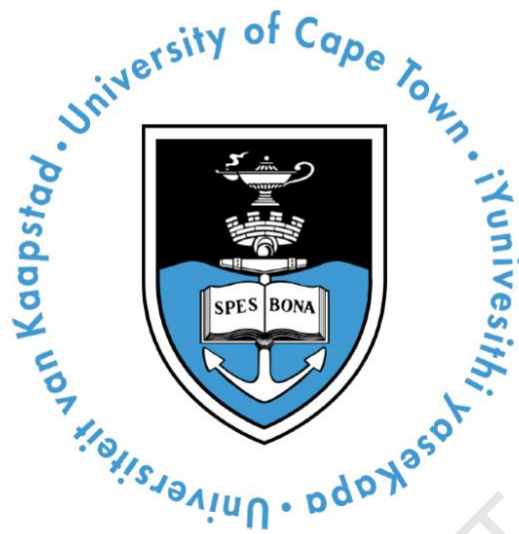


UNIVERSITY OF CAPE TOWN



The Criminalisation of Asylum Seekers: Arbitrary Detention in South Africa

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MPhil Human Rights Law

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the MPhil in Human Rights Law in approved courses and a minor dissertation.

The other part of the requirement for this qualification was the completion of a programme of courses. I hereby declare that I have read and understood the regulations governing the submission of MPhil in Human Rights Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

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ACRONYMS

ACHPR – African Charter on Human and People’s Rights
DHA – Department of Home Affairs
DSW – Department of Social Welfare
ICCPR – International Covenant on Civil and Political Rights
IDC – International Detention Coalition
LHR – Lawyers for Human Rights
MHA – Minister of Home Affairs
RAB – Refugee Appeals Board
RRO – Refugee Reception Offices
RSDO – Refugee Status Determination Officer
SADC – South African Development Community
SAHRC – South African Human Rights Commission
SAPS – South African Police Service
UDHR – Universal Declaration of Human Rights
UN – United Nations
UNGA – United Nations General Assembly
UNHCR – United Nations High Commissioner for Refugees
WGAD – Working Group on Arbitrary Detention

I INTRODUCTION

Enshrined in Article 9 of the 1948 Universal Declaration of Human Rights (UDHR), is the universal right entitling all people to be free from arbitrary detention.¹ Article 9 asserts that ‘[no]one shall be subjected to arbitrary arrest, detention or exile.’² Additionally, everyone has the right to seek asylum from persecution in another country, as declared in Article 14 of the UDHR.³ The UDHR was established by the United Nation’s General Assembly (UNGA) in 1948. While it informs the broader international human rights framework, it remains a non-enforceable human rights doctrine.⁴ Central to the UDHR is that these rights must be extended to all persons, regardless of nationality, race, sex and other discriminatory elements. The UDHR was the precursor to the 1951 Convention Relating to the Status of Refugees (1951 Convention); the foremost legislative document providing for the rights and guaranteed protection of refugees under international law.⁵ Under the 1951 Convention, refugees are specifically protected from inhumane treatment, discrimination, and arbitrary detention. Article 31 of the 1951 Convention relates to the ‘non-penalization, detention and protection of refugees,’ thus ensuring the right to freedom from arbitrary detention, freedom of movement, and security of person. It also prohibits contracting states from imposing penalties on refugees for their illegal entry or presence in a country where they seek protection.⁶ Despite these provisions and other pertinent international laws which prohibit the arbitrary detention of asylum seekers, these vulnerable persons are regularly detained throughout Europe, Australia, North America and South Africa (to name a few).⁷

Since the 1994 democratic transition, South Africa has become a leading destination for asylum seekers and refugees from across the African continent. South Africa’s refugee system was inspired by international human rights law and attempts to encompass a humanitarian-based approach. It has become increasingly evident that a prominent feature of South Africa’s contemporary asylum seeker system is the continued use of arbitrary detention

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, A/RES/217 (III).

² Ibid

³ Ibid Article 14

⁴ Ibid

⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

⁶ Ibid

⁷ Guy S. Goodwin-Gill ‘Article 31 Of The 1951 Convention Relating to The Status of Refugees: Non-Penalization, Detention and Protection’ (2001) A Paper Prepared at The Request of The Department of International Protection for The UNHCR Global Consultations. UDHR. Available at <http://www.unhcr.org/3bcfdf164.pdf>.

as a primary tool of immigration enforcement.⁸ Largely due to the erroneous implementation of the Refugee Act, there is an uneasy coexistence of immigration control imperatives in the asylum system.⁹ This convulsion has resulted in a system that does not provide adequate protection to asylum seekers. Despite this, South Africa's progressive legislation has the potential to establish a humanitarian-based approach to the challenges posed by the increase in asylum seekers. As such, it is crucial for the country to address its continued use of detention.

Under international law, seeking asylum is not unlawful and cannot be grounds for detainment of asylum seekers.¹⁰ However, it is widely acknowledged that the illegal entry of asylum seekers into states poses a challenge. Using arbitrary detention to mitigate the challenges associated with influxes of asylum seekers remains a contentious issue.¹¹ Additionally, states are subject to both the national and international norms they are party to, which dictate the treatment of asylum seekers. If detention does occur it must be done according to the standards and frameworks set forth by international and domestic law. International law frameworks include the UDHR, 1951 Convention, and guidelines established by the Office of the United Nations High Commissioner for Refugees (UNHCR).¹² These authoritative bodies assert that detention can only be resorted to in exceptional cases and with legitimate reasons. Without factual and substantial justification, detention is intrinsically considered arbitrary and is therefore unlawful.¹³

The two most significant international documents establishing the rights of asylum seekers and refugees in South Africa are the 1951 Convention and the 1967 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa

⁸ Lawyers for Human Rights 'Monitoring Immigration Detention in South Africa' (2008). Available <<http://www.lhr.org.za/publications/monitoring-immigration-detention-south-africa-2008>>

⁹ Corey Johnson 'Failed Asylum Seekers in South Africa: Policy and Practice' (2015) African Human Mobility Review. Scalabrini Institute for Human Mobility in Africa. Available at <http://sihma.org.za/wp-content/uploads/2015/09/AHMR-Vol-1-No-2-May-August-2015-docx.pdf>

¹⁰ Alice Edwards 'Back to Basics: The Right to Liberty and Security of Person And 'Alternatives to Detention' Of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (2011) Legal and Protection Policy Research Series UNHCR. Available at <http://www.unhcr.org>, accessed 17 October 2017

¹¹ United Nations High Commissioner for Refugees. 2015. "Policy on Detention Monitoring". UNHCR. <http://www.unhcr.org/detention>. at 7

¹² United Nations Human Rights Office of the High Commissioner. Available at <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>

¹³ UN High Commissioner for Refugees (UNHCR), 'Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention' 2012 at 16

(OAU Convention).¹⁴ The inclusion of the OAU Convention is important as it expands on the 1951 Convention and modifies the existing legislation on refugees to better suit aspects of refugee problems specific to Africa.¹⁵ Domestically, when dealing with the entry of asylum seekers into its country, South Africa refers to its Refugee Act in conjunction with its Immigration Act. The purpose of this paper is to provide an in-depth analysis of South Africa's use of arbitrary detention as an immigration tool. The research focuses on how the misapplication of immigration legislation in the asylum system has created an ineffective asylum process that criminalises the act of seeking asylum.

(a) Research topic and significance

The topic of this paper is the criminalisation of asylum seekers through arbitrary detention in South Africa. Broadly interpreted, the term detention refers to the deprivation of liberty through confinement, arrest, or limiting freedom of movement.¹⁶ Additionally, any form of detention must comply with international and domestic legislation. Any form of nonconformity is considered unlawful under international and domestic law.¹⁷ However, the issues of asylum seekers and detention are controversial as they involve the upholding of international standards by sovereign states. Sovereignty is a cornerstone of state governance and often supersedes the implementation of international law, as states have discretion in controlling entry to their territory. The contradictory nature of the right to seek asylum – without the corresponding obligation on states to guarantee asylum – highlights the tensions between territorial sovereignty and international law. These tensions are particularly evident in asylum management. By analysing the sources and consequences of these contentions, the overlap between international and domestic law can be delineated with regards to asylum seekers.

The first central theme of this paper is the nexus between arbitrary detention and the deprivation of liberty. The normative frameworks that inform international and South African legislation are central to this discussion, as they form the structure and subsequent implementation of legislation that fails to protect asylum seekers from arbitrary detention. The second central theme of this paper is the notion of 'criminalising' asylum seekers, which

¹⁴ Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45

¹⁵ This is elaborated upon at a later stage

¹⁶ United Nations High Commissioner for Refugees op cit note 19

¹⁷ Ibid at 14

includes an analysis of the criminalisation cycle through the application of South Africa's Immigration Act in conjunction with its Refugee Act.

(b) Study object

The object of this research is South Africa's Immigration Act and the Refugee Act. The use of these two acts simultaneously has resulted in ineffective protections for asylum seekers. This is largely evident in the increased use of arbitrary detention. The reason for this research's focus on asylum seekers is due to the absence of adequate protections extended to asylum seekers as a result of not having refugee status. Vulnerable groups of people such as asylum seekers are more likely to be arbitrarily detained. In addition to this, they face many challenges when entering territories, accessing due process, and obtaining documentation. This paper contributes to research on the South African asylum system, the use of detention as an immigration tool, and finding alternatives to detention in South Africa. It provides alternatives to detention and recommendations for better managing the asylum system in South Africa. Importantly, this paper focuses on the need to situate the right to be free from arbitrary detention and the right to remedies, solutions, and procedural due process more substantially into existing human rights law.¹⁸ This research intends to identify the nexus between arbitrary detention and criminalisation and to exemplify the negative consequences of an ineffective asylum system on asylum seekers and their right to dignity and protection.

(c) Research problem

The main problem that is analysed in this research is the criminalisation of asylum seekers through arbitrary detention in South Africa. This research will attempt to analyse the implications of criminalising the act of seeking asylum.

(d) Research question

How has the use of arbitrary detention in South Africa criminalised asylum seekers and what are the implications of this process?

(d) (i) Sub-questions

¹⁸ Goodwin-Gill, Guy S. op cit note 7 at 197

To answer the main research question, this paper will analyse two sub-questions. What roles do the Refugee Act and the Immigration Act play in the asylum process in South Africa? What alternatives to detention are most applicable in the case of South Africa?

(e) Research objectives

This paper explores the tensions between existing human rights protections for asylum seekers found in international legislation and gaps in those protections in national legislation in South Africa. It discusses the uneasy relationship between South Africa's immigration and asylum laws and, in doing so, assesses immigration enforcement measures, administrative control mechanisms, and illegal actions taken by South African officials. The reasons for detention are categorised into three components to delineate how detention occurs and why it is considered arbitrary: 1) the illegal entry or presence of asylum seekers, 2) the misapplication of the law, and 3) the use of arbitrary detention as an administrative tool for immigration control. After discussing how arbitrary detention has been used as the primary tool for immigration enforcement in South Africa, the research will analyse how this process has resulted in the criminalisation of asylum seekers and will examine the implications and impact of these measures.

(f) Main thesis

A solution to the use of arbitrary detention in South Africa is the reformation of the country's current state practise and its implementation of international and national refugee law. In South Africa, the progressive nature of refugee legislation is undermined by the erroneous application of immigration law to asylum-seeking situations. Through effective management of the asylum process and the use of viable alternatives to detention, South Africa can better utilise its Refugee Act to protect asylum seekers. Reforming the current institutions can alter public perception and prevent the criminalisation of seeking asylum.

(g) Research methodology

The bulk of this paper's research was obtained from the analysis of both legislative and substantive documentation. The three classifications of literature used are a) legal frameworks, b) academic scholars and organisations, and c), cases, websites and news sources. The legal frameworks include international law and conventions, African

conventions and South African law. All legislation was analysed with a specific focus on the normative frameworks that dictate the treatment of asylum seekers. Some of the important international normative frameworks are the UDHR, the 1951 Convention, and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).¹⁹ Others include the International Covenant on Civil and Political Rights (ICCPR),²⁰ the 1984 UN General Assembly Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),²¹ the 2003 UN General Assembly Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT)²² and, The African conventions include the OAU Convention and the 1981 African Charter on Human and People's Rights (ACHPR).²³ All the above-mentioned conventions refer to the right to liberty, freedom of movement, freedom from discrimination, and freedom from detention. In addition to the conventions, the guidelines created by the UNHCR relating to the treatment of asylum seekers, status determination of refugees, and detention of asylum seekers provide crucial practical elements to the treatment of asylum seekers. The United Nations database, website, and Refworld provided most of the legislation and treaties relevant to this research.

Domestically, the South African legislative frameworks include the 1996 Constitution and Bill of Rights,²⁴ 1998 Refugee Act, Act 130,²⁵ and Act 13 of the 2002 Immigration Act.²⁶ The Refugee Act is one of the most progressive acts in South Africa. However, the analysis of the South African case illustrates the ineffective implementation of the Act and the consequent asylum system that violates human rights standards. The Immigration Act is fundamental as it pertains to the entry of any foreigner into the country. However, the Immigration Act and Refugee Act are applied simultaneously and inconsistently, the result

¹⁹ UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

²⁰ UN General Assembly, International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171.

²¹ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 available at <https://www.refworld.org/docid/3ae6b3a94.html>

²² UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199,

²³ Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

²⁴ Constitution of the Republic of South Africa, 1996. The interim Constitution remains the Constitution of the Republic of South Africa, Act 200 of 1993.

²⁵ South Africa: Act No. 130 of 1998, Refugee Act, 1998 [South Africa], 26 November 2008

²⁶ South Africa: Act No. 13 of 2002: Immigration Act [South Africa] 31 May 2002

of which is a system that limits the rights and access to due process for asylum seekers in the country.

Multiple international and national organisations have produced work relevant to asylum seekers and arbitrary detention. Nationally, the University of Cape Town's Refugee Law Clinic provides basic guidelines for asylum seekers in South Africa to access the asylum process. Lawyers for Human Rights (LHR), The Scalabrini Centre, and the South African Human Rights Commission (SAHRC) also provide research. They have initiated investigations into the South Africa asylum system, arbitrary detention, detention facilities, and detainee treatment. Internationally, the Working Group on Arbitrary Detention (WGAD), International Detention Coalition (IDC) and Amnesty International also provide relevant research. Specific South African case law is often referred to in order to exemplify the disputed application of the law in South Africa. The case law was sourced from the South African Legal Information Institute (SAFLI)²⁷ database. In addition to these legislative documents, this paper draws on multiple sources from interdisciplinary fields. Literature was sourced and accessed through the database platforms of JSTOR, EBSCO, and Taylor and Francis. This was supplemented by reports, news articles, NGO press releases, and media sources. These were gathered from various scholars, academic institutions, and online platforms. Some key academic scholars who address asylum seeker and refugee rights both internationally and within the South African context are Guy.S Goodwin-Gill, James C. Hathaway, Jeff Handmaker, Fatima Khan, David Cote, Wessel le Roux, and Alice Edwards.

(h) Structure of the paper

The structure of the research consists of an introduction, four sections of analysis, and a conclusion. Chapter II analyses the international normative frameworks of refugee and asylum law, specifically those about detention and deprivation of liberty. It elaborates on the development of the term *asylum seeker* and explains how the definition of a refugee was further developed by the OAU Convention. Chapter III is a case study of South Africa. It examines the legal frameworks of South African immigration and refugee law. It provides an analysis of the application of refugee and immigration law in South Africa and critically analyses the use of detention as the first port of call. The chapter illustrates the asylum process, South Africa's obligations to asylum seekers under domestic and international law,

²⁷ South African Legal Information Institute available at <http://www.saflii.org/>

and ensuing issues within South Africa's asylum system. Chapter IV examines the criminalisation of asylum seekers and the implications of arbitrary detention as a criminalising mechanism. Through a brief outline of what the criminalisation cycle is and how it functions, the chapter analyses how the cycle of arbitrary detention is perpetuated in South Africa. This section highlights how criminalisation creates an environment in which asylum seekers are subject to violence, xenophobia, and limited access to due process and resources. Finally, the Conclusion illustrates the main findings of the research and recommends alternatives to detention that are relevant to South Africa.

