



**THE OBLIGATION OF SOUTH AFRICA TO PROVIDE SOCIAL SECURITY
TO REFUGEES AND ASYLUM SEEKERS DURING THE COVID-19
PANDEMIC**

By

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Declaration

I, Awethu Zethu Dekeda declare that the work presented in this thesis is my own and has not been presented for a degree or examination purposes at any other Institution. Where other people's works have been used, complete references have been provided.

Signed 

Date: 01/02/2023

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Abstract

Covid-19 a novel pandemic, has wreaked havoc globally, threatening the livelihoods of all, including refugees and asylum seekers. Like all other countries globally, South Africa has gone to great lengths to mitigate the challenges that this pandemic has caused. However, it is far from clear whether these responses are according due regard to the rights of some of the most vulnerable in society, amongst which are refugees. This thesis deals with South Africa's obligation to provide social security to refugees during the Covid-19 pandemic. It specifically assesses whether South Africa's responses to the Covid-19 pandemic were in adherence to fundamental refugee law principles relevant to the protection of refugees. The study commences with a general introduction, followed by an analysis of the international human rights and refugee law framework relevant to protection of refugees. This framework is used to assess South Africa's responses. Subsequently, the discussion delves into South Africa's own national framework on social security. Using the standards identified in both the national and international frameworks, the thesis then proceeds to measure South Africa's Covid-19 related responses regarding social security to resolve the issue of whether South Africa adhered to these standards in as far the protection of refugees' right to social security is concerned.

Keywords: human rights, social security, refugees, asylum seekers, covid-19

List of Abbreviations and Acronyms

COVID-19	Corona Virus Disease 19
1951 Convention	United Nations Convention Relating to the Status of Refugees
1967 Protocol	Protocol Relating to the Status of Refugees
ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
AIDS	Acquired immunodeficiency syndrome
CC	Constitutional Court
CDC	Centre for Disease Control and Prevention
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights

COIDA	Compensation for Occupational Injuries and Diseases Act
CPS	Cash Paymaster Services
CRC	United Nations Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil society organisations
DHA	Department of Home Affairs
DOL	Department of Labour
DSD	Department of Social Development
EVD	Ebola Virus Disease
HIV	Human immunodeficiency virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
ILO	International Labour Organisation

Maputo Protocol	The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
NGO	Non-government organisations
OAU Convention	Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa
SADC	Southern Africa Development Community
SAHRC	South African Human Rights Commission
SAJHR	South African Journal for Human Rights
SALJ	South African Law Journal
SASSA	South African Social Security Agency
SCA	Supreme Court of Appeal
SCRA	Standing Committee for Refugee Affairs
SRD	Social Relief of Distress

TERS	Temporary Employer Employee Relief Scheme
The Committee	Committee on Elimination of Discrimination Against Women
UDHR	United Nations Declaration of Human Rights
UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund
UN Charter	United Nations Charter
UN Convention	International Law Commission of the United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
VAT	Value Added Tax
Vienna Convention	Vienna Convention on the Law of Treaties
WHO	World Health Organisation

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Table of Contents

Declaration.....	i
Abstract.....	iii
List of Abbreviations and Acronyms.....	iv
TABLE OF CASES.....	viii
TABLE OF STATUTES.....	xi
South Africa.....	xi
International.....	xii
CHAPTER ONE: BACKGROUND AND CONTEXT.....	1
1.1. The reality of pandemics in Africa.....	1
1.2. Understanding the terms refugee and asylum seeker and their need for protection.....	4
1.3. Refugees and asylum seekers in South Africa and Covid-19 social protection responses.....	6
1.4. Social security for refugees and asylum seekers and whether there is an obligation on South Africa.....	8
1.5. Problem statement.....	11
1.6. Aims and Objectives of the study.....	12
1.7. Methodology of the study.....	12
1.8. Preliminary Literature Review.....	12
1.9. Outline of chapters.....	14
CHAPTER TWO: INTERNATIONAL STANDARDS ON SOCIAL SECURITY: IMPLICATIONS FOR REFUGEE AND ASYLUM SEEKER PROTECTION.....	16
2.1 Introduction.....	16
2.2. Understanding social security as a right.....	17
2.3. Treaties as sources of international law.....	18
2.4. Treaties in the South African context.....	20
2.5. International treaties and the right to social security: Implications for refugees and asylum seekers.....	21
2.5.1. United Nations Charter (UN Charter).....	21
2.5.2. The Universal Declaration of Human Rights (UDHR), 1948.....	23
2.5.3. The International Covenant on Economic, Social, and Cultural Rights 1966.....	25
2.5.4. ILO Convention 202 on Social Protection Floor Recommendation, 2012 (No. 202) (R202).....	30
2.5.5. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security, 2022.....	31

2.5.6. The United Nations Convention Relating to the Status of Refugees 1951 (1951 UN Convention).....	33
2.5.7. The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (OAU Refugee Convention).....	36
2.5.8. The right to social security under women’s rights treaties: The CEDAW and Maputo Protocol.....	37
2.5.9. Social security under children’s rights treaties: The CRC and the ACRWC.....	40
2.5.10. The Regional Human Rights System: A commentary on the African Commission.....	41
2.6. Conclusion	43
CHAPTER THREE: SOCIAL SECURITY UNDER SOUTH AFRICA’S NATIONAL LAW: IMPLICATION FOR REFUGEE AND ASYLUM SEEKER PROTECTION	45
3.1. Introduction.....	45
3.2. Defining social security under South African national law	45
3.3. National framework on social security	47
3.3.1. Constitution of the Republic of South Africa, 1996.....	47
3.3.2. The South African Social Security Agency Act.....	51
3.3.3. The Refugee Act 130, 1998.....	54
3.4. Jurisprudence on social security: Implication for refugee and asylum seeker protection	57
3.4.1. <i>The Black Sash Trust v Minister of Social Development</i> (2017).....	57
3.4.2. <i>South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg</i> (2014).....	58
3.4.3. <i>Christian Roberts v Minister of Social Development</i> (2007).....	59
3.5. Jurisprudence on the rights of refugees: Implications on social protection of refugees and asylum seekers	61
3.6. Recent amendments on refugee law: Implications on social protection of refugees and asylum seekers	64
3.6.1. Refugee Amendment Act 11, 2017	65
3.7. Recent Policies on immigration: Implications on social protection of refugees and asylum seekers	67
3.7.1. Permanent residency and citizenship	68
3.7.2. Changes towards migrants from Africa	68
3.8. Conclusion	69
CHAPTER 4: THE SOCIAL WELFARE NEEDS OF REFUGEES/ASYLUM SEEKERS AND SOUTH AFRICA’S COVID-19 RESPONSES REGARDING SOCIAL SECURITY.....	71
4.1. Introduction.....	71
4.2. South Africa as a destination country for refugees.....	71

4.3. Understanding the social welfare needs of refugees and asylum seekers.....	72
4.3.1. Food and Water.....	73
4.3.2. Housing and Shelter.....	74
4.3.3. Healthcare.....	75
4.3.4. Income and employment.....	78
4.3.5. Education.....	79
4.3.6. Social security.....	80
4.4. Urban refugee framework in South Africa and the heightened challenge of accessing social welfare needs.....	80
4.5. South Africa’s response to Covid-19.....	82
4.5.1. Workmen’s Compensation.....	83
4.5.2. Temporary Employer Employee Relief Scheme (TERS).....	85
4.5.3. Social Security Assistance.....	86
4.5.4 Closure of businesses and the indirect exclusion of refugees in informal sector from social security.....	87
4.5.5. Closure of home affairs during the pandemic and the indirect exclusion of refugees/asylum seekers from social security.....	89
4.6. A glimpse into Uganda’s responses in comparison to South Africa.....	90
4.7. Conclusion.....	93
CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS.....	94
5.1. Introduction to conclusion.....	94
5.2. Conclusions in chapters.....	94
5.3. Deductions considering the conclusions in chapters.....	97
5.3.1. There was mismatch between the international treaty law and the realisation of the right to social security for refugees during the Covid-19 pandemic.....	97
5.3.2. The mismatch between South Africa's constitutional guarantees and the realisation of the right to social security for refugees during the Covid-19 pandemic.....	99
5.3.3. The Covid-19 pandemic merely exacerbated the exclusion of refugees.....	100
5.3.4. Policies that include yet exclude refugees.....	100
5.3.5. Protection of refugees during a pandemic is also a matter of political will.....	101
5.4. Recommendations.....	102
5.4.1. The executive.....	102
5.4.2. The legislature.....	103
5.4.3. The judiciary.....	103
5.4.4. Civil society organisations (CSOs) and Non-government organisations (NGOs).....	104
5.4.5. Department of Home Affairs.....	105

BIBLIOGRAPHY	107
Journal articles, books and book chapters.....	107
Academic writing.....	109
Internet sources	109

CHAPTER ONE: BACKGROUND AND CONTEXT

1.1. The reality of pandemics in Africa

Covid-19¹ would not be the first pandemic or virus to wreak havoc on human-kind globally and on the African continent. From Ebola, monkey pox, to Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (HIV/AIDS), the list is indeed far from exhaustive. In responding to these pandemics, governments including those in Africa, have not always accorded due regard to all the rights of individuals at stake. Notably, the Ebola Virus Disease, commonly known as Ebola, is a fatal illness which affects both humans and animals.² It is transmitted to humans from wild animals such as bats. It spreads to humans through physical contact with organs, secretions and blood.³ The first Ebola outbreaks occurred in Central Africa, however, the outbreak in West Africa between 2014 and 2016 is considered to be the largest and most fatal outbreak since this virus was first discovered in 1976.⁴ More recently (in 2022), the outbreak of Ebola has been reported in a number of countries including Uganda.⁵ These countries have attempted to manage the outbreak and have amongst others, imposed measures including quarantines, curfews and lockdowns. However, these responses have been criticised for failing to pick lessons from the mistakes made during the Covid-19 pandemic.⁶ Human immunodeficiency virus, commonly known as HIV, is a virus that attacks the immune system of the body.⁷ If HIV is not treated, it can lead to acquired immunodeficiency syndrome

¹ The word “Covid-19” as described by the World Health Organisation (WHO) stands for Coronavirus disease of 2019 where CO stands for Corona, VI for virus, D for disease and 19 for the year the outbreak was first recognised, late in 2019.

² Centre for Disease Control and Prevention (CDC) “What is Ebola Virus Disease” (2021) <https://www.cdc.gov/vhf/ebola/about.html>. (accessed: 16 December 2022).

³ Scientists think people are initially infected with Ebola virus through contact with an infected animal, such as a fruit bat or nonhuman primate. This is called a spillover event. After that, the virus spreads from person to person, potentially affecting a large number of people. The virus spreads through direct contact (such as through broken skin or mucous membranes in the eyes, nose, or mouth) with; blood or body fluids (urine, saliva, sweat, feces, vomit, breast milk, amniotic fluid, and semen) of a person who is sick with or has died from Ebola virus disease (EVD); objects (such as clothes, bedding, needles, and medical equipment) contaminated with body fluids from a person who is sick with or has died from Ebola; infected fruit bats or nonhuman primates (such as apes and monkeys) as well as semen from a man who recovered from the virus (through oral, vaginal, or anal sex).

⁴ CDC “2014–2016 Ebola Outbreak in West Africa” (2021).

⁵ See CDC “Uganda Ebola Outbreak, September 2022” (2022) On 20 September 2022, the Ugandan Ministry of Health confirmed an outbreak of Ebola in the western Uganda. The announcement came after a patient with a suspected viral hemorrhagic fever was identified and isolated. A sample from the patient was sent to the VHF laboratory at the Uganda Virus Research Institute, where Ebola (Sudan strain) was confirmed. This marks the sixth Ebola outbreak in Uganda. <https://www.cdc.gov/vhf/ebola/outbreaks/uganda/2022-sep.html>. (accessed: 16 December 2022).

⁶ I Damon “A Focus on Ebola Response” (2021) <https://www.cdc.gov/vhf/ebola/outbreaks/responder/a-focus-onebola-response.html>. (accessed: 16 December 2022).

⁷ World Health Organisation (WHO) describes HIV as an infection that attacks the body’s immune system, specifically the white blood cells called CD4 cells. HIV destroys these CD4 cells, weakening a person’s immunity

(AIDS), otherwise, HIV can be controlled and an individual with it can live a long and healthy life. It is reported that HIV in humans originated from a type of chimpanzee in Central Africa. Studies show that HIV may have jumped from chimpanzees to humans as far back as the late 1800s.⁸ Again, various governments in Africa have taken drastic measures to contain the spread of HIV. Amongst others, South Africa has taken the route of indirect criminalisation of transmission of HIV.⁹

Criminalisation often results in withholding information on the HIV status from another party, yet, silence is considered to be fraud.¹⁰ In the case of *S v Phiri*,¹¹ where the accused (herein referred to as Mr. Phiri) was employed as an HIV/AIDS counsellor at a local clinic, Mr. Phiri was aware of his HIV status (HIV positive for 3-years) when he had unprotected sex with the complainant, who had come to the clinic to be tested and had found out that she was HIV negative. The relationship between Mr. Phiri and the complainant grew and they had consensual intercourse on two occasions, with Mr. Phiri declining the request by the complainant to use protection on both occasions. The complainant later tested positive for HIV when she was tested as part of her pre-natal routine. Judge Mokgoka ruled that “although the state did not prove that Mr. Phiri transmitted the complainant with HIV virus, his conduct remains reckless.” The appellate court then confirmed a six-year sentence, with the court taking judicial notice of the fact HIV/Aids had no cure and the infection with the virus was likely to lead to a reduced life span.¹² Despite the fact that the prohibition and punishment of transmission and exposure to HIV has been considered by South Africa, it is not in the interest

against opportunistic infections, such as tuberculosis and fungal infections, severe bacterial infections, and some cancers.

⁸ *Ibid.*

⁹ It is notable that the law in South Africa does not directly criminalise exposure, transmission, or non-disclosure of HIV. However, in principle, such behaviour falls under the scope of common law crimes such as murder and assault.

¹⁰ S Shegal “Important Case where Silence is Considered to be Fraud” (2018) <http://www.shareyouressays.com/knowledge/3-important-cases-where-silence-is-considered-to-be-fraud-inindia94785>. (accessed: 08 January 2023).

¹¹ *S v Phiri* 2014 (1) SACR 211 (GNP).

¹² See *S v Phiri*, Judge Makgoka stated that “It was sufficient for a conviction on the count of attempted murder to establish that the appellant, knowing that he was HIV-positive, engaged in sexual intercourse with the complainant, whom he knew to be HIV-negative, without any preventative measures. It must be accepted, and we can take judicial notice of the fact, that HIV/Aids has no cure presently, and the infection with the virus is likely to lead to reduced life span... Moreover, it was established over a decade ago by this court that such conduct constitutes attempted murder. The trial court found to be aggravating the fact that he was employed as an HIV counsellor by the department of health to help in educating people about the dangers of unprotected sex, among others. Indeed, much was expected of the appellant... The argument that because there was a love relationship between the parties should serve as a mitigating factor is a startling proposition... We do not perceive how this could possibly serve as a mitigating factor. The very fact could easily serve as an aggravating one, as lovers are expected to protect one another.

of public health rights.¹³ An individual suspecting to be infected with HIV might, for example, avoid testing for HIV as to do so would suggest that he/she is aware of his/her status. Ignorance of HIV status means he/she may not be held criminally accountable because they may be deemed to lack the means-rea to infect another person with HIV. The downside of this is the fact that failure to test would deprive such an individual of the opportunity to receive health care necessary for healthy living.

A discussion of pandemics and their responses in Africa is vast and cannot be exhausted. Thus, the brief discussion in this background merely paints a picture of their reality on the African continent. All considered, what one gathers, firstly, is that disease outbreaks and pandemics go back in history and they remain a common phenomenon in present times and will most likely continue to be in the future. Effectively, the manner in which governments respond to them and the extent to which the rights of individuals are upheld during such responses is critical. Secondly, Africa has suffered the brunt of these pandemics, either because they originated from Africa, or, because, despite originating from elsewhere, African countries have lacked (or mismanaged) the necessary resources to respond effectively to the needs of its people. Thirdly, a common thread that runs through most of the responses by governments to these outbreaks is the little to no regard accorded to fundamental rights in a holistic manner. This state of affairs did not seem to have changed with the outbreak of the Covid-19 pandemic. This now brings us to a discussion of the Covid-19 pandemic which forms the crux of this thesis.

In December 2019, reports surfaced regarding the Covid-19 outbreak in the city of Wuhan in China.¹⁴ Thereafter, the virus spread drastically, leading the World Health Organisation to declare a pandemic on 11th March 2020.¹⁵ On 5th March 2020, the first cases of infection in South Africa were reported by the National Institute for Communicable Diseases.¹⁶ In line with global responses, the country implemented protection measures such as physical distancing, restricted travels, and limits to gatherings. These measures were collectively referred to as “lockdown.” The first lockdown commenced on 27th March 2020.¹⁷ It was accompanied by

¹³ *S v Nyalungu* 2013 2 SACR 99 (T) 1 the case pertained to a charge of attempted murder in respect of HIV/AIDS exposure. The Supreme of Appeal held, amongst others, that where an individual objectively foresees the possibility or risk of infection of the other party and reconciles himself with that possibility, this constitutes necessary intention to sustain a conviction of attempted murder. This approach was applied in subsequent cases such as *Phiri v S*.

¹⁴ H Zhu et al. “The novel Coronavirus outbreak in Wuhan, China.” (2020) Global Health Res Policy <https://ghrp.biomedcentral.com/articles/10.1186/s41256-020-00135-6>. (accessed: 21 May 2021).

¹⁵ H Zhu et al. “The novel Coronavirus outbreak in Wuhan, China.” (2020).

¹⁶ “National Institute for Communicable Disease” <https://www.nicd.ac.za/disease-a-z-index/covid-19/>. (accessed: 20 March).

¹⁷ *Ma-Afrika Hotels (Pty) Ltd v Santam Limited* 2021 (1) All SA 195 (WCC) para 1.

measures directed at containing the Covid-19 pandemic. These measures impacted everyone negatively, both nationals and refugees.¹⁸ By far, the Covid-19 pandemic stands out as one of the pandemics that were most regulated through legislation and regulations. With such high regulation came profound impact on the rights of individuals including those most vulnerable in society such as refugees and asylum seekers.

1.2. Understanding the terms refugee and asylum seeker and their need for protection

Perhaps before one goes further with this study, it is paramount to elucidate between some of the terms used in the study such as refugees, asylum seekers, and migrants. The Amnesty International gives a better differentiation of these terms and states that “a refugee is a person who has fled their own country because they are at risk of serious human rights violations and persecution there. The risks to their safety and life were so great that they felt they had no choice but to leave and seek safety outside their country because their own government cannot or will not protect them from those dangers.”¹⁹ Moreover, an asylum seeker is being understood as “a person who has left their country and is seeking protection from persecution and serious human rights violations in another country, but who hasn’t yet been legally recognized as a refugee and is waiting to receive a decision on their asylum claim. Seeking asylum is a human right.”²⁰ While there seems to be no definite explanation of who a migrant²¹ is, migrants are believed to be individuals who stay outside their country of origin but who are neither refugees nor asylum seekers. More often, migrants enter these countries with the aim of seeking employment or to study, whatever the case may be, but unlike the former, migrants do not flee persecution. What is common between these definitions is that, in all these groups “everyone” has the right to international protection, thus they are entitled to have all their human rights protected and respected, regardless of the status they have in the country they moved to. In this thesis, both the terms refugee and asylum seekers, but cognizant of the differences between them.

¹⁸ Some commentators, like Mukumbang *et al.*, have argued that the outbreak of the pandemic and the enforced lockdown measures only worsened the situation for refugees. See F Mukumbang *et al.* “Unspoken Inequality: How COVID-19 has Exacerbated Existing Vulnerabilities of Asylum-Seekers, Refugees, and Undocumented Migrants in South Africa” (2020) 141 *International Journal for Equality in Health* at 3-7.

¹⁹ Amnesty International “Refugees, Asylum Seekers and Migrants” (2023) <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/>. (accessed: 14 April 2023).

²⁰ *Ibid.*

²¹ Migrant and refugee are two terms which are used interchangeably even though they have a legal difference.

Governments are indeed expected to protect the rights of their citizens. However, in situations such as conflict, nationals of a given country may be forced to flee their countries of origin to seek safety in neighbouring countries. Upon movement, the protection of their rights rests on the states where they seek refuge. When a state grants asylum to an individual, it accepts the obligation to protect them.²² Countries that have acceded to the 1951 Convention, the 1967 Protocol, and the Organisation of African Unity (OAU) Convention on the rights of refugees are guided by the rights and obligations contained in these treaties regarding standards of protection of refugees. South Africa has acceded to all three of these treaties.²³ Article 1(1) of the 1951 United Nations Relating to the Status of Refugees,²⁴ defines a “refugee” in part as any person who:

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Before individuals are given refugee status, they are identified as asylum seekers. For an asylum seeker to satisfy eligibility criteria for refugee status before an adjudicator, they initially must present testimony in writing through affidavits supplemented by oral submissions.²⁵ Although this thesis focusses on refugees, the terms refugees and asylum seekers will be used interchangeably in light of the fact that an asylum seeker is a refugee in waiting. As of 2020, the total number of registered refugees in South Africa stood at 76 754,²⁶ with the majority escaping from Somalia, the Democratic Republic of Congo, Congo Brazzaville, Ethiopia, Burundi, and Zimbabwe.²⁷ The Covid-19 pandemic had devastating effects on everyone including refugees. In these circumstances, social security became critical in ensuring that the well-being of those affected is guaranteed. This became especially critical for refugees on

²² See F Mukumbang et al. “Unspoken Inequality: How COVID-19 has Exacerbated Existing Vulnerabilities of Asylum-Seekers, Refugees, and Undocumented Migrants in South Africa” (2020) 141 *International Journal for Equality in Health* at 3-7.

²³ United Nations Convention Relating to the Status of Refugees adopted on 28 July 1951, the Protocol Relating to the Status of Refugees, adopted on 31 January 1967, and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted on 10 September 1969.

²⁴ Article 1A (2) of the 1951 UN Convention.

²⁵ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines for International Protection (2019) para 20-27.

²⁶ World Bank “South Africa Refugee Statistics 1993-2020” <https://www.macrotrends.net/countries/ZAF>. (accessed 24 July 2021).

²⁷ United Nations High Commissioner for Refugees “Refugee Population” <https://reporting.unhcr.org/population>. (accessed 21 May 2021).

account of their vulnerable status. The vulnerability of refugees was affirmed in the case of *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others*,²⁸ where Kondile J ruled that:

“Refugees are indisputably the most vulnerable group in our society and their plight calls for compassion. Refugees have been forced to flee their homes because of persecution, human rights violations, and conflict beyond their control. Very often they, or those close to them, have been victims of violence based on very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.”²⁹

In light of the above ruling, social security became extremely crucial in ensuring the well-being of refugees.

1.3. Refugees and asylum seekers in South Africa and Covid-19 social protection responses

The Committee on Economic Social and Cultural Rights has provided authoritative guidance on the right to social security. According to this Committee, “the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection.”³⁰ Social protection was a significant Covid-19 related relief aimed at addressing the plight of the most vulnerable in society. The United Nations High Commissioner for Refugees (UNHCR) observed that “refugees and other persons of concern have been disproportionately impacted by the Covid-19 pandemic, leading to serious health, socio-economic and protection impacts.”³¹ According to the UNHCR, this rendered inclusive social protection responses relevant in the well-being of refugees.³²

What makes the situation of refugees and asylum seekers in South Africa unique is that they are expected to sustain themselves, including finding shelter and catering for their families.

²⁸ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC).

²⁹ 2007 (4) BCLR 339 (CC) para 28. *Minister of Home Affairs v See also Minister of Home Affairs v Rahim Rahi* (CCT124/15) [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) where the Constitutional Court agreed with the Supreme Court of Appeal (SCA) that “it is an international norm that refugees and others caught up in migratory regulation have a peculiar status.”

³⁰ Refworld “United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant)” (2008) <https://www.refworld.org/docid/47b17b5b39c.html>. (accessed 1 December 2021).

³¹ United Nations Higher Commissioner for Refugees “Social protection responses to COVID-19 for forcibly displaced persons: UNHCR Division Of Resilience And Solutions” (2020) <https://reporting.unhcr.org/sites/default/files/Social%20protection%20responses%20to%20COVID%20for%20forcibly%20displaced%20persons.pdf>. (accessed 1 December 2021).

³² *Ibid.*

Most of them are involved in informal trading, while a few are formally employed.³³ Since one of the measures implemented to curb the spread of covid-19 included the closure of such economic activities, with the Government Gazette stating that “during the lockdown, all businesses and other entities shall cease operations,”³⁴ many refugees were left with no income to sustain themselves.³⁵ Covid-19 Regulations³⁶ also required everyone to stay in their homes, thus, prejudicing this category of individuals even further because the informal nature of some refugees' businesses means that they must sell on the streets and from house to house.³⁷ With the advent of the lockdown and its impact on trade and income-generating activities, the South African government disbursed stimulus packages in the form of cash payouts and food hampers.³⁸ However, it is far from clear whether the administrative processes for benefiting from these package rendered the right to social protection in this regard accessible to refugees and asylum seekers.³⁹ Also, businesses that suffered loss received some support from insurance companies.⁴⁰ While this would have been an option for refugees, many are in the informal sector where insurance is underutilised.

As the pandemic raged on, South Africa made provision for social relief for those in distress. To qualify for these grants, applicants had to be South African citizens, permanent residents or “refugees registered on the Home Affairs system.”⁴¹ It could be argued that in principle, the Social Relief for those in distress catered for refugees. However, it is worth noting that with the outbreak of the pandemic, the Department of Home Affairs (DHA) circulated an announcement on 26th March 2020 which read as follows: “All Refugee Reception Centres will not be assisting any clients during the nation-wide lockdown for 21-days, with effect from 27th March 2020 to

³³ *Somalian Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* 2014 ZASCA 143 para 1.

³⁴ See Department of Small Business Development, GN R450, *Government Gazette* 43208, 06 April 2020.

³⁵ Regulation 11 B (1) (b) and (c) on Alert Level 5; VM Mutambara, “Assessing the impact of Covid-19 on women refugees in South Africa” (2021) 44 *Journal of Refugee Studies*.

³⁶ Regulation 11.B (i) Level 5 regulation: Regulation 16 (1) Level 4 regulations.

³⁷ See *Somalian Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014 [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCa) (26 September 2014).

³⁸ South African Government “Social grants - Coronavirus covid-19” (2020) “SASSA will issue Social Relief of Distress (SRD) in the form of food parcels as a temporary provision of assistances - SRD is paid to South African citizens, permanent residents or refugees who have sufficient means.” www.gov.za. (accessed 25 July 2021). However, changes to include refugees were only made after complaints were made. Initially they did not qualify. Asylum seekers did not qualify totally.

³⁹ *Ibid*.

⁴⁰ *Cafe Chameleon CC v Guardrisk Insurance Company Ltd* 2020 (65) All SA 41 (WCC).

⁴¹ South African Social Security Agency “Application for social relief of distress as a response to the disaster amid the Covid-19” https://www.sassa.gov.za/Documents/Grants-Documents/SRD%20for%205052/GA-5052001%20Covid-19%20SRD_Grant.pdf. (accessed 1 December 2021).

16 April 2020.”⁴² The Directives⁴³ issued by the DHA concerning temporary measures regarding entry into or exit out of the Republic had no guidelines regarding the issuance and renewal of asylum seeker visas. Additionally, the services provided by refugee reception centres were not listed as “essential services.”⁴⁴ Travel restrictions and the closure of refugee reception offices meant that there was no legal avenue for new asylum applicants in transit to South Africa and those who had already arrived but had not yet lodged their applications.⁴⁵ While status is not meant to exclude anyone from the enjoyment of the rights guaranteed under the Constitution, when it came to social relief grants, only refugees registered on the Home Affairs system were eligible for social relief. Yet, it is to be recalled that registration on the Home Affairs system was not possible because Refugee Reception Centres were closed at the time.⁴⁶ The pertinent question becomes: what is the viability of inclusive measures where the policy and administrative framework in place makes it difficult for refugees and asylum seekers to access social protection measures? If indeed the Constitution guarantees the right to social security for “everyone” is everyone covered in light of the current administrative and policy framework? It is critical to examine whether the social relief responses during the Covid-19 pandemic were in alignment with South Africa’s human rights obligations towards refugees and asylum seekers, if such obligations exist.

1.4. Social security for refugees and asylum seekers and whether there is an obligation on South Africa

The issue of provision of social security to refugees and asylum seekers brings to the fore both international law international human rights law to be specific, and South Africa's national laws. The Constitution of South Africa and South Africa's Refugee Act mandate South Africa to have regard to international treaties applicable to the protection of refugees, including the United Nations Convention Relating to the Status of Refugees, 1951 (1951 Convention), the United Nations Protocol Relating to the Status of Refugees, 1967 (1967 Protocol) and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (OAU Convention).⁴⁷ This position was affirmed by the 2019

⁴² Department of Home Affairs “Measures to Combat Covid-19 Pandemic at Refugee Reception Centres” (2020) <https://www.scalabrini.org.za/wp-content/uploads/2021/03/Scalabrini-Centre-Cape-Town-GovernmentDirections-March-2021.pdf>. (accessed 10 September 2021).

