

THE PLIGHT OF REFUGEES IN SOUTH AFRICA

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Abstract

Democratic South Africa emerged in 1994 through a horrific history of exclusion, racial discrimination, and segregation. Following years of sanctions, boycotts, and disgrace from the international community, South Africa promised its people and the world that a new dawn had risen. A transformative constitution ushered in this change, determined to ensure equal rights and protection for all and to never repeat the crimes of the past. Unfortunately, this idealistic goal has not extended to all those who call South Africa home. The hard-fought battle against apartheid which was aided by many African countries did little for the status of asylum seekers and refugees in the post-1994 state. Refugees continue to be targeted and ostracised in our ‘free and equal’ land. This has given rise to violations of the international obligations that South Africa voluntarily assumed in 1996 in respect of refugees. Owing to the continued human rights violations of refugees and the state’s failure to translate visions of an equal and democratic South Africa beyond the borders of citizenship, redress is sorely needed. To this end, the landscape of refugee law is explored and outlined, both on the domestic plane and the international stage. A critical analysis of these sources will serve to concretise the position of refugees and asylum seekers, the shortfalls of the existing system, and the need for greater transformation and equality.

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1 Introduction

The purpose of this article is to shed light on the current plight of refugees faced in South Africa. As a point of departure, it is acknowledged that xenophobia remains a prevalent struggle faced by refugees and asylum seekers, but it shall not be the dominant discussion of this paper. The article's primary aim is to critically analyse the legal position of refugees through a thorough evaluation of the relevant jurisprudence, legislation, and the impact of transformative constitutionalism. Throughout this article, the core objective is to illustrate the trappings of being a refugee and to reimagine a system where greater consideration is given to the protection and promotion of the human rights of those vulnerable in our communities.

The paper is divided into five distinct but related parts. Part I presents the circumstances endured by asylum seekers and refugees and sets the scene of life as a refugee in South Africa. Part II outlines South Africa's international and domestic obligations to refugees. Against this backdrop, Part III analyses the judgment and order made in the case of *City of Cape Town v JB and Others* (*City of Cape Town*).¹ Flowing from this analysis, the judgment made in *City of Cape Town* will be critiqued in Part IV. Finally, an alternative view is suggested in addressing the prevailing refugee crisis.

2 The position of refugees in South Africa

The presence of migrants in South Africa is not a new phenomenon. Migrants, both documented and undocumented, have streamed through South Africa's borders since the time of apartheid.² Various factors led to an increase in the number of migrants entering South Africa during the 1980s to late 1990s. Many African countries were in the struggle for independence with conflicts resulting in intolerable living conditions and the persecution of persons. The influx of Mozambican citizens seen in the 1990s during the ongoing civil war involving Renamo and Frelimo is a notable example of a factor which contributed to mass migration trends in South Africa.³

¹ *City of Cape Town v JB and Others* 2020 (2) SA 784 (WCC) (*City of Cape Town*).

² S Peberdy 'Setting the scene: Migration and urbanisation in South Africa' (2009) *The Atlantic Philanthropies* at 3-5.

³ S Nomazulu 'The impact of immigration on the labour market: Evidence from South Africa' unpublished MCom thesis, University of Fort Hare, 2008 at 15.

When entering into the new constitutional dispensation in 1994, specific focus was given to ensuring compliance with international obligations and standards.⁴ Although it took some time to finalise its domestic law guaranteeing protection for refugees and asylum seekers, South Africa did ratify both the 1951 Refugee Convention as well as the 1969 OAU Refugee Convention in 1996.⁵ On the foundation of these international obligations, the Refugees Act was enacted in 1998 giving effect to the promotion and protection of the rights of refugees and asylum seekers.⁶ Despite this, however, the circumstances and difficulties that refugees and asylum seekers face today depict a life of hardship, fear, and prejudice.

Refugees and asylum seekers in South Africa face threats of xenophobic attacks and violence based on their countries of origin. In 2019, a surge of xenophobia swept through South Africa causing riots and looting.⁷ To paint the picture of life as a refugee, three individuals will be looked at.

Jean, a Congolese shop owner, had his property broken into and looted during the 2019 riots. He was badly beaten when he approached his shop, sustaining serious injuries, similar to a previous attack that he had endured in 2008.⁸ A 16-year-old girl named Nathalie came to South Africa in 2009 from the Democratic Republic of Congo (Congo). She was attacked and beaten by classmates for being elected as a student representative for her grade. The guilty students were never punished, and Nathalie has not since returned to school for fear of her life.⁹ The life of Asad Abdullahi depicts the struggles of living as an asylum seeker in South Africa. He stated that after fleeing the war-torn and failed state of Somalia and traversing Africa at a very young age in search of safety, South Africa remains one of the most dangerous and violent places that he had ever lived in.¹⁰

It is undeniable that refugees and asylum seekers face incredible struggles when arriving in South Africa. This begs the question of whether they have escaped to a country that can actually protect

- 4 Constitution of the Republic of South Africa, 1996 (Constitution) secs 39(2), 232 & 233.
- 5 Convention Relating to the Status of Refugees (28 July 1951) United Nations Treaty Series (189) 137 (1951 Refugee Convention); OAU Convention on Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) United Nations Treaty Series (1001) 45 (1969 OAU Refugee Convention).
- 6 Refugees Act 130 of 1998.
- 7 Human Rights Watch ‘South Africa: Widespread Xenophobic Violence’ 17 September 2020 <https://www.hrw.org/news/2020/09/17/south-africa-wide-spread-xenophobic-violence> (accessed 18 June 2021).
- 8 Human Rights Watch ‘They have robbed me of my life’ 17 September 2020 <https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south> (accessed 18 June 2021).
- 9 Human Rights Watch (n 8).
- 10 J Steinberg *A Man of Good Hope* (2014) at 195-200.

them. The many untold stories of violence and the hardships that refugees face also question whether the protective measures ensured by the Refugees Act are being practically implemented by the Department of Home Affairs, the courts, and local government.

