Marie Burley & Walter Mattli 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41; and Laurence Helfer & Anne-Marie Slaughter 'Toward a Theory of Effective *Supra*national Adjudication' (1997) 107 *Yale Law Journal* 273.
[512] Andrew Moravcsik 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *International Organization* 513; and Anne-Marie Slaughter 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.
[513] Moravcsik 'Taking Preferences Seriously' 540.
[514] Alkoby 'Theories of compliance' 165.

internationaly treaty. Deliberate disregard for a treaty is not evident in the context where failure to comply is attributed to such considerations as:

> the ambiguity of treaty language, lack of financial or administrative capacity for implementation, and the absence of "a period of transition" between the adoption of the treaty and the expected time of compliance.[515]

Ayee acknowledges that 'insufficient training and capacity development strategies are some of the major problems affecting effective public service'[516] because of its impact on the 'quality of the bureaucracy tasked with formulation and implementation of policies'.[517] The overwhelming consensus is that administrative capacity is possibly the factor that has the greatest impact on treaty implementation, specifically due to its two-dimensional nature. Goltermann endeavours to delimit administrative capacity by suggesting that it has both a quantitative and a qualitative character. Human or financial resources would constitute quantitative measures, while government effectiveness and regulatory quality is qualitative in nature.[518] Sufficient administrators who are able to execute tasks entrusted to them while demonstrating accountability and maintaining transparency[519] should be the quintessential goal of the state. A symptom of severe administrative impediment is political pressure exerted on the bureaucracy in order to achieve a specific outcome.[520] Logically, appropriate and relevant capacity building programmes are vital to repairing administrative failings. This is an aspect of particular relevance to refugee protection and is taken up in detail in Chapters Seven and Eight.

6. Conclusion

Aspects such as the identity and personality of a state within the broader international community inevitably have a bearing on that state's compliance with international law. The impact of socialization on the relationship between states therefore cannot be

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[515] Chayes & Chayes *The New Sovereignty* 188-197.
[516] Joseph Ayee 'Public Sector Management in Africa' African Development Bank (ADB) Economic Research Working Series Paper no 82 (2005) 21-23 at *http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00457499-EN-ERWP-82.PDF*.
[517] Lukas Goltermann 'State Capacity and Compliance in ASEAN' in Tanja Börzel et al (eds) *Roads to Regionalism: Genesis, Design, and Effects of Regional Organisation* (2012) 165.
[518] Golterman 'State Capacity and Compliance' 165.
[519] Kirsten Norman-Major & Susan Gooden (eds) *Cultural Competency for Public Administrators* (2012) 226.
[520] Golterman 'State Capacity and Compliance' 165-6.

underestimated. Understandably, as soon as apartheid was abolished and as soon as it rejoined the UN and the OAU, South Africa sought to curate a reputation of a liberal state committed to the implementation of its international obligations. One could even go as far as saying that South Africa was determined to participate in negotiating towards a united Africa on the basis of those 'commonalities of language and culture, common values, a shared ancestry, a shared history'[521] that were deemed intrinsic to post-apartheid South Africa's personality. Indeed, of specific relevance is South Africa's articulation of its foreign policy that reflects an appreciation of the need for South Africa's domestic laws to cohere with internationally accepted standards of equality, dignity, non-racialism and respect for the rule of law. A theoretical perspective bearing particular resonance with South Africa's situation because of its emphasis on a sense of common identity and human action undertaken consistent with this identity, is described as the logic of appropriateness. Alkoby explains that identification with an inherent identity evokes action that matches the obligations arising from that identity.[522] Accordingly, in endeavouring to 'avoid loss of status, shaming and humiliation', the decision to comply is relationally connected to the pursuit of maintaining – or even maximizing – prestige, status or honour.[523] Accordingly, compliance with international law is by no means straight-forward or easy, but involves a concerted process of social, legal and political internalisation of the norms contained in international treaties. The extraneous factors that are designed to facilitate internalization, such as the imposition of sanctions, loss of reputation through shaming by other states or international organisations play an important role in promoting compliance. At the same time, the power of persuasion is significant. An apparent weakness inherent in the entire system, though, is the bureaucracy at the domestic level whose responsibility it is to apply and enforce the international norms. Consequently, my objective in this chapter was to propose that the humanization of international law has the potential to encourage better compliance with international law because of the fundamental purpose of postcolonialism and ubuntu, which speak directly to Lauterpacht's conception of the humanization of international law. Such an approach carries with it the promise of the bureaucracy having

[521] Kimani Nehusi 'Language in the construction of "Afrikan" unity: Past, present and policy' in Mammo Muchie *The Making of the Africa-Nation* 214.
[522] Alkoby 'Theories of compliance' 166.
[523] Alkoby 'Theories of compliance' 170.

a consensual understanding of their obligations as representatives of a state that is an active and committed member of the international community. For South Africa to succeed in complying with the international legal obligations undertaken, a combination of all of the theories of compliance discussed in this chapter would have to apply, although not necessarily at the same time, since all of them have a role to play in ensuring the effectiveness of the law.

The underlying purpose of this chapter was to situate the obligations which South Africa has consciously undertaken with respect to the protection of refugees arriving in South Africa within the context of international law. It is the complexity associated with compliance with international law that is exacerbated by a state's history. As such, the succeeding chapter takes the form of a comprehensive elucidation of South Africa's colonial history.

CHAPTER THREE
THE HISTORY AND CONTEXT OF SOUTH AFRICA'S 'IDENTITY CRISIS'

1. Introduction

Foucauldian in its erudition is the phrase 'a history of the present' indicating that the origins of rules, practices or institutions that apply contemporaneously all have an historical basis. Foucault makes it clear that the essence 'is not to understand the past in its own terms or for its own sake, but to understand and evaluate the present'.[524] Heeding this call, a process of 'mapping'[525] to detect 'patterns and identify potential leads or sources of evidence', as well establish 'a sense of the scale of violations'[526] was imperative. Anghie's assertion that international law's foundation was colonialism[527] provided the broad theoretical basis for my contention that international refugee law is intrinsically bound to colonial history. The immediate obstacle was that to date no full-length study has ever been conducted on colonialism and international law,[528] confirming that historical accounts are 'fragile' for their incompleteness.[529] A notable exception is Shahabuddin's *Ethnicity and International Law* published in 2016, although even this is limited to analyses of colonisation by Germany and France.[530] Furthermore, it became evident that research on refugee law in South Africa has not adequately drawn the link between South Africa's present socio-economic and political situation and the racist colonial and apartheid past that moulded it to its current form. According to Mayblin, this is also true for refugee studies more generally: it has not engaged much 'with thorny social and political phenomena such as racism'.[531] Naturally, it was incumbent on me to construct a complete socio-legal and political history of South Africa with a view to juxtaposing that with an analysis of South Africa's compliance with international refugee law.

[524] Gutting *Foucault* 50.
[525] Alston & Goodman *International Human Rights* 874.
[526] Alston & Goodman *International Human Rights* 874.
[527] Antony Anghie *Imperialism, Sovereignty, and the Making of International Law* (2008).
[528] Koskenniemi *Gentle Civilizer of Nations* 99.
[529] Lynn Hunt *History: Why it matters* (2018) 60.
[530] Mohammad Shahabuddin *Ethnicity and International Law: Histories, Politics and Practices* (2016).
[531] Mayblin *Asylum after Empire* 3.

Intending to ensure coherence with respect to international law principles and concepts, I had an affinity for *The Gentle Civilizer of Nations* by Koskenniemi as the foremost reference point. Koskenniemi's early admission that he did not employ the 'grand history', painting a canvas of "epochs" as the kind of history in his book[532] appeared to pose a potential problem as I sought to distinguish the impact of different historical events (colonisation and apartheid) on South Africa. This concern was short-lived when I consulted the works of Klotz and Mayblin, who, respectively, had utilised 'macro-historical comparisons' taking the form of periodisation[533] and 'diachronous'[534] approaches instead. Where Klotz writes about South Africa's historical relationship with migration and national identity, Mayblin's study concerns refugee law from the perspective of South Africa's colonial master, Britain. In addition to the work of Koskenniemi, Klotz and Mayblin, two prominent and compelling themes contained in the literature informed the construction of this historical narrative. The first concerns the settler coloniser's habit of transplanting laws and institutions from the land from whence they had come. Klotz uses the term 'inheritance'[535] to describe this although I rely on Weingast's explanation of 'transplant'[536] because of his expansive elaboration of its implications, in the context of the nature of the state that the colonisers found and subsequently "invented". Colonisation's 'theft of history', subjugation and exploitation, and its 'tortuous, complex and variegated'[537] long-term and multi-dimensional impact on Africa encapsulates the second theme. Using the analogy of religion, Dangarembga's portrayal of colonisation's effect is instructive:

> Nyasha … became quite annoyed and delivered a lecture on the dangers of assuming that Christian ways are progressive ways. "It is bad enough", she said severely, "when a country gets colonised, but when the people do as well! That's the end, really, that's the end".[538] … To forget who you were, what you were and why you were that. The process, [Nyasha] said, was called assimilation.[539]

[532] Koskenniemi *Gentle Civilizer of Nations* 6.
[533] Klotz *Migration and National Identity* 19.
[534] Mayblin *Asylum after Empire* 6.
[535] Klotz *Migration and National Identity* 126.
[536] Weingast 'Why developing countries prove so resistant' 28.
[537] Richard Olaniyan 'Africa and the Challenges of Development in the 21st Century' in Richard Olaniyan & Ehimika Ifidon *Contemporary Issues in Africa's Development: Whither the African Renaissance?* (2018) 7.
[538] Dangarembga *Nervous Conditions* 147.
[539] Dangarembga *Nervous Conditions* 178-9.

Kebede's intention to counteract colonialism's impact by rehabilitating 'the traditional social order and to seek salvation in the pristine values of our [African] ancestors'[540] undergirds the recognition that Africa was fundamentally (fatally, I am inclined to say) altered by colonisation. Accentuation of differences between people has been a characteristic of South Africa's history for so long, that polarization and what appear to be sharply contrasting ideas and values, have become firmly entrenched. This historical bifurcation of South African society has resulted in a distinct pattern of pervasive, often violent, conflict within South African society in light of its 'long history of conflicting development'.[541] Indeed, Esterhuyse argues that highly polarized and disordered societies, such as South Africa, 'produce political instability' that potentially erodes the legitimacy of the entire political system.[542] This forewarning frames the objective of this chapter. Elucidating South Africa's history in a manner that clearly reveals the origin of the societal cleavages and fissures increases the potential to erase – as far as possible – the continued reference to difference at the expense of solidarity and unity.[543]

Hall's insightful contribution conceiving identities as 'increasingly fragmented and fractured; never singular but multiply[ing] … across often intersecting and antagonistic, discourses, practices and positions'[544] drills into the very core of South Africa's prevailing identity crisis with a heterogenous population of over fifty million. The veritable parallel with Lorde's theory that 'there is no such thing as a single-issue struggle because we do not lead single-issue lives'[545] is striking. De-cerebralization is required. This term, coined by Fanon, is apposite as it illustrates that colonisation has resulted in a cognitive process of dissociating from one's culture, language and even land.[546] For this reason, reliance is placed on

[540] Messay Kebede 'From Colonialism to Elitism: An Enquiry into the African Imbroglio' in Mammo Muchie *The Making of the Africa-Nation* 109; PO Bodunrin 'The Question of African Philosophy' in Richard Wright (ed) *African Philosophy* (1984) 5.
[541] Omar 'The inadequacy of the political system' 126-7.
[542] Esterhuyse 'The normative dimension of future South Africa' 21.
[543] Underscoring this process is the philosophy that 'Afrikan scholars must begin to operate in the service of the vast majority of Afrikans' (sic) (Nehusi 'Language in the construction of "Afrikan" unity' 229).
[544] Stuart Hall 'Who needs "identity"?' in Paul du Gay, Jessica Evans & Paul Redman (eds) *Identity: A reader* (2000) 17.
[545] Audre Lorde *Sister, Outsider: Essays and Speeches by Audre Lorde* (2007) 138.
[546] Young *Postcolonialism* 146.

Chatterjee's call for autochthonous interpretations of anticolonial nationalism so as to ensure authenticity:

> History, it would seem, has decreed that we in the postcolonial world shall only be perpetual consumers of modernity. Europe and the Americas, the only true subjects of history, have thought out on our behalf not only the script of colonial enlightenment and exploitation, but also that of our anticolonial resistance and postcolonial misery. Even our imaginations must remain forever colonized.[547]

The articulation of South Africa's supposedly distinctive identity forms a key aspect, with Omar commenting that the 'core debate' in the 1980s 'revolve[d] around the fact that we have two major forces of potential conflict – black and white (predominantly Afrikaner) nationalism. These forces of nationalism are deeply rooted in the historical development of South Africa'.[548] Accordingly, given that the quest for nationalism has been associated with the sustenance of 'political instability,' urgency was reflected in Omar's tone when he demanded that

> [t]he sooner a meeting point between the rapidly radicalizing factors in the political milieu is found, the greater the prospects of arriving at a centre of gravity which could maximize the positive potential between the polarities in order to eradicate the negative actions of the past. What has to be achieved are levels of equality of compromise.[549]

However, over and above the extant mistrust between South African citizens, it is refugees who now represent the epitome of the 'outsider'. Indeed, South Africa has yet to achieve a common nationalism and many South Africans arguably still perceive themselves as outsiders because of the inequality that prevails. Since refugees symbolise the continuing fight for belonging in South Africa, an international law conception of colonialism's determination of the boundaries of the nation state is juxtaposed against the international law meaning of sovereignty. This is necessary for purposes of clarifying the acute vulnerability of refugees due to circumstances beyond their control and the corollary obligation to protect refugees, notwithstanding the perceived threat that refugees pose to a state's sovereignty.

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[547] Partha Chatterjee *Empire and Nation: Selected Essays* (2010) 26.
[548] Omar 'The inadequacy of the political system' 126.
[549] Omar 'The inadequacy of the political system' 127.

Drawing somewhat on the 'periodisation' approach employed by Klotz and Mayblin, in what follows, I document South Africa's history into four broad moments.[550] To me the term 'moment' is appropriate for conveying the fact that within the larger history, each period of time is of relatively short duration, yet the importance of each period cannot be underestimated when viewed cumulatively. Moreover, such an approach highlights the development of two mutually-supporting evolutionary concepts: 'human security' and 'legal culture'.[551] When combined, these two concepts illustrate that there cannot be any linear description of events over a specific time-frame. Precisely attributable to a sustained campaign in pursuit hereof, human security has only recently come to be understood as encompassing 'attentiveness, responsibility and responsiveness to the needs of others'.[552] Similarly, the idea of 'legal culture' is congruent with the notion of 'a culture of compliance', explored in Chapter Two where theories of compliance with international law are addressed.

Although the concept 'human security' has its genesis in the time succeeding the violence of the Cold War, it has also recently been construed/reformulated in the form of 'second-generation human security' by Chinkin and Kaldor.[553] This nascent articulation is intended to create a 'blueprint for human survival'.[554] Contrasted against this, my conceptualization of security as a foundation for colonisation and apartheid arises in the context of the imposed entrenchment of asymmetrical (and grossly inequitable) power relations as a result of conquest and colonisation. It is the antithesis of human security for those who suffered 'violations of human rights, economic predation and virtual conflict'.[555] Fanon elucidates this most profoundly: '[the settler's] preoccupation with security makes him remind the native out loud that there he alone is master'.[556] The violence of colonial conquest did not suddenly end upon independence; instead, it is 'associated with continuing polarization, instability and disorder'[557] – the very opposite of security. It is hardly

[550] Corroborating my use of this term is Pahuja's use of the term to explain the decolonisation of international law in her book *Decolonising International Law* 2.
[551] Martin Chanock *Making of South African Legal Culture: 1902-1936. Fear, Favour and Prejudice* (2001).
[552] Chinkin & Kaldor *International Law and New Wars* 510.
[553] Chinkin & Kaldor *International Law and New Wars* 479.
[554] Chinkin & Kaldor *International Law and New Wars* 482.
[555] Chinkin & Kaldor *International Law and New Wars* 479.
[556] Fanon *The Wretched of the Earth* 53.
[557] Chinkin & Kaldor *International Law and New Wars* 479.

imaginable that there is a better description than that for colonisation's impact in South Africa. In my opinion, the need to concretise security and ensure human survival was a core concern of the settlers/colonisers who had a distinct objective to entrench themselves in a foreign land and derive financial and other benefits from colonisation/settlement. There is a correlation between how the United Nations Development Programme describes security and how it would have been conceived in the process of colonisation in the 1600s: security relates to personal, community, environmental and political welfare and includes access to the economy, to food and to healthcare.[558] The objective of the colonial settlers was to prevent any form of personal deprivation as this is the main cause of war and violence. Whereas existing international law approaches to conflict are described as 'inadequate',[559] following Butler, the modern-day concept of human security could be employed to unambiguously illustrate that access to resources was "naturally" reserved almost exclusively for the settlers due to certain "subjects" not being recognized as human beings[560] and that these resources were fought over to accrue wealth and stability. It is doubtful whether there are alternative feasible approaches that so accurately describe the imposition and expansion of one group's power and control at the expense of all others from the 1600s onwards. It is submitted that this mentality was the primary driver of colonisation and even its elevation to a more intense form under apartheid. Inhumanity was propagated by a complete denial of the equal subjectivity of African persons, to the extent that Africans were not only ignored, but systematically denigrated and even eliminated.

The construction of a detailed historical account of colonialism and apartheid and its indelible impact on South Africa commences in 1652 when Jan van Riebeeck arrived in South Africa. The period from 1652 until 1707 is the first moment. The present chapter is aligned with the assertion that 'history was past politics and politics present history',[561] conveying that South Africa's present history is undoubtedly imbued with contextual and political factors that have been carried over from the colonial and apartheid eras. Of course, inherent in colonisation was the 'transplant' into South Africa of legislation adopted in the Europe.

[558] Chinkin & Kaldor *International Law and New Wars* 482.
[559] Chinkin & Kaldor *International Law and New Wars* 480.
[560] Butler *Frames of War* 4.
[561] Hunt *History* 63.

There is accordingly a certain amount of overlap and interplay between different events occurring simultaneously in Britain (or Europe or elsewhere in 'the West') and in Africa, thus to categorise them too strictly into defined periods would distract from the the multi-layered and complex processes that have contributed to the refugee system operating in South Africa presently.

The second moment commences in 1707 and covers Britain's colonisation of South Africa, in parallel with continuing colonisation by the Dutch and how this brought about conflict between the two groups. This moment ends in 1910 when South Africa became the Union of South Africa and achieved a measure of independence from its colonial master. As such, this moment clearly illustrates the damage caused by colonialism as well as providing a record of the development of asylum legislation in Europe and its enduring impact on South Africa.

The third moment spans the period from 1910 to 1976, during which time apartheid was devised and implemented. The moment from 1976 to 1989 is described as the protracted demise of apartheid; a remarkable fourth moment because it represents the acknowledgement by the South African government at the time that transformation was inevitable. It must be noted that I have elected to deal with the period directly associated with the transition from apartheid to democracy as a distinct moment. This time-frame (1990 until April 1994) was when negotiations towards democracy took place and includes the significant event of the first democratic election. I have elected to separate this moment in to a subsequent chapter because it is here that I interrogate the multiple paradoxes that informed the type of state that South Africa was destined to become. This chapter is the prelude to the comprehensive analysis of the challenges and failures of refugee protection in the context of 'democratic' South Africa that is undertaken in Chapter Seven.

2. Social Darwinism: The theory underpinning 'racial' segregation

Social Darwinism places extreme emphasis on exclusion and relies on the 'ethnic dichotomy of "self" and "other"' to distinguish between different ethnic groups, thereby

justifying disparate treatment.[562] Writing in 1883, from the perspective of Darwinist thinking, Lorimer maintained that humanity was distinguished by separate spheres, described as 'three concentric zones – civilized humanity, barbarous humanity, and savage humanity'.[563] Accordingly, Shahabuddin terms Darwinism 'a blueprint for social action' and concedes that this 'set the intellectual scene for colonialism'.[564] From the outset, the projected status of Africa illuminates inherent bias and prejudice, with Africa categorized as 'a stationary society', portrayed as 'voiceless, feminine, irrational, despotic, and backward', contrasted against 'progressive society', seen as 'rational, male, democratic, and forward-looking'.[565] The defining characteristic which justified colonisation of non-European communities was an alleged lack of European conceptions of civilization[566] notwithstanding that '[n]o word is more vague and has permitted the commission of more crimes than that of civilization'.[567] The terms 'backward'[568] and 'primitive community'[569] were applied to South Africa at the time. More importantly, Koskenniemi cites Bluntschli who argued that 'progress as civilization came together with rac[e]'. Bluntschli bluntly asserted that the mission of Aryans (whites) was

> to educate other races in political theory and statehood so as to fulfil their great historical assignment to develop and complete the domination of the world which already lies in the hands of the Aryan peoples in a consciously humanistic and noble way so as to teach civilization for the whole mankind.[570]

Confirming that Europe was entirely ad idem with Bluntschli's declaration, the content of this chapter serves the purpose of systematically illustrating how the pathologies of colonisation have had an immensely adverse and material effect on the nature of the South African population. Race classification was the central method by which the colonialists pursued their objectives. Supposed racial origin and racial difference, argues Gilroy, 'considers that some human bodies are more easily and appropriately humiliated,

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[562] Shahabuddin *Ethnicity and International Law* 60.
[563] Shahabuddin *Ethnicity and International Law* 47 quoting James Lorimer *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (1883) 101.
[564] Shahabuddin *Ethnicity and International Law* 46.
[565] Edward Saïd *Orientalism. Western Conceptions of the Orient* (1995) 57-73.
[566] Koskenniemi *Gentle Civilizer of Nations* 135.
[567] Koskenniemi *Gentle Civilizer of Nations* 106.
[568] Pahuja *Decolonizing International Law* 48.
[569] WJ Hosten et al *Introduction to South African Law and Legal Theory* (1998) 271
[570] Koskenniemi *Gentle Civilizer of Nations* 103-4 quoting Johann Caspar Bluntschli 'Arische Völker und arische Rechte' in *Gesammelte Kleine Schiften* (1879) 66 and 90.

imprisoned, shackled, starved and destroyed than others'.[571] The legacy of the contemptuous and debilitating notion of race from colonial discourse, asserts Kebede 'is responsible for illusory conceptions of unity that lose sight of African social, tribal and cultural diversity'. He further laments the fact that the notion of race 'encourages the rise of ethnic politics': given that ethnicity's 'inspiration and methods draw on flawed assumptions', it gives rise to 'the liquidation of democracy [and] the spread of ethnic conflicts'.[572] As Fanon proclaimed, ethnicity 'is nothing more than exasperated racism. It is a cheap racism. … an expression of colonised mentality in that it classifies, separates, excludes peoples on the basis of natural characteristics', which is precisely what the colonisers did.[573]

Colonialism's devastating effects did not end there, however. The reality was that contrary to the purported humanistic or noble development, colonisation signalled the beginning of Europe's 'theft of history'[574] in relation to the identity and humanity of the people of South Africa.[575] The indigenous inhabitants of South Africa lived according to customary law systems. Plunkett argues that customary law systems are actually sophisticated systems 'derived from ancient legal systems that regulate the distribution of all resources – material, human, and spiritual'. In effect, he opines that the rule of law is an intrinsic part of customary law systems.[576] The rule of law was inevitably diminished by colonisation. Equally detrimental was the systematic vitiation of African culture.[577] Culture is a dominant and self-actualising concept in the African philosophical, anthropological and social context. One of the more better-known cultural concepts that applies to South Africa (having similar application in other African states) is the notion of ubuntu. In its most fundamental sense, ubuntu represents personhood, humanity, intense humanness, respect, compassion and morality.[578] Ngcoya asserts that as a worldview, ubuntu 'stresses the importance of

[571] Paul Gilroy '"Where Ignorant Armies Clash by Night": Homogenous Community and the Planetary Aspect' (2003) 6(3) *International Journal of Cultural Studies* 263.
[572] Kebede 'From Colonialism' 111-3.
[573] Fanon *Wretched of the Earth* 94.
[574] Ndlovu-Gatsheni 'Racism and "blackism"' 74-5.
[575] Nehusi 'Language in the construction of "Afrikan" unity' 223.
[576] Mark Plunkett 'Re-establishing the Rule of Law' in Gerg Junne & Willemijn Verkorn (eds) *Post Conflict Development: Meeting New Challenges* (2005) 78-79.
[577] Kwasi Wiredu 'Social Philosophy in Postcolonial Africa: Some Preliminaries Concerning Communalism and Communitarianism' (2008) 27(4) *South African Journal of Philosophy* 332.
[578] Clarence Tshoose 'The emerging role of constitutional value of Ubuntu for informal social security in South Africa' (2009) 12(3) *African Journal of Legal Studies* 12-9.

community, solidarity, caring, and sharing. … advocat[ing] a profound sense of interdependence and emphasizes that our true human potential can only be realized in partnership with others'.[579] For this reason, it has been described as a metaphor for group solidarity precisely because 'group solidarity is central to the survival of society in a context of scarce resources'.[580] Therefore, contrasting directly with the so-called civilizing mission of colonialism was the fact that acculturation was employed. Acculturation constituted the 'dehumanising and decentring … uprooting [of] African peoples',[581] by 'denying philosophy to indigenous peoples'.[582] The process of acculturation occurs when '[a]ny dominating group seeks to destroy the confidence of those they dominate because this helps them to maintain their position'.[583] As Kebede further states: instead of being a means of 'learning of modern methods and concepts, acculturation is thus essentially how indigenous peoples learn to adhere to their allotted inferior rank and marginality through the depreciation of themselves and their legacy'.[584] To be sure, colonisation is the antithesis of indigenous knowledge systems that 'view life and being as holistic, complex and interdependent'.[585] Nehusi puts it thus:

> The invasion and colonisation of Afrika was not merely a physical act; it was fundamentally a process with deep spiritual, cultural, psychological and mental ramifications that still reverberate in the Afrikan consciousness and so in the Afrikan reality today *(sic)*.[586]

3. The first moment: Colonisation of South Africa by the Dutch (1652 - 1707)

The circumstances that undermine and erode stability, respect for the rule of law and substantive equality were repeatedly foisted on South Africa since 1652. The large majority of these debilitating circumstances continue to operate until the present and severely threaten democracy and social justice. Nehusi's remark that 'an accurate understanding of the past' is necessary for 'a correct view of self; the repair of self and so a positive view of

[579] Mvuselelo Ngcoya *Ubuntu: Globalization, Accommodation, and Contestation in South Africa* (PhD thesis University of Amsterdam 2009) 1.
[580] Nkhata *Rethinking governance and constitutionalism in Africa* 34.
[581] Kebede 'From Colonialism' 104 referring to the work of Placide Tempels *Bantu Philosophy* (1945).
[582] Kebede 'From Colonialism' 104.
[583] Julius Nyerere *Freedom and Unity* (1964) 3.
[584] Kebede 'From Colonialism' 107.
[585] Patel *Decolonizing Educational Research* 18.
[586] Nehusi 'Language in the construction of "Afrikan" unity' 223.

the future'[587] underpins the historical narrative. Applying Foucault's 'instrumentalisation of the law',[588] this moment constitutes the initial step of critically analysing South Africa's compliance with refugee law by way of specific reference to the past. Therefore, this thesis contributes to the decolonisation of South African law by analysing South Africa's history with a view to establishing an historical account of the development of South African law and policy and how this has impacted on refugee law in particular. My assertion is reinforced by Nehusi's poignant statement that:

> [t]he idea of deliberately fashioning a future that is based upon a commonly shared vision is an idea whose time has long come. Such a vision must in turn be constructed upon a sober view of the common Afrikan past and the commonalties of Afrikan culture *(sic)*.[589]

The Khoekhoe[590] and the San were the Cape's indigenous inhabitants. As for the rest of South Africa, while Khoisan-speaking hunters and herders occupied the western parts of the country, agro-pastoralists occupied the eastern part.[591] In the 1400s, Bartholomew Dias and Vasco da Gama docked on the shores of the Cape. Dias and da Gama did not remain in South Africa, however. The arrival of Jan van Riebeeck in 1652 is regarded as the beginning of the colonisation of South Africa. As former President Thabo Mbeki suggests:

> [a]lthough initially suspicious of the stranger that had docked on their shores, [the Khoi and the San], imbued with the spirit of *ubuntu,* welcomed those Europeans and gave them the best African hospitality that still characterizes our people today. Jan van Riebeeck and his Dutch companions were received with the same hospitality when they arrived in 1652.[592]

Dugard emphasizes that although van Riebeeck was ostensibly representing the Republic of United Netherlands in the Cape of Good Hope, at that stage no settlement or colony was envisaged.[593] Instead, van Riebeeck intended to create an outpost for the employees of the Dutch East India Company[594] and the 'European presence was limited to the immediate

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[587] Nehusi 'Language in the construction of "Afrikan" unity' 221.
[588] Golder & Fitzpatrick *Foucault's Law* 55.
[589] Nehusi 'Language in the construction of "Afrikan" unity' 230.
[590] Robert Ross *These Oppressions Won't Cease: An Anthology of the Political Thought of the Cape Khoesan, 1777-1879* (2017) xvii.
[591] de Vos & Freedman *South African Constitutional Law* 5.
[592] Thabo Mbeki 'Address on the Occasion of Heritage Day' Cape Town 24 September 2006.
[593] John Dugard *International Law: A South African Perspective* (2000) 16 and 121 citing Leo Marquard *The Story of South Africa* (1955) 39.
[594] This corporation is regarded as the original investment vehicle, although it has been described as 'a trader, extractor of profit, and pirates'. See Nick Robins *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational* (2006).

environs of Cape Town [up until] the last decade of the century'.[595] Over time, however, the employees of the Company became 'settlers and began the inevitable process of expansion in search of new lands'.[596] Such occupation was consistent with the Eurocentric view that territory 'inhabited by political communities characterized as unorganized, primitive, or uncivilized'[597] was *terra nullius* and belonged to no one. It has its legal foundations in the Treaty of Westphalia of 1648 to which the 'modern international legal system of sovereign states' is attributed.[598] Moreover, this European plunder was justified by reference to 'the rule of law': the 'idea of civilization as the opposite of chaos and irrationality, where rules precede actual disputes'.[599] Ironically, the violence inflicted on and perpetrated against South Africa's original inhabitants was through the law itself: the historical importation of law by colonial powers. Therefore, rather than one single event, settler colonialism is an ongoing structural process that has at its core the logic of the transplant of law[600] from the colonial power and the acquisition and ownership of land by a few. Since land, Patel maintains, is the central organizing principle, the relationship created between people and land has positioned people differentially 'relative to their worthiness to own it'.[601] The 'unquenchable thirst' for land as the symbol of property and wealth has been the cause of many 'dysfunctional relationships' in both a material and figurative sense.[602] Significantly, because land is regarded as a finite resource, it necessarily converts all other

[595] Ross *These Oppressions Won't Cease* xvii.
[596] Dugard *International Law* 121. See also Ross *These Oppressions Won't Cease* xvii.
[597] Dugard *International Law* 112.
[598] Cryer et al *Research Methodologies* 26. Anghie's critique is that the notion of the nation state was imposed by the imperialists because the international law formulated by Europe was deemed the only valid legal system (Anghie *Imperalism, Sovereignty and the Making of International Law*). A specific example of this situation is the legal concept of *uti possidetis jure*. Africa had been carved up and apportioned by Europe, but Africans were bound by the rule that sovereignty only existed over the demarcated territories that they possessed as of law, hence the boundaries could not be changed. A measure of flexibility has arguably been introduced to the concept of *uti possidetis* in Africa due to the secession of South Sudan in 2011 and Eritrea in 1993. The dissenting (separate) opinion of Justice Abdulqawi A Yusuf in the *Frontier Dispute between Burkina Faso and Niger* of 16 April 2013 provides further impetus to the assertion that African leaders did not intend to be bound by the *uti possidetis jure* principle, but instead desired to create their own principles on the delimitation of African boundaries so as to give effect to the Pan-African ideal of uniting the respective African states into a single political entity. See paras 3 to 6 of Justice Yusuf's separate opinion.
[599] Nader 'Law and the Frontiers of Illegalities' 67.
[600] Hosten et al *Introduction to South African Law* 271.
[601] Patel *Decolonizing Educational Research* 30-3.
[602] Patel *Decolonizing Educational Research* 35-7.

entities into property, including people, and their status.[603] According to Wynter, the 'larger colonial project has its genealogical roots in determining which lands were desirable, and by proxy, which beings were deemed to be human and which not'.[604] The desire for land 'manifests through a logic that erases to replace'.[605] The quintessential component of any land grab is that the peoples already residing there must be eliminated. As Smith puts it:

> This logic holds that [the Indigenous] peoples must disappear. In fact, they must *always* be disappearing in order to enable non-Indigenous peoples' rightful claim to land. Through this logic of genocide, non-Native peoples then become the rightful inheritors of all that was Indigenous (emphasis in the original).[606]

For its violence, targeting the 'actual processes of life and the conditions for existence', the 'colonial death project' took effect.[607] The Khoekhoe and the San were inevitably subjugated[608] on account of the employees of the Dutch East India Company's typically 'human practice of making claims, proclaiming interests and getting involved in competition'. While Esterhuyse describes this type of political process as 'a universal human activity',[609] I argue that it occurred against the backdrop of the San and the Khoekhoe invariably not anticipating that the Dutch would seek to unilaterally change the original terms of their settlement in the Cape of Good Hope. Furthermore, the asymmetrical power relations between the Khoekhoe and the San on one hand and the Dutch, on the other, resulted in conflict. Employing sociological terms, Esterhuyse states that the 'nature and cause of disagreement and conflict is a necessary condition for devising effective strategies aimed at resolving the conflict'. However, the fact that the Dutch already had material advantages and an arsenal of 'sources of authority and means of resolving conflict',[610] such as guns and horses,[611] meant that the Dutch succeeded in completely disempowering the San and the Khoekhoe. By the end of the seventeenth century, Ross

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[603] Patel *Decolonizing Educational Research* 31 quoting Cheryl I Harris 'Whiteness as Property' (1993) 106(8) *Harvard Law Review* 1709.
[604] Sylvia Wynter 'Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, after Man, Its Overrepresentation – An Argument' (2003) (3)3 *Centennial Review* 266.
[605] Patel *Decolonizing Educational Research* 33.
[606] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2012).
[607] Ndlovu-Gatsheni 'Racism and "blackism"' 75 quoting Julia Suarez-Krabbe *Race, Rights and Rebels: Alternatives to Human Rights and Development from the Global South* (2016) 3.
[608] Dugard *International Law* 121.
[609] Esterhuyse 'The normative dimension of future South Africa' 20.
[610] Esterhuyse 'The normative dimension of future South Africa' 20.
[611] Ross *These Oppressions Won't Cease* xviii.

explains, ‘those who had lived on the rich plains in the immediate environs of Cape Town’ were rendered poverty-stricken; their grazing lands unilaterally appropriated by European settlers. In fact, those who lived as San hunter-gatherers ‘were the target of a long genocidal campaign on the part of the European stock farmers’[612] and did not have the capacity to ‘survive the onslaught on their way of life’.[613] The economy was controlled entirely by the Dutch. The Khoesan faced ‘a harsh life’: they were ‘incorporated into colonial society in a dependent position’ and the farmers ‘reasoned they had nothing to lose by the systematic overexploitation of their Khoesan labourers’. There was, as Ross puts it ‘no brake on destructive violence’.[614] What was most striking was the rapidity with which the Khoekhoe languages of the Cape disappeared.[615] wa Thiong’o would describe this as colonialism’s invasion of the ‘African mental universe … annihilat[ing] a people’s belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves’.[616] Unsurprisingly, conflict permeated society.

In the book *The Dual Mandate in Tropical Africa* Lugard recounts that Africans received (whether they sought it or not) from Europeans ‘the substitution of law and order for the methods of barbarism’.[617] Colonisation took the form of the colonisers transplanting laws and institutions from the parent jurisdictions[618] where they were effective, expecting them to be just as effective in the occupied state,[619] regardless of the fact that the occupied state’s social, cultural or political system was not as strong[620] or ready for the reception of this transplanted order.[621] By displacing existing indigenous institutions, this constitutes a form of socialization whereby ‘interrelated policy making processes’ impacts the options available in the less advanced country.[622] The description attached to the latter state is a

[612] Ross *These Oppressions Won’t Cease* xvii.
[613] Ross *These Oppressions Won’t Cease* xviii.
[614] Ross *These Oppressions Won’t Cease* xviii.
[615] Ross *These Oppressions Won’t Cease* xix.
[616] wa Thiong'o *Decolonising the Mind* 3.
[617] Frederick Lugard *The Dual Mandate in Tropical Africa* (1922), cited in Raymond Betts *Decolonization: The Making of the Contemporary World* (1998) 12.
[618] Klotz *Migration and National Identity* 24.
[619] Pistor et al ‘Social norms, rule of law’ 269-270.
[620] Pistor et al ‘Social norms, rule of law’ 271.
[621] Pahuja *Decolonising International Law* 208.
[622] Klotz *Migration and National Identity* 20.

basic natural state.[623] One of the defining features of a basic natural state is that it is not a 'perpetual state'. The absence of perpetuity means that the state cannot commit to long-term policies. Consequently, such states experience 'great difficulty establishing and maintaining institutions capable of sustaining the rule of law'.[624] Upham develops this point by arguing that '[l]egal anarchy can result in a society that has a new, formal legal system but lacks the social capital, institutions and discipline to make use of it'.[625] Hosten provides a detailed account of how the legal system operating in the United Netherlands was transplanted into South Africa by the Dutch East India Company, for the stipulated purpose of maintaining law and order.[626] As a point of departure, Roman Law was used in the United Netherlands, hence the term Roman-Dutch Law.[627] The States-General was the central organ of the United Netherlands and it had delegated its sovereign power over the Cape to the Dutch East India Company.[628] The Company code of discipline, the *Artyckelbrief* 'was the primal source of law during van Riebeeck's time'.[629] Bodenstein maintains that '*ipso facto* the institutions of Holland' were used in the Cape from 1652 onwards[630] and laws emanating from the States of Holland would have applied in the Cape unless the local conditions dictated that this was not possible.[631] In such an instance, the law would be redrafted, based on the original law.[632] Moreover, men who had obtained their legal qualifications at Leiden or other Dutch universities practised law in South Africa. Evidence of the transplant of Roman-Dutch Law was a sentence handed down by a court in the Cape in 1671 in which 'the usages and customs of the United Netherlands and the general practice of Roman law' informed the decision.[633] In 1685, the *Raad van Justitie* became the highest court in South Africa, with some South African men serving as judges in this court. The *Secunde* (lieutenant-governor) confirmed all sentences of the *Raad van Justitie* and

[623] Weingast 'Why developing countries prove so resistant' 32.
[624] Weingast 'Why developing countries prove so resistant' 45-6.
[625] Frank Upham 'Mythmaking in the Rule of Law Orthodoxy' (Paper 30, Carnegie Endowment for International Peace Working Papers, Rule of Law Series, Democracy and the Rule of Law Project, September 2002) 34.
[626] Hosten *Introduction to South African Law* 338.
[627] Hosten *Introduction to South African Law* 321.
[628] Hosten *Introduction to South African Law* 338.
[629] Hosten *Introduction to South African Law* 339.
[630] HDJ Bodenstein 'English Influences on the Common Law of South Africa' (1912) 32 *South African Law Journal* 342.
[631] Hosten *Introduction to South African Law* 341.
[632] Hosten *Introduction to South African Law* 343.
[633] Hosten *Introduction to South African Law* 344.

was responsible for all legal and other matters in the Cape.[634] Documentation illustrating that the Dutch Governor codified transgressions applicable in the Cape right up until 1740 supports the assertion that Roman-Dutch Law was used by the Cape courts.[635]

Expressed at its most blunt, Nader declares that co-existence between the indigenous people and the colonisers (or even co-colonisers) 'was never the point'.[636] She goes on to describe the 'colonial foundations' of law as

> influenced, albeit unevenly at times, by the need to legalize usurped rights. From the beginning of European expansion there was a need to establish a legal foundation for the empire's policy of owning and redistributing conquered land for the purposes of economic exploitation.[637]

Besides the transplant of laws, other characteristics of basic natural states are a restriction on meaningful access to rights and organizations and a lack of competition.[638] Pertaining to this latter aspect, the fundamental need is to control violence, thought to be ensured by limiting access to rights and organizations. Necessarily, access to competition is severely curtailed, with restriction of competition in the economy being a serious consequence. Furthermore, these types of states also limit competition in the polity. This exponentially reduces 'the production of new ideas and means of solving various political and other dilemmas that all societies inevitably face'. These states, continues Weingast based on the foregoing, have not yet reached the stage where they 'are sustained … by a belief system that emphasizes impersonal equality before the law'[639] and inclusive incorporation in democracy and markets.[640] Crucially, such societies suffer the long-term pathology of difference being exalted as an ideological rationale.[641] Such a state is simply unable to deliver benefits on an impersonal basis[642] and essentially, it is a person's identity that is the primary indicator of how they are treated.[643] When an oppressive and inequitable system is institutionalized

[634] Hosten *Introduction to South African Law* 339-40.
[635] Hosten *Introduction to South African Law* 346.
[636] Nader 'Law and the Frontiers of Illegalities' 67.
[637] Nader 'Law and the Frontiers of Illegalities' 67.
[638] Upham 'Mythmaking in the Rule of Law' 35.
[639] Weingast 'Why developing countries prove so resistant' 33-34.
[640] Weingast 'Why developing countries prove so resistant' 33.
[641] Friedman 'Agreeing to differ' 255.
[642] Weingast 'Why developing countries prove so resistant' 46.
[643] Weingast 'Why developing countries prove so resistant' 39.

to the extent that it was in South Africa, it is not easily overcome.[644] Thus, conflict was also prevalent between the Zulus, the Xhosas, the Sekhukuni and other groups against white frontiersmen,[645] the most significant event being the Xhosa attack of the Dutch in the Cape Colony between 1799 and 1802.

4. The second moment (1707 - 1910)

4.1 Colonisation by the British

Activities relating to British colonialism have existed since the fifteenth century.[646] However, in relation to South Africa, the precursor to imperial domination by the British Empire is attributable to the Act of Union of 1707 that brought the British state into existence. This event is therefore a precursor to settler colonisation of South Africa by Britain and its adoption of the 1793 Aliens Act, amongst a raft of similar legislation influencing South African domestic law and practice.

In material terms, 1795 was the year in which the first British occupation took place. Concerned that the French Republic would succeed in seizing the Cape, representatives of Great Britain arrived in the Cape in June 1795. This arrival was strongly resisted by the Dutch East India Company and the Francophiles of the Cape. As Hosten recounts, a 5 000-member strong British battalion managed to persuade the Company to relent on 16 September 1795. The Articles of Capitulation entered into between the Company and the British provided that the *Raad van Justitie* (re-named the Court of Justice) would continue administering 'the ancient law of the settlement',[647] namely Roman-Dutch law in all civil and criminal matters.[648]

The British vacated the Cape in 1802[649] but by July 1805, once again sought to seize it. The British resumed control at the Cape in January 1806.[650] The Second British Occupation of

[644] Klotz arrived at this conclusion after seeking to provide 'a convincing characterization of the status quo' in South Africa. See Klotz *Migration and National Identity* 32.
[645] Schlemmer 'South African society under stress' 3.
[646] Mayblin *Asylum after Empire* 7.
[647] Hosten *Introduction to South African Law* 353.
[648] Hosten *Introduction to South African Law* 347-8.
[649] Hosten *Introduction to South African Law* 348.
[650] Hosten *Introduction to South African Law* 349.

1806 resulted in the British holding 'the full power of the state in their hands'.[651] However, Britain insisted on the 'preservation of burgher rights and privileges, including *inter alia* the Roman-Dutch law'. Hosten ruefully remarks in this regard that there were clear contradictions and challenges in adhering to the 'canons of classical Roman-Dutch law within the framework of what was becoming an adjective law modelled on English criminal procedure'.[652]

The 1820s marked a discernible shift in the British government's approach to the Cape Colony. Lord Somerset's 1822 proclamations unequivocally provided for the 'penetration of English legal rules', although, for example, the matrimonial property of English settlers who had married at the Cape without an antenuptial contract was regulated by Roman-Dutch law.[653] Botha records that the intention was to ensure a 'gradual assimilation of the law of the Colony to the law of England'.[654] Anglicisation included a substitution of the official language from Dutch to English and the establishment of new schools where English would be taught.[655] Effective from 1 January 1828 the First Charter of Justice was implemented and this represented the complete transplant of English law in the Cape.[656]

Increasingly dissatisfied with British rule in the Cape, a large contingent of the Dutch left the Cape in the early 1830s, heading for the interior. Known as the 'Great Trek' into the deserted areas of what is now KwaZulu-Natal, the Dutch established the Boer Republic in Natal in 1838.[657] Britain did not recognise this Republic and occupied it in 1842. At this stage, the Boers had 'become an indigenous constituency force' but the British merely sought to ride roughshod over them.[658] Natal was annexed to the British Government in 1843.[659] Natal was henceforth treated in the same way that the Cape of Good Hope was.[660] Significantly, it was at or around this time that the Cape Colony became a self-governing Dominion of

[651] Ross *These Oppressions Won't Cease* xix.
[652] Hosten *Introduction to South African Law* 350.
[653] Hosten *Introduction to South African Law* 351.
[654] C Graham Botha 'The Early Influence of the English Law upon the Roman-Dutch Law in South Africa' (1923) *South African Law Journal* 404.
[655] Hosten *Introduction to South African Law* 351.
[656] Hosten *Introduction to South African Law* 352.
[657] See, for example, Omer-Cooper *The Zulu Aftermath.*
[658] Omar 'The inadequacy of the political system' 128.
[659] Dugard *International Law* 122 footnote 58.
[660] Dugard *International Law* 17.

Britain[661] followed by the arrival of a steady stream of white settlers into Natal and the Cape Colony. The reality that South Africa is 'a country of immigration' confirms these developments.[662] As will become apparent as this historical record develops, however, the only acceptable immigration, was immigration of whites; a practice continuing to the present, hence the large-scale rejection of refugees – particularly those of African descent.[663]

Meanwhile, in Britain, the Alien Removal Bill was introduced in the House of Commons on 1 May 1848 with a view to achieving 'national self-protection' while also affording asylum to persons who had been exiled from their European homelands due to persecution on the basis of their political opinions.[664] Significantly, at this time, colonialism was not considered a form of persecution.

Evidence of the umbilical link between the parent jurisdiction and the developing jurisdiction was clear in South Africa. As Klotz remarks, 'the territorial boundaries of the state, embedded in legacies of Imperial subjecthood and its denial, continue as the basis for contemporary definitions of a South African nation'.[665] Even the recognition by Britain of the independent states of the South Africa Republic (Transvaal) in 1852 and the Orange Free State in 1854, did not necessarily confer full independent statehood on those states. Dugard explains that notwithstanding Britain's recognition of the South Africa Republic, the independence of this Republic was negated by 'severe restraints on [its] treaty-making power'.[666] Precisely in accordance with the transplant effect, the Constitutions of these two states can be said to be the root of racial citizenship in South Africa. The Orange Free State's Constitution of 1854 'had a justiciable Bill of Rights that guaranteed rights of peaceful assembly, petition, property and equality before the law', but these protections were restricted to white males exclusively.[667] Despite the South African Republic embracing 'a form of governance based on the principle of separation of powers', the Constitution 'was

[661] Klotz *Migration and National Identity* 30.
[662] Klotz *Migration and National Identity* 7.
[663] See generally, Jonathan Klaaren *From Prohibited Immigrants to Citizens: The Origins of Citizenship and Nationality in South Africa* (2017).
[664] Mayblin *Asylum after Empire* 15.
[665] Klotz *Migration and National Identity* 61.
[666] Dugard *International Law* 17.
[667] de Vos & Freedman *South African Constitutional Law* 6.

blatantly racist' in providing that 'the People desire to permit no equality between coloured people and white inhabitants'.[668] Such a patronizing and parochial attitude exhibits in clear terms how international law was developed as 'a system of law, rooted in convictions of European superiority'.[669] Accordingly in pursuit of broadening the empire, the British appropriated Natal as their own by 1856, and thus it was made a separate British Crown Colony.[670] What cannot be disputed is that the major players in the economy throughout this period were white, buttressing the assertion that colonisation had an economic foundation that could only be fully realized through subordination of indigenous South Africans. Specifically, the 'financial qualifications' for political participation in South Africa preserved white rule, which Klotz regards as the precursor to the 'economic nationalism' that exists in contemporary South Africa.[671] Contrastingly, she maintains that South Africa does not have 'an ethnic basis for its new civil nationalism';[672] a view with which I cannot agree. Colonialism constructed and subsequently reinforced apparent ethnic differences and this ethnic distinction and segregation permeated every aspect of life during colonisation. In fact, the idea of ethnic difference has become so institutionalized that it continues to be used albeit unconsciously to date in South Africa.

4.2 The period 1860 - 1910: Intensification of colonisation's effect and influence

Despite the documented history of exclusion and segregation in South Africa's history, Klotz highlights the 'dearth of legal protections' from 1860 to 1910 as the reason for exclusionary policies.[673] Furthermore, Klotz relies on the notion of 'path dependency' to explain why South Africa has been unable to achieve significant reform twenty-five years after the end of apartheid.[674] Sympathetic to this argument, I nonetheless disagree with it in that it fails to take into account the systematic manner in which colonisation took hold in South Africa (as a basic natural state, as it was at the time) and concretised ethnic segregation and economic inequality. Accordingly, the principal argument I make is that the transplant of

[668] de Vos & Freedman *South African Constitutional Law* 6-7.
[669] Dugard *International Law* 16.
[670] Dugard *International Law* 122.
[671] Klotz *Migration and National Identity* 14.
[672] Klotz *Migration and National Identity* 55.
[673] Klotz *Migration and National Identity* 8.
[674] Klotz *Migration and National Identity* 9.

markets, elections and judicial institutions from the developed world (the inheritance)[675] – which occurred as a consequence of colonisation and has never been sufficiently revised – is unsustainable. Substantiation for my view is the empirical research, which reveals that the inevitable consequence of the transplant effect is 'a repeated cycle of violence, governments collapsing, rights being altered, assets expropriated, new constitutions being written, and policies altered overnight'.[676] Confirming this view is the fact that the Colonial Laws Validity Act of 1865 entailed that all colonial parliaments remained subservient to the British Parliament. The significance of this situation is that the Westminster system of government began operating in the British colonies in South Africa. As a characteristic of the Westminister system, 'the principle of the supremacy of the legislature' was firmly established in South Africa.[677] Accordingly,

> the legislature by and large had a free hand to pass any legislation it wished as long as it followed the requisite procedures. Courts were not empowered to test the laws passed by the legislature against a bill of rights and could not declare legislation invalid even where that legislation infringed on the rights of citizens.[678]

By 1872 what emerged was a system of 'responsible government … with a Governor-General representing the British Crown' in the Cape.[679] Natal obtained self-governing status in 1893.[680] However, while locally elected representatives governed, their powers were severely constrained by the fact that the 'British-appointed Governor-General had to approve legislation'.[681] Moreover, the 1890s is characterised as a period of intense hostility towards migrants. During this time, the arrival at the Durban harbour of indentured labourers from India was met by protest from 'angry mobs'.[682] This was caused by propaganda, carefully constructed without reference to race, that Asians posed a threat to society. To permanently keep Indians out of Natal, an exclusionary literacy test ('The Natal Formula') was adopted.[683] Moreover, the Glen Grey Act, passed in the Cape Colony in 1894 specifically excluded the majority of Africans from the Cape Parliament. This Act is

[675] Klotz *Migration and National Identity* 33.
[676] Weingast 'Why developing countries prove so resistant' 20.
[677] de Vos & Freedman *South African Constitutional Law* 6.
[678] de Vos & Freedman *South African Constitutional Law* 6.
[679] de Vos & Freedman *South African Constitutional Law* 6.
[680] Klotz *Migration and National Identity* 67.
[681] de Vos & Freedman *South African Constitutional Law* 6.
[682] Klotz *Migration and National Identity* 6.
[683] Klotz *Migration and National Identity* 10.

described as the precursor to the 'segregationist and apartheid measures'[684] that were subsequently introduced. Specifically, the Act 'introduced separate "reserve" areas where Africans were required to stay if they were not selling their labour to white-owned institutions in cities and towns'.[685]

As Shahabuddin's compelling study into ethnicity and international law illuminates, Germany's belated acquisition of colonies during the period April 1884 to February 1885, starting with South West Africa[686] (the only 'suitable venue for large-scale German settlement' in Bismarck's opinion)[687] proved crucial for South Africa's own segregationist project. The Germans regarded themselves as 'a racially superior organic body'.[688] The concept of race was repeatedly invoked as a defining feature of "different" population groups, ensuring segregation, albeit that race is a social construct[689] and notwithstanding that the competing "races" are in all material respects identical.[690] Furthermore, Shahabuddin maintains that for the Germans, imperialism was simultaneously 'a force for elimination' and fueled by 'intense international economic competition'.[691] To be clear, Germany was not part of the 'civilizing mission' "group" of colonisers. Instead, it was the notion of Social Darwinism that operationalised Germany's 'mission to accomplish the task of securing its due position in world history by way of violent imperalism'.[692] As Bluntschli states in *The Theory of the State* (1885), 'the settlement of political communities in an uninhabited and scarcely cultivated country with the intention of founding a new state is a peaceful form of territorial acquisition'.[693] He continued: 'if the "barbaric natives" remained in the territory of the new colony, the superiority of the "civilized" over a barbarous people would necessarily lead to the dominion of the former'.[694] Germany represents the

[684] Klotz *Migration and National Identity* 9.
[685] Klotz *Migration and National Identity* 8.
[686] Shahabuddin *Ethnicity and International Law* 65.
[687] Shahabuddin *Ethnicity and International Law* 71.
[688] Shahabuddin *Ethnicity and International Law* 69.
[689] Jeremy Seekings 'The continuing salience of race: discrimination and diversity in South Africa' (2008) 26(1) *Journal of Contemporary African Studies* 22.
[690] Paul Gilroy *Between Camps: Nations, Cultures and the Allure of Race* (2000) 33.
[691] Shahabuddin *Ethnicity and International Law* 65 and 68 quoting Smith *The German Colonial Empire* 27.
[692] Shahabuddin *Ethnicity and International Law* 60.
[693] Bluntschli *The Theory of the State* 219.
[694] Bluntschli *The Theory of the State* 219.

quintessential 'conservative ethnic-exclusionist' state in relation to the colonial other.[695] What Shahabuddin illustrates is how Germany's 'construction of the national "self"' constituted the understanding and justification of colonialism. He takes this further by providing an exposition of Germany's execution of colonial policies.[696] In this regard, he highlights the atrocities associated with German colonisation: Germany resorted to an extermination policy culminating in the genocide of the Herero and the Nama between 1904 and 1907.[697] Moreover, the German colonial mission 'demonstrated an inherently polygenic as well as exclusionist attitude towards the natives'.[698] Specifically, in South West Africa, Germans sought to '"distance" themselves from the natives 'to protect its racial superiority from any undesired racial intermixing'.[699] As Shahabuddin notes, 'to combat the increasing trend of marriage between whites and African women, the colonial government of South West Africa opted for legislation that would erect a significant barrier between natives and non-natives with a view to protecting "the ranks of Europeans against the influx of coloured blood"'. Indeed, Shahabuddin explains further, in 1905 'General Tecklenburg banned mixed marriage', relying on 'racial, exclusionist logic' that included reference to the 'danger it posed to the white man'.[700] Total control over (and segregation from) black Africans was specifically advanced 'by three notorious native ordinances of 1907 – the Control Ordinance, the Pass Ordinance, and the Master and Servant Ordinance – which together established a racist and interventionist state within the framework of the law'.[701] Immediately apparent is that South Africa adopted virtually identical policies. In the latter part of the 1800s, buttressed by prejudices, 'stereotypes and hostile commentary about nonwhites',[702] [South] Africans were restricted to locations specifically set aside to segregate residential areas for whites and non-whites. In terms of legislative enactment, the Natives Location Act of 1899

[695] Shahabuddin *Ethnicity and International Law* 63.
[696] Shahabuddin *Ethnicity and International Law* 62.
[697] See the discussion in Shahabuddin *Ethnicity and International Law* 73-7, where reference is made at 77 to the words of Frenssen that 'these blacks deserved to die' (as quoted in Medardus Brehl 'The Drama was Played Out on the Dark Stage of the Sandveldt: The Extermination of the Herero and Nama in German (Popular) Literature' in Jurgen Zimmerer & Joachim Zeller *Genocide in German South West Africa: The Colonial War of 1904-1908 and Its Aftermath* (2008) [1836] 106).
[698] Shahabuddin *Ethnicity and International Law* 71.
[699] Shahabuddin *Ethnicity and International Law* 72.
[700] Shahabuddin *Ethnicity and International Law* 72.
[701] Shahabuddin *Ethnicity and International Law* 72; Jurgen Zimmerer 'The Model Colony? Racial Segregation, Forced Labour and Total Control' in Zimmerer & Zeller *Genocide in German South West Africa* 29.
[702] Klotz *Migration and National Identity* 100.

permitted employers to establish separate locations for African employees. Consequently, fervent resistance to the forced removals to give effect to the Natives Location Act resulted in the adoption of the Natives Reserves Locations Act of 1902 that categorically 'required almost all Africans to live in locations'.[703] Reinforcing the Act's effect was the introduction of the pass system.[704] Although speaking in the context of the exclusion of Asians from the Union, Minister Abraham Fischer confirmed the colonial view that self-preservation of the white man depended on progress derived from European civilization.[705]

While the symbolic and structural forms of violence associated with colonisation have inevitably been more damaging in their penetration of the identity and dignity of black South Africans, physical violence was also perpetrated. Colonial states were described as heavily securitized. At the end of the nineteeth and the beginning of the twentieth centuries 'the increasing use of force in the determination of the fate of peoples' through imperial domination and war was concerning. Koskenniemi continues: at that time Europeans continued to oppress indigenous peoples in the name of civilization by acting 'from a position of superiority towards others' resulting in 'brutal colonial wars'.[706] Renault condemns the fact that Europeans had 'misused their power against the "so-called barbarians" and waged unjust wars against them, violating the most elementary rules of international law'.[707] Salomon's sombre words confirm the historical legacy of colonialism as 'violence, injustice and shedding of blood'.[708] As Klotz reveals, South Africa remains securitized in both its discourse and practice.[709]

The period of 1899 to 1902 – when the Anglo-Boer War took place[710] – illustrates that conflict and violence associated with the quest for power in South Africa was also directed

[703] Klotz *Migration and National Identity* 100.
[704] Klotz *Migration and National Identity* 100 quoting Klaaren 'Migrating' 80-1; Vivian Bickford-Smith *Ethnic Pride and Racial Prejudice in Victorian Cape Town* (2003) 80-4; 130-3, 147-8 and 153-60.
[705] Klotz *Migration and National Identity* 106.
[706] Koskenniemi *Gentle Civilizer of Nations* 98.
[707] Koskenniemi *Gentle Civilizer of Nations* 105 quoting Louis Renault *Introduction à l'étude de droit international* in *L'oeuvre international de Louis Renault* (1932) 11-7.
[708] Koskenniemi *Gentle Civilizer of Nations* 104 and 106 quoting Charles Salomon *L'occupation des territoires sans maître. Etude de droit international* (1889) 68. Indeed, Salomon 'read the contemporary language of civilization as pure hypocrisy that sought only the advancement of commerce' (at 197).
[709] Klotz *Migration and National Identity* 10.
[710] Dugard *International Law* 17.

at fellow Europeans. For two long years a 'bitter guerrilla war was waged'.[711] Dugard explains that although Britain (who defeated the Boers) treated the Boer guerillas as lawful belligerents, their families were herded into concentration camps, where thousands died, and their properties devastated.[712] A consequence of Britain's victory in the war was that the Boer Republics were henceforth controlled by the British government. Juxtaposed against this development was that systematic steps towards territorial segregation of blacks and whites in the form of a clearly bifurcated state, 'as a permanent mandatory feature of public life', were taken by the Native Affairs Commission in 1903.[713] A fiction of the colonial rulers was that the sovereign right over land constituting 'native reserves' had been transferred to the Crown through 'peaceful annexation'.[714] At the time, Lord Selborne was the High Commissioner of the Cape Colony and Natal, and Governor of the Orange River Colony and Transvaal (which would ultimately become the four provinces of South Africa in 1910).

