

A review of the latest developments in South African refugee law and policy
in light of the country's international obligations

by

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DECLARATION

I, 1881902 (Student number), declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Abstract

This research considered the issue of whether latest developments regarding South African refugee law and policies are aligned to the country's international obligations. The motivation behind this research report is to contribute to academic and public discourse on human rights, migration, and global responsibility. Furthermore, this report serves as a platform for critical analysis, shedding light on the intricacies of South Africa's approach to refugees and asylum seekers in the context of its international commitments.

It is imperative to comprehend the evolution of the legal framework governing refugees and asylum seekers in South Africa, given the significant presence of hundreds of thousands of refugees and asylum seekers within the country's borders. The question of refugees and asylum seekers is both a legal and political matter. Legally, it involves navigating international agreements and national laws that dictate how these individuals are recognised and protected. Simultaneously, the issue extends into the political sphere, where decisions on refugee policies are influenced by domestic political considerations, public opinion, and concerns about national security or economic stability. The interplay between legal principles and political realities shapes the approach a nation takes, highlighting the need for nuanced solutions that address both aspects of this complex challenge. The aim of this research report is to consider the recent developments of South African refugee law and policy and how it aligns with the country's international obligations.

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1. INTRODUCTION

South Africa has long been a destination for individuals seeking refuge from persecution, conflict, and human rights abuses in their home countries. As a signatory to the 1951 Refugee Convention¹ and its 1967 Protocol², the country is constrained by global commitments to safeguard and assist refugees within its territory.³ The 1951 Refugee Convention, serves as a cornerstone in international refugee law. Its main aim is to establish a legal structure for ensuring protection of individuals who have left their nations because of a legitimate apprehension of persecution.⁴ The Convention defines who qualifies as a refugee and introduces the principle of non-refoulement, thereby prohibiting the return of refugees to a location where they could face persecution.⁵ In 1967, recognising the evolving nature of global displacement, the Protocol Relating to the Status of Refugees was adopted, effectively removing the temporal and geographic limitations of the original Convention. The 1967 Protocol broadened the protective framework to encompass refugees globally, irrespective of when or where they were displaced.⁶ Together, the 1951 Refugee Convention and its 1967 Protocol form the fundamental legal instruments guiding the international community in safeguarding the rights and well-being of refugees, emphasising the shared responsibility of nations in addressing the challenges posed by forced displacement.

Over the years, South Africa's refugee law and policy have undergone various developments to meet the evolving challenges of forced displacement while ensuring compliance with its international commitments. The protective environment for asylum seekers in South Africa has steadily declined over time. The South African government has altered its policies and stance, leaning towards exclusion rather than acceptance of refugees. As a consequence of these policy adjustments, numerous refugees and asylum seekers in South Africa now exist within an extensive population that is concealed and lacks proper documentation. In 1991, South Africa

¹ The 1951 Convention Relating to The Status of Refugees.

² The 1967 Protocol relating to the Status of Refugees.

³ National Immigrant Justice Center 'A Legacy of Injustice: The U.S. Criminalization of Migration' available at <https://immigrationjustice.org/research-items/report-legacy-injustice-us-criminalization-migration>, National Immigrant Justice Center 'A Legacy Of Injustice: The U.S. Criminalization of Migration' accessed on 30 March 2024.

⁴ Edukraze 'World Refugee Day 2023: Hope Away from Home' available at <https://edukraze.com/world-refugee-day-2023-hope-away-from-home/>, accessed on 30 March 2024.

⁵ Op cit note 1 pg 5.

⁶ Op cit note 2.

initially allowed United Nations High Commissioner for Refugees⁷ field officers to assist in repatriating South African exiles, later extending this agreement to Mozambican refugees in 1993.⁸ Upon ratifying the 1969 OAU Convention in December 1995⁹, South Africa enacted the Refugees Act of 1998¹⁰, aligning with international obligations. The Act, based on human rights principles, was once praised by the UNHCR as progressive. In recent years, changes in South Africa's governmental stances and policies have limited asylum opportunities, resulting in a significant undisclosed community of at-risk refugees without proper documentation.¹¹

Despite implementing non-encampment policies and guaranteeing freedom of movement, practical realisation of refugee rights has faltered. The ANC's policy document suggests a shift from inclusion to exclusion, with over 95% of asylum seekers labeled as economic migrants.¹² The proposed Green and White Papers reinforce this belief, emphasising the relocation of Asylum Seeker Processing Centres closer to borders.¹³ The Green Paper is a preliminary policy document that outlines the government's proposed approach and options for addressing issues related to refugees in South Africa.¹⁴ The White Paper is a more definitive policy document that builds on the feedback and recommendations gathered from the Green Paper consultations and it represents the government's final stance and proposed policy direction on refugee issues.¹⁵

Recently, South Africa has seen the introduction of the Refugees Amendment Act 11 of 2017¹⁶, alongside the draft Refugees Regulations of 2018¹⁷. These initiatives signaled a significant step by the government to curtail the protection extended to refugees and asylum seekers.

The review of the latest developments in South African refugee law and policy underscores the country's ongoing efforts to meet its international obligations while addressing the complex challenges posed by forced displacement. Striking a balance between national interests and

⁷ Fatima Khan and Megan Lee 'Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers' *African Human Mobility Review*, Vol. 4, No. 2 (August 2018) pg 1205.

⁸ Marjoleine Zieck *UNHCR and voluntary repatriation of refugees: a legal analysis* (1997).

⁹ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

¹⁰ Refugees Act 130 of 1998.

¹¹ Op cit note 7 pg 1206.

¹² Op cit note 7 pg 1208.

¹³ Op cit note 7 pg 1209.

¹⁴ South African Department of Home Affairs 'Green Paper on International Migration in South Africa' 2016.

¹⁵ South African Department of Home Affairs 'Publication of the White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa' 2023.

¹⁶ Refugees Amendment Act 11 of 2017.

¹⁷ Refugees Regulations of 2018.

humanitarian considerations remains a delicate task for the government. This intricate balancing act encompasses a myriad of complex factors, ranging from geopolitical dynamics and economic priorities to moral imperatives and ethical obligations. Regional cooperation, addressing integration challenges, and streamlining asylum procedures are crucial aspects to ensure that South Africa can effectively protect and support refugees within its borders while upholding the principles of international refugee law. This research report endeavors to analyse the congruence between recent developments in South African refugee law and policy and the country's international obligations. The primary focus is to assess the impact of these changes on the protection and rights of refugees and asylum seekers. To achieve this objective, the report delves into the national legal framework relevant to refugees and asylum seekers, examining its operation. Simultaneously, an exploration of the international legal framework concerning refugees and asylum seekers will be conducted to ascertain South Africa's global standing.

Furthermore, the study will scrutinise amendments to the Refugees Act, as well as any recent white papers, policies, and laws affecting refugees and asylum seekers. This comprehensive analysis aims to provide a nuanced understanding of the evolving landscape surrounding refugee protection in South Africa and its alignment with international standards.

2. NATIONAL LEGAL FRAMEWORK APPLICABLE TO REFUGEES AND ASYLUM SEEKERS IN SOUTH AFRICA

2.1.1 *Historical Evolution of Refugee Law in South Africa*

The evolution of refugee law in South Africa reflects the country's changing political landscape and its commitment to upholding international human rights standards. Throughout the 20th and early 21st centuries, South Africa experienced significant political transformations that influenced its approach to refugee protection.