3 The legal protection guaranteed to refugees in South Africa

3.1 International instruments on refugee protection

Refugee protection emanated after the formation of the League of Nations in response to the emerging conflict arising from the Russian Federation in 1921. A specialised agency, the International Refugee Organization, was appointed to address the growing number of displaced persons post World War II.¹¹ An increase in the need for regulation necessary to protect refugees led to the establishment of the United Nations High Commissioner for Refugees (UNHCR) in 1950. The UNHCR originated as a temporary agency but has since been permanently established.¹²

The United Nations enacted three noteworthy authorities on refugee law; the 1951 UN Convention on the Status of Refugees and its 1967 Refugee Protocol, as well as the 1950 Statute of the Office of the UNHCR.¹³ The 1951 Refugee Convention outlined the definition of a refugee and the subsequent protection granted as per the mandate set out by the United Nations. However, the definition lacked clarification on temporal and geographical elements that were later affirmed in the definition set out by the 1967 Refugee Protocol.¹⁴

A refugee is defined by Article 1A(1) of the 1951 Refugee Convention read in tandem with Article 1A(2) of the 1967 Refugee Protocol and embellished by Article 1 of the 1969 OAU Refugee Convention as: any person who is outside their country of origin and is unable or unwilling to return or avail themselves of its protection, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a social group, or political opinion. Article 1 of the 1969 OAU Refugee Convention broadens the application of protection by addressing groups of refugees as well as

11 GS Goodwin-Gill ‘The International Law of Refugee Protection’ in E Fiddian-Qasmiyah, G Loescher, K Long & N Sigona (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) at 1.

12 J McAdam ‘The Enduring Relevance of the 1951 Refugee Convention’ (2017) 29 *International Journal of Refugee Law* at 1.

13 1951 Refugee Convention (n 5); Protocol Relating to the Status of Refugees (31 January 1967) United Nations Treaty Series (606) 267 (1967 Refugee Protocol); Statute of the Office of the United Nations High Commissioner for Refugees (14 December 1950) A/RES/428(V).

14 Goodwin-Gill (n 11) 2.

individual refugees.¹⁵ Moreover, the 1969 OAU Refugee Convention's definition specifically protects refugees experiencing armed conflict from war-torn countries.

This combined definition provides a wide scope of legal protection for refugees to the extent that persecution need not be current but can be a future or emerging threat while a citizen is absent from the country.¹⁶

The 1969 OAU Refugee Convention is a pertinent and essential instrument in combatting the influx of refugees throughout Africa. Africa's history has been plagued by colonisation and segregation which have led to continued armed conflict in the fight for independence.¹⁷ The result of this is the widespread dispersion of persons, with many African nationals seeking asylum and ultimately refugee status. The 1969 OAU Refugee Convention has in many ways set the tone for the treatment of refugees by upholding values of community, acceptance, and hospitality.¹⁸ It allows for people to be accepted into host countries on a 'face value' basis. This approach grants refugee status without extensive evidence or proof being required in order to accommodate those seeking assistance.¹⁹ It cannot be denied that the 1969 OAU Refugee Convention plays a fundamental role in protecting refugees originating in Africa. South Africa has a duty to give effect to the binding standards of the 1969 OAU Refugee Convention in developing its own protective measures for refugees and asylum seekers.

From this foundation, state obligations, and the subsequent implementation of such obligations in terms of the 1951 Refugee Convention, the 1967 Refugee Protocol, and the 1969 OAU Refugee Convention must be analysed. The 1951 Refugee Convention sets out the contracting states' obligation to ensure the welfare of refugees in Articles 20 to 23. Refugees are afforded the same rationing of resources as nationals,²⁰ therefore, equal housing opportunities should be given to refugees subject to domestic law and public authority. Additionally, less favourable terms cannot be imposed upon refugees where other non-citizens are treated more favourably.²¹ Refugees should also have access to basic education on

¹⁵ 1951 Refugee Convention (n 8) Art 1A(1); 1969 OAU Refugee Convention (n 8) Art 1.

¹⁶ Goodwin-Gill (n 11) 2-3.

¹⁷ South African History Online 'South African's Foreign Relations During Apartheid, 1948' <https://www.sahistory.org.za/article/south-africas-foreign-relations-during-apartheid-1948> (accessed 18 June 2021).

¹⁸ African and Latin American Working Group 'Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees' (1992) *UNHCR* at 2.

¹⁹ African and Latin American Working Group (n 18) 4.

²⁰ 1951 Refugee Convention (n 5) Art 20.

²¹ 1951 Refugee Convention (n 5) Art 21.

the same standard as nationals,²² and public relief assistance must be equally distributed to refugees as it is to the nationals within the country.²³

Likewise, Article 2(1) of the 1969 OAU Refugee Convention sets out the responsibilities of Member States when granting asylum. Member States must ensure the acceptance and settlement of refugees requiring asylum through domestic legislative mechanisms.²⁴ Articles 2(1) and (3) also emphasise the importance of adhering to the principle of *non-refoulement*, ensuring that no person seeking asylum is rejected at the border.²⁵

The 1951 Refugee Convention and 1967 Refugee Protocol were created to solve the refugee problem which was specifically presented after World War II.²⁶ The 1969 OAU Refugee Convention was thereafter enacted to combat the rising refugee numbers in Africa.²⁷ Unfortunately, the application of these international instruments has been underwhelming and has not achieved its goal in the seventy years since its enactment with the goal being to ultimately decrease the worldwide numbers of refugees as well as to enact a universal standard of protection for all refugees and asylum seekers.²⁸ Unfortunately, many borders still see mass influxes of asylum seekers with both refugees and asylum seekers receiving inadequate treatment and protection from their host countries. The refugee situation is anything but diminished, requiring states to continue providing solutions to the ever-increasing issue.

