

**The Process of Naturalisation of Refugees under International and  
South African Law and its Implications for Human Rights**

**BY**

**Paul Sakwe Masumbe**

**(Student N0: 201415930)**

**A thesis submitted in fulfilment of the requirements for the degree of  
Doctor of Laws (LLD), Nelson R Mandela School of Law, University of  
Fort Hare, South Africa**

**Supervisor:**

**Professor Nasila Selasini Rembe**

**Date of Submission: November 2015**

## **ABSTRACT**

This study seeks to examine the naturalisation of refugees under international law with specific focus on the South African refugee system. The universalised nature of human rights and the difficulties of refugees finding new roots in host states form the basis of this study.

This study takes a closer look at the South African refugee system and the path to naturalisation of refugees. It identifies policy and legal gaps in the process of naturalisation of refugees and argues that the practice as it stands today, fundamentally abuses the rights of refugees and questions South Africa's good faith in meeting its international obligations under the 1951 Refugee Convention. It argues further that the biopolitical philosophy upon which South African citizenship is anchored is itself a hindrance to the realisation of efforts aimed at naturalising refugees and their descendants. The research methodology used in this study is non-empirical. This is so because the study is based on available data, information already available in print or on the internet.

The study attempts to accomplish the above by undertaking an in-depth analysis of the history of refugees, the current position of naturalisation under international law, and identifies the inherent challenges. In the South African context, the study makes use of extensive statutory, constitutional and case law materials to justify that the current treatment of refugees in their quest for naturalisation is indefensible within the context of a human rights-based approach and the dictates of the Constitution.

This study concludes by making recommendations that would help close the legal and policy gaps that obtain presently. These include amendments to the Refugees, Immigration and Citizenship Acts and strengthening policy implementation at the DHA. It is hoped that the recommendations will strengthen and evolve a human rights culture and bring refugee, immigration and citizenship laws in line with the Constitution. It will also pave the way for a more just and peaceful South Africa as she strives to meet her obligations under regional and international law.

**Key Words: Refugees, human Rights, naturalisation, citizenship, immigration, biopolitics, constitution**

## DECLARATION

I, **Paul Sakwe Masumbe**, declare that **The Process of Naturalisation of Refugees under International and South African Law and its Implications for Human Rights** is my own work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted in the text have been duly acknowledged and referenced.

Signature of Candidate.....

Date.....

Signature of Supervisor.....

(Professor Nasila Selasini Rembe)

Date.....

## **DEDICATION**

To my beloved mother Besumbu Grace Masumbe, for your unconditional love, belief, support and tireless prayers. Mom, this is for the restoration of pride, faith, dignity and a new hope. Thank you for everything.

## ACKNOWLEDGMENTS

Writing a doctoral dissertation, although an ultimately solitary endeavour, is contingent on a complex intersection of good guidance, access to relevant documents, opportunity versus preparation and a consistent and prompt feedback from an engaged and supportive supervisor. I thank my supervisor, Professor Nasila Rembe, for his useful guidance, critical and always prompt feedbacks on my drafts in spite of his heavy workload and other commitments. His encouraging words and the trust he put in me inspired and motivated me to work harder and complete my study timeously.

I am equally mindful that I stand not only on the shoulders of scholarly giants but on the shoulders of my family and friends without which this journey would have been formidable. To my lovely children Elektra Askia and Uhuru Nikolae Masumbe - though you were without your father during the period of this thesis, my love was with you guys always. To my father, Dr. Peter Sakwe Masumbe, and my mother, Besumbu Grace Masumbe, I am grateful for all that you have done for me till now. To Naomi and David De Koker, I thank you for supporting me and being there for my family during my absence. To all my friends and particularly Dr. J. Foncha, Dr. J. F. Abongdia, Professor P. Tanga, I thank you guys for everything.

I would like to extend my profound gratitude to the Govan Mbeki Research and Development Centre for its financial assistance without which this journey could have been an exceptionally difficult one. Most importantly, I give thanks to the Almighty God for strengthening my resolve and spiritual strength especially during those moments when it seems the straight path of success was lost. Thank you Lord !

## ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACRC	African Charter on the Rights of the Child
ACA	Aliens Control Act
ANC	African National Congress
AU	African Union
BCLR	Butterworth Constitutional Law Reports
CC	Constitutional Court
CERD	Convention on the Elimination of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DA	Democratic Alliance
DHA	Department of Home Affairs
DRC	Democratic Republic of Congo
EU	European Union
GPTT	Green Paper Task Team
HCR	High Commissioner for Refugees
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFP	Inkatha Freedom Party

IRO	International Refugee Organisation
LHR	Lawyers for Human Rights
NGO	Non Governmental Organisation
OAU	Organisation of African Unity
PAJA	Promotion of Administrative Justice Act
RAB	Refugee Appeal Board
RSA	Republic of South Africa
RRO	Refugee Reception Officer
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer
SAMP	Southern African Migration Project
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SCA	Supreme Court of Appeal
SCRA	Standing Committee for Refugee Affairs
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNRRA	United Nations Relief and Rehabilitation Administration
USSR	Union of Soviet Socialist Republics
WPTT	White Paper Task Team

## TABLE OF CONTENTS

<b>Abstract</b> .....	ii
<b>Declaration</b> .....	iv
<b>Dedication</b> .....	v
<b>Acknowledgments</b> .....	vi
<b>Acronyms</b> .....	vii
<b>List of International and Regional Instruments</b> .....	xv
<b>List of Cases</b> .....	xvii

### CHAPTER ONE

#### INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 Background to the Study.....	1
1.1.1 The Historical Context.....	1
1.1.2 The Refugee in South Africa.....	2
1.1.3 The Refugee and the Dilemmas of South African Citizenship.....	6
1.2 Statement of the Problem.....	14
1.3 Research Question.....	15
1.4 Purpose of the Study.....	16
1.5 Objectives of the Study.....	17
1.6 Assumptions of the Study.....	17
1.7 Significance of the Study.....	18
1.8 Delimitations of the Study.....	19
1.9 Definition of Key Concepts.....	19

1.10 Literature Review.....	21
1.11 Methodology.....	30
1.12 Ethical Consideration.....	30
1.13 Limitations.....	30
1.14 Presentation.....	31

## **CHAPTER TWO**

### **APPRAISING REFUGEE AND REFUGEES FROM A HISTORICAL PERSPECTIVE**

2.1 Introduction.....	37
2.2 The Philosophy behind the Right to Leave Ones Country of Origin.....	40
2.2.1 Refuge in Medieval Times.....	48
2.2.2 Refuge in the Age of Religious and Political Intolerance.....	51
2.2.2.1 Refuge in Political and Religious Intolerant Spain.....	52
2.2.2.2 The Case of France and the Emergence of the Modern 'Refugee'.....	54
2.2.2.3 Refuge in England and Events across the Atlantic.....	58
2.3 Refugees in the League of Nations.....	60
2.3.1 Background.....	60
2.3.2 The Development of Refugee Rights and the League of Nations.....	61
2.3.3 From the UNRRA to the Geneva Convention of 1951.....	64
2.4 The Refugee in Contemporary International Law.....	68
2.4.1 Background.....	68
2.4.2 The Refugee in the 1951 Convention.....	70
2.4.3 Evaluating the Geneva Convention of 1951.....	78
2.4.3.1 Background.....	78

2.4.3.2 The Predicaments of Persecution in the Geneva Convention.....	79
2.4.3.3 The Omission of Alienation in the Refugee Definition.....	83
2.4.3.4 Linking Refugee Rights to Sovereignty: A Legal Mistake.....	85
2.4.3.5 The Implication of the Hemispheric Nature of the Convention.....	88
2.5 Changing Perception on Refugees.....	90
2.5.1 Refugees: From the Lionised to the Mentally Deficient.....	91
2.5.2 Refugees: A Moral Dislocation and a Developing World Problem.....	96
2.6 Conclusion: Beyond UNHCR and the Geneva Convention.....	99

## **CHAPTER THREE**

### **NATURALISATION OF REFUGEES UNDER INTERNATIONAL LAW**

3.1 Introduction.....	103
3.2 Naturalisation of Refugees under International Human Rights Law.....	108
3.2.1 Naturalisation of Refugees before 1945.....	111
3.2.2 Naturalisation of Refugees under the current Rights Regime.....	114
3.2.3 Naturalisation of Refugees in Africa.....	124
3.3 The Gulf between Refugee Rights and Citizenship Rights under International Law: Implications for Naturalisation of Refugees.....	129
3.4 Refugee Rights versus Human Rights: Implications for Naturalisation.....	138
3.5 Refugee Rights versus Sovereignty: Implications for Naturalisation.....	147
3.6 Refugee Rights versus the Borders: Implications for Naturalisation.....	156
3.7 Conclusion: Beyond the current Human Rights Dispensation of Refugees.....	165

## CHAPTER FOUR

### THE NATURALISATION PROCESS OF REFUGEES WITHIN THE FRAMEWORK OF THE SOUTH AFRICAN REFUGEE LAW

4.1 Introduction.....	169
4.2 The Legal History of South African Refugee Law.....	174
4.2.1 Refugee Policy in South Africa before the Refugees Act of 1998.....	176
4.2.2 The Drafting History of the Refugees Act: Implications on Refugee Rights.....	181
4.3 South Africa’s Refugee Obligations under International Law.....	198
4.4 Refugee Rights in the South African Refugee System.....	204
4.5 Fault Lines in Actualising Refugee Rights in South Africa.....	208
4.6 Conclusions: Legal Deformities and Beyond.....	217

## CHAPTER FIVE

### THE NATURALISATION OF REFUGEES: BETWEEN IMMIGRATION, THE CONSTITUTION AND THE BIOPOLITICS OF SOUTH AFRICAN CITIZENSHIP

5.1 Introduction.....	223
5.2 The Legal Architecture of Naturalisation of Refugees under South African Law.....	226
5.2.1 Application of the Law and Implication for Refugee Rights.....	229
5.2.2 The Refugee Status.....	229
5.2.3 Transiting from Certification to Permanent Residence.....	237
5.2.4 Refugee Rights to Naturalisation from a Constitutional Perspective, the Courts and DHA.....	242
5.3 The Biopolitics of South African Citizenship: Implications for the	

Naturalisation of Refugees.....	253
5.3.1 The Concept of ‘Biopolitics’.....	254
5.3.2 Biopolitics of South African Citizenship and the Descendants of Refugees.....	262
5.3.2.1 Acquisition of Citizenship by Children of Refugees .....	263
5.3.2.2 The South African Citizenship Model: Emphasis on Naturalisation.....	264
5.3.2.3 Analysing both Models of Citizenship.....	265
5.3.2.4 The Biopolitics of South African Citizenship: Implications for the Naturalisation of Children of Refugees.....	271
5.3.2.5 The South African Citizenship Model and the Constitution: Implications for the Naturalisation of Refugees.....	276
5.4 Conclusion.....	281

## **CHAPTER SIX**

### **THE FUTURE OF NATURALISATION OF REFUGEES IN SOUTH AFRICA: FINDINGS AND RECOMMENDATIONS**

6.1 Findings.....	284
6.1.1 Introduction.....	284
6.1.2 Naturalisation of Refugees under International Law.....	285
6.1.3 Naturalisation of Refugees under South African Law.....	289
6.1.3.1 The Asylum Seekers stage: Beginning of Error.....	289
6.1.3.2 Transition from Refugee Status to Certification.....	291
6.1.3.3 Transition to Permanent Residence: Continuation of Error.....	292
6.1.3.4 Naturalisation of Children of Refugees Born in South Africa.....	295
6.1.3.5 Human Element, Naturalisation Process and the Constitution.....	297

6.1.3.6 Biopolitics of South African Citizenship and the Naturalisation of Refugees..	300
6.1.3.7 Conclusion.....	304
6.2 Recommendations.....	304
6.2.1 Naturalisation of Refugees under International Law.....	304
6.2.2 The Asylum Process as the first stage of Naturalisation of Refugees.....	305
6.2.3 The Transitional Phase from Refugee Status to Permanent Residence.....	306
6.2.4 The Biopolitical Impact of the Citizenship Act.....	307
6.2.5 Final Recommendation.....	309
Bibliography.....	310

## **LIST OF INTERNATIONAL AND REGIONAL INSTRUMENTS**

African Charter on Human and Peoples' Rights, 1981

African Charter on the Rights and Welfare of the Child, 1990

Convention Relating to the Status of Refugees, 1951

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Convention on the Reduction of Statelessness, 1961

Convention on the Rights of the Child, 1990

Declaration on Territorial Asylum, 1967

Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, 1990

Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

International Convention on the Elimination of All Forms of Racial Discrimination, 1969

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969

The Cartagena Declaration on Refugees, 1984

Universal Declaration of Human Rights, 1948

Vienna Convention on the Law of Treaties, 1969

## LEGISLATION

Aliens Control Act 96 of 1991

Alien Control Amendment Act 76 of 1995

Citizenship Act 88 of 1995

Citizenship Amendment Act 17 of 2010

Constitution of the Republic of South Africa of 1996

French Constitution of September 1791

Federal Constitution of Brazil, 1998

Immigration Act 13 of 2002

Immigration Amendment Act 19 of 2004

Kenyan Refugees Act 13 of 2006

Promotion of Administrative Justice Act 3 of 2000

Passport Control Instruction 63 of 1994

Passport Control Instruction 23 of 1995

Refugee Act 130 of 1998

Refugee Amendment Act 33 of 2008

Senegalese Nationality Act 61/70 of 1961

The 14th Amendment to the United States Constitution of 1868

Zambian Refugees (Control) Act 40 of 1970

## LIST OF CASES

### South African

*Akanakimana v the Chairperson of the Standing Committee and Others* (10970/2013) (WC) (Unreported).

*Arse v Minister of Home Affairs* (25/10) [2010] ZASCA 9

*Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC)

*Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 256 (CC) (2002 (9) (BCLR 891)

*Bula & Others v Minister of Home Affairs & Others* (2012) (4) SA 560 (SCA)

*Christian Boketsa Bolanga v Refugee Status Determination Officer and Others* (5027/2012) [2015] ZAKZDHC

*Centre for Child Law v Minister of Home Affairs and Others* 2005 (6) SA 50 (T)

*Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v*

*Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs & Others* 2000 (1) SA 997 (CC)

*D.G.L.R & another v Minister of Home Affairs & Others* (2014) Case No: 38429/13 (Unreported)

*Director-General: Home Affairs v Dekoba* (224/2013) (2014) ZASCA 71 (28 May 2014)

*Eisenberg & Associates and Others v Director General of Department of Home Affairs and Others* (2178/2011) [2011] ZAWCHC 437; 2012 (3) SA 508 (WCC)

*Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC)

*Foodcorp (Pty) Ltd v Deputy Director-General, DEAT: Branch Marine and Coastal Development* 2006 (2) SA 199 (C).

*Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA)

*Harksen v Lane NO and Others* 1998 (1) SA 300 (CC)

*Hartman v Chairman, Board for Religious Objection* 1987 (1) SA 922

*Hererimana v the Chairperson of the Refugee Appeal Board and Others* 2013 (WC) unreported, Case No. 10972/2013 (Unreported)

*Houd v Minister of Home Affairs and Others* (1344/06) (2006) ZAWCHC (25 August 2006)

*Jian-Qiang Fang v Refugee Appeal Board et al* (2006) Case No. 40771/1/05 (Unreported)

*Kalil NO & Others v Mangaug Metropolitan Municipality & Others* 2014 (5) SA 123 (SCA)

*Khosa v Minister of Social Development* (2004)(6) SA (CC)

*Larbi-Odam v MEC for Education (North West Province)* (1998) (1) SA 245 (CC)

*Lawyers for Human Rights v Minister of Home Affairs* (2001) Case No: 10783/2001  
(Unreported)

*Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA  
125 (CC) (2004 (7) BCLR 77

*Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection  
Board and Others* 2001 (12) (BCLR) (C)

*Mayongo v Refugee Appeal Board* (2007) JOL19645 (T)

*Minister of Home Affairs and Others v Watchenuka and Others* (2003) ZASCA 142;  
[2004] 1 ALL SA 21 (SCA)

*Mohamed and Another v President of the Republic of South Africa and Others (Society  
for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3)  
SA 893 (CC) (2001 (7) BCLR 775)

*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and  
Others (the “Sodomy Case”)* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC)

*Pharmaceutical Manufacturers Association and Another; in re Ex Parte President of the  
Republic of South Africa and Others* 2000 (2) SA 674 (CC)

*Premier Mpumalanga v Association of Estate Agents School* 1999 (2) (CC)

*President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997  
(6) BCLR 759 (CC)

*Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC)

*Richter v Minister of Home Affairs & Others* (2009) CC

*Ruyobeza v Minister of Home Affairs* 2003 (5) SA 51 (C)

*S v Makwanyane & Another* (1995) (3) SA 391 (CC)

*S v Jaipal* 2005 (4) SA 581 (CC) 2005 (1) SACR 215; 2005 (5) BCLR 423

*Shalabi and Another v Minister of Home Affairs and Others: Thomas and Another v Minister of Home Affairs & Others* (2000) (1) SA 997 (CC)

*Speaker of the National Assembly v De Lille and Another* 1994 (4) SA 863 (SCA)

*Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 332 (T)

*Union of Refugee Women v Director of the Private Security Industry Regulatory Authority* (2007) 4 SA 395 (CC)

*United Democratic Movement v President of the Republic of South Africa and Others (and African Christian Democratic Party and Others intervening; Institute for Democracy in South Africa and Others as amici curiae)* (No. 2) 2003 (1) SA 495 (CC)

*University of the Western Cape and Others v Member of the Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C)

*Voiletta Mukhamadiva v Director General of Home Affairs & 1* 2011

*Van Gaderen No v Refugee Appeal Board and Others* (unreported) 30720/2006

*Viking Pony African Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC)

*Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC)

## **Cases from other Jurisdictions**

### **United States**

*INS v Cordoza-Fonseca* 480 US 421 (1987) US Supreme Court

*Perez v Brownell* (1958) 356 US 44, 64.

*Schneiderman v. United States*, 320 U.S. 118, 122 (1943)

### **Canada**

*Singh v Canada (Minister of Employment and Immigration)* 1985 14 CCR 13

### **India**

*National Human Rights Commission v. State of Arunachal Pradesh* (1996) 83 AIR 1234 (9 January 1996).



# CHAPTER 1

## INTRODUCTION AND OVERVIEW OF THE STUDY

As long as mankind is nationally and territorially organized in States, a stateless person is not simply expelled from one country, native or adopted, but from all countries – none being obliged to receive and naturalize him [*sic*] which means he[*sic*] is actually expelled from humanity.

Arendt H 'For the Love of the World' (1982) 275

### 1.1 Background to the Study

#### 1.1.1 The Historical Context

The fall of apartheid and the introduction of multi-party democracy in 1994 dawned a new era for human rights and the rule of law in South Africa. Redeemed from institutional and racial injustice of the past, its history written with the blood of human sacrifice, and ostracised from the community of nations, South Africa emerged a new nation and enacted a new Constitution.<sup>1</sup> The latter enshrined human dignity, equality and justice as its foundational tenets and has been frequently invoked as the *national* soul of the country.<sup>2</sup> As South Africa rejoined the community of nations, it shouldered its own share of international engagement and responsibilities. Amongst the treaties signed by South Africa which are of relevance here is the Convention Relating to the Status of Refugees,<sup>3</sup> the International Covenant on Civil and Political Rights,<sup>4</sup>

---

<sup>1</sup>Constitution of the Republic of South Africa, 1996.

<sup>2</sup>N. Mandela, "Address by President Nelson Mandela to the Constitutional Assembly on the occasion of the adoption of the New Constitution" (Cape Town, 8 May 1996), available at [www.anc.org.za/ancdocs/history/mandela/1996/sp960508.html](http://www.anc.org.za/ancdocs/history/mandela/1996/sp960508.html) (Accessed 30/09/2014).

<sup>3</sup>Adopted on 28 July 1951, entered into force 22 April 1954 and ratified by South Africa on 12 January 1996 and hereafter referred to as the 1951 Refugee Convention.

International Covenant on Economic, Social and Cultural rights,<sup>5</sup>and the Universal Declaration of Human Rights of 1948.<sup>6</sup> Regionally, South Africa is a state party to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,<sup>7</sup> and the African Charter of Human and Peoples' Rights of 1981.<sup>8</sup>

In domesticating its international and regional obligations in the area of migration, South Africa passed the Refugees Act,<sup>9</sup> the Immigration Act<sup>10</sup> and the Citizenship Act.<sup>11</sup> The recognition of international law as an interpretive tool in the domestic laws of South Africa is given effect by the Constitution which requires that courts must consider international law when interpreting the rights in the Bill of Rights.<sup>12</sup>

### **1.1.2 The Refugee in South Africa**

Notwithstanding the obligations enacted in the Refugees, Immigration and Citizenship legislation, their enforcement by the Department of Home Affairs (DHA) has met severe practical challenges. Among these challenges are - lack of clarity of refugee and immigration laws, unnecessary delays of permit processing and flagrant disregard of the Constitution. The repercussion of these challenges has led to the abuse of the rights of

---

<sup>4</sup>Adopted in New York, 16 December 1966, entered into force 23 March 1976, UN Doc A/6316 (1966), 999 UNTS 171 (ICCPR). South Africa signed this Convention on 3 October 1994 and ratified it on 10 December 1998.

<sup>5</sup>Adopted in New York, 16 December 1966, entered into force 3 January 1976, UN Doc A/6316 (1966) 999 UNTS 3 (ICESCR) and signed by South Africa on 3 October 1994.

<sup>6</sup>Adopted on 10 December 1948. Though this is not a treaty, it has a moral and political authority internationally as a minimum standard of states human rights obligations as parties to the United Nations Charter as enshrined in articles 55 & 56 of the UN Charter of 26 June 1945 and binds South Africa as a member of the UN.

<sup>7</sup>Adopted on 10 September 1969, entered into force 20 June 1974 and ratified by South Africa on 15 December 1995.

<sup>8</sup>Adopted on 27 June 1981, entered into force 21 October 1986 and acceded to by South Africa on 9 June 1996.

<sup>9</sup>Act 130 of 1998 as amended by the Refugee Amendment Act 33 of 2008.

<sup>10</sup>Act 13 of 2002 as amended by the Immigration Amendment Act 19 of 2004.

<sup>11</sup>Act 88 of 1995 as amended by the Citizenship Amendment Act 17 of 2010.

<sup>12</sup>Section 39 of the Constitution.

refugees especially with regard to the full realisation of their legal rights under the above legislation in general, and international refugee law in particular.

Beyond the asylum seekers stage, the naturalisation process<sup>13</sup> for a refugee in South African starts with section 27 (1) (c) of the Refugees Act<sup>14</sup> which provides that:

A refugee is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.

Though the above provision refers to the granting of an immigration permit after five years with a refugee status, refugees in South Africa have been allowed to apply for permanent residence certification at the Standing Committee for Refugee Affairs.<sup>15</sup> Upon approval, the certified indefinite refugee will proceed to apply for a permanent residence<sup>16</sup> permit under the Immigration Act.<sup>17</sup> Once a permanent residence status is granted, he/she can apply for citizenship after five years of permanent residence.<sup>18</sup> This

---

<sup>13</sup>The naturalisation process of refugees under South African law cannot be actualised solely within the Refugee Act or its subsequent amendments. The process to citizenship for refugees operates at an intersection between the Refugee, Immigration and Citizenship acts. More often therefore, references will be made on these acts because the path to naturalisation of refugees crosses them all.

<sup>14</sup>Act 130 of 1998.

<sup>15</sup>There is only one Standing Committee in South Africa based in Pretoria dealing with these applications from the five refugee receiving centres throughout the republic.

<sup>16</sup>Section 27 of the Immigration Act of 2002 entitled 'Residence on other grounds' provides *inter alia* that:

The Department (DHA) may issue a permanent residence permit to a *foreigner* of good and sound character who—

(d) is a refugee referred to in section 27(c) of the Refugees Act, 1998 (Act No. 130 of 1998), subject to any prescribed requirement.

<sup>17</sup>The prerogative to grant permanent residence and citizenship falls with the DHA. A permanent resident is very important to a non-citizen resident. For example, in terms of section 25 (1) of the Immigration Act of 2002, a permanent resident enjoyed similar rights as a South African citizen. These rights were taken away with the amendment of the Immigration Act in 2004. See Klaaren J 'Viewed from the Past, the Future of South African Citizenship' (2010) *African Studies*, 69:3, 385-401 at p.395. The withdrawal of this equality right notwithstanding, the status of a permanent residence confers more rights to its holder than any other permit in the Immigration Act. Permanent residence brings a refugee status to an end and it is a step away from citizenship. A permanent resident, therefore, is a citizen in waiting.

<sup>18</sup>Section 5 of the Citizenship Act 17 of 2010 apart from giving the Minister of the DHA prerogative to grant citizenship in South Africa, sets out the requirements for citizenship or naturalisation as follows:

is briefly the legal transition of a refugee from refugee to citizenship status in South Africa.

While refugee laws are to a limited extent clear on paper, the practical realisation of the legal rights of refugees, especially their transition to citizenship has been, and remains, very onerous in practice. The burden lies in the lack of legal clarity and the execution of these laws by the bureaucracy in the DHA.

First, the adjudication or eligibility process to determine if an asylum seeker qualifies for protection as a refugee which, in terms of the Refugee Act and its regulations should normally be adjudicated or finalised within six months or 180 days from the date of application,<sup>19</sup> takes more than 4 years to finalise.<sup>20</sup> The refugee status determination process is a severely flawed one and because of the negative impact it has on refugee rights, some writers believe it is a distinct failure of the refugee system in South Africa as a whole.<sup>21</sup> As a result of this flawed adjudication process, there was a backlog of 230,486 applications for refugee status at the DHA refugee department as of 18 March 2013.<sup>22</sup> These are asylum seekers who are not refugees and are therefore prevented

---

5(a) The Minister may, upon application in the prescribed manner grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister that—

(b) he or she has been admitted to the Republic for permanent residence therein; and

(c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application...

<sup>19</sup>*Refugee Regulations (Forms and Procedure)* 2000, Government Gazette No. 21075, 6 April 2000 (Pretoria: Government Printer, 2000), Section (3) (1),6.

<sup>20</sup>Annette Lovemore, DA's Shadow Minister (14 October 2010)Refugee applications: Refugees wait up to 4 years for answers from Home Affairs available on <http://www.da.org.za/newsroom.htm?action=view-news-item&id=8797>(Accessed 3/12/2013).

<sup>21</sup>Amit R 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' (2011) Vol.23 No.3 *Int'l J. Refugee L.* 458-488.

<sup>22</sup>Parliamentary Internal Questions No. 4 of 2013 available on <http://www.pmg.org.za/questions-and-replies/2013/06/03/home-affairs> (Accessed 3/12/2013).

from enjoying basic socio-economic rights entitled to refugees in terms of chapter 2 of the Constitution.

Second, after more than 4 years of waiting to obtain a refugee status, the refugee has a further 5 year waiting period to qualify for a permanent residence certification in terms of Section 27 of the Refugees Act of 1998.

Third, the time frame for processing and finalising a permanent residence application, according to former DHA Minister Naledi Pandor, is 8 months. This applies to permanent residence applications either at the immigration department or permanent residence certification at the Standing Committee for Refugee Affairs.<sup>23</sup> This time frame is rarely respected as applicants wait for more than 2 years for the outcome of their applications. This situation is worse for the refugee because he/she has more than 2 years to wait for permanent residence certification and more than 2 years for the actual permanent residence. As a result of these administrative glitches and delays in the finalisation of permits, the immigration department is constantly experiencing backlogs.

As of 2005, the backlog for permanent residence stood at 17,000 which Chris Watters noted then that it will take 6years to process.<sup>24</sup> In an article on 14 August, 2012, the backlog for permanent residence stood at 11, 239. Although, Apleni, the Director-

---

<sup>23</sup>Minister Pandor's interview with Paula Chowles of ENews Channel Africa on 27 September 2013 available on [www.enca.com/search/permanent%2502residence/2520backlog](http://www.enca.com/search/permanent%2502residence/2520backlog) (Accessed 3/12/2013). The interview was about the case of Andrew Fleming, an American Senior Researcher in Urban Development who applied for permanent residence in South Africa in April 2011 and as at the 27 of September 2013, he was still waiting for the outcome of his application.

<sup>24</sup>Rebecca Rosenberg (Jan. 23, 2006) Home Affairs in a Sorry State Says Experts, available on <http://www.iol.co.za/news/politics/home-affairs-in-a-sorry-state-says-experts-1.246278#.UlrWVNMJFg>.(Accessed 10/12/2013).

General of the DHA vowed that by the end of December that same year the backlog will be cleared,<sup>25</sup> by 27 September, 2013 it stood at 23,945.

After obtaining permanent residence, there is another waiting period of 5 years before a permanent resident can apply for citizenship in South Africa.<sup>26</sup> As explained above, the time frame from asylum to citizenship is at least 15 years. This cannot prevail in a country that prides itself as the hub of human rights and freedom in Africa. Mindful of the bundle of rights which come with citizenship, a legal and administrative defect that unjustifiably prolongs the path to citizenship is an indirect denial of human rights. It is a disturbing trend whose impact is more than just statistics but the erosion of the human rights of refugees.

### **1.1.3 The Refugee and the Dilemmas of South African Citizenship**

To be rooted, writes Simone Weil in *The Need for Roots*, 'is the most recognized need of the human soul.'<sup>27</sup> The geographical space allocated to growing roots, conveys social rank and political value and naturalises human beings into the environment which they inhabit. The refugee in South Africa is a territorial inhabitant with very uncertain naturalisation rights partly because refugee and immigration laws are inconsistent on paper and very sloppy in practice.

As stated in 1.1.2 above, under the current refugee regime with its indeterminate legal uncertainty and time frame for permit processing, it will take a refugee more than 15

---

<sup>25</sup>Home Affairs warned about Outsourcing, available on [www.news23.com/SouthAfrica/politics/Home-Affairs-warned-about-outsourcing-20120814](http://www.news23.com/SouthAfrica/politics/Home-Affairs-warned-about-outsourcing-20120814). (Accessed 10/12/2013).

<sup>26</sup>Section 5 of the Citizenship Amendment Act 17 of 2010.

<sup>27</sup>Weil S *The Need for Roots* (1952) 8.

years to become a South African citizen.<sup>28</sup> The effect of this indetermination and inconsistency in the application of these laws beyond the abuse of refugees and migrants rights is the presence of a failed population living in South Africa. The refugees are a 'failed population' because they are both contained and expelled at the same time due to the legal and administrative failures in attaining citizenship and its associated benefits. They are contained in the country because they are refugees; they are expelled because they don't enjoy the full rights of citizenship and so the country is left with a failed population. The failed population is in a strange position of 'being outside the legal protection of citizenship, but nevertheless, subject to the full force of state power.'<sup>29</sup> The legal integration of refugees into citizenship under the current South African refugee regime has failed the refugee population and by the same token, impacted negatively on South Africa's commitment as a state party to the 1951 Refugee Convention which provides for naturalisation under Article 34.

Beyond the sloppiness and inconsistency of these laws, is this failure just an accident of administrative incompetence of the DHA or is the citizenship model designed to fail refugees in South Africa? In order to understand the philosophy behind the South African model of citizenship and why the system is failing some section of the population present in the country, this thesis will consider its biopolitics.

Biopower is understood in its broadest sense as a power over life and citizenship itself is a biopolitical space. Biopolitics is understood here as the 'explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of

---

<sup>28</sup>In the case of Canada for example, once an asylum seeker becomes a refugee, he/she has 180 days to apply for permanent residence and after 3 years as a permanent resident, he/she is entitled to apply for citizenship. See Jones M & Baglay S *Refugee Law (Essentials of Canadian Law)* (2007) 89.

<sup>29</sup>Butler J & Spivak G *Who Sings the Nation-State* (2007) 17.

populations.<sup>30</sup> Biopolitics from a refugee and immigration perspective serves to exclude refugees from citizenship but yet subjugate them to full control in that exclusion.

From Westphalia in 1648, the territorial state was established as the basis of the modern state system and emphasised international boundaries as the legal territorial boundaries between one State and another. In asserting state sovereignty, human life becomes the subject of sovereign power<sup>31</sup> and membership in a *sovereign* political community therefore becomes 'the primary good.'<sup>32</sup>

The modern subject therefore 'reaches her humanity by acquiring political rights which guarantee her admission into the universe of human nature by excluding from that status those who do not have such rights.'<sup>33</sup> It is at this very moment, as Foucault observes, that 'life has now become ... an object of power'<sup>34</sup> and has been inescapably inscribed into its techniques of administration and technologies of biopower. In defending the society therefore, 'the state acts preventively in order to protect the population's biological well-being, thus it must kill the other: if you want to live, the other must die.'<sup>35</sup> In this way, killing is no longer perceived to be murder but it is justified in the name of security. The politics of security - 'the dispositive of security'<sup>36</sup> as Foucault calls biopower - establishes a binary categorisation between 'us' and 'them', or between the normal (e.g. legitimate citizens) and the abnormal (e.g. refugees). The former deserve to live, while the latter is expendable.

---

<sup>30</sup>Foucault M *The history of Sexuality* (1981) 140.

<sup>31</sup>Okhonmina S 'States Without Borders: Westphalia Territoriality under Threat' (2010) *J. Soc. Sci* 24(3) 177-182 at p.1.

<sup>32</sup>Walzer M *Spheres of Justice* (1983) 31.

<sup>33</sup>Douzinan C *The End of Human Rights* (2000) 112.

<sup>34</sup>Foucault M *Les mailles du pouvoir* in *Ditsetecrits* (1994) 194.

<sup>35</sup>Foucault M *Society Must Be Defended: Lectures at the Collège de France, 1975-1976* (2003) 255.

<sup>36</sup>Foucault *ibid* at 242.

The brief discourse of biopolitics above is central to the argument that the existence of a failed population present in South Africa as a result of a complicated passage to citizenship is not by any accident of a flawed design of the refugee and immigration system, but that such failure can be attributed to the South African model of citizenship.

The choice, for example, of excluding birthright citizenship (*jus soli*) in the Citizenship Act; the exclusion of permanent residents (citizens in waiting) from participating at any level of the democratic process (which allows even non-resident citizens as well as prisoners' participation); and the harsh immigration regime are the bi-product of a biopolitical system designed to fail refugees in South Africa.

Children born of refugees in South Africa are in the extraordinary position of entering the country illegally at birth. From their first breath and the cut of the umbilical cord, children of refugees are subject to the full force of immigration control.<sup>37</sup> In her 2013 budget vote to Parliament on 9 May 2013, former DHA Minister Naledi Pandor, citing the World Bank Migration and Remittance Unit report of 2011, noted that there are 1.9million immigrants living in South Africa, i.e. 3.7% of the country's population. Census 2011 estimated that 2.7million or 5.7% of South Africa's 51.7million people are foreign born.<sup>38</sup> This foreign born population represents the population of the failed, marginalised, those excluded and disqualified from citizenship and the rights which flow from this status. South African citizenship model excludes birthright citizenship.

---

<sup>37</sup>In countries with the *jus soli* citizenship, any child born on their soil is a citizen. See the 14<sup>th</sup> Amendment to the US Constitution of 28 July 1868, Article 12 of the Federal Constitution of Brazil of October 5 1998 and Section 3 (1) (a) of the Canadian Citizenship Act just to name a few.

<sup>38</sup>Minister Naledi Pandor's Opening Address to Parliament on the Home Affairs Budget Vote, 9 May 2013 available on [www.home-affairs-gov.za:8087/index.php/statement-speeches/159-address-by-naledi-pandor-mp-minister-of-home-affairs-opening-the-department-of-home-affairs-budget-vote-9-may-2013](http://www.home-affairs-gov.za:8087/index.php/statement-speeches/159-address-by-naledi-pandor-mp-minister-of-home-affairs-opening-the-department-of-home-affairs-budget-vote-9-may-2013) (Accessed 17/12/2013).

Ayelet Shachar argues that birthright citizenship directly contributes to, and sustains, global inequality. Shachar draws an analogy between birthright citizenship and inherited property by suggesting that both legal concepts include the “right to exclude” and the “right not to be excluded.”<sup>39</sup> In the South African legal polity, it serves to exclude thereby sustaining inequality and discrimination from birth.

Refugees therefore, having lost their roots and sovereign protection of their native countries because of circumstances beyond their control, find it difficult to be enrooted as a result of the inconsistency of South Africa’s refugees and immigration laws. Devoid of political rights, it is fair to conclude that refugees are properly objects of charity rather than justice, that they ‘may well have no right to be successful.’<sup>40</sup> The refugee does not fit into the citizen-state-territory trinity but rather into the gaps of what Emma Haddad has termed ‘between nation-states’.<sup>41</sup> In the absence of political rights therefore, the refugee is, in the words of Douzinas, ‘the total other of civilization, the zero degree of humanity. The refugee represents the state of nature in all its stark nakedness and the world finds nothing sacred in the abstract nakedness of being human.’<sup>42</sup>

Donnelly noted that ‘the principles of human rights would maintain that being human is the right to have rights and that human rights are literary the rights that one has simply because one is human.’<sup>43</sup> If this is so, then why would the law not be clear, precise and fair enough to grant the naturalisation it promises refugees? Is it fair in a constitutional democracy founded on human rights, human dignity and freedom to have children born

---

<sup>39</sup>Shachar A *The Birthright Lottery* (2009) 27.

<sup>40</sup>Walzer M *Spheres of Justice* (1983) 50.

<sup>41</sup>Haddad E ‘The Refugee: The Individual between Sovereigns’ (2003) *Global Society*, 17:3, 297-322.

<sup>42</sup>Douzinas C *The End of Human Rights* (2000) 144.

<sup>43</sup>Donnelly J *Human Rights in Theory and Practice* (2003) 10.

in the country as foreigners and refugees with little or no rights? Is this not a question of constitutional discrimination?

The most fundamental aspects of migration laws in South Africa have remain untested. When a process, for example, one designed to adjudicate asylum claims within a specified period, say six months, takes more than a decade to complete, then that law is beset with problems. If a process designed to take eight months, as is with the case of permanent residence both in the immigration and refugee categories, exceed two years, then we have a problem. When there is confusion in the interpretation of legal provisions as to their meaning and such provisions if understood correctly have vast implications for the rights of refugees and their naturalisation prospects, then the law is not clear. An example of this obscurity is found in section 27 of the Refugee Act. Subsection 2 provides that upon acquiring a refugee status, the refugee has the right to remain in the country. What does it mean 'to remain'? Without saying the refugee has the right to remain temporarily, the assumption would be to remain permanently. As it would be seen, the Constitutional Court equated to 'remain' in section 27 of the aforementioned Act to mean 'indefinitely'.<sup>44</sup> The liability of legal obscurity of any law in South Africa falls with parliament as much as that of administrative incompetence in execution of refugee and immigration laws falls squarely with the home affairs.

It would not be stretching common sense to the point of incredulity to equate to 'remain' with 'indefinite' because without the adding the phrases 'temporarily remain', the

---

<sup>44</sup>*Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others* 2007 (4) SA 595 para 99.

assumption with the case of the refugee especially would be to remain indefinitely. Here is an ambiguity borne from lack of clarity in a particular section of the Refugees Act.

This ambiguity progressed to subsection(c) of the same section above requiring the refugee to apply for an indefinite refugee status at Standing Committee for Refugee Affairs.<sup>45</sup> The latter is tasked, among others things, to decide if the refugee would be in the country indefinitely after five years with a refugee status. This sounds more of a linguistic redundancy in that 'to remain' and to 'indefinite remain' without first mentioning 'temporarily remain', is inaccurate.

A more clear approach or sensible one is found in the difference between the asylum permit and a refugee permit. The asylum permit in South Africa reads 'Asylum Seekers Temporary Permit' and the refugee permit reads 'Recognition of Refugee Status in RSA'. The distinction could not be any clearer than this example. It will be argued that to remain 'indefinite' and 'permanent' are one and the same thing. The superfluity of these phrases is a result of lack of legal clarity and its effect is to illegally prolong the refugees' passage to citizenship in South Africa contrary to Article 34 of the 1951 Refugee Convention.

These legal and policy gaps will be discussed and ultimately weighed against the Constitution of South Africa and other international legal instruments relevant to this discourse. Apart from challenging the citizenship regime especially for refugee children, this thesis would propose an alternative model within the purview of human rights and in keeping with the promise and spirit of the Constitution. All that is required is a rights-

---

<sup>45</sup>Hereafter SCRA.

based argument (as will be shown in this thesis) outlining the benefits of such expansion of rights to the constitutional and human rights culture of South Africa as might be taken up eventually by an independent and impartial judiciary.<sup>46</sup>

A critical analysis of the path to citizenship for refugees, interrogating the biopolitical foundations of South African citizenship and making the case for refugees and permanent resident enfranchisement will be the main goal that this thesis seeks to pursue. The thesis will dare to take up Foucault's question: 'Through what system of exclusion, by eliminating whom, by creating what division, through what game of negation and rejection can society begin to function?'.<sup>47</sup> In the words of Agamben, failure to question the foundations of social structures that tolerate such categorisation (as between 'us' and 'them') is to 'maintain a secret solidarity with the very powers they ought to fight'.<sup>48</sup> It is hoped that this thesis will lay a foundation for further research into the advancement of refugee and migrants rights in South Africa and to become, as Foucault puts it, 'an instrument of those who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal'.<sup>49</sup>

---

<sup>46</sup>The impartiality and boldness of the South African Judiciary cannot be over emphasized. In a recent landmark ruling for example on July 3, 2014 in the case of *D.G.L.R & another v Minister of Home Affairs & Others* under case number 38429/13, the North Gauteng High Court ordered that a 6 years old Cuban girl born in South Africa to Cuban parents be granted South African citizenship in terms section 2 (2) of the Citizenship Act. And that section 2 (2) of the Citizenship Act be regulated accordingly. Mindful that South African citizenship is by blood and not by birth, the ruling sets a stage for the expansion of human rights.

<sup>47</sup>Foucault M *The Archeology of Knowledge* (1972) 28.

<sup>48</sup>Agamben G *Means without End* (1996) 20.

<sup>49</sup>Foucault M 'Questions of Method' in Faubion J's (ed.) *Essential Works of Foucault 1954-1984, Vol.III: Power* (2000) 236.

## 1.2 Statement of the Problem

The 1951 Refugee Convention to which South Africa is a state party provides for naturalisation of refugees.<sup>50</sup> Apart from the fact that naturalisation brings a refugee status to an end, it allows the beneficiary to enjoy the dignity and human rights that only comes with citizenship. Under international refugee law, Article 34 of the 1951 Refugee Convention that provides for naturalisation of refugees does not impose a clear binding obligation on member states. The 1951 Refugee Convention does not mandate state parties to grant their citizenship to refugees however long they reside in host countries neither does it compel refugees to accept any such offers made to them. It is more of a recommendation which states have discretion, and based on their human rights regimes, they can mandate or reject naturalisation rights to refugees.

South Africa has domesticated the refugee convention alongside its naturalisation provisions through its Refugees, Immigration and Citizenship Acts. Despite the adoption of these laws, the naturalisation passage for refugees is very onerous and remains severe challenge to South Africa's capability to fulfil its international obligation to refugees.<sup>51</sup> The problem is that the legislation lacks clarity and various stages towards citizenship are vague. This leaves the interpretation of the processing of citizenship at the discretion and mercy of DHA officials.<sup>52</sup> If these laws were precise, there would have

---

<sup>50</sup>Art. 34.

<sup>51</sup> Handmaker J, De La Hunt & Klaaren J *Advancing Refugee Protection in South Africa* (2008) 219.

<sup>52</sup> *Voiletta Mukhamadiva v Director General of Home Affairs & 1 (2011)* para 10. See also, Legal Resource Centre's Press Release of 16 March 2012 titled 'Nigerian permit holder detained unlawfully for 114 days' available on [www.lrc.org.za/press-release/1836-2012-03-16-press-release-nigerian-permit-holder-detained-unlawfully-for-114-day](http://www.lrc.org.za/press-release/1836-2012-03-16-press-release-nigerian-permit-holder-detained-unlawfully-for-114-day) (Accessed 15/09/2014). See also "Waiting for 3 years for an answer from Home Affairs" *News 24*, 22 June 2014 available on [www.news24.com/MyNews24/waiting-for-3-years-for-an-answer-from-home-affairs-20140622](http://www.news24.com/MyNews24/waiting-for-3-years-for-an-answer-from-home-affairs-20140622) (Accessed 29/09/2014). The list is long, but this is testament that the DHA officials apply the law as they see fit.

been negligible backlogs in permit processing and their issuance, less complaints and minimum litigation against the DHA - and a robust and fair human rights regime that advances the human rights of refugees in South Africa. This, unfortunately, is not the case of South Africa.

Another obstacle in the discharge of its international obligation towards refugees in the context of naturalisation is South Africa's citizenship regime which disallows birthright citizenship thereby formulating citizenship along the lines of property inheritance. This means that the child of a refugee born in South African is a refugee from birth and devoid of citizenship rights. A citizenship system that allows others to be born as citizens and others with little or no rights bespeaks of constitutional inequality and a severe disregard of human rights. It is only a matter of time before such a system itself is put into trial.

The legal defects in refugee and immigration laws - especially towards citizenship for refugees and the current citizenship regime in South Africa - is a distinct impediment towards the country discharging its international obligations to refugees. The human rights impact of this systemic impediment to the advance of refugee rights is deleterious to refugees as human beings in particular, and to the advancement of a general culture of human rights in South Africa in general.

### **1.3 Research Question**

In view of the legislative inconsistencies and bureaucratic complexities encountered by refugees and other migrants in obtaining citizenship in South Africa as stated above, this thesis seeks to answer a number of questions:

- Why is the legal passage to naturalisation or citizenship problematic for conventional refugees in South Africa despite the existence of various pieces of refugee and immigration legislation?
- Does the biopolitical set up of the current citizenship laws do justice to the Constitution and South Africa's international human rights obligations?
  - Would the laws and administrative functions of the DHA pass Constitutional muster and international refugee law and practice?
  - Are there less restrictive means or alternatives that can be put in place in achieving naturalisation in an accelerated manner as laid down by Article 34 of the Geneva Convention?

#### **1.4 Purpose of the Study**

The purpose of this study is to:

- Examine the naturalisation of refugees under international law.
- Examine the refugee law of South Africa with specific emphasis on the naturalisation of refugees.
- Assess South Africa's performance with regard to this specific element of the aforementioned obligation and the impact of such performance on the human rights of refugees.
- Bearing in mind the objectives of the principal legislation, investigate why to date the legislation and subsequent amendments has not achieved the purpose it was

intended for, i.e. advancing the rights of refugees especially towards naturalisation.

- Analyse the biopolitical foundation and the human rights impact of the South African citizenship model especially the exclusion of birthright citizenship and the implications for the human rights of refugees and their progenies in the context of naturalisation.

### **1.5 The Objectives of the Study**

The aims and objectives of this study are to:

- Analyse from a legal perspective the refugee's passage to citizenship in South Africa.
- Examine the citizenship laws and assess if the citizenship model currently in place in South Africa does justice to the Constitution and refugees from a human rights perspective.
- Examine relevant domestic case laws, legislation on refugees and immigration, and international human rights instruments relevant to refugee rights in keeping with South Africa's international obligations.

### **1.6 Assumptions of the Study**

This study is based on the following assumptions:

- The provision of naturalisation to refugees under Article 34 of the Geneva Convention is weak and that leaving this provision to the interpretation and discretionary application by member states to the convention, breeds human right uncertainties for conventional refugees.

- The legal framework and biopolitics of the South African refugee, immigration and citizenship laws are to an extent premised on the notion of ‘inclusive exclusion’, that is, ‘let them in the country but complicate their attainment of citizenship’.

### **1.7 Significance/Rationale of the Study**

The study will throw light on South Africa’s implementation of the refugee laws and in particular the transition from refugee to citizenship status. In this regard, it will provide a useful guidance on how the DHA, immigration practitioners and policy implementers can manage the process better. The study will therefore:

- demonstrate that the current legislation regarding the naturalisation of refugees is inconsistent on paper and sloppy in practice and that it is an affront to South Africa’s obligations to refugees as a state party to international and regional refugee law.
- endeavour to show that the citizenship regime of South Africa serves to advance and sustain deep seated inequality because it was designed to disable the rights of others found on its territory. This disability of rights is a severe violation of the rights of children born of foreign parents and refugees on South African soil and challenges the very quintessence of South Africa’s constitutional tenets of equality, human rights and justice.
- propose workable legal and policy recommendations design to roll back the spectre of human rights deficit for refugees and children born of refugee parents on South African soil and reconcile the inhuman gap between the ‘we’ and ‘them’.

The recommendations from this study will challenge the debilitating perception of refugees and migrants which is the focal point of 'negrophobic xenophobia' (intense dislike for black foreigners) and enhance the human rights, democratic ethos and image of South Africa.

### **1.8 Delimitations of the Study**

This study will be limited to the legal passage of refugees to citizenship, the philosophical underpinnings of South African citizenship and the citizenship model with focus on birthright citizenship for children of refugees. It will not deal with asylum seekers, determination of refugee status or various categories of immigration permits.

### **1.9 Definition of Key Concepts**

The scope of this study makes it mandatory to explain briefly the key concepts that would be used for two reasons. The first is that this study is purely legal and terms maybe ascribed different meaning in different fields. The other reason is to define the scope and parameters of the study by delineating the subject of the study.

#### **1.9.1 Refugees**

The concept and definition of a refugee in this study is that preferred by the Geneva Convention which defines a refugee as a person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable to,

or owing to such a fear, is unwilling to avail himself of the protection of that country.'<sup>53</sup>

This definition has received wide acceptance, although it has been given regional specificity in the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969.

### **1.9.2 Xenophobia**

Xenophobia will have the same meaning as that used by the South African Human Rights Commission as 'the deep dislike of non-nationals by nationals of a recipient State. Its manifestation constitutes a violation of human rights.'<sup>54</sup>

### **1.9.3 Legal Obligation**

Legal obligation refers to duties that accrued to South Africa from the international legal regime which has been domesticated via legislation. These obligations set out standard by which South Africa shall discharge failure of which constitutes a breach of that obligation under international law.

### **1.9.4 Non-Citizen Residents**

Non-citizen residents will be loosely defined as people of another state who have voluntarily or otherwise settled in South Africa temporarily or permanently.

---

<sup>53</sup>Geneva Convention, art.1A(2). This definition is expanded by art. 1(2) of the Organisation of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa which include individuals fleeing large-scale instability in a country. Home Affairs has however privileged the narrower UN definition of a refugee based on the persecution of individuals, which limits potential asylum claims. See Klotze A 'South Africa as an Immigration State' (2012) *Politicon: South African Journal of Political Studies*, 39:2, 189-208 at 197.

<sup>54</sup>South Africa's Human Rights Commission's Braamfontein Statement on Racism and Xenophobia, 15 October 1998.

### **1.9.5 Naturalisation**

Naturalisation is the admission of a non-citizen to the citizenship of a country, with full rights and responsibilities that attach to this status. Naturalisation is one of the recognised methods of acquiring citizenship.

### **1.9.6 Citizenship**

This terminology will be used to mean a legal status granted by a state entitling the holder to enjoy full legal rights and privileges, obey all laws and fulfill all duties required by the State.

### **1.9.7 Sovereignty**

Sovereignty means the power of a state to exercise its authority within its territory independently from any external control or influence.

### **1.9.8 Biopolitics**

This study will prefer the definition used by Foucault as the ‘explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations.’<sup>55</sup>

### **1.10 Literature Reviewed**

Although books, articles and dissertations have been written regarding refugee and citizenship issues,<sup>56</sup> none of them deal in detail with the question of refugees’ passage

---

<sup>55</sup>Foucault M *The history of sexuality* (1981) 140.

<sup>56</sup>See Andrews P & Ellmann S *The post-apartheid constitutions: perspectives on South Africa’s basic law* (2001), Robins S. *Limits to Liberation after Apartheid: Citizenship, Governance and Culture* (2005), Hassim S, Kupe T & Worby E *Go Home or Die Here: Violence, Xenophobia and the Reinvention of*

to citizenship in South Africa from a legal perspective. In *Contested Citizenship in South Africa* (one among twenty essays that comprised Andrews and Ellmann's book), the author addressed the question of how the new democracy captured the will of a people who had been entirely disenfranchised and how their new found aspirations were to be reflected in a founding document.<sup>57</sup> This book explored some of the very important rights protected by the Constitution, including, the rights to citizenship, equality (especially of women), cultural freedom, freedom of speech and socio-economic rights as well as the applicability of the Bill of Rights to private actors. Despite emerging challenges, the book hopes that the promises in the constitution would become a reality. However, the entire volume is silent on the naturalisation process of refugees in South Africa and its implications on human rights.

In *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa*,<sup>58</sup> the authors focused on the 2008 xenophobic attacks and the reconstruction of the image of foreigners in South Africa. Professor Albertyn's contribution in the above book titled *Beyond Citizenship: Human Rights & Democracy*, tackles refugee and migrant rights through the courts, mainly the Constitutional Court. She stated that:

---

*Difference in South Africa* (2008), Handmaker J, De La Hunt & Klaaren J *Advancing Refugee Protection in South Africa* (2008), Peberdy S *Selecting Migrants: National Identity and South Africa's Immigration Policies 1910-2008* (2009), Klotze A *Migration and National Identity in South Africa* (2013), Khan F & Schreier T *Refugee Law in South Africa* (2014), Le Roux W 'Migration, Disaggregated Citizenship and Voting Rights' (2009) Seminar paper presented at the Forced Migration Studies Program, Wits, 29 September 2009.

<sup>57</sup>Klaaren J *Contested Citizenship in South Africa* in P. Andrews and S. Ellman (eds.) *The Post-Apartheid Constitution: Perspectives on South Africa's Basic Law* (2001) 304-326 at 304. It is important to mention here that Dr. Klaaren's 2004 PhD thesis at Yale's Sociology department titled 'Migrating to Citizenship: Mobility, Law, and Nationality in South Africa, 1897-1937' dealt with the development of South African citizenship and the mobility that precipitated it. As such, it did not address the naturalisation of refugees.

<sup>58</sup>Hassim S, Kupe T & Worby E *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa* (2008).

'the constitutional aspiration of a transformed society envisages engaged compassionate citizens within an open, transparent and accountable state. Its reach extends beyond a narrow idea of community citizen to a broadly caring society, inclusive of all who live here.'<sup>59</sup>

Buttressing her narrative with landmark constitutional decisions<sup>60</sup> impeding discrimination against refugees and other non-citizens, she concluded that:

'the court's conception of state and society that actively care for those in need is the high-water mark of constitutional jurisprudence on the treatment of foreign nationals living in South Africa, capturing the constitutional vision that signifies the best we can be'.<sup>61</sup>

While her contribution and that of the volume as a whole adds to the growing literature against xenophobia and the rights of non-citizens, it shied away from the philosophical underpinnings of citizenship and the path available for refugees to attain it.

In 2009, Sally Peberdy explored the synergy between periods of significant change in state discourses and policies of migration and those historical moments when South Africa was reinvented.<sup>62</sup> She traces the history of discriminatory immigration practices particularly against black South Africans from 1910 till the fall of apartheid. Consistent with the discursive nature of discriminative immigration practices in the pre-1994 period, she opined that 'such discrimination survived the end of apartheid into the Immigration Act of 2002'.<sup>63</sup> Although commending government for the protection of refugees under the Refugees Act of 1998, she noted that 'the administration of the Act has been

---

<sup>59</sup>At p.178.

<sup>60</sup>*S v Makwanyane* (1995) (3) SA 391 (CC), *Larbi-Odam v MEC for Education (North West Province)* (1998) (1) SA 245 (CC), *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326 (SCA), *Khosa v Minister of Social Development* (2004) 6 SA (CC) and *Union of Refugee Women v Director of the Private Security Industry Regulatory Authority* (2007) 4 SA 395 (CC).

<sup>61</sup>At p.183.

<sup>62</sup>Peberdy S *Selecting Migrants: National Identity and South Africa's Immigration Policies 1910-2008* (2009). It is worth mentioning that Dr. Peberdy's 1999 PhD thesis in Canada is of a similar title, an academic effort which led to her 2009 book.

<sup>63</sup>At p.148.

problematic and raised question over the DHA's commitment to its refugee regime.'<sup>64</sup> The book is very insightful from a historical view point but sheds very little light on the rights of refugees especially towards citizenship and the philosophy of South Africa's citizenship; neither does it make a case of expanding the current frontiers of refugee rights.

In *Advancing Refugee Protection in South Africa*,<sup>65</sup> the authors focused on refugee status determination processes, regional integration, migration policy implementation and xenophobia. The aim of this book is to present various perspectives on refugee protection in South Africa, reflecting on the recently newness of these issues and the invaluable public participation in policy development processes. The authors, however, missed two key aspects which their work otherwise set to achieve. First, the 1951 Convention defining refugees is provided,<sup>66</sup> but from this definition, the authors failed to note that the distinction between 'refugees' and 'asylum seekers' is not clear. If persecution is *sine qua non* to both, is the former considered a temporary resident and the later a potentially permanent one?

Second, on xenophobia, while the authors noted the heightened tension in the civilian space due to economic hardship in 2008 leading to distrust and antagonism against refugees and the national infamy it inspired, they failed to point out the role of history. They did not show how the history of apartheid, particularly its impact on nationalism,

---

<sup>64</sup>At p.155.

<sup>65</sup>Handmaker J, De La Hunt & Klaaren J *Advancing Refugee Protection in South Africa* (2008).

<sup>66</sup>At 219.

has negatively affected the implementation of a fairly progressive refugee policy.<sup>67</sup> On the naturalisation of refugees, the book is of very little assistance.

In 2013, Audie Klotze<sup>68</sup> explored the historical developments in immigration and citizenship laws. However, Chapter Four which dealt with refugee issues did not address the legal passage to citizenship for refugees in South Africa and therefore left a yawning gap which this thesis will grapple to close.

In *Limits to Liberation after Apartheid*,<sup>69</sup> the authors (all of them anthropologists) examined issues of culture and identity, drawing attention to the creative agency of citizens of the new South Africa. The first essay in Part 2 of this book<sup>70</sup> made a very interesting point that the generic Westphalian model of the nation-state and its citizenry is not analytically useful for interpreting contemporary South Africa. Wood & Shearing brought home seeds of a concept that is driving citizenship globally, namely, *denizenship* whereby membership in a community is premised on the basis of residence rather than nationality.<sup>71</sup> Despite advocating a residency based citizenship in the form of *denizenship*, the authors did not articulate how a residency anchored citizenship can be of any benefit to refugee rights especially towards their naturalisation. However, the book lacked the legal touchstone essential to understand the naturalisation of refugees in South Africa, in part due to its anthropological focus.

---

<sup>67</sup>Belvedere, M. Florencia 'Insiders but Outsiders: The Struggle for the Inclusion of Asylum Seekers and Refugees in South Africa' (2007) *Refuge*, Centre for Refugee Studies, York University and Queen's University, Vol. 24, No.1: 57-70 at p.58.

<sup>68</sup>Klotze A *Migration and National Identity in South Africa* (2013).

<sup>69</sup>Robins S *Limits to Liberation After Apartheid: Citizenship, Governance and Culture* (2005).

<sup>70</sup>Wood J & Shearing C 'Nodal Governance, Denizenship and Community Space: Challenging the Westphalian Idea', in Robins S (ed) *Limits to Liberation After Apartheid* (2005).

<sup>71</sup>At 97-113.

In *Refugee Law in South Africa*,<sup>72</sup> the authors examined the components of fear necessary for a refugee status, application for asylum, rights of refugees and reconciled the immigration and refugee laws in South Africa. The right to naturalisation dealt with in Chapter Nine<sup>73</sup> is a resounding sketch because the authors shied away from stating the bureaucratic difficulties that refugees' face in obtaining this status. The authors did not bother with case law and they failed to even point out that South Africa's model of citizenship is itself a barrier for refugees acquiring citizenship. Above all, the book is silent on the naturalisation process of refugees and its implications for human rights.

While invaluable for their empirically rich details, the studies reviewed above do not offer an analytical framework that captures in depth and from a legal angle the process of naturalisation of refugees in South Africa and the implications for human rights. There is therefore a need to explore the legal passage to citizenship for refugees, the legal and policy impediments to the naturalisation process and the biopolitical underpinnings of South African citizenship.

In *Ubuntu, the Constitution and the Rights of Non-Citizens*,<sup>74</sup> Justice Mokgoro addressed the rights of non-citizens and argued that in keeping with South Africa's international obligations especially to refugees and having regard to the Constitution, save for certain rights reserved for citizens, all the other rights in the Bill of Rights are for everyone. She uses case law and, in some instances, foreign jurisprudence to make the case for the universality of most of the rights in the Constitution. The thesis of her paper was probably not to address or justify why certain rights are reserved for citizens only and

---

<sup>72</sup>Khan F & Schreiner T *Refugee Law in South Africa* (2014).

<sup>73</sup>At 217-218.

<sup>74</sup>Mokgoro JY 'Ubuntu, the Constitution and the Rights of Non-Citizens' (2010) 2 *STELL LR* 221-229.

neither was it to put the South African citizenship regime, especially birthright citizenship, in a human right trial. This thesis will attempt to scrutinise the human rights issues of refugee rights within the paraphernalia of naturalisation in both domestic and international law.

Barutciski, on the other hand, provided a telling history of South Africa's refugee law and contrasted the gaps between the Green and White papers of migration leading to the current refugee and immigration laws.<sup>75</sup> The author, however, did not address the path to naturalisation in detail and understandably so because his paper was written in 1998 before the advent of both the refugee and immigration laws.

Jonathan Crush<sup>76</sup> at the end of the 1990s contrasted the policies of migration implemented in post-apartheid South Africa with those of the dark old days and laments that the new democracy has inherited the discrimination of the past despite commitments to human rights and democracy. He focused more on the labour side of migration. He did not address the question of the naturalisation of refugees either under domestic or international law. His work perhaps belongs to the history of labour migration spiced with a human right touch in post-apartheid South Africa.

Kleinsmidt and Manicom<sup>77</sup> were more concerned with the policy analysis of the 1998 Refugees Act. The authors addressed many issues amongst which are the evolution of the Refugees Act in South Africa, Southern African Development Community

---

<sup>75</sup>Barutciski M 'The Development of Refugee Law and Policy in South Africa: A Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill' (1998) 10 *Int'l J. Refugee L.* 700-724.

<sup>76</sup>Crush J 'Fortress South Africa and the deconstruction of Apartheid's migration regime' (1999) 30 *Geoforum* 1-11.

<sup>77</sup>Kleinsmidt V & Manicom D 'A Policy Analysis of the Refugee Act 130 of 1998' (2010) *Africa Insight* 39 (4) 164-181.

immigration<sup>78</sup> and refugee policy, the refugee situation during pre- and post-apartheid, the challenges of illegal migration, and the roles of NGOs etc. However, they did not address the issue of refugee naturalisation and the implication for human rights neither did they examine the biopolitics of the South African citizenship and its impact on the naturalisation process. Likewise, they did not tackle naturalisation of refugees either domestically or internationally. This thesis will attempt to close this gap.

Crush and Vincent,<sup>79</sup> on the other hand, focused more on the movements of refugees in South Africa, the making of the Refugees Act, temporary protection and the repatriation of refugees. They further examined the contradictions between refugee and migration policies and the functioning of refugee centres. The two authors did not address the question of naturalisation under South African refugee and international law, neither did they look at the implication of the citizenship model and how it constrained the right to naturalisation in South Africa.

Matsinhe,<sup>80</sup> writing in post-2008 xenophobia, focuses more on the trial of the issues at hand which was xenophobia and, as he puts it, 'Africa's fear of itself'. This is so because Africans of non-South African origins were the subject of popular anger, killings and brutal torments during the infamous 2008 xenophobia. His work does not speak to the naturalisation of refugees in South Africa law or under international law.

No research has been published that has examined in detail the refugee's progressive right to citizenship from a legal perspective or critically assessed whether the citizenship

---

<sup>78</sup>Hereinafter SADC.

<sup>79</sup>Crush J & Vincent W 'Evaluating Refugee Protection in South Africa' (2002) *Southern African Migration Project: Migration Policy Brief No.7*, 1-17.

<sup>80</sup>Matsinhe DM 'Africa's Fear of Itself: the ideology of *Makwerekwere* in South Africa' (2011) *Third World Quarterly* 32 (2) 295-313.

model in South Africa does justice to refugees.<sup>81</sup> Specifically, no comprehensive research has been done that addresses in detail and from a legal perspective, the passage to citizenship for refugees in South Africa. Similarly, there is no research or data from the DHA regarding the progressive rights of refugees towards citizenship or that assesses the biopolitics of South Africa citizenship model and its impact on refugees' naturalisation. There has been no comprehensive research done to answer the question whether birthright citizenship, as in the case of the United States<sup>82</sup> and Brazil,<sup>83</sup> will do justice to refugee rights in South Africa.

It should be mentioned here that because birthright citizenship is constitutional in the United States, there are currently more than 85,000 South African born people living in the United States today<sup>84</sup> and elsewhere.<sup>85</sup> No research has been undertaken from a human rights angle that addresses the impact of birthright exclusion of children of refugees in South Africa and weighing the same against the Constitution of the Republic of South Africa. This study will therefore address this existing gap, and attempt to offer solutions.

---

<sup>81</sup>Le Roux W 'Migration, Disaggregated Citizenship and Voting Rights' (2009), seminar paper presented at the Forced Migration Studies Program, Wits, on 29 September 2009. Le Roux made a compelling case why non-citizen residents should have a say or vote in the laws that affect them. While this thesis will not address the issues of non-citizens participation in the democratic process of South Africa, it will use the equal moral worth of every human to argue that human dignity as an inviolable Constitutional value is quintessential in the equal distribution of rights especially full birthright membership for the progenies of refugees. This perhaps adds impetus to Le Roux's take on non-citizens participation because the equal moral worth of everyone in a particular territorial space is compelling for equal participation.

<sup>82</sup>The 14<sup>th</sup> Amendment to the US Constitution of 28 July 1868 provides for birthright citizenship.

<sup>83</sup>Art. 12 of the Federal Constitution of Brazil of 5 October 1998 provides for birthright citizenship.

<sup>84</sup>'South Africans thriving in US' *Sowetan2* August 2014, available on [www.sowetanlive.co.za/news/2014/08/02/south-africans-thriving-in-us](http://www.sowetanlive.co.za/news/2014/08/02/south-africans-thriving-in-us) (Accessed 15/2/2015).

<sup>85</sup>As at 23 August 2012, there were 155, 690 South African-born people in Australia, while there were 227,000 in the UK with exclusion of their progenies born in British soil. See Elizabeth Glanville 'How many South Africans live overseas?' *The South African* 23 August 2012, available on [www.thesouthafrican.com/how-many-south-africans-live-overseas/](http://www.thesouthafrican.com/how-many-south-africans-live-overseas/) (Accessed 15/2/2015).

### **1.11 Methodology**

The research methodology used in this thesis is non-empirical. This form of methodology is important because the thesis collected and analysed data from the DHA and information already available in print or on the internet. A decade of refugee and immigration data was collected at DHA's head office and the Standing Committee for Refugee Affairs and analysed in order to determine the various stages of refugee rights, timeframes and numbers. The study substantially utilised desk-top based research because it analysed the law, jurisprudence, case law, administrative practice and available literature on the various stages of the naturalisation process of refugees.

### **1.12 Ethical Consideration**

This thesis will conform to the University of Fort Hare's research policy. The research will indicate and acknowledge all sources used or quoted as complete references and it will avoid plagiarism. The research methodology used in this thesis is exclusively non-empirical and as such, no interviews were envisaged.

### **1.13 Limitations**

The data collection needed for analysis was obtained in Pretoria because it is the immigration headquarters of the DHA. The function of regional offices to issue all categories of permits, including permanent residence for refugees, became centralised when Dr. Dlamini-Zuma was minister of Home Affairs. Similarly, the data needed to analyse the trend of the certification of refugees into permanent residents could only be obtained at the Standing Committee for Refugee Affairs in Pretoria. This information is not randomly available online, neither is the complete data available at the

Parliamentary Monitoring Group's website or in Statistics South Africa annual reports. Lack of funding to cover travel to and from Pretoria may have denied the researcher from accessing valuable data and information. This gap, however, was filled by robust engagement with available literature, jurisprudence and online internet sources.

### **1.14 Presentation**

This thesis is divided into six chapters. Chapter I is the introductory chapter which provides an overview of the study, the research question, aims and objectives of the research, literature review, methodologies employed in the study, the limitations of the research and the outline of the chapters.

Chapter II focuses on the origins of refugees, the development of international refugee law and the shifting perceptions of refugees at the international level. While this chapter deals directly with the origins of refugees, it sets the pace for the dialogue that runs throughout the thesis. The origins of refugees and the development of refugee law in the twentieth century are necessary because of its foundational discursive element upon which the naturalisation of refugees is even possible as a topic of rights. On the development of refugee law at the international level, the thesis relies more on European literature. The reliance of European literature is premised on the fact that from the revocation of the Edict of Nantes in 1685<sup>86</sup> through to the 1951 Refugee Convention, the African countries were not independent states and therefore not actors on the international scene. This chapter further focused on the philosophical justification of the right to leave one's country of origin. It addresses the concept of refuge in

---

<sup>86</sup>This revocation led to one of the largest movements of religious exiles from France upon which the term refugee was first coined.

medieval times and the emergence of the term 'refugee.' It looks into the development of refugee law under the League of Nations and the current international refugee regime. It tackles the changing perceptions of refugees at the international level, especially after the end of the Cold War. Building on this history, this chapter analyses the contribution and impact of regional instruments such as the OAU Convention Governing the Specific aspects of Refugee Problems in Africa as part of the growing literature on refugee rights in post-the 1951 Refugee Convention.

Chapter III deals with the naturalisation of refugees under international law. With more than 60 million refugees in the world today,<sup>87</sup> 188, 000 rescued so far trying to cross the Mediterranean into the European Union,<sup>88</sup> more than 2,000 dead in the same effort,<sup>89</sup> with an average of 6,000 persons arriving on European shores daily and with 120, 0000 persons present in the EU in need of protection,<sup>90</sup> the world has not seen anything like this since the height of World War II. With Britain racing to up the ante of deportation to stem what prime minister Cameron called 'swarm' crossing in the Mediterranean,<sup>91</sup> the closing of the Hungarian border and with the death by drowning of a three year old Syrian boy Aylan Kurdi after the boat carrying them to the Greek island of Kas capsized

---

<sup>87</sup>'World faces major crisis as number of displaced reached record high' *UNHCR* 18 June 2015. See also '60 Million People Living Today as Refugees' *Huffington Post* 19 June 2015, available on [www.60-million-people-living-b7623596.html](http://www.60-million-people-living-b7623596.html) (Accessed 23/7/2015).

<sup>88</sup>Hereinafter, the EU.

<sup>89</sup>'Radio Free Europe/Radio Liberty; More than 2,000 migrants have died crossing Mediterranean' 4 August 2015, available at <http://www.refworld.org/docid/55ee965f23.html> (Accessed 15/8/2015).

<sup>90</sup>Melissa Fleming 'UNHCR outlines Proposals to manage refugee and migration crisis in Europe ahead of EU Summit' Briefing Notes *Palais des Nations*, Geneva, 22 September 2015, available at [www.unhcr.org/print/560146a46.html](http://www.unhcr.org/print/560146a46.html) (Accessed 2/10/2015).