Britain had by this stage begun implementing a 'policy of granting self-rule to white colonists in its various colonies'.[715] A consequence immediately emanating from this was that immigration could be regulated by the Dominion itself.[716] However, Britain's laws and policies were described as 'the keystone for harmonizing naturalization policies' in the Dominions. For example, even though the British Aliens Act of 1905 made absolutely no mention of race or ethnicity, it nonetheless 'demanded evidence of sufficient means of support, basic mental and physical health, and a clean record regarding non-political crimes',[717] thereby deliberately excluding the majority of non-whites. Importantly, the Act contained a caveat for refugees: those fleeing persecution would receive protection, notwithstanding the restriction on lack of means.[718]

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[711] Dugard *International law* 18.
[712] Dugard *International Law* 438.
[713] de Vos & Freedman *South African Constitutional Law* 9. This Commission was also referred to as the Langden Commission.
[714] de Vos & Freedman *South African Constitutional Law* 9. This ancestral land was 'held communally and administered by tribal chiefs'.
[715] de Vos & Freedman *South African Constitutional Law* 9.
[716] Klotz *Migration and National Identity* 61.
[717] Although naturalization is not the topic of the present study, it is relevant for the fact that Louis Botha, who represented the Transvaal in 1907 vehemently objected to non-white British subjects being naturalized as 'an imperial law would demand that South Africa recognize rights that it did not grant to some of its own residents'. See Klotz *Migration and National Identity* 119.
[718] Klotz *Migration and National Identity* 117.

Jan Smuts made (white) South Africa's intentions clear right from 1906 when he declared the aim of 'preserving the rights of the permanent population of the land, English as well as the Dutch'.[719] Interestingly, not long afterwards, pursuant to the policy of self-rule, and with the deliberate refusal to invite black South Africans, 'Britain [despite having ulterior motives in light of extensive British investment in South Africa] facilitated negotiations that led to the formation of the Union of South Africa'.[720] A preliminary step to this end was the granting of self-government to both the Transvaal and Orange River colonies. The South Africa Act, 1909 (Constitution) was designed to create the Union of South Africa by consolidating 'shared control of the British and the Dutch as well as the various indigenous groupings in South Africa in a single unitary state'.[721] Specifically, section 37 of the Act 'enshrined both English and Dutch (later Afrikaans) as official languages'. Harmonious relations were very short-lived. Controversy arose in relation to the 'extent to which section 37 was equitably applied in practice'.[722] It is therefore evident that inequality, division and oppression permeated all of society during the colonial era. Moreover, every effort was taken to marginalize non-whites politically and remove them from the voters roll.[723] Apartheid, which followed, exacerbated the polarization of society and entrenched a system where the administration, undemocratic in its composition and without much oversight or control, wielded significant power; especially in terms of the governance of black South Africans who had been relegated to native reserves.[724] It is not surprising, therefore, that subsequent attempts at integrative nation building have inevitably failed.[725]

5. The third moment: South Africa as a quasi-sovereign self-governing colony of the British Empire and the introduction of the apartheid system (1910 - 1976)

What is striking about South Africa's evolution from a colonised state to a sovereign, independent state is that the granting of independence to South Africa had two intersecting

[719] Klotz *Migration and National Identity* 125.
[720] Klotz *Migration and National Identity* 125.
[721] Klotz *Migration and National Identity* 126.
[722] Welsh 'Can South Africa become a nation-state?' 566.
[723] Klotz *Migration and National Identity* 127. This objective was finally achieved in 1936.
[724] Klotz (*Migration and National Identity* 127-8) refers to the work of Ivan Evans *Bureaucracy and Race: Native Administration in South Africa* (1997) 165-8. It is not inconsequential that these same bureacrats 'proved vulnerable to corruption', especially with migrants being highly motivated to 'circumvent restrictions'.
[725] Klotz *Migration and National Identity* 8.

implications. The first is that decolonisation did not occur. The second, related point is that the granting of independence occurred in the context of the original colonisers seamlessly continuing to control the state and government, with the associated autonomy and 'omni-competence'[726] that this conferred. South Africa fluidly embraced the imperial 'orthodoxy that nation statehood was the natural form of collective politico-territorial organisation'.[727] Aptly stated by Klotz, South Africa became the coloniser instead of the colony, 'mimicking the decolonization process in an effort to preserve its international legitimacy'. [728] Sovereignty afforded the state the right to 'exercise exclusive power' over the territory and its subjects.[729] Re-stated with reference to the idea of 'bare sovereignty', the danger unfolding in South Africa was, as Douzinas describes, that '[s]overeignty launches itself when it sets the origin and the ends of community, when a community gives itself to itself formally in self-jurisdiction'.[730] The quintessential quality of bare sovereignty is 'the self-authorising gesture of a national community'.[731] With such immense power at its disposal, the period from 1910 to 1976 is considered the era of the 'institutionalization of apartheid',[732] which witnessed an 'ever-accelerating pace'[733] of discrimination in South Africa's laws. To Nader, law is responsible for 'a manipulation of institutions, ideologies and other parameters of power that blur differences between legal and illegal'.[734] Extrapolating on this premise is the assertion by Esterhuyse that 'since its inception in 1910 as an independent state on the African continent, South Africa has been the battlefield of competing political ideas, values and ideologies. This competition and conflict reflected the cultural, linguistic, ethnic … diversity of the country'.[735] Without explicitly mentioning law, albeit that law permeates all aspects of life,[736] he went on to state that 'these differences

[726] CG Weeramantry *Universalising International Law* (2004) 105.
[727] Pahuja *Decolonising International Law* 80.
[728] Klotz *Migration and National Identity* 40.
[729] Georges Abi-Saab 'Permanent Sovereignty over Natural Resources and Economic Activities' in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (1991) 598.
[730] Costas Douzinas 'The Metaphysics of Jurisdiction' in Shaun McVeigh (ed) *Jurisprudence of Jurisdiction* (2007) 22.
[731] Pahuja *Decolonising International Law* 122.
[732] Marais *South Africa in the Nineties* xiv.
[733] Marais *South Africa in the Nineties* xiii.
[734] Nader 'Law and the Frontiers of Illegalities' 69.
[735] Esterhuyse 'The normative dimension of future South Africa' 19.
[736] Nader, for example, at 69 states that the 'separation of law from politics, and law above politics, economics or personal values, is idealized. [But p]ractices belie the ideal or ideological'. What cannot be disputed are 'the political, economic, racist and sexist components of the law'.

stemmed from the distorted nature of the political, social and economic relations of power which existed in the country, and the normative political models buttressing these relations'.[737] Schlemmer maintains that sociological and political studies of South Africa 'point to apartheid having been caused by more basic factors' than 'some form of psychosocial pathology' or 'the so-called "mentality" of the Afrikaners, the "boers" or the "racist whites"'.[738] Confirming observations made earlier in this chapter, the empirical evidence reveals that apartheid was based on 'capitalist interests in regulating the behaviour and reproduction of black labour, economic and resource competition, ethnic and cultural norms of interest, and competitive nationalist aspirations among a section of whites'.[739] A succinct characterisation of apartheid South Africa is that it was a 'bureaucratic authoritarian state built on institutionalized racism [through] the legislated separation of races in order to ensure White supremacy, [causing] hyper-exploitation, and profound injustice'.[740] This separation was crystallised by the refusal to name all Africans as citizens; instead naming them 'migrants' and relegating them, by force, to ethnic Bantustans.[741]

As soon as South Africa became a Union, it commenced the process of consolidating the laws of its four provinces and advancing exclusionary and discriminatory measures against Africans. Section 147 of the South Africa Act of 1909 formalised the 'control and administration of Native Affairs' by the Governor-General-in-Council.[742] Thereafter, the Mines and Works Act, 12 of 1911 served to protect white labour by reserving specific positions for whites only. So too, the Native Labour Regulation Act, 15 of 1911 sought to 'prevent abuses [by African labour]' and ensure protection of the employee 'against breach of contract by Africans'.[743] Irrespective of the reason for apartheid, one of the many consequences was that 'the sheer controversy' of apartheid 'inculcated a high level of

[737] Esterhuyse 'The normative dimension of future South Africa' 19.
[738] Schlemmer 'South African society under stress' 2.
[739] Schlemmer 'South African society under stress' 2.
[740] Dugan Fraser & Patricia Rogers 'Is Government's Approach to Evaluation Deepening Democracy in South Africa?' in Donna Podems (ed) *Democratic Evaluation and Democracy: Exploring the Reality* (2017) 212.
[741] Klotz *Migration and National Identity* 6 quoting Evans *Bureaucracy and Race*; Deborah Posel *The Making of Apartheid, 1948-1961* (1977) and Jonathan Klaaren 'Citizenship, Xenophobic Violence, and Law's Dark Side' in Loren Landau (ed) *Exorcising the Demon Within: Xenophobia, Violence, and Statecraft in Contemporary South Africa* (2010).
[742] Horrell *Laws Affecting Race Relations* 21.
[743] Horrell *Laws Affecting Race Relations* 6-7.

poltical awareness in the population'.[744] The African National Congress (ANC) was consequently established in 1912. The ANC's establishment arose in pursuit of 'black resistance to the political system, and the ideas, principles and values underpinning the system'.[745] Ngcukaitobi thus frames the early ANC as an 'anti-colonial' movement having as its purpose to disrupt 'the consensus of the colonial state'.[746] Based on succeeding events, the struggle against subjugation of Africans would require greater intensification.

Following closely on the ANC's formation was the enactment of the 1913 Natives Land Act. The Natives Land Act withdrew all rights, such as 'owning land, renting, sharecropping' of African farmers in white rural areas, substituting this with legal residency and precarious land tenure in reserves.[747] The restrictions on land ownership had far-reaching consequences: it represented the methodical impoverishment of Africans to ensure a continuous supply of cheap labour in the mining industry.[748] It cannot be disputed that this legislation had 'a profound effect on the African population across the country [and was followed by] other legislation which further entrenched dispossession' and segregation.[749] Substantively, the Natives Land Act turned Africans who were outside of the designated reserves into 'internal migrants'. Africans immediately found themselves 'under the jurisdiction of rural chiefs and councils or urban "native" councils'. This measure prevented Africans from being able to protest the unfairness and illegitimacy of the oppressive laws passed.[750] Furthermore, in a calculated move to impede African education, only the 'missionary system' was permitted for African educational purposes.[751] While the laws were all discriminatory (in varying degree), what was envisaged was 'the near total legal exclusion of … immigrants, politically and physically'.[752] One method to achieve this purpose was the adoption of the Immigrants Regulation Act, 22 of 1913. This Act introduced the notion of 'foreign Africans' and obliged the passport control officer to declare a person a 'prohibited person' if they were unable to

[744] Schlemmer 'South African society under stress' 3.
[745] Esterhuyse 'The normative dimension of future South Africa' 19.
[746] Tembeka Ngcukaitobi *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018) 27.
[747] Klotz *Migration and National Identity* 128.
[748] Acemoglu & Robinson *Why Nations Fail* 264.
[749] 'The Natives Land Act of 1913' at *https://www.sahistory.org.za/topic/natives-land-act-1913*.
[750] Klotz *Migration and National Identity* 116.
[751] Klotz *Migration and National Identity* 116.
[752] Klotz *Migration and National Identity* 61.

produce an unexpired passport or identity document issued by the Minister.[753] In addition to constituting a criminal offence for a prohibited person to remain in the country, this law also expressly prohibited the naturalisation of foreign Africans.[754]

In 1917, the Imperial War Conference settled on the best method by which the Dominions would regulate immigration: each Dominion, Klotz claims, would 'enjoy complete control of the composition of its own population by means of restrictions on immigration from any of the other communities'. Described as 'vexatious catechisms from petty officials in the Dominions'[755] the impact of this policy on Africans would soon materialize.

Contrasting with the distinctly exclusionary domestic context, was South Africa's formal admission to the League of Nations in 1919. Significantly, Smuts is credited with having 'conceived the idea of the League of Nations'[756] while he was Prime Minister between 1919 and 1924. South Africa thus 'obtained "for all League purposes a definite position as, for these matters at least, [a] state of international law"'.[757] Preceding this event by a few months was South Africa's inclusion in the Paris Peace Conference of 1919, responsible for drafting the covenant for the League of Nations. Although a British Dominion, as a member of the British Empire, Smuts, who was Prime Minister at the time, was one of 'the main British representatives for the race equality negotiations'.[758] Since the process was initiated by the great powers of Western European origin, Japan – a great power on economic and military grounds – perceived that they were subject to racial prejudice and sought to ensure '[n]ot equality of all, but of the Japanese in relation to the Europeans[759] ["Western races"]'.[760] South Africa and the other four Dominions[761] were included to increase Britain's voting power in the League of Nations, and thus thwart Japan's proposal (and prevent a race war).[762] In a Foreign Office communiqué, the point was made that 'the

[753] Horrell *Law Affecting Race Relations* 189.
[754] Horrell *Laws Affecting Race Relations* 190.
[755] Klotz *Migration and National Identity* 121.
[756] Mayblin *Asylum after Empire* 118.
[757] Dugard *International Law* 18-9.
[758] Mayblin *Asylum after Empire* 100.
[759] Mayblin *Asylum after Empire* 93.
[760] Mayblin *Asylum after Empire* 104.
[761] Canada, Australia, New Zealand and India.
[762] Mayblin *Asylum after Empire* 104.

British Empire can exercise a stronger influence over the course of the present negotiations than any other of the Great Powers'.[763] The qualification 'for all League purposes' became relevant in 1920 when the mandate for South West Africa was conferred on South Africa, as a reward, after World War One. The result was that South Africa did obtain some, albeit vague, independent status due to South Africa remaining 'accountable' to the League of Nations for its administration of South West Africa.[764] Pivotal is the impact that German colonisation of South West Africa had on South Africa's own future trajectory. An appropriate description would be that German colonisation of South West Africa provided a 'template' that South Africa subsequently emulated. It is argued that South Africa was heavily influenced by the actions of the Germans in South West Africa. In particular, South Africa replicated the native ordinances – the pass laws specifically – in combination with other segregationist and exclusionist policies, such as the Immorality Act of 1927 during apartheid. Interestingly, and having a direct bearing on the xenophobia to which refugees in South Africa are subject, Bernhardi explains the idea of Germany's superiority and the need to colonise as self-preservation, by stating: 'the instinct of self-preservation leads inevitably to war, and the conquest of foreign soil. It is not the possessor, but the victor, who then has the right'.[765] Admittedly, refugees do not set out to engage in war, but the overwhelming need for self-preservation results in conflict between citizens and refugees when refugees arrive.

South Africa's conflicted and unclear position internationally was echoed domestically, in what was described as 'an awkward dualism' between the British and the Dutch, resulting in the Flag Crisis of 1920 relating to the hierarchy of flags and anthems.[766] It was the Imperial Conference of 1926, however, that resolved that South Africa (as a Dominion and in its relationship with Britain) was 'equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs'.[767] At the same time, the introduction of an international passport regime in the 1920s had a substantial impact on mobility across the world. Strict control of domestic borders ensued, and South Africa followed suit consistent

[763] Mayblin *Asylum after Empire* 100.
[764] Dugard *International Law* 18-9.
[765] Friedrich von Bernhardi *Germany and the Next War* (1914) 22.
[766] Welsh 'Can South Africa become a nation-state?' 566.
[767] Dugard *International Law* 75.

with its identity as a sovereign member of the international community.[768] Ironically, although the Balfour Declaration emanating from the Imperial Conference 'removed London's powers to disallow legislation adopted in the Dominions'.[769] Britian continued to hold the right to 'declare war on behalf of South Africa'.[770]

In terms of the development of South Africa in international law terms, in spite of the formation of the Union of South Africa in 1910, the Colonial Laws Validity Act still prevailed. Thus, the Imperial British Government not only continued to determine and administer South Africa's foreign policy, but Parliament also continued to be 'subject to the authority of Westminster'.[771] However, the repeal of the Colonial Laws Validity Act by the Statute of Westminster in 1931 is described by Dugard as a defining moment because henceforth, 'it was clear beyond all doubt that South Africa was a sovereign independent state, a full subject of international law'.[772] It is particularly pertinent to emphasise that 'neither the League of Nations nor any state raised objections to South Africa's racial policies when it became an independent member of the community of states'.[773]

Ironically, with white supremacy based on racial hierarchy as his premise, Smuts is described as the 'architect of white settler nationalism and advocate of racial segregation'[774] yet Smuts had curated an 'international reputation as a leading advocate for liberal internationalism'.[775] In particular, in 1927, South Africa established a Department of Foreign Affairs,[776] accentuating South Africa's desire to participate as a member of the international community while disregarding internationally accepted norms domestically. Relevant is Smuts' portrayal of 'the black African' in 1929, in the following terms:

> It has largely remained a child type, with a child psychology and outlook. A child-like human cannot be a bad human … the African easily forgets past troubles and does not anticipate

[768] Klotz *Migration and National Identity* 122.
[769] Klotz *Migration and National Identity* 109.
[770] Dugard *International Law* 76.
[771] Dugard *International Law* 18.
[772] Dugard *International Law* 19.
[773] Klotz *Migration and National Identity* 78.
[774] Mayblin *Asylum after Empire* 118.
[775] Klotz *Migration and National Identity* 110 quoting Mark Mazower *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009) ch 1.
[776] Klotz *Migration and National Identity* 122.

> future troubles. This happy-go-lucky disposition is a great asset, but it also has its drawbacks. There is no inward incentive to improvement.[777]

Confirming that South Africa's internal political situation had no impact on its relations with the international community, South Africa attended the San Francisco conference that established the UN in April 1945 and was one of the original signatories to the UN Charter.[778] Smuts was (once again) South Africa's Prime Minister when the Charter of the United Nations was drafted. Crucially, he wrote the Preamble that was received with 'widespread political acclaim'.[779] At first glance, Smuts' Preamble to the UN Charter conveys a change in disposition. The Preamble commits states to promoting justice and freedom and reaffirming faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women. It did not, however. For both Smuts and the entire UN, colonialism was not a violation of fundamental human rights.[780] By signing the UN Charter South Africa was unambiguously elevated to a 'civilized nation' notwithstanding its internal policies. Authority for this view is the wording of section 38(1)(c) of the Statute of the International Court of Justice,[781] providing that 'a source of international law is the general principles of law recognized by civilized nations'. Juxtaposed against this development was the establishment of the Department of Native Affairs and a Commissioner for Immigration and Asiatic Affairs that unashamedly denied rights to Africans,[782] by among other things, introducing pass laws to ensure that African urbanisation was kept to a minimum.

Therefore, South Africa's colonial history outlined above, in combination with such events as the adoption of the Natives Land Act of 1913, illustrates that South Africa has a 'long history of official attempts to manipulate an imposed "ethnicity" for purposes of maintaining domination' and segregation.[783] Ethnicity, confirms Klotz, 'dominated the search for a common South Africa[n] nationalism among whites'.[784] For instance, Calpin's book *There are no South Africans* published in 1941 lays bare the irony that white people in South Africa

[777] Jan Smuts *Toward a Better World* (1944) 39.
[778] Klotz *Migration and National Identity* 85; Pahuja *Decolonising International Law* 12-13.
[779] Mayblin *Asylum after Empire* 119.
[780] Mayblin *Asylum after Empire* 119.
[781] Statute of the International Court of Justice SATS 6 (1945).
[782] Dugard *International Law* 122.
[783] Welsh 'Can South Africa become a nation-state?' 562.
[784] Klotz *Migration and National Identity* 111-2.

simultaneously rejected social cohesion, and enforced it. Calpin demonstrates this by describing the strained relationship between English and Afrikaans-speaking (white) persons, not too long after the Anglo-Boer War:

> The child of the Afrikaner is educated in an Afrikaner-medium school, the child of the Englishman in an English-medium school. … The educational system merely accentuates the differences already too well established in the home. The consciousness of *racial* difference, even of the ends to be achieved, is […] settled in early youth and seldom […] erased from the minds (own emphasis).[785]

Calpin's view must be contrasted against Burgis' *The Looting Machine* that illustrates how, despite their own differences, white South Africans acted in concert to exclude black South Africans from the state's resources:

> From the country's birth, South Africa's white rulers relied on income from exports of minerals, primarily gold. In 1912, the year when the … ANC was formed to press for black rights, gold and diamonds accounted for 78 per cent of exports. Manufacturing developed, but throughout the apartheid decades South Africa remained a resource economy. The relationship between the English-speaking tycoons who controlled the biggest mining companies and the Afrikaner politicians who ran the apartheid system was at times uneasy, but they reached an accommodation that kept racist rule in place and secured the flow of cheap black labour to the mines.[786]

The National Party rose to power in 1948. This moment was a turning point in South Africa's oppressive history. If racial discrimination against black South Africans had ever been in doubt before, this event put paid to that doubt. Following the 1948 British Nationality Act, South Africa adopted the 1949 Citizenship Act. This Act altered the term 'citizen' to 'Union National', which had the effect of permitting the citizens of Britain and other Dominions to acquire South African nationality by way of registration.[787] Nationality was substantively different from citizenship in that citizenship was extremely difficult to obtain as it involved proof of extended residency. A distinctly racist colour bar operated in the Transvaal and the Orange Free State.[788]

By the 1950s, white solidarity was fostered by a 'sharpening racial divide'.[789] Indeed, Apartheid legislation, the 1950 Population Registration Act and the 1951 Group Areas Act

[785] George Calpin *There are no South Africans* (1941) 22.
[786] Burgis *The Looting Machine* 210.
[787] Klotz *Migration and National Identity* 123.
[788] Klotz *Migration and National Identity* 124.
[789] Klotz *Migration and National Identity* 112.

– the 'cornerstones' of apartheid policy – sought to segregate all aspects of South African life along racial lines so that South Africans could 'develop separately'. The Group Areas Act specifically prevented non-white South Africans from owning property and severely restricted their free movement within the state, given that it was passed for purposes of regulating the labour of black South Africans. For its part, the Population Registration Act 30 of 1950 developed specific race categories. In terms of this legislation, one was either 'White', 'Native', or 'Coloured'. 'Indian' was a sub-category of 'Coloured'.[790] It is indisputable that the concepts of race and ethnicity were emphasised to entrench segregation.[791] Essentially, states Welsh, ethnicity is neither material nor economic. Welsh relies on Weber's interpretation that the sense of ethnic identity relates closely to honour (self-esteem).[792] For this reason, 'the most galling aspect of apartheid for blacks' asserts Welsh, '[was not] so much the poverty, regimentation and poor education to which they were subject – though these were bad enough – as the imputation of inferiority that necessarily underlay the policy'.[793] Paradoxically, the Suppression of Communism Act, 44 of 1950 defined 'the encouragement of feelings of hostility between the European and the Non-European races of the Union' as one of the aims of communism,[794] conveying the perspective that blacks constituted 'the main threat to social stability'.[795] The purpose of the Suppression of Communism Act was to declare 'communist' organisations unlawful and ban that organisation as well as every member of the organisation. Although the apartheid government made the glaring error of confusing communism and liberalism,[796] every person (black and white) seeking political, social and economic change in South Africa faced the inevitable prospect of arrest and detention for contravening the Suppression of Communism Act. Consequently, exile was resorted to in order to further the struggle for reform in South Africa, from a safe distance.[797] Conciding with this development, beginning in 1951, the National Party no longer used the category 'Native', opting instead to use

[790] Horrell *Laws Affecting Race Relations* 16-9.
[791] Chandia & Hart 'An alien in the country of my birth' 30.
[792] Welsh 'Can South Africa become a nation-state?' 556.
[793] Welsh 'Can South Africa become a nation-state?' 556.
[794] Horrell *Laws Affecting Race Relations* 413 citing para (d) of the definition of Communism in the Act.
[795] Klotz *Migration and National Idenity* 35.
[796] Horrell *Law Affecting Race Relations* 413.
[797] Loren Landau 'Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy' (2006) 19 *Journal of Refugee Studies* 312.

'Bantu'.[798] The irony is that the use of the word abantu (plural of bantu) literally interpreted means that only blacks are persons. Claassens explains that 'the word abantu is a personification of the quality ubuntu – meaning human behaviour, compassion, humanity'. Poignantly, she remarks: '[i]t is however not all that surprising [that] whites have used the word "Bantu" to mean "Black people" … there has been a terrible shortage of ubuntu in white people's behaviour towards blacks'.[799]

The government seized upon the flight of supposed communists from South Africa in order to pursue their objective of eliminating political challengers to the regime. Thus, the orchestrated targeting of politicized individuals was achieved through the administration of the provisions of the Departure from the Union Regulation Act 34 of 1955. According to this legislation, it became a criminal offence for any person to depart from South Africa without a passport or equivalent travel document. Dugard captured the significance of this law for purposes of excluding Africans when he wrote:

> A person who is refused a passport may be given an "exit permit" and this shall be given to such a person if he satisfies the Secretary of the Interior that he intends to leave the country permanently. He does, however, forfeit his citizenship and thus becomes a stateless person under international law. If he returns he is deemed to have left South Africa without a permit and is subject to the penalty for unlawful departure, that is imprisonment for not less than three months and not more than two years.[800]

Therefore, the tension between white South Africans as described by Calpin, was completely overshadowed by the categoric distinction between white and black South Africans and the discrimination and oppression suffered by black South Africans. Referring to South Africa during the fifties and sixties, Bekker states that a description usually used to explain South Africa is 'an Afrikaner state'. What this meant was that

> the Afrikaner nationalist movement used state power to reward its Afrikaner followers. This state of affairs led to the notion of an ethnic state, a state within which 'cultural or racial outsiders are not merely excluded from the rewards of power, but their very existence is ignored'.[801]

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[798] Zimitri Erasmus 'Apartheid race categories: daring to question their continued use' (2012) 79 *Transformation* 1.
[799] Aninka Claassens 'People and Whites' (1986) 28(4) *The Black Sash* 18.
[800] Dugard *Human Rights and the South African Legal Order* 142.
[801] Simon Bekker 'Constitutional negotiations in the nineties: A framework for analysis' in *South Africa in the Nineties* 173-4.

For this reason, for over forty years, claims Dugard, the UN dedicated considerable attention to South Africa's racial policies and devoted more attention to persuading and coercing South Africa to abandon apartheid 'than to any other single item on their agenda'.[802] The General Assembly first raised the issue of the apartheid policy in 1952. This was the same year that the government enacted an extremely strict law requiring every African male over 16 years of age to carry what was termed a reference book ('a dompas' or pass), so that it could be determined whether he belonged in the white areas. The issue of apartheid also appeared on the General Assembly's agenda every year thereafter, until 1994, with a number of resolutions being adopted imploring South Africa to revise its racial policies.[803]

The 1955 case of *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, relating to 'South Africa's failure to respond to General Assembly resolutions on South West Africa' (which South Africa was still administering), provides evidence of South Africa's apparent disdain for compliance with the law and proved that South Africa had no intention of relinquishing its racist policies, even if it meant being ousted from the UN as a consequence. The International Court of Justice, per Lauterpacht, held that

> a state which consistently sets itself above the solemnly and repeatedly expressed judgment of the [United Nations] Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and tht it has exposed itself to consequences legitimately following as a legal sanction.[804]

At home, the Native (Bantu) Labour Regulations instrumentalized the control of movement and exclusion of Africans. All urban areas were declared 'proclaimed areas' and were restricted for whites only, unless 'special exemption' had been granted to an African.[805] An underlying purpose of this management of migration was to ensure labour for the mines. All unemployed African men between the ages of 16 and 64 were obliged to register at a

[802] Dugard *International Law* 394.
[803] Dugard *International Law* 398.
[804] *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa* 1955 ICJ Report 67.
[805] Horrell *Laws Affecting Race Relations* 248.

local employment bureau that informed them of vacancies for which they were eligible.[806] The Witwatersrand Native Labour Association (later termed The Employment Bureau of Africa), a subsidiary of the Native Affairs Commissioner, implemented this Act by recruiting African miners from throughout the region (including neighbouring states, such as Mozambique and Lesotho) and transporting the miners to and from the mines.[807]

Responding to the legislatively imposed deprivation, domination, dehumanisation and subjugation inflicted on black South Africans, the ANC adopted the Freedom Charter on 16 June 1955. The preamble declares 'that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people'.[808] Esterhuyse states that the adoption of the Freedom Charter 'marked a turning point in the history of black resistance'. Not only did it clearly symbolize the blatant 'rejection of the political system and its legitimizing values, but also articulated the normative model supported by a vast majority of blacks'.[809] Esterhuyse highlights that the pre-democratic era was essentially 'based on the normative idea of (racial) group self-determination'. Thus, nation building was addressed from the 'normative perspective of ethnic nationalism, creating a major area of conflict'.[810] Quoting Fisher, Shahabuddin defines conflict as 'a relationship between two or more parties who have … incompatible goals', that invariably arise from 'imbalances in social, economic, or power relations, for such imbalances lead to problems such as discrimination, unemployment, poverty, oppression, and many more'. This conflict plays out either as a process of 'constructive change or destructive violence'.[811]

Abel confirms the destructive violence of apartheid's law. He admits that 'law was not the rule and violence the exception; rather, law became the continuation of violence by other means'.[812] As pressure against it increased, the apartheid regime 'substituted power with

[806] Horrell *Laws Affecting Race Relations* 248.
[807] Klotz *Migration and National Identity* 130.
[808] Welsh 'Can South Africa become a nation-state?' 562.
[809] Esterhuyse 'The normative dimension of future South Africa' 19.
[810] Esterhuyse 'The normative dimension of future South Africa' 21-2.
[811] Shahabuddin *Ethnicity and International Law* 180 quoting Simon Fisher 'Understanding Conflict: Towards a Conceptual Framework' in *Working with Conflict: Skills and Strategies for Action* (2000) 4.
[812] Abel *Politics by Other Means* 540.

violence'.[813] The violence of colonialism and apartheid, as already stated, was not only physical; it was also institutional and structural. The Sharpeville Massacre illustrates the physical violence of apartheid. Accounts record that on 21 March 1960, protesters chanting freedom songs and calling out campaign slogans such as *Izwe lethu* (Our land) and *Awaphele amapasti* (Down with passes), engaged in non-violent protest against the Pass Laws. At the Sharpeville Police Station, a policeman was accidently pushed over. The police claimed that protesters began to stone them. Consequently,

> without any warning, one of the policemen … panicked and opened fire. His colleagues followed suit and opened fire. The firing lasted for approximately two minutes, leaving 69 people dead and, according to the official inquest, 180 people seriously wounded.[814]

Following the massacre were widespread strikes, accompanied by the

> declaration of a state of emergency, and the banning of both the African National Congress (ANC) and the Pan Africanist Congress (PAC). Subsequently, these two organizations, together with other political organizations, abandoned their nonviolent strategies against apartheid for violent ones.[815]

A specific example of structural violence perpetrated by the apartheid government that was a direct affront to the essence of the Freedom Charter occurred in 1960. Although the Charter of the United Nations 'implicitly recognized the legitimacy of colonialism',[816] article 76(b) proclaimed 'development towards self-government or independence' while articles 1(2) and 55 affirmed the principle of "self-determination of peoples". Pursuant hereto, on 14 December 1960, by way of a General Assembly Resolution, the UN adopted Resolution 1514(XV): the Declaration on the Granting of Independence to Colonial Countries and Peoples.[817] Immediately, the UN denied the legitimacy of colonialism and sought to bring to a 'speedy and unconditional end colonialism in all its forms and manifestations'.[818] Not surprisingly, South Africa was one of the nine states that abstained from the vote.[819]

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[813] Christian Gade *A Discourse on African Philosophy: A New Perspective on Ubuntu and Transitional Justice in South Africa* (2017) 14.
[814] 'Sharpeville Massacre, 21 March 1960' at *https://www.sahistory.org.za/topic/sharpeville-massacre-21-march-1960*.
[815] Gade *A Discourse on African Philosophy* 14.
[816] Dugard *International Law* 85.
[817] GA Res 1514 (XV), UN GAOR, 15th session, 947th plenary meeting, UN Doc A/RES/1514 (XV) (14 September 1960).
[818] Dugard *International Law* 86.
[819] Pahuja *Decolonising International Law* 81.

Therefore, the apartheid state violated its obligations as a member of the UN given that the 1960 Declaration on the Granting of Independence called for

> immediate steps to be taken … for the transfer of all powers to the peoples … without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order for them to enjoy complete … freedom.[820]

Certainly as a direct consequence of the 1960 Declaration on the Granting of Independence, 31 May 1961 was a significant moment in that it was on this date that South Africa declared its independence from the British Emprire and became a republic.[821] Following soon after was South Africa's accession to the Commonwealth, which served South Africa's interests because the 1962 Commonwealth Relations Act stopped free trans-border movement into South Africa,[822] reinforcing South Africa's anti-migration stance. In addition, this Act brought an end to simple registration as a method of obtaining South African nationality. It also restricted dual nationality.[823]

With its newfound independence, South Africa completely disregarded the content of the Declaration on the Granting of Independence, compelling the General Assembly to adopt a far-reaching resolution in 1962. Resolution 1761(XVII) requested all member states to:

> Break off or refrain from establishing diplomatic relations with South Africa; close their ports to all vessels flying the South African flag; enact legislation prohibiting their ships from entering South African ports; boycott all South African goods and refrain from exporting goods, including arms and ammunition, to South Africa; … refuse landing and passage facilities to all South African aircraft, suspend cultural, educational and sporting exchanges with South Africa.[824]

By this stage the South African state had already proven its contempt for the rule of law by violating the 1960 Declaration on the Granting of Independence. Interestingly, as a form of panacea to the problem of poor compliance, Henkin[825] argues states may be incentivised to comply with rules of international law if there is substantial opposing state interest.[826] Yet, the extraordinary amount of pressure that was placed on South Africa to abandon its

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[820] Dugard *International Law* 86.
[821] Klotz *Migration and National Identity* 35.
[822] O'Brien & Reiss 'Context, Challenges, Constraints and Strategies' 3429.
[823] Klotz *Migration and National Identity Africa* 123 at footnote 24.
[824] Dugard *International Law* 398-9.
[825] Louis Henkin *How Nations Behave* 2 ed (1979) 47.
[826] Henkin *How Nations Behave* 47.

policy of apartheid, an internal policy, serves as an example that compliance is not wholly dependent on opposing state interest.

Explicitly invoking the situation in South Africa, the UN General Assembly included the right to self-determination in Resolution 2625(XXV) of 1970, being the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN.[827] Self-determination was defined with specific reference to 'colonialism, alien subjugation, domination and exploitation'.[828] Despite the clarion call for bringing a decisive end to apartheid, South Africa persisted with its system of maintaining racial exclusion and domination. Moreover, South Africa exhibited 'a general climate of unaccountability and secretive control' and a 'profoundly opaque approach to policymaking and public service provision'.[829] For example, in 1969 the South African government 'invoked "general government policy" (presumably grand apartheid) in respect of forced removals of blacks'[830] into arid "independent" homelands (Bantustans)[831] where the white government would not be responsible for the welfare of the people there, dubiously invoking the "public interest" as its rationale.[832] Indeed, at the height of apartheid, South Africans who had the "audacity" to live outside of the "designated" homeland to which they were relegated, acquired the label of "alien" in the country of their birth. It was the law itself that reinforced this label: a registered pass (the notorious "dompas")[833] qualified the "alien" as outside of their designated residential area, albeit with a restricted right to remain. Ironically, even within the homelands, some South Africans were called *makwerekwere* (meaning babbler or barbarian).[834]

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[827] Dugard *International Law* 122.
[828] Dugard *International Law* 92-5 refers to the definition of internal self-determination as elaborated by Antonio Cassese in *Self-Determination of Peoples: A Legal Appraisal* (1995) 119-121, who provides that the peoples within an existing state acquire the 'right to choose their own political status, to freely pursue their economic, social and cultural development, and to choose and participate in the government of the state'.
[829] Fraser & Rogers 'Is Government's Approach Deepening Democracy?' 214.
[830] Abel *Politics By Other Means* 424.
[831] These homelands were the Transkei, Bophuthatswana, Venda and Ciskei, although [separate] territorial authorities were also established in Gazankulu, Lebowa, Qwaqwa and KwaZulu.
[832] Abel *Politics By Other Means* 424.
[833] Chandia & Hart 'An alien in the country of my birth' 30.
[834] Owen Sichone 'Xenophobia' in Nick Shepherd & Steven Robins (eds) *New South African Keywords* (2008) 255.

Historical cleavages relating to ethnicity, culture, religion, language and values permeated every aspect of South African society, and had a decisive impact on group solidarity.[835] For example, 'voting patterns [were] influenced by these factors [and] in the narrow democracy of whites no English-speaking white South African stood a fair chance of being prime minister or president'.[836] As Bekker contends, [b]y the early 1970s South Africa was 'fused to an Afrikaner nationalist government',[837] with clear – and hierarchical – divisions between ethnic groups. Nehusi draws the sound conclusion that this legacy of racial stratification, formed over '[c]enturies of emphasis on division, promotion of disunity … dis-empowerment, exclusion, domination and exploitation'[838] has done considerable damage to the prospect of social cohesion for South Africa.

There can be no denying that apartheid laws constituted 'structural exclusion' and 'xenophobic culture'[839] all reinforced by bureaucrats appointed by the authoritarian regime. As Ginsburg explains: 'a typical configuration [of administrative law in authoritarian regimes] involves loosely drafted statutes, under which bureaucrats exercise a good deal of discretion, subject to political rather than legal oversight'.[840] Violation of the rule of law is endemic, invariably with impunity. This repugnant attitude caught up with South Africa eventually, for despite South Africa having succeeded in becoming a member of the UN in 1945, in 1974, South Africa was 'excluded from participation in the debates and work of the General Assembly … as a result of its racial policies'.[841] Specifically, the Credentials Committee of the Assembly found that 'the National Party government did not represent the state of South Africa'.[842]

Notwithstanding the deeply persecutory status of South Africa at the time, however, Angolans and Mozambicans who had been persecuted during the civil wars in their own

[835] Omar 'The inadequacy of the political system' 129.
[836] Omar 'The inadequacy of the political system' 129.
[837] Bekker 'Constitutional negotiation in the nineties' 174.
[838] Nehusi 'Language in the construction of "Afrikan" unity' 231.
[839] Chandia & Hart 'An alien in the country of my birth' 31.
[840] Ginsburg 'The politics of courts in democratization' 183.
[841] Dugard *International Law* 395. Dugard states that South Africa was only saved from expulsion by the vetoes of Britain, France and the United States.
[842] Dugard *International Law* 395.

states sought refuge in South Africa and received protection from the UNHCR.[843] At that time, South Africa was not a signatory to any international legal treaty concerning the protection of refugees. d'Orsi explains that South Africa also had no 'municipal law specifically regulating the position and the treatment of refugees in the country' at the time.[844] Nyerere would argue that (black) South Africans regarded these Angolans and Mozambicans as 'human beings' and 'members of an extended family' according to the doctrine of a true African socialist who 'does not consider one class of men as his "brethren" and another as his enemies'.[845] As Sachs elaborates

> during the late period of minority racist rule, tens of thousands of South African fled across our borders into neighbouring states. Few had documents or anything more than a change of clothing, if even that. They were well received and sheltered, and treated with humanity by many African states, who frequently paid a heavy price in lives and blood for fulfilling their international responsibilities.[846]

Illustrative of South Africa's disregard for the rights of refugees, in the apartheid government's quest to maintain power, South Africa routinely carried out military operations in states where South African refugees had sought protection so that those states hosting refugees would themselves be destabilized; hoping to eliminate the 'communist enemy' within those states.[847] Politically, the National Party continued to be 'dominated by and bound to the rights of groups compulsorily defined along strictly racial lines'.[848] Confirming the exclusionary nature of this stance was the declaration by John Vorster in October 1975 that 'as far as this Parliament is concerned, the whites of South Africa only, in terms of the policy I believe in, will be represented'.[849] However, by 1975 the demise of apartheid was already becoming clear, resulting in turmoil in Afrikaner thinking. Seeking an exit that would allow the continuation of Afrikaner nationalism, the Afrikaner Volkswag, the Afrikaner Weerstandbeweging and the Oranjewerkers retreated into secessionist thinking. Together,

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[843] d'Orsi *Asylum-Seeker and Refugee Protection* 158 quoting Gil Loescher, Alexander Betts & James Milner *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the Twenty-First Century* (2008) 31.
[844] d'Orsi *Asylum-Seeker and Refugee Protection* 158 quoting John Faris 'The Angolan refugees and South Africa' (1976) 2 *South African Yearbook of International Law* 177.
[845] Nyerere *Freedom and Unity* 170.
[846] Albie Sachs 'From refugee to judge of refugee law' in *Critical Issues in International Refugee Law* 54.
[847] Bonaventure Rutinwa 'The End of Asylum in Africa?' *UNHCR Refugee Research Working Paper Series No 5* (1996) 18.
[848] Omar 'The inadequacy of the political system' 110.
[849] Omar 'The inadequacy of the political system' 105.

they 'sought to identify territory in which they would be an exclusive Afrikaner majority[where] even English-speaking South Africans were to be excluded from their "volkstaat"'.[850]

6. The fourth moment: The protracted demise of apartheid (1976 - 1989)

International legal instruments, such as the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973,[851] were invoked to substantiate that apartheid was a crime against humanity and 'to expose the barbarity … of the apartheid system of governance [so as to] push for its eradication'.[852] Aligned with the increasing pressure exerted on the apartheid government, these efforts eventually began to pay off. The protracted 'demise of apartheid', registers Marais, commenced in 1976 although it only started coming to fruition in 1988. These 'tragically wasted years' were caused by such things as the failure of the National Party government to repeal the Group Areas Act, the Natives (Land) Act and the Population Registration Act, described cumulatively as the legislative 'pillars of apartheid'.[853] Perhaps more accurately, the process can be described as unnecessarily protracted because 'PW Botha was caught in the present between the past and the future of his tribe, the Afrikaner'.[854]

Nonetheless, 1976 is considered an apex moment, because by this time, the 'decades of authoritarian control over blacks by the white government and the curtailment of political activity produced a culture of militant anti-system protest' that had become 'a common response to grievances for a decade and a half'.[855] For those Africans that remained in South Africa to pursue the struggle for freedom, the ANC mobilized township populations in order to 'create pressure on government for capitulation or change'.[856] Simultaneously, at the international level, the UN Security Council continued to target South Africa's apartheid policies. The adoption of the International Convention on the Suppression and Punishment

[850] Omar 'The inadequacy of the political system' 109.
[851] UN General Assembly resolution 3068 (XXVIII) of 30 November 1973, 28 UN GAOR Supplement (No 30) at 75, UN Doc A/9030 (1974) 1015 UNTS 243. The Convention entered into force on 18 July 1976.
[852] *Law Society of South Africa v President of the Republic of South Africa (South Africa Litigation Centre and Centre for Applied Legal Studies as Amicus Curiae)* [2018] ZACC 51 para 4.
[853] Marais *South Africa in the Nineties* xiv.
[854] Omar 'The inadequacy of the political system' 103.
[855] Schlemmer 'South African society under stress' 3.
[856] Schlemmer 'South African society under stress' 3.

of the Crime of Apartheid in 1973 was followed by the imposition of sanctions and a mandatory arms embargo in 1977. The latter was in relation to South Africa's 'discriminatory and repressive laws and practices and its acts of aggression against neighbouring states'.[857] This mobilization had a "snowball" effect: it increased politicization; fomented 'conflict within the unenfranchised communities … sharpen[ing] political awareness even further'. [858] Mobilization provoked the beginning of a number of legislative reforms in the late 1970s that 'progressively removed formal barriers to black occupational advancement'.[859]

PW Botha was aware of the illegitimacy of the apartheid system, when he stated in 1983 that: 'we must govern ourselves into a new dispensation'.[860] However, the Constitution of South Africa, Act 110 of 1983 epitomised the government's nefarious intentions with respect to suppressing political pressure while simultaneously maintaining power. In this regard, when the NP became aware that its policies conflicted with the provisions of the 1983 Constitution, it 'transferred large chunks of power to the administrative bureaucracy in order to neutralize areas of policy conflict without losing control', thereby blurring the distinction between political power and administrative function. [861] The bureaucracy inevitably became bloated, vesting officialdom with so much power that any checks and balances simply disappeared. The result was a marked 'decline in the standard of good governance, as was evidenced by the spate of investigations into corrupt practices'.[862] To be clear, during apartheid 'two of white South Africa's proudest boasts [were] a free press and the rule of law'.[863] But Dyzenhaus unravelled the latter claim by proving that when deliberating on matters, courts applied the law in a positivist and neutral manner, regardless of its immoral character.[864] As such, the evidence shows that 'South Africa preserved the rule of law by eviscerating it'.[865] Indeed, Abel sums it up thus: 'the rule of law was form

[857] Resolution 418 (1977) as quoted in Dugard *International Law* 7.
[858] Schlemmer 'South African society under stress' 3.
[859] Schlemmer 'South African society under stress' 5.
[860] Omar 'The inadequacy of the political system'. 104.
[861] Omar 'The inadequacy of the political system' 119.
[862] Omar 'The inadequacy of the political system' 120.
[863] Abel *Politics By Other Means* 303.
[864] David Dyzenhaus *Hard Cases in Wicked Legal Systems* (1991).
[865] Abel *Politics By Other Means* 307.

without content':[866] when tested, it was found 'empty'[867] and without substance. Indeed, the 1983 Constitution included political values that are recognized in democracies, such as 'individual franchise, rule of law, accountability to electorates', but it was enforced in the 'context of continuing state action to maintain law and order through strict security measures'.[868] The apartheid policy was distinctly authoritarian, with a very narrow and unconstrained distribution of power; the antinomy of inclusive political institutions.[869] State security was the 'primary policy objective'[870] instrumentalized through the National Security Management System (NSMS). Created in 1979, during the 1985 and 1986 states of emergency, the NSMS, through its 'military reformers or "securocrats" put a carefully worked out counter-revolutionary programme into operation'. Actually, the NSMS was responsible for 'oppression ("control" as it was called by the state) which included wiping out resistance organizations and countering subversion', says Kotzé.[871] Characterising the NSMS was

> a movement away from control by and accountability to Parliament. Wide discressionary (sic) powers were granted to government officials [and] press restrictions, mass detentions without trial and restrictions on resistance organizations could take place without the relevant legislation being discussed in Parliament.[872]

The contradictory and paradoxical attitude of the apartheid government came to the fore however, when PW Botha said: 'We reject mixed political parties and power sharing'.[873] As Bekker remarks, in response, black political movements were compelled to adopt an 'extraconstitutional political culture [based on] the stance that full member participation in decision making is fundamental to democratic politics'.[874] Fundamentally, this strategy cohered with ubuntu ('a person is a person through other persons', expressed differently as 'one's humanity, one's person-hood is dependent upon one's relationships with others. … ubuntu is anti-individualism and pro-communalism').[875]

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[866] Abel *Politics By Other Means* 309.
[867] Abel *Politics By Other Means* 303.
[868] Bekker 'Constitutional negotiations in the nineties' 172.
[869] Acemoglu & Robinson *Why Nations Fail* 80.
[870] Hennie Kotzé 'Constrained policy making in South Africa: struggling with the legacy of apartheid' in *South Africa in the Nineties* 136.
[871] Kotzé 'Constrained policy making' 138.
[872] Kotzé 'Constrained policy making' 138.
[873] Omar 'The inadequacy of the political system' 105.
[874] Bekker 'Constitutional negotiations in the nineties' 172.
[875] Bekker 'Constitutional negotiations in the nineties' 172-3 quoting *Sunday Times* 27 November 1988.

Therefore, while the 1983 Constitution ostensibly brought about the 'formal constitutional rejection of … partitioning the country into a patchwork of African Balkan states, as distinct from an exclusively white South Africa',[876] in reality, it euphemistically sought to 'regulate competition by political parties over national political authority'.[877] This condundrum was evident after the 1983 Referendum which permitted coloured and Indian representation in Parliament although that it gave rise to the 'incongruity of "non-white" coloureds and Indians still precluded from sitting on white park benches whilst sitting alongside cabinet ministers on the benches of Parliament'.[878] Moreover, this fomented the belief that there was no 'moral justification for excluding Africans' from Parliament.[879] Even to those within government the perception created was that the Constitution

> broke tradition with the political philosophy that centred on the premise of white exclusivity in the political structures of South Africa. It put paid to the centuries-old notion, deeply rooted in the history of European colonialism, that white people were inherently superior and that there could be no equality between black and white, socially, economically or politically.[880]

Undeniably, apartheid resulted in massive oppression, inequality and extremely poverty, culminating in violence. One of the worst periods of violence since 1910 in South Africa occurred during the period September 1984 to November 1990, where Schlemmer and de Kock note that 'more than 5 700 people were killed in unrest and more than 14 200 had been injured in nearly 52 000 incidents of violent activity'.[881] Approximately 14 500 houses and buildings and 31 700 vehicles were damaged or destroyed.[882] Burgis relates the apartheid state in South Africa to what he terms the 'resource state' and illustrates how a state's rich resources operates, counterintuitively, as the root cause of poverty and inequality, just as Acemogulu and Robinson portray in *Why Nations Fail*. Providing an historical account, South Africa, Burgis makes clear 'is in many ways different from the continent's other resource states'. But the effects are the same. In fact, it is wealth from diamonds and gold that enabled apartheid's existence and facilitated the highest level of

[876] Omar 'The inadequacy of the political system' 102.
[877] Bekker 'Constitutional negotiations in the nineties' 172.
[878] Omar 'The inadequacy of the political system' 105.
[879] Omar 'The inadequacy of the political system' 108.
[880] Omar 'The inadequacy of the political system' 102-3. Omar was a Member of the President's Council.
[881] Schlemmer 'South African society under stress' 3; de Kock 'Violence as an option?' 39. Both Schlemmer and de Kock made it clear that while they were quoting official figures, these were likely an underestimate.
[882] de Kock 'Violence as an option?' 39 quoting *Sowetan* 26 April 1990 and remarking that the figures can be regarded as conservative.

'orchestrated subjugation of the majority' on the continent.[883] While race may appear at the forefront of South Africa's problems, it is 'the curse of natural resources'[884] that cannot be ignored, despite its economy being more sophisticated and the existence of stronger state institutions that have largely been able to withstand political manipulation. Explaining the curse of natural resources, Burgis states:

> Where there is an asymmetrical concentration of political and economic power, the resource economy on the African continent often falls prey to a narrow, extractionist elite whose outlook, despite its democratic pretensions, is feudal, and its behaviour more similar to old tribal chiefs than modern government. … white rule was an extreme manifestation of the resource state: the harnessing of a national endowment of mineral wealth to ensure the power and prosperity of the few while the rest are cast into penury and impotence.[885]

Schlemmer provides alarming statistics of socio-economic inequality in South Africa as a result of apartheid policy:

> despite the average black household income increase[ing] by 406 per cent (from R112 to R567 per month) between 1978 and 1988 and the consequence that black wage and salary increases outstripped those of whites by 142 per cent, in absolute terms, the income gap between whites and blacks widened by 239 per cent over the same period.[886] To illustrate this point, in 1986, social pensions provided by the state were R2 439 per beneficiary for whites and R899 for blacks.[887] For the financial year 1987/1988, the claimed monthly household income was R2 727 among whites and R567 among blacks.[888] Moreover, while R745 per month was the salary of a black industrial labourer, at the same time, the minimum budget for adequate survival of a family of five was R675 per month.[889] Furthermore, while blacks constituted 21 per cent of the formal labour force in 1988, the salaries that black people were earning then were commensurate with half of the salaries that whites in the same positions were earning![890] Blacks constituted no more than 13 per cent of the skilled workers in industry.[891]

Education, particularly the education of black South Africans, is an issue which both Kotzé and Schlemmer identified as being 'one of the most politicized social issues in South Africa'.[892] Providing an analysis of access to education, they revealed that in 1987 blacks

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[883] Burgis *The Looting Machine* 210.
[884] Burgis *The Looting Machine* 217.
[885] Burgis *The Looting Machine* 210-1. Burgis reveals that in 1970 South Africa produced approximately 62% of the gold mined globably. Between 1970 and 1993 South Africa's primary exports were diamonds, gold and other minerals that constituted between half and two thirds of South Africa's annual exports.
[886] Schlemmer 'South African society under stress' 5.
[887] Schlemmer 'South African society under stress' 4.
[888] Schlemmer 'South African society under stress' 4 citing the 'All Media Products Survey 1987/88'.
[889] Schlemmer 'South African society under stress' 6.
[890] Schlemmer 'South African society under stress' 7-8. Schlemmer quotes a *Business Day* article dated 26 September 1990, which attributes this to 'factors of supply and demand and lack of experience and educational background among blacks'.
[891] Schlemmer 'South African society under stress' 7-8.
[892] Kotzé 'Constrained policy making' 149.

constituted 53% 'of all pupils in the final year of secondary school' and that by 1989, this number had increased to 58%. However, only 16.4% of black pupils passed with the legal requirement for a bachelor's degree at university in 1988.[893] 'School unrest' resulted in a decline in the number of enrolments for 1989.[894] Without providing any further detail, Schlemmer comments that one factor impacting on education was 'pupil discipline'.[895] Based on the foregoing, by 1989 only 14% of the students at technikons; and 15% of students at technical colleges were blacks.[896] Although 32% of students at universities were black, this was 'dominantly in degree courses … less favourable in terms of employability'.[897] There is no dispute that the primary reason for these alarming statistics is the inferior quality of education provision for black pupils, compounded by 'a severe shortage of qualified teachers and of classroom accommodation'.[898] Kotzé put the figure at 450 000 new teachers required by the end of the twenty-first century.[899] Specific evidence of the intention to constrain or retard education for black pupils was that in 1988, expenditure per pupil for blacks was R595, compared with R2 722 for whites.[900] A direct correlation is thus made with higher grade maths and science, with only 1 to 2% of blacks passing these subjects.[901] In addition, compounding the poor prospects for black youth, throughout this time the leadership of the black (banned) political movements

> ran the ever-present danger of being detained … leaving the movement without effective leadership. This vacuum was often filled by youth leaders who had little experience and discipline.[902]

7. Conclusion

The transplant of laws and institutions from the colonial masters constitutes the 'poisoned chalice' bequeathed to South Africa. Empirically proven, the transplant effect is responsible for what is termed 'resistance' to compliance with the rule of law. Complicating that legacy

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[893] Schlemmer 'South African society under stress' 8.
[894] Schlemmer 'South African society under stress' 8.
[895] Schlemmer 'South African society under stress' 9.
[896] Schlemmer 'South African society under stress' 7.
[897] Schlemmer 'South African society under stress' 8.
[898] Schlemmer 'South African society under stress' 9.
[899] Kotzé 'Constrained policy making' 150.
[900] Schlemmer 'South African society under stress' 9.
[901] Schlemmer 'South African society under stress' 8.
[902] Bekker 'Constitutional negotiations in the nineties' 173.

is the warning conveyed in the chapter that we need to maintain perspective about the memory of colonialism and apartheid in order to prevent a repetition of the mistakes made during those moments. In particular, the mistakes that must be avoided are the continued use of racial classification to segregate and differentiate between groups of people, at the expense of national unity and to perpetuate paranoia and distrust by securitising the state. This is especially necessary for purposes of the protection of refugees who are viewed with suspicion and deemed not to 'belong' within an already deeply stratified, fragmented and divided society. Specifically, the disregard which the apartheid government had for the rights of refugees by continuing to deliberately persecute them in their host states is a lesson that should inform the protection by South Africa of refugees in the present.

