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Intersections of refugee law and international criminal law: The rise of impunity and host nation's responsibility in pursuing justice on behalf of Asylum Seekers and Refugees under universal jurisdiction.

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This mini dissertation is submitted in partial fulfilment of the requirements for the degree of Master of Laws in Advanced Criminal Justice.

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2025

DECLARATION

I, **Ruth Mutseriwa, Student Number: 217029881** hereby declare that the mini dissertation entitled ***Intersections of Refugee Law and International Criminal Law: The rise of impunity and host nation's responsibility in pursuing justice on behalf of asylum seekers and refugees under universal jurisdiction*** is my own work, and that all sources utilised or quoted have been appropriately acknowledged and referenced. This dissertation is being submitted for the Degree of Master of Laws (LLM) at the University of KwaZulu-Natal and has not been submitted for a degree or examination at any other university.

Signed: [redacted]

Date: February 11, 2025

Place: University of Kwa-Zulu Natal, Howard College Campus, Durban.

DEDICATION

I dedicate this work to my mother and father. I am grateful to God for their presence and support in my life. Many thanks to my sister for the countless meals you made when I was buried in my dissertation work, and to my little brother, thank you for your quiet support and for always making me laugh when I needed it most.

Above all I am grateful to God for the strength and knowledge He gave me through this entire journey.

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ABSTRACT

'Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion.' [1]'Perpetrators responsible for the atrocities refugees suffer are seldom held to account. To date, justice systems and host nations have primarily focused on providing asylum to refugees and have consequently neglected to hold the perpetrators to account. This dissertation highlights this gap. Where countries of origin fail to execute justice on behalf of its citizens, host nations can step in using universal jurisdiction to break the cycle of impunity to ensure that a cycle of human rights violations is not perpetuated. With the increase in armed conflict and wars; the refugee problem will not be dissipating anytime soon, and it is crucial that there is a conversation on pursuing justice on behalf of refugees. Universal jurisdiction allows for states to prosecute crimes that have occurred beyond their borders thus making a way for receiving states to investigate and prosecute crimes in the refugee's countries of origin. This paper will contribute to refugee law jurisprudence by shifting the focus from merely providing asylum to holding perpetrators accountable.

Key words: Refugee law, international criminal law, impunity, justice, universal jurisdiction, host nations, human rights & accountability.

[1] Union of Refugee Women and Others v Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC) paras 28-30

LIST OF ACRONYMNS

CC	Constitutional Court
NPA	National Prosecuting Authority
ICC	International Criminal Court
PCLU	Priority Crimes Litigation Unit
RS	Rome Statute
SADC	Southern African Development Committee
SALC	Southern Africa Litigation Centre
SAPS	South African Police Service
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UJ	Universal Jurisdiction
UN	United Nations
WWI	World War One
WWII	World War Two

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CHAPTER 1

1. INTRODUCTION AND SYNOPSIS OF STUDY

Refugee law is a branch of human rights law governing the protection and rights of persons fleeing persecution. It provides a legal framework for host nations to facilitate the recognition and living conditions of refugees in their states. Presently there are over 35.3 million recorded refugees worldwide.[2] This number excludes asylum seekers and other categories of displaced persons who are yet to be recognized as refugees or classified under a specific group. With the rampant rise in armed conflict across the world and the unsettled state of society it is inevitable that the number of refugees has soared beyond the above figures and will continue to rise.

Accountability from perpetrators is vital to ensure justice for the victims. International criminal law provides for the prosecution of serious crimes by states beyond their borders under the principle of universal jurisdiction. Universal jurisdiction assists in holding criminals accountable while ensuring justice for victims. South Africa is home to thousands of displaced people, with the majority coming from the central parts of Africa and the northeastern parts. The country's hospitality has ended at providing asylum has not extended to pursuing justice on behalf of the victims.

This paper aims to highlight the specific obligation of states to investigate international crimes committed against refugees under universal jurisdiction, particularly when the refugees have been granted asylum by the state. In South Africa, the right to justice underscores this obligation. Citizens have the right to have crimes committed against them prosecuted, so why should not this same right extend to refugees? It raises the question of whether the South African Police Service (SAPS) and the National Prosecuting Authority (NPA) should prioritize

[2]'Refugee Statistics' United Nations Refugee Agency, available at: https://www.unrefugees.org/refugee-facts/statistics/, accessed on 23 July 2024

the investigation and prosecution of crimes committed against refugees who have been granted refugee status in South Africa? In recent times, refugees have become crucial sources of evidence, as their oral testimonies provide a valuable evidence base. Thus, not only do refugees have a right to justice, but universal jurisdiction should focus on refugees for practical reasons, such as the availability of evidence.

The*National Commissioner of Police v Southern African Human Rights Litigation Centre and Another 2015 (1) 255 (CC) (SALC case),* among other cases, will serve as the main case law forming the basis for the judicial legal framework. In this case, the court established guiding principles to assist the South African Police Service (SAPS) and National Prosecuting Authority (NPA) in exercising its broad universal jurisdiction.

2. RESEARCH PROBLEM

Millions of receive recognition in various parts of the world due to the atrocities they have experienced in their countries of origin. Host nations acknowledge the need to protect these individuals by formerly recognizing them as refugees. However, subsequent to recognition, no investigations take place in the victims' countries of origin, allowing the atrocities to continue and leaving new victims without justice. This forms a cycle where perpetrators continue crimes with impunity. This issue can be addressed through the legal principle of universal jurisdiction. The Constitutional Court expounded on the principle in the *SALC case* by addressing the challenges of not knowing when and how to exercise universal jurisdiction given the limited resources available.

The paper will explore whether police services and prosecuting authorities should focus on crimes committed against refugees when exercising universal jurisdiction.

3. PURPOSE STATEMENT

The purpose of this paper is to investigate the continuous rise of impunity that has plagued the lives of refugees and to analyse the responsibilities of host states in pursuing justice on behalf of recognized refugees within their territories. The study aims to bring to light the gaps in the current legal and institutional frameworks and to propose solutions for improving accountability and justice for refugees.

4. RESEARCH QUESTIONS

1. What are the obligations in respect of refugees for receiving states?

2. What are the obligations in respect of refugees in international criminal law?

3. What is the intersection between these two regimes?

5. RATIONAL

This study is important because it investigates current issues and offers solutions through existing mechanisms. As wars escalate and rebel groups continue to commit atrocities in various regions, this paper will raise awareness of these issues and propose solutions. By examining current laws, the study aims to highlight how existing legal mechanisms can be utilized to advance the right to justice for this vulnerable group. Additionally, it will contribute to the existing literature by providing a new perspective into the intersections of refugee law and international criminal law.

6. LITERATURE REVIEW

Finding literature that effectively links the themes of refugee law, international criminal law, and the pursuit of justice on behalf of refugees under universal jurisdiction has proven to be challenging. Most literature tends to focus on specific angles or questions, making it difficult to find comprehensive coverage. However, this challenge offers an opportunity to provide a

fresh perspective in the field of criminal justice. For instance, Joseph Bazirake's article, "The Contemporary Global Refugee Crises," delves into refugee crises, emphasizing displacement and the complexities of resettlement.[3] However, Bazirake's analysis does not extend to holding perpetrators accountable or examining states' responsibilities under universal jurisdiction. Nevertheless, the article provides foundational knowledge on the refugee discourse.

On the other hand, Megret discusses universal jurisdiction in the context of host nations but does not explore the intersection of refugee law and international criminal law.[4] Tunamsifu's examination of the Democratic Republic of the Congo (DRC) focuses on victims of sexually related violence accessing justice, addressing critical human rights violations.[5] However, it may not thoroughly explore the intersection between refugee law and international criminal law.

Uzun's discussion of international criminal law and international refugee law comes closest to addressing the research problem. However, there appears to be limited discourse on states pursuing justice on behalf of refugees under universal jurisdiction.[6] Additionally, there is a lack of analysis concerning the rise of impunity and the challenges of holding perpetrators accountable for crimes.

