Limiting State competence to counter structural violence:

(Im)permissibility of arrest and detention of undocumented asylum seekers during the South African asylum application process

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DECLARATION

I, Nasreen Solomons, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

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ABSTRACT

South Africa has the competence to regulate the entry and stay of asylum seekers in the country, and to introduce measures of arrest and detention in asylum applications. It enacted the Refugees Act in 1998, which gave effect to its international law obligations in terms of the three specific international and regional refugee law conventions: the 1951 UN Convention Relating to the Status of Refugees, the 1967 UN Protocol relating to the status of refugees and the 1969 OAU Convention governing the specific aspects of refugee problems in Africa. It committed to providing meaningful protection to displaced persons who fled their home countries out of force and need. A key part of this commitment is to provide displaced persons seeking asylum with documentation to regularise their stay in the country. This study is concerned with South Africa's treatment of undocumented asylum seekers. South Africa's commitments in terms of the Act and to its international law obligations have been undone by its current legal framework and practices. Of particular importance is not only the State's failure to protect undocumented asylum seekers from arrest and detention through meaningful assistance during the application process, but also its preference to keep them in a state of being undocumented and therefore vulnerable to arrest and detention. The recent Refugees Amendment Act 11 of 2017 introduced measures that make it easier to arrest and detain undocumented asylum seekers, creating a precarious environment for those most in need of protection during the asylum application process. The study argues that the 2017 amendments (legal framework) and implementation (practices) create an untenable environment for undocumented asylum seekers and amounts to State structural violence. This finding of structural violence can never be permissible in international and constitutional law; therefore, South Africa's competence to introduce measures of arrest and detention in asylum applications must be limited. To respond to the structural violence, any approach formulated and applied must centre the rights and needs of this underserved group and guarantee positive steps are taken to undo structural violence. The study therefore puts forward standards to the limitation of South Africa's competence to regulate arrest and detention in the asylum application process. These standards may form a basis for a new legal and practical framework that centres the rights and needs of undocumented asylum seekers, protects them more substantively, and brings the State into compliance with its international and constitutional obligations.

LIST OF ACRONYMS

ACHPR	African Charter of Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
D-G	Director-General
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECG	Eastern Cape Division of the High Court, Grahamstown
ECHR	European Court of Human Rights
ECP	Eastern Cape Division of the High Court, Port Elizabeth
GNP	North Gauteng Division of the High Court, Pretoria
GSJ	South Gauteng Division of the High Court, Johannesburg
HRC	Human Rights Committee
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LHR	Lawyers for Human Rights
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
RAA	Refugee Appeals Authority
RAB	Refugee Appeals Board
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SAFLII	Southern African Legal Information Institute
SAPS	South African Police Services

SCA	Supreme Court of Appeal
SCRA	Standing Committee on Refugee Affairs
WCHC	Western Cape Division of the High Court
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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I INTRODUCTION

"*We the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity."*[1]

a) Background

The right to seek asylum is grounded in international law. With its foundations rooted in the 1951 Convention Relating to the Status of Refugees,[2] there was universal recognition that war-time efforts displaced people in droves and required the assistance of another State to provide protection. This created a universal right to asylum, and that States were to respect and protect this right (if they assumed this obligation by signing and ratifying the Convention). The provisions of the 1951 Convention were extended by the 1967 UN Protocol,[3] and 1969 OAU Convention.[4] South Africa used these Conventions and Protocol to create its domestic refugee law. In 1998, South Africa promulgated the Refugees Act[5] which remains the central legislation regulating the lives of asylum seekers in South Africa. In *Somali Association of South Africa and Others v The Refugee Appeal Board and Others*[6] the Court recognised the need to protect asylum seekers in the current climate:

> International television news channels and other media regularly feature images of refugee crises unfolding in many parts of the world with the attendant human cost. A relatively recent stark image of the body of a three year-old toddler on a Turkish beach, after fleeing from war in Syria, springs to mind. The skepticism, to which State authorities and decision-makers are sometimes prone in relation to applications for refugee status, should be tempered by what is set out above and by the obligations of countries embodied in international instruments. [sic]

The Refugees Act provides that asylum seekers entering South Africa are required to approach a Refugee Reception Office ('RRO') to formally apply for asylum. The Refugees

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[1] Constitution of the Republic of South Africa, 1996, Preamble.

[2] United Nations Convention relating to the status of refugees, 1951.

[3] United Nations Protocol relating to the status of refugees, 1967.

[4] Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa, 1969.

[5] Refugees Act 130 of 1998.

[6] (Case no 585/2020) [2021] ZASCA 124 (23 September 2021) at 1.

Act has since been amended by the Refugees Amendment Act[7] ('the Amendment Act'), which is much more restrictive in the protection it affords asylum seekers.

At the start of 2011, there were six functioning RROs throughout the country where asylum seekers could lodge new applications and access services. As such, persons entering the country seeking asylum had to find their way to one of these six RROs for assistance. New asylum applicants often did (and still do) so with extremely limited funds; alone; with little to no knowledge of the English language; and after having made a difficult journey to South Africa seeking protection. Since 2012, however, the Department of Home Affairs ('the Department') closed three of the six RROs it established – Cape Town, Johannesburg, and Gqeberha (Port Elizabeth). Each one of these closures was the subject of litigation, with the courts finding that each decision to close an office was unlawful and ordered to re-open.[8] These closures have greatly restricted an already limited number of service points for asylum seekers.

The most recent court decision regarding the closure of a RRO was the 2017 matter of *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others.*[9] The Supreme Court of Appeal ('SCA') reviewed the decision by the Director-General ('D-G') of the Department to close the Cape Town RRO and held it to be unlawful. The D-G's decision was thereby set aside and the respondents were ordered to re-open the RRO by 31 March 2018 to new asylum applicants. The Cape Town RRO currently only functions to serve existing asylum seekers applicants whose applications were originally made in Cape Town and is therefore effectively closed as it does not receive new applications. The RRO in Gqeberha and Johannesburg have also been ordered to reopen to new asylum applicants. Since the litigation, the Gqeberha office recently re-opened to new applicants; however, Johannesburg and Cape Town remain closed at the time of writing.[10]

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[7] Act 11 of 2017.

[8] For the closure of the Port Elizabeth office: *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* 2015 (3) SA 545 (SCA); Johannesburg: *Consortium for Refugees and Migrants in South Africa and others v Minister of Home Affairs and others* (14 December 2011) North Gauteng, Pretoria Division; Cape Town: *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 (4) SA 125 (SCA).

[9] 2018 (4) SA 125 (SCA), hereinafter '*Scalabrini Centre*'.

[10] Department of Home Affairs Presentation: Opening of Refugee Reception Offices Presentation to Home Affairs Portfolio Committee (20 September 2022) available at: *https://pmg.org.za/committee-meeting/35586/* accessed on 21 November 2022 p 4.

New asylum seeker applicants were turned away when they approached non-operational RROs to make an application; and asylum seekers who had made their initial application in another city were refused assistance. In the latter instance, the asylum seekers must return to the city in which their original application was made in order to be assisted, whether with the renewal of their visas or the processing of their claims.[11] This meant that asylum seekers would have to travel between two and 12 times a year,[12] at great cost to them, in order to receive assistance which they have a statutory right to receive.[13] Often, asylum seekers would not be in a financial position to travel to another city. As a result, their visas would expire, or they would be staying in South Africa without any lawful documentation. In both instances, asylum seekers would be considered undocumented. Being undocumented makes them vulnerable to arrest and detention due to circumstances created by no fault of their own, the purposes of which is deportation. It also affects access to the rights to education, health and work.[14]

The Department's decision to close RROs, and the very limited way the offices operate, has had extremely prejudicial consequences for asylum seekers. In its 2019 report titled *Living in limbo,* Amnesty International made the following observations about the context of service provision, which affect undocumented asylum seekers: turning asylum seekers away at RROs; requesting travel documents or proof of country of origin; renewal length and appeal delays; late renewal fines; lack of explanation and interpretation; flawed decisions and delays; an insurmountable backlog and institutional xenophobia.[15]

Furthermore, within the RROs, these offices are not adequately staffed, with complaints of long queues, unnecessary bureaucracy and corruption; and an application process that takes longer than the envisaged 6 months[16] (and often up to 12 years) before receiving an

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[11] *Scalabrini Centre* at 43.

[12] Asylum seeker visas are valid for periods ranging between one month and six months. As a result, asylum seekers would have to travel to the city where they made their application, if it is not Cape Town, anywhere from twice a year to 12 times a year. It is dependent upon the number of months for which their permit is valid. See also: *Scalabrini Centre* SCA judgment; *Ntumba Guella Nbaya & Others v Director-General of Home Affairs & Others* (6534/15) Western Cape High Court.

[13] Refugees Act, section 22(3).

[14] Amnesty International Living in limbo: Rights of asylum seekers denied (2019) Available at: https://www.amnesty.org/download/Documents/ AFR5309832019ENGLISH.PDF Accessed on 30 November 2022 p 12.

[15] Amnesty International *Living in limbo* pp 11-20.

[16] As per the information publicly provided by the Department at: Department of Home Affairs 'Service standard' *Refugee status and asylum* available at *http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum* accessed on 21 November 2022.

outcome.[17] With all of these, and more socio-economic, xenophobic, psychological and emotional issues facing asylum seekers entering and staying in South Africa, there is the additional threat of arrest and detention for having an expired visa or no visa at all.

According to the Department's website, there are now only five cities containing RROs: Gqeberha; Cape Town; Tshwane (Pretoria); Musina; and Durban, with only four operating fully to assist all asylum seekers.[18] As an example of the need for working RROs to assist undocumented asylum seekers, Cape Town was the second busiest RRO in the country after Tshwane. In its first four months of opening, it received 5946 applications, which equated to about 1500 applications per month; and 52 666 applications for extensions of section 22 permits (as they were termed then) in the same period. In the reasons given by the D-G, he stated that the RRO's facilities were inadequate to service the number of clients who would need assistance, which only highlights the necessity of the office. Therefore, if a RRO is necessary, 'it can never be a rational response to close down the existing office, and then do nothing to find alternative premises.'[19]

The consequences, and effects of closing these offices for asylum seekers is one example of the difficulties they face during the application process that often makes it extremely difficult to: a) make an application for asylum in South Africa, and thus have documentation authorising and regulating their stay; b) timeously renew; and c) be issued a further visa in the event of loss or destruction. Lack of access to services is a fundamental challenge to possessing a valid visa that continues to authorise and regulate their stay in South Africa. What is most concerning is that the inhibited access is known and, I argue, to be a concerted effort on the part of the Government to continue the untenable situation.

The already-limited landscape of service provision was aggravated by the COVID-19 pandemic. In its submission to the Portfolio Committee on Home Affairs dated 13 September 2022, Lawyers for Human Rights ('LHR') provided its recent observations on arrest and detention of asylum seekers. When the RROs were closed during the pandemic, the organisation received several requests from new asylum seekers who were detained at

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[17] *Scalabrini Centre* at 41, discussing the delay in adjudicating applications for asylum, that applicants who had made application had not received an outcome until 2013.

[18] Department of Home Affairs *Refugee Centres* available at: *http://www.dha.gov.za/index.php/contact-us/refugee-centres* accessed on 14 November 2022.

[19] *Scalabrini Centre* at 39.

Lindela Repatriation Centre ('Lindela') despite expressing their intentions to apply for asylum. At that point, there was no online system for submitting new applications, and the online renewal system did not provide for new applications either. With the aid of LHR, asylum seekers were released "and given an opportunity to apply for asylum but they were given no level of protection that they would not be arrested again pending the reopening of the RROs."[20] The online system of renewal has its own challenges as well. LHR reported to the Portfolio Committee that asylum seekers were being arrested because their visas renewed online were said to be invalid on presentation to an arresting officer.[21] As identified by LHR, this is evidence of the Department's failure to communicate its decisions in a timely and widespread manner.[22] LHR drew these conclusions through its work at its law clinics and monitoring efforts.

It is the threat of arrest and detention of undocumented asylum seekers that is the subject of this thesis. This threat plays out in the 'context of service provision' which refers specifically to the legal framework and its implementation (as set out above). This context, the thesis argues, amounts to structural violence because of the way it treats (willingly and knowingly) undocumented asylum seekers, where 'structural violence involves a social structure that produces, maintains, and amplifies inequitable life chances.'[23] Here, the focus of the structural violence is the inclusion of arrest and detention in the context of asylum applications. It is argued that it is necessary to concentrate on the *nature* of asylum seekers as an underserved community and to centre their lived experiences. Asylum seekers are underserved given that they had to flee their home countries and by the way they are treated in South Africa. The focus is the structural violence embedded in the practical and legal context. Accepting that asylum seekers are an underserved group, and that laws and practice of arrest and detention amount to structural violence, the thesis analyses whether and how to limit South Africa's competence (legal ability) to include arrest and detention in the application process considering this. 'State competence' refers to 'the inherent powers of a

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[20] Lawyers for Human Rights Briefing by lawyers for human rights on statelessness ins South Africa, re-opening of refugee reception offices and processing of documentation for refugees and asylum seekers, and trends on arrests and detention of migrants (13 September 2022) available at: *https://static.pmg.org.za/220920LHR_submission_to_the_PC_Home_Affairs_Sep_2022.pdf* accessed on 16 November 2022 pp 14-16.

[21] LHR Briefing to Parliament 2022 14-16.

[22] LHR Briefing to Parliament 2022 14-16.

[23] Danieal Dominguez, Belinda Hernandez-Arriaga et al 'They treat us like we are not human: Asylum seekers and "La Migra's" violence' (2022) 12(4) *Psychology of Violence* vol 241-251at 242.

sovereign state to regulate and forbid entrance to foreigners into its borders or admit them on such conditions as it may see fit to prescribe.'[24] The assessment is made considering South Africa's obligations in international law and constitutional law.

b) Rationale for proposed research

The use of arrest and detention is to regulate irregular entry or stay in countries, with a purpose of deterring irregular migration or applying for asylum.[25] The thesis grapples with whether South Africa's current legislative and practical scheme regulating arrest and detention of undocumented asylum seekers is permissible in international law and constitutional law. That is, ought South Africa to have the ability to regulate the reception and stay of asylum seekers within its borders, which regulation includes arrest and detention? The assessment is necessary given the current context of service provision. The research focuses on the following categories of undocumented asylum seekers: a) expired visas but which has not been withdrawn; b) new asylum applicants who do not yet have a visa; and c) not in physical possession of a visa. These categories form part of the asylum application process as set out in this thesis.

The paper flows from the fundamental premise that asylum seekers are an underserved community facing structural violence in South Africa. Their position in society is made vulnerable at a community level – being an asylum seeker; and an individual level – persons making up the community with their own individual experiences of discrimination and stigma. It is from this fundamental premise that legislation and policy centring this underserved community must be created and align with international law obligations and constitutional imperatives. Failure to do so would perpetuate structural violence, particularly where laws and practice deny rights realisation and enjoyment. It is intuitively impermissible to arrest and detain undocumented asylum seekers, especially where this situation arises by no fault of their own.

The research embarks on a thorough analysis of the current legislative scheme and its purpose. It methodically analyses whether it is legally permissible, in international law and constitutional law, to arrest and detain undocumented asylum seekers. It attempts to be a

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[24] *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA) at 7.

[25] UNHCR 'Beyond detention: A global strategy to support governments to end the detention of asylum seekers and refugees 2014-2019' (2015) 27(2) *International Journal of Refugee Law* 375-389 at 375.

holistic source of information on this topic that may be a point of reference, thus advancing the current body of work relating to it. Based on the findings within a set conceptual and theoretical framework, the study will set standards against which laws and practices ought to be measured to establish whether State competence must be limited. I argue that these standards can be generally applicable to other underserved communities, and related laws and practices that infringe on rights.

c) Research question

The question this thesis considered and answered is:

> *In centring the rights and needs of undocumented asylum seekers, is it legally permissible, in international law and South African constitutional law, to include arrest and detention of undocumented asylum seekers in the asylum application process where such amounts to structural violence; and how can State competence to do so be limited considering its legal impermissibility?*

d) Research methodology

Evidence was gathered using doctrinal research comprising of a systematic review and focused review concerning the arrest and detention of undocumented asylum seekers during the asylum application process. The systematic review was of the current legal framework (international law, constitutional law and refugee law); and all available case law discussing the topic, directly or indirectly. It also comprised a focused and defined review of the literature available on the specific topic of arrest and detention of undocumented asylum seekers.

Systematic reviews are considered best practice where authors seek to establish the 'feasibility, appropriateness, meaningfulness or effectiveness of a certain treatment or practice'.[26] They also assist to identify any gaps, trends or deficiencies in the collected evidence. This was to assist with and inform future research and interventions on the topic. The systematic review was framed by an intersectional, decolonial and interdisciplinary conceptual framework for analysis and findings throughout the thesis.

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[26] Zachary Munn, Micah DJ Peters, Cindy Stern et al. 'Systematic review or scoping review? Guidance for authors when choosing between a systematic or scoping review approach' (2018) 18 *BMC Medical Research Methodology* 143 p2.

The first aspect of the research, the legal framework, was conducted to include a review of refugee law in international law and its introduction into South African law. This was to understand the legal principles underpinning the Refugees Act, and to understand the amendments made to it by the Amendment Act. This required a comparative analysis between what South Africa envisioned and initially embarked upon with its refugee law framework, to what it has become in law and practice. This begins the analysis as to whether arrest and detention is permissible in the legal framework.

The second aspect was the systematic review of the case law. This set out the jurisprudence and legal analysis of South Africa's legal obligations to respect, protect, promote and fulfil the rights of undocumented asylum seekers. The body of jurisprudence gave further meaning to the provisions of the Refugees Act. It also assisted greatly to understand the amendments made to the refugee law framework by the Amendment Act. This estimation and the legal framework analysis points unequivocally to an approach by the Department that can only be perceived as structural violence. The full methodological approach to the case law analysis and findings is set out in chapter 4 below.

Lastly, the thesis adopted a focused review of literature. It limited itself to secondary sources that spoke *specifically* to the topic of arrest and detention of undocumented asylum seekers in South Africa. It was intentional in excluding sources with wider topics, and so to understand the body of research on the specific issue and the gaps therein.

e) Outline and structure of the thesis

The thesis is divided as follows according to their content:

Chapter 1: Introduction

Chapter 2: Interpretive principles, which includes a literature review which guided interpretation of the evidence gathered.

Chapter 3: The international and constitutional law, and domestic refugee law framework governing arrest and detention of undocumented asylum seekers.

Chapter 4: Jurisprudence on the arrest and detention of undocumented asylum seekers.

Chapter 5: The limitation on State competence and the features thereof, to ensure that arrest and detention are no longer part of the asylum application process.

Chapter 6: Conclusion

f) Conclusion

It is the hope that this thesis will not only be a point of reference on this topic, but that it guides practitioners, state actors and organisations assisting arrested and detained undocumented asylum seekers. This thesis does not exist merely in the abstract but has been written with a view to playing a role in law and practice. Arrest and detention of undocumented asylum seekers fundamentally contradicts the objectives for which the legal regime was established to assist asylum seekers, and amounts to the rights violations of an inherently underserved community.

II INTERPRETIVE PRINCIPLES: ANALYSING STRUCTURAL VIOLENCE IN ASYLUM APPLICATIONS

"[…] intersectional analysis places power at the centre, analysing not what makes people vulnerable but taking a broader approach to conceptualising how power hierarchies and systemic inequalities shape their life experiences."[27]

a) Introduction

It is necessary to establish from the outset that with which the thesis is concerned and that with which it is not. This establishes the parameters of the thesis. It goes to South Africa's competence to regulate a specific component of the asylum application process – to include arrest and detention in the process. This process is implemented by the Department, and the laws and practices of arrest and detention created and meted out by the Department are the subject of this study to limit State competence.

First, as discussed by Goodwin-Gill and McAdam,[28] 'state competence' is the legal ability of a State to detain non-nationals pending their removal or decisions on their entry into a State's territory.[29] It is a principle adopted in international law alongside the right to seek asylum. South Africa's Refugees Act is derived from the international law obligations it has ratified. State competence therefore operates within refugee law, both international and domestic, to regulate arrest and detention of undocumented asylum seekers. Using this principle adopted in international law, this thesis springboards from that to analyse whether the South Africa *ought to have* the competence to arrest and detain undocumented asylum seekers in terms of its international law obligations and constitutional law provisions. Once answered in the negative, the study assesses the standards set for, and features of, limiting State competence.

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[27] M Lokot & Y Avakyan 'Intersectionality as a lens to the COVID-19 pandemic: Implications for sexual and reproductive health in development and humanitarian contexts' (2020) *Sexual and Reproductive Health Matters* 28(1) 40-43 at 42.

[28] Guy S Goodwin-Gill & Jane McAdam *The refugee in international law* 3rd ed (2007) Oxford University Press, New York.

[29] Goodwin-Gill & McAdam *The refugee in international law* p 462.

Second is the meaning of 'structural violence'. The nature and manner in which State officials empowered to arrest and detain undocumented asylum seekers exercise this power amounts to structural violence. Artero and Fontanari[30] describe structural violence as:

> In relation to the human rights issue, structural violence consists of a gap between the actuality of de facto rights and potential and de jure rights: when economic, social and judicial structures limit an individual's agency to the extent that fundamental human needs cannot be met.

Structural violence in the South African context speaks to the abuse of State power to arrest and detain in law and practice. The State and its officials are inherently more powerful in the balance of power between State representatives and asylum seekers. Asylum seekers are dependent on the laws and practices of the State to receive assistance and the enjoyment of their fundamental rights. To do or act otherwise exacerbates the already vulnerable position of asylum seekers in society and opens them up to further rights violations and stigma within State and institutional structures.

Third is the meaning of 'application process'. The view adopted is that it begins the moment an asylum seeker presents at a State's borders. Inherent to this are two elements: physical presence at a border and an intention to apply for asylum. Asylum seekers experience a range of constraints in successfully accessing the formal procedure of the application. These are language barriers, lack of knowledge about where to seek assistance, physical barriers as to where and how to access RROs, and no understanding of the legal and practical landscape for lodging a formal application, among others. Intention, therefore, must be understood within the context in which it applies. It cannot be a simple verbal expression, but a mental state as well. As circular as it may seem, but is in fact interlinked, is that the intention element is deduced from the physical presence at the border. Why present after fleeing if one does not intend to apply for asylum? These are the two elements for the application process.

The presence at a border is not restricted to formal ports of entry only. The entry into South Africa other than through ports of entry is grounds for arrest and detention in terms of the current legal framework. As the study adopts a wide approach to the application process

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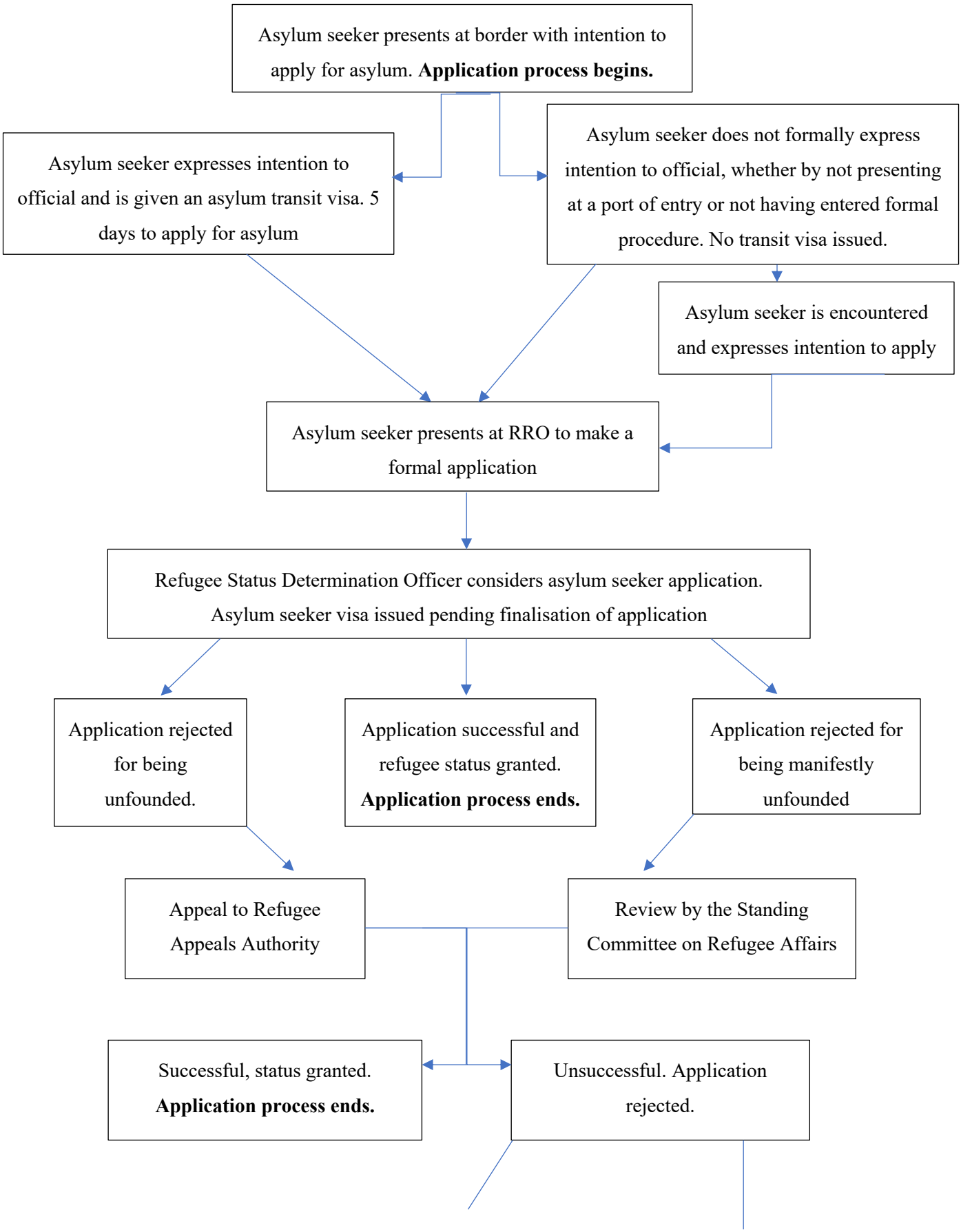
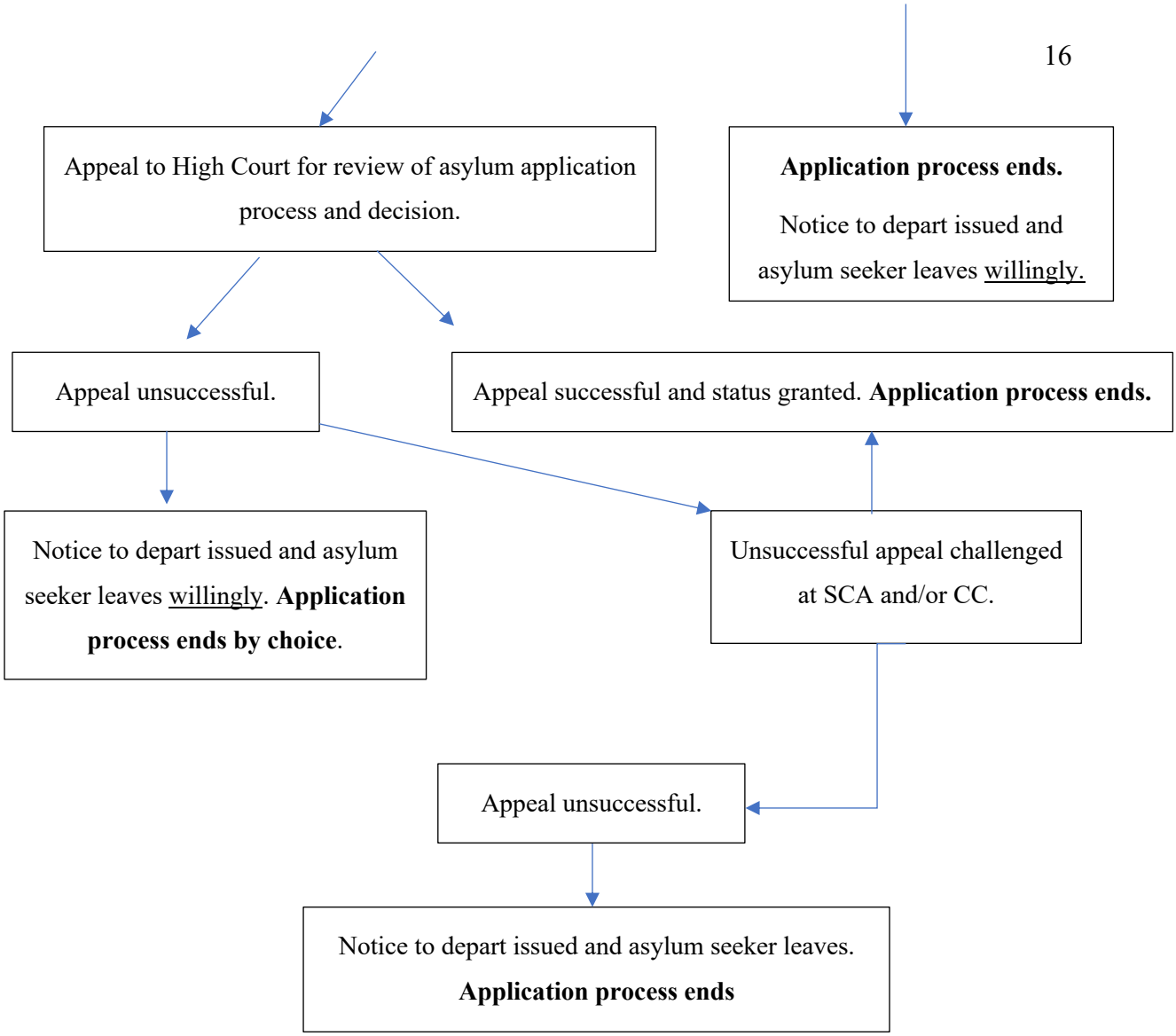
[30] Maurizio Artero and Elena Fontanari 'Obstructing lives: local border and their violence in the asylum field of post-2015 Europe' (2021) 47 *Journal of Ethnic and Migration Studies* 631-648 at 634.

