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Master's Dissertation

Investigating South Africa's protection of refugee womxn: Refugee womxn's access to housing, inclusion into the labour market and protection from gender-based violence

by

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Supervised by Dr Fatima Khan

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Contents

Contents	3
Copyright ©	6
Declaration.....	7
Abstract.....	9
Abbreviations.....	10
Chapter 1: Introduction	11
I INTRODUCTION.....	11
II PROBLEM STATEMENT	12
III RESEARCH QUESTION.....	14
IV THEORY AND METHODOLOGY	14
V LITERATURE REVIEW.....	15
a) Introduction.....	15
b) Human Rights Violations of refugee womxn internationally.....	15
c) Human Rights Violations of refugee womxn in South Africa.....	18
d) Conclusion.....	22
VI CHAPTER SYNOPSIS	22
Chapter 2: The International Normative Framework.....	24
I INTRODUCTION.....	24
II THE 1951 UNITED NATIONS REFUGEE CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES	24
a) Historical background.....	24
b) The definition of ‘refugee’	26
c) Gender neutrality of the Convention.....	28
d) The rights to housing, work, and protection from gender-based violence.....	32
III THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN	43
a) States’ general obligations in terms of CEDAW	46
b) States’ specific obligations to refugee womxn	48
IV REGIONAL LEGAL FRAMEWORK.....	50
Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969	50
Chapter 3: The South African Normative framework.....	53

I INTRODUCTION.....	53
II THE REFUGEES ACT.....	53
III HOUSING.....	55
IV INCLUSION INTO THE LABOUR MARKET	56
V PROTECTION FROM GENDER-BASED VIOLENCE.....	58
VI CONCLUSION.....	63
Chapter 4: The Position of Refugee Womxn Internationally.....	64
I INTRODUCTION.....	64
II HOUSING.....	64
III INCLUSION INTO THE LABOUR MARKET.....	66
IV GENDER-BASED VIOLENCE.....	67
V CONCLUSION.....	68
Chapter 5: The position of Refugee Womxn in South Africa.....	69
I INTRODUCTION.....	69
II HOUSING.....	69
IV INCLUSION INTO THE LABOUR MARKET	71
V GENDER-BASED VIOLENCE	72
VI CONCLUSION.....	75
Chapter 6: Recommendations.....	76
I INTRODUCTION.....	76
II HOUSING.....	76
IV INCLUSION INTO THE LABOUR MARKET	77
V GENDER-BASED VIOLENCE	79
IV CONCLUSION.....	82
I BIBLIOGRAPHY	83
Primary Sources.....	83
Cases.....	83
Statutes, Declarations, General Comments and Conclusions.....	83
Secondary Sources.....	85
<i>Books</i>	85
The Constitution	85
Journal articles and Reports.....	85
PhD Thesis.....	88

Internet sources 88
Newspapers 89

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Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in Human Rights Law by approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations

Signed by candidate

.....
Danielle Louw

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Abstract

This paper investigates the integration experience of refugee womxn in South Africa. It focuses on the areas of access to housing, employment and protection from gender-based violence. Through a human rights approach, influenced by intersectional feminist theory, it analyses the international normative and South African domestic framework and discusses its gaps and challenges. Thereafter, an overview of the experience of refugee womxn's access to housing, employment and protection from gender-based violence internationally and in South Africa is presented. Lastly, recommendations are made to the South African state suggesting reform in law, policy and practice.

Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
DVA	Domestic Violence Act
EU	European Union
EXCOM	Executive Committee on Migration
GBV	Gender-based violence
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
RSS	Refugee Social Services
SAPS	South African Police Service
SORMA	Sexual Offences (and Related Matters) Act
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commission for Refugees
USA	United States of America

Chapter 1: Introduction

I INTRODUCTION

In South Africa, refugees are not camp based, but rather tend to reside within the urban centres of cities.¹ There is, therefore, an exaggerated need for refugees in South Africa to be afforded a path to integration into local communities. The reality, however, is that refugees arriving in the country are not supplied with food, shelter, or healthcare, nor are they greeted by refugee reception centres that assist them with their housing and other basic needs.² In the absence of this initial assistance, refugees must then begin trying to integrate into their new communities and establish living conditions that can support a meaningful existence.

For refugee womxn in South Africa there are further challenges and barriers ahead. They face threats to their safety, challenges in obtaining gainful employment, and discrimination when looking for shelter and housing. Refugee womxn are required to integrate into a society which is hostile towards womxn, and particularly womxn of colour, because of the violence inherited from colonialism and apartheid. South African society today is dominated by ‘deeply entrenched patriarchal norms and attitudes towards the role of women’³ which causes refugee womxn’s integration experience to be different from those of their male counterparts.

What are the duties of the state towards refugee womxn in South Africa? Khan argues that for a refugee to lead a meaningful existence in South Africa, the state has two duties: first, they need to create an enabling environment, and second, a welcoming society.⁴

It is in this context that this paper will investigate South Africa’s state response to the integration needs of refugee womxn, namely, whether they are working to create an enabling environment for refugees in which they are welcomed in society. It will focus on how the state has responded in respect of three areas; first, refugee womxn’s access to housing; second, their inclusion into the South African labour market; and third, their protection from gender-based

¹ F Khan ‘Local integration: Lessons learnt and the way forward’ Paper delivered in Geneva at UNHCR annual Pre-Excom meeting (2007), available at www.refugeerights.uct.ac.za › local_intergration_sa_context.doc, accessed on 28 January 2020 at 2.

² D Dass, K Ramjathan-Keogh & F Khan ‘The socio-economic rights of refugees and asylum seekers in South Africa’ in Fatima Khan & Tal Schreier (eds) *Refugee Law in South Africa* (2015) at 223.

³ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa*, 14 June 2016, A/HRC/32/42/Add.2, available at <https://www.refworld.org/docid/57d90a4b4.html> accessed on 30 January 2020 at 3.

⁴ Khan ‘Local Integration’ op cit note 1 at 3.

violence. These areas have been selected as the focus of this paper since it is considered as indicators to refugee womxn's integration into the country for the following reasons: housing does not only provide physical shelter but affects one's health and livelihood options. It also impacts on whether one feels at home in a country.⁵ Further, having meaningful employment fosters a feeling of belonging in the country. Lastly, protection from gender-based violence creates an enabling environment which fosters successful integration into host communities.

II PROBLEM STATEMENT

Securing housing is one of the most important basic needs for refugees when they arrive in South Africa. As refugee womxn live among the local community, they need to compete with the rest of South Africans for housing. Currently, refugees are not eligible for social housing in South Africa, and are therefore required to rent from the private rental market. Often, securing a lease for an apartment in the urban center (where most refugees are based out of fear for their safety in informal settlements) comes at a high cost. It is, therefore, only refugees with the necessary financial means who can enter into a lease for housing in the city center. Yet, even those womxn who have the financial means, are often rejected for leases because they are foreigners. Many refugee womxn are therefore forced to live in unstable, overcrowded living situations, usually with strangers.⁶ These insecure housing situations increase the chance of refugee womxn being exposed to gender-based violence.⁷ It, therefore, does not create an enabling environment in which they can lead a meaningful existence.

Many refugee womxn are unemployed as their lack of command of the English language operates as a barrier to entry into the labour market. Those who are employed, are concentrated in the unskilled areas which include the domestic, care and agricultural sectors.⁸ Furthermore, many refugee womxn's qualifications are not recognised by South African employers and they are often excluded from professional positions. They further face discrimination in the workplace based on their refugee and/or foreign status. Additionally, they are subject to xenophobia from

⁵ J Greenburg & T Polzer 'Migrant Access to Housing in South African Cities' (2008), available at <http://www.migration.org.za/wp-content/uploads/2017/08/Migrant-Access-to-Housing-in-South-African-Cities.pdf>, accessed on 30 January 2020 at 2.

⁶ A N Mbiyozo 'Gender and migration in South Africa: Talking to women migrants' (2018), available at <https://issafrica.org/research/southern-africa-report/gender-and-migration-in-south-africa-talking-to-women-migrants>, accessed on 30 January 2020 at 11.

⁷ Mbiyozo 'Gender and Migration in South Africa' op cit note 6 at 11.

⁸ Ibid at 12.

South African employers and employees. Their job insecurity thus prevents refugee womxn from developing to their ultimate human potential.

Refugee womxn in South Africa are more vulnerable to violence, exploitation, and abuse.⁹ 21 per cent of womxn in South Africa have experienced physical abuse by an intimate partner.¹⁰ In 2016, the United Nations (UN) Special Rapporteur on Violence against women, its causes and consequences on her mission to South Africa (the Special Rapporteur on Violence against women), reported that relative to other groups of womxn, refugee womxn experience an increased risk of violence in South Africa.¹¹ Currently, more womxn are migrating alone, unaccompanied by a spouse or partner.¹² These womxn are at an even heightened risk for violence.¹³

The situation is not much better globally. In the European Union (EU), refugee womxn's insecurity is primarily linked to the conditions of reception and accommodation that leads to new forms of violence being created as well as the exacerbation of existing forms, such as domestic violence.¹⁴ Internationally, it is reported that 30 per cent of womxn have been physically or sexually abused by an intimate partner or non-partner at some point in their lives.¹⁵ Furthermore, refugee womxn are forced to share living space with unknown persons.¹⁶ In some instances, womxn are forced to sleep out in the open, and camp in makeshift tents on pavements and borders of busy road junctions.¹⁷ Of particular concern, is the reluctance of refugee womxn to report sexual and gender-based violence.¹⁸ A lack of access to information regarding whom to report these abuses to, as well as the fear of being deported, acts as barriers preventing refugee womxn from reporting these violations.¹⁹

⁹ Mbiyozo 'Gender and migration in South Africa' op cit note 6 at 2.

¹⁰ Statistics South Africa 'South African Demographic and Health Survey' (2016), available at <http://www.statssa.gov.za/publications/Report%2003-00-09/Report%2003-00-092016.pdf>, accessed on 30 January 2020 at 54.

¹¹ HRC *Report of the Special Rapporteur on violence against women* op cit note 3 at 4 – 5.

¹² Mbiyozo 'Gender and Migration in South Africa' op cit note 6 at 11.

¹³ Ibid.

¹⁴ J Freedman 'Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"' (2016) *Reproductive Health Matters* 24(47) at 21.

¹⁵ UN Women 'Facts and figures: Ending violence against women', available at <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes>, accessed on 30 January 2020.

¹⁶ Freedman 'Sexual and gender-based violence against refugee women' op cit note 14 at 22.

¹⁷ Ibid at 23.

¹⁸ Ibid.

¹⁹ Ibid.

III RESEARCH QUESTION

The main research question that this dissertation will ask is whether the South African state is complying with its obligations in terms of international human rights law regarding the protection of the rights of refugee womxn. The fulfillment of the rights focused on in this paper are considered as indicators of refugee womxn's integration experience and are the right to housing, the right to work, and to be protected from gender-based violence.

Moreover, several sub-questions arise; namely what are the particular human rights violations that refugee womxn experience? What steps has the South African state taken to ensure the protection of the rights of refugee womxn? What gaps exist in the legal and policy frameworks and the implementation thereof that prevent the effective protection of the rights contained therein? What can the state do to address any gaps or limitations in its legal and policy frameworks?

IV THEORY AND METHODOLOGY

This thesis is situated within a human rights framework and takes as its point of departure the principles of equality, non-discrimination and human dignity. It considers the protections provided to refugee womxn as it is contained in various international and domestic human rights instruments. At the same time, an intersectional feminist approach as it was formulated by critical race theorist Kimberlé Crenshaw²⁰ is employed as the analytical framework through which the research question will be answered. This thesis adopts the definition of intersectionality as compounded by Nina Lykke as follows:

Intersectionality can[...] be considered as a theoretical and methodological tool to analyse how historically specific kinds of power differentials and/or constraining normativities, based on discursively, institutionally and/ or structurally constructed socio-cultural categorizations such as gender, ethnicity, race, class, sexuality, age/ generation, dis/ability, nationality, mother tongue and so on, interact, and in so doing produce different kinds of societal inequalities and unjust social relations²¹.

As this thesis is situated within the international refugee law framework, and specifically the space refugee womxn occupy therein, it is important to emphasise that the intersectional interplays between the categorisations of 'refugee' and 'gender' will be analysed as mutual and

²⁰ K W Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', (1990), available at <https://www.racialequitytools.org/resourcefiles/mapping-margins.pdf>, accessed on 30 January 2020.

²¹ N Lykke 'Feminist studies: A guide to intersectional theory, methodology and writing' (2010) at 50.

“intertwined processes of transformation” and not as the mere addition of either category.²² This thesis therefore employs an intersectional feminist methodology to give an accurate description of the lived realities of refugee womxn and South Africa’s international and domestic obligations to protect refugee womxn. It will employ the method known as intra-categorical intersectional analysis which focuses on “neglected points of intersection.”²³ This method analyses the “social location at the intersection of single dimensions of multiple categories”²⁴ Therefore, the specific circumstances that exist when a person is both a refugee and a womxn will be the focus throughout this thesis.

Furthermore, another method that will be used to answer the research question is known as ‘asking the womxn question.’ The womxn question “identif[ies] the gender implications of rules and practices which might otherwise appear to be neutral or objective.”²⁵ Katherine Bartlett explains that this method is used to examine *where* and *how* the law fails to take the experiences and values which appear more typical of womxn than of men into account, and how existing legal standards and concepts might disadvantage womxn.²⁶ It will use this method when considering the legal and policy frameworks containing the rights provided to refugee womxn.

V LITERATURE REVIEW

a) *Introduction*

This literature review presents a thematic discussion of the literature considered by presenting short summaries of the main points found in each source. It will first consider the literature relating to the position of refugee womxn internationally, and second, the literature relating to the position of refugee womxn in the South African context. Under both headings, the focus is on refugee womxn’s access housing, inclusion into the labour market and protection from gender-based violence.

b) *Human Rights Violations of refugee womxn internationally*

The first academic article considered is titled ‘Sexual and gender-based violence against refugee women: A hidden aspect of the refugee crisis’ by Jane Freedman.²⁷ The author asserts that refugee womxn remain vulnerable to sexual and gender-based violence not only during their

²² Ibid at 51.

²³ L McCall 2005. ‘The Complexity of Intersectionality’ *Signs: Journal of Women in Culture and Society* 30 (3) at 1774.

²⁴ Ibid at 1781.

²⁵ K Bartlett ‘Feminist Legal Methods’ (1990) *Harvard Law Review* 103(4) at 837.

²⁶ Ibid.

²⁷ Freedman ‘Sexual and gender-based violence against refugee women’ op cit note 14 at 18 – 26.

journeys but also in their country of destination. She suggests that various forms of gender-specific violence are perpetrated against refugee womxn. Her findings showcase how the conditions for reception of refugees both creates new forms of violence *and* exacerbates existing violence, such as domestic violence. Inadequate accommodation is a primary source of insecurity for refugee womxn. Refugee womxn's vulnerability to gender-based violence is increased by the inadequacy of the reception and accommodation conditions in many EU countries.

Freedman's findings of the vulnerability of refugee womxn in Europe is consistent with the position in South Africa. It also presents a major distinguishing factor, namely that in many EU nations refugees are not yet integrated into the local population and are forced to stay in precarious and dangerous forms of accommodation.

The second article considered is 'Unsettled integration: Pre-and post-migration factors in Congolese refugee women's resettlement experiences in the United States' by Karin Wachter, Laurie Cook Heffron and Susanna Snyder²⁸. The authors report that resettlement in the USA brings additional stressors to refugee individuals and families. They argue that womxn continue to be vulnerable to new or continued abuse and violence in the USA. They further found that single refugee womxn, particularly those with mental health needs, were vulnerable to being exploited by men who sought sex, free room and board and other benefits in exchange for companionship and protection.

Regarding employment, most womxn reported receiving an extremely low pay of which the majority had to be spent on rent.

In 'Immigrant, Refugee and Internally Displaced Women and US Policy'²⁹ published by Women Engaging Globally, it is reported that while the USA makes notable provisions for refugees, the *unique experiences* of refugee womxn, a vulnerable population group, is often overlooked or ignored in policy, funding, and services. Further, they report that refugee womxn who live in refugee camps must provide for their children in an atmosphere in which their security is threatened and the likelihood of sexual violence is heightened, and they are often discriminated against while attempting to access food, shelter, health, education, and training.

²⁸ K Wachter, L C Heffron, S Snyder, N B Busch-Armendariz 'Unsettled integration: Pre- and post-migration factors in Congolese refugee women's resettlement experiences in the United States' (2016) *International Social Work* Vol. 59(6) 875 – 889.

²⁹ 'Immigrant, Refugee and Internally Displaced Women and U.S. Policy' *Women Engaging Globally* available at <https://www.wedo.org/wp-content/uploads/immigrantwomen.pdf>, accessed on 1 February 2020.

Further, they report that womxn and children make up approximately two-thirds of immigrants living within the US. Violence against womxn, particularly domestic violence, has specific and disproportionate effects on immigrant womxn. They report that immigrant womxn experience higher levels of violence because of the unique obstacles they face. These include the fact that immigrant womxn may not be able to leave abusive relationships because of immigration laws, language barriers, social isolation and a lack of financial resources. In this regard, they report that abusive partners will often use a womxn's immigration status to control her. Their precarious position is exacerbated by the erroneous assumption made by both abusers and victims that the protections and penalties of the US legal system do not apply to them.

The fourth source considered is a 2019 report entitled 'Unlocking Refugee Women's Potential' prepared by RescueWorks. They provide that while womxn everywhere experience barriers in employment and earnings, refugee womxn face *additional* regulatory, administrative and discriminatory barriers.

The fifth source is entitled 'Female refugees and asylum seekers: the issue of integration' by Silvia Sansonetti. The author provides a snapshot of refugee womxn's access to housing, employment, and protection from gender-based violence in the EU. She argues that refugee womxn face additional barriers to their integration into the labour market: namely, that their educational career is not recognised; they are offered only underqualified positions; negative stereotyping and discrimination; and limited knowledge of the language of the host country.³⁰ Those refugee womxn who are employed are concentrated in unskilled, undervalued and low-paying sectors.³¹

In the sixth place, the report entitled 'Housing out of reach? The Reception of Refugees and Asylum seekers in Europe' prepared by the Asylum Information Database, states that while asylum-seekers and refugees are entitled to 'material reception conditions' which include housing, food, and clothing,³² insufficient reception capacity has been a problem in several European states. They report that this is due to many countries being unprepared for dramatic

³⁰ S Sansonetti 'Female refugees and asylum seekers: the issue of integration' *Directorate-General for Internal policies Women's Rights and Gender Equality* 2016 at 34.