⁴³ Department of Home Affairs, GN R518, *Government Gazette* 43301, 09 May 2020.

⁴⁴ Paragraph 17D of the Directions on Services to be rendered by Home Affairs, 2020.

⁴⁵ Lawyers for Human Rights, Submissions to the Special Rapporteur on the Human Rights of Migrants After one and half year: the impact of Covid-19 on the human rights of migrants (2021) 1-7.

⁴⁶ *Ibid.*

⁴⁷ Section 6 of the Refugees Act; Section 39 (b) of the Constitution of Republic of South Africa, 1996.

Constitutional Court decision in *Gavric v Refugee Status Determination Officer, Cape Town, and others (People against Suppression, Suffering, Oppression, and Poverty as amicus curiae)*, where it was emphasised that the interpretation and application of rights and principles relevant to the protection of refugees must be guided by international law.⁴⁸

In analysing South Africa's obligations, international human rights law is used as a lens or normative framework through which to measure South Africa's responses. According to Jordan, a norm is synonymous with a legal principle or a standard upon which legal principles should be based.⁴⁹ Jordan adds that a norm or a legal principle is a prevailing standard or set of standards of behaviour or judgment assumed to be just standards of behaviour for society or for humanity in its entirety.⁵⁰ Muniz states that legal norms consist of legal principles, which provide for standardised forms of behaviour for subjects of the law.⁵¹ This means that legal norms play a practical role of specifying or generalising standards to be used to justify the validity of other written sources such as laws, subordinate legislation and policy decisions by government.⁵² International human rights law provides a useful normative framework for assessing the manner in which states respond to fundamental rights of individuals.

In terms of treaties relevant to protection of the rights of refugees, refugee law treaties are brought into focus. South Africa acceded to the 1951 Convention and its 1967 Protocol on 12th January 1996. It also acceded to the OAU Refugee Convention in 1995. These Conventions contain several provisions that place obligations on the country to protect refugees. However, none of them makes explicit provision for the right to social security. It is therefore not clear whether there was a solid legal basis under these treaties for South Africa to provide social security to refugees in times the Covid-19 pandemic. Critical to this research, however, is the Conventions' emphasis on prevention of all forms of discrimination.⁵³ Based on this emphasis, it is important to assess whether provisions on non-discrimination under these treaties can be

⁴⁸ *Gavric v Refugee Status Determination Officer, Cape Town and others (People against Suppression, Suffering, Oppression, and Poverty as amicus curiae)* 2019 (1) BCLR 1 (CC) para 25. See also s 39 and 236 of the Constitution of South Africa 1996 on the weight of international law in South Africa.

⁴⁹ D Jordan "Legal Principles, Legal Values and Legal Norms: Are They the Same or Different" (2010) *Academicus- International Scientific Journal* 109.

⁵⁰ *Ibid.*

⁵¹ JR-T Muniz "Legal Principles and Legal Theory" (1997) *10 Ratio Juris* 267.

⁵² D Jordan at 113.

⁵³ Article 3 of the 1951 UN Convention and article 4 of the OAU Conventions mandate State parties to apply provisions of these Conventions to all refugees without discrimination as to race, religion, nationality, membership of a particular social group, or political opinions.

relied on conclude that there was an obligation on South Africa to provide social security to everyone, including refugees.

It is worth noting that both the OAU and 1951 Convention recognises other rights not explicitly guaranteed under these Conventions.⁵⁴ It is therefore important to explore whether the right to social security as guaranteed under other international treaties and instrument could have founded a solid basis to impose an obligation on South Africa to afford social security to refugees during the Covid-19 pandemic. Mention of other rights beyond those contained in the 1951 and OAU Conventions renders the United Nations Declaration of Human Rights (UDHR) a good starting point. In terms of article 22 of the UDHR, the right to social security is guaranteed to everyone. The UDHR, in article 1, makes it explicit that “all human beings are born free and equal in dignity and rights.” In addition, the UDHR, in its Preamble, states that what matters in affording one protection is the “human family.” It adds that “recognition of the inherent dignity and of the equal and inalienable rights of all members is the foundation of freedom, justice and peace in the world.” It is important to engage with the foregoing provisions to determine their implication for provision of social security to refugees during the Covid-19 pandemic.

In 2015, South Africa ratified the International Covenant of Economic, Social and Cultural Rights (ICESCR). The ICESCR guarantees the right of everyone to social security under article 9. It is important to therefore assess whether “everyone” as used in article 9 can be a basis to argue for inclusion of social protection for refugees and asylum seekers during the Covid-19 pandemic. Also critical to the discussion in the research are the provisions in both the 1951 Convention and the OAU Convention to the effect that “states shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals.”⁵⁵ In devastating situations such as the Covid-19 pandemic, it is important to assess whether international treaty law creates an obligation on South Africa to afford refugees social protection as favourable as that accorded to nationals and if so, the extent to which this was achieved during the Covid-19 pandemic. Furthermore, South Africa is party to children and women rights treaties at the African Union and United Nations level.⁵⁶ It is critical to assess

⁵⁴ See, e.g., article 5 of the 1951 UN Convention.

⁵⁵ Article 4, 1951 UN Convention.

⁵⁶ The United Nations Convention on the Rights of the Child (UNCRC) 1989 ratified by South Africa on 16 June 1995; African Charter on the Rights and Welfare of the Child (ACRWC) (Adopted on 11 July 1990. Entered into force on 29 November 1999); The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa better known as the Maputo Protocol (adopted in 1981, enacted in 1986); Convention on the

whether, despite these treaties not making explicit provision for social security for refugees during pandemics, an obligation can be discerned from these treaties. At the national level, South Africa's Constitution guarantees the right to social security.⁵⁷ In guaranteeing this right, the Constitution makes use of the word “everyone.” By using the term “everyone,” the national legal framework seemingly envisages a protection regime that makes no distinction between nationals and non-nationals. This is affirmed in the Refugees Act which provides that a refugee “enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution.”⁵⁸ Recognising the obligation to afford protection to all individuals within the South African territory regardless of status, the Constitutional Court ruled in *Lawyers for Human Rights v Minister of Home Affairs* that mere physical presence of an individual in South Africa entitles them to the rights guaranteed under the Constitution.⁵⁹ It is important to assess the implication that South Africa’s legal framework has on the provision of social security for refugees during the Covid-19 pandemic.

1.5. Problem statement

The Covid-19 pandemic had and continues to have devastating consequences on everyone including refugees. The government of South Africa responded to ease the burden of some of those effected by providing social security packages to various members of society in South Africa. In many of these packages, refugees and asylum seekers were left out either directly or indirectly, thus, raising the issue of whether there was an obligation on South Africa to afford refugees and asylum seekers social security during the Covid-19 pandemic. Both the OAU and UN Conventions are the overarching treaties on protection of refugees and they guarantee several rights for refugees, but they are silent on the right to social security. It is therefore unclear whether such an obligation existed and the extent to which South Africa adhered to such obligation, if it did exist. Mapping out the contours of state obligations and measuring them against South Africa’s responses is particularly critical because as noted in the introduction, Covid-19 is not the first and last pandemic. The lessons identified will prove valuable for how governments, South Africa in this context, respond and addresses the needs of refugees during pandemics and disease outbreaks.

Elimination of All Forms of Discrimination against Women (CEDAW), 1981; ratified by South Africa on 15 December 1995.

⁵⁷ See Chapter 2 of the Bill of Rights under the Constitution of South Africa 1996.

⁵⁸ Article 27, Refugees Act 1998.

⁵⁹ *Lawyers for Human Rights v Minister of Home Affairs* (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (9 March 2004).

1.6. Aims and Objectives of the study

Aim: The aim of this research is to assess whether, in terms of international human rights law, South Africa was under any obligation to afford social security to refugees during the Covid-19 pandemic. It will then examine South Africa's Covid-19 responses in regard to social security and determine whether South Africa acted in alignment with these obligations, if any.

Objectives of the research:

1. To assess whether there was an obligation on South Africa in terms of international human rights law to provide social security to refugees and asylum seekers during the Covid-19 pandemic;
2. To examine South Africa's Covid-19 responses during the Covid-19 pandemic in regard to social security;
3. To analyse whether South Africa's Covid-19 response in regard to social security were in alignment with its obligations towards refugees and asylum seekers, if such obligations exist.

1.7. Methodology of the study

The study will deliver on the objectives set out above by using primary sources such as national legislation, case law, international, regional, and sub-regional treaties relating to refugees and asylum seekers. Soft law documents from International Organizations such as the UNHCR will also be considered. The study will also engage with the interpretive background of key treaties, including the 1951 UN Convention and the OAU Refugee Convention, measuring them against South Africa's social protection responses during the Covid-19 pandemic. It will engage in an extensive analysis of the scholarship to examine the views of other authors. Case law relevant to the subject of refugee protection will also be analysed.

1.8. Preliminary Literature Review

The proposed problem of this thesis is particularly important in advancing knowledge in this field. From the perspective of already existing studies, hardly any work has engaged with states' obligations towards refugees in the area of social security during pandemics such as the Covid-19 pandemic. Various studies conducted thus far either leave gaps to be addressed by this study,

or, set the pace for this study. For example, Durojaye⁶⁰ explores South Africa's response to the Covid-19 pandemic and the challenge of striking a balance between public health and human rights. The author considers South Africa to be caught up between a "rock and a hard place" in as far as balancing these two critical issues is concerned. His work does not specifically touch on refugees and asylum seekers; however, it brings to the fore a critical issue for discussion in this research – South Africa's commitment to protection of human rights of individuals during, including refugees, during pandemics.

Makumbang and others⁶¹ examine the issue of discrimination against refugees, particularly in South Africa during the Covid-19 pandemic and how the restrictions aggravated the already existing vulnerability of refugees. The study lays out the various challenges faced by the refugees during this period with a specific reference to South Africa's response to Covid-19. However, the authors do not grapple with the implication of these issues on refugee law principles, such as non-discrimination, and favourable treatment. These will be at the center of this research.

Kavuro,⁶² another scholar, analyses the challenge of unemployment among refugees in South Africa. He submits that the challenge of unemployment faced by refugees arises from factors including ill-sentiments towards non-citizens as well as legal and procedural barriers. Kavuro contends that refugees are excluded in most policies that aim to protect citizens' interests. Building on the work of Kavuro, this research will critic some of the neutral policies that have sidelined refugees during the pandemic because of their refugee status. It will then proceed to demonstrate how this undermines various treaty law obligations.

Gazi and his colleagues⁶³ provide a logical argument demonstrating how the Covid-19 pandemic has intensified inequality and increased the financial insecurity of the most vulnerable people in society. The authors are of the view that humanitarian support given to these vulnerable groups needs to be increased to effectively respond to the vulnerable state of those in need. Concurring with the views of these authors, this research will seek to demonstrate

⁶⁰ E Durojaye "Between a rock and a hard place: (un)balancing the public health interventions and human rights protection in the COVID 19 era in South Africa" (2022) 26 *International Journal for Human Rights* 332-347.

⁶¹ F Mukumbang et al. "Unspoken Inequality: How COVID-19 has Exacerbated Existing Vulnerabilities of Asylum-Seekers, Refugees, and Undocumented Migrants in South Africa" (2020) 141 *International Journal for Equality in Health*.

⁶² Kavuro *Refugees and asylum seekers: Barriers to accessing South Africa's labour market* 2015.

⁶³ T Gazi et al. "Humanitarian Aid in the Age of COVID-19: A Review of Big Data Crisis Analytics and the General Data Protection Regulation" (2021) *International Review of the Red Cross* 102.

how South Africa's response, if inclusive of refugees, could go a long way in addressing the plight of refugees.

Decisions in cases such as *Cafe Chameleon CC v Guardrisk Insurance Company Ltd*,⁶⁴ would appear to have provided some relief to the vulnerable in society. Contrary to this viewpoint, this research will criticise the *Café Chameleon* decision due to its restrictive approach. In this decision, ruling in favour of the applicant by granting indemnity to formal businesses only, thus, leaving out informal businesses, where most refugees are employed, it will be argued, was indirect discrimination. The research will show how such seemingly neutral policies undermine the refugee law principle of non-discrimination.

Similarly, in the case of *Saddiq v Department of Labour (Vereeniging)*,⁶⁵ the Equality Court ruled that the asylum seeker in question was unfairly discriminated against in the distribution of unemployment benefits. Cases such as this will be used in the study to demonstrate the vulnerability of refugees due to their status and the discrimination that continues to thrive against them. Overall, in this proposed research, the obligations of South Africa towards refugees will be explored, with pandemics such as Covid-19 being the context in which this analysis will be conducted.

1.9. Outline of chapters

To deliver on the objectives set out in this thesis, this research is divided into chapters. The first chapter of the study has provided a general background to the study. This chapter has presented the general aims and objectives of the study and the problem statement. At the heart of the problem statement has been the issue of whether there was an obligation on South Africa, in terms of human rights law, to afford social security to refugees during the Covid-19 pandemic. The chapter has gone a step further to highlight the research methodology that is used in the study- the doctrinal method.

Chapter two unpacks the obligations under the treaty provisions of social security with a view to assessing whether there is a sound basis under various human rights treaties for South to afford social protection to refugees during the Covid-19 pandemic or outbreaks more generally. What is the wording of these treaties and what is the implication of such wording for the rights of refugees during the pandemic in particular regarding the right to social security?

⁶⁴ 2020 4 All SA 41 (WCC).

⁶⁵ 2017 EQ04.

Accordingly, the chapter will analyse both international human rights law and refugee law treaties, focusing on their implication for social security for refugee and asylum seekers. Greater emphasis will be placed on treaties to which South Africa is party.

Chapter three of the study engages with South Africa's national law with a focus on the framework on social security. Using the legal and policy framework on social protection in South Africa, the chapter assesses whether South Africa's own national laws and policies provide a basis for provision of social protection to refugees during the Covid-19 pandemic. In doing so, the chapter examines some of the national sources such as the Constitution of the Republic of South Africa, 1996; the South African Social Security Agency Act 9, 2004, as well as the Refugees Act 130 of 1998 which are the cornerstone for the protection and promotion of enjoyment of human rights.

Having dealt with the international treaty framework on social security as well as South Africa's own national framework, chapter four examines South Africa's Covid-19 responses in regard to social security for refugees with a view to assessing their alignment with South Africa's international treaty law commitments as well as its own national laws regarding the right to social security for refugees.

Chapter five is the last and final chapter. This chapter covers the conclusion and recommendations. It draws a conclusion and makes relevant recommendations based on the findings of the study.

CHAPTER TWO: INTERNATIONAL STANDARDS ON SOCIAL SECURITY: IMPLICATIONS FOR REFUGEE AND ASYLUM SEEKER PROTECTION

2.1 Introduction

The Covid-19 pandemic, which started as a public health crisis, progressed into a global social and economic crisis, with severe and potentially lasting impact on economies, employment, and livelihoods. Many businesses and livelihood were left in peril and in the absence of adequate social protection systems. These effects will exacerbate poverty and inequality, affecting even more, those who are already vulnerable. Amidst these real and potential challenges, social security systems have proven to be powerful mechanisms to mitigate the negative impact of crises and disasters. Social security protects and empowers people to increase resilience while at the same time, contributing to boosting economic demand and accelerating recovery. Additionally, social security plays a crucial role in furthering social cohesion and inclusion, equality, social justice, and sustainable social and economic development.⁶⁶

Social security is a right guaranteed under international human rights law. As a right, it is universal and every individual in South Africa is entitled to enjoy it in terms of international human rights law.⁶⁷ Refugee law also underlines that people should enjoy fundamental rights and freedoms without discrimination regarding race, religion, or country of origin.⁶⁸ Therefore, in terms of both international human rights law and refugee law, all individuals are entitled to the enjoyment of the right to social security regardless of immigration status. The rights of refugees under international law are derived from various standards, including those entrenched in treaties/ conventions as sources of international law. This section analyses the various international treaties that guarantee the right to social security with the aim of unpacking the obligations that such treaties impose on states which are party to these treaties. In this instance, South Africa is the state party. The analysis will seek to assess whether the wording in these treaties imposes an obligation on South Africa to guarantee the right to social security for all people, including refugees and asylum seekers. Before this analysis, however, the chapter provides a general understanding of social security.

⁶⁶ ILO “Social Security (Minimum Standards) Convention” (2020) 102 Convention 1952 at 2.

⁶⁷ This is based on the principle of non-discrimination and the inherent nature of rights.

⁶⁸ Human Rights Watch “The Human Rights of Undocumented Migrants, Asylum Seekers and Refugees in South Africa” https://www.hrw.org/legacy/reports98/sareport/App1a.htm#N_1_. (accessed 28 January 2022).

2.2. Understanding social security as a right

According to the International Labour Organisation, social security is a human right which entails “a set of policies and programmes designed to reduce and prevent poverty and vulnerability throughout the life cycle.”⁶⁹ This form of protection includes benefits for children and families, maternity, unemployment, employment injury, sickness, old age, disability, survivors, as well as health protection.⁷⁰ Social protection systems address all these policy areas by a mix of contributory schemes and non-contributory tax-financed benefits, including social assistance.⁷¹

The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately and the right to equal enjoyment of adequate protection from social risks and emergencies.⁷² Although the nature of social security may be different and varies across sectors, there are cross cutting features, all of which are geared towards reducing/preventing poverty and vulnerability.⁷³ Additionally, the right to social security requires, for its implementation, that a system, whether comprised of a single scheme or a variety of schemes, is available and in place to guarantee that benefits are offered for the relevant social emergencies.⁷⁴ Furthermore, states must strive to provide benefits to cover the loss or lack of earnings due to the inability to obtain or maintain suitable employment. In the case of loss of employment, benefits should be paid for an acceptable period. At the expiry of the period, the social security system should ensure sufficient protection of the unemployed workers, through social assistance.⁷⁵ The social security system should, in times of natural disasters and pandemics cover everyone, including vulnerable groups regardless of their refugee status.⁷⁶ Benefits should be provided to cover periods of loss of income, shelter as well as medical care amongst other things, suffered by everyone during the pandemic.

⁶⁹ ILO “Social Security (Minimum Standards) Convention” (2020) 102 Convention 1952.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² See General Comment no.19 para 9.

⁷³ General Comment no.19 gives a normative content of the right to social security and states that “The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies” para 9.

⁷⁴ General Comment no.19 para 11.

⁷⁵ Para 16.

⁷⁶ See General Comment no.19 at para 50 where it states that States have an obligation to “provide the right to social security when individuals or a group are unable, on grounds reasonably considered to be beyond their control, to realise that right themselves, within the existing social security system with the means at their disposal.”

It has been recognised that refugees ought to be entitled to at least core forms of assistance, as supported by international, regional, and constitutional law.⁷⁷ The UNHCR has recognised the obligation of states to protect the welfare of displaced persons by concluding that these groups of individuals ought to have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs such as food, clothing, shelter, and medical care, in respect of their privacy, are met.⁷⁸ This core assistance should also cover essential social assistance based on social relief of distress and emergency medical treatment.⁷⁹ Kapuy has observed that treaty laws provide equal treatment to non-nationals in social security, provided that irregular migrant workers fulfill the relevant national and international legal requirements.⁸⁰

The United Nations High Commissioner for Human Rights has also indicated that even though there may be grounds, in some situations, for differential treatment between migrants and non-migrants in specific areas, such grounds should not be relied on to unfairly discriminate against refugees.⁸¹ Moreover, the right to social security has been enshrined in several human rights instruments adopted by the United Nations as well as African Union treaties, thus, reinforcing the normative framework on social security.

2.3. Treaties as sources of international law

As noted in the introduction, this section focusses on treaties as sources of law on the right to social security. To understand the obligations in these treaties in as far the right to social security is concerned, it is important to understand the law that governs treaties. Generally, the treaty applicable in this regard is the Vienna Convention on the Law of Treaties. It is an international agreement governing treaties between states. It was drafted by the International Law Commission of the United Nations, adopted on 23 May 1969, and entered into force on

⁷⁷ See the position adopted by the government in the *White Paper on International Migration* (GN 529 in GG 19920 of 1 April 1999) which recognises that there is no constitutional basis to exclude, *in toto*, the application of the Bill of Rights owing to the status of a person while in South Africa.

⁷⁸ UNHCR ExCon Conclusion No.93 (LIII) "Conclusion on the reception of asylum seekers in the context of individual asylum systems" (2020) at para (b)(ii).

⁷⁹ See UNHCR ExCon Conclusion No.93 (LIII) "Conclusion on the reception of asylum seekers in the context of individual asylum systems" (2020) at para (b)(ii). The Supreme Court of Appeal has already upheld the right of asylum seekers (who are awaiting the process of their application) to work or study on a limited basis: *Watchenuka*. Also, see *Arse v Minister of Home Affairs* (2010) 7 BCLR 640 SCA.

⁸⁰ Kupay K "The Social Position of Irregular Migrant Workers" (2011). See also; Article 27(1) of the International Convention on the Protection of All Migrant Workers and Members of Their Families (1990).

⁸¹ See UN High Commissioner "The Economic, Social and Cultural Rights of Migrants in an Irregular Situation" (2014) <https://www.refworld.org/docid/54479e174.html>. (accessed 8 May 2022).

27 January 1980.⁸² The Convention applies to written treaties between states. The first part of the document defines the terms and scope of the agreement between parties. In contrast, the second part lays out the rules for the conclusion and adoption of treaties, including the consent of parties to be bound by treaties and the formulation of reservations.⁸³ Thirdly, the document deals with the application and interpretation of treaties and discusses means of modifying or amending treaties. The Convention also delineates grounds and rules for invalidating, terminating, or suspending treaties and includes a provision granting the International Court of Justice jurisdiction in disputes arising from applying those rules.⁸⁴ The final parts discuss the effects of treaties on government changes within a state, alterations in consular relations between states, the outbreak of hostilities between states, and the rules for depositaries, registration, and ratification.⁸⁵

Article 2 of the Vienna Convention on the Law of Treaties outlines the role of international treaties and conventions as a source of international law. In terms of article 2, a “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its designation.⁸⁶ For a state to be bound by a treaty, it must accede or ratify it. The Vienna Convention defines ratification as the process by which a State establishes on the international plane its consent to be bound by a treaty.⁸⁴ The process of ratification or accession binds the contracting state to all the provisions contained in the treaty ratified, except where the state makes reservations.

Article 11 of the Vienna Convention makes provision for expression of consent to be bound by a treaty. The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession, or by any other means if so agreed.⁸⁷ Article 26 establishes the “*Pacta sunt servanda*” rule which stipulates that every treaty in force is binding upon its parties and must be performed in good faith.⁸⁸ Furthermore, article 27 makes provision for internal law and its implication on treaty

⁸² The Vienna Convention on the Law of Treaties, 1969. (adopted on 23 May 1969, which entered into force on 27 January 1980).

⁸³ See Vienna Convention on the Law of Treaties <https://www.britannica.com/topic/Vienna-Convention-on-the-Law-of-Treaties>. (accessed: 12 April 2022).

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Vienna Convention on the Law of Treaties (adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties), article 2(a).

⁸⁷ Article 2 (b).

⁸⁸ Article 26.

provision. In terms of this provision, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.⁸⁹ By ratifying the various treaties that make provisions for social security, South Africa is bound by the provisions therein under treaty law. Therefore, South Africa must enforce the rights contained in the various treaties on social security that it has ratified/acceded to in good faith.

In terms of the Vienna Convention, “party” means a state which has consented to be bound by the treaty and for which the treaty is in force.⁹⁰ Thus, upon ratification of treaties which have a bearing on the right to social security, South Africa is in complete agreement with all the treaty provisions contained in treaties to which it is a party. Moreover, the African Commission has stated in this regard in *Legal Resource Foundation v Zambia* that “international treaties which are not part of domestic law and which may not be directly enforceable in the national courts nonetheless impose obligations on State Parties.”⁹¹ It follows then that there is an obligation on South Africa to enforce the provisions of treaties in good faith, including those that make provision for social security.

2.4. Treaties in the South African context.

In South Africa, “the negotiating and signing of all international agreements is the responsibility of the national executive.”⁹² These treaties become law in South Africa after enactment in national legislation.⁹³ By implication therefore, South Africa is a dualist state in as far as incorporation of international treaties is concerned. Despite being a dualist state, it has been settled that “the fact that a State is monist or dualist cannot be used as an excuse for not complying with its treaty obligations.”⁹⁴ In addition, South Africa’s Constitution has been lauded as one of the most international friendly constitutions globally. There are various provisions under the Constitution of South Africa that make provision for international law. Since treaties are a key source of international law, these constitutional provisions on international law are relevant. For example, according to section 39(1)(b) of the Constitution, when interpreting the Bill of Rights, international law, including treaties to which South Africa

⁸⁹ Article 27.

⁹⁰ Article 2 (g).

⁹¹ African Commission on Human and Peoples’ Rights, Communication 211/98 *Legal Resource Foundation v Zambia*, para 60.

⁹² Article 231(1) of the Constitution of the Republic of South Africa, 1996.

⁹³ Article 231(4) of the Constitution of the Republic of South Africa, 1996.

⁹⁴ African Commission on Human and Peoples’ Rights, 313/05 *Kenneth Good v Republic of Botswana*, Para 236.

is party, must be considered.⁹⁵ Reference to international law means that the courts are bound to refer to the international treaties to which South Africa is a party.

Section 233 further provides that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”⁹⁶ Therefore, in addition to the obligation by the South African courts to consider international law in terms of section 39 (b) of the Constitution,⁹⁷ they are also mandated to prefer an interpretation that is consistent with the rules of the international law contained in treaties. It follows then that should there be national legislation or policies at the national level on social security that are subject for various interpretation, the interpretation that agrees with international law should be preferred.

2.5. International treaties and the right to social security: Implications for refugees and asylum seekers

Clearly, from the above discussion, treaties to which South Africa is a party impose binding obligations. It is critical at this juncture to unpack the various treaties that South Africa has ratified or acceded to, to assess whether they impose any obligations regarding social security and if those obligations can be extended to refugees and asylum seekers.

2.5.1. United Nations Charter (UN Charter)

The United Nations was formally established in San Francisco on 26 June 1945. South Africa ratified the UN Charter on 7 November 1945.⁹⁸ After World War II, the Charter was established to maintain international peace and security and cooperation among nations on economic, social, and humanitarian problems.⁹⁹ Article 1 of the Charter briefly outlines its purpose and provides as follows; (i) to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; (ii)

⁹⁵ Section 39 (1) (b) of the Constitution of the Republic of South Africa, 1996.

⁹⁶ Section 233.

⁹⁷ C Rautenbach “The South African Constitutional Court's use of foreign precedent in matters of religion: Without fear or favour?” (2015) 18 *Potchefstroom Electronic Law Journal* para 5.

⁹⁸ United Nations Charter (adopted on 26 June 1945 and came into force on 7 November 1945).

⁹⁹ United Nations Charter, 1945.

to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; (iii) to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and (v) to be a centre for harmonising the actions of nations in the attainment of these joint ends.¹⁰⁰

According to chapter XI of the UN Charter, under article 55, the Charter provides that,

“with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁰¹

States have committed to “take joint and isolated action in participation with the Organisation” within the protection of fundamental freedoms and human rights.¹⁰² The pledge by member states indicates states’ intention to be responsible for any infringement of human rights in their respective countries. It should, in any case, be noted that the drafters of the UN Charter intended to make a “good faith” commitment among the members of the UN. As a party to the UN Charter, South Africa is expected to guarantee fundamental human rights of all individuals, without distinction. Among the socio-economic rights to be guaranteed is the right to social security for all, including refugees and asylum seekers.

Additionally, states are expected to respect their human rights pledge in circumstances where failure to honour this pledge may jeopardise conditions of steadiness and well-being between or among states. They are duty-bound to recognise human rights in case non-compliance might unfavourably influence relations among states. Moreover, states are responsible for any actions likely to disturb peaceful and friendly relations among member states. It could be argued that friendly relations are undermined when states fail to guarantee the social security rights of those

¹⁰⁰ Article 1 of the UN Charter, 1954.

¹⁰¹ Article 55 of the United Nations Charter, 1945.

¹⁰² Articles 55-56 of the UN Charter.

residents in their countries, thus, causing an unfair burden on other states committed to guaranteeing social security rights. Therefore, the obligation to enforce human rights, including social security, may be indirectly linked to peace and friendly relations.

2.5.2. The Universal Declaration of Human Rights (UDHR), 1948.

Adopted by the United Nations (UN) General Assembly on 10 December 1948, the UDHR was a response to the atrocities that took place during World War II. As half the globe lay in ruin and millions of lives were taken, an international prioritisation of human rights was reawakened by the super powers.¹⁰³ The UDHR is not legally binding but has provided the foundation for the recognition of social security rights in treaties subsequently adopted.