What this chapter has highlighted is the contradictions and inconsistencies that epitomised the South African state: South Africa played a leading role in the establishment of both the League of Nations and its successor, the United Nations, yet it displayed contempt for these institutions, particularly the United Nations, resulting in its eventual expulsion therefrom. Despite the fundamental change in political system in South Africa, one is inclined to draw on this precedent by forming the impression that South Africa has invoked its sovereignty to challenge decisions that it does not agree with, and thus, there is an inherent proclivity for such conduct, notwithstanding significant pressure to conform.

CHAPTER FOUR
SOUTH AFRICA AT A CRITICAL JUNCTURE

1. Introduction

The historical background provided in Chapter Three juxtaposes colonialism and apartheid – the primary protagonists of subjugation, domination and exclusion of the majority of its citizens – against South Africa's impending transition to democracy. The analysis of South Africa's socio-political transformation resumes as at circa 1988 given that by this stage negotiations towards democracy were already well under way and the Interim Constitution Act 200 of 1993 was soon to be drafted. This is a significant time-frame as it was the precursor to the first democratic elections held in 1994. Indeed, 27 April 1994 symbolised what was intended to characterise the decisive break with the past and was also the date upon which South Africa's Interim Constitution became operative. Considering that the Interim Constitution was, as its name suggests, merely an interim instrument to drive the process of transformation, this chapter also engages with the adoption and entry into force of the Constitution of the Republic of South Africa, 1996, being the final Constitution, which entered into force on 4 February 1997.

There can be no disputing that sustained international pressure on South Africa played an important role in South Africa's radical shift. The renowned international law expert, Brownlie, asserts that '… in Africa … the removal of foreign political domination has left the successor states with a long agenda of unsettled problems, legal and political'.[903] Although the statement was made with specific reference to the arbitrary boundaries that had been drawn, Brownlie's argument is also a cogent explanation of the consequences of colonisation on the people both within and outside of the successor states. Of seminal importance is the effect that colonisation has on the formulation of the subsequent 'political culture' of a country. Therefore, to state that South Africa's transition from decades of oppression would be difficult is an extreme understatement. Compromises were inevitable from all sides. Therefore, this chapter commences with an articulation of the numerous

[903] Dugard *International Law* 113 citing Ian Brownlie *Principles of Public International Law* 5 ed (1998) 125.

complex domestic determinants that resulted in South Africa prioritising democratisation over decolonisation. The purpose underlying the present chapter is to establish the relevance and/or effectiveness of the theory of postcolonialism in a state such as South Africa, which, I argue, was compelled to prioritize democratization at the expense of decolonisation. With this perspective in mind, the purpose of the present chapter is to provide a cogent explanation of the type of state that South Africa sought to become; the factors impacting that choice; and the likely consequences that this type of state has on the ability of the state to comply with the rule of law.

2. Transformation in the face of 'insurmountable' legacies

The adoption of the Promotion of Constitutional Development Act of 1988 brought with it debate on the question of constitutional rights for all South Africans – both black and white, facilitating 'participation by all South Africans in the planning and preparation of a new constitutional dispensation'.[904] Even more than the introduction of the 1983 Constitution, this signalled the 'turning point in … South African history'. However, Omar admits, instead of eliciting enthusiasim, 'a climate of unprecedented political instability resulted' in South Africa's black communities.[905] The reason for this is not difficult to fathom: a history of domination and subjugation has had a fundamental impact on the psyche of black South Africans. The promise of 'freedom' inevitably gave rise to an urgency for results, which manifested in the release of energy in violent ways. As Bekker put it: 'The prospect of negotiations … induced a surge of excitement, a wave of violence, a spiraling anxiety. The situation is fluid and fraught with uncertainty'.[906] This description is consistent with Tazreiter's view that violence 'comes to be the end result of systems of symbolic power which are held in place most effectively through covert means, rather than tangible acts of force'.[907] Synonymous with what Fanon and others have argued, that dehumanisation, domination and subjugation were forms of violence for which the only logical response is violence as a defence mechanism, de Kock submits that there are 'conditions for violence

[904] DJ van Vuuren & JA du Pisanie 'Constitutional options' in *South Africa in the Nineties* 190.
[905] Omar 'The inadequacy of the political system' 102.
[906] Bekker 'Constitutional negotiatons in the nineties' 169.
[907] Tazreiter *Asylum Seekers and the State* 27.

within the process of violence itself'.[908] He argues that if the 'values of violence in the community' have been 'institutionalized' and 'internaliz[ed] in the personality of individuals' whereby 'the values of negotiation are broken down', those affected will resort to 'self-help'.[909] Here, de Kock draws the link between non-violent direct action and direct physical violence, explaining that the two 'are so interwoven that a proper understanding of the former is essential for a grasp of the latter'.[910] Important in this regard is Coser's assertion that 'human beings … will resort to violent action only under extremely frustrating, ego-damaging, and anxiety-producing conditions'.[911] To this list, de Kock adds other valid explanations for conflict: 'structural origin, relative deprivation, status incongruence, rising expectations, conflict group formation and resource mobilization'.[912] Moreover, South Africa was experiencing 'rising structural unemployment' and a recession,[913] further disillusioning and aggravating blacks who viewed 'employment opportunities as their major priority'.[914] As such, transpiring during the negotiations was a surge in 'political and criminal lawlessness in South Africa':[915] in 1990, 'social pathologies and (non-political) violence and delinquency [were] at a high level'.[916] Schlemmer relates the fragmentation of the black family to the impact of violence. He notes that as at 1991, approximately 70% of families in black townships in South Africa had broken down[917] and this is significant because of its inevitable effect on 'the discipline of black youth'.[918] Understandably with all of these factors a reality, violent conflict continued in the struggle for freedom in South Africa.

President FW de Klerk's 'promise of "a new South Africa" in his inaugural address in 1989 indicated a commitment to a "new order"'.[919] But what exactly this entailed was left vague. Very little research has been conducted on the context surrounding that pivotal period from

[908] de Kock 'Violence as an option?' 49.
[909] de Kock 'Violence as an option?' 50.
[910] de Kock 'Violence as an option?' 43.
[911] de Kock 'Violence as an option?' 45 quoting Lewis Coser 'Some social functions of violence' (1966) 364 *The Annals of the American Academy of Political and Social Science* 13.
[912] de Kock 'Violence as an option?' 45.
[913] Schlemmer 'South African society under stress' 6.
[914] Schlemmer 'South African society under stress' 7.
[915] Marais *South Africa in the Nineties* xviii.
[916] Schlemmer 'South African society under stress' 16.
[917] Schlemmer 'South African society under stress' 14 quoting Prof JP de Lange, a noted educationalist.
[918] Schlemmer 'South African society under stress' 14.
[919] Patrick Laurence 'Crossing the Rubicon' (1990) 6(2) *South African Foundation Review* 1.

1989 to 1994 when negotiations in respect of the transition took place. Immediately apparent, however, are the numerous seemingly incompatible – yet imperative – strategic decisions that were made in pursuit of transformation. Possibly the most fundamental decision was to democratise South Africa. There can be no gainsaying that there was an 'unusual popular enthusiasm for democracy', rooted in a history where black South Africans were denied all participation in the political arena, thus being completely disenfranchised.[920] However, juxtaposed against this was the reality that 'most new democracies fail' according to Weingast [921] and 'effective governance [was] a more urgent requirement than democracy, but is impossible without it'.[922] As Omar identified: 'for the critical period of transition' societies undergoing transition 'require more power at the helm and less "democracy" at the base'.[923] Democratisation thus took hold in an organic manner and decolonisation fell by the wayside. There were justifiable reasons for the emphasis on democracy, however. Both the ANC and the NP determined that 'the costs of continued conflict outweighed those of the compromises entailed by settlement'.[924]

The pent up, all-consuming, suffocating frustration and anger would have subsided somewhat by the dramatic and far-reaching changes which were catalysed on 2 February 1990. Political parties and groups were immediately reoriented due to former President FW de Klerk's announcement that the government was unconditionally releasing Nelson Mandela, that previously banned political organisations would be unbanned and that the state of emergency would be relaxed.[925] Specifically, de Klerk 'made a ringing call for participation in building "a broad consensus about the fundamentals of a new, realistic and democratic dispensation"'.[926] Despite the decades of struggle against oppression, the apartheid government's announcement in 1990 that it intended to dissolve itself and bring an end to apartheid caught everybody off guard; in particular new political actors such as those emerging from exile or from the underground.[927] Both colonialism and apartheid

[920] Friedman 'Agreeing to differ' 249.
[921] Weingast 'Why developing countries prove so resistant to the rule of law' 47.
[922] Friedman 'Agreeing to Differ' 246.
[923] Omar 'The inadequacy of the political system' 123.
[924] Friedman 'Agreeing to Differ' 248.
[925] Marais *South Africa in the Nineties* xvii.
[926] Esterhuyse 'The normative dimension of future South Africa' 25.
[927] Bekker 'Constitutional negotiations in the nineties' 178.

denied – indeed proscribed – black persons in South Africa the right to establish 'homegrown political parties of the Westminster type'.[928] Moreover, the adversarial nature of the Westminster system is antithetical to African philosophical approaches to dispute resolution.[929] Confusion about how exactly the conduct of politics would occur in such an eventuality was widespread,[930] justifying the rule that 'instant political expertise [i]s a myth'.[931] Exacerbating this situation is Esterhuyse's important point that normative ideas and ideological considerations also determine the 'value attached to negotiations as a means to resolve conflict'.[932] In particular, he mentions "non-collaboration" as a characteristic of those 'on the left of the political spectrum' because they 'exclude compromise and negotiation [on issues such as] land, socialism and political participation'.[933] Esterhuyse notes that this time-period

> highlighted the absence of a broad consensus on "fundamentals", the sharp ideological differences existing in South Africa and the challenge to build a political culture which … could contribute to socio-political stability in the country.[934]

Notwithstanding the divergent positions, the Groote Schuur Minute (which included the ANC) reflected 'a commitment to a process of peace, acceptance of negotiations as a means to resolve conflict and a commitment against the use of violence and intimidation'.[935] Agreement thus existed that negotiations would be the mechanism to achieve the goal of the systematic dismantling of apartheid on account of 'the need for a new democratic order, participation in the political process, the maintenance of human rights and a multiparty system'. However, 'the respective contexts' in which agreement was achieved 'differ[ed] substantially'.[936] This was perhaps the first indication that conflict would continue to permeate South African society. Notwithstanding this reality, what did appear clear is that 'the parties to the conflict … accepted that the cost [of] maintaining traditional positions [was]

[928] Omar 'The inadequacy of the political system' 104.
[929] Ubuntu has as one of its characteristics, the achievement of consensus in decision making that is informed by the needs and interests of every member of that society.
[930] Bekker 'Constitutional negotiations in the nineties' 178.
[931] Omar 'The inadequacy of the political system' 110.
[932] Esterhuyse 'The normative dimension of future South Africa' 28.
[933] Esterhuyse 'The normative dimension of future South Africa' 28.
[934] Esterhuyse 'The normative dimension of future South Africa' 27.
[935] Esterhuyse 'The normative dimension of future South Africa' 28.
[936] Esterhuyse 'The normative dimension of future South Africa' 28.

too high'[937] and the interaction between the ANC and the government at the time 'auger[ed] well for the future'.[938] On the question of nation building, Esterhuyse contended that this 'relates to the question of how to establish a collective sense of political identity which will transcend the hitherto fragmented nature of the South African polity'.[939] Due to the complexity of such an issue given South Africa's polarizing past, Esterhuyse argued that the 'more serious question' was whether South Africa should strive to achieve 'state building or nation building'.[940] Specifically, Esterhuyse emphasised the need to establish 'a new political culture' that would be 'aimed at creating attitudes, emotions, beliefs, symbols, ideas and values which would enhance regard for the political system, its institutions and policy-making process'. In other words, a 'process of political socialization'.[941] Set in motion in South Africa was 'a political dynamic that became irreversible'.[942] Fortunately, promising conclusions emanating from an investigation into intergroup relations in South Africa laid the framework for the conduct of fruitful negotiations. The most significant conclusion was that 'the country had reached the end of the partition road with its emphasis on and statutory institutionalization of differences'. Supporting this claim was evidence of 'increasing authentic direct contact between the people of this country'.[943] As far as future nation building was concerned, the research emphatically declared that 'the required critical minimum of overlap between values of the various population categories' existed and that the focus should be shifted to 'communalities, shared values [and] overarching symbols'.[944] The prevailing rhetoric had also shifted to the concept of 'power sharing without domination by one group over another'.[945]

The announcement of 1 February 1991 that 'all remaining discriminatory measures' would be scrapped by government 'gave further impetus to the dismantling of statutory apartheid'.[946]

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[937] Esterhuyse 'The normative dimension of future South Africa' 30.
[938] Esterhuyse 'The normative dimension of future South Africa' 31.
[939] Esterhuyse 'The normative dimension of future South Africa' 31-2.
[940] Esterhuyse 'The normative dimension of future South Africa' 32.
[941] Esterhuyse 'The normative dimension of future South Africa' 32.
[942] Omar 'The inadequacy of the political system' 103.
[943] Marais *South Africa in the Nineties* xvi.
[944] Marais *South Africa in the Nineties* xvi.
[945] Omar 'The inadequacy of the political system' 108.
[946] Marais *South Africa in the Nineties* xviii.

But with it arose 'a dilemma and a challenge':[947] 'Black and white nationalism [stood] at the crossroads – poised to work either in conflict at the expense of all South Africans, or in confluence in the forging of a new nation'.[948] Underpinning the navigation of the complex terrain that the political negotiatiors had to contend with were three fundamental factors relating to South African society that were likely to continue into the future because they were 'so deeply entrenched'.[949] Schlemmer states:

> South Africans are exceptionally highly politicized, at a level of intensity which generates violent conflict; attitudues among major groups have been shaped by historical conflicts sustained in the collective memory of these groups; and inequality in socio-economic circumstances is very large and coincides with race boundaries.[950]

Since stability was essential for the peaceful transition, numerous competing and conflicting issues had to be carefully balanced, with priority being accorded to the best interests of the majority and South Africa's future prospects. Worth bearing in mind is the notion that violence diminishes wealth,[951] thus it was imperative that the transition was as peaceful as possible. As such, 'cost-benefit calculations' were invariably conducted by both the ANC and the NP, impelling a negotiated settlement.[952] Both sides were acutely aware of the need to 'discourag[e] potentially debilitating conflict' and continue meeting the 'material needs' of the citizens, hence political calculations took account of these factors.[953] What did not exist, Omar points out, was 'ready-made answers to all South Africa's problems'.[954] The hypothesis is therefore that democratisation was both a strategic and contextual decision, albeit at the expense of decolonisation, due to the unprecedented nature of the transition taking place. The dire warning of Nehusi, referring to the effects of colonialism, is relevant at this point as it informs the constitution-making process that had just begun. Nehusi explains that although South Africa had arrived at the 'end of formal political domination', it did not 'solve the most fundamental problem' of colonialism and apartheid: 'cultural penetration, mental enslavement and economic servitude'[955] were destined to

[947] Omar 'The inadequacy of the political system' 103.
[948] Omar 'The inadequacy of the political system' 103.
[949] Schlemmer 'South African society under stress' 3.
[950] Schlemmer 'South African society under stress'.
[951] Weingast 'Why developing countries prove so resistant to the rule of law' 33.
[952] Friedman 'Agreeing to differ' 248.
[953] Friedman 'Agreeing to differ' 251.
[954] Omar 'The inadequacy of the political system' 110.
[955] Nehusi 'Language in the construction of "Afrikan" unity' 208.

continue. In particular, a large part of the population found itself in the throes of abject poverty: only 10% of the population were receiving 50% of the domestic income. Obviously, the more privileged classes could not even begin to imagine this disparity in wealth.[956] To be sure, clear congruence between race boundaries and inequality in socio-economic circumstances were pervasive in South Africa resulting from colonialism and apartheid. Indeed, the socio-economic situation of black South Africans had been materially and adversely affected and would substantially affect the 'delicate balance' that Esterhuyse referred to in determining policy. The experience of relative deprivation would inevitably have become more acute.[957] Therefore, job creation and its corollary, the combating of unemployment, constituted significant challenges for government, necessitating the dedication of serious thought to 'strategies that stimulate demand such as public job creation and labour intensive social services if full employment is to be achieved'.[958] For these reasons, economic and social policy were ideologised, thus 'a significant part of the political debate revolve[d] around how the political dispensation should be restructured so as to provide the best policy'.[959] Illustrating that the prospects of success of the negotiations were not hinged exclusively on the agency (or lack thereof) of the negotiatiors, the concrete situation on the ground revealed that:

> Poverty is one of the fundamental social problems arising from such high levels of unemployment and is generally accompanied by enormous health and crime problems. Against this background it is clear that policy makers in South Africa are faced by [serious] constraints on policy making.[960]

With democracy being the chosen vehicle for transformation, what South Africa's democratic leaders did not anticipate is that empirical studies confirm that 'developing countries are resistant to the rule of law'.[961] Berkowitz and Weingast attribute this resistance to the rule of law to what they call 'the transplant effect'.[962] What transpires is that the developing state under-invests in formal law and legal institutions. Importantly, the transplant effect is similar to the notion of 'decoupling' where a state will easily and quickly

[956] Kotze 'Constrained policy making' 152.
[957] Schlemmer 'South African society under stress' 5.
[958] Kotzé 'Constrained policy making' 151.
[959] Kotzé 'Constrained policy making' 151.
[960] Kotzé 'Constrained policy making' 152.
[961] Weingast 'Why developing countries prove so resistant to the rule of law' 52.
[962] Berkowitz 'The Transplant Effect' 165-195.

ratify treaties, but will fail to implement them effectively.[963] Compounding the problems already revealed is that governments of mature natural states that are extractive and exclusionary display no '[e]vidence of a democratic culture'.[964] This fact constitutes a considerable 'threat to democracy and state-building'.[965] Invariably, such governments are heavily dominated by the executive, 'diminishing the effectiveness of the separation of powers and the ability of the legislative branch to act as a check on executive power'.[966] Natural states tend to act in an arbitrary manner, with the adjustment of rights and privileges on an ongoing basis. Actions are thus closely tied to the rise and fall of the fortunes of the leaders of the state. Simply put, 'policies and rights appear to be too closely associated with choices by the ruler bound not by rules but seemingly by whim'.[967] Elegantly stated in *Why Nations Fail* is the 'vicious circle': the combination of unconstrained political power and massive disparity in incomes naturally heightens the stakes in pursuit of power. Whoever succeeds in controlling the state is the custodian of excessive power. With it comes unfettered access to the extreme wealth generated. Consequently, such extractive political and economic institutions are unstable because of the persistent infighting that has at its core the desire to control political power and its associated financial benefits.[968] It is not a surprise therefore, that frequent and dramatic shifts and reversals of policy 'wreak havoc with investment' and the economy.[969] For example, '[t]he inability of the state to honour a stable system of property rights greatly compromises' the economy.[970] Most alarming is that these states often have a propensity to 'end freedoms overnight, such as democracy'.[971] The danger inherent is that '[p]rogress towards democracy can be a risky exercise where the beneficiaries of democracy are themselves the adjudicators of how far democracy is to be extended'.[972] For example, when it becomes clear that the 'power relationships are out of balance with the distribution of benefits, those with more power than benefits are likely to demand a larger share; and, if it is not forthcoming, they are then

[963] Goodman & Jinks 'Towards an institutional theory of sovereignty' 1760-1.
[964] Friedman 'Agreeing to differ' 254.
[965] Friedman 'Agreeing to differ' 254.
[966] Weingast 'Why developing countries prove so resistant' 36.
[967] Weingast 'Why developing countries prove so resistant' 39.
[968] Acemoglu & Robinson *Why Nations Fail* 344.
[969] Weingast 'Why developing countries prove so resistant' 45.
[970] Weingast 'Why developing countries prove so resistant' 35.
[971] Weingast 'Why developing countries prove so resistant' 45.
[972] Omar 'The inadequacy of the political system' 123.

tempted to fight for it'.[973] Expropriation of assets is one method to adjust so as to reduce the risks of violence.[974] The ensuing crisis caused by this increases the likelihood of violence due to perpetration of violence in self-defence, thus initiating a vicious circle. In these types of volatile societies, violence is pervasive.[975] However, expropriation is particularly problematic for the fact that 'from an economic and political standpoint … [i]nvestors of all kinds care not just what the rules are today – property rights and tax rates, for example – but what they will be tomorrow'.[976] Therefore, Weingast asserts that it is the long-term stability of a state in transition that is imperilled when he explains that

> [c]reating a state that honors rules today and tomorrow requires institutions with two characteristics. First, these institutions must commit the state – political officials, judges, bureaucrats – to honor these rules and rights. Second, they must commit all major players in society to respect the constitutional rules. … Unfortunately, this type of credible commitment eludes most natural states and typically occurs only for those that begin the transition.[977]

Non-negotiable aspects of the transformational reforms included reliance on 'competitive markets; parties and elections; rights and constitutions',[978] without regard being had to Weingast's assertion that these reforms 'rarely succeed in producing long-term economic growth [and] stable democracy that polices public officials'.[979] That notwithstanding, negotiations concerning a new South Africa were entered into. Complicating the negotiations was the reality, eloquently articulated by Esterhysen, that 'political stability and economic growth are "blind" without political participation and socio-economic equity [and] [p]articipation and socio-economic equity are "empty" without political stability and economic growth'.[980] The dominant character of this, Schlemmer stated, is 'social alienation and a weak basis for progress', albeit that it is the majority of the country that is likely to be afflicted by these conditions'. Compounding this is the fact that two very distinct political cultures characterized South Africa at the commencement of the negotiations, 'each with its own set of attitudes, emotions, symbols, beliefs, ideas and values, namely

[973] Weingast 'Why developing countries prove so resistant' 31.
[974] Weingast 'Why developing countries prove so resistant' 32.
[975] Weingast 'Why developing countries prove so resistant' 36.
[976] Weingast 'Why developing countries prove so resistant' 39.
[977] Weingast 'Why developing countries prove so resistant' 40.
[978] Weingast 'Why developing countries prove so resistant' 28.
[979] Weingast 'Why developing countries prove so resistant' 28.
[980] Esterhuyse 'The normative dimension of future South Africa' 32.

the political culture of (white) domination and the political culture of (black) resistance'.[981] Ultimately, Kotzé makes it clear that political considerations would weigh more heavingly than socio-economic factors in charting the way forward.[982] He contrasts this against Western countries, where the economy affects the public policy process to an enormous extent, so much so that 'analysis of political systems cannot explain this process'.[983] However, he confirms that the 'delicate balance between economic determinants and politics … prevents economic considerations alone from determining policy standpoints'.[984] He remarks that

> political and socio-economic transformation is not just a matter of effectively managing sociopolitical processes or efficiently applying the techniques of social engineering. The institutionalization and internalization of new political ideas, beliefs and values, the creation of a viable political culture, the process of political socialization and the development of a pattern of normative ideas and values, or, for that matter, an ideology legitimizing political change and mobilizing support, are of equal if not decisive importance.[985]

In other words, the establishment of inclusive institutions that create successful political and economic institutions occurs when there is 'a confluence of factors at a critical juncture, including interplay between existing institutions and the opportunities and challenges'[986] that these present. It is precisely the reality that extant political and economic institutions presented both opportunities and challenges that laid the foundation for the manouvres at this critical juncture in South Africa's transformation. Elucidating the paradoxes or antinomies informing the strategic decisions made at this critical juncture are discussed next.

3. The process of creating an entirely new political culture

Friedman highlights an intensely 'complex and contradictory' political culture in South Africa at the time but acknowledges that 'both sides were sufficiently loyal to the notion of a common state (and specifically, 'a peculiar sense of common identity even amid deep-rooted divisions')[987] to believe that its survival merited significant compromise'.[988] Where the parties agreed, was that South Africa's future system would have to be consistent with

[981] Esterhuyse 'The normative dimension of future South Africa' 27.
[982] Kotzé 'Constrained policy making in South Africa' 155.
[983] Kotzé 'Constrained policy making in South Africa' 155.
[984] Kotzé 'Constrained policy making in South Africa' 156.
[985] Esterhuyse 'The normative dimension of future South Africa' 36.
[986] Acemoglu & Robinson *Why Nations Fail* 364.
[987] Friedman 'Agreeing to differ' 249.
[988] Friedman 'Agreeing to differ' 248.

'a constitutionally defined political contest for power'. A formidable challenge in this regard, Bekker cautioned, is that it would be 'a contest between political actors most of whom will venture upon the constitutional stage for the first time'.[989] What had to be achieved was a political culture that exhibited the essential combination of characteristics, factors and elements that 'reflect a collective's regard or disregard for the political system and its institutions, relations of power, policy-making procedures and political processes'. [990] Esterhuyse also comments that political culture includes 'attitudes, beliefs, values, ideas, symbols and emotions', extrapolating that 'a diverse and fragmented political culture has a direct bearing on political instability';[991] something that South Africa certainly needed to avoid. To be sure, the success of a democracy, admits Friedman, is largely dependent on '[p]olitical culture, institutional continuity, civil society and leadership'.[992] The requirements of conflict resolution and state building also feature prominently.[993] Added to these factors are the intangible qualities of 'identity and loyalties'. [994] Against this backdrop it is appropriate to engage in the construction of the various intersecting variables that are determinative of political culture and thereby, either enhance or undermine effective and efficient implementation of the law. Sought to be distilled from this is an account of the prevailing legal culture of South Africa. It is this legal culture that is subsequently applied to the question of refugee protection so as to arrive at a defensible conclusion concerning the extent to which South Africa is complying with the law to be found in Chapter Seven.

3.1 The variable of the legitimacy of the law and democratic processes

Without doubt it is submitted that when it became clear that political power would be shifted to the ANC, it was the intention of the leadership of the ANC to create a sovereign state that would qualify as a liberal democracy, guaranteeing the conferment of rights so as to achieve equality and social justice. Liberal theory advances the argument that 'modern states implicate a contract of citizens among themselves, and with the government, as a

[989] Bekker 'Constitutional negotiations in the nineties' 177.
[990] Esterhuyse 'The normative dimension of future South Africa' 24.
[991] Esterhuyse 'The normative dimension of future South Africa' 24.
[992] Friedman 'Agreeing to differ' 252.
[993] Friedman 'Agreeing to differ' 257.
[994] Friedman 'Agreeing to differ' 249.

result of which the latter become accountable to the former'.[995] Congruent with this theory, the primary objective to be achieved by the ANC was 'to reorganize the political, administrative, social, economic, legal and educational structures that harbour inequality, injustice and constitutional disenfranchisement'.[996] South Africa's intention was clearly to establish a liberal democratic state. To maintain the legitimacy of this form of democracy, however, 'a certain degree of closure is required'.[997] As such, tension inevitably arises in liberal democratic states in respect of the 'irresolvable contradictions' between the ideal of human rights and the need to maintain sovereignty.[998] Significantly (although not surprising), throughout the apartheid era international human rights instruments were scorned. In fact, the government 'denigrated international law as mere politics'.[999] The only international human rights treaty to which South Africa was party was the Charter of the UN. However, the judiciary would not be persuaded to have regard to this instrument in the interpretation of legislation.[1000] Illustrating that the promise of change would not easily be achieved, and that exclusion remained a state priority was the fact that as late as 1991, the government promulgated the Aliens Control Act. This Act characterised non-nationals as either aliens or illegal aliens, unless they could be categorised as seasonal migrant labourers or other groups that the Act allowed.[1001] Most important, the Act made absolutely no mention of the institution of asylum and provided no mechanism for granting refugee status,[1002] fomenting the belief that the 'particularistic and exclusionary' nature of liberal democracy leaves asylum-seekers in an acutely vulnerable position. Simultaneously, however, to unambiguously prove its human rights-oriented commitments and credentials, the new government sought re-entry into the UN, given its objectives of achieving peace, security and protection of human rights.[1003] This is notwithstanding that it has vociferously been

[995] Kebede 'From Colonialism' 116.
[996] Omar 'The inadequacy of the political system' 103.
[997] Seyla Benhabib *The Rights of Others: Aliens, Residents and Citizens* (2004) 19.
[998] Benhabib *The Rights of Others* 19.
[999] Abel *Politics By Other Means* 118.
[1000] Dugard *International Law* 263 citing the cases of *S v Werner* 1980 (2) SA 313 (W); *S v Adams*; *S v Werner* 1981 (1) SA 187 (A); and *Sobukwe v Minister of Justice* 1972 (1) SA 693 (A).
[1001] Corey Johnson 'Failed Asylum Seekers in South Africa: Policy and Practice' (2015) 1(2) *African Human Mobility Review* 210.
[1002] Elspeth Boynton *Protectionism and National Migration Policy in South Africa* (2015) (Master's Dissertation, University of the Witwatersrand) 33.
[1003] Rosa Freedman *Failing to Protect: The UN and the Politicisation of Human Rights* (2014) 12.

argued that the UN 'symbolise[s] accommodation into an existing and un-decolonised Euro-North American-centric world system and un-deimperialised global order'.[1004] Exacerbating this point is the concern raised by Alvarez that since it is Western regimes that are primarily responsible for determining the meaning and content of norms in international treaties and for deciding what constitutes compliance, this may foment the belief that 'Western regimes are vehicles for neocolonialism'[1005] and hence, be regarded as abusive.

With respect to the creation of a new constitution, Omar foresaw that the type of constitution would 'depend in great measure on how' it is arrived at.[1006] Indeed, he determined that underscoring this would be 'the ability of the political system … to accommodate and regulate the conflict of political interests'.[1007] Accordingly, whereas South Africa's Interim Constitution signalled a final end to apartheid as it reflected the wishes of the people, there was immediate contestation about the legitimacy of this Constitution. In the first instance, although there was 'overwhelming public interest' in the content of the constitution, and 'over two million submissions' were received by the Constitutional Assembly,

> it is unclear to what extent the public submissions influenced the final outcome which, on politically controversial issues at least, was often the result of deal-making between the principal political parties.[1008]

Secondly, the Interim Constitution was drafted by 'the unelected negotiating parties at the [Multi Party Negotiating Forum and was subsequently] adopted by the apartheid Parliament in terms of the 1983 Constitution'.[1009] These concerns did not, however, constitute any tangible affront to the legitimacy of the Interim Constitution. As the Interim Constitution was intended to set the tone for the transformation that was to follow in South Africa, the epilogue read, in relevant part, that the Constitution was designed to provide a

> bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. … there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for Ubuntu but not for victimization.

[1004] Ndlovu-Gatsheni 'Racism and "blackism"' 81.
[1005] José Alvarez 'Do states socialize?' (2006) 54 *Duke Law Journal* 974.
[1006] Omar 'The inadequacy of the political system' 104.
[1007] Omar 'The inadequacy of the political system' 104.
[1008] Ian Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) 6 footnote 21.
[1009] Christina Murray 'A constitutional beginning: Making South Africa's final Constitution' (2001) 23 *University of Arkansas at Little Rock Law Review* 813.

What was viewed as decidedly problematic in the epilogue, though, was reference to amnesty 'in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'.[1010] The Azanian Peoples' Organisation challenged the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995, that denied apartheid-era victims the right to approach a court of law seeking an appropriate remedy for the injustices perpetrated against them.[1011] The matter was put to rest somewhat by the Constitutional Court's dictum that 'the South African legal system is "revolutionary" for its ability to obtain legitimacy despite a "country haemorrhaged dangerously by a tragic past"'.[1012] Conversely, though, Friedman claims that 'the Truth and Reconciliation Commission [highlighted] the degree to which different understandings of the past remain. … [F]ar from reconciling, the commission exercise largely confirmed the persistence of competing notions of justice.[1013]

It is necessary here to confirm that the legitimacy of the law has a direct correlation with adherence to the rule of law. The 'universal principles'[1014] or elements of the rule of law are relevant to a proper understanding of what adherence to the rule of law entails. Scholars are in agreement that adherence to the rule of law is predicated on the enactment of fair law that is easily accessible and that is administered in an efficient manner. For this to occur, the government and its officials and agents (the bureaucracy) must be accountable under the law based on the supremacy of the legal authority of the law. In addition, the laws must be clear, stable, publicly documented and protect fundamental rights, including the security of persons and property. A further level of control to ensure adherence to the law is that access to justice must be provided by a sufficient number of competent, impartial, independent, and ethical law enforcement officials, attorneys or representatives, and judges who have adequate resources, and reflect the makeup of the communities that they serve. The underlying intention of the principle of the rule of law is to promote a belief in the

[1010] Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* 2.
[1011] *Azanian Peoples' Organisation v President of South Africa* 1996 (8) BCLR 1015 (*AZAPO*).
[1012] Lee Stone 'Two decades of jurisprudence on substantive gender equality: What the Constitutional Court got right and wrong' (2016) 108 (30) 2 *Agenda* 16 referring to para 1 of the *AZAPO* judgment.
[1013] Friedman 'Agreeing to differ' 253.
[1014] 'World Justice Project' (2007). It is submitted that 'the universal and uncontested nature of these norms will generate respect for the law and thus, compliance'. See Pistor et al 'Social norms, rule of law' 255.

general population 'that they should be subject to the law and do their best to uphold it'.[1015] At the same time, government must also be seen to be respecting the rule of law because

> [c]ompliance with and obedience to the law is contingent upon … perceptions that government is meeting its obligations to them, has the capacity to locate and punish free riders, and is acting according to prevalent standards of fairness and procedural justice.[1016]

As far as the adoption of the Final Constitution is concerned, Botha summarises the criticism that that too, was 'essentially undemocratic' when he states that

> the sovereignty of the people, in whose name the Constitution was adopted, was systematically weakened by a two-stage process that bound the peoples' elected representatives to prior agreements between political elites. As a result, it might be argued, the voice of 'the people' was drowned out by the buzz of the elite bargaining, the noisy arguments of lawyers and the pronouncements of judges.[1017]

To place these circumstances into context, political stability is contingent on some measure of consistency in normative political ideas and values,[1018] with respect for the rule of law pivotal to ensuring wide-spread uniform action in terms of these ideas and values. This coincides with the theory that 'democracy is only viable if there exists a "broad enough base of common values – fundamental issues about which people in a community agree"'.[1019] Therefore, normative ideas, such as 'perceptions of the nature of democracy, human rights, distributive (economic) justice, nationalization' are intrinsic to political activity[1020] and play 'a vital role … in the presentation of claims and the resolution of conflict'. These normative political ideas effect the political process on at least three levels:

(1) the level of institutionalized and generally accepted rules which formalize and direct the political process ordinarily embodied in the constitution, which qualifies the normative moral perspective;
(2) the level of decision- and policy-making processes and procedures. Here, normative political ideas and values motivate and restrict the actions of political leaders as they relate to the content and process of decision and policy making;
(3) the level of political mobilization where normative political ideas and values impact on the competition for political power, determining the support a leader or party is able to mobilize for its policies. As such, the nature of the normative political ideas and values presented to

[1015] Levi & Epperly 'Principled principals' 193.
[1016] Levi & Epperly 'Principled principals' 193.
[1017] Henk Botha 'Instituting public freedom or extinguishing constitutent power? Reflections on South Africa's constitution-making experiment' (2010) 26(1) *South African Journal on Human Rights* 69.
[1018] Esterhuyse 'The normative dimension of future South Africa' 21, where it is submitted that the US 'with its emphasis on human rights and democracy' produced political stability and 'legitimize[d] the political system, its institutions and the procedures of the political process'.
[1019] Welsh 'Can South Africa become a nation-state?' 561.
[1020] Esterhuyse 'The normative dimension of future South Africa' 20.

> the voting public is a clear indication of the nature of the disagreement and conflict existing in a particular polity.[1021]

With reference to the first level, for both strategic and normative purposes, when South Africa became a democracy in 1994, there was an overwhelming principled commitment to ensuring respect for the rule of law. Indeed, section 1 of the Constitution attests to this. The Constitution itself necessitates that legislative and other measures be taken in order to implement the provisions contained therein. Significantly, the normative values of democracy, accountability, transparency, openness and participation in decision-making are established from the outset. As far as the second level is concerned, public participation in all processes that have a bearing on rights and entitlements is not negotiable. For this reason, in a democracy there exists a very subtle balancing process that aims to reconcile the law with political processes. Any overt politicisation of issues could infringe democratic procedure by imbuing the lawmaking process with disproportionate political content.[1022]

In addition to the consolidation of the first and second levels, the third level's particular significance is revealed when applying the theory pertaining to normative political ideas and values to South Africa's transition – especially the content of the negotiations at that time. Based on the evidence provided above, it is submitted that the transition from apartheid has carried with it a democratic deficit on account of insufficient public participation in the drafting of the Interim Constitution, particularly with respect to obtaining consensus on such things as amnesty. Quite simply, there was a fatal inadequacy of consultation and information about the democratic processes. The existing political mobilisation of the people and the excitement at the prospect of democracy is what carried the process. Compelling is Friedman's contention that South Africa's 'formal democratisation has … proved illusory'.[1023] More disconcerting is his argument that this may give rise to 'anti-democratic recidivism'.[1024] Simultaneously, however, there is the need to recognise that at a minimum, 'stability, order and prosperity',[1025] are essential for the achievement of a strong state characterized by political and economic good governance, respect for human rights and respect for the rule

[1021] Esterhuyse 'The normative dimension of future South Africa' 20.
[1022] Tazreiter *Asylum Seekers and the State* 45.
[1023] Friedman 'Agreeing to differ' 234.
[1024] Friedman 'Agreeing to differ' 257.
[1025] Helton *The Price of Indifference* 268.

of law.[1026] Since it is the state that is responsible for providing much-needed stability and security, especially for those 'who live in social and economic despair',[1027] human security has a direct correlation with the 'survival of the state'.[1028] Security threats, irrespective of the guise they may take, impact on 'development, security and governance'. [1029] The manifestation of violence causes insecurity, impacting on the ability of the state to govern effectively and maintain law and order. In light of these important considerations, some measure of undemocratic exercise of power was arguably necessary to ensure a stable transition to a liberal democracy.

3.2 The variable of reputation

The external expression of a state's intentions is closely bound with developments at the domestic level and the end of apartheid signified the beginning of a new era for South Africa. Extreme care was taken to make 'decisions which had a very positive impact on the country's position in the international political environment'.[1030] The image of South Africa as being committed to upholding the rule of law was central to the desire of South Africa to earn the respect of the international community. The articulation of a progressive and world-renowned Constitution alongside a miraculously peaceful transition to democracy, drove South Africa's enhanced image and reputation. Thus, the perception created was that South Africa was not only committed to establishing a legitimate and credible state that would adhere to the international legal obligations it had voluntarily undertaken, but also 'sought to play in the premier league of world affairs'.[1031] Reinforcing the transformation of South Africa's image was the urgent ratification of numerous international treaties and accession to international organisations. Friedman alludes to South Africa's proclivity for ratifying international treaties and being members of international organisations as 'the elite's desire to model itself in the image of European or American "best practice" rather

[1026] Hammerstad 'People, States and Regions' 6.
[1027] Marie Lindegaard *Surviving Gangs, Violence and Racism in Cape Town* (2018) 27.
[1028] Hammerstad 'People, States and Regions' 5.
[1029] van Schalkwyk 'Friend or Foe?' 122.
[1030] Roland Henwood 'South Africa's Foreign Policy' (1993) *South African Yearbook of International Law* 258.
[1031] Chris Landsberg *The quiet diplomacy of liberation: International politics and South Africa's transition* (2004) 185.

than domestic reality'.[1032] Friedman qualifies this statement by referring to 'an elite tendency to measure success by the – perceived – standards of Washington and Paris [which] tends to obstruct democratic and social progress'.[1033] It will be recalled that South Africa joined the OAU on 23 May 1994 and the UN General Assembly welcomed South Africa back on 23 June 1994.[1034] Almost instantaneously, South Africa assumed the 'moral high ground in the global arena'[1035] in its relations with the international community because of its conscious actions aimed at 'realigning itself with accepted practice in international politics'.[1036] This was so pronounced that South Africa was referred to as 'punching above its weight' within the international community.[1037] South Africa certainly succeeded in becoming the epitome of an exemplary role model to other states.[1038]

3.3 The variable of leadership

Leadership, argues Weingast, is of seminal importance in the long-term respect for the rule of law and thus, the success of a democracy.[1039] Ginsburg notes that when a new government is democratically elected to replace an authoritarian regime, the new regime is 'frequently stuck with the bureaucrats appointed by [the former] regime, and may lack sufficient personnel with technical expertise capable of running the government'.[1040] This exemplifies the South African experience. As Ndlovu-Gatsheni observes, at the end of apartheid 'the leadership that took over the state were products of the same [apartheid] and colonialism they claimed to be fighting against'. Furthermore, these leaders are criticised for mimicking the West by permitting 'the imposition of external templates as policy on Africa'.[1041] However, Levi and Epperly assert, more optimistically, that if the condition of a

[1032] Friedman 'Agreeing to differ' 257.
[1033] Friedman 'Agreeing to differ' 257.
[1034] General Assembly Resolution 48/13C of 23 June 1994.
[1035] Spies 'South Africa's Foreign Policy' (2011) 327; Yolanda Spies 'South Africa's Foreign Policy' (2009) *South African Yearbook of International Law* 271.
[1036] Henwood 'South African Foreign Policy' (1995) 256.
[1037] Spies 'South Africa's Foreign Policy' (2009) 272.
[1038] This is notwithstanding the fact that on 9 January 1996 it was confirmed that South Africa was 'the most violent country in the world outside of a war zone' (Margaret Beukes 'Southern African Events of International Significance – 1996' (1997) *South African Yearbook of International Law* 214 citing the crime figures released by the Police National Crime Information Management Centre.)
[1039] Weingast 'Why developing countries prove so resistant' 29.
[1040] Ginsburg 'The politics of courts in democratization' 183.
[1041] Ndlovu-Gatsheni 'Racism and "blackism"' 82.

leader who leads by example in respecting the rule of law exists, it should ensure 'the existence of a bureaucracy that is itself law-abiding, that implements the laws of the state in a way that is both relatively honest and procedurally just'.[1042] Relevant is Helton's contention that sometimes law is the only 'meaningful source of influence [when] political institutions [are] corrupt, paralyzed, or inaccessible'.[1043] Therefore, Levi and Epperly argue that the key to the establishment of effective rule of law institutions are leaders that are

> capable of obtaining cooperation [and] able to convince state agents and members of the polity that they are in a situation where corruption is unacceptable. [Such leadership develops] an organizational culture based upon leaders' credible commitments to principles that they will uphold even in unforeseen contingencies and even when it is against their personal interest to do so.[1044]

The instrumental role of leadership is of paramount importance in the context of dramatic social change (in the case of South Africa, from collective trauma to democracy and respect for human rights). Consistent with the scholarly view that the leadership's approach to respect for the rule of law is essential, Nelson Mandela's tenure as President is characterised precisely in terms of his unflinching determination to uphold the law and to set an example in this regard. In the matter of *Executive Council of the Western Cape Legislature v President of the Republic of SA*[1045] decided in 1995, the Constitutional Court invalidated the President's proclamation and Parliament's amendment of the Local Government Transition Act. President Mandela not only praised the judgment, but observed that 'this judgment is not the first, nor the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance'.[1046] Levi and Epperly do warn, though, that 'when the first mover dies, is replaced, or experiences a motivational change, the rule of law may fall apart'.[1047] As Weingast says: '[n]o matter how attractive today's institutions or rights [are], they are no good in the long term if tomorrow's regime can alter them at will'. He further warns about leaders who have the power to undo rights and institutions 'when they prove

[1042] Levi & Epperly 'Principled principals' 193.
[1043] Abel *Politics By Other Means* 523.
[1044] Levi & Epperly 'Principled principals' 192.
[1045] 1995 (4) SA 877 (CC).
[1046] Heinz Klug *Constituting Democracy Law, Globalism and South Africa's Political Reconstruction* (2000) 150.
[1047] Levi & Epperly 'Principled principals' 193.

inconvenient'.[1048] Therefore, the 'rules and institutions of government [must] not depend on the identity of political officials'.[1049]

3.4 The variable of identity, loyalities, equality and social justice

Colonialism, asserts Nehusi, caused Africans to 'define themselves in mutually antagonistic terms that emphasise difference and consider other Afri[c]ans as strangers, total outsiders, people with whom they have nothing in common'.[1050] In addition to that, for five decades of South Africa's history 'identities were manipulated … in order to subjugate four-fifths of the populace'[1051] and difference was used 'to buttress a system of minority power and privilege'.[1052] Since both colonialism and apartheid were exclusionary in nature, identity is a highly emotive political issue. By virtue of the colonial and apartheid systems that were based on dispossession, imposed racial categorisation and hierarchical relationships of power and 'status', the legacy of the identities created by those systems would undoubtedly pose a significant threat to the fate of South Africa's democracy. Nelson Mandela therefore 'devote[d] much of his presidency to reconciliation and seeking a common sense of nationhood across the racial divides'.[1053] Mandela's actions reflected an awareness that Africa has been gripped 'by a seemingly permanent downward spiral marked by crisis after crisis' rooted in racism[1054] and constructed differences. To '"get along" and "get ahead"', argue de la Sablonnière et al, a clearly defined cultural identity that capitalizes on a shared history, is a prerequisite.[1055] Cultural identity exponentially impacts 'higher levels of well-being and self-esteem'[1056] as well as serving as a template to guide rational individual behaviour within established social structures. Dramatic social change obstructs and compromises the clear cultural identity of both individuals and groups, however. The identification of common characteristics and social identity that 'represent the worthy

[1048] Weingast 'Why developing countries prove so resistant' 29.
[1049] Weingast 'Why developing countries prove so resistant' 29.
[1050] Nehusi 'Language in the construction of "Afrikan" unity' 214.
[1051] Friedman 'Agreeing to differ' 250.
[1052] Friedman 'Agreeing to differ' 254.
[1053] Friedman 'Agreeing to differ' 252.
[1054] Nehusi 'Language in the construction of "Afrikan" unity' 212.
[1055] de la Sablonnière, Taylor & Caron-Diotte 'Restoring Cultural Identity' 252.
[1056] de la Sablonnière, Taylor & Caron-Diotte 'Restoring Cultural Identity' 257.

pursuits in life' informs one's cultural identity.[1057] In the face of dramatic social change, the effect is insecurity relating to prioritising 'what goals to strive for, what ones are possible or even realistic, and how to conduct [oneself] on a daily basis'.[1058] In short, a 'cultural vacuum' may ensue, as invariably occurred during colonisation where indigenous culture was destroyed, without replacement by an alternative culture.[1059]

Restoration of cultural identity is facilitated by recourse to key historical events and people that 'reflect the group's past, present and future'[1060] which re-instil pride and hope. Importantly, this process is dependent on the group

> having a shared knowledge about the events in which their group has been implicated, and which outgroups represent foes or allies [so that] individuals can derive the mission of their group and how they are to act with outgroup members.[1061]

Nation building was specifically emphasised in the years preceding the transition to a democracy. Although Welsh conceded that the issues of ethnicity and race are highly emotive given South Africa's history,[1062] he insisted that the Constitution should be the linchpin of nation building in order to avoid both 'inter-ethnic, as well as intra-ethnic conflict'.[1063] It is noteworthy in this regard that the 1988 policy document titled 'Constitutional Guidelines' specifically intended to 'outlaw the advocacy or practice of racism, fascism, nazism or the incitement of ethnic and regional exclusiveness or hatred'.[1064] The Guidelines went further to describe nation building in the following terms:

> It shall be state policy to promote the growth of a single National Identity and loyalty binding on all South Africans. At the same time, the state shall recognise the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development.[1065]

[1057] de la Sablonnière, Taylor & Caron-Diotte 'Restoring Cultural Identity' 254-5.
[1058] de la Sablonnière, Taylor & Caron-Diotte 'Restoring Cultural Identity' 256.
[1059] de la Sablonnière, Taylor & Caron-Diotte 'Restoring Cultural Identity' 258.
[1060] de la Sablonnière, Taylor & Caron-Diotte 'Restoring Cultural Identity' 259.
[1061] de la Sablonnière, Taylor & Caron-Diotte 'Restoring Cultural Identity' 262.
[1062] Welsh 'Can South Africa become a nation-state?' 562.
[1063] Welsh 'Can South Africa become a nation-state?' 563.
[1064] Welsh 'Can South Africa become a nation-state?' 562 citing paras k and l.
[1065] Welsh 'Can South Africa become a nation-state?' citing para g.

3.5 The variable of state institutions and the bureaucracy

In spite of their association with the apartheid policies, the ANC deemed the state and the economy as worthy of preservation due to their strength.[1066] Therefore, the ANC 'inherited a political space inhabited by people harbouring different identities, loyalties and concepts of the appropriate source of authority'.[1067] The irony of ironies is that the democratic government, led overwhelmingly by the ANC, was placed in the precarious position of continuing to exercise power within the confines of colonial and apartheid-era institutions. Illustrating the consequences of this fact, Nehusi argues that it is the institutions ('the legislature, the judiciary, administration and education and training')[1068] of 'the colonial system … that continually reproduces … the ways of thinking and behaving engendered by the colonial system'.[1069] Supporting the view that the transition merely perpetuated the use and application of colonial institutions, is Bekker's statement that at the beginning of the period of transition, South Africa's 'state bureaucracies [were] functional and intact [and] the country's economic record and the government's more recent economic policies [we]re widely viewed as policies suited to present conditions'[1070] thus they became the institutions and policies of democratic South Africa. While the ANC appeared to be inheriting 'a "usable" state[1071] and democratic institutions,'[1072] what was actually bequeathed was an inherently flawed and 'intrinsically corrupt system of governance [that was] so deeply entrenched … that it inevitably served to corrupt the new order' from the very start.[1073] When the state is characterised by corruption, incompetence and a wilful defiance of binding international obligations, the rule of law loses its meaning and significance. Consequently, there will no longer be any incentive to comply with the rule of law.[1074] Southall confirms that 'challenges posed by economic transformation (within a racially polarized capitalist economy which

[1066] Friedman 'Agreeing to differ' 251.
[1067] Friedman 'Agreeing to differ' 238.
[1068] Nehusi 'Language in the construction of "Afrikan" unity' 211.
[1069] Nehusi 'Language in the construction of "Afrikan" unity' 209.
[1070] Bekker 'Constitutional negotiations in the nineties' 178.
[1071] Friedman 'Agreeing to differ' 247. Friedman quotes Linz & Stepan who define "usable" as 'the capacity to "command, regulate and extract"' (Juan Linz & Alfred Stepan *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe* (1996) 11).
[1072] Friedman 'Agreeing to differ' 247.
[1073] Heinz Klug 'Separation of Powers, Accountability and the Role of Independent Constitutional Institutions' (2015) 60 *New York Law School Law Review* 24.
[1074] Levi & Epperly 'Principled principals' 194.

creates opportunities for careerism, personal enrichment and corruption)' would invariably continue into the future.[1075] Abel's sobering remark that 'power not only corrupts, it also fosters complacency and carelessness'[1076] is an appropriate description of the immense challenges the new government faced upon assuming office, lest it perpetuate the very system it sought to destroy.

More specifically, Westminister type political processes would continue to be applied. 'The advers[a]rial nature of Westminster systems without the fundamentals of power which underpin such a system', contends Omar, 'leads to constitutional anomalies'.[1077] Specifically, the 'elements of rigidity, particularly in terms of conventions and the caucus system, [have] a negative effect on [a] society in transition'. Subsequently, 'with small scope for flexibility' society is further fragmented because 'frustration tends to build up among the forerunners in such parties who sometimes hive off to smaller and less effective political organizations to the left'.[1078]

It is on the implementation of the aspiration of creating a new political culture that emphasis must be placed. Of seminal importance to South Africa's situation is Bekker's analysis of the public service's role in facilitating or impeding the transition. As he states:

> The South African public service has not acted as a neutral body carrying out the new directives of the NP. For, while some public servants undoubtedly remain loyal to a party which has radically changed its ideology, others have remained loyal to the earlier ideology and have broken from the party, whilst others still have been recruited from a fundamentally different political culture – with little sympathy with government ideology of either the past or the present. Accordingly, the state itself – as in wider civil society – has become a major arena of dissension as these different groups of public servants conflict with one another over the application of new policy.[1079]

This scenario also reveals the disjuncture between the good intentions of those in power and the reality faced by members of society. In practice, 'procedures for making and implementing laws and the expertise of government officials takes precedent over any

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[1075] Roger Southall *Mail & Guardian* 'How the ANC's path to corruption was set in the 1994 political transition from apartheid' (7 September 2016) at *https://mg.co.za/article/2016-09-07-how-the-ancs-path-to-corruption-was-set-in-the-1994-transition-from-apartheid.*
[1076] Abel *Politics By Other Means* 529.
[1077] Omar 'The inadequacy of the political system' 121.
[1078] Omar 'The inadequacy of the political system' 121. This is precisely what has occurred with the African National Congress, with the Economic Freedom Fighters having hived off to the left.
[1079] Bekker 'Constitutional negotiations in the nineties' 179.

substantive conflicts between the norms (or interests) condoned by formal law and those held by members of society'.[1080]

4. Compromises haunting South Africa's future

It barely requires stating that conflict was very much 'woven into the very fabric of society' during apartheid.[1081] Marais emphasises that the assumption that a 'conflict-free country' is possible overnight due to a few reform measures, is not only a gross oversimiplification but also not supported by empirical reality and comprehensive theoretical insights'.[1082] Pertinent is Bekker's description of the 'tragedy' associated with transition, described thus:

> … the process of transition politics seems to interact with the continuing cycles of widely publicized communal violence. It is widely accepted that there is a complex set of causes for these cycles, both socio-economic and community-based, and that the role of the state has a profound effect on the nature of the violence.[1083]

The negotiations were duly constrained by the 'high risks' relating to transformation. As Bekker states: 'when debate moves to substantive matters such as policy regarding property rights, or other primary economic and service delivery issues', the high risks arise from the fact that these matters impact directly upon the community-based interests', particularly in South Africa 'within which dramatically different material levels of living are found'.[1084] Quoting O'Donnell and Schmitter, Bekker confirms that 'such substantive matters have often been resolved only after the new political rules of the game have been agreed upon'. Speaking directly to the methods to be employed in order to secure a successful transition, Bekker announced:

> the sooner apartheid-related structures and constraints are eliminated, the better the prospect. … [t]he removal of discriminatory measures at all levels of society constitute an integral part of the process towards a democratic society.[1085]

Bekker relates Crick's 'sombre' assessment to South Africa: 'The most that can and should be hoped for is procedural consensus; agreement on rule by which substantive problems

[1080] Pistor et al 'Social norms, rule of law' 269.
[1081] Marais *South Africa in the Nineties* xv. As Marais emphasises: 'It would be difficult to identify a scientifically accountable social analysis of South African society which would not acknowledge this'.
[1082] Marais *South Africa in the Nineties* xv.
[1083] Bekker 'Constitutional negotiations' 179.
[1084] Bekker 'Constitutional negotiations' 180.
[1085] Bekker 'Constitutional negotiations' 180.

can, within a framework of government, be resolved'.[1086] He duly predicted that transition to democracy would 'probably pass the hurdle of reaching constitutional consent on procedural matters first, before policy matters on major material issues are determined'.[1087]

The democratisation process in South Africa was plagued by a distinct inadequacy of effective 'negotiating mechanisms' whereby constitutional conflicts end up being 'recurrently raised', with government being relegated to 'talk-shop motions in Parliament, much to the detriment of participation politics'.[1088] A specific consequence is

> the existence of a large array of high-profile and often financially lucrative offices which also tend to attract people whose resistance to being co-opted by the government is minimal. The superfluous multiplicity of such offices creates the temptation amongst those participating to compete for the benefits of office at the expense of political objectives, resulting in serious distortions of the image, role and purpose of participation politics.[1089]

Looking to solutions for South Africa's future, Schlemmer commented that 'prominent black articulators of interest' began endorsing affirmative action as a fair and moral means of ensuring 'black occupational progress'.[1090] Leading businesspeople also pronounced on the 'unavoidability' of affirmative action programmes [1091] simultaneously with the ANC consistently raising the issue of the redistribution of resources to promote the interests of its constituency: the poor.[1092] Schlemmer warned, however, that there are 'very real dangers that well-intentioned but unstrategic affirmative action programmes will increase tension and conflict in South Africa'.[1093] Significantly, Schlemmer noted that 'paternalism erodes self-sufficiency,' entailing that bureaucratic manipulation of advancement could perpetuate the self-image among blacks of being victims. Based on empirical studies, he stated that affirmative action programmes 'encourages disadvantaged groups to become overly reliant on their status as victims, and actually weakens the strategies and ability for

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[1086] Bekker 'Constitutional negotiations' 181 quoting Bernard Crick *Sunday Tribune* 17 September 1989.
[1087] Bekker 'Constitutional negotiations' 181.
[1088] Omar 'The inadequacy of the political system' 117.
[1089] Omar 'The inadequacy of the political system' 117.
[1090] Schlemmer 'South African society under stress' 10-1 citing Prof WL Nkulu, Principal of the University of Transkei, as quoted in *The Star* 30 August 1990.
[1091] Schlemmer 'South African society under stress' 10 referring to comments by Mike Rosholt, the chairperson of the Urban Foundation, as published in the *Business Day* 26 October 1990.
[1092] Schlemmer 'South African society under stress' 10 quoting Thabo Mbeki in a *Business Day* article dated 1 November 1990.
[1093] Schlemmer 'South African society under stress' 12.

self-advancement among such groups'.[1094] Whereas affirmative action was proposed as a means of ensuring redress, based on the moral imperative to prioritise those who had been disadvantaged by the apartheid system, all of the studies into the effectiveness of affirmative action have revealed that it is a failure. Furthermore, intimately related to the previous point was that despite apartheid-era race classification being seen as antithetical to nation building from the perspective of ensuring inclusivity and equality, these same race classifications would invariably have to be retained because they could be utilised as proxies for disadvantage. [1095] Redressing disadvantage, precisely because of this historically prejudicial race classification, was an imperative.[1096] But, Weingast asserts that a society is prone to respecting the rule of law better when the interactions within the state are based on impersonal relationships (ie: they do not hinge on the 'unique corporeal body' or 'socially ascribed characteristics').[1097] Prefacing the exposition of the findings of studies into the effects of affirmative action, Schlemmer warned that 'some sobering trends emerge'.[1098] In studies conducted in the USA, analysts determined that affirmative action had failed and that 'some of the methods … used to increase black participation have backfired'. Affirmative action was also described as 'a disaster, evoked in the name of the most unfortunate people but with the gains restricted to black elites'.[1099] Supplementing these claims were reports published in *New York Times Magazine*, *US News and World Report*, *The Economist* and *Saturday Star Review*:

> After reaching a peak in the seventies, the number of black students and staff at US universities until recently was declining. For example, in 1986 at the University of Chicago, the number of black undergraduates had halved from the mid-seventies and there were 38 per cent fewer tenured and tenure track black staff members. … The American born black population remains stuck at the back of the line … Blacks are more than twice as likely as whites to be jobless … Nearly a third of all black as against 10 per cent of whites, live below what is officially recognised as the poverty level … the real absolute gap in per capita annual incomes between whites and blacks has widened from $5 100 in 1970 to $5 600 in 1988.[1100]

Schelmmer's predictions of the potential pitfalls of implementing affirmative action measures in South Africa have almost all materialised, with devastating consequences for

[1094] Schlemmer 'South African society under stress' 16.
[1095] Stone & Erasmus 'Race-thinking' 126.
[1096] Stone & Erasmus 'Race-thinking' 125.
[1097] Weingast 'Why developing countries prove so resistant' 31.
[1098] Schlemmer 'South African society under stress' 11.
[1099] Schlemmer 'South African society under stress' 12.
[1100] Schlemmer 'South African society under stress' 11-2.

the economy[1101] and therefore, the prospects of seamless inclusion of refugees seeking access to the state's resources are severely curtailed. This assessment is over and above the aggravation and tension that will be caused within the South African populace. From the outset, the promise of affirmative action measures give rise to expectations – not all of which are realistic. When affirmative action policies fail to produce the outcomes promised, the result is 'as much or even more stress and conflict than the inequality which inspired them in the first place',[1102] thereby exacerbating latent conflict. On the issue of land redistribution (one of the burning issues that has yet to be adequately resolved by the democratic government), Kotzé insightfully declared that 'the question of the redistribution of agricultural land … is destined to be a major political issue in the next few years'.[1103] Kotzé's prescient remarks cohere with the matter of decolonisation in present-day South Africa. Fanon in particular declared that the land is central to the issue of colonialism and decolonialism. As Fanon stated '[f]or a colonized people, the most essential value, because it is the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity'.[1104] Providing more substantive analysis, Schlemmer noted the glaring reality that any 'politically inspired purchase or acquisition of land' for redistribution would have to involve the granting of credit to aspirant farmers. However, interest rates would likely rise, making this credit unaffordable. Combined with this situation is the more obvious circumstance that each plot of land would invariably be very small, given the large number of people deserving of redistribution. Since each plot is too small to sustain livelihood, agricultural activity would have to be supplemented by other forms of income generation. Having alternative employment means that productivity of the land would decrease. Ultimately, the credit for the land will not be able to be repaid, causing further financial pressure and stress. Also in reference to an unrelenting problem caused by apartheid that has not been resolved by the democratic government is the issue of housing. Like Schlemmer,

[1101] At 13 Schlemmer comments that affirmative action would place inordinate strain on the fiscus, stimulating inflation and forcing a situation of either retrenchments in the worst-case scenario, or falling real earnings, in the best-case scenario, thus creating a discontented class of administrative functionaries. With the continued expansion of the civil service to absord demand for employment, it will necessitate the redistribution of financial resources. Since this will constitute inflationary expenditure, the income of every South African will inevitably suffer.
[1102] Schlemmer 'South African society under stress' 13-14.
[1103] Kotze 'Constrained policy making' 149.
[1104] Fanon *Wretched of the Earth* 44.