II INTERNATIONAL LAW

Arbitrary detention means to detain an individual on no legal basis.²⁸ This chapter analyses the international and regional frameworks that establish the human right to be free from arbitrary detention. By examining the nexus between arbitrary detention and the deprivation of liberty, the human rights denied through arbitrary detention will be analysed. Following this, the universal right to seek asylum will be discussed, this will highlight the discrepancy between the right to seek asylum and the lack of state obligation to provide asylum. This, to a large extent, explains the disjuncture between international human and refugee's law and the absence of corresponding national practise in South Africa. Lastly, this chapter analyses the relevant theoretical frameworks relating to the core reasons for detention as determined by this paper, (a) illegal entry, (b) documentation and (c) administrative. Essentially, this chapter analyses how international law protects, and subsequently fails to protect, asylum seekers from arbitrary detention.

(a) Understanding the notion of arbitrary

The term 'arbitrary' is central to this paper, it is the point at which detention is no longer legally justifiable and is therefore considered unlawful. This research refers to the work of the WGAD in determining unlawful detention. The group mandate provides that detention is considered arbitrary when the deprivations of liberty, security of person and freedom, are 'contrary to relevant international provisions laid down in the Universal Declaration of Human Rights or the relevant international instruments ratified by States.'²⁹

²⁸ Front Line Defenders 'Arbitrary Detention' available at <https://www.frontlinedefenders.org/en/violation/arbitrary-detention>

²⁹ OHCHR 'Working Group on Arbitrary Detention' Ohchr.Org, Available at <https://www.ohchr.org/en/issues/detention/pages/wgadindex.aspx>.

Detention is considered arbitrary when it contravenes the international and national norms dictating appropriate detention. However, detention is not arbitrary if it is consistent with domestic law and international standards, and is conducted per the standards and procedures of legal due process. The WGAD provides three elements in which to determine the arbitrariness of detention. a) In situations where it is impossible to invoke any legal justification for the arrest, detention and deprivation of liberty of the individual. b) In a situation where the acts that have resulted in detention and the deprivation of liberty are not in accordance with the rights guaranteed by the UDHR and other human rights frameworks. c) In the absence of total or partial judicial oversight or adherence to international norms relating to the right to a fair trial and due process, it is then considered arbitrary in nature.³⁰ Should the detention of an asylum seeker meet these criteria, it is considered arbitrary and therefore unlawful.

(b) Asylum seekers and the 1951 Convention

The 1951 Convention was established post-WWII, it is orientated towards dealing with the circumstantial refugee crisis of the time. ³¹ The term refugee is defined in Article 1 A(2) of the 1951 Convention which states that a refugee is someone who

‘[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’³²

Despite the Euro-centric nature of the 1951 Conventions definition of a refugee, four principles of what characterises a refugee can be elucidated, 1) the individual must be outside their country of nationality. 2) They must have a well-founded fear of persecution due to their 3) race, religion, nationality, or membership of a particular group or political opinion, and 4) are unable or unwilling to seek or avail themselves to the protection of their country of origin, or the country is unable or unwilling to provide protection to them. However, as this definition remains Eurocentric and Western, its focus is predominantly on civil and political rights of individuals without consideration for the equally important socio-economic rights. The 1951 Convention definition is therefore limited and outdated in a contemporary context

³⁰ Ibid

³¹ 1951 Convention, op cit note 5

³² Ibid Article 1

as it extends protection to certain groups of people and provides a closed list on the types of persecution once must face to be considered a well-founded fear.

This evident lack of adequate protection was a significant consideration in the drafting of the 1969 OAU Convention, the OAU Convention is the first regional Convention to expand upon the original 1951 Convention definition.³³ One such way it did so was to include the term ‘ethnic group’ as a factor of persecution. It inherently changed the perception of refugees and made the term refugee more applicable to the specific African context. This monumental milestone in refugee protection legitimated the different reasons for persecution and provided a broader framework in which to classify refugees, it has allowed for a more substantial interpretation of the 1951 Convention.

However, the term ‘asylum seeker’ is not included or mentioned in the 1951 Convention, the 1967 Protocol, or the OAU Convention. This is a cause for concern as it intrinsically limits the effectiveness of these Conventions when applied to asylum seekers. Although there is no clear-cut universal definition of the meaning of asylum, the term asylum seeker refers to those who seek international protection and are in the process of attaining refugee status. Notably, they are not formally recognised as refugees.³⁴ In principle, not all asylum seekers are refugees though, all refugees were once asylum seekers.³⁵ Asylum seekers are those whose refugee status has not been determined according to Article 1 of the 1951 Convention. As such they are considered people who ‘would have applied for asylum because returning to his or her country would lead to persecution on account of race, religion, nationality or political beliefs.’³⁶ Therefore the term asylum seeker encompasses any persons who have entered a host country, be it illegally or lawfully, and established their intent to apply for refugee status, or have applied and are awaiting the outcome of their application.³⁷

Despite this omission, the 1951 Convention definition of refugee remains the primary tool in which to identify refugees, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status interprets this to mean that should an individual meet this

³³Ibid

³⁴ Amnesty International ‘Do you know the difference between a refugee and an asylum seeker? The most common refugee terminology explained’ (updated 2019) available at <https://www.amnesty.org.au/refugee-and-an-asylum-seeker-difference/>

³⁵ Ibid

³⁶ Ibid

³⁷ The term ‘asylum seeker’ will be discussed in Chapter 2

criterion, they are considered a refugee under the 1951 Convention.³⁸ Hence, individuals who enter a territory and claim to be refugees, even without an evaluation of the claim, are considered asylum seekers. They remain asylum seekers as long as their application is under consideration.³⁹

(c) Applicable international normative frameworks

Under the UDHR all human rights are universal and indivisible – meaning the political and civil rights cannot be separated from the social-economic and cultural rights. They are integrated, interdependent and inalienable, therefore no person can be denied these rights.⁴⁰ Unfortunately, the de facto extension of these rights to many vulnerable groups has been a controversial topic. Derogations and reservations can only be exercised in specific circumstances and, even in these circumstances, the core human rights apply at all times. In addition to the UDHR and 1951 Convention, they feature in the Covenant on Civil and Political Rights (ICCPR)⁴¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴² The Human Rights Committee (HRC)⁴³ has also identified and interpreted the core human rights and has provided an authoritative interpretation of them. Although not a core right, General Comment 24 by the HRC clarifies that states may not reserve provisions in Covenants that represent customary international law, such as arbitrarily arresting and detaining persons.⁴⁴ It is well established in human right law that freedom from arbitrary detention is a rule of customary international law, the HRC articulates this right as peremptory and a Jus-Cogen⁴⁵ norm and therefore non-derogable.⁴⁶ Similarly, the right to be free from deprivation of liberty is also a non-derogable right. The intertwined nature of these two fundamental human rights, outline the numerous other rights linked to arbitrary

³⁸UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3 available at <https://www.refworld.org/docid/4f33c8d92.html>

³⁹ Amnesty International op cit note 34

⁴⁰ Jonathan Crush ‘The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa’ (2001) *International Migration* 38 at 3

⁴¹ ICCPR op cit note 20

⁴² UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, *United Nations, Treaty Series*, vol. 993, p. 3

⁴³ United Nations Human Rights Office of the High Commissioner. Available at <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>

⁴⁴ UN Office of the High Commissioner for Human Rights (OHCHR), *The Core International Human Rights Treaties*, 2014, ISBN-13: 978-92-1-154202-8, available at: <https://www.refworld.org/docid/52fa3be54.html>

⁴⁵ JUST COGEN

⁴⁶ DEFINE NON_DEROGABLE Maryam Ishaku Gwangndi and Abubakar Garba ‘The Right to Liberty under International Human Rights Law: An Analysis’ (2015) *Journal of Law, Policy and Globalization* (37) at 213

detention. This nexus exemplifies the duty to protect asylum seekers under international human rights law and international refugee law. The WGAD stresses the connection between detention and the deprivation of liberty and in doing so analyses the importance and necessity of detention being used as a last resort.⁴⁷

(c) (i) The right to seek and enjoy asylum

Article 14(1) of the UDHR states that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.'⁴⁸ Originally, the term 'and be granted' was used instead of the word 'enjoy,' however, this was a point of conflict as it brought to light the issue of state sovereignty. The act was subsequently amended and instead the term 'enjoy asylum' was used. This is emblematic of the role of state sovereignty plays in international law and the tension that results from the intersection of non-derogable rights and state sovereignty. This tension stems from the original wording as it obligated states to provide and grant asylum. Yet the amendment removed this obligation on states, instead, it inferred that it was the duty of states to grant asylum. As a result, states are not obligated to grant asylum under international law, they are merely encouraged to do so as a moral duty to humanity. This conflicts with the universal right to seek asylum and, as a result of this disparity, the 1967 UN Declaration on Territory Asylum was formed.⁴⁹ The 1967 Declaration was mindful of Article 14 of the UDHR, yet encouraged states to interpret Article 14 in conjunction with the UDHR Article 13(2) which proclaims that '[e]veryone has the right to leave any country, including his own, and to return to his country.'⁵⁰ In doing so, it recommended that states base their practices relating to territorial asylum on the principle and understanding that granting asylum is the exercising of state sovereignty.⁵¹ Likewise, the ACHPR in Article 12(2) mentions everyone has the right to leave any country including one's own, Article 12(3) states that everyone has the right to seek asylum and, Article 12(4) clarifies that an individual may only be expelled (from a territory) for reasons in accordance to the law.⁵² Similarly, the OAU Convention refers to the right to asylum in Article II(2) emphasising that '[t]he granting of asylum to refugees is a peaceful and humanitarian act and shall not be

⁴⁷ Alternatives to detention is discussed at a later stage

⁴⁸ UDHR op cit note 1

⁴⁹ UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII)

⁵⁰ UDHR cit note 1 Article 13(1)

⁵¹ 1967 Declaration on Territorial Asylum op cite note 49

⁵² ACHPR op cit note 6

regarded as an unfriendly act by any Member State.’⁵³ Additionally, Article II(1) stressed that states must use their best endeavours, consistent with their national legislation, to receive refugees and secure their settlement based on the definition of a refugee as stated in Article I.⁵⁴ It was also acknowledged that refugee-specific cases must be considered in conjunction with Article 6 of the ACHPR, which refers to the right to liberty and security of persons, specifically prohibiting arbitrary detention.⁵⁵ This is in addition to the provision prohibiting arbitrary detention in Article 9 of the ICCPR.⁵⁶ Principally, these conventions and articles extend to all people. The OAU Convention explicates that not only are refugees and asylum seekers subject to the protection stipulated in the convention, but they are also guaranteed protection from deprivation of liberty and arbitrary detention as people under the broader human rights framework. Nonetheless, in the application of international law, the rights of asylum seekers are not often interpreted within the broader human rights framework and, therefore asylum seekers have limited protection.

The right to seek asylum is primarily founded on the basis that a state may not lay claim to own its nationals or residents and, therefore an individual has the right to leave their country of origin in pursuit of asylum.⁵⁷ This contributes to the rights of liberty, freedom, and security of person – and emphasises the right to seek asylum. Even though the UDHR and other international human rights frameworks are not a legally binding instruments, they are intended to set forth the ‘inalienable and inviolable rights of all members of the human family and [to constitute] an obligation for the members of the international community.’⁵⁸ They encourage the adherence to human rights norms by instilling a sense of obligation to all people. Yet, a huge problem is the discrepancy between the right to seek asylum and the corresponding duty to provide asylum. The lack of substantive legal content guaranteeing asylum is evident in the fact that the right to seek asylum is not mentioned in the 1951 Refugee Convention. Instead, the 1951 Convention states that it is grounded on the principle of Article 14 in the UDHR, the intention being that the 1951 Convention should be interpreted within the broader human rights framework.⁵⁹ Without the substantive content, interpreting the 1951 Convention in isolation negates the universal right to seek asylum. The

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ ACHPR op cit note 67 Article 6

⁵⁶ Ibid Article 9

⁵⁷ Roman Boed op cit note 40 at 6

⁵⁸ Ibid at 6

⁵⁹ 1951 Convention op cit note 5 preamble

1951 Convention does not mention the right to grand asylum either, instead, it reaffirms that states are sovereign entities and therefore have the right to control entry into their territories.⁶⁰

Similarly, the OAU Convention addresses granting asylum within the context of state sovereignty. The Convention does not include the right to seek asylum creating a lacunae in refugee law concerning asylum seekers. The Convention only refers to the duty to grant asylum in relation to state sovereignty limiting the protection the convention aimed to provide. The challenge of balancing state sovereignty and international obligations was largely addressed by the right to non-refoulement.⁶¹

(c) (ii) Arbitrary detention and the deprivation of liberty

The detention of asylum seekers is not new, whether for administrative purposes or as a consequence of the criminalisation of seeking asylum – the use of detention is an unprecedented global phenomenon. There is a growing trend amongst states who are inundated with asylum seekers to make seeking asylum a criminal offence by criminalising their unlawful or irregular entry or presence in a territory. The result of this trend renders asylum seekers subject to the refugee system, in conjunction with the criminal justice system.⁶² Detention due to documentation is also a common occurrence, asylum seekers who have no permits, expired permits or, no documentation are often criminalised. This is despite mechanisms that elucidate that the lack of permits or expired permits do not contravene international and domestic laws when concerning asylum seekers.⁶³ Another principle reason detaining asylum seekers is for administrative purposes, primarily to determine asylum status. However, asylum determination must be conducted on a case-by-case basis to justify the expulsion or deportation, therefore detention cannot be used as a tool in which to identify the applicant's status.⁶⁴

⁶⁰ Catherine Phuong 'Identifying States' Responsibilities towards Refugees and Asylum Seekers' (2005) *European Society of International Law Research*. Available at <http://www.esil-sedi.org/english/pdf/Phuong.PDF>. Accessed on 17 October 2018

⁶¹ Non-refoulement is discussed at a later stage

⁶² Stefanie Grant 'Immigration Detention- Some Issues of Inequality' (2011) *The Equal Rights Review* 7 at 69. Available at <http://www.corteidh.or.cr/tablas/r27135.pdf>

⁶³ Documentation is discussed at a later stage

⁶⁴ Ibid

Article 3 of the UDHR states that '[e]veryone has the right to life, liberty and security of person,'⁶⁵ this is similarly mentioned in Article 9(1) of the ICCPR.⁶⁶ Articles 2-5 of the ICCPR assert that individuals detained have a right to be informed of the reasons for arrest and, are entitled to due process and compensation for unlawful arrest.⁶⁷ The ICCPR provides a nexus point between the deprivation of liberty and arbitrary detention, it emphasises that unless on just grounds and in accordance to the law, detention is considered arbitrary as it is a deprivation of liberty. Article 9 of the ICCPR does not prohibit immigration detention, it merely prohibits unlawful and arbitrary detention.⁶⁸ In General Comment 29, the HCR identifies Article 9(1) of the ICCPR as a peremptory norm and accordingly prohibits the derogation of it. Linking arbitrary detention and the deprivation of liberty exemplifies the other violations of human rights when arbitrarily detaining individuals. Although the UDHR does not clearly elucidate this link, Article 9 declares that '[n]o one shall be subjected to arbitrary arrest, detention or exile,'⁶⁹ essentially guaranteeing the fundamental right to be free from arbitrary detention.

Another imperative relation is between the right to liberty and freedom of movement. Article 13(1) and 13(2) of the UDHR outlines how freedom of movement supports the right to liberty and to seek asylum.⁷⁰ In doing so it positions individual autonomy as a human right and central to the broader human rights framework. Freedom to leave one's own country is generally considered modern customary international law and is mentioned in Article 12(2) of the ICCPR which proclaims that '[e]veryone shall be free to leave any country, including his own.'⁷¹ The United Nations Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities further vindicated this right.⁷² The right to freedom of movement is recognised in multiple international treaties, including the Convention on the Elimination of Racial Discrimination (CERD) Article 5D(i)⁷³, the Convention on the Elimination of Discrimination against Women (CEDAW) Article 15(4)⁷⁴,

⁶⁵ UDHR op cit note 1 Article 3

⁶⁶ ICCPR op cit note 20 Article 9

⁶⁷ ICCPR op cit note 20

⁶⁸ ICCPR op cit note 20

⁶⁹ UDHR op cit note 1

⁷⁰ Ibid

⁷¹ ICCPR op cit note 20

⁷² Roman Boed op cit note 40 at 7

⁷³ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195,

⁷⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 19 December 1979, 1249 U.N.T.S. 13.

and Article 39(1) of the UN Convention Protection of the Rights of All Migrant Workers.⁷⁵
Article 26 of the 1951 Convention states that

‘[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.’⁷⁶

However, the application of territorial sovereignty has negated the obligation to freedom of movement. Freedom of movement is intricately linked to liberty and, therefore supports the right to be free from arbitrary detention. This link is not present in many conventions, this has limited the extent of the protection extended to asylum seekers and the scope for interpretation.