The most utilised and blanket solution when receiving asylum seekers is placing them in ‘refugee camps’ or ‘refugee centres’. Encampment of refugees is favoured in many African and European countries as the natural consequence of seeking asylum.²⁹ Refugee camps, however, provide a paradoxical situation where on one hand their purpose remains a temporary solution, but on the other hand, refugees remain in the camps for undetermined periods of time.³⁰ Ironically, the camps become, to some extent, a form of permanent residence. This compromises the purpose of refugee camps, which are constructed as temporary settlements, as they should only be considered as a brief stepping-stone to refugee status being granted.

22 1951 Refugee Convention (n 5) Art 22.

23 1951 Refugee Convention (n 5) Art 23.

24 1969 OAU Refugee Convention (n 5) Art 2(1).

25 1969 OAU Refugee Convention (n 5) Arts 2(1) & (3).

26 Goodwin-Gill (n 11) 2.

27 1969 OAU Refugee Convention (n 5) Preamble.

28 1951 Refugee Convention (n 5) Preamble; 1969 OAU Refugee Convention (n 5) Preamble.

29 R Kreichauf ‘From forced migration to forced arrival: the campization of refugee accommodation in European cities’ (2018) 6(7) *Comparative Migration Studies* at 3.

30 Kreichauf (n 30) 4.

The UNHCR has set out three preferential solutions that states may implement when accommodating refugees in their countries.³¹ Voluntary repatriation remains the best option for states to utilise in decreasing refugee numbers.³² Refugees should unconditionally be able to return to their countries of origin and be received back as citizens if the past threat has ceased.³³

Should repatriation be impossible, the contracting state should strive for the integration of refugees into local communities, a system that South Africa has adopted.³⁴ Full integration speaks to both legal recognition and the holistic acceptance of refugees into everyday life in South Africa. Legal recognition takes the form of refugees being entitled to and receiving all rights afforded to permanent residents.³⁵ Additionally, refugees should be encouraged to immerse themselves in South African culture and communities in order to create a new home for their families.

Various factors must be considered in achieving local reintegration.³⁶ These factors cannot be invariably utilised as refugees come from all over the world seeking asylum, resulting in varied ways of living.³⁷ Local reintegration can only be achieved by accommodating individuals on a case-by-case basis. Often, refugees have come from traumatic backgrounds and still endure the psychological implications of this.³⁸ Many refugees also come from religions and cultures that are drastically different from the cultures of their host country.³⁹ Additionally, refugees have often been deprived of basic rights and opportunities which are essential for assimilation into a new country and to rebuilding one's dignity. A holistic approach should thus be taken to the process of integration in order to achieve long-lasting results.

Finally, resettlement can be facilitated by the state to relieve the pressure of one state receiving large numbers of refugees. Resettlement can either be in the country of safety or to a third country that can accommodate refugees.⁴⁰ The 1969 OAU Refugee

³¹ United Nations General Assembly Resolution 428(v) (14 December 1950) A/RES/428(V) Annexure para 1.

³² United Nations High Commissioner for Refugees *Voluntary Repatriation: International Protection* (1996) at 4-10.

³³ UNHCR 'Voluntary Expatriation No.18 (XXXI)' (1980) paras (c) & (d).

³⁴ JC Kanamugire 'Local Integration as a Durable Solution for Refugees in South Africa' (2016) 12(3) *Acta Universitatis Danubius* at 4.

³⁵ Kanamugire (n 36) 5.

³⁶ Goodwin-Gill (n 11) 6.

³⁷ Goodwin-Gill (n 11) 7.

³⁸ P Zambelli 'Hearing Differently: Knowledge-based Approaches to Assessment of Refugee Narrative' (2017) 29 *International Journal of Refugee Law* at 13.

³⁹ Zambelli (n 40) 14.

⁴⁰ Goodwin-Gill (n 11) 6.

Convention also proposes an option for Member States as set out in Article 2(4).⁴¹ If issues arise in granting asylum or providing for refugees then the host country may request that asylum seekers be accepted by another Member State. This grants a measure of relief to over-burdened countries faced with large numbers of refugees.

Although these available solutions cannot solve the root cause of the influx of refugees, the aim is to relieve both the host countries' responsibilities as well as to address the pressing needs of refugees throughout Africa.

3.2 Domestic protection ensured to refugees

South Africa has not been immune to the influx of refugees streaming through her borders. Rather, migrants and refugees have been intrinsically linked to South Africa's history.⁴² When 1994 brought the hard-earned prize of democracy, the newly elected government had to address and conform to the international standards on the treatment and protection of refugees. The Aliens Control Act 96 of 1991 had failed to fulfil the supposed assurances made to its applicants.⁴³ Therefore, a revised and updated piece of legislation was sorely needed to give effect to the 1951 Refugee Convention and its 1967 Refugee Protocol, as well as to the 1969 OAU Refugee Convention.

In response to this need, the Refugees Act was enacted in 1998 and came into operation in 2000.⁴⁴ Alongside it, the Immigration Act also addresses issues surrounding the admission of foreign nationals and the transgression of the immigration conditions resulting in arrest and deportation.⁴⁵ It allows foreign nationals to reside in South Africa provided that they remain self-sufficient and economically secure.⁴⁶ The Act also notes that the loss of economic stability results in 'undesirable immigrants' who are expected to return to their country of origin. Finally, the Immigration Act also addresses the treatment of those who reside in South Africa in contravention of the immigration laws. Residing in the country without the necessary documents brands one as an illegal foreigner, allowing the Department of Home Affairs to deport migrants back to their country of origin.⁴⁷

In contrast, the Refugees Act focuses on the protection of refugees and the treatment and procedures affordable to refugees

41 1969 OAU Refugee Convention (n 5) Art 2(4).

42 Peberdy (n 2) 5-6.

43 J Handmaker 'No Easy Walk: Advancing Refugee Protection in South Africa' (2001) 48 *Indiana University Press* at 92-96.