³¹ *Ibid.*

³² Asylum Information Database 'Housing out of reach? The Reception of Refugees and Asylum seekers in Europe', 29 May 2019, available at https://www.asylumineurope.org/sites/default/files/shadow-reports/aida_housing_out_of_reach.pdf, accessed on 3 February 2020 at 6.

changes in asylum applications³³ and because many asylum-seekers and refugees remain in reception facilities for longer than anticipated given their lack of access to the private housing market.³⁴

c) Human Rights Violations of refugee womxn in South Africa

South African society is a hostile place for womxn. In ‘Violence Against Women in South Africa: Policy Position and Recommendations’³⁵ Ramadimetja Mogale, Kathy Kovacs Burns and Solina Richter evaluates the Domestic Violence Act No. 116 of 1998 (DVA) and the Criminal Law Amendment (Sexual Offences and Related Matters) Act No. 105 of 1997 (SORMA). They find that these laws are ineffective in its how it describes violence against womxn and that it fails to provide strategies that take into consideration *or* counter the cultural, social and economic factors which inform the context in which violence against womxn is embedded. They report that South Africa’s legacy of colonization and apartheid perpetuate the belief that violence against womxn is a cultural practice that entitles men to control and own womxn.

As a result of its failure to critically engage with the South African context of violence, the DVA, and SORMA contains limitations which prevent it from protecting womxn successfully and thus to offer an effective remedy. Considering the findings discussed above, it is arguable that refugee womxn, who are also entitled to the protection of these acts, are at an increased risk of ineffective protection as their refugee status provides unique problems not faced by South African womxn.

In a report entitled ‘Gender and Migration in SA – Talking to Women Migrants’³⁶ by the Institute for Security Studies, it is argued that African womxn migrants face triple discrimination; as black, as womxn and as migrants. Migrant womxn are at an increased risk of violence and have their work undervalued. First, the author reports that migrant womxn are subject to violence at all stages of the migration process and thus even in an apparent “safe” third country. Second, womxn migrants are concentrated in unskilled and undervalued work which includes domestic work, care, and agriculture. Womxn migrants are less likely to be employed than men and are necessitated to engage in precarious forms of informal self-employment which

³³ Ibid at 8.

³⁴ Aida ‘Housing out of reach? The reception of refugees’ op cit note 33 at 26.

³⁵ R S Mogale, K K Burns & S Richter ‘Violence Against Women in South Africa: Policy Position and Recommendations’ (2012) 18(5) *LJ* 580 – 594.

³⁶ Mbiyozo ‘Gender and migration in South Africa’ op cit note 6 at 1 – 35.

leads to exploitation and abuse. Moreover, many refugee womxn work in secluded environments and are vulnerable to physical and sexual violence. They further do not have information relating to their labour rights. This leads to workplace abuse by employers and other employees, as well as causing refugee womxn to be powerless to report abuses due to the fear of job losses.

In ‘Searching for sanctuary: refugee women in South Africa’³⁷ by Lydia Wambugu, the author reports that (at time of writing) 80 per cent of refugees are women and children. She argues that refugee womxn - because of their gender - suffer most in the overall process of seeking asylum. She reports that womxn asylum applicants - especially those who arrive without spouses - are exposed to unjustified and unduly prolonged detention, sexual and physical abuse, exploitation and sexual discrimination. She reports that rape and other forms of sexual violence are utilised a means of humiliation and terrorisation. Refugee womxn must put up a ‘double fight’ to access basic necessities such as food, shelter, and clothing for themselves and their children. In addition, refugee womxn experience financial hardship at ensuring that their children are educated. Refugee womxn, need a legal status that affords them adequate protection of their social and economic rights and access to basic items, such as food, shelter, and clothing.

Further, she reports that the majority of refugee womxn in SA are urban-based and live within host communities. They experience xenophobia as they attempt to integrate into local communities. Refugee womxn experience double discrimination of being womxn and outsiders. Their traditions and values are little understood or respected by the society in which they find themselves.

In “‘Trying to Make South Africa My Home’: Integration into the Host Society and the Well-being of Refugee Families”³⁸ by Ria Smit, the author reports that refugees find it hard to integrate into South African society. They are subject to xenophobia and are victims of crime and/ or police harassment. As such, they report a general lack of safety as a daily concern.³⁹ The author highlights two aspects of relevance to this dissertation; the first being access to adequate housing, and the second being job opportunities.⁴⁰

³⁷ L Wambugu ‘Searching for sanctuary: refugee women in South Africa’ (2003) *Agenda: Empowering Women for Gender Equity* 27 – 35.

³⁸ R Smit “‘Trying to Make South Africa My Home’: Integration into the Host Society and the Well-being of Refugee Families” *Journal of Comparative Family Studies* (2015) Vol 46(1) 39 – 55.

³⁹ *Ibid* at 45.

⁴⁰ *Ibid*.

First, the author finds that refugees struggle to access affordable housing. Since most refugees experience financial constraints, all the participants were forced to live in overcrowded and dilapidated apartment buildings in dangerous parts of the inner-city areas of Tshwane and Johannesburg.⁴¹ Congolese and Burundian womxn must share accommodation with several other individuals or families. Womxn report that some apartments are being occupied by up to ten people, that they experienced high noise levels, and that they have a lack of privacy.⁴² These womxn report that this was not a conducive environment for a healthy family life.⁴³

Second, refugee womxn have a hard time obtaining employment in South Africa. Zimbabwean refugees are underemployed and are frustrated that their qualifications are not recognised in South Africa.⁴⁴ For the Congolese and Burundian womxn, their lack of proficiency in English acts as a barrier to their access in securing employment. As such, they are at risk of long-term unemployment which is a significant and continuous source of distress.⁴⁵

In the ‘Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa’⁴⁶, the UN Special Rapporteur after visiting South Africa for eight days in December 2015 notes that in SA, more than half of all womxn have experienced GBV and that certain groups of womxn, such as refugee womxn, face increased risks of GBV being perpetrated against them.

The Special Rapporteur provides that there are certain serious shortcomings in the response of the SA criminal justice system. One of these is the conduct of the South African Police Service (SAPS) who turn down womxn seeking their protection and tell them to return to their abusive partners. She further notes that many police officers treat rape survivors badly and do not always believe them. Furthermore, in the case of womxn at heightened risk of gender-based violence such as refugee womxn, police behaviour is even more discriminatory which leads to secondary victimization.

The sixth source considered is entitled ‘Migrant Access to Housing in South African Cities’ by Jennifer Greenburg and Tara Polzer. The authors report that the private rental market

⁴¹ Smit ‘Integration into the Host Society op cit note 38 at 45.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ HRC *Report of the Special Rapporteur on violence against women* op cit note 3.

provides accommodation to the majority of refugees in South African cities.⁴⁷ They report that a reason why refugees elect to access inner-city rental markets with its higher rent as opposed to those in townships, is because in the latter, refugees are exposed to higher levels of xenophobia and are targeted as reasons for crime.

In the seventh place, the book entitled *Refugee Law in South Africa* edited by Fatima Khan and Tal Schreier, the authors discuss the differences apparent in the reception of refugees in developed versus developing countries.

Next, in ‘Local integration: Lessons learnt and the way forward’ by Fatima Khan, the author argues that states have two duties in respect of refugees’ integration into South African cities. First, they need to create an enabling environment, and second, a welcoming society.⁴⁸

Further, in ‘The career development processes of women refugees in South Africa: An exploratory study’ by Tatenda Nyabvudzi and Willie Chinyamurindi, the authors argue that refugee womxn have a ‘short-term survivalist mentality’ as they desire short-term survival as opposed to long-term planning, where a career path is envisioned.⁴⁹ They aim to acquire and fulfil their physiological needs namely, food, shelter, and security, instead of being focussing on a long-term career path.⁵⁰

Next, in ‘Refugees, Violence and Gender: The Case of Women in the Albert Park Area in Durban’⁵¹ by Sinenhlanhla Memela and Brij Maharaj, the authors argue that refugee men’s unemployment and womxn’s economic empowerment contributes to domestic violence.⁵² This is comes given that men lose their bargaining power to control household economic decisions which threaten traditional gender roles in the family structure.

Further, in ‘Rape without remedy: Congolese refugees in South Africa’⁵³ by Theresa Alfaro-Velcamp and Robert McLaughlin, the authors demonstrate how refugee womxn are at a

⁴⁷ Ibid at 9.

⁴⁸ Khan ‘Local Integration’ op cit note 1 at 3.

⁴⁹ T Nyabvudzi and W T Chinyamurindi ‘The career development processes of women refugees in South Africa: An exploratory study’ *SA Journal of Industrial Psychology* (2019) 45(0) at 5.

⁵⁰ Ibid.

⁵¹ S Memela & B Maharaj ‘Refugees, Violence and Gender: The Case of Women in the Albert Park Area in Durban, South Africa’ (2018) *Urban Forum* 29.

⁵² Ibid at 434.

⁵³ T Alfaro-Velcamp & R McLaughlin ‘Rape without remedy: Congolese refugees in South Africa’ (2019) *Cogent Medicine* 6: 1697502.

continuous risk of being raped in South Africa⁵⁴ without any recourse through local, state and international actors.’⁵⁵

d) Conclusion

After an evaluation of the literature discussed above, it is evident that refugee womxn face several barriers preventing their effective integration into their host society. As local integration is considered and pursued as the most durable solution for refugees in the country⁵⁶, these barriers must be removed. It is therefore imperative that the rights of refugees be ensured so that they can sustain themselves and integrate with the local community. In light of this backdrop, it is one of the aims of this thesis to investigate how the South African government has responded in terms of legislation and policy to the barriers to housing and employment refugee womxn face, and further, how it ensures their protection against GBV.

VI CHAPTER SYNOPSIS

Chapter 1: Introduction

This chapter introduces the research question by discussing how the areas of housing, employment and protection from gender-based violence act as indicators to refugee womxn’s integration into South Africa. It then states the problem question and identifies the issues refugee womxn experience in these sectors both in South Africa, and more briefly, internationally. Next, the research question and sub-questions are presented. The main research question considers the extent to which the South African state has responded to the protection of the rights of refugee womxn in the context of housing, employment, and protection from gender-based violence. Thereafter, it is discussed that this paper is situated within a human rights framework and will use an intersectional feminist analysis to answer the research question. Then, the literature review presents key findings about the position of refugee womxn from sources which include books, academic articles and reports. Lastly, a chapter synopsis provides a brief overview of each of the chapters.

Chapter 2: International Normative Framework

⁵⁴ Ibid at 11.

⁵⁵ Ibid.

⁵⁶ Dass, Ramjathan-Keogh & Khan ‘The socio-economic rights of refugees and asylum seekers in South Africa’ op cit note 2 at 220.

This chapter discusses and evaluates the international normative framework as it pertains to refugees. It will analyse these instruments through a human rights and intersectional feminist methodology as discussed in Chapter 1 above.

Chapter 3: South African Normative Framework

This chapter sets out the South African legal and policy framework relating to the protection of refugees. It furthermore discusses the legal and policy measures that the South African government has in place as it relates to refugees and refugee womxn's access to housing, the right to work, and protection from gender-based violence.

Chapter 4: The International Position of Refugee womxn

This chapter examines the specific problems faced by refugee womxn in host countries in relation to the three identified areas; access to housing, inclusion into the labour market, and protection from gender-based violence. It analyses existing data from various sources which indicates the extent of the problem relating to human rights violations perpetrated in these contexts against refugee womxn internationally.

Chapter 5: The Position of Refugee Womxn in South Africa

This chapter investigates the specific challenges faced by refugee womxn in their integration into South African society in the areas of access to housing, inclusion into the labour market, and protection from gender-based violence.

Chapter 6: Recommendations and Conclusion

Based on a consideration of the international and national normative frameworks, the lived experiences of refugee womxn in South Africa, and a consideration of the literature, this chapter provides recommendations to the South African state on reform within the three sectors of housing, employment, and protection from gender-based violence. It further provides a conclusion to the paper.

Chapter 2: The International Normative Framework

I INTRODUCTION

International law offers the global community a framework in which states are the principal actors.⁵⁷ It is primarily formulated by international agreements which create rules binding upon its signatories, and by customary rules and articulates states' legal responsibilities in its treatment of individuals.⁵⁸ When a state expresses its consent to be bound to a treaty, it is bound to the provisions of the 1969 Vienna Convention on the law of treaties (Vienna Convention) that determines how treaties should be interpreted. The Vienna Convention provides that states should interpret conventions in good faith in accordance with the ordinary meaning of the terms and in their context in light of its object and purpose.⁵⁹ As such, on the international stage, this provision of the Vienna Convention should guide states in its interpretation and application of the conventions it becomes a party to.

This chapter provides a discussion of the international legal framework relating to the protection of refugees. It starts by providing an overview of the historical background of the 1951 UN Convention by focusing on how the Convention defines a refugee. It further discusses the gender-neutrality of the Convention. With reference to the 1966 International Covenant on Social, Economic and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), it provides the legal framework applicable to refugees in the context of housing, employment, and protection from gender-based violence. Thereafter, it discusses the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as a supplementary and specific instrument for the protection of refugee womxn.

II THE 1951 UNITED NATIONS REFUGEE CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

a) Historical background

After the atrocities of WWII in 1945, 51 states came together to draw up the United Nations Charter (“the UN Charter”).⁶⁰ Art 1(3) of the UN Charter provides that one of the core purposes

⁵⁷ ‘Understanding International Law’ (2011) available at https://treaties.un.org/doc/source/events/2011/Press_kit/fact_sheet_1_english.pdf, accessed on 1 February 2020 at 1.

⁵⁸ Ibid.

⁵⁹ Article 31(1).

⁶⁰ ‘History of the UN’ available at <https://www.un.org/un70/en/content/history/index.html>, accessed on 1 February 2020.

of the UN is that it aims to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. In 1948, the General Assembly adopted the Universal Declaration of Human Rights (“the UDHR”)⁶¹, which is also known as the international bill of rights.⁶² Article 2 of the UDHR provides that the rights and freedoms contained therein apply to all people, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Further, article 14 provides that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution.’ Article 14 is considered a human right to de facto asylum, and not a right to be granted formalized, de jure asylum or permanent residence.⁶³ This article symbolises the end of the first phase and the start of the second phase of refugee policy of the 20th Century.⁶⁴ This is because in 1948, after being profoundly influenced by the atrocities of WWII, several states undertook to formulate a number of declarations on how people should behave towards each other, how power should be administered, and what the relationship should be between the values of right and wrong. These declarations were collected and codified in the UDHR. It followed, then, that from having condemned the exercise of certain kinds of power, the international community should furthermore request countries to afford protection to the individuals who are subject to human rights violations stemming from the abuse of power.⁶⁵ Article 14 of the UDHR set the scene for further binding international legal instruments on the rights of refugees to be adopted.⁶⁶ Such an instrument was the 1951 UN Refugee Convention.

The 1951 UN Convention was adopted by a Conference of Plenipotentiaries of the UN on 28 July 1951 and entered into force on 21 April 1954.⁶⁷ It was the first human rights treaty adopted by the UN after WWII.⁶⁸ The Convention constitutes the second pillar of the

⁶¹ ‘Universal Declaration of Human Rights explained’ available at

https://everything.explained.today/Universal_Declaration_of_Human_Rights/, accessed on 3 February 2020.

⁶² G A Del Prado ‘The United Nations and the Promotion and Protection of the Rights of Women: How well has the organization fulfilled its responsibility’ (1995) *William & Mary Journal of Race, Gender and Social Justice* 2(1) at 52.

⁶³ T Einarsen ‘Drafting history of the 1951 Convention and the 1967 Protocol’ in Andreas Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1 ed (2011) 48.

⁶⁴ ‘Universal Declaration of Human Rights’ available at

http://cnmml.columbia.edu/projects/mmt/udhr/article_14.html, accessed on 1 February 2020.

⁶⁵ Ibid.

⁶⁶ ‘Introductory note by the Office of the UNHCR’ 1951 UN Refugee Convention at 2.

⁶⁷ Einarsen ‘Drafting history of the 1951 Convention’ op cit note 63 at 49.

⁶⁸ Ibid at 40.

international refugee regime, while the United Nations High Commissioner for Refugees (UNHCR) created by the General Assembly in 1950 constitutes the first.⁶⁹

The Protocol Relating to the Status of Refugees ('the 1967 Protocol') is an independent treaty to which states can become a party. Its obligations, however, are closely linked to the obligations of the 1951 UN Convention as article 1 para 1 of the 1967 Protocol states that its contracting states 'undertake to apply articles 2 to 34 inclusive of the Refugee Convention to refugees as hereinafter defined.' The main purpose for the adoption of the 1967 Protocol was the removal of the temporal and geographical limitations outlined in article 1B of the 1951 UN Convention, and thus, to make the protection of refugees universal.⁷⁰

The preamble of the 1951 UN Refugee Convention states that it is based on the principle that all human beings 'shall enjoy fundamental rights and freedoms without discrimination'.⁷¹ The Convention can be viewed as a third party agreement; namely, a treaty which allows contracting states take on obligations towards each other for the benefit of refugees who are then provided refugee rights.⁷² The rights contained in the 1951 UN Convention can be separated into two categories: one, a fundamental right of non-return to persecution directed against any contracting state, even at its borders (or beyond, depending on when and how the actual state powers are exercised) which is known as the non-*refoulement* provision contained in article 33, and two, the political, civil and social rights, some of which only apply at certain stages of the stay or residence of a person who claims to be a refugee within the territory of a contracting state of refugee, and is contained in article 3 to 32.⁷³

b) *The definition of 'refugee'*

To access the aforementioned categories of rights, and hence be afforded the status of 'refugee', individuals need to meet the criteria established in article 1A, para 2 of the definition of a 'refugee.' This article provides that a refugee is a person who:

'[O]wing to a wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country[...]

⁶⁹ Einarsen 'Drafting history of the 1951 Convention' op cit note 63 at 40.

⁷⁰ Ibid at 69.

⁷¹ Ibid at 40.

⁷² Ibid.

⁷³ Ibid.