In terms of case law, the SALC[7] case represents the most appropriate piece of jurisprudence. The issue the Constitutional Court (CC) sought to resolve on behalf of the National Prosecuting Authority (NPA) was how to effectively exercise universal jurisdiction, which extends globally. The court established guiding principles such as geographic proximity, available evidence,

[3] JB. Bazirake 'The contemporary global refugee crisis' (2017) 29(1) *Peace Review* 61-7.
[4] F. Mégret 'The elephant in the room' in debates about universal jurisdiction: diasporas, duties of hospitality, and the constitution of the political.' (2018) In Transnational Crime (pp. 99-126). Routledge.
[5] SP. Tunamsifu 'The right to justice: A challenge for survivors of conflict-related sexual violence in the Eastern Democratic Republic of the Congo'. (2015) *African Human Rights Law Journal*. 15(2):473-95.
[6] E.D Uzun 'On the Refugee Crisis Discourse: A Critical Analysis Sitting in the Junction of International Criminal Law and International Refugee Law'. (2020) *Istanbul Hukuk Mecmuası*. 2020;78(4):2025-48.
[7] *The National Commissioner of Police v Southern African Human Rights Litigation Centre and Another 2015 (1) 255 (CC)*

presence of the accused, and available resources. These principles assist the NPA in determining how and when to exercise universal jurisdiction.

Given the presence of refugees in host nations and the oral evidence they can provide, prioritizing refugee cases when applying the principle of universal jurisdiction is both practical and beneficial. Refugees, being within the country, can contribute crucial testimony, thus fostering a continued relationship with the host nation. This approach addresses gaps in both international criminal law and refugee law literature by merging the two fields. Extending the limiting principles outlined in the SALC case to include refugee populations not only advances the rights of refugees, who are now part of the host community and protected under various constitutions, but also counters the perception that universal jurisdiction is purely a political move.

The State v Henry Emomotimi Okah also addresses an important aspect of the current study. One of the issues before the court was "*whether South African courts have jurisdiction under section 15(1) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act (the Act) to try alleged offences beyond the financing of an offence that occurred outside South Africa".*[8] Mr. Okah, who had been charged with committing terrorist acts, challenged the Gauteng High Court's jurisdiction to convict him of crimes committed outside South Africa. The High Court dismissed this defence, but on appeal, the Supreme Court of Appeal overturned the Warri-related convictions.

The Constitutional Court disagreed with the Supreme Court of Appeal, ruling that section 15(1) of the Act confers extraterritorial jurisdiction on South African courts to try terrorist offences occurring outside the country, beyond just financing.

[8] *S v Okah (CCT 315/16; CCT 193/17) [2018] ZACC 3; 2018.*

While the above case does not directly address the intersection between refugee law and international criminal law, it does provide insights into the application of universal jurisdiction under the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act.* This demonstrates that the proposed solution to the research problem is feasible. Although South Africa has been exercising universal jurisdiction, it has not specifically focused on pursuing justice for refugee populations within the Republic.

In summary, there seems to be a limited discussion regarding host nations' pursuit of justice for refugees under universal jurisdiction. Furthermore, there is a lack of analysis on the increasing impunity and the difficulties associated with holding perpetrators of crimes accountable.

7. THEORETICAL FRAMEWORK

This dissertation will be underpinned by the human rights theory. Equal access to justice and the international responsibility of states to advance and protect the rights of all peoples within its borders will form the foundation of this paper.

8. RESEARCH METHODOLOGY

My study will be in the form of a desktop study. I will assess the existing legal framework to get a comprehensive foundation for the paper. The legal framework will include national, regional, and international legal instruments. I will further gather information from academic journals and books to assess current and past views from the legal academia.

9. OUTLINE OF DISSERTATION

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1.1 Research problem

1.2 Purpose statement

1.3 Research questions

1.4 Rational

1.5 Literature review

1.6 Theoretical framework

1.7 Research methodology

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2.1 Introduction

2.2 Historical Development of Refugee Law

2.3 1951 Refugee Convention

2.4 Responsibilities of Host Nations

2.5 South Africa as a Receiving State

3. What are the obligations in respect of refugees in international criminal law?

3.1 Introduction- why was international criminal law established?

3.2 The Rome Statute and the Establishment of the International Criminal Court

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4.3 Oral testimonies of vulnerable groups

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5. Conclusion and Recommendations

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CHAPTER TWO

WHAT ARE THE OBLIGATIONS IN RESPECT OF REFUGEES FOR RECEIVING STATES?

2.1 Introduction

This chapter will lay the foundation of the dissertation by examining the history of refugee law as well as its beginnings and developments in the international community. It will be evident that the devastating effects of World War 11 made it paramount for nations to agree on a uniform structure for refugee law to regulate the movement of millions who had been displaced because of the war. Subsequently the end of World War II brought about the Universal Declaration of Human Rights (UDHR) and the Refugee Convention, which expanded on certain articles in the UDHR, notably Article 14.

The chapter will conclude by focusing on the South African perspective on refugee law as a host nation and examine how these principles have been implemented within this jurisdiction.

2.2 Historical development of refugee law

The term 'refugee' has its origins in Latin, but its more direct roots are in French. The word *'réfugié'* was first used to describe 'Protestant Huguenots who fled France after the 1685 revocation of the Edict of Nantes, which had previously granted them religious freedom.'[9] Within no time the term refugee was used to describe persons who had involuntarily left their places of residence because of persecution.

[9]The origin of 'Refugee' Merriam Webster dictionary, available at https://www.merriam-webster.com/wordplay/origin-and-meaning-ofrefugee#:~:text=Their%20shared%20roots%20go%20all,rights%20to%20the%20Protestant%20Huguenots access date: 10/01/2025.

Until the 1920s the movement of refugees was not regulated as the amount of people seeking asylum were relatively small. It is not until the World War I when there was an increase in the number of persons seeking protection that states saw a need to limit the definition and scope of refugee qualification. [10] Millions had been displaced and there was a need to seek refuge beyond their country's borders. [11]

Nations came together in the establishment of the League of Nations or the United Nations as it is now known in the 1920s. It was a forum where they could solve matters of international concern. Amongst the issues to be addressed was prisoners of war, epidemics and of course the refugee's seeking protection. [12] It was not until Gustav Ador (ICRC's President) saw a need to address specifically the problem of Russian refugees and proposed the appointment of a commissioner as "an obligation to international justice" that the international community saw the beginning of a more structured approach to the refugee problem. [13] A memorandum acknowledged that there was an absence of legal protection and legally defined status. Further, many of the rights which refugees presently enjoy such as the right to education were absent. It was then (1921) that there was a proposition for the commissioner to define the legal status of the then Russian refugees and ensure that they are protected by states and any legal systems.[14]

Less than two decades later came the invasion of Poland by Germany ushering in the World War II. The war spanned for six years leaving devastation and havoc in its wake and many parts

[10] J.C Hathaway The Evolution of Refugee Status in International Law (1984) 1920—1950. *International & Comparative Law Quarterly*, *33*(2), pp.348-380.
See also L.W Holborn The legal status of political refugees (1938) , 1920–1938. *American Journal of International Law*, *32*(4), pp.680-703.
[11] The U.S. Committee for Refugees and Immigrants (USCRI*)* Policy & Advocacy Report 12.05.2023 Volume 7 | Issue No.5| December.05.2023
[12] G.S Goodwin "A short history of international refugee law: the early years." (2020).
[13] Ibid.
[14] Ibid.

of the world in ruins. The loss of life and the complete disregard of human rights led to nations establishing a standard of human treatment that every human is entitled to.

The Universal Declaration of Human Rights (UDHR) was established. The preamble pointed to the "barbaric" and contempt towards human rights as the basis of establishing the declaration. [15] The UDHR set out 30 inalienable rights and freedoms that are accorded to every person by virtue of being human. Article 14 particularly pointed to the right of persons to 'seek asylum in countries other than their own when they could no longer avail themselves to the protection of their states'.[16] This article has formed the foundation of many of the world's refugee legal instruments.[17]

Three years on states sought to expounded on Article 14 to create a more comprehensive legal framework to govern the status of who qualified as a refugee. Heads of states met in Geneva and drafted what is now known as the *1951 Convention Relating to the Status of Refugees* or the *Geneva Convention* (the convention/refugee convention). The convention set out the status and rights of refugees and the responsibilities of states protecting them. It extended and merged previous international agreements into one document where states could ratify and become a part of. [18]However, the Convention was limited to events occurring before 1951. Hence the adoption of the 1967 protocol which extended to non-European refugees and subsequent events.