44 Refugees Act (n 6).

45 Immigration Act 13 of 2002.

46 Immigration Act (n 47) Preamble.

47 Immigration Act (n 47) secs 2 & 34.

seeking asylum once they are physically in South Africa.⁴⁸ The Act protects two categories of foreign nationals; refugees and asylum seekers. The Refugees Act defines a refugee in section 3 as:⁴⁹

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

This definition gives direct effect to the 1951 Refugee Convention's description of a refugee – allowing for a broad scope of protection for those who are formally granted refugee status. Important to note, the expansion of the definition per section 3(b) of the Act is a direct result of the 1969 OAU Refugee Convention which included armed conflict as a reason for seeking asylum. Prior to being granted refugee status, applicants must undergo a process that is set out in the Refugees Act. The process begins by lodging an application as an asylum seeker at the Refugee Reception Offices, administered by the Department of Home Affairs (DHA).⁵⁰ The DHA is responsible for implementing the Act and processing asylum applications.⁵¹

Finally, the Refugees Act sets out the general protection of refugees and asylum seekers in sections 27 to 30, giving effect to the 1951 Refugee Convention.⁵² Section 27 affords refugees (not asylum seekers) full access to all rights contained in the Bill of Rights. Section 27A of the Refugees Amendment Act sets out the rights and protections given to asylum-seekers and [vaguely] entitles asylum seekers to the rights contained in the Bill of Rights.⁵³ South African domestic law has indeed given effect to its international obligations ensuring adequate protection to asylum seekers and refugees. The

⁴⁸ V Ramoroka 'The determination of refugee status in South Africa: A human rights perspective' unpublished LLM thesis, University of Pretoria, 2014 at 12-14.

⁴⁹ Refugees Act (n 6) sec 3.

⁵⁰ Refugees Act (n 6) secs 21-22.

⁵¹ Refugees Act (n 6) sec 22(6).

⁵² 1951 Refugee Convention (n 5) Arts 27-30.

⁵³ Refugees Amendment Act 33 of 2008 sec 27A.

practical implementations of this protection however leave much to be desired.

4 A summary and judgment of *City of Cape Town v JB and Others*

The case of *City of Cape Town v JB and Others* must be first set out in the context of the 2019 xenophobic attacks that struck fear into the hearts of many migrants across South Africa.⁵⁴ This was not the first bout of these attacks, nor regrettably does it seem to be the last. The conflict arose between taxi drivers operating throughout South Africa but specifically in Tshwane and Cape Town where migrants, predominantly Nigerians, were accused of having dealings in drug circles, child trafficking, and prostitution.⁵⁵ The conflict was originally confined to these two groups (South African taxi drivers and Nigerian businessmen), but soon a net was cast over all migrants living in South Africa. No distinction was made amid the anger and violence between documented and undocumented occupants, asylum seekers, or refugees.⁵⁶

At the height of this turmoil, hundreds of migrants left their homes as they felt unsafe to continue working and living in their communities. The City of Cape Town could not accommodate them nor could the UNHCR facilitate their demands to be resettled—to a safer country as the option of resettlement was incredibly limited.⁵⁷ Thus, protests and riots ensued in order to pressurise the UNHCR to meet their demands of resettlement.⁵⁸ With nowhere else to go during the sit-in protests, women, children, and men flocked to the Central Methodist Church which housed hundreds of people.⁵⁹ The men were forced to live on the streets due to space constraints and set up informal housing arrangements.⁶⁰ Against this backdrop, the City of Cape Town approached the Western Cape High Court for an order to clear the migrants off the streets.

The first section of the judgment focuses on the contravention of the City of Cape Town By-laws relating to Streets, Public Places and the Prevention of Noise Nuisances and outlines the procedures that the City and municipal police took to keep the refugees and asylum seekers ‘in check’ during these riots.⁶¹ Clause 22 of the City by-laws

54 *City of Cape Town* (n 1) para 4.

55 *City of Cape Town* (n 1) paras 4-10.

56 Human Rights Watch (n 7).

57 *City of Cape Town* (n 1) para 13.

58 *City of Cape Town* (n 1) paras 13-14.

59 *City of Cape Town* (n 1) para 16.

60 *City of Cape Town* (n 1) paras 16-17.

61 City of Cape Town By-Laws Relating to Streets, Public Places and the Prevention of Noise Nuisances No.6469 of 2007 (City By-Laws).

set out the process that must be followed in the instance of contravention.⁶² The City is required to issue a notice as a first remedy and to then look to alternatives such as fines or imprisonment. The latter can only be applied through a court order after a consideration of the relevant circumstances. However, the City failed to issue notices against the respondents, nor did it rely on the available civil remedies.⁶³

The City clearly set out the functions and duties of its municipal police force but failed to identify their participation in arresting the respondents. The City did not rely on the municipal police service to perform its duties as established by Clause 23(1) of the City by-laws.⁶⁴ It seems that the City wished to avoid two scenarios. First, contrary to its behaviour and actions towards the respondents, the City did acknowledge that arresting the respondents should be a measure last resort.⁶⁵ To avoid the responsibility falling on its own municipal police, the City took a step back and relied on the South African Police Service (SAPS) to arrest the respondents instead. This thereby absolved the municipality from the high threshold of establishing the necessity of arrest.

Second, the City circumvented the procedure set out to warrant the SAPS' involvement. Although the SAPS was within its scope of authority, the municipal police first had to file a complaint of an alleged violation, which the SAPS then had to investigate.⁶⁶ At no stage did the City approach the SAPS to lodge a complaint.⁶⁷

The second part of the judgment then shifted focus to the applicability of the Immigration Act and the Refugees Act. It is unopposed that these instruments are applicable to the respondents as their complaints were directed at the DHA's functioning and administrative duties. In this regard, the City happily relied on the Immigration Act while failing to ensure the protection guaranteed by the application of the Refugees Act.⁶⁸

Thulare J identifies the relevant and applicable provisions in the Refugees Act which should apply to the respondents but fails to expand on how both the City and the DHA did not fulfil their mandate in acting upon these provisions. Oddly enough, Thulare J instead considers the behaviour of the respondents as deceitful in inciting fellow migrants to continue demanding relocation from the UNHCR.⁶⁹

⁶² *City of Cape Town* (n 1) para 26; City By-Laws (n 64) clause 22.