<sup>91</sup>'Calais Crisis: Deport more migrants to stop 'swarm' crossing Mediterranean, says David Cameroon' *The Telegraph* 30 July 2015. <http://www.gosucker.info/1/Home/0/1/News/6/Telegraph/Calais-crisis-Deport-more-migrants-to-stop-swarm-crossing-Mediterranean,-says-David-Cameron-25452.html> (Accessed 5/8/2015).

shocking the conscience of the world,<sup>92</sup> the EU and the rest of the West especially, have come face to face with the practical side of human rights as much as being human. As migrants rain over Europe to seek protection and with South Africa's decision to deport more than 2,000 Angolan refugees – some of whom have been in the country for as long as 18 years without citizenship<sup>93</sup> there is no better time to write on the subject of the naturalization of refugees.

This chapter therefore tackles the legal position of naturalisation under international law and demonstrates the imprecision of its naturalisation provisions. It revisits the much debated dichotomy about refugee rights and citizen's rights and upon the assumption of a difference between the citizen and the refugees', it draws a distinction between these rights. It argues that the legal imprecision of the provision of naturalisation under the Geneva Convention and the difficulties in realising actual human rights for refugees which is only possible through full membership is predicated on the fact that actual rights have been tied to territory, sovereignty, borders and their inhabitants. The chapter also examines these indicators individually alongside their implication on the naturalisation of refugees and contends that the presence of these indicators contributed to the framing of a weak position of naturalisation of refugees under Article 34 of the Geneva Convention. It attempts to argue that human rights are in reality citizenship rights, a tradition that has survived since Westphalia. Despite the legal inaccuracy of the naturalisation provision under the Geneva Convention, it nonetheless

---

<sup>92</sup>"Turkish policeman who found Aylan says: 'I thought of my own son'" *The Citizen*, 6 September 2015.

<sup>93</sup>'SA to send refugees home' *SowetanLive* 4 September 2015, available at <http://www.sowetanlive.co.za/news/2015/09/04/sa-to-send-refugees.-home> (Accessed 20/9/2015).

sets a pace for the realisation of such rights by the various governments of member states. The rights allocated to refugees by various member states is actually contingent on the human rights, constitutional and democratic culture of each state. Some states have granted more rights to refugees than others. Many states, for example in Africa and particularly in East Africa, have entered reservation on Article 34 of the Geneva Convention. In these countries, refugees do not naturalise as a matter of human rights whereas South Africa has a passage of naturalisation for refugees. In this context therefore, the human rights, democratic and constitutional value of each member state to the Geneva Convention determines what rights refugees are entitled in their territory. With this differentiation in the assemblage and disarticulation of refugee rights varying from one state to the other, the next chapter articulates and examines the naturalisation process of refugees in South Africa.

Chapter IV therefore brings the argument of naturalisation of refugees home to South Africa. This chapter tackles the legislative history of refugee law in South Africa. It examines briefly the law applicable to refugees before the advent of democracy and South Africa's assumption of international obligations to refugees. It looks into South Africa's obligations under international refugee law and how these obligations inform the drafting of its Refugees Act. It also looks into the drafting history of its refugee legislation in a bid to understand the philosophy behind refugee law in South Africa. This is important because it informs the country's perception of its obligations under international refugee law and general human rights law. The success and failures in the execution of South Africa's obligations to refugees is contingent on its legislations and so understanding the intention of the drafters is vital to assess the general process of

naturalising refugees. The chapter also examines various legal stages towards the naturalisation of refugees in South Africa in keeping with its international obligations. It looks at the rights of refugees and the path to naturalisation and identifies the legal and policy gaps in the refugee legislation in South Africa and the implications of such gaps on the process of naturalisation of refugees.

Chapter V examines immigration, the Constitution and the biopolitics of South African citizenship. It is trite that the citizens regime of a country such as South Africa as in elsewhere in the world determines the mode of belonging even to refugees. This chapter lays out the legal architecture of the naturalisation process, its application and impediments while focusing on the naturalisation process of the progenies of the refugees in South Africa. It looks into the role that the courts have played in the realisation of refugee rights towards naturalisation in South Africa. The policy impediments in the refugee and naturalisation process entertain a study of the biopolitics of South Africa's citizenship model and its implication on this process of belonging. While biopolitics is an instrument or strategy of population control, the controlling population in this case is refugees and their descendants. In assessing the naturalisation rights of refugee children born in South Africa, the birthright regime and biopolitics of South African citizenship model comes under scrutiny. In scrutinising the philosophical underpinnings of its citizenship model, certain constitutional provisions are employed such as the inviolable right to human dignity. It will argue that certain aspects of the refugee, immigration and citizenship act as enforced currently, cannot pass constitutional muster and are therefore illegal. If certain provisions of these

aforementioned acts defy the Constitution of South Africa, they should no longer be applicable.

Chapter VI is the concluding chapter, bringing together the major findings or conclusions reached in this research. This chapter brings together all the major findings, emerging challenges and recommendations. It recommends major legal and policy changes towards naturalisation of refugees and their children under the refugee, immigration and citizen laws in South Africa in keeping with the Constitution and the country's obligations under international human rights and refugee law.

## CHAPTER 2

### APPRAISING REFUGE AND REFUGEES FROM A HISTORICAL PERSPECTIVE

The Prince of Sacrifice return  
as rain in a drouth year,  
The Prince of War return  
as sores on the face of politicians  
The Prince of Betrayal return  
impaled on the swords of their friends.  
But the Prince of Exile never return.

Richard Shelton, "The Prince of Exile"  
The New Yorker, 45, October 22, 1973, at 50

#### 2.1 Introduction

This chapter is foundational to the entire thesis. In itself, the chapter tackles the origins of refuge which before the emergence of the word "refugee", was sanctuary. In unpacking the history of sanctuary, this chapter goes beyond contemporary writings on refugee literature within space and time. As a transnational concept, the spatial discursive literature on refugee studies very often omit one historic truth which is fundamental to a complete understanding of this discipline – the philosophical underpinnings that justify the right to leave one's country of origin in the first place.

The first part of this chapter is dedicated to establishing the philosophy behind the right to leave one's country of origin. Zolberger *et al* acknowledged that for a refugee flow to begin, 'certain conditions must be met in one or more of the states of destination as well as in the state of origin. People cannot leave their country if they have no place to

go....<sup>94</sup> While this holds true to all types of international migration, including forced migration (refugees), it ignores the foundational question of what if there was no right to leave one's country of origin in the first place? The first section of this chapter will be responding to this concern.

The second section deals with the concept of refuge in medieval times and the emergence of the word "refugee". This part of the chapter targets developments of the concept of refuge in selected countries. It however links the emergence of the word 'refugee' to Spain contrary to some writers who took the view that the concept of the 'refugee' first emerged in France.<sup>95</sup>

Section three tackles the development of the concept of 'refugee' under the League of Nations. It answers the question why the refugee concept under the League of Nations did not survive into contemporary times.

In section four, the focus shifts to the current international refugee regime where the concept of 'refugee' is evaluated. It attempts to answer the question why the current refugee regime is incapable of actualising the practical universal rights of refugees as set out in the international refugee regime and other relevant international human rights instruments. It looks at the internationalism of the present international refugee regime.

Section five deals with the changing perception of refugees at the international level and the implication it has on the human rights of refugees. It will be argued that the once

---

<sup>94</sup>Zolberg A, Astri S & Sergio A. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (1989) 7.

<sup>95</sup>Haddad E 'The Refugee: Individual between Sovereigns' (2003) *Global Society*, 17:3, 297-322 who wrote on p.302 that, ...indeed, it was in regard to these French Protestants that the term refugee was first coined. In Zolberg *et al*, n 1, on p.3, the authors noted that the term 'refugee' was first employed in 1573.

lionised<sup>96</sup> perception of refugees as freedom fighters quite common in Cold War rhetoric has faded into images of aimless wanderers, high sea rejects and social misfits severely incapable of integration. Peter Rose succinctly captures the conflicting images of the refugee in this way:

*Refugees: A word that conjures up images of sad-eyed children with bloated bellies in dusty border camps. Refugees. Alexander Solzhenitsyn and his friends at a press conference in Zurich. Refugees. A family of bewildered Vietnamese arriving at a snowy airport in northern Minnesota. Refugees. A group of sullen Cubans behind a cyclone fence on an old army post in Arkansas. Refugees. Two elderly Soviet Jews being lionised at a community centre in New Jersey.*<sup>97</sup>

The changing perception of refugees internationally represents a balance sheet of how refugee rights have played out in most countries that they find themselves especially in their effort toward naturalisation.

Section six concludes chapter two. It reaches a conclusion quite different from other writers who opined that the current international refugee regime is an illusion and advocate for its ultimate liquidation.<sup>98</sup> It acknowledges that the history of refugees sets the stage for the discourse of naturalisation under international law.

In this chapter, European literature on the development of the concept of refuge and international refugee law is used: first, because the concept under discussion originates from that continent; and because the concept of refuge and refugee was developed, refined or betrayed in the same continent and exported to the rest of the globe. Third, the international law governing refugees in the broader context of humanitarian law and

---

<sup>96</sup>To be lionised is to be recognised with honour.

<sup>97</sup>Rose P 'Some Thoughts about the Descendants of Theseus' (1981) *International Migration Review*, Vol. 15, No. 1/2 8-15 at p1.

<sup>98</sup>Davis S 'Truly' *International Refugee Law? Or yet Another East/West Divide?* (2002) *Social Alternatives*, Vol. 21 (4) 37-44. Dunbar-Oritz R & Harrell-Bond B 'Africa Rights Monitor: Who Protects the Human Rights of Refugees?' (1987) *Africa Today*, Vol.34, No. 1/2 105-125. See also Davis S 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) 19 *International Journal of Refugee Law*, 703-728.

human rights is a product of European creation forged by centuries of Western experience.

## 2.2 The Philosophy behind the Right to leave one's Country of Origin

The right to leave one's country of origin is as old as migration itself.<sup>99</sup> Though this right has been included in major human rights instruments today, the immediate impetus for the inclusion of the right was the Nazi regime's curtailment of free movement of people during World War II.<sup>100</sup> Although the circumvention of free movement in the Nazi era triggered the sanction of freedom of movement internationally and made it a universal right, it arose out of a much longer intellectual lineage linked to the concept of 'liberty'.

It is argued that the extent to which a state permitted emigration was a barometer in practical terms of its idea of liberalism towards personal political freedom.<sup>101</sup> John Torpey, for example, noted that 'the freedom to move about internally or to emigrate beyond the borders of one's country has remained a matter of the greatest significance in political struggle down to our day.'<sup>102</sup>

---

<sup>99</sup> Mcadam J 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) *Melbourne Journal of International Law*, Vol. 12 (1)27-56, at p.28.

<sup>100</sup>It should be noted here that there is no historical trace at any time in history from classical, enlightenment and even in contemporary liberal consciousness of unlimited freedom of movement across borders even in the restricted context of the right to leave and return. See Hannum H *The Right to Leave and Return in International Law and Practice* (1987) where he noted at p. 4:

All commentators agree that some restrictions of such movement are legitimate if imposed for limited purposes in a fair and non-discriminatory manner, eg, on grounds of securing compliance [sic] with valid judicial or administrative decrees; preventing the spread of contagious diseases; ensuring fulfilment of [sic] of certain contractual obligations; and, in time of war, regulating movements that may directly affect legitimate national security concerns.

<sup>101</sup>See generally Mcadam J 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) *Melbourne Journal of International Law*, Vol. 12 (1)27-56, at p.29.

<sup>102</sup>Torpey J *Leaving: A Comparative View* in Green N & Weil F(eds) *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation* (2007) 13.

A state's population is its manpower and in this vein, 'represented the most valuable asset of any sovereign.'<sup>103</sup> Emigration was at times seen as an economic necessity for

states and as a means of 'expanding national wealth through trade and remittances.'<sup>104</sup>

The focus here was rather less of free movement as an aspect of personal economic freedom and development but rather as a means of increasing national wealth.<sup>105</sup>

Freedom of movement, inclusive of the right to leave and return to one's own country, in classical thought has its origins in ancient philosophy and natural law. In articulating the vision of Socrates, Plato wrote:

We further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him. None of our laws will forbid him or interfere with him. Anyone who does not like us and the city, and who wants to emigrate to a colony or to any other city, may go where he likes, retaining his property.<sup>106</sup>

This Socratic position reflected the classical conception of freedom of movement and was integral to personal liberty even if it was limited to certain male adults.

In modern times, some of the first to write on free movements were lawyers setting out the principles of the 'law of nations' (international law). The Spaniard, Francisco de Vitoria (1492-1546), and Dutchman Hugo Grotius (1583-1645)<sup>107</sup> had enormous influence on the development of the international law. Although these two scholars wrote against a historic backdrop of advancing the imperial trade expansion of their

---

<sup>103</sup>Zolberg A *The Exit Revolution* in Green N & Weil F (eds) *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation* (2007) 33. See also Johnston H *British Emigration Policy 1815-1830: Shovelling out Paupers* (1972) where he wrote on p.2 that 'Men still equated population with power and wealth and saw each industries emigrant as a further loss of national strength'.

<sup>104</sup>Zolberg, n 93, *ibid*.

<sup>105</sup>Mcadam J, above n 99, 29.

<sup>106</sup>Crito 51d-e, quoted in Meagher S *Philosophy and the City* (2008) 22.

<sup>107</sup>Grotius is known as the 'father of the law of nations'. See Jennings R & Watts A (eds.) *Oppenheim's International Law* (1992) where they noted on p.43 that 'the book of Grotius obtained such a world-wide influence that he is correctly styled the "Father of the Law of Nations"'.

respective states,<sup>108</sup> their contribution set the stage for the development of the philosophy of free movement. Grotius, for example, demonstrated clearly that the Dutch... 'have the right to sail to the East Indies, as they are doing, and to engage with trade with the people there'.<sup>109</sup> Vitoria on his part, took the view that '[i]t was permissible from the beginning of the world for anyone to set forth and travel wheresoever he would' which justified the travel of the Spaniards to the new world.<sup>110</sup>

Vitoria's work sets out fourteen propositions and proofs related to the right to free movement. Albeit his efforts were geared towards the right to enter one's country, it is quintessential to the argument that people have the right to leave their country of origin. Relevant among his fourteen propositions and proofs to this writing, is proof 2 and 3. De Vitoria's first proposition and proof is that nations were free to travel to other lands provided they do no harm to the natives and natives may not prevent them.<sup>111</sup> This, he argued, is derived from the law of nations (*jus gentium*), 'which either is natural law or is derived from natural law'<sup>112</sup> (that which 'natural reason has established among all nations').<sup>113</sup> In his view therefore, it was 'natural' to permit foreigners to enter a territory.

---

<sup>108</sup>Fauchille P 'The Rights of Emigration and Immigration' (1924) 9 *International Labour Review* 317-320 where he noted on p.318 that 'One of the rights of states is to carry on international trade, and such trade necessarily implies for the nationals of states the power to pass to and from the territories of other states'. See generally Mcadam J above n 99, 33.

<sup>109</sup>Grotius H, *The Freedom of the Seas* (Ralph van Deman Magoffin trans) (1916) [trans of: *Mare Liberum* (first published 1609) 7.

<sup>110</sup>De Vitoria F *On the Indians Lately Discovered* (Bate J trans) (2000) sect III, 386 [trans of: *De Indis Noviter Inventis* (first published 1532)].

<sup>111</sup>Ibidat 386.

<sup>112</sup>Ibid, at xxxvi.

<sup>113</sup>Ibid, referring to Justinian, *The Institutes* I.ii.I.

In his second 'proof' he contended that common ownership of property from the beginning of the world meant that anyone had been free to travel and settle 'wheresoever he would' and that this right had not been lost even as property began to be divided up.<sup>114</sup> De Vitoria even turned to 'divine law' to bolster his argument that the right to enter another's country is part of natural law. He relied on St. Mathew - 'I was a stranger and ye took me not in'<sup>115</sup> - to suggest that it is aberrant to refuse a stranger. Present day international law does not reflect his views on the right of entry but it does recognise the right to leave.<sup>116</sup>

Grotius on the other hand, declared the principle that '[e]very nation is free to travel to every nation 'to be a 'most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable'.<sup>117</sup>

Later on in the 1620s, Grotius admonished that foreigners who had been expelled from their homes and were seeking refuge should not be denied permanent residence, provided they submitted themselves to the established government 'and observe[d] any regulation which [were] necessary in order to avoid strife'.<sup>118</sup> Citing Cicero's description of 'the foundations of liberty' as being the right to retain or abandon one's country and his commendation of a law that said 'no one is forced to remain in a state against his

---

<sup>114</sup>Ibid.

<sup>115</sup>De Vitoria, n 108, at xxxvii, referring to St Mathew, Ch 25 (King James Version).

<sup>116</sup>UDHR art 13(2); ICCPR art 12(2).

<sup>117</sup>Grotius, *The Freedom of the Seas*, n107, xxxi.

<sup>118</sup>Grotius H, *On the Law of War and Peace* (Francis W Kelsey trans) (1925) Vol.2, 201 [trans of: *De Jure Belli ac Pacis Libri Tres* (first published 1625)].

will',<sup>119</sup> Grotius concluded that people not only had a right to physically leave their own country but also to withdraw from its political constituency.<sup>120</sup>

More than a century later, the Swiss lawyer, Emmerich de Vattel (1714-67), would agree that people may quit a society and retire elsewhere, sell their land, and take with them all their effects.<sup>121</sup> In the *Law of Nations*, he proclaimed that:

A person may quit his country because every man is born free; and the son of a citizen, when comes to the years of discretion, may examine whether it be convenient for him to join the society for which he was destined by his birth. If he does not find it advantageous to remain in it, he is at liberty to quit it on making it a compensation for what it has done in his favour, and preserving, as far as his new engagements will allow him, the sentiments of love and gratitude he owes it.<sup>122</sup>

Adopting a cautious view that the right to leave one's country of origin is and cannot be an absolute right, Swiss philosopher Jean Jacques Rousseau noted that a person can only renounce allegiance to a state if 'he does not leave to escape his obligations and avoid having to serve his country in the hour of need. Flight in such a case would be criminal and punishable, and would be, not withdrawal, but desertion'.<sup>123</sup>

English lawyer William Blackstone characterised the right to leave as part of the common law right to personal liberty. Though he continued advocating perpetual allegiance to the crown, Blackstone wrote that every Englishman under the common law had an absolute right derived

---

<sup>119</sup>*Ibid*, 254.

<sup>120</sup>Grotius, *The Freedom of the Seas*, n 107, 254.

<sup>121</sup>De Vattel E, *The Law of Nations, or, Principles of the Law of Nature* (G G& Robinson J, revised eds) (1797) bk I, ch III [33] [trans of: *Les Droit des Gens ouPrincipes de la LoiNaturelle*(first published in 1758)].

<sup>122</sup>*Ibid*, bk I, ch xix, 220.

<sup>123</sup>Rousseau JJ *The Social Contract* (George Douglas Howard Cole trans, Cosimo Classics) (2008) 101 [trans of: *Du Contract Social* (first published 1762)]. In fact similar ideas formed part of emerging liberal discourse on the 'rights of man' which was central to the notion of individual freedom in relation to the state. In his *Two Treatise of Government* (1689) at p.121, John Locke (1632-1704) regarded leaving one's country as the means by which one could refuse consent to be part of a political community. In Locke's view, the right to expatriate one's self was a manifestation of self-government and individual self-determination.

from 'the immutable laws of nature' to exercise the power of locomotion, of changing situation or moving one's person to whatsoever place one's inclination may direct....'<sup>124</sup>

During and post the 1789 revolution, the French on the other hand, associated freedom of movement and the right to leave with the broader right to liberty.<sup>125</sup> In the litany of complaints against the government and the privileges of the aristocracy, art 2 of the *cahiers* of the *Parish of Neuilly-sur-Marne* drew on divine law to plead:

As every man is equal before God and every sojourner in this life must be left undisturbed in his legitimate possessions, especially in his natural and political life, it is the wish of his assembly that individual liberty be guaranteed to all the French, and that therefore that each must be free to move about or to come, within and outside the Kingdom, without permissions, passports, or other formalities that tend to hamper the liberty of its citizens.<sup>126</sup>

Across the Atlantic, Thomas Jefferson expanded the frontiers of the right to free movement drawing on Blackstone's thinking to advance America's claim to the right of expatriation which would enable a severance of links to the British Crown in this way:

[O]ur ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right, which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as, to them, shall seem most likely to promote public happiness.<sup>127</sup>

He continued:

I hold the right of expatriation to be inherent to every man by the laws of nature, and incapable of being rightfully taken from him even by the united will of every other person in the nation. If the laws have provided no particular mode by which the right of expatriation maybe exercised, the individual may do it by any effectual and unequivocal act or declaration.<sup>128</sup>

---

<sup>124</sup>Blackstone W *Commentaries of the Laws of England* (1775) Vol. I, bk I, ch I, s II at 124.

<sup>125</sup>Torpey J *The Invention of the Passport: Surveillance, Citizenship and the State* (2000) 29.

<sup>126</sup>*Ibid*, quoting *Cahiers des Etats Generaux* (Libraire Administrative de Paul Dupont, 1866) vol. 4, 759. Although none of the 17 articles of the 1789 *Declaration of the Rights of Man and Citizens of 26 August 1789* expressly provided for freedom of movement or a right to leave (since it was presumably thought to be encompassed in the broader 'right to liberty' under art 4), the *French Constitution of September 1791* guaranteed in title 1 'the freedom of everyone to go, to stay, or to leave, without being halted or arrested in accordance with procedures established by the Constitution.

<sup>127</sup>Jefferson T *A Summary View of the Rights of British America* (1774) in Wakelyn J (ed.) *America's Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance* (2006) 581.

<sup>128</sup>Letter from Thomas Jefferson to the Secretary of the Treasury Albert Gallatin, 26 June 1806 in Ford P (ed.) *The Works of Thomas Jefferson: Correspondence and Papers 18-3-1807*, Vol.10, 273. This same

The period therefore from 1850 to 1930 has been described as the most intensive period of migration history, with over 50 million Chinese, 50 million Europeans and around 30 million Indians leaving for new lands. This migration was rendered possible because the right to free movement, inclusive of the right to leave one's country of origin, was developed as a natural right and forced migration is viewed along this same prism. In fact an 1881 Lalor's Encyclopaedia described emigration as the 'highest form' of freedom of movement in these words:

The free man is little bound to the state as to the soil. It is not worthy of the state to hold him as if he were a serf, if he wishes to leave his home and hopes to find in another state better conditions for his advancement. But it was a long time before freedom of emigration was acknowledged. It is not acknowledged everywhere even to-day. But the state certainly has a right in this matter, viz, that the emigrant shall beforehand fulfill his indispensable duties towards his native country, and shall not, apparently to evade or mock the law of the land, simply step out of his previous allegiance to one government into allegiance to another<sup>129</sup>

In fact, if freedom of movement encompasses the right to leave one's country and if expatriation is the right to renounce one's nationality, then emigration describes the act of leaving one's country to reside in another. Having the opportunity to vote with one's feet is perhaps the ultimate means of expressing personal liberty.<sup>130</sup>

---

right so vehemently defended by Jefferson which bolstered America's case for severing ties with the British Crown was denied mankind by his fellow countrymen 135 years later when proposals were afoot for a universal charter of human rights. An official US Draft, the State Department's 1942 *Declaration of Rights*, did not include the right to freedom of movement.

<sup>129</sup>Bluntschli J *Freedom and Rights of Freedom* in Lalor, *Cyclopaedia of Political Science, Political Economy, and of the Political History of the United States by the Best American and European Writers* (1883) Vol. II, 281.

<sup>130</sup>Hannum H *The Right to Leave and Return in International Law and Practice* (1987) 4. He continued that 'There is no doubt that the right to 'vote with one's feet' — whether to escape persecution, seek a better life, or for purely personal motives having nothing to do with larger political or economic issues — may be the ultimate means through which the individual may express his or her personal liberty.

Whereas a right to free movement was not consistently included in the rights declarations proposed during WWII and the immediate post-war period,<sup>131</sup> by 1948, the notion of a right to leave and return to one's country was expressed as a fundamental human right worthy of recognition in the first universal human rights instrument.<sup>132</sup> It has been suggested that it was essential to include this right in the Universal Declaration of Human Rights because without it,

a person may be unable to associate with his kith and kin, to obtain employment which is not available in his country, and to achieve a better standard of living. He may be prevented from studying or from marrying and raising a family. He may even be prosecuted in the country where he is forced to stay. Such a policy would evidently be contrary to the other principles embodied in the *Declaration on Human Rights*.<sup>133</sup>

Freedom of movement was described by various delegations as 'a fundamental human right',<sup>134</sup> 'the sacred right of every human being... necessary to progress and to civilisation',<sup>135</sup> and a principle 'recognised before national states had reached their present age of development'.<sup>136</sup> Interestingly, many of the drafters of the Universal Declaration of Human Rights were themselves émigrés.<sup>137</sup>

---

<sup>131</sup>Simpson A *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001) 187.

<sup>132</sup>Article 13 of the UDHR.

<sup>133</sup>Jagerskiold S *Historical Aspects of the Right to Leave and Return* in Vasak K & Liskofsky S (eds.) *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19-20 June, 1972* (The American JEWISH Committee) 1, 3.

<sup>134</sup>Commission on Human Rights, *Summary Record of the Fifty-Fifth Meeting*, UN ESCOR, 3<sup>rd</sup> sess, 55<sup>th</sup> mtg, UN Doc E/CN.4/SR.55 (15 June) 1948) 6 (Indian Delegate).

<sup>135</sup>*Summary Record of the 120<sup>th</sup> Meeting*, UN Doc A/C.3/SR.120, 316 (Chilean Delegate).

<sup>136</sup>*Ibid* 318. *Draft International Declaration of Human Rights: Report of the Third Committee*, UN GAOR, 3<sup>rd</sup> Comm, 3<sup>rd</sup> sess, UN Doc A/777 (7 December 1948) (Haitian Delegate).

<sup>137</sup>Among the drafters who were émigrés are, André N Mandelstam, a Russian émigré who settled in Paris and who was also a former jurist and diplomat after the Bolshevik Revolution in Russia; the Greek expatriot and jurist Antoine Frangulis who settled in France; Egon Schwelb, a Gestapo prisoner and émigré from Prague who settled in Britain and later in the US till his death. For a full and a more comprehensive list, see Simpson *supra*, n 129 at 205-7; see also Bernstorff J 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) *The European Journal of Human Rights* 19 (5) 903-924 at 905-910; See also Mazower M 'The Strange Triumph of Human Rights, 1933-1950' (2004) *The Historical Journal* 47 (2) 379-398 at 381-386.

Although its foundation was predicated on imperialistic expansion, desire of sovereignty and economic gains, freedom of movement and the right to leave one's country of origin is now a universal right upon which the rights of asylum and refugee rights takes their cue.

### **2.2.1 Refuge in Medieval Times**

There is no 'proto-refugee' of which the modern refugee is a direct descendant, any more than there is a 'proto-nation' of which the contemporary nation form is a logical, inevitable outgrowth. As long as mankind has existed, people have been moving from place to place for whatever reasons they may have. According to Atle Grahl-Madsen, refugee movements have been recorded 'as far back as the history of mankind'.<sup>138</sup> In classical times, contemporary words like 'refuge' and 'asylum' were 'exile' and 'sanctuary'. Blending the classical with the contemporary, Peter Rose captures the refugee with typical acuity:

Many contemporary refugees are exiles in the original sense of that Latin-rooted term: they are outcasts, expellees who have been banished from their home lands. Many more are exiles in the modern vein, reluctant leavers forced to flee, driven out by the prospect of an unacceptable fate should they chose to stay behind. And there are others, perhaps the largest group, the human flotsam and jetsam caught in the cross-currents of conflicts which are not of their direct concern. They are untargeted victims, bystanders sucked into the maelstrom then washed ashore (or along a muddy trail or a fetid campsite) with other frightened, hungry and bewildered displaced persons.<sup>139</sup>

Meanwhile the term refugee has only recently entered the legal vernacular, the seeker of sanctuary, driven out by centrifugal forces beyond his/her ability to control is as old a figure in the human drama as communal life itself. Kaplan notes that 'exile' has 'played a role in western cultures of narratives since the Hellenic era'.<sup>140</sup> The term 'refugee' which was first

---

<sup>138</sup>Madsen A *The Status of Refugees in International Law* (1966) 9.

<sup>139</sup>Rose P 'Some Thoughts about Refugees and the Descendants of Theseus' (1981) *International Migration Review*, Vol. 15, No. 1(2)8-15.

<sup>140</sup>Kaplan C *Questions of Travel: Postmodern Discourses of Displacement* (1996) 27.

employed in 1573, emerged through this process of identity formation.<sup>141</sup> The privileging of displacement in the identification of victims of human rights abuse is thus rooted in the history of refugee movement. Stafford on the other hand claimed that ‘the privilege of sanctuary had been enjoyed since before time out of mind.’<sup>142</sup>

In the Greek states, asylum was afforded to ‘zealous conquerors’, to those emerging conquered from wars, and to the politically oppressed.<sup>143</sup> In medieval times (AD 350-1450) asylum became closely allied to the public realm of state and church, with asylum and sanctuary being relatively interchangeable concepts, both representing fundamental underpinnings of the common law.<sup>144</sup> In classical times banishment was a form of social death, a kind of capital punishment.<sup>145</sup> In Sophocles’ *Oedipus at Colonus*, we are told how Theseus, King of Athens, welcomed the beleaguered and blinded Oedipus to his homeland saying

Never could I turn away from any stranger  
such as you are now  
and leave him to his fate....<sup>146</sup>

And later, assuring the old man who is still confused by Theseus’ generosity, the compassionate King reiterates his words of welcome.

Your life is safe - be sure of that -  
while any god saves mine.<sup>147</sup>

---

<sup>141</sup>Zolberg A, Suhrke A, Aguayo S *Escape from Violence: Conflict and the Refugee Crisis in the Development World* (1989) 3.

<sup>142</sup>That is, prior to 30 September 1189, the first day of the reign of Richard I (Richard the Lion Heart). James A Ballentine’s *Law Dictionary* (1969) 3<sup>rd</sup> ed., s.v. noted that events after 30 September 1189 were recorded as ‘time of legal memory.’

<sup>143</sup>See generally Rose, ‘*Some Thoughts*’ above, n 137, 8-9.

<sup>144</sup>See generally, Ryan W ‘*The Historical Case for the Rights of Sanctuary*’ (1987) *Journal of Church and State* 209.

<sup>145</sup>Fustel de Coulanges D *The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome* (1980) 193.

<sup>146</sup>Sophocles, *Oedipus at Colonus* in *The Oedipus Plays of Sophocles* (1958) (Paul Roche trans) 110.

<sup>147</sup>*Ibid.*

Banished, uprooted, or displaced, the princes (and paupers) of exile are found throughout history. We know of them from the biblical texts which tell of the exodus from Egypt, from lamentations of those encamped along the Rivers of Babylon, and through the prayers of those in the Diaspora who for over two millennia proclaimed in a wild dirge “Next Year in Jerusalem”.

By the rivers of Babylon, there we sat down,  
Yes, we wept,  
When we remembered Zion.  
We hanged our harps upon the willows  
In the midst thereof.

For there they carried us away captive  
Required of us a song;

And they that wasted us  
Required of us mirth, saying  
Sing us one of the songs of Zion.

How shall we sing the Lord's song  
In a strange land?<sup>148</sup>

According to biblical accounts, after the Hebrews were freed from four hundred years of slavery in Egypt, and as they were conquering Canaan's land (modern Israel and portions of Jordan, Lebanon and Syria); they received instructions to set up three cities of refuge.<sup>149</sup> The purpose of these cities of refuge was to prevent the avenger from killing one who was not worthy of death.<sup>150</sup> The refuge seeker had to confess his crime at the city gates to the elders (a bureaucratic equivalence of a Refugee Status Determination Officer in South Africa today) who then permitted him to enter and gave him a place to dwell among them.<sup>151</sup>

---

<sup>148</sup>Psalm 137. (all biblical references are as in King James version, 1611).

<sup>149</sup>Deut.19: 1-7.

<sup>150</sup>Deut.19:6.

<sup>151</sup>Joshua. 20:4.

Besides the cities of refuge, in at least two instances, those who feared for their life fled to the tabernacle or the temple and caught hold of the horns of the altar.<sup>152</sup> These persons sought refuge in the sanctuary itself.

It is said that Romulus, the mythical founder of Rome, was the first to create a sanctuary when the Palatine Hill was made an asylum for fugitives.<sup>153</sup> Although the story is apocryphal like many classics in antiquity, it highlights the idea that sanctuary is not merely of Judeo-Christian origin but is, indeed, part of the *Volksggeist*.<sup>154</sup> The purpose of asylum in antiquity is perceptively captured by Norman Trenholme in this way:

It is said that in times of war the Greeks asylums were crowded with supplicants, while in time of peace they were often deserted. This was the principal purpose of asylum in classical times: to save the lives of those defeated in war.<sup>155</sup>

In classical times therefore, refuge, was to save the lives of those defeated in war or in general distress. The concept of refuge under classical thought was not solely a mainstay of a Judeo-Christian philosophical underpinning but a Greco-Roman upshot as well and the concept grew from the mercy and humanity shown to the defeated in times of war especially.

## **2.2.2 Refuge in the Age of Religious and Political Intolerance**

The joining of moments of exile into an abstract and seemingly ahistorical category forms the basis of the refugee concept which now exist as a socio-political construct - one which has 'a diffuse meaning in ordinary parlance and a much more precise one in legal and

---

<sup>152</sup>1 Kings 1:50.

<sup>153</sup>Plutarch "Romulus" in *Lives of the Noble Greek and Romans* (1886) (trans: J. Langhorne) 1:24 "As soon as the foundations of the city was laid, they opened a place of refuge, which they called the temple of the Asylaeon god."

<sup>154</sup>The term comes from Von Savigny and represents what he calls "the common consciousness of the people". See generally Von Savigny F *System des Heutigen Romischen Rechts (System of Modern Roman Law)* (1840-49) 12.

<sup>155</sup>Trenholme N *The Right of Sanctuary in England* (1903) 302.

administrative jargon'.<sup>156</sup> It emerged to describe a group of people whose defining moment had come about with their exodus from France, who had, by the process of exile (that is, movement) defined themselves.<sup>157</sup>

Their refugeehood is not conditioned upon their movement rather 'refugee' is a category which attaches itself once exile has occurred, all other things being equal. This is so in both historical and contemporary terms and is a truth which applies universally to movements of those we designate as 'refugees' whatever the motivating cause of their movement. No artificial construction — legal or socio-political, can add or alter this essential truth.<sup>158</sup> In post-medieval ages the 'site of asylum' was claimed by the 'well to do'...or at least the 'once well to do'.<sup>159</sup> Unlike today, it was a relatively exclusive site, importing strong power relations,<sup>160</sup> and was rapidly filled during the three centuries before our own during which the exodus of religious and political dissidents became a feature of European history. Indeed, religious persecution soon came to be known as the 'classic' hallmark of the refugee.<sup>161</sup>

### **2.2.2.1 Refuge in Political and Religious Intolerant Spain**

The refugee process under consideration originated in Western Europe half a millennium ago, where it produced several massive waves of refugees in the period extending from the

---

<sup>156</sup>Zolberg *et al* *Escape from Violence*, n93, 3.

<sup>157</sup>Tuitt P *Rethinking the Refugee Concept* in Nicholson F & Twomey P *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 114.

<sup>158</sup>*Ibid.*

<sup>159</sup>Marrus M *The Unwanted: European Refugees in the Twentieth Century* (1985) 53.

<sup>160</sup>Farer T 'How the International System Copes with Involuntary Migration: Norms, Institutions and State Practice' (1995) 17 *Human Rights Quarterly* 72-3.

<sup>161</sup>Tuitt P *supra*, n155, 112.

late fifteenth to the late seventeenth century, amounting altogether to something like one million persons - an enormous number, given the size of the population at that time.<sup>162</sup>

The first victim groups to be considered are the unconverted Jews expelled from Spain in 1492 and soon, afterwards from Portugal, where many of them had sought refuge, and the Spanish population of identifiable Moslem descent, perennially persecuted throughout the sixteenth century and finally expelled in 1609.<sup>163</sup>

The Jews became a target when the recently united Kingdom of Castile and Aragon, having completed their territorial *Reconquisita* of the Iberian peninsula by defeating the Moslems at Grenada, set out to Europeanise their state by ridding themselves of a stateless population that England and France had eliminated two centuries earlier, when they themselves were beginning to emerge as the first modern states in Europe.<sup>164</sup> But the continued existence of an unconverted segment undermined the assimilationist solution, whose success was rendered more urgent when Spain emphasised religious unity as a foundation for its constitution of a modern state. Hence the expulsion which involved between 120 000 to 150 000 persons, or about two percent of Spain's total population was central to this drama of displacement. The expulsion was a startlingly modern measure in that it constituted a deliberate act of a well-organised state, simultaneously enforced throughout the realm; its pre-eminently political character is emphasised by the fact that in ordering the expulsion, the authorities were aware that it would have negative economic consequences.

---

<sup>162</sup>Zolberg A 'The Formation of New States as a Refugee-Generating Process' (1983) *ANNALS, AAPSS* 467, 24-38 at 31.

<sup>163</sup>Ibid.

<sup>164</sup>Ibid.

After the Jews who refused conversion were thrown out of Spain, the next in line were the Moslems. Their position in the Iberian structure was very different from that of the Jews; although their situation varied somewhat, they were mostly a rural population of plantation workers, concentrated in particular regions, and of greater economic value to the Spanish feudal aristocracy than to the crown. However, in 1609, Phillip III issued the deportation order and altogether, it is estimated that about 275, 000 Moslems were shipped from Spain to North Africa over the next five years.<sup>165</sup>

As the deportation of the Moslems was on the way, Spain had already again begun to deal with the very different problem of elimination of the Protestants from those parts of the low counties - roughly equivalent to present the day Belgium. Extending from 1573-1630s, the total emigration is now reliably estimated at around 115, 000, approximately 14 percent of the overall population, by far the largest in relative size of the refugee waves of the early modern epoch.<sup>166</sup>

The above population chased out of the Spanish Crown would qualify as refugees according to the criteria used in international law today. While they remain a classic case of unrecognised refugees, they represent the modern origin of refuge.

#### **2.2.2.2 The Case of France and the Emergence of the Modern 'Refugee'**

The concept of the refugee was and is associated with victimisation by events 'for which, at least as an individual, cannot be held responsible'.<sup>167</sup> Originating in France in the late seventeenth century, the word refugee is recorded as having been used in 1573 in the

---

<sup>165</sup>Zolberg A, *supra*, n160, 32.

<sup>166</sup>*Ibid*, 33.

<sup>167</sup>Vernant J *The Refugee in the Post-War World* (1953) 5.

context of granting asylum and assistance to foreigners escaping persecution.<sup>168</sup> The date suggest that this phenomenon probably referred to the arrival of Calvinists from the adjacent low counties, a region where the reformation had gained considerable support but whose Spanish rulers were engaged in an all-out repression of religious dissent.<sup>169</sup>

The English word 'refugee' is derived from the French; ironically, it was first used about a hundred years later in reference to the Huguenots, persecuted Calvinists from France who streamed into England immediately before and after the revocation of the Edict of Nantes by Louis XIV on 18 October, 1685. The revocation of the Edict of Nantes in 1685<sup>170</sup> was the capstone of a twenty-year-long systemic attempt to undermine every requirement for the survival of the Reformed Community, making it impossible for people to be born, work, marry or even die as Calvinists.<sup>171</sup>

The French Huguenots were indeed a notable case, in that they constituted a large mass of persons fleeing the consequences of government actions against its own very valuable subjects, decreed in peacetime and without any provocation on their part after nearly a century of mutual accommodation.<sup>172</sup> In 1598, after forty years of civil war, the French state regained stability; this was largely achieved by way of the Edict of Nantes, a political

---

<sup>168</sup>Ibid.

<sup>169</sup>Zolberg et al, n93, 5.

<sup>170</sup>The Edict of Nantes was a proclamation issued by King Henry IV in 1598 tolerating religious minorities under catholic rule.

<sup>171</sup>Zolberg et al, *Escape from Violence*, n 93, 5. See also Barnett L 'Global Governance and the Evolution of the International Refugee Regime' (2002) *14 International Journal of Refugee Law* 238-262 where she noted at 239 that 'King Louis XIV provoked this flight by revoking the Edict of Nantes, a proclamation issued by King Henry IV in 1598 tolerating religious minorities under Catholic rule. With the revocation at Nantes came royal decrees against emigration and harsh punishment for those who attempt to escape'.

<sup>172</sup>Zolberg A 'The Formation of New States as a Refugee-Generating Process' (1983) *Annals, AAPSS*, 467: 34.

compromise between Catholic and Protestant nobles. The latter then numbering perhaps one-fourth of the aristocracy - whereby Catholicism was established as the state religion, but Protestants were granted considerable freedom, amounting in effect to communal self-government complete with their own courts of law and military forces. At this stage, France was celebrated in Europe as a haven for religious tolerance and peace.<sup>173</sup>

However, with each subsequent step in the consolidation of state power, the situation of the Protestants came to be viewed as more anomalous. As was with Spain, religious conformity was imposed on the aristocracy in the late 1620s, and Protestant towns were deprived of their political autonomy. By the middle of the century, French Protestantism amounted to a minority of about 10 percent, largely bourgeois in character; very prominent in French economic life.<sup>174</sup>

However the loss, after seizing the reins of government in 1661, Louis XIV determined upon a final solution to the Protestant question: enforced mass conversion, coupled with a prohibition on their departure. The most satisfactory explanation for this apparently gratuitous decision and the waves of persecution that ensued centres on the logic imposed by the monarch's general political objective, perfecting the most powerful state in Europe. After two decades of increasing pressure, the Edict of Nantes was finally revoked in 1685. Although the intent was to turn the King's valuable Protestant subjects into at least nominal Catholics and to keep them in France, an estimated 200, 000 of them - about one - tenth of the Protestant

---

<sup>173</sup>Ibid.

<sup>174</sup>Ibid.

population, mostly from among the better-off, managed to escape over the next several years.<sup>175</sup>

What therefore made the Huguenots refugees? First, they were people fleeing a life threatening danger - with "life" referring to both spiritual and physical existence - but they constituted something more distinctive than an aggregate of individuals in flight, and the danger they faced was distinctive as well. Their plight stemmed from membership in a religious organisation targeted for destruction by the government authorities of their own country, in peace time and without any provocation on their part. Second, the potential persecution which necessitated the Huguenots flight from 1685 in France is today the acid test of determining refugees' status under the current international refugee Convention. However, it was not until the French revolution that the concept of asylum was linked with political persecution to create the present notion of 'refugees'.<sup>176</sup>

After the French revolution, it became 'noble' for 'both sides' - the aristocratic and revolutionary states - to offer asylum to those who were considered 'victims' of this political upheaval.<sup>177</sup> The aristocrats fleeing the French revolution were referred to as *émigrés*, a signal of the dignity and respect accorded to their position and one that seemed to refute their

---

<sup>175</sup>Zolberg A 'The Formation of New States as a Refugee-Generating Process' (1983) *Annals, AAPSS*, 467: 34. Zolberg et al *Escape from Violence*, n93, concluded on p.5 that '...between 1681 and 1720 this estimated 200. 000 Huguenots as exiled from France would be scattered widely, with most going to Britain and the Netherlands, some to Switzerland and Brandenburg-Prussia, and a few as far afield as Russia, the British colonies of North America, and the Dutch colony in Southern Africa.' The Huguenots sought refuge everywhere they go except in Dutch Southern Africa where they arrived as masters instead of refugees.

<sup>176</sup>Zolberg, *Escape from Violence*, at 6.

<sup>177</sup>Marrus M, *supra*, n157, 15.

desperate situation.<sup>178</sup> In fact, a 1789 revision of the *Encyclopedia Britannica* marks the first time that the term 'refugee' was applied to anyone other than the Huguenots, extending the term to 'all such as who leave their country in times of distress...'. However this extension remained generally unrecognised in popular usage.<sup>179</sup>

The expulsion therefore of the Huguenots in France in 1685 after the revocation of the Edict of Nantes represents a significant turning point in defining the refugee in dynastic terms and more in modern territorial terms, and it is for this reason that the Huguenots can be categorised as the earliest example of a 'refugee' phenomenon in the modern sense of the term.

### **2.2.2.3 Refuge in England and Events across the Atlantic**

The development of the English national state, and subsequently of the British one, also generated substantial flows of refugees until well into the eighteenth century. Best known among them of course is the Puritans and Quakers, religious and political radicals who were simultaneously exiled from England and granted a haven in the wild of the New World, where they also served as guardians of the British Empire against Catholic France.<sup>180</sup>

When compared to France, the production of refugees in Britain was different in the course of its modernity. England, as noted above, was a refugee producing state as well as a refugee receiving state. A sizeable chunk of the Huguenots from France for example, ended up in England as its first refugees in history. Such a flood of new immigrants was washed onto British shores in the 1680s (precisely in October 1681) that a new word came into the English language at the time to describe them: 'refugiés' or refugees. Forty or fifty thousand crossed

---

<sup>178</sup>Barnet L *Global Governance*, n 169, 240.

<sup>179</sup>Marrus M *supra*, n 157, 9.

<sup>180</sup>Zolberg A, *Formation of New States*, *supra*, n 160, 33.

the channel while Louis XIV sat on the French throne (1660-1714).<sup>181</sup> Others had come in the time of the Tudors, especially during the reigns of Edward and Elizabeth. Both their Protestantism and their skills are relevant in explaining why so many Huguenots crossed the English Channel. England was second in popularity as a place of refugees only to the Dutch Republic, more popular than Germany or Switzerland or places further afield like America or the Cape of Good Hope (present day Cape Town).<sup>182</sup>

It is worth noting that comparatively few refugees came in 1685, the actual year of the Revocation of the Edict of Nantes or in 1686; but they arrived in large numbers in 1687, after James II had issued his Declaration of Indulgence.<sup>183</sup> In other words, the Huguenots did not relish the thought of moving to the land of another Catholic sovereign, but were strongly attracted to England as soon as the prevailing religious conditions seemed acceptable.<sup>184</sup>

Across the Atlantic, less well known is the fact that the American Revolution triggered an equivalent movement.<sup>185</sup> Albeit estimates of the number of loyalists who left for Canada, Nova Scotia, or England run as high as 100 000, Robert Palmer adopts a more conservative 60, 000. On the basis of a population of about 2.5 million (including slaves, some of whom became refugees), this produces a ratio of 24 refugees per 1000, five times higher than in France.<sup>186</sup>

---

<sup>181</sup>Gwynn R 'England's First Refugees' (1985) *History Today*, Vol.35 (5) 22-28 at 22.

<sup>182</sup>*Ibid.*

<sup>183</sup>*Ibid.*

<sup>184</sup>*Ibid.*, at 23.

<sup>185</sup>Zolberg A et al *Escape from Violence*, *supra*, at 8.

<sup>186</sup>Palmer R *The Age of Democratic Revolutions* (1959) 188.

The Western European region as a whole ceased generating massive refugee flows approximately two and a half centuries after the onset of the process of state formation, partly because the most undesirable had been eliminated - by way of their departure (Jews/Moslems/Protestants in Spain) or gradual assimilation (Huguenots in England and Cape of Good Hope) into the mainstream - but mainly because of the eventual generalisation of the rule of law.

As absolutism gave way to enlightened despotism, religious tolerance became accepted grounds of principles as well as self-interest. Committed to a doctrine of individual rights, the revolutionary regimes that subsequently emerged in America and France emancipated religious minorities from their remaining disabilities. The absence of religious persecution became the hallmark of “civilised” states, and thus anyone who was so persecuted came to be considered a refugee.

## **2.3 Refugees in the League of Nations**

### **2.3.1 Background**

The historical narrative continued in this vein from the age of religious persecution to the age of political oppression in the eighteenth century with most countries in Europe being forced to admit political dissidents fleeing from Austria, Prussia, Russia and France. The dawn of the twentieth century, the events of World War I<sup>187</sup> brought with it a distinct flow of refugees. The Treaty of Versailles ending WW I made possible the emergence of the League of Nations. The League of Nations would in turn manage the refugee problem emanating from WW I.

---

<sup>187</sup>Hereinafter WWI.

### 2.3.2 The Development of Refugee Rights and the League of Nations

The Russian Revolution of 1917 caused the first mass exodus of the twentieth century, with Russian aristocrats and others fleeing the Bolshevik regime. More than one million people fled Russia between 1917 and 1921.<sup>188</sup> Some of the largest atrocities committed during WWI were directed at the Armenians. The population of two million was decimated by what was later recognised as the first genocide of the twentieth century. Systemic persecution under the Ottoman Empire meant that half of the population was dead by 1918 and hundreds of thousands were rendered homeless and stateless refugees. Added to the above, the rise of nationalist authoritarian regimes from the 1920s to the early 1930s such as Fascist takeover of Italy in 1922 and the Nazi victory in Germany in 1933 drove many into exile. These incidents prompted international effort to deal with the issue of refugees.<sup>189</sup>

The League of Nations High Commission (HCR) for Refugees was established in 1921 under the direction of Fridthof Nansen. It was design to deal with the problem of refugees. In a more fundamental sense, the refugee rights regime draws heavily on earlier precedents of the law of responsibility for injuries to aliens and international efforts to protect international minorities.<sup>190</sup> The HCR created no general definition for a refugee, relying instead on a category-oriented approach that identified refugees according to group affiliation and origin.<sup>191</sup> This notwithstanding, this Commission was the first international effort aimed at the welfare of refugees and its creation laid the foundation for the international refugee law

---

<sup>188</sup>Joly D & Nettleton C *Refugees in Europe* (1990) 6.

<sup>189</sup>The Guardian (UK Edition), *What Happened to History's Refugees?* 23 July 2013, available on [www.theguardian.com/news/datablog/interactive/23/july/25/what-happened-history-refugees#Israelites](http://www.theguardian.com/news/datablog/interactive/23/july/25/what-happened-history-refugees#Israelites) (Accessed 22/12/2014).

<sup>190</sup>Hathaway J *The Rights of Refugees under International Law* (2005) 75.

<sup>191</sup>Goodwin-Gill G *The Refugee in International Law* (1996) where the author termed this on p.4 as a 'group or category approach'.

regime and the recognition of the refugee as a category of non-citizen under international law.<sup>192</sup>

In the 1920s the League of Nations commenced an ambitious international effort to codify international law, which produced the Hague Conference for the Codification of International Law. The conference focused on three areas of international law, one area being the 'Responsibility of States for Damages caused in their Territory to the persons or Properties of Foreigners.'<sup>193</sup> Between the two World Wars, a number of other refugee treaties were concluded which aimed at the recognition and advancement of the welfare of refugees.<sup>194</sup> With an estimated total of 9.5 million refugees in 1926, the refugee crisis of the post-WWI years reached a magnitude unprecedented in European history.<sup>195</sup>

As in the past, and well into the late 1930s, and despite the various efforts from 1921, there was no universally accepted definition of a refugee because some states were concerned about the domestic dangers of harbouring political dissidents. This did not bode well for the future development of legal status relating to the recognition of refugees. A draft resolution prepared by the Institute of International Law for the League of Nations 1936 session defined a refugee as 'any person who, by reasons of political events in his state of origin, has either

---

<sup>192</sup>Lillich R *The Human Rights of Aliens in Contemporary International Law* (1984) 34.

<sup>193</sup>Bjorklund A 'Reconciling States Sovereignty and Investor Protection in Denial of Justice Claims' (2005) 45 *Virginia Journal of International Law* 809 at 833.

<sup>194</sup>The Arrangement Relating to the Legal Status of Russian and Armenian Refugees of 30 June 1928 (89 LNTS 55), the Convention Relating to the International Status of Refugees of 28 October 1933 (159 LNTS 3663) and the Convention concerning the Status of Refugees coming from Germany of 10 February 1938 (191 LNTS 4461).

<sup>195</sup>Marrus M *The Unwanted: European Refugees in the Twentieth Century* (1985) 51. See also Kulisher E *Europe on the Move, War and Population Changes, 1917-1947* (1948) 248.

left the territory of that state, whether voluntary or under expulsion....”<sup>196</sup> In the same vein, the principal contemporaneous study of refugees stated that the refugee “is distinguished from the ordinary alien or migrant in that he has left his former territory because of political events there, not because of economic conditions or because of the economic attractions of another territory.”<sup>197</sup> But these criteria evoked considerable resistance by state officials and as one observer reported,

The customary argument against accepting a general legal status for political refugees are that it might encourage countries to get rid of their unwanted people and that many might emigrate who would otherwise remain in their countries even under serious disabilities.<sup>198</sup>

In addition, no government at the time was willing to create a universal definition of ‘refugee’, as they perceived the refugee problem to be a temporal emergency. Fears about a heavy financial burden and an excessive workforce at a time of high unemployment might have also contributed to that perception.<sup>199</sup> However, the refusal to adopt a universal definition of the term refugee argues, Loescher, stemmed from ‘fear of opening the door to international recognition of political dissidents’.<sup>200</sup>

True to the hostile economic climate and uncertainties in the 1930s, the League of Nations in moving forward in seeking legal protection for refugee rights, had two points to confront. First, given the economic insecurity and political circumstances at the time, governments were likely to sign any binding commitment only if they are able to quickly denounce it. Second, and more profoundly, it was understood that truly adequate protection would be provided only

---

<sup>196</sup>Vernant J *The Refugee in the Post-War World* (1953) 6.

<sup>197</sup>Sir Simpson J *The Refugee Problem—Report of a Survey* (1939) 4.

<sup>198</sup>Holborn L ‘*The Legal Status of Political Refugees, 1920-1938*’ (1939) 32 *American Journal of International Law* 680-703.

<sup>199</sup>Stoessinger G *The Refugee and the World Community* (1956) 39-41.

<sup>200</sup>Loescher G *Beyond Charity: International Cooperation and the Global Refugee Crisis* (1993) 40.

if refugee rights were effectively assimilated to those of nationals, a proposition flatly rejected by most European states.<sup>201</sup>

The League of Nations strategy for the protection of refugee rights was clearly ineffective and it failed dismally to even produce a generally acceptable definition of a refugee. The League of Nations was dissolved as WW II drew to a close, and the Allied Powers created the United Nations Relief and Rehabilitation Administration<sup>202</sup> in 1943 to deal with the new population flows.

### **2.3.3 From the UNRRA to the Geneva Convention of 1951**

By the end of WW II, there were more than forty million refugees in Europe alone.<sup>203</sup> Overseas, millions of Chinese people who had been displaced during the Japanese occupation of China were seeking asylum outside China and by 1947, the porous borders of newly created India and Pakistan led to the exodus of nearly fourteen million.<sup>204</sup>

The scale of the disaster was such that international law and international organisations tasked to deal with refugees were urgently created and quickly evolved to become the foundation that is still relied upon today. Before the formal establishment of the United Nations (UN) in June 1945, the need to address the overwhelming refugee crisis led to the establishment of UNRRA by the western states in 1943. However, the long-term durability of the UNRRA was limited. It was solely created for humanitarian responses to those displaced by WW II. According to UNRRA, its mandate was to assist 'victims of war in any area under

---

<sup>201</sup>Hathaway J, *The Rights of Refugees under International Law* (2005) 89.

<sup>202</sup>Hereinafter referred to as *UNRRA*.

<sup>203</sup>UN *Refugees* (2000) 13.

<sup>204</sup>*Muntarbhorn V The Status of Refugees in Asia* (1992) 4.

the control of the UN.<sup>205</sup>The mandate of UNRRA therefore was not specifically designed exclusively for the assistance of refugees though it ventured into the settlement of refugees. UNRRA was succeeded by the International Relief Organisation (IRO).

Founded on April 20, 1946, the IRO was a temporal inter-governmental agency designed by the UN to regularise the status of the WW II refugees. Unlike UNRRA, the IRO constitution went further to actually defining those they protected as refugees. These were victims of Nazi, Fascist or similar regimes; victims of persecution for reasons of race, religion, nationality, political opinion; and refugees of long standing. These included Eastern Europeans political dissidents and the Jews who remained in Germany and Austria.<sup>206</sup>

In the end though, UNRRA and the IRO managed to settle millions of Europeans refugees in Canada, Australia, the US and Israel and helped others return to their home countries mainly in Eastern Europe. Western European countries were relatively willing to receive displaced persons and refugees during this period as many nations suffered from depleted manpower after the war. Many Polish soldiers were permitted to stay in England due to the increased need for labour and quickly integrated into mainstream English society. By 1949, the IRO has started phasing out its program and in 1952, it officially closed down.

In the late 1940s, the debate had begun about the prospect of creating a permanent refugee structure. In a communiqué to the United Nations Economic and Social Council on 11 July, 1949, the IRO pleaded passionately that:

---

<sup>205</sup>Melander G *The Concept of the Term "Refugee"* in Bramwell A & Marrus M (Eds.) *Refugees in the Age of Total War* (1988) 8.

<sup>206</sup>Kourula P *Broadening the Edges: Refugee Definition and International Protection Revisited* (1997) 51.

The refugee is an alien to any country to which he may go. He does not have the last resort which is always open to the 'normal alien' - return to his country. The man who is everywhere an alien has to live in usually difficult material and psychological conditions. In most cases, he has lost his possessions, he is penniless and cannot fall back on the various forms of assistance which a state provide for its nationals. Moreover, the refugee is not only an alien wherever he goes, he is also an 'unprotected alien' in the sense that he does not enjoy the protection of his country of origin. Lacking the protection of the government of his country origin, the refugee does not enjoy a clearly defined status based upon the principle of reciprocity, as enjoyed by those nationals of those states which maintain diplomatic relations. The rights which are conferred on such nationals by virtue of their status, which is dependent upon their nationality, are generally unavailable to him. A refugee is an anomaly under international law, and its often impossible to deal with him in accordance with the legal provisions designed to apply to aliens who receive assistance from their national authorities.<sup>207</sup>

What was most apparent in these debates was that states wanted 'the maximum guarantee that their legitimate interest would be safeguarded'.<sup>208</sup> Despite disagreement on the form the body would take, a compromise was reached. In December 1949, the United Nations General Assembly<sup>209</sup> decided by thirty six votes to five, with eleven abstentions, to establish the Office of the United Nations High Commissioner for Refugees,<sup>210</sup> which from 1 January, 1951 would have an initial mandate for three years.

The UNHCR was a subsidiary organ of the UNGA under article 22 of the UN Charter and from the beginning, its scope and authority was severely limited. This was 'principally the result of the desires of the United States and its Western allies to create an international refugee agency that would neither pose any threat to the national sovereignty of the Western powers nor impose any new financial obligations on them'.<sup>211</sup>

---

<sup>207</sup>Communication from the International Refugee Organization to the Economic and Social Council, *UN Doc E/1392*, July 11, 1949, at App. 1.

<sup>208</sup>Holborn L *Refugees - A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951-72* (1975)28.

<sup>209</sup>Hereinafter referred as UNGA.

<sup>210</sup>Hereinafter referred as UNHCR.

<sup>211</sup>Loescher G 'The UNHCR and World Politics: State Interest Vs. Institutional Autonomy' (2001) *International Migration Review*. 19.

In the first half of the twentieth century, there was no actual universal institutional framework seriously dealing with refugee issues. From the League of Nations till 1951, there was no universally acceptable definition of a refugee. This legal gap and the absence of international refugee institutions acted against the development of refugee rights. The refugees were treated more as a subset of foreigners. The legal development of the international refugee regime from the League of Nations till 1951 was exclusively confined to the western hemisphere. Therefore, there was no sense to refer to any of the above institutions as 'international' because with regards to refugees, none of them was designed for any situation beyond Europe. A glaring example is the fact that while the UNRRA and IRO was busy resettling European refugees within Europe, the US, Canada and Australia, the more than 14 million refugees produced by the porous borders erected by the West during the partition of the Indian sub-continent on 15 August 1947 and Chinese refugees were largely either ignored by the international relief organisations or attended to on *ad hoc* international arrangements.<sup>212</sup>

---

<sup>212</sup>The territorial division was decided on to relieve the rising tensions between the Hindu and Muslim communities. Because the two populations to some extent overlapped, the partition had created religious minorities in each of the two states. With the outbreak of hostilities, whose toll amounted to over half a million dead, over fourteen million people fled across what now had become international borders to what they considered their homeland. The fledging governments of India and Pakistan were left to deal with a huge resettlement problem, involving extremely poor populations whose mass dwarfed that of Europe's refugees, with little assistance from the international community. See generally Zolberg et al, n 93, 23.

## 2.4 The Refugee in Contemporary International Law

### 2.4.1 Background

People have always sought refuge over the ages. But the “refugee” as a specific social category and a legal problem of a global dimension did not exist in its full modern form until after WW II. Post WW II, the spate of refugee flows continued unabated necessitated by civil wars, political conflicts, ideological differences, social rejections and natural disasters. Economic failures further inflamed this hotly burning melting pot of anti-democratic, dangerous conditions that pushed hundreds of thousands on their atypical, dangerous ways into the unknown. Immigrants constituted an economic form of migration and refugees a political form.<sup>213</sup> These immigrants become homeless wanderers who rely on human charity such as recognition by UN institutions, while embracing governments they do not understand. The desperate attempt at refuge in our contemporary times is perhaps best captured in the lachrymose remarks of Barrister Frances Webber:

As airlines turned them away, undocumented travellers were forced to travel overland, by train or hiding in lorries to get to the country they believed would offer sanctuary and respect for their rights. A typical journey, described by an Afghan teenager, had taken a year, through the mountains to Iran, then from Turkey to Greece and Italy, on trains across France to Calais where he had tried five times in the past week to cross the Channel by clinging to the underside of a lorry.<sup>214</sup>

In 1951 the UN moved to establish an international agreement for defining, processing and resettling refugees - the 1951 Convention relating to the Status of Refugees.<sup>215</sup> The draft resolution which became the Convention<sup>216</sup> was passed by the UNGA by twenty six votes to

---

<sup>213</sup>Hein J *Refugees, Immigrants, and the state* (1993) *Annual Review of Sociology* Vol.19, 43-59 at 43-44.

<sup>214</sup>Webber F *Borderline Justice: The Fight for Refugee and Migrant Rights* (2012) 22.

<sup>215</sup>Hereinafter, referred to as the Geneva Convention.

<sup>216</sup>Resolution A/C.3/L.142.

five, with twelve abstentions.<sup>217</sup> Details of the adopted Convention were then resolved at a conference in Geneva in July 1951. The conference decided that the Convention would include a 'narrow' definition of the term 'refugee', which must be presented on an individual basis. In brief, a refugee was to be any person who had been considered a refugee by the League of Nations, the UNRRA or IRO; in addition, a refugee was any person who had, as a result of events occurring before 1 January 1951:

Well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>218</sup>

Three elements are self-evident to this definition. First, it is contained in an international document, second, the geographical scope is restricted to Europe, the timeframe for those to be considered refugees cannot exceed January 1951 and, third, the prospective refugees must be Europeans because it is only for those who were victims of events that occurred in Europe before the aforementioned cut-off date. From every perspective therefore, the definition is exclusively Eurocentric although the title is international. This Eurocentric definition of the refugee was bound not to last because the refugee flow continued after 1951 down till today. Certainly, in the intervening years, inadequacies in the 1951 Convention approach were revealed at the regional level. In 1969, for example, the OAU, while under pressure from Geneva, adopted the 1951 definition of refugee but broadened the definition in

---

<sup>217</sup>UN Official Records, 1950, 454. Art. 1A(2) of the Geneva Convention.

<sup>218</sup>UNHCR, 1951, *Convention Relating to the Status of Refugees*, 1951, 16.

order to accommodate the social reality of refugees in Africa at a time of decolonisation and national liberation.<sup>219</sup>

#### **2.4.2 The Refugee in the 1951 Convention**

The 1951 Refugee Convention was the critical event in the internationalisation of the post-WW II order. The Convention and its subsequent Protocols are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specifically regulate the treatment of those who are compelled to leave their home because of a rupture with their country of origin.<sup>220</sup> It was the capstone of disparate efforts to deal on ad hoc basis - much as has occurred after WW I - with a European refugee crisis that was even more overwhelming than the earlier one. According to a comprehensive post-world war survey, the total number of Europeans displaced in the six years war, 1939 to 1945, was more than 30 million, out of which eleven million survivors were outside their country and in need of assistance.<sup>221</sup> Contrary to what obtains today where refugees are turned away, most of these refugees were settled within a few months after the cessation of hostilities. In some cases there were population exchanges between neighbouring countries, similar to the earlier ones in the Balkans.

---

<sup>219</sup>Not much later, in the Americas, the Cartagena Declaration was to follow the lead of the OAU and approved a similar extension of the traditional understanding of the definition of refugees. Even Europe in the 1970s, and thereafter, adopted different categories and statuses for refugees who were recognized as not falling within the 1951 Convention but as nonetheless requiring some level of protection — the Dutch 'A' and 'B' statuses. This is the extent of the definitional flaw inherent in the 1951 Geneva Convention. See generally Chattam House *The Refugee Convention: Why not Scrap it?* (20 October 2005) available at [www.chattamhouse.org/sites/files/chattamhouse/public/research/internationallaw/ilp201005.pdf](http://www.chattamhouse.org/sites/files/chattamhouse/public/research/internationallaw/ilp201005.pdf). (Accessed 20/11/2014).

<sup>220</sup>Feller E, Turk V & Nicholson F *Refugee Protection in International Law* (2003) 3.

<sup>221</sup>Kulisher, *Europe on the Move*, n193, 305.

The refugee Convention is an instrument of human rights protection designed to implement the basic rights to flee persecution and to seek asylum. It equally enshrines the rights against *refoulement*.<sup>222</sup> The refugee in the definition refers to a person with a 'well-founded fear of persecution' who is outside his/her country, and who is persecuted for one of the five reasons specified in the definition. It is now well established that the meaning of 'persecution' should be interpreted within a human rights framework which includes reference to the standards provided by the main human rights treaties.<sup>223</sup> Michel Foster<sup>224</sup> enumerates these main human right treaties to include the Universal Declaration of Human Rights,<sup>225</sup> International Covenant on Civil and Political Rights,<sup>226</sup> International Covenant on Economic, Social and Cultural Rights,<sup>227</sup> Convention on the Elimination of All Forms of Discrimination Against Women,<sup>228</sup> Convention on the Rights of the Child,<sup>229</sup> and International Convention on the Elimination of All Forms of Racial Discrimination.<sup>230</sup> To be a refugee therefore under the 1951 Geneva Convention, a person must:

- The person must have a well-founded fear of persecution;

---

<sup>222</sup>Art. 33 (2) of the Geneva Convention.

<sup>223</sup>Kneebone S *Refugees, Asylum Seekers and the Rule of Law* (2009) 6.

<sup>224</sup>*International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) chap.2.

<sup>225</sup>10 December 1948, GA Res 217 A (III) UN Doc. A/810 (UDHR). Hereinafter UDHR

<sup>226</sup>Adopted in New York, 16 December 1966, entered into force 23 March 1976, UN Doc A/6316 (1966), 999 UNTS 171 (ICCPR). Hereinafter, ICCPR

<sup>227</sup>Adopted in New York, 16 December 1966, entered into force 3 January 1976, UN Doc A/6316 (1966) 999 UNTS 3 (ICESCR).

<sup>228</sup>Adopted in New York, 18 December 1979, entered into force 3 December 1981, UN Doc A/34/46, 34 UNGAOR Supp. (No.46) at 193 (CEDAW).

<sup>229</sup> Adopted in New York, 20 November 1989, entered into force 2 September 1990, UN Doc A/44/49, 44 UNGAOR Supp. (No.49) at 169 (CROC).

<sup>230</sup>Adopted in New York, 21 December 1965, entered into force 4 January 1969, UN Doc A/6014, 660 UNTS 195 (CERD). See also, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York, 10 December 1984, entered into force 26 June 1987, UN Doc A/Res/39/36 (CAT) particularly art. 3.

- Fear persecution based on one of the five reasons listed in the definition i.e. race, religion, nationality, membership of a particular social group, or political opinion;
- Be outside the country of habitual residence;
- Unable to return; and
- Owing to such fear, be unwilling to avail himself/herself to the protection of that country<sup>231</sup>

Monica Toft writes that there are several items to note about the definition of the refugee. First is the reference to country of origin - “of his former habitual residence” and the notion of being “outside” of one’s former country. The person first and foremost is identified with his home country. Second is the notion of return and the ability or unwillingness to return to one’s home country. Therefore, from the very start a refugee was identified both as individual in his or her own right with a distinct race, religion or nationality, but also a member of a country from which he or she fled. The definition of who constitutes a refugee thus presents a tension between a demand for the protection of individual rights, and the reality of every individual being attached to a particular country, which may not protect him.<sup>232</sup> For Shacknove, such concrete definitions are predicated on an implicit argument (or conception) that:

- a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis for society;
  - in the case of the refugee, this bond has been severed;
  - persecution and alienage are always the physical manifestation of this severed bond;
- and

---

<sup>231</sup>Convention, art.1A(2).

<sup>232</sup>Toft M ‘*The Myth of the Borderless World: Refugees and Repatriation Policy*’ (2007) *Conflict Management and Peace Science* vol. 24, 139-157 at 142.

- these manifestations are the necessary and sufficient conditions for determining refugeehood.

Thus the concept supplies the theoretical basis for the definition. It stipulates what is essential and universal about refugeehood. It asserts both a moral and empirical claim. It is moral because it posits the existence of a normal, minimal relation of rights and duties between the citizen and the state, the negation of which engenders refugees. It is empirical because it asserts that the actual consequences of this severed bond are always persecution and alienation.

In the early 1960s, the UN took steps to address the three weaknesses that the Geneva Convention self-evidently presented i.e. the geographical nature of the definition, the time limit of recognition of refugees and the fact that the Convention did not address refugees in *en masse* situations.

During the Cold War, the UNHCR accepted the 1967 Protocol on refugees to enable it to deal with new situation of refugee *en masse*, such as Chinese refugees fleeing Communism, civil wars and independent movements particularly on the African Continent since this period coincided with decolonisation. However whereas the 1967 Protocol recognised the universality of the problem and the need for a global solution, the Protocol as finally framed, did not grant the UNHCR the extra powers it needed to deal with *en masse* refugees. The achievement of the 1967 Protocol was that it removed the geographical confinement and the time limit in the Geneva Convention to give it a more universal bearing.

In terms of observing the application of the 1951 Refugee Convention and its succeeding Protocols, the mandate falls with the UNHCR. The original mandate of the UNHCR stems from the UN General Assembly in the form of Resolution 428 (V) of 14 December 1950, to which the UNHCR statute was annexed.<sup>233</sup> The 1951 Refugee Convention in terms of Art 35 (1) mandates the UNHCR to supervise the implementation of this Convention in member states. And to facilitate this role, the Geneva Convention proclaims in art 35 (2) that, in order to enable the office of the High Commissioner or any other Agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

- (a) The Condition of refugees,
- (b) The implementation of this Convention, and;
- (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.'

And in terms of Art 36, the Contracting States shall communicate to the Secretary General of the United Nations the laws and regulations that they have adopted to ensure the proper implementation of this Convention. This duty is not just a moral one,<sup>234</sup> but has a legal basis in Art 56 of the UN Charter on the obligations of member states to cooperate with the UN, a duty that by extension, includes the UNHCR in its capacity as one of the subsidiary organs of the UN General Assembly in terms of Art 22 of the UN Charter.