and one that seeks to limit State competence, it necessarily adopts a wide view that protects those who enter the country illegally. This view is in line with jurisprudence, discussed further in chapter 4 below. Though presence is not the beginning of the *formal* process (lodging a formal application) at a RRO, it is the practical start to the process. The asylum seeker makes the necessary inroads to begin the process of formal documentation which is the tangible manifestation of regularising their status in the country. This status, it is argued, exists over and above the formal legal process because prior to entering the formal process is when an asylum seeker is most vulnerable. As such, the study focuses on the arrest and detention of *undocumented* asylum seekers *during* the asylum application process, which begins when presenting at a border wherever that may be. The application process exists from this point until its end. The complete application process, as argued by the thesis, is as follows. At any given point during this process until its finalisation can an asylum seeker be undocumented:

Figure 1:

Asylum application process



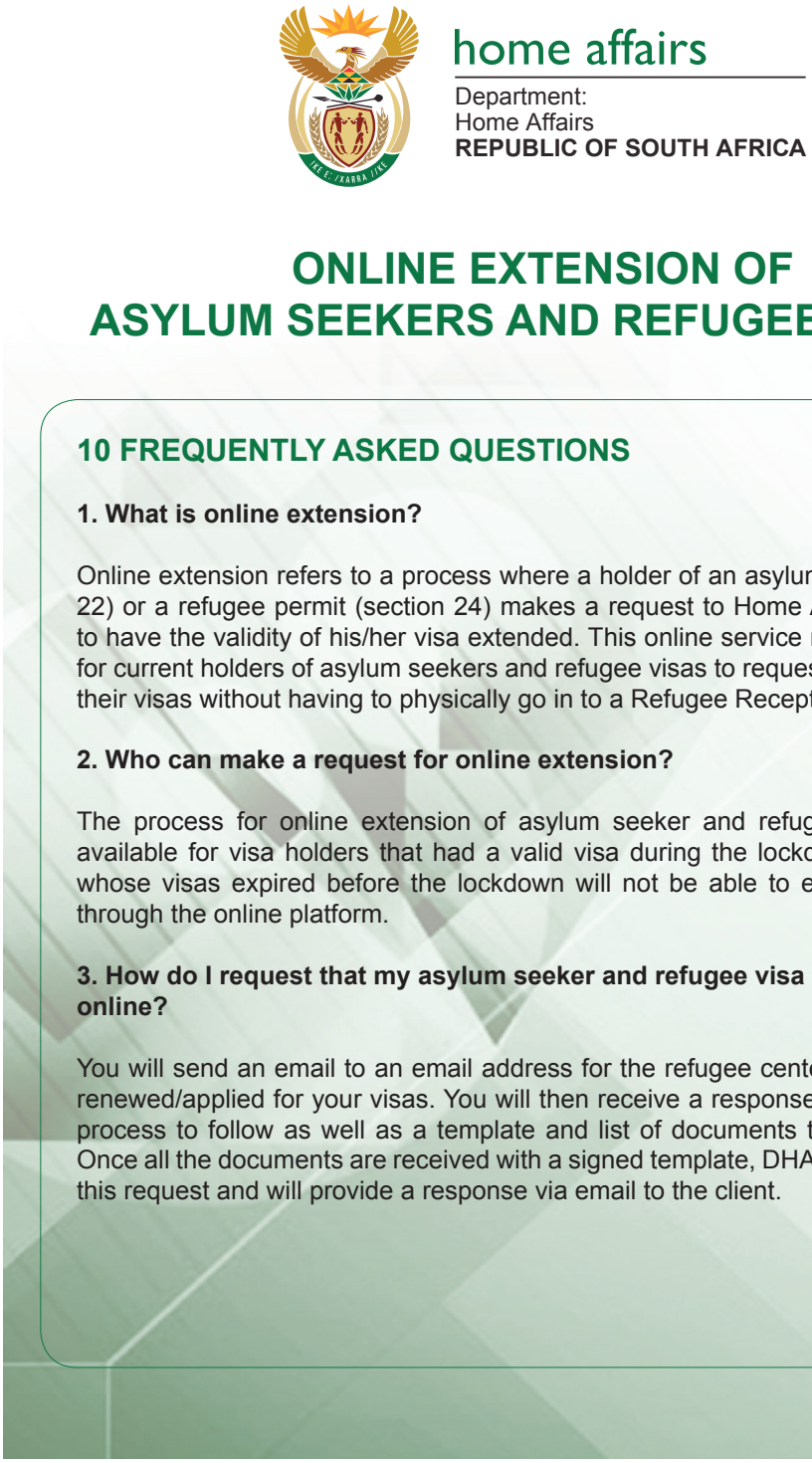


Fourth is the meaning of 'undocumented'. It refers to three different categories: new applicants; applicants in possession of an expired visa; and applicants who are not in physical possession of their visa. New applicants are those asylum seekers who have yet to begin the formal legal process of applying for asylum and receive documentation. The second category of undocumented asylum seekers are those persons who have made an application, been issued with an asylum visa, but the visa has expired. The final category are those who applied, were issued a visa but were not in physical possession of it. This could be due to the visa being lost or destroyed, or not carried by the person at the time of encountering a Department official. In all three categories the asylum seekers have not yet reached the end of their application process, which is to issue them with a final decision to leave the country or grant refugee status. The decision issued to leave the country must come after *all legal processes* challenging the decisions made to reject the claim for asylum have been exhausted. The processes, as indicated in Figure 1, include legal proceedings of appeal and review. Conversely, the thesis is not concerned with persons who have received a final decision in

terms of their asylum seeker application; have been issued with a ‘must-leave’ order by the Department of Home Affairs; and who can then be detained in terms of the Immigration Act for the purposes of ensuring their deportation. During and due to the COVID-19 pandemic the working RROs closed and did not service asylum seekers. This rendered all asylum seekers undocumented and open to arrest and detention for being undocumented. The Department did, however, develop a new process for the renewal of asylum visas, but this was not without its limitations or problems. The process is set out in the FAQs made available on the Department’s website. This is captured in Figure 2 below. In sum, the process is burdensome, tedious, and only available to those who had a valid visa during the period of lockdown (therefore those whose visas expired before lockdown were ineligible):

Figure 2:

FAQs for online renewal system[31]



[31] Department of Home Affairs *Online extension of Asylum Seeker and Refugee Visas* (19 May 2021) available at: dha.gov.za/index.php/notices/1441-online-extension-of-asylum-seekers-and-refugees-visas and *http://www.dha.gov.za/images/PDFs/FAQs_Asylum_21.pdf* accessed on 02 November 2022.

4. What documents do I need to request online extension?

To request for online extension for an asylum seeker and refugee visa a client will need to submit the following documents:

- A signed* template that has
(1) visa number
(2) full names and surname
(3) full contact details - email address, cell numbers, physical address
**the signature on the template must be the same as the one on the existing or expired visa*

- Proof of physical address (utility bill or an affidavit confirming address)

- A copy of the current visa. If the visa is lost, the client must submit an affidavit confirming that the visa is lost and indicate the previous visa reference number.

Note: *The template must be completed for each applicant. Please ensure that the information submitted on the template is correct. The writing on the template must be very clear, free of errors and must be legible. If the writing is not clear or legible it will be sent back to complete again.*

5. Where do I send this request?

Request for extensions must be sent to the refugee reception office where the last extension was done.

Refugee Reception office	Asylum Seeker (section 22) visas	Refugee (section 24) visas
Desmond Tutu Refugee Reception Centre	dtrrc.extension22 @dha.gov.za	dtrrc.extension24 @dha.gov.za
Cape Town Refugee Reception Centre	ctrrc.extension22 @dha.gov.za	ctrrc.extension24 @dha.gov.za
Durban Refugee Reception Centre	durbanrrc.extension22 @dha.gov.za	durbanrrc.extension24 @dha.gov.za
Musina Refugee Reception Centre	musinarrc.extension22 @dha.gov.za	musinarrc.extension24 @dha.gov.za
Gqeberha (Port Elizabeth) Refugee Reception Centre	perrc.extension22 @dha.gov.za	perrc.extension24 @dha.gov.za

6. Can my spouse and dependents request extensions of their visas using one form?

In cases where a family has a joint file, each family member must submit their request for extension separately. This means that if there is more than one family member, each family member must submit their own request filing in a new template. Please note that you are may use the same email address. Minors will have their requests signed by the principal applicant.

The signature on that request template must be the same as the one on the existing/ expired visa.

7. What possible outcomes will I get from my request?

There are three possible outcomes for a request for online extension of an asylum seeker and refugee permit:

1. A PDF visa - if the request has been filled-in correctly and complies with all the requirements, the Department will evaluate the request and if successful will email a valid visa that the client can print and use as a new and valid asylum seeker and refugee permit. The visa will be encrypted.

2. Letter requesting additional information - if the request is incomplete, an email will be sent back to the requester asking for additional information to be sent to the department via email. The request will not be processed until all information and documents are submitted.

3. Letter requesting you to appear in person at a RRO - if the request cannot be processed online and requires that the requester to appear in person at a RRO, a letter stating this will be sent. This letter will provide such person with the office name, date and time of their appointment.

8. How can the validity of my visa be confirmed?

A person or organisation that wants to verify the validity of a visa that was issued online may email the Department. The email addresses for verifications are outlined at the bottom of the visa.

Requests for verifications can be sent via email to:

REFUGEE CENTRE	VERIFICATION EMAIL ADDRESSES
Desmond Tutu Refugee Reception Centre	asmverifications@dha.gov.za
Cape Town Refugee Reception Centre	verification.ctrro@dha.gov.za
Durban Refugee Reception Centre	verification.durban@dha.gov.za
Musina Refugee Reception Centre	verification.musina@dha.gov.za
Gqeberha (Port Elizabeth) Refugee Reception Centre	verification.perro@dha.gov.za

9. How much will this service cost me?

The Department of Home Affairs offers this service for free and a government official should under no circumstances ask for or be offered a payment for this services.

10. What must I do after I have sent all the relevant documents?

If there is any additional information required or a decision has been made, the Department will contact you. You are kindly requested not to send the request multiple times as it overloads the system and can delay the time it take the department to respond to requests for extension.

Report Corruption: 0800 701 701 or report.corruption@dha.gov.za

Fifth, the use of the word 'asylum seeker' refers to 'a person who is seeking recognition as a refugee in the Republic'[32] provided in the Refugees Act as amended. For the purposes of the study, it will refer to those persons who seek asylum, but have not been rejected or granted asylum. This definition excludes refugees as they have been formally declared to be refugees and their application process is at an end. So, the legal framework examined excludes the provisions or aspects dealing with refugees. It will also not be concerned with the merits of asylum seeker applications and the substance or reasons for seeking asylum.

Finally, 'impermissibility' refers to whether the current inclusion and implementation of the power to arrest and detain undocumented asylum seekers ought to be permitted in South African law. It is a standard against which laws and practice will be assessed. If these are found to be impermissible a set of standards is created to determine whether laws and practice can be considered permissible in international law and South African constitutional law. Impermissibility is therefore concerned with whether a specific set of standards has been met to ensure rights realisation and enjoyment during the asylum application process.

b) Literature review and parameters of sources

A combination of academic and grey literature was considered for the purpose of this study. Each category of literature was afforded equal weight as the approach of this study was to assess practical and theoretical views on the topic of arrest and detention of undocumented asylum seekers. This equitable approach accepts unequivocally that, though theoretical literature is the gold standard in academia against which to analyse new or additional studies, it would be unacceptable to ignore practical commentary and analyses from community-based or civil society organisations (among others). To undertake an analytical exercise absent practical assessments grounded in lived experiences would be indulging in discussions in the abstract. It risks producing work that is non-existent in reality for being divorced from it, or simply unhelpful because it is or cannot be utilised. This study argues and simultaneously accepts that academia must be socially responsive and no longer operate as though it exists in a silo, where elite scholars theorise about individuals and communities without centring their experiences. This study will not do that to an extent that it will prefer literature based on experiences as opposed to those based in high level, abstract discussions.

[32] Refugees Act section 1.

Although the approach of the study is grounded in and prefers literature based on lived experiences it understands its failing of not including direct evidence from undocumented asylum seekers. As a purely desktop review, this study fails to add to the body of work that relies on testimony collected directly from asylum seekers. The centring of experiences is that of those organisations working directly with undocumented asylum seekers, and so act as an intermediary to understanding these direct experiences. This is as far as the desktop study was able to go in centring experiences by virtue of its limitation in being a desktop review. By its very nature it was doomed to rely on literature based in practice and which presents these experiences filtered through organisations' analyses thereof. This thesis is fully aware that this scholarship can only go so far in its assessment given the nature of desktop reviews and fully accepts that future or all topics designed to be socially responsive *must* rely on direct testimony or data to be useful in practice and for the advancement of society.

This literature review discusses academic and grey literature chronologically. The primary sources of laws and policies regulating arrest and detention are unpacked in chapter 3; and case law will be discussed in chapter 4.

Though a great deal of literature took place prior to 2012, the thesis deliberately chose not to rely too heavily on sources older than 10 years. It considered the most recent and contemporary literature to track the changes in, or approaches to, refugee law in South Africa and which spoke directly to the topic. For these reasons, Feller, Türk & Nicholson;[33] Foster;[34] Goodwin-Gill;[35] Handmaker, de la Hunt and Klaaren[36] were discarded for being unhelpful. These sources were useful in setting out refugee law principles in international law, and their application in South Africa; however, all other sources spoke to this as well. For this same reason, the work of prominent scholar Professor James Hathaway was not considered.

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[33] Erika Feller, Volker Türk & Frances Nicholson (eds) *Refugee protection in International Law: UNHCR's global consultations on international protection* (2003) Cambridge University Press, United Kingdom.

[34] Michelle Foster, *International refugee law and socio-economic rights: Refuge from deprivation* (2007) Cambridge University Press, New York.

[35] Goodwin-Gill & McAdam *The refugee in international law*; and Guy Goodwin-Gill 'International and national responses to the challenges of mass forced displacement' in J, L A de la Hunt & J Klaaren (eds) *Advancing refugee protection in South Africa* (2008) 11-26.

[36] J Handmaker, L A de la Hunt & J Klaaren (eds) *Advancing refugee protection in South Africa* (2008) Berghahn Books, New York.

Feller, Türk & Nicholson[37] were not considered and analysed for the fact that it was a source from 19 years ago. The thesis preferred recent sources that could speak to the current context, or if not recent then at the very least to certain important aspects of the subject matter. Foster discussed the area of migration based on economic hardship or strife as a bona fide claim for refugee status. Though the thesis accepts that there are different reasons for migrating based on persecution, it is not focused on the grounds for seeking asylum, but whether the framework regulating asylum applications should make space for arrest and detention during the process. Foster's book was useful for the human rights-based argument upon which her thesis of inclusion was based. To view the refugee law conventions within this framework allowed for a more human rights and humanitarian approach, and according to which different state laws should be sculpted. Accepting her creative analysis of the 1951 Convention and what it allows, do we then proceed from this interpretation or rely on a plain reading of the Convention to make our argument? We can do both. I submit that on a plain reading, arrest and detention are not permitted – Foster's interpretation only emboldens this view through her human rights interpretation of the Convention, adding more nuance to how we understand the situation. It is also in line with South African law, to interpret our internal laws in harmony with international law, and is in keeping with the transformative nature of the Bill of Rights.

Goodwin-Gill and McAdam's[38] text was a comprehensive one about international law standards in the widest form as they apply to asylum seekers and refugees, and a detailed analysis of the applicable international law conventions dealing specifically with refugees. Greater detail was afforded to the Global North and North West's experience and history in dealing with refugee law. It was a good resource for extensive or thorough detail on the international law treaties or conventions applicable to refugees and asylum seekers, going into their history and politics; but for the purposes of this thesis, it was not the politics but the articles formulated and that seek to protect refugees that were of concern. It was how they were read together with other existing conventions and treaties to which South Africa is a signatory. The section on detention accepted that States have the competency to detain asylum seekers pending the outcome of their applications and assessed the effects and/or legality of detention standards and practices from this premise. It did not unpack whether this

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[37] Feller, Türk & Nicholson (eds) *Refugee protection in International Law*.

[38] Goodwin-Gill & McAdam *The refugee in international law*.

competency within international law can be argued to be excluded or severely curtailed, and the basis therefor. It did mention that detention was a measure of last resort but did not make or set out the international law arguments upon which this was based or should be based, to deter the practice altogether, especially in the current context of South Africa.

Goodwin-Gill's second text[39] explored the role of national institutions to protect refugees against the backdrop of international law norms and standards. This is a similar approach adopted in this thesis; however, Goodwin-Gill discussed international law at a broader level as opposed to a concentrated level of arrest and detention of asylum seekers. Goodwin-Gill did, however, discuss the 1951 Convention's recognition of the importance of identification documents, especially in circumstances where an asylum seeker arrives to a host country without identification. The Convention creates an entitlement to identification and recognition because in doing so the asylum seeker has access to basic services in the host country, and recognition as a person with equal protection before the law.[40] This right and entitlement is frustrated in a system that hinders access to valid documentation and criminalises the absence thereof, keeping asylum seekers in a precarious position that compromises their enjoyment of equal recognition and equal protection before the law. This is at odds with international law rights as set out in the Convention and other implicated human rights conventions, and the Constitution.

Handmaker, de la Hunt and Klaaren's[41] book included chapters written by different authors on select topics in refugee law in South Africa. The thesis focused on works situated in the first and third parts of the book (development and special issues), to understand how the policies came to be and their rationale, and issues of detention. The topics covered in part 2 did not discuss (exclusively) detention of asylum seekers. This is where Jenkins and de la Hunt's chapter was particularly useful to this study.

Jenkins and de la Hunt's work on detaining asylum seekers at proposed reception centres offered a unique perspective, though the piece was published 12 years ago. It discussed the past consideration of reception centres in South Africa that the Department sought to introduce. Given that this approach to handling asylum seeker applications has not changed,

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[39] Goodwin-Gill 'International and national responses to the challenges of mass forced displacement'.

[40] Goodwin-Gill 'International and national responses to the challenges of mass forced displacement' pp 21-22.

[41] Handmaker, de la Hunt & Klaaren (eds) *Advancing refugee protection in South Africa*.

the source was useful to understand differences and commonalities between the two systems – that is, when the Refugees Act first came into existence vs the present amendments to, and application of, the Refugees Act. The authors argued that the implementation of such a policy would be subject to a constitutionality challenge on the basis of freedom of movement and freedom from arbitrary detention.[42]

The chapter took a similar approach as the one in this study, focusing on the legal muster of the detention centres in terms of the rights above, and the limitations clause. It focused on three prongs: a) is the scheme supported in law; b) is it reasonable and justifiable in terms of the section 36 analysis; and c) the burden on the state to justify the potential effect of the proposed centres.[43] This thesis goes further to recognise the implication of additional rights. The situation examined is different from this thesis as it involved deprivation of freedom already enjoyed and its focus was also only on the section 36 analysis.

Equality Rights Trust[44] examined detention of stateless persons who can also form part of asylum seekers. The Human Rights Committee ('HRC') and European Court of Human Rights ('ECHR') have developed jurisprudence on immigration detention. Focus was on arbitrary arrest and detention, and the provisions that spoke to this in international law. They drew analogous arguments based on the position of asylum seekers regarding detention practices, so they recounted the international standards and practice in this area, which was very useful for the study, but as it related to immigration detention. Immigration standards and practices are a separate system from refugee and asylum seeker law. The book was heavily focused on ECHR and the European context within which issues of statelessness and detention applied.

Islam and Bhuiyan's book of collected works[45] related to the broad topic of an introduction to international refugee law. The introduction to the book placed refugee law in the global context. They attributed or recognised that there have been trends towards non-admission policies and practices. This was attributed to factors such as the global financial

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[42] Frankie Jenkins and Lee Anne de la Hunt 'Detaining asylum-seekers: Perspectives on proposed reception centres for asylum-seekers in South Africa' in F Jenkins, L A de la Hunt & J Klaaren (eds) *Advancing refugee protection in South Africa* (2008) 167-185 p 168.

[43] Jenkins and de la Hunt 'Detaining asylum seekers' p 172.

[44] Equality Rights Trust, *Unraveling anomaly: Detention, discrimination and the protection needs of stateless* persons (2010) Prontaprint Bayswater, London.

[45] Rafiqul Islam & Jahid Hossain Bhuiyan (eds) *An introduction to international refugee law* (2013) Marthinus Nijhoff Publishers, Leiden.

crisis (of 2008), rising unemployment, austerity measures and socio-political unrest, smuggling, xenophobia, and national security concerns.[46] There was a need to look inward that trumps fulfilment of assumed refugee law obligations. The book, however, highlighted that there was a discourse in which 'the refugee problem' was one faced by the North and did not recognise that there were similar issues of persecution in the South, thus further marginalising the issue.[47]

Currie and De Waal[48] was useful for its brief re-telling of the constitutional process, how the constitutional order came to be, and constitutionalism. It went into great detail about the rights and freedoms provided in the Bill of Rights, and the jurisprudence interpreting and adding flesh to these rights. It was helpful to briefly understand the rights and their meanings, and useful for those who want more detail about the definition and interpretation of these rights. The text assisted in formulating and understanding the extent of those rights identified and infringed in the arrest and detention of undocumented asylum seekers.

Khan and Schreier[49] offered a basic overview of refugee law in South Africa, taking the time to discuss all aspects of the law as it related to asylum seekers and refugees. Written in 2014, the book was only considered for its discussion on detention and deportation under the Immigration Act. Though the exercise of detention and deportation took place under the Immigration Act, this thesis maintains that the Refugees Act is a separate, specific legislation governing the arrest and detention of undocumented asylum seekers. It is common knowledge that immigration officials abuse their power under the Immigration Act, but this thesis only focuses on what comes before the final step of arrest and detention under the Immigration Act. The focus is the argument that undocumented asylum seekers ought never to be arrested and detained pending the outcome of their decisions. The concern is this process and not the act of wilfully but 'mistakenly' arresting and detaining asylum seekers in terms of the Immigration Act. Khan and Schreier were useful for understanding the latter; however, their writing only went so far to assist with this thesis, which is not concerned with a predominant discussion on detention under the Immigration Act.

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[46] Islam & Bhuiyan *An introduction to international refugee law* pp 1-2.

[47] Islam & Bhuiyan *An introduction to international refugee law* pp 1-2.

[48] Iain Currie & Johan De Waal (eds) *Bill of Rights Handbook* 6ed (2014) Juta, Cape Town.

[49] F Khan & T Schreier (eds) *Refugee law in South Africa* (2014) Juta, Cape Town. At the time of writing and completion, the thesis refers to the 2014 version of this publication but I am aware that the publication has been updated in 2022. It was therefore not relied on or referenced in the thesis.

The United Nations High Commissioner for Refugees' ('UNHCR') 'Beyond detention'[50] was particularly useful for the argument made in the thesis. It focused on detention not being the answer in migration and that practices of detention must end. It noted that detention was used to regulate irregular entry or stay in another country. This acted as a deterrent to, among others, asylum seekers and asylum applications. This text assisted the findings related to the Amendment Act, which created a framework that excludes asylum seekers, and to keep or push these individuals out of the country. The document created a framework in which to challenge countries that used detention as a mechanism in the asylum process to rethink this strategy. It is a toolkit and guide for the relationship between the UNHCR, governments, and other partners and stakeholders to end arrest and detention of asylum seekers and refugees. It speaks to the way these parties can go about ending detention, with specific focus areas, and roadmaps for attaining the goals of these focus areas. This thesis is not concerned with a roadmap to ending detention, but a clear end thereto and standards set to ensure arrest and detention will never be part of the asylum seeker application process.

A research report[51] compiled by Amnesty International, self-defined as 'a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all,' was particularly useful for practical information about the fallout from poor or lack of service provision to asylum seekers. The report included both desktop and qualitative research based on focus group discussions and one-on-one interviews with asylum seekers and refugees. Its findings used the data collected from asylum seekers to make findings regarding the effect of the closures of the Cape Town RRO and Gqberha RRO on the lives of asylum seekers. The report was therefore useful to understand practical findings based on the lived experiences of asylum seekers in South Africa.

Artero and Fontanari;[52] and Dominguez and Hernandez-Arriaga et al[53] assisted with definitions of structural violence adopted in this thesis. The articles were particularly useful for discussions on State power to limit rights realisation and enjoyment for asylum seekers, which limitation amounted to structural violence. Both articles, however, were based in experiences in Italy (Europe) and the United States of America (North America),

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[50] UNHCR 'Beyond detention'.

[51] Amnesty International *Living in limbo*.

[52] Artero and Fontanari 'Obstructing lives'.

[53] Dominguez, Hernandez-Arriaga et al 'They treat us like we are not human'.

respectively, and therefore not concerned with structural violence in South Africa. Artero and Fontanari focused on the 'migrant crisis' in Europe post-2015, a study of the 2015 'long summer of migration' and the informal and implicit obstructions to hinder attributing legal status to asylum seekers. The focus was on 'bureaucracy as a form of social power that regulates everyday existence and acts as a gatekeeper for structural inequalities and manifestations of structural violence.'[54]

Dominguez and Hernandez-Arriaga et al.'s article was about the experiences of black, indigenous and people of colour migrants in the United States of America. It assisted in understanding how institutionalised racism was capital for politicians and private companies to mistreat and detain migrants. It was also useful for its discussion on how structural violence affected inequitable life chances for asylum seekers, and that '[s]tructural violence involves a social structure that produces, maintains, and amplifies inequitable life chances.'[55] Both sources have been fundamental to setting out a definition of 'structural violence' that this study adopts, as it

> [i]n relation to the human rights issue, structural violence consists of a gap between the actuality of de facto rights and potential and de jure rights: when economic, social and judicial structures limit an individual's agency to the extent that fundamental human needs cannot be met.[56]

The authors also argued that the 'apprehension and detention of migrants and asylum seekers' was a form of direct violence. This is based on the definition provided by Galtung of direct violence, and adopted by the authors, that it 'involves "somatic incapacitation […] at the hands of an actor who intends this to be the consequence."'[57] They apply this definition to the policies of the US government in its immigration enforcement and violent programmes of detention. I adopt that structural violence, of course, includes direct violence as appreciated by the authors, which informs the study's analysis.

c) Key theoretical and conceptual framework

(i) Intersectionality

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[54] Artero and Fontanari 'Obstructing lives' p 636.

[55] Dominguez, Hernandez-Arriaga et al 'They treat us like we are not human' p 242.

[56] Artero and Fontanari 'Obstructing lives' p 634.

[57] Dominguez, Hernandez-Arriaga et al 'They treat us like we are not human' p 242.

Intersectionality, coined by Crenshaw,[58] refers to the experience of individuals of discrimination that cuts across different points of identity, such as race, gender, sex, social status, economic status, membership to an under-served group, among others. Cho, Crenshaw and McCall[59] discuss its origins as:

> Over the intervening decades, intersectionality has proved to be a productive concept that has been deployed in disciplines such as history, sociology, literature, philosophy, and anthropology as well as in feminist studies, ethnic studies, queer studies, and legal studies. Intersectionality's insistence on examining the dynamics of difference and sameness has played a major role in facilitating consideration of gender, race, and other axes of power in a wide range of political discussions and academic disciplines […]

This approach allowed an understanding and analysis that was rich with understanding how different aspects of identity of undocumented asylum seekers intersected to exacerbate discrimination and power disparities. This was particularly important to understand, to some degree through doctrinal research, how the abuses of power and misunderstanding and/or misuse of the normative framework gave effect to xenophobic attitudes. It also helped to understand how the actions of state officials affected asylum seekers across ages, sex and gender, among other points of discrimination. Intersectionality was ultimately applied to develop the standards towards attaining equity, in law and practice, for undocumented asylum seekers.