Article 1 explicitly states that “all human beings are born free and equal in dignity and rights.” “All human beings,” as used in this provision, most certainly includes asylum seekers and refugees. The UDHR, in its Preamble, also states that what matters in affording one protection is the “human family.” It adds that “recognising the inherent dignity and the equal and inalienable rights of all members is the foundation of freedom, justice, and peace.” The UDHR goes a step further to recognise “the right to seek and enjoy asylum from persecution in other countries.”¹⁰⁴ While the UDHR is not a treaty, some of the rights guaranteed under it have been recognised in several treaties to which South Africa is a party, including the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR).¹⁰⁵ These treaties guarantee several rights, including freedom from discrimination, social security, the right to work, education, housing, health, and dignity, amongst other fundamental rights.¹⁰⁶

Furthermore, in article 22 of the UDHR, the right to social security is guaranteed to everyone. The term “everyone” as used in entrenching the right to social security under the UDHR encompasses refugees and asylum seekers because they form part of “everyone”. The UDHR, in article 1, makes it explicit that “all human beings are born free and equal in dignity and

¹⁰³ Universal Declaration of Human Rights, 1948.

¹⁰⁴ Article 14 of the Universal Declaration of Human Rights, 1948.

¹⁰⁵ African Charter on Human and Peoples' Rights (ACHPR) adopted in 1986; International Covenant of Economic, Social and Cultural Rights (ICESCR), 1966, ratified by South Africa on 12 January 2015.

¹⁰⁶ See articles 6-7, 9, 11, 12, and 13-14 of the ICESCR.

rights.”¹⁰⁷ Additionally, in its Preamble¹⁰⁸ the UDHR states that what matters in affording one protection is the “human family.” It adds that “recognition of the inherent dignity and the equal and inalienable rights of all members is the foundation of freedom, justice, and peace in the world.”¹⁰⁹ Another necessary provision is article 25(2),¹¹⁰ which states that:

“everyone has a right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in the circumstances beyond his control.”¹¹¹

An adequate standard of living comprises of food, clothing, housing, and the most significant attainable standard of health. Accordingly, everyone ought to be able to enjoy their basic needs under conditions of dignity, and nobody should have to degrade themselves by resorting to bonded labour. A good standard of living may generally be understood to mean one that is above the poverty line in the society concerned.¹¹² Moreover, the right to an adequate standard of living is included in several other human rights treaties. To mention but a few; article 27 of the Conventions on the Rights of the Child (CRC)¹¹³ Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹¹⁴ and article 28 of the Convention on the Rights of Persons with Disabilities (CRPD)¹¹⁵ all set out the right to an adequate standard of living and social protection in very strong terms. Thus, excluding refugees and asylum seekers from humanitarian relief is considered a discriminatory act when viewed through the lens of the foregoing treaties and the UDHR.

South Africa undoubtedly has one of the most well-established social security systems.¹¹⁶ Thus, the effective provision of social security services requires uniform norms and standards, standardised delivery mechanisms and a national policy for the efficient, economic and effective use of the limited resources available to the State for social security.¹¹⁷ Nonetheless,

¹⁰⁷ Article 1.

¹⁰⁸ See the UDHR Preamble.

¹⁰⁹ *Ibid.*

¹¹⁰ Article 25 (2) of the UDHR, 1948.

¹¹¹ *Ibid.*

¹¹² UDHR Art 25.

¹¹³ Conventions on the Rights of the Child (CRC), 1989.

¹¹⁴ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1981.

¹¹⁵ Convention on the Rights of Persons with Disabilities (CRPD), 2008; ratified by South Africa on 30 November 2007.

¹¹⁶ OECD Economic Surveys “Building an inclusive social protection system” <https://www.oecdilibrary.org/sites/d6bc2d63en/index.html?itemId=%2Fcontent%2Fcomponent%2Fd6bc2d63en>. (accessed: 13 April 2022).

¹¹⁷ South African Social Security Agency Act 9, 2004.

significant gaps in coverage still become a challenge, and some of the groups excluded from social security coverage include primarily those who experience long-term structural unemployment. Refugees and asylum seekers are part of this group.

Although the UDHR is not legally binding as consistently noted, there have been arguments that it has attained customary international law status.¹¹⁸ The Constitution of South Africa recognises customary international law as a source of law in South Africa. In terms of section 232 of the Constitution, “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.” If the position then is that the UDHR has attained customary international law status, then South Africa is under obligation in terms of the UDHR to afford equal social assistance to refugees and asylum seekers during Covid-19, considering that this was a global pandemic that affected everyone.

2.5.3. The International Covenant on Economic, Social, and Cultural Rights 1966.

Prior to the adoption of the Universal Declaration on Human Rights in 1948, broad agreement existed that the rights to be enshrined in the Declaration were to be transformed into legally binding obligations through the negotiation of one or more treaties. In 1966, two separate treaties, covering almost entirely all the rights enshrined in the Universal Declaration of Human Rights, were adopted: one for civil and political rights, the International Covenant on Civil and Political Rights (ICCPR), and one for economic, social, and cultural rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976.¹¹⁹ South Africa later ratified the Covenant on 12 January 2015. The Covenant enshrines economic, social, and cultural rights such as the rights to adequate food, adequate housing, education, health, social security, water and sanitation, and work.

The ICESCR aims to ensure the protection of economic, social, and cultural rights, including the right to self-determination of all peoples (article 1); the right to non-discrimination based on race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status (article 2); the equal right of men and women to enjoy the rights

¹¹⁸ International Customary Law imposes obligations and duties under international law to respect, to protect and to fulfil human rights. Such an obligation requires States parties to protect individuals and groups against human rights abuses, to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. Therefore, for the UDHR to attain the status of international customary law means that it binds all states regardless of ratification status.

¹¹⁹ International Covenant of Economic, Social and Cultural Rights (ICESCR), 1996, ratified by South Africa on 12 January 2015.

in the ICESCR (article 3); the right to work (articles 6–7); the right to form and join trade unions (article 8); the right to social security (article 9); protection and assistance to the family (article 10); the right to an adequate standard of living (article 11); the right to health (article 12); the right to education (articles 13–14); and the right to cultural freedoms (article 15).¹²⁰

Article 9 of the ICESCR provides that “the States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.”¹²¹ The right to social security is of paramount importance in ensuring human dignity for all persons when faced with circumstances that deprive them of their capacity to realise their Covenant rights fully. Moreover, the right to social security encompasses the right to access and maintain benefits, whether in cash or kind, without discrimination in order to secure protection, among other things, from (i) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (ii) unaffordable access to health care; (iii) insufficient family support, particularly for children and adult dependents.¹²² Additionally, social security plays a vital role in poverty reduction and alleviation through its redistributive character, preventing social exclusion and promoting social inclusion.¹²³

Article 2 (1) of the ICESCR requires states parties to the Covenant to take effective measures and periodically revise them, when necessary, within their maximum available resources to fully realise the right of all persons without any discrimination to social security, including social insurance.¹²⁴ The wording of article 9 of the Covenant suggests that the measures that are to be used to provide social security benefits cannot be defined narrowly and, in any event, must guarantee all people a minimum enjoyment of this human right.¹²⁵ These measures can include (i) contributory or insurance-based schemes such as social insurance, expressly mentioned in article 9.¹²⁶ These generally involve compulsory contributions from beneficiaries, employers, and, sometimes, the state, in conjunction with the payment of benefits and administrative expenses from a common fund;¹²⁷ (ii) non-contributory schemes such as universal schemes which provide the relevant benefit in principle to everyone who experiences

¹²⁰ The Committee has, among other things, in General Comment 14, para 28 reiterated the restrictive situations in which such limitations may be employed.

¹²¹ Article 9 of the ICESCR.

¹²² See General Comment 19, adopted on 23 November 2007.

¹²³ *Ibid.*

¹²⁴ Article 2 of the ICESCR.

¹²⁵ General comment 19.

¹²⁶ General comment 19.

¹²⁷ General comment 19.

a particular risk or contingency, or, targeted social assistance schemes where those in a situation of need receive benefits.¹²⁸ In almost all States, non-contributory schemes will be required since it is unlikely that every person can be adequately covered through an insurance based system.

Furthermore, the ICESCR recognises several other rights that are relevant in the realisation of the right to social security, including the right to health, education, decent work, and an adequate standard of living, including housing for all people.¹²⁹ Of importance for purposes of protection of the rights of refugees and asylum seekers is the fact that the ICESCR guarantees these rights to “everyone” and draws no distinction based on residency status or nationality. Furthermore, the ICESCR also forbids discrimination on the grounds of, amongst others, nationality or social origin.¹³⁰

Article 6 of the ICESCR further states that: “States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right ... The steps to be taken by a state party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies, and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”¹³¹ Article 7 (ii) goes on to state that “States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: decent living for themselves and their families in accordance with the provisions of the present Covenant.”¹³²

Clearly, from Article 6 of the ICESCR above, an obligation is imposed on the states to implement possible measures that will achieve the “full realisation” of the right by giving “technical and vocational guidance and training programmes.” Hence, the state should also implement “policies and techniques to achieve steady economic, social and cultural

¹²⁸ *Ibid.*

¹²⁹ UN High Commissioner “Protecting the rights of migrants in irregular situations” (2017) www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/IrregularMigrants.pdf. (accessed: 20 August 2021).

¹³⁰ M Ramsden “Using the ICESCR in Hong Kong Courts” (2012) 42 *Hong Kong Law Journal* at 480; Article (2) of the ICESCR also stipulates that, the States parties ought to guarantee the rights enunciated in the present Covenant shall be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

¹³¹ Article 6 of ICESCR, 1966.

¹³² Article 7 (ii).

development and full and productive employment under conditions safeguarding fundamental, political and economic freedoms to the individual.” It is to be noted that article 6 and 7 of the ICESCR refer to “everyone.” Therefore, the right to work and the favourable conditions that accompany this right are to be guaranteed to “everyone.” The term “everyone,” by implication, includes even refugees and asylum seekers.

(i) ***The right to social security under the ICESCR and the principle of non-discrimination.***

In terms of article 2 of the ICESCR, the obligation of states parties to guarantee that the right to social security is to be realised without discrimination.¹³³ Moreover, equality between men and women (article 3) permeates all the obligations under Part III of the Covenant. The Covenant thus prohibits any discrimination, whether in law or fact, whether direct or indirect, on the grounds of race, colour, sex,¹³⁴ age¹³⁵ language, religion, political or other opinions, national or social origin, property, birth, physical or mental disability, health status, including HIV/AIDS, sexual orientation, and civil, political, social, or another status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.¹³⁶ Similarly, states parties are mandated to remove *de facto* discrimination on prohibited grounds, where individuals cannot access adequate social security.¹³⁷ States parties are also to ensure that legislation, policies, programmes, and the allocation of resources facilitate access to social security for all members of society.¹³⁸ Restrictions on access to social security schemes should also be reviewed to ensure that they do not discriminate in law or fact.¹³⁹

Accordingly, whereas everyone has the right to social security, states parties should give attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular vulnerable groups, the unemployed, workers inadequately protected by

¹³³ Article 2 of the ICESCR.

¹³⁴ See general comment No. 16 (2005) on the equal right of men and women to enjoy all economic, social, and cultural rights (art. 3).

¹³⁵ See general comment No. 6. The Committee notes that some distinctions can be made based on age, for example, entitlement to a pension. The fundamental underlying principle is that any distinction on prohibited grounds must be reasonable and justified in the circumstances.

¹³⁶ General comment no.5.

¹³⁷ Committee on Economic, Social and Cultural Rights clearly states that “States parties should also remove *de facto* discrimination on prohibited grounds, where individuals are unable to access adequate social security. States parties should ensure that legislation, policies, programmes, and the allocation of resources facilitate access to social security for all members of society in accordance with Part III. Restrictions on access to social security schemes should also be reviewed to ensure that they do not discriminate in law or in fact.” para 30.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

social security, persons working in the informal economy, refugees, asylum-seekers, internally displaced persons, returnees, non-citizens, amongst others.

(ii) *The right to social security under the ICESCR and the informal economy.*

In South Africa, as is the case in several other African countries,¹⁴⁰ refugees and asylum seekers mainly find work in the informal economy. Many of these sectors do not have structured social security systems in place. The Committee on Economic Social and Cultural Rights has picked up on this gap and given directions regarding states' obligations regarding the right to social security for those involved in the informal sector. The Committee has underscored that States parties must take steps to the maximum available resources to ensure that the social security systems cover those working in the informal economy.¹⁴¹

The International Labour Organisation has defined the informal economy as “all economic activities by workers and economic units that are - in law or practice - not covered or insufficiently covered by formal arrangements.”¹⁴² The duty to provide social security for those in the informal sector is essential where social security systems are based on a formal employment relationship, business unit, or registered residence. In terms of the Committee on Economic Social and Cultural Rights, measures could include: (i) removing obstacles that prevent such persons from accessing informal social security schemes, such as community based insurance; (ii) ensuring a minimum level of coverage of risks and contingencies with progressive expansion over time; and (iii) respecting and supporting social security schemes developed within the informal economy such as microinsurance and other microcredit related schemes.¹⁴³ The Committee notes that universal pension and healthcare schemes covering all persons have been adopted by several states' parties with a large informal economy.¹⁴⁴

(iii). *The right to social security under the ICESCR and migrant workers, refugees, asylum-seekers, and stateless persons.*

Article 2 of the ICESCR prohibits discrimination based on nationality, and the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including

¹⁴⁰ Countries like Sudan, Ethiopia, Kenya amongst others are identified as some of the countries where refugees contribute to the economy through informal trading.

¹⁴¹ See General Comment no.19, the Committee on Economic Social and Cultural Rights has picked up the gap and given directions regarding states' obligations regarding the right to social security for those involved in the informal sector.

¹⁴² General Conference of the International Labour Organization, 90th session para 3.

¹⁴³ General comment no.19 para 34.

¹⁴⁴ *Ibid.*

migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country. A migrant worker's entitlement should also not be affected by a change in the workplace. Nonnationals should be able to access non-contributory schemes for income support, affordable access to health care, and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency, or immigration status, are entitled to primary and emergency medical care. Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalised individuals and groups should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.

2.5.4. ILO Convention 202 on Social Protection Floor Recommendation, 2012 (No. 202) (R202)

Having become a specialised agency for the newly formed United Nations in 1946, the driving forces for the ILO's creation ascended from security, humanitarian, political and economic deliberations.¹⁴⁵ The authors of the ILO recognised the importance of social justice in securing peace, against a background of the exploitation of workers in the industrialising nations of that time.¹⁴⁶

Paragraph 4 of the R202 demands that “members states should in accordance with national circumstances, establish as quickly as possible and sustain their social protection floors encompassing basic social security guarantee. Moreover guarantees should ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income security which together secure effective access to goods and services defined as necessary at the national level.¹⁴⁷ Subsequently, comprising at least some of these basic social security guarantees which include: (a) access to a nationally defined set of goods and services,

¹⁴⁵ Convention 202 was adopted by ILO constituents in the aftermath of the 2008 financial and economic crisis, expressing the commitment of member States to ensure that all members of society enjoy at least a basic level of social protection throughout their lives.

¹⁴⁶ *Ibid.*

¹⁴⁷ The R202 on its Preamble makes it explicit that one of its purposes is “Reaffirming that the right to social security is a human right, and acknowledging that the right to social security is, along with promoting employment, an economic and social necessity for development and progress, and recognising that social security is an important tool to prevent and reduce poverty, inequality, social exclusion and social insecurity, to promote equal opportunity and gender and racial equality, and to support the transition from informal to formal employment, and considering that social security is an investment in people that empowers them to adjust to changes in the economy and in the labour market, and that social security systems act as automatic social and economic stabilizers, help stimulate aggregate demand in times of crisis and beyond, and help support a transition to a more sustainable economy,”

constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality; (b) basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services; (c) basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and (d) basic income security, at least at a nationally defined minimum level, for older persons.”¹⁴⁸

Clearly, the R202 affirms the essential nature of social protection in response to poverty, vulnerability as well as social exclusion.¹⁴⁹ The Convention also recognises the notion of non-discrimination and responsiveness to special needs as stipulated in paragraph 3 of the Convention. Moreover, the R202 aims at extending support to the most vulnerable and ensuring the universality of social protection and social solidarity amongst state countries.

2.5.5. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Citizens to Social Protection and Social Security, 2022.

The Protocol on Social Protection has recently been adopted by the African Union. The significance of this Protocol is that the African Union now has a single binding instrument that addresses a broad range of social-protection issues. Previously, informal workers were either recognised somewhat through binding AU instruments that did not deal adequately with the various social-protection issues or particular groups of people. The newly adopted Protocol addresses these gaps.¹⁵⁰

Article 2 of the AU Protocol states that “states Parties shall promote social protection to be human rights-based, participatory, transformative, integrative and intersectional in nature, follows a lifecycle approach, address vulnerability and inequality, and be inclusive (leaving no one behind).¹⁵¹ States Parties shall ensure continual progress in relation to the realisation of the rights, obligations and commitments contained in this Protocol, and the taking of immediate steps within the means of States Parties towards the full realisation of these rights, obligations and commitments.¹⁵² States Parties shall adhere to the principle of non-discrimination, namely

¹⁴⁸ See para 5 of the R202.

¹⁴⁹ *Ibid*, para 2.

¹⁵⁰ The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Citizens to Social Protection and Social Security (fifth draft), adopted in February 2022.

¹⁵¹ Article 2 (b).

¹⁵² *Ibid*, article 2 (c).

that every individual shall be entitled to the enjoyment of the rights recognised and guaranteed in this Protocol without distinction of any kind such as age, disability, race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”¹⁵³

Article 3 and 4 provides:

“every person residing in a territory of a Member State has, subject to the provisions of this Protocol, the right to social protection. The state has the obligation to ensure that social protection is available, accessible, adequate, affordable and transparent....¹⁵⁴ States Parties shall; Review and adopt legislation that compels all employers to enrol all employees into social insurance schemes; establish health insurance schemes that cover all the population groups; put in place measures that enable everyone, especially the youth, to prepare for retirement, and that give expression to the need to contribute to social insurance schemes; carry out periodic reviews of social insurance benefits to ensure that they are in line with inflation and prevailing economic conditions; adopt legislative and other measures to ensure that persons can benefit from their contributions even when they move between similar schemes or to other countries (portability of benefits); ensure the protection of social insurance benefits for those covered by bilateral or multilateral agreements; adopt legislative and other measures to ensure the proper management and administration of social insurance arrangements, the protection of social insurance funds against mismanagement, diversion for other purposes, cyclical fluctuations and market failure.”¹⁵⁵

Article 7 reads:

“states parties shall; adopt measures to ensure that all migrants including migrant workers are provided with social protection benefits; introduce measures to facilitate the co-ordination and portability of social security entitlements and benefits, especially through the adoption of appropriate bilateral and multilateral agreements providing for equality of treatment between individuals from countries of origin and countries of destination, aggregation of insurance periods, maintenance of acquired rights and benefits, portability of benefits, pro-rata sharing of financial liability, institutional cooperation, and the avoidance of double taxation; develop mechanisms, services and effective financial products to facilitate the affordable transfer of remittances by migrants; ensure that displaced persons are included in social protection schemes measures that are responsive to their needs and contexts; adopt measures to provide social protection benefits to unaccompanied children, asylum seekers, refugees and stateless persons.”¹⁵⁶

It is without a doubt that, from the above provisions, the AU Protocol bluntly imposes an obligation on all member states to ensure the availability of social security as well as social assistance to “everyone” without discrimination.

¹⁵³ *Ibid*, article 2 (d).

¹⁵⁴ *Ibid*, article 3.

¹⁵⁵ *Ibid*, article 4 (a) – (g).

¹⁵⁶ *Ibid*, article 7 (a) – (e).

2.5.6. The United Nations Convention Relating to the Status of Refugees 1951 (1951 UN Convention)

Drawing inspiration from Article 14 of the Universal Declaration of human rights 1948, which recognises the right of persons to seek asylum from persecution in other countries, the 1951 UN Convention, which was adopted in 1951, is the major instrument for international refugee protection.¹⁵⁷ The Convention entered into force on 22 April 1954 and has undergone only one amendment in the form of a 1967 Protocol,¹⁵⁸ which eliminated the geographic and temporal boundaries of the 1951 Convention.¹⁵⁹ The 1951 UN Convention aims to consolidate the preceding international instruments relating to refugees and provides the broadest categorisation of the rights of refugees at the international level. In contrast to earlier international refugee instruments,¹⁶⁰ which applied to specific groups of refugees, the 1951 Convention entrenches a specific definition of the term “refugee” in Article 1. The emphasis of this definition is on the protection of persons from political or other forms of persecution. The Convention is a status and rights-based instrument underpinned by several fundamental principles, notably non-discrimination, favourable treatment, and non-refoulement.¹⁶¹

Article 1 (a) and 1 (a) (2) of the 1951 UN Convention¹⁶² define a refugee as;

“any person who has a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, national city, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

¹⁵⁷ The UN Refugee Agency “Convention and Protocol Relating to the Status of Refugees” <https://www.unhcr.org/3b66c2aa10>. (accessed: 25 March 2022).

¹⁵⁸ The Protocol Relating to the Status of Refugees, 31 January 1967.

¹⁵⁹ The Convention enabled States to make a declaration when becoming a party. The words "events occurring before 1 January 1951" mean "events occurring in Europe" prior to that date. A minimal number of states have maintained this geographical limitation and, with the adoption of the 1967 Protocol, has lost much of its significance. The Protocol of 1967 is attached to United Nations General Assembly resolution 2198 (XXI) of 16 December 1967 <http://www.unhcr.org/refworld/docid/3b00f1cc50.html>. (accessed: 25 March 2022).

¹⁶⁰ See the Geneva Refugee Convention and Protocol (The UN multilateral treaty which was the key legal document defining who is a refugee, and who was not, the rights of refugees and the legal obligations of States towards them); For an example, the International Refugee Organization (IRO) was an intergovernmental organisation which was created in 1947, as a specialised agency of the United Nations to deal with the residual problem of refugees. It lapsed after World War II. It was the first international agency to deal comprehensively with every aspect of refugee problem: registration, determination of status, repatriation, resettlement, “legal and political protection”. It continued its activities until 1951.

¹⁶¹ UNHCR “Convention and Protocol Relating to the Status of Refugees” <https://www.unhcr.org/3b66c2aa10>. (accessed: 25 March 2022).

¹⁶² Convention Relating to the Status of Refugees art 1A (2).

outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

In terms of the above definition, the status of refugees is recognised upon request by a foreign individual who escaped from their country of origin and refused to go back due to well-founded fear of being persecuted on the grounds stated under Article 3 of the 1951 UN Convention above.¹⁶³ Additionally, Article 3 of the 1951 UN Convention relating to the status of refugees¹⁶⁴ prohibits discrimination against refugees based on race, religion, country of origin, nationality, membership of a particular social group, or political opinion. It can then be argued that where any of these grounds become a basis for discrimination of refugees, making their enjoyment of the right to social security a challenge, then a state party to the 1951 UN Convention is deemed to have failed in its obligations as guaranteed under this Convention.

(i) The 1951 UN Convention and the notion of non-discrimination

The principle of non-discrimination is enshrined under Article 3 of the 1951 UN Convention.¹⁶⁵ It stipulates that “the contracting states shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”¹⁶⁶ Non-discrimination is also a fundamental principle of human rights law, and it is protected under various human rights treaties. To mention but a few, article 7 of the UDHR,¹⁶⁷ the African Charter on Human and Peoples’ Rights (article 28), the International Covenant on Civil and Political Rights (article 23 (4) and article 24), and article 2 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) all recognise the principle of non-discrimination.¹⁶⁸

The principle of non-discrimination imposes obligations on states to enforce human rights such that no distinction is made on various grounds including nationality status or migration status. A detailed discussion of this principle will be examined further in chapter four where it will be assessed in light of South Africa’s responses to Covid-19. In that chapter, it will be resolved

¹⁶³ M Draniceru “Public Policies on the Protection and Rights of Refugees in the Republic of Moldova” (2017) 2 *Cross-Border J for Int’l Studies* at 64.

¹⁶⁴ 1951 Convention art 3.

¹⁶⁵ Article 3 of 1951 Convention.

¹⁶⁶ *Ibid.*

¹⁶⁷ Article 7 of the UDHR states “All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and any incitement to such discrimination.”

¹⁶⁸ Article 2, part II of the ICESCR stipulates that “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

whether refugees were discriminated against by some of the social security policies which were put into effect during the pandemic. For instance, some directives provided social assistance to protect the vulnerable against the loss suffered during the pandemic. Some of these directives required applicants to furnish identification documents. Could it be that indirectly, refugees and asylum seekers were discriminated against since many lack identification documents? There was also stimulus paid out to businesses that suffered losses during the pandemic. However, these mainly targeted formal business structures. Could refugees also be again excluded since the majority work in informal sectors?¹⁶⁹ Therefore, are they unable to benefit from these social security measures for any loss they suffered due to lockdown regulations?

(ii) The 1951 UN Convention and the notion of favourable Treatment

Although the 1951 UN Convention does not define the principle of favourable treatment, it has enshrined it under some provisions of this Convention. Article 15 on the right of association states that “as regards non-political and non-profit-making associations and trade unions, the contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.”¹⁷⁰ Article 18 on self-employment states that “the contracting states shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.”¹⁷¹ Article 17 on wage-earning employment provides that “the contracting state shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.”¹⁷²

As can be gleaned from above, this principle applies to wage-earning employment. It imposes an obligation on the host state to provide support to refugees by ensuring that refugees get treatment that is most favourable amongst foreign nationals.¹⁷³ Refugee workers often find

¹⁶⁹ In *Somalian Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism*, the court declared that refugees are entitled to apply for and renew written consent to operate tuck-shops or spaza shops in terms of the Musina Land Use Management Scheme of 2010 para 46 (a)(iii).

¹⁷⁰ Article 15 of the 1951 Convention.

¹⁷¹ Article 18 of the 1951 Convention.

¹⁷² Article 17 of the 1951 Convention.

¹⁷³ C Kavuro *Refugees and asylum seekers: Barriers to accessing South Africa's labour market* at 233.

themselves in precarious situations and are vulnerable to abuse, exploitation, and discrimination in places of work.¹⁷⁴ They may receive less payment than nationals, be excluded from social security benefits at work, or be compelled to work extremely long hours and under uncondusive conditions.¹⁷⁵ In terms of the principle of favourable treatment, refugees cannot be left uncatered for when calamities such as pandemics strike. In the unfortunate circumstance that pandemics strike, as the case was during the Covid-19 pandemic, states, including South Africa, were obligated to ensure that refugees receive “favourable treatment” in the enforcement of rights, including social security. It is, however, unfortunate that the principle of favourable treatment only applies to refugees who are in a country lawfully. It follows then that asylum seekers who do not have documentation for one reason or another, for example the closure of Home Affairs offices during the Covid-19 pandemic, do not qualify for favourable treatment in the employment context.

2.5.7. The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (OAU Refugee Convention)

At the African regional level, the legal instrument governing refugees is the OAU Refugee Convention. It comprises of 15 articles. It was enacted on 10th September 1969 and entered into force on 20th June 1974. It builds on the 1951 Refugee Convention and the 1967 Protocol. South Africa ratified this Convention in 1995¹⁷⁶ and is therefore under obligation to enforce the provisions of this treaty in good faith. The OAU Refugee Convention has unique provisions that distinguish it from the 1951 Refugee Convention. For example, it expanded the definition of refugees to incorporate those individuals who escaped from their countries of origin due to exposed hostility, occupation, foreign domination, and any other events aggravating the public order.¹⁷⁷ It further emphasises that states should utilise the utmost endeavours consistent with their respective legislations to receive and secure a settlement for those refugees who, for legitimate reasons, are reluctant to return to their country of nationality.¹⁷⁸

¹⁷⁴ See status of ratification of this treaty at <https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa>. (accessed 2 May 2022).

¹⁷⁵ G Bekker “The protection of asylum seekers and refugees within the African regional human rights system ” (2013) 13 *AHRLJ* at 1-29.

¹⁷⁶ UN High Commissioner for Refugees (UNHCR), UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees, July 2021.

¹⁷⁷ G Bekker “The protection of asylum seekers and refugees within the African regional human rights system” (2013) 13 *AHRLJ* at 1-29.

¹⁷⁸ Bekker 2013 *AHRLJ* 29.

Further, article 4 of the OAU Refugee Convention¹⁷⁹ provides that “member states undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.” Like the 1951 UN Convention, OAU Refugee Convention recognises refugees and aims to ensure that the host countries protect the rights of refugees without discrimination. It is expected that these obligations apply in all situations including during the pandemics such as Covid-19.

Just like the 1951 Convention, the OAU Refugee Convention also recognises the principle of favourable treatment. Therefore, it is expected that refugees receive treatment that is most favourable in sectors such as employment and accompanying rights such as social security.

2.5.8. The right to social security under women’s rights treaties: The CEDAW and Maputo Protocol

(i) United Nations Conventions on Elimination of all Forms of Discrimination Against Women 1979 (CEDAW)

The CEDAW is an international treaty adopted in 1979 by the United Nations General Assembly. It is described as an international bill of rights for women¹⁸⁰ and ratified by 189 states. South Africa signed it on 29th January 1993 and ratified it without reservation on 15 December 1995.¹⁸¹ The CEDAW is a UN treaty that explicitly addresses women’s rights, including women refugees.¹⁸² Article 11 of the Convention provides that state parties shall take all appropriate measures to eliminate discrimination against women in the field of employment to ensure, based on equality of men and women, the same rights, in particular: (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacities to work, as well as the right to paid leave.