Kotzé remarked that urbanization was a policy area of particular concern and for which no one was adequately prepared. Quoting the *Rapport Newspaper*, Kotzé describes it as 'a kind of culture shock' because government officials had never contemplated 'preparing a permanent and comprehensive strategy to make [blacks] part of the cities'.[1105] A conservative estimate by the World Bank in the early 1990s was that 1.8 million houses would have to be built to eradicate the housing shortage. The factual situation predicted then and which closely correlates to the present reality is that '[o]nly a proportion of the need will be addressed before the limits of fiscal resources are reached or other necessary forms of state expenditure are curtailed. Upward pressure on interest rates will make it even more difficult for those not yet provided with housing to acquire shelter.[1106] Access to housing has a direct link with the restoration of one's dignity and identity. Likewise, education is a matter of specific importance for realising one's potential and cultivating a strong sense of identity and dignity. The warning by Schlemmer was that any dramatic increase in the provision of funding for educational provision would exponentially decrease the quality of output, especially in the context of expanding enrolment numbers. Moreover, the stunted economy would entail a 'relative lack of employment opportunity in the wage and salary sector'. This would have the effect of devaluing any worth that the qualifications may have had. This confluence of low quality education and massive unemployment would provoke frustration and anger that would require an outlet. Drawing down to the impact on dignity, identity and culture of black South Africans, Schlemmer projected that affirmative action would likely cause unfair stereotypes and bias against blacks if there is a very rapid deployment of blacks in 'visible levels in the private sector'. The harm about which Schlemmer was warning was the impression created of 'unearned elite status', thereby damaging race relations even further. A fundamental aspect of affirmative action that Schlemmer raised as a concern is that any rapid implementation of affirmative action 'in state employment could lower the efficiency of the bureaucracy'.[1107]

In this regard, an intensive investigation of the economic consequences of apartheid serves the purpose of revealing that historical dispossession, deprivation and abject poverty will

[1105] Kotzé 'Constrained policy making' 147 quoting *Rapport* 8 July 1990 (original in Afrikaans).
[1106] See also, Kotzé 'Constrained policy making' 149.
[1107] Schlemmer 'South African society under stress' 13-14.

continue to have a significant effect on the experience of the large majority of South Africans. Accordingly, whereas numerous national, regional and local 'negotiating forums all addressed socio-economic issues' in parallel with formal negotiations towards democracy,[1108] Friedman concedes that 'they rarely achieved their stated purpose – to agree on post-apartheid socio-economic policy'[1109] hence this remains the unfinished business of the transition. Thus, it is for this reason that although land redistribution, as one of the more pressing issues, was included in the Constitution, the current political discourse is that the ANC 'sold out' by not addressing the question of land in a more decisive manner.[1110] Finally, Omar projected that the new constitution, like its precedessor, would operate 'in an "abnormal" political climate'; detailing the consequences of this occurring:

> an infringement of the principle of accountability, on the one hand, could tend to promote the practice of self-centered individualism on the other. … A certain segment of the people vote for reasons that have little to do with policy or calibre. … This distorted process has two consequences: First, it leads to an abnormally large percentage of people who have no management or political ability, and are unable to hold their own in the ordinary market, weaving their way into the highest decision-making processes of the land. Experience has shown that often their presence is a hindrance rather than a help to political objectives. Their compliance in the negotiating situation is often the product of their inability to grasp issues, if not for reasons of expediency. Second, it enables individuals whose attachment to the general social moral value system is at best weak not only to become members of parliament but then to evade such norms with breathtaking impunity. … In the long term it carries with it the corrosive potential to have a negative influence on the normative values of society as a whole. Compounding the situation are constitutional rules which have the effect of punishing morality and rewarding anti-social behaviour. For example, a minister sacked for corruption still ends up receiving a golden handshake plus an office-bearer's pension payment for life. The system has allowed a false culture of political rewardism to develop'.[1111]

Up to this point, numerous predictions of what could reasonably be expected in democratic South Africa have been canvassed. It is the materialisation of these predictions – especially as they impact compliance with international refugee law – that will systematically be illustrated and assessed as this thesis progresses.

[1108] Friedman 'Agreeing to differ' 252.
[1109] Friedman 'Agreeing to differ' 252.
[1110] Cameron Modisane *News24* 'How Mandela's ANC sold out the economic struggle' (22 April 2014) at *https://www.news24.com/elections/opinionandanalysis/how-mandelas-anc-sold-out-the-economic-struggle-20140422*; Aninka Claassens *Mail & Guardian* 'Mandela didn't sell out: post-1994 ANC did' (8 August 2018) at *https://mg.co.za/article/2018-08-08-mandela-didnt-sell-out-post-94-anc-did*.
[1111] Omar 'The inadequacy of the political system' 117.

5. Conclusion

Creative destruction at a critical juncture – a process intrinsic to the successful future trajectory of a state – is intended to be destablising, yet transformative.[1112] Postcolonialism as a methodology is similarly destabilising, but this is contingent upon applying knowledge pertaining to colonialism's impact to chart the positive transformation of the state. This is certainly consistent with the motives of the parties charged with negotiating South Africa's future when the demise of apartheid was achieved. Negotiations sought to fulfil the fundamental purpose of 'securing popular legitimacy' in the legal order[1113] as this is central to promoting adherence to the rule of law because of its relationship with pluralism and inclusivity. Despite South Africa theoretically being a liberal democracy that promises to ensure the welfare and dignity of all people in the territory, the realisation of social justice is impeded by the multiple – and sometimes mutually exclusive – priorities arising from a history fraught with exclusion, dehumanisation and marginalisation. Within the purview of the decades of colonial and apartheid policies imposed in South Africa, a theme that reverberates is conflict. Conflict between diametrically opposed 'forces' wrought destructive violence, creating the institutionalisation of violence as a means of resolving conflict. Long-term symbolic, structural, physical and psychological violence has impaired the dignity and culture of all South Africans. Even more so, the profound economic inequalities created by colonialism and apartheid sow the seeds for resentment and further conflict. While this is debilitating to society on its own terms, it has a more acute effect on refugees who are perceived as posing a threat to the distribution of the resources of the state amongst those who have an expectation that their entitlement to the resources precedes that of non-South Africans. Consequently, notwithstanding the potence of ubuntu as an African worldview that embraces humanity, solidarity and collective interdependence as an ethical form of conduct, individualistic and competitive behaviour is prioritised, albeit that it comes at an extreme cost of those forced to flee persecution in their home states; the very persons discussed in the following chapter. In this regard, it is doubtful whether the notion of the humanization of international law applies more pertinently to any other legal regime than international refugee law.

[1112] Acemoglu & Robinson *Why Nations Fail* 86.
[1113] Friedman 'Agreeing to differ' 251.

CHAPTER FIVE
THE CONTENT OF INTERNATIONAL REFUGEE LAW

1. Introduction

Refugees are the end result of prolonged human rights violations and persecution. Trauma and anxiety inevitably precede a refugee's compelled flight across an international border. When placed in a life-threatening position, the compulsion to flee to escape the threat rests on 'the understanding that the flight is not the outcome of a free choice, but of necessity'.[1114] What cannot be forgotten, is that migration itself is extremely stressful and psychological trauma accompanies the person[1115] along this journey and most certainly aggravates subsequent trauma. Medical studies confirm that trauma 'suffered at an earlier time will affect the ability of the individual to withstand a new trauma'.[1116] Sachs attributes the subsequent trauma associated with migration to 'the loss of autonomy and sense of defeat at having been overwhelmed by irresistible forces beyond your control; and … the emotion of doom at not being able to return'.[1117] It is, however, the original trauma, that is the source of a claim for asylum. This trauma is the result of any number of life-changing persecutory experiences. It is impossible, Hoffmann explains, to isolate oneself 'from the effects of gross [human rights] violations abroad':

> they breed refugees, exiles and dissidents who come knocking at our doors – and we must choose between bolting the doors, thus increasing misery and violence outside, and opening them, at some cost to our own well being.[1118]

Although fortunate not to require asylum, Burgis (a journalist) explains his exposure to a traumatic experience and its long-term effect on him. It is precisely the kind of horrific situation that he details, that refugees endure:

> I had travelled from Lagos to Jos, a city on the fault line between Nigeria's predominantly Muslim north and largely Christian south, to cover an outbreak of communal violence. I arrived in a village on the outskirts not long after a mob had set fire to houses and their occupants, among them

[1114] Nathwani *Rethinking Refugee Law* 82.
[1115] Dinesh Bhugura, Tom Craig & Kamaldeep Bhui (eds) *Mental Health of Refugees and Asylum Seekers* (2010) 2.
[1116] Norman-Major & Gooden *Cultural Competence* 203.
[1117] Sachs 'From refugee to judge' 42-3.
[1118] Stanley Hoffmann *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (1981) 111.

> children and a baby. … Over the months that followed, when images of the corpses flashed before my mind's eye, I would instinctively force them out, unable to look at them. The ghosts of Jos appeared at the end of my hospital bed. The women who had been stuffed down a well. The old man with the broken neck. The baby – always the baby. Once the ghosts arrived, they stayed.[1119]

Even in the absence of any knowledge of the existence and content of international refugee law treaties, a refugee has a legitimate expectation[1120] that from a moral perspective[1121] and out of necessity[1122] he will receive assistance implicating his very survival. This expectation is premised on the knowledge that asylum, explains Sachs, a former refugee, will save him from further persecution, albeit that it will never be able to 'repair the damage that accompanied being extruded against [his] will from the land of [his] birth'.[1123] Article 14 of the 1948 Universal Declaration of Human Rights was adopted specifically to this end, by affording anyone who is subject to persecution, 'the right to seek and enjoy in other countries asylum'. Defining the grounds upon which asylum may be sought as well as engaging in an analysis of the process through which an asylum-seeker must traverse in order to be granted refuge is the primary function of this chapter. Considerable attention is paid to the role of the UNHCR as it is this agency of the UN that is responsible for working with states to effectively administer the asylum process.

2. Clarifying when asylum must be granted to a refugee

Given that the Universal Declaration of Human Rights is not legally binding, in 1951, the UN adopted the Convention on the Status of Refugees, cementing the obligation to provide refuge to those who qualify. Parts of this Convention have even been interpreted as constituting customary international law, from which no derogation is permissible, such as the right to protection from refoulement.[1124] That being said, the right to asylum often

[1119] Burgis *The Looting Machine* ix-x.
[1120] James Hathaway *The Law of Refugee Status* (1991) 125. See also O'Sullivan & Stevens *States, the Law and Access to Refugee Protection* 18 who argue that 'international institutions are attempting to hold states "responsible" under international law … through either the spirit or the "force of law" … for refugees who enter asylum host state territory (thereby raising legal responsibility pursuant to the Refugee Convention)'.
[1121] Tazreiter *Asylum Seekers and the State* 41.
[1122] Nathwani *Rethinking Refugee Law* 147.
[1123] Sachs 'From refugee to judge' 42-3.
[1124] Elihu Lauterpacht & Daniel Bethlehem 'The scope and content of the principle of non-refoulement: Opinion' in Erica Feller, Volker Türk & Frances Nicholson *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 87, although Hathaway does not share this view. See James Hathaway 'Leveraging Asylum' *Texas International Law Journal* (2010) 45 503.

remains out of reach and continues to be contested because it contradicts the most fundamental part of the international system: territorial sovereignty.[1125] In pursuit of the protection of their sovereignty, states have sought to restrict access to asylum. Provoked by this state of affairs, in 1979 the UNHCR published its *Handbook on Criteria and Guidelines for Determining Refugee Status*. Persuasively, Lewis submits that exclusive focus on the 1951 Refugee Convention in ascertaining whether a state is complying with its refugee law obligations is inadequate because of the 'significance of soft law standards, such as, inter alia, UNHCR doctrinal positions and EXCOM conclusions', and the 'general humanitarian approach by States to refugees'.[1126] It is accordingly appropriate to place reliance on the UNHCR *Handbook* as this confirms that a person is a refugee as soon as she fulfils the criteria contained in the definition. Accordingly, refugee status does not make the person a refugee but only declares that she is one.[1127] The logical implication is that the state is not relieved of its international obligation to provide asylum, notwithstanding the cogency of its intention of securing and maintaining its territorial sovereignty.[1128] Feller highlights that the 1951 Refugee Convention was most certainly not intended to regulate and control migration. Instead, despite the treaty impacting a state's 'sovereign right to regulate entry across broders', this has as its purpose solely to introduce a much-needed 'exception for a clear category of persons'.[1129] The clear category of persons identified by Feller is pronounced in the definition of a refugee in the 1951 Refugee Convention. The definition reveals that a refugee must satisfy a number of requirements to be granted asylum, which at a minimum include:

> well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion [and] 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.[1130]

[1125] Tazreiter *Asylum Seekers and the State* 40-1.
[1126] Lewis *UNHCR and International Refugee Law* 38.
[1127] *UNHCR Handbook* para 28. The relevant expression is 'She does not become a refugee because of recognition, but is recognized because she is a refugee'.
[1128] Tazreiter *Asylum Seekers and the State* 13.
[1129] Erica Feller 'The Evolution of the International Refugee Protection Regime' *Journal of Law & Policy* (2001) 129.
[1130] Art 1A(2) of the 1951 Refugee Convention; Art 1(2) of the 1967 Protocol.

In Africa, this definition has been expanded by the 1969 OAU Refugee Convention. This treaty also includes people fleeing 'external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality',[1131] as eligible for refugee status and broadly reflects the continuum along which the protection of the various categories of migrants passes, with economic migrants being afforded the least amount of protection and refugees the most.[1132] It is worth reiterating that refugees are in a precarious predicament as they have had to relinquish the protection of their state of nationality or origin because they faced a well-founded fear of risk to their life and safety. They remain vulnerable because the risk may become reality if are forced to return to their home countries. To elaborate the rationale and contours of the interpretation of the definition of a refugee, a number of factors are to be considered. The first point is that the state, as Abass explains, is

> charged by the constitution or fundamental law of every country to protect the fundamental human rights of people. Furthermore, when these rights are violated, it is the same State institutions that must ensure that the law is enforced against violators, even if such be the State itself.[1133]

In the event that it is the state that persecutes a person on its territory (or where the circumstances in the state are so volatile that public order is disturbed), that person should initially seek assistance from the state (notwithstanding that it may have been that state that persecuted him). In this regard, it is either the state of which the person is a national or the state where the person ordinarily resides that must be approached for assistance. Flight across an international border should be a measure of last resort. The effective functioning of – and protection received from – the state of which one is a citizen[1134] is integral to the question of whether assistance will be forthcoming. Hathaway makes it clear that *de facto* protection by the state of origin automatically excludes an application for international protection in the form of refugee status.[1135] Thus, it is only if the state is unable or unwilling to assist the person and remedy the violation of rights, that asylum comes into the equation. It is also possible, however, that due to the nature of the persecution, the refugee is 'justifiably

[1131] Art 2(2) of the OAU Refugee Convention.
[1132] Alexander Betts 'Survival Migration: A New Protection Framework' (2010) 16(3) *Global Governance: A Review of Multilateralism and International Organizations* 361-382.
[1133] Ademola Abass *International Law: Text, Cases and Materials* (2012) 676.
[1134] Hathaway & Foster *The Law of Refugee Status* (2014) 49-52.
[1135] Hathaway *The Law of Refugee Status* 134.

unwilling to avail himself of protection of the state of origin' that the compulsion to flee to another country will be justified.[1136] Essentially, the individual cannot reasonably be expected to remain in a state where their very existence is endangered.[1137] As such, the Refugee Convention only becomes applicable when the refugee claims that they are unable to access or benefit from the protection of their state of origin, nationality or habitual residence. While that is the widely accepted position, Battjes maintains that a well-founded fear of persecution supersedes any alternative protection that may be available.[1138] These divergent views can be reconciled simply by the assertion that a refugee has been compelled to flee and cannot be expected to live in the country of refuge as a common alien, thus he requires 'a substitute for this lack of diplomatic protection' in the form of refugee status.[1139] All measures must accordingly be taken to give meaningful effect to the refugee treaties, beginning with affording the refugee a real opportunity to submit a claim for protection.

States receiving refugees bind themselves to permit the refugee access to – and protection on – its territory until a durable solution is found. This legal obligation to permit the entry of refugees into a state's territory, argues Viljoen, epitomises the application of international human rights law at the domestic level because it necessarily requires an erosion of state sovereignty.[1140] By ratifying an international refugee law treaty, the state party is required to protect the rights of refugees as human beings entitled to protection against the violation of any of their rights by their state of origin or nationality. International refugee law unequivocally prevents a state from placing restrictions on the entry into territory in respect of persons who fulfil the definitional requirements of a refugee.[1141] The decision, as well as the processes involved, regarding the reception of persons who claim to be refugees, explains Tazreiter, must be made strictly on the basis of justice, equity and respect for the rule of law in order to 'satisfy domestic and international obligations'.[1142] Colliding and

[1136] Hathaway & Foster *The Law of Refugee Status* 288-9 citing the case of *Ward v Canada (Attorney-General)* [1993] 2 SCR 689 (Can SC, 30 June 1993) 709.
[1137] Goodwin-Gill & McAdam *The Refugee in International Law* 98-9; Nathwani *Rethinking Refugee Law* 97.
[1138] Hemme Battjes *European Asylum Law and International Law* Migration Law Working Paper series 3 (2006) 249 at *https://rechten.vu.nl/en/Images/European_Asylum_Law_tcm248-748844_tcm248-748844.pdf.*
[1139] Nathwani *Rethinking Refugee Law* 99.
[1140] Viljoen *International Human Rights Law* 20.
[1141] Tazreiter *Asylum Seekers and the State* 42.
[1142] Tazreiter *Asylum Seekers and the State* 42.

competing interests in the state of asylum cannot, therefore, negate the reality that refugees are in an exceptionally vulnerable situation, requiring particular humanitarian concern, because they do not enjoy protection from their own state. Articulating these competing interests in order to reveal the obligations that nonetheless arise from ratification of the 1951 Refugee Convention and the 1969 OAU Refugee Convention is the primary purpose of this chapter. This analysis will engage with both the 'original intent' as well as the established 'legal content' of the Convention.[1143] The treaty-monitoring body responsible for ensuring the implementation of the refugee treaties is the UNHCR. Accordingly, it is to this institution's mandate that attention must first be given.

3. The role and function of UNHCR

The UNHCR was created by the adoption of its statute in December 1950[1144] with the primary responsibility of ensuring the international protection of refugees while simultaneously exploring permanent (durable) solutions for the problem of refugees. These two obligations are distinct from each other notwithstanding the fact that the discussion of the former in the UNHCR Statute creates the impression that the aspiration to find permanent solutions is merely part of ensuring international protection of refugees. Voluntary repatriation, local integration or resettlement to a third country constitute the essential solutions and the UNHCR dedicates substantial resources to finding solutions to the problems of refugees. Possibly the best expression of a solution-oriented response is to facilitate independence and self-reliance on the part of refugees as this will inevitably aid in restoring their dignity and self-worth given the atrocities to which they were subjected. Gilbert advocates for such an approach with the poignant statement that 'the quality of asylum, like the quality of mercy, should not be strained'.[1145] A solution-oriented response has another important consequence. It will ensure that states are not unduly burdened by refugees. Significantly, Betts et al's *Refugee Economies* unequivocally concludes that the most sustainable solution to the 'growing numbers of displaced people and declining state

[1143] Canefe 'The fragmented nature of the international refugee regime' 177.
[1144] Statute of the Office of the United Nations High Commissioner for Refugees. In the Annex to UN General Assembly Resolution 428(V) of 14 December 1950. GA Res. 428(V) (14 December 1950).
[1145] Sachs 'From refugee to judge' 53.

willingness to provide protection'[1146] is to recognise that 'refugees have complex economic lives' and the recognition of this will underpin 'interventions that better support refugees' ability to help themselves and others'.[1147] Advancing the argument for the independence of refugees is reliance on the variables of structure and agency. The fact of being a refugee 'places people within a particular institutional context'. Moreover, 'the way markets work', which knowledge is derived from New Institutional Economics, 'is shaped by the institutions that regulate them – by property rights, contracts, and governance'. Therefore, agency is predicated on 'the capacity of refugees to transcend th[e] institutional context both as individuals and as communities'[1148] and to live dignified lives as recognised members of a particular polity who are able to contribute and exercise the rights to which they are entitled.

It is the day-to-day protection of refugees that engages the UNHCR's primary resources. The UNHCR's mandate is therefore to interpret and assist in the implementation of refugee law treaties. The UNHCR is credited with using 'its status as the authoritative organization to help shape refugee policy and persuade states to comply with its standards'.[1149] The General Assembly made the implementation of refugee law obligatory by way of resolution 428(V) to which the Statute of the Office of the UNHCR was annexed. This resolution therefore needs to be read with the UNHCR Statute. In relation to the resolution, paragraph 2(a) dictates that 'States are to take the necessary steps of implementation' of refugee law treaties. This is interpreted to mean that states are required to report on the extent to which the Convention has been implemented so that this may be monitored by UNHCR.[1150] Pertaining to international co-operation between domestic jurisdictions and the UNHCR, article 35 of the 1951 Refugee Convention is regarded as 'executory' in nature by Zieck, who observes that by envisaging co-operation and liaison, the treaty:

> serves to … connect the responsibilities of States as laid down in the 1951 Convention with those of UNHCR [and ensure that] States …provide protection to refugees on the basis of the 1951 Convention … [resulting in] a complementary form of international protection.[1151]

[1146] Alexander Betts et al *Refugee Economies: Forced Displacement and Development* (2017) 200.
[1147] Betts et al *Refugee Economies* 200.
[1148] Betts et al *Refugee Economies* 201.
[1149] Michael Barnett & Martha Finnemore *Rules for the World: International Organizations in Global Politics* (2004) 73-6.
[1150] Lewis *UNHCR and International Refugee Law* 42.
[1151] Marjoleine Zieck 'Article 35 of the 1951 Refugee Convention/Article II of the 1967 Protocol' in Andreas Zimmerman *The 1951 Convention on the Status of Refugees and its 1967 Protocol: A Commentary* (2011) 1468.

To this end, very ambitiously, paragraph 8(d) of the Statute requires that UNHCR promote 'the admission of refugees, not excluding those in the most destitute categories, to the territories of States'.[1152] Essentially, this confirms UNHCR's role in relation to the implementation of international refugee law obligations by states.[1153] Paragraph 8(g) further obliges UNHCR to stay in touch with governments and thereby foster a good working relationship with states to benefit the refugees that UNHCR is mandated to protect.[1154] Specifically, paragraph 8(b) of the Statute places the onus on UNHCR to promote the execution of measures calculated to improve the situation of refugees, while also reducing the number of refugees requiring protection.[1155] Importantly, Lewis notes, over and above obligations owed to the General Assembly, states must provide the Secretary-General, without a request having been made to this effect, with the instruments (laws and regulations) that they have adopted with a view to implementing the 1951 Refugee Convention.[1156] Should a state not comply with this duty, paragraph 2(h) of the resolution is repeated in paragraph 8(f) of the Statute and it obliges UNHCR is to ensure that it obtains the necessary information from governments relating to the number and situation of refugees and the laws and regulations concerning them.[1157] Based on these obligations, it is evident that UNHCR plays a crucial role in realising the General Assembly's responsibilities of 'promoting international co-operation in the political field' and 'assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.[1158]

One of the serious weaknesses of the international refugee framework is that no provision is made for sanctions in the case of non-compliance. Indeed, suspension or expulsion from the treaty regime is not even contemplated. When the 1951 Refugee Convention was adopted, reference to compliance was emphatically rejected. Grahl-Madsen explains that it was 'presupposed that such measures would be taken at the discretion of the State within

[1152] Lewis *UNHCR and International Refugee Law* 19.
[1153] Lewis *UNHCR and International Refugee Law* 16.
[1154] Lewis *UNHCR and International Refugee Law* 16.
[1155] Lewis *UNHCR and International Refugee Law* 19.
[1156] Lewis *UNHCR and International Refugee Law* 42 referring to art 36 of the 1951 Refugee Convention.
[1157] Lewis *UNHCR and International Refugee Law* 16 and 44.
[1158] Art 13 para 1 of the UN Charter.

a reasonable time'. It was further argued that the proposed article 'was superfluous, since the Convention laid down provisions which, in the case of most countries, were already covered by domestic law'. [1159] This gaping lacuna in the Refugee Convention is filled somewhat by UNHCR which arguably plays a seminal role in ensuring that refugees are granted asylum and are not forcibly returned to the countries from which they have fled, as well as promoting appropriate procedures to determine whether or not a person is a refugee. This thinking is consistent with Lewis's contention that 'the close relationship between governments and the UNHCR has the potential to encourage States' implementation of the 1951 Refugee Convention'.[1160] The reality, however, is that failure to include binding provisions concerning implementation and compliance has led to the untenable situation whereby sovereignty and national security far outweigh the protection of refugees, despite UNHCR's emphasis on the rule of law. It is appropriate to explain what UNHCR means when referring to the rule of law as a cornerstone of the refugee determination process since this situates the analysis of whether a state, like South Africa, is indeed adhering to the rule of law in the context of refugee status determination. I elaborate upon this in the section that follows.

3.1 The primacy of the rule of law

The UNHCR proclaimed in its note on international protection that it is imperative that states frame their national laws and policies that are designed to implement international law obligations, in a manner which protects and advances the principle of the rule of law.[1161] The UNHCR defines the rule of law as a concept relating to adherence to the provisions (norms and standards) of international treaties that have been domesticated. It therefore refers to the principle of state governance in which all persons, institutions and entities (both public and private), are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated.[1162] According to the UNHCR, the integrity of the refugee regime is dependent on 'fair standards, substantive equality and consistency in decision-

[1159] Atle Grahl-Madsen *Commentary on the Refugee Convention 1951: Articles 2-11, 12-37* (1997) 256.
[1160] Lewis *UNHCR and International Refugee Law* 46.
[1161] 'The UNHCR Note on International Protection' (2016) 28(1) *International Journal of Refugee Law* 134.
[1162] Executive Committee of the High Commissioner's Programme, 'Note on International Protection' (the rule of law), EC/66/SC/CRP.10, 8 June 2015, Standing Committee, 63rd meeting, para 3.

making'[1163] as these are inherent to respect for the rule of law.[1164] By implication, states are obliged to 'provide a safe and rights-respecting environment [for refugees], supported by a functioning judicial sector and other accountability structures'[1165] that are substantively and procedurally transparent.[1166] An important consideration is that humanitarian and solution-oriented responses are only achieved in a climate of proper adherence to the rule of law.[1167] The UNHCR therefore strives to work closely with states and civil society 'to identify challenges and potential responses, and to advance accountability'.[1168] Of particular concern to the UNHCR is that the bureaucracy responsible for administering and implementing the refugee treaties is 'trained to employ a protection-sensitive approach', thereby delivering fair, non-discriminatory and efficient service.[1169]

3.2 UNHCR's 'soft enforcement' of the rule of law by states

Article 35(2) of the 1951 Refugee Convention imposes an obligation on states to report to the UNHCR. The fundamental purpose of these reports is the collation and production of cumulative reports that are forwarded to the competent organs of the UN. States are expected to provide 'information and statistical data' relating to the condition of refugees; the implementation of the refugee convention, as well as the laws, regulations or decrees in force in the respective states regarding refugee protection.[1170] Despite UNHCR's stated role in pursuit of the implementation of the refugee treaties, absurdly, UNHCR has absolutely no original power to enforce compliance in the case of contraventions or violations of the refugee conventions. Instead, it is merely mandated to supervise and encourage implementation of, and compliance with, international refugee law.[1171] Zieck aptly describes this relationship between UNHCR and states as 'a double-edged sword'.[1172] While UNHCR operates in states by invitation of the particular state, the result is that the

[1163] 'Note on International Protection' para 3.
[1164] 'Note on International Protection' para 46.
[1165] 'Note on International Protection' para 30.
[1166] 'Note on International Protection' para 3.
[1167] 'Note on International Protection' para 76.
[1168] 'Note on International Protection' para 30.
[1169] 'Note on International Protection' para 31.
[1170] Lewis *UNHCR and International Refugee Law* 41.
[1171] Gil Loescher & James Milner 'UNHCR and the Global Governance of Refugees' in Alexander Betts (ed) *Global Migration Governance* (2011) 7-8.
[1172] Zieck 'Article 35 of the 1951 Refugee Convention' 1468.

UNHCR is inevitably 'subservient' to the state and must maintain cordial relations with governments, failing which they risk expulsion.[1173] The situation presents a conundrum because UNHCR fulfils the dual role of implementing partner as well as the one to whom the state is to be accountable for such implementation. Given this context, the supervision by UNHCR could be described as 'soft enforcement'[1174] if one considers that it takes the form of representation to states on both a formal as well as an informal level.[1175] Notwithstanding the foregoing, UNHCR incentivises governments to improve compliance with international refugee law by 'persuasion, socialization and material incentives'.[1176] It would accordingly be fair to state that compliance with refugee law rests on UNHCR's influence and 'persuasive abilities vis-à-vis States'.[1177] However, Gorlick asserts that UNHCR has not managed to give full effect to its duty in article 35 because of the failure by states to provide it with the information prescribed in subarticle 2.[1178] This attitude to the UNHCR is characteristic of the attitude by states to refugees as well. If states fail to consolidate relevant information pertaining to the number of refugees on their territory, it is unlikely that they are fully committed to ensuring the protection of those refugees. Establishing what genuine protection of refugees entails is the subject of the next section, given that it is this section that clarifies not only who qualifies for refugee status, but what the associated consequences of being afforded refuge are.

4. Discerning the ambit and extent of the commitment to protect as espoused in the 1951 UN Refugee Convention and the 1969 OAU Refugee Convention

Given the 'recurring phenomena' of forced displacement that has taken place throughout human history,[1179] and the disparate manner in which sovereign states responded to claims for asylum, contemporary, universal legally-binding refugee law obligations were codified

[1173] Loescher & Milner 'UNHCR and the Global Governance of Refugees' 196-202.
[1174] James Simeon 'Monitoring and supervising international refugee law: Building the capacity to enhance international protection and democratic global governance of the International Refugee Protection Regime' in Simeon (ed) *The UNHCR and the Supervision of International Refugee Law* (2013) 315.
[1175] Simeon 'Monitoring and supervising' 315.
[1176] Loescher & Milner 'UNHCR and the Global Governance of Refugees' 195.
[1177] Lewis *UNHCR and International Refugee Law* 49.
[1178] Brian Gorlick 'Human rights and refugees: Enhancing protection through international human rights law' *UNHCR New Issues in Refugee Research Working Paper No 30* (2000) 5 at *http://www.refworld.org/docid/4ff581592.html*.
[1179] Tazreiter *Asylum Seekers and the State* 45.

in the United Nations Convention Relating to the Status of Refugees of 1951. The 1969 OAU Refugee Convention complements[1180] the 1951 UN Refugee Convention. Indeed, the preamble to the OAU Refugee Convention states that the UN Refugee Convention 'constitutes the basic and universal instrument relating to the status of refugees'.[1181] What distinguishes the OAU Refugee Convention is that it 'arose in the context of independence movements and massive displacement during the period of decolonization in Africa'.[1182] Given this context, article II(2) of the OAU Convention states that the grant of asylum is 'a peaceful and humanitarian act',[1183] purportedly to 'take the political "sting" out of asylum', as Kneebone phrases it[1184] albeit, as Garvey declares, that refugee law rests on the 'tragically inadequate' premise of being humanitarian.[1185] Viewed from this perspective, notwithstanding that article II of the 1969 OAU Refugee Convention merely recommends that a state grants asylum,[1186] the OAU Convention confirms the singular importance of asylum where an applicant complies with the definitional requirements contained in the refugee treaties and their survival is at risk.

The 1951 Refugee Convention definition has been described by Sztucki – both 'for better and for worse' as he puts it – as flexible, leaving the 'otherwise fundamental elements of "well-founded fear" and "persecution" … open to a wide range of interpretation'.[1187] The result is the increased 'stigmatizing of refugees as pariahs – outcasts and liabilities to those who host them'.[1188] As Hadad states: 'one refugee is an individual in need who should be let in, a thousand refugees is a threat and a burden'.[1189] Stigmatisation, exacerbated by growing

[1180] McAdam *Complementary Protection* 2.
[1181] Lewis *UNHCR and International Refugee Law* 19.
[1182] Susan Kneebone 'Refugees and Asylum-seekers in the International Context – Rights and Realities' in Susan Kneebone (ed) *Refugees, Asylum-seekers and the Rule of Law* (2009) 16. Kneebone raises the point that between 1963 and 1969 the number of refugees in Africa rose from 300 000 to 700 000.
[1183] Preamble to the OAU Refugee Convention. The Preamble states that 'hostility created between states with regard to refugee movements should be eliminated as far as possible'.
[1184] Kneebone *Refugees, Asylum-seekers and the Rule of Law* 16.
[1185] JI Garvey 'Towards a Reformulation of International Refugee Law' (1985) 26 (2) *Harvard International Law Journal* 483.
[1186] d'Orsi *Asylum-Seeker and Refugee Protection* 6-7 quoting Marina Sharpe 'The 1969 African Refugee Convention: Innovations, misconceptions, and omissions' (2012) 58 *McGill Law Journal* 104-5.
[1187] Sztucki 'Who is a refugee?' 58. See also Lee Stone 'Elevating a well-founded fear of sexual violence to a form of persecution in refugee status determination: Justifications for a more inclusive approach' (2013) *South African Yearbook of International Law*.
[1188] Tazreiter *Asylum Seekers and the State* 45.
[1189] Haddad *The Refugee in International Society* 31.

numbers of refugees seen as 'racially, and culturally "different" from asylum-granting countries' inevitably impacts both the legal and political interpretation of the refugee conventions, culminating in the rejection of refugees seeking admission.[1190] This is perpetrated by, among other things, policies which maintain no real distinction between genuine refugees, unauthorized (economic) migrants (Jastram has identified a 'widespread tendency to suspect asylum-seekers of being economic migrants'),[1191] and even terrorists. The development of such a 'highly adverse protection climate' heightens the risks of 'further confusion and backlash'.[1192] Therefore, without recognizing the distinct attributes that qualify a refugee, detrimental consequences will undoubtedly ensue. The lack of protection provided by the state to which the refugee belongs, argue Jastram and Achiron, triggers the legal, ethical and political obligations contained in the resilient 1951 Refugee Convention.[1193] For his part, echoing Jastram and Achiron's use of the term resilience to describe the refugee treaty, Gilbert relies on the description employed in the case of *AA* where the Convention is termed 'a living document that could adapt to the needs of the times'[1194] endorsing the need for effective interpretation and application of the 1951 Refugee Convention.

Over time, the perception has been created that the 1951 Refugee Convention is 'an overly guarded safety net … protecting the needs of the refugee-receiving states first and foremost.'[1195] Evidence to this effect are the widely varying outcomes in refugee applications, despite the similarity of cases.[1196] As such, Maley contends that 'the definition of refugees has become problematic' because it 'does not match the volume and nature of displaced peoples in need of sustenance, shelter, and care when events drive them en masse from their homes'.[1197] Exacerbating this untenable situation is, as Davidoff-Gore

[1190] Canefe 'The fragmented nature of the international refugee regime' 176-7.
[1191] Jastram 'Economic harm as a basis for refugee status and the application of human rights law to the interpretation of economic persecution' in Simeon *Critical Issues in International Refugee Law* 161 quoting Michelle Foster *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 2-21, 238-247, where Foster engages in a skillful deconstruction of this dichotomy and its impact.
[1192] Jastram 'Economic harm as a basis for refugee status' 171.
[1193] Jastram & Achiron *Refugee Protection* 3.
[1194] Gilbert 'Running scared since 9/11' 110-1 citing *Secretary of State for the Home Department, re AA (Palestine)* [2005] UKIAT 00104. Significantly, the Tribunal also held that 'the purposes and principles of the UN were not limited to Articles 1 and 2 of the Charter of the United Nations, but could be extended through Resolutions'.
[1195] Canefe 'The fragmented nature of the international refugee regime' 174.
[1196] Jastram 'Economic harm as a basis for refugee status' 172.
[1197] Maley 'A New Tower of Babel?' 307.

reveals, the fact that for the most part, the political debates surrounding the formulation of the Convention on the Status of Refugees concerned the scope of the Convention and not necessarily the substance.[1198] The reason for this, he contends, is that states were preoccupied with the 'desire to protect state interest and preserve national policies' although that could hardly be reconciled with their intention to create a treaty that would unambiguously protect refugees.[1199] Accentuating Davidoff-Gore's critique is Lewis's perspective that in the realm of refugee law, the state party's conduct is contrasted directly with the provisions in the Refugee Convention.[1200] However, the Refugee Convention does not contain any explicit provisions on the procedures that states must adopt. Arguably, a state that does not have a refugee status determination procedure in place could nevertheless still be considered in technical compliance with the standards in the Refugee Convention. Juxtaposed against this is the requirement in the 1969 OAU Refugee Convention that the right of asylum must be 'consistent with' the state's domestic legislations. Although this qualification at first sight appears to negate the right to asylum by providing a loophole to states, in actual fact, Kneebone contends that it constitutes an important 'advance on the Refugee Convention'.[1201] The characterisation of the OAU Refugee Convention as more strenuously protecting refugees is made evident by the situation of refugees unlawfully in the country of refuge. The absurd result emanating from the wording of article 31 of the Refugee Convention is that it does not mention detention of asylum-seekers. Therefore, a state that detains asylum-seekers who lack legal documents would also conceivably not be in violation of the obligations contained in the Refugee Convention.[1202] Contrasted against this, when the OAU Refugee Convention was drafted in the 1960s, it was categorically declared that African states that are parties to the Convention must 'implement it in a spirit as liberal as possible'[1203] which can conceivably be construed to entail that asylum-seekers should be protected from arbitrary administrative detention while their claims are being processed. The OAU Refugee

[1198] Samuel Davidoff-Gore *Compliance without Obligation: Examining State Responses to the Syrian Refugee Crisis* (2015) (BA (Hons) thesis Brown University) 70.
[1199] Davidoff-Gore *Compliance without Obligation*.
[1200] Lewis *UNHCR and International Refugee Law* 37 quoting Raustiala & Slaughter 'International Law, International Relations and Compliance' 538-9.
[1201] Kneebone *Refugees, Asylum-seekers and the Rule of Law* 16.
[1202] Lewis *UNHCR and International Refugee Law* 37.
[1203] Resolution CM/Res 149 (XI) 1968 para 6.

Convention is further distinguished from the Refugee Convention by the right stipulated in the Convention that the first asylum country may appeal to other member states for assistance. The provision imposes a duty on other states to take appropriate measures to lighten the burden of the member states granting asylum in a spirit of African solidarity and international cooperation.[1204] Nonetheless, when confronted with refugee influxes, most states have relied on the 'exceptional' nature of the need for persons to temporarily seek protection from another state. As such, states have concerned themselves with finding a short-term, 'problem solving practical approach'.[1205] It has become abundantly clear, however, that this thinking is counter-intuitive and counter-productive, because it provides no binding framework for the protection of refugees. Against the backdrop of these preliminary observations of the dominant impressions created of the UN and OAU refugee treaties, respectively, the purpose is to establish the specific contours and permutations of the obligations arising from these treaties. Ultimately, sought to be established is what would amount to effective or sufficient legal protection of the asylum-seeker. To this end, a rights-based approach is applied in articulating the rights of refugees, as this is consistent with ascertaining the outer limits of the 'assurances of protection in a non-arbitrary environment'.[1206]

4.1 Creating a robust, credible refugee protection system that is fit for purpose

Fair, effective and efficient assessment systems for determining the veracity of asylum claims[1207] are an absolute minimum threshold requirement for ensuring consistency in decision-making and therefore establishing and maintaining the integrity of an asylum system that has adherence to the rule of law as its basis.[1208] Systems premised on the rule of law involve policy and legal frameworks that are consistent with the standards established

[1204] 1969 Convention art II para 4. The reality is as Newman exclaims, that 'international solidarity in refugee reception is largely absent, so host countries make every effort to reduce the number of refugees by systematically outlawing refugee migration and by blocking all possible avenues of access'. See Newman *Refugees and Forced Displacement* 26.
[1205] Lewis *UNHCR and International Refugee Law* 30.
[1206] 'Note on International Protection' para 52.
[1207] 'Note on International Protection' para 31.
[1208] 'Note on International Protection' para 46.

through the jurisprudence on the 1951 Refugee Convention.[1209] In this regard, the credibility of the protection system is predicated on a system that is focused on the refugee regime. It cannot, therefore, be 'dominated by and held hostage to priorities drawn from immigration control', specifically where the 'general discretionary provisions' of immigration are fundamentally different from the obligations imposed by the refugee treaties.[1210] Even more pertinent is the need to distinguish the refugee protection system from national security, and other domestic imperatives. Quoting Okoth-Obbo, Sachs confirms that states must prioritise the stability – and possibly even the expansion – of the refugee space in a manner that is not viewed as 'a constriction of the ability of states to pursue legitimate influx control and law and order objectives'. However, this is conditional upon:

> a refugee protection system [that] has, and should have, a validity all of its own. It should not be viewed as only the balance from requirements established at the level of immigration control and national penal and criminal law enforcement.[1211]

Buttressing the separation of the refugee system from the immigration or security scheme within a state, the refugee system must facilitate discrimination-free access to the territory, where those who have been forcibly displaced 'can exercise their rights freely, in accordance with the law'.[1212] Such system is reinforced by administrators who have the requisite qualifications, capacity and competence and are committed to employing a 'protection-sensitive approach' by consistently applying the law in a manner that guarantees legal certainty, 'accountability, equity and transparency'.[1213] As Nathwani eloquently states:

> [r]efugee status is a valuable resource and should be distributed on the basis of the urgency of need. Abuse should be avoided. Energies in this direction are justified. However, such efforts should not deprive refugee law of its purpose in general.[1214]

Excom Conclusions emanating from UNHCR insist that asylum claimants, whether they are at the border or within the state territory, must be referred to the competent authorities in order to lodge a claim for asylum. From the outset, the challenge posed by – and for – the asylum-seeker is that they have been compelled to flee and thus are invariably unable to

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[1209] UNHCR *A Thematic Compilation of Executive Committee Conclusions* (2011), citing EXCOM Conclusion No 65 (1991) para (o); No 71 (1993) para (i); No 74 (1994) para (i); No 81 (1997) para (h); No 82 (1997) para (d*)(ii)*; No 85 (1998) para (p); No 87 (1999) para (j); No 100 (2004) Preamble; and No 103 (2005) para (r).
[1210] Sachs 'From refugee to judge' 52.
[1211] Sachs 'From refugee to judge' 52.
[1212] 'Note on International Protection' para 30.
[1213] 'Note on International Protection' para 30.
[1214] Nathwani *Rethinking Refugee Law* 111.

produce any tangible proof that they fled due to 'well-founded fear of persecution'. All they will have is their oral testimony, often in a language that is not spoken by the officials who they first encounter. For this reason, paragraph 47 of the UNHCR *Handbook* provides that:

> [t]he requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself [therefore] if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.[1215]

Juxtaposed immediately against the *Handbook's* "lenience" is the qualification within the same paragraph that it 'does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account' of the asylum-seeker's case. Therefore, assistance must also be provided to the applicant if warranted. Such assistance may include guidance on the procedure to be followed, in addition to legal assistance and/or translation services. Furthermore, unrestricted access to UNHCR or non-governmental or other civil society organisations should be granted, as well as authorisation to remain in the territory of the state in which asylum is sought, pending a final decision on the application.[1216]

If all of these conditions permeate the protection system, two benefits will ensue: genuine refugees will fluidly move through the system and obtain the protection to which they are entitled, while illegitimate applications that undermine the system will be curtailed proportionately.[1217] In this regard, if the system functions fairly and effectively, the quality of asylum granted will be enhanced exponentially. In this regard, to establish whether a person arriving at the border or who is already within the state, is a genuine refugee, the administrator who first comes into contact with the person must be in a position to apply the provisions of the Refugee Convention, correctly interpreted, to the person's circumstances.

[1215] Nathwani *Rethinking Refugee Law* 73 referring to para 47 of the UNHCR Handbook.

[1216] EXCOM Conclusions No 8 (1977) para (e); and No 30 (1983) para (e*)(i).* See UNHCR 'Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards' (2005) at *www.unhcr.org/refworld/pdfid/432ae9204.pdf.*

[1217] Nathwani (*Rethinking Refugee Law* 44) quotes the European Commission, COM (2001) 627, 8, where it states: 'Effective action against illegal immigration plays an essential part in contributing to public acceptance of admission for humanitarian grounds by preventing misuse of the asylum system. Nevertheless, the fight against illegal immigration has to be conducted sensitively and in a balanced way. … This could include greater use of Member States' discretion in allowing more asylum applications to be made from abroad or the processing of a request for protection in the region of origin and facilitating the arrival of refugees on the territory of the Members States by resettlement scheme. Such approaches could ensure sufficient refugee protection within and compatible with a system of efficient countermeasures against irregular migratory flows'.

4.1.1 Assessing the 'totality of the claim': principled diagnosis of prior persecution or prognosis of well-founded fear of persecution

At its most fundamental, refugee status will be granted if the applicant is able to prove 'well founded fear of persecution'. The content of this standard is a reasonable possibility of persecution rather than a possibility of persecution. Put differently, if the applicant is able to prove fear of persecution to a *reasonable* degree, refugee status must be granted.[1218] Persecution as a specific concept, despite its importance to the interpretation and application of the refugee treaties, is not defined in the refugee treaties. As Lewis points out, the 1951 Refugee Convention contains significant gaps and ambiguities, which render the Convention's applicable standards insufficient in ensuring protection.[1219] Moreover, there is no internationally accepted definition of what constitutes persecution. Resort is therefore made to the ordinary dictionary definition of persecution being: 'to pursue with malignancy or injurious action, especially to oppress for holding a heretical opinion or belief.'[1220] In the context of refugee law, in Draft Guidelines for the Application of the Criteria for Determining Refugee Status, 1994, the European Union formulated an interpretation of persecution in the following terms:

> In order to constitute 'persecution' … acts must constitute by their nature and/or repetition an attack of some seriousness which would render normal life in the country of origin impossible ('normality' of life must be assessed having regard to the prevailing conditions in the country).

Grahl-Madsen's assessment of why no definition of persecution appears in the Refugee Convention is compelling precisely because of its relevance to humanity's weaknesses. In his opinion, the drafters may have decided to 'introduce a flexible concept which might be applied to circumstances as they arise; or in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men'.[1221] This notwithstanding, seeking a definition of persecution that is contained in international law remains necessary to prevent confusion or ambiguity, particularly since this ensures adherence to the rule of law. The most recent international treaty that does define

[1218] *Immigration and Naturalization Service v Cardoza-Fonseca* 480 US421 (1987) 440.
[1219] Lewis *UNHCR and International Refugee Law* 37.
[1220] As employed in the case of *R v IAT Ex parte Jonah* 1985 Imm AR 7.
[1221] Grahl-Madsen *Commentary on the Refugee Convention* 193.

persecution is the Rome Statute of the International Criminal Court.[1222] Under the category of crimes against humanity, article 7(2)(g) of the Rome Statute defines persecution as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.[1223] Reliance on the Rome Statute to derive the meaning of persecution in the context of refugee law is apposite because of the Rome Statute's broad conception of persecution. By way of illustration, crimes against humanity include 'severe economic human rights violations'. This has been interpreted to mean 'total economic proscription'[1224] and has further risen to the accepted *de facto* standard. As Simeon argues, 'if international criminal law could hold a person responsible for deprivation of livelihood, then refugee law should certainly be able to do the same'.[1225] A reasonable interpretation of persecution based on the aforegoing is that persecution involves punishment or systematic harm that inflicts suffering (physical, psychological, emotional or even financial in nature), directed at an individual or group. The conduct should reach such a level of intensity that remaining within the state of origin is not only difficult, but intolerable or impossible. Thus, the individual is motivated to flee in search of refuge.

Unequivocal is the knowledge that the wide acceptance of norms by states does not prevent contrary and conflicting interpretations of those norms 'particularly in light of other strong norms in international life'[1226] and for this reason, the most plausible and legally sound interpretations will be constructed and presented. A basic starting premise, arising from Article 14 of the Universal Declaration of Human Rights, is that refugee law cannot be interpreted without reference to international human rights law because of the inherent relationship between the two branches of law. So adamant is the UN that international human rights law informs refugee law, that Navanethem Pillay, the former United Nations High Commissioner on Human Rights, urged 'refugee law judges to employ the Universal Human Rights Index, developed by the Office of the [UN] High Commissioner on Human Rights' when deliberating on claims to refugee status.[1227] This is consistent with the

[1222] Rome Statute (1998) 2187 UNTS 90.
[1223] Simeon *Refugees and Forced Displacement* 32-3.
[1224] Jastram 'Economic harm as a basis for refugee status' 154 quoting Foster *International Refugee Law* 90-1.
[1225] Simeon *Refugees and Forced Displacement* 32.
[1226] Alkoby 'Theories of compliance' 177.
[1227] Jastram 'Economic harm as a basis for refugee status' 163 quoting Foster *International Refugee Law* 31.

perspective that international human rights law 'provides the appropriate frame of reference'.[1228] Following Foster and Simeon, Jastram encourages the use of international human rights law in refugee status determination procedures because of its ability to crystallise universally consistent decisions, given its nature as an 'external and "objective" source' of interpretation.[1229] Hathaway and Foster are equally convinced that reference to international human rights standards would be most appropriate for 'seeking authoritative guidance on the interpretation' of the refugee treaty provisions.[1230] This is relevant with regard to the purpose and object of the Vienna Convention, especially article 60(5), which requires that domestic refugee law be compatible with the provisions of the 1951 Convention.

As far as particular norms of international human rights law are concerned in the assessment of a claim for refugee status, Hathaway and Foster lean in favour of the international human rights law matrix originally devised by Hathaway in 1991.[1231] Hathaway had advocated for a hierarchical approach by superimposing civil and political rights and thereafter, socio-economic rights over the Refugee Convention to establish the violation of a core human right and thus whether refugee status should be accorded. On Hathaway's original construction, if the violation was of one or more of the 'non-derogable rights' found in the International Covenant on Civil and Political Rights, such violation was immediately assumed to constitute persecution. Moving down the hierarchy, if it was found that the right violated is derogable, the presumption was that persecution occurred, unless it could be established that the requirements in order to derogate from those right(s) were met. As far as the consideration of whether a violation of an economic, social, or cultural right amounts to persecution is concerned, the question was whether the state had discriminated against the claimant or whether the state had failed to comply with its obligation to take reasonable legislative or other measures to progressively realise economic, social and cultural rights. If the state possessed adequate resources and had not taken appropriate action to enable the claimant to enjoy specific rights in the International Covenant on Economic, Social and

[1228] Jastram 'Economic harm as a basis for refugee status' 164. Pertinently, to date, the Human Rights Index is invoked, be it explicitly or implicitly, in status determination processes in at least fifteen states.
[1229] Jastram 'Economic harm as a basis for refugee status' 163 quoting Foster *International Refugee Law* and James Simeon 'Human Rights Nexus Working Party Rapporteur's Report' in *The Changing Nature of Persecution* (2001) International Association of Refugee Law Judges 305.
[1230] Hathaway & Foster *The Law of Refugee Status* 200.
[1231] Hathaway *The Law of Refugee Status*.