(ii) Decolonial approach

Given that majority of scholarship has overwhelmingly been shaped by and understood through the social lens of white men, adopting an exclusionary and warped view of findings; however, they may have attempted an approach to the benefit of under-served groups.

The sources considered focused mainly on the Refugees Act and its implementation in South Africa; however, given that the Refugees Act is based on the 1951 Convention, as well as the 1967 Protocol[60], and the 1969 Organisation of African Unity Convention [61], it was necessary to consider authors who could speak to refugee law in the international law

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[58] Coined by Crenshaw in 1989, the concept has shaped the understanding of discrimination as multi-faceted and multi-level.

[59] Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) *Journal of Women in Culture and Society* 38(4) 785-810 p 786.

[60] 1967 Protocol.

[61] 1969 OAU Convention.

framework. Doctrinal research also allowed access to the necessary domestic case law; statutes such as the Refugees Act and Immigration Act; international law treaties, conventions, and commentary; and comparative foreign laws. The point of shaping the analysis using this theoretical and conceptual lens was to read the sources against the grain and to focus findings to the benefit of undocumented asylum seekers. This framed the findings to centre and serve their rights and needs, towards protecting these and developing standards around these considerations.

(iii) Inclusivity

The thesis adopts a necessarily inclusive approach, applying its findings and analysis sensitive to all persons. This is intimately linked to the intersectional approach of the thesis. It is mindful that the findings must centre all underserved groups. To adopt this approach means to adopt one that is fundamentally good for all. If the best possible approach upholds and centres the rights and needs of those ignored and underserved groups then it will necessarily be to the benefit of all. This is linked to equity in law and practice.

Inclusivity is not only referring to persons with physical and mental disabilities but includes: women, children, gender and sexually diverse individuals, persons making use of mental health facilities and resources, and persons without formal housing. This approach respects the fact that vulnerabilities are intersectional and that asylum seekers are individuals with their own unique experiences that can and will cut across multiple identities and lived realities. Inclusivity will centre the rights and needs of all undocumented asylum seekers in its analyses.

(iv) Race and xenophobia

As stated in *Rahim and others v Minister of Home Affairs*[62]

> There is public concern about the illegal influx of foreigners. Many of our African brothers and sisters and even people, like most of the appellants, from more distant shores, flock to our country in search of a better life and economic opportunities. This has caused a degree of animosity to be directed at foreigners and more recently has led to what has been described as xenophobic attacks on foreigners. It is vital in this context to affirm that we are a constitutional state subscribing to the principle of legality, an incident of the rule of law. Our Constitution demands a normative standard and we must be held bound by it. In adjudicating

[62] *Rahim and others v Minister of Home Affairs* 2015 (4) SA 433 (SCA) at 2.

> this case, sight will not be lost of the logistical and other difficulties that the Department experiences in dealing with an influx of foreign nationals. At the same time, we cannot lose sight of our constitutional duty to do justice in accordance with constitutional norms.

In South Africa, it is common cause that race and xenophobia are rife. Most markedly were the xenophobic attacks of 2008, but also the discontent being sowed at national level through xenophobic statements being shared by the then Minister of Health, Dr Aaron Motsoaledi who made remarks about foreign nationals, such as:

> [T]he South African health system was overburdened by foreign nationals from neighbouring countries. He specifically referred to women giving birth and said that of 700 births in one facility, 400 were babies born to foreign nationals. He admitted that there is no evidence for this, only anecdotal stories.[63] [footnotes omitted]

Dr Motsoaledi is now the Minister of Home Affairs which spells trouble in the current context of service provision. Under his power, the onerous and exclusionary amendments, which are being meted out in full effect by the Department, will continue to persecute asylum seekers, undocumented or not.

LHR, in its presentation to the Parliament Portfolio Committee on Home Affairs, discussed xenophobia towards asylum seekers and refugees.[64] In the asylum seeker application process, LHR submitted that:

> Xenophobia shows itself in many forms in South Africa; scapegoating by politicians, pitting of citizens against non-nationals, denial of access to services and the DHA [the Department] failing at its domestic and international duty as the custodians of the asylum protection system.[65]

This thesis is always cognisant of the presence of South Africa's past and continuing undercurrents of racist ideologies and practices. As Cameron J stated in *Ruta v Minister of Home Affairs*[66] '[t]hat history looms tellingly over any understanding we seek to reach of the Refugees Act.' It is through the lens of this history of not only the Apartheid past but the entire trajectory of racist laws, policies and practices that have dogged (and continue to do so) the South African society since its colonial inception. This is also why it is necessary to

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[63] Amnesty International *Living in limbo* p 19.

[64] Lawyers for Human Rights *Briefing* 2022.

[65] Lawyers for Human Rights *Briefing* 2022 p10.

[66] *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) at 25.

regard these findings through a post-colonial and decolonial lens, to shed common understandings of the Refugees Act in favour of findings that are consonant with the principles of international law and constitutional law.

(v) Underserved communities and stigmatisation

The language adopted by the thesis is that of 'underserved' communities and 'stigmatisation'. This views asylum seekers as underserved for the fact that they do not commonly, if at all, receive State attention, resources and care as other classes of individuals or groups in the country. This ties in with the stigmatisation experienced by asylum seekers as a community overburdening and redirecting services from South African citizens (in line with Dr Motsoaledi's views), which is inherently linked to experiences of xenophobia and racial tensions. This begets stigmatisation, which exacerbates experiences of being underserved, which exacerbates experiences of stigmatisation. It becomes a vicious cycle with the snake eating its own head for asylum seekers not only in South Africa but the world over. It is necessary to be aware of this positioning and experiences faced by asylum seekers generally when interpreting and analysing the findings in this thesis.

(vi) International law framework first

Goodwin-Gill[67] aptly stated the main driver of this thesis's analysis:

> 'Here, international law, broadly considered, provides tools for organisation and management, for solutions and protection. It lays down rules of conduct, and establishes institutional roles, in varying degrees of detail. International law also provides the framework of principle within which problems such as forced migration should be resolved […]'

This argument is also adopted by Ziegler[68] who argues that it is international law that should lead the interpretation of the Refugees Act as opposed to domestic laws. The Refugees Act clearly states in its Preamble that international law is central to the Act, naming those specific international and regional conventions regulating refugee law and to which South Africa has assumed obligations:[69]

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[67] Guy Goodwin-Gill 'International and national responses to the challenges of mass forced displacement' at p 12.

[68] Ruvi Ziegler 'Access to effective refugee protection in South Africa: Legislative commitment, policy realities, judicial rectifications' (2020) 10 *Constitutional Court Review* 65-106.

[69] Refugees Act, preamble.

> WHEREAS the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.

Refugee law is an international phenomenon. It regulates, among other things, the rights, duties and movements of displaced persons who have fled their countries of origin due to persecution. The principles of international law are necessarily applicable and at the forefront of the Refugees Act's. Even more so, the Act goes beyond just the named international refugee law conventions but also includes other conventions to which South Africa is signatory as part of the Act's foundation. Section 233 of the Constitution, which states that Acts must prefer an interpretation in line with international law, bolsters this approach.

d) Conclusion

It is necessary to frame the thesis and its parameters of *what* is to be analysed and *how* the analysis takes place. This situates the reader to understand the deliberate lens through which the findings were made, and the conclusion reached regarding the limitation of State competence regarding arrest and detention of undocumented asylum seekers – that is, that South Africa's current context of service provision is so lacking as to be stripped of competence in this respect. The ultimate analysis and findings, according to this multi-layered lens, will create standards for South Africa (and which are argued to be globally applicable to other States of similar contexts) to meet in ensuring that the rights of undocumented asylum seekers are protected.

III LAWS GOVERNING THE ARREST AND DETENTION OF ASYLUM SEEKERS IN SOUTH AFRICA, AND THEIR PERMISSIBILITY IN INTERNATIONAL LAW AND CONSTITUTIONAL LAW

"Arbitrary actions can either be those which contravene existing laws, or those which are prima facie *legal, but are in fact inappropriate, unjust, unpredictable and consequently arbitrary"*[70]

a) Introduction

The legal framework governing the right to seek asylum in South Africa is made up of relevant regional and international law conventions and treaties applicable to South Africa (herein referred collectively as 'international law' given that they are outside the bounds of domestic laws created in the territory). But, standing together with these conventions and treaties is the Constitution, setting the standard in terms of which South African law must operate; and permitting consideration of international law principles when interpreting the Bill of Rights and South African legislation.[71]

It is necessary to understand the legal obligations and principles binding state actors in all their permutations. So, at the outset, a detailed and nuanced recounting of the law as it operates in the South African constitutional dispensation is a necessary element to understanding the extent of impermissibility. The context within which this legal framework operates is discussed in chapter 1 above. This section therefore deals with the law, both international and constitutional, specifically and exclusively as it relates to a) the creation of the power to arrest and detain; b) undocumented asylum seekers and c) in the asylum seeker application process. Given the range of literature on the laws relating to (in the following order) international law; the Constitution and Bill of Rights; and (undocumented) asylum seekers, a strategic setting out of the relevant legal parameters applicable to this study is necessary so as not to get lost in unnecessary detail. The section below will therefore be rich but succinct, setting out the framework as it is necessary to answer the research question.

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[70] Equality Rights Trust, *Unraveling anomaly* p 90.

[71] Sections 39(1)(b) and 233 of the Constitution.

b) The international law framework – what are the obligations South Africa has assumed towards asylum seekers?

The study takes an 'international law first' framework. As argued by Ziegler,[72] international law ought to lead interpretation of the Refugees Act given that the Act is uniquely drawn from the international legal framework as opposed to being led by South African legal principles. Below, the relevant international law considered are those international agreements to which South Africa is a signatory and has ratified.[73]

(i) The right to seek asylum in international law, and South Africa's concomitant duties to asylum seekers

Everyone, according to international law, has the right to seek asylum. The right first came into being after the effects of the Second World War led to the displacement of masses of people. The United Nations recognised the need to shape the international law landscape to allow for the right to operate, and thus enacted the 1951 Convention Relating to the Status of Refugees. The Convention came into force on 22 April 1954 and was the codification of the rights of refugees at international level. It is both a status and rights-based instrument, establishing the conditions necessary to be considered a refugee in international law, and conferring rights upon persons with such status. It was limited in its scope, applying to those who became refugees due to events occurring before 01 January 1951.

South Africa is a party to the Convention, which recognises the principles of *non-refoulement* and the right to family unity. *Non-refoulement* is foundational and indispensable to refugee law. It dictates that an asylum seeker may not be returned against their will or in any manner to a territory where they fear threats to their life or freedom. Goodwin-Gill and McAdam argue that the concept covers both non-rejection and non-return.[74] The provisions of the Amendment Act must be evaluated according to this principle, which is captured in its section 2. In *Ruta* it was held that the 1951 Convention protects both *de facto* and *de jure* refugees, which includes those seeking refugee status but who have not yet achieved it.[75] The Convention was later extended by the 1967 Protocol Relating to the Status of Refugees,

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[72] Ziegler, 'Access to effective refugee protection in South Africa' p 73.

[73] Constitution of South Africa, section 231(1) and (2).

[74] Goodwin-Gill and McAdam *The refugee in international law* p 208.

[75] *Ruta* at 27.

which extended the applicable time period (that is beyond the Second World War) and provided that all refugees were to enjoy equal status despite the date at which they became refugees, and the causes thereof.

The predecessor for both the Convention and the Protocol is the Universal Declaration of Human Rights ('UDHR'). It was adopted in 1948 in the same year that hundreds of thousands of Palestinians were forced from their homes by a colonising Zionist force (and which they continue to live under, in violation of their human rights and struggle for liberation).[76] Article 14 explicitly provides for the right to seek asylum, and that:

> (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

At the time of the UDHR's adoption, South Africa was a member state to the United Nations.

South Africa has also ratified the 1969 Organisation of African Unity ('OAU') Convention, which came into force in June 1974, and was a response to the increase in the numbers of refugees in Africa. An objective of its introduction was that the instrument was 'desirous of finding ways and means of alleviating their [asylum seekers' and refugees'] misery and suffering as well as providing them with a better life and future'.[77] This objective was ratified by South Africa and is applicable to the interpretation of its laws regulating the reception of asylum seekers into the country. The definition of 'refugee' in the OAU convention is similar to South Africa's Refugees Act.

South Africa has an obligation as a signatory to an international law convention to respect such at State level, as between States. However, to create internal obligations, the country is required to domesticate the law. The Refugees Act gave effect to relevant international legal instruments, standards and principles relating to refugees.[78] The Act explicitly states that South Africa acceded to the three main international law instruments

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[76] Rashid Khalidi *Palestinian identity: The construction of modern national consciousness* (1998) Columbia University Press p 21.

[77] 1969 OAU Convention, Preamble.

[78] Refugees Act, long title.

relating to refugees, namely the Conventions and Protocol.[79] The Preamble goes further to provide that the State assumed 'certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.' It is this recognition, this acknowledgement of accession to international law principles, that forms the basis of the South African legal framework governing the asylum seeker process.

It is imperative to emphasise that the laws in South Africa do not operate in isolation, be it domestic law or those international legal instruments to which South Africa has pledged itself as a signatory. All laws are interpreted and evaluated against the standards set by the Constitution.[80]

(ii) Other international conventions and treaties impacted by arrest and detention of asylum seekers

The above Conventions operate alongside other existing international law treaties, to recognise and give effect to other human rights that are affected, and ought to be protected, during arrest and detention of asylum seekers. Of the applicable conventions to which South Africa is a signatory, these include:

- the International Covenant on Economic, Social and Cultural Rights ('ICESCR');
- Convention on the Elimination of Discrimination Against Women ('CEDAW');
- Convention on the Rights of the Child ('CRC');
- International Convention on Civil and Political Rights ('ICCPR');
- African Charter of Human and People's Rights ('ACHPR');
- African Charter on the Rights and Welfare of the Child ('ACRWC');
- Convention Against Torture ('CAT');
- Convention on the Rights of Persons with Disabilities ('CRPD'); and
- African Union Protocol to the African charter on human and people's rights on the rights of women in Africa ('Maputo Protocol')

[79] Refugees Act, preamble.

[80] The Constitution of the Republic of South Africa, 1996. Section 1(c) provides for the supremacy of the Constitution, as the highest law in the land against which all laws, conduct, and policy will be scrutinized.

Certain Conventions have established treaty monitoring bodies that issue commentaries and receive reports on each State's commitments and steps taken to give effect to the Convention's provisions, such as the ICESCR, CEDAW, and ICCPR, among others. The commentaries provide further detail and substance to provisions, fleshing out their meaning and providing States with a better understanding of what the commitment to the Conventions and its specific provisions entail. These necessarily assist in interpreting the legal framework applicable to this study.

South Africa has ratified the ICESCR.[81] The foundations of the Covenant are set in accepting the inalienability and universality of human rights and freedom. The relevant articles are Article 11, the rights of everyone to an adequate standard of living, which is affected by the threat of arrest and detention for undocumented asylum seekers. Where one is constantly and consistently placed in a precarious legal position that affects physical and mental security, this creates inaccessibility of resources and complicates the ability to better one's position in society. This is intimately linked to Article 12 providing for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. To constantly live in fear of the threat of arrest and detention by virtue of being undocumented necessarily affects the mental health of asylum seekers, thus derogating from this right. It is also foreseeable that the precarious position and stigmatisation experienced could affect undocumented asylum seekers' access to health services for fear of being reported for possession of no or expired visas. This therefore acts as a barrier to accessing health (among others) services in South Africa and is a form of structural violence.

The CEDAW focuses solely on the rights to equality for women. CEDAW recognises that though progress was made in terms of rights enjoyment women continue to experience discrimination due to past and perpetuated discrimination. The Convention is important because arrest and detention would add the layer of discrimination against women as it places them in an even more precarious position as already exists in society. Given the intersectional approach of the thesis, the application of CEDAW is a necessary instrument to which we ought to have due regard when interpreting the Act (as amended). Goodwin-Gill and McAdam[82] recognise that during the movement of refugees to the host country women and

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[81] International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966.

[82] Goodwin-Gill and McAdam *The refugee in international law* p 473.

girls face ‘double discrimination’ as both refugees and women. They are vulnerable to further human rights violations in these circumstances, facing problems of food insecurity, access to resources and healthcare, security, welfare and education services. Together with the specific purpose of CEDAW there is also CRC which speaks to the rights of children of which their best interests shall be paramount in determinations involving them. We see this principle applied in the 2005 case of *Centre for Child Law and another v Minister of Home Affairs and others* which concerned the detention of unaccompanied minors pending deportation. Their detention and placement with adults were recognised to have markedly negative psychological effects.[83] This is in clear violation of:

- the best interests of the child principle.
- article 2(2), that States will take all appropriate measures to ensure children are protected against all forms of punishment.
- article 6(2), to ensure the survival and development of children to the maximum extent.
- Article 22, which provides that children seeking refugee status are to receive appropriate protection and humanitarian assistance.
- Article 24 regarding the right to the highest attainable standard of health, which includes mental and physical health.
- Article 27 on the right to an adequate standard of living.
- Article 37 providing for specific rights that no child shall be subject to torture or other cruel, inhuman or degrading treatment; or unlawful or arbitrary deprivation of liberty.

Among these Conventions on specific groups of persons are the ACRWC, CRPD and Maputo Protocol expressing similar sentiments as those in the CEDAW and CRC.

CAT speaks specifically about the right to be free from torture in Article 1, which states that:

> […] the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person… for any reason based on discrimination of any

[83] *Centre for Child Law and another v Minister of Home Affairs and others* 2005 (6) SA 50 (T).

> kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Of significant application to asylum seekers and refugees is Article 3, which provides for the principle of *non-refoulement*:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The ACHPR and ICCPR concern generally applicable rights enjoyment like those instruments regarding specific groups. Article 7 of the ICCPR (prohibition against torture or cruel, inhuman or degrading treatment or punishment) has been interpreted to incorporate the principle of *non-refoulement*.[84] The above principles and provisions of international treaties and Conventions govern the interpretation of the law relating to the arrest and detention of undocumented asylum seekers. These principles and provisions lead the interpretation of the context of service provision under the charge of the Amendment Act, whether they are lawful in their inclusion and exercise, and whether and to what extent they should be permissible.

c) The Constitution, Asylum Seekers, and the rights implicated by arrest and detention

With the adoption of the Constitution in 1996, South Africa formalised its constitutional democracy. It is the supreme law[85] and all other laws operating in the country must be consistent with it. This is where the Constitution's obligations to consider international law, particularly in relation to legislation, are important. This read together with section 6(1) of the Refugees Act (as amended), that requires due regard to be had to the international legal framework, bolsters the argument that the international legal framework must lead the discussion.

Where an asylum seeker is arrested and detained for being undocumented, the constitutional rights implicated are human dignity; freedom and security of the person;

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[84] Goodwin-Gill and McAdam *The refugee in international law* p 209 referring to Human Rights Committee General Comment 31 at 12, and General Comment 20 at 9.

[85] Constitution, section 1(c) and section 2.

privacy; freedom of movement; environment; just administrative action; and equality. The constitutional rights, international law, operation of the Refugees Act and Amendment Act, and context of service provision cannot be divorced from one another. The examination must take place in a holistic manner.

(i) Right to human dignity

Human dignity acts as both a right and founding value of the Constitution and legislation.[86] The Constitutional Court has recognised that the right and fundamental value of human dignity is the source for many personal rights in the Constitution, such as the rights to life, privacy, and freedom and security of the person.[87] These rights are also impugned in the arrest and detention of undocumented asylum seekers. The scope of the right to human dignity includes several values, such as a person's right to reputation, their sense of self-worth, and their right to privacy.[88] As a fundamental value through which other rights are interpreted, human dignity is the constitutionally entrenched recognition of the inherent self-worth of everyone, irrespective of nationality and citizenship status.

The right to human dignity is foundational to the right not to be treated or punished in cruel, inhuman or degrading way,[89] which is also entrenched in the international law standards discussed. Punitive measures that result in or seek to challenge the enjoyment of one's right to human dignity, and challenge the inherent self-worth of persons, must be justified.[90] The impermissible inclusion and operation of arrest and detention of undocumented asylum seekers impacts and derogates from this right. It necessarily affects the human dignity of this community, and the individuals identified within it. Arrest and detention on the pure basis of being undocumented during the asylum-seeking process, when read together with human dignity and the right established in terms of Article 14 of the UDHR (that everyone has the right to seek asylum in other countries from persecution), the failure of the State to uphold and respect these right impacts on the right to dignity.

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[86] Constitution, section 1(a).

[87] MP Olivier 'Refugees and asylum seekers' in Law of South Africa vol 15 (3ed) section 22; MP Olivier 'The Refugees Act' *Law of South Africa* 2 ed (2013) vol 13(3) section 297; *S v Makwanyane* 1995 6 BCLR 665 (CC) at 144; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) par 35.

[88] *Khumalo v Holomisa* 2002 8 BCLR 771 (CC) at 27.

[89] Constitution, section 12(1)(e); *S v Williams* 1995 (3) SA 632 (CC).

[90] Currie & De Waal *Bill of Rights Handbook* p 254.

(ii) Right to freedom and security of the person

Guaranteed by section 12 of the Constitution, the right to freedom and security of the person consists of different components. These include the rights: not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated in a cruel, inhuman or degrading way.[91] Of particular importance are the rights to be free from all forms of violence from either public or private sources, and not to be treated in a cruel, inhuman or degrading way.

The section 12 right is further broken down into the right to freedom of the person and the right to security of the person. The right to freedom has a substantive component and procedural component. Justice O'Regan remarked in *Bernstein v Bester*[92] that the substantive aspect ensures that a deprivation of physical freedom cannot take place without just cause or arbitrarily; and the procedural aspect ensures that where deprivation occurs it is done in terms of fair procedure.[93] It is necessary to establish that a deprivation has occurred, then for the substantive and procedural aspects to be satisfied; that is the deprivation was based on a just cause or objective, and that the deprivation occurred according to fair process.[94] The Constitutional Court held that arrest and imprisonment constitutes a deprivation of freedom that is sufficient to trigger the application of this right.[95] Though shorter in length than imprisonment, arrest and detention nonetheless amount to a deprivation of freedom as it involves the placement of persons in a cordoned off room or area for the purposes of limiting freedom of movement and physical freedom.

Recalling the definition of structural violence, we can understand that arrest and detention unjustifiably implicates these rights for undocumented asylum seekers. As part of the applied definition of structural violence, we can accept that it is also a form of direct violence. The thesis adopts the definition of structural violence as set out in Dominguez and Hernandez-Arriaga et al., which includes the physicality of arrest and detention as forms of

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[91] Constitution, section 12(1)(a), (b), (c), (d) and (e).

[92] 1996 (4) BCLR 449 (CC).

[93] *Berntein v Bester* at 145; stated again in *S v Coetzee* 1997 (3) SA 527 (CC) par 159.

[94] Currie & De Waal *Bill of Rights Handbook* p 272.

[95] *Malachi v Cape Dance Academy International (Pty) Ltd* 2010 (11) BCLR 1116 (CC) at 28; DW Freedman 'Deprivation of freedom' in *Law of South Africa* 2 ed (2012) vol 5(4) para 74.

direct violence, which therefore leads to this conclusion. Where arrest and detention occur it is a form of direct (and therefore structural) violence committed by State officials against undocumented asylum seekers. We can therefore take this further to conclude that this direct violence violates this section 12 constitutional right's protection of freedom and security of the person.

(iii) The right to privacy

Protected in section 14 of the Constitution, the right to privacy provides that 'Everyone has the right to privacy, which shall include the right not to have– (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.' The right is enjoyed fully within the personal realm and operates on a continuum in that the further one moves away from the personal realm and into communal and social spaces, its scope, enjoyment and protection will shrink.[96]

In *S v Jordan*,[97] the Constitutional Court recognised that the constitutional commitment to human dignity placed value in the inviolability and worth of the *human body*, and the protection of one's privacy serves as a protection of their *right to dignity*. Here we see that the rights violated are interconnected and intimately linked. In this respect, the right to privacy is intimately linked to the enjoyment of the right to human dignity.

The right is argued to be implicated in the arrest and detention of undocumented asylum seekers where a search of their person and seizure of the copy of their visa, or the establishment that they are not in possession of a visa, took place. In this respect, the section 14 right includes the rights not to have one's person searched or possessions seized. This, of course, is not absolute and there are lawful instances in which the right would be justifiably breached. It is generally accepted that search and seizures are to be conducted in terms of legislation setting out the legal parameters within which such may take place and the guidelines necessary to carry out the conduct. Searches must be authorised by a warrant as they will entail a violation of privacy.[98] Furthermore, the power to conduct a search and seizure granted to officials must fit within the purpose of the Refugees Act,[99] and be based on

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[96] DW Freedman 'The continuum of the right to privacy' in *Law of South Africa* 2 ed (2012) vol 5(4) para 94; *Bernstein v Bester* at 67.

[97] 2002 (11) BCLR 1117 (CC) par 81.

[98] Currie and De Waal *Bill of Rights Handbook* p 304.

[99] Currie and De Waal *Bill of Rights Handbook* p 305.

reasonable grounds for the invasion of privacy.[100] The Refugees Act as amended makes no reference to search and seizure; however, indirect reference has been made to the unlawful use of the power by State officials to search and seize documents. This is noted through the case law. The unlawful use of the power is an instance of impermissible structural violence and cause for limiting South Africa's competence. There are no measures allowing for the use of this power and/or for it to go unchecked but through a court challenge. The right to privacy is infringed in a manner that cannot be justified in the circumstances.

(iv) Freedom of movement and residence

Section 21 of the Constitution provides that everyone, citizens and foreigners, has the right to freedom of movement.[101] The rights to enter, remain in and reside anywhere in the Republic; and the right to a passport are constitutional rights reserved specifically for citizens. This, of course, does not exclude foreigners from enjoying a version of this right via the creation of a statutory right, which the Refugees Act as amended makes provision for, as drawn from international law in terms of which South Africa has assumed duties. Asylum seekers therefore do not have an automatic right to enter, remain in and reside in South Africa; however once admitted, they enjoy the right to freedom of movement provided it is exercised in accordance with the law.

The inclusion of arrest and detention in this context cannot be implemented without impacting on this right. The legal and practical landscape of service provision in South Africa violates this right given how limited or greatly diminished the right is when it comes to where, when and how undocumented asylum seekers can access RROs and meaningful service provision such as health, work and study. This then restricts movement out of fear of arrest and detention. The state of being undocumented in these circumstances impacts not only this section 21 right but the enjoyment of other rights.

(v) Environment

The right to environment provides that '(e)veryone has the right to an environment that is not harmful to their health or wellbeing'.[102] The right is often understood in terms of health and the right to health, and in turn is connected to the rights listed above. The thesis accepts that it

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[100] Currie and De Waal *Bill of Rights Handbook* p 308.

[101] Constitution, section 21(1).

[102] Constitution, section 24(a).

ought to refer to the environments in which undocumented asylum seekers are detained. There is an entitlement to be detained at facilities that are respectful of dignity and which are in line with relevant human rights standards. The minimum standards are determined in terms of Annexure B of the Immigration Act and were the subject of litigation in *Lawyers for Human Rights v Minister of Safety and Security and others*[103] (discussed further below). These standards give effect to the right to environment and interrelated rights discussed above.

Presumably, when one has been arrested and detained, they are taken to a holding cell or place designated for the purposes of detention. More often, these places of detention are holding cells at South African Police Service ('SAPS') centres as the Immigration Services Inspectorate at the Department often has an agreement with SAPS to hold persons they believe to be in violation of the Immigration Act in these holding cells. These cells, however, are deplorable. With little to no seating available, wet and dirty floors, and open ablution facilities for use by those in the cell, the conditions do not create a safe and healthy environment for the detainees.[104] To place asylum seekers in an environment with these conditions infringes on the constitutional right to environment.

(vi) The right to equality

Both a right in the Bill of Rights and one of the values[105] upon which the South African democratic State was founded, equality and its guarantee was a direct response to the inequalities of South Africa's past. The right to equality is captured in section 9 of the Constitution, and provides:

> 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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[103] [2009] JOL23612 (GNP).

[104] *Lawyers for Human Rights* (2009).

[105] Constitution, section 1(a); section 7(1); section 36.

> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

In *Harksen v Lane,*[106] the Constitutional Court established the equality test, to determine whether the rights to equality and non-discrimination have been violated. Thus, it looks at whether section 9(1) and (3) above have been violated by law or conduct that differentiates between people. At paragraph 53, the test is set out as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of [section] 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

  (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

  (ii) If the differentiation amounted to 'discrimination', does it amount to 'unfair discrimination'? If it had been found to have been on a specified ground, then unfairness would be presumed. If on an unspecified ground, unfairness would have to be established by the complainant. The test of unfairness focused primarily on the impact of the discrimination on the complainant and others in his or her situation. If the differentiation was found not to be unfair, there would be no violation of section 8(2).

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[106] 1998 (1) SA 300 (CC).

(c) If the discrimination is found to be unfair then a determination would have to be made as to whether the provision could be justified under the limitations clause, section 33 [of the interim Constitution].

