

EVALUATING THE ALIGNMENT OF THE REFUGEE STATUS DETERMINATION  
PROCESS WITH INTERNATIONAL AND NATIONAL HUMAN RIGHTS AND  
REFUGEE LAW: A CROSS-COUNTRY ANALYSIS OF SWEDEN AND SOUTH  
AFRICA

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## TABLE OF CONTENTS

### LIST OF ABBREVIATIONS

### CHAPTER I - INTRODUCTION

#### 1.1 BACKGROUND

#### 1.2 SIGNIFICANCE OF STUDY & RESEARCH OBJECTIVE

#### 1.3 RESEARCH QUESTIONS

#### 1.4 METHODOLOGY

#### 1.5 LIMITATIONS

#### 1.6 CHAPTER BREAKDOWN

### CHAPTER II – INTERNATIONAL LEGAL FRAMEWORKS

#### 2.1 INTRODUCTION

#### 2.2 REFUGEE STATUS DETERMINATION

#### 2.3 INTERNATIONAL LEGAL FRAMEWORK

#### 2.4 REGIONAL EUROPEAN LEGAL FRAMEWORK

#### 2.5 REGIONAL AFRICAN LEGAL FRAMEWORK

#### 2.3 CONCLUSION

### CHAPTER III – SOUTH AFRICA

#### 3.1 INTRODUCTION

#### 3.2 THE SOUTH AFRICAN LEGAL FRAMEWORK

#### 3.3 THE APPLICATION AND INTERPRETATION OF THE LAW

#### 3.4 REFUGEE STATUS DETERMINATIONS IN SOUTH AFRICA

#### 3.5 HUMAN RIGHTS STANDARDS

#### 3.6 CONCLUSION

### CHAPTER IV - SWEDEN

#### 4.1 INTRODUCTION

#### 4.2 THE SWEDISH LEGAL FRAMEWORK

#### 4.3 THE APPLICATION AND INTERPRETATION OF THE LAW

#### 4.4 REFUGEE STATUS DETERMINATIONS IN SWEDEN

#### 4.5 HUMAN RIGHTS STANDARDS

## 4.6 CONCLUSION

## CHAPTER V - CROSS-COUNTRY ANALYSIS

### 5.1 INTRODUCTION

### 5.2 DISCUSSION

### 5.3 RECOMMENDATIONS – SOUTH AFRICA

### 5.4 RECOMMENDATIONS – SWEDEN

## CHAPTER VI - CONCLUSION

## BIBLIOGRAPHY

Abbreviation	Meaning
CFR	Charter of Fundamental Rights of the European Union
CEAS	Common European Asylum System
COE	The Council of Europe
COI	Country of Origin Information
DHA	Department of Home Affairs
EASO	European Asylum Support System
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
MoU	Memorandum of Understanding
OAU	The Organisation of African Unity
PAJA	Promotion of Administrative Justice Act 3 of 2000
RAB	Refugees Appeal Board
RRO	Refugee Reception Offices
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer
SMA	Swedish Migration Agency
UDHR	United Nations Universal Declaration on Human Rights
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations

## CHAPTER 1 INTRODUCTION

### 1.1. BACKGROUND

In South Africa, the domestic refugee legislation, the Refugees Act 130 of 1998 (Refugees Act), was enacted in 1998.<sup>1</sup> However, the country continues to struggle to correctly implement and apply the refugee law in a successful manner. Outside its domestic refugee legislation, South Africa has both ratified and signed the 1951 United Nations Convention Relating to the Status of Refugees<sup>2</sup> (1951 Convention) as well as the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).<sup>3</sup> The country has hence committed to honouring the obligations in both conventions in accordance with international law and to enact the Refugees Act.<sup>4</sup> Furthermore, the United Nations General Assembly adopted The Universal Declaration of Human Rights (UDHR) in 1948.<sup>5</sup> Although the UDHR is not a treaty and hence means that States cannot become a party to it, UN member States acknowledge that the rights contained in the UDHR are of minimum standards in terms of state practice. It is considered as an articulation of the State's obligation to uphold human rights. The majority of the rights outlined in the UDHR are additionally recognized as customary international law. States, such as South Africa, are hence bound by upholding these human rights principles. South Africa's constitution acknowledges the significance of adhering to international law principles and outlines that:

[C]ustomary international law is in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>6</sup>

On January 12, 1996, South Africa acceded the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).<sup>7</sup> Accession simply signals a State becoming a party, to an agreement, and its willingness to adhere to the outlined principles and corporate with the

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<sup>1</sup> Refugees Act [No.130 of 1998]

<sup>2</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189.

<sup>3</sup> Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969) 1001 U.N.T.S 45.

<sup>4</sup> Refugees Act [No.130 of 1998]

<sup>5</sup> United Nations General Assembly *Universal Declaration of Human Rights* (1948) 217 A (III).

<sup>6</sup> Constitution of the Republic of South Africa (1996), Section 232.

<sup>7</sup> United Nations General Assembly *Protocol Relating to the Status of Refugees* (1967) Treaty Series vol. 606.

international community in doing so. In a general sense, States who are parties to the 1967 Protocol and the 1951 Convention are under obligation to ensure the rights of refugees within their territory. While the 1967 Protocol specifically outlines how to protect the rights of refugees, its origin stems from Article 14 of the UDHR, which states that all people have the right to seek and enjoy asylum.<sup>10</sup> Further, the 1951 Convention was established to specifically protect people who are fleeing any form of persecution in their country of origin due to grounds such as race, religion, nationality, political opinion or membership in a particular social group.<sup>11</sup> However, according to a report by the African Centre for Migration & Society, South Africa continuously fails to fulfil its obligations under the 1951 Convention as well as its own domestic Refugees Act. For instance, refugee status determination officers are more often than not reproducing arbitrary rejections that are not based on the applicants' individual claims.<sup>12</sup> With the country's extensive processing times as well as the hardship to receive more than a temporary residency in the country for long periods, many refugees and/or asylum seekers are put into uncertain circumstances which can have negative effects on both their physical and mental health.

Sweden, a country on the opposite north altitude of South Africa, traditionally had a well-established outward image of being an open and welcoming country for refugees. As a member State of the European Union, Sweden is obliged to follow any policies that the EU develops. The European Council in 1999 began to develop the Common European Asylum System (CEAS),<sup>13</sup> which would be foundational to the inclusive and full application of the 1951 Convention.<sup>14</sup> This established system has undergone different developmental periods since its inception. During, what is commonly referred to as, the European influx of refugees that began in 2015, many deficiencies in the EU refugee and asylum policies and laws were exposed.<sup>15</sup>

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<sup>10</sup> United Nations General Assembly *Universal Declaration of Human Rights* (1948) 217 A (III), Article 14.

<sup>11</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189.

<sup>12</sup> Roni Amit 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' available at <http://www.migration.org.za/wp-content/uploads/2017/08/All-Roads-Lead-to-Rejection-Persistent-Bias-and-Incapacity-in-South-African-Refugee-Status-Determination.pdf> accessed at 20 September 2023.

<sup>13</sup> European Commission 'Common European Asylum System' available at [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en), accessed on 20 September 2023.

<sup>14</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189.

<sup>15</sup> European Commission 'Common European Asylum System' available at [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en), accessed on 20 September 2023.

Consequently, many of the member states who were affected began to increase their engagement in terms of the future direction of the EU asylum and refugee policies and laws. Numerous countries additionally began to refuse their obligations in terms of EU policies and laws surrounding the topic.<sup>16</sup> The European refugee influx also marked an important transition in Sweden's refugee and asylum policies. Prior to 2015, Sweden took pride in being a generous state in terms of their national asylum and refugee system, as well as the quality of care which refugees and asylum seekers were provided at the point of arrival. One prime example of this was in 2013 when all Syrian and stateless persons seeking asylum were automatically guaranteed and provided permanent residency, given that they were arriving from war-torn countries of origin. This policy has since changed, and it is far more complicated and difficult for an asylum seeker and refugee to attain permanent residency.<sup>17</sup> There has been a notable switch in Sweden's stance on accepting and receiving refugees and asylum seekers even after the 2022 election, in which a far-right majority now has most of the political control in the country.<sup>18</sup>

With the difficulties that asylum seekers and refugees face in terms of having their refugee status determined globally, this paper seeks to first investigate whether South Africa's refugee status determination (RSD) process is fully aligned with international human rights standards and refugee law; and secondly, investigate why Sweden moved to a similarly difficult RSD process as South Africa. The paper also considers the similarities and differences in the countries' processes and whether they are beneficial for refugees.

## 1.2. SIGNIFICANCE OF THE STUDY & RESEARCH OBJECTIVES

This dissertation assesses the situation of asylum seekers and refugees undergoing RSD processes in South Africa and Sweden when they apply for asylum in those countries. More specifically, whether their human rights are adhered to throughout the process, and if their rights are being protected properly by the host country. Asylum seekers and refugees are a diverse group in terms of age, gender, ethnicity, nationality and culture. Yet, they share one

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<sup>16</sup> *Commission v Poland, Hungary and the Czech Republic* 2020 C1715/17, C718/17 and C719/17 (CJEC).

<sup>17</sup> European Migration Network 'Sweden 2021: Main developments in migration and international protection, including latest statistics' available at [https://home-affairs.ec.europa.eu/system/files/2022-08/EMN\\_factsheet2021\\_SE.pdf](https://home-affairs.ec.europa.eu/system/files/2022-08/EMN_factsheet2021_SE.pdf) accessed on 20 September 2023.

<sup>18</sup> Anadolu Agency 'Swedish far-right party launches anti-immigration policy' available at: <https://www.aa.com.tr/en/europe/swedish-far-right-party-launches-anti-immigration-policy/2673823>, accessed on 20 September 2023.

thing in common: they have been subjected to forced migration and are fleeing persecution from their countries. Due to a vast range of refugees' intersectional identities, asylum seekers and refugees can also be subjected to a high level of discrimination. It is additionally important to note that asylum seekers and refugees can experience distinct inequalities and issues as a result of their insecure immigration status. Such inequalities and issues consist of, but are not limited to, language barriers, xenophobia and prejudice, and access to housing and employment. The procedure for applying for refugee status in a host country can be challenging. Although there are existing international standards, such as the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*<sup>19</sup> set for states to follow when processing an asylum application, each state is to some degree (depending on the region) entitled to its own domestic laws, policies and regulations concerning any immigration matters. Furthermore, there are a number of different factors that influence a state's own RSD process, as it is a complex, multidimensional and non-linear process. Influencing factors include political climate, personal biases amongst decision-makers and xenophobia. As observed, the global political climate is moving towards an increased anti-immigration agenda<sup>20</sup> – and although states, in theory, adhere to the international human rights standards when processing RSDs, these influencing factors can result in damaging consequences for asylum seekers and refugees, if not adhered to in practice. Further, the overall aim of this dissertation is to provide a deeper understanding of the challenges and difficulties asylum seekers face today in obtaining protection in host countries and the implications this may have on their overall human rights.

This dissertation is focusing on South Africa and Sweden for a number of reasons and there are a number of main factors that make these countries specifically relevant as research objectives. First, South Africa and Sweden show various contexts such as cultural backgrounds, geographical location, and history. Examining both States allows for a comparable analysis that can result in differences and commonalities in terms of their approaches to RSD procedures. Second, South Africa and Sweden have distinguishable administrative and legal frameworks governing asylum and refugee processes – this is mainly due to their regional differences. Through analyzing the specific administrative and legal processes in each state,

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<sup>19</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/1P/4/ENG/REV. 4

<sup>20</sup> Indelicato, A., Martin J.C & Scuderi, R. 'A comparison of attitudes towards immigrants from the perspective of the political party vote' (2023) 9 *Heliyon* 3.

the dissertation can present a nuanced comprehension of the obstacles that asylum seekers and refugees face in each country. Third, both South Africa and Sweden have pledged their commitment to uphold international human rights standards through being signatories to both international and regional human rights conventions, such as the UDHR<sup>21</sup> in Sweden's case and the African Charter on Human and Peoples' Rights<sup>22</sup> (Banjul Charter) in South Africa's case. This makes South Africa and Sweden interesting cases for investigating the alignment of international human rights standards and their respective RSD procedures. The analysis of differences from such international human rights standards and their respective impact on the well-being and rights of asylum seekers provides for a more extensive comprehension of the global refugee protection landscape. Fourth, South Africa has a history of facing challenges with xenophobia and socio-economic issues due to their past of Apartheid, while Sweden has generally been regarded as a country that is open to migrants and people in need of protection. These narratives will be examined and as such, and the dichotomy gives awareness to the different regional historical contexts and their influence on the treatment of asylum seekers and refugees. To summarize, the reasoning behind South Africa and Sweden as case studies allows for a broad analysis of the administrative, legal, and human rights dimensions of their RSD procedure. The comparable approach allows for a nuanced comprehension of the complexities associated with each State, providing a valuable understanding of the comprehensive discourse on refugee rights and protection.

The significance of this dissertation is in its broad analysis of the circumstances that asylum seekers and refugees face while having their RSD processed in South Africa and Sweden. The main research objective is to examine if the human rights of asylum seekers and refugees are adequately protected and upheld during their asylum application process by the host countries, which in this dissertation refers to South Africa and Sweden. Fundamentally, the comprehensive objective of this dissertation is to deepen the understanding of the present challenges that asylum seekers and refugees face in securing protection in South Africa and Sweden. By investigating the challenges that individuals face in the RSD process, the objective of the dissertation is to emphasize the potential impact on the general human rights of asylum seekers and refugees, and in doing so, contribute with a valuable understanding of the discussion on refugee rights and protection.

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<sup>21</sup> United Nations General Assembly *Universal Declaration of Human Rights* (1948) 217 A (III).

<sup>22</sup> Organisation of African Unity *African Charter on Human and Peoples' Rights* (1981) CAB/LEG/67/3 rev. 5, 21 I.L.M 58.

### 1.3. RESEARCH QUESTIONS

This dissertation seeks to address the main question of how the current legal and administrative process for seeking refugee status in Sweden and South Africa impact the perceived difficulties in obtaining such status, and to what extent these processes align with international human rights law, thereby influencing the rights and well-being of asylum seekers and refugees? The dissertation will further address the question of what lessons can be derived from the policies and strategies of South Africa and Sweden to combat challenges identified in the Refugee Status Determination processes.

### 1.4. METHODOLOGY

In addressing the above-mentioned research questions, this dissertation will undertake a comparative analysis of the RSD processes in Sweden and South Africa to assess if they align with international human rights and refugee law. The analysis will be conducted through desk-top research comprising academic literature, international and regional treaties, legislation, government reports, policy documents, relevant case studies, academic publications, journal articles, book chapters and books.

By applying desk-top research, the dissertation will attempt to provide a comprehensive understanding of the challenges and difficulties that refugees and asylum seekers face today in both countries.

### 1.5. LIMITATIONS OF THE STUDY

Although this dissertation aims to outline a broad examination of the RSD procedure in South Africa and Sweden, there are various limitations in the study methodology and design. First, the findings in this dissertation might not be globally applicable to all regions and countries. This is mainly due to the unique social, political and legal aspects of South Africa and Sweden. Aiming to generalize the findings beyond the specified contexts should hence be done with caution. Second, the dissertation depends mainly on desk-top research, such as policy documents, academic literature and reports by governmental authorities and international organization's. The accuracy and availability of such sources might differ, and possibly limit the reliability and depth of the study. Third, language barriers might limit the ability to retrieve relevant sources, specifically sources that are not available in English. This could lead to a limited scope of literature review and possibly result in a lack of crucial findings and

perspectives which are only available in other languages than English. Fourth, the RSD procedure is a complex and multifaceted process, highly influenced by various factors. The complexity of such processes might result in difficulties in fully evaluating and comprehending their influence on asylum seekers and refugees. Regardless of these limitations, the objective of this dissertation is to provide valuable insights into the obstacles and challenges faced by asylum seekers and refugees in both South Africa and Sweden, and to contribute to a comprehensive discourse.

## 1.6. CHAPTER BREAKDOWN

### CHAPTER 2 – INTERNATIONAL LEGAL FRAMEWORK

The second chapter offers a definition of an asylum seeker and a refugee under international law. With reference to the relevant international and regional instruments and frameworks used by States for RSD procedures, it describes and analyses the process of determining refugee status under international law.

### CHAPTER 3 – SOUTH AFRICA

The third chapter assesses the domestic legal frameworks and RSD procedures in South Africa. It considers the challenges that arise from the government's inability to effectively implement policies and to adhere to asylum seekers' and refugees' basic rights. The chapter further sheds light on the historical and legislative context of the treatment of asylum seekers and refugees.

### CHAPTER 4 – SWEDEN

The fourth chapter assesses the domestic legal frameworks and RSD procedures in Sweden. As an EU member state since 1995, Sweden has adhered to EU laws, which include the common asylum procedures and regulations. The shift in the political climate since the refugee influx in 2015 introduced new regulations and policies which creates obstacles for asylum seekers and refugees in terms of obtaining residency in the country. This is significant in the context that it sheds light on the dynamic relationship between a political shift, asylum and refugee policies and the new obstacles that refugees and asylum seekers now face.

### CHAPTER 5 – CROSS-COUNTRY ANALYSIS

The fifth chapter presents a comparative analysis of South Africa's and Sweden's asylum procedures and sheds light on similarities, differences, and particularly common challenges

between the countries in light of and despite their geographical and cultural differences. The chapter highlights the States' struggle to ensure consistency and fairness in RSD decisions.

#### CHAPTER 5 – CONCLUSION

The sixth chapter will provide a conclusion of the findings of this dissertation.

## CHAPTER 2 INTERNATIONAL LEGAL FRAMEWORKS

### 2.1 INTRODUCTION

This chapter seeks to explore the Refugee Status Determination (RSD) process through first delving into the international legal frameworks, primarily the Universal Declaration of Human Rights (UDHR),<sup>23</sup> the 1951 Refugee Convention (1951 Convention)<sup>24</sup> and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).<sup>25</sup> The chapter further outlines the European and African legal instruments in place to address the rights and protections of asylum seekers and refugees, such as the Charter of Fundamental Rights of the European Union (CFR),<sup>26</sup> the Common European Asylum System (CEAS),<sup>27</sup> European Convention on Human Rights (ECHR)<sup>28</sup>, the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention),<sup>29</sup> and the African Charter on Human and Peoples' Rights (Banjul Charter).<sup>30</sup> The chapter emphasizes the complexities associated with the RSD process in both the European and African regions, analyzing the diverse factors influencing the RSD outcomes and the important role the RSD process plays in an asylum seeker's life. The central argument revolves around the intricate nature of the RSD process, emphasizing challenges, complexities and variations in the European and African regions. The argument is addressed through discussing the different international and regional instruments and examining the various factors influencing the RSD outcomes. Finally, the chapter emphasizes the need for an ongoing enhancement of the RSD process in both the European and African regions to ensure consistency and fairness in refugee protection across both regions.

### 2.2 REFUGEE STATUS DETERMINATION

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<sup>23</sup> United Nations General Assembly *Universal Declaration of Human Rights* (1948) 217 A (III).

<sup>24</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) United Nations, Treaty Series 189.