During the drafting process between 1948 and 1951⁷⁴, serious efforts were dedicated to the determination of the elements that would make up the definition of ‘refugee’.⁷⁵ Einarsen argues that the drafting history of the Convention does not support a broad conception of who a Convention refugee is, and accordingly offers a narrow approach to the determination of refugee status.⁷⁶ They continue by noting that the definition contains certain limitations which serve to exclude, rather than include, the following categories of people: those who are internally displaced; migrants of purely economic or personal convenience; stateless persons who are not liable to persecution, and accidental victims of natural disasters, environmental problems or a violent society without an element of discrimination or differential treatment that expose any given group or individual to a higher risk of harm to others.⁷⁷

Freedman further argues that this is an individualistic definition that is only designed to offer protection to a select few.⁷⁸ She continues that even those persons who meet the criteria of the definition are subject to the vagueness of the definition, which has led to a ‘political instrumentalization’ which imposes extreme limits on who is granted asylum in states.⁷⁹ Hence, the Convention definition of refugee, in its vagueness, leaves the interpretation thereof up to the discretion of each individual state.⁸⁰

The 1951 UN Convention, with its narrow, and vague definition for ‘refugee’ was drafted primarily by the United States of America (USA) and its European allies⁸¹ and as such, reflects the specific concerns of its writers who were white, educated, Western males.⁸² Most of the new Eastern bloc states boycotted the negotiations.⁸³ Freedman argues that the USA asserted significant dominance during the negotiations, with the result being that the 1951 UN Convention was limited in its application, and aimed at primarily dealing with the cases of persons arriving in the West from the Soviet bloc countries.⁸⁴ As Hathaway asserts, Western states wanted to give priority for those seeking protection whose flight was motivated by pro-

⁷⁴ J C Hathaway *The Law of Refugee Status* 2ed (2014) op cit note 74 at 10.

⁷⁵ Einarsen ‘Drafting history of the 1951 Convention’ op cit note 63 at 50.

⁷⁶ *Ibid* at 52.

⁷⁷ *Ibid*.

⁷⁸ J Freedman ‘Gender and Asylum in International Law – The Geneva Convention revisited’ in Jane Freedman (ed) *Gendering the International Asylum and Refugee Debate* (2015) at 73.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* at 72.

⁸¹ *Ibid*.

⁸² N Valji ‘Women and the 1951 Refugee Convention: Fifty Years of Seeking Visibility’ (2001) *Refugee* 19(5) at 2.

⁸³ *Ibid*.

⁸⁴ Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 72.

Western political values.⁸⁵ Loescher shares this view and argues that the Convention largely reflects the international politics of the early Cold War era.⁸⁶ Freedman describes the refugee envisioned by the Convention as ‘an individual persecuted by a totalitarian regime because of his or her political views or activism.’⁸⁷

Traditionally, persons fleeing persecution because of their political views have been men.⁸⁸ They are often more active in the public sphere in their countries of origin and are more exposed to public persecution and political repression.⁸⁹ Because of this traditional conception of the putative refugee, large groups of people fleeing from civil wars and international conflicts were not envisaged by the Convention.⁹⁰

c) Gender neutrality of the Convention

The limitations to the definition of refugee continue to be relevant today and has meant that it has been challenging for many womxn to obtain refugee status.⁹¹ The UNHCR has stated that the refugee definition has historically been interpreted through a ‘framework of male experiences.’⁹² Freedman asserts that this is because the 1951 UN Convention, like other international human rights treaties, was written from a male perspective which ignored the situations and interests of womxn.⁹³ During negotiations, the relevance of ‘sex’ was discussed only once when it was debated on whether it should be included in article 3, which provides that the Convention shall be applied ‘without discrimination as to race, religion, or country of origin.’⁹⁴ It was, however, swiftly abandoned after it was concluded that the issue of gender equality should be a matter for national legislation.⁹⁵ Consequently, the 1951 UN Convention is a representation of the views of the drafters who negotiated it.

Bunch notes that ‘the dominant definition of human rights and the mechanisms to enforce them in the world today are ones that pertain primarily to the types of violations that the men

⁸⁵ Hathaway *Law of Refugee Status* op cit note 74 at 10.

⁸⁶ G Loescher *The UNHCR and World Politics: A Perilous Path* (2001) 44.

⁸⁷ Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 72.

⁸⁸ S Sansonetti ‘Female refugees and asylum seekers’ op cit note 30 at 12.

⁸⁹ Ibid.

⁹⁰ Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 72.

⁹¹ Ibid.

⁹² UNHCR ‘Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’, 7 May 2002, available at <https://www.unhcr.org/3d58ddef4.pdf>, accessed on 4 February 2020 at 2.

⁹³ Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 72.

⁹⁴ T P Spijkerboer *Gender and Refugee Status* (unpublished LLD thesis, Katholieke Universiteit Nijmegen 1999/2000) at 1.

⁹⁵ Ibid.

who first articulated the concept most feared.⁹⁶ Consequently, Freedman argues that violations and persecutions relating primarily to womxn are often left out of the spectrum of those that are considered as valid reasons for granting refugee status.⁹⁷ Valji emphasises that one of the reasons for this is the built-in binary implicit in the 1951 UN Convention, namely, the divide between the political and private spheres.⁹⁸ Freedman and others have pointed out that liberal definitions of human rights have been transposed into the interpretation of the Convention which has reinforced the division between the public and private.⁹⁹ An example hereof is the naming of ‘political opinion’ as a nexus of persecution.¹⁰⁰ In terms of liberal rights discourse, the public sphere refers to non-domestic life, namely, the sphere of politics, military and the market¹⁰¹ which is dominated by men, and the private sphere denotes domestic and family matters, and thus the terrain of womxn.¹⁰² This division has worked to ignore the discriminations perpetrated against womxn that take place within the private setting of the home and family, which has the consequent result that large areas of womxn’s lives are considered outside the scope of legal protection and redress.¹⁰³

As seen above, the definition of refugee provides that persons who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are entitled to seek asylum. Absent from this definition is the ground of gender. However, in its 2002 Guidelines on International Protection for Gender-Related Persecution (‘the 2002 Guidelines’), the UNHCR asserts that it is an established principle that the refugee definition, in its entirety, should be interpreted through a ‘gender perspective’.¹⁰⁴ The UNHCR defines gender as the ‘relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another.’¹⁰⁵ Freedman defines gender as denoting the social and cultural constructions which are used to distinguish and classify what is considered ‘masculine’

⁹⁶ C Bunch ‘Transforming Human Rights from a Feminist Perspective’ in J. Peter and A. Wolper (eds) *Women’s Rights, Human Rights: International Feminist Perspectives* at 13.

⁹⁷ Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 72-73.

⁹⁸ Valji ‘Women and the Refugee Convention’ op cit note 82 at 27.

⁹⁹ Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 77.

¹⁰⁰ Valji ‘Women and the Refugee Convention’ op cit note 82 at 27.

¹⁰¹ Ibid.

¹⁰² Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 77.

¹⁰³ Ibid.

¹⁰⁴ UNHCR ‘Guidelines on International Protection: Gender-Related Persecution’ op cit note 92 at 2.

¹⁰⁵ UNHCR ‘Guidelines on International Protection: Gender-Related Persecution’ op cit note 92 at 2.

and ‘feminine’.¹⁰⁶ ‘Sex’, on the other hand, refers to the biological differences between men and womxn.¹⁰⁷ Butler amongst others, have argued that sex is as much a social construction as gender and that to argue that there is a difference between sex and gender is part of what is called ‘foundationalist fictions.’¹⁰⁸ This dissertation will, however, proceed on the basis of the distinction between gender and sex, as outlined above. The definitions of sex and gender are useful tools to analyse how social constructions and representations impact men and womxn in different ways, and work to expose how relations between men and womxn are structured as relations of power.¹⁰⁹

The 2002 Guidelines provide further that while gender-related claims may be brought by both womxn or men, these claims are more commonly brought by womxn.¹¹⁰ It is perhaps worth noting that the 2002 Guidelines conceptualise gender in terms of a binary; namely, ‘man’ and ‘woman’. While gender is a relational concept as it is often defined in terms of relationships between men and womxn, or masculinities and femininities, it is also dynamic.¹¹¹ As Freedman suggests:

‘[Gender is] a dynamic and evolving concept; gender relations should not be understood as fixed across time or place, but rather in constant evolution, and varying according to different local contexts.’¹¹²

Thus, it should be borne in mind that other classifications of gender identity also exist and will continue to be elucidated. These include, for instance, the classification of gender non-binary. Gender-related refugee claims can accordingly also be brought by persons identifying as non-binary.

Gender-related claims to refugee status have generally been brought based on the ground of ‘membership of a particular social group.’¹¹³ A ‘particular social group’ is defined as:

‘[A] group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one

¹⁰⁶ Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 16.

¹⁰⁷ Ibid.

¹⁰⁸ J Butler *Gender Trouble: Feminism and the Subversion of Identity* (1990) at 39.

¹⁰⁹ J Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 16.

¹¹⁰ UNHCR ‘Guidelines on Gender-Related Persecution’ op cit note 92 at 2.

¹¹¹ Freedman ‘Gender and Asylum in International Law’ op cit note 78 at 16.

¹¹² Ibid.

¹¹³ UNHCR ‘Guidelines on Gender-Related persecution’ op cit note 92 at 7.

which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.'¹¹⁴

Considering the above definition, the 2002 Guidelines offer that the category 'sex', properly interpreted, can be within the ambit of the social group category, with womxn being a social subset defined by innate and immutable characteristics, and who are often treated differently than men.¹¹⁵ Womxn's characteristics further identify them as a group in society, who are subjected to different treatment and standards.¹¹⁶ The 2002 Guidelines further provide that the size of the group is not a basis in fact or reason to refuse the recognition of womxn generally as a particular social group.¹¹⁷ There is furthermore no requirement that the particular social group should be cohesive or that members of it voluntarily associate, or that every member of the group is at risk of persecution.¹¹⁸

The UNHCR believes that since the refugee definition, properly interpreted, covers gender-related claims, it is unnecessary to add gender as an additional ground to the 1951 UN Refugee Convention.¹¹⁹ They base their opinion on summary conclusions that were drafted at a roundtable of experts, held in San Remo, Italy in 2001. Freedman considers this conclusion as premature when states' actual interpretation of the Convention is considered.¹²⁰ This is because the UNHCR only offers advice and legal interpretive guidance and has little to no control over the way states implement the 1951 UN Refugee Convention at the domestic level. As such, the UNHCR cannot ensure a consistent or uniform interpretation¹²¹ which will include gender-related claims. Arguments in favour of adding gender as an additional ground of persecution, suggest that the absence of gender works to trivialise gender-related persecution and showcases that it is not taken as seriously as other forms of persecution based on race, religion or political opinion.¹²² Other commentators have argued that the omission of gender perpetuates the process

¹¹⁴ UNHCR 'Guidelines on Gender-Related persecution' op cit note 92 at 7.

¹¹⁵ Global Consultations on International Protection *Summary Conclusions – Gender-Related Persecution* (2001) available at <https://www.refworld.org/docid/470a33b60.html>, accessed on 1 February 2020 at 2.

¹¹⁶ UNHCR 'Guidelines on Gender-Related persecution' op cit note 86 at 7.

¹¹⁷ Ibid.

¹¹⁸ Global Consultations 'Summary Conclusions' op cit note 104 at 2.

¹¹⁹ UNHCR 'Guidelines on Gender-Related persecution' op cit note 86 at 3.

¹²⁰ Freedman 'Gender and Asylum in International Law' op cit note 43 at 76.

¹²¹ Freedman 'Gender and Asylum in International Law' op cit note 43 at 76.

¹²² Ibid at 75.

of the invisibilisation of victims of gender-related persecution, even if womxn's claims might be brought under another Convention ground.¹²³

Freedman concludes that while the 1951 UN Convention protects all on a gender-neutral basis, the procedures for granting such protection have been undermined by 'deeply gendered practices which fail to offer protection to women because their persecution is not recognised as such.'¹²⁴ States, in turn, have adopted various definitions of persecution, however, many of these definitions are based on traditional definitions of human rights which are defined from a male perspective.¹²⁵ Crawley asserts that over the years, the interpretation of refugee law has evolved through an examination of male asylum applicants which have exposed yet also reinforced existing gender biases within states. She argues that:

'[I]t is men who have been considered the principal agents of political resistance and therefore the legitimate beneficiaries of protection from resulting persecution.'¹²⁶

Thus, as regards the 1951 UN Convention's practical implementation in states' domestic legislation and procedures, a gender bias remains.¹²⁷

d) The rights to housing, work, and protection from gender-based violence

Once an individual meets the criteria contained in the refugee definition, they are entitled to the rights contained in the 1951 UN Convention.

First, article 3 contains the guarantee of non-discrimination, which provides that states should apply the rights contained in the 1951 UN Convention without discrimination based on race, religion or country of origin. This is the first provision of its kind as no similar provision is contained in any of the earlier arrangements relating to the status of refugees.¹²⁸ As mentioned above, article 3 does not prohibit discrimination based on gender or sex and demonstrates the gender-neutrality of the Refugee Convention. Article 3 becomes relevant only if another provision of the Convention is invoked and can be referred to as an 'accessory prohibition of discrimination'.¹²⁹ As such, it must always be related to another provision of the Refugee

¹²³ M Stevens, 'Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category' (1993) *Cornell Journal of Law and Public Policy* at 205.

¹²⁴ Freedman 'Gender and Asylum in International law' op cit note 78 at 76.

¹²⁵ Ibid.

¹²⁶ H Crawley 'Women and Refugee Status: Beyond the Public/Private Dichotomy' in D. Indra (ed.) *Engendering Forced Migration: Theory and Practice* (1999).

¹²⁷ Freedman 'Gender and Asylum in International law' op cit note 78 at 77.

¹²⁸ R Marx & W Staff 'Article 3 (Non-Discrimination)' in A Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) at 645.

¹²⁹ Ibid at 647.

Convention.¹³⁰ However, article 3 has an important interrelationship with articles 5 and 7. Article 5 provides that:

‘Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.’

This article determines that the 1951 UN Convention shall be no obstacle to the granting of additional rights and benefits to refugees.¹³¹ As such, article 5 refers to rights granted outside the scope of the Convention, while article 3 refers to the rights within the scope of the Convention.¹³² Article 5 permits each state individually, or in conjunction with other states, to progressively structure new rules, or rule clusters, relating to the status of refugees.¹³³ This article, therefore, empowers states to confer further rights and benefits to refugees in its jurisdiction. Article 7, in its turn, obliges states to ‘accord to refugees the same treatment as is accorded to aliens generally’ or more favourable treatment, and compensates for the lack of a general prohibition of discrimination against refugees.¹³⁴ This article defines the general standard for the treatment of refugees and links the 1951 UN Convention with external legal regimes.¹³⁵ While not mentioned explicitly, this includes the prohibition of discrimination against refugees because of their status as refugees.¹³⁶

i) Housing

The first right applicable to this thesis’ investigation is the right to housing guaranteed in article 21 of the 1951 UN Refugee Convention.¹³⁷ This article provides that:

‘As regards housing, the Contracting States [...] shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.’

Article 21 confers an obligation on states to accord to refugees a certain minimum treatment in respect of housing.¹³⁸ It restricts the beneficiaries of the right to housing to only

¹³⁰ Marx & Staff ‘Article 3 op cit note 128 at 647.

¹³¹ A Skordas ‘Article 5 (Rights Granted Apart from this Convention)’ in A Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) at 673.

¹³² Marx & Staff ‘Article 3’ op cit note 128 at 647.

¹³³ Skordas ‘Article 5’ op cit note 131 at 673.

¹³⁴ Marx & Staff ‘Article 3’ op cit note 128 at 648.

¹³⁵ A Skordas ‘Article 7 (Exemption from Reciprocity)’ in A Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) at 719.

¹³⁶ Marx & Staff ‘Article 3’ op cit note 128 at 648.

¹³⁷ S Leckie & E Simperingham ‘Article 21 (Housing)’ in A Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) at 1004.

¹³⁸ Ibid.

those refugees who are *lawfully staying* in the territory of the state.¹³⁹ Hence, refugees who do not meet the requirement of legality will only be entitled to protection under general human rights law.¹⁴⁰ Furthermore, the standard that states are required to meet under article 21 is to provide ‘treatment as favourable as possible and, in any event, not less favourable than that provided to aliens generally’ practically offers little more than that which is in any event required towards foreigners in the territory of a state and the generalized standard of non-discrimination.¹⁴¹ However, article 21 read with article 7, entitles refugees to claim the protection and benefit of any human rights treaty that the state on whose territory they are has become a party to as well as any relevant protections guaranteed under customary international law.¹⁴² The only exception to this principle is contained in article 2, para 3 of the ICESCR which provides that:

‘Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.’

While the ICESCR does not define ‘developing country’ or ‘economic’ rights, this provision has been interpreted to mean that ‘less developed countries may determine the extent to which they will extend ‘economic’ rights to non-citizens, including refugees.¹⁴³ However, that discretion does not apply to the core content of the rights set out by the ICESCR.¹⁴⁴ The Committee on Economic, Social and Cultural Rights (CESCR) has defined the core content of key rights which includes the right to housing. They state that:

‘...a minimum care obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie* failing to discharge its duty under the [ICESCR]’

Leckie and Simperinham argue that since article 21 affords only limited protection, that it may, in many instances, be more beneficial to rely on the right to housing under other human

¹³⁹ Leckie & Simperinham ‘Article 21’ op cit note 137 at 1009.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid at 1010.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

rights law instruments rather than the specific protection guaranteed under the 1951 UN Convention.¹⁴⁵ In this regard, article 11, para 1 of the ICESCR guarantees that:

‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.’

In General Comment 4, the CESCR provides that the right to adequate housing:

‘[...] should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided merely by having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in *security, peace and dignity*.’¹⁴⁶

The CESCR has given content to what exactly ‘adequate’ means, and states that legal security of tenure, availability of services, materials, facilities, and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy are all factors that should be taken into account to determine the adequacy of housing.¹⁴⁷ The CESCR and the Special Rapporteur on Adequate Housing have confirmed that states should give refugees special consideration with regard to their housing rights.¹⁴⁸

ii) Inclusion into the labour market

Chapter III on the 1951 UN Convention contains three provisions under the heading ‘Gainful Employment.’ First, article 17 guarantees to refugees the right to ‘wage-earning employment.’ It provides that states:

‘[S]hall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.’

The right to wage-earning employment or the right to work is linked to the enjoyment of other human rights and the longer-term integration of a refugee.¹⁴⁹ The right to wage-earning

¹⁴⁵ Leckie & Simperhingham ‘Article 21’ op cit note 137 at 1010.

¹⁴⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)* (1991) E/1992/23, available at: <https://www.refworld.org/docid/47a7079a1.html>, accessed on 2 February 2020 para 7.

¹⁴⁷ Ibid para 8.

¹⁴⁸ Leckie & Simperhingham ‘Article 21’ op cit note 137 at 1012.