The historical trajectory of “migration policies and border control practices in South Africa”¹⁸ is marked by racialised apartheid policies until 1994, underwent significant changes with the enactment of the Refugees Act in 2000. During the pre-1994 era, stringent external border

¹⁸ Jeff Handmaker and Caroline Nalule ‘Border enforcement policies and reforms in South Africa (1994-2020)’ Working Paper No. 686 (2021) pg 8.

controls and arbitrary internal measures, especially in urban areas, were implemented.¹⁹ Undocumented migrants were often profiled based on racial criteria, leading to detentions even when individuals were in possession of valid visas or permits.²⁰ South Africa's apartheid regime extended its racialised policies to border control, resisting external pressure to change.²¹ Despite significant numbers of Mozambicans migrating during the civil war, the government upheld stringent control measures using police and security forces to enforce segregation.²²

The harsh and racially discriminatory approach of past white-minority governments in South Africa, particularly towards black foreigners, including civil war refugees from Mozambique, forced them to endure perilous conditions like dangerous animals in Kruger National Park and an electrically charged fence.²³ Post-apartheid, South Africa's migration policies still reflected an unchanged, apartheid-era method, notably seen in the Alien's Control Act of 1991, often referred to as 'apartheid's last act.'²⁴ This legislation retained elements of the prior migration and border control framework, thus postponing the implementation of reforms.²⁵ The 'two gates' system, which encompassed the Aliens Control Act and bilateral agreements for temporary migrant labourers, continued until the Immigration Act was enacted in 2002.²⁶

During the “early stages of South Africa's post-apartheid migration and border control”²⁷ strategies, the South African Police Service (SAPS) assumed the principal responsibility for implementing internal regulations, resulting in allegations of corruption and misuse of authority.²⁸ Similar to the apartheid era, SAPS had a significant enforcement role, especially in manpower, overseeing internal controls and managing several land border posts, including the “Lebombo border post on the Maputo corridor, where reports of bribery were high.”²⁹ In addition to regulating human movement, SAPS also tackled the detection of illegal trafficking

¹⁹ Ibid.

²⁰ Jeff Handmaker and Jeniffer Parsley ‘Migration, Refugees and Racism in South Africa’ *Refuge*, 20(1): pg 40-51. ‘

²¹ Jeff Handmaker and Karam Singh ‘Crossing Borders: A comparison of US and South African Border Control Policies’, *RULA Working Paper* (2002) pg 2.

²² Op cit note 16.

²³ Human Rights Watch ‘Prohibited Persons’ (1998).

²⁴ Jonathan Crush ‘Apartheid’s Last Act?’ *Democracy in Action* 10(2) (1996) pg 35-38.

²⁵ Anthony de V. Minaar, Michael Hough and Mike Hough *Who Goes There? Perspectives on Clandestine Migration and Illegal Aliens in Southern Africa* (1996).

²⁶ Jonathan Crush ‘Covert Operations: Clandestine Migration, Temporary Work and Immigration Policy in South Africa’ *SAMP Policy Series No. 1* (1997).

²⁷ Op cit note 16 pg 9.

²⁸ Pretoria News ‘Corruption: Swoop on Police Illegal Alien Unit’ (1998).

²⁹ Op cit note 16 pg 9.

of goods and banned items.³⁰ On the other hand, the Department of Home Affairs (DHA) focused on ‘policy-making and controlling the entry and exit of people, including complex determinations of residential and refugee status.’³¹ The DHA's immigration function, particularly asylum management, has often conflicted with its civic services role, such as birth registrations and issuing IDs and passports.³² Lastly, the South Africa National Defence Forces (SANDF) have had the overarching responsibility of securing the country's borders, a role that has been especially contentious.³³

Following South Africa's inaugural democratic elections, the enthusiasm for the newfound democracy, coupled with a commitment to a rights-based constitutional order and international human rights norms, underscored the pressing need for immigration policy reform. The Aliens Control Act, which originated during the apartheid era, has undergone minimal revisions, transitioning from a punitive system grounded in racialised exclusion to one centred on racialised deterrence.³⁴ Revisions made in 1995 to the Aliens Control Act of 1991 eliminated certain harsh provisions, such as ouster clauses that previously barred judicial challenges to decisions made by immigration officers.³⁵

Initially, South Africa's basic refugee policy was shaped ‘within the broader and restrictive framework of the Aliens Control Act.’³⁶ Post 1994, there was growing international and domestic pressure to adopt a more progressive migration regime, with refugee policy gaining initial priority.³⁷ Without a solid legislative foundation, the government, from 1991 to April 2000, considered “asylum seekers as exceptions under the Aliens Control Act.”³⁸ Initially, asylum seekers were mandated to submit their requests at the border, with officials receiving training from UNHCR to recognise potential asylum seekers in the early 1990s.³⁹ The process

³⁰ Sally Peberdy and Jonathan Crush ‘Invisible trade, invisible travellers: the Maputo corridor spatial development initiative and informal cross-border trading’ *South African Geographical Journal* 83(2) pg 115-123.

³¹ Op cit note 16.

³² Op cit note 16.

³³ Op cit note 16.

³⁴ Op cit note 16 pg 10.

³⁵ Jonathan Klaaren ‘So Far Not So Good: An Analysis of Immigration Decisions under the Interim Constitution’ *12 South African Journal on Human Rights* (1996).

³⁶ Jeff Handmaker ‘Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa’ (2009) pg 65.

³⁷ Op cit note 16.

³⁸ Op cit note 19 pg 5.

³⁹ Op cit note 16.

of determining refugee status was formalised through internal departmental circulars and a foundational agreement between the South African government and the UNHCR.⁴⁰ However, putting it into practice posed difficulties, particularly due to the broad discretion given to immigration and border control officials, lacking adequate managerial or judicial oversight.

A Refugees Act was passed at the end of 1998 following NGO lobbying, but subsequent regulations in April 2000 revealed the government's intent to restrict refugee protection through limiting refugee protection by adopting strict interpretations and diminish the reception standards for asylum seekers to deter migration.⁴¹ This approach persisted even though individuals genuinely fleeing persecution would struggle to survive independently, and those with non-Refugee Convention motives would also be discouraged, as their primary intention was merely to enter South Africa.⁴² Proposed amendments to the Act threatened to further diminish the rights outlined in the Refugees Act.

Amid various Non-Governmental Organisation concerns, the crucial international refugee law principle that asylum seekers should not be penalised for illegal entry was routinely disregarded. In 2000, "South African NGO Lawyers for Human Rights successfully contested the government's safe country policy, but implementing this decision, like many others, proved challenging."⁴³ The Department of Home Affairs consistently resisted these court rulings, leading to a renewed challenge by LHR in 2011.⁴⁴ Another major issue for NGOs relates to the South African government's tendency to heavily restrict entry, bolstered by strict entry criteria, NGOs' limited capacity to provide legal aid, and significant distances between borders and refugee processing centres.⁴⁵

In the subsequent section of this research report, a comprehensive analysis is undertaken with the objective of examining the prevailing legislative framework that governs the management and rights of refugees and asylum seekers in the country. This analysis encompasses a detailed

⁴⁰ Jeff Handmaker 'Who Determines Policy: Promoting the Right of Asylum in South Africa' 11 *International Journal of Refugee Law*, 290, (1999).

⁴¹ Op cit note 16.

⁴² Op cit note 16.

⁴³ Op cit note 16.

⁴⁴ Op cit note 16.

⁴⁵ Op cit note 16.

exploration of the pertinent statutes and regulations that shape the legal landscape for refugees and asylum seekers in the country.