Though the test was established under the provisions of the Interim Constitution, it has been accepted in jurisprudence formulated under the final Constitution.

The Constitutional Court has recognised the intersectional nature of the grounds of discrimination, and that claims of discrimination do not have to be brought on one ground only.[107] The intersectionality of the grounds illustrates how the impact of discrimination can be exacerbated for certain groups, compounding the experience of discrimination due to social positioning. This is true for undocumented asylum seekers in South Africa, who enter the country because pre-existing conditions that have caused them to flee their homes and force them to seek the assistance of another State for their safety and security. And it is clear from the drafting of the right that it is applicable to everyone and anyone, beyond citizens of South Africa and who are in South Africa's jurisdiction. At the core of the analysis of the permissibility of State competence in international and constitutional law is intersectionality. Applying an intersectional lens to the problem is necessary to the central determination of this thesis. It is imperative to establish that our Courts have recognised that intersectionality exists, and the law is no stranger to its application.

Given the nature of being an asylum seeker, arrest and detention on the grounds of being undocumented affects individuals in this community according to their personal standings in society, which implicates their rights to equality. These can be on the listed grounds of race, gender, sex, nationality, ethnic or social origin, and disability. The identification of undocumented asylum seekers to be vulnerable to arrest and detention in comparison to other self-identified population groups living in South Africa necessarily implicates the right to equality. Asylum seekers are governed by a specific legislation, which sets the regulation of their stay in South Africa. This separate regime places asylum seekers apart from citizens and permanent residents. Arrest and detention based on the state of being undocumented in this separate regime undeniably affects the right to equality with discrimination cutting across different grounds. The legal regime governing asylum seekers and refugees needs to be aware of the differentiation affecting the right and causing further harm. Violating the right to

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[107] *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC).

equality marginalises asylum seekers, forcing them to the fringes of South African society. This violation is a consequence of the structural violence.

(vii) The right to just administrative action

Section 33 of the Constitution guarantees the right to just administrative action, providing that '[e]veryone has the right to just administrative action that is lawful, reasonable and procedurally fair'.[108] Where one's rights have been adversely affected by administrative action, then they are entitled to written reasons. The Promotion of Administrative Justice Act[109] ('PAJA') was enacted to give effect to the section 33 right, and to make available the avenue of judicial review for those administrative actions which adversely affected the rights of persons and have had direct, external legal effect.[110]

The Constitutional Court has accepted that the "principal function of section 33 is to regulate conduct of the public administration and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice."[111] There is a constitutional commitment to ensuring an administration that is efficient, equitable and ethical, which respects the fundamental rights of the public.[112] The right to just administrative action, and therefore to administrative justice, implicates the enjoyment of other fundamental rights provided for in the Constitution and in statute. It is the violation or threat of violation of these rights in the fulfilment of administrative functions that would impugn the right to just administrative action and trigger recourse in terms of the PAJA, or to examine the constitutionality of the legislation for allowing violations of this nature.

For administrative action to be lawful, it must be authorised by law, and be within the prescripts of the empowering law. For administrative action to be lawful, it must comply with the empowering law and the purpose for which the action was given.[113] Therefore, where arrests and detentions of asylum seekers occur beyond the ambit of the legal parameters, then

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[108] Constitution, section 33(1).

[109] Act 3 of 2000 (PAJA).

[110] PAJA section 1 definition of 'administrative action'.

[111] *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 2000 (1) SA 1 (CC) par 136.

[112] *SARFU* at 133; MP Olivier 'Administrative justice' in *Law of South Africa* 2 ed (2012) vol 13(2) para 85.

[113] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 306; DW Freedman 'Lawfulness: General' in *Law of South Africa* 3 ed (2019) vol 7(2) para 37.

this will necessarily be a live issue for an inquiry within administrative justice principles. The administration, the Department, have shown that they did not respect the legal parameters of the Refugees Act or the standards set by the Constitution and Bill of Rights. Now the Amendment Act has authorised and made lawful that they can continue their previously unlawful actions, which authorisation is a form of structural violence.

The interpretation of legislation must be one that is consistent with international law. Given the context of service provision, when there are Bill of Rights violations then it is invariably structural violence in the implementation of the Refugees Act as amended. These rights are enjoyed by everyone, which includes asylum seekers. The position of asylum seekers in society as an underserved community renders them vulnerable. The violation of their constitutional rights perpetuates and exacerbates this vulnerability. The manners in which the State has trampled these rights reveals a level of structural violence that is so harmful as to lead to no other conclusion but to limit state competence. This is apparent through the discussion of the different constitutional rights violated by State action and the ways in which they are violated.

d) The provisions of the Refugees Act pre- and post-2017 amendments

The Refugees Act formed part of a legislative movement of political will to enact a series of progressive laws with an intention to uphold and protect fundamental constitutional rights. It domesticated and acknowledged the three main international and regional law instruments relating to refugees, along with other human rights treaties and instruments. Section 6 (now section 1A as amended by the Amendment Act) expressly provides that the Refugees Act is to be interpreted and applied with due regard to the 1951 and 1969 Conventions and 1967 Protocol, and any other international agreement to which South Africa is a party. What is most important is that the Refugees Act includes the principle of *non-refoulement,* not to return an asylum seeker to a country, including their country of origin if it would subject them to circumstances for which they fled their country in the first instance.[114] The principle operates in the international sphere given that asylum seeking is an international phenomenon.

This section begins with a brief description of the asylum application process, which is set out in Chapter 3 of the Act. It provides that it must be made in person at a RRO.

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[114] Refugees Act, section 2.

Currently, South Africa only has four operating RROs at which asylum seekers may apply for asylum and access services. When an application is made, an asylum seeker receives an asylum visa. This visa, however, contains an expiry date and must be renewed at a RRO at a time and date specified on the visa, and upon appearance of the applicant.[115] The period of validity for the visa can be between one month and six months.

So, it is common practice for an asylum seeker to approach the RRO closest to where they entered the country, or a city in which they will reside for the duration of their stay in South Africa. When they approach the RRO, they will complete an application form and be interviewed by a RSDO, who will establish whether they have a valid claim for asylum in terms of section 3 of the Refugees Act.

The 2017 Amendment Act introduced distressing provisions that respond directly to the jurisprudence produced in legal challenges instituted under the Refugees Act. The Department's responses have made lawful behaviour that was struck out by the Courts for being misapplications of the law. This clear adoption by the Department to legitimise unlawful behaviour is an abhorrent display of sanctioning abuses of power and to limit the right to apply for asylum in South Africa to the extent that it is effectively impossible to obtain. This contradicts the obligations assumed by the State in terms of international law.

The relationship between the Refugees Act and the Immigration Act can be dispensed with immediately. It is accepted that the Immigration Act only applies where an asylum seeker has exhausted all remedies in terms of the Refugees Act's processes related to the application. This will result in a notice to depart issued to unsuccessful applicants and detention for a failure to respect the notice. It is clear, therefore, that this status of illegal foreigner and departure is only applicable once the entire asylum application process has concluded, which includes exhausting *all* internal remedies in the application process. The application process begins the moment an asylum seeker presents at South Africa's borders, whether formally or informally, and ends with an unsuccessful litigious challenge to the application process, which may end at the Constitutional Court of South Africa should this be followed. This was the case in *Abore v Minister of Home Affairs and another.*[116] This means

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[115] Refugee Regulations (Forms and Procedure), GNR366 of Government Gazette 21075, 06 April 2000 (enacted in terms of the Refugees Act), regulation 7.

[116] 2022 (2) SA 321 (CC).

that an undocumented asylum seeker for the purpose of the thesis ought to be protected from arrest and detention *throughout the course of the application process* as set out in Figure 1.

It is a principle of statutory law that a later statute's general provisions do not derogate from another statute's specific provisions.[117] The Refugees Act provides imperatively that, notwithstanding the status, an asylum seeker claim must first be processed under it. The Immigration Act empowers an immigration officer to arrest and detain an illegal foreigner, but which power defers to the provisions of the Refugees Act.[118] The Refugees Act therefore trumps the Immigration Act given that it is the framework dealing specifically with undocumented asylum seekers and protects them from arrest and detention until they have been issued a notice to depart *and* have breached such.[119] The Constitutional Court in *Abore*[120] also recognised that the context applicable is that asylum seekers who enter the country illegally or not through designated ports are hesitant to inform officials of the manner and date of their arrival.[121] It is likely that asylum seekers enter illegally and are in possession of false documentation, which is likely a result of their vulnerability, hence the separate regimes.

The following sections and chapters of the Refugees Act and Amendment Act have been identified as pertinent to the arrest and detention of undocumented asylum seekers during the application process.

(i) Chapter 1: general provisions

Section 2, at the outset of the Act, provides for the principle of *non-refoulement*, which the Courts have held is the foundation of interpretation in matters affecting asylum seekers detained and therefore to be deported. The principle is that asylum seekers may not be refused entry, be expelled, extradited, returned, or 'be subject to any similar measure' if the result is that they would have to return to or remain in a country where they would be persecuted based on a listed ground or their life would be threatened due to external

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[117] *Ruta* at 42.

[118] *Ruta* at 46.

[119] *Nwankwo v Minister of Home Affairs and others; Anyacho and another v Director-General:Department of Home Affairs and another; Onwuakpa v Director General: Department of Home Affairs and another* (2021/01004; 2021/0013; 2021/0014) [2020] ZAGPJHC 377 (22 September 2020) at 5.

[120] *Abore v Minister of Home Affairs and another* 2022 (2) SA 321 (CC).

[121] *Abore* at 32.

factors.[122] This section is important for the fact that this principle applies in spite of any provision in the Refugees Act or in any other law that is contrary to it. It is a powerful section upon which the assessment of competence relies to limit South Africa's competence to regulate the arrest and detention of undocumented asylum seekers.

Section 4, exclusion from refugee status, has been the subject of litigation, mainly whether the commission of a crime in South Africa excludes an asylum seeker from obtaining refugee status. The section is clear in stating that the exclusion based on a crime only pertains to crimes not of a political nature committed *outside* of South Africa's territory prior to the asylum seeker's entry. This section has now been amended to include a number of additional grounds upon which an asylum seeker cannot qualify for refugee status, which includes the commission of a crime in South Africa.

(ii) Chapter 2: RROs, Standing Committee for Refugee Affairs and the Refugee Amendment Act

Section 8(1) of the pre-amendment Refugees Act concerned the establishment of RROs, namely that the D-G could establish 'as many Refugee Reception Offices in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of the Act.' This section is important given that the number of RROs established has a marked impact on where and how an asylum seeker may access services. The queues to access services and relegating certain nationalities to specific days make renewal of visas a drawn-out process. This places asylum seekers in a precarious position given that their visas have expired and remain expired for as long as they are unable to access services. Moreover, the fact that there are only four working RROs in South Africa means that asylum seekers must travel to one of these RROs, which operate under the above conditions and circumstances, to receive assistance. The already limited landscape of physical resources is amplified by the amendments to this section. In section 8(1), the D-G no longer has to consult with the Standing Committee for Refugee Affairs ('SCRA') on this topic. They can establish or disestablish offices by notice in the Government Gazette, and now has the stated power to disestablish RROs. This section therefore authorises the D-G to disestablish a RRO without consultation.

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[122] Refugees Act, section 2(a)-(b).

Furthermore, section 8(2) now states that each RRO must have at least one RSDO as opposed to the previous requirement of at least one Refugee Reception Officer together with one RSDO. The section was already offering an irrationally minimum number of RSDOs and Refugee Reception Officers per RRO to offer services to a multiplicity of asylum seekers. The already limited landscape of service provision is now made worse and further ineffective. At the minimum number, and if followed, asylum seekers have little to no guarantee that they will be assisted at all and within the time limits set by the Refugees Act (as amended) and the new Regulations.[123] The Department is clear in its position to place asylum seekers in such a difficult position as to push them out of the country, whether by choice or force through arrest and detention.

(iii) Chapter 3: Asylum application process

Section 21 of the Amendment Act sets out the new application process. Applications are now to be made in person at a RRO within 5 days of entry into South Africa as opposed to 14 days.[124] They are given five days in terms of an asylum seeker transit visa which authorises their movement in the country to make an asylum application. The decidedly low number of RROs makes it near impossible for an asylum seeker who has little to no knowledge of the legal framework, geographical placement of RROs, and how to travel to these RROs, among others, to access a RRO within 5 days of entry. This is also under the assumption that RROs are fully functional and capable of offering asylum seekers assistance. Locations of RROs are shown in chapter 4 below. Every applicant is to submit biometrics at ports of entry or at an RRO should they be unable to submit at a port of entry.[125]

Applicants who do not possess an asylum transit visa must be interviewed by an immigration officer to provide reasons why they are not in possession of the visa.[126] This requirement does not set out a standard or criteria to guide the immigration official as to whether the reasons are 'valid'. This leaves the assessment at the discretion of the immigration official, which will effectively be a barrier to lodging an asylum application and rendering the asylum seeker undocumented. This, of course, opens them up to arrest and detention. The section goes further to empower the D-G to require categories of asylum

[123] Refugees Regulations GNR 1707 of GG 42932 of 27 December 2019.

[124] Refugees Amendment Act, section 21(1).

[125] Ibid, section 21(1A).

[126] Ibid, section 21(1B).

seekers of any country, geographic area, or particular religion, gender, nationality, political opinion or social group to report to specific RROs.[127] This is another clear instance of limiting access to services as it allows one chance in the working days of the RRO to gain access. It is also uncertain where, how and when this important information is communicated to the community *by the State* and not reliant on the onus being placed on the community to share via word of mouth.

The amended section 24(1)(4)(a) now limits the provision of non-institution of proceedings against an applicant who entered the country unlawfully but made an application for asylum. The amendment moved from a wider interpretation to exhausting all remedies of reviews and appeals to appeals specifically to the Refugee Appeals Authority ('RAA') and SCRA. This then means that remedies to be exhausted are until this point and no longer include those post-internal appeals, and that proceedings can only be instituted up to the point of internal appeals which limits the application process set out in chapter 2. Where these processes result in a negative outcome for the asylum seeker, who could be undocumented at the time or as a result of the outcome, the asylum seeker can be arrested and detained pending the proceedings instituted against them for unlawful entry into the country.

The new section 24(6) provides that false, dishonest or misleading information must be rejected when found by an RSDO or the SCRA. This is in response to the decisions in *Ersumo v Minister of Home Affairs and others*[128] which held that where an applicant possessed fraudulent documents and encountered as such in terms of the Immigration Act this does not preclude them from applying for asylum. The new section 24(6) sidesteps the specificity of being encountered by an immigration official and found to be in possession of fraudulent documentation to specify that these applications ought to be rejected outright when discovered by the RSDO, RAA or SCRA.

Section 22 has introduced more sections, double that of its previous iteration. The amended section 22 is unfathomably onerous. An inconsequential change is that of 'permit' to 'visa' for the document issued to an asylum seeker to permit their stay in the country pending their application. The new section 22 provides the following applicable amendments.

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[127] Refugees Amendment Act, section 21(1C).

[128] 2012 (4) SA 581 (SCA).

Visas must be issued to asylum seekers whose applications have not yet been adjudicated. The language of this section is confusing due to the change of 'permit' to 'visa' given that asylum seekers presenting at ports of entry are issued an asylum transit visa in terms of the Immigration Act. The plain reading of this section could cause confusion. Even more, where an asylum seeker's application is referred to the Courts for determination those persons are not entitled to be issued a visa, which places them in a position to be arrested and detained for being undocumented. This is in contrast to the language of the section's predecessor which provided that an asylum seeker must be issued with a permit *pending the outcome of the application process*, which, according to the process set out in chapter 2, includes adjudication. The Department therefore considers the application process to end after an outcome is reached by the SCRA or RAA. The 1951 Convention creates an entitlement to identification and recognition because in doing so the asylum seeker has access to basic services in the host country, and recognition as a person before the law with equal protection of the law.[129] This right and entitlement is frustrated in a system that hinders access to valid documentation and criminalises the absence thereof, keeping asylum seekers in a precarious position that compromises their enjoyment of equal recognition before, and equal protection of, the law. This is at odds with constitutional law and international law rights as set out in the international refugee legal framework and other human rights conventions.

Sections 22(6) – (8) speak to the asylum seeker's ability to sustain themselves while sojourning in the country, that they may be assessed as to whether they are able to do so *with or without the assistance of friends or family* for a period of at least six months.

This is emphasised for the fact that it assumes asylum seekers have networks in the country to sustain themselves and/or that these networks are able to sustain an asylum seeker (whether an individual or family) where the asylum seeker is unable to work in terms of section 22(8). It also assumes that work would become available for the asylum seeker within four months of their stay, or find this work themselves cognisant of the barriers asylum seekers face upon arrival in the country. Where family members are unable to sustain them, they must avail themselves of the UNHCR or another charitable organisation's resources. It assumes that the UNHCR and charitable organisations have more than enough resources to sustain large numbers of asylum seekers, which the Department ought to know is not the

[129] Goodwin-Gill 'International and national responses to the challenges of mass displacement' 21-22.

case. What aggravates the situation and renders asylum seekers unable to sustain themselves is that where they are unable to do so through the assistance of family and/or friends, or they are sustained through the UNHCR or another charitable organisation they are not allowed to work in the country. The right to work is hindered further when read together with section 8(c), when the asylum seeker fails to produce a letter confirming employment but seeks to extend the right to work already endorsed on the visa.

Where an asylum seeker is able to secure work or study, the place of employment or study must produce a letter confirming such and within 14 days from the date of employment or enrolment. This makes them dependent on their workplace a) being able to guarantee employment, and b) being able to produce the relevant letter, and to do so within the prescribed time period. The letter must also be produced on a prescribed form, and from the date at which the asylum seeker took up employment. This assumes knowledge of refugee law by the employer, where and how to access the necessary form, and to guarantee that the asylum seeker would continue to be employed for a length of time to sustain themselves meaningfully. Where they fail to comply or issue a fraudulent letter they will be fined R20 000. The section does not state which office in the institution or which position the person of the employer must issue the letter. This could lead to a back and forth between the asylum seeker and their employers or institutions, which back and forth may be because of communications with the Department. The Court in *Kyabu v Minister of Home Affairs* had the following to say about a 48-hour turnaround time given to the Department to respond to a letter of demand:

> [T]he expectation that a government department could react within that [48-hour] period of time seems to be inappropriate. It would imply that immediately the e-mail was received it would be taken to the desk of someone in a position of authority to deal with it. That person would have had to communicate with the Lindela Detention Centre in order to determine the facts and the circumstances, compose a bundle of documents that would facilitate consideration of those circumstances and compose a letter responding to the attorney of the applicant.[130]

If in the circumstances where a letter of demand, which may set off legal proceedings, has been issued and the Department cannot be expected to respond within a set timeline as befits

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[130] *Kyabu v Minister of Home Affairs* (18338/2019; 18339/2019) [2019] ZAGPJHC 204 (25 June 2019) at 9.

the circumstances, then it is reasonable to assume that they are likely to take a lackadaisical approach to the section's provisions. The section is highly likely to cause circumstances where the employer or institution would have to pay the fine. Where both are familiar with this section of the Act it may cause them to be hesitant to offer employment or enrolment, which places the asylum seeker in a position where they are unable to secure work or study (which would increase their chances to access work in the country). The Department is essentially crippling the asylum seekers' opportunities to sustain themselves in South Africa, which constructively forces them to leave the country because it would not benefit their seeking refuge meaningfully while here. Moreover, section 22(11) provides that where the right to work has been endorsed on the visa but the asylum seeker is unable to prove that they secured employment 6 months after the endorsement then such endorsement must be revoked.

Another troubling amendment is that of the time limit placed on an asylum seeker in which to renew their visa provided in 22(12). If after a period of one month the visa is not renewed then it will be endorsed as abandoned unless the asylum seeker can satisfy the SCRA that they were unable to present themselves due to hospitalisation or another form of institutionalisation or any other compelling reason. This would render an asylum seeker undocumented for the period between non-renewal to receiving the outcome of the decision of the SCRA. This process does not state how representations are to be made to the Committee nor when and how the outcome will be received. It also does not provide guidance to the Committee on how to assess the reasons as compelling where these differ to hospitalisation or institutionalisation. This leaves the asylum seeker's fate to the discretion of the individuals making up the SCRA and their views, whims, attitudes and beliefs towards asylum seekers. This is an extremely problematic section. The Court in *Nwankwo Nwankwo v Minister of Home Affairs and others* recognised that as the express mention of the hospitalisation or institutionalisation mean the two will likely lead to their being relied on most often, which limits the reasons the SCRA will consider compelling.[131]

Section 22(13) further provides that where the application is considered abandoned then the asylum seeker cannot re-apply, which potentially conflicts with the recognition that applicants can become refugees *sur place* during their stay in South Africa and in cases

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[131] *Nwankwo* at 16.

where their applications have been unsuccessful. The matter of *A I and others v Director of Asylum Seeker Management: Department of Home Affairs and others*[132] granted the urgent application brought by a group of asylum seekers whose applications were unsuccessful but required new applications to be made due to circumstances in their country rendering them unable to return. The amendment of 22(13) flies in the face of recognition that individuals can become refugees *sur place* and be given an opportunity to lodge new applications as a result. What is most disturbing is that section 22(14) now expressly makes it an offence to be in possession of an expired visa, which can make the undocumented asylum seeker liable to imprisonment for a period of five years, or a fine, or both imprisonment and a fine. It seems that at every turn, the Department is making it easier and easier to arrest and detain asylum seekers.

Section 23 provides that the D-G now has the power to arrest and detain an asylum seeker whose visa has been withdrawn[133] because it was rejected; contravention of any condition endorsed on the visa; the application was found to be manifestly unfounded, fraudulent or abusive; or the applicant is or becomes ineligible due to cessation or exclusion. The asylum seeker may be arrested and detained pending the finalisation of their application, meaning that while appeal proceedings are being finalised the applicant will be arrested and detained. This is subject to section 29 of the Act, which places a limitation on the number of days of detention.

(iv) Chapter 5: protection and rights of refugees

Section 29 provides for restriction on detention, that asylum seekers may not be detained for a period longer than 30 days and where an extension occurs it must be reviewed by the High Court. This review must occur after the expiry of 'every subsequent period of 30 days':

> No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a court in whose area of jurisdiction the person is detained, and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days of detention.

This must be read together with section 34 which states that detention may not exceed a period of 120 days. This section assumes that asylum seekers have 1) knowledge of their

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[132] (22059/18) [2019] ZAWCHC 114 (02 September 2019).

[133] Refugees Amendment Act Section 22(5).

rights in terms of the Refugees Act as amended and this section, and 2) access to legal resources to challenge their arrest and detention pending the finalisation of their applications. Several matters concerning arrest and detention pending the outcome of applications is discussed further in chapter 4 below. The section also speaks to the detention of children as a measure of last resort and for the shortest period of time. It makes provision for the possibility of detaining a child, which in and of itself is in contradiction with international law principles and the findings in *Centre for Child Law and another v Minister of Home Affairs and others.*[134] It also conflicts with the Children's Act[135] which protects children against detention.[136]

(v) The Refugees Regulations[137]

For their connection to the application process, and arrest and detention of asylum seekers during this process, the following regulations have been identified for the discussion. Regulation 8: application for asylum in terms of section 21; Regulation 9: Abandoned applications and compelling reasons in terms of section 22(12); Regulation 12(3): issuing of visa to a failed application pending judicial review; Regulation 12(4): possession of visa at all times; Regulation 12(8): renewal of visa; Regulation 13: withdrawal of visa in terms of section 22(5); and Regulation 21: detention and removal in terms of section 28.

Regulation 8 discusses the practical requirements for the asylum application. Sub-regulation (1)(b) provides that when an asylum seeker makes an application for asylum the form must be accompanied by a valid asylum transit visa, proof of identification or declaration of identity made in writing before an immigration officer, and the applicant's biometrics. However, where an applicant presents without a valid visa issued in terms of the Immigration Act, including asylum transit visa, they must show good cause for their illegal entry;[138] and regulation 8(4) states that a judicial officer must require the applicant who expresses an intention to apply to show good cause in terms of regulation (3) why they were unable to express such intention as soon as possible to an immigration official. In *Pinzirai and Others v Minister of Home Affairs and Another*, the Court held that the good cause

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[134] 2005 (6) SA 50 (T).

[135] 38 of 2005.

[136] Khan and Schreier *Refugee law in South Africa* p 248.

[137] GNR1707 of 27 December 2019 GG 42932.

[138] 2019 Refugee Regulations, regulation (3).

provision in the Regulations is reliant or based upon article 31(1) of the 1951 Convention.[139] As regards 'good cause' the court put forward that this, undefined in the Regulations, can rely on the provisions of the 1951 Convention and mean that a foreigner who appears before a Court and indicates an intention to apply need only show good cause for illegal entry without being required to state their claim for asylum, which the respondents, Minister of Home Affairs, argued ought to have been the case.[140] This was the Court confirming that an asylum seeker need not satisfy an immigration official as to the substance of their claim for asylum. This infers that the decision, as has long been upheld, is for a RSDO to determine.[141]

In terms of abandoned applications, compelling reasons contemplated in section 22(12), the Regulations[142] stipulate that these reasons 'shall' relate to: quarantine; entry into a witness protection programme; arrest without bail; or any other similar circumstance. Given the limitations around the specific reasons, the 'other similar circumstances' are related to those specific circumstances and are therefore restrictive and limiting. It provides little space for the SCRA when considering compelling reasons and may lead to a restrictive interpretation to the exclusion of other compelling reasons. This adds to the restrictive nature of the Amendment Act and its implementation in the already limited context of service provision in South Africa. It will act as a barrier to asylum applications, limiting the number to be processed before reaching the substantive process.

Regulations 12(3), (4) and (8) all relate to the application process contained in section 22 of the Refugees Act as amended. Regulation 12(3) limits the issuing of a visa to an unsuccessful applicant should a notice of motion (application proceedings) be served, with the visa issued for a period of 30 days at a time only. This causes the asylum seeker to have to travel every month to have the visa renewed, which is a costly, cumbersome experience given the barriers in service provision. Regulation 12(4) unfortunately provides that asylum seekers are required to carry their visas with them always, which is reminiscent of the dompas system during Apartheid, where '[i]ts mission was to formalise and systematise, with

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[139] *Pinzirai and Others v Minister of Home Affairs and Another* (1794/2020) [2022] ZAECPEHC 2 (18 January 2022) at 15.

[140] *Pinzirai* at 21.

[141] See: *Bula and others v Minister of Home Affairs and others* 2012 (4) SA 560 (SCA); *Ersumo v Minister of Home Affairs and others* 2012 (4) SA 581 (SCA); *Iqbal v Minister of Home Affairs and others* 2013 (5) SA 408 (GSJ); *ZA v Minister of Home Affairs and others* [2020] JOL 46638 (GJ).

[142] 2019 Refugee Regulations, regulation (9)(3).

often vindictive cruelty, existing racial subordination, humiliation and exclusion.'[143] Khan and Kolabhai[144] set this out further:

> The type of bureaucracy at issue here is generally called 'identity management', a term used to describe the systems and protocols for the collection, storage, maintenance, and accessibility of identity registers. In South Africa identity management has a history of prejudice and exclusion: in fact, it was apartheid minister Hendrik Verwoerd's grand, modern vision of universal and all-encompassing identity registers and passes (the infamous dompas) which allowed the state to exercise control over the native Black population by limiting freedom of movement, undermining security of tenure, and exposing Black Africans to constant surveillance and threat of detention.

It would therefore be an additional avenue for arrest and detention given that when found not to be in possession of the visa always renders the asylum seeker undocumented. Finally, regulation 12(8) provides that asylum seekers are to renew their visas at the RRO at which their application was made. Read together with regulation 12(3), this is evidence that with the limited number of RROs and the delays and difficulties in accessing services at RROs it is a recipe for asylum seekers to be undocumented and therefore vulnerable to arrest and detention. The Department has now introduced an online system for lodging new asylum applications.[145] The new process took effect on 3 May 2022 but has been subject to serious challenges. As identified in the LHR submission to the Portfolio Committee on Home Affairs in September 2022, these challenges include: the new system was not properly communicated; it did not account for the difficulties experienced by newcomer asylum seekers; there were delays in responses; and the system often crashed or continues to crash.[146]

Regulation 13 sets out the procedure for withdrawal of an asylum visa as contemplated in section 22(5) of the Act. Before withdrawing, the D-G notifies the asylum seeker in writing of the intention to withdraw, the reasons therefor, and the opportunity to make representations. After considering representations, a final decision is communicated to the asylum seeker. The final step is that the Minister must order the withdrawal following which

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[143] *Ruta* at 25.

[144] Fatima Khan & Mikhail Kolabhai 'Bureaucratic barriers to social protection for refugees and asylum seekers during the COVID-19 disaster in South Africa' (2021) *African Human Mobility Review* 7(2) 74-95.

[145] UNHCR 'How can you apply for asylum in South Africa?' *Asylum and refugee status determination* available at: *https://help.unhcr.org/southafrica/get-help/asylum/* accessed on 22 November 2022.