[15] *Universal Declaration of Human Rights Preamble*.
[16] Article 14 of the UDHR.
[17] Ibid4.
[18] About UNHCR the 1951 Refugee Convention available at https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention. access-15-11-2024

2.3 1951 Refugee Convention

Central to the Convention was the principle of non-refoulement which forms the foundation of refugee law. Article 33 of the convention states: 'No Contracting State shall expel or return ('refoul') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The principle protects refugees from being forcibly returned to countries they face threats to life, freedom and general well-being. [19] This principle has been at the centre of much litigation and position papers. It will be expounded a bit further before the conclusion of this chapter.

The Convention further exempted those seeking protection from criminal penalties should they enter a state without the necessary documentation. Article 31 states the following:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."[20]

The convention took to comprehensively cover missing gaps from previous legal instruments which were endeavouring to protect refugees. The principle of non-refoulment allows the convention to go further than just defining a refugee but ensures that host nations fulfil their obligations of protecting the vulnerable by prohibiting forced returns.[21]

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[19] *Convention and Protocol relating to the Status of refugee*-Introductory note by the Office of the United Nations High Commissioner for Refugees.
[20] Article 31 of the Refugee Convention.
[21] G.S Goodwin "The international law of refugee protection." (2014) *The Oxford handbook of refugee and forced migration studies* 36-47.

The Convention has been influential in developing refugee legal frameworks around the world, more so in South Africa.

2.4 The responsibility of host nations

Host nations or receiving states as they are often referred to offer a sanctuary to victims of the gravest human rights violations. A violation of human rights is a stripping away of the dignity and safety that every human deserves. No person should live in constant fear of their life being threatened or their human rights being at the mercy of another individual. Unfortunately, this is the reality of millions of people across the world. In November 2024 the UN Joint Human Rights Office in the DRC recorded 344 human rights violations in the eastern parts of the country which resulted in 1 334 victims. Armed groups have been responsible for massacres and sexual-related violence. [22] Children as young as nine years face mass sexual violence and mutilation.[23] Alarmingly some of these atrocities occur whilst they are fleeing armed conflict. Approximately 130 00 children have had to flee their homes. [24]These are the victims that find themselves at the boarders of receiving states. And what is the responsibility of the receiving state? To ensure the 'assimilation and naturalization of refugees'[25]

The concluding segment of this chapter will glance at how South Africa has incorporated the convention into its domestic legislation and how it has implemented refugee jurisprudence as

[22] Atrocity Alert No. 422: Sudan, Myanmar (Burma) and the Democratic Republic of the Congo, available at https://reliefweb.int/report/sudan/atrocity-alert-no-422-sudan-myanmar-burma-and-democratic-republic-congo access date: 10/01/ 2024.

[23] Children as young as nine face mass sexual violence and mutilation in the DRC – Save the Children, available at https://reliefweb.int/report/democratic-republic-congo/children-young-nine-face-mass-sexual-violence-and-mutilation-drc-save-children access date: 10/01/2024.

[24] Ibid.

[25] I.C. Jackson, 'The 1951 Convention Relating to the Status of Refugees (1991) A Universal Basis for Protection'3(3) *International Journal of Refugee Law* 403

a leading host nation for refugees in Africa. Evidently it is one of the top 10 receiver states for refugees in the world. [26]

2.5 A glance at South Africa as a host nation

South Africa ratified the refugee convention after the abolition of apartheid in 1996 as the new Constitution came into effect. The Refugee's Act was assented to parliament in 2000 and expounds on the Convention. The Act goes further than most jurisdictions as it provides for the assimilation of refugees into the South African community and does not confine asylum seekers and refugees in camps. The act affords refugees the same basic human rights as its citizens with the exceptions of political rights. Refugees have the right to education, the right to work, the right to access health care and the right to approach courts and have their rights enforced.

The South African judicial system has kept true to its mandate by upholding the nations' Constitution founded on human dignity, equality and freedom. Through the initiating of legal proceedings by human rights organizations on behalf of asylum seekers and refugees, South Africa's refugee law jurisprudence has developed to promote the spirit purport and objects of the Bill of Rights. Presently undocumented children can attend school, undocumented asylum seekers can access healthcare, they can establish businesses, refugees are entitled to welfare and social services.

In *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* the case concerned the right of asylum seekers and refugees in South Africa to earn a living by way of self-employment in the form of spaza shops. [27]The department had denied the applicants trade licenses. In the appeal court the

[26] J. Dugard, 'International criminal law' 5 ed. Refugee and stateless persons, chapter 16, Anton Katz and Tiynjana Maluwa.

[27] *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014) ZASCA 143 (26 September 2014).

court held that there was no absolute ban on asylum seekers and refugees seeking employment. The court did not find any law or condition that prevented foreign nationals from obtaining licenses for spaza or tuck shops. Additionally, the court pointed to paragraph 32 of the *Minister of Home Affairs and Others v Watchenuka and Others* that made it clear that in 'situations where individuals have no other means to support themselves and would be left destitute, the constitutional right to dignity is relevant'. [28]The right to dignity could be 'extended for purposes of wage-earning employment to self-employment'.[29] If a refugee or asylum seeker is unable to find wage-earning work and is facing starvation, which leads to humiliation and degradation, and the only way they can support themselves is through trade, then they should be able to invoke the constitutional right to dignity to argue for a trading license. In fact, denying them this right under such circumstances would go against the enlightened rights culture enshrined in our Constitution. [30]

The courts further vindicated the right to education on behalf of undocumented children in *Centre for Child Law and Others v Minister of Basic Education and Others*. Undocumented children who were offspring of asylum seekers and undocumented immigrants were facing prohibitions of receiving basic education, a right without any qualification in terms of section 29 of the Constitution.[31] The court affirmed that right to dignity and equality and held:

> 'Children have their own dignity and are individuals with distinctive personalities not dependent on or assessed in the light of the actions of their parents. They cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. ...These disadvantaged children end up without the hope of being able to rid themselves

[28] *Minister of Home Affairs and Others v Watchenuka and Others 2004 (4) SA 326 (SCA).*
[29] Supra 28.
[30] *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014) ZASCA 143 (26 September 2014).
[31] *Centre for Child Law and Others v Minister of Basic Education and Others. [2019] ZAECGHC 126].*

of poverty or being allowed to participate meaningfully in the societies of which they are a part; they are denuded of their self-esteem and self-worth, and the potential for human fulfilment. Due to being idle, some of the children end up involved in criminal activity and thus become a menace to the social fabric*'*.

The court further held that being denied education based on their documentation status amounted to unfair discrimination as it violated the right to equality.[32]

Despite the establishment of a comprehensive legal framework and a progressive judicial organ South Africa has had its fair share of issues relating to the asylum system.

In 2024Scalabrini took to the Western Cape High Court bench to challenge Section 22(12) and (13), Regulation 9 and Form 3 of the Refugees Regulations. The provisions and regulations gave penalties to applicants who had failed to renew their asylum seeker visas within a month of expiry. Failure to renew would amount to automatic abandonment of claim and in turn would result in the applicants being compelled to return to their countries of origin.[33] Herein the issue lay. Forced returns would be in contravention of the principle of non-refoulement as asylum seekers would be compelled to go where they face threats to life and dignity. The applicants argued that automatic abandonment was not consistent with best interest of the child. Dependants of asylum seekers who are in majority of cases children are caught in the crossfire and in turn face barriers to documentation. The lack of documentation may potentially lead to difficulty in them accessing other rights and of course the potential threat of refoulement. The department of home affairs argued that because of the backlog in the asylum system the abandonment penalty served to reduce the backlog. The court reasoned 'that limiting the right to non-refoulment and placing asylum seekers in a position where they must return home and

[32] Ibid.