<sup>25</sup> United Nations General Assembly *Protocol Relating to the Status of Refugees* (1967) Treaty Series 606, 267.

<sup>26</sup> European Union *Charter of Fundamental Rights of the European Union* (2012) 2012/C 326/02.

<sup>27</sup> European Commission 'Common European Asylum System' available at [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en), accessed on 20 September 2023.

<sup>28</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950).

<sup>29</sup> Organisation of African Unity op cit note 66.

<sup>30</sup> Organisation of African Unity *African Charter on Human and Peoples' Rights* (1981) CAB/LEG/67/3 rev. 5, 21 I.L.M 58.

It is important to first underline the difference between an asylum seeker and a refugee. The United Nations High Commissioner for Refugees (UNHCR) has defined an asylum seeker as a person who has fled their country of origin due to a well-founded fear of persecution on one or more of the following grounds; race, religion, nationality, political opinion or membership of a particular social group.<sup>31</sup> However, asylum seekers can only receive refugee status in their host country once they have undergone a comprehensive RSD conducted by state authorities or appointed agencies.

First, the RSD process entails the point in time in which a person enters a country up until the moment of exhaustion of all remedies to apply for asylum in a country, which includes appeal and review of an asylum application. With that, RSD is the administrative and legal process in which the UNHCR or state governments determine if an asylum seeker can be constituted as a refugee under national, legal and/or international law. The United Nations developed the 1951 Convention<sup>32</sup> and states that are signatories to the Convention adopt the legal and administrative procedure outlined in the Convention to determine if an asylum seeker qualifies as a refugee. This typically entails a compounded process which includes many different factors.<sup>33</sup> UNHCR also provided states with a handbook<sup>34</sup> with guidelines and recommendations for governmental authorities in the RSD process.

Scholars have examined the influence of asylum seeker's socioeconomic and demographic backgrounds as well as other factors during the RSD process such as linguistic interpretation when providing translation services for asylum seekers, the narrative coherence of an asylum seeker claim, legal representation, and corroboration of an asylum seekers claim, to see if such factors influence the RSD acceptance rate.<sup>35</sup> Studies have shown a vast variety in the results in the RSD acceptance rate stemming from different RSD decisions, which mainly depend on the

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<sup>31</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) United Nations, Treaty Series 189.

<sup>32</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) United Nations, Treaty Series 189.

<sup>33</sup> See UNHCR's basic requirements for RSD Procedures, available at: <https://www.unhcr.org/il/en/protection/refugee-status-determination-rsd/basic-requirements-for-rsd-procedures>.

<sup>34</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/1P/4/ENG/REV. 4.

<sup>35</sup> Anker, D. 'Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court' (1990) 2 *International Journal of Refugee Law* 2, p. 252-264.

governmental official and decision maker in the asylum case, rather than the applicant's claim.<sup>36</sup> Ramji-Nogales, Schoenholtz and Schrag argue that- in many cases, the most important momentum in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer.<sup>37</sup>

Scholars have further analyzed the different individual characteristics of asylum case officers that influence how they make decisions in their cases. These characteristics include professional background, education, ethnicity and race, gender, and work experience.<sup>38</sup> For instance, a study found that female authorities were more likely to grant an applicant asylum. The authors linked this finding to a female's ability to empathize with an applicant's claim due to their own experience with discrimination in terms of their own gender.<sup>39</sup> The most crucial part of the RSD procedure is determined to be the credibility assessment, provided the general lack of appraisal forms of evidence or transparency meets the criteria set out in national and international refugee law.<sup>40</sup> Still, how asylum case officers evaluate the credibility of an asylum seeker's claim and its different thresholds, are particularly appraised when examining across context, situations, and individuals. Credibility is a principal albeit flexible lens in the assessment in which decision-makers prioritize different factors from affective performance to narrative constructions.<sup>41</sup> Simultaneously, officials and decision-makers depend on a greater aspect of factors when determining an asylum seekers refugee status. For example, in the case where a judge has to decide on an asylum appeal, there is an examination of the claimants' effort to integrate into society through sociocultural and financial means.<sup>42</sup> In its entirety, with regard to the complexity, improvisation and discretion required in the RSD process, analyzing officials' practices and perceptions as they incorporate legal mandates into conduct, advances our overall understanding of asylum and its inconsistent patterns in acceptance rates.<sup>43</sup>

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<sup>36</sup> L.C Keith, Camp L., Holmes J. & Miller B. 'Explaining the Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive Approach' (2013) 35 *Law & Policy* 4, p. 261-289.

<sup>37</sup> Ramji-Nogales, J., Schoenholtz A. & Schrag P. 'Refugee Roulette: Disparities in Asylum Adjudication' (2007) 60 *Stanford Law Review* 2, p. 295-412.

<sup>38</sup> Gould, J., Sheppard C. & Wheeldon J. 'A Refugee from Justice? Disparate Treatment in the Federal Court of Canada' (2010) 32 *Law & Policy* 4, p. 454-486.

<sup>39</sup> Gould J., Sheppard C. & Wheeldon J op cit note 28 at 457.

<sup>40</sup> Fisher, D., Gill, N. & Paszkiewicz N. 'To Fail an Asylum Seeker: Time, Space and Legal Events' (2022) 40 *EPD: Society and Space* 1, p 21-40.

<sup>41</sup> Jubany, O. 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' 26 *International Sociology* 1, p. 74-94.

<sup>42</sup> Vianelli L., Gill N. & Hoellerer N. 'Waiting as Probation: Selecting Self-Disciplining Asylum Seekers' (2022) 48 *Journal of Ethnic and Migration Studies* 5, p. 1013-1032.

<sup>43</sup> Gill N. & Good A. *Asylum Determination in Europe: Ethnographic Perspectives* (2019) Cham, Springer.

The RSD is a crucial part of an asylum seeker's process of obtaining residency in a host country. The different factors that go into the process determine the person's ability to find safety in another country than their origin. However, the part that comes after obtaining a refugee status is crucial and impacts the person's ability to create a new life for themselves as well.

Further, the next part will outline the international and regional tools and frameworks that States utilize in the RSD process and in understanding asylum seekers' and refugees' rights.

### 2.3 INTERNATIONAL LEGAL FRAMEWORK

There are several international legal frameworks in which the right to seek and enjoy asylum is enshrined. The UDHR<sup>44</sup> outlines in Article 14(1) that;

*[E]veryone has the right to seek and enjoy in other countries asylum from persecution.*<sup>45</sup>

However, the adoption of UDHR is non-binding, and the right to asylum outlined in Article 14 is therefore not a state-based obligation. It can, nevertheless, be argued that due to the singularity of the provision itself on a global level, it can be considered binding under customary international law.<sup>46</sup> Furthermore, when examining the history behind the drafting of the UDHR, as well as the implementation and interpretation of statutory asylum in various countries, it presents that the right to asylum has transitioned into a directly enforceable right by individuals.<sup>47</sup> It can be regarded as, besides the right to life, that the right to asylum presents a verifiable right without which no other human right might be enjoyed.<sup>48</sup>

Following the UDHR, the 1951 Convention was introduced. In its preamble, it is stated that the Convention was established to;

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<sup>44</sup> United Nations General Assembly *Universal Declaration of Human Rights* (1948) 217 A (III).

<sup>45</sup> United Nations General Assembly *Universal Declaration of Human Rights* (1948) 217 A (III), at 3.

<sup>46</sup> Noll, G. *Negotiating asylum: The EU acquis, extraterritorial protection and the common market of deflection* (2000) The Hague, Martinus Nijhoff Publishers.

<sup>47</sup> Lambert, H., Messineo, F. & Tiedemann, P. 'Comparative perspectives of constitutional asylum in France, Italy, and Germany: Requiescat in pace?' (2008) 27 *Refugee Survey Quarterly* 3, 16-32.

<sup>48</sup> Chetail, V. 'Foreword' (2008) 27 *Refugee Survey Quarterly* 3, 1-2.

*[E]nsure refugees the widest possible exercise of these fundamental rights and freedoms.*<sup>49</sup>

Following the 1951 Convention was the establishment of the 1967 Protocol.<sup>50</sup> Both instruments constitute criteria for each regional or domestic regulation with regard to refugee and asylum law.<sup>51</sup> States that have acceded to or ratified the 1951 Convention agreed that the terminology ‘refugee’ relates to any individual who constitutes a refugee under prior international instruments or agreements. The application of such status was initially limited to refugees acquiring it ‘as a result of events occurring before 1 January 1951’.<sup>52</sup> Limitations as such were however removed in the establishment of the 1967 Protocol.

The 1951 Convention recognizes five applicable grounds of persecution and characterizes four relevant elements that are currently still used and applied in the RSD process. For instance, one important element of the 1951 Convention is the principle of *non-refoulement*, which represents a cornerstone of international protection.<sup>53</sup> Article 33(1) outlines that;

*[N]o contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*<sup>54</sup>

The principle of *non-refoulement* essentially entails the protection against being returned to a State in which an individual has a reasonable fear of danger or persecution – which is arguably one of the most crucial elements of refugee status and seeking asylum. Nevertheless, the practice in itself by asylum administrators in different States presents a phenomenon known as ‘indirect or chain refoulement’.<sup>55</sup> A ‘safe third country’ is essentially a country that has been deemed safe for an asylum applicant, where the applicant will not face serious harm, danger or

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<sup>49</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189.

<sup>50</sup> United Nations General Assembly *Protocol Relating to the Status of Refugees* (1967) Treaty Series 606, 267.

<sup>51</sup> Zimmermann, A. *The 1951 Convention relating to the status of refugees and its 1967 protocol: A commentary* (2011) Oxford University Press, Oxford.

<sup>52</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189..

<sup>53</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189.

<sup>54</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189, Article 33(1).

<sup>55</sup> Subramanya, N. *Human rights and refugees* (2004) APH Publishing, Geneva.

persecution. In circumstances where a state applies the ‘safe country concept’, the state may establish that another state can accept the responsibility for examining the applicant's claim. However, observations show that in practice, an applicant is often refused admission and thereafter returned to a country, which they previously passed, and without having their application examined, sent to either their country of origin or another unsafe country. Hence, states adopt administrative and legal measures – for instance, expediting asylum procedures and passing on responsibilities to other states – which may consequently result in situating refugees in circumstances that can lead to refoulement in their country of origin or unsafe countries. National procedures, therefore, need measures in which respect the principle of *non-refoulement* can be ensured, and continues to be the guiding principle and objective of the refugee protection system.

## 2.6 REGIONAL EUROPEAN LEGAL FRAMEWORK

There are also regional legal instruments that characterize the definition of RSD. Within the European Union, the CFR<sup>56</sup> covers the right to asylum under Article 18,<sup>57</sup> which can be linked to Article 14(1)<sup>58</sup> of the UDHR. Furthermore, in terms of *non-refoulement*, this can be found under Article 19 of the CFR.<sup>59</sup> Since the Treaty of Lisbon<sup>60</sup> came into force in December 2009, the CRF has been legally binding on all member states of the European Union. Legal scholars have debated the extensive examination of the specific transformation of rights in the CFR, engaging in the debate of the extent of material covered in the provisions’ application. This examination incorporates considerations of comparative regional and international law, along with the overarching objective of the CRF. There have hence been arguments surrounding whether the right to asylum in the CRF should be interpreted as a subjective and enforceable right for applicants to be granted asylum under EU law rather than merely a procedural right.<sup>61</sup> Hence, the right to asylum is enforceable as primary EU law, directly applicable in domestic national law, requiring no additional transposition. In addition, the CRF can also be directly invoked before member states’ national courts. The translation and interpretation of applying

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<sup>56</sup> European Union *Charter of Fundamental Rights of the European Union* (2012) 2012/C 326/02.

<sup>57</sup> European Union *Charter of Fundamental Rights of the European Union* (2012) 2012/C 326/02, Article 18.

<sup>58</sup> United Nations General Assembly *Universal Declaration of Human Rights* (1948) 217 A (III), at 3.

<sup>59</sup> European Union *Charter of Fundamental Rights of the European Union* (2012) 2012/C 326/02 at 399.

<sup>60</sup> European Union Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007) 2007/C 306/01.

<sup>61</sup> Gil-Bazo M.T ‘The charter of fundamental rights of the European Union and the right to be granted asylum in the Union’s Law’ (2008) 27 *Refugee Survey Quarterly* 3, 33-52.

legal text into practice have proven to be problematic in the context of the right to asylum.<sup>62</sup> When analyzing state practices, it becomes apparent that individuals still lack the right to be granted asylum, as this right has a tendency to assume a discretionary nature.<sup>63</sup> The State in question has the overall authority to exercise discretion in both the application of this right and in the determination of who qualifies for asylum, which includes the additional protections and the specific criteria that govern these protections. This is hence the underlying reason why the notion of asylum is an obligation imposed on states to provide lasting solutions, irrespective of the corresponding rights of individuals, continues to face objections.

The European Council began to establish a document outlining common minimum standards for the treatment of all asylum seekers in 1999, today known as the CEAS,<sup>64</sup> Although the agenda behind the development of a CEAS was developed by the Tampere European Council in the primary key aims and principles of the Treaty of Amsterdam (1999),<sup>65</sup> when the Lisbon Treaty was adopted in 2009 it was understood that there was a need for an established uniform asylum procedure amongst the European member states. The Lisbon Treaty further made the CRF legally binding and the European Parliament further adopted various measures to reform the CEAS. This included common procedures, a proposal to end the transfers of applicants to member states that were finding it difficult to cope with the number of arriving asylum seekers, a fundamental set of rights for asylum seekers arriving in EU member states and common responsibilities to process asylum applications in a dignified manner, to ensure fair treatment of asylum seekers and refugees and to have similar asylum procedures when examining cases. One of the most crucial actions taken by the EU can also be considered to be the establishment of the European Asylum Support Office (EASO) in 2010, which was developed to assist with administrative cooperation.<sup>66</sup> EASO is one of the agencies that played a significant role in terms of the development of CEAS. The primary objective of EASO is to strengthen, coordinate and facilitate the cooperation between member states, provide any form of assistance with regard to EU legislation and policy implementation relating to asylum, and provide operational

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<sup>62</sup> Pund, R. 'Law in books and law in action' (1910) 44 *American Law Review* 12.

<sup>63</sup> Goodwin-Gill, G.S & McAdam, J *The refugee in international law* (2007) Oxford University Press, Oxford.

<sup>64</sup> European Commission 'Common European Asylum System' available at [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en), accessed on 20 September 2023.

<sup>65</sup> European Union: Council of the European Union *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts* (1997).

<sup>66</sup> Peers, S., Guild, E. & Tomkin, J *EU immigration and asylum law: Text and commentary* (2012) Martinus Nijhoff Publishers, Leiden Boston.

assistance to member states which are experiencing difficulties relating to their reception and asylum system.<sup>67</sup> However, the EASO lacks any form of power in terms of the decisions on asylum applications in each member state.

EASO further operates through close cooperation with EU agencies related to asylum and immigration such as Frontex, Europol, UNHCR and the Fundamental Rights Agency as well as domestic tribunals and courts of member states. EASO's fundamental contribution to the CEAS is primarily through the creation of a common culture with regard to asylum in member states, which is mainly achieved through the EASO Training Curriculum,<sup>68</sup> covering the main aspects of asylum procedures. There are six relevant EU directives and regulations that can be considered the main legal instruments utilized in EU member states relating to asylum procedures. First, the Asylum Procedures Directive (2005/85/EC, Directive 2013/32/EU),<sup>69</sup> which was developed to create common standards for guarantees and safeguards of accessing efficient and fair asylum procedures. As per the Directive, member states are obliged to provide impartial and objective individual examinations of asylum applications as well as allow applicants to remain in the country during the assessment of their applications. Second, the Reception Conditions Directive (2009/9/EC, 2013/33/EU)<sup>70</sup> puts an obligation on member states to ensure asylum seekers are provided fundamental support in terms of their needs during the duration of their applications being processed. Third, the Qualification Directive (2004/83/EC, 2011/95/EU)<sup>71</sup> highlights the inconsistent approach in the RSD procedure amongst member states. These inconsistencies include asylum applicants not always being offered personal interviews, provided enough time to prepare for interviews or even an opportunity to explain their claims in some member states.<sup>72</sup>

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<sup>67</sup> European Union Regulation (EU) No 439/210 of the European Parliament and of the Council of 19 May 2010 (2010) Official Journal of the European Union.

<sup>68</sup> European Asylum Support Office *EASO Training Curriculum* (2014) Publications Office of the European Union, Luxembourg.

<sup>69</sup> European Union Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (2013) Official Journal of the European Union.

<sup>70</sup> European Union Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (2013) Official Journal of the European Union.

<sup>71</sup> European Union Directive 2004/83/EC of the European Parliament and of the Council of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (2004) Official Journal of the European Union.

<sup>72</sup> United Nations High Commissioner for Refugees 'UNHCR study finds inconsistent examination of asylum claims in EU' 26 March 2010, available at: <https://www.unhcr.org/news/briefing-notes/unhcr-study-finds->

The directive interprets and incorporates the definition of a refugee from the 1951 Convention and 1967 Protocol and allows for subsidiary protection which is international protection for asylum seekers who do not qualify as refugees. Fourth, the Dublin Regulation (343/2003, 604/3013)<sup>73</sup> was established to create a system of biometrics amongst asylum seekers. This intends to assist the application of the Dublin II Regulation, in which asylum seekers' biometrics in terms of fingerprints are required. Lastly, the Return Directive (2008/115/EC)<sup>74</sup> establishes common procedures and standards for the return of third-country nationals remaining unlawfully in the territories of a member state (Art 2(1)).<sup>75</sup>

An additional European legal instrument should also be mentioned. Although the ECHR<sup>76</sup> does not explicitly contain any provision relating to asylum, a large body of jurisprudence appears from the Convention, which resulted in the establishment of standardized rights for asylum seekers within the territories of EU member states.<sup>77</sup> There are specifically three relevant and important articles in the ECHR that relate to asylum; Article 3 on the prohibiting of torture and inhuman or degrading treatment;<sup>78</sup> Article 8 on the right to family and private life;<sup>79</sup> and Article 13 on the need for a remedy for every victim of a violation of protected rights.<sup>80</sup> In terms of articles relating to RSD, the following are relevant; Article 2 on the right to life;<sup>81</sup> Article 6 on

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[inconsistent-examination-asylum-claims-eu#:~:text=The%20study%20found%20that%20Member,or%20to%20explain%20their%20claims.,](#) accessed on 22 January 2024.

<sup>73</sup> European Union *Directive 343/2003 of the European Parliament and of the Council of 18 February 2003 on establishing the criteria and mechanisms for determining the Member State responsible for examining asylum application lodged in one of the Member States by a third-country national* (2003) Official Journal of the European Union.

<sup>74</sup> European Union *Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals* (2008) Official Journal of the European Union.

<sup>75</sup> European Union op cit note 49.

<sup>76</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950).

<sup>77</sup> Mole, N. & Meredith, C. *Asylum and the European Convention on Human Rights* (2010) Council of Europe Publishing, Strasbourg.

<sup>78</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950), at 6.

<sup>79</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950), at 10.

<sup>80</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950), at 13.