Article 14 further states that; state parties shall consider the problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas. Secondly, states are to take all appropriate measures to eliminate discrimination

¹⁷⁹ Article IV of 1969 OAU Convention.

¹⁸⁰ Convention on the Elimination of All Forms of Discrimination Against Women 1979 (entry into force 3 September 1981).

¹⁸¹ CEDAW, 1979, following article 27(1)).

¹⁸² CEDAW, 1979.

against women in rural areas to ensure, based on equality of men and women, that they participate in and benefit from rural development and shall ensure to such women the right: (c) To benefit directly from social security programmes.

In interpreting article 14 (2)(c), the Committee on Elimination of Discrimination Against Women (the Committee) has provided that states parties are under obligation to ensure that rural women benefit directly from social security programmes.¹⁸³ However, most rural women have limited opportunities in the formal labour market. They are more likely to be engaged in activities not regulated by labour codes and social security legislation linked to formal employment. They are therefore exposed to increased risks and need measures of social protection that take their situation into account.¹⁸⁴ Moreover, in order to eliminate discrimination against rural women in economic and social life, states parties should: (i) ensure that rural women engaged in unpaid work or the informal sector have access to non-contributory social protection in line with general recommendation No. 16 (1991) on unpaid women workers in rural and urban family enterprises and that those employed in the formal sector have access to contributory social security benefits in their own right, irrespective of their marital status and (ii) adopt gender-responsive social protection floors to ensure that all rural women have access to essential health care, childcare facilities and income security, in line with article 14, paragraphs 2 (b) and (h), and Social Protection Floors Recommendation, 2012 (No. 202) of the International Labour Organization.¹⁸⁵

The Committee has also provided interpretation to the nature of state obligations in situations of emergencies and natural disasters. Natural disasters in this instance could be progressively interpreted to include the Covid-19 pandemic. In its General Recommendation, the Committee has observed as follows:

“the obligations of States parties do not cease in periods of armed conflict or in states of emergency due to political events or natural disasters. Such situations have a deep impact on and broad consequences for the equal enjoyment and exercise by women of their fundamental rights. States parties should adopt strategies and take measures addressed to the particular needs of women in times of armed conflict and states of emergency.”¹⁸⁶

¹⁸³ See the General Recommendation No. 34 on the rights of rural women at para 40.

¹⁸⁴ General Recommendation 34 at para 40.

¹⁸⁵ *Ibid* at para 41.

¹⁸⁶ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination against Women Forty-seventh session, 4 - 22 October 2010, para 11.

The above interpretation does suggest that in situations of natural disasters as the case was during the Covid-19 pandemic, there was an obligation on South Africa as a state party to the CEDAW to ensure that refugees, particularly women, are not excluded from benefiting from the right to social security. Moreover, the Committee has added that:

“even though under international law, States primarily exercise territorial jurisdiction; the obligations of States parties apply without discrimination both to citizens and noncitizens, including refugees, asylum seekers, migrant workers, and stateless persons, within their territory or effective control, even if not situated within the territory. States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.”¹⁸⁷

From the above interpretation, one gathers that the obligation on South Africa to provide social security should be implemented for both women citizens and women noncitizens, including refugees and asylum seekers, without discrimination.

(ii) The Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa 2003 (Maputo Protocol)

The Maputo Protocol is a regional human rights instrument on the rights of women at the African Union level. It came into effect in 2005. The Protocol guarantees comprehensive rights to women, including the right to participate in the political process, social and political equality with men, and improved autonomy in their reproductive health decisions, amongst other things. It was adopted by the African Union in Maputo, Mozambique, in 2003 in the form of a protocol to the African Charter on Human and Peoples' Rights.¹⁸⁸ South Africa ratified the Maputo Protocol on 17 December 2004.¹⁸⁹ In its Preamble, the Protocol makes it explicit that all states parties should eliminate every discrimination against women and ensure the protection of women's rights as stipulated in international declarations and conventions, especially for refugee women.¹⁹⁰

Article 4 of the Maputo Protocol provides that:

“every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman, or degrading punishment and treatment shall be prohibited... States Parties shall take appropriate and effective measures to ensure that women and men enjoy equal rights in terms of access to refugee status, determination procedures and that women refugees are

¹⁸⁷ *Ibid*, para 12.

¹⁸⁸ The Maputo Protocol, 1981.

¹⁸⁹ The Maputo Protocol (ratified by South African on 17 December 2004).

¹⁹⁰ See the Maputo Protocol on its Preamble recognises article 18 of the African Charter on Human and Peoples' Rights.

accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents.”¹⁹¹

Article 13 adds that:

“states Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it.”¹⁹²

Furthermore, article 24 obligates states parties to “ensure the protection of poor women and women heads of families including women from marginalised population groups and provide an environment suitable to their condition and their special physical, economic and social needs.”¹⁹³

The Maputo Protocol is vigorous in ensuring the rights of every woman and girl in Africa are protected and promoted. This includes refugee women who are to be protected from being discriminated against in social security measures, especially in cases where such women and children are left behind in workplaces and communities on account of their gender.

2.5.9. Social security under children’s rights treaties: The CRC and the ACRWC

(i) United Nations Convention on the Rights of the Child 1989 (CRC)

The CRC establishes international standards on children's civil, political, economic, social, and cultural rights. South Africa ratified the Convention on 16 June 1995.¹⁹⁴ Article 22 of the CRC states that:

“states Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”¹⁹⁵

¹⁹¹ Article 4 (1) and 2 (k).

¹⁹² Article 14 (f).

¹⁹³ Article 24 (a).

¹⁹⁴ Convention on the Rights of the Child (CRC), 1995.

¹⁹⁵ Article 22 of the CRC.

Clearly, there is an obligation on South Africa to ensure that refugee children are protected and accorded humanitarian assistance. It is expected that such protection extends to situations of national disaster as the case was during the Covid-19 pandemic.

(ii) African Charter on the Rights and Welfare of the Child 1990 (ACRWC)

Similar to the CRC, the ACRWC also deals with children's rights to be protected from exploitative labour. However, the ACRWC expands its protection to a broader context, addressing child labour in informal sectors. The ACRWC was adopted in 1990.¹⁹⁶ The Convention was ratified by South Africa on 7 January 2000.¹⁹⁷ Article 23 of the Convention provides that:

“state parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the states are parties.”¹⁹⁸

It can be deduced from the above provision that states are under obligation to ensure that migrant children receive necessary protection and assistance. Thus, state parties to the ACRWC are bound to comply with the obligations to respect, protect, and fulfil children's rights in international migration, regardless of their parents' or legal guardians' migration status.¹⁹⁹ The notion of “appropriate protection and humanitarian assistance” may be understood to impose an obligation on states parties including South Africa to afford protection to refugee children in times of disasters such as the Covid-19 pandemic. Moreover, the obligations of states towards all migrants including children are to be enforced without discrimination.²⁰⁰

2.5.10. The Regional Human Rights System: A commentary on the African Commission

Recognising the vulnerability of refugees, the African Commission on Human and Peoples' Rights has adopted different mechanisms to promote and protect the rights of refugees in Africa. These measures include the call “to seek, receive, examine, and act upon the situation

¹⁹⁶ African Charter on the Rights and Welfare of the Child (ACRWC) 1999.

¹⁹⁷ ACRWC, 1999.

¹⁹⁸ Article 23 of the ACRWC.

¹⁹⁹ See General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families at para 11.

²⁰⁰ *Ibid* at para 12.

of refugees, asylum seekers and internally displaced persons in Africa.”²⁰¹ Furthermore, the African Commission²⁰² has provided some guidance regarding the right to freedom from discrimination when it comes to non-nationals by observing as follows:

“the African Charter in Article 2 provides that every individual is entitled to the enjoyment of the rights and freedoms in the Charter “without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”, and the Commission in its jurisprudence has held that the result is that all persons, be they nationals or non-nationals, have the right to the enjoyment of the rights and freedoms under the Charter.²⁰³ However, this may be an over-simplification, as it is clear that there are limitations which may be placed on certain rights, based on a person’s status. For example, the right to vote and to stand for election are reserved for citizens of the State concerned. Thus, while they have to be reasonable, justifiable and proportionate, the State may impose limitations on certain rights, including the rights of non-nationals.”²⁰⁴

From the above ruling, it is clear that the rights guaranteed under the ACHPR are subject to some limitations in respect of non-nationals. Notable is the right to vote. However, it is hard to argue that this limitation suffices in respect of the right to social security. The African Commission has established in *Kenneth Good v Botswana* that in determining whether a violation of the right to non-discrimination occurred, the following factors are to be considered: (a) equal cases are treated in a different manner; (b) a difference in treatment does not have an objective and reasonable justification; and (c) if there is no proportionality between the aim

²⁰¹ See African Commission on Human and Peoples’ Rights on Resolution 72 of the Special Rapporteur on refugees, asylum seekers, migrants, and internally displaced persons in Africa, 2004.

²⁰² The African Commission on Human and Peoples’ Rights began functioning in 1986. It is established under Article 1 of the ACHPR. It is a quasi-judicial body which plays an oversight role in the promotion and protection of human rights, as well as monitors State compliance with the African Charter and its Protocols. The Commission comprises of eleven part-time Commissioners who hold two ordinary sessions annually, lasting about two weeks each, and two extra-ordinary sessions, which last about ten days each. The Commission’s mandate is limited to violations of human rights and freedoms guaranteed by States parties arising from the African Charter (and its Protocols) after the specific dates of ratification.

²⁰³ On jurisprudence referred to here by the African Commission, see African Commission on Human and Peoples’ Rights, Communication 159/96 *Union interafricaine des droits de l’Homme, Fédération internationale des ligues des droits de l’Homme, RADDHO, Organisation nationale des droits de l’Homme au Sénégal and Association maliennedes droits de l’Homme v. Angola*, para 18. The Commission in *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* 9 Communication 29/04 (2006) ACHPR para 91 defined discrimination as: “any act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour [...] or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, one equal footing, of all rights and freedoms.”

²⁰⁴ African Commission on Human and Peoples’ Rights, Communication 344/07, *George Iyanyori Kajikabi v. The Arab Republic of Egypt*, Para 152.

sought and the means employed.²⁰⁵ Prohibited discrimination is constituted by (a) a differential treatment of persons in analogous or relevantly similar situations, which (b) has no objective and reasonable justification.²⁰⁶ Furthermore, in *Institute for Human Rights and Development in Africa v Angola*, the African Commission acknowledged that “there is nothing in the African Charter that requires Member States of the African Union to guarantee for nonnationals an absolute right to enter and/or reside in their territories.”²⁰⁷ It however noted cautiously that;

“this, however, does not in any way mean that the African Charter gives Member States the free hand to unnecessarily and without due process deal with non-nationals to such an extent that they are denied the basic guarantees enshrined under the African Charter for the benefit of everyone.”²⁰⁸

Based on the African Commission’s standpoint, it is hard to argue that differential treatment or exclusion of refugees and asylum seekers from social protection, during dire situations such as the Covid-19 pandemic, has an objective and reasonable justification in a free and democratic society. The Human Rights Committee had earlier taken a similar position regarding the rights contained in the ICCPR. It, in this regard, established that:

“the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers, and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.”²⁰⁹

2.6. Conclusion

This chapter set out to assess if there is an obligation on South Africa, under treaty law, to provide social security to refugees during the Covid-19 pandemic. The chapter has analysed the various treaties to which South Africa is party. These treaties impose binding obligations, and South Africa is expected to enforce the provisions in these treaties in good faith, in accordance with the principle of *pacta sunt servanda*.²¹⁰ By analysing the various treaties

²⁰⁵ African Commission on Human and Peoples’ Rights Communication 313/05- *Kenneth Good v Botswana* (2010) ACHPR para 219.

²⁰⁶ African Commission on Human and Peoples’ Rights, 355/07 Communication 355/07 - *Hossam Ezzat & Rania Enayet (represented by Egyptian Initiative for Personal Rights & INTERIGHTS) v The Arab Republic of Egypt*, Para 97.

²⁰⁷ African Commission on Human and Peoples’ Rights, Communication 292/04 *Institute for Human Rights and Development in Africa v Angola* para 84.

²⁰⁸ *Ibid.*

²⁰⁹ Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (International covenant on civil and political rights)*, Adopted on 29 March 2004 (2187th meeting) paragraph 10.

²¹⁰ Article 27 Vienna Convention.

having a bearing on social security to which South Africa is party, it has been established that in guaranteeing the right to social security, these treaties refer to the term "everyone." By implication, these treaties encompass all individuals, including refugees. The principle of non-discrimination further buttresses the requirement of all state parties to these treaties, including South Africa, not to discriminate against refugees in the realisation of the right to social security.

The chapter has also dealt with treaties that do not specifically entrench the right to social security, such as the 1951 Convention, OAU Convention, the ACHPR, and the ICCPR, to mention but a few. In analysing these latter treaties, it has been established that various principles impose an obligation on South Africa to ensure that the right to social security is guaranteed for refugees. Notably, principles such as favourable treatment and non-discrimination place an obligation on South Africa to ensure that refugees are not left behind. Other general rights contained in these treaties, such as the right to work, health care, and education, to mention but a few, though not explicitly labelled "social security," are critical to the realisation of the right to social security for refugees. Moreover, although both the 1951 and OAU Convention do not make explicit reference to the right to social security, it is clear that they recognise the viewpoint that silence shall not be deemed "to impair any rights and benefits granted by a Contracting State to refugees apart from [these conventions]."²¹¹ This, therefore, means that the right to social security as guaranteed under instruments, such as the UDHR and the ICESCR, is very much recognised by refugee treaties.

South Africa is also obligated to realise the right to social security under treaties specific to the rights of women and children. These obligations can be gleaned from the United Nations and African Union treaties on women and children. The next chapter will delve into South Africa's national framework to assess whether it sets out standards on South Africa's duty to enforce the right to social security for refugees.

²¹¹ Article 5 1951 Convention.

CHAPTER THREE: SOCIAL SECURITY UNDER SOUTH AFRICA'S NATIONAL LAW: IMPLICATION FOR REFUGEE AND ASYLUM SEEKER PROTECTION

3.1. Introduction

This chapter will assess the national legal framework on social security. The chapter will begin by mapping out the contours of the concept of social security under South African national law and then proceed to examine the laws and policies on social security and the rights of refugees. The aim of this discussion is to establish whether the national legal framework of South Africa places an obligation on South Africa to provide social security to refugees in dire situations such as the Covid-19 pandemic.

3.2. Defining social security under South African national law

Shared access to social security and an adequate standard of living can be regarded as both a fundamental human right and a policy objective in South Africa. Section 27 of the Constitution not only guarantees “everyone” the right of access to social security but also imposes a duty on the state to take reasonable legislative and other measures, within the available resources, to achieve the progressive realisation of this right.²¹² The laws, regulations, and rules that govern social security do not always offer solid answers regarding eligibility for social security benefits. The shortcomings in the social security system often result in the exclusion of the marginalised.²¹³ To be marginalised is to be excluded from power and resources that enable self-determination in economic, political, and social measures. Marshall defines marginalisation as “a process by which a group or individual is denied access to important positions and symbols of economic, religious, or political power within any society.”²¹⁴ Therefore, social security may be defined as any programme of social protection recognised by legislation, or any other mandatory arrangement, that affords individuals a degree of income security when faced with emergencies like old age, incapacity, disability, unemployment, or rearing children. It may also offer access to restorative or preventive medical care.²¹⁵

²¹² Taryn Lee Vos “Access to Social Security for Non-Citizens: An International, South African and European View” (2011) 5 *Pretoria Student L Rev* at 67.

²¹³ U Becker and MP Olivier “Access to social security for non-citizens and informal workers: An international, South Africa and German perspective” (2008) at 23-25.

²¹⁴ G. Marshall “A Dictionary of Sociology” (1998) *Oxford Press*.

²¹⁵ ISSA “Social security: A fundamental human right” <https://www.issa.int/about/socialsecurity>. (accessed: 11 May 2022).

Article 1 (5) of the Code on Social Security in the Southern Africa Development Community (SADC) defines social security as; “the public and private, or to mixed public and private measures, designed to protect individuals and families against income insecurity caused by contingencies such as unemployment, employment injury, maternity, sickness, invalidity, old age, and death.”²¹⁶ The main objectives of social security are: (a) to maintain income, (b) to provide health care, and (c) to provide benefits to families. Conceptually and for this Code, social security includes social insurance, social assistance, and social allowances.²¹⁷

In terms of the White Paper on Social Welfare Policy, the social security system in South Africa consists of four fundamental elements, namely, private savings, social insurance, social assistance, and social relief.²¹⁸ Private savings require an individual to voluntarily save for unexpected emergencies such as accidents, retirement, or chronic diseases. Social insurance is the joint contribution between an employer and employees to provident funds. Moreover, the government can also contribute to social insurance covering accidents at work. On the other hand, social assistance is the non-contributory and means-tested benefit the state offers to anyone with disabilities, old age, and children. A means test determines whether an individual or family is eligible for government assistance or welfare based upon whether the individual or family possesses the means to do without that help. Lastly, Social relief is the short-term measure that serves as a waver for people over a specific pandemic or community crisis. It is non-contributory and means-tested.

South Africa’s White Paper for Social Welfare²¹⁹ covers a range of public and private measures that provide cash or in-kind benefits. Accordingly, these measures come into play if an individual maliciously experiences retrenchment from work, is interrupted and never develops. Such a person may not be able to avoid poverty, thus, the critical role of social security. Secondly, the measure arises in situations where children have to be maintained. Moreover, the White Paper outlines the aims of social security as poverty prevention, poverty relief, social compensation, and income distribution.²²⁰ Additionally, it defines social security as policies that ensure that all people have adequate economic and social protection during unemployment,

²¹⁶ Article 1 of the Code on Social Security in the SADC (Founded on 17 August 1992).

²¹⁷ *Ibid.*

²¹⁸ White Paper on South African Social Welfare Policy 1997 chapter 7.

²¹⁹ White Paper on South African Social Welfare Policy 1997

²²⁰ *Ibid.*

ill-health, maternity, child-rearing, widowhood, disability, and old age, using contributory and non-contributory schemes for providing for their basic needs.²²¹

3.3. National framework on social security

South Africa has various legal and policy structures that deal with social security under its national framework. Thus, there is an obligation to abide by the obligations enshrined in these laws and policies. This section will look at the Constitution of South Africa, the South African Social Security Agency Act 9, 2004, and the Refugees Act 130 of 1998 as some of the sources of law on social security that map out the contours of social security in South Africa.

3.3.1. Constitution of the Republic of South Africa, 1996

The Republic of South Africa is a sovereign democratic state founded on the values of human dignity to achieve equality and the advancement of human rights and freedoms, non-racialism and non-sexism, as well as supremacy of the Constitution and the rule of law.²²² Chapter 2 of the Constitution comprises of the Bill of Rights, which is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom. The Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary, and state organs. Thus, the organs in South Africa must respect, protect, promote, and fulfil the Bill of Rights.²²³ The Constitutional Court approved the Constitution on December 4, 1996, and it took effect on February 4, 1997. The Constitution is the supreme law of the land. No other law or government action can supersede the provisions of the Constitution.²²⁴ Thus, the Constitutional obligations, including those on social security, supersede any contrary provisions in other legislation or policies.

Section 27(1)(c) of the Constitution of the Republic of South Africa stipulates that “everyone” has the right of access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.²²⁵ This right is part of the collection of socio-

²²¹ *Ibid.*

²²² Department of Justice & Constitutional Development “The South African Constitution” <https://www.justice.gov.za/legislation/constitution/chp01.html>. (accessed: 12 May 2022).

²²³ Section 7 of the Constitution of the Republic of South Africa, 1996, particularly section 7 (2), states, “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom... The state must respect, protect, promote and fulfil the Bill of Rights... The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

²²⁴ *Ibid.*

²²⁵ Section 27 (1)(c) of the Constitution, 1996.

economic rights found in the Bill of Rights. Section 7 of the Constitution²²⁶ emphasises the significance of the values of human dignity and equality for everyone and provides valuable guidance on how the state should realise socio-economic rights in the Bill of Rights. Section 7(2) provides that “the state must respect, protect, promote, and fulfil the Bill of Rights.”²²⁷

Ngcobo CJ in *Glenister v President of the Republic of South Africa* ruled, following an argument presented by the amicus in this case, that there is a constitutional obligation to establish an independent anti-corruption unit rooted in section 7(2) of the Constitution. He added that

“this obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all the fundamental rights contained in the Bill of Rights.”²²⁸

Section 39(1)(a) of South Africa’s Constitution goes on to state that when a court interprets the Bill of Rights, it must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; it must consider international law and may consider foreign law.²²⁹ Accordingly, in interpreting the content of the obligation created by section 7(2), it was not obligatory to prescribe which steps the state needed to take to meet its obligation in terms of the section.²³⁰ However, any preferred steps ought to be reasonable and adequate. This means that any steps taken concerning the realisation of the right of access to social security ought to be taken in a manner that respects, protects, promotes, and fulfils the right, and these steps must be reasonable.

According to the South African Human Rights Commission (SAHRC), the duty to respect as it pertains to guaranteed rights means that the state must not encumber exercising such a right.²³¹ This comprises of an obligation not to restrict the enjoyment of an individual right that is already in existence.²³² Therefore, the state must also promote rights in the Bill of Rights, which involves providing information about the right of persons entitled to it.²³³ In other words, the state must educate persons about which rights they are entitled to and the scope and content of those rights. Decisively, the obligation to fulfil rights obliges the state to take appropriate

²²⁶ Section 27.

²²⁷ Section 7 (2).

²²⁸ *Glenister v President of the Republic of South Africa* (2011) 3 SA 347 (CC) para 105.

²²⁹ Section 39.

²³⁰ *Ibid* para 191.

²³¹ SAHRC 7 Report on Economic and Social Rights 2006-2009 (2009) vi.

²³² *Ibid*.

²³³ SAHRC 2009 v.

legislative and other measures which contribute to the full realisation of the rights in the Bill of Rights.²³⁴ The obligation to protect mandates South Africa to protect individuals from violation of rights, including the right to social security, from violations by third parties.²³⁵

The wording of section 27 on social security, as already alluded to, refers to “everyone” in guaranteeing the right to social security. The scope of this terminology has been given meaningful content in court decisions. In *Khosa v Minister of Social Development*²³⁶ (herein referred to as the *Khosa* case) the Constitutional Court decided that the constitutional entitlement of access to social security applies to “everyone,” including all the country’s people. Therefore, the exclusion of refugees and other immigrants would be a violation of their right to human dignity as enshrined in section 10 of the Constitution,²³⁷ as well as the right to equality.²³⁸ The Constitutional Court further stated that non-citizens constitute a vulnerable social group that ought to be protected.²³⁹

The judgment in *Khosa* played a significant role in advancing access to social assistance for migrants who are permanent residents of South Africa. In this case, the constitutionality of some provisions of the Social Assistance Act 59 of 1992 (the Act) was challenged by Mozambican citizens who are permanent residents of South Africa who were excluded from social assistance.²⁴⁰ These immigrants would have been eligible for social assistance under the Act, but their lack of citizenship requirement deprived them of benefits. Therefore, the applicants contended that their exclusion conflicted with the state's duties under section 27(1)(c) of the Constitution. They also argued that section 9 on the right to equality had been unreasonably limited and that the limitation could not be justified in terms of section 36 of the general limitation clause of the Constitution. The Court decided that the Bill of Rights protects

²³⁴ *Glenister v President of the Republic of South Africa* para 107.

²³⁵ SAHRC 2009 v.

²³⁶ *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* (CCT/13/3. CCT 12/03) 2004 ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR.

²³⁷ Section 10 of the Constitution states, “Everyone has inherent dignity and the right to have their dignity respected and protected.”

²³⁸ The Equality clause, enshrined under section 9 of the Constitution, prohibits unfair discrimination and guarantees complete protection of the right to equality for “everyone.”

²³⁹ *Khosa*, para 74.

²⁴⁰ In *Khosa's* case, the issue at hand was the constitutional validity of section 3(c) “Subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he satisfies the Director-General that he— (a) is an aged or disabled person or a war veteran; (b) is resident in the Republic at the time of the application in question; (c) is a South African citizen; and (d) complies with the prescribed conditions.” Section 4B(b)(ii) “Subject to the provisions of this Act, any person shall be entitled to a care dependency grant if that person satisfies the Director-General that— (a) he or she is the parent or foster parent of a care-dependent child; and (b) that he or she and that child— (i) are resident in the Republic at the time of the application for the grant in question; (ii) in the case of a parent and his or her child, are South African citizens; and (iii) comply with the prescribed conditions.”

the rights of all people in South Africa and that section 27 of the Constitution provides that everyone has the right to social security.²⁴¹ According to the Court, section 27(1) showed no indication that the right was restricted to citizens alone.

The decision in the *Khosa* case dealt with the issue of social security for permanent residents only. In contrast, the Constitution, in guaranteeing the right to social security, uses the term “everyone.” Thus, ruling in favour of permanent residents receiving social security might be some progress but insufficient to address the challenges of refugees who may not have permanent residence status yet, and constitute a vulnerable group. In the *Khosa* case, Mokgoro’s J underscored the discrimination resulting from the exclusion of specific categories of individuals from social security by ruling as follows:

“there can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.”²⁴²

From this statement, one can tell that the only vulnerable persons being referred to are taxpayers in the country whereas not all immigrants in South Africa hold refugee status. Moreover, not all refugees are taxpayers, as some do not have employment to have taxable income. Thus, they are not permanent residents, and others are not contributing to the country's economy but still need social assistance.

In a unanimous decision in *Government of the Republic of South Africa v Grootboom* (*Grootboom* case),²⁴³ it was noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, healthcare, sufficient food and water, and social security to those unable to support themselves and their dependents. The

²⁴¹ Section 27(2) also imposes a duty on the state to take reasonable legislative and other measures within the available resources to achieve the progressive realization of this right.

²⁴² *S v Khosa*, para 74.

²⁴³ *Government of the Republic of South Africa v Grootboom* (2000) ZACC 19; (2001) 1 SA 46; (2000) 11 BCLR 1169 (4 October 2000).

Constitutional Court stressed that all the rights in the Bill of Rights are interrelated and mutually supporting.²⁴⁴

In the *Grootboom* case, the Constitutional Court found that section 28 (1)(c) must be read in conjunction with section 28 (1)(b) of the Constitution.²⁴⁵ These sections suggest that parents are primarily obligated to provide for their children's economic and social needs. The state should intervene only where a parent cannot provide for children. The primary responsibility to take care of children thus lies with their parents. Children's growth, development, and wellbeing depend primarily on their parent's ability to provide for them. This case pertains to the right to housing. However, it brings to the fore the obligation of the state to make provisions for the social needs of those unable to fend for themselves within South Africa. Although a large percentage of refugees are unable to access socioeconomic needs, many are often not included in the government's social welfare packages.²⁴⁶

Effectively, excluding refugees and asylum seekers from humanitarian relief amounts to discrimination against them. It may be argued that expecting South Africa to address the social security needs of refugees is unrealistic, given the country's financial constraints. While such a concern may make sense, the reality is that the Constitution of South Africa has used language that establishes a high threshold that needs to be upheld. When the Constitution uses the term "everyone," by necessary implication, all individuals, including refugees, are envisaged. Unless South Africa changes this high constitutionally entrenched threshold, which would be unfortunate, it remains constitutionally bound by it.

3.3.2. The South African Social Security Agency Act

The South African Social Security Agency (SASSA) is a public entity in Schedule 3A of the Public Finance Management Act.²⁴⁷ It is a national agency of the government established in

²⁴⁴ In *Government of the Republic of South Africa v Grootboom*, the Court emphasised that all the Rights in the Bill of Rights are interrelated, "Our Constitution entrenches both civil and political rights and social and economic rights... All the rights in our Bill of Rights are inter-related and mutually supporting... There can be no doubt that human dignity, freedom, and equality, the foundational values of our society, are denied to those who have no food, clothing, or shelter. Therefore, affording socio-economic rights to all people enables them to enjoy the other rights enshrined in Chapter 2... The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."

²⁴⁵ Section 28 (1)(b)-(c) of the Constitution provides that "(b) to family care or parental care, or to appropriate alternative care when removed from the family environment; to basic nutrition, shelter, basic health care services and social services."

²⁴⁶ See Chapter 1 of the White Paper for Social Welfare, 1997.

²⁴⁷ See Schedule 3A of the Public Finance Management Act 1, 1999.