[33] *Scalabrini Centre of Cape Town v Minister of Home Affairs and Others CCT 51/23.*

face gross human rights violations for the purposes of clearing backlog was not justifiable in terms of the Constitution.'[34] Asylum seekers were to be returned home based on the merits of their claim and not an administrative issue.[35]

The court held that the provisions were arbitrary and that they violated principles of refugee law. It went further to state that asylum seekers should be treated as presumptive refugees and thus be accorded the same rights. [36]The court cited *Abore v Minister of Home Affairs and Another* and emphasized that the principle of non-refoulement applies to asylum seekers and refugees and that the principle applies so long as the claim has not been finalized and not been finally rejected. [37]

[34] Ibid.
[35] Ibid.
[36] Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others (5441/20) [2023].
[37] Abore v Minister of Home Affairs and Another [2021] ZACC 50

CHAPTER THREE

WHAT ARE THE OBLIGATIONS IN RESPECT OF REFUGEES IN INTERNATIONAL CRIMINAL LAW?

3.1 Introduction

Why was International Criminal law established?

International criminal law and international criminal justice are terms often used interchangeably.[38] The latter term resonates particularly with the essence of this paper because of its emphasis on justice. Central to international criminal law is the pursuit of justice for crimes that demand the international community's attention due to their grievous nature. Bassiouni described international criminal law as "the prevention and suppression of international criminality, enhancement of accountability and reduction of impunity, and the establishment of international criminal justice." [39]

Ultimately this paper is centred on advancing justice for refugees and addressing the rising tide of impunity. The severe crimes that refugee endure are of such staggering proportions that they must not remain unchecked. International criminal law serves as a crucial mechanism for providing this check.

The early development of international criminal law can be traced back to the prohibitions of piracy and slavery.[40]However, the Treaty of Versailles, established in 1919 after World War I, is often cited as a significant point of departure. [41] Article 227 of the Treaty proposed the trial

[38] C. Gevers, *International Criminal Law*: Introduction, history and general principles (Unpublished lecture notes) 2024.
[39] C.M Bassiouni *Introduction to International Criminal Law, 2nd Revised Edition*, BRILL, 2012. *ProQuest Ebook Central*, https://ebookcentral.proquest.com/lib/ukzn-ebooks/detail.action?docID=1081568.
[40] Ibid 32.
[41] Ibid.

of Kaiser Wilhelm II and other German war criminals. Despite its intentions, the Treaty failed to prevent the outbreak of World War II a few decades later. [42]

The end of WWII brought about the establishment of the Nuremburg trials to try Nazi war criminals for war crimes. Since then, the world has witnessed approximately 250 global, regional and national conflicts resulting in immense suffering. [43] Despite the scale of these crimes, few have been held accountable and governments have chosen diplomacy over justice. Inevitably this has led to the normalization of international crimes like aggression, war crimes, genocide and crimes against humanity. Before the establishment of the International Criminal Court nations formed temporary tribunals to address the after mirth of wars or any injustices. However, the tribunals were temporary. They lacked the permanence needed to consistently investigate and prosecute criminals.[44] The world needed a permanent judicial body with standard practices that could be uniformly enforced on all violators with fairness. [45] As a result, the International Criminal Court was established.

3.2 The Rome statute and establishment of the ICC

In 1998, 120 nations adopted the Rome Statute with notable exceptions including China, Ethiopia, India, North Korea, Turkey amongst others. The Rome Statute provides for the establishment of an International Criminal Court. Before the drafters of the statute where several considerations to consider as different countries had to come to a consensus on what the court should look like. Concerns were raised regarding the character of the proposed Court. Which crimes ought to be brought before the court? How can nations, organizations, and people

[42] International Criminal Court Project, Evolution of International criminal justice, available at https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/ access date: 25/12/2024.

[43] Bassiouni, M. Cherif. *Introduction to International Criminal Law, 2nd Revised Edition*, BRILL, 2012. *ProQuest Ebook Central*, https://ebookcentral.proquest.com/lib/ukzn-ebooks/detail.action?docID=1081568.Chapter7 page 651.

[44] Ibid.

[45] Ibid.

from many backgrounds and cultures agree on the offenses that the Court ought to try? What strategies, agreements, and processes should countries employ to effectively accomplish shared objectives? How will the Court react to the kinds of heinous crimes that have been exposed in recent wars, especially those that target women and children? In what ways might the Court assist survivors and victims'? How will the Court administer justice?[46] All these were questions to be addressed by the individuals involved in the negotiations. However, negotiators had one desire, that is to eliminate impunity for the most serious international crimes. [47]

The preamble of the Rome Statute asserts that 'the most heinous crimes, which are of concern to the international community, must not go unpunished' [48] Understandably so as the primary aim of the ICC is to bring an end to impunity and ensure a safer future for humanity. [49]

This aligns with the primary aim of the ICC: to reject impunity and ensure a safer future for humanity. The ICC was established not to replace national courts but to complement them. While domestic courts are still expected to exercise their jurisdiction, the ICC intervenes when national courts are unable or unwilling to investigate and prosecute certain individuals.[50]

It is crucial to acknowledge that the ICC has faced significant controversy and criticism, particularly from several African countries. Critics argue that the ICC's prosecutorial team has disproportionately targeted Africans in its investigations. This perception has led to a broader debate about the fairness and impartiality of the ICC's operations.[51] However, Mude points out

[46] F. Benedetti, Fanny '*Negotiating the International Criminal Court' : New York to Rome, 1994-1998*, BRILL, 2013. *ProQuest Ebook Central*, https://ebookcentral.proquest.com/lib/ukzn-ebooks/detail.action?docID=1576640.

[47] Ibid.

[48] Understanding the International Criminal Court available at https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf access date 25/12/2024

[49] Ibid

[50] Ibid.

[51] L. García Iommi, 'Whose justice? The ICC Africa problem'. (2020) International Relations, 34(1), 105-129. https://doi.org/10.1177/0047117819842294

the involvement of the United Nations Security Council (UNSC) in referring matters, of which not one African country is a permanent member. He further highlights the component of African states comprising a large fraction of the state parties to the ICC. 34 out of 124 parties to the ICC are African states. The African continent has a total of 54 countries meaning 64% of the African continent are parties to the ICC.[52] Mude further argues that those who push the idea that the ICC prosecutes largely African states are countries attempting to absolve themselves from responsibility.[53]

Notwithstanding these arguments, the ICC continues to be an important organization for addressing atrocious crimes and bringing justice in situations where national courts are unable to. 'Since its inception the ICC has heard 32 cases before the bench. 59 arrest warrants have been issued and 21 people have been detained in the ICC detention centre and have appeared before the Court. 30 people remain at large. Charges have been dropped against 7 people due to their deaths. Further, ICC judges have issued 9 summonses to appear, and 11 convictions and 4 acquittals have been issued.' [54]

3.3 Universal jurisdiction under the ICC Act

Several countries have signed and ratified the Rome statute including South Africa. In July 1998 the statute was signed and was ratified two years later. South Africa further went on to enact the *Rome Statute Implementation Act No. 27 of 2002 (Implementation Act).* [55] The Implementation Act served to assist the judiciary to effectively implement South Africa's obligations as per the ratification of the statute. Particularly to provide for the trying of

[52] T. Mude Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric (2017). *Open Journal of Political Science*, *7*(01), p.178.
[53] Ibid.
[54] International criminal court- about the court available at https://www.icc-cpi.int/about/the-court access date 28/12/2024.
[55] South Africa and the Rome Statute available at https://www.pgaction.org/ilhr/rome-statute/south-africa.html access date access date 28/12/2024.

international crimes in South African courts. This has been made possible through the ICC's complimentary clause.