Cultural Rights or had wilfully discriminated against the claimant, persecution was deemed to have taken place.[1232] For the most part, Hathaway and Foster do not object to this approach insofar as they submit that the international human rights standards as articulated in the International Bill of Rights[1233] are appropriate because they provide 'an understanding of the minimum duty owed by a state to its nationals' and these treaties have been widely ratified.[1234] Where they differ fundamentally from the earlier position is that the hierarchy is abandoned. Instead, pursuant to the indivisibility of human rights, they rely on the plethora of additional international human rights law treaties[1235] that codify rights in international law in order to propose a structured three-step 'positivist framework' cognisant of human rights law's 'inbuilt flexibility'[1236] to analyse whether a serious risk of harm or persecution is posed to the applicant.[1237] The first part of this enquiry is to assess whether the specific interest alleged to be at stake can be measured against the benchmark of being 'defined by a widely ratified international human rights treaty'. The second leg of the test asks whether the risk, notwithstanding wide ratification, is 'one deemed acceptable by reference to the scope of the right as codified?'[1238] The final stage of the assessment involves a practical, synthesized and critical analysis of the cumulative effect and nature of the conduct that the claimaint alleges is persecutory and directed at him; in other words, the 'totality of the claim'.[1239] Specifically, this totality of claim, argue Goodwin-Gill and McAdam, involves a consideration

[1232] Hathaway *International Refugee Law* 108-12.
[1233] This includes the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political rights, adopted 19 December 1966, 999 UNTS 171, and the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 UNTS 3.
[1234] Hathaway & Foster *The Law of Refugee Status* 200-1.
[1235] International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, 660 UNTS 195; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); International Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 December 1979, 1249 UNTS 13; the Convention on the Rights of the Child, adopted 20 November 1989, 1577 UNTS 3.
[1236] Art 18(3) of the ICCPR, for example, states that human rights are sometimes subject to legitimate limitation or restriction where necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
[1237] Hathaway & Foster *The Law of Refugee Status* 204-5.
[1238] Hathaway & Foster *The Law of Refugee Status* 205. Foregrounding the more fluid approach to refugee status determination is the recognition that the types of claims most often constituting persecution are risks to physical security, threats to liberty and freedom, and infringements of autonomy and self-realization.
[1239] Hathaway & Foster *The Law of Refugee Status* 206-8 citing *Minister of Citizenship and Immigration v Patel* [2009] 2 FCR 196 (Can FC, 17 June 2008) paras 43-6.

of: '(1) the nature of the freedom threatened, (2) the nature and severity of the restriction, and (3) the likelihood of the restriction eventuating in the individual case'.[1240]

The material terms that accompany persecution aid in qualifying the nature and extent of persecution suffered to determine whether it reaches a threshold which would warrant refugee status being declared. The phrase employed is 'well-founded fear of persecution', thus the notion of persecution cannot be considered in isolation in regard to claims for refugee status. One would be inclined to refer to the UNHCR *Handbook* in establishing the meaning of the phrase 'well-founded fear of persecution'. Indeed, it describes this phrase as constituting 'the key phrase' denoting refugee character and places significant emphasis on the concept of fear.[1241] Since fear is subjective, the *Handbook* envisages that the definition involves a subjective element in the person applying for recognition as a refugee.[1242] Importantly, the application of the UNHCR criteria primarily involves 'an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin'.[1243] UNHCR's approach is to establish without doubt that 'the predominant motive for [an] application is fear'.[1244] The specific personality of the applicant, contends UNHCR, is relevant given that psychological responses differ between individuals.[1245] In explaining the implications of this, UNHCR proclaims that the expressed fear must be reasonable, qualifying this statement with:

> Exaggerated fear, however, may be well-founded if, in all the circumstances of the case (for example, 'a person's character, his background, his influence, his wealth or his outspokenness),[1246] such a state of mind can be regarded as justified.[1247]

This overtly subjective analysis is justifiably criticised not least because it places an untenable burden on the adjudicator to assess the individual's subjective experience of fear.[1248] A further criticism is that the claimant is expected to support his allegation of persecution with evidence of a real threat to his person. This threat of persecution must be

[1240] Goodwin-Gill & McAdam *The Law of Refugee Status* 92.
[1241] Para 37.
[1242] Para 38.
[1243] Para 40.
[1244] Para 41.
[1245] Para 40.
[1246] Para 43.
[1247] Para 41.
[1248] Hathaway & Foster *The Law of Refugee Status* 186-90.

over and above evidence of general conditions of oppression in the country of origin. I therefore find Nathwani's 'necessity approach to interpreting the refugee concept'[1249] very appealing and instructive. Nathwani convincingly argues that an appropriate test to articulate the individual's circumstances is the question: 'would a reasonable person, in the place of [this individual], have fled [the state of origin] like the individual did, or would an average … person have [been able to resist the need for escape]?'[1250] Nathwani employs this test because of his awareness that fear and one's state of mind might very well 'be caused by imperfect knowledge' and/or not be based on reality.[1251] Moreover, this test also considers the extent to which willpower impacts upon a claimant's decision to flee. The reason for this is located in the law's ability to regulate human behaviour in terms of the presumption that everyone possesses an average level of willpower.[1252] Stated differently, the test could read: would 'a person of reasonable firmness in the same situation and sharing the general characteristics of the claimant, like age, sex, physical frailty etc. … have acted in the same way as the claimant?'[1253] This test, known as the 'third person test' is proposed by Nathwani because of its capacity to offer an objective assessment of the individual's situation. In the result, the fear must therefore relate to the individual's subjective, yet reasonable,[1254] state of mind in light of all the relevant facts and circumstances known to the adjudicator. Jurisprudentially, this type of test has been applied in Canada for over 30 years. In the cases of *Kwaitakowsky v Canada,*[1255] *Rajudeen v Canada*,[1256] *Adjei v Canada*[1257] and *Canada v Ward*,[1258] it was held that the person applying for refugee status should fear persecution and the fear should have an objective basis or at least be able to be assessed objectively, despite the applicant having a subjective fear. This is quite obviously the preferred method of assessment given its more balanced and neutral approach. Accordingly, Hathaway and Foster invoke the definition of 'being persecuted' as employed in the case of *R v Immigration Appeal Tribunal and*

[1249] Nathwani *Rethinking Refugee Law* 85-114.
[1250] Nathwani *Rethinking Refugee Law* 110.
[1251] Nathwani *Rethinking Refugee Law* 110.
[1252] Nathwani *Rethinking Refugee Law* 111.
[1253] Nathwani *Rethinking Refugee Law* 111.
[1254] Nathwani *Rethinking Refugee Law* 110.
[1255] (1982) 2 SCR.
[1256] (1984) NR 55.
[1257] (1989) DLR 57.
[1258] (1993) SCR 2.

Another; Ex parte Shah, where Sedley J describes it thus: 'a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form'.[1259]

Hathaway and Foster argue that 'fear can remain well-founded despite formal changes, and even where significant progress towards greater respect for human rights is evident'.[1260] They confirm that a state's expressed intentions do not automatically eliminate any fear of persecution. This is true for refugees who fled Rwanda and Angola; the large majority refuse to return although the conflict has ended. Prospectively, therefore, the adjudicator is also required to assess the future risk of persecution.[1261] Goodwin-Gill articulates the appropriate standard of probability by linking the degree of persecution and the degree of likelihood, thus:

> the examiner must make a reasoned guess as to the future, while also taking account of the element of relativity between the degree of persecution feared (whether death, torture, imprisonment, discrimination, or prejudice, for example) and the degree of likelihood of its eventuating.[1262]

Accordingly, he submits that the nexus between the fear and the harm are proportionate to each other, with more serious harm feared equating to a lower likelihood of risk of harm required for purposes of granting refugee status. In this regard, the underlying procedures entail that the adjudicator should be in a position to objectively assess and verify a situation of risk or danger in the country of origin. However, Nathwani warns that practically, 'the refugee adjudicator is incapable of correctly establishing [such danger and thus], the possibilities of the authorities of the state of refuge making a correct prognosis are very limited indeed'. He strongly argues that such a system should be avoided as it would 'operate against the claimant' due to the obvious 'lack of evidence'.[1263] Alternatively, he suggests, a refugee's claim should be determined by way of the falsification of 'the claim of persecution on the basis of available and reliable evidence' if any exists.[1264] In circumstances where the claimant's fear is credible, notwithstanding a lack of reliable evidence, 'he should be given the benefit of the doubt'.[1265] The grounds for claiming refugee status are canvassed next.

[1259] *R v Immigration Appeal Tribunal and Another; Ex parte Shah* [1997] Imm AR 145 (Eng HC 24 October 1996) para 24.
[1260] Hathaway & Foster *The Law of Refugee Status* 132.
[1261] Nathwani *Rethinking Refugee Law* 107.
[1262] Goodwin-Gill *The Refugee in International Law* 24.
[1263] Nathwani *Rethinking Refugee Law* 73.
[1264] Nathwani *Rethinking Refugee Law* 111.
[1265] Nathwani *Rethinking Refugee Law* 111.

4.1.2 The qualification of the grounds upon which persecution must be feared

Whereas the claimant must be able to satisfy the adjudicator that he or she has a well-founded fear of persecution, the Refugee Convention is explicit that the persecution must be directly linked to one or more of the grounds listed in the Refugee Convention. Reference to these grounds is apparently necessary to convey the persecutor's intent. However, from the perspective of the purpose of the Refugee Convention, this additional qualification potentially deprives the refugee of the protection they so desperately require since persecution itself should be sufficient to warrant the granting of refugee status. Moreover, it defeats the fundamentally apolitical and humanitarian nature of refugee law. Gagliardi's assessment that threats to life or freedom are the primary indicators of persecution (irrespective of how persecution is defined) reinforces the view that the grounds listed in the Refugee Convention neither make the process of establishing the veracity of a claim more 'objective' nor provides a universal standard that can be relied on.[1266] On this latter point, Jastram remarks that the 'imposition of [an extremely] demanding standard is not justified under the Convention' in any event.[1267]

The grounds listed in the Refugee Convention are arguably superfluous because they do not contribute to the determination of whether persecution itself has been – or will be – perpetrated. For this reason, Goodwin-Gill and McAdam's description that the analysis of whether persecution is likely 'turn[s] on an assessment of a complex of factors'[1268] accurately portrays that refugee adjudicators 'must delve more deeply than most human rights experts into an understanding of the nature and limits of the right under consideration'.[1269] Nonetheless, the grounds contained in the Refugee Convention include political opinion; membership of a particular social group; race or ethnicity; religion; and nationality. In establishing the substance of these grounds, the approach adopted by Hathaway and Foster focuses on legitimate risks to a refugee's physical security. The approach of Goodwin-Gill and McAdam as read with the approach of Hathaway and Foster

[1266] DP Gagliardi 'The inadequacy of cognizable grounds of persecution as a criterion for awarding refugee status' (1987/1988) 24 *Stanford Law Journal* 259-273.
[1267] Jastram 'Economic harm as a basis for refugee status' 148.
[1268] Goodwin-Gill & McAdam *The Refugee in International Law* 92.
[1269] Jastram 'Economic harm as a basis for refugee status' 165.

is favoured above an analysis which concentrates on the specific wording of the listed grounds because of its consistency with the sentiment that 'critical risks to socio-economic rights' also fall within the ambit of the 'quintessential refugee claim'.[1270] These factors could include poverty, medical condition, occupation, and wealth.[1271] This is significant because violations of socio-economic rights have not ordinarily been interpreted as constituting a valid claim to protection in terms of refugee law. As noted by Jastram, socio-economic characteristics have instead been applied for purposes of establishing whether the complainant should be determined to have been persecuted due to his or her particular social group.[1272] As such, a literal interpretation of the grounds is antithetical to refugee law's purpose and objectives.[1273]

Many scholars have emphasised that the weaknesses and deficiencies inherent in the normative and substantive principles of international refugee law equally affect the institutions responsible for managing refugee crises.[1274] To remedy this problem there has been a substantial shift in the pattern of interpretation of the Statute of the UNHCR. Accordingly, there is agreement that it is no longer exclusively the definition of a refugee which determines who qualifies as a refugee. Instead, contextual factors such as a person's need for international protection are decisive when categorising a person as a refugee.[1275] Consonant with the move away from a literal approach, even the term international protection is construed as including 'complementary protection' (where states permit persons who are not Convention refugees but return to their country of origin is not possible or advisable)[1276] as well as a wide variety of mechanisms, encompassing both procedural and material assistance.[1277] One justification for the generous approach to interpretation is due to what Venzke describes as the yawning gap that often unfolds 'between the mechanisms of control, ways and means of contesting the influence of bureaucracies and their actual exercise of

[1270] Hathaway & Foster *The Law of Refugee Status* 208.
[1271] Jastram 'Economic harm as a basis for refugee status' 147 relying on 'Second Circuit Uphold BIA Decision that "Affluent Guatemalans" Do Not Constitute a Particular Social Group' (2007) 84 *International Relations* 2874.
[1272] Jastram 'Economic harm as a basis for refugee status' 147.
[1273] Hathaway & Foster *The Law of Refugee Status* 181 citing Art 31 of the Vienna Convention.
[1274] Garvey 'Towards a Reformulation of International Refugee Law' 488 and Michael Barutciski 'The limits of the UNHCRs supervisory role' in Simeon *Refugees and Forced Displacement* 67.
[1275] Venzke *How Interpretation Makes International Law: On Semantics and Normative Twists* (2012) 88.
[1276] McAdam *Complementary Protection* 20.
[1277] Venzke *How Interpretation Makes International Law* 88.

power'.[1278] To be sure, it is the exercise of power that is integral to the effectiveness of refugee law. This is especially evident in relation to refoulement, considered below.

4.1.3 Protection against refoulement

Article 33 has been described as the most important provision of the Refugee Convention. Termed the principle of non-refoulement, this provision confirms the legally binding nature of the Refugee Convention by prohibiting in 'any manner whatsoever'[1279] the expulsion or return of a refugee. What is quite remarkable is that the OAU Refugee Convention uses the term 'persons' instead of 'refugees',[1280] with the consequence that it protects a wider category of individuals from refoulement. Moreover, the OAU Convention has 'increased the scope of non-refoulement to include prohibition of return at the border'.[1281]

When an asylum-seeker has no possibility of seeking asylum in any other country, it is absolutely impermissible to reject or turn a refugee away 'while the source of their persecution still exists'.[1282] The effect of this provision is that a state would be guilty of contravening its international legal obligations if does not comply with the requirements contained in article 33. In this regard, a state may not forcibly expel a refugee from its territory and/or send a refugee back to their state of origin where they fear persecution which could amount to a threat to their life, liberty, freedom or physical security. Moreover, the principle of non-refoulement also entails that a person may not be sent to a state from which they could be further deported to their country of origin, articulated in article 33(1) as:

> 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.

The OAU Refugee Convention similarly provides:

> No person shall be subjected by a Member State to measures such as rejection at the frontier, return or explusion, which would compel him to return to or remain in a territory where his life,

[1278] Venzke *How Interpretation Makes International Law* 76.
[1279] Goodwin-Gill & McAdam *The Law of Refugee Status* 257-262.
[1280] d'Orsi *Asylum-Seeker and Refugee Protection* 37.
[1281] Jacob van Garderen & Julie Ebenstein 'Regional Developments: Africa' in Zimmermann *The 1951 Convention on the Status of Refugees* 186. See generally, Jacob van Garderen et al 'The African Union Legal Framework for Protecting Asylum-seekers' in Ademola Abass & Francesca Ippolito (eds) *Regional Approaches to the Protection of Asylum-seekers: An International Perspective* (2014) 19-44.
[1282] Tazreiter *Asylum Seekers and the State* 42.

> physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

This protection is also extended to persons waiting at the border in terms of the OAU Convention. It is worth mentioning, however, that evidence of state practice of ensuring the protection of persons who have not yet entered the state, in terms of the Refugee Convention also exists. As such, Hathaway argues that this ban on refoulement indicates that refugee law is clearly based on a theory of temporary protection since a state is obliged to protect the refugee on a temporary basis pending a proper determination of their refugee status.[1283] A violation of this provision would occur, however, if a state 'takes the refugee back to the border' of the state where persecution could occur.[1284] That being said, there are very limited permissible exceptions to the right against refoulement, being national security and public safety.[1285] Accordingly, article 33(2) of the Refugee Convention states:

> 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/she is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

These exceptions to refugee status have been codified in the form of explicit exclusions but have been liberally interpreted on occasion. On this aspect Gilbert comments that 'judges have tended only to use a generous interpretation where it broadens the exclusion clauses, not the scope for protecting the individual through a purposive approach'. [1286] Notwithstanding the exclusions, all states – whether they are party to the Refugee Convention or not – are legally bound to respect and comply with the principle of non-refoulement since this principle has been interpreted to constitute customary international law. Indeed, some scholars have even gone as far as arguing that customary non-refoulement has risen to the level of a peremptory norm of international law in particular circumstances.[1287] Any violation of this principle (or even a potential violation thereof) will prompt the UNHCR, along with law enforcement or judicial authorites, to intervene. To

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[1283] Hathaway *Reconceiving International Refugee Law* xviii.
[1284] Paul Kuruk 'Asylum and the non-refoulement of refugees: The case of the missing shipload of Liberian refugees' (1999) 35 *Stanford Law Journal of International Law* 328 as quoted in d'Orsi *Asylum-Seeker and Refugee Protection* 37.
[1285] See also Goodwin-Gill & McAdam *The Refugee in International Law* 234-5.
[1286] Gilbert 'Running scared since 9/11' 110-1 citing *Secretary of State for the Home Department, re AA (Palestine)* [2005] UKIAT 00104.
[1287] Lauterpacht & Bethlehem 'The scope and content of the principle of non-refoulement' 87-179.

guard against any future violations of the principle, UNHCR may take it upon themselves to publicly inform members of the public that the state has not complied with the obligations it has undertaken.[1288] Moreover, the right of non-refoulement is not only customary international law in nature. Its significance is exhibited by the fact that it is also present in numerous international human rights treaties. This is consistent with the understanding that refugee law has human rights law as its basis. As Gilbert eloquently puts it:

> Human rights are fundamental to refugee protection and the developments in international human rights law since 1951 require courts dealing with refugee status determination to understand [changes over time]. If international human rights law would not allow the refoulement of a person, no matter what their previous conduct, international refugee law that is the root of non-refoulement needs to be interpreted in a consistent fashion.[1289]

The treaties that refer to the principle of non-refoulement include, in the first instance, the ICCPR[1290] and the Convention against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment.[1291] The specific relevance of these two treaties is that in terms of article 7 of the ICCPR, torture and other violations are particularly prohibited. For this reason, article 7 has been interpreted by the Human Rights Council as prohibiting refoulement.[1292] Likewise, anyone subject to refoulement may invoke the Torture Convention and have recourse to the Committee against Torture to seek a declaration that they may not be refouled.[1293] Other treaties referring to the principle of non-refoulement are the Declaration on the Protection of All Persons from Enforced Disappearance,[1294] and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.[1295] These treaties all confirm that refoulement to a country where a risk of serious abuse exists, is unlawful.

[1288] Jastram & Achiron *Refugee protection* 14.
[1289] Gilbert 'Running scared since 9/11' 102.
[1290] Art 13.
[1291] See in this regard, Goodwin-Gill & McAdam *The Refugee in International Law* 209.
[1292] Para 9 of General Comment 20 art 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment) of the [former] UN Human Rights Committee declares: 'State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'. UN HRC, CCPR 20 (10 March 1992).
[1293] Jastram & Achiron *Refugee protection* 14.
[1294] Art 8.
[1295] Art 5.

4.1.4 Refoulement by other means: 'first safe country' and 'safe third country'

Nowhere in the 1951 Refugee Convention does it state that refugees must be returned to the first safe country where they had an opportunity to apply for asylum. The 'first safe country' rule that has developed in international refugee discourse entails that if an asylum-seeker applies for refugee status, but it is evident that they initially transited through a safe country where they could have made a refugee status application, they can lawfully be returned to that first safe country in order to have their claim adjudicated.[1296]

The international refugee law framework is also silent on the so-called safe third country rule. This system is only applicable in the European Union and is based exclusively on bilateral or multilateral agreements between countries. Essentially, this system permits a 'destination country' to return an asylum-seeker to another country through which the asylum-seeker passed, if that other country is party to the agreement to this effect.[1297]

4.1.5 The duty not to contain or unnecessarily detain refugees

This right is contained in the UDHR as well as in article 9 of the ICCPR. It is well-known that invariably when a refugee is forced to flee their country of origin, often at short notice, they are unable to prepare travel documents. As such, state parties to the Refugee Convention 'may not penalise refugees for illegal entry into their territory', provided that the refugee 'present themselves without delay to the authorities and show good cause for their illegal entry or presence'.[1298] The penalisation of refugees, regardless of the provisions of the Refugee treaties, often takes the form of detention. Administrative detention, notes Gorlick, is employed in many states in an effort to deter would-be asylum-seekers.[1299] In this regard, Tazreiter makes it clear that a state's 'willingness to detain asylum-seekers for long periods is symptomatic of a defensive political system'.[1300] It will also be recalled that at the beginning of this chapter the point was made that persons who have suffered trauma have immense

[1296] Hathaway & Foster *The Law of Refugee Status* 151.
[1297] Hathaway & Foster *The Law of Refugee Status* 30.
[1298] Art 31.
[1299] Gorlick 'Human rights and refugees' 921.
[1300] Tazreiter *Asylum Seekers and the State* 191.

difficulty coping with any subsequent trauma. Detention of refugees has conclusively been found to re-traumatise them,[1301] which could have serious long-term consequences for the refugee, even after subsequently being granted refugee status and released from detention.

4.1.6 The host state's duty to protect refugees' social, economic and civil rights

The Refugee Convention is explicit in pronouncing on the rights of refugees. These rights include the right to freedom of movement within the territory;[1302] the right not to be expelled from a country (unless the refugee poses a threat to national security or public order);[1303] the right of free access to courts of law on the territory of the state;[1304] and the right not to be discriminated against.[1305] States are also obliged to respect the right to freedom of religion of refugees;[1306] and within the remit of the domestic law, the right to work.[1307] On the socio-economic side, the rights to housing;[1308] education;[1309] and to public relief and assistance[1310] are essential to promote the dignity, well-being, autonomy and future prospects of the refugee.

5. Conclusion

Accentuated in this chapter is the lack of precision and specificity of the definitional criteria of a refugee in the 1951 UN and 1969 OAU Refugee Conventions. Contrasted against this is the prominent role that the UNHCR plays with respect to supporting and monitoring the state's compliance with the refugee treaties. In pursuit of implementing the refugee treaties, the UNHCR insists on absolute adherence to the rule of law in both a procedural and substantive sense. Although regarded as 'onerous' by states, the agreement to be bound

[1301] Tazreiter *Asylum Seekers and the State* 199 relying on the research done by Derrick Silove, Phillipa McIntosh & Rise Becker *Retraumatisation of Asylum-Seekers* (1993); and Derrick Silove & Zachary Steel *The Mental Health and Well-Being of On-Shore Asylum-seekers in Australia* (1998).
[1302] Art 26.
[1303] Art 32.
[1304] Art 16.
[1305] Art 3 of the Refugee Convention; Art 2 of the ICCPR.
[1306] Art 4 of the Refugee Convention; Art 18 of the ICCPR.
[1307] Art 17.
[1308] Art 21.
[1309] Art 22.
[1310] Art 23.

by the international refugee law treaties imposes an unequivocal obligation to comply with the ethical, legal and political underpinnings of the treaties. At the very least, the state must establish a system that can receive and process applicants for asylum in a manner that respects the fundamental rights of the applicant and gives meaningful effect to the letter and spirit of international refugee law. Moreover, the system must be capacitated by competent, committed and knowledgeable administrators who are able to make fair and consistent decisions. Most important is the need to interpret the refugee treaties in good faith and implement them in a transparent manner. Intuitively, the system must be able to differentiate between *bona fide* asylum-seekers and persons who may be abusing the system. As such, the correct interpretation of the treaties is crucial for maintaining the integrity of the refugee regime. Albeit that the key concepts of the refugee definitions, such as 'well founded fear' and 'persecution' are not defined in the treaties, the UNHCR *Handbook* provides an elaborate discussion of the subjectivity of the experience of the refugee and ultimately implores the decision-maker to give the applicant the benefit of the doubt where evidence cannot be exhaustively corroborated. This method of approaching the adjudication of an application is compatible with the humanitarian nature of refugee law and guarantees that the applicant's human rights are respected.

South Africa's transition to democracy was founded on the rule of law and protection of human rights, as well as African solidarity. It is against this backdrop that domestication of the international refugee treaties discussed above will be explored, with Chapter Six offering a theoretical discussion of the legislation and the institution responsible for implementing same, while Chapter Seven analyses the practice juxtaposed against the theory to establish the extent of the divergence between the commitments and their implementation.

CHAPTER SIX
SOUTH AFRICA'S REFUGEE LAW REGIME

1. Introduction

Nathwani's statement that refugee law is won or lost at the national level[1311] is an appealing description of how international law operates: without effective domestic implementation, it is rendered worthless. Extending the concept of winning or losing to the refugee determination process, is Caren's analogy that it is like a trial.[1312] He asserts that both are imperfect procedures which may or may not succeed in achieving the intended outcomes. While the purpose is to 'distinguish those who fit the definition from those who do not', serious errors are always possible. He argues that:

> Just as two types of error can occur in a trial (acquitting the guilty and convicting the innocent), so two types of error can result from the refugee determination process (admitting the unqualified, rejecting the qualified).[1313]

Seeking to be predicted in Chapter Four was the quality and character of South Africa as a democracy: how it would navigate the critical juncture in light of its 'moral foundations and the political manifestations of national interest overlaid with international pressure of an economic, political or indeed ethical nature'.[1314] Persecution of the majority of the population is one feature that had to be decisively combatted. One would therefore assume that protection from any form of persecution would be a paramount consideration of the new government. At first blush, such commitment was evident when South Africa ratified the international refugee treaties. Sachs states it best when he proclaims that the moral debts owed by South Africans compelled to seek refuge in other African states during apartheid 'are paid off not through direct reciprocity, but by means of voluntary acceptance of international treaty obligations'.[1315] While the initial steps of acceding to international

[1311] Nathwani *Rethinking Refugee Law* 35.
[1312] Joseph Carens 'The Philosopher and the Policymaker. Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum' in Kay Hailbronner et al (eds) *Immigration Admissions: The Search for Workable Policies in Germany and the United States* (1997) 22.
[1313] Carens 'The Philsopher and the Policymaker'.
[1314] Tazreiter *Asylum Seekers and the State* 30-1.
[1315] Sachs 'From refugee to judge' 54.

treaties do signal the formal acceptance of legal obligations at a particular point in time,[1316] by themselves, they cannot be used to 'measure the behaviour of states'.[1317] The true 'test of a state's commitment to human rights principles and the spirit of the Refugee Convention', argues Tazreiter, 'is in the treatment of asylum-seekers who will almost always of necessity enter a country in a clandestine fashion in order to ask for protection'.[1318] In the realm of public international law, the content, nature and intended purpose of international treaties requires domestic law-making to take place[1319] – along with the implementation of these laws – in order to establish with precision and clarity, whether the obligations imposed are complied with. Leary locates the situation being experienced in South Africa well within the paradigm of public international law. She asserts that

> states are required under international law to bring their domestic laws into conformity with their validly contracted international commitments. Failure to do so, however, results in an international delinquency but does not change the situation within the national legal systems where judges and administrators may continue to apply national law rather than international law in such cases.[1320]

As Viljoen so poignantly puts it: 'the incorporation of international law into domestic law determines the ability of international human rights norms and standards to flourish in the soil of states and bear fruit in the lives of the people'.[1321] Inevitably, must be had to policy considerations as well as the text of the international treaty when domesticating the law. Similarly, Tazreiter emphasises that there is often a disjuncture between the 'in-principle agreement' to protect refugees and 'the reality of granting protection in the broader social, economic and cultural context of a given country'.[1322] Undoubtedly this is of immense importance to the admission or rejection of refugees. In this regard, an important factor to be emphasised is Tazreiter's assertion that the formulation of refugee policy is heavily influenced by the state's 'historical relationship with immigration and emigration [and] the practices of granting citizenship'.[1323] Essentially, she submits that a state's approach to

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[1316] Ryan Goodman & Derek Jinks 'Measuring the Effects of Human Rights Treaties' (2003) 14 *European Journal of International Law* 174.
[1317] Goodman & Jinks 'Measuring the Effects' 174.
[1318] Tazreiter *Asylum Seekers and the State* 1.
[1319] Goodman & Jinks 'Measuring the Effects' 174.
[1320] Henry Steiner, Philip Alston & Ryan Goodman 'Vertical interpenetration: International human rights law' in *International Human Rights* 1095 quoting Virginia Leary *International labour conventions and national law* (1982).
[1321] Viljoen *International Human Rights Law* 529.
[1322] Tazreiter *Asylum Seekers and the State* 53.
[1323] Tazretier *Asylum Seekers and the State* 125.

"outsiders" impacts on policy responses. As Chapter Three clearly revealed, South Africa was a bifurcated state, with the architecture of apartheid being both social and physical segregation[1324] combined with a deliberate attempt to deny black South Africans citizenship in the land of their birth. Although South Africa's history did not bode well for the protection of refugees, a comprehensive domestic refugee protection system was established.

2. The creation of an effective, efficient refugee protection system

Pursuant to South Africa's desire to join the 'family of nations',[1325] in January 1996 she acceded to the 1951 United Nations Convention Relating to the Status of Refugees; the 1967 Protocol to the Convention Relating to the Status of Refugees; and the 1969 Organisation of African Unity Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa. Early indications were that South Africa was committed to pan-Africanism and regional integration. The Green Paper on International Migration of 1997 (which formed the basis of the domestic refugee legislation subsequently adopted) articulated the goal of achieving a rights-based framework premised on inclusive regional migration and burden sharing.[1326]

The Refugees Act 130 of 1998[1327] is the domestication of the international obligations that South Africa undertook and takes the form of a verbatim repetition of the definitions of qualifying criteria for refugee status as espoused in both the UN and OAU refugee treaties. The preamble emphatically declares that by acceding to the international refugee treaties, South Africa 'assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law'. Importantly, the UNHCR *Handbook* confers on states a wide measure of discretion to 'establish [a refugee protection system and] procedure that it considers the most appropriate, having regard to its particular constitutional and administrative structure'.[1328] The result is what Canefe describes as 'symptoms of idiosyncratic appropriation of the 1951 Convention'.[1329]

[1324] Lindegaard *Surviving Gangs* 57. For an extensive treatment of South Africa's conceptions of South African citizenship, see Jonathan Klaaren *From Prohibited Immigrants to Citizens: The Origins of Citizenship and Nationality in South Africa* (2017).
[1325] Preamble to the Constitution of the Republic of South Africa, 1996.
[1326] Johnson 'Failed Asylum Seekers in South Africa' 210.
[1327] The Act entered into force on 1 April 2000 through Proclamation No R22 2000 *GG*21075 of 4 April 2000.
[1328] UNHCR *Handbook* para 189.
[1329] Canefe 'The fragmented nature of the international refugee regime' 178.

For example, of the three possible solutions determined by the UNHCR for the protection of refugees, the one directly applicable to the South African context is local integration as this is pursuant to the decision taken when the refugee treaties were acceded to: South Africa refused to adopt an encampment policy[1330] and preferred to foster the assimilation of refugees into society. The Refugees Act also differs from refugee legislation in other African states on account of its approach of establishing an 'individual status determination system' instead of *prima facie* group-based refugee status.[1331] A further innovation is that while it does not specifically define the term 'persecution', section 6 of the Act obliges an administrator to interpret the terms of the Act in accordance with the Universal Declaration of Human Rights and any other international instruments to which South Africa has acceded. Precisely, the Refugees Act sets out in quite elaborate detail the processes for the reception of asylum-seekers in South Africa by regulating the method of receipt of applications as well as the criteria to be met for the granting of refugee status.

Complete freedom of movement, the right to work, the right to basic education and basic healthcare as well as the right not to be arbitrarily detained are all guaranteed to asylum-seekers and refugees. The Act also explicitly declares that asylum-seekers will be protected against refoulement. Johnson and Carciotto affirm the fact that by including this provision prominently within the Act (in section 2), South Africa confirmed its commitment to granting refugee status to a person facing imminent danger in his country of origin. The formulation of the right to non-refoulement in the Act goes even further than the provision in the Refugee Convention and also disambiguates 'otherwise contested issues', by explicitly prohibiting refusal of entry at the frontier, expulsion, extradition or return to a third country if any threat of persecution exists.[1332]

On paper, at least, South Africa projected an unambiguous human rights-based approach when adopting the Act, confirming that refugees are entitled to the protection which refugee status confers, as well as extending to them the enjoyment of the rights in the Bill of Rights. This Act superseded the Aliens Control Act 96 of 1991, which was infamous for its control

[1330] Secs 8 and 21 of the Refugees Act state that refugees are not permitted to be confined to refugee camps.
[1331] Johnson & Carciotto 'The State of the Asylum System in South Africa' 168.
[1332] Johnson & Carciotto 'The State of the Asylum System in South Africa' 169.

of people in distress, rather than their protection. South Africa's intention appeared clear: the protection of refugees, without reservation. Handmaker puts it thus:

> The interdependence between the international and national laws provides a firm basis for understanding the national and international obligations at domestic level in promoting the equal worth of human beings. In compliance with the international law requirement of protecting refugees, South Africa protects people who leave their countries for a variety of reasons, including: war; persecution; and natural disasters.[1333]

Alive to inevitable deficiencies in compliance with the law by states, Goodwin-Gill has devised a test to establish whether a state is indeed implementing its refugee law obligations in good faith. This test takes the following form: 'whether, in light of domestic law and practice, including the exercise of administrative discretion, the state has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned'.[1334] Relevant to applying this test is the articulation by Raz of the eight principles that are integral to the effective implementation of the law:[1335]

(1) laws should be prospective, open and clear;
(2) laws should be relatively stable;
(3) the making of particular laws (legal orders) should be guided by open, clear, general rules;
(4) the independence of the judiciary must be guaranteed;
(5) the principles of natural justice must be observed;
(6) courts should have review powers over the implementation of the principles of the rule of law in respect of administrative action and legislation;
(7) courts should be easily accessible; and
(8) the discretion of law enforcement agencies should not be allowed to pervert the law.

Accordingly, it is the combination of the theory espoused by Goodwin-Gill and Raz that informs the critical analysis of South Africa's implementation of the refugee treaties that have been adopted. It is evident from the theory that at a minimum, to ensure enforcement of the law, what is required is a bureaucracy that is law-abiding and that implements the law in a procedurally fair or substantively just manner.[1336] Since administrative justice is prospective, it is obvious that the principles of administrative justice or legality inherent in the definition of the rule of law must be applied at the time when the action is performed or discretion

[1333] Jeff Handmaker 'Who determines policy? Promoting the right of asylum in South Africa' (1999) 11/2 *International Journal of Refugee Studies* 290-309.
[1334] Goodwin-Gill *The Refugee in International Law* 240.
[1335] Joseph Raz 'The rule of law and its virtue' (1977) *Law Quarterly Review* 198.
[1336] Levi & Epperly 'Principled principals' 193.

exercised,[1337] failing which, the conduct will be invalid and constitute a violation of the rule of law. What is essential is that an unbiased system of law is applied.[1338]

3. Refugee protection in South Africa from an institutional perspective

Orren and Skowronek categorise institutions as organisations that have four broad characteristics. First, they have discernible purposes, albeit that these are broadly stated. Second, they establish norms and rules. Third, participants within the institutions each have assigned roles; and fourth, there is a distinct boundary delineating those members who fall within the institution, and those outside of the institution.[1339] The government department responsible for refugees in South Africa is the Department of Home Affairs. The Minister of Home Affairs exercises executive responsibility over the Department, although he is assisted in this regard by the Standing Committee for Refugee Affairs, created by section 11 of the Act. Accordingly, the Committee advises the Minister on any matter he refers to it. To this end, the Minister is responsible for appointing a chairperson as well as any other members he deems necessary, to this Committee. In terms of qualifications, the Act prescribes that at least one member must possess a qualification in law. The Act expressly excludes from appointment to the Committee persons who are not South African citizens and persons who have been sentenced to imprisonment without the option of a fine during the preceding four years. The Act vests the Standing Committee with the following functions:

> Formulating and implementing procedures for granting asylum; regulating and supervising the work of the Refugee Reception Offices; liaising with representatives of the United Nations High Commissioner for Refugees; monitoring decisions by Refugee Status Determination Officers; deciding any matter of law referred to it by a Refugee Status Determination Officer; reviewing applications found to be manifestly unfounded; and determining conditions relating to work or study by asylum-seekers (as long as these conditions are constitutional or are compatible with international human rights and refugee law).[1340]

Most often, an asylum-seeker's first contact with an official representing the state is at the port of entry. The Act dictates that an asylum-seeker should indicate to the official that their purpose is to apply for asylum, in order that they may be issued with an asylum transit visa.

[1337] Yvonne Burns & Margaret Beukes *Administrative Law under the 1996 Constitution* (2006) 6.
[1338] Acemoglu & Robinson *Why Nations Fail* 74-75.
[1339] Karen Orren & Stephen Skowronek *The Search for American Political Development* (2004).
[1340] See sec 25 of the Act.

With this transit visa in hand, the asylum-seeker is permitted to travel to one of the Refugee Reception Offices located in various cities across the country. Without any delay,[1341] and within a maximum of 14 days,[1342] the asylum-seeker must lodge an application for asylum at the Refugee Reception Office of their choice. In the case of an asylum-seeker who has not entered the state in a 'regular' manner, they too must be issued with an asylum transit visa to afford them the opportunity to submit their application for asylum.[1343]

Section 8 of the Act establishes Refugee Reception Offices where applications for refugee status are received by Refugee Reception Officers. Once an applicant has completed an eligibility form with the assistance of a Refugee Reception Officer, adjudication of the merits of the applicant's claim takes place by a Refugee Status Determination Officer.[1344] The Act prescribes the specific attributes that Reception Officers should possess, being 'qualifications, experience and knowledge of refugee matters as makes them capable of performing their function'. The Status Determination Officer must obviously also be suitably qualified and have the requisite knowledge and expertise.[1345] As a safeguard designed to protect the integrity of the refugee status determination process, section 6 of the Act obliges the Department to implement the Act with specific reference to the three international refugee law treaties, the UDHR, and 'any other relevant convention or international agreement to which the Republic is or becomes a party'.[1346] The legislature thus intended 'to create a progressive and humane refugee regime in keeping with South Africa's international legal obligations'. [1347] An unequivocal onus is placed on Reception Officers and Status Determination Officers to apply their mind carefully to the decision being made. Pertinently, the Act goes on to state that these representatives of the state must 'receive additional training that is necessary to perform their functions properly'.

[1341] Reg 2(1).
[1342] Sec 23(2) of the Immigration Act 2002 ostensibly becomes applicable after the 14-day period lapses in that it states: 'Despite anything contained in any other law, when the permit … expires before the holder reports in person to a Refugee Reception Officer … the holder of that permit shall become an illegal foreigner and be dealt with in accordance with this Act.' However, in the case of *Erusmo v Minister of Home Affairs* 2012 (4) SA 581 (SCA), the Supreme Court of Appeal held that on its own, the lapse of the asylum transit visa does not render an asylum seeker an illegal foreigner.
[1343] Reg 2(2).
[1344] Sec 21 of the Act.
[1345] UNHCR Handbook para 190.
[1346] Sachs 'From refugee to judge' 53.
[1347] Sachs 'From refugee to judge' 53.

Section 12 of the Act establishes a Refugee Appeal Board. The Board's primary role is to decide appeals referred to it by applicants whose applications were rejected. The Board may also determine any question of law that has been referred to it. In terms of the provisions of the Constitution of the Republic of South Africa, the Department is required to operate in a democratic, open, accessible, transparent and accountable manner. It is thus imperative that the Minister maintains effective oversight over the officials within the department, thus ensuring that the law is implemented in a manner that strictly complies with the tenets of the rule of law.

3.1 Reception and determination of refugee status

Section 21 of the Act authorises Refugee Reception Officers to undertake an initial examination of an applicant's eligibility for refugee status. In order for this preliminary determination to be made, the asylum-seeker must formally make the application, in person, and complete the prescribed form.[1348] As such, when an application is received, the Refugee Reception Officer must be satisfied that the application has been duly completed and that all of the relevant information is contained in the application. Specifically, the name and nationality of the applicant must appear on the form, as well as information outlining why the applicant resorted to leaving the country of their nationality or habitual residence. It is accordingly the responsibility of the Refugee Reception Officer to obtain any other relevant information from the applicant so that a proper and considered determination of the application can take place. Where necessary, the Refugee Reception Officer must assist an applicant who experiences any difficulties in completing their application. It is also the responsibility of the Refugee Reception Officer to obtain biometric evidence from the applicant on Form BI-1590 (or DHA-1590). This takes the form of fingerprints as well as two recent photographs of the applicant.

Pending the final determination as to whether the applicant satisfies the requirements for refugee status, the applicant is issued with an asylum-seeker permit regulated by section 22 of the Act, hence the title 'section 22 permit'. Once in possession of an asylum-seeker

[1348] Sec 21(4)(b) of the Act.

permit, the applicant has the right to remain in South Africa and may not be arbitrarily arrested or detained for being in the state illegaly. In theory, the final decision on the application for refugee status should be made within a maximum period of 180 days.[1349] However, this permit is renewable by the Refugee Reception Officer and is thus valid for the entire time that it takes for a final decision to be made.

3.1.1 Determining a 'well-founded fear of persecution'

The preliminary determination of an asylum-seeker's claim is followed by what is supposed to be a more thorough analysis (in the form of an interview or hearing) by the Refugee Status Determination Officer. In terms of section 24(1)(a) of the Act this constitutes an opportunity to obtain better and further information from the applicant as well as from the UNHCR if necessary or appropriate.[1350] A fundamental aspect of this process is that the principles of natural justice must be adhered to. In this regard, the applicant is given an opportunity to present his account of why he is eligible for refugee status. As it is a deliberative process, the Refugee Status Determination Officer may consult the applicant, requesting clarification or further detail either from the applicant or from the Refugee Reception Officer. The cumulative effect of this opportunity to obtain pertinent information is to enable the Refugee Status Determination Officer to arrive at an accurate and justifiable decision. Therefore, the onus is on the Status Determination Officer to ensure that the asylum-seeker understands the procedures, their rights and responsibilities as well as the evidence presented.[1351]

A contentious aspect of the process is where the Act stipulates that the Refugee Status Determination Officer 'must also conduct such enquiry as he or she deems necessary in order to verify the information' contained in the application form.[1352] The purpose is to identify whether there is a nexus between the grounds of asylum in the Act and the

[1349] This time frame is in terms of reg 3(1), although evidence points to decisions only being made well after the expiry of this term.
[1350] It will be recalled from Chapter Five that the UNHCR is mandated to collect up-to-date information on the situation of states where refugees originate. This information could also include pertinent information on particular persons of concern on account of their political opinions.
[1351] Sec 24(2).
[1352] This is a restatement of para 196 of the UNHCR Handbook and shifts the onus on the examiner to 'use all the means at his disposal to produce the necessary evidence in support of the application'.

applicant's personal circumstances. This enquiry needs to consider the impact of both subjective and objective factors. The state of mind of the asylum-seeker constitutes the subjective component. To be granted refugee status, the judiciary has confirmed that the applicant must 'persuade'[1353] the decision-maker of the strength of their application by furnishing 'compelling reasons' that justify recognition as a refugee.[1354] At the same time, the objective state of affairs must confirm the asylum-seeker's state of mind.[1355] However, given the circumstances surrounding the applicant's flight and the paucity of reliable information in the public domain pertaining to the alleged persecution, the objective and subjective components must be carefully scrutinised as there may be statements that are not susceptible to proof. In such an instance, the UNHCR urges the Status Determination Officer to give the applicant 'the benefit of the doubt' unless there are good reasons to arrive at a contrary decision.[1356] Even then, there is a safeguard in favour of the protection of the applicant: information that is averse to the applicant must be brought to his or her attention. In the case of *Mary Grace AOL v The Minister of Home Affairs and Others*[1357] Swain J was unequivocal in his assertion that such information is to be 'forwarded to the claimant for comment before being used as a basis for rejection' of their claim.[1358] Empirical evidence even shows that the Refugee Appeal Board itself does not avail an applicant of an opportunity to rebut adverse inferences.[1359] This undermining of the rules of natural justice renders the process fatally flawed.

Paragraph 197 of the UNHCR *Handbook* clarifies paragraph 196 by expressly stating that too strict an emphasis on evidence should be avoided, but that at the same time, unsupported statements 'cannot be accepted as true if they are inconsistent with the general account put forward by the applicant'. More substantive guidance to establishing

[1353] *Somali Association of South Africa and Others v The Refugee Appeal Board and Others* 2019 ZAGPPHC 78 (30 January 2019) para 34.
[1354] *Mateku v Minister of Home Affairs and Others* (2012 ZAGPJHC 241 (28 November 2012); *Mayongo v Refugee Appeal Board and Others* 2007 ZAGPHC 17 (4 April 2007); *Singh v Minister of Home Affairs and Another* 2012 ZAECGHC 48 (14 June 2012) para 20.
[1355] UNHCR *Handbook* paras 37-8 as confirmed in *Fang v Refugee Appeal Board and Others* 2007 (2) SA 447 (T) at 456C.
[1356] UNHCR *Handbook* para 196.
[1357] 2006 (2) SA 8 (D&CLD).
[1358] This precedent confirms the finding in the case of *Yuen v Minister of Home Affairs and Others* 1998 (1) SA 958 (C) at 970C-970G.
[1359] *Tantoush v The Refugee Appeal Board*, Case no. 13182/06 (TPD) at para 59.

whether a well-founded fear of persecution exists is contained in paragraph 42 of the UNHCR *Handbook*, which elucidates the applicable test to determine whether an applicant that presents herself as an asylum-seeker actually qualifies for refugee status. Succinctly put, the standard of proof articulated by Hathaway is the existence of 'a reasonable possibility of persecution'. This standard was elaborated upon by Seriti J in *Fang v Refugee Appeal Board and Others*[1360] as follows:

> The applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition or would for the same reasons be intolerable if he returned there.

It is during this evidence-gathering process that information may come to light impacting on any possible exclusion from refugee status. The Refugee Act stipulates that refugee status will be denied if there is reason to believe that the applicant has

> committed crimes against peace, humanity, etc. as defined in any international legal instrument dealing with such crime; committed a crime which is not of a political nature; and been found guilty of acts which are contrary to the principles of the United Nations.[1361]

If the exclusion clause does not apply and the evidence indicates that the applicant has been subject to persecution and continues to have a well-founded fear of persecution occurring if forced to return to the country from whence he has come, the Refugee Status Determination Officer must grant the applicant refugee status and this must be formally documented.[1362] If, however, the Refugee Status Determination Officer arrives at the conclusion that the applicant does not qualify for refugee status, the Refugee Status Determination Officer must be able to substantiate that the application has been rejected as manifestly unfounded, abusive or fraudulent; or simply as unfounded. Empirical studies prove that it is here where legitimate applications appear to be routinely, arbitrarily, rejected. However, this is not the end of the process, as review and appeal of decisions is contemplated in the Act. For the requirements of just administrative action to be complied with,[1363] the asylum-seeker must be given written reasons for the rejection of the

[1360] 2007 (2) SA 447 (T) at 456F.
[1361] See sec 4 of the Act.
[1362] Sec 23(3).
[1363] See, for example, the case of *Minister of Home Affairs v Saidi* (294/2016) [2017] ZASCA 40 (30 March 2017) para 25, where the Court confirmed that all asylum processes and procedures are administrative in nature and thus subject to the provisions of the Promotion of Administrative Justice Act 4 of 2000.

application. Furthermore, the record of proceedings and a copy of those reasons must be submitted to the Standing Committee.[1364]

According to section 25 of the Act, the Standing Committee must review any decision taken by a Refugee Status Determination Officer in respect of manifestly unfounded applications. The Standing Committee may confirm a decision rejecting an application for asylum found to be manifestly unfounded, abusive or fraudulent.[1365] The Standing Committee may also set it aside and refer the application back to the Refugee Status Determination Officer with directives as to how or why the decision should be reconsidered. These directives must be complied with by the Refugee Status Determination Officer.

The Standing Committee has relatively wide powers with respect to the review of manifestly unfounded decisions by Status Determination Officers. In order for the Standing Committee to establish all the material factual circumstances and reach a defensible decision, the Committee is encouraged to seek information from a representative of the UNHCR. This information may either be provided in writing or orally. In addition, the Committee may (although this should be compulsory) request the applicant to appear before it to provide further clarification.[1366] Should this information be inadequate, the Committee is permitted to make further investigations into the matter, which may involve seeking the attendance of any person who may furnish it with additional information.

An applicant whose application has been rejected on the basis that it is unfounded is also entitled to appeal the decision by approaching the Refugee Appeal Board in terms of section 26(1) of the Act. The Board has the power to confirm, set aside or substitute any decision taken by a Refugee Status Determination. Therefore, the Refugee Appeal Board functions in an almost identical fashion to the Standing Committee in that it is also empowered to invite written or oral representations from a representative of the UNHCR, engage in further investigations of its own and/or request information from any other person who may apprise it of relevant information. However, the Appeal Board may also refer the matter back to the

[1364] Sec 23(4).
[1365] Sec 25(3)(a).
[1366] Sec 25(2)(b).

Standing Committee for its further investigation and deliberation. One important factor in the manner in which the appeal is disposed of is that the applicant is not only permitted to attend the appeal hearing and furnish additional information where relevant,[1367] but the applicant may also be represented by a legal representative.

A final remedy if refugee status is not granted is that the decision of the Refugee Appeal Board (or any other executive decision of the Minister) can be reviewed by the High Court. In such an instance an unfavourable decision may be appealed further to the Supreme Court of Appeal and even the Constitutional Court. Significantly, it was held in 2015 in the case of *Rahim v Minister of Home Affairs*[1368] that a section 22-permit only lapses once a final finding has been handed down by the judiciary recording that the asylum-seeker's claim is unsuccessful. Throughout this time, therefore, the applicant may remain in South Africa and may not be arbitrarily arrested or detained.

3.1.2 Rights accruing to refugees and their integration into South African society

Although liberal democracies are permitted to 'reserve rights and benefits for nationals, and deny other fundamental rights to foreigners and immigrants',[1369] in South Africa, once refugee status has been granted, it is accompanied by a number of rather progressive rights. These include full legal protection and access to the rights in the Bill of Rights; to remain in the country indefinitely;[1370] to an identity document;[1371] to a South African travel document;[1372] the right to seek employment; and access to basic health services as well as primary education.[1373] Moreover, South Africa has a specified non-encampment policy, which entails that refugees are required to integrate into the community. While this arguably advances the independence and self-reliance of refugees, it also leaves them more vulnerable to xenophobic attacks as they live side-by-side with South Africans in impoverished

[1367] Sec 26(2).
[1368] 2015 3 SA 425 (SCA).
[1369] Troeller 'Refugees and human displacement' 52.
[1370] The Act allows them the discretion to remain in country although the government can invoke cessation if it considers that the circumstances have changed in the country of origin.
[1371] Sec 30 of the Act.
[1372] Sec 31 of the Act.
[1373] Sec 27 of the Act.

townships. However, when circumstances dictate that encampment is in the best interests of refugees, the government is obliged to facilitate the establishment of such camps. The xenophobic violence in 2008 provides an example to this effect. However, as elucidated in the case of *Mamba v Minister of Social Development*,[1374] the government sought to eradicate these camps after three months in spite of the fact that the inhabitants of the camps were not yet prepared to integrate into society due to the fear that they experienced.

4. Conclusion

On the face of it, when South Africa was elevated to a member of the international family of nations in 1994, South Africa showed a commitment to embrace international law and domesticate it in pursuit of confirming an expressed intention to comply with the rule of law. Accession to the three refugee treaties occurred with the full knowledge that many South Africans had been forced from their homes during apartheid and that the protection of refugees is a legal, moral and ethical duty. The enactment of the Refugees Act ostensibly indicated that an appropriate and effective system would be established to give meaningful effect to these international obligations. The Refugees Act is even described as one of the more progressive refugee protection instruments, especially on account of its extensive definition of a refugee that reflects Africa's particular circumstances, such as the consequences of colonisation and the struggle for liberation from apartheid. The Department of Home Affairs has been entrusted with the important (albeit difficult) task of establishing whether the persons who claim to have suffered persecution or have had to flee due to circumstances rendering it impossible to remain in their country of origin, are indeed refugees. All that is required is for the officials to apply their minds to the facts of each application by carefully connecting the definition of a refugee to the applicant's personal account and arriving at a decision that is consistent with the rule of law. A critical assessment of the Department's success in this regard will reveal the state's true character as a liberal democracy. That critical assessment is the subject of Chapter Seven.

[1374] Case number 36573/08, Transvaal Provincial Division of the High Court, Pretoria.

CHAPTER SEVEN
CRITICAL ANALYSIS OF SOUTH AFRICA'S COMPLIANCE WITH INTERNATIONAL REFUGEE LAW AND POLICY

1. Introduction

The literature suggests that refugee rights are 'severely compromised' in South Africa.[1375] Moreover, South Africa's asylum system is described as 'struggling',[1376] 'dysfunctional'[1377] and 'failing'.[1378] A reasonable assessment is Newman's description that 'the legal rights of refugees – as refugees and also as humans with human rights – are often demonstrably unfulfilled or violated'.[1379] As such, it appears that there is a growing disregard for the rights of refugees in South Africa. Musalo attributes this to the 'shortcomings in the implementing regulations',[1380] although the evidence advanced in this chapter disputes that theory. More accurately, it is South Africa's historical context that is the actual cause of the demise of the obligation to protect refugees, with two sound and defensible descriptions of why asylum applications are unlawfully rejected. These are the transplant effect; and the enduring legacy of colonialism and apartheid. The reason for this is because the past, states Nietzsche, 'is a chain, which runs with [the man] however far or fast he runs. The past becomes a heavy, often invisible load that will continue to grow and to obstruct his movement'.[1381] Accordingly, this chapter examines history's role in South Africa's apparent reluctance to adhere to the rule of law. Specifically, this chapter involves a critical analysis of South Africa's failure to implement international refugee law obligations incumbent upon it. The substantive reality systematically contrasted against the theoretical protection of refugees in South Africa displays real evidence of the quotidian expression that the rule of law is violated far more than it is protected.[1382] Most apparent from the present chapter is

[1375] Khan & Schreier *Refugee Law in South Africa* xxxvi.
[1376] Director-General of Home Affairs reporting to the Home Affairs Portfolio Committee on 22 May 2012.
[1377] Polzer Ngwato *Policy Shifts* 17.
[1378] Amit *All Roads Lead to Rejection* 13.
[1379] Newman *Refugees and Forced Displacement* 6.
[1380] Musalo et al *Refugee Law and Policy* 167.
[1381] Friedrich Nietzsche 'History in the Service and Disservice of Life' in William Arrowsmith (ed) *Unmodern Observations* (1990) 89.
[1382] Abel *Politics By Other Means* 1.

that the difficulties South Africa continues to experience with respect to implementation of international refugee law, is a direct consequence of the colonial and apartheid past. Implied in this scenario is that issues imperilling a successful democracy, such as the continued reference to race categories, the perpetuation of colonial institutions within the postcolony, and failure to address past injustices have rendered South Africa's democracy a 'virtual democracy' as Joseph[1383] and others put it, or an inchoate democracy, as I express it. It is this chapter which highlights the manner in which conflict permeates formerly oppressed societies and becomes a method and mechanism by which members of such societies express themselves on account of internal frustrations based on experience of that oppression. As will become clear, there is an inextricable relationship between the refugee determination system operating in South Africa and South Africa's past. Patel terms this the echo of 'material effects of practices' of colonialism.[1384] The purpose of this chapter is therefore to assess, as Goodwin-Gill puts it: whether, by way of the exercise of administrative discretion, the state has attained the international standard of reasonable efficacy and efficient implementation of the refugee treaty provisions that have been voluntarily undertaken. The ultimate aim is to illustrate precisely how South Africa's past, which has been elaborately detailed in Chapters Three and Four has a direct effect on refugee protection in the present. This will assist in determining where the shortcomings are in order to recommend appropriate and relevant interventions and strategies to ensure compliance with South Africa's international obligations. This latter point reflects the fact that South has a future. That future's success can only be achieved if we are aware of the shortcomings so that they may be appropriately addressed.

2. Recalling South Africa's history

Apartheid bequeathed a legacy of 'institutionalised racism'[1385] culminating in 'high levels of violent crime'.[1386] By reducing people to fixed categories of race, uprooting and forcibly displacing people to specific areas designated according to race categories, determining

[1383] Richard Joseph (ed) *State, Conflict and Democracy in Africa* (1999); Larry Diamond, Juan Linz & Seymour Lipset (eds) *Politics in Developing Countries: Comparing Experiences with Democracy* (1996).
[1384] Patel *Decolonizing Educational Research* 32.
[1385] Lindegaard *Surviving Gangs* 15.
[1386] Lindegaard *Surviving Gangs* 25.

the forms of employment permitted and providing grossly inferior education, subjecting people to arbitrary imprisonment and torture, apartheid undeniably created a 'culture of violence' and a 'lost generation',[1387] alongside massive poverty. Unsurprisingly, the physical and structural violence and inequalities permeating South Africa 'have produced very dramatic levels of social stress and political conflict'. [1388] Cultural theories, argues Lindegaard, 'provide more complex understandings of the sources, mechanisms, discontinuities and reproductions of culture in its relationship with both social structures and human agency'.[1389] In the absence of any other methods of ensuring social cohension, it is this conflict that becomes a 'reifying force', binding individuals together through a common purpose and keeping them together. [1390] Specifically, this violence vitiates the post-apartheid transformation of South Africa. Consequently, South Africa has not been able to achieve the transformational aspirations that were intended.

While Mamdani, an expert on Africa, argues that South Africa 'has dismantled one aspect of apartheid: the racial nation state',[1391] it is not clear to what extent that is entirely true. Identity – based on racial categorisation – remains the preeminent organisational construct in South Africa. As Friedman warns: if a particular identity is allowed to dominate and if the state simply ratifies 'its hegemony over the others, then the source of decades of conflict is merely reconstituted'.[1392] In this regard, the voting behaviour in South Africa clearly reflects divergent identity as the overriding consideration.[1393] The corollary of this is that outsiders (refugees in the present context) instrumentalise national identity, with those seeking protection 'portrayed as violating sovereignty through incursions to territory [and] to resources'.[1394] What could not be predicted at the outset of South Africa's transition was the question of how refugees seeking access to the state would be treated in the political

[1387] Lindegaard *Surviving Gangs* 25.
[1388] Schlemmer 'South African society under stress' 14.
[1389] Lindegaard *Surviving Gangs* 22.
[1390] Jennifer Hazen 'Understanding gangs as armed groups' (2010) 92 (878) *International Review of the Red Cross* 385.
[1391] Mahmoud Mamdani *Citizen and Subject: Contemporary Africa and the Politics of Late Colonialism* (1995) 29.
[1392] Friedman 'Agreeing to differ' 240.
[1393] Friedman 'Agreeing to differ' 240. As examples Friedman cites the results of the 1999 South African election, where the ANC received 'just on two-thirds of the vote' and where, in KwaZulu-Natal, the Inkatha Freedom Party performed well at the polls 'because it best expressed the identity' of adherence to traditional (Zulu) authority.
[1394] Tazreiter *Asylum Seekers and the State* 24-25.

discourse. Tazretier, describing 'the open sore of reconciliation between black and white Australians', in reference to Australia's history of discrimination against Aborigines, declares that this has resulted in an intensely exclusionary state, bearing a 'strong symbolic relationship to how asylum-seekers fare' in Australia.[1395] Sharing a similar history, it is imperative that this inevitable outcome be counteracted in South Africa.