<sup>81</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950), 6.

the right to a fair trial;<sup>82</sup> Article 10 on freedom of expression;<sup>83</sup> and Article 1 of Protocol No. 7 on the procedural safeguards of the expulsion of aliens.<sup>84</sup> Furthermore, the ECtHR is the established court in place to enforce the ECHR. The ECtHR and its jurisprudence have substantial guiding value, with a number of different rulings regarding immigration as well as removal cases that have been imposing crucial limitations on sovereign powers. The ECtHR's case law has additionally had a significant impact in terms of the scope development of *non-refoulement*. This is beyond Article 33 of the Refugee Convention<sup>85</sup>, and through continuously re-enforcing the non-negotiable and absolute elements of Article 3 of the ECHR<sup>86</sup>. This can additionally be found in Article 15 of the European Union Qualification Directive<sup>87</sup> regarding subsidiary protection. When regarding these legal settings, officials must analyze whether nonrefoulement is admissible in circumstances where the criteria for granting asylum are missing. When analyzing whether nonrefoulement can be implemented there needs to be an examination of whether an expulsion would result in a 'real risk' of violating Article 2 or Article 3 of the ECHR.<sup>88</sup> Hence, decision-makers need to be certain that (i) the treatment that the applicant is fearing amounts to either torture or can be constituted as degrading and/or inhuman and (ii) there are considerable grounds to be convinced that the person will be subjected to such treatment on return to their country of origin.<sup>89</sup>

## 2.7 REGIONAL AFRICAN LEGAL FRAMEWORK

In the African region, the main instrument utilized to address any issues relating to asylum seekers and refugees is the OAU Convention.<sup>90</sup> Asylum seeker's and refugee's rights are further

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<sup>82</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950), at 9.

<sup>83</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950), at 11.

<sup>84</sup> European Court of Human Rights *Guide to Article 1 of Protocol No. 7 to the European Convention on Human Rights on Procedural Safeguards relating to Expulsion of Aliens* (2022).

<sup>85</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189, at 176.

<sup>86</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950), at 6.

<sup>87</sup> <sup>87</sup> European Union *Directive 2004/83/EC of the European Parliament and of the Council of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* (2004) Official Journal of the European Union, article 15.

<sup>88</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950), at 6.

<sup>89</sup> Goodwin-Gill, G.S. & McAdam, J *The refugee in international law* (2007) Oxford University Press, Oxford. at 310-11.

<sup>90</sup> Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969) 1001 U.N.T.S 45.

protected under the Banjul Charter.<sup>91</sup> Under the Banjul Charter, it is proclaimed that persons have the right, in circumstances of persecution, to be able to seek and obtain asylum in other nations, in accordance with the domestic laws of those nations as well as international conventions.<sup>92</sup> Furthermore, the Banjul Charter imposes an obligation on receiving nations to ensure that asylum seekers who have been granted asylum do not engage in activities which can be constituted as subversive activities such as unlawful acts to their country of origin, or any other nation that is party to the Banjul Charter.<sup>93</sup> According to the OAU Convention, the definition of a refugee is an individual who, due to a well-founded fear of persecution based on political opinion, membership in a social group, nationality, religion or race, is outside their country of origin and unwilling to seek protection there, or lacks nationality and is unable or unwilling to return due to such fear. Additionally, the definition extends to an individual who is compelled to leave their habitual residence due to events severely disrupting public order, foreign domination or external aggression in their country of origin, and seeks refuge elsewhere.<sup>94</sup>

The definition of a refugee is broader under the OAU Convention in comparison to the 1951 Convention. For instance, random victims of war are protected under the OAU Convention, however, people fleeing generalized violence, which would constitute them as random victims of war, are not protected under the 1951 Convention. Generalized violence can be explained as confrontations in the country of origin of the asylum seeker, in which the violence is of a sustained nature, continuous and general, and not used indiscriminately. According to paragraph 164 of the UNHCR Handbook ‘persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or the 1967 Protocol’.<sup>95</sup> Professor James Hathaway further expands on this by explaining that ‘victims of war and conflict are not refugees unless they are subject to differential victimization based on civil or political status’.<sup>96</sup>

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<sup>91</sup> Organisation of African Unity *African Charter on Human and Peoples’ Rights* (1981) CAB/LEG/67/3 rev. 5, 21 I.L.M 58.

<sup>92</sup> Organization of African Unity *African Charter on Human and Peoples’ Rights* (1981) CAB/LEG/67/3 rev. 5, 21 I.L.M 58, Article 12(3).

<sup>93</sup> Organization of African Unity *African Charter on Human and Peoples’ Rights* (1981) CAB/LEG/67/3 rev. 5, 21 I.L.M 58, Article 23(2)(a).

<sup>94</sup> Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969) 1001 U.N.T.S 45, Article 1.

<sup>95</sup> UN High Commissioner for Refugees *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees definitions* 2 December 2016, HCR/GIP/16/12.

<sup>96</sup> Hathaway J.C *The Law of Refugee Status* (1991) Cambridge University Press, Cambridge, at 185.

Considering the circumstances that many countries in the African region find themselves in, such as government instability, public disorder, incursions by rebels and war, the broader definition of refugee that can be found under the OAU Convention is more consistent with refugees' and asylum seekers' needs across the African continent. Initially, the OAU Convention was developed to allow asylum seekers to be recognized as refugees in difficult times such as mass influx as a result of war. In situations where countries face a mass influx of asylum seekers and refugees, the OAU Convention recognizes such individuals as refugees *prima facie*. *Prima facie* recognition entails provisionally regarding a group or an individual without the requirement of completing a formal RSD procedure, facilitating a prompt decision without individually determining their refugee status.<sup>97</sup> This has resulted in a widespread utilization of the status *prima facie* throughout the procedure in most African countries and entails that an individual might qualify for refugee status merely by being a citizen of a specific country.<sup>98</sup> This is quite contrasting to countries in other regions, where it is more common to have individual status determination procedures.<sup>99</sup>

On the African continent, the process of decolonization has generated political conflicts and tensions which created mass displacement of people. Excessive and blatant violations of human rights in States which lacked democracy have been a great contributor to the development of millions of refugees globally. Hence why the OAU Conventions' broad definition is praised for sustaining the African values of community over the contrasting Western individualism.<sup>100</sup>

## 2.8 CONCLUSION

As established, the RSD process is a multifaced and complex procedure, which consists of both administrative and legal factors. The difference between an asylum seeker and a refugee is demonstrated in the identification of a well-founded fear of persecution, based on the criteria outlined in the 1951 Convention. This distinction between the two is a crucial one since an asylum seeker must undergo a rigorous RSD procedure in order to determine if the applicant

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<sup>97</sup> Durieux J.F 'The many faces of "prima facie": group-based evidence in refugee status determination' (2008) 25 Centre for Refugee Studies 2, at 153.

<sup>98</sup> Tuepker, A. 'On the threshold of Africa: OAU and UN definitions in South African asylum practice' (2002) 15 *Journal of Refugee Studies*, 409-423.

<sup>99</sup> Nathwani, N. *Rethinking Refugee Law (Refugees and Human Rights, v. 7)* (2003) Brill, Nijhoff.

<sup>100</sup> Tuepker, A. 'On the threshold of Africa: OAU and UN definitions in South African asylum practice' (2002) 15 *Journal of Refugee Studies*, 409-423.

falls under the definition of a refugee. International legal frameworks, such as the 1951 Convention and the 1967 Protocol, outline the recommendations and guidelines on how to determine an asylum seeker's refugee status. These international legal instruments also outline and uphold a person's right to seek and enjoy asylum in host countries, while emphasizing the principle of *non-refoulement*, which is in place to prevent host countries from returning asylum seekers to unsafe conditions. Scholars have also analysed the influence of different aspects on RSD outcomes in various countries. These include socio-economic, narrative coherence, linguistic interpretation and more.

Within the European region, the CFR, CEAS and ECHR establish the procedures and the rights of asylum seekers within the European territory. The African region adopted the OAU Convention as well as the Banjul Convention. The broader definition of a refugee under the OAU Convention is significant in terms of addressing the challenges faced by African nations, and acknowledging the influence of mass displacement due to political conflicts on the continent.

The RSD procedure is central in shaping the lives of asylum seekers, regulating their capability to find safety in a host country and build their lives. Hence, the variations and complexities in the RSD procedures across regions call attention to the need for continuous examination and improvements to ensure fairness and consistency in the protection of refugees.

## CHAPTER III SOUTH AFRICA

### 3.1 INTRODUCTION

In South Africa, refugees and asylum seekers enjoy most of the rights as naturalized people in the country, except having the right to vote. This is in accordance with the provisions of the Refugees Act 130 of 1998 (Refugees Act).<sup>101</sup> The Refugees Act states that the rights outlined in The Bill of Rights, which includes socio-economic, civil, cultural and political rights, extend to ‘everyone’ who is a resident of South Africa and does not limit these rights to only citizens. These rights include access to social assistance and social security, adequate housing, sufficient water and food, health care services and the right to work.<sup>102</sup> Nevertheless, many asylum seekers and refugees still find it difficult to access their entitled rights. This can be boiled down to the government's failure to effectively implement the policies and laws in the Refugees Act, which consequently results in asylum seekers and refugees experiencing challenges in accessing their basic rights.<sup>103</sup>

South Africa did not have a refugee-specific legislation prior to 1998 and only acceded to the Convention Relating to the Status of Refugees (1951 Convention),<sup>104</sup> the Protocol Relating to the Status of Refugees (1967 Protocol)<sup>105</sup> and the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)<sup>106</sup> following the end of Apartheid. These instruments were later used to form the legislative framework that was developed to address asylum seekers and refugees in South Africa. Lacking both a legal commitment to any of the international legal instruments as well as any form of domestic legislation for asylum seekers and refugees, the United Nations High Commissioner for Refugees (UNHCR) developed and signed a Memorandum of Understanding (MoU)<sup>107</sup> together with the South African

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<sup>101</sup> Refugees Act [No.130 of 1998].

<sup>102</sup> The Constitution of the Republic of South Africa, 1996.

<sup>103</sup> Kavuro, C. ‘The disappearance of refugee rights in South Africa’ (2022) 43 *Obiter* 1.

<sup>104</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189.

<sup>105</sup> <sup>105</sup> United Nations General Assembly *Protocol Relating to the Status of Refugees* (1967) Treaty Series vol. 606.

<sup>106</sup> Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969) 1001 U.N.T.S 45.

<sup>107</sup> UN High Commissioner for Refugees Memorandum of Understanding Between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees on the Voluntary

government under Apartheid in 1991.<sup>108</sup> This MoU provided UNHCR with a role in South Africa and served as the main legal agency in terms of the protection of refugee rights.<sup>109</sup> Despite this development, the MoU was fairly limited in terms of its focus and scope and mainly addressed refugees from Mozambique. As of 1993, UNHCR's role and presence began to grow when South Africa officially began addressing other groups of asylum seekers and refugees on its territory.<sup>110</sup> UNHCR and the South African government further concluded the Basic Agreement between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees.<sup>111</sup> The Basic Agreement was the South African government's official statement to show its willingness to introduce and adopt international legal principles pertaining to the treatment and protection of asylum seekers and refugees.<sup>112</sup> The document shaped the foundation of UNHCR's operations within the territory, with a centre of attention on advocacy for refugee rights and coordination with the South African government.<sup>113</sup> In addition, the Basic Agreement can be considered one of the primary influential reference points for the succeeding refugee policies prior to the development of the official Refugees Act.<sup>114</sup>

Lacking refugee-specific legislation up until 1998, South Africa utilized the Aliens Control Act 76 of 1995 (ACA) in terms of addressing any person without citizenship in its territory, including asylum claims.<sup>115</sup> However, the ACA was deemed 'manifestly unsuitable' for refugee protection due to its problematic provisions.<sup>116</sup> For instance, the act merely administered admissions concerning exit of foreign nationals, residence and work, and had no

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<sup>108</sup> Dugard, J. 'South Africa – United Nations High Commissioner for Refugees: Memorandum of Understanding on the Voluntary Repatriation and reintegration of South African Returnees' (1992) 31 *Cambridge University Press* 3.

<sup>109</sup> Dugard, J. 'South Africa – United Nations High Commissioner for Refugees: Memorandum of Understanding on the Voluntary Repatriation and reintegration of South African Returnees' (1992) 31 *Cambridge University Press* 3.

<sup>110</sup> Handmaker, J. 'No Easy Walk: Advancing Refugee Protection in South Africa' (2001) 48 *Indiana University Press* 3.

<sup>111</sup> The Basic Agreement between the Government of the Republic of South Africa and United Nations High Commissioner for Refugees (UNHCR) 6 September 1993.

<sup>112</sup> Handmaker, J. 'No Easy Walk: Advancing Refugee Protection in South Africa' (2001) 48 *Indiana University Press* 3.

<sup>113</sup> Handmaker, J. 'No Easy Walk: Advancing Refugee Protection in South Africa' (2001) 48 *Indiana University Press* 3.

<sup>114</sup> Handmaker, J. 'No Easy Walk: Advancing Refugee Protection in South Africa' (2001) 48 *Indiana University Press* 3.

<sup>115</sup> Mireku O. 'South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties' (2002) 35 *Nomos Verlagsgesellschaft mbH* 3.

<sup>116</sup> Mireku O. 'South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties' (2002) 35 *Nomos Verlagsgesellschaft mbH* 3.

provisions addressing the accord of any rights to asylum seekers or refugees.<sup>117</sup> Further, features of the legislation were deemed unconstitutional, especially during the development and establishment of the Constitution of the Republic of South Africa 1996 (The Constitution).<sup>118</sup> Eventually, in 2002, the ACA was repealed by section 54 of the Immigration Act 13 of 2002.<sup>119</sup> In 1995, the South African government requested UNHCR to draft an initial version of refugee-specific legislation.<sup>120</sup> Following another three years of consultation with refugee law experts, civil society, the Gender Commission and the South African Human Rights Commission, the final draft of the Refugees Bill was presented to the South African Parliament.<sup>121</sup> The Refugees Bill was thereafter officially adopted as the Refugees Act and became effective in April 2000. During the interim period, the South African government continued to use the ACA as the legislative basis for processing asylum applications, regardless of numerous of its provisions being rendered void and null due to their unconstitutional nature.<sup>122</sup> First, it is important to note that the application of the Constitution to aliens, which includes asylum seekers and refugees, within the South African territory has to be applied correctly and that aliens are included under the terminology of ‘persons’ and should hence be considered under Chapter three on fundamental rights.<sup>123</sup> An example of how aliens have been lacking their constitutional rights under the ACA can be seen in the case of *Xu v Minister van Binnelandse Sake*<sup>124</sup> (Xu case) where the court decided to dismiss the application with regards to section 24(c) of the Constitution due to written reasons for a refusal extend a temporary residence permit in accordance with the ACA.<sup>125</sup> Section 24(c) of the Constitution states that;

*[E]very person shall have the right to- be furnished with reason in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public.*<sup>126</sup>

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<sup>117</sup> Mireku O. ‘South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties’ (2002) 35 *Nomos Verlagsgesellschaft mbH* 3.

<sup>118</sup> The Constitution of the Republic of South Africa, 1996, Chapter 3.

<sup>119</sup> Immigration Act [No. 13 of 2000].

<sup>120</sup> Mireku O. ‘South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties’ (2002) 35 *Nomos Verlagsgesellschaft mbH* 3.

<sup>121</sup> Mireku O. ‘South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties’ (2002) 35 *Nomos Verlagsgesellschaft mbH* 3.

<sup>122</sup> Ziegler R. ‘Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?’ (2020) 10 *Constitutional Court Review*.

<sup>123</sup> The Constitution of the Republic of South Africa, 1996, Chapter 3.

<sup>124</sup> *Xu v Minister van Binnelandse Sake* 1995 1 SA 185(T).

<sup>125</sup> *Xu v Minister van Binnelandse Sake* 1995 1 SA 185(T).

<sup>126</sup> The Constitution of the Republic of South Africa, 1996, Section 24(c).

The application for written reason in accordance with section 24(c) was denied in the following manner. The Xu case held that the alien in question had no legitimate interests or expectations and no rights that would be threatened or affected by administrative action under the ACA. When following this line of reasoning, the court depended on the differentiation between rights and privileges.<sup>127</sup> In other words, a right is an entitlement that cannot be legally withheld, whereas a privilege is a special opportunity or advantage that can be granted or revoked and is exclusive to specific individuals. In the Xu case, the court's reasoning clearly shows that the ACA tend to align in the same manner as prohibited persons. The reasoning may be intended to underscore that an alien does not possess the rights bestowed upon temporary residents or permanent residents under the ACA and the court might have simply observed that both the Constitution and the ACA do not provide aliens with the right to simply enter and remain in the country. However, a second understanding of the reasoning may be considered more accurate. The reasoning in the Xu case shows similarities in case law that concerns prisoners, in which prisoners were claimed under the principle to have no rights but rather may be granted privileges.<sup>128</sup> Hence, in the Xu case, aliens appear to exist not as holders of rights but as recipients of privileges, which contradicts Chapter Three of the Constitution.

As mentioned, the ACA was repealed by the Immigration Act 13 of 2002<sup>129</sup> (Immigration Act) in 2002. Upon the enactment of the Refugees Act in 2000, the South African government started addressing refugees and asylum seekers through its provisions. The Refugees Act allows for an asylum seeker to receive a transit visa at any port of entry. Further, any asylum seeker must apply for asylum within five days of entry to South Africa at a specific Department of Home Affairs (DHA) office, also known as the Refugee Reception Office (RRO).<sup>130</sup> If an asylum seeker fails to do so, the person automatically becomes an illegal foreigner and risks being deported. This further poses some problems for asylum seekers, as there are currently only five RROs in the country; the Durban Refugee Reception Office, the Desmond Tutu Refugee Reception Office, the Musina Refugee Reception Office, the Gqeberha Refugee Reception Office, and the Cape Town Refugee Reception Office (only re-established in 2023).

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<sup>127</sup> See *Ridge v Baldwin* [1964]1 AC 40 (1963).

<sup>128</sup> See *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).

<sup>129</sup> Immigration Act [No. 13 of 2000].

<sup>130</sup> Immigration Act [No. 13 of 2000], section 23.

This chapter focuses on the legal frameworks governing asylum seekers and refugees in South Africa. The argument revolves around the inadequacies and challenges in the Refugee Status Determination (RSD) process in the country. The argument is addressed by discussing the challenges in applying the Refugees Act as well as addressing the challenges Refugee Status Determination Officers (RSDOs) face in determining the subjective and objective components of the criteria for establishing the well-founded fear of persecution of an asylum seeker's claim. RSDOs are critiqued for failing to consider an asylum seeker's individual circumstances when processing their asylum claims as well as for misinterpreting the concept of persecution. The chapter further explores the decision-making process in establishing an asylum seeker's refugee status and raises concerns in terms of inadequate reasonings in RSDO rejection decisions. Lastly, the chapter calls for improvements and the need for reforms within South Africa's domestic law to ensure an alignment with international standards for protecting refugees.