---

<sup>233</sup>The competence of the UN to deal with refugees is implicitly contained in articles 1, 13, 55 and 60 of the UN Charter. These provisions together with article 7 (2) and 22 of the UN Charter form the constitutional basis of the UNHCR Statute. And in terms of art 22 of the UN Charter, the UNHCR is a subsidiary organ of the United Nations.

<sup>234</sup>Zieck M *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (1997) 450.

International law requires contracting states to implement any treaty obligation in good faith in accordance with the principle of *pacta sunt servanda*<sup>235</sup> and states may not invoke provisions of their domestic laws as justification of non-performance of their treaty obligations.<sup>236</sup>

The legacy of this episode was to create a distinction between refugees who flee individualised persecution (and who can claim refugee status under the Geneva Convention), and those who flee generalised violence (who may have difficulty in proving that they are persecuted as individuals). This spelled tension between states interests and the UNHCR which depended on those same states for funding. Ultimately, the funders won and the *en masse* refugee situation was confined into the dustbin of history.

Consequent on the failure of the Protocol to extend the mandate of the UNHCR, the problem of refugee *en masse* was thus left for the regions themselves to deal with the situation. When *en masse* refugees became regionalised, it exposed the weakness surrounding the Geneva Convention, the same weakness that the 1967 Protocol could have averted.

The general definition of refugees contained in the UNHCR statute and the 1951 Refugee Convention have been rendered obsolete by evolving realities in the developing world. With hindsight, this was inevitable. Elaborated in the special atmosphere of the post-war years, the restrictive nature of the early definitions did not adequately respond to the variety of situations in the sixties and seventies; for the drafters of the early definitions neither considered nor

---

<sup>235</sup>Vienna Convention on the Law of Treaties, 23 May 1969, Art. 26

<sup>236</sup>Ibid. Art. 27.

anticipated the problems of the developing world.<sup>237</sup> Africa and Central America are prime examples of regions where the internationally accepted definitions of refugees have proven inadequate. Africa and Central America have been characterised by a large exodus of people.

The definition of a 'refugee' adopted by the OAU is the only salient challenge to the proposition that persecution is an essential element of refugeehood. That definition, after incorporating the United Nations persecution-based phraseology, proceeds to add that:

The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality.<sup>238</sup>

For the first time, the legal term 'refugee' albeit at regional level was extended to individuals forced to leave their countries owing to aggression by another state and/or as a result of an invasion. The OAU Convention marked the beginning of a refugee protection system which directly addressed the causes of mass refugee influxes, by emphasising objective conditions in the country of origin.<sup>239</sup>

Clearly, the OAU and the UN definitions reflect markedly different historical contexts. The latter was a response to European totalitarianism experienced when, indeed, refugees were primarily persecuted victims of highly organised predatory states. Regrettably, such states still exist, and the OAU definition provides for them. But the OAU definition recognises, unlike

---

<sup>237</sup>Chimni B *International Refugee Law* (2000) 63.

<sup>238</sup>OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *adopted*, September 10, 1969 (UNTS 14691), art 1(2). Hereinafter referred to as the OAU Refugee Convention.

<sup>239</sup>Chimni, *supra*, n 235, 63.

the UN definition, that normal bond between the citizen and the state can be severed in diverse ways, persecution being but one.<sup>240</sup>

An even broader definition of the refugee was advanced by Latin America in 1984 in the Cartagena Declaration on Refugees which provides that:

...in view of the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee....Hence the definition or the concept of a refugee to be recommended for the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.<sup>241</sup>

The Cartagena Declaration was the first document in the Latin American context to established guidelines for states faced with mass inflows of refugees. It was also the first international declaration recognising that victims of generalised violence, internal conflicts, and mass human rights violations deserve refugee status. Although, unlike the OAU Convention, the Cartagena Declaration is not a formally binding legal instrument, its broader definition has gradually become the established norm throughout Latin America.<sup>242</sup>

The refugee in the 1951 Refugee Convention was the subject of legal controversy from the outset, its definition is contingent to European experiences with respect to where, when and who is a refugee under international law. Although the 1967 Protocol succeeded in obviating

---

<sup>240</sup>Shacknove A 'Who is a Refugee' (1985) *Ethics*, Vol.95 (2), 274-284 at 276.

<sup>241</sup>Cartagena Declaration on Refugees, adopted 22 November 1984. Sec. 3(3).Hereinafter referred to as the Cartagena Declaration.

<sup>242</sup>Chimni, *supra* n235, at 64.

two of its three legal disabilities, the central impeding element survived the Protocol - the actual definition. The regionalisation of refugee conventions such the OAU Refugee Convention and the Cartagena Declaration were predicated on the actual legal disability of the Geneva Convention. The 1951 Refugee Convention will be evaluated in the succeeding section of this chapter.

Perhaps it is helpful to recall that the title of the 1951 Refugee Convention is the Convention Relating to the Status of Refugees and that is what it is primarily about. Articles 2-34 of the Convention deals essentially with status and, to some extent, the rights of the refugee but the word 'right' hardly appears in the Refugee Convention. Further, unlike the OAU Refugee Convention, the Geneva Convention does not deal with why people flee or why they do not flee. There seems to be therefore a shortage of mechanisms which can effectively allow the international community to remedy the cause of flight as may arise commonly.

## **2.4.3 Evaluating the Geneva Convention of 1951**

### **2.4.3.1 Background**

The Geneva Convention was negotiated at the aftermath of WWII. In particular, it was directed towards the victims of Nazi and Fascist regimes. This is recognised by the definition which describes a refugee as a person with an individual 'well-founded fear of being persecuted as a result of events occurring before 1<sup>st</sup> January 1951.<sup>243</sup> Signatories to the Convention were at liberty to interpret this as referring to events in Europe or 'elsewhere'<sup>244</sup>,

---

<sup>243</sup>Geneva Convention, art. 1A(2).

<sup>244</sup>Ibid, art 1B(1).

but largely, it has been read as being subject to geographical limits. This geographical limit was removed by the 1967 Protocol.

The right to seek asylum and to enjoy asylum is embraced in the international community's foundational post-war charter on human freedoms, the UDHR.<sup>245</sup> The spectre of spurned Jewish asylum-seekers forced back to Nazi Germany, and sometimes perishing as a consequence, thrust this right into the consciousness of those defining basic principles of human dignity for the post-war world.<sup>246</sup> Yet, the drafters of the UDHR carefully refrained from articulating the right to be granted asylum.<sup>247</sup> When the "soft law" of the UDHR was succeeded by the 1951 Refugee Convention, no mention was made of the right to seek and enjoy asylum. The Convention's key obligatory provisions assume a situation in which refugees, possibly by irregular means, have somehow managed to arrive at or in the territory of the contracting state.<sup>248</sup> The ICCPR failed to build upon the UDHR's expression of the right to seek and enjoy asylum. The ICCPR provides for the right to leave any country and the right to enter one's own country, but not a right of entry for purposes of seeking asylum.<sup>249</sup> This omission was intentional.<sup>250</sup>

#### **2.4.3.2 The Predicaments of Persecution in the 1951 Refugee Convention**

The definition of a refugee in the 1951 Refugee Convention originates from the Huguenots experience in the late seventeenth century. One of the major basis for the criticism of the 1951 Refugee Convention is in relation to the definition of who is and who is not a refugee.

---

<sup>245</sup>10 December, 1948. Hereafter, UDHR.

<sup>246</sup>Fitzpatrick J 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harv. Hum. Rts J.* 229-253 at 245.

<sup>247</sup>Holborn L *Refugees: A Problem of Our Time* (1975) 163.

<sup>248</sup>Arts 31, 32 and 33 respectively.

<sup>249</sup>Art 12

<sup>250</sup>Holborn, *supra*, n 245, 228.

The definition itself reflected the experience of thirty preceding years.<sup>251</sup> The League of Nations approach though unacceptable, was very simple: who does not enjoy the protection of his country, and does not that person have another nationality? States had as much difficulty in applying that definition as they do in applying that of the 1951 Refugee Convention. The IRO had a long list of persons who shall be refugees, victims of Fascist regimes, Spanish republicans, those displaced by WW II and those who had been persecuted.

The refugee definition in the Convention and its geographical insistence sparked constraints in the 1960s when stateless populations appeared in Korea, China and Africa. But even before this, during the time of the Convention and the statute of the UNHCR, the constraint was viewed by some with disbelief. They knew that the refugee population would not cease after 1951. In Asia and Africa, refugees fled persecution but also ethnic conflict, man-made environmental disasters, natural disasters, coups, civil and interstate conflicts over the borders.<sup>252</sup>

A definition framed in terms of fear of persecution that is well-founded on certain grounds is likely limited. Decision-makers know how difficult it can be to get good, accurate information about the conditions in an individual's country in order to determine whether he/she does have a well-founded fear of persecution. The nature of a decision that an adjudicator has to make is also infinitely difficult. It is not like a judge looking backwards and saying on the balance of probabilities or beyond all reasonable doubt this happened. In refugee decision

---

<sup>251</sup>Since the creation of the first office of the High Commissioner of Refugees in 1921.

<sup>252</sup>Davis S 'Truly' *International Refugee Law? Or Yet Another East/West Divide?* (2002) *Social Alternatives*, Vol. 21 (4) 37-44 at 39.

making it is necessary to look to the future and ask whether if a refugee is returned to their country of origin, he/she would face a serious risk of persecution, and to try and quantify the risk.

The refugee definition further places a burden on the state party in the event of a large scale influx. The refugee definition is framed in terms of the individual, each individual has rights and his or her case must be looked at individually. Refugee advocates have argued the other way that if a country's situation is known, like Somalia for example, individual cases need not apply. But this does not sit well with states who anticipate that this would lead to their being swamped. States to some extent are their own worst enemies in this regard. South Africa, for example, may claim to suffer the burden of individual case by case determination and the resultant backlog, but the country may not want to go that way, lest they be the soft touch in SADC.

In refugee policy circles, basic threats to individuals are usually divided into three categories: persecution, vital (economic) subsistence, and natural calamities.<sup>253</sup>Refugeehood is said to result only from acts of persecutions. Naturally, all these indices can give rise to refugeehood. Persecution is, therefore, just one manifestation of the absence of physical security. The sovereign must, at least protect the citizen from foreign invasion and the "injuries of one another", which include civil war, genocide, terrorism, torture, and kidnapping, whether perpetrated by state agents or others. Beneath this threshold, there is no state, and the bonds which constitute the normal basis of citizenship dissolve. Hence, persecution is a

---

<sup>253</sup>Madsen G, *The Status of Refugees in International Law* (1966) 75-76.

sufficient, but not a necessary, basis for justified claim to refugeehood. If persecution establishes a valid claim to refugee status, then other threats to physical security do as well.<sup>254</sup>

Since the attribution of refugee status is designed to provide grounds for a claim for some entitlements, relief, admission and the like, the distinction, when used in relation to policy, establishes discrimination in favour of political victims against others.<sup>255</sup> Much of the current debate in the sphere of refugee policy is focused on whether this discrimination is fair. It is arguable, and fairly so, that if political causes are taken as a starting point, then the analysis should include economic refugees as well, because their fate is often attributable as much to political evils - consciously pursued governmental policies or merely the maintenance by political means of severe social inequality - as to the intrinsic inadequacy of a country's resources or its model of economic organisation.<sup>256</sup>

In reality therefore, the refugee definition in the 1951 Refugee Convention never accurately described the situation of many of the Convention's intended beneficiaries: large groups displaced by WW II. Rarely were these criteria applied with stringency and intellectual rigour during the Cold War.<sup>257</sup>

---

<sup>254</sup>The argument for a right to revolution that Locke developed in his *Second Treatise* also justifies a right to refugeehood. Citizens are at liberty either to prevent tyranny or to escape it. Whether the citizen mobilises opposition therefore against an unjust regime or simply quits society is strictly a prudential calculation. See Locke J *The Second Treatise of Government* (1952) 119-39.

<sup>255</sup>Zolberg A 'The Formation of New States as a Refugee-Generating Process' (1983) *ANNALS, AAPSS*, 467, 24-38 at 25-26.

<sup>256</sup>*Ibid*, 26.

<sup>257</sup>Collinson S *Beyond Borders: West European Migration Policy Towards the 21<sup>st</sup> Century* (1993) where on p.6, she describes the granting of asylum to Eastern Europeans in the 1950s and 1960s as "almost automatic," concluding that these claimants enjoyed "presumptive refugee status" even though "the

### 2.4.3.3 The Omission of Alienation in the Refugee Definition

The predominant generation-old conception advanced by international instruments, municipal statutes, and scholarly treaties identifies the refugee, in essence, as a person who has crossed international frontiers because of a well-founded fear of persecution.<sup>258</sup> Conceptually however, refugeehood is unrelated to migration. It is exclusively a political relationship between the citizen and the state, not necessarily a territorial relationship between a country man/woman and his/her homeland. Refugeehood is one form of unprotected statelessness. Under normal conditions, state protection appends to the citizen, following him/her into foreign jurisdictions. For the refugee, state protection of basic needs is absent even at home.<sup>259</sup>

Their refugeehood is not conditioned upon this movement rather 'refugee' is a category which attaches itself once exile has occurred, all other things being equal. This is so in both historical and contemporary terms and it is a truth which applies universally to movements of those we designate as 'refugees' whatever the motivating factor of their movement. No artificial construction - legal or socio-political can add to or alter this essential truth.<sup>260</sup>

---

majority would not have been able to make a case for refugee status according to a strict interpretation of the 1951 Convention."

<sup>258</sup>Shacknove, *supra* n 238, at 274.

<sup>259</sup>*Ibid*, 283.

<sup>260</sup>Tuitt P *Rethinking the Refugee Concept* in Nicholson F & Twomey P (ed.) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 114.

If the distinction between fact and legal determination (which the UNHCR grasp fleetingly) provides any clue as to the essence of refugeehood, this essence is to be found in the only element of the definition that alludes to a factual situation - the putative refugee's bare estrangement from territory.<sup>261</sup> All but the condition of alienation (the prior fact of the refugee situation), perform a different function to that of defining the refugee - although of course, they occupy a place in the Convention definition contained in Art. 1.

To move from legal terminology to the language of critical theory or philosophy, the essence of refugeehood is to be found in the person in a condition which Hannah Arendt was to designate as an existence "without the right to have rights".<sup>262</sup> Speaking of Arendt's formulation, Patricia Owen<sup>263</sup> wrote:

In *Origins of Totalitarianism*, Arendt gave a concrete illustration of what happens when human beings have nothing to fall back on except their status as *zoe*. The classical concept of human rights, formulated as the 'Rights of Man and Citizen', presupposed the existence of a natural 'human being as such'. Arendt was one of the first to identify the central and still unresolved problems with this formation. Those most in need of the so-called 'inalienable' rights – stateless persons and refugees, those without a right to citizenship – are in no position to claim them.<sup>264</sup> Faced with the individual who has 'nowhere on earth to go'<sup>265</sup>, the positive can only work frantically to disguise the brutality and senselessness of that estrangement from territory.

The two specific points to be noted here are that, first, territorial alienation takes primacy over all other elements of the refugee definition and, second, and perhaps most important, is that certain actions upon territory precede and thus exceed all positive norms including the positive law governing refugee status and asylum. These are points clearly missed by the 1951 Geneva Convention.

---

<sup>261</sup>Tuitt P 'Transitions: Refugee and Natives' (2013) *International Journal on Minority and Group Rights*, 179-197 at 182.

<sup>262</sup>Arendt H *The Origins of Totalitarianism* (1958) 298.

<sup>263</sup>'Beyond "Bare Life": Refugees and the "Right to have Rights"', in Betts A & Loescher G (ed.) *Refugees and International Relations* (2011).

<sup>264</sup>At 133-151.

<sup>265</sup>Arendt, *supra* n 260, 293.

On point one, Goodwin-Gill speaks of the demand that the refugee is 'outside' his or her country of origin, as an 'intrinsic' element of the refugee. In contrast to the law, the 'ordinary, natural, commonsense' meaning of refugee is that of someone uprooted.<sup>266</sup> The universal characteristics of the refugee, is (unlike other elements of the Convention's definition) anterior to the Convention and other regional definitions of refugee but captured within them. Being thus captured, the refugee migrant resides there as the unrepresented and unrepresentable aspect of the refugee phenomenon.

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his status is formerly determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.<sup>267</sup>

The claim therefore here is that the Geneva Convention definition purports to capture the phenomenon of refugee but inevitably fails in its endeavour.<sup>268</sup>

#### **2.4.3.4 Linking Refugee Rights to Sovereignty: A Legal Mistake**

The contradictory principles of human rights and national sovereignty, schizophrenically both paramount in post-war international law, served two separate agendas of the great powers: the need to legitimise the new order through its commitments to rights, without exposing the victorious states to scrutiny and criticism about their own flagrant violations. As Lewis puts it:

the debate about human rights and the upholding of human dignity, was in reality a process of re-legitimation of the principles of sovereignty and non-intervention in the domestic affairs of sovereign

---

<sup>266</sup>Goodwin-Gill & Mcadam J *The Refugee in International Law* (1996) 62.

<sup>267</sup>UNHCR, *Handbook and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR, Geneva, 1992, 1979) para. 28.

<sup>268</sup>See generally Tuitt, *supra* n 155, 181.

states. The most powerful states, through human rights discourse, made their priorities the universal concern of others.<sup>269</sup>

International responsibility regarding refugees is predicated theoretically in the notion that, when a state has defaulted on its protective role, other states may substitute. The inability of the state to provide effective protection against insurgents for example has been recognised as sufficient to confer refugee status on the victims of their non-state violence.<sup>270</sup>

In refugee issues, the sovereignty principle translates into the authority of a state to control the entry and exit of refugees and their treatment while within the boundaries of the state.<sup>271</sup>

Unfortunately, the elasticity of the definition of persecution depends on the political will of member states implementing the Convention. In the era of economic inadequacies and fear of incurring unbounded obligations, the pattern, at least in most countries particularly in the West, is not adaptation to new exigencies for forced migrants but insistence on outdated and restrictive definitions of persecution. Viewed as an aspect of territorial sovereignty, grants of asylum are inherently discretionary rather than obligatory.

National authorities have the discretion to tighten the criteria of eligibility, either consciously or visibly for deterrent aims, surreptitiously, or even in subconscious reaction to fears of opening floodgates.<sup>272</sup> The 1951 Refugee Convention places few obvious constraints on the

---

<sup>269</sup>Lewis N *Human Rights, Law and Democracy in an Unfree World* in Evans T (ed.), *Human Rights Fifty Years On: A Reappraisal* (1998) 89.

<sup>270</sup>Goodwin-Gill S *The Refugee in International Law* (1983) 42-43. See also Hathaway J *The Law of Refugee Status* (1991) 124-33. See also Fukuyama F, *The End of History and the Last Man* (1992) who in Chap. 1 labelled states that could not provide security for their citizens as failed states.

<sup>271</sup>Skran C *The International Refugee Regime: The Historical and Contemporary Context of International Response to Asylum Problems* (1992) *Journal of Political History*, Vol. 4(1) 8-35 at 15.

<sup>272</sup>Fitzpatrick J, *supra*, n 244, 242.

discretion of policy makers to devise deterrent measures. For example, 'safe third country'<sup>273</sup> and 'safe country of origin'<sup>274</sup> designations may undermine effective access to asylum, but the 1951 Refugee Convention does not directly address them. Such measures can be implemented consistently with the Convention and in a manner that does not deprive refugees of effective protection.

The entire text of the 1951 Refugee Convention is also unclear as to whether states are obligated to permit entry of asylum-seekers at the border, pending determination of their claim to refugee status, and whether states are prohibited from seizing asylum-seekers at the high seas and returning them to the state in which they fear persecution. In fact the Declaration on Territorial Asylum<sup>275</sup> marked an advancement of the 1951 Geneva Convention by including an explicit right not to be rejected at the frontier, where this would undermine effective enjoyment of the right to asylum. However, this particular right is undercut by a qualifier permitting states to make exceptions 'for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.'<sup>276</sup> With emphasis shifting to deterrence of asylum-seekers, measures design to make life in exile more attractive obviously have less appeal in official circles. Policy makers in many areas of

---

<sup>273</sup>"Safe third country" agreements provide that an asylum applicant who has transited a state in which he or she could have sought asylum maybe denied access to the asylum process and returned to the 'safe third country' to pursue an asylum claim there.

<sup>274</sup>"Safe country of origin" designations establish a presumption against granting asylum to nationals of certain states, in which human rights are believed to be generally accepted. This presumption is generally rebuttable. See generally Byrne R & Shacknove A '*The Safe Country Notion in European Asylum Law*' (1996) 9 *Harvard Human Rights Journal*.

<sup>275</sup>G.A. Res. 2312, UN GAOR, 22<sup>nd</sup> Session, UN Doc. A/RES/2312 (1967) art.3(1).

<sup>276</sup>*Ibid*, art. 3(2), at 3.

the world are striving to design conditions of accommodation that will prompt the earliest possible return to states of origin thereby fulfilling 'Arendt prophecy.'<sup>277</sup>

Linking refugee rights or any human rights to sovereignty or government amounts to a betrayal of the inalienability of such rights because governments are the enemy against whom human rights were conceived as a defence. Government-operated international human rights law according to Douzinas, therefore is 'the best illustration of the poacher turned gamekeeper.'<sup>278</sup>

#### **2.4.3.5 The Implication of the Hemispheric Nature of the Definition**

The Geneva Convention focused on refugees from events surrounding WWII in Europe and thus placed both geographical limitations and temporal limits (that is, before 1 January 1951) on its definition. Persecution however did not cease after 1951.<sup>279</sup> With the continuance of persecution post 1951, the 1967 Protocol to the Geneva Convention expanded the definition of a refugee to include refugees emerging from events before and after 1951 thereby omitting from the definition term 'events occurring before 1 January 1951.'<sup>280</sup>

During the discussion on the draft 1967 Protocol for example, Nigeria and Uganda expressed discontent. They argued that the Protocol did not 'go far enough to solve the problems of

---

<sup>277</sup>Arendt H, *supra*, n 260, at 290 where she noted that 'All discussions about the refugee problems rested around this one question: How can the refugee be made deportable again?'

<sup>278</sup>Douzinas C *The End of Human Rights* (2000) 119.

<sup>279</sup>Weissbrodt D *The Human Rights of Non-Citizens* (2008) 152.

<sup>280</sup>Miranda C *Toward a Broader Definition of Refugees: 20<sup>th</sup> Century Development Trends* (1990) 20 *California Western International Law Journal* 315-324 at 319.

refugees.<sup>281</sup> First, they argued that, the assistance provided to African refugees 'did not even represent one tenth of the already very small subsistence allowance given to refugees elsewhere than in Africa'.<sup>282</sup> Second, that many African countries with 'still underdeveloped' economies were shouldering a 'crushing burden when the problem had not been of their making'.<sup>283</sup> Nigeria argued further that African refugee problem had been caused by colonialism, and, in particular, by the countries that had colonised Africa. They had a duty, Nigeria argued, to contribute to the UNHCR program and acknowledge that they had a moral obligation to alleviate as much as possible the hardship for which they were responsible.<sup>284</sup> Notwithstanding this plea, when the Protocol was adopted, it ignored Africa, Asia and Latin America's concerns to address the situation of *en masse* refugee influx and maintained the Eurocentric character of the 1951 Refugee Convention.

The 1951 Refugee Convention and the 1967 Protocol were not primarily developed to respond to Africa and Asia's concerns about refugees. As James Hathaway argues, the 1951 Refugee Convention was primarily concerned with serving the political needs of the West.<sup>285</sup> The 1967 Protocol, though important because it removed the time and geographical constraints contained in the Convention, prohibited alternative interpretations of who a refugee was and how this status could be determined.<sup>286</sup> What is apparent from the drafting procedure of both the 1951 Geneva Convention and the 1967 Protocol is that developing states had little role in the process of creating this instrument but were, nonetheless,

---

<sup>281</sup>UNGA, *Official Records of the Third Committee*, Twenty-First Session, 1449<sup>th</sup> Meeting, 6 December 1966, 436.

<sup>282</sup>*Ibid*, 437.

<sup>283</sup>*Ibid*.

<sup>284</sup>*Ibid*.

<sup>285</sup>Hathaway J, *supra*, n 188, 10-11.

<sup>286</sup>See generally Davis S 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) 19 *International Law Journal of Refugee Law* 703-728 at 727.

expected to adopt it.<sup>287</sup> This has nonetheless been the trend in international affairs. Writing on how decisions are made from global security, finance and global power dynamics in what he concludes might culminate into a clash of civilization, Huntington summarised how global decisions are made by a powerful few and yet proclaimed as international decisions:

Decisions made at the UN Security Council or in the International Monetary Fund that reflect the interest of the West are presented to the world as the desires of the world community. The very phrase “the world community” has become the euphemistic collective noun (replacing “the Free World”) to give global legitimacy to actions reflecting the interest of the United States and other Western powers.<sup>288</sup>

In this vein, many states did not participate in the framing of the Geneva Convention even though it is referred to as an international agreement.

## 2.5 Changing Perception on Refugees

The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who have indeed lost all other qualities and specific relations - except that they are still humans.<sup>289</sup> And in view of objective political conditions, it is hard to say how the concept of the ‘human’ upon which human rights are based - that he/she is created in the image of God (in the American formula), or that he/she is the representative of mankind, or that he/she harbours within himself/herself the sacred demands of natural law (the French formula) - could have helped to find solution to the problem of refugees.<sup>290</sup>

---

<sup>287</sup>*On Heroes and Uhuru-Worship* (1967) Ali Mazrui even noted that ‘Africa is landed with the consequences of the common agreement of others’. 5-10.

<sup>288</sup>Huntington S ‘*The Clash of Civilizations?*’(1993) *Foreign Affairs* 72 (3) at 39. The Eurocentric Geneva Convention and Protocol turned international agreements support this references.

<sup>289</sup>Arendt H *supra* n 260, 299.

<sup>290</sup>*Ibid*, 300.

Over the past few years human rights advocates have realised significant success in lessening the number of cases of cruel and inhuman punishment of institutionalised people. But why have refugees not been considered as members of this category when millions of them are indeed institutionalised, that is, they live in and are sometimes confined to refugee camps? Harrell-Bond and Dunbar-Oritz wondered almost three decades ago why is it then that with few exceptions, refugees have not been part of the agenda of the international human rights community? <sup>291</sup>

The overuse of the term “refugee” strikes people’s attention a bit like species of human beings different from others, often at the origins of problems, essentially living on the social margins, and quite often relying on the charity of those who can drop unnecessary coins into the coffers of churches and NGOs to extend to the world.<sup>292</sup> Such presentation of this collection of characteristics of this type of refugee may lead people to believe that nothing good can come from them, only instability, unsolvable financial burdens, and the impossibility of assimilation into host societies. Refugees therefore, liminal in the categorical order of nation-states, thus fit Turner’s famous characterisation of *liminal personae* as ‘*naked unaccommodated man (sic)*’ or ‘*undifferentiated raw material*’.<sup>293</sup>

### **2.5.1 Refugees: From the Lionised to the Mentally Deficient**

Peter Rose captures the images of the refugee in the summer of 1981 with typical acuity as follows:

Refugees: A word that conjures up images of sad-eyed children with bloated bellies in dusty border camps. Refugees: Alexander Solzhenitsyn and his friends at a press conference in Zurich. Refugees: A

---

<sup>291</sup> ‘Africa Rights Monitor: Who Protect the Human Rights of Refugees?’ (1987) *Africa Today*, Vol.34, No. 1/2, *Human Rights: The African Context*,105-125.

<sup>292</sup>Kaputu F ‘Refugees: the “Other” Human Face, and the “Other” academics, an African and Personal Experience’ (2012) *Journal of Global Citizenship & Equity Education*, Vol. 2 (2), 182-196 at 185.

<sup>293</sup>Turner V *The Forest of Symbols. Aspects of Ndembu Ritual* (1967) 98-99.

family of bewildered Vietnamese arriving at a snowy airport in northern Minnesota. Refugees: A group of sullen Cubans behind a cyclone fence on an old army post in Arkansas. Refugees: Two elderly Soviet Jews being lionized at a community centre in New Jersey.<sup>294</sup>

The late 1940s marked the beginning of the Cold War, a time when the industrialised states were being organised by the US and USSR into two competing and rival blocs.

In the post-World War II landscape of apparently global bipolarity of ideological combat pitting the USSR against the West, refugee laws throughout the West were channelled towards the reception of exiles from the USSR led bloc.<sup>295</sup> In Europe, the US led bloc claimed that the USSR led a reprehensive system which virtually enslaves its people in the service of an all-out effort to achieve global domination. The USSR led bloc claimed the US led a repressive system in which poor people in its own country and in the developing world were exploited to enrich a decadent and world-destructive bourgeois class.<sup>296</sup> Each side labelled as defectors, any of its citizens seeking asylum in the other's bloc, while those arriving from the enemy's bloc were welcome as refugees. Refugees from either side were therefore valuable and boosted morals and supremacy of each system, making refugees a Cold War tool with each side opening their doors and resources to unlimited numbers. In the US, political considerations became an explicit component of refugee admission policies<sup>297</sup> and Western European states equally eased the entry of exiles from the USSR led Eastern bloc.<sup>298</sup>

---

<sup>294</sup>Rose P, n137 at 8-15.

<sup>295</sup>Hathaway J 'A Reconsideration of the Underlying Premise of Refugee Law' (1989) *Harvard International Law Journal* 3(1), 148-151.

<sup>296</sup>Koehn P *Refugees from Revolution* (1991) 207-13.

<sup>297</sup>Ibid.

<sup>298</sup>Fassman H & Munz R *European East – West Migration, 1945 - 1992* in Cohen R (ed.) *Cambridge Survey of World Migration* (1995) 473.

Contrary to the image of the refugee especially in Africa and from Africa and other developing countries as vulnerably economic needy individuals, refugees especially from the Eastern bloc were celebrated as heroes and heroines during the cold war.

It is difficult now to remember that for most of the Cold War, refugee to the West were commonly presented as political heroes and courageous defenders of freedom, not traumatised victims.<sup>299</sup> The familiar image of the refugee was associated with political dissident. Alexander Solzhenitsyn was perhaps the archetypal of the political exile. His novel *One Day in the Life of Ivan Denisovich*<sup>300</sup> tackled the suffering of prisoners in Soviet Camps, but the prisoners were not viewed by Western audiences through the paradigm of trauma, but politics. Equally the Hungarian-born writer Arthur Koestler was considered an intellectual and political combatant in the twentieth century. His most famous work *Darkness at Noon*,<sup>301</sup> repeatedly published, portray persecution and torture, its themes were also viewed in political terms. Political suffering was the recurring interest. Similarly, the Czech writer and dissident Milan Kundera was embraced by the West.<sup>302</sup> On the eve of the collapse of the Berlin Wall, Russian poet Irina Ratushinskaya, author of a number of books including *Grey is the Colour of Hope*<sup>303</sup> was upheld as a brave champion of artistic freedom. Solzhenitsyn, Ratushinskaya and others were embraced in the Western official circles in their Cold War struggle as demonstrating the superiority of the *Free World* against the Communist bloc.

---

<sup>299</sup>Pupavac V 'Refugees in the 'sick role': stereotyping refugees and eroding refugee rights' (2006) *New Issues in Refugee Research, Research Paper No. 128* at p. 1.

<sup>300</sup>Solzhenitsyn A *One Day in the Life of Ivan Denisovich*(1974).

<sup>301</sup>1941.

<sup>302</sup>Pupavac V, *supra*, n 296, 1.

<sup>303</sup>1989.

Either way, the iconic images of refugees to the West were strong, heroic figures struggling for freedom and justice both politically and intellectually. They were figures of admiration in their defiant stance and personal sacrifice. This was how the refugees were mostly perceived in the West during the Cold War era. They were lionised in the West and their perceived sacrifice and courage even to flee perhaps reaffirmed the purported liberty and justice in the free world.

The romanticised image of the heroic political exile did not, however, imply that all refugees were welcomed. All too frequently, tacit or not so tacit racial distinctions were made in deciding who qualifies as a refugee and who did not, even the 1951 Geneva Convention test of persecution was applied racially.<sup>304</sup> A good example was the outrageous behaviour of the British labour government in 1967 (the same year the ICCPR was adopted) rushing through legislation to prevent Kenyan Asians from fleeing to Britain on their British passports thereby effectively making people who were actually British citizens stateless persons.<sup>305</sup> But during the Hungarian uprising in 1956, France and the UK announced their intention to take an unlimited number of refugees. Upwards of 20, 000 Hungarians found asylum in the UK within a few days, the highest of any European country.<sup>306</sup> The exiles of the Cold War from the Soviet bloc found ready welcome and individuals were granted asylum almost immediately.<sup>307</sup>

The shifting image of refugees from political heroes to traumatised victims does not simply reflect the changing fortunes of refugees, but also reflect some changes in Western societies.

---

<sup>304</sup>Pupavac V, *supra*, n 296, 2.

<sup>305</sup>*Ibid.*

<sup>306</sup>Loescher G & Scanlan J *Calculated Kindness: Refugees and America's Half Open Door, 1945 to the Present* (1996) 52. See also, Tabori P *The Anatomy of Exile: a semantic and historical study* (1972) where at 339, he puts the UK figure to 300 000 Hungarians.

<sup>307</sup>Tabori *supra* at 340. See also Patterson S *The Poles: An Exiled Community in Britain* in Watson J (ed.) *Between Two Cultures: Migrants and Minorities in Britain* (1977) 216. See especially Dummett A & Nicol A *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (1990) 188.

The end of the Cold War signalled the triumph of the West over the Soviet bloc. However, the space the refugee occupies today as traumatised victim, having lost a heroic political status, is no longer as distinct from the illegal immigrant and is seen as alien to the political community and an alien social burden despite their contribution. And space according to Keith and Pile, is 'an active component of hegemonic power... it tells you where you are and it puts you there'.<sup>308</sup> And so we end up at the international level, with a panel-beating figure of a refugee as a morally dislocated, crime ridden, socially misfit and economic dehydrating subhuman being completely unworthy of rights.

The Cold War lionised and iconic status refugees once enjoyed, however discriminatory this status was, since it was only applied to refugees from the competing blocs, the contemporary refugee is no longer perceived as intellectually capable of even presenting his/her story. With the same status, Alexander Solzhenitsyn and other refugees could exert influences, tell their stories, free to attend conferences and awe the 'free world' with their courage and indomitable will. Contemporary refugees, on the other hand, especially those from African continent, are perceived as mentally deficient and are held up in camps like pigs and their stories left to be told by NGOs and lawyers, and in most cases, their story is often changed in the telling. This global visual field of often quite standardised representational practices is surprisingly important in its effects, for it is connected at many points to the de facto inability of the particular refugees to represent themselves authoritatively in the inter - and transnational institutional domains where funds and resources circulate.<sup>309</sup>

---

<sup>308</sup>Keith M & Pile S *Place and the Politics of Identity* (1993) 37.

<sup>309</sup>See generally Malkki L 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricisation' (1996) *Cultural Anthropology*, Vol.11 (3) 377-404 at 386.

Mass displacements are often captured as a 'sea' or 'blur of humanity'<sup>310</sup> or as a vast and 'throbbing mass'<sup>311</sup> especially in Africa. Black bodies are pressed together impossibly closed in a confusing and frantic mass. This is a spectacle of raw bare humanity. Feldman's essay on 'Cultural Amnesia' captures the images of refugees in Africa as sometimes portrayed in the media which still holds true today

Generalities of bodies – dead, wounded, starving, diseased, and homeless - are pressed against the television screen as mass articles. In their pervasive depersonalization, this *anonymous corporeality* functions as an allegory of the elephantine, "archaic," and violent histories of external and internal subalterns.<sup>312</sup>

The refugees are portrayed as intellectually deficient and completely incapable of telling their own story which now must be told by purported experts with scant knowledge of their inherent plight. This is the portrait and perception of refugees in our contemporary time, a stark different image from that enjoyed by their Cold War counterparts.

### **2.5.2 Refugees: A Moral Dislocation and a Developing World Problem**

The term 'refugees' denotes an objectified, undifferentiated mass that is meaningful primarily as an aberration of categories, an object of therapeutic interventions and, as Turner notes, '*an undifferentiated raw material*.'<sup>313</sup> This, in another way, symbolises a broken moral being.

The theme of moral break down has not disappeared from the study of exile and displacement. Pellizzi, for instance, speaks of the 'inner destruction' visited on the exile 'by the full awareness of his condition.'<sup>314</sup>

---

<sup>310</sup>Lamb D 'Threading Through a Surreal World' (1994) *Los Angeles Times*, June 14, H1, H5.

<sup>311</sup>Warrick P *Tipper Gore's Mission of Mercy* (1994) *Los Angeles Times*, 15 August, E1, E2.

<sup>312</sup>Feldman A *On Cultural Amnesia: From Desert Storm to Rodney King* (1994) 21 *American Ethnologist*, 404-18, at 407. See also Stein B *The Refugee Experience: Defining the Parameters of a Field of Study* (1981) *International Migration Review* 15 (1), 320-330, the author, in justifying the sorry and needy images of refugees as portrayed in the media, noted at 327 that 'refugees are helped because they are helpless; they must display their needs and helplessness.'

<sup>313</sup>Turner, *supra*, n 291, 88-89.

Contemporary field of refugee studies and post-war literature did not see refugees as ordinary people, but represent, rather, an anomaly requiring specialised correctives and therapeutic interventions.<sup>315</sup> It is striking how often the abundant literature claiming refugees as its object of study locates 'the problem' not in the political conditions or processes that produce massive territorial displacements of people, but, rather, within the bodies and minds (and even soul) of people categorised as refugees.<sup>316</sup> Hence by the 1970s, when the majority of refugees came from the developing world, host countries were less willing to receive them, perceiving a threat to political and economic stability.<sup>317</sup> To this end, terms soon emerged to distinguish between 'genuine' conventional and 'de facto' refugees.<sup>318</sup> By now it became clear that the international refugee regime was predicated more on economic and ideological considerations rather than human rights and humanitarian grounds. According to Toft, the threat posed in any host country by refugees 'can be (and generally) construed along two parallel axes: (1) a socio-cultural axis in which the questions of culture, language, race, and assimilation all leap to the fore; and (2) an economic axis, where incoming refugees are imagined (sometimes justifiable so) to strain a host country's social services capacity, as well as to take over jobs that otherwise might have been available to lower skilled locals at a higher wage'. The naivety of this perception is the incapacity of the author to appreciate the contributions that refugees make to host countries from education to commerce.

---

<sup>314</sup>Pellizzi F *To Seek Refuge: Nations and Ethnicity in Exile* in Guidieri R, Pellizzi F & Tambiah S (eds.) *Ethnicities and Nations: Processes of Interethnic Relations in Latin America, Southeast Asia, and the Pacific* (1988) 170.

<sup>315</sup> See generally, Pupavac V, *supra*, n 296.

<sup>316</sup> See generally Malkki, *supra* n 306, 33.

<sup>317</sup> Kushner T & Knox K *Refugees in an Age of Genocide* (1999) 11.

<sup>318</sup> Sztucki J 'Who is a Refugee' *The Convention Definition: Universal or Obsolete?* in Nicholson & Twomey (eds.) *Refugee Rights and Realities* (1999) 69.

Apart from the fact that international refugee regime is predicated on economic and ideological considerations, it is also perceived first and foremost as an African problem.

The period from the rapid decolonisation in the 1960s saw a watershed period of modern phenomena of refugees and refugees' settlement practices. The establishment and, in some cases, movement of nation-state boundaries and the global consolidation of processes of extraction and impoverishment were just two factors in the emergence of the developing world as a vast source of refugees and migrants. The rich countries in the West started since in the 1970s to defend themselves against immigration in what Nobel described back in 1988 as an 'arm race against humanitarianism' and an 'escalation of unilateral measures against refugees'.<sup>319</sup> That countries in the West are refugees' non-producing countries is not an accident of geography or history.

From World WarII to the end of the Cold War, 'decolonisation and super-power conflict produced the largest number of refugees....'<sup>320</sup> In allocating most of the refugees troubles in the developing world to the West including the extraction of natural resources, maintaining dictators, selling arms and barring victims of human rights violations from seeking refuge in the West, Nobel perceptively wrote:

Some say we live in the era of the bomb and the migrant. I would say it is the era of the refugees as very few states today encourage anything but marginal immigration and then exclusively in the interest, as it is understood, of that state. The overwhelming majority of the refugees originate in the Third World. The direct causes of their flight are conflicts kept alive mostly by super-power politics and by weapons forged and manufactured at bargain prices in the rich countries, who export death and destruction, and import the natural and partly processed products of the poor countries. At the same time they refuse to a great extent to receive the refugees who try to escape the suffering and the sorrow generated by super-power politics.<sup>321</sup>

---

<sup>319</sup>Nobel P *Refugees and other Migrants viewed with a legal eye - or how to fight confusion* in Peterson K and Rutherford A (ed.) *Displaced Persons*. Coventry (1988) 29-30.

<sup>320</sup>Hein J 'Refugees, immigrants, and the State' (1993) *Annual Review of Sociology* (19) 43-59 at 47.

<sup>321</sup>Nobel P, *supra*, n 315, 29.

This is the tragedy of refugee production particularly in the African continent and elsewhere around the globe. In most cases, refugees are produced by conflicts fuelled by forces beyond their borders.

## **2.6 Conclusion: Beyond UNHCR and the Geneva Convention**

The fundamental basis of international law is the recognition of state sovereignty. Once a person or a people step outside the borders of a state of which they are citizens, it has been the assumption that they are no longer a proper subject for consideration by those concerned with human rights.

Refugees are considered subject to humanitarian law. Humanitarian law, unlike human rights law, is mostly applicable in situations involving armed conflict. As an outgrowth of the law of war, humanitarian law (or the Geneva Law) provides protection for victims of armed conflict – civilians including refugees, medical and relief workers and wounded or captured soldiers who have been disarmed. Humanitarian and refugee law in practice provide extremely limited protection for refugees. Refugees for example, do not have the right to enter other states, although governments which have ratified the 1951 Geneva Convention are not permitted to send refugees back to their home countries if there is basis for a well-founded fear of persecution.<sup>322</sup>

International human rights law, for example, is embodied in the UN Charter itself, in the UDHR and in the two International Covenants, as well as in the UN resolution, customs, judicial decisions and expert opinions. Refugees are never specifically mentioned in this body of laws, although there is the inclusion that all humanity, without discrimination, are the

---

<sup>322</sup>Dunbar-Ortiz & Harrell-Bond B 'Africa Rights Monitor: Who Protect the Human Rights of Refugees?' (1987) *Africa Today*, Vol. 34 (1) *Human Rights: The African Context*, 108.

beneficiaries of international human rights protection.<sup>323</sup> Although they are subjects of humanitarian law as embodied in the 1951 Refugee Convention, Protocols and regional conventions such as the 1969 African Refugee Convention, refugees themselves, either as individuals or in concert, have no recourse to protection other than the application of asylum.

The right to seek and enjoy asylum is embraced in the international community's foundational post-war Charter of human freedoms, the UDHR,<sup>324</sup> yet, the drafters of the UDHR carefully refrained from articulating a right to be granted asylum.<sup>325</sup> No right to receive, or even to seek, asylum was expressly incorporated into the ICCPR, even though it has been included in the draft prepared by the Human Rights Commission in 1954. Contracting States had rejected the draft proposal that included the right to receive asylum on the grounds that it is incompatible with the sovereign power of states to decide whether to admit or exclude aliens from their territory.<sup>326</sup> A reprieve for asylum seekers and refugees amid this impasse is however found in Art 13 of the ICCPR which, *inter alia*, provides for the protection of aliens lawfully in a territory of a state from being arbitrarily expelled.

Further, the 1951 Geneva Convention especially, does not deal or address why people flee or otherwise. There seems therefore to be a shortage of mechanisms which can effectively allow the international community to remedy the cause of flight. Although Art 38 of the 1951 Geneva Convention provides that disputes between states parties relating to its interpretation

---

<sup>323</sup>Ibid.

<sup>324</sup>General Assembly Resolution 217 (III), UN Doc. A/810, at 74 (1948) provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”

<sup>325</sup>Holborn L *Refugees: A Problem of Our Time* (1975) 163. In fact, Art. 14 of the UDHR does not provide for a right to receive asylum. Indeed, the word ‘receive’ was removed from an earlier draft during the course of the negotiations on the text. In this regard, see, Plender R & Mole N *Beyond the Geneva Convention: Constructing a de facto right of asylum from international human rights instruments* in Nicholson F & Twomey P (eds.) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 81.

<sup>326</sup>Ibid.

maybe be brought before the International Court of Justice, no procedures were ever laid down for individual complaints. Hence domestic courts remain the only avenue for complaints.

The continued persistence of refugee movements and asylum problems since WW I strongly suggests that the founders of the interwar and contemporary refugee regimes operated in a fundamentally wrong assumption. What distinguishes contemporary refugees from particularly those of the Cold War era is, according to Stoessinger, 'the immense difficulty, and often impossibility of finding a new home.'<sup>327</sup>

Consequent on these numerous shortcomings of the 1951 Geneva Convention in particular and international human rights in general, Skran predicts 'the great danger for refugees is that these institutions will become increasingly ineffective and eventually collapse, as was the case in the late 1930s.'<sup>328</sup> In supporting her conclusion that the international refugee regime has a long way to go to become truly international and relying on a quote from Nietzsche that 'Truth are illusions about which one has forgotten that this is what they are', Sara Davis concluded that "the 'true' refugee law and practices that we observe as international are just an illusion within the myriad practices and discourses that comprises refugeeness."<sup>329</sup>

While I agree with Sara Davis, I am convinced Skran is wrong in concluding the 1951 Geneva Convention will commit suicide as its predecessors in the 1930s. The reason why Skran is wrong is that the international community no longer feels the pressure as before because refugees, particularly in the African continent are primarily the concern of host nations. It is

---

<sup>327</sup>Stoessinger J *The Refugee and the World Community* (1956) 6.

<sup>328</sup>Skran C 'The International Refugee Regime: The Historical and Contemporary Context of International Responses to Asylum Problems' (1992) *Journal of Policy History*, Vol. 4 (1) 29.

<sup>329</sup>Davis S 'Truly' International Refugee Law? Or Yet Another East/West Divide?' (2002) *Social Alternatives*, Vol. 21 (4) 41.

therefore, not clear how the refugee situation including attacks on foreigners for example in South Africa directly impacts the UNHCR. The UNHCR to an extent, has mortgaged its responsibilities to refugees to host countries and so why should the system collapse as Skran predicted? Her prophecy of the collapse of the international refugee regime cannot be fulfilled and so her prayer must fail.

The question is: can an institution forged in the fires of the Cold War be adapted to solve present and future challenges of the refugee problem? In the understanding that the 1951 Geneva Convention, though Eurocentric, sets only a minimal standard of protection for refugees and that municipal and regional instruments must be strengthened to deal with refugee problems, yes, it can help solve the problem. The UNHCR's supervisory and reporting role will be more effective if regional and domestic instruments protecting and advancing refugee rights are strengthened. Every attempt must be made to wrestle the utter control of the promotion and advancement of refugee rights from the UNHCR and the 1951 Geneva Convention because so far, the institution and the application of the Convention, particularly in Africa, is a betrayal of human rights. It is with this background at hand that the naturalisation of refugees under international law will take its cue.

## CHAPTER 3

### NATURALISATION OF REFUGEES UNDER INTERNATIONAL LAW

Man of the twentieth century has become just as emancipated from nature as eighteenth century man from history. History and nature have become alien to us, namely, in the sense that the essence of man can no longer be comprehended in terms of either category. On the other hand, humanity, which for the eighteenth century, in Kantian terminology, was more than a regulative idea, has today become an inescapable fact. The new situation, in which “humanity” has in effect assumed the role formerly ascribed to nature or history, would mean in this context that the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means whether this is possible.

Hannah Arendt, “The Origins of Totalitarianism” 1951, 298

#### 3.1 Introduction

The architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity should enjoy all human rights.<sup>330</sup> This bold position is nonetheless subject to an exceptional restriction predicated on the distinction between a citizen and a non-citizen. However, under international law, such distinction is allowed only if it is designed to achieve a legitimate state objective and it's proportionate to the said purpose.<sup>331</sup>

It was implicit from the very outset ‘that only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions, that persons of different nationality needed some law of exception until they were completely assimilated and divorced from their origin.’<sup>332</sup> However, post-Westphalia and modern

---

<sup>330</sup>The UDHR (1948), GA Res 217 A (III) at 71, UN Doc A/810, recognised this principle in Art. 2 (1).

<sup>331</sup>Weisserbrodt D *The Human Rights of Non-Citizens* (2008) 45.

<sup>332</sup>Arendt H *The Origins of Totalitarianism* (1951) 275.

international law has provided a path for legal integration especially for forced migrants in which states that did not reserve such provisions during ratification have to domesticate the same in their municipal laws.

There is a line of thinking in post-modernist literature assuming that globalisation characterised by mobility of people, goods, capital and ideas and the erosion or dismantling of spatially bounded social worlds<sup>333</sup> has led perhaps to the deterritorialisation of identity. Consequent to this, people of diverse origin however their backgrounds are in the process of becoming citizens of a globalised world, a kind of cosmopolitanism. Accordingly, identity has become more or less deterritorialised. It is argued further that this period is characterised by a 'generalised condition of homeless'<sup>334</sup> as the world and mankind shrink into a borderless cosmos wherein 'we are all refugees'<sup>335</sup> or 'even tourists.'<sup>336</sup>

The implications of this position is that not only does the relationship between people and place been denied but further that people regardless of their territorial origin are increasingly becoming members of a globalised community whereby irrefutable concepts such as homeland, locality and territoriality situated unequivocally on national and collective identities are speedily becoming a thing of the past.

It is, however, difficult to conceive or perceive a deterritorialised identity in a territorialised setting to which every state from Westphalia till date is predicated.

---

<sup>333</sup>Stepputat F 'Repatriation and the Politics of Space: The Case of the Mayan Diaspora and Return Movement' (1994) *Journal of Refugee Studies* 7(2/3) 175-185 at 176.

<sup>334</sup>Said E 'Zionism from the Point of View of its Victims' (1979) *Social Text* 1: 7-58 at 18.

<sup>335</sup>Warner D 'We are all Refugees' (1992) *International Journal of Refugee Law* 4(3) 365-372.

<sup>336</sup>Ezrahi in Warner D 'Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics' (1994) *Journal of Refugee Studies* 7(2/3) 160-174 at 168.

However, if the above argument was to hold substance that we are all mobile and by implication homeless, then there would have been no home in a material sense for refugees to seek membership or to even return. Put differently, there would be no refugees and therefore no need for any refugee policy, let alone a question of naturalisation of refugees. This tendency of a super mobility has only become a reality for capital, goods and ideas, certainly not people.

Hence, the assumption that identities have been deterritorialised and that states are simply there for the taking regardless of the national origins of the aspirants, 'has no objective existence outside the minds of its proponents'.<sup>337</sup> Nowhere is this true than the quest of membership, local and legal integration of those forcefully displaced.

Under international refugee law, local integration is one of the durable solutions to the refugee problem. As one of the important durable solution to the refugee problem, local integration is a legal, social and economic process.<sup>338</sup> This thesis deals only with the legal integration and naturalisation of refugees.

Through naturalisation, refugees enjoy the full legal protection of a host country and acquire an effective nationality as any of its citizens. Hence if the legal aspects of local integration are fully implemented, it would lead to naturalisation and the ultimate benefits of full membership.

While full legal integration is of particular importance to refugees because it restores their full human rights, it has never been accepted by many host states, hence the

---

<sup>337</sup>Kibreab G 'Revisiting the Debate on People, Place, Identity and Displacement' (1999) *Journal of Refugee Studies* 12(4) 384-410 at 385.

<sup>338</sup>UNHCR 'Displacement and Durable Solutions in Statistical Yearbook : Trends in Displacement, Protection and Solutions.

existence of camps to cage refugees and their human rights in many countries. It is not even mentioned in UNHCR's publications nowadays probably because it would not carry favour with countries of asylum. Chimni notes that 'international hospitality has changed since the 1950s'.<sup>339</sup> Many states have not only closed their borders to refugees to shield them from their territories and in their view protect their nationals, but have equally adopted draconian and restrictive receptive policies design to constrain their integration. In fact, it should be noted that integration is not formally defined in the principal legal instruments governing UNHCR policies: the 1951 Geneva Convention<sup>340</sup> and the statute of the UNHCR.

Within the purview of naturalisation, it has been suggested that states should take practical and effective measures to ensure that non-citizens inclusive of refugees, enjoy without discrimination, the same right to acquire citizenship.<sup>341</sup> This position is only binding on those states such as South Africa and others who have not entered reservation on Article 34 of the 1951 Geneva Convention. Skran wondered why given the many problems created by prolonged relief, repatriation huddles and local integration complexities much effort has not been made to prevent the creation of refugees in the first place.<sup>342</sup>

---

<sup>339</sup>Chimni B *International Refugee Law* (2000) 344.

<sup>340</sup>Article 8 of the Geneva Convention on the Status of Refugees which specifies and lays down the duties of the UNHCR High Commissioner includes protecting the 'admission (of refugees) to a new territory or national community.' That can hardly mean anything else than their naturalization and this is confirmed by article 34 of the Convention, which provides for the facilitation of the naturalization of refugees. See Chimni, *ibid*.

<sup>341</sup>Concluding Observations of the committee on the Elimination of Racial Discrimination: Yemen (2002) UN Doc CERD/C/61/Col 10, para 14.

<sup>342</sup>Skran CM 'The International Refugee Regime: The Historical and Contemporary context to International Response to Asylum Problems' (1992) *Journal of Political History* 4(1) 8-35 at 28.

This chapter deals with the naturalisation of refugees under international law. It argues that the law regarding naturalisation of refugees at the international level is imprecise and clearly inadequate. Given the super importance of citizenship in the world of rights where it is increasingly becoming crystal clear that the line separating human rights and citizenship rights is blurred, nothing else is worse than an unclear international statute. This chapter digs deeper in order to unravel why international law and the international community fail to wrestle or deterritorialise an important status such as citizenship which carries so much weight in a world where human rights are almost becoming citizenship rights. The impact of the opaque international law position regarding naturalisation has translated into states overestimating the currency of citizenship and erecting painful legislation calculated to torture refugees on their path to full membership.

This chapter identifies a couple of alignment factors that ought to be non-aligned if the human right to naturalisation of refugees were to be certain and less intrusive. The chapters closing argument will centre on a deterritorialisation of rights and status from the clutches of an overreaching state power in our neoliberal world.

This chapter will be presented into six parts. The first part will tackle the legal position of naturalisation under international refugee and human rights law. The second part revisits the much debated dichotomy between refugee rights and citizenship rights. Assuming that refugee rights are practically different from citizenship rights, the third part contrast refugee rights versus human rights. Part four will examine the difficulties arising from linking human and refugee rights to states' sovereignty. Part five looks into

the doctrine of borders and argues that if human rights are indeed transnational, what is the implication of borders in the enjoyment of rights. Part six is the concluding part in this chapter. In each of the preceding parts, the elements are examined against the right to refugee naturalisation under international law.

### **3.2 Naturalisation of Refugees under International Human Rights Law**

Contemporary international human rights law itself draws a lot from both the French Declaration of the Rights of Man and Citizens and the American Bill of Rights. Writing back in 1951, Hannah Arendt captures the essence of human rights in the guise of the Rights of Man. She notes that:

Since the Rights of Man were proclaimed to be “inalienable”, irreducible to and undeducible (*sic*) from other rights or laws, no authority was invoked for their establishment; Man himself was their source as well as their ultimate goal. No special law, moreover, was deemed necessary to protect them because all laws were suppose to rest on them. Man appeared as the only sovereign in matters of law as the people was proclaimed the only sovereign in matters of government. The people’s sovereign (different from that of the prince) was not proclaimed by the grace of God but in the name of Man, so that it seems only natural that the “inalienable” rights of Man would find their guarantee and become an inalienable part of the right of the people to sovereign self-government.<sup>343</sup>

As a matter of fact, the very language of the American Bill of Rights of 1791 as well as the French *D’eclaration des Droits de l’homme et du citoyen* of 1789 carries words such as “inalienable” which means “given by birth”, “self-evident truths” certainly implies the belief in a kind of human “nature” which would be subject to the same laws of growth as that of the individual and from which rights and laws could be deduced. Consequent to this, it is trite therefore that humanity has assumed the role formerly ascribed before both declarations to nature or history. The immediate implication within the context of contemporary human

---

<sup>343</sup>Arendt, *supra* n328 at 291.

rights would mean that ‘the rights to have rights or the rights of every individual to belong to humanity should be guaranteed by humanity itself.’<sup>344</sup> This unfortunately is not the case today. Simultaneously, it is the absence of this understanding and implementation of rights especially within the context of refugee naturalisation that has constantly brought the universal human rights system into constant scrutiny and pressure.

The current international human rights regime is a historically recent positive discourse of law and legitimacy, established only with the UN Charter of 1945 and what many may see as the ‘foundational text that enabled the Charter to be specified in terms of rights by the adoption of the UDHR of 1948.’<sup>345</sup> In commenting on the status relationship between the Charter and the UDHR, Sieghart noted that:

By the time of the adoption of the UN Charter it had not proved possible to define what these ‘human rights and fundamental freedoms’ were. In order to repair the omission, the United Nations proceeded to draft the famous Universal Declaration of Human Rights<sup>346</sup>

However, the UDHR as it stands is a declaration and not a binding treaty under international law and ever since then efforts and moves have constantly been afoot to translate its intentions into detailed treaties. The consequences of these efforts are the

---

<sup>344</sup>Arendt, *Ibid*, 298.

<sup>345</sup>Yeatman A ‘Who is the Subject of Human Rights?’ (2000) *American Behavioral Scientist*, 43(9) 1498-1513 at 1499.

<sup>346</sup>Sieghart P *International Human Rights Law: Some current problems* in Blackburn R & Taylor J (eds.) *Human Rights for the 1990s: Legal, political and ethical issues* (1991) 27.

1951 Geneva Convention governing Refugees, the 1966 protocols and the rest that has followed till date.

As it stood then and today, while the rights spelt out in both the UN Charter and the UDHR are fundamental and inalienable rights in theory, their realisation and respect thereof are only possible through the units of individual states with the exception of the European Union. This is so because, states at the very outset of the foundational texts of human rights, were the only units that could promote, defend and ensure the recognition of the various rights. As it would be seen below, tying fundamental inalienable rights to state power and sovereignty has not only brought uncertainty but a clash of universal and municipal authority and perhaps to an extent, a fallacy in the realisation of fundamental human rights especially to forced migrants.

However the proclamation in the UN Charter of 1945 and the UDHR institutionalising human rights for all, marked a paradigm shift and imposes a new set of demands on governing authorities of member states of the UN, namely that, states must respect the principle of the human dignity of everyone irrespective of national origin and in all matters. Nevertheless, the respect of state sovereignty and the respect of fundamental human rights of every individual for no other reason but because they are human has unavoidably opened a window of contest between these two competing ideals. How this intermittent ideological conflict pitting sovereignty and fundamental human rights would play in the naturalisation of refugees would be seen as this chapter unfolds.

### 3.2.1 Naturalisation of Refugees before 1945

Historically, there has always been and there exist still, a distinction between nationality and citizenship especially when enfranchisement was denied women in Europe, America and colonial Africa. The people of these states were obviously nationals but lacked full citizenship rights in terms of voting rights. While they were nationals, they were not citizens of their nation-states, a practice very much alive today perhaps in some states.<sup>347</sup>

The refusal or granting of nationality has long been regarded even in classical international law to be the exclusive preserve of the state concerned, a position confirmed in 1923 by the Permanent Court of International Justice.<sup>348</sup> In 1930, the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws reaffirmed in its preamble that it is in the interest of the international community to ensure that ‘every person should have a nationality.’<sup>349</sup> While conceding however that each state party must retain the right to determine its own citizenship laws, it nonetheless noted in Article 1 that other states will recognise these laws only insofar as they are consistent with international conventions, customs and ‘principles of law generally recognised with regard to nationality.’ It is important however to look at the broad intentions of this Hague Convention. The latter was an attempt to guarantee

---

<sup>347</sup>Saudi Arabia and the Vatican are prime examples of states where women do not vote till now.

<sup>348</sup>Nationality Decrees Issued in Tunisia and Morocco on 8 November, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7) para. 8. See also Weiss P *Nationality and Statelessness under International Law* (1979) when he wrote at p.26 that “the right to state to make rules governing the loss of nationality is, in principle – with the possible exception of clearly discriminatory deprivation – not restricted by international law, unless the state has by treaty undertaken specific obligations imposing such restrictions”.

<sup>349</sup>“It is for each State to determine under its own rules who are its nationals. This law shall be recognized by other States insofar as it is consistent with international conventions, international customs, and the principles of law generally recognized with regard to nationality.” Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930 (entered into force 1937), Art. 1.

citizenship to all while minimising dual citizenship practices among states. It was designed to cater for the statelessness or enable refugees who have lost protection of their states to find another state or nationality *per se*.<sup>350</sup>

The League of Nations did not address naturalisation of refugees even after the catastrophic events of World War I, neither did it deal extensively with the human rights of forcibly displaced persons. However, it situated and solidified citizenship within the power of sovereign states and subsequent human rights treaties would further build into this solidity and to date, citizenship remained a gift of government and the refugee, a permanent outsider in the inside.

The League of Nations helped promote inter-governmental organisations dealing with refugees by way of conferences, conventions, resolutions and agreements. Its creation and action was therefore essential in formulating the refugee as an axis of displacement, as well as affirming intergovernmental institutions as the norm for confronting the phenomenon.<sup>351</sup> The League of Nations High Commissioner for Refugees, Soguk would write at the end of the 1990s that it 'was a fundamental practice of statecraft of the first order, during whose tenure, the ontology of the refugee was fully

---

<sup>350</sup>See generally Manby B *Citizenship Law in Africa: A Comparative Study* (2010) 18-28.

<sup>351</sup>Haddad E 'The Refugee: The Individual between Sovereigns' (2003) *Global Society* 17(3) 297-322 at 316.

determined and thoroughly formalised, thus enabling the subsequent regime activities.’<sup>352</sup>

In accordance with the body of refugee rights developed from the League of Nations and the current regime of rights, and the international legal aspect of state sovereignty, neither the UN nor any other international organisation ‘promotes effective protection of human rights outside of freedoms made possible in the territorial jurisdiction of states.’<sup>353</sup>

Although the League of Nations and its refugee wing did not address the issue of naturalisation of refugees in terms of specific provisions in its few conventions, a lot of resettlements took place especially during post-World War II. This resettlement and subsequent naturalisation of refugees during the post-war years did not spur international obligation even after the UN Charter was proclaimed in 1945, but it was basically motivated by economic reasons. Hathaway wrote about a fortuitous coalescence of interest basically post-world war II economic boom in the new world which in itself opened the doors for the need for labour. International statistics show that the scale of resettlement during this period was massive and that between 1947 and 1951, the International Relief Agency resettled more than one million European

---

<sup>352</sup>Soguk N *States and Strangers: Refugees and Displacement of Statecraft* (1999) 111.

<sup>353</sup>Franke MFN ‘The Unbearable Rightfulness of being human: Citizenship, Displacement, and the right to not have rights’ (2011) *Citizenship Studies* 15(1) 39-56 at 39.

refugees in the Americas, Israel and Oceania.<sup>354</sup> Naturalisation was not in any way a vindication or even a mere upholding of the human rights of refugees but rather their subjugation and reaffirmation of their subhuman status which the current international regime has also failed to repair.

### **3.2.2 Naturalisation of Refugees under the current Rights Regime**

The United Nations commitment to human rights for all, best exemplified by humanitarian intervention, has at best created perhaps an institutional paradox. The organisation on the one hand is made up of independent states with global outreach and it dares to dilute the statist paradigm of non-interference predicated on sovereignty. On the other hand, consequent on a desire to bring all nations together in pursuing a common vision, however incomprehensive, the UN erroneously integrated and placed under the protection of member states, the human agents it sought to extricate from states' rule.

The UDHR provides that everyone has a right to a nationality,<sup>355</sup> the 1961 Convention on the Reduction of Statelessness makes a similar provision in Article 8<sup>356</sup> and the UN

---

<sup>354</sup>Ruthström-Ruin C *Beyond Europe: the Globalisation of Refugee Aid* (1993) 17.

<sup>355</sup>Art. 15 of the Universal Declaration of Human Rights of 1948 provides the following;

'15(1) Everyone has the right to a nationality.

15(2) No one shall be arbitrarily deprived of a nationality nor denied the right to change one.'

<sup>356</sup>Convention on the Reduction of Statelessness, adopted on 30 August 1961 by a conference of plenipotentiaries which met in 1959 and reconvened in pursuance of Gen. Ass. Res. 896(IX) of 4 December 1954 as entered into force 13 December 1975, in accordance with article 18. Art 8 provides:

'8(1) A contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.'

Convention on the Rights of the Child echoes the same provision.<sup>357</sup> In the context of nationality provisions, African Conventions have shown relative weakness. The African Charter on Human and Peoples' Rights is silent on the nationality question despite the artificial African frontiers.<sup>358</sup> The African Charter on the Rights of the Child, takes its cue from the UN Convention of the Rights of the Child by providing for the right to a name from birth, the right to acquire nationality, as opposed to the right to a nationality at birth.<sup>359</sup> The terminology 'stateless' at least acknowledged the fact that an individual has indeed lost the protection of his or her government and requires international agreements to safeguard his/her legal status. In reality and putting the terminology politics aside, such is the fate of a refugee, hence the desire to find a new but permanent home and governmental protection and participation in the form of naturalisation.

The right to seek and enjoy asylum, for example, is a universal one. In fact Article 14 of the UDHR provides that 'everyone has the right to seek and enjoy in other countries

---

<sup>357</sup>Convention on the Rights of the Child, adopted by Gen. Ass. Res. 44/25 of 20 November 1989 and entered into force 2 September 1990 provides in art. 7 that:

'7(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

7 (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.' See also art. 24 (1) of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966 which entered into force on 23 March 1976.

<sup>358</sup>African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>359</sup>African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999 provides in article 6 that:

'6(1) Every child shall have the right from his birth to a name.

6(2) Every child shall be registered immediately after birth.

6(3) Every child has the right to acquire a nationality.

6(4) State Parties to the present charter shall undertake to ensure that their Constitutional legislation recognise the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

asylum from persecution', Article 13 provides for freedom of movement,<sup>360</sup> and Article 15 makes it clear that everyone has a right to a nationality. The 1951 Geneva Convention is itself a full expression of Article 14 of the UDHR. These ideas have been implemented parochially in almost every Member State of the UN. The reason might be because some of these provisions are themselves ambiguous.

The UDHR recognises individual's freedom from persecution and the right to freely leave one's country and enjoy asylum in other countries free from persecution but without a corresponding right to member States to receive such asylum seeker. Without the corresponding right for States to receive asylum seekers, Articles 13 and 14 are indeed of little legal significance.

Thus, those who do not enjoy territorial presence and roots in a particular country within the maps of international society are, according to Franke, 'doubly displaced, from both the determined places of humanity and grounds from which respect as a human being maybe leveraged.'<sup>361</sup> In view of the above, therefore, the UDHR is not so much a document endowing and privileging humanity with rights. It serves in the case of naturalising refugees as an obligation imposed on member states to mobilise itself and

---

<sup>360</sup>Article 13 of the UDHR provides that:

'13 (1) Everyone has the right to freedom of movement and residence within the borders of each State.

13 (2) Everyone has the right to leave any country, including his own, and to return to his country.'

<sup>361</sup>Franke, *supra* n349 *ibid*. See also Franke MFN 'The Displacement of the Rights of displaced Persons; an irreconciliation of human rights between place and movement' *Journal of Human Rights* (2008) 7 (3) 262-281. For the human right impact to freedom of movement in encampment situation for refugees, See Franke MFN 'Refugee registration as foreclosure of the freedom to move: the virtualisation of refugees' rights within the maps of international protection' (2009) *Environment and planning D: Society and Space* 27 (2) 352-369.

extend generosity as a political unit to those seeking admission into the human sphere of belonging.

The Geneva Refugee Convention of 1951 was designed to give effect to Article 14 of the UDHR and guarantees the right to seek asylum free from persecution. Access to citizenship for refugees through naturalisation is addressed by article 34 of the 1951 Geneva Convention,<sup>362</sup> an unprecedented provision without a legal equal match in international refugee law.

Article 34 provides that:

The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings

As regards the facilitation of the naturalisation process, Article 34 commits states parties to show flexibility in relation to the administrative formalities taking place between the submission of an application for naturalisation and its finalisation.<sup>363</sup> State parties are enjoined to make every effort in good faith in order to help refugees meet the usual requirements for the acquisition of the host state's citizenship.<sup>364</sup> Furthermore, state parties are expected to 'expedite' the application for naturalisation received from

---

<sup>362</sup>The drafters did not debate the meaning of naturalisation, it having been asserted that simply that "[t]he word 'naturalisation' was well known and bare a distinct meaning": statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.39, 21 August 1950 at 26. See Hathaway J *The Rights of Refugees under International Law* (2005) 980.

<sup>363</sup>Statement of Mr. Ordonneau of France, UN Doc, E/AC. 32/SR.22, 2 February 1950, at 3.

<sup>364</sup>A similar duty was recognized outside the context of the Refugee Convention by the Supreme Court of India in 1996 where the court ordered the state government to desist from efforts to prevent Chakma refugees from securing Indian citizenship on the basis of the usual requirements. The supreme court ruled that:

"[B]y refusing to forward their applications, the Chakma's are denied rights, constitutional and statutory, considered for being registered as citizens of India. If a person's satisfies the requirements of Section 5 of the Citizenship Act, he or she can be registered as a citizen of India."  
National Human Rights Commission v. State of Arunachal Pradesh (1996) 83 AIR 1234 (9 January 1996).

refugees. Article 34 therefore is an appeal to state parties to accelerate the application procedure of refugees.<sup>365</sup> Actually contemporary formulations on local integration may add some value to the convention of refugees by emphasising the dynamic process necessary to transform these rights into social reality. But as a matter of law, even this activist dimension may reasonably be thought to be quintessential in the duty to implement treaty obligations in good faith.<sup>366</sup>

If pursued religiously, Article 34 has the legal capacity to bring refugee status to an end through naturalisation. Many states in East Africa for example have either entered reservation to this promise or implement tortuous legislation designed to stifle the path to citizenship for refugees in a bid to discourage further flow of refugees into their territories. In such states, refugees are caught in a permanent impermanence while the international community stands aloof. This is so because theoretically, in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of naturalisation, emigration, nationality and expulsion.<sup>367</sup>

---

<sup>365</sup>Statement of Mr.Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, 2 February 1950 at 3. The French representative noted 'the purpose of the recommendation in article 34 was to bring about the naturalization of the largest possible number of refugees': Statement of Mr.Juvigny of France, UN Doc, E/AC.32/SR.39, 21 August 1950, at 25. While the British representative initially opposed this duty on grounds that it would 'entail giving priority to the application of refugees over those of other foreigners', he was however persuaded to drop his cause: Statement of Sir Lesley Brass of the United Kingdom, UN Doc, E/AC. 32/SR 22 February 1950 at 3. Blay and Tsamenyi are therefore justified in their conclusion that article 34 "effectively requires the states to give the refugees more favorable treatment than the states would normally give to other aliens'. Blay S and Tsamenyi M 'Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the status of refugees' (1990) 2 (4) *International Journal of Refugee Law* 527 at 542. See especially Hathaway *supra* n358 at 960-987.

