



SOCIO-ECONOMIC RIGHTS OF URBAN REFUGEES AND REFUGEES IN CAMPS: A COMPARATIVE STUDY OF SOUTH AFRICA AND RWANDA.

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This mini-dissertation is submitted in partial fulfilment of the requirements of a degree in Master of Laws (LL.M) in Multi-disciplinary Human Rights, at the University of Pretoria, South Africa.

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Pretoria, November 2015

Acknowledgements

I wish to thank my family and friends for their support and encouragement throughout the writing of this dissertation. I wish to also thank my supervisor, Professor Magnus Killander, for his guidance.

A special thank you goes to my parents, Mr Jean-Baptiste Gatali and Mrs Dorothée Karangwa, for their love and for instilling in me the value and passion for education.

TABLE OF CONTENTS

1. INTRODUCTION

1.1 Background	1
1.2 Research problem	3
1.3 Research questions	4
1.4 Objective of the study	4
1.5 Preliminary structure	4
1.6 Methodology	5

2. THE REFUGEE LEGAL FRAMEWORK OF SOUTH AFRICA AND RWANDA

2.1 The refugee legal framework of South Africa	7
2.2 The refugee legal framework of Rwanda	9
2.3 Conclusion	10

3. REFUGEE'S RIGHT TO EDUCATION

3.1 International human rights law and the right to education	12
3.2 Refugee's right to education in South Africa	14
3.3 Refugee's right to education in Rwanda	16
3.4 Conclusion	18

4. REFUGEE'S RIGHT TO ACCESS TO HEALTH

4.1 International human rights law and the right to access to health	19
4.2 Refugee's right to health in South Africa	22
4.3 Refugee's right to health in Rwanda	24
4.4 Conclusion	26

5. REFUGEE'S RIGHT TO WORK

5.1 International human rights law and the right to work	27
5.2 Refugee's right to work in South Africa	30
5.3 Refugee's right to work in Rwanda	31
5.4 Conclusion	32

6. CONCLUSION AND RECOMMENDATIONS

6.1 Recommendations	34
6.1.1 Rwanda must withdraw its reservation to Article 26 of the 1951 Refugee Convention	34
6.1.2 South Africa should have a better implementation of their legal and policy framework with regard to access to education and health by refugees	34
6.1.3 Access to education should also continue in upper secondary, for refugee children in camps in Rwanda	35
6.1.4 Rwanda must allow refugees free movement, in order to find work outside of the camps	35
6.1.5 South Africa should adopt measures to deal with the issue of xenophobia in the country	36
BIBLIOGRAPHY	37

Chapter 1

Socio-economic rights of urban refugees and refugees in camps: A comparative study of South Africa and Rwanda.

1.1 Background

The high number of refugees in Africa is one of the major problems facing the continent. The UNHCR puts the number of refugees in Africa to 11 million.¹ South Africa with its refugee and asylum seekers number at 350.000 is one of the major destinations on the continent.² The attraction is that it is a middle-income country, therefore offering better economic and social opportunities for migrants.

South Africa's asylum seekers and refugee system is very liberal and guarantees a lot of rights, including freedom of movement.³ On the legal side of refugee protection, South Africa is ahead of most African countries, but practice has not kept up with the law. Some public institutions, like some hospitals and schools, do not recognise refugees' permits, preventing them from benefitting fully from these rights. Also since most of the refugees are based in urban areas, it is harder for the UNHCR to help them.⁴ The high unemployment and social inequality leads to a competition of resources with the locals, which sometimes lead to violence.⁵ South Africa makes an interesting study case, because of its unique refugee system within Africa.

On the other hand is Rwanda, a country whose leadership is composed mostly of former refugees from neighbouring countries. Rwanda is a major destination for refugees from neighbouring DRC and has 122.570 refugees, most of whom are helped by the UNHCR.⁶ Although, their freedom of movement is limited as the majority of them are confined to

¹ 2015 UNHCR regional operations profile – Africa <http://www.unhcr.org/pages/4a02d7fd6.html> accessed on 20th/4/2015

² 2015 UNHCR country operations profile - South Africa <http://www.unhcr.org/pages/49e485aa6.html> accessed on 20th/4/2015

³ 2015 UNHCR country operations profile - South Africa <http://www.unhcr.org/pages/49e485aa6.html> accessed on 20th/4/2015

⁴ 2015 UNHCR country operations profile - South Africa <http://www.unhcr.org/pages/49e485aa6.html> accessed on 20th/4/2015

⁵ LB Landau 'Transplants and Transients: Idioms of Belonging and Dislocation in Inner-City Johannesburg' *African Studies Review*, 49, pp 125-145

⁶ 2015 UNHCR country operations profile - Rwanda <http://www.unhcr.org/pages/49e45c576.html> accessed on 20th/4/2015

stay in camps, some of their basic needs and socio-economic rights are met as they have access to health, education etc....⁷

South Africa and Rwanda have both ratified all the major international and regional treaties that protect refugees, yet they take different approaches and yield different results.

People displaced by conflict, natural disasters or economic hardships which leads to their livelihoods being destroyed, are more likely to end up in urban areas, as a result of global urbanisation.⁸ 'Urban refugees' means refugees or asylum seekers who reside in an area designated, by the host government, as being an urban area.⁹ These refugees are usually free to move about and be self-reliant by establishing informal and formal business, where the laws and policies of the host country allow it.¹⁰ Refugees in urban areas are more vulnerable to exploitation, arrest and detention than those in refugee camps.¹¹ The local population can see them as competition for jobs and government services, which may lead to conflict.¹² Urban refugees usually do not have the same assistance provided by the UNHCR to refugees in camps, such as free education, access to healthcare and food aid.¹³ This situation led to UNHCR adopting in September, the *UNHCR Policy on Refugee Protections and Solutions in Urban Areas* which will be referred to as the 2009 Urban Policy.¹⁴ The 2009 policy clearly set out the rights of the urban refugee and asylum seeker, it says:

*'These rights include, but are not limited to, the right to life; the right not to be subjected to cruel or degrading treatment or punishment; the right not to be tortured or arbitrarily detained; the right to family unity; the right to adequate food, shelter, health and education, as well as livelihoods opportunities.'*¹⁵

⁷ 2015 UNHCR country operations profile - Rwanda <http://www.unhcr.org/pages/49e45c576.html> accessed on 20th/4/2015

⁸ K Jacobsen 'Refugees and Asylum Seekers in Urban Areas: A Livelihoods Perspective' *Journal of Refugee Studies* Vol. 19, No. 3, 273-286

⁹ K Jacobsen 'Refugees and Asylum Seekers in Urban Areas: A Livelihoods Perspective' *Journal of Refugee Studies* Vol. 19, No. 3, 273-286

¹⁰ J Crisp 'Africa's Refugees: Patterns, Problems and Policy Challenges' *Journal of Contemporary African Studies*, Vol 18 No 2, 157-178

¹¹ UNHCR 'Urban refugees: trying to get by in the city' on <http://www.unhcr.org/pages/4b0e4cba6.html> accessed on 21st/2/2015

¹² LB Landau 'Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy' *Journal of Refugee Studies* Vol. 19, No. 3, 308-326

¹³ K Jacobsen 'Refugees and Asylum Seekers in Urban Areas: A Livelihoods Perspective' *Journal of Refugee Studies* Vol. 19, No. 3, 273-286

¹⁴ UNHCR Policy on Refugee Protections and Solutions in Urban Areas on <http://www.refworld.org/docid/4ab8e7f72.html> accessed on 21st/2/2015

¹⁵ Par 17 UNHCR Policy on Refugee Protections and Solutions in Urban Areas on <http://www.refworld.org/docid/4ab8e7f72.html> accessed on 21st/2/2015

In this paper I will analyse the situation of the urban refugee, by looking at the case of South Africa. I will look at its advantages and disadvantages. I will also look at the national laws that protect the refugee and the asylum seeker, and if the practice is in line with the legal requirements.

Refugees in camps constitute the majority of all refugees, as it is the traditional ways of dealing with refugees, but in those countries with camps, they also still have a significant number of urban refugees.¹⁶ The biggest human right issue with camps is the separation of refugees from the rest of the population.¹⁷ In camps, the refugees are given all the basic needs, although at times they may not be sufficient, in quality or quantity.¹⁸ The dependence on the UNHCR and their partner organisations for everything affects the refugees emotionally, physically and socially.¹⁹ If the refugees can't find any work outside the camps, then the economic and social separation with the host population will grow even wider.²⁰ On the health side, camps are ideal places for diseases to spread, because of the many people, living in such close proximity. This was the case in the Democratic Republic of Congo (former Zaire) with the outbreak of Cholera where thousands of refugees, fleeing from the conflict in Rwanda, were infected and many died.²¹

In this paper, I will look at all these advantages and disadvantages, and conclude with recommendations on which one is better system and how to truly cater for all refugees, where all their needs are met and their rights respected.

1.2 Research problem

The objective of the study is to determine whether refugees are better off in camps or within the general population of the host country with regards to access to education, health and work. I will look at the legal framework of both countries and also pay particular attention on the policies passed by respective governments, in respect of the guaranteeing certain basic human rights. The study will help in the understanding of the two different ways of dealing with the problems. Although, the two countries are different economically,

¹⁶ UNHCR 'Refugee figures' on <http://www.unhcr.org/pages/49c3646c1d.html> accessed on 22nd/2/2015

¹⁷ J Pobjoy & G Verdirame 'The end of refugee camps?' *Legal Studies Research Paper Series* Paper no. 29/2013, University of Cambridge (2013)

¹⁸ J Crispy 'Africa's Refugees: Patterns, Problems and Policy Challenges' *Journal of Contemporary African Studies*, Vol 18 No 2 157-178

¹⁹ J Crispy 'Africa's Refugees: Patterns, Problems and Policy Challenges' *Journal of Contemporary African Studies*, Vol 18 No 2 157-178

²⁰ J Crispy 'Africa's Refugees: Patterns, Problems and Policy Challenges' *Journal of Contemporary African Studies*, Vol 18 No 2 157-178

²¹ W Van Damme 'Do refugees belong in camps? Experiences from Goma and Guinea' *Lancet* Vol 346 pg 360-362

they are both young democracies and have dealt with major social issues, as a result of their history.

1.3 Research questions:

- What are the respective legal frameworks in which the rights of refugees and asylum seekers are guaranteed in South Africa and in Rwanda?
- Do refugees and asylum seekers get better access to education in South Africa or in Rwanda?
- Do refugees and asylum seekers get better access to health in South Africa or in Rwanda?
- Do refugees and asylum seekers get better access to work in South Africa or in Rwanda?

