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The legal framework and the role of the state in protecting undocumented immigrants against forced eviction in South Africa

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LLM (Multidisciplinary Human Rights)**

by

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Declaration of originality

I declare that this dissertation is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Masters in Law of Multidisciplinary Human Rights by course work and dissertation at the University of Pretoria, Pretoria. It has not been submitted before for any degree or examination in this or any other university.

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Abbreviations and acronyms

| | |
|-------|---|
| IOM | International Organisation on Migration |
| SADC | Southern African Development Community |
| PIE | Prevention of Illegal Eviction from and Unlawful Occupation of Land Act |
| LRC. | Lindela Repatriation Centre |
| RSDO | Refugee Status Determination Officer |
| RRO. | Refugee Reception Centre |
| HRC | Human Right Commission |
| UNHCR | United Nations High Commissioner for Refugees |
| OUA | The Organisation of African Unity |
| ILO | International Labour Organisation |
| GMG | The Global Migration Group |
| LDC | Least Developed Countries |
| HRBA | Human Rights Based Approach |
| NGO | Non-governmental Organisation |
| NAP | National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| SAHRC | South African Human Rights Commission |
| SADC | Southern African Development Community |
| UN | United Nations |

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Abstract

The 1996 South African Constitution and section 26 of the Prevention of Illegal Eviction from and Unlawful Occupation Act guarantee the protection of persons who live in South Africa against unlawful eviction or discriminatory or arbitrary removals from one's place of shelter. Undocumented migrants living in South Africa should be given this protection against evictions. South Africa has ratified numerous international statutes which oblige states to protect undocumented immigrants against unlawful eviction. The research paper examines the national legal framework governing forceful evictions of undocumented immigrants living in South Africa and the state's obligation to guarantee such protection. The study analyses the existing legal regimes, including international human rights law and domestic legislation, to assess their effectiveness in safeguarding the rights of undocumented immigrants against evictions based on legal status or citizenship. It explores the constitutional threshold of these legal frameworks and their compatibility with international human rights standards. The research also investigates the state's obligations under international law and the measures it should take to ensure the protection of undocumented immigrants against forceful evictions. By evaluating the legal framework and state obligations, this research paper aims to contribute to the ongoing discourse on the rights of undocumented immigrants and provide insights for policymakers, legal practitioners, and scholars.

Chapter 1: Introduction

1.1. Background

Migration has been a historical phenomenon in South Africa, and thus a contribution to South Africa's multiracial society.¹ However, South Africa's current migration climate is politically charged. The responses to regular and irregular situations of migrants that of a begrudging acceptance, hostility, and extreme xenophobia.² The responses to regular and irregular situations of migrants is that of a begrudging acceptance, hostility and extreme xenophobia.³ Operation *Dudula*⁴ is a reflection of this sentiment with migrants, migrant workers, refugees, asylum seekers, and undocumented immigrants targeted as the reasons for the growing unemployment rates and social mishaps in the country.⁵ This has increased distress, fear, and distrust among undocumented communities.⁶ This category of migrants face irregular policing,⁷ unlawful evictions or forced removals from their homes, harassment and extortion by law enforcement with no specialised assistance whilst awaiting outcomes of their visa, permit or refugee status applications. In South Africa, the Department of Home Affairs is tasked with the legal status determination process of immigrants and issuing visas and permits to immigrants to maintain their legal status. However, South Africa's institutional failures e.g. the problematic determination of refugee status, untimely issuance of documents, and denial of essential services are to be noted as contributing factors to the increasing numbers of undocumented immigrants in South Africa and thus South Africa's failed refugee policy.⁸

¹ J Crush 'Southern African Migration Project. International Migration and Good Governance in Southern African Region' *Migration Policy Brief* 6.

² DE Kaplan 'South African Orthodoxy Today: Tradition and Change in a Post-Apartheid, Multiracial Society' (1998) 33 *Tradition: A Journal of Orthodox Jewish Thought* 75.

³ P Taran 'Status and Prospects for the UN Convention on Migrants' Rights' (2000) *European Journal on Migration Law* 85.

⁴ Operation Dudula has been termed an anti-immigration vigilante group who are responsible for numerous xenophobic-fuelled attacks against foreign nationals. These attacks often taken the form of displacing perceived undocumented immigrants away from homes, shelter or school.

⁵ N Odiaka 'The Face of Violence: Rethinking the Concept of Xenophobia, Immigration Laws and the Rights of Non-Citizens in South Africa' (2017) *BRICS Law Journal* 45.

⁶ BN Morey 'Mechanisms by Which Anti-Immigrant Stigma Exacerbates Racial/Ethnic Health Disparities' (2018) *Am J Public Health* 463.

⁷ Unpublished Thesis: SA Mabudusha 'The policing of undocumented foreign nationals in South Africa' (2014) *University of South Africa* 200.

⁸ Human Rights Watch (1998) 'Prohibited Persons': Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa' <https://www.refworld.org/docid/3ae6a8430.html> 150 (accessed 21 August 2023).

Post-Apartheid South Africa's Bill of Rights does not, for the most part, distinguish or discriminate between citizens and non-citizens.⁹ The preamble of the Freedom Charter "South Africa belongs to those who live in it" interprets that all basic rights in the Bill of Rights extend to all who live in the Republic.¹⁰ Moreover, it expressly states that all rights in the Bill of Rights of the South African Constitution apply to these refugees.¹¹ The South African Constitution is regarded as the supreme law of the state. Its Bill of Rights is binding on all legislatures and no law enacted shall be in contravention of the Constitution. If found in contravention of the Constitution and Bill of Rights, such application is unconstitutional and invalid.

South Africa's Constitution contains the Bill of Rights mirroring numerous internationally recognised rights and places upon the state a duty to "respect, protect, promote and fulfil" these rights, for all.¹² Therefore, the South African Constitution extends to all immigrants in South Africa, including asylum seekers, refugees and undocumented immigrants, the rights to not be unlawfully evicted from their homes.

Since 1994, South Africa has actively engaged in international agreements and enacted local laws to safeguard and uphold the right to be free from forced evictions. Displaced migrants and refugees in South Africa should only arouse efforts to protect their rights against unlawful displacements and towards the development of an effective framework to address the failures of the determination of status for asylum seekers and granting of temporary protections against the unlawful application of legislative frameworks at the detriment of the migrants living in South Africa.

1.2. Problem statement

Historically, the attitude towards immigrants or refugees has been to provide "a home away from home."¹³ However, in recent years, there seems to be a conflict between

⁹ Human Rights Watch (n 8) 156.

¹⁰ The Freedom Charter of South Africa 1955.

¹¹ The Constitution of the Republic of South Africa section 27.

¹² The Constitution (n 11) section 7(2).

¹³ E Hernandez 'Finding A Home Away from Home: Effects of Immigrants On Firms' Foreign Location Choice and Performance' (2014) *Administrative Science Quarterly* 75.

a state's consciousness towards immigrants and the international human rights standards on the protection of the rights of immigrants as the state fears for the security of its sovereignty when it tries to promote or integrate international standards into domestic laws.¹⁴ This conflict is pervasive in the widespread community-driven and governmental-led evictions of perceived “foreigners” from their shops, schools, and homes.¹⁵ These evictions, often violent, have adverse social, psychological, and economic impacts on immigrants and members of their families. South Africa's commitment to protecting the rights of immigrants through national law is often tainted with prejudice and political nuances.¹⁶ There are little or no measures by the South African state to address these discriminatory treatments experienced by immigrants or provide adequate housing or temporary accommodation. Additionally, the courts, when intervening in civil procedures regarding evictions, are often faced with the debate of whether the domestic laws extend to undocumented immigrants and members of their families.

1.3. Research Questions

Main question

Human rights extend to every individual, irrespective of their background or circumstances. By their humanity, everyone in South Africa is entitled to these fundamental rights. Thus, this research sought to answer the question: to what extent does current legislation in South Africa protect the right of undocumented immigrants not to be unlawfully evicted from their homes?

Sub-questions

1. How does the application of laws relating to forced evictions of undocumented immigrants in South Africa manifest?
2. What is the constitutional threshold of the legal regimes that govern the eviction of undocumented immigrants in South Africa?

¹⁴ R Morgan & BS Turner 'Interpreting human rights, social science perspectives' (2009) *Routledge Advances in Sociology* 90.

¹⁵ J Hicel 'Xenophobia' in South Africa: Order, Chaos, and the Moral Economy of Witchcraft' (2014) *Cultural Anthropology* 108.

¹⁶ C Kavuro 'Housing and integrating refugees: South Africa's exclusionary approach' (2019) 75.

3. Which law is most suitable to govern the evictions of undocumented immigrants in South Africa?
4. What is the duty of the state in preventing arbitrary, illegal, often forceful evictions of undocumented immigrants from their homes or informal settlements?

1.4. Research Objectives

Many migrants face obstacles in acquiring legal status and often due to their status in the country are usually prone to harsh treatment and arbitrary removal from their property and residences. This dissertation sought to provide an analysis of the current legal framework addressing undocumented immigrants facing forced removals, displacements, and illegal evictions and recommend appropriate measures for this complex problem.

The specific objectives of this paper were to:

- a) Map out the current legal framework for addressing forced evictions.
- b) Determine the extent to which undocumented immigrants are entitled to adequate housing.
- c) Determine the state's obligation in the protection of undocumented immigrants in South Africa, particularly against forceful evictions.
- d) Determine the best way to ensure protection of undocumented migrants who face the threat of eviction.

1.5. Significance of study

Little research considerations are given regarding the protection of undocumented migrants or irregular migrants as they are regarded as illegal and not worthy of protection due to their lack of legal status in host countries. There is vast research on the effects of international migrations but little regard for the ills migrants face in accessing socio-economic rights in the hope of bettering their lives. Furthermore, this research tried to fill the gap between theory and practice, as few scholarships were available that investigate the expansion of protection to undocumented immigrants in

terms of seeking temporary emergency accommodation in countries of refuge. Also, the present study was a valuable contribution for prospective researchers, and academicians and most significantly improving South Africa's index on the global scale on its protection of the rights of migrants that live within its borders.

1.6. Limitations of the study

This study looked at the overall legal framework of evictions, prevention of arbitrary evictions, and management of immigrants to South Africa. Issues relating to immigrants are very nuanced but due to this being a mini-dissertation, this study was limited to the protection of immigrants during evictions. Further, no field study was undertaken thus there were no respondents to give first-hand information or any explanation on the forceful evictions.

1.7. Structure of The Study

The research was divided into six chapters. The first chapter introduced the background within which the problem is stipulated, the problem statement, the scope, research questions and objectives, and the definition of key concepts. Chapter Two provided a literature review on the themes of this research. Chapter Three looked into the theoretical framework and methodology of the research. Chapter Four examined the constitutionality threshold of the current national, regional, and international legal framework set up to preserve the rights to adequate housing and prevent arbitrary removals of undocumented foreigners living in South Africa. Also, it included an in-depth exploration of the application of the legal framework in case law and the gaps in the framework addressing infringements of migrants' rights against arbitrary removals. Chapter Five explored South Africa's obligations under international law to protect undocumented immigrants against forced evictions. The Sixth Chapter was the conclusion and recommendations of the research.

1.8. Definition Of Key Concepts

Definition of the following concepts may be helpful in navigating this paper and understanding the problem in which this paper hopes to address.

1.8.1. Immigrant

Section 1(1) of the Immigration Act No 13 of 2002 describes an “immigrant” as an individual who enters another country or territory that is not their birthplace. Immigrants are persons who enter an already defined social context of people and places in which their experiences are constantly forming and changing.¹⁷ An immigrant is a person who has departed from his or her own country to seek permanent resident status in the country of destination.¹⁸ There are different classes of immigrant. For this research, these classes are limited to refugees, asylum seekers, migrant workers, illegal immigrants, and undocumented immigrants.¹⁹ These related terms have subtle differences, and are often used confusingly and inconsistently.²⁰

1.8.2. Undocumented Immigrant

An ‘undocumented immigrant’ is a foreign-born person who lacks legal status or rights within the host country, as having entered without permission and not obtained any right to remain or stay beyond the expiration date of permit or visa.²¹ Specific to this paper, this definition of ‘undocumented immigrant’ is controversial, important yet not fully understood.²² They are often referred to as ‘illegal foreigners’ which is complicit to the lackadaisical nature of governments to protect immigrants from the ills of the society they migrate into. In South Africa, undocumented migrants are usually victims of administrative failures of the DHA to issue or extend permits timeously. The term “illegal foreigner” should be hesitantly used as all migrants are rights holders regardless of status and states must apply laws to protect this group, “cooperate internationally to ensure safe, orderly and regular migration involving full respect for

¹⁷ K Deaux ‘To be an immigrant’ (2006) *Russell Sage Foundation* 5.

