Redefining Belonging: South Africa's 2024 White Paper Reshapes Asylum Policy

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Received 01 December 2025 / Accepted 01 April 2026 / Published 30 April 2026
DOI: https://doi.org/10.14426/vmcdp404

Abstract

Immigration and asylum laws worldwide continue to wrestle with the persistent, though often obscured issue of race. The 2025 United States Executive Order extending asylum eligibility to white South Africans exemplifies a racialized asylum framework revealing how race remains central to the architecture of international migration regimes. Yet racism is not confined to Western contexts. In South Africa, Black citizens historically oppressed under apartheid also perpetuate racial and xenophobic prejudices, often in ways that may be subconscious yet nonetheless damaging. The paradox is stark when juxtaposed with South Africa's positioning on the global human rights situation. The country has assumed a prominent role in international justice, notably by initiating proceedings before the International Court of Justice in *South Africa v Israel*. Domestically, however, South Africa's failure to address recurrent xenophobic violence exposes a profound dissonance between rhetoric and reality. Violent episodes in 1998, 2008, 2015, 2017, 2019, 2022, 2023, and 2025 against African migrants reveal enduring fractures that undermine human rights commitments and damage the country's moral standing. This article adopts a thematic doctrinal approach, interpreting human rights instruments, statutory provisions, and leading judicial decisions, triangulated with policy materials and contextual evidence. The central contention is that, despite divergent legal frameworks, states collectively contribute to a systematic erosion of refugee protections. Employing the doctrinal legal analysis methodology informed by Critical Race Theory (CRT), the article argues that South Africa's reconciliation project remains largely superficial: beneath the rhetoric of inclusivity, racialized and xenophobic structures persist, exposing contradictions at the heart of its human rights discourse.

Keywords: Asylum seekers, Refugees, Non-refoulement, Racialized immigration, Xenophobia

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INTRODUCTION

The White Paper on Citizenship, Immigration, and Refugee Protection of 2024 (RSA, 2024) in South Africa, which was revised in 2025 (RSA, 2025) has introduced major restrictions that could severely impact asylum seekers and refugees. Key changes include removing refugee status as a pathway to permanent residency or citizenship, establishing asylum-processing centers at borders, and introducing stricter criteria and biometric tracking systems. These measures reflect a shift from a humanitarian to a security-focused approach, raising concerns about respect for the rights of migrants, such as dignity, access to fair asylum, and the potential risk of refoulement. The proposed withdrawal from the 1951 Refugee Convention Relating to the Status of Refugees (UNHCR, 2024) and its 1967 Protocol further implies a retreat from international refugee obligations and potential violation of constitutional rights, which attract legal battles.

The White Paper, through a Draft Revised White Paper on Citizenship, Immigration and Refugee Protection (RSA, 2025), which was open for public comment until 15 February 2026, aims to transition from a residency-based to a merit-based system like a citizenship and visa points-driven model that prioritizes economic contribution and skilled labor. Likewise, new categories for remote workers and startups, a first safe country principle for refugees, digital transformation of the asylum and appeals processes, among others, are the envisioned features of asylum and immigration laws and policies. This is one of the pivotal and exemplary steps that can lead South Africa into asylum crisis. However, there have been no official publications since the public comments closed in February. Yet it is anticipated that the Revised White Paper (RSA, 2025) could become a Draft Bill of Parliament to be debated and potentially be enacted into law.

This article investigates whether recent asylum policy shifts in South Africa are consistent with human rights obligations and international standards. Drawing on the doctrinal legal analysis methodology informed by the Critical Race Theory (CRT), the article situates South Africa's evolving asylum policy within global patterns of racialized migration governance. After the attainment of constitutional democracy in 1994, South Africa promulgated the Refugees Act of 1998, which incorporated the international and regional obligations under the refugee conventions (Ziegler, 2020). In terms of its scope and content, the Refugees Act provides protection of asylum seekers and refugees. More importantly, the Act has been viewed as one of the progressive and more advanced pieces of legislation in South Africa (2020). The principle of non-refoulement is affirmed under section 2 of the Refugees Act.

Despite this clear legal obligation to respect and protect refugees and asylum seekers' rights and uphold the principle of non-refoulement, it has been proven that compliance with non-refoulement remains elusive, since refoulement can occur in direct and indirect forms. For example, South African courts have frequently addressed the disconnect between the protective intent of the Refugees Act and restrictive executive policies that undermine it (Ziegler, 2020). While the Act promises

fair access to asylum and substantive rights for asylum seekers, the government practices like delays in asylum processing, Refugee Reception Office (RRO) closures, and denial of the right to work or study have limited refugees' rights. Courts have intervened to uphold the constitutional and international obligations, emphasizing procedural fairness and upholding the right to dignity and non-refoulement in asylum-application procedures.

To address the loopholes found in the White Paper (RSA, 2024) and the Revised White Paper (RSA, 2025), as reinforced in the refugee and immigration laws in South Africa, this article situates the contextual background of forced migration and investigates how the laws and policies are implemented. It starts with an outline of the contextual framework of the asylum system in South Africa and the centrality of racism and the legacy of colonialism and apartheid (Williams, 1991; Modiri, 2012). It proceeds with a discussion of the changes that ought to be brought by the White Paper, noting revisions and amendments to the Refugees Act. Furthermore, the article discusses the issue of unaccompanied and separated child refugees and proceeds with an analysis of closed-door policies and presents a conclusion and recommendations.