April 2005. The Agency aims at ensuring the distribution of social grants on behalf of the Department of Social Development. It was also intended to reallocate the function of social security from South Africa's provinces to the national sphere of government and report to the Department of Social Development (DSD).²⁴⁸ Furthermore, SASSA ensures the processing of applications for social grants, verification, approval of applications, disbursement, payment of grants to eligible beneficiaries, quality assurance, and fraud prevention and detection.²⁴⁹

Accordingly, in terms of section 3 of the South African Social Security Agency Act of 2004, the Agency has an objective to act as the sole agent that will ensure the efficient and effective delivery of social security,²⁵⁰ serve as an agent for the administration and payment of social,²⁵¹ render services relating to such payments, management, administration, and payment of social assistance and security.²⁵² Section 4(3) of the SASSA aims at ensuring the effective, efficient, and economical use of funds designated for payment to beneficiaries of social security;²⁵³ promotion and protection of the human dignity of applicants for and beneficiaries of social security,²⁵⁴ as well as honest, impartial, fair, and equitable service delivery.²⁵⁵

Social assistance consists of non-contributory grants to adults and children, funded as part of the national security budget. Essentially, the right to social assistance guarantees that persons living in poverty can access a minimum level of income sufficient to meet basic sustenance needs so that they do not live below a minimum acceptable standard.²⁵⁶ Therefore, the South African government must intervene to assist the people who need social assistance. The South African government uses its social security programs to address poverty. This obligation, however, should also extend to the most vulnerable and marginalised group as the issue of social security affects “everyone” and knows no colour, race, or origin.

Refugees and asylum seekers are catered for under the SASSA as long as they go through the means test. The means test suggests that one has to be eligible to apply for social assistance. The Social Assistance Act No. 13 of 2004 and its amendments in 2012 qualified refugees with

²⁴⁸ The South African Social Security Agency Act 9, 2004.

²⁴⁹ Section 4 (4) of the SASSA Act 2004.

²⁵⁰ Section 3 (a).

²⁵¹ Section 3 (b).

²⁵² Section 3 (c).

²⁵³ Section 4 (3)(a).

²⁵⁴ Section 4 (3)(b).

²⁵⁵ Section 4 (3)(d).

²⁵⁶ TI Chelechele *A critical analysis of the Implementation of the Social Assistance Grant Policies in the North West Province of South Africa* (MA, dissertation, University of Pretoria 2010) at 86.

a valid refugee permit to access social grants.²⁵⁷ Thus, refugees can access seven types of grants divided into two parts: the old age grants for all refugees over the age of 60 and child support grants, which include foster child grants, child support grants, and care dependency grants. This inclusion is commendable. However, despite refugees' legal right to access social security, policy decisions and the administrative hurdles to accessing this right have rendered it illusory. For example, following the closure of some refugee offices,²⁵⁸ the Department of Home Affairs deprived asylum seekers of the opportunity to have their permits renewed at offices other than the office of the first application. This left several asylum seekers undocumented for as many as seven years.²⁵⁹ During this period, they could not proceed to get refugee status and have the documentation necessary to ensure access to social grants.

This matter could only be resolved after the High Court in the case of *AJ v Director-General of the Department of Home Affairs*²⁶⁰ and *Nbaya v Director General of Home Affairs*²⁶¹ ruled that the Refugee Office (RRO) of Cape Town must renew all asylum permits regardless of the office of the first application. The Department of Home Affairs has also, on occasion, introduced arbitrary requirements for renewing asylum seeker permits. For example, in 2013, the Department established a new rule that states that asylum seeker permits should not be renewed more than 12 times.²⁶² This rule left many asylum seekers undocumented. Following the decision in the case of *Bahamboula v Minister of Home Affairs*²⁶³ this rule was dropped.

²⁵⁷ SASSA, in its Preamble, emphasises the importance of aligning with the Constitution and states that the Constitution provides that everyone has the right to have access to social security, including the right to social assistance if they cannot support themselves and their dependents.

²⁵⁸ A submission by Hlengiwe Mtshatsha at the World's Refugee Day; Refugee Law Clinic with Lawyers for Human Rights in Pretoria "The Impact of Discriminatory Policies and Practices towards Migrants." 2021.

²⁵⁹ *Ibid.*

²⁶⁰ *AJ v Director-General of the Department of Home Affairs and Others* 2003 (5) BCLR 463 (CC).

²⁶¹ Department of Home Affairs was obliged to extend asylum seeker permits in Refugee Reception Offices other than Cape Town. The permits of all those who presented themselves were extended while their files were transferred to the Cape Town Refugee Reception Office. See; *Nbaya and Others v Director General of Home Affairs (Case no. 6534/15), Western Cape Division, Cape Town - Court Order Date: 3 June 2016.*

²⁶² A submission by the Department of Home Affairs, "Home Affairs Minister Dr. Aaron Motsoaledi extends the validity period of different categories of temporary visas," Published on 29 June 2021. <http://www.dha.gov.za/index.php/statements-speeches/1458-home-affairs-minister-dr-aaronmotsoalediextends-the-validity-period-of-different-categories-of-temporary-visas>. (accessed: 14 October 2022).

²⁶³ See *Bahamboula v Minister of Home Affairs* 2014 (9) BCLR 1021 (WCC), where the Presiding Judge contended as follows "While I do not suggest that the Applicants made out a skeleton case in their founding affidavit, the point is that their complaint was raised in respect of the seven applicants and the broader interests referred to above. Pursuant to the Respondent's answer, no further complaint was raised concerning the Applicants. In these circumstances, it is not appropriate for the Applicants to place reliance on several further individuals whose specific details did not appear in the founding affidavit. In this regard, the Applicants suggest that some of the persons were referred to in a list attached to the founding affidavit. While it is correct that some of these names were referred to in that list, that list contained 301 names in an annexure to the founding affidavit. That cannot, in my view, justify a stance that the Respondents had to explain the position

Similarly, several refugees were left undocumented while the Department of Home Affairs investigated errors in the documentation on its computer system. The prejudice caused to refugees due to this delay could only be resolved following the decision of the Court in *Mwamba v The Department of Home Affairs*.²⁶⁴

Altogether, these cases illustrate that various administrative practices by the government departments make the legal right to documentation by refugees inaccessible. This has, in turn, affected access to social security because access to social grants by refugees is tied to documentation which is often lacking. Thus, although the SASSA Act makes some provision for the social protection of refugees, the hurdle of accessing legal documentation, which is a condition precedent to accessing social grants, makes the right almost non-existent for many refugees.

3.3.3. The Refugee Act 130, 1998

The 1998 Refugee Act is the leading national legislation governing South African refugees.

Under section 3 of the Refugees Act,²⁶⁵ a person qualifies for refugee status if that person:

“owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it,”²⁶⁶ or; “owing to external aggression, occupation, foreign domination or other events alarming public order in either a part of 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,”²⁶⁷ Alternatively, “is a spouse or dependent of a person contemplated in paragraph (1) or (2) above. Dependents include any unmarried dependent child or any destitute, aged, or infirm member of the family of an asylum seeker or refugee.”²⁶⁸

concerning the 301 persons, particularly bearing in mind that their names and peculiar circumstances were not specifically addressed in the founding affidavit.”

²⁶⁴ In *Mwamba v The Department of Home Affairs*, unreported, Case No 14820/15, the practice of the DHA to leave refugees undocumented while it conducted investigations into irregularities picked up on its computer system regarding fingerprinting, identity photographs, duplication of files or other administrative errors were challenged. This left many refugees undocumented, and only legal intervention led to the abandonment of the practice. However, the practise returned in early 2019.

²⁶⁵ Section 3.

²⁶⁶ Section 3 (a).

²⁶⁷ Section 3 (b)

²⁶⁸ Section 3 (c).

Section 27 (b) of the Refugees Act of South Africa,²⁶⁹ guarantees government protection for refugees in the country. The section reads, “a refugee should enjoy full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic.”²⁷⁰ The rights in Chapter 2 of the Constitution include the right to social security. Other rights in this regard that are relevant to the social welfare of refugees include the right to work, health, water, and education.²⁷¹ Regarding the right to work, refugees are entitled to work in the country to sustain themselves and improve their quality of life. On several occasions, the courts in South Africa have determined that refugees have the right to work, thus, giving meaning to this right. For example, in *Somalian Association of South Africa v Limpopo Department of Economic Development, Environment, and Tourism*,²⁷² the Supreme Court of Appeal interpreted the right to work as the undertaking of business or employment. Concerning the rights of refugees and asylum seekers lawfully present in South Africa, the Court ruled that as set out in the provisions of the Refugees Act, they have a right to earn a living by way of self-employment through informal trading such as spaza or tuck-shops.²⁷³

Courts have also handed down judgments that emphasise the protection of refugees from discrimination in accessing essential services and benefits relating to employment. An example is the Equality Court decision in the case of *Saddiq v Department of Labour and Others*.²⁷⁴ The plaintiff in this matter was an asylum seeker who had been working for three years, lost his job, and approached the Department of Labour (DOL) to claim Unemployment Insurance Fund benefits. Regardless of monthly contributions being deducted from his salary and paid to the UIF, the DOL prohibited him from presenting his claim because he did not have an identity number.²⁷⁵ The plaintiff approached the Equality Court seeking orders to (i) declare the respondents' conduct unconstitutional, (ii) amend provisions of the Department's policies that

²⁶⁹ Section 27 (b) of Refugees Act 180 of 1998 states "that a refugee enjoys full legal protection, which includes the rights set out in chapter 2 of the Constitution and the right to remain in the republic by the provisions of this Act."

²⁷⁰ Section 27 (b).

²⁷¹ Section 27 provides that “Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance... The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights... No one may be refused emergency medical treatment.”

²⁷² 2014 4 All SA 600 (SCA) para 1.

²⁷³ The SCA in *Somalian Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* ruled that as set out in the provisions of the Refugees Act, refugees have a right to earn a living by way of self-employment through informal trading such as spaza or tuck-shops.

²⁷⁴ *Saddiq v Department of Labour (Vereeniging)* EQ04 2017 (unreported judgment of the Equality Court).

²⁷⁵ D Singo “The case for Asylum Seekers’ entitlement to Unemployment Insurance Fund benefits: *Musanga v Minister of Labour*” (2020) 3 SALJ at 419.

were discriminatory to asylum seekers, and (iii) direct the DOL to issue an unconditional apology, amongst other orders.²⁷⁶ However, while the judgment in this matter did not state which provisions of the Equality Act the complaint was based on, a rational inference was made from the judgment that asylum seekers were unfairly discriminated against.²⁷⁷

In the *Saddiq* case, the Court decided to emphasise the protection of asylum seekers from discrimination in accessing essential services and benefits relating to employment. Undoubtedly, granting equal employment to refugees will empower them to be productive and contribute fully to their host country. This ensures that refugees escape poverty, sustain themselves, and are protected against unemployment distress, guaranteeing their dignity.²⁷⁸ Despite the critical role of work in addressing the social welfare needs of refugees, recent amendments to the Refugee Act in 2020 have placed limitations on the right to work. For example, Under the Refugees Amendment Act, asylum seekers no longer have the automatic right to work.²⁷⁹ The right to work is only granted to asylum seekers after they demonstrate that they can support themselves.²⁸⁰ This requirement is already problematic, considering that most asylum seekers need work to support themselves.

Altogether, a reading of the Refugees Act of South Africa leads to the conclusion that there is an obligation on South Africa to afford social security to refugees in all instances and, even more critically, in situations of pandemics, as the case was during Covid-19, some recent amendments may undermine these achievements. This obligation has been buttressed by courts' decisions in situations where the rights of refugees were at risk of being undermined, as seen in the *Somalian* and *Saddiq* cases. Therefore, it is critical that the recent amendments be read in light of South Africa's constitutional obligations and jurisprudence.

²⁷⁶ *Ibid.*

²⁷⁷ D Singo "A brief retrospective on two cases about UIF and asylum seekers" (2020) <https://www.werksmans.com/legal-updates-and-opinions/a-brief-retrospective-on-two-cases-about-uif-and-asylum-seekers/>. (accessed 08 June 2021).

²⁷⁸ C Kavuro *Refugees and asylum seekers: Barriers to accessing South Africa's labour market* (LLD, thesis, Stellenbosch University 2015) at 234.

²⁷⁹ The right to work in the Republic may not be endorsed on the asylum seeker visa of any applicant who can sustain himself or herself and his or her dependants, as contemplated in subsection (6) ... Is offered shelter and necessities by the UNHCR or any other charitable organisation or person, as contemplated in subsection (7) ... or seeks to extend the right to work, after having failed to produce a letter of employment as contemplated in subsection (9): Provided that such extension may be granted if a letter of employment is subsequently produced while the application in terms of section 21 is still pending.

²⁸⁰ *Ibid.*

3.4. Jurisprudence on social security: Implication for refugee and asylum seeker protection

There are several cases relevant to refugee law and social assistance. Such cases provide an entry point to understanding the obligations of South Africa towards refugees as far as the right to social security is concerned. These cases are discussed in this subsection to unpack the court's interpretation of South Africa's obligation in as far as the issue of social security is concerned.

3.4.1. *The Black Sash Trust v Minister of Social Development (2017)*

On 17 March 2017, the Constitutional Court handed down a ground-breaking judgment that, amongst other things, prevented a looming crisis that threatened to disrupt monthly social grant payments to millions of poor and vulnerable South Africans. To give a brief background of the case, in 2012, the South African Social Security Agency (SASSA) entered into a contract with Cash Paymaster Services (Pty) (CPS) to disburse social grants on its behalf. On 29 September 2013, the Constitutional Court declared that the award of this contract was null and void.²⁸¹

The Constitutional Court, however, suspended the order of invalidity on the condition that SASSA takes over the duty of paying grants after the expiration of the contract on 31 March 2017 or award a five-year contract to a new service provider after a competitive tender process as set out under section 217 of the Constitution.²⁸²

Given that SASSA failed to adhere to the order set out by the Constitutional Court, the Black Sash Trust petitioned the Constitutional Court to reinstate its supervisory role over the disbursement of social grants. The applicant sought the following orders: (i) that in order to ensure payment of social grants from 1 April 2017, SASSA submits a report on an affidavit setting out how it intends to handle an interim contract with CPS; (ii) a declaration that CPS must act reasonably when negotiating the payment contract with SASSA; (iii) that the contract must set out adequate protection to safeguard the autonomy, dignity and personal privacy of grant recipients; (iv) that SASSA and the Minister of Social Development (Minister) report continually to the Court on the measures adopted or to be adopted to forestall disruption of grant payment from 1 April 2017; and (v) a declaration that SASSA is legally obliged to ensure that the process of grant payment does not violate the autonomy, dignity and personal privacy

²⁸¹ *The Black Sash Trust v Minister of Social Development and Others* (CCT48/17) [2017] ZACC 8.

²⁸² Section 217 of the Constitution states that “When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

of grant beneficiaries. In delivering its judgment, the Constitutional Court held that CPS and SASSA are obliged under section 27(1)(c) of the Constitution to ensure continuous disbursement of grants to recipients from 1 April 2017 until an entity other than CPS is contracted for this purpose.²⁸³ Furthermore, it held that any failure by CPS or SASSA to continue this process would infringe on recipients' right to social assistance.²⁸⁴

One of our constitutional democracy's signature achievements is establishing an inclusive and effective social assistance program. It has had a material impact on reducing poverty and inequality and mitigating the consequences of high levels of unemployment. In so doing, it has given some content to the core constitutional values of dignity, equality, and freedom. In addition, the Constitution provides that everyone has the right to access social security, which includes appropriate social assistance if they cannot support themselves and their dependents. By implication, refugees who cannot support themselves fall under the umbrella of this protection. Of particular interest to the right to social security for refugees, the Constitutional Court ruled in the *Black Sash* Case that “the constitutional right to social assistance ... for many, especially children, the elderly, and the indigent, provide the bare bones of a life of dignity, equality, and freedom.” For refugees, many of whom flee their countries for fear of persecution and arrive in host countries in dire and desperate circumstances, this ruling could not be more relevant as social security would provide the bare bones of a life of dignity, equality, and freedom.

3.4.2. South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg (2014)

Upon an urgent request, in *South African Informal Traders Forum v City of Johannesburg*,²⁸⁵ the applicant and other informal street traders launched an urgent application for an order stating that they are permitted to trade in a manner consistent with the City's Informal Trading By-Laws at the locations they occupied immediately before their removal. The traders argued that they were in a desperate situation, had no income, and feared losing their homes. Moreover,

²⁸³ *Blacksash* at para 64. The Constitutional Court, on its judgement, stated that "The Minister and SASSA were to file reports on affidavit with this Court quarterly, commencing on the date of this order, setting out how they plan to ensure the payment of social grants after the expiry of any "interim contract," what steps they have taken in that regard, what further steps they will take, and when they will take each such future step, to ensure that the payment of all social grants is made when they fall due after the expiry of any interim contract."

²⁸⁴ *Ibid* para 62.

²⁸⁵ *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* (CCT 173/13; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014).

they urgently needed to have a livelihood. They could not wait till March 2014 to be heard for an application brought on 5 December 2013 if an ordinary course of action was taken. The Constitutional Court of South Africa mediated in a lower court affair to stop the municipal government and metropolitan police force from hindering what was proclaimed lawful activity by informal traders.²⁸⁶ Furthermore, the so-called “Operation Clean Sweep” is a citywide initiative to remove illegal traders, was criticised as an act of “humiliation and degradation,” which deprived thousands of people and their children of their livelihood. The Court expressed concern about the City's description of the eviction of thousands of informal traders as “convenient.” Instead, the Court characterised the so-called “Operation Clean Sweep” as haphazard and flawed.²⁸⁷ The informal sector provided traders who relied on the informal economy to feed their families and maintain the level of dignity allowed for in Article 10 of the Constitution of South Africa with the ability to carry on activities until a final decision could be rendered.

The decision in this case is critical to refugees, many of whom are involved in the informal sector. Therefore, with South Africa being guided by the Constitution, which in its Bill of Rights promotes equality for everyone, it owes a duty towards refugees who work in informal sectors to be catered for and protected whenever the need arises, in this instance, being the time of the pandemic, which affected everyone directly or indirectly.

3.4.3. *Christian Roberts v Minister of Social Development* (2007)

In *Christian Roberts v Minister of Social Development*,²⁸⁸ four male applicants over 60 years of age but below 65 mounted a constitutional challenge to Section 10 of South Africa's Social Assistance Act 13 of 2004 and the relevant Regulations, which set the age for accessing an old age grant at 60 for women and 65 for men. The four men contested the age differentiation on the basis that it violated the equality clause (section 9(3)) and the right of access to social assistance (section 27(1)(c)), both of which are explicitly guaranteed by South Africa's

²⁸⁶ The city was conflating the position of illegal traders with the applicant traders. It is open to the city to use all lawful means to combat illegal trading and other criminal conduct. However, it has no entitlement to cause harm to lawful, if not vulnerable, traders. Even so, the city argued in the alternative that if the Court were minded granting the relief sought, the order should return verified lawful traders it evicted in the first instance. Again, the city missed the point. It may not remove or evict traders who have a right to trade without observing the requirements of its By-Laws.

²⁸⁷ See para 31. The Court adds, "It must be added that the eviction of the traders involved constitutional issues of considerable significance. The ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it, they faced "humiliation and degradation."

²⁸⁸ *Christian Roberts v Minister of Social Development* (2007) 32838/05.

Constitution. For its part, the South African government, pointing to race, class, and social discrimination faced by African women during apartheid, argued that the differentiation aimed to address the inequities faced by women generally and by African women in particular.²⁸⁹ After the initial hearing, the government amended the legislation so that the pension age differentiation would be phased out over three years, thus allowing men to access social old age grants from the age of 63 by April 2008; from age 61 by April 2009; and finally, achieve equality by April 2010.²⁹⁰

Eventually, the High Court ruled in favour of the South African government and allowed the retention of the differentiating scheme.²⁹¹ Effectively, the Court adopted the view that the inequities suffered by women required particular interventions to address the past injustices they suffered.²⁹² This case is noteworthy primarily for highlighting how formal legal enshrinement of social protection programs coupled with a long-term national action plan dramatically increases the protection of all peoples' right to social protection, especially the most disadvantaged and vulnerable groups. As noted by the Committee on Economic, Social, and Cultural Rights, while any given state's laws and national action plan should consider the equal rights of men and women, it should also consider the rights of the most disadvantaged and marginalised groups and at the same time set targets or goals to be achieved and the timeframe for their achievement.²⁹³

In this case, the South African government has set targets and sought the progressive realisation of equality to cater for those previously marginalised. As far as refugees are concerned, the issue that South Africa would have to ask itself is - if refugees are among the disadvantaged and marginalised groups in society, are there targeted steps being taken to address this

²⁸⁹ *Christian* para 58 emphasised that “One consequence of an approach based on context and impact would be the acknowledgment that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention. Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, are not; it could in certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would be appropriate. Alternatively, a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who historically have suffered discrimination as blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers.”

²⁹⁰ *Ibid* at para 60.

²⁹¹ *Ibid*.

²⁹² *Ibid*.

²⁹³ General Comment 19.

disadvantage? With social security being one of the interventions that could help address marginalisation, how well did South Africa deal with this issue during the pandemic?

In a nutshell, these cases emphasise that the right to social security is guaranteed for all, and refugees are among those envisaged in such protection. Even so, South Africa often fails to cater for this vulnerable population, although the Constitution says that the right to social security is enjoyable by “everyone.” In many instances, the country's policies contradict the Courts' decisions. This can be gleaned from the factual issues leading to the institution of the cases before the Courts. In most of these cases, asylum seekers and refugees have sought to challenge policies and regulations that discriminate against them, with the courts often finding in favour of refugees and asylum seekers.

3.5. Jurisprudence on the rights of refugees: Implications on social protection of refugees and asylum seekers

A variety of cases explicitly dealing with the rights of refugees have a bearing on refugees' right to social security. The court's rulings in these cases are also critical in mapping out the contours of the obligation of South Africa towards refugees as far as social security is concerned. For example, in a matter involving the *Scalabrini Centre of Cape Town*²⁹⁴, it was held that protection for asylum seekers and refugees be extended to their families, given that dependents may apply to be documented through family joining or on their terms.²⁹⁵ It follows then that refugees' protection, including social security, is to be extended to their families. Thus, refugee families can be documented together as a group to ensure their rights to family unity, dignity, and other incidental rights are guaranteed in South Africa.²⁹⁶ Moreover, this has far reaching implications for an individual's security and social security position, amongst other things. Critically, such family members are less likely to be detained because of a lack of documentation. However, extending protection to families addresses the challenge of detention resulting from a lack of documentation. Furthermore, the protection extended to these family

²⁹⁴ *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7, 1995 (10) BCLR 1382, 1995 (4) SA 631.

²⁹⁵ *Ibid* para 63.

²⁹⁶ See the decision in *Nandutu v Minister of Home Affairs* (2019) ZACC 24; Regulation 9(9)(a) of the Immigration Act, in its context, not providing foreign spouses and children of citizens and permanent residents with the option of changing their visa status from within the country. The judgment explains the intertwined relationship between human dignity and family rights and how they function alongside notions of state security and legislative regimes that seek to protect persons within the borders of South Africa. The key finding of the case was to declare an immigration regulation unconstitutional because of its unreasonable limitation on the right to dignity and children's rights to family care.

members also suggests that they would be guaranteed the right to work in South Africa legally and enjoy the benefits of such work, including social security, welfare, education, health, and other social needs.

The legal entitlement of refugees and asylum seekers to Unemployment Insurance Fund (UIF) benefits has always been challenging due to their transient status in the country. For instance, asylum seekers may be unable to contribute for a long time since their temporary stay in the country may cease at short notice if their refugee application is denied. For this reason, some may be denied the opportunity to contribute towards or even benefit from UIF. In the case of *Lucien Ntumba Musanga v Minister of Labour*,²⁹⁷ a settlement agreement was entered to allow applications for UIF benefits from applicants who could only adduce asylum permit numbers. The Regulations provided under the Unemployment Insurance Act (UIA), which prevented this agreement, were challenged, and the Equality Court found them unconstitutional.²⁹⁸ An amendment to the UIA provision, which excluded asylum seekers from benefiting from the UIF, was required.²⁹⁹ Such an outcome suggests that asylum seekers' right to social security through UIF benefits should be guaranteed.

The recent unreported Equality Court case of *Saddiq v Department of Labour* concerned asylum seekers who had been dismissed from their workplaces where they were employed for more than two years but never received any benefits from the Department of Labour (DOL). The respondents argued that the asylum seeker's exclusion was the lack of a system to make payments to asylum seekers claiming unemployment insurance benefits.³⁰⁰ The Equality Court decided based on the equality provisions under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.³⁰¹ The Court found that the applicant was a victim of

²⁹⁷ *Lucien Ntumba Musanga v Minister of Labour* 2999/18 NGHC (Unreported case).

²⁹⁸ *Ibid* para 3-4 of the draft order precludes that "Regulations 1 and 2 of the regulations of the Unemployment Insurance Act 63 of 2001 (namely GN 400 of 28 March 2002: Regulations in terms of Section 54 of the Unemployment Insurance Act) ("UIA Regulations") are inconsistent with the Constitution of the Republic of South Africa, 1996 insofar as they exclude asylum seekers from claiming benefits from the Fund and are therefore invalid to the extent of this inconsistency... The definition of "identity document" in regulation 1 of the UIA Regulations must be read as if the words "as well as permits and/or other identifying documents contemplated in, and/or issued in terms of the Refugees Act 130 of 1998" appear after the word "passports." Accordingly, following the reading-in of the aforementioned words, this definition shall now read "identity document" means a 13-digit bar-coded RSA and non-RSA identity (card) document or an RSA bar-coded passport and includes valid foreign identity documents and passports, as well as permits and/or other identifying documents contemplated in, and/or issued in terms of the Refugees Act 130 of 1998."

²⁹⁹ See Ziegler R "Access to effective refugee protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications? Constitutional Court Review" (2020) 10 *Juta Law* at 26.

³⁰⁰ (Unreported) Case No. EQ 04/2017.

³⁰¹ Section 6 of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 stipulates that "Neither the State, a public body nor any person may unfairly discriminate against any person... Any person who

unfair discrimination, and a sum of R30 000 was awarded to him as damages in addition to the UIF benefits he was entitled to.³⁰² Worthy to note, the DOL was given the mandate to correct its technical glitches so it can also accommodate asylum seekers who had contributed to the Fund and be entitled to the benefits thereof. Bearing in mind that the UIF includes maternity, adoption, and illness benefits, the implication that such a decision has on the protection of the rights of asylum seekers to social security cannot be emphasised enough.

The newly implemented Covid-19 social relief distress grant, which mainly caters to unemployed individuals who do not benefit from any other social grant or UIF, had initially excluded asylum seekers and other unique permit holders. At the same time, it seemed to only cater to citizens, permanent residents, and refugees. The Scalabrini Centre argued in *The Scalabrini Centre v Minister of Social Development*³⁰³ before the North Gauteng High Court, that such exclusion was arbitrary, irrational, and unreasonable. Scalabrini Centre also submitted that such exclusion violated the constitutional rights to equality, dignity, and access to social security.³⁰⁴ It was, therefore, argued that; (i) asylum seekers whose visas had expired during lockdown are most likely to face dismissal at work without any form of income, while their bank accounts may be frozen; (ii) asylum seekers face exclusion from government social relief measures such as food parcels because of lack of a 13-digit identification number which is a requirement to access these benefits; (iii) this vulnerable group is also excluded from financial relief packages which the government initiates, and (v) the Unemployment Insurance Fund application process for non-citizens is subjected to inevitable delays thus leading to less effectiveness in the workplaces.

Confirming the above view, the case of *Larbi-Odam v Member of the Executive Council for Education (Northwest Province)*³⁰⁵ challenged the constitutionality of regulations disqualifying non-citizens from permanent employment as teachers in state schools. In this judgment, the Constitutional Court rejected the submission that the social challenges facing South Africa

causes, encourages or requests another person to discriminate against any other person, is deemed to have discriminated against such other person... If a worker, employee or agent of a person contravenes the Act in the course of his or her work or while acting as agent, both the person and the worker, employee or agent, as the case may be, are jointly and severally liable for a contravention and proceedings under the Act may be instituted against either or both of them unless the person took reasonable steps to prevent the worker, employee or agent from contravening the Act."

³⁰² *Saddiq* para 24.

³⁰³ *Scalabrini Centre of Cape Town v Minister of Social Development* (22808/2020) [2020] ZAGPPHC 308; 2021 (1) SA 553 (GP) (18 June 2020).

³⁰⁴ *Scalabrini Centre* 308.

³⁰⁵ *Larbi-Odam v MEC for Education (North-West Province)* (1996) 12 BCLR 1612 (B).

could be used as a ground to justify the distinction between citizens and permanent residents in its interpretation of the right to equality. It was decided that:

“permanent residents should be viewed no differently from South African citizens when it comes to reducing unemployment. In other words, the government's aim should be to reduce unemployment among South African citizens and permanent residents ... permanent residents have been invited to make their home in this country. After a few years, they become eligible for citizenship. In the interim, they merit the government's top concern concerning the availability of employment opportunities. Unless posts require citizenship for some reason, for example, due to the political sensitivity of such posts, employment should be available without discrimination between citizens and permanent residents. Thus, it is simply illegitimate to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent residents of posts they have held, in some cases for many years, is too high a price to pay in return for increasing jobs for citizens.”³⁰⁶

From this decision, one gathers that the Court placed much emphasis on equal treatment and underscored how differential treatment that is not justified in a free and democratic society ought not to stand. By analogy, this applies to South Africa's social security interventions, including in times of pandemics. Such interventions may not unreasonably discriminate against individuals because of nationality or migration status.