¹⁴⁹ A Edwards ‘Article 17 (Gainful Employment)’ in A Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) at 954.

employment is, however, slightly limited by the provisions in subsection (2) which states that the right may be limited by national economic considerations. Yet, at the same time, subsection (3) provides that states should give ‘sympathetic consideration’ to the assimilation of refugees’ rights to employment with those of nationals.¹⁵⁰

This right has a crucial interrelationship with the other Chapter III rights, namely article 18 concerning self-employment and article 19, the right to work within the liberal professions.¹⁵¹ It is also related to article 24, which provides that refugees are entitled to the same treatment as nationals in respect of *inter alia*, remuneration, work hours, minimum age of employment, apprenticeship and training, ‘women’s work’, and the enjoyment of the benefits of collective bargaining.

The right to work was first recognised in the UDHR and later re-established in article 6 of the ICESCR. Article 6 provides that:

‘everyone has the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts...’

The constituent parts of the right to work as provided for in the ICESCR include access to the labour market, free choice of employment, and a guarantee against arbitrary dismissal. Access to employment incorporates the obligations upon states to work progressively toward the objective of full employment, the opportunity to gain ones’ living by work, equal access to employment access to employment services (implied), and occupational training.¹⁵² At a minimum, the international right to work is not a guarantee to secure work, only a right to seek work, and protection against unjust denial of work and the right not to be subjected to forced labour.¹⁵³

Furthermore, free choice of employment extends, at least in theory, ‘to ensuring the fullest opportunity for each worker to use his or her skills in a suitable job’, as well as a prohibition on forced labour, protection against excessive restrictions on the right to strike, and even the right not to work or to refuse to work.¹⁵⁴ Alongside the provision prohibiting discrimination, these minimal guarantees constitute the minimum core content or non-derogable

¹⁵⁰ Edwards ‘Article 17’ op cit note 149 at 954.

¹⁵¹ Ibid at 957.

¹⁵² M Craven ‘The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development’ (1995) pp 205 – 271.

¹⁵³ Edwards ‘Article 17’ op cit note 149 at 958.

¹⁵⁴ Ibid.

component of the right and are of immediate effect.¹⁵⁵ However, regarding the broader components of the right to work, states here only have a duty to ‘progressively realise’ these obligations.¹⁵⁶

The CESCR has summarised the right to work into four components; namely, availability, accessibility, acceptability, and quality.¹⁵⁷ Availability means that states should have specialized services that assist and support individuals to enable them to identify and find available employment.¹⁵⁸ Accessibility means that employment opportunities should be free from discrimination, physically accessible for people with disabilities, and the right to seek, impart and obtain information about employment opportunities.¹⁵⁹ Acceptability and quality refer to rights and conditions at work.¹⁶⁰

As regards the right of refugees to benefit from the rights contained in article 6, this provision must be read with article 2 and article 4 of the ICESCR.¹⁶¹ Article 2 provides that:

- ‘1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.’

¹⁵⁵ Edwards ‘Article 17’ op cit note 149 at 958.

¹⁵⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)* (1990) E/1991/23, available at:

<https://www.refworld.org/docid/4538838e10.html>, accessed on 2 February 2020 para 9.

¹⁵⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)* (2006) E/C.12/GC/18, available at: <https://www.refworld.org/docid/4415453b4.html>, accessed 2 February 2020 para 12.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Edwards ‘Article 17’ op cit note 149 at 959.

The first general limitation on the enjoyment of socio-economic rights, and thus the right to work, is that the ICESCR requires states to implement their obligations ‘progressively’ and ‘to the maximum of [their] available resources’.¹⁶² However, this provision does not mean that a state should do nothing.¹⁶³ The CESCR has stated that progressive realisation imposes an obligation on states to move as expeditiously and effectively as possible towards the goal of the full realisation of the right in question.¹⁶⁴ Importantly, the CESCR has asserted that the obligation to ensure that all rights be exercised without discrimination is of immediate effect.¹⁶⁵ Moreover, states are obliged to immediately ‘take steps’ to achieve progressive realisation.¹⁶⁶ These steps must be deliberate, concrete, and targeted towards the full realization of the right to work.¹⁶⁷ Additionally, in implementing this right, states should use their resources effectively.¹⁶⁸ Furthermore, while the rights in the ICESCR apply equally to nationals and non-nationals, the ICESCR allows some distinction to be drawn between nationals and non-nationals as exceptions to the general principle of non-discrimination,¹⁶⁹ while any other exceptions beyond those explicitly provided for must be justified according to ‘reasonable and objective criteria.’¹⁷⁰

Next, article 2 para 3 explicitly allows developing countries to limit the economic rights of non-nationals. However, it is not an unlimited discretion as any limitations on the guarantee of economic rights must be justified according to human rights and national economic considerations.¹⁷¹ This provision was inserted to end the domination of certain economic groups of non-nationals during colonial times.¹⁷² As such, it should be interpreted narrowly in the context of refugees.¹⁷³

Another safeguard against unreasonable restrictions on economic rights generally, or as applied to non-nationals specifically, is contained in article 4. It provides that:

‘The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights

¹⁶² Art 2 para 1 ICESCR.

¹⁶³ Edwards ‘Article 17’ op cit note 149 at 959.

¹⁶⁴ UN CESCR *The Nature of States Parties’ Obligations* op cit note 156 para 9.

¹⁶⁵ *Ibid* para 1.

¹⁶⁶ *Ibid* 2.

¹⁶⁷ UN CESCR *The Right to Work* op cit note 157 para 19.

¹⁶⁸ *Ibid* at para 41.

¹⁶⁹ Edwards ‘Article 17’ op cit note 149 at 960.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*.

¹⁷² *Ibid*.

¹⁷³ *Ibid*.

only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.’

Article 4 allows any form of limitation to ICESCR rights, provided such limitations are determined by law and only if they are compatible with the nature of the right in question and to ensure that the general welfare of society is promoted. Edwards argues that this provision is not sufficiently broad to allow complete scope to deny rights to non-nationals without justification.¹⁷⁴ Any restrictions have to be determined by law and should be compatible with the right to promote human dignity¹⁷⁵, and solely to promote the general welfare of a democratic society.¹⁷⁶ Edwards further argues that when states deny refugees and asylum-seekers the right to work, it could lead to the opposite effect of the intentions of the drafters. They argue that the drafters’ intentions were to give refugees and/ or asylum-seekers access to the labour market or self-employment opportunities to promote the general welfare of society, to enhance understanding, and to build confidence between citizens and refugees and/ or asylum seekers, and generally contribute to their sense of self-worth and dignity.¹⁷⁷ This would facilitate the process of long-term integration and naturalization (see art 34 of the Refugee Convention.)¹⁷⁸ In support of this argument, the CESCR has asserted that article 4 is ‘primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the state.’¹⁷⁹

Thus, to conclude, the right to work under the ICESCR applies to refugees and asylum-seekers generally, although it is subject to a few express limitations. Edwards, however, argues that these limitations should be restrictively interpreted for two reasons; first, so that the object and purpose of the ICESCR is not defeated, and secondly, to not allow limitations that are discriminatory in purpose or effect, which undermine the human dignity of refugees and asylum-seekers, or which curtail their ability to integrate into their host country.¹⁸⁰ The right to work as contained in article 6 of the ICESCR is wider in scope than the 1951 UN Refugee Convention

¹⁷⁴ Edwards ‘Article 17’ op cit note 149 at 961.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* (1999) E/C.12/1999/10, available at: <https://www.refworld.org/docid/4538838c22.html>, accessed 2 February 2020 at 12.

¹⁸⁰ Edwards ‘Article 17’ op cit note 149 at 961.

rights as it is not subject to residence requirements, that the standard to be applied is treatment equal to that enjoyed by nationals (unless exceptions could be read into the provisions), and it does not distinguish between asylum-seekers, refugees, or other migrants. At the same time, the 1951 UN Refugee Convention rights in arts. 17 – 19 continue to be relevant as far as they apply to particular categories of recognized refugees, or where the state in question is not a party to the ICESCR.¹⁸¹

Article 18 of the 1951 UN Refugee Convention furthermore requires states to afford to refugees the possibility of engaging in independent economic activity, subject to a few limitations. It provides that:

‘The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.’

Of the three rights relating to gainful employment under Chapter III, article 18 is the most favourable as, in most instances, it grants rights earlier than articles 17 or 19, and it further requires states to provide treatment ‘as favourable as possible’.¹⁸² It only requires lawful *presence* in the territory of the state, and is therefore available to refugees, in most instances, earlier than the ‘lawfully’ staying standard of articles 17 and 19.¹⁸³ The lower standard of ‘lawfully in’ indicates that no waiting period was intended; and that the right can be invoked as soon as refugees are lawfully in the territory, i.e. at recognition.¹⁸⁴

Next, article 19 provides the following:

1. ‘Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.
2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.’

¹⁸¹ Edwards ‘Article 17’ op cit note 149 at 961.

¹⁸² Edwards ‘Article 18 (Self-Employment)’ in A Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) at 974.

¹⁸³ Ibid at 975.

¹⁸⁴ Ibid at 981.

Article 19 calls upon states to recognise refugees' degrees or diplomas to allow refugees to work in their professions, for the purposes of their human dignity, integration, and to satisfy their needs.¹⁸⁵ Edwards argues that this right can be important to secure the needs of the refugee community where skilled refugees may be in a better position to deal with the linguistic, cultural and health specificities of refugees.¹⁸⁶ Article 19 is therefore intended to give refugees access to the same market 'as aliens generally in the same circumstances', and calls on states to make a positive effort to minimize any restrictions in this regard.¹⁸⁷

While this provision is a novelty in an international instrument dealing with refugees¹⁸⁸ Edwards, however, argues that it does not do much beyond treating refugees in a manner equivalent to 'aliens generally'.¹⁸⁹ The provision, however, does call for more favourable treatment, and it already comes into effect as soon as a refugee is 'lawfully staying' in the host country.¹⁹⁰ This provision is thus equivalent to the general wage-earning provision in article 17, however, it is not as generous as the self-employment provision in article 18.¹⁹¹ Thus, there is a dispute concerning which provision applies to a refugee who holds a professional certification but wishes to set up their own business (i.e. to be self-employed). Edwards argues that by including this provision, the 1951 UN Convention implies that it is an exception to the self-employment provision in article 18 and that persons in liberal professions should be treated less favourably than other self-employed persons.¹⁹² Regardless, it does not impose any greater standard on refugees in terms of having their certificates accredited than on other foreigners, with the possibility of some of the fees and other restrictions being dropped due to the nature of their status as refugees (via article 6 of the 1951 UN Convention).¹⁹³

The right to work, and as such, to be included in the host country's labour market has thus extensively been provided for under the 1951 UN Refugee Convention, and the ICESCR. The importance of this right to human beings generally, and refugees specifically, has clearly been underscored.

¹⁸⁵ A Edwards 'Article 19 (Liberal Professions)' in A Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) at 984.

¹⁸⁶ J C Hathaway *The Rights of Refugees Under International Law* (2005) at 786.

¹⁸⁷ Edwards 'Article 19' op cit note 185 at 984.

¹⁸⁸ *Ibid* at 990.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid*.

¹⁹² Edwards 'Article 19' op cit note 185 at 990.

¹⁹³ *Ibid*.

iii) Protection from gender-based violence

Whilst physical security is an important element to refugee protection, the 1951 UN Refugee Convention does not include any general provision on refugee protection, nor any specific provision on the physical protection of refugee women. Mtango argues that this omission might be ascribed to the fact that the primary concern of the drafters was to ensure the economic and social well-being of refugees, and that it was assumed that the issue of physical safety would follow from the enforcement of norms derived from the international law of armed conflict and national asylum laws.¹⁹⁴ Hathaway however, argues that like the international human rights standards that were contemporaneously developed, this omission reflects a masculinist assumption: namely, that it is not necessary to codify protection from physical attack as a human right.¹⁹⁵ He continues by stating that:

[S]ince the norms of refugee law and international human rights were almost exclusively drafted by men, and because men presumed themselves to be independently able to ensure their own physical security there was no need to draft a general right to physical security.¹⁹⁶

In terms of the 1951 UN Convention, then, a refugee can rely on the guarantee provided in article 7(1) of the 1951 UN Convention, which confirms that refugees are to enjoy at least the same treatment as is afforded aliens in general. While we are not able to ground a right to physical safety in the 1951 UN Convention itself, refugees are entitled to the benefits contained in articles 6, 7 and 9(1) of the ICCPR. These are respectively; the right to life, the right to freedom from torture, cruel, inhuman, or degrading treatment and the right to security of the person.

The Human Rights Committee (HRC), the monitoring body of the ICCPR, states that article 6 is the ‘supreme right from which no derogation is permitted, save under exceptional circumstances.’¹⁹⁷ The right to life is not to be understood as only a negative right directed solely at the state, but rather a right that obliges states to take positive measures to ensure it.¹⁹⁸ Article 6

¹⁹⁴ E Mtango ‘Military and Armed Attacks on Refugee Camps’ in G Loescher & L Monahan (eds) *Refugees and international relations* (1989) at 97.

¹⁹⁵ Hathaway *Rights of Refugees* op cit note 186 at 449.

¹⁹⁶ Ibid.

¹⁹⁷ Human Rights Committee *UN General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (2018) at 1 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf, access on 1 February 2020.

¹⁹⁸ Ibid para 63.

is therefore also infringed where the state fails to take appropriate, positive steps to protect persons whose lives are known to be at risk from non-state actors.

Furthermore, the right to freedom from torture, cruel, inhuman or degrading punishment in article 7 of the ICCPR - like the right to life - not only prohibits negative state conduct but requires states to take positive steps to protect everyone under their authority from these risks.¹⁹⁹ However, unlike in the case of article 6, states may never limit this right.²⁰⁰

Next, Hathaway notes that article 9(1), the right to freedom and security of the person, contains the independent duty to take ‘affirmative measures to protect all persons under their authority from attacks against their personal integrity, and perhaps also their property.’²⁰¹ The UNHCR ExCom has stated in no uncertain terms, that states should ‘vigorously’ investigate violations of the personal security of refugees, and institute criminal prosecution where possible.’²⁰²

As such, articles 6, 7 and 9 in their totality provide a ‘relatively sound foundation’ for refugees’ physical security.²⁰³ These rights can therefore be invoked by refugees to require host states to avoid both negative acts and to take positive steps to prevent risks to their physical well-being.

III THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

As seen from the discussion above, the 1951 UN Refugee Convention and its definition of refugee, works to exclude womxn from being conferred refugee status and receiving gender-sensitive treatment. It further does not confer any rights expressly to refugee womxn. However, as seen above, article 5 of the 1951 UN Refugee Convention provides that states may grant refugees additional rights and benefits within its jurisdiction. One such instrument containing further rights, and rights specific to refugee womxn, is the Convention on the Elimination of All Forms of Violence against Women (CEDAW), adopted in 1979. Hence, there is an important

¹⁹⁹ UN Human Rights Committee *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992) available at: <https://www.refworld.org/docid/453883fb0.html>, accessed on 2 February 2020 para 2.

²⁰⁰ *Ibid.*

²⁰¹ Hathaway *Rights of Refugees* op cit note 186 at 458.

²⁰² UNHCR Executive Committee Conclusion No. 72, ‘Personal Security of Refugees’ (1993), available at <https://www.unhcr.org/afr/excom/exconc/3ae68c4314/personal-security-refugees.html?query=conclusion%2072>, accessed on 2 February 2020 para (c).

²⁰³ Hathaway *Rights of Refugees* op cit note 186 at 460.

overlapping interrelationship between international human rights law, which includes CEDAW, and the 1951 UN Refugee Convention.²⁰⁴ The provisions of CEDAW reinforce and complement the international legal protection regime for refugee womxn, especially given of the omission of explicit gender equality provisions in the Refugee Convention.²⁰⁵

In its preamble, CEDAW recognises that despite the various instruments that had already entered into force aimed at protecting the human rights of all peoples, ‘extensive discrimination against women continues to exist.’ It provides that discrimination against womxn violate ‘the principles of equality of rights and respect for human dignity.’²⁰⁶ The treaty is considered the International Bill of Rights for womxn and prohibits discrimination against womxn in all its forms and manifestations, thus, both de jure and de facto.²⁰⁷

Article 1 provides that

‘[d]iscrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’

Furthermore, states who become a party to CEDAW are bound by its core obligations contained in article 2.

The CEDAW Committee, the monitoring body of the Convention, has stated that the objective of CEDAW is the elimination of all forms of discrimination against womxn on the basis of sex.²⁰⁸ As such, it not only prevents states from discriminating against womxn, but it also imposes a positive duty to guarantee the equal rights of men and womxn on all levels of society.²⁰⁹ Therefore, womxn’s fundamental freedoms in the political, economic, social, cultural, civil, domestic and any other field, regardless of their marital status, should be guaranteed on a

²⁰⁴ UN Committee on the Elimination of Discrimination Against Women *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women* (2014) CEDAW/C/GC/32, available at <https://www.refworld.org/docid/54620fb54.html>, accessed on 2 February 2020 at 4.

²⁰⁵ Ibid.

²⁰⁶ CEDAW Preamble.

²⁰⁷ Del Prado ‘The United Nations and the Promotion and Protection of the Rights of Women’ op cit note 62 at 64.

²⁰⁸ UN Committee on the Elimination of Discrimination Against Women *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (2010) CEDAW/C/GC/28, available at <https://www.refworld.org/docid/4d467ea72.html>, accessed 2 February 2020 at 2.