¹⁸ As above.

¹⁹ Sonke Gender Justice ‘Reporting on Migration in South Africa: A Guide for Journalists and Editors’ 31 October 2019 <https://genderjustice.org.za/publication/reporting-on-migration-in-south-africa/> (accessed 23 June 2023).

²⁰ S Graf, M Rubin, Y Assilamehou-Kunz et al ‘Migrants, asylum seekers, and refugees: Different labels for immigrants influence attitude through perceived benefits in nine countries’ (2021) *European Journal of Social Psychology* 972.

²¹ NOLO Dictionary <https://www.nolo.com/dictionary/undocumented-immigrant-term.html> (accessed 24 June 2023).

²² SH Legomsky ‘Portraits of the Undocumented Immigrant’ (2010) *Georgia Law Review* 66.

human rights and the humane treatment of migrants regardless of migration status”, and to report on the enjoyment of these human rights for all living in their country.²³

1.8.3. Refugee

Refugees are people who have fled war, violence, conflict, or persecution and have crossed an international border to find safety in another country.²⁴ They often have had to flee with little more than the clothes on their backs, leaving behind homes, possessions, jobs, and loved ones. South Africa justifies the exclusion of refugees and asylum seekers from socio-economic benefits such as social assistance based on permanent residence. The acquisition of permanent residence takes up to 5 years or even more.²⁵

The U.N 1951 Convention

Article 1 of the 1951 Convention²⁶ defines a refugee as:

Article 1 of the 1951 Convention^[10] defines a refugee as:

“Someone who "owing to 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 [their] nationality and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence, is unable or, owing to such fear, is unwilling to return to it.”

Article 33 lays down the prohibition of “refoulement” according to which no state party “shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers

²³ The New York Declaration (para. 5) <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/RegularAndIrregular.pdf> (accessed 20 June 2023).

²⁴United Nations High Commissioner for Refugee (UNHCR) Global Website <https://www.unhcr.org/what-refugee#:~:text=Refugees%20are%20people%20who%20have,find%20safety%20in%20another%20country> (accessed 24 June 2023).

²⁵ Kavuro (n 16) 82.

²⁶ The Convention Relating to the Status of Refugee, also known as the 1951 Refugee Convention.

of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”²⁷

The Organisation of African Unity (OAU)

country on the basis:

“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 or nationality.”

This extensive definition is particularly important as it reconceptualizes the definition of a refugee and South Africa, a party to the AU Convention, an affection of the principles of the Convention in terms of the Refugee Act, must rethink the concept of refugees on humanitarian grounds or better still refer as ‘humanitarian refugees’.²⁸ Humanitarian refugees are fleeing from violence or internal factors rather than persecution by their home countries.²⁹ This definition seeks to protect humanitarian refugees. It rejects the notion that all refugees or immigrants are “bogus refugees”³⁰ or economic migrants. Kapindu highlights that this definition will extend protection to Zimbabweans (and many other immigrants) who would be generally considered as ‘illegal immigrants’ as a result of the withdrawal of the Zimbabwean Exemption Permits (ZEP).³¹ The distinction between categories of immigrants and refugees is important to understand the nature and scope of their asylum protection.³²

The Refugees’ Act

A refugee is any person who has been granted asylum in terms of the Refugee Act.³³ South Africa’s policy of non-refoulement is obligated by article 33 of the UN Convention

²⁷ The 1951 Refugee Convention article 33.

²⁸ C Kavuro ‘SA should rethink its definition of what constitutes a humanitarian refugee’ 03 August 2022 <https://www.sun.ac.za/english/Lists/news/DispForm.aspx?ID=9402> (accessed 20 June 2023).

²⁹ K Hailbronner ‘Non-refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Thinking?’ (1985) *Virginia Journal of International Law* 857.

³⁰ LB Landau ‘Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy’ (2006) *Journal of Refugee Studies* 321.

³¹ R Kapindu ‘Towards a more effective guarantee of socio-economic rights for refugees in Southern Africa (2014) 100. Also, Zimbabwe Exemption Permit (ZEP) was introduced in 2009 for eligible Zimbabweans who fled their home country due to economic and political strife.

³² Kavuro (n 28).

³³ The Refugees Act 1998.

on Refugees as well as section 2 of the Refugee Act.³⁴ This obligation to protect a refugee, a displaced person under the Act can be seen in the Constitutional Court decision in *Mohamed and Another v. President of the Republic of South Africa and Other*,³⁵ where the Court held that “it is unconstitutional for the state to remove a person to another state where he or she has the possibility of facing the death penalty.”³⁶

1.8.4. Asylum Seeker

According to the Refugee Amendment Act 33 of 2008, an asylum seeker is “a person who is seeking recognition as a refugee in another foreign country”. This term refers to a person who seeks protection in another country due to intolerable living conditions in his/her country of origin (operational definition). Asylum seekers are presumed to be refugees until proven otherwise, and they benefit from the protection afforded by section 33 unless their claim to refugee status is rejected.³⁷

1.8.5. Migrant worker

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW) defines a migrant worker as “a person who is to be engaged or has been engaged in a remunerated activity in a state of which he or she is not a national”.³⁸ Thus, a migrant worker could be anyone leaving the country of his or her own country with a contract of employment or parallel employment relations in the country of destination.³⁹ They are workers who are often used in response to the shortage of skilled labour in the host country.⁴⁰ Due to the growing economic downturn globally, mass migration of migrant workers into high-income

³⁴ The Refugees Act section 2.

³⁵ *Mohamed and Another v President of the Republic of South Africa and Others (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).*

³⁶ *Mohamed n (35)*. This decision is important as court obliges the state not to effect removal of a person through deportations to the country of origin where they will be subjected life-threatening circumstances infringing on their right to life, dignity and not to be subjected to cruel, inhumane and degrading punishments

³⁷ The Refugees Act section 33.

³⁸ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW).

³⁹ CRMW article 2.

⁴⁰ B Anderson & M Ruhs ‘Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy’ (2010) *Oxford University Press* 50.

countries and the increasingly precarious nature of these employment relations seem to threaten standard (legal) employment relationships.⁴¹

1.8.6. Foreigner

According to the Immigration Act 13 of 2002, ‘foreigner’ refers to “Someone who is neither a citizen nor a resident of a particular country”. For this study, a foreigner refers to anyone who has left his/her country of origin to reside in another country temporarily or permanently. Foreign nationals are usually presumed to lack documentation and classified as “illegal”. The distinction between voluntary and forced migrants, and particularly, the distinction between refugees and all other types of migrants must be made to better understand the plight of refugees in South Africa.⁴² Despite these distinctions and institutional failures, the rights and protections of foreign nationals are usually questioned.

1.8.7. Xenophobia

South Africa has a National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) also known as the Hate Crimes Bill which describes xenophobia as intolerant behaviours in the form of hate speech or actions that often aim to vilify persons, based on perceived foreign identity to the community, society, or national identity they find themselves in.⁴³ South Africa’s undocumented migrants have been categorized as *criminals* who are responsible for the social disorder, lawlessness, high rates of unemployment, economic instability, and security threats to many communities in the country. This often results in xenophobia and acts of violence towards this vulnerable group. Xenophobia, in this sense, refers to the fear

⁴¹ J Fudge ‘Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers’ (2013) *Comparative Labour Law. and Policy Journal* 1.

⁴² C Spreen, L Starl & S Valley ‘Privatisation of Schools - Selling Out the Right to Quality Public Education for All Centre for Education Rights and Transformation <https://www.right-to-education.org/resource/privatisation-schools-selling-out-right-quality-public-education-all> (accessed 05 May 2023).

⁴³ The National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP).

or hate of foreigners living in an individual's country,⁴⁴ and could in worse situations include assault and violence against these groups.⁴⁵ In 2008, South Africa witnessed a major xenophobic outpour against foreign nationals emerging from townships and recorded across all provinces in which sixty-two people *were* confirmed dead, over 100,000 persons displaced.⁴⁶ These violent acts "showed no discrimination in targeting men, women and children, and destroyed, looted and burnt down their businesses and houses".⁴⁷ This xenophobia, xenophobic sentiments, and acts took to take the form of unlawful evictions of undocumented migrants from their homes or places of shelter. They are regarded as unlawful occupiers of land, property, or country, solely based on being undocumented, justifying unauthorised evacuations from land or property.

1.8.8. Reasons for immigration

Immigrants consist of voluntary migrants who migrate on their own choice to migrate on one hand, and involuntary migrants, who migrate from their home countries with little choice.⁴⁸ The International Labour Organisation (ILO) reports that this high influx of immigrants into host countries is due to *push factors* such as poverty, human rights violations, poor living conditions, starvation and violent conflicts, and *pull factors* such as political stability, democratic government, access to consumer goods, higher wages and better life within a country.⁴⁹

⁴⁴ O Fayomi, F Chidozie & C Ayo 'A Retrospective Study of the Effects of Xenophobia on South Africa–Nigeria Relations' (2015). *CORE* [online] <https://core.ac.uk/download/pdf/32225837.pdf> (accessed 03 May 2023).

⁴⁵ AP Adebisi & A Agagu 'The Challenges of Xenophobia and Terrorism for the Development of Higher Education in Africa.' (2017) In: F Maringe and E Ojo, (eds.) *Sustainable Transformation in African Higher Education: Research, Governance, Gender, Funding, Teaching, and Learning in the African University* 119.

⁴⁶ L Vromans, RD Schweitzer, K Knoetze & A Kagee 'The Experience of Xenophobia in South Africa' (2011) *American Journal of Orthopsychiatry* 93.

⁴⁷ J Crush, G Tawodzera, A Chikanda, S Ramachandran & D Tevera 'South Africa Case Study: The Double Crisis – Mass Migration from Zimbabwe And Xenophobic Violence in South Africa' (2017) *International Centre for Migration Policy Development: SAMP Special Report* <https://scholars.wlu.ca/samp/4/> (accessed 08 May 2023)

⁴⁸ M Verkuyten, HG Altabatabaei, & N Nooitgedagt (2018) 'Supporting the Accommodation of Voluntary and Involuntary Migrants' 268

⁴⁹ https://www.ilo.org/africa/areas-of-work/labour-migration/WCMS_670561/lang--en/index.html (accessed 10 July 2023).

Chapter 2: Literature review

Section 26 of South Africa's Constitution guarantees this right to house for the protection of human dignity, physical and mental health, and social development.⁵⁰ It is under this right that the right to not be unlawfully evicted without provision of temporary alternate accommodation accrues.⁵¹ There is a vast literature on different aspects of immigration about healthcare, legality, identity politics, xenophobia and employment.⁵² However, there is little literature on the increasingly xenophobia-fuelled forceful removals of undocumented immigrants from their homes and whether the South African state can prevent and protect against these evictions targeted toward this migrant group. South Africa has many legal instruments protecting the rights against being forcefully or illegally evicted from their homes based on constitutional values of equality and dignity.⁵³ This includes the Constitution, Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), Refugee Act and Immigration Act.⁵⁴

However, the challenge remains on the clarification of whether these protection laws extend to undocumented immigrants. However, the challenge remains a clarity issue, whether these protection laws extend to undocumented immigrants. For instance, there is a contradiction between the constitutional right not to be evicted in terms of section 26(3) of the Constitution⁵⁵ and the Immigration Act,⁵⁶ particularly sections 32(2) and 34(1) which provide that any "illegal foreigner" may be deported and that an immigration officer without the need for a warrant may arrest an "illegal foreigner" respectively. This has led to arbitrary removals from their homes as these sections require a mandatory departure from the Republic and departure from their homes or residences where they take shelter, therefore infringing on their right to housing. This suggests that evictions and removals under the guise of implementation of provisions

⁵⁰ L Chenwi 'The Right to have access to adequate housing' (2007) *Economic and Social Rights in South Africa* 22.

⁵¹ The PIE Act.

⁵² B Maharaj "Migrants and Urban Rights: Politics of Xenophobia in South African Cities" (2009) *Problems and Perspectives in Management* 2.

⁵³ K Manji, S Perera, J Hanefeld, et al. 'An analysis of migration and implications for health in government policy of South Africa' (2023) *International Journal for Equity in Health* 11.

⁵⁴ E Alimohammadi & G Muller 'The Illegal Eviction of Undocumented Foreigners from South Africa' (2019) *Africa Law Journal* 798.

⁵⁵ The Constitution (11) section 26(3).