The Rome Statute's "complementarity" clause places the ICC as a court of last resort. [56]Investigating and prosecuting international crimes is primarily the duty of States Parties, not the ICC. Only when states are "unable or unwilling" to bring charges does the ICC step in.[57]Under this system, the Rome Statute grants precedence to any State that is willing and able to do so, regardless of where the crime was committed, otherwise known as universal jurisdiction. [58]

The principle of universal jurisdiction is based on the belief that 'specific crimes are so injurious to the international community that states are authorised and even obliged to institute proceedings against the offender, regardless of the location of the crime or the nationality of the perpetrator or the victim'.[59]

Section (4) 3 (d) governs the jurisdiction of South African courts in prosecuting international crimes. "To secure the jurisdiction of a South African court, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-

that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.*"*

[56] K. Evode. "The universal jurisdiction of South African criminal courts and immunities of foreign State officials." *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 18.7 (2015): 2561-2603 see also Van Sliedregt E and Stoitchkova D "International Criminal Law" in Joseph S and McBeth A (eds) *A Research Handbook on International Human Rights Law* (Edward Elgar Cheltenham 2010) 241-271

[57] Ibid.

[58] Ibid.

[59] C. Lilian. "Universal jurisdiction and South Africa's perspective on the investigation of international crimes." *South African Law Journal* 131.1 (2014): 27-45.

One significant accept of universal jurisdiction is its aim of ensuring justice for victims who are beyond nations' boarders. As mentioned before, justice is not always realized on behalf of victims when perpetrators hold powerful positions in government and society. Universal jurisdiction makes room for such. A developing principle that promotes this notion is "the responsibility to protect principle". It advances the idea that states have a responsibility to aid fellow states in protecting the wellbeing of its citizens and may intervene either "*diplomatically*" or "*militarily*" to protect the human rights of another state.[60]It was developed after states realized that there had been a failure to take active measures to prevent the Rwandan genocide atrocities. In 2009 the office of the UN secretary general published a document outlining the implementation of the responsibility to protect. It outlined three "*pillars of action*". Namely the 'responsibility of a government to protect its own people, the responsibility of other states in assisting to protect and limit atrocities in other states and finally the responsibility of the international community to respond decisively and enforce justice against perpetrators'.[61]

The second and third principle perfectly encapsulates one of the main ideas being advanced by this paper, that is the responsibility to pursue justice on behalf of vulnerable communities. Refugees often face atrocities that fall under the umbrella of international criminal law, including genocide, war crimes, and crimes against humanity. However, they hardly receive justice for the harm suffered.

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[60] International justice resource center, Universal Jurisdiction available at https://ijrcenter.org/cases-before-national-courts/domesticexerciseofuniversaljurisdiction/#:~:text=Prominent%20Cases%20Involving%20Universal%20Jurisdiction&text=In%20particular%2C%20Spanish%20courts%20have,its%20annual%20review%20and%20database access date 29/12/2024.

[61] A Framework for Action for the Responsibility to Protect, A Resource for States, Global centre for the responsibility to protect. Can be found at https://www.globalr2p.org/publications/a-framework-for-action-for-the-responsibility-to-protect-a-resource-for-states/ access date 29/12/2024.

In a position paper (concerning the returns of refugees to the North and South Kivu), published by the United Nations High Commissioner for Refugees (UNHCR)[62], reference was made to a press release on behalf of the UN Human Rights Chief and Special Adviser on Prevention of Genocide. UN officials were condemning the ongoing attacks between the M23 and armed forces of the DRC against the citizens. [63]They further condemned hate speech against groups that could have the potential of fuelling attacks against specific communities and lead to genocidal attacks.[64]Hate speech almost always leads to atrocious attacks against a particular social group. A prime example would be the genocidal attacks that took place in Rwanda in the late 1900's. Radio Télévision Libre des Milles Collines, (a media house) is often referenced as one of the main enablers of the violence by broadcasting hate speech that encouraged animosity against the Tutsi's and some Hutu's. It is viewed as one of the leading events that led to the outbreak of the genocidal attacks. Prior to that the Tutsi's which made up fourteen percent of the population had received preferential treatment over Hutu's. [65]

To conclude, if the crimes committed against refugees fall under the scope of international criminal law, why is it that refugees do not enjoy its protective benefits? The final chapter will shed light into this question by exploring how refugee law and international criminal law can intersect to provide a solution to the refugee problem.

[62] UN High Commissioner for Refugees (UNHCR), UNHCR Position on Returns to North Kivu, South Kivu, Ituri and Adjacent Areas in the Democratic Republic of Congo Affected by Ongoing Conflict and Violence – Update III, November 2022,available at https://www.refworld.org/policy/countrypos/unhcr/2022/en/124181 [accessed 20 December 2024].

[63] UN Human Rights Chief and Special Adviser on Prevention of Genocide disturbed by increase in violence and hate speech in eastern DRC, 20 June 2022 available at https://www.ohchr.org/en/press-releases/2022/06/un-human-rights-chief-and-special-adviser-prevention-genocide-disturbed access date 28/12/2024.

[64] Ibid.

[65] Outreach Programme on the 1994 Genocide against the Tutsi in Rwanda and the United Nations at https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml access date 28/12/2024.

CHAPTER FOUR

WHAT IS THE INTERSECTION BETWEEN THE TWO REGIMES?

4.1 Case study

Zimbabwe has been at the centre of an economic crises for several decades. Many have attributed the genesis of the crisis to the early 2000's, particularly the re-distribution of the land to the African man. Mlambo points to the ostracization of the country from the international community, mismanagement of the economy by the leaders and political upheavals, coupled with the morbid clinging of power by the ruling party as the perfect recipe to an economic collapse. [66]

Since then, Zimbabwe has been a breeding ground for human rights abuses, autocratic leaders, a ruling elite that somehow benefits from the failed economy and high inflation rates that are yet to be seen elsewhere in the world. [67] Worse, on a regular four-year interval Zimbabwe is often plagued with electoral violence with members of the ruling party facing accusations of rigging, being the masterminds of public violence against citizens and opposition parties and allegations of torture.

To date, 2008 stands as the year with most unprecedented amount of violence in post-colonial Zimbabwe. Violence broke out between Zimbabwe African National Union-Patriotic Front (ZANU-PF) (the ruling party) and Movement for Democratic Change (MDC) (opposition party), with ZANU being reported as the main perpetrators. Election results were disputed, and a run-off was inevitable. In the days leading up to the elections Zimbabwean nationals were

[66] A.S Mlambo, "The Zimbabwean crisis and international response." *Journal for Contemporary History* (2006)31.2 (2006): 54-77.
[67] Ibid.

subjected to abductions, beatings, killings and torture. [68] Local institutions recorded 2000 cases of torture and killings, with a shocking incident of an elderly woman of 76 being beaten in the public village. [69] Human Rights Watch (HRW) pointed out that Zimbabwe had an extensive record of impunity for grave human rights abuses dating back to the 1990's when the MDC was formed. The report by the HRW further advised that for the future well-being of the country impunity had to be addressed and violators held accountable. [70]

The HRW report echoed the sentiments of Mlambo on SADC and the African Union. There was a need of stern rebuke from the regional organizations as opposed to the coddling approach that attempted to protect relations and diplomacy. Half a decade earlier at a SADC meeting at Victoria Falls, African heads of state expressed their support of the Zimbabwean government and declared the then president to be a champion of Human Rights, this is after ZANU had been in power for twenty-five years with the late R. Mugabe as the head of state. 44 years later ZANU is still in power, and each election has been characterized by violence and the gravest human rights violations.

It is 2008 election violence in Zimbabwe prompted the Southern African Litigation Centre (SALC), a public interest organization committed to advancing human rights and upholding the rule of law, to challenge the South African National Prosecuting Authority (NPA) and South African Police Service (SAPS). The challenge arose from the SAPS decision not to investigate allegations of torture-an act considered a crime against humanity committed by Zimbabwean officials against their own citizens.

[68] "Bullets for Each of You" State-Sponsored Violence since Zimbabwe's March 29 Elections, Human Rights Watch available at https://www.hrw.org/report/2008/06/09/bullets-each-you/state-sponsored-violence-zimbabwes-march-29-elections access date 28/12/2024.
[69] Ibid.
[70] Ibid.