[146] LHR Briefing to Parliament p8.

the asylum seeker is removed. This removal is done in spite of any other law. This regulation assumes, once again, that asylum seekers understand their rights (through reading and understanding the notice, or having someone explain the notice to them in a language of their choice), and/or that they have the necessary access to resources, whether by themselves or with the assistance of another, to make meaningful representations to prevent their departure. The fact that this regulation operates in spite of any other law limits the rights of recourse available in these situations, particularly the PAJA, and it is questionable whether it extends to the *non-refoulement* provision in the Refugees Act (or be interpreted to do so).

The Department has adopted a stance and method through which to severely limit the accessibility of the asylum process, and to wilfully create circumstances giving rise to the arrest and detention of asylum seekers. This is done with the aim of deportation, to push out asylum seekers by not affording them a meaningful opportunity to make and go through an asylum application.

e) Conclusion

The legal principles of international and constitutional law make it clear the manner and form in which South Africa openly disregards its assumed duties in international law, and the rights it is meant to respect, protect, promote and uphold in the Constitution. Through the flouting of the State's responsibilities, South Africa proves its repudiation of its international law commitments, which repudiation is not only incongruent with constitutional standards but an open refusal to uphold these duties and standards.

The Amendment Act fundamentally goes against the principle of *non-refoulement*. Though it maintains the principle, the construction of the new sections, together with the current landscape of service provision in practice, South Africa takes a position that ostensibly conflicts with the principle. The principle is fundamental to refugee law in international law and domestic law. It is clearly contained in the three named Conventions and Protocol and read into certain of the other international law conventions. The amendments discussed above necessarily conflict with the tenets of *non-refoulement*, which the Court in *Abore* held to be the fundamental principle against which the provisions of the Refugees Act are secondary in the assessment of actions against asylum seekers. In its current construction, the Act's provisions when operating in the current landscape of service provision and access thereto would essentially push or keep out asylum seekers for being so strict and restrictive. Ignoring the principle of *non-refoulement* through enacting such

restrictive provisions goes against the identified constitutional rights. Through an intersectional application adopted, we are able view those rights as intrinsically linked in understanding the extent to which arrest and detention of undocumented asylum seekers are violated.

The principle of *non-refoulement* recognises and dictates that an asylum seeker may not be returned against their will or in any manner to a territory where they fear threats to their life or freedom. The emphasis on 'in any manner' is argued to include the constructive return of asylum seekers through the restrictive provisions introduced by the Amendment Act, such as considering applications abandoned where they do not renew visas within 30 days; arrest of asylum seekers in possession of an expired visa; requiring asylum seekers to prove that they will be sustained upon entry into South Africa; reducing the period of time within which to approach a RRO in terms of the transit visa, opening asylum seekers up for arrest on the basis that they are undocumented and therefore to be treated as an illegal foreigner; for those who do not enter through a port of entry, they do not receive a visa and so will be vulnerable to arrest and detention; and the grounds to show compelling reasons for unlawful entry and/or being undocumented begin with specific reference to hospitalisation or institutionalisation opening up the risk of these two to be the predominant standards against which reasons are held to the exclusion of 'any other compelling reason'. These difficulties essentially act as a barrier to successfully access the asylum process and to have a meaningful opportunity to have applications heard without the constant fear of arrest.

South Africa has further, through the above, flouted its responsibilities in those other conventions to which it has assented. The new amendments cause asylum seekers to constantly live in fear of the threat of arrest and detention. This constant fear necessarily affects the mental health of asylum seekers, thus derogating against the rights in Articles 11 and 12 of the ICESCR. The risky position and stigma experienced as a result of being part of the asylum seeker population could affect undocumented asylum seekers' access to health services, job security, and other services. The fear of being undocumented and actually being undocumented is probable to cause apprehension towards accessing services for fear of being reported for possession of no or expired visas.

The rights of asylum seekers as stated above have been codified through the Constitution, Refugees Act, and the relevant international and regional law instruments. To understand the full extent and content of these rights is to analyse and draw down the accepted principles as

expressed in jurisprudence dealing specifically with these laws and this topic. The current legislation makes it near impossible for asylum seekers to access services and enjoy their rights meaningfully; but in contrast makes it easy to be open to arrest and detention for being undocumented during the application process. The amendments go against the principles established and assented to in international law. Having due regard to the named Conventions and Protocol, and other related international law conventions illustrates that South Africa's restrictive move towards restrictive provisions flies in the face of its assumed obligations. It is necessary to engage with South African case law, and the Courts' interpretation of the international and constitutional legal framework, and the rights and duties set out therein, to distil the position regarding the permissibility of arrest and detention of undocumented asylum seekers during the application process.

IV JURISPRUDENCE, ARREST AND DETENTION, AND STRUCTURAL VIOLENCE

'The structure of the Refugees Act is premised on respecting the right to liberty of a foreigner who claims refugee status until his application is finalised.'[147]

Justice Spilg, South Gauteng High Court, Johannesburg

a) Introduction

This section focuses on the jurisprudence of the High Courts, Supreme Court of Appeal, and Constitutional Court of South Africa on the laws, regulations and practices concerning the rights of undocumented asylum seekers in South Africa. The jurisprudence assisted with the interpretation of the context of service provision for this underserved community and the extent of the structural violence perpetrated against them. This is proved via how and the extent to which the Department often breached or failed to fulfil its legal duties. It was prudent to consider the jurisprudence set by the higher courts, to survey and apply the principles established by the courts. When read together with chapter 3, the cases prove the Department's strategy to double-back on the progress made in the jurisprudence by introducing the Amendment Act. The Department clearly amended the Refugees Act to subvert the decisions of the courts to make asylum seeking in South Africa an inaccessible system. This aligns with the consistent opposition of the Department in the cases sourced, in defence of its unlawful actions. The cases reveal that the amendments are the Department's considered choice to frustrate the positive outcomes made in favour of undocumented asylum seekers and to sanction unlawfulness.

b) Methodology for case collection and analysis

A mixed-methods approach was adopted to analyse the case data and make findings. Over the course of the four-year period since this study began, a collection of cases was compiled each year to stay updated not only on the development of jurisprudence to the benefit (to some degree) of undocumented asylum seekers, but also to track the progression of the law in response to jurisprudence. The collection also assisted in understanding the approaches of the different judges presiding over matters within the framework of state competence to regulate arrest and detention of asylum seekers in South Africa's legal system. The assessment of

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[147] *Fikre v Minister of Home Affairs and others* 2012 (4) SA 348 (GSJ) at 37.

these approaches, together with the findings in chapter 3, assist in developing the argument that state competence ought to be limited.

The methodology adopted during the collection of the case law was that of constantly updating the list of cases concerning the following subjects: 1) undocumented asylum seekers; and 2) matters that fundamentally concerned or would have an impact on the lives of asylum seekers in South Africa, but did not necessarily focus on, or mention undocumented asylum seekers per se.

A total number of 35 cases relevant to the study, and which fit within the above categories, were found using three databases: Lexis Nexis; SAFLII; and Juta Publications. Over the four-year-period of the study, the databases were constantly accessed to include the most up-to-date judgments. The judgments are a combination of both reportable and non-reportable cases, that is precedent-setting and non-precedent-setting cases.

The list of cases was marked with the following topics, to understand broadly the subject matter to which each case spoke:

Table 1:

Topic markers for Case Law

undocumented migrants detained on a ship	Immigration Act
deportation	Refugees Act
unlawful detention	undocumented asylum seeker
detention of unaccompanied minors	failure to provide necessary facilities and opportunities to make an asylum application
lawfulness of police station as detention centre for persons considered illegal foreigners	appeal
standards for detention facilities	meaning of ‘territory’
asylum seeker	asylum seeker application

impact on asylum application of arrest and detention on criminal charges	asylum seeker still in application process
expressing intention to apply for asylum	role of RSDO
meaning of 'encountered'	meaning of application to be made 'without delay'
flawed processes by DHA[148]	constitution of RAB[149]
jurisdiction of RSDO	review
international legal framework	*non-refoulement*
impact of possession of fraudulent documentation on asylum application process	unlawful arrest
claim for damages	confirmation of High Court order of invalidity in terms of the Constitution
refugee sur place	closure of RRO

In addition to the above topics, the cases were also captured according to the following fields:

- Name of case
- Date of judgment
- Presiding court
- Presiding judge
- Found in favour of applicant (against State);

[148] 'DHA' refers to the Department of Home Affairs.

[149] 'RAB' refers to the Refugee Appel Board, which has now been amended to the Refugee Appeals Authority. See section 8B of the Refugees Act as amended,

- Urgent application;
- Structural interdict;
- Declaration of constitutional invalidity;
- Conduct, policy or procedure by the State considered unlawful;
- Respondent (Department of Home Affairs) opposing the application; and
- Court discussion of international and/or regional law obligations of the State.

The table below sets out the numbers of cases according to the above fields. Please note that the below numbers overlap as the cases involved different fields, but each field is marked according to the total number of 35 cases.

Table 2:

Cases according to overarching fields

Field	**No. of cases**	**% of cases**
Found in favour of applicant (against State)	30	86%
Urgent application	17	48.5%
Structural interdict	2	5.7%
Declaration of constitutional invalidity	2	5.7%
Conduct, policy or procedure by the State considered unlawful	30	86%
Respondent (Department of Home Affairs) opposing the application	34	97%
Court discussion of international and/or regional law obligations of the State.	26	74%

Table 3 indicates the number of cases according to the subjects, that is 1) undocumented asylum seekers; and 2) matters that fundamentally concerned or would have an impact on the lives of asylum seekers in South Africa, but did not necessarily focus on, or mention undocumented asylum seekers per se. This was split per Court.

Table 3:

Breakdown of cases according to subject and Court

Court	**No. concerning undocumented asylum seekers specifically**	**No. impacting asylum seekers generally**
Constitutional Court	3	2
Supreme Court of Appeal	3	5
North Gauteng High Court, Pretoria		3
South Gauteng High Court, Johannesburg	13	1
Eastern Cape High Court, Pietermaritzburg	1	
Eastern Cape High Court, Grahamstown	1	
Eastern Cape Local Division, Port Elizabeth	1	
Western Cape High Court	1	1

The table below sets out the number of cases according to courts and provinces.

Table 4:

Number of cases according to courts

Court	**Province**	**No. of cases**
Constitutional Court	N/A	5
Supreme Court of Appeal	N/A	8
North Gauteng High Court, Pretoria	Gauteng	3
South Gauteng High Court, Johannesburg	Gauteng	14
Eastern Cape High Court, Pietermaritzburg	Eastern Cape	1
Eastern Cape High Court, Grahamstown	Eastern Cape	1
Eastern Cape Local Division, Port Elizabeth	Eastern Cape	1
Western Cape High Court	Western Cape	2

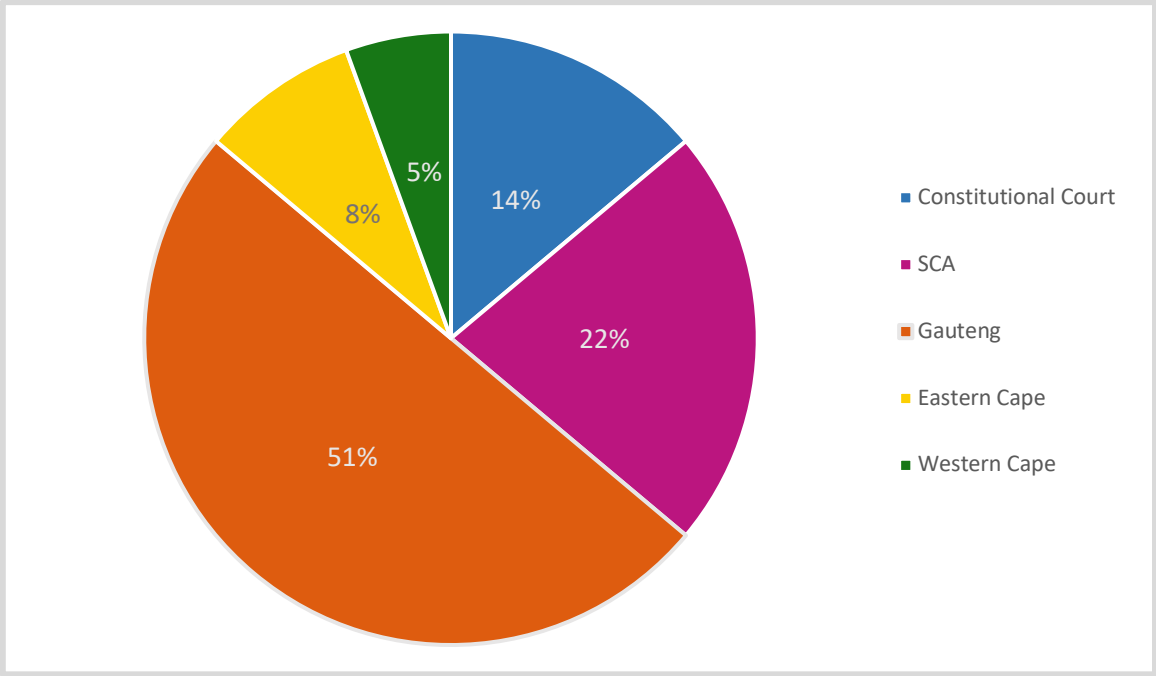
Table 5:

Frequency of State being unsuccessful in litigation

Type (number of cases)	**Result**	**Percentage of total number of cases**
No. of cases opposed by the State	34	97%
No. of cases brought by the State	1	3%
No. of cases found in favour of applicant(s)	30	86%

Figure 3:

Percentage of State loss per Court (CC, SCA, and High Courts by province)

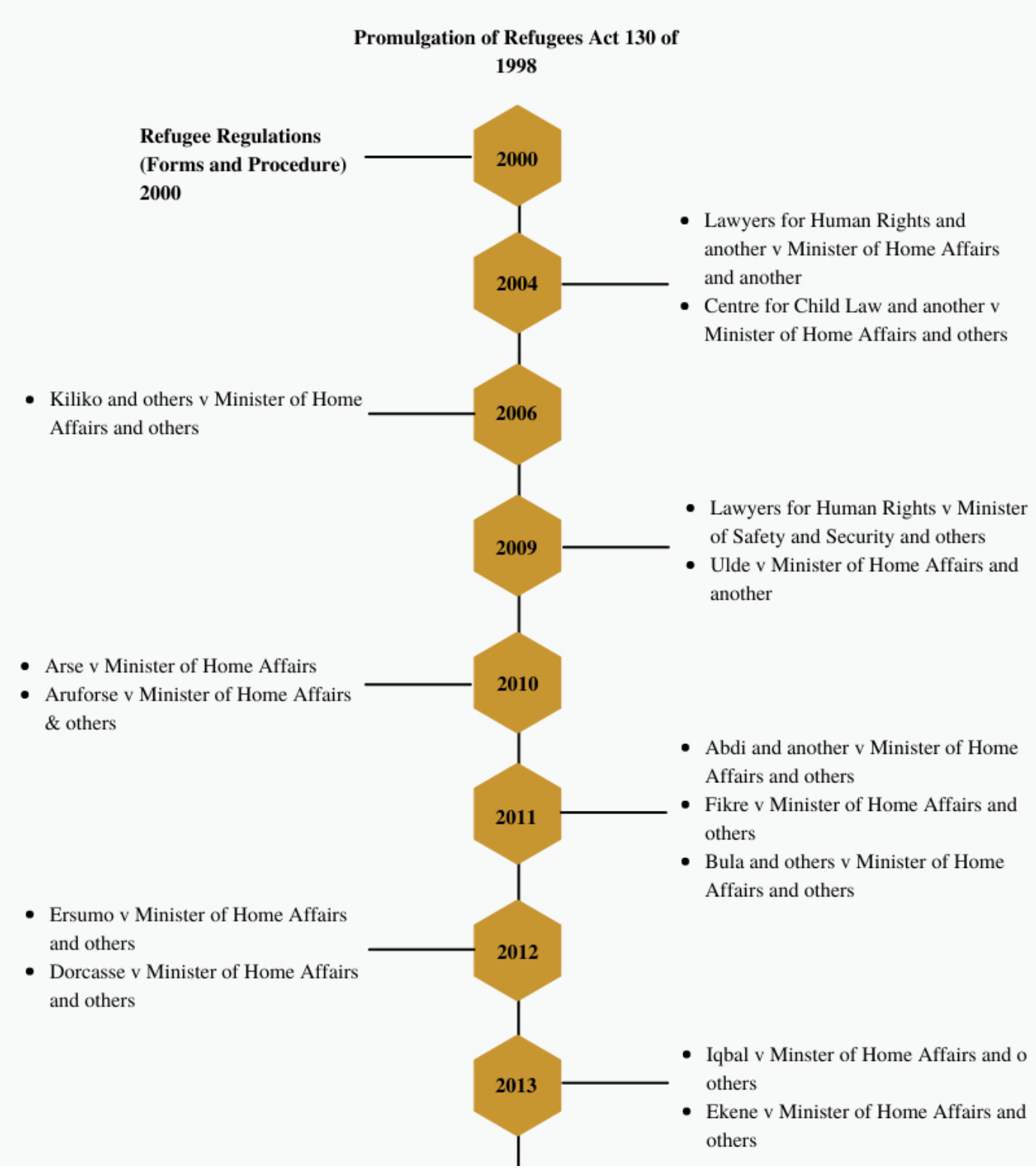


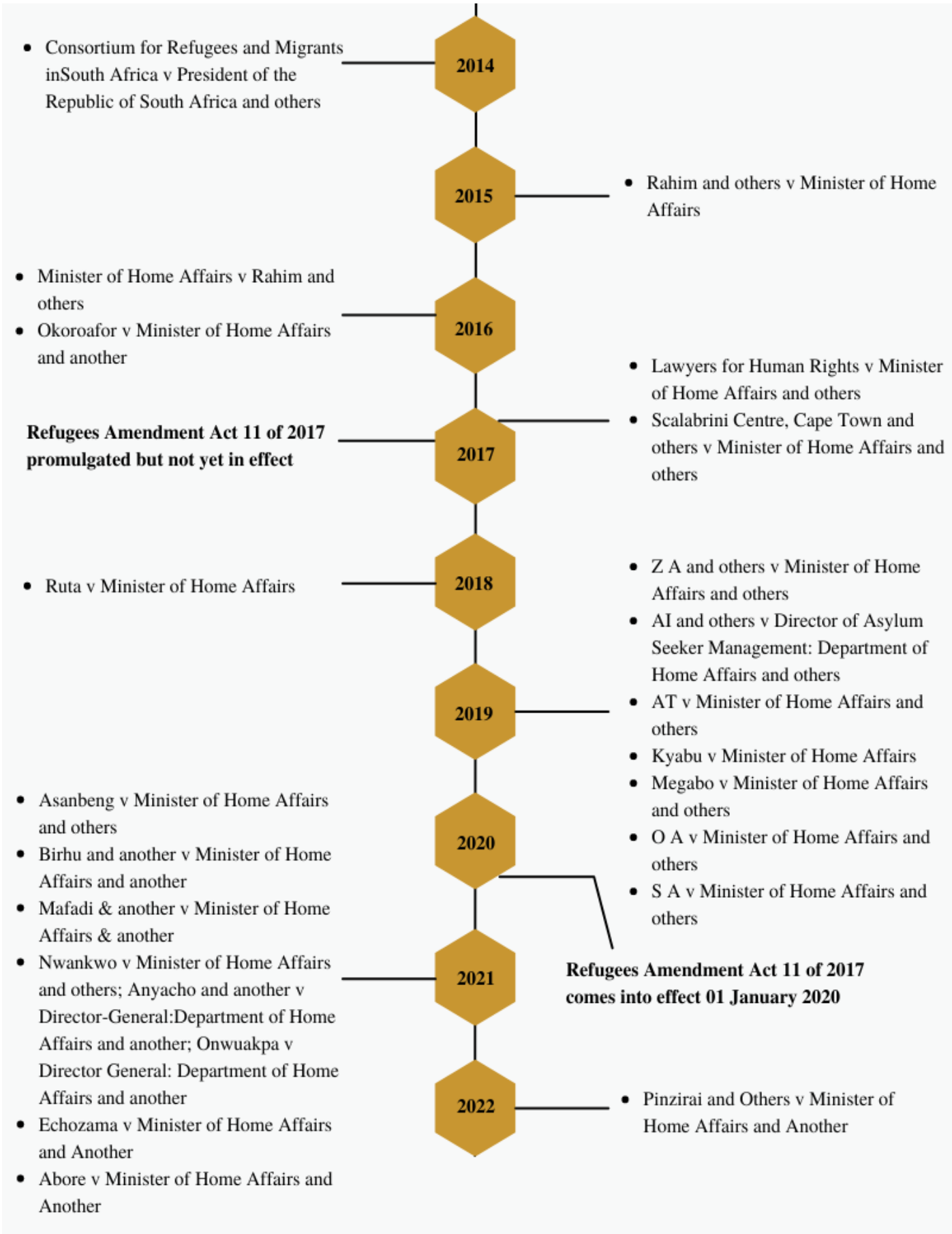
The cases collected over the four-year period spanned across the Refugees Act and Amendment Act which came into effect on 01 January 2020. The cases therefore track jurisprudence pre- and post-amendment. This was particularly important given the impact of the jurisprudence on the amendments. The amendments and the response of the Department in court cases were telling of its approach to its international law and constitutional obligations towards asylum seekers received in the country. The above method of collecting and analysing the case law data adopted an interdisciplinary approach to the findings of the jurisprudence on undocumented asylum seekers in South Africa.

c) The creation of jurisprudential principles

Figure 4:

Timeline of cases (from year of decision)




2014
Consortium for Refugees and Migrants inSouth Africa v President of the Republic of South Africa and others
2015
Rahim and others v Minister of Home Affairs
2016
Minister of Home Affairs v Rahim and others
Okoroafor v Minister of Home Affairs and another
2017
Refugees Amendment Act 11 of 2017 promulgated but not yet in effect
Lawyers for Human Rights v Minister of Home Affairs and others
Scalabrini Centre, Cape Town and others v Minister of Home Affairs and others
2018
Ruta v Minister of Home Affairs
Z A and others v Minister of Home Affairs and others
AI and others v Director of Asylum Seeker Management: Department of Home Affairs and others
2019
AT v Minister of Home Affairs and others
Kyabu v Minister of Home Affairs
Megabo v Minister of Home Affairs and others
O A v Minister of Home Affairs and others
S A v Minister of Home Affairs and others
2020
Refugees Amendment Act 11 of 2017 comes into effect 01 January 2020
2021
Asanbeng v Minister of Home Affairs and others
Birhu and another v Minister of Home Affairs and another
Mafadi & another v Minister of Home Affairs & another
Nwankwo v Minister of Home Affairs and others; Anyacho and another v Director-General:Department of Home Affairs and another; Onwuakpa v Director General: Department of Home Affairs and another
Echozama v Minister of Home Affairs and Another
Abore v Minister of Home Affairs and Another
2022
Pinzirai and Others v Minister of Home Affairs and Another

The findings are set out according to the different steps in the asylum seeker application process that lead to, or at which asylum seekers may be undocumented, given the context of service provision in South Africa. The discussions collectively include cases pre- and post-amendment of the Act and Regulations. In *Mafadi and another v Minister of Home Affairs and another*, the Court held that the new amendments do not affect the jurisprudential framework established in terms of the old Act.[150] The Constitutional Court in *Abore*[151] referred to the principles established in *Ruta v Minsiter of Home Affairs,*[152] *Bula and others v Minister of Home Affairs and others,*[153] and *Ersumo v Minister of Home Affairs and others*[154] (created in terms of the Refugees Act pre-2017 amendment) in its post-amendment determination as to whether the amended Refugees Act's provisions prevented Mr Abore from making an application because he had entered the country illegally.[155] It is therefore clear that the jurisprudence produced in the previous iteration of the Refugees Act still applies in interpreting the provisions of the Amendment Act. The findings will therefore apply these established principles to the Amendment Act and context of service provision when examining whether State competence ought to be limited. It will also refer to the jurisprudence in chronological order, to show the development over time.

(i) Non-refoulement

All the cases discuss the fundamental principle of *non-refoulement*, which is contained in section 2 of the Refugees Act and Amendment Act. It is foundational to refugee law, international and domestic. The Court in *Abore* found that the principle trumps any other provision in the Refugees Act as amended, and any other provision in other legislation. The Court relied on the principle to find in favour of the applicant, that the principle protected him from deportation pending the outcome of an asylum application yet to be lodged. The principle served as a basis to afford an undocumented applicant the opportunity to apply once they expressed an intention to do so. *Non-refoulement* may only be lifted once the full

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[150] [2021] ZAGPJHC 141 (16 July 2021) at 43.

[151] *Abore v Minister of Home Affairs and another* 2022 (2) SA 321 (CC).

[152] 2019 (2) SA 329 (CC).

[153] 2012 (4) SA 560 (SCA).

[154] 2012 (4) SA 581 (SCA).

[155] *Abore* at 32.

procedure was followed, which included being given an opportunity to apply.[156] The opportunity to apply extended to those who did not declare an intention to apply at a port of entry or who entered the country unlawfully.[157] Irrespective of these situations, once an asylum seeker expresses an intention to apply to an official then they must be assisted to make an application. This accords with the asylum application process adopted in this thesis. To deny the opportunity to apply would render the asylum seeker an illegal foreigner for the purposes of the Immigration Act and open to deportation. The principle operates to the exclusion of the Immigration Act's provisions and serves to protect undocumented asylum seekers from deportation, particularly those who have not yet entered into the formal application process.

The principle has also been used with regard to permitting refugee *sur place* applications. This is where individuals whose claims failed or who did not apply for asylum became asylum seekers while in their host country. This is because a change in circumstances in their country of origin rendered them asylum seekers, that they would be subject to harm if they were to be returned. The Court in *Abdi and another v Minister of Home Affairs and others*[158] held that to refuse entry and thereby expose someone to the risk of persecution or physical violence in their home country was in conflict with the fundamental values of the Constitution as well as the principle.

In *Ruta,* the Court began its analysis of the matter with reference to section 2, which the Court recognised entrenched the principle of *non-refoulement*, which has not been removed from the Amendment Act. In that matter, the Court affirmed that the principle is placed above any contrary provisions within the Refugees Act pre- and post-amendment, and any other statute or provision. It is this standard against which conduct of the Department, and the question of limiting State competence is held. It encompasses the constitutional rights set out above when implicated by arrest and detention, and which rights are intimately linked. It is therefore through this prism that we come to understand the process of asylum applications that include arrest and detention. And the efforts of the Department that run counter to this openly adopted principle must be recognised as structural and indirect violence for engaging

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[156] *Abore* at 42.

[157] *Abore* at 27.

[158] *Abdi and another v Minister of Home Affairs and others* 2010 (6) SA 579 (GSJ).

in efforts that would seek to return and expose individuals to harm should they be removed from the country.

(i) Entering the country

Entry into the country is perhaps one of the more vulnerable steps in the asylum application process. Asylum seekers are at the mercy of officials tasked with admitting them into the country, or if not through a port of entry, then those officials who encounter them after entry. With the nature of asylum seeking being one of vulnerability with the safety and assurances of protection being in the hands of a foreign State, entry is a precarious event. South Africa is not exempt from holding and practicing xenophobic views. It is not beyond the realm of probability to conclude that these views and actions extend to the borders, that officials will allow xenophobic views to impact on decisions to grant entry and/or expressing these views to asylum seekers who present at ports of entry. This sets the tone of treatment once in the country, aggravating the existing vulnerability of asylum seekers.

Entry into the country is subject to even more precarity where it occurs outside a designated port of entry.[159] The formal points of entry for foreign nationals are set out according to the countries bordering South Africa (Botswana; Lesotho; Mozambique; Namibia; Swaziland; and Zimbabwe), and those not bound by physical borders, such as airports and harbours. All ports of entry have stipulated operating hours. Though these ports of entry exist, the courts have accepted that asylum seekers do not often use the ports to enter the country lawfully nor do they possess the necessary documentation when entering. Due to the COVID-19 pandemic, select ports of entry were closed. It was only on 28 July 2022 that the Minister of Home Affairs, by way of Notice in the Government Gazette, declared that all ports were re-opened as of 01 August 2022.[160]

In *Lawyers for Human Rights and another v Minister of Home Affairs and another*[161] the Court dealt with the matter of permitting asylum seekers into the country who had been detained on a ship. The application sought to challenge the constitutionality of certain sections of the Immigration Act, that person found to be illegal foreigners attempting to enter the country could be detained on the ship they used to enter the country or be detained

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[159] Department of Home Affairs *South African Points of Entry* available at: *http://www.dha.gov.za/index.php/immigration-services/south-african-ports-of-entry,* accessed on 03 October 2022.

[160] Immigration Act (13/2002): Opening of all ports of entry GN 2380 GG 46710 of 15 August 2022.