⁶³ *City of Cape Town* (n 1) para 27.

⁶⁴ City By-Laws (n 64) clause 23(1).

⁶⁵ *City of Cape Town* (n 1) paras 29-31.

⁶⁶ *City of Cape Town* (n 1) para 31.

⁶⁷ *City of Cape Town* (n 1) paras 32-33.

⁶⁸ *City of Cape Town* (n 1) paras 36-39.

⁶⁹ *City of Cape Town* (n 1) paras 40-41.

The City found it necessary to arrest and detain the respondents to ascertain whether they were illegal residents in South Africa. Ultimately, the purpose of this investigation was to apply the Immigration Act to deport undocumented immigrants back to their country of origin.⁷⁰ The City was under the misconception that it need not apply section 26 of the Refugees Act which allows asylum seekers to appeal their applications either to the Standing Committee for Refugee Affairs or to the Refugee Appeal Authority before any final action is taken.⁷¹ The City was all too quick to rely on the consequences set out in the Immigration Act as justification of the treatment of the respondents.⁷²

Last, Thulare J addresses the actions of the first and second respondents. He reprimands their behavior and intent to stir up anger and frustration amongst the other protesters full knowing that their demands of resettlement would not otherwise be met.⁷³ Rather, it is suggested by Thulare J that the respondents should have applied to the various mechanisms for housing opportunities via the City as most South Africans are expected to do.⁷⁴

The application of international law is then discussed in terms of the principle of *non-refoulement* alongside the applicability of the Refugees Act.⁷⁵ The case of *Ruta v Minister of Home Affairs* is quoted in establishing the importance of the principle of *non-refoulement*.⁷⁶ However, further insight into the application of *non-refoulement* or its relevance in this matter was left unaddressed. The judgment is concluded by stating that the respondents bear the onus of proving why they cannot return to their habitual residences and that in failing this, they should return immediately – which is ironically stated directly after the consideration of *non-refoulement*.⁷⁷ The discussion of international law appears incredibly abrupt and as more of an afterthought.

Based on the findings of the case, an order was made to prohibit the respondents from contravening the City by-laws. Specifically, a prohibition was imposed upon the respondents to not stay overnight, sleep at any time, make fires, wash clothes, conduct personal hygiene, and urinate or defecate in the vicinity of the church, or on any public property including the streets. Conclusively, Thulare J ordered the DHA to conduct investigations into the statuses and applications of all migrants present at the church.⁷⁸

70 *City of Cape Town* (n 1) para 34.

71 *City of Cape Town* (n 1) para 38.

72 *City of Cape Town* (n 1) para 40.

73 *City of Cape Town* (n 1) paras 43-45.

74 *City of Cape Town* (n 1) para 47.

75 *City of Cape Town* (n 1) para 48.

76 2019 (2) SA 329 (CC) paras 24-25.

77 *City of Cape Town* (n 1) para 47.

78 *City of Cape Town* (n 1) para 58.

5 Critique of the *City of Cape Town v JB and Others* judgment

This section evaluates the *City of Cape Town* judgment heard by the Western Cape High Court. In doing so, it problematises the Court's failure to uphold the principles of substantive equality in its treatment of refugees in accordance with its constitutional mandate. Moreover, this section will outline how the *City of Cape Town* ruling violated South Africa's international law obligations and further criticises the inadequacy of domestic refugee law. It is argued that the Court's failure to engage with international law and to amend national policy has undermined the refugees' right to housing and family.

5.1 The Court failed to ensure substantive equality for refugees in South Africa

'No order is sought against the Respondents inside the church.' This was a statement made by Thulare J in his judgment against the migrants residing on the streets of Cape Town outside the Central Baptist Church.⁷⁹ This seemingly innocuous statement violates the Court's duty to uphold substantive equality and transformative constitutionalism.

In ruling on the *City of Cape Town* case, Thulare J placed emphasis on the contravention of the City by-laws by the respondents. It is undisputed that the respondents were indeed in violation of by-laws which the municipality had a duty to uphold for the benefit of individuals who were being affected by the protests.⁸⁰ However, the conditions in which the respondents found themselves also deserved attention and relief and should not have been ignored. This draconian approach centred solely on the by-laws of the municipality is overly positivistic and falls short of the constitutional mandate on courts to prioritise substantive equality and transformative constitutionalism.⁸¹

Accordingly, a transformative approach should have been adopted in this case. Transformative constitutionalism speaks to a revolutionary approach to the law to ensure that social and economic rights are realised with the Constitution as the vehicle for this change.⁸² The ultimate goal of transformative constitutionalism is to

⁷⁹ *City of Cape Town* (n 1) para 16.

⁸⁰ *City of Cape Town* (n 1) paras 26-27.

⁸¹ K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* at 146.

⁸² P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* at 352-354.

achieve a truly egalitarian society.⁸³ The courts play an active role in ensuring the realisation of a transformed society. Judges cannot only utilise legal reasoning but must provide judgments that reflect on and advance constitutional norms and values.⁸⁴ A technical approach to interpreting legal issues is thus no longer sufficient as social, historical, and economic circumstances must be considered when judgments are made.⁸⁵

This duty is evident in a few landmark judgments which depict the importance of the courts' role in considering the plight of vulnerable communities as a whole. The cases of *Grootboom*, *Treatment Action Campaign*, and *Khosa* all address the importance of fulfilling socio-economic rights with due regard to the capacity of the state.⁸⁶ These judgments had a significant impact on the applicants who received legal relief and the vulnerable individuals and communities that the cases were relevant to. In doing so, they upheld their duty to champion transformative constitutionalism even in the instance where positive laws are violated.