### 3.2 THE SOUTH AFRICAN LEGAL FRAMEWORK

In South Africa, there are two main legal frameworks used to regulate non-national documentation, stay and entry in the country. These are the Immigration Act<sup>131</sup> and the Refugees Act.<sup>132</sup> More precisely, regulations regarding the asylum application can be found under Sections 21 and 22 of the Refugees Act.<sup>133</sup> Further, the Refugees Act is the main legal framework in place to ensure the dignity, well-being and safety of asylum-seekers and refugees, however, both frameworks outline determined procedures that need to be applied within the RSD procedure. The instruments contain provisions for a four-stage RSD procedure; preliminary interview, a hearing, referral and appeals. The preliminary interview, or interaction, occurs in the presence of an RSDO, the hearing takes place before the Status Determination Committee, the referral, also called the automatic review, is made to the Director-General in specific situations, and the appeal is before the Refugee Appeal Board (RAB).<sup>134</sup> The Refugees Act further outlines the regulations in terms of the reception process of individuals within South Africa's territory, asylum applications as well as the recognition and determination of refugee status.<sup>135</sup> The Refugees Act does not include provisions that

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<sup>131</sup> Immigration Act [No. 13 of 2002] .

<sup>132</sup> Refugees Act [No.130 of 1998].

<sup>133</sup> Refugees Act [No.130 of 1998], 14.

<sup>134</sup> Refugees Amendment Act [No. 33 of 2008], section 8A.

<sup>135</sup> Refugees Act [No.130 of 1998], section 1.

outline South Africa's obligation to receive asylum seekers,<sup>136</sup> however, section 21(1) states that an individual has the right to be granted an opportunity to apply in person within South Africa's territory. Hence, South Africa is obliged to receive and assist persons who intend to submit an asylum application.<sup>137</sup>

The right to have your refugee status assessed and determined has been emphasized in the case of *Abdi v Minister of Home Affairs*.<sup>138</sup> In this case, the Supreme Court of Appeal of South Africa determined that, in accordance with the provisions of the Refugees Act, it is unlawful to restrict a person's access to South African territory, if the person has been forced to flee their country of origin due to circumstances outlined in Section 2 of the Refugees Act.<sup>139</sup> These circumstances include if an individual may be subjected to persecution due to their membership of a particular social group, political opinion, nationality, religion or race, or if the individual's freedom or physical safety could be threatened on account of occupation, external aggression, foreign domination or other events seriously disrupting or disturbing public order in their country of origin.<sup>140</sup> Section 2(2) further outlines that the person is required to apply for asylum in South Africa in person at one of the designated RROs without any delay.<sup>141</sup> This provision is a source of concern due to asylum seekers frequently facing delays in submitting their applications, primarily because of restricted access to RROs. According to Section 22(1) of the Refugees Act, asylum seekers must be granted an asylum seeker permit by the RSDO once an asylum application has been submitted, in order for the asylum seeker to legally remain within the territory of South Africa.<sup>142</sup> The RSDO has both the right to amend the conditions of the permit as well as change the period for which the permit is valid,<sup>143</sup> however, the RSDO does not have a right to refuse the issuance of this permit. Aside from the already discussed national legal frameworks, the Immigration Act regulates the documentation, entry and stay of foreign nationals in South Africa. The Immigration Act is ruled by the principle of sovereignty, which entails South Africa's right to freely implement and enact its own migration policies.<sup>144</sup>

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<sup>136</sup> Kerfoot, W. & Schreier, T. 'Application for asylum: Reception' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 138.

<sup>137</sup> Refugees Act [No. 130 of 1998], Section 21(1).

<sup>138</sup> *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA).

<sup>139</sup> *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA), para 22.

<sup>140</sup> Refugees Act [No. 130 of 1998], Section 2.

<sup>141</sup> Refugees Act [No. 130 of 1998], Section 2(2).

<sup>142</sup> Refugees Act [No. 130 of 1998], Section 22(1).

<sup>143</sup> Refugees Act [No. 130 of 1998], Section 22(3).

<sup>144</sup> Nathwani N. & Noll, G. 'Rethinking refugee law' (2004) 17 *Journal of refugee studies* 4, 486-488.

Section 3(a) of the Refugees Act outlines the definition of a refugee,<sup>145</sup> which is similar in its character to the definition provided in Article 1A (2) of the 1951 Convention,<sup>146</sup> except for the fact that the 1951 Convention includes tribe and gender as additional grounds in which an individual can base their asylum claims on. This makes it harder for individuals seeking asylum in South Africa to submit applications on the basis of, for instance, gender-based violence.

Further, the Constitution of the Republic of South Africa of 1996 (the Constitution) is considered to be exceptionally generous and liberal in terms of its provisions outlining the entitlements and rights of both nationals and non-nationals.<sup>147</sup> In this, there is a portrayal that South Africa has a strong intention to protect asylum seekers within its territory.<sup>148</sup> In the case *Lawyers for Human Rights v Minister of Home Affairs*, the court held that the Bill of Rights in Chapter 2 of the Constitution protects any individual present within South Africa's borders, regardless of their legal or non-legal status.<sup>149</sup> Hence, asylum seekers in South Africa have a legal right to the same standard of treatment as anyone within the territory of South Africa, specifically in terms of their fundamental human rights.<sup>150</sup> Section 33 of the Constitution additionally requires official administrators, such as officials of the DHA, to act reasonably and lawfully, to fairly follow procedures and to issue written reasons in circumstances where an individual's rights have been negatively affected.<sup>151</sup>

In accordance with the Promotion of Administrative Justice Act 3 of 2000 (PAJA), all DHA officials are obliged to respect the rights of asylum seekers.<sup>152</sup> It should be further noted that effectiveness and fairness within the RSD procedure are fundamental to the protection of asylum seekers and refugees. The 2017 White Paper on International Migration (2017 White Paper) sets out South Africa's policies regarding international migration which is applied

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<sup>145</sup> Refugees Act [No. 130 of 1998], Section 3(a).

<sup>146</sup> *United Nations General Assembly Convention Relating to the Status of Refugees (1951) Treaty Series vol. 189, Article 1A(2)*

<sup>147</sup> The Constitution of the Republic of South Africa, 1996.

<sup>148</sup> Jenkins, F. & de la Hunt, L.A 'Detaining Asylum-Seekers: Perspectives On Proposed Reception Centres for Asylum-Seekers in South Africa' in Handmaker (eds) *Advancing Refugee Protection in South Africa* (2008) 2,

<sup>149</sup> *Lawyers for Human Rights v Minister of Home Affairs 2004* (4) SA 125 (CC) 151.

<sup>150</sup> Sachs, A. 'From a refugee to a refugee judge' in Simeon JC (ed) *Critical Issues in International Refugee Law* (2010), 51.

<sup>151</sup> The Constitution of the Republic of South Africa, 1996, Section 33.

<sup>152</sup> Promotion of Administrative Justice Act 3 of 2000.

through the Immigration Act as well as the Refugees Act.<sup>153</sup> The 2017 White Paper contains a more relevant and broader framework than the previous 1999 White Paper on International Migration (1999 White Paper).<sup>154</sup> As mentioned before, due to South Africa being a sovereign state, setting out conditions regarding the residence and admission of foreign nationals in line with the country's interest is within the country's right. Even if a State's legal framework is shaped and influenced by domestic, regional and international instruments, what essentially shapes the crux of a country's RSD process is its domestic instruments. Nevertheless, each state has an obligation to ensure that its domestic legislation is in compliance with ratified and signed international legislation.

### 3.3 THE APPLICATION AND INTERPRETATION OF THE LAW

As within any state, the law needs to be applied properly to determine if an asylum seeker meets the requirements for refugee status.<sup>156</sup> However, RSDOs have continuously proven to fail in their assessments and applications of refugee law, specifically in terms of the concepts of well-founded fear, persecution and credibility.<sup>157</sup> Consequently, when the law is applied incorrectly, asylum seekers lack a fair opportunity to have their applications considered. To determine if an asylum seeker will be successful in their application depends on whether the applicant has a well-founded fear of persecution and if the applicant's claim is considered credible.<sup>158</sup> The fear is considered well-founded if the applicant can demonstrate that their return to their country of origin will lead to persecution through human rights violations or threats that are systematic or sustained and the government in the asylum seeker's country of origin either fail to protect the asylum seeker or in some cases, actively participate in those forms of violations.<sup>159</sup>

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<sup>153</sup> White Paper on International Migration for South Africa 2017, available at: <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf>.

<sup>154</sup> White Paper on International Migration for South Africa 1999.

<sup>156</sup> Amit, R. 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23 *International Journal of Refugee Law* 3, 464.

<sup>157</sup> Amit, R. 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decision' (2010) *Forced Migration Studies Programme, University of the Witwatersrand*, 25.

<sup>158</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/1P/4/ENG/REV. 4. Para 42.

<sup>159</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/1P/4/ENG/REV. 4.

The determination of such well-founded fear is both objective and subjective in nature.<sup>160</sup> Even though fear in itself is subjective, within the RSD process, the fear must be established as well-founded in the sense that it has to have an objective foundation, which entails that an external reality needs to exist and be connected to the applicant's circumstances.<sup>161</sup> In the case of *Rajudeen v. Minister of Employment and Immigration*, the Canadian Federal Court of Appeal stated that;

*[T]he subjective component relates to the existence of a fear of persecution in the mind of the refugee. The objective component requires that the refugees fear be evaluated objectively to determine if there is a valid basis of that fear.*<sup>162</sup>

Hence, although an asylum seeker might have a subjective fear of persecution in their country of origin, that fear must be examined objectively by taking into account the circumstances prevailing in that country to assess if the fear is well-founded.<sup>163</sup> UNHCR further outlines in their *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR Handbook) that the concept of fear – a subjective condition and state of mind – builds on the criteria of well-founded<sup>164</sup> This indicates that it is not merely the state of mind of the asylum seeker that is a deciding factor of their refugee status, instead, this state of mind needs to be reinforced by an objective factor. RSDOs in South Africa continuously have failed to provide consideration to the applicant's individual circumstances, such as background, age and/or gender, and instead tend to solely rely on an examination of the person's country of origin and the state of that country to both establish the subjective and objective factors.<sup>165</sup> Although RSDOs can acknowledge the distinctive nature between the subjective and the objective factors, they often fail in their application of the subjective and objective rightfully.<sup>166</sup> Further, assessments have shown that when the RSDOs have relied

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<sup>160</sup> Amit op cit note 125 at 33.

<sup>161</sup> UN High Commissioner for Refugees *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (2001) para 11.

<sup>162</sup> *Rajudeen v. Minister of Employment and Immigration* (1984) 55 N.R 129 (FCA).

<sup>163</sup> *Chan v. Canada (Minister of Employment and Immigration)* [1995] 3 S.C.R. 593, para 134.

<sup>164</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/IP/4/ENG/REV. 4, at page 19.

<sup>165</sup> Amit, R. 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) *African Centre for Migration and Society* 39.

<sup>166</sup> Amit, R. 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23 *International Journal of Refugee Law* 3, at 433.

solely upon the situations of the countries of origin, the decisions that have been made are usually founded on outdated or incorrect information.<sup>167</sup> Even in situations in which internal relocation should be deemed not appropriate considering the fear stems from state actors themselves, RSDOs have rejected an asylum seeker's application due to their inability to consider individual circumstances.<sup>168</sup>

As mentioned previously, an additional crucial part in determining an asylum seeker's refugee status is the aspect of persecution.<sup>169</sup> The 1951 Convention does not outline a definition of persecution, however, UNHCR has provided an interpretation which includes; any form of serious human rights violation or a threat to life or freedom based on affiliation with a specific social group, race, nationality, political opinion or religion and are unable or, due to fear, unwilling to seek protection in their country of origin.<sup>170</sup> Within the South African context, RSDOs have had a tendency to fail in their application determination of an asylum seeker's well-founded fear of persecution in a rather restrictive way. In the past, this has been limited to a person's membership to a political party, and a disregard to any other form of ground of persecution provided in the Refugees Act.<sup>171</sup> A person may present that their circumstances include a well-founded fear of persecution due to situations in their past as well as in their future, which includes serious human rights violations or a threat to their life or freedom.<sup>172</sup> Nevertheless, RSDOs rarely acknowledge such factors and tend to only consider past survivors of physical harm, despite the guidelines provided in UNHCR's Handbook<sup>173</sup> under the 1951 Convention and the 1967 Protocol<sup>174</sup> in which past persecution is not a criterion for refugee

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<sup>167</sup> Amit, R. 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decision' (2010) *Forced Migration Studies Programme, University of the Witwatersrand*, 25, at 469.

<sup>168</sup> Amit, R. 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) *African Centre for Migration and Society* 39, at 40.

<sup>169</sup> <sup>169</sup> Amit, R. 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decision' (2010) *Forced Migration Studies Programme, University of the Witwatersrand*, 25, at 424.

<sup>170</sup> <sup>170</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189, Article 33.

<sup>171</sup> Amit, R. 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decision' (2010) *Forced Migration Studies Programme, University of the Witwatersrand*, 25, at 465.

<sup>172</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/1P/4/ENG/REV. 4, Para 45.

<sup>173</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/1P/4/ENG/REV. 4.

<sup>174</sup> <sup>174</sup> United Nations General Assembly *Protocol Relating to the Status of Refugees* (1967) Treaty Series vol. 606.

status.<sup>175</sup> According to the guidelines, an individual does not need to be a survivor of any harm or persecution but merely needs to be able to establish a well-founded fear of future harm or persecution. Despite this, the RSDOs continuously reject asylum applications on the basis that the applicant has not yet been subjected to any physical harm already.<sup>176</sup> Such conduct is the result of RSDOs altering the criterion of a well-founded fear, in which a plausible concern for future persecution is not being taken into consideration. Furthermore, even in cases where harm has been established, the RSDOs will reject the application on the basis that a single act of persecution is not sufficient enough to meet the criteria of refugee status.<sup>177</sup>

The RSDOs are required to take into consideration the possibility of future persecution, and not solely rely on the individual's subjection to physical past harm and in that create a threshold for such harm.<sup>178</sup> This presents an issue since the presence of physical harm should not be a determining factor in establishing whether a person has a well-founded fear of persecution. This aligns with UNHCR's guidelines, as mentioned previously, which do not require past persecution as a criterion for refugee status. However, since a proper definition of persecution does not exist, the concept has been established and understood through judicial, academic and administrative interpretations.<sup>179</sup> According to the 1951 Convention, persecution is defined as harm suffered by an individual, and not by groups of individuals, fleeing persecution.<sup>180</sup> What has been overlooked is the different forms of persecution that are contextual, such as persecution perpetrated by non-state actors or gender-based persecution. This has nevertheless been further developed through doctoral approaches. When the Rome Statute of the International Criminal Court was drafted in 1998, the concept of persecution was defined as the intentional and severe deprivation of fundamental rights which extended to groups of

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<sup>175</sup> Amit, R. 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decision' (2010) *Forced Migration Studies Programme, University of the Witwatersrand*, 25, at 465.

<sup>176</sup> Amit, R. 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decision' (2010) *Forced Migration Studies Programme, University of the Witwatersrand*, 25, at 32.

<sup>177</sup> Amit, R. 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) *African Centre for Migration and Society* 39, at 26.

<sup>178</sup> Amit, R. 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) *African Centre for Migration and Society* 39 at 27.

<sup>179</sup> Fischel de Andrade, J.H. 'On the Development of the Concept of Persecution in International Refugee Law' (2008) 2 *Anuario brasileiro De Direito Internacional* 123.

<sup>180</sup> McFadyen, G. 'The Contemporary Refugee: Persecution, Semantics and Universality' 2012 available at: <http://www.dla.ac.uk.>media-234569-en>.

individuals, contrary to the 1951 Convention.<sup>181</sup> The overall comprehension of the concept of persecution should, through case law and doctrine, develop into a more harmonious, dynamic and progressive interpretation and application to benefit the asylum seeker, fleeing such persecution.

Lastly, an additional element within the RSD process is establishing the credibility of the applicant. This process requires a thorough individual assessment and consideration in terms of the person's circumstances. In many of the cases, persons who have fled their countries of origin lack any supporting documentation. An applicant's testimony in such cases can be sufficient to establish their refugee status.<sup>182</sup> The testimony is cross-examined by an RSDO and if the applicant can present a reasonable and coherent claim, the individual may be considered as credible.<sup>183</sup> More often than not, however, determining the credibility of an applicant is difficult considering factors such as language, gender, class, and cultural and traumatic barriers.<sup>184</sup> Due to the applicant's past experiences, the individual might be reluctant to share their stories with authority figures which consequently may affect the extent of important information needed to assess their asylum claims.<sup>185</sup> Further, there have been issues identified with the Eligibility Form<sup>186</sup> used in the RSD process in South Africa. For instance, the Eligibility Form does not allow space for extensive information to be recorded, and RSDOs have used the limited information on these forms to reject asylum claims.<sup>187</sup> Further, due to a lack of assistance, many applicants may be unsure of the expected information to provide or have language barriers preventing them from fully expressing their claims.<sup>188</sup> Considering the issues stemming from attempting to determine an applicant's credibility, more consideration

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<sup>181</sup> UN General Assembly Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6, Article 7 2(g).

<sup>182</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/1P/4/ENG/REV. 4, para 198.

<sup>183</sup> Amit, R. 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) *African Centre for Migration and Society* 39, at 470.

<sup>184</sup> Kalin, W. 'Troubled Communication: Cross-Cultural Missunderstanding in the Asylum Hearing (1986) 20 *International Migration Review* 2, 230.

<sup>185</sup> U N High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/1P/4/ENG/REV. 4, Para 198.

<sup>186</sup> Republic of South Africa Department of Home Affairs Eligibility Determination Form for Asylum Seekers, available at: <https://www.passport2000.com/files/BI-1590.pdf>.

<sup>187</sup> Amit, R. 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) *African Centre for Migration and Society* 39, at 470.

<sup>188</sup> Amit, R. 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) *African Centre for Migration and Society* 39, 471.

should be put into the guiding principles provided in the *Tantoush v Refugee Appeal Board*.<sup>189</sup> In this case, the court stated that assessing the claimant's credibility and reliability to determine if they harbor a well-founded fear of persecution involves considering inherent probabilities, internal and external consistency, alignment with other evidence, candor, and overall performance. Objective factors are crucial; merely relying on an asylum seeker's past falsehoods to dismiss their fear of persecution is often inadequate, especially if they lived in the margins of legality.<sup>190</sup>

This indicates the importance of not solely determining an applicant's credibility based on a prior inconsistency, but instead establishing a holistic and thorough assessment and considering other relevant elements.<sup>191</sup> In many of the examined rejections of asylum applications, the RSDOs used credibility determination as a reason for rejecting an asylum claim, especially in cases where there were no clear reasons for the rejection.<sup>192</sup> It has been noted that the RSDOs have a tendency to resort to such rejection, despite UNHCR's clear guidelines that in cases where there is a lack of evidence and/or supporting documentation, there needs to be a rigorous investigation of the applicant's credibility.<sup>193</sup> A rigorous investigation of an applicant's claim calls for the RSDO to actively acquire evidence such as examining Country of Origin Information (COI), assessing witnesses, advising experts or obtaining other information from reliable sources. Instead, RSDOs will use any trivial inconsistencies as a justification to question the applicant's credibility. There have also been cases where the RSDO questions the credibility of an applicant due to the individual's country of origin's seemingly improved circumstances.<sup>194</sup> Why this is a problematic approach in determining a person's asylum claim is because one cannot guarantee that a country is safe for everyone in that territory. Examining merely the overall safety of a country does not allow the consideration of an asylum seeker's individual circumstances, such as being a member of a minority who faces discrimination in that country. This is an indication that even in cases where the individual will provide honest

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<sup>189</sup> *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T).