1.4 Objective of the study

The study will help in the understanding of the two different ways of dealing with the problems. Although, the two countries are different economically, they are both young democracies and have dealt with major social issues, as a result of their history.

1.5 Preliminary structure

- Chapter 1: Sets out the background of the study and the content of the research proposal.
- Chapter 2: The refugee legal frameworks of Rwanda and South Africa: the legal frameworks of both countries will be examined including the relevant international treaties.
- Chapter 3: The right to education: I will analyse and compare the two systems guarantee of refugees' right to education. I will look at the legal frameworks, the policies and the results they yield.
- Chapter 4: The right to access to health: I will analyse and compare the two systems guarantee of refugees' right to access to health. I will look at the legal frameworks, the policies and the results they yield.
- Chapter 5: The right to work: I will analyse and compare the two systems guarantee of refugees' right to work. I will look at the legal frameworks, the policies and the results they yield.
- Chapter 6 Conclusion and recommendations: Here I will conclude by examining which system is better and recommend how that system can be improved in order to guarantee and fulfil those basic rights of refugees.

1.6 Methodology

The methodology that will be used in this dissertation is a literature review of books, journal articles, human rights reports, United Nations reports, NGO reports, legislation, newspaper articles and international conventions.

I will make use of different sources including, but not limited to:

- The UN Convention relating to the status of refugees of 1951²²: is the key international legal instrument that defines who is a refugee and his/her rights. The documents also set out the obligations of the State to the refugee. A United Nations agency, the UNHCR, was created in order to help states give effect to the contents of the Convention. Most of national legislations that deal with refugees rely or have as their source this key Convention; therefore I will extensively rely on it.
- Protocol relating to the status of refugees of 1967²³: This instrument is related to the 1951 refugee convention, but is an independent instrument. It expands the definition of a refugee found in the 1951 Convention.
- African Union Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969²⁴: is a regional instrument that repeats the definition of 'refugee' as set out in the UN Convention but expands on it, therefore taking an objective approach rather than a subjective approach, when determining who qualifies as a refugee.²⁵
- Law n° 13ter/2014 of 21/05/2014 relating to refugees²⁶: This legislation that came into effect on 30 June 2014 is the authoritative legislation, in the Republic of Rwanda, that defines and protects all the rights of refugees. The legislation replaced *Law No. 34/2001* of the 5 July 2001 and its amendment, *Law No. 29/2006* of 20 July 2006, and has afforded more protection to refugees.²⁷ I will use it to assess the rights that are guaranteed by this document and also to assess whether the definitions are in line with international conventions.

²² The UN Convention relating to the status of refugees of 1951 <http://www.unhcr.org/3b66c2aa10.html> accessed on 13th /2/2015. It was ratified by South Africa on 12 January 1996 and Rwanda on 03 January 1980

²³ Protocol Relating to the Status of Refugees of 1967 <http://www.unhcr.org/3b66c2aa10.html> accessed on 10th/11/2015. It was ratified by South Africa on 12 January 1996 and Rwanda on 03 January 1980

²⁴ African Union Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 on [http://www.au.int/en/sites/default/files/Convention En Refugee Problems in Africa AddisAbaba 10September1969_0.pdf](http://www.au.int/en/sites/default/files/Convention%20En%20Refugee%20Problems%20in%20Africa%20AddisAbaba%2010September1969_0.pdf) accessed on 13th /2/2015. It was ratified by South Africa on 15 December 1995 and Rwanda on 19 November 1979

²⁵ OO George 'Thirty years on: a legal review of the 1969 OAU refugee convention governing the specific aspects of refugee problems in Africa' *Refugee Survey Quarterly*, Vol. 20, No. 1, 2001 <http://www.unhcr.org/research/RESEARCH/42d673472.pdf> accessed on 15th /2/2015

²⁶ Law n° 13ter/2014 of 21/05/2014 relating to refugees <http://midimar.gov.rw/index.php?id=93> accessed on 13th /2/2015

²⁷ Law n° 13ter/2014 of 21/05/2014 relating to refugees <http://midimar.gov.rw/index.php?id=93> accessed on 13th /2/2015

- Refugee Act 130 of 1998²⁸ : This legislation that came into effect on the 1 April 2000, states in its objective is to *'give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith'*.²⁹ I will use this piece of legislation to analyse whether those rights mentioned adhere to international standards, I will also look at legal cases that have impacted the interpretation of those rights contained in the legislation.

Besides, these three documents, I will also look at journal articles, books, case law and other relevant documents, in order to assess which system is better for the refugee.

²⁸ Refugee Act 130 of 1998 http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

²⁹ Refugee Act 130 of 1998 http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

Chapter 2: The refugee legal framework of South Africa and Rwanda

2.1 The refugee legal framework of South Africa

At the end of Apartheid, South Africa enacted a Constitution that was seen by many as the being one of the most progressive in the world.³⁰ This Constitution requires the State to act in promoting political, social and economic rights.³¹ As a result of this standard set by the Constitution and its insistence on the promoting of human dignity, all legislation has to be able to meet those criteria. Section 27 and 29 of the Constitution guarantees ‘everyone’ access to healthcare, education, food and social security.³²

Following the 1994 democratic elections, South Africa received a high number of migrants from other African countries. Some of them were fleeing conflicts, such as the genocide in Rwanda or the war in the Democratic Republic of Congo, and others came as a result of South Africa’s economic opportunities.³³ This situation led to a need for policy and legal reform with regard to migrants. South Africa started these reforms by ratifying the 1969 African Union Refugee Convention on 15 December 1995.³⁴ A year later, on 1 December 1996, South Africa ratified the 1951 Refugee Convention and its 1967 Protocol.³⁵ All these conventions helped South Africa to formalize its refugee and asylum system but it still needed a specific domestic legislation.³⁶ In order to meet the obligations, set out by the above international treaties, the Refugee Act was passed in 1998 and came into force on 1 April 2000.³⁷ The Refugee Act, as amended, defines a ‘refugee’ as a person:

‘(a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

³⁰ Constitution of the Republic of South Africa, 1996

³¹ LB Landau ‘Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy’ *Journal of Refugee Studies* Vol. 19, No. 3, 308-326

³² Section 27 & Section 29 of the Constitution of the Republic of South Africa, 1996

³³ LB Landau ‘Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy’ *Journal of Refugee Studies* Vol. 19, No. 3, 308-326

³⁴ 1969 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa

³⁵ The UN Convention Relating to the Status of Refugees of 1951 <http://www.unhcr.org/3b66c2aa10.html> accessed on 13th /2/2015

³⁶ LB Landau ‘Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy’ *Journal of Refugee Studies* Vol. 19, No. 3, 308-326

³⁷ Refugee Act 130 of 1998 http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality

*(c) is a spouse or dependant of a person contemplated in paragraph (a) or (b).*³⁸

Subsection (a) and (b) are almost a *verbatim* repeat of the definition found in the African Refugee Convention, and subsection (a) is also similar to the definition in the U.N Refugee Convention. But the South African Act has changed a few things.

Subsection (a) which was taken from the UN Convention is very important in the sense that it has expanded the criteria that qualify someone as a refugee.³⁹ This definition goes beyond the criteria set by the 1951 UN Convention of race, religion, nationality, political opinion or being part of a particular social group. The SA Refugee Act has added two other criteria namely, 'tribe' and 'gender'.⁴⁰

Section 3(b) definition is taken from the OAU definition of a refugee.⁴¹ The OAU definition is legally binding and was ratified by South Africa in 1995. There are no *travaux preparatoires* for the OAU Convention, scholars are of the opinion that the second part of the definition, which is repeated in *3(b)*, had a specific purpose.⁴² The purpose of the definition is to move away from the emphasis on individual prosecution advocated by the UN Convention, but rather to look at the conditions that led to the displacement of the person.⁴³ This objective approach rather than the subjective approach, taken by the OAU Convention, makes this a progressive Convention in refugee rights.⁴⁴ Unfortunately, there's no jurisprudence in South Africa which dealt with the definition and application of the Convention in South African cases.

³⁸ Section 3 of Refugee Act 130 of 1998 http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

³⁹ OO George 'Thirty years on: a legal review of the 1969 OAU refugee convention governing the specific aspects of refugee problems in Africa' *Refugee Survey Quarterly*, Vol. 20, No. 1, 2001 <http://www.unhcr.org/research/RESEARCH/42d673472.pdf> accessed on 15th /2/2015

⁴⁰ Section 3 of Refugee Amendment Act 33 of 2008 http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

⁴¹ 1969 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa

⁴² Khan F & Schreier T 'Refugee Law in South Africa' Juta , 2014

⁴³ Khan F & Schreier T 'Refugee Law in South Africa' Juta , 2014

⁴⁴ Khan F & Schreier T 'Refugee Law in South Africa' Juta , 2014

2.2 The refugee legal framework of Rwanda

The end of the Rwandan genocide, brought a new regime on power. The new government consisted, mostly, of members of the Rwanda Patriotic Front (RPF).⁴⁵ Most of the members of this new government, had been refugees most of their life.⁴⁶ As a result of discriminatory practices by the old regime against the minority Tutsis, as a result a lot of them became refugees in neighboring countries. In 2003, by referendum, a new Constitution was adopted, effectively making Rwanda a Constitutional Republic.⁴⁷

The Preamble to *Law n° 13ter/2014 of 21/05/2014 relating to refugees*, which amended Law n° 34/2001, (hereafter referred to as the Rwandan Refugee Law), makes reference to the Constitution of Rwanda and international and regional conventions that Rwanda has ratified.⁴⁸ The Constitution of Rwanda, in Article 25, recognizes the right to asylum if it meets the requirements determined by the law.⁴⁹

Article 190, of the Constitution, says that international instruments that have been ratified have supremacy over statutory law, therefore can be a source by individuals seeking redress in the courts.⁵⁰ The Preamble of the Rwandan Refugee Act makes reference to the UN Convention relating to the Status of Refugees (and its Protocol) and to the 1969 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, both of which Rwanda acceded to on the 3 January 1980 and 19 November 1979, respectively.⁵¹ It is important to note that the Government of Rwanda made a reservation with regard to Article 26, of the UN Convention, relating to the freedom of movement of refugees.⁵² The

⁴⁵ I Steflja 'Toward a Regional Solution for Rwanda's Returning Refugees' African Initiative Research on [http://www.africaportal.org/articles/2012/11/22/toward-regional-solution-rwanda%E2%80%99s-returning-refugees#chapter%3C?php%20print%20\\$chapter;?%3E](http://www.africaportal.org/articles/2012/11/22/toward-regional-solution-rwanda%E2%80%99s-returning-refugees#chapter%3C?php%20print%20$chapter;?%3E) accessed on 13th/03/2015