LEGAL FRAMEWORK OF ASYLUM SYSTEM IN SOUTH AFRICA

South Africa's asylum history is inextricably intertwined with migration and the benefits of migrant labor. During apartheid, migrants from the Southern African region were the main drivers of the country's mining and agricultural economies (Wentzel and Tlabela, 2006). The surge of migrant labor to South Africa continued even after the end of apartheid in 1994. This article examines the potential impacts of South Africa's White Paper (RSA, 2024) on the rights and status of African refugees and asylum seekers. It underscores the need to examine not only the evolving nature of South Africa's asylum and refugee handling institutions, but also how they maintain lawfulness in shaping and implementing migration laws and policies.

Against this backdrop, the article examines the scope of obligations imposed by the refugee conventions and implementational challenges in South Africa in different phases. During the colonial and apartheid regimes in South Africa from 1652 to1994, the country's asylum and immigration laws and policies were explicitly racialized to reinforce the broader discriminatory policy of apartheid (Khan, 2022). The Citizenship Act of 1949 denied Black migrants citizenship, while granting it to whites and their children born in and outside South Africa. This resonates with Modiri's (2012) findings after interrogating the visible and invisible racial components in legal and political discourse. Building on the CRT, which is committed to promoting human rights and social justice, this article uses the White Paper (RSA, 2024), as revised a year later (2025), to demonstrate how race can be engrained in immigration and legal framework designs (Pulitano, 2013). The doctrinal legal analysis methodology informed by the CRT is used to demonstrate how race can be entrenched in asylum laws and policies to reinforce the legacy of colonialism and apartheid.

It must be pointed out that despite the adoption of the 1951 Refugee Convention and the Organisation of African Unity (OAU) Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), the principles of non-refoulement had no practical impact in South Africa. Asylum and refugee status determination remained race-based, because migrants who were perceived as "desirables" (Europeans or Africans of European descent) from Rhodesia (Zimbabwe), South West Africa (Namibia), and Mozambique were granted immediate entry, settlement, and full citizenship (Khan, 2022). However, Black migrants from the same countries were deported and categorized as "undesirables" who were allowed entry as migrant laborers and deported when no longer needed (Crush, 2000).

In 1991, closer to the attainment of constitutional democracy, the apartheid government enacted the Aliens Control Act, which empowered the minister to issue temporary permits to "prohibited persons" (Khan, 2022). In terms of this legislation, the temporary permits were issued to "prohibited persons" or Black migrants and refugees. During this period, South Africa had no formal refugee legal framework and was not a party to many international human rights treaties, including the 1951 UN and 1969 OAU Refugee Conventions. Refugees and asylum seekers would be dealt with under the Aliens Control Act, which regulated the admission, residence, and deportation of "aliens." The Act faced criticisms for its overt racial bias, as it failed to extend its protection to Black refugees. The non-white refugees who qualitied for international protection were deported as "illegal aliens" without considering the consequences of such deportation in their countries of origin (Johnson, 2015).

In 1993, toward the end of apartheid, the government signed a Memorandum of Understanding (MoU) with the United Nations High Commissioner for Refugees (UNHCR) concerning Mozambican refugees. The MoU's primary objective was to facilitate repatriation of Black Mozambican refugees, instead of providing them with complete legal status or integration opportunities. This was revealed in the case of *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* where the Constitutional Court challenged the constitutionality of excluding permanent residents from social welfare services. The applicants, Black Mozambican refugees who were granted permanent residency after 1994, challenged such exclusion because it violated their rights to equality and access to social security. The court viewed such exclusion as unconstitutional.

Despite its limitations, the MoU was hailed as a landmark achievement in regional refugee management, reflecting South Africa's commitment to humanitarian principles and the UNHCR's role in post-conflict resettlement. However, this commitment remains questionable to date when examining the adoption of the 2024 White Paper, 2025 Revised White Paper and the 2017 amendments to the Refugees Act of 1998, which all suggest a shift toward a more restrictive and security-driven approach than a human rights approach. The 1951 Refugee Convention under Article 1 defines a refugee as:

> … a person who, owing to a well-founded fear of being persecuted for reasons such as race, is outside the country and is unable, owing to such fear, unwilling to avail himself of the protection of the country of nationality (UNHCR, 2024).

Originally, the 1951 Convention was limited to events that occurred before January 1, 1951, but its 1967 Protocol removed this restriction to include other categories of refugees.

In Africa, Article 2 (3) of the OAU 1969 Refugee Convention broadens the refugee definition by stating that it applies,

> … to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence to seek refuge in another place outside his country of origin (OAU, 1969).

Considering what is stated under both conventions, it appears that the 1951 Convention provides a narrow, individualized definition that focuses on limited grounds, while the 1969 OAU Convention adopts a broader view beyond grounds listed in the 1951 Convention (Ziegler, 2020). The OAU Convention considers a more inclusive approach that recognizes war and generalized violence as legitimate grounds for granting refugee status. The Convention's framework is more adaptable to Africa's mass displacements. It acknowledges displacement caused by armed violence and political instability, allows collective or group refugee status, and addresses the continent's history of conflicts, colonialism, and apartheid as causes of forced migration in Africa. For example, Tanzania granted group asylum to Rwandese who fled to Tanzania during 1959 to 1962 and Burundian refugees who fled to Tanzania in 1972. Later, these refugees were given naturalization—36,000 Rwandese in the 1980s, 160,000 Burundians in 2008, and 1,200 Bantu Somali, while 1,500 were naturalized in 2009. Similarly, South Africa granted special asylum permits to refugees from Zimbabwe in 2014, 2017, and 2021, as well as group special permits to refugees from Angola. The OAU Convention considers historical and political realities and allows countries' flexibility to expand the definition of a refugee.