Colonisation is responsible for stripping 'Africans of the African discourse which focus on humanity and compassion',[1396] both of which are essential values in the context of protecting those most vulnerable, such as refugees. The uprootedness that colonisation effected, argues Kebede, results in 'the [conspicuous] collapse of all ethical relationships with the social community'.[1397] Although Kebede was referring to the context of the postcolonial elite, his argument applies precisely to the ethical concern for refugees. Indeed, Kebede's use of the phrase 'moral bankruptcy' is on point. But he goes deeper by equating this with 'disdain', when he explains the feeling of 'contempt … for Africanness disturb[ing] their ethical relationships with … their original society'.[1398] As such, 'the dividing line here is between the ethnically related and the alien'.[1399] Quoting Fanon, by invoking ethnicity, 'we perceive that race feeling in its most exacerbated form is triumphing'[1400] curating a 'separatist spirit'.[1401] In this regard, Kebede declares: '[t]he use of ethnicity … confuses what is essentially a problem of democratisation with the emergence of a new ethnic state whose democratisation is yet to come'.[1402] This begs the question: is democracy even possible in the absence of decolonisation? Is justice possible in such a context?

Friedman concedes that '[p]re-democratic authority structures and patterns of political behaviour' have unquestionably influenced South Africa's democracy.[1403] These egregious economic, social and political injustices are summarised by Burgis in the following terms:

[1395] Tazreiter *Asylum Seekers and the State* 229.
[1396] Gade *A Discourse on African Philosophy* 502.
[1397] Kebede 'From Colonialism' 108-9.
[1398] Kebede 'From Colonialism' 108-9.
[1399] Kebede 'From Colonialism' 114.
[1400] Kebede 'From Colonialism' 113 quoting Fanon *Wretched of the Earth* 158.
[1401] Kebede 'From Colonialism' 115.
[1402] Kebede 'From Colonialism' 115.
[1403] Friedman 'Agreeing to differ' 254.

> First the colonialists and then the apartheid regime carried off the cream of South Africa's natural wealth. … by the time black South Africa came into its inheritance, mining output was slowing, many of the richest remaining seams lay dangerously deep underground, and the industry's money men were wary of investing in a country run by a party with a socialist tradition. … Under apartheid, when whites made up at most 20 per cent of the population, they garnered between 65 and 70 per cent of the national income.[1404]

Therefore, although the Constitution sought to introduce an entirely new legal system, it would necessarily subsist within the institutional and structural milieu that was South Africa at the dawn of democracy. Jurisprudentially, a legal system is supposed to conform to two standards for it to be regarded as existing. The first, argues Hart, is that accepted standards of official behaviour must be exhibited by state officials in respect of the changing of rules and the adjudication of the validity of legal rules, while the second is that valid rules of behaviour must be obeyed by everyone in society.[1405] This definition offers a concise explanation of the rule of law and will inevitably have a significant role to play in how the Constitution and legislation is implemented in light of similar experiences across the rest of postcolonial Africa. To remain aware of is wa Mutua's caution that:

> Principles of the rule of law are failing because African countries have not truly thrown off the shackles of colonial rule and emerged as truly just nations even though many have the rule of law at the heart of their constitutions.[1406]

Similarly, Kebede, speaking in the context of the mere replacement of colonial states by modern African states, therefore decries the fact that valid rules are not generally followed when he observes that

> without the prior dismantling of the colonial state and methods, especially without a far-reaching decolonization of the educated and political elites, small wonder the same structure and turn of mind leads to similar results.[1407]

Fombad confirms Kebede's point. In particular, Fombad details how the introduction of new legal systems that have constitutional democracy as the foundation has done nothing to 'change the status quo'.[1408] For the most part, 'multiparty "democratic" dictators' have been

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[1404] Burgis *The Looting Machine* 215-216. Burgis does concede that South Africa's mineral resources remain the world's most valuable, estimated at $2 494 billion.
[1405] HLA Hart *The Concept of Law* 2 ed (1994).
[1406] wa Mutua 'Africa and the Rule of Law' 1.
[1407] Kebede 'From Colonialism' 109.
[1408] Charles Fombad 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1023; Charles Fombad 'The African Union, Democracy, and Good Governance' (2006) 32 *Current African Issues* 15.

installed and they have continued to operate within the context of the 'repressive, exploitative and inefficient structures' that they inherited, invariably rendering the successive leaders just as 'corrupt, violent, powerdrunk, manipulative and inefficient'.[1409] The present chapter therefore has a fundamental objective: it illuminates the significant role that context plays in the ongoing development of South Africa as a democratic nation state labouring under the myriad legacies of colonialism and apartheid. Specifically, it reveals how strategies formulated to design a certain type of nation state may have very little effect, precisely because of the underlying contextual issues that are not necessarily of the state's own making and have catalysed the operation of resistance to the rule of law.

3. Articulating the form of state most closely resembling South Africa as at 1994

The thorough investigation of South Africa's particular history undertaken in Chapters Three and Four is necessary to derive the normative content of South Africa's democracy as illustrated through deliberate policy choices. A hybrid system is the most plausible description of South Africa as at 27 April 1994. Taking account of South Africa's past, Weingast's classification of 'a mature natural state',[1410] in other words, a developing state, that is resistant to the rule of law, and is hampered by considerable inequalities, is one dimension. Parallel with this, in light of the provisions of the Constitution, the other dimension is that South Africa intended to adopt a liberal democratic system[1411] bearing many characteristics of an established welfare state as exists in the developed world. Evidence bearing this out is the institutionalisation of universal adult enfranchisement in governance processes and decision-making, the unequivocal protection of human rights, and the quest to resolve conflicts by way of compromise and peaceful political contestation.[1412] The foundation for this strategy is obviously the Constitution, as it was designed to 'reflect the vital role [of] normative ideas and values in the political process'[1413] for it included a justiciable and comprehensive bill of rights alongside the categorical protection of the rule of law, multiparty democracy, accountability, transparency and

[1409] Fombad 'Constitutional Reforms' 1024; Fombad 'The African Union' 15.
[1410] Weingast 'Why developing countries prove so resistant' 32.
[1411] Friedman 'Agreeing to differ' 235.
[1412] Friedman 'Agreeing to differ' 234.
[1413] Esterhuyse 'The normative dimension of future South Africa' 20.

openness. The objective was to establish justice, freedom, equality and dignity; something that is ensured when there is an independent judiciary empowered to review law and conduct alleged to contravene the Constitution. As Mogoeng CJ has remarked

> public office-bearers ignore their constitutional obligations at their peril because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.[1414]

Unfortunately, it appears that the two component parts of this hybrid system are not only irreconcilable, but actually work against each other, repudiating the stipulated intentions underpinning South Africa's democracy. Three examples are pertinent in this regard. The exemplification of an intense resistance to 'outsiders' is that notwithstanding the enactment of the Constitution, but prior to refugee-specific domestic legislation being enacted, litigation was instituted against the Minister of Home Affairs in relation to an asylum application. A family of Congolese nationals had applied for asylum. Their application was rejected, initiating litigation sought to obtain an order that the family could remain in South Africa until such time as a review of the negative decision on their application had been completed.[1415] The basis for the review was that 'the applicants' version as to their moves in their own country to avoid political persecution were obviously misunderstood by the department' … and … 'the applicants' allegation that conditions have not improved and that they would suffer severe persecution, if not death, if they were returned at this stage were once again misinterpreted and then incorrectly weighed up by the respondent', thereby rendering the 'decision capricious and incorrect'.[1416] This case is ironic for that fact that South Africa was one of the first states to recognise the new government of Laurent Kabila in the Democratic Republic of the Congo subsequent to the 1997 ousting of the Mobutu regime. *The Star* Newspaper of 19 June 1998 quoted Aziz Pahad, then Deputy Minister of Foreign Affairs, as saying:

> The immediate recognition by South Africa of President Kabila and his government after their military forces [violently and with lethal force] took over control of the country … was based on the realisation that a power vacuum in Kinshasa would generate chaos and *further* contribute to

[1414] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 1.
[1415] *Kabuika v Minister of Home Affairs* 1997 (4) SA 341 (C). The facts indicate that the applicant fled to South Africa in April 1992 and his wife and children arrived in 1994.
[1416] *Kabuika* 344.

> the economic collapse of the country. … It was *vital that peace and stability be restored* (own emphasis).[1417]

The Department of Home Affairs could possibly be excused because at the material time, no domestic refugee-specific legislation yet existed. However, South Africa had already sought the assistance of UNHCR in 1991,[1418] thus the practice of refugee protection in South Africa had been clearly established. It did not take long, therefore, before South Africa's true character as a natural state overshadowed its good intentions. South Africa began acquiring a reputation for ratifying international treaties (such as the refugee treaties) in pursuit of portraying a commitment to the rule of law but failing to implement them. In terms of a broad overview, in 2006, UNHCR regarded South Africa as a 'generous host to refugees' for conferring socio-economic rights on recognized refugees.[1419] However, if one analyses the relatively short period of time from 2006 until 2009, it becomes evident that the deterioration in refugee rights has been rather dramatic. Although asylum-seekers and refugees have the right to work in South Africa, it has not been without open resentment from a number of South Africans.[1420] Most alarming was when, between 13 and 18 May 2008, the townships of Alexandra, Diepsloot, Tembisa, Ivory Park, Cleveland, Hillbrow, Primrose, Reiger Park, Thozoka and Soweto were besieged by mobs of South Africans on the rampage seeking out foreigners who they accused of stealing jobs and houses.[1421] Estimates vary, but at least seven (although the number is possibly closer to 50) people were killed, 50 injured, and hundreds of others forced to seek refuge in police stations. It is almost impossible to establish whether the foreigners targeted were asylum-seekers or economic migrants. President Mbeki voiced his disgust at the xenophobic violence and specifically mentioned that the attacks 'had done enormous harm to South Africa's standing in the world

[1417] Dugard *International Law* 100.
[1418] UNHCR 'Agreement Between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees (UNHCR) Governing the Legal Status, Privileges and Immunities of the UNHCR Office and its Personnel in South Africa (2 September 1991).
[1419] Jack Redden 'Number of asylum-seekers in South Africa rises sharply in first quarter' UNHCR (19 May 2006) at *http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=446dd6dc4.*
[1420] 'South Africa: Protect Victims of Xenophobic Violence: Provide Basics of Food, Shelter, and Safety to Displaced' *Human Rights Watch* (5 June 2008) at *www.hrw.org/en/news/2008/06/05/south-africa-protect-victims-xenophobic-violence*; 'South Africa, Events of 2008' *Human Rights Watch World Report* 2009 at *www.hrw.org/en/world-report/2009/south-africa*.
[1421] Beukes 'Southern African Events – 2007' (2008) 294.

… and soiled the good name of our country'.[1422] By 2009 the Minister of International Relations and Cooperation conceded that 'the era of being the toast of the world is over; we are now viewed and treated like any other country'.[1423] Prima facie, the xenophobic violence constituted the turning point in South Africa's policy decisions relating to refugee protection. But this must be juxtaposed against Jastram's sombre warning that by '[i]nterpreting the Convention in light of desired policy outcomes could politicize and discredit the refugee regime, which carries its own risk of loss of public support',[1424] a reality that South Africa now confronts.

South Africa's transformation in the 1990s expressly intended to redress the effects of colonialism. Therefore, the second example stems from the pressure placed on government to adopt a suitable strategy to promote equality. The chosen method was affirmative action. In his assessment, Burgis explains that Black Economic Empowerment, developed to empower black persons disadvantaged by colonialism and apartheid, 'have either failed or continue to divide citizens along racial lines'.[1425] Consequently, the government was caught in the trap of attempting 'to eliminate differences, which perpetuate inequity'[1426] while simultaneously emphasising difference. Affirmative action was clearly not equal to the task for which it was designed as divisions according to race were more evident in 2003 than at any time since 1994.[1427] Unfortunately, affirmative action culminated in the adverse effects that Schlemmer had warned about in the early 1990s. Likewise, Burgis reveals that:

> Black Economic Empowerment does nothing to change the fundamental structure of the mining industry, one that channels rents narrowly to those who control it, whatever the level of melanin in their skin. Conditions for the average mine worker remained grim while the new black moguls dreamed, as Tokyo Sexwale told his aides, of becoming 'the first black Oppenheimer'.[1428]

Closely related to affirmative action is the third example: at the dawn of democracy, a comprehensive social welfare system was established providing modest financial resources

[1422] Beukes 'Southern African Events – 2007' (2008) 294-6.
[1423] Spies 'South Africa's Foreign Policy' (2009) 288 quoting Nkoana-Mashabane 'Lecture by the Minister of International Relations and Cooperation at Rhodes University Grahamstown' 22 October 2009.
[1424] Jastram 'Economic harm as a basis for refugee status' 162.
[1425] Patel *Decolonizing Educational Research* 31.
[1426] Friedman 'Agreeing to differ' 254.
[1427] Friedman 'Agreeing to differ' 253.
[1428] Burgis *The Looting Machine* 215.

to those most in need but who qualify in terms of the eligibility requirements.[1429] A peculiar characteristic of an extractive or natural state (as contrasted against an inclusive state) is that the absence of impersonal equality before the law entails that the rule of law (if it exists at all) cannot be enforced impartiality.[1430] This hinders the state's ability to provide essential public goods such as education, health care, social insurance and infrastructure.[1431] Indeed, in a welfare state, such as South Africa, rights granted to some, if they are enforced, inevitably reduce the welfare of others. For example, trade unions often raise benefits to members at the cost of higher prices for consumers, lower profits for shareholders, and lower wages for nonunion workers: in other words, the welfare state 'benefits insiders at the expense of outsiders'.[1432] Exacerbating the welfare state complication is that these types of states have

> rationalized modes of conduct towards citizens as members and towards newcomers as outsiders in administrative and bureaucratic techniques broken down into myriad component parts. From the development of policy, to the communication of it through media and finally through its implementation, first-hand and meaningful contact with the 'subjects' of policy is mostly absent. No individual player has more than a partial, fleeting or secondary contact with those upon whom policy impacts. The [result is the] creation of social distance through bureaucratic techniques.[1433]

Bureaucratic techniques of differentiation, exclusion and even elimination represents in the clearest terms how the officials within the Department of Home Affairs reject claims for asylum due primarily to South Africa's protracted history of colonisation and apartheid, with the ancillary socio-economic disparities that these caused. On a wider level, South Africa's essential character as a natural or extractive state is unambiguously evident. Unfortunately, therefore, practices that are anachronistic to respect for the rule of law, democracy, and the aim of securing justice are persisting in South Africa. Impeding South Africa's democracy is what Friedman calls 'the frequent absence of the implied "social contract" between state and society'.[1434] In his words, 'the substance of that democracy is left

[1429] Child Support Grants, Disability Grants, Old Age Grants are the primary resources provided to indigent South Africans and permanent residents.
[1430] Weingast 'Why developing countries prove so resistant' 34. See also Acemoglu & Robinson *Why Nations Fail* 308.
[1431] Weingast 'Why developing countries prove so resistant' 36.
[1432] James Heckman 'The viability of the welfare state' in *Global Perspectives on the Rule of Law* 94.
[1433] Tazreiter *Asylum Seekers and the State* 209.
[1434] Friedman 'Agreeing to differ' 256.

wanting'.[1435] Specific examples are a lack of democratic participation in decision-making[1436] and very weak control over elected officials. Public participation in decision-making is entrenched in section 57 of the Constitution. It has been described as the method of meaningfully linking the population 'with processes of the state'[1437] and is 'intrinsic to the core meaning of democracy'.[1438] To relate it to the theories on compliance with international law as discussed in Chapter Two, public participation can be equated with persuasion due to its ability to influence policy-making. Also referring to theories on compliance with international law, managerial theory is analogous because for public participation to occur, aspects such as the 'design, capacity and resource gaps impacting on the effectiveness of measures put in place'[1439] are crucial prerequisites. Notwithstanding this principle, when rational choice theory is applied to South Africa's particular domestic context, all indications are that 'citizens vote or participate in democratic activity purely to maximise their material interests'.[1440] Rational choice theory is instrumentalised by voting constituencies placing pressure on the state to 'diminish sovereignty' in order to control 'the economy and regulation of flows of finance in and out of a country; and for membership in tangible and intangible forms: citizenship and identity'.[1441] Empirical evidence proves some of the main charges against the public participation process in South Africa: there is '[i]nsufficient political will to implement broader participatory processes, lack of clarity on where responsibility for this lies, as well as lack of guidelines, resources and capacity to facilitate this'.[1442] Indeed, policy-making processes have been described as 'an elite driven process of exclusion and demobilisation of the public'[1443] with the general public reporting 'feelings of being sidelined and marginalised, excluded and disempowered'. In reality, public input is often only sought after policy responses have already been pre-determined and formulated.[1444] In the face of public participation that is farcical, as described, the public

[1435] Friedman 'Agreeing to differ' 235.
[1436] Friedman 'Agreeing to differ' 257.
[1437] Janine Hicks & Imraan Buccus 'Crafting new democratic spaces: Participatory policy-making in KwaZulu-Natal, South Africa' (2007) 65 *Transformation* 95.
[1438] Hicks & Buccus 'Crafting new democratic spaces' 98-9
[1439] Hicks & Buccus 'Crafting new democratic spaces' 101.
[1440] Friedman 'Agreeing to differ' 249.
[1441] Tazreiter *Asylum Seekers and the State* 74.
[1442] Hicks & Buccus 'Crafting new democratic spaces' 102.
[1443] Hicks & Buccus 'Crafting new democratic spaces' 102.
[1444] Hicks & Buccus 'Crafting new democratic spaces' 104.

feel 'conned and betrayed'.[1445] One example of such a situation in South Africa that highlights the proclivity for violent response to this betrayal and in order to assert a position, is the *Merafong* case.[1446] Tazreiter contextualizes the resort to violence when she states: 'violence comes to be the end result of systems of symbolic power which are held in place most effectively through covert means, rather than tangible acts of force'.[1447] In *Merafong*, the overwhelming majority of residents of Khutsong opposed the Constitutional Amendment which would relocate Merafong municipality from Gauteng to the North West province.[1448] Even though a consultative process had ostensibly been followed, whereby the community were allowed to air their views, 'strong arguments against incorporation into North West [were] presented by members of the community',[1449] the opinions of the community were blatantly disregarded and the legislature nonetheless brought the law into force regardless of the dissatisfaction of the community. 'Hotly disputed' is the euphemistic expression of Merafong's location.[1450] As a direct result of the failure to give meaningful effect to public participation, the Khutsong township of Merafong became '"ungovernable" and resembled a war zone as residents refused to accept the decision to relocate the municipality'.[1451]

Interestingly, from the very beginning of his tenure as president, Thabo Mbeki recognised the existence of a 'moral vacuum', exemplified by a generally poor attitude to respect for law, manifesting in crime and corruption. On his assessment, this could conceivably render the country 'ungovernable' and raised the very real possibility that South Africa was 'threatened with disintegration', notwithstanding 'a fine constitution and democratic elections'.[1452] Despite his incredible foresight concerning the deleterious role of a failure to comply with the rule of law in the functioning of an effective and stable state, it was under the Mbeki administration that the ANC began 'implementing a legislative and policy agenda, which stresses majority interests in antagonism to those of the minority'.[1453] Mbeki was

[1445] Hicks & Buccus 'Crafting new democratic spaces' 99.
[1446] *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC).
[1447] Tazreiter *Asylum Seekers and the State* 27.
[1448] *Merafong* para 33.
[1449] *Merafong* para 47.
[1450] *Merafong* para 15.
[1451] de Vos & Freedman *South African Constitutional Law* 88.
[1452] Gade *A Discourse on African Philosophy* 80-81 referring to a conversation between President Mbeki and Augustine Schutte, a South African moral philosopher.
[1453] Friedman 'Agreeing to differ' 253.

unceremoniously removed from office by the ANC in 2008 after being implicated in politically interfering in the decision of the National Prosecuting Authority to arrest Jackie Selebi for corruption, despite Selebi being the Commissioner of the South African Police and the head of Interpol at the time. This provides an appropriate segway to another characteristic of a natural state: weak control over elected officials. Relying on the international law theory of rationalism to portray an incident of weak control over elected officials, is the case of *Economic Freedom Fighters v Speaker of the National Assembly*. While he was president, Jacob Zuma's private Nkandla homestead underwent valid security upgrades. During the process, however, a number of non-security features were also installed. The President 'knowingly deriv[ed] undue benefit from the irregular deployment of State resources'.[1454] Burgis explains that the money used had been 'diverted from the Department of Public Works' budget for inner-city regeneration, the body charged with remoulding the physical legacy of apartheid'.[1455] The Public Protector was asked to investigate the allegations. In her report 'Secure in Comfort', the Public Protector expressed that it was 'the self-evident reality' that

> the features identified [were] unrelated to the security of the President, checked against the list of what the South African Police Service (SAPS) security experts had themselves determined to be security features.[1456]

The Public Protector recommended that Zuma pay back the amount by which he had been enriched. As the democratically elected National Assembly is the institution that elects the President, it is also mandated to hold the President, as head of the executive, accountable. The Public Protector ordered that Zuma was to issue a report to the National Assembly concerning how he would comply with the finding made against him.[1457] Absurdly, and entirely arbitrarily, the National Assembly absolved the President of all liability.[1458] This prompted an opposition political party to refer the matter to the Constitutional Court, requesting an order that the President was obliged to comply with the Public Protector's findings, which the Court accordingly did. The 'Nkandla' matter as it is now known exemplifies Friedman's contention that well into democracy, numerous empirical studies

[1454] *EFF v Speaker of the National Assembly* para 2.
[1455] Burgis *The Looting Machine* 218.
[1456] Public Protector's Report paras 7.14.2 and 7.14.4; para 2 of the judgment.
[1457] Public Protector's Report para 11.1.4.
[1458] Public Protector's Report para 12.

reveal that there exists 'a marked gap between the policy agenda of the new elite and that of its constituents'.[1459] Diluting the ability of the state to deliver on its promises is the very real conflation of the state and the ruling party (the ANC).[1460] Klotz disputed this fact in her assessment of the role played by the state in generating xenophobia,[1461] although it is a phenomenon that Choudhry has convincingly analysed, concluding that South Africa is effectively a dominant-party democracy. Choudhry's synopsis is that 'one of the pathologies of a dominant party democracy is the colonization of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage'.[1462] The ANC has persistently come under attack for its inability to separate the party from the state.[1463] In short, orchestrated state capture linked to the tenure of Zuma will remain one of the clearest indications of moral bankruptcy of the leadership of South Africa. To be sure, it was under Zuma's watch that some of the most alarming incidents of blatant violation of the rule of law occurred. Zuma's negotiation of, and signature on, the 2014 Protocol on the Southern African Development Community Tribunal, emasculated the Tribunal entirely, denuding it of jurisdiction over disputes against member states brought by individuals, ineluctably causing the suspension of the Tribunal's operations.[1464] The Constitutional Court declared Zuma's conduct unconstitutional, unlawful, and irrational on 11 December 2018, with the Court ordering the removal of South Africa's signature from the Protocol.[1465] Another, similar, instance occurred with South Africa's refusal to arrest Omar Al-Bashir and the declaration that South Africa would withdraw from the Rome Statute. Omar al-Bashir's arrival in South Africa in June 2015 to participate in the African

[1459] Friedman 'Agreeing to differ' 256.
[1460] As Spies states: South Africa's domestic policy, 'amplified in its foreign policy, increasingly manifests a blurred party-state distinction' ('South African Foreign Policy' (2011) 334).
[1461] In fact, Klotz criticizes MacDonald for apparently making the error of conflating the state and the ANC in his analysis. See Klotz *Migration and National Identity* 38 citing Michael MacDonald *Why Race Matters in South Africa* (2012) 172.
[1462] Sujit Choudhry '"He had a mandate:" The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 24-5.
[1463] See, for example, Mashupye Maserumule *TimesLive* 'Zuma has gone: but the ANC's inability to separate party from state is still a threat to democracy' (1 March 2018) at *https://www.timeslive.co.za/politics/2018-03-01-zuma-has-gone-but-the-ancs-inability-to-separate-party-from-state-is-still-a-threat-to-democracy/;* and Susan Booysen *Daily Maverick* 'The Ramaphosa versus the Zuma gap years – how the rules AND the game have changed' (20 June 2018) at *https://www.dailymaverick.co.za/opinionista/2018-06-20-the-ramaphosa-versus-the-zuma-gap-years-how-the-rules-and-the-game-have-changed/*.
[1464] *Law Society of South Africa v President of the Republic* [2018] para 7.
[1465] *Law Society of South Africa v President of the Republic* [2018] paras 7 and 97 (1.1-1.3).

Union Summit, and the South African government's refusal to arrest him pursuant to the ICC's arrest warrants, and in spite of a court order compelling the government not to allow Omar-al Bashir to leave South Africa before the matter could be heard by a competent court, is indicative of political decisions seemingly taking precedence over principled (and lawful) decisions.[1466] Worse still is South Africa's declaration that it intended to withdraw from the Rome Statute of the International Criminal Court after it had ratified this treaty and passed implementing legislation to give effect to it. No doubt, this characterizes a natural state's attitude to the rule of law: when a law is inconvenient, the rules must be changed. In the context of refugee law, although the African Union adopted the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Establishment, and its Implementation Roadmap on 29 January 2018,[1467] as at 16 July 2019, South Africa had neither signed nor ratified the treaty, which is indicative of its reluctance to protect refugees entering South Africa and its desire to securitise its borders to prevent 'outsiders' from accessing the territory.

4. The confluence of colonisation and apartheid and their enduring legacy

Despite the fact that many parts of South Africa are 'a melting pot of local and international cultures',[1468] exclusion remains the order of the day. Distinct patterns of perpetuation of colonial and apartheid divisions and polarisation, race classification, hierarchies of status, and fierce competition for access to resources are some of the constant challenges that South Africa experiences. Currently, one would be hard-pressed to define South Africans as a united and cohesive nation. However, the mere mention of African refugees and migrants, elicits an instantaneous reaction that they are non-citizens, thus not worthy of belonging, nor entitled to any aspect of the state's resources. In that context alone, South Africans view themselves as a homogenous group and this often plays itself out in xenophobic attacks against refugees and African foreign nationals. This is not uncommon

[1466] Stone 'A Sign of the Times'.
[1467] States that have signed, ratified/acceded to the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment at *https://au.int/sites/default/files/treaties/34244-sl-protocol_to_the_treaty_establishing_the_african_economic_community_relating_to_free_movement_of_persons_right_of_residence_and_right_of_establishment.pdf*.
[1468] Chandia & Hart 'An alien in the country of my birth' 30.

around the world: 'in economically developed and less developed countries, fear and suspicion of outsiders has intensified into visceral hatred expressed in overt and covert acts of violence'.[1469] When large scale inequality already exists, there is the potential for simmering tensions to escalate. Helton argues that human security is vitiated when poverty, deprivation, and exploitation proliferate.[1470] Put differently, van Schalkwyk warns that 'root/structural causes' arising from within the state itself pose greater threats to security than external causes. She lists these causes as 'underdevelopment; unequal access to resources; undemocratic governance; and other economic, social and political injustices'.[1471] For purposes of perspective, Burgis explains that in the year 2009

> the richest 20 per cent of South Africans garnered 68 per cent of the national income; the figure reached 70 per cent in 2011. By some measures the gap between rich and poor has widened since the end of apartheid. That is the legacy of apartheid-era urban planning, two-tier education and countless other lingering distortions of white rule.[1472]

Hate in the minds of people is considered one of the long-term effects of colonialism.[1473] Referring to apartheid, Omar claims that South Africa's 'previous policy of not allowing persons of colour to be in a commanding position over whites' caused immeasurable injury to human dignity.[1474] The racial indoctrination of South African society would not be easily eradicated. Prejudiced and polarising racial assumptions thus persist.[1475] Friedman proclaims that 'in differing and complex ways, just about all South African party politics, whether practised by white professionals in the suburbs or by black shack-dwellers, is about identities'.[1476] Exacerbating the existing polarisation of society is Tazreiter's opinion that immigration creates the 'uncomfortable reality of a person with the need for food, shelter and clothing and the right to dignity in the fulfilment of human potential like education and work', thereby raising tension. This anxiety and fear is associated with 'the commonly used linguistic pairing; refugee "problem", or indeed asylum-seeker "crisis"'.[1477] Given the stiff competition for scarce resources, resentment of refugees naturally ensues.

[1469] Tazreiter *Asylum Seekers and the State* 1.
[1470] Helton *The Price of Indifference* 12.
[1471] van Schalkwyk *People, States and Regions* 124-5.
[1472] Burgis *The Looting Machine* 216.
[1473] Young *Postcolonialism* 125.
[1474] Omar 'The inadequacy of the political system' 112.
[1475] Friedman 'Agreeing to differ' 250.
[1476] Friedman 'Agreeing to differ' 250.
[1477] Tazreiter *Asylum Seekers and the State* 27-8.

At a philosophical level, the works of Foucault and Žižek provide insight into the operation of critical social theory. Proceeding from the presumption that 'society is constituted by difference in the form of social antagonisms between competing groups',[1478] there is an ongoing competition between different racial, cultural and ethnic groups for symbolic and material dominance in society.[1479] Throughout history, continuing in the present, is the pursuit of hegemony (cultural and social ascendancy and dominance)[1480] by 'different cultural-linguistic and ethnic groups'.[1481] The argument developed hereunder is that critical social theory undoubtedly applies to the South African context because of the calculated denial of refugee status to African migrants fleeing persecution. Emanating from the original American schooling system is the notion of 'the commons'. Žižek distinguishes four 'enclosures' of the commons, describing these as representing the violent destruction 'of the shared substance of our social being'.[1482] One form which this enclosure takes is equated to 'de facto apartheid':[1483] the physical separation of people in order to exclude certain categories of people,[1484] ultimately threatening 'the very survival of the species'.[1485] Such has been the pressure exerted by citizens since 1994 that the issue of 'national interest'[1486] has superseded the former 'idealistic notion of collective continental interest'.[1487] It is not difficult to understand why MacDonald claims that identity has risen to the level of 'racial nationalism' in South Africa.[1488] Increasingly, South Africa's primary objective is national interest, with morality assuming the role of a secondary objective.[1489] Such importance is attached to national interest that the Department of International Relations' 2011 White Paper on foreign policy, titled: 'Building a better world: The diplomacy of Ubuntu' states: 'South Africa faces the challenge of balancing its national interests against global realities

[1478] Saltman *The Politics of Education* 26.
[1479] Saltman *The Politics of Education* 26.
[1480] Saltman *The Politics of Education* 35.
[1481] Saltman *The Politics of Education* 27.
[1482] Slavoj Žižek *First as Tragedy, Then as Farce* (2009) 91.
[1483] Saltman *The Politics of Education* 85.
[1484] Žižek *First as Tragedy* 91.
[1485] Saltman *The Politics of Education* 86.
[1486] As Kotze states: 'The national interest is an elusive concept and very difficult to concretise' (see Dirk Kotze 'South Africa's International relations during a second term: Domestic interests within global dynamics' (2014) *South African Yearbook of International Law*.
[1487] Spies 'South Africa's Foreign Policy' (2009) 287.
[1488] MacDonald *Why Race Matters.*
[1489] Henwood 'South Africa's Foreign Policy' (1995) 284.

in a rapidly changing world'.[1490] The discussion of how this balancing act plays out in practice follows.

5. The transplant effect and its corollary: Resistance to the rule of law

It has to be emphasised that not only was South Africa not part of the drafting of the international refugee law treaties, but the apartheid government vehemently rejected all international human rights treaties. Not long after the first democratic elections, South Africa adopted the OAU Refugee Convention and the UN Refugee Convention in their entirety, notwithstanding that no consideration had yet been given to the enactment of domestic legislation to implement the treaties. While this is compatible with South Africa's sovereignty and the margin of appreciation, the wholesale adoption of these treaties to be implemented in the institutions inherited from the colonial and apartheid system is consistent with Berkowitz's criticism of the 'transplant effect'.[1491] The transplant effect is characterized most precisely by the severe underinvestment in institutions inherited and personnel giving effect to those institutions. Refugee status determination by the Department of Home Affairs is undeniably a telling example. As a symptom of the transplant effect, a number of recurring themes arise in relation to the Department's approach to refugees in general and status applications in particular.[1492] There is ample evidence that South Africa has under-invested in ensuring compliance with the formal law and legal institutions, undoubtedly undermining respect for the rule of law. To illustrate this point, it of substantial concern that despite the contention that the Refugees Act was passed pursuant to stipulated democratic procedures, with ample opportunity for public participation in the process,[1493] Klaaren et al state that the regulations – vital to the implementation of the Act – were formulated in secret and 'their content was a surprise to many in the field'.[1494] It will be recalled from the paradoxes facing South Africa at the beginning of the transition that Omar explained that

[1490] Spies 'South Africa's Foreign Policy' (2011) 332.
[1491] Pistor et al 'Social norms, rule of law' 244.
[1492] Amit *All Roads Lead to Rejection* 15.
[1493] Johnson & Carciotto (168) explain that the migration policy was the result of a collaboration between government and civil society that produced a Green Paper on International Migration in May 1997 and a White Paper in June 1998.
[1494] Jonathan Klaaren, Jeff Handmaker & Lee Anne de la Hunt 'Talking a new talk: A legislative history of the Refugees Act 130 of 1998' in Handmaker et al *Advancing Refugee Protection* 55.

societies in transition 'require more power at the helm and less "democracy" at the base'.[1495] However, de Kock highlights that 'the forced escalation of coercion in the exercise of power from top to bottom'[1496] is an important factor that determines the future success of an institution so created. Interestingly, notwithstanding the fatal flaw in the process of bringing the Act into effect, no legal challenge was posed, thus the Act and its regulations became law in the Republic in 2000. As revealed in Chapter Two, coercion as a form of social control is never successful. Approaching the Refugees Act and its regulations from the perspective of the impression that is created in an already fractured postcolonial society such as South Africa, Tazreiter comments that

> a policy which neglects to adequately inform the host population about the meaning and intent of reception and integration or, alternatively, which 'unfavourably targets' particular groups of migrants, usually leads to 'the rise of ultra nationalist movements, xenophobia and violent acts against foreigners'.[1497]

Given the bureaucrat's already reluctant attitude to granting asylum (as exemplified in the *Kabuika* case above), it is conceivable that when the Refugees Act entered into force once the regulations had been promulgated, it was imposed from above on those working in the Department of Home Affairs. Any latent feelings of resentment against 'outsiders' seeking access to a state which was recovering from a history of segregation, economic deprivation and flagrant abuse of human rights would invariably have been exacerbated. Combined with underinvestment in training so as to adequately inform the Department of Home Affairs officials about the meaning and intent of reception and integration, it is quite easy to comprehend the inevitable outcome, notwithstanding that the numerous scholars who have investigated the abuse to which asylum-seekers and refugees are subject in South Africa have overwhelmingly only documented these facts without offering substantive reasons for the horrendous and intolerable treatment. The point of departure is that the rule of law has both procedural criteria and substantive content. As will be revealed, refugees – who are entirely dependent on the mercy of the Department (and specifically Status Determination Officers) – do not benefit from either the procedural, nor the substantive rule of law. Consistent with the managerial theory of compliance with international law, states should

[1495] Omar 'The inadequacy of the political system' 123.
[1496] de Kock 'Violence as an option?' 50.
[1497] Tazreiter *Asylum Seekers and the State* 37.

endeavour to provide adequate administrative and bureaucratic capacity to the government department responsible for implementing international refugee law. Despite Amit's assertion that 'significant state resources are being devoted' to the Department,[1498] the Department itself stated in early 2017 that '[t]he department has been severely underfunded over the past 23 years leading to ongoing tensions between locals and foreign nationals'.[1499] The resources that are allocated to the Department are clearly not being committed to the effective functioning of the Department. In fact, the Department routinely erodes the rule of law by failing to adhere to the right to just administrative action. Therefore, what we are left with is 'a system that has ceased to function in accordance with its purpose under law'.[1500]

Although states have the discretion to decide how administrative decisions are to be made within their sovereign territory, the test of the state's commitment is whether sufficient financial and personnel resources have been dedicated to the objective. In addition, 'the often intangible'[1501] political will of the state may play a decisive role. Indeed, as will become evident, South Africa's primary weakness concerns administrative discretion that has culminated in the perversion of the law. Regardless of the apparent institutional and legislative strength of the refugee protection system in South Africa, the system 'operates under great practical, conceptual, and legal strain'.[1502] To be sure, the Minister of Home Affairs, the Standing Committee for Refugee Affairs and the Refugee Appeal Board have routinely had to account to the judiciary for their failure to comply with the provisions of the Refugees Act. Amit remarks that 'it points to a government department that is unable to give effect to its legal obligations'.[1503] This is especially disappointing in light of Handmaker et al's description that South Africa represents the epitome of 'a government staffed in large part by former refugees' who were responsible for creating and implementing an inclusive refugee protection policy. The expectation was that these former refugees would be able

[1498] Amit *All Roads Lead to Rejection* 9.
[1499] Cele & Stone 'Home Affairs should manage state security'.
[1500] Amit *All Roads Lead to Rejection* 9.
[1501] Tazreiter *Asylum Seekers and the State* 41.
[1502] Newman *Refugees and Forced Displacement* 6.
[1503] Amit *All Roads Lead to Rejection* 13.

to impart a sophisticated understanding of refugee integration aligned with an enhanced appreciation of historical and regional dynamics.[1504]

Klotz highlights a further issue: in the apartheid era, Home Affairs was exclusively responsible for administering white (desirable) immigration, and the police took responsibility for the deportation of black (undesirable) immigrants out of urban areas.[1505] Relying on Vigneswaran's contention that 'institutionalized bureaucratic roles create path-dependent barriers to change' the argument made by Klotz is that bureaucrats will maintain the status quo if there is an incentive to do so.[1506] Complicating matters is that the refugee system is managed in the same manner as the immigration system.[1507] This confusion regarding division of labour impedes Home Affairs' ability to 'take charge of immigration enforcement'.[1508] Consequently, what transpires is a failure to declare persons who qualify for refugee status, as refugees; and likewise, declaring other (economic) migrants as refugees, or worse, declaring persons who are clearly excluded from eligibility, as refugees.[1509] Combined with South Africa being a natural state that has transplanted law and institutions from more developed jurisdictions, exacerbated by deep divisions and fear of foreigners, the systematic analysis of South Africa's implementation of international refugee law obligations takes place in juxtaposition to the consequences flowing from that history.

5.1 Usurpation of unfettered political power by Home Affairs officials

Foucault's statement 'let the bureaucrats decide who I am' quoted at the beginning of Chapter One is the articulation of the fact that states emphasise 'the bureaucratic administration of persons'.[1510] South Africa has most certainly employed a 'highly refined

[1504] Handmaker et al (eds) *Advancing Refugee Protection* 4.
[1505] Klotz *Migration and National Identity* 17.
[1506] Klotz *Migration and National Identity* 17 quoting Darshan Vigneswaran 'Enduring Territoriality' 791 and Darshan Vigneswaran 'Taking Out the Trash?'
[1507] Amit *All Roads Lead to Rejection* 10.
[1508] Klotz *Migration and National Identity* 17.
[1509] *Consortium for Refugee and Migrants in South Africa v President of the Republic of South Africa and Faustin Kayumba Nyamwasa and 10 Others,* Case no 30123/11, North Gauteng High Court.
[1510] Tazreiter *Asylum Seekers and the State* 55.

set of administrative filtering and constraining measures' [1511] that clearly distinguish between citizens and outsiders. Tazreiter argues that the

> continuation of a system which extends political, social and economic rights only to members of a particular territory, is a system which can be maintained only through increasingly defensive measures, including communicative modes which constantly reinforce fear of strangers.[1512]

Although the state has the sovereign right to defend its national interests and determine how it wishes 'to administer, manage and direct members and non-members who are within a given territory,'[1513] it is how this right is used as the site of power to exclude that is elucidated by Foucault. Taking an institutional approach, Foucault believed that power originates 'at the local level', such as within the Department of Home Affairs, where the functionaries employed within those institutions generate practices and rituals that become entrenched. It is an invisible – but very far-reaching – power, the mechanism of which 'actively produces the subject in particular ways.' [1514] Ginsburg identifies the area of administrative law as a specific weakness in new democracies, arguing that bureaucrats in these democracies are largely unfamiliar with the limits of the discretion conferred upon them by administrative law. This is especially true in the context of refugee law, which is characterized by: 'loosely drafted statutes, under which bureaucrats exercise a good deal of discretion, subject to political rather than legal oversight'.[1515]

While it is believed that a shared identity and ethnic solidarity may account for why states will host refugees,[1516] the context of colonisation and apartheid cannot be forgotten. Colonisation and apartheid segregated humans; dispossessed them of their land; and diminished their status through the concerted process of dehumanisation and subjugation. Compounding this is South Africa's shrinking economy, high unemployment, wastage of enormous state resources through corruption and maladministration[1517] and the exceedingly

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[1511] Tazreiter *Asylum Seekers and the State* 125.
[1512] Tazreiter *Asylum Seekers and the State* 224.
[1513] Tazreiter *Asylum Seekers and the State* 24.
[1514] Saltman *The Politics of Education* 41-43.
[1515] Ginsburg 'The politics of courts' 183.
[1516] Shibley Telhami & Michael Barnett (eds) *Identity and Foreign Policy in the Middle East* (2002).
[1517] Sean Gossel 'How corruption is fraying South Africa's social and economic fabric' *The Conversation* (12 July 2017) at *http://theconversation.com/how-corruption-is-fraying-south-africas-social-and-economic-fabric-80690*.

slow pace of land reform.[1518] Competition for resources permeates South African society, often resulting in violent conflict. In Chapter Three, explanations of conflict included relative deprivation, status incongruence, rising expectations and resource mobilization. What is inherent in all of these factors is competition for resources. De Kock clarifies the meaning of conflict as follows: 'conflict is the process whereby two or more social units … strive for the same objective independently of each other'.[1519] Applied to South Africa, the social units competing against each other for the limited resources in South African society are South African citizens (the challenger group) and asylum-seekers/refugees (opponents). The resources at issue include material resources, as well as status. The South African citizens are represented in this 'game' by the officials of the Department of Home Affairs on account of the fact that these officials possess 'political power'. According to de Kock 'political power is seen as the ability to take and implement decisions within the society'.[1520] Society is predicated on rules and institutions designed to 'keep the action of all the competing social units directed towards attaining the goal [resources] and to prevent it from being directed directly against one another'.[1521] In the context of a distinct scarcity of resources, de Kock concedes that in some circumstances, one social unit may 'focus its attention and energies primarily on the competitor (the opponent),' and not the goal. This is known as 'manifest conflict' and arises where 'the different social units are aware of the goal and the competitors [are] striving after the same goal'. This 'implies action taken towards attaining the goal and action taken against the competitors'.[1522] Effectively, explains de Kock, a 'social unit attempts to achieve its goal by endeavouring to neutralize or eliminate the competitor (opponent)'.[1523] Averring that law may 'function *as a system of discontrol*,'[1524] Nader describes this type of process as a method of transforming 'illegalities into legalities, by carefully targeting liminal areas in order to expand power' and takes the form of 'the exploitation of [the] liminal status of persons (disregard of international treaty obligations in

[1518] Jan Gerber 'Parliament concerned about slow pace of land reform' *News24* (20 May 2017) at *https://www.news24.com/SouthAfrica/News/parliament-concerned-about-slow-pace-of-land-reform-20170519*.
[1519] de Kock 'Violence as an option?' 40.
[1520] de Kock 'Violence as an option?' 43.
[1521] de Kock 'Violence as an option?' 40.
[1522] de Kock 'Violence as an option?' 40.
[1523] de Kock 'Violence as an option?' 40.
[1524] Nader 'Law and the Frontiers of Illegalities' 55. Emphasis in the original.

regard to [refugees])'.[1525] It adumbrates colonisation: it is the colonisation of refugees through the application of law to oppress. Foucault was a fervent proponent of the belief that 'there is no getting outside of historically constituted power relations'.[1526] To be sure, the Department of Home Affairs is producing 'a social structure and sociological patterns that privileges certain groups over others'[1527] and *produces* economic migrants who are abusing the asylum system. Accordingly, when a refugee presents himself, the Department constructs the profile of an ethnically different, sub-human subject who poses a threat and must be eliminated. As the primary agents of institutional power concerning the reception and processing of foreign nationals seeking asylum, 'the traumatic effects of a socio-history of oppression and dehumanisation'[1528] are being reproduced and perpetuated on African asylum-seekers by the Department. Grosfoguel attributes this to 'the most powerful myth of the twentieth century': the myth that 'withdrawal of direct colonial administrations and juridical apartheid [was] decolonisation'.[1529] Similarly, Nkrumah argued that 'entrap[ment] in global coloniality' amounts to neo-colonialism,[1530] akin to Mignolo's conception of the coloniality of power.

Elaborating further, de Kock explains that where the challenger group has had to make significant 'sacrifices in the past' then 'the value that is attached to the goals of the challenger group' (resources) increases proportionately.[1531] de Kock warns that 'as the violent struggle continues, more issues emerge' and 'more polarizations takes place'. Not only does this 'imped[e] communication', but it is 'a recipe for the escalation of violent conflict'.[1532] All of this is severely aggravated by an economic dispensation that is not acceptable to the large majority of society. With respect to the refugee system in South Africa, competition for resources is apparent in 'the attitudes and behaviour of reception and status determination staff'.[1533] Specifically, the 'protection officers tend to view

[1525] Nader 'Law and the Frontiers of Illegalities' 70.
[1526] Saltman *The Politics of Education* 31.
[1527] Saltman *The Politics of Education* 54.
[1528] Langa & Kiguwa 'Race-ing xenophobic violence' 84.
[1529] Ramón Grosfoguel 'The epistemic decolonial turn: Beyond political-economy paradigms' (2007) 21 (2-3) *Cultural Studies* 219.
[1530] Kwame Nkrumah *Neo-Colonialism: The Last Stage of Imperialism* (1965).
[1531] de Kock 'Violence as an option?' 51.
[1532] de Kock 'Violence as an option?' 51.
[1533] Amit 'National Survey' 6.

applicants with suspicion, resulting in an obstructive attitude that directly or indirectly denies many legitimate asylum-seekers the protection to which they are entitled'.[1534] The rejection of asylum-seekers' applications for refugee status constitutes 'passive resistance [passive aggression] as it is aimed at neutralizing the opponent'.[1535] Of even more specific relevance to South Africa's history, de Kock provides additional reasons for the attitude of refugee reception officers. He states that violence is dependent on 'the quantitative development and hardening of existing negative stereotypes and attitudes'. Throughout South Africa's history there has been division and violence. Essentially, he submits that in these circumstances, 'the opponent is increasingly dehumanized and the use of violence against him [is] made all the more justifiable'.[1536] Furthermore, violence is also predicated on 'the dominant group's [refugee reception officers] generalisations of specific acts of violence'[1537] ("stealing jobs and women") committed by African foreign nationals.[1538] This passive aggression (violence) may also arise due to 'despair' that there are ever-increasing numbers of refugees competing for resources.[1539] This is closely related to what de Kock calls 'a sense of crisis … that gives rise to feelings of anxiety' resulting in the Refugee Reception Officers believing that they are being pushed into a corner and they are running out of options.[1540] As he states: 'a challenger group that feels particularly frustrated believes that all communication channels to the [other] group are blocked or are not legitimate.' The group thus believes that its actions can have a positive effect on the situation.[1541] The frustration explanation is as follows: the challenger group (Refugee Status Determination Officers, and other officials) reach a certain level of frustration (that refugees are directly

[1534] Amit 'National Survey' 6.
[1535] de Kock 'Violence as an option?' 42.
[1536] de Kock 'Violence as an option?' 50.
[1537] de Kock 'Violence as an option?' 50.
[1538] In February 2017 "The Mamelodi Concerned Residents" held an anti-immigrant march in Pretoria. This group blame African immigrants for 'crime and stealing jobs meant for South Africans'. The march was followed by violent clashes and the looting of foreign-owned shops. See 'South Africa' in *Human Rights Watch World Report 2018* (2018) 491. Violent conflict and the looting and burning of foreign-owned shops occurred again in early September 2019.
[1539] de Kock 'Violence as an option?' 50.
[1540] de Kock 'Violence as an option?' 51.
[1541] de Kock 'Violence as an option?' 44.

competing for the limited resources available, which they should have preferential access to) and have to give vent to their feelings one way or another.[1542]

Due to the fact that participatory and direct democracy has seemingly been subsumed within representative democracy in South Africa,[1543] the dignity of the people and their feelings of value, worth and belonging have been undermined. With the power of implementation in their hands, the officials within the Department reject the decision taken at the national level, without consultation, to protect refugees and act thereon. A very strong possibility therefore exists that the Department officials (agents) regard the political leadership as lacking legitimacy for incurring international obligations to protect refugees and they feel 'politically alienat[ed]'.[1544] More precisely, the refugee status determination officers 'distrust' the established order's political decisions and because they have a strong sense of political efficacy, they execute their objectives by rejecting applications for asylum.[1545] Given the largely unfettered power that is conferred on refugee status determination officers to make decisions and the fact that they may 'feel that they are increasingly in control of their own destinies, but that societal structures prevent them from living their lives to the full and they are not in a position to change these structures' any other way, they have 'high political efficacy'.[1546] Ultimately, Status Determination Officers have the sole objective of neutralizing or eliminating their opposition;[1547] an objective which they apparently achieve given that 96% of refugee status applications are rejected.[1548] To Status Determination Officers, their aims are 'non-negotiable'[1549] and they have no avenue to challenge the existing laws which they are required to implement. The same applies to society at large. They reject as illegitimate the laws which permit foreign nationals to apply for asylum and remain in the state, competing for the same resources that they require for their own survival.

[1542] de Kock 'Violence as an option?' 44 referring to Dollard's 'well-known frustration-aggression-violence model' (J Dollard et al *Frustration and Agression* (1967) 1-54.
[1543] Hicks & Buccus 'Crafting new democratic spaces' 1278.
[1544] de Kock 'Violence as an option?' 44.
[1545] de Kock 'Violence as an option?' 44.
[1546] de Kock 'Violence as an option?' 44.
[1547] de Kock 'Violence as an option?' 45.
[1548] Postman '96% of refugee applications are refused, say lawyers' *Ground Up* (8 February 2018) at *https://www.groundup.org.za/article/96-refugee-applications-are-refused-say-lawyers.*
[1549] de Kock 'Violence as an option?' 45-6.

5.2 Inadequate training exacerbated by systemic incompetence

The most egregious problem pertaining to refugee determination is the grossly inadequate training of staff. At this juncture, it is relevant to quote Sachs, who conveys the danger of inadequate training:

> The principle of "all-or-nothing" is frequently dangerous in administrative law. It disregards the notion of proportionality that lies at the heart of fairness of treatment. Experience warns that because cautious administrators might be fearful of being regarded as unduly generous, in practice this principle will usually lead to nothing.[1550]

Refugee Status Determination Officers quite simply 'do not possess a relevant set of skills'[1551] that would empower them to 'produce administratively fair and individualised decisions'.[1552] Naturally this impedes their ability to determine 'whether or not a person qualifies as a refugee'[1553] but more seriously, it negatively impacts on 'the life and death decisions' that they make.[1554] Empirical research indicates that Status Determination Officers do not possess 'minimum educational requirements' and are not 'properly trained in all aspects of refugee law'.[1555] Alarmingly, Status Determination Officers have been described as being 'largely ignorant' of the provisions of section 3 of the Refugees Act. To be specific, section 3 reflects the extended definition from the OAU Refugee Convention that affords refugee status to persons who have had to flee civil disturbances and other events that cause instability rendering it impossible to remain in that state. However, Status Determination Officers have been found to reject these types of asylum applications, justifying their decisions by citing 'British case law stating exactly the opposite proposition, that fleeing the instability of civil war does not qualify an individual for asylum'.[1556] It is not only the knowledge and interpretation of the discrete body of refugee law that is relevant to a determination of refugee status. Section 39(1)(b) expressly stipulates that when interpreting the Bill of Rights, a court, tribunal or forum *must* consider international law. This provision is reinforced by section 39(2) of the Constitution that obliges any forum to promote

[1550] Sachs 'From refugee to judge' 57.
[1551] Amit *All Roads Lead to Rejection* 11.
[1552] Amit *All Roads Lead to Rejection* 10.
[1553] Amit 'National Survey' 10.
[1554] Amit *All Roads Lead to Rejection* 11.
[1555] Amit *All Roads Lead to Rejection* 11.
[1556] *Harerimana v Chairperson of the Refugee Appeal Board and Others* 2014 5 SA 550 (WCC) para 41.

the spirit, purport and objects of the Bill of Rights when engaging in the interpretation of legislation. Moreover, the International Association of Refugee Law Judges insist on 'coherence between refugee law and human rights law', recommending that 'the term persecution be interpreted by reference to accepted international human rights instruments'.[1557] If the Department of Home Affairs officials are not adequately trained in international law, as well as refugee law, their decisions should be vitiated because they do not possess the core substantive knowledge that is essential to arriving at the correct decision. At its minimum, if Departmental officials are simultaneously empowered to interpret international refugee and human rights law, but without having received any training in this regard, their decisions are are actually invalid on account of non-compliance with the precepts of the Constitution.

The effects of inadequate training are compounded by little to no supervision of the decisions being made. Indeed, there does not appear to be any monitoring of the decisions made and this failure to monitor adherence to the law is symptomatic of a flawed system.[1558] Systemic incompetence is evident in the fact that Status Determination Officers allegedly do not 'adequately communicate the details of the asylum application process or inform applicants of their rights, effectively denying administrative justice to asylum applicants'.[1559] Such sheer inhumanity is intolerable in the context of refugees.

Striking evidence of the transplant effect is that the Refugee Appeal Board members have only ever received half a day of training by the UNHCR in refugee law since their appointment.[1560] Furthermore, the composition of the Refugee Appeal Board is decidedly problematic. Section 13(2) of the Refugees Act prescribes that only one member of the Board is required to be legally qualified. In the context of decisions pertaining to refugee status, what is required is a detailed knowledge of Refugee Law, Administrative Law, International Law and Human Rights Law, thus it is unfathomable that stricter qualifications

[1557] Jastram 'Economic harm as a basis for refugee status' 162-163 quoting James Simeon 'Human Rights Nexus Working Party Rapporteur's Report' in *The Changing Nature of Persecution* International Association of Refugee Law Judges 305.
[1558] Amit 'National Survey' 10.
[1559] Amit 'National Survey' 7.
[1560] Polzer Ngwato *Policy Shifts* 9.

have not been set as prerequisites for members of the Board. For example, it is incumbent on members of the Board to ensure that South Africa complies with its international obligations and ensures that no refugee is subject to discrimination of any kind. The most complete definition of discrimination is contained in General Comment 18 the Human Rights Committee as this refers to the prohibited grounds of discrimination contained in the Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of All forms of Discrimination Against Women. General Comment 18 provides:

> the term "discrimination" … should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

This lack of appropriate qualifications and competence renders them wholly unfit for the complex task of making objective and subjective decisions concerning claims for asylum. Furthermore, Kock asserts that members of the Appeal Board only receive the files of the various matters on the same morning of the hearing, thereby not affording them sufficient time to prepare.[1561] It is also documented that the lack of training extends to the interpreters;[1562] the very people who are intended to provide asylum-seekers with voice and agency where the applicant cannot express themselves in one of South Africa's eleven official languges, as was evident in the case of *FAM*, discussed more fully below.

It is submitted that the massive backlog of refugee status applications that are still pending finalization, as well as the many applications that have yet to be received in the first instance by Refugee Reception Officers,[1563] is attributed to an orchestrated attempt to deny asylum-seekers their humanity although it is also symptomatic of systemic incompetence. Kock describes the pattern of what appears to be the perfunctory rejection of applications as manifestly unfounded, fraudulent or abusive as 'strategic'.[1564] Strategic, because this is done with a view to prolonging the application process for each applicant, in the knowledge

[1561] Olivia Kock 'Aspects of South Africa's Refugee Status Determination Process' (LLM dissertation University of Pretoria, 2018) 23.
[1562] Amit 'National Survey' 9.
[1563] Handmaker, de la Hunt & Klaaren *Advancing Refugee Protection* 188. See also, '2015 UNHCR country operations profile – South Africa' last accessed from *http://www.unhcr.org/pages/49e485aa6.html*.
[1564] Kock 'Aspects of South Africa's Refugee Status Determination Process' 21.

that all that the Standing Committee for Refugee Affairs has the power to do, is to refer the matter back to the Refugee Status Determination Officer with instructions to re-interview the applicant. If a different Status Determination Officer also rejects the applicant's claim, the only recourse the applicant has, is to submit an appeal to the Refugee Appeal Board.