²⁰⁹ Del Prado ‘The United Nations and the Promotion and Protection of the Rights of Women’ op cit note 62 at 65.

basis of equality with men.²¹⁰ The Committee, however, has provided that while the Convention only refers to sex-based discrimination, that on an interpretation of article 1 together with articles 2(f) and 5(a) indicates that the Convention also covers gender-based discrimination.²¹¹ Article 2(f) provides that states should ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against womxn’, while article 5(a) provides that states shall take all appropriate measures to:

‘[M]odify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’

The CEDAW Committee states that the social position of womxn comes as a result of the unfavourable distribution of power and rights which favour men and disadvantage womxn.²¹² They assert that the different positions of womxn and men are affected by political, economic, cultural, social, religious, ideological and environmental factors which can be changed by changing culture, society, and community.²¹³ Regarding the definition of ‘discrimination’ in article 1, the CEDAW Committee points out that any ‘distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by womxn of human rights and fundamental freedoms’ is discrimination, even where discrimination was not intended.²¹⁴ By this, they refer to indirect discrimination which results from identical or neutral treatment which does not recognise the pre-existing gender-based disadvantage and inequality that womxn face.²¹⁵

In terms of article 2 containing the general obligations on states, states are to respect, protect and fulfil womxn’s right to non-discrimination and the enjoyment of equality. The obligation to ‘respect’ refers to a negative duty where states are to refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly lead to the denial of the equal enjoyment by womxn of their civil, political, economic, social and cultural rights.²¹⁶ The obligation to ‘protect’ requires states to take positive

²¹⁰ CEDAW *General Recommendation No. 28* op cit note 208 at 2.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ CEDAW *General Recommendation No. 28* op cit note 208.

measures which will protect womxn from discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the idea of the superiority or inferiority of either sexes and stereotyped roles for men.²¹⁷ As such, article 2 imposes a due diligence obligation on states to prevent discrimination by private actors and are required to take appropriate measures to regulate their activities.²¹⁸ These include the regulation of activities pertaining to education, employment, health policies and practices, working conditions and work standards, housing, and other areas in which private actors provide services or facilities.²¹⁹ Lastly, the obligation to ‘fulfil’ refers to a wide variety of positive measures which states have to take to ensure that womxn and men enjoy equal rights *de jure* and *de facto*, which includes the adoption of temporary special measures, where appropriate.²²⁰ States’ obligations are those of means or conduct *and* those of results.²²¹ These public policies, programmes, and institutional frameworks should be aimed at fulfilling the *specific* needs of womxn, which will lead to the full development of their potential on an equal basis with men.²²²

a) States’ general obligations in terms of CEDAW

The CEDAW Committee asserts that states should understand the scope of their obligations in terms of article 2 through the lens of intersectionality.²²³ The term ‘intersectionality’ was introduced by Crenshaw to indicate how conceptions of antiracist and feminist practices have excluded the experiences of womxn of colour.²²⁴ She argues that by these practices expounding identity as either ‘womxn’ or ‘person of colour’, they ‘relegate the identity of women of colour to a location that resists telling.’²²⁵ By the Committee promoting intersectionality, they acknowledge that discrimination of womxn based on sex and gender is inextricably linked with other factors that affect womxn, such as race, ethnicity, religion, caste, etc.²²⁶ Hence, states have an obligation to legally recognise intersecting forms of discrimination and their compounded negative impact on the womxn concerned and should prohibit them.²²⁷ States should furthermore adopt and implement policies and programmes aimed at eliminating such occurrences, and,

²¹⁷ Ibid at 3.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid.

²²³ Ibid at 4.

²²⁴ Crenshaw ‘Mapping the Margins’ op cit note 20 at 1.

²²⁵ Crenshaw ‘Mapping the Margins’ op cit note 20 at 1.

²²⁶ CEDAW *General Recommendation No. 28* op cit note 208 at 4.

²²⁷ Ibid.

where appropriate, introduce temporary special measures in accordance with article 4 of CEDAW.²²⁸

The core element of the introductory paragraph of article 2 is the obligation of states to pursue a *policy* aimed at the elimination of discrimination against womxn.²²⁹ This policy should be comprehensive and should apply to all fields of life, including those which are not explicitly mentioned in the text of CEDAW.²³⁰ It must apply to the public and private spheres, which includes the domestic sphere, and ensure that all branches of government – executive, legislative and judicial – and all levels of government, assume their respective responsibilities for implementation.²³¹ Importantly, the policy must identify *all* womxn, which includes refugee womxn, within the state party’s jurisdiction as rights-bearers with a particular emphasis on the womxn or groups of womxn who are most marginalized and who may suffer from various forms of intersectional discrimination.²³² The policy should furthermore ensure that womxn, both as individuals and groups, have access to information about their rights under CEDAW, and can effectively promote and claim those rights.²³³ In this regard, states should ensure that womxn are able to actively participate in the development, implementation, and monitoring of the policy.²³⁴ Therefore, resources must be allocated to ensure that human rights and womxn’s non-governmental organizations are well-informed, adequately consulted and generally able to play an active role in the development of the policy.²³⁵

The words ‘without delay’ are indicative of the fact that states should, by all appropriate means, immediately pursue their policy.²³⁶ The language is unqualified and does not allow for any delayed or incremental implementation of its obligations.²³⁷ It follows that a delay cannot be justified on any grounds, including political, social, cultural, religious, economic, resources or other considerations or constraints within the state.²³⁸ States who face resource constraints or

²²⁸ Ibid.

²²⁹ Ibid at 5.

²³⁰ Ibid at 6.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ CEDAW *General Recommendation No. 28* op cit note 208 at 6.

²³⁷ Ibid.

²³⁸ Ibid.

require technical guidance to facilitate the implementation of its obligations under CEDAW should seek international cooperation to overcome these difficulties.²³⁹

Regarding the substantive implications of article 2 contained in subparagraphs a – g, the Committee has stated that states should ensure that the principle of equality between womxn and men and of non-discrimination is enshrined in domestic law with an “overriding and enforceable status.”²⁴⁰ Importantly, refugee womxn are identified as particularly vulnerable to discrimination through civil and penal laws, regulations and customary law and practices.²⁴¹ By acknowledging refugees as particularly vulnerable, the Committee emphasises that a state’s policy should make provision for their vulnerability.²⁴² By ratifying and acceding to CEDAW, states undertake to incorporate its provisions into their domestic legal system or give it otherwise appropriate legal effect within their domestic legal orders in order to secure the enforceability of its provisions at the national level.²⁴³ Subparagraph (b) provides that states parties should ensure that legislation that prohibits discrimination and promotes equality between womxn and men provide appropriate remedies for womxn who have had their rights under CEDAW violated.²⁴⁴ These remedies should include different forms of reparation such as monetary compensation, restitution, rehabilitation and reinstatement, measures of satisfaction such as public apologies, public memorials and guarantees of non-repetition, changes in relevant laws and practices, and bringing to justice the perpetrators of violations of human rights of womxn.²⁴⁵

b) States’ specific obligations to refugee womxn

In General Recommendation 32, the CEDAW Committee aims to provide authoritative guidance as regards the legislative, policy and other measures states should take to comply with their obligations towards refugee womxn.²⁴⁶ The CEDAW Committee asserts that the experiences of womxn during displacement, from asylum to integration and return or settlement in a third country are shaped by the action or inaction of various actors.²⁴⁷ Regardless of the actor, states bear the primary responsibility for ensuring that refugee womxn within their territory and under

²³⁹ Ibid.

²⁴⁰ Ibid at 7.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ UN Committee on the Elimination of Discrimination Against Women *General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women* (2014) CEDAW/C/GC/32, available at <https://www.refworld.org/docid/54620fb54.html>, accessed 2 February 2020 at 1.

²⁴⁷ Ibid at 3.

their effective control or jurisdiction, even if not situated within their territory, are not exposed to violations of their rights in terms of CEDAW.²⁴⁸

The CEDAW Committee further emphasises that states have an express responsibility towards refugee womxn to ensure to them an adequate standard of living which includes assisting in finding them proper, safe²⁴⁹ accommodation, training and/or employment opportunities and to offer language classes and any other measures to facilitate their integration.²⁵⁰ As such, CEDAW offers an additional layer of protection to refugee womxn in respect of their access to proper housing and employment opportunities.

The CEDAW Committee further addresses the fact that harm is often perpetrated against refugee womxn and girls by non-state actors, which include family members, neighbours or society in general.²⁵¹ In such cases, article 2(e) of CEDAW is applicable, as it contains the obligation on states to act with due diligence to ensure that womxn are effectively protected from harm inflicted by non-state actors.²⁵² The Committee states that it is not sufficient for states merely to strive for vertical gender equality, but that they must also ensure that discrimination is prevented at the horizontal level, namely, within the family.²⁵³

Further obligations include the provision of information on refugee womxn's rights and practical information on how to gain access to such services in a language that they understand. States should also be mindful of illiteracy among some refugee womxn and should offer special assistance.²⁵⁴

Furthermore, states should report to the Committee on their national policy and legislation pertaining to refugees and should gather, analyse and make available sex-disaggregated statistical data and trends over time on asylum claims, countries of origin, reasons for seeking asylum and recognition rates.²⁵⁵

Lastly, states should ensure that they allocate adequate human and financial resources for the implementation of CEDAW in respect of refugees, which include gender-related aspects of

²⁴⁸ Ibid.

²⁴⁹ Ibid at 15.

²⁵⁰ Ibid at 9.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ CEDAW *General Recommendation No. 32* op cit note 246 at 11.

²⁵⁵ Ibid at 13.

that implementation, and seek technical advice and assistance as required.²⁵⁶ States are further obliged to cooperate with all UN Agencies, in particular the Office of the UNHCR and civil society and grass-roots NGOs who offer support to womxn asylum seekers and refugees.²⁵⁷ The CEDAW Committee further provides that it is essential for womxn who receive refugee status to receive individual documentation in order to prove their status, be protected from *refoulement* and secure associated rights.²⁵⁸

IV REGIONAL LEGAL FRAMEWORK

Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969

The Organisation of African Unity (OAU) adopted the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Refugee Convention) in 1969.²⁵⁹ It is the only legally binding refugee instrument governing the protection of refugees in the African regional context.²⁶⁰ Its objectives are threefold; to ensure security and peaceful relations among OAU member states; to complement the 1951 UN Convention; and to address the refugee challenges unique to Africa.²⁶¹ As regards the latter, there was a concern that the 1951 UN Convention did not make provision for refugees displaced from countries that were ruled by colonial powers and white racist regimes.²⁶²

The right to seek asylum is complemented by Article 12, para 3 of the African Charter on Human and Peoples' Rights (the Banjul Charter).²⁶³ One of the most important developments introduced by the 1969 OAU Convention is that it expanded the definition of a refugee. The first definition is a reproduction of the 1951 UN Convention's refugee definition,²⁶⁴ and the second constitutes an expansion of the aforementioned definition and provides that:

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid at 14.

²⁵⁹ African Union 'OAU Convention Governing Specific Aspects of Refugee Problems in Africa' available at <https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa>, accessed on 3 February 2020.

²⁶⁰ T Schreier 'The expanded refugee definition' in *Refugee Law in South Africa* (eds) F Khan & T Schreier (2014) at 74.

²⁶¹ J van Garderen & J Ebenstein 'Regional Developments: Africa' in A Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011) at 188.

²⁶² Van Garderen & Ebenstein 'Regional Developments: Africa' op cit note 261 at 188.

²⁶³ '[E]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries an international conventions.'

²⁶⁴ Article 1(1).

[...] the term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’²⁶⁵

There is consensus among commentators that one of the main objectives of the 1969 OAU Convention was to shift from an individualised persecution standard as contained in the 1951 UN Convention, towards a focus ‘on the objective, disruptive conditions in the country of origin that may cause the displacement of persons.’

However, whilst expanding the definition, the 1969 OAU Convention did not include gender as a ground on which to base a claim for asylum. While there are no *travaux préparatoires* for the 1969 OAU Convention²⁶⁶ we are unable to establish the intention of the drafters and do not know the reasons behind the omission. While it succeeded by guaranteeing further protection to those affected by events in the ‘public order’, usually men,²⁶⁷ it did not extend its protection to those in the private sphere, usually womxn. Thus, it is a pity that it did not use the impetus it had to address one form of systemic oppression – namely racism, to address the other related system of sexism.

Lastly, while under the 1951 UN Convention the UNHCR ExCom has developed a collection of soft law through regular ExCom Conclusions on a variety of protection-related topics, such as gender-related persecution, the OAU has failed to develop and clarify its treaty obligations and standards.²⁶⁸

V CONCLUSION

This chapter discussed the international normative framework as it relates to the rights of refugees. It demonstrated how the core refugee document, the 1951 UN Convention, is drafted in a gender-neutral manner and as such, works to exclude asylum-seeker womxn from its protection. It was further shown how refugees’ rights to housing and employment are guaranteed in the 1951 UN Convention and the ICESCR. It was furthermore demonstrated that the 1951 UN

²⁶⁵ Article 1(2).

²⁶⁶ J van Garderen & J Ebenstein ‘Regional Developments: Africa’ op cit note 261 at 188.

²⁶⁷ Ibid.

²⁶⁸ Van Garderen & Ebenstein ‘Regional Developments: Africa’ op cit note 261 at 203.

Convention does not provide for an explicit right against gender-based violence, but that refugees' right to their physical safety is guaranteed by the ICCPR. Lastly, it was shown how the 1969 OAU Convention expanded the 1951 UN Convention's definition of refugee to make provision for persons fleeing persecution from oppressive colonial or racist regimes yet did not include gender as a ground for persecution.

Chapter 3: The South African Normative framework

I INTRODUCTION

This chapter will examine the South African normative framework. It provides an overview of the legal and policy framework relating to refugees' rights to housing, employment and protection from gender-based violence. It starts by discussing the Refugees Act No. 130 of 1998 (Refugees Act) focusing on the definition of 'refugee' and the rights guaranteed to refugees contained therein. The right to access housing is then discussed with reference to the Constitution of the Republic of South Africa, 1996 (the Constitution) and the National Housing Code (the Housing Code). A discussion on the refugees' right to inclusion into the South African labour market follows, with an examination of the relevant legislative provisions and case law. Lastly, the legislative and policy landscape relating to refugee womxn's protection from gender-based violence is examined.

II THE REFUGEES ACT

The treatment of asylum-seekers and refugees in South Africa is governed by the Refugees Act. Section 3 of the Refugees Act provides that refugee status will be granted to a person who:

- a) 'owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable, or, owing to such fear, unwilling to return to it;
- b) Owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- c) Is a dependant of a person contemplated in paragraph (a) or (b).'

Section 3(a) includes the 1951 UN Convention's definition of a refugee and thereby incorporates South Africa's international human rights obligations into domestic law.²⁶⁹ While section 3(a) reiterates the 1951 UN Convention definition of a refugee, it has two distinguishing factors.²⁷⁰ The first is that it contains the ground of 'tribe' as a basis on which to ground a

²⁶⁹ F Khan & J de Jager 'Persecution (acts, agents and grounds)' in (eds) F Khan & T Schreier *Refugee Law in South Africa* (2014) at 57.

²⁷⁰ *Ibid* at 58.

refugee claim. The second is that the Refugees Amendment Act 33 of 2008 (Refugees Amendment Act) has added the additional ground of ‘gender’.²⁷¹ The Refugees Amendment Act came into operation on 1 January 2020.²⁷² This is therefore an indication of the South African legislature developing its domestic law progressively in favour of refugee womxn. This is further in compliance with the recommendation by the CEDAW Committee that, notwithstanding the 1951 UN Convention definition of refugee, that states consider adding gender as an additional ground on which to claim refugee status in their domestic legislation.²⁷³

Section 3(b) is furthermore taken from the 1969 OAU Convention definition of refugee, with the only difference being the addition of the words ‘or disrupting’ public order.

The Refugees Act further states that the Act should be interpreted and applied with regard to the 1951 UN Convention and its 1967 Protocol, the 1969 OAU Convention, the UDHR and ‘other relevant conventions or international agreements’ to which South Africa is, or becomes a party.²⁷⁴ Other conventions include CEDAW, the ICESCR and the ICCPR.

Furthermore, section 27(b) of the Refugees Act guarantees to refugees full legal protection in the country, and that the rights contained in the Bill of Rights of the Constitution apply to them. As such, refugees are entitled to equal treatment and the right to have their human dignity respected as contained in section 9 and 10, respectively of the Constitution. Section 9(3) and (4) guarantees to refugees protection from unfair discrimination, by the state or private actors, on the basis of their ethnic or social origin, while section 10 provides that *everyone* has inherent dignity and the right to have their dignity respected and protected.

The status of international law is stipulated in section 231 of the Constitution. Section 231(2) provides that an international agreement only binds the nation after approval by both houses of parliament, namely the National Assembly and the National Council of Provinces. Furthermore, an international agreement only becomes law in the country once it is enacted into law by national legislation.²⁷⁵

²⁷¹ F Khan & J de Jager ‘Persecution’ op cit note 269 at 58.

²⁷² Government Gazette *Commencement of the Refugees Amendment Act, 2008 (Act No. 33 of 2008)* (2019) available at https://www.gov.za/sites/default/files/gcis_document/201912/42932rg11024p60.pdf, accessed on 2 February 2020.

²⁷³ CEDAW *General Recommendation No. 32* op cit note 246 at 13.

²⁷⁴ Section 6.

²⁷⁵ Section 231(3).

The following section will take a closer look at the rights to housing, employment and protection from gender-based violence contained in the South African legal and policy landscape.

III HOUSING

In South Africa, refugees do not reside in camps with the resultant consequence that housing is one of the most urgent needs when they arrive in the country.²⁷⁶ In most developing countries the UNHCR administers a policy of encampment. The UNHCR ensures that refugees' basic necessities such as food, shelter and health care is provided to them.²⁷⁷ While in developed countries, refugee reception centres assist with refugees' housing needs upon their arrival.²⁷⁸ In South Africa, therefore, refugees arriving in the country are expected to integrate into the local community. Most refugees elect to reside within the urban centre, given that they experience high levels of xenophobia in townships.²⁷⁹

The Refugees Act is silent on refugees' access to housing, save for section 27 which affirms refugees' right to the rights contained in the Bill of Rights, as discussed under II above. However, the Constitution guarantees to both refugees and citizens the right to access adequate housing. Section 26(1) of the Constitution provides that:

- '(1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

The right to access housing is an access right and does not place a duty on the South African state to provide housing on demand.²⁸⁰ The extent of the South African state's positive obligations is dependent on the economic resources available to different sectors of the population.²⁸¹ Refugees with sufficient financial means therefore, have access to housing through the private rental market.²⁸² Thus, should a refugee have the means, they cannot be

²⁷⁶ D Dass, K Ramjathan-Keogh & F Khan 'The socio-economic rights of refugees' op cit note 2 at 222.

²⁷⁷ Ibid at 223.

²⁷⁸ Hathaway 'The Rights of Refugees' op cit note 186 at 480.

²⁷⁹ Greenburg & Polzer op cit note 5 at 9.

²⁸⁰ I Currie & J de Waal 'Socio-economic rights' in (eds) I Currie & J de Waal *Bill of Rights Handbook* at 584.

²⁸¹ Ibid.

²⁸² Dass, Ramjathan-Keogh & Khan 'The socio-economic rights of refugees' op cit note 2 at 223.

denied access to housing because of their status as a refugee.²⁸³ Refugees are therefore able to enter into lease agreements with landlords, and are protected from unfair discrimination based on their right to equality as contained in the Constitution.

While South Africa has identified refugees as a vulnerable group, they have not granted them any preferential rights to housing.²⁸⁴ Currently, public housing programmes do not include non-citizens as benefactors.²⁸⁵ In terms of the National Housing Code (Housing Code) published by the Department of Human Settlements in 2010, access to programmes such as housing subsidies, are restricted to citizens and permanent residents of South Africa.²⁸⁶ The DHA only accepts applications from immigrants (who meet certain conditions imposed by the DHA) who wish to upgrade their informal housing structure and consider these on a case-by-case basis.²⁸⁷ Second, the same category of immigrants will be assisted under the ‘housing assistance in emergency circumstances’ context.²⁸⁸ Therefore, at present, given that refugees are excluded from receiving social housing, they are required to engage the private rental sector for their housing needs.