Contrary to the 1951 Convention, the OAU Convention focuses on individual persecution based on specific grounds without explicitly recognizing war or generalized violence and aggression as a basis for refugee status determination. South Africa ratified the 1951 and 1969 conventions in 1996, which provide for the basis of refugee protection, such as complying with the principle of non-refoulement, as well as the minimum standards for State Parties to adhere to how refugees should be treated (UNHCR, 2024).

The 1951 Refugee Convention provides for State Parties' legal obligations to protect and promote the rights of asylum seekers and refugees (UNHCR, 2024).

Article 33 of the Convention prohibits refoulement—the expulsion, deportation, return, or extradition of refugees or asylum seekers to their countries of origin where their lives could be threatened or put in danger. One of the objectives of the 1951 Refugee Convention is to set a practical framework for treating refugees in a manner akin to that of other foreign nationals in terms of Article 7.

Furthermore, in 1994 South Africa ratified the International Covenant on Civil and Political Rights (ICCPR) of 1966 as well as other important human rights treaties. The ICCPR, for example, provides for fundamental human rights, which include civil and political rights, to be enjoyed by all human beings. The Constitution of the Republic of South Africa (RSA, 1996) under section 39 1(b) empowers courts to consider international law when interpreting human rights provisions. Additionally, courts must favor any reasonable interpretation that complies with international law under section 233 when interpreting legislation. The promulgated refugee laws and regulations govern the admission of individuals seeking asylum in South Africa due to fleeing or attempting to flee persecution in their countries of origin. These laws and regulations guarantee the constitutionally entrenched rights to individuals seeking asylum in South Arica (Kavuro, 2022). South Africa favors the urban refugee policy as opposed to an encampment policy found in other African countries like Tanzania, Namibia, Malawi, Zambia, and Kenya.

GLOBAL ASYLUM GEOPOLITICAL TRENDS

During the apartheid era, South Africa was a refugee-producing country, with an estimated 38,600 refugees in 1984; however, this number reduced dramatically since 27 April 1994. In 2021 there were 4025 refugees from South Africa globally (Statistics South Africa (Stats SA), 2023). However, this number has recently increased following the implementation of the United States (US) Presidential Executive Order of 2025, which granted asylum to approximately 4,500 white South Africans who claimed discrimination and "genocide" (Drenon, 2025; US Government, 2025). The US Executive Order demonstrates a continued pattern of racial bias and exclusionary practices in the asylum processes (Pulitano, 2013), akin to what happened in South Africa under the apartheid regime (Modiri, 2012). This was the case with migration laws and its segregation patterns (Khan, 2022).

It is important to point out that anti-migration sentiments are not unique to South Africa because of global geopolitical underlying forces that support the asylum and immigration shifts (Pulitano, 2013). The global state of individualism and third-country deportations pioneered by conservative politicians such as Donald Trump in the US (Riemer, 2025; Totenberg, 2025), Boris Johnson in the United Kingdom (UK) (B. Johnson, 2022), Marine Le Pen in France (*The Guardian*, 2023), Gayton McKenzie in South Africa (Lekabe, 2024), and others have publicly supported anti-refugee and anti-migration sentiments. This suggests that geopolitical narratives are circumventing the law and favor "third-country deportations" as durable solutions to the forced migration crisis. For example, in April 2022, the UK and Rwanda signed the

MoU between the Government of the UK and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement (the UK asylum MoU) (Government of the UK, 2023). This partnership allowed the UK to forcibly deport asylum seekers to Rwanda. In return, the UK agreed to provide developmental funding and cover the processing and integration costs for deportees. The MoU was signed in 2022 and would be renewable annually upon its expiry. However, the UK asylum MoU's legality was challenged in the case of R *(on the application of AAA and others) v Secretary of State for the Home Department*. The High Court upheld its legality in December 2022, but the Court of Appeal later ruled that Rwanda could not be deemed a safe third country. In 2024, Prime Minister Keir Starmer formally ended the deportation policy, a decision widely supported by human rights groups (*Al Jazeera*, 2024).

Interestingly, after the failure of the UK asylum MoU, Rwanda and the US have concluded a similar third-country deportation agreement, despite Rwanda still being among the refugee-producing nations (Fleming, 2025). This demonstrates how geopolitical shifts influence asylum seeking around the world. This trend is also outlined in the European Commission's 2025 proposal, which marks a significant shift in the global migration laws and policies. This proposal, which seeks to rationalize the refugee repatriation process by allowing European Union (EU) Member States to deport migrants, not only to their countries of origin but also to third countries (European Commission, 2025). Similar agreements have been concluded between US and Latin American countries to allow Venezuelan migrants to be deported to Mexico as an extension of a US immigration detention facility (*AP News*, 2025). Likewise, asylum seekers from central Asia were flown to Panama and Costa Rica to await the so-called "voluntary" repatriation to their countries of origin. Venezuelans previously held at Guantanamo Bay were left on a Honduran tarmac before being deported to Caracas in Venezuela (*AP News*, 2025).