<sup>190</sup> *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T), para 102.

<sup>191</sup> De Jager, J. 'Refugee Status Determination in South Africa' in Khan F. & Schreier T. (eds) *Refugee Law in South Africa* (2014) 163.

<sup>192</sup> Amit, R. 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decision' (2010) *Forced Migration Studies Programme, University of the Witwatersrand*, 25, at 469.

<sup>193</sup> Amit, R. 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) *African Centre for Migration and Society* 39, at 38.

<sup>194</sup> Amit, R. 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' (2012) *African Centre for Migration and Society* 39, at 38.

and proper information regarding their situation in their country of origin, which establishes their credibility, the applicant's credibility will still be questioned as the RSDOs have deemed the circumstances in the country to have improved.

### 3.4 REFUGEE STATUS DETERMINATIONS IN SOUTH AFRICA

When an asylum seeker enters through one of South Africa's borders, he or she must express their intention to apply for asylum to a border management authority and be issued an asylum seeker transit permit which is valid for fourteen days<sup>195</sup> The asylum seeker thereafter has fourteen days to approach a RRO to submit their asylum application. The asylum seeker's transit permit also prevents an asylum seeker from being detained or arrested if he or she encounters authority officials such as the police or an immigration officer prior to submitting their asylum application.

In accordance with section 21(2)(a) of the Refugees Act, a Refugee Reception Officer must receive the asylum application form from the applicant.<sup>196</sup> The Refugee Reception Officer must also give assistance to the asylum seeker with completing a biometrics application form as well as interviewing the applicant.<sup>197</sup> Every asylum seeker over the age of sixteen is also required to have their photographs taken and leave fingerprints. Following this procedure, an applicant's status transitions into an asylum seeker and the individual will be issued a Section 22 Permit. This permit permits the asylum seeker to work, conduct business and/or study in South Africa until their application has been finalized. According to section 3(1) of the Refugees Act, the application has to be finalized within 180 calendar days.<sup>198</sup> The RSDOs will make a decision on an asylum application once the interviews have concluded; the applicant will either be granted refugee status or have their claim declared unfounded or manifestly unfounded.<sup>199</sup> In the case where the claim has been rejected, the RSDO is required to issue the asylum applicant with sufficient written reasoning for the reached decision.<sup>200</sup> This is a crucial part of the RSD process as the asylum seeker has the option to use the reasoning behind the decision to

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<sup>195</sup> The Refugees Act [No. 130 of 1998], Section 2(2).

<sup>196</sup> The Refugees Act [No. 130 of 1998], Section 21(2)(a).

<sup>197</sup> Republic of South Africa, Department of Home Affairs, 'Eligibility Determination Form for Asylum Seekers', available at: <https://www.passport2000.com/files/BI-1590.pdf>, accessed on 1 February 2024.

<sup>198</sup> The Refugees Act [No. 130 of 1998], section 3(1).

<sup>199</sup> De Jager, J. 'Refugee Status Determination in South Africa' in Khan F. & Schreier T. (eds) *Refugee Law in South Africa* (2014) 163, at 164.

<sup>200</sup> Refugees Act [No.130 of 1998], para 24(4).

challenge the RSDOs reasoning.<sup>201</sup> In such instances, the applicant can claim to suffer from prejudice, if the reasoning by the RSDO is considered insufficient. These prejudiced acts from RSDOs may be the incorporation of personal prejudices and stereotypes in their reasonings, the use of derogatory language in official documents and the combination of evidence in terms of sexual identities, all utilized in a discriminatory manner to justify a denial of an asylum seeker application.<sup>202</sup> The applicant's right to be provided with sufficient reasoning in their rejected decision is further outlined and supported in Section 5(2) of PAJA.<sup>203</sup> It has been understood by the courts of South Africa that it is difficult to generalize what constitutes a sufficient reasoning, however, in the case of *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*, guidance has been issued to address this difficulty.<sup>204</sup> In the case, the court stated that the decision-maker must provide their understanding of the legislation and facts relevant to the case which resulted in their concluded decision.<sup>205</sup> This should be carried out in an unambiguous and clear language. Additionally, in the case of *Katabana v The Chairperson of the Standing Committee for Refugee Affairs*, the court emphasized and acknowledged that RSDOs is not a court and hence are not under any obligation to provide lengthy judgements, rather should be able to provide a carefully contemplated reasoning that is sufficient for the applicants understanding.<sup>206</sup> In the case of *Koyobe v Minister of Home Affairs*, the court stated that the provided reasons for a rejected decision had to be adequate for the applicant to present it for an appeal or review.<sup>207</sup> Regardless of the provided guidelines and regulations, applicants are often given decision letters in which the reasoning section is lacking any statement at all.<sup>208</sup> Applicants who have received rejection decisions with the reasoning of being manifestly unfounded are not being provided the same treatment as other applicants, most likely as their claims are considered fraudulent in nature. However, as outlined above, according to Section 5(2) of PAJA, RSDOs are required to provide sufficient reasoning behind

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<sup>201</sup> De Jager, J. 'Refugee Status Determination in South Africa' in Khan F. & Schreier T. (eds) *Refugee Law in South Africa* (2014) 163, at 164.

<sup>202</sup> Southern African Catholic Bishops' Conference Parliamentary Liaison Office 'LGBTI+ Asylum-seekers in Facing Discrimination' Briefing Paper 522 June 2021 at 2, available at: <http://www.cplo.org.za/wp-content/uploads/2021/06/BP-522-LGBTI-discrimination-PJ.pdf>, accessed on 26 January 2024.

<sup>203</sup> Promotion of Administrative Justice Act 3 of 2000, Section 5(2).

<sup>204</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA).

<sup>205</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA), Para 40.

<sup>206</sup> *Katabana v The Chairperson of the Standing Committee for Refugee Affairs* (WC) unreported case no 25061/2011 of 14 December 2012.

<sup>207</sup> *Koyobe v Minister of Home Affairs* 2010 (4) SA 327 (CC).

<sup>208</sup> Amit, R. 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23 *International Journal of Refugee Law* 3, 464.

their decisions.<sup>209</sup> Further, this form of treatment fails to consider that even if their claims have been deemed manifestly unfounded, it does not indicate that the asylum seeker has not provided a genuine claim but can rather indicate a poor implementation of the asylum process. It is furthermore noteworthy to mention that if an asylum seeker or refugee experiences that their human rights have been violated by the State of South Africa, it is considerably difficult to take the case to the regional African Court on Human and Peoples' Rights. Individual cases can only be brought before the court if the state, against which the application is made, has made a special declaration accepting this procedure.<sup>210</sup>

### 3.5 HUMAN RIGHTS STANDARDS

When looking into the South African context, there are a number of measures to rectify former injustices in the means by which the Refugees Act is implemented. When assessing socio-economic development regions, restitution or remedial means influence the necessity to improve historically disadvantaged communities to free them from economic disparities, social inequality and poverty, which in the South African case is greatly influenced by the apartheid. An approach as such creates a risk of magnifying an already existing vulnerable circumstance of asylum seekers and refugees within South African society. Such risk manifests in the government of South Africa and its xenophobic approach immersed in the political lack of willingness to share national resources for the protection of asylum seekers and refugees. Hence the deviation from its prior commitment and desire to provide protection to asylum seekers and refugees in the means that the refugee regime initially envisioned. The South African government has over the past decade changed policies and laws to exclude asylum seekers and refugees from employment, economic, social and labour. There are a number of different amendments to refugee and immigration regulations and legislations that lack the intent to enhance or improve constitutionally based inclusive refugee protection. Rather these amendments decrease the existing protection for asylum seekers and refugees.<sup>211</sup> Consequently, means have also been implemented to deny asylum seekers entry into South Africa, grounds have been implemented in order to deny asylum seekers the opportunity to enjoy the same protection as refugees, or even denying genuine refugees their status as such.

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<sup>209</sup> Promotion of Administrative Justice Act 3 of 2000, Section 5(2).

<sup>210</sup> African Court on Human and Peoples' Rights 'How to File a Case' available at: <https://www.african-court.org/wpafc/how-to-file-a-case/#:~:text=Individuals%20and%20non%2Dgovernmental%20organizations,special%20declaration%20accepting%20this%20procedure.,> accessed on 7 February 2024.

<sup>211</sup> Khan, F. & Lee, M. 'Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugee and Asylum Seekers' (2018) 4 *African Human Mobility Review* 2, 1205-1225.

Current grounds to be able to disqualify refugee protection have hence been extended.<sup>212</sup> The initial intention of the refugee regime in South Africa was on the provision of refugees being able to enjoy the same treatment as citizens of South Africa. However, the state has diverged from these initial intentions by refusing to align the Refugees Act with policies and laws that achieve socio-economic rights in accordance with the Bill of Rights. There are a number of ways in which this is evident. For instance, through the lack of policies in place to assist asylum seekers and refugees. Even though South Africa's refugee legislation outlines the right to local integration in various ways, there is no inclusive policy in place to enable the economic, social and legal integration of refugees.<sup>213</sup> South Africa has adopted the non-encampment policy, which entails that refugees are provided access to public services as well as socio-economic services.<sup>214</sup> This essentially allows refugees to live amongst the local population, however, there is a call for policies that illustrate the rights of refugees to the public population in order to facilitate a durable integration process and a welcoming society.<sup>215</sup> It is clear that the South African population lack an understanding of the socio-economic rights of refugees.<sup>216</sup> For instance, refugees have reported that when attempting to find work in South Africa, prospective employers often lack knowledge of their rights.<sup>217</sup> Refugees have also reported experiencing a high level of exploitation by employers and that they struggle to sufficiently integrate economically, despite their right to work in South Africa.<sup>218</sup> Another way in which refugees and asylum seekers are prevented from their rights is their experienced difficulties in accessing documents in South Africa. This is evident in the number of cases taken against the DHA. One of those cases is the *Kiliko & Others v Minister of Home Affairs & Others*, in which the Western Cape High Court concluded that;

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<sup>212</sup> Kavuro, C. 'South Africa's Refugee Policy: New Grounds to Exclude Refugees from Refugee Protection' *Rights in Exile* 1 April 2017, available at <https://rightsinexile.tumblr.com/post/159067508272/south-african-refugee-policy-new-grounds-to>, accessed on 5 November 2023.

<sup>213</sup> Chrysostome, J. 'Local Integration as a Durable Solution for Refugees in South Africa' (2016) 12 *Acta Universitatis Danubius Juridica* 3.

<sup>214</sup> White Paper on International Migration for South Africa 2017, available at: <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf>.

<sup>215</sup> Executive Committee of the High Commissioner's Programme General Conclusion on International Protection No. 81 (XLVIII) – 1997, No. 81 (XLVIII), 17 October 1997.

<sup>216</sup> Ingrid Palmary 'Refugees, Safety and Xenophobia in South African Cities: The role of local government' available at: <https://www.csvr.org.za/docs/foreigners/refugeessafetyand.pdf>, accessed on 6 February 2024.

<sup>217</sup> Dass, D., Ramjathan-Keogh, K. & Khan, F. 'The socio-economic rights of refugees and asylum seekers in South Africa' in F Khan & T Schreier (eds) *Refugee law in South Africa* (2014) p. 220.

<sup>218</sup> Dass, D., Ramjathan-Keogh, K. & Khan, F. 'The socio-economic rights of refugees and asylum seekers in South Africa' in F Khan & T Schreier (eds) *Refugee law in South Africa* (2014) p. 220.

*[U]ntil an asylum seeker obtains an asylum-seeker permit in terms of section 22 of the Refugees Act, he or she remains an illegal foreigner and, as such, is subject to the restrictions, limitations and inroads enumerated in the preceding paragraph, which, self-evidently, impact deleteriously upon or threaten to so impact upon, at least, his or her human dignity and the freedom and security of his or her person.*<sup>219</sup>

This emphasizes the importance of obtaining documents in order to access their rights. Furthermore, if an asylum seeker or a refugee is within the territory of South Africa undocumented, or in possession of expired or invalid documents they essentially remain in the country as irregular immigrants without protection.

### 3.6 CONCLUSION

The situation of asylum seekers and refugees in South Africa has been characterized by a compounded history of evolving government policies and legislative development. Although asylum seekers and refugees generally enjoy most rights of naturalized citizens, one primary challenge is their ability to access these rights and entitlements. This is mainly due to an ineffective implementation of laws and policies. The change in the numbers of asylum seekers and refugees within the South African territory, the lack of a refugee-specific legislation before 1998 and the eventually enacted Refugees Act in 2000 have all formed the current legal framework and procedure that exists. With the current framework, asylum seekers are obliged to apply for asylum within five days of entering the territory of South Africa at one of the Refugee Reception Offices. However, due to the limited number of Refugee Reception Offices, it poses several challenges for asylum seekers. For the situation to improve, South Africa has to enhance the availability of RROs and strengthen the current coordination between organizations such as UNHCR and government agencies. Such steps are crucial to fulfil South Africa's international obligations and to improve the overall protection of asylum seekers and refugees in the country.

South Africa regulates foreign national's documentation, entry and stay through two key legal frameworks; the Immigration Act 13 of 2002<sup>220</sup> and the Refugees Act 130 of 1998<sup>221</sup>. The policies and regulations surrounding the RSD procedure can be found under the Refugees Act,

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<sup>219</sup> *Kiliko & Others v Minister of Home Affairs & Others* (2739/2005) [2009] ZAWCHC 79.

<sup>220</sup> Immigration Act [No. 13 of 2000].

<sup>221</sup> Refugees Act [No.130 of 1998].

in which a four-stage procedure is outlined, emphasizing the right of asylum seekers to have their refugee status determined and assessed. Although the Immigration Act endorses South Africa's sovereignty in developing its own migration policies, apprehension exists in terms of the vague definition of refugee in comparison to the 1951 Convention. Regardless, South Africa's Constitution as well as the PAJA issue a vigorous legal framework to ensure fair treatment for asylum seekers and refugees. Further, the 2017 White Paper on International Migration, although improved from the 1999 White Paper on International Migration, still contributes to irregular migration, corruption, and human rights abuses. In steering such complex aspects, South Africa has to align its domestic legislation with international standards. Navigating national interests with human rights is crucial, demanding ongoing improvements to ensure a fair, effective and humane RSD procedure for asylum seekers and refugees within the territory of South Africa.

The RSDOs in South Africa have been shown to face a number of crucial challenges in terms of the application of refugee law. Their assessments of well-founded fear, persecution and credibility are generally inadequate, resulting in unfair rejections of asylum applications. RSDOs often depend too majorly on the situation of the applicant's country of origin, and physical harm as a criterion for persecution, failing to take into consideration subjective factors. In addition, RSDOs have a tendency to question the credibility of an applicant, based on improvements in the situation in their country of origin, even in cases where the applicant provides accurate information. There is hence a need for reform, to ensure a fair and just RSD procedure, and in order to consider individual circumstances more comprehensively, broaden the understanding of persecution and conduct a more impartial assessment of an applicant's credibility. This will further improve the country's ability to fulfil its international obligations and develop a more equitable RSD process for asylum seekers.

Further, the role of RSDOs in deciding the outcome of asylum applications is crucial. The RSDOs can either grant an applicant refugee status or reject their claims after conducting an interview. Either way, they are under obligation to provide a sufficient and clear written reasoning for their decision. According to Section 5(2) of the PAJA, it is important to provide a comprehensive and understandable reasoning. Court cases have also issued guidance for RSDOs and emphasized the need to explain their interpretation of the law as well as relevant facts concisely and clearly. Nevertheless, some applicants receive decision letters that lack any form of reasoning. This is especially prevalent in cases that are deemed manifestly unfounded.

This contravenes South African law and fails to recognize manifestly unfounded claims that can be a result of processing issues rather than fraud. To ensure transparency and fairness within the RSD procedure, South Africa should consistently issue sufficient and clear reasonings in rejection decisions. This is to further protect the rights of asylum seekers and improve the country's overall integrity of the asylum procedure.

The Refugees Act's implementation in South Africa diverges from protecting refugees and asylum seekers, with policies excluding them from opportunities and extending disqualification grounds. This fosters a hostile and xenophobic environment. Realignment with constitutional principles advocating socio-economic rights is crucial to rectify injustices and ensuring an inclusive refugee protection.

## CHAPTER IV

### SWEDEN

#### 4.1 INTRODUCTION

Sweden is a constitutional monarchy and a parliamentary democracy. This entails that all public powers, including the governance of migration, proceed through the Swedish Parliament from its citizens.<sup>222</sup> This essentially entails that the Swedish Parliament holds legislative authority, representing the people at the national level. The current king is the official head of state, and possesses some representative and symbolic missions, however, lacks any form of political power.<sup>223</sup> Sweden's system of governance is regulated by the four fundamental laws; the Instrument of Government, the Act of Succession, the Fundamental Law on Freedom of Expression and the Freedom of Press Act.<sup>224</sup> In terms of the governmental system such as the basic principles, the functionality and the parliamentary election are enshrined in the Instrument of Government.<sup>225</sup> The four fundamental laws also form the Swedish constitution.<sup>226</sup> Although the right to asylum is not mentioned in any of the four fundamental laws, Chapter 10 of the Instrument of Government outlines its cooperation with other states as well as intergovernmental organizations such as the European Union (EU) and the United Nations (UN).<sup>227</sup> It could therefore be perceived that the constitutional reinforcement of the right to seek asylum in Sweden is derived from its European and international obligations and commitments. Sweden joined the EU in 1995, following the accession agreement.<sup>228</sup> Additionally, the Swedish judicial system falls under the EU *Acquis Communautaire*, conveying the precedence of ratified EU laws over the domestic laws of member-states.<sup>229</sup> EU member states hence have common policies and regulations in terms of certain legislative

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<sup>222</sup> Instrument of Government (1974:152), Chapter 1, Paragraph 1.

<sup>223</sup> Instrument of Government (1974:152), Chapter 5.

<sup>224</sup> Government Offices of Sweden 'Swedish Government Offices Yearbook 2015' available at <https://www.government.se/contentassets/af7c76f44ea8423486f6ce4c02e1acd2/swedish-government-offices-yearbook-2015.pdf> accessed 15 October 2023.

<sup>225</sup> Government Offices of Sweden op cit note 168.

<sup>226</sup> Government Offices of Sweden 'The Constitution' 11 March 2015, available at: <https://www.government.se/how-sweden-is-governed/the-constitution/>, accessed on 26 January 2024.

<sup>227</sup> Instrument of Government (1974:152), Chapter 10.

<sup>228</sup> Government Offices of Sweden 'Swedish Government Offices Yearbook 2015' available at <https://www.government.se/contentassets/af7c76f44ea8423486f6ce4c02e1acd2/swedish-government-offices-yearbook-2015.pdf> accessed 15 October 2023.