⁵⁶ The Immigration Act sections 32(2) & 34 (1).

of the Immigration Act contravene the substantive and procedural protections outlined in the PIE and sections 26(1) and section 26(3) of the Constitution.⁵⁷ Another contradiction is evident in section 23 of the Refugees Act which provides the detention of an asylum seeker whose application has been denied or withdrawn.⁵⁸ This detention involves mandatory removals of this category of migrants from where they reside or take shelter to Lindela Repatriation Centre (LRC), for deportation from the country. These contradictions will be explored in the course of the study.

Additionally, Wilson iterates on the power of courts to apply international norms that advance the inherent rights of migrants and that, 'judges wield immense power over the process of forced evictions in South Africa that could lead to the displacement of several poor people and as such the particular needs of the South African poor should be paramount.'⁵⁹ This power is evident in *City of Tshwane Metropolitan Municipality v Unknown Protestors/Refugees and Others*,⁶⁰ the applicant, the City of Tshwane brought an application in terms of Rule 42(1) (b)⁶¹ and section 4 (12) of the Prevention of Illegal Eviction from An Unlawful Occupation of Land Act No. 19 of 1998 (PIE) as read with s173 of the Constitution.⁶² For context, in May 2022, the second respondent, the DHA conveyed about 50 refugees to the premises of the UNHCR in Waterkloof, Pretoria. They had previously been in the Lindela Repatriation Centre, run by the Department of Home Affairs (DHA) as per the court order in *Brooklyn*. Neukircher J resolved that the City of Tshwane cannot relinquish its responsibilities to 'provide

⁵⁷ The Constitution (n 11) section 26 (1).

⁵⁸ If the Minister has withdrawn an asylum seeker permit in terms of section 22(6), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.

⁵⁹ S Wilson 'Judicial Enforcement for the Right to Protection from Arbitrary Eviction: Lessons from Mandelaville' (2006) *South African Journal on Human Rights* 535.

⁶⁰ *City of Tshwane Metropolitan Municipality v Unknown Protestors/Refugees and Others* 2023 JDR 1114 GP.

⁶¹ Rules Board for Court of Law Act rule 42 (10)(b). This rule states in relation to variation and rescission of orders that (1) the court may, in addition to any other powers it may have *mero motu* or upon the application of any party affected, rescind or vary (b) an order or judgement in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. Section 4 (12) of PIE states that any order for the eviction of an unlawful occupier or the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable and the court may on good cause shown vary any condition or an eviction order. Section 173 of the Constitution provides that the constitutional court, the supreme court of appeal and the High court of South Africa has inherent power to protect and regulate their own process, and to develop common law, considering the interest of justice.

⁶² The PIE Act.

suitable alternative accommodation' due to budgetary reasons or errors in the language of the order. Neukircher J implied the error as to whom the responsibility fell on was to prevent *judicial overreach* and not dictate how the applicant carries out its mandate in terms of section 6 (1)(3)(c) of the PIE Act. The court iterated that s41(1)(h) of the Constitution imposes a duty on all state organs to cooperate with and support one another in the interest of the public and justice. The government's argument of "lack of resources" to extend this right to non-citizens has not been an acceptable excuse before courts of law in South Africa.⁶³

Evictions of undocumented immigrants are conducted by representatives of the government and municipalities without adhering to the procedural safeguards stipulated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).⁶⁴ Unscrupulous evictions primarily result from a set of parallel sources of law to guide evictions despite the differences contained in the said laws namely PIE, the Refugees Act and Immigration Act. It is important that an enquiry into the most appropriate source of law to guide evictions finds its answer in the country's single system of law which flows from the Constitution and the subsidiarity principles, a creation of the Constitutional Court.⁶⁵

Based on the checklist in the principles of justice, fairness, and human rights, the PIE Act can address forced evictions of undocumented migrants and should be the most appropriate legislation to guide the process of evictions and ensure the protection against illegal evictions of undocumented immigrants.⁶⁶ The Immigration Act and the Refugee Act lack similar protections afforded by PIE and can only be used to supplement it in the regulation of admission and exit from South Africa.⁶⁷ Until such a time when the status of migrant is decided, they are entitled to enjoy all the rights afforded to other citizens.⁶⁸ It is evident that these frameworks do not guarantee protection against unlawful evictions and may suggest undocumented immigrants seek protections under PIE.

⁶³ Kavuro (n 16) 78.

⁶⁴ Alimohammadi & Muller (n 54). 798.

⁶⁵ Alimohammadi & Muller (n 54) 800.

⁶⁶ Alimohammadi & Muller (n 54) 802.

⁶⁷ Alimohammadi & Muller (n.54) 811,812.

⁶⁸ Alimohammadi & Muller (n 54) 815.

Additionally, Kavuro expounds on the exclusionary approach taken by the government of South Africa towards housing refugees asylum seekers and other vulnerable groups of migrants and the inclusionary approach that ought to be taken.⁶⁹ Non-citizens are excluded from socio-economic rights and the benefits enjoyed by other citizens and permanent residents through government assistance programs such as social housing on account of being temporary residents.⁷⁰ He opines that this exclusionary approach is constitutionally problematic as the provisions of article 26(1) and 28 (c) do not limit the access of the right to housing. Similarly, Article 21 of the Refugee Convention on the Status of Refugees obliges the government to afford this right.⁷¹ Therefore, in recent developments, the 2017 White Paper on International Migration for South Africa (WPIM) suggests the review of two critical pieces of legislation: The Immigration Act and the Refugees' Act. The South African government's position, as reflected in the WPIM, underscores the delicate balance between managing migration and upholding human rights. The WPIM recognizes the rights of undocumented migrants, including their right to housing. The challenge lies in ensuring that policies and practices align with both national interests and international obligations.

Post-Apartheid South Africa's Bill of Rights does not, for the most part, distinguish or discriminate between citizens and non-citizens.⁷² It bestows upon the state to "respect, protect, promote and fulfil the rights as advocated for in the Bill of Rights" of everyone, equally.⁷³ The preamble of the Freedom Charter "South Africa belongs to those who live in it" interprets that all basic rights in the Bill of Rights extend to all who live in the Republic.⁷⁴ Moreover, it expressly states that all rights in the Bill of Rights of the South African Constitution apply to the category of migrants in *Brooklyn*.⁷⁵ The South African Constitution is regarded as the supreme law of the state. Its Bill of Rights is binding on all legislatures. No law enacted shall be in contravention of the Constitution. If found inconsistent with the Constitution and Bill of Rights, it will be deemed unconstitutional and invalid.

⁶⁹ Kavuro (n 16) 79.

⁷⁰ Kavuro (n 16) 80.

⁷¹ Kavuro (n 16) 75.

⁷² Human Rights Watch Report (n 8).

⁷³ The Constitution of the Republic of South Africa, section 7(2).

⁷⁴ The Freedom Charter (n 10).

⁷⁵ The Constitution (n 74) section 27.

This research seeks to add to the existing literature concerning the protection of immigrants, specifically undocumented immigrants. This will be done by highlighting the adequacies of the current regulatory framework to address the protection of undocumented immigrants against unlawful evictions. It will further highlight the state's national and international obligations to protect and promote migrant rights, assessing South Africa's response to the xenophobic arbitrary removals of undocumented migrants from their homes.

Chapter 3: Theoretical framework and methodology

3.1. Theoretical Framework

Rawls' theory of justice as fairness is an attempt to identify 'the principles which would underlie a system which offers a balance between competing claims (a just system).⁷⁶ Expanding on this theory, Merritt argues that justice is the maximization of an end that brings about an individual good to the society.⁷⁷ In other words 'it entails the elimination of arbitrary distinctions and the establishment of a proper balance between competing claims.'⁷⁸In the context of forced evictions, this means considering both the government's claims (e.g., public interest, development) and the claims of evictees (e.g., housing security, human rights), to find a forced eviction to be just. Aligning with Rawls' theory, using the capabilities approach, Nussbaum purports that justice is achieved if there are equal opportunities influenced by social and economic conditions that lead to the flourishing and well-being of humans.⁷⁹ Undocumented migrants deserve fair housing policies and legal protection to create an environment that is dignifying and flourishing.⁸⁰ This theory underscores the importance of fairness, equal rights, and minimizing harm. Applying this theory to forced evictions ensures a balanced approach that respects citizens' liberties while addressing government powers. It calls for a system where the rights and interests of the least advantaged are protected and not left in extremely disadvantaged conditions after eviction.

Additionally, in the context of protecting undocumented migrants against unlawful or forced evictions, the human rights theory plays a crucial role in shaping legal frameworks, policies, and advocacy efforts. The rights of every human being, documented or not are worthy of protection and realisation. These rights are categorised as natural rights or inherent rights.⁸¹ These are those rights that individuals possess by their humanity. These rights are considered universal,

⁷⁶ J Rawls 'Justice as fairness' (1958) *Philosophical Review* 165.

⁷⁷ G Merritt 'Justice as Fairness: A Commentary on Rawls's New Theory of Justice' (1973) *Vanderbilt Law Review* 665.

⁷⁸ J Rawls (n 77) 169.

⁷⁹ MC Nussbaum 'Creating Capabilities: The Human Development Approach' (2011) *Harvard University Press* 237.

⁸⁰ MC Nussbaum (n 80) 237.

⁸¹ A Tuckness 'Locke's Political Philosophy' 06 October 2020 <https://plato.stanford.edu/entries/locke-political/> (accessed 04 March 2024).

inalienable, and independent of any specific legal system.⁸² They include essential entitlements such as life, liberty, equality, and justice. The concept of natural rights gained prominence during the Enlightenment period, where thinkers grappled with questions about governance, justice, and individual freedoms.⁸³ Locke argued that individuals possess inherent rights to life, liberty, and property. He believed that governments derive their legitimacy from the consent of the governed and that their primary purpose is to protect these natural rights.⁸⁴ Locke's ideas laid the groundwork for modern democratic principles and influenced subsequent discussions on human rights. While Kant did not explicitly discuss natural rights, his ethical framework emphasised the inherent worth and dignity of every rational being. Kant's concept of a universal moral principle aligns with the idea of treating all humans as ends in themselves, rather than as means to an end.⁸⁵ Although Kant did not directly address human rights, he emphasises moral autonomy and respect for persons resonates with the broader discourse on individual rights.⁸⁶ On the other hand, Karl Marx dismissed natural rights as bourgeois ideology.⁸⁷ He argued that these rights served the interests of capitalist society, emphasizing individualism and private property. According to Marx, natural rights masked class divisions perpetuated inequality, and challenged the notion of abstract, universal rights divorced from social context.⁸⁸ Marx believed that true emancipation required transcending individualistic rights and the focus should be on collective rights, social justice, and economic equality.⁸⁹ Aligning with Nussbaum approach, Marx argues that human rights were inseparable from the material conditions of existence. Contemporary human rights discourse continues to grapple with tensions between individual and collective rights.

international norms. As societies progressed, the need arose to codify and safeguard these rights through legislation. The Universal Declaration of Human Rights (UDHR) of 1948 adopted by the United General Assembly enshrined a comprehensive set of

⁸² A Tuckness (n 82).

⁸³ D Foster 'Two Treaties Government by John Locke' (2016) *Interpretation* 145.

⁸⁴ D Foster (n 84) 149.

⁸⁵ K Samuel 'Treating Persons as Means' 20 October 2023 <https://plato.stanford.edu/entries/persons-means/> (accessed 04 March 2024).

⁸⁶ L Campbell 'Kant, Autonomy and Bioethics, Ethics' (2017) *Medicine and Public Health* 388,

⁸⁷ K Marx 'On the Jewish Question' (1975): *In Marx/Engels Collected Works* 148.

⁸⁸ L Stevens 'Marxism and morality' (1985) *New York: Oxford University Press* 27, 28.

⁸⁹ L David 'The Young Karl Marx: German Philosophy, Modern Politics and Human Flourishing' (2007). *Cambridge University Press* 32.

human rights applicable to all people based on the principles of emphasised equality, dignity, and freedom. According to the UDHR, “all human beings are born free and equal in dignity and rights”⁹⁰ and “everyone is entitled to all the rights and freedoms...without distinction of any kind”.⁹¹ Article 25 of the UDHR states that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security”.⁹² While legal protections have expanded globally, challenges persist in ensuring equal access to rights for all, including undocumented migrants facing eviction. Human rights remain a powerful tool for advocating justice, dignity, and equality but cognisance must be taken of their limitations and contextual nuances. The evolution of human rights from natural rights theories to legal frameworks reflects ongoing societal commitment to protect the inherent worth and well-being of every person, regardless of their legal status or background.