[161] 2004 (7) BCLR 775 (CC).

elsewhere. Section 34 of the Immigration Act allowed for the detention on a reasonable suspicion that a person is in the country without a legal basis, therefore liable to detention. The application of the section in this case meant that those detained on the ship had no right to recourse. It was argued that because they were on the ship, and not within the borders of South Africa, they were not subject to the rights afforded in terms of the Immigration Act, to have their detention reviewed after 30 days. The case is useful for the parallel that can be drawn regarding entry via a ship for asylum seekers who do so without documentation permitting their stay in the country. These asylum seekers would be treated as illegal foreigners in terms of the Immigration Act until they expressed an intention to apply for asylum. This, however, hinges on language and whether asylum seekers can, on their own or with assistance, express this intention to access the protections of the Refugees Act. That said, whether they are able to express such an intention, their lack of proper documentation may yet interfere with their entry, leading to access being dependent on the goodwill of immigration officials. It is at this point of entry where asylum seekers are undocumented in terms of the country's laws that would subject them to arrest and detention. As Ziegler sets out,[162] which is applicable upon presentation at a border irrespective of whether it is a formal port of entry:

> Ultimately, it is because recognition of a person as a refugee is declaratory that asylum seekers must enjoy unhindered access to a fair Refugee Status Determination (RSD) process, lest they should be exposed to refoulement prior to having their claims assessed. Having been granted such access, and following submission of an asylum application, asylum-seekers should be considered "presumptive refugees" until and unless their claim has been duly and finally rejected following a fair procedure. Therefore, the onus is on host country authorities to justify why asylum-seekers whose applications are pending should be denied access to rights that are otherwise available to refugees, rather than assume this should be the legal default. Administrative backlogs and staffing shortages should not be 'rewarded' by relying on them as a basis for denial of rights.

Adopting Ziegler's approach, the asylum seeker application begins upon their entry into the country or presenting at the border. Seeking asylum, and the formal processes of that country would apply upon their presenting themselves in the country. The application of the law's

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[162] Ziegler 'Access to effective refugee protection in South Africa' p74. Footnotes omitted.

provisions becomes dependent on language barriers and whether immigration officials can assist them, whether by design or willingness.

This point is taken further in *Bula and others v Minister of Home Affairs and others*[163] which concerned a failure to produce documentation to permit entry and stay in the country by undocumented asylum seekers. The 19 appellants were arrested and detained on the same day they arrived in the country and were transferred to Lindela for deportation. The appellants were detained for non-production of documentation validating their stay, and were denied any opportunity to apply at a RRO. This concerned the meaning of the word 'encounter' as provided for in regulation 2(2) of the 2000 Regulations (now repealed by the 2019 Refugee Regulations[164]), that once someone is encountered to be in violation of the Immigration Act, they must be issued with an asylum transit visa to approach a RRO to make an application for asylum. The Court held the following:[165]

> The word "encountered" in regulation 2(2) must be given its ordinary meaning which is to meet or come across unexpectedly. The regulation does not require an individual to indicate an intention to apply for asylum immediately he or she is encountered, nor should it be interpreted as meaning that when the person does not do so there and then he or she is precluded from doing so thereafter. [sic]

The intention was to ensure that where the intention to apply was expressed then the regulatory framework of the Refugees Act kicked in; however the thesis argues that the framework kicks in once the asylum seeker presents at a border and not once the intention is expressly shared. The appellants expressed this when detained at Lindela and through a letter sent to the respondents by their attorneys. Once they did so, they became entitled to treatment and protection under the Refugees Act and its regulations, to be given opportunity to apply for asylum, which included a transit visa. In these circumstances, if detained, the applicant for asylum is entitled to be set free to make an application for asylum.[166] The word 'encountered' for the purposes of the Regulations was given a wide meaning, that one need not express an intention when first encountered, and not doing so does not exclude expressing the intention at a later stage. One can therefore be 'encountered' after being arrested and detained. This

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[163] 2012 (4) SA 560 (SCA).

[164] 2019 Refugees Regulations.

[165] *Bula* at 72.

[166] *Bula* at 80.

regulation has been repealed by the new 2019 Regulations introduced in terms of the Amendment Act, as well as section 21 of the Amendment Act.[167] This, it is argued, was the Department's way of denying an avenue of access to the application process when an undocumented asylum seeker is encountered, especially those who entered other than through a port of entry. The protection that was afforded by this section can now be found in the *non-refoulement* provision in the Refugees Act, as held by the Court in *Abore*, that the provision will be applicable until there is a final determination on an asylum application.

Bula, however, revealed prejudice on the part of the judge in the court *a quo*, who held harmful views and handled the matter poorly.[168] This was indicative of how inaccessible the court systems can be, and how xenophobic and concerning ideologies permeate all levels, creating bad law and bad policy for an underserved community who are inherently vulnerable. It also teases out issues of power and power disparity in asylum seeker matters. The court *a quo* concluded that their asylum applications would not have been *bona fide* and they were illegal foreigners. The judge was found to have referred the matter to oral evidence without proper notice; accepted evidence that was not given under oath; favoured and relied on the testimony of an advocate before hearing the appellants; and treated the appellant witnesses unfairly and without dignity.[169] He was inflammatory in his remarks and concluded that the appellants were involved in a syndicate apropos of any evidence or submissions in that regard.[170]

The SCA also appreciated the burden on the State to keep track of numerous people under this system, but even more so recognised that the burdens were exacerbated by the Department failing to put measures in place to resolve the burden and make the system more effective.[171] But those who suffer most are the ones meant to be protected by the system, which ends up punishing them for the failings of those duty-bearers obligated to protect them.

Finally, the matter of *Birhu and another v Minister of Home Affairs and another,*[172] a 2021 matter wherein the applicants sought declaratory orders that their detention was

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[167] 2019 Refugees Regulations, regulations 7 and 8.

[168] *Bula* at 23-52.

[169] Ibid at 53.

[170] Ibid at 56.

[171] *Bula* at 81.

[172] *Birhu and another v Minister of Home Affairs and others* (46972/2021) [2021] ZAGPJHC 604 (22 October 2021).

unlawful, that they not be deported until their statuses as refugees be determined, and they be released in order to apply for asylum at a RRO is relevant. In reference to precedent, the Court recognised that where an intention to apply for asylum is expressed then the applicants ought to be released to be given an opportunity to apply.[173] The applicants argued that their detention was unlawful as they had an intention to apply for asylum and should be given an opportunity to do so.[174] The Department denied the applicants access to the asylum application process because the previous regulation 2(2) was repealed. The respondents referred to the Amendment Act and its 2019 Regulations, arguing that the applicants were not entitled to release, and could only apply if they showed good cause for their illegal entry and stay in the country.[175] The amended regulatory framework came into operation on 01 January 2020.[176] The Court accepted that in spite of the applicants' illegal entry and stay in the country, they were still entitled to apply for asylum. The illegal entry and stay did not extinguish this entitlement.[177] The Court relied on the pronouncements made in *Ruta*, that though an asylum seeker entered the country unlawfully and is therefore an illegal foreigner under the Immigration Act, the two Acts ought to be read together and in harmony. When done, the Refugees Act's provisions are applicable and an asylum seeker cannot be deported until their asylum application has been processed.[178]

The new Regulations provide that someone who enters South Africa to apply for asylum must make this intention clear and be issued with an asylum seeker transit visa; are to do so through a port of entry; and the applicant must present in person at a RRO within five days to make the application, failing which they must provide good cause for the delay and the reason they do not possess a transit visa.[179] Judicial discretion is limited to considering the matter on good cause shown by the party in terms of sub-regulation (3).[180] This is where any foreigner is in the country illegally who expresses an intention to apply. Applying *Ruta,* the

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[173] *Birhu* at 12.

[174] Ibid at 13.

[175] Ibid at 14.

[176] Ibid at 15.

[177] Ibid at 16.

[178] *Birhu* at 23.

[179] *Birhu* at 20-21.

[180] Ibid at 21.

Court decided that the mechanisms created by the amended regulations do not create a bar to applying for asylum.[181]

The Court was satisfied that the applicants should not be automatically excluded from the provisions of the Refugees Act.[182] At the time, the RROs remained closed without certainty of when they would re-open. The applicants retained the right to apply and an opportunity to show good cause before an RSDO and if successful to apply for asylum. Their detention makes this impossible and they should be released to apply for asylum.[183] The position adopted in *Ruta* has not been changed since the introduction of the new amendments to the Refugees Act.[184] However, the Court expressed, in the face of the RROs being closed due to the pandemic that the applicants should have been more active in their attempts to regularise their stay in South Africa,[185] which in the context of service provision would have produced the same result.

(ii) The transit visa and approaching a facility

The Amendment Act provides for an asylum transit visa the be issued at a port of entry. The purpose of the visa is to permit the asylum seeker to travel to a RRO to lodge an application. It does, however, give the individual five days only to travel to the RRO. In comparison to the previous section, the number of days has been lowered from 14 days to five, greatly reducing the opportunity to lodge an application. Failure to make an application during the five days would, according to a simple reading of the Immigration Act, render individuals illegal foreigners. *Bula* held that an applicant who expresses an *intention to apply* for asylum is entitled to an asylum transit visa to approach a RRO and to make an application.[186] This entitled an applicant to be freed (or not be detained) to make their application.

Ersumo established that a *delay* in making an application did not preclude one from being assisted to make one, be issued with a transit visa, and delay in making an application was not grounds for refusing such.[187] The regulation foresaw the possibility of someone who

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[181] Ibid at 23.

[182] Ibid at 24.

[183] Ibid at 27.

[184] Ibid at 28.

[185] Ibid at 29.

[186] *Bula and others v Minster of Home Affairs and others* 2012 (4) SA 560 (SCA).

[187] *Ersumo* at 15.

entered the country illegally and did not make an application without delay. The Court also held that it applied to all foreigners encountered irrespective of their reasons for illegal entry who profess an intention to apply for asylum. The Court also accepted that the meaning of 'encountered' in terms of regulation 2(2) of the previous Regulations included being found with an expired visa. Furthermore, *Ersumo* 'conclusively determined that false stories, delay and adverse immigration status nowise preclude access to the asylum application process, since it is in that process, and there only, that the truth or falsity of an applicant's story is to be determined…' [footnotes omitted].[188] In reference to *Ersumo*, the Court in *Okoroafar v Minister of Home Affairs and another*[189] stated that:

> What does emerge from this passage is that whatever schemes an illegal foreigner may have devised to escape the attentions of the authorities, it would not disqualify him from obtaining a regulation 2(2) permit. An extended illegal presence in South Africa similarly does not disqualify him from insisting upon the delivery of a regulation 2(2) permit when detected.[190]

In *Iqbal v Minster of Home Affairs and others*[191] the Court applied the principle of *Bula* to recognise that it is the intention to apply and not the intention to seek asylum that mattered. It is the act of making the application as opposed to the reasons for making the application that mattered.[192] Finally, as held in *Arse v Minister of Home Affairs*,[193] when an asylum transit permit is issued, they are part of the asylum process and proceedings cannot be instituted until a decision on their application is reached.

Mention of the jurisprudence in terms of the repealed 2000 Regulations on this step of the asylum application process raises a specific point. The protection afforded by regulation 2(2) especially as interpreted by the courts is no longer expressly available to asylum seekers who have entered the country illegally and declare an intention to apply for asylum once encountered. The default position is now that they are no longer to be issued with an asylum seeker transit visa to assist them to travel to a RRO and make an application for asylum. The default position is therefore to make them vulnerable to arrest and detention, and at the mercy

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[188] *Ruta* at 16.

[189] *Okoroafar v Minister of Home Affairs and another* [2017] JOL 38058 (ECP).

[190] *Okoroafar* at 31.

[191] 2013 (5) SA 408 (GSJ).

[192] *Iqbal*.

[193] *Arse* at 20-21.

of immigration officials who encounter them and their willingness to assist them to make an application. This is important for the conclusion that the repeal of the regulation 2(2) was an intention of the Department to make access to the application process difficult or utterly inaccessible.

(iii) Accessing a (working) facility: the application process

The map[194] below indicates where asylum seekers can *currently* access a RRO to make an application for asylum.

Figure 5:

Map of working Refugee Reception Offices

It is necessary to understand the landscape of physical access to a RRO available to asylum seekers. According to the Department of Home Affairs[195] there are five RROs in South

[194] United Nations Geospatial *South Africa* (2007) available at: *https://www.un.org/geospatial/content/south-africa* (accessed on 22 September 2022).

[195] Department of Home Affairs *Refugee Centres*.

Africa: Gqeberha Refugee Reception Centre, Pretoria: Desmond Tutu Refugee Reception Centre, Musina Refugee Reception Centre, Durban Refugee Centre, and Cape Town Refugee Reception Centre. Cape Town remains closed to new applications. Even though the Gqeberha office has reopened for services for new applicants, some new applicants have received appointments for late in 2023. Even though asylum seekers have not neglected in their duties to approach a RRO in order to be documented arrest and detention continues unabated in South Africa.

In *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and others,*[196] on discussing the context of service provision and the need for a RRO in Cape Town, the Court recognised that support networks were necessary for new asylum seekers to 'survive and live with dignity while they await the determination of their applications'.[197] The Court recognised that majority of asylum applications take years to process at the initial stage of decision-making, and there were further delays when decisions have been referred to the SCRA and RAB (now the Refugee Appeals Authority). It is within these circumstances that asylum seekers access services and assistance in the application process, and in terms of which arrest and detention take place.

Where RROs are functional, of the 35 cases sourced, 18[198] of them included evidence of an inability to receive assistance at RROs. This led to the applicants being vulnerable to arrest and detention for being undocumented due to a failure on the part of the State to offer meaningful assistance in making an application. This was a duty in terms of the Refugees Act and Amendment Act, that asylum applications must be made in person at a RRO and determined by the RSDO at the RRO. The delays caused by the State frustrate the asylum

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[196] *Scalabrini* (2018).

[197] *Scalabrini* (2018) at 41.

[198] See: *Lawyers for Human Rights and another v Minister of Home Affairs and another* 2004 (7) BCLR 775 (CC); *Kiliko and others v Minister of Home Affairs and others* 2007 (4) BCLR 416 (C); *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA); *Abore v Minister of Home Affairs and Another* 2022 (2) SA 321 (CC); *Aruforse v Minister of Home Affairs & others* 2010 (6) SA 579 (GSJ); *Bula and others v Minister of Home Affairs and others* 2012 (4) SA 560 (SCA); *Birhu and another v Minister of Home Affairs and another* (46972/2021; 46973/2021) [2021] ZAGPJHC 604 (22 October 2021); *Dorcasse v Minister of Home Affairs and others* [2012] 4 All SA 659 (GSJ); *Echozama v Minister of Home Affairs and Another* (51910/2021) [2021] ZAGPJHC 831 (20 December 2021); *Ersumo v Minister of Home Affairs and others* 2012 (4) SA 581 (SCA); *Lawyers for Human Rights v Minister of Home Affairs and others* [2017] ZACC 22; *Mafadi and another v Minister of Home Affairs and another* (27878/2021) [2021] ZAGPJHC 141 (16 July 2021); *A I and others v Director of Asylum Seeker Management: Department of Home Affairs and others* (22059/18) [2019] ZAWCHC 114 (02 September 2019); *A T v Minister of Home Affairs and others* (33524/2014) [2019] ZAGPJHC 485 (27 November 2019); *O A v Minister of Home Affairs and others* (33905/2019) [2019] ZAGPJHC 470 (1 November 2019); *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC); *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 (4) SA 125 (SCA); *Z A and others v Minister of Home Affairs and others* (40089/19) [2019] ZAGPJHC (29 November 2019); [2020] JOL 46638 (GJ).

application process and cause the situation of asylum seekers being undocumented for which the State then shifts the blame to the asylum seekers by not considering the very situation the State created. Through its deleterious actions, the State authorises its power to arrest and detain asylum seekers for being undocumented. The Court in *Kiliko and others v Minister of Home Affairs and others*[199] held that the policy and practice at the RRO that limited the number of asylum seekers that could be serviced was inconsistent with their rights in terms of sections 9 (equality), 10 (human dignity), 12 (freedom and security of the person) and 33 (just administrative action) of the Constitution; and international law.[200]

What constantly impacts the ability to receive assistance is the arrest and detention by immigration officials who determine that undocumented asylum seekers ought not to receive assistance because they believe their claims to be ineligible. It has been held that it is not for a single immigration officer to decide that there was a reason to believe the applicant was disqualified from applying for asylum (even before the applicant made the application).[201] Furthermore, jurisdictional facts of persecution do not need to be disclosed to an immigration official. The disclosure of the facts would defeat the purposes of the confidentiality protection in the then section 21(5) of the Refugees Act.[202] It is for the RRO to receive the application and for the RSDO to determine it.[203] Until the matter is finalised by the RSDO the principle of *non-refoulement* applies.[204]

Intimately linked to the above is that courts have no role to play in bureaucratic processes to determine whether an individual is a *bona fide* asylum seeker, and the Courts processes are limited to judicial oversight. In terms of the new amendment of exclusion, (section 4(1)(e): commission of a crime in South Africa), as a reason to withdraw an asylum seeker application per section 22(6), the Court in *Nwankwo v Minister of Home Affairs and others*[205] held that such decision was not automatic or peremptory. It required a process to be

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[199] 2007 (4) BCLR 416 (C).

[200] *Kiliko* at 31.

[201] *Okoroafar* at 26.

[202] *Z A* at 24.

[203] *Mafadi* at 24.

[204] *Mafadi and another v Minister of Home Affairs and another* (27878/2021) [2021] ZAGPJHC 141 (16 July 2021) at 28.

[205] *Nwankwo v Minister of Home Affairs and others; Anyacho and another v Director-General:Department of Home Affairs and another; Onwuakpa v Director General: Department of Home Affairs and another* (2021/01004; 2021/0013; 2021/0014) [2020] ZAGPJHC 377 (22 September 2020).

followed by SCRA before it can be withdrawn.[206] Once done, then only can the D-G withdraw the visa and then order the detention of the asylum seeker. Section 29 requires judicial oversight of the detention.[207] The Court was of the view that the new amendments had no effect on existing jurisprudence and so the Court still had oversight of the bureaucratic process followed by the Department.

What is equally important is that actions done to evade the attention of, and mislead immigration officers, do not necessarily convey an intention not to avail an individual of an opportunity to apply for asylum if the endeavour to evade failed.[208] In *Ruta*, the Court held that '[a]t no stage however does delay function as an absolute disqualification from initiating the asylum application process.'[209] Delay in making an application is relevant for determining credibility and authenticity, but this is a determination the RSDO must make. The Court holds that though an asylum seeker who is in the country unlawfully is an illegal foreigner for the purposes of the Immigration Act and liable to deportation, the Refugees Act provides imperatively that, notwithstanding the status, an asylum seeker claim must first be processed under the Refugees Act.[210]

As regards the impact of a fraudulent visa on an intention to apply, and therefore to be assisted in terms of the Refugees Act, it has been held that once the provisions of regulation 2(2) kicked in there was no time limit on when the person can be encountered or when they can express the intention to apply.[211] Regulation 2(2) includes persons in violation of the Immigration Act, which necessarily includes having fraudulent documents.[212] This regulation's protection as interpreted by the Court has been withdrawn by the Amendment Act. This is an instance of the Department stripping protection previously afforded to asylum seekers.

Another display of refusal to assist is the Department's refusal to process *sur place* applications. An example of this is *A I v Director of Asylum Seeker Management:*

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[206] *Nwankwo* at 19.

[207] *Nwankwo* at 20.

[208] *Okoroafar* at 30.

[209] *Ruta* at 56.

[210] *Ruta* at 43.

[211] *Ekene v Minister of Home Affairs and others* [2014] JOL 31406 (GSJ at 10.

[212] Ibid at 12.

Department of Home Affairs and others.[213] Where the applicants' initial applications were unsuccessful, but circumstances in their countries of origin changed they would need to make new applications on this basis. The Department, however, was of the view that when an application was rejected, the unsuccessful applicant must leave the country, and where they have not they must be deported. No allowance was made for *sur place* applications. The Court found that *Ruta* was apposite, holding that the Immigration Act did not trump the Refugees Act and the applicants were found to have a clear right to have their applications considered.[214] *Pinzirai and Others v Minister of Home Affairs and Another*[215] (post-Amendment Act) affirmed the fact that regulations 8(3) and (4) did not give power to the courts to refuse a person the opportunity to apply for asylum when expressed, because this would be synonymous with refoulement.[216]

Finally, the 2022 decision of the Constitutional Court in *Abore*[217] regarding release pending the outcome of an application is most important for understanding the interplay between the Refugees Act and Amendment Act. When an asylum seeker expresses an intention to apply, this is the date used to determine which versions of the Refugees Act applied.[218] Since section 2 has not been amended, it was still applicable and protected Mr Abore from deportation until his status was finally determined. *Non-refoulement* may only be lifted until the full application procedure was completed.[219] Section 2 applies notwithstanding any other provisions in the Act or any other law.[220] The amendments did not affect Mr Abore's eligibility to be afforded the protection of *non-refoulement* irrespective of when he arrived (pre- or post-amendment), or the entitlement to an interview in terms of s 21(1B) read with regulations 8(3) and (4).[221] The Court also held *Ruta* still applied to the matter regarding findings of delay.[222]

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[213] (22059/18) [2019] ZAWCHC 114 (02 September 2019).

[214] *A I* at 36-38.

[215] (1794/2020) [2022] ZAECPEHC 2 (18 January 2022).

[216] *Pinzirai* at 23.

[217] *Abore v Minister of Home Affairs and another* 2022 (2) SA 321 (CC).

[218] *Abore* at 33.

[219] *Abore* at 42.

[220] *Abore* at 44.

[221] *Abore* at 48.

[222] *Abore* at 45.

(iv) Other

There were four other cases gathered that referred to matters affecting asylum seekers. The findings of these cases are intrinsically linked to the process of arrest and detention, and further form the basis for challenging South Africa's competence to use arrest and detention during the application process.

It is unlawful to hold those considered to be 'illegal foreigners' at a police station, which was controlled by police officials and not immigration officers. This speaks to the standards of detention and the conditions in which this underserved community are held pending deportation or the outcome of their matters. The use of the facility challenged in *Lawyers for Human Rights v Minister of Safety and Security and others* (2009)[223] was unlawful because minors were being detained on the premises as well, and the standards of detention set out in Annexure B of the Immigration Act were not met. The standards were peremptory and must be provided by the State, but the conditions of the holding facilities were reprehensible and violated the right to dignity, among others.

In *Lawyers for Human Rights v Minister of Home Affairs and others* (2017),[224] the Immigration Act was challenged for being unconstitutional in its provisions regulating detention proceedings for illegal foreigners. This impacted undocumented asylum seekers who are treated as illegal foreigners for the purposes of the Immigration Act. Some issues were a failure to inform individuals of their rights in terms of section 34 of the Immigration Act; detention exceeding 120 days; and an inability to exercise their rights because of lack of access to resources and legal assistance.[225] This revealed inadequacies in the system created by the Immigration Act. The relief granted by the Constitutional Court was to read in a process in the interim and pending an amendment to be made by Parliament. The legislation has still not been introduced, evidencing a lack of care or concern on the part of the State.

Dorcasse v Minister of Home Affairs[226] concerned the RAB (now the RAA) being improperly constituted to hear a matter and pass a decision. The Act provided that three members must be present at an appeal hearing conducted by the RAB, but only one was

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[223] *Lawyers for Human Rights v Minister of Safety and Security and others* [2009] JOL23612 (GNP).

[224] *Lawyers for Human Rights v Minister of Home Affairs and others* [2017] ZACC 22.

[225] *Lawyers for Human Rights* (2017) at 10.

[226] *Dorcasse v Minister of Home Affairs and others* [2012] 4 All SA 659 (GSJ).

present at the hearing concerned. The Court held that this was unlawful. This was based on the legal principle that a statutory body with decision-making powers which was improperly constituted is incapable of pronouncing valid decisions.[227] This section has now been amended to provide that an appeal need only be constituted by a minimum of one person or a number determined by the chairperson of the RAA.[228] This amendment was clearly in response to the Court's finding. This, it is argued, creates circumstances in which a decision may pass without the input or checks of additional members to ensure it is fair and substantively correct.

Finally, *Rahim and others v Minister of Home Affairs*[229] concerned the determination of places of detention. The Court found that the places at which the appellants were held were not determined by the D-G to be places of detention in accordance with international standards, where illegal foreigners were to be held pending deportation. The Court held further that a determination of this nature must be publicly proclaimed, in the interests of certainty and effective administration. Section 8(1) was amended to state expressly that establishing and disestablishing a RRO must be done by way of notice, which implements the finding of the Court.

d) Findings

(i) The Department always opposes court applications

The cases illustrate that the Department is committed to opposing applications challenging its unwritten policy to deny those rights the Refugees Act plainly protects, and which give effect to the international rights to which the Refugees Act was designed to give effect. This demonstrates an institutional stance that the Department is not wrong in its conduct and practices. It depicts the Department's commitment to disregarding its statutory duties.

What is presented is a complete disregard of jurisprudence, which, given the number of cases and constant opposition to unlawful conduct, sanctions or communicates a dedication to disregard established asylum application procedures. It is (wilful) ignorance by a State department of the rights it is meant to protect and uphold, going against the tenets of international law and the Constitution. A more forgiving approach is that this demonstrates a

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[227] *Dorcasse* at 17.

[228] Refugees Act as amended, section 8C.

[229] *Rahim and others v Minister of Home Affairs* 2015 (4) SA 433 (SCA).

lack of knowledge and/or training on case outcomes and jurisprudence. This approach is clear in all the cases collected.

The constant opposition by the Department in favour of its warped approach to refugee law and its practice to continuously disregard court decisions is an instance of structural violence. The choice to dismiss, wilful ignorance of, or lack of training on Court decisions throughout the ranks in the Department points to a conclusion of structural violence. This violence is effected to the clear detriment of asylum seekers and their protection under South African law, as the host country that ought to ensure their protection as their claim for asylum is processed.

The case law clearly indicates that this opposition, the deliberate denial of State wrongdoing in failing to uphold rights, is a conclusion that the State has no intention of respecting the rights of asylum seekers and their duties to do so. It cannot be denied that this institutional approach is structural violence exacted against asylum seekers. This violence cannot be overlooked or go unchecked. To recognise it as impermissible is one step towards holding the South African State accountable for its failure to respect the rights of asylum seekers and, even more, to wilfully trample on these rights in favour of a practice to create a system that invariably results in arrest and detention of asylum seekers. Where impermissibility is acknowledged then it is necessary to hold the State accountable by limiting its competence to include arrest and detention measures during the asylum application process.

(ii) Abuse of power

The above links to abuses of power by officials that is consistent and unapologetic. The constant opposition is in relation to the same issues being raised in the jurisprudence, particularly regarding the detention pending deportation where asylum seeker applications are still in the process of review, and therefore not yet finalised. The Court in *Mafadi and another v Minister of Home Affairs and another*[230] observed that:

> The respondents in charging and convicting the applicants and getting them to sign these forms constitutes a series of blunders that demonstrate the complete disregard for the Refugees Act and of course the entire jurisprudential context of refugee law in this country.

[230] (27878/2021) [2021] ZAGPJHC 141 (16 July 2021).

Given how cumbersome it is for asylum seekers to access justice through the courts, it is simple to accept that there are more, unknown cases of abuse and incorrect application of the law. There would be asylum seekers who do not know they can challenge decisions because they are not told about these opportunities and their rights; and if they are aware of their rights, there may not be access to legal representation to assist in challenging arrest and detention. This requires access to human and financial resources to successfully appear before the courts to seek assistance against the Department's evident misapplication of the law. This is demonstrated by officials taking applicants straight to detention facilities as opposed to providing opportunities to be heard and to challenge these decisions, as was the case in *Bula*. The Court in *Dorcasse*[231] aptly stated this abuse, which can apply beyond the cases sourced:

> There are numerous similar matters involving the Department of Home Affairs on the motion court roll of this High Court. This occurs on a weekly basis almost. In my experience, most of these matters ought not to be coming to Court. In most of the matters, the allegations of the applicants are often conceded or the matters are simply settled at Court. It is not unusual for draft orders in these matters to provide for the immediate release of the applicants as well as ancillary relief. It may be that the time has arrived for the Department of Home Affairs to devise an effective, cost saving and well-balanced approach to matters of this nature and immigration issues.

Linked to the above, failure to communicate with asylum seekers in a language of their choice, affects their rights in terms of the Refugees Act. It is necessary to, but which is clearly not done by the Department, centre the needs of this underserved community when upholding the duties assumed in international law and which ought to be protected by the Refugees Act. Where this centring does not occur, as denoted through the case law, then asylum seekers are placed in precarious positions of non-protection by duty-bearers tasked with protecting their rights. This is a form of structural violence by the Department, an arm of the South African State.

(iii) No delineation between the Refugees Act and Immigration Act.