Critically, neither the 1951 Convention or the 1967 Protocol, mention or show the nexus between the deprivation of liberty and arbitrary detention. In summation, the UDHR and the ICCPR are the only treaties that directly prohibit arbitrary detention. More often, arbitrary detention has been indirectly mentioned as in the CAT, OPCAT and, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Alternatively, the right to liberty is mentioned in the UDHR, ICCPR, CAT, OPCAT and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, providing significant emphasis on liberty as a human right. However, the right to be free from detention and deprivation of liberty is not mentioned in the OAU Convention, the ACHPR, the Protocol to the African Charter on Human and Peoples' Rights, or The Rights of Women in Africa (Maputo Protocol).⁷⁷

The inconsistent proclamation of specific rights creates gaps in the international human rights framework and allows for the negation of rights when conventions and laws are not interpreted in conjunction. It is commonly understood that international law should be applied in conjunction with other applicable conventions, however, without explicitly mentioning these rights in the legislation, there is greater potential for state contravention of

⁷⁵ UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158

⁷⁶ 1951 Convention op cit note 5

⁷⁷ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003

these rights. A primary element in the contention surrounding arbitrary detention, liberty and freedom of movement lies within the notion of state sovereignty.

(c) (iii) Analysing the issue of state sovereignty

International law acknowledges states as sovereign entities and their discretion to determine who can enter their territory. Paramount to the international obligations of states is their sovereignty and, to a large extent, international legislation has been drafted to avoid the tension between international law and state sovereignty. The 1951 Convention recognises the tension between international obligations and state sovereignty. The right to asylum and lack of corresponding duty to provide asylum was addressed in Article 31 which specifically refers to special circumstances wherein states are obligated to grant entry into their territory as refugees are vulnerable people in need protection. Yet sovereignty is still the foremost mechanism for the regulation of people's movement across state boundaries. A fundamental issue is the discrepancy between legislation and practise, the UN monitoring body on detention describes how many states lack legal regimes and oversight governing and monitoring immigration and asylum procedures. Other states apply inappropriate laws and many use detention as a deterrence strategy.⁷⁸ Although states have the sovereignty to determine who enters their territory, states are also obligated to adhere to the treaties and conventions they are party to.

(d) International mechanisms to protect asylum seekers

The nexus between detention and the deprivation of liberty is noticeably absent with regards to seeking asylum. Despite this, the 1951 Convention, 1967 Protocol and the OAU Convention form the cornerstone of refugee protection in many countries – such as South Africa. Yet, the 1951 Convention has multiple inadequacies in protecting asylum seekers from arbitrary detention, mainly in terms of (a) illegal entry, (b) documentation challenges and (c) administrative.

(d) (i) Illegal entry

Detention due to unlawful entry raises two points, 1) the elements of penalisation for illegal entry and 2) the concept of non-refoulement. The meaning of the term 'illegal entry' or presence has not raised much contestation, rather, it is universally acknowledged as

⁷⁸ Stefanie Grant op cit note 62 at 71

referring to the crossing of international borders without the correct documentation or in an unlawful manner. It also includes those ‘arriving or securing entry through the use of false or falsified documents, the use of other deception, clandestine entry, for example, as a stowaway, and entry into State territory with the assistance of smugglers or traffickers.’⁷⁹ Although it is illegal to enter a sovereign state unlawfully, the 1951 Refugee Convention states that

‘[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1.’⁸⁰

Despite this provision, the UNHCR has reported on the increasing use of detention at border points, transit areas or in the pre-administrative phase of seeking asylum.⁸¹ As there is no provided definition for the term penalties, ‘punishment’ for illegal entry remains a contentious issue. In Article 31 of the 1951 Convention the drafters imply that measures such as fines, prosecution, imprisonment and administrative detention are considered penalties. Yet, provisional detention for investigation was not excluded – therefore detention for illegal entry and detention to carry out an investigation is crucial to differentiate, the second one being justifiable. In the interpretation of Article 31, it is clear that the act of entering a state to seek asylum cannot be considered an unlawful act. The Article provides that no penalties can be imposed ‘on refugees coming directly territory where their life or freedom was threatened, provided they present themselves without delay and show good cause for their illegal presence.’⁸² This has characterised the principles that prohibit penalisation due to illegal entry as, a) coming directly, b) presenting themselves without delay and c) showing good cause for their illegal entry. However, the drafters intended this to be interpreted as circumstantial, individuals presenting themselves to the state as quickly as possible in their circumstances. Guy S Goodwin-Gill states that

‘while asylum seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration.’⁸³

⁷⁹ Ibid Article 31

⁸⁰ Ibid Article 31(1)

⁸¹ Ibid

⁸² Guy S. Goodwin-Gill ‘International Law and the Detention of Refugees and Asylum Seekers’ (1986) *The International Migration Review. Special Issue: Refugees: Issues and Directions* 20 (2) at 207

⁸³ Guy S. Goodwin-Gill ‘Article 31 Of The 1951 Convention Relating to The Status of Refugees: Non-Penalization, Detention and Protection’ (2001) *A Paper Prepared at The Request of The Department of*

Therefore, depriving asylum seekers of their liberty for entering or residing in a country is in contravention to Article 31(1). Yet, illegal entry invokes the complex issues of state sovereignty and the principle of non-refoulement.

(d) (ii) the principle of non-refoulement

As a law of *jus-Cogen* state sovereignty is still subject to the cardinal principle of non-refoulement. The 1967 UN Declaration on Territory Asylum proclaims that ‘no person who meets the requirements of Article 1 of the 1951 Convention may be rejected at the frontier or subject to non-refoulement’.⁸⁴ As generally considered a part of international customary law, it is implied that until an individual is declared not to be an asylum seeker or refugee, they may not be returned to their country of origin. Article II (3) of the OAU Convention provides that

‘[N]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.’⁸⁵

Rejecting an asylum seeker at the frontier, or returning anyone claiming asylum without the proper due process of status determination is considered refoulement. The right to non-refoulement is paramount in refugee law. The OAU provision explicitly provides for the right to non-refoulement and prohibits all member states from depriving anyone of this right. Although the term non-refoulement is not used in the OAU Convention, the interpretation of Article II(3) is in line with the international right to be free from refoulement. This is the only regional legislation referring to the right to non-refoulement. Article 33 of the 1951 Convention on the prohibition of expulsion or return of refugees similarly postulates the right to be free from refoulement. The provision states that contracting states may not expel or return any refugee from the frontiers of its territory.⁸⁶ A dominant point of contestation in interpreting and applying these frameworks, however is whether rejection of entry is considered non-refoulement.

International Protection for The UNHCR Global Consultations. UDHR. Available at <http://www.unhcr.org/3bcfdf164.pdf>. at 8

⁸⁴ 1967 Declaration on Territorial Asylum op cite note 49

⁸⁵ OAU Convention op cit note 14

⁸⁶ 1951 op cit note 5 Article 33

Many states regard rejection of entry as *refoulement*, alternatively, many states do not agree with this interpretation of Article 33 of the 1951 Convention. Arguably, rejection at the border does not imply a return of the individual to the country of persecution and therefore does not constitute *refoulement*.⁸⁷ Conversely, if rejection upon entry is considered *refoulement* it does not entail a duty to admit asylum seekers into the territory either. The argument that the treaty must be fulfilled under good faith implies that states must see it as their duty to temporarily grant access to their territory to anyone claiming asylum to determine whether they deserve protection under Article 33 of the 1951 Convention. The UNHCR declares that any state presented with an asylum request at the frontier of its territory is immediately responsible for the protection of that individual, specifically admission, even if only temporarily. This is until the asylum seeker has had access to fair and efficient status determination and access to the asylum system.⁸⁸ The inference of this is that asylum seekers are secured admission through the pre-emptory norm of non-*refoulement*.⁸⁹ Although there is no right to grant asylum, states are bound by the core principle of non-*refoulement*. This discrepancy is criticised by Professor Lauterpacht as providing asylum seekers the right to seek asylum without guaranteeing them asylum international law does not specify whose duty it is to provide that right.⁹⁰ Drafters continued to omit the right to be granted asylum in light of a state's authority to decide who can enter its territory. This lacuna leaves asylum seekers vulnerable to states sovereignty and a lack of legislation giving effect to the right to seek asylum.

The prohibition of *refoulement* is similarly mentioned in Article 3 of the CAT, it also states that only in cases of a threat to national security may countries derogate from Article 33 (1951 Convention). Article 33(2) states that asylum seekers may not benefit from the provision (Article 33(1)) reasonable grounds are suggesting they pose a threat to the security of the country.⁹¹ As a result, the question of who entitled to be protected from the principle of non-*refoulement* arises. If interpreted through Article 1 and 33 of the 1951 Convention in which the point at which you flee deems you an asylum seeker, then inherently the individual should be subject to the principle of non-*refoulement*. However, due to the non-binding

⁸⁷ Catherine Phuong op cite note 67 at 3

⁸⁸ UN High Commissioner for Refugees (UNHCR), Convention Plus: Issues Paper Submitted by UNHCR on Addressing Irregular Secondary Movements of Refugees and Asylum-Seekers, 11 March 2004, FORUM/CG/SM/03, available at: <https://www.refworld.org/docid/471de35b2.html> at 7

⁸⁹ Catherine Phuong op cite note 67 at 3

⁹⁰ Roman Boed op cit note 40 at 9

⁹¹ 1951 op cit note 5 Article 33 (2)

nature and lack of obligation on the state to grant asylum, the question of whether an asylum seeker is unlawfully in a territory remains at the discretion of the state.⁹² Despite the notion of non-refoulement being guaranteed to all refugees, the interpretation of the articles prohibiting refoulement is consequently at the discretion of the state and the non-binding nature of international conventions.

(d) (iii) Documentation

Asylum seekers are often subject to the same laws applied to aliens, immigrants and nationals and therefore are often exposed to punishment and detention due to a lack of documentation or having expired or falsified documentation.⁹³ Administrative detention is different from detention under criminal law, unlike criminal detention, under administrative detention asylum seekers are not detained having committed a crime. Rather, they are detained to determine their asylum status or due to their impending deportation. Documentation can be broadly understood as ‘evidence of the applicant’s identity, nationality or citizenship,’⁹⁴ yet it is more than this, it provides proof of having applied for asylum or refugee status. Having an asylum seeker permit entitles individuals to certain rights – all necessary when conducting oneself in a host state. The necessity of identification in a host state cannot be overstated, yet the concept of identity is only briefly mentioned in the 1951 Convention and not at all in the 1967 Protocol. It is generally recognised that the burden of proof remains on the investigator or official handling the asylum seeker case. Additionally, it should be acknowledged that ‘in most cases, a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.’⁹⁵ This was recognised in the UNHCR Handbook for Determining Refugee Status which purports that those seeking asylum often arrive without personal documentation owing to the circumstances of their departure from their state of origin.⁹⁶ The need to consider the circumstances those fleeing from persecution may find themselves in was not lost on the drafters of the 1951 Convention either. The UNHCR guidelines state in part (iii) that ‘[a]sylum-seekers who arrive without [a] documentation because they are unable to obtain any in

⁹²Alice Edwards op cit note 10 at 14

⁹³ Guy S. Goodwin-Gill op cit note 77 at 203

⁹⁴ Kristian Hollins ‘Comparative international approaches to establishing identity in undocumented asylum seekers’ (2018) *Migration and Border Policy Project Working Paper, The Lowy Institute for International Policy* 8. Available at <https://www.lowyinstitute.org/publications/comparative-international-approaches-establishing-identity-undocumented-asylum-seekers>

⁹⁵ UNHCR) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status op cit note 52

⁹⁶ Kristian Hollins op cit note 94

their country of origin should not be detained solely for that reason.⁹⁷ Noted in the 1999 Executive Committee of the HRC, states must recognise the nature of the circumstances which prompted the flight of asylum seekers. The meeting declared that should the asylum seeker be willing to cooperate with the state through all processes of verification and status determination, and not sabotage their asylum claim through destroying their documentation or misleading authorities, detention is deemed unnecessary and should not be a routine part of the asylum process.⁹⁸ As per Article 27 of the 1951 Convention, contracting states have a duty to provide identity documentation and travel permits should the refugee in their territory not possess these.⁹⁹ However, the 1951 Convention does not guarantee asylum seekers protection from detention if arriving or residing in a state without any or with expired documentation. The lack of comprehensive protection for documentation challenges, in addition to the difficulties of attaining documentation, are primary reasons for the arbitrary detention of asylum seekers.

(d) (iv) Administration

The 1979 Arusha Conference on the Situation of Refugees in Africa stressed that no penalties for illegal entry and no measures of detention should be imposed on asylum seekers¹⁰⁰ – this should be interpreted to be understood that no penalties should be imposed on asylum seekers for a lack of documentation either. The conference was also concerned about the increasing use of administrative detention to ‘manage’ the influx of asylum seekers. It was also noted that the right to due process is often compromised when asylum seekers are in administrative detention.¹⁰¹ The international sphere is increasingly questioning the use of detention as a means of controlling entry into a territory, establishing the status of individuals and a form of deterrence.¹⁰² The 2009 UN General Assembly defined administrative detention as the

‘arrest and detention of individuals by State authorities outside the criminal law context, for example for reasons of security, including terrorism, as a form of preventive detention, as

⁹⁷ UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers op cit note 13

⁹⁸ 1999 Executive UNHCR ‘Detention of asylum seekers’ available at <https://www.unhcr.org/3cc413ae4.pdf> at 4

⁹⁹ 1951 Convention op cit note 5 Article 27

¹⁰⁰ Guy S. Goodwin-Gill op cit note 75 at 193

¹⁰¹ The Right to Liberty and Security of Person op cit note 61 at 13

¹⁰² Ibid

well as to restrain irregular migrants.’¹⁰³

States routinely use administrative detention as a means to control or manage migration, thus unlawfully detaining asylum seekers for administrative convenience. The 5th paper by the General Assembly on the deprivation of liberty of migrants clarifies that any administrative detention must be applied as a measure of last resort, for short periods and legitimate purposes. Detention must be ordered and approved by a judge or other judicial authority and the individual detained must be brought before judicial authority as soon as possible. The disregard for habeas corpus,¹⁰⁴ and the unlawful detention and flouting of detention standards is in contravention to many laws. In particular, Article 9(4) of the ICCPR which states that

‘[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’¹⁰⁵

Detention has been deemed appropriate in specific cases and has been resorted to in cases where there is a need to verify identity, determine the claims for asylum status and, to deal with cases where documents have been destroyed or are fraudulent.¹⁰⁶ The conflicting views on when detention is necessary and has resulted in an inconsistent interpretation of legislation. There is a large need for national legislation to address the discrepancy in the practice of this legislation.

Article 1 of the UDHR proclaims that ‘[a]ll human beings are born free and equal in dignity and rights.’¹⁰⁷ Following this Article 2 asserts that the rights and freedoms in this declaration apply to all people without discrimination or distinction.¹⁰⁸ These are fundamentally the backbone of international human rights. However, the discriminatory mechanisms and use of state sovereignty to exclude asylum seekers highlights that these articles are not upheld and not extended to all people. The inadequate protection guaranteed to asylum seekers is largely based on discriminatory practises and inconsistent mechanisms that disregard the vulnerability of asylum seekers. Arbitrary detention is one of these

¹⁰³ UN General Assembly, Report of the Working Group on Arbitrary Detention, 16 February 2009, A/HRC/10/21

¹⁰⁴ The right to legal due process

¹⁰⁵ ICCPR op cit note 23

¹⁰⁶ Kay Hailbronner ‘Detention of Asylum Seekers’ (2007) *Eur. J. Migration & L.* 9 (159) at 164

¹⁰⁷ UDHR op cit note 1 Article 1

¹⁰⁸ UDHR op cit note 1 Article 2

measures, it has evolved to not only limit the freedom of movement, deprive individuals of their right to liberty and, security – but also to criminalise asylum seekers. Inevitably, criminalising individuals and groups of people make communities unresponsive and hostile towards them. This is evident in the increase of xenophobia, refusal of entry, deportation and ill-treatment of asylum seekers. South Africa is a country where this has become increasingly evident even though it is party to many of the international and regional conventions mentioned above. The lack of commitment to aid asylum seekers in the spirit of humanitarianism, a characteristic the country emphasised in the aftermath of apartheid, has resulted in some of the worst treatment of asylum seekers such as detention, violence and xenophobia. The following chapter will discuss the case of South Africa in more detail to further link how the arbitrary detention has criminalised asylum seekers.