<sup>366</sup>Article 26, Geneva Convention on the Law of Treaties, 1969.

<sup>367</sup>Arendt, *supra* n328 at 281.

Article 34 of the 1951 Geneva Convention is however not framed as a strong obligation under international law. It neither obliges state parties to eventually grant their citizenship to refugees nor refugees to accept any such offer made to them.<sup>368</sup> As a matter of fact, the proposal of what became Article 34 took the view that long-staying refugees who decline the offer of naturalisation should have their refugee status revoked. The Secretary-General of the UNHCR at the time was blunt that it would be inappropriate to circumvent the prerogative of member states as to determine who they would offer their citizenship and under what conditions:

The decision of the state granting naturalization is...absolute. It cannot be compelled to grant its nationality, even after a long waiting period, to a refugee settled in its territory.<sup>369</sup>

Despite the argument that such an approach was necessary to combat statelessness, no state party advocated mandatory enfranchisement during the drafting of the 1951 Geneva Convention. Understandably, compulsory naturalisation would have been inappropriate especially in the cases of prominent political figures who represent a cause because their cause and perhaps that of their countries would have possibly ended with naturalisation.

This, notwithstanding, if mandatory naturalisation of refugees was judged to be inappropriate, the route that could have aligned it with the inalienability of human rights would have been to grant naturalisation to any forced migrant who seeks enfranchisement. The logic here is simple: by granting refugees the right to participate

---

<sup>368</sup>Weis P *The Refugee Convention, 1951: The Travaux Préparatoires* by Dr. Paul Weis (1995) (posthumously published) 352.

<sup>369</sup>United Nations Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems, UN Doc, E/AC.32/2, 3 January 1950 at 50.

in the public life of a country, naturalisation has the capacity to eliminate the most profound gap in the rights otherwise available to refugees. This is so because refugees are not granted full political rights under the 1951 Refugee Convention and non-citizens, inclusive of refugees, do not enjoy a similar right under general principles of international human rights law.<sup>370</sup>

The fact that Article 25 of the ICCPR<sup>371</sup> is the only provision that failed to guarantee a universal human right but rather narrowly focused on citizens rights is *carte blanche* to states parties to deny non-citizens including refugees the right to political membership. This, to an extent, amounts to legalising discrimination, and member states have rode on it exceedingly especially in the process of naturalisation of refugees. Despite the ostensible legal obligations binding the 146 member states to the 1951 Geneva Convention,<sup>372</sup> there is however no lawful means that an asylum seeker can reach any member state. Even the current life crossing at the deadly Mediterranean Sea has been greeted with scornful resentment by European authorities and these are foundational members to the 1951 Geneva Convention.<sup>373</sup>

---

<sup>370</sup>Hathaway *supra* n188 at 980.

<sup>371</sup>International Covenant of Civil and Political Rights adopted 19 December 1966, entered into force 23 March 1976. Article 25 provides:

‘Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without any reasonable restrictions:

25 (a) To take part in the conduct of public affairs, directly or through freely chosen representatives:

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal Suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

(c) To have access, on general terms of equality, to public service in his country.

<sup>372</sup>As of April 2015. See UNHCR ‘State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol’ available at [www.unhcr.org/3b73b0d63.html](http://www.unhcr.org/3b73b0d63.html) (Accessed 2/8/2015).

<sup>373</sup>‘Divided EU leaders to offer cash for Syria Refugees’ *Eyewitness News*, 23 September 2015, available on [www.ewn.co.za/2015/09/23/Divided-EU-Leaders-to-offer-cash-for-Syria-refugees](http://www.ewn.co.za/2015/09/23/Divided-EU-Leaders-to-offer-cash-for-Syria-refugees) (Accessed 1/10 2015).

Notwithstanding the non-discrimination clause under Article 3 of the 1951 Geneva Convention,<sup>374</sup> most member states have adopted xenophobic legislation regarding refugees, constraining the path to naturalisation and imbibing policies of 'exclusionary inclusion',<sup>375</sup> condemning asylum seekers and refugees as dangerous and distrustful outsiders. To this extent, the provision is frequently disregarded as an encroachment to sovereignty. Linda Bosniak wondered:

To what extent is discrimination between citizens and aliens a legitimate expression of the government's power to regulate the borders and control the composition of membership of the community? How far does sovereignty reach before it must give way to equality?<sup>376</sup>

Consequent on the overreaching hand of sovereignty despite globalising forces, transnational agreements and the fluidity of markets, the refugees' story has revolved only around one question, how can the refugee be deportable again? If international human rights instruments were truthful to their narrative of the inalienability of human rights, then no law would have been necessary to justify the humanity and status of the refugee because the refugee is a human being. The presence of the refugee as a human is enough for every law to rest on him or her, but today it is the law that justifies humankind instead of humankind justifying the law. The inalienability of human rights therefore does not hold.

As the nation-state gradually surrenders its once impeccable sovereignty to unfair market forces, the refugee (also to an extent a victim of neo-liberalism)

---

<sup>374</sup>Article 3 provides that 'The Contracting States shall apply the provisions of this Convention to refugees without as to race, religion or country of origin.'

<sup>375</sup>Kneebone S 'Strangers at the Gate: Refugees, Citizenship and Nationality' (2004) *Australian Journal of Human Rights* 10 (1) 33.

<sup>376</sup>Bosniak L *The Citizen and the Alien: Dilemmas of Contemporary Membership* (2006) 39.

nonetheless becomes an 'embarrassing figure for the international system because the refugee breaks the singular identity of man (sic) and citizen and puts into crisis the original fiction of sovereignty...' <sup>377</sup> Despite the fact that the rights of humans separated from citizenship rights is implied in the UDHR and many other human right instruments, Agamben's reminder of the refugees' position within this distinction of rights suggest an enormous gap once the assumption of citizenship is questioned. Agamben concluded that because of this, and in many countries, there are stable denizens who live in a situation of extra-territoriality, but never citizens and yet govern and punished by the same laws. Then, laws that are not equal to all in the same country revert to privileges and rights, something clearly contradictory to the very nature of nation-states. <sup>378</sup>

In terms of fundamental rights, by constraining the path of naturalisation, many states leave refugees without any state protection and, to an extent, stateless.

Butler and Spivak wrote:

...the stateless are not just stripped of status and prepared for their dispossession and displacement, they become stateless precisely through complying with certain normative categories. As such, they are produced as stateless the same time they are jettisoned from juridical mode of belonging <sup>379</sup>

Rather than challenging this citizenship-centred political geography of international human rights, human rights specialists, according to Franke,

---

<sup>377</sup>Agamben G 'Au-delà des droits de l'homme', *Libération* (9 June 1993) 8.

<sup>378</sup>Arendt *supra*, n328 at 290.

<sup>379</sup>Butler J and Spivak GC *Who Sings the Nation-State?* (2007) 15-16.

...now seek that we reformulate fundamental human rights principles to include the responsibility of citizens to ensure the rights protection of those who fall outside the grounds from which such claims are practicable<sup>380</sup>

This proposal is even worse considering the climate in which human rights are theorised, legislated and protected. This opinion is further problematic because its proponents forget that the price of the rights and freedoms enjoyed by citizens which they opined can be extended to refugees especially in the quest for naturalisation, is bought at the inhuman price of excluding others in their midst.

Franke, wrote in 2007:

The supposed humanity of citizenship is expressed through a dehumanization of those excluded from it, a practice we see quite overtly in the historical grounds to modern international law wherein the legal rights of human beings outside of political determination are theorized....Philosophically, human rights may be conceived as proper to a universal human subject in the abstract, priority is given to liberties that are grounded in sovereign communities with singular rule of law....Human rights are given practical address insofar as they may be found or attached to legal jurisdiction in which the liberty specific to a form of citizen-human are already subject to protection.<sup>381</sup>

The international legal framework of naturalisation of refugees is a weak one. Article 34 of the Geneva Convention is crafted as a recommendation and not an obligation. The international community's error is tying human rights to territorial spaces and by implication, making citizen perhaps the proper subject of human rights. It is then for states to craft laws laying down naturalisation procedures for refugees and judging them by the standards they have created.

---

<sup>380</sup>Franke, *supra* n349 at 40.

<sup>381</sup>Franke MFN 'Self Determination versus the Determination of self: a critical reading of the colonial ethics inherent to the United Nations declaration in the rights of indigenous people' (2007) *Global Ethics* 3(3)368.

### 3.2.3 Naturalisation of Refugees in Africa

While Article 34 of the 1951 Geneva Convention provides for the naturalisation of refugees, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>382</sup> does not contain a similar provision. A closer reading of the provision of Article 2 in the OAU refugee convention would suggest a similar meaning as Article 34 of the Geneva Convention. Article 2 (1) provides:

Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well founded reasons, are unable or unwilling to return to their country of origin or nationality.

The language of Article 34 of the 1951 Refugee Convention is ambiguous and amounts to a recommendation rather than an obligation. That member states should 'use their best endeavours and consistent with their respective legislations', amounts to goodwill from member states to receive refugees and perhaps naturalise those who are unwilling or unable to return. Consistent with this proviso, the naturalisation of refugees shifts from a human rights question to that of a discretionary mercy from receiving states. One way of reading the human rights implications of Article 2 (1) is that, member states legislation can override conventional provisions and that municipal laws however defective from a rights perspective, can prevail over a universal or regional provision.

More than 20 countries in Africa have naturalisation laws but amongst these, very few made provision for such passage for refugees and in most cases, the timeframe

---

<sup>382</sup>September 1969.

required for non-citizens to apply range between five to ten years of continuous stay.<sup>383</sup> South Africa, for example, has as a general principle - a two-step process for naturalising refugees and other immigrants. In principle, after five years of asylum, a refugee can bring an application for permanent residence and after another five years, the refugee can apply for citizenship. In Chad, Nigeria, Sierra Leone and Uganda, qualification for application is subject to continuous residence of between 15 to 20 years and in Central African Republic, a continuous residence of 35 years is required.<sup>384</sup> Under the 2004 nationality laws of the DRC, application for naturalisation must be considered by a council of ministers, submitted to the National Assembly for approval and subsequently awarded or declined through a presidential decree.<sup>385</sup>

Even African countries that recently adopted refugee legislation have rarely tapped on a positive interpretation of Article 34 of the 1951 Geneva Convention and refined it nationally to accord refugees a legal and certain path to naturalisation. The 1991 Mozambique Refugees Act provides for naturalisation of refugees on the same terms as foreigners.<sup>386</sup> In November 2006, former Botswana President Festus Mogae approved the grant of Botswana citizenship to 183 Angolan refugees who had not repatriated after that country's long civil war ended after death of Jonas Savimbi on 22 February 2002. It should be noted that these refugees were in Botswana since the 1970s.<sup>387</sup> In 2002, a discussion in the Zambian parliament to amend that country's 1970 Refugees Act with a

---

<sup>383</sup>See Manby B *Citizenship Law in Africa: A Comparative Study* (2010) 83.

<sup>384</sup>*Ibid*, at 6.

<sup>385</sup>*Ibid*, 85-90.

<sup>386</sup>See Klaaren J and Rutinwa 'Towards the Harmonization of Immigration and Refugee Law in SADC' *Migration Dialogue for Southern Africa (MIDSA) Report No. 1* (2004) 90-91.

<sup>387</sup>Government of Botswana Daily News online, 2 November 2006.

possibility of a path to citizenship for long staying Angolan refugees was withdrawn under fierce opposition. The law currently in force is its 1970 refugee law that does not conform to the 1951 Geneva Convention and by implication, provides no naturalisation path for refugees especially Angolan refugees who have resides in Zambia since the 1970s.<sup>388</sup>

The 2006 Kenyan Refugees Act<sup>389</sup> was designed to bring Kenyan refugee legislation in line with its international obligations. In the spirit of abandonment, the Kenyan legislation is a tough one for asylum seekers and refugees because it deprives them of the right to free movement and residential choice; they have no right to study or work; and no path to naturalisation however the length of stay.

Senegal, for example has a humane naturalisation regime in general and for which refugees have benefited enormously. Senegalese naturalisation law provides that refugees from neighbouring countries (mainly ECOWAS member states) who have lived continuously in the country for 5 years can opt straight for Senegalese citizenship without any further condition.<sup>390</sup>

In terms of enfranchisement of refugees in the African continent however, Tanzania carries the flagship of naturalisation of refugees and it is lauded as home to one of the

---

<sup>388</sup>UN High Commissioner for Refugees, "Zambian Refugee Initiative Launched", *Briefing Notes* 27 August 2002.

<sup>389</sup>Refugee Act, No. 13 of 2006.

<sup>390</sup>Law No. 61/70 of 7 March 1961 determining the nationality of Senegal, art. 29.

largest numbers of refugees in Africa. In 1980, during the presidency of that country's founding father, Mwalimu Julius Kambarage Nyerere, the government of Tanzania naturalised more than 30, 000 Rwandan refugees.<sup>391</sup> In 2005, Tanzania granted citizenship to around 182 Somali refugees from the Chogo settlement in the northeast part of the country.<sup>392</sup> In May 2005, Tanzania announced another massive enfranchisement of almost 200, 000 Burundian refugees who have lived in the country since 1972. In announcing its support for the procession of such applications in August 2008, the European Commission hailed the move as 'a unique and unprecedented act of generosity and humanity.'<sup>393</sup> Reacting to the news, UNHCR spokeswoman Teresa Ongaro welcomed the process noting that 'the naturalisation of nearly 200, 000 people is unprecedented and is a hugely important milestone.'<sup>394</sup> The precise number of Burundians naturalised in this effort is 162, 156.<sup>395</sup>

In Fact Mathias Chikawe, Tanzania's Minister of Home Affairs noted that those who would decline the offer will equally be assisted to leave the country and the former refugees camps were integrated into functional Tanzanian villages. As unprecedented as Tanzania has been in naturalising refugees in Africa, its refugee laws do not provide for a passage to naturalisation for refugees. Hence, within the context of human rights law and refugee naturalisation rights in particular, the Tanzanian refugee law falls short

---

<sup>391</sup>Chol A 'The Legal Dimensions of the Refugee Problem in Africa' (1992) *Migration* 14 (5) 23.

<sup>392</sup>UN High Commissioner for Refugees, 'United Republic of Tanzania' *UNHCR Global Appeal*, 2005; 'Somalia-Tanzania: Somali Bantus to get citizenship' *IRIN*, 22 June 2005.

<sup>393</sup>See 'EU funds naturalisation of Burundians', *Daily News* (Dar es Salaam) 19 August 2008; UNHCR *Global Report 2007*.

<sup>394</sup>ENCA 'Tanzania to grant citizenship to 200, 000 Burundi refugees' 14 October 2014 available at [www.enca.com/africa/tanzania-grant-citizenship-200000-burundi-refugees](http://www.enca.com/africa/tanzania-grant-citizenship-200000-burundi-refugees) (Accessed 29/4/ 2015).

<sup>395</sup> An External examiner's recommendation.

of human rights expectations. Tanzania's extension of its citizenship to these refugees is not an adherence to fundamental human rights law or a religious observation of the inalienability of human dignity and fundamental rights. It is exactly what it is, a humanitarian gesture as president Kikwete adequately put it himself: 'some don't know where to go if asked to go back to Burundi. We are doing this on humanitarian grounds'.<sup>396</sup>

It is trite to note that to naturalise means to take the citizenship of a host state. Under prevailing international human rights law, the OAU/AU refugee law and individual states municipal laws, citizenship which is supposed to be a status, has been elevated into a person. Citizenship by any stretch of legality is not an individual, it is merely a status.

It is, however, not an ordinary status because of the implication it visits to every non-citizens and refugees in particular who have lost every protection of their government and cannot fall back even on diplomatic and consular assistance as other non-citizens.

Citizenship has become a site of oppression to refugees, an echo of dehumanisation and a testament to the fallacy of the inalienability of the 'Rights of Man'. As a contested space of immense injustice buttressed by oppressive and xenophobic policies and legislation in many countries, why has the international community stood by while this repression continue? Why on earth would a supposedly human right generation convert citizenship into a scarce commodity knowing well enough the depth of its depravity to

---

<sup>396</sup>Ibid.

the forcefully displaced? Why has the neo-liberal world fought so hard to free goods, capital and resources through globalising forces and commercial transnational accords and shackle the liberty for humans to be equal humans wherever misfortune deposits them? If nothing is done to close the gap of rights by wresting the status of citizen from the state or drastically minimise the impact to those who don't have it, it risks becoming a site of permanent human displacement and by implication, the end of human rights.

Mindful of the punishing implication the status of citizenship if denied has on refugees, the remainder of this chapter grapples as to why this status of oppression has remained a site of resistance, a blight to the international community's effort to realise actual human rights for all in general and for refugees in particular.

### **3.3 The Gulf between Refugee Rights and Citizenship Rights under International Law: Implications for Naturalisation of Refugees**

Ong has suggested that:

the different elements of citizenship once assumed together (rights, entitlements etc), are becoming disarticulated from one another, and re-articulated with universalizing forces and standards. So while in theory, political rights depend on membership in a nation-state, in practice, new entitlements are being realized through situated mobilization and claims in milieus of globalized contingencies.<sup>397</sup>

Understandably, in a world where rights such as equal treatment, access to the various sources of livelihood, social services, freedom of movement and choice of

---

<sup>397</sup>Ong A 'Mutations in Citizenship' (2006) *Theory, Culture & Society* 23 (2/3) 499-505 at 499.

residence etc are apportioned on the basis of territorially anchored identity and rights. The identity people gain from the association with a particular place is increasingly becoming an indispensable tool to an economically and socially fulfilled life. This disarticulation and re-articulation of rights and entitlements that Ong so adequately expressed and the question of territorially anchored identity and rights are nowhere stifled than in the naturalisation process of forced migrants.

Becoming a citizen as far as refugees are concerned bespeaks of a qualitatively distinct level of acceptance by the host society. Once a citizen, 'not only is the refugee guaranteed the right to remain and to enjoy basic rights as required by the 1951 Refugee Convention and general norms of international human rights law, he or she is also entitled to take part as an equal participant in the political life of the country.'<sup>398</sup>

The human rights not to be stateless or the right to a nationality is very important especially in today's world where many states are increasingly tying the full enjoyment of civil, political and socio-economic rights to citizenship and by implication, the enjoyment of full human rights. It is for this reason that the right to

---

<sup>398</sup>Enfranchisement can be achieved in principle without the granting of citizenship. 'The right to participate public life ...is not restricted to citizenship; a state may chose to extend its application to others who live within its territory.' See Jayawickrama N *The Judicial Application of Human Rights Law* (2002) 793-794.

be a citizen has been called 'man's (sic) basic right for it is nothing less than the right to have rights.'<sup>399</sup>

While international law scholars might claim that the right to a nationality is the right to have rights, human rights principles certainly dictate otherwise. The principle of human rights would maintain that being human is the right to have rights. As one human right scholar maintains, '[h]uman rights are, literally, the rights that one has simply because one is human.'<sup>400</sup> Although 'national governments reserve the right of implementing internationally recognised human rights in their own countries, human rights are the rights of all human beings, whether they citizens or not.'<sup>401</sup>

Some human rights apologists have even gone as far to argue that several international human rights documents have purposefully diminished the importance of citizenship in order to prevent statelessness or lessened the presumed status of citizenship so as to deny it the liberty of oppression as a beacon of discrimination. This position is perhaps most succinctly defended in the writing of Claude Cahn, who writes:

[D]espite the central role the concept of citizenship played in the rise of human rights culture, the words 'citizen' and 'citizenship' are rare in major international human rights instruments. Indeed, the sense of the instruments themselves is to erode the importance of the very concept which originally gave rise to the idea of fundamental human rights (i.e.

---

<sup>399</sup>Justice Warren in *Perez v Brownell* (1958) 356 US 44, 64.

<sup>400</sup>Donnelly J *Universal Human Rights in Theory and Practice* (2003) 10. See also a similar position adopted by the South African Supreme Court of Appeal decision of 2004 when it took the view '...that human dignity has no nationality...' *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 25.

<sup>401</sup>*Ibid*, at 159-60. See generally Weissbrodt D *The Human Rights of Non-Citizens* (2008) 80-95.

citizenship) in the interest of doing away altogether with boundaries between privileged and non-privileged.<sup>402</sup>

From the lethal waters of the Mediterranean to the offshore barring of asylum seekers or denying the boat people access to the island of Australia and to the severe displacement of the rights of the displaced in Africa, EU and elsewhere around the globe, the desire for refugee naturalisation has remained ever more slippery. Slipperier still is the fact that countries like Australia and continental blocks like the EU are brazenly defying the provisions of the 1951 Geneva Convention with no response by the international community as people seeking protection are denied even entry.<sup>403</sup> Consequent on the quest for naturalisation of refugees, bounded citizenship has played a very stifling role.

The fact is that nationality and citizenship could not have emerged as a citadel of rights or taken such a stronghold on members of contending political spaces without the simultaneous invention of the foreigner: “henceforth citizen and foreigner would be correlative, mutually exclusive, exhaustive categories. One would either be a citizen or a foreigner because there would be no third way.”<sup>404</sup> In other words, the citizen could not have emerged without the surfacing of the

---

<sup>402</sup>Cahn C, Editorial, ‘Privileging the Document’ (2003) 3 *Roma Rights Quarterly*. See also Cahn C ‘The Right to a Nationality is a human right: the current trend towards recognition’ *Human Rights Law Journal* (1991) 12 (12). See especially Batchelor C ‘Statelessness and the Problem of Resolving Nationality Status’ *International Journal of Human Rights Law* 10 (1/2) 156-183.

<sup>403</sup>Mathew Weaver Mark Rice-Oxley and Nadia Khomami ‘Refugee Crisis: Hundreds set off from Budapest on foot – as it happened’ *The Guardian*, 4 September 2015 available on [www.theguardian.com/world/live/2015/sep/04/refugee-migration-crisis-live-eu-biggest-test-since-second-world-war](http://www.theguardian.com/world/live/2015/sep/04/refugee-migration-crisis-live-eu-biggest-test-since-second-world-war) (Accessed 16/09/2015).

<sup>404</sup>Brubaker WR *Citizenship and Nationhood in France and Germany* (1992) 46-47.

foreigner and the creation of the identity of the foreigner was quintessential in the establishment of the citizen-nation-state hierarchy. The refugee was to follow as another foreigner later in the 20<sup>th</sup> century and would take centre stage almost knocking out the other founding foreigners in the game, the internationally created 'other'.

To have citizens we must have aliens, to have a home or a home country, others must not share it with us or if they should, they must be in a movement, in perpetual flotation, or in orbit, a kind of permanent impermanence.<sup>405</sup> In terms of the *French Declaration of the Rights of Man and Citizens of 1789*, the alien is 'the gap between man and citizen and between human nature and political community lies the roving refugee.'<sup>406</sup> Unable to speak our language (even if our language hasn't got enough words), and having left everything - including the only community he or she has ever known - and with no community, the refugee is the 'absolute other.' The refugee represents 'in an extreme way the trauma that marks the genesis of state and self and puts to the test the claims of the universalisation of human rights.'<sup>407</sup> This was however not the case during the Cold War years

---

<sup>405</sup>Refugees are usually put in orbit under the 'first safe country rule' adopted in the EU in 1990 following the Dublin Convention which prevents asylum seekers from transiting to a destination of their choice. Attempts by the South African department of home affairs to make 'safe third country' exclusion explicit through internal procedures or amendments to the law was blocked and set aside by challenges based on compliance with international standards and constitutional protection. See *LHR v DHA* on the withdrawal of controversial 'safe third country' policy: New Release, 30 March 2001 available at [www.lhr.org.za/refugees/news](http://www.lhr.org.za/refugees/news) (Accessed 8/9/2015).

<sup>406</sup>Douzinas C *The End of Human Rights* (2000) 42.

<sup>407</sup>Ibid.

when the West happily accepted refugees from the Communist Block and enfranchise them as a triumph of their own ideals.

The experience and practice of the West in the 1950s and 60s was that nobody ever gave a thought to the idea that anyone fleeing Eastern Europe would be expected to return to their country of origin. If they were granted refugee status, this was enough for them to be accorded permanent residence and eventually citizenship. The contemplation of the possibility of return for refugees was alien to the thinking of this period. With the industrial expansion and economic boom during this period, labour was in high demand and refugees filled the blank space perfectly. Naturalisation of refugees was necessary even beyond the Cold War divide to satisfy labour demands.

Consequent on the economic slowdown in 1970s, labour became surplus and restrictions were erected in most industrialised states and refugee labour that was much needed became a source of resentment. From here on, states began applying refugee laws selectively and the question of naturalisation became problematic. In light of the unwillingness of European states especially to grant meaningful rights to refugees, there was indeed no option left other than to pursue resettlement of refugees in states outside the region. This adoption of what Coles

has styled “exilic bias” in refugee law led to a de-emphasis on the elaboration of standards to govern refugee rights.<sup>408</sup>

From the introduction of globalisation in the 1990s to date, while capital and resources gained unprecedented freedom even if to the advantage of the industrialised world, refugees face the highest restriction unseen since the height of labour demand in the 1970s. States are saturated with all manner of xenophobic laws and amendments to keep off refugees from reaching or integrating to their societies while ironically trading, and even supporting tyrannical governments and amassing wealth from the very refuge producing countries. Kibreab wrote at the end of the 1990s:

The Shift towards xenophobic restrictionism is increasingly a universal pattern. In most host countries, neither governments nor their citizens ‘imagine’ refugees as being members of their society. One of the consequences has been that states, communities and individuals within geographically bounded spaces have become more territorial than ever before. Because of this, territorially-based identity has become a scarce resource which is jealously guarded and protected by those who perceive themselves as standing to lose by an influx of refugees or immigrants from other countries.<sup>409</sup>

As pointed out by the UNHCR in 1998, ‘...because of the democratisation process, governments increasingly accountable to the public opinion may be tempted to tighten their refugee policies in response to negative perceptions....’<sup>410</sup>

Contemporary discourse on refugees is therefore predicated on the premise that ‘the modern citizen, occupying a bounded territorial community of citizens, is the

---

<sup>408</sup>Coles G *Approaching the Refugee Problem Today* in Loescher G and Monahan L (eds.) *Refugees and International Relations* (1990) 373.

<sup>409</sup>Kibreab G ‘Revisiting the Debate on People, Place, Identity and Displacement’ (1999) *Journal of Refugee Studies* 12 (4) 384-410 at 400.

<sup>410</sup>Quoted in Rutinwa B ‘Responding to the Arrival of Asylum Seekers: The End of Asylum: The Changing Nature of Refugee Policies in Africa and other Developing Regions’ (29 June -3 July 1998) *The Hague, Paper for the Technical Symposium on International Migration and Development*.

proper subject of political life, the principal agent of action and the source of all meaning of value.<sup>411</sup> The refugee, on the other hand, has 'lost protection in this bounded space of presupposed particularity and difference, the nation-state.'<sup>412</sup> The refugee constitute a threat and a unique problem by lacking effective state representation and protection because he or she is uprooted, dislocated, displaced and cut off from both the territory and community of which the state is the legal expression.<sup>413</sup> The refugees' lost of protection and the difficulty of securing the same in another country where he or she fled is described by Rose in this way:

Like Simmel's 'stranger' and in a different sense like Camus, refugees are persons apart, outsiders who peer into closed rooms. They seek admittance but are ever conscious of their foreignness; they want acceptance but are never sure of their acceptability. They are eager to find niches of their own. Their friends tell them they must never look back – but in their hearts they cannot help but hear "the evening bells of home." They are caught in a limbo, in a state of permanent instability, living oxymorons. They are the quintessential "marginal men."<sup>414</sup>

Thus trapped in cosmopolitan spaces in a context where states and their hierarchy of privileged citizens believe in the coercive illusion of fixed and bounded locations, the refugees, forced into guarded borders are condemned to feel like they are in a permanent transit.<sup>415</sup> The inability of the refugees to find meaningful protection in another state simply because he or she is a human being brings uncertainty and questions the very universalisation of human rights. In light of the foregoing, Habermas notes:

---

<sup>411</sup>Soguk N *States and Strangers: Refugees and Displacement of Statecraft* (1999) 9.

<sup>412</sup>Ibid, 10.

<sup>413</sup>Ibid, 10.

<sup>414</sup>Rose P 'Forced Out: The Experience of Exile' (1989) *Oxford University Lecture # 1* at 9.

<sup>415</sup>See Nyamnjoh F 'From Bounded to Flexible Citizenship: Lessons from Africa' (2007) *Citizenship Studies* 11 (1) 73-82 at 74.

human rights are Janus-faced, looking simultaneously towards morality and law. Like moral norms, they refer to every creature “that bears a human face”, but as legal norms, they protect individual persons only insofar as the latter belong to a particular legal community.<sup>416</sup>

The exclusion of the refugee in participating in the life of host communities and their naturalisation is very much by analogy constitutive of national identity as it is of human subjectivity. In asking therefore to be recognised, ‘the refugee brings back the exclusion at repression at law’s foundation, and demand of us to accept the difficulty that we have to live with the other in us, to live as another.’<sup>417</sup> In this regard, the refugee breaks the illusionary state-citizen-territory Westphalian arrangement model and, by seeking naturalisation, the refugee exposes the inadequacy of the fiction of the universalisation of human rights. The refugees, according to Soguk:

lacks the citizen-subject’s home, the citizen-subject’s secure socio-cultural affiliation, the citizen-subject’s shared understanding with other citizen-subject’s secure ties to a community....To restore order to international society, the imagined citizen-state-territory hierarchy must be reaffirmed: refugees must be regimented, even during those times when they deserve compassion and pity, lest the conditions of territorially bounded life...irreversibly deteriorate into anarchy.<sup>418</sup>

However any human right scholar or activist may seek to twist the facts, namely that from law and human rights founding, the refugee is not a citizen, the refugees suffers structural, institutional and universal discrimination in the context of human rights. The refugee is a lesser human being with very little rights because he or she is not a citizen. The opening paragraph in the preamble of the UDHR is of particular interest here. It states:

---

<sup>416</sup>Habermas J *The postnational constellation: political essays* (2001) 118.

<sup>417</sup>Douzinas C *The End of Human Rights* (2000) 357.

<sup>418</sup>Soguk ,*supra*, n406 at 18-19.

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

The words 'inherent dignity', 'equal' and 'inalienable' rights of all is seriously misplaced and offensive in the application of the refugees' quest of belonging in the form of naturalisation. Within the context of naturalisation of refugees under international law, the first common mistake agreed by the international community was to distinguish between refugee rights and citizenship rights. This distinction highlights the notion that all are not equal under international law and by implication, domestic law.

### **3.4 Refugees Rights versus Human Rights: Implications for the Naturalisation**

Claims to human rights protection by displaced persons are dislodged from the universe of humanity and rendered ineffective by the geopolitical character and framework of modern international law in favour of the protection of the rights of territorially emplaced citizens. It is trite that an individual is a human being; a man or a woman, a citizen or a worker; subject to the extent that he or she is recognised as the legal subject and bearer of the respective rights. In other words, the individual partakes in the human artifice or human nature to the extent that the law recognises such individual as a legal subject.

For the refugee, the quest for naturalisation is the only route for achieving that full recognition to partake completely in the theatre of humanity. Scaling the refugees' right against human rights helps to situate the refugees' efforts at belonging within

the broader context of humanity in reconciliation with a state's obligation, if any, in emplacing the refugee at a site of equal rights vis-à-vis its citizenry. The current difficulties at naturalising refugees in many countries who are state parties to the 1951 Geneva Convention and other human rights treaties and standards summons an effort to perhaps ask and answer this question: where did the international human rights regime fell short?

Early statements and declarations present human rights as a series of individual entitlements and claims that belong to the individual simply on an account of the fact he or she belongs to humanity rather than the result of a domestic political contrivance. Douzinas would later ask 'who is the "man" of the rights of man, what humanity is promised and which nature is proclaimed in the classical declaration of human rights?'<sup>419</sup>Douzinas question addresses itself as this section unfolds culminating in a positive or negative position if the right of man is a fantasy or a concrete set of rights especially in the wake of the refugees' quest of belonging.

The institution of rights was not a product of the *ancienne* regime, it was unknown at the time. The concept of rights, according to Douzinas, 'is an invention of

---

<sup>419</sup>Douzinas C 'Human Rights at the End of History' (1999) *Journal of Theoretical Humanities* 4 (1) 99-114 at 101.

Roman law and classical natural law had introduced ideas of equality and liberty into pre-revolutionary enlightened opinion.<sup>420</sup>

The main distinction between the revolutionary and the earlier conceptions of rights was a bold claim that a new form of organisation was quintessential for the recognition and protection of these rights as proclaimed by the state. Douzinas took the view that 'as no authority external to society existed, the positivisation of natural law and its imposition upon state power had to pass through the main principle of authority available to modern society – that is, the consent of its citizens.'<sup>421</sup> Human rights treaties and codes are a new type of positive law, the last and most safe haven of a *sui generis* positivism. Codifications, from the Justinian to the Napoleonic Code, has always been the ultimate exercise of legislative sovereignty and the supreme expression of state power. The collective of these ideas from equality, liberty and human rights would later find their fullest expression in the American system and later spread to the world at large as fundamental to human existence and well-being.

As of today, human rights have become the cry of the oppressed, the politically neglected, the exploited and the dispossessed, a kind of imaginary or exceptional law for those who have nothing else to fall back on.<sup>422</sup> The higher status of human rights law, according to Douzinas, is seen as the:

---

<sup>420</sup>Ibid, 102.

<sup>421</sup>Ibid.

<sup>422</sup>Taking a very optimistic and lone voice maybe of a human rights world, Manfred Frank even quipped that 'the being that stands across me in the circle of reflection is my being which has been mistaken for being as such.' What is Neostructuralism? (Wilke and Gray translation) (1989) 297.

Result of their universalism, a triumph of the universality of humanity. The law addresses all states and all persons qua human and declares their entitlement to be part of the patrimony of humanity, which has replaced human nature as the rhetorical ground of rights.<sup>423</sup>

For a law that protects human rights, including the aspiration of naturalisation of refugees, 'injustice would be to forget that humanity exists in the face of each person, in their uniqueness and unrepeated singularity, and that human nature (the universal) is constituted in and through its transcendence by the most particular.'<sup>424</sup> Their ethical importance is the demand that each person be treated as a sole and unique incarnation of humanity and their needs especially at full belonging to a polity, as the responsibility of each one and the law.

Thus, if human rights were really universal, if the metaphysical trait that survives their deconstruction was that any human is enough and that he or she is the beginning and end of rights, there would be no refugees to start with and the question of naturalisation or return of refugees would *ipso facto* become redundant. Articulating the fallacy of universal human rights, Arendt wrote with typical acuity:

in plain language what until then had been only implied in the working systems of nation-states, namely, that only nationals could be citizens, only people of the same national origin could enjoy the protection of legal institutions, that persons of different nationality needed some law of exception until or unless they are completely assimilated and divorced from their origin<sup>425</sup>

---

<sup>423</sup>Douzinas C *The End of Human Rights* (2000) 116.

<sup>424</sup>Douzinas, *supra* n 414 at 112.

<sup>425</sup>Arendt H *The Origins of Totalitarianism* (1951) 275.

In view of this reality, some pro-human rights movements have been calling for 'disaggregating' citizenship in bundles of rights and benefits in order to cater for migrants, corporations and refugees within territorial settings.<sup>426</sup> Such limited benefits and civil rights would only lead to structured and institutionalised discrimination even if they are sanctioned constitutionally since its beneficiaries would neither be citizens or total foreigners - a kind of denizen or elite foreigners. Ong and other academics support for a disaggregated citizenship as better than no status is itself conflicting with the inalienability of the foundational concepts of human rights. Either an individual is a human being subject to full human rights as a unique member of humanity or he or she is not human at all, there can be no apprenticeship in this case. The inalienability of rights today has been consigned to a mercy of state power.

The fundamental deprivation of human rights in today's world is expressed first and foremost by a denial of a place in the world which makes ideas significant and actions effective and possible. What is far more supreme than justice and freedom which are the rights of citizens is when belonging to a community or naturalising in a state is no longer a matter of choice but an extension of mercy from state power.

Referring to statelessness and refugees, Arendt writes:

The first loss which the rightless suffered was the loss of their homes, and this meant the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world. What is unprecedented is not the loss of a home but the impossibility of finding a new one. Suddenly, there was no place on earth where migrants could go without the severest restrictions, no country where they could be assimilated, no territory where they could find a new community of their own.

---

<sup>426</sup>Ong A 'Mutations in Citizenship' (2006) *Theory, Culture and Society* 23 (2/3) 499-505 at 500.

The problem of refugees seeking naturalisation is not very much a deprivation of life, liberty and the pursuit of happiness or equality before the law and freedom of expression. These are formulas designed by states to solve problems within communities even though in reality, the refugees do not belong to any community in host states. Arendt notes:

The concept of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relations – except that they were still human. And in view of objective political conditions, it is hard to say how the concept of man upon which human rights are based – that he is created in the image of God (in the American formula), or that he is the representative of mankind, or that he harbors within himself the sacred demands of natural law (the French formula) could have helped to find solution to the problem.<sup>427</sup>

Within the context of the quest for belonging by the refugee, there is no greater reminder of the demand of ethics than to grant full rights to a refugee seeking one because there is no stronger request of rights than a refugee seeking fresh roots. The removal of this possibility by most states parties to the 1951 Geneva Convention in their municipal laws may mark the end of human equality. Douzinas notes:

As human rights start veering away from their initial revolutionary and dissident purposes, as their end becomes obscured in ever more declarations, treaties and diplomatic lunches, we may be entering the epoch of the end of human rights and the triumph of a monolithic humanity.<sup>428</sup>

Have we not helplessly watched how human rights have degenerated into tools that can be used by others except those they were intended to? From Australia,

---

<sup>427</sup>Arendt, *supra* n 328 at 299-300.

<sup>428</sup>Douzinas, *supra* n 418 at 380. On the mythical foundations of law and human rights, see generally Douzinas C 'Law's Birth and Antigone's Death: On Ontological and Psychoanalytical Ethics' (1994) 16 *Cardozo L. Rev.* 1325-1362.

the EU, US and the port of Calais into the UK, prospective refugees seeking protections and new homes from the human catastrophes of their countries of origin have been turned away.<sup>429</sup> These same rights that could not be enjoyed or used by those they were actually framed for, are nonetheless used even to invade other nations. Human rights in this respect became humanitarian rights. Ranciere's suspicion all along had been that 'the "man" of the Rights of Man was a mere abstraction because the only real rights were the rights of citizens, the rights attached to a national community as such.'<sup>430</sup> Douzinas asks if '...we have a principle of human rights that does not depend on the universality of law, the archaeology of myth or the eschatology of reason?'<sup>431</sup> It is therefore not surprising that human rights are almost becoming the standard slogan of those who cannot enforce them.

The tradition of human rights therefore, from classical invention of nature against convention to contemporary struggle for political liberation and human dignity against state law has always expressed the perspective of a-day-away or the not yet.

---

<sup>429</sup>Jessica Elgot and Mathew Taylor 'Calais crisis: Cameron condemned for 'dehumanising' description of migrants' *The Guardian*, 30 July 2015, available on [www.theguardian.com/uk-news/2015/jul/30/david-cameron-migrant-swarm-language-condemned](http://www.theguardian.com/uk-news/2015/jul/30/david-cameron-migrant-swarm-language-condemned) (Accessed on 1/8/2015).

<sup>430</sup>Ranciere J 'Who is the Subject of the Rights of Man?' (2004) *The South Atlantic Quarterly* 103 (2/3) 297-310 at 298. Arendt expressed her own view of the futility and perplexity of human rights in the following terms 'the Rights of Man are the Rights of those who are only human beings, who have no property left than the property of being human. Put another way, they are the rights of those who have no rights, the mere derision of rights. Arendt H *supra* n327 at 297-298.

<sup>431</sup>Douzinas, n 418 at 100.

While the refugee remains a subhuman being because he or she is not a citizen and while many state parties to the 1951 Geneva Convention have either refused to adhere to Article 34 or enter reservations altogether, there is at least one angle that the refugee exercises full citizenship rights even before naturalisation. In the commission of an offence, the refugee assumes unrivalled importance. There is nowhere where human rights are so justly applied as in the rights of the accused. If the refugee is accused, he or she is presumed innocent like a citizen, if the refugee has no money, the state will provide a lawyer for the refugee, he or she can complain about jailers and such complain is taken seriously. All of a sudden, the refugee has acquired a set of citizenship rights without naturalisation because he or she committed a crime, rights the refugee could not exercise or enjoy as a complete innocent person. What therefore stops that same state that accorded the refugee citizenship rights as a criminal to grant the remainder of rights?

Perhaps it is with this understanding in mind that Ranciere wrote that 'The Rights of Man (sic) are the rights of those who have not the rights that they have and have the rights that they have not.'<sup>432</sup> He attempts to illustrate this point with the story of *Olympe de Gouges*<sup>433</sup> in French political history. *Olympe de Gouges* was one of the first women to fight for equal rights at a time when women, though

---

<sup>432</sup>Ranciere J 'Who is the Subject of the Rights of Man?' (2004) *The South Atlantic Quarterly* 103 (2/3) 302.

<sup>433</sup>Olympe de Gouges (7 May 1748 – 3 November 1793) was a French Revolutionary woman, political activist and playwright. Her book *Declaration of the Rights of Woman and the Female Citizen* (1791) was a rallying cry for full citizenship and equality for women. She was executed by guillotined in 1793 by the Revolutionary government during the Reign of Terror. See Ranciere J 'Who is the Subject of the Rights of Man?' (2004) *The South Atlantic Quarterly* 103 (2/3) 300-305.

nationals, were not allowed to vote or be voted for. Her fight against inequality, discrimination and enfranchisement for all at the height of the reign of terror led to her being guillotined on 3 November 1793. Her statement at the guillotine that 'if women are entitled to go to the scaffold, they are entitled to go to the assembly' survived the ages.<sup>434</sup> The point here is very simple and straight forward: if the refugees are entitled to pay taxes if employed, obey every law and are equal in punishment, they should be entitled to naturalisation or to the whole of equality rather than one part being equal and the other unequal.

Ranciere's statement on the Rights of Man (sic) above within the context of human rights would mean that refugees do not have the rights that they are entitled as humans which include public or political rights, but the rights that they cannot put into action, thereby removing them from the theatre of humanity.

By disguising citizenship rights as human rights, the international community did not just fracture the path to naturalisation under Article 34 of the Geneva Convention nor certify the fallacy of universal human rights but the whole of humanity is betrayed by a universal accord. Summing it all, Arendt noted that 'only with a completely organised humanity could the loss of a home and political status become identical with expulsion from humanity altogether.'<sup>435</sup>

---

<sup>434</sup>Ranciere J, *Ibid*, at 303.

<sup>435</sup>Arendt H *supra*, n 328 at 297.

### **3.5 Refugee Rights versus Sovereignty: Implications for Naturalisation**

A lot of emphasis here would be placed on the naturalisation of refugees' vis-à-vis territorial citizenship because since the Westphalia accord in 1648, sovereignty has consigned full right to territorial occupants under a sovereign power. The 'Rights of Man' has now really been territorialised by national constitutions as citizen's rights. The point of departure here is to wrestle and free human rights from its territorialised tyranny and render it as a right for which refugees are fully entitled because of their inalienability as humans. Sovereignty, however, remains one of the greatest obstacles in realising this drive for equality in the acquisition of citizenship status and by extension, the equality of the human race. The reality is that the structures of modern sovereignty such as rights and citizenship have rarely been challenged against the deprivation of those who seek it in any critical way in legal scholarship.

If one takes a longer historical period as a framework of departure, the epoch that began with the Treaty of Westphalia in 1648, which eclipsed 100 years of religious war in Europe and established a framework of international law in resolving conflicts between sovereign states, the foundations were laid that made it possible for the construction of a national basis for the territorial sovereignty of states. National sovereignty and non-intervention in the domestic affairs of states were the key principles and foundations upon which international law was built.<sup>436</sup>

---

<sup>436</sup>Charter of the United Nations, 26 June 1945, Art.2 (4).

Ever since the states system arose in its modern form, the state has retained the right to regulate and control the entry of non-citizens to its territory as a fundamental concomitant of sovereignty.<sup>437</sup> Sovereignty in this context meant, and still means, the unfettered exercise of power within the prince's (state's) "domain", that is, the territory which he ruled, and the individual within that territory originally called his "subjects" but now usually described as the state's "citizens".<sup>438</sup> They may be called citizen now but from the standpoint of sovereignty under international law, they are subjects. Sieghart writes:

the notion of "civil rights" and "civil liberties" which began to be developed in the domestic laws of England in the seventeenth century and found their full flowering almost simultaneously in the French *Déclaration des droits de l'homme et du citoyen* in 1789 and the US Bill of Rights in 1791, for a long time found no echo in international law. Private individuals could not be the subject of that law: they were the subjects of their princes, having only those rights which they were allowed on the level of "national" or "domestic" law.<sup>439</sup>

However, since the emergence of nation-states coincided with the development of constitutional governments, territorialisation of rights as well as the formation of a comity of nations constrained the exercise by governments of their full sovereign power; the issue of migration was not very much a problem at the time of such framing. Arendt would later write:

The inherent dangers of linking rights with nationality remained hidden from view until World War I and its consequences sufficiently shattered the façade of Europe's political system to lay bare its hidden frame. Such viable exposures were the sufferings of more

---

<sup>437</sup>Skran C *Refugees in Inter-war Europe: The Emergence of a Regime* (1995) 68.

<sup>438</sup>Sieghart P *International human rights law: Some current problems* in Blackburn R and Taylor J (Eds.) *Human Rights for the 1990s: Legal, political and ethical issues* (1991) 24-43 at p25. See also Kirby M *Human Rights: An agenda for the future* in Galligan B & Sampford (Eds.) *Rethinking human rights* (1997) 2-23.

<sup>439</sup>Sieghart Ibid. See generally Yeatman A 'Who is the Subject of Human Rights?' (2000) *American Behavioral Scientist* 43 (9) 1498-1513.

and more groups of people to whom suddenly the rules of the world around them had ceased to apply.<sup>440</sup>

The state is supposed to service the matrix for the obligations and prerogatives of citizenship. It is that which form the regressive or progressive condition that binds. Nonetheless, sovereignty remains a reciprocal relationship between states as states with little oversight or explicit obligation on how it treats the population that constitutes it within a defined territory.

According to Haddad, 'a state may be considered sovereign and continue to reap the benefits of such a title without respecting the 'no harm' principle towards its citizens, and forcing them out of their territory as refugees.'<sup>441</sup> The 'state-nation-territory' trinity inclusive of citizenship, would no doubt crumble that trinity and by extension the simultaneous rupture of the person-citizen matrix in a polity. The situation of the refugee therefore 'outside traditional formulations is indicative of a new, positive form of identity politics.'<sup>442</sup> The issue here is that, sovereignty is increasingly been seen in today's world as the control over population movements and so, 'the movement of refugees is much closer to the core of nation's understanding of their own essence and power than ever before.'<sup>443</sup>

The concomitant desire of states to increase investment in the well-being of their citizens has propelled them to reassert the supremacy of borders between insiders and

---

<sup>440</sup>Arendt *supra* n328 at 267. See also Zolberg A 'The Formation of New States as a Refugee-Generating Process' (1983) *Annals of the American Academy of Political and Social Science*, Vol. 467: 24-38 at 28.

<sup>441</sup>Haddad E 'The Refugee: The Individual between Sovereigns' (2003) *Global Society* 17 (3) 320.

<sup>442</sup>Warner D *The Refugee State and State Protection* in Nicholson and Twomey's (ed.) *Refugee Rights and Realities* (1999) 255.

<sup>443</sup>Dauvergne C 'Challenges to Sovereignty: migration laws for the 21<sup>st</sup> century' (2003) *New Issues in Refugee Research, Working Paper No.3* at 6.

outsiders manifestly visible in the reinforcement of visas and passports in national frontiers. Arendt wrote:

The world of barbarity thus comes to a head in a single world composed of states, in which only those people organized into national residence are entitled to have rights. The loss of 'residence' or a 'loss of social framework' worsened by the impossibility to find one are characteristics of this new barbarity issued from the very core of the nation-state system'<sup>444</sup>

The rights regime created in post-holocaust and developed further in post-colonial era starting from the 1948 Declaration of Human Rights would be rendered questionable by the constituency of the very assembly that contrived it. This is so because it was done by tying the rights proclaimed to territorial power rather than to an individual, whether resident on a territory or mobile. Balibar noted that 'the nation-state was at the same time the sole positive or institutional horizon for the recognition of human rights and an 'impossible' one, producing the destruction of the universal values it had supported.'<sup>445</sup>

It was trite and within the stretch of the imagination that as a characteristics of sovereignty, the mere attempt to confine people within territorial spaces would inevitably forced others outside the gaps of states or outside the normal compact of citizen-state-territory trinity, for any reason. The refugee, as Haddad would write, 'are victims of an international system that brings them into being, then fails to take responsibility for them.'<sup>446</sup>This invokes Bauman's characterisation of the refugee as those caught in a

---

<sup>444</sup>Arendt, *supra* n328 at 294.

<sup>445</sup>Balibar E 'Outlines of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence' (2001) *Constellations* 8 (1) 19.

<sup>446</sup>Haddad, *supra* n436 at 297. See generally Haddad E *The Refugee in International Society: Between Sovereigns* (2008) 107-142.

'permanent impermanence' that precludes, or at least makes uncertain and fragile, the norms of identity-making and ontological well-being.<sup>447</sup>

Thus when a refugee is forcefully dispossessed from one state, there is often nowhere else to go. Even when he or she arrives at another state, taking roots and eventual naturalisation is constrained by domestic legislations; he or she is perceived as being in a kind of permanent transit. It may be within the borders of a given state but 'precisely not as a citizen; so one is received as it were, on condition that one does not belong.'<sup>448</sup>

Once outside the normal mode of belonging, the refugee act to reinforce that imagined construct when the nation-state systems were crafted by forming the impermanent 'other', the transit 'outsider' upon which the identity of the nation-state and its citizenship continue its relevance as in the days of its founding. The refugee does not belong to any individual state, and although he or she exists, he or she falls outside the reach of the international society. Once borders were erected and territorial jurisdictions defined, refugees are condemned to live between the cracks, they are subject to no full state protection - in practical effect, they are stateless. States on their part throw their sovereignty around by deciding who they will protect and who they will allow into their

---

<sup>447</sup>Bauman Z *Society under Siege* (2002) 114. See generally Haggis J and Schech S 'Refugees, Settlement process and citizenship making: An Australian case study' (2010) *National Identities* 12 (4) 365-379 at 370.

<sup>448</sup>Butler J & Spivak GC *Who Sings the Nation-State?* (2007) 6. Displacement was indeed necessary for the definition of certain individuals as outsiders, enemies so that the whole process of the nation-state could proceed. People actually need 'others' to be able to invent for themselves a 'we' as obviously distinct from 'they'. See Kristeva J *Strangers to Ourselves* (1991) 81.

space. States exercise that choice of protection, membership and admission against the submission of the unprotected refugee.

To municipal law:

The refugee is a threat to the principle of territorial jurisdiction. But the refugee also represents a threat to jobs and amenities and also a deeper threat to the construction of national identity.<sup>449</sup>

Refugees have therefore replaced foreigners as the principal category of 'otherness' in our current globalised world and the side effects of the creation of separate sovereign states which has dangerously failed to cater for all citizens. When the roving foreigner arrives at the borders of a state, the assumption of national and personal integrity comes under severe pressure. Even if the refugee is admitted, he or she is only included in the state by exclusion. The refugee is part of the system without been part of it. By virtue of this inclusionary exclusion, the refugee is the total other civilisation, the living and mobile cruelty of human failures, a testament of the failure of Westphalia. In all the newly created states post-Westphalia, the refugees have attached themselves like a curse on the conscience of their constitutions and humanity.

More than three centuries after Westphalia, the international refugee protection brought in by the 1951 Geneva Convention was equally formulated on the basis of the nation-state. This was the genesis of the error that beset refugees in their quest for new roots in the guise of naturalisation. The 1951 Geneva Convention itself is a scant constrain on sovereignty because as of today, prosperous nations in the West who were themselves

---

<sup>449</sup>Douzinas, *supra* n418 at 142.

leading exponents of the Convention since its creation, are backing away from even key provisions without consequences. As conflict heightens in parts of the Arab World and Africa, migrants daring to reach Europe are blocked by the very same states in Europe who championed the creation of the 1951 Geneva Convention.<sup>450</sup> Article 34 of the Convention is fast metamorphosing from an international obligation (to those states who did not enter reservation) to naturalise long staying refugees who seek such status to an extension of sovereign mercy.

We are also now in a post-Westphalia period due to globalisation where non-state national demands are on the rise and state's sovereignty seem to be losing grip.<sup>451</sup> The illusionary concept was to free capital, resources and people across borders but typical of neoliberal capitalism, the whole motive was to access and free resources and capital at the expense of human rights. The decline of sovereignty therefore is the result of economic and political restructuring of welfare moving towards critical regionalism combating global capital.<sup>452</sup> While global capital is daring sovereignty, states have regimented their borders and constrained legislation designed to naturalise refugees.

---

<sup>450</sup>John Stevens 'Europe slams migrant door: Hungary, Austria and Holland shut boarders as Germany imposes controls – saying it can't cope' *The Daily Mail*, 15 September 2015, available on [www.dailymail.co.uk/news/article-3234524/Europe-slams-migrant-door-Hungary-Australia-Slovakia-Holland-shut-boarders-Germany-imposes-controls-saying-it-can't-cope](http://www.dailymail.co.uk/news/article-3234524/Europe-slams-migrant-door-Hungary-Australia-Slovakia-Holland-shut-boarders-Germany-imposes-controls-saying-it-can't-cope) (Accessed 17/9/2015).

<sup>451</sup>See Zapata-Barrero R 'Borders in Motion: Concept and Policy Nexus' (2013) *Refugee Survey Quarterly* 32 (1) 1-23 who noted on p2 that states are losing some of their sovereignty and legitimacy due to globalisation.

<sup>452</sup>Butler and Spivak, *supra* n443 at 76.

The implementation of international human rights, including refugees' rights to naturalisation, is not only beset by difficulties arising from the existence of political regimes that nakedly defy human rights but increasingly by the fundamental contradiction implied by the cosmopolitan concept of rights. Cosmopolitanism has introduced into the rights concept all legitimacy and laws, 'a tension between human rights on the one hand and national sovereignty on the other.'<sup>453</sup>

For most legal scholars as well as some political philosophers,<sup>454</sup> the question of which state should guarantee membership to a particular individual in the event of naturalisation is largely irrelevant because the inequality that the absence of this status pose is hidden by the international aspect of sovereignty. Benedict Kingsbury notes that "[t]he system of state sovereignty has hitherto had the effect of fragmenting and diverting demands that international law better address inequality."<sup>455</sup>

The argument here therefore would be that for the naturalisation of refugees to become a practical reality under international law, de-territorialising the state is a potent and viable option to actualise it. The de-territorialisation of the state with the refugee at the

---

<sup>453</sup>Bayefsky A *The UN and the international protection of human rights* in Galligan B & Sampford (eds.) (1997) *Rethinking human rights* pp74-87.

<sup>454</sup>See for example, Shachar A 'The Worth of Citizenship in an Unequal World' (2007) *Theoretical Inquiries in Law* Vol. 8 367-388.

<sup>455</sup>Kingsbury B 'Sovereignty and Inequality' (1998) *European Journal of International Law* Vol.9 at 600.

forefront or symbol of that effort is 'very appealing in the vanguard of new forms of relationship outside traditional identity politics.'<sup>456</sup>

Some scholars have even ruled out the possibility of states solution to the naturalisation process, preferring an international panacea. In rejecting a statist approval, Douzinas writes:

The foreigner is the political pre-condition of the nation-state and the other the ethical pre-condition of identity. She (*sic*) represents in an extreme way the trauma that marks the genesis of state and self and puts to the test the claims of the universalisation of human rights. There is a great paradox then is asking the law to protect the refugee. The law divides the inside from outside and is then asked to heal the scar or bandage it by offering limited protection to its own creation.<sup>457</sup>

With great respect, Douzinas view that the law cannot protect the refugee even in a universal setting is inaccurate. The reality is that the universal framework functions through a system of nation-states, however flawed, in its conception and it is the emergence of this system of states that created the refugees in the first place. It is trite therefore that if the system creates and bounds, it can as well de-create and unbound.

Therefore a non-statist approach at solving the refugee problem given the reality of a world of nation-states is doomed to fail or better still, inconceivable, just as the refugee is inconceivable outside a world of sovereign states. It goes without saying therefore that if the refugee is naturalised he or she will be integrated into the state and *ipso facto* ceases to be a refugee.

The path to naturalisation of refugees under international law is greatly hampered by the concept of sovereignty and a lasting solution would be to de-territorialise citizenship.

---

<sup>456</sup>Werner, *supra* n436 at 254-255.

<sup>457</sup>Douzinas, *supra* at n418 at 358.

### 3.6 Refugee Rights versus the Borders: Implications for Naturalisation

Liberal values and principles, are, to a large extent, limited by the notion of a frontier that acts as a decider of order and stability and requires the idea of a state that protects its own while it simultaneously excludes those that are not its own. The dividing line between the notion of citizen and non-citizens is predicated on a notion of a border. Political identities and full enjoyment of human rights comes with the notion of borders. The idea of a nation-state as a well defined entity demands unequivocally the protection of its borders. The perceived threat of invasion by immigrants leads to the use of repression both within the boundaries of the national community and against the identified migrants as the outsider.<sup>458</sup>

The border is first and foremost an institution of the sovereign and a territorial site in its own right. The historical thesis will reaffirm that ‘there are no “natural boundaries” and they have never existed. The notion of a “natural boarder” is simply a political myth.’<sup>459</sup> Against this backdrop, Newman noted correctly that ‘the bordering process would create order through the construction of disorder.’<sup>460</sup>

The semantic family of the border would include limit, boundary, separation, demarcation, edge, barrier, bank, margin etc. The border, Zapata-Barrero wrote:

---

<sup>458</sup>Hassim S, Kupe T and Worby E *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference* (2008) 237. On a general understanding of how human and social organisation is condition on the notion of border and territory, See generally Anderson M *Frontiers, Territory and State Formation in the Modern World* (1996) 175-185. On a communitarian approach on the definition of border and the inside/outside divide, see O’Neill O *Justice and Boundaries* in Brown C (ed.) *Political Restructuring in Europe: Ethical Perspectives* (1994) 69-88. See especially Cole P *Philosophies of Exclusion* (2000).

<sup>459</sup>Balibar E *Nous, citoyens d’Europe? Les Frontières, l’Etat, le peuple* (2001) 174.

<sup>460</sup>Newman D ‘On Borders and Power: A Theoretical Framework’ *Journal of Borderland Studies* (2003) 13-24. See also Donnan H & Wilson T *Borders: Frontiers of Identity, Nation and State* (1999) 60-63.

is basically the limit of the known world, of the nation-state. It is always seen from within as protection; from the outside, as an obstacle. It always evokes something that is to be extended.<sup>461</sup>

Every architectural wall, Boyer writes, 'functions as a machine of elimination; its primordial function lies in the ability to separate, exclude, circumscribe and avoid those things that bear offence.'<sup>462</sup>

The essence of a boarder is to enable governments to control resources and people in order to determine and advance its fortunes. To the refugee, the border is a wall and towards naturalisation; the same borders are constantly in motion. Kymlicka covers the link between rights and equality appropriately when he opined that:

borders show the limits of the allocation of rights. What is the justification of distinguishing between the rights of citizens and those of foreigners outside them? If the principle of the moral value of individuals has to be taken seriously, then the state must not violate individual's physical integrity.<sup>463</sup>

For the refugee, the idea of traversing from one bounded territorial space to another inspires a narrative of a special kind where arrival follows departure in a paradoxical theme of assimilation and estrangement. Again, both spatiality and location deserve a constant rethink from inside the territory especially in light of the dispossession that demands immobility. Naturalisation in itself has always exudes a dispassion that saturates mobility against administrative and bureaucratic holdup. Amoore would write that 'the border becomes a condition of being that is always becoming, it is never entirely crossed but appears instead as a constant demand for proof of status and

---

<sup>461</sup>Zapata-Barrero R *supra* n446 at 5-6.

<sup>462</sup>Boyer C *The many mirrors of Foucault and their architectural reflections* in Dehaene et al (ed.) *Heterotopia and the City* (2008) 66.

<sup>463</sup>Kymlicka W *Territorial Boundaries: A Liberal Egalitarian Perspective* in Miller D & Hashmi S (Eds.) *Boundaries and Justice: Diverse Ethical Perspectives* (2001) 249.

legitimacy....<sup>464</sup> From South Africa, Europe and the US, those against naturalising refugees have chanted the same popular position from old ‘it’s our country. We can let in or keep out whomever we want.’<sup>465</sup> Carens noted that ‘this could be interpreted as a claim that the right to exclude others is based on property rights, perhaps collective or national property rights. Would this sort of claim receive support from theories in which property rights play a central role?’<sup>466</sup>

The borders and tight screening procedures are necessary if citizenship should inspire any meaning.<sup>467</sup> The image of the “other” or “outsider” contrast to who we imagine to be the “same” to be part of our “nation”. This imagined ‘other’ is as necessary as the imagined “self” in sustaining our idea of the “nation” and hence our sense of identity.<sup>468</sup> Those who do not belong, such as the refugees, ‘provide a constitutive outside for the identity formation for the communities of those who do.’<sup>469</sup> The “we” is integrally related to and formed by its relationship with the alien.<sup>470</sup>

In the South African context, for example, the movement towards naturalisation for the refugee entail a five stage process: the asylum processes; the refugee status stage; the certification phase; the conversion to the immigration stage and the citizenship phase.

---

<sup>464</sup>Amoore L ‘Biometric Borders: governing mobilities in the war on terror’ (2006) 25 *Political Geography* 336-351 at 348. Using the term the pedagogy of space, Löfgren discusses the ritualization of borders and how crossing the borders dislocates identities as people seek belonging. See Löfgren O ‘Crossing the Borders: the nationalisation of anxiety’ (1999) 29 *Ethnologica Scandinavica* 5-27 at 6.

<sup>465</sup>Carens JH ‘Aliens and Citizens: The Case for Open Borders’ (1987) *The Review of Politics* 49 (2) 251-273 at 252.

<sup>466</sup>Ibid.

<sup>467</sup>See also Miller D *On Nationality* (1995) where at p33 noted that ‘frontiers are actually necessary if citizenship will have any significance.’

<sup>468</sup>Serensen JM *The Exclusive European Citizenship: The Case for Refugees and Immigrants in the European Union* (1996) 14.

<sup>469</sup>Malkki LH ‘Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization’ (1996) *Annual Review of Anthropology* 11 (3) 377-404 at 389.

<sup>470</sup>Hyndman J *Managing Displacement: Refugees and the Politics of Humanitarianism* (2000) xxv.

In essence, this means that there are five official border crossing before naturalisation is actualised and as Blaise notes, ‘the border seemed to move with me, hanging overhead like a cloud.’<sup>471</sup> This five stage path to naturalising the refugee in South Africa and elsewhere in the continent and beyond is the product of states policies. As these policies were emplaced by individual governments, they can equally be displaced by the same governments. As Samers argues, ‘there can be no undocumented immigration without immigration policy, and thus those who are deemed to be illegal, irregular, *sans papiers* or indeed undocumented, shift with the nature of immigration policy.’<sup>472</sup>

As the refugee cannot be confined or situated in a specific place, he or she acts to blur or hemorrhage national boundaries.<sup>473</sup> The refugees constitute a population blunder and disfigure the national order of things and by implication, defying the natural divide concocted at the founding of the nation-state between the citizen and the foreigner. Against this backdrop of abnormality, the refugee becomes someone requiring ‘specialised therapeutic interventions.’<sup>474</sup> If nations were to classify and sort people into national kinds and types, refugees would constitute an anomaly of categories, ‘a zone of pollution.’<sup>475</sup>

---

<sup>471</sup>Blaise C ‘The Border as a Fiction’ (1990) *Borderlands Monograph Series* No.4 at 5. See also Gilbert L ‘Resistance in the neoliberal city, City: analysis of urban trends, culture, theory, policy, action’ (2005) *City* 9 (1) 26-28.

<sup>472</sup>Samers M ‘Invisible Capitalism: political economy and the regulation of undocumented immigration in France’ (2003) *Economy and Society* 32 (4) 555-583 at 556.

<sup>473</sup>Douglas M *Purity and Danger. An Analysis of the Concept of Pollution and Taboo* (1966) 7.

<sup>474</sup>Malkki L *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania* (1995) 8.

<sup>475</sup>*Ibid.* at 4.

The international system of nation-states and the borders that demarcated them have nonetheless continued to sustain this divide because the refugee is necessary for the citizen to continue its relevance as status of rights. At the borders therefore, what is considered a natural right - mobility<sup>476</sup> is severely questioned and scrutinised whereas sovereignty which is invented remains permanently unquestioned. Hindess argues that:

citizenship is an important component of a dispersed system of governing a large, culturally diverse, and interdependent world population and that it operates by dividing that population into a series of discreet subpopulations and setting them against each other. Within that large population, citizenship serves to facilitate or promote certain kinds of movement and interaction between its members and to inhibit or penalize others.<sup>477</sup>

While the European Union have resolved their refugee problems by dismantling the borders thereby removing every possibility of a European refugee, the African continent, for example, has maintained artificial borders that were created by Europeans. In questioning colonial borders and the impact they have had on Africa, Mazrui asked 'is a foreigner a man from across the border even if that border was drawn up by other foreigners when they scramble for colonies?'<sup>478</sup> Where human rights have failed so far to penetrate a territorially bounded space and naturalise those that seek belonging, neoliberal capital has succeeded.

Most recently, in the context of globalisation, there has been a considerable analysis of the extent to which citizenship is losing its relevance or in a related way, 'becoming

---

<sup>476</sup>Art. 13 (2) of the UDHR provides that 'Everyone has the right to freedom of movement and residence within the borders of each state.'

<sup>477</sup>Hindess B 'Citizenship in the international management of populations' (2000) *American Behavioral Scientist* 43, 1486-1497 at 1495. See also Higgins R 'The right in international law of an individual to enter, stay in and leave a country' (1973) *International Affairs* 49, 341-357.

<sup>478</sup>See generally Mazrui A *On Heroes and Uhuru Worship* (1967) 8-21.

denationalised.<sup>479</sup> Economic borders have been dismantled to free capital and resources while security borders, keeping people out and constraining their belonging have been fortified under the threats of terrorism, sapping of resources and amenities from citizens. Paradoxically though, immigration is absorbed by economic forces and yet it is still perceived as a disruptive force to the legitimacy and homogeneity of the nation-state and its erroneous pursuit of a unified culture. There is therefore a huge disconnect pitting immigrants and refugees contribution to the economic advance of the nation-state against the nation-state's capacity to absorb the cultural difference of forced migrants.

Therefore, there is paradigmatic shift in the ethics of subject formation, or the ethics of citizenship as governing 'becomes concern (sic) less with the social management of the population (biopolitics) than with individual self-governing (ethico-politics).<sup>480</sup> Given the scenario of shifting global assemblages, Ong writes:

the sites of citizenship mutations are not defined by convention. The space of the assemblages, rather than the territory of the nation-state is the site for political mobilizations and claims. In sites of emergence, a spectrum of mobile and excluded populations articulates rights and claims in universalizing terms of neoliberal criteria and human rights.<sup>481</sup>

The universalising and borderless breakthrough advantageously piloted by neoliberal forces has instead militarised the frontiers of states against those seeking protection. This is done at the same time as states threaten those already protected in the inside

---

<sup>479</sup>Dauvergne C 'Citizenship with a Vengeance' (2007) 8 *Theoretical Inq. L.* 489.

<sup>480</sup>Rose N *Powers of Freedom: Reframing Political Thought* (1999) 233-250.

<sup>481</sup>Ong A 'Mutations in Citizenship' (2006) *Theory, Culture & Society* (23) 500.

from their quest for naturalisation, equality and full rights implicit on their humanity.

Etienne Balibar writes:

When I speak of a division between zones of life and zones of death with a fragile line of demarcation, it was tantamount to speaking of the “totalitarian” aspects of globalization. But globalization is clearly not only that. At the moment at which humankind becomes economically and, to some extent, culturally “united” it is violently divided “bio-politically.” A politics of civility (or a politics of human rights) can be either the imaginary substitute of the destroyed unity, or the set of initiatives that reintroduce everywhere, and particularly on the borderlines themselves, the issue of equality, the horizon of political action.<sup>482</sup>

What therefore began ages ago from the Magna Carter, the French Declaration and American Bill of Rights, and enshrined in the 1948 Universal Declaration of Human Rights for all persons, has in all practicality ended up as a theory of citizens. In actual fact, the universal rights that liberalism, neo-liberalism and democracy confers to everyone, is transformed during their implementation to some people and citizens of a state. If the ‘Rights of Man’ of yesterday and contemporary human rights of today were indeed framed *qua* human, the inalienability of rights would dictate that the subject of human rights is not the same as that of the citizen. This is because citizenship is particularistic, uniquely attached to municipal jurisdiction and territorially bound, but not universal despite the spirited attempts of cosmopolitanism and its proponents. A universal or transnational realistic approach to human rights would therefore, in all spatiality, transcend territorialism amongst others.

The obvious question that comes next is what is the basis of any state or individual in any state to exclude those who seek to be party to it, especially refugees for whom it is clear that they no longer enjoy any protection or diplomatic assistance from their states

---

<sup>482</sup>Balibar E ‘Outlines of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence’ (2001) *Constellations* 8 (1) 15-29 at 27.

of origin? This is because the agency in which human rights is situated by the international community is erroneously tied to the state in the name of citizenship. Those who are displaced by circumstances like refugees are therefore displaced by the same situation created by the international community - the site of the citizen and the state. Human rights are, to a large extent, displaced as the individual is displaced from the internationally sanctioned site of rights - the state. Herein lay the genesis of error.

In the spirit of this particularistic approach of human rights by nearly every state in the universal system, Franke notes that:

Most views of human rights have become at best particularistic and at worst dictatorial. In such a move, there exist already a prejudice that the most fundamental of human rights is the right to the state, and, thus, the question of human rights is indeed quickly lost to the question of citizen's rights. Inherent to this mode of thinking is that it is only citizens who can actively bear rights and that, by reason, persons displaced from the site of citizenship are lacking in the basic human agency even required for a serious human rights claim and the right to demand that such a claim be taken seriously.<sup>483</sup>

It should, however, not be forgotten that the manner in which the notion of rights has been qualified with the notion of the human is itself a social construct of modernism. Citizenship itself is a right, it is and will never be a person. But then, being a social construct, societies have heaped enormous significance on it thereby trumping even the very human that constructed it. It has socio-legally assumed a leviathan status, a site of oppression, an axis of injustice constraining even the refugees' chance at attaining it. In rejecting its oppressive bearing, one of the ways out would be to deconstruct the human out of the citizen.

---

<sup>483</sup>Franke MFN 'The unbearable rightfulness of being human: Citizenship, displacement, and the right to not have rights' (2011) *Citizenship Studies* 15 (1) 39-56 at 49.