This article contends that the geopolitical arrangements extend beyond traditional refugee re-admission frameworks, which once facilitated the temporary relocation of individuals to countries unrelated to their migration paths, serving merely as interim holding points pending final repatriation. The emergence of a third-country deportation policy shift represents a troubling evolution in global migration and asylum control (Pulitano, 2013; RSA, 2025). Systemic racism and erratic xenophobic surges in the US, for example, call for efforts to bring racial justice into immigration law (K.R. Johnson, 2022). This is reflected in a strategy driven by deterrence, cruelty, and political convenience influenced by individualism and racist ideologies, as evident in the white South African "refugees" being granted asylum in the US and should be viewed as a matter of serious concern. This places the global refugee protection regime at a critical juncture, which suggests a potential collapse of the international refugee legal framework and has far-reaching implications for national refugee legal frameworks. Anti-Black African immigrant sentiments in

South Africa, for example, have contributed in great measure to fueling xenophobia (Lekabe, 2024; Vaughn, 2025).

CHANGES INTRODUCED BY THE 2024 WHITE PAPER AND AMENDMENTS TO THE 1998 REFUGEES ACT

Despite the South African refugee protection under the 1998 Refugees Act, the 1951 Refugee Convention, the 1969 OAU Refugee Convention, and the South African Constitution, in 2023 the then Minister of Home Affairs, Dr Aaron Motsoaledi, announced reforms in terms of South Africa's citizenship, immigration, and refugee laws (SA News, 2023), specifically the adoption of the White Paper (RSA, 2024). The Minister asserted that the White Paper aims to provide a comprehensive framework for granting residency and citizenship to immigrants, including refugees and asylum seekers but prioritizes the protection of the rights of South African citizens under section 97 (1).The White Paper (RSA, 2024), as revised in 2025, emphasizes that due to the country's existing challenging reality and stresses, South Africa cannot extend citizenship to all migrants who cross its borders in the hope of benefiting from the rights and privileges extended to South African citizens.

During the drafting of the White Paper, a comparison was made with developed countries like the US, Canada, Switzerland, and the UK; yet these countries that have superior resources compared to South Africa have implemented stringent immigration laws to protect the interests and rights of their citizens (SA News, 2023). Dr Motsoaledi noted that South Africa has different categories of legislation that do not complement each other without framework considerations. The minister indicated that the main objective of the 2024 White Paper was for South Africa to withdraw from the 1951 and 1969 Refugee Conventions. Furthermore, the minister alluded to the government's intention to repeal the current Citizenship Act and the Births and Registrations Act and replace them with a single piece of legislation that combines citizenship, immigration, and protection of refugees. The minister claimed that this course of action would eradicate the loopholes found in the legislation and strengthen the government's argument for rejecting asylum seekers' applications if they had traveled to South Africa through other countries (SA News, 2023).

The approach to refugee protection of the current Minister of Home Affairs, Dr Leon Schreiber, is not different from his predecessor. Dr Schreiber has also taken a harder stance on immigration, prioritizing national security and economic stability over protection of asylum seekers and refugees. His stance on immigration and refugee policies reflects the government's broader efforts to tighten border control and manage migration more effectively. The minister's views on withdrawing from non-refoulement imply a shift toward stricter asylum and immigration laws and policies (Simba et al., 2025).

It is evident that the 2024 White Paper has a negative impact on African asylum seekers (Chothia, 2023). The acclaimed positive aspects of the 1998 Refugees Act, Refugees Amendment Act (2017) and Regulations of 2018, which came into

effect on January 1, 2020, have significantly altered South Africa's refugee protection commitment, severely limiting the access to asylum-seeking and thereby depriving asylum seekers of the essential rights they previously had. The automatic right to work and study in terms of section 22 (9) of the Refugees Act of 1998 has been limited, resulting in refugees and asylum seekers being ineligible to work or study. Moreover, certain refugees who had been recognized under the 1951 and 1969 Refugee Conventions have had their status and protection revoked by the 2017 Refugees Amendment Act (RAA).

This article argues that several provisions of the 2017 RAA contradict the constitution and South Africa's international obligations (Ziegler, 2020). There is a noticeable shift in the asylum policies and approaches in South Africa toward restricting refugees at the borders, contrary to what was promised in the 1990s. It is evident from the wording of the 2017 RAA, the Draft Regulations of 2018, and the White Paper (RSA, 2024), as revised, that the Department of Home Affairs (DHA) has resolved to limit the protection of asylum seekers and refugees (Khan and Lee, 2018). For example, South Africa has threatened to withdraw from the 1951 Refugee Convention (UNHCR, 2024), citing concerns over national security, economic strain, and asylum system abuses. The government maintains that many asylum seekers are economic migrants who abuse the asylum system by adding pressure to public services and fueling xenophobic tensions between local communities and foreign nationals.

