



UNIVERSITY OF KWAZULU-NATAL
SCHOOL OF LAW, HOWARD COLLEGE

**Analysing the socio-economic implications of state failure to
deliver on its legal obligations towards refugees: A constitutional
and international law perspective**

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This mini-dissertation is submitted in partial fulfilment of the
requirements for the degree of Master of Laws in Constitutional
Litigation

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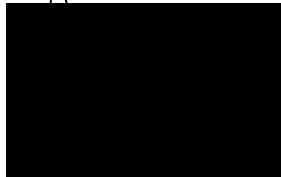
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ABSTRACT

Refugees and asylum seekers often rely on the domestic laws of host countries to translate international standards of protection into tangible rights. This study turns to a socio-legal analysis of South Africa's refugee regime, examining how international and constitutional standards of socio-economic rights are translated into domestic law and practice. The research undertakes a two pronged analysis of both domestic legislation and its implementation. At legislative level, the research suggests a pervasive erosion of socio-economic rights through amendments hindering refugees' pathways to citizenship and access to work and education. Within implementation, systemic failures, xenophobic sentiment, and bureaucratic inefficiencies reveal the barriers that hinder access to socio-economic rights in general. Cumulatively, through unveiling these restrictions, the study exposes the broader trend of limitations to refugee integration. The study asserts that this signifies a shift from a rights-based approach towards a more restrictive regime, justified by the allegation of "*limited state resources*". The study argues that such a claim acts as a smokescreen, masking a deeper failure on the part of the state to uphold its international and constitutional obligations. Ultimately, this study champions sustainable reforms, moving beyond a simple revival of rights-based principles, towards achieving lasting change in light of resource constraints.

KEYWORDS: *Refugees; Asylum Seekers; Socio-economic Rights; Integration; Progressive Realisation; Limited resources; Rights Based Approach; Legislative and Policy Reforms*

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LIST OF ABBREVIATIONS

ACMS	African Centre for Migration & Society
AHMR	African Human Mobility Review
CC	Constitutional Court
CESCR	Committee on Economic, Social, and Cultural Rights
DHA	Department of Home Affairs
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILM	International Legal Materials
LHR	Lawyers for Human Rights
OAU	Organisation of African Unity
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SAJHR	South African Journal on Human Rights
SAPS	South African Police Service
SCA	Supreme Court of Appeal
SERAC	Social and Economic Rights Action Centre
SERI	Socio-Economic Rights Institute of South Africa
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UTS	United Nations Treaty Series

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CHAPTER 1:

THE SOUTH AFRICAN REFUGEE REGIME, BETWEEN PROMISE AND PRECARIETY

1 INTRODUCTION

Refugees, often described as ‘vessel[s] on the open sea ... not sailing under any flag’,¹ find themselves reliant on international treaties and conventions for the protection of their rights and obligations.² While these international instruments provide a crucial foundation, refugee protection ultimately vests at the national level of host countries.³ Consequently, refugees turn to domestic legislation for the recognition, protection, and realisation of their rights,⁴ be it basic, civil or socio-economic rights.⁵ This study focuses broadly on the latter, socio-economic rights, which recognise that access to necessities like food, water, shelter, healthcare, education, employment and social security are fundamental for the survival and self-actualisation of all people.⁶ For refugees, in particular, access to these rights are vital for their integration, a long-term process by which they become full and equal members of their host community.⁷ However, refugees often enter host countries with no more than the clothes on their backs.⁸ This reality makes them reliant on substantial state support to access socio-economic rights, let alone their integration.⁹

¹ P Weis ‘The International Protection of Refugees’ (1954) 48(2) *The American Journal of International Law* 193.

² R Ziegler ‘Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?’ (2020) 10 *Constitutional Court Review* 67.

³ Ibid.

⁴ Ibid.

⁵ J McAdam ‘From Economic Refugees to Climate Refugees? Review of International Refugee Law and Socio-Economic Rights: Refuge from Deprivation by Michelle Foster’ (2009) 10(2) *Melbourne Journal of International Law* 579.

⁶ S Liebenberg ‘The Interpretation of Socio-economic Rights’ (2006) 2 *Constitutional Law of South Africa* 1-2.

⁷ E Pistoia ‘Social integration of Refugees and Asylum Seekers through the Exercise of Socio-economic Rights in European Union Law’ (2018) 3(2) *European Papers* 781. Social integration corresponds to ‘local integration’ a concept embraced by the United Nations High Commissioner for Refugees (UNHCR) as a ‘durable solution’ for refugees (see UNHCR ‘Self-reliance, Economic Inclusion, and Livelihoods, Global Report 2023’, available at <https://reporting.unhcr.org/global-report-2023/outcome-areas/self-reliance-economic-inclusion-and-livelihoods>, accessed on 18 October 2024). ‘Refugees who are able to access housing schemes or employment for example, are woven into the fabric of society and are given the necessary tools to become self-sustaining and contribute to a host country’s economy’.

⁸ McAdam (note 5 above) 579.

⁹ Ibid.

In South Africa, the obligation of the state to provide access to socio-economic rights is deeply embedded within the Constitution of the Republic of South Africa, 1996 (the Constitution).¹⁰ This commitment is demonstrated in the Bill of Rights, which delineates a broad array of socio-economic rights enforceable by the courts.¹¹ In fact, the Constitutional Court (CC) affirmed that although not universally recognised as fundamental rights, socio-economic rights are, to an extent, justiciable and must be protected from intrusion and infringement.¹² Section 7(2) of the Constitution echoes this principle, asserting that the state must respect, promote and fulfil the Bill of Rights for ‘all people in our country’.¹³ Consequently, this constitutional guarantee of socio-economic rights obligates the state to facilitate their access to all members of society, including refugees, through appropriate laws, policies, and implementation.¹⁴

However, the state of the economy, often reflected in metrics like Gross Domestic Product, debt levels, investment rates, and employment figures, directly impacts the resources available for funding socio-economic rights programmes.¹⁵ Thus, the realisation of socio-economic rights is intertwined with resource availability.¹⁶ This raises critical questions about how the state has provided refugees access to socio-economic rights, particularly in light of resource constraints. To uncover this question, the study will now turn to an analysis of the refugee regime in South Africa, encompassing both the legal framework and its implementation.

However, to fully understand the impact of the refugee regime on the rights of those fleeing persecution, it is crucial to distinguish between asylum seekers (*de facto* refugees) and refugees (*de jure* refugees).¹⁷ Both an asylum seeker and refugee flee their country of origin due to ‘a well-founded fear of being persecuted for reasons of race, religion, nationality,

¹⁰ Recital 5 of the preamble of the Constitution: The Constitution is vested with the power to ‘*heal the divisions of the past and ... improve the quality of life of all citizens and free the potential of each person*’ (see M Heywood ‘Economic Policy and the Socio-Economic Rights in the South African Constitution 1996–2021: Why Don’t They Talk to Each Other?’ (2021) 11 *Constitutional Court Review* 1-3).

¹¹ Sections 22, 26, 27 and 29 of the Constitution. See Heywood (note 10 above) 1-4; C Scott and P Macklem ‘Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution’ (1992) 141 *U Penn LR* 1, 26.

¹² Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) paras 49-50.

¹³ Section 7(2) of the Constitution.

¹⁴ Section 7(2) of the Constitution; Heywood (note 10 above) 1-4.

¹⁵ Heywood (note 10 above) 1-4.

¹⁶ Heywood (note 10 above) 1-4.

¹⁷ *Abraham v Minister of Home Affairs* 2023 ZAGPJHC 253; 2023 (5) SA 178 (GJ) para 22.

membership of a particular social group or political opinion'.¹⁸ However, the distinguishing factor lies in legal recognition: a refugee has been formally recognised as such under the domestic law of their host country, while an asylum seeker has not yet received this formal recognition.¹⁹

By tracing the respective journeys of both asylum seekers and refugees, from their point of entry to eventual (or attempted) integration within the host country, this study will speak to the implications of the refugee regime on the socio-economic rights of both categories of people seeking refuge within its borders.

1.1 The South African refugee regime: progress undermined by pitfalls

Examining the evolution of the South African refugee regime is crucial to understanding the current landscape of socio-economic rights available to asylum seekers and refugees. During apartheid, South Africa's approach to refugees was deeply intertwined with race.²⁰ European refugees were readily accepted and granted citizenship, while black refugees from neighbouring countries were often denied entry or repatriated.²¹

It was not until the dismantling of apartheid in the early 1990s that South Africa began to shift towards a more inclusive refugee regime based on human rights.²² The state eventually ratified international agreements like the United Nations Convention Relating to the Status of Refugees (1951), *ILM* 2545 (the 1951 Convention) and its Protocol Relating to the Status of Refugees (1967).²³ South Africa moved from a race-based system towards an internationally compliant rights-based approach.²⁴

¹⁸ Article IA(2) of the United Nations Convention Relating to the Status of Refugees (1951) *ILM* 2545. The Organisation of African Unity Convention Concerning Specific Aspects of Refugee Problems in South Africa, (1969) 1001 *UNTS* 45 enriches this definition, adding that a refugee may flee for reasons of generalised violence, internal aggression or human rights violations.

¹⁹ *Abraham* (note 17 above) para 22.

²⁰ F Khan, S Mbatani & C Marais 'Trusting Democracy: The Law Can Work for Refugees, but what the System Needs is an 'Injection of Humanity' (2021) *JAAS* 56(1) 49-50.

²¹ *Ibid.*

²² *Ibid.*

²³ The Protocol Relating to the Status of Refugees (1967) was created to supplement the 1951 Convention and remove the temporal and geographical limitations imposed by said Convention on refugees. Both instruments are dubbed as the cornerstone of international refugee law; T Alexie *Realising the Socio-Economic Rights of Refugees under Human Rights Law: A case Study of South Africa* (unpublished LLM thesis, University of the Western Cape 2013).

²⁴ Khan, Mbatani & Marais (note 20 above) 49-52.

The promulgation of the Refugees Act 130 of 1998 (Refugees Act) marked a significant turning point.²⁵ Motivated by a commitment to aligning with international standards,²⁶ the Refugees Act²⁷ established a formal process for determining refugee status.²⁸ It granted refugees a range of rights, including the Bill of Rights, as they applied to them.²⁹ This signalled a clear departure from the arbitrary and discriminatory practices of the apartheid era.³⁰ Crucially, South Africa adopted a non-encampment policy, a key factor in fostering integration by allowing refugees to live within communities among citizens rather than being confined to camps.³¹

While the Refugees Act³² represented a significant stride forward, subsequent amendments, particularly in the recent Refugees Amendment Act 11 of 2017 (Refugees Amendment Act), have drawn considerable criticism from scholars³³ and the judiciary alike.³⁴ The changes introduced through the Refugees Amendment Act³⁵ have been characterised as a ‘paper wall’ of new procedural requirements for asylum seekers, barring efficient access to official refugee status and integration.³⁶ Kavuro argues that the new procedurally cumbersome approach has effectively restricted refugees' access to socio-economic rights.³⁷ This has fuelled refugee dissatisfaction, often manifested through protests demanding resettlement to other countries that can offer better socio-economic protections.³⁸

²⁵ Ibid.

²⁶ Act 130 of 1998. The interpretation, application and administration of the Act is subject to the 1951 Convention and its 1967 Protocol, as well as the Organisation of African Unity Convention Concerning Specific Aspects of Refugee Problems in South Africa (1969) 1001 *UNTS* 45.

²⁷ Section 6 of Act 130 of 1998.

²⁸ Chapters 2-4 of Act 130 of 1998.

²⁹ Section 27(b) of Act 130 of 1998.

³⁰ Khan, Mbatani & Marais (note 20 above) 49-52.

³¹ J Crush, C Skinner & M Stulgaitis ‘Benign Neglect or Active Destruction? A Critical Analysis of Refugee and Informal Sector Policy and Practice in South Africa’ (2017) 3(2) *African Human Mobility Review* 752-782.

³² Act 130 of 1998.

³³ Ziegler (note 2 above) 67-106; C Kavuro, ‘Disappearance of Refugee Rights in South Africa’ (2022) 43 *Obiter* 49-78.

³⁴ *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* 2023 ZACC 45.

³⁵ Act 11 of 2017.

³⁶ J Crush, C Skinner & M Stulgaitis ‘Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy’ (2017) 79 *South African Migration Programme Policy Series* 21.

³⁷ Kavuro (note 33 above).

³⁸ Kavuro (note 33 above) 43, 78.

Ziegler observes that the Refugees Amendment Act³⁹ signals retrogression from the spirit of the original Refugees Act⁴⁰ and potentially compromises internationally recognised rights.⁴¹ This concern has been underscored by the CC declaring certain provisions unconstitutional.⁴²

Beyond the letter of the law, however, various studies on the lived realities of refugees, speaking to state implementation, conduct, and policies, reveal a stark gulf between the previously espoused rights-based approach and the actual experiences on the ground.⁴³ This discrepancy is felt acutely by refugees in their interactions with the public, government officials or administrative bodies like the Department of Home Affairs (DHA).⁴⁴

First, interactions with the public reveal harrowing ordeals marked by xenophobic attacks that result in the tragic loss of lives and widespread displacement of foreigners (inclusive of refugees and asylum seekers) across major cities.⁴⁵ The threat of violence forces many refugees and asylum seekers to flee their homes, their places of work, and their schools, and concomitantly compromises their socio-economic rights to housing, labour and education, among others.⁴⁶

Secondly, refugees consistently report mistreatment by government officials.⁴⁷ The state's response to the 2015 xenophobic attacks, for example, reveals that the government initially downplayed the attacks, attributing them to criminal elements rather than

³⁹ Act 11 of 2017.

⁴⁰ Act 130 of 1998.

⁴¹ Ziegler (note 2 above) 105.

⁴² *Scalabrini* (note 34 above). The recent landmark judgement of *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs* (2023) ZACC 45 has showcased that the judiciary has found specific provisions within the Refugees Amendment Act 11 of 2017 to create hindrances to the realisation of a refugee's rights. This case specifically involved an analysis of sections 22(12) and (13) in so far as it held that where asylum seekers did not renew their visas within one month of their date of expiry, they were automatically presumed to have abandoned their asylum applications, and risked being classified as "illegal foreigners" in terms of section 32 of the Immigration Act of 2002. Being deemed an illegal foreigner subsequently meant that they were subject to arrest, detention and ultimately deportation to the country from which they sought asylum, where they were potentially at risk of further persecution. This amendment was challenged, and the court held that sections 22(12) and 22(13) violate the Constitution and international law principles such as 'non-refoulement'. The court held that the impugned provisions were not reasonable and failed to serve a legitimate governmental purpose.

⁴³ K Moyo & C Botha 'Chapter Refugee Policy as Infrastructure: The Gulf Between Policy Intent and Implementation for Refugees and Asylum Seekers in South Africa' in *Migration in Southern Africa IMISCOE Regional Reader* (2021) 77-91; Khan, Mbatani & Marais (note 20 above) 52-53; Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 4.

⁴⁴ Moyo & Botha (note 43 above) 87.

⁴⁵ Khan, Mbatani & Marais (note 20 above) 52.

⁴⁶ M Sikanyiso & S Rama 'Challenges to Refugees' Socio-economic Inclusion: A Lens Through the Experiences of Congolese Refugees in South Africa' (2020) 20(1) *SAGE* 82; *City of Cape Town v J B* 2020 ZAWCHC 9; 2020 (2) All SA 784 (WCC).

⁴⁷ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 4-21.

xenophobia.⁴⁸ This official denial, coupled with a tendency to blame victims and crack down on undocumented asylum seekers, reveals a systematic approach to marginalising and intimidating refugee communities.⁴⁹ The courts have identified that by neglecting to recognise the humanity and inherent dignity of refugees, the state perpetuates the very conditions that fuel xenophobic violence.⁵⁰

Thirdly, refugees also encounter significant challenges within the administrative systems designed to protect them.⁵¹ Refugees complain of arbitrary decisions and a pervasive lack of transparency within the DHA.⁵² The DHA faces substantial challenges in processing asylum applications, characterised by long queues,⁵³ closure of Refugee Reception Offices (RROs)⁵⁴ and allegations of corruption.⁵⁵ Refugees seeking to formalise their refugee status often endure lengthy waiting periods, sometimes spanning several years, due to backlogs and inefficiencies within the system.⁵⁶ This situation is further exacerbated by reports of corruption, where bribes are allegedly demanded to expedite applications, placing vulnerable individuals at risk of

⁴⁸ Khan, Mbatani & Marais (note 20 above) 53-55; Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 16; Operation Operation *Fiela* (sweep), for example, was launched in response to xenophobic attacks. However, the aim of the campaign was to identify undocumented asylum seekers and facilitate their deportation. In Cape Town, law enforcement, military personnel, and immigration officials conducted a coordinated raid at the station deck, a hub for foreign-owned businesses. Witnesses described a terrifying atmosphere, with soldiers brandishing weapons and aggressively confiscating goods from vendors, often without providing receipts or allowing for any dialogue regarding the seized items. This operation exemplified a systematic approach to marginalising and intimidating refugee communities, highlighting the intersection of crime control and xenophobia in state policy.

⁴⁹ Khan, Mbatani & Marais (note 20 above) 53-55; F Khan & M Lee 'Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers' (2018) 4(2) *African Human Mobility Review* 1205-1225.

⁵⁰ *Somali Association of South Africa v Limpopo Department of Economic Development Environment Tourism* 2014 ZASCA 143, 2015 (1) SA 151 (SCA).

⁵¹ Moyo & Botha (note 43 above) 87.

⁵² *Ibid.*

⁵³ Khan & Lee (note 49 above) 1212; *Tafira v Ngozwane* 2006 ZAGPHC 136.

⁵⁴ *Kiliko v The Minister of Home Affairs* 2008 ZAWCHC 124.

⁵⁵ R Amit 'Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System' (2015) Lawyers for Human Rights and the African Centre for Migration & Society Report 3-6.

⁵⁶ Khan & Lee (note 49 above) 1212; For example, in *Kiliko* (note 54 above) 124, the applicants detailed their multiple unsuccessful efforts to access the Cape Town RRO for asylum applications, facing barriers like limited daily entries. They argued that the DHA's restrictions violated their access to constitutional rights. Judge Van Reenen held that the availability of adequate facilities to grant asylum-seeker permits was imposed by South Africa's international obligations and the Constitution. As a result, the DHA's failure to introduce adequate and effective measures to ensure access to RROs violated the applicants' fundamental rights. The court ordered the Department to put measures into place to ensure access to the Cape Town RRO and to report to the court on the progress thereof.

exploitation.⁵⁷ These systemic delays create significant barriers for refugees attempting to access legal protection and essential services in South Africa.⁵⁸

Cumulatively, both the legal framework and lived experiences of refugees reveal that the refugee regime currently stands at a crossroads. While a rights-based approach was initially embraced,⁵⁹ the current landscape is fraught with unfulfilled promises and a palpable sense of regression.⁶⁰ This shift is epitomised by the recent *White Paper on Citizenship, Immigration and Refugee Protection: Towards A Complete Overhaul of the Migration System in South Africa* (2024) (*White Paper*).⁶¹ The *White Paper* has sparked controversy by proposing limitations to South Africa's obligations under the 1951 Refugee Convention, citing resource constraints as a justification.⁶² It cites that the DHA's 2024/25 budget has been reduced by approximately R400 million per annum and that the state cannot afford to provide access to socio-economic rights in a manner consistent with the 1951 Convention.⁶³ Crucially, this proposed withdrawal from international conventions represents a departure from the global standards that the original Refugees Act⁶⁴ explicitly sought to uphold.⁶⁵

Many civil society organisations have outwardly criticised these proposals, citing that the *White Paper* is contemptuous of a democratic dispensation, labelling it as draconian in nature.⁶⁶ Others have argued that the *White Paper*'s calls for reform omit addressing the administrative system's systemic failures.⁶⁷

A clear trend emerges: a reluctance on the part of the state to embrace and fully maintain an internationally compliant rights-based approach.⁶⁸ Underpinning this trend is the rationale of inadequate resources, often cited as justification for restrictive measures that ultimately

⁵⁷ Amit (note 55 above) 3-6.

⁵⁸ Khan & Lee (note 49 above) 1212.

⁵⁹ Khan, Mbatani & Marais (note 20 above) 48-53.

⁶⁰ Ziegler (note 2 above) 105.

⁶¹ The White Paper on Citizenship, Immigration and Refugee Protection: Towards A Complete Overhaul of the Migration System in South Africa (GG 50530 of 17 April 2024).

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Act 130 of 1998.

⁶⁵ Section 6 of the Refugees Act 130 of 1998.

⁶⁶ IOL 'Draconian' Immigration white paper shows contempt for democracy, says Lawyers for Human Rights' 2024, available at <https://www.iol.co.za/pretoria-news/news/draconian-immigration-white-paper-shows-contempt-for-democracy-says-lawyers-for-human-rights>, accessed 07 June 2024.

⁶⁷ Helen Suzman Foundation 'HSF Rejects the finalisation of the White Paper on Citizenship, Immigration and Refugee Protection' (2024) <https://hsf.org.za/news/press-releases/hsf-rejects-finalisation-of-white-paper-on-citizenship-immigration-and-refugee-protection>, accessed 07 June 2024.

⁶⁸ Khan, Mbatani & Marais (note 20 above) 48- 63.

undermine the rights and protections afforded to refugees.⁶⁹ This rationale raises concerns about the government's commitment to its international obligations and willingness to uphold the rights of refugees, even in light of limited resources.

1.2 Research objectives

The Refugees Act⁷⁰ enshrined a progressive, rights-based approach to refugee protection.⁷¹ However, recent legal and policy developments depart from this commitment, particularly regarding refugees' socio-economic rights.⁷² Now, the refugee regime stands at a crossroads, with proposals seeking to withdraw from socio-economic obligations toward refugees due to resource constraints.⁷³

Thus, this study aims to analyse the state's retreat from socio-economic commitments and the resulting disenfranchisement of this vulnerable population. To do so, the study first establishes the legal obligations owed to refugees and asylum seekers regarding their socio-economic rights, examining the international and constitutional frameworks. It then assesses the state's fulfilment of these obligations, analysing legislation and practical implementation. Thirdly, the study scrutinises the state's justification of limited resources for curtailing socio-economic rights. By carefully weighing resource constraints against legal obligations, the research investigates the legitimacy of the state's rationale. Ultimately, the study hypothesises that limitations based solely on resource constraints are unjustifiable. Therefore, it is necessary to propose recommendations for a sustainable, rights-based approach to refugee protection in South Africa. This exploration encompasses innovative solutions aiming to balance the imperative of refugee protection with the complexities of resource allocation.

1.3 Research questions

1. What international law and constitutional obligations are imposed on the state to protect and implement socio-economic rights for refugees and asylum seekers?
2. To what extent has domestic legislation given effect to these obligations and impacted the access to socio-economic rights of refugees and asylum seekers?

⁶⁹ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

⁷⁰ Act 130 of 1998.

⁷¹ Khan, Mbatani & Marais (note 19 above) 48- 63.

⁷² Kavuro (note 33 above) 49-78; Johnson C 'Failed asylum seekers in South Africa: Policy and practice' (2015) 1(2) *AHMR* 200-228; Ziegler (note 2 above) 67-106; Crush, Skinner & Stulgaitis (note 31 above) 752-782.

⁷³ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

3. To what extent has state implementation given effect to these obligations and impacted the access to the socio-economic rights of refugees and asylum seekers?
4. Are the state's limitations of socio-economic rights justified through the notion of "*limited resources*"?
5. Where state limitations are unjustified, what legislative and policy reforms could promote a more sustainable, rights-based approach to refugee protection in South Africa, even within a context of resource constraints?

1.4 Methodology

This dissertation is a desktop study and employs a socio-legal research methodology, undertaking a two-pronged assessment. The first prong analyses the legal framework governing refugee rights in South Africa. This analysis involves examining relevant legal documents, including international treaties, the South African Constitution, the Refugees Act,⁷⁴ and the Refugees Amendment Act.⁷⁵ The second prong involves a systematic review of the implementation of this legal framework, drawing on secondary sources such as academic articles, NGO reports, and media articles to provide context and insights into the lived experiences of refugees in South Africa. This systematic review will critically appraise the evidence attained from the literature, and evaluate the overall trends and conclusions on the implementation of refugee law in South Africa. A cumulative analysis of the law and its implementation will then conclude on the efficacy of the states' refugee regime. The theory of constitutionalism will underpin this analysis. This lens emphasises the importance of the rule of law, human rights protection, and state accountability to citizens and non-citizens. By applying constitutionalism, the dissertation will critically analyse discrepancies between constitutional mandates and actual state performance, advocating for reforms that promote a more just and equitable refugee regime. Lastly, by drawing from best practices, the research will investigate sustainable solutions for the refugee regime within the context of resource constraints.

⁷⁴ Act 130 of 1998.

⁷⁵ Act 11 of 2017.

1.5 Rationale

This dissertation is grounded in the principle of constitutionalism, which posits that the legitimacy of any state action, including its refugee regime, hinges on its adherence to the rule of law as embodied in both international and domestic legal frameworks. Therefore, it is essential to investigate whether South Africa's treatment of refugees aligns with its global and constitutional obligations. Where discrepancies exist, reform becomes not only desirable but necessary to ensure the legitimacy of the refugee regime and uphold the rule of law. By investigating the state's rationale and exploring viable alternatives, this study contributes to the crucial conversation surrounding the reform of South Africa's refugee regime, seeking sustainable pathways to uphold refugee rights.

1.6 Dissertation structure

1.6.1 *Chapter one*

The first chapter introduces the South African refugee regime, laying the groundwork for the dissertation. It defines key terms like *refugees*, *asylum seekers*, *socio-economic rights*, and *integration*, clarifying who is affected and what is at stake. The chapter then traces the evolution of South African refugee law, highlighting how its development seems to contradict the initial promises of socio-economic rights and integration due to resource constraints. This discrepancy forms the basis for the research problem. Finally, the chapter outlines the methodology and rationale guiding the research.

1.6.2 *Chapter two*

The second chapter begins by outlining the international and constitutional standards that govern state obligations towards the socio-economic rights of refugees. Then, the chapter analyses how South African domestic law, specifically the Refugees Act,⁷⁶ the Refugees Amendment Act⁷⁷, and the recent *White Paper*,⁷⁸ upholds (or fails to uphold) these standards. This analysis forms the first leg of the dissertation's investigation into the South African refugee regime.

⁷⁶ Act 130 of 1998.

⁷⁷ Act 11 of 2017.

⁷⁸ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

1.6.3 *Chapter three*

The third chapter moves from legal frameworks to lived experiences, examining the implementation of domestic laws. This chapter, the second leg of the analysis, investigates how the realities faced by refugees reflect the fulfilment or violation of international and constitutional obligations, particularly concerning socio-economic rights. It scrutinises state implementation efforts, systemic failures and societal dynamics, including the impact of institutionalised xenophobia, to understand how they affect the realisation of refugee rights in practice.

1.6.4 *Chapter four*

The fourth chapter delves into the critical question of whether the South African state's justification of limited resources can legitimately excuse the curtailment of refugees' socio-economic rights in light of its progressive realisation obligations. Where the study finds that limitations cannot be justified, Chapter Four proposes sustainable solutions for reforming legislation and implementation, acknowledging the realities of resource limitations while advocating for the protection of refugee rights.

1.6.5 *Chapter five*

This fifth chapter offers a concise summary of the key findings from the preceding chapters. It revisits the research questions posed in the introduction, providing clear answers based on the evidence presented. Additionally, Chapter Five outlines concrete recommendations, aiming to contribute to a more just and sustainable refugee regime in South Africa.

1.7 Conclusion

This chapter has provided a foundational understanding of the South African refugee regime, revealing a critical disconnect between the initial promises of socio-economic rights and integration and the current realities refugees face. This gap necessitates a deeper exploration of the legal framework governing refugee rights, which will be undertaken in Chapter Two. This Chapter will investigate the state's international and constitutional obligations concerning refugees' socio-economic rights and how well these obligations have been translated into domestic laws.