2.1.2 The Legislative Framework on the Management of Refugees

(a) The Refugees Act of 1998

The cornerstone of the legal framework for refugee law in South Africa is the Refugees Act of 1998.⁴⁶ The aim of the Act is “to implement the pertinent international legal instruments, principles, and standards concerning refugees within the Republic of South Africa; to facilitate the reception of asylum seekers into South Africa; to oversee the procedures for applying for and acknowledging refugee status; to outline the rights and responsibilities associated with such status; and to address related matters.”⁴⁷

Asylum and refugee status are critical issues that have been at the forefront of global migration discussions for decades. The Refugees Act bases the definition of a refugee on that found in the UN Refugee Convention⁴⁸ and the OAU Refugee Convention⁴⁹. Article 1 of the UN Refugee Convention defines a refugee as “A refugee, according to the Convention, is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. an individual who cannot or will not return to their home country due to a genuine fear of persecution based on factors such as race, religion, nationality, membership in a specific social group, or political beliefs.”⁵⁰ Article 1 of the OAU Convention defines the term ‘refugee’ as “every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.”⁵¹ In South Africa, with reference to the Refugees Act, a refugee is defined as “any person who has been granted asylum in terms

⁴⁶ Refugees Act 130 of 1998.

⁴⁷ Ibid.

⁴⁸ Op cit note 1.

⁴⁹ Op cit note 9.

⁵⁰ Article 1 of the UN Refugee Convention 1951.

⁵¹ Article 1 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

of this Act.”⁵² Refugee status signifies being under the protection of the South African government and entails the assurance that an individual cannot be compelled to return to their home country until it is deemed safe.⁵³ This designation is designed to aid individuals whose lives have been at risk in their country of origin.

(b) Immigration Act 13 of 2002

Prior to the enactment of the Immigration Act, the relevant laws were the Aliens Control Act and its subsequent amendment, the Aliens Control Amendment Act. The aim of the Act is to regulate the entry, residence, and departure of individuals from the Republic, along with related matters.⁵⁴ Section 23 of the Act provides for The Department to issue an asylum permit to an asylum seeker subject to the Refugees.⁵⁵ However, *Ruta v Minister of Home Affairs* the Constitutional Court held that while the Immigration Act outlines who is classified as 'illegal foreigners' and subject to deportation, whereas the Refugees Act is the only legislation that governs the criteria for granting asylum and refugee status.⁵⁶

The finding in *Ruta* is critical in South African law as it clarifies the distinct legal pathways under the Immigration Act and the Refugees Act. This decision underlines the principle that the determination of who qualifies as an "illegal foreigner"⁵⁷ for deportation falls under the Immigration Act, whereas the assessment of who can seek asylum and obtain refugee status is exclusively governed by the Refugees Act. The implications of this decisions safeguards asylum seekers from being prematurely classified as "illegal foreigners" based on their entry method or documentation status, recognising their unique circumstances. It reinforces the integrity of the asylum procedure, ensuring those fleeing persecution can access asylum processes without the immediate threat of deportation, in line with international obligations. The decision provides clear guidance on the application of the Refugees Act versus the Immigration Act, important for the administration of justice and understanding of asylum procedures. It signals the need for a policy balance that respects both immigration control and the rights of asylum seekers, without compromising South Africa's international human rights commitments.

⁵² Section 1 of the Refugees Act 130 of 1998.

⁵³ Ibid.

⁵⁴ Immigration Act 13 of 2002.

⁵⁵ Ibid section 23.

⁵⁶ *Ruta v Minister of Home Affairs* [2018] ZACC 52 para 4-5 and pg 5-6.

⁵⁷ Ibid.

In essence, this landmark decision strengthens the legal protections for asylum seekers, ensuring their right to seek asylum is respected and that they are not unjustly subjected to deportation processes under the Immigration Act. It emphasises the necessity of adhering to international obligations while maintaining a clear and humane approach to asylum and immigration matters in South Africa.

(c) The Constitution of the Republic of South Africa and Refugees

While the Constitution does not explicitly protect the rights of refugees and asylum-seekers, it does encompass a broad range of rights that apply to all individuals.⁵⁸ The nation's judiciary, particularly its highest courts, has struck down numerous government policies harming refugees and asylum-seekers, ruling them unconstitutional.⁵⁹

With reference to Section 27(b) of the Refugees Act, “a refugee is entitled to complete legal protection, encompassing the rights outlined in the Bill of Rights and the entitlement to stay in South Africa in compliance with the Refugees Act's provisions.”⁶⁰ The theory of complete legal protection for refugees is underpinned by constitutional norms, values, and principles, establishing a foundational basis for the state's duty to ensure justice for them. Refugees are entitled to the universal rights outlined in the Bill of Rights, including socio-economic rights in section 26, 27 and 29 of the Constitution such as emergency medical assistance, healthcare, education, social assistance, social security, access to water, food, and housing.⁶¹ Vulnerable children have the right to basic shelter, and individuals and families in emergencies are entitled to temporary housing. In practical situations, the state is obligated to enforce these constitutional rights. If they are violated or threatened, refugees have the legal right to assert them.

The case of *Ruta*⁶² sheds light on the intricate interplay between South Africa's Refugees Act, Immigration Act, and constitutional provisions regarding refugees. provides an excellent view on how the Refugees Act, Immigration Act and the Constitution are intertwined in matters pertaining to refugees. At its core were two crucial questions: whether a potential asylum seeker

⁵⁸ Chapter 2, sections 7-39 of The Constitution of the Republic of South Africa, 1996.

⁵⁹ Ibid.

⁶⁰ Section 27(b) of the Refugees Act.

⁶¹ Section 26, 27 and 29 of The Constitution of the Republic of South Africa, 1996.

⁶² Op cit note 54.

retains the right to apply for asylum upon expressing the intention to do so, even after a delay,⁶³ and whether an asylum seeker with a criminal conviction within South Africa can still apply for asylum.⁶⁴

Facing deportation, sought legal recourse to prevent it and applied for asylum under the Refugees Act. Initially granted relief by the High Court, the decision was challenged by the Minister in the Supreme Court of Appeal, which overturned it.⁶⁵ The majority judgment cited Ruta's failure to promptly apply for asylum and his conviction for traffic violations as grounds for ineligibility. Lastly, the court noted that Mr. Ruta violated the Immigration Act upon entry, necessitating proceedings under the Immigration Act rather than the Refugees Act.⁶⁶

Mr. Ruta argued in the Constitutional Court that immigration officials must permit him to seek asylum when he expresses the intention to do so.⁶⁷ He contended that denying him this opportunity under the Refugee Act, as authorised by the law, violates the responsibilities and authority of a refugee status determination officer (RSDO).⁶⁸ Additionally, Mr. Ruta asserted that the Department's refusal undermines his constitutional rights to “human dignity, life, freedom, and security of the person.”⁶⁹

In reply, the Minister argued that Mr. Ruta should have applied for asylum sooner to adhere to the law and asserted that the Immigration Act is the main legal framework for addressing illegal immigrants.⁷⁰ According to this law, the situation of individuals seeking asylum who have not yet formally applied and have not received protection under the Refugees Act should be evaluated.⁷¹

The Constitutional Court, in a unanimous decision led by Justice Cameron, overturned the Supreme Court of Appeal's ruling.⁷² The Court underscored that the Refugees Act clearly states that a delay in submitting an asylum application does not render it invalid.⁷³ The only valid

⁶³ Op cit note 54 para 14 pg 10.

⁶⁴ Op cit note 54 para 14 pg 10.