Much like the bureaucracy of the apartheid era, the Department wields 'naked power, taking refuge in its unfettered discretion'.[1565] This is the very antithesis of the expectation of accountability and transparency that is required of administrators.[1566] The behaviour of Status Determination Officers can be equated to what de Kock terms 'facelessness' or 'public deindividualization'[1567] of the bureaucracy. So the argument goes, these officials may be under the impression that as units within the greater state bureaucracy, 'they can transgress any of the normal behavioural rules since their victims … will not be able to identify them' and they thus 'behave in a way they would not normally behave'.[1568] Foucault's critical statement that 'normalizing procedures are increasingly colonizing the procedures of law'[1569] illustrates in the most precise terms how the unfettered discretion of administrators becomes internalized and normalized, to the point that the rule of law has lost its meaning.

Frustrating the cause of refugee protection is the poor management of the administrators and other staff in the Department. Tazreiter explains that 'the orthodoxies of managerialism tend to flatten the nuances and distinctions underlying administrative practice'.[1570] The outcome is that the functions of members of the bureaucracy are not monitored with a 'consequence-management' approach. The factual scenario relayed in the matter of *JI*[1571] provides evidence to this effect. According to the applicant, no interview was ever actually held to establish the basis for his claim for asylum. In fact, while the Refugee Reception Officer was obtaining the applicant's biometrics, the Officer requested R300.00 from the applicant 'in order to be granted asylum'. Aggrieved by this, the applicant sought the assistance of 'a senior officer' in light of what had transpired. However, when the senior

[1565] Abel *Politics By Other Means* 545.
[1566] Norman-Major & Gooden *Cultural Competency* 226.
[1567] de Kock 'Violence as an option?' 47.
[1568] de Kock 'Violence as an option?' 47.
[1569] Michel Foucault *Society Must Be Defended: Lectures at the Collège de France 1975-1976* (2003) 38-39.
[1570] Tazreiter *Asylum-seekers and the State* 79.
[1571] A decision of the Marabastad Refugee Reception Office in August 2012. On file with the author.

officer asked the Refugee Reception Officer why she had solicited R300.00, the Officer simply apologized to the senior officer and 'they then continued speaking to each other in an African language' with which the applicant is not familiar. He was duly denied asylum. By all accounts, corruption is rampant within the Department and senior management appear blind to it.[1572]

Perhaps even more incriminating regarding poor management and oversight of Refugee Reception Offices, as well as security personnel appointed at the Department, is the fact that violence resulting from the inhumane manner in which asylum-seekers are treated has led to at least four deaths.[1573] With the temperature touching a maximum of 15 degrees Celsius, on 22 May 2013, security guards at the Department of Home Affairs in Foreshore, Cape Town, opened a fire hose of cold water on hundreds of refugees who had been queuing for weeks without success to renew their permits.[1574]

5.3 Materially incorrect interpretation of refugee law

Although international refugee law treaties are described as 'complex', 'vague',[1575] 'vexing and confusing'[1576] they have 'very distinct criteria in mind' with a view to determining who is eligible for refugee status,[1577] albeit that a nuanced interpretation of some of the provisions may be necessary in some instances. In addition, international refugee treaties are supposed to be implemented in a humanitarian and liberal spirit. Nonetheless, Status Determination Officers routinely make serious (and sometimes fatal – both literally and figuratively) errors of law,[1578] such as the 'wrong standard of proof; improper use of the manifestly unfounded

[1572] Corruption Watch 'CW raises concerns over unchecked corruption at refugee centre' (6 September 2018) at *https://www.corruptionwatch.org.za/cw-raises-concerns-unchecked-corruption-desmond-tutu-refugee-centre/*.
[1573] Polzer Ngwato *Policy Shifts* 7.
[1574] Daneel Knoetze 'Guards turn hose on desperate refugees' *Independent Online* (28 May 2013) at *https://www.iol.co.za/news/south-africa/western-cape/guards-turn-hose-on-desperate-refugees-1522852#Ua8RrWR5gi4S.*
[1575] Alice Edwards 'Human security and the rights of refugees: Transcending territorial and disciplinary borders' (2009) 30 *Michigan Journal of International Law* 782.
[1576] Simeon 'Introduction' *Critical Issues in International Refugee Law* 28.
[1577] Tazreiter *Asylum Seekers and the State* 41.
[1578] *RM*; *FAM v Director-General of Home Affairs*, Case number 6871/13, North Gauteng High Court; *Tantoush v Refugee Appeal Board* (2006), Case number 13182/06, Transvaal Provincial Division.

standard; and misinterpretation of the concepts of persecution and well-founded fear'.[1579] It is argued that such errors bring into question the integrity of the process by which asylum applications are decided and hence bring the entire system into disrepute.

The impression created is that the Department of Home Affairs is defiant – if not contemptuous – of court decisions declaring that legal standards and the burden of proof that they apply, for example, are incorrect. Indications to this effect are gleaned from the 2006 case of *Van Garderen NO v The Refugee Appeal Board and Others*,[1580] where the court rejected and condemned the decision of the Board for imposing too high a standard. The court highlighted that the Board had placed reliance on the case of *Appeal no 72668/01* of the Refugee Status Appeals Authority in New Zealand, which imposed too high a standard. In New Zealand the test is whether a 'real chance' of persecution exists. Botha J asserted that 'a reasonable possiblity' of persecution was the appropriate standard and that by utilising the 'real chance' standard, the Board had relied on the incorrect standard. Notwithstanding this decision, as recently as 18 September 2012, a Refugee Status Determination Officer in the *Ngorima Gibson* matter,[1581] continues to explicitly refer to real chance when he writes: 'whether, given the current state of affairs in that particular country, the applicant still faces a real chance of persecution'.[1582] Unsurprisingly, the authority provided in the attempt to define persecution, is 'Refugee Appeal No. 71427/99, The Refugee Status Appeals Authority of New Zealand'.[1583] This case was decided by the New Zealand judiciary two years before the one impugned in the *van Garderen* matter, yet it is cited as relevant authority. One is left to conclude that the Department of Home Affairs officials refuse to have regard to the precedents set in binding court cases against them. Furthermore, the overwhelming weight of evidence is that every single decision rendered by them is simply the same document that is distributed to each applicant with the only amendment being made is the name and country of origin of the applicant.[1584] These

[1579] Amit *All Roads Lead to Rejection* 15.
[1580] Case number 30720/2006 (19 June 2007) Transvaal Provincial Division.
[1581] *In re: Application for Asylum: Ngorima Gibson* File No: PTAZWE010110912 (Marabastad Refugee Reception Centre, 18 September 2012). On file with the author.
[1582] *Ngorima Gibson* 2.
[1583] *Ngorima Gibson* 2.
[1584] If thousands of these types of decisions by the Department of Home Affairs have been issued, it is likely that this same argument and authority is contained in virtually each and every one in light of the fact that the

decisions are replete with contradictions and errors. A contradiction that goes to the heart of a material error of law is the Refugee Status Determination Officer's remark that '[t]he onus of proof rests on the applicant to show that he/she is entitled to refugee status',[1585] but on page 6 concedes that 'the burden of proof … to a larger extent, rested on [the applicant]'. This discloses that absolutely no reliance is placed on paragraphs 196 and 197 of the UNHCR *Handbook* that shifts the onus to the Refugee Status Determination Officer to conduct necessary research to establish the veracity of the asylum-seeker's claim. From the perspective of the obligations imposed by the OAU Refugee Convention, as entrenched in the Refugees Act, South Africa is bound to grant refugee status where the person has fled events seriously disturbing public order in their country. This ground for conferring refugee status is not even alluded to, let alone mentioned in the decisions communicated to the applicants, raising serious doubts about the competence and commitment of the Status Determination Officers.

A particularly problematic error is the assertion by Refugee Status Determination Officers that asylum-seekers are ineligible for refugee status because of the existence of state protection in their home state.[1586] In what can only be described as an attempt to intimidate the applicant with what appears to be water-tight legal authority for this position, in a rote fashion, the Refugee Status Determination Officer includes the reference: 'James Hathaway *The Law of Refugee Status* (1990) 104-105'. Not only does this signal that the Status Determination Officers are "stuck in the 1990s", it is patently incorrect and designed to deceive the applicant into abandoning their application. Indeed, Hathaway's argument has been met with severe criticism[1587] and Hathaway himself has long since relinquished his

two decisions that I have come across in a purely random manner and dealing with persons from entirely different countries, say exactly the same thing. The comparator is the matter of *In re: Application for Asylum: Mr Jahirul Islam* File No: PTABGD001420812 (Marabastad Refugee Reception Centre, 24 August 2012). Corroborating my independent assessment that this is the case is the report by Amit 'All Roads Lead to Rejection' at 98 where she documents all the evidence of 'duplicate letters' that she has had regard to.

[1585] *Ngorima Gibson* 2.

[1586] *Ngorima Gibson* 2 footnote 2. As the Refugee Status Determination Officer writes:
'In Refugee Appeal No. 71427/99, the Refugee Status Appeals Authority of New Zealand followed Hathaway's definition of persecution, namely that persecution is a sustained and systemic violation of basic human rights demonstrative of a failure of the state protection'. (*sic*)

[1587] Nathwani, for example, finds that on Hathaway's construction, there is a fundamental inconsistency because it blurs the distinction between persecution and discrimination. See Nathwani *Rethinking Refugee Law* 81.

earlier theory as unsustainable.[1588] Hathaway and Foster concede that 'there is no presumption that the state can provide protection, whether or not it is a democracy'.[1589] They continue to enunciate that irrespective of 'whether the risk relates to serious harm committed by the state, condoned by the state, tolerated by the state, or serious harm not condoned or tolerated by the state but nevertheless present because the state either refuses or is unable to offer protection … [it] is not a threshold question determining qualification for status'.[1590]

Possibly even more damning is the fundamental error relating to the correct interpretation of when one of the exclusions from refugee status applies, as illustrated in the matter of General Faustin Nyamwasa.[1591] For purposes of context and clarity, it will be recalled that implication in the commission of war crimes is explicitly mentioned as an exclusion to refugee status being accorded. Such exclusion can even be established despite the person not having been formally charged or convicted.[1592] Nyamwasa is a former Minister in the Rwanda government. He was once a close ally of Rwandan president Paul Kagame, serving as Director of Military Intelligence in Uganda from 1990 to 1994. In these capacities, he was an active member of the Rwandan Patriotic Front (RPF) (a Tutsi rebel group), prior to the party assuming power. Uncontested evidence indicates that during and after the war to end the Rwandan genocide, Nyamwasa was Kagame's closest confidant and that he served in Kagame's security apparatus. Specifically, from 1998 to 2001, Nyamwasa held the senior military position of chief of the army. His position in the RPF means that he is accused of involvement in killings in the run-up to and during the Rwandan genocide. In fact, a French indictment and extradition request was issued relating to the shooting down of former President Juvénal Habyarimana's aeroplane in 1994; the catalyst for the genocide. In addition, he is implicated in the commission of grave human rights violations in north-west Rwanda and the Democratic Republic of Congo (DRC) in the period 1994-

[1588] See James Hathaway & Michelle Foster 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination' in Erica Feller, Volker Türk & Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 365-72.
[1589] Hathaway & Foster *The Law of Refugee Status* 302.
[1590] Hathaway & Foster *The Law of Refugee Status* 306-7.
[1591] *Consortium for Refugees and Migrants v Faustin Kayumba Nyamwasa,* Case number 30123/11.
[1592] Hathaway *The Law of Refugee Status* 215.

1998. To be sure, Nyamwasa's known seniority within the RPF at this time provides reason to believe that he, either directly or by virtue of his command authority, is responsible for the serious crimes perpetrated before, during and after the genocide. A UN Report released in 1998 details the crimes alleged to have been committed by high-ranking members of the RPF, including attacking a Red Cross facility, killing both adult and child refugees and the massacres of Hutu refugees in 1997.

On 6 February 2008, citing Nyamwasa as the 'Commanding Officer of all military units', a 180-page indictment issued by the Spanish High Court charged 40 current or former high-ranking Rwandan military officials for crimes committed between 1990 and 2002 in Rwanda and the DRC. These crimes included crimes against humanity and war crimes against the civilian population. The inevitable consequence is that it attributes vicarious responsibility for the criminal conduct of his subordinates to him.

Among other reasons, Nyamwasa's relations with Kagame and Rwanda broke down when he was accused of orchestrating three fatal grenade attacks in Kigali in February 2010. Consequently, he and his family fled to South Africa the same month. Subsequently, the Rwandan government requested that South Africa extradite Nyamwasa. This request was denied, so Rwanda's Military Court sentenced Nyamwasa, *in abstentia*, to life imprisonment for his alleged involvement in the grenade attacks.

On 19 June 2010, Nyamwasa was the target of a shooting incident in Johannesburg. Nyamwasa and his family applied for asylum on 22 June 2010 at the Crown Mines Refugee Reception Office. Within the remit of the Spanish indictment having been brought to the attention of the South African authorities, as well as the highly publicized shooting of Nyamwasa, asylum was nonetheless granted the very same day. Given the factual information at the disposal of Home Affairs officials, in conjunction with the provisions of paragraph 107 of the UNHCR Handbook dealing with the effect of indictments in respect of asylum applications, it becomes clear that a number of material errors of law were

perpetrated by Department of Home Affairs officials in granting asylum.[1593] In this regard, the Handbook states that 'indictments by international criminal tribunals will satisfy the standard of article 1F proof because they are put together in a "rigorous manner," and "[d]epending on the legal system, this may also be the case for certain individual indictments"'. Aggravating this fact was that Nyamwasa began calling for an uprising in Rwanda to overthrow Kagame and established an opposition political party. Article III of the 1969 OAU Refugee Convention is explicit: refugee status may be revoked if a refugee engages in 'subversive activities against any Member State of the (O)AU'. This Convention specifically prohibits refugees from expressing political or other views that are 'likely to cause tension between Member States'. An application seeking judicial review of the Department's decision to grant refugee status was launched in 2013. To date, over six years later, there has been no conclusion to the matter.

Similarly, in 2014, the North Gauteng High Court set aside the decision of the Department of Home Affairs, where refugee status had been denied, whereas if appropriate procedures had been followed and careful consideration given to the merits of the case, asylum would have been granted. The case of *FAM v Director-General of Home Affairs and Others*[1594] illuminates that it is incumbent on departmental officials to engage in progressive and contextualized interpretation of the refugee treaties in light of the facts presented to them.

Born on 30 November 1986 in a village near the Ethiopia/Eritrea border to an ethnic-Eritrean mother and Ethiopian father, FAM was considered Ethiopian, despite never having obtained an Ethiopian birth certificate or identity document. In about 1989 due to the Ethiopia/Eritrea war, FAM's mother was expelled to Eritrea and FAM lost all contact with her. During the war, when FAM was about 5, Eritrean soldiers raided FAM's town. Her father and other family members were shot by the soldiers and they took all the family's money and furniture and burned down the family's grain store, which is what they relied on to survive. FAM was physically and sexually assaulted by the soldiers until she lost consciousness. Once she

[1593] Goodwin-Gill emphatically states at 97 of *The Refugee in International Law* that: 'Being integral to the refugee definition, if the exclusion applies, the claimant cannot be a refugee, whatever the other merits of his or her claim'.
[1594] Case number 6871/13, North Gauteng High Court.

had been found by her cousin, the two of them went to Addis Ababa as they feared for their safety if they remained where they were. Pertinently, having been born in a small village near Eritrea, FAM's home language was Tigrin and not Amharic. The import of this fact is relevant to FAM's ability to communicate effectively in Ethiopia and elsewhere.

While in Addis Ababa, FAM witnessed soldiers from the Eritrean Peoples' Revolutionary Democratic Front (EPRDF) forcing students to join the army. Those who refused were beaten and some, shot. FAM thus feared for her life, which fear was exacerbated by the fear of persecution on account of being partially Eritrean. Consequently, in 2001 FAM and her cousin fled to Kenya. The Kenyan government was, however, deporting Ethiopians and Eritreans back to where they came from. Out of fear, FAM and her cousin fled Kenya. Significantly, the establishment of the Ethiopian-Eritrean Claim Commission in December 2004 resulted in FAM being deprived of her Ethiopian nationality, although she was not guaranteed to obtain Eritrean nationality and had never even been to Eritrea. Over the next few years they lived in Burundi, Tanzania and Mozambique and then entered South Africa in 2006. For two years FAM lived a precarious existence without documentation and only applied for asylum in 2008. Although she was issued with a section 22 permit, at the time of making her application, FAM was still not fluent in English and thus required assistance with translation. She came across a fellow asylum-seeker from Ethiopia who offered to assist her at a fee of R50. He spoke Amharic, while she speaks Tigrin, thus the communication between them was basic, to say the least, and was not conducive to accurately conveying FAM's circumstances and experiences. In fact, most of the answers that were written on the application on FAM's behalf did not reflect the true state of affairs. Noting that insufficient information had been provided on the biometrics form, and unable to render a decision thereon, on 11 November 2009 FAM was called to adduce additional information to the Refugee Status Determination Officer. However, the Department of Home Affairs provided FAM with an Amharic-speaking interpreter and proceeded to interview her via this interpreter. A feature of a culturally competent administrator is that they have the ability to 'identify [the] requirements for interpreter services and have the ability to effectively communicate using interpreters, [as well as demonstrating] respect for

[other/different] cultural beliefs'.[1595] To make matters worse, the interpreter did not appear to have the requisite training or skills.[1596] If the interpreter had received the requisite training, they would have been in a position to convince the Status Determination Officer that a Tigrin-speaking interpreter was required instead.

Documenting the fatal flaws in the Department's decision, Keightley AJ relates that the 'notes'[1597] recording what transpired at the interview were incomplete and contained material inconsistencies when compared to the information that FAM had tried to relay about her claim for asylum. The Refugee Status Determination Officer also ignored FAM's averments that women of mixed ethnicities are particularly vulnerable to gender abuse and persecution in both Eritrea and Ethiopia.[1598] To make matters worse, he made gratuitous and derogatory remarks concerning FAMs allegations of sexual abuse. Having regard to her circumstances, it is incongruous that FAM was denied refugee status. There are thus a number of reasons why the Refugee Status Determination Officer's decision was fatally flawed and thus sought to be reviewed. The most obvious is that in terms of the Regulations to the Refugees Act, the Refugee Status Determination Officer must determine an applicant's eligibility for refugee status 'on a case-by-case basis, taking into account the specific facts of the case and conditions in the country of feared persecution or harm'.[1599] As Keightley AJ made clear in the judgment, there is a multitude of reliable information from a number of credible sources that could have been relied on to substantiate or verify FAM's averments, yet the Refugee Status Determination Officer neglected to make any effort to this end.[1600] Ultimately, by the Refugee Status Determination Officer wrongly concluding that FAM did not meet the relevant requirements for refugee status as stipulated in the Refugees Act, deeming her application 'manifestly unfounded', refugee law as it is intended to be interpreted and understood was undermined .

[1595] Norman-Major & Gooden *Cultural Competency* 255.
[1596] Likewise, in *Chen and Another v Director-General Home Affairs and Others* 2014 ZAWCHC 181 (2 December 2014) at para 36, the Court held an asylum-seeker has a right to have the correct interpreter present.
[1597] In terms of para 26, Keightley AJ points out that the notes are 'rather scant in nature, and take the form of a bullet point list of sentences and questions'.
[1598] *FAM* para 154.10.
[1599] Reg 12(1).
[1600] *FAM* para 158.

5.4 Persisent bias; and decisions taken in bad faith, arbitrarily or capriciously

Describing visible indicators that a person is a refugee in need of humanitarian assistance and protection, Tazreiter reveals that these 'marks and signposts' are carried with and on the body:

> the travel documents tucked in a top pocket, the family photos carried close at hand, the foreign currency, the marks of torture and mistreatment on torso, on feet, are part of the artefacts which remind us at once of the distinctions that mark 'outsiders', while simultaneously striking chords of common humanity, even self-identification.[1601]

Accordingly, psychological bias undoubtedly affects refugee status determination. Congruent with Tazreiter's reference to 'self-identification', if refugees appear similar to Refugee Status Determination Officers, they are 'more likely to see and validate' the refugee.[1602] If no such identification occurs, an immediate aversion to their existence in the country arises, and their claim to asylum is not only denied, but vociferously challenged. Achiron and Jastram describe this as a typical scenario where 'the elements on which the claim to refugee status or asylum is based'[1603] are used more often to deny refugee status than to grant it. The result is the subversion of the applicant's history and identity. Consequently, no care is taken to adequately enquire into the merits of their claim for refuge, despite the fact that it is relatively easy to identify bias in administrative law. To prove bias, the test is simply whether objectively speaking, there is a reasonable apprehension that the [decision maker] is biased. The test asks whether

> a reasonable, objective and informed person would on the correct facts reasonably apprehend that the [decision maker] has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and submissions.[1604]

The test for bias coheres with Habermas's explanation of the asymmetrical power relations between the asylum-seeker and the status determination officer in respect of refugee status determination generally. Acknowledging that legal processes and procedures may be fallible, Habermas notes that it is imperative that suitable processes are created to 'ensure

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[1601] Tazreiter *Asylum Seekers and the State* 214.
[1602] Patel *Decolonizing Educational Research* 35.
[1603] Jastram & Achiron *Refugee Protection* 7.
[1604] *President of the Republic of South Africa v South African Rugby Football Union (2)* (Judgment on recusal application) 1999 (4) SA 147 para 48. In arriving at this test, the Court relied on the decision of the Canadian Supreme Court in *R v S (RD)* (1997) 118 CCC (3d) 353.

that minorities have at least some chance of winning over a majority to the possibility of an alternative approach; establishing a revision of what are more usually majority decisions'.[1605] While at first glance Habermas's suggestion appears trite, its significance is reinforced by Tazreiter's comment that the first instance of bias will invariably have a negative impact on any subsequent hearing into the same matter. As she states: 'once an asylum-seekers' claim is labelled fraudulent, unbelievable, or inconsistent, the likelihood of success on a second hearing or appeal seems to be diminished'. [1606] A well-established rule in administrative law is that 'a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body'.[1607] Accordingly, an applicant seeking asylum has a right to a fair process at every step of the determination of his status; especially at the initial stage, yet this is sorely lacking. The Department has even admitted bias in the asylum process. Evidence to this effect is that although the Refugees Act contains no requirement that an asylum transit visa must be obtained prior to their application being considered, numerous asylum-seekers were prevented from even entering the Refugee Reception Office without this visa.[1608] The Department vehemently denied that any such 'practice, policy or procedure' existed, but did disclose bias against asylum-seekers who enter the country clandestinely and illegally by not reporting to a border post.[1609]

5.5 Irrational and unreasonable decision-making; errors of fact; and irrelevant considerations relied upon

What is particularly shameful is when the decisions made have no accurate correlation with the conditions prevailing in the country of origin, or worse refer to the wrong country completely, or even the incorrect claimant. Evidence that inaccurate country conditions is due to negligence on the part of officials emanates from the injunction placed on them by the UNHCR *Handbook* to obtain all relevant information. Indeed, it is incumbent on the

[1605] Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 179.
[1606] Tazreiter *Asylum-seekers and the State* 142.
[1607] Lawrence Baxter *Administrative Law* (1984) 588-9.
[1608] Johnson & Carciotto 'The state of the asylum system' 179 referring to 'South Africa: Red Tape Ensnares Asylum-seekers' (ks/cb, Johannesburg, IRIN, 20 January 2012) at *www.irinnews.org/report/94692/south-africa-red-tape-ensnares-asylum-seekers*.
[1609] *Dennis Ssemakula v Minister of Home Affairs* [2012] ZAWCHC 398 (5 March 2012) para 6.

decision-maker to decide the application in favour of the applicant if it is 'coherent and plausible' and does 'not run counter to generally known facts'.[1610] To establish these facts, the decisions of Chaskalson CJ and O'Regan J in the case of *Kaunda and Others v President of the Republic of South Africa and Others*[1611] unambiguously sanction the use of reports 'originating … from well-respected international agencies concerned with the protection and promotion of human rights' in order to determine the true state of affairs in a particular country.[1612] As Chaskalson CJ held:

> Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organizations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case.[1613]

A specific example indicative of the failure to interrogate a claim adequately in light of the material circumstances pertaining in the country of origin arises in the case of *Makumba v Minister of Home Affairs and Others.*[1614] Substantial evidence exists recording persecution of homosexual persons in Malawi. Nonetheless, when a lesbian person from Malawi applied for asylum, the Refugee Status Determination Officer neglected to enquire as to whether the basis for the claim for asylum was the applicant's sexual orientation. As a result, the application was rejected as unfounded. Although the Refugee Status Determination Officer was ordered to re-interview the asylum-seeker, the decision to refuse asylum was confirmed, necessitating judicial review of the decision.

5.6 Changing of policies overnight and inability to enforce the social contract

Initially, the domestic policy on refugees could be described as 'humanitarian' and liberal in nature in light of the fact that the African system of refugee law (to which South Africa subscribes) is unapologetically humanitarian in its approach.[1615] Even though South Africa's domestic law is progressive and ostensibly consistent with international law, over

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[1610] *Gorhan v Minister of Home Affairs and Others* 2016 ZAECPEHC 70 (20 October 2016) para 30.
[1611] 2005 (4) SA 235 (CC) 2004.
[1612] *Kaunda* para 265.
[1613] Para 123.
[1614] *Makumba v Minster of Home Affairs and Others* 2012 184 ZAGPJHC SA 659.
[1615] UNHCR Excom conclusion 50.

time, various policy decisions have been adopted which are undoubtedly eroding compliance with international obligations. As Polzer Ngwato asserts: no recent 'explicit policy documents' have been adopted providing the rationale for changes in refugee policy in South Africa, yet there have been considerable changes in practice.[1616] Moreover, there does not appear to be any rational link between these shifts in policy and any 'strategic aims' which the state may have.[1617] Precisely, in extractive, natural states – even mature ones such as South Africa – the legal systems have not been developed in such a way as to 'enforce contracts … based on rule of law principles'.[1618] The acceptance of international treaties by a state amounts to a contract being entered into between the state and the international community at large. This contract also extends to the people within a state, to which the international treaty relates. The people acquire a legitimate expectation that the contract will be enforced.

A natural corollary of section 33, and as proclaimed in section 57 of the Constitution, public participation in decision-making which is likely to have an effect on the public, must take place. Notwithstanding this injunction, Polzer Ngwato asserts that there has been 'little substantive consultation with stakeholders' with respect to changes in policy and practice concerning refugee rights.[1619] More damnding, the South African government has had to concede that there is an irreconcilable difference between the policy and the law with respect to refugee protection in South Africa in its Green Paper on International Migration.[1620] The Green Paper argued that the current international migration policy must be replaced as it does not enable SA to adequately embrace global opportunities while safeguarding sovereignty and ensuring public safety and national security.[1621] The Green Paper states:

> The DHA amended the Immigration and Refugees Acts and implemented strategies to address gaps in legislation. What is required, however, is a comprehensive review of the policy framework that can inform systematic reform of the legislation and administration of immigration. The last comprehensive national discussion of the international migration policy was prior to the publication of the White Paper on International Migration in 1999. Since then, South Africa and the world have undergone profound changes and there is a better

[1616] Polzer Ngwato *Policy Shifts* 4.
[1617] Polzer Ngwato *Policy Shifts* 4.
[1618] Weingast 'Why do developing countries prove resistant?' 35; Acemoglu & Robinson *Why Nations Fail* 307-309 in particular.
[1619] Polzer Ngwato *Policy Shifts* 4.
[1620] *Green Paper on International Migration* 15 June 2016.
[1621] *Green Paper on International Migration* 6.

> understanding of the way in which international migration should be managed by states, regions and internationally.[1622]

While a Green Paper and subsequently, a White Paper on International Migration was produced in 2012, with the objective of creating a 'coherent set of proposals' that prioritize the management of immigration, the adoption of a White Paper does not represent the stage of law-making where public participation is specifically required or even available. As such, in the absence of public participation in the adoption of relevant legislation governing international migration, the far-reaching implementation of new policies, practices and systems represents invalid and unconstitutional conduct. It has also been argued that this indicates that the proposed changes will be adopted irrespective of substantive consultation on the topic, thus representing a *fait accompli*.[1623] A detailed interrogation of these changes, which follows, illustrates that South Africa is acting in defiance of its international obligations. Despite the Department of Home Affairs declaring under oath in 2005 that some systems introduced, such as setting the maximum number of applications received per day, were only temporary because they occurred in the context of insufficient staff, backlogs of cases and inadequate facilities and would be replaced by long-term strategies and solutions,[1624] serious problems persist over a decade later.

a. Receipt and processing of asylum-seekers only at designated borders

The Refugees Act provides for the establishment of temporary reception centres for asylum-seekers only in the context of a 'mass influx'. Without such mass influx, the government's adoption of the Border Management Authority Bill, 2015 that declares that asylum-seekers will only be received and processed at specific border posts[1625] is unlawful, unconstitutional and invalid. The practical implications of this decision are manifold. One inevitable consequence of the fact that many asylum-seekers enter through land borders other than Lebombo and Beitbridge, means that those asylum-seekers would not be in a position to apply for asylum at the 'designated' border, and therefore, they face a risk of

[1622] *Green Paper on International Migration* 6.
[1623] Polzer Ngwato *Policy Shifts* 12.
[1624] *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C) paras 15-17.
[1625] The Border Management Agency Bill, 2015, published in Government Gazette 39056, 5 August 2015.

being ‘penalised for entering a host country by irregular means’ contrary to international refugee law.[1626] In 2012 the Supreme Court of Appeal confirmed in the case of *Bula v Minister of Home Affairs*[1627] that it is the Refugees Act and not the Immigration Act that applies to all foreign nationals who indicate that they intend to apply for asylum. Accordingly, no genuine asylum-seeker may be refouled simply because they have entered the state in an irregular fashion[1628] or allowed their asylum transit visa to expire. Given that the processing of refugee status is supposed to take place within 180 days, but in some cases even takes as long as ten years, asylum-seekers would consequently be required to reside at that border pending finalization of their application, thus impacting on their welfare needs. In fact, the implication inherent in the Bill is that South Africa is subverting its protection mandate in favour of employing a mechanism to deter immigration.

The nature of the proposed residence at the border is also questionable. It could either take the form of detention[1629] or be equivalent to a refugee camp scenario. It is well-documented that refugee camps do not afford adequate protection for refugees. Camps are synonymous with violence, such as rape, crime, and sexual exploitation[1630] and often give rise to human trafficking, drug havens and even weapons trafficking.[1631] There is also the possibility that the refugee camps situated close to borders with states which are experiencing conflict, renders refugees vulnerable to a spill-over of these conflicts across the border.[1632] Arguably even more significant is that refugee camps reduce the prospect of integration and self-sufficiency of refugees because of the severely limited opportunities for work and study.[1633]

[1626] Polzer Ngwato *Policy Shifts* 7.
[1627] 2012 (4) SA 560 (SCA) para 74
[1628] Art 31(1) of the Refugee Convention provides that a state may not impose penalties on refugees and asylum-seekers who have entered any state illegally or are in the state territory illegally if they have come directly from a territory where there was a threat to their life or freedom within the meaning of art 1 of the Convention.
[1629] Polzer Ngwato *Policy Shifts* 8.
[1630] Jeff Crisp ‘Forced Displacements in Africa: Dimensions, Difficulties and Policy Directions’ (2010) 29 *Refugee Quarterly Survey* 8.
[1631] Ninette Kelly ‘International Refugee Protection Challenges and Opportunities’ 2007 (19) *International Journal of Refugee Law* 405.
[1632] Kelly ‘International Refugee Protection’ 405.
[1633] Alice Edwards ‘Refugee Status Determination in Africa’ 2006 (14) *African Journal of International & Comparative Law* 205.

b. Decisions being made by officials not authorised to do so

From the outset, an alarming irregularity that constitutes a serious infringement of the rule of law is that while all of South Africa's land, sea and air borders are protected by officials employed by the Department of Home Affairs, these border officials have not been 'specifically designated as refugee reception officers'. Consequently, continues Polzer Ngwato, they 'do not have the requisite training, qualifications or experience … to assess asylum claims. Irrespective of this fact, border officials are refusing asylum claims, thus they are making ultra vires decisions'.[1634] The fact that border officials are making decisions that are not within their scope of authority or competence is unlawful. Zimbabweans, for example, are routinely and strictly denied access to asylum,[1635] irrespective of their circumstances. It is impossible for the applicant to 'resist denial of entry or seek recourse for an unjust decision'.[1636] Without 'basic legal knowledge'[1637] of international refugee law, this inevitably results in refoulement of persons who have a legitimate fear that they would suffer persecution or other human rights violations if returned to Zimbabwe.[1638] The practice has also developed that the border official decides whether the applicant is entitled to an 'asylum transit permit'.[1639] In most cases, the border official simply refuses to provide one.

c. Physical inaccessibility to Refugee Reception Offices

Inexplicably, in the period between 2003 and 2004, the Johannesburg Refugee Reception Office moved premises three times within six months. Refugees would arrive at the former

[1634] Polzer Ngwato *Policy Shifts* 5.
[1635] At one stage South African officials were receiving 8 000 applications for asylum per day from Zimbabweans. Wendell Roelf 'Zimbabweans "not refugees in SA"' *Reuters* (24 August 2007) at *https://www.reuters.com/article/us-safrica-refugees-idUSL1467094820071121?feedType=RSS&feedName=worldNews*; 'Govt reiterates no refugee status for Zimbabweans' *SABC* (12 August 2007) at *www.sabcnews.co.za.* See also, Dianne Hawker et al 'Zim refugees pour into South Africa' *Cape Times* (4 April 2007) at *https://www.iol.co.za/news/politics/zim-refugees-pour-into-sa-321750*; 'Refugees flood into SA from Zimbabwe' *Mail & Guardian* (1 July 2007) at *www.mg.co.za*; 'Government "in control of refugee crisis"' *AFP* (12 August 2007) at *www.iol.co.za*; 'Fact or Fiction? Examining Zimbabwean Cross-Border Migration into South Africa' Forced Migration Studies Programme and Musina Legal Advice Office, Special Report 2007 at *http://migration.org.za/*. See 'Zimbabwe visa decision takes flak' *Legalbrief* (6 May 2009) at *legalbrief.co.za*.
[1636] Polzer Ngwato *Policy Shifts* 5.
[1637] Polzer Ngwato *Policy Shifts* 6.
[1638] Polzer Ngwato *Policy Shifts* 5.
[1639] Amit *All Roads Lead to Rejection* 8.

Refugee Reception Office and no information was provided about the office having been closed, nor about the new location of the office.[1640] Similarly, one of the more alarming events not supported by any specific policy position to this effect, was that in 2011 the Cape Town, Johannesburg and Port Elizabeth Refugee Reception Offices were unlawfully closed. This was accompanied by a declaration that all Refugee Reception Offices in major cities would be moved to the international land borders[1641] of the state. This has a decidedly negative impact on access to asylum, because it is at these offices that asylum-seekers submit initial applications, seek renewal of their temporary permits, have status determination interviews, as well as institute appeals for negative decisions. Regardless of binding court orders to re-open the Refugee Reception Offices, the Department has been recalcitrant and contemptuous of the judicial system by failing to re-open the Refugee Reception Offices and by failing to provide equivalent services in these metropolitan municipalities.[1642] A further consequence of this is that it has an exponential impact on the costs of access for asylum-seekers as they are required to attend upon alternative Refugee Reception Offices. Moreover, it also opens up the risk of asylum-seekers becoming undocumented, thus rendering them 'subject to fines, detention and direct or indirect refoulement'.[1643] This is particularly true for those asylum-seekers who have already commenced with the process of having their status verified, because they would have to incur an 'unreasonable burden of costs to complete administrative processes' and would run directly counter to the requirement of 'efficient service provision'.[1644]

2011 was also the year in which the Department of Home Affairs unilaterally introduced the requirement that asylum-seekers had to produce an asylum transit visa before they were permitted to apply for asylum.[1645] At that material time, however, asylum transit visas were not yet being issued at border posts. This resulted in the untenable situation that asylum-seekers were precluded from applying for asylum due to no fault on their part in not having

[1640] Jonathan Crush, Caroline Skinner & Manal Stulgaitis 'Benign Neglect or Active Destruction? A Critical Analysis of Refugee and Informal Sector Policy and Practice in South Africa' (2017) 3 (2) *African Human Mobility Review* 758.
[1641] Polzer Ngwato *Policy Shifts* 7.
[1642] Polzer Ngwato *Policy Shifts* 7.
[1643] Polzer Ngwato *Policy Shifts* 7.
[1644] Polzer Ngwato *Policy Shifts* 8.
[1645] Johnson & Carciotto 'The state of the asylum system' 179.

obtained an asylum transit visa. Ultimately, it also led to the inevitable refoulement of asylum-seekers.[1646]

d. Evidence of prejudice, preconceived decisions and limitations on the number of applications accepted per day

Within just four years of the Refugees Act becoming operative, the Department of Home Affairs adopted the view that the majority of the applications for asylum were not legitimate. It therefore devised two systems to respond to its inability to receive and process all of the asylum applicants' claims per day.[1647]

With respect to the first system, the Department manufactured an application form – issued to asylum-seekers waiting in the queue outside of the Refugee Reception Offices – that sought to eliminate as many applications as possible.[1648] The form was composed of two main parts: the first was the collection of 'basic demographic information'[1649] while the second required the applicant to clearly stipulate the reasons upon which they based their claim for asylum with reference to why the person left their state of origin and what the consequence was likely to be if they returned there.[1650] No guidance or assistance was offered to the applicants in order to solicit relevant information. The absurdity of this situation is further pronounced by the fact that the Refugees Act unambiguously states that refugees are entitled to interpreters in order to convey the substance of their claim and no interpreters were afforded[1651] while the forms were being completed. Furthermore, the confidentiality and privacy of applicants was severely compromised by these circumstances although paradoxically, at the same time, the applicants did not have sufficient space on

[1646] Johnson & Carciotto 'The state of the asylum system' 180 referring to the Médecins Sans Frontières report 'No Way In Means No Way Out: South African Immigration Policy Entraps Asylum-seekers in Catch-22 Situation' (Johannesburg/Musina 31 January 2012) at *www.msf.org.za/msf-publications/%E2%80%9 Cno-way-in-means-no-way-out%E2%80%9D-south-african-immigration-policy-entraps-asylum-seekers*.
[1647] Johnson & Carciotto 'The state of the asylum system' 173.
[1648] Johnson & Carciotto 'The state of the asylum system' 173 referring to *Tafira v Ngozwane* ZAGPHC 136 (TPD) 2006 para 38.
[1649] Johnson & Carciotto 'The state of the asylum system' 174.
[1650] Johnson & Carciotto 'The state of the asylum system' 174.
[1651] Reg 4(a) states that it is the responsibility of the Refugee Reception Officer to ensure that interpretation services are provided to asylum-seekers when making their applications.

the form to provide substantiation in any event.[1652] The Department of Home Affairs alleged that the knowledge they obtained from these forms was that 'many of the applicants were not really desirous of wanting asylum or … would not even remotely qualify for asylum'.[1653] On the strength of this apparent 'knowledge', the Department admitted that some asylum-seekers were denied the opportunity to apply for asylum.[1654] Indeed, some asylum-seekers were issued with a document bearing the Department's letterhead that declared that the applicant did not comply with the qualifying criteria for asylum and that they were to exit the Refugee Reception Office.[1655]

The second system entailed either the introduction of maximum numbers of new applications that the Refugee Reception Office would accept each day or the imposition of a quota on the number of applicants per state of origin per day.[1656] As was revealed in the *Kiliko* case, the Cape Town Refugee Reception Office would only receive 20 applications per day, leaving numerous asylum-seekers without documentation, ultimately resulting in the affected asylum-seekers rioting, suffering serious injuries necessitating hospital treatment.[1657] The Court did not hesitate to regard this practice as unlawful and invalid as it violated the rights to dignity and freedom and security of the person as stipulated in the Constitution and which rights also extended to asylum-seekers.[1658]

e. Safe country of origin

The Department of Home Affairs has been known to adopt a "white list" of countries that are deemed to be 'non-refugee generating countries' and therefore 'safe', although the Refugees Act makes no mention of such countries.[1659] The direct consequence of such action is that it has been used to automatically exclude some asylum-seekers both from

[1652] Johnson & Carciotto 'The state of the asylum system' 174.
[1653] *Tafira v Ngozwane* paras 5-6.
[1654] *Tafira v Ngozwane* paras 32-35.
[1655] *Tafira v Ngozwane* paras 32-35.
[1656] Johnson & Carciotto 'The state of the asylum system' 175 citing D Vigneswaran 'A Foot in the Door: Access to Asylum in South Africa' Forced Migration Studies Working Paper 40, University of the Witwatersrand (August 2008) 12.
[1657] *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C) paras 23 and 10.
[1658] *Kiliko v Minister of Home Affairs* para 31.
[1659] Johnson & Carciotto 'The state of the asylum system' 178.

the territory as well as access to the asylum procedures. Zimbabweans have been particularly adversely affected by this practice.[1660] This amounts to an unlawful (and arbitrary) implementation of the Refugees Act in that it discriminates against individuals from certain countries and introduces a geographic limitation as an additional criterion to qualify for refugee status.[1661]

f. Lack of independence and increased securitisation of process

The 'kleptocratic decade' (to borrow the phrase from Ferrial Haffajee) and scandal-ridden era of Zuma's presidency is synonymous with 'a weakening of the institutions of law and order'.[1662] Although Weingast had forewarned that leaders may use their power to undo rights when they prove inconvenient, it is no less shocking to see this reality unfolding. An aspect of particular concern is that under Zuma, the Department of Home Affairs became part of the security cluster. Foucault had convincingly theorised that a 'triangle' exists, composed of sovereignty, discipline, and governmental management of the population. His view was that those in power are susceptible to manipulating their 'technical instrument(s)' (the 'appartuses of security') in order to control the population.[1663] In Zuma's case, he deliberately 'staffed the security cluster with trusted allies' and the Cabinet Ministers in the security cluster became increasingly influential over time. Furthermore, the security cluster exhibited 'an increased "desire to operate in the dark"'.[1664]

Asylum is a 'highly sensitive public policy concern'.[1665] It follows, therefore, that the designated officials who engage in the complex process of determining whether or not an applicant qualifies for refugee status, should be entirely independent from government. In South Africa, however, these officials are employees within the Department of Home

[1660] Johnson & Carciotto 'The state of the asylum system' 179 referring to the situation report: 'Refoulement of Undocumented Asylum-seekers at South African Ports of Entry with a Particular Focus on the Situation of Zimbabweans at Beitbridge' (Lawyers for Human Rights September 2011) 9.
[1661] Johnson & Carciotto 'The state of the asylym system' 178.
[1662] Aron Hyman 'Recent hits signal possible "clean-up" by gang bosses' *Sunday Times* (23 February 2018) at *https://www.timeslive.co.za/news/south-africa/2018-02-23-recent-hits-signal-possible-clean-up-by-gang-bosses/.*
[1663] Foucault *Security, Territory, Population* 108-9.
[1664] de Vos & Freedman *South African Constitutional Law* 181 quoting Steven Friedman 'Secrecy Bill' *Business Day Live* (6 August 2012) at *http://www.bdlive.co.za/articles/2011/11/22/steven-friedman-secrecy-bill*.
[1665] Quoting Juan Osuna, Acting Chairman of the US Board of Immigration Appeals (BIA) (at the time).

Affairs. Of a similarly egregious nature is the fact that despite the Standing Committee for Refugee Affairs and the Refugee Appeal Board being described as 'independent' in the Refugees Act, the administrative work of these bodies is carried out by officials from the Department of Home Affairs who have been seconded to these positions by the Director-General of Home Affairs.[1666] It is inconceivable that they are able to exhibit independence when they are effectively acting under the dictation of a Department that not only forms part of the 'security cluster of the state' but is outwardly hostile to migrants seeking asylum. This perpetuation of the securitization of the state, reminiscent of the highly securitized apartheid South Africa is particularly dangerous for refugee protection. Tazreiter claims that the notion of security gives impetus to the 'political and social construction of refugees and in particular of asylum-seekers as "irregular" arrivals'. She warns that this provides 'a focus for resentment, readily exploited by politicians searching for simplistic ways of communication about complex social problems to their constituents.'[1667] Reference to the abuse of the asylum system creates the perception that all migrants pose an existential threat to the cohesion and security of the nation[1668] and that 'violence [to repel this threat] is valid so long as it is employed for [that] purpose'.[1669] The overwhelming focus on national security has inevitably resulted in waning compliance with international refugee law, as South Africa illustrates. Perplexing is the knowledge that even members of the judiciary are known to have perpetuated the idea that asylum-seekers pose a threat to the state. In response to a request by asylum-seekers to be released from detention, the judge commented that:

> The applicants remain illegal refugees so long as they have not been accorded asylum refugees status, consequently bound to be deported to their country of origin ... To merely have illegal refugees released simply because it is alleged that their further detention is unlawful, will result in a situation where the numbers of refugees roaming the streets of the Republic ever increasing to unacceptable and uncontrollable proportions. *(sic)*[1670]

In March 2017, during the official opening of the National House of Traditional Leaders, President Jacob Zuma claimed that there is widespread concern among South Africans

[1666] Olivia Kock 'Aspects of South Africa's Refugee Status Determination Process' 23.
[1667] Tazreiter *Asylum Seekers and the state* 223.
[1668] d'Orsi *Asylum-Seeker and Refugee Protection* 35.
[1669] Tazreiter *Asylum-seekers and the state* 25.
[1670] *Mogul and Others v Minister of Home Affairs and Another In re: Mustafa and Others v Minister of Home Affairs and Another* 2008 ZAGPHC 227 (29 July 2008) para 39.

about South Africa's dangerously 'porous boundaries'.[1671] Reiterating the supposed threat posed by migrants, and speaking in relation to the proposed rationalisation of the state, as contained in the ANC's 2017 discussion document on peace and stability, then Minister of Home Affairs, Malusi Gigaba said on 5 March 2017 that:

> The department of home affairs is currently "wrongly positioned" and should be dealing with critical matters of state security. … the role of the department is "widely misunderstood" to be that of an administrative department that delivers routine services of low value [whereas it should] be elevated to a strategic and crucial national security, service-delivery and economic development unit. … The abuse of the asylum-seeker system by migrants with low skills levels, combined with the 2008 influx of Zimbabweans, led to a systems breakdown and social unrest. … the justice cluster's policy framework and security should be repositioned and its operational and organisations structures and funding remodeled [to include] the department … in the security architecture of the country (being responsible for police service, prisons and immigration).[1672]

A further aspect of concerns is that Polzer Ngwato recounts that questions posed to the Minister of Home Affairs concerning the appeal processes were answered by the Refugee Appeal Board. Thus, the division of responsibilities between the Department of Home Affairs and Refugee Appeal Board are unclear [1673] and certainly undermine the independence of the Refugee Appeal Board and Standing Committee for Refugee Affairs.

5.7 Pre-screening by way of the introduction of the 1st or 3rd safe country rule and asylum transit permits

Sovereign states are increasingly taking defensive measures such as '[r]ejecting asylum-seekers at the border [and] not allowing them access to legal processes.[1674] If the consequences are dire, there is no room to argue that these measures are reasonable. *Prima facie*, there is a concerted effort by the Department to prevent asylum-seekers from making applications in the first instance (otherwise referred to as constructive refoulement).[1675] The evidence suggests that the Department takes concerted action to filter applicants at the border by requiring them to obtain an asylum transit permit from

[1671] 'President Jacob Zuma: Official opening of National House of Traditional Leaders' (3 March 2017) at *http://www.gov.za/speeches/annual-official-opening-national-house-traditional-leaders-3-mar-2017-0000.*
[1672] Cele & Stone 'Home Affairs should manage state security'.
[1673] Polzer Ngwato *Policy Shifts* 9.
[1674] Tazreiter *Asylum Seekers and the state* 42.
[1675] Khan & Schreier *Refugee Law in South Africa* 12 citing *Kiliko v Minister of Home Affairs* and *Tafira v Ngozwane*.

border officials.[1676] In the absence of such an asylum transit permit issed by a border official, there are some instances where the asylum-seeker continues to approach a Refugee Reception Officer in order to apply for asylum. The first obstacle that the asylum-seeker needs to overcome, is the 'behaviour and attitude of security guards working outside refugee reception offices'.[1677] Thereafter, Refugee Reception Officers have been found to refuse to accept applications from those applicants.[1678]

In blatant disregard for the fact that pre-screening is substantially similar to the application of the (non-existent)[1679] 1st or 3rd safe country rule,[1680] South Africa has begun pre-screening applicants to determine whether they should be returned to a safe country through which they transited on route to South Africa.[1681] Confirming this is the public statement by the Minister of Home Affairs in March 2011 that asylum-seekers must 'seek refuge in the first safe country they transit' because this is required by international law.[1682] Such a statement raises alarm that the Department is unilaterally introducing barriers to accessing asylum, without any legitimate basis for such decision. This is also in contravention of the UNHCR's stance on the 1st safe country rule,[1683] as well as being antithetical to South Africa's domestic law,[1684] which prohibits refoulement.

As a result, and in contradistinction to the express right againt refoulement, asylum-seekers are being arrested and deported.[1685] The Lindela Repatriation Centre is massively over-crowded, and it is likely that many of the people detained there are genuine asylum-seekers. So serious is the problem of the detention and deportation of possible refugees that during the presentation of South Africa's second periodic state report, for the period

[1676] Amit *All Roads Lead to Rejection* 8.
[1677] Amit 'National Survey' 9.
[1678] Amit *All Roads Lead to Rejection* 8.
[1679] This rule only applies if it has specifically been adopted in terms of a bilateral or multilateral treaty, as has occurred in the European Union, Australia, the US and Canada.
[1680] Polzer Ngwato *Policy Shifts* 4.
[1681] Polzer Ngwato *Policy Shifts* 5.
[1682] 'South Africa: Home Affairs to finalise asylum seeker process' (24 March 2011) at *http://allafrica.com/stories/printable/2011032440076.html* as quoted in Polzer Ngwato *Policy Shifts* 21.
[1683] UNHCR Executive Committee Conclusion No 15(XXX) and No 85 (XLIX) established basic rules for determining whether a safe 1st or 3rd country rule could possibly apply. See Polzer Ngwato *Policy Shifts* 22.
[1684] Polzer Ngwato *Policy Shifts* 5.
[1685] Polzer Ngwato *Policy Shifts* 5.

1999 to 2001, to the 38th Ordinary Session of the African Commission on Human and Peoples' Rights, Commissioner Malila directed his questions to problems confronting refugee protection in South Africa. He expressed concern about the insecurity caused by the failure or inability of the Department to process asylum applications. Acknowledging that Lindela Repatriation facility was overcrowded with foreign nationals who may well be refugees, he asked what the government was doing to verify the status of asylum-seekers and illegal immigrants who had been arrested and detained'.[1686]

These circumstances are relevant to the operation of the institutionalist theory of compliance with international law. This theory holds that membership of international or regional human rights systems, which have as their objective the establishment of a uniform body of binding rules, norms and procedures applicable to all parties[1687] are more likely to result in compliance. The reason for this is that membership of a regional human rights system 'positively impacts a state's perception of its self-interest by creating significant incentives to comply with the international rules and norms established'[1688] by the system. As a member of the African Union, and party to the African Charter on Human and Peoples' Rights, South Africa was obliged to engage in a dialogue with the Commission with respect to its compliance with international law. Interestingly, however, the Minister of Justice and Constitutional Development had no response in her oral reply to the Commissioner's questions.[1689] It can be safely assumed that the façade of the protection of refugees was shattered in the eyes of the continent's pre-eminent human rights monitoring body. Three years later, the African Commission held in the case of *Institute for Human Rights and Development in Africa v Angola* that:[1690]

> African States are faced with many challenges especially economic. Therefore, these States often resort to radical measures to protect their nationals and their economies from non-nationals *but no matter the circumstances*, however, such measures should not be taken at the detriment of the enjoyment of fundamental human rights (own emphasis).[1691]

[1686] Lee Stone 'The 38th ordinary session of the African Commission on Human and Peoples' Rights, November 2005, Banjul, The Gambia' (2006) 1 *African Human Rights Law Journal* 229-230.
[1687] Elvy 'Theories of state compliance' 111.
[1688] Elvy 'Theories of state compliance' 79.
[1689] Stone 'The 38th ordinary session' 229-230.
[1690] (2008) AHRLR 43 (ACHPR).
[1691] *Institute for Human Rights and Development in Africa v Angola* para 68.

The UN General Assembly, of which South Africa is a member, has urged states to refrain from refusing entry to asylum-seekers. The Assembly noted that a decision not to admit an asylum-seeker is invariably made by an 'organ of the administration without a court decision or the possibility for the non-admitted asylum-seeker to appeal the decision',[1692] thus obfuscating the possibility of an opportunity to test the 'legality of state action against the will and integrity of an individual'.[1693] Notwithstanding this, when it underwent Universal Periodic Review by the United Nations Human Rights Council, the very first question that South Africa had to respond to concerned the manner in which foreign nationals are treated in South Africa.[1694] Unfortunately, it appears that membership of international treaty-monitoring bodies has not had the positive socializing effect that institutionalization is consistent with.

5.8 Procedural flaws and structural problems

As a matter of quite elementary psychology, refugees have invariably been subject to extreme psychological turmoil. A compelling view is therefore that '[r]efugees who have had particularly traumatic, or perhaps even violent experiences commonly need long periods of time to be able to recount their stories'.[1695] However, asylum-seekers are obliged to present themselves to the Department within a matter of days (or risk being arrested, detained and deported for being in the country illegally). The irony, though, is that 'many asylum-seekers are forced to wait for years before being afforded an RSD interview'.[1696] The Department attributes this to 'structural problems', once again blaiming economic migrants for 'overwhelming the demand on the system'.[1697]

[1692] UNGA Second report on the expulsion of aliens, International Law Commission, 20 July 2006, document No A/CN.4/573 para 173, 55 as quoted in d'Orsi *Asylum-Seeker and Refugee Protection* 40.
[1693] d'Orsi *Asylum-Seeker and Refugee Protection* 40.
[1694] Polzer Ngwato *Policy Shifts* 14-5.
[1695] Tazreiter *Asylum Seekers and the State* 216.
[1696] Justin de Jager 'Refugee status determination in South Africa' in Khan & Schreier *Refugee Law in South Africa* 157. Here, the author quotes MS Gallagher 'Refugee status determination in southern Africa' (2009) at *http://www.fm-review.org/FMRpdfs/FMR32/55-56.pdf*; and Human Rights Watch 'Obstacles in the refugee status determination process' (2005) at *http://www.hrw.org/reports/2005/southafrica1105/5.htm*.
[1697] Amit *All Roads Lead to Rejection* 14.

When asylum-seekers are interviewed, wholly insufficient time is provided 'for conducting interviews and for the deliberative process before issuing decisions'.[1698] This constitutes a glaring lack of intention to implement the law effectively and its consequence is a process that is fatally 'flawed by decision-making which is neither thorough nor reasoned'.[1699]

A final decision is supposed to be communicated to the applicant within 180 days,[1700] along with the reasons for the decision.[1701] This rarely ever occurs. Instead, many applicants wait – in an extremely precarious situation – for years for a decision.[1702] As Amit remarks:

> despite introducing a number of changes – such as the Zimbabwe Documentation Project; Pre-Screening Measures at the Border; and Pre-Screening Measures at Refugee Reception Offices, which reduced the number of applications from 341 602 in 2009 to 124 336 in April 2010 to March 2011, status determination decisions have not improved.[1703]

The only logical conclusion to be drawn is that a pattern has formed where it is clear that the officials tasked with implementing the Act deliberately incorrectly interpret and apply the Act in order to neutralize the competition and perceived threat that refugees pose. Exacerbating the situation further is when the Refugee Appeal Board is not properly constituted and is composed of a single member, instead of the stipulated number of three members, as has happened on more than one occasion.[1704]

5.9 Executing an invalid or unlawful plan of action disclosed by political leaders

A crucial factor is whether political leaders have issued what de Kock terms a 'plan of action'.[1705] Under this theory, if someone in a position of power incites action against the opponents, it places the persons within the challenger or dominant group 'under the impression that everyone approves the plan'. Stated differently, 'universalism begins to

[1698] Amit 'National Survey' 10.
[1699] Amit 'National Survey' 10.
[1700] de Jager 'Refugee status determination' 157.
[1701] See *M v Minister of Home Affairs and Others* 2014 ZAGPPHC 649 (22 August 2014); *Kumah and Others v Minister of Home Affairs and Others* 2016 4 All SA 96 (GJ); 2018 2 SA 510 (GJ) para 46.
[1702] See, inter alia, *RM v Refugee Appeal Board.*
[1703] Amit *All Roads Lead to Rejection* 14-5.
[1704] *Dorcasse v Minister of Home Affairs and Others* 2012 4 All SA 659 (GSJ) and *Bolanga v Refugee Status Determination Officer and Others* 2015 ZAKZDHC 13 (24 February 2015).
[1705] de Kock 'Violence as an option?' 47.

apply to that particular "instruction"'.[1706] The public statement by the Minister of Home Affairs in March 2011 that asylum-seekers must 'seek refuge in the first safe country they transit' because this is required by international law,[1707] as well as King Goodwill Zwelithini's utterances in March 2015 that 'foreigners must go back to their countries'[1708] created the perception that refugees are 'thieves and enemies'. The message conveyed was that foreigners sabotage the interests of citizens, causing the 'non-realization' of their expectations[1709] to wealth, prosperity, housing, jobs and land. Even going as far as classifying refugees as an existential threat, in February 2015, Nomvula Mokonyane, the Minister of Water and Sanitation (as she was at the time), posted a comment on Facebook stating that:

> Almost every second outlet (spaza) or even former general dealer shops [in Kagiso] are run by people of Somali or Pakistan origin *(sic)* … I am not xenophobic fellow comrades and friends but this is a recipe for disaster.[1710]

More problematic is the instruction issued by the Department to the South African Police Service to close foreign businesses in townships.[1711] This is in direct contradiction to the rights of asylum-seekers and ostensibly for the purpose of preventing further xenophobic attacks, since the entrepreneurial skills of foreign nationals appear to be a cause for resentment amongst South African.[1712] It is unfathomable that such a stance would be taken when it would have an adverse impact on the right of asylum-seekers to be self-sufficient and independent of state grants or other welfare.[1713]

More recently, on 14 July 2017, the Deputy Minister of Police, Bongani Mkongi stated: 'How can [Johannesburg] be 80 percent foreign national? That is dangerous. South Africans

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[1706] de Kock 'Violence as an option?' 47.
[1707] 'South Africa: Home Affairs to finalise asylum seeker process' (24 March 2011) at *http://allafrica.com/stories/printable/2011032440076.html* as quoted in Polzer Ngwato *Policy Shifts* 21.
[1708] Ndinda & Ndhlovu 'Attitudes towards foreigners in informal settlements' 132.
[1709] de Kock 'Violence as an option?' 48.
[1710] Kate Wilkinson 'South Africa's xenophobic attacks: Are migrants really stealing jobs?' *The Guardian* (20 April 2015) at *https://www.theguardian.com/world/2015/apr/20/south-africa-xenophobic-violence-migrants-workforce.*
[1711] Polzer Ngwato *Policy Shifts* 6.
[1712] Vanya Gastrow & Romi Amit 'Lawless Regulation: Government and civil society attempts at regulating Somali informal trade in Cape Town' African Centre for Migration Studies Research Report (February 2015) at *http://www.migration.org.za/wp-content/uploads/2017/08/lawless-regulation.pdf.*
[1713] Polzer Ngwato *Policy Shifts* 6.

have surrendered their own city to the foreigners'.[1714] When viewed against the backdrop that the government has never brought to fruition the draft national action plan to combat racism, racial discrimination and related intolerance,[1715] the message being conveyed is that the government condones (and is perpetuating) the anti-foreign and anti-African migrant sentiment. Therefore, if the perception by the majority group (refugee reception officers and the public at large) is that this type of violence against asylum-seekers is 'approve[d]'[1716] of, that majority group will continue administering it.[1717] Added to this is the further 'polarization' of society, which negates or limits the 'moderat[ing] or stabilizing' elements. Ultimately, states de Kock, 'the dimming of the initial specific grievances of the disadvantaged group [refugee reception officers] and the development of one central, vague, comprehensive issue as the reason for the violent struggle' means that 'the whole system needs to be changed'.[1718] Given that the system is entirely corrupt,[1719] changing the whole system is possibly the only option.