CHAPTER 2:

RIGHTS, OBLIGATIONS AND REALITIES - A CRITICAL ANALYSIS OF REFUGEE LAWS IN SOUTH AFRICA

2 INTRODUCTION

Understanding the state's role in upholding refugee rights necessitates a two-pronged approach: Examining the legal framework and its practical implementation. This chapter contemplates the former, providing a critical overview of the law underpinning South Africa's refugee regime. Beginning with the interplay between international refugee and constitutional law, the chapter delves into the socio-economic rights and obligations enshrined in the Constitution and relevant international instruments. It then analyses how these rights and obligations are transposed in South Africa's domestic refugee laws through the Refugees Act,⁷⁹ the Refugees Amendment Act,⁸⁰ and recent proposals for a complete overhaul of the law, as outlined in the latest *White Paper*.⁸¹

This analysis of the legal framework paves the way for a comprehensive assessment in Chapter Four, where both the law and its implementation will cumulatively be evaluated to determine whether the refugee regime, as a whole, has upheld its stated rights and corresponding obligations.

2.1 International and Constitutional rights and obligations towards refugees

2.1.1 Understanding the sources: interplay between international, constitutional and domestic law in general

The South African refugee framework is composed of an interplay between international, constitutional and domestic laws.⁸² At its apex lies the Constitution,⁸³ which establishes that all laws, policies and regulations must be consistent with it in order to be considered valid.⁸⁴ The injunction to interpret all laws in a manner that promotes the spirit and objectives of the Bill of

⁷⁹ Act 130 of 1998.

⁸⁰ Act 11 of 2017.

⁸¹ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

⁸² Ziegler (note 2 above) 67.

⁸³ Section 2 of the Constitution; the Constitution is the supreme law of the land.

⁸⁴ Section 2 of the Constitution.

Rights guides the interpretation and application of law in South Africa.⁸⁵ This Bill of Rights is regarded as the cornerstone of constitutional democracy and entrenches fundamental rights for everyone.⁸⁶ Katz postulates that the Bill of Rights is not reserved for citizens but is enjoyed by all persons, including refugees.⁸⁷ Thus, the Constitution is not merely a legal document but a transformative instrument aimed at fostering a just and equitable society for all, regardless of nationality.⁸⁸ Former Deputy Chief Justice Moseneke echoes that the Constitution has an ‘unconcealed design’ to rectify social unevenness and proactively foster social justice for all.⁸⁹

Crucially, when interpreting the Bill of Rights, section 39 of the Constitution mandates that courts pay due regard to international law.⁹⁰ This encompasses the body of rules and principles governing relations between states and regulating their conduct.⁹¹ Sources of international law primarily stem from international treaties and customary practices recognised by judicial decisions and civilised nations.⁹² Legal pronouncements of committees and commissions formed by international treaties also hold weight as sources of international law.⁹³ These sources cumulatively act as a protective mechanism for refugee rights.⁹⁴ Its integration into domestic legal frameworks is paramount for upholding these crucial standards.⁹⁵

These international norms are woven into the fabric of domestic law when translated into national legislation, as per section 231(4) of the Constitution.⁹⁶ Additionally, per section 231(2) of the Constitution, the state assumes binding obligations under international law upon ratification.⁹⁷

Having established the broader interplay between South Africa's constitutional, international and domestic legal obligations, this chapter now turns to the specific socio-

⁸⁵ Section 39(2) of the Constitution; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2009 ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC);

⁸⁶ F Khan & T Schreier (eds) *Refugee Law in South Africa* (2014) 204.

⁸⁷ A Katz ‘Immigration and the Court’ in Du Plessis M and Pete S (eds) *Constitutional Democracy in South Africa* (1994-2004) 200.

⁸⁸ Heywood (note 10 above) 5; Khan & Schreier (note 86 above) 204; *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

⁸⁹ *Head of Department: Mpumalanga* (note 85 above).

⁹⁰ Section 39(1)(b) of the Constitution.

⁹¹ D Chirwa ‘Chapter 3- Protecting Socio-Economic Rights Internationally’ in *Dullah Omar Institute Socio-Economic Resource Book* (2007) 94.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Section 231(4) of the Constitution states that ‘any international agreement becomes law in the Republic when it is enacted into law by national legislation’.

⁹⁷ Section 231(2) of the Constitution; provided that Parliament subsequently approves them.

economic commitments enshrined within these frameworks. Socio-economic rights, encompassing the ‘material dimensions of human welfare’⁹⁸ such as access to food, water, shelter, healthcare, education, social security, and employment, are indispensable for individuals to lead dignified lives and realise their full potential.⁹⁹ These rights serve the purpose of placing a legal obligation on states to utilise their available resources to cater to social and economic inequalities and imbalances.¹⁰⁰ Scholars argue that democracy itself hinges on equitable access to resources and the social and economic development of society.¹⁰¹ In this context, socio-economic rights are vital for the integration of refugees into society.¹⁰² Access to socio-economic rights empowers refugees to thrive in communities, earn livelihoods and realise their full potential, as opposed to merely survive or escape from the remnants of their persecution.¹⁰³ Thus, the role of socio-economic rights in the integration of refugees cannot be ignored.

2.1.2 *International law and its socio-economic rights and obligations*

International treaties ratified under section 231(2) of the Constitution form the frame of reference for understanding socio-economic rights obligations. Chief among these are the 1951 Convention and its 1967 Protocol.¹⁰⁴ These instruments were ratified in 1996 and are considered the cornerstone of international refugee protection that codifies the rights of refugees on a global scale.¹⁰⁵ A central principle of the 1951 Convention is that refugees must be awarded, at minimum, the same standard of ‘favourable treatment’ as ‘aliens’ or non-nationals in similar circumstances.¹⁰⁶ Similarly, in terms of socio-economic rights, refugees should be accorded the same favourable treatment as non-nationals in similar circumstances

⁹⁸ Liebenberg (note 6 above) 3.

⁹⁹ Ibid.

¹⁰⁰ N Haysom ‘Constitutionalism, Majoritarian Democracy and Socio-Economic Rights’ (1992) 2 *SAJHR* 451.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ United Nations Convention Relating to the Status of Refugees (1951), *ILM* 2545; UN General Assembly ‘Protocol Relating to the Status of Refugees (1967) 606 *UN Treaty Series* 267; The 1967 Protocol was created to supplement the 1951 Refugee Convention and remove the temporal and geographical limitations imposed by said Convention on refugees; Alexie (note 23 above).

¹⁰⁵ JC Hathaway *The Rights of Refugees in International Law* (2005); Chirwa D ‘Chapter 3- Protecting Socio-Economic Rights Internationally’ in *Dullah Omar Institute Socio-Economic Resource Book* (2007) 93-96.

¹⁰⁶ Article 7 of the 1951 Convention.

with respect to housing,¹⁰⁷ education,¹⁰⁸ public relief,¹⁰⁹ wage-earning employment,¹¹⁰ and social security.¹¹¹ Article 17, pertaining to wage-earning employment, also holds that refugees should be subject to the same labour laws and regulations as nationals.¹¹² Lastly, Article 18 gives refugees the right to engage in self-employment.¹¹³ It emphasises that refugees should be allowed to pursue self-employment as soon as they are legally in the country.¹¹⁴

Although the 1951 Refugee Convention is legally binding upon the state, its enforcement can be problematic.¹¹⁵ Enforcement typically takes the form of diplomatic and political ‘pressure’ from the United Nations High Commissioner for Refugees (UNHCR) and other global actors.¹¹⁶ These entities can only exert *moral and diplomatic influence*, encouraging compliance with the 1951 Convention's obligations.¹¹⁷

Secondly, the Organisation of African Unity Convention Concerning the Specific Aspects of Refugee Problems in Africa (OAU Convention) was ratified by South Africa in 1996 and is a significant regional instrument addressing the rights and protections of refugees.¹¹⁸ The OAU Convention complements the 1951 Convention by recognising the unique circumstances and challenges faced by refugees within a regional context.¹¹⁹

¹⁰⁷ Article 21 states that: refugees shall be accorded the same treatment as nationals with respect to housing.

¹⁰⁸ Article 22 states that refugees should receive the same treatment as nationals regarding education, specifically at the elementary level.

¹⁰⁹ Article 23 provides that refugees shall be accorded the same treatment as nationals with respect to public relief and assistance. This ensures that refugees have access to social welfare programs and support.

¹¹⁰ Article 17 of the 1951 Convention.

¹¹¹ Article 24 states that refugees shall be accorded the same treatment as nationals with respect to social security. This includes access to social security benefits and protections. Article 24 states that refugees shall be accorded the same treatment as nationals with respect to social security. This includes access to social security benefits and protections.

¹¹² Article 17 of the 1951 Convention.

¹¹³ Article 18 of the Refugee Convention.

¹¹⁴ Article 18 of the Refugee Convention.

¹¹⁵ Hathaway (note 105 above) 54; Chirwa (note 91 above) 93-96.

¹¹⁶ Ibid.

¹¹⁷ For example, the UNHCR oversees states' implementation of the 1951 Convention by conducting periodic country reporting. Herein, states submit reports detailing how they are upholding their obligations. The UNHCR reviews these reports and engages in dialogue with states to ensure that refugee rights are respected: Hathaway (note 104 above) 54; Chirwa (note 91 above) 93-96. For example, the UNHCR oversees states' implementation of the 1951 Convention by conducting periodic country reporting. Herein, states submit reports detailing how they are upholding their obligations. The UNHCR reviews these reports and engages in dialogue with states to ensure that refugee rights are respected: Hathaway (note 105 above) 54; Chirwa (note 91 above) 93-96.

¹¹⁸ Naldi GJ ‘The Organization of Africa Unity: An Analysis of its Role’ (1989) 35 *Journal of African Law* 217-219.

¹¹⁹ Ibid; It echoes the socio-economic rights of the 1951 Convention, such as the right to work and self-support, the right to education, and access to social services. In addition, the OAU Convention speaks to the right to family unity emphasising the importance of maintaining family ties among refugees. Briefly, enforcement of the OAU Convention occurs through regional and international mechanisms, including diplomatic pressure, state reporting, and regional bodies, such as the African Union, formerly the OAU.

Thirdly, the Universal Declaration of Human Rights (UDHR), although not a treaty and therefore not legally binding, serves as a declaration by the international community outlining the minimum standards of state practice.¹²⁰ The principles couched in the UDHR are regarded as customary international law,¹²¹ binding the South African state simply through its membership within the community of states.¹²²

Fourthly, efforts to transform the UDHR into a binding document produced the landmark International Covenant on Economic, Social, Cultural and Rights of 1996 (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The UDHR, ICCPR, and ICESCR are referred to as the 'International Bill of Human Rights' as they establish the fundamental principles of international human rights law.¹²³ Hathaway organised the rights within these instruments into four tiers.¹²⁴ This hierarchy places the socio-economic rights of the ICESCR in the third tier.¹²⁵ Given this paper's focus on socio-economic rights, the subsequent analysis will elaborate on the ICESCR.

The ICESCR, ratified by South Africa in 2015,¹²⁶ establishes a framework that champions socio-economic rights, placing positive obligations on states to make these rights accessible to all within its jurisdiction.¹²⁷ The interpretation of these obligations is guided by General Comments issued by the Economic, Social, and Cultural Rights Committee (CESCR).¹²⁸ The primary socio-economic duties imposed by the ICESCR arise from Article 2 and will be explored in detail below.

¹²⁰ JC Hathaway, *The Law of Refugee Status* (1991) 108-112.

¹²¹ Chirwa (note 91 above) 94-95, Customary international law is defined as rules and regulations carried out by states over a lengthy period of time that are driven by a sense of legal obligation. These rules and regulations are not signed or ratified but are strictly complied with by many states, giving them due weight.

¹²² Section 232 of the Constitution holds that international customary law is recognised as law in South Africa, provided it does not conflict with the Constitution or an Act of Parliament

¹²³ Hathaway 1991 (note 120 above) 108-112.

¹²⁴ Ibid; The first tier includes the most fundamental and inalienable rights outlined in the ICCPR, from which no derogation is allowed under any circumstances. For example, the right to non-refoulement prohibits the return of refugees or asylum seekers to a country where they may face persecution. The second tier consists of other civil and political rights that states may derogate from in exceptional situations, such as a 'public emergency which threatens the life of the nation.' The third tier encompasses socio-economic rights found in the ICESCR. Lastly, the fourth tier includes rights from the UDHR that are not codified in other instruments.

¹²⁵ Hathaway 1991 (note 120 above) 108-112.

¹²⁶ South African Government 'Human Rights Commission welcomes ratification of International Covenant on Economic, Social and Cultural Rights' (January 2015) available at <https://www.gov.za/news/media-statements/human-rights-commission-welcomes-ratification-international-covenant-economic>, accessed 12 October 2024.

¹²⁷ T Stein 'Constitutional socio-economic rights and international law: You are not alone' (2013) 16(1) *PELJ* 12-30.

¹²⁸ Ibid.

First, Article 2(1) obligates state parties to undertake steps, be they technical or economic, to actively pursue the realisation of rights under the ICESCR through means of progressive realisation, making use of the maximum of its available resources, and exhausting all appropriate means, including adopting legislation.¹²⁹ The CESCR has enriched the interpretation of this provision, calling for ‘deliberate, concrete and targeted’ steps towards the complete realisation of rights.¹³⁰ These steps could include judicial remedies, effective legislation, and social programmes.¹³¹ The use of targeted steps and the emphasis on the use of ‘maximum available resources’ in this article acknowledge that while immediate realisation of all rights may not yet be feasible, states must still exhaust all available means to demonstrate a commitment to progressively achieving these rights.¹³² Thus, the realities of resource constraints do not indemnify states from inaction.¹³³

Secondly, Article 2(2) of the ICESCR outlines a non-discrimination principle.¹³⁴ Herein, states are obligated to fulfil the rights of the ICESCR without discriminating on the basis of, *inter alia*, race, religion, birth, language, political opinion, nationality, or sex.¹³⁵ Any differential treatment must be lawful, pursue a legitimate aim, and be proportionate.¹³⁶ A lack of resources cannot justify discriminatory treatment unless a state has exhausted all available resources to eliminate it.¹³⁷ This non-discrimination principle showcases that refugees and asylum seekers are owed the same socio-economic rights guaranteed by the ICESCR as other individuals under a state's jurisdiction.¹³⁸ In fact, the CESCR has explicitly extended the reach of the ICESCR to ‘all asylum seekers, refugees, and other migrants,’ regardless of their legal status.¹³⁹ The CESCR affirms that the instrument should supplement and strengthen the existing refugee rights framework within the 1951 Convention and 1967 Protocol.¹⁴⁰

¹²⁹ Article 2(1) of the ICESCR.

¹³⁰ Committee on Economic Social and Cultural Rights in General Comment No 3: The Nature of State Parties' Obligation (Art 11) 1990 Para 1.

¹³¹ *Ibid.*

¹³² Committee on Economic, Social and Cultural Rights in General Comment No 12: Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights (Art 2) 2017 para 4.

¹³³ *Ibid.*

¹³⁴ Article 2(2) of ICESCR.

¹³⁵ Article 2(2) of ICESCR.

¹³⁶ General Comment 12 (note 132 above) paras 3-6.

¹³⁷ *Ibid* paras 3-6.

¹³⁸ *Ibid* paras 3-6.

¹³⁹ *Ibid* para 3.

¹⁴⁰ *Ibid* paras 3-6.

Thirdly, Article 2(3) of the ICESCR provides a limited exception to the non-discrimination principle based on nationality, specifically regarding the right to employment.¹⁴¹ Developing countries may determine the extent to which they guarantee these rights to non-nationals,¹⁴² but cannot deny them entirely.¹⁴³

Lastly, regardless of circumstance, states must uphold the minimum core content of each right for all individuals under their effective control.¹⁴⁴ Core obligations, such as freedom from hunger, access to water, essential medicines, and education, cannot be restricted based on nationality or legal status.¹⁴⁵ A state can only claim resource constraints as a reason for not meeting these obligations if it has demonstrably exhausted all available resources.¹⁴⁶ Even with large refugee influxes, states cannot, in principle, restrict the core content of Covenant rights due to a lack of resources.¹⁴⁷

2.1.3 *The Constitution and its socio-economic rights and obligations*

The framework for interpreting socio-economic rights in South Africa's constitutional dispensation begins with recognising their interconnectedness with civil, political, and cultural rights.¹⁴⁸ This principle was endorsed in *Government of the Republic of South Africa v Grootboom* (*Grootboom*),¹⁴⁹ where the court emphasised that these rights must be viewed holistically to promote their enjoyment in unity.¹⁵⁰ The South African Bill of Rights upholds this principle by outlining a wide range of social, economic, and cultural rights, all of which

¹⁴¹ Ibid para 8.

¹⁴² Article 2(3) of the ICESCR.

¹⁴³ CESCR General Comment 12 (note 132 above) para 8: While acknowledging concerns about protecting employment for citizens, the CESCR notes that employed migrants contribute to the economy and are less likely to need social assistance. Thus, the CESCR advocates for the access of these rights to non-nationals regardless of the exception.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid paras 9-10.

¹⁴⁷ Ibid para 8; However, socio-economic rights are often neglected in practice due to their categorisation as 'third-tier' rights, implying lesser importance. The challenge still lies in determining how far a state must go to meet its obligations under the ICESCR while considering the available resources and the varying levels of socio-economic development among states. While the ICESCR allows for flexibility, it also places a burden on states to justify their resource allocation and progress. This intricate balance between available resources and the fulfilment of socio-economic rights will be further explored in Chapter Four, with a specific focus on whether South Africa has adequately upheld its duties in light of its resource constraints.

¹⁴⁸ Liebenberg (note 6 above) 2.

¹⁴⁹ *Government of the Republic of South Africa v K* 2001 (1) SA 46 (CC).

¹⁵⁰ *Grootboom* (note 149 above) para 24.

are enforceable through the courts.¹⁵¹ A strong argument for the inclusion of justiciable socio-economic rights herein is that their absence would push the values and interests they represent to the periphery of constitutional discourse, and that this could result a situation where civil and political rights are utilised to undermine and supersede social and economic reform.¹⁵² Thus, the entrenchment of socio-economic rights is paramount to allow the judiciary to protect the rights of the most vulnerable and destitute in society.¹⁵³

These vulnerable groups, including refugees, fall under the protective embrace of the Constitution's socio-economic rights, generally through the inclusive term 'everyone'.¹⁵⁴ The broader spectrum of socio-economic rights, such as access to housing,¹⁵⁵ healthcare,¹⁵⁶ and social security,¹⁵⁷ cannot be denied to those who find themselves outside the bounds of citizenship.¹⁵⁸ In *Khosa v Minister of Social Development (Khosa)*,¹⁵⁹ the court affirmed the extension of socio-economic rights to non-citizens,¹⁶⁰ particularly permanent residents.¹⁶¹ Similarly, in *Larbi-Odam v Member of the Executive Council for Education (Larbi Odam)*,¹⁶² the court highlighted the vulnerability of non-citizens, recognising them as a minority lacking the 'political muscle' to advocate for their interests.¹⁶³ The court asserted that excluding specific

¹⁵¹ Liebenberg (note 6 above) 2; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 49-50; Sections 22 through 31 and 35(e) of the South African Constitution address a range of social, economic, and cultural rights, including those related to trade, labour, environment, property, housing, healthcare, food, water, social security, children's rights, education, language, culture, and the rights of cultural, religious, and linguistic communities. These provisions demonstrate the interconnected nature of rights, blurring the lines between civil and political rights and socio-economic rights. For instance, the right to join a trade union or a cultural or religious association reflects the broader civil right of freedom of association.

¹⁵¹ Section 7(2) of the Constitution.

¹⁵² Liebenberg (note 6 above) 2.

¹⁵³ *Ibid.*

¹⁵⁴ Sections 26-27 of the Constitution; the rights to housing, healthcare, reproductive healthcare, social security and sufficient food and water; C Kavuro 'Housing and Integrating Refugees: South Africa's Exclusionary Approach' (2019) 40(1) *Obiter* 75; Katz (note 87 above).

¹⁵⁵ Section 26(1) of the Constitution.

¹⁵⁶ Section 27(1)(a) of the Constitution.

¹⁵⁷ Section 27 1(c) of the Constitution.

¹⁵⁸ Kavuro (note 154 above) 75-76.

¹⁵⁹ *Khosa* (note 88 above).

¹⁶⁰ *Khosa* (note 88 above).

¹⁶¹ *Khosa* (note 88 above); F Khan 'Does the right to dignity extend equally to refugees in South Africa?' (2020) 20 *African Human Rights Law Journal* 283. However, while the court extended social grants to permanent residents, it did so based on their established ties to South Africa, similar to citizens, rather than on shared human dignity. This focus on immigration status, rather than needs or rights, is problematic. The court assumed temporary residents lacked such ties, implicitly excluding refugees and other non-citizens from social assistance. Although the Social Assistance Act 13 of 2004 now includes permanent residents and refugees, the decision highlights how non-citizens can be excluded from rights, even those constitutionally guaranteed.

¹⁶² *Larbi-Odam v Member of the Executive Council for Education* 2006 (1) SA 292 (CC).

¹⁶³ *Larbi-Odam* (note 162 above).

categories of non-citizens from constitutionally guaranteed social benefits could constitute unfair discrimination.¹⁶⁴ Thus, these cases illustrate that socio-economic rights must be inclusive, transcending citizenship to uphold the dignity of all individuals within the state's jurisdiction.

Building upon the principle of inclusivity in socio-economic rights, it is crucial to understand the obligations underpinning them. These obligations primarily manifest within section 7(2) of the Constitution, mandating that the state 'respect, protect, promote and fulfil' the rights contained in the Bill of Rights.¹⁶⁵ The duty to respect these rights imposes a negative obligation on the state to refrain from interfering in the enjoyment of socio-economic rights.¹⁶⁶ For example, the state must refrain from arbitrarily evicting individuals from their homes.¹⁶⁷ Thereafter, the obligation to protect generally entails the positive obligation to create legislation and utilise effective remedies or other measures.¹⁶⁸ This framework of laws fosters an environment where individuals can freely realise their rights without interference.¹⁶⁹ The duty to promote embraces the notions of tolerance building and raising awareness. Lastly, the duty to fulfil connotes a positive expectation that the state will utilise its resources in a manner that produces the tangible realisation of rights.¹⁷⁰

Beyond these broad obligations, the state's specific duties concerning socio-economic rights depend on the category of socio-economic rights in question. These categories are qualified rights,¹⁷¹ unqualified rights¹⁷² and rights that prohibit certain state conduct.¹⁷³ Qualified rights in sections 26-27 endows 'everyone' with 'access to' adequate housing,¹⁷⁴ healthcare,¹⁷⁵ reproductive healthcare,¹⁷⁶ social security¹⁷⁷ and sufficient food and water.¹⁷⁸ Importantly, these access rights are accompanied by internal modifiers, which acknowledge the realities of

¹⁶⁴ *Larbi-Odam* (note 162 above) paras 19-20.

¹⁶⁵ Section 7(2) of the Constitution; Liebenberg (note 6 above) 6.

¹⁶⁶ Liebenberg (note 6 above) 6; *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Comm 155/96* October 2001, African Commission on Human and Peoples' Rights paras 44-47.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Liebenberg (note 6 above) 6.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Section 26 of the Constitution.

¹⁷⁵ Section 27(1)(a) of the Constitution.

¹⁷⁶ Section 27(1)(a) of the Constitution.

¹⁷⁷ Section 27(1)(c) of the Constitution.

¹⁷⁸ Section 27(1)(b) of the Constitution.

resource constraints.¹⁷⁹ They stipulate that the state is obligated to take reasonable steps within its available pool of resources to achieve the progressive realisation of these rights.¹⁸⁰ Unqualified socio-economic rights, on the other hand, are immediately realisable.¹⁸¹ They encompass the ‘basic’ rights of ‘every child’¹⁸² and detained persons,¹⁸³ as well as basic rights to education, including tertiary education.¹⁸⁴ Thirdly, rights that prohibit certain state conduct or conduct from private parties, such as section 26(3), provide that nobody may be evicted or have their home demolished without a court order contemplating all the necessary circumstances.¹⁸⁵ Additionally, legislation may not permit arbitrary evictions.¹⁸⁶ Another example includes section 27(3), providing that ‘nobody may be refused emergency medical treatment’.¹⁸⁷

Focusing on the first category, qualified rights seemingly echo those of the ICESCR discussed above.¹⁸⁸ The phrase ‘subject to available resources’ and ‘progressive realisation’ in the Constitution mirrors the expression ‘to the maximum of its available resources’ and ‘progressive realisation’ in Article 2(1) of the ICESCR.¹⁸⁹ Both inject a realistic perspective into the discourse on socio-economic rights, ensuring that states are not held to absolute obligations beyond their resource capacities.¹⁹⁰

However, *Grootboom*¹⁹¹ illustrated two distinctions between the constitutional provisions and those of the ICESCR.¹⁹² First is the Constitution’s emphasis on the right to ‘access’.¹⁹³

¹⁷⁹ Liebenberg (note 6 above) 6.

¹⁸⁰ Section 26(2) and section 27(2) of the Constitution.

¹⁸¹ Liebenberg (note 6 above) 6.

¹⁸² Section 28(1)(c) of the Constitution holds that every child has the basic right to shelter, healthcare, social services and nutrition.

¹⁸³ Section 35 (2)(e) of the Constitution endows the detained persons with basic conditions that are in line with human dignity.

¹⁸⁴ Section 29 of the Constitution.

¹⁸⁵ Section 26(3) of the Constitution.

¹⁸⁶ Section 26(3) of the Constitution.

¹⁸⁷ Section 27(3) of the Constitution.

¹⁸⁸ Liebenberg (note 6 above) 14-15.

¹⁸⁹ C Heyns & D Brand ‘Introduction to socio-economic rights in the South African Constitution’ (1998) 2 *Law Democracy and Development* 156-159; However, in the ICESCR and through General Comments, this realistic injection does not serve as a blanket justification for failure to realise these rights; states parties are mandated to; ensure the widest possible enjoyment of the relevant rights under prevailing circumstances. Even when resources are limited, states must demonstrate that they are utilizing all available resources to the maximum extent to fulfil their obligations as a matter of priority.

¹⁹⁰ Ibid.

¹⁹¹ *Grootboom* (note 149 above).

¹⁹² Liebenberg (note 6 above) 14-15.

¹⁹³ *Grootboom* (note 149 above) para 35.

*Grootboom*¹⁹⁴ centred around the right to access adequate housing as per section 26(1) of the Constitution,¹⁹⁵ however, the principles established extend to all qualified rights.¹⁹⁶ The ICESCR omits the inclusion of ‘access’, awarding the direct right to ‘adequate housing’ for example.¹⁹⁷ This difference in typology is significant because ‘access’ connotes more than a physical or tangible resource.¹⁹⁸ *Grootboom* emphasised that ‘access’ in terms of the right to housing implies:¹⁹⁹

More than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing, all of these conditions need to be met: there must be land, there must be services, there must be a dwelling [...] The state must create the conditions for access to adequate housing for people at all economic levels of our society.²⁰⁰

Secondly, a difference also manifests between ‘appropriate steps’ under the ICESCR and ‘reasonable legislative and other measures’ under the Constitution.²⁰¹

In *Grootboom*,²⁰² the court stated that defining ‘reasonable measures’ is a fact-specific inquiry and must be assessed in both formulation and implementation.²⁰³ These measures must be comprehensive and coherent, and the state must develop and implement policies that systematically address housing needs across different societal groups.²⁰⁴ These policies must

¹⁹⁴ *Grootboom* (note 149 above) para 24.

¹⁹⁵ *Grootboom* (note 149 above), the Constitutional Court of South Africa, was tasked with addressing the issue of the right to adequate housing as enshrined in Section 26 of the Constitution. The case arose from the plight of a group of people, including Ms Grootboom, who were evicted from their informal settlement and sought access to adequate housing. The Court was required to determine whether the State's housing policy and actions met the constitutional obligation to provide access to adequate housing, particularly for vulnerable groups. The judgment emphasised the need for a comprehensive approach to housing that includes physical structures and the necessary services and support systems, thereby reinforcing the State's duty to facilitate access to housing for all, especially those in desperate need.