⁴⁶ I Steflja 'Toward a Regional Solution for Rwanda's Returning Refugees' African Initiative Research on [http://www.africaportal.org/articles/2012/11/22/toward-regional-solution-rwanda%E2%80%99s-returning-refugees#chapter%3C?php%20print%20\\$chapter;?%3E](http://www.africaportal.org/articles/2012/11/22/toward-regional-solution-rwanda%E2%80%99s-returning-refugees#chapter%3C?php%20print%20$chapter;?%3E) accessed on 13th/03/2015

⁴⁷ Article 25 of the Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005 on <http://www.refworld.org/docid/46c5b1f52.html> accessed on 13th /2/2015

⁴⁸ Law n° 13ter/2014 of 21/05/2014 relating to refugees <http://midimar.gov.rw/index.php?id=93> accessed on 13th /2/2015

⁴⁹ Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005 on <http://www.refworld.org/docid/46c5b1f52.html> accessed on 13th /2/2015

⁵⁰ Article 190 of the Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005 on <http://www.refworld.org/docid/46c5b1f52.html> accessed on 13th /2/2015

⁵¹ Preamble of Law n° 13ter/2014 of 21/05/2014 relating to refugees <http://midimar.gov.rw/index.php?id=93> accessed on 13th /2/2015

⁵² Article 26 freedom of movement

'Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances' UNHCR 'Reservations and declarations to the 1951 Refugee Convention' accessed on <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d9abe177&query=1951%20Refugee%20Convention> accessed on 13th/03/2015

Government stated in the reservation that it has the right to determine the place of residence for refugees and to limit their movement, for reason of public policy.⁵³

In the definition of terms of the Rwandan Refugee Law, refugee is defined as:

*'A person who has been granted asylum in accordance with this law and international instruments relating to the status of refugees ratified by Rwanda'*⁵⁴

This shows that the international instruments are considered in every policy that is made with regards to refugees. Article 7 of the Rwandan refugee Act, says that a person, is eligible for asylum if:

*'1)having a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion different from the political line of the country of his/her nationality and owing to such fear, he/she is unable to avail himself/herself of the protection of that country'*⁵⁵

*'2) owing to an external aggression, occupation, foreign domination or events seriously disturbing public order in either part or in the whole of his/her country of origin or nationality, he/she was compelled to leave his/her place of habitual residence in order to seek refuge in another place outside his/her country of origin or nationality.'*⁵⁶

This definition is a slightly different wording of the UN Convention and the OAU Convention, but contains the same elements. There's no substantial difference, between the Rwandan and the South African one.

As Rwanda has reservation to Article 26, freedom of movement, of the UN Convention, they have kept refugees in designated areas (camps).

2.3 Conclusion

In conclusion, both countries have taken definitions from international instruments, when drafting their national refugee laws, therefore keeping them in line with the rest of the world in their recognition of who qualifies as a 'refugee' and which rights he is entitled to. The difference between the two legal systems comes with Rwanda's reservation to Article

⁵³ UNHCR 'Reservations and declarations to the 1951 Refugee Convention' accessed on <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d9abe177&query=1951%20Refugee%20Convention> on 13th/03/2015

⁵⁴ Article 2 of Law n° 13ter/2014 of 21/05/2014 relating to refugees <http://midimar.gov.rw/index.php?id=93> accessed on 13th /2/2015

⁵⁵ Article 7(1) of the Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005 on <http://www.refworld.org/docid/46c5b1f52.html> accessed on 13th /2/2015

⁵⁶ Article 7(2) of the Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005 on <http://www.refworld.org/docid/46c5b1f52.html> accessed on 13th /2/2015

26 of the UN Refugee Convention, which effectively restricts refugees to camps, unlike in South Africa where they are not restricted to any place.⁵⁷

In the next chapter, I will look at the specific right of access to education, with regard to, whether staying in a designated area (camps) or in urban areas, gives the refugee better access. I will look at the legal frame of each country with regard to that right, by looking at international, national legislation policies and statistics.

⁵⁷ UNHCR 'Reservations and declarations to the 1951 Refugee Convention' accessed on <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d9abe177&query=1951%20Refugee%20Convention> on 13th/03/2015

Chapter 3: Refugee's right to education

'Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development.' - Koffi Annan (Former Secretary General of the United Nations).⁵⁸

3.1 International human rights law and the right to education

In this section, I will analyse the content of the right to education, by looking at international instruments which set out the standards. I will then look at whether that right is guaranteed to refugees and which practice and policies enforces them.

The following international conventions guaranteed the right to education, namely:

The International Covenant on Economic, Social and Cultural Rights (ICESCR), in article 13(2) (a) and (b), states that everyone has a right to education and obliges states parties to make primary education compulsory and free, whereas secondary education shall be made generally available and accessible.⁵⁹

The requirements for quality education are set out in Article 13 of the ICESCR.⁶⁰ Article 13 is the longest article in the covenant and it talks about how education must be accessible to everyone, how it must develop the personality of the person, must respect his views and must conform to some type of standards.⁶¹

This article was the basis for Katarina Tomasevski, the UN Special Rapporteur on the Right to Education, to develop the 4-A scheme to measure the fulfilment of the right to education.⁶²

The 4-A scheme to measure quality education are: availability, accessibility, adaptability, acceptability.⁶³ I will briefly explain each of the criteria:⁶⁴

- Availability: Education must be free and compulsory for all learners at the basic level. It must meet the educational needs of the learners and it must be given by competent and qualified teachers;

⁵⁸ KA Annan 'UNICEF- Education: The State of the World's Children' 1999

⁵⁹ Article 13 of United Nations 'The International Covenant on Social, Economic and Cultural Rights (ICESCR)' 1966 on <http://www.refworld.org/docid/3ae6b36c0.html> accessed on 24th/03/2015

⁶⁰ 'What's quality education?' on <http://www.ohchr.org> accessed on 7th/06/ 2015

⁶¹ 'What's quality education?' on <http://www.ohchr.org> accessed on 7th/06/ 2015

⁶² Tomasevski, K *Manual on rights-based education* 2006

<http://www.unesco.org/new/en/unesco/resources/publications/unescdoc-database/> accessed on 17th/06/ 2015

⁶³ Tomasevski (n 5 above)

⁶⁴ HakiElimu 'What is Quality Education?' 2007 http://hakielimu.org/publication_details.php?pub=238 accessed on 17th/06/2015

- Accessibility: Education must be accessible to everyone without any discrimination due to their sex, race, disability etc... governments must give special attention to the education of marginalised groups in society;
- Adaptability: Education must be adaptable to the changing needs of society and respond to the needs of the learner within their cultural, social and economic context and
- Acceptability: The curricula and methods of teaching must be relevant, culturally appropriate and in the best interests of the learner. This includes having a safe and healthy school environment.⁶⁵

The above are the 4 criteria used to measure whether a state has fulfilled its obligations to provide quality education to its citizens. The 4 criteria have been adopted by the Committee on Economic, social and cultural rights in its General Comment to the right to education.⁶⁶ The right to education is also guaranteed in other international and regional treaties such as :

--The Universal Declaration on Human Rights, Article 26, provides that:

*'everyone has the right to education' and that 'education shall be free, at least in the elementary and fundamental stages'.*⁶⁷ The 1951 UN Refugee Convention makes that right to education also available to refugees in Article 22.⁶⁸

-The Convention on the Rights of the Child (CRC) protects the right to education in article 28. Article 28(1)(a) obliges states parties to make primary education compulsory and free.⁶⁹ The Convention in Article 22 says that a refugee child has the same rights as any other child who is a national of that State.⁷⁰

-The African Charter on the Rights and Welfare of the Child guarantees the right to free and compulsory primary education in Article 11.⁷¹ Education is also guaranteed by Article 17 of the African Charter.⁷²

⁶⁵ HakiElimu 'What is Quality Education?' 2007 http://hakielimu.org/publication_details.php?pub=238 accessed on 17th/06/2015

⁶⁶ General Comment No 13: the right to education http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en accessed on 16 June 2015

⁶⁷ United Nations 'The Universal Declaration on Human Rights' 1948 on <http://www.un.org/en/documents/udhr/> accessed on 24th/03/2015

⁶⁸ The United Nations 'Convention relating to the status of refugees' 1951 <http://www.unhcr.org/3b66c2aa10.html> accessed on 13th /2/2015

⁶⁹ United Nations 'The Convention on the Rights of the Child (CRC)' 1990 on <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed on 24th/03/2015

⁷⁰ Article 22 of The Convention on the Rights of the Child (CRC)

⁷¹ Organisation of African Union 'African Charter on the Rights and Welfare of the Child' 1990 on <http://www.refworld.org/docid/3ae6b38c18.html> accessed on 13th /2/2015

⁷² African Commission on Human and Peoples' Rights 'African Charter on Human and Peoples' Rights' 1981 on <http://www.achpr.org/instruments/achpr/#a16> accessed on 30th/07/2015

South Africa and Rwanda have both ratified the above treaties.

3.2 Refugee's right to education in South Africa

South Africa ratified the ICESCR, on 12 January 2015, with a reservation to Article 13.⁷³ In order to understand that reservation, we need to look at how the right to education was interpreted in the national courts.

The analysis begins with the Constitution, where the right to education is found in Section 29, where it says that:

'(1) Everyone has the right:

(a) to a basic education, including adult basic education, and

(b) to further education, which the state through reasonable measures,

*must make progressively available and accessible.'*⁷⁴

Section 29(1)(a) was interpreted in the case of *In re School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 537, where the court said that section 29(1)(a) requires the state not to interfere with a person's enjoyment of right to basic education but to also provide basic education to everybody.⁷⁵ This means that unlike other socio-economic rights, the right contained in 29(1)(a) is an absolute right, the state has to implement measures to give effect to the right as a matter of absolute priority. This would require that the state prioritise those programmes, in its policies and budgetary allocations that seek to give effect to the right over its other spending requirements. This was confirmed by the Constitutional Court in the *Juma Masjid School* case.⁷⁶ This is why section 29(1)(a) is called a 'strong positive right'. Although it has been called an absolute right it still not enforced as many children are not able to attend school as they do not have the financial means to do so.