III THE SOUTH AFRICAN REFUGEE SYSTEM

Protection from arbitrary detention, despite international law and human rights law, is still largely dependent on state practice. There is a significant gap between legislation and practice and the resulting factor is that some of the most vulnerable groups of people are not guaranteed or provided with adequate protection. The increasing disregard for upholding the rights guaranteed to all humans by the UDHR and other protection mechanisms is a common global phenomenon, this is particularly evident in South Africa. South Africa has been internationally commended for its efforts to meet and surpass international human rights standards, particularly with regards to asylum seekers and refugees. This is predominantly on paper and has yet to manifest in state practice.¹⁰⁹ The inadequate implementation, national practice and under-resourced nature of the asylum system has failed to uphold many of the international and domestic obligations. Like many young democracies, South Africa's acts and regulations were written with high ideals, however, the legacy of apartheid has presented obstacles in transforming of these high ideals into an operational human rights culture surrounding the management of asylum seekers.¹¹⁰

Initially, this chapter will provide a brief outline of the legislation and historical context of migration in South Africa. Following this is an analysis of South Africa's Immigration and Refugee Act. This chapter analyses the applicable legislation and erroneous

¹⁰⁹ Jaya Ramji 'Interpretation Consistent with International Law? The Detention of Asylum Seekers in South Africa' (2002) available at <https://refuge.journals.yorku.ca/index.php/refuge/article/viewFile/21261/19932> at 62

¹¹⁰ Ibid at 6

application of legislation in South Africa. It outlines the core differences in the South African Immigration Act and Refugee Act and the implications of the conflation of these two separate legal systems. By examining the interplay between the core legislation protecting asylum seekers, mainly the 1996 Constitution, and the Immigration Act, and the Promotion of Administrative Justice Act, 2000 Act No. 3 of 2000 (PAJA) and the Refugee Act, the ways in which the laws have served, or failed asylum seekers, relating to arbitrary detention will be deliberated. In attempting to reconcile immigration law and refugee law, this chapter lays analyses why arbitrarily detaining asylum seekers is unlawful and fundamentally creates a system which criminalizes the asylum-seeking process and asylum seekers.

(a) South Africa's international obligations

South Africa has domestic and international legal frameworks that dictate the standards and norms of refugee law. The international obligations South Africa is subject to are the conventions and treaties the country is party to or has signed and ratified. South Africa has signed and ratified the 1951 Convention and its 1967 Protocol. As well as the 1993 Basic Agreement between the Government of South Africa and the United Nations High Commissioner for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and its Personnel in South Africa of South Africa. Additionally, South Africa is party to the OAU Convention. South Africa did not nationalize its international obligations until the establishment of the Refugees Act in 1998. The Refugee Act ingrained and codified international obligations into South Africa's national law by inculcating the provisions of the 1951 Convention and the OAU Convention. It came into force in April 2000 to give effect to the international legal instruments, principles and standards relating to refugees.¹¹¹ Embodying the frameworks provided for by the 1951 and OAU Conventions, the Refugee Act prescribes, in Section 6(1), that

‘[T]his Act must be interpreted and applied with due regard to- (a) the Convention Relating to the Status of Refugees (UN, 1951); (b) the Protocol Relating to the Status of Refugees (UN, 1967); (c) the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969); (d) the Universal Declaration of Human Rights (UN, 1948); and (e) any other relevant convention or international agreement to which the Republic is or becomes a party.’¹¹²

¹¹¹ National Legislative Bodies / National Authorities, *South Africa: R 366 of 2000, Refugee Regulations (Forms and Procedures) 2000*, 6 April 2000 Regulation 5

¹¹² South Africa Refugee Act op cit note 25

Section 6(2) also obligates the Minister to uphold and administer this Act. Section 233 of the South African Constitution decrees that in the interpretation of any legislative mechanism, every court must refer to both domestic and international interpretations.¹¹³ Related to detention and asylum seekers, South Africa has signed and ratified the ICCPR and is party to the CAT, it has yet to ratify the OPCAT. South Africa is party to both the 1951 Convention and the 1967 Protocol relating to the status of refugees as well as the ACHPR the OAU Convention. All these place obligations on the country and many have been domesticated into the national legislation, nonetheless, they are not legally binding instruments.

(b) South African normative frameworks

Some of the first steps South Africa took towards a more human rights orientated legal system was entering into a 1997 Memorandum of Understanding between the South African Development Community (SADC) and including the UNHCR in the affairs of the country. Reforming the immigration and refugee system post-apartheid was not a priority. As a result, for a long time, the immigration system remained stagnant emphasising immigration as a form of control rather than a human rights duty. The most oppressive of the immigration mechanisms was the 1991 Aliens Control Act which consolidated all of the immigration laws traceable back to the 1910's and was inherently a 'draconian apartheid throwback.'¹¹⁴ The hesitancy of the new government to reform the immigration system can be surmised as due to three factors. The first was the DHA's fear of an unprecedented volume of immigrants attempting to enter the country. Second, the entrenched apartheid ideology that permeated all administrative bodies and had yet to be transformed, consequently stunting any progressive immigration reforms. The third factor was the hostility towards immigrants, an ideology that arose as a result of the construction of post-apartheid nation-building and national identity narratives.¹¹⁵

The post-apartheid era South Africa ushered in four significant statutes relating to immigration and refugee law, the Constitution and Bill of Rights, the Aliens Control Act, the Refugees Act and the Immigration Act. South Africa is clear that the Constitution and Bill of rights applies to everyone in South Africa unless specifically otherwise mentioned, therefore

¹¹³ South Africa Constitution op cit note 24 Section 233

¹¹⁴ Ibid at 38

¹¹⁵ Ibid at 38

asylum seekers should enjoy the same rights citizens of South Africa do. The implementation of the 2002 Immigration Act represented a change in immigration policies and a more human rights approach to immigration. The repeal was due to an incongruence between the Alien Control Act and the Constitution which led to the 2002 Immigration Act. The Immigration Act and accompanying Regulations set out a more detailed set of procedures to ensure that the detention and deportation of illegal foreigners is done in a fair and just manner. Preceding the 2002 Immigration Act was a Green Paper (1997) and White Paper (1999), both aimed to address the issues that arose as a result of the continued use of the Aliens Control Act.¹¹⁶ Until the Refugee Act came into force in 2000, the Aliens Control Act was still the core legislation regarding refugee and asylum seekers.¹¹⁷ Drafted in 1998, the Refugee Act came into force in 2000, it is accompanied by the 2000 Refugee Regulations (Forms and Procedures) (The Regulations).¹¹⁸ South Africa boasts a progressive legal framework based on human rights principles, characterised by its non-camp, urban refugee situation allowing for freedom of movement to asylum seekers. The Refugee Act and its Regulations are principally considered reformist, incorporating the humanitarian principles of the 1951 Convention, in addition to recognising the OAU Convention.¹¹⁹

In 2016, a Green Paper on International Migration was released, the paper was a comprehensive review of the existing migration policy by the DHA and commented on the countries outdated immigration and refugee system while implying an acknowledgement of its ineffectiveness too.¹²⁰ In addressing the management of asylum seekers and refugees, the DHA stated that only 5% of the claims lodged were successful as most applications were economic migrants. The main problem identified by the DHA was the high volumes of migrants that were utilizing the asylum system to regularize their stay in the country. The new proposed policy aimed to address this by establishing a more effective and efficient status determination system and mechanisms to protect genuine asylum seekers and refugees. The intention was to limit the abuse of the asylum system by economic migrants but instead has made the asylum system largely inaccessible and the asylum process arduous.¹²¹ The

¹¹⁶ Fatima Khan 'Immigration Law in South Africa' (2018) Juta at 39

¹¹⁷ Jeff Handmaker, and Lee Anne De La Hunt 'Perspectives On Refugee Protection In South Africa.' (2002) *Lawyers For Human Rights*. at 50

¹¹⁸ 2000, Refugee Regulations op cit note 111

¹¹⁹ OAU Convention op cit note 14

¹²⁰ Parliamentary Monitoring Group. International Migration Policy Green/White Paper; Refugees Amendment Bill Submissions Summary 2017. Available at <https://pmg.org.za/committee-meeting/23944/>.

Accessed 11 Nov 2018.

¹²¹ Ibid

xenophobic attitudes of DHA officials and communities was also noted upon, specifically with this contributing to a discriminatory bias within the asylum system. The focus of the Green Paper was to inform a subsequent White Paper on managing migration. Notably, it is only within the context of migration that asylum and refugee concerns have been addressed. The 2017 DHA drafted White Paper on International Migration intended to balance sovereignty and security while embracing international migration – all three framed as national interests.¹²² However, the country continues to securitise its immigration policies, and grapple with the legacy of apartheid.

(b) (i) Migrants and asylum seekers in South Africa

In the 2011 case involving the *Zimbabwean Exiles Forum vs Minister of Home Affairs*, a clear distinction between migrants and asylum seekers in South Africa was made. Article 2 of the Judgement recognises two broad categories of people who enter the country in South African domestic law - namely migrants, and asylum seekers and refugees. The legal regimes applicable to people entering the country are largely based on this distinction. Migrants are considered subject to territorial sovereignty wherein the state has the authority to determine who can enter the and on what terms. Alternatively, asylum seekers fall under the legal protections in which the state has a duty to provide refugee and asylum to anyone who is fleeing persecution.¹²³ In South Africa, migrants fall under immigration law, guided by the Immigration Act, and asylum seekers and refugees under refugee law, guided by the Refugee Act. While there may be different systems governing migrants and asylum seekers, these legal systems are often applied simultaneously or consecutively, this uneasy relationship renders asylum seekers vulnerable to the regulations of the Immigration Act. The nexus of understanding the detention of asylum seekers in South Africa is reconciling immigration and refugee law. Understanding the laws that govern detention under the Immigration Act and the Refugee Act principally highlight the differences between lawful and arbitrary detention.

¹²² Fatima Khan op cit note 116 at 33

¹²³ *Zimbabwe Exiles Forum and Others v Minister of Home Affairs and Others* ZAGPPHC 29 (17 February 2011)

(b) (ii) Asylum seekers and illegal foreigners

Anyone who enter South Africa is fundamentally protected by the South African Constitution and the Immigration Act. Although the DHA is authorized by the Immigration Act to identify, detain and deport, these processes must adhere to these legal protections and be procedurally fair.¹²⁴ The differentiation between an illegal foreigner and asylum seeker dictate the procedures and protection extended. The 2004 Immigration Amendment Act defines an illegal foreigner as a ‘foreigner who is in the Republic in contravention of this Act and includes a prohibited person.’¹²⁵ The term illegal foreigner is not used in the Refugee Act or the 2016 Green Paper instead, the term ‘irregular migrants’ (or undocumented/illegal migrants) is used. Irregular migrants are defined as people who enter a country without the required documentation in search of economic opportunity or income-generating activities.¹²⁶ The Green Paper defines an asylum seeker as a ‘person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status.’¹²⁷ Similarity, the Refugee Act defines an asylum seeker as ‘a person who is seeking recognition as a refugee in the Republic.’¹²⁸ The differentiation between illegal foreigners, migrants and asylum seekers attests to the forms of protection guaranteed through determining which set of legislation should be applied. The continuous conflation of immigration and refugee legislation in South Africa has created an ineffective immigration and asylum system.

As per Section 1 of the Refugee Act, a refugee is ‘any person who has been granted asylum in terms of this Act,’¹²⁹ refugee status is determined according to Section 3 of the Refugee Act,¹³⁰ as similarly stated in the 1951 Convention and OAU Convention. The Refugee Act incorporates the OAU Conventions definition in Section 3(b). Through Section 3, there are three core ways in which an individual may qualify for refugee status in South Africa, by virtue of Section 3(a) in which the individual has a well-founded fear of prosecution due to belonging to a listed category, Section 3(b) in which the individual had to

¹²⁴ Roni Amit ‘Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa’ (2010). *FMSP Research Report*. Available at: <https://ssrn.com/abstract=3274019> at 8

¹²⁵ South Africa: Act No. 19 of 2004: Immigration Amendment Act [South Africa], 18 October 2004 at 9

¹²⁶ Parliamentary Monitoring Group ‘Green Paper on International Migration’ (2016) at 6 available at <https://pmg.org.za/committee-meeting/23944/>

¹²⁷ Ibid

¹²⁸ South Africa Refugee Act op cit note 25

¹²⁹ Ibid

¹³⁰ Ibid Section 3(a)

leave their country of origin due to external aggression or serious public disruption. Or under Section 3(c) which provides for those who are dependents of those claiming for asylum under Sections 3 (a) and (b).¹³¹ Yet, the issue of state sovereignty poses a challenge to asylum seekers entering South Africa.

(b) (iii) Territorial Sovereignty

Territorial sovereignty is present in immigration law of most countries, this is true for South Africa too. As per the Constitution, territorial sovereignty must be in line with the human-rights based ethos determined by the democratic transition. In the *South African 2004 Watchenuka case*, the South African Supreme Court stated that ‘the context within which the states sovereignty was phrased can be distinguished from situations where the dignity of a person is affected.’¹³² This is interpreted to assume that the foundational human right of the right to dignity may circumvent and limit a states exertion of the right to sovereignty. Immigration and refugee law are explicitly impacted by the exercising of state sovereignty. Although international law provides that any person may leave a country, it does not obligate any state to grant entry into their territory.¹³³ This is only applicable to immigration law as under international law, refusing entry to asylum seeker constitutes non-refoulement.

(c) The asylum-seeking process in South Africa

The asylum process starts at the point of entry into the geographical territory of South Africa. As per the Immigration Act, to declare their intention to seek asylum, an asylum seeker must enter South Africa at a recognised and legal port of entry, and declare their intention to an immigration officer.

(c) (i) Section 23 permit

All individuals who claim asylum upon entering the country are entitled to a transit permit under Section 23 of the Immigration Act. A transit permit is valid for 14 days, in this time the asylum seeker must report to a Refugee Reception Offices (RRO) and make their asylum claim in person as per Section 21 of the Refugee Act.¹³⁴ RROs are DHA run offices that provide a point of contact for asylum seekers to access the asylum system. Asylum

¹³¹ 2000, Refugee Regulations op cit note 141 Regulation 7

¹³² *Minister of Home Affairs and Others v Watchenuka and Others* All SA 21 (SCA) (28 November 2003)

¹³³ Fatima Khan op cit note 116 at 168

¹³⁴ Fatima Khan and Tal Schreier, *Refugee Law in South Africa*. 2nd ed. (2014) Juta at 250

applications are lodged, interviews conducted and permits issued and renewed at the RROs by immigration officers. Although an individual is technically under the protection of the Refugee Act once their intention to seek asylum has been stated, a significant concern is that they are still subject to the stricter Immigration Act regulations. If the transit permit lapses before the asylum application has been made, the person is regarded as an illegal foreigner as defined in Section 23(2) of the Immigration Act. They are then subject to the provisions for detention and deportation as postulated in the Immigration Act. There are numerous challenges asylum seekers face within this process. The initial challenge is the notion of legally acknowledged port of entries, the Immigration Act is clear on the issue of legal ports of entry, however, the porous border and circumstances of migration result in many individuals entering the country at non-designated entry points. A large majority of asylum seekers enter South Africa by irregular methods of entry, most of which involve bypassing recognised ports of entry. The reasons for this may be varied, however, it can be deduced that a large contributing factor is the fear of being turned away at a port of entry, a lack of documentation or using smugglers.

Another major challenge is the time limit set by the transit permit as asylum seekers only have 14 days to make their claim. According to the 1951 Convention, Article 31(1), and Refugee Regulation 2(1), individuals must make their application for asylum ‘without delay.’¹³⁵ There are only three functioning RROs in South Africa in which asylum seekers can lodge their asylum claim and deal with their permits. These are located in Durban, Musina, and Pretoria. The other two offices in Cape Town and Port Elizabeth are no longer in operation. Due to the location of these offices, accessing these resources is an expensive and time-consuming process, consequently, most asylum seekers struggle to get to these offices within the allotted time. In the *2012 Ersumo v Minister of Home Affairs* case, that the term ‘without delay’ was declared too subjective in South Africa and therefore cannot be used as a means to prevent access to the asylum process.¹³⁶ However, it was also stated that if the individual does not present themselves at a RRO within the 14 days, the protection of the transit permit would not apply. This incongruity poses major challenges to asylum seekers, it has resulted in an asylum system that inconsistently applies the applicable and relevant laws. Besides the barriers of accessing the RROs, the offices are under-resourced and ill-equipped

¹³⁵ The issue of ‘without delay’ was discussed in the previous chapter.