¹⁹⁶ Liebenberg (note 6 above) 14-15.

¹⁹⁷ *Grootboom* (note 149 above) para 35.

¹⁹⁸ *Grootboom* (note 149 above) para 35.

¹⁹⁹ *Grootboom* (note 149 above) para 35.

²⁰⁰ *Grootboom* (note 149 above) para 35; Additionally, ‘access’ implies that the state must empower not only itself but also private individuals and organisations to contribute to housing solutions. The court emphasises that the responsibility for providing housing does not rest solely with the state; rather, it requires legislative and other measures to enable various societal agents, including individuals, to participate actively in housing provision.²⁰⁰ This perspective aligns with the notion that the state has a duty to protect socio-economic rights by ensuring that private parties do not obstruct or hinder vulnerable groups from accessing these rights.

²⁰¹ Liebenberg (note 6 above) 23; Article 2(1) of the ICESCR; Sections 26-27 of the Constitution.

²⁰² *Grootboom* (note 149 above)

²⁰³ *Grootboom* (note 149 above) paras 38-44.

²⁰⁴ *Grootboom* (note 149 above) paras 41-45.

be aimed at achieving the rights over time, and the state cannot be expected to provide immediate solutions.²⁰⁵ However, this progress must be steady and purposeful, with adequate steps within available resources.²⁰⁶ Reasonable measures must also cater to those in desperate or emergency situations, like people without shelter.²⁰⁷ Lastly, the state must ensure that its housing policy is not overly rigid or narrowly focused but instead balanced and flexible to the changing needs of society and the resources at its disposal.²⁰⁸

Another significant difference between the ICESCR's formulation of socio-economic rights and that of the Constitution is the absence of minimum core obligations in the latter.²⁰⁹ In *Grootboom*,²¹⁰ the court rejected the need for a 'minimum core' and found that the language of the Constitution did not support such a duty.²¹¹ It argued that setting a universal minimum standard would be impractical, given the fluctuating nature of resource availability and the diversity of individual needs.²¹² Despite this, the court acknowledged that the minimum core concept could help assess the reasonableness of state measures.²¹³ Notably, this case occurred before South Africa ratified the ICESCR, meaning that while the court rejected the minimum core at the time, the state is now bound by it under international law.²¹⁴

Bilchitz offers a critique of this rejection of minimum core obligations.²¹⁵ He insists that a minimum core obligation is vital for addressing basic survival needs, which should be prioritised under the principle of progressive realisation.²¹⁶ Bilchitz views this minimum core obligation as two components of the duties imposed by the phrase 'progressive realisation'.²¹⁷ The first is to give effect to and establish the minimum level of provision without delay.²¹⁸

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid; The court criticised the government's housing policy for not including measures for those facing immediate crises, particularly vulnerable groups like children and the homeless.

²⁰⁸ Ibid.

²⁰⁹ Liebenberg (note 6 above) 15-30.

²¹⁰ *Grootboom* (note 149 above) paras 41-45.

²¹¹ *Grootboom* (note 149 above) para 32.

²¹² *Grootboom* (note 149 above).

²¹³ *Grootboom* (note 149 above).

²¹⁴ *Grootboom* (note 149 above).

²¹⁵ D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 118 *SALJ* 484, 487.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1 11.

Thereafter, steps must be taken to gradually enhance the level of provision through various progressive measures.²¹⁹

In conclusion, both international and constitutional law provide a robust framework for protecting refugees' socio-economic rights. The 1951 Refugee Convention sets a baseline of 'favourable treatment' while the ICESCR, mirrored in South Africa's Constitution, mandates states to respect, protect, promote and progressively fulfil these rights. Crucially, the principle of 'progressive realisation' demands demonstrable steps towards full realisation, preventing states from using resource constraints as justification for inaction. Furthermore, the concept of 'minimum core obligations' within the ICESCR establishes a non-degradable baseline for essential levels of each right, regardless of resource limitations. Having established this comprehensive framework, the chapter now turns to analysing how these obligations are translated into South Africa's domestic legislation, particularly within the Refugees Act²²⁰ and its subsequent amendments.

2.2 Translating refugee socio-economic rights into domestic law

Translating refugee protections into domestic law requires that the design of legislation is compliant with the Constitution and its Bill of Rights, as well as the international refugee laws established above.²²¹ The Refugees Act²²² was promulgated to achieve this goal.²²³ Notably, section 6 of the Refugees Act²²⁴ mandated that its provisions be interpreted and applied with due regard to key international instruments, including the 1951 Convention, its 1967 Protocol, the OAU Convention, and the UDHR.²²⁵ The adoption of a non-encampment urban policy, favouring the integration of refugees into communities rather than confining them to refugee camps or detention centres, clearly reflected a commitment to upholding the dignity of refugees.²²⁶ Thus, the onset of the democratic era in South Africa and the commitment to

²¹⁹ Ibid.

²²⁰ Act 130 of 1998.

²²¹ Khan (note 161 above) 269.

²²² Act 130 of 1998.

²²³ Preamble of Act 130 of 1998.

²²⁴ Act 130 of 1998.

²²⁵ Section 6 of Act 130 of 1998.

²²⁶ Section 6 of Act 130 of 1998.

international human rights law within the Refugees Act²²⁷ signalled a rights-based approach to refugee protection.²²⁸

However, amendments to the Refugees Act²²⁹ in 2008 and later in 2017 through the promulgation of the Refugees Amendment Act²³⁰ marked a significant departure from the international framework.²³¹ The introduction of several amendments has been censured by scholars as restrictive, culminating in dwindling protections for refugees and asylum seekers.²³² Below, some of these amendments will be contrasted against their counterpart in the original Refugees Act²³³ to highlight the discrepancies and their implications on the socio-economic rights of both refugees and asylum seekers.

2.2.1 Amendments affecting refugees

Commencing with section 27 of the Refugees Act²³⁴ this provision is related to the general rights of refugees. With regard to the socio-economic rights, section 27 held that a refugee is entitled to:

- (b) full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;
- (c) apply for an immigration permit in terms of the Aliens Control Act, 1991, after five continuous in the Republic from the date on which he was granted asylum [...]
- (g) seek employment; and
- (h) the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

Per section 27(b), refugees enjoy the full protection of the Bill of Rights, meaning that they are consequently entitled to access the socio-economic rights of the Constitution.²³⁵ Sections 27(f) explicitly awarded the right to ‘seek employment’.²³⁶ Notably, section 27(g) explicitly granted

²²⁷ Act 130 of 1998.

²²⁸ Khan (note 161 above) 269; F Khan *In Chronic Exile: A Critique of South Africa's Legal Regime for Refugees in Protracted Refugee Situations* (unpublished LLD thesis, University of Cape Town, 2017) 115; Rulashe ‘UNHCR Chief Commends Pretoria's Refugee Policy, Pledges Cooperation’ August 2007, available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&skip=36&docid=46cf10634&query=%22south%20africa%22>, accessed 10 October 2024.

²²⁹ Act 130 of 1998.

²³⁰ Act of 11 2017.

²³¹ Act 130 of 1998; Kavuro (note 33 above) 49-78; Ziegler (note 2 above) Khan, Mbatani & Marais C (note 20 above) 48-63.

²³² Ibid.

²³³ Act 130 of 1998.

²³⁴ Act 130 of 1998.

²³⁵ Section 27(b) of the Refugees Act 130 of 1998.

²³⁶ Sections 27(f) of Act 130 of 1998.

the right to the same basic healthcare and primary education that nationals receive.²³⁷ These sections echo the international standard of minimum and favourable treatment for refugees, per the 1951 Convention, and crucially facilitate the enjoyment of the socio-economic rights of refugees.

However, the Refugees Amendment Act²³⁸ notably omits the provision of section 27(g), signalling a departure from international norms and a weakening of South Africa's commitment to upholding refugee rights. While one could argue that refugees retain access to healthcare and education through the broader scope of section 27(b), this omission reflects a concerning trend of legislative erosion of refugee protections. This omission is not just symbolic; it creates ambiguity and removes a clear, enabling provision that strengthens refugees' legal standing when attempting to access these fundamental rights.

Moreover, in the original Refugees Act,²³⁹ refugees could apply for permanent residence status swiftly after staying in South Africa for five continuous years from the date that they were initially granted asylum.²⁴⁰ This meant that protection was not only temporary but also allowed refugees to establish a permanent and meaningful presence in the country, aligning with international norms regarding the treatment of refugees, including naturalisation.²⁴¹ Naturalisation is deemed a 'durable solution' to refugeehood that allows refugees to rebuild their lives and contribute to their community, thereby facilitating their long-term social and economic integration.²⁴²

However, the section 27 (c) of the Refugees Amendment Act²⁴³ now extends this period to ten years.²⁴⁴ Kavuro asserts that this extension signifies the intent of the legislature to limit pathways to permanent residency and entrench refugee conditions and protections that are only temporary in nature.²⁴⁵ By being classified as temporary residents for an onerous period of

²³⁷ Sections 27(g) of the Refugees Act 130 of 1998.

²³⁸ Act 11 of 2017.

²³⁹ Act 130 of 1998.

²⁴⁰ Section 27(c) of Act 130 of 1998; Kavuro (note 33 above) 62.

²⁴¹ Kavuro (note 33 above) 62; Khan (note 161 above) 283; Article 34 of the 1951 Convention.

²⁴² Section 27(c) of Act 130 of 1998; Kavuro (note 33 above) 62.

²⁴³ Act 11 of 2017.

²⁴⁴ Section 27(c) has been amended to denote 'apply for permanent residence in terms of section 27(d) or 31(2) (b) of the Immigration Act after ten years of continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee, after considering all the relevant factors and within a reasonable period of time, including efforts made to secure peace and stability in the refugee's country of origin, certifies that he or she would remain a refugee indefinitely'

Section 27(c) of Act 11 of 2017; Kavuro (note 33 above) 62.

²⁴⁵ Ibid.

time, refugees will not have access to the socio-economic protections that accrue to permanent residents under the Housing Act²⁴⁶ or the Protection of Illegal Evictions Act (PIE),²⁴⁷ for example.²⁴⁸ These statutes and other housing schemes, like South Africa's National Housing Policy and Subsidy Programmes under the Housing Development Programme, restrict eligibility for housing subsidies to citizens and permanent residents only.²⁴⁹

Thus, although the Refugees Amendment Act²⁵⁰ recognises refugees and asylum seekers as holders of various constitutional rights,²⁵¹ such as the right to access adequate housing within the Bill of Rights,²⁵² the South African government paradoxically justifies their exclusion from housing legislation or programmes by categorising them as temporary residents.²⁵³ Kavuro asserts that the lack of housing provisions for refugees in South African housing legislation is constitutionally concerning.²⁵⁴ Decent housing is crucial for protecting the well-being and dignity of refugees and asylum-seekers.²⁵⁵ The failure to consider their rights in housing legislation, regulations, and programmes leads to unacceptable living conditions, contributing to their 'moral and social' decline.²⁵⁶

Arendt connects citizenship to the right to dignity, arguing that belonging to a political community and a state enables access to human rights.²⁵⁷ Stateless individuals, existing in a 'legal limbo', are often denied these rights.²⁵⁸ Referencing Arendt, Khan highlights how the state's intention to maintain refugees' temporary status can prevent them from fully realising their rights.²⁵⁹

The intent to maintain the temporary nature of a refugee's legal status is further deepened by the condition that permanent residency may be granted only in the event that a refugee's

²⁴⁶ Act 107 of 1997.

²⁴⁷ Act 19 of 1998.

²⁴⁸ Kavuro (note 33 above) 62.

²⁴⁹ C Kavuro 'World Refugee Day: Protecting refugees' right to adequate housing' June 2023, available at <https://www.sun.ac.za/english/Lists/news/DispForm.aspx?ID=1000,1> accessed 20 November 2024; Based on the 1994 Reconstruction Development Programme, these programs aim to provide secure housing with essential services (water, sanitation, energy). However, access is contingent upon citizenship or permanent residence.

²⁵⁰ Act 11 of 2017.

²⁵¹ Section 27 of Act 11 of 2017

²⁵² Section 27 of Act 11 of 2017; Section 26 of the Constitution.

²⁵³ *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2006 ZACC 23, 2007 (4) SA 395 (CC) paras 42, 55 and 65.

²⁵⁴ Kavuro (note 249 above).

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ H Arendt *The origins of totalitarianism* (1968) 296; Khan (note 161 above) 262- 262.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

country of origin is in a precarious, insecure or unstable state.²⁶⁰ Here, a refugee is disqualified from attaining permanent residency in South Africa if their country of origin is ‘stable and secure’.²⁶¹ These refugees are inherently expected to repatriate voluntarily and return to their country of origin.²⁶² Crucially, the stability and security approach is not applicable to other foreign nationals who seek and meet the criteria for permanent residency under sections 26 and 27 of the Immigration Act,²⁶³ and they are not required to undergo a ten-year qualification period; instead, a 5-year period is applicable to them.²⁶⁴ Consequently, the 1951 Convention requirement that refugees should be treated under favourable conditions akin to that of foreign nationals in similar circumstances is not adhered to.²⁶⁵ Cumulatively, this amendment signals a growing trend of non-compliance with constitutional and international law.

2.2.2 Amendments affecting asylum seekers

Changes affecting asylum seekers begin with the introduction of Section 27A in the Refugees Amendment Act.²⁶⁶ Previously, section 27 of the Refugees Act²⁶⁷ only spoke to the rights of refugees.²⁶⁸ Now, section 27A explicitly outlines general rights for asylum seekers, notably including those granted by the Bill of Rights.²⁶⁹ This aligns with the principles established in *Saidi v Minister of Home Affairs (Saidi)*,²⁷⁰ which affirmed that asylum seekers are entitled to constitutional protections, pending the status of their application.²⁷¹

While Section 27A seemingly upholds the rights of asylum seekers, a closer look reveals other amendments that contradict this apparent inclusivity. Section 4(1)(i) of the Refugees Amendment Act²⁷² offers a potent example.²⁷³ This section mandates that asylum seekers must report to a Refugee Reception Office (RRO) within five days of entering South Africa or risk forfeiting their eligibility for refugee status.²⁷⁴ This timeframe has been reduced from 14 to 5

²⁶⁰ Section 27(c) of Act 11 of 2017; Kavuro (note 33 above) 62.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Act 13 of 2002.

²⁶⁴ Act 13 of 2002.

²⁶⁵ Kavuro (note 249 above); Article 7 of 1951 Convention.

²⁶⁶ Act 11 of 2017.

²⁶⁷ Act 130 of 1998.

²⁶⁸ Section 27 of Act 130 of 1998.

²⁶⁹ Section 27A of Act 11 of 2017.

²⁷⁰ 2018 (4) SA 333 (CC).

²⁷¹ *Saidi* (note 270 above).

²⁷² Act 11 of 2017.

²⁷³ Ziegler (note 2 above) 82.

²⁷⁴ Section 4(1)(i) of Refugees Act 11 of 2017; Ziegler (note 2 above) 82.

days.²⁷⁵ Failure to comply with this 5-day period requires the provision of ‘compelling reasons’, placing a significant burden of proof on individuals fleeing persecution.²⁷⁶ Since RROs process different nationalities of asylum seekers on designated days, this change necessitates careful timing of arrival in South Africa to coincide with the appropriate reception day.²⁷⁷ Thus, this five-day window, rather than offering a period of respite and support, becomes a source of anxiety and potential exclusion of asylum status and the enjoyment of socio-economic rights affixed to it.²⁷⁸

Thereafter, section 22(8) of the Refugees Amendment Act²⁷⁹ introduces the requirement of an endorsement of the right to work and study on an asylum seeker visa.²⁸⁰ The amendment is framed as a measure to ‘remedy’ previous shortcomings of the right to work and study for asylum seekers.²⁸¹

Prior to the Refugees Amendment Act²⁸² the question of an asylum seekers right to work surfaced in various cases. These legal disputes were largely based on the exclusion of asylum seekers, refugees, or migrant workers from employment on the basis that they were not citizens of South Africa, nor permanent residents. In *Minister of Home Affairs v Watchenuka* (*Watchenuka*),²⁸³ a Congolese widow, after applying for asylum, sought employment to support her disabled son while he studied at a college in Cape Town.²⁸⁴ However, the Standing Committee on Refugee Affairs prohibited both the widow’s employment and the son’s studying on the basis of a rule that prohibited asylum-seekers and their family members from

²⁷⁵ Section 4(1)(i) of Refugees Act 11 of 2017; Ziegler (note 2 above) 82.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Ibid: As will be uncovered in Chapter 3, this provision proves impractical given the systemic failures that often hinder documentation within this short timeframe. Long queues at RROs, coupled with potentially ineffective administration, create significant obstacles for asylum seekers attempting to comply with the five-day rule. These challenges render the provision not only insensitive but also unrealistic in its expectation of timely application.

²⁷⁹ Act 11 of 2017.

²⁸⁰ Act 11 of 2017, section 22(8) states that the right to work in the Republic may not be endorsed on the asylum seeker visa of any applicant who—

- (a) is able to sustain himself or herself and his or her dependants, as contemplated in subsection (6);
- (b) is offered shelter and basic necessities by the UNHCR or any other charitable organisation
- (c) or person, as contemplated in subsection (7); or
- (d) seeks to extend the right to work after having failed to produce a letter of employment as contemplated in subsection (9);

Provided that such extension may be granted if a letter of employment is subsequently produced while the application in terms of section 21 is still pending.

²⁸¹ Ziegler (note 2 above) 80-100.

²⁸² Act 11 of 2017.

²⁸³ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

²⁸⁴ *Watchenuka* (note 283 above) paras 1-4.

working or studying during the first six months of holding a section 22 permit (permit that allowed an asylum seeker to stay in the country while their application is processed).²⁸⁵ The court rejected this blanket prohibition on working and studying on the grounds that it denied asylum seekers of their right to dignity.²⁸⁶ The judgment emphasised the dire consequences of leaving asylum seekers destitute and without employment, particularly when secure employment is their only viable means of support.²⁸⁷ In such cases, the court emphasised that restrictions to employment extends to a serious limitation on an individual's ability to live with dignity, free from humiliation and degradation.²⁸⁸ Ultimately, *Watchenuka*²⁸⁹ set a precedent in that asylum seekers were granted an automatic right to work and study, by virtue of their inherent right to dignity.²⁹⁰

A crucial aspect of this judgment however, is that the right to work was granted solely by extension of the right to dignity,²⁹¹ and not under the constitutional rights to enter and remain in the country²⁹² or to choose a trade or profession.²⁹³ The typology of these rights reserve its protections to 'every citizen', excluding asylum seekers from the scope of its protection.²⁹⁴ Critics argue that the judiciary could have adopted a more expansive interpretation of these rights, recognising asylum seekers' right to work based on international legal obligations, such as those that promote wage-earning employment²⁹⁵ and self-employment²⁹⁶ for refugees and asylum seekers.²⁹⁷ Herein, the right to work is recognised as a standalone right rather than one dependent on the broader right to dignity.²⁹⁸ Ziegler emphasises that the court could have employed a purposive interpretation of the relevant provisions in light of international treaty obligations.²⁹⁹ Instead, the court relied on somewhat 'vague and amorphous' concepts of (in)dignity and vulnerability.³⁰⁰ Reliance of these notions, Ziegler argues, undermine the

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ *Watchenuka* (note 283 above) paras 31-32.

²⁸⁸ *Watchenuka* (note 283 above) paras 31-32.

²⁸⁹ *Watchenuka* (note 283 above).

²⁹⁰ Ibid.

²⁹¹ Section 10 of the Constitution.

²⁹² Section 21 of the Constitution.

²⁹³ Section 22 of the Constitution.

²⁹⁴ *Watchenuka* (note 283 above).

²⁹⁵ Article 17 of the 1951 Convention.

²⁹⁶ Article 18 of the 1951 Convention.

²⁹⁷ Ziegler (note 2 above) 83.

²⁹⁸ Ibid.

²⁹⁹ Ziegler (note 2 above) 83.

³⁰⁰ Ibid.

concrete international legal frameworks that underpin the protection of these individuals.³⁰¹ Thus, the judgement missed a critical opportunity to address the specific obligations that South Africa has undertaken under international law. By not linking its reasoning to established international human rights principles, the judgment failed to reinforce the legal protections afforded to vulnerable populations, ultimately diminishing the potential for meaningful rights enhancement for refugees.

In *Union of Refugee Women v Director, Private Sector Industry Regulatory Authority (Union of Refugee Women)*³⁰² asylum-seekers and refugees were excluded from security service positions as they were not citizens nor permanent residents.³⁰³ The court, deemed the exclusion justifiable, asserting that it had a rational purpose and was narrowly tailored, as it did not apply across all industries.³⁰⁴ This case affirmed that discrimination against certain categories of migrants, including refugees and asylum seekers, does not inherently amount to unfair discrimination, particularly when differentiated against permanent residents.³⁰⁵

However, the dissenting opinions of Justices Mokgoro and O'Regan emphasised the necessity of interpreting rights, such as the right to employment, in light of the country's international obligations.³⁰⁶ They argued that refugees are 'more closely allied to permanent residents' than other foreign nationals who only entitled to a temporary stay in South Africa.³⁰⁷ This distinction emphasises that refugees hold preferential rights compared to temporary residents, indicating a legal recognition of their vulnerabilities and needs.³⁰⁸

In *Somali Association of South Africa v Limpopo Department of Economic Development Environment Tourism (Somali)*³⁰⁹ municipal officials and members of the South African Police Service (SAPS) informed local traders that a municipal business permit was now required to trade legally, with enforcement of this rule commencing immediately.³¹⁰ Coinciding with these actions, a local business forum pressured South African landlords to terminate leases with foreign traders, insisting that only businesses possessing municipal permits could operate.³¹¹

³⁰¹ Ibid.

³⁰² Union of Refugee Women (note 253 above).

³⁰³ Ibid paras 1-48.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid paras 104, 106, 109.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ *Somali* (note 50 above).

³¹⁰ Ibid paras 11-12.

³¹¹ Ibid paras 11-12.

They argued that only South African citizens with valid identification documents could apply for such permits.³¹² As a consequence of these developments, there was a noticeable increase in the closure of spaza shops run by Somali and Ethiopian refugees and asylum seekers.³¹³ Foreign traders faced immediate closure of their businesses and confiscation of their property if they were unable to present the required business permits or official consent to operate.³¹⁴

At the High Court the judgement relied on *Union of Refugee Women*³¹⁵ and Section 22 of the Constitution³¹⁶ to assert that only South African citizens possess the right to engage in self-employment.³¹⁷ This interpretation denotes a blanket prohibition on asylum seekers and refugees participating in self-employment and, by extension, trading activities.³¹⁸

This dispute then extended to the Supreme Court Of Appeal (SCA), where the claimants argued that they were entitled to equal treatment with South African citizens, including the right to apply for business licenses, and asserted that preventing them from earning a living violated their constitutional right to dignity.³¹⁹ Opposing arguments maintained that refugees and asylum-seekers do not share the same rights as citizens and that this differentiation is justified.³²⁰

The SCA found that if a refugee or asylum seeker faces dire circumstances leading to starvation and degradation, they should be able to invoke their constitutional right to dignity to argue for the right to obtain a trading license.³²¹ This perspective was particularly important given the absence of a general social assistance program for refugees in South Africa, leaving many without any means of support.³²² The court thus criticised the judgement of the court *a quo* as ‘myopic’, for failing to recognise the ‘real problems’ faced by asylum seekers and the exacerbating effects of the state's conduct on these challenges.³²³ The court held further that the court *a quo*’s approach in weighing section 22, the constitutional right to choose a trade or

³¹² Ibid paras 11-12.

³¹³ Ibid paras 11-12.

³¹⁴ Ibid paras 11-12.

³¹⁵ *Union of Refugee Women* (note 253 above).

³¹⁶ The right of every citizen to choose their trade and occupation.

³¹⁷ *Somali* (note 50 above) para 31.

³¹⁸ Ibid.

³¹⁹ Ibid paras 1-10.

³²⁰ Ibid.

³²¹ Ibid paras 28-46.

³²² Ibid para 33.

³²³ Ibid para 32.

occupation, against section 10, the right to dignity, is flawed.³²⁴ Electing section 22 as the decisive and prevailing provision, signified that there was a ‘trump card’ among constitutional rights.³²⁵ The SCA echoed Mokgoro J and O’Regan J stating that rights within the Bill of Rights should be interpreted as mutually reinforcing and interdependent.³²⁶ This means that all rights should be considered in relation to one another rather than allowing one right to dominate or negate the other.³²⁷

Therefore, relying on the above judgments, an asylum seekers right to work was previously invoked through the broader right to dignity. However, criticism from these judgements and legal scholars consistently assert that this right needs more explicit recognition and stronger enforcement based on international treaty obligations.³²⁸

More recently, the case of *Rafoneke v Minister of Justice and Correctional Services (Rafoneke)*³²⁹ dealt with the extent to which the state may legitimately exclude non-citizens and non-permanent residents from working in a particular profession.³³⁰ The court upheld the limitation on the ability of temporary residents to practice law, asserting that this restriction was permissible to protect job opportunities for South Africans and permanent residents.³³¹ The court argued that the limitation on the right to practice law did not inherently violate human dignity, as the applicants retained the general right to work; they were merely restricted from certain legal professions.³³² This echoed the principles established in *Union of Refugee Women*.³³³ Newaj³³⁴ adds that the judgement also aligns with the principles of *Watchenuka*³³⁵ in so far as it finds that the dignity of the applicants have not been degraded as a result of their exclusion.³³⁶ Therefore these principles of justified discrimination on the basis of permanent

³²⁴ Ibid para 39.

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Ziegler (note 2 above) 83; *Union of Refugee Women* (note 253 above).

³²⁹ *Rafoneke v Minister of Justice and Correctional Services* 2022 (6) SA 27 (CC).

³³⁰ Ibid paras 48-98.

³³¹ Ibid.

³³² Ibid.

³³³ *Union of Refugee Woman* (note 253 above).

³³⁴ Newaj K ‘Limitations on the rights of migrant workers: Is a compliant and consistent approach being followed’ 2023 *Law, Democracy and Development* 324.

³³⁵ 2004 (4) SA 326 (SCA).

³³⁶ Newaj (note 334 above) 323-324; Critically, the judgment brings to light a potential tension between national legal standards and international human rights norms, particularly regarding the rights of migrants. While legislation like the Legal Practise Act 28 of 2014 is designed to prioritise citizens in the job market, it can create

residency and the protection of dignity as benchmarks for exclusion from the right to work, remain.

Now, the right to work for asylum seekers has been consolidated through amendments in the Refugees Amendment Act.³³⁷ The *Green Paper on International Migration in South Africa*³³⁸ that preceded the Refugees Amendment Act,³³⁹ stated that in the cases above,³⁴⁰ judicially sanctioned employment only became necessary because asylum seekers did not receive social assistance,³⁴¹ a recognised socio-economic right.³⁴² The Refugees Amendment Act³⁴³ thus ‘remedies’ this through inserting sections 22(8)-(14).

Crucially, this amendment dismantles the precedent of *Watchenuka*³⁴⁴ (recognising that the right to work and education by extension of the right to dignity) and instead establishes that the right to work and study must be ‘endorsed’ by a Refugee Status Determination Officer (RSDO) who is satisfied that an asylum seeker is able to sustain themselves and their dependants first.³⁴⁵ Thus, only a self-sustaining asylum seeker is eligible for an endorsement to study and work; asylum status alone is not sufficient to warrant the right to work or study.³⁴⁶ Those unable to meet the requirement of self-sufficiency can acquire social assistance from the UNHCR or charitable organisations.³⁴⁷

However, the reality on the ground is far more complicated.³⁴⁸ First, contrary to the amendment's assumptions, the UNHCR has explicitly stated that it has insufficient tools and resources to provide adequate support for all those asylum seekers who cannot sustain themselves.³⁴⁹

complications for individuals in positions like the applicants in *Rafoneke*, who pursued legal qualifications and training in good faith.