This finding is linked to poor training and/or refusal to apply the law properly. The courts have made clear when and how asylum seekers are considered unlawful immigrants,

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[231] [2012] 4 All SA 659 (GSJ) at 41.

particularly during the asylum application process. What's more is the prioritising of the Refugees Act above the Immigration Act, that the former applies to asylum seekers before the application of the Immigration Act. This illustrates a wilful misunderstanding and refusal to apply duties in terms of the Refugees Act and Immigration Act. *Ruta* is a seminal case for interpretation of rights of asylum seekers during the process of applying for asylum given how they enumerate on the rights contained in the Refugees Act and its delineation from the Immigration Act.

(iv) Flagrant disregard of rights and duties

Given the problems above, it is doubtful whether the Department cares to take the time to inform its officials of their legal obligations in terms of the Acts and as further interpreted by the courts to give more meaning to the provisions. If not, it may also indicate a concerted approach to disrespect the decisions of the courts to give effect to the unlawful conduct sanctioned by the Department. This begs the question whether there are internal processes of complaint and accountability being applied for known and proven abuses of power. There is doubt as to whether they are being applied given the flagrant disregard of state duties and concomitant rights by state officials, and the prevalence thereof. The approach of Department officials is evidence of xenophobic and internalised institutional racism given the predominant race and countries of origin being black and from the continent, respectively, whether direct or indirect.

Even more troubling is that the Amendment Act assumes asylum seekers are aware of their rights or made aware of their rights when encountering a state official. It assumes that those who have just entered a foreign country are aware of the rights and duties applicable to them, and/or that they know which processes to follow during the asylum application process, or their rights of recourse when they experience rights violations. Access to justice is a common problem in South Africa and will be aggravated for those who are not aware of their rights, who have entered the country by force given specific dire circumstances in their countries of origin. The State shows a complete disregard for those underserved communities who require meaningful and accessible access to legal systems that respect, protect, promote and fulfil their rights.

(v) Subverting the Rule of Law

Given decisions of the courts on the office of the Minister and/or heads of departments are binding, it is against the Rule of Law that they breach these orders. The Rule of Law is

divided into three principles: the principle of authority; the principle of procedural legality; and the principle of substantive legality.[232] According to Freedman,[233] the principle of authority is that the State may only act in terms of those powers conferred upon it by a valid law. The principle of authority confers procedural requirements for the State's making and implementation of laws, that they must be prospective, general, clear, open and stable, and enforced following fair procedures. The principle of substantive legality is concerned with the promotion and protection of fundamental human rights, to achieve a just society. Abiding by Court orders 'constitutes the most important and fundamental duty imposed upon the State by the Constitution.' [footnotes omitted][234] The behaviour of the Department and its officials proves otherwise. This is evident from the tendency to prefer arrest and detention over assistance. Use of detention in the context of South Africa's service provision and failure to respect basic principles of State duties can never make detention lawful. Circumstances must be such that the use of detention cannot be questioned as to whether it is legitimate or not.

(vi) Creating law and policy in direct conflict with established jurisprudence

The jurisprudence has led to or informed several changes introduced by the 2017 Amendment Act. Majority of the changes are negative and afford the Department methods to sidestep their duties and the rights of asylum seekers as made clear in the various cases brought against the Department. This also prevents the Department being challenged in litigation as it has now taken steps to codify and legalise that which was previously the subject of litigation.

Section 4 of the Amendment Act introduced a number of changes in response to the jurisprudence developed in terms of the previous Act. Section 4 now contains four additional grounds for exclusion from refugee status. Section 4(1)(e) is based on a crime committed in the South Africa in terms of Schedule 2 of the Criminal Law Amendment Act or a crime without the option of a fine upon conviction. The troubling aspect of this section is that it is based on the RSDO having *reason to believe* the crime has been committed. The section does not guide the RSDO as to what ought to satisfy this reason – a rumour or statement averring a crime has been committed; a charge being brought against the asylum seeker; a trial; sentence or conviction.

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[232] DW Freedman 'Rule of Law' in *Law of South Africa* vol. 7(2) 3 ed para 34.

[233] DW Freedman 'Rule of Law' in *Law of South Africa* vol. 7(2) 3 ed para 34.

[234] *Mafadi* at para 33, quoting *Mifeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 452C-E.

Section 4(1)(h) is the failure to satisfy an RSDO of compelling reasons as to the unlawful entry into the country, preventing access to those who have entered the country other than through a port of entry; or the asylum seeker failed to report to a RRO within five days of being issued an asylum transit visa (section 4(1)(i)). This failure must be based on compelling reasons including hospitalisation, institutionalisation or any other compelling reason. As identified by De Villiers J in *Nwankwo*, it is likely that the two named reasons would be heavily relied upon by RSDOs when making this assessment.[235] This would be to the exclusion of other compelling reasons, which would bar an asylum seeker from the opportunity to access the asylum application process.

To meet the finding established in *Rahim and others v Minister of Home Affairs,*[236] section 8(1) of the Amendment Act requires that RROs must be established by the D-G by way of Gazette. In response to *Dorcasse*, the new Refugees Appeals Authority consists of a chairperson and 'such number of other legally qualified members'. In comparison to its predecessor, the Refugee Appeals Board, which required a chairperson and two other members, this new section seeks to subvert that requirement, especially when read together with section 8C, which states that an appeal must now be considered by 'a single person or such number of members of the Refugee Appeals Authority as the chairperson may consider necessary.' The section 31(1) transitional arrangements bring the RAA into effect on the Amendment Act taking effect; thus, the new provisions are in effect as of 2020.

Section 21's amendments are troubling for the fact that they seek to make lawful circumstances constraining access to assistance regarding documentation. It is indicative of a clear approach against the reception of asylum seekers and limiting their rights. Amended section 21(1)(a) provides that asylum seekers who report to a RRO withing five days of entry, thus who were issued with an asylum transit visa, must be assisted. This states without clear reference that the asylum seeker must and did enter the country lawfully through a port of entry, that the asylum seeker is aware of where the closest RRO is situated and has the necessary resources and assistance to approach the facility. This provision makes it clear that the State will weed out those asylum seekers that could access assistance in time vs those

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[235] *Nwankwo* at 16.

[236] 2015 (4) SA 433 (SCA).

who are in an even more vulnerable position. The time afforded renders access ineffectual for a great number of asylum seekers, effectively excluding them from the process.

Section 21(1C) makes lawful the delays made or experienced in the course of renewal of the visa. This policy to regulate the number of asylum seekers who may receive assistance was declared unlawful in *Kiliko*, which can be extended to creating a separate regime for different groups of asylum seekers. To do so would necessarily affect the number of asylum seekers who could receive assistance at a RRO. Section 21(1C) provides that: 'The Director-General may, by notice in the Gazette, require any category of asylum seekers to report to any particular or designated Refugee Reception Office or other place specially designated as such when lodging an application for asylum, if the Director-General considers it necessary for the proper administration of this Act.' This approach is openly adopted at the different Refugee Reception Offices.[237] The schedule is captured below:

[237] Department of Home Affairs *Nationality days for asylum seekers at Refugee Reception Centres* available at: *http://www.dha.gov.za/index.php/immigration-services/schedule-for-asylum-seekers* accessed on 02 November 2022.

Figure 6:

Regulation of nationalities at Refugee Reception Centres

NATIONALITY DAYS FOR ASYLUM SEEKERS AT REFUEE RECEPTION CENTRES

DAY	COUNTRY	LANGUAGE
Monday	SADC, North Africa & Asians - Angola , Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Zimbabwe, Swaziland, Egypt, Algeria, Pakistan, India and China	French, Swahili, Lingala, Tshiluba, Shona, Chichewa, Portuguese, Arabic, Bangali, Urdu, Gujarat, Punjabi, Mandarin (China), Hindi, Tsonga
Tuesday:	SADC, North Africa & Asians - Angola , Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Zimbabwe, Swaziland, Egypt, Algeria, Pakistan, India and China	French, Swahili, Lingala, Tshiluba, Shona, Chichewa,Portuguese, Arabic,Bangali, Urdu, Gujarat, Punjabi, Hindi, Ndebele
Wednesday	Ethiopia, Burundi, Rwanda, Uganda, Eritrea and Ghana	Amharic, Hadiya, Kambati, Oromo, Swahili, French, Kirundi Kinyarwanda, Tigrinya, Luganda
Thursday	Somalia, Camerron, Senegal, Eritrea and Ethiopia	French, Wolof, Swahili Lingala, Twi, Somalia, Amharic, Hadiya, Oromo, Triginya, Kambata
Friday	English only	

The unlawfulness of that strategy can be extended to creating a separate regime for different groups of asylum seekers. To do so would necessarily affect the number of asylum seekers who could receive assistance at a RRO.

Section 22 amendments worth noting are subsections (12) and (14). Section 22(12) makes lawful and reasonable the delays experienced, in practice, by asylum seekers and caused by the policies of the Department. It provides that an application will be considered abandoned if the asylum seeker fails to renew their visa after one month of expiry. It is baffling that in the context of only four working RROs, the regulation of nationality days, and known delays in service provision caused by the Department, that this provision was included. It is the Department's attempt to make lawful the circumvention of its duties in international and constitutional law, and to push out asylum seekers from the country. The

only exception is where an asylum seeker is able to provide to the Standing Committee compelling reasons for the delay in renewing the visa, which compelling reasons refer specifically to hospitalisation or institutionalisation or any other compelling reasons. Read together with section 22(14), which penalises the possession of an expired visa and making an asylum seeker vulnerable to arrest and detention, the State has revealed its hand in making lawful procedures previously declared unlawful by the Courts.

e) Conclusion

The legal challenges brought against the State have revealed how litigious the Department has been. It is also evidence of the fact that where there was a clear violation of rights, and which violations were on similar or the same facts, the State sought to protect its unlawful policies and practices by constantly opposing these applications. What is even more troubling is the fact that the State used the lessons learned from the challenges in a most negative way, to make lawful their declared unlawful policies and practices through the Amendment Act. This approach also seeks to subvert the jurisprudence established and render these ineffective under the new legislative regime. The tack taken by the Department is to make clear that it will make impossible the international law right to seek asylum, prevent asylum seekers from accessing the application process altogether, or place them in a position that constructively makes the application process inaccessible and therefore pushes them out of the country. This flies in the face of the principle of *non-refoulement*. It is this approach, evidenced through the Amendment Act, that forms a basis to challenge and limit South Africa's competence to regulate the reception of, and systems of services to, asylum seekers which includes the State's legal ability to arrest and detain asylum seekers during the application process. When centring the rights and needs of this underserved community the law and practices of South Africa are not designed to protect asylum seekers from arrest and detention. The manners in which duties have been disregarded, and practices have been implemented to place this underserved community at risk are grounds for limiting State competence. The context of service provision for this underserved community amounts to structural violence, is impermissible and leads to the conclusion that South Africa's competence in the respect of arrest and detention ought to be limited.

V CENTRING ASYLUM SEEKERS, STRUCTURAL VIOLENCE, AND LIMITING STATE COMPETENCE

"The respondents in charging and convicting the applicants and getting them to sign these forms constitutes a series of blunders that demonstrate the complete disregard for the Refugees Act and of course the entire jurisprudential context of refugee law in this country."[238]

a) Introduction

Refugee law is an encroachment on the norm of states to exercise control over the receipt of foreigners and the ability to set strict standards for persons seeking to enter and stay in the country.[239] This exercise allows asylum seekers certain entitlements and to be treated in accordance with human rights standards when seeking asylum, such as *non-refoulement*, the right to seek and claim asylum, and to have the application considered according to certain principles. The ability of the State to set strict standards in this regard goes to State competence. It therefore includes the legal ability to include and regulate arrest and detention in asylum applications. With reference to chapters 2-4 above, it is impermissible for South Africa to rely on its competence to include arrest and detention in asylum application processes. In this regard, State competence must be limited.

b) Analysis

(i) The theoretical and conceptual framework

Throughout the analysis runs the conceptual and theoretical framework, a prism through which the findings are made. These principles undergird the understanding of the intersectional experience of this underserved underserved community. This is based on their circumstances. It is therefore always necessary to hold in the back of the mind the myriad of experiences and characteristics through which they are made even more vulnerable where they experience rights violations because of arrest and detention.

Together with intersectionality, and by virtue of this, intimately connected is the application of inclusivity, which is necessarily a part or shade of intersectionality. Additionally, xenophobia and race, which gives rise to asylum seekers being a stigmatised

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[238] *Mafadi* at 7.

[239] Goodwin-Gill 'International and national responses to the challenges of mass forced migration' p 12.

underserved group; and how structural violence exacerbates existing discrimination, stigmatisation perpetuates the negative impact of harmful laws and practices. These work to exclude the rights and needs of this underserved community.

Centring the rights, interests and needs of asylum seekers necessarily links to considerations of xenophobia and State control to exclude asylum seekers who are predominantly from the continent. The laws and practices, particularly the Amendment Act, invariably and indirectly discriminate on the basis of race and nationality. When we take this analysis with the undercurrent of intersectionality, we can conclude that it will necessarily include gender, sex, disability, ethnic or social origin, culture and language. This is not a closed list, but definitely one that cannot be denied. The blanket provisions on, referencing, or indirectly including arrest and detention necessarily affect individuals who form part of the asylum seeker community seeking assistance in South Africa. Inconsiderate of the difference and commonalities in experiences that exist within the asylum seeker community, the State implements law and policy that necessarily excludes the community; and when recognising that this community is made up predominantly of black people from the continent is xenophobic and racist.

It is against these principles that rights violations and concomitant duties are understood, and that an avenue of recourse, being the limitation of state competence, must operate. To establish impermissibility requires awareness of the myriad of ways rights violations influence underserved communities, with particular reference to undocumented asylum seekers. This work was created to serve underserved communities who are marginalised and experience stigma as a result or by virtue of belonging to a certain community or population.

(ii) Standards of international and constitutional law, and repudiation in South African refugee law

The legal principles of international and constitutional law discussed in chapter 3 make it clear the manner and form in which South Africa openly disregards its assumed duties in international law, and the rights it is meant to respect, protect, promote and fulfil in the Constitution. Through the flouting of the State's responsibilities, South Africa reveals its repudiation of its international law commitments, which repudiation is not only incongruent with constitutional standards but an open refusal to uphold these duties and standards.

The Amendment Act, as made clear in the legal framework section fails to meet these standards in that it fundamentally goes against the principle of *non-refoulement*. Though it

maintains the principle, the construction of the new sections, together with the current landscape of service provision, show that South Africa takes a position that ostensibly conflicts with the principle. The Court in *Abore* held it to be the fundamental principle against which the provisions of the Refugees (Amendment) Act are secondary. In its current construction, the Amendment Act's provisions would essentially push or keep out asylum seekers for being so strict and restrictive.

The principle of *non-refoulement* recognises and dictates that an asylum seeker may not be returned against their will or in any manner to a territory where they fear threats to their life or freedom. The emphasis on 'in any manner' includes the constructive return of asylum seekers through the restrictive provisions, such as considering applications abandoned where they do not renew the visa within 30 days; arrest of asylum seekers in possession of an expired visa; requiring asylum seekers to prove that they will be sustained upon entry into South Africa; reducing the period of time within which to approach an RRO in terms of the transit visa, opening asylum seekers up for arrest on the basis that they are undocumented and therefore to be treated as an illegal foreigner; for those who do not enter through a port of entry, they do not receive a visa and so will be vulnerable to arrest and detention; and the grounds to show compelling reasons for unlawful entry and/or an undocumented status begins with specific reference to hospitalisation or institutionalisation opening up the risk of these two being the predominant standards against which reasons are held to the exclusion of 'any other compelling reason'. These difficulties essentially act as a barrier to successfully access the asylum process and to have a meaningful opportunity to have applications considered without the constant fear of arrest.

South Africa has further, through the above, flouted its responsibilities in those other conventions to which it has assented. Where the principle of *non-refoulement* is referred to directly (such as the CAT) or indirectly (ICCPR), and where the Convention deals specifically with assisting specific underserved communities recognised as vulnerable in society, such as children and women, South Africa has failed in this regard as well. For those conventions dealing with specific underserved communities, we understand through inclusivity and intersectionality that these groups have different individual experiences by virtue of the characteristics that converge to cause and/or exacerbate discrimination. The amendments therefore affect individuals intersectionally by virtue of belonging to this community, and the community as a whole for being asylum seekers.

The new amendments cause asylum seekers to constantly live in fear of the threat of arrest and detention. This constant fear necessarily affects the mental health of asylum seekers, thus derogating against the rights in Articles 11 and 12 of the ICESCR. The risky position and stigma experienced as a result of being part of the asylum seeker population could affect undocumented asylum seekers' access to health services, job security, and other services. The fear of being undocumented and actually being undocumented is probable to cause apprehension towards accessing services for fear of being reported for possession of no or expired visas.

Intimately linked to these international law rights violations are those of the Constitution. Section 39(1)(b) obliges the interpretation of rights in the Bill of Rights to consider international law. This is done to ensure that the rights read together will align when adding content to the nature of the right. The above violation of international law duties affects the constitutional rights. Arrest and detention on the sole basis for being undocumented during the asylum-seeking process, when read together with human dignity and the right established in terms of Article 14 of the UDHR (that everyone has the right to seek asylum in other countries from persecution), is an infringement on both the right to human dignity and the underlying value. The underlying value is an undercurrent for the enjoyment of those other constitutional rights impugned by violation.

The identification of police stations, and failure of the State to meet clear standards for places of detention reveals a defiance of the right to freedom and security of the person. The right to privacy is violated where asylum seekers would be approached to establish the possession of their asylum visa. The requirement in the Amendment Act that asylum seekers must always be in possession of their visa is reminiscent of the dompas system that was in place during apartheid, and implies a power of immigration officials to search asylum seekers to establish possession. There is no direct reference or inclusion of such power, but given the case law findings, it is highly probable this will be done. Even more, there is no guidance on how to use this power, so it is susceptible to abuse.

Freedom of movement and residence can be read as extended to asylum seekers through the promulgation of the Refugees Act and its Regulations. The legal and practical landscape of service provision in South Africa violates this right. Asylum seekers are not able to access RROs, meaningful service provision and other services and resources. Moreover, where they

must travel to the RRO where they have made their application their movement is restricted by forcing them to navigate to a specific RRO of four working RROs.

Given the nature of being an asylum seeker entering the country for assistance, arrest and detention on the grounds of being undocumented implicates the right to equality. This impacts individuals according to their intersectional experiences in society and their being attributed to this underserved community. These can be on the listed grounds of race, gender, sex, nationality, ethnic or social origin, and disability. The separate legal regime governing asylum seekers sets them apart from South Africans and other self-identified groups and individuals on these multiple grounds of discrimination. Arrest and detention based on the state of being undocumented in this separate regime undeniably affects the right to equality with discrimination cutting across different grounds.

(iii) Case law

The case law supports the above findings, through the jurisprudence created during the pre-amended Refugees Act, that the jurisprudence has clearly been met with legislated opposition by the Department given the changes introduced by the Amendment Act. The amendments reveal the approach of the Department to solidify conduct previously found to be unlawful by the Courts. It is a direct response that is in open opposition to what the Courts have established to protect the rights of asylum seekers against violations by the Department. What protects the changes made to the Refugees Act is the principle of *non-refoulement*. The Court in *Abore* ensured this in its finding that the principle trumps any other provision in the Act and other legislation.

This principle is derived from international law provisions, where it is recognised in the 1951 Convention, the 1967 Protocol, and the 1969 OAU Convention. The Court in *Abore* held that the principle applies throughout the application process and can only be lifted once the full process has been completed and the outcome of the application determined.[240] It will prevail where a contradiction exists in the Amendment Act and, by inference, the Regulations as well. The amendments to the Act and the practices of the Department are in direct or indirect conflict with the principle.

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[240] *Abore* at 42.

Additionally, there were six other main findings from the jurisprudence. These were: the Department always opposes court applications; abuses of power; no delineation between the Refugees Act and the Immigration Act; flagrant disregard of duties; subverting the rule of law; and creating law and policy in direct opposition to established jurisprudence. The constant opposition to cases brought demonstrates an institutional belief that they are not wrong in the facts pleaded by the applicants. The Department does not choose the option to, on the facts, abide by the Courts' decision to accept the applicants' side and admit to the unlawfulness of its conduct. This is evidenced by the similarity of the factual matrices for majority of the cases, but which the respondents choose to deny when opposing applications.

The above is an instance of abuse of power by officials representing the State and a Departmental approach to defend its unlawful behaviour. The abuses of power, to arrest and detain asylum seekers for being undocumented, are established through the case law as consistent and unashamed (among others). The constant opposition to the same or similar issues and facts supports this conclusion. Given how cumbersome it is for asylum seekers to access justice through the courts, it is no great leap of reason to accept that there are more, unknown cases of abuse on the same issues and facts. There would be asylum seekers who are unaware of their rights, avenues of recourse and how to access justice who may be or were detained for being undocumented. The sole purpose of this detention is to deport undocumented asylum seekers from the country. The new amendments make it easier for officials to arrest and detain asylum seekers and to attempt deportations on this basis. The actions of the State as laid bare in the case law led to the inference that this is highly likely or probable to take place. A total of 21 cases concerned the arrest and detention of an asylum seeker for being undocumented, which makes up 60% of the cases sourced. This number is not definitive of the total cases. The Court in *Dorcasse*[241] as shared in chapter 4 above but which cannot be overstated, recognised that:

> There are numerous similar matters involving the Department of Home Affairs on the motion court roll of this High Court. This occurs on a weekly basis almost. In my experience, most of these matters ought not to be coming to Court. In most of the matters, the allegations of the applicants are often conceded or the matters are simply settled at Court. It is not unusual for draft

[241] [2012] 4 All SA 659 (GSJ) at 41.

> orders in these matters to provide for the immediate release of the applicants as well as ancillary relief. [own emphasis]

The Gauteng High Courts receive an overwhelming number of these cases due to its proximity to Lindela, which is in Gauteng. The Court's observation above indicates a) that there are a high number of cases, b) that many asylum seekers are being detained for being undocumented, and c) the apathy and carelessness with which the Department arrests and detains asylum seekers to the point that they are willing to settle matters outside of Court. They recognise they were wrong on one hand but are quick to continue their unlawful behaviour, to violate the rights of undocumented asylum seekers, on the other hand.

These findings lead, incontrovertibly and symbiotically, to the finding of the Department's flagrant disregard of its rights and duties towards undocumented asylum seekers. The decisions and actions of the Department presumes that it does not inform its officials of their legal obligations in terms of the Refugees Act, Amendment Act, international law obligations and constitutional obligations, and the developed jurisprudence; or if they do that this information is wilfully discarded by Departmental officials at all levels. Consequently, it is doubtful that there are (meaningful) internal processes of complaints and accountability to hold offending officials responsible for human rights violations. This is tied up in the assumption created by the Amendment Act that asylum seekers are aware, or informed, of their rights to assert when encountering a state official.

The disregard of duties by State officials is a subversion of the Rule of Law in two forms. It subverts the principle of authority as the cases illustrate the State's actions are in contradiction with the provisions of the Refugees Act as it was prior to its amendment. It subverts the principle of substantive legality as the State's actions do not ensure the protection and promotion of human rights in pursuit of a just society. This is in respect of the 31 findings made against the State (88.5% of the sourced cases) that the State's opposition flies in the face of these rules, and the courts' pronouncements about this were evidence of the effect of this subversion. The use of detention in the context of South Africa's service provision, and its failure to respect basic principles of State duties can never make detention lawful in the circumstances. The approach in relation to the Refugees Act prior to its amendment proves the State's preference to push out asylum seekers by making the process inaccessible, which is now made lawful by the Amendment Act.

Majority of the changes introduced by the Amendment Act afford the Department power to sidestep the established jurisprudence prospectively, making lawful its previous policies and practices. These changes restrict the rights previously assigned to asylum seekers, and in doing so they restrict the rights in international law to which asylum seekers are entitled. It goes against the principle in law that one cannot restrict or reduce rights to which one is entitled. One may broaden the rights, but not restrict them. The restriction in favour of the Department is a subversion of the principle of substantive legality. It also creates a framework that allows the Department not to be challenged on previous grounds that declared the actions of the State unlawful under the previous iteration of the Refugees Act. For instance, section 4 includes additional grounds for exclusion from refugee status: a crime committed in the South Africa in terms of Schedule 2 of the Criminal Law Amendment Act or a crime without the option of a fine upon conviction; and section 4(1)(h) is the failure to satisfy an RSDO of compelling reasons as to the unlawful entry into the country, preventing access to those who have entered the country other than through a port of entry; and section 4(1)(i), the asylum seeker failed to report to an RRO within five days of being issued an asylum transit visa (section 4(1)(i)).

To meet the finding established in *Rahim*, section 8(1) incorporates the requirement that RROs must be established by way of Government Gazette. In response to *Dorcasse*, the new Refugees Appeals Authority consists of a chairperson and 'such number of other legally qualified members' read together with section 8C, which states that an appeal must now be considered by 'a single person or such number of members of the Refugee Appeals Authority as the chairperson may consider necessary'.

Section 21(1)(a) provides that asylum seekers issued with a transit visa must report to a RRO within 5 days of entry to receive assistance. Asylum seekers with the transit visa who did not present within the five days, or those who are not in possession of a transit visa are excluded from the obligation to receive assistance. This is in response to findings that those not in possession of a valid visa must be issued one and given 14 days to apply for asylum, in terms of the previous 2000 Regulations. It reduces the number of days and limits assistance to those who have a valid visa and present within five days. It also goes against the Court's findings that those asylum seekers who entered unlawfully and detained for this reason must be released and assisted to make an application at an RRO.

Section 21(1C) now permits delays during the application process, that the Department may not be held responsible for the delays experienced in making an application at a RRO. It provides that the D-G may require any category of asylum seekers to report to any particular or designated RRO or other place specially designated as such when lodging an application for asylum. It is now incumbent on the asylum seekers to make their way to a RRO to make an application as soon as possible. The Department will provide access to the application process by merely establishing 'working' RROs for asylum seekers to access, but whether the environment creates access in reality is now not the concern of the Department. An example is that the policy to regulate the number of asylum seekers was declared unlawful in *Kiliko*, which can extend to creating a separate regime for different groups of asylum seekers. We see this allowance in all RROs, which now creates a schedule of asylum seeker nationalities to be assisted according to the days of the week.

The above is to be read together with section 22(12) which provides that an application will be considered abandoned if the asylum seekers fails to renew their visa after one month of expiry. It is the Department's attempts to push out, and make the process inaccessible to, asylum seekers. The only exception is to provide the Standing Committee with compelling reasons for the delay. The compelling reasons refer specifically to hospitalisation or institutionalisation or any other compelling reasons. Read together with section 22(14), the penalisation of possessing an expired visa now makes it lawful for an asylum seeker to be arrest and detained for the purposes of deportation because they are undocumented *while they are still in the asylum application process.*

c) Findings

Given the analysis above, the findings prove structural violence is being perpetrated under the current construction and application of the Amendment Act. These findings are made when centring this stigmatised underserved community in South Africa, applying those interpretive principles adopted in the thesis. There are five components to this exercise of structural violence, which components are the foundation for the argument that the law and practice adopted by South Africa are impermissible in international law and constitutional law. This finding of impermissibility therefore calls for and requires a limitation on South Africa's competence to include arrest and detention in its laws regulating undocumented asylum seekers. The evidence of the current components of structural violence requiring the limitation are necessary to reset the laws and practices of South Africa to ensure the

introduction of a regime that assists undocumented asylum seekers to remain documented throughout the application process, protects their rights, and places them in a position that would respect their international law and constitutional rights. To do otherwise, given their positions in society as underserved and stigmatised, amounts to structural violence.

(i) Creating a precarious position for asylum seekers

The legislation and context of service provision make it impossible for undocumented asylum seekers not to be in a precarious position during the process and indelibly open to arrest and detention. The current legislation and arguments made in *Abore* prove the Department's approach to asylum access in South Africa, which is essentially unavailable to undocumented asylum seekers. In *Abore*, the State argued that the principles of *Ruta* did not apply due to the amendments, and the applicant was only arrested and expressed his intention to apply after these came into effect.[242] *Ruta* held that where an asylum seeker expresses an intention to apply for asylum then they must be assisted. Delays in making an application are not a bar to assistance. The court *a quo* in *Abore* held that the principles did not apply where an applicant has spent many years in the country before expressing the intention to apply. The length of the delay was a factor militating against protection under section 2 of the Refugees Act. The long queues at the RROs were no excuse for the delay.[243] The respondents therefore argued that the new amendments do not automatically grant an 'illegal foreigner' a right to an opportunity to apply for asylum once they express an intention to apply.[244] Section 21(1B) and Regulation 8(3) provide that an illegal foreigner without a transit visa must be interviewed by an immigration official to explain why they do not possess a transit visa, and show good cause for not being in possession of such.[245] The new amendments, therefore, grant immigration officials and the courts the authority to determine why an illegal foreigner is not in possession of a valid transit visa *before* they are given an opportunity to apply.[246] In terms of the process of asylum adopted in this thesis, the respondents do not consider the process to begin at entry, nor do they consider a person open to making a formal application where they do not possess a transit visa. Expressing an intention to apply is rendered

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[242] *Abore* at 18.