¹³⁶ *Ersumo v Minister of Home Affairs and Others* (69/2012) [2012] ZASCA 31; 2012 (4) SA 581 (SCA); [2012] 3 All SA 119 (SCA) (28 March 2012)

to deal with the large volume of asylum seekers. Many asylum seekers wait for weeks outside offices without being seen to by a Refugee Status Determination Officer (RSDO), the application process is long and officers are often unaware of the correct procedures. A contributing factor is also the erroneous application of refugee law and immigration law. This is partly due to the ignorance and misinformed arresting or immigration officials. In an interview by News24 in 2018, an asylum seeker waiting to renew his Section 22 permit at the Pretoria RRO stated that ‘there was a long, long queue. I went up and down, up and down. I slept outside the gate at night.’¹³⁷ Over time he had received many temporary permits with varying renewal times depending on the officer he was dealing with. His plight is one of many asylum seekers in South Africa face. The financial implications of travelling to a RRO to renew a permit and the limited access to RROs are only some of the challenge’s asylum seekers face. Efficient urban RROs are essentially the cornerstone of a working refugee system,¹³⁸ yet none of the current RRO are effective in their administration of the asylum system. This is one of many obstacles’ asylum seekers attempting to access documentation need to overcome and inevitably, this makes asylum seekers more vulnerable to detention and deportation.

(c) (ii) Section 22 permit

Once an individual has presented themselves to a RRO and made their asylum claim they are entitled to assistance from an immigration office in filling out their asylum application (Form BI-1590). The asylum determination process involves numerous interviews by RSDO and a long waiting period for the application outcome. Once an application has been filed, asylum seekers are entitled to a temporary asylum permit under Section 22 of the Refugee Act. The Section 22 permit allows the asylum seeker to sojourn in the country lawfully while awaiting the outcome of their refugee status application. The permit extends a guarantee of protection to the asylum seeker from detention as in line with Section 21(4) of the Refugee Act and article 31(1) of the 1951 Convention.¹³⁹ Article 31(1) proclaims that regardless of the law of the country if a person has applied for asylum status in terms of subsection (1) no proceedings may be taken against them in respect to their unlawful entry or presence in the country. This protection is guaranteed until a decision on their

¹³⁷ Claire van den Heever, 2018. "Humanitarian in Appearance, Inhumane in Reality". News24. Available at <https://www.news24.com/Columnists/GuestColumn/humanitarian-in-appearance-inhumane-in-reality-20180715-2>.

¹³⁸ Ibid

¹³⁹ Fatima Khan and Tal Schreier op cit note 134 at 254

application has been made.¹⁴⁰ Once a temporary or an asylum seeker permit has been issued, the individual can no longer be classified as an illegal foreigner. These articles protect against detention and deportation of asylum seekers as per the Immigration Act. This was reiterated in the *Arse vs Minister of Home Affairs* case in which the Court found that the provisions of Section 23(2) of the Immigration Act do not apply to asylum seekers once an application has been made.¹⁴¹ Despite the guaranteed protection asylum seekers who have valid documentation or have applied for asylum or refugee status are routinely detained, this is considered arbitrary detention and is unlawful.

Additionally, the Section 22 permit poses numerous other challenges to asylum seekers. The permit requires renewal every one to three months until a decision on the asylum application has been made. If an official asylum seeker permit is issued the renewal period extends to every two years. If the asylum claim is deemed unfounded and therefore refused, the Section 22 permit is extended to provide time to appeal to the Refugee Appeal Board or leave the country.¹⁴² Due to the few RRO, the overburdened system, and the financial constraints many asylum seekers face, they struggle to renew their permits. On commenting on the RRO situation, Corey Johnson proffered that ‘the department treats the asylum system more like immigration control than the humanitarian system it was intended to be,’¹⁴³ this is testament to the conflation between immigration and refugee law in South Africa. Often asylum seekers are held in arbitrary detention and cannot renew their permits, thus providing a basis in which to be legally detained under the Immigration Act. The system is inefficient and inconsistent and does not provide the legal protection that asylum seekers are guaranteed under international and domestic law. Many asylum seekers have admitted that they are afraid to renew their permits as it is common for immigration officers to stagnate the process or detain them without cause. Bribery is also common and can speed up the process and make it more efficient, however, most asylum seekers are already under significant financial strain and cannot afford to bribe the immigration officers at the RRO. Although on paper the Section 22 permit confers asylum seekers the legality to sojourn and

¹⁴⁰ 1951 Convention op cit note 5

¹⁴¹ Fatima Khan and Tal Schreier op cit note 134 at 254

¹⁴² Who qualifies for which permits? IOL News (2008) available at <https://www.iol.co.za/news/south-africa/who-qualifies-for-which-permits-423751>

¹⁴³ Claire van den Heever op cit note 168

conduct their lives in the country, the system itself fails to uphold the rights and deliver on that legality.

According to the Refugee Act Regulations, RROs are obligated to provide adequate assistance and sufficient interpretation of the relevant legislation, namely Regulation 5 and any DHA established guidelines. A date must be specified within 30 working days of the submission of an asylum seeker application for the individual to appear before an RSDO for an interview. The rights, conditions of the temporary permit, and asylum seeker requirements must be verbally explained to the person in their language and a written notice provided too. Notably, RRO officers must renew the permit each time the applicant appears as scheduled at the RRO. However, the African Centre for Migration and Society (ACMS) surmises two of the most pressing challenges asylum seekers face at the RROs are

‘the continuation of two practices that were specifically challenged in court and ruled illegal: 1) Continued use of appointment slips; and 2) Continued application of work and study restrictions to permits.’¹⁴⁴

Appointment slips are written indications of when the asylum seeker should return to the RRO to renew their permit, more recently this has developed into verbal appointment slips which immigration officials deny issuing. Due to the large volume of appointment slips issued a vast majority of asylum seekers have expired permits, cannot afford to return to the RRO as the dates given range from days to months, or cannot afford to bribe the immigration official to immediately renew their permit and avoid an appointment slip. Challenges at the RRO extend to interviews, the Refugee Appeal Board (RAB), the inefficient training immigration officers have in determining asylum seeker status, aggressive attitudes, dismissive behaviour and, incorrect procedural application. The result is often inconsistent issuing of Section 22 permits or unjust refusal of asylum seeker status. Due to the long waiting time and delays, many asylum seekers are late to renew their permits and therefore detained for not appearing at the scheduled time, many of which were there on the date prescribed.¹⁴⁵ Under the Refugee Act Regulations Article 8 a Section 22 permit may be withdrawn with regards to Section 22 of the Refugee Act, this clause includes the applicant not appearing on the date scheduled as it contravenes the conditions endorsed by the permit.

¹⁴⁴ Organization for Refuge, Asylum & Migration (ORAM), *Blind Alleys: The Unseen Struggles of Lesbian, Gay, Bisexual, Transgender and Intersex Urban Refugees in Mexico, Uganda and South Africa - Part I: Guidance for NGOs, Governments, UNHCR & Program Funders*, (2013), available at: <https://www.refworld.org/docid/524d433b4.html>

¹⁴⁵ 2000, Refugee Regulations op cit note 141 Regulation 23

Additionally, the Refugee Act provides that the Minister of Home Affairs (MHA) may withdraw an asylum seekers permit under Section 23 read in conjunction with Section 22(6), they may subsequently be detained as per Section 29.¹⁴⁶ Withdrawing a permit subjects asylum seeker to Section 23 of the Immigration Act as they are then considered illegal foreigners. However, the withdrawal of a Section 22 permit does not automatically translate to the detention of the asylum seeker. Section 28 of the Refugee Act also allows for the detention of an asylum seeker pending their removal from the country, yet this Section may only be invoked should the MHA and DHA deem the individual a threat to public order or national security. This also falls under Section 33 of The Constitution and in line with international law. However, no domestic guidelines specify what constitutes a threat to public order or national security, and this Section has yet to be utilised by the MHA.¹⁴⁷

In practice, detention is foremost not only used as a first port of call but also as a deterrent and to prevent and punishment failure to comply with administrative requirements.¹⁴⁸ In order to meet the standards for detention set out by the UDHR detention must be for valid reasons such as protection of public order, however, lapsed permits and failure to appear at hearings are considered cause for detention under the Immigration Act of South Africa.

(d) Detention

The rights of those detained in South Africa are primarily enshrined in The Bill of Rights, Section 35 on ‘arrested, detained and accused persons’, it stipulates the rights that extend to anyone who is arrested and detained in South Africa. Although the right to due process, courts and fair judicial review are all in the Bill of Rights, how detention occurs through the immigration system negates these rights. Two key elements in the detention of asylum seekers is the manner of their entry and the right to non-refoulement.

(d) (i) Entry

Upon entering the country, the first challenge is whether an individual entered through a port of entry, defined in the Immigration Act as ‘a place prescribed from time to time where foreigner has to report before he or she may move, sojourn or remain within or

¹⁴⁶ Popo Mfubu ‘Alternatives to Detention’ University of Cape Town’s Refugee Rights Unit and Office of the United Nations High Commission for Refugees at 5

¹⁴⁷ Ibid at 8

¹⁴⁸ Jaya Ramji op cit note 126 at 7

enter the Republic,'¹⁴⁹ or through an alternative route. A port of entry is the first port of call in claiming asylum status, without which you cannot be issued a Section 23 'transit permit' and are therefore deemed illegal. Any person who enters the territory of South Africa is subject to the provisions of the Immigration Act and until a transit permit or asylum permit has been issued to an asylum seeker, he or she is an illegal foreigner in the state. The term illegal here is not necessarily related to the lack of proper documentation, it is also relevant to the manner of entry – if the individual entered the country in an unregulated manner. The interpretation of the scope of Article 31 of the 1951 Convention concerning illegal entry applies to the case of the illegal entry of asylum seekers in South Africa. Article 31 (27) raises the point of 'presumptive refugees' in which it implies that the non-penalisation extends to asylum seekers and accounting for illegal entry and intent to apply for refugee status, thus asylum seekers. Under both international and South African law, no individual may be detained on the grounds of illegal entry. As such, it is only asylum seekers who may enter a country in a manner construed as illegally. Evidence of these circumstances should be discerned and confirmed from the facts determined by the RSDO. As per Section 21(4) of the Refugee Act, until a decision has been made based on the asylum application, no proceedings may be taken against a person regarding their unlawful entry or presence in a country.¹⁵⁰

(d) (ii) Non-refoulement

In continuing with the issue of unlawful entry, the concept of non-refoulement is key. Being party to both the 1951 Convention and the 1967 protocol, South Africa has inculcated the principle of non-refoulement into its national legislation. Section 2 of the Refugee Act encapsulated this principle and developed its applicability in three principle ways. First, it has eliminated the confusion surrounding whether the principle applies to those who have entered and those who seek to enter. This is due to the inclusion of the phrase 'general prohibition of the refusal of entry'¹⁵¹ in Section 2 which implies that any refusal of entry is considered refoulement. Second, South Africa has addressed the issue of returning asylum seekers to other countries, not only their country of origin, as non-refoulement. Third, it develops this definition to include, not only individuals who face serious harm but also those whose lives

¹⁴⁹ South Africa Immigration Act op cit note 26

¹⁵⁰ *Arse v Minister of Home Affairs and Others* (25/2010) [2010] ZASCA 9; 2010 (7) BCLR 640 (SCA) ; [2010] 3 All SA 261 (SCA); 2012 (4) SA 544 (SCA) (12 March 2010)

¹⁵¹ South Africa Refugee Act op cit note 25 Section 2

will be at risk. This inline with South Africa's ratification of the 1969 OAU Convention.¹⁵² The progressive nature of the Refugee Act is evident in the fact that South Africa recognizes that non-refoulement applies refugees in the country lawfully and unlawfully, but also asylum seekers who have not yet entered the country, and elucidated that refusal and rejection of entry is synonymous to refoulement.¹⁵³ South Africa also adheres to the 'safe' third-country-rule which implies that it is permissible to redirect individuals to a third country deemed safe if they are refused entry. This third country must guarantee safety from refoulment.¹⁵⁴ Evident in the outcome of the *Abdi v Minister of Home Affairs* case, refusing entry to an asylum seeker is also considered unconstitutional as it conflicts with the values of the South African Constitution. As such, no asylum seeker may be refused from entering the South African territory as it constitutes non-refoulement.

(d) (iii) *Detention Centres in South Africa*

The Lindela Holding Facility, also known as the Lindela Repatriation Centre, is a DHA detention facility for illegal foreigners in Krugersdorp. The facility is subcontracted to a private company called Bosasa Holdings which is in charge of the day to day operations of the holding facility. The lack of DHA oversight and the shift in responsibility from the DHA to Bosasa has resulted in Lindela being without monitoring and oversight mechanisms. In 2017 Lawyers for Human Rights (LHR), the South African Human Rights Commission (SAHRC) and Doctors Without Borders (MSF) visited Lindela after numerous reports of detainee abuse by Bosasa officers. The investigation exposed the mistreatment, abuse and limited access to legal assistance detainees faced in Lindela.¹⁵⁵ Typically, illegal foreigners facing deportation are held in Lindela, however, many asylum seekers are arbitrarily detained and denied access to due process. According to LHR, 'hundreds of men, women and children are deported from the facility daily, in some cases, regardless of whether they have valid asylum claims, or in many circumstances are even documented.'¹⁵⁶ The investigation also exemplified the level of

¹⁵² Fatima Khan and Tal Schreier op cit note 1634 at 6

¹⁵³ Ibid at 7

¹⁵⁴ Ibid at 8

¹⁵⁵ Lawyers for Human Rights. 2017. "Violence and Violations at Lindela Repatriation Centre". Available at <http://www.lhr.org.za/news/2017/violence-and-violations-lindela-repatriation-centre>.

¹⁵⁶ Sabelo Sibanda and Gina Snyman. n.d. 'LHR Launches Report on Monitoring Immigration Detention in South Africa'. Lawyers for Human Rights. available at <http://www.lhr.org.za/news/2008/lhr-launches-report-monitoring-immigration-detention-south-africa>.

secrecy and communication disparity between Bosasa and the DHA thus emphasises the ineffective nature of the asylum system.¹⁵⁷

Often, asylum seekers are haphazardly arrested by the military or police officials and end up in detention facilities or prisons,¹⁵⁸ a clear violation of the Refugee Act and constituting arbitrary and unlawful detention. Increasingly, asylum seekers are being detained for long periods at police stations and prisons for immigration purposes. Many of the police stations found to routinely detain asylum seekers are within proximity to the functioning RRO. One such police station is the Musina Police Station which, since the closing of the detention facility, has been known to arrest and detain illegal foreigners without identifying them as asylum seekers. Other South African Police Service (SAPS) run facilities that detain asylum seekers are the Sunnyside Police Station, Germiston Police Station, Westville Police Station, and the Pretoria Central Police Station, which is close to the Pretoria RRO. Up until 2018, the Pollsmoor Prison (Pollsmoor Maximum Security Prison) was often used to detain asylum seekers too.¹⁵⁹

(d) (iv) Detention and deportation of illegal foreigners under the Immigration Act

Although the 2002 Immigration Act was a stark contrast to its oppressive predecessor, it is still a restricting piece of legislation aimed at using a hard-line approach as a form of immigration management. The aim was primarily to establish an immigration regime that fostered a human rights environment in line with the Constitution. It also addressed the issues of xenophobia, equality and inclusion. The implementation of the Immigration Act is ineffective. Although the initial consensus after apartheid was that skilled migrants would foster economic growth and development, in 2004 this notion was revisited and the South Africa government began a process of securitizing their migration policies. Migration and the policies informing migration are very much linked to the political landscape of South Africa. As a result, the obligations to migrants, protection of migrants and perspective of migrants are largely dependent on the political and socio-economic landscape of the country.

¹⁵⁷ South African Human Rights Commission. 2017. "Children Illegally Detained Under Bosasa's Watch at Lindela As Healthcare Crumbles". SAHRC. Available at <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1075-children-illegally-detained-under-bosasa-s-watch-at-lindela-as-healthcare-crumbles>.

¹⁵⁸ Lawyers for Human Rights. 2009. 'LHR Challenges Unlawful Detention in Musina' Available at <http://www.lhr.org.za/news/2009/lhr-challenges-unlawful-detention-in-musina>.

¹⁵⁹ Countries - Global Detention Project | Mapping Immigration Detention Around the World". Global Detention Project | Mapping Immigration Detention Around the World, 2018, available at <https://www.globaldetentionproject.org/countries/africa/south-africa>.