Although 'basic education' has not been defined in South Africa, academics are of the opinion that it refers to either a certain standard of education or a certain age.⁷⁷

The South African Bill of Rights states that access to basic education is human rights for 'everybody' irrespective of your nationality and in this respect Article 27 (g) of the South

⁷³ICESCR Status ' Declaration under article 13 (2) (a)

"The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2) (a) and Article 14, within the framework of its National Education Policy and available resources." ' on https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty accessed on 24th/03/2015

⁷⁴ Constitution of the Republic of South Africa, 1996

⁷⁵ Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995 (CCT39/95) [1996] ZACC 4; 1996 (4) BCLR 537; 1996 (3) SA 165 (4 April 1996)

⁷⁶ Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011)

⁷⁷ Chiedza Simbo 'Defining the term basic education in the South African Constitution: An international law approach' *Law, Democracy & Development*, Vol. 16, 163-184

African Refugee Act states that ‘a refugee is entitled to the same basic health services and basic primary education which the inhabitants of the country receive from time to time.’⁷⁸

In the case of *Bulambo v Minister of Home Affairs*, the court issued an order that refugees and asylum seeker children, be allowed to register in public schools without a study permit.⁷⁹ This was an important decision as it led to the Department of Education amending its *Admissions Policy* and bringing it line with the Constitution and international law.⁸⁰

Despite all of this, a 2010 report by Lawyers for Human Rights, estimated that 24% of refugees and asylum seekers’ children, of school-going age, are not going to school.⁸¹ They are many problems that limit access, to this constitutionally guaranteed right. Problems such as not being able to afford school fees, lack of documents (i.e study permit), lack of books and uniform, no transport fees, local schools being full and security issues due to xenophobic attitudes by the locals.⁸² On 8 April 2015, after a speech by the Zulu monarch, where he said that foreigners ‘must pack their bags and leave’ a wave of xenophobic attacks started.⁸³ This violence led to around 8000 people being displaced and moving to temporary refugee camps set up by the government with the help of the civil society.⁸⁴ As it was in the middle of the academic year, many children missed school; as a result of the displacement.⁸⁵ The temporary refugee camps do not have schools, as they are short term solutions and refugees are supposed to go back to their communities when the wave of violence ceases.

This is one example of the problems that, refugee and asylum seekers, face in order to have access to this constitutionally guaranteed right.

⁷⁸ Refugee Act 130 of 1998 http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

⁷⁹ *Bulambo Mlakomboka Mubake v Minister of Home Affairs* NGHC case no 72342/2012

⁸⁰ Khan F & Schreier T ‘Refugee Law in South Africa’ Juta , 2014

⁸¹ LHR/CoRMSA submission to the Portfolio Committee on Basic Education on the difficulties faced by refugees, asylum seekers and other foreign migrant children in accessing education, February 2010 on <http://www.lhr.org.za/policy/lhrcormsa-submission-portfolio-committee-basic-education> accessed on 17th/3/2015

⁸² LHR/CoRMSA submission to the Portfolio Committee on Basic Education on the difficulties faced by refugees, asylum seekers and other foreign migrant children in accessing education, February 2010 on <http://www.lhr.org.za/policy/lhrcormsa-submission-portfolio-committee-basic-education> accessed on 17th/3/2015

⁸³ South Africa History Online ‘Xenophobic violence in democratic South Africa’ <http://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa> accessed on 21/4/2015

⁸⁴ Medecins sans frontieres ‘South Africa: MSF Assists People Displaced by Xenophobic Violence’ <http://www.doctorswithoutborders.org/article/south-africa-msf-assists-people-displaced-xenophobic-violence> accessed on 21st/4/2015

⁸⁵ Medecins sans frontieres ‘South Africa: MSF Assists People Displaced by Xenophobic Violence’ <http://www.doctorswithoutborders.org/article/south-africa-msf-assists-people-displaced-xenophobic-violence> accessed on 21st/4/2015

3.3 Refugee's right to education in Rwanda

Rwanda is hosting around 122 500 refugees, spread in 5 refugee camps, which are Gihembe, Kigeme, Kiziba, Mugombwa and Nyabiheke.⁸⁶ The number of refugees has been growing, as a result of regional conflicts, most notably in the neighbouring country of the Democratic Republic of Congo (DRC).⁸⁷

The right to education is guaranteed by the Rwandan Constitution, and goes on to say that primary school is compulsory and free in public schools.⁸⁸ Article 47 of Law 54/2011 emphasises that each child, whether a national or not, is entitled to free primary school education and that it must be compulsory.⁸⁹ The government, through the Nine Years Basic Education Implementation Policy, has said that compulsory and free education should extend to 9 years of school.⁹⁰

The extension to 9 years of school, which would be extended to 12 years of school as of 2015, is part of Rwanda's *Vision 2020*.⁹¹ *Vision 2020* is a policy framework for Rwanda's development in which all government policies will be based on, the main objectives of the framework is to transform Rwanda into a middle-income country knowledge-based economy by the year 2020.⁹² In this framework, education plays a central role as part of the six pillars which the framework is based on.⁹³ As a result of these policies, the enrolment rate in primary school which was 62.5 % in 1990 rose to 91.7% in 2010 and targeted to be 100% by 2015.⁹⁴ There is also an aim of increasing the percentage of children enrolled in

⁸⁶ 2015 UNHCR country operations profile - Rwanda <http://www.unhcr.org/pages/49e45c576.html> accessed on 20th/4/2015

⁸⁷ 2015 UNHCR country operations profile - Rwanda <http://www.unhcr.org/pages/49e45c576.html> accessed on 20th/4/2015

⁸⁸ Article 40 of the Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005 on <http://www.refworld.org/docid/46c5b1f52.html> accessed on 13th /2/2015

⁸⁹ 'Law n°54/2011 of 14/12/2011 relating to the rights and the protection of the child' adopted on 29/09/2011, the law emphasises in Article 7 that there should not be any discrimination when it comes to the rights and protection of the child

⁹⁰ Ministry of Education 'Nine Years Basic Education Implementation Policy' 2008 on www.mineduc.gov.rw/fileadmin/user_upload/9_year_B_E.pdf accessed on 24th/4/2015

⁹¹ Ministry of Education 'Nine Years Basic Education Implementation Policy' 2008 on www.mineduc.gov.rw/fileadmin/user_upload/9_year_B_E.pdf accessed on 24th/4/2015

⁹² Ministry of finance and economic planning 'Rwanda Vision 2020' 2000 on www.minecofin.gov.rw/fileadmin/templates/.../NDPR/Vision_2020_.pdf accessed on 3rd/5/2015

⁹³ 'improvements in education and health services are integral parts of the human resource development and to achieve a knowledge-based economy' Page 10 Ministry of finance and economic planning 'Rwanda Vision 2020' 2000 on www.minecofin.gov.rw/fileadmin/templates/.../NDPR/Vision_2020_.pdf accessed on 3rd/5/2015

⁹⁴ Republic of Rwanda 'Government of Rwanda constructs 1,082 new classrooms to boost access to education' 2015 on http://www.gov.rw/news_detail/?tx_ttnews%5Btt_news%5D=1022&cHash=104586e0a7241693a5eb52522a141c5a accessed on 3rd/5/2015

lower secondary schools from 21% to 40%, and in upper secondary from 25% to 42%.⁹⁵ A policy that directly applies to refugee children is the 'National policy for orphans and vulnerable children'. This policy defines a vulnerable child as a 'person under 18 years exposed to conditions which do not permit him/her to fulfil her/his fundamental rights for her/his harmonious development'.⁹⁶ The main objectives of the policy are to protect the rights of orphan and vulnerable children and to ensure the physical and social development.⁹⁷ 'Refugee and displaced' children fall in the category of 'vulnerable children' in this policy. In the following part, I will look at whether refugee children, in Rwanda, have also benefitted from these good government policies.

In the refugee camps of Rwanda, the UNHCR and their partners are in charge of providing basic services including education.⁹⁸ The government of Rwanda only provides security and administration of the camps, but not any other services.⁹⁹ Education had the biggest chunk in the UNHCR budget, in Rwanda, in 2013.¹⁰⁰ In this regard, an UNHCR partner organisation called The Adventist Development Relief Agency (ADRA) is in charge of providing education to refugees in all camps in Rwanda.¹⁰¹ As a consequence of the restriction on free movement for refugees, refugees are educated within the camps and are not integrated in the communities.¹⁰² The UNHCR with the assistance of their implementing partner, the ADRA, provides free 9 years basic education to all refugee children.¹⁰³ Around 91% of school-age children attend school in the camps; although most of them (45%) attend a lower grade than indicated by their age.¹⁰⁴ Various factors contribute to this delay such as overcrowded classrooms, poor quality of teachers, no special needs education, no pre-

⁹⁵ Benson RK 'Reversing privatization of education: Case study of Rwanda' 2015 on <http://campaignforeducationusa.org/blog/detail/reversing-privatization-of-education-case-study-of-rwanda> accessed on 7th/5/2015

⁹⁶ Ministry of local government, information and social affairs 'National Policy on Orphans and Other vulnerable children' 2003

⁹⁷ Ministry of local government, information and social affairs 'National Policy on Orphans and Other vulnerable children' 2003

⁹⁸ UNCHR 'Rwanda Factsheet' 2015 on www.unhcr.org/524d86a69.pdf accessed on 10th/5/2015

⁹⁹ UNCHR 'Rwanda Factsheet' 2015 on www.unhcr.org/524d86a69.pdf accessed on 10th/5/2015

¹⁰⁰ "UNHCR allocated \$13,620,974 of the \$38,882,642, of the 2013 budget, on education" UNHCR 'Working Environment' 2014 on www.unhcr.org/528a0a210.pdf accessed on 10th/5/2015

¹⁰¹ UNHCR 'Working Environment' 2014 on www.unhcr.org/528a0a210.pdf accessed on 10th/5/2015

¹⁰² UNHCR 'Reservations and declarations to the 1951 Refugee Convention' accessed on <http://www.unhcr.org/cgi-bin/txis/vtx/search?page=search&docid=3d9abe177&query=1951%20Refugee%20Convention> on 13th/03/2015

¹⁰³ UNHCR 'Working Environment' 2014 on www.unhcr.org/528a0a210.pdf accessed on 10th/5/2015

¹⁰⁴ AVSI Foundation 'Child Protection KAP in Rwandan Refugee Camps' 2013 on <http://www.avsi.org/wp-content/uploads/2013/07/KAP-Survey-Rwanda.pdf> accessed on 13th/5/2015

primary quality education and children arrived in the camp after the beginning of the school year.¹⁰⁵

Education programs in refugee camps cover two levels: Primary (P1-6) and lower secondary (S1-3).¹⁰⁶ At the end of lower secondary, if they pass a national exam, they may be given the opportunity to continue to upper secondary at boarding schools outside the camps, but from the 10th grade, the education is no longer free and the refugees or UNHCR must pay for it themselves.¹⁰⁷ Due to lack of funds by UNHCR and their implementing partners, this opportunity is only given to a very small number of refugees.¹⁰⁸ An example of the scarcity of funds is that in the *Gihembe* Refugee camp, out of 1331 in secondary school, only 5 have been given the opportunity to continue to the upper secondary.¹⁰⁹

Because of lack of funds, most refugee children end their schooling by the end of the 9th grade. They are therefore not equipped with enough knowledge to be able to compete in the economy.¹¹⁰ The figure of 5 students is so far, from the 2013 85% national rate of pupils who go beyond the 9th grade.¹¹¹ Other problems as to why there's no 100% school attendance are sickness, having to help at home and having to work.¹¹²

3.4 Conclusion

As we have seen with South Africa, Rwanda's refugee population do not all attend schools as a result of various factors I highlighted above, lack of fund to continue to upper secondary being the main obstacle. Besides these problems, it seems that refugee children in Rwanda have more access to education, 76% in South Africa against 91% in Rwanda. Despite the free movement of refugees in South Africa, it seems that with it comes with more obstacles to access to education than Rwanda, where that right is guaranteed within the camps.