³³⁷ Act 11 of 2017.

³³⁸ (GG 40088, 24 June 2016).

³³⁹ Act 11 of 2017.

³⁴⁰ *Somali* (note 50 above); *Watchenuka* (note 283 above).

³⁴¹ Ziegler (note 2 above) 98.

³⁴² *Ibid.*

³⁴³ Act 11 of 2017.

³⁴⁴ *Watchenuka* (note 283 above).

³⁴⁵ Section 22(8)–(9) of Act 11 of 2017.

³⁴⁶ Scalabrini Centre of Cape Town ‘The Asylum System in South Africa: 5 Problems- 5 Solutions’ available at <https://www.scalabrini.org.za/the-asylum-system-in-south-africa-5-problems-and-5-solutions/> accessed 12 October 2024.

³⁴⁷ Section 22 (8) of Act 11 of 2017.

³⁴⁸ Scalabrini Centre of Cape Town (note 346 above).

³⁴⁹ *Ibid.*

Secondly, the criteria to demonstrate self-sufficiency is paradoxical.³⁵⁰ Asylum seekers are required to be self-sufficient to gain certain rights or benefits (for example, the right to education). Still, they are simultaneously denied the means to achieve self-sufficiency, such as employment, unless they can already demonstrate they are self-sufficient.³⁵¹ It is a circular requirement that makes it nearly impossible to meet the criteria.³⁵²

Thirdly, the amendment places a significant administrative burden on both asylum seekers and employers.³⁵³ Asylum seekers must secure a letter of employment within 14 days of starting work, while employers risk hefty fines for non-compliance.³⁵⁴ If an asylum seeker is employed without this endorsement, the employer can be found guilty of an offence, punishable by a fine of up to R20,000.³⁵⁵ Additionally, the DHA Director-General must revoke the endorsement if the asylum seeker cannot prove employment within six months of the endorsement being granted.³⁵⁶ The six-month window for proving employment following endorsement adds another layer of pressure.³⁵⁷ As the Scalabrini Centre of Cape Town aptly points out,³⁵⁸ this amendment is likely to push asylum seekers towards informal or unauthorised employment.³⁵⁹ The amendment's silence on the right to engage in self-employment raises a crucial question: does this omission effectively bar asylum seekers from pursuing such opportunities? This ambiguity creates uncertainty regarding the legal standing of asylum seekers wishing to engage in self-employment or casual work, regardless of their financial situation.

Fourthly, relying on an endorsement affixed to the asylum seeker visa document further complicates matters.³⁶⁰ The process of obtaining this visa is often fraught with delays, sometimes stretching for indefinite periods due to systemic inefficiencies or circumstances beyond the asylum seeker's control.³⁶¹ This leaves asylum seekers both without the visa and its

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Section 22(8)(c) of Act 11 of 2017.

³⁵⁵ Section 22(11) of Act 11 of 2017.

³⁵⁶ Section 22(11) of Act 11 of 2017.

³⁵⁷ Scalabrini Centre of Cape Town (note 346 above).

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Ziegler (note 2 above) 98.

³⁶¹ Ibid.

affixed endorsement of the right to work.³⁶² This could signal a denial of the right to work entirely, thereby infringing on Article 2(3) of the ICESCR.³⁶³

The UNHCR and CESCR have echoed concerns that the right to work for asylum seekers has effectively been denied through section 22(8) and have urged South Africa to ensure that asylum seekers can support themselves and enjoy the right to work by amending the legislation.³⁶⁴ The CESCR added that the denial of the right to work threatens starvation and an individual's sense of dignity.³⁶⁵ The CESCR went on further to state that all the rights of the ICESCR should be enjoyed by all persons under the state's jurisdiction, regardless of their status.³⁶⁶

The amendment's departure from the principles established in *Watchenuka*³⁶⁷ exposes a stark dissonance in South Africa's approach to refugee rights.³⁶⁸ While *Watchenuka*³⁶⁹ affirmed asylum seekers' right to work and study as an integral aspect of their constitutional right to dignity, the amendment seemingly undermines this very principle.³⁷⁰ This shift signifies a concerning regression in the legal framework, potentially jeopardising the well-being and dignity of asylum seekers.³⁷¹ The amendment's intricate and potentially unworkable system raises serious doubts about its practicality and potential consequences.³⁷² The risk of further infringing upon asylum seekers' dignity through this amendment is a grave concern that warrants immediate attention.³⁷³ Cumulatively, these amendments raise concerns about the shrinking space for refugee rights,³⁷⁴ that signify retrogression or withdrawal on the part of the state from the rights-based ethos of the post-apartheid regime.³⁷⁵

³⁶² Ibid.

³⁶³ CESCR General Comment 12 (note 132 above) para 8; Developing countries may determine the extent to which they guarantee the right to work rights to non-nationals, but cannot deny them entirely.

³⁶⁴ United Nations 'Committee on Economic, Social and Cultural Rights considers the report of South Africa' October 2018, available at <https://www.ohchr.org/en/press-releases/2018/10/committee-economic-social-and-cultural-rights-considers-report-south-africa>, accessed 18 October 2024.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ *Watchenuka* (note 283 above).

³⁶⁸ Crush, Skinner & Stulgaitis (note 31 above) 752-782.

³⁶⁹ *Watchenuka* (note 283 above).

³⁷⁰ Scalabrini Centre of Cape Town (note 346 above).

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ Section 27(c) of Act 130 of 1998; Kavuro (note 33 above).

³⁷⁵ Ziegler (note 2 above) 105.

2.2.3 Refugee rights at a crossroads: assessing the White Paper's implications

Having established the legal framework governing the socio-economic rights of refugees in South Africa, it is crucial to consider proposed legislative changes that could significantly alter this landscape. The recent *White Paper*³⁷⁶ outlining a blueprint for a new direction in refugee rights has sparked widespread criticism.³⁷⁷

First, the *White Paper* advises the government to consider withdrawing from the 1951 Convention and its 1967 Protocol with the intention of re-acceding with reservations.³⁷⁸ In particular, it calls for reservations to Article 17, which pertains to wage-earning employment.³⁷⁹ Instead of heeding calls to improve the conditions for the right to work, this proposal further undermines this fundamental right for asylum seekers.³⁸⁰

The recommendation to withdraw from the 1951 Convention and its Protocol, and then re-accede with reservations has been widely condemned by organisations like Lawyers for Human Rights, who argue that it not only undermines South Africa's international legal obligations but also reflects a 'contemptuous disregard' for democratic principles and the human rights of all individuals within its borders.³⁸¹ These steps contravene the principle of non-regression, which mandates that established rights should not be rolled back.³⁸² The Socio-Economic Rights Institute of South Africa (SERI) has also warned that such a step would constitute retrogression and could strip refugees of essential protections and rights, leaving them vulnerable and without recourse at an international level.³⁸³ The UNHCR, in its comments, emphasised that 'withdrawing from the 1951 Convention and its Protocol would

³⁷⁶ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

³⁷⁷ SERI 'SERI makes comments on the White Paper on Citizenship, Immigration and Refugee Protection' February 2024, available at <https://seri-sa.org/index.php/latest-news/1355-submission-seri-makes-comments-on-the-white-paper-on-citizenship-immigration-and-refugee-protection-1-february-2024>, accessed 12 October 2012.

³⁷⁸ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

³⁷⁹ Ibid 39-42.

³⁸⁰ SERI (note 377 above); Lawyers for Human Rights 'Press Statement | LHR makes submission on poorly written White Paper from Home Affairs, calls for its withdrawal' February 2024, available at <https://www.lhr.org.za/lhr-news/press-statement-lhr-makes-submission-on-poorly-written-white-paper-from-home-affairs-calls-for-its-withdrawal/>, accessed 12 October 2024; Daily Maverick 'Government must rethink its Draconian white paper on refugees and migrants' July 2024, available at <https://www.dailymaverick.co.za/opinionista/2024-07-01-government-must-rethink-its-draconian-white-paper-on-refugees-and-migrants/>, accessed 12 October 2012.

³⁸¹ SERI (note 377 above); Lawyers for Human Rights (note 380 above); Daily Maverick (note 380 above); S Samtani 'International Law, Access to Courts and Non-Retrogression: Law Society v President of RSA' (2020) 10 *Constitutional Court Review* 197.

³⁸² Ibid.

³⁸³ Ibid.

set a negative precedent, both regionally and globally'.³⁸⁴ They assert that South Africa would still be bound by its constitutional and other international obligations, rendering the withdrawal an exercise in futility.³⁸⁵

According to the *White Paper*, these reservations are deemed necessary to avoid obligations that the country may not be able to fulfil due to limited resources.³⁸⁶ A significant factor influencing these recommendations is the budget cut for the DHA, which has been reduced by R400 million per annum for the next three years.³⁸⁷ However, critics argue that such drastic budgetary decisions, are primarily controlled by the executive branch, who fail to engage with the implications of these decisions on socio-economic rights.³⁸⁸ In a paper prepared by the Financial and Fiscal Commission, it was stated that neither the budget speech nor the budget review acknowledged the state's constitutional obligations regarding socio-economic rights.³⁸⁹ Further, there was no indication that the government had considered how to protect these rights in light of declining resource allocations.³⁹⁰ Mureinik echoes the need for greater scrutiny of budgetary decisions and their potential impact on constitutional rights.³⁹¹ He suggests that judicial oversight may be necessary when these rights are threatened by economic policy.³⁹²

Secondly, the *White Paper* proposes to tighten the pathway to citizenship for refugees and migrants in South Africa.³⁹³ It cites that the country cannot afford to grant citizenship to all individuals who may enter its borders and seek access to the rights that come with citizenship.³⁹⁴ It acknowledges that the existing system allows foreign nationals and refugees to potentially obtain citizenship, which raises concerns about the implications for national security and the integrity of South Africa's borders.³⁹⁵ This strengthens the argument that the

³⁸⁴ SERI (note 377 above).

³⁸⁵ *White Paper* GG50530 on 17 April 2024 (note 61 above) 39-42.

³⁸⁶ *Ibid.*

³⁸⁷ E Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464-474, 472.

³⁸⁸ *Ibid.*

³⁸⁹ Heywood (note 10 above) 16.

³⁹⁰ *Ibid.*

³⁹¹ Mureinik (note 387 above).

³⁹² *Ibid.*

³⁹³ *White Paper* GG50530 on 17 April 2024 (note 61 above) 60-63; To streamline and strengthen the legal framework, the *White Paper* proposes the repeal of the Citizenship Act 88 of 1995 and the Births and Deaths Registration Act 51 of 1992, advocating for their inclusion in a single piece of legislation that addresses citizenship, immigration, and refugee protection. This consolidation aims to eliminate contradictions in the current legal pathways to citizenship, which are currently governed by multiple pieces of legislation.

³⁹⁴ *White Paper* GG50530 on 17 April 2024 (note 61 above) 60-63.

³⁹⁵ *Ibid.*

state intends to limit pathways to permanent residence and perpetuate the temporary nature of their legal status.

Thirdly, the *White Paper* emphasises the need for stricter regulations regarding unlawful entry and asylum claims.³⁹⁶ Specifically, individuals who enter the country unlawfully must demonstrate good cause for their presence.³⁹⁷ This framework aims to deter economic migrants posing as asylum seekers and to ensure that genuine refugees are processed appropriately.³⁹⁸ Furthermore, it calls for effective monitoring of asylum seekers to prevent them from disappearing during the application process, thereby enhancing the integrity of the refugee protection system.³⁹⁹

Evidently, these proposals, ostensibly aimed at tightening processes, are deeply intertwined with the political framing of refugees as economic migrants.⁴⁰⁰ This framing, rooted in the 2007 Zimbabwean economic crisis,⁴⁰¹ has led to a dangerous conflation of refugees with economic migrants, ultimately eroding the rights of legitimate asylum seekers.⁴⁰² The South African government failed to anticipate and adequately prepare for the large number of Zimbabweans seeking refuge, resulting in the asylum system becoming a ‘catch-all’ for generalised migration.⁴⁰³ Officials argued that the overwhelming demand for a place in the asylum queue and the rights attached to asylum status had rendered the system ineffective in adjudicating legitimate refugee claims.⁴⁰⁴ This situation has created accusations of ‘bogus’ applicants who abuse the system for its economic benefits.⁴⁰⁵ These applicants have been labelled as ‘economic migrants’.⁴⁰⁶ Officials asserted that the liberal asylum regime

³⁹⁶ Ibid 45-46.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ K Moyo & F Zanker ‘No Hope for the “Foreigners”’: The Conflation of Refugees and Migrants in South Africa’ (2022) 20 (2) *Journal of Immigrant & Refugee Studies* 254.

⁴⁰¹ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 5; This crisis was characterised by hyperinflation, severe unemployment, and widespread poverty, largely resulting from political instability and mismanagement by the government. As a result, millions of Zimbabweans sought refuge in neighbouring countries, particularly South Africa, in search of better economic opportunities and safety from the deteriorating conditions at home. This mass exodus significantly impacted South Africa, leading to increased tensions and challenges related to the integration of refugees and asylum-seekers into local communities.

⁴⁰² Moyo & Zanker (note 400 above) 254.

⁴⁰³ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 5.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ ‘Economic migrants’ refers to an umbrella term for a wide array of people that move from one country to another solely to advance their economic interests, as opposed to seeking safety from persecution; Moyo & Zanker (note 400 above) 254.

inadvertently allowed non-genuine refugees seeking economic opportunities to exploit the system.⁴⁰⁷ These sentiments contribute to the rhetoric of viewing all foreign nationals collectively as economic migrants who are then seen as threats to jobs, resources, and societal well-being.⁴⁰⁸

This conclusion by state officials, however, fails to account for systemic issues, including inadequate resources and facilities, restrictive time-frames, a shortage of well-trained personnel, and corruption within the asylum system.⁴⁰⁹ This attitude toward refugees, apparent in the *White Paper*, is seemingly tailored to target economic migrants while, in turn, having a detrimental impact on the rights of legitimate refugees.⁴¹⁰

Instead of addressing South Africa's complex challenges, the *White Paper* contributes to the erosion of refugee rights. It reflects a shift away from protecting socio-economic rights, like the right to work, and aims to restrict pathways to permanent residency while increasing securitisation. Ultimately, refugee protection has become a conflict between universal human rights and state sovereignty, negatively impacting refugees' lives and livelihoods.⁴¹¹

The *White Paper* also illustrates how South Africa is leveraging the weaknesses of international instruments. For example, by withdrawing from the Convention and re-joining with specific reservations, this manoeuvre underscores South Africa's ability to exploit the inherent loopholes in the international framework to limit its obligations while simultaneously neglecting the socio-economic needs of refugees. This highlights a significant disparity in the protection of socio-economic rights for refugees, contrasting sharply with the comprehensive rights guaranteed by the South African Constitution.

2.3 Conclusion

This chapter has examined the legal framework governing refugee protection in South Africa, highlighting the stark contrast between the initial post-apartheid commitment to a rights-based approach and the increasingly restrictive regime that has emerged. What began as an

⁴⁰⁷ M Gigaba 'Address by Minister Gigaba at the Department of Home Affairs World Refugee Day' 2018, available at <https://www.gov.za/news/speeches/minister-malusi-gigaba-world-refugee-day-20-jun-2018> accessed on 17 August 2024.

⁴⁰⁸ Kavuro (note 33 above) 52.

⁴⁰⁹ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 5.

⁴¹⁰ Moyo & Zanker (note 400 above) 255.

⁴¹¹ Khan (note 161 above) 277.

internationally compliant system has been steadily eroded by legislative amendments in the 2017 Refugees Amendment Act⁴¹² and the *White Paper*.⁴¹³ These recent developments, characterised by a disregard for constitutional and international obligations, paint a bleak picture of the disabling legal environment confronting refugees in South Africa. The ensuing chapter will examine how the realities of the ground, including state practices and implementation, either support or further hinder the realisation of refugee rights.

⁴¹² Act 11 of 2017.

⁴¹³ *White Paper* GG50530 on 17 April 2024 (note 61 above).

CHAPTER 3:

RIGHTS, OBLIGATIONS AND REALITIES - A CRITICAL ANALYSIS OF THE IMPLEMENTATION OF REFUGEE LAWS

3 INTRODUCTION

Moving beyond the framework of legislation, this chapter delves into the lived experiences of refugees, evaluating how state practices on the ground have either facilitated or obstructed the realisation of the socio-economic rights of refugees. Through a critical appraisal of the literature, this chapter will scrutinise systemic failures, institutionalised xenophobia, and the practice of prioritising citizens over refugees as key factors framing the restrictive implementation of refugee rights.

Once again, to fully grasp the impact of state implementation of the refugee regime established by the Refugees Act on the rights of those fleeing persecution, it is essential to consider the different phases of refugeehood. This chapter delves into the experiences of both groups: *de facto* refugees (asylum seekers awaiting confirmation of their status) and *de jure* refugees (those legally recognised as such).⁴¹⁴ By examining state conduct at these critical junctures, this chapter aims to illuminate the reality of state implementation of the refugee regime on all those seeking refuge within its borders.

3.1 Integration as a means to implement and give effect to socio-economic rights

Legal frameworks establish socio-economic rights for refugees on paper, but codification alone is insufficient.⁴¹⁵ State implementation (through conduct and policies) becomes necessary to facilitate the enjoyment of these rights.⁴¹⁶ Integration is one such model of implementation and is lauded as a ‘durable solution to refugeehood’.⁴¹⁷ It encompasses a long-term process by

⁴¹⁴ Abraham (note 17 above) para 22.

⁴¹⁵ Khan (note 161 above) 270.

⁴¹⁶ UNHCR ‘UNHCR policy on refugee protection and solutions in urban areas’ September 2009, available at <https://www.unhcr.org/protection/hcdialogue%20/4ab356ab6/unhcr-policy-refugee-protection-solutions-urban-areas.html>, accessed 3 October 2024; Khan (note 161 above) 270.

⁴¹⁷ Pistoia (note 7 above) ‘Social integration corresponds to ‘local integration’ a concept embraced by the United Nations High Commissioner for Refugees (UNHCR) as a ‘durable solution’ for refugees’; UNHCR (note 7 above) ‘Refugees who are able to access housing schemes or employment for example, are woven into the fabric of society and are given the necessary tools to become self-sustaining and contribute to a host country’s economy’.

which refugees become full and equal members of their host community.⁴¹⁸ The UNHCR has developed an urban policy to facilitate integration as a means to realise the rights of refugees in host countries.⁴¹⁹ The UNHCR's urban policy outlines a framework for the integration of refugees into urban settings, emphasising the importance of legal and social structures that support their rights and inclusion.⁴²⁰ By encouraging host governments to adhere to international refugee law and human rights standards, the policy advocates for the establishment of domestic laws that facilitate meaningful integration.⁴²¹ Moreover, the policy underscores the responsibility of host governments to actively engage in the refugee integration process by providing necessary reception facilities, managing refugee registration, and ensuring proper documentation.⁴²² This urban policy serves as a counterbalance to the practice of confining refugees in camps and recognises urban areas and cities as legitimate spaces for refugees to exercise their rights.⁴²³ It emphasises the importance of empowering refugees to become active members of society rather than isolating them as temporary burdens.⁴²⁴

Crucially, the UNHCR recognises that certain expectations fall on the state in order to give effect to effective integration.⁴²⁵ First is systemic operations; host states must provide reception facilities, manage the registration of refugees, and ensure proper documentation.⁴²⁶ Secondly, host governments must also engage with the refugee community to foster positive relationships between refugees and local citizens.⁴²⁷ This duty also means that governments must promote refugees' livelihoods and self-sufficiency.⁴²⁸ Thirdly, the extent to which refugees enjoy their socio-economic rights serves as an indicator of a state's integration efforts.⁴²⁹ The following section will analyse how the state has upheld these three expectations of integration.

⁴¹⁸ Ibid.

⁴¹⁹ UNHCR (note 416 above); Khan (note 161 above) 270.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ UNHCR (note 416 above); Khan (note 161 above) 270.

⁴²⁴ This prevents situations wherein refugees remain in the host country for more than five years, without permanent residence on the one hand, and are unable to return to their country of origin for fear of persecution on the other hand (a continued state of exile); Khan (note 161 above) 82; UNHCR *No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa* (2008).

⁴²⁵ UNHCR (note 424 above); Khan (note 161 above) 270.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ UNHCR (note 416 above); UNHCR (note 424 above)

⁴²⁹ Khan (note 161 above) 268.

3.2 Systemic operations or systemic failures: reception, registration, and documentation

In terms of the reception of asylum seekers, South Africa has taken significant strides to align its policies with that of the UNHCR's urban policy, incorporating key elements for effective integration in its non-encampment model.⁴³⁰ This approach demonstrates a commitment to integrating asylum seekers into local communities rather than confining them to camps.⁴³¹

However, proposals in the now-rejected 2017 *White Paper on International Migration in South Africa*⁴³² reflected the government's intent to abandon this non-encampment policy.⁴³³ This attempt to revert to an encampment model exposes the fragility of South Africa's commitment to non-encampment and refugee integration. While the government outwardly embraces these principles, its actions suggest a wavering dedication, leaving refugees vulnerable to detrimental policy shifts. The proposal suggested that asylum-seekers be kept in secure facilities while their claims were adjudicated, halting their freedom of movement and subsequent integration into communities.⁴³⁴ While 'low-risk' asylum-seekers could be released into the care of organisations or families, they would not have automatic rights to work or study, becoming dependent on the government or UNHCR for basic needs.⁴³⁵ This proposal drew criticism for potentially contradicting South Africa's international law obligations and creating a system where asylum-seekers are detained and reliant on a system that may not have the resources or the will to provide for them adequately.⁴³⁶

Beyond non-encampment, refugee reception and registration and the attainment of documentation should ideally provide for a smooth transition from the point of entry until recognition as a refugee. On paper, stipulations in the Refugees Amendment Act⁴³⁷ hold that within five days of entry into the Republic, asylum seekers must report to a RRO to apply for asylum.⁴³⁸ The applicant is hereafter entitled to an asylum seeker visa,⁴³⁹ thereby allowing them to sojourn in the country prior to having their refugee status confirmed.⁴⁴⁰

⁴³⁰ Crush, Skinner & Stulgaitis (note 31 above) 756.

⁴³¹ Ibid.

⁴³² White Paper on International Migration in South Africa (GG 0602 on July 2017).

⁴³³ Ibid; Crush, Skinner & Stulgaitis (note 31 above) 756.

⁴³⁴ Ibid.

⁴³⁵ Ibid.

⁴³⁶ Ibid.

⁴³⁷ Act 11 of 2017.

⁴³⁸ Section 21(1)(a) of the Refugees Amendment Act 11 of 2017.

⁴³⁹ Section 22 of the Refugees Amendment Act 11 of 2017.

⁴⁴⁰ Section 22(1) of the Refugees Amendment Act 11 of 2017.

During this interim period, an asylum visa and its affixed legal status are the vehicles through which asylum seekers can access their constitutional rights to education, healthcare, employment, and housing, among others.⁴⁴¹ Ideally, on paper, this approach by the state facilitates South Africa's non-encampment policy⁴⁴² and entitles asylum seekers to integrate into society, enjoying their rights to freedom of movement and the autonomy to create their own standard of living.⁴⁴³

Even undocumented asylum seekers, defined by their physical presence in South Africa, are entitled to certain constitutional rights regardless of their legal status.⁴⁴⁴ Together, the non-penalisation of illegal entry and the non-encampment policy seemingly reflects a 'liberal and progressive' refugee regime that supports the integration of refugees.⁴⁴⁵

However, in reality, asylum seekers and refugees encounter what Hathaway calls a cumbersome bureaucratic system that hinders both their enjoyment of socio-economic rights and their integration.⁴⁴⁶ From the outset, asylum seekers face demanding requirements.⁴⁴⁷ The five-day window of landing an application imposes an unreasonable burden on individuals fleeing persecution, creating anxiety and potentially leading to an unjust denial of legitimate asylum claims.⁴⁴⁸ Additionally, the individual must apply in person and fill out a nine-page application form in English, which many struggle to complete without the assistance of interpreters, who are often scarce.⁴⁴⁹ Consequently, asylum seekers frequently fail to present a thorough claim during the initial stages of their application.⁴⁵⁰ Thereafter, applicants encounter inexperienced Refugee Status Determination Officers (RSDOs) who may misinterpret the law

⁴⁴¹ Alexie (note 23 above) 54; South Africa is an identity-driven society; R Amit & N Krigler 'Making migrants "il-legible": The policies and practices of documentation in post-apartheid South Africa' (2014) *Kronos* 269; Khan (note 161 above) 278.

⁴⁴² Non-encampment is a policy that discourages the establishment of refugee camps, promoting instead the integration of refugees and asylum seekers into local communities to enhance their access to services and uphold their dignity; Crush, Skinner & Stulgaitis (note 31 above) 756.

⁴⁴³ Khan & Lee (note 49 above) 1208.

⁴⁴⁴ *Lawyers for Human Rights v Minister of Home Affairs* 2004 ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC).

⁴⁴⁵ Khan & Lee (note 49 above) 1208.

⁴⁴⁶ Khan (note 161 above) 273.

⁴⁴⁷ Ibid.

⁴⁴⁸ Section 4(1)(i) of Act 11 of 2017.

⁴⁴⁹ Refugees Act Regulations GN R366 GG 21075 (6 April 2000) BI-1590 form; Khan (note 161 above) 273.

⁴⁵⁰ Khan (note 161 above) 273.

and focus on irrelevant details.⁴⁵¹ These issues contribute to a high rate of rejections by the DHA.⁴⁵²

A central issue endemic within the system is the DHA's inability to meet the timelines established for processing refugee status.⁴⁵³ Although the regulations stipulate a 180-day period for the adjudication process, the DHA often does not comply, with some cases taking up to ten years to resolve.⁴⁵⁴ A notable instance illustrating this is *Bolanga v Refugee Status Determination Officer (Bolanga)*.⁴⁵⁵ The applicant in this matter applied for asylum in 2005 but only received a negative response from the RSDO in 2007, two years later.⁴⁵⁶ This delay violated the maximum threshold of 180 days required in law.⁴⁵⁷ The applicant appealed the decision, extending the timeline by several more years.⁴⁵⁸ Ultimately, it was not until 2012, seven years after initial application, that the court provided relief.⁴⁵⁹ This situation is particularly troubling given that individuals with asylum seeker permits have significantly restricted rights and freedoms compared to those granted official refugee status.⁴⁶⁰

Systemic delays also manifest in poor management of RROs. In *Kiliko v The Minister of Home Affairs (Kiliko)*,⁴⁶¹ individuals who wished to apply for asylum made extensive efforts to access the Cape Town RRO, including sleeping outside the RRO and arriving early in the

⁴⁵¹ Forced Migration Studies Programme *National survey of the refugee reception and status determination system in South Africa* (Research report, Johannesburg: University of the Witwatersrand 2009); A national survey conducted by the Forced Migration Studies Programme in 2009 revealed that 96% of respondents reported their interviews lasting less than 20 minutes, indicating that these interviews often do not provide asylum seekers with a sufficient opportunity to fully present their claims. Without such an opportunity, asylum seekers may be unjustly denied refugee status and forced to return to potentially perilous situations.

⁴⁵² Khan (note 161 above) 273; In 2015, out of 60,642 asylum applications processed, only 2,499 were granted refugee status.

⁴⁵³ Khan (note 161 above) 273; Khan & Lee (note 49 above) 1208; R Amit All roads lead to rejection: Persistent bias and incapacity in South African refugee status determination (ACMS Research Report 2012).

⁴⁵⁴ Ibid.

⁴⁵⁵ *Bolanga v Refugee Status Determination Officer* [2015] ZAKZDHC 13.

⁴⁵⁶ *Bolanga* (note 465 above).

⁴⁵⁷ *Bolanga* (note 465 above).

⁴⁵⁸ *Bolanga* (note 465 above).