The White Paper (RSA, 2024) considers citizenship and immigration as being driven by economic, security, and public interests. However, Simba et al. (2025), while referring to "academic xenophobia," expose how policy frameworks have influenced the xenophobic climate, even within South African academic spaces. They contend that xenophobia does not present itself only as public sentiment and street-level vigilantism—like the "Operation Dudula" (meaning to push out) movement— but that xenophobia has been institutionalized, given metrics, and normalized in the shadow of the universities (2025). This suggests that South Africa's reconciliation project remains largely superficial, as the persistence of xenophobia toward Black immigrants undermines the nation's commitment to upholding its constitutional and international obligations, as well as the sentiments of Ubuntu. This resonates with Modiri (2012), who uses the CRT and argues that legal scholars, practitioners, and judges have disregarded how racial identities and orders can be intertwined in social, legal, labor, and political systems.

Based on the current realities, effective implementation of the Refugees Act is failing, due to several factors. These include the DHA's bureaucracy, stringent refugee and immigration laws and policies, as evident in the 2017 RAA and the revised 2025 White Paper. The central tenet of refugee law is the principle of non-refoulement (Johnson, 2015). Article 33 of the 1951 Refugee Convention prohibits the expulsion or return of a refugee to a country where their "life or freedom would be threatened based on grounds like race, religion, nationality, membership of a particular social

group or political opinion." This principle obliges the State Parties to the Refugee Conventions and the international community to protect refugees' fundamental rights and freedoms (Johnson, 2015). However, case law reveals that South Africa has become non-compliant with regard to non-refoulement, as evidenced by cases like *Ruta v Minister of Home Affairs, Abore v Minister of Home Affairs*, and *Scalabrini Centre of Cape Town v Minister of Home Affairs*, just to mention a few.

One of the challenges of refugee law in South Africa is the application of the Refugees Act. Once an asylum visa is granted, asylum seekers must renew it within one month of expiry, contrary to three months under section 22 of the Act. The DHA implements strict detention and deportation processes, where asylum seekers who receive their final rejection, can be detained or deported. Section 22(12) states that where an asylum seeker fails to renew the visa within one month, the application is deemed abandoned by the applicant. They may not re-apply and would automatically be regarded as an "illegal foreigner," according to section 33 (2) the Immigration Act, and then be eligible for deportation. The case of *Scalabrini Centre of Cape Town v Minister of Home Affairs* questioned the constitutionality of sections 22 (12) and (13) of the Refugees Act, because they do not comply with the principle of non-refoulement and are thus inconsistent with international law.

The outcome of the *Scalabrini Centre of Cape Town v Minister of Home Affairs* and the *Ashebo v Minister of Home Affairs* cases are among a long list of judgments against the DHA and the Minister of Home Affairs in challenging the interpretation of the 1998 Refugees Act, the 2017 RAA, and the 2002 Immigration Act. Similarly, in *Abore v Minister of Home Affairs*, the court had to decide, inter alia, whether the new amendments to the Refugees Act were applicable to an illegal foreigner who expresses an interest in applying for asylum in South Africa. This question was answered in 2018 in *Ruta v Minister of Home Affairs*, which set an important precedent for the application of non-refoulement. The Constitutional Court addressed three key legal issues: First, whether an "illegal foreigner" who claims refugee status and intends seeking asylum should be processed under the Refugees Act rather than the Immigration Act. Second, whether a 15-month delay between Mr Ruta's arrival in December 2014 and his arrest in March 2016 disqualified him from applying for asylum. Third, it questioned whether a foreigner who entered and stayed in South Africa illegally could still exercise the right to seek asylum after contravening national laws. The court ruled in Mr Ruta's favor, stating that a delay in an asylum application does not invalidate an applicant's right to asylum seeking. Justice Cameron (Constitutional Court) referred to section 2 of the Refugees Act and affirmed that non-refoulement applies to both de facto and de jure refugees. Mr Ruta's actions were deemed unlawful under section 44 of the Immigration Act, which describes "an illegal foreigner or any individual whose status or citizenship cannot be determined." When a person's legal status or nationality is unclear, such person can be classified as an irregular immigrant or illegal person.

It is important to acknowledge that when an individual enters a country without following the proper legal procedures and later seeks asylum only after being arrested for criminal offenses, as it was in the Ruta case, it may still raise concerns regarding fraud and abuse of the asylum system. Yet the Ruta judgment remains valid, as it considers that refugees are vulnerable persons who flee persecution, their lives are in danger, and they try to find a place of refuge in another country for safety and protection. Therefore, finding a safer place is the priority for refugees, more than formalizing asylum processes, which is an indication that they should not be disqualified as genuine refugees. Kapindu (2020) suggests that the Ruta judgment is correct, because it considers non-derogability of the principle of non-refoulement. The author further elaborates that once a person claims to be an asylum seeker, the receiving state must rigorously investigate the asylum claim before resorting to immigration processes that involve deportation, to comply with the principle of non-refoulement (2020).

The Ruta judgment remains significant, because it summonses other countries globally for their increasingly restrictive advances toward granting asylum to refugees who are in genuine need of protection. The Ruta case reminds African countries, including South Africa, to respond to refugee and asylum-seeker problems cognizant of human rights and humanitarian approaches within the spirit of the OAU Refugee Convention, ensuring that the application of non-refoulement under domestic law is upheld.