¹⁰⁵ AVSI Foundation 'Child Protection KAP in Rwandan Refugee Camps' 2013 on <http://www.avsi.org/wp-content/uploads/2013/07/KAP-Survey-Rwanda.pdf> accessed on 13th/5/2015

¹⁰⁶ UNHCR 'Briefing Note On Gihembe Refugee Camp, District of Gicumbi, North Province' 2014

¹⁰⁷ UNCHR 'Rwanda Factsheet' 2015 on www.unhcr.org/524d86a69.pdf accessed on 10th/5/2015

¹⁰⁸ UNHCR 'Briefing Note On Gihembe Refugee Camp, District of Gicumbi, North Province' 2014

¹⁰⁹ "This was done through scholarships by ADRA and the Buffet Foundation" UNHCR 'Briefing Note On Gihembe Refugee Camp, District of Gicumbi, North Province' 2014

¹¹⁰ UNCHR 'Rwanda Factsheet' 2015 on www.unhcr.org/524d86a69.pdf accessed on 10th/5/2015

¹¹¹ Ministry of Education '2013 education statistical yearbook' 2013 on http://www.mineduc.gov.rw/fileadmin/user_upload/2013_Rwanda_Education_Statistics.pdf accessed on 10th/5/2015

¹¹² AVSI Foundation 'Child Protection KAP in Rwandan Refugee Camps' 2013 on <http://www.avsi.org/wp-content/uploads/2013/07/KAP-Survey-Rwanda.pdf> accessed on 13th/5/2015

Chapter 4: Refugee's right to access to health

'It is my inspiration that health finally will be seen not as a blessing to be wished for, but as a human right to be fought for'- Koffi Annan (Former Secretary General of the United Nations).¹¹³

4.1 International human rights law and the right to access to health

I will set out, the content of the right to access to health by looking at the various international legal instruments that guarantees that right.

The following international conventions guaranteed the right to health, namely:

- The first time 'the right to health' was mentioned in an international legal instrument was in Article 25 of the 1948 Universal Declaration of Human Rights.¹¹⁴ In this article, the right to health was talked about as part of rights that needs to be satisfied in order to have an 'adequate standard of living'.¹¹⁵ As a result, we did not get the content of that right.

- The International Covenant on Social, Economic and Cultural Rights (ICESCR) in Article 12 recognises this right, it says:

'1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene...'¹¹⁶

In the wording of this section, the treaty sets out key elements that were necessary for the right to be realised but the content was not defined.¹¹⁷ For the content of the right to

¹¹³ KA Annan 'UNFPA- Access to healthcare' on <http://www.unfpa.org/resources/quotes-human-rights> accessed on 17th/07/2015

¹¹⁴ United Nations 'The Universal Declaration on Human Rights' 1948 on <http://www.un.org/en/documents/udhr/> accessed on 24th/07/2015

¹¹⁵ United Nations 'The Universal Declaration on Human Rights' 1948 on <http://www.un.org/en/documents/udhr/> accessed on 24th/07/2015

¹¹⁶ UN Committee on Economic, Social and Cultural Rights (CESCR) Article 12 of United Nations 'The International Covenant on Social, Economic and Cultural Rights (ICESCR)' 1966 on <http://www.refworld.org/docid/3ae6b36c0.html> accessed on 24th/07/2015

¹¹⁷ UN Committee on Economic, Social and Cultural Rights (CESCR) Article 12 of United Nations 'The International Covenant on Social, Economic and Cultural Rights (ICESCR)' 1966 on <http://www.refworld.org/docid/3ae6b36c0.html> accessed on 24th/07/2015

health, we have to look at General Comment 14 to Article 12, published on 11 August 2000.¹¹⁸ The comment starts by emphasising that right to health doesn't mean the right to be healthy but as right to enjoy certain services, goods and facilities necessary in order to attain the highest standard of health.¹¹⁹ The comment goes on to define certain elements that are essential for that right to be realised, namely:¹²⁰

- (a) Availability: this means that goods, facilities and services necessary to guarantee the right to health must be available in sufficient quantity. This includes but not limited to hospital facilities, medical personnel and medicine. This category also includes certain services that are necessary to create a healthy environment such as clean water.¹²¹
- (b) Accessibility: Health services must be available to everyone without any form of discrimination or qualification. Accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility and information accessibility.¹²²
- (c) Acceptability: the health services offered must be respectful of the customs and traditions of the community in which they serve. This could be the culture of individuals, groups or minorities.¹²³ Basically, the health services must be offered in a way that's acceptable to the community.
- (d) Quality: the health services offered must be of high quality and this includes tested and safe medicine, skilled medical workers and clean and safe hospitals.¹²⁴

All the rights in the Covenant, including the right to health, are subjected to 'progressive realisation', meaning that some countries do not have the resources to immediately realise them.¹²⁵ But states must 'take progressive steps' to realise the right to health by implementing legislation and policies.¹²⁶

¹¹⁸) UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)', 11 August 2000, E/C.12/2000/4 on <http://www.refworld.org/docid/4538838d0.html> accessed on 27th/07/2015

¹¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)', 11 August 2000, E/C.12/2000/4 on <http://www.refworld.org/docid/4538838d0.html> accessed on 27th/07/2015

¹²⁰ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)', 11 August 2000, E/C.12/2000/4 on <http://www.refworld.org/docid/4538838d0.html> accessed on 27th/07/2015

¹²¹ *ibid* 8

¹²² *ibid* 8

¹²³ *ibid* 8

¹²⁴ *ibid* 8

¹²⁵ Article 2(1) *ibid* 8

¹²⁶ *ibid* 13

General Comment 14 also sets out certain minimum obligations which must be prioritised by the State, with regard to right to health, they are:¹²⁷

- *The right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;*
- *Access to the minimum essential food which is nutritionally adequate and safe;*
- *Access to shelter, housing and sanitation and an adequate supply of safe drinking water;*
- *The provision of essential drugs;*
- *Equitable distribution of all health facilities, goods and services.*¹²⁸

- Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women says that women must have equal access, to healthcare, as men.¹²⁹ It goes on that special services must be given to pregnant and lactating women, services such as good nutrition.¹³⁰

- Article 24 of the Convention on the Rights of the Child sets out certain obligations that the State must fulfil including to curb child mortality and malnutrition, prenatal and post-natal care for mothers and access to information about the advantages of breast feeding and hygiene.¹³¹

- Regionally, Article 16 of the African Charter on Human and Peoples ' Rights, says that everyone has a right to the best mental and physical health and states must protect the health of their citizens and ensure they have access to medical facilities.¹³²

As there's no international instrument that talks specifically about refugee's right to health, we have to rely in the above general instruments. All of them emphasises that the right to health is for 'everyone', based on the key elements set out in Comment 14.¹³³

South Africa and Rwanda have both ratified the above treaties.

¹²⁷ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)', 11 August 2000, E/C.12/2000/4 on <http://www.refworld.org/docid/4538838d0.html> accessed on 27th/07/2015

¹²⁸ Ibid 15

¹²⁹ UN General Assembly 'Convention on the Elimination of All Forms of Discrimination Against Women' 1979 on <http://www.refworld.org/docid/3ae6b3970.html> accessed on 30th/07/2015

¹³⁰ Article 12(2) ibid 13

¹³¹ Article 24, United Nations 'The Convention on the Rights of the Child (CRC)' 1990 on <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed on 30th/07/2015

¹³² African Commission on Human and Peoples' Rights 'African Charter on Human and Peoples ' Rights' 1981 on <http://www.achpr.org/instruments/achpr/#a16> accessed on 30th/07/2015

¹³³ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)', 11 August 2000, E/C.12/2000/4 on <http://www.refworld.org/docid/4538838d0.html> accessed on 27th/07/2015

4.2 Refugee's right to health in South Africa

The right to health is guaranteed in section 27 of the Constitution which says that health care services, also reproductive health care, must be accessible by everyone.¹³⁴ The Section goes on to say:

'(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

*(3) No one may be refused emergency medical treatment.'*¹³⁵

The interpretation of Section 27 was brought to the Constitutional Court in the case of *Soobramoney*.¹³⁶ The decision was that the right to health must be realised progressively, with the resources available.¹³⁷

Another case that dealt with the right to have access to healthcare was *Minister of Health v Treatment Action Campaign (TAC)*.¹³⁸ In the case, the government was providing 'nevirapine', a drug that prevents mother-to-child transmission of HIV to only research and training facilities and not public medical facilities, therefore excluding the poor and the disadvantaged from accessing it.¹³⁹ The court decided that the policy is in breach of constitutional provisions in Article 27 (1) & (2); the minimum core approach was applied by the court to come to this decision.¹⁴⁰ The rationale behind the decision was that the policy was not 'reasonable' as contained in Section 27(2), as it breached the minimum core obligations of the right to access to health care, contained in General Comment 14.¹⁴¹ Although the right to access to health care must be progressively realised, the measures taken by the State to realise that right must still be 'reasonable'. In the next paragraph I will look specifically at the Refugees Act and what it says about healthcare.¹⁴²

The Refugees Act in Section 27(g) says that a refugee must have access to the same basic healthcare as to which the inhabitants of the country are also entitled to.¹⁴³ This section of

¹³⁴ Section 27 (1) (a) of the Constitution of the Republic of South Africa, 1996

¹³⁵ Section 27(2) & 27(3) *ibid* 22

¹³⁶ *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

¹³⁷ *Ibid* 23

¹³⁸ *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC)

¹³⁹ *Ibid* 25

¹⁴⁰ Para 135 *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC)

¹⁴¹ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)', 11 August 2000, E/C.12/2000/4 on <http://www.refworld.org/docid/4538838d0.html> accessed on 27th/07/2015

¹⁴² Refugee Act 130 of 1998 on http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th/2/2015