[243] *Abore* at 8.

[244] *Abore* at 19.

[245] *Abore* at 19.

[246] *Abore* at 19.

nugatory and assistance is no longer automatic where the intention is expressed. Asylum seekers must give reasons for being undocumented before they can formally enter the application process. This new process adopted in opposition to the cases that evinced and applied the principles of *Ruta* causes asylum seekers to be vulnerable to arrest and detention. This is especially deplorable where one accepts that asylum seekers do not know or understand South Africa's laws before and/or upon entry. The amendments enacted by the State therefore place asylum seekers in a precarious position that most likely leads to them having little to no access to the asylum application process and therefore being undocumented while they await the outcome to their applications. Creating and placing asylum seekers in a precarious position is structural violence.

(ii) Asylum seekers held in abeyance

The above leads, necessarily, to undocumented asylum seekers being caught in a state of abeyance during the application process as set out in chapter 2. This, of course, is to their disadvantage, but is to the State's advantage. It gives the State the opportunity and reason to abuse their power and therefore the new process of assisting undocumented asylum seekers to enter the formal process and receive documentation to protect them from arrest and detention. This new process renders asylum seekers even more dependent on the discretion of the officials meant to assist during the process; however, the case law presents an approach that officials are likely to abuse the process to the great disadvantage of asylum seekers and cause them to be undocumented. This is a form of structural violence perpetrated with impunity. To produce a legal regime that would hold undocumented asylum seekers in abeyance pending entry into, access to, and continuing, the asylum process denies them rights established in international law and the previous Refugees Act and regulations.

(iii) De facto position to deny asylum in South Africa

The precarity of asylum seeker's positions given the amendments exhibits a position of the State to make inaccessible and render the asylum application process inoperative. The legislation designed the process such that it keeps or pushes asylum seekers out. The enactment of provisions in stark contrast to the pronouncements and principles established by the courts reveals a clear approach to evade State responsibilities assumed in international law and established in case law. This display through the amendments is proof of closing the country off to new asylum seekers and creating positions for existing asylum seekers to be driven out of the country. We see this specifically with the amendments regarding the failure

to renew the asylum seeker visa and therefore being undocumented. These changes subverting the principles established by the courts, and therefore essentially opting out of certain international law obligations upon which the refugee law framework is based, is a form of structural violence.

(iv) Laws and practice inconsistent with international and regional law

The legislation and its regulations are inconsistent with international law standards. These contradict (attaining) a system that assists vulnerable individuals and respects their rights to accessible service provision. The inconsistency also avoids producing a system in which the application of jurisprudence is done in a manner that protects the rights entitlements of undocumented asylum seekers. The State, in essence, wants to block any asylum applications, and wants to simplify the process of removing undocumented asylum seekers from South Africa. This approach is a clear repudiation of international and constitutional law responsibilities, which is a form of structural violence. It fundamentally contradicts the principle of *non-refoulement*, which underpins conventions on asylum and the constitutional rights these protect. It requires a legal challenge that would end with the Constitutional Court making pronouncements and remedies that include suggested amendments to the Refugees Act. Alternatively, it would require legislative reform, but given the fact that the Amendment Act passed and came into force in 2020, the likelihood of reform in Parliament is minimal to non-existent. Both routes are lengthy, protracted processes, and these changes would be ineffectual until they are decided (court challenge) or come into force (legislative reform). Asylum seekers would remain in precarious positions pending these processes, with the uncertainty of outcomes holding them and their rights in abeyance.

(v) Power imbalance and abuse of State power

The findings of abuses of power and power imbalance in practice, particularly in the case law chapter, are forms of structural violence. The creation of laws that oust the rights of asylum seekers is linked to the findings above. The changes made by the Amendment Act are a negative response to the jurisprudence produced to interpret the Refugees Act (pre-amendment) widely and to afford protections to undocumented asylum seekers during the application process. The changes and practices of the Department and its officials are a show of clear assumptions that asylum seekers know their rights to protect themselves against being undocumented. Alternatively, more likely, is the Department's knowledge and acceptance that asylum seekers are not familiar with South Africa's laws, processes, avenues

of recourse, and access to resources. This knowledge and acceptance, together with the changes, make the process inaccessible to asylum seekers. This is a clear display of a power imbalance and opportunity for State officials to abuse the power conferred on them by the Amendment Act.

The use of arrest and detention in the context of South Africa's service provision and failure to respect basic principles of State-accepted duties can never make their inclusion lawful and permissible. The circumstances in which state competence is exercised must be such that it cannot be questioned for amounting to denial of rights, flouting duties in international and constitutional law, and amount to structural violence as a result. South Africa's current legal regime and poor landscape of service provision dictate that its competence to regulate arrest and detention of undocumented asylum seekers must be limited.

d) Advancing limitations on state competence: argument and standards for limitation on state competence

(i) Background

The UNHCR[247] argued that seeking asylum is not an unlawful act, so to detain someone for entering a country without the proper documentation runs counter to international law. In international law, individuals have the *right* to seek asylum, and when they do so they are to be treated humanely and with dignity. South Africa's current legal regime does neither, and denies undocumented asylum seekers proper documentation, which is inconsistent with the dictates of international law. Arrest and detention have negative, long-lasting effects as it 'increases anxiety, fear and frustrations and can exacerbate past traumatic experiences.'[248] Openly making it inaccessible to attaining documentation and remaining documented when in South Africa goes against both international law and constitutional law given the rights impugned by the international law protections for asylum seekers.

The UNHCR argued that some of the main goals of being documented are to end detention of children; and to ensure alternatives to detention in law and practice.[249] With the intersectional and inclusive approach, the goal includes protecting persons who are made

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[247] UNHCR 'Beyond detention p 375.

[248] Ibid p 376.

[249] Ibid p 377.

doubly vulnerable as asylum seekers due to the convergence of personal axes of discrimination. The document 'Beyond detention' is a toolkit creating a framework in which to challenge countries to re-think the strategy of using detention as a mechanism in the asylum process. The document is a guide for the relationship between the UNHCR, governments, and other partners and stakeholders to end arrest and detention of asylum seekers. It speaks to the way these parties can go about ending detention, with specific focus areas and roadmaps for attaining the goals of these focus areas.

This section focuses not on a roadmap, which infers a long-term process, but on a response that strips South Africa of its competence to regulate arrest and detention at all. The role it will play in re-thinking its strategy to ending arrest and detention will be that of creating an entirely new legal regime and context of service provision as opposed to working with an existing one that includes arrest and detention. South Africa, it is argued, will have to start afresh.

The inherent vulnerability of asylum seekers and secondary victimisation through arrest and detention must be centred when guiding and creating law, policy and practice. These must strive for equality and equity, which necessarily excludes practices that would cause victimisation, stigma and of underserved communities. Asylum seekers must be protected from legal processes that would exclude them from rights enjoyment in terms of international law and constitutional law. South Africa's legal framework and practices present systemic failures to protect asylum seekers. It goes even further to actively adopt a legal framework that openly disrespects, does not protect, promote or fulfil the rights of asylum seekers. This approach is impermissible in law. It is an approach that sees South Africa defy its international law obligations in its refugee law and is inconsistent with its constitutional law. South Africa's State competence must be limited as a result of the above.

(ii) The features of limiting State competence

The limitation, first and foremost, is that there will be no arrest and detention in the asylum application process in South Africa. What is the focus is to create a legal regime that supports asylum seekers during the application process, to protect their rights and ensure they remain documented throughout. This cannot be gainsaid in the South African context, but also more broadly in the international context, for States to move away from including arrest and detention in the system that regularises the entry and stay of asylum seekers in their countries. This is based fundamentally on the position of asylum seekers in the world. Their personal or

political circumstances in their country amount to persecution. They require protection on this basis alone, but what exacerbates their position in society further is that asylum seekers are constituted of individuals with their own personal experiences of discrimination in addition to being an asylum seeker.

To create and include harmful laws and practices in the asylum application process causes further harm to those requiring support from host countries that receive them. This should be the main consideration and position taken by the State (and other States) when creating laws and processes governing the receipt and stay of asylum seekers. States must always be cognisant of the inherent position of asylum seekers in society, that harmful laws and practices cause them to be (further) marginalised, made vulnerable and stigmatised. Moreover, where the marginalisation, vulnerability and stigmatisation occur, this is intrinsically linked to their being underserved as a community. Pushing asylum seekers to the fringes of society by creating precarious positions through arrest and detention will cause asylum seekers to often avoid services, and in the South African context, making service provision at RROs inaccessible.

We have established that asylum applications ought not to include arrest and detention in the process. This is due to the position of asylum seekers in society, particularly in the South African context. We now move to consider the requirements for State competence to be regulated in a manner that protects asylum seekers. The standards proposed are necessary for States to meet to adopt laws, policies and practices that respect, protect, promote and fulfil the rights of asylum seekers from the outset of their application process, that is when they arrive in the country. The standards are made up of five salient criteria that States ought to meet to protect asylum seekers from further rights violations and to respect their rights, which will seek to cure structural violence in the asylum application process. In each criterion, arrest and detention is excluded.

First, there must be an assessment of the landscape of service provision and whether it makes access to services during the application process impossible or difficult. The laws, policy and practice must not be formulated in any manner, whether in substance or form, that would create an environment in which the asylum application process is rendered redundant. Absent the assessment producing positive results, that is that the landscape of service allows for full and free access to services, then this criterion will not be met. The criterion is made

up of the following requirements that must be met for the laws, policies and practices to come up as positive.

Increased numbers of RROs. There must be, at least, one RROs per region per province that is fully operational, receiving and processing asylum applications. The RROs must have a dual system for asylum seekers and refugees to receive assistance according to their needs in their respective processes. This will avoid influx and ensures individuals receive assistance as and when they need. It will also guard against overburdening state officials assisting in the application process. This can follow the services provided at the Department of Home Affairs wherein the office contains separate sections or counters depending on the services needed, such as refugee passports, applications for permanent residency, renewal of asylum seeker visas, and lodging of asylum application processes. In addition to this, asylum applications must be valid for at least a year given the backlog in the processing of current applications, and to avoid overburdening the system with constant renewals to the detriment of asylum seekers in the application process.

Electronic submission and processing of applications. The application process must include a *working* option to submit an application electronically to bypass any physical or infrastructural barriers in presenting at a RRO. It is untenable that physical applications are still the predominant option in the current digital age. It is archaic and inaccessible for asylum seekers, especially asylum seekers with disabilities, financial constraints, language barriers, among others. The entire application system must migrate to an online system predominantly, with physical documentation to be a secondary avenue for accessing assistance. Where an application is made in person and physically then this must still be captured electronically. Together with the public information campaign, this will simplify processes and ensure that asylum seekers do not have to wait in long queues to receive assistance, or experience delays. The burden must move to the State to make access and assistance available and in a manner that does not place the burden on asylum seekers to process their application but for a timely renewal of visas and ensuring they are able to gather any necessary documentation. This can follow the current online system created by the Department for processing identification document and passport renewals. Where the State has made services widely available for permanent residents and citizens, then they must adopt the same approach for asylum seekers and the application processes.

Public information campaigns. Together with the establishment of RROs per region per province, there must be public information campaigns to make asylum seekers aware of their rights and responsibilities. This will assist those who do not possess an asylum transit visa to understand where and how to get the necessary documentation to regulate their stay in the country. This protects those individuals who did not enter through a port of entry from the provisions of the Immigration Act that would penalise them for not having the necessary visa to approach a RRO. The campaigns must also be in English and a language most common among the asylum seekers dependent on the countries from which most asylum seekers come.

No offences for late applications. To complement the above, there must be no offences for late applications or presentation at a RRO should there be any *reasonable* time limits set on making an application. The reasonableness follows the ordinary test: whether someone in the position of the asylum seekers would know in the circumstances what is required of them. Given that asylum seekers are not immediately aware of the application process upon entry, where to access services in this regard, or understand how to do so given language barriers, the time limit for lodging an application must be reasonable. The existing limitations on access to services that amount to rights violations must be taken into account when setting time limits for presenting at a RRO. Where an asylum seeker presents at a RRO late, their application can be accompanied by a condonation application or form, which must be made available for them to complete to set out the reasons for a failure to present within a reasonable number of days. This will not affect the lodging of the application but will instead be used to inform the public information campaigns to ensure current and future undocumented asylum seekers are made aware of their rights in the process.

Adequately staffed, and support for staff at, RROs. Every RRO must be adequately staffed and provide internal support for staff to shield against burnout and compassion fatigue. The State must protect the needs of its officials in the workplace, to create a working environment that is supportive and healthy. This may include debriefing sessions for staff and access to constant psychosocial support given the nature of the work and content with which they are faced. Asylum applications necessarily contain evidence of persecution so it is necessary to guarantee that staff members are cared for at their places of work. Furthermore, to make certain that no errors, or abuses of power and process occur staff must be given access to and receive constant training on the laws and regulations in which they operate and provide services. The training must include any amendments made to legislation and policy, and outcomes of judgments.

Secondly, the legal regime must include an independent oversight and accountability mechanism. Where there is a failure on the part of officials during the course of their duties, there must be a working independent, impartial and public oversight mechanisms. It is clear from the case law that the Department continues with its approach of violating the rights of asylum seekers during the application process, as established both in the case law and the Amendment Act. An independent mechanism allows for proper courses of action against state officials failing in their duties, to hold these officials accountable. Independence also ensures faith in processes of accountability and to provide recourse for rights violations. The powers of the independent oversight mechanism must include sanctioning state officials in their personal capacity as well given that they are employed, in the ordinary sense, to serve a specific purpose or function which is doubly important given that they are employed by the State. Together with the independent oversight mechanism, a fund ought to be established to provide compensation for wrongful arrest and detention (for being undocumented) since arrest and detention no longer form part of the asylum application process.

Thirdly, there must be reasonable access to work and education for asylum seekers. The current legal framework requires asylum seekers to have proof of financial support and work to sustain themselves during their stay in the country. This approach, as argued in chapter 3, places asylum seekers in a position that makes it highly likely that they will be arrested and detained. In the assessment of the landscape of service provision, not only will this requirement be dispensed with (given that the laws itself are unlawful and unconstitutional) but will require the State to endorse the visa with the right to work and study from the outset. This gives asylum seekers the opportunity to sustain themselves while in South Africa and during their stay.

Fourthly, law, policy and practice must align with international law and jurisprudence. These must be in line with the applicable international laws, especially those international refugee laws, and South Africa's legal framework. In its current formulation, the refugee law framework does not align with South Africa's legal obligations, but more so irrational for the failure to comply with these obligations. If challenged, it would not pass constitutional muster. It detracts from and flies in the face of established jurisprudence that adopted interpretations that were aligned with international law and the Constitution. It is necessary for the new legal regime to do the same and meet the necessary standard of giving effect to international law obligations underpinning domestic refugee laws, and which align with the

Constitution and principle to protect, respect, promote and fulfil the rights in the Bill of Rights.

Finally, laws must not, in fact, render the asylum application process null and void. They must not be constructed in a way that pushes out asylum seekers, which the current legal framework does. In this regard, it must not make abuse through arrest and detention highly likely by causing delays in accessing the application process and making it cumbersome for those who did not enter through a port of entry; create requirements for asylum seekers to have economic support immediately but without affording the right to work; or penalising asylum seekers for not renewing their visas. To include these stringent measures creates a dire situation for asylum seekers, which may cause re-traumatisation and afford them no other option but to leave and attempt to seek asylum elsewhere, which is argued to be the main goal introduced by the current amendments.

(iii) The implementation of limiting State competence

The plans to regulate these circumstances need to be subject to engagement and oversight beyond just the confines of South African processes. It must be assessed in the international sector as well as locally, done via the mechanisms created through the African Charter on Human and Peoples Rights, the United Nations, and the Parliament of South Africa. The implementation of the limitation on South Africa's competence must be a joint endeavour. The limitation is that South Africa's legal framework will no longer contain arrest and detention measures in asylum application process or those provisions that would otherwise have made asylum seekers vulnerable to arrest and detention by virtue of their connection thereto, to give effect to a negative system of managing asylum applications. To respect this response to arrest and detention, and ensure that South Africa meets the above standards, will require an overhaul of the current legal framework to contain the above features. During such time that South Africa re-works its legal framework, the old refugee law regime should be re-instated respectful of established case law, alongside which prospective amendments and policy are formulated to meet the above standards. The formulation, however, cannot be left to South Africa only to do given the response it has had through the Amendment Act. South Africa requires intervention at an international level to ensure 1) impartiality, 2) that it meets its obligations in international law, and 3) that its new laws and policies work to respect, protect, promote and fulfil the rights of undocumented asylum seekers. This is where a multi-level partnership and process is embarked upon.

The process will involve the African Commission on Human and People's Rights, particularly the office of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants. It will also include the UNHCR, and the African Court on Human and People's Rights as a measure of accountability. Finally, Parliament will exercise its legislative and oversight functions once South Africa has adopted its legislative and policy roadmap that incorporates the above standards that will limit its competence to successfully exclude arrest and detention from the asylum application process and respect the rights of asylum seekers.

The roles of the Special Rapporteur and UNHCR are the same – to receive, comment and make recommendations on South Africa's proposed steps it will take to implement a legal framework that will contain the necessary standards above. The Special Rapporteur forms part of the African Commission on Human and People's Rights ('the Commission'). The Commission was established in terms of article 45 of the African Charter to which South Africa is a party, and to which it has assented to the powers of the Commission. The role of the Commission is to promote, protect and fulfil human rights, which includes doing so via the Special Rapporteur's activities. Resolution 72 of the 36th ordinary session extended the mandate of the Special Rapporteur to include, among others, to

> [..] assist Member States of the African Union to develop appropriate policies, regulations and laws for the effective protection of refugees, asylum seekers, and internally displaced persons…[250]

Moreover, Resolution 484 of 2021 of the African Commission:[251]

> 1. Reminds all States Parties that the main purpose of refugee status is to ensure that the rights of refugees are respected,
>
> 2. Condemns all expulsions of asylum-seekers and refugees by States Parties which expose them to the risk of violations in their countries of origin, including detention, enforced disappearances and violations of the right to life;

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[250] African Commission on Human and Peoples Rights Resolution 95 of the 39th Ordinary Session (May 2006) available at *https://achpr.au.int/index.php/en/mechanisms/special-rapporteur-refugees-asylum-seekers-internally-displaced-persons-and-migrant* accessed on 11 November 2022.

[251] African Commission on Human and Peoples' Rights Resolution on the respect for the principle of non-refoulement of asylum seekers and refugees ACHPR/Res. 484 (2021) EXT.OS/XXXIII available at *https://achpr.au.int/index.php/en/adopted-resolutions/484-resolution-respect-principle-non-refoulement-asylum-seekers* accessed on 1o November 2022.

3. Urges all States Parties to respect the principle of non-refoulement without any restrictions.

Thus, lodging matters with the Commission would involve the Special Rapporteur. This is a mechanism that ought to form part of South Africa's reconstruction of its asylum application regime.

The UNHCR is a body governed by the General Assembly of the United Nations and Economic and Social Council, reporting to both entities on its activities. The UNHCR was established in Resolution 319(IV) of 3 December 1949 to come into effect on 1 January 1951.[252] The Statute of the Office of the United Nations High Commissioner for Refugees sets out its mandate. States are called upon to cooperate with its functions by adopting international refugee law, among others.[253] South Africa, as established above, has assented to the three international refugee law Conventions and Protocol, and has adopted the provisions and principles of these into its domestic law governing asylum seekers in the country. In this regard, South Africa as a party to the Resolution of 1950 setting out the UNHCR's mandate has assented to this provision.[254] The main purpose of the body is to provide international protection for refugees (and asylum seekers) and assisting governments with seeking permanent solutions 'for the problem of refugees'.[255] In 2014, in a presentation to Parliament, the UNHCR set out its activities in South Africa: a) monitor the implementation of the 1951 Convention; b) assist in drafting the 1998 Refugees Act; and c) provide guidance on policy reform and advice on matters concerning refugees.[256] Furthermore, it also assists with: advocacy; coordination with civil society; and technical support and capacity building to state officials. It therefore has the necessary expertise and mandate to assist South Africa with the reconstruction of its legal framework governing undocumented asylum seekers.

South Africa will commit to developing this framework to lodge with both bodies after which it will incorporate, to the benefit of asylum seekers and the application process, any suggested amendments and improvements that will give effect to the standards. Once the

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[252] General Assembly Statute of the office of the United Nations High Commissioner for Refugees Resolution 428(V) of 14 December 1950 p 2.

[253] Statute of the UNHCR p 4.

[254] Statute of the UNHCR at 2(a).

[255] Statute of the UNHCR General Provisions at 1.

[256] UNHCR Presentation to Portfolio Committee of Home Affairs (11 November 2014) available at *https://pmg.org.za/committee-meeting/17845/* accessed on 11 November 2022 slide 18.

feedback has been received, South Africa must then further develop and improve its legal framework to introduce such to Parliament for oversight and adoption where there is a new amendment created to the Refugees Act. Parliament will therefore, through passing new legislation, confirm the new legal framework being adopted by the Portfolio Committee on Home Affairs. The Committee will also be tasked with confirming policy aligns with the new legal regime and feedback received from the Special Rapporteur and UNHCR. Given the functions served by the Special Rapporteur in the process, they can lodge with the African Court any issues with South Africa's new legal framework or the approach taken once comments have been received on it.

Further oversight can be via the South African court system, with the new legal framework to be confirmed by the Constitutional Court through an *ex parte* application lodged by the Minister of Home Affairs once the finalised draft Acts and policy have been formulated. This, much like the draft final Constitution, can take on the nature of certification proceedings to ensure alignment with international laws and constitutional validity. This will also consider the manner and extent to which the necessary changes (standards) have been introduced and included in the new legal framework. The purpose is to ensure that States use their competence in a protective sense through a regime that meets the standards above. The certification process can, of course, invite *amicus curiae* submissions to ensure the Court has all the necessary information before it when considering the legal framework.

The above model for limiting State competence and ensuring that new legal framework is in line with the standards of the model is argued not only to be applicable to South Africa, but can also be more generally applicable. It is general in nature and can be adjusted according to the regional bodies that would be applied to specific countries that undergo the limitation endeavour. The aim of the exercise is to centre the rights and needs of undocumented asylum seekers during their application processes, working towards protecting those who need it most and to ensure they move away from a culture of secondary victimisation and stigma to one that serves and centres them. It seeks to guard against abuses of state power and therefore structural violence, which proves to be a systemic issue within the legal framework regulating undocumented asylum seekers.

e) Conclusion

The laws, policies and practices of the Department in regulating the arrest and detention of asylum seekers have been shown to be in direct conflict with established jurisprudence in

favour of protecting undocumented asylum seekers. The intentional move away from the jurisprudence to create a system that would support arrest and detention of undocumented asylum seekers is evidence of a concerted departmental effort to further stigmatise a group of persons already made vulnerable by the context and reasons for their seeking asylum, and rendering them an underserved group in South Africa. The callous efforts of the Department to afford themselves the power to contradict the established body of jurisprudence is evidence of their desire to push out or prevent asylum seekers accessing the application process in South Africa and making it simpler for them to be arrested and detained for being undocumented. The position adopted via the legal framework must be limited.

South Africa's competence to regulate arrest and detention by including it in the asylum application process must be limited. The manner of limitation is set according to a model that requires active assessment and engagement, publicly and internationally, to ensure compliance with international law standards and constitutional validity. The assessment of the legal framework is according to those five necessary standards. The engagement with regional and international bodies, and the Constitutional Court is to include and certify that the assessed legal framework meets the standards set. Once the draft legal framework aligns with international law standards and constitutional law only then can it be applied in South Africa. This process, however, need not only be applicable to South Africa, but its general nature allows it to be adopted in other jurisdictions with the necessary modifications in regional and international monitoring bodies playing a role in the process. This will ensure the protection of undocumented asylum seekers from arrest and detention.

VI CONCLUSION

'The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.'[257]

The thesis undertook to prove the hypothesis that South Africa's State competence to include arrest and detention in its asylum application process ought to be limited. It did so based on two elements: 1) centring the rights and needs of asylum seekers, particularly undocumented asylum seekers; and 2) findings of structural violence against asylum seekers. Through the study, it continuously applied an approach centring undocumented asylum seekers to make its findings. These findings proved that structural violence occurs against undocumented asylum seekers. In doing both, it found that arrest and detention in the asylum application process is impermissible. Thus, for being impermissible, the State competence of South Africa must be limited in this regard.

There were specific parameters set for the study, in which analysis took place and findings made. These were specific definitions attached to 'state competence' which is the legal ability of a State to detain non-nationals pending their removal or decisions on their entry into a State's territory. This was the formal ability the thesis argued to be limited in answering the research question. Secondly, was defining 'structural violence' which was the basis upon which state competence would be limited if laws and practice (the context of service provision) were found to amount to structural violence for the purposes of the research question. Thirdly, was the meaning of 'application process' adopted in the thesis, that it began once presenting at state's borders and ending with a final determination that may include a constitutional challenge, therefore once all legal challenges or recourse has been exhausted. Fourthly, was the meaning of 'undocumented' which referred specifically to new applicants; applicants in possession of an expired visa; and those not in physical possession of a visa. Regarding the definition of application process and undocumented, the thesis adopted a wide approach to both meanings. Fifthly, was the definition of asylum seeker: a person seeking recognition as a refugee in South Africa, as provided in the Refugees Act. It excluded refugees and was not concerned with the merits of asylum claims. Finally,

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[257] *Lawyers for Human Rights* (2004) at 21.

impermissibility, which was the outcome that would result in the limitation of competence. These parameters were necessary to refine and define the framework in which the hypothesis was tested to answer the question, and to set out the limitations of the research so that the reader was fully aware of that with which the thesis was concerned and that with which it was not.

The thesis conducted its analysis in terms of a specific conceptual and theoretical framework when centring the rights and needs of undocumented asylum seekers and establishing whether the context of service provision in South Africa amounted to structural violence. This was necessary because it set the specific features of the analytical framework that was applied to the findings. These were, of course, the findings made within the limitations of the research and to answer the research question as holistically as possible. The conceptual framework consisted of intersectionality; a decolonial approach; inclusivity; race and xenophobia; underserved groups and stigmatisation; and an international law framework first. These were the lenses through which the findings were made, and which the thesis also accepted were intimately linked.

The analysis began with the legal framework applicable to South Africa and its processes of arrest and detention in asylum seeker applications. It was necessary to understand the formal context of service provision in terms of which the process was operating, whether South Africa was upholding its international law and constitutional law obligations. The section found that South Africa was failing its international law and constitutional law obligations in practice, and formally through the enactment of the new Amendment Act which came into force in 2020. The Amendment Act adopted provisions that were in direct opposition to the jurisprudence created in terms of the Refugees Act and 2000 Regulations, which afforded undocumented asylum seekers protection from arrest and detention inasmuch as it could within the legal framework.

It then moved on to examine the jurisprudence. The case law demonstrated how much the Department openly disregarded its international law and constitutional law obligations towards undocumented asylum seekers. What was even more disturbing was the new amendments introduced by the Amendment Act that made lawful conduct and practices previously found to be unlawful by the courts under the Refugees Act. It could only be concluded that the amendments were introduced to shield the Department against future legal challenges and to continue with practices that were previously declared unlawful. The

Department has now created conditions in which it can act with impunity where previously it could not. Additionally, the new amendments create an environment that makes asylum seekers easily undocumented, and therefore vulnerable to arrest and detention, and in a system that ostensibly pushes them out or keeps them out of the asylum process in South Africa.

Due to the above, through centring asylum seekers and doing so through the prism of the key theoretical and conceptual framework, the laws and practices of South Africa were found to amount to structural violence. The instances of structural violence were: creating a precarious position for asylum seekers; asylum seekers were held in abeyance by the new legal framework; South Africa's *de facto* position to deny asylum in South Africa; laws and practices were inconsistent with international and regional law; and the power imbalance and abuse of state power.

For these reasons, the research question was answered, that state competence ought to be limited, and then moved on to the features of limiting state competence, setting the four standards and the ways in which limitation could be implemented. The standards were: to conduct a thorough assessment of the landscape of service provision. This had within it five features that needed to be met for a positive landscape of service provision. Secondly, was that the legal regime must include an independent oversight and accountability mechanism to hold the Department and individual state officials accountable for unlawful conduct. Thirdly, the new framework must have reasonable access to work and study. Fourthly, the new framework and practices must align with international law and jurisprudence; and finally, the framework must not render the asylum application process null and void. These standards were created and shaped according to the thesis's findings, and therefore in direct response to South Africa's context of service provision. Implementation of the new framework requires input at regional, international and domestic levels, to ensure that South Africa meets all proposed standards and respects the limitation to its competence to include arrest and detention in the asylum application process.

As previously stated, this model can be generally applicable and adopted in different States to ensure their respective refugee laws protect asylum seekers, particularly undocumented asylum seekers, against arrest and detention. It was with this intention, to centre the rights and needs of an underserved community, that the research was conducted. It is, therefore, the hopes of the thesis that it will be of practical assistance.

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