This article argues that asylum seekers and refugees in South Africa should be afforded fundamental rights, as prescribed in the major refugee conventions, specifically upholding the principle of non-refoulement and the country's constitution. The White Paper (RSA, 2024), on the other hand, suggests that non-refoulement should be limited, because foreign nationals burden the national fiscal allocations, thus unduly depleting state resources. Immigrants make up approximately 4.2% of the population (Stats SA, 2023). This raises the question of whether legislative reforms that aim to limit the socio-economic rights of immigrants who comprise less than 4.2% of the national population, would solve the national financial burden and socio-economic crisis in South Africa.

UNACCOMPANIED AND SEPARATED CHILD REFUGEES

It is evident that the White Paper (RSA, 2024) poses severe risks to unaccompanied and separated child refugees, specifically the children whose parents are Black asylum seekers and refugees. While aiming to reform the asylum system, the White Paper introduces stricter border controls, detention-like reception centers and limits on individual refugee assessments, which often undermine children's rights and protection. As stated earlier, the apartheid regime denied Black migrants and their children citizenship, while granting it to white immigrants and their children. This observation corroborates the CRT, that while race is an illusional concept, there is a pressing need for a critical analysis about race and its implications for social,

political, and legal designs (Modiri, 2012). The case of *Rafoneke v Minister of Justice and Correctional Services*, for example, questioned the impugned provisions of the Legal Practice Act of 2014 that prevent Black foreign nationals who are deemed neither citizens nor permanent residents from being legal practitioners.

In the asylum-seeking context, the lack of clear procedures for guardianship, family re-unification, and birth registration increases the risk of statelessness and perpetuates the vulnerability of Black child immigrants. Moreover, the White Paper (RSA, 2024), as revised, does not adequately reflect South Africa's obligations under international children's rights legal frameworks in terms of the Convention on the Rights of the Child (CRC) of 1989 and the African Charter on the Rights and Welfare of the Child of 1990. This raises concerns that the best interests of the children may not be prioritized in the White Paper's implementation.

In South Africa, the Children's Act of 2005 mandates special care for all children, including unaccompanied and separated child refugees, regardless of their asylum status. The Department of Social Development can assign social workers to assess and place unaccompanied and separated children in child and youth care centers. Also, the Refugees Act permits asylum procedure adjustments to allow child refugees to lodge claims through their guardians or get assistance from nongovernmental organizations or social workers. However, administrative delays, inconsistent application of asylum procedures, and lack of specialized shelters remain among the challenges that undocumented, unaccompanied, and separated child refugees face. Children with undocumented or separated statuses are frequently excluded from access to social security services, and prolonged lack of documentation may lead to their stateless status, detention, and deportation.

Mahleza and Maake-Malatji (2024) rightly observe that gaps in the South African legal and policy frameworks for birth registration often result in children remaining undocumented, resulting in statelessness and potential deportation. The case of the *Centre for Child Law and Others v Minister of Home Affairs and Others* questioned the detention of unaccompanied foreign children in a deportation facility, which was viewed as unlawful under the Children's Act and the country's constitution. The experiences and treatment of undocumented, unaccompanied, and separated child refugees in South Africa undoubtedly do not conform to sections 39 and 233 of the constitution.

One of the key challenges is the issue of undocumented Black refugee and asylum seeker mothers who reside and give birth in South Africa but are unable to register their children. These limitations have intensified the socio-economic problems that manifest in the lack of access to educational rights, which can easily lead to discrimination and reinforce the lack of access to socio-economic support and rights. It is common practice that children must present identification documents before they can be officially registered at school. In the 2020 case of the *Centre for Child Law v Minister of Basic Education*, the court emphasized that "over a million children have been conditionally admitted to schools, with the risk of exclusion

should they fail to submit the required documentation." The White Paper refers to the *Centre for Child Law v Minister of Basic Education* and states that although this case extended the right to education to undocumented children, yet some countries have limited the right to education or placed conditions on asylum seekers and refugees by entering reservations to the 1951 Refugee Convention and its 1967 Protocol. These reservations often violate migrants' socio-economic rights, which many African countries argue that they cannot be extended to asylum seekers and refugees due to limited resources. South Africa faces similar socio-economic rights constraints and declares that it is unable to extend these rights to child refugees and asylum seekers.

CLOSED-DOOR POLICY IN SOUTH AFRICA

In Africa, there is an interplay of political instability, economic hardship, and porous borders that have influenced the way asylum should be granted (Kaisi et al., 2024). The profound socio-economic and political implications of illegal immigration have forced countries, including South Africa, to adopt stringent refugee and immigration laws and policies. They often raise issues, such as increased pressure on strained public services and security concerns associated with cross-border crimes like human trafficking and arms and illegal drug smuggling. The influx of illegal immigrants often overwhelms border management systems, exposing the gaps in the allocation of resources, operational efficiency, and inter-agency coordination (Kamazima, 2018).

The above challenges underscore the urgent need for robust immigration policies and coordinated efforts to address the multifaceted impacts of illegal immigration, political stability, and economic development. Although there is international cooperation in border management, such as the African Union Border Program, established in 2007, South Africa continues to grapple with the surge of de jure and de facto refugees. Since the attainment of constitutional democracy in 1994, South Africa has hosted and continue to host refugees from Zimbabwe, the Democratic Republic of the Congo (DRC, formerly Zaire), Rwanda, Burundi, Ethiopia, Malawi, Sudan, Cameroon, Eritrea, Pakistan, and others. In the late 1990s and early 2000s, the principle of non-refoulement was respected; however, since the mid-2000s, there has been a paradigm shift to adopt a closed-door policy.