In the *City of Cape Town* case, it is reasoned that a greater issue was at play and this issue was not addressed. This resulted in a missed opportunity to improve the lives of refugees and migrants in general by enhancing their dignity and fulfilling their fundamental rights. The requests for adequate housing, protection, food, and water were not unreasonable and should not have been disregarded for the sake of fulfilling the City's by-laws.⁸⁷ In the context of 2019, refugees and asylum seekers felt great fear for their lives and were deprived of basic human rights – issues that were prevalent in this case but were left unaddressed.⁸⁸

Moreover, the impact of Thulare J's judgment on the women and children living in the church should not be ignored.⁸⁹ While these refugees were not before the Court in this issue, the ruling had a direct and substantial impact on them. The failure to grant the respondents the necessary protection resulted in the women and children residing in the church with little recourse to their situation. It was not only the respondents facing housing issues and xenophobic violence and, consequently, the Court should have extended the

⁸³ Langa (n 86) 352.

⁸⁴ Langa (n 86) 353.

⁸⁵ Klare (n 85) 146-148.

⁸⁶ *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC) (*Grootboom*); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC) (*TAC*); *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 6 BCLR 569 (CC) (*Khosa*).

⁸⁷ 1951 Refugee Convention (n 5) Arts 27-30; Refugees Act (n 6) sec 27.

⁸⁸ Human Rights Watch (n 7).

⁸⁹ Klare (n 85) 146; Langa (n 86) 352.

protection of the Refugees Act to those not before the court but who were directly affected by the judgment.

Court orders and judgments hold great power in providing justice for the parties involved. Furthermore, serious ramifications can ensue in the social and economic aspects of people's lives on a greater scale.⁹⁰ Court decisions cannot be separated from reality, context, or the day-to-day circumstances that people face.

As a result, it would be fallacious to suggest that the court's role and responsibility lie solely with those who appear before it. In this case, the opportunity to advance transformation was squandered. The impact on lived experiences is seen in three categories namely; the ability to reduce or increase inequality, the ability to protect and promote an individual's dignity, and the ability to meet (in full or in part) the basic needs of individuals or communities.⁹¹ The Court's failure in improving the respondents' lived experiences has not only undermined the specific protection granted to the respondents, but has also left refugees nationwide unassured that the state will fulfil its obligations.

6 Inadequate adherence to international law

South African courts are bound to international law on three main accounts. First, section 39(2) of the Constitution requires the mandatory consideration on courts to apply or utilise international law when interpreting the Bill of Rights. Second, section 232 binds the courts to customary international law with the caveat of invalidity if it is found to be inconsistent with the Constitution or supporting legislation. Finally, section 233 instructs courts to choose a reasonable interpretation of legislation that is consistent with international law rather than an interpretation that conflicts with international law.⁹² These provisions ensure that not only are our international obligations complied with, but that international law remains intrinsically linked with the courts' decision-making processes.

The Constitution provides various instructions for courts to apply when interpreting domestic law within the ambit of international law. These provisions directly affect the involvement of international refugee law on the application of the Refugees Act and the protection of refugees and asylum seekers in South Africa. However, specific reliance on international law is found within the Refugees

⁹⁰ *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC) para 157.

⁹¹ Constitutional Justice Report 'Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report' (2015) at 37.

⁹² Constitution (n 1) secs 39(2), 232 & 233.

Amendment Act.⁹³ The importance of the interpretation and application of the Act as well as its consistency with applicable international instruments cannot be undermined. Therefore, understanding the implementation of international obligations forms the starting point in the application of the Refugees Act.⁹⁴

6.1 Why international law should have been incorporated in the *City of Cape Town* case

The Western Cape High Court in the case of *City of Cape Town* relied heavily on the domestic law concerning refugees and migrants by considering both the Refugees Act and the Immigration Act.⁹⁵ It is, however, proposed that in considering the broader context in this dispute, far more reliance should have been given to international refugee law standards.

A pressing issue that the respondents face, as well as refugees and asylum seekers at large, is the issue of accessing socio-economic rights such as housing, health, and basic education.⁹⁶ The Refugees Act does not ensure access to adequate socio-economic rights as a general right to refugees and asylum seekers per section 27 of the Refugees Act.⁹⁷ Therefore, asylum seekers and refugees are essentially left unassisted in obtaining these fundamental needs.

Both refugees and asylum seekers are (with some limitation) granted entitlement to the rights set out in the Bill of Rights. Sections 26, 27, and 29 contained in the Bill of Rights ensures the right to access to adequate housing, healthcare, food, water, social security, and education, and these rights apply to refugees as they are covered by the protection of the Bill of Rights.⁹⁸ The Refugees Act, however, provides no express right to many socio-economic rights housed in Chapter 2 of the Constitution. Fortunately, the courts also have a duty to interpret the Bill of Rights in accordance with international law per section 39(2) of the Constitution.

The 1951 Refugee Convention specifically addresses the issue of housing, education, and public relief in Articles 21, 22, and 23.⁹⁹ The 1951 Refugee Convention outlines broader and more explicit protection of socio-economic than what is contained in South Africa's domestic law. It is suggested that in considering the socio-economic needs presented in the case of *City of Cape Town*, the Court should

93 Refugees Amendment Act (n 56) sec 1A.

94 1951 Refugee Convention (n 5); 1967 Refugee Protocol (n 13); 1969 OAU Refugee Convention (n 5).

95 *City of Cape Town* (n 1) para 26.

96 *City of Cape Town* (n 1) para 43.

97 Refugees Act (n 6) sec 27.

98 Constitution (n 4) secs 26, 27 & 29.

99 1951 Refugee Convention (n 5) Arts 21-23.

have ensured a practical implementation of the Bill of Rights by interpreting the purpose and objectives of the 1951 Refugee Convention together with additional international instruments.