Under the Immigration Act, undocumented migrants may be subjected to removal procedures. These undocumented migrants include asylum seekers who do not have permits, have been unable to access the asylum system, have expired permits, have been unable to renew their permits, or whose asylum applications have failed. The use of the Immigration Act and its enforcement provisions are unlawful when applied to asylum seekers whose asylum claims have yet to be finalised.¹⁶⁰ Section 41(1) of the Immigration Act provides that if an officer is not satisfied with the form of identification provided by an individual, and therefore their presence in the country is under scrutiny, the officer has authority to interview the individual about their identity and status. These immigration or police officer may take the individual into custody to conduct the interview, without a warrant.¹⁶¹ The Act also provides that these prescribed steps can also result in detaining the person as per Section 34.¹⁶² Regardless, the officers are obligated to take the necessary steps, prescribed in the Immigration Act, to assist the person in verifying their status or identity. However, this is not often the case, in 1999 the SAHRC did a report into the ‘Arrest and Detention of Suspected Undocumented Migrants.’ In the findings, it was consistently reported that many people were denied their request to fetch their documentation or call a relative when apprehended by the police.¹⁶³ Of the study, 30% of those interviewed claimed to have had valid documentation that they were either unable to access, or was completely ignored, an interviewee stated that ‘the police don't care even if you have an ID with you, if they suspect you ... they just detain you,’¹⁶⁴ more so, documentation was often confiscated and not returned. The majority of those interviewed did not have valid documentation or had expired documentation. However, they were taken into custody with little effort made to assist them with proving their status or identity. The report also found that many apprehended individuals were given no reason for being detained, and therefore were not aware of their rights they were entitled to. Many asylum seekers have expired permits due to the difficulties accessing the refugee system, despite the *Bukasa and Others v Minister of Home Affairs* case which clarified the obligations of immigration officials to extend asylum seekers permits once the individual presents themselves at a RRO.¹⁶⁵

¹⁶⁰ Ibid at 240

¹⁶¹ South Africa Immigration Act op cit note 26 Section 41(1)

¹⁶² Fatima Khan and Tal Schreier op cit note 134 at 240

¹⁶³ South Africa Human Rights Commission ‘Report into the Arrest and Detention of Suspected Undocumented Migrants’ at http://archive.niza.nl/uk/press/docs/za_hrc/za_hrcreport.htm#destroy

¹⁶⁴ Ibid

¹⁶⁵ *Bukasa and Others v Minister of Home Affairs* (Case no: 22197/10) [Unreported].

The Immigration Act also specifies that there must be reasonable ground for an officer to be unsatisfied with the individual's presence in the country. More so, it is constitutionally impermissible for an officer to arbitrarily request an individual to provide identification on the grounds of discrimination as per Section 9(3). Requesting proof of identity contravenes the Constitution, not only the grounds of discrimination but also the right to dignity clause (Section 10) and the protection against deprivation of liberty without just cause (Section 12).¹⁶⁶ Although under suspicion of criminal activity or in police operated roadblocks or operations, individuals must provide their identity or status documentation as failure to do so may be reasonable grounds for detention, this applies to asylum seekers too.¹⁶⁷ Section 34(1) of the Immigration Act is specific to the detention of illegal foreigners, it classifies detention for two purposes.¹⁶⁸ Detention for deportation, or detention for purposes other than deportation. Despite providing immigration and police officers the authority to detain illegal foreigners without a warrant, it specifies how this must be done. Section 34 (1) (a-e) provides that the detained person must be notified in writing the reasons for detention and notified of their option to appeal. If detained without a warrant, the person can only be held for 48 hours unless a warrant is procured within that time. Their rights in detention and as an illegal foreigner must be clearly stated and provided for in a language they understand, and they must be held in detention in compliance to the minimum standards protecting their dignity and human rights. Without a warrant from a court on legal and justifiable grounds, illegal foreigners may not be held in detention for longer than 30 calendar days. This may be extended on reasonable grounds not exceeding 90 calendar days.¹⁶⁹ It is evident that Section 34(1) applies to individuals classified as 'illegal foreigners' however, as per the Immigration Act and Refugee Act, asylum seekers are not illegal foreigners and therefore subjecting them to immigration laws and regulations is unlawful.

(d) (v) Detention vs. arbitrary detention

The Immigration Act provides that if a person is classified as an illegal foreigner, they may be legally detained under the Act. The detention of an asylum seeker may not exceed 30 days without being reviewed by a judge of the High Court. However, the current application of the system does not provide for the individual to present themselves in court in person to

¹⁶⁶ Fatima Khan and Tal Schreier op cit note 134 at 241

¹⁶⁷ Ibid at 241

¹⁶⁸ South Africa Immigration Act op cit note 26 Section 34(1)

¹⁶⁹ Ibid at 243

make their case and argue their detention. All asylum seeker must be provided the opportunity to explain their circumstances, identity and status – without which asylum seeker are more susceptible to be subject to deportation, violence and lack of access to legal representation and due process.¹⁷⁰ In 2017, LHR presented 10 years’ worth of evidence on monitoring the immigration detention violation of asylum seeker rights. Their findings emphasised the inadequate implementation of the asylum system by the DHA. The detention of asylum seekers, who are legally protected by the South Africa Refugee Act, under the Immigration Act, is considered arbitrary detention. As such, the current intertwined nature of the application of immigration and refugee law has resulted in the negation of asylum seeker protection mechanisms. Consequently, the ‘justification’ of detaining illegal foreigners as being illegally in the state is inherently arbitrary when applied to asylum seekers.

(e) Reconciling immigration law and refugee law in South Africa

The differing orientations of the immigration and refugee systems are reflected in their historical roots. Nonetheless, the considerable overlap in immigration and refugee law in South Africa makes for an unreliable refugee system. Although there have been attempts to simultaneously apply the provisions of these distinct acts, their differing approach has led to the misapplication of relevant law and their conflation makes accessing the asylum system a challenge.

(e) (i) Unconstitutionality of the Immigration Act

The Immigration Act dictates entry into the state, type of applicable permits and the detention and deportation of illegal foreigners. Although considered counter-intuitive to the strict immigration regime, the Refugee Act lays out a different set of processes for entry and status. This largely due to the Immigration Act being more of an administrative tool governed largely by sovereignty and the entry of voluntary migrants. Whereas refugee law, although administrative too, is human rights-based and addresses the needs of vulnerable groups of people who have entered due to different reasons. Although these two systems are often

¹⁷⁰ Lawyers for Human Rights ‘LHR to Challenge Constitutionality of Immigration Detention Laws’ 2017 available at <http://www.lhr.org.za/news/2017/press-release-lhr-challenge-constitutionality-immigration-detention-laws>

complementary, they need to be distinguished to avoid the misapplication of the laws and to ensure the full extent of protection for asylum seekers and refugees.¹⁷¹

In 2017 the South Africa Constitutional Court in the *Lawyers for Human Rights vs Minister of Home Affairs* case at the Gauteng High Court declared that Section 34 of the Immigration Act as unconstitutional when applied to asylum seekers. The case involved the determination of whether Section 34, under which an illegal foreigner was arbitrarily detained without trial, was valid. A point of contention was the validity of detaining an illegal foreigner for the prescribed 30 days without judicial oversight or the capacity to appear before a court to enforce their rights in person.¹⁷² By arguing that Section 12(1) incorporates both a substantive and procedural element to applying Section 34, the court argued that detention must be resorted to under constitutionally accepted reasons. Therefore, the arbitrary detention of individuals and deprivation of their freedom and security of persons must be linked to legitimate government oversight and purpose. More so, the procedural aspect found in Section 21(1)(b), relates to the procedural oversight that should be extended by the courts.¹⁷³ The outcome was clear on the issue that detention must be constitutional, yet it is unconstitutional to detain asylum seekers.

The Refugee Act was a long-awaited and necessary piece of legislation to appropriately deal with the influx of asylum seekers in a humanitarian way. Although strong on paper the Refugee Act and refugee protection framework are ineffectively implemented. The uneasy coexistence of immigration control imperatives has blurred the lines of the legality of detaining asylum seekers.¹⁷⁴ The tension created by the simultaneous application of the progressive Refugee Act and restrictive Immigration Act has conflated the legal frameworks and resulted in the erroneous application of laws. The underlying tension in South Africa lies in the legislative formal human rights protection and the conjuncture of immigration enforcement imperatives.¹⁷⁵ This is evident in all three reasons for the arbitrary detention of asylum seekers presented in this paper, detention is largely controlled by the Immigration Act, yet the Refugee Act must be acknowledged when dealing with asylum seekers as set out in the Refugee Act and 1951 Convention. A considerable challenge is the

¹⁷¹ Fatima Khan and Tal Schreier op cit note 134 at 238

¹⁷² Fatima Khan op cit note 116 at 42

¹⁷³ Ibid at 42

¹⁷⁴ Corey Johnson op cit note 9 at 203

¹⁷⁵ Ibid at 203

lack of DHA and RSDO adherence to procedures, especially regarding the application of relevant legislation. The limited access and availability of RRO, and therefore documentation, has resulted in the use of detention for administrative purposes. This is a common practise and asylum seekers are subject to detention in facilities such as the Lindela Holding Facility.

Fundamentally, South Africa is clear on its policy that the asylum process is governed exclusively by the Refugee Act and not the Immigration Act. All asylum seekers, either acknowledged, pending their application outcome or rejected, are protected by the Refugee Act and should not be subject to the Immigration Act. Many police officers are unaware or do not understand immigration and refugee law, therefore when police officers encounter undocumented or documented asylum seekers, expired or up to date, they detain them as per the Immigration Act as illegal foreigners. This was partially addressed in *the Lawyers for Human Rights v Minister of Home Affairs and Others case*, wherein which it was clarified that any person detained as an illegal foreigner should be brought before a court within 48 hours.¹⁷⁶ This is not followed and instead, individuals are immediately placed in detention. This blatant infringement of the right to appear in person and make their case further problematises the arbitrary detention of asylum seekers.

IV CRIMINALIZATION OF ASYLUM SEEKERS

South Africa's human rights-based asylum system enables asylum seeker to access resources including health care, education and employment. More recently the South Africa government has taken the view that these post-apartheid policies for refugee protection are too generous and open to abuse, they ,therefore, need to be revised to include more limitations, greater restrictions and fewer rights. The major changes to the 1998 Refugee Act in the 2016 Refugee Amendment Act, followed by the 2017 White Paper on Migration show the development of asylum seeker and refugee exclusionary measures and policies.¹⁷⁷ South Africa's once progressive asylum system has deteriorated and the corruption, and mismanagement of the asylum process has resulted in one of the longest asylum arbitration periods in the world. Many asylum cases have stretched on for years and court cases remain

¹⁷⁶ Popo Mfubu op cit note 146 at 11

¹⁷⁷ Jonathan Crush, Caroline Skinner and Manal Stulgaitis 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *Southern African Migration Programme (SAMP) SAMP Migration Policy Series* No. 79. Available at <http://samponline.org/wp-content/uploads/2017/08/SAMP-79.pdf>

unaddressed. An unintended consequence of the initial liberal approach to asylum has been an influx of migrants who are not seeking asylum but rather economic opportunities. However, seeing as South Africa immigration law is undeniably more stringent, many apply under the guise of being asylum seekers.¹⁷⁸ This has overburdened the already under-resourced asylum system and had devastating effects on asylum seekers who are fleeing persecution and intending to seek asylum in the country. The widespread failure to acknowledge any economic, cultural and social advantages that asylum seekers could represent, in addition to failing to recognise the state's role in the scarcity of public resources has further criminalised asylum seekers.

In 2015 a WhatsApp message was sent on behalf of the Patriotic Movement, Unemployed Workers Forum, Anti-Crime Movement, Pan Local Forum, and others went viral. The message instructed immigrants residing in South Africa, both legally and illegally, to leave the country. The message used existing xenophobic attitudes and frenzied the already 'afrophobic' communities of South Africa to openly criminalise immigrants. This reflected the general perception many South Africans have of immigrants entering and residing in South Africa. Immigrants are criminalised for their illegal entry, lack of papers, and accused of selling drugs, stealing jobs, health services and other opportunities from South Africans. The message ended with a declaration of war against all foreigners, justified by fear, it threatened the death of millions if foreigners do not comply and leave the country.¹⁷⁹ Emblematic of the aggressive and xenophobic attitudes many South Africans have towards immigrants, the awareness of the distinctions between migrants and asylum seekers remains unacknowledged. Although this paper identified detention as a technique for criminalising asylum seekers, two core mechanisms are enabling arbitrary detention, they are 1) the governments' politicisation of migrants and 2) the structure of the asylum and immigration systems. Through the asylum process, the DHA, MHA, and SAPS, have framed asylum seekers as criminals who have illegally entered the country. The manifestations of this has resulted in a cycle of criminalisation, in which the external factors have altered the public perception of asylum seekers and therefore asylum seekers are criminalised by the public and the institutions that are supposed to protect them.

¹⁷⁸ Ibid at 6

¹⁷⁹ Theresa Alfaro-Velcamp and Mark Shaw 'Please GO HOME and BUILD Africa': Criminalizing Immigrants in South Africa' (2016) *Journal of Southern African Studies* 42(5). Available at <https://doi.org/10.1080/03057070.2016.1211805> at 984 /

This chapter unpacks the phenomenon of criminalisation by initially explaining what the criminalisation cycle is, and how detention is the dominant mechanism. Through an analysis of the governments' politicisation of migrants and the structure of the asylum and immigration systems, this chapter shows how the asylum process, and the DHA, MHA and SAPS, inherently criminalise asylum seekers. A challenge is the rampant corruption and misuse of the asylum process, asylum seekers are forced to bribe or pay for their documentation to legally stay in South Africa.¹⁸⁰ Globally and nationally, this cycle has criminalised the act of seeking asylum – despite it being a fundamental human right. It has also resulted in asylum seekers struggling with issues of aggression, xenophobia, discrimination, deprivation of resources and services, exclusion and hostility. In addition to the trauma of being arbitrarily detained, asylum seekers face emotional and mental trauma, abuse and psychological issues. Essentially, this chapter is a cumulative analysis of the previous chapters and identifies how arbitrary detention criminalises asylum seekers in South Africa.

(a) The criminalisation cycle

The use of immigration and refugee law as migration deterrence mechanisms has multiple implications for asylum seekers. The term criminalisation means to make an action illegal, such as seeking asylum.¹⁸¹ This paper is aimed at highlighting how the act of detaining asylum seekers, for administrative reasons, inevitable criminalises not only asylum seekers but also the act of seeking asylum. This has multiple implications including the deterrence of asylums seeking and the exclusion of asylum seekers from communities through the perception of asylums seekers being criminals and therefore unwanted. Criminalisation in the context includes making an act or people illegal through criminal and administrative means. When applying criminal law to asylum seekers in this manner it negates the norm of presumed innocence. In this case, the norm of criminalising asylum seekers has been established in which the state and public have made a human right inherently wrong or illegal by criminal and state law.¹⁸² The criminalisation of asylum seekers can be broadly interpreted to occur through the reinforcement of two processes. The symbolic or rhetoric criminalisation, wherein asylum seekers are construed of being

¹⁸⁰ Ibid at 983

¹⁸¹ Oxford English Dictionary available at <https://en.oxforddictionaries.com/definition/criminalization>

¹⁸² Patrick Tomlin 'Extending the Golden Thread? Criminalization and the Presumption of Innocence' (2013) *Journal of Political Philosophy* 21.1 pp. 44-66.

dangerous and criminals through the media and public discourse. In addition to the procedural criminalisation of asylum seekers in which asylum seekers are presumed to be criminals and are therefore treated as such.¹⁸³ The implications of criminalisation result in a system in which asylum seekers are not given the benefit of the doubt and therefore not presumed in need of protection until anything contrary is determined. It has normalised the act of making non-punishable acts punishable. In this, it has allowed South African society to contribute to the discourse on what is 'illegal' and consequently, how they should be punished. Despite attempts from the state to curb the discrimination, aggression and xenophobia the public continues to propagate and subject asylum seekers to, the asylum system has become a source of criminalising asylum seekers.

(a) (ii) Symbolic or rhetoric criminalization

The use of legislative and discursive mechanism to reconceptualise what the term asylum seeker implies has resulted in the portrayal of asylum seekers and refugees as being criminals, deviant and dangerous.¹⁸⁴ Welch and Schuster identify that increasingly, asylum seekers are being characterised as 'menacing strangers who threaten not only individual safety but also the entire social order,'¹⁸⁵ thus positioning asylum seekers as threats to society and the state.