During the 1960s, newly independent states in Southern Africa like Zambia, Malawi, and Tanzania often received waves of refugees from countries that were still engaged in battles against colonialism and apartheid, like South Africa, Namibia, Mozambique, and Angola through their "open-door" policy (Crisp, 2000). In the Great Lakes Region of Africa, many refugees who fled from the political instability in Rwanda and Burundi in the 1960s and 1970s were granted asylum in Tanzania, Uganda, and the DRC. Similarly, asylum was extended to the victims of the political instability in the Horn of Africa. It is this progressive attitude toward the acceptance of refugees that led to Africa's refugee policy being called an "open-door policy," in line with the OAU Convention (Rutinwa, 1999). As stated in Article 2(1) of

the OAU Convention, Member States of the AU are instructed to "use their best endeavors consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality." This provision shows that compliance with the non-refoulement principle had to be demonstrated in a practical rather than a theoretical way.

While the refugee problem has escalated, African countries are becoming less committed to receiving asylum seekers and refugees (Rutinwa, 1999; Kavuro, 2022). Instead of opening their doors to asylum seekers who fear persecution, as it was in the 1960s to the late 1990s, African countries currently prefer refugees to be protected in the "safe zones" in their countries of origin, even if conditions in these countries remain volatile. The DRC, Sudan, Ethiopia, Somalia, Rwanda, Burundi, and Mozambique are examples of this scenario. Many countries regularly reject refugees' entry at the borders or deport them, even if the conditions from which they have fled, persist. Many refugees whose asylum applications succeed, are received in host countries with what Rutinwa (1999) calls "pseudo asylum." As a result, their security, dignity, and socio-economic needs are not guaranteed. Similarly, many countries have become reluctant to encourage and facilitate local integration or to offer refugees resettlement opportunities. Instead, involuntary repatriation is favored at the onset, despite the unchanging conditions in the countries of origin. For example, South Africa, which has been viewed as a progressive country in Africa, adopted the Green Paper on International Migration in 1997, which proposed "rights-regarding, solution-oriented and temporary protection" for refugees.

The Green Paper recommended mandated repatriation once refugees have received protection for five years. One year later, in 2018, the White Paper on Migration from an international refugee law perspective was adopted. The then Deputy Minister for Home Affairs of South Africa, Lindiwe Sisulu stated:

> The social and economic mobility of large numbers of foreign nationals when many citizens remain impoverished, criminal activity on the part of some, and the presence of refugees has resulted in little differentiation between immigrants, economic migrants and refugees. Foreign nationals are perceived as a "problem" that must be "dealt with" (Sisulu, 1998).

From the above, it can be inferred that South Africa, as reflected in the 2017 Green Paper, the 2018 White Paper, and the keynote address by the then deputy minister, tends to adopt short-term solutions to a refugee crisis. This stance has often been used to justify the country's partial or non-compliance with the obligations set out in the Refugee Conventions.

The "closed-door policies" toward refugees have been justified by several factors stated above, such as security and crime concerns linked to some refugees, but also lack of capacity, international and regional burden-sharing, influence of

restrictive Western asylum policies, and xenophobia (direct and indirect or both). Direct xenophobia in South Africa has manifested through a series of violent incidents over the years, highlighting deep-rooted tensions and hatred toward Black foreign nationals (OHCHR, 2022). Additionally, xenophobia in South Africa has perpetuated hostility toward Black migrants through recurring violent attacks from 2008 to 2025 and the rise of organized anti-migrant movements, such as "Operation Dudula" and "March March" (Amusan and Mchunu, 2018; Chiumbu and Moyo, 2018; Uchechukwu et al., 2020; Hlatshwayo, 2023; Chekenya, 2024; HRW, 2024; Esau, 2025; Khumalo, 2025; Sithole, 2025; Madlokovana, 2026).

The abovementioned xenophobic events reflect a pattern of growing hostility, with actions widely condemned and referred to by human rights groups as "organized xenophobia." Also, indirect xenophobia in South Africa manifests through systemic discrimination and social exclusion rather than overt violence. Xenophobia is embedded in institutional practices, policies, and public attitudes that marginalize foreign nationals, particularly African undocumented immigrants.

Foreign nationals, including asylum seekers and refugees often face barriers to access essential services, such as health care and education, with many being denied treatment or school admission due to documentation issues. Bureaucratic inefficiencies at the DHA further complicate access to legal documentation, leading to forced illegality that results in detentions and deportations. In housing, foreign nationals are frequently excluded from public support, subjected to arbitrary evictions, charged exorbitant rentals, and targeted by community-led illegal actions with little legal recourse. Employment opportunities are also limited by discriminatory local hiring practices, while anti-immigrant campaigns like "Operation Dudula" and "March March" put pressure on businesses and employers to dismiss foreign workers. Additionally, migrants often lack protection from the justice system, with police dismissing their complaints and xenophobia-related crimes rarely being prosecuted. These indirect forms of xenophobia, though less visible than physical violence, have a profound and lasting negative impact on the lives of Black migrants in South Africa.