Of importance, this challenges the question of whether or not non-citizens should be entitled to social assistance benefits. It highlights the objectives of a social security system and the government's concerns about providing social welfare. Furthermore, it addresses the concern of maintaining resources for citizens' welfare and the legitimacy of an immigration policy intended to prevent social security benefits from serving as an enticement for immigration.

3.6. Recent amendments on refugee law: Implications on social protection of refugees and asylum seekers

As can be gleaned from the discussion of the legal framework above, South Africa has a clear obligation at the national level to provide social security to refugees and asylum seekers. Despite the administrative hurdles in the system, with the cases challenging these hurdles being a testament to that, the obligation to provide social security is still discernible from both the Constitution and legislation. However, despite a national legislative framework that sets out clear parameters of the obligations of South Africa to protect and provide social security to a

³⁰⁶ *Ibid* para 30-31.

vulnerable group, certain amendments to legislation over the years seem to conflict with this obligation, thus undermining the obligation set out, which is to guarantee the right to social security for everyone, including refugees. Recent amendments to laws and policies, such as the 2017 Refugee Amendment Act and the 2017 White Paper, contain provisions inclined toward migration control immigration rather than protection. A keen look at South Africa's recent refugee law amendments suggests that South Africa's refugee law framework is arguably torn between migration control and refugee protection. This poses challenges for refugees and asylum seekers subjected to harsh migration control responses rather than protection. In this subsection, a brief analysis of these amendments and their implications on social security for refugees and asylum seekers is conducted.

3.6.1. Refugee Amendment Act 11, 2017

The Refugee Amendment Act was signed into law on 14 December 2017 and later came into force on 1 January 2020.³⁰⁷ The Act amends the Refugees Act, 1998 as follows: to amend and insert specific definitions; include further provisions relating to disqualification from refugee status and provide for integrity measures to combat fraud and corruption among staff members at Refugee Reception Offices, as well as the Standing Committee and the Refugee Appeals Authority.³⁰⁸ Additionally, it focuses on omitting provisions that may refer to the Status Determination Committee; substituting specific provisions relating to the Refugee Appeals Authority, providing for the re-establishment of the Standing Committee for Refugee Affairs, and conferring additional powers on the Standing Committee; conferring additional powers on the Director-General; clarifying the procedure relating to conditions attached to asylum seeker visas and abandonment of applications; revising provisions relating to the review of asylum applications; providing for the withdrawal of refugee status in respect of categories of refugees; providing for additional offences and penalties; providing for transitional provisions, and providing for matters connected in addition to that.³⁰⁹

³⁰⁷ Refugee Amendment Act No.11 of 2017.

³⁰⁸ *Ibid.*

³⁰⁹ Section 36 of the Refugee Amendment Act 2017 “Standing Committee may withdraw a person’s refugee status if such person has been recognised as a refugee due to fraud, forgery or false or misleading information of a material or substantive nature in relation to the application; such person has been recognised as a refugee due to an error, omission or oversight; or such person ceases to qualify for refugee status in terms of section 5... The Standing Committee must, in the prescribed manner, inform each affected person contemplated in subsection (1) of its intention to withdraw his or her status as a refugee, as well as the reasons for the withdrawal and such person may, within the prescribed period, make a written submission with regard thereto: Provided that no such notice is required if the withdrawal is requested by the refugee concerned... If the Minister has issued an order to cease the recognition of refugee status in respect of a category of refugees, the Standing Committee must implement such

The 2017 Refugees Amendment Act is the most extensive of the amendments to the primary Act. It specifies that asylum seekers who fail to report to the Refugee Reception Office within five days of arriving in the country should be deprived of refugee status. Moreover, the Act also restricts the right to work of asylum seekers to those who can cater for themselves and their families and those not supported by an NGO or the UNHCR.³¹⁰ Such asylum-seekers must present an employment letter within six months of being accorded the right to work. The amendment also expands the time limit before refugees may apply for permanent residence from 5 to 10 years. It also provides a fine or prison sentence (up to five years) for a person possessing an expired asylum-seeker visa and the deregistration of such a person from the refugee status determination process.³¹¹

These amendments pose severe challenges to refugees' and asylum seekers' social security rights. Notably, without work, asylum seekers cannot access social security interventions tied to work, such as maternity, illness, and death, amongst others. Yet, these amendments make the right to work for asylum seekers close to impossible. Also, by increasing the time of applying for permanent residence from 5 to 10 years, refugees have to wait much longer before enjoying the social security measures and protections tied to permanent residence. Moreover, requiring an asylum seeker to present an employment letter after six months of being granted the right to work is unrealistic, considering the extremely high unemployment rate in South Africa, coupled with the discrimination against non-citizens in the employment market. Therefore, these amendments have far-reaching implications for refugees' social security rights.

It is also notable that under the newly amended Act, asylum seekers must apply for an asylum transit visa, valid for five days, before entering the Republic at a port of entry.³¹² Failure to apply for this visa suggests that an immigration officer will interview them to ascertain a good reason for not having a transit visa or if there is reasonable cause for any illegal entry before being entitled to asylum.³¹³ All these additional requirements lengthen the time before an asylum seeker can obtain refugee status to access social security in the SASSA Act.

resolution by withdrawing the refugee status of such category as a whole by notice in the Gazette... A person whose refugee status is withdrawn in terms of subsection (1) or (3) must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.”

³¹⁰ UNHCR “Migrants Refugees” (2021) <https://migrants-refugees.va/it/wpcontent/uploads/sites/3/2021/12/2021-CP-South-Africa.pdf>. at 6.

³¹¹ *Ibid.*

³¹² See Section 15(a) of the Refugee Amendment Act 2017.

³¹³ J Whyte “Asylum Seekers’ right to apply for asylum not barred by delay” (2022 para 4 <https://www.financialinstitutionslegalsnaps.com/2022/02/asylum-seekers-right-to-apply-for-asylum-notbarred-by-delay/>). (accessed 16 May 2022).

These problematic amendments continue to rest uncomfortably alongside constitutional guarantees on non-discrimination and jurisprudence emphasising the protection of refugees and asylum seekers. In *Ruta v Minister of Home Affairs*,³¹⁴ the Constitutional Court arrived at the following conclusions regarding the Refugee Amendment of 2017. The first is that once an illegal immigrant expresses the intention to apply for asylum, they must be allowed to do so without undermining their intention. The second is that the extent of the delay in doing so does not bar the individual from exercising that right.³¹⁵ However, many of these recent amendments to the Refugees Act go squarely against established jurisprudence on the rights of refugees and asylum seekers.

3.7. Recent Policies on immigration: Implications on social protection of refugees and asylum seekers

The White Paper on International Migration was released in July 2017. It sets out the framework for future immigration law in South Africa and forms part of its law-making.³¹⁶ This Paper provides an outline of various approaches to immigration. While some of these strategies are progressive (In the foot, provide examples of strategies that you deem progressive),³¹⁷ others pose threats to refugees and asylum seekers. For example, the Paper proposes strategies that entrench the shift in policy from one based on urban integration and protection to one that sees asylum seekers and refugees as a threat.³¹⁸ Moreover, while the Paper mentions the protection of refugees, the idea of protection is framed against the backdrop of immigration and refugee movements being a threat to national security.³¹⁹ These policy considerations are premised on South Africa being a “destination for illegal immigrants (undocumented migrants, border jumpers, over-stayers, smuggled and trafficked persons) who pose a security threat to the economic stability and sovereignty of the country.”³²⁰ Unfortunately, refugees who, as already alluded to, are vulnerable and in need of protection, are responded to base on measures geared towards immigration control rather than protection.

³¹⁴ *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) (20 December 2018).

³¹⁵ See *Ruta v Minister of Home Affairs*, the dissentient in the Supreme Court of Appeal considered that once a refugee has shown an intention to apply for asylum, he or she is protected under the Refugees Act and its regulations and is entitled to be afforded access to that statute's application process. At para 6.

³¹⁶ The White Paper on International Immigration (2017). The Cabinet approved the new White Paper on International Migration on 29 March 2017.

³¹⁷ See the White Paper on International Immigration (2017) at 13.

³¹⁸ *Ibid* at 35, 36, 55 & 67.

³¹⁹ White Paper at 72.

³²⁰ *Ibid* at 67.

The White Paper sets out significant policy changes; amongst these are (i) permanent residency and citizenship and (ii) change towards migrants from Africa.

3.7.1. Permanent residency and citizenship

The White Paper aims to change how permanent residency and citizenship are granted. In doing so, the White Paper looks at breaking the chain between the temporary residence of refugees and refugee status to attain permanent residency.³²¹ There is also an alternative of providing 'long-term residence' as a substitute for "permanent residence" Permanent residence will be accessible to certain migrants, such as highly skilled migrants on a fast-track system, while refugees may apply for long-term residence.³²² The difference between permanent and long-term residence is that the latter will be reviewable and not linked to citizenship.³²³ This distinction impacts refugees and their right to social security. With some refugees not falling within the category of highly skilled immigrants, they are most likely not to benefit from permanent residence permits and, consequently, deprived of the social security benefits of being a permanent resident.

3.7.2. Changes towards migrants from Africa

The White Paper takes a pan-African stance, which seeks to move away from the colonial legacies of previous migration policies. The Paper references the African Union Agenda 2063, which prohibits visa requirements for all African citizens.³²⁴ The aim is to have visa-free travel for African citizens, that is, being able to enter South Africa for at least ninety days upon arrival at South Africa's borders.³²⁵ However, this will work if return agreements and security measures are in place. "Trusted travellers" from Africa can access long-term, multiple-entry visas.³²⁶ The White Paper plans for a fully automated visa application system for all migrants, whereby applications are made in countries of origin and are subject to advanced security checks using improved data systems.³²⁷ While these policies indeed demonstrate some form of progress in visa application systems, they fail to cater for the unique needs of refugees and asylum seekers. Suffice it to note here that several refugees arrive at the borders in very

³²¹ Sonke Gender Justice "Permanent Residency and Citizenship" (2021) <https://genderjustice.org.za/card/whatis-the-white-paper-on-international-migration/permanent-residency-and-citizenship/>. (accessed: 08 January 2023).

³²² *Ibid.*

³²³ White Paper at 42.

³²⁴ Scalabrini "What Is the White Paper On International Migration?" <https://www.scalabrini.org.za/news/whatis-the-white-paper-on-international-migration/>. (accessed: 17 May 2022).

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

desperate conditions. Their persecution often means they cannot make visa applications from those countries. The overall effect of such policies, if implemented, would further delay refugees' processing of documentation, thus, making it hard to access fundamental rights, including social security.

3.8. Conclusion

This chapter aimed to unpack the legal and policy framework on social protection in South Africa to assess whether there is a basis for the social protection of refugees during the Covid19 pandemic. The national legal framework on the implication of social protection for refugees has been examined. Also, jurisprudence on social security and the rights of refugees has been unpacked. The Constitution is the supreme law of the land. It has been discussed with the emphasis being that the provision on social security mentions “everyone,” meaning that refugees are included in the protection. Thus, it imposes a binding obligation to South Africa to act following its constitutional and legislative provisions in good faith.

The South African Bill of Rights expressly recognises the rights of all people in our country. Thus, the state must gradually promote these rights, along with them, the right of access to social security, which applies to everyone regardless of the limitations or shortage of resources. An analysis of the jurisprudence has demonstrated that the Constitutional Court has interpreted the scope of social assistance reimbursements to include permanent residents. However, this may not go far enough as not many refugees have permanent residence status. There have also been concerns about the current social security system of South Africa being burdened, thus, making it unrealistic for social security to be extended to non-citizens.³²⁸ While this is a valid concern, the Constitution of South Africa, which is the supreme law of the land, has made it explicit that the right to social security is to be enjoyed by “everyone.” Thus, unless the Constitution is amended to qualify this commitment, any distinction in the realisation of the right to social security would go squarely against the principle of non-discrimination as firmly entrenched in section 9 of the Constitution. At the very least, it would need to be a justifiable limitation in terms of section 36 of the Constitution. If this is the high threshold with which refugees' right to social security is guaranteed, a critical issue yet to be resolved for purposes of this research is whether South Africa met this high threshold during the Covid-19 pandemic.

³²⁸ See GM Letlhokwa “Charity begins - but does not end - at home - *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 CC: case” (2005) *Orbiter* at 173.

The next chapter resolves this issue.

CHAPTER 4: THE SOCIAL WELFARE NEEDS OF REFUGEES/ASYLUM SEEKERS AND SOUTH AFRICA'S COVID-19 RESPONSES REGARDING SOCIAL SECURITY

4.1. Introduction

The previous two chapters have demonstrated that both South Africa's treaty law commitments and South Africa's national laws impose obligations on South Africa to afford social security to refugees and asylum seekers. In as far the Covid-19 pandemic is concerned, a question arises, and did South Africa adhere to these obligations? In this chapter, South Africa's responses during the Covid-19 pandemic on issues of social security to assess whether these international and national commitments were adhered to will be examined. Although this chapter is not purely comparative, it further goes a step further in the discussion to draw insights from Uganda, a country that hosts the highest number of refugees on the African continent. This discussion will seek to assess how, Uganda, a country faced with a similar pandemic Covid19, responded to the social security needs of refugees and what insights, if any, are of relevance to South Africa. For purposes of the discussion of social security in this chapter, refugees' welfare needs include access to food and water, housing and shelter, health care facilities, income and payment, education, and social security. To place the discussion into perspective, the chapter will proceed with a discussion that highlights South Africa as a destination country for refugees. Furthermore, the chapter will give a brief description of the Covid-19 pandemic in South Africa. It is then that the responses will be discussed and measured against South Africa's international and national commitments to social security rights.

4.2. South Africa as a destination country for refugees

The presence of migrants in South Africa is not a new phenomenon. Migrants, both documented and undocumented, streamed through South Africa's borders, before and during the apartheid era.³²⁹ Various factors increased the number of migrants entering South Africa from the 1980s to the late 1990s. Many African countries were in the struggle for independence, with conflicts resulting in intolerable living conditions and the persecution of persons.³³⁰ Thus, some found refuge in South Africa. Following South Africa's historical transition from undemocratic rule to democracy, additional concerns came to the fore, including the rights of refugees and

³²⁹ S Peberdy "Setting the scene: Migration and urbanisation in South Africa" (2009) *The Atlantic Philanthropies* at 3-5.

³³⁰ *Ibid.*

migrants, freedom of information, and access to essential services. Although South Africa has a long migration history, it only began formally admitting asylum seekers and recognising refugees in terms of internationally recognised criteria in 1994. Following South Africa's transition to democracy, the social justice challenges that refugees have faced in this period include access to asylum procedures, securing recognisable identification documents, and accessing social services.³³¹

4.3. Understanding the social welfare needs of refugees and asylum seekers

The UNHCR has observed that the inclusion of refugees in social protection systems of countries is critical to their protection because of the dire circumstances that many often find themselves.³³² In this regard, the UNHCR has noted that “policies and programs aimed at preventing or protecting all people against poverty, vulnerability and social exclusion throughout their life-course, with emphasis on vulnerable groups” go a long way in guaranteeing the rights of refugees.³³³ It has underscored that where feasible, states should ensure inclusion of refugees in government social protection systems, national health insurance schemes and social assistance mechanisms.³³⁴

The International Labour Organisation has also advanced a similar argument by emphasising that inclusion of refugees “is key to ensuring income security for all, reducing poverty and inequality, achieving decent working conditions and reducing vulnerability and social exclusion. It has been widely recognised that social protection promotes inclusive growth and sustainable development.”³³⁵ Inclusion has been known to prevent “households from falling further into poverty and their redistributive effect on incomes, and consequently on economic inequality, builds social cohesion, reduces political instability and promotes equitable societal progress in the long term as a matter of social justice.”³³⁶

The current national legal framework suggests that South Africa is committed to the cause of inclusion. Section 184(3) of the Constitution of the Republic of South Africa provides that each year, the South African Human Rights Commission must require relevant organs of state to

³³¹ J Handmaker *Advancing Refugee Protection in South Africa* (2008) at 346.

³³² UNHCR “Social Protection” (2022) <https://www.unhcr.org/social-protection.html>. (accessed: 08 September 2022).

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ International Labour Organisation “Extending social protection to migrant workers, refugees and their families: A guide for policymakers and practitioners” (2021) https://www.ilo.org/wcmsp5/groups/public/---ed_protect/--protrav/migrant/documents/publication/wcms_826684.pdf. (accessed: 7 August 2022).

³³⁶ *Ibid.*

provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education, and the environment.³³⁷ The issue though is whether these ensure refugee inclusion. Access to these social welfare needs is a complex matter because often, laws and policies clash. It is indisputable that refugees and asylum seekers encounter tremendous struggles upon arrival in South Africa. Some of the challenges they encounter include limited access to shelter, healthcare facilities and education. Therefore, this raises the issue of whether they have entered a country that guarantees their rights or places them in a much worse situation than the countries they are fleeing from. The many untold stories of aggression and the social welfare hardships that refugees tend to encounter also raise the question of whether the protective measures entrenched in the Refugees Act are being practically implemented by the Department of Home Affairs, the courts, the local government, and other relevant government departments.³³⁸ The following discussion starts by unpacking the key social welfare needs of refugees before attempting to assess South Africa's response during the Covid-19 pandemic.

4.3.1. Food and Water

The right to food security is not separable from the right to water. South Africa cannot achieve one without guaranteeing the other. Section 27(b) of the Constitution stipulates that everyone has the right to access sufficient food and water.³³⁹ Ensuring access to adequate food and safe water is necessary for protecting the safety, health, and well-being of many refugees and asylum seekers who have been forced to flee their countries of origin. The most widely accepted definition of food security is: "access by all people always to enough food for an active, healthy life. Includes ready availability of nutritionally adequate and safe foods; and assured ability to acquire acceptable foods in socially acceptable ways."³⁴⁰ In refugee settings, particularly those living in camps, the availability of nutritionally adequate and safe foods is often achieved through food aid. Food aid is given in different forms. The most implemented program in this regard is the General Food Distribution Program, which aims at meeting the minimum food and nutritional needs of refugees.³⁴¹ In the context of South Africa, however, refugees do not

³³⁷ Section 184 of the Constitution, 1996.

³³⁸ A.E Ashfield "The Plight of Refugees in South Africa" (2021) 15 *Pretoria Student Law Review* at 127.

³³⁹ Section 27(b) of the Constitution, 1996.

³⁴⁰ The World Food Summit of 1996 defined food security as existing "when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life."

³⁴¹ MN Andre "Human right to food security in refugee settings: rhetoric versus reality" (2002) 8 *Australian Journal of Human Rights* at 43-55.

live in camps. Therefore, they are expected to fend for themselves. Despite the expectation to fend for themselves, in situations of lack, the Supreme Court of Appeal has handed down rulings that place emphasis on the protection of individuals' right to basic food needs including water. Notably, in the case of *City of Cape Town v Marcel Mouzakis Strümpher*.³⁴² The primary issue on appeal was whether the City of Cape Town was entitled to disconnect the water supply because of non-payment. The city advanced two key arguments. Firstly, that the respondent's right to water supply was merely a personal right that was based on a contract. Secondly, that the City was authorised in terms of the by-laws on water and debt collection to stop water supply in case of non-payment. The SCA found this argument to be problematic and that the fact that a contract must be concluded by a consumer living in a municipal area does not relegate the consumer's right to water to a "mere personal right flowing from that contractual relationship."³⁴³ The Court held that the City of Cape Town remained with the statutory and constitutional obligation to supply water to the respondent. The SCA underscored that the right to water is a basic constitutional right.

From this decision, we see the court's emphasis on protection of the basic right to water despite the contractual obligations that justified the City's move to deprive the respondent of the right to water. The Court recognised that water is a basic right that needed to be protected and such protection took precedence over other contractual obligations. This analogy may be applied to refugees. For many who may not be able to afford basic services such as water, the need to guarantee their basic rights may, depending on the circumstances of each case, warrant interventions that warrant protection of their basic right to water regardless of the expectation that refugees have to fend for themselves.

4.3.2. Housing and Shelter

Section 26 of the Constitution states that everyone has the right to access adequate housing. The right to housing protects individuals against forced evictions. Housing is defined as the permanent or temporary removal against the will of individuals, families, and communities from the homes or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection, where forced evictions convey a sense of the arbitrariness of illegality and lead to violations of other rights, including the right to life, security of the person,

³⁴² *City of Cape Town v Marcel Mouzakis Strümpher* 2012 ZASCA 54 (30 March 2012).

³⁴³ *City of Cape Town v Marcel Mouzakis Strümpher* para 9.

non-interference with privacy, family, and home, and the peaceful enjoyment of possessions.³⁴⁴ Housing is a basic social need for refugees and asylum seekers in South Africa especially because South Africa does not apply the encampment approach to refugee settlement. Refugees are integrated in society, thus, bringing to the fore their need for housing. South Africa's Courts have on occasion underscored the critical role of housing for those who are vulnerable. In the case of *Government of the Republic of South Africa. v Grootboom (Grootboom case)*,³⁴⁵ a case that dealt with the right to housing in terms of section 26 of the Constitution, the Constitutional Court found a violation of the right to adequate housing under section 26. The Court held that section 26 mandates South Africa to devise and implement a coherent and co-ordinated housing programme. The Court added that in failing to provide for those in most desperate need, the government had failed to take reasonable measures to progressively realise the right to housing. The Court ordered that the various governments “devise, fund, implement and supervise measures to provide relief to those in desperate need.” The emphasis on the need for governments to make provision for housing for those in most desperate need holds true for refugees, some of whom are often caught up in desperate circumstances.

4.3.3. Healthcare

Section 27(b) of the Refugees Act provides everyone the right to access health care services, including reproductive health care. Refugees are one of the most vulnerable groups globally, and this is attributable to several factors including their lack of stability as result of persecution from their countries of origin. During the covid-19 pandemic, this group was exposed to worse situations because of their status. Some of the challenges they faced included (i) living in poor and densely populated camps with inadequate healthcare facilities, with little to no physical distancing practiced, (ii) lack of access to Personal Protective Equipment, hygiene, and clean water, (iii) restricted access to public healthcare centres due to not having identity documents, and (iv) the lack of funds to access basic services.³⁴⁶

Furthermore, even though refugees are eligible to access the same primary health care as any other South African citizen in light of section 27 (g) of the Refugees Act where it is stated that “a refugee is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time”, the failure of systems to distinguish

³⁴⁴ J Udombana “Life, Dignity, and the Pursuit of Happiness: Human Rights and Living Standards in Africa” (2008) 28 *SAJHR* at 56-57.

³⁴⁵ *Grootboom* 2000 (11) BCLR 1169 (CC).

³⁴⁶ The United Nations High Commissioner for Refugees.

between refugees and other migrants in the country often results in the non-prioritisation of refugees in accessing essential health services. This is very problematic considering that section 27(g) still maintains that refugees have a legal right not to be charged healthcare costs applicable to foreigners.³⁴⁷

The clash in laws also often undermines refugees' access to health care. Notably, the Constitution states that all people in South Africa, regardless of status or nationality, have the right to have access to health care services, and that 'no one' may be refused emergency medical treatment.³⁴⁸ The National Health Care Act also confirms that all people in South Africa can access primary health care at clinics and community health centres.³⁴⁹ Pregnant or breast-feeding women and children under the age of six are entitled to free health care services at any level.³⁵⁰ And as noted above, the Refugees Act has made it explicit that refugees have the same right to access healthcare as South African citizens, as set out in the Constitution. However, while the foregoing laws are clear on refugees and migrants' rights to access health care, the Immigration Act poses serious hurdles to access. It requires staff at clinics and hospitals to find out the legal status of patients before providing care (except in an emergency).³⁵¹

The importance of availing resources for the realisation of health services was emphasised by the Constitutional Court in the case of *Minister of Health v Treatment Action Campaign*.³⁵² This case related to a court challenge brought by the Treatment Action Campaign and others regarding the government's policy on the prevention of mother-to-child transmission of HIV.³⁵³ As part of efforts aimed at combating the disease, the government devised a programme for the prevention of mother to child transmission of HIV at birth using the antiretroviral drug, nevirapine.³⁵⁴ The use of nevirapine was permissible in a limited number of pilot sites (two per province), with the result that only about 10% of all births in the public sector could benefit

³⁴⁷ A Bamjee et al. "Forced Migrants in the New Johannesburg: Towards a Local Government Response-Legal Problems facing Refugees in Johannesburg" SALJ 54.

³⁴⁸ See Section 27 (3) of the Constitution 1996.

³⁴⁹ Section 42 (c) of the National Health Act 61 of 2003.

³⁵⁰ *Ibid*, section 4 (3) (a).

³⁵¹ *Ibid*.

³⁵² *Minister of Health and Others vs. Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 10 BCLR 1033.

³⁵³ See TAC case at para stating that "The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly, they are. The question is whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution."

³⁵⁴ *Ibid* para 32.

from the policy.³⁵⁵ Doctors in the public sector outside the pilot sites were precluded from prescribing the drug for their patients.

The Constitutional Court considered two key issues on appeal by the government against the decision of the High Court. The first was whether the government was justified in refusing to make nevirapine available to pregnant women living with HIV and who give birth in public health facilities outside the research sites where it is medically indicated. The second issue was whether the government was legally obliged to implement and set out clear time frames for a national programme to prevent mother to child transmission of HIV, including voluntary counselling and testing, antiretroviral therapy, and the option of using formula milk for feeding.

Sections 27 of the Constitution provides the right for everyone to have access to health care services, including reproductive health care. In terms of this provision, South Africa must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. Also, section 28 of the Constitution promotes the right for every child to basic nutrition, shelter, basic health care services and social services. Therefore, in light of these provisions, the Constitutional Court decided that the government had not taken reasonable steps to reduce the risk of mother to child transmission of HIV at birth, because it failed to make the anti-retroviral drug nevirapine available to HIV-positive mothers and at-risk newborns even when ordered or prescribed by doctors,³⁵⁶ and that the government did not set out a timeframe for creating a national program to prevent mother-to-child transmission of HIV.³⁵⁷ Accordingly, the Court ordered the government to remove restrictions that prevented most public hospitals from making nevirapine available to reduce the risk of mother-to-child transmission of HIV and make nevirapine available where medically indicated; provide for counselors at public hospitals and clinics to advise about nevirapine.³⁵⁸ Of importance to the rights of refugees is the Court's ruling regarding poor residents in South Africa. At paragraph 70, the Court noted that "to the extent that government limits the supply

³⁵⁵ The decision by government to provide nevirapine to mothers and infants at the research and training sites is consistent only with government itself being satisfied as to the efficacy and safety of the drug. These sites cater for approximately 10% of all births in the public sector and it is unthinkable that government would gamble with the lives or health of thousands of mothers and infants. In any event, the research and training sites are intended primarily to train staff and to study the operational problems of the comprehensive prevention of mother-to-child transmission package. As to the research component at these sites, it is intended to focus on the efficacy of the treatment rather than its safety. There is no evidence to suggest that a single dose of nevirapine administered at birth is likely to harm children during the first two years of their lives. The risk of nevirapine causing harm to infants in the public health sector outside the research and training sites can be no greater than the risk that exists at such a site or where it is administered by medical practitioners in the private sector.

³⁵⁶ *Ibid* para 62.

³⁵⁷ *Ibid* para 18.

³⁵⁸ *Ibid* para 36

of nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences.” The vulnerable and poor state that refugees often find themselves in suggests that some health policies may have devastating consequences on their wellbeing because most of them are poor and unable to afford to pay for health services.

4.3.4. Income and employment

In South Africa, the refugee framework regulates the affairs of refugees and their stay in the country.³⁵⁹ Before the 2008 Refugees Amendment Act, their stay was subject to conditions determined by the Standing Committee for Refugee Affairs (the SCRA) while awaiting the outcome of their claim.³⁶⁰ The SCRA adopted a condition impeding asylum seekers from enjoying the rights to work and education for the first 180 days from the date they applied for asylum.³⁶¹ However, the Refugees Act was radically revised to respond to the gap in the refugee framework by prescribing the conditions of asylum seekers' stay and introducing the rights that flow from that status.³⁶² These rights are rights contained in the Bill of Rights as those rights apply to everyone, at least until the recent 2017 amendments that turned the tide (as discussed in the preceding chapter).

In *Watchenuka v Minister of Home Affairs*,³⁶³ the prohibition on asylum seekers undertaking employment and obtaining education was judicially reviewed. In its analysis, the Supreme Court of Appeal (SCA) considered the plight of asylum seekers, particularly that South Africa did not offer any humanitarian assistance to them. Accordingly, the SCA ruled that such general prohibition was unlawful and fundamentally violated the right to human dignity simply because “where employment is the only means for the person's support” and where education offers an opportunity for human fulfilment at a critical period, the right to dignity is implicated.³⁶⁴ Regarding the right to work, the SCA reasoned that the denial of the right to work would

³⁵⁹ C Kavuro “Refugees and Asylum Seekers: Barriers to Accessing South Africa's Labour Market” (2015) 19 *Law, Democracy and Development* at 232.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² See Refugees Amendment Act 33 of 2008. The title of the Act states: "To amend the Refugees Act, 1998, to amend, insert and delete certain definitions... to provide for the clarification and revision of procedures relating to refugee status determination; to provide for obligations and rights of asylum seekers..."