"The torture docket case" as it is referred by the SALC website stands as a landmark case in the fight against impunity in South Africa and the international community at large [71]As outlined in the founding affidavit, SALC took to utilize the Implementation Act to the Rome Statute to request the SAPS and NPA to investigate and prosecute the above-mentioned allegations.

SALC acted under Section 38 of the Constitution, 1996 which allows persons to approach a competent court to seek relief on behalf of those who's rights have been infringed or threatened.[72] The provision particularly states that persons acting as "members of, or in the interest of, a group or class of persons" or "anyone acting in the public interests or an association acting in the interests of its' members" can approach a competent court.

4.2 Legal framework of universal jurisdiction in South Africa

In South Africa in terms of section 179 of the Constitution, the National Prosecuting Authority has a mandate to institute criminal proceedings on behalf of the state without fear, favour or prejudice. [73]Section 5(1) of the ICC Act requires the consent of the NPA to institute prosecutions against someone who has committed and international crime:

> "*No prosecution may be instituted against a person accused of having committed an international crime without the consent of the National Director of Public Prosecutions*".[74]

Thus, the NPA serves as the foundation of litigation concerning international crimes. The Act further establishes a Priority Crimes Litigation Unit, led by its head, whose primary

[71] Atilla Kisla, Torture in Zimbabwe available at https://www.southernafricalitigationcentre.org/torture-in-zimbabwe/#:~:text=In%20the%20Torture%20Docket%20case,allegedly%20been%20committed%20in%20Zimbabwe.
[72] *Constitution of the Republic of South Africa, 1996.*
[73] Supra 74.
[74] Section 5(1) of the ICC Act.

responsibilities include managing the unit and overseeing the prosecution of international crimes as outlined in the ICC Act.

Should the NPA decline to prosecute the crimes in question, they are required to furnish reasons to the Director General of Justice and Constitutional Development in terms of section 5(5) of the ICC Act. The reasons must be filed with the registrar of the International Criminal Court.[75]

4.3 Oral testimonies of vulnerable groups

The above provisions bring to light a critical consideration that bridges the gap between international criminal law and refugee law: whether prosecuting authorities in the exercise of their mandates should prioritize the prosecution of crimes committed against refugees who have been granted asylum within their borders? The presence of refugees in the host nation and their oral testimonies provide a valuable evidence base. That is not to say relying on such evidence does not come with its own challenges-In Byrne's discussion on 'credibility determinations of oral testimonies in international criminal law she discusses international evidence law principles for assessing the oral testimonies of alleged victims of human rights abuses. One of the main challenges is reliance on evidence that is mainly oral. [76]Testimonies from victims and witnesses of extreme gruesome crimes are not always reliable. They are prone to misrepresentation and distortion as a result of the extremity of the experience. [77]Indeed, the ICTY Trial Chamber had alluded to the same concern:

> 'Apart from the fact that much time has passed since 1992, the Trial Chamber is aware of the limited value of witness testimony in general. Special caution is warranted in cases like this one which have both a highly political, ethnic and religious element and

[75]SALC case Founding Affidavit.
[76] R. Byrne Assessing testimonial evidence in asylum proceedings: Guiding standards from the international criminal tribunals. (2007) *International Journal of Refugee Law*, *19*(4), pp.609-638.
[77] Ibid.

a complex historical background. The Judges are convinced that for the most part, most witnesses sought to tell the Chamber what they believed to be the truth. However, the personal involvement in tragedies like the one in the former Yugoslavia often consciously or unconsciously shapes a testimony'[78]

Not only does emotional vulnerability play a role in undermining oral testimonies but physical distance from the event and span in time. [79] Further the difficulty or lack of witnesses to corroborate the evidence pauses stumbling block as there must be a reliance on one version from the victim. This is unfortunate as corroboration is vital for strengthening oral testimony.[80] While oral testimonies from asylum seekers and refugees present challenges, their testimonies provide a crucial starting point for investigating and prosecuting crimes to limit impunity.

4.4 The SALC case

As thousands of refugees continue to be displaced, a question arises, how would a country like South Africa exercise universal jurisdiction given the volume of asylum seekers entering various ports of entry? The SALC case outlined limiting principles to assist the NPA and SAPS to exercise universal jurisdiction. The case commenced at the High court and proceeded to go to the Constitutional Court.

High Court

Before the court was the issue of the lawfulness of the decision by the respondents not to investigate the allegations of torture in Zimbabwe. It was held that the failure by the police service was not only unlawful but unconstitutional.[81] 'South Africa had an obligation in terms

[78] Prosecutor v. Strakic, ICTY Trial Chamber Judgment, 31 July 2003 and Byrne, R.
See also Ibid 78.
[79] Supra 79.
[80] Ibid.
[81] Southern Africa Litigation Centre & another v National Director of Public Prosecutions & others 2012 (10) BCLR 1089 (GNP) ('SALC v NDPP').

of international and domestic law to investigate international crimes to the greatest extent possible'. Secondly, a suspect did not need to be present in the Republic for the investigation to be underway and finally 'diplomatic and political considerations were not to influence the decision whether to prosecute or not prosecute as this point.'[82] After all the Act did not grant immunity to heads of state accused of committing international criminal crimes.

The Hight court further distinguished the duties of SAPS, NPA and PLCU in terms of empowering legislation and how they could work together with SALC.[83] Important considerations as to who was responsible for initiating investigations were of note. The court advised: The Priority Crimes Investigation Unit (under the SAPS) was primarily responsible for the investigations of the crimes. The PLCU as the body established to investigate crimes under the ICC Act must assist the SAPS in the investigation of the crimes in question. [84]SALC as a public interest organization together with the Zimbabwean exile's forum were to assist in making the witnesses available questioning. Processing of travel documentation for witnesses from Zimbabwe to South Africa were to be overseen the PLCU, SAPS and NPA. Following the conclusion of the investigation the PLCU was responsible for recommending to the NPA whether a prosecution was necessary. [85]

SCA

SAPS and NPA appealed the decision and SAPS argued that section 4 of the Implementation Act which governed jurisdiction of South African courts was limited by territory.[86] The conduct set out could only be considered a crime if the suspect was present in South Africa. The court

[82] SALC case, High Court judgement.
[83] Supra.
[84] SALC case overview, available at https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Analysis-of-High-Court-Judgment.pdf access date: 15/01/2025
[85] Supra 83.
[86] National Commissioner of the South African Police Service and Another v Southern Africa Litigation Centre and Another SCA (2013)

rejected this argument and stated that section 4 needed to be interpreted considering prescriptive jurisdiction, which requires that conduct is punishable if it was a crime at the time of commission. The court further held that section 4(1) "criminalises such conduct at the time of its commission, regardless of where and by whom it was committed."[87]

The court also examined the role of the SAPS in light of section 16 of the South African Police Service Act (SAPS Act). The provision gives police authority to investigate international crimes which are categorized as "national priority offences". As per the act, these were to be investigated by Hawks under SAPS.[88] The court held "it is clear that the SAPS, in the form of the Hawks, had the competence to initiate an investigation into conduct criminalised in terms of the Act which had been committed extra-territorially".[89] The court further noted that "whilst it is true that s 4(3) of the ICC Act does not expressly authorise an investigation prior to the presence of an alleged perpetrator within South African territory, it also does not prohibit such an investigation."[90] SAPS could only hold an investigation if Zimbabwe consented to such. The court concluded that SAPS was indeed obligated to investigate the said crimes. However, the court held that there would be no need for an investigation if there was no possibility of a prosecution.[91] In obiter the court held that requiring the presence of suspects to initiate investigations would serve as stumbling block in the fight against impunity. 'SAPS are empowered to investigate the alleged offences irrespective of whether or not the alleged perpetrators are present in South Africa" and that the SAPS are required to initiate an investigation under the ICC Act"[92]

[87] SALC case and summary of judgment National Commissioner of the South African Police Service and Another v Southern Africa Litigation Centre and Another available at https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Summary-of-Zim-SCA-judgment-2.pdf access date: 16/01/2025
[88] Supra 88.
[89] Supra 88.
[90] SALC case. SCA Judgement.
[91] Supra 88.
[92]SALC SCA judgement.