It is trite that the citizen is not, and would never be a fine example of a human, on whom human rights are predicated upon due to its oppressive and discriminatory power. As beings, the two do not occupy the same position because the citizen is particularistic while the human is universal and the universal should and must always trump the particular. As universal beings due to humanity, the refugees' quest for naturalisation must outweigh a particularistic construct of citizenship and be granted as such. This is so because it is not so much that humans have rights but that rights make us humans.

Invariably, one should not undermine how the notion of modern citizenship, inclusive of full political membership, has ignored and displaced the rights claims of others as humans. One should equally not be oblivious to the fact that citizenship itself is conditioned on political and legal orders that seek to protect their communities through a discriminatory strategy of excluding and shutting out others, including desperate refugees seeking membership and full protection.<sup>484</sup> Perhaps it is the difficulty of deconstructing the professed universality of human rights from the particularity of the citizen that compelled Aleinikoff to support and settle for the unequal status of denizen.<sup>485</sup> In light of this difficulty, Franke has suggested that:

For citizens and displaced persons to meet under conditions where there is the possibility of universal respect and protection for rights, as human rights, the right to have rights must be quit(sic) as the premise and substituted with a right to not have rights. By this, I mean that human rights may be approached universally where all persons claiming respect as

---

<sup>484</sup>See also Halfman J 'Citizenship, universalism, migration and the risk of exclusion' (1998) *The British Journal of Sociology* 49 (4) 513-533 where at 519 he noted that the civil rights of the community in a political setting is supported by the exclusion of outsiders. See generally Hindess B 'Citizenship for all' (2004) *Citizenship Studies* 8 (3) 305-315.

<sup>485</sup>Aleinikoff A & Klusmeyer D *Citizenship Policies for an Age of Migration* (2002).

human beings are permitted to do so without having to present their rights but, rather, where they give one another the opportunity and right to pose the rights of humans as questions to one another; where they allow one another the freedom to continually render rights as problems to be mutually engaged in the claims they make of each other; and where they are free to call humanity itself into question in the relations they form to address each other's dignity and well being.<sup>486</sup>

No state's argument will seem plausible or stand the test of reason or indeed make human rights sense in defence of its citizenship law if it directly challenges the assumption of the equal moral worth of every human being. If indeed it is accepted that the refugee is a human being, constraining his or her quest for naturalisation in any state that scantily subscribe to human rights is morally and legally indefensible and this should be the framework that international human rights law must adopt. The right to naturalisation for refugees must be de-territorialised.

### **3.7 Conclusion: Beyond the current Human Rights Dispensation of Refugees**

This chapter looked deeper into the international aspects of the naturalisation of refugees. It examined the various elements that concentrate the right of membership into the hands of states. In weighing all these elements against the international effort of naturalising refugees, the chapter found that contrary to a narrow understanding of human rights, the latter are indeed in every practical terms citizenship rights. This of course is within the context of refugee rights especially the right to naturalisation.

In both the 1951 Geneva Convention and the African Refugee Convention, the path to the naturalisation of refugees is not framed as a right but as a recommendation. The

---

<sup>486</sup>Franke, *supra* n478 at 40-41.

provision in the African Refugee Convention is even worse because it does not qualify even as a recommendation.

The findings here would support the conclusion that the right to naturalise refugees may be best achieved if pursued as a complete human right option void of statist control. Even this human rights option is plagued with difficulties because the Westphalia model of states creation centred humanity into territorially bounded spaces with fewer options of exercising full human components of rights outside these spaces. The situation is further compounded by the international law aspect of sovereignty and non-intervention in the affairs of member states. In situating the human race into territorially bounded spaces, the international community erroneously tied human rights to bounded territoriality and people like refugees pushed out of these spaces find it very difficult to realize their full rights to humanity. Once outside this territorially bounded space, refugees would inadvertently need some law of exception to bring them back into the human fold. This aspect of exception questions the very universality of human rights and because rights are localised within territorial borders, it could be bluntly concluded that the refugee is not perceived as human enough under international law.

By adopting the principle of sovereignty, non-intervention in internal affairs of states, territorially bounded human rights in the form of citizenship and making it difficult for refugees to naturalise, international human rights law is to an extent compromised. State parties to the Geneva Convention have exercised their rights of sovereignty by deciding who they can let in or naturalise thus selectively leaving the human out of the

concept of rights. This has made the naturalisation rights of refugees an aspect of state mercy contingent on sovereign power. Castillo and Hathaway conclude that:

Now that the political advantages of refugee recognition have gone the way of the Cold War, and as developed states become increasingly skeptical of the value of other than carefully circumscribed immigration, (sic) the logic of the anomalous attachment to routine permanent integration has greatly diminished.<sup>487</sup>

The refugee therefore, in the quest for naturalisation has artificial barriers to cross and in most cases, there is no chance to even cross these barriers. In keeping with fundamental human rights tradition to which most parties in the international system have subscribed and incorporated into their domestic laws, the very state parties, without risk of any international remand, have erected laws defeating the human rights of refugees found in their territory. This point only to one conclusion: that human rights are actually citizenship rights. Zapata-Barerro notes that in actual sense, 'the political theory of borders shows that the full benefits of the liberal democratic principle of equality is exclusively reserved to citizens.'<sup>488</sup>

At its inception, many believed that perhaps globalisation would ease the short fall of the respect and realisation of human rights since it aped to free the borders. As seen in this chapter, globalisation did everything but ease the movement and emplacement of peoples especially refugees. As Watt remarks:

hyper-connectedness, driven by increasingly footloose capital operating on a global scale, does not...signal the erasure of local difference or of local identity, but rather invalidates and reconstitute places.<sup>489</sup>

---

<sup>487</sup>Castillo MA and Hathaway J *Temporary Protection* in Hathaway J (ed.) *Reconceiving International Refugee Law* (1997) 3.

<sup>488</sup>Zapata-Barrero R *supra* n446 at 15-16.

<sup>489</sup>Watts MJ 'Space for Everything (A Commentary)' (1992) 7 *Cultural Anthropology* 115-128 at 122.

In addition to the above findings, the chapter notes the impossibility of human rights for all. This is because full enjoyment of human rights is tied to citizenship. This position validates the narrative that as an oppressive site, citizenship is not and cannot be a fine example of human rights. As a status, citizenship is and will never be a person.

## CHAPTER 4

### THE NATURALISATION PROCESS OF REFUGEES WITHIN THE FRAMEWORK OF THE SOUTH AFRICAN REFUGEE LAW

Let it rest lightly,  
If it can,  
tis foreign soil.  
Let it grow pity like a bloom.  
Although once you said  
even the air in a foreign land  
is heavy and cuts the lungs.

Let it be light,  
this handful of earth  
I throw against the coffin,  
my last debt and your newest  
wound.

Without a fatherland  
the landless find  
all brown earth an insult,  
and soil rootless.  
The exile is a stranger  
even to his grave

AntranikZaroukian, "Let it be Light," Translated by  
Diana Der Hovanesian, reprinted in "Landscape  
and Exile", 1985, 157

#### 4.1 Introduction

Emerging from the dehumanising trenches of apartheid when the country was a refugee-producing state, South Africa became one of the models of a constitutional democracy on the African continent and beyond. The country's international status as a refugee-producing state was swiftly succeeded by a new status, a destination of refuge and a refugee-receiving state.

With the birth of democracy, a new constitution which promised freedom and human rights, a physical infrastructure and functioning economy, together with the presence of the towering figure of Nelson Mandela proved attractive for people embarking south. But then, there was a need to bring South African laws in line with International human rights law.<sup>490</sup>

After years of being systematically turned away, the office of the United Nations High Commissioner for Refugees<sup>491</sup> was permitted to establish a presence in South Africa in 1991. Once it gained a mandate to operate in South Africa, the UNHCR began addressing “durable solutions” for returning South African exiles, among them, an estimated 300, 000 Mozambicans who fled the 1980s civil war in their country, but had never been recognised by the South African government.<sup>492</sup>

In bringing South Africa in line with the international community in the area of refugee protection, South Africa passed the Refugees Act and its accompanying regulations.<sup>493</sup>

This chapter deals with the naturalisation of refugees within the Refugee Act.<sup>494</sup> While the current Act in force is foundational to the naturalisation of refugees in South Africa, it is nonetheless only a commencement of such process. In other words, a refugee in South Africa cannot attain naturalisation through the Refugees Act alone. The Refugees Act therefore represents only a fraction of the process of naturalisation for refugees in

---

<sup>490</sup>Smith T ‘The Making of the South Africa (1998) Refugee Act’ (2003) *Forced Migration Working Paper Series #5* p.3.

<sup>491</sup>Hereinafter referred to as the UNHCR.

<sup>492</sup>Crush J & Williams V ‘Evaluating Refugee Protection in South Africa’ (2002) *Southern African Migration Project, Policy Brief No. 7* at p.1.

<sup>493</sup>GN R366, GG 21075, 6 April 2000 as amended by GN R938, GG 21573, 15 September 2000. For an application of its asylum provisions, see the 2010 Supreme Court of Appeal judgment in *Arse v Minister of Home Affairs (25/10)* [2010] ZASCA 9 from para. 15-19.

<sup>494</sup>Act No. 130 of 1998.

South Africa. There is a history to this position as to why the Refugees Act alone is incapable of naturalising a refugee. For the naturalisation of a refugee under South African law to be possible, the refugee has to migrate from the Refugees Act to the Immigration Act and unto the Citizenship Act. The argument or justification of, for the sake of administrative fairness, the cause of naturalisation could have better been served if the Refugees Act alone was enough to naturalise the refugee, falls beyond the circumference of this thesis. This is not to say that such propositions were not advanced during the making of the current Refugees Act. Propositions of this nature were simply cast aside during the finalisation of the current Act.

Within the context of naturalisation in the Refugees Act, this chapter will attempt to argue that the architecture of the current Act works against the facilitation of the naturalisation process of refugees contrary to the spirit and purport of the Geneva Convention. Reconciling South Africa's municipal law pertaining to refugees and its international obligations to refugees especially within the context of naturalisation, this chapter argues that there are legal and policy gaps in the current refugee regime. These legal and policy gaps that impede South Africa's effort in fulfilling its international obligation regarding refugees obviously need a redress. Is it that the law was improperly articulated at its drafting? Is it that the ideological impasses framing the law could not be reconciled to produce a law that meets obligations to which South Africa is a state party? Or is it that the law may be fair owing to such international obligations but its application or implementation is flawed to an extent that puts the entire refugee law on a trail of failure?

Some have suggested that migration and asylum policy in South Africa is inconsistent on paper and remarkably sloppy in practice.<sup>495</sup> Others contend that the asylum system itself is so severely flawed that it speaks to a distinct failure of the entire South African refugee regime.<sup>496</sup> How is the naturalisation process framed in the act to the extent that the process alongside the entire refugee regime is part of this failure of distinct proportion? This thesis will grapple to establish what works and what does not within the context of naturalising refugees in South Africa within the refugees Act. The drafting history will perhaps be a point of departure to answer how South Africa ended up with the current Act in the first place. Fifteen years later after its inception, the Refugees Act, as it will be seen, has remain very contentious on paper; rights of asylum seekers and refugees have been deferred in practice simultaneously bringing the fulfilment of South Africa's international obligations towards refugees into crisis.

This chapter will be divided into five parts. The first part will assess the legal history of the South African refugee law. It will look briefly on the law applicable to asylum-seekers and refugees before the emergence of the current Act. South Africa became a state party to international conventions governing refugees before enacting its own municipal refugee law.

The second part looks into South Africa's obligation to refugees as a state party to various international refugee conventions and how its obligations informed the drafting of the current Act which is criticised by some writers as being a failure.

---

<sup>495</sup>Landau L 'Loving the Alien? Citizenship, Law, and the Future in South Africa's Demonic Society'(2010) *African Affairs* 109/435, 213-230 at p. 222.

<sup>496</sup>Amit R 'No Refuge: Flawed Status Determination Process and the Failures of South Africa's Refugee System to Provide Protection' (2011) *International Journal of Refugee Law*, Vol. 23 (3), p.458-488.

The third part will significantly look into the drafting history of the current act in efforts to understand how the current Act was formulated especially within the context of naturalisation. It is important to understand why the state ended up with the current act and the corresponding shortcomings that had remain at the centre of so much contention in refugee circles. The drafting history is very significant here for two reasons. First, the drafting history will reveal the intentions of the law and its framers from the outset. This is important because the trend the law is taking today signifies either a fulfilment of the drafter's original intentions or its betrayal. Second, in keeping with its international obligations towards refugees, the success and failures of fulfilling such internationally binding obligations rests exclusively on what the drafters set out to achieve from the very outset. If the human rights of asylum seekers and refugees are deferred, it might therefore not just be a case of administrative sluggishness or a failure of basic administrative justice but perhaps it was designed to be so.

The fourth part will look into the rights and obligations of refugees especially towards the process of naturalisation. It is trite to note that one cannot deal with the human rights of refugees without engaging with the asylum system which itself is a passage towards refugee status and eventually the naturalisation for those refugees who seek it.

The last part would attempt to assess the legal and policy gaps of the current refugee regime especially within the context of naturalisation. This chapter deals more closely with specific rights of refugees and, to a lesser extent, asylum seekers under the current refugee legislation. In fact, in terms of the current law, the path to naturalisation certainly begins with an application for an asylum permit. This process is necessary to understand the progression of refugee rights into naturalisation within the South African

refugee system. This part will equally look into some judicial decisions that have assisted the fostering and realisation of the rights of refugees in South Africa.

This chapter concludes by summarising the shortcomings and gaps in the asylum system. In the current framework of the law, it will be very difficult for South Africa to truly meet its international obligations towards refugees.

#### **4.2 The Legal History of South African Refugee Law**

With the exceptions of South Sudan and Namibia, South Africa is relatively new to refugee issues compared to the rest of Africa and beyond. Prior to 1990, South Africa was still a refugee producing state and there was no presence of UNHCR mandate. South Africa was not a signatory to any international human rights or humanitarian conventions and neither was it a state party to any hemispheric human rights treaty. In terms of human rights protection, South Africa was a pariah state during the apartheid era. This does not mean there were no asylum seekers in South Africa: there were people seeking refuge in South Africa who, together with others, constituted migration at the time. Factors contributing to migration during these time included mining, commercial agriculture and the service sector. Forced migration, wars in Mozambique and Angola led to large number of asylum seekers making their way into South Africa.<sup>497</sup>

Most migrants during the apartheid era therefore came to South Africa to escape poverty and destitution in their home countries as well as civil wars and political

---

<sup>497</sup>Gibney M and Hansen R *Immigration and Asylum from 1900 to Present* (2005).

instability.<sup>498</sup> Although there was no refugee regulatory framework at this stage, people still streamed into the country for refuge. Refugees who entered South Africa in the 70s and 80s, largely Mozambicans and other blacks, were confined exclusively into the homelands. The apartheid government did not issue them with any South African identity documents and so they had no status in the country. As much as they were confined into the homelands, they were subjected to rampant arrest when they moved out of their designated areas.<sup>499</sup> Their presence was, however, essential from an economic point of view without any legal possibility of integration. Therefore, while the apartheid government at that time turned a blind eye to clandestine migration in order to secure an abundant supply of cheap labour, it was nevertheless opposed to black migrants applying for citizenship.<sup>500</sup>

On 6 September 1993, the South African government, on the basis that it was willing to apply internationally recognised principles regarding the protection and treatment of asylum seekers and refugees, signed a basic agreement with the UNHCR.<sup>501</sup> This agreement paved the way for the office of the UNHCR and South Africa to put in place a policy for determining refugees' status which subsequently culminated in the ratification of the Geneva Convention in 1995.<sup>502</sup> This was rendered possible after the UNHCR gained a formal legal mandate in South Africa in 1991. This mandate was of a limited

---

<sup>498</sup>Maharaj B 'Immigration to Post-apartheid South Africa'(2004) *Global Migration Perspective*, No.1, p.1-27.

<sup>499</sup>Minnar A and Hough M 'Who goes there? Perspectives on Clandestine Migration & Illegal Aliens in Southern Africa' (1996) *Human Science Research Council* p. 106-116.

<sup>500</sup>Maharaj, *supra* at p3. See also Jeeves *A Migrant Labour in South Africa's Economy* (1985). See especially Kleinsmidt V and Manicom D 'A Policy Analysis of the Refugee Act 130 of 1998'(2010) *African Insight*, Vol. 39 (4) 164-181 at p.167.

<sup>501</sup>Basic Agreement Between the government of the Republic of South Africa and the United Nations High Commissioner for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and Its Personnel in the Republic of South Africa, February 1993.

<sup>502</sup>UNHCR General Conclusion on International Protection, available on [www.unhcr.org/EXCOM](http://www.unhcr.org/EXCOM).

purpose, namely, to facilitate the return of South Africa's own exiles besides attending to foreigners.

This Basic Agreement was followed more than a week later by a Tripartite Agreement between South Africa, Mozambique and the UNHCR on 15 September 1993. It was designed to achieve two things: the first was to provide for a UNHCR-led voluntary repatriation, especially of Mozambican refugees in the South Africa.<sup>503</sup> The second reason was to integrate former refugees (after a cabinet approved recommendation) who did not take advantage of repatriation and regularise their status in South Africa.<sup>504</sup> Mozambicans were therefore the first recipients of the South African policy a few months after the 1994 elections that ushered in the era of human rights and democracy.<sup>505</sup>

#### **4.2.1 Refugee Policy in South Africa before the Refugees Act of 1998**

After years of being systematically turned away, the office of the UNHCR was allowed to establish a presence in South Africa in 1991. Once the UNHCR clinched the mandate to operate in South Africa, it began addressing "durable solutions" for returning South African exiles and an estimated 300,000 Mozambicans who fled that country in the civil

---

<sup>503</sup>De la Hunt L.A *Refugees and Immigration Law in South Africa* in Crush J (ed.) *Beyond Control :Immigration and Human Rights in a Democratic South Africa* (1998) 131-5. See also Klaaren J and Sprigman C *Refugee Status Determination Procedures in South Africa* in Handmaker J, De la Hunt L and Klaaren J (eds.) *Advancing Refugee Protection in South Africa* (2008) 62-3. See especially Minnar A 'Migrants' Rights: The South African Experience Post-1994' (2000) *Institute for Human Rights and Criminal Justice Studies, Paper presented to the 14<sup>th</sup> International Conference of the International Society for the Reform of Criminal Law: Sandton International Convention Centre, Johannesburg, South Africa, 3-7 December 2000*, p.5.

<sup>504</sup>Perhaps it is worth mentioning that this Tripartite Agreement did not succeed in realising its primary objective, that of repatriation. This is so because for the almost 135, 000 who registered in March 1995, only 31 589 returned voluntarily and by the end of December 1995, 67 060 had returned. See Human Rights Watch *"Prohibited Persons" Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (1998) 30.

<sup>505</sup>Kleinsmidt V and Manicom D 'A Policy Analysis of the Refugee Act 130 of 1998'(2010) *African Insight*, Vol. 39 (4) 164-181.

wars of the 1980s. Although these Mozambicans were in South Africa since the 1980s, the apartheid government never formally recognised them as refugees and so they had no rights.

In fact the post-World War II period in itself has been characterised as the Age of Rights, an era when human rights movement came of age.<sup>506</sup> The new South Africa is the first state that is the virtual product of that age and the norms it represents. The construction of the post-apartheid state represents ‘the first deliberate and calculated effort in history to craft a human rights state – founded on policy and ethos that are primarily animated by human rights norms.’<sup>507</sup>

Hence, with the advent of democracy, a rights-based constitution which promised freedom and human rights, as well as economic development, South Africa became a beacon of hope especially for black Africa and beyond the continent. There was therefore a need to bring South Africa into the international community. These required a reconciliation of its municipal laws with the human rights expectations of the international community as reflected in various instruments particularly in the refugee sector.

---

<sup>506</sup>Henkin triumphantly declared that “[o]urs is the age of rights. Human right is the idea of our time, the only political-moral idea that has received universal acceptance.” See Henkin L *The Age of Rights* (1990) p.ix.

<sup>507</sup>Makau wa Mutua ‘Hope and Despair for a New South Africa: The Limits of Rights Discourse’ (1997) 10 *Harv. Hum. Rts. J.* 63-114 at p.65.

The 1994 government of national unity inherited a legal framework of immigration legislations that had been consolidated into the Aliens Control Act.<sup>508</sup> This legislation itself was conceived in inhuman and racist circumstances under the alien administration of apartheid and was used to advance exclusionary policies.

South Africa's policy on refugees therefore has its origins in the country's much criticised Aliens Control Act which in numerous respects failed to provide adequate guarantees to its applicants.<sup>509</sup> The Mozambicans who were in South Africa in the 1980s had never been formally recognised as refugees by the apartheid government, it was necessary to recognise them retrospectively for the purpose of the time-limited repatriation program. Without any refugee legislation at this point in the early 90s, legal recognition was achieved through a basic determination procedure contained in a government instruction of 1993.<sup>510</sup>

This procedure for establishing the refugee status of Mozambicans laid down the basis for another Passport Control Instruction in 1994<sup>511</sup> which, when put together with the

---

<sup>508</sup>Act 96 of 1991.

<sup>509</sup>De la Hunt LA 'Refugee Law in South Africa: Making the Road Longer?' in *World Refugee Survey 2002* (2002) US Committee for Refugees, Washington DC at p.123. See also Handmaker J 'Returning Home: Learning Lessons from the Past, and Promoting Safety and Dignity in Repatriation and Return' (1999) *Africa Legal Aid Quarterly* 3: 19-27. See also Handmaker J 'Who Determines Policy: Promoting the Right of Asylum in South Africa' (1999) *International Journal of Refugee Law* 11 (2) 290-309. See especially Human Rights Watch 'Prohibited Persons' Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa' (1998) 170.

<sup>510</sup>A basic Determination Procedure was promulgated under Passport Control Instruction No. 20 of 1993 issued in terms of the Alien Control Act of 1991.

<sup>511</sup>Passport Control Instruction No.63 of 1994.

1993 Instruction and the “Basic Agreement” signed with the UNHCR and South Africa on 3 September 1993, became the basis of South Africa’s pre-1998 refugee policy.<sup>512</sup>

In the 80s many refugees that had moved into South Africa from neighbouring countries such as Mozambique had been dealt with under the Aliens Control Act, and given section 41 permits with the possibility of renewals before expiration. This permit entitles its holder to work and study (a legislative equivalence of section 22 of the current Act). The Aliens Control Act was, however, never drafted or designed for asylum seekers or refugees, and neither was it framed to regulate this group of migrants.

After the agreement with the UNHCR, there was an urgent need to attend to refugee issues and instructions were issued with regard to procedure to deal with asylum seekers and refugees. The Department of Home Affairs<sup>513</sup> established a Directorate for Refugee Affairs and a Standing Committee to review applications based on Convention guidelines. However, they were ill-prepared, understaffed and lacked experience.<sup>514</sup>

Officers at the frontiers were instructed to take finger prints of all applicants, conduct interviews, complete certain forms and issue section 41 permits in terms of the Aliens

---

<sup>512</sup>See Handmaker (1999) n504, 297.

<sup>513</sup>Hereafter the DHA.

<sup>514</sup>Crush J and William V ‘Introduction: The Means of Amnesty’ in Crush J and William V (eds.) *The New South African? Immigration Amnesties and Their Aftermath* (1999) 4. See also Handmaker J and Schneider J ‘The Status ‘Regularisation’ Programme for Former Mozabican Refugees in South Africa’(2002) *Working Paper, Research Unit on Law and Administration, School of Law, University of Witwatersrand*, available at [http:// www.law.wits.ac.za](http://www.law.wits.ac.za) (Accessed 3/11/ 2014).

Control Act pending the outcome of applications for asylum.<sup>515</sup> With the implementation of this instruction, problems of fraud emerged among others, and this led to a new instruction designed to tighten the procedure on 1 March 1995.<sup>516</sup>

Although minor amendments were made to the Aliens Control Act to accommodate refugees in 1995 and introduce a few rights-based protection, the Act itself remained affronted to the new constitutional dictates of democracy, human rights, equality and international refugee law. For example, the Aliens Control Act stipulates that a person is an illegal alien if that person:

- i. enters South at a place other than a port of entry;
- ii. remains in the country without a valid residence permit;
- iii. acts in contravention of his/her residence permit;
- iv. remains in South Africa after the expiry of a residence permit;
- v. is prohibited from entering the country; or
- vi. becomes a prohibited person while in South Africa.<sup>517</sup>

In line with international law, no one can be punished for entering any country illegally provided the person reports to a refugee reception office within the time frame laid down for the purpose of applying for asylum. The Aliens Control Act, apart from affronting the new South African constitution, was incompatible with various international human

---

<sup>515</sup>Issued in accordance with Passport Control No. 63 of 1994, issued by the Director-General on 23 September 1994.

<sup>516</sup>Passport Control Instruction No. 23 of 1995, issued by the Director-General on 1 March 1995.

<sup>517</sup>Article 1-6 of the Aliens Control Act.

rights instruments, offended international refugee law in every material respect, and was described by Human Rights Watch as a 'draconian apartheid throwback'.<sup>518</sup>

In a climate where laws applicable to refugee issues directly conflict with the Constitution, contradicted international refugee law as a whole, the naturalisation of refugees and protection of refugee rights in general could not be contemplated or realised under the Aliens Control Act. There was therefore an urgently need to address this visible domestic and international legal shortfall.

#### **4.2.2 The Drafting History of the Current Refugees Act: Implications on Refugee Rights**

The legal disabilities of the Aliens Controls Act and its ardent failure to comply with international human rights instruments, the Constitution and especially international refugee law, inspired the legal appetite to enact a refugee law that will comply with all these expectations. If Landau and Amit<sup>519</sup> believe that the current refugee system in South Africa screams injustice, the current spatial xenophobic cries - even beyond the shores of South Africa - and the impact of all these on the naturalisation of refugees, it stands to reason therefore to dive deep into the history of its crafting. The relevance of this process is not to indict the system as a failure of municipal, regional or universal refugee rights, but rather to understand that some occurrences regarding refugee rights in South Africa are not accidental but contingent on the character of its foundation and the perception of its framers. The perception of the drafters, as will be seen, was

---

<sup>518</sup>Human Rights Watch, n 504, 160.

<sup>519</sup>See above, n490 and n491.

informed by their understanding of refugee protection, the meaning of international obligation, the constitution and the protection of citizens after more than three centuries of brutal oppression and dehumanisation from successive alien administrations.

In 1994, the DHA published an unofficial draft Refugees Act. It was unclear who wrote the draft but it may have originated with the UNHCR.<sup>520</sup> This draft espoused the contents of international instruments like the OAU Refugee Convention and the Geneva Convention of 1951. It proposed the setting up of a Standing Committee for Refugee Affairs, a Refugee Appeal Board, and a Refugee Affairs Committee.

The draft disposed that 'every recognised refugee shall, in respect to wage-earning employment, be entitled to the same right and be subject to the same restrictions, if any, as are conferred or imposed generally on persons who are not citizens of South Africa'.<sup>521</sup> This first draft attracted very few comments and interest from civil society and other interested parties.

In 1996, a group of more than three hundred asylum seekers and refugees from more than twelve countries (particularly African countries) marched into Pretoria on 29 July 1994 at the offices of the UNHCR. They protested that they have been mistreated by the officials of the DHA in that many of them had been given notices to leave the

---

<sup>520</sup>See Smith above (2003) n 485, 5.

<sup>521</sup>Section 12 (3), Draft Refugee Act, 1994, DHA (Unofficial Draft).

country within 14 days and that generally, they have been treated unfairly. On the following day, they handed a letter of grievances to President Mandela's office.<sup>522</sup> This was clearly a testament that the asylum and refugee issues required attention and urgent redress.

In September 1996, the DHA published the second refugee draft bill for comments. Unlike the 1994 draft which attracted very few comments, the second draft attracted a large number of comments. This was so because there was already a noticeable presence of asylum seekers and refugees in South Africa and many NGOs sprang up protecting and advancing the rights and interest of asylum seekers and refugees. The second draft therefore coincided with a strong civil society very much sensitised on the plight and rights of these groups of migrants and so there was lot of comments on the second draft.

Though the second draft attracted more attention than the DHA anticipated, its policies had changed since 1994. The minister of home affairs was empowered to impose whatever conditions he or she sees fit when issuing asylum and refugee permits.<sup>523</sup> The DHA had, by this time, equally set up a small Standing Committee for Refugee Affairs and a one person Appeal Board Chaired by Advocate Leach.

On 14 November 1996, Lawyers for Human Rights together with the Wits Refugee Research Program organised a workshop on the subject titled "Asylum and Naturalisation: Concerns Regarding Policy and Practice" and invited a couple of interested parties. Those in attendance included government officials, DHA officials

---

<sup>522</sup>*The Star Newspaper*, 30 and 31 July 1996.

<sup>523</sup>Smith above, n 485, 6.

including officials from the Correctional Services. Apart from discussing the second draft Refugee Bill, which at the time had been published for public comments, this forum raised as main issues, the question of administrative justice for refugees, the centralisation of the Standing Committee for Refugee Affairs<sup>524</sup> and a single centralised Refugee Appeal Board.<sup>525</sup> This forum, amongst other things, recommended a decentralised SCRA, regional Refugee Appeal Boards and better training of DHA officials.<sup>526</sup>

At the close of 1996, the government put a stop on the second draft and Dr. Buthelezi appointed a Green Paper Task Team (hereinafter 'GPTT') to address all aspects of immigration, migration and forced migration. The GPTT met on the 26 of February 1997 and by 13 May 1997, the GPTT had completed its work and submitted the same to the Minister for publication in the government gazette of 30 May 1997. Below, this study examines a few provisions relevant to this study such as the Green Paper's proposal on Refugee Status Determination (hereinafter 'RSD'). The latter is the first step towards naturalisation for a refugee in South Africa, including administration.

Chapter 4 of the Green Paper dealt with refugees and it was largely influenced by the views of refugee law scholar Professor James Hathaway, amongst others.<sup>527</sup> The GPTT's ambition was to re-conceive refugee protection in a way that is reconcilable with

---

<sup>524</sup>Hereinafter, 'SCRA'.

<sup>525</sup>These structural concerns raised in November 1996, survived till today. This forum argued that such centralisation will impede administrative justice in refugee affairs because it will slow the refugee process as a whole and it will affect refugee status determination processes.

<sup>526</sup>Report and Recommendations from the workshop held at SAHRC, 23 November 1996.

<sup>527</sup>Hathaway J & Neve R 'Making International Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection'(1997) 10 *Harv. Hum. Rts. J.* 115-211. This article is an elaboration of South Africa's Green Paper on Migration, 1997.

the legitimate concerns of states, while not sacrificing the critical right of at-risk people seeking asylum.<sup>528</sup> The Green Paper was mindful that as a sovereign state:

South Africa reserved the right to determine who will be allowed entry into the country and under what conditions. The design and implementation of immigration policy must, however, be faithful to the new constitution and Bill of Rights. It must also be consistent with our commitment to upholding universal human rights, administrative justice and certain basic rights for all the people who are affected by the South African state.<sup>529</sup>

It noted as well that:

because of our past, South Africans tend to take a negative view of immigration, regarding immigrants as posing unwarranted competition and potential security risks. Policy is therefore focused primarily on control and expulsion rather than facilitation and management.<sup>530</sup>

In its definition of a refugee, the Green Paper harmonised the definition of the refugee as expressed in both the Geneva Convention and the OAU Refugee Convention.<sup>531</sup>

On RSD, a “non-adversarial interview by a refugee officer design to determine whether to grant or not to grant a refugee status, the Green Paper took the view that:

Refugee Status Determination should be the domain of an expert authority with a reasonable assurance of independence from both the executive and political branches of government. Instead the expertise required to engage in refugee status determination is a sound familiarity with the legal and empirical realities of human rights protection, and the ability effectively to communicate across cultural, linguistic and other divides. It is moreover important that refugee protection be insulated from the potential for political intervention.<sup>532</sup>

---

<sup>528</sup>Ibid.

<sup>529</sup>Green Paper on International Migration (1997) para. 1.1.3.

<sup>530</sup>Ibid, para. 1.2.1.

<sup>531</sup>Ibid, para. 4.3.2 and 4.3.3.

<sup>532</sup>Green Paper, para. 4.4.1.

In terms of administration and procedure regarding the status determination, the Green Paper:

Endorse a streamlined one-step investigatory status determination procedure. This procedure shall include a quality moral hearing before an independent status determination authority, in which all due process rights established by international law and the constitution are ensured. An explicitly investigatory mandate supported by free access to all relevant and credible sources of human rights data is the best guarantor that all relevant facts are taken into account. Full disclosure, a pre-hearing process to narrow the range of inquiry, and reliance on community and other resources to assist in the assessment of identity should be features of the process.<sup>533</sup>

In terms of appealing a decision of the Determination Officer which today entails various avenues such as appealing to RAB, the SCRA and a judicial review by a high court in terms of the Constitution,<sup>534</sup> the Green Paper took the view that:

There should be a single opportunity for review or appeal of the decision on a refugee status, which might ordinarily be conducted on the basis of written submissions with discretion to hear arguments and otherwise conduct a more fulsome reassessment as required by the facts of the particular case. A firm commitment to expeditiously deport rejected asylum seekers who have exhausted their appeal rights is moreover essential to the credibility of the refugee protection system.<sup>535</sup>

In the context of naturalisation of refugees, while the drafters of the Green Paper saw no need for refugees to pass through the Immigration Act (as it obtains today) in order to attain citizenship and the delays that may encompass such a process, the Green Paper proclaimed that:

Apart from advocating a rights-regarding and solution-oriented strategy, it is suggested a five years temporary protection is necessary but again they insisted that refugees should benefit from a firm guarantee to make permanent residence available at the end of the temporary protection period.<sup>536</sup>

---

<sup>533</sup>Green Paper, para. 4.4.2

<sup>534</sup>Section 33 of the South African Constitution, 1996.

<sup>535</sup>Green Paper, para. 4.4.2.

<sup>536</sup>Green Paper, para. 4.6.7.

Since it was perceived that the DHA did not have the capacity to enforce immigration policy, the Green Paper suggested the establishment of a Department of Citizenship and Immigration Services (DCSI) and this department should deal only with immigration issues.

Nevertheless, although the GPTT was appointed by the minister of home affairs, he did not entirely support their recommendation. Some activists, the DHA and even the UNHCR viewed the Green Paper as expressing progressiveness.<sup>537</sup> Some in the DHA noted that the Green Paper is advocating a position that no Government is willing to consider and which far exceeds legal obligations: immediate rights of permanent residence for all refugees.<sup>538</sup> As NGOs argued among themselves over the application of temporal protection, the DHA was committed to pushing forward another version of the draft bill which will clearly represent a less progressive vision of refugee protection but does not include any obligation to integrate refugees permanently.<sup>539</sup>

---

<sup>537</sup>As the UNHCR pointed out and particularly referring the Green Paper's position on a firm guarantee of permanent residence for refugees after five years, '[r]efugee protection is primarily not intended as an alternative avenue to obtain permanent immigration into South Africa.' UNHCR, 'Comments on Chapter 4 of the Draft Green Paper on International Migration' (1997) para. 3 (d).

<sup>538</sup>The Green Paper, in proposing guarantees for refugees after five years on a refugee status relied on Art 34 of the Geneva Convention of 1951. Most often, Art. 34 is invoked in support of this position. Art.34 proclaim that 'The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and cost of such proceedings.' This provision does not actually impose any legal obligation on host States. They are simply encouraged to facilitate naturalization. If refugees were to be granted permanent residence or citizenship shortly after their arrival, then refugee status determination would be somewhat superfluous. It would be more honest to allow asylum seekers apply for citizenship (on humanitarian grounds) as soon as they arrive at the border; this is unacceptable for governments and most of their constituencies. See Barutciski M 'The Development of Refugee Law and Policy in South Africa: A Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill' (1998) *International Journal Refugee Law*, Vol. 10(4) 700-724 at p.717.

<sup>539</sup>Barutciski, *ibid*.

The next meeting was that of the White Paper Task Team (hereinafter 'WPTT') held in Cape Town between 8-12 June 1997 which adopted many issues in conflict with the Green Paper. The WPTT came up with a twelve page document on 19 June 1997. Some of the differences concerned the question of oral hearing for refugee status determination (hereinafter 'RSD') and the independence of the refugee structure. The DHA officials did not want the refugee department to be independent from the government but at this stage, they did not seem to know how they wanted them to operate.<sup>540</sup>

There was a difference in the two Task Team recommendations. Whereas the Green Paper explicitly proposed that the full set of rights accorded to refugees under international law be granted, the White Paper's lack of clarity on this issue is reflective in section 26 (a) of the draft bill.<sup>541</sup> The White Paper provides that refugees shall be afforded self-sufficiency rights such as the right to work and the right to education.<sup>542</sup> On the other hand, the DHA's views were revealed to an extent in an earlier 1998 version of the draft bill, which expressly denies

---

<sup>540</sup>Smith above, n485 at 15.

<sup>541</sup>Section 26 of the draft bill: 'A refugee shall – (a) enjoy full legal protection, which shall include the rights set out in Chapter 2 of the Constitution except for those rights where non-citizens have been expressly excluded'. Particularly problematic is the manner in which the protective provision in the Bill of Rights which do not exclude foreigners (such as, right to housing, health care, food, water, and social security) are followed by a qualifier that all but render this rights not absolute. In fact, section 26(2) and 27(2) of the Constitution: 'The state shall take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.' Section 26 of this draft bill survived into section 27 (b) of the current Refugee Act (Act 130) of 1998 as enforced. Section 27(b) 'A refugee shall – enjoy full legal protection, which include the rights set out in chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provision of this act.'

<sup>542</sup>Para. 4.6, Draft Refugee White Paper, 19 June 1998, Notice No. 1122 of 1998.

international entitlements of a socio-economic nature to refugees present in South Africa.<sup>543</sup>

Another contentious difference between the Green and White Papers was in the area of legal integration of refugees in the form of permanent residence or naturalisation. The Green Paper recommended a firm guarantee of permanent residence after five years as a refugee but the White Paper, in deviation, took a different view. The White Paper does not offer permanent residence to refugees after five years of continuous stay as refugees but rather an opportunity for refugees to apply directly for naturalisation five years after the date of recognition as a refugee.<sup>544</sup> The guarantee of permanent residence proposed and advanced by the Green Paper was therefore rejected.

Although refugees can apply for permanent residence after five years, such approval or rejection of permanent residence remains the exclusive preserve and discretion of the DHA. The earlier version, however, is revealing on the intention of the drafters part: even if the refugees manage to acquire the right to stay<sup>545</sup> and

---

<sup>543</sup>See section 27(3) of the third version of the draft bill, 1998: the refugee 'shall not have an automatic entitlement to social, economic and welfare rights'. Although the final version which eventually became the bill in April 2000 will provide for the not-absolute socio-economic rights of refugees, the regulation activating the bill into operation withheld these rights. Although section 27(3) of the third version of the draft refugee bill did not succeed into the final bill, the regulation activating the bill effected its enforcement. Every asylum permit issued immediately the refugee act came into force carried the condition that 'work and study - prohibited'. This was so despite the provision of section 27(b) of the final act. This position remained in place especially for asylum seekers until the Constitutional Court's landmark decision against this prohibition in the *Minister of Home Affairs v Watchenuka* (2004) (4) SA 326 (SCA). See generally, Barutciski (1998), n534 at p.711.

<sup>544</sup>Section 26(b) of the White Paper Draft Bill.

<sup>545</sup>In the Third Version of the Draft Bill, government is not obliged whatsoever to grant permanent residence. For example, SCRA may authorise that the recognised refugee remain in South Africa, although there is no obligation to do so. See section 22(3) and (4) of this draft.

are continually present in South for more than a decade, they can lay no claim whatsoever of permanent residence.<sup>546</sup>

The White Paper took a similar view regarding the possibility of refugees applying for naturalisation after five years of recognition as refugees. This position though, is more precise in that such application for naturalisation by a refugee will be considered as if it were presented by a permanent resident.<sup>547</sup> Refugees with five years of status were under this proposition, in a similar position as permanent residents.

It remained unclear however, why in both the White Paper and its annexed Draft Bill, refugees were not given residency rights prior to citizenship. Residency can indirectly result from the operation of international legal obligations to refugees while the granting of citizenship remain the exclusive province and discretion of the host government. The Green Paper actualised this by proposing that permanent residence should be guaranteed but that citizenship must be granted or denied at the discretion of the host government.

Some academics have contended that the spatial discursive dichotomies and the corresponding implication of rights between the White Paper and the Green Paper is contingent on the heated division within the government of national unity as the ANC and the IFP pitted against each other. This position finds articulation and expression when Maharaj opined that:

---

<sup>546</sup>Section 27(2) of this Third Draft Bill disposed that 'The continued presence of such a refugee shall not establish any claim to permanent residence in the Republic or any similar right, interest or legitimate expectations in regard thereto.'

<sup>547</sup>Para. 4.8.2: 'In making such an application, the same criteria will apply to refugees as to permanent residents'.

The sea of change between the Green and White Paper reflects the tensions in the ruling alliance in the Government of National Unity which comprises the majority ANC and the minority IFP. The Minister of Home Affairs, Chief Mangosuthu Buthelezi, has consistently advocated a conservative, regulatory migration policy.<sup>548</sup>

The Southern African Migration Project<sup>549</sup> produced an expert analysis of the Draft Refugee White Paper and the Draft Refugee Bill produced by Professor Hathaway.<sup>550</sup> In this analysis, Hathaway contrasted both the Green and White Papers and came out with a lot of divergence, noting particularly the human rights repercussion on refugees on the White Paper. Hathaway noted that the White Paper's significant departure from the Green Paper does not bode well for refugee justice with a final suggestion that the Act be re-drafted. For the purpose of this thesis, two of his analysis stands out.

On the question of the independence of refugee status determination process and its officers from both the executive and political branches of government as suggested in the Green Paper which the White Paper deviated from, Hathaway noted:

White Paper, in contrast, vests determination authority in a "separate and independent functional entity within the DHA. This is unlikely to establish operational independence in any meaningful sense: the careers of decision-makers are still under the authority of their superiors within the DHA."<sup>551</sup> This concern is exacerbated by the Bill. Both Refugee Receiving Officers (RROs) and (RSDOs) are appointed for terms of office determined by the [Home Affairs] Director-General";<sup>552</sup> the remuneration and allowances of SCRA and RSDO members are "determined by the Minister [of Home Affairs] in consultation with the

---

<sup>548</sup>Maharaj B 'Immigration to post-apartheid South Africa' in *Global Migration Perspective*' (2004) 20.

<sup>549</sup>Hereinafter, SAMP.

<sup>550</sup>Hathaway J 'Analysis of the Draft Refugee White Paper and Draft Refugee Bill, 1998' (*Republic of South Africa*), 18 June 1998. SAMP

<sup>551</sup>Para. 2.1.2, White Paper (1998).

<sup>552</sup>Section 7(2)(a) White Paper.

Minister of Finance;<sup>553</sup> and SCRA and RAB will not even have their own administrative support staff, but will be assisted “by staff of the Department, designated by the Director-General for that purpose”.<sup>554</sup>

Regarding the administrative and speedy conclusion of refugee status determination process - which in itself is necessary for avoiding backlogs and delays, legal integration and naturalisation where appropriate - Hathaway noted:

The Green Paper recommends a one-step investigatory status determination procedure, with a single opportunity for review on the merits. The White Paper in contrast proposes a six-stage procedure (interview by RRO; hearing by RSDO; potential for referral on an issue of law by RSDO to SC; appeal to either SC or RAB; appeal from SC to RAB; and judicial review).<sup>555</sup> If the commitment to “principles of natural justice and due process”<sup>556</sup> is honoured under such a multi-layered system, experience in other countries suggests that the White Paper’s estimate of an “overall time-frame for the status determination procedure...[of] not longer than six months” is hopelessly unrealistic. In the result, backlogs under the six-stage procedure are a near inevitability, raising the spectre of systemic break down.<sup>557</sup>

On the question of enfranchisement of refugees, the Green Paper had suggested that refugees benefit from a firm guarantee to make permanent residence available to refugees after five years of temporary protection.<sup>558</sup> The White Paper provided instead for a right to apply for naturalisation five years after the date of recognition as a refugee.<sup>559</sup> This, he noted, raises two concerns:

First, there is no longer a “firm guarantee” to enfranchise refugees after five years. There is merely a right to apply for naturalisation. To the extent that an individual might be denied citizenship for reasons that would not render him or her an unsuitable permanent resident, there is a risk of exposing refugees to indefinite temporary status. The second and more important, while access to naturalisation (rather than permanent resident status) will no doubt be welcomed by many refugees, others will maintain a strong allegiance to their country of origin, and hope eventually to return. The choice of indefinite temporary status or naturalisation puts such refugees in the invidious position of losing the citizenship of their country of origin in order to establish a more stable status in South Africa.<sup>560</sup>

---

<sup>553</sup>Section 18, White Paper.

<sup>554</sup>Section 19, White Paper.

<sup>555</sup>Para. 2.3.2, White Paper.

<sup>556</sup>Para, 2.2.2, White Paper.

<sup>557</sup>Hathaway (1998) above, n545 at para. 4.

<sup>558</sup>Para 4.6.6, Green Paper.

<sup>559</sup>Para. 3.12.3, White Paper.

<sup>560</sup>Hathaway (1998) above, n545 at para 10. It is important to note that this calls by Hathaway were not heeded in the final draft. His warning of indefinite temporal status for asylum seekers in South Africa

After analysing the shortfall in the White Paper and the effect it may visit on the rights of refugees, Hathaway concluded:

The White Paper falls short in terms of both human rights protection, and practicality. It affords refugees less protection than the Green Paper in a number of key ways: the class to be protected is more constrained, the determination authority is less independent, rights derogation in context of (an undefined) mass influx is contemplated, and no provision is made for the immediate admission as permanent residents of 'special needs cases.' Yet simultaneously it compromises the viability of enduring commitment to refugee protection by advocacy of an unduly complex determination process, failure to grant the DHA an explicit right of intervention, absence of a commitment to the expeditious removal of non-refugees, and incorporation of a right of persons who have ceased to be refugees nonetheless to remain as permanent residents.

Most fundamentally, the Green Paper's carefully structured compromise between the rights of refugees and receiving countries has been lost. The White Paper proclaims that it (like the Green Paper) is committed to protection of refugees for the duration of risk, but fails to commit South Africa to the practical steps that would make this approach workable. Nor does it endorse a shift to more collectivised protection efforts of the kind needed to sustain such a system in the long-term. In the result, the separation of refugee protection from immigration issues becomes more a matter of form than of substance.

These concerns in the disparity between the Green Paper and the White Paper were largely ignored in the final draft of the bill.

The DHA however made an input which is necessary to understand the mindset of the department officials at the time. The events that took place later may equally help in understanding more of what transpired then and even now regarding refugee rights. This include issues such as short permit extensions, closing down

---

became prophetic till this day. See December Refugee earns degree in Stellenbosch, Western Cape IOL, 12 December 2014 available on [www.iol.co.za/news/south-africa/western-cape/refugee-earns-degree-at-stellenbosch-1.1794766](http://www.iol.co.za/news/south-africa/western-cape/refugee-earns-degree-at-stellenbosch-1.1794766) (Accessed 13/11/2014). This article recounts the story of a Rwandan refugee in South Africa for 15years and still waiting for permanent residence. See more especially 'Former car guard gets his master's degree' available on [www.groundup.org.za/article/former-car-guard-gets-his-masters-degree-1971](http://www.groundup.org.za/article/former-car-guard-gets-his-masters-degree-1971) (Accessed 9/7/2014). Although he has acquired a master's degree in HIV and Aids management, the article notes that he is usually not accepted for senior positions because such positions are reserved for citizens and permanent residents. He has no permanent residence despite applying for one and he has been in South Africa for 20 years since 1995. These are the kinds of indefinite temporary status that Hathaway was referring.

refugee centres, delaying certification of permanent residence, backlogs, indefinite temporary asylum and refugee permits, amongst others.

In his article in 2003, Smith referred to a memorandum dated 22 July 1998. This memorandum, he contends, was an input from various officials at the sub-directorate of refugee affairs. In his opinion, this was the DHA's official submission to the White Paper.<sup>561</sup> The following points in the memorandum are worth quoting as contained in Smith's article:

- i) In the exercise of its discretion the Government must seek at all times to maintain its sovereignty, ensure that it does not surrender its sovereignty to multilateral organisations in the ostensible pursuit to meet its responsibilities and obligations in terms of international law.<sup>562</sup>
- ii) Set time period in which a person will be afforded a chance to seek asylum in refugee receiving offices. Non-refugee producing countries one week and refugee producing countries a maximum period of three weeks.<sup>563</sup>
- iii) Under general comments, the memo suggested a payment system whereby all applicants would have to pay R500 in order to have their status revealed. This money would be refundable to all those who were granted refugee status, and non-refundable to "all abusers" of the system. This system, the memo claimed, would be a "remedy to the

---

<sup>561</sup>Smith (2003), above, n485 at 19.

<sup>562</sup>Sub-directorate for Refugee Affairs, DHA *Comments/Inputs on the Draft Refugee White Paper* (1998).

<sup>563</sup>Sub-directorate Comments, *supra*, at para.2.

current massive numbers, which are entering South Africa, with the intentions to exploiting the country's economy.

- iv) Under RAB, the memo states: No judicial review by courts should be allowed because our courts are not trained in refugee matters and the fact that we have legally trained personnel, e.g. Chairman of the Standing Committee as a legally trained person and the Chairman of RAB, and legally trained processors, depreciates (sic) the need for a judicial review."<sup>564</sup>
- v) That there is a need to set up camps as "South Africa seems to be the only country which allows its refugees to move around, thus we experience such numbers of refugees. Strict control has to be in place and all the loopholes should be minimised at all cost."<sup>565</sup>

On 13 August 1998, the cabinet laid out its views on South Africa refugee policy and summarised the same in priorities such as:

- i) Migration Control objectives;
- ii) Law and order;
- iii) Concerns over gun-running, drug trafficking and racketeering, money-laundering, international crime syndicates and cartels;
- iv) Various other aspects of national and state security;
- v) Social and economic interests; as well as

---

<sup>564</sup>Sub-Directorate Comments, *supra*, n 557 at para. 5.

<sup>565</sup>*Ibid.* See Smith (2003) *supra*, n484 at 19. See especially Belvedere MF 'Insiders but Outsiders: The Struggle for the Inclusion of Asylum Seekers and Refugees in South Africa' (2007) *Refuge, Centre for Refugee Studies, York University and Queens University, Vol. 24(1)* 57-70 at 59-60.

vi) Bilateral, regional and international relations.<sup>566</sup>

Under the mantle of concerns of the above, a relatively progressive law with many safeguards for refugee protection in the form of the Green Paper was watered down. The draft law (Draft White Paper and Bill) was approved by cabinet on 19 August 1998 with the inconsideration of the changes requested by the DHA and State law advisors. This drew criticism and shock from participants who believe the law as it stood will do very little to protect and advance refugee rights, especially their path to naturalisation. The South African Human Rights Commission,<sup>567</sup> the UNHCR, Lawyers for Human Rights<sup>568</sup> expressed disappointment and noted that the draft bill as presented after Cabinet's approval was a radical departure of their expectation and input.

In a letter to the deputy minister of home affairs dated 24 August 1998, Dr.Pityana<sup>569</sup> queried that the refugee bill has not taken into account the separation of the Refugee Reception Office from the Status Determination Offices. He noted that there is only one SCRA instead of devolving it to regions and that the bill retained the idea of a single RAB and not a tribunal with strong independence and integrity. Dr.Pityana contended further that the bill removed the Refugee Council which, it was hoped, was vital for a comprehensive and interactive development of refugee policy and practice. Pityana concluded:

---

<sup>566</sup>Draft Cabinet Memorandum on a Refugee Policy for South Africa as set out in the accompanying Draft White Paper and Refugee Bill, 1998. As cited by Smith.

<sup>567</sup>Hereafter, SAHRC. The SAHRC contributions to the Refugee Bill before the Home Affairs Portfolio Committee in Parliament is available at [www.quensu.ca/samp/comments/SAHRC.htm](http://www.quensu.ca/samp/comments/SAHRC.htm) (Accessed 8/2/2015).

<sup>568</sup>Hereafter, LHR.

<sup>569</sup>Hon. Lindiwe N. Sisulu was deputy minister of DHA and Dr. Barney Pityana was Chair of the SAHRC.

I am deeply unhappy with this turn of events. I wish that if the department wished to write its own legislation, it was unnecessary to invite our participation. I will not wish that the Commission be associated with a process where all our contributions were rejected out of hand....In the circumstances, it is important that all reference to my participation and that of the Commission be removed.<sup>570</sup>

Even as the bill was introduced to parliament on 30 September 1998, some members of the Home Affairs Portfolio Committee expressed concern at clause 24(3) where the RSDO was granted the powers to decide whether an application should be accepted or rejected. Some felt this was an awesome responsibility.<sup>571</sup>

On the central question of naturalisation of refugees, LHR felt that there should be a specific and complimentary set of criteria for refugees applying for naturalisation after five years. The National Consortium for Refugee Affairs expressed concern that it could have been more realistic that refugees be entitled to apply for naturalisation after five years of residence from the date on which he or she made initial application for asylum instead of the date that refugee status was granted. The position contained in section 27<sup>572</sup> of the refugee bill to be approved by parliament however took little notice of these concerns. The Cabinet Committee had already changed the original wording of the Draft Bill from “to apply for naturalisation” to “to apply for an immigration permit.” The words in section 27 “if

---

<sup>570</sup>Letter from Dr. Barney Pitso to Hon. L.N. Sisulu, 24 August 1998. As cited in Smith, n485 at 23. The Southern African Migration Project noted that the White Paper was pervaded with a the neo-Malthusian view that ‘South Africa has reached its carrying capacity’ and that any population increase would be untenable but was oblivious to the fact that carrying capacity cannot be determined simply by considering population and resources. That there are other variables such as qualifications and skills, economic growth rate, level of development must all be considered. SAMP ‘Analysis of the Draft White Paper on International Migration’ (2000) Para.2 available at [www.quensu.ca/samp/Comments/analysis.htm](http://www.quensu.ca/samp/Comments/analysis.htm) (Accessed 8/2/2015). See also Maharaj B (2004) supra, n 492 at 19 where he noted that ‘the White Paper echoed the popular xenophobic view that migrants were linked to crime, competed with citizens for jobs, increased pressure on social services, and contributed to corruption. It does not provide any evidence to support this claims and ignored research that suggested that this was not so.’

<sup>571</sup>Minutes of the Home Affairs Portfolio Committee, 27 October 1998, *Parliamentary Monitoring Group*, Cape Town.

<sup>572</sup>Section 27 of the Refugee Bill dealt with certification for permanent residence for refugees.

SCRA certifies that he or she will remain stateless indefinitely” were amended to “or he or she will remain a refugee indefinitely.”<sup>573</sup>

As parliament passed the bill despite all these deficiencies that would operationally have a negative impact on refugee rights in South Africa, especially within the context of naturalisation, deputy minister Sisulu praised the bill in this way:

When we give asylum to refugees, we do so because of our constitution and international obligations. We do it as a matter of principle. We do not do it as a matter of goodwill, or because we like the people that we confer this status on.<sup>574</sup>

President Mandela signed the Bill into law on 2 December 1998 as Act 130 of 1998.

Beyond the manifestation of this Bill moving forward into this thesis, the drafting history of the White Paper that eventually became the Refugees Act is a clear testament that the deprivation of refugee rights has been creeping for a long time in South Africa.<sup>575</sup>

#### **4.3 South Africa’s Refugee Obligations under International Law**

South Africa was the first state to be reborn after the universal acceptance, at least rhetorically, of human rights ideals by states of all major cultural and political traditions.<sup>576</sup> The South African constitutional order draws extensively from international

---

<sup>573</sup>Klotz A ‘South African as Immigration State’ (2012) *Politicon: South African Journal of Political Studies*, 39:2, 189-208. She even noted further on 199-200 that ‘The rights-based approach which dominated the contemplated spirit of the Green Paper and faintly enshrined in the legislation is substituted with the alternative that immigrants especially from Africa are a threat to society.’

<sup>574</sup>Hansard, Thursday November 12, 1998, National Council of Provinces.

<sup>575</sup>Belvedere (2007) n560 at 60.

<sup>576</sup>In expressing this “universality”, Henkin notes that “[h]uman rights are enshrined in the Constitutions of virtually every of today’s...states—old and new; religious, secular, and atheist; Western and Eastern;

law, including human rights law. The reliance by the new state on human rights norms is well echoed in a United Nations report in this way:

The Constitution, itself, consciously and explicitly draws from international human rights law. The Bill of Rights resulted from careful analysis of international comparative law, in light of specific South African needs. International human rights norms are specifically referred to. Courts are required by the Constitution to consider international law in the interpretation of the Bill of Rights. Moreover, the overall importance of human rights and the rule of law within the new constitutional system is demonstrated by provisions for Constitutional review and the important reliance which the Constitution places on powerful, independent “human rights” commissions, all of which is new in South Africa.<sup>577</sup>

Indeed, the dramatic rebirth of the South African state, marked by the 1994 democratic elections, has arguably been the most historic event in the human rights movement since its emergence almost seventy years ago.<sup>578</sup>

While international human rights law respects the sovereignty of states in deciding whom they grant authorisation to stay or not in their countries, it seeks to ensure that once admitted for any reason whatsoever, certain fundamental rights are fully recognised and respected. Promotion and respect for fundamental human rights and fundamental freedom for all without discrimination of any kind are the cardinal purposes

---

democratic, authoritarian, and totalitarian; market economy, socialist, and mixed; rich and poor...” See Henkin, *supra* n504, at ix.

<sup>577</sup>See *United Nations High Commissioner for Human Rights, Centre for Human Rights, Programme of Technical Cooperation in the Field of Human Rights, Report of the Needs Assessment Mission to South Africa*(6-25 May 1996) 51-54.

<sup>578</sup>The human rights movement—that collection of norms, processes, and institutions addressing the relationship among individuals, the state, and communities—is generally taken to have been born after the abominations of World War II. The normative foundation of that movement is the Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR, 3d Session, Supp. No 16, at 71, U.N. Doc. A/810 (1948)[hereinafter UDHR]. The UDHR and two other key instruments, the International Covenant on Civil and Political Rights, G.A. Res. 2200 A, U.N. GAOR, 21<sup>st</sup> Session, Supp. No.16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR], and the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A, U.N. GAOR, 21<sup>st</sup> Session, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR], form the so-called International Bill of Rights, the corner stone of human rights movement. See Steiner and Alston *International Human Rights in Context: Law, Politics, Morals* (1996) 117-65; Buergenthal T *International Human Rights in a Nutshell* (1988) 17-47; See especially Makau Wa Mutua ‘*Hopes and Despair for a New South Africa: The Limits of Rights Discourse*’ (1997) 10 *Harv. Hum. Rts J* 63-114.

and principles of the UN Charter and these are *mutatis mutandis* applicable to refugees as human beings and members of the international community.<sup>579</sup>

Although South Africa only formally acknowledged international obligations especially to refugees in the 90s, the country has received those seeking refuge - however clandestine the process was - since there was even no law specifically for this purpose. After 1994, South Africa committed itself to various international human rights instruments. Relevant to refugee protection and the corresponding human rights instruments include:

- UN Convention Relating to the Status of Refugees, 28 July 1951;<sup>580</sup>
- International Covenant of Civil and Political Rights, 16 December 1966;<sup>581</sup>
- International Covenant on Economic, Social and Cultural Rights, 16 December 1966;<sup>582</sup>
- Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966;<sup>583</sup>
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984;<sup>584</sup>

---

<sup>579</sup>Art.1, UN Charter 1945, para.1; see also the African Charter on Human and Peoples' Rights of 27 June 1981 [hereinafter ACHPR] noting that "human rights, freedom, equality, justice and dignity are essential in the achievement of the aspiration of African People". In fact human rights and refugee rights are fundamentally intertwined and some refugee rights are universally guaranteed rights as expressed in the UDHR. Amongst these rights are the right to life, protection from torture and ill-treatment, the right to a nationality, the right to freedom of movement, the right to leave any country including one's own country and the right to be forcibly returned to the country one is fleeing from are all guaranteed in both the UDHR and the ACHPR. See Walberg R *Human Rights and Humanitarian Law* (1994) *United Nations Centre for Human Rights* 314-320; See Hegarty A and Leonard S *A Human Rights: An Agenda for the 21st Century* (1999) 15-32; See also Henkin L and Hargrove JL *Human Rights: An Agenda for the Next Century* (1994).

<sup>580</sup>South Africa acceded on 12 January 1996.

<sup>581</sup>South Africa signed the Covenant on 3 October 1994 and ratified same on 10 December, 1998.

<sup>582</sup>South Africa signed the Covenant on 3 October 1994, not yet ratified.

<sup>583</sup>South Africa signed the Covenant on 3 October 1994, ratified on 15 December 1995.

- Convention on the Rights of the Child, 20 November 1989;<sup>585</sup>
- OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 10 September 1969;<sup>586</sup>
- African Charter on Human and Peoples' Rights – adopted on 27 June 1981 and entered into force on 21 October 1986<sup>587</sup>

However, it is the government of South Africa, rather the UNHCR which bears the ultimate responsibility for the well-being of asylum seekers and refugees in the country as illustrated by its willingness to accede to the Geneva and OAU Conventions. As a state party to the above Conventions, South Africa is obliged to adhere to specific de-territorialised treatment of asylum seekers and refugees lawfully in its territory.<sup>588</sup> As a state party to the ACHPR, South Africa is equally bound to respect every individual's right to life and his/her physical integrity,<sup>589</sup> dignity and freedom from torture, exploitation and degrading treatment,<sup>590</sup> liberty and personal security,<sup>591</sup> fair

---

<sup>584</sup>South Africa signed the Covenant on 29 January 1993, ratified on 10 December 1998.

<sup>585</sup>South Africa signed the Convention on 29 January 1993, ratified same on 16 June 1995.

<sup>586</sup>South Africa signed the Instrument of Accession on 15 December 1995 (the Instrument of Accession was deposited on 15 January 1996).

<sup>587</sup>South Africa signed this Charter on 9 June 1986, ratified same on 9 June 1996 (hereinafter 'ACHPR').

<sup>588</sup>Art. 17 of the Geneva Convention for example enjoins South Africa to “ ‘...accord refugees legally staying in its territory the most favourable treatment accorded to non-nationals in the same circumstances as regards to the right to engage in wage-earning employment’; Art 23 summons South Africa ‘accord refugees lawfully staying in its territory the same treatment with respect to public relief and assistance as accorded to its nationals; and art 34 enjoins South Africa ‘facilitate as far as possible the assimilation and naturalisation. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and cost of such proceedings’; and finally art. 26 enjoins South Africa to ‘accord refugees lawfully in its territory the right to chose their place of residence and to move freely within its territory subject only to regulations applicable to aliens in similar circumstances’”.

<sup>589</sup>Art. 4 ACHPR.

<sup>590</sup>Ibid, Art. 5.

<sup>591</sup>Ibid, Art. 6.

trial,<sup>592</sup>rights to work under satisfactory and equitable conditions,<sup>593</sup> right to education<sup>594</sup> and right to family life<sup>595</sup> amongst others.

The South African Refugees Act therefore is an expression of the universal rights of asylum seekers and refugees as enshrined in the Bill of Rights in particular, and the Constitution in general. The principle of *non-refoulement* or no return, is generally acknowledged as the most basic form of protection required by a refugee<sup>596</sup> and is enshrined in the South African Refugees Act.<sup>597</sup> While the Geneva Convention generally guarantees that refugees lawfully in a country have the right to choose their place of residence and move freely,<sup>598</sup> but unlike many countries that have confined them in camps throughout the rest of Africa, South Africa has honoured this provision.<sup>599</sup>

All these obligations incurred under international human rights law to which South Africa is a state party, have been domesticated in the legal system of South Africa. The statutory frame work in which these rights are embedded are facilitative and rights-based. The Constitution itself being partly an embodiment and expression of

---

<sup>592</sup>Ibid, Art. 7.

<sup>593</sup>Ibid, Art. 15.

<sup>594</sup>Ibid, Art. 17.

<sup>595</sup>Ibid, Art. 18. See generally International Federation for Human Rights(2008) *Surplus People? Undocumented and other vulnerable migrants in South Africa*, 10-42.

<sup>596</sup>Goodwin-Gill G *The Refugee in International Law* (1996) 30.

<sup>597</sup>See section 2 of the Refugee Act of 1998.

<sup>598</sup>Art. 26 of the Geneva Convention.

<sup>599</sup>See section 27(b) which states that 'A refugee enjoys full legal protection, which include the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provision of this act.' See also section 21(1) of the Constitution: 'Everyone has the right to freedom of movement.' Whether or not freedom of movement can be justified under section 21 of the Constitution that would warrant any limitations that are 'reasonable and justified in an open and democratic society' (s.39(1)(a)) is a matter that can only be decided by a court of competent jurisdiction.

international human rights law affirms the indispensability of international law in forging municipal justice when it affirms such prominence as expressed in section 39:

“(1) When interpreting the Bill of Rights, a court, a tribunal or forum -

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”<sup>600</sup>

The preamble of the Refugees Act notes that:

The Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.

In terms of application of the aforementioned undertaken, the Refugees Act proclaim that:

The Act must be applied with due regard to the above-mentioned legal instruments as well as the Universal Declaration of Human Rights and other international agreements to which the Republic is a party.<sup>601</sup>

---

<sup>600</sup>See Malan J in *Arse v Minister of Home Affairs* (2010) (7) BCLR 640 (SCA) para 13; See also Navsa J in *Bula & Others v Minister of Home Affairs & Others* (2012) (4) SA 560 (SCA) para 61; See also Seriti J in *Jian-Qiang Fang v Refugee Appeal Board et al* (2006) Case No. 40771/1/05 at para. 10;

<sup>601</sup>Section 6 of the Refugees Act. See Bertelsmann J in *Abdi v Minister of Home Affairs* (2011) (3) SA 37 (SCA) were the court noted in para 2 that ‘...the provision of the Act referred to in the preceding paragraph (Refugee Act) mirror those of the 1951 United Nations Convention on the Status of Refugees and the 1969 Organisation of African Unity Convention...’ See also Sachs A ‘*From refugee to judge of refugee law: a tentative introduction to some off-the-cuff remarks*’ (2010) *Critical Issues in International Refugee Law* 40-58.

Taken together, these provisions reflect acknowledgement by the legislature of the need to create a progressive and humane refugee regime in keeping with South Africa's international legal obligations.

However, the domestication of international legal obligations especially in refugee circles does not, *ipso facto* translate into implementation of these purported rights to their intended beneficiaries. The practical actualisation of these rights can only be measured by the positive changes, noticeable enjoyment and visible progression in the life of refugees in a territorial setting. Although governments sometimes see refugee protection as an uncontrolled “backdoor” to permanent migration which directly conflicts with their intended tailored admission strategies, refugee law exists because it is a politically acceptable means of maximising border control in the face of recurrent involuntary migration.<sup>602</sup>

The contested history of its making notwithstanding, the 1998 Refugees Act brought South Africa in line with its Constitutional and international obligations. A greater part of the remainder this thesis will be dedicated to the practical application of this law especially within the province of refugee naturalisation.

#### **4.4 Refugee Rights in the South African Refugee System**

President Nelson Mandela and many other post-apartheid leaders sought to construct a new non-racial South Africa in which human rights principles become the basis for democratic legitimacy. As part of this vision, the 1996 Constitution remedied the prior denial of citizenship to Africans by setting forth guarantees that most rights would apply

---

<sup>602</sup>Hathaway J (1997) n522 at 117-120.

to 'all people'. With scant regard at the time to immigration, the implications of these promises were unforeseen. The seeds of a distinct paradox appear to have been planted: advocacy groups emerged, and the courts upheld significant rights for non-citizens.<sup>603</sup>

In terms of the South African Constitution therefore, the Refugees Act explicitly states that recognised refugees enjoy the rights contained in the Bill of Rights, which, unlike many constitutions in the world, not only embodies a bill of justiciable<sup>604</sup> fundamental civil, political, cultural and socio-economic rights, but expressly extends these rights to "everyone" (who lives in the country) rather than to "every citizen".<sup>605</sup> Pertinent among these rights include: the right to have access to adequate housing, healthcare services including emergency medical treatment, sufficient food and water, social security and social assistance, lawful administrative action; and access any information held by the state; as well as direct rights such as the right to education and a number rights to protect children.<sup>606</sup> Apart from some specific rights reserved only for citizens such as the right to vote and profession, right to passport among others,<sup>607</sup> all other rights in the Bill are available to everyone. However, most of the rights listed above are subject to limitations based on the availability of government's resources. Consequent on its

---

<sup>603</sup>Handmaker J, De la Hunt LA and Klaaren J (eds.) *Advancing Refugee Protection in South Africa* (2008) Chapter 3.

<sup>604</sup>South Africa is one of the few countries in the world that has agreed to incorporate a list of directly enforceable socio-economic rights in its Constitution. See Belvedere, n559 at 59.

<sup>605</sup>This position was imposed by Friedman JP in Bophuthatswana Supreme Court in the matter of *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B). The initial position was that all citizens are entitled to equal treatment. Friedman JP therefore extended the right to be treated equally to non-citizens as well. Albeit this case involved foreign academics who were permanent residents in South Africa, the same principle could be said to be applicable for other categories of non-nationals including forced migrants or asylum seekers and refugees.

<sup>606</sup>Section 28 of the Constitution.

<sup>607</sup>Rights reserved for citizens only are found from section 18-22 of the Constitution.

generosity it has been hailed by some writers as one of the most progressive legal pieces on refugees in Southern Africa and perhaps entire continent of Africa:

In this regard, the *Refugee Act* has been hailed as one of the more inclusive pieces of legislation in the Southern African region, as it enshrines freedom of movement, as well as other fundamental civil, political, social, and economic rights, in line with the Bill of Rights of South Africa's Constitution.<sup>608</sup>

It is an ambitious piece of document because despite the limitation contingent on the state's ability to provide them, the Bill of Right is frequently invoked as the national soul of the country.<sup>609</sup>

However, even though the constitution embody this humanist potential, the Constitution has become inserted into a state discourse that asserts its centrality as a key element to unite South Africa first as "equal citizens" against a history of relentless racial discrimination and massive socio-economic inequalities.

The Refugees Act was however a substantial shift, because the legislation offered an array of new protection. It sets out the provision of a distinct asylum seekers permit<sup>610</sup> and limited asylum seekers detention to 30 days unless approved by the High Court.<sup>611</sup> Once approved, a refugee could receive an ID, travel outside the country,<sup>612</sup> work and receive benefits, including medical care and access to

---

<sup>608</sup>Belvedere, n560 at 59.

<sup>609</sup>N. Mandela, "Address by President Nelson Mandela to the Constitutional Assembly on the occasion of the adoption of the New Constitution" (Cape Town, 8 May 1996) available on [www.anc.org.za/ancdocs/history/mandela/1996/sp960508.html](http://www.anc.org.za/ancdocs/history/mandela/1996/sp960508.html) (Accessed 30/09/2014).

<sup>610</sup>Section 22 of Act 130 of 1998.

<sup>611</sup>Section 29 of Act 130 of 1998.