⁶⁵ Op cit note 54 para 4-13.

⁶⁶ Ibid.

⁶⁷ Op cit note 54 para 20.

⁶⁸ Op cit note 54 para 4.

⁶⁹ Op cit note 54 para 3.

⁷⁰ Op cit note 54 para 5.

⁷¹ Op cit note 54 para 6.

⁷² Op cit note 54 para 55.

⁷³ Op cit note 54 para 56.

grounds for refusal are those outlined in the Refugees Act, aligning with South Africa's obligations under international law. The Refugees Act incorporates a crucial international law principle - non-refoulement - ensuring the right of those fleeing persecution to seek and enjoy asylum.⁷⁴

The ruling recognises that non-South African citizens do not possess an inherent entitlement to enter, stay, or live in any part of the Republic, and there are no international agreements that confer such a right. Granting individuals such as Mr. Ruta and asylum seekers in similar circumstances the chance to undergo status determination under the Refugees Act does not inherently authorise anyone to enter the Republic through any border. The original Refugees Act adhered to South Africa's international and regional legal commitments, providing asylum seekers with the opportunity for status determination as prescribed in the Act and preventing their immediate deportation under the Immigration Act.

3. INTERNATIONAL LEGAL FRAMEWORK APPLICABLE TO REFUGEES AND ASYLUM SEEKERS

The 1951 Refugee Convention primarily addressed refugee issues in Europe, where individuals faced displacement due to persecution based on race, religion, nationality, and political opinion.⁷⁵ The convention introduced the "well-founded fear of persecution"⁷⁶ criterion, traditionally interpreted as an individual fear, requiring personal risk demonstration on one of the five persecution grounds.

The 1951 Refugee Convention underwent changes with the 1967 Refugee Protocol, eliminating geographic and temporal restrictions.⁷⁷ The protocol acknowledged new refugee situations and expanded the definition without granting additional rights. States joining only the 1967 Protocol accept the 1951 Refugee Convention's definition and obligations. The cornerstone principle of the 1951 Convention is non-refoulement, which mandates that refugees cannot be returned to a country where they are at risk of severe harm to their life or liberty.⁷⁸ Additionally, the 1951 Convention establishes a framework that provides refugees with entitlements such as protection from expulsion or return to a nation where their life or freedom

⁷⁴ Op cit note 54 para 54.

⁷⁵ Op cit note 1.

⁷⁶ Op cit note 1 pg 3.

⁷⁷ Op cit note 2.

⁷⁸ Op cit note 1 pg 3.

would be endangered, the freedom to move, access to legal aid, educational opportunities, the right to work, and various other rights.⁷⁹

In the mid-1960s, African states undergoing decolonisation witnessed struggles against colonial or apartheid governments, leading to significant emigration. The individualised ‘fear of persecution’ criterion from the 1951 Refugee Convention was found insufficient in the African context and in response to perceived inadequacies, the Organisation of African Unity (OAU) introduced the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969 to bridge this gap.⁸⁰ The OAU Convention broadened the definition of refugees to encompass individuals escaping “external aggression, occupation, foreign domination, or events significantly disrupting public order.”⁸¹ Unlike the 1951 Convention, the OAU Convention does not necessitate a subjective fear of persecution for asylum seekers fleeing armed conflict and violence, making it more generous in its recognition of refugee groups. The 1969 OAU Convention prohibits turning away, deporting, or extraditing asylum seekers and refugees, with exceptions specified based on criteria.⁸² The refugee legislation in many African Union (AU) nations, derived from the 1969 OAU Convention, tends to be stricter compared to South Africa's Refugees Act. Moreover, the principle of Pan-Africanism does not endorse unauthorised entry into nations that have ratified the 1969 OAU Convention.⁸³

3.1.1 Some of the Rights and Obligations Afforded to Refugees in South Africa by International Conventions and South African Law

As a party to the United Nations' 1951 Refugee Convention and its 1967 Protocol, South Africa undertakes specific rights and responsibilities regarding the treatment of refugees and asylum seekers. The Refugee Convention establishes the basic rights of refugees and the legal obligations of the countries that have acceded to it.

(a) Recognition of Refugee Status

⁷⁹ Op cit note 1 pg 3.

⁸⁰ Op cit note 9.

⁸¹ Op cit note 9.

⁸² Citizenship Rights in Africa Initiative ‘Press Statement on the release of the white paper on Citizenship, Immigration and Refugee Protection: a complete overhaul of the migration system in South Africa’ available at <http://citizenshiprightsafrika.org/press-statement-on-the-release-of-the-white-paper-on-citizenship-immigration-and-refugee-protection-towards-a-complete-overhaul-of-the-migration-system-in-south-africa/>, accessed on 30 March 2024.

⁸³ Department: Home Affairs Republic of South Africa Explanatory Memorandum: White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of The Migration System in South Africa.

South Africa possesses the authority to determine the refugee status of individuals within its territory based on the standards outlined in the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol.⁸⁴ Upon being granted asylum, typically accompanied by written acknowledgment of refugee status, an individual is usually provided with a section 24 permit in South Africa.⁸⁵ This permit permits the individual to stay for a designated period of two years, and its renewal is contingent upon a review process conducted by a Refugee Status Determination Officer (RSDO).⁸⁶

(b) Freedom of Movement

As per Section 21 of the Constitution⁸⁷, asylum seekers and refugees possess the entitlement to freedom of movement within South Africa.⁸⁸ They are not constrained or restricted to specific areas but have the liberty to travel to any location. Individuals who seek asylum and flee their home countries are granted additional rights regarding their movement.⁸⁹ In such instances, the right to freedom of movement is augmented by the entitlement of asylum seekers not to be hindered from entering a country or compelled to depart if exclusion or forced departure would jeopardise their life, freedom, and fundamental human rights.⁹⁰ This principle is called the principle of non-refoulement.

(c) Non-Refoulement

In international human rights law, non-refoulement prevents individuals from being sent back “to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment, or any other form of irreparable harm.”⁹¹ This principle applies universally to all migrants, regardless of their migration status. Non-refoulement prohibits states from expelling

⁸⁴ Op cit note 1 and 2.

⁸⁵ UNHCR ‘Refugee Rights & Responsibilities in South Africa’ available at <https://help.unhcr.org/southafrica/get-help/documentation/refugee/>, accessed on 27 October 2023.

⁸⁶ Section 24 of the Refugees Act 130 of 1998.

⁸⁷ Section 21 of The Constitution of the Republic of South Africa, 1996.

⁸⁸ Scalabrini Institute for Human Mobility in Africa ‘World Refugees Day: Assessing South Africa’s Refugee Protection System’ available at <https://sihma.org.za/Blog-on-the-move/world-refugees-day>, accessed on 30 March 2024.

⁸⁹ Scalabrini Centre of Cape Town ‘Know your rights!’ available at <https://www.scalabrini.org.za/scalabrini-encourages-you-to-know-your-rights/#:~:text=Freedom%20of%20Movement%20and%20Residence,may%20go%20to%20any%20area>, accessed on 27 October 2023.

⁹⁰ Ibid.

⁹¹ Sylwia Katarzyna Mazur ‘The Temporary Protection Directive is Dead, Long Live the Temporary Protection Directive! Indispensability of the Temporary Protection Scheme in the EU Legal Landscape’ (2022) *XLII Polish Yearbook of International Law* pg 283.

or extraditing individuals from their territory or jurisdiction if there are substantial reasons to believe that doing so would expose them to risks upon return.