⁴⁵⁹ *Bolanga* (note 465 above).

⁴⁶⁰ Khan, Mbatani & Marais (note 20 above) 53; Amit (note 463 above); asylum seekers encounter 'persistent [...] incapacity' in the refugee status determination process; Lawyers for Human Rights 'Open letter to President Ramaphosa on World Refugee Day' June 2018, available at <https://mg.co.za/article/2018-06-20-00-open-letter-to-president-ramaphosa-on-world-refugee-day>, accessed 22 November 2024; In a letter to Parliament on World Refugee Day 2018, the human rights organization Lawyers for Human Rights claimed that the DHA was 'disregarding the laws of South Africa and the values of the Constitution' in its treatment of refugees and asylum seekers. The organisation documented the department's failures, including a backlog of refugee status applications that has left many individuals waiting over 15 years for their status to be granted.

⁴⁶¹ *Kiliko* (note 54 above).

morning.⁴⁶² However, the RRO only allowed 20 people access per day.⁴⁶³ This situation left many applicants undocumented, rendering their legal status precarious.⁴⁶⁴ This restriction on documentation access has a cascading effect, effectively curtailing asylum seekers' ability to navigate life in an identity-document driven society like South Africa.⁴⁶⁵

Documentation serves as a conduit to essential services and social integration; without it, asylum seekers are left in a precarious and desperate situation, struggling to meet their basic needs and build a life within the host country.⁴⁶⁶ The court recognised this and held that the availability of adequate facilities to grant asylum-seeker permits was an obligation imposed by international law and the Constitution.⁴⁶⁷ The failure to introduce 'adequate and effective' measures to ensure access to RROs (and subsequently documentation) resulted in a violation of the applicant's fundamental rights.⁴⁶⁸ The court ordered the DHA to put corrective measures into place to facilitate efficient access to the Cape Town RRO, and report on the progress of such measures.⁴⁶⁹

Khan and Lee posit that the stance of the judiciary in cases like these⁴⁷⁰ demonstrates a crucial legal principle: any obstacle preventing asylum seekers from accessing RROs is considered unlawful.⁴⁷¹ These obstacles cannot be defended by the argument that the administrative demands on the DHA require the implementation of restrictive measures.⁴⁷²

⁴⁶² *Kiliko* (note 54 above).

⁴⁶³ *Kiliko* (note 54 above).

⁴⁶⁴ *Kiliko* (note 54 above).

⁴⁶⁵ Alexie (note 23 above) 54.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Kiliko* (note 54 above).

⁴⁶⁸ *Kiliko* (note 54 above).

⁴⁶⁹ *Kiliko* (note 54 above).

⁴⁷⁰ Khan & Lee (note 49 above) 1212. Long queues, a visible symptom of deeper systemic issues, also significantly hinder access to RRO services. In an attempt to remedy this, the DHA implemented two measures. The first was an appointment system, where first-time asylum seekers were not seen immediately by an official but were instead given an appointment slip, scheduling a consultation for a date that could be six months to a year away. The second procedure was a pre-screening process intended to filter applicants before they could formally apply for asylum. However, these measures, intended to alleviate the strain on the system, instead exacerbated the vulnerability of asylum seekers. The long waiting periods and pre-screening process created significant obstacles, effectively denying many individuals timely access to protection and essential services. The appointment slips were deemed unconstitutional in *Tafira* (note 53 above) as they did not provide sufficient legal protection to applicants awaiting legal status. The DHA's rationale that staff shortages were a valid reason for these restrictive policies was not accepted as a valid justification. Regarding the pre-screening procedure, the court held that while pre-screening could be lawful if aimed at genuinely assisting asylum seekers, the evidence indicated that the pre-screening process obstructed the asylum application process, violating the applicants' constitutional rights.

⁴⁷¹ Khan & Lee (note 49 above) 1212.

⁴⁷² *Ibid.*

Despite these legal precedents emphasising the need for unhindered access to RROs, the DHA undertook a drastic policy shift in 2011.⁴⁷³ The DHA made the decision to shut down the RRO in Johannesburg and designate those in Cape Town and Port Elizabeth as ‘wind-down’ facilities, effectively stopping new asylum applications.⁴⁷⁴ This policy shift was intended to decrease the asylum population and relocate refugee services to border regions.⁴⁷⁵ This premature closure of urban RROs without finalising policy details, was challenged in the courts on the grounds of unlawful procedure.⁴⁷⁶ This led to a review that confirmed that the closure was inconsistent with the doctrine of legality.⁴⁷⁷ The court noted that the decision to close the office would disproportionately affect those who were already vulnerable and in need of protection.⁴⁷⁸ Namely, closures imposed the burden of traveling to the remaining open RROs, which often become overcrowded.⁴⁷⁹ Many self-sufficient asylum seekers needed to sacrifice time and money, risking their jobs and leaving young children behind to access these services.⁴⁸⁰ By closing the office, the authorities were not only failing to provide a necessary service but also infringing on the rights of asylum seekers.⁴⁸¹

Despite orders of the court the state did not put measures into place to make access to RROs more effective.⁴⁸² Instead, certain RRO’s remained non-operational for an extended period, impacting the asylum process and exacerbating the existing backlog of asylum claims.⁴⁸³ While new RROs eventually opened in 2018, it was only after tireless activism and legal efforts, including a case management system overseen by a judge, that progress was made.⁴⁸⁴

Crucially, through encountering obstacles at RROs, individuals are compelled to enter and stay in the country without proper documentation for reasons beyond their control.⁴⁸⁵ The lasting impact of this is both ironic and cyclic. The state produces undocumented applicants

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ *Scalabrini* (note 34 above).

⁴⁷⁷ *Scalabrini* (note 34 above).

⁴⁷⁸ *Scalabrini* (note 34 above).

⁴⁷⁹ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 8.

⁴⁸⁰ Ibid.

⁴⁸¹ *Scalabrini* (note 34 above).

⁴⁸² Khan & Lee (note 49 above) 1212.

⁴⁸³ *Scalabrini* Centre of Cape Town (note 346 above).

⁴⁸⁴ SIMA ‘World Refugees Day: Assessing South Africa's Refugee Protection System’ June 2023 available at <https://sihma.org.za/Blog-on-the-move/world-refugees-day>, accessed 22 November 2024.

⁴⁸⁵ Khan & Lee (note 49 above) 1212.

through chronic systemic failures at RROs, leaving them divested of legal status.⁴⁸⁶ Thereafter section 34 of the Immigration Act⁴⁸⁷ categorises these individuals as ‘*illegal foreigners*’ who are subject to arrest or detention.⁴⁸⁸ The state then, in its enforcement of the Immigration Act,⁴⁸⁹ targets these undocumented applicants in order to facilitate their deportation,⁴⁹⁰ despite the principle of non-penalisation of illegal entry,⁴⁹¹ or the principle in *Saidi*⁴⁹² that holds that asylum seekers must still be awarded constitutional protections while awaiting the outcome of their application.⁴⁹³ As Khan, Mbatani & Marais aptly question: ‘How can the asylum system punish refugees for lacking documentation when the institution that is tasked with furnishing such documents is not in operation or fails to assist?’⁴⁹⁴

The state’s approach to targeting undocumented asylum seekers was showcased in *Ruta v Minister of Home Affairs*.⁴⁹⁵ Herein, Ruta, a Rwandan national, unlawfully entered South Africa in December 2014, rendering him an ‘illegal foreigner’ under the Immigration Act.⁴⁹⁶ In March 2016, he was arrested in Pretoria for traffic violations, leading to his conviction and imprisonment.⁴⁹⁷ While incarcerated, the DHA initiated deportation proceedings against him.⁴⁹⁸ In response to the imminent deportation, Ruta applied for asylum under the Refugees Act,⁴⁹⁹ asserting that he would face death if returned to Rwanda. However, the Minister of Home Affairs denied his application, claiming it was submitted too late.⁵⁰⁰ Ultimately, on appeal, the court held that individuals who have not applied for asylum upon their arrival in South Africa must be granted an opportunity to visit an RRO and must not be penalised for not possessing a visa.⁵⁰¹

⁴⁸⁶ Ibid.

⁴⁸⁷ Act 13 of 2002.

⁴⁸⁸ Section 34 of Act 13 of 2002; A Hiropolous ‘Migration and detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals’ (2018) *African Policing Civilian Oversight Forum* 18.

⁴⁸⁹ Act 13 of 2002

⁴⁹⁰ *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC).

⁴⁹¹ Lawyers for Human Rights (note 460 above).

⁴⁹² *Saidi* (note 270 above).

⁴⁹³ *Saidi* (note 270 above).

⁴⁹⁴ Khan, Mbatani & Marais (note 20 above) 59.

⁴⁹⁵ *Ruta* (note 490 above).

⁴⁹⁶ Act 13 of 2000.

⁴⁹⁷ *Ruta* (note 490 above).

⁴⁹⁸ *Ruta* (note 490 above).

⁴⁹⁹ Act 130 of 1998.

⁵⁰⁰ *Ruta* (note 490 above).

⁵⁰¹ *Ruta* (note 490 above).

The facts of the case reflect a broader trend among officials to prioritise bureaucratic processes over humanitarian considerations. Despite Ruta's urgent plea that he would face persecution and possible death if returned to Rwanda, the officials adhered strictly to procedural norms, emphasising the timing of his asylum application and his prior criminal record rather than the life-threatening circumstances he faced. This rigid adherence to legal technicalities illustrates a systemic issue where the rights and safety of asylum seekers are secondary to administrative efficiency. The treatment of Ruta as merely an '*illegal foreigner*' rather than as a person in need of protection exemplifies a dehumanising perspective prevalent in bureaucratic systems, which often reduces individuals to their legal status and overlooks their humanity. In this case, the necessity for judicial intervention further underscores the failure of administrative bodies to adequately protect vulnerable individuals, highlighting the urgent need for the state to adopt a more humane approach that recognises the complexities of individual circumstances and prioritises the protection of human rights over mere compliance with bureaucratic norms. The central injunction to interpret all laws in a manner that promotes the spirit and objects of the Bill of Rights and the Constitution's commitment to social justice that guides the interpretation and application of laws,⁵⁰² can arguably be seen as merely peripheral within state practices. Squared, the state prioritises the enforcement of immigration laws over the protection of socio-economic rights.⁵⁰³

It is worth noting that even with documentation, the integration of asylum seekers is not seamless due to the temporary nature of visas.⁵⁰⁴ For example, In 2017, a Gauteng school threatened to have foreign children without current documentation arrested by police, illustrating the precarious position of refugee children in education.⁵⁰⁵ This incident highlights

⁵⁰² Head of Department: Mpumalanga (note 85 above).

⁵⁰³ One such example can be drawn from the arbitrary evictions of undocumented asylum seekers. In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA), officials from three governmental agencies, including the Immigration Control Office of the DHA, conducted a joint operation that evicted 100 individuals from rudimentary shelters on vacant land. On account of being undocumented, 16 of the evicted individuals were deported. The DHA asserted that their involvement in the evictions was focused only on identifying non-documented illegal foreigners. The court deemed the evictions as unconstitutional and unlawful as they circumvented the procedural safeguards of the PIE Act as well as the constitutional protections against evictions. This case reflects a broader systemic issue where the state's commitment to immigration enforcement often eclipses its obligation to uphold human rights, thereby perpetuating a cycle of marginalisation for undocumented individuals, who are, in fact, entitled to protection under the law.

⁵⁰⁴ Khan (note 161 above) 279.

⁵⁰⁵ N Goba 'Outrage over school letter threatening to bar pupils with foreign parents' February 2017, available at bing.com/ck/a1, accessed 22 November 2024.

how the temporary nature of documentation can undermine access to education, even at the basic level, despite the constitutional right of all children to basic education in South Africa.⁵⁰⁶

Lastly, another troubling intersection emerges between systemic inefficiency on the one hand and corruption on the other. The overwhelming demand at RROs, evident in the long queues, exposes a system struggling with limited resources and personnel.⁵⁰⁷ This creates the breeding ground for exploitation, where unethical security guards and officials prey on the desperation of asylum seekers, demanding bribes for services that should be freely accessible.⁵⁰⁸ This corrupt environment erodes trust in the system, forcing individuals to navigate a bureaucratic labyrinth where financial transactions dictate their access to protection.⁵⁰⁹ Adding to the complexity, informal intermediaries, often fellow asylum seekers, emerge, offering translation or representation services for a fee.⁵¹⁰ While some may operate ethically, others exploit vulnerabilities by fabricating claims or embellishing details to enhance the perceived legitimacy of applications.⁵¹¹ This practice further compromises the integrity of the asylum process and puts vulnerable individuals at risk by perpetuating a reliance on potentially misleading information.⁵¹²

Corruption within the South African asylum system is not limited to a single stage but permeates the entire process.⁵¹³ The power held by RSDOs is significant, as they largely determine an asylum seeker's fate and their transition into recognised refugees.⁵¹⁴ Disturbingly, there are reports of some RSDOs demanding bribes ranging from R3,000 to R8,000 in exchange for granting refugee status.⁵¹⁵ This corruption is fuelled by the immense value associated with obtaining refugee status.⁵¹⁶ The combination of extensive backlogs and a high rejection rate fosters an environment where asylum seekers, facing a system seemingly

⁵⁰⁶ Khan (note 161 above) 279.

⁵⁰⁷ Amit (note 55 above) 3-6.

⁵⁰⁸ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 5-8; Asylum seekers reported that officials at the DHA often took bribes of R2000 from applicants in queues. Those applicants who paid bribes were taken to the front of the queue, while those applicants who could not pay a bribe would experience delays lasting weeks.

⁵⁰⁹ Amit (note 55 above) 3-6.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² Ibid.

⁵¹³ Ibid. 25-37.

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid; Khan & Lee (note 49 above) 1208-1212.

designed to deny them legal status, view bribes as their only hope for obtaining eventual refugee recognition.⁵¹⁷

In summary, the South African asylum system suffers from over-bureaucratisation, characterised by chronic issues such as inadequate access to RROs and, subsequently, documentation, the targeting of undocumented individuals, and pervasive corruption. Instead of fulfilling systemic operations effectively, state practises reveal potent systemic failures.

3.3 State engagement with refugees: promoting self-sufficiency or perpetuating xenophobia?

While integration models emphasise the need to foster positive relationships between the state and local citizens with refugees,⁵¹⁸ Khan observes that South Africa has not adequately communicated the presence of refugees to the public, hindering meaningful engagement.⁵¹⁹ Many South Africans appear to be unaware of the full range of socio-economic rights available to refugees.⁵²⁰ For instance, refugees often report that potential employers lack knowledge about their rights.⁵²¹ They also experience workplace exploitation and face challenges in achieving economic integration despite having the right to seek employment.⁵²² Thus, Khan argues that the South African government must take further action to convey to its citizens that welcoming refugees is an international obligation and a moral duty rooted in our shared humanity.⁵²³

Beyond interactions with individuals, xenophobic sentiment also infiltrates public institutions.⁵²⁴ The South African Department of Health has faced accusations of medical xenophobia, with reports indicating that public hospitals have denied medical care to foreigners.⁵²⁵ For instance, in 2017, a pregnant woman from the Democratic Republic of the Congo had no choice but to give birth at Johannesburg's Park Station after being turned away by three hospitals.⁵²⁶ Additionally, a Zimbabwean woman at Mamelodi Day Hospital was

⁵¹⁷ Amit (note 463 above) 25-37.

⁵¹⁸ UNHCR (note 416 above); Khan (note 161 above) 270.

⁵¹⁹ Khan (note 161 above) 275- 278.

⁵²⁰ Ibid.

⁵²¹ Ibid.

⁵²² Ibid.

⁵²³ Ibid.

⁵²⁴ Khan, Mbatani & Marais (note 20 above) 49-52.; A Waters 'Mom gives birth at Park Station after three hospitals turn her away' (June 2017) available at <https://www.iol.co.za/news/south-africa/gauteng/mom-gives-birth-at-park-station-after-three-hospitals-turn-her-away-9552507>, accessed 22 November 2024.

⁵²⁵ Khan, Mbatani & Marais (note 20 above) 49-52.

⁵²⁶ Khan, Mbatani & Marais (note 20 above) 49-52.

reportedly mistreated by staff and was left to give birth while standing up, resulting in her child's death and subsequent legal action.⁵²⁷ Crush and Tawodzera also highlight the prevalence of medical xenophobia, which discriminates against patients based on language, appearance, and nationality.⁵²⁸

Besides overt xenophobic treatment within private and public institutions, a more insidious threat emerges from deeply entrenched xenophobic tendencies at national, provincial and municipal levels of government.⁵²⁹ This institutionalised xenophobia, woven into policies and their execution, has been identified as a pivotal factor eroding refugee rights.⁵³⁰

For instance, in response to the 2015 xenophobic attacks, government established an Inter-Ministerial Migration Committee (IMC).⁵³¹ The IMC identified that the root cause of xenophobia was increased competition induced by socio-economic conditions in South Africa.⁵³² The IMC's characterisation of the attacks however, only further entrenched the perception that refugees are to blame for straining government services to health, housing, education, and social grants.⁵³³ They asserted further that foreign nationals (including asylum seekers and refugees) dominated trade in specific sectors, particularly consumable goods in informal settlements, negatively impacting unemployed and low-skilled South Africans.⁵³⁴ Additionally, the IMC accused refugees of employing business models that deter competition, such as forming monopolies, evading taxes or customs, and selling illegal or expired goods.⁵³⁵ This characterisation not only stigmatised refugees and asylum seekers but also diverted attention away from the broader economic and social challenges facing the country.⁵³⁶ In turn,

⁵²⁷ Maromo J 'Mamelodi Hospital probed after Zimbabwe woman forced to give birth standing up' (August 2019) available at <https://www.iol.co.za/news/south-africa/gauteng/mamelodi-hospitalprobed-after-zimbabwe-woman-forced-to-give-birth-standing-up-31055123>, accessed 22 November 2024.

⁵²⁸ J Crush and G Tawodzera 'Medical xenophobia and Zimbabwean migrant access to public health services in South Africa' (2014) 40(4) *Journal of Ethnic and Migration Studies* 655–670; A 2011 study on South African migration policy revealed that xenophobia among medical staff was prevalent, manifesting in various ways, such as requiring refugee patients to provide documentation and proof of residency before receiving treatment. The study also highlighted instances where healthcare professionals refused to communicate in English or provide translators, along with frequent xenophobic insults and verbal abuse. Additionally, non-South African patients were often made to wait until all South African patients had been seen.

⁵²⁹ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 16.

⁵³⁰ Ibid.

⁵³¹ Ibid.

⁵³² G Nicolson 'Parliamentary Report on Xenophobic Violence Talks a Lot, Says Very Little' *Daily Maverick* (2015) available at <https://www.dailymaverick.co.za/article/2015-11-24-parliamentary-report-on-xenophobic-violence-talks-a-lot-says-very-little/> accessed 17 August 2024.

⁵³³ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 16.

⁵³⁴ Ibid.

⁵³⁵ Ibid.

⁵³⁶ Ibid.

the IMC launched Operation *Fiela* (sweep), a widespread campaign to identify undocumented asylum seekers and facilitate their deportation.⁵³⁷

In Cape Town, law enforcement, military personnel, and immigration officials conducted a coordinated raid at the Central Station deck, a hub for foreign-owned businesses.⁵³⁸ Witnesses described a terrifying atmosphere, with soldiers brandishing weapons and aggressively confiscating goods from vendors, often without providing receipts or allowing for any dialogue regarding the seized items.⁵³⁹ This operation exemplified a systematic approach to marginalising and intimidating refugee communities, highlighting the intersection of crime control and xenophobia in state policy.⁵⁴⁰

Further, in 2015, the Minister of Small Business Development, Ms Lindiwe Sisulu, often castigated foreign business owners (referring cumulatively to asylum seekers, refugees and migrants) for expecting to coexist peacefully with locals while not contributing to sharing knowledge and practices that could benefit the broader community.⁵⁴¹ The Minister's adviser described foreign traders' presence as an invasion, labelling it an ongoing 'sore point' in the socio-economic landscape.⁵⁴² He asserted that foreigners have encroached on spaces traditionally occupied by South Africans,⁵⁴³ thereby justifying the frustrations of locals who 'are not merely going to sit in the corner and sulk'.⁵⁴⁴

This suggestion that locals cannot be expected to accept passively what they perceive as an infringement on their economic opportunities dangerously incites the notion that xenophobic violence is justified in light of these grievances. This rhetoric, often emanating from government officials, starkly contrasts the Constitution's ethos of non-discrimination.⁵⁴⁵ This also sets a dangerous precedent for condoning xenophobic attacks. This rhetoric undermines the principles of equality and non-discrimination that form the bedrock of South African society.⁵⁴⁶

⁵³⁷ Ibid.

⁵³⁸ Ibid.

⁵³⁹ Ibid.

⁵⁴⁰ Ibid.

⁵⁴¹ T Mazwai 'Time to Confront Home Truths' (2016) available at <https://www.iol.co.za/business-report/companies/time-to-confront-home-truths-2025351>, accessed 17 August 2024.

⁵⁴² Ibid.

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

⁵⁴⁵ *Larbi-Odam* (note 162 above). The court held that denying permanent employment opportunities to foreign nationals on the basis of nationality, constitutes unfair discrimination.

⁵⁴⁶ *Larbi-Odam* (note 162 above).

Politicians further manipulate public perception by framing refugees as threats to national security.⁵⁴⁷ By portraying refugees as dangerous, they position themselves as protectors of citizens, creating a sense of unease and fear among the population.⁵⁴⁸ This tactic is often also accompanied by blame deflection, where politicians attribute societal issues such as poor healthcare, unemployment, or crime to refugees.⁵⁴⁹ This narrative suggests that refugees are responsible for these problems, shifting the focus away from underlying systemic issues.⁵⁵⁰ These sentiments can easily culminate into xenophobic outbursts and public animosity towards refugees.⁵⁵¹

This antagonism towards refugees and migrants is not merely confined to rhetoric but manifests concretely in policy decisions at provincial and municipal levels of government. For instance, Limpopo has overtly implemented operations targeting refugees and migrants in the informal sector, exemplified through Operation *Hardstick*.⁵⁵² This military-style campaign targeted small businesses, particularly affecting Somali entrepreneurs.⁵⁵³ Despite being presented as a crime-fighting initiative, Operation *Hardstick* was enforced selectively, disproportionately impacting migrant businesses while leaving South African-owned businesses unscathed.⁵⁵⁴ Over 600 businesses were shut down, owners were detained, stock was confiscated, and fines were imposed for operating without permits, often accompanied by verbal abuse.⁵⁵⁵ Authorities claimed that refugee permits and asylum-seeker visas did not entitle them to operate businesses in South Africa, disregarding the legal rights of both asylum-seekers and refugees.⁵⁵⁶

⁵⁴⁷ T van Lennep 'The State of South Africa Refugee Protection Regime: Part II-Politics and Policy' *Helen Suzman Foundation* (2018); Foreign nationals are burdening SA health system: Motsoaledi SABC News <https://www.sabcnews.com/sabcnews/foreign-nationals-are-burdening-sa-health-system-motsoaledi/sf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-iii-party-politics>, accessed 09 May 2024.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid.

⁵⁵¹ L Landau & M Duponchel's 'Laws, Policies, or Social Position? Capabilities and the Determinants of Effective Protection in Four African Cities' (2011) 24(1) *Journal of Refugee Studies* 19.

⁵⁵² Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 18.

⁵⁵³ Ibid.

⁵⁵⁴ Ibid 19.

⁵⁵⁵ *Somali* (note 50 above).

⁵⁵⁶ *Somali* (note 50 above).

The SCA in *Somali*⁵⁵⁷ condemned the police actions as xenophobic discrimination and noted that the government's approach to licencing spaza shops seemed aimed at forcing destitute foreign nationals to leave the country.⁵⁵⁸

This case, along with the aforementioned examples, exemplifies how deeply ingrained xenophobia permeates the implementation of refugee policies, eroding the very rights and protections that asylum-seekers and refugees are entitled to under South African and international law. The lack of accountability for xenophobic violence fosters a sense of impunity.⁵⁵⁹ This, coupled with inadequate institutional support, suggests state complicity in denying refugees their constitutional rights.⁵⁶⁰ To uphold democratic principles, Khan, Mbatani & Marais assert that a demonstrable commitment from leaders and institutions is essential, addressing the xenophobic rhetoric that undermines the protection of vulnerable populations.

⁵⁶¹

3.4 The pursuit of socio-economic rights: prioritising citizens or neglecting refugees?

While successful integration hinges on refugees enjoying socio-economic rights,⁵⁶² Kavuro points out that competition for scarce resources in South Africa has led to a decline in refugees' rights.⁵⁶³ Inevitably, the consequence of a society where the majority still struggle to make ends meet has manifested in a decline in refugee rights.⁵⁶⁴

The post-1994 reconstruction and development agenda and its focus on improving the lives of the previously disadvantaged majority has been identified as a reason for this decline.⁵⁶⁵ Taking cognisance of the deep racial and socio-economic divisions of apartheid, the agenda, coupled with section 9(2) of the Constitution, calls for legislative and other measures to be taken to protect and advance the position of previously disadvantaged persons and aims to achieve substantive, restitutionary or remedial equality.⁵⁶⁶ Substantive equality, in turn, requires a transformative approach beyond legal formalism to ensure the realisation of the

⁵⁵⁷ *Somali* (note 50 above).

⁵⁵⁸ *Somali* (note 50 above).

⁵⁵⁹ Khan, Mbatani & Marais (note 20 above) 49-52; 59

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

⁵⁶² Khan (note 161 above) 268.

⁵⁶³ Kavuro (note 33 above) 50.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid.*

rights enshrined in the Constitution.⁵⁶⁷ Transformative constitutionalism aims to bring about revolutionary change to achieve a truly egalitarian society, advocating for an active interpretation and application of constitutional provisions to foster social transformation and enhance democratic values, ensuring that the law serves as a tool for achieving substantive equality and social justice.⁵⁶⁸ Thus, legal and political principles are now centred on the idea that restoring dignity, promoting equality, and fostering sustainable social development can be achieved by redistributing wealth and opportunities to benefit the impoverished and most vulnerable citizens.⁵⁶⁹ Therefore, bridging the socio-economic gap between the previously privileged and historically disadvantaged groups has become a primary governmental focus.⁵⁷⁰

However, whilst extensive effort is made to achieve substantive equality for citizens, it neglects to include refugees within this scope. *City of Cape Town v JB (JB)*⁵⁷¹ presents an example of how the state has failed to apply substantive equality to refugees and asylum seekers.⁵⁷² The events giving rise to this case occurred during the 2019 xenophobic attacks in South Africa, where conflicts were originally confined to South African taxi drivers and Nigerian businessmen, the latter accused of selling counterfeit goods, creating unfair competition for local businessmen, being involved in child trafficking, drug circles and prostitution.⁵⁷³ Soon thereafter, a net was cast over all migrants in South Africa, asylum seekers and refugees, documented and undocumented.⁵⁷⁴

As violence and unrest heightened, hundreds of refugees and asylum seekers fled their homes and their places of work, feeling unsafe in their communities.⁵⁷⁵ Neither the City of Cape Town nor the UNHCR could accommodate them or facilitate their resettlement.⁵⁷⁶ Consequently, sit-in protests and riots erupted among refugees to pressure the UNHCR for resettlement.⁵⁷⁷ They demanded relocation as a group to Canada, other European countries, or any nation willing to accept them outside of South Africa rather than returning to their countries

⁵⁶⁷ A E Ashfield 'The Plight of Refugees in South Africa' (2021) 15 *Pretoria Student Law Review* 139.

⁵⁶⁸ Kavuro 'Refugees and Asylum-Seekers: Barriers to Accessing South Africa's Labour Market' (2015) 19 *Law, Democracy and Development* 249.

⁵⁶⁹ Ibid 251.

⁵⁷⁰ Ibid.

⁵⁷¹ *JB* (note 46 above) paras 43-45.

⁵⁷² Ashfield (note 567 above) 139.