<sup>612</sup>Section 30 and 31 of Act 130 of 1998.

education<sup>613</sup> with the possibility of a permanent residence after five years with a refugee status.<sup>614</sup> The refugee cannot be returned to any country including that of his birth where he or she can be subjected to cruel, unusual or degrading punishment because it conflicts with the fundamental values of the Constitution and international law.<sup>615</sup> If after determination, the asylum seeker is denied a refugee status, an applicant could have a hearing before the RAB.<sup>616</sup> An independent SCRA would provide oversight, particularly when applications for asylum were denied, and more generally, advise the minister of Home Affairs especially when legal questions arose.<sup>617</sup> The law also requires DHA to provide extra training for specially designated Refugee Reception Officers and Refugee Status Determination Officers (hereafter RSDO).<sup>618</sup>

The South African refugee law therefore laid down a rights-based piece of legislation that transcends what many countries particularly in the African continent crafted for their asylum seekers. One of the fundamentals that distinguish the South African asylum system from other refugee legal frameworks is the freedom of movement of refugees or their right to choose their own place of residence within the Republic. Contrary to the practice of many African countries and

---

<sup>613</sup>Section 27(b) of Act 130 of 1998.

<sup>614</sup>Section 27( c) of Act 130 of 1998.

<sup>615</sup>Section 2 of Act 130 of 1998. The Constitutional Court of South Africa upheld this position in *Mohamed & Another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & another intervening)* (2001) (3) SA 893 (CC) paras 48, 52 and 54; See also *S v Makwanyane & Another* (1995) (3) SA 391 (CC) paras 300-308 where the court forbids capital punishment.

<sup>616</sup>Section 12-14, 26 of Act 108 of 1998.

<sup>617</sup>Section 9-11, 25 of Act 130 of 1998.

<sup>618</sup>Section 8 of Act 130 of 1998.

Southern Africa in particular where refugees are kept in camps, South Africa distinctly honours that specific provision of the Geneva Convention requiring asylum seekers and refugees to choose their place of residence. Another distinct feature of the South Africa system is the possibility of legal integration of refugees through permanent residence and, ultimately, the possibility of naturalisation which is quite uncommon in many African refugee regimes.<sup>619</sup> The practical application of these rights as promised would be the ultimate test of the character of the South African refugee regime judged against its own standards of what is fair and just in a democratic and human rights system.

#### **4.5 Fault Lines in Actualising Refugee Rights in South Africa**

Writing back ten years ago, Human Rights Watch characterises the current state of affairs in the South African refugee system in this way:

The inability of the DHA to process asylum applications within the legally stipulated six-months period has resulted in prolong insecurity for asylum seekers, in some cases for up to five years. During this waiting period, Human Rights Watch found that asylum seekers are living in the margins. They are often unable to work or study, although they are legally entitled to seek employment and education. Refugee reception officers appear to be arbitrarily applying a ruling that lifted a prohibition to work and formal education for asylum seekers, sometimes only removing the prohibition after bribery or intervention by lawyers.

---

<sup>619</sup>In October 2014, the Tanzanian minister of Home Affairs Mathias Chikawe announced an amnesty by President Jakaya Kikwete to grant citizenship to more than 200 000 Burundians who have been resident in the Tanzanian Refugee Camps of Tabora and Katavi since 1972. On this issue, the difference here is that it took Tanzania 42 years to enfranchise these Burundian refugees and they have lived a camp for more than four decades. Comparatively to South Africa, the asylum seekers and refugees don't live in camps and even though the South African refugee law faults its own time frame to deliver on expectations, it certainly won't take any refugee more than forty years to attain citizenship. For some of these reason, the South African refugee regime still remain the most progressive in the continent despite myriads of legal abnormalities and most often self-inflicted legal disabilities. President Kikwete's announcement was however by far one of the most far reaching efforts at enfranchising refugees throughout Africa. The move was even described by Teresa Ongaro (UNHCR spokeswoman) as 'unprecedented and...a hugely important milestone'. This development is available on <http://www.enca.com/africa/tanzania-grant-citizenship-200000-burundi-refugees> (Accessed 9/4/2015).

The inability to seek employment and work prevents asylum seekers from meeting their own basic needs.<sup>620</sup>

The DHA is entrusted with both the registration and provision of documents to South Africans through its civic services branch, and with control over and regularisation of population movements including refugees through its immigration branch. However, based on a vision geared towards controlling the entry and stay of migrants in the country rather than facilitating their contribution to South Africa and protecting their rights, tend to maintain documented migrants in temporary status and even expose them to losing their status. The South African government's position towards asylum seekers and refugees is guided by the Refugees Act of 1998, which came into force in April 2000 and its accompanying regulations<sup>621</sup> administered by the DHA. This regulation rolling out the Refugees Act states that asylum applications should be adjudicated and finalised by the DHA "within 180 days upon filing a completed asylum application with a Refugee Reception Officer."<sup>622</sup>

This time frame was calculated by the DHA officials to be adequate to finalise asylum determination. On the other hand, it was, and it has never been the case because applicants have waited and continue to wait far longer than this period.<sup>623</sup>

---

<sup>620</sup>Human Rights Watch 'Living on the Margins' (2005) Vol. 17(15A)

<sup>621</sup>*Refugee Regulations (Forms and Procedure)* 2000: Government Gazette NO. 21075, 6 April 2000 (Pretoria: Government Printer, 2000).

<sup>622</sup>Section 3(1)(b) of *Refugee Regulations (Forms and Procedure)*.

<sup>623</sup>In a most recent case of *Christian Boketsa Bolanga v Refugee Status Determination Officer and Others*, Case NO. 5027/2012 decided at the High Court of Kwazulu-Natal in Durban on the 24 February 2015, Mr. Bolanga, a national of the DRC resident in Durban fled his country and arrived in South Africa in 2004. He applied for asylum as required by the Refugee Act and after 10 years, he determination process was still pending despite the 180 days laid down by the DHA for the completion and finalization of asylum claims. In para 53, the judge had this to say " Here one shudders to think of the many thousands of

The situation was compounded in that even though South Africa does not confine its asylum seekers and refugees into camps as in other African countries, the latter prohibited asylum seekers from studying and working while waiting for the finalisation of their determination processes. Without encampment and financial support from government, being prohibited to seek employment or study and, given the time frame of adjudication that is rarely respected, asylum seekers were completely dehumanised.<sup>624</sup>

In a scathing attack on the DHA regarding its treatment of asylum seekers, refugees and migrants as a whole, De Vos J wrote:

In a society like ours which prides itself on its noble sentiments, [the treatment of refugees] is shameful. As South Africans we are justifiably proud of our country and our democracy which has just celebrated its tenth birthday. We are proud of those policies which are enshrined in our Constitution, a constitution which is unparalleled in Africa, and indeed equals those of the most advanced countries in the world in terms of liberality and compassion....We subscribe to the principles contained in international treaties...We claim to enforce the laws put in place to protect the rights of [refugees], and especially those pertaining to children. Yet all this lofty ideas become hypocritical nonsense if those policies and sentiments are not translated into action by those who are put in position of power by the state to do exactly that; who are paid to execute these admirable laws and yet, because of apathy and lack of compassion, fail to do so.<sup>625</sup>

---

refugees in similar situations in our country who have been or are being subjected to the same treatment as the applicant has been by those to whom the law has entrusted their fate. How many have waited ten years, fifteen years perhaps, or have simply given up. How many have had access to lawyers?" At para.52 of this judgment, Penzhorn J described the situation as 'deplorable' and ordered the DHA in para 59.3 to issue Mr.Bolanga with a written recognition of a refugee status in terms of section 27 of the Act within ten days of the judgment.

<sup>624</sup>This position was reversed by the Constitutional Court in the *Minister of Home Affairs and Others v Watchenuka and Others* (2003) ZASCA 142; [2004] 1 ALL SA 21 (SCA) (28 November 2003) para. 33, 14-15. From April 2000 till the date of this judgment therefore, asylum seekers were prohibited from working or studying in South Africa.

<sup>625</sup>*Centre for Child Law v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) para 30, 14. Although this case concerns the detention of 92 children at the Lindela holding facility in the same accommodation as adults and were facing imminent and unlawful deportation, the learned judge's remarks speaks to the broad hardship and human rights disrespect of all forced migrants in South Africa.

It is trite that without a speedy and just determination system, genuine refugees fall into the cracks of injustice. The wide gap in the enjoyment of human rights between asylum seekers and refugees in South Africa ranging from employment opportunities that is essential to enhance human dignity and the possibility of legal integration in the form of naturalisation is wide. The DHA's practice of keeping asylum seekers and refugees in permanent temporality can be taken in practical terms as narrowing their rights especially in a country where even some nationals still live sub-standard lives.

The gap therefore between rising expectations in post-apartheid South Africa and actual improvements in the lives of the black majority has perhaps served to feed attempts by some sectors of the state and society to protect state resources for citizens by excluding foreigners, especially asylum seekers and refugees. Consequently the potential to produce a more inclusive political community that incorporates asylum seekers and refugees has been deferred markedly. The battle for the advancement and protection of the human rights of victims of forced migration has been left to other political and non-political actors and refugees to engage in the ongoing struggle to de-territorialise the Constitution and thereby giving substance to its expressed commitment to human rights for 'everyone'.<sup>626</sup> This reinforces the aloneness, paralysis and indignity that accompany estrangement in the experience of refuge, as the poet Houseman would note:

And if my ways are not as theirs  
Let them mind their own affairs.

---

<sup>626</sup>See Belvedere, n560 *supra*.

Their deeds I judge and most condemn  
Yet when did I make laws for them?

Please yourselves, Say I, and they  
Need only look the other way.  
But know, they will not, they must still  
Wrest their neighbor to their will,

And make me dance as they desire  
With jail and gallows and hellfire  
And how am I to face the odds  
Of man's bedevilment and God's?

I, a stranger and afraid  
In a world I never made.<sup>627</sup>

While the delays in permit adjudication remains unabated<sup>628</sup> it has driven asylum seekers and refugees into corrupt practices to secure access to documents. It has nonetheless become more politically expedient for the DHA to portray them as fraudsters and abusers of the system who are responsible for the failure of the asylum process rather than for the DHA to admit that its own practices are working to undermine the asylum process.<sup>629</sup>

---

<sup>627</sup>Houseman AE (1859-1936) *The Laws of God, The Laws of Man*.

<sup>628</sup>Belvedere has termed it permanent delays; See Belvedere, n560 at 61.

<sup>629</sup>Ibid.

As of April 2006, the backlog of undecided asylum cases at the DHA was 100, 000 with some cases dating as far back as 1998.<sup>630</sup> This administrative uncertainty does not actually serve justice to this vulnerable group of people who remain at the margins of society. They are included and at the same time excluded from the rights conferred to them by the various policies and legal components of the refugee system. The administrative process in the refugee system therefore cannot possibly warrant a fulfilment of South Africa's international obligations owed to refugees. Even a prior Director-General<sup>631</sup> acknowledged that the protracted application adjudication process had rendered "the refugee system [as] the easy way in".<sup>632</sup> He noted that on different occasions, departmental officials often operate under "corrupting influences" or "corrupting pressure," even though he himself recognised that South Africa's immigration services "is a joke".<sup>633</sup>

Politics has in some way failed to actualise the rights of asylum seekers and refugees in South Africa. There has been a failure to de-territorialise and

---

<sup>630</sup>"Statement by Acting Deputy Director General: National Immigration Branch, Mr.Gcinumzi Ntlakana on the Refugee Backlog Project at the Court Classic Hotel" (DHA Pretoria, 20 April 2006) available at [www.home-affairs.gov.za/speeches.asp?id=157](http://www.home-affairs.gov.za/speeches.asp?id=157) (Accessed on 4/5/2015); And as on 18 March 2013, there was 230 486 outstanding application pending adjudication and finalisation according to the National Immigration Information System (NIIS) available at [www.pmg.org.za/questions-and-replies/2013/06/03/home-affairs](http://www.pmg.org.za/questions-and-replies/2013/06/03/home-affairs) (Accessed 3/12/2014).

<sup>631</sup>Hereinafter DG.

<sup>632</sup>Gilder B *Director General's Media Briefing* (Sandton, 5 November 2003) 3 available at [www.home-affairs.gov.za/speeches.asp?id=76](http://www.home-affairs.gov.za/speeches.asp?id=76) (Accessed 4/5/ 2014).

<sup>633</sup>"Home Affairs Boss Paints a Bleak Picture" *The Star*, 6 November 2003; See also "Immigrants to SA have a torrid time" *The Independent*, 19 February 2014, available at [www.iol.co.za/news/immigrants-to-sa-have-a-torrid-time-1.1649693#.ViSYaqiSwYE](http://www.iol.co.za/news/immigrants-to-sa-have-a-torrid-time-1.1649693#.ViSYaqiSwYE) (Accessed 4/5/2014) where Nathan Geffen noted that he has met asylum seekers who have been renewing their permits after every few months for more than a decade. See especially "Refugee wins asylum after 10 years in legal limbo" *Mail & Guardian*, 24 February 2015 available at [www.mg.co.za/article/2015-02-26-refugee-wins-asylum-after-10-years-in-legal-limbo](http://www.mg.co.za/article/2015-02-26-refugee-wins-asylum-after-10-years-in-legal-limbo) (Accessed 25/2/2015).

democratise the rights in the Constitution to benefit asylum seekers and refugees in South Africa. The administrative actions of the DHA compel one to conclude that asylum seekers face exclusion and that forced migrants may as well not succeed in the country. Bruce Grant shows in his book that in many instances:

A refugee is an unwanted person. He or she makes a claim on the humanities of others without always having much, or even anything sometimes, to give in return. If, after resettlement, a refugee works hard or is lucky and successful, he may be accused of taking the work or the luck or success of someone else. If he fails and becomes resentful or unhappy, he is thought to be ungrateful and a burden to the community. A refugee is especially unwanted by officials: his papers are rarely in order, his health is often suspect; and sometimes, although he claims to be fleeing from persecution, he is simply trying to get from a poor, overpopulated country to a rich under-populated one<sup>634</sup>

The complete inability for the DHA to complete asylum adjudication on time as laid down by its own Regulation of 2000 activating the Refugees Act of 1998 has immense defects in the protection of the human rights asylum seekers and refugees in South Africa. This form of exclusion implicates the enjoyment of refugee rights and discredits the South African refugee system as a whole.

The next fault-line in the South African refugee system that is the character of the refugee identity document itself. The nature of these permits themselves is a testament of exclusion, a contingent expression of their sub-humanity within the polity which serves to constrain their acceptance, integration and naturalisation. The refugee permit is on a colour print A4 paper, an examination paper which examines the character, suitability and the level of rights the holder aspires in the Republic. Belvedere described the refugee permit this way:

---

<sup>634</sup>Grant B *The Boat People* (1980).

The section 22<sup>635</sup> permit is an A4 (297 by 210mm) flimsy piece of white paper with letterings in black ink and contained the scanned picture of the holder and because of renewal every one, three or six months, it cannot be laminated and this paper is subject to many folds, tears and fading.<sup>636</sup>

In terms of the Refugees Act, a refugee is entitled to identity<sup>637</sup> and travel documents<sup>638</sup> but the identity documents issued to refugees are very different from the ones issued to a South African citizen. The South African identity document is a 13 digit number bar-coded, with pages with a green cover while that of the refugee is maroon in colour with no pages inside. Belvedere<sup>639</sup> noted that:

In a country where the 13 bar-coded green ID book is the key to access public services and to integration, the Department assumed that “abusers” of the system would gain access to these valuable IDs and therefore to valuable services destined for citizens.<sup>640</sup> The state’s issuing of maroon IDs to refugees has served to reinforce an “internal exclusion” by effectively denying them access to publicly provided services and employment. The maroon refugee ID books are unrecognized in formal employment circles. Some have even contended that the maroon ID books look like the passbook in the apartheid era.<sup>641</sup>

Even after a prolonged battle that ended in the supreme court of appeal lifting the prohibition to work and study in South Africa in 2004,<sup>642</sup> the permit which now guarantees these rights is itself an invitation of distrust from employers, landlords and other sectors of the society. Without an enabling document to work, asylum seekers and refugees still find themselves incapable of securing meaningful employment to advance their dignity. The right to work for refugees is of little

---

<sup>635</sup>Asylum seekers permit in terms of the Refugees Act of 1998.

<sup>636</sup>Belvedere, n560 at 61.

<sup>637</sup>Section 30 of the 1998 Act.

<sup>638</sup>Section 31 of the 1998 Act.

<sup>639</sup>Belvedere, n560.

<sup>640</sup>Department of Home Affairs, “Comments/Inputs on the Draft White Paper”, section 4.7.3.

<sup>641</sup>“Pass Books for Refugees” *Mail & Guardian*, 22 to 28 June 2001.

<sup>642</sup>*Minister of Home Affairs and Others v Watchenuka and Others* (2003) ZASCA 142; [2004] 1 ALL SA 21 (SCA).

significance if the document enabling this right becomes an obstacle in the realisation of the same right it portends to achieve. The nature of the refugees' permit alone defies the Constitution because it reinforces discrimination which the Bill of Rights outlaws in South Africa. Without such documents, the refugee remains in a state of permanent exclusion and in their case, South Africa does not belong to all those who live in it.

The third fault-line rests at the very core of the refugee law itself and its implication for naturalisation of refugees in South Africa. The section 22 permit given to asylum seekers which is where the journey to naturalisation normatively begins is a category of permit not intended for asylum seekers who are not fleeing *en masse* situation. The temporary asylum seekers permit is designed for mass flows such as the case of Syrian refugees today and because of the large numbers involved, individual status determination as practiced in South Africa is not feasible. This being the case, asylum seekers caught in such situations are given temporary permits with limited rights because of the emergency nature of their flight and arrival. The reasoning here is that, either the situation that provoked their flight will soon normalise or a proper arrangement will be made for them. This is the form of protection granted to groups and not to individuals as in the case of South Africa. Refugees in South Africa, most of whom are from within the continent, are not fleeing in large numbers at once and arriving here as emergency but rather come individually. While the Act therefore proposes individual status determination as practiced by determination officers, the DHA is allocating temporary protection permits with limited rights to those who are not in emergency

situation. Consequent on the ineptitude of DHA, the wrong permit with very limited rights have remained with the wrong group of forced migrants. This situation is further exacerbated by the fact that some asylum seekers stay with this temporal permits for years and even over a decade. This bleak situation has the implication of deferring the dreams of legal integration and naturalisation for those who need it.<sup>643</sup>

These backlogging, painful permit delays and wrong permit is not just an absence of a substantive refugee rights regime, it is evidence of a law poorly crafted as well as a distinct failure of basic administrative justice. Working with the current legislation, it is nonetheless with this A4 examination permit that the government is poised in meeting its international obligations to refugees especially towards naturalisation.

#### **4.6 Conclusion: legal deformities and beyond**

In view of the assessment of refugee rights in the current Refugees Act, the administration of this Act and particularly its drafting history, the following conclusions can be reached.

The departure point is that the very foundation of South African refugee law is rooted in an unjust legislation – the Aliens Controls Act of 1991. The backbone of this particular legislation is discrimination, exclusion and apartness of the races. The foundational

---

<sup>643</sup>See Barutciski, n534, 704-720; See also Crush J and Williams V, 'Evaluating Refugee Protection in South Africa'(2002) *Migration Policy Brief N0.7*, at 8; See also Peberdy S 'Imagining Immigration: Inclusive and Exclusive Priorities in Post-1994 South Africa'(2001) *Africa Today*, Vol. 48(3) 15-30; See also Matsinhe D 'Africa's Fear of Itself: the Ideology of Makwerekwere in South Africa'(2011) *Third World Quarterly*, Vol.32(2) 295-313.

principle of this legislation has survived in the current Refugees Act in the form of excluding refugees from the myriad of rights promised to them in the refugee legislation, the Constitution and international human rights law. From their permits, maroon ID documents and travel documents, the refugee is the legal 'other' of mankind in South Africa and he or she cannot escape this otherness.<sup>644</sup> This clear difference plays into discrimination in the enjoyment of rights, and exposes refugees and asylum seekers to exploitation and popular distrust and attack especially from some unwelcoming sections of the society. This difference impedes legal integration and the pace of naturalisation of refugees in South Africa.

Although the Refugees Act incorporated both the 1951 Geneva Convention, the OAU Refugee Convention and opted for individualised determination procedure,<sup>645</sup> the issuance of emergency temporary asylum permits calls into questions South Africa's intentions under both conventions and general human rights law. Section 22 permits issued to asylum seekers in South Africa is designed for emergency and *en masse* flights of people in need of protection. This is so because due to the emergency of their flight and the large numbers, their cases cannot be determined individually. This is not the case for asylum seekers in South Africa. The legal deficit here is that the wrong permit has been issued all this time to asylum seekers in the wrong category. It is worse

---

<sup>644</sup>Mosselson A 'There is no difference between citizens and non-citizens anymore: Violent Xenophobia, Citizenship and the Politics of Belonging in Post-Apartheid South Africa' (2010) *Journal of Southern African Studies* 36 (3) 644-648 at 645.

<sup>645</sup>This means that no one can seek refuge in any South African embassy in the world however precarious their situation might be. This is because the refugee system in South Africa requires personalised determination, the asylum seeker must be in present in person in South Africa and their case determined individually.

in South Africa's case because some asylum seekers have remained with these permits for more than a decade, a kind of 'permanent temporality.' The implication is that, these categories of people have been denied even basic socio-economic rights that they are entitled to by the Constitution and international law. The legal and human rights impact of permanent temporality within the purview of naturalisation is that apart from restraining the progressive enjoyment of rights, it narrows the numbers of those who can eventually seek naturalisation.<sup>646</sup>

The system is predicated on individualised determination procedures. However, determination procedures in the DHA have deviated into the granting of refugee status based on refugee-producing and refugee non-producing categories of determination. This is a travesty of the very foundation on which the refugee system is rooted. The legal and human rights deficiency here is that actual refugees are denied protection based on a generalised notion of country information rather than the individual's risk.<sup>647</sup>

The drafting history of the Refugees Act evinced the intentions of the DHA to limit the rights of asylum seekers and refugees in South Africa despite the government's

---

<sup>646</sup>With an outstanding backlog of 230 486 application for refugee status as of 18 March 2013, South Africa is home to less than 66000 refugees, far behind countries in East Africa, Germany and the United States. In 2013, of the 70010 asylum applications received in South Africa, only 7289 were approved and 62 721 rejections. Country information rather than individualised status determination played a role in these results. See Question and Reply: Home Affairs, 2013-06-03 available at [www.pmg.org.za/questions-and-replies/2013/06/03/home-affairs](http://www.pmg.org.za/questions-and-replies/2013/06/03/home-affairs) (Accessed 10/2/2014).

<sup>647</sup>Statistical trends available on the Parliamentary Monitoring Group website indicated that approval rates versus rejection rates between 2009-2013 shows that approval rate for refugee status determination has seen a 12% approval of refugee status, 37% of unfounded cases and 51% of fraudulently or manifestly unfounded cases. This trend is largely attributable to Country's information rather than individual determination procedures.

commitment to international human rights instruments. Most of the rights enjoyed by forced migrants in South Africa have been won through court battles.

Even though the Refugees Act and the Constitution guarantee socio-economic rights to forced migrants, the regulation that brought the refugee legislation into effect withheld these rights from asylum seekers. It should be noted that even section 41 of the amended Aliens Control Act,<sup>648</sup> permitted its holders to work and study in South Africa.

While the DHA was mindful that it could not deliver full adjudication and finalisation of refugee determination procedures within the stipulated 180 days, it withheld the right to work and study from asylum seekers and perhaps forcing them into illegal activities. It took litigation to lift the prohibition.

Domestic courts have played and are still playing a major role in the realisation of forced migrants' rights in South Africa. Even attempts by the DHA to make the 'safe third country'<sup>649</sup> exclusion explicit through internal procedures and or amendments to the law, was blocked by litigation in strict compliance with international standards and Constitutional protection.<sup>650</sup> The South African refugee legislation in its current form

---

<sup>648</sup>Alien Control Amendment Act, 1995 (No.76 of 1995).

<sup>649</sup>The Dublin Convention of June 1990 proclaimed the 'safe third country' rule which bars applications for asylum by asylum seekers who have passed through fairly peaceful and democratic countries and never sought asylum there.

<sup>650</sup>*Lawyers for Human Rights v Minister of Home Affairs*, unreported Case No. 10783/2001 (9 May 2001) Pretoria Local Division where it was successfully argued that the South African government's policy of refusing admission to asylum seekers who have passed through neighbouring countries was unconstitutional.

remains a piece of legislation drafted with the intentions of limiting refugees' rights and operates below the standards of its obligations under international human rights law.

Finally, the path to naturalisation of refugees under the current refugee legislation is characterised by high degree of arbitrariness which, to an extent, has failed to achieve acceptable standards of basic administrative justice.

In the drafting history above, the DHA and the government rejected the Green Paper's proposal of a firm guarantee of permanent residence for refugees after five years with a refugee status. In rebuttal, the DHA substituted firm guarantee of permanent residence with the requirement to apply for naturalisation after 5years with a refugee status. In the final White Paper, it further substituted the requirement to apply for naturalisation with 'to apply for an immigration permit or certification of permanent residence.' This immigration permit and certification comes with no guarantees and is subject to the judgment and discretion of the chair of SCRA.<sup>651</sup>

The changing positions of the DHA therefore can be seen as a deliberate attempt to narrow the possibility of naturalising refugees despite the requirements of Article 34 of the Geneva Convention on naturalisation. The fact that the naturalisation process for refugees under the Act is silent on the many years asylum seekers wasted due to the

---

<sup>651</sup>When the National Consortium for Refugee Affairs indicated during submissions to the final draft of the White Paper that refugees should apply for citizenship after five years from date of recognition, it never predicted the sluggishness of the determination system.

failures the DHA procedures is itself a worrying trend.<sup>652</sup> Some asylum seekers and refugees who have even lost their lives in the numerous xenophobic attacks died stateless and as strangers even to their graves. They were citizens of nowhere at death, they left their native countries and the current refugee regime impedes their naturalisation efforts leaving them stateless and strangers even to their graves. In the final analysis, there is a need for radical policy changes and amendment to the current refugee law with the intention to reconcile the human rights spirit of the Constitution, and refugee rights, especially towards naturalisation under international law. The aim here is to find practical ways for South Africa to fully meet its obligations under international refugee law and advance its image as a beacon of human rights, freedom, democracy and justice.

---

<sup>652</sup>In *Christian Bokesta Bolanga v Refugee Status Determination Officer and Others*, 5027/2012 decided on 24 February 2015, where he waited for more than ten years for refugee status determination, these lost years will not be considered in his quest for naturalisation should he chose that route. Although Penzhorn AJ ordered that he be granted a refugee status and describing the DHA determination process as 'deplorable', his lost years will have no impact on his naturalisation quest as a refugee. It should be noted that as part of his prayers in the proceedings, Mr. Bolanga's counsel sought an order for permanent residence based on the slippery notion that had his client been assisted within the required time frame laid down by law, he could have qualified for certification of permanent residence under section 27 of the Refugee Act. Section 27 proclaims that a refugee is eligible to apply for permanent resident certification after five years from date of recognition as a refugee. Section 3 (1) of the Refugee Regulations (Forms and Procedure) of 2000, provides that refugee status determination must be finalised 180 days from date of initial application (which in his case has taken ten years). It was from this angle that counsel for Mr. Bolanga tendered a prayer for an order of permanent residence. While the counsel succeeded on the relief for a refugee status, Penzhorn J noted that the prayer for permanent residence must fail because in the learned Judge's view, Mr. Bolanga's has not brought such application before either the RSDO or RAB. See para 57 of the judgment.

The legal implication for Bolanga here is that he has to wait for another five years with his refugee status to qualify for an application for permanent residence certification before SCRA. Although he arrived and applied for asylum in South Africa in 2005, Mr. Bolanga will only qualify to make an application for permanent residence certification in 2020. It took him ten years to start enjoying basic socio-economic rights assigned to refugees under chapter 2 of the Constitution and under the refugee act and his case is symptomatic of a failing refugee regime.

## CHAPTER 5

### THE NATURALISATION OF REFUGEES: BETWEEN IMMIGRATION, THE CONSTITUTION AND THE BIOPOLITICS OF SOUTH AFRICAN CITIZENSHIP

Once we had a country and we thought it fair,  
Look in the atlas and you'll find it there:  
We cannot go there now, my dear, we cannot go there now.

The consul banged the table and said:  
'If you got no passport, you're officially dead':  
But we are still alive, my dear, but we are still alive.

Went to committee meeting; they offered me a chair;  
Asked me politely to return next year:  
But where shall we go today, my dear, but where shall we go today?

Came to a public meeting; the speaker got up and said:  
'If we let them in, they will steal our daily bread';  
He was talking of you and me, my dear, he was talking of you and me.

W H Auden "Refugee Blues" 1939

#### 5.1 Introduction

Susan Kneebone has noted that the attempt to even argue for refugee rights in itself highlights the fact that there exist attempts by states to exclude the enjoyment of such rights.<sup>653</sup> Under prevailing international law, states are not bound by international norms that they object to during the crystallisation of such norms.<sup>654</sup> Every state has the legal capacity to enter into treaties under international law.<sup>655</sup> Norms that states voluntarily bound themselves, especially human rights commitments, must be respected and applied municipally.<sup>656</sup> No state, however, may invoke its municipal laws as an excuse

---

<sup>653</sup>Kneebone *S Refugees, Asylum Seekers and the Rule of Law* (2009) 69.

<sup>654</sup> Art. 17 and 19 of the Vienna Convention on the Law of Treaties, 23 May 1969.

<sup>655</sup>Art. 6 Vienna Convention *Ibid*.

<sup>656</sup>This is referred to as the principle of *Pacta Sunt Servanda* under Art. 26 of the Vienna Convention on the Law of Treaties.

for not observing or enforcing its treaty obligation to the full.<sup>657</sup> This would be the case with the Geneva Convention and other international and regional conventions dealing with refugees. Understandably, states can and do reserve certain provisions for which they would not be bounded.

Although refugee rights are universal human rights, their applications by states have often been perceived by many states as a challenge to their sovereignty and, in most cases, international human rights law has been applied on humanitarian grounds. Dauvergne contends that 'communitarian liberalism', which emphasises the 'beneficence' or discretion of states in recognising such rights, fails to provide principled guidance for legal systems. She notes that such policy is based on humanitarianism and for this reason, it is amoral for not recognising universal human rights.<sup>658</sup>

South Africa on its part acceded to the Geneva Convention and has accordingly domesticated its provisions alongside the OAU Refugee Convention. The provision of naturalisation of refugees under international law has as well been domesticated. The localisation of the refugee law in South Africa and the country's robust Constitution notwithstanding, the law has been beset with acute challenges ranging from gaps in certain key provisions pertaining to naturalisation of refugees, a weak system of administration and endemic corruption. Only the legal aspect of the refugee system

---

<sup>657</sup>Art. 27 Ibid.

<sup>658</sup>Dauvergne C 'Amorality and Humanitarianism in Immigration Law' (1999) 37 *Osgoode Hall Law Journal* 597 at 620-623.

regarding naturalisation and the implication of this legal weakness to the human rights of refugees is dealt with in this chapter. The importance of the different stages towards naturalisation of refugees with respect to the rights inherent in each level, raises the question of the biopolitical underpinnings of South African citizenship itself.

This chapter will be divided into four parts excluding this introduction. The first part deals with naturalisation law in South Africa. It outlines various legislations in force relevant to the naturalisation of refugees. It examines the application of these laws and deconstructs the various legal and policy impediments in the naturalisation process of refugees in South Africa including the rights of second generation refugees – the children of refugees. It will further examine the role that the courts have played in advancing refugee rights and naturalisation of refugees in particular.

The legal and policy impediments that would be traced in the first part summons an analysis of the biopolitics of South African citizenship which becomes the subject of part two. It would start by examining the concept of biopolitics and how it applies to naturalisation. In understanding the path towards naturalisation of refugees in South Africa, it is helpful to critically examine its philosophical underpinnings, its concept and perhaps why the country chose the model of citizenship that it has. For the purpose of further understanding the citizenship regime of South Africa, it would help to weigh this model against the Constitution and the position of naturalising refugees under prevailing laws.

Part three looks at citizenship, biopolitics and refugee naturalisation triangle by focusing on the refugees' progeny as the focal point of biopower. The last part will conclude by looking beyond biopower and the refugee legislation.

## **5.2 The Legal Architecture of Naturalisation of Refugees under South African Law**

The *fons et origo* of the naturalisation of refugees under international law is Article 34 of the 1951 Geneva Convention<sup>659</sup> and by implication, Article 2 of the African Refugee Convention.<sup>660</sup> These two provisions have been domesticated in South African law through the Refugees Act,<sup>661</sup> the Refugee Regulations,<sup>662</sup> some provisions of the Immigration Act<sup>663</sup> and its latest regulations<sup>664</sup> and the Citizenship Act.<sup>665</sup> These acts and some of their relevant provisions for the purpose of this theme are further strengthened by the Constitution,<sup>666</sup> the Promotion of Administrative Justice Act<sup>667</sup> and realised in certain instances through litigation, judicial interpretations and decisions from the bench.

---

<sup>659</sup>Geneva Convention, 1951, Art. 34 provides that:

'The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite the naturalization proceedings and to reduce as far as possible the charges and cost of such proceedings.'

<sup>660</sup>OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Art. 2 (1) states: 'Member States of the OAU shall use their best endeavors consistent with respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.'

<sup>661</sup>Refugees Act, 130 of 1998.

<sup>662</sup>Regulations to the South African Refugee Act (Forms and Procedure), 2000, Government Gazette No. 21075, 6 April 2000 (Pretoria: Government Printers, 2000).

<sup>663</sup>Immigration Act 13 of 2002 (the principal act).

<sup>664</sup>Regulations to the South African Immigration Act, 2005, Government Gazette No. 27725, 27 June 2005 and Regulations to the Immigration Act, 2014, Government Gazette No. 37679 of 22 May 2014.

<sup>665</sup>South African Citizenship Act, 88 of 1995, and the South African Citizenship Amendment Act, 2010, Government Gazette No. 33850 of 7 December 2010.

<sup>666</sup>Constitution of the Republic of South Africa, 1996.

<sup>667</sup>Act 3 of 2000, commenced on 30 November 2000. The Regulation here is the Regulations on Fair Administrative Procedures (GN R1022 in GG 23674 of 31 July 2002). This act was designed to give effect to section 33 of Constitution of the Republic of South Africa.

Section 33 provides that:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

These statutory and constitutional frameworks set the stage and mark a departure point in the discourse of naturalisation examined in this chapter. The founding provision is enacted in the Refugees Act under section 27. This section is itself a legal and domesticated expression of Article 34 of the 1951 Geneva Convention. Section 27 of the Refugees Act lays down the possibility and legal passage of the naturalisation of refugees in South Africa.<sup>668</sup> In terms of section 27 (c) of the Refugees Act, therefore, a refugee is entitled to apply for a refugee permit after five years of continuous stay in the Republic from the date upon which asylum was granted and if the Standing Committee certifies that the applicant would remain a refugee indefinitely. This provision suggests a two prong approach to an immigration permit for the refugee. The first, is meeting the five years requirement with a refugee status and second, the Standing Committee must certify that the applicant would remain a refugee indefinitely.

After the above two requirements are met, the certified indefinite refugee is relieved from the Refugees Act and proceeds to regulate his or her status in terms of the

---

Section 33 (3) of the Constitution requires national legislation to be enacted to give effect to those rights and, and to-

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsection (1) and (2), and
- (C) promote an efficient administration.

<sup>668</sup>Section 27 that a refugee-

- (a) is entitled to a formal written recognition of refugee status in the prescribed form;
- (b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provision of this Act;
- (c) is entitled to apply for an immigration permit in terms of the Alien Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;
- (d) is entitled to an identity document referred to in section 30;
- (e) is entitled to a South African travel document on application as contemplated in section 31 of;
- (f) is entitled to seek employment; and
- (g) is entitled to same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

Immigration Act. This would be an application for permanent residence in terms of 27 (d) of the Immigration Act of 2002<sup>669</sup> as amended with other requirements.<sup>670</sup> The application for permanent residence, once lodged, is expected to be finalised within eight months.<sup>671</sup>

From the date of the granting of permanent residence as opposed to the date of application, the holder of permanent resident is eligible to apply for naturalisation after five years in terms of the citizenship act.<sup>672</sup> After the approval by the Minister of Home Affairs, the applicant becomes a South African citizen by naturalisation.

Since naturalisation brings refugee status to an end under international law, in the case of South Africa, this process statutorily takes ten years on the average.

---

<sup>669</sup>Section 27 of the Immigration Act of 2002 provides that 'The *Department* may issue a permanent residence to *foreigner* of good and sound character who—  
(d) is a refugee referred to in section 27 (c) of the Refugee Act, 1998 (Act No. 130 of 1998) , subject to any *prescribed* requirements.

<sup>670</sup>Immigration Regulation of 22 May 2014 provides in section that:

24 (11) The requirements contemplated in section 27 (d) of the Act shall be—

- (a) the submission of the certification contemplated in section 27 (c) of the Refugee Act, 1998 (Act No. 130 of 1998);
- (b) where applicable, the submission of affidavits with regard to aliases used by the applicant and family members; and
- (c) the submission of the information and documentation contemplated in regulation 23(2)(b)(copy of a birth certificate in respect of the applicant), (f)(medical and radiological report), (g)(documents related to applicants children), (h)(documents relating to applicant marital status or spousal relationship contemplated in regulation 3) and (l) (an unabridged birth certificate in respect of each dependent child): Provided that in the case of documents issued by the country from which he or she fled not being available, a sworn affidavit.

<sup>671</sup>Department of Home Affairs Annual Report, 2008/09 at p.56.

<sup>672</sup>Section 5 of the South African Citizenship Act, 1995 (Act No. 88 of 1995) as amended by the Citizenship Amendment Act No. 17 of 2010. This section provides *inter alia*;

Section 5 'The Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister that—';

- (a) he or she has been lawfully admitted to the Republic for permanent residence therein; and
- (b) he or she is ordinarily resident in the Republic for a continuous period of not less than five years immediately preceding the date of his or her application.

### 5.2.1 Application of the Law and Implication for Refugees Rights

While the aforementioned statutory provisions dealing with the path to naturalisation for refugees in South Africa represent one of the best expressions of Article 34 of the Geneva Convention, the administration of these laws has raised a lot of controversies. The capacity to administer these laws, attitude of administrative officials coupled with the capability of their manifest understanding of migration laws and the corresponding implications for refugees' rights has invoked legal disquiet leading to civil actions from many quarters, including refugee organisations.

### 5.2.2 The Refugee Status

The burden of proof in the granting of a refugee status rest entirely on the asylum seeker in terms of the refugee laws of South Africa and general international law. The standard of proof is however lower than the normal civil standard and the asylum seeker is in most cases given the benefit of the doubt. The courts in South Africa adopted this approach. In *Van Gaderen No v Refugee Appeal Board and Others*, a judgment of the North Gauteng High Court, Botha J noted after considering various domestic and international authorities:

All this confirms my view that the normal onus in civil proceedings is inappropriate in refugee cases. The inquiry has an inquisitorial element. The burden is mitigated by a lower standard of proof and a liberal application of the benefit of doubt principle.<sup>673</sup>

---

<sup>673</sup>Unreported decision 30720/2006, 19 June 2007. See also *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) para 102. See especially *Fang v Refugee Appeal Board* 2007 (2) SA 447 (T) where the court noted that 'the normal standard of proof in a civil matter is too burdensome for a refugee-claimant.' Perhaps the standard of a lower burden of proof in refugees adjudication was best advanced by Stevens J of the United States Supreme Court in the case of *INS v Cordoza-Fonseca* 480 US 421 (1987) where he noted at 453 that:

Perhaps it is with this simple understanding that the Refugee Regulations of 2000 proclaimed that applications for asylum will be adjudicated within six months upon filing of an asylum claim.<sup>674</sup> Another reason for this adjudication time frame - apart from ensuring speediness, fairness, administrative justice, realisation of human rights - is the greater awareness of the wide ranging disparity of rights between an asylum seeker and a refugee under South African law. The refugee is entitled to all the rights set out in chapter 2 of the Constitution<sup>675</sup> whereas an asylum seeker is not. This alone calls for an accelerated administrative process and justifies the 180 days adjudicative timeline espoused by section 3(1) of the Refugee Regulations.

Despite the adjudication time line in the Refugee Regulations, the DHA's refugees department has, in the majority of cases either overlooked or ignore such timeframes. The reason for discussing this timeframes here is important for a number of reasons;

First, the path to naturalisation of refugees starts not from when an asylum seeker crosses the borders or is issued with an asylum seekers permit in terms of section 22 of the Act, but when he or she is granted asylum. It is therefore important that adjudication

---

There is simply no room in the United States definition for concluding that because an applicant has a ten percent (10%) chance of being shot, tortured, or otherwise persecuted, that he or she has no well-founded fear of the event happening...[A] moderate interpretation of the well-founded fear standard would indicate so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility

<sup>674</sup>Section 3 of the Regulation to the Refugee Act of 2000 proclaims:

Section 3 (1) 'Applications for asylum will generally be adjudicated by the department of Home Affairs within 180 days of filing a completed asylum application with a Refugee Reception Officer.

<sup>675</sup>Chapter 2 of the Constitution sets out the Bill of Rights. These are rights are not expressly granted to an asylum seeker until he or she have their claim finalized. It is therefore fundamental to the asylum seeker that such claim of asylum be finalized within stipulated timeframes because without certainty in this process, an asylum seeker is not entitled to the most fundamental of human rights as set out in the Bill of Rights, the Geneva Convention and its Protocols and other human rights instruments. Any system that would offend adjudication timeline quintessential to the enjoyment of rights is prima facie guilty of human rights violation. Any system where a refugee path to naturalization is predicated on a timeframe upon recognition, no violation of rights in this sphere would be more blatant than subjecting asylum seekers to an indeterminate adjudication process.

in this area has certainty because it enables one to be in or out of full protection as required under international law than wallow endlessly in a limbo or be trapped between rights.

Second, the gap between the rights of the asylum seeker and the refugee is very wide, a more certain speedy adjudication process is therefore *sine qua non* to close this yawning gap of rights.

Third, in a country like South Africa which is stretched economically, survival with respect to employment and business is rooted in the character of the permit each migrants holds.

Fourth, the refugee enjoys a better level of protection under international human rights law because he or she is recognised and protected by a sovereign state. The asylum seeker is not yet protected and his or her fate is uncertain and by extension, only limited protection is assigned to this group of people.

Lastly, in terms of overseas resettlement - however rare these days given the current trend of international migration - the refugee would be the one to be considered for such opportunities, rarely an asylum seeker.

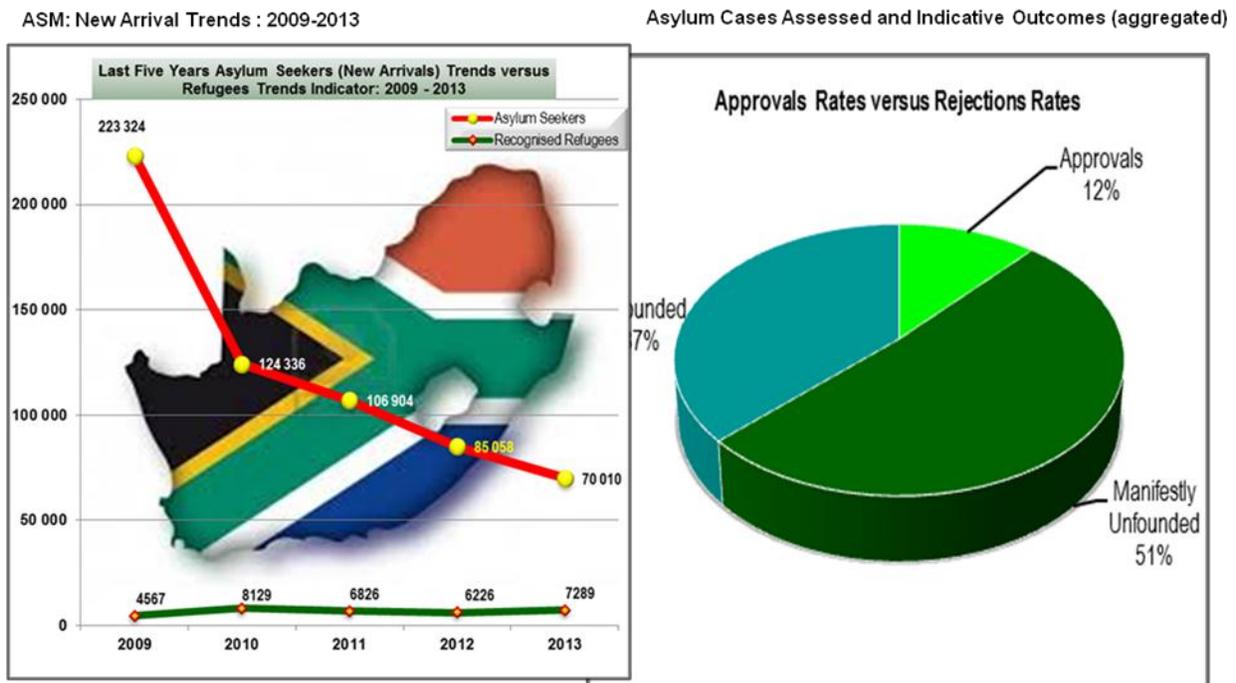
A 2014 UNHCR report estimated that there are 200, 000 asylum seekers in South Africa and 65, 881 recognised refugees.<sup>676</sup> Despite this seemingly high numbers of asylum seekers and refugees, adjudication processes have been very sluggish in the DHA. A

---

<sup>676</sup>UNHCR on its Refugee Work in South Africa; Statelessness Convention Committee: Home Affairs briefing, 11 November 2014.

presentation document to the parliamentary committee on Home Affairs speaks to this telling.<sup>677</sup>

## Asylum Seeker Management



**Figure 1: New Arrival Trends 2009/2013**

**Figure 2: Approval versus Rejection Rates in %**

**Source: DHA Annual Report 2013/2014, 14 October 2014**

Figure 1 shows the asylum trend in South Africa for the past five years. It also shows a slight increase in refugee recognition from 2011 to 2013. In figure 2, if one combines manifestly unfounded rejection with unfounded cases, it brings the total number of rejected asylum claims in aggregate to 88% with a barely 12% approval rate. Figure 1

<sup>677</sup>DHA Annual Report 2013/2014, 14 October 2014, available on [www.dha.gov.za/files/Annual%20Reports/Annual\\_Report\\_2013](http://www.dha.gov.za/files/Annual%20Reports/Annual_Report_2013) (Accessed 25/2/2015).

shows that out of a total number 223, 324 asylum claims in 2009 alone, 218, 757 were rejected with 4,567 approved and a similar pattern followed the accompanying years.

The concern in the naturalisation process though is what is not contained in these figures expressly, i.e. the time frame of the approvals and the prognosis in resolving the unfounded claims and their time frames. In the five years covering this trend, a total number of almost 230, 000 asylum claims were rejected as unfounded in terms of section 24(3) (c ) of the Act and therefore subjected to appeal in terms of section 26(1). Understandably, the above figures showed a trend and not the time frame of approval and rejection but nonetheless provided working numbers.

The adjudication history of asylum seekers in South Africa since the dawn of democracy has revealed a trend of cutting edge administrative sloppiness and questionable neglect. Minnar wrote in 2000 that:

South Africa only adopted a refugee policy in 1994, but many applications have taken up to 3 years to process. Since 1994, nearly 48000 had applied for refugee status in South Africa but by the beginning of 1999 fewer than 8000 received their refugee status.<sup>678</sup>

Minnar's three years observation however pales in comparison to several cases of asylum seekers waiting for eight years,<sup>679</sup> ten years and more for a determination that

---

<sup>678</sup>Minnar A 'Migrants' Rights: The South African Experience Post-1994' (2000) *Institute for Human Rights and Criminal Justice Studies, Paper presented to the 14<sup>th</sup> International Conference of the International Society for the Reform of Criminal Law: Sandton International Convention Centre, Johannesburg, South Africa*, 3-7 December 2000, p.6.

<sup>679</sup>Johnston N 'We want to be Citizens not Charities' *Mail & Guardian*, 27 June 2006, available at [www.mg.co.za/article/2006-06-27-we-want-to-be-citizens-not-charities](http://www.mg.co.za/article/2006-06-27-we-want-to-be-citizens-not-charities) (Accessed 16/6/2014). This article recounts among other things, the situation of an asylum seeker from Ivory Coast – Dosso Ndessomin. Mr.Ndessomin arrived in South Africa in 1994 and applied for asylum. After 8 years of waiting, he received his refugee status only in 2002.

legally should be finalised at most within eight months.<sup>680</sup> It appears easier to lay down figures as Minnar and others have done, and perhaps attack and discredit the credibility of the DHA's performance and lay bare its administrative dysfunction. Within the context of human rights law, the impact is beyond statistics because real life's chances and rights of asylum seekers and refugees are disabled as a consequence of this administrative dysfunction. The situation becomes dire if one weighs the DHA's administrative disability against the process of naturalisation and the progression of rights that the situation impels. Upon the indisputable assumption that asylum seekers spend years in South Africa waiting only for a refugee status, the research examines the next phase of the naturalisation process, the transition from a refugee permit to the indefinite certification of the refugee.

Certifications time frames have not been expressly spelt out in the Refugee Regulations and this means that applicants must just wait for the SCRA to finalise their applications.

---

<sup>680</sup>In the Bolanga's case in chapter 4, it took more than 10 years for the applicant to be granted a refugee status which only came after a court order, in *Akanakimana v the Chairperson of the Standing Committee for Refugee Affairs* 2013, the applicant had to wait for five years to be granted a refugee status in terms of section 27 of the act, in *Director-General: Home Affairs v Dekoba* (224/2013) (2014) ZASCA 71 (28 May 2014) the applicant waited for 9 years just for an appeal to be reached. Though her permit was withdrawn, the court per Wallis J ordered the reinstatement of the same and concluded at para 19 that the permit must remain valid until the appeal is finalised. And in an article in the *Independent Newspaper* titled 'Immigrants to SA have a torrid time', 19 Feb 2014, Nathan Geffen notes that he has met asylum seekers who have been renewing their permits every few months for more than a decade; their asylum applications have still not been considered. In an article on the *Sowetan* by Zoe Mahopo 'Refugee waits 15 years for a new life', *Sowetanlive*, 2 July 2015, available at [www.pressreader.com/south-africa/sowetan/20150702/281659663699340/TextView](http://www.pressreader.com/south-africa/sowetan/20150702/281659663699340/TextView) (Accessed 4/7/2015), a DRC citizen who fled the war and political turmoil in that country since 2000 has been waiting for the past 15 years to be recognised as a refugee to no avail and as she notes 'Life is difficult because you become stuck. I have become a non-person. I can't study or open a bank account. I have nothing and no hope'. Michael Mwale (a Zimbabwe national who is equally seeking asylum in South Africa since 2005 and has not been recognised as a refugee more than 10 years later) of the Refugee Alliance for Justice believed that a class action is necessary against the DHA on behalf of all those foreigners who have suffered in the hands of the system. Commenting on the South African asylum system, he noted that 'It is imprisonment of the worst kind. It is worse than formal imprisonment. You are left on the ledge to survive on the fringes of society and of the economy.' This to a large degree, constitute a pattern, almost a *modus operandi* of the asylum system in South Africa.

For the purpose of argument, it will be presumed that the eight months time frame the DHA staked out for permanent residence in the immigration category should, *mutatis mutandis*, apply in the certification process as well. In actual fact, the time frame of processing and finalisation should be less in the case of certification given the low numbers than in the immigration category. After waiting for more than a decade, certification should not constitute another barrier and the turnaround period should be less than even six months given the low numbers. A 2012/2013 DHA - bears testament to this numbers. Applications for refugee status certification under section 27 (c) data spanning between 1 April 2012 to 31 March 2013 evince the following balance sheet from SCRA:<sup>681</sup>

**Table 1: Refugee Status Certification from 1 April 2012 to 31 March 2013**

Received	Considered	Granted	Declined	Pending
1 445	872	308	564	2593

**Source: DHA Annual Report 2012/2013**

This table shows that during this period SCRA received 1,445 applications from refugees for certification. Out of these applications, 872 were considered, 308 were granted certification that they would remain refugees indefinitely and 564 were declined. There is no conclusive evidence from the above table that those considered were those received for the year under review. Since this conclusion cannot be reached especially if one weighs the number of received and pending applications, it would not be unreasonable to infer that the applications considered might be unconsidered

---

<sup>681</sup>DHA Annual Report 2012/2013 at p91.

applications carried over from previous years.<sup>682</sup> What is worth considering in the Table above, is the number of pending cases awaiting consideration and determination. The number that is pending is almost twice the number that applied in this period and almost three times the number considered during the year under analysis. In a Question and Reply session before the Home Affairs Committee in parliament on 3 June 2013, the DHA laid out the following balance sheet:<sup>683</sup>

Section 27(c) applications for certification by refugees submitted to the Standing Committee for Refugee Affairs, Data 2010/2013

**Table 2: Section 27 (c) applications as submitted between 2010-2013**

Applications Received from April 2009 to March 2010	Applications Received from April 2010 to March 2011	Applications Received from April 2011 to March 2012	Applications Received from April 2012 to February 2013
1948	1405	1448	39

**Source: Question & Answer Session in Parliament, 3 June 2013**

The pace of SCRA's consideration in Table 1 and Table 2 informs the analysis and draws a conclusion that there are applicants who have been waiting for more than 2 years to have their certification applications considered. There are others who, after

<sup>682</sup>The report under consideration is a 2012/2013 annual report and this report is the state of performance of the DHA as at the 31 March 2013. This report was selected because it was the most detail report in this specific analysis and that the report from 2000 till 2014 excepting 2012/2013 avoided the detail of performance as to how many applications were receive and how many pending. The reason to omit this intelligence is exactly what is done here, to avoid a proper analysis of the failures and success of performance and the implication on rights. In a presentation to the Home Affairs Committee in parliament titled 'State of Ports of Entry and Refugee Reception Offices' 22 May 2012, the Director General of Home Affairs Mr.Mkuseli Apleni reported that as of this date, the Refugee Appeal Board had a backlog of 74 000 appeals to be heard and finalized and that the Standing Committee of Refugee Affairs stood with a backlog of 66 000 cases. It is interesting to note that among this 66 000 is refugees applying for certification for indefiniteness and this explains why in the table under analysis, the pending cases exceeded the number of applicants received for 2012/2013. The obvious conclusion which follows this observation is that it would take more than two years to finalize an application for certification.

<sup>683</sup>Available on [www.pmg.org.za/questions-and-answers-replies/2013/06/03/home-affairs](http://www.pmg.org.za/questions-and-answers-replies/2013/06/03/home-affairs) (Accessed 27/2/2014).

waiting for a decade or more for their refugee status, obtained it, waited for 5 years to qualify for an application for certification and applied, waited for more than 2 years for consideration, (only to be declined) and their refugee status ultimately withdrawn in terms of section 36. From the Table and analysis above, it is safe to conclude that the waiting period for the certification of refugee status from the date of such application would be 2 years at least.

Of these numbers therefore, 308 refugees were certified as eligible to apply for permanent residence under the immigration category and to an extent, the end of their refugees' status. After certification, the life and rights of the refugee in South Africa faces a transition from the Refugees Act to the Immigration Act. This of course is not automatic because it is still subject to an application for permanent residence in the immigration category. The certification from SCRA that the refugees' stay in South Africa indefinitely would not lead straight to permanent residence, but brings the certified refugee to another application – that of permanent residence in the immigration category. After more than a decade waiting for the determination of a refugee status, the refugee applies for certification five years from the date he or she received this status. After more than 2 years waiting for certification from SCRA, the refugee applies for permanent residence in the immigration category.

### **5. 2. 3 Transiting from Certification to Permanent Residence**

The transition to permanent residence for the certified refugee is predicated on a few provisions of the Immigration Act of 2002 and the Immigration Regulations of 2014.<sup>684</sup>

---

<sup>684</sup>Government Notice R413 IN Government Gazette 37679 dated 22 May 2014. Commencement date: 26 May 2014.

Section 27 (d) of the Immigration Act of 2002 provides that a refugee may apply for permanent residence after meeting the requirements of the Refugees Act of five years after the granting of status and a certification approval by the Standing Committee. Section 24 (11) of the new immigration regulation added that the applicant supplies a certification approval, affidavits with respect to any aliases used by the applicant and family members and a host of other documents where applicable such as birth certificates, marriage and children birth certificates etc.

In addition to this, the DHA in many of its annual reports and budget submissions to parliament over the years till now have unapologetically maintained that the procession and adjudication time frame for a permanent residence application is eight months.

The above provisions notwithstanding, application for permanent residence for refugees has rarely been consistent with the time frame as laid down by the DHA. It is common to see applicants wait for almost three years for the outcome of their permanent residence applications lodged at the DHA.<sup>685</sup>

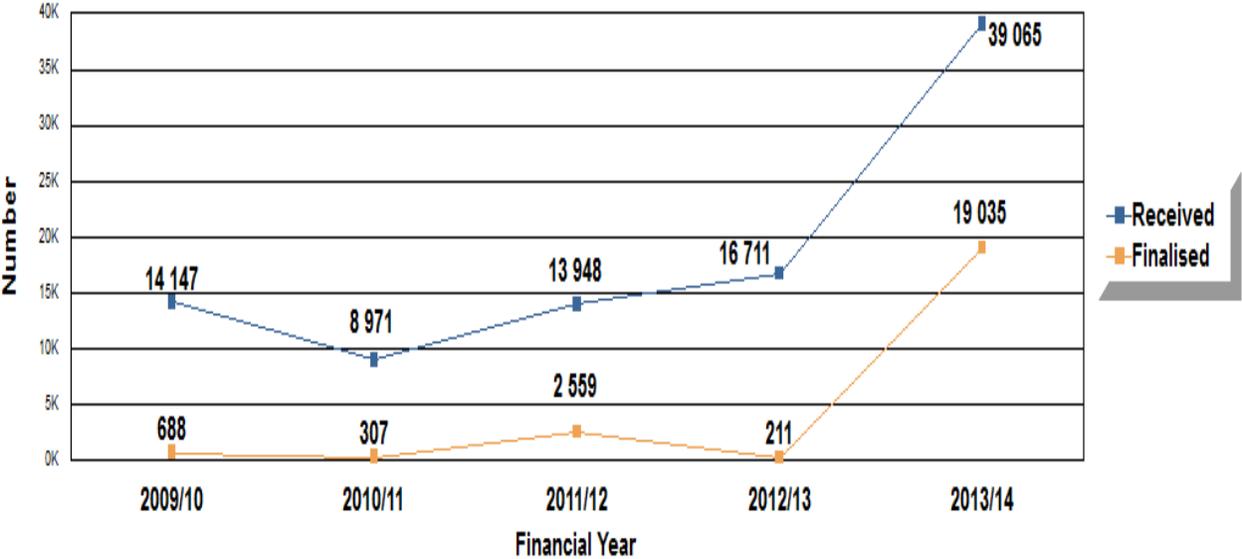
---

<sup>685</sup>Dano Z 'Permit Woes for Cuban Engineer' *Independent Newspaper*, 12 December 2014, available at [www.iol.co.za/news/south-africa/western-cape/permit-woes-for-cuban-engineer-1.1795083#.ViSqXqiSwYE](http://www.iol.co.za/news/south-africa/western-cape/permit-woes-for-cuban-engineer-1.1795083#.ViSqXqiSwYE) (Accessed 5/1/2015) recounts the story of Alejandro Ochoa from Cuba. He applied for his permanent residence in June 2012 and as at 12 December 2014 he was still waiting for the outcome of his application. Thirty months later from date of application, the applicant noted that 'I have been going from office to office, making calls and emails to officials trying to find out how far my application is. I don't care whether is positive or negative, I just want feedback on it.' See also, 'Waiting for 3 years for an answer from Home Affairs' *News24*, available at [www.news24.com/MyNews24/waiting-for-3-years-for-an-answer-from-home-affairs-20140622](http://www.news24.com/MyNews24/waiting-for-3-years-for-an-answer-from-home-affairs-20140622) (Accessed 29/9/2014).

This level of performance speaks not only of notorious slowness in the processing of permits but to distinct inefficiency. What is at stake here though is not just numbers, statistics and data but it is the rights of people. The rights that a permanent resident holder has, is comparable to that of a citizen except that he or she cannot vote or stand for political office.

For refugees who have waited across the various stages of status progression, the inefficiency in the processing of permanent residence at the DHA is just reminder of their lack of belonging. Available data in the 2013/2014 to parliament<sup>686</sup> bears testament to the distinct inefficiency and sloppiness of the DHA and the stifling of rights over five years spanning from the period 2009 to 2014.

**Table 3: Permanent Residence**

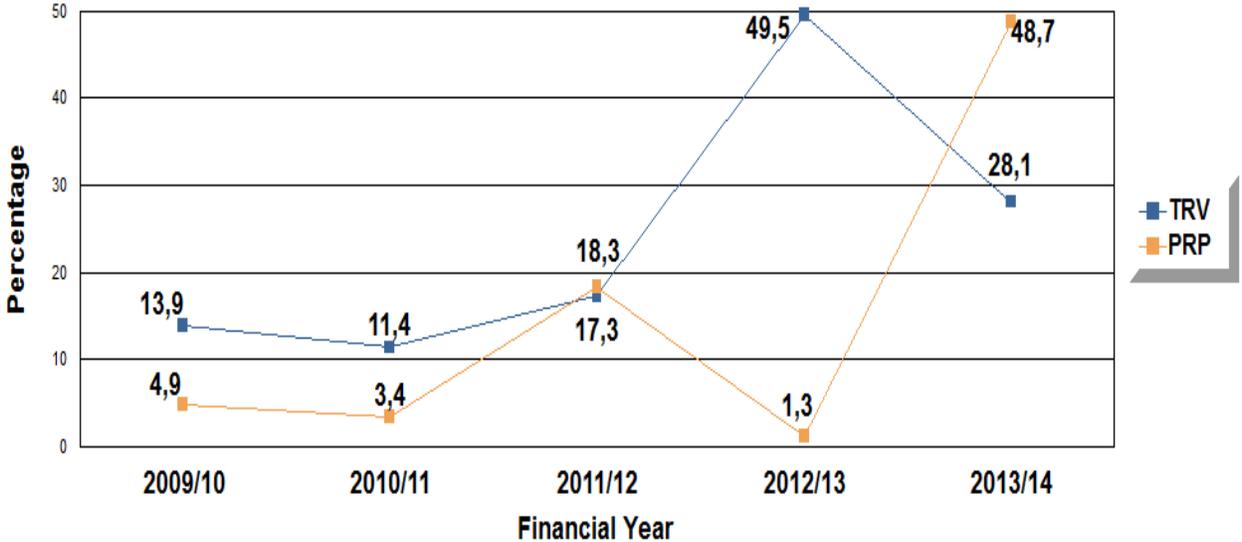


Source: DHA Annual Report 2013-2014, 14 October 2014.

<sup>686</sup>DHA’s Annual Report 2013 – 2014 to Parliament, 14 October 2014.

Table 3 shows that of the 14 147 application for permanent residence received between 2009/2010, the DHA finalised just 688 applications. In 2010/2011 it received 8971 applications and finalised 307; during 2011/2012 it received 13 948 applications and 2 559 applications were finalised; in 2012/2013 it received 16 711 and barely finalized 211 applications; and between 2013/2014, it received 39 065 applications for permanent residence and finalised 19 035.

**Table 4: Percentage of Finalised – Temporal and Permanent Residence 2009 - 2014**



Source: DHA Annual Report 2013-2014, 14 October 2014

Table 4 shows the performance of the DHA within this period in percentage terms. Understandably, these figures do not show pending applications carried over from one year to the other, but just new applications and what is considered each year. If only 4.9% (2009/2010), 3.4% (2010/2011) and 1.3% (2012/2013) of total applications submitted during this period were finalised, it speaks volumes of the backlog and simultaneously affirms how much wait applicants have to endure in this process. The

frustration alone has led capable applicants to either litigate against the DHA or take to the press to vent their frustration. In an article dated 6 November 2012,<sup>687</sup> the Democratic Alliance even went as far to contend that disciplinary steps be taken against the Director-General of the Home Affairs after the DHA revealed that it had spent more than R43, 3 million on legal cost alone in the 2011/2012 financial year. The DA noted that the soaring cost were 'likely attributable to the fact that the department's immigration services were a complete disaster and they continuously fail to comply with court orders.'<sup>688</sup>

The backlog at the DHA for permanent residence applications has remained constant and the number of applicants who obtain permanent residence in the eight months set by the DHA is quite negligible. From asylum, appeals, certification and application for permanent residence, the DHA has been everything but a respecter of refugee rights. In an article in the Cape Times, an immigration attorney, after his meeting with the Chief Director of the DHA on 24 October 2012 was quoted to have said: 'they (DHA officials) don't have an idea as to how many permanent residence backlog and appeals they have.'<sup>689</sup>

The bottom line here is that after an analysis of the five years data, expressed discontent from even members of parliament attesting to the state of the DHA and

---

<sup>687</sup>'Home Affairs Needs Work' *Independent Newspaper* 6 November 2012, available on [www.iol.co.za/the-star/home-affairs-needs-work-da-1.1418159#.Uqlz/NMJFG](http://www.iol.co.za/the-star/home-affairs-needs-work-da-1.1418159#.Uqlz/NMJFG) (Accessed 13/2/2014).

<sup>688</sup>Ibid.

<sup>689</sup>'Home Affairs permanent residence finalisation in shambles' *Cape Times*, 2 November 2012, available on [www.samigration.com/blog/home-affairs-permanent-residence-finalisation-in-shambles](http://www.samigration.com/blog/home-affairs-permanent-residence-finalisation-in-shambles) (Accessed 14/3/2014).

media complaints, it is common cause that the DHA as a state organ is consistently failing to deliver within the time limit it set for itself. What this analysis equally suggests is a safe conclusion that an application for permanent residence in South Africa either from a refugee or an ordinary applicant outside forced migration would require a waiting period of at least 2 years. This of course is not what the law provides but it is necessitated by the inefficiency, incompetence, disregard of law and a complete disaster of the administrative bureaucracy of the DHA. Perhaps it would be helpful to look for answers in the Constitution and other applicable laws.

#### **5.2.4 Refugee Rights to Naturalisation from a Constitutional Perspective, the Courts and DHA**

Amid the legal uncertainty of the refugees' passage to naturalisation, the distinct inability of the DHA to respect legal time frames to process permits and to implement refugee rights lurked the abrogation of constitutional provisions. Is the DHA's performance an affront to the Constitution of South Africa and the general rights of refugees? This presentation begins by weighing the Constitution of the Republic of South Africa against the disrepair performance of the DHA, refugee rights and how the courts have fared amid all these.

The Constitution is very clear with respect to the fundamental rights of everyone in South Africa irrespective of their national origin. Its founding provisions espouse *inter alia* that 'the Republic of South Africa is one, sovereign, democratic state founded on

human dignity, the achievement of equality and the advancement of human rights and freedoms’ and ‘the supremacy of the Constitution and the rule of law.’<sup>690</sup>

These founding values, among others, inform the interpretation of the Constitution and other laws.<sup>691</sup> In keeping with section 1 of the Constitution, section 2 provides that the Constitution is the supreme law; and that law or conduct inconsistent with it is invalid; and that the obligations imposed by it must be fulfilled.<sup>692</sup> Section 10 proclaims the absolute right to human dignity and by all standards refugees are humans and so fall within the ambit of this provision as well as every other right laid down in the Bill of Rights.<sup>693</sup>

The Constitutional Court<sup>694</sup> has on several occasions emphasised the preponderance of human dignity to our Constitutional order.<sup>695</sup> It has acknowledged the importance of the

---

<sup>690</sup>Section 1 (a) and (c) of the Constitution.

<sup>691</sup>See *United Democratic Movement v President of the Republic of South Africa and Others (and African Christian Democratic Party and Others intervening; Institute for Democracy in South Africa and Others as amici curiae)* (No. 2) 2003 (1) SA 495 (CC) at 508 para (18-19).

<sup>692</sup>See *Speaker of the National Assembly v De Lille and Another* 1994 (4) SA 863 (SCA) at 868-869 para (14); See also *Pharmaceutical Manufacturers Association and Another*; in re *Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at 687 para (19). See especially *Houd v Minister of Home Affairs and Others* (1344/06) (2006) ZAWCHC (25 August 2006) at para 30.

<sup>693</sup>Non-citizens including refugees are entitled to every right in the Bill of Rights except those rights expressly reserved for citizens. See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs & Others* 2000 (1) SA 997 (CC) at 1043 I – 1044 E.

<sup>694</sup>Hereinafter the CC.

<sup>695</sup>See *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 144 (per Chaskalson P); See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 47-49 (per Ackermann J); *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 759 (CC) at para 41 (per Goldstone J); *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 46 and 50 – 53 (per Goldstone J), para 91 – 92 (O’Regan J dissenting); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*

constitutional value of human dignity in interpreting rights such as the right to equality.<sup>696</sup> Human dignity informs constitutional adjudication and interpretations at various levels,<sup>697</sup> it is a value that informs the interpretation of many, if not, all the rights in the Constitution.<sup>698</sup> Human dignity is even a value that is of central significance in the limitation clause under section 36 of the Constitution.<sup>699</sup>

In terms of section 195, public administration must be governed by the democratic values and principles enshrined in the Constitution.<sup>700</sup> The DHA is one of the state organs contemplated under section 195 (2) of the Constitution. As employees of a state organ therefore, the DHA and its officials bear a constitutional obligation to seek to promote the Bill of Rights<sup>701</sup> and such every constitutional obligation must be performed diligently and without delay.<sup>702</sup> As the supreme law of the land, the Constitution further provides in section 33 that administrative action such as those undertaken by the DHA in assisting asylum seekers and refugees must be fair and just.<sup>703</sup> This is why

---

*and Others* 1999 (1) SA 6 (CC) paras 17-32 (Ackermann J), paras 120-129 (Sachs J) among others. This goes to show the importance of human dignity in the Constitution of the Republic of South Africa.

<sup>696</sup>See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 31-33 (per Ackermann, O'Regan and Sachs JJ), and the right not to be treated in a degrading way: See *S v Makwayane and Another* at para 327. See also section 12 (1) (e) of the Constitution.

<sup>697</sup>See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs v Others* 2000 (1) SA 997 (CC) at para 35 (per O'Regan J).

<sup>698</sup>See the concurring judgment of Sachs J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) paras 120 that 'It will be noted that the motif which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity.'

<sup>699</sup>See para 35 in the Dawood judgment at n692 *supra*.

<sup>700</sup>Section 195 (a) provides that 'A high standard of professional ethics must be promoted and maintained.'

Section 195 (d) 'Services must be provided impartially, fairly, equitably and without bias.'

Section 195 (2) provides that the above principles apply to—

(a) administration in every sphere of government;

(b) organs of state

<sup>701</sup>Section 8 (1) of the Constitution.

<sup>702</sup>Section 237 of the Constitution.

<sup>703</sup>Section 33: Just administrative action;

parliament passed the Promotion of Administrative Justice Act in order to give effect to section 33 of the Constitution.<sup>704</sup>

The reason for setting out the above constitutional and other legal provisions quintessential in the reconciliation of human rights and administrative justice in South Africa is designed to weigh these provisions against the performance of the DHA and the implications to the rights of refugees towards their path to naturalisation.