The principle of non-refoulement is supported in South African legislation. Section 2 of the South African Refugees Act asserts that regardless of any provision within the Act or other laws, no individual shall be denied entry into the Republic of South Africa, expelled, extradited, or subjected to similar actions.⁹² This restriction applies if those actions would force the individual to go back to or stay in a country where they could encounter “any of the risks or hazards defined in the refugee criteria outlined in the 1951 and 1969 OAU conventions.”⁹³

In the case of *Minister of Home Affairs and Others v Watchenuka and Another*, the South African Supreme Court of Appeal underscored that the South African Refugees Act was passed to honour the nation's international commitments, aligning with the norms and principles set forth in international law.⁹⁴ The court also emphasised that Section 2 of the Act, which outlines the principle of non-refoulement, demonstrates how the Act implements these international obligations.⁹⁵

(d) Access to Healthcare

The rights enshrined in the Constitution of South Africa apply to all individuals within the country, irrespective of their nationality or legal standing. The Constitution explicitly asserts that everyone is entitled to access healthcare services, and emergency medical treatment cannot be denied to anyone.⁹⁶ The National Health Act reinforces this by confirming that all persons in South Africa, including refugees, can avail themselves of primary healthcare services at clinics and community health centres.⁹⁷

The Refugees Act outlines the rights of asylum-seekers and refugees in South Africa, stating that refugees possess the same healthcare access rights as South African citizens.⁹⁸ This

⁹² Constitutional Court Review ‘Beyond the Global Pandemic’ Volume X (2020) pg 114.

⁹³ Ibid.

⁹⁴ *Minister of Home Affairs and Others v Watchenuka and Another* (010/2003) [2003] ZASCA 142.

⁹⁵ Ibid.

⁹⁶ Section 27 of The Constitution of the Republic of South Africa, 1996.

⁹⁷ National Health Act 61 of 2003.

⁹⁸ Sonke Gender Justice ‘what does the law say about migrants and refugees accessing healthcare in South Africa’ available at <https://genderjustice.org.za/card/refugees-migrants-and-health-care-in-south-africa-explained/what-does-the-law-say-about-migrants-and-refugees-accessing-healthcare-in-south-africa/>, accessed on 27 October 2023.

interpretation is broadly extended to include asylum-seekers. A 2007 Circular issued by the Department of Health reiterated that refugees and asylum seekers, regardless of their permit status, are entitled to receive basic healthcare services equivalent to those available to South African citizens.⁹⁹

While the Constitution, National Health Act, and Refugees Act delineate the rights of refugees and migrants to healthcare, the Immigration Act takes a different stance. It requires clinic and hospital personnel to verify the legal status of patients prior to delivering care, except in cases of emergency.¹⁰⁰ The Immigration Act also requires healthcare facilities to report any illegal foreigner or individuals with unclear status to the Director-General of Home Affairs.¹⁰¹

(e) Access to Work

Prior to the 2004 case of *Minister of Home Affairs v Watchenuka*¹⁰² and the enactment of the Refugees Amendment Act 33 of 2008, asylum seekers were not fully recognised as individuals capable of supporting themselves, and they lacked the ability to claim their entitlement to subsidised socio-economic services.

As a recognised refugee under section 24, one has the right to pursue employment in South Africa.¹⁰³ However, with the amended Refugees Act, the rules differ for asylum seekers under section 22.¹⁰⁴ Unlike the previous practice, as an asylum seeker, one does not automatically have authorisation to work in South Africa while awaiting the outcome of their asylum application.¹⁰⁵

According to the new law, those wishing to work with an asylum seeker permit (section 22) must seek authorisation to work in South Africa by having their asylum seeker document 'endorsed'.¹⁰⁶ The Standing Committee will evaluate their application to determine whether they should be granted permission to work during the adjudication of their asylum claim. If

⁹⁹ Department of Health 2007 Circular 'Revenue Directive-Refugees/Asylum Seekers With or Without A Permit'.

¹⁰⁰ Op cit note 52 regulation 11.

¹⁰¹ Op cit note 52 section 44.

¹⁰² Op cit note 92.

¹⁰³ Op cit note 44.

¹⁰⁴ Op cit note 14.

¹⁰⁵ Ibid.

¹⁰⁶ Op cit note 14.

permission to work is granted, it will be officially recorded on their asylum seeker document. They are required to demonstrate that are employed within six months from the date of the endorsement. Failure to show employment within this timeframe may result in the removal of this condition from their asylum seeker document.¹⁰⁷

(f) Access to Education

Children who are not South African citizens, including those without documentation, asylum seekers, and individuals with refugee status, must not face refusal when seeking access to fundamental education in South Africa. The South African courts have consistently affirmed the right to a basic education for all, irrespective of documentation, as demonstrated in the case of *Mubake v Home Affairs*.¹⁰⁸

In this case, the applicants requested a court order that acknowledges children separated from their parents as dependents of their primary caregivers, as defined in section 1 of the Refugees Act and its associated regulations.¹⁰⁹ The applicants contended that these children should be automatically considered dependents of adult asylum seekers or refugees who bring them into South Africa and suggested interpreting Section 1 of the Act to include separated children as dependents of adult asylum seekers.¹¹⁰ The judge in this case state that such an interpretation aligns with the constitutional values of the South African Constitution, promotes the essence and objectives of the Bill of Rights, and aligns with the international obligations of our country.¹¹¹

Recognising separated children as dependents of adult asylum seekers is crucial for protecting vulnerable minors by ensuring they receive necessary support and care. This approach prioritises family unity and aligns with the best interests of the child, as advocated by international child protection standards like the United Nations Convention on the Rights of the Child.¹¹² It aids in preventing exploitation and abuse, while facilitating access to healthcare, education, and legal services. Additionally, it can streamline the asylum process, reducing the

¹⁰⁷ Op cit note 14.

¹⁰⁸ *Mubake and Others v Minister of Home Affairs and Others* (72342/2012) [2015] ZAGPPHC 1037.

¹⁰⁹ Ibid para 1 pg 2.

¹¹⁰ Op cit note 14.

¹¹¹ Op cit note 14.

¹¹² United Nations Convention on the Rights of the Child.

time these children spend in limbo. This recognition not only supports the well-being of separated children but also enhances the humanitarian aspect of asylum systems, upholding international human rights commitments.

Refugees and asylum seekers in South Africa encounter significant challenges in accessing their rights, including difficulties in navigating complex bureaucratic processes, language barriers, and discrimination. Limited awareness of their rights and the lack of legal assistance exacerbate their struggles, often resulting in arbitrary detention, exploitation, and denial of essential services such as healthcare and education. Moreover, xenophobic attitudes and social tensions contribute to a hostile environment, hindering their integration and exacerbating their vulnerability. These difficulties highlight the pressing requirement for enhanced legal aid, language assistance, and awareness initiatives to guarantee that refugees and asylum seekers can adequately exercise their rights and lead dignified lives in South Africa.

4. LATEST AMENDMENTS AND DEVELOPMENTS TO SOUTH AFRICAN REFUGEE LAW

4.1.1 Refugee Amendment Acts

On December 12, 2019, the President of South Africa officially proclaimed that the Refugee Amendment Act 2008 would take effect starting January 1, 2020.¹¹³ This delayed commencement also triggered the immediate enforcement of both the Refugees Amendment Act 12 of 2011 and the Refugees Amendment Act of 2017.¹¹⁴

The Refugees Amendment Act of 2008 introduced section 1A into the Refugees Act, replacing section 6 and introducing a noteworthy modification.¹¹⁵ Section 1A closely mirrors the provisions of the former section 6, with a significant alteration concerning the substitution of the phrase “with due regard to with in a manner that is consistent with.”¹¹⁶ This revision mandates that the understanding and enforcement of the Refugees Act must be consistent with various international treaties, including the 1951 Convention, the 1967 Protocol, the 1969 OAU

¹¹³ The Proclamation was published on 27 December 2019 in Government Gazette No. 42932.