IV INCLUSION INTO THE LABOUR MARKET

Section 27(f) of the Refugees Act states that refugees are entitled to seek employment. However, the refugee permit that refugees are issued with, contains no express provision indicating that they can work.²⁸⁹ In *Minister of Home Affairs and Others v Watchenuka and Others*²⁹⁰ (*Watchenuka*) the Supreme Court of Appeal (SCA) had to decide whether a prohibition on the right of asylum seekers to work constituted a justifiable infringement to their human dignity. In coming to its conclusion, the court made two important findings: first, it stated that:

‘[...] [W]here employment is the only reasonable means for the person’s support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity

²⁸³ Dass, Ramjathan-Keogh & Khan ‘The socio-economic rights of refugees’ op cit note 2 at 223.

²⁸⁴ Ibid.

²⁸⁵ Greenburg & Polzer ‘Migrant Access to Housing in South African Cities’ op cit note 5 at 4.

²⁸⁶ Department of Human Settlements ‘National Housing Policy and Subsidy Programmes’ (2010) available at <http://policyresearch.limpopo.gov.za/bitstream/handle/123456789/1084/National%2520Housing%2520Policy%2520and%2520Subsidy%2520Programmes.pdf?sequence=1> accessed on 2 February 2020.

²⁸⁷ Ibid at 6.

²⁸⁸ Ibid at 9.

²⁸⁹ Dass, Ramjathan-Keogh & Khan ‘The socio-economic rights of refugees’ op cit note 2 at 224.

²⁹⁰ [2004] 1 All SA 21 (SCA) (28 November 2003).

for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation’²⁹¹

Second, as the prohibition excluded *all* asylum-seekers from working, it found that it: ‘[would] inevitably include amongst those that it affects applicants for asylum who have no reasonable means of support other than through employment. A prohibition against employment in those circumstances is a material invasion of human dignity that is not justifiable in terms of s36 [of the Constitution].’²⁹²

Whilst dealing with asylum-seekers and not refugees, the SCA’s position on the link between the ability to work and human dignity is important and also relevant to the situation of refugees.

Given that section 27(b) of the Refugees Act provides that refugees are entitled to the rights contained in the Bill of Rights, refugees are entitled to fair labour practices as guaranteed in section 23(1) of the Bill of Rights. The Basic Conditions of Employment Act No. 75 of 1997 (BCEA) was enacted to give effect to section 23(1).²⁹³ Section 2 of the BCEA states that its purpose is to ‘advance economic developments and social justice by fulfilling the primary objects’ of the Act; namely, to give effect to the right to fair labour practices by providing for the regulation of basic conditions of employment and, to give effect to South Africa’s obligations in terms of the International Labour Organisation (ILO).²⁹⁴ Section 3 of the Act provides that the Act applies to ‘all employees and employers’ and does not list refugees or foreigners as groups excluded from the protection of the Act. As such, this confirms that the Act applies to refugees.

While section 23(1) and the provisions of the BCEA apply to refugees, the South African courts, however, have imposed certain limitations on refugees’ right to work. In *Union of Refugee Women v The Director of the Private Security Industry Regulatory Authority*²⁹⁵ the Constitutional Court, the highest court in the country, held that it is constitutional to exclude refugees from working in the private security industry. The court came to its conclusion by stating that the trustworthiness of citizens and permanent residents is easier to verify objectively than that of refugees.’²⁹⁶

²⁹¹ *Watchenuka* para 32.

²⁹² *Ibid* para 33.

²⁹³ Introductory note Basic Conditions of Employment Act No. 75 of 1997.

²⁹⁴ *Ibid*.

²⁹⁵ 2007 (4) BCLR 339 (CC) 325.

²⁹⁶ *Watchenuka* para 38.

Therefore, it is evident that refugee womxn have the right to work in South Africa, as well as having the protections of the BCEA. The only limitation on their right to work is that they cannot work in the private security industry.

V PROTECTION FROM GENDER-BASED VIOLENCE

Section 12 of the Constitution provides that everyone has the right to be free from violence, whether it is inflicted by a public or private actor. The section provides that:

- (1) Everyone has the right to freedom and security of the person, which includes the right—
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way
- (2) Everyone has the right to bodily and psychological integrity [...]

This right is extended to *everyone* in South Africa, without distinction, and is therefore granted to refugees.²⁹⁷ The right to equality and non-discrimination as guaranteed in section 9 are related to the right to physical security.²⁹⁸ In South Africa, refugees are at risk of xenophobia, a form of discrimination against foreigners that often gets expressed through violence. The most recent xenophobic attacks flared up in Johannesburg in September 2019, where at least 11 people died.²⁹⁹ The onslaught of xenophobia against refugees has led to a large group of refugees in Cape Town demanding resettlement out of South Africa to a third, safe country. The UNHCR however, have stated that such resettlement is impossible, since resettlement only occurs in certain limited cases for persons with specific needs.³⁰⁰

Whilst refugees are subject to xenophobia, refugee womxn are further at risk of gender-based violence. South Africa has one of the highest rates of violence committed against womxn.³⁰¹ In response to calls from both local and international agencies in the mid-1990s to

²⁹⁷ D Dass, J Klaaren, K Ramjathan-Keogh & F Khan 'The Civil and political rights of refugees and asylum seekers in South Africa' in F Khan & T Schreier (eds) *Refugee Law in South Africa* (2014) at 207.

²⁹⁸ Ibid.

²⁹⁹ J Burke "'We are a target': wave of xenophobia attacks sweeps Johannesburg" *The Guardian* 10 September 2019 available at <https://www.theguardian.com/world/2019/sep/10/we-are-a-target-wave-of-xenophobic-attacks-sweeps-johannesburg>, accessed on 2 February 2020.

³⁰⁰ K Mafolo & S Shoba 'Things Fall Apart in the church of refugees' *Daily Maverick* 16 January 2020 available at <https://www.dailymaverick.co.za/article/2020-01-16-things-fall-apart-in-the-church-of-refugees/>, accessed on 2 February 2020.

³⁰¹ Statistics South Africa 'Crime against women in South Africa' op cit note 10 at 7.

combat violence against womxn, the South African state enacted the Domestic Violence Act.³⁰² The DVA is considered to be the most comprehensive and progressive piece of legislation on the issue of domestic violence.³⁰³ The preamble to the DVA acknowledges that domestic violence is ‘a serious social evil and that there is a high incidence of domestic violence within the South African society.’ The DVA applies to complainants in domestic relationships with respondents who are subject to domestic violence at the hands of such respondent. The DVA empowers complainants to obtain a protection order against the complainant³⁰⁴ and to obtain a warrant of arrest upon the protection order being granted. It does, however, suspend the execution of the warrant subject to the respondent complying with the terms of the protection order.³⁰⁵

A ‘domestic relationship’ is defined by the Act as denoting a relationship between a complainant and a respondent in any of the following ways:

- a) they are or were married to each other, including marriage according to any law, custom or religion;
- b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- d) they are family members related by consanguinity, affinity or adoption;
- e) they are or were in an engagement, dating or customary relationship. including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- f) they share or recently shared the same residence.³⁰⁶

The Act therefore offers protection to persons within a broad range of relationships. Moreover, while primarily offering a civil remedy in the form of a protection order, it also offers

³⁰² Mogale, Burns & Richter ‘Violence Against Women in South Africa op cit note 35 at 583.

³⁰³ P Parenzee, L Artz, K Moulton ‘Monitoring the implementation of the Domestic Violence Act’ (2001) available at https://s3.amazonaws.com/academia.edu.documents/52831531/DVA_Report.pdf?response-content-disposition=inline%3B%20filename%3DMONITORING_THE_IMPLEMENTATION_OF_THE_DOM.pdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIWOWYYGZ2Y53UL3A%2F20200202%2Fus-east-1%2Fs3%2Faws4_request&X-Amz-Date=20200202T192305Z&X-Amz-Expires=3600&X-Amz-SignedHeaders=host&X-Amz-Signature=0e716934c16379cf6fba0cf2edf240c068ce8bec7eb9a862b6283d25ef30aed3, accessed on 2 February 2020.

³⁰⁴ H B Kruger ‘Addressing domestic violence: to what extent does the law provide effective measures?’ (2004) *Journal for Juridical Science* 29(1) at 158.

³⁰⁵ Section 8.

³⁰⁶ Section 1.

a criminal remedy³⁰⁷ by criminalising the breach of the protection order.³⁰⁸ In terms of sections 7 and 17(a) of the Act, should a protection order be violated, an offence is committed and criminal proceedings may be instituted against the respondent.

Furthermore, the DVA contains a broad definition of domestic violence which includes different forms of abuse, stalking, harassment, intimidation and damage to property.³⁰⁹ The DVA further asserts economic abuse as a form of abuse, which allows victims of financial deprivation to rely on the Act.³¹⁰

The DVA moreover addresses the use of firearms and other weapons and states that the court may order the seizure of any arm or dangerous weapon in the possession of the respondent.³¹¹ Furthermore, in terms of section 2, the Act places a specific obligation on SAPS to assist complainants of domestic violence with several matters. Members of SAPS are obliged to inform complainants of the remedies available to them, to assist them to find shelter and to obtain medical treatment. They are also obliged, if reasonably possible to do so, to provide the complainant with a notice containing the information in the official language of the complainant's choice.³¹² Should a police official not comply with any of these obligations, they must be reported to the Independent Complaints Directorate in terms of section 18(4) of the Act.

The DVA, however, is limited in that; one, it only applies to the domestic violence as a specific form of gender-based violence, and two, it is only applicable to persons within the relationships as defined in section 1. Womxn subject to gender-based violence who are not in one of these relationships, or who are affected by another form of gender-based violence such as sexual assault by a stranger, must resort to the South African criminal justice system.

In 2007, South Africa enacted the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA). SORMA repealed the common law offence of rape, and replaced it with an expanded statutory offence of rape.³¹³ Much of the conduct previously criminalised as indecent assault now falls under the definition of rape.³¹⁴ It further repealed the

³⁰⁷ Kruger 'Addressing domestic violence' op cit note 304 at 159.

³⁰⁸ Ibid at 160.

³⁰⁹ Definition of 'domestic violence' Section 1.

³¹⁰ Definition of 'economic abuse' Section 1.

³¹¹ Section 9.

³¹² Section 2(b).

³¹³ Introductory note: Criminal law (Sexual offences and related matters) Amendment Act 32 of 2007.

³¹⁴ K Phelps & D Smyth 'Chapter 2 – Section 3: Rape' in D Smyth & B Pithey (eds) *Sexual Offences Commentary* at 2-1.

common law offence of indecent assault and replaced it with a statutory offence of sexual assault which applies to all forms of sexual violation without consent.³¹⁵ Lastly, it created new statutory offences relating to certain compelled acts of penetration or violation.³¹⁶

SORMA has three objectives: to afford complainants of sexual offences the maximum and least traumatising protection the law can provide; to provide the relevant organs of State with measures that will enable them to give full effect to the Act; and lastly to combat, and ultimately eradicate, the high rates of sexual offences committed in the country.³¹⁷ SORMA states that by promoting the spirit of *batho pele* ('the people first') in respect of service delivery in the criminal justice system, it aims to ensure more effective and efficient investigation and prosecution of perpetrators.³¹⁸ It has done this, the provision continues, by defining existing offences more clearly, and by creating new offences.³¹⁹ It further aims to facilitate a uniform and co-ordinated approach by the relevant Government departments in dealing with sexual offences³²⁰, to entrench accountability for government officials³²¹ and to minimise disparities as regards the provision of services to victims of sexual offences.³²² Smyth notes that these objects reflect a strong commitment by the state to delivering improved services to complainants and to ensure better coordinated responses.³²³ In a country where the vast majority of cases are lost to the system before being heard in court, Smyth continues by asserting that:

'It is really in these new and reinforced institutional mechanisms that we see the potential for an effective State response to sexual violence.'³²⁴

It is only when the state realises the commitment contained in these objectives aiming to established a criminal justice system that is indeed effective, efficient, sensitive, responsive and accountable that its obligation to address sexual violence will be met.³²⁵

Regarding other responses, the President arranged a Summit on Gender-Based Violence and Femicide between 1-2 November 2018.³²⁶ One of the outcomes of the Summit was to

³¹⁵ Introductory note: Criminal law (Sexual offences and related matters) Amendment Act 32 of 2007.

³¹⁶ Ibid.

³¹⁷ Section 2.

³¹⁸ Ibid.

³¹⁹ Section 2(e)(i).

³²⁰ Section 2(e)(iii)

³²¹ Section 2(e)(iv)

³²² Section 2(e)(v).

³²³ D Smyth 'Chapter 1 – Sections 1-2: Definitions and objects' in D Smyth & B Pithey (eds) *Sexual Offences Commentary* at 1-2.

³²⁴ Ibid.

³²⁵ Smyth *Sexual Offences Commentary* op cit note 323 at 1-2, 1-3.

appoint a technical advisory team to draft the content of the National Strategic Plan to combat gender-based violence and femicide (GBVF NSP).³²⁷ Momentum for the GBVF NSP arose from the demands of womxn across South Africa who marched on 1 August 2018, calling for government action on GBV under the banner of #TheTotalShutdown as well as the subsequent call by womxn who attended the Presidential Summit.³²⁸ The GBVF NSP, currently in its draft phase³²⁹, aims to:

‘provide a multi-sectoral, coherent strategic policy and programming framework to strengthen a coordinated national response to the crisis of gender-based violence and femicide by the government of South Africa and the country as a whole.’

The GBVF NSP constitutes the foundation of a ‘10-year national focus on decreasing levels of gender-based violence’ through:

1. Strengthening state and societal responsibility, driven by bold leadership and political commitment;
2. Demanding improved accountability across state and societal institutions to drive an agenda to end GBVF;
3. Making the response to GBVF an integral part of the national effort to combat poverty, unemployment and inequality, and
4. Deepening society’s understanding of GBVF, building partnerships and rooting the response in communities.’³³⁰

The GBVF NSP states that accessible, equitable and quality ‘victim-centred and survivor-focused’ services must be readily available to victims of gender-based violence across the criminal justice, health, educational and social support system and at all levels.³³¹ It further states that currently, it is problematic that there is no comprehensive national, provincial or local database or assessment of existing services, systems and structures to prevent and/ or respond to violence against womxn.³³² Importantly, the GBVF NSP affirms refugee womxn as a group particularly vulnerable to violence because of intersecting vulnerabilities, and provides that they

³²⁶ ‘National Gender-based violence and Femicide Strategic Plan 2020-2030’, 12 August 2019, available at https://www.gov.za/sites/default/files/gcis_document/201909/nspongbfvdraft.pdf, access on 2 February 2020 at 9.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Date on document: 16 August 2019.

³³⁰ South African Government ‘National Strategic Plan on GBVF takes shape’ 24 October 2019 available at <https://www.gov.za/speeches/national-strategic-plan-gbv-f-takes-shape-24-oct-2019-0000>, accessed on 2 February 2020.

³³¹ SA Government ‘National Strategic Plan on GBVF’ op cit note 330 at 63.

³³² Ibid.

require ‘specialised care and support.’³³³ It acknowledges that there are places where basic support services exist, but that they are usually underfunded, not of sufficient quality, and/ or lack trained staff to provide care and support to survivors of GBV. Moreover, the availability and access to such services can be insufficient, uncoordinated or limited in scope and coverage, particularly in respect of womxn subjected to multiple forms of discrimination such as refugee womxn.³³⁴

The GBVF NSP is currently still in its draft phase and South African society is waiting to hear from the Department of Women, Youth and People with Disabilities as well as the President, regarding when it will be accepted.

VI CONCLUSION

This Chapter discussed the South African legal and policy framework as it relates to refugee womxn’s access to housing, the right to work, and protection from gender-based violence. In respect of refugee womxn’s access to housing, it demonstrated that whilst the Constitution guarantees to everyone the right of access to adequate housing, that this right is subject to progressive realisation in accordance with the state’s means. At present, the state has not included refugees as a group who can benefit from social housing schemes and as such, refugees with the necessary financial means, are required to access housing through the rental market.

In respect of the right to work, it was shown that the Refugees Act asserts the right of refugees to work but that the South African courts, while acknowledging its importance for the protection of refugees’ dignity, have imposed a limitation on that right.

Lastly, in respect of refugee womxn’s protection from gender-based violence, it was demonstrated that the Constitution guarantees the right of everyone to physical safety. The state has promulgated the Domestic Violence Act to respond to domestic violence as a form of gender-based violence, and the Sexual Offences Act in order to protect victims of various other forms of violence. The state’s National Strategic Plan to combat gender-based violence and femicide was discussed and it was shown that the Plan contains certain progressive and extensive provisions which, if implemented, will contribute to the eradication of gender-based violence in the South African society.

³³³ Ibid.

³³⁴ Ibid.

Chapter 4: The Position of Refugee Womxn Internationally

I INTRODUCTION

While the majority of refugees are hosted by African states, the rest of the world are also hosts to large numbers of refugees. Over the period 2014 to 2018, the UNHCR, in its mid-term report, provided that the EU experienced a substantial increase and subsequent steady decrease in the number of asylum-seekers arriving within its borders.³³⁵ The region saw a decrease from 1 325 505 persons in 2015 to 609 920 in 2018.³³⁶ While the number of persons claiming refugee status has decreased, the EU is still home to many refugees, with Turkey hosting a total of 3.6 million refugees and the rest of the EU about 2.7 million.³³⁷ The UNHCR has not provided gender-disaggregated data on what proportion refugee womxn make up of the total number of refugees. Regardless, EU member states have a considerable number of refugees on their territory to whom they owe international obligations. The Americas, by mid-2018, were hosts to 664 800 refugees and in 2018, the United States of America (USA), was the state with the highest number of applications for refugee status.³³⁸

As host nations, the EU, USA, and others, have international obligations towards refugee womxn within their territory. While having established the international normative framework in chapter 2, this chapter will now provide an overview of the implementation of the rights of refugee womxn in practice, by investigating their access to housing, employment, and protection from gender-based violence.

II HOUSING

In terms of EU policy, asylum-seekers are entitled to ‘material reception conditions’ which include housing, food, and clothing.³³⁹ However, insufficient reception capacity has been a consistent problem in many different European states.³⁴⁰ This is ascribed to two phenomena: first, many countries are unprepared for the sudden or substantial changes in asylum applications,³⁴¹ and second, given that many asylum-seekers and refugees remain in reception

³³⁵ Aida ‘Housing out of reach? The Reception of Refugees’ op cit note 33 at 8.