⁵⁷³ *JB* (note 46 above) 4-10.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid 13-17.

⁵⁷⁶ Ibid.

⁵⁷⁷ Ibid.

of origin.⁵⁷⁸ They expressed fears of what they described as xenophobic violence and claimed that they were all refugees or qualified for that status as asylum seekers.⁵⁷⁹ The UNHCR informed the respondents that resettlement was highly unlikely.⁵⁸⁰

With no alternative, many women, children, and men also sought refuge in the Central Methodist Church, which became a temporary shelter for hundreds.⁵⁸¹ However, space limitations forced many men to live on the streets and create informal housing.⁵⁸² In response, the City sought a court order to remove the migrants from the streets on account of violating by-laws relating to noise nuisances, public places and streets.⁵⁸³ The first part of the judgement honed into this contravention of municipal by-laws, and thereafter, an order was issued to prohibit the respondents from violating the by-laws.⁵⁸⁴ In the first part of the judgment, the court concluded that the respondents violated various by-laws relating to the occupation of the streets through their conduct (lighting fires, ablution, sleeping on streets).⁵⁸⁵

In the second part of the judgement, the court held that the refugees' demand for resettlement should be appropriately dealt with by DHA and regulated under the Immigration Act⁵⁸⁶ and Refugees Act.⁵⁸⁷ The court suggested that the respondents should have pursued housing opportunities through the appropriate channels provided by the City, as is expected of most South Africans.⁵⁸⁸ Crucially, the court reprimanded the respondents for inciting the sit-in

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid

⁵⁸⁰ Ibid.

⁵⁸¹ Ibid.

⁵⁸² Ibid.

⁵⁸³ *JB* (note 46 above) paras 13-17; contraventions were cited for making fires, washing clothes, conducting absolutions, sleeping overnight, etc. The applicants asserted that the respondents occupied the front stoops of hotels in the area and refused to leave when requested by the business owners. This situation led to guests feeling threatened, resulting in their reluctance to disembark from taxis and enter the hotels. Hotel managers who attempted to address the respondents' behaviour faced threats of physical harm. The escalating situation prompted several European travel advisories to issue warnings to tourists against visiting Cape Town, directly impacting the local tourism industry.

⁵⁸⁴ *JB* (note 46 above) paras 352-354; This prohibition specifically forbade the respondents from engaging in certain activities, including staying overnight, sleeping at any time, making fires, washing clothes, conducting personal hygiene, and urinating or defecating in the vicinity of the church or on any public property, including the streets.

⁵⁸⁵ *JB* (note 46 above) .

⁵⁸⁶ Act 13 of 2000.

⁵⁸⁷ Act 38 of 1998; *JB* (note 46 above) paras 36-41; Although the City deemed it necessary to arrest and detain the undocumented respondents and apply the Immigration Act 13 of 2002 to deport undocumented immigrants back to their countries of origin, the City mistakenly believed that it did not need to adhere to Section 26 of the Refugees Act 38 of 1998 which allows asylum seekers to appeal their applications to the Standing Committee for Refugee Affairs or the Refugee Appeal Authority before any final action is taken. The court ordered the DHA to conduct investigations into the statuses and applications of all migrants present at the church.

⁵⁸⁸ *JB* (note 46 above) paras 43-45.

protests,⁵⁸⁹ noting their intent to incite anger and frustration among the other protesters, fully aware that their demands for resettlement were unlikely to be met.⁵⁹⁰

Ashfield asserts that the judgment exhibited a failure to apply substantive equality by focusing solely on the respondents' violation of municipal by-laws without considering the dire conditions in which the refugees found themselves.⁵⁹¹ The judgment did not address the need for relief or attention to the refugees' situation, disregarding the principles of substantive equality and transformative constitutionalism.⁵⁹² The judgment overlooked requests for adequate housing, protection, food, and water, disregarding the pressing needs of refugees and asylum seekers.⁵⁹³ The impact of the judgment on women and children living in the church, although not party to the court, was significant, as they were left with little recourse to their situation.⁵⁹⁴

The judgment has been criticised for its narrow focus on formal equality rather than a more substantive engagement with the rights enshrined in the Constitution and international law.⁵⁹⁵ This formalistic approach fails to adequately address the systemic inequalities and vulnerabilities faced by refugees and asylum seekers.⁵⁹⁶ The 1951 Refugee Convention, incorporated into domestic law, aims to ensure refugees receive welfare benefits, including housing.⁵⁹⁷

Court decisions hold power in providing justice and can have far-reaching social and economic consequences.⁵⁹⁸ Therefore, courts must consider the real-life context and circumstances faced by refugee communities, not just those directly involved in the case, to advance transformative change and uphold human dignity.⁵⁹⁹ The formalistic and technical approach to interpreting legal issues used in this case is no longer sufficient, as social, historical, and economic circumstances must be considered in court judgments.⁶⁰⁰ The failure

⁵⁸⁹ *JB* (note 46 above) paras 43-45.

⁵⁹⁰ *JB* (note 46 above) paras 43-45.

⁵⁹¹ Ashfield (note 567 above) 139.

⁵⁹² *Ibid.*

⁵⁹³ *Ibid.*

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Ibid* 141.

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *Ibid* ; Article 21 of the Convention specifically obligates states to provide housing opportunities for refugees, treating them on par with other non-citizens. Similarly, the OAU Convention emphasises the duty of African nations to alleviate the suffering of refugees and ensure their access to socio-economic rights, including housing.

⁵⁹⁸ Ashfield (note 567 above) 139.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*

to address the broader issues at play resulted in a missed opportunity to improve the lives of refugees by enhancing their dignity and fulfilling their fundamental rights.⁶⁰¹

3.5 Conclusion

In conclusion, despite the UNHCR's emphasis on host state expectations for implementation through integration, South Africa has demonstrably failed to uphold its responsibilities. Systemic failures undercut the provision of reception facilities and documentation, hindering access to essential socio-economic rights. Instead of fostering positive community relationships, the state has perpetuated institutionalised xenophobia. Further, the failure to prioritise refugee livelihoods and self-sufficiency, coupled with the neglect of socio-economic rights, reflects a deep-seated ethos of exclusion and bureaucratic autonomy, devoid of the injunction to uphold constitutional and international refugee rights.

With both refugee law and its implementation outlined in Chapters Two and Three, respectively, Chapter Four will scrutinise whether the refugee regime as a whole can be justified in light of the lack of available resources and the obligation of progressive realisation. If the refugee regime cannot be justified, this dissertation will subsequently assess the ways in which the state can still ensure the protection of refugees, suggesting solutions for reform in light of scarce resources.

⁶⁰¹ Ibid.

CHAPTER 4:

REFUGEE RIGHTS AMIDST STATE INCAPACITY: A CRITICAL ANALYSIS OF SOUTH AFRICA'S REFUGEE REGIME AND RECOMMENDATIONS FOR REFORM

4 INTRODUCTION

The analysis conducted in Chapters Two and Three exposed a concerning pattern of limitations on the socio-economic rights of both refugees and asylum seekers. These limitations manifest in both the design of legislation⁶⁰² and its implementation.⁶⁰³ The state consistently justifies these limitations by invoking the challenge of limited state resources.⁶⁰⁴ This rationale needs to be weighed against the state's obligation of progressive realisation under constitutional and international law. The chapter argues that while resource constraints are a genuine concern, South Africa's reliance on this justification masks a deeper failure to prioritise the rights of refugees and asylum seekers, ultimately undermining its commitments to international law and the Constitution. Moving beyond a mere critique, the chapter proposes concrete recommendations for reform grounded in a rights-based approach that acknowledges the

⁶⁰² Legislatively, section 27(c) of the Refugees Amendment Act 11 of 2017 extending the permanent residency requirement to 10 years erects a significant barrier for refugees seeking access to crucial rights associated with this status, such as participation in housing development schemes. The removal of previously explicit language guaranteeing basic healthcare and education for refugees in section 27(g) of the Refugees Act 130 of 1998 signals a concerning retreat from the intent to protect these essential rights. Section 4(1) (i) of the Refugees Amendment Act 11 of 2017 requires asylum seekers to report to a Refugee Reception Office within five days of entering South Africa. This imposes an unreasonable burden on individuals fleeing persecution, creating anxiety and potentially leading to unjust denial of legitimate asylum claims if they do not meet this timeframe. Lastly, the shift from an automatic right to work for asylum seekers to an endorsement-based system, in section 22 of Refugees Amendment Act 11 of 2017, coupled with systemic delays in visa processing, effectively denies this right in practice. Alarming, proposals within the *White Paper*, suggest making reservations to international conventions that form the bedrock of refugee and asylum-seeker rights. This move, particularly concerning wage-earning employment, underscores a concerning trend of withdrawing from the protection of socio-economic rights. The cumulative effect of these limitations in law, represents a clear departure from international law such as the 1951 Convention and the ICESCR, and constitutional obligations.

⁶⁰³ Challenges in implementation are apparent through processing delays and administrative hurdles, including the closure of RROs that erect barriers and prevent asylum seekers from accessing visas. Barred access to documentation then creates a domino effect, severely limiting access to fundamental socio-economic rights, including banking, healthcare, and education among others. Beyond systemic challenges, Chapter 3 uncovered evidence of discriminatory practices by officials, often fuelled by xenophobia or governmental intent to target economic migrants and tighten control over the asylum system, reflecting a bureaucratic approach to implementation that prioritises border securitisation over humanitarian protection.

⁶⁰⁴ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

realities of resource constraints while advocating for a more sustainable system of refugee protection.

4.1 Limited resources or limited commitment: unpacking South Africa's progressive realisation obligations

The recurring conflict between insufficient state resources and the limitations on socio-economic rights has prompted judicial intervention in many legal disputes. In general, the courts have taken cognisance of the fact that socio-economic rights are subject to the requirement of 'progressive realisation';⁶⁰⁵ those textually qualified rights that place an obligation on the state to take 'reasonable measures' to fulfil them gradually.⁶⁰⁶ While the Constitution acknowledges that these rights cannot be fulfilled instantaneously, the judiciary has asserted that the state 'must go on trying to resolve these problems'.⁶⁰⁷ In essence, government entities cannot evade their responsibilities by simply citing budgetary limitations.⁶⁰⁸ This reinforces the idea that the state must actively work to fulfil its constitutional commitments rather than using financial constraints as a blanket justification for inaction.⁶⁰⁹ It must plan and allocate resources accordingly, even if that means adjusting its budget.⁶¹⁰

By meticulously evaluating the state's conduct through this lens of progressive realisation, this chapter aims to provide a nuanced understanding of whether the 'limited resources' argument holds water or serves as a convenient veil for a retreat from its commitments. Herein, the criteria for progressive realisation established in *Grootboom*⁶¹¹ will be analysed in conjunction with the relevant provisions of the ICESCR.

4.1.1 Reasonableness

Reasonableness demands that state actions are rational and proportional to the objective of realising socio-economic rights.⁶¹² The court in *Grootboom*⁶¹³ laid out four key

⁶⁰⁵ *Soobramoney v Minister of Health* (1997) ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 para 11; Sections 26(2) and 27(2) of the Constitution.

⁶⁰⁶ Section 26(2)-27(2) of the Constitution.

⁶⁰⁷ *Soobramoney* (note 605 above) para 43.

⁶⁰⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (CC) 2011 ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) para 74.

⁶⁰⁹ *City of Johannesburg* (note 608 above).

⁶¹⁰ *City of Johannesburg* (note 608 above).

⁶¹¹ *Grootboom* (note 149 above)

⁶¹² *Soobramoney* (note 605 above).

⁶¹³ *Grootboom* (note 149 above).

considerations for determining reasonableness: legislative measures must be accompanied by concrete policies, programmes, and plans with clear timelines (short-term, medium-term, and long-term);⁶¹⁴ roles and responsibilities must be clearly defined across different levels of government;⁶¹⁵ while implementation may be shared, the national government bears ultimate responsibility for ensuring programmes effectively uphold constitutional rights;⁶¹⁶ programmes must be designed and implemented to genuinely advance the realisation of the specific right(s) in question, and crucially, programmes must provide relief for the vulnerable.⁶¹⁷

To illustrate how the refugee regime falls short of this reasonableness standard, this chapter will draw from specific examples in both the legal framework and its practical implementation.

First, refugee laws are not supported by policies or programmes to bolster their implementation. For instance, the endorsement-based right to work,⁶¹⁸ discussed in Chapter 2, lacks the necessary supporting mechanisms for its implementation in practice.⁶¹⁹ As a result, delays in the processing of asylum visas render the right impractical.⁶²⁰ Justified through the notions of state incapacity, systemic failures then leave asylum seekers without both the visa and its affixed endorsement to work for unknown periods of time.⁶²¹ Thus, the absence of supporting mechanisms to realise the right to work for asylum seekers, leaves many undocumented and without employment, perpetuating a cycle of vulnerability and marginalisation.⁶²²

Secondly, there is an absence of clearly designated roles and responsibilities for each sphere of government. For instance, local government officials express that the responsibility of providing services to refugees should fall solely under the purview of the DHA.⁶²³ This sentiment once again stems from a lack of resources and capacity at the local level to

⁶¹⁴ *Grootboom* (note 149 above) paras 39-45.

⁶¹⁵ *Grootboom* (note 149 above) paras 39-45.

⁶¹⁶ *Grootboom* (note 149 above) paras 39-45.

⁶¹⁷ *Grootboom* (note 149 above) paras 39-45.

⁶¹⁸ Section 22(8) of the Refugees Act 11 of 2017.

⁶¹⁹ Sections 22(8)-(11) of Act 11 of 2017. See United Nations (note 364 above). See Scalabrini Centre of Cape Town (note 346 above) and Kavuro (note 33 above);. See also Chapter Two above para 2.2.2. 'Amendments affecting asylum seekers'.

⁶²⁰ *Ibid.*

⁶²¹ *Ibid.*

⁶²² Scalabrini Centre of Cape Town (note 346 above).

⁶²³ I Palmary *Refugees, Safety and Xenophobia in South African Cities: The role of local government* (Research report written for the Centre for the Study of Violence and Reconciliation 2002) 6.

adequately address the needs of refugees.⁶²⁴ Instead of upholding rights, efforts are often directed towards targeting undocumented asylum seekers for deportation, through clean sweep operations discussed in chapter three.⁶²⁵ These operations signal that the focus point of local government is putting the socio-economic rights of refugees at the periphery. This stance underscores the dissonance between the focus of national laws against policies and local implementation.

Thirdly, the national government does not assume ultimate responsibility for ensuring that programmes effectively uphold constitutional rights.⁶²⁶ The *White Paper* reveals a concerning approach from the national government where the constitutional rights of refugees are treated as merely a peripheral concern.⁶²⁷ Drastic budget cuts are presented as a foregone conclusion, citing that the budget of the DHA for the years 2024/25 has been reduced by R400 million per annum.⁶²⁸ The budget of the DHA would largely affect the processing of asylum and refugee documents, the gateway for accessing socio-economic rights. Additionally, the *White Paper* also cites that the state's '*limited resources*' necessitate a reassessment of commitments to international conventions safeguarding the socio-economic rights of refugees.⁶²⁹ Members of the national assembly have echoed that while these conventions have positioned South Africa as a hospitable destination for refugees and asylum seekers, they have also led to an overwhelming influx of individuals seeking refuge, straining the country's capacity as a developing nation.⁶³⁰ In turn, parliament is increasingly calling for and directing resources toward stricter immigration enforcement.⁶³¹

This emphasis on immigration and border control seemingly reflects a prioritisation by Parliament on bolstering border security, while neglecting the protection refugee rights. Dr. Leon Schreiber, the Minister of Home Affairs, has announced plans to increase capacity within

⁶²⁴ Ibid.

⁶²⁵ Ibid; *Somali* (note 50 above).

⁶²⁶ *Grootboom* (note 149 above) paras 39-45.

⁶²⁷ *White Paper* in GG50530 on 17 April 2024 (note 61 above); SERI (note 377 above).

⁶²⁸ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

⁶²⁹ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

⁶³⁰ *White Paper* in GG50530 on 17 April 2024 (note 61 above); SERI (note 377 above); Parliament of the Republic Of South Africa 'Department of Home Affairs Steps Up Efforts to Address Illegal Migration' July 2024 <https://www.parliament.gov.za/news/departments-home-affairs-steps-efforts-address-illegal-migration> , accessed 02 March 2025.

⁶³¹ Ibid.

the immigration inspectorate.⁶³² He outlined plans for a sustained, integrated, and collaborative approach to tackling illegal immigration.⁶³³ For the upcoming year, the DHA plans to increase inspections at restaurants, spaza shops, farms, and mines by over 50% to combat illegal employment, which includes potential deportations.⁶³⁴ Further, Minister Schreiber announced plans to re-establish the Immigration Advisory Board and enhance inspections of businesses, and the deployment of an additional 400 border guards.⁶³⁵

While members of parliament welcomed the proposed enhancement of capacity within immigration control, they have also urged that this capacity increase should extend to the permit and refugee sections of the department.⁶³⁶ The concerted efforts of controlling illegal and economic migration, versus the neglect of refugee operations, reveal the prioritisation of border security over the protection of refugee rights. This ultimately undermines the state's responsibility of ensuring that programmes effectively uphold constitutional rights these individuals.⁶³⁷ As stated in *Somali*,⁶³⁸ the state's frustration in managing a high volume of asylum seekers should not overshadow its duty to uphold constitutional and statutory responsibilities.⁶³⁹

Arguably, the state is evading its responsibilities by citing budgetary limitations without actively working to mitigate them. On one hand, the state of the economy, typically assessed through the Gross Domestic Product, national debt, investment levels, and employment rates, plays a critical role in determining the extent of funding available for socio-economic rights and the prioritisation of these funds.⁶⁴⁰ While there is merit in the need for budget constraints, there is no indication that the government has considered how to preserve and protect these rights.⁶⁴¹

The CESCR has echoed the importance of planning and accountability at the national level in addressing socio-economic rights, making use of indicators and benchmarks and

⁶³² Ibid; Department of Home Affairs 'Home Affairs Minister Dr Leon Schreiber Budget Vote 2024 Speech' 15 July 2024 at <https://www.dha.gov.za/index.php/statements-speeches/1789-home-affairs-minister-dr-leon-schreiber-budget-vote-2024-speech>, accessed 02 March 2025.

⁶³³ Ibid.

⁶³⁴ Ibid.

⁶³⁵ Ibid.

⁶³⁶ Ibid.

⁶³⁷ *Grootboom* (note 149 above) paras 39-45.

⁶³⁸ *Somali* (note 50 above).

⁶³⁹ Ibid.

⁶⁴⁰ Heywood (note 10 above) 3.

⁶⁴¹ Ibid 16.

allowing institutions, like the South African Human Rights Commission, to evaluate progress.⁶⁴² Here, resource constraints cannot be used as a *carte blanche* for inaction.⁶⁴³ It requires states to actively take concrete steps, including legislative and policy measures, to realise these rights gradually.⁶⁴⁴ This once again emphasises that the lack of resources cannot be a blanket justification for failing to uphold these rights, as states must continually strive to improve their capacity to meet their obligations under international law.⁶⁴⁵

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (City of Johannesburg)*,⁶⁴⁶ the judiciary went so far as to clarify that the reasonableness of a municipality's measures cannot be solely justified by its budgetary constraints.⁶⁴⁷ Here the court asserted that if a municipality has a constitutional or statutory obligation to provide certain services, it must plan and allocate resources accordingly, even if that means adjusting its budget.⁶⁴⁸ This ruling highlighted that merely claiming a lack of budgeted resources is insufficient if the municipality has failed to adequately prepare for its obligations.⁶⁴⁹ The courts' position underscores the principle that constitutional duties must be met with appropriate planning and resource allocation, and that organs of state cannot evade their responsibilities by merely citing budgetary limitations.⁶⁵⁰ This reinforces the idea that the state must actively work to fulfil its constitutional commitments, rather than using financial constraints as a blanket excuse for inaction.⁶⁵¹

Thus, as Mureinik aptly points out, the government's reliance on the notion of '*limited resources*' is a superficial argument that often fails to engage with the complexities of socio-economic rights.⁶⁵² By neglecting to justify how budgetary decisions align with constitutional obligations, the national government avoids meaningful scrutiny of its priorities.⁶⁵³ The CESCR posits that persistent inequalities indicate that South Africa's economic development

⁶⁴² Committee on Economic Social and Cultural Rights (CESCR) in General Comment 4 The right to adequate housing (Art 1) para 12; Liebenberg (note 6 above) 43; The state must also report biannually on its progress in implementing the rights outlined in the Covenant. The CESCR itself reviews these reports.

⁶⁴³ Sections 26(2) and 27(2) of the Constitution; Liebenberg (note 6 above) 40-41.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ Heywood (note 10 above) 22-23.

⁶⁴⁶ *City of Johannesburg* (note 608 above) para 74.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Ibid.*

⁶⁵² Mureinik (note 387 above) 472.

⁶⁵³ *Ibid.*

model remains elusive.⁶⁵⁴ The CESCR criticised the country's fiscal policy, stating that it does not effectively mobilise the resources necessary to reduce inequalities and is not sufficiently progressive.⁶⁵⁵

Fourthly, policies and laws are not designed to advance the socio-economic rights of vulnerable refugees. In *Grootboom*,⁶⁵⁶ the judiciary underscored the necessity of prioritising the rights of vulnerable groups, who are confronted with unique challenges and adversities.⁶⁵⁷ As articulated in *Union of Refugee Women*⁶⁵⁸ and *Somali*,⁶⁵⁹ refugees represent an exceptionally vulnerable segment of society.⁶⁶⁰ Many refugees have fled their homes as a result of persecution, violence, and human rights violations, all circumstances largely beyond their control.⁶⁶¹ They are often victims not only of the conflict that forced them to flee but also of the additional hardships associated with displacement in a foreign land.⁶⁶² The judiciary's emphasis on the rights of refugees signals an understanding that the challenges they face are often compounded by systemic barriers that prevent them from accessing their rights fully.⁶⁶³ Thus, refugees possess an inherent vulnerability that necessitates concerted efforts by the state to uphold their rights and provide adequate protection.⁶⁶⁴ By recognising the special vulnerability of refugees, the courts call upon the state to take active measures to create an environment in which their rights are upheld. This includes enforcing legal protections, providing adequate resources, and ensuring access to socio-economic rights that are essential for their integration.

However, recent amendments within legislation are arguably retrogressive in nature. For example, the extension of the period of residency necessary to qualify for permanent residence status from five to ten years signifies retrogression.⁶⁶⁵ Such a change excludes refugees from the scope of benefits associated with permanent residency, such as housing programmes,

⁶⁵⁴ UN Committee on Economic, Social and Cultural Rights 'Concluding Observations on the Initial Report of South Africa' November 2018, available at <https://www.ohchr.org/en/documents/concluding-observations/ec12zafco1-concluding-observations-initial-report-south-africa>, accessed 7 September 2024.

⁶⁵⁵ *Ibid*; Consequently, it recommended that South Africa review its fiscal policy and re-examine its growth model to pursue a more inclusive development pathway.

⁶⁵⁶ *Grootboom* (note 149 above) paras 39-45.

⁶⁵⁷ *Grootboom* (note 149 above) paras 39-45.

⁶⁵⁸ *Union of Refugee Woman* (note 253 above).

⁶⁵⁹ *Somali* (note 50 above).

⁶⁶⁰ *Somali* (note 50 above) para 33; *Union of Refugee Woman* (note 253 above) paras 28-30.

⁶⁶¹ *Ibid*.

⁶⁶² *Ibid*.

⁶⁶³ *Ibid*.

⁶⁶⁴ *Ibid*.

⁶⁶⁵ Section 27(c) of the Refugees Amendment Act 11 of 2017.

condemning them to a life of degradation.⁶⁶⁶ It can be interpreted as a mechanism that further erodes the socio-economic rights of refugees, particularly when considered within the broader context of the government's efforts to limit pathways to permanent residency, maintain the temporary status of refugees, and tighten border control.⁶⁶⁷

This conduct contradicts the principles of *Grootboom*⁶⁶⁸ and that of the CESCR, which highlighted the state's implicit obligation to prevent retrogressive measures concerning socio-economic rights.⁶⁶⁹ The CESCR posits that any deliberate measure that diminishes the existing level of enjoyment of a right is incompatible with the ICESCR unless meticulously justified.⁶⁷⁰ The CESCR holds that if austerity measures are unavoidable, they should be 'temporary, necessary, proportionate, non-discriminatory... and not disproportionately affect the rights of disadvantaged and marginalised individuals and groups.'⁶⁷¹ Arguably, the state has failed to meet the meticulous justification standard required by the ICESCR for retrogressive measures, instead invoking '*limited resources*' as a foregone conclusion without demonstrating necessity, proportionality, or lack of discriminatory impact, as required.

Overall, justifying the exclusion of refugees and asylum seekers from their socio-economic rights through '*limited resources*' does not meet the standard of reasonableness of 'progressive realisation'.

4.1.2 *Minimum core obligations and maximum available resources*

Bilchitz holds that the test of reasonableness alone is not enough.⁶⁷² He points out that reasonableness primarily focuses on the second subsection of sections 26 and 27 of the Constitution, which deals with progressive realisation, without adequately incorporating the first subsection, which defines the content of the rights themselves.⁶⁷³ This critique highlights a crucial need for a more defined concept of the state's core obligations, particularly when basic needs are at stake.⁶⁷⁴

⁶⁶⁶ Kavuro (note 154 above) 91.

⁶⁶⁷ Kavuro (note 33 above) 62.

⁶⁶⁸ *Grootboom* (note 149 above).

⁶⁶⁹ UN Committee on Economic, Social and Cultural Rights (note 654 above).

⁶⁷⁰ *Ibid.*

⁶⁷¹ *Ibid.*

⁶⁷² Bilchitz (note 215 above) 11.

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

This is where the concept of ‘*minimum core obligations*’ under international law becomes relevant.⁶⁷⁵ This recognises a distinct set of obligations that states must meet, even with limited resources, to ensure the basic survival of individuals.⁶⁷⁶ The CESCR believes that every state party has a basic responsibility to ensure that all individuals have access to at least the minimum essential level of their rights.⁶⁷⁷ This is significant for refugee claims, especially when a person's economic and social rights are actively withdrawn,⁶⁷⁸ as evident in the context of proposals in the *White Paper* advocating for the withdrawal from socio-economic obligations in the 1951 Convention or the exclusionary approaches of state policies and conduct. Clearly, deliberate withdrawal from socio-economic obligations results in a failure to meet even the minimum standards of core obligations of the ICESCR.

The ICESCR also imposes an additional duty on states to mobilise the ‘maximum available resources’ to realise a range of socio-economic rights.⁶⁷⁹ The criterion supplements and enriches the interpretation of ‘available resources’ within the Constitution. This addition requires the state to demonstrate its commitment to these rights by actively seeking to optimise resource use and implementing policies that facilitate the realisation of socio-economic entitlements, even in the face of economic constraints.⁶⁸⁰ The *White Paper*’s substantiation for reservations to international conventions safeguarding the socio-economic rights is ‘*limited resources*’.⁶⁸¹ This signifies that resource constraints are seen as a foregone conclusion, and that clear benchmarks to utilise the maximum available resources or to mitigate the lasting

⁶⁷⁵ Liebenberg (note 6 above) 40-41; In *Grootboom* the court rejected the need for a ‘minimum core’ and found that the language of the Constitution did not support such a duty. It argued that setting a universal minimum standard would be impractical, given the fluctuating nature of resource availability and the diversity of individual needs. Despite this, the court acknowledged that the minimum core concept could help assess the reasonableness of state measures. Notably, this case occurred before South Africa ratified the ICESCR, meaning that while the court rejected the minimum core at the time, the state is now bound by it under international law. This criterion thus supplements that of reasonableness.

⁶⁷⁶ Liebenberg (note 6 above) 40-41.

⁶⁷⁷ General Comment No 3 (note 130 above) para 10.

⁶⁷⁸ McAdam (note 5 above) 579.