Constitutional Court

Considering the SCA decision, SAPS as a last resort approached the Constitutional Court with the hopes of overturning the High Court and Supreme Court rulings. Central to the delivery from the Constitutional Court bench was South Africa's obligation 'as a member of the family of nations' to prevent impunity through its domestic laws and international obligations[93] *Majiedt AJ* with the rest of the bench concurring, laid out the foundation of the judgement by referencing Nelson Mandela's future policy on foreign affairs. [94] Human rights were to be the 'core concern of international relations. The promotion of human rights would take precedence in any issue concerning international relations. In addressing the issues this would be the theoretical framework influencing the bench. As the court of final appeal, the court had to determine the following issues:

'Where an international crime is committed outside of South Africa, does the suspected perpe trator need to be present in South Africa, forthe police to investigate the crime?'Whether the Constitution dutied the police to investigate the crime against humanity of torture'?[95]
'Whether there were limits on the police investigating international crimes committed outside of South Africa by and against foreign nationals?'[96]

In addressing the first issue the court acknowledged that there were differing views amongst scholars when it came to presence of the accused for an investigation. The court referenced[97] the distinction between investigation and prosecution looking at the Rome Statute and the South African Constitution. Both instruments distinguished between the two stages, the Constitution requiring the presence of the accused during the trial proceedings and the Rome

[93] Preamble of the Constitution &SALC case.
[94] Mandela 'South Africa's Future Policy: New Pillars for a New World' (1993) 72 Foreign Affairs
[95]*National Commissioner of Police v Southern African Human Rights Litigation Centre and Another 2015 (1)255 (CC)*
[96] Supra.
[97] Paragraph 3(b) of the 2005 Resolution of the Institut de Droit International.

Statute leaving it to state parties to draw a distinction between these two stages of criminal proceedings. The court further acknowledged that an even an extradition request could only take place after a certain level of prior investigation. The court concluded that the presence of the accused was not required for purposes of an investigation.[98]

In terms of whether the Constitution placed a duty on the police to investigate crimes against humanity, the constitutional court went further than the Supreme Court and held that police did not only have the power, but a duty to do so. This was in terms of section 205(3) and had to be interpreted in terms of the constitution and the ICC Act considering international law. The court further acknowledged that "the designation of international crimes under the SAPS Act, domesticated into our law by the ICC Act requires the SAPS to prioritize international crimes and imposes a duty to do so." [99]Further this duty was supported by the Priority Crimes Litigation Unit within the NPA. The SAPS Act gave the head of the hawks the power to request assistance from the NPA in the investigation of national priority offences.

In finding that there was a duty the court addressed the question of when and how this duty could be exercised. The test established by the court has become a litmus in the exercise of universal jurisdiction under our law. After all there should be caution and limits in the exercise of power. On the onset the court acknowledged that the exercise of 'universal jurisdiction is subject to a substantial connection between the subject matter and the jurisdiction.'[100]Once jurisdiction was established, the state had to exercise caution and observe the principle on 'non-intervention' in the affairs of another state. South Africa could investigate only if the state with the subject matter was 'unwilling or unable to'. [101]In the case in question the respondents

[98] Supra 97.
[99] SALC case CC Paragraph 57.
[100] Supra 97.
[101] Supra. 97

admitted that they had not requested the Zimbabwean government to investigate the allegations, the court agreed with the respondents that it was unlikely that the said government would carry out the investigation with the 'necessary zeal' as it were high-profile government officials implicated.[102]

Upon establishing that a state is unwilling an unable, they had to look at the practicability of carrying out the investigation. Would it be reasonable to carry out an investigation of an international crime in another state? The costs associated with logistics, transportation and leaving arrangements of investigators and costs of forensic experts, the safety of officials all were factors to be considered. [103]The proximity of South Africa to the country in question and the likely presence of the accused whether through an extradition request or on their own volition was an important factor. The gathering of evidence to meet the elements of the crime in question and interviewing of witnesses was another vital consideration. [104]All these were important considerations to assess the resources required for an 'effective investigation'. Ultimately the main consideration was whether the investigation would lead to a prosecution. The court suggested a 'preliminary investigation' to assess the practicability of a 'full on investigation'. In relation to the torture docket case the ultimate question was whether SAPS had reasonably declined to investigate the allegations of torture in Zimbabwe. [105]In the concluding remarks the court held that 'South Africa could not be seen as tolerating impunity and providing a haven for alleged tortures. The country's 'international- domestic law obligations had to be honoured'.[106]

[102] Supra 97.
[103] Supra.
[104] Spra.
[105] Supra.
[106] SALC Case, CC

The limiting principles are relevant to the conclusion of this paper as they provide a roadmap for determining how and when the SAPS can investigate crimes committed against refugees residing in South Africa.

4.5 Application of the SALC inquiry to the refugee problem

A substantial connection

South Africa is governed by the supremacy of the Constitution and the rule of law which mandates that conduct that is inconsistent with these legal principles is invalid.[107] The rule of law advances the notion that no one is above the law ensuring that accountability rises above nationality, class and political position. However, in many parts of the world this is not the case- thus leading to a refugee crisis and widespread impunity. How can the SALC principles be implemented to address the dismal lack of accountability that underpins the global refugee crisis. As suggested in the paper, prosecuting perpetrators will allow the international community to tackle the crisis from its inception.

Upon arrival asylum seekers go through a refugee status determination interview and state their claim. Some claims are approved immediately other claims are rejected and go through an appeals process. The appeals process in most cases requires an advanced knowledge of refugee law, of which not many refugees possess, let alone an understanding of the English language. Which is understandable given that no one ever dreams of living their home and being a refugee. Most refugees cannot afford the representation of legal experts; hence they rely on the assistance of human rights organizations. These organizations have access to the refugee community and most importantly access to policy makers and government officials who have the power to effect change. Through their work with refugees, they can monitor trends and observe the pressing issues affecting this vulnerable group. Like the Southern Africa Litigation

[107] Section 2, chapter 1 of the South African Constitution.

Centre in the torture docket case, organizations can team up with other public interest organizations and litigate on behalf of the indigent and refer cases to the SAPS and NPA for investigations. By virtue of being a host nation, countries that provide asylum have somewhat of a substantial connection to refugees and crimes committed against them. For example, a country like South Africa is home to thousands of refugees from the DRC and other parts of Africa. Undoubtedly South Africa is affected by the atrocities that are often recorded in the DRC as it bears the burden of hosting the victims. In fact, the recent deaths of 14 SANDF members are a testament to the substantial connection between international crimes that take place in the DRC and South Africa.

Unwilling or unable?

Staying on with the example of the DRC, the central African country has been experiencing conflict for over three decades. Al Jazeera reports approximately six million deaths since 1996.[108] The notorious M23 rebel group has recently gained control of Goma and is continuing to leave havoc in its wake. Their crimes extend further than conventional warfare with reports of rape and sexually related violence towards woman and young girls, destroying any hope for a brighter future in their minds. Whether a single country can single handily tackle the problems of a country like the DRC is a subsequent issue. The initial issue would be whether the country is unwilling or unable? For a three-decade long conflict one might argue and say the DRC has long lost control over its land and can no longer protect its citizens. However, a country helping would assist in curbing impunity.

[108] A guide to the decades-long conflict in DR Congo- available at https://www.aljazeera.com/news/2024/2/21/a-guide-to-the-decades-long-conflict-in-dr-congo access date: 03/02/2025

Practicability

The Constitutional Court in expounding on the practicability of investigating crimes beyond the boarders suggested a preliminary investigation to assess the feasibility of a full-blown investigation. In the solution being proposed by this paper the question would be whether it is practical for host nations to investigate crimes committed against refugees who have come to find refuge in their states. In the example of the of the DRC would a country like South Africa be able to investigate and gather evidence for a prosecution? One might argue against the feasibility of such considering the current case of fallen soldiers in Goma. How then would an investigation team survive an almost chronically unstable region? Of course, one would need to be cognisant of the fact that the DRC might be a difficult scenario and that not all cases would be as such.