<sup>229</sup> Government Offices of Sweden 'Swedish Government Offices Yearbook 2015' available at <https://www.government.se/contentassets/af7c76f44ea8423486f6ce4c02e1acd2/swedish-government-offices-yearbook-2015.pdf> accessed 15 October 2023.

areas, including the EU asylum regulations, in which the Convention Relating to the Status of Refugees (1951 Convention),<sup>230</sup> the Protocol Relating to the Status of Refugees<sup>231</sup> (1967 Protocol) are incorporated foundations of the asylum regime.<sup>232</sup> Furthermore, Sweden is a signatory of the 1951 Convention, and as a member of the Council of Europe (COE) has ratified the European Convention on Human Rights (ECHR).<sup>233</sup> Sweden has in addition incorporated the 1951 Convention's definition of refugee as well as other regulations in its own domestic Aliens Act 2005:716 (Aliens Act).<sup>234</sup> There are a number of different actors and authorities involved in the various aspects of the asylum and migration chain, however, the Swedish Migration Agency (SMA) is the primary authority handling Refugee Status Determinations (RSD) and describes its role as the main administrator of the entire migration and asylum chain in Sweden.

This chapter explores the legal frameworks governing asylum seekers and refugees in Sweden, as well as the influence of international law and EU legislation on Sweden's legal landscape. The primary argument is centred around the disparities and complexities within Sweden's RSD process. It further tackles concerns regarding the introduction of the Law on Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden<sup>235</sup> (Temporary Law) in 2016, highlighting its restrictive nature and the consequences that refugees and asylum seekers in Sweden face due to the new regulations. The argument is addressed by analyzing how Sweden further copes after the high influx of asylum seekers following 2015. It examines the intricacies of the RSD process, delves into the disparities in granting rates of asylum application, the crucial role of the Migration Supreme Court on the outcome of asylum applications as well as the influence of socio-political circumstances in the decision-making process in asylum applications.

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<sup>230</sup> United Nations General Assembly *Convention Relating to the Status of Refugees* (1951) Treaty Series vol. 189.

<sup>231</sup> UN High Commissioner for Refugees *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees definitions* 2 December 2016, HCR/GIP/16/12.

<sup>232</sup> European Union: Council of the European Union *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (2011) OJ L. 337/9-337/26.

<sup>233</sup> Government Offices of Sweden 'Swedish Government Offices Yearbook 2015' available at <https://www.government.se/contentassets/af7c76f44ea8423486f6ce4c02e1acd2/swedish-government-offices-yearbook-2015.pdf> accessed 15 October 2023.

<sup>234</sup> Aliens Act (2005:716).

<sup>235</sup> Law on Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden (2016:752).

## 4.2 THE SWEDISH LEGAL FRAMEWORK

Sweden has a number of different legislative acts governing asylum and migration, which cover different aspects such as reception, RSD, judicial procedures, detention and border controls. The legislative acts are to a larger extent founded on both EU legislation and international law. The primary legislative acts governing asylum and migration are the Aliens Act 2005:716,<sup>236</sup> the Aliens Act Ordinaire 2006:97,<sup>237</sup> the Law on Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden 2016:752<sup>238</sup> and the Law on Reception of Asylum Seekers and Others 1994:137.<sup>239</sup> Furthermore, the Aliens Act regulates the entry, stay and work of foreigners in Sweden.<sup>240</sup> Additionally, the Aliens Act stipulates under what conditions a foreigner can be expelled or rejected and contains various asylum and migration-related provisions and definitions.<sup>241</sup> However, the Aliens Act does not cover all aspects of Sweden's migration law and Sweden lacks a consolidated immigration law that handles all asylum and migration matters. It is through the combination of various legislative acts, including those on the EU level, that concludes the consolidated asylum and immigration system. Moreover, the domestic legislation on immigration in Sweden has been modified in accordance with the Fundamental Principle of Freedom of Movement and Residence for persons within the EU.<sup>242</sup> The right of freedom of movement for all EU citizens is embedded in Sweden's domestic Aliens Act, derived from the EU Directive of the European Commission and Parliament.<sup>243</sup> The Swedish Courts have further indicated that many of the provisions found in the Aliens Act have been developed by EU Directives, and in situations where legislation is unclear, the government is to refer back to the interpretation within the Directives.<sup>244</sup>

As emphasized before, due to Sweden being a member state of the EU, many of the legislations and rules governing asylum and migration on the EU level need to be adhered to on a domestic

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<sup>236</sup> Aliens Act (2005:716).

<sup>237</sup> Aliens Act Ordinaire (2006:97).

<sup>238</sup> Law on Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden (2016:752)

<sup>239</sup> Law on Reception of Asylum Seekers and Others (1994:137)

<sup>240</sup> Aliens Act (2005:716).

<sup>241</sup> Aliens Act (2005:716).

<sup>242</sup> European Union *Freedom of movement, residency and social security regulations for European Union nationals who move to other EU countries; the situation of Czech, Hungarian, and Slovak nationals who move to other EU countries, including labour rights and access to social services* (2015).

<sup>243</sup> European Parliament 'Free movement of persons' 2018 EU fact Sheets available at: [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_4.1.3.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.1.3.html) accessed on 15 October 2023.

<sup>244</sup> *M v Migrationsverket* (2007:14) MIG.

level. The topic of migration has in the past decade become a rather crucial issue to tackle on the EU level, and hence, any decision made on the regional level needs to be applied within all member-states regardless of any prior national legislation. There are a number of various EU Directives to address the issues that have stemmed from the increased number of asylum seekers within the EU territory. One main goal is to ensure that asylum seekers are treated on an equal level regardless of where their applications for asylum are submitted. The primary Directives are the Revised Dublin Regulation,<sup>245</sup> the Revised Reception Conditions Directive,<sup>246</sup> the Revised Asylum Directive<sup>247</sup> and the Revised EURODAC Regulation.<sup>248</sup> These Directives were adjusted and revised after the high influx of refugees and asylum seekers following the Syrian war in 2015.<sup>249</sup> Within the Swedish territory, the number of asylum seekers reached a record high in November 2015.<sup>250</sup> Following this increase, the Swedish government decided to revise its own national rhetoric as well as its action plan to address the issues that arose from the influx, considering that Sweden was receiving the highest number of asylum seekers per capita within the whole region. This action plan began by introducing stricter border controls. By November 2015, the Swedish government had already proposed a number of different measures with the aim of reducing the number of asylum seekers arriving in the territory, as well as improving the integration and reception system. Following this, a restrictive temporary law addressing and restricting asylum seekers' and refugees' ability to

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<sup>245</sup> Council of the European Union Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (2013) OJ L. 180/31-180/59.

<sup>246</sup> Council of the European Union Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (2013) OJ L. 180/96-105/32.

<sup>247</sup> Council of the European Union Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L. 180/60-180/95.

<sup>248</sup> Council of the European Union Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) OJ L. 180/1-180/30.

<sup>249</sup> European Commission 'The EU and the migration crisis' (2018) available at <http://publications.europa.eu/webpub/com/factsheets/migration-crisis/en/> accessed on 17 October 2023.

<sup>250</sup> Swedish Migration Agency 'Applications for asylum received 2000-2017' (2018) available at <https://www.migrationsverket.se/download/18.4a5a58d51602d141cf41038/1515076827649/Applicatio%20for%20asylum%20received%202000-2017.pdf> accessed on 17 October 2023.

receive permanent residency in Sweden was proposed and introduced in 2016.<sup>251</sup> It was argued that this law was established due to a fear of the country's ability to cope with the continuous increase of asylum seekers. Other than the restrictions on receiving permanent residency, the law further restricted the possibility of family reunification. These restrictions arguably resulted in lessened protection for refugees and asylum seekers.

Prior to the introduction of the Temporary Law,<sup>252</sup> after the conduction of an RSD and the applicant received refugee status, the refugee would immediately be issued a permanent resident permit in Sweden. However, in accordance with the Temporary Law, even though an asylum seeker is granted refugee status, the individual is only issued a temporary residence permit for three years.<sup>253</sup> In order for a refugee to receive a permanent resident permit, the individual needs to meet a number of different criteria such as employment and language conditions. If those criteria are not met once the three-year temporary permit has reached its end, the refugee is granted subsidiary protection.<sup>254</sup> According to the Aliens Act, persons who do not fall under the definition of 'refugee' laid out in the 1951 Convention and the 1967 Protocol, might still be able to qualify for asylum in Sweden.<sup>255</sup> As previously outlined in Chapter Two of this dissertation, the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*<sup>256</sup> (UNHCR Handbook) states that 'persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol'.<sup>257</sup> Instead, such individuals may qualify for 'subsidiary protection' in Sweden for being considered 'otherwise in need of protection' due to circumstances of internal or

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<sup>251</sup> European Commission 'Law 2016:752 concerning temporary restrictions on the granting of permanent residence permit for asylum seekers' available at [https://ec.europa.eu/migrant-integration/library-document/law-2016752-concerning-temporary-restrictions-granting-permanent-residence-permits\\_en](https://ec.europa.eu/migrant-integration/library-document/law-2016752-concerning-temporary-restrictions-granting-permanent-residence-permits_en) accessed on 18 October 2023.

<sup>252</sup> Law on Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden (2016:752).

<sup>253</sup> Law on Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden (2016:752).

<sup>254</sup> <sup>254</sup> Aliens Act (2005:716), Chapter 4, Article 3A.

<sup>255</sup> UN High Commissioner for Refugees UNHCR Resettlement Handbook Country Chapters, July 2016, available at: <https://www.refworld.org/docid/542134777.html>, accessed on 29 January 2024, p 224.

<sup>256</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) HCR/1P/4/ENG/REV. 4.

<sup>257</sup> UN High Commissioner for Refugees *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees definitions* 2 December 2016, HCR/GIP/16/12.

external armed conflict, or due to tensions or natural disasters in their country of origin or due to well-grounded fear of being subjected to any form of abuse in their country of origin.<sup>258</sup> The length of the subsidiary protection is dependent on the type of refugee status that the individual has been granted, but normally such a permit needs to be renewed every thirteen months. Further, refugees with temporary permits lack certain rights such as the right to Swedish travel documents and the right to family reunification. Family reunification has generally been considered vital to refugees' well-being, and is commonly defended under Article 8 of the European Convention of Human Rights (ECHR); the right to respect for private and family life.<sup>259</sup> In addition, research on mental health emphasizes the impact of migration-related changes in family relationships on the well-being of refugees and highlights the importance of support from close family and friends.<sup>260</sup> The changes introduced by the Temporary Law can hence have a significant impact on the well-being of the refugees only receiving subsidiary protection. Furthermore, even though the Temporary Law was introduced in 2016 as a temporary measure to address the high influx of refugees that began in 2015, the law was codified in July 2021.<sup>261</sup>

#### 4.3 THE APPLICATION AND INTERPRETATION OF THE LAW

Research on administrative justice in terms of RSDs has found that there are disparities in the rate of refugee status being granted, specifically in countries that have similar criteria when assessing refugee status and protection.<sup>262</sup> These disparities have been found in the Swedish RSD procedure as well. One research anthology concluded that homogeneous cases were assessed differently. It was argued that this was due to decision-makers lacking the correct legal methods and theoretical instruments to avoid such discretionary decision-making.<sup>263</sup> The government released a report evaluating the Migration Supreme Court in which it was argued that the assignment of the Court is to merely provide guidance in questions and interpretations

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<sup>258</sup> Aliens Act (2005:716), Chapter 4, Section 2.

<sup>259</sup> Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 8.

<sup>260</sup> Carlzén, K. & Slobodan, Z. 'Promoting Refugees' Right to Health and Social Inclusion: A Systematic Approach' (2016) 2 Public Health Panorama 4, p 442-448.

<sup>261</sup> Law on Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden (2016:752).

<sup>262</sup> Neumayer, E. 'Asylum Recognition Rates in Western Europe: Their Determinants, Variation, and Lack of Convergence' (2005) 49 *Journal of Conflict Resolution* 1: 43-66.

<sup>263</sup> Neumayer, E. 'Asylum Recognition Rates in Western Europe: Their Determinants, Variation, and Lack of Convergence' (2005) 49 *Journal of Conflict Resolution* 1: 43-66.

of the law, and not to utilize information on socio-political circumstances within a country.<sup>264</sup> However, the reason behind using country of origin information in RSD procedures is to assess the degree of risk of persecution that an asylum-seeker may be exposed to and to assess the credibility of an asylum seeker's claim against commonly known facts. The report further concluded that a lack of guidance in terms of factual questions may result in the creation of an even greater disparity between decisions.<sup>265</sup> This conclusion was also reached in a comparative study between Sweden's and the United Kingdom's structure of utilizing country of origin information.<sup>266</sup> The paper argued that Sweden's structure risks resulting in a lack of predictability, inconsistency and arbitrariness due to individual decision-makers interpreting country of origin information differently.<sup>267</sup> There have been further assessments of Sweden's asylum procedure that find disparities in granting rates.<sup>268</sup>

The Swedish RSD procedure can be seen to have many similarities with other liberal democracies' asylum procedures. The SMA is the initial governmental authority to process all asylum claims. It has been structured to follow bureaucratic ideals of standardized and routinized decision-making, internal control and hierarchical organization – a structure generally used in Western countries.<sup>270</sup> If an applicant receives a rejection on their asylum application, they can appeal to the established migration courts, which will be further discussed later in the paper. The migration court will proceed to review the decision based on the legislation and facts. If the applicant's credibility has been questioned in the decision, the court has the option to use oral hearings to further examine the credibility of the applicant's claim. The application of law in Sweden is led by the precedence from the Migration Supreme Court, the final instance of asylum appeals. The Migration Supreme Court merely reviews questions of law and therefore leaves most appealed asylum cases externally of their scrutiny, which is different from other states in which the appellate organ provides statements on country

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<sup>264</sup> Government Office of Sweden Den nya migrationsprocessen (The new migrationprocess), SOU 2009:56, 24 June 2009, available at: <https://www.regeringen.se/contentassets/4fc657892a30486397dfea4a130969db/den-nya-migrationsprocessen-sou-200956-del-2-kapitel-11---bilagor/>, accessed on 29 January 2024.

<sup>265</sup> European Institute for Gender Equality 'The Swedish Government Official Reports SOU 2009:56. The New Migration Process' available at <https://old.eige.europa.eu/gender-based-violence/resources/sweden/statens-offentliga-utredningar-sou-200956-den-nya-migrationsprocessen> accessed on 18 October 2023.

<sup>266</sup> Stern, R. Country Guidance in Asylum Cases: Approaches in the UK and Sweden (2013) RLI Working Paper No. 9, Refugee Law initiative, available at: <https://sas-space.sas.ac.uk/4956/>, accessed on 29 January 2024.

<sup>267</sup> Tolley, M.C 'Judicialization of Politics in Europe: Keeping Pace with Strasbourg' (2012) 11 *Journal of Human Rights* 1: 66-84.

<sup>268</sup> Martén, L. Political Bias in Court? Lay Judges and Asylum Appeals (2015) Working paper 2015:2, Department of Economics, Uppsala, Uppsala University.

<sup>270</sup> Kneebone, S. Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives (2009) Cambridge: Cambridge University Press.

information.<sup>271</sup> Furthermore, the SMA conducted a report that found that the RSD granting rate amongst the different cities differed significantly. While the report showed that the granting rate in Gothenburg was around 38%, it was as low as 19% in Stockholm.<sup>272</sup>

The politics surrounding the refugee context have generally been defined through a discourse of solidarity and generosity.<sup>273</sup> Comparing the public Swedish discourse on refugees with other Western democratic countries, it is evident that Sweden is distinct in its solicitude to refugees. In many of the other member-states in the EU, countries express a high level of distrust towards asylum-seekers and their attempt to abuse the asylum system.<sup>274</sup> However, Sweden's refugee and asylum policy has been reasonably non-restrictive in the context of the European region, which is an indication of its openness towards refugees and asylum seekers.<sup>275</sup>

#### 4.4 REFUGEE STATUS DETERMINATIONS

It is noteworthy to consider Sweden's geographical location and the country's extent of asylum-driven immigration. Sweden only physically borders with two countries, Norway and Finland, and is overall surrounded by member-states of the Schengen Agreement. Most asylum-seekers that arrive in Sweden do so by land routes. As of the re-institution of the border controls in 2015, asylum-seekers can submit their applications by the borders instead of being required to do so at an SMA office.<sup>276</sup> Although this expedites the application process for the asylum-seeker, since the re-established border controls, rail, bus and ferry companies are now legally obliged to request identity documentation for all passengers. This essentially makes it more difficult for asylum-seekers to enter Sweden. When an application has been submitted at the border, the asylum-seeker is sent to the closest SMA office that accepts asylum applications.<sup>277</sup> There are currently eight such offices throughout the country. The remaining

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<sup>271</sup> Tolley, M.C 'Judicialization of Politics in Europe: Keeping Pace with Strasbourg' (2012) 11 *Journal of Human Rights* 1: 66-84.

<sup>272</sup> Migrationsdomstolarna 'Kartläggning och analys av bifallsfrekvenserna i migrationsdomstolarna' (2007) Länsrätten Göteborg, Länsrätten Skåne Län, Länsrätten Stockholms Län.

<sup>273</sup> Abiri, E. 'The Changing Praxis of 'Generosity': Swedish Refugee Policy During the 1990s' (2000) 13 *Journal of Refugee Studies* 1: 11-28.

<sup>274</sup> Rawlings, R. 'Review, Revenge and Retreat' (2005) 68 *The Modern Law Review* 3:378-410.

<sup>275</sup> Qvist, M., Suter, B. & Ahlstedt, S. Migration, In: Dahlstedt, M. & Neergaard, A. (eds) *International Migration and Ethnic Relations* (2015) London: Routledge, 38-61.

<sup>276</sup> European Migration Network and Swedish Migration Agency 'EMN Annual Report on Migration and Asylum 2017 Sweden' (2017) available at [https://home-affairs.ec.europa.eu/system/files/2020-09/17a\\_sweden\\_arm\\_part2\\_2017\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/17a_sweden_arm_part2_2017_en.pdf) accessed on 19 October 2023.

<sup>277</sup> European Migration Network and Swedish Migration Agency 'EMN Annual Report on Migration and Asylum 2017 Sweden' (2017) available at [https://home-affairs.ec.europa.eu/system/files/2020-09/17a\\_sweden\\_arm\\_part2\\_2017\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/17a_sweden_arm_part2_2017_en.pdf) accessed on 19 October 2023.

SMA offices are in control of arranging material support and housing for asylum-seekers. Furthermore, in accordance with the *ius soli* principle, none of the Swedish missions abroad can accept asylum applications.<sup>278</sup> The submission of an asylum application hence has to be in person within Sweden's territory.