⁶⁷⁹ United Nations Economic and Social Council ‘An evaluation of the obligation to take steps to the “maximum of available resources” under an optional protocol to the covenant’ (2007) available at https://digitallibrary.un.org/record/607726/files/E_C.12_2007_1-EN.pdf accessed on 7 September 2024; Article 2 of the ICESCR; United Nations (note 364 above).

⁶⁸⁰ Heywood (note 10 above) 22-23.

⁶⁸¹ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

effects of resource scarcity, have not been furnished. This approach (absence of benchmarks and planning) has not changed since the CESCSC's last appraisal of the state's efforts in 2007.⁶⁸²

In conclusion, South Africa's persistent reliance on '*limited resources*' as a catch-all justification fails to meet its obligations under the progressive realisation framework, particularly concerning reasonableness, maximum available resource utilisation, and fulfilling minimum core obligations. This argument, therefore, cannot be perpetually leveraged to deny refugees their constitutional and international rights. A more nuanced approach is required, one that prioritises the equitable allocation of resources while upholding the socio-economic rights of refugees. The following section will offer recommendations for achieving this balance.

4.2 Reconciling rights and resources: charting a sustainable path for refugee protection in South Africa

Thus far, this study has established that South Africa's refugee regime, once lauded for its rights-based approach, now stands at a crossroads.⁶⁸³ While the country's initial legislation embraced international principles of refugee protection, subsequent years have witnessed a marked departure from these ideals.⁶⁸⁴ This deviation is evident in both retrogressive legislative amendments,⁶⁸⁵ and inconsistent implementation of refugee laws and policies,⁶⁸⁶ culminating in a system that struggles to uphold the rights of refugees and asylum seekers.⁶⁸⁷ As Khan aptly points out, the system seems to have lost its 'sense of humanity'.⁶⁸⁸

This erosion of a rights-based approach, is deeply concerning. While a return to these principles is essential, it is equally crucial to acknowledge the fragility of the previous rights-based system of the Refugees Act,⁶⁸⁹ which proved susceptible to political pressures and resource constraints.⁶⁹⁰ Therefore, this analysis argues that a mere revival of a rights-based

⁶⁸² Additionally, the ICESCR's explicit inclusion of all persons, regardless of legal status, within its scope suggests that state conduct that denies specific groups access to rights available to others constitutes discriminatory behaviour; Article 2(2) of the ICESCR.

⁶⁸³ Khan, Mbatani & Marais (note 20 above) 48- 63; Khan (note 161 above) 261-284; Kavuro (note 33 above) 49-78; Moyo & Botha (note 43 above) 77-91; Crush Skinner & Stulgaitis (note 31 above) 752-782.

⁶⁸⁴ Moyo & Botha (note 43 above) 78-79; Khan, Mbatani & Marais (note 20 above) 49-50.

⁶⁸⁵ Ziegler (note 2 above) 67-106.

⁶⁸⁶ Moyo & Botha (note 43 above) 82-83; Khan, Mbatani & Marais (note 20 above) 53-55.

⁶⁸⁷ Kavuro (note 33 above) 49-78

⁶⁸⁸ Khan, Mbatani & Marais (note 20 above) 48.

⁶⁸⁹ Act 130 of 1998.

⁶⁹⁰ N Willie & P Mfubu 'Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa' (2016) 2(3) *AHMR* 546, 555-557.

approach is insufficient.⁶⁹¹ Instead, a more robust and resilient framework is required; one that embeds refugee rights within a broader framework of social justice, economic inclusion, and good governance, all whilst acknowledging the realities of resource constraints. To locate effective solutions, it is essential to first uncover the root causes behind retrogressive approaches. Thereafter targeted recommendations can be made to chart a sustainable path forward.

4.2.1 *Regional mass migration pressures and burden sharing*

Willie and Mfubu offer a compelling explanation for the shift from a rights-based approach in South Africa.⁶⁹² They observe that people fleeing war or persecution often seek refuge in neighbouring countries or those perceived as politically and economically stable.⁶⁹³ As a result, African countries in close proximity to conflict zones or those considered relatively progressive often bear a disproportionate responsibility for hosting refugees.⁶⁹⁴ Thus, they argue that this increasing pressure of mass migration has led to a ‘gradual but serious erosion of hospitality’ towards refugees in South Africa.⁶⁹⁵ They postulate that South Africa bears a disproportionate burden of mass migration due to what Hathaway and Neve term an ‘accident of geography’.⁶⁹⁶

In turn, South Africa's tightening regulations, particularly those aimed at curtailing access to the right to work, appear to be part of a calculated strategy to deter asylum seekers.⁶⁹⁷ This view is supported by Crush, who posits that the state aims to make the country a less desirable destination for refugees,⁶⁹⁸ who were once drawn to the country for its progressive

⁶⁹¹ Khan (note 161) above 283; Khan also highlights the limitations of a purely rights-based approach. She expounds that the right to dignity serves as the foundation upon which other rights are realised. However, Khan observes a discrepancy between this principle and the lived experiences of refugees in South Africa. She argues that the right to dignity appears to be intrinsically linked to citizenship, effectively excluding refugees from this fundamental right. Despite South Africa's progressive legal framework and urban policy, Khan contends that refugees are often treated as outsiders, denied their right to dignity due to their non-citizen status. Thus the right to dignity, which underpins all other rights, is not universally upheld. She highlights the need for a more nuanced perspective on refugee protection, one that moves beyond legal frameworks to address the systemic and societal barriers that prevent refugees from experiencing full and equal dignity.

⁶⁹² Willie & Mfubu (note 690 above) 555-557.

⁶⁹³ Ibid.

⁶⁹⁴ Ibid.

⁶⁹⁵ Ibid.

⁶⁹⁶ JC Hathaway, & RA Neve ‘Making refugee law relevant again: A proposal for collectivised and solution-oriented protection’ (1997) 10 *Harvard Human Rights Journal* 115; Willie & Mfubu (note 690 above) 555-557.

⁶⁹⁷ Ibid.

⁶⁹⁸ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above).

Constitution and non-encampment policy that promoted the integration of refugees into society.⁶⁹⁹

Okoth-Obbo echoes this sentiment by stating that African states are adopting restrictive refugee policies in a move towards stricter border control and containment strategies, prioritising domestic political and economic concerns over the humanitarian ethos of international conventions.⁷⁰⁰ To this end, Masuku posits that African countries only adopt these international agreements, like the ICESCR or the 1951 Convention, to gain legitimacy rather than due to a genuine commitment to their implementation.⁷⁰¹ This means they might adopt the appearance of compliance without the capacity or resources to truly uphold these standards.⁷⁰² Thereafter, they prioritise their domestic economic and political interests over their obligations to the global refugee community.⁷⁰³

This is arguably evidenced by South Africa's stance, through the proposed reservations to the 1951 Refugee Convention in the *White Paper*⁷⁰⁴ that aim to restrict refugee rights, including access to work, or the *White Paper's*⁷⁰⁵ aim of deterring economic migration, or the extension of the number of years of residency needed to gain permanent residence status and the subsequent barrier to integration that it creates.⁷⁰⁶ These factors signal a concerning trend towards the securitisation of migration management, where border control and national security interests supersede the protection of refugee rights.

This 'every man for himself' approach, where states prioritise their own interests over collective solutions, has only exacerbated the challenges posed by forced displacement.⁷⁰⁷ Without a concerted effort to address the refugee crisis through a coordinated and collaborative framework, ensuring all states contribute resources regardless of geographic proximity, the

⁶⁹⁹ Hathaway & Neve (note 696 above) 115; Willie & Mfubu (note 690 above) 555.

⁷⁰⁰ G Okoth-Obbo, G 'Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20(1) *Refugee Survey Quarterly* 79-139.

⁷⁰¹ S Masuku 'Universal Refugee Social Protection Guidelines: A Discussion into the Challenges to Their Successful Adoption' (2024) *International Journal of Politics, Culture, and Society* 6-27.

⁷⁰² Ibid.

⁷⁰³ Ibid.

⁷⁰⁴ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

⁷⁰⁵ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

⁷⁰⁶ Section 27(c) of the Refugees Amendment Act 11 of 2017.

⁷⁰⁷ Willie & Mfubu (note 690 above) 554-558.

situation will continue to deteriorate.⁷⁰⁸ Thus, to foster a more humane and sustainable system, scholars emphasise the concept of burden-sharing.⁷⁰⁹ The 1951 Conventions preamble states:

[...]considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation.

This connotes the equitable distribution of responsibilities and resources among states in addressing the needs of refugees and ensuring their rights are upheld.⁷¹⁰ This can encompass various forms of support, including financial assistance, resettlement programs, and providing access to essential services.⁷¹¹ The 2018 Global Compact on Refugees⁷¹² also emphasises responsibility sharing, advocating for international cooperation to support countries hosting large refugee populations.⁷¹³

Willie and Mfubu hold that the existing legal frameworks, including the 1951 Convention and the 1969 OAU Refugee Convention, lack a comprehensive framework for receiving and processing refugees, particularly during periods of mass influx.⁷¹⁴ This absence of clear guidelines often leads to *ad hoc* responses that are inconsistent and potentially inadequate in addressing the needs of refugees.⁷¹⁵ To address this gap, scholars recommend that a standardised protocol be developed and integrated into the 1969 OAU Refugee Convention.⁷¹⁶ This protocol should outline clear and predictable standards for managing large-scale refugee arrivals, ensuring a more coordinated and humane response.⁷¹⁷ Drawing upon existing guidelines, such as UNHCR's Procedural Standards for Refugee Status Determination, the protocol should address key aspects of reception and processing.⁷¹⁸

⁷⁰⁸ Ibid.

⁷⁰⁹ Willie & Mfubu (note 690 above) 554; Carciotto & C d'Orsi *Access to socio-economic rights for refugees: A comparison across six different countries* (Report by Scalabrini Institute for Mobility in South Africa 2017) 46.

⁷¹⁰ Willie & Mfubu (note 690 above) 554- 558.

⁷¹¹ Ibid.

⁷¹² UN General Assembly *Global Compact on Refugees* (2018).

⁷¹³ Ibid.

⁷¹⁴ Willie & Mfubu (note 690 above) 558- 560.

⁷¹⁵ Ibid.

⁷¹⁶ Ibid.

⁷¹⁷ Ibid.

⁷¹⁸ These could include: standardised procedures for documentation upon arrival; access to adequate reception facilities and basic services, such as shelter, food, water, and healthcare; implementing fair and efficient procedures for refugee status determination, adhering to international standards; and clearly defining the roles and responsibilities of states, UNHCR, and other relevant actors in managing mass influx situations; Willie & Mfubu (note 690 above) 554, 558- 560.

This would allow for tailored responses while upholding a common set of principles and standards.⁷¹⁹ By establishing a uniform approach, African states can move towards a more predictable and effective system for managing refugee flows, ensuring the protection of refugee rights even in times of crisis.⁷²⁰

Beyond control of mass influx, refugee protection entails significant financial and logistical burdens.⁷²¹ Willie and Mfubu propose a dedicated Refugee Protection Fiscal Fund or Scheme.⁷²² This concept, as advocated for by Hathaway and Neve⁷²³ would operate as a form of insurance against the unpredictable costs associated with hosting refugees.⁷²⁴ Currently, existing mechanisms for financial assistance from other states or the UNHCR remain *ad hoc* and insufficient, lacking a sense of collective obligation.⁷²⁵ A dedicated fund, based on principles of equitable burden-sharing, could address the imbalances of disproportionate costs shouldered by some hosting states in the region.⁷²⁶ Contributions from member states would be determined based on their capacity and resources, ensuring a fair distribution of responsibility.⁷²⁷ A transparent and accountable mechanism for accessing the fund would provide timely support to refugee-hosting countries facing unexpected financial strains.⁷²⁸ These efforts would include leveraging aid to strengthen basic service provision, ensuring that both refugees and host communities benefit from improved access to essential services.⁷²⁹ Such an approach promotes a more sustainable and equitable system of refugee protection.⁷³⁰

4.2.2 *From temporary refuge to lasting belonging: embracing pathways to integration*

As demonstrated in Chapter two, beyond managing mass migration, the trend of securitisation and border control is often accompanied by an underlying state intention of limiting pathways to residency and self-sufficiency. However, this approach only fuels a pressing humanitarian

⁷¹⁹ Ibid.

⁷²⁰ Ibid.

⁷²¹ Ibid.

⁷²² Ibid.

⁷²³ Hathaway, & Neve (note 696 above) 115.

⁷²⁴ Willie & Mfubu (note 690 above) 554- 563.

⁷²⁵ Ibid.

⁷²⁶ Ibid.

⁷²⁷ Ibid.

⁷²⁸ Ibid.

⁷²⁹ Carciotto & d’Orsi (note 709 above) 46.

⁷³⁰ Ibid.

crisis: the pervasive issue of poverty among displaced populations.⁷³¹ Studies confirm that the world's poorest have borne the brunt of recent global shocks, with refugees disproportionately affected.⁷³² The World Bank's analysis of poverty trends reveals that low-income countries, hosting the vast majority of the world's refugees, lack the fiscal capacity to protect their populations adequately.⁷³³ This leaves refugees extremely vulnerable, with existing poverty exacerbated by inadequate social protection systems and limited access to employment.⁷³⁴ Thus, while humanitarian aid may provide a crucial lifeline, the widening gap between needs and resources demands a fundamental shift in approach.⁷³⁵

This shift requires enabling refugees' access to labour markets as a critical pathway out of poverty.⁷³⁶ It fosters self-reliance, reduces reliance on aid, and unlocks the potential for refugees to contribute to their host communities.⁷³⁷ The 2018 Global Compact on Refugees⁷³⁸ recognises the urgent need for change, advocating for productive and dignified work for refugees as a pathway to self-sufficiency.⁷³⁹ Scholars Betts, Bloom, Kaplan, and Omata assert that refugees should be viewed not merely as victims but as active economic agents, forming networks, contributing to host economies, and striving for self-reliance.⁷⁴⁰ Thus, empowering refugees requires a shift from focusing solely on vulnerabilities to recognising their capabilities and aspirations.⁷⁴¹ Successful examples like Jordan's Compact⁷⁴² demonstrate the

⁷³¹ S Malik 'Unlocking the economic gains of hosting refugees starts with economic inclusion' November 2023, available at <https://www.unhcr.org/blogs/unlocking-the-economic-gains-of-hosting-refugees-starts-with-economic-inclusion/>, accessed on 31 October 2024.

⁷³² Ibid.

⁷³³ Ibid.

⁷³⁴ Ibid.

⁷³⁵ Ibid.

⁷³⁶ Ibid.

⁷³⁷ Ibid.

⁷³⁸ UN General Assembly (note 712 above). The Global Compact is an international framework aimed at bolstering the global response to refugee crises. It strives to guarantee that refugees and their host communities receive the necessary support. The Compact's development was informed by a comprehensive two-year consultation involving refugees, civil society organisations, international organisations, experts, and UN Member States.

⁷³⁹ World Economic Forum 'How we can advance sustainable economies in developing countries hosting refugees' September 2023, available at <https://www.weforum.org/agenda/2023/09/how-we-can-advance-sustainable-economies-in-developing-countries-hosting-refugees/>, accessed 31 October 2024.

⁷⁴⁰ Malik (note 731 above).

⁷⁴¹ Ibid.

⁷⁴² The Jordan Compact, a landmark agreement reached in 2016, saw Jordan commit to improving access to education and legal employment for Syrian refugees residing within its borders. In exchange, the country received billions of dollars in grants and loans and preferential trade agreements with the European Union. This agreement demonstrated that leveraging existing political capital between donor governments, international organisations, and host governments, alongside economic and political incentives like trade deals, can effectively mobilise resources and foster a more inclusive policy environment within a short timeframe.

transformative potential of granting work rights and promoting self-reliance.⁷⁴³ Such collaborations create livelihood opportunities, foster innovation, and offer replicable models for sustainable solutions.⁷⁴⁴

Yet, many countries continue to deny refugees the right to work, perpetuating a cycle of dependence and hindering the search for durable solutions.⁷⁴⁵ South Africa appears to be doing the same. Both the Refugees Amendment Act⁷⁴⁶ and proposals in the *White Paper*⁷⁴⁷ further curtail refugees' right to work, jeopardising their self-reliance and perpetuating a cycle of poverty. Section 22(8) of the Refugees Amendment Act⁷⁴⁸ with its conditional endorsement approach to the right to work for asylum seekers, exemplifies a narrow view of refugees solely through the lens of victimhood (fleeing from state persecution). By confining refugees to two restrictive categories, those in need of aid and those who can work if specific conditions are met, the amendment erects barriers to integration rather than fostering it. This stance starkly contrasts with the need for inclusive economic participation as a means to achieve integration.⁷⁴⁹ This signifies that the state is concerned about the potential impact of refugee inflows on its citizens, leading to a hesitance to fully embrace the economic integration of refugees.⁷⁵⁰

It is helpful to analyse the potential economic benefits refugees can bring when effectively integrated, to combat this view of refugees as a burden. From an economic standpoint, a large arrival of refugees can be compared to a sudden increase in the labour supply within a local area.⁷⁵¹ Initially, this increase in available workers can lead to more competition for jobs, potentially driving down wages for everyone.⁷⁵² However, it is important to note that neither the existing residents nor the refugees are a uniform group.⁷⁵³ The specific types of jobs where refugees compete with residents depend on the refugees' skills and whether they can

⁷⁴³ Malik (note 731 above).

⁷⁴⁴ Ibid; as exemplified by IKEA's partnership with UNHCR in Ethiopia, private sector involvement further highlights the positive impact of investing in refugee integration.

⁷⁴⁵ Ibid.

⁷⁴⁶ Section 22(8)-(11) of Act 11 of 2017.

⁷⁴⁷ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

⁷⁴⁸ Section 22(8)-(11) of Act 11 of 2017.

⁷⁴⁹ Malik (note 731 above).

⁷⁵⁰ Schneiderheinze C & Lücke M Socio-economic impacts of refugees on host communities in developing countries (2020) Kiel Institute for the World 7.

⁷⁵¹ Ibid.

⁷⁵² Ibid 7-19, 24- 27.

⁷⁵³ Ibid.

legally work.⁷⁵⁴ If refugees face restrictions and can only find work in the informal sector, this concentrates the competition within that labour market segment.⁷⁵⁵ This can significantly impact wages and lead to job losses for residents who rely on informal work.⁷⁵⁶ This negative impact can be even more pronounced if some refugees are overqualified for informal jobs and outperform the local workforce.⁷⁵⁷

While this situation negatively impacts some residents, it can benefit businesses and households that rely on informal labour due to lower labour costs.⁷⁵⁸ This can make local businesses more competitive and potentially lead to higher profits, particularly in sectors like agriculture.⁷⁵⁹ The impact of refugees on developing countries extends beyond their roles as workers.⁷⁶⁰ Their spending on local goods and services, coupled with international financial aid, creates a ripple effect throughout the economy.⁷⁶¹ While there are concerns about refugees competing with residents for jobs, research suggests that the overall impact of immigration on resident labour markets is generally small.⁷⁶² This is because refugees, like other immigrants, contribute to the local economy through consumption.⁷⁶³

International financial support, often provided as grants to host countries or direct aid to refugees, acts as a significant boost to local economies.⁷⁶⁴ This aid and refugee spending increase demand for local goods and services, leading to economic growth.⁷⁶⁵ This growth is amplified by the size of the refugee population and the amount of international support received.⁷⁶⁶

While the combined impact of increased labour supply (refugees seeking work) and increased demand (from refugee spending and aid) is complex, it is reasonable to expect an overall positive effect on resident workers.⁷⁶⁷ This is because the impact of immigration on

⁷⁵⁴ Ibid.

⁷⁵⁵ Ibid.

⁷⁵⁶ Ibid.

⁷⁵⁷ Ibid.

⁷⁵⁸ Ibid.

⁷⁵⁹ Ibid.

⁷⁶⁰ Ibid.

⁷⁶¹ Ibid.

⁷⁶² Ibid.

⁷⁶³ Ibid.

⁷⁶⁴ Ibid.

⁷⁶⁵ Ibid.

⁷⁶⁶ Ibid.

⁷⁶⁷ Ibid.

labour markets is generally minimal, while the economic stimulus from international aid and refugee spending creates a clear demand for more workers.⁷⁶⁸

The Global Compact on Refugees⁷⁶⁹ stands as a testament to the international community's growing recognition of economic inclusion as a cornerstone of effective refugee protection.⁷⁷⁰ It moves beyond the traditional humanitarian focus on immediate needs and emphasises the importance of supporting refugees' self-reliance and economic integration.⁷⁷¹ This paradigm shift is evident throughout the Compact's four objectives. These call for enhanced refugee self-reliance, expanded access to third-country solutions, support for conditions in countries of origin for return in safety and dignity, and improved responsibility-sharing among states.⁷⁷² By promoting policies that facilitate access to education, employment, and financial services for refugees, the Compact encourages states to view refugees not merely as passive recipients of aid but as active agents of their own development and contributors to their host societies.⁷⁷³ Evidently, the state needs to embrace the contributions of refugees in the economy in order to move forward and not stagnate.

However, while fostering self-reliance among refugees can be a valuable tool for promoting integration, this approach should not overshadow the importance of more durable solutions, such as naturalisation.⁷⁷⁴ The concept is couched within Article 34 of the 1951 Convention, which holds that states shall, as far as possible, facilitate the process of naturalisation of refugees.⁷⁷⁵ The UNHCR has also recommended that host states make provision for a wide range of entitlements that are universally enjoyed by citizens and, over time, promote the possibility of naturalisation.⁷⁷⁶ Khan and Ziegler highlight that access to citizenship in the host country offers a pathway to full and permanent inclusion, effectively ending the transient nature of refugee status.⁷⁷⁷

⁷⁶⁸ Ibid.

⁷⁶⁹ UN General Assembly (note 712 above).

⁷⁷⁰ UNHCR 'Livelihoods and economic inclusion' 2023, available at <https://www.unhcr.org/what-we-do/build-better-futures/livelihoods-and-economic-inclusion>, accessed 5 November 2024.

⁷⁷¹ Ibid.

⁷⁷² Ibid.

⁷⁷³ Ibid.

⁷⁷⁴ Legal process by which a non-citizen of a country can acquire citizenship or nationality. It typically involves meeting specific requirements established by the country's laws, such as residency duration, language proficiency, knowledge of the country's culture and history, and good moral character; F Khan & R Ziegler 'Refugee Naturalization and Integration' (2020) in *Oxford Handbook of International Refugee Law* (2020) 289.

⁷⁷⁵ Article 34 of the 1951 Convention.

⁷⁷⁶ Khan & Ziegler (note 774 above) 289.

⁷⁷⁷ Ibid 289, 306.

Khan and Ziegler criticise the Global Compact's⁷⁷⁸ downplay of naturalisation.⁷⁷⁹ While self-reliance can be beneficial, the authors caution that it should not overshadow the ultimate goal of durable solutions, including naturalisation, which provides refugees with a more secure and permanent legal status.⁷⁸⁰ This shift away from naturalisation indicates that many host countries, particularly in the Global South, are reluctant to grant citizenship to refugees.⁷⁸¹

To this end, Khan, Mbatani, and Marais observe that South Africa's approach to refugee integration burdens refugees, effectively making them responsible for their integration rather than providing adequate state support.⁷⁸² They are left to navigate complex bureaucratic systems with limited support related to documentation, housing, healthcare, employment, education, and legal recourse, often in unfamiliar urban environments.⁷⁸³ This burden extends to holding the state accountable for institutional failures, with the threat of deportation or detention looming over those who cannot successfully advocate for themselves and are left undocumented.⁷⁸⁴

Moreover, the states' actions, particularly the amendments introduced by Section 27(c) of the Refugees Amendment Act⁷⁸⁵ and the restrictive approach to citizenship outlined in the *White Paper*,⁷⁸⁶ suggest a reluctance to adopt principles of naturalisation. Many refugees find themselves trapped in a system where they lack the legal means to fully integrate and access rights in their host country, including the crucial right to citizenship.⁷⁸⁷ This cycle of exclusion particularly affects children born or raised in the host country, for whom naturalisation offers an equal opportunity to thrive.⁷⁸⁸

Thus, by embracing naturalisation as a key element of a rights-based approach, South Africa can move towards a more just and sustainable system of refugee protection, fostering social cohesion and unlocking the full potential of refugees as members of society.⁷⁸⁹

⁷⁷⁸ UN General Assembly (note 712 above).

⁷⁷⁹ Khan & Ziegler (note 774 above), 306.

⁷⁸⁰ Ibid.

⁷⁸¹ Ibid 289, 306.

⁷⁸² Khan, Mbatani, & Marais (note 20 above) 58.

⁷⁸³ Ibid.

⁷⁸⁴ Ibid; *Ersumo v Minister of Home Affairs* 2012 ZASCA 31; 2012 (4) SA 581 (SCA); 2012 (3) All SA 119 (SCA).

⁷⁸⁵ Act 11 of 2017.

⁷⁸⁶ *White Paper* in GG50530 on 17 April 2024 (note 61 above).

⁷⁸⁷ JC Kanamugire 'Local Integration as a durable solution for refugees in South Africa' (2018) 8(1) *International Journal of Social Sciences and Humanity Studies* 289- 306; Khan & Ziegler (note 774 above) 289-305.

⁷⁸⁸ Ibid.

⁷⁸⁹ Kanamugire (note 787 above) 289- 306; Khan & Ziegler (note 774 above) 289-305.

Naturalisation fosters a sense of belonging and encourages refugees to invest in their new homes.⁷⁹⁰ This leads to greater social cohesion and reduces the likelihood of social and economic marginalisation.⁷⁹¹

While naturalisation offers a promise of integration, it is not without drawbacks. Firstly, integration or the enjoyment of rights is not guaranteed as citizenship alone does not resolve socio-economic marginalisation.⁷⁹² Refugees who undergo naturalisation may still encounter political obstacles or societal resistance, which can hinder their ability to fully participate in and contribute to their new communities.⁷⁹³ Thus, while naturalisation is a potential pathway to stability, it is essential to consider the breadth of alternatives that could more effectively address the needs and circumstances of refugees.⁷⁹⁴

First, voluntary repatriation, the process where refugees choose to return to their home country when conditions have improved, enabling them to do so safely and sustainably.⁷⁹⁵ This option can be a viable solution because it allows refugees to return to familiar environments and communities, potentially reintegrating into their cultural and social fabric.⁷⁹⁶ Additionally, repatriation can support the rebuilding of their home country, as returning individuals may bring back skills, knowledge, and resources.⁷⁹⁷

Secondly, resettlement to a third country. This involves relocating refugees to a third country that has agreed to accept them.⁷⁹⁸ This option can be particularly beneficial for those who cannot return home due to ongoing conflict or persecution, or for those who face prolonged uncertainty in their current host country.⁷⁹⁹ Resettlement can provide refugees with enhanced opportunities for stability, security, and integration into a new society, often accompanied by access to education, healthcare, and employment.⁸⁰⁰

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid.

⁷⁹² Ibid.

⁷⁹³ Ibid.

⁷⁹⁴ Ibid.

⁷⁹⁵ Ibid.

⁷⁹⁶ Ibid.

⁷⁹⁷ Ibid.

⁷⁹⁸ Ibid.

⁷⁹⁹ Ibid.

⁸⁰⁰ Ibid.