Additionally, the principles of equality and non-discrimination lie at the heart of international human rights law and are directly related to that of universality, which affirms that every human being has fundamental rights.⁹³ Undocumented migrants must have access to these fundamental human rights according to international human rights law.⁹⁴ If differential treatment between citizens and non-citizens or between different non-citizen groups is being considered, it must be by international human rights obligations, be undertaken to achieve a legitimate goal, and be proportionate and reasonable. When unlawful or forced evictions of undocumented migrants based solely on their legal status occur, it constitutes a violation of their human rights. In most cases, their socioeconomic state is worsened, and they tend to be abandoned by the government, with little to assistance. The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees to “everyone” the rights contained in the UDHR, including the rights to work, to just and favourable conditions of work, to trade union freedoms, to social security, to an adequate standard

⁹⁰ The United Nations, Universal Declaration of Human Rights (UDHR), article 1.

⁹¹ UDHR (n 91) article 25.

⁹² UDHR (n 91 above) article 25(1).

⁹³ OHCHR General Comment Number 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions (1997).

⁹⁴ J Donnelly ‘Universal Human Rights in Theory and Practice,’ (2013) *Cornell University Press* 17.

of living, to health, and education.⁹⁵ Discrimination is prohibited by the ICESCR under all circumstances.

Based on Rawls' theory of balancing competing claims, states have the prerogative to manage migration flows but are still obligated by international law to uphold individual rights. States are obliged to ensure that any differences in treatment between citizens and non-citizens or between different groups of non-citizens serve a legitimate objective, and any course of action they take to achieve such an objective must itself be proportionate and reasonable. State sovereignty is not undermined when migration management laws protect migrants' rights.

Groups who are extremely vulnerable, such as undocumented migrants, are severely impacted by forced evictions. The Special Rapporteur on the human rights of migrants has acknowledged that forceful evictions jeopardize not just the right of migrants to housing but also their ability to exercise their rights to food, water, health, and education.⁹⁶ In carrying out its duties, states are expected to undergo several procedural protections before any eviction is carried out, including undisputable meeting with those affected; "adequate and reasonable notice for all affected persons before the scheduled date of eviction; the provision of legal remedies; and legal aid to persons who need it to seek redress from the courts." Under international law, states are to follow in the implementation of eviction orders, measures necessary to prevent and address homelessness, the unaffordability of housing, migration, and eviction challenges.⁹⁷ Under this UN document, specific attention is paid to undocumented migrants by urging states to avoid discrimination of these groups in any form during the eviction process are to provide alternative housing to these vulnerable group of migrants to safeguard their rights to housing.

⁹⁵ The International Covenant on Economic, Social and Cultural Rights article 11.

⁹⁶ M McAuliffe 'The Nexus Between Forced and Irregular Migration: Insights from Demography' (2018) in: Hugo, G., Abbasi-Shavazi, M., Kraly, E. (eds) *Demography of Refugee and Forced Migration. International Studies in Population* 230.

⁹⁷ The UN General Assembly Resolution 60/251.

Both documented and undocumented migrants are entitled to protection under international law, grounded in their inherent human rights, dignity, and freedoms. Using existing South African law, this dissertation will investigate the efficacy of current legislation in safeguarding the housing rights of undocumented immigrants and assess whether existing legal frameworks adequately shield them against forceful evictions. And ultimately examine how the state balances its sovereignty with its obligation to uphold human rights through the lens of highlighted theoretical postulations, aiming to bridge theory and practice. By doing so, it seeks to contribute to a more just and equitable approach to housing rights for all, regardless of legal status.

3.2. Methodology

3.2.1. *Research approach*

This research adopted a qualitative methodology to determine the legal framework enshrining and protecting the right not to be forcefully evicted and the provision of temporary emergency accommodation in the case of arbitrary evictions to undocumented immigrants. Qualitative research is a type of research that explores and provides deeper insights into real-world problems which involve “inductive, holistic, emic, subjective and process-oriented methods used to understand, interpret, describe and develop a theory on some phenomena”.⁹⁸ Qualitative research typically involves direct personal experience, with the goal of the depth of understanding of “externally observable behaviour and internal states” in the context being examined.⁹⁹ Qualitative data is data extracted from descriptions, research, work, and statistics.¹⁰⁰ A qualitative research is appropriate as secondary data is extracted on the international, regional as well as national strategies that extend protection to *undocumented immigrants* as well as protection from discrimination in legal status application process, housing application process and eviction proceedings.

⁹⁸ N Burns & SK Grove ‘Understanding nursing research’ (2003) *Philadelphia: Sanders* 356.

⁹⁹ MQ Patton ‘Qualitative research & evaluation methods: Integrating theory and practice’ (2015) *Sage Publications* 56.

¹⁰⁰ <https://www.fullstory.com/qualitative-data/> (accessed 15 March 2024).

3.2.2. *Unit of analysis*

Secondary data analysis is the use of data that was collected by someone else for some other purpose.¹⁰¹ In this case, the researcher poses questions that are addressed through the analysis of a data set that they were not involved in collecting. This consists of information from other sources such as journals, dissertations, theses, books, conference reports, internet sources, and Honours and Masters Dissertations as well as PhD theses relating to evictions. Secondary data prescribes evictions, and human rights as the main themes to be used as units of analysis within the scope of this research.

3.2.3. *Data Sampling Procedure*

In terms of sampling, the strategy for data selection should be integrated into the overall logic of any study¹⁰² and the rationale for sample selection needs to be aligned from an ontological, epistemological and axiological perspective with the overarching aims of the study.¹⁰³ In a qualitative study, a relatively small and purposively selected sample may be employed,¹⁰⁴ with the aim of increasing the depth of understanding.¹⁰⁵ This selection of data process is called purposive sampling and researcher has employed purposive sampling method to select limited research resources effectively.¹⁰⁶ A purposive selection means the process of choosing a number of documents so that the documents as a whole produce relevant and helpful information,¹⁰⁷ that as nearly as possible has the same average or proportion as the totality with regard to those characteristics that are already the subject of statistical knowledge.¹⁰⁸ Based on this purposive method, the sampling frame was limited to a

¹⁰¹ A Crossman 'Pros and Cons of Secondary Data Analysis: A Review of the Advantages and Disadvantages in Social Science' (2019) <https://www.thoughtco.com/secondary-data-analysis-3026536> (accessed 27 October 2023).

¹⁰² K Punch 'Developing Effective Research Proposals' (2004) *Sage Publications* 200.

¹⁰³ S Campbell, M Greenwood, S Prior S et al 'Purposive sampling: complex or simple? Research case examples' (2020) *Journal of Research in Nursing* 655.

¹⁰⁴ M Miles & A Huberman 'An expanded sourcebook: Qualitative data analysis' (1994) *Thousand Oaks: Sage Publications* 2.

¹⁰⁵ LA Palinkas, SM Horwitz & CA Green 'Purposeful sampling for qualitative data collection and analysis in mixed method implementation research' (2015) *Administration and Policy in Mental Health and Mental Health Services Research* 533

¹⁰⁶ LA Palinkas, SM Horwitz & CA Green (note 106) 535.

¹⁰⁷ S Kelly 'Qualitative interviewing techniques and styles. In: Bourgeault I, Dingwall R, de Vries R. (eds). (2010) *The Sage Handbook of Qualitative Methods in Health Research*, Thousand Oaks: Sage Publications 317.

¹⁰⁸ SR Myneni 'Legal Research Methodology' (2007) *Allahabad Law Agency* 125.

specific group of migrants in South Africa which were categorised as undocumented migrants living in South Africa. This target population was selected based on a specific criterion, that they are undocumented and are facing evictions based on this criterion (actual or perceived). The data was collected using secondary data collection methods.

In addition to the purposive research style, the researcher adopted a consecutive method to the secondary data sources as a complementary method. The consecutive method is a convenience sampling method. Consecutive sampling is one method of purposive sampling in qualitative research. In this method, instead of selecting a fixed sample of resources, every source or document that contains the themes being examined is selected until more appropriate, befitting documents for research are found.¹⁰⁹ This method was used after having purposively found the preliminary sources with migration, eviction proceedings and human rights information. In applying the consecutive method, the researcher employed the insertion of terms and themes into Google Scholar, Lexis Nexis, HeinOnline, and Sabinet Discover, and the articles that came up were analyzed. Examples of key terms used in the search were “migration in South Africa, undocumented migrants, evictions, evictions of undocumented immigrations, legal protection for undocumented immigrants in post-apartheid South Africa”. This chosen sampling procedure is appropriate as it ensures the most relevant information is available to the researcher.

3.2.4. *Data collection*

The secondary information collected by the researcher consisted of existing legislation, literature, case law, books, journal articles, and publications by international and local human rights bodies on the prevention and mitigation of forced evictions directed at undocumented immigrants. There were fifty-three (53) journal articles used for this study which were retrieved from the following sources, fifteen (15) books consulted, eleven (11) regional and international legislation consulted, nine (9) domestic legislation, and eleven (11) case law studies were explored.

¹⁰⁹ M Naderifar, H Goli & F Ghaljaei 'Snowball Sampling: A Purposeful Method of Sampling in Qualitative Research (2017) *Strides in Development of Medical Education* 3.

Fourteen online articles and newspapers were consulted to provide descriptive information on the extent of xenophobic attacks in South Africa. The data was collected over twenty weeks of reading and assessing the relevance of the documents to the research project.

3.2.5. *Data analysis*

Critical Discourse Analysis (CDA) was the chosen method of data analysis. CDA seeks to incorporate social-theoretical insights into discourse analysis and advocates social commitment and interventionism in research.¹¹⁰ Fairclough's model of analysis involves three levels of discourse- text, process, and social context.¹¹¹ In this context, CDA allows the dissertation to explore how legal text, policies, and discourse shape the treatment of undocumented migrants facing eviction. It will involve the analysis of language used such as 'undocumented' 'immigrants' and 'illegals' to project implicit biases in the implementation of evictions, identify dominant public narratives surrounding eviction and migration, and reconcile the imbalances between the concepts of 'property rights' and 'unlawful occupiers. This dissertation will challenge assumptions within the legal discourse such as whether migrants are treated as a homogenous group, ignoring their diverse experiences, whether eviction is seen as a neutral administrative process, or whether it involves human rights violations. Conclusively, through critical discourse, practical steps and alternatives will be proposed, for example, a human rights-based approach to evictions and using findings to recommend changes in eviction policies. With this chosen discourse analysis, we can understand the phenomena of migration, evictions, and human rights in South Africa.¹¹²

3.2.6 *Data Quality*

1. Trustworthiness

The researcher ensured that all data collected were accurate and that all fabrications, fraudulent materials, omissions, and contrivances were avoided.

¹¹⁰ J Blommaert & C Bulcaen 'Critical Discourse Analysis' (2000) *Annual Review of Anthropology* 460.

¹¹¹ N Fairclough 'Critical Discourse Analysis' (1995) *London Longman* 183.

¹¹² HM Tirivangas 'The Efficiency Of Strategies For The Prevention Of Xenophobia In Post-Apartheid South Africa' (2017) 62.

2. Credibility

This refers to the equivalence of research results with the objective reality being examined.¹¹³ This is the truthfulness of the research and to what extent the research process and findings have been able to overcome the effects of misinformation and understand the context and its culture it operates in.¹¹⁴ The researcher ensured credibility by analysing enough sources to confirm the study findings. Furthermore, the researcher took time to immerse herself in the literature to get the truth or meaning of xenophobic attacks.

3. Confirmability

Confirmability deals with the issue of bias and prejudices of the researcher.¹¹⁵ Following the process, the researcher ensured that findings are independent of values, motives, or political persuasions of the researcher and that results are objective.

4. Dependability

Dependability refers to the stability of findings over time and remain the same if study is replicated in similar context.¹¹⁶ To ensure the dependability of findings and process, the researcher enlisted a detailed description of methods and themes of the research and involved peer reviews of methods and findings.

3.2.7 Ethical Consideration

This is the moral obligation of the researcher to abide by the ethical standards of research.¹¹⁷ The researcher has avoided falsification of data, distortion of results, and plagiarism and met every ethical standard of qualitative research. Additionally, in this research, no human subjects were involved or included in the study.

¹¹³ V Bitsch 'Qualitative Research: A Grounded Theory Example and Evaluation Criteria' (2005) *Journal of Agribusiness* 81.

¹¹⁴ V Bitsch (note 114) 82.

¹¹⁵ V Bitsch (note 114) 87.

¹¹⁶ V Bitsch (note 114) 87.

¹¹⁷ HJ Streubert-Speziale & DR Carpenter 'Qualitative research in nursing: Advancing the humanistic imperative' (2007) *Lippincott Williams & Wilkins* 60.