¹⁴³ S 27(g) Refugee Act 130 of 1998 on http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th/2/2015

the Refugees Act only guarantees this right to a refugee, which means that he/she must have been granted asylum according to the Act.¹⁴⁴ The consequences were that a lot of asylum seekers who have yet to be given a decision, due to the massive backlog, were not able to access healthcare.¹⁴⁵

This position changed after advocacy by Lawyers for Human Rights (Public interest litigation NGO) and UNHCR urged the Department of Health to change it and the result was Revenue Directive of 19 September 2007.¹⁴⁶ This policy extends the right to health care to everyone, whether a refugee or an asylum seeker with or without a permit, on the same footing as South Africans.¹⁴⁷ To qualify for free healthcare or partial subsidies, the government uses an assessment of income, known as a means test.¹⁴⁸ With this test, a person whose income is less than R36.000 per annum or a household where the income is less than R50.000 per annum are entitled to free healthcare.¹⁴⁹ The policy also provides free healthcare to pregnant mothers, children under 6 years old, HIV treatment, victims of any type of violence, patients with infectious diseases and people with mental disorders, without any classification.¹⁵⁰ After the Revenue Directive policy was issued, the refugees and asylum seekers are also entitled to the same treatment as South African citizens.¹⁵¹

Even with the policy in place, many refugees are still denied access to health.¹⁵² A study by Wits' Forced Migration Studies Program in 2008, found that the biggest problems faced by asylum seekers and refugees in accessing healthcare are: language problems (28%), treated badly by nurse (23%), denied treatment because of documents (22%), denied treatment because of being a foreigner (21%), could not get treatment/medicine because of cost (16%) and treated badly by doctor (10%).¹⁵³

¹⁴⁴ Means granted asylum by a Refugee Status Determination Officer in terms of Section 24 Refugee Act 130 of 1998 on http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

¹⁴⁵ Khan F & Schreier T 'Refugee Law in South Africa' Juta , 2014

¹⁴⁶ Department of Health 'Department of Health Revenue Directive of 19 September 2007 BI 4/29 REFUG/ASYL 8 2007' on http://www.passop.co.za/wp-content/uploads/2012/07/revenue-directive_refugees-and-asylum-seekers-with-or-without-permit.pdf accessed 7th August 2015

¹⁴⁷ Ibid 32

¹⁴⁸ Department of Health 'Explanation of the Current Policy Regarding the Classification of Patients for the Determination of Fees' 2002 on <http://www.health.gov.za/index.php/uniform-patient-fee-schedule/category/108-u2012> accessed 9th October 2015

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Department of Health 'Department of Health Revenue Directive of 19 September 2007 BI 4/29 REFUG/ASYL 8 2007' on http://www.passop.co.za/wp-content/uploads/2012/07/revenue-directive_refugees-and-asylum-seekers-with-or-without-permit.pdf accessed 7th August 2015

¹⁵² Doctors without Borders 'No Refuge, Access Denied: Medical and Humanitarian Needs of Zimbabweans in South Africa' 2009 on <http://www.doctorswithoutborders.org/news-stories/special-report/no-refuge-access-denied-medical-and-humanitarian-needs-zimbabweans-south> accessed on 10th August 2015

¹⁵³ Forced Migration Studies Program 'Migrant Access to Health Care and Primary Education' 2008 on <http://cormsa.org.za/wp-content/uploads/Research/Access/MigrantGautengDoH.pdf> accessed 10th October 2015

What the study concludes was that asylum seekers are denied treatment, mostly because of the xenophobic attitudes of the hospital staff or because of ignorance of the law with regard to the rights of refugees.¹⁵⁴

4.3 Refugee's right to health in Rwanda

The right to health care in Rwanda is guaranteed in Article 41 of the Constitution which says that:

*'All citizens have the right and duties relating to health. The State shall have the duty of mobilizing the population for activities aimed at promoting good health and to assist in the implementation of these activities.'*¹⁵⁵

In Vision 2020, a policy framework, health is one of the central pillars.¹⁵⁶ As a result significant results have been achieved in the area of health, such as maternal mortality ratio falling by 60% and child mortality falling by 70%, this is also due to the fact that approximately 98% of the population has medical insurance.¹⁵⁷ This medical insurance known as *Mutuelle de Santé* was established by Law N° 62/2007 of 30/12/2007.¹⁵⁸ According to the law, the medical schemes are autonomous organisations operated on the district level but under the supervision of the Ministry of health.¹⁵⁹ The law was implemented through a policy called 'Rwanda National Health Insurance Policy' passed in 2010.¹⁶⁰ The policy sets out categories (known as *ubudehe*) in which families will fall in depending on their economic status, which will then determine their contribution to the scheme.¹⁶¹ For example *ubudehe* category 1 is for families who don't own a house and cannot afford basic needs and category 2 is for families with a house but who rarely have full time jobs, the families in these categories will then fall in category one of *Mutuelle de*

¹⁵⁴ Doctors without Borders 'No Refuge, Access Denied: Medical and Humanitarian Needs of Zimbabweans in South Africa' 2009 on <http://www.doctorswithoutborders.org/news-stories/special-report/no-refuge-access-denied-medical-and-humanitarian-needs-zimbabweans-south> accessed on 10th August 2015

¹⁵⁵ Article 41 of the Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005 on <http://www.refworld.org/docid/46c5b1f52.html> accessed on 13th /2/2015

¹⁵⁶ 'improvements in education and health services are integral parts of the human resource development and to achieve a knowledge-based economy' Page 10 Ministry of finance and economic planning 'Rwanda Vision 2020' 2000 on www.minecofin.gov.rw/fileadmin/templates/.../NDPR/Vision_2020_.pdf accessed on 3rd/5/2015

¹⁵⁷ The New York Times 'Rwanda's Health Care Success Story' 06/02/2013 on http://www.nytimes.com/2013/02/05/science/rwandas-health-care-success-story.html?_r=0 accessed on 3rd/5/2015

¹⁵⁸ Law N° 62/2007 'Establishing and determining the organisation, functioning and management of the mutual health insurance scheme' 30/12/2007

¹⁵⁹ *ibid*

¹⁶⁰ Ministry of Health 'Rwanda National Health Insurance Policy' 2010 on http://www.moh.gov.rw/fileadmin/templates/Docs/insurance_policy1.pdf accessed on 10th October 2015

¹⁶¹ *ibid*

Santé which is the one where there's the lowest contribution, in this case Rwf 2000 (\$ 2.7) per annum per individual in the household.¹⁶² If a household is too poor to even afford that minimum fee, the government and their partners will provide their contribution.¹⁶³ This system has led to Rwanda being one of the few countries, which meet the Millennium Development Goals, in terms of health.¹⁶⁴

In all refugee camps of Rwanda, the healthcare of refugees is taken care by the American Refugee Committee, as a result of an agreement with the Government of Rwanda and UNHCR.¹⁶⁵ ARC's work including the building of clinics in camps, providing primary and reproductive healthcare, HIV/AIDS prevention and treatment, nutrition education and water and sanitation.¹⁶⁶ All camps have a health centre which provides primary care and includes a laboratory, maternity ward, consultation rooms and pharmacies.¹⁶⁷ If anyone is in need of additional care, they are referred to public hospitals in the area.¹⁶⁸ The American Refugee Committee also has immunization and HIV/AIDS programs that cover new-borns and is provided by community health workers, from within the camps.¹⁶⁹ This has resulted in 92% of all births in camps being facilitated by a health professional and not a single case of mother-to-child transmission of HIV being recorded in any camp, since 2010.¹⁷⁰ For refugees outside the camp, they have to register for a health insurance as it is compulsory for any resident of Rwanda to have health insurance.¹⁷¹

Despite all the achievements, the access to health care by refugees is still impeded by many obstacles.¹⁷² Problems such as lack of sufficient toilets and showers, shortage of water and sexual-based violence such as a rape, which might result in HIV being contracted, but the victim won't come forward for fear of being persecuted or shamed by the community.¹⁷³

¹⁶² *ibid*

¹⁶³ *ibid*

¹⁶⁴ The New York Times 'Rwanda's Health Care Success Story' 06/02/2013 on <http://www.nytimes.com/2013/02/05/science/rwandas-health-care-success-story.html? r=0> accessed on 3rd/5/2015

¹⁶⁵ UNCHR 'Rwanda Factsheet' 2015 on www.unhcr.org/524d86a69.pdf accessed on 10th/5/2015

¹⁶⁶ American Refugee Committee 'ARC Rwanda' 2014 on http://www.arcrelief.org/site/PageServer?pagename=programs_rwanda accessed on 11th/08/ 2015

¹⁶⁷ UNHCR 'Briefing Note On Gihembe Refugee Camp, District of Gicumbi, North Province' 2014

¹⁶⁸ American Refugee Committee 'ARC Rwanda' 2014 on http://www.arcrelief.org/site/PageServer?pagename=programs_rwanda accessed on 11th/08/2015

¹⁶⁹ American Refugee Committee 'ARC Rwanda' 2014 on http://www.arcrelief.org/site/PageServer?pagename=programs_rwanda accessed on 11th/08/2015

¹⁷⁰ *ibid* 44

¹⁷¹ Article 33 of Law N° 62/2007 'Establishing and determining the organisation, functioning and management of the mutual health insurance scheme' 30/12/2007

¹⁷² The New York Times 'Rwanda's Health Care Success Story' 06/02/2013 on <http://www.nytimes.com/2013/02/05/science/rwandas-health-care-success-story.html? r=0> accessed on 3rd/9/2015

¹⁷³ UNHCR 'Briefing Note On Gihembe Refugee Camp, District of Gicumbi, North Province' 2014

Another obstacle which is shared by the citizens of Rwanda is the shortage of health facilities and health personnel, which has one doctor for every sixteen thousand people.¹⁷⁴

4.4 Conclusion

In conclusion, in South Africa the health facilities are better than those in Rwanda, but refugee's access to healthcare is impeded by xenophobic attitudes and ignorance of the law by medical personnel in those facilities. In Rwanda, the biggest obstacle to healthcare is the shortage of health facilities and medical personnel coupled with other issues prevalent in camps, such as shortage of water and toilets, and also attitudes of the community toward certain behaviours such as the silence about gender violence.