Moreover, among the considerations would be whether the investigation would most likely lead to a prosecution for refugees to see their perpetrators in court. In countries where the rule of law still bears sway and there is cooperation between the investigating country and country of origin this would be possible.

State sovereignty and political considerations

The High court acknowledged that it is not possible for a country to enter the territory of another state especially for the purposes of investigating international crimes without cooperation from the state in question. In the SALC case the SAPS would have needed cooperation from Zimbabwe and so in the proposed solution host nations would need the cooperation of the refugee's country of origin to launch investigations. Furthermore, as mentioned in the same court, diplomatic considerations between the host nation and country of origin would not be relevant at the initial stages of an investigation but would become a factor to be considered when prosecuting authorities institute proceedings in a court of law

The proposed solution will not come without its challenges. However, with the continuous rise of human rights abuses without even an attempt to secure justice on behalf of refugees makes the risk worthwhile. Indeed, why has there never been an attempt to prosecute crimes committed against refugees. Why has the world assumed that all refugees need was asylum? If the world paused to reflect on this, the focus would be shifted from merely providing asylum to addressing the root causes of refugees' unfortunate circumstances. Unfortunately, the issue lies in the practicability of such. Despite this, it seems as if concerns of practicability are raised when it is the vulnerable that require assistance. Suddenly it becomes impractical, costly and not feasible. However, is it practical for thousands of people to be forced from their homes and countries with nothing on their backs to start a new life without a dime? Unfortunately, that is the reality of many refugees. Despite this, refugees have proven to be resilient; within a year they establish vendor stalls and put food on their table for their children. However, they go through life carrying the painful memories.

Practicability will undoubtedly always be a leading argument against universal jurisdiction, but it should not serve as a deterrence to the exercise thereof. [109]As expected, countries that have attempted to fulfil their international obligations and exercise universal jurisdiction have faced significant hurdles from the countries were the crimes were committed. It is important to note that this will not always be the case and that measures can be put in place to counteract possible obstacles associated with universal jurisdiction. Amnesty International suggests 'victims and witnesses located outside the country where the crime occurred to give evidence from other sources, such as satellite photos or video conference'.[110]Most importantly the fact that prosecutors in the past have successfully launched criminal proceedings for crimes committed

[109] Universal Jurisdiction, *Amnesty International December (2001)* available at https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530202001en.pdf >uploads>2021/06 access date: 04/02/2025
[110] Ibid.

beyond the boarders (for example- ‘International Criminal Tribunals for the former Yugoslavia and Rwanda’) shows that it is possible. It has been done. It can be done.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

The main objective of this paper was to shed light on a vulnerable group in society that is often overlooked when it comes to conversations concerning justice. By researching on the intersections of international criminal law and refugee law the paper identified a crucial gap, the lack of justice that refugees are subjected to and the responsibility of receiving states in initiating investigations on their behalf. The discussion was built on this premise: providing asylum is no longer enough, instead, host nations must address the underlying causes that are forcing refugees to flee.

The paper commenced with a historical overview of refugee law detailing the obligations of states to protect refugees and the remedies available under international criminal law to hold perpetrators accountable.

Thus, given the presence of refugees in host nations and the oral evidence they can provide, prioritizing refugee cases when applying the principle of universal jurisdiction is practical and beneficial. Refugees, being within the country, can contribute crucial testimonies, in turn fostering a continued relationship with the host nation.

Further, the paper conceded that the proposed solution would have its challenges, but these challenges should not outweigh the obligation to seek justice for refugees. States should actively seek solutions to overcome the 'practicability challenges' in order hold perpetrators of human rights violations accountable.

Through the SALC case it was confirmed that the suspected individuals need not be present in the country for an investigation to commence. [111]Only at the trial stage would the presence of

[111] SALC case-High Court judgement.

the accused be required. Even then, the court pointed out that heads of states do not enjoy immunity from the commission of international crimes.

Further it was emphasized that the proposed solution serves as a preventative measure as opposed to the current reactionary measures we see. If human rights violators were prosecuted and held accountable for their crimes, we would see less populations seeking asylum. Addressing problems at the root cause has always proven to be a sustainable solution.

Moreover, the paper did not seek to introduce universal jurisdiction as a new principle. Rather it suggested that in the exercise of universal jurisdiction states should prioritize investigating and prosecuting crimes committed against refugees residing within their borders as their testimonies provide a valuable evidence base.

Additionally, an important finding was the recommendation by the high court for SALC to assist the investigating unit to facilitate the presence of witnesses. The involvement of law clinics serves as an advantage as law clinics are the first point of call when asylum seekers and refugees require legal advice.

The implementation of the above findings would develop international criminal law jurisprudence to encompass refugee rights protection. The two fields would benefit from the development as this would be the first instance were these two areas of law amalgamate.

5.1 Recommendations

An interesting area to conduct future research would be what constitutes ‘unwilling ‘or ‘unable’ This is important to determine as it the difference between a host nation investigating and not investigating an international crime. The difference between refugees receiving justice or their assailants going free.

As seen in the SALC case, human rights organizations should continue to refer cases to the police for investigations. They have the advantage of consulting with refugees and asylum seekers on the ground. They can further assist in facilitating the travel of witnesses from the country of origin to the police services.

Investigations can be initiated by interviewing witnesses who are already in the receiving state. The Hight Court in the SALC case had suggested the NPA work with the assistance of the SALC. In the case of refugees, the SAPS and NPA can always commence with interviewing witnesses by working together with public interest organizations. Further, police services can work with relief organizations in the countries of origin to assist in the monitoring of trends and gathering of evidence.

The future of refugee law

Migration has quickly become a political tool at home and abroad. Political parties who are silent on migration policies are losing votes at an alarming rate. Political commentators have attributed South Africa's ANC and EFF's decline in voters support to their stance on migration. Parties who are anti-immigrant are viewed as prioritizing South Africans whilst those who are for diversity and inclusion have seen votes trickle in. Not only South Africa but the world at large. Countries are adopting stringent measures and limiting migration. If ordinary migrants are facing limitations despite their contribution to the economy, what more asylum seekers fleeing persecution with nothing to offer.

The US government has suspended funding for diversity programmes. South Africa has published a white paper to overhaul the entire immigration system. Further, there have been talks of withdrawing from the refugee convention.

Efforts used in the past to curb the rising tide of anti-immigrant sentiments will need to take a different form as the landscape is shifting at an alarming rate. Immigrants and refugees have suddenly become the enablers of unemployment and crime. However, should they be removed from the equation the same issues would exist. Should South Africa with draw from the Convention the unemployment rate would remain the same, crime would still exist. Ivor argues the following:

> 'The Convention may not provide an answer to many of today's problems which have a bearing on the refugee situation, is not a reason for questioning its basic value in the sphere for which it was intended. The Convention should not be blamed for failing to resolve problems with which it was never supposed to deal. Further it should never be forgotten that the Convention is an essential part of our humanitarian heritage for the international protection of refugees. It has traditionally provided an excellent legal basis for such protection and should be preserved as such.'[112]

The world is evolving, presenting each generation with new challenges. New challenges need new solutions. Therefore, it is the responsibility of each generation to implement solutions to these challenges. In our case refugee law must evolve to encompass international criminal law in order to confront the rising tide of impunity and advance justice.

[112] Jackson, Ivor C. "The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection." *International Journal of Refugee Law,* vol. 3, no. 3, July 1991, pp. 403-413. *HeinOnline*, https://heinonline.org/HOL/P?h=hein.journals/intjrl3&i=417.

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UNIVERSITY OF
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Miss Ruth Mutseriwa (217029881)
School Of Law
Pietermaritzburg

Dear Miss Ruth Mutseriwa,

Original application number: 00026297
Project title: Intersections of refugee law and international criminal Law: The rise of impunity and host nations responsibility in pursuing justice on behalf of Asylum Seekers and Refugees under universal jurisdiction.

Exemption from Ethics Review

In response to your application received on 7 June 2024, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Matthew Blain Kimble
Academic Leader Research
School Of Law