7 The full significance of *non-refoulement* was overlooked in this dispute

The principle of *non-refoulement* has received customary international law status thus binding our courts to its implementation.¹⁰⁰ As well as being firmly established in the 1951 Refugee Convention and the 1969 OAU Refugee Convention, a host of jurisprudence has emerged on the issue of *non-refoulement* starting with the case of *Soering v United States* where it was confirmed that an individual cannot be returned to a country where they face the possible risk of degradation, torture, or inhumane treatment.¹⁰¹ In the case of *Chahal v United Kingdom*, the European Court of Human Rights further affirmed the principle's application in criminal cases.¹⁰² Through both the jurisprudence and international instruments, the principle affords wide protection to refugees and narrow room for states to act in contradiction of *non-refoulement*.

The Western Cape High Court did mention *non-refoulement* and its place in both international and domestic law. It is acknowledged that the Court's technical approach to *non-refoulement* cannot be faulted. The spirit behind this principle was, however, not translated in this judgment. *Non-refoulement* remains the cornerstone of international refugee law and ensures protection to those who are entitled to receive it. It prevents the expulsion of asylum seekers whose applications, including those on appeal, have not been finalised by the DHA.¹⁰³ *Non-refoulement* upholds enshrined constitutional values and the rights to dignity, life, and protection against torture and cruel or inhumane treatment. The dignity of asylum seekers is thus ensured by preventing forced returns as well as by providing a safe environment while refugee applications are pending.¹⁰⁴

The principle of *non-refoulement* speaks to an assurance that through the process of applying for asylum, asylum seekers will not be subject to being forcibly returned nor will they be subjected to the same treatment faced in the country from which they fled.¹⁰⁵

¹⁰⁰ UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' 26 January 2007 <https://www.refworld.org/docid/45f17a1a4.html> (accessed 10 August 2021) at 2.

¹⁰¹ *Soering v United Kingdom* [1989] 11 EHRR 439 para 111.

¹⁰² *Chahal v United Kingdom* [1996] 23 EHRR 413 paras 151-154.

¹⁰³ Goodwin-Gill (n 11) 4.

¹⁰⁴ As above.

However, the Court did not elaborate on the City's intent in arresting protesting individuals and its subsequent plan of deportation. The City was far too quick in allowing for the deportation mechanisms of the Immigration Act to be put into effect on the assumption that all asylum seekers could be classified as illegal migrants. Regardless of the ensured protection that asylum seekers are granted through *non-refoulement*, the Court did not hold the City accountable for placing migrants in a position of possible expulsion without acknowledging their entitled protections.

8 The state's obligation to provide housing for refugees and asylum seekers as a basic socio-economic right

The enactment of the 1951 Refugee Convention and its subsequent domestication is aimed at solving the refugee crisis and providing refugees with welfare benefits during the application process as well as once their status as refugees has been established.¹⁰⁶ However, the judgment in *City of Cape Town* did little to realise this protection.

The state must provide housing opportunities per Article 21 of the 1951 Refugee Convention.¹⁰⁷ Article 21 of the 1951 Refugee Convention sets out three limitations to the right to housing granted to refugees. Namely, that refugees should be accorded the right to housing by the host state, refugees should receive the same treatment as other non-citizens in the country, and that the realisation of the right to housing must be in line with the domestic law of the host country.¹⁰⁸ Similarly, the 1969 OAU Refugee Convention states that African countries have a duty to 'find ways and means of alleviating refugees' misery and suffering as well as providing them with a better life and future indicative of providing refugees with sufficient access to socio-economic rights'.¹⁰⁹ These requirements, flowing from international obligations, place a burden on executive and administrative authorities to ensure that refugees and asylum seekers are given equal opportunities in attaining housing.¹¹⁰

Section 26(1) of the Constitution does not limit the right to housing to citizens but uses the term 'everyone' inclusive of refugees

¹⁰⁵ UNHCR (n 104) 2-4.

¹⁰⁶ 1951 Refugee Convention (n 5) Preamble & Arts 21-23; Refugees Act (n 6) Preamble & Art 27.

¹⁰⁷ 1951 Refugee Convention (n 5) Art 21.

¹⁰⁸ 1951 Refugee Convention (n 5) Art 21.

¹⁰⁹ 1969 OAU Refugee Convention (n 5) Preamble.

¹¹⁰ *Katabana v Chairperson of the Standing Committee for Refugee Affairs* 2012 SA 362 (HC) para 6.

and asylum seekers.¹¹¹ This constitutional right is directly reflective of South Africa's international obligations. Unfortunately, the legislative protection for refugees' rights to housing ends there. The Housing Act as well as the National Housing Policy and Subsidy Programmes exclude non-citizens from housing projects and adequate housing.¹¹² This discrepancy presented a unique opportunity for the Court in the case of *City of Cape Town* to directly address the inadequate effect that South Africa's domestic law has given to its international obligations as the Court had the responsibility to hold the executive accountable for its appalling approach to housing schemes.¹¹³

It appeared rather simple in both the judgment and the opinion of the local government that refugees will receive the same treatment as citizens regarding housing and that they should simply wait their turn. In reality, this promise is nearly never fulfilled. In a housing report, it was revealed that 2% of people (citizens and non-citizens) received government housing, and a further 2% received housing via non-governmental organisations.¹¹⁴ Similar sentiments on the issue of housing were made by a Congolese refugee stating 'There is no respect for this right to housing. In South Africa, they accept refugees here but they don't do anything – we are just left like this'.¹¹⁵

It cannot be sufficient for the Court to disregard this housing obligation by allowing the Cape Town municipality to rely on the defense of insufficient resources.¹¹⁶ Understandably, certain welfare benefits may be restricted due to lack of funds, however, refugees already make up a disadvantaged group and should not be subject to further degradation or discrimination by not being able to live in homes that are safe and accessible. The 1951 Refugee Convention highlights the importance of acknowledging the special treatment which states must give to refugees and asylum seekers even within the limitation of resources.¹¹⁷ The order made should have outlined this protection and given the municipality the directive of practical implementation to realise the right to access housing.