¹¹⁴ Section 33 of the Refugees Amendment Act.

¹¹⁵ Refugees Amendment Act of 2008.

¹¹⁶ Ruvi Ziegler ‘Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?’ *Constitutional Court Review Volume 10 (2020)* PG 66.

Convention, the Universal Declaration of Human Rights, and any pertinent domestic legislation or international accords to which South Africa is a signatory.¹¹⁷

The Refugees Amendment Act of 2017 (RAA 2017) brought a significant amendment to section 4(1)(d) of the Refugees Act, introducing an exclusion criterion for individuals who benefit from the safeguard provided by any other nation where the individual is acknowledged as a refugee, resident, or citizen.¹¹⁸ This amendment expands the scope of the original Refugees Act by incorporating the term 'resident' into its previous formulation.¹¹⁹

This adjustment underscores a refined approach in evaluating eligibility for refugee status by considering not only recognised refugees and citizens but also residents in another country. By including 'resident' in the exclusion criteria, the amendment acknowledges that individuals may already have a certain level of protection in a host country, even if they are not formally recognised as refugees or citizens.

This modification aligns with contemporary perspectives on refugee protection, recognising the importance of evaluating an individual's circumstances comprehensively, including their residency status in another nation. It reflects an intention to prevent potential abuse of asylum systems by individuals who may already enjoy protection in a host country through residency.

The Refugees Act initially embraced a non-encampment policy, facilitating freedom of movement for asylum-seekers and refugees and enabling local integration.¹²⁰ However, the RAA 2017 introduces a provision granting authority to the Director-General of the Department of Home Affairs to require certain groups of asylum seekers to report to particular or specified Refugee Reception Offices¹²¹ or other specially designated locations when submitting asylum applications.¹²²

¹¹⁷ Ibid.

¹¹⁸ Op cit note 114.

¹¹⁹ Op cit note 115.

¹²⁰ Scalabrini Institute for Human Mobility in Africa 'World Refugees Day: Assessing South Africa's Refugee Protection System' available at [https://sihma.org.za/Blog-on-the-move/world-refugees-day#:~:text=Furthermore%2C%20South%20Africa%20does%20not,\(Scalabrini%20Centre%2C%202023\).](https://sihma.org.za/Blog-on-the-move/world-refugees-day#:~:text=Furthermore%2C%20South%20Africa%20does%20not,(Scalabrini%20Centre%2C%202023).), accessed on 29 October 2023.

¹²¹ Section 21(c) of the Refugees Act (as amended).

¹²² Op cit note 115 pg 96.

This amendment represents a shift in the approach to asylum-seeker management, allowing the government to tailor reporting obligations based on specific characteristics or circumstances. It introduces a level of flexibility in the reception and processing of asylum applications, potentially responding to varying needs and challenges associated with different categories of asylum seekers. While the original policy emphasised freedom of movement, the amended provision seeks a nuanced approach to asylum-seeker reporting, considering specific factors that may impact their reception and processing.

According to the RAA 2017, individuals seeking asylum and aiming to secure the right to work, as indicated on their visa, are obligated to demonstrate to a Refugee Status Determination Officer that they lack the means to support themselves and their dependents.¹²³ The assessment of their eligibility 'may be conducted' by relevant authorities.¹²⁴ If successful in proving their inability to be self-sufficient, these asylum-seekers may be provided with “shelter and basic necessities, either by the UNHCR or any charitable organisation or individual.”¹²⁵

Only in cases where these entities or individuals cannot offer support would these asylum-seekers potentially qualify for the endorsement of their right to work.¹²⁶ This endorsement necessitates the production of an employment letter within 14 days of commencing employment. Employment of an asylum-seeker without this endorsement is considered an offense, subject to a fine of up to R20,000.¹²⁷ Moreover, the Director-General of the Department of Home Affairs is mandated to revoke the endorsement if the employee fails to demonstrate continued employment “after a period of six months from the date on which such right was endorsed.”¹²⁸

This amendment introduces a structured process for asylum-seekers to access the right to work, emphasising the need for proof of economic vulnerability and highlighting the consequences of non-compliance for both employers and asylum-seekers. The six-month timeline for endorsement revocation underscores the importance of ongoing employment verification to maintain the endorsed right to work.

¹²³ Section 22(8)(a) of the Refugees Act (as amended).

¹²⁴ Section 22(6) of the Refugees Act.

¹²⁵ Op cit note 90 pg 99.

¹²⁶ Sections 22(8)(c) and 22(9) of the Refugees Act.

¹²⁷ Section 22(10) of the Refugees Act.

¹²⁸ Section 22(11) of the Refugees Act.

The Refugees Amendment Act of 2017 marks a pivotal development in South African refugee law by introducing reforms aimed at improving the efficiency and fairness of the asylum system. Key provisions include the establishment of the Refugee Appeals Authority to review asylum decisions, streamlining asylum procedures, and enhancing measures to combat fraud. These changes are designed to expedite asylum processing, reduce backlogs, and uphold South Africa's international obligations towards refugees, contributing to a more robust and responsive asylum system.

4.1.2 *White Paper on Citizenship, Immigration and Refugee Protection*

In 2019, the Department of Home Affairs initiated the process of developing the White Paper on Citizenship, Immigration, and Refugee Protection, with the goal of revamping the migration system in South Africa.¹²⁹ In 1996, following the first democratic elections, South Africa formally approved a number of international agreements, including the 1951 Convention, the 1967 Protocol, the 1969 OAU Convention, and additional global treaties.¹³⁰ The government undertook this without establishing a distinct policy on migration, encompassing refugee protection. It refrained from making reservations or exceptions permitted under international law, even though both the 1951 Convention and the 1967 Protocol allow for reservations.¹³¹ Article 42 of the 1951 Convention permits reservations to articles other than 1, 3, 4, 16 (1), 33, 36-46 inclusive.¹³² Article VII of the 1967 Protocol allows reservations to articles IV and 1, excluding 1, 3, 4, 16(1), and 33.¹³³ South Africa's decision not to make reservations proved detrimental, leading to the development of judicial precedents in South African courts regarding asylum and refugees that are unfavourable to the government's interests.¹³⁴

¹²⁹ Department of Home Affairs 'Press statement on the release of the white paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa' available at <http://www.dha.gov.za/index.php/statements-speeches/1724-press-statement-on-the-release-of-the-white-paper-on-citizenship-immigration-and-refugee-protection-towards-a-complete-overhaul-of-the-migration-system-in-south-africa#:~:text=The%20preference%20of%20whites%20over,of%20asylum%20seekers%20and%20refugees,> accessed on 16th October 2023.

¹³⁰ Ibid.

¹³¹ Op cit note 128.

¹³² Article 42 of the 1951 Convention.

¹³³ Article VII of the 1967 Protocol.

¹³⁴ Op cit note 128.