Once an asylum application has been submitted, the applicant will receive an individual case number. The SMA in addition abide by UNHCR's registration process for any stipulations. This entails documenting all personal information such as family status and names, and education as well as identity documentation.<sup>279</sup> During the initial submission, the SMA Officer will conduct an initial interview to establish the applicant's country of origin and a summary of their asylum claim. However, the aim is not to screen applicants but instead, to establish if there are comprehensible grounds for their asylum claims. All applicants above the age of 14 are additionally subjected to having their biometrics registered, this includes their fingerprints and photographs. The applicant's fingerprints are thereafter entered into Eurodac, a shared database amongst EU member states, Norway, Lichtenstein, Switzerland and Iceland to store data on people who have illegally crossed borders within those territories. Furthermore, foreign nationals who are subject to deportation or removal have the right to free legal counselling.<sup>280</sup> This is to ensure that the person receives proper assistance and advice during the asylum application or deportation appeal.

In terms of the RSD procedure, a Dutch study revealed that Sweden has a relatively high refugee status recognition rate in an international comparison.<sup>281</sup> It however noteworthy that most asylum-seekers arrive from countries in which political persecution, civil war and or violent conflict are prevalent. In 2022, the largest group of Sweden's foreign-born population

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<sup>278</sup> Nordic Council of Ministers 'Citizenship in the Nordic Countries: Past, Present, Future' (2018) available at <https://norden.diva-portal.org/smash/get/diva2:1197581/FULLTEXT03.pdf> accessed on 19 October 2023.

<sup>279</sup> European Migration Network and Swedish Migration Agency 'EMN Annual Report on Migration and Asylum 2017 Sweden' (2017) available at [https://home-affairs.ec.europa.eu/system/files/2020-09/17a\\_sweden\\_arm\\_part2\\_2017\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/17a_sweden_arm_part2_2017_en.pdf) accessed on 19 October 2023.

<sup>280</sup> Immigration and Refugee Board of Canada Sweden: Asylum procedure, including legal representation, appeal procedure, documents issued to claimants, processing times, approval rates for Iraqi claimants, 25 May 2004, SWE42566.E, available at: <https://www.refworld.org/docid/41501c602a.html>, accessed on 29 January 2024.

<sup>281</sup> Leerkes, A. *How (un)restrictive are we? 'Adjusted' and 'expected' asylum recognition rates in Europe* (2015) Ministerie van Veiligheid en Justitie, Amsterdam.

were people born in Syria.<sup>282</sup> The high rate of refugee recognition is hence not that surprising in this context.

All submitted asylum applications in Sweden are screened and reviewed. Once an application has been submitted, an interview is scheduled. In the case of a family applying, those interviews are conducted separately.<sup>283</sup> This is done as a part of the credibility assessment but also in case one of the family members has an asylum claim against another family member. The decision is made by the SMA independently, and the SMA Officer bases the decision on the applicable asylum law. Other ministries or governmental actors cannot interfere in any of the decisions made up to this point. Although Sweden lacks specific legislation to address ‘safe countries of origin’, the SMA regularly adopt and revises internal ‘legal positions’.<sup>284</sup> These legal positions are used as the basis for examining the situation within a specific country. Protection is issued for anyone who has been recognized as a refugee, persons who have been subjected to ‘particularly distressing circumstances’, persons who have been determined to be ‘otherwise in need of protection’ and persons who are eligible for subsidiary protection.<sup>285</sup> If it has been established that a person has committed any serious crimes or crimes against humanity, that applicant is risking exclusion from protection.<sup>286</sup>

If an applicant experiences that their rejection decision is incorrect on a first-instance decision, the person can challenge the SMA’s decision in court. The appeal must be submitted to the Migration Court within three weeks of having received a rejection decision.<sup>287</sup> Prior to the Migration Court considering the appeal, an SMA Officer who was not part of assessing the applicant’s asylum claim, will review the decision. If the Officer does not find a compelling

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<sup>282</sup> Statista ‘Number of refugees living in Sweden in 2022, by country of origin’ available at <https://www.statista.com/statistics/1300145/number-refugees-sweden-country-origin/> accessed on 20 October 2023.

<sup>283</sup> European Migration Network ‘Sweden 2021: Main developments in migration and international protection, including latest statistics’ available at [https://home-affairs.ec.europa.eu/system/files/2022-08/EMN\\_factsheet2021\\_SE.pdf](https://home-affairs.ec.europa.eu/system/files/2022-08/EMN_factsheet2021_SE.pdf) accessed on 20 September 2023.

<sup>284</sup> European Migration Network ‘Sweden 2021: Main developments in migration and international protection, including latest statistics’ available at [https://home-affairs.ec.europa.eu/system/files/2022-08/EMN\\_factsheet2021\\_SE.pdf](https://home-affairs.ec.europa.eu/system/files/2022-08/EMN_factsheet2021_SE.pdf) accessed on 20 September 2023.

<sup>285</sup> Aliens Act (2005:716), section 5.

<sup>286</sup> Swedish Migration Agency ‘Asylum Regulations’ (2023) available at: <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Applying-for-asylum/Asylum-regulations.html#:~:text=If%20the%20investigation%20into%20your,be%20granted%20asylum%20in%20Sweden.,> accessed on 29 January 2024.

<sup>287</sup> Aliens Act (2005:716), section 10.

reason to change the decision, the case will be presented to the Migration Court.<sup>288</sup> The Migration Court will either confirm the first-instance decision or change it. If the Court decides to change the SMA's decision, the applicant will be issued a residence permit. However, if the Court finds that the SMA is correct in its decision, the applicant will be issued a deportation decision. In such cases, the applicant can appeal the Migration Court's decision to the Migration Court of Appeal, located in Stockholm. The Migration Court of Appeal is considered the highest court to address such matters and will only consider an appeal if there are exceptional grounds for the appeal.<sup>289</sup>

A legally binding asylum decision is valid for up to four years. An asylum seeker is not able to apply for asylum renewal until the end of that prescribed period.<sup>290</sup> Nevertheless, there are various ways in which an expulsion decision can be prevented, such as in circumstances where the political situation in a country of origin has changed for the worse or in circumstances in which the applicant is suffering from a severe illness. In such cases, the SMA will provide the applicant with a residence permit due to enforcement barriers.

#### 4.5 HUMAN RIGHTS STANDARDS

According to the SMA, the agency considers applicant's human rights in various ways. The SMA states its commitment to consider each application individually, in accordance with the applicable law and on the basis of a common and clear procedure. As mentioned, the ECHR was embodied in Sweden's domestic law in 1995. Its court, The European Court of Human Rights (ECtHR) has since through its different judgements influenced the legal system in Sweden significantly.<sup>291</sup> The ECtHR, as a regional entity, has the ability to hold its member states accountable, and the Court has argued a number of times that Sweden may violate the ECHR.<sup>292</sup> An example of this is the case of *X v. Sweden* which involved a Moroccan national

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<sup>288</sup> European Migration Network 'Sweden 2021: Main developments in migration and international protection, including latest statistics' available at [https://home-affairs.ec.europa.eu/system/files/2022-08/EMN\\_factsheet2021\\_SE.pdf](https://home-affairs.ec.europa.eu/system/files/2022-08/EMN_factsheet2021_SE.pdf) accessed on 20 September 2023.

<sup>289</sup> Swedish Migration Agency 'If you want to Appeal' (2021) available at: <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/When-you-have-received-a-decision-on-your-asylum-application/If-your-application-is-refused/If-you-want-to-appeal.html>, accessed on 29 January 2024.

<sup>290</sup> European Migration Network op cit note 14.

<sup>291</sup> European Union *Directive 2004/83/EC of the European Parliament and of the Council of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* (2004) Official Journal of the European Union.

<sup>292</sup> <sup>292</sup> European Union *Directive 2004/83/EC of the European Parliament and of the Council of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as*

residing with a residence permit in Sweden, who faced a deportation decision to Morocco.<sup>293</sup> The applicant received a residence permit in Sweden in 2005, however, the Swedish Security Service in 2015 deemed the applicant a national security threat to Sweden. Following being labelled as a terrorist by the Swedish Security Service and receiving a deportation notice by the SMA, the applicant applied for asylum. The SMA rejected the applicants' asylum application due to the applicant being deemed a national threat by the Swedish Security Service. This decision was further upheld by the Migration Court of Appeal. When the applicant took the case to the ECtHR, the Court intervened with Rule 39, which prevents the deportation pending further notice. The applicant claimed that Sweden violated Article 3 of the ECHR, citing the potential of being considered a security threat and subject to ill-treatment by the Moroccan government, if returned to Morocco, and hence evoked their right to protection as per non-refoulement. It is notable to state the effect that the judgements by the ECtHR have on the Migration Board and the Migration courts in Sweden. This is especially prominent in the case of *R.C v. Sweden*.<sup>294</sup> In this case, Swedish courts and authorities were condemned for failing to sufficiently assess the applicant's claims, alleging torture, and for not appropriately investigating the submitted evidence. An immediate effect of this judgement was an issued updated precedent on the subject by the Migration Court of Appeal.<sup>295</sup> These precedents guide the authorities, including the migration courts and the SMA, as to how the law should be applied and interpreted – and hence influence the decisions of future asylum cases.

#### 4.6 CONCLUSION

Sweden operates as a constitutional monarchy and parliamentary democracy, with its governmental system defined by its four fundamental laws. Although none of these four laws specifically refers to a right to asylum, Sweden's commitment to such a right is largely derived and outlined in its ratified and signed international and European obligations. The SMA is the main authority in charge of handling migration and asylum applications.

Sweden's asylum and migration framework is governed by different sets of legislative acts, covering different aspects. These aspects include the reception, RSDs, border controls and

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*Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* (2004) Official Journal of the European Union, Article 3.

<sup>293</sup> *X v. Sweden* (Application no. 36417/16), ECLI:CE:ECHR:2018:0109JUD003641716, Council of Europe, European Court of Human Rights.

<sup>294</sup> *R.C v Sweden*, Application no 41827/07, Council of Europe: European Court of Human Rights (2010).

<sup>295</sup> MIG 2012:2 (UM 4609-10).

judicial procedures. The primary acts governing asylum and migration are the Aliens Act, the Aliens Act Ordinaire, the Law on Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden and the Law on Reception of Asylum Seekers and Others. All these acts draw significantly from both international law and EU legislation. Due to Sweden lacking a consolidated immigration law, it combines different legislative acts to form a coherent immigration and asylum system. Further, as a member state of the EU, Sweden's domestic immigration legislation aligns with the EU principle of freedom of movement, which is derived from EU Directives. As a member state of the EU, Sweden has an obligation to adhere to EU regulations governing migration and asylum. The EU has amended a number of main directives to address the challenges the region experienced by the surge of asylum seekers in 2015. These directives include the Revised Dublin Regulation, the Revised Asylum Directive, the Revised Reception Conditions Directive and the Revised EURODAC Regulation. Additionally, Sweden made changes to its own domestic regulations as a response to the record-high influx of asylum seekers. Sweden introduced stricter border control and introduced the Temporary Law, which restricted refugee's ability to receive permanent residency permits as well as family reunification.<sup>296</sup> These restrictions were later codified in July 2021, which in turn marked a significant shift in Sweden's approach to migration and asylum in response to a transforming regional dynamic.

Research that has been done on the administrative justice of RSDs in Sweden has revealed disparities in the number of refugee statuses being granted, even in cases with alike criteria in terms of assessing refugee protection and status. Such disparities can be linked to a lack of consistency in theoretical instruments and legal methods in the decision-making process. Such instruments and methods are necessary to avoid unpredictability and inconsistency in asylum decisions. The SMA initially processes all asylum applications and has the intention to follow its hierarchical organization and bureaucratic ideals of standardized decision-making, which is common within other Western countries. In terms of appeals within the asylum process, it is the responsibility of the migration courts. The migration courts will review decisions based on facts and legislation, and in some circumstances conduct oral hearings to assess the credibility of applicants. Furthermore, the Migration Supreme Court serves as the final instance for all appeals, but its main role is to review questions of the law, leaving many appealed cases outside its scrutiny. In terms of Sweden's political context concerning asylum and refugees, the country

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<sup>296</sup> European Commission 'The EU and the migration crisis' (2018) available at <http://publications.europa.eu/webpub/com/factsheets/migration-crisis/en/> accessed on 17 October 2023.

has historically stood out for its discourse of generosity and solidarity in comparison to other Western democratic countries, which often express distrust and scepticism towards asylum-seekers. Nevertheless, Sweden's judicial system reveals an unclear separation between public administration and courts, resulting in challenges in constitutional review and a reputation for weak judicial review of political decisions. Such findings emphasize the challenges and complexities within Sweden's asylum and migration system, underscoring a need for continual research and reform to ensure consistency and fairness in the asylum process.

Overall, the Swedish migration and asylum system can be described as a structured process for handling asylum applications. Asylum seekers mainly arrive in Sweden by land routes, and as of the introduction of stricter border controls in 2015, applications may be submitted to the police by the borders. As a further result of the border controls, it has become more difficult to enter Sweden as transport companies are now obliged to request identity documentation from passengers. Once an asylum application has been submitted, the applicant is redirected to the closest SMA office. The applicant is thereafter provided with an individual case number and undergoes the UNHCR registration process, which includes documentation of personal information and biometric registration. Sweden's proportionally high rate of recognition in terms of refugee status can be linked to the significant number of asylum seekers originating from countries with violent conflicts and political persecution. The SMA Officer makes the initial decision based on applicable asylum law, and the decision-making process is independent of any other governmental actor. If an asylum seeker receives a rejection on their asylum claim and believes that the decision is incorrect, they have the ability to challenge the decision in court if the appeal is submitted within three weeks of receiving the decision. The Migration Court will review the appeal and if the decision is changed, the applicant will be issued a residence permit. If the Court finds no fault in the SMA's decision, the applicant can further appeal to the Migration Court of Appeal in Stockholm. However, the Migration Court of Appeal in Stockholm only considers cases with exceptional grounds for appeal.

A legally binding asylum decision is generally valid for up to four years, with renewal possibilities, subject to barriers preventing deportation such as political situations or severe illness leading to a residence permit. Sweden's structured asylum system ensures law and international standard compliance. The SMA states its human rights prioritization, incorporating the ECHR into domestic law, influenced by the ECtHR judgements such as the

case of *R.C v. Sweden*,<sup>297</sup> outlining the attempt to align asylum practices with international human rights standards.

A legally binding asylum decision is generally valid for up to four years. An Asylum seeker can only renew their applications at the end of that period, however, different enforcement barriers can prevent deportation. Such changes can be the political situation in the asylum seekers' country of origin, or severe illness, which can result in the issuance of a residence permit. The structured asylum system in Sweden is designed to manage applications and ensure that decisions are conducted in accordance with the law and international standards.

The SMA emphasizes its commitment to human rights in the asylum procedure while adhering to individualized processes and applicable laws. This is further underscored by the incorporation of the ECHR into Swedish law, in which the judgements of the ECtHR have significantly influenced the country's domestic laws. The case of *R.C v. Sweden*<sup>298</sup> showed failings in the assessment of torture claims, which resulted in a reevaluation by the Migration Court of Appeal, shedding light on the direct influence of the ECtHR judgements on Sweden's domestic asylum procedures. This further demonstrates a continuing procedure of attempting to align asylum practices with international human rights standards.

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<sup>297</sup> *R.C. v. Sweden*, Application no. 41827/07, Council of Europe: European Court of Human Rights, 9 March 2010.

<sup>298</sup> *R.C. v. Sweden*, Application no. 41827/07, Council of Europe: European Court of Human Rights, 9 March 2010.

## CHAPTER V

### CROSS-COUNTRY ANALYSIS

#### 5.1 INTRODUCTION

In this next section, I will conduct a comparative analysis of the asylum and refugee systems of South Africa and Sweden, specifically their respective procedural intricacies, legal frameworks and challenges. Although South Africa and Sweden are culturally diverse and geographically distant, both states are faced with similar challenges in their approach to refugee and asylum protection.

South Africa's asylum system is formed by an intricate history of legislative development. Although refugees and asylum seekers can enjoy many of the rights naturalized individuals do, they face significant challenges in accessing these rights. This is primarily due to the ineffective implementation of policies and laws. In South Africa, the legal framework is governed by the Refugees Act No. 130 of 1998<sup>299</sup> and the Immigration Act 13 of 2002<sup>300</sup>, which outlines the four-stage Refugee Status Determination (RSD) process. The country's approach to RSDs is characterized by issues in determining an applicant's well-founded fear, and persecution as well as assessing a claimant's credibility, which generally is heavily dependent on the applicant's country of origin or adopting physical harm as criteria for persecution. These conditions raise concerns about the fairness of the RSD process in South Africa and the necessity of extensive reform.

Contrarily, as a constitutional monarchy and parliamentary democracy, Sweden has established a fairly comprehensive legal framework for processing asylum applications and claims, with a main dependency on the European Union (EU) and international obligations. Sweden's commitment to the right to asylum is outlined in a number of domestic legislative acts, derived from both EU directives and international law. Nevertheless, Sweden's commitment and approach underwent a crucial transformation following the 2015 refugee and asylum influx that occurred in Europe. These changes can be seen in Sweden's implementation of stricter border controls and limited access to permanent residency permits. The country has historically

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<sup>299</sup> Refugees Act [No.130 of 1998].

<sup>300</sup> Immigration Act [No. 13 of 2000].

been known for its solidarity and generosity in terms of accepting refugees, however, now faces challenges in maintaining fairness and consistency in its RSD decisions. This emphasizes the country's need for ongoing analysis and reform within its domestic asylum system.

In both South Africa and Sweden, the quality of RSD decisions and the standard of protection provided to asylum seekers are key challenges. While Sweden's approach to a transforming regional dynamic resulted in stricter measures, South Africa struggles with the challenges of effective and fair RSD procedures. Both states are under obligation to uphold international standards, however, their distinctive contexts and obstacles call for a need for tailored approaches to ensure that their asylum procedures meet their obligations to uphold human rights for the individuals involved. In the next section, I will further dive deeper into the mentioned complexities, analyzing the decision-making procedures, the legal frameworks and the challenges surrounding asylum and refugee protection in both states.

## 5.2 DISCUSSION

Both South Africa and Sweden have legislative frameworks that govern the asylum and refugee process, which share similar complex challenges. In South Africa, the main legal tools utilized in the asylum and refugee process are the Immigration Act<sup>301</sup> and the Refugees Act<sup>302</sup> with specified provisions that address the process of applying for asylum in Sections 21 and 22 of the Refugees Act.<sup>303</sup> Furthermore, the Refugees Act outlines the four-stage RSD procedure which includes the preliminary interview with a Refugee Status Determination Officer (RSDO), a hearing before the Status Determination Committee, a referral to the Director-General in certain cases and lastly an appeal to the Refugee Appeals Board (RAB). Both the Refugees Act and the Constitution of the Republic of South Africa 1996,<sup>304</sup> emphasize the state's guarantee of protecting people's human rights, which includes all people within the South African borders. In Sweden, the legislative framework utilized for the asylum procedure is mainly the Aliens Act (2005:716),<sup>305</sup> which is complemented by other regional and international acts and directives.<sup>306</sup> As a member-state of the EU, Sweden's domestic legislation is significantly more influenced by EU directives than South Africa's domestic

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<sup>301</sup> Immigration Act [No. 13 of 2000].

<sup>302</sup> Refugees Act [No.130 of 1998].

<sup>303</sup> Refugees Act [No.130 of 1998].

<sup>304</sup> Constitution of the Republic of South Africa, 1996.