Chapter 4: The Legal framework protecting undocumented immigrants against forced evictions

4.1. Introduction

This chapter explores the existing legislative safeguards available to undocumented immigrants facing eviction. It outlines the central theme - the protection of undocumented immigrants in the context of evictions. Overall, this chapter discusses the legal provisions and mechanisms designed to protect this vulnerable group. The key legal instruments are the South African Constitution, particularly section 26 (1), which guarantees the right to access adequate housing for all, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, which plays an important role in preventing unlawful evictions and ensuring due process, Immigration Act as it intersects with eviction proceedings and the rights of undocumented immigrants and the Refugee Act which affords protections to refugees and asylum seekers. An important part of this research highlights the many challenges faced by undocumented immigrants in eviction threats. These challenges range from negative attitudes to aggressive acts of xenophobic violence against migrants perceived as bringing crime and disease into the receiving state and overburdening resources meant for the citizens of that state.¹¹⁸

Additionally, South Africa's response to xenophobia and violence against undocumented migrants involved denialism and a failure to take responsibility for the consequences of this heightened hostility towards migrants.¹¹⁹ This chapter aims to provide the state with a comprehensive understanding of the legal measures surrounding forced evictions for undocumented immigrants and evaluate their effectiveness against constitutional provisions and principles to contain xenophobic driven civil and state unlawful evictions.

¹¹⁸ J Crush, S Ramachandran, & W Pendleton 'Soft Targets: Xenophobia, Public Violence and Changing Attitudes to Migrants in South Africa After May 2008' (2013) *Southern African Migration Programme SAMP Migration Policy Series* 64 2.

¹¹⁹ G Tawodzera & J Crush 'A foreigner is not a person in this country': xenophobia and the informal sector in South Africa's secondary cities' (2023) *Urban Transform* 3.

4.2. Pre-1994 legal regime

The Aliens Control Act 96 of 1991 (Aliens Control Act) was the applicable law that governed the immigration status of foreigners.¹²⁰ State officials utilised the Aliens Control Act under apartheid to restrict the people's freedoms to move and housing.¹²¹ This contributed to the creation and upkeep of a racially and socioeconomically segregated land use system.¹²² Consequently, throughout apartheid, the occupier's ability to evict was legally strengthened by the state's police powers to remove individuals in order to limit immigration.¹²³ Local authorities were given the ability to remove illegal immigrants, which gave them the power to regulate the range of immigrant rights and award broad, seemingly unrestricted powers to those in charge of immigration control and detection.¹²⁴ The Aliens Control Act was abolished by the Refugees Act 130 of 1998 and the Immigration Act 13 of 2002, respectively.¹²⁵ The rights granted to individuals under this new regulatory framework, however, are still essentially a holdover from apartheid practices and remain a subject of bureaucratic procedure rather than judicial interpretation.¹²⁶

4.3. Post-1994 South Africa's migration policy: a balancing act

Post-1994 democratic dispensation has seen South Africa embrace progressive migration trends for economic benefits and opportunities on a global scale. However, in relation to free movement of people, particularly African migrants and refugees, there is some hesitation.¹²⁷ This hesitation is attributed to its pre-1994 apartheid era migration policy characterised as security conscious and restrictive, specifically enforced towards black migrants.¹²⁸ It is obvious that South Africa's national immigration policy and its enforcement is centred on colonial notions of national

¹²⁰ TF Hicks 'The Constitution, Aliens Control Act, and xenophobia: The struggle to protect South Africa's pariah: The undocumented immigrant' (1999) *Indiana Journal of Global Legal Studies* 339.

¹²¹ (n 54 above) 795.

¹²² G Muller 'The legal-historical context of urban forced evictions in South Africa' (2013) *Fundamina* 369.

¹²³ (n 54 above) 795.

¹²⁴ Sec 54(1) of the Aliens Control Act 96 of 1991 states that '[a]ny immigration officer may for the purpose of this Act (a) enter upon any premises; and (b) interrogate any person found in or on such premise'. The interpretation of 'any' provided immigration officers with broad power.

¹²⁵ E Alimohammadi & G Muller (n 54) 795.

¹²⁶ E Alimohammadi & G Muller (n 54) 795.

¹²⁷ BA Ionel & GM Constantinescu 'South Africa's Migration Dynamics: From Segregation to Integration' (2021) *Journal of Liberty and International Affairs* 61.

¹²⁸ BA Ionel & GM Constantinescu (n 128) 62.

protectionism, exceptional inclusion and xenophobia.¹²⁹ South Africa is in need of a policy reflective of modern neo-liberal stance on migration and as a way of reaffirming the country's commitment to socio-economic developments and human rights, witness the DHA publish the 2017 White Paper on International Migration (WPIM).¹³⁰ The WPIM proposes a complete overhaul of the migration system and outlines a policy framework for the strategic management of international migration in line with the country's national development goals.¹³¹ The WPIM establishes a process for foreign nationals to obtain residency and citizenship in South Africa, as well as to safeguard refugees and asylum seekers. This framework will ensure adherence to international migration agreements and protocols to which South Africa is a signatory. The WPIM critiques the Immigration Act noting that it makes South Africa susceptible to security risks, clandestine irregular migration, and reinforcement of apartheid patterns of migration.¹³² The WPIM recognises that the current system is unable to adequately identify and support those in need of immediate and special assistance.¹³³ The WPIM signalled a willingness to progress on regional integration, but implementation remains a challenge.¹³⁴

4.3.1. *The Constitution*

Everyone is safeguarded by the law from wrongful evictions. 'Everyone', including immigrants with or without documentation, is granted several essential rights, advantages, and safeguards under the country's existing post-1994 constitutional structure.¹³⁵ The legal framework exploring the nexus between migration and evictions

¹²⁹ T Achiume & T Last 'Decolonial Regionalism: Reorienting Southern African Migration Policy' (2021) *TWAIL Review* 3.

¹³⁰ J Handmaker & J Parsley 'Migration, Refugees, and Racism in South Africa' (2001) *Refugee: Canada's Journal on Refugees* 48.

¹³¹ A Farley 'South African Migration Policy: A Gendered Analysis' (2019) 2.

¹³² Farley (n 132) 12.

¹³³ Farley (n 132) 15

¹³⁴ OA Maunganidze, A Fakhry, A., & V Rietig 'Migration Policy in South Africa: Lessons from Africa's Migration Magnet for European Policymakers' 2021 <https://dqap.org/en/publications?title=OA+Maunganidze®ion=All&topic=All&type=All&program=All> (accessed 24 July 2024).

¹³⁵ The Constitution of the Republic of South Africa, 1996 contains a number of additional essential rights that offer protection to "everyone," whereas Section 26 is of special significance for this research study. Sec 24(1)(a) states that '[e]veryone has the right to an environment that is not harmful to their health or wellbeing'. Sec 27(1) states that '[e]veryone 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 dependents, appropriate social assistance'. Sec 29(1) states that '[e]veryone has the right to a basic education, including adult basic education; and to further

was altered by the democratic transition and the implementation of South Africa's, 1996. Section 26(1) of the Constitution provides that everyone has the right to have access to adequate housing. The legal landscape shifted from one that perpetuated inequality and discrimination to one that prioritised housing as a fundamental right. Section 26(2) places an obligation on the state to adopt reasonable legislative and other measures to achieve the progressive realisation of this right within its available resources. Furthermore, section 26(3) of the Constitution provides that no one may be evicted from their home or have their home demolished without a court order which was made after considering all the relevant circumstances. Section 26(3) furthermore states that no legislation may permit arbitrary evictions.

Firstly, to determine the constitutionality of the statute to address evictions of undocumented immigrants, it is important to understand that South Africa is a democracy built on the principles of the supremacy of the Constitution and the rule of law, the question of which statute (PIE, Immigration Act, Refugee Act) should be used to address the protection of undocumented immigrants during eviction should be based on which statute provides an outcome that is constitutional and reflects a progressive migration policy based on human right norms of dignity, equality and freedom from discrimination.

Secondly, an understanding of the role of the subsidiarity principle of the Constitution is equally important. Subsidiarity principle of the Constitution empowers local-level decision-making on public issues with limited interference by a national or higher level of government unless there are compelling reasons for centralization.¹³⁶ The application of the subsidiarity rule is evident in *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* (Pharmaceutical Manufacturers),¹³⁷ states that '[t]here is only one system of law ... shaped by the Constitution which is the supreme law, and all law, including common law, derives its force from the Constitution and is subject to constitutional control'.¹³⁸

education, which the state, through reasonable measures, must make progressively available and accessible' and so forth.

¹³⁶ The Constitutional Court has developed a mechanism known as subsidiarity principles through which laws are considered self-reliant to address social issues such as migration, housing, crime or evictions.

¹³⁷ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000].

¹³⁸ *Pharmaceutical Manufacturers* (n 138) para 44.

It relies on each of these Acts' potential and likely to advance the spirit, purpose, and goal of the Constitution to determine what are constitutionally tenable in for evicting undocumented immigrants.

We then combine the subsidiarity rule and single system of law ideas with elements of eviction legislation that support the tenets, purposes, and goals of the Bill of Rights. When considered collectively, these principles and traits are used to assess PIE, the Immigration Act, and the Refugees Act to determine the proper relationship between these three statutes in governing the effective eviction of undocumented immigrants from land and buildings or structures occupied illegally.

The subsidiarity principle was developed by the Constitutional Court using the idea of a single system of law. The subsidiarity principle should be used as a starting point when deciding which source should control litigation involving an alleged rights infringement, particularly the rights of undocumented immigrants. This also applies to the evictions of immigrants without proper documentation. This assures the highest level of consistency with the notion of a unified system of law and avoids the extinction of competing legal sources, particularly in a dispute over property and housing rights.¹³⁹ In application, this principle states that when bringing an action to defend a right, a litigant who claims that a Bill of Rights provision has been violated must rely on the legislation that was specifically passed to protect that right and may not rely directly on the provision in the Bill of Rights.¹⁴⁰ However, if a party challenges the law because it is unconstitutional or fails to effectively safeguard the right, the proviso permits that party to rely directly on the corresponding clause in the Bill of Rights.¹⁴¹

The result of this move away from competing sources guarantees that two interconnected processes that are part of a single legal and constitutional purpose are balanced fairly. According to Van der Walt, all sources of law should have the following qualities: they should be officially legitimate and of universal applicability, meaning

¹³⁹ G Muller 'Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa' (2015) *South African Law Journal* 132.

¹⁴⁰ AJ Van der Walt 'Normative pluralism and anarchy: Reflections of the 2007 term' (2008) *Constitutional Court Review* 36.

¹⁴¹ G Muller (n 140) 622; Van der Walt (n 141) 35.

they must be publicly accepted and disseminated;¹⁴² be described in plain language, have a prospective application, not call for behaviour that is outside the scope of the people, and not change often enough to prevent people from managing their activities and affairs, synchronize their actions; and must be applied by their wording.¹⁴³ The following universal principles should also be supported by all legal sources: equality, respect for each person's intrinsic human dignity, access to court and administrative justice.¹⁴⁴

Eviction proceedings should also acknowledge that eviction laws should serve an acceptable public goal and that the state may regulate property that is "legitimate, natural, and inevitable".¹⁴⁵ And when a state interferes with property, it must strike a fair balance between the private interests it will affect and the public interest it will advance.¹⁴⁶ Eviction processes or regulations should not permit the arbitrary expulsion from one's house or the arbitrary deprivation of property,¹⁴⁷ but rather make sure that fresh legislation is passed to implement the Constitution's following reformative objectives: granting access to stable tenancy; granting equal access to land; the right to appropriate housing is gradually being realised, and people are protected against being evicted without a court decision and only after all relevant factors have been taken into account.¹⁴⁸ As a result, these traits suggest that eviction proceedings should not have the unintended consequences of creating or aggravating homelessness or landlessness.¹⁴⁹

Van der Walt contends that these traits and the unintended consequences are related to the overarching constitutional objectives and transformational ambitions outlined in the different Bill of Rights clauses.¹⁵⁰ It must be established whether and to what extent PIE, the Immigration Act, or the Refugees Act promotes the principle of a single legal system of law that demonstrates these characteristics while avoiding undesirable

¹⁴² F Michelman 'The rule of law, legality and the supremacy of the Constitution' in S Woolman, M Bishop & J Brickhill (2008) *Constitutional law of South Africa* 11.

¹⁴³ Van der Walt (n 141) 27, 28.

¹⁴⁴ J Klaaren & G Penfold 'Just administrative action' in Woolman, Bishop & Brickhill (2012) 63.

¹⁴⁵ Van der Walt (n 141) 29.

¹⁴⁶ (n 141) 28.

¹⁴⁷ (n 11) section 25(1).

¹⁴⁸ (n 11) section 26(3).