The White Paper suggests that the South African government should reconsider its adherence to the 1951 Convention and the 1967 Protocol, aiming to join with reservations, similar to other nations.¹³⁵ Moreover, refugee and immigration laws should include provisions for reservations and exemptions as outlined in the 1951 Convention and the 1969 OAU Convention, especially considering South Africa's limitations in fulfilling the socio-economic rights specified in the 1951 Convention.¹³⁶

The White Paper adopts the same approach as that of Canada. Canada's Immigration and Refugee Protection Act of 2001 establishes the Immigration and Refugee Board.¹³⁷ The Refugee Protection Division (RPD) serves as the Canadian equivalent of Refugee Status Determination Officers (RSDOs) and is a statutory body responsible for deciding asylum applications.¹³⁸ To prevent backlogs, RPD members are appointed full-time under the Canadian Public Service Act, performing functions akin to those assigned to RSDOs in the Refugees Act. The RPD conducts thorough hearings, providing asylum seekers the right to legal representation and aiming to streamline the current legislative appeal process.¹³⁹

For those dissatisfied with the RPD decision, an appeal can be made to the Refugee Appeal Division, where the majority of members are appointed full-time, and 10% must have a minimum of five years' experience as members of the bar or attorneys.¹⁴⁰ Additionally, Canadian legislation distinctly categorises economic immigrants and refugees.¹⁴¹

The White Paper proposes an additional requirement in cases of unlawful entry into the Republic, suggesting that refugees must demonstrate a valid reason for their unauthorised entry or presence.¹⁴² The proposal advocates granting the Minister the authority to invalidate an asylum claim made by an asylum seeker connected to a first safe country, strictly applying the first safe country principle.¹⁴³ This includes individuals eligible to seek recognition as refugees

¹³⁵ Op cit note 128.

¹³⁶ Op cit note 128.

¹³⁷ Canada's Immigration and Refugee Protection Act of 2001, c.27.

¹³⁸ Ibid.

¹³⁹ Op cit note 128.

¹⁴⁰ Op cit note 128.

¹⁴¹ Op cit note 128.

¹⁴² Op cit note 128.

¹⁴³ Op cit note 128.

in that particular state. This policy framework aims to discourage asylum seekers from intentionally avoiding applying for asylum in the first safe country, which is a signatory to the 1951 Convention, the 1967 Protocol, and the 1969 OAU Convention. Additionally, it seeks to dissuade economic migrants from entering South Africa under the guise of asylum seekers.¹⁴⁴

5. ANALYSIS ON THE COMPATIBILITY OF SOUTH AFRICAN LAW AND ITS DEVELOPMENTS WITH OBLIGATIONS UNDER INTERNATIONAL LAW

According to the South African Constitution, courts are required to consider international law when interpreting the Bill of Rights¹⁴⁵ by giving precedence to interpretations in line with international law over other reasonable interpretations in legislation,¹⁴⁶ and customary international law is recognised as law in South Africa unless it contradicts the Constitution or an Act of Parliament.¹⁴⁷ While debates exist on the methodology for identifying relevant international law¹⁴⁸ sources and the weight¹⁴⁹ given to binding and non-binding instruments¹⁵⁰, such challenges rarely arise in interpreting and applying International Refugee Law within the Constitutional context.¹⁵¹ The Refugees Act outlines a particular interpretive framework, instructing that it should be interpreted while considering the 1951 Convention, 1967 Protocol, 1969 OAU Convention, 1948 Universal Declaration of Human Rights, and any other international human rights treaties that South Africa is a party.¹⁵² Article 5 of the 1951 Convention emphasises that “the Convention does not affect rights and benefits granted by a Contracting State to refugees beyond the Convention.”¹⁵³

With this constitutional and legislative framework, International Refugee Law, coupled with relevant human rights instruments, is expected to hold paramount importance in South African asylum and refugee cases. This asks the question as to whether the recent developments in South African refugee law and policy have brought us closer or further to fulfilling our international obligations.¹⁵⁴

¹⁴⁴ Op cit note 128.

¹⁴⁵ Section 39(1)(b), of the Constitution of the Republic of South Africa, 1996.

¹⁴⁶ Section 233, of the Constitution of the Republic of South Africa, 1996.

¹⁴⁷ Section 232, of the Constitution of the Republic of South Africa, 1996.

¹⁴⁸ Dire Tladi ‘*Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga*’ (2016) 16 African Human Rights Law Journal 310,336.

¹⁴⁹ *Government of RSA v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC) para 26.

¹⁵⁰ *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) para 35.

¹⁵¹ *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 (3) SA 347 (CC).

¹⁵² Op cit note 115.

¹⁵³ Article 5 of the 1951 Convention.

¹⁵⁴ Op cit note 115.

The implementation of the RAA 2017 on January 1, 2020, significantly and adversely transformed the refugee protection landscape in South Africa. This alteration resulted in a substantial restriction of access to the asylum system, depriving asylum-seekers of substantive rights that were previously available to them. Furthermore, the amended Refugees Act has implications for some refugees already recognised under International Refugee Law, as it withdraws their status and protection.¹⁵⁵ Many of the newly introduced provisions raise concerns about potential violations of South Africa's international obligations as stipulated in the Constitution.

With regards to the RAA 2008 introduction of section 1A, the amendment, by replacing 'with due regard,' eliminates potential ambiguity in interpretation. The new phrase, 'in a manner consistent with,' provides a clear and robust directive, necessitating an evaluation of alignment with the specified instruments in all cases falling under the jurisdiction of the Refugees Act.¹⁵⁶ This modification reinforces the commitment to uphold international standards and obligations, emphasising the need for a consistent and unequivocal application of the law in accordance with the enumerated legal frameworks.

Article 1E exclusions are applicable to individuals considered to have a status higher than that of refugees in another nation. According to the UNHCR Handbook on Procedures, the Article 1E exclusion is invoked when an individual's status closely resembles that of a national of the host country.¹⁵⁷ The Refugee Amendment Act of 2017, in its modification of section 4(1)(d), aligns with the principles outlined in the White Paper by adopting a 'safe first country of entry' approach.¹⁵⁸ This approach significantly deviates from the emphasis placed in Article 1E of the 1951 Convention, which underscores the importance of securing residence in a non-persecutory country.¹⁵⁹ The amendment reflects a shift in perspective on the criteria for exclusion, emphasising entry safety over considerations of the non-persecutory nature of the host country.

Article 3 of the 1951 Convention specifies that the treaty shall be applicable to refugees¹⁶⁰ Therefore, even though the RAA 2017 amendment which reversed the initial non-encampment

¹⁵⁵ Op cit note 115.

¹⁵⁶ Section 1A of the Refugees Amendment Act 2008.

¹⁵⁷ Article 1E of The UNHCR Handbook on Procedures.

¹⁵⁸ Refugee Amendment Act of 2007 modification of section 4(1)(d).

¹⁵⁹ Op cit note 115.

¹⁶⁰ Op cit note 90 pg 96.

policy adopted in the Refugees Act has its benefits as mentioned above, it does contravene Article 3 of the 1951 Convention.

In terms of employment access for asylum seekers, the Amendment introduces stringent procedural conditions that significantly impact their ability to secure employment.¹⁶¹ The requirement for asylum seekers to submit their application within five days of entering the Republic, including the declaration of dependents, poses a time constraint for them “to communicate with friends and family, seeking confirmation of support before”¹⁶² lodging the application.¹⁶³ During the initial assessment period, asylum seekers are barred from exercising their right to work.

Acquiring an employment endorsement hinges on demonstrating that they are unable to receive assistance from entities such as UNHCR or other organisations.¹⁶⁴ This setup raises the prospect of extended periods during which asylum seekers might find themselves unable to sustain themselves or rely on external support, potentially resulting in destitution.