The rhetoric of the dangerousness of asylum seekers, in conjunction with exclusionary policies, have established a notion of illegal foreigners being the 'other' or the enemy within. Through 'othering' asylum seeker, the public and state has become less receptive to this vulnerable group. More so, this rhetoric has blurred the differentiations between asylum seeker, refugee, migrant or illegal immigrant, particularly in the mind of the public.¹⁸⁶

¹⁸³ Leanne Weber 'The detention of asylum seekers: 20 reasons why criminologists should care' (2002). *Current Issues in Criminal Justice* 14 (1) at 14

¹⁸⁴ James Banks 'The Criminalisation of Asylum Seekers and Asylum Policy' (2008) *Prison Service Journal* 175 at 43-49. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129409. at 43

¹⁸⁵ *Ibid* at 44

¹⁸⁶ Leanne Weber op cit note 183 at 12

(a) (iii) Procedural criminalization

Procedural criminalisation can be conceptualised as practices which essentially treats asylum seekers as ‘virtual criminals.’¹⁸⁷ The presumption of asylum seekers being criminals, and therefore the consequent action and behaviour of a state, officials and the public can be explained through institutional, policy and perception practices. Mainly, through treating asylum seekers as illegal upon their entry into a country. The use of punitive crime control mechanisms in immigration and refugee law as served to justify ‘increasingly restrictive and draconian legislation and policy’¹⁸⁸ in the asylum process. In effect, it is the use of legislation and mechanisms to problematize asylum seekers and make illegal the act of seeking asylum, that enable the continued use of such instruments. As such, a central element of this punitive approach is the use of detention largely for the illegal entry of an asylum seeker into a territory, despite the 1951 Convention and the Refugee Act prohibiting this.

(b) Politicization of asylum seekers

The inhumane and toxic rhetoric that has formed to represent asylum seekers has inevitably politicized the nature of seeking asylum and subsequently, posed asylum seekers as unwanted or threats to the country. In the context of this paper, the term politicization refers to issues becoming more contested and therefore increasing public demands on public policy.¹⁸⁹ The result of the politicization has been the normalization of the hard-line approach to the asylum system. How non-nationals are treated is a symptom of the political landscape in South Africa, through the politicization of migration, and asylum-seeking, it can be argued that the asylum system has become a proxy for other state issues.

(b) (i) Asylum seekers as scapegoats

The politicisation of migration into South Africa highlights multiple issues at a national level. Velcamp and Shaw propose that the criminalisation of asylum seekers is essentially a subterfuge for the government’s inability to provide for the population.¹⁹⁰ It also

¹⁸⁷ Ibid at 14

¹⁸⁸ James banks op cit note 184 at 43

¹⁸⁹ Birgit Glorius ‘Public opinion on immigration and refugees and patterns of politicisation Evidence from the Eurobarometer’ (2018) European Migration Research, CEASEVAL Working Papers. available at <http://ceaseval.eu/publications/Public%20opinion%20on%20immigration%20and%20refugees%20and%20patterns%20of%20politicisation.pdf>

¹⁹⁰ Theresa Alfaro-Velcamp and Mark Shaw op cit note 179 at 985

directs attention away from government issues of corruption, state crime and inefficient governance. Notably, this paper is not suggesting every government department and official is responsible for such actions, however, the misalignment between departments and the conflicting mandates are evidence of such conduct occurring. Although the DHA, SAPS, RRO, lawyers, officials and judges often have differing mandates, roles and functions. There seems to be consistency within the way immigrants are targeted and how the asylum and immigration processes have become increasingly difficult to access. Consequently, the application of immigration and asylum law has been inconsistent and problematic.

(b) (ii) Economic migrants and asylum seekers

The widespread misconception that all immigrants, despite their legal status, are ‘illegal’, and are therefore a threat to the well-being and ability of the country to thrive is a relevant challenge in South Africa. This misconception is largely due to the politicization of ‘illegal foreigners’ and the threat they pose to the South African public. A result of this is, is the DHA’s continued treatment of the asylum system as one which is being abused by economic migrants. Therefore justifying the limiting policies and high asylum rejection rates.¹⁹¹ As only a RSDO may determine an individual’s asylum status, DHA and RRO officers have the power to prevent asylum seekers from accessing the documentation.¹⁹² According to Amit and Kriger, the DHA has established a system that limits asylum seekers status by creating barriers that limit the access to necessary documentation to apply and maintain asylum status.¹⁹³ Due to the restrictive policies on economic migrants, many economic migrants entering South Africa attempt to do so under asylum laws, which allow asylum-seekers to apply for asylum while legally residing in the country. Thus further increasing the volume of asylum seekers and pressure on the DHA. The DHA is tasked with classifying foreign migrants as either asylum seekers, legal migrants or illegal foreigners. Additionally, the lack of effective RRO makes the process of determining and differentiating valid asylum claims from economic migrants convoluted. As a result, asylum seekers are often rejected on the premise of being economic migrants.

¹⁹¹ Roni Amit and Norma Kriger op cit note 133 at 277

¹⁹² Ibid

¹⁹³ Ibid

(c) Structure of asylum and immigration systems

Although the structure of the asylum and immigration systems in South Africa has been previously discussed, due to the limited oversight, these system has become a hotspot for corrupt practices and officials, and therefore, both these systems contribute to the criminalization of asylum seekers.

(c) (i) Refugee Rights office

During the application process, asylum seekers go through a rigorous interview process. If received, the Section 22 permit also requires multiple renewals before a determination is made and a Section 24 permit, or refusal, is issued. However, the process now involves bribing officials for access to the RRO and RSD processes.¹⁹⁴ Increasingly, immigration officers are pressuring asylum seekers to buy permits. This has become one of the only ways to renew permits, submit asylum applications or receive asylum status. The problem is two-fold, many asylum seekers cannot afford to pay bribes or buy documentation, and those who do have illegally obtained documents, are aware that it is a criminal offence. By providing no alternative means to legally reside in South Africa, and making access to documentation nearly impossible, asylum seekers are coerced into resorting to illegal means of obtaining documentation. Thus, the entire asylum process, and system, criminalises asylum-seekers through lack of choice and alternatives. By preying on the fear and need for documentation of asylum seekers, the system has become lucrative for immigration and RSD officers. In the SAHRC investigation, interviewees stated that you have to have a 'contact' to get a permit, the costs range from R2000 for a Section 22 permit, short term, R2500 for a Section 22 permit with a four-year validity period, and up to R8,000 for a Section 24 permit.¹⁹⁵ It is also nationality dependent as most of these 'contacts' are South African and discriminate against foreigners. The vicious cycle of requiring a permit to gain employment means these methods of obtaining documentation are unavailable to most asylum seekers, despite their illegal nature. Most migrants are completely aware of the illicit nature of buying documentation or bribing officials to get documentation, they acknowledge the criminalisation in their participation. However, their frustration with the asylum system and the level of corruption, in conjunction with their need for the protection and rights ideally

¹⁹⁴ Theresa Alfaro-Velcamp and Mark Shaw op cit note 179

¹⁹⁵ Theresa Alfaro-Velcamp and Mark Shaw op cit note 179 at 989

guaranteed by permits, provide no alternative course of action than to participate in these illegal activities.¹⁹⁶

(c) (ii) South African Police Service

Simultaneously, the SAPS play a role in the criminalisation of asylum seekers through their institutional power. SAPS officers routinely raid known non-national occupied areas, such as Hillbrow in Johannesburg, in search of undocumented and illegal foreigners. The policing system and style of the SAPS is largely reminiscent of the apartheid era-like policing system, echoing the need for control, the use of violence and aggression, and the lack of accountability. Often, asylum seekers face discrimination and police brutality. In July 2014, the DHA raided the areas of Somerset West and Sholoza Villa in Kraaifontein, in the Western Cape. The raid was unprovoked, and targeted foreigners on the grounds of not having documentation. These individuals, both women and men, were then taken to facilities including Pollsmoor Correctional Facility and Lindela. Raids like this are a common occurrence, the 2008 nation-wide xenophobic attacks and operations like ‘Operation Fiela’ (sweep out the dirt)¹⁹⁷, have been some of the worst xenophobic outbreaks in South Africa.

The use of discriminatory practises and racial profiling is a common mechanism for policing foreigners in South Africa too. The subjective and prejudiced policing has resulted in the targeting of specific migrant groups who are subsequently harassed by the police. Using fear tactics are another policing strategy which has resulted in an inherent fear and cycle of avoidance of the police by asylum seekers. Additionally, asylum seekers have no officials to turn to in order to report police brutality or the misuse of police authority. Alternatively, police officers’ resort to ‘turning a blind eye’ to the violence asylum seekers are subject to or policing practises that are unlawful.

(d) The act of criminalising asylum seekers through their politicisation

The politicization of asylum seekers, in addition to the ineffective and intertwined asylum and immigrations systems, have resulted in the criminalization of asylum seekers.

¹⁹⁶ Theresa Alfaro-Velcamp and Mark Shaw op cit note 179 at 990

¹⁹⁷ Aislinn Laing ‘South African church sanctuary for refugees targeted in police raid’ *The Telegraph* 8 May 2015. Available at <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/11593301/South-African-church-sanctuary-for-refugees-targeted-in-police-raid.html>. Accessed on 17 October 2018

More so, they have criminalized the universal right to seek asylum and consequently, have been utilized as a deterrence mechanism to deter people from seeking protection in South Africa.

Inevitably, classifying individuals as ‘illegal’ upon their entry into a country is a declaration of their criminality. The justifications of irregular entry, for example, not entering the country at a recognised port of entry, or the whim of the official, or not having a Section 23 transit permit, essentially makes the asylum seeker a criminal and threat to the country, therefore subject to the Immigration Act. Although these asylum seekers may not be refused entry due to non-refoulement legislation, criminalising the individual under irregular entry and for a lack of transit permit inevitably makes them vulnerable to detention. Notably, this tool also makes the act of seeking asylum, which is a human right under the UDHR and other international and national law, a criminal act. The politicisation of immigration inherently criminalises the act of seeking asylum, a right enshrined in Article 14 (1) of the UDHR.¹⁹⁸ According to Heberton and Thomas ‘illegal entry’ is said to be in state of flux, alternating between periods of being tolerable and prohibited.¹⁹⁹ The objective is the prevention of asylum seekers from illegally entering the territory. The fundamental need for personal safety instils a sense of fear in communities and states, thus creating the division between ‘us’ and ‘them’. More so, it uses detention to blur the distinction between asylum seekers and criminals which is particularly effective on the public perception of asylum seekers.

(d) (i) Criminalisation as a deterrence mechanism

The notion of deterrence can be explained as ‘any mechanism designed to discourage the performance of an activity not yet accomplished.’²⁰⁰ In the case of asylum seekers, it is the act of using detention and criminalisation as mechanisms to deter asylum seekers from seeking refuge in South Africa. Notably, the White Paper on Migration mentioned the use of detention and deportation as a deterrence mechanism as mechanisms too costly to maintain. However, officials continue to use the practice of detention for multiple reasons, deterrence

¹⁹⁸ UDHR op cit note 1

¹⁹⁹ Leanne Weber op cit note 183 at 6

²⁰⁰ International Detention Coalition ‘Reframing immigration detention in response to irregular migration: Does Detention Deter?’ 1 (2015) available at https://idcoalition.org/wp-content/uploads/2015/04/Briefing-Paper_Does-Detention-Deter_April-2015-A4_web.pdf

being one of them.²⁰¹ Although the deterrence mechanism, in this case is two-fold, being that of detention and criminalisation, it has developed into a system wherein which seeking asylum has become punishable. The reasoning being to encourage asylum seekers to avoid South Africa as an asylum destination. However, in a report written by the International Detention Coalition (IDC), it was suggested that the use of mechanisms for deterrence has not resulted in a de facto situation in which asylum seekers are deterred.²⁰² Rather, deterrence mechanisms have resulted in alternatives ways in which asylum seekers seek asylum in a state, including the use of smugglers to avoid state officials. The report also mentions that ineffective reception offices and aggression are not deterrence mechanisms due to the circumstances of individuals seeking asylum. However, the impacts of criminalisation have developed into a deterrence mechanism as it affects the integration and socialisation of asylum seekers into the host country.²⁰³ The inability to find work, or be included in the social fabric of the state has been an unexpected form of deterrence in South Africa as it affects the ability to live and survive in the state. Thus, criminalisation or detention are not direct deterrence mechanisms, however, it has developed into an indirect deterrence mechanism.

(e) Implications of criminalisation on asylum seekers

This criminal perception of an asylum seeker has inevitably been used to condone arbitrary detention and has resulted in bouts of xenophobic violence and inhumane treatment. Arguably, a reason for the exclusive and limiting approach to asylum is because a vast majority of South Africans live in poverty and struggle to meet their basic needs. As such, South Africans themselves compete for resources and adding foreigners to this pool has resulted in the perception of a zero-sum game. In this zero-sum game, asylum seekers or refugees who have access to public services, like access to health care, education and employment, are considered to have access due to South African being deprived of them. This perception has resulted in a negative approach to asylum seekers and resulted in their exclusion and violence against them. More so, by arbitrarily detaining asylum seekers, the

²⁰¹ Agnes Musonda and Liesbeth Schockaert 'South Africa is on a perilous path to making criminals of people on the move' *Mail and Guardian* 16 August 2018. Available at <https://mg.co.za/article/2018-08-16-south-africa-is-on-a-perilous-path-to-making-criminals-of-people-on-the-move>. Accessed on 17 October 2018

²⁰² International Detention Coalition 'Reframing immigration detention in response to irregular migration: Does Detention Deter?' op cit note 200

²⁰³ Ibid

state inevitably adds to this negative perception of asylum seekers and worsens their living conditions.

(e) (i) Violence, Aggression and Discrimination

The issue of detention by DHA and SAPS highlight the elements of discrimination and the tension between immigration and asylum seeker protection. Importantly, how law enforcement and government institutions fail to distinguish asylum-seekers, illegal immigrants and criminals. At RRO and during the RSD processes and interviews, many asylum seekers have reported cases of discrimination, aggression and xenophobia. According to Hathway, the right to non-discrimination may be the only legal guarantee an asylum seeker may require as any unequal treatment must be justifiable according to consistently accepted and applied norms.²⁰⁴ Considered by many in international law to be *jus cogens*, it extends asylum seekers and refugees an additional form of protection despite citizenship, nationality, or migrant category. However, the denial of this right, despite being in contravention to multiple human rights, also denies asylum seekers protection and the discrimination of asylum seekers based on race and country of origin has resulted in the unfair and inconsistent application of both refugee and immigration law.

(e) (ii) Xenophobia

Although a contested term with no internationally agreed-upon definition, xenophobia is widely defined as an irrational fear of the unknown, a fear or hatred of foreigners or non-national by nationals of a country. The phenomenon is ‘largely based on unfounded myths and stereotypes with foreigners scapegoated for domestic social and economic problems.’²⁰⁵ In South Africa, foreigners are commonly blamed for the high unemployment rates, high HIV/AIDS rates, increased crime statistics, and the lack of social services. Asylum seekers are not differentiated from migrants or economic migrants and are often called derogatory terms and subjected to unacceptable levels of violence by both citizens and agents of the state. Handmaker and Parsley suggest that the unprecedented rates of xenophobic racism and violence in South Africa stem from the country’s history of enforced social control and racially oppressive history. In 2008 the xenophobic attacks against African nationals residing in South Africa made international headlines, the attack wasn’t unique though, and

²⁰⁴ Fatima Khan op cit note 116 at 20

²⁰⁵ Theresa Alfaro-Velcamp and Mark Shaw op cit note 179

xenophobia has been a consistent phenomenon since 1994. In 1998 an attack on a train in Johannesburg, which left two Senegalese and one Mozambican dead, hardly reached the public eye. The link between xenophobia and racism is further exacerbated by the problem of police brutality, the SAPS exercise called Operation Crackdown was evidence of this. Targeting immigrant communities the police went in with the express aim of ‘thoroughly ventilate all criminal elements and illegal immigrants,’²⁰⁶ besides the violence and injury inflicted, many asylum seekers were arrested and detained without legal due process.

(e) (iii) Access to resources

As earlier mentioned, the impacts of criminalization and detention have largely affected the well-being and access to resources of asylum seekers. Documentation, employment, bank accounts, education, medical, and other necessary means of living are denied and limited due to their criminalization. The lack of documentation, due to the difficulty and corruption asylum seekers are subject to, means finding legitimate work, opening bank accounts or even getting medical care is challenging. Detained asylum seekers often face challenges in accessing resources, support and preparation for their legal cases, this is in the case that they are provided access to courts and legal due process. Often, asylum seekers are not informed of their rights when detained and as such have inadequate knowledge of the legal system, due process and their rights. More so, children have difficulty accessing education regardless of the DHA policy on all children being allowed to attend school despite their legal status. The limited access to documentation for children is particularly problematic as foreigners in South Africa, regardless of their legal and document status, have no access to formal birth registration and are instead issued with birth notifications which do not have Identification (ID) numbers. making the resources needed to live and survive inaccessible largely affects the mental and physical well-being of asylum seekers.