³⁶³ See *Watchenuka v Minister of Home Affairs* (1486/02) [2002] ZAWCHC 64 2002 at para 23.

³⁶⁴ *Ibid.*

severely restrict asylum seekers' ability to support themselves and their families and this would be degrading and lead to humiliation.³⁶⁵

4.3.5. Education

The right to education is enshrined under section 29 of the Constitution of South Africa, which states that everyone has the right to primary education.³⁶⁶ This right extends to refugees and asylum seekers as well. Hence, with South Africa being a host country to refugees and having a constitution which encompasses everyone in as far as guaranteed rights are concerned, South Africa bears the obligation to ensure that the fundamental right to education is available and accessible to everyone, including refugees and asylum seekers, without any form of discrimination.

The importance of access to education has been clearly articulated in the case of *Centre for Child Law and Others v Minister of Basic Education*.³⁶⁷ The case concerned children who were precluded from continuing to attend public schools unless they or their parents or guardians identified themselves by means of, amongst other things, passports, identity documents, birth certificates or permits.³⁶⁸ The respondent contended that its requirements were intended to improve the administration within the Department and to ameliorate challenges associated with illegal immigration.³⁶⁹ The court decided that the Department of Basic Education and the Provincial Department acted unconstitutionally by preventing children to continue receiving education in public schools purely based on the fact that they lacked identification documents.³⁷⁰

This decision is particularly critical for refugees and asylum seekers in as far as their education needs are concerned. As consistently noted, many often flee their countries abruptly to escape persecution. For some of them, identification documents are far from being key documents in their possession. Thus, policies that require that children or their parents to submit relevant

³⁶⁵ *Ibid.*

³⁶⁶ Section 29 of the Constitution, 1996.

³⁶⁷ *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019).

³⁶⁸ *Ibid* para 1.

³⁶⁹ Department of Education of the Eastern Cape Provincial Government provided teaching staff and funding to all learners at schools in the Eastern Cape regardless of whether the learners possessed identification documents. Funding was provided to schools based on the actual number of learners in the school, and not on the number of learners whose identification document particulars were entered into the South African Schools Administration and Management System.

³⁷⁰ Para 131.

documentation is akin to exclusion of such children from the education system and an arbitrary move to deprive them of education.

4.3.6. Social security

As consistently observed in this thesis, the Covid-19 pandemic wreaked havoc worldwide, leaving many without jobs, livelihoods, and shelters, no food to eat and provide for their families, no access to healthcare facilities, and many families into financial strain while threatening the lives of many.³⁷¹ This exposed an uncomfortable truth about the shaky living situations for many including refugees. This was the case for refugees and asylum seekers who have been directly impacted by the struggle of the novel pandemic as they were not catered for and did not benefit from social reliefs like food parcels distributed amongst other South African citizens.

When some of the policies were implemented under the National Disaster Management Act, it seemed as if the South African government failed to align itself with the principles of the refugee law as well as human rights law which, therefore, did not consider the status of refugees, living them at further risk.³⁷² In these circumstances, the right social security became especially critical, yet, for many refugees and asylum seekers, it remained a far-reaching goal.

All considered, the social-welfare needs of refugees and asylum seekers which warrant the realisation of the right to social security, are not merely needs, they also find grounding in human rights and various courts in South Africa have pronounced themselves on the need to make these needs (or rights for that matter) a reality for those most vulnerable in society, amongst which are refugees and asylum seekers.

4.4. Urban refugee framework in South Africa and the heightened challenge of accessing social welfare needs

South Africa has witnessed a significant increase in refugees and asylum seekers since 2007. This is due to the worsening of neighbouring countries' social and economic infrastructures and the trendy conflicts these refugees fled from.³⁷³ Although the trend of urban refugees is

³⁷¹ Refugees and Migrants Forgotten in Covid-19 Crisis Response 2020 para 1 www.amnsety.org. (accessed: 25 July 2022).

³⁷² *Ibid.*

³⁷³ M Thomas et al. "Environmental Risk: Urban Refugees' Struggles to Build Livelihoods in South Africa" (2017) 60 *International Social Work* at 667.

not new, the reality of these new migration patterns creates challenges for governments and non-governmental organisations. Humanitarian organisations, such as the UNHCR and NGOs, have often provided camp-based programs.³⁷⁴ However, urban refugees exist in a vastly different framework because they do not live in one location as the case is for those in camps. Consequently, organisations seeking to support urban refugees are confronted with a range of challenges including trying to access them to afford them relevant services.³⁷⁵ The fact that refugees are often scattered in urban areas, poses challenges in determining eligible beneficiaries and to distinguish between refugees and the urban poor.³⁷⁶ Thus, despite being formally and legally recognised, refugees and asylum seekers in South Africa often find themselves without support because they are invisible to those with the power and mandate to address and respond to the social security needs.³⁷⁷

In 2018, UNHCR established that 61 percent of refugees reside within urban areas and as such, could not benefit from the services that those in camps receive.³⁷⁸ Although the demands and challenges for urban and in-camp refugees differ from country to country, most often, the unique challenges of urban refugees necessitate approaches, policy responses and service delivery approaches that respond to these vulnerabilities. Of course, urban refugees are exposed to unique independence and freedom, which enhances their access to economic prospects. However, they do not always benefit from the support that those in camps receive. Consequently, for urban refugees, the Covid-19 pandemic had a distinct effect on their household budget.³⁷⁹

It is worth noting that in camps, refugees' access to social assistance taking the form of health services, food, water, housing, amongst others, may alleviate some of the devastating impact on poverty and pandemics such as the Covid-19 pandemic.³⁸⁰ Moreover, even though urban refugees have more opportunities to find jobs, work restrictions often leave them wedged in

³⁷⁴ O Bekewell "Community Services in Refugee Aid Programmes: A Critical Analysis" (2013) 82 *ISSN* 6.

³⁷⁵ J Crisp et al. "Displacement in Urban Areas: New Challenges, New Partnerships" (2012) 36 *Disasters* at 23-42.

³⁷⁶ E Ferris "Ten Observations on the Challenge of Humanitarian Work in Urban Settings" (2011) *The Brookings Institution* <http://www.brookings.edu/research/opinions/2011/06/30-humanitarianurbanferris>. (accessed: 4 August 2022).

³⁷⁷ LB Landau "Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy" (2006) 19 *Journal of Refugee Studies* at 27.

³⁷⁸ H Dempster et al. "Locked Down and Left Behind: The Impact of COVID-19 on Refugees' Economic Inclusion" (2020) 179 *Centre for Global Development* at 44.

³⁷⁹ Dempster at 18.

³⁸⁰ Dempster at 52.

informal low-skilled jobs, which have been affected by Covid-19 lockdowns.³⁸¹ For instance, over 10,000 urban refugee wage earners in Rwanda lost their jobs due to business closures during the pandemic and struggled with importing supplies.³⁸² In South Africa, while the South African government later eased down the regulations on lock down and allowed Spaza shop owners to continue to work, it was a requirement for business owners who were non-South African citizens to have been lawfully admitted into the country and in possession of a valid passport, refugee document or asylum seeker permit.³⁸³

While these developments could have opened the door for refugees and asylum seekers to have an income, the challenge of lack of documentation which was exacerbated by the closure of home affairs offices and refugee offices during the Covid-19 pandemic meant that many did not have the documentation relevant to make them eligible to engage in the informal sector. Thus, while refugees in camps often receive basic social welfare services such as shelter, food etc., urban refugees are expected to pay for their stay, often in congested areas, where access to cash-based assistance and other forms of humanitarian support is minimal.³⁸⁴ Hence, Covid19 restrictions have left most refugees in South Africa without the means to sustain their living, thus being confronted with eviction.³⁸⁵

With the understanding of the social-welfare needs of refugees and the urban nature of the refugee system in South Africa, it is easy to see the critical need for the realisation of the right to social security during the Covid-19 pandemic. In the next subsection, South Africa's responses are examined with a view of assessing their alignment with its international and national obligations.

4.5. South Africa's response to Covid-19

In line with global responses to the Covid-19 pandemic, South Africa implemented protection measures such as physical distancing, restricted travels, and limits to gatherings. These measures were collectively referred to as "lockdown." The first lockdown commenced on 27th

³⁸¹ Dempster at 80.

³⁸² Dempster at 81.

³⁸³ Scalabrini Institute for Human Mobility in Africa "The Severe Effect of COVID-19 on Jobs for Migrants and Refugees" (2020) <https://sihma.org.za/Blog-on-the-move/the-severe-effect-of-covid-19-on-jobs-for-migrants-and-refugees>. (accessed 15 October 2022).

³⁸⁴ H Dempster et al. "Locked Down and Left Behind: The Impact of COVID-19 on Refugees' Economic Inclusion" (2020) 179 Centre for Global Development 91.

³⁸⁵ *Ibid* para 93.

March 2020.³⁸⁶ The outbreak of Covid-19 pandemic and its lockdown measures impacted everyone negatively, both nationals and refugees.³⁸⁷ Consequently, the situation worsened for the already vulnerable group since there seemed to be no directive on how the government plans on extending the social assistance for refugees and asylum seekers who are equally affected by the strains of the pandemic.³⁸⁸ In response to the health crisis, the state introduced several social safety measures to cater for individuals who were at risk of losing their source of income, wholly or partially, due to the pandemic.³⁸⁹ These responses are analysed to assess how inclusive they were of refugees and asylum seekers.

4.5.1. Workmen's Compensation

Workman's Compensation is a type of an insurance, instituted by the Compensation for Occupational Injuries and Diseases Act. It ensures that employers access damages for civil claims and enables both casual and full-time employees to claim compensation directly from the Fund for work-related injuries and disability.³⁹⁰ Furthermore, the insurance enables the dependents of an employee to claim compensation in the case of a work-related death. Anyone who is a member to this insurance is obligated to pay a yearly fee, determined as a percentage of the amount that the business spends on salaries, and in turn the fund helps cover all the employees' medical bills or compensation in the case of death.³⁹¹

On 23 March 2020, the compensation commissioner issued a notice in terms of section 6A of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), alluding to the fact that if an employee has contracted the coronavirus during or within their scope of employment, such employee is entitled to claim compensation, thus establishing Covid-19 as an occupational disease under COIDA.³⁹² This, however, did not make provision for

³⁸⁶ *Ma-Afrika Hotels (Pty) Ltd v Santam Limited* 2021 (1) All SA 195 (WCC) para 1.

³⁸⁷ Some commentators, like Mukumbang *et al.*, have argued that the outbreak of the pandemic and the enforced lockdown measures only worsened the situation for refugees. See F Mukumbang *et al.* "Unspoken Inequality: How COVID-19 has Exacerbated Existing Vulnerabilities of Asylum-Seekers, Refugees, and Undocumented Migrants in South Africa" (2020) 141 *International Journal for Equality in Health* at 3-7.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ Company Partners "What is Workman's Compensation (COID) and why do you need it?" <https://companypartners.co.za/what-is-workmans-compensation/>. (accessed: 12 October 2022).

³⁹¹ *Ibid.*

³⁹² See Casual Workers Advice Office. On 25 May, the Minister of Employment and Labour extended the scope of the UIF's Covid-19 Temporary Employer Employee Relief Scheme (C19 TERS) to cover workers who are not registered for UIF. This comes on the eve of an urgent Labour Court application set down for hearing on 28 May, brought by the Casual Workers Advice Office (CWAO), Women on Farms Project (WFP), and the Izwi Domestic Workers Alliance (Izwi). (2020) <http://cwao.org.za/Press-release-TERS-benefit-extended.html>. (accessed: 05 August 2022).

individuals working in the informal sector as it is not covered by the COIDA. The COIDA also did not cover domestic workers at the time the commissioner issued this notice in March 2020.³⁹³ For the considerable number of refugees who work in the informal section, indirectly, they were unfairly discriminated against as they did not fall within the ambit of the COIDA.

Fortunately, the exclusion of domestic workers in COIDA was the subject of litigation in the case of *Mahlangu v Minister of Labour*.³⁹⁴ This case sought to resolve the crucial question of whether it was constitutional for the government to exclude domestic workers from social security benefits in the form of occupational health and safety protection. COIDA, in particular, excluded domestic workers from benefitting from compensation for injuries or diseases that they may have contracted through their employment. The court found section 1(xix)(v) of the COIDA unconstitutional and a violation of sections 27 and 9, and 10 of the Constitution.³⁹⁵ These sections are on the right to Social Security, the Equality clause, and the right to human dignity respectively. Although this was a successful challenge, this reform only occurred after exclusion of refugees based on the notice issued in March 2020.

It is to be recalled that in chapter 2, it was underscored that in terms of the ICESCR, whereas everyone has the right to social security, states parties should give attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular vulnerable groups, the unemployed, workers inadequately protected by social security, persons working in the informal economy, refugees, asylum-seekers, internally displaced persons, returnees, non-citizens, amongst others. In chapter 2, it was also underscored that in terms of the Committee on Economic Social and Cultural Rights, measures that accord due regard to those involved in the informal sector could include: (i) removing obstacles that prevent such persons from accessing informal social security schemes, such as community-based insurance; (ii) ensuring a minimum level of coverage of risks and contingencies with progressive expansion over time; and (iii) respecting and supporting social security schemes developed within the informal economy such as microinsurance and other microcredit related schemes.³⁹⁶ It would appear that the regulations regarding compensation did not take this international obligation

³⁹³ See Department of Employment and Labour “Unemployment Insurance Fund: Dispute Resolution Guidelines” at 3.

³⁹⁴ *Mahlangu v. Minister of Labour* Mahlangu (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020) 24.

³⁹⁵ See *Mahlangu*; The definition of “employee” in the COIDA text created an exception for domestic workers in private households that excluded them from coverage. All other workers in South Africa receive coverage under COIDA and have been covered since the law was passed in 1993.

³⁹⁶ General comment no.19 para 34

into account. The same can be said of South Africa's Constitutional obligations regarding social security in terms of the Constitution's reference to "everyone" in as far as the right to social security is concerned.

4.5.2. Temporary Employer Employee Relief Scheme (TERS)

In March 2020, the Department of Employment and Labour ("DOL") set up the Covid-19 Temporary Employer Employee Relief Scheme (TERS) as means of supporting businesses and employers who were temporarily unemployed due to the lockdown and were not capable of paying workers' salaries.³⁹⁷ Primarily, the subsidy was only accessible to employers registered with the Unemployment Insurance Fund (UIF).³⁹⁸ Nevertheless, due to pressure from civil society organisations,³⁹⁹ the department made two significant amendments to the TERS directive. Firstly, individual employees were granted an opportunity to apply for themselves if their employers fail to do so. The directive also extended TERS to non-registered workers who had formerly been excluded from the scheme because their employers had unlawfully failed to register them.⁴⁰⁰

Subsequently, after several complaints from refugees and asylum seekers alleging that the TERS system had excluded them,⁴⁰¹ the department issued a statement clarifying that "foreign nationals get payment later than some of the South African workers because the applications of foreign nationals need to go through a verification process with the Department of Home Affairs and at times in the South African Revenue Service (SARS)."⁴⁰²

Moreover, the TERS is not open to foreign nationals without a valid work permit. It can be gleaned from this arrangement that refugees were expected to wait longer to receive relief. Yet, section 27 of the Refugees Act, as already discussed, suggests that in as far as the rights in the Bill of Rights are concerned, refugees need to be placed on a footing similar to that of citizens.

³⁹⁷ Department of Employment and Labour "Temporary Employee/Employer Relief Scheme" (2020) <http://www.drakenstein.gov.za/docs/Documents/TERS-application-process.doc%20FINAL.%202012.pdf>. (accessed: 12 October 2022).

³⁹⁸ *Ibid.*

³⁹⁹ Civil society groups have played an important role in responding to the Covid-19 social crisis in South Africa. These include the "community action networks" in Cape Town and Gauteng, as well as similar initiatives in more rural areas, such as the Eastern Cape. They also include extraordinary crisis response efforts by pre-existing NGOs, such as Boost Africa and Umgibe, and novel social innovations like Food Flow.

⁴⁰⁰ Regulation 11 on Alert Level 5.

⁴⁰¹ Unathi Nkanjeni "Frustrated R350 relief grant applicants disappointed with Sassa's slow services" (2020) <https://www.timeslive.co.za/news/south-africa/2020-06-04-frustrated-r350-relief-grant-applicants-disappointedwith-sassas-slow-services>. (Accessed: 05 August 2022).

⁴⁰² *Ibid.*

It is also notable that this relief is limited to those with documentation. Therefore, those in the process of securing documentation are excluded. Moreover, it is to be recalled that in chapter 2, it was underscored that in terms of Article 17 of the 1951 Refugee Convention to which South Africa is party, it has generally been underscored that “the contracting state shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment.”⁴⁰³ It is hard to argue that the manner in which South Africa approached the Temporary Employer Employee Relief Scheme placed refugees on the most favourable treatment accorded to nationals of a foreign country.

4.5.3. Social Security Assistance

South Africa introduced a social relief grant for unemployed individuals, subject to not receiving any other government grants. The Covid-19 Social Relief for Distress Grant was said to be a “temporary provision of assistance intended for persons in such a dire material need that they are unable to meet their families' most basic needs.” The grant was R350 per month and was later increased to R600 per month. Its initial payment commenced in May 2020.⁴⁰⁴ Only South African citizens, permanent residents, and refugees registered with home affairs can benefit from the grant.⁴⁰⁵ On the 2nd of June 2020, the South African Social Security Agency (SASSA) announced that it had paid out the grant to the first 116 000 persons.⁴⁰⁶

Similarly, all social grant beneficiaries received increased amounts to combat the crisis. This included child support grant beneficiaries, even though theirs was temporary, and other grant beneficiaries like old age, foster care, and the disabled.⁴⁰⁷ SASSA also delivered food parcels and vouchers to those in need. The government stated that between 58,000 to 100,000 households had collected food parcels since the lockdown and that SASSA has also allocated R400 million for food parcels and vouchers.⁴⁰⁸

⁴⁰³ Article 17 of the 1951 Convention.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Statement by President Cyril Ramaphosa on further economic and social measures in response to the COVID19 epidemic <https://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-further-economicand-social-measures-response-covid-19>. (Accessed: 07 August 2022).

⁴⁰⁶ J Cassette Socio-economic challenges face a nationwide lockdown (LLM, thesis, University of Notre Dame, Indiana USA, 2020).

⁴⁰⁷ *Ibid.*

⁴⁰⁸ See "Proposals on Informal Food System: Traders, Street Vendors, and Spazas," compiled by C19 People's Coalition, Food Working Group, 21 April 2020.

Moreover, reports have surfaced that even when immigrants are fully documented and eligible for social relief, they are often unfavoured, and preference is given to South African citizens.⁴⁰⁹ Refugees, therefore, rely heavily on relief efforts by civil society organisations. In light of the manner in which the social relief in distress grant, one is forced to take a step back to ponder about the OAU Refugee Convention to which South Africa is party. In terms of article 4 of the 1969 OAU Convention⁴¹⁰ “member states undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.” Clearly, the manner in which the relief grant was dealt with appears to suggest that refugees were discriminated against on account of nationality or membership of the refugee social group.

4.5.4 Closure of businesses and the indirect exclusion of refugees in informal sector from social security

As already alluded to, South African refugees are expected to sustain themselves, including finding shelters and catering for their families. Most refugees are involved in informal trading, while a few are formally employed.⁴¹¹ Since one of the measures implemented to curb the spread of covid-19 included the closure of such economic activities, it was laid out in the Government Gazette that “during the lockdown, all businesses and other entities shall cease operations.” This left many refugees with no income to sustain themselves as before.⁴¹² With the advent of the lockdown and its impact on trade and income-generating activities, businesses had recourse to their insurers to ameliorate the challenges resulting from the pandemic.

In the case of *Cafe Chameleon CC v Guardrisk Insurance Company Ltd*,⁴¹³ the applicant was a restaurant owner who sought an urgent order declaring the respondent, an insurance company, obliged to repay it as a policyholder, in terms of a business interruption section of the policy, for the loss suffered because of the disruption triggered by the Covid-19 pandemic. The applicant submitted that “the lockdown regulations had severely disrupted his business to the extent that the services of its 41 employees could not be utilised since 27th March 2020.”⁴¹⁴ The court ruled that the respondent should indemnify the applicant regarding the business

⁴⁰⁹ *Ibid.*

⁴¹⁰ Article IV of 1969 OAU Convention.

⁴¹¹ 2014 ZASCA 143 para 1.

⁴¹² Regulation 11 B (1) (b) and (c) on Alert Level 5.

⁴¹³ 2020 (65) All SA 41 (WCC).

⁴¹⁴ *Ibid* para 17.

interruption section of the policy for any loss encountered since 27th March 2020. This is because the Covid-19 outbreak in South Africa resulted in the declaration and enforcement of regulations by the Minister of Co-operative Government and Traditional Affairs under the Disaster Management Act, 57 of 2002, which placed the applicant within the ambit of protection about business interruption.⁴¹⁵

From this case, we gather that businesses suffered losses because of the lockdown.⁴¹⁶ Furthermore, the relief from various institutions, including insurance companies, government social security measures, and donor support, played a critical role.⁴¹⁷ While this would be an option for refugees, many are involved in the informal sector, where insurance is underutilised. Moreover, given the informal nature of some refugees' businesses, they often must sell on the streets and from house to house.⁴¹⁸ However, Covid-19 regulations⁴¹⁹ required everyone to stay in their homes, thus, prejudicing this category of individuals even further. Furthermore, the South African government catered for local citizens through various measures such as social grants, Unemployment Insurance Fund (UIF), and food parcels, but refugees were not included in this program.

It is to be underscored here that in chapter 2, it was demonstrated that in as far as enjoyment of social economic rights, international human rights law prohibits any discrimination, whether in law or fact, whether direct or indirect.⁴²⁰ The manner in which the insurance schemes played out suggests that refugees and asylum seekers were indirectly discriminated against since many are involved informal business structures,⁴²¹ thus, being unable to benefit from these social security measures for any loss they suffered due to lockdown regulations.

⁴¹⁵ In *Cafe Chameleon CC v Guardrisk Insurance Company Ltd*, Grange J ordered that " The Respondent is declared liable to indemnify the Applicant in terms of the Business Interruption section of Policy number HIC 0000-02950 for any loss suffered since 27 March 2020 as a result of the Covid-19 outbreak in South Africa which resulted in the promulgation and enforcement of Regulations made by the Minister of Co-operative Government and Traditional Affairs under the Disaster Management Act, 57 of 2002."

⁴¹⁶ 2020 (65) All SA 41 (WCC) para 1.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ Regulation 11.B (i) Level 5 regulation: Regulation 16 (1) Level 4 regulations.

⁴²⁰ Article 2 of the ICESCR.

⁴²¹ In *Somalian Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism*, the court declared that refugees are entitled to apply for and renew written consent to operate tuck-shops or spaza shops in terms of the Musina Land Use Management Scheme of 2010 para 46 (a)(iii).

4.5.5. Closure of home affairs during the pandemic and the indirect exclusion of refugees/asylum seekers from social security

The Department of Home Affairs aims at offering a multitude of services to the citizens of South Africa, as well as foreigners who wish to visit, work, or stay in South Africa. One of the purposes that the department serves is that it regulates and facilitates immigration and the movement of persons through ports of entry. It also provides civic and immigration services at foreign missions; and determines the status of asylum seekers and refugees in accordance with international obligations.⁴²² The department thus makes a significant contribution in ensuring national security, enabling economic development, and promoting good international relations.⁴²³

The closure of home affairs offices has also directly impacted other rights, such as education and health. It has left many refugees unable to obtain proof of legal right to reside in the country. Hence, they are commonly referred to as “undocumented” refugees, yet such evidence remains crucial in enrolling for education and health services in South Africa.⁴²⁴ Although offices have been open since 15th April 2021, over a year since their first closure, the process of attending to refugees has been slow, and with Covid-19, the question of whether such permits are legitimate remains an issue. Many refugees are still excluded from applying online for their legal status to be country residents. Without documentation, refugees are classified as private patients under healthcare facilities.⁴²⁵ The implementation of laws that were meant to cater to refugees in South Africa has been haphazard.

It is hard to argue that the regulations pertaining to the closure of home affairs accorded due regard to South Africa’s international and constitutional obligations. As noted above, lack of documentation impacted on critical rights including health and education. Here it must be emphasised that education is critical to children’s best interest. The same can be said of other rights including health and social security. It is to be recalled that in chapter 2, it was emphasised that in terms of article 22 the CRC, to which South Africa is party:

“states Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall,

⁴²² Department of Home Affairs “Civic and immigration services at foreign missions” <http://www.dha.gov.za/index.php/about-us>. (accessed: 12 October 2022).

⁴²³ *Ibid.*

⁴²⁴ A submission by Hlengiwe Mtshatsha at the World’s Refugee Day; Refugee Law Clinic with Lawyers for Human Rights in Pretoria “The Impact of Discriminatory Policies and Practices towards Migrants.” 2021.

⁴²⁵ *Ibid.*

whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”⁴²⁶

Clearly, if the closure of Home Affairs offices, without contingency measures, had the effect of undermining children’s rights including health and education, this is far from South Africa fulfilling its obligations of ensuring that refugee children are protected and accorded humanitarian assistance.

4.6. A glimpse into Uganda’s responses in comparison to South Africa

The Republic of Uganda is a landlocked country in East Africa. It is bordered on the east by Kenya, on the north by Sudan, on the west by the Democratic Republic of the Congo, on the southwest by Rwanda, and on the south by Tanzania. The Southern part of the country includes a substantial portion of Lake Victoria, which is also bordered by Kenya and Tanzania. Uganda takes its name from the Buganda kingdom, which encompasses a portion of the central part of Uganda including the capital city of Uganda - Kampala. Uganda has a long history of hosting refugees. This started in the early 1940s with Polish refugees who fled from Nazi-occupied Europe.⁴²⁷ The Nakivale refugee settlement was formed in 1959 and it is located in the Western part of Uganda.⁴²⁸ Hence, Uganda is considered the oldest refugee camp in Africa. In the mid-1950s almost 80,000 Sudanese refugees, fleeing the first civil war, sought refuge in the country.⁴²⁹ They were only the first of many waves of refugees from different neighbouring countries to arrive. As a result, it has hosted significant numbers of refugees ever since.⁴³⁰

Today, almost 1.5 million refugees live in Uganda, making it the top refugee-hosting country in Africa and one of the top five hosting countries in the world.⁴³¹ Its refugee policy, which guarantees freedom of movement and the right to employment, education, healthcare, and opening its own business, is a crucial factor that has made this country stand out amongst all

⁴²⁶ Article 22 of the CRC.

⁴²⁷ Aljazeera “The Complex story of Polish Refugees in Iran” (2017) <https://www.aljazeera.com/features/2017/6/3/the-complex-story-of-polish-refugees-in-iran>. (accessed: 08 January 2023).

⁴²⁸ N Omata and J Kaplan “Refugee Livelihoods in Kampala, Nakivale and Kyangwali Refugee Settlements” (2013) 95 *Refugee Studies Centre* 26.

⁴²⁹ *Ibid.*

⁴³⁰ The Conversation “Uganda has a remarkable history of hosting refugees, but its efforts are underfunded” <https://theconversation.com/uganda-has-a-remarkable-history-of-hosting-refugees-but-its-efforts-are-underfunded-166706>. (accessed: 12 October 2022).

⁴³¹ *Ibid.*

other hosting countries.⁴³² Regarding Covid-19 responses for refugees in Uganda, the United Nations High Commissioner for Refugees (UNHCR) and the prime minister's office co-led the refugee response and organised humanitarian support and security for millions of refugees in Uganda.⁴³³ Some of the policies the government of Uganda implemented as part of social assistance includes among other things, funding for agriculture inputs and entities was also provided.⁴³⁴

Being one of the largest refugee-hosting countries, Uganda also implemented a refugee policy that guaranteed freedom of movement, employment, education, healthcare, and the right to open their own business.⁴³⁵ This has made this country stand out amongst all other hosting countries. Profoundly, the Covid-19 risk communication in Uganda was very transparent, consistent, and inclusive. The government implemented conventional, social, and print media for public health communication. The president continuously held periodic press briefings to manage public perception and deliver situation reports about the pandemic.⁴³⁶ The covid-19 response committee, led by the prime minister, coordinated the testing, contact tracing, and response in collaboration with districts and local councils (the smallest administrative unit in the country), the Uganda virus research institute, and other relevant stakeholders.⁴³⁷ Moreover, the UNHCR and the prime minister's office co-led the refugee response in Uganda and organised humanitarian support and security for over 1.4 million refugees. In March 2021, Uganda confirmed 1,560 Covid-19 cases as of 15 August 2021. This was inclusive of 60 refugees.⁴³⁸

Furthermore, the government of Uganda also provides refugees with a piece of land to make a living for themselves through farming and building shelters. It is safe to say that refugees in Uganda enjoy citizenship rights save for the obvious exceptions such as the right to vote.⁴³⁹

⁴³² AM Sarki et al. "Uganda as a Role Model for Pandemic Contaminated in Africa" (2020) *National Centre for Biotechnology Information* at 2.

⁴³³ S Momodu "Uganda Stands out in Refugee Hospitality" (2019) *African Renewal* para 7.