¹⁴⁹ AJ Van der Walt, *Constitutional property law* (2005) 410,411.

¹⁵⁰ Van der Walt (n 150) 410.

outcomes when determining the constitutionality threshold of these statutes to regulate the eviction of undocumented foreigners in post-apartheid South Africa.

4.4. The Constitutionality and Effectiveness of Legislative framework on Eviction of Undocumented Immigrants

This part of the chapter will interrogate the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, the Immigration Act, and The Refugees Act against constitutional norms in addressing issues of evictions of undocumented migrants from property or land. This is so as discussed, that civil and state actors have defended their actions of involuntary, often aggressive removals of “illegals” from property as legitimate under the aforementioned statutes. This stance is problematic since these legislation not only have distinct content requirements and procedural requirements, but also have different outcomes.¹⁵¹ According to Van der Walt, the possibility of having a choice between many legal sources might result in a fight for dominance between forces that uphold the status quo and those who encourage reform.¹⁵² The questions then arise whether these actors are correct, that does existing framework echo their convictions, and if so, are these convictions and legislative provisions constitutionally tenable?

4.4.1. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act was passed to implement provision 26(3) of the Constitution. PIE establishes guidelines for removing trespassers from property and prohibits unlawful eviction.¹⁵³ The PIE Act acknowledges the right of landowners to request an eviction order from a court in the proper situations. PIE offers three different application processes for the eviction of unauthorised occupants: normal eviction proceedings initiated by a private owner or the person in charge of the land,¹⁵⁴ an urgent eviction proceedings initiated by a private

¹⁵¹ Alimohammadi & Muller (n 54) 800.

¹⁵² Van der Walt (n 141) 24.

¹⁵³ PIE section 1: An unlawful occupier as someone who uses land without the owner's or person in charge's express or implicit agreement; this definition excludes anyone whose use of the property is authorised by another legislation, such as the Extension of Security of Tenure Act, 62 of 1997.

¹⁵⁴ The PIE Act section 4.

owner or the person in charge of the land¹⁵⁵; and eviction proceedings initiated by an organ of state.¹⁵⁶ A judge may only order an eviction if it is reasonable and equitable.¹⁵⁷ This implies that the removal of unauthorised occupants from property must be done fairly, with specific attention paid to the rights of the elderly, children, people with disabilities, households led by women, and other vulnerable members of society. In addition to protection of unlawful occupiers of a property, PIE affords substantive and procedural rights to these occupiers.¹⁵⁸

The reliance on PIE acknowledges that it was passed by a democratically elected legislature after 1994, demonstrating the intended characteristics and attempting to avert undesirable effects.¹⁵⁹ PIE explicitly states that a court should make an order that is just and equitable to landowners and the unlawful occupiers, which limits owners' rights to the use and enjoyment of their property for a lawful purpose while also ensuring that a proper balance is struck between the property interests of landowners and the housing interests of the unlawful occupiers.¹⁶⁰ PIE is compatible with one of the Constitution's programs for land reform.¹⁶¹ According to one definition, land tenure reform is the legalisation of land ownership, which is typically done to bring about social transformation.¹⁶² Calls for social reform through a land use system that is not separated along the lines of ethnic or socioeconomic origin are expressed in the context of the expulsion of undocumented immigrants. The repeal of discriminatory apartheid land laws was insufficient and just marked the beginning of a procedure that called for more laws to be passed to fortify and stabilise shaky property rights and interests.¹⁶³

It is believed that the availability of alternative accommodation is the most crucial criterion that a judge should take into account when deciding whether it is reasonable and equitable to issue an eviction order.¹⁶⁴ The truth of an eviction is that the evicted

¹⁵⁵ The PIE Act section 5.

¹⁵⁶ The PIE Act section 6.

¹⁵⁷ The PIE Act section 6.

¹⁵⁸ The PIE Act section 4(1).

¹⁵⁹ Alimohammadi & Muller (n 54) 802.

¹⁶⁰ Van der Walt (n 150) 410.

¹⁶¹ Van der Walt (n 150) 411.

¹⁶² DC Miller *Land title in South Africa* (2000) *Juta Cape Town* 456.

¹⁶³ G Muller (n 140) 635.

¹⁶⁴ *Tswelopele* para 18.

individuals cannot carry the actual location and its intangible components as a home with them to the new location.¹⁶⁵ As a result, an eviction order frequently destroys the solid emotional bonds and social networks inside a community.¹⁶⁶ The livelihoods of those being evicted and their families are destroyed, and relocation involves many unknowns. When undocumented immigrants are forced to leave, a further element of uncertainty is added, along with the possibility of greater marginalisation and xenophobic violence. The precarious situation of undocumented immigrants who are evicted from their homes may be perpetuated or even made worse by failing to assess whether it is reasonable and equitable to obtain an eviction order. According to the PIE Act, it is illegal to evict anybody without permission, and doing so is punishable by law. Anyone found guilty of forcibly evicting someone faces a fine or a sentence of up to two years in jail. The Bill of Rights' spirit, purpose, and objectives are thus best promoted by PIE since it fits the criteria for a property system that does so.¹⁶⁷

Although, the PIE Act gives expression to a constitutional right that has a direct bearing on evictions in general,¹⁶⁸ it is still regarded as an incomplete legislation due to its unclear provisions regarding alternative accommodation, unspecific provisions for migrants, and limited scope focusing on the eviction process itself rather than discussing key broader issues relating to housing and social justice.¹⁶⁹ This incompleteness may lead to migrants without viable options, or access to legal remedies after evictions.

4.4.2. The Immigration Act

The Immigration Act was passed to create a unified framework with standards for the control of foreigners' entry into¹⁷⁰, their residence in,¹⁷¹ and exit from the Republic.¹⁷² The Immigration Act contains details on all other pertinent issues related to it, including the enforcement and detection strategy for monitoring alien nationals.

¹⁶⁵ L Fox 'The meaning of home: A chimerical concept or a legal challenge?' (2002) 9 *Journal of Law and Society* 580.

¹⁶⁶ G Muller (n 140) 636.

¹⁶⁷ The PIE Act, section 8.

¹⁶⁸ Van der Walt (n 150) 410.

¹⁶⁹ G Muller (n 123) 633.

¹⁷⁰ The Immigration Act section 1(1)(a).

¹⁷¹ Immigration Act (n 171) section 1(1)(xvii).

¹⁷² As above.

Additionally, it aspires to establish a new system of immigration control whereby Home Affairs' administrative resources are used to efficiently and effectively implement immigration regulations.¹⁷³

The effectiveness of the Immigration Act, a post-1994 legislation, much as PIE, to address evictions of undocumented immigrants must be handled similarly to that of PIE.¹⁷⁴ The Immigration Act is partial legislation – not all its provisions have been enacted and does not directly implement a constitutional right, albeit it may indirectly implement section 21 of the Constitution.¹⁷⁵ It indirectly affects it by regulating entry, residence, and movement within the country setting eligibility criteria, visa requirements, and deportation procedures, the Act influences individuals' ability to exercise their mobility rights. The legal status of people resident in South Africa may have an impact on the scope of the protection provided by the Bill of Rights.¹⁷⁶ Everyone is guaranteed the freedom of movement according to Section 21(1), and Section 21(2) declares that 'everyone', including non-citizens, is also entitled to leave the Republic.¹⁷⁷ Sections 21(1) and 21(2) of the Constitution may indirectly take effect since the Immigration Act governs how foreign nationals are admitted to, remain in, and leave the Republic.

The scope and application of section 21 determine the extent of the protection of the right, which is linked to the interpretation of the right to freedom of movement and residence. This protects persons who are neither South African citizens nor have regularised their stay. The position of section 21 in light of the *Lawyers for Human Rights judgment* confirms that sections 21(1) and 21(2) of the Constitution similarly would apply to all persons within the South African territory, including persons who are illegally in the Republic.¹⁷⁸

¹⁷³ Alimohammadi & Muller (n 54) 802.

¹⁷⁴ Alimohammadi & Muller (n 54) 807.

¹⁷⁵ Alimohammadi & Muller (n 54) 808.

¹⁷⁶ J Klaaren 'The right to freedom of movement and residence' in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2013) 66.

¹⁷⁷ The Constitution section 21(3) provides that '[e]very citizen has the right to enter, to remain in and to reside anywhere in, the Republic'. Sec 21(4) provides that '[e]very citizen has the right to a passport'. Therefore, protection in terms of sec 21 in some instances is afforded to 'everyone' and in other cases only to 'citizens'. However, the restriction of the protection is only to the extent that persons enter into and remain in the Republic and reside anywhere in the Republic.

¹⁷⁸ Klaaren (n 171) 66-63. 'Everyone' should be given its ordinary meaning. The term, therefore, provides coverage to all natural persons, whether or not they are of South African nationality. Sec 26(1) of the

Additionally, sections 32 and 34 regulate deportation and detention of undocumented immigrants and states,¹⁷⁹ and often require mandatory departure from the Republic.¹⁸⁰ This process of application of law involves forceful, unlawful removal, loss or deprivation of shelter, and can be characterised as "painful and frequently degrading experience" that maintains the social marginalisation of undocumented.¹⁸¹ The review and adjudication of judgments that negatively impact an undocumented immigrant are minimally encouraged under the Immigration Act.¹⁸²

The Immigration Act makes no effort to find a balance between the public interests of local authorities in policing immigration and the personal interests of undocumented immigrants who are adversely impacted with limited possibility to return once they have regularised their status due to having a criminal record.¹⁸³ The Immigration Act should be viewed in the same light as legislation that supports the letter, spirit, and purposes of the Bill of Rights.¹⁸⁴ The Immigration Act works to preserve immigration control on behalf of the general public, it does not do enough to uphold people's inherent dignity.¹⁸⁵ The Immigration Act's main goal is to provide effective and efficient immigration control, not to regulate evictions. Removal of undocumented immigrants from their homes under the guise of deportation goes against the values of the Constitution.¹⁸⁶ It falls short in terms of increasing access to administrative justice, boosting access to courts, and promoting the intrinsic human dignity of undocumented immigrants.

Constitution states that everyone has the right to access adequate housing. It is suggested that the meaning of 'everyone' in terms of sec 26(1) be given the same interpretation as 'everyone' in terms of sec 21.

¹⁷⁹ See Immigration Act. This can be done without the need for a warrant and an immigration office may arrest an undocumented immigrant or cause him to be arrested and detained.

¹⁸⁰ Sec 34(5) of the Immigration Act. Failure to depart will result in the foreigner being guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

¹⁸¹ *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others 2012 (6) SA 294 (SCA)* para 33.

¹⁸² Alimohammadi & Muller (n 54) 811.

¹⁸³ Alimohammadi & Muller (n 54) 812.

¹⁸⁴ Alimohammadi & Muller (n 54) 812.

¹⁸⁵ Alimohammadi & Muller (n 54) 807.

¹⁸⁶ Alimohammadi & Muller (n 54) 816.

4.4.3 *The Refugees Act*

The Refugees Act was passed to give effect to the pertinent international legal instruments, principles, and standards relating to refugees in South Africa, to facilitate the admission of asylum seekers into the country, to control the application and recognition processes, and to outline the rights and responsibilities that come with being granted refugee status. The Refugees Act was also enacted after 1994 and its reliance is to address issues relating to evictions of undocumented immigrants in post-apartheid South Africa must be approached similarly to that of PIE and the Immigration Act.¹⁸⁷ Similarly to the Immigration Act, the Refugees Act is a partial legislation, technical nature (administrative) and does not give direct effect to a right in the Constitution but may give indirect effect to section 21 of the Constitution. It remains contextually problematic to construct a direct line between the Refugees Act and a right in the Constitution. By assuring adherence to pertinent international legal instruments, principles, and standards about refugees, the Refugees Act promotes a public purpose. Therefore, by providing refuge to persons who are unable or unwilling to return to their place of nationality due to fear, the Refugees Act promotes public and private interests. The Refugees Act contains specific provisions for when the rights, needs, and circumstances of refugees and asylum seekers are considered.

The Refugees Act provides for the detention of an asylum seeker whose status has been withdrawn.¹⁸⁸ If the Director General has withdrawn an asylum seeker visa in terms of section 22(5), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the asylum application, in the manner and place determined by him or her with due regard to human dignity.

In this case, removal and detention require the asylum seeker to leave the home he or she currently lives in permanently. As a result, the asylum seeker is driven from their residence. Many of the traits of a property system that supports the tenets, goals, and spirit of the Bill of Rights seem not to be met by the Refugees Act. In situations where its provisions, notably section 23 above, are applied to carry out an eviction, it offers no protection.

¹⁸⁷ Alimohammadi & Muller (n 54) 815.