(e) (iv) Mental and psychological health

A significant consequence of arbitrarily detaining asylum seekers is the impact it has on their mental and psychological health and well-being. There are many medical and

²⁰⁶ Themba wa Sepotokele ‘Hillbrow crime blitz nets hundreds’ *IOL News* 13 March 2000. Available at <https://www.iol.co.za/news/south-africa/hillbrow-crime-blitz-nets-hundreds-30983>. Accessed on 17 October 2018

sociological studies which show that experiencing detention can seriously affect the health of individuals. This is particularly true of asylum seekers who often flee persecution from countries in conflict, where they experienced violence, trauma and sometimes torture. A 2006 study by The British Journal of Psychiatry explained how Post Traumatic Stress Disorder (PTSD), emotional distress and depression are common symptoms experienced in detention.²⁰⁷ The study also suggests that prolonged periods of detention have long-term impacts on the mental and psychological wellbeing. More so, asylum seekers are a vulnerable group of people, detention often renders them more vulnerable to abuse by individuals and the asylum system. The detention conditions and isolated nature of being detained result in an environment in which asylum seekers often relive past experiences, lose hope and eventually resign to their arbitrary detention. Discriminatory behaviour and language barriers exacerbate the impacts of detention and contribute to the isolation commonly felt by asylum seekers. The limited access to contacting family members and the deprivation of freedom create strong feelings of alienation and disheartenment. Typically, asylum seekers are unaware of the reasons for their arrest and as is the case in South Africa, their right to be given a verbal (in their language) and written justification for their detention is not provided. As a result, many asylum seekers are unaware of why they are being treated in such a manner and their rights, more so, why they are considered criminals for seeking refuge. Detention alters the mindset of the asylum seeker and the public or host society, further perpetuating the negative image of asylum seekers.

The negative consequences of South Africa's criminalization of asylum seekers are far-reaching. Despite the act of seeking asylum perceived as a crime punishable by detention, through the incorrect application of immigration law. The subjection of asylum seekers to extreme violence, exclusion and aggression has resulted in South Africa being an inhospitable environment. The nature of criminalization has provided a basis in which asylum seekers are barely equipped with resources necessary to survive and the normalization of this means the public is partial to this problem. Exploiting the vulnerable state of asylum seekers, largely through criminalizing their need for protection and limiting the protection guaranteed

²⁰⁷ Zachary Steel, Derrick Silove, Robert Brooks, Shakeh Momartin, Bushra Alzuhairi and Ina Susljik 'Impact of immigration detention and temporary protection on the mental health of refugees' (2006) *British Journal of Psychiatry* 188 (58). Available at <https://pdfs.semanticscholar.org/cdf4/128c8897cca737142b6785267547194c42a8.pdf>. at 6

through international and domestic frameworks, has resulted in an environment conducive to blatant human rights violations.

(f) The ineffectiveness of arbitrary detention in managing the asylum process

The increasing use of detention as a migration management tool has not reduced migration flows or asylum seekers from seeking refuge in countries. Research conducted by the IDC and La Trobe Refugee Research Centre has shown that in most cases, asylum seekers are unaware or have limited knowledge and understanding of asylum policies in countries of arrival.²⁰⁸ Most asylum seekers and migrants have come to consider detention as an inevitable part of seeking asylum.²⁰⁹ This inability to return to their home countries and the need for international protection is a key differentiating element between migrants and asylum seekers and should be consistently acknowledged when addressing the asylum system. In assessing the efficiency of detention, authorities often justify the arbitrary detention of asylum seekers as an administrative tool to determine identity and status or to deport asylum seekers. However, the aims of arbitrarily detaining asylum seekers are often not reached as individuals are denied their right to appear in front of a court and their papers often unacknowledged rendering the process ineffective. Additionally, there are cost implications of detaining asylum seekers unnecessarily.²¹⁰ In all detention facilities, the cost of providing for a detainee, despite the dismal treatment of detainees, is a considerable amount. South Africa's prisons and detention facilities are already underfunded, under-resourced and overcapacity. The conditions of detention infringe on the basic human rights of dignity and detaining asylum seekers in these centres arbitrarily puts more pressure on these establishments and the state. As such, it is inherently more expensive to detain asylum seekers than to effectively manage them at RRO.

(g) Alternatives to detention

The UNHCR is succinct in its principled position against the arbitrary detention of those deemed in need of international protection. Globally, there is an increasing recognition

²⁰⁸ Robyn Sampson, Grant Mitchell and Lucy Bowring 'There are alternatives: a handbook for preventing unnecessary immigration detention' (2011) *International Detention Coalition and La Trobe Refugee Research Center*

²⁰⁹ François Crépeau 'Human Rights Council Twentieth session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' Report of the Special Rapporteur on the human rights of migrants,' available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24-Add1_en.pdf

²¹⁰ Robyn Sampson et al, op cit note 208

for the need to find alternatives to detention, in addition to more safeguards and monitoring mechanisms to better protect the rights of asylum seekers. There is no single legal or political definition for how alternatives to detention may be construed, as such, the practice and interpretations of the term differ.²¹¹ The IDC defines alternatives to detention as ‘any legislation, policy or practice, formal or informal, that ensures people are not detained for reasons relating to their migration status.’²¹² Under international law, the detention of immigrants must only be used as a measure of last resort. As such, states are obligated to seek alternatives and implement these policies and therefore protect vulnerable people from being subject to arbitrary detention.

In their research about finding alternatives to detention, the IDC expressly states that alternatives are, 1) possible and effective, 2) most cost-effective than detention, and importantly, 3) respect human rights.²¹³ Finding alternatives to arbitrary detention means finding ways in which specific interests must be met. The alternative must provide an efficient way in which asylum seekers can fairly access the asylum process. Additionally, the entire process must adhere to the protection mechanisms guaranteed to asylum seekers through international and national means. The alternative must also provide integration mechanisms and address the public perception of asylum seekers in host communities.²¹⁴ Essentially, all states are obligated to find alternatives to detention that better respect human rights of all humans and asylum seekers. However, this not always the case despite evidence showing that the use of detention and other oppressive systems are costlier and less effective. The inclusion of appropriate measures for detention and non-custodial or administrative detention inevitably effect and prevent arbitrary and unlawful detention.²¹⁵ Importantly, the IDC noted that including community-based options is more likely to create an environment where fundamental human rights are respected and communities more willing to include asylum seekers. Thus contributing to the well-being of asylum seekers and providing them the platform to integrate, engage and contribute to society.²¹⁶ Although the roots of why asylum seekers need protection are a primary concern, the need to acknowledge that states have a role to play in the protection of these vulnerable people is key. Countries like South

²¹¹ Ibid

²¹² International Detention Coalition ‘Alternatives to detention’ available at <https://idcoalition.org/alternatives-to-detention/>

²¹³ Ibid

²¹⁴ Robyn Sampson et al, op cit note 258

²¹⁵ International Detention Coalition ‘Alternatives to detention’ op cit note 212

²¹⁶ Ibid

Africa will continue to be inundated with asylum claims and finding more sustainable and humane alternatives to detention should be the priority.

CONCLUSION

This research illustrates the complex nature of seeking asylum and how South Africa's asylum process perpetuates the criminalisation of asylum seekers. First, the nexus point between arbitrary detention and the deprivation of liberty is the lack of legal adherence. Without legal justification and when in contravention to the international and national legal requirements that dictate the premise on which detention can be justified, detention is inherently arbitrary. WGAD provides three key features in which to determine if detention can be considered arbitrary and a deprivation of liberty. This research illustrates that there is no legal justification for the detention of asylum seekers in South Africa, therefore the deprivation of liberty is unfounded under international and South Africa legislation. It is arbitrary and unlawful. Asylum seekers' detention is not in accordance with the rights guaranteed to asylum seekers under international and South African law. Instead of invoking asylum law, detention is conducted under immigration law, further rendering it unlawful as the Immigration Act does not apply to asylum seekers in South Africa. The absence of judicial oversight, due process, and fair trials is in contravention to the rights asylum seekers are entitled to. Asylum seekers detained in South Africa without cause and without the opportunity to provide identification or present themselves in court to make their case are deprived of their right to due process and are thus detained arbitrarily. This research has identified that the case of detention in South Africa meets all the criteria set out by WGAD that determine detention as arbitrary and as a deprivation of liberty. Second, the erroneous use of the South Africa Immigration Act in the asylum process has established, perpetuated, and subjected asylum seekers to a cycle of criminalisation. RRO and SAPS treat asylum seekers as criminals and have criminalised the act of seeking asylum and asylum seekers' presence in South Africa. The manifestations of this criminalisation have impacted asylum seekers' access to the asylum process and subjected them to violence and discrimination. The act of seeking asylum is not unlawful, neither is entering a country illegally for the sole aim of seeking asylum. Any restrictions on liberty and freedom of movement on individuals exercising the right to seek asylum must be provided for by legal backing. The act of detention is considered arbitrary and unlawful if detention is not deemed legitimate, necessary, or proportionate on an individual case by case basis.

This research analyses the main problem of how arbitrary detention has criminalised asylum seekers in South Africa. The paper analysed this problem by illustrating the role the Immigration Act has played in South Africa's asylum process. South Africa's history has contributed to the creation of a refugee system underpinned by oppressive apartheid structures largely associated with South Africa's immigration laws. The lacunae evident in the asylum process is a direct result of the erroneous application of immigration control imperatives to asylum seekers. The politicisation of asylum seekers and corrupt RRO and SAPS have used arbitrary detention as a means of deterrence and control. This has created a system wherein asylum seekers are criminalised by South African institutions and the South African public. The implications of this criminalisation cycle have created an inhospitable environment for asylum seekers in South Africa.

State sovereignty and international obligations are a primary source of tension between the application of international and South Africa laws and the practice and implementation of these laws. This tension provides the primary basis on which asylum seekers are detained as the negation of legislation is often justified by state sovereignty. The law of non-refoulement exemplifies the uneasy relationship between state sovereignty and international and South African refugee law, as well as the use of arbitrary detention as a form of immigration control. Although detention is not expressly prohibited, it must not be arbitrary and should only be resorted to in exceptional circumstances. The use of detention for administrative and deterrence reasons is evident in the case of South Africa. Arbitrary detention extends not only to the right to be free from arbitrary detention, but also the right to liberty, security of person, freedom of movement, freedom to seek asylum, and the principle of non-discrimination, all which are central to the UDHR and other human rights covenants.

Despite the absence of substantial legislation obligating states to guarantee asylum and the conflicting universal right to seek asylum, it can be surmised that South Africa is obligated under international and national law to receive and allow entry into its territory to any persons claiming asylum. The country may not expel or refuse entry, extradite, prosecute, arrest or detain any person who seeks asylum from persecution, regardless of whether the individual enters the country at a legal port of entry or lacks valid documentation. South Africa is also obligated to allow all asylum seekers who comply with the asylum process to sojourn in the country without limitations to their access to resources necessary for survival. Yet, the erroneous application of immigration law, corruption, ineffective RRO, and

ignorance regarding the rights guaranteed by Section 23 and 22 permits have undermined these obligations.

States are obligated to pursue all alternatives to detention and consider remedial solutions before turning to detention. It is paramount to interpret refugee law within the broader human rights framework. In doing so, it is clear that applying immigration regulations to asylum seekers is unlawful. The use of detention as a mechanism of immigration control has inevitably resulted in criminalising the act of seeking asylum. The research presented in this paper clearly illustrates that arbitrary detention informs the mechanisms that criminalises asylum seekers, yet arbitrary detention is unlawful. The act of arbitrarily detaining asylum seekers remains unlawful under South African and international law. The misinterpretation of the Refugee Act in South Africa, in addition to the detention and criminalisation of asylum seekers, has rendered asylum seekers in South Africa victims of a vicious cycle of lack of protections.

Recommendations

South Africa has a sound and progressive Refugee Act. The legal aspect of refugee law is not the cause of the use of detention. Rather, it is the large discrepancy between state law and state practise that enables arbitrary detention. South Africa's main challenge is its unwillingness to implement the Refugee Act correctly. To establish a system that no longer uses detention as the first port of call, effective alternatives to detention need to be identified. Based on the protections that should be extended to asylum seekers and the capacity of South Africa to provide these protections, there are multiple alternatives to detention and humane solutions to the continued use of arbitrary detention. This research recommends measures that can be taken to circumvent and discourage the use of detention.

The first measure is educating the institutions and their officers on the correct application of the Refugee Act. There is a need to emphasise that South Africa has a duty to seek alternatives to detention and pursue these before resorting to detention. These need to be prioritised and integrated into White and Green Papers and reiterated as the first step in the asylum process. Simultaneously, there needs to be avenues available to these institutions to manage the large volume of asylum seekers. This can be achieved through better management of the asylum and immigration systems in South Africa. A more effective criteria needs to be established to differentiate between asylum seekers and economic

migrants and clearly define the point at which detention is justifiable. The implementation of these policies and guidelines needs to occur at all levels, meaning educating and informing RDO's, RSDO's, the DHA, SAPS and the legal system of South Africa. These policies and practices can only be substantially implemented if these institutions are better resourced, funded and educated. This would require more RRO and the reopening of the Cape Town and Port Elizabeth offices. More offices should be established to manage the asylum process as opposed to the proposed 'border camps.' For these measures to be effective, South Africa needs to establish accountability, monitoring, and oversight mechanisms.

In his 2018 opening speech, President Cyril Ramaphosa addressed the nation on the issues he aimed to prioritise and address, however, he did not mention the ineffectiveness of the asylum system. He did not mention asylum seekers, refugees or migrants at all. In an open letter to him, Fatima Khan was quick to point out that '[y]ou spoke of a new dawn and recognised that sometimes we fail, merely because we fail to implement our laws.'²¹⁷ On World Refugee Day, LHR wrote another open letter to President Ramaphosa, this time commenting on the parallels between South Africans during apartheid seeking refuge in other countries and our unwillingness to do the same for other African states and individuals post-apartheid.²¹⁸ The letter listed all the unlawful practices and policies perpetuated by the DHA without accountability. The list included the unlawful refusal to renew asylum seekers' permits, the unlawful denial of the right to apply for asylum, the disregard of court orders, and the continued use of detention.²¹⁹ If we judge South Africa's progress in establishing a human rights-based system post-apartheid by examining how the country treats its vulnerable occupants, such as asylum seekers, it is clear that South Africa has not upheld its promise to foster a human rights culture in the nation. The need to redress the asylum system requires immediate attention. Better oversight and accountability mechanisms and a general prohibition on arbitrary detention need to be established. Most importantly, reform needs to occur at a state level in policy, practice, and the attitude of the country itself before the public can reform its perception of asylum seekers and refrain from criminalising them. The recommendations repeatedly proposed by the UCT Refugee Clinic and LHR, amongst other

²¹⁷ Fatima Khan 'Op-Ed: Dear President Ramaphosa, make life more humane for our refugees' *Daily Maverick* 26 February 2018. Available at <https://www.dailymaverick.co.za/article/2018-02-26-op-ed-dear-president-ramaphosa-make-life-more-humane-for-our>. Accessed on 17 October 2018

²¹⁸ Lawyers for Human Rights 'Open letter to President Ramaphosa on World Refugee Day' 0 June 2018 available at <https://mg.co.za/article/2018-06-20-00-open-letter-to-president-ramaphosa-on-world-refugee-day>. Accessed on 17 October 2018

²¹⁹ Ibid

international organisations such as WGAD and IDC, need to be heeded and implemented and the assistance offered to better implement the national legislation needs to be utilised.

Reforming and making the asylum system effective needs to be a collective effort. South Africa's Refugee Act has been internationally acknowledged for its comprehensive and human rights orientated approach to the refugee situation. Currently, this act is undermined by the evident lack of accountability and the erroneous application of immigration law to asylum situations. There are numerous alternatives to detention that can be utilised by South Africa – many cost-effective and humane. These alternatives need to be prioritised and a shift in mindset needs to be inculcated into the South African government, institutions and public. The shift from a hard-line and restrictive approach to a humane solution-orientated approach needs to be addressed at all levels within the South African system.

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