⁴³⁴ International Monetary Fund "Policy Responses to Covid-19" (2021) <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>. (accessed 14 July 2022).

⁴³⁵ AM Sarki et al "Uganda as a Role Model for Pandemic Contaminated in Africa" (2020) *National Centre for Biotechnology Information* 2.

⁴³⁶ *Ibid.*

⁴³⁷ International Monetary Fund "Policy Responses to Covid-19" (2021) <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Response-to-COVID-19>. (accessed: 04 May 2021).

⁴³⁸ See the COVID-19 response by UNHCR and refugees in Uganda's significant boost <https://www.unhcr.org/afr/news/stories/2020/8/5f4370114/covid-19-response-by-unhcr-and-refugees-in-ugandareceives-major-boost.html>. Accessed. (26 July 2022).

⁴³⁹ Saeki at 2.

Hence Uganda has been applauded for its hospitality.⁴⁴⁰ Alternatively, some of the policies which the government of Uganda implemented as part of social assistance included: (i) additional funding to the health sector, including for medical equipment, masks, test kits, and vaccines (ii) support to households, including food to the vulnerable and funding for agriculture inputs and entities that support the sector (iii) employment support, such as through the EMYOOGA initiative (iv) support to firms, including waived interest on tax arrears, deferred payments of Pay-As-You-Earn and corporate income tax, and the expedited repayment of VAT refunds, (v) the expansion of labour-intensive public works programs, (vi) acceleration of the development of industrial parks, and (vii) clearance of arrears.⁴⁴¹ However, looking at these policy measures, it is evident that the government of Uganda did not leave behind the vulnerable. Thus, its implementation did accommodate the refugees.

A common factor between South Africa and Uganda is that both countries are hosts of refugees on the African continent.⁴⁴² While South Africa does not host as significant a number as Uganda, it has several refugees who are often attracted to South Africa because of its level of economic stability.⁴⁴³ In one way or the other, evidence suggests that both countries are overwhelmed by the number of refugees they receive. Even though the Covid-19 pandemic directly affected every country, in some countries, refugees were forgotten. Notwithstanding Uganda's modest economic well-being, the government has been lauded as a model for other African countries.⁴⁴⁴ It is to be emphasised that Uganda, just like South Africa, was hit by the Covid-19 pandemic. Studies show that 41% of Ugandans live in poverty,⁴⁴⁵ yet, Uganda hosts the largest refugee population in Africa⁴⁴⁶ and during the Covid-19 pandemic, this country adopted programs that were inclusive of refugees. It may then be concluded that inclusive responses for refugees and asylum seekers despite being a matter of financial resources is also so much one of political will.

⁴⁴⁰ S Momodu “Uganda Stands out in Refugee Hospitality” (2019) www.un.org. Accessed: (26 July 2022).

⁴⁴¹ Department of Home Affairs “Policy Responses to COVID-19” (2021) <https://www.imf.org/en/Topics/imfand-covid19/Policy-Responses-to-COVID-19>. Accessed: (26 July 2022).

⁴⁴² Francisca Vigaud-Walsh and Michael Boyce “Getting it right: Protection of South Sudanese Refugees in Uganda” (2017) *Refugee International* <https://www.refworld.org/docid/58c2c2624.html>. (accessed 28 July 2022).

⁴⁴³ Human Rights Watch “Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa” (1998) <https://www.refworld.org/docid/3a6a8430.html>. (accessed 28 July 2022).

⁴⁴⁴ Submitted by Walters Samah at the World’s Refugee Day, 2021; Africa Renewal “Uganda stands out in refugees hospitality” <https://www.un.org/africarenewal/magazine/december-2018-march-2019/uganda-stands-outrefugees-hospitality>. (accessed 27 July 2021).

⁴⁴⁵ Opportunity International “Uganda” <https://opportunity.org/our-impact/where-we-work/uganda-facts-aboutpoverty#:~:text=In%20Uganda%2C%2041%25%20of%20people,to%20seek%20asylum%20in%20Uganda>. (accessed 15 October 2022).

⁴⁴⁶ *Ibid.*

4.7. Conclusion

The relationship between human rights and the provision of social security is characterised by the states' obligations that are often considered unattainable.⁴⁴⁷ The Covid-19 pandemic has brought even more challenges to the fore once again. Remarkably, the Covid-19 pandemic had dire consequences on the country's economy and social security measures, particularly for refugees. To circumvent the socio-economic hardships brought by the pandemic, the state made specific provisions for various social relief measures to improve the conditions of vulnerable.

This chapter has outlined how the pandemic's successive lockdown measures have reinforced and exacerbated the existing challenges of inequality and insecurity faced by refugees and asylum seekers. It is a fact that refugees are vulnerable group. This is based on the fact that some refugees work in unstable, informal, and often exploitative employment sectors. This means they were prone to direct economic insecurity and had no capital or savings to fall back on. Adequate food and housing insecurity became this group's expected outcome during the pandemic. Access to adequate healthcare has also been made more complex. Broadly, some undermined the social welfare needs of refugees and asylum seekers in South Africa. Therefore, in ensuring that the impact of Covid-19 does not linger, South Africa will need to prioritise cohesion and human rights over national citizenship.

⁴⁴⁷ S.A Karim and P Kruger “Which Rights? Whose Rights? Public Health and Human Rights through the Lens of South Africa's COVID-19 Jurisprudence” (2021) 11 *Constitutional Court Review* at 533.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction to conclusion

As consistently underscored in this this thesis, the Covid-19 pandemic had an overwhelming impact on everyone, including refugees. The government of South Africa responded to this by providing social security packages to vulnerable members of society. However, in doing so, refugees and asylum seekers were left out either directly or indirectly. The overarching issue for resolution in this research has been whether there is an obligation on South Africa to provide social security to refugees, and if so, to what extent this obligation was adhered to during the Covid-19 pandemic. The last four chapters have focused on resolving the said issue and this chapter concludes with the salient features of the discussion and makes appropriate recommendations. This concluding chapter is presented in three sections. The first section provides a summary of the findings of all the chapters in this thesis. The second section makes deductions based on the analysis conducted in all previous chapters. This is followed by recommendations for various organs and stake holders based on the conclusions drawn and deductions made.

5.2. Conclusions in chapters

This research commenced with chapter one. This chapter provided a general background to the study. It spelt out the research objectives, stated the research's problem, and broke down the chapters of the thesis. In light of South Africa's social security responses, many of which excluded refugees and asylum seekers either directly or indirectly, this chapter stated the problem as follows: Was there an obligation on South Africa to afford refugees and asylum seekers social security during the Covid-19 pandemic in terms of both national law and international law? Answering this question became critical because the OAU and UN Conventions, two critical treaties on the protection of refugees, are silent on the right to social security. This leaves unresolved the issue of whether South Africa was justified to exclude, refugees and asylum seekers, whether directly or indirectly, from the social security measures rolled out. This unresolved issue set the pace for a detailed analysis of South Africa's obligations in as far as social security is concerned and whether South Africa's responses during the Covid-19 pandemic adhered to these obligations, if any.

Chapter two dealt with various treaties to which South Africa is party. Understanding South Africa's international treaty obligations became particularly critical because of the status of

international law in South Africa's legal framework. Notably, South Africa's Constitution has been lauded as one of the most internationally friendly constitutions globally.⁴⁴⁸ Various provisions under the Constitution of South Africa make provisions for international law. Since treaties are a vital international law source, these provisions are relevant. For example, according to section 39(1)(b) of the Constitution, international law, including treaties to which South Africa as party, must be considered when interpreting the Bill of Rights.⁴⁴⁹

Reference to international law means that the courts are bound to refer to international treaties which South Africa as party. Having analysed the various treaties on social security, the discussion in chapter two established that treaties that have a bearing on social security and to which South Africa is a party guarantee the right to social security. In guaranteeing the right to social security, these treaties refer to the term “everyone.” By implication, these treaties encompass all individuals, including refugees and asylum seekers. The principle of non-discrimination, entrenched in these treaties in solid terms, further buttresses the requirement of all state parties, including South Africa, not to discriminate against refugees in realising the right to social security.

The chapter also discussed treaties that do not expressly guarantee the right to social security such as the 1951 Convention, OAU Convention, the CEDAW, among others. In analysing these treaties, it was established that various provisions indirectly impose an obligation on South Africa to guarantee refugees' right to social security. Notably, principles such as favourable treatment and non-discrimination obligate South Africa to ensure that refugees are not left behind. Other general rights in these treaties such as the right to work, health care, and education, though not explicitly labelled “social security,” are critical to the realisation of refugees' right to social security. Moreover, although both the 1951 and OAU Convention do not make explicit reference to the right to social security, it is clear that they recognise the viewpoint that silence shall not be deemed “to impair any rights and benefits granted by a Contracting State to refugees apart from [these conventions].”⁴⁵⁰

This, therefore, means that the right to social security, as guaranteed under instruments such as the UDHR and the ICESCR, is very much recognised by treaties on the rights of refugees, namely the OAU and 1951 Conventions. The chapter also analysed treaties specific to the rights

⁴⁴⁸ Business Media Mags “A Progressive Constitution” (2020) www.businessmediamags.co.za. (accessed: 08 January 2023).

⁴⁴⁹ Section 39 (1) (b) of the Constitution of the Republic of South Africa, 1996.

⁴⁵⁰ Article 5 1951 Convention.

of women and children. The analysis established that a good faith interpretation of some provisions in these treaties imposes an obligation on South Africa to afford social security to child and female refugees in dire situations such as the Covid-19 pandemic.

Chapter 3 dealt with the national legal and policy framework on social security in South Africa and its implication on refugees. The chapter set out to assess whether, in terms of South Africa's national laws and policies, South Africa must provide social security to refugees. Various sources were analysed, including the Constitution of the Republic of South Africa, the Refugee Act, and the South African Social Security Agency Act. Regarding the Constitution, it was established that the South Africa's Bill of Rights expressly recognises the rights of all people in our country. Thus, the state must promote these rights and the right of access to social security, which applies to everyone regardless of nationality. An analysis of the jurisprudence in this section also revealed that the Constitutional Court has interpreted the scope of social assistance reimbursements to include permanent residents.

However, it was underscored that while this interpretation makes room for the protection of social security rights of refugees who become permanent residents, such jurisprudence may not go far enough as most refugees do not have permanent residence status. The chapter took note of concerns about the current social security system of South Africa being burdened, thus, making it unrealistic for social security to be extended to non-citizens.⁴⁵¹ While this is a valid concern, the chapter underscored that the Constitution of South Africa, which is the supreme law of the land, has made it explicit that the right to social security is to be enjoyed by "everyone." Thus, unless the Constitution is amended to qualify this commitment, any distinction in the realisation of the right to social security would go squarely against the principle of non-discrimination as firmly entrenched in section 9 of the Constitution.

Chapter four of this study analysed South Africa's Covid-19 responses and the implication that this had on the social security rights of refugees. These measures were weighed against South Africa's treaty law and constitutional obligations. At the heart of the analysis in this chapter was first, the assessment of the extent to which South Africa's social protection responses catered for refugees and, second, the adherence of these measures to South Africa's constitutional and international obligations. In instances where the social protection measures catered for refugees, chapter four conducted an in-depth analysis of the existing administrative

⁴⁵¹ See GM Letlhokwa "Charity begins - but does not end - at home - *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 CC: case" (2005) *Orbiter* at 173.

and policy framework to assess whether they ensured adequate access to social security. It was established that the measures invoked did not adequately cater for refugees.

In the few instances where the measures made provision for refugees, the discussion in the chapter established that the administrative hurdles, including the lack of documentation due to the closure of Home Affairs offices, made these benefits illusory and as good as non-existent. Broadly, some policies implemented to curb the spread of those impacted by Covid19 were not accessible to refugees. Consequently, implementing these policies heightened the already vulnerable conditions that refugees find themselves in South Africa. Overall, it was established that South Africa's responses did not adhere to its international and constitutional obligations.

5.3. Deductions considering the conclusions in chapters

A few deductions can be made from the conclusions drawn based on the analysis in the chapters of this research. These are discussed below.

5.3.1. There was mismatch between the international treaty law and the realisation of the right to social security for refugees during the Covid-19 pandemic

Human rights law, with particular focus on international human rights treaties and South Africa's Bill of Rights, were used as a lens through which to assess South Africa's social security responses during the Covid-19 pandemic. An engagement with the international treaty law regime to which South Africa is party shows a clear mismatch between South Africa's international commitments and its responses. Notably, it is to be recalled that in terms of article 22 of the UDHR, the right to social security is guaranteed to everyone. The term "everyone," as used in entrenching the right to social security under the UDHR, encompasses refugees and asylum seekers because they form part of "everyone." The UDHR, in article 1, explicitly states that "all human beings are born free and equal in dignity and rights."⁴⁵² Additionally, in its Preamble⁴⁵³ the UDHR states that what matters in affording one protection is the "human family." It adds that "recognition of the inherent dignity and the equal and inalienable rights of all members is the foundation of freedom, justice, and peace in the world."⁴⁵⁴ Another necessary provision is article 25(2) of the UDHR,⁴⁵⁵ which states that everyone has a right to a

⁴⁵² Article 1.

⁴⁵³ See the UDHR Preamble.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Article 25 (2) of the UDHR, 1948.

standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond his control.⁴⁵⁶ An adequate standard of living comprises food, clothing, housing, and health care. Accordingly, everyone should be able to access these rights as part of guaranteeing their dignity.⁴⁵⁷

It is to be remembered also that in terms of Article 2 (1) of the ICESCR, states parties to the Covenant are required to take adequate measures and periodically revise them, when necessary, within their maximum available resources to fully realise the rights in the covenant without any discrimination.⁴⁵⁸ Contrary to these international treaty obligations, reports have established that even when refugees are fully documented and eligible for social relief, they are often excluded, with preference being given to South African citizens.⁴⁵⁹ Refugees, therefore, rely heavily on relief efforts from civil society organisations. Based on the manner in which social relief in distress is granted, one is forced to take a step back to reflect on the OAU Refugee Convention, to which South Africa is a party. In terms of article 4 of the 1969 OAU Convention⁴⁶⁰ “member states undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.” However, the way the relief grant was dealt with during the Covid-19 pandemic suggests that refugees were discriminated against on the basis nationality or membership in the refugee social group.⁴⁶¹ A deduction can therefore be made that there is a mismatch between South Africa's international treaty obligations and its responses during the Covid-19 pandemic. This should be a learning curve not just during the Covid-19 pandemic but for future disasters where South Africa needs to intervene to afford social security to those most vulnerable.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ UDHR Art 25.

⁴⁵⁸ Article 2 of the ICESCR.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Article IV of 1969 OAU Convention.

⁴⁶¹ *Ibid.*

5.3.2. The mismatch between South Africa's constitutional guarantees and the realisation of the right to social security for refugees during the Covid-19 pandemic

The Constitution of the Republic of South Africa, which is the supreme law of the land, prohibits discrimination in any manner, thus promoting equality for all, as enshrined in section 9. Section 27(1)(c) of the Constitution goes on to stipulate that “everyone has the right of access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.”⁴⁶² This right is part of a collection of socio-economic rights found in the Bill of Rights. Section 7 of the Constitution⁴⁶³ emphasises the significance of human dignity and equality for everyone and provides valuable guidance on how the state should realise socio-economic rights in the Bill of Rights. Section 7(2) provides that “the state must respect, protect, promote, and fulfil the Bill of Rights.”⁴⁶⁴ Similarly, The Social Assistance Act No. 13 of 2004 and its amendments in 2012 made provision for refugees with a valid refugee permit to access social grants.⁴⁶⁵ Thus, refugees can access seven types of grants divided into two parts: the old age grants for all refugees over the age of 60 and child support grants, which include foster child grants, child support grants, and care dependency grants.

This inclusion is commendable. However, despite refugees' legal right to access social security, policy decisions and the administrative hurdles to accessing this right have rendered it illusory, for example, following the closure of some refugee offices.⁴⁶⁶ The discussions in this thesis underscore that despite a solid framework on social security for refugees, during the Covid-19 pandemic, South Africa did not adhere to these national standards. Notably, it failed to adequately extend all of the social security measures it guarantees under its laws to refugees and asylum seekers, thus, leaving this group more vulnerable. Therefore, from this discussion, it is submitted that the national legal framework guarantees refugees' rights in solid terms. However, during the Covid-19 pandemic, there was an apparent mismatch between the law and its implementation, as evident in the responses to the pandemic.

⁴⁶² Section 27 (1)(c) of the Constitution, 1996.

⁴⁶³ Section 7.

⁴⁶⁴ Section 7 (2).

⁴⁶⁵ SASSA, in its Preamble, emphasises the importance of aligning with the Constitution and states that the Constitution provides that everyone has the right to have access to social security, including the right to social assistance if they cannot support themselves and their dependents.

⁴⁶⁶ A submission by Hlengiwe Mtshatsha at the World's Refugee Day; Refugee Law Clinic with Lawyers for Human Rights in Pretoria “The Impact of Discriminatory Policies and Practices towards Migrants.” 2021.

5.3.3. The Covid-19 pandemic merely exacerbated the exclusion of refugees

Social protection is critical in reducing poverty, exclusion, and inequality while enhancing political stability and social cohesion. It is a powerful tool for preventing and recovering from economic crises, natural disasters, and conflicts. The recent experience with the Covid-19 pandemic has clearly shown this.⁴⁶⁷ Social protection contributes to economic growth by supporting household income, domestic consumption and enhancing human capital and productivity and is, therefore, essential for inclusive growth and sustainable development. A perusal through the recent amendments to legislation and policies, as can be gleaned from the preceding chapters, demonstrates that the exclusion of refugees through laws and policies has always been a reality in South Africa. The pandemic merely placed the spotlight on such exclusion as the vulnerabilities of refugees were made visible in the light of inadequate responses from the government of South Africa. Addressing the inequality resulting from the rolling out of Covid-19 responses would therefore require an overhaul of laws and policies which discriminate against refugees as such discrimination was merely heightened and made more visible during the Covid-19 pandemic.

5.3.4. Policies that include yet exclude refugees

Several social security interventions, such as food parcels, social relief grants, and protective emergency equipment, amongst other things, were put in place to cushion those severely affected by the Covid-19 pandemic, especially the most vulnerable in society. As consistently noted, refugees have been recognised among the vulnerable members of South Africa's society. Indeed, some relief measures make provision for refugees. Notable is the social relief grant. While these interventions are inclusive and praise-worthy, they have also excluded refugees. For example, most refugees and asylum seekers could not access these benefits because they were not registered at the time. This is because they could not prove they were residents of the country. For some, the fault was due to Home Affairs offices being closed following the lockdown regulations.

Moreover, an engagement with the policies rolled out, such as stimulus packages to those in need, would suggest that these interventions are inclusive and benefit all those in need, including refugees. However, these interventions were very much exclusionary because the

⁴⁶⁷ International Labour Organisation “Africa Regional Social Protection Strategy, 2021-2025” at 8.

administrative hurdles excluded many refugees. These realities underscore the fact that realisation of the social-economic rights of refugees needs to go beyond legislative amendments and policy enactments. Mechanisms need to be put in place to ensure that life is breathed upon these laws and policies to foster seamless implementation.

5.3.5. Protection of refugees during a pandemic is also a matter of political will

There is no doubt that addressing the social security needs of refugees and citizens alike, required resources. With many African countries struggling financially, it may be argued that African states do not have adequate resources to realise the right to social security for citizens, let alone refugees. However, this argument would be problematic and cannot stand. The African Commission on Human and Peoples' Rights has dismissed such claims in a number of its recommendations. For example, in the case of *Purohit v The Gambia*, the African Commission stated as follows with regard to a socio-economic right similar to the right to social security:

“millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore..., the African Commission would like to read into Article 16 the obligation on the part of the state party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all aspects without discrimination of any kind.”⁴⁶⁸

In light of the African Commission's recommendation in the *Purohit* case, African states are obliged to take concrete and targeted steps and to give priority to socio-economic rights. It is not enough for states to claim that they do not have resources to fulfil their obligations. Moreover, comparative insights would definitely water down claims of lack of resources, thus, reducing the issue of meeting the social security needs of refugees to a matter of political will. Insights from a low-income country such as Uganda, as was discussed in chapter 4, is testament to the fact that proper prioritisation and political will, despite meagre resources, can ensure that the rights of refugees are protected.

⁴⁶⁸ *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 84.

5.4. Recommendations

In light of the above conclusions and deductions, some recommendations to various organs and stake holders are worthwhile. Notable are the executive, the parliamentary, judiciary, NGOs, and some government departments like the Department of Home Affairs.

5.4.1. The executive

Principles such as favourable treatment and non-discrimination obligate South Africa to ensure that refugees are not left behind. It imposes obligations on states to enforce human rights such that no distinction is made on various grounds, including nationality status or immigration status. In the unfortunate circumstance that pandemics strike, as the case was during the Covid19 pandemic, states, including South Africa, were obligated to ensure that refugees receive “favourable treatment” in enforcing rights, including social security. However, it is unfortunate that the principle of favourable treatment only applies to refugees who are in a country lawfully. It follows then that asylum seekers who do not have documentation for one reason or the other, for example, as a result of the closure of Home Affairs offices during the Covid-19 pandemic, may not be able to benefit from these standards in various contexts including employment. But with the Constitution using broad terminology such as “everyone” in guaranteeing rights such as social security, it is recommended the interventions look beyond the semantics of refugee and asylum seeker to protect the vulnerable in society.

Worthy to note also, it is the executive arm of government that is responsible for issuing regulations. In respect of the Covid-19 Regulations, it is Nkosazana Dlamini-Zuma, the Minister of Cooperative Governance and Traditional Affairs, along with other ministers, who issued regulations on lockdown. The Regulations entailed, among others, the closure of Home Affairs offices and the boarder. Such closure was aimed at curbing the spread of the Covid-19 pandemic. But as was discussed in chapter 4, such measures had a devastating effect on refugees. One may submit that closing down the operations of Home Affairs offices during the pandemic discriminated against refugees and asylum seekers because it left them without documentation necessary in accessing social grants.

It is in these circumstances that principles such as non-discrimination and favourable treatment need to penetrate the various laws and policies of South Africa on issues of refugee protection and the specific issue of social security. Existing policies including those on social security and the White Paper on Immigration need to be revisited with a view to ensuring that the principles

of non-discrimination and favourable treatment inform their content. Also, in ensuring that the impact of Covid-19 does not linger on for so long, it is recommended that legal and policy responses prioritise cohesion and human rights over national citizenship. A rights-based approach will go a long way in aligning South Africa's legal and policy reforms, in as far as the rights of refugees are concerned.

5.4.2. The legislature

It is indisputable that refugees and asylum seekers encounter tremendous struggles upon arrival in South Africa. Some of the challenges they encounter include lack of access to shelter, healthcare facilities, and education. It is common cause that these are basic rights that no one should be deprived of. However, when Covid-19 struck, we saw a shift in guaranteeing these rights, such that refugees and asylum seekers were discriminated against even though South Africa is a state party to treaties that put into question such discriminatory postures. The violation of these rights was exacerbated by already existing laws that undermine the rights of refugees including the amendments to the Refugee Act of 2020 as discussed in chapter 3. With the legislature having power to enact and amend laws, it is recommended that provisions of laws that further undermine the right to social security, as comprehensively discussed in chapter three and four, should be repealed. The parliament should enact laws that are inclusive and that are in alignment with the principle of non-discrimination and favourable treatment.

5.4.3. The judiciary

The judiciary plays a critical role in protecting the rights of the vulnerable in society. Section 39(1)(a) of South Africa's Constitution states that when a court interprets the Bill of Rights, it must promote the values that underline an open and democratic society based on human dignity, equality, and freedom; it must consider international law and may consider foreign law.⁴⁶⁹ During the peak of the Covid-19 pandemic, the Courts played a critical role in protecting the rights of the most vulnerable in society including refugees. For example, in *Community of Hangberg v City of Cape Town*, the Court made pertinent rulings critical to the protection of the most vulnerable in society. The *Hangberg* case pertained to the eviction of an indigent person by the city of Cape Town during the Covid-19 pandemic. Frowning upon this action by the City of Cape Town, the Western Cape High Court noted as follows:

⁴⁶⁹ Section 39.

“we are prevailing in the unchartered and unprecedented challenging times of the Covid-19 pandemic and which presents extreme hardships across our communities and the globe, but indeed most of all for our poorer communities who is the hardest affected by homelessness, unemployment and poverty to name but a few. Insulation against those hardships are appreciated by our government and reflective by the Covid-19 regulations, pronouncements of our courts over the past few months and court directives, which have sought to eradicate the turmoil effects on our poorer communities. Pertinent to the matter at hand, are that evictions have been stayed both in terms of Section 36(1) of Alert Level 3 Regulations, made in terms of Section 27(2) of the Disaster Amendment Act of 2002 as well as the judicial directives.”⁴⁷⁰

At paragraph 10, the Court added:

“the actions of the respondents in repeatedly demolishing the home of Mr. Phillips is a sore and painful reflection of a failure to appreciate the plight of our poor communities, the hardships suffered and what can probably be described as objectifying the indigent as having no individual rights worthy of recognition. Mr. Phillips construction of his home together with being in peaceful and undisturbed possession thereof established his constitutional rights which have been zealously grabbed from him without care of his dignity and other enshrined values of our constitution, his rights in terms of our law and with his humanity simply having been commoditised. This demolition was indeed also inhumane, heartless and done with scant regard to his safety, security and health particularly in light of the Covid19 health pandemic. It bears mentioning that the challenges to government, municipalities, businesses and individuals alike in the face of the country and global pandemic of this consuming virus are overwhelming.”⁴⁷¹

Such decisions, speaking directly to the rights of the vulnerable, are commendable and are a demonstration of Courts’ commitment to interpreting the law to protect the most vulnerable in society. With the discriminatory way refugees have been dealt with, coupled with the laws and policies which have provisions that undermine the social security rights of refugees, it is recommended that courts, when confronted with such matters, apply a similar approach, taking cognizance of South Africa’s international and constitutional obligations.

5.4.4. Civil society organisations (CSOs) and Non-government organisations (NGOs)

CSOs and NGOs played a key role in advocating for the rights of refugees during the pandemic. They have also always played an essential role in litigating on issues of refugee rights as can be gleaned from some of the cases discussed in chapter 3 and 4. Since these CSOs have been a strong pillar for refugees to lean on during the pandemic and they understand the various

⁴⁷⁰ *Hangberg v City of Cape Town* (7837/2020) [2020] ZAWCHC 66 (15 July 2020), para 6

⁴⁷¹ Para 10.

refugee rights at stake, it is recommended that they engage in strategic litigation to ensure that some of the laws and policies that undermine the social security rights of refugees are struck down by the courts. These organisations should also continue in their very praise-worthy role of advocacy on the rights of refugees and asylum seekers.

The UNHCR has observed that the inclusion of refugees in countries' social protection systems is critical to their protection because of the dire circumstances that many often find themselves in.⁴⁷² In this regard, the UNHCR has noted that “policies and programs aimed at preventing or protecting all people against poverty, vulnerability and social exclusion throughout their life-course, with emphasis on vulnerable groups” go a long way in guaranteeing the rights of refugees.⁴⁷³ It has underscored that, where feasible, states should ensure the inclusion of refugees in government social protection systems, national health insurance schemes, and social assistance mechanisms.⁴⁷⁴ During the Covid-19 pandemic, the UNHCR supported a number of refugees in dire situations.⁴⁷⁵ In South Africa, because refugees do not live in camps, tracing them for purposes of meeting their social welfare needs may be a challenge. It is recommended that UNHCR and government responses in this regard should be targeted and context-based to ensure that urban refugees are accessed and not left out.

5.4.5. Department of Home Affairs

Departments like Home Affairs should consider revising policies that negatively affect refugees and asylum seekers. The operations of this department have, to this day, resulted in severe violations of the rights of refugees. Such violations were heightened during the pandemic. The Department, through the Minister of Home Affairs, should develop clear guidelines that cater and include refugees and asylum seekers during pandemics. Failure to do so has a ripple effect with all rights including social security being impacted negatively. For instance, ceasing the operation of this department as one of the measures which were put in place to curb the spread of the pandemic, did more harm than good because to date, the department is still faced with a backlog of applications, with some dating as far back as prior to the pandemic. Some refugees and asylum seekers are still waiting in the queue for assistance. This is quite devastating. It is recommended that Home Affairs leverage technology to ensure that refugee and asylum seeker

⁴⁷² UNHCR, “Social Protection” (2022), <https://www.unhcr.org/social-protection.html>. (accessed: 9 October 2022).

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ UNHCR “Convention and Protocol Relating to the Status of Refugees” <https://www.unhcr.org/socialprotection.html>. (accessed: 25 March 2022).

applications are not held up in the system as such backlog directly undermines their access to basic rights including the right to social security, contrary to South Africa's international and constitutional obligations.

The covid-19 pandemic may currently have slowed down and in future, might be a thing of the past. However, to prepare for any other pandemic that may hit the country, the government should implement robust policies and programs to eliminate the marginalisation, discrimination, and extreme exclusion of refugees and asylum seekers. This must be done through inclusion of refugees and asylum seekers in every departmental policymaking. A rights-based approach, in accordance with the various treaty laws to which South Africa is party, will certainly ensure better outcomes.

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