The recognition of the dignity of all, citizens and non-citizens alike is a fundamental constitutional right as reiterated by the Supreme Court of Appeal<sup>705</sup> in its judgment of 2004:

Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected by s10 of the Bill of Rights<sup>706</sup>

The refugee is a beneficiary of this right by virtue of his or her presence in South Africa.

In subjecting asylum seekers to endless wait for procession of their permits, the DHA is

---

33 (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

33 (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

<sup>704</sup>Act 3 of 2000 and hereinafter PAJA. In fact section 1 of PAJA defines administrative action inter alia as 'any decision taken or any failure to take a decision by an organ of the state exercising a public power or performing a public function in terms of legislation', and section 6 identifies the circumstances in which the review of administrative action may take place in the event of an unfair administrative procedure. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) at 505 para (24).

<sup>705</sup>Hereinafter the SCA.

<sup>706</sup>*Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 25. See also *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); (2004) BCLR 569 (CC). See especially *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 245 (CC); 1997 (12) BCLR 1655 (CC), a case concerning the right of permanent residents to be granted permanent teaching posts. The court concluded that unjust treatment based on nationality has the potential to impair the fundamental dignity of persons as human beings: as a minority, foreign citizens lack political power and are vulnerable to having their interests overlooked and being seen as less worthy than South African. (para 19).

in breach of section 10 of the Constitution. And since rights are graduated by the status that asylum seekers and refugees attain, the DHA denies them the inherent rights in the various stages of the progression of their status towards naturalisation.

Contrary to the output and services that refugees receive from the DHA, the latter bears a constitutional obligation to seek to promote the Bill of Rights<sup>707</sup> and execute its duties with diligence and without delay.<sup>708</sup>

The DHA as an organ of state under section 195 (2) (b) bears a constitutional duty to execute its mandate to the public lawfully in terms of service delivery and conversely, the public has a right to demand that services be timely and efficient. An authoritative position was adopted by the SCA when it noted that:

The function of public servants and government officials at national, provincial and municipal levels is to serve to the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where...the legality of their action is at stake, it is crucial for public servants not to play fast and loose with the truth.<sup>709</sup>

In terms of complying with existing laws and the Constitution, the state and its organs such as the DHA must lead by example.<sup>710</sup> Therefore, to raise a lame justification such as backlogs is unacceptable especially when weighed against the loss of rights on the part of refugees. Administrative convenience will therefore not suffice as an acceptable excuse for failure to discharge a duty owed to the

---

<sup>707</sup>Section 7 (2) and section 8 (1) of the Constitution.

<sup>708</sup>Section 237 of the Constitution. See also *Eisenberg & Associates and Others v Director General of Department of Home Affairs and Others* (2178/2011) [2011] ZAWCHC 437; 2012 (3) SA 508 (WCC) at para 80 (per Cloete JA).

<sup>709</sup>See *Kalil NO & Others v Mangaug Metropolitan Municipality & Others* 2014 (5) SA 123 (SCA) para 30.

<sup>710</sup>See *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) (2001 (7) BCLR 775) para 68.

public.<sup>711</sup> The inability of the DHA to provide refugees with permits within legally stipulated time frames and, in most cases, refugees having to wait more than a decade to process what should be finalised within 180 days is offensive to the rights of refugees. The administrative attitude of the DHA transgresses section 2 and 22 of the Refugees Act, defies sections 9, 10, 12, 33, 195 and 237 of the Constitution, and constitutes a blatant disregard for South Africa's obligations under international law.

This situation is further exacerbated because refugees are a vulnerable group of people within our midst. After the physical and psychological torture that most of them have endured fleeing conflict ravaged countries with gross human rights violations, the DHA activities only add to the list of their woes. Refugees therefore become the unwanted people of our society, the *rightless* ones for whom in the doings of the DHA, the Constitution does not apply to them. In so doing, it is tantamount to the DHA denying that refugees are humans.

The condition of being a refugee bespeaks of and connotes a 'special vulnerability as refugees by definition are persons in flight from the threat of serious human

---

<sup>711</sup>See the Canadian case of *Singh v Canada (Minister of Employment and Immigration)* 1985 14 CCR 13, especially the views of Wilson J at 57 which was referred to with approval by Mokgoro and Sachs JJ in the minority judgment in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 256 (CC) (2002 (9) BCLR 891) in para 170. In fact the CC in *S v Jaipal* 2005 (4) SA 581 (CC) 2005 (1) SACR 215; 2005 (5) BCLR 423 at para 56, took the view that:

'...as far as the upholding of the fundamental rights and other imperatives of the Constitution are concerned, all those involved in the public administration must, despite a lack of adequate resources, purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations even under difficult circumstances, and that reasonable, careful and creative measures, borne (sic) out of consciousness of the values and requirements of our Constitution should go a long way to avoid undesirable situations.'

abuse.<sup>712</sup> Appalled by the unjust administrative actions at the DHA, interested groups, such as refugee rights groups have led a number of cases against DHA brought mostly under section 38 of the Constitution<sup>713</sup> and sections of PAJA,<sup>714</sup> among others. Among the requirements of acting in the public interest is that the section of the group so represented must be vulnerable, lack means, lack support system and lack acquaintance.<sup>715</sup> The court has recognised that ‘the more vulnerable the group adversely affected by discrimination, the more likely the discrimination will be held to be unfair.’<sup>716</sup>

In most cases relating to the way the DHA handles refugee matters, the court has often expressed concern and in most instances found that the conduct of DHA and its officials show a clear dereliction of duty and bad faith in dealing with refugee issues. In *Christian Boketsa Bolanga v Refugee Status Determination Officer and*

---

<sup>712</sup>See *Union of Refugee Women v Director: Private Security Industry Regulation Authority* 2007 (4) SA 395 (CC) at para 29. See also Hathaway J *Reconceiving International Refugee Law* (1997) at 8.

<sup>713</sup>Section 38 states that ‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The person who may approach a court are—

38 (b) anyone acting on behalf of another person who cannot act in their own name;

(d) anyone acting in the public interest

<sup>714</sup>For authority where PAJA applies to swift administrative actions especially as in the case of the procession of permits by the DHA, see *Viking Pony African Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC) where the court held at 341:

‘PAJA defines administrative actions as decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes action that has the capacity to affect legal rights. Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.

<sup>715</sup>See Yacoob J in *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC) (2004 (7) BCLR 775) in para 18.

<sup>716</sup>See O’Regan J in *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at para 112 as confirmed by the court in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (the “Sodomy Case”)* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC) at para 27.

*Another*<sup>717</sup> for example, an asylum seeker who has waited for more than 10 years for a refugee status, Penzhorn AJ held lachrymously that:

Here one shudders to think of the many thousands of refugees in similar situations in our country who have been or are been subjected to the same treatment as the applicant has been by those to whom the law has entrusted their fate. How many have been waiting (*sic*) ten years, fifteen years perhaps, or have simply given up? How many have had access to lawyers?<sup>718</sup>

In most DHA matters brought to court for review under section 6 of PAJA, the courts have never hesitated to substitute and set aside the decisions of DHA organs. Without the power of review and substitution of administrative decisions by the courts, the path to naturalisation for asylum seekers and refugees in South Africa could have been almost impossible given the administrative performance of the DHA. The purpose of a judicial review was set out in 2001<sup>719</sup> as follows:

The purpose of a judicial review is to scrutinise the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant function themselves. As a general principle, a Review Court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision.<sup>720</sup>

However, the power of the court to substitute an administrative decision such as that of RAB, SCRA or a decision to reject a permit by the immigration sector of the

---

<sup>717</sup>24 February 2015 (5027) [2015] ZAKZDHC 13.

<sup>718</sup>At para 53. See also *Hererimana v the Chairperson of the Refugee Appeal Board and Others* 2013 (WC) unreported, Case No. 10972/2013 (per Davis J) were upon appealing his rejection, the applicant had to wait for 4 years for an appeal answer that suppose to be communicated to him within 10 days. At 560 G of the judgment, Davis J stated the following:

‘This decision must surely be strengthened by the disturbing fact, unacceptable in this case, that it was more than four years after his initial interview that applicant was ultimately notified that his claim for refugee status had been unsuccessful.’ See also *Akanakimana v the Chairperson of the Standing Committee and Others* (10970/2013) unreported (WC).

<sup>719</sup>See *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) (BCLR) (C).

<sup>720</sup>At 1259 E. Guidelines on how a court can deal with a successful review are set out in *Premier Mpumalanga v Association of Estate Agents School* 1999 (2) (CC) 113 at para 50.

DHA and the principle underlying it is set out in para 28 and 29 in the *Tantoush* case which is worth quoting extensively:

[28]When a court sets aside a decision of a body such as the RAB, the default position must be to refer the matter back to the designated body to enable it to reconsider the issue and make a fresh a decision. An administrative functionary is vested by statute with the power to consider and approve an application is generally best equipped by the variety of its composition, by experience, and its access to relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognize its own limitations. A court must show respect for a legislative design which creates a specialist body to deal with the task of making decisions of an administrative nature, besides, review cannot simply be conflated into an appeal to usurp these decision making powers, thereby expanding the powers of the courts into areas which a legislative framework has expressly eschewed.

[29] However, as acknowledged in sections 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), a court is granted the power on review to substitute or correct a defect arising from a decision “in exceptional circumstances.” The phrase “exceptional circumstances” does not equate to a court adopting the view that it is in as good a position to make a decision as the administrative body. That would be to subvert the default position. But, fairness is a consideration which must be uppermost in the mind of the court in determining whether it is dealing with the kind of exceptional case which calls for substitution as oppose to a remittal.<sup>721</sup>

The point is that the courts are willing to effect substitution in terms of reviewing an administrative decision only in exceptional circumstances.<sup>722</sup> In fact, commenting on the power of substitution, Hlophe JP (as he then was) laid down instances where substitution is possible:

Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the courts have not hesitated to substitute their own decision for that of the functionary...The courts have also not hesitated to substitute their own decision for that of the functionary where undue delay would cause unjustifiable prejudice to the Applicant...our courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias incompetence to such a degree that it would be unfair to require the Applicant to submit to the same jurisdiction again...It would also seem that our courts are willing to interfere, there by substituting their own decision for that of a functionary where the court is in a good position to make the decision itself as qualified should take the

---

<sup>721</sup>*Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 332 (T).

<sup>722</sup>In *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA), the court held that exceptional case is one where, due to consideration of fairness, the court is ‘persuaded that a decision to exercise a power should not be left to the designated functionary.’

decision of the administrator's powers or functions. In some cases however, fairness to the Applicant may demand the court should take such a view.<sup>723</sup>

In addition to the above, the right of asylum seekers and refugees to access courts of law is a right sanctioned by international human rights and refugee instruments to which South Africa is a state party<sup>724</sup>as well as by the Constitution.<sup>725</sup>

In cases brought for review, the courts have applied the principle of substitution and, in most cases, found that exceptional circumstances exist especially in the way the DHA handle asylum seekers and refugees matters. In the *Bolanga* case for example, the court shuddered to the facts that the applicant has been waiting for more than 10 years for a refugee status. It was a clear cut case where the principle of substitution found exceptional circumstance. At para 55 of the judgment of the High Court in Durban, Penzhorn J asked if after more than a decade of incompetence by the DHA, the matter should be referred back to the DHA for a decision? The judge doubted; 'Must I now refer the matter back to the RAB or the RSDO for the process to take another five years, six years, whatever? clearly not.'<sup>726</sup>

---

<sup>723</sup>*University of the Western Cape and Others v Member of the Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) 131. See also Hathaway J *The Rights of Refugees under International Law* (2005) 633-656 on the right to judicial and administrative assistance for refugees and asylum seekers. See also *Foodcorp (Pty) Ltd v Deputy Director-General, DEAT: Branch Marine and Coastal Development* 2006 (2) SA 199 (C). See also *Hartman v Chairman, Board for Religious Objection* 1987 (1) SA 922 (O); see especially *Ruyobeza v Minister of Home Affairs* 2003 (5) SA 51 (C) at 65 D-65H.

<sup>724</sup>See art. 16 (1) of the Geneva Convention of 1951 and art.14 (1) of the International Covenant on Civil and Political Rights of 1966. See also Khan F & Schreier T *Refugee Law in South Africa* (2014) 180-199.

<sup>725</sup>Section 34.

<sup>726</sup>Para 55 of the *Bolanga* judgment.

The DHA was ordered to issue the applicant with a refugee status in terms of section 27 (a) of the act within 10 days. Without the intervention of the court through the process of judicial review, the principle of substitution of administrative decision, the applicant's quest for naturalisation would have remained a lost cause because of the incompetence of the DHA.<sup>727</sup> The courts therefore have, through this process of review, contributed enormously to the naturalisation of refugees in South Africa.

In not finalising permits of asylum seekers, refugees and immigrants within legal timeframes, the DHA is infringing with impunity and little redress on the rights of forced migrants especially towards naturalisation. As highlighted above, the DHA is in breach of the Constitution, PAJA, the Refugees and Immigration Acts and general international human rights law.

Therefore, refugees who have applied for permanent residence in the immigration category can now proceed to apply for citizenship 5 years after obtaining permanent residence. In all therefore, despite the legal position the naturalisation of refugees in South Africa is a 10 years process, it may well take more than 18 years for naturalisation to be possible. This is largely due to the administrative incompetence of the DHA and the lack of clarity of certain provisions in the refugee and immigration acts.

---

<sup>727</sup>Then again, not every asylum seeker has the resources to challenge the incompetence of the DHA as Mr. Bolanga was fortunate to do. At n 674 above for example, the asylum seeker has waited for more than 15 years to be recognised which would pave way for her naturalisation and enjoyment of full rights in South Africa. Not having the resources that helped brought justice to Mr. Bolanga, she may have another 5 years or more of waiting for the DHA to recognise her as a refugee.

This clearly defeats of Article 34 of the 1951 Geneva Convention which provides for naturalisation. The treatment of asylum seekers and refugees by the DHA is a blight to the principle of equality and human right which are foundational in the Constitution as well as an assault on South Africa's democracy as a whole. The activities of the DHA send a clear message that this group of people are excluded from the polity of the country, a sentiment that to an extent contains a recipe of dislike and help fan the flames of xenophobia.

If this is the legal framework governing the refugees' path to naturalisation in South Africa, what happens to the refugees progeny? What happens to the second generation refugees born on South African soil especially in light of the current Constitution?

This inefficiency of the DHA and certain unclear provisions in the migration laws is not just pernicious to the refugees' quest for naturalisation but begs the question of the constitution of South African citizenship. Why would it be so much a hassle to naturalise anyone in a country with a solid human rights - based Constitution? Is the citizenship model and regime itself an impediment to those seeking it? The rest of the chapter will grapple to make sense of this regime and perhaps understand the matrix of the DHA's effort to exclude refugees and asylum seekers from attaining South African citizenship.

### **5.3 The Biopolitics of South African Citizenship: Implications for the Naturalisation of Refugees**

This part deals with the concept of citizenship in South Africa. It examines the philosophical underpinnings of its regime and weighs it against the naturalisation

process of refugees in South Africa. In the light of its philosophical bearing, this part applies its principles to refugees and their children and reconciles the same with the foundational principles of the Constitution and general international law where applicable. In order to achieve this, and make sense of the process, the biopolitics of South African citizenship will be examined.

### **5.3.1 The Concept of ‘Biopolitics’**

From an ordinary perspective, biopolitics is the control and regulation of a population within a given state or simply, power over life. From Westphalia to modern day, the control of population, especially in migration terms is seen to be one of the highest expressions of sovereignty. It is sovereign power that decides who enters into its polity and regulates their stay. Sovereign power decides what rights are accorded each group of entrants in line with international human rights conventions. One of the crucial and central functions of sovereign power is the capacity to suspend the rights of individuals or groups or to cast them out of their jurisdiction. The control and regulation of a population by a sovereign power is therefore at the heart of the concept of biopolitics. This is a common understanding that runs through the thinking of biopolitics’ leading exponents.<sup>728</sup>

According to Foucault, the sovereign power – or the ‘juridico-institutional power’ as he calls it – can be summarised in this formula: power of life and death. To the extent that the sovereign exercises the right to life only by exercising the right to kill, the sovereign right as the power of life and death is in reality the right to take life or let live.<sup>729</sup> Through

---

<sup>728</sup>The three leading exponent of biopolitics are Michel Foucault, Carl Schmitt and Giorgio Agamben.

<sup>729</sup>Foucault M *The History of Sexuality: An Introduction* (1990) 136.

a gradual process over time, this sovereign power has been replaced by a power that Foucault calls bio-power.<sup>730</sup> In the case of bio-power, it is no longer a question of bringing death into play, but of distributing the living in the domain of value and utility and its task is to take charge of life that needs continuous regulatory and corrective mechanisms.<sup>731</sup> Foucault therefore used the term 'bio-power' to designate the mechanism through which disciplinary strategies (enforced by producing docile bodies within sites such as the prisons, schools and hospitals) were replaced in modern times by a biopolitics whose power was the regulation of populations.<sup>732</sup>

Schmitt has equated the principle of political authority with the state of exception. The sovereign power is the power that decides on the state of exception in which normal legality is suspended.<sup>733</sup> In other words, it is by the exercise of this sovereign power that humanity in a given state is split as between those who belong and those who do not. The decision necessitating this divide is an expression of sovereign power in the state of exception in the thinking of Schmitt. It is this power that has the capability to institute two separate laws governing the same humanity in a given polity. In one populace, sovereign power suspends the laws applicable to one group as opposed to the other however the uniformity may be of other laws applicable to them. From this perspective, one group is controlled by general laws and the other, by an exceptional law

---

<sup>730</sup>Ibid, 144.

<sup>731</sup>Ibid. See also, Ojakangas M 'Impossible Dialogue on Bio-power' (2005) 2 *Foucault Studies* at 6.

<sup>732</sup>See Foucault M *The History of Sexuality* (1990) Vol. 1, 'Society must be defended: Lectures at the Collège des France 1975-1976 (2003) 35.

<sup>733</sup>Schmitt C *Political Theology. Four Chapters on the Concept of Sovereignty* (1985) 13-15.

inapplicable to the general group. Schmitt's sovereign power is the same with Foucault's bio-power.

Agamben instead identifies Schmitt's state exception and Foucault's bio-power with a power over life. According to Agamben's analysis in *Homo Sacer*,<sup>734</sup> the first move of classical Western politics was the separation of the biological from the political as noted in Aristotle's separation between life in the *polis* (*bios*, political life) and *zoē* (biological life) or bare life as Agamben calls it. He writes:

The entry of *zoē* into the sphere of the *polis* - the politicisation of bare life as such - constitutes the decisive event of modernity and signals a radical transformation of the political-philosophical categories of classical thought.<sup>735</sup>

In Agamben's view, state power understood as sovereign power exercises itself paradigmatically via the capacity to transform some section of a population to a state (not a state) that is practically outside the polity, one that Agamben describes as bare life. The one whose existence is reduced to a bare life is by implication living in a state of exception determined by the sovereign.<sup>736</sup> Agamben even claims that it is not the city but rather the camp (refugee camps) that is the fundamental biopolitical paradigm of the West.<sup>737</sup> Consequently, the camp signifies a state of exception that is normalised in the contemporary space.<sup>738</sup> In the state of exception or what Agamben calls 'a zone of

---

<sup>734</sup>Agamben G *Homo Sacer* (1998) The ambiguous figure of the *Homo Sacer* originates from archaic Roman Law, a man whose death could amount neither to homicide, nor to sacrifice. Set apart from the citizenry, *homo sacer* endures in the mode of bare life, subject to the absolute power of the state. p.71-74. See also Harrington J 'Citizenship and the Biopolitics of Post-nationalist Ireland' (2005) *Journal of Law and Society* 32 (3) 430-444.

<sup>735</sup>At p. 4. See also Zembylas M 'Agamben's Theory of Biopower and Immigrants/Refugees/Asylum Seekers' (2010) *Journal of Curriculum Theorizing* 26 (2) 33-35.

<sup>736</sup>*Homo Sacer*, 84.

<sup>737</sup>*Ibid*, 81.

<sup>738</sup>*Ibid*, 166.

irreducible indistinction',<sup>739</sup> the 'originary relation of law to life is not application but abandonment.'<sup>740</sup> Those trapped in this *irreducible indistinction* are the refugees and asylum seekers most of whom are in camps, but as in South Africa, they are not encamped but the law that regulates them is not the law that regulates the citizens.

From the perspective of *irreducible indistinction*, Schmitt's state of exception and a refining of Foucaudian bio-power; Agamben introduced the ban into biopolitics which as he states:

He who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather abandoned by it, that is, exposed and threatened on the threshold in which life and law, outside and inside become indistinguishable.<sup>741</sup>

Agamben sees twentieth-century concentration and extermination camps as the ultimate instance of sovereign power in this mode, but he divines its form too in contemporary asylum and immigration controls.<sup>742</sup> In a turn of phrase specifically apt in this context, he proclaims that 'the Refugee, formerly regarded as a marginal figure, has become now the decisive factor of the modern nation-state by breaking the nexus between human being and citizen.'<sup>743</sup> He emphasises that it is not possible to distinguish sovereign juridico-institutional power from bio-power and that the production of 'bare life' is the original, although concealed, activity of sovereign power.<sup>744</sup>

---

<sup>739</sup>Ibid, 9.

<sup>740</sup>Ibid, 29.

<sup>741</sup>Ibid, 28.

<sup>742</sup>Harrington J 'Citizenship and the Biopolitics of Post-nationalist Ireland' (2005) *Journal of Law and Society* 32 (3) 442.

<sup>743</sup>Agamben G *Means Without End. Notes on Politics* (2000) x.

<sup>744</sup>Agamben *Homo Sacer*, 6.

This 'bare life' neatly confined out of political membership but trapped in sovereign power in the same territorial space which Agamben refers as zones of exception, are the asylum seekers and refugees because they are set outside the political. They are included solely by their exclusion. What is excluded in the exception, maintains itself in relation to the rule in the form of the rule's suspension. The rule applies in the exception in no longer applying it, in withdrawing from it. The suspension of the rule means not chaos but a zone of *indistinction* between that chaos and a normal situation.<sup>745</sup>

The sovereign decision on the exception inspires the means for both the state and the refugees, the excluded and the included, to acquire meaning. The refugee is therefore the 'other' who finds him or herself in the state of exception due to sovereign power. The 'state of exception', Haddad writes, 'is equal to being outside the citizen-state-territory trinity, outside international society and in the gaps between states where individuals are not supposed to exist and the rules no longer apply.'<sup>746</sup>In the state of exception therefore, the 'other' is vital for the confirmation of the identity of the 'self' or put bluntly, the existence of the refugee is quintessential for the validity and significance of the citizen.

In terms of modern jurisprudence, the *Homo Sacer* is one who belongs neither in the sphere of positive law nor to that of natural law. He has neither the rights of a citizen or full human rights. He represents, according to Agamben, 'the originary figure of life in

---

<sup>745</sup>Ibid, 18. See, Ojakangas M 'Impossible Dialogue on Bio-power' (2005) 2 *Foucault Studies* at 7-8.

<sup>746</sup>Haddad E 'The Refugee: The Individual between Sovereigns' (2003) *Global Society* 17 (3) 306.

the state of exception that has become the rule and thereby a life taken into the sovereign ban.<sup>747</sup> The refugee as the definitive expression of 'bare life,' is excluded from the political realm and from the space where normal rules of power exist despite the numerous international conventions of rights. To the extent that '[i]ts inhabitants were stripped of every status and wholly reduced to 'bare life', the camp was also the most absolute biopolitical space ever to have been realised, in which power confronts nothing but pure life, without any mediation.'<sup>748</sup>

The life of naked rights (refugees) trapped in paralysis (because they cannot be used to effect any change in policy) and that of public life (citizens) have been maintained territorially since the proclamation of the Geneva Convention and all other instruments of rights that followed. The distinction between the depraved life of private idiocy and a public or politicised life is therefore an effect of a new form of power that is no longer old sovereign power of life and death over the subjects but a positive power of control over biological life. These right of private idiocy (refugee rights) Rancière argues, 'have been set in a sphere of exceptionality that is no longer political, in an anthropological sphere of sacrality(*sic*) situated beyond the reach of political dissensus.'<sup>749</sup> What Rancière meant here is that the rights of the 'others' for example refugees, have been set in a site

---

<sup>747</sup>Agamben, *Homo Sacer*, 83.

<sup>748</sup>Ibid, 171.

<sup>749</sup>Rancière J 'Who is the subject of the Rights of Man?' (2004) *The South Atlantic Quarterly* 103 (2/3) 299-300. See also Rancière *Aesthetics and its Discontent* (2009) 88-107; Hewlett N Badiou, Balibar, Rancière: *Rethinking Emancipation* (2007) 84-101. See especially Mary T *The Political Thought of Jacques Rancière* (2008)142-189 dealing with active equality in contemporary politics.

that cannot even inspire political disagreements or different opinion (dissent).<sup>750</sup> If it were elevated to the site of political *dissensus*, it might transform the depraved rights of private idiocy (refugee rights) into concrete rights or public rights (citizenship rights) thereby making them useful to effect change. Being exceptional rights because of their power disability, they serve little purpose as to worry the political. They are reserved for those trapped in the zones of human rights exception – the refugees and asylum seekers.

The high numbers of asylum seekers and refugees consequent on regional and global instability has sparked mass movement of people across borders in violation of state's sovereignty. This movements challenge sovereign power because this power is predicated on control. The intrusion of those seeking protection from the ravages of war and other factors trigger states to invent exceptional laws to isolate those they perceive as super intruders into the polity. Tuck Writes:

Thus, the identity of the citizen and the protection of this identity is becoming a crucial part of migration control. The drive towards "social cohesion" and "active citizenship" can be seen as a statement of migration management under the perceived threat of the super mobile "other."<sup>751</sup>

It is this phobia of the super mobile and threatening 'other' and the desire of protecting the identity of the citizen through questionable policies and laws that trigger the necessity of Schmitt's state of exception, widens Foucault's bio-power, and inaugurates

---

<sup>750</sup>For more discussion on Rancière's Dissensus, see Bowman P & Stamp R (eds.) *Reading Rancière* (2011) 1-17. See also Souter J 'Emancipation and Domination: Human Rights and Power Relations' (2008) *In-Spire Journal of Law, Politics and Societies* 3 (2) 142-145.

<sup>751</sup>Tuck R 'Asylum and the Path to Citizenship: A Case Study of Somalis in the United Kingdom' (2011) *New Issues in Refugee Research* No.201 at 5. See also Mosselson A 'There is no difference between citizens and non-citizens anymore: Violent Xenophobia, Citizenship and the Politics of Belonging in Post-Apartheid South Africa' (2010) *Journal of Southern African Studies* 36 (3) 644-648.

Agamben's biopolitics.<sup>752</sup> The demarcation of different rules governing two set of people within the same territorial space emerge, drawn by the state of exception simultaneously quintessential to biopolitics. Although Salter argues that the state of exception is always fundamental to sovereign power and it is intimately tied to the very notion of territorial sovereignty and the imaginary concept implied in bounded spaces,<sup>753</sup> the dividing line in terms of graduation of status towards naturalisation of the 'other' varies with each state.

What distinguishes containment from expulsion within a polity is contingent on where the line of rights is drawn as between the inside and the outside.<sup>754</sup> Both expulsion and containment are a necessary mechanism for the drawing of that dividing line of rights. The graduation from an asylum seeker to a refugee, to permanent resident and to citizenship - is itself a biopolitical process and each stage in this process connotes different rights. Each stage towards naturalisation signifies a different level in the state of exception and every stratum crossed in the progression of rights is itself a biopolitical filter.

The concept of biopolitics is quintessential in understanding state's philosophy while formulating refugee laws. It is even more important in the process of the naturalisation of refugees because it informs the thinking of the sovereign power that makes these laws. If one does not question a society where one set of people live with total depravity

---

<sup>752</sup>Mosselson A 'There is no difference between citizens and non-citizens anymore: Violent Xenophobia, Citizenship and the Politics of Belonging in Post-Apartheid South Africa' (2010) *Journal of Southern African Studies* 36 (3) at 643.

<sup>753</sup>Salter M 'When the Exception becomes the rule: borders, sovereignty, and citizenship' (2008). *Citizenship Studies* 12 (4) 367.

<sup>754</sup>Butler J & Spivak S *Who Sings the Nation State?* (2007) 8-9.

of rights and where the rules that apply to the rest don't apply to them, then to Agamben, one is in secret solidarity with the powers that oppresses humankind.

### **5.3.2 Biopolitics of South African Citizenship and the Descendants of Refugees**

Citizenship describes status of belonging to a sovereign space, rights, practices and performances. It applies at the level of the state (national citizenship), below the state (urban citizenship), across states (supranational citizenship), between states (transnational citizenship), beyond states (cosmopolitan and global citizenship), and in deterritorialised socio-political spaces (the market, terrorists networks, the internet) and more.<sup>755</sup> As a status which once acquired bestows upon an individual an array of rights, citizenship clearly distinguishes between members of a *demos* who exercise this full array of rights and non-members void of the same. As Balibar perceptively notes, 'by definition citizenship can exist only where we understand a notion of the city to exist – where fellow citizens and foreigners are clearly distinguished in terms of rights and obligations in a given space.'<sup>756</sup> The focus here is on legal citizenship as understood under international law. The rights common to citizens of virtually all countries in the world and inclusive of the right to enter, stay and leave and return, including consular assistance.

This section deals with the acquisition of South African citizenship by descendants of refugees and asylum seekers in South Africa. It examines the model of citizenship in

---

<sup>755</sup>Macklin A 'Who Is the Citizen's Other? Considering the Heft of Citizenship' (2007) 8 *Theoretical Inq. Law*333-366.

<sup>756</sup>Balibar E *Is a European Citizenship still Possible?* in Balibar E (ed.) *Politics and the other scene* (2002) 108. See also Heater D *What is Citizenship?* (1999); see Tambakaki P 'From Citizenship to Human Rights: the Stakes for Democracy' (2009) *Citizenship Studies* 13 (1) 5-9.

South Africa, it assess its biopolitical underpinnings and, finally, weighs this model against the Constitution.

### **5.3.2.1 Acquisition of Citizenship by Children of Refugees**

A child born of refugee parents in South Africa is a refugee by birth. There is no birthright citizenship for this class of children. The child, according to law, inherits the status of his or her parents. In fact section 4 of the 2010 Citizenship Amendment Act<sup>757</sup> amending section 5 the 1995 Act provides:

Citizenship by Naturalisation

4. (1) Any person who—

(a) immediately prior to the date of the commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by naturalisation; or

(b) in terms of this Act is granted a certificate of naturalisation as a South African citizen in terms of section 5,

(3) A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if—

(a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and

(b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).

Section 4 (3) (a) therefore emphasises that a child born of parents who are neither South Africans or one of whom is a South African or permanent residence holder can only be eligible for citizenship upon attaining the age of majority. Refugees and asylum seekers are not permanent resident holders in terms of the law and so whatever status they hold at the time of the child's birth, is passed on to their child. A child of an asylum

---

<sup>757</sup>Act No. 17 of 2010 amending the Citizenship Act No. 88 of 1995. Section 1 (vi) places the age of majority at 18 years.

seeker born in South Africa effectively becomes an asylum seeker and so too is the descendant of a refugee. The South African model of citizenship disallows birthright to anyone who is neither a citizen nor a permanent resident holder.

### **5.3.2.2 The South African Citizenship Model: Emphasis on Naturalisation**

Traditionally, under international law, citizenship is either acquired by birth (*jus soli*) or by blood (*jus sanguinis*). *Jus soli* is the acquisition of citizenship by the fact that one is born in a particular territory. In other words, on the soil where a child receives his or her first breath, the child acquires the nationality of that state and it doesn't matter whether his or her parents are nationals or permanent residents of such state.<sup>758</sup> *Jus sanguinis* is the acquisition of citizenship based on blood. Whichever nationality one's parents has, it is transferred to the child at birth and it doesn't matter where the child is born. What is similar in both regimes is the fact that they are both acquired arbitrarily and not by choice or consent.

While there is a clear cut distinction between these two categories of citizenship models, this distinction has recently broken down. This is so because formerly *jus sanguinis* states that have experienced significant migration have tended to adopt *jus soli* rules in order to avoid multiple non-citizen generations born in their state. Some *jus soli* states have adopted requirements permitting birthright citizenship if either or both of the child's parents are lawful residents.<sup>759</sup>

---

<sup>758</sup>Prominent *jus soli* countries include among others, the United States of America, Brazil and Canada.

<sup>759</sup>Aleinikoff TA & Chetail V *Migration and International Legal Norms* (2003) 21.

South Africa is a *jus sanguinis* state. It is a state whereby acquisition of citizenship is determined by blood and to be more reductive, the blood of the parents.

In the South Africa regime of citizenship, a foreigner parent begets a foreigner child, a refugee parent begets a refugee child even if the child played no role to be a refugee, it doesn't matter. However, the child of a refugee has the choice upon attaining the age of majority to decide if or not, and what citizenship, to acquire. South African citizenship is therefore only available to the child of asylum seekers or refugees upon attaining the age of majority. From birth to the age of majority therefore, the child remain an asylum seeker or a refugee despite been born in South Africa.

### **5.3.2.3 Analysing both Models of Citizenship**

Linda Bosniak notes that 'the rights and recognition enjoyed by immigrants are usually understood to derive from either their formal status under law or their territorial presence.'<sup>760</sup> Besides *jus soli* and *jus sanguinis*, the status and territoriality conception of membership which, to an extent, underpins these two categories of membership explains them better.

In the status based category, one's rights in a state (in the case of migrants and refugees) is determine by the status he or she occupies. For example, the status of a refugee in South Africa inspires more rights than that of an asylum seeker. In the same

---

<sup>760</sup>Bosniak L 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 *Theoretical Inq. L.* 389-410 at 390.

way the status of permanent residence allocates more rights to its holder than a refugee and a temporal resident. There is equally the territorial based concept which defies the status category from a human rights perspective and insists that one's presence alone in a territorial space is enough to extend full membership.

In contrast to the status based category therefore, the territorial based conception rejects the notion of different levels of immigration status and its corresponding rights strata. The territorial conception of immigrant rights treats a person's geographical presence as a sufficient basis for core aspects of membership. The territorial concept stresses the normative significance of the physical fact of presence in the national space.<sup>761</sup> It is a person's presence in the state concern that triggers the extension of rights and recognition, not graduated status contingent on immigration and sovereign mercy. Juxtaposing the status and territorial conception of rights, Bosniak elaborates:

The distinction between them is clearest when we focus on the situation of unauthorised migrants — people who are territorially present within a national society but who have, as a formal matter, failed to play by the formal rules of graduated membership. Although geographically here, these are people who are out of line, both literally and figuratively. For status exponents, the illegality of their presence places them outside the community of membership for most purposes, or else in outermost circle. For territorialists, the fact of their presence often trumps the irregularity of their status for purposes of allocating rights and recognition.<sup>762</sup>

These divisional split of rights notwithstanding, the territorial based concept as opposed to the status ideology offers greater justice. The territoriality-based concept therefore, in

---

<sup>761</sup>Ibid, at 391. For a related line of argument, see also Raustiala K 'The Geography of Justice' (2005) 73 (6) *Fordham L. Rev.* 2501-2560; see also Parekh B 'Cosmopolitanism and Global Citizenship' (2003) *Review of International Studies* 29 (1) 3-17.

<sup>762</sup>Bosniak *supra*, n102 at 392. See also Bosniak *The Citizen and the Alien: Dilemmas of Contemporary Membership* (2006) 37-77.

opposing the imposition of the less-than-complete-membership on classes of residents including refugees and their descendants, honours egalitarianism, constitutionalism and human rights. The concept of birthright for the children of refugees and asylum seekers is better served by the concept of territorialism.

In today's world, one's place of birth and parentage holds a determining destiny, defines start ups in life and is emblematic of one's membership in a given polity. The regime of citizenship by different states therefore becomes the deciding factor. The status that the descendants of asylum seekers and refugees acquire in their state of residence is tied to this deciding factor.

While the difference between *jus soli* and *jus sanguinis* has a clear distinction, the situation is even more clear when weighed against the descendants of forced migrants, or what Shachar calls 'the second generation problem'.<sup>763</sup>

In traditional *jus soli* countries like the US, Canada, Brazil and others, this problem of descendants of refugees is solved because anyone born in any of these countries is a citizen of that country by birth. In most cases in these countries, the status of the parents is immaterial in determining the membership of citizenship of their descendants. In other words, that the parent of a child is a refugee, an asylum seeker or even an illegal immigrant, has no bearing on the rights of the child. To this end, the American Constitution's Fourteenth Amendment provides that '[a]ll persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United

---

<sup>763</sup>Shachar A 'The Worth of Citizenship in an Unequal World' (2007) 8 *Theoretical Inq. L.* 367-388 at 376.

States and of the State wherein they reside.<sup>764</sup> In a similar vein, Canadian Citizenship Act provides that a citizen is a person 'born in Canada.' That is, birth in Canadian soil is a necessary and sufficient condition for becoming a natural-born citizen.<sup>765</sup>

The status of parents cannot be transferred to their children. Countries with *jus sanguinis* and status based regime have adopted a qualifier that descendants of migrants, including refugees, can only attain full membership upon meeting certain criterion among which is presence in the country for a number of years. In this case, the rights of these children are differed as well as their opportunities in life. Children in *jus sanguinis* countries start their life in inequality and so becomes their future.

As a *jus sanguinis* state where rights of non-citizens are graduated in a status oriented fashion and where children inherit the status of their parents, South African citizenship is a complex type of property with hereditary trappings. It is like a system of intergenerational transfer of property rights in the guise of belonging and benefits crafted to exclude those who do not have South African blood by birth. Citizenship in this model becomes an intergenerational property with 'priceless benefits' as the US Supreme Court memorably put it, adding that, 'it would be difficult to exaggerate its value and importance.'<sup>766</sup> Understood from a point of view excluding even children of refugees who played no role to become refugees, the South African citizenship

---

<sup>764</sup>U.S. Constitutional Amendment, XIV, Section 1.

<sup>765</sup>Canadian Citizenship Act, R.S.C., ch. C-29, section 3 (1) (a) (1985). See also section 12 of the Federal Constitution of Brazil, 5 October 1985 stating that all persons born in Brazil are natural born Brazilians.

<sup>766</sup>See *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

becomes a site of oppression and dehumanisation. On the property version of intergenerational transfer of citizenship, Shachar writes:

Whereas the archaic institution of hereditary transfer of entailed estates has been discredited in the realm of property, in the most unlikely of places, we still find a structure that resembles it: that is, in the conferral of citizenship.<sup>767</sup>

It should be made clear in this discourse of models of citizenship and particularly the denial or deferral of citizenship to children of refugee parents and other migrants in South Africa, that it is inhuman for any child to be born an asylum seeker or refugee in a world of human rights. In reality, no one benefits if a child is born and denied citizenship rights because his or her parents is an asylum seeker or refugee and neither is there any natural justification of such blatant inequality. Perhaps this reason, amongst others, made the Americans to not just legislate birthrights citizenship, but constitutionalised it.

Shachar writes:

There is however nothing apolitical or natural about these birthright regimes: they are constructed and enforced by law, advantaging those who have access to inherited privileges of membership, while disadvantaging those who do not – just like regimes of automatic property transmission in the past preserve wealth and power in the hands of the few.<sup>768</sup>

Once a system as in South Africa opts for a citizenship regime that includes or excludes others, such status immediately assumes the impact of scarcity; it becomes a dividing line of success and a weapon of indignity. It is worse if it oppresses the opportunities of children of refugees who themselves are already a vulnerable group in our midst. In his

---

<sup>767</sup>Shachar *supra*, n758 at 385.

<sup>768</sup>Shachar *supra*, n 758 at 380. On a troubling his history of exclusion, see Heather D *A Brief History of Citizenship* (2004).

inaugural address in 2001, President Bush, although commenting on the citizenship and ideals of the US, presented this similarly striking vision:

America has never been united by blood or birth or soil. Instead, we are bound by ideals that move us beyond our backgrounds and lift us above our interest. What are these ideals? [E]veryone belongs, everyone deserves a chance, and no insignificant person was ever born.<sup>769</sup>

Why then should the fortuities of birthplace and parentage which today establishes the backbone of the distribution of territoriality and its accompanying advantages be permitted to dictate the life chances of children of refugees? Why should a human right state become a barrier to the life chances of humans?<sup>770</sup>

When children born of refugee parents are denied citizenship at birth in South Africa, they become stateless. Many of these children will never have another culture or history or national allegiance. Apart from the fact that denying them citizenship will render them stateless, this citizenship regime in South Africa has the capability of breeding a permanent underclass of oppressed denizens – people without rights, prospects and egalitarian chances in life. Such is its impact on the children of asylum seekers and refugees – the punishment of the innocent and the creation of an intergenerational caste of a permanent disadvantaged group which is clearly repugnant to the values of the South African Constitution.<sup>771</sup>

---

<sup>769</sup>George W Bush, *First Inaugural Address* 20 Jan. 2001.

<sup>770</sup>For an illuminating discussion on the state encroaching on the rights chances of individuals through birthright conceptions of citizenship, see Dauvergne C 'Citizenship with a Vengeance' (2007) 8 *Theoretical Inq. L.* 489-507. See also Ong A *Buddha is Hiding: Refugees, Citizenship, the New America* (2003)

<sup>771</sup>For a further discussion on the breeding of denizens by the denial of citizenship and its accompanying human rights demerits, see Kerwin D 'Toward a Catholic Vision of Nationality' (2009) 23 *Notre Dame J.L. Ethics & Public Policy* 197-207; Shachar A 'The Shifting Border of Immigration Regulation' *Stanford*

#### **5.3.2.4 The Biopolitics of South African Citizenship: Implications for the Naturalisation of Children of Refugees**

South African citizenship is itself a product of biopolitics. It is a membership regime sustained by inequality because it is not open to everyone who seeks it. Some are born without it even though they are born on South African soil, it is a blood and status oriented model of citizenship. It is akin to the old hereditary property model of transmission of rights from one person to another. It is a model where even those who are citizens of the blood and soil retain their status however long they stay out of the country while at the same time denying it to others however long they stay in the country. It is a paradox of unequal proportion because its denial stretches even to those who do not directly benefit from any country's protection or consular assistance as international law would require of a citizen. The citizenship model is even more questionable as it denies its membership even to children of refugees who will grow up knowing no other country's culture, anthem and values except that of South Africa.

This population of refugees without citizenship is trapped in a state of exception; they are saturated with full obligations, obedience of every law and subject to full sovereign power. Its life is regulated by a different set of law that does not apply to the citizens. Thus trapped under exceptional laws, sovereign power is at its raw state on this front of exceptionality. This is equally so because the refugees are denied the capability to elect anyone who can represent their cause, they depend on collective mercy since they are

---

*Journal of Civil Rights-Civil Liberties* (2007); Shachar A & Hirschl R 'Citizenship as Inherited Property' (2007) *Political Theory* 35 (3) 253-287.

a threat to citizenship. The refugees are the unpopular 'other' and they are what Marrus called the 'unwanted.' Marrus of course was writing among other things, about the difficulties in accepting and integrating refugees in Europe despite the human rights and refugee conventions among others.<sup>772</sup>

Excluding refugees and their children from naturalisation and birthright citizenship is not peculiar to South Africa or to other Western Democracies as well. It is a global phenomenon informed not by justice, human rights or constitutionalism but by the imaginary and unjustified fear of the invading 'other'. It is perceived as a kind of invisible but provably naïve kind of collective private dislike or something close or akin to what Fisher termed *fearism*.<sup>773</sup> Fisher has describes this as 'a process and discourse hegemony which creates an experience of fear that is normalised...keeping the cultural matrix of fear operative and relatively invisible.'<sup>774</sup> This invisible fear therefore mobilises the increasing armory of technologies of control and exclusion against asylum seekers, refugees and their descendants.<sup>775</sup> It is this imaginary fear and the exclusive and often unjust treatment emanating from this fear that cries foul of justification within the context of human rights. Agamben writes:

---

<sup>772</sup>See Marrus MR *The Unwanted: European Refugees in the Twentieth Century* (1985); See also Weiner Myron *The Global Migration Crisis: Challenges to States and to Human Rights* (1995).

<sup>773</sup>Fisher M 'Invoking "Fear" Studies' (2006) *Journal of Curriculum Theorizing* 22 (4) 39-71.

<sup>774</sup>Ibid, at 51.

<sup>775</sup>For an expansion of a discourse fear and how it projects exclusion, see Nyers P 'Abject Cosmopolitanism: The politics of protection in the anti-deportation movement' (2003) *Third World Quarterly* 24 (6) 1069-1093. See also Neal W 'Foucault in Guantanamo: Towards an Archaeology of the Exception' (2006) *Security Dialogue* 37 (1) 31-46.

It would be more honest and above all, more useful to carefully investigate ...[the] deployments of power by which human beings could be so completely deprived of their rights...that no act committed against them could appear any longer a crime.<sup>776</sup>

In South Africa, citizenship has from 1994 signifies the participation in the biopolitics of the state, and characterises itself by duties and obligations emanating from a developed *sensus communis* or community sense and so it's perceived obstruction by refugees somehow constitute an existential deprivation. Perhaps a radical approach would be that refugees break the fallacy of citizen-territory-state concept. Refugee put to question a community's superficial sense of uniqueness and virtues of patriotism sustained by a radical freedom from oppressive discourses centred amid the political construction of the responsibilities of citizenship. So the refugees and their descendants becomes a threat, regulated by different laws, they are kept in a state of exception because rules that apply to citizens is alien to them.

In twisting the naturalisation path to those seeking protection and belonging by administrative roadblocks and denying birthright citizenship to their progenies, the South African citizenship regime is the quintessential biopolitical space. Refugees and their children are the absolute 'others' in the South African political space. Their space, apart from being an articulate embodiment of counter power in the form of naked sovereign control and distinct exclusion, has become sites of domination and biopolitical oppression in that they have no voice to influence anything. They are included in the South African polity only by their exclusion.

---

<sup>776</sup>Agamben G *Homo Sacer: Sovereign power and bare life* (1998) 171. For an illuminating treatment of the feared populace, see also Agamben G *Remnants of Auschwitz: The witness and the archive* (2002).

Despite their quest for roots in South Africa and having been rootless for a long time, other nationals have retained their citizenship status however long they stay out of the country, contributing very little, affected by no national laws and are not under the jurisdiction of the state. Shachar writes:

Even if a natural-born citizen has left the country and no longer has any effective ties to the polity, there is no corresponding loss of the rights and benefits of citizenship. This is surprising: it is yet another example of the relative importance of inheritance, as opposed to choice, where stakeholder status is concerned.<sup>777</sup>

The spaces the refugees and their descendants occupy in South Africa are not just spaces of exclusion but they have become perforated heterotopias, spaces of 'otherness' where difference and inequality have been internalised. Agamben writes:

Only in a world in which the spaces of states have been thus perforated and topologically deformed and in which the citizen has been able to recognize the refugee that he or she is – only in such a world is the political survival of mankind today thinkable<sup>778</sup>

The lack of political status or full membership of the refugee is passed to their children through the biopolitical technology of exclusion. This in turn leads to a second generation of exclusion, seconding their parent's exclusive inclusion. This population constitutes a failed populace in South Africa, those who from birth have to an extent, no right to progress because they start in unequal footing to others. This failed population, who have been ejected from the state despite their presence are nevertheless contained and sometimes detained within the state as its interiorised 'other'. This population, Judith Butler notes, 'are both contained and expelled...saturated with power

---

<sup>777</sup>Shachar A 'The Worth of Citizenship in an Unequal World' (2007) 8 *Theoretical Inq. L.* 367-388 at 374-375. See also Shachar A *Birthright Lottery* (2009) 21-70.

<sup>778</sup>Agamben G *Means Without End* (1996) 25.

at the moment in which they are deprived of citizenship.<sup>779</sup> The child of a refugee therefore enters South Africa illegally from birth and inherits the status of its parents.

For the refugees, the South African boarder has never been crossed. The border is not in Musina or Beitbridge, the border is here at home. The restriction and exclusion that characterises the border follows the refugees and their descendants at every bend on his or her way to naturalisation.

The Refugees, Immigration and Citizenship Acts especially the latter, is itself a biopolitical weapon designed to exclude those it perceived are not natives of South Africa. In excluding the children of refugees born in South Africa, the Citizenship Act illustrates what Foucault has termed “‘state racism’: a means of classifying, distinguishing and opposing a population on the basis of appeals to essentialist categories of origin.”<sup>780</sup> For the purpose of the subject under discussion, Foucauldian ‘state racism’ is substituted with ‘state inequality’.

The Citizenship Act of 1995 as amended is a biopolitical instrument designed to fail a section of the population present in South Africa. Its biopolitical power is extreme in the disability of rights, particularly the birthrights of the descendants of refugees. In a biopolitical state especially in South Africa where the frontier is brought home, every

---

<sup>779</sup>Butler J & Spivak G *Who Sings the Nation State?language, politics and belonging* (2007) 40.

<sup>780</sup>See Foucault M *The Birth of Biopolitics: Lectures at the Collège de France 1978-79* (2008) 72-79.

institution including universities and banks and every individual, including landlords, are sovereigns unto themselves to check immigration status; they are the super mobile agents of bio-power. This is how the split of the inside and the outside is manifested through the disablement of rights. Fiss notes that the problem of splitting the inside and outside strategy is problematic because it is based on empirical premises about the possibility of maintaining separation between the community's inside and its edges that simply do not hold. Fiss account is clearer when he explains that:

Admission laws can be enforced by fences at the borders, deportation proceedings, or criminal sanctions, not, I maintain, by imposing social disabilities.<sup>781</sup>

The existence of a failed population in the likes of refugees and their descendants is therefore not by an accident of a flawed design but it is rather foundational to the biopolitics of South African citizenship. South Africa's model of citizenship has become a site of oppression, an echo of inequality and a mechanism through which democratic freedoms and inalienable rights are retracted from a section of the population despite its enviable Constitution.

### **5.3.2.5 The South African Citizenship Model and the Constitution: Implications for Naturalisation of Refugees**

The Constitutional framework within which immigration legislation and policy functions allows for the respect, promotion and fulfilment of the rights contained in the Bill of Rights in principle. Citizenship and refugee laws are equally immigration laws to an extent because they regulate the status of persons. As a constitutional democracy

---

<sup>781</sup>Fiss W 'The Immigrant as Pariah' (1998) *The Boston Review*, *New Democracy Forum*, Oct-Nov at 16.

founded on the principles of human rights, freedom, equality, human dignity, democratic values amongst others, South African Constitution is one of the best that ever came out of the human mind. It is an ambitious piece of document founded on the enviable principle of justice and suffice it to say that the South African Constitution is rooted in the equal moral worth of all human kind.

It proclaims amongst other things that South Africa belongs to all those who live in it;<sup>782</sup> it expresses the equality of persons;<sup>783</sup> it prohibits any sort of discrimination in any form,<sup>784</sup> and it underlines and emphasises that human dignity is sacrosanct and inviolable.<sup>785</sup> It enshrines the rights of all and affirms the democratic values of human dignity, equality and freedom<sup>786</sup> and it enjoins and binds the state to respect, promote and fulfil the rights in the Bill of Rights.<sup>787</sup> Human dignity as proclaimed in the Constitution is a non-derogable right which means that the extent of its protection is absolute. The SCA on its part, ruled that human dignity has no nationality and that it is inherent to all people, citizens and non-citizens alike.<sup>788</sup> On these premises, it can be authoritatively proclaimed that the South African Constitution is anchored on the equal moral worth of every human being.

---

<sup>782</sup>Constitution of the Republic of South Africa, 1996, preamble.

<sup>783</sup>Section 9 of the Constitution.

<sup>784</sup>Section 9 (3) (4) (5).

<sup>785</sup>Section 10.

<sup>786</sup>Section 7 (1).

<sup>787</sup>Section 7 (2).

<sup>788</sup>*Minister of Home Affairs & others v Watchenuka & another* 2004 (4) SA 326 (SCA) para 25.

Working from the premise of the equal moral worth of humankind, is the exclusion of the refugees descendants constitutionally valid? Let it be known and acknowledged that the refugee status is not a temporal visa as in other temporal visas such as work, study, tourism or asylum seekers permits. The CC took the view that a refugee permit allows its holder to remain in the country indefinitely<sup>789</sup> and hence the permit is more close to permanent residence status than any other permit.<sup>790</sup> The CC therefore interpreted 'to remain' in section 27 (b) of the Refugees Act as to 'remain indefinitely'. It is trite that the term 'indefinite' is the same as 'permanent'. It is perhaps for this reason that a recognised refugee is entitled as section 27 (b) disposes, to every right set out in the Bill of Rights.<sup>791</sup>The centre piece of the rights in the Bill of Rights relevant for the case of citizenship for children born of refugee parents is human dignity and the equal moral worth of anyone subject to this bundle of rights.

On the basis of this permanency therefore, why would section 5 of the Citizenship Act as amended deny immediate citizenship to children born of refugees parents in South Africa? As the law stands today, children of refugee parents are only eligible for South African citizenship upon attaining the age of majority. Despite this deferred process of full membership, the DHA is still unwilling to grant such citizenship for those refugee children who already meet this requirement. On 4 July 2015, Refugee Alliance for Justice, an NGO, brought an application against the DHA in the North Gauteng High

---

<sup>789</sup>Section 27 (b) of the Refugee Act provides that a refugee 'enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provision of this Act.'

<sup>790</sup>See the powerful dissenting judgment of Mokgoro and O'Regan JJ in *Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others* 2007 (4) SA 595 para 99.

<sup>791</sup>Chapter 2 of the Constitution.

Court to force the DHA to grant a South African Identity document to a child of refugee parents born in South African on 19 February 1996. The ID was needed for the child to be able to write the metric exams.<sup>792</sup> It stand to reason therefore that even the provision in the Citizenship Act that children of refugees born in South Africa be granted citizenship upon attaining majority was not just citizenship deferred at birth but a provision that would not be respected.

The idea of a *post-birth* citizenship for children of refugees born in South African soil is clearly inconsistent with the Constitutional value of human dignity. If the constitutional value of human dignity and the ideal of the equal moral worth of everyone is anything to aspire to, the system cannot justify excluding children of a vulnerable group of people born on South African soil from being beneficiaries of citizenship. In accepting deferred citizenship (which the DHA has already instituted a dispute to honour) for these children who would grow up knowing only South African culture, section 5 of the Citizenship Act is unconstitutional. This is clearly a case of a citizenship model with a vengeance akin to the children of refugees paying for their parents sins of coming to South Africa uninvited. In this model of citizenship, a second generation of underclass population is continued with a split of rights between them and the children of South African parents. This reinforces the politics of difference as between ‘us’ and ‘them’, and stands against the meaning of human dignity as a founding constitutional principle in South Africa.

---

<sup>792</sup>Zoe Mahopo ‘Pupil’s battle to get SA ID – Needs papers to write matric’ *Sowetan*, 4 July 2015, available at [www.sowetanlive.co.za/news/2015/07/04/pupil-s-battle-to-get-sa-id-needs-papers-to-write-matric](http://www.sowetanlive.co.za/news/2015/07/04/pupil-s-battle-to-get-sa-id-needs-papers-to-write-matric) (Accessed 5/7/2015). The story’s subheading was *The Department of Home Affairs has been hauled before the court to force it to grant the child of refugee parents an ID so he can write matric.*

In a human right state such as South Africa, why should there even be a split of rights especially in the case of children of refugee parents and those born of South African parents? What can be argued within the context of human rights, human dignity and the equal moral worth of humankind to justify this split? What are the foundational structures necessitating this split of rights as between 'us' and 'them'? Is the refugee and his or her descendants not human enough to be considered equal in a free and democratic society?

Democratic justice itself would require that membership's rights and rules be open and equally open to all who live within a political community's territory and are subject to local laws.<sup>793</sup> To the extent that individuals who inhabit a national community are not recognised as members, they are subject to nothing short of political and social tyranny.<sup>794</sup>

In denying children of refugee parents their birthright to citizenship even though they are born on South African soil and complicating the path to citizenship for their parents, this population is radically excluded from the polity. The radically excluded are automatically denied the material conditions of life and denied the recognition of their human dignity as provided for in section 10 of the Constitution.

---

<sup>793</sup>Walzer M *Spheres Justice: A Defense of Pluralism and Equality* (1983) 60-61.

<sup>794</sup>Ibid, at 59.

When the enjoyment of citizenship and its privileges comes at the very oppression of others who desperately need it, the whole system goes on a human right trial. This is not to suggest that South Africa must open its borders to all or be soft in defending its borders, it is a call for a human rights- based approach in dealing with those on the inside. Fiss insist that 'laws regarding admission cannot be enforced or implemented in ways that would transform immigrants into social pariahs.'<sup>795</sup> And so whatever restrictions are enforced at the border, egalitarian values must be maintained within, in relation to those present on the territory. The constitutional values of South Africa cannot accept or condone the way the DHA treats refugees.

Our very existence as human beings who enjoy rights summons our morality and humanity to recognise the same for others wherever they are or come from. To view and conceive our human rights as inalienable, that inalienability can only be validated against the recognition of the same in others.

#### **5.4 Conclusion**

This chapter found that some of the provisions of the Refugees, Immigration and Citizenship Acts are themselves an impediment to the realisation of the goals set out by the legislature. The DHA has been particularly the single greatest threat against migration laws in South Africa. The activities of the DHA are a threat to the human rights

---

<sup>795</sup>Fiss O 'The Immigrant as a Pariah' (1998) *The Boston Review, New Democracy Forum*, Oct-Nov at 16. See generally Bosniak L 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 *Theoretical Inq. L.* 389-410 at 390-396.

of migrants especially forced migrants and an affront to the Constitution of South Africa. Drawing from the evidence presented in this chapter, it will take an asylum seeker at least 18 years to attain naturalisation in South Africa. A refugee would require at least 14 years to be naturalised in South Africa. This is because some provisions of the laws are not clear and the DHA's model of administration is itself a breach of the Constitution and a dishonour of South Africa's international obligation towards refugees.

South African citizenship is itself a biopolitics because it is predicated on a radical exclusion of refugees and their descendants. It is a kind of biopolitics contingent on an exclusive inclusion whereby refugees and their children are both contained and expelled at the same time. While refugees and their descendants are beneficiaries of few rights, they are, however, subject to full sovereign power and control.

The citizenship model, by denying children of refugees' birthright citizenship, the system does not only breed a second generation of refugees but it denies them material survival and infringes their constitutional right to dignity – nay, they are not human enough.

Although the Citizenship Act provides for *post*-birthright citizenship for the children of refugees upon attaining majority, the DHA has shown that as a biopolitical institution, they have no intentions to respect it. To the extent therefore that a class of persons is allowed to subsist among us in a less-than-fully-incorporated status, a caste-based distinction is entrenched and institutionalised. This is a consequentialist argument pitched in the negative: if we do not extend rights and recognition to co-inhabitants, we allow for the maintenance of what Walzer calls 'a class of live-in servants' who are

perpetually disadvantaged under law.<sup>796</sup> In doing this, we will, to an extent, have poisoned the democratic values, human dignity which are foundational values of the Constitution of South Africa, and above all, betrayed its founders.

---

<sup>796</sup>Cited in Bosniak *supra*, n795 at 407.

## CHAPTER 6

### THE FUTURE OF NATURALISATION OF REFUGEES IN SOUTH AFRICA: FINDINGS AND RECOMMENDATIONS

Is the cost to meet the needs of refugees greater than the consequences of turning a blind eye on their suffering?

Aung San SuuKyi, Nobel Lecture, 16 June 2012

#### 6.1 Findings

##### 6.1.1 Introduction

This thesis examined the naturalisation of refugees under international law with specific emphasis on South Africa as a state party to various human rights treaties and the 1951 Geneva Convention in particular. A great part of the thesis is premised on the naturalisation of refugees under South African law. It examined refugee law in South Africa, the administration of the naturalisation process and the legal gaps in this law and existing practice. It weighed the application of South Africa's refugee law and practice of naturalisation against the PAJA, its international obligations to refugees and its Constitution. It examined South Africa's citizenship model and its impact to the naturalisation of refugees and their descendants and attempted to reconcile this model of citizenship against the Constitution. In navigating the naturalisation process and its implications for human rights, the thesis makes extensive use of case law where relevant and applicable. This chapter will therefore provide specific conclusions and make recommendations based on the findings in this thesis.

However, since each chapter has its own conclusion which some of the findings may not be repeated here in detail, the following general conclusions and observations merit attention.

### **6.1.2 Naturalisation of Refugees under International Refugee Law**

With more than 59.5 million refugees as of 20 June 2015 - excluding the recent spike of refugees and migrants crossing into Europe<sup>797</sup> - the washing ashore of the dead body of a three-year- old Ayland Kurdi<sup>798</sup> and the many deaths across the Mediterranean, the world is facing its greatest migration crisis since the height of World War II. As Europe and the world comes face to face with massive human suffering and refugees in need of protection and belonging against a backdrop of numerous human rights treaties, the naturalisation of refugees couldn't have been examined in a more better time.

It has been observed that Article 34 of the 1951 Refugee Convention that provides for naturalisation of refugees under international refugee law is itself a problematic provision. While the provision lays down the path to naturalisation, its framing is weak and it does not amount to a strong obligation under international refugee law. The provision does not require state parties to eventually grant citizenship to refugees neither does it compel refugees to accept any such offer made to them by host

---

<sup>797</sup>World focuses on its 59.5 million refugees' *Sowetan Live*, 20 June 2015.

<sup>798</sup>Gilmore S 'Why Canada should take in 20 times more refugees' *Ecocide Alert*, 3 September 2015.

countries.<sup>799</sup> Despite the arguments in its framing that an obligation to naturalise refugees is quintessential for combating statelessness, no state party to the Convention advocated for mandatory enfranchisement.<sup>800</sup> This therefore, left the granting of citizenship to refugees exclusively at the mercy of member states of the Convention.

It is observed that the framing of this provision in a less obligatory language is contingent on the protection of the sovereignty of member states. The international protection of refugees in the 1951 Refugee Convention was therefore formulated on the basis of the nation-states. This is where the problem began. The inability of the international community to separate human rights from states even for those trapped in exceptional circumstances such as refugees is among the principal reasons why Article 34 was framed in a non-obligatory manner. Protecting the sovereignty of member states took precedent over the actual implementation of human rights whereby the mere presence of anyone is sufficient for the enjoyment of every right allocated to anyone.

The sovereignty of states for which Article 34 of the 1951 Refugee Convention was traded for, is in itself, the only hidden reason why there are close to 60 million refugees in the world today in the first place. It is characteristics of sovereignty that the attempt to place mankind within homogenous territorial spaces and separate states alone will inevitably force others between the cracks. The refugee therefore is the bi-product of

---

<sup>799</sup>Robinson N 'Convention Relating to the Status of Refugees: Its History, Content and Interpretation. A Commentary' (1953) 166.

<sup>800</sup>Hathaway J *The Rights of Refugees under International Law* (2005) 982.

the creation of separate sovereign states which has ultimately forced others outside the internationally crafted citizen-state-territory trinity. In effect, refugees are the side effects of the creation of separate sovereign states, the victims of an international system that brings them into being but fails to take responsibility for them – a mobile evidence of the failures of Westphalia.

It was observed that while the provision of Article 34 is not phrased as a strong obligation, states would, in an age of human rights, treat refugees as every other human being within their borders and not stand in their way to naturalisation for no other reason but because they are humans.

State parties to the 1951 Refugee Convention who themselves have subscribed to human right treaties and democratic principles have all but adopted xenophobic interpretations of Article 34. In this vein, they have consigned and interpreted human rights principles to mean rights of their citizens thereby abandoning the universal attributes of human rights. A shift towards xenophobic restriction has increasingly become a universal pattern of the interpretation of human rights and so the right of refugees towards naturalisation has succumbed to statist discretion against its universal moorings. In most host countries, neither governments nor their citizens have even distantly nurture the imagination of refugees becoming members of their societies and so, they have confined them into camps like pigs while in the same breadth, chant and proclaim human rights to their own people and rest of the world.

At the same time when mankind has become economically and, to some extent, culturally 'united' it is violently divided 'biopolitically' – the totalitarian aspects of citizenship sanctioned by professed constitutional democracies the world over.<sup>801</sup> Viewing refugees as people unworthy to join their communities, many states have, by national laws, converted their citizenship regime into fortresses. The fact that Article 34 is framed without a strong obligation, state parties turn to interpret the naturalisation of refugees as one of choice and the principles of human rights have not helped to reshape this conception. Whereas human rights are often viewed as passive rights because of their protective functions, citizenship on the other hand, is perceived as a dynamic set of entitlement which can be exercised. Without making it obligatory for states to grant citizenship to refugees who seek it, the international community, through the 1951 Refugee Convention, turned its back on the inalienability of human rights. And by drawing a wide distinction between the rights enjoyed by citizens and those enjoyed by refugees and making naturalisation a matter of discretion, human rights lost their universality and inalienability. It might be safe to say that human rights are indeed the rights of citizens. The 1951 Refugee Convention's position to leave the naturalisation of refugees under the domestic laws of states was and is still a wrong one for human rights. This goes to confirm that universally agreed on something does not make anything right except that they agreed to a collective wrong disguised as rights – such is the case of naturalisation of refugees under international law.

---

<sup>801</sup>Balibar E 'Outlines of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence' (2001) *Constellations* 8 (1) 27.

### **6.1.3 Naturalisation of Refugees under South African Law**

#### **6.1.3.1 The Asylum Seekers stage: Beginning of Error**

It has been observed that the asylum stage is the first port of call towards the naturalisation of refugees in South Africa and elsewhere. While South Africa is a state party to the Geneva Convention and the obligations that comes with it, the current asylum system is very difficult to meet this obligation. South Africa refugee system is an individualised system whereby application for asylum can only be done by the prospective individual in person and in the country. This means it would be difficult for anyone to seek asylum in any South Africa's missions overseas.

It has been observed however that, the section 22 permit issued to asylum seekers is the wrong kind of permit altogether. The permit issued to asylum seekers in South Africa is called the 'Asylum Seekers Temporary Permit'. This is the permit asylum seekers use as a starting point on their path to naturalisation under South African law.

However, this permit is designed for asylum seekers fleeing in emergency situation and mass inflows circumstances as was the case in Bosnia in the past and the Syrian refugees of today. In this situation, the possibility of individual determination is impossible because of emergency and large numbers and it is under such circumstances that an asylum seekers temporary permit is justified. This permit is therefore designed as a pragmatic response to emergency situation and so the rights

associated with it are of very temporal in nature. In South Africa, the asylum seekers do not come under these circumstances. The country has a structure in place and subscribes to an individual status determination process but it issues permits designed for those in emergency situations. This permit, by its nature, excludes socio-economic rights because of its emergency status. It could have been overlooked if this mistaken permit was determined on time to allow its holder to enjoy socio-economic rights as laid down by the 1951 Refugee Convention<sup>802</sup> and the South African Refugees Act.<sup>803</sup> The law actually provides that this temporary status be adjudicated and finalised within six months from date of application.<sup>804</sup> Despite this legal provision, it has been observed that some asylum seekers have been kept in this wrong temporal permit for a period of 10 or 15 years.<sup>805</sup> This, of course, has tremendous negative impact on the quest for naturalisation and it stifles the human rights especially given the fact that each status comes with its own bundle of rights. It is observed that the asylum process itself is one of the greatest obstacles to the naturalisation of refugees beside the fact that the DHA has been issuing the wrong permits to asylum seekers all these years. For the DRC citizen referred to above who has waited for more than 15 years for a refugee status, if she is given the refugee status this year, she would have to wait 5 years more to qualify for certification, at least 2 years to wait for the outcome, another 2 years to wait for permanent residence and another 5 years to qualify for citizenship. That would be 29 years from the date she sought asylum. It would be easy to conclude that the law does

---

<sup>802</sup>Articles 17-28 of the Geneva Convention.

<sup>803</sup>Article 27 of the Refugee Act of 1998.

<sup>804</sup>*Refugee Regulations (Forms and Procedure)* 2000: Government Gazette NO. 21075, 6 April 2000 (Pretoria: Government Printer, 2000) section 3(1)b.

<sup>805</sup>In an article on the *Sowetan* titled 'Refugee waits 15 years for a new life' 2 July 2015, a DRC citizen who fled the war and political turmoil in that country since 2000 has been waiting for the past 15 years to be recognized as a refugee to no avail and as she notes 'Life is difficult because you become stuck. I have become a non-person. I can't study or open a bank account. I have nothing and no hope'.

not treat her as a human being entitled to human rights and justice. The asylum system stage in South Africa is a barrier to naturalisation and a wrong interpretation of this area in international law.

It is observed further that in terms of international law, a person is a refugee immediately that person satisfies the definition of what constitutes a refugee, and so the host state's determination is not constitutive of this status.<sup>806</sup> The South African system that a refugee must be 5 years with a refugee status in order to apply for certification is a flawed one. This is so because the refugee status does not make the asylum seeker a refugee but declares the person to be one. In this vein, the 5 years suppose to be counted from the date of asylum rather than from the date of refugee status. The current position is therefore inconsistent with international law and defies the court's position in the *Mayongo's case*.<sup>807</sup>

### 6.1.3.2 Transition from Refugee Status to Certification

Section 27 (c) of the Refugees Act provides that after 5 years of continuous stay with a refugee status, the refugee is entitled to apply for an immigration permit if SCRA certifies that he or she will remain a refugee indefinitely. While this position has not

---

<sup>806</sup>UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, para 28 provides: A person is a refugee within the meaning of the 1951 Convention as soon as he (*sic*) fulfils the criteria contained in the definition. This would not necessarily occur prior to the time at which his refugee status is formerly determined. Recognition of his (*sic*) refugee status does not make him (*sic*) a refugee but declares him to be one. He (*sic*) does not become a refugee because of recognition, but is recognised because he (*sic*) is a refugee.' See the unreported case of *Mayongo v Refugee Appeal Board* (2007) JOL19645 (T) where the court held in para 8 that the fact that the government took long in finalising Mr. Mayongo's status determination does not impair his status as a refugee because recognition of his refugee status does not make him a refugee but simply declares him to be one.

<sup>807</sup>*Mayongo v Refugee Appeal Board* (2007) JOL19645 (T) at para 8.

been tested, it is observed that it would be problematic because it would be very difficult to ascertain whether a refugee will so remain indefinitely. This is so because even if situation changes in the country of origin, refugee situations rarely resolve themselves within a period of five years.<sup>808</sup>

The provision of indefiniteness is an unclear provision because the law failed to explain what is meant by that except that it is a ground to apply for an immigration permit towards permanent residence. The interpretation of the meaning of indefinite in this context therefore remains in the hands of officials of SCRA which leaves them with wide discretion as to what constitutes 'indefiniteness'. This leaves the rights of refugees and the process of naturalisation uncertain and subject to administrative discretion.

### **6.1.3.3 Transition to Permanent Residence: Continuation of Error**

After the certification of indefiniteness by SCRA, the refugee has to apply for permanent residence under section 27 (d) of the Immigration Act of 2002 and then citizenship after 5 years. It is observed that 'indefiniteness' under section 27 (c) of the Refugees Act and 'permanent' under section 27 (d) are one and the same thing to begin with.

---

<sup>808</sup>See Handmaker J 'Refugees, Migrants, Immigrants and Policy Development: A Critical Look at the South African 1997 Green Paper on International Migration (1998) (unpublished paper): Lawyers for Human Rights, at 7. See also Crush J and Williams V 'Evaluating Refugee Protection in South Africa' (2002) Southern African Migration Project: Migration Policy Brief No.7 at 7.