Contrary to Article 17 of the 1951 Convention, which affords refugees favourable treatment akin to nationals in terms of wage-earning employment,¹⁶⁵ the RAA 2017 bars asylum seekers from engaging in any kind of freelance work or temporary employment, irrespective of their capability to support themselves or access assistance.¹⁶⁶ Additionally, asylum seekers who fall into the categories of self-sustainability or alternative support are also excluded from wage-earning employment. Notably, these exclusions lack a defined time frame, given the removal of expectations for timely asylum application assessments. These overarching restrictions may be deemed incongruent with International Refugee Law, particularly with respect to the nuanced temporal distinctions in access to different forms of employment under the 1951 Convention.¹⁶⁷

The core “principle of non-regression in international law”¹⁶⁸ asserts that when a country moves to realise a specific right, it is obliged, at minimum, to maintain the achieved level of protection in the future.¹⁶⁹ Sanya Samtani argues that although the South African court in the

¹⁶¹ Op cit note 114.

¹⁶² Op cit note 90 pg 99.

¹⁶³ Op cit note 114.

¹⁶⁴ Op cit note 160.

¹⁶⁵ Article 17 of the 1951 Convention.

¹⁶⁶ Op cit note 114.

¹⁶⁷ Op cit note 115.

¹⁶⁸ Op cit note 90 pg 105.

¹⁶⁹ Op cit note 115.

case of *Law Society v President of RSA* does not expressly mention the principle of non-regression¹⁷⁰ in South African law, it offers a tangible example of its implementation.¹⁷¹ The court, especially concerning the state's duty according to section 7(2) of the Bill of Rights, underscores that the President's authority must be consistent with safeguarding, advancing, respecting, and fulfilling the rights articulated in the Bill of Rights.¹⁷² Any deviation is constitutionally impermissible, especially if it risks undermining or extinguishing citizens' existing rights at any level where they were previously enjoyed.¹⁷³ The ruling states that it is unconstitutional for the President to support and ratify a retrogressive international agreement aimed at reducing citizens' access to justice at the SADC level, as long as both the Constitution and the Treaty remain unaltered.¹⁷⁴

The RAA 2017 is evidently retrogressive, introducing several regressive elements. It excludes individuals classified as 'refugees' under the 1951 and OAU Conventions from obtaining refugee status in South Africa. The act considers asylum claims abandoned, removing their assessment under the current protection framework. It establishes de facto detention centres, eliminates statutory deadlines for assessing asylum claims, restricts asylum-seekers' rights to employment and education, and reduces the likelihood of refugee integration.¹⁷⁵ These changes individually weaken South Africa's refugee protection commitment, and collectively, they signify a significant shift in the asylum system.

The White Paper's suggestion for South Africa to reassess and potentially withdraw from the 1951 Convention and the 1967 Protocol, while considering accession with reservations, indicates a shift towards a more circumspect stance regarding international commitments.¹⁷⁶ The emphasis on reservations and exceptions aligns with the acknowledgment that South Africa faces resource constraints, particularly in meeting the socio-economic rights outlined in the 1951 Convention.

In contrast, Canada, through its Immigration and Refugee Protection Act, has established a comprehensive framework, including “the Refugee Protection Division and the Refugee

¹⁷⁰ Op cit note 90 pg 105.

¹⁷¹ S Samtani 'International Law, Access to Courts and Non-Retrogression: *Law Society v President of RSA*' 10 *Constitutional Court Review* 197 (2020).

¹⁷² *Law Society of South Africa & Others v President of the Republic of South Africa and Others* [2018] ZACC 51, 2019 (3) BCLR 329 (CC), 2019 (3) SA 30 (CC) para 78.

¹⁷³ Ibid para 82.

¹⁷⁴ Op cit note 170.

¹⁷⁵ Op cit note 90 pg 105.

¹⁷⁶ Op cit note 128.

Appeal Division”¹⁷⁷, to strengthen its capacity to address asylum applications. The appointment of full-time members and the streamlining of the legislative appeal process demonstrate a commitment to robust refugee protection mechanisms.

The additional requirement proposed in the White Paper, which calls for refugees to demonstrate a valid reason for unauthorised entry or presence and grants the Minister authority to invalidate asylum claims, indicates a shift towards stricter measures. While the intention is to discourage abuse of the asylum system, it also raises concerns about potential challenges in meeting certain international standards, such as the right to seek asylum. Overall, South Africa's proposal, as outlined in the White Paper, may be interpreted as a move towards a more cautious and possibly restrictive stance on meeting international obligations in the realm of refugee protection.

6. CONCLUSION

The primary objective of this research report is to conduct a comprehensive analysis of the congruence between recent developments in South African refugee law and policy and the nation's international obligations. This study delves into various facets of South Africa's refugee legal framework, including legislative reforms and policy shifts, to assess their alignment with key international instruments and principles governing refugee protection. By scrutinising recent developments, the report aims to evaluate the extent to which South Africa's refugee regime adheres to its commitments under international law and norms.

A pivotal aspect of the report is its exploration of the historical evolution of South Africa's rules and laws governing refugees and asylum seekers, particularly during the pre-apartheid era. Understanding this historical context is essential as it serves as a foundation for comprehending the underlying principles embedded in the Refugees Act, Immigration Act, and the rights afforded to individuals within South Africa's borders. Contextualising these laws within South Africa's historical trajectory allows for an appreciation of their provisions and the principles they embody, such as non-discrimination, equality before the law, and respect for human dignity. This historical understanding not only provides insights into the evolution of

¹⁷⁷ Shane Francis Garritty 'Immigration and refugee protection act: balancing individual rights and national security' (2008).

immigration and refugee policies but also underscores the imperative of upholding these principles in contemporary governance and decision-making processes.

The report delves into the International Conventions and Protocols to which South Africa is a party, establishing a framework for deciphering the expectations placed upon a State when dealing with refugees and asylum seekers. A notable emphasis is placed on the principle of non-refoulement, highlighting the imperative to prevent the return of individuals to countries where their lives or freedom may be at risk.

As the analysis progresses to scrutinise recent developments and amendments to laws concerning refugees and asylum seekers in South Africa, a discernible shift towards a more stringent and robust approach is observed. This approach, while ostensibly aimed at safeguarding and advancing the national interest, is noted to come at the expense of the protection afforded to refugees and asylum seekers.

One of the pivotal contributions of this research report lies in its significant capacity to serve as a catalyst for raising awareness, both within South Africa and internationally, regarding the recent changes and amendments to South Africa's refugee laws. By shedding light on the intricacies of legislative reforms and policy shifts within the country's refugee legal framework, the report plays a vital role in informing the public about the evolving landscape of refugee protection in South Africa.

By reaffirming the nation's international obligations and revisiting its apartheid history marked by unjust treatment of refugees and asylum seekers, the report serves as a reminder of the importance of upholding humanitarian values. It calls for a continued awareness of historical injustices and aims to ensure that the spirit, purport, and objectives of the Bill of Rights are upheld, fostering a commitment to protecting the rights and dignity of refugees and asylum seekers within South Africa's borders.

The report advocates for a balanced approach that considers both national interests and international obligations. It recognises the importance of safeguarding the sovereignty and security of South Africa while upholding its commitments to human rights and humanitarian principles. By advocating for a compassionate and rights-based approach to refugee protection, the report emphasises the inherent dignity and worth of every individual, regardless of their nationality or immigration status. It underscores the importance of fostering cooperation and solidarity with the international community to address global refugee challenges effectively,

while also acknowledging the unique socio-economic and political context within South Africa.

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