¹⁷⁴ The New York Times 'Rwanda's Health Care Success Story' 06/02/2013 on <http://www.nytimes.com/2013/02/05/science/rwandas-health-care-success-story.html? r=0> accessed on 3rd/9/2015

Chapter 5: Refugee's right to work

"If a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him or herself by engaging in trade, such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a license to trade..." - Judge MS Navsa (Acting Deputy President of the Supreme Court of Appeal of South Africa).¹⁷⁵

5.1 International human rights law and the right to work

In this section, I will define the right to work through the different international and regional legal instruments:

-Article 23 of the 1948 Universal Declaration of Human Rights, sets out the right to work.¹⁷⁶ The article says that everyone has a right to work and a free choice of employment and to have equal pay for equal work, without any form of discrimination.¹⁷⁷ The article also emphasises that the right to work is necessary for the human dignity and also for the survival of the person and his/her family.¹⁷⁸

-Article 6 and 7 the International Covenant on Social, Economic and Cultural Rights (ICESCR), deals with the right to work, but for the sake of our discussion, we will focus on only Article 6.¹⁷⁹ It says:

'1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural

¹⁷⁵ *Somali Association of South Africa and others v. Limpopo Department of Economic Development, Environment and Tourism*, (48/2014) [2014] ZASCA 143, South Africa: Supreme Court of Appeal, 26 September 2014, on <http://www.refworld.org/docid/5425522d4.html> accessed 11th September 2015

¹⁷⁶ United Nations 'The Universal Declaration on Human Rights' 1948 on <http://www.un.org/en/documents/udhr/> accessed on 24th/07/2015

¹⁷⁷ Article 23(1)&(2) United Nations 'The Universal Declaration on Human Rights' 1948 on <http://www.un.org/en/documents/udhr/> accessed on 24th/07/2015

¹⁷⁸ Article 23(3) of the United Nations 'The Universal Declaration on Human Rights' 1948 on <http://www.un.org/en/documents/udhr/> accessed on 24th/07/2015

¹⁷⁹ UN Committee on Economic, Social and Cultural Rights (CESCR) Article 6 & 7 of United Nations 'The International Covenant on Social, Economic and Cultural Rights (ICESCR)' 1966 on <http://www.refworld.org/docid/3ae6b36c0.html> accessed on 24th/07/2015

*development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*¹⁸⁰

In General Comment 20 of 2009, the Committee on Economic, Social and Cultural Rights, confirmed that all the socio-economic rights in the Covenant apply to everyone, including asylum seekers and refugees regardless of legal status.¹⁸¹ But this paragraph is qualified by Article 2 of the Covenant, especially 2(1) & 2(3).¹⁸² As with the other rights I discussed in earlier chapter, the right to work is not an immediate right, but must be achieved progressively by all appropriate means.¹⁸³ Article 2(3) talks specifically about economic rights and says that developing countries may on their own decide to what extent some rights may be guaranteed to non-nationals, with regard to their national economy.¹⁸⁴ What this effectively means, is that some rights such as the right to work, might not be given to non-nationals, that there's high unemployment in the country and those jobs available should be given to nationals.

-Regionally, Article 15 of the African Charter on Human and Peoples' Rights guarantees the right to work, under equitable conditions and for equal pay for equal work.¹⁸⁵

- A more direct international instrument on the right to work for refugees is the 1951 Refugee Convention.¹⁸⁶ The Convention talks extensively about the right to work for refugees in Article 17, 18 and 19.¹⁸⁷ It distinguishes between wage-earning employment and self-employment as these will determine which rights accrues to the refugee.¹⁸⁸ I will briefly break down it down:

A) Article 17(1) deals with wage-earning employment and says that : *'The Contracting State shall accord to refugees lawfully staying in their territory the most favourable*

¹⁸⁰ UN Committee on Economic, Social and Cultural Rights (CESCR) Article 6 of United Nations 'The International Covenant on Social, Economic and Cultural Rights (ICESCR)' 1966 on <http://www.refworld.org/docid/3ae6b36c0.html> accessed on 24th/07/2015

¹⁸¹ Para 30 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, on <http://www.refworld.org/docid/4a60961f2.html> accessed 21st /09/ 2015

¹⁸² UN Committee on Economic, Social and Cultural Rights (CESCR) Article 6 of United Nations 'The International Covenant on Social, Economic and Cultural Rights (ICESCR)' 1966 on <http://www.refworld.org/docid/3ae6b36c0.html> accessed on 24th/07/2015

¹⁸³ Article 2(1) *ibid* 8

¹⁸⁴ Article 2(3) *ibid* 8

¹⁸⁵ African Commission on Human and Peoples' Rights 'African Charter on Human and Peoples' Rights' 1981 on <http://www.achpr.org/instruments/achpr/#a16> accessed on 30th/07/2015

¹⁸⁶ The UN Convention relating to the status of refugees of 1951 <http://www.unhcr.org/3b66c2aa10.html> accessed on 13th /2/2015

¹⁸⁷ *ibid* 11

¹⁸⁸ Asylum access 'Global Refugee Work Rights Report: Taking the movement from theory to practice' 2014 on http://asylumaccess.org/wp-content/uploads/2014/09/FINAL_Global-Refugee-Work-Rights-Report-2014_Interactive.pdf. Accessed on 21st /09/ 2015

*treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.*¹⁸⁹

Here the key word is 'lawfully staying' and it's not defined in the Convention but Hathaway, a leading refugee law scholar is of the opinion that it means three things, namely:

**Recognized as refugees through individual refugee status determinations (RSD) or as prima facie refugees (refugees whose status has been determined on a group basis) whether by the state or by UNHCR;*

** Asylum seekers in a state that fails to determine or comply with an RSD system or where the procedure is unduly prolonged; and*

**Refugees waiting for resettlement in another state.*¹⁹⁰

Most of the asylum seekers and refugees fit into one of those categories, therefore, following Hathaway interpretation, they should be allowed to work.¹⁹¹ Article 17(2) has a list of conditions, which also once satisfied, should allow the refugee to work, and despite restrictions imposed by the host country to protect its labour market.¹⁹²

B) Article 18 deals with self-employment and it says that:

*'The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.'*¹⁹³

In this Article, the key words are 'lawfully in' and once again we turn to Hathaway, who is of the opinion that it applies to:

**Asylum seekers and refugees who have been admitted to the territory of a Member State for a fixed period of time;*

¹⁸⁹ Article 17(1) The UN Convention relating to the status of refugees of 1951
<http://www.unhcr.org/3b66c2aa10.html> accessed on 13th /2/2015

¹⁹⁰ Hathaway, J 'The Rights of Refugees Under International Law' Cambridge University Press, 2005

¹⁹¹ Ibid 15

¹⁹² Article 17(2) The UN Convention relating to the status of refugees of 1951
<http://www.unhcr.org/3b66c2aa10.html> accessed on 13th /2/2015

¹⁹³ Article 18 The UN Convention relating to the status of refugees of 1951
<http://www.unhcr.org/3b66c2aa10.html> accessed on 13th /2/2015

**Asylum seekers who have lodged their asylum claim with the host country...¹⁹⁴*

This means that the right to self-employment should be given to asylum seekers and refugees, before their status is determined and not doing so is a violation of their right.¹⁹⁵

South Africa and Rwanda have ratified all the above treaties.

5.2 Refugee's right to work in South Africa

In terms of right to work, South Africa's domestic law has granted some significant protection, in terms of the Refugees Act of 1998.¹⁹⁶ Section 27(f) says that a refugee: *'is entitled to seek employment.'*¹⁹⁷

As the Refugee Act of 1998, distinguishes between an asylum seeker and a refugee, these rights including the right to work, is seemingly only extended to refugees who in principal have legal status and not to asylum seekers, who have yet to have their status determined.¹⁹⁸ Therefore by law, a refugee whose status has been determined is entitled to work as any citizen would.¹⁹⁹ With asylum seekers, the Act is silent and for clarification, we have to turn to case law.

In *Minister of Home Affairs and Others v Watchenuka and Others*, the Supreme Court of Appeal found that a decision by the Standing Committee, that all asylum seekers permits must contain a prohibition against work and study for the 180 days, was found to be unconstitutional.²⁰⁰ The court in its judgement that:

'The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for

¹⁹⁴Hathaway, J 'The Rights of Refugees Under International Law' Cambridge University Press, 2005

¹⁹⁵ Asylum access 'Global Refugee Work Rights Report: Taking the movement from theory to practice' 2014 on http://asylumaccess.org/wp-content/uploads/2014/09/FINAL_Global-Refugee-Work-Rights-Report-2014_Interactive.pdf. Accessed on 21st /09/ 2015

¹⁹⁶ Refugee Act 130 of 1998 http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

¹⁹⁷ Sect 27(f) Refugee Act 130 of 1998 http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

¹⁹⁸ Asylum access 'Global Refugee Work Rights Report: Taking the movement from theory to practice' 2014 on http://asylumaccess.org/wp-content/uploads/2014/09/FINAL_Global-Refugee-Work-Rights-Report-2014_Interactive.pdf. Accessed on 21st /09/ 2015

¹⁹⁹ Sect 27(f) Refugee Act 130 of 1998 http://www.saflii.org/za/legis/consol_act/ra199899/ accessed on 12th /2/2015

²⁰⁰ Minister of Home Affairs and Others v Watchenuka and Others (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003)

*meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.*²⁰¹ This was an important decision as the Court confirmed that the right to take part in work is an important part of human dignity. The judgement also means that any condition on the right to work on an asylum seekers permit must be done on a case to case basis.²⁰²

Despite these legal guarantees, refugees in South Africa still face many obstacles to find a job such as employers being ignorant about the law, language issues, educational differences, cultural barriers, xenophobic etc...²⁰³ Some of these obstacles are not only experienced by refugees but also nationals, because of the high unemployment rate in the country (25%).²⁰⁴ In April 2015, xenophobic violence flared about in some regions of South Africa, leading to 8 deaths and 2000 displaced foreign nationals, the main reason advanced by the perpetrators, for their frustration, was that foreigners were stealing their jobs.²⁰⁵

5.3 Refugee's right to work in Rwanda

In Rwanda, the right to work is contained in Article 37 of the Constitution which says:

'Every person has the right to free choice of employment.