4.2.3 Ensuring accountability, transparency, and compliance

An adequate rights-based approach must also confront a critical disconnect within South Africa's refugee system: the gulf between progressive court judgments upholding refugee rights and the inconsistent implementation of these judgments in practice.⁸⁰¹ The judiciary's commitment to substantive equality and dignity, particularly for vulnerable groups, has led to successful legal challenges against government departments like the DHA.⁸⁰² These challenges highlight how rights-based claims can effectively challenge existing power structures and advocate for greater protection of refugee rights.⁸⁰³

However, these legal victories are frequently undermined by the inconsistent and, at times, discriminatory application of the law by government departments like the DHA.⁸⁰⁴ The state's disregard for court directives demonstrates a troubling disregard for the rule of law and further marginalises this vulnerable population.⁸⁰⁵

For example, the court in *Watchenuka*⁸⁰⁶ emphasised the universal right to dignity as a cornerstone of both South African and international law.⁸⁰⁷ The court powerfully asserted that 'human dignity has no nationality' and that restricting the right to work limits self-sufficiency and infringes on an individual's ability to live free from 'humiliation and degradation'.⁸⁰⁸ Thus, asylum seekers' right to work was judicially sanctioned by virtue of their right to dignity.⁸⁰⁹ However, as demonstrated in Chapter Two, section 22(8) of the Refugees Amendment Act⁸¹⁰ represents a concerning retrogression, effectively reversing the judicially sanctioned right to work established in *Watchenuka*,⁸¹¹ now necessitating endorsements for asylum seekers' right to work.⁸¹² This reversal highlights a concerning lack of political will to implement these

⁸⁰¹ Khan, Mbatani, & Marais (note 20 above) 56-62; Moyo & Botha (note 43 above) 77-91.

⁸⁰² Khan, Mbatani, & Marais (note 20 above) 56-62.

⁸⁰³ Ibid.

⁸⁰⁴ Ibid; Numerous court cases highlight a pattern of these institutions misinterpreting or inadequately applying refugee law. The courts have intervened to challenge systemic practices that undermine refugee rights. For instance, the courts deemed unlawful the DHA's attempts to implement a pre-screening system to restrict asylum applications in *Tafira* (note 53 above) 136. Although the courts consistently strive to uphold the rights of refugees, their efforts are often stymied by the DHA's failure to comply with court orders.

⁸⁰⁵ Ibid.

⁸⁰⁶ *Watchenuka* (note 283 above).

⁸⁰⁷ *Watchenuka* (note 283 above).

⁸⁰⁸ *Watchenuka* (note 283 above).

⁸⁰⁹ *Watchenuka* (note 283 above).

⁸¹⁰ Act 11 of 2017.

⁸¹¹ *Watchenuka* (note 283 above).

⁸¹² Ziegler (note 2 above) 67-106

progressive court decisions at the national level.⁸¹³ This lack of commitment to upholding the rights of refugees is a betrayal of the initial promise of a more just and humane system.⁸¹⁴ Further, the intertwining of xenophobia and political opportunism is evident in the shift towards more restrictive refugee policies.⁸¹⁵ This gap between legal principle and lived reality, mirroring the broader disconnect between laws, policies, and their implementation, underscores the urgent need for robust accountability mechanisms.⁸¹⁶

Landau observes that the country lacks the necessary institutional capacity to translate legal rights into tangible benefits for refugees.⁸¹⁷ Landau contends that the mechanical application of policies is insufficient.⁸¹⁸ Instead, he calls for a more proactive approach, emphasising the South African government's responsibility to facilitate refugee integration actively.⁸¹⁹

Thus, to foster a more accountable and transparent refugee protection system, South Africa should prioritise enhanced accountability measures across all levels of government. This involves holding key institutions like the DHA accountable for their action or inaction, ensuring compliance with court orders, and addressing systemic inefficiencies. Further, increasing transparency in decision-making processes is crucial. This can be achieved through open communication channels that keep refugees informed about their rights and the status of their applications, as well as mechanisms that facilitate public access to information on refugee-related policies and budgetary allocations.

The delegation of economic policy to the executive branch, while standard practice, raises concerns about adequate oversight, especially regarding its impact on socio-economic rights. Heywood argues that the lack of robust oversight mechanisms for economic policy creates a disconnect between economic decisions and their impact on fundamental rights.⁸²⁰ While the legislature technically has oversight, its effectiveness is questionable, particularly given the influence of political sentiment and potentially xenophobic attitudes.⁸²¹ Mureinik,⁸²²

⁸¹³ Khan, Mbatani, & Marais (note 20 above) 56-62.

⁸¹⁴ Khan, Mbatani, & Marais (note 20 above) 56-62; Moyo & Botha (note 43 above) 77-91.

⁸¹⁵ Ibid.

⁸¹⁶ Ibid.

⁸¹⁷ L Landau 'Protection and dignity in Johannesburg: Shortcomings of South Africa's urban refugee policy' (2006) *Journal of Refugee Studies* 19(3) 308-327.

⁸¹⁸ Ibid.

⁸¹⁹ Ibid.

⁸²⁰ Heywood (note 10 above) 16.

⁸²¹ Ibid.

⁸²² Mureinik (note 387 above).

recognising this potential conflict suggests that judicial oversight might be necessary in cases where economic policy infringes upon socio-economic rights.⁸²³ This would provide an additional layer of protection, ensuring that economic decisions are aligned with constitutional guarantees.⁸²⁴ The specific mention of economic policy here stems from its direct link to resource allocation, which is crucial for the realisation of socio-economic rights. Therefore, stronger oversight mechanisms, including a more active judicial role, are needed to ensure that economic policy does not undermine the constitutional framework protecting these rights.

Finally, comprehensive advocacy and training programmes are essential for fostering a rights-based approach. These programs should target government officials, particularly those interacting directly with refugees, to enhance their understanding of refugee rights, combat xenophobic attitudes, and promote humane and dignified treatment.

4.3 Conclusion

This chapter has argued that the persistent invocation of '*limited resources*' cannot serve as a carte blanche excuse for South Africa to abdicate its commitment to the international and constitutional rights of refugees. While resource constraints are a genuine concern, they cannot justify the wholesale denial of fundamental rights. Instead, this chapter has advocated for a nuanced approach, proposing concrete recommendations to navigate resource constraints while upholding the rights of refugees. These include, first, actively pursuing burden-sharing mechanisms with the regional community; secondly, promoting sustainable integration through economic inclusion and expanded pathways to residency; and lastly, establishing robust accountability and compliance mechanisms to ensure transparency and good governance. Underpinning these recommendations is a call for the revival of a rights-based ethos within South Africa's refugee regime. Chapter Five will now synthesise the findings of this analysis, drawing overarching conclusions and outlining study recommendations.

⁸²³ Ibid.

⁸²⁴ Ibid.

CHAPTER 5:

FINDINGS AND RECOMMENDATIONS

5 INTRODUCTION

This study has examined the relationship between international and constitutional legal obligations, domestic legislation, and the realities faced by refugees in South Africa regarding their access to socio-economic rights. It highlighted the tension between the state's retreat from socio-economic commitments and the resulting disenfranchisement of this vulnerable population. This concluding chapter synthesises the key findings, revisits the initial research questions, and provides evidence-based answers. Additionally, it offers concrete recommendations for reform to promote a more just, sustainable, and rights-based approach to refugee protection in South Africa.

5.1 Research questions and findings

5.1.1 What international law and constitutional obligations are imposed on the state to protect and implement socio-economic rights for refugees and asylum seekers?

The study found that South Africa's commitment to refugee protection is rooted in international and domestic legal frameworks,⁸²⁵ primarily the Constitution, which enshrines a broad array of socio-economic rights in its Bill of Rights.⁸²⁶ Section 7 emphasises the state's duty to 'respect, protect, promote and fulfil' these rights.⁸²⁷ Crucially, according to section 39, courts are obligated to consider international instruments when adjudicating or interpreting matters related to the Bill of Rights.⁸²⁸ For the purposes of refugee rights, these include the 1951 Convention, its 1967 Protocol, and the ICESCR, among others.⁸²⁹

⁸²⁵ Ziegler (note 2 above) 67.

⁸²⁶ Head of Department: Mpumalanga (note 85 above). *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

⁸²⁷ Section 7 of the Constitution.

⁸²⁸ Section 39(2) of the Constitution.

⁸²⁹ Hathaway (note 105 above) 54; Chirwa (note 91 above) 93-96.

The 1951 Convention advocates for refugees to receive the same favourable treatment as non-nationals in similar circumstances⁸³⁰ regarding housing,⁸³¹ education,⁸³² public-relief,⁸³³ wage-earning employment⁸³⁴ and self-employment.⁸³⁵ The ICESCR also sets out core obligations to guarantee minimum essential levels of each socio-economic right without discrimination.⁸³⁶ This includes ensuring access to essential food, basic shelter, primary healthcare, and basic education.⁸³⁷

Crucially, both the Constitution and the ICESCR emphasise progressive realisation, acknowledging that resource constraints may necessitate a phased approach.⁸³⁸ However, *Grootboom*⁸³⁹ stressed that this principle cannot justify inaction or indefinite postponement of basic needs fulfilment.⁸⁴⁰ The state must demonstrate ‘reasonable measures’ toward realising these rights, prioritising the needs of the most vulnerable. The ICESCR stipulates that the state has a duty to ensure the implementation of the rights protected within that Convention to the maximum of its available resources,⁸⁴¹ and that the state must still uphold the minimum core standards of socio-economic rights.⁸⁴²

If retrogressive measures are taken or existing measures are insufficient, the state must justify its resource allocation and demonstrate tangible progress.⁸⁴³

In sum, the study has identified that international law and the Constitution create a binding obligation on the state to realise socio-economic rights for refugees and asylum seekers progressively. To uphold the rule of law and the legitimacy of refugee law, the state must give effect to these binding obligations, thoroughly justifying any retrogressive measures.

⁸³⁰ Article 7 of the 1951 Convention.

⁸³¹ Article 21 states that: refugees shall be accorded the same treatment as nationals with respect to housing.

⁸³² Article 22 states that refugees should receive the same treatment as nationals regarding education, specifically at the elementary level.

⁸³³ Article 23 provides that refugees shall be accorded the same treatment as nationals in respect to public relief and assistance. This ensures that refugees have access to social welfare programs and support.

⁸³⁴ Article 17 of the 1951 Convention.

⁸³⁵ Article 18 of the Refugee Convention.

⁸³⁶ General Comment No 3 (note 130 above) para 1.

⁸³⁷ General Comment No 3 (note 130 above) para 1.

⁸³⁸ Article 2(1) of the ICESCR; Sections 26(2) and 27(2) of the Constitution.

⁸³⁹ *Grootboom* (note 149 above).

⁸⁴⁰ *Grootboom* (note 149 above).

⁸⁴¹ General Comment No 3 (note 130 above) para 1.

⁸⁴² Bilchitz (note 215 above) 11.

⁸⁴³ UN Committee on Economic, Social and Cultural Rights (note 654 above).

5.1.2 *To what extent has domestic legislation given effect to these obligations and impacted the access to the socio-economic rights of refugees and asylum seekers?*

In the first leg of the analysis, the study found that South Africa's legal framework reveals a complex interplay between commitments and domestic realities. The initial enactment of the Refugees Act⁸⁴⁴ marked a significant step towards aligning domestic law with international obligations, particularly the 1951 Refugee Convention.⁸⁴⁵ However, subsequent amendments in 2008 and 2017 introduced restrictive measures that have drawn criticism for undermining these initial strides.⁸⁴⁶

Notably, the omission of section 27(g) of the Refugees Act,⁸⁴⁷ which guarantees refugees access to healthcare and education, creates ambiguity and weakens their legal standing. While broader interpretations may still allow access, this change is detrimental. Additionally, section 27(c) of the Refugees Amendment Act⁸⁴⁸ now imposes a ten-year qualification period for permanent residency.⁸⁴⁹ This stands in contrast to the five-year period applicable to other foreign nationals seeking permanent residency under the Immigration Act.⁸⁵⁰ This discrepancy contradicts the 1951 Convention's stipulation that refugees should be treated similarly to other foreign nationals and undermines the principle of 'favourable treatment'.⁸⁵¹ This directly impacts their ability to access subsidised housing programs without permanent residency status, placing refugees at a systemic disadvantage.⁸⁵²

Amendments affecting asylum seekers include section 4(1)(i) of the Refugees Amendment Act, which requires asylum seekers to report to a RRO within five days of entering

⁸⁴⁴ Act 130 of 1998.

⁸⁴⁵ Section 6 of the Refugees Act 130 of 1998; O Mireku 'South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties' (2002) 35(3) *Law and Politics in Africa, Asia and Latin America* 399- 400.

⁸⁴⁶ Act 130 of 1998; Kavuro (note 33 above) 49-78; Ziegler (note 2 above) 67-106; Khan, Mbatani, Marais (note 20 above) 8-63.

⁸⁴⁷ Act 130 of 1998.

⁸⁴⁸ Act 11 of 2017.

⁸⁴⁹ Section 27(c) of Act 11 of 2017.

⁸⁵⁰ Act 13 of 2002; Kavuro (note 33 above) 62.

⁸⁵¹ Article 7 of the 1951 Convention; The 1951 Refugee Convention promotes the principle of 'favourable treatment,' advocating for refugees to receive treatment that is as favourable as possible, and, at least, no less favourable than that accorded to other non-nationals in similar circumstances. This principle applies to various aspects of refugees' lives, including housing, education, public relief, wage-earning employment, and self-employment. While the Convention doesn't mandate identical treatment, it aims to ensure refugees aren't disadvantaged compared to other foreign nationals within the host country.

⁸⁵² Kavuro (note 154 above) 82.

South Africa.⁸⁵³ This short timeframe generates anxiety for individuals fleeing persecution, risking unjust denial of legitimate claims.⁸⁵⁴

Additionally, section 22 of the Refugees Amendment Act⁸⁵⁵ now provides that asylum seekers are required to prove financial self-sufficiency to gain endorsement for the right to work on an asylum visa.⁸⁵⁶ However, administrative delays that leave applicants without a visa for unknown periods of time thereafter leave asylum seekers without the affixed endorsement of the right to work.⁸⁵⁷ This requirement, coupled with the flawed assumption that asylum seekers can rely on the UNHCR or charities for support, ignores the reality of limited resources and forces many without legal identity into precarious situations.⁸⁵⁸ This amendment contradicts the court's stance in the *Watchenuka*⁸⁵⁹ case which emphasised asylum seekers' right to work.⁸⁶⁰

While these legislative changes reflect a concerning trend of shrinking socio-economic rights for refugees, the proposed *White Paper*⁸⁶¹ signals a shift towards more restrictive policies. Human rights organisations and legal experts have raised key concerns. First, the proposed withdrawal from international agreements like the 1951 Refugee Convention raises serious questions about South Africa's commitment to human rights.⁸⁶² Secondly, this withdrawal violates the principle of non-regression, potentially stripping refugees of essential rights.⁸⁶³ Thirdly, the *White Paper's* emphasis on budget cuts and stricter regulations threatens already precarious access to socio-economic rights for asylum seekers.⁸⁶⁴ Fourthly, restricting avenues for permanent residency perpetuates temporary status, creating uncertainty for refugees.⁸⁶⁵

⁸⁵³ Ziegler (note 2 above) 82.

⁸⁵⁴ Ibid.

⁸⁵⁵ Act 11 of 2017.

⁸⁵⁶ Section 22 (8)–(11) of Act 11 of 2017.

⁸⁵⁷ Scalabrini Centre of Cape Town (note 346 above).

⁸⁵⁸ UN Committee on Economic, Social and Cultural Rights (note 654 above).

⁸⁵⁹ Ibid.

⁸⁶⁰ *Watchenuka* (note 283 above).

⁸⁶¹ United Nations (note 364 above): The UNHCR and CESCR have raised concerns that this amendment effectively denies asylum seekers the right to work and have urged the state to amend the legislation to ensure asylum seekers can support themselves.

⁸⁶² *White Paper* in GG50530 on 17 April 2024 (note 61 above).

⁸⁶³ SERI (note 377 above); Lawyers for Human Rights (note 380 above); Daily Maverick (note 380 above).

⁸⁶⁴ Ibid.

⁸⁶⁵ Ibid.

Finally, the focus on securitisation has been criticised for addressing systemic inefficiencies within the DHA while potentially exacerbating challenges faced by asylum seekers.⁸⁶⁶

In sum, domestic legislation in South Africa, while aiming to uphold international and constitutional obligations regarding refugee socio-economic rights, has demonstrably fallen short. Despite incorporating elements of the 1951 Convention, the Refugees Act⁸⁶⁷ has now been amended to include restrictive provisions that create barriers for refugees and asylum seekers attempting to exercise their rights. Rather than signifying improvement, the *White Paper* signals a further departure from these obligations. These shifts signal that the socio-economic rights of refugees are merely a peripheral concern. The increased bureaucratic requirements indicate the state's intention to make the asylum and refugee process more restrictive, highlighting two themes: limitations to pathways to permanent residency and hindering self-sufficiency through restrictions on the right to work. Ultimately, visions for integration of refugees into society have eroded.

5.1.3 *To what extent has state implementation given effect to these obligations and impacted the access to the socio-economic rights of refugees and asylum seekers?*

In the second leg of analysis, the study found that in order to uphold its integration model, South Africa is expected to facilitate effective systemic operations (reception, registration, and documentation), engage with refugees to foster integration within local communities, promote self-sufficiency, and protect their socio-economic rights, recognising their vulnerability.⁸⁶⁸

However, systemic failures, particularly within the RROs, have led to inefficiencies, excessive backlogs, and non-operational offices, leaving many asylum seekers undocumented. This lack of documentation denies them access to essential rights such as education, healthcare, and employment, forcing them into a cycle of illegality and vulnerability.⁸⁶⁹

Without documentation, asylum seekers are subjected to a cruel irony: the very system designed to protect them forces them into a cycle of illegality.⁸⁷⁰ Unable to access documentation due to systemic failures, they are then categorised as ‘illegal migrants’ under

⁸⁶⁶ Ibid.

⁸⁶⁷ Act 130 of 1998.

⁸⁶⁸ UNHCR (note 416 above).

⁸⁶⁹ Scalabrini (note 34 above).

⁸⁷⁰ Section 34 of Act 13 of 2002; Scalabrini (note 34 above).

the Immigration Act,⁸⁷¹ making them vulnerable to arrest, detention, and deportation.⁸⁷² This contradicts the principle of non-penalisation of illegal entry and undermines the protections afforded to asylum seekers.⁸⁷³

Moreover, a pervasive culture of exclusion and institutionalised xenophobia within government institutions further hinders refugees' integration and access to rights. Instead of fostering a protective environment, the state often views refugees as competitors for scarce resources, leading to a decline in their socio-economic rights.⁸⁷⁴

In sum, state implementation has seemingly deviated from the humanitarian principles enshrined in the Constitution and international law, not only hindering refugee integration but actively furthering their marginalisation.

5.1.4 *Are the state's limitations of socio-economic rights justified through the notion of limited resources?*

Cumulatively, through an analysis of the law and its implementation, the study identified that recurring infringements of socio-economic rights have been justified through the assertion of 'limited resources'. However, this rationale crumbles under scrutiny.

First, the state's conduct does not adhere to the standards of reasonableness devised in *Grootboom*,⁸⁷⁵ nor the minimum core obligations and use of maximum available resources of the ICESCR. Scholars aptly characterise the 'limited resources' defence as a superficial argument that sidesteps the complexities of socio-economic rights.⁸⁷⁶ The government evades

⁸⁷¹ Section 34 of Act 13 of 2002.

⁸⁷² Section 34 of Act 13 of 2002; *Scalabrini Centre of Cape Town* (note 34 above).

⁸⁷³ *Ruta* (note 490 above); *Saidi* (note 270 above); The need for frequent judicial intervention to uphold the rights of refugees underscores the systemic failure of administrative bodies to provide adequate protection.

⁸⁷⁴ Crush, Skinner & Stulgatis *Rendering South Africa Undesirable* (note 36 above) 16.

⁸⁷⁵ *Grootboom* (note 149 above) paras 30-45; The refugee regime fails to meet the following requirements (see chapter 4 above); legislative measures must be accompanied by concrete policies, programmes, and plans with clear short-term, medium-term, and long-term timelines; roles and responsibilities must be clearly defined across different levels of government; while implementation may be shared, the national government bears ultimate responsibility for ensuring programs effectively uphold constitutional rights; and crucially, programs must be designed and implemented to genuinely advance the realisation of the specific right(s) in question and provide relief for the vulnerable.

⁸⁷⁶ Mureinik (note 387 above) 472. Department of Home Affairs (note 632 above). The state's spending priorities expose the hollowness of the 'limited resources' argument. Concerted efforts for deporting undocumented foreigners, while the basic needs of refugees within the country remain unmet, reveals a misplaced emphasis on border control over humanitarian concerns. This prioritisation is compounded by a lack of transparency and accountability in budgetary decisions impacting socio-economic rights. The absence of legislative oversight and public participation in these critical processes allows economic policies to stray from constitutional obligations towards vulnerable groups, including refugees.

meaningful scrutiny of its priorities by failing to demonstrate how budgetary decisions align with constitutional mandates.⁸⁷⁷ The CESCR's critique of South Africa's fiscal policy further reinforces this point, highlighting its inadequacy in reducing inequalities and its lack of progressive redistribution.⁸⁷⁸ The persistence of these inequalities exposes the flaws in the current economic model. It underscores the need for a more just and equitable approach to resource allocation that prioritises the fulfilment of all individuals' socio-economic rights.⁸⁷⁹

Resource constraints, therefore, cannot be a *carte blanche* for inaction but rather a catalyst for progressive realisation through concrete legislative and policy measures. The state has thus fallen short of fulfilling its constitutional and international obligations under progressive realisation. In order to remedy this, the state must take concrete measures to fulfil the socio-economic rights of refugees. These are recommended below.

5.2 A path forward: actionable recommendations for a sustainable refugee regime

The regime's emphasis on restricting socio-economic rights under the pretext of '*limited resources*' has strayed from its humanitarian roots, compromising the rights of refugees and questioning the state's commitment to uphold human rights. To rectify this, it is crucial to realign the refugee regime with its foundational human rights principles but merely reviving a rights-based approach is insufficient. Sustainable solutions must be crafted that reconcile resource constraints while pursuing innovative and equitable methods to fulfil the rights and needs of refugees.

5.2.1 *Burden sharing*

A key factor contributing to the erosion of a rights-based approach to refugee protection is the disproportionate burden placed on South Africa due to regional mass migration.⁸⁸⁰ As discussed, African countries near conflict zones often bear a disproportionate responsibility for hosting refugees.⁸⁸¹ This 'accident of geography'⁸⁸² has strained South Africa's resources and

⁸⁷⁷ Ibid.

⁸⁷⁸ UN Committee on Economic, Social and Cultural Rights (note 654 above). Consequently, it recommended that South Africa review its fiscal policy and re-examine its growth model to pursue a more inclusive development pathway.

⁸⁷⁹ Mureinik (note 387 above) 472.

⁸⁸⁰ Willie & Mfubu (note 690 above) 555-557.

⁸⁸¹ Ibid.

⁸⁸² Hathaway & Neve (note 696 above) 115.

fuelled negative perceptions of refugees, particularly given the overwhelming demand to deliver on the socio-economic rights of its own citizens.⁸⁸³

It is crucial to advocate for establishing and strengthening regional burden-sharing mechanisms to address this imbalance.⁸⁸⁴ South Africa should actively engage in regional and continental dialogues to establish a more equitable system of responsibility-sharing.⁸⁸⁵ This could involve strengthening existing regional frameworks to include concrete burden and responsibility-sharing mechanisms.⁸⁸⁶ Additionally, promoting the harmonisation of refugee laws and policies within regional blocs is essential to ensure consistent standards of protection and prevent refugees from being disproportionately drawn to specific countries.⁸⁸⁷ Finally, advocating for increased financial and technical support from the international community to assist countries hosting large refugee populations is crucial for fostering a sense of shared responsibility.⁸⁸⁸

5.2.2 Embracing pathways to integration, economic inclusion and naturalisation

Poverty is a pervasive issue among displaced populations, exacerbated by limited access to employment and social protection systems.⁸⁸⁹ Therefore, it is crucial to prioritise refugee integration, particularly access to labour markets, as a key pathway out of poverty and towards self-reliance.⁸⁹⁰ This can be achieved by reviewing and amending legislation restricting access to the formal labour market, such as section 22 of the Refugees Amendment Act.⁸⁹¹ Thereafter, by shifting the narrative from refugees as a burden to refugees as economic actors, South Africa can create a more inclusive and prosperous society for all.⁸⁹²

While fostering self-reliance is important, it should not overshadow the significance of pathways to citizenship.⁸⁹³ Facilitating access to naturalisation and addressing legal and practical barriers are crucial in providing refugees with a sense of belonging and permanence

⁸⁸³ Willie & Mfubu (note 690 above) 555-557.

⁸⁸⁴ Ibid.

⁸⁸⁵ Ibid.

⁸⁸⁶ Ibid.

⁸⁸⁷ Ibid.

⁸⁸⁸ Ibid.

⁸⁸⁹ Malik (note 731 above).

⁸⁹⁰ Ibid.

⁸⁹¹ Act 11 of 2017.

⁸⁹² Schneiderheinze & Lücke (note 750 above) 7-19, 24-27.

⁸⁹³ Kanamugire (note 787 above) 289- 306; Khan & Ziegler (note 744 above) 289-305.

in their host country.⁸⁹⁴ This could involve reducing the residency requirement.⁸⁹⁵ Thus, by embracing naturalisation as a key element of a rights-based approach, South Africa can move towards a more just and sustainable system of refugee protection, fostering social cohesion and unlocking the full potential of refugees as members of society.⁸⁹⁶

5.3 Accountability and transparency in governance

While South African courts have consistently upheld the rights of refugees, translating these legal victories into tangible benefits has been hampered by a lack of institutional capacity and a tendency towards mechanical, rather than proactive, application of policies.⁸⁹⁷ The government must move beyond upholding legal principles and actively facilitate refugee integration.⁸⁹⁸ This requires a multi-pronged approach that prioritises enhanced accountability measures across all levels of government, holding institutions like the DHA responsible for their actions and ensuring compliance with court orders. Furthermore, fostering transparency through open communication channels and accessible information regarding refugee-related policies and budgetary allocations is crucial for building a more accountable and trustworthy system.

5.4 Concluding Remarks

Both domestic law and its implementation are plagued by symptoms that erode at the humanitarian ethos of international and constitutional refugee protections. These ailments threaten the very foundation of the rule of law and the overall legitimacy of the nation's refugee regime. The noble aspiration of a society where refugees are fully integrated and empowered to rebuild their lives is significantly hampered by the chasm between international and constitutional principles and the stark reality of South Africa's refugee framework. This discrepancy is further exacerbated by restrictive legislative amendments, systemic obstacles, and deeply ingrained institutionalised xenophobia. Consequently, the current regime is fraught

⁸⁹⁴ Ibid.

⁸⁹⁵ Section 27(c) of Act 11 of 2017.

⁸⁹⁶ Kanamugire (note 787 above) 289-306; Khan & Ziegler (note 744 above) 289-305.

⁸⁹⁷ Khan, Mbatani & Marais (note 20 above) 56-62; Moyo & Botha (note 43 above) 56-62.

⁸⁹⁸ Landau (note 817 above) 308-327.

with unfulfilled promises and a palpable sense of regression, casting a long shadow over the future of refugee rights in South Africa.

While the state often misdiagnoses these shortcomings, attributing them to “*limited resources*”, it fails to meaningfully engage with both its progressive realisation obligations and the root causes of this systemic illness. This study asserts that simply returning to a rights-based approach is insufficient to properly treat and rehabilitate the regime. Instead, targeted, systemic, and sustainable solutions are crucial to achieving a future where the promise of South Africa's progressive legal framework translates into lasting improvements in the lives of refugees. This requires the state to reconcile resource constraints with a commitment to innovative and equitable methods, such as burden-sharing, fostering pathways to integration, and establishing robust accountability mechanisms. Only through such comprehensive and transformative action can South Africa hope to bridge the gap between principle and practice and truly fulfil its obligations to those seeking refuge within its borders.

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Miss Fathima Docrat (224170706)
School Of Law
Howard College

Dear Miss Fathima Docrat,

Original application number: 00026128

Project title: Analysing the socio-economic implications of state failure to deliver on its legal obligations towards refugees: A constitutional and international law perspective

Exemption from Ethics Review

In response to your application received on 9 September 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,

Mr Matthew Blain Kimble
pp Academic Leader Research
School Of Law

UKZN Research Ethics Office
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Website: <http://research.ukzn.ac.za/Research-Ethics/>

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