³³⁶ Ibid at 9

³³⁷ Ibid at 6.

³³⁸ Ibid at 14.

³³⁹ Ibid at 6.

³⁴⁰ Ibid at 13.

³⁴¹ Ibid at 8.

facilities longer than anticipated due to a lack of access to the private housing market.³⁴² Once an asylum-seeker obtains refugee status, they face severe barriers to move out of reception centres and to secure accommodation. They are often confronted by high rental prices and landlords who are reluctant to rent their property to refugees.³⁴³ For refugees, this often means that they are required to continue residing in emergency accommodation.³⁴⁴

Due to an increase of asylum-seekers in 2015 and 2016, many EU states resorted to emergency accommodation given that their reception systems could not cope with the rapid increase.³⁴⁵ In terms of EU policy, emergency housing allows states to offer different modalities for housing, but provide that it should still provide for basic needs.³⁴⁶ It should also only be used in the most exceptional cases.³⁴⁷ Many states, however, have prolonged their use of emergency facilities.³⁴⁸ Germany, for instance, continued housing 1000 asylum-seekers in emergency shelters at the Berlin airport at the end of December 2018.³⁴⁹ In some states such as France and Italy, emergency housing solutions have steadily become entrenched within its general reception system.³⁵⁰ The conditions at emergency facilities are poor: many are overcrowded, lack hot water and offers a lack of security.³⁵¹ Further, Sansonetti reports that it is more likely for a single refugee womxn to live in a protracted emergency housing situation than her male counterpart.³⁵²

Moreover, refugee womxn's housing affects their ability to feel at home in a society. Freedman notes that in the EU, inadequate accommodation constitutes a primary source of insecurity for refugee womxn.³⁵³ She reports that inadequate accommodation creates new forms of violence against refugee womxn while exacerbating existing forms, such as domestic violence.³⁵⁴ Therefore, she stresses, that in many EU countries refugee womxn's vulnerability to gender-based violence is increased.³⁵⁵

³⁴² Aida 'Housing out of reach? The Reception of Refugees' op cit note 33 at 26.

³⁴³ Sansonetti 'Female refugees and asylum seekers: the issue of integration' op cit note 30 at 21.

³⁴⁴ Ibid at 13.

³⁴⁵ Aida 'The Reception of Refugees and Asylum seekers in Europe' op cit note 33 at 20.

³⁴⁶ Ibid at 19.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid at 22

³⁵² Sansonetti 'Female refugees and asylum seekers: the issue of integration' op cit note 30 at 21.

³⁵³ Freedman "Sexual and gender-based violence against refugee women" op cit note 14 at 5.

³⁵⁴ Ibid at 22.

³⁵⁵ Ibid.

In the USA, the Department of State and the Department of Health and Human Services funds nine refugee resettlement agencies.³⁵⁶ These agencies assist refugees after their arrival in the USA by arranging housing, which includes basic furnishing, and some of the food typical of the refugees' culture.³⁵⁷ Representatives from the resettlement agencies escort refugees to their new homes.³⁵⁸ It was difficult to obtain any information on how the resettlement agencies operate in practice, yet with the Trump Administration curbing back on refugees and immigrants' access to the USA, it is not difficult to assume that the human rights of refugee womxn are not being prioritised.

III INCLUSION INTO THE LABOUR MARKET

Access to the labour market is an essential component of integration into a host society.³⁵⁹

Unemployment leads to isolation, frustration, and a decrease in the sense of belonging in the host country.³⁶⁰ According to the UN Secretary General's High Level Panel Report on Women's Economic Empowerment, two key barriers prevent womxn from doing work; namely, unpaid care work and discriminatory social norms.³⁶¹ As evidenced by the UN Secretary General's Report, labour markets all across the world are divided by gender:³⁶² men are likely to be found working in mining, industry, transport, trade and construction and management³⁶³ while womxn, on the other hand, are found in sectors such as health, teaching, cleaning, cooking, and service.³⁶⁴

In a 2019 report entitled 'Unlocking Refugee Women's Potential' prepared by RescueWorks, the authors provide that while womxn everywhere experience barriers in employment and earnings, refugee womxn face *additional* regulatory, administrative and discriminatory barriers.³⁶⁵ Some of these barriers include that refugee womxn's educational background is not recognised; that they experience negative stereotyping and discrimination; and

³⁵⁶ National Immigration Forum 'Fact Sheet: US Refugee Resettlement' 25 January 2019, available at <https://immigrationforum.org/article/fact-sheet-u-s-refugee-resettlement/>, accessed on 3 February 2020.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

³⁵⁹ Sansonetti 'Female refugees and asylum seekers: the issue of integration' op cit note 30 at 34.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ RescueWorks 'Unlocking Refugee Women's Potential', July 2019, available at <https://www.rescue.org/report/rescueworks-unlocking-refugee-womens-potential>, accessed on 3 February 2020 at 11.

that they possess a limited knowledge of the language of the host country.³⁶⁶ Refugee womxn are therefore concentrated in unskilled, undervalued and low-paying sectors in the informal economy.³⁶⁷ Also known as the ‘secondary labour market’, many refugee womxn are employed in the domestic services sector which includes childcare, care for elderly and household cleaning.³⁶⁸ In this informal economy, jobs are precarious, trade unions provide less support, working conditions are poor³⁶⁹ and career opportunities are limited.³⁷⁰

In many cases, then, refugee womxn are employed at a level that is far below their qualifications and skills. Freedman suggests that this labour segregation affects womxn more than men, who have a greater opportunity for access to a wide range of job opportunities.³⁷¹ This generally has the accompanying consequence of insecure tenure and livelihoods.³⁷² Insecure refugee workers face further challenges arising from limited protection and constraints on their mobility, and their precarious status makes them vulnerable to exploitation and abuse.³⁷³

In the United Kingdom, a report demonstrates that most refugees who are unemployed are womxn.³⁷⁴ One of the barriers refugee womxn face is the fact that they are still considered the family members responsible for the care of the children and of the household. Further, they are also expected to embody all that is left of the culture of origin – childcare, language, and food – thus making their integration pathway into the host society more challenging.³⁷⁵

IV GENDER-BASED VIOLENCE

Sansonetti reports that violence against womxn affects refugee womxn more than any other female population in the world³⁷⁶ and that refugee womxn are particularly exposed to the risk of rape and other forms of sexual abuse.³⁷⁷ Human Rights Watch reports that refugee womxn are exposed to gender-based violence while being held in detention and that in Macedonia, incidents of transactional sex, where womxn are promised that they would be released earlier or that their

³⁶⁶ Sansonetti ‘Female refugees and asylum seekers: the issue of integration’ op cit note 30 at 34.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ RescueWorks ‘Refugee Women’s Potential’ op cit note 365 at 11.

³⁷⁰ Sansonetti ‘Female refugees and asylum seekers: the issue of integration’ op cit note 30 at 34.

³⁷¹ Ibid.

³⁷² RescueWorks ‘Refugee Women’s Potential’ op cit note 365 at 11.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ Ibid at 43.

³⁷⁷ Ibid.

cases would be heard sooner if they had sex with guards, also takes place.³⁷⁸ As mentioned in II above, the insecure living conditions of many refugee womxn create new forms of violence and also exacerbates existing violence, such as domestic violence.³⁷⁹

Furthermore, the underreporting of incidents of gender-based violence is one of the main challenges that states have to deal with.³⁸⁰ Freedman reports that in the EU, survivors generally have no one to report this to.³⁸¹ Refugee womxn are reluctant to talk about their experiences and to testify to gender-based violence.³⁸² Stigma, shame, fear of reprisal³⁸³, mistrust of authorities and the fear of re-victimisation operate as barriers preventing womxn from reporting these. An additional barrier is not knowing the language of the host country.³⁸⁴ Underreporting, therefore, constitutes a major barrier to developing effective policies and programmes to prevent gender-based violence and to provide support to survivors.

V CONCLUSION

This chapter presented an overview of refugee womxn's access to housing, employment, and protection from gender-based violence. It showed how many refugee womxn are unable to obtain security of tenure for themselves as they remain in reception and emergency facilities for longer than anticipated. Further, refugee womxn face several barriers in obtaining gainful employment and are required to work in the informal sector, where they receive less protection. Lastly, it was demonstrated how the insecure living conditions of refugee womxn increase their risk of gender-based violence.

³⁷⁸ Freedman "Sexual and gender-based violence against refugee women: A hidden aspect of the refugee 'crisis'" op cit note 14 at 20.

³⁷⁹ Ibid at 22.

³⁸⁰ Sansonetti 'Female refugees and asylum seekers: the issue of integration' op cit note 30 at 43.

³⁸¹ Freedman Sexual and gender-based violence against refugee women: A hidden aspect of the refugee 'crisis'" op cit note 14 at 23.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid.

Chapter 5: The position of Refugee Womxn in South Africa

I INTRODUCTION

After having considered the position of refugee womxn internationally, this chapter looks at the position of refugee womxn in South Africa. As in the previous chapter, it will focus on the areas of housing, inclusion into the labour market and gender-based violence.

II HOUSING

South Africa does not follow an encampment policy for refugees³⁸⁵ and thus, like South Africans, refugees, in principle, have to choose from housing options located in urban areas.³⁸⁶ In a report published by Greenburg and Polzer for the Forced Migration Studies Programme at the University of the Witwatersrand, it is stated that the most important housing sector for refugees is the private rental market, followed by informal accommodation, with some dependence on NGO-run shelters and public housing.³⁸⁷ It is noted that gender-disaggregated data was not found and that this analysis is thus limited by that fact. However, when looking at the situation of housing for refugee womxn internationally, the same presumptions can be made for the situation in South Africa.

First, as noted above, the private rental market provides accommodation to the majority of refugees in South African cities.³⁸⁸ Greenburg and Polzer report that a reason why refugees elected to access inner-city rental markets with its higher rent as opposed to those in townships is because refugees are exposed to higher levels of xenophobia and are targeted by locals as reasons for crime.³⁸⁹ Refugees gain access to inner-city rental markets primarily through friends, family and other informal social networks located particularly in churches.³⁹⁰ A survey conducted by the New African Cities demonstrates that overwhelmingly, refugees' most common strategy upon first arrival in the city is to stay with friends or family.³⁹¹

The problems refugees experience with their current housing, namely privately rented or sublet accommodation, most refugees report a list of common concerns.³⁹² These include

³⁸⁵ Dass, Ramjathan-Keogh & Khan 'The socio-economic rights of refugees and asylum seekers in South Africa' op cit note 2 at 222.

³⁸⁶ Greenburg & Polzer 'Migrant Access to Housing in South African Cities' op cit note 5 at 3.

³⁸⁷ Ibid.

³⁸⁸ Ibid at 9.

³⁸⁹ Ibid.

³⁹⁰ Ibid at 10.

³⁹¹ Ibid.

³⁹² Ibid.

perceived xenophobic treatment by landlords and neighbours, the threat of eviction for being a foreigner, threat of eviction for not having required documentation and being forced to pay a higher rent because of being a refugee.³⁹³

In particular, the lack of a recognized identity document and language barriers are the most severe barriers encountered in the private rental markets.³⁹⁴ Refugees experience serious hardship attempting to gain access to formal documentation through the Department of Home Affairs (DHA). Even when refugees have the correct documentation, landlords and real estate companies do not acknowledge Refugee and Asylum seekers' permits and require a South African Identity Document to enter into a lease agreement.³⁹⁵ Refugees are therefore necessitated to sub-lease informally, which leaves them vulnerable to exploitation.³⁹⁶ The lack of access to a recognized identity document has the effect that many refugees and asylum seekers are unable to obtain formal employment or work for a consistent income.³⁹⁷ This means that they cannot satisfy the requirements to enter into a formal contract of lease with a landlord, or to pay the security deposit and monthly rent.³⁹⁸

It is thus evident that refugees' housing situation is accompanied by high levels of volatility.³⁹⁹ The difficulties faced by refugees as listed above, contribute to what Greenburg and Polzer describe as 'a common housing story of constant displacement and movement from one temporary, precarious housing situation, to the next.'⁴⁰⁰ Data from Greenburg and Polzer's study suggests that the mean for all refugees interviewed for the number of residential moves since coming to Johannesburg was 7.5 times and that only 13.1 % of the respondents expected to be living in the same place within the next two years.⁴⁰¹ This instability does not allow refugees to lead a meaningful existence in South African cities, and as such, does not contribute to successful integration into South African society.

³⁹³ Greenburg & Polzer 'Migrant Access to Housing in South African Cities' op cit note 5 at 10

³⁹⁴ Ibid.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ Ibid at 11.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid at 11 – 12.

IV INCLUSION INTO THE LABOUR MARKET

In a 2018 report prepared by the Institute for Security Studies, the author demonstrates how migrant womxn are concentrated in unskilled and undervalued sectors.⁴⁰² These include domestic, care work and agriculture.⁴⁰³ Migrant womxn are furthermore less likely to be employed than their male counterparts and are necessitated to engage in precarious forms of informal employment, which often leads to exploitation and abuse.⁴⁰⁴ Moreover, refugee womxn often work in secluded environments which exacerbates their vulnerability to physical and sexual violence.⁴⁰⁵ Furthermore, they do not have access to information about their labour rights.⁴⁰⁶ This leads to workplace abuse by employers and other employees and makes refugee womxn powerless to report incidents as they are afraid of losing their job.⁴⁰⁷

In a 2019 study focusing on the career development processes of refugee womxn in South Africa undertaken by Nyabvudzi and Chinyamurindi, it was found that refugee womxn focused on short-term survival as opposed to the long-term, where a career path is envisioned.⁴⁰⁸ Refugee womxn aim to acquire and fulfil their physiological needs namely, food, shelter, and security, instead of being focussing on a long-term career path.⁴⁰⁹ The authors demonstrate that a potential explanation for what they call a ‘short-term survivalist mentality’ could be attributed to a language barrier.⁴¹⁰ Refugee womxn find it challenging to speak English, and an increased challenge to speak indigenous South African languages.⁴¹¹ As a result of this barrier, refugee womxn decide or are forced to remain in jobs with little or no career progression.⁴¹²

Moreover, the language barrier can lead to unemployment. In Nyabvudzi and Chinyamurindi’s study, the majority of refugee womxn reported that they could not obtain employment because of their limited English proficiency and low level of formal education when

⁴⁰² Mbiyozo ‘Gender and migration in South Africa’ op cit note 6 at 12.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ T Nyabvudzi and W T Chinyamurindi ‘The career development processes of women refugees in South Africa: An exploratory study’ *SA Journal of Industrial Psychology* (2019) 45(0) at 5.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid at 6

⁴¹¹ Ibid.

⁴¹² Ibid.

arriving in South Africa.⁴¹³ However, even those womxn whose language proficiency have improved and those who have obtained formal qualifications, struggle to gain entry into the labour force reporting that they get turned down for positions because of their refugee status.⁴¹⁴

Refugee womxn are thus focussed on survival and are employed in jobs that can meet their short-term physiological needs. Their short-term focus is mostly as a result of constraints beyond their control. These constraints place a limit on their ability to enact career choices, even though the desire for a long-term career exists.

Certain structural constraints also affect refugee womxn's career trajectory.⁴¹⁵ One of the most stressful structural issues expressed by refugee womxn is xenophobia. Xenophobia affects refugee womxn's career development for a few reasons; first, locals view refugees as a threat to their economic security by "stealing" their jobs. Second, some employers are unaware of refugees' legal status and are reluctant to employ refugees because of their documentation.⁴¹⁶ Xenophobia, therefore, affects refugee womxn's vocational as well as their personal lives, which in turn disrupts their integration process.⁴¹⁷

V GENDER-BASED VIOLENCE

During September 2019, thousands of South Africans protested against the government's failure to act against the onslaught of violence against womxn.⁴¹⁸ The protests were held after what has been called the deadliest month for violent crimes against women that the country had ever seen.⁴¹⁹ However, the country has been a dangerous place for womxn for a very long time. During her visit to South Africa in 2015, the UN Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa reports that:

'The violence inherited from apartheid still resonate profoundly in today's society dominated by deeply entrenched patriarchal norms and attitudes towards the role of women and which makes

⁴¹³ Ibid.

⁴¹⁴ Nyabvudzi and Chinyamurindi 'The career development processes of women refugees in South Africa' op cit note 408 at 6.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ R L Francke 'Thousands protest in South Africa over rising violence against women' 5 September 2019, available at <https://www.theguardian.com/world/2019/sep/05/thousands-protest-in-south-africa-over-rising-violence-against-women>, accessed on 3 February 2020.

⁴¹⁹ Ibid.

violence against women and children, especially in rural areas and in informal settlements, a way of life and an accepted social phenomenon.⁴²⁰

In South Africa, between 1 April 2014 and 31 March 2015, 99 in every 100 000 people were sexually assaulted.⁴²¹ Out of fear of stigmatisation, however, womxn don't always report this to the authorities. It is reported that only 1 in 4 womxn report incidents of sexual violence. Memela and Maharaj argue that in the case of refugee womxn, the number of actual cases is much higher.⁴²² The UN Special Rapporteur on violence against women supports this conclusion and states that refugee womxn face an increased risk of being victims of gender-based violence in South Africa.⁴²³ Moreover, the Institute for Security Studies reports that refugee womxn are at heightened risk for gender-based violence in their host country, particularly if they are not accompanied by a man.⁴²⁴ Furthermore, refugee womxn living in unstable housing situations with strangers are exposed to an increased level of gender-based violence.⁴²⁵

The Institute for Security Studies further reports that displacement often disrupts gender norms and increases or introduces new pressures for both refugee men and womxn.⁴²⁶ Men are often not able to provide for or meet the expectations of their families and womxn may be expected to work for the first time.⁴²⁷ This is the case for a refugee community in Albert Park, in Durban, South Africa. The Refugee Social Service (RSS) developed many empowerment programmes for refugee womxn. However, it did not develop such programmes for refugee men. As such, refugee womxn obtained employment and became the heads of their households, while men were unemployed and spent most of their time at home.⁴²⁸ Memela and Maharaj found that men's unemployment and womxn's economic empowerment contribute to domestic violence.⁴²⁹ This is due to men lose their bargaining power to control household economic decisions which threaten traditional gender roles in the family structure.⁴³⁰ Men may feel a sense of inadequacy or

⁴²⁰ 'Report of the Special Rapporteur on violence against women' op cit note 3 at 3.

⁴²¹ Memela & Maharaj 'Refugees, Violence and Gender' op cit note 51 at 430.

⁴²² Ibid.

⁴²³ Report of the Special Rapporteur on violence against women op cit note 3 at 5.

⁴²⁴ Mbiyozo 'Gender and migration in South Africa' op cit note 6 at 11.