Despite successful litigation to rectify many of these retrogressive measures, the situation persists. For example, in 2008, in direct response to a Constitutional Court decision that the government is obliged to care for asylum-seekers and refugees, the provincial governments held summary reviews of hundreds of asylum claims, most of which were denied, which 'undoubtedly led to the *refoulement* of *bona fide* asylum-seekers'.[1720] Subsequently, access to refugee status has been made 'particularly burdensome and bothersome', to the extent that many people are forced to give up completely on the asylum system, which constitutes an 'indirect form of refoulement'.[1721]

Gilbert affirms that since 'there is no International Refugee Court or Tribunal to oversee treaty interpretation … protection of refugees through the 1951 Convention is dependent

[1714] *Human Rights Watch World Report 2018* 491. No action was ever taken againt Mkongi for this statement.
[1715] *Human Rights Watch World Report 2018* 'South Africa' 491.
[1716] Klotz *Migration and National Identity* 31 citing Michael Neocosmos 'From "Foreign Natives" to "Native Foreigners": Explaining Xenophobia in Post-Apartheid South Africa' CODESRIA Monograph (2006), albeit that Klotz remarks that 'politicians and analysts demonstrate discomfort with the moral implication of this logic'.
[1717] de Kock 'Violence as an option?' 50.
[1718] de Kock 'Violence as an option?' 50.
[1719] Amit *All Roads Lead to Rejection* 11.
[1720] Musalo *et al Refugee Law and Policy* 166.
[1721] Khan & Schreier *Refugee Law in South Africa* 14.

on domestic legislation and national judges.'[1722] Notwithstanding the numerous judgments against the Department, some of the problems persist. Indeed, recommendations made by Amit in a 2012 study have never been considered, let alone implemented.

6. Conclusion

By international standards, the Constitutional Court concedes, South Africa is 'very heavily burdened by asylum-seekers'.[1723] Nonetheless, South Africa's ratification of international refugee law treaties obliges the bureaucracy to implement and comply with these legal obligations, not least because the Constitution affirms South Africa's commitment to the rule of law. Unfortunately, what we find instead is that the Department of Home Affairs exhibits the characteristics of an extractive state that has been carried over from colonisation and apartheid. Certainly, the exercise of unconstrained power to neutralize anyone deemed "other" is due to the lack of trust that South Africans have developed because of the flagrant violation of human rights and human security during colonisation and apartheid. The politics at play in this institution reveals that the bureaucrats anticipate being deprived of their economic privileges and political power if they allow asylum-seekers access to the resources of the state[1724] since massive poverty and inequality still prevail in South Africa despite the turn to democracy. In the context of this ongoing conflict, the rule of law is sacrificed because it is inconvenient, and this chapter has systematically illustrated that the entire refugee system in South Africa is manipulated to deter asylum-seekers and guarantee that refugee status is not granted, even when it is in direct contradiction to the letter of the law in the Refugees Act. Added to this is the complete failure to adequately train Refugee Reception and Status Determination Officers, that could be construed as a deliberate attempt to sabotage the refugee system and perpetuate the vortex of uncertainty and unpredictability that is occasioned by a failure to respect the rule of law because the rules of the game established over decades in South Africa are that conflict is not only natural, but is also necessary to (re)claim access to the resources, income and power of which the majority were violently and arbitrarily deprived.

[1722] Gilbert 'Running scared since 9/11' 93.
[1723] *Ruta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC) para 10.
[1724] Acemoglu & Robinson *Why Nations Fail* 86.

CHAPTER EIGHT
CONCLUSION AND PROPOSED SOLUTIONS TO DECOLONISE AND HUMANISE REFUGEE LAW

1. Concluding remarks

Conceived as a predominantly positivist enquiry into South Africa's apparent failure to comply with international refugee law obligations, it became obvious soon into the process that this approach was neither appropriate nor useful. Indeed, in the South African context there are numerous studies that document South Africa's failure to comply with refugee law, but very few of these address the root causes of the state's apparent recalcitrance, manifesting in xenophobia (in all its guises) to which asylum-seekers and refugees are subject. Crucially, as I delved into the literature, I drew increasing inspiration from studies on refugee law that overwhelmingly argued for a fundamental reconceptualisation of refugee law in order that it is made more 'effective'. The decision to assume this type of approach was substantiated by the abhorrent manner in which refugees are treated in South Africa. There was a common fact that recurringly resonated with the plight of refugees that was of particular relevance to South Africa: colonisation's *raison d'etre* was the exclusion – indeed, the elimination – of the 'other' and this thinking continues to manifest to the present, with refugees constituting the easiest targets of continued exclusion and dehumanisation. Colonialism is only one manifestation of Social Darwinism. For the purpose of the present study, Social Darwinism is also a logical explanation for the xenophobic sentiment expressed to and about refugees entering South Africa. Applying Social Darwinism to the context of a modern nation state (such as South Africa), Lapouge argued that as an 'amalgamation of different races', the state is an 'artificial entity', giving rise to 'potential battlegrounds of "racial conflicts"'.[1725] Taking this argument even futher, Lapouge asserted that 'the assimilationist idea of turning a foreigner into a national, i.e., naturalization, is '"biological nonsense"'.[1726] Although refugees are not claiming immediate

[1725] Shahabuddin *Ethnicity and International Law* 46.
[1726] Shahabuddin *Ethnicity and International Law* 46 quoting George Lapouge *Les Selections Sociales* (1896) 225.

naturalization, the long-term secure protection that they are seeking bears many of the traits of assimilation and integration into the national polity. What is evident is that the exclusionist thinking that is characteristic of Social Darwinism remains alive to this day and was not only the fuel for colonisation but continues to impact on refugee protection. The narrative of South Africa's history illuminates the dichotomous ethnic thinking that informed colonisation and apartheid, and which remains vested in the memory of South Africans.

South Africa has a fairly good record as far as the ratification of important treaties is concerned.[1727] This is consistent with the progressive Constitution. Therefore, in theory at least, all of the foundations for adherence to international treaties are in place. Effective implementation of those treaties is where South Africa's true intentions are revealed, however. An example of the incompatibility between the legislative provisions and state practice, in the context of refugee rights, is the fact that although substantial public participation from all stakeholders was embraced when drafting the Refugees Act of 1998 (public participation in legislative processes is mandated by section 59 of the Constitution), the same was not true for the drafting of the Regulations to the Refugees Act. The Regulations to Acts are of even more significance than the Acts themselves very often, because it is through the Regulations that implementation actually takes place. Accordingly, this research uncovered systemic failures in the effective implementation of South Africa's refugee legislation. These failures not only undermine the domestic legislation, but obviously, also undermine the international treaties from whence the domestic legislation is derived.

The vexing question is why the rule of law is not adhered to. History offered the most plausible explanation. As Mayblin has noted, no specific studies have juxtaposed colonisation and refugee law to analyse and determine the relationship between colonisation and the reluctance exhibited by most (if not all) states to comply with the

[1727] My assessment as 'fairly good' is based on the reality that South Africa was exceedingly slow to ratify the 1966 Covenant on Economic, Social and Cultural Rights and has also failed to make the article 34(6) declaration, which permits individuals to lodge cases directly with the African Court on Human and Peoples' Rights. For purposes of ensuring that the people live a dignified life and have access to recourse in the event of a failure by the state to provide them with such public goods, it is incumbent on South Africa to ratify all relevant treaties and to implement them in good faith.

international refugee law obligations that they have assumed. Applying Foucault's notion of 'a history of the present', this study interrogated the impact of colonialism and apartheid on South Africa's compliance with refugee law. The confluence of history and profound sociological re-engineering that were instruments of colonialism and apartheid have left an indelible mark on South African society. Social Darwinism created a deeply exclusionary and fragmented society and colonialism and apartheid (the products of this theory) were intensely damaging to the persons directly affected by their administration. This damage has had severe long-term repercussions on the 'memory' of all South Africans. Thus, South Africa continues to operate within the binary and dichotomous construct of either 'citizens' or 'thieves and enemies'. More alarming is the fundamental harm these systems have caused to the nature of South Africa as a sovereign nation-state. When colonisation took hold, South Africa was a 'basic natural state' with an undeveloped legal system. The colonisers proceeded to 'transplant' laws from Europe and impose them in South Africa. Berkowitz and Weingast, respectively, argue that the 'transplant effect' in conjunction with the tenets of basic natural states results in states being 'resistant to the rule of law' often causing constitutions to be altered and rights infringed overnight. Even the development of South Africa over time from a basic natural state to a mature natural state has not eradicated the weaknesses inherent in the character of natural states. In South Africa, the generous refugee commitments undertaken when apartheid was subverted have given way to denial of refugee status on arbitrary grounds. Accordingly, there is little doubt that the transplant effect, in combination with the history of colonialism and apartheid, is the cause of South Africa's woes as far as refugee law is concerned. The Refugees Act is the domestication of South Africa's international obligations and takes the form of a verbatim repetition of the definitions of qualifying criteria for refugee status as espoused in both the UN and OAU refugee treaties. South Africa was not part of the drafting of either of these international treaties and merely adopted them in their entirety without much consideration for South Africa's own particular circumstances. A consequence is that refugees are viewed with suspicion and deemed to be the source of all the problems that the poor are experiencing. Moreover, the implementation of refugee law represents a symptom of an incomplete or virtual transition to democracy. Feeding off utterances by prominent political and community leaders, the decisions of Refugee Status Determination Officers can be

seen as a blanket denial of refugee status to persons perceived as 'others', regardless of their circumstances. The best description of this is officials from within the Department of Home Affairs taking the law into their own hands, deliberately neutralising and eliminating the perceived threat that refugees constitute, notwithstanding the precedent set that in a society where the rule of law arguably prevails, self-help is anachronistic.[1728] The *Union of Refugee Women* case decided by the Constitutional Court in 2006 reflects the judiciary's constant refrain that international refugee law must be implemented 'in a humane and supportive way', given the 'human dimension' of what is at stake when a person is unlawfully denied refugee status.[1729] Despite this – and hundreds of other cases – the Department of Home Affairs has not only continued to deny refugee status where it should automatically have been granted, but the executive has actually stepped up its efforts to exclude refugees from accessing the territory in the first place. Adopting the White Paper on International Migration that promotes the idea that refugees pose an existential threat to South Africa's security illustrates a retrogression of the state's human rights intentions. As a result, refugee law is honoured more in its breach than in its observance, culminating, inter alia, in spectacular xenophobic violence, constituting clear evidence of the inter-personal conflict generated by the economic and social policies of colonialism and which continue to permeate South African society to date.

Recognising that the implementation of international obligations is multi-faceted and fundamentally bound up with political, economic, historical and cultural forces, I sought to provide a careful and methodical construction of South Africa's history. The purpose of this was three-fold. Firstly, to understand exactly what effect South Africa's history has had on present-day South Africa and secondly, to enable me to prove or disprove the hypothesis that natural states are resistant to the rule of law. The third reason is founded on the knowledge that one is not able to recommend a future trajectory without knowledge of the past. Cumultatively, these three reasons serve the edifying process of enlightening South Africa's population (particularly younger members) of the specific impact of colonisation and apartheid to generate substantive debate on how to counter their effect. Once the

[1728] *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC).
[1729] Sachs 'From refugee to judge' 50.

historical perspective was elucidated, a logical next step was to consider the paradoxes that dictated the (controversial) decision to prioritise democratisation over decolonisation at the end of apartheid. With this knowledge in mind, it was possible to construct a nuanced analysis of South Africa's foreign and domestic policy from the early 1990s until the present. What revealed itself was a pattern which provides insights that are not evident from a literal interpretation of the ratification of treaties. Aside from the impact of colonisation and apartheid, there is a distinct lack of political will on the part of South Africa to comply with refugee law. Embracing the requisite political will would arguably manifest through the materialization of the international commitments freely undertaken instead of the outward expressions of respect for international law, without the associated compliance therewith.

An articulation of the requirements and processes expected of states by the international refugee law treaties with the support and supervision of the United Nations High Commissioner for Refugees clarifies the minimum expectations imposed upon states. In this regard, the emphasis is placed on the rationale for the international refugee law regime in the first place. Accordingly, consistency in decision-making within the rubric of fair standards is not only essential to ensure the integrity of the asylum system, but also guarantees that decisions are based on the rule of law. Therefore, an enforceable and coherent system is the ultimate goal. Such a system must be supported by administrators who are ethical, open-minded, sensitive, empathetic, compassionate, principled and who exhibit humility. In short, a protection-sensitive approach is a *sine qua non*. To achieve this type of system, the bureaucracy charged with implementing the refugee treaties must be properly trained. Indeed, training should extend to law enforcement officers, whether public or private, as well as border guards and even judges. The conclusion I inevitably reached after systematically conducting the research as outlined above, is that South Africa's refugee system needs to be decolonised and humanised. A component of such a system is that it would exponentially depoliticise decisions on asylum. The underlying objective is fundamental social transformation. By insisting on cultural competency in conjunction with an appreciation of South Africa's history and experience, everyone on South African territory would be able to 'get along and get ahead' as de la Sablonnière et al assert.

Economically and politically, South Africa would derive immense benefit from real decolonisation and humanisation of its law and systems of governance.

Embodying suffering and human insecurity, refugees are 'chronic features in the human experience', forcing us 'to confront terrible chaos and evil'.[1730] They represent the manifestation of injustice and misery caused by tyranny, poverty and exploitation. In Helton's words:

> Refugees are the personification of sudden life reversals and imposed change with all the attendant agony and despair. They reflect failures in governance and international relations. … They raise basic doubts about the ability of people to live together.[1731] … Refugees force us to be witness to the indignities [cruelty, degradation] and deprivations they have suffered at the hands of persecutors. … Their humiliation and loss is manifest.[1732]

The primary objective of refugee law, from the perspective of the humanisation of international refugee law, is to facilitate the process of coming to terms with the experiences of physical and psychological trauma, as well as displacement. To this end, Sachs declares, refugee law is intended to 'make the refugee feel at home and welcome'.[1733] In pursuit of this aim, refugee law must protect the refugee from irrational prejudice, stereotypes and negative presuppositions. Foucault would submit that by treating the mentally ill in 'the asylum' in a manner that demeans them, instead of assisting them, elicits their ostracisation from society, although the decision as to who is mentally ill may be arbitrary and incorrect. Referencing Foucault's view of the treatment of the mentally ill is apposite because of Sachs's contention that 'disproportionate and uncalled-for adverse treatment [of refugees induces] an unacceptable and avoidable experience of alienation and helplessness.'[1734] The specific message that Sachs conveys is that the exercise of power by refugee status determination officers has the potential to 'track stereotypes … flowing from and reinforcing negative presuppositions'. He warns that if power is exercised in such a manner it may very easily 'become entangled in the public mind with existing prejudicial assumptions, reinforcing prejudice and establishing a downward spiral of disempowerment'.[1735] This

[1730] Helton *The Price of Indifference* 7-8.
[1731] Helton *The Price of Indifference* 12.
[1732] Helton *The Price of Indifference* 8.
[1733] Sachs 'From refugee to judge' 55.
[1734] Sachs 'From refugee to judge' 55.
[1735] Sachs 'From refugee to judge' 55.

narrative of the nexus between the treatment of refugees by the bureaucrats entrusted with implementing refugee law and the consequent public attitude to refugees is provided to illustrate that xenophobic violence that took place in 2008, in 2015 and again in 2019 was the manifestation of the treatment of refugees by the Department of Home Affairs and is likely to occur again in future unless the irrational prejudices are removed. These irrational prejudices and stereotypes can only be articulated with direct reference to South Africa's history providing the root causes of those prejudices and stereotypes. Labelling refugees as an existential threat to South Africa, accompanied by the crisis elicited by deliberately refusing to grant refugee status to genuine refugees, results in xenophobic violence which causes and exacerbates violence in South Africa.

In May 2008 it was Ernesto Alfabeto Nhamuave, along with 60 others; in 2011 there were five; by 2012 that number rose to 140; Abdi Nasir Mahmoud Good perished in 2013; Emmanuel Sithole succumbed in 2015; and in December 2018 it was Claude Mazuruza and Alex Musambya. Two more foreign nationals died at the hands of South Africans during an outbreak of xenophobic violence in September 2019. This is the growing list of people who have either been burnt alive or died as a result of savage and brutal xenophobic attacks in South Africa.[1736] Documented under the title 'Killing the Other' photojournalists have resorted to exhibiting scenes of murderous violence in the hope of confronting xenophobia.[1737] Referring to Pinker's study of levels of violence in *The Better Angels of Our Nature,* published in 2011, Sowell uses the phrase '"decivilizing" behaviour' to describe violence and social retrogression that is attributed to historical adverse treatment that has perpetuated inequality.[1738] Sowell warns that redressing wrongs of the past has too often 'been written in blood across the pages of history' without achieving the restitution so

[1736] See (among other reports), Khadija Patel & Azad Essa 'S Africa migrants battle rising persecution: Murder of Somali draws ire of foreign African nationals over rising xenophobic violence' *Aljazeera News* (6 July 2013) at *http://www.aljazeera.com/indepth/features/2013/06/201365124758700631.html;* Mphathi Nxumalo 'Spotlight on police after DRC men burnt to death in KZN' *Daily News* (18 December 2018) at *https://www.iol.co.za/dailynews/spotlight-on-police-after-drc-men-burnt-to-death-in-kzn-18542580*.
[1737] Ufrieda Ho 'Xenophobia chooses random targets every day' *Daily Maverick* (17 May 2018) at *https://www.dailymaverick.co.za/article/2018-05-17-exhibition-highlights-that-xenophobia-chooses-random-targets-every-day/*.
[1738] Thomas Sowell *Discrimination and Disparities* (2018) 111 citing Steven Pinker *The Better Angels of Our Nature* (2011) 106-7.

desperately sought.[1739] Interestingly, Schlemmer made virtually the identical point twenty years earlier when he declared that in South Africa,

> if a generalized perception among blacks persists that their conditions are due to disadvantages imposed on them, intergroup relations and politics could become a social "war of attrition" between classes and ethnic groups. In this situation everyone will become poorer.[1740]

What Schlemmer suggested was the introduction of 'corrective programmes'. According to this logic, if these programmes 'establish and reinforce the principle of merit, ability and equal opportunity, the remaining socio-economic differences will not as easily lead to demands for the politics of retribution'.[1741] No satisfactory corrective programmes were designed or employed in parallel with South Africa's repudiation of apartheid. In the result, the very real danger is that South Africa is in the throes of authoritarian populism with economic nationalism, racism and xenophobia eclipsing efforts towards complete democracy and nation building. The continent's pre-eminent treaty-monitoring body, the African Commission on Human and Peoples' Rights is painfully aware of the plight of African immigrants in South Africa. In its conclusions to the state visit to South Africa conducted between 3 and 8 September 2018, the African Commission specifically noted the '[c]ontinuing economic tension between the poor South Africans and migrant populations which operate in the informal sector, which result in violence and xenophobic attacks'. Subsequently, the African Commission urged the government to '[i]nitiate a national dialogue and multidimensional action plan for addressing the challenges of racialism, socio-economic inequality and weakening social cohesion'.[1742] Cognisant of the numerous complex challenges, the purpose of this chapter is to propose feasible methods of fundamentally altering the South African psyche in order to counteract the effects of colonisation and apartheid. For decolonisation to succeed, 'radical dismantling and disruption [of] material effects of practices' is needed.[1743] It is necessary to clarify from the outset, however, that the possible solutions that I envisage differ substantially from the

[1739] Sowell *Discrimination and Disparities* 115.
[1740] Schlemmer 'South African society under stress' 17.
[1741] Schlemmer 'South African society under stress' 17.
[1742] 'Press Statement at the Conclusion of the Promotion Mission of the African Commission on Human and Peoples' Rights to the Republic of South Africa, 3 to 8 September 2018' at *http://www.achpr.org/press/2018/09/d421/.*
[1743] Patel *Decolonizing Educational Research* 93.

argument that is being made quite vociferously of late. Precisely, I do not advocate for the amendment of the Constitution.[1744] Instead, my proposal is the systematic decolonisation and humanisation of refugee law (that has the advantage of impacting positively on the whole of South Africa in the process). I thus prefer to operate within the existing constitutional framework as this constitutes the bedrock of the legal and socio-political system and is designed with transformation as its ultimate objective.

The practical purpose of a state is to establish a society that respects the rule of law. Helton highlights the need 'to introduce the basic rule of law as a threshold measure of human security'.[1745] When the state is characterised by corruption, incompetence and a wilful defiance of binding international obligations, the rule of law loses its meaning and significance. Consequently, there will no longer be any incentive to comply with the rule of law.[1746] It appears to have become reality that there is no incentive to comply with the rule of law in South Africa. Alarming is the pronouncement by the Minister of Justice and Correctional Services, Michael Masutha, as recently as August 2018 that 'South Africa's obligations under the Rome Statute as a member of the International Criminal Court (ICC) stood in the way of government's international relations and diplomatic work' [1747] notwithstanding South Africa's ratification of the Rome Statute. Moreover, as the examples of the fatal xenophobic attacks prove, the law is increasingly being taken into the people's own hands as a method of eliminating competition that constitutes a perceived threat to resources. The treatment meted out to refugees and foreign migrants is only one aspect of South Africa's woes, however. Once the overarching problem has been addressed, it will have a direct effect on social relations across and between South Africans. In concrete terms, the enduring legacies of colonisation and apartheid in South Africa are a fractured citizenship that largely eschews integration across races and cultures. Further destablising South Africa was the radical social change accompanying the transformation to a

[1744] Tshepo Madlingozi 'The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonisation?' (6 April 2018) at *http://criticallegalthinking.com/2018/04/06/the-proposed-amendment-to-the-south-african-constitution/*.
[1745] Helton *The Price of Indifference* 4.
[1746] Levi & Epperly 'Principled principals' 194.
[1747] C du Plessis 'Brics summit "almost collapsed" because of legal threat against heads of state – Masutha' *News24* (29 August 2018) at *https://m.news24.com/SouthAfrica/News/brics-summit-almost-collapsed-because-of-legal-threat-against-heads-of-state-masutha-20180829*.

democracy. Although the instinctive reaction to this latter event is that it would inherently have gone some way towards repairing the injustices of the past, this thinking is flawed and is not supported by empirical evidence.[1748] In particular, the cultural identity of all South Africans has been negatively affected by the 'revolution' that occurred in the early 1990s. What cannot be ignored is that the impairment of cultural identity due to democratisation further exacerbated the destruction of the cultural identity of black South Africans as a result of colonisation and apartheid. Some of the consequences of these historical events is that South African society actively excludes the 'other' and views them along the lines of preconceived stereotypes that reify division and difference, fomenting discrimination and perpetuating the notion of the 'other' as constituting an existential threat. Refugees and African migrants are particularly badly affected in this regard. To put it plainly, the refugee 'is treated all over the world as not quite human enough to deserve full access to human rights'.[1749] South Africa provides a classic example of this. Indeed, the cycle of xenophobia, argues Neocosmos, 'can only be broken by an alternative definition of citizenship as an active political identity', based on 'humanistic and Pan-African solidarity'.[1750] Agreeing with this view is Ndlovu-Gatsheni who submits that 'the pan-African project failed as territorial sovereignty was privileged over pan-African unity'[1751] at the demise of apartheid. Drawing heavily on this overarching perspective, this chapter proceeds from the premise that one needs to have a sound understanding of the cause of the problem before suggestions to defeat the problem will be effective. Accordingly, for purposes of the decolonisation and humanisation of refugee law, decolonisation and humanisation of South Africa and its people is necessary. Accordingly, I invoke Patel's metaphor:

> If colonization is about ownership and territoriality for some at the expense of others, anticolonial stances must imagine still being in relation with each other but for survivance: in order to grow and to thrive from lived agency.[1752]

The Constitution is an obvious starting point in the context of any analysis on South Africa's past, present and future. The National Development Plan 2030 succinctly describes the value of the Constitution in pursuit of transformation. It proclaims that the Constitution

[1748] de la Sablonnière et al 'Restoring Cultural Identity' 262.
[1749] Mayblin *Asylum after Empire* 3.
[1750] Klotz *Migration and National Identity* 33 quoting Neocosmos 'From "Foreign Natives"' xii.
[1751] Ndlovu-Gatsheni 'Racism and "blackism"' 82.
[1752] Patel *Decolonizing Educational Research* 8.

creates a new South African identity; enables South Africa to overcome its history and to attain the constitutional vision of a society based on equality, freedom and dignity; and provides normative principles that ensure a meaningful, cohesive life, irrespective of differences.[1753] Complementing the Constitution, I rely on a combination of a focus on African-centeredness, historicisation and critical pedagogy as strategic instruments of social change. For each of these instruments to be effective, a certain measure of psychological engineering is necessary. From a psychoanalytical perspective, recalibration – 'de-cerebralization' as Fanon would have it – is required. I hypothesise that when the three instruments of social change have been internalised and operate simultaneously, decolonisation and humanisation of society and refugee law will inevitably ensue.

Indigenous knowledge systems, such as ubuntu, are pivotal to theories of self-determination and survival. As such, eradicating colonialism is dependent on the application of these theories in a manner that restores cultural identity. Cultural identity encompasses knowledge of one's history in order to demarcate the future. South Africa is fortunate to have a constitutional system that embraces indigenous knowledge systems alongside its inherited hybridised Roman-Dutch and English legal system. There is no reason, therefore, that new legislation, such as the Prevention and Combating of Hate Crimes and Hate Speech Bill cannot be interpreted in light of indigenous values and South Africa's dark history of hatred purely on the basis of a socially constructed ethnic difference between human beings. Specifically, cultural competency and sensitivity to diversity is absolutely essential to South Africa's peaceful future given the highly volatile nature of the populace due to decades of dehumanisation and structural violence. The valuable methods suggested to deal with radical social change, such as historical trajectories and prototypical leadership have the potential to succeed in South Africa as demonstrated by the examples of the late Nelson Mandela and the Truth and Reconciliation Commission. It is the positive attributes of both that require emphasis so that they become intrinsic to each and every individual in South Africa.

[1753] 'National Development Plan 2030' 422.

2. Viable methods of decolonising and humanising of South African refugee law

The 'experience' referred to by Allott when interpreting law is of singular significance in understanding South African law.[1754] Poetic it is not, but South Africa's long history of colonialism and apartheid is the context within which the understanding and implementation of refugee law must necessarily take place. This type of interpretation will be successful if there is a meaningful 'intersection between new content and life experience'.[1755] The Constitutional Court itself has repeatedly confirmed that South Africa's particular history provides the possibility to interpret legal texts more meaningfully. As the Court put it in the case of *Prinsloo v van der Linde*,[1756] 'we are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied'.[1757] The violence occasioned by colonialism and apartheid locates the transformative process within a complex matrix of historical reflection and an awareness of sociological, political, economic and psychological considerations, while also looking to the future. De Vos, for example, asserts that when interpreting South African law (although he was specifically referring to the Constitution), South Africa's history provides the 'grand narrative' (a meaning-giving story). This strategy, argues de Vos, has the benefit of enabling the interpreter to consider both law and politics simultaneously, thus imbuing the interpretation with more legitimacy.[1758] Supporting this approach is the assumption 'that communities that have been under the heel of colonization hold within them deeper resources and ways of being, refusing to be defined through the colonizer's terms'.[1759] As such, it is logical to commence the process of decolonisation and humanisation of refugee law with reference to the African concept of ubuntu. As part of a 'deep cultural heritage' of the large majority of the population, the 'spirit' of ubuntu 'suffuses the whole constitutional order'.[1760]

[1754] Allott 'New International Law' 109.
[1755] Norman-Major & Gooden *Cultural Competency* 251.
[1756] *Prinsloo v van der Linde* 1997 (3) SA 1012 (CC).
[1757] Para 31.
[1758] Pierre de Vos 'A bridge too far? History as context in the interpretation of the South African Constitution' (2001) *South African Journal on Human Rights* 1-33.
[1759] Patel *Decolonizing Educational Research* 8.
[1760] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

2.1 African centredness: A return to ubuntu

The call for African centredness within South Africa is similarly articulated outside of South Africa. An 'Afri[c]an centred orientation' contends Nehusi, is arguably 'the only proper basis of consistent and sustained action for Afri[c]a's liberation and development'.[1761] The most frequently cited reference to the impetus for an African renaissance is 'African solutions to African problems'.[1762] The relevance of the African renaissance to refugee law is manifest. In a Parliamentary debate concerning Africa's position in world politics held on 4 March 1999 the *Hansard* contains reference to the poignant statement that:

> The African renaissance represents a call for Africa's continental peace, justice, respect for human life, dignity and pride. It is a call on all African leadership not to create, in their respective parts of the continent, an atmosphere into which our future generations will regret having been born; for to be born in a world ravaged by wars whose consequences are death, destruction, abject poverty and despair can only lead to the destruction of the very souls of our people, and to feelings of worthlessness and indignity on the part of those innocent people …[1763]

wa Mutua similarly maintains that in the context of the African continent:

> The only salvation for the continent, and the one sure cure for the problem of displacement [and forced migration] lies in … States that are accountable and transparent, and societies that respect human rights. Otherwise, Africa's demise is inevitable.[1764]

Foregrounding the decolonisation of South African refugee law is the notion of ubuntu: a 'prophetic moral national culture in which all South Africans, irrespective of race, find a home'.[1765] The African traditional value system of ubuntu is premised on the spirit of humanity and reconciliation.[1766] Similarly, albeit viewed from a western perspective, it has been argued that 'the achievement of harmony, cohesion and social justice' is a 'humanistic

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[1761] Nehusi 'Language in the construction of "Afrikan" unity' 213.

[1762] Although this phrase is an aphorism that was popular amongst Pan Africanists in the 1960s and 1970s projecting ideological strength on the African continent, in September 2017, former President Jacob Zuma's statement at the United Nations General Assembly included a call for the United Nations to 'support the African Union to resolve conflicts on the continent through promoting "African solutions to African problems and challenges"'. See 'South Africa' in *Human Rights Watch World Report 2018* 493.

[1763] Henwood 'South Africa's Foreign Policy' (1999) 384.

[1764] Makau wa Mutua 'The Interaction between Human Rights, Democracy and Governance and the Displacement of Populations' (1995) *International Journal of Refugee Law* 45.

[1765] Michael Eze 'Foreword' in Gade *A Discourse on African Philosophy* ix.

[1766] A valid criticism of immense pressure that is placed on ubuntu is that it is an overly ideological discourse intended to achieve the impossible: 'cure post-apartheid South Africa of all melancholies and anxieties from the past'. See Eze in Gade *A Discourse on African Philosophy* ix.

requirement'.[1767] Adopting this approach is advanced as the most feasible because of its rejection of violence as a method of decolonisation. At its core, ubuntu signals a deeply rooted belief in inherent dignity, equality and inclusion, as well as an ethic of care: concern for the wellbeing, bodily and psychological integrity and survival of every member within an intensely interdependent, relational and mutually supportive society. From the perspective of colonialism's denigration of respect for human life, 'a spontaneous call has arisen among sections of the community for a return to ubuntu'.[1768] For ubuntu to succeed, it 'must be read within history [and] as relevant to context'.[1769] In fact, methodologically, it 'empowers us to become actors, agents and subjects of history and not only objects of history'.[1770] But in order for this method to work, history must be understood and appreciated.

2.2 Identifying and affirming significant historical figures and trajectories

The struggle for emancipatory change, claims Saltman, is hinged on the historicisation of situations.[1771] Entitativity (group cohesiveness) relies, among other things, on restoration of cultural identity through historical narratives that emphasise 'concrete exemplars of ["prototypical" historical leaders that] represent the best attributes that define what every member of the group strives to achieve'.[1772] The purpose is to emulate the 'behaviour[], personal qualities and traits' of these leaders.[1773] Moreover, by observing the immense adversity that courageous cultural heroes faced and survived, hope and optimism for the future should occur.[1774] For Saltman, the articulation of an historical narrative necessitates a 'critical examination of subjective experience in relation to objective forces', on the basis that this produces agency that has the power to transform 'oppressive forces and structures'.[1775]

[1767] Vessela Balinska-Ourdeva '21st Century Learners: Economic Humanism and the Marginalization of Wisdom' in AA Abdi et al *Decolonizing Global Citizenship Education* 179.
[1768] *S v Makwanyane* 1995 (3) SA 391 (CC) para 227.
[1769] Eze 'Foreword' in Gade *A Discourse on African Philosophy* xi.
[1770] Eze 'Foreword' in Gade *A Discourse on African Philosophy* xi.
[1771] Saltman *The Politics of Education* 37.
[1772] de la Sablonnière et al 'Restoring Cultural Identity' 263.
[1773] de la Sablonnière et al 'Restoring Cultural Identity' 264.
[1774] de la Sablonnière et al 'Restoring Cultural Identity' 263.
[1775] Saltman *The Politics of Education* xxv.

Detailed understanding of profound historical events give content to the questions of 'what the group was and what its underlying behaviours, values and goals' were.[1776] Context, in the form of a coherent, detailed historical trajectory, as provided in Chapters Three and Four represents 'historical high points and challenges' that can serve as referents and to help 'focus on long-term goals'.[1777] Historical trajectories also 'explain why things are as they are in the present'.[1778] Seeking this explanation is the justification and essence of this thesis: to understand why South Africa is not complying with its international legal obligations relating to the protection of refugees. Ultimately, historical trajectories are vital: they remind 'group members that existential fears have been faced and overcome in the past', confirming the resilience of the group and thereby enabling members to 'focus on developing future collective goals' sustaining positive cultural identity clarity.[1779]

The two predominant methods advocated here, being historical trajectories and prototypical historical leaders, discussed immediately below, are consistent with Saltman's claim that 'knowledge … needs to be seen as the basis for self and social understanding, action, and social transformation'.[1780] As Gramsci would argue, 'any group that has won social power has managed to educate other groups into particular ways of thinking and acting'.[1781] This is undoubtedly an ongoing process of educating, thinking and acting.

2.2.1 Specific historical trajectories

a. Colonisation and apartheid

Colonisation and apartheid are the two broad moments in South African history that have defined and irrevocably devastated what was, up until the forceful imposition of that sequential phase, a functional portion of the globe. Not a single person living in South Africa can afford to ignore the record of systematic usurpation of the cultural identity, land and dignity of indigenous (native) South Africans by the colonisers. Detailed historical

[1776] de la Sablonnière et al 'Restoring Cultural Identity' 264.
[1777] de la Sablonnière et al 'Restoring Cultural Identity' 266-267.
[1778] de la Sablonnière et al 'Restoring Cultural Identity' 267.
[1779] de la Sablonnière et al 'Restoring Cultural Identity' 267-8.
[1780] Saltman *The Politics of Education* 32.
[1781] Saltman *The Politics of Education* 37 quoting Antonio Gramsci *Selections from the Prison Notebooks* (1971).

awareness is of paramount importance given that socialization during early childhood develops certain preconceived notions, prejudices, stereotypes and generalizations.[1782] Incorrect conclusions tend to be drawn based on these inherent "beliefs". However, this is a natural process: 'our minds are designed to make sense of diversity in a manner that is predictable and that routinely helps us to efficiently promote a sense of order in how we view difference in the world'.[1783] But, as Foucault contends, knowledge itself is power. Power, he argues, is 'implicated in the questions of whether and in what circumstances knowledge is to be applied or not'.[1784]

For purposes of clarity, the 1903 Langden Commission (the South African Native Affairs Commission) is described as the origin of the formal territorial segregation of the state between black and white. Black South Africans were relegated to 'Native Reserves' on ancestral land with tenure in the form of group ownership, administered by a tribal chief. It is pertinent to point out that in African philosophy – particularly 'ubuntuism' as it is referred to by the Samkanges – 'there should be state, communal and individual property'.[1785] In addition to being paternalistic, this segregationist system deprived the black population of their land, their agency and froze both black society and the indigenous legal systems in time while also maintaining a strict prohibition of relations between people of different racial or ethnic groups.

Having documented this history, however, the purpose is not to allow that history to become 'a "battle axe" that continues to haunt the people'.[1786] Instead, this knowledge is intended to promote 'perceptual flexibility' because it should assist people to 'identify their personal biases' through a 'systematic and intentional process of becoming self-aware' after considered self-evaluation.[1787] Furthermore, armed with the knowledge that the racial segregation was socially constructed and engineered – and is not based on biological differences – should promote sincere and valuable interaction among South Africa's

[1782] Norman-Major & Gooden *Cultural Competency* 253.
[1783] Norman-Major & Gooden *Cultural Competency* 248.
[1784] Saltman *The Politics of Education* 42.
[1785] Stanlake Samkange & Tommie Samkange *Hunhuism and Ubuntism: A Zimbabwe Indigenous Political Philosophy* (1980) 64.
[1786] Eze 'Foreword' in Gade *A Discourse on African Philosophy* xii.
[1787] Norman-Major & Gooden *Cultural Competency* 250.

diverse population. This process will have the additional benefit of challenging preconceived notions, while also broadening 'perspectives with regard to race, ethnicity, and cultural differences'.[1788] The purpose would be for every person to traverse the continuum from ethnocentric, through to culturally open, thereafter to culturally relevant, and finally, to culturally efficacious.[1789] The mutually-supporting relationship with ubuntu is manifest: the creation of a worldview that embraces and validates diversity while simultaneously resting on the assumption that everyone is equal in worth and value would eliminate discriminatory conduct.

b. The Truth and Reconciliation Commission

As a panacea for the contentious issue of continued reference to race, Wiredu and Biko argue that national reconstruction requires a reversion to genuine African culture and cultural self-identity.[1790] This is consistent with Welsh's view that national reconciliation and social cohesion would only be successful if 'adversarial politics [are] limited, if not eliminated altogether, in favour of a fundamentally different style of politics that offer pay-offs for accommodative, coalition-building behaviour'.[1791] He also predicted (based on repeated survey findings by the Human Sciences Research Council)[1792] that 'transition [w]ould be greatly facilitated by an agreement to share power and to avoid a "winner-takes-all" politics'.[1793] In particular, Welsh asserted that 'the quest for nation building requires that far more attention be paid to the issue of symbolism than has previously been the case in South Africa's political debates'.[1794] The key to nation building and social cohesion, so the arguments of Wiredu, Biko, Mbeki and Welsh impart, is ubuntu. The conundrum that South Africa found itself within is that South Africa urgently needed to be 'cure[d] … of all the melancholies and anxieties from the past'[1795] and an appropriate form of transitional justice was needed to achieve this end. Pursuant hereto, a deliberate choice was to establish the

[1788] Norman-Major & Gooden *Cultural Competency* 252.
[1789] Norman-Major & Gooden *Cultural Competency* 252.
[1790] Wiredu 'Social Philosophy' 332; Bantu Stephen Biko *I Write What I like* (1978) 71.
[1791] Welsh 'Can South Africa become a nation-state?' 565.
[1792] 'HSRC Survey' *Argus* (16 February 1990).
[1793] Welsh 'Can South Africa become a nation-state?' 565.
[1794] Welsh 'Can South Africa become a nation-state?' 565.
[1795] Gade *A Discourse on African Philosophy* ix.

Truth and Reconciliation Commission (TRC), which would be responsible for achieving understanding; not vengeance, reparation; not retaliation, and ubuntu; not victimization.[1796] Despite the objections to amnesty being granted to perpetrators of human rights violations,[1797] it was consistently argued that ubuntu would be utilised as the method of reconciliation of South African society. Some might even argue that that also constitutes the perpetuation of colonisation, where colonisers are prone to arguing that

> Regardless of methods used both in imposing law and in creating law ad hoc, in the long run importance should not be attached to the means (violence, looting, war, genocide), but to the result – the rule of law as a legacy of the "civilized world". Property rights are secured, good governance, predictability and so forth are positive results.[1798]

Having as its imprimatur, national reconstruction of the political imagination, the Truth and Reconciliation Commission was aimed at providing a 'source of socio-political and moral unity' to replace the 'subjective alienation [and] exclusion' that colonisation and apartheid produced.[1799] In retrospect, the TRC was located squarely within the prism of transitional justice; a mechanism designed to encompass

> the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale abuses, in order to assure accountability, serve justice and achieve reconciliation.[1800]

The metaphor 'selling the shadow to support the substance' employed in Chapter One is conceivably also relevant to the Truth and Reconciliation Commission (TRC). Distinguishing the South African TRC from others is that the granting of amnesty was included as a method to promote reconciliation. This amnesty was, however, conditional. Perpetrators were obliged to provide full disclosure concerning the offences committed during apartheid. Moreover, the perpetrator had to convince the TRC that the offence was not only entirely politically motivated, but was also proportional to the political motive sought to be achieved. Although the total number of perpetrators who were granted amnesty was relatively small (894 out of 7 128 applications received)[1801] (12.5%), amnesty was deemed

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[1796] Epilogue (Postscript) of the Constitution of the Republic of South Africa, Act 200 of 1993.
[1797] *Azanian Peoples' Organisation v President of South Africa* 1996 (8) BCLR 1015.
[1798] Nader 'Law and the Frontiers of Illegalities' 57 quoting Niall Ferguson *Empire: How Britain Made the Modern World* (2003).
[1799] Michael Eze *Intellectual History in Contemporary South Africa* (2010) 29, 57, 119-43, 150, 187-90.
[1800] Kofi Annan *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies'* UN Doc. S/2004/616 (23 August 2004) para 8.
[1801] Gade *A Discourse on African Philosophy* 3.

highly objectionable by the Azanian Peoples' Organisation (AZAPO), who approached the Constitutional Court to have it declared unconstitutional and invalid. Their argument was that amnesty deprived victims of the right to approach a court of law to seek justice for the wrongs perpetrated against them. The granting of amnesty by the TRC was quite obviously a controversial compromise arising from the complex negotiations leading up to democratisation. Wilson has argued that 'Ubuntu became the Africanist wrapping used to sell a reconciliatory version of human rights talk to black South Africans'.[1802] Here, the substance was reconciliation, but in order to achieve it, the dark shadow of "a get out of jail free card" in the form of amnesty, notwithstanding massive race-based violence, had to obtain purchase among the majority of the population. Indeed, in handing down judgment in the *AZAPO* matter, the Constitutional Court emphasised restorative justice, reconciliation and forgiveness, confirming that South Africa's future is 'founded on the recognition of human rights … development opportunities for all South Africans irrespective of colour, race, class, belief or sex. … the well-being of all South African citizens', thereby justifying the limitation of access to courts by victims.[1803] In Gade's words: ubuntu, as an inherent component of the TRC process, is 'a powerful political tool' that 'has come to serve as a political counter-ideology to the segregation ideology'.[1804]

2.2.2 Prototypical leadership

Without hesitation, it would be appropriate to regard the late Nelson Mandela as a prototypical leader who inspires belief in the values, characteristics and traits that are equated with moral superiority. From as early as 1960, during the Rivonia Treason Trial, Mandela sought to alter the psychological mindset of white South African leaders by proposing 'a concession of 60 seats in Parliament for Africans for a limited period in order to educate the white electorate'. The intention was to generate ideological contradictions and leave white South Africans questioning the validity of the apartheid system, thus encouraging social change.[1805] Although this proposal was rejected, and notwithstanding

[1802] Richard Wilson *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001) 13.
[1803] *AZAPO* para 3.
[1804] Gade *A Discourse on African Philosophy* 5.
[1805] Omar 'The inadequacy of the political system' 106.

his imprisonment, Mandela was a constant feature in the fight against apartheid and the government could not ignore him. From 1985 a series of secret meetings were held between Nelson Mandela and the apartheid government. Eventually, on 11 February 1990, Mandela was released from prison and he became one of the main negotiators in the multi-party negotiations that culminated in the adoption of the Interim Constitution on 18 November 1993. Mandela subsequently became president after the first democratic elections held on 27 April 1994. Exhibiting characteristic compassion at a meeting of the Organization of African Unity on 13 June 1994, Mandela called for urgent action to address the tragedy unfolding in Rwanda. Although the genocide had already started to decline after its climax in April 1994, the moral force of Mandela's call to action did result in 'Operation Turquoise', the intervention led by former French President François Mitterrand.[1806] It is not surprising therefore, that Rwandans fleeing the genocide sought refuge in South Africa.

Despite criticism of his aloof manner, Thabo Mbeki also represents the quintessential leader who should be emulated. This is particularly so in light of his frequent references to Africa's precolonial past and the role of ubuntu in obtaining the type of South Africa that accommodates all who live in it. Mbeki has consistently urged a return to ubuntu because:

> Many of our communities have abandoned the central tenets of our value system of *ubuntu* which for centuries ensured that our people acted responsibly and respectfully towards one another, giving due regard to the objective to respect the dignity of every individual regardless of their status in society, concerned to protect the most vulnerable among us.[1807]

Mbeki also expressed ubuntu as 'the food of the soul that would inspire all our people to say that they are proud to be South African!'[1808] In respect of making better use of ubuntu in nation building, Mbeki declared:

> Clearly, we have a responsibility to utilize the many positive attributes of ubuntu to build a non-racial, non-sexist and united South Africa. We also have to use to better effect the value and ethos of ubuntu in our Moral Regeneration Campaign. This we should do because I am confident that all South Africans, black and white, will agree that this value system should characterize a South African.[1809]

[1806] Helton *The Price of Indifference* 146 citing Gerard Prunier *The Rwanda Crisis: History of a Genocide* (1995) 281 and Gerard Prunier 'Operation Turquoise: A Humanitarian Escape from a Political Dead End' in Howard Adelman & Astri Suhrke (eds) *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire* (2000) 301.
[1807] Thabo Mbeki 'Address at the Opening of the National House of Traditional Leaders' Tshwane (4 May 2006).
[1808] Thabo Mbeki 'Nelson Mandela Memorial Lecture' University of the Witwatersrand (29 July 2006).
[1809] Thabo Mbeki 'Address at the Heritage Day Celebrations' Taung (24 September 2005).

2.3 Critical pedagogy for purposes of establishing a culturally-sensitive society and bureacracy

To ensure enforcement of the law, what is required is a bureaucracy that is law-abiding and that implements the law in a procedurally fair or substantively just manner.[1810] It is submitted that the officials within the Department of Home Affairs actively devalue the 'identities, cultures, language, and experiences' of refugees.[1811] Writing on the impact of culture to the context of education and situating his study within a recognition of 'the pre-existent unity of the world', Smith frames 'the primary ethical principle' as being humanity (life) itself.[1812] Saltman puts it thus: education is 'a matter of social values, vision for the future, and political will'.[1813] Therefore, he advocates that 'commitment to equality and democracy must be taught and learned'.[1814] For this reason, I argue that critical pedagogy is an appropriate method of decolonisation and humanization of refugee law. Indeed, critical pedagogy's essential purpose is 'humanization':[1815] the prevention of exploitation by others. History, ethics, power, politics and social justice provide 'a critical lens'[1816] through which social intervention can conceivably occur. As an edifying process, innovative educationalists such as Paulo Freire and Henry Giroux submit that the end result of critical engagement with history and context is 'democratic social relations' arrived at after 'human emancipation from domination and oppression'.[1817]

Critical pedagogy is useful and relevant to South Africa's bureaucracy because South Africa epitomizes a failing of new democratic governments: 'they are frequently stuck with the bureaucrats appointed by the authoritarian regime, and may lack sufficient personnel with technical expertise capable of running the government'.[1818] In fact, Bekker had specifically highlighted this phenomenon[1819] and the manner in which asylum applications are received

[1810] Levi & Epperly 'Principled principals' 193.
[1811] Saltman *The Politics of Education* 37.
[1812] David Smith *Pedagon: Interdisciplinary essays in the human sciences, pedagogy and culture* (1999) 19.
[1813] Saltman *The Politics of Education* 38.
[1814] Saltman *The Politics of Education* 39.
[1815] Saltman *The Politics of Education* 24.
[1816] Saltman *The Politics of Education* x.
[1817] Saltman *The Politics of Education* 23.
[1818] Ginsburg 'The politics of courts' 183.
[1819] See Chapter Four, referring to Bekker 'Constitutional negotiations in the nineties' 179.

and processed, as analysed in Chapter Six, illustrates the necessity for the development of a culturally-sensitive and competent bureaucracy. The government has already committed itself to ensuring a culturally competent and sensitive bureaucracy in both the Constitution and the National Development Plan. Section 195 of the Constitution adumbrates a list of nine principles that should govern the public administration. This list is supplemented by the National Development Plan that demands that public servants possess the attribute of 'an in-depth understanding of the sections of society with which they work'.[1820] The prerequisite is thus to develop cultural competence within the bureaucracy, especially 'in the context of "life or death" services'[1821] such as refugee status determination, where it is an absolute imperative, failing which 'real harm can result'.[1822] A critical entry point for developing cultural competence is 'perceptual flexibility, valuing diversity [and] cultivating awareness'.[1823]

Cross defines cultural competence by interpreting each word individually. Culture 'implies the integrated pattern of human behaviour that includes thought, communication, actions, customs, beliefs, values and institutions of a racial, ethnic, religious or social group'. Competence simply conveys the 'capacity to function effectively'.[1824] When viewed along a continuum, the opposite of cultural competence is cultural destructiveness and cultural incapacity, respectively. Cultural destructiveness includes 'dehumanization of minority groups', while cultural incapacity entails that 'agencies do not actively work to destroy a culture but do not have the capacity to serve minority members of the community'.[1825]

Norman-Major and Gooden explain that the acquisition of cultural competence occurs through a cycle characterized by four key elements. If this is successful, argues Bailey, the end result is supposed to be individuals 'who possess cultural competency awareness, knowledge and skills'.[1826] Appreciating cultural diversity, insist Norman-Major and Gooden, entails 'more than a superficial acknowledgement of ethnic differences'.[1827] In fact, a

[1820] National Development Plan 371.
[1821] Norman-Major & Gooden *Cultural Competency* 351.
[1822] Norman-Major & Gooden *Cultural Competency* 32.
[1823] Norman-Major & Gooden *Cultural Competency* 248.
[1824] Terry Cross 'Services to minority populations: Cultural competence continuum' (1988) 3(1) *Focal Point* 1.
[1825] Cross 'Services to minority populations' 3.
[1826] Margo Bailey 'Cultural competency and the practice of public administration' in MF Rice (ed) *Diversity and Public Administration: Theory, Issues, and Perspectives* (2005).
[1827] Norman-Major & Gooden *Cultural Competency* 249.

distinct benefit is that this cultural competency will henceforth permeate the institution.[1828] It is my argument that cultural competency should be acquired by every individual in society so that the state benefits as a result. The first element is the need to learn about other cultures. Secondly, the individual has a duty to be 'aware and knowledgeable about cultural differences and their effect and impact on (public service delivery) outcomes'. Thirdly, this cultural awareness and knowledge must be transformed into cultural-sensitivity practices; and finally, cultural competence must be systematically applied (in the public service).[1829]

Strategies for the transformative administration of the law as well as for society to operate optimally are found within the theory of cultural competency. At a minimum, cultural competency contains the expectation that differences across cultures will not 'be overlooked, ignored, or merely tolerated'.[1830] Rather, it will inculcate prejudice reduction,[1831] 'awareness and sensitivity (attitude), multiculturalism (knowledge) and cross-culturalism (skills)' because it embraces cultural nuances.[1832] If these minimum requirements are met, it is designed to give effect to the 'five levels of the social ecological model'. Norman-Major and Gooden describe these five levels thus:

(1) at the individual level, the output is behaviour;
(2) at the interpersonal level, the output is relationship;
(3) at the institutional or organizational level, the output is procedure;
(4) at the community level, the output is collaboration; and
(5) at the public policy level, the output is policy.[1833]

This latter point is of immense value given Kotzé's admission that 'the bureaucracy's relation to policy is determined [by] the extent and the importance of the bureaucracy's own decision-making authority, and the extent and intensity of its influence on other decision-making structures in the system'.[1834] Accordingly it is proposed that a concerted project of cultural competency become a routine component of all government departments, with the Department of Home Affairs being prioritised. Furthermore, for cultural competency to

[1828] Norman-Major & Gooden *Cultural Competency* 24-5.
[1829] Norman-Major & Gooden *Cultural Competency* 24-5.
[1830] Norman-Major & Gooden *Cultural Competency* 261.
[1831] Elizabeth Paluck 'Diversity training and intergroup contact: A call to action research' (2006) 62(3) *Journal of Social Issues* 579.
[1832] Norman-Major & Gooden *Cultural Competency* 260.
[1833] Norman-Major & Gooden *Cultural Competency* 260.
[1834] Kotzé 'Constrained policy making' 145.

achieve the limits of its power and potential, cultural competency should also be included in the educational setting at primary, secondary and tertiary levels. One would expect programmes of this nature to already be included in subjects such as Life Orientation. Evidently, no specific attention is paid to cultural competency in light of the non-collaboration, xenophobia and exclusionary attitude exhibited by the large majority of South Africans. The fundamental element that should infuse cultural competency as a strategy, argue Norman-Major and Gooden, is identity. As they put it:

> Identity as the assertion of individual autonomy on the basis of respect for one's own culture is the political side of a coin whose obverse is ethical, the valuing of others' cultural norms and values through identification with them; this presupposes a dialectic movement from cultural rootedness to cultural transcendence.[1835]

I therefore contend that the creation of an emotional connection with one's identity will inevitably advance the consolidation of the democratic constitutional project of South Africa. Given that identity is 'socially, culturally, linguistically, and historically constituted', states Saltman, it is specifically 'subject to the historical play of power struggles by competing material interests and symbolic positions of classes, racial, ethnic, gender, and sex groups'.[1836] All of these aspects speak directly to South Africa's troubled history. The obvious conclusion to be drawn is that they should, likewise, be relevant to the construction of South Africa's future.

In addition to cultural competency, the suggestion by Schlemmer in 1990 concerning empowerment of the youth is significant. In his words:

> For the unemployed, school-leaver youth … who almost universally have difficulty in finding career opportunities [and who] could quite easily destabilize a future South Africa, some form of (non-military) national service is essential, both to channel their idealism and absorb their productive energies. A form of "brigade" service, aimed at mobilizing energies for community service, is entirely feasible in the light of smaller-scale precedents in Botswana, Malawi, KwaZulu and elsewhere. Remarkable loyalty and discipline can be achieved. One proviso is important – any such scheme must involve tranining in vocational skills for wage employment or self-employment at a later stage.[1837]

Combined with a youth-centred constructive skills development and employment-related setting, the statutory framework governing xenophobia should be enforced. The adoption

[1835] Norman-Major & Gooden *Cultural Competency* 279.
[1836] Saltman *The Politics of Education* 22.
[1837] Schlemmer 'South African society under stress' 15.

of the Prevention and Combating of Hate Crimes and Hate Speech Bill signals a real commitment to protect asylum-seekers and refugees. The Bill is novel for the fact that incitement of harm is not a prerequisite. Accordingly, the Bill defines hate speech as advocacy, publication, propagation, or communication that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm or promote hatred based on either race, ethnicity, gender or religion. At the same time, it criminalises the intentional advocacy of hatred, even without incitement of harm.[1838] This draft legislation alone is inadequate, however. For it to be enforced (along with all other legislation), what is required is creative destruction resulting in the decolonisation and Africanisation of South Africa's legal, political and economic system to protect the rights of refugees alongside the rights of South Africans, advancing the essence of ubuntu.

[1838] Martin van Staden 'Exploring the constitutional definition of hate speech' *City Press* (1 January 2019) at *https://city-press.news24.com/Voices/exploring-the-constitutional-definition-of-hate-speech-20181231*.

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