It has been noted that most refugee movement tend to result in permanent exile.<sup>809</sup> Once admitted into a state and the requirements met, that person becomes a refugee and it does not matter how long the authorities take to grant the refugee status. Section 27 (b) provides that upon the granting of refugee status, the refugee has a right to remain in the Republic in accordance with the provision of the Refugees Act.

In their dissension in the *Refugee Women's case*,<sup>810</sup> Mokgoro and O'Regan JJ took this view:

Refugees who have been granted asylum are a special category of foreign nationals. They are more closely allied to permanent residents than those foreign nationals who have rights to remain in South Africa temporarily only. Recognised refugees also have a right to **remain in South Africa indefinitely** in accordance with provisions of the Refugee Act. So their position is closer to that of permanent residents than it is to foreign nationals who have only a temporary right to be in South Africa or foreign nationals who have no right to be here at all.<sup>811</sup>

It is observed that if a refugee status does not confine its holder to temporary residence in South Africa, then the CC's position above that the refugee has a right to remain indefinitely is the correct one. The question is, if the refugee has a right to remain in the country indefinitely, what is the purpose of certification? What is the purpose of applying for permanent residence if he/she is already in the country indefinitely? Does indefinite and permanent have two different meaning? To stay permanently and to stay indefinitely, are in the opinion of this study, one and the same thing. It is an ambiguity of the law which has resulted in severe abuse on refugees' path to naturalisation in South Africa.

---

<sup>809</sup>Rogge J *Repatriation of Refugees* in Allen T and Morsink H (ed.) *When Refugees Go Home: African Experiences* (1994) 14-16.

<sup>810</sup>*Union of Refugee Women v Director: Private Security Industry Regulation Authority* 2007 (4) SA 395 (CC).

<sup>811</sup>At para 99.

It is observed that it is legally incorrect to subject the refugee to certification of permanent residence while he or she already has a refugee status that allows its holder to reside in the country indefinitely. It is illegal therefore to subject refugees, giving their vulnerability and minimal means, to a certification process that would take more than two years just to confirm what the refugees actually are – indefinite residents.

To compound the situation further, a refugee is required to apply for permanent residence under the Immigration Act which will take another 2 years or more of waiting. If a refugee has to apply to be granted permanent residence, what then is the purpose of the certification of indefinite stay even though he or she is staying indefinitely already? It is observed that the process of certification and that of applying for permanent residence is simply designed to achieve the status the refugee already has and therefore nonessential and a calculated obstruction of administrative justice. This legal non-essentiality is designed to torment the rights of refugees and stifle the progress of naturalisation for those who seek it. It is observed further that this approach of certification, permanent resident application is inconsistent with Article 34 of the Geneva Convention which provides that:

The Contracting Parties shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings.

It is observed further that by subjecting refugees to a similar process of transition - the administrative assault in the asylum process - the DHA is in breach of Article 34 of the Geneva Convention. The administrative treatment of asylum seekers and

refugees in South Africa in the various stages towards naturalisation is a distinct failure of the country's obligations to refugees under prevailing international law.

#### **6.1.3.4 Naturalisation of Children of Refugees Born in South Africa**

It has been observed that children born of asylum seekers or refugee parents in South Africa adopt the status and nationality of their parents. This is predicated on South Africa's citizenship model which does not recognise birthright citizenship for non-citizens. Being a *jus sanguinis* citizenship regime, a child of a refugee becomes a refugee without seeking asylum. However, section 4(3)(a) of the Citizenship Act of 1995<sup>812</sup> provides that children who are not born of South African and permanent residence parents can only acquire citizenship upon attaining the age of majority. Section 2 (2)(a) also provides that if a child who has no nationality at birth or is not possible for the child to acquire any other nationality, would be granted South African citizenship.

Pursuant to the authoritative position in the dissenting judgment in the *Refugee Women's case*<sup>813</sup> the refugee is closely allied to a permanent resident than any other foreigner because he or she is entitled to remain in the Republic indefinitely. The exclusion of birthright citizenship to the descendants of refugees is therefore unlawful. This is so because the child of a permanent resident acquires South African citizenship

---

<sup>812</sup>Act 88 of 1995 as amended by Act 17 of 2010.

<sup>813</sup>*Union of Refugee Women v Director: Private Security Industry Regulation Authority* 2007 (4) SA 395 (CC).

at birth and there is no reason why the child of a refugee admitted to remain indefinitely should not be granted the same right. By denying children of refugees' birthright citizenship and compelling them to become refugees at birth, the South African citizenship regime offends the dignity of this category of migrants and reinforces the narrative that the human rights of refugees are not taken seriously despite the promises of a human rights- based Constitution.

It has been observed that despite the provision of section 2(2) above, the DHA has without compunction resisted to grant citizenship to even stateless children.<sup>814</sup>The children of refugees, apart from the argument that they meet the requirements to acquire birthright citizenship because their parents are indefinite residents, are equally eligible for birthright citizenship even under section 2(2) of the Act. This is so because their being refugee is closely allied to a stateless individual and moreover, unlike any other foreigner, he or she is not entitled to any consular assistance from his or her country of origin. It stands to reason therefore that those without any protection from their countries of origin and who cannot return home as they wish are effectively stateless. A child born from such parent is automatically stateless and meets the requirements of section 2(2) of the Act as well.

---

<sup>814</sup>In a landmark ruling for example on 3 July, 2014 in the case of *D.G.L.R & another v Minister of Home Affairs & Others*, case number 38429/13 (unreported), the North Gauteng High Court ordered that a 6 years old Cuban girl born in South Africa to Cuban parents be granted South African citizenship in terms section 2 (2) of the Citizenship Act. And that section 2 (2) of the Citizenship Act be regulated accordingly. The child was unable to acquire the nationality of her parents because Cuban bars such transfer of citizenship if the parents have lived out of the country for a very long time. The child was effectively stateless and meets the requirements of section 2(2) of the 1995 citizenship as amended. Despite the fact that section 2(2) was designed to cater for such situations, the DHA refused to grant the stateless child citizenship. The court however ordered the DHA to grant the child South African citizenship by birth.

However, it has been observed that even the promise to grant citizenship to children of refugees in accordance with the aforementioned section 4(3)(a) upon attaining the age of majority has been vigorously resisted by the DHA.<sup>815</sup> It is therefore trite that the citizenship regime reinforces discrimination, applies discriminately and sustains structural inequality and frustrates the naturalisation process of refugees in South Africa.

### **6.1.3.5 Human Element, Naturalisation Process and the Constitution**

There has been considerable resistance in South Africa for the integration of refugees and their descendants even against the Constitution. As a progeny of the age of rights, the South African Constitution remains a benchmark for validating laws and administrative actions and the courts are there to pronounce judgements in the event of inconsistencies. This thesis found that the Constitution is very clear in many respects and as it proclaims, 'it is the supreme law of the land and every law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.'<sup>816</sup>The Constitution sets out number core human rights values and justiciable rights that must act as a barometer of justice in its Bill of Rights. The Constitution makes it very clear that human dignity as a core constitutional value is a non-derogable right<sup>817</sup> and the SCA affirms that this value has no nationality.<sup>818</sup> It proclaims equality for everyone;<sup>819</sup> it

---

<sup>815</sup>'Pupil's battle to get SA ID – Needs ID papers to write matric' *The Sowetan* 4 July 2015. The DHA was hauled to court to force it to grant the child of refugee parents an ID so he can write matric exams.

<sup>816</sup>South African Constitution, 1996, Section 1(2).

<sup>817</sup>Section 10.

<sup>818</sup>*Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 25.

<sup>819</sup>Section 9.

stated that South Africa belongs to all those who live in it;<sup>820</sup> it provides that everyone is entitled to just administrative action that is lawful;<sup>821</sup> reasonable and procedurally fair; it expressly imposes a specific duty that every state organ has a constitutional obligation to promote the Bill of Rights<sup>822</sup> which must be performed diligently and without delay.<sup>823</sup>

It is observed that as a state organ under section 195 of the Constitution charged with the promotion of the Bill of Rights, the DHA acts with disregard to this provision. By allowing asylum seekers to stay more than 10 years with a status that legally should be adjudicated within 6 months, the DHA is breach of sections 33 and 237 of the Constitution. The latter provides that 'constitutional obligations must be performed diligently and without delay.'

The right to dignity, being a non-derogable right,<sup>824</sup> is key to constitutional justice. Perhaps it is for this reason that the SCA took the view in the aforementioned case that the constitutional value of human dignity has no nationality because everyone is human. This thesis found that this 'human element' as ' a core constitutional value' is severely misplaced in the administration of refugee law in South Africa and has impair the passage to naturalisation for refugees. It is trite that while the refugee is entitled to every right in the Bill of Rights, an asylum seeker is not a beneficiary of most of those rights. It

---

<sup>820</sup>Preamble of the Constitution.

<sup>821</sup>Section 33.

<sup>822</sup>Section 195 (2).

<sup>823</sup>Section 237.

<sup>824</sup>Section 36.

is observed that it is perhaps for this reason that the Refugee Regulations provides that the DHA must finalise the adjudication of asylum applications within a 180 days. In refusing an asylum seeker the enjoyment of the rights contained in the Bill of Rights by neglecting to finalise their application for more than 15 years, the DHA acts with disregard to the humanity of asylum seekers. The DHA is therefore in derogation of the non-derogable right of human dignity as provided for in section 10 of the Constitution.

The transition to permanent residence for the refugees is another contentious issue if weighed against the Constitution. It is observed that the process of certification paves the way for a refugee to apply for permanent residence and the application of permanent residence is inessential. As it is argued above, to be certified to remain in the country indefinitely and to be a permanent resident is in effect one and the same thing. Subjecting refugees through the same process with massive waste of years due to administrative failures goes against the constitutional provision that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.<sup>825</sup> Subjecting refugees to the same process is a calculated attempt to frustrate their quest for naturalisation, perpetuating a permanent underclass of quasi right holders and a travesty of their human dignity.

It is observed that the citizenship model that denies birthright to children of refugees will not pass constitutional muster either. Granted that South Africa's citizenship provide

---

<sup>825</sup>Section 33.

birthright citizenship to children of citizens, a child whose either parent is a citizen, or a child of a permanent resident, it nonetheless excludes children of refugees. It is observed that the Refugees Act provides that upon the granting of a refugee status, the refugee has the right to remain in the Republic and the CC interpreted 'to remain' in its dissenting judgment as 'indefinite', meaning that the children of refugees are therefore entitled to birthright citizenship. By allowing children of refugees to be born as refugees even though their parents have lost the protection of their country of origin and their children effectively stateless, section 2 of the Citizenship Act is perpetuating the notion that some children are born insignificant. This is a misplacement of the human element in the Citizenship Act, a defeat for human dignity which offends section 10 of the Constitution of South Africa. It is contended that no one benefits if any child is denied birthright citizenship.

#### **6.1.3.6 The Biopolitics of South African Citizenship and the Naturalisation of Refugees**

The study found that South African migration policy remains geared towards security concerns and population control contingent on the erroneous promise that considerable numbers of economic migrants seek to come and stay in the country. This changing security concerns has necessitated a shift from geopolitics to biopolitics designed to restrict mobility and control the population from within. Based on a vision driven by the control of the entry and stay of migrants in the country rather than facilitating their contribution, integration and protecting their rights in South Africa, DHA tend to maintain

asylum seekers, refugees and other migrants in temporal status calculated to frustrate them into self-deportation.

It is observed that there has been a considerable political resistance in South Africa to integrate refugees and their children into full membership in the polity. The granting of refugee status has since its inception been perceived as temporal and the DHA and the government have, without compunction, pursued deportation processes even for refugees and their families who have been granted refugee status for more than 18 years.<sup>826</sup> Fear of refugees becoming a part of the South African society has become a more common sentiment than compassion in the face of massive human suffering borne from a deprivation of rights inherent in the denial of full membership in the polity. In a simple and straight forward poetry, Rudyard Kipling, a man well known for his own racism, offers perhaps a most reasonable sociological explanation to this morally reprehensible tendency of the fear of the foreigner:

The Stranger within my gate  
He may be true or kind  
But he does not talk my talk  
I cannot feel his mind.  
I see the face and eyes and mouth  
But not the soul behind

The men of my own stock  
They may do ill or well,  
But they tell the lies I am wonted to,  
They are used to the lies I tell;  
And we do not need interpreters  
When we go to buy and sell.<sup>827</sup>

---

<sup>826</sup>'SA to send refugees home' *Sowetan Live*, 4 September 2015. The government decides to send back about 2000 Angolans back home and among these, are refugees and their families who have been on refugee status for more than 18 years. It is decided that refugees from other countries will follow.

<sup>827</sup>Rudyard Kipling *The Stranger* from *Rudyard Kipling's Verses* (1945) 349 cited by Rose P 'Forced Out: The Experience of Exile' (1989) *Oxford University Lecture #1* at 15.

The biopolitical underpinnings of South African migration philosophy which reinforce the control of foreign population was captured in this excerpt after the Immigration Bill was adopted by the National Assembly of Parliament at the end of May 2002 as follows:

The Immigration Bill represents a curious mix of typographical errors and theories of migration. This Bill was always in danger of being a series of short-term to medium, ad hoc interventions rather than a coherent and holistic engagement with the migration debates....Clearly, parliament and the executive branch do not share a vision on the proper role of migration within the national transformation process....Rather than making the promised leap of faith into the 21<sup>st</sup> century to tackle the challenges of globalisation, the bill appears to want to drive the foreign barbarians from the immigration gates.<sup>828</sup>

It is observed further that the refugees' movement from an established state to one of metaphysical abandonment is contingent on South Africa's biopolitical philosophy. However, despite this reference to metaphysical abandonment, the refugee is still found within and under the control of a state, only that he or she is relegated to bare life because of the complexity of naturalisation, but yet, steeped in political power. Refugees are not just stripped from the status that defines their humanity, but due to legal uncertainty, they are dispossessed from full enjoyment of rights precisely by complying and conforming to certain normative categories in the immigration ladder.

It is found that as a biopolitical space, the South African citizenship regime is premised on inclusive exclusion. Hence the refugee is included in the state by virtue of his or her exclusion and as Haddad maintains, the refugee is part of the

---

<sup>828</sup>Business Report, 28 May 2002 cited in Maharaj B's 'Immigration to post-apartheid South Africa' (2004) *Global Migration Perspectives* No.1 at 21.

system whilst not been part of it, the refugee is both inside and outside at the same time.<sup>829</sup>

This study could not find a human rights justification as the basis for South Africa to exclude refugees that could not be used to exclude citizens as well since human dignity has no nationality. When children of refugees born in South Africa are denied citizenship at birth, they become stateless however one chose to look at it. This is one way of understanding how someone can be in state and yet remain stateless. In maintaining this denial of birthright citizenship, the system might be in danger of reviving the age old discredited philosophy of eugenics where some are born unfit to be citizens while others acquire this status from birth with all its attendant rights and benefits. In so doing, the system has bred and maintained an underclass of human misfits, a radically excluded populace. The radically excluded population, Balibar writes, are:

Those who, having being denied citizenship, are automatically denied the material conditions of life and the recognition of their human dignity, do not provide only a theoretical criterion to evaluate historical institutions against the model of the ideal constitution, they also force us to address the reality of extreme violence in contemporary political societies – nay, in the very heart of their everyday life.

It is observed further that the obstacles to naturalisation for refugees and their progenies is not just a distinct failure of administrative justice and constitutional stubbornness, but it is foundational to the biopolitics of South African citizenship which is designed to fail populations such as refugees and their descendants. Exclusive claims of sovereignty and the desire to protect its citizens and resources

---

<sup>829</sup>Haddad E 'The Refugee: The Individual between Sovereigns' (2003) *Global Society* 17 (3) 297-322 at 312.

has driven South Africa to go against the heart of its core constitutional value of human dignity even in the face of massive human suffering in the throes of refugee exclusion.

### **6.1.3.7 Conclusion**

This study has found that the lack of clarity of some legal provisions in the Refugees Act, the lack of the human element in the asylum process, the superfluous stages of permanent residence, the model of citizenship, the neglect of international obligations to refugees and the total disregard of the Constitution by the DHA is an impediment to the naturalisation process of refugees in South Africa.

## **6.2 Recommendations**

### **6.2.1 Naturalisation of Refugees under International Law**

The weakness of the international human rights system is predicated on the rights of citizens within any given state. It is recommended that for human rights to be truly universal, the international system must wrestle the 'human' from the citizen because the citizen is not remotely the best example of the human. Citizenship rights should be just a portion of human rights and that the human should be the beginning and end of rights wherever he or she may find himself/herself. This will ultimately render Article 34 of the 1951 Refugee Convention redundant because

the human will carry with him or her the full power of rights wherever they are found. If the international community cannot make these changes and give the UDHR a legal force including de-politicising and the de-territorialisation of human rights, universal human rights will remain as they are today, rights of private idiocy.

## **6.2.2 The Asylum Process as the first stage of Naturalisation of Refugees**

In order to discharge its international obligation to refugees, the effect of the *Mayongo* judgment,<sup>830</sup> administrative failures of the DHA, the disregard of Refugee Regulations, or the implications of the Bill of Rights, calls for the amendment of the Refugees Act. Rather than granting asylum seekers 3 to 6 months extensions whenever their permit expires, asylum permits should be valid for 2 years renewable. This is so because the DHA has rarely finalised adjudication of asylum claims within the 6 months timeframe laid down by law. A two years extension will equally stabilise the asylum seeker and keep alive the security of protection and the dreams of belonging.

In light of the administrative dysfunction of the DHA, the enjoyment of all the rights in the Bill of Rights currently available only to refugees, should be extended to asylum seekers without the right to remain pending the finalisation of their status. This is so because the DHA has maintained asylum applicants in the same temporal status for more than 10 years.

In line with this administrative uncertainty, section 27 (c) of the Refugees Act laying down the eligibility for permanent residence be amended by the deletion and insertion of

---

<sup>830</sup>*Mayongo v Refugee Appeal Board* (2007) JOL 19645 (T).

respectively, 'after 5 years continuous stay with a refugee status' to '5 years of continuous stay from date of application of asylum.' This is so because the *Mayongo* judgment<sup>831</sup> made it clear that the refugee status does not make the refugee one, but simply confirms he or she as one. Add to this, is of course the excessive delays at the DHA leading to serious deprivation of human rights which is deferring the dreams of naturalisation to an errand into the wilderness. It is imperative therefore, in line with human dignity and in keeping with the Constitution to effect these changes. It would help to speed up adjudication processes in keeping with section 33 of the Constitution.

The progressive jurisprudence by the courts as shown in this thesis is a legitimate basis to inspire public interest litigation in this area of the law with the aim of reviewing both the refugee and immigration legislation and practices. It is recommended that NGOs and other human rights institutions take advantage of this progressive jurisprudence to expand the frontiers of human rights in South Africa.

### **6.2.3 The Transitional Phase from Refugee Status to Permanent Residence**

The certification of indefinite refugee process under section 27 (c) is legally redundant because it serves little purpose to certify that a refugee would be a refugee indefinitely. Viewed as an administrative delaying tactic to frustrate the passage to naturalisation of refugees, it is recommended that this provision be deleted.

---

<sup>831</sup>Ibid, para 8.

The transition from certification of indefinite refugee status to an application for permanent resident under the Immigration Act pose a conflict of law and is itself a travesty of justice. This is so because a refugee is not a normal migrant and from inception, immigration law does not regulate their stay anymore than it should bring the refugee status to an end. What would be the rationale to grant permanent residence to someone who has been certified to reside in the country indefinitely? This is nothing but administrative and legal gimmick designed to slow down the progress of naturalisation.

It is recommended that there must be a clear cut distinction between the naturalisation of normal migrants and refugees because their rights have never been regulated by the same acts from the outset. Refugees should, after 5 years of continuous stay with their status, apply for citizenship without passing through the Immigration Act. These changes have human rights implication of saving refugees more than 5 years of intentional administrative frustration from the DHA. The discretion to grant citizenship which rests with the minister of Home Affairs should replace the certification and permanent residence application phases for the refugees towards naturalisation in South Africa.

#### **6.2.4 The Biopolitical Impact of the Citizenship Act**

A citizenship regime that allows refugees to stay in the country for more than 18 years without granting them citizenship, is certainly inconsistent with human rights and in particular, affronts human dignity. Such a citizenship model needs rethinking especially in a constitutional democracy founded on the principles of human dignity, freedom and human rights such as South Africa's. Ayelet Shachar's recommendation of a new

category of regulating citizenship and naturalisation process once any migrant enters and reside in a territory is recommended here to bolster South Africa's citizenship model and perhaps help roll back the spectre of human rights abuse from the DHA. Shachar propose the implementation of the *jus nexi* principle which she describes as a genuine connection, interests and sentiments that a migrant develops over time while in a territory.<sup>832</sup> Sending refugees back after 18 years, with children born and raised in the country and who know no other culture but the South African culture is not only inappropriate, but a defeat for humanity. The acquisition of citizenship based on the *jus nexi* principle would do justice to refugees and the non-derogable right of dignity in the Constitution of South Africa.

The birthright provision in section 2 of the Citizenship Act granting birthright citizenship to children born of South African parents, either one South African parent or a permanent resident should be amended to include children of recognised refugees. This is so because it is amoral to implicate the child of refugees in the status of his or her parents while they play no role for such parent's refugee status. It is not different from punishing a child for the offence of the parents. It will be against human dignity to allow anyone to be born with scanty rights thereby condemning the child to start life in a minus. Section 2 of the Citizenship Act is therefore discriminatory, inconsistent with human dignity and certainly against the Constitution. In order to bring this provision in line with the Constitution, it is recommended that it be amended to include children born of recognised refugees in South Africa. It is imperative to amend this provision, and if for

---

<sup>832</sup>Shachar A *The Birthright Lottery: Citizenship and Global Inequality* (2009) 169.

no other reason, but because the Constitution does not believe that any insignificant person was ever born – hence, it made human dignity sacrosanct.

### **6.2.5 Final Recommendation**

No moral argument will therefore survive the principle of justice if it challenges the equal moral worth of all individuals. If South Africa wishes to impose different treatment to different groups of people in its territory, it would have to be justified based on the equal moral worth of every individual who lives in it. If this cannot be justified, the above recommendations are quintessential for the equal moral worth of refugees and their descendants as they seek naturalisation and the restoration of their human rights and dignity in South Africa. For a law or constitution which proclaims human rights and dignity for all, injustice would be to forget that humanity exist in the face of each person, their uniqueness and their unrepeated singularity throughout the history of humankind.

## BIBLIOGRAPHY

### Books

Agamben G *Homo Sacer: Sovereign Power and Bare Life*, Stanford: Stanford University Press, 1998

Agamben G *Means Without End*, Minneapolis: University of Minnesota Press, 1996

Agamben G *Remnants of Auschwitz: The witness and the archive*, Zone Books, 2002.

Aleinikoff & Chetail *Migration & International Legal Norms*, T.M.C Asser Press, The Hague, 2003

Aleinikoff A & Klusmeyer D (eds.) *Citizenship Policies for an Age of Migration*, Washington: Dc: Carnegie Endowment for International Peace, 2002

Anderson M *Frontiers, Territory and State Formation in the Modern World*, Polity Press, Oxford, 1996

Arendt H *For the Love of the World*, New Haven and London: Yale University Press, 1982

Arendt H *The Origins of Totalitarianism*, Harcourt Brace Jovanovich Publishers, San Diego, New York and London, 1951

Bauman Z *Society under Siege*, Polity Press, 2002

Blackstone W *Commentaries on the Laws of England*, Law Printers to the King Most Excellent Majesty, 1775

Bosniak L *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Princeton University Press, 2006

Boyer C *The many mirrors of Foucault and their architectural reflections* in Dehaene et al (ed.) *Heterotopia and the City*, London and New York: Routledge, 2008

Bowman P & Stamp R (eds.) *Reading Rancière*, London and New York: Continuum, 2011

Buergenthal T *International Human Rights in a Nutshell*, West Publishing Co. Minnesota, 1988

Brubaker WR *Citizenship and Nationhood in France and Germany*, New York: New York University Press, 1992

Butler J & Spivak G *Who Sings the Nation-State*, Calcutta: Seagull, 2007

- Chimni B *International Refugee Law*, SAGE Publications Ltd, New Delhi, 2000
- Cole P *Philosophies of Exclusion*, Edinburg: Edinburg University Press, 2000
- Collinson S *Beyond Borders: West European Migration Policy Towards the 21<sup>st</sup> Century*, Royal Institute of International Affairs, 1993
- Crush J and Williams V *The New South Africans? Immigration amnesties and their aftermath*, Cape Town: Southern African Migration Project, 1999
- Crush J and William V 'Introduction: The Means of Amnesty' in Crush J and William V (eds.) *The New South African? Immigration Amnesties and Their Aftermath*, Cape Town, 1999
- De la Hunt L.A *Refugees and Immigration Law in South Africa* in Crush J (ed.) *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, Cape Town, 1998
- De Vattel E, *The Law of Nations, or, Principles of the Law of Nature* (G G & Robinson J, revised eds) bk I, ch III [33] [trans of: *Les Droit des Gens ou Principes de la Loi Naturelle* (first published in 1758)], Liberty Fund, 1797
- De Vitoria F *On the Indians Lately Discovered* (Bate J trans) sect III, 386 [trans of: *De Indis Noviter Inventis* (first published 1532)], Carnegie Institute, 2000
- Douglas M *Purity and Danger. An Analysis of the Concept of Pollution and Taboo*, New York, Praeger, 1966
- Donnan H & Wilson T *Borders: Frontiers of Identity, Nation and State*, Bloomsbury Academic, 1999
- Donnelly J *Universal Human Rights in Theory and Practice*, Cornell University Press, 2003
- Douzinas C *The End of Human Rights*, Hart Publishing, Oxford, 2000
- Dummett A & Nicol A *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, 1990, London: Weidenfeld & Nicolson, 1990
- Feller E, Turk V & Nicholson F *Refugee Protection in International Law*, Cambridge University Press, 2003

- Foucault M *The History of Sexuality*, Vol.1 (Trans. Robert Hurley), New York: Vintage Books, 1981
- Foucault M *The History of Sexuality: An Introduction*, Vintage; Reissue Edition, 1990
- Foucault M *Les mailles du pouvoir* in *Ditset Ecrits*, Paris: Gallimard, 1994
- Foucault M *Society Must Be Defended: Lectures at the Collège de France, 1975-1976*, Bertani M & Fontana A (eds.) New York: Picador, 2003
- Foucault M *The Archaeology of Knowledge*, New York: Pantheon Books, 1972
- Foucault M *Questions of Method* in Faubion J (ed.) *Essential Works of Foucault 1954-1984, Vol. III: Power*, New York: The New Press, 2000
- Foster M *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge University Press, 2007
- Fukuyama F, *The End of History and the Last Man*, Free Press, 1992
- Fustel de Coulanges D *The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome*, Library of Congress, 1980
- Gibney M and Hansen R *Immigration and Asylum from 1900 to Present*, Santa Barbara, CA, ABC-CLIO, 2005
- Goodwin-Gill G & Mcadam J *The Refugee in International Law*, Oxford: Oxford University Press, 1996
- Grotius H, *The Freedom of the Seas* (Ralph van Deman Magoffin trans) [trans of: *Mare Liberum* (first published 1609)], Oxford: Oxford University Press, 1916
- Grotius H, *On the Law of War and Peace* (Francis W Kelsey trans) Vol.2, 201 [trans of: *De Jure Belli ac Pacis Libri Tres* (first published 1625)], Oxford: Oxford University Press, 1925
- Haddad E *The Refugee in International Society: Between Sovereigns*, Cambridge: Cambridge University Press, 2008
- Handmaker J, De la Hunt & Klaaren J *Advancing Refugee Protection in South Africa*, Berghahn Books, New York and Oxford, 2008
- Hannum H *The Right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers, 1987
- Hathaway J *The Law of Refugee Status*, Cambridge University Press, 1991

Hathaway J *The Rights of Refugees under International Law*, Cambridge University Press, 2005

Heater D *What is Citizenship?*, Cambridge: Polity Press, 1999

Heather D *A Brief History of Citizenship*, Edinburgh University Press: Edinburgh, 2004

Hassim S, Kupe T & Worby E *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa*, Wits University Press, 2008

Hegarty A and Leonard S *A Human Rights: An Agenda for the 21st Century*, London: Cavendish, 1999

Henkin L *The Age of Rights*, New York: Columbia University Press, 1990

Henkin L and Hargrove JL *Human Rights: An Agenda for the Next Century*, Washington Dc: American Society of International Law, 1994

Habermas J *The postnational constellation: political essays*, The MIT Press: 1st MIT Press Edition, 2001

Hewlett N *Badiou, Balibar, Rancière: Rethinking Emancipation*, London: Continuum International Pub. Group, 2007

Holborn L *Refugees - A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951-72*, Scarecrow Press Incorporated: New Jersey, 1975

Human Rights Watch *"Prohibited Persons" Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa*, New York, Washington, London, Brussels: Library of Congress, 1998

Jayawickrama N *The Judicial Application of Human Rights Law*, Cambridge: Cambridge University Press, 2002

Jeeves A *Migrant Labour in South Africa's Economy*, McGill-Queens's Press – MQUP, 1985

Jennings R & Watts A (eds.) *Oppenheim's International Law*, Oxford: Oxford University Press, 1992

Joly D & Nettleton C *Refugees in Europe*, London: Minority Rights Group, London: MRG, 1990

Jones M & Baglay S *Refugee Law: Essentials of Canadian Law*, Irwin Law Publishers, 2007

Johnston H *British Emigration Policy 1815-1830: Shovelling out Paupers*, Oxford: Clarendon Press, 1972

Keith M & Pile S *Place and the Politics of Identity*, London: Routledge, 1993

Khan F & Schreier T *Refugee Law in South Africa*, Cape Town: Juta & Co. Ltd, 2014

Klaaren J and Rutinwa B 'Towards the Harmonization of Immigration and Refugee Law in SADC' *Migration Dialogue for Southern Africa (MIDSA) Report No. 1*, Idasa, Cape Town and Queens University Press, Canada, 2004

Klotze A *Migration and National Identity in South Africa, 1860-2010*, New York: Cambridge University Press, 2013

Kneebone S *Refugees, Asylum Seekers and the Rule of Law*, Cambridge University Press, 2009

Koehn P *Refugees from Revolution: US Policy and Third-World Migration*, Westview Press, 1991

Koestler A *Darkness at Noon*, Penguin, 1941

Kourula P *Broadening the Edges: Refugee Definition and International Protection Revisited*, Martinus Nijhoff Publishers: The Hague, 1997

Kulisher E *Europe on the Move, War and Population Changes, 1917-1947*, New York: Columbia University Press, 1948

Kushner T & Knox K *Refugees in an Age of Genocide*, Frank Cass: London, 1999

Kristeva J *Strangers to Ourselves*, New York: University of Columbia Press, 1991

Lillich R *The Human Rights of Aliens in Contemporary International Law*, Manchester University Press, 1984

Locke J *Two Treatise of Government*, London, 1689

Locke J *The Second Treatise of Government*, Thomas P. Peardon (ed.), New York: Bobbs-Merrill, 1952

Loescher G *Beyond Charity: International Cooperation and the Global Refugee Crisis*, New York and Oxford: Oxford University Press, 1993

- Loescher G & Scanlan J *Calculated Kindness: Refugees and America's Half Open Door, 1945 to the Present*, New York: Free Press, 1996
- Madsen A *The Status of Refugees in International Law*, Leyden: Sijthoff, 1966
- Manby B *Citizenship Law in Africa: A Comparative Study*, Open Society Foundation: New York, 2010
- Manfred F, Wilke S and Gray R *What is Neoliberalism*, Minnesota: University of Minnesota Press, 1989
- Malkki L *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania*, Chicago: Chicago University Press, 1995
- Marrus M *The Unwanted: European Refugees in the Twentieth Century*, Oxford: Oxford University Press, 1985
- Mary T *The Political Thought of Jacques Rancière*, The Pennsylvania State University Press: University Park: Pennsylvania, 2008
- Miller D *On Nationality*, Oxford: Clarendon Press, 1995
- Minnar A and Hough M 'Who goes there? Perspectives on Clandestine Migration & Illegal Aliens in Southern Africa', Pretoria: Human Science Research Council Publishers, 1996
- Muntarhorn V *The Status of Refugees in Asia*, Oxford: Clarendon Press, 1992
- Mazrui A *On Heroes and Uhuru-Worship*, Longmans, 1967
- Neocosmos M *From 'Foreign Natives' to 'Native Foreigners': Explaining Xenophobia in Post-apartheid South Africa*, Dakar: Codesria, 2010
- Ong A *Buddha is Hiding: Refugees, Citizenship, the New America*, Berkeley and Los Angeles: University of California Press, 2003
- Palmer R *The Age of Democratic Revolutions*, Princeton NJ, Princeton University Press, 1959
- Peberdy S *Selecting Migrants: National Identity and South Africa's Immigration Policies 1910-2008*, Wits University Press, 2009
- Plutarch "Romulus" in *Lives of the Noble Greek and Romans* ( trans: J. Langhorne), Columbus (Ohio): Public School Library, 1886
- Rancière J *Aesthetics and its Discontent*, Cambridge, Polity, 2009

- Ratushinskaya I *Grey is the Colour of Hope*, Vintage, 1989
- Robinson N *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation*, New York, Institute of Jewish Affairs, 1953
- Robins S *Limits to Liberation: Culture, Citizenship and Governance After Apartheid*, Oxford: James Currey, 2005
- Rose N *Powers of Freedom: Reframing Political Thought*, Cambridge: Cambridge University Press, 1999
- Rousseau JJ *The Social Contract* (George Douglas Howard Cole trans, Cosimo Classics) 101 [trans of: *Du Contract Social* (first published 1762)], Gale Ecco, 2008
- Rudyard Kipling *The Stranger from Rudyard Kipling's Verses*, Garden City, New York: Doubleday, Doran and Company, 1945
- Ruthström-Ruin C *Beyond Europe: the Globalisation of Refugee Aid*, Lund: Lund University Press, 1993
- Serensen JM *The Exclusive European Citizenship: The Case for Refugees and Immigrants in the European Union*, Aldershot: Ashgate, 1996
- Shachar A *The Birthright Lottery: Citizenship and Global Inequality*, Cambridge, MA: Harvard University Press, 2009
- Schmitt C *Political Theology. Four Chapters on the Concept of Sovereignty*, University of Chicago Press, 1985
- Simpson A *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, Oxford University Press, 2001
- Sir Simpson J *The Refugee Problem—Report of a Survey*, London, 1939
- Skran C *Refugees in Inter-war Europe: The Emergence of a Regime*, Oxford: Clarendon Press, 1995
- Soguk N *States and Strangers: Refugees and Displacement of Statecraft*, University of Minnesota Press, 1999
- Solzhenitsyn A *One Day in the Life of Ivan Denisovich*, Knopf Publishers, 1974
- Sophocles, *Oedipus at Colonus* in *The Oedipus Plays of Sophocles* (Paul Roche trans), New York: New American Library, 1958

Steiner and Alston *International Human Rights in Context: Law, Politics, Morals*, Oxford: Oxford University Press, 1996

Stoessinger G *The Refugee and the World Community*, Minneapolis: University of Minnesota Press, 1956

Tabori A *The Anatomy of Exile*, London, Harrap, 1972

Trenholme N *The Right of Sanctuary in England: A Study in Institutional History*, Columbia: University of Missouri, 1903

Torpey J *The Invention of the Passport: Surveillance, Citizenship and the State*, Cambridge University Press, 2000

Turner V *The Forest of Symbols: Aspects of Ndembu Ritual*, Cornell University Press, 1967

Vernant J *The Refugee in the Post-War World*, London: George Allen & Unwin Ltd, 1953

Von Savigny F *System des Heutigen Romischen Rechts (System of Modern Roman Law)*, Berlin: F. Vahlen, 1840-49

Walberg R *Human Rights and Humanitarian Law*, United Nations Centre for Human Rights, Washington Dc, 1994

Walzer M *Spheres of Justice*, New York: Basic Books, 1983

Walzer M *Spheres Justice: A Defense of Pluralism and Equality*, New York: Basic Books, 1983

Webber F *Borderline Justice: The Fight for Refugee and Migrant Rights*, London: Pluto Press, 2012

Weis P *The Refugee Convention, 1951: The Travaux Preparatoires Analysed* (Posthumously Published) Cambridge University Press, 1995

Weiner Myron *The Global Migration Crisis: Challenges to States and to Human Rights*, New York: Harper Collins College Publishers, 1995

Weil S *The Need for Roots* (Arthur Wills trans), London: Routledge &Kegan Paul, 1952

Weissbrodt D *The Human Rights of Non-Citizens*, Oxford, New York: Oxford University Press, 2008

Zieck M *UNHCR and Voluntary Repatriation of Refugees: A Legal Analyses*, The Hague: Martinus Nijhoff, 1997

Zolberg A, Astri S & Sergio A. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*, New York: Oxford University Press, 1989

### **Chapters in Books**

Auden WH *Refugee Blues* in Wain J (ed.) *Oxford Anthology of Great English Poetry*, Oxford University Press, 1990

Balibar E *Is a European Citizenship still Possible?* In Balibar E (ed.) *Politics and the other scene*, London, New York: Verso, 2002

Bayefsky A *The UN and the international protection of human rights* in Galligan B & Sampford (eds.) *Rethinking human rights*, Federation Press: Sydney, 1997

Bluntschli J *Freedom and Rights of Freedom* in Lalor, *Cyclopaedia of Political Science, Political Economy, and of the Political History of the United States by the Best American and European Writers*, Vol. II, New York: Maynard, Merrill, & Co, 1883

Castillo MA and Hathaway J *Temporary Protection* in Hathaway J (ed.) *Reconceiving International Refugee Law*, Martinus Nijhoff Publishers: The Hague, 1997

Coles G *Approaching the Refugee Problem Today* in Loescher G and Monahan L (eds.) *Refugees and International Relations*, Oxford: Oxford University Press, 1990

Fassman H & Munz R *European East – West Migration, 1945 - 1992* in Cohen R (ed.) *Cambridge Survey of World Migration*, Cambridge University Press, 1995

Jagerskiold S *Historical Aspects of the Right to Leave and Return* in Vasak K & Liskofsky S (eds.) *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19-20 June, 1972*, New York: American Jewish Committee, Ann Arbor, Michigan, 1972

Jefferson T *A Summary View of the Rights of British America (1774)* in Wakelyn J (ed.) *America's Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance*, Westport, Connecticut: Greenwood Press, 2006)

Klaaren J *Contested Citizenship in South Africa* in Andrews P & Ellman S (eds.) *The Post-Apartheid Constitution: Perspectives on South Africa's Basic Law*, Cape Town: Juta, 2001

Klaaren J and Sprigman C *Refugee Status Determination Procedures in South Africa* in Handmaker J, De la Hunt L and Klaaren J (eds.) *Advancing Refugee Protection in South Africa*, New York: Berghahn Books, 2008

Kirby M *Human Rights: An agenda for the future* in Galligan B & Sampford (eds.) *Rethinking human rights*, Federation Press: Sydney, 1997

Kymlicka W *Territorial Boundaries: A Liberal Egalitarian Perspective* in Miller D & Hashmi S (eds.) *Boundaries and Justice: Diverse Ethical Perspectives*, Princeton: Princeton University Press, 2001

Lewis N *Human Rights, Law and Democracy in an Unfree World* in Evans T (eds.), *Human Rights Fifty Years On: A Reappraisal*, Manchester: Manchester University Press, 1998

Melander G *The Concept of the Term "Refugee"* in Bramwell A & Marrus M (eds.) *Refugees in the Age of Total War*, London: Unwin Hyman, 1988

Nobel P *Refugees and other Migrants viewed with a legal eye – or how to fight confusion* in Peterson K and Rutherford A (ed.) *Displaced Persons*, Coventry, UK: Dangaroo Press, 1988

O'Neill O *Justice and Boundaries* in Brown C (ed.) *Political Restructuring in Europe: Ethical Perspectives*, London: Routledge, 1994

Owen P 'Beyond "Bare Life": Refugees and the "Right to have Rights"', in Betts A & Loescher G (ed.) *Refugees and International Relations*, Oxford University Press, 2011

Patterson S *The Poles: An Exiled Community in Britain* in Watson J (ed.) *Between Two Cultures: Migrants and Minorities in Britain*, Basil, Oxford: Blackwell, 1977

Pellizzi F *To Seek Refuge: Nations and Ethnicity in Exile* in Guidieri R, Pellizzi F & Tambiah S (eds.) *Ethnicities and Nations: Processes of Interethnic Relations in Latin America, Southeast Asia, and the Pacific*, University of Texas Press: Austin, 1988

Plender R & Mole N 'Beyond the Geneva Convention: Constructing a de facto right of asylum from international human rights instruments' in Nicholson F & Twomey P (eds.) *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press, 1999

Rogge J *Repatriation of Refugees* in Allen T and Morsink H (ed.) *When Refugees Go Home: African Experiences*, Trenton, New Jersey: Africa World Press, 1994

Sieghart P *International Human Rights Law: Some current problems* in Blackburn R & Taylor J (eds.) *Human Rights for the 1990s: Legal, political and ethical issues*, London: Mansell, 1991

Stoessinger J *The Refugee and the World Community*, University of Minnesota Press, 1956

Sztucki J 'Who is a Refugee' *The Convention Definition: Universal or Obsolete?* in Nicholson & Twomey (eds.) *Refugee Rights and Realities*, University of Cambridge Press, 1999

Tuitt P *Rethinking the Refugee Concept* in Nicholson F & Twomey P (ed.) *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press, 1999

Warner D *The Refugee State and State Protection* in Nicholson F and Twomey's (ed.) *Refugee Rights and Realities*, Cambridge University Press, 1999

Wood J & Shearing C *Nodal Governance, Denizenship and Communal Space: Challenging the Westphalian Ideal* in Robins S (ed.) *Limits to Liberation: Culture, Citizenship and Governance After Apartheid*, Oxford: James Currey, 2005

Torpey J *Leaving: A Comparative View* in Green N & Weil F (eds.) *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation*, Champaign, IL: University of Illinois Press, 2007

Zolberg A *The Exit Revolution* in Green N & Weil F (eds.) *Citizenship and Those Who Leave: The Politics of Emigration and Expatriation*, Champaign, IL: University of Illinois Press, 2007

## **Journal Articles**

Amoore L 'Biometric Borders: governing mobilities in the war on terror' (2006) 25 *Political Geography* 336-351

Amit R 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' (2011) 23 (3) *Int'l J. Refugee L.* 458-488

Balibar E 'Outlines of a Topography of Cruelty: Citizenship and Civility in the Era of Global Violence' (2001) 8 (1) *Constellations* 15-29

Batchelor C 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 (1/2) *International Journal of Human Rights Law*, 156-183

Barutciski M 'The Development of Refugee Law and Policy in South Africa: A Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill' (1998) 10 *Int'l J. Refugee L.* 700-724.

Belvedere, M. Florencia 'Insiders but Outsiders: The Struggle for the Inclusion of Asylum Seekers and Refugees in South Africa' (2007) *Refugee, Centre for Refugee Studies, York University and Queen's University*, Vol. 24, No.1: 57-70

Barnet L '*Global Governance and the Evolution of the International Refugee Regime*' (2002) 14 *International Journal of Refugee Law* 238-262

Bernstorff J 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) *The European Journal of Human Rights* 19 (5) 903-924

Bjorklund A '*Reconciling States Sovereignty and Investor Protection in Denial of Justice Claims*' (2005) 45 (4) *Virginia Journal of International Law* 809-896

Blaise C 'The Border as a Fiction' (1990) *Borderlands Monograph Series No.4*, 533-554

Blay S and Tsamenyi M 'Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the status of refugees' (1990) 2 (4) *International Journal of Refugee Law* 527-561

Bosniak L 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 *Theoretical Inq. L.* 389-410

Byrne R & Shacknove A '*The Safe Country Notion in European Asylum Law*' (1996) 9 *Harvard Human Rights Journal* 185-226

Cahn C 'The Right to a Nationality is a human right: the current trend towards recognition' (1991) *Human Rights Law Journal*, 12(1) 1-14

Carens JH 'Aliens and Citizens: The Case for Open Borders' (1987) *The Review of Politics* 49 (2) 251-273

Chol A 'The Legal Dimensions of the Refugee Problem in Africa' (1992) *Migration* 14 (5) 1-19

Crush J & Vincent W 'Evaluating Refugee Protection in South Africa' (2002) *Southern African Migration Project: Migration Policy Brief No.7*, 1-17.

Crush J 'Fortress South Africa and the deconstruction of Apartheid's migration regime' (1999) 30 *Geoforum* 1-11

- Dauvergne C 'Challenges to Sovereignty: migration laws for the 21<sup>st</sup> century' (2003) *New Issues in Refugee Research, Working Paper No.3*, 1-13
- Dauvergne C 'Citizenship with a Vengeance' (2007) 8 *Theoretical Inq. L.* 489-507
- Dauvergne C 'Amorality and Humanitarianism in Immigration Law' (1999) 37 *Osgoode Hall Law Journal* 597-623
- Davis S 'Truly' *International Refugee Law? Or yet Another East/West Divide?* (2002) *Social Alternatives, Vol. 21 (4)* 37-44
- Davis S 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) 19 *International Journal of Refugee Law*, 703-728
- De la Hunt LA 'Refugee Law in South Africa: Making the Road Longer?' in *World Refugee Survey 2002*' (2002) *US Committee for Refugees, Washington DC*
- Douzinas C 'Human Rights at the End of History' (1999) *Journal of Theoretical Humanities* 4 (1) 99-114
- Douzinas C 'Law's Birth and Antigone's Death: On Ontological and Psychoanalytical Ethics' (1994) 16 *Cardozo L. Rev.* 1325-1362
- Dunbar-Ortiz R & Harrell-Bond B 'Africa Rights Monitor: Who Protects the Human Rights of Refugees?' (1987) *Africa Today*, Vol.34, (1/2)105-125
- Ezrahi in Warner D 'Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics' (1994) *Journal of Refugee Studies* 7(2/3) 160-174
- Farer T 'How the International System Copes with Involuntary Migration: Norms, Institutions and State Practice' (1995) 17 *Human Rights Quarterly* 72-100
- Fitzpatrick J 'Revitalizing the 1951 Convention' (1996) 9 *Harv. Hum. Rts J* 229-253
- Fauchille P 'The Rights of Emigration and Immigration' (1924) 9 *International Labour Review* 317-320
- Feldman A 'On Cultural Amnesia: From Desert Storm to Rodney King' (1994) 21 *American Ethnologist*, 404-418
- Fisher M 'Invoking "Fear" Studies' (2006) *Journal of Curriculum Theorizing* 22 (4) 39-71
- Franke MFN 'The Unbearable Rightfulness of being human: Citizenship, Displacement, and the right to not have rights' (2011) *Citizenship Studies* 15(1) 39-56

Franke MFN 'Refugee registration as foreclosure of the freedom to move: the virtualization of refugees' rights within the maps of international protection' (2009) *Environment and planning D: Society and Space* 27 (2) 352-369

Franke MFN 'Self Determination versus the Determination of self: a critical reading of the colonial ethics inherent to the United Nations declaration in the rights of indigenous people' (2007) *Global Ethics* 3(3)368

Gilbert L 'Resistance in the neoliberal city, City: analysis of urban trends, culture, theory, policy, action' (2005) *City* 9 (1)

Gwynn R 'England's First Refugees' (1985) *History Today*, Vol.35 (5) 22-28

Haddad E 'The Refugee: The individual between Sovereigns' (2003) *Global Society* 17(3), 297-322

Haggis J and Schech S 'Refugees, Settlement process and citizenship making: An Australian case study' (2010) *National Identities* 12 (4) 365-379

Halfman J 'Citizenship, universalism, migration and the risk of exclusion' (1998) *The British Journal of Sociology* 49 (4) 513-533

Higgins R 'The right in international law of an individual to enter, stay in and leave a country' (1973) *International Affairs* 49, 341-357

Handmaker J 'Returning Home: Learning Lessons from the Past, and Promoting Safety and Dignity in Repatriation and Return' (1999) 3 *Africa Legal Aid Quarterly*, 19-27

Handmaker J 'Who Determines Policy: Promoting the Right of Asylum in South Africa' (1999) *International Journal of Refugee Law* 11 (2) 290-309

Harrington J 'Citizenship and the Biopolitics of Post-nationalist Ireland' (2005) *Journal of Law and Society* 32 (3) 430-444

Hathaway J 'A Reconsideration of the Underlying Premise of Refugee Law' (1989) *Harvard International Law Journal*, Vol. 31(1) 129-147

Hathaway J & Neve R 'Making International Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 *Harv. Hum. Rts. J.* 115-211

Hein J 'Refugees, Immigrants, and the state (1993) *Annual Review of Sociology*' Vol.19, 43-59

Hindess B 'Citizenship in the international management of populations' (2000) *American Behavioral Scientist* 43, 1486-1497

- Hindess B 'Citizenship for all' (2004) *Citizenship Studies* 8 (3) 305-315
- Holborn L 'The Legal Status of Political Refugees, 1920-1938' (1939) 32 *American Journal of International Law* 680-703
- Huntington S 'The Clash of Civilizations?' (1993) *Foreign Affairs* 72 (3) 22-49
- Kaputu F 'Refugees: the "Other" Human Face, and the "Other" academics, an African and Personal Experience' (2012) *Journal of Global Citizenship & Equity Education*, Vol. 2 (2), 182-196
- Kerwin D 'Toward a Catholic Vision of Nationality' (2009) 23 *Notre Dame J.L. Ethics & Public Policy* 197-207
- Kibreab G 'Revisiting the Debate on People, Place, Identity and Displacement' (1999) *Journal of Refugee Studies* 12 (4) 384-410
- Kingsbury B 'Sovereignty and Inequality' (1998) *European Journal of International Law* Vol.9, 599-625
- Klaaren J 'Viewed from the Past, the Future of South African Citizenship' (2010) *African Studies* 69:3, 385-401
- Kleinsmidt V & Manicom D 'A Policy Analysis of the Refugee Act 130 of 1998' (2010) *Africa Insight* 39 (4) 164-181.
- Klotz A 'South Africa as an Immigration State' (2012) *Politicon: South African Journal of Political Studies* 39 (2), 189-208
- Kneebone S 'Strangers at the Gate: Refugees, Citizenship and Nationality' (2004) *Australian Journal of Human Rights* 10 (1) 33-59
- Landau L 'Loving the Alien? Citizenship, Law, and the Future in South Africa's Demonic Society' (2010) *African Affairs* 109/435, 213-230
- Le Roux W 'Migration, Disaggregated Citizenship and Voting Rights' (2009) Seminar paper presented at the Forced Migration Studies Program, Wits, September 2009
- Löfgren O 'Crossing the Borders: the nationalization of anxiety' (1999) 29 *Ethnologica Scandinavica* 5-27
- Macklin A 'Who Is the Citizen's Other? Considering the Heft of Citizenship' (2007) 8 *Theoretical Inq. Law* 333-366

Mcadam J 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) *Melbourne Journal of International Law*, Vol. 12 (1) 27-56

Maharaj B 'Immigration to Post-apartheid South Africa' (2004) 1 *Global Migration Perspective*

Makauwa Mutua 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harv. Hum. Rts. J.* 63-114

Minnar A 'Migrants' Rights: The South African Experience Post-1994' (2000) *Institute for Human Rights and Criminal Justice Studies, Paper presented to the 14<sup>th</sup> International Conference of the International Society for the Reform of Criminal Law: Sandton International Convention Center, Johannesburg, South Africa, 3-7 December 2000*

Malkki L 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization' (1996) *Cultural Anthropology*, Vol.11 (3) 377-404

Mazower M 'The Strange Triumph of Human Rights, 1933-1950' (2004) *The Historical Journal* 47 (2) 379-398

Matsinhe DM 'Africa's Fear of Itself: the ideology of *Makwerekwere* in South Africa' (2011) *Third World Quarterly* 32 (2) 295-313.

Miranda C *Toward a Broader Definition of Refugees: 20<sup>th</sup> Century Development Trends* (1990) 20 *California Western International Law Journal* 315-324

Mokgoro J Y 'Ubuntu and the Law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 1-11

Mokgoro JY 'Ubuntu, the Constitution and the Rights of Non-Citizens (2010) 2 *STELL LR* 221-229

Mosselson A 'There is no difference between citizens and non-citizens anymore: Violent Xenophobia, Citizenship and the Politics of Belonging in Post-Apartheid South Africa' (2010) *Journal of Southern African Studies* 36 (3) 644-648

Neal W 'Foucault in Guantanamo: Towards an Archeology of the Exception' (2006) *Security Dialogue* 37 (1) 31-46

Newman D 'On Borders and Power: A Theoretical Framework' *Journal of Borderland Studies* (2003) 13-25

- Nyamnjoh F 'From Bounded to Flexible Citizenship: Lessons from Africa' (2007) *Citizenship Studies* 11 (1) 73-82
- Nyers P 'Abject Cosmopolitanism: The politics of protection in the anti-deportation movement' (2003) *Third World Quarterly* 24 (6) 1069-1093
- Ojakangas M 'Impossible Dialogue on Bio-power' (2005) 2 *Foucault Studies* 5-28
- Okhonmina S 'States Without Borders: Westphalia Territoriality under Threat' (2010) *J. Soc. Sci* 24 (3) 177-182
- Ong A 'Mutations in Citizenship' (2006) *Theory, Culture and Society* 23 (2/3) 499-505
- Parekh B 'Cosmopolitanism and Global Citizenship' (2003) *Review of International Studies* 29 (1) 3-17
- Peberdy S 'Imagining Immigration: Inclusive and Exclusive Priorities in Post-1994 South Africa' (2001) *Africa Today*, Vol. 48 (3) 139-158
- Pupavac V 'Refugees in the 'sick role': stereotyping refugees and eroding refugee rights' (2006) *New Issues in Refugee Research*, Research Paper No. 128
- Raustiala K 'The Geography of Justice' (2005) 73 (6) *Fordham L. Rev.* 2501-2560
- Rose P 'Some Thoughts about the Descendants of Theseus' (1981) *International Migration Review*, Vol. 15, No. 1/2 8-15
- Ranciere J 'Who is the Subject of the Rights of Man?' (2004) *The South Atlantic Quarterly* 103 (2/3) 297-310
- Rose P 'Forced Out: The Experience of Exile' (1989) *Oxford University Lecture # 1*
- Rutinwa B 'Responding to the Arrival of Asylum Seekers: The End of Asylum: The Changing Nature of Refugee Policies in Africa and other Developing Regions' (29 June -3 July 1998) *The Hague, Paper for the Technical Symposium on International Migration and Development*
- Ryan W 'The Historical Case for the Rights of Sanctuary' (1987) *Journal of Church and State* 209-232
- Sachs A 'From refugee to judge of refugee law: a tentative introduction to some off-the-cuff remarks' (2010) *Critical Issues in International Refugee Law* 40-58.
- Said E 'Zionism from the Point of View of its Victims' (1979) *Social Text* 1: 7-58

Salter M 'When the Exception becomes the rule: borders, sovereignty, and citizenship' (2008). *Citizenship Studies* 12 (4) 365-380

Samers M 'Invisible Capitalism: political economy and the regulation of undocumented immigration in France' (2003) *Economy and Society* 32 (4) 555-583

Shacknove A 'Who is a Refugee' (1985) *Ethics*, Vol.95 (2), 274-284

Shachar A 'The Worth of Citizenship in an Unequal World' (2007) *Theoretical Inquiries in Law* Vol. 8 367-388

Shachar A 'The Shifting Border of Immigration Regulation' *Stanford Journal of Civil Rights and Civil Liberties* (2007) 165-193

Shachar A & Hirschl R 'Citizenship as Inherited Property' (2007) *Political Theory* 35 (3) 253-287.

Skran C *The International Refugee Regime: The Historical and Contemporary Context of International Response to Asylum Problems* (1992) *Journal of Political History*, Vol. 4(1) 8-35

Smith T 'The Making of the South Africa (1998) Refugee Act' (2003) *Forced Migration Working Paper Series #5*

Souter J 'Emancipation and Domination: Human Rights and Power Relations' (2008) *In-Spire Journal of Law, Politics and Societies* 3 (2)

Stein B 'The Refugee Experience: Defining the Parameters of a Field of Study' (1981) *International Migration Review* 15 (1), 320-330

Stepputat F 'Repatriation and the Politics of Space: The Case of the Mayan Diaspora and Return Movement' (1994) *Journal of Refugee Studies* 7(2/3) 175-185

Tambakaki P 'From Citizenship to Human Rights: the Stakes for Democracy' (2009) *Citizenship Studies* 13 (1) 3-15

Toft M 'The Myth of the Borderless World: Refugees and Repatriation Policy' (2007) *Conflict Management and Peace Science* vol. 24, 139-157

Tuck R 'Asylum and the Path to Citizenship: A Case Study of Somalis in the United Kingdom' (2011) *New Issues in Refugee Research* No.201

Tuitt P 'Transitions: Refugee and Natives' (2013) *International Journal on Minority and Group Rights*, 179-197

Warner D 'We are all Refugees' (1992) *International Journal of Refugee Law* 4(3) 365-372

Watts MJ 'Space for Everything (A Commentary)' (1992) 7 *Cultural Anthropology* 115-128

Yeatman A 'Who is the Subject of Human Rights?' (2000) *American Behavioral Scientist*, 43(9) 1498-1513

Zapata-Barrero R 'Borders in Motion: Concept and Policy Nexus' (2013) *Refugee Survey Quarterly* 32 (1)

Zembylas M 'Agamben's Theory of Biopower and Immigrants/Refugees/Asylum Seekers' (2010) *Journal of Curriculum Theorizing* 26 (2) 31-45

Zolberg A 'The Formation of New States as a Refugee-Generating Process' (1983) *ANNALS, AAPSS* 467, 24-38

## Internet Sources

Address by "President Nelson Mandela to the Constitutional Assembly on the occasion of the adoption of the New Constitution" 8 May 1996 available at [www.anc.org.za/ancdocs/history/mandela/1996/sp960508.html](http://www.anc.org.za/ancdocs/history/mandela/1996/sp960508.html) (Accessed 30/09/2014)

Cahn C, Editorial, 'Privileging the Document' (2003) 3 *Roma Rights Quarterly*, [www.errc.org/cikk.php?cikk=1055](http://www.errc.org/cikk.php?cikk=1055). (Accessed 29/4/2015)

Calais Crisis: Deport more migrants to stop 'swarm' crossing Mediterranean, says David Cameron' *The Telegraph* 30 July 2015, <http://www.gosucker.info/1/Home/0/1/News/6/Telegraph/Calais-crisis-Deport-more-migrants-to-stop-swarm-crossing-Mediterranean,-says-David-Cameron-25452.html> (Accessed 5/8/2015)

Chattam House *The Refugee Convention: Why not Scrap it?* (20 October 2005) available on [www.chattamhouse.org/sites/files/chattamhouse/public/research/internationallaw/ilp201005.pdf](http://www.chattamhouse.org/sites/files/chattamhouse/public/research/internationallaw/ilp201005.pdf). (Accessed 20/11/2014)

DHA Annual Report 2013/2014, 14 October 2014, available at [www.dha.gov.za/files/Annual%20Reports/Annual\\_Report\\_2013](http://www.dha.gov.za/files/Annual%20Reports/Annual_Report_2013) (Accessed 25/2/2015)

Dano Z 'Permit Woes for Cuban Engineer' *Independent Newspaper*, 12 December 2014, available at [www.iol.co.za/news/south-africa/western-cape/permit-woes-for-cuban-engineer-1.1795083#.ViSqXqiSwYE](http://www.iol.co.za/news/south-africa/western-cape/permit-woes-for-cuban-engineer-1.1795083#.ViSqXqiSwYE) (Accessed 5/1/2015)

Divided EU leaders to offer cash for Syria Refugees' *Eyewitness News*, 23 September 2015, available on [www.ewn.co.za/2015/09/23/Divided-EU-Leaders-to-offer-cash-for-Syria-refugees](http://www.ewn.co.za/2015/09/23/Divided-EU-Leaders-to-offer-cash-for-Syria-refugees) (Accessed 1/10/ 2015)

Elizabeth Glanville 'How many South Africans live overseas?' *The South African* 23 August 2012, available at [www.thesouthafrican.com/how-many-south-africans-live-overseas](http://www.thesouthafrican.com/how-many-south-africans-live-overseas) (Accessed 15/2/2015)

ENCA 'Tanzania to grant citizenship to 200, 000 Burundi refugees' 14 October 2014 available at [www.enca.com/africa/tanzania-grant-citizenship-200000-burundi-refugees](http://www.enca.com/africa/tanzania-grant-citizenship-200000-burundi-refugees) (Accessed 29/4/ 2015)

Fiss O 'The Immigrant as Pariah' (1998) *The Boston Review, New Democracy Forum*, Oct-Nov, 23(5), available at [www.bostonreview.net/BR23.5/Fiss.html](http://www.bostonreview.net/BR23.5/Fiss.html) (Accessed 29/3/2015)

Former car guard gets his master's degree' available on [www.groundup.org.za/article/former-car-guard-gets-his-masters-degree-1971](http://www.groundup.org.za/article/former-car-guard-gets-his-masters-degree-1971) (Accessed 9/7/ 2014)

Gilder B *Director General's Media Briefing* (Sandton, 5 November 2003) 3 available at [www.home-affairs.gov.za/speeches.asp?id=76](http://www.home-affairs.gov.za/speeches.asp?id=76) (Accessed 4/5/ 2014)

Handmaker J and Schneider J 'The Status 'Regularisation' Programme for Former Mozabican Refugees in South Africa'(2002) *Working Paper, Research Unit on Law and Administration, School of Law, University of Witwatersrand*, available on <http://www.law.wits.ac.za> (Accessed 3/11/ 2014).

Home Affairs Needs Work *The Star* 6 November 2012 at [www.iol.co.za/the-star/home-affairs-needs-work-da-1.1418159#.Ulqz/NMJFg](http://www.iol.co.za/the-star/home-affairs-needs-work-da-1.1418159#.Ulqz/NMJFg) (Accessed 13/2/2014)

Home Affairs Warned about Outsourcing *News24* 14 August 2012 at [www.news24.com/SouthAfrica/politics/Home-Affairs-Warned-about-outsourcing-20120814](http://www.news24.com/SouthAfrica/politics/Home-Affairs-Warned-about-outsourcing-20120814) (Accessed 10/12/2013)

Home Affairs in a Sorry State Says Expert, 23 January 2006 available on [www.iol.co.za/news/politics/home-affairs-in-a-sorry-state-says-expert-1.246278#.UlrWVNMJFg](http://www.iol.co.za/news/politics/home-affairs-in-a-sorry-state-says-expert-1.246278#.UlrWVNMJFg) (Accessed 10/12/2013)

Home Affairs permanent residence finalisation in shambles *Cape Times*, 2 November 2012, available on [www.samigration.com/blog/home-affairs-permanent-residence-finalisation-in-shambles](http://www.samigration.com/blog/home-affairs-permanent-residence-finalisation-in-shambles) (Accessed 14/3/2014)

Huffington Post, '60 Million People Living Today as Refugees' 19 June 2015, available on [www.60-million-people-living-b7623596.html](http://www.60-million-people-living-b7623596.html) (Accessed 23/7/2015)

Immigrants to SA have a torrid time" *The Independent*, 19 February 2014, available at [www.iol.co.za/news/immigrants-to-sa-have-a-torrid-time-1.1649693#.ViSYaqiSwYE](http://www.iol.co.za/news/immigrants-to-sa-have-a-torrid-time-1.1649693#.ViSYaqiSwYE) (Accessed 4/5/2014)

Jessica Elgot and Mathew Taylor 'Calais crisis: Cameron condemned for 'dehumanising' description of migrants' *The Guardian*, 30 July 2015, available on [www.theguardian.com/uk-news/2015/jul/30/david-cameron-migrant-swarm-language-condemned](http://www.theguardian.com/uk-news/2015/jul/30/david-cameron-migrant-swarm-language-condemned) (Accessed 1/8/2015)

John Stevens 'Europe slams migrant door: Hungary, Austria and Holland shut borders as Germany imposes controls – saying it can't cope' *The Daily Mail*, 15 September 2015, available on [www.dailymail.co.uk/news/article-3234524/Europe-slams-migrant-door-Hungary-Australia-Slovakia-Holland-shut-borders-Germany-imposes-controls-saying-it-can-t-cope](http://www.dailymail.co.uk/news/article-3234524/Europe-slams-migrant-door-Hungary-Australia-Slovakia-Holland-shut-borders-Germany-imposes-controls-saying-it-can-t-cope) (Accessed 17/9/2015)

Johnston N 'We want to be Citizens not Charities' *Mail & Guardian*, 27 June 2006, available at [www.mg.co.za/article/2006-06-27-we-want-to-be-citizens-not-charities](http://www.mg.co.za/article/2006-06-27-we-want-to-be-citizens-not-charities) (Accessed 16/6/2014)

*LHR v DHA* on the withdrawal of controversial 'safe third country' policy: New Release, 30 March 2001 available at [www.lhr.org.za/refugees/news](http://www.lhr.org.za/refugees/news) (Accessed 8/9/2015).

Mathew Weaver Mark Rice-Oxley and Nadia Khomami 'Refugee Crisis: Hundreds set off from Budapest on foot – as it happened' *The Guardian*, 4 September 2015 available on [www.theguardian.com/world/live/2015/sep/04/refugee-migration-crisis-live-eu-biggest-test-since-second-world-war](http://www.theguardian.com/world/live/2015/sep/04/refugee-migration-crisis-live-eu-biggest-test-since-second-world-war) (Accessed 16/09/2015)

Melissa Fleming 'UNHCR outlines Proposals to manage refugee and migration crisis in Europe ahead of EU Summit' Briefing Notes *Palais des Nations*, Geneva, 22 September 2015, available at [www.unhcr.org/print/560146a46.html](http://www.unhcr.org/print/560146a46.html) ((Accessed 2/10/2015)

Minister Pandor's budgetary vote to Parliament, 9 May 2013 at [www.home-affairs.gov.za:8087/index.php/statement-speeches/159-address-by-naledi-pandor-mp-minister-of-home-affairs-opening-the-department-of-home-affairs-budget-vote-9-may-2013](http://www.home-affairs.gov.za:8087/index.php/statement-speeches/159-address-by-naledi-pandor-mp-minister-of-home-affairs-opening-the-department-of-home-affairs-budget-vote-9-may-2013) (Accessed 17/12/2013)

Nigerian permit holder detained for 114 days, Legal Resource Centre, available at [www.lrc.org.za/press-release/1836-2012-03-16-press-release-nigerian-permit-holder-detained-unlawfully-for-114-days](http://www.lrc.org.za/press-release/1836-2012-03-16-press-release-nigerian-permit-holder-detained-unlawfully-for-114-days) (Accessed 15/09/2014)

The Guardian (UK Edition), *What Happened to History's Refugees?* 23 July 2013, available on [www.theguardian.com/news/datablog/interactive/23/july/25/what-happened-history-refugees#Israelites](http://www.theguardian.com/news/datablog/interactive/23/july/25/what-happened-history-refugees#Israelites) (Accessed 22/12/ 2014).

Parliamentary Internal Questions No.4 2013 at [www.pmg.org.za/questions-and-replies/2013/06/03/home-affairs](http://www.pmg.org.za/questions-and-replies/2013/06/03/home-affairs) (Accessed 3/12/2013)

Refugee applications: Refugees wait up to 4 years for answers from Home Affairs *DA Newsroom* 14 October 2010 at [www.da.org.za/newsroom.htm?action=view-news-item&id=8797](http://www.da.org.za/newsroom.htm?action=view-news-item&id=8797) (Accessed 3/12/2013)

Refugee earns degree in Stellenbosch, Western Cape IOL, 12 December 2014 available on [www.iol.co.za/news/south-africa/western-cape/refugee-earns-degree-at-stellenbosch-1.1794766](http://www.iol.co.za/news/south-africa/western-cape/refugee-earns-degree-at-stellenbosch-1.1794766) (Accessed on 14/12/ 2014)

Refugee wins asylum after 10 years in legal limbo" *Mail & Guardian*, 24 February 2015 available at [www.mg.co.za/article/2015-02-26-refugee-wins-asylum-after-10-years-in-legal-limbo](http://www.mg.co.za/article/2015-02-26-refugee-wins-asylum-after-10-years-in-legal-limbo) (Accessed on 25/2/2015)

Radio Free Europe/Radio Liberty; More than 2,000 migrants have died crossing Mediterranean' 4 August 2015, available at <http://www.refworld.org/docid/55ee965f23.html> (Accessed 15/8/2015)

SA to send refugees home' *Sowetan Live* 4 September 2015, available at <http://www.sowetanlive.co.za/news/2015/09/04/sa-to-send-refugees.-home> (Accessed 20/9/2015)

SAMP 'Analysis of the Draft White Paper on International Migration' (2000) Para.2 available at [www.quensu.ca/samp/Comments/analysis.htm](http://www.quensu.ca/samp/Comments/analysis.htm) (Accessed 8/2/2015)

South Africa's Human Rights Commission's Braamfontein Statement on Racism and Xenophobia, 15 October 1998, available at [www.sahrc.org.za/home/files.../4th%20annual\\_report98\\_99.pdf](http://www.sahrc.org.za/home/files.../4th%20annual_report98_99.pdf) (Accessed on 30/5/2014)

South Africans thriving in US' *Sowetan2* August 2014, available on [www.sowetanlive.co.za/news/2014/08/02/south-africans-thriving-in-us](http://www.sowetanlive.co.za/news/2014/08/02/south-africans-thriving-in-us)(Accessed 15/2/2015)

The SAHRC contributions to the Refugee Bill before the Home Affairs Portfolio Committee in Parliament is available at [www.quensu.ca/samp/comments/SAHRC.htm](http://www.quensu.ca/samp/comments/SAHRC.htm) (Accessed 8/2/2015)

Turkish policeman *who* found Aylan says: 'I thought of my own son'" *The Citizen* 6 September 2015

UNHCR 'State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' available at [www.unhcr.org/3b73b0d63.html](http://www.unhcr.org/3b73b0d63.html) (Accessed 2/8/2015).

Waiting for 3 years for an answer from Home Affairs, News24, 22 June 2014 available at [www.news24.com/MyNews24/waiting-for-3-years-for-an-answer-from-home-affairs-20140622](http://www.news24.com/MyNews24/waiting-for-3-years-for-an-answer-from-home-affairs-20140622) (Accessed on 29/09/2014)

Zoe Mahopo 'Refugee waits 15 years for a new life', *Sowetanlive*, 2 July 2015, available at [www.pressreader.com/south-africa/sowetan/20150702/281659663699340/TextView](http://www.pressreader.com/south-africa/sowetan/20150702/281659663699340/TextView) (Accessed on 4/7/2015)

Zoe Mahopo 'Pupil's battle to get SA ID – Needs papers to write matric' *Sowetan*, 4 July 2015, available at [www.sowetanlive.co.za/news/2015/07/04/pupil-s-battle-to-get-sa-id-needs-papers-to-write-marric](http://www.sowetanlive.co.za/news/2015/07/04/pupil-s-battle-to-get-sa-id-needs-papers-to-write-marric) (Accessed 5/7/2015)