*Persons with the same competence and ability have a right to equal pay for equal work without discrimination.*²⁰⁶

The Refugee law of Rwanda also says that every right provided to refugees, by an international instrument to which Rwanda has ratified shall be given effect by the State.²⁰⁷ The reality is the majority of refugees in Rwanda stay in camps where they can start businesses or take jobs as helpers in the camps, but not outside, as their movement is

²⁰¹ Para 27 Minister of Home Affairs and Others v Watchenuka and Others (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003)

²⁰² Asylum access 'Global Refugee Work Rights Report: Taking the movement from theory to practice' 2014 on http://asylumaccess.org/wp-content/uploads/2014/09/FINAL_Global-Refugee-Work-Rights-Report-2014_Interactive.pdf. Accessed on 21st /09/ 2015

²⁰³ Khan F & Schreier T ' Refugee Law in South Africa' Juta , 2014

²⁰⁴ Statistics South Africa on <http://www.statssa.gov.za/> accessed on 12th/10/2015

²⁰⁵ South Africa History Online 'Xenophobic violence in democratic South Africa' 2015 on <http://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa> accessed on 12th/10/2015

²⁰⁶ Article 37 of the Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005 on <http://www.refworld.org/docid/46c5b1f52.html> accessed on 13th /2/2015

²⁰⁷ Article 37 Law n° 13ter/2014 of 21/05/2014 relating to refugees <http://midimar.gov.rw/index.php?id=93> accessed on 13th /2/2015

limited.²⁰⁸ Most of their needs are met through allowances and other help, provided by UNHCR and their partners, including the Government.²⁰⁹

5.4 Conclusion

In conclusion, South Africa should offer more protection to the refugees, other than just laws but policies and awareness programs targeting employers. Rwanda should honour its commitment to the international treaties it ratified and grant refugees the right to work, which can only be realised once they are given the right to free movement, and the right to work, as the South African Supreme Court of Appeal said, is an integral part of human dignity.²¹⁰

²⁰⁸ UNHCR 'Briefing Note On Gihembe Refugee Camp, District of Gicumbi, North Province' 2014

²⁰⁹ Ibid 32

²¹⁰ Para 27 Minister of Home Affairs and Others v Watchenuka and Others (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003)

Chapter 6: Conclusion and recommendations

The research question this study attempted to answer was whether refugees confined to camps or urban refugees have more access to three basic rights, namely education, health and work.

South Africa and Rwanda have both ratified all the major international and regional instruments which set out refugee rights, such as 1951 Refugee Convention, and also the major international and regional instruments which guarantee socio-economic rights to everybody, like the ICESCR. The major difference between these two countries and which is at that foundation of this study is Rwanda's reservation to Article 26 of the 1951 UN Refugee Convention.²¹¹

Article 26 guarantees freedom, for refugees, to choose their place of residence in the host country.²¹² This reservation effectively confines most of the refugees in Rwanda to camps, where their needs are met by donations from the UNHCR and their partners, including the government.²¹³ This means that refugees having access to services that are essential for the fulfilment of those rights depends on the availability of funds.²¹⁴ Since the refugees can't leave the camps, they have no choice but to accept what is given to them.

South Africa has no reservation to the Refugee Convention, refugees can settle whenever they want and the country also guarantees extensive access to a number of services to refugees. Most of the refugees settle in low income areas, which put them in contact with the locals and have caused tensions which have culminated in xenophobic attacks against them.²¹⁵ The local population accuse them of taking their jobs, economic opportunities and for being involved in crime.²¹⁶ Another big hurdle to refugees and asylum seekers, in South Africa, not having access to their rights is a lack of knowledge by the foreigners and also the

²¹¹ UNHCR 'Reservations and declarations to the 1951 Refugee Convention' accessed on <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d9abe177&query=1951%20Refugee%20Convention> on 13th/03/2015

²¹² Article 26 The United Nations 'Convention relating to the status of refugees' 1951 <http://www.unhcr.org/3b66c2aa10.html> accessed on 13th /2/2015

²¹³ 2015 UNHCR country operations profile - Rwanda <http://www.unhcr.org/pages/49e45c576.html> accessed on 20th/4/2015

²¹⁴ UNCHR 'Rwanda Factsheet' 2015 on www.unhcr.org/524d86a69.pdf accessed on 10th/5/2015

²¹⁵ K Jacobsen 'Refugees and Asylum Seekers in Urban Areas: A Livelihoods Perspective' *Journal of Refugee Studies* Vol. 19, No. 3, 273-286

²¹⁶ South Africa History Online 'Xenophobic violence in democratic South Africa' 2015 on <http://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa> accessed on 12th/10/2015

local population about rights that refugees are entitled under the south African legal system.²¹⁷

6.1 Recommendations

1. Rwanda must withdraw its reservation to Article 26 of the 1951 Refugee Convention.

Rwanda's reservation to Article 26 effectively limits the movement of refugees and confines them to camps. UNHCR in their *UNHCR Policy on Alternatives to Camps* said that staying in camps is detrimental to the refugee population as it denies them independence, ability to manage their own lives and creates a barrier between them and the local population, increasing their feeling of isolation.²¹⁸ In Rwanda, the government is in charge of the security at camps they control the flow of refugees, in and out of the camps, which might give refugees a sense of being in a prison.²¹⁹ UNHCR has said that in its experience, refugees who have self-reliance bring personal skills and assets which stimulate the local economy and also UNHCR usually invest significantly in infrastructure for refugees by constructing schools and clinics, which may also be used by the local population therefore increasing social cohesion.²²⁰

2. South Africa should have a better implementation of their legal and policy framework, with regard to access to education and health by refugees.

South Africa's legal and policy framework, with regard to access to education and health for refugees and asylum seekers, is very progressive but is poorly implemented.²²¹ This can be achieved in the following ways:

- By training school administrators and health personnel about the right of migrants to have access to education and health, no matter their status, as per South African law.²²²

²¹⁷ Forced Migration Studies Program 'Migrant Access to Health Care and Primary Education' 2008 on <http://cormsa.org.za/wp-content/uploads/Research/Access/MigrantGautengDoH.pdf> accessed 10th October 2015

²¹⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Alternatives to Camps*, 22 July 2014, UNHCR/HCP/2014/9, on <http://www.refworld.org/docid/5423ded84.html> accessed 2nd November 2015

²¹⁹ 2015 UNHCR country operations profile - Rwanda <http://www.unhcr.org/pages/49e45c576.html> accessed on 20th/4/2015

²²⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Alternatives to Camps*, 22 July 2014, UNHCR/HCP/2014/9, on <http://www.refworld.org/docid/5423ded84.html> accessed 2nd November 2015

²²¹ LHR/CoRMSA submission to the Portfolio Committee on Basic Education on the difficulties faced by refugees, asylum seekers and other foreign migrant children in accessing education, February 2010 on <http://www.lhr.org.za/policy/lhrcormsa-submission-portfolio-committee-basic-education> accessed on 17th/3/2015

- Government must ensure that every public school and health facility is aware of the laws and policies, through the issuing of directives.
- The different government departments, such as the Department of Education, The Department of Health, The Department of Social Development and the South African Police Service must work together to ensure that basic rights, of education and health, by refugees are not violated.²²³

3. Access to education should also continue in upper secondary, for refugee children in camps in Rwanda.

Only a very small number of refugees continue their education beyond the 9th grade because of lack of funds.²²⁴ In camps only 5%, compared to the 85% nationally, go past the 9th grade.²²⁵ This could be solved if the government would allow refugee children to attend school in the communities surrounding the camp. This might require the government to divert a bit more funds in education, but will help with the integration of the refugees in local communities and also curb social problems that come as a result of teens loitering around instead of attending school, such as teenage pregnancies and use of drugs.²²⁶

4. Rwanda must change its policies in order to allow refugees to find work outside of the camps.

As I said in the first recommendation, the right to movement is essential for the realisation of other rights such as the right to work. Currently, the government only allows refugees to work or set up businesses, within the confines of the camps.²²⁷ The refugees are not

²²² Forced Migration Studies Program 'Migrant Access to Health Care and Primary Education' 2008 on <http://cormsa.org.za/wp-content/uploads/Research/Access/MigrantGautengDoH.pdf> accessed 10th October 2015

²²³ LHR/CoRMSA submission to the Portfolio Committee on Basic Education on the difficulties faced by refugees, asylum seekers and other foreign migrant children in accessing education, February 2010 on <http://www.lhr.org.za/policy/lhrcormsa-submission-portfolio-committee-basic-education> accessed on 17th/3/2015

²²⁴ UNCHR 'Rwanda Factsheet' 2015 on www.unhcr.org/524d86a69.pdf accessed on 10th/5/2015

²²⁵ Ministry of Education '2013 education statistical yearbook' 2013 on http://www.mineduc.gov.rw/fileadmin/user_upload/2013_Rwanda_Education_Statistics.pdf accessed on 10th/5/2015

²²⁶ AVSI Foundation 'Child Protection KAP in Rwandan Refugee Camps' 2013 on <http://www.avsi.org/wp-content/uploads/2013/07/KAP-Survey-Rwanda.pdf> accessed on 13th/5/2015

²²⁷ UNHCR 'Briefing Note On Gihembe Refugee Camp, District of Gicumbi, North Province' 2014

independent, as their needs are met by being given allowances.²²⁸ Working gives human a sense of self-esteem and self-worth, these are being denied to refugees, when their right to work is limited.²²⁹ By changing their policies on their right to work, the government would give back refugees their human dignity and also contribute to the local economy as refugees will bring personal skills and assets in the communities in which they will be working in.²³⁰

5. South Africa should adopt measures to deal with the issue of xenophobia in the country.

Xenophobia attitude and attacks are at the core of the obstacles, faced by migrants in South Africa. There is an attitude of distrust and dislike toward migrants in South Africa, which results in them being denied access to services such as schools and clinics, to which they are entitled to.²³¹ Some of the ways to deal with this issue are:

- Incorporate issues of migration and xenophobia in school's curriculum;
- Training of community leaders, from communities which a high number of migrants, about human rights, non-discrimination and xenophobia;
- Organise programs promote long-term cohabitation and tolerance between the local population and the migrants, those programs can be used to dispel negative stereotypes and myths, against foreigners;
- Government should root out corruption at different institutions that deal with migrants, making them more credible and efficient;
- Government must deal with the core socio-economic issues behind the xenophobic attacks, such as high unemployment rate and
- The police and the judiciary must deal harshly with anyone that commits a crime to another person, just because they are foreigners.²³²

²²⁸ UNHCR 'Briefing Note On Gihembe Refugee Camp, District of Gicumbi, North Province' 2014

²²⁹ Asylum access 'Global Refugee Work Rights Report: Taking the movement from theory to practice' 2014 on http://asylumaccess.org/wp-content/uploads/2014/09/FINAL_Global-Refugee-Work-Rights-Report-2014_Interactive.pdf. Accessed on 21st /09/ 2015

²³⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Policy on Alternatives to Camps*, 22 July 2014, UNHCR/HCP/2014/9, on <http://www.refworld.org/docid/5423ded84.html> accessed 2nd November 2015

²³¹ South Africa History Online 'Xenophobic violence in democratic South Africa' <http://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa> accessed on 21/4/2015

²³² South African Human Rights Commission 'Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals' 2010 on http://www.sahrc.org.za/home/21/files/Reports/Non%20Nationals%20Attacks%20Report_1-50_2008.pdf accessed 2nd November 2015

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Word count (excluding bibliography): 13 809