<sup>305</sup> Aliens Act (2005:716).

<sup>306</sup> Aliens Act (2005:716).

legislation by being a member-state to the Organization of African Unity (OAU). Hence, the regional influence on the asylum process is greater in Sweden than in South Africa. Furthermore, in South Africa, once an asylum application is approved, the applicant will receive a Section 24 permit, which officially acknowledges your status as a refugee within the South African territory.<sup>307</sup> The Section 24 permit is a temporary permit valid for a period of two years and has to be renewed three months before it expires. Similarly, Sweden introduced the Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden<sup>308</sup> (Temporary Law) in 2016, which established stricter measures for both asylum seekers and refugees. The Temporary Law, which, unlike its name, is now codified, limits a refugee's ability to obtain permanent residency. Consequently, once an applicant has received refugee status, the applicant is issued a temporary residence permit which is valid for three years before it needs to be renewed. A study made on the introduction of temporary residence permits for refugees in Norway showed the negative effects these temporary permits have on refugees. The study analyzed how the possibility of revocation of their permits and status influences the refugee integration process and results in prolonged uncertainty.<sup>309</sup>

Both South Africa and Sweden in addition share common challenges in their respective RSD procedures, specifically in terms of interpreting and assessing well-founded fear, persecution and credibility. Patterns of inconsistencies and discrepancies can be found in both systems, spotted in the decision-making, resulting in apprehension regarding the fairness of the asylum procedure. In South Africa, RSDOs have been struggling with accurately applying the law to correctly determine an asylum applicant's eligibility for refugee status. For instance, in terms of their assessments of well-founded fear, a concept that needs to be both objective and subjective is often obstructed by an overdependency on objective factors related to the applicant's country of origin, at the cost of not taking into account the individual circumstances of an applicant's situation. This dependency on country conditions generally results in decisions based on incorrect or outdated information, leading to a rejection of asylum applications. In addition, the interpretation of persecution has historically been limited, with a specific focus on political party membership and disregarding other grounds of persecution

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<sup>307</sup> Department of Home Affairs Republic of South Africa 'Refugee Status & Asylum', available at: <http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum>, accessed on 14 November 2023.

<sup>308</sup> Law on Temporary Limitations to the Possibility of being Granted a Residence Permit in Sweden (2016:752).

<sup>309</sup> Brekke, J.P, Birkvad, S.M, Erdal, M.B 'Losing the right to Stay: Revocation of Refugee Permits in Norway' (2021) 34 *Journal of Refugee Studies* 2, 1637-1656.

outlined in the Refugees Act. This limited interpretation results in the rejection of claims that are still based on serious human rights threats or violations of freedom or life, even considering the fact that past persecution is not a criterion to meet the threshold of persecution. The identified inconsistencies in RSDO assessments of well-founded fear, together with an unwillingness to take into account the possibility of future persecution further adds to the issues identified in the RSD procedure in South Africa. Furthermore, challenges have been identified in terms of RSDO credibility assessments, especially in circumstances where asylum applicants lack any form of supporting documentation. In general, the dependency on a claimant's testimony, linked with gender, cultural, language and traumatic barriers, results in difficulty in assessing an applicant's credibility. RSDOs tend to reject claims based on minor inconsistencies, and in addition, the limited space provided in the Eligibility Form is often used as a reason to reject applicant's claims. Hence, a need for an improved comprehensive and holistic assessment of an applicant's credibility, as suggested in the case of *Tantoush v Refugee Appeal Board*.<sup>310</sup> This is for South Africa to improve their fairness in the RSD procedure. Similar challenges have been identified in Sweden as well, specifically in terms of disparities in the Swedish Migration Agency (SMA) granting refugee status and concerns with discretionary decisions. Studies have shown that homogenous cases are assessed and determined differently as a result of decision-makers lacking crucial theoretical instruments and legal methods to avert discretionary decisions. In Sweden, the use of country of origin information is an important factor in the RSD process, however, lacking guidance on factual questions can result in a higher rate of disparities in decisions. Similarly to the South African RSD process, Sweden follows bureaucratic ideals of routinised and standardised decision-making, however, is confronted by challenges with arbitrariness and inconsistency as a result of varying interpretations of country of origin information. The Swedish Refugee Law Centre conducted a report which showed notable differences between the separate asylum assessment units of the SMA in their RSD assessments. The report concluded that in the summer of 2022, the SMA asylum assessment unit in Stockholm granted asylum to applicants from Afghanistan in 85% of the cases, whereas the asylum assessment unit in Gothenburg only granted asylum to 28% of the applicants from Afghanistan.<sup>311</sup> South Africa and Sweden hence grapple with similar issues in their RSD procedures, which include inconsistencies in their decision-making, challenges in assessing well-founded fear and persecution as well as difficulties in determining

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<sup>310</sup> *Tantoush v Refugee Appeal Board and Other* (13182/06) [2007] ZAGPHC.

<sup>311</sup> Swedish Refugee Law Center 'Flyktingskapsbedömningar i första instans - ett år efter talibanernas maktövertagande i Afghanistan' 2022, available at: <https://bit.ly/3Jnbj2G>, accessed on 7 February 2024, 42.

an applicant's credibility, which sheds light on the need for an improved system in both countries to ensure a fair and consistent process in determining refugee status.

Furthermore, in terms of South Africa's and Sweden's legal frameworks utilized for handling asylum applications, there are a number of issues identified. In South Africa, the RSDOs are the main officers responsible for deciding an applicant's asylum claim. Once an interview has been conducted, the claimant is either granted refugee status or has their claims declared either manifestly unfounded or unfounded. If an applicant has received a rejection, the RSDO is required to issue a written justification for their decision, in accordance with Section 5(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).<sup>312</sup> Despite the requirements outlined in Section 5(2) of PAJA, RSDOs have not sufficiently been providing such justifications in decision letters.<sup>313</sup> While courts have issued guiding principles on what constitutes a sufficient justification, research has shown that many asylum seekers are issued decision letters that either lack a justification or with an inadequate justification. Furthermore, the notion of manifestly unfounded claims is not an adequate reason for a lack of proper justification. This is due to South African legislation requiring the provision of adequate justification to allow for appeals. This procedure does not acknowledge the possibility of an inadequately established asylum procedure resulting in manifestly unfounded claims. In terms of Sweden, the refugee status recognition rate is fairly high. This has been identified as a result of asylum seekers often being from countries with a high rate of political persecution, violent conflict and/or civil war. The application process involves an initial individual screening and review, with the assessment interview scheduled at one of the SMA offices upon submission. The SMA thereafter makes decisions based on the applicable asylum laws, and no other governmental actors can interfere in this process. Sweden does not have legislation that addresses 'safe countries of origin', much like many of the other EU member states, however, the SMA does adopt internal 'legal positions' to assess the current conditions in specific countries. Protection is provided to anyone who has been assessed to be a refugee, who is in a distressing circumstance and those eligible for subsidiary protection. Similarly to the appeal process in South Africa, if an applicant receives a negative decision from the SMA, they have the option of submitting an appeal within three weeks of receiving the decision. The Migration Court will either confirm the SMA's decision or issue a deportation decision. If the applicant

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<sup>312</sup> Promotion of Administrative Justice Op cit note 119, Section 5(2).

<sup>313</sup> Promotion of Administrative Justice Op cit note 119, Section 5(2).

is issued a deportation decision, they can further appeal the Migration Court's decision to the Migration Court of Appeal, which is the highest national court for asylum matters. However, the Migration Court of Appeal only considers appeals with exceptional grounds.

Asylum seekers face a different possibility in terms of having the option to submit cases to a regional human rights court. In Europe, an applicant has the possibility to further take a negative decision to the European Court of Human Rights (ECtHR). The ECtHR has jurisdiction to decide applications submitted by individuals concerning any form of violation of the European Convention on Human Rights (ECHR).<sup>314</sup> However, an applicant in Africa does not have the same privilege in terms of the regional African Court of Human and People's Rights. Individuals can only institute cases to the Court if the State party from which they come has made a declaration allowing such direct applications.<sup>315</sup>

In terms of both countries' commitment to international human rights standards, the research has shown the influence of international and regional frameworks. When looking into South Africa, the assessment shows a deviation from its prior commitment to protect refugees and asylum seekers. The South African government continuously shifts policies to exclude refugees and asylum seekers from opportunities, and the country's different amendments to regulations reduce their protection, which results in a risk of exacerbating the vulnerable position the group already finds themselves in. Due to South Africa's past with Apartheid, the country has faced significant challenges in terms of xenophobia, oppression, discrimination and racism. Such historical injustices furthermore influence the shaping of the socio-economic disparities as well as a xenophobic approach by the government. For instance, this is evident in the case of *Minister of Home Affairs v Warchenuka* in which the exclusion of asylum seekers from employment was justified on the ground that it denied South African citizens employment.<sup>316</sup> Conversely, the Swedish context sheds light on its commitment to always consider human rights in its asylum assessments. According to the SMA, an overall respect for human rights is fundamental in Sweden which is reflected in their individual case processing.<sup>317</sup> This is further

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<sup>314</sup> Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950).

<sup>315</sup> African Court on Human and Peoples' Rights 'FAQs', available at: <https://www.african-court.org/wpafc/faqs/>, accessed on 18 November 2023.

<sup>316</sup> *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA); 2004 (2) BCLR 120 (SCA).

<sup>317</sup> Swedish Migration Agency 'Human Rights' 10 May 2023, available at: <https://www.migrationsverket.se/English/About-the-Migration-Agency/Our-mission/Human->

emphasized by its incorporation of the ECHR in its domestic laws. The ECtHR has the ability to hold Sweden accountable in case of any human rights violations, as seen in the case of *R.C v. Sweden*.<sup>318</sup> Both countries struggle with challenges in aligning their asylum procedures with human rights principles. However, asylum seekers or refugees who experience that their human rights have been violated by the Swedish state have the option to have their case examined on a regional level by submitting a case to the ECtHR. The possibility of submitting a case to the regional African Court on Human and Peoples' Rights is only available for asylum seekers and refugees in South Africa in rare cases. Sweden is hence under more pressure to align its asylum procedure with international human rights standards. There is no independent entity or body to hold the South African government accountable for human rights violations in individual cases. Regardless, both countries are in need of continuous alignment and improvement with international human rights standards to ensure a thorough and fair assessment of claims made by asylum seekers.

The RSD procedure is a practice that has been established internationally, mainly through the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.<sup>319</sup> There is hence a set of standards and norms that most states are required to follow in terms of the determination of an asylum seeker's refugee status. An asylum seeker is in addition entitled to internationally acknowledged rights. These rights apply to the asylum seeker from the moment they reach the border of a country to the point in which their status has been determined. The objective of this study has been to assess the RSD procedure in both South Africa and Sweden and to examine in which ways these states are similar and how well they adhere to international norms and standards.

### 5.3 RECOMMENDATIONS – SOUTH AFRICA

The analysis in the chapters of this dissertation has brought up the following findings in terms of the South African RSD procedure. First, even though South Africa may be committed to adhering to international principles of refugee law, merely adopting such principles is not

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*Rights.html#:~:text=The%20Swedish%20Migration%20Agency%20works,a%20clear%20and%20common%20process.* accessed on 7 February 2024.

<sup>318</sup> *R.C. v. Sweden*, Application no. 41827/07, Council of Europe: European Court of Human Rights, 9 March 2010.

<sup>319</sup> UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV.

sufficient. Major problems and challenges in terms of the interpretation of the Refugees Act, refugee policies, policies and regulations as well as the process that involves identifying asylum seekers and refugees have been identified. Second, asylum seekers are not able to access refugee reception offices as easily as they should. The accessibility of the offices poses a major issue as there are only five refugee reception offices available in South Africa. The nearest office from the port of entry is in Musina, close to the border of Zimbabwe. This office is mainly used by asylum seekers who arrive in South Africa on foot – and only asylum seekers who have the financial means for transportation are able to go to other offices. This can consequently result in a backlog of cases in some of the offices.

Third, the Refugees Act outlines that RSDs require decisions to be in accordance with the act without any form of bias. An effective and fair RSD procedure provides individuals who are fleeing persecution to have a safe arrival in South Africa and to seek asylum within the territory. The South African government hence is no longer a passive decision-making actor with restrictive policy aims with the focus on merely presenting social order.<sup>320</sup> Additionally, there needs to be an emphasis on the difference between a refugee's needs and a regular migrant's needs. All officers assessing and handling asylum seekers should, if not, be trained on the difference between the two. Much like within the European region, a uniform set of standards for the assessment of asylum applications needs to be instituted in order to reduce inconsistent asylum and refugee decision-making. South Africa needs to adopt such guidelines, in which RSD officers might judge an individual's conduct when evaluating their asylum application. The guidelines do not have to be absolute, but instead, be effectively flexible to authorize officers to adapt to an asylum seeker's personal circumstances. This establishment of such a standard set of rules will allow for uniformity within the South African asylum procedure. South Africa faces various socio-economic challenges such as poverty, social inequality, high unemployment rates and inadequate public service access to this day.<sup>321</sup> A high number of asylum seekers and refugees does pose additional strain to the country's system. Nevertheless, the country's regulatory framework must continue to stay open to refugees, and simultaneously prevent the system from being exploited. Fundamentally, it's a matter of balancing the needs of South Africans as well as those in need of safety.

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<sup>320</sup> Thomas, R. *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (2011) Hart Publishing.

<sup>321</sup> Development Bank of Southern Africa 'Socio-economic factors that challenge SA's education system' available at: <https://www.dbsa.org/article/socio-economic-factors-challenge-sas-education-system>, accessed on 18 November 2023.

#### 5.4 RECOMMENDATIONS - SWEDEN

Sweden has been acknowledged for its solidarity and openness to humanitarian assistance. This has been acknowledged both on a regional and global level, especially with regard to Sweden's response to assisting asylum seekers and refugees. The 'generous' Swedish asylum system model had until 2015 been an instrumental factor in why the country was a destination country for many asylum seekers. Sweden was in addition distinctive in its policy of granting permanent residency to classified refugees and beneficiaries of international protection. Furthermore, in Sweden, asylum seekers were supported financially even after exhausting all appeal stages. This is nevertheless not the case anymore since the new legislation was introduced in 2016. Additionally, refugees were never required to learn a level of the local language in order to obtain Swedish citizenship, which is the case in many of the other European countries. This solidarity, attitude and openness within the Swedish asylum procedure has however switched since the refugee influx in 2015 and greatly impacted the political sphere and asylum policies. The increased number of individuals who are in need of international protection has ironically resulted in a restrictive asylum process. The initially implemented temporary measures that have been introduced since 2016, have now been codified and permanent. This nevertheless a pattern only observed in Sweden, and the lack of cooperation and solidarity among the European states as well as the increased popularity of far-right anti-immigration political parties have laid the foundation of a hardening an already restrictive asylum process. Furthermore, Sweden has in recent years received critique by international humanitarian institutions and organisations regarding the country's compliance with international human rights standards, the European Convention as well as the 1951 Geneva Convention. For instance, UNHCR was requested by the Swedish government to issue its observations regarding the draft law proposal in 2016. UNHCR has stated its concerns in its observations, arguing that;

*[I]nstead of implementing- in a spirit of solidarity and equal sharing of responsibility- the various decisions made by the EU in 2015, European States rather appear to be competing to restrict their national systems in a race to the bottom.<sup>322</sup>*

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<sup>322</sup> UN High Commissioner for Refugees 'Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal on restrictions of the possibility to obtain a residence permit in Sweden' 10 March 2016, available at <https://www.refworld.org/docid/56e27d7e4.html>, accessed at 23 November 2023.

UNHCR has recognized in its observations that Sweden is amongst the countries that have accepted and welcomed the highest numbers of asylum seekers during the influx in 2015 and 2016.<sup>323</sup> However, UNHCR has also expressed its understanding that the ongoing lack of solidarity and unity by other European States as a response to the increased number of asylum seekers and refugees within the region has positioned Sweden to restrict its policies and laws to the lowest common standard permissible by the EU.<sup>324</sup> Furthermore, the Commissioner for Human Rights of the Council of Europe released a report after he visited Sweden in 2017. The Commissioner stated that their greatest concern was with regard to the restrictions put on family reunification possibilities for refugees.

Sweden is in need of reviewing the legislative changes implemented since 2016 that have resulted in a more restrictive asylum process. There needs to be an increased consideration regarding the impact that the restrictive legislation that was introduced in 2016 has on particularly vulnerable groups and if it aligns with international human rights standards. Furthermore, Sweden should place importance on the concerns raised by international humanitarian institutions, such as UNHCR. This entails addressing the concerns regarding restrictions on family reunification possibilities for refugees.

An efficient and fair asylum procedure amongst EU member states continues to be the foundation for sustainable asylum reform. Sweden must ensure that safeguard measures are implemented within its asylum procedure. International protection for those who need it cannot only be available according to legislation – it additionally needs to be effective and available in practice. A theoretical standard and guarantee of key human rights safeguards while simultaneously lacking in the practical implementation of such safeguards is not adequate.

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<sup>323</sup> UN High Commissioner for Refugees ‘Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal on restrictions of the possibility to obtain a residence permit in Sweden’ 10 March 2016, available at <https://www.refworld.org/docid/56e27d7e4.html>, accessed at 23 November 2023, Para 5-7.

<sup>324</sup> UN High Commissioner for Refugees ‘Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal on restrictions of the possibility to obtain a residence permit in Sweden’ 10 March 2016, available at <https://www.refworld.org/docid/56e27d7e4.html>, accessed at 23 November 2023, Para 10.

## CHAPTER VI

### CONCLUSION

The objective of this dissertation was to examine if the Refugee Status Determination (RSD) process in South Africa and Sweden aligns with international human rights standards. It has explored the influence of the RSD process on the rights and well-being of asylum seekers and refugees, taking into account factors such as historical context, administrative frameworks and political climate. Altogether, the dissertation strived to deepen the comprehension of the obstacles asylum seekers and refugees face in receiving protection and to further the discourse on refugee protection and rights. The assessment of South Africa's RSD procedure discloses a multitude of challenges in its implementation and alignment with international standards. Regardless of South Africa's commitment to different international conventions regarding the protection of asylum seekers and refugees, notable problems persist, which consequently result in the hindrance of asylum seekers' and refugees' protection. The limited access to Refugee Reception Offices, biased decision-making by Refugee Status Determination Officers (RSDO), as well as inconsistencies in the application of domestic refugee legislation, are all instrumental factors that result in an environment where the rights of asylum seekers and refugees are generally not fully realized. Furthermore, Sweden's asylum procedure once praised for its generosity and openness, has experienced a substantial transformation in response to the refugee influx of 2015. Hence, Sweden now has an increasingly more restrictive approach, which has been criticized by the international humanitarian community. Concerns regarding the restrictions on family reunification have been raised and the general influence it has had on vulnerable groups affected by it. Both South Africa and Sweden should commit to addressing the deficiencies in their respective asylum procedures to ensure consistency, fairness, and alignment with human rights standards. This requires a continuous reform effort and collaboration with the international community to uphold the rights of asylum seekers and refugees. Merely a theoretical commitment to international human rights conventions, standards and principles is not enough and must cohere with practical implementation in order to provide sufficient protection for those in need.

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