In summary, local communities in refugee-hosting states do not have the same sympathy they had for asylum seekers in the 1960s and 1970s who fled their countries due to struggles against colonialism, racial domination, and apartheid. Coincidentally, the xenophobic sentiments emerged at a time when Africa is democratizing and governments are compelled to consider public opinion in formulating various policies (Masiko-Mpaka, 2023). The result has been the adoption of anti-refugee platforms by some politicians, informing the adoption of anti-refugee policies. Some politicians maintain that embracing the open-door policy was a wrong move (Rwegasira, 1995). Africa remains a fragile continent—economically, socially, and politically. The Great Lakes Region and the Horn of Africa are traditionally known as main refugee-generating parts of the continent and remain politically volatile to date. Likewise, the central, western, and southern sub-regions are not exonerated—the

political instability in the Central African Republic, Mali, Burkina Fasso, Niger, and Mozambique serves to illustrate this unfortunate reality.

CONCLUSION

South Africa's commitment to asylum provision has undergone an overwhelming reform. While the demand for asylum protection continues to rise amid global political instability, the country's willingness to host refugees has declined sharply. This regression contrasts starkly with the "open-door policy" that characterized the 1960s to the 1990s, notably, the post-1994 democratic era. Following the end of apartheid, South Africa embraced asylum as a constitutional and international humanitarian obligation aligned with the 1951 and 1969 Refugee Conventions and the laudable spirit of Ubuntu. The principle of non-refoulement was respected and granting asylum was viewed not merely as an act of charity but as a moral and legal duty. The 1994 democratic government sought to emulate other African states by developing a comprehensive refugee protection framework that recognized Black refugees, an approach radically opposed the apartheid's exclusionary practices. The White Paper (RSA, 2024), however, signals a decisive departure from post-1994 democratic-era commitments.

This article argues that the 2024 White Paper as revised represents a regressive shift, reframing refugee protection through the lens of securitization and exclusion. The 2024 White Paper undermines core principles of human dignity, equality, and non-refoulement, effectively transforming asylum from a rights-based to a security-driven and merit-based regime. Judicial decisions such as the Ruta, Abore, Ashebo, and Scalabrini Centre of Cape Town cases illustrate the courts' crucial, yet strained role in countering executive overreach and defending constitutional safeguards. Viewed through a CRT lens and doctrinal legal analysis, both White Papers (RSA, 2024, 2025) perpetuate racialized and postcolonial hierarchies reminiscent of apartheid-era exclusionary practices (Modiri, 2012). The failure to protect vulnerable groups, such as Black unaccompanied and separated child refugees, constitutes a violation of the constitution, the Children's Act, and the CRC. The institutional shortcomings reflect deeper socio-political factors of economic insecurity, populist rhetoric, and xenophobic media narratives that entrench exclusionary attitudes, specifically against Black African immigrants.

Enforcing refugee law in South Africa faces systemic internal weaknesses and external pressures. Administrative inefficiency, inadequate training, corruption, and the absence of political will often hinder meaningful asylum reforms (Amit, 2015). The high unemployment rate has strained public resources, and poverty exacerbates tensions between refugees and host communities, fueling xenophobic violence (Vaughn, 2025). The government's response of tightening migration controls and framing asylum seekers as security threats undermines constitutional commitments and further erodes public trust.

The article notes that security concerns complicate migration management. Porous borders, weak enforcement mechanisms, and corruption facilitate illegal migration, human trafficking, and transnational crimes. Yet these challenges are worsened by poor regional and international cooperation, resulting in fragmented and inconsistent asylum responses. Instead of fostering solidarity and burden-sharing, many African states resort to regressive laws and policies that contravene their international and constitutional obligations.

To move forward, innovative and cooperative policy approaches remain essential. For example, South Africa must strengthen asylum systems, while the promotion of equitable burden-sharing, and secure financial and technical assistance from international partners remains imperative. As indicated in the White Paper (RSA, 2024), the challenges that the DHA faces and the gaps evident in the asylum legislation can be addressed through policy reforms. The AU, donor states, and international organizations must coordinate sustainable solutions, including resettlement programs, and local integration initiatives, while addressing the root causes of forced displacement in a rigorous manner. Genuine refugee protection requires recognizing asylum seekers as rights-bearing individuals, as stated in the UN 1951 Refugee Convention, its 1967 Protocol, and the 1969 OAU Refugee Convention. Moreover, the application of Ubuntu offers a radical critical counter-narrative. It emphasizes communal responsibility and shared humanity, in contrast to securitized migration governance. Upholding Ubuntu demands a recommitment to constitutional supremacy and the protection of vulnerable Black African immigrants. The 2024 White Paper, if left unchallenged, risks institutionalizing xenophobia, weakening human rights protection, and tarnishing South Africa's international reputation in promoting human rights, as demonstrated in the country's *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (UN, 2025).

In this context, this article recommends concrete policy interventions, such as establishing an independent asylum oversight body, enhancing parliamentary accountability, and advancing regional frameworks grounded in solidarity and human dignity. Moreover, Western nations must model humane refugee practices through global ethical consistency where refugee protection can be standardized. Finally, civic education is indispensable in transforming public perceptions and media narratives. Governments, civil society organizations, and academic institutions must collaborate to counter xenophobia and promote empathy toward asylum seekers and refugees. Training for public officials, legal practitioners, media professionals, and community leaders should emphasize human rights obligations and the socio-economic contributions of immigrants. Encouraging open dialogue on economic, political, and cultural factors that shape migration policy can help to dismantle prejudices and inspire institutional reforms in South Africa.

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