¹⁸⁸ The Refugees Act (n 58) section 23.

4.4.4. Case law discussion: practical constitutional implications of PIE, Immigration Act and Refugees Act.

The courts have handed down judgments in cases where local authorities have used police power legislation to evict undocumented immigrants from land or property. The important cases for this discussion are *Scalabrini Centre of Cape Town v. Minister of Home Affairs (Scalabrini)*,¹⁸⁹ *Minister of Home Affairs v. Rahim and Others (Rahim)*,¹⁹⁰ *City of Cape Town v. The South African Human Rights Commission (SAHRC)*,¹⁹¹ *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality (Tswelopele)*,¹⁹² *the Refugee Appeal Board of South Africa v Mukungubila (Mukungubila)*,¹⁹³ *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew and Another (Chapelgate)*,¹⁹⁴ *the City of Johannesburg v Changing Tides (Pty) Ltd & Others (Changing Tides)*¹⁹⁵ and the *Helen Suzman Foundation and Another v Minister of Home Affairs and Others (Helen Suzman Foundation)*.¹⁹⁶

In *Tswelopele*,¹⁹⁷ officials from three governmental agencies in a joint operation evicted 100 people, respectively, from the rudimentary shelters that they had erected on a vacant piece of land. A total of 16 immigrants without South African documentation were arrested and subsequently deported. The eviction was found to have been unlawful despite the plea of Home Affairs stating that their participation was focused solely on identifying 'non-documented illegal immigrants'. In this case, the court faced the challenge of reconciling police power legislation (such as PIE) with immigration laws. The absence of clear guidance on the relationship between eviction procedures and immigration status led to uncertainty.

¹⁸⁹ *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others (CCT 51/23) [2023] ZACC 45; 2024 (4) BCLR 592 (CC).*

¹⁹⁰ *Minister of Home Affairs v Rahim and Others (CCT124/15) [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC).*

¹⁹¹ *South African Human Rights Commission and Others v City of Cape Town and Others (8631/2020) [2020] ZAWCHC 84; 2021 (2) SA 565 (WCC).*

¹⁹² *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality [2007] ZASCA 70; [2007] SCA 70 (RSA); 2007 (6).*

¹⁹³ *Refugee Appeal Board of South Africa and Others v Mukungubila (185 of 2018) [2018] ZASCA 191.*

¹⁹⁴ *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew and Another (2010/3234) [2016] ZAGPJHC 389; 2017 (2) SA.*

¹⁹⁵ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6). SA (SCA).*

¹⁹⁶ *Helen Suzman Foundation and Another v Minister of Home Affairs and Others [2017] 3 All SA 253 (GP).*

¹⁹⁷ *Tswelopele (n193) para 3.*

Similarly, in *Chapelgate*, the City of Johannesburg sought the eviction of approximately 300 occupiers, 161 of whom were undocumented immigrants. Here, the courts evaluated the effectiveness of PIE, the Refugees Act, and the Immigration Act and examined the extent of benefits, protections, and rights afforded to undocumented immigrants in this instance. In this judgment, Mokgoro J stated that the case of an undocumented immigrant was 'quite different' to that of a person who has regularised his or her stay. However, the failure of an immigrant to enter the country legally at a designated port of entry or one who did not seek asylum but gained entry using another category of visa that has since expired does not render that person subject to the consequences of the Immigration Act provided that an intention to seek asylum exists.¹⁹⁸ The courts have confirmed that the right to dignity is determinative of the issue if it is conflicted by any other law, including another provision in the Constitution.¹⁹⁹

Additionally, Spilg J concluded that undocumented migrants are equally entitled to the socio-economic rights contained in the Bill of Rights as a citizen would ordinarily be entitled to insofar as the provision does not specifically provide enjoyment and protection for citizens only. With this strategy, local authorities won't be able to "weed out" the few undocumented occupants who might not be eligible for some benefits, such as temporary emergency housing, while still claiming to be concerned with immigration control.²⁰⁰ The courts concluded that their occupation was unlawful. An eviction order was granted, and the issue turned to whether the City was obliged to provide temporary emergency accommodation for undocumented immigrants under PIE. This case did not specifically address deportation or asylum for the unlawful occupiers. The courts failed to provide clear guidance on how these statutes interacted. Specifically, they did not address the interplay between PIE (which governs evictions), the Refugees Act (which deals with refugees and asylum seekers), and the Immigration Act (which regulates entry and residence).

In both *Tswelopele* and *Chapelgate*, the courts failed to determine the precise nature of the relationship between police power legislation authorising the eviction of

¹⁹⁸ *Chapelgate* (n 195), para 40.

¹⁹⁹ *Chapelgate* (n 195) para 5.

²⁰⁰ *Changing Tides* (n 182) para 52.

undocumented immigrants in terms of PIE, the Immigration Act, and the Refugees Act. As a result, evictions of undocumented migrants are routinely carried out under the pretext of "solely identifying non-documented immigrants" by the Immigration Act and the Refugees Act. Government representatives and municipal authorities carry out evictions without adhering to PIE's substantive safeguards and procedural protections. They assert that their goal is to fulfil the requirements of the Immigration Act and the Refugees Act, not to expel undocumented immigrant residents. The use of police force during these constructive evictions to get around the procedural safeguards and substantive safeguards stipulated in PIE has a disturbing resemblance to the brutal chaos of immigration control and racial segregation under apartheid.

Additionally, in the *Mukungubila* case, the RAB excluded Mr. Mukungubila's asylum application under section 4(1)(a) and (b) of the Refugees Act.²⁰¹ However, it failed to provide reasons for rejecting the application as manifestly unfounded, abusive, or fraudulent, as required by section 24(3)(b) or c of the Act. This case highlights the delicate balance between individual rights (such as asylum seekers' protection) and public interest (ensuring adherence to international refugee norms). The courts applying the subsidiarity principle, relayed the matter to the RAB, citing that it was an expert body better positioned to assess asylum applications than the judiciary. Also, in *Changing Tides*,²⁰² the interior of a building had been divided into apartments that were let to citizens and undocumented immigrants. The Supreme Court of Appeal debated whether the City had to offer temporary emergency housing to immigrants without proper documentation. The question of whether or not status determination should come before the emergency shelter was decided. The Court determined that the circumstances called for rapid relief of the misery of people who had been caught in an emergency.²⁰³ The life and health of this vulnerable group were a priority, necessitating an obligation on the city to provide suitable temporary accommodation.

²⁰¹ Section 4(1)(a) and (b) of the Refugees Act gives grounds for application such as if their life, physical safety, or freedom is threatened due to external aggression, occupation, foreign domination and also exempts eligibility for application if one committed a crime.

²⁰² *Changing Tides* (n 182) paras 53.

²⁰³ *Changing Tides* (n 182) paras 53-54.

However, in *Scalabrini*, the Scalabrini Centre challenged certain sections of the Refugee Act as unconstitutional in which the court examined whether specific provisions of the Refugees Act violated constitutional rights. The contested sections related to the rights of asylum seekers, including access to social services and documentation. Ultimately, the court declared those provisions unconstitutional. Additionally, in the *Rahim* case, the respondents, Bangladeshi nationals, sought asylum in South Africa under section 21 of the Refugees Act. They were granted asylum-seeker permits under section 22(1), allowing them to stay temporarily while awaiting the outcome of their asylum application. Despite their permits, their asylum applications were eventually rejected, leading to their arrest, unlawful eviction from their residence, and subsequent detention. The respondents were detained under the authority of section 34(1) of the Immigration Act, which permits the arrest and detention of “illegal foreigners” The Constitutional Court affirmed that the principles protecting asylum seekers still applied, even if they entered the country “illegally.” The detention of the respondents was found to be unlawful, and damages were awarded for wrongful detention. This is important as it highlights the tension between immigration control and safeguarding the rights of vulnerable populations and the need to balance immigration enforcement with the protection of asylum seekers’ rights.

Lastly, another example where the Refugee Act was tested against the Constitution was in *Helen Suzman Foundation and Another v Minister of Home Affairs and Others*. In this case, Home Affairs Minister Aaron Motsoaledi decided not to renew the Zimbabwe Exemption Permits (ZEP) permits,²⁰⁴ affecting over 178,000 people living in South Africa. The Court declared this decision invalid, unlawful, and unconstitutional because the ZEP holders were not given a reasonable opportunity to make representations and iteration that such proclamation did not consider the impact on ZEP holders and their families and that the decision unjustifiably limited rights. Ultimately, the court ordered the matter to be reconsidered, and during this process, the ZEP permits would remain valid for the next 12 months. This decision upheld South Africa’s post-apartheid constitutional values of fair processes and human rights. Similarly, in *the City of Cape Town v. The South African Human Rights*

²⁰⁴ Kapindu (n 31).

Commission, during the Covid-19 lockdown, regulations severely curtailed evictions. A viral video showed a man being dragged from his dwelling by City of Cape Town officials due to being undocumented. The Western Cape High Court declared sections of the Refugees Act unconstitutional. The court ordered that the City of Cape Town must not arrest or issue deportation orders for Zimbabwean Exemption Permit holders.

4.5. Conclusion

In conclusion, this chapter sheds light on the intricate legal landscape surrounding the protection of undocumented immigrants facing eviction in South Africa. By examining key legal instruments such as the South African Constitution, the PIE Act, the Immigration Act, and the Refugees Act, we uncover both safeguards and challenges. Section 26(1) of the Constitution ensures the right to access adequate housing for all. However, this promise remains elusive for many undocumented immigrants. It may seem, in application, that legislative documents such as PIE, the Immigration Act, and the Refugee Act may echo the xenophobic rhetoric of civil and state actors. However, when tested against its constitutional tenability through adjudication, such a stance is rejected by South Africa's Constitution. The application of these laws regarding undocumented immigrants during eviction threats remains complex. There is a need for enhanced legal enforcement mechanisms, societal empathy, and a holistic approach to protect the rights of this vulnerable group. By doing so, South Africa can move toward a more just and inclusive society.

Chapter 5: International obligation to protect undocumented migrants against forced evictions

5.1. Introduction

South Africa is a key actor on the global stage and party to many key international standards and norms about immigrants. These norms will be discussed later in this chapter. South Africa is praised globally for its shift from its exclusive socio-political and legal landscape to a modern inclusive era, however, the experiences of these migrants in South Africa tell a different story. They are subjected to institutional and physical xenophobia, and limited realisations of migrant's rights protected under international law.²⁰⁵ This is heightened by the lack of political will of the state to protect the undocumented immigrants and criminalise acts of violence towards this group.²⁰⁶ The international human rights landscape has evolved to consist of legal instruments, institutions and mechanisms to enforce a state's commitment to addressing migrant issues - for this chapter - unlawful removals and evictions of undocumented immigrants and place binding obligations.²⁰⁷ Whilst addressing the objectives of this research, this chapter will explore the nexus between state responsibility to provide adequate housing and the protections of undocumented immigrants against forced evictions under international law, including regional law..

International law and policies generally prohibit forced evictions and consider them unlawful. However, the prohibition of forced evictions excludes evictions that are carried out in accordance with domestic laws that are aligned to international standards.²⁰⁸ Article 1 of the Universal Declaration of Human Rights (UDHR) states that 'all human beings are born free and equal in dignity and rights'.²⁰⁹ Although the UDHR has no binding authoritative force, its founding principles are considered to be part of international customary law and for that reason they are universally mandatory.²¹⁰ Also, the principles in the UDHR have been incorporated in other

²⁰⁵ F Khan 'Does the Right to Dignity Extend Equally to Refugees in South Africa?' (2020) *African Human Rights Law Journal* 262.

²⁰⁶ LB Landau (n 30) 3.

²⁰⁷ VN John-Langba 'Implications and opportunities of the international refugee protection regime for national human rights institutions in Africa (2022) *African Human Rights Law Journal* 52.

²⁰⁸ Evictions which may be justifiable include in cases 'of persistent nonpayment of rent or of damage to rented property without any reasonable cause...' See General Comment Number 7.