¹¹¹ Constitution (n 1) sec 26(1).

¹¹² C Kavuro 'Refugees' Access to Socio-Economic Rights: Favorable Treatment for the Protection of Human Dignity' LLD thesis, University of Stellenbosch, 2018 at 268-270.

¹¹³ Constitution (n 1) sec 7(2).

¹¹⁴ J Greenburg & T Polzer 'Migrant Access to Housing in South African Cities' (2008) 2 *Migrant Rights Monitoring Project* at 4.

¹¹⁵ Greenburg & Polzer (n 118) 2 & 11.

¹¹⁶ Kavuro (n 116) 275.

¹¹⁷ 1951 Refugee Convention (n 5) Preamble & Arts 21-23.

9 The actions of the DHA were egregious and furthered asylum seekers' inability to achieve refugee status

The Department of Home Affairs is notoriously known for its delays when processing applications from asylum seekers. Its continued violation of procedures has been highlighted in various cases, most notably the case of *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others*.¹¹⁸ The Court, in this case, criticised the Department of Home Affairs' decision in closing down the Cape Town Refugee Reception Offices and concluded that the DHA had acted irrationally and unlawfully.¹¹⁹ The closure of the Cape Town Refugee Reception Offices put a heavy strain on asylum seekers as they now had to travel to alternative Reception Offices and were unable to lodge any new applications.¹²⁰ The Court recognised the DHA's total disregard for protective legislative frameworks (including the Refugees Act) and failure to ensure the protection of asylum seekers in its application process. The Court ordered that the Refugee Reception Offices be re-opened.¹²¹

Although the facts of *Minister of Home Affairs v Scalabrini Centre* differ in every regard to the case of *City of Cape Town*, a similar reluctance by the DHA in implementing protective measures can be found. Admirably, Thulare J ordered the Department to identify and process the respondents and asylum seekers living on the streets and in the church. He went as far as to secure transport and temporary tents for the DHA officials to conduct sessions.¹²² The lack of urgency displayed by the DHA in cementing asylum applications undoubtedly contributes to the dissatisfaction and frustrations that many asylum seekers face.

9.1 The state has a domestic and international obligation to keep families united

In addressing the direct issue in the case of *City of Cape Town*, the Court overlooked the effect of removing the respondents from the streets outside the church. During the protests and conflict, women and children were living in the church while the men resided on the streets in the area surrounding the church. The church property could

¹¹⁸ *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (4) All SA 571 (SCA) (*Minister of Home Affairs v Scalabrini Centre*).

¹¹⁹ *Minister of Home Affairs v Scalabrini Centre* (n 122) paras 74-76.

¹²⁰ *Minister of Home Affairs v Scalabrini Centre* (n 122) paras 5 & 10-14.

¹²¹ Scalabrini Centre of Cape Town 'The Cape Town Refugee Reception Office closure case, explained' 20 March 2018 <https://www.scalabrini.org.za/news/the-cape-town-refugee-reception-office-closure-case-explained/> (accessed 28 July 2021).

¹²² *City of Cape Town* (n 1) para 58.

not sustain all of the refugees and asylum seekers who sought shelter during the xenophobic attacks.¹²³ Thus, families were effectively separated due to the arrests and the order made removing the men (fathers, brothers, and uncles) from the streets.

The fundamental right to a family unit and the necessity of maintaining the family unit has been illustrated in various international instruments, most notably in Article 14(1) of the Universal Declaration of Human Rights.¹²⁴ Jastram and Newland argue that this right creates a duty on the state to refrain from actions that would separate a united family and obligates the state to provide opportunities for families to be reunited.¹²⁵ The importance of keeping families intact speaks to the assistance and protection that family members provide for one another.¹²⁶ The fundamental functions of a family are physical care, protection, and emotional support.¹²⁷ Moreover, the economic purpose of the family must also be considered; namely who the breadwinner is and how provision is ensured for the rest of the family.¹²⁸

The order made against the respondents in the case of *City of Cape Town* interfered with the family unit by separating men from their women and children. The women and children were deprived of physical care, protection, and emotional support at a time that was already traumatic and stressful. Additionally, many families lost their source of income as a result of the separation and due to the fact that the women and children continued living in the church. The case of *Dawood v The Minister of Home Affairs* confirms this foundational international principle by applying it to our domestic law.¹²⁹ This order cannot be seen in isolation and must be considered in light of the consequences of removing the respondents, which the Court failed to take into consideration.

10 Conclusion

This discussion should not be seen in a light of impending doom or inescapable negativity on the topic of refugees and asylum seekers in South Africa. Rather, an opportunity is presented to further the protection of these categories of migrants by creating a safe environment for them to live in. The courts should be relentless in

¹²³ *City of Cape Town* (n 1) paras 4-12.

¹²⁴ Universal Declaration of Human Rights 1948 Art 14(1).

¹²⁵ K Jastram & K Newland 'Family Unity and refugee protection' in E Feller, V Turk & F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) at 557.

¹²⁶ Jastram & Newland (n 129) 558.

¹²⁷ Jastram & Newland (n 129) 555-557.

¹²⁸ Jastram & Newland (n 129) 562-563.

¹²⁹ *Dawood v The Minister of Home Affairs* 2000 (3) SA 936 (CC) para 28.

ensuring that the local governments and the DHA comply with this obligation.

The country that we all strive towards and dream of requires dedication and inclusivity from all of its stakeholders. The judiciary should lead this process and foster an attitude of equality for all refugees and asylum seekers by considering the underlying principles of human dignity, non-discrimination, and freedom. This attitude established by the courts should permeate through various non-profit organisations, churches, and individuals to contribute to the task of providing shelter and food to asylum seekers and refugees in South Africa. A land of dignity, freedom, and equality as envisioned by our Constitution, should not be a far-off goal for refugees in South Africa. A combined effort of all spheres of government is thus required to implement the legal system effectively. Only then will the conditions of refugees and asylum seekers improve.