⁴²⁵ Ibid.

⁴²⁶ Ibid at 13.

⁴²⁷ Ibid.

⁴²⁸ Memela & Maharaj 'Refugees, Violence and Gender' op cit note 51 at 435.

⁴²⁹ Ibid at 434.

⁴³⁰ Ibid.

loss of control which can lead to an increased risk of domestic violence;⁴³¹ namely, they may resort to violence to gain their power back as the authoritarian head of the household.⁴³²

The UN Special Rapporteur furthermore reports that South Africa's criminal justice system contains serious shortcomings in its response to violence against womxn.⁴³³ One of these shortcomings is that when womxn seek help from SAPS, SAPS turns them down and tells them to return to their abusive partners. She further notes that many police officers treat rape survivors badly, and do not always believe them.⁴³⁴ In the case of refugee womxn who are at a heightened risk of gender-based violence, police behaviour is even more discriminatory which leads to secondary victimization of refugee womxn.⁴³⁵ But the picture is bleaker; in the 2018/2019 Independent Police Investigative Directorate (IPID) Report, 124 incidents of rape by a police officer were reported.⁴³⁶ This paints a grim picture in that the state machinery at the forefront of the fight against crime, are at the same time co-perpetrators of gender-based violence.

A recent study focusing on Congolese refugee womxn's experience with rape found that most womxn interviewed had escaped the Democratic Republic of the Congo (DRC) after being gang-raped, and have found them in South Africa, where they have been raped once again, or are at a continuous risk of being raped.⁴³⁷ One womxn states that: [t]o survive in South Africa has meant enduring violence and abuse without recourse through local, state and international actors.'⁴³⁸ Another refugee womxn reported an account of a man who assisted her and other refugees by taking them to the DHA to obtain asylum-seeker permits.⁴³⁹ On the way, however, he took her to his house and only spoke English, which she could not understand.⁴⁴⁰ He then took her to a room and raped her.⁴⁴¹ Another womxn told the authors about being kidnapped, held, and raped by South African men in Parow. She was walking home from church and a car chased her. This was the second attempt these men have made to catch her; the first time she

⁴³¹ Mbiyozo 'Gender and migration in South Africa' op cit note 6 at 13.

⁴³² Memela & Maharaj 'Refugees, Violence and Gender' op cit note 51 at 434.

⁴³³ Report of the Special Rapporteur on violence against women op cit note 3 at 17 -18.

⁴³⁴ Ibid at 18.

⁴³⁵ Ibid.

⁴³⁶ Independent Police Investigative Directorate 'IPID Annual Report 2018/2019 Financial Year' available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/IPID_Annual_Report_201819_FULL.pdf, accessed on 3 February 2020 at 46.

⁴³⁷ Alfaro-Velcamp & McLaughlin 'Rape without remedy: Congolese refugees in South Africa' op cit note 53 at 11.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid at 10.

escaped to a Somali spaza store.⁴⁴² She recognised the driver and reported the incident to the police; however, they did not follow up.⁴⁴³ This incident indicates the extent to which SAPS fails refugee womxn, and substantiates the claim made by the Special Rapporteur.

VI CONCLUSION

This chapter presented an overview of refugee womxn's access to housing, employment, and protection from gender-based violence in South Africa. It showed how many refugee womxn are unable to access housing, as rental prices are high and because they are confronted with discrimination in the housing sector. Further, it was shown how refugee womxn are predominantly employed in the informal economy, and that they do not have the opportunity to focus on a long-term career path since they are focused on meeting their most basic needs first. Lastly, it was demonstrated how refugee womxn have an increased risk of gender-based violence in the South African society, and that acts of gender-based violence perpetrated against them generally go unpunished.

⁴⁴² Alfaro-Melcamp & McLaughlin 'Rape without remedy' op cit note 53 at 10.

⁴⁴³ Alfaro-Melcamp & McLaughlin 'Rape without remedy' op cit note 53 at 10.

Chapter 6: Recommendations

I INTRODUCTION

From the discussion in Chapter 4 and 5 above, one can distil certain trends regarding refugee womxn's access to housing, employment, and protection from gender-based violence in practice. These are that refugee womxn experience insecure living conditions which increase their risk to gender-based violence; they are employed in the informal economy primarily engaged in work which is undervalued, and that their status as refugees increases their vulnerability to gender-based violence.

With specific reference to the barriers identified within the South African context, this chapter will provide recommendations for reform to the South African state response to the protection of refugee womxn. The recommendations aim to address the gaps identified in legislation, policy, and practice, and while being specific to each focus area, namely, housing, employment, and protection from gender-based violence, overlap may occur.

II HOUSING

As stated before, South Africa does not follow an encampment policy and refugees therefore mainly live in the urban centres of cities among local communities. Most refugees stay with friends and family or rent from the private rental market to ensure their housing needs. Currently, however, they are unable to apply for social housing subsidies, as the National Housing Code (Housing Code) expressly excludes refugees. South Africa's international and domestic obligations are clear; it should progressively achieve the realisation of the right to access adequate housing to *everyone* in the country, without discrimination. Since precarious housing situations exacerbate refugee womxn's risk to gender-based violence and therefore leads to long-term social costs for the government, it is in the government's best interest to take seriously the unsatisfactory housing situation of refugees in South Africa. As such, this paper agrees with the recommendation put forward by Greenberg and Polzer⁴⁴⁴ and suggests that the National Department of Housing include refugees as a specific category of legal migrant who can access housing subsidies and other benefits.

Moreover, decisions about refugees should not be made without them. It is therefore recommended to the Department of Provincial and Local Government and Local Government

⁴⁴⁴ Greenburg & Polzer 'Migrant Access to South African Cities' op cit note 5 at 1.

Authorities that refugee womxn and refugee organisations are included in discussions and planning for transitional and subsidized housing programmes.

Furthermore, as refugees are currently largely dependent on the private rental market, this paper agrees with the recommendation of Greenburg and Polzer⁴⁴⁵ that the Department of Provincial and Local Government and Local Government Authorities should develop programmes aimed at educating landlords regarding renting to documented refugees and penalise those landlords who abuse refugees.

As refugees' permits are not always accepted or understood in practice, it is suggested that the Department of Home Affairs conduct educational programmes aimed at local government authorities and the Department of Housing regarding the recognition of refugees' permits.

The majority of South Africa's refugee womxn are from other African countries that have fled violent conflicts.⁴⁴⁶ As many of the conflicts refugees have fled have not ceased, refugee womxn will most likely stay in South Africa for a very long time.⁴⁴⁷ As such, the South African state cannot continue its current housing policy which does not recognise refugees as legitimate claimants to social housing. To achieve the successful integration of refugee womxn in society, and as such, to offer them the opportunity to develop their full human potential, the state needs to make provision for refugees in their national housing policy.

IV INCLUSION INTO THE LABOUR MARKET

From the literature considered, the three main issues refugee womxn face in respect of their access to employment is; first, the informal and undervalued nature of jobs; second, that they are not in a position to focus on long-term career goals and are forced to focus on short-term survival instead; and three, that they are seriously affected by xenophobia.

The state must take measures to disrupt the current division of labour which sees refugee womxn over-concentrated in the domestic sector, or private sphere, at the exclusion of men. The state should develop and implement programmes aimed at securing the rights of all womxn employed in this sector.

⁴⁴⁵ Greenburg & Polzer 'Migrant Access to South African Cities' op cit note 5.

⁴⁴⁶ Khan 'Local Integration of Urban Refugees in South Africa' op cit note 1 at 2.

⁴⁴⁷ Ibid.

In respect of refugee womxn's inability to plan for a long-term career, the state must respond to the factors forcing them to focus on their short-term survival. The issues raised by refugee womxn relate to housing (already discussed in III above), food, and security (which are related to gender-based violence as discussed below). The other major barrier is refugee womxn's inability to speak English, or indigenous South African languages. Competence in the English language furthermore facilitates a refugee's integration into the wider community.⁴⁴⁸ Currently, NGOs are the only organisations offering English classes to refugees in South Africa. The Scalibrini Centre of Cape Town (Scalibrini) offers specialised English language classes for refugees in South Africa.⁴⁴⁹ They charge an R 300 fee for enrolment into the class. Another organisation is offering free English classes to refugee womxn is the Turquoise Harmony Institute, an interfaith organisation whose aim is to pursue tolerance among people who come from different backgrounds.⁴⁵⁰

With the literature indicating that command of the English language is important to refugees' inclusion into the labour market, the onus of offering language classes cannot solely be on NGOs. The state should ensure that language classes are made available to refugee womxn through collaboration with universities and other places of learning.

South Africa is facing a xenophobia crisis.⁴⁵¹ This paper has demonstrated that xenophobia impacts refugee womxn's employment prospects and that it is generally a social problem that pervades all aspects of refugees' lives. Unlike racism, xenophobia is currently not regarded as a crime in South Africa.⁴⁵² Those arrested during xenophobic violence are not charged with the crime of xenophobia, but with the associated common law crimes such as assault, looting, and destruction of property.⁴⁵³ As such, this paper is of the view that the state requires a coherent response to the xenophobic crisis in which it finds itself.

⁴⁴⁸ Home Office Development and Practice Report 'Indicators of Integration: final report', 2004, available at <https://webarchive.nationalarchives.gov.uk/20110218141321/http://rds.homeoffice.gov.uk/rds/pdfs04/dpr28.pdf>, accessed on 3 February 2020 at 4.

⁴⁴⁹ Scalibrini Centre of Cape Town 'English School' available at <https://scalibrini.org.za/service/english-school/>, accessed on 3 February 2020.

⁴⁵⁰ Turquoise Harmony Institute 'Language conversation classes for refugee and migrant women' available at <http://turquoise.org.za/develop/2019/02/04/language-conversation-classes-for-refugee-and-migrant-women-in-south-africa/>, accessed on 3 February 2020.

⁴⁵¹ Burke "'We are a target': wave of xenophobia attacks" op cit note 299.

⁴⁵² T Masuku 'Xenophobia, like racism, must be treated as a crime' 25 September 2019, available at <https://issafrica.org/iss-today/xenophobia-like-racism-must-be-treated-as-a-crime>, accessed on 3 February 2020.

⁴⁵³ Ibid.

A step in this direction was signalled with the Prevention and Combating of Hate Crimes and Hate Speech Bill (the Hate Crimes and Hate Speech Bill) B9-2018. The Bill criminalises the commission of an act motivated by prejudice or intolerance towards someone on the basis of their ethnic or social origin as well as nationality, migrant or refugee status.⁴⁵⁴ When the Bill becomes enacted, this conduct will be punishable.⁴⁵⁵ Unfortunately, the Bill collapsed in the fifth Parliament which closed in March 2019.⁴⁵⁶ However, the Minister of Justice and Constitutional Development, Ronald Lamola, committed to the revival of the Bill as a priority among the government's efforts to criminalise hate crimes.⁴⁵⁷

It is therefore recommended that the state acts in accordance with its commitment to achieving the constitutional promise that South Africa belongs to all who live in it⁴⁵⁸, and finalises the Hate Crimes and Hate Speech Bill.

V GENDER-BASED VIOLENCE

South Africa has responded to gender-based violence in three ways; first, by the promulgation of the Domestic Violence Act; second, by the promulgation of the Sexual Offences and Related Matters Act and third; with the drafting of the National Strategic Plan on Gender-based Violence and Femicide. Yet, despite these legislative and policy initiatives, violence against womxn is continuing at alarming rates. The 2016/2017 Victims of Crime statistical release reports that 250 out of every 100 000 womxn were victims of sexual offences compared to 120 out of every 100 000 men.⁴⁵⁹ In the same period, the South African Police Service statistics reported that 80% of the reported sexual offences were rape.⁴⁶⁰ Statistics South Africa (Statistics SA) estimates that 68.5% of the victims of sexual assault were womxn.⁴⁶¹ Moreover, the 'crude estimate' of the number of womxn raped per 100 000 is 138.⁴⁶² Statistics SA report that this figure is among the

⁴⁵⁴ Section 3 Prevention and Combating of Hate Crimes and Hate Speech Bill (the Hate Crimes and Hate Speech Bill) B9-2018.

⁴⁵⁵ Masuku 'Xenophobia, like racism, must be treated as a crime' op cit note 452.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid.

⁴⁵⁸ Preamble of the Constitution.

⁴⁵⁹ Statistics South Africa 'Crime against women in South Africa' op cit note 10 at 8.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

highest in the world and that for this reason South Africa has been labelled as the ‘rape capital of the world.’⁴⁶³

Mogale, Burns, and Richter argue that while the DVA and SORMA exhaustively provide for what constitutes violence against womxn and offer detailed strategies on how state departments should address violence against womxn, the Acts do not ‘provide strategies that take into consideration or counter cultural, social, and economic factors as the forces within which violence against womxn is embedded.’⁴⁶⁴ They group the limitations and gaps of the two acts into themes which include the following: one; governance and legal responsibilities, and two; prevailing culture and attitudes.⁴⁶⁵

Regarding the area of governance and legal responsibilities, the state expressed its commitment to combat violence against womxn in its various forms with the passing of the two acts mentioned, as well as with the establishment of the Ministry for Women, Children, and Persons with Disabilities in 2009. However, despite their commitment, violence against womxn is still widespread. Mogale, Burns, and Richter recommends that the Ministry for Women, Children, and Persons with Disabilities coordinate a major stakeholders’ forum that should be tasked to explore in detail the relationships among the barriers to effective implementation of the acts and provide possible solutions to address them.⁴⁶⁶ The GBVF NSP also recognises that the legal framework should be strengthened.⁴⁶⁷ Regarding the DVA, it recommends that domestic violence should be defined as a criminal offence, and that annual reporting of the number of police cases of domestic violence should be mandated.⁴⁶⁸ It further states that the monitoring and evaluation of state programmes aimed at addressing violence against womxn should improve.⁴⁶⁹ Similarly, the CEDAW Committee, in its most recent concluding observations to South Africa in 2011, recommends that the state establish mechanisms of accountability aimed at ensuring the implementation of the DVA and SORMA.⁴⁷⁰

⁴⁶³ Statistics South Africa ‘Crime against women in South Africa’ op cit note 10 at 8.

⁴⁶⁴ Mogale, Burns and Richter ‘Violence Against Women in South Africa’ op cit note 35 at 582.

⁴⁶⁵ Ibid at 588.

⁴⁶⁶ Ibid.

⁴⁶⁷ ‘National Gender-based violence and Femicide Strategic Plan 2020-2030’ op cit note 10 at 30.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ UN Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women - South Africa*, 16 December 2011, CEDAW/C/ZAF/CO/4, available at: <https://www.refworld.org/docid/4eeb5fbe2.html>, accessed 3 February 2020 at 6.

Next, regarding cultural and traditional attitudes regarding womxn, Mogale, Burns, and Richter recommend that children be educated about the appropriate treatment and respect for the rights of womxn, and that violence is unacceptable and punishable by law.⁴⁷¹ The CEDAW Committee recommends that the state should raise public awareness by way of the media and educational programmes, on the fact that all forms of violence against womxn are a form of discrimination under CEDAW, and as such, is a violation of womxn's rights.⁴⁷² This paper agrees with these recommendations, and further encourages the state to conduct these campaigns through an intersectional feminist approach, and educate children and the broader public on the rights of refugee womxn.

Regarding the commencement of the GBVF NSP, on 3 September 2019, members of parliament were informed by the Department of Women, Youth, and People with Disabilities, that it does not have the budget to implement the GBVF NSP.⁴⁷³ Moreover, on 19 November 2019, a joint meeting involving various Portfolio and Select Committees from the National Assembly and the National Council of Provinces took place to discuss the progress made concerning the development of the GBVF NSP.⁴⁷⁴ During the meeting, however, it became apparent that the documents members had been sent in preparation of the meeting did not correspond with the documents being presented at the meeting.⁴⁷⁵ There was furthermore a lack of attendance by the lead departments responsible for implementing the GBVF NSP.⁴⁷⁶ As such, the meeting was postponed until a later date.⁴⁷⁷ The date has not yet been confirmed. Organisations have called upon President Cyril Ramaphosa's government to implement the GBVF NSP.⁴⁷⁸ These events are demonstrative of a lack of political will by the government to

⁴⁷¹ Mogale, Burns and Richter 'Violence Against Women in South Africa' op cit note 35 at 591.

⁴⁷² CEDAW *Concluding observations* op cit note 470 at 6.

⁴⁷³ Lawyers for Human Rights 'LHR on Announcement that there is no money for state plan on violence against women', 2019, available at <https://www.lhr.org.za/news/2019/press-release-lhr-announcement-there-no-money-state-plan-violence-against-women>, accessed on 3 February 2020.

⁴⁷⁴ Parliamentary Monitoring Group 'National Strategic Plan on Gender-Based Violence and Femicide, with Minister (postponed), 19 November 2019, available at <https://pmg.org.za/committee-meeting/29359/>, accessed on 3 February 2020.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Sonke Gender Justice 'Sonke Gender Justice is calling on the South African government to implement a fully-funded national strategic plan to combat gender-based violence' 5 September 2019, available at <https://genderjustice.org.za/news-item/sonke-gender-justice-is-calling-on-the-south-african-government-to-implement-a-fully-funded-national-strategic-plan-to-combat-gender-based-violence/>, accessed on 3 February 2020.

ensure that the necessary financial and other resources are allocated for the implementation of the GBVF NSP.⁴⁷⁹

This paper recommends that the state implement the GBVF NSP in order to protect all womxn in South Africa and ensure remedies for the violation of the rights of victims of gender-based violence. It should allocate adequate financial resources in its annual budget, which is due to be delivered by the Minister of Finance on 26 February 2020.⁴⁸⁰ By doing so, it will act in compliance with its international obligations and specifically the obligation contained in CEDAW, which is that states are to develop a policy aimed at the elimination of all discrimination against womxn. When implementing the GBVF NSP, it should do so by keeping the special circumstances of refugee womxn in mind.

IV CONCLUSION

This chapter provided recommendations to the South African state regarding refugee womxn's access to housing, inclusion into the labour market and protection from gender-based violence. In the context of housing, it showed that the state should include refugees as a group with the legal right to access public housing. Further, the South African state should secure the rights of all womxn employed in the domestic sector, offer English classes, and implement the Hate Crimes and Hate Speech Bill. Lastly, the state should implement the National Strategic Plan on Gender-based violence and femicide and allocate the required financial resources to do so.

⁴⁷⁹ Lawyers for Human Rights 'LHR Announcement' op cit note 473.

⁴⁸⁰ SARS 'Budget' available at <https://www.sars.gov.za/About/SATaxSystem/Pages/Budget-Speeches.aspx>, accessed on 3 February 2020.

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