²⁰⁹ Universal Declaration of Human Rights (UDHR) article 1,

²¹⁰ S Romero 'Mass Forced Evictions and the Human Right to Adequate Housing in Zimbabwe' (2007) *North Western Journal of International Human Rights* 282.

international instruments that are legally binding to state parties that have either acceded or ratified them, for example, the International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention Against Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of Persons with Disabilities (CRPD), Convention on the Rights of the Child (CRC).²¹¹

Article 11(1) of the ICESCR obliges state parties to the Covenant to acknowledge the right to 'everyone' to an adequate standard of living...including the right to housing.²¹² ²¹³To further expound on this right, General Comment Number 4 of 1991 and General Comment Number 7 of 1997 on the practice of forced evictions were adopted by the United Nations Committee on Economic, Social and Cultural Rights.²¹⁴ General Comment Number 4 stresses on the need for 'all' persons to have a secure tenure which affords legal safeguard against eviction, inhuman treatment and other threats.²¹⁵ It concludes that forced evictions are, at *prima facie*, inconsistent with the spirit and object of ICESCR. State parties are obliged to desist from forced evictions and monitor the adoption and implementation of laws that prohibit other authorities or private individuals from carrying out forced evictions that are not by the law. Where forced evictions have been carried out illegally and arbitrarily, State parties should ensure that perpetrators are brought to justice and victims are adequately compensated. Resource constraints are not considered to be a valid justification for the State's failure to comply with these obligations.²¹⁶

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) permits differentiation between citizens and non-citizens but this permitted distinction cannot overrule the illegality of discrimination on the grounds of, among

²¹¹ See Special Rapporteur on human rights defenders 'Declaration on human rights defenders' Available at <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders#:~:text=The%20Declaration%20is%20not%2C%20in,on%20Civil%20and%20Political%20Rights>. (accessed 17 July 2023).

²¹² South Africa deposited its instrument of ratification to the International Covenant on Economic, Social and Cultural Rights on 15 April 2015.

²¹³ Covenant on Economic, Social and Cultural Rights article 11(1).

²¹⁴ CESCR General Comment Number 7: *The right to adequate housing (Art.11.1): forced evictions* <https://www.refworld.org/legal/general/cescr/1997/en/53063> (accessed July 2023)

²¹⁵ General Comment Number 4 para 8 (a).

²¹⁶ General Comment Number 7 paras 8 & 9.

others, nationality.²¹⁷ South Africa is a state party to ICERD, therefore, the obligations imposed by Articles 1 - 3 of the treaty are binding to the country.

Moreover, all migrants have the right to be protected against refoulement.²¹⁸ Article 33(1) of the United Nations Convention on Refugees and Article 11 (3) of the Organisation of African Unity Convention Governing the Specific Aspects of Refugees, respectively, pinpoints that all migrants must not be arbitrarily denied entry at the member state borders or be expelled to a jurisdiction where they are prone to be subjected to cruelty or degraded treatment or punishment.²¹⁹ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the refoulement of migrants to a state that has 'a consistent pattern of gross, flagrant or mass violations of human rights'.²²⁰

South Africa's obligations regarding migrants' right to be unlawfully evicted housing are to respect, protect and fulfil. The obligation to respect implies that South Africa desists from directly or indirectly interfering with the enjoyment of the migrant's right to adequate housing as well as to prevent non-state actors from the same. States-forced evictions should only be carried out in exceptional circumstances, by the law, and after extensive consultation with the affected individuals or communities and the exploration of alternatives.²²¹

²¹⁷ CERD article 1 - 3 of and CERD General Recommendation Number 30 on Discrimination against Non-citizens

²¹⁸ "The principle of non-refoulement forms an essential protection under international human rights, refugee, humanitarian and customary law. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations." See United Nations Human Rights Office of the High Commissioner 'The principle of non-refoulement under international human rights law' 1-2.

²¹⁹ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3 (1).

²²⁰ Convention Against Torture (n 220) article 3(2); General Comment Number 5 on the African Charter on Human and People's Rights (African Charter), article (12(1) <https://achpr.au.int/en/node/905> (accessed 29 July 2023); Resolution on the Respect for the Principle of Non-Refoulement of Asylum Seekers and Refugees <https://achpr.au.int/en/adopted-resolutions/484-resolution-respect-principle-non-refoulement-asylum-seekers> (access 28 July 2023); *Modise v. Botswana* https://www.worldcourts.com/achpr/eng/decisions/1997.04.24_Modise_v_Botswana.htm (accessed 29 July 2023).

²²¹ UN Habitat 'Alternative solutions to forced evictions and slum demolitions: Case studies from Africa, Asia, North and South America' (2018) https://unhabitat.org/sites/default/files/download-manager-files/forced%20evictions_final.pdf (accessed 05 July 2023).

All migrants should be protected against targeted and unlawful expulsion from a country or place of residence.²²² As a member of the African Union (AU) and the Southern African Development Community (SADC), there are several instruments and guiding principles that South Africa is bound by which safeguard and promote the rights of migrants. If read comprehensively and holistically, these regional instruments and guidelines prohibit African States from discriminating against migrants irrespective of their, among others, race, national and social origin.²²³ Of particular importance is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention). The Kampala Convention seeks to address and mitigate the incidence of xenophobic violence and provide effective social responses to victims who have been internally displaced as a result of the xenophobic-led actions of state and non-state actors.²²⁴

Additionally, the African Charter on Human and People's Rights (African Charter) notes the commitment of African States to upholding and protecting the rights of all persons irrespective of their 'migration status'.²²⁵ Although the African Charter does not explicitly refer to the right to housing, the African Commission on Human and People's Rights, which has been given the mandate to interpret the African Charter - has interpreted the right to housing as a collection of fundamental rights which the African Charter explicitly provides for.²²⁶ Additionally, the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, The Protocol to the African and Human and Peoples' Rights of

²²² 'Expulsion is an act of a public authority by which an alien is requested under threat of penalty or, if necessary, compelled to leave the territory of the country of his residence or stay.' See The Encyclopaedia of World Problems & Human Potential available at <http://encyclopedia.uia.org/en/problem/expulsion-immigrants-and-aliens#:~:text=Expulsion%20is%20an%20act%20of,of%20his%20residence%20or%20stay>. (accessed 18 July 2023).

²²³ The Constitutive Act of the African Union, article 3(h).

²²⁴ R Adeola 'Xenophobia and internal displacement in Africa: Defining protection and assistance through the Kampala Convention' (2020) *South African Journal of International Affairs* 500.

²²⁵ Article 2 of the African Charter on Human and Peoples' Rights states that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present 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."

²²⁶ UN Habitat (n 222) 14.

Persons with Disabilities in Africa - in all is enshrined the obligation by state parties to safeguard the violation of the rights of migrants by both state and non-state actors.²²⁷

Article 7 and Article 12(5) of the African Charter on Human and People's Rights prohibit expulsion and mass expulsion of migrants. Moreover, the expulsion of refugees to a jurisdiction that will threaten their 'life, physical integrity' is also prohibited in terms of Article II (3) of the Organisation of African Unity Convention Governing the Specific Aspects of Refugees. For expulsion to be regarded as lawful it has to emanate from a decision that has been taken by the governing laws, unless if there are compelling reasons that indicate a threat to national security. Oftentimes, the forced eviction of migrants precedes their expulsion, thereby rendering them homeless if no alternative accommodation has been availed. Every migrant has the right to property and the exercise of this right can only be interfered with by the applicable laws and to further public interests.²²⁸

Although it has been established that South Africa does have obligations to provide adequate housing to and prevent unlawful evictions against undocumented immigrants under regional and international instruments South Africa has made slow efforts to reform its immigration law through the introduction of the WPIM, for instance. However, this reform has been met with civil and political pushback. Recently, the Home Affairs Minister, Dr. Aaron Motsoaledi characterised the WPIM as "unworkable" and cited that South Africa "does not have the resources to grant the socio-economic rights envisaged in international law".²²⁹ He then proposed that South Africa withdraw from the Refugee Convention and recede to it with reservations, cherry-picking which rights to respect. In April 2024, the final WPIM was published but received opposition from civil society and public interest groups on South Africa's withdrawal from the Refugee Convention, its Protocol, and the first safe country principle".²³⁰ These recent

²²⁷ See article 4 of the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa article 3, the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa article 2 and the Protocol to the African and Human and Peoples' Rights of Persons with Disabilities in Africa article 3.

²²⁸ The African Charter article 14.

²²⁹ <https://www.hrw.org/news/2023/11/20/south-africa-mulls-major-immigration-overhaul> (accessed 05 January 2023)

²³⁰ Migration Issue Brief 7 'The first safe country principle in law and practice' (2011) *African Centre for Migration Society* <https://www.migration.org.za/wp-content/uploads/2017/08/First-Safe-Country-Principle-in-Law-and-Practice.-Issue-Brief-7.pdf> (accessed 20 February 2024).

developments of the WPIM not only constitute a violation of international law but will legitimise impunity, harassment, and attacks against immigrants within the state by state officials and civilians.²³¹

South Africa is yet to ratify the CRMW and the Kampala Conventions, which enables the government to armour their factions with a scapegoating technique and political xenophobic denialism, framing migrants as threats to national identity or sovereignty and competitors for resources and economic opportunities.²³² An identifiable factor contributing to a punitive and deterrence stance on migration is the political landscape where political parties amplify xenophobic rhetoric for political gain. In 2008, Thabo Mbeki described Zimbabwe immigrants as 'illegal immigrants' not worthy of asylum or protection.²³³ For example, respondents in a Wits-Tufts survey, although acknowledging a rise in crime, blamed migrants for this social ill. Another example is the South African government's failure to fact-check incorrect data on the immigrant (documented and undocumented) population in South Africa. South Africans erroneously perceive that 25 percent of their population consists of foreigners. However, the accurate number is 500 000 undocumented migrants.²³⁴ This bias can be seen when South Africans fail to distinguish between the category of migrants classifying all as 'illegals'.²³⁵ These biases and blame game has clouded South Africa's debate on migration, preventing progressive implementation of the WPIM for rights-based solutions.²³⁶

South Africa's non-compliance with its obligations under regional and international law can be notably attributed to political factors, especially the May 2024 general elections. For instance, the Department of Home Affairs iterated that South Africa will not be able to achieve economic growth if there is not a halt on immigration flow or the

²³¹ LB Landau (n 30) 310.

• ²³² F Adegalu & T Mitchell 'The Impact of the United Nations Human Rights Treaties on Domestic Law Level in South Africa' in F Viljoen, R Murray and C Heyns *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On* (2024) 1082.

²³³ G Simpson 'Neighbours in Need' 2008 <http://www.hrw.org/en/node/62160/section/1> (accessed 20 February 2024).

²³⁴ K Jacobsen 'Migration Within Africa: The View from South Africa.' (2007) *The Fletcher Forum of World Affairs* 208.

²³⁵ K Jacobsen (n 236) 209.

²³⁶ BA Ionel & GM Constantinescu (n 121) 61.

regularisation of migrants to documented residents in South Africa.²³⁷ This constant political rhetoric influences mass South African populace attacks on undocumented migrants and carry out unlawful, politically supported violent removals of these migrants from their place of work or home. The SAPS and the government often do not persecute perpetrators of these unlawful acts, resolving that these acts are motivated by discontent with the socio-economic stagnation of the country believed to be caused by migrants and not necessarily discriminatory.²³⁸ The lack of political will to delegitimise anti-migrant movements such as *Operation Dudula* continues to plague South Africa's non-compliance with international law to protect the livelihoods, safety, and human dignity of these vulnerable group of migrants.²³⁹

5.2. The state's role in arbitrary evictions

The South African state is a constitutional state, although marred by serious inequality among its citizens, adheres to the supremacy of the Constitution, and no human rights violations that parallel its *Apartheid regime*, may be permitted. In evictions, South Africa protects its citizens, and that all evictions must be court ordered, having been adjudicated in a democratic process.²⁴⁰ By highlighting some court case decisions, it will be prevalent of the protective measures the state has put in place for its citizen in the eviction process. For example, in *Government of the Republic of South Africa and Others v Grootboom* case, the courts iterated that the state has a constitutional obligation to protect its citizens against evictions that may lead to homelessness and must provide accommodation within its available resources.²⁴¹ The state is brought into these eviction proceedings, especially when there is a risk of homelessness, an infringement of a constitutionally enshrined right to housing. The state interventionist role in creating entitlement mechanisms that redress inequality and housing deprivation has been key to a modern eviction legal system in South Africa.

²³⁷ YB Abdulfatai 'Exploring the Rise in Anti-Immigrant Violence in South Africa: An Interdisciplinary disciplinary analysis of history, economic, social, and political factors (2023) *Bard Digital Commons* 200.

²³⁸ J Crush & Ramachandran 'Migrant Entrepreneurship, Collective Violence and Xenophobia in South Africa (2014) *South African Migration Programme, SAMP Migration Policy Series* 1.

²³⁹ KS Tarisayi 'Framing Operation Dudula and Anti-Immigrant Sentiment in South African. Media discourse' (2024) *Indonesian Journal of Education and Social Science* 36.

²⁴⁰ S Fick & M Vols (note 242) 48.

²⁴¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 66.

Additionally, in eviction proceedings, the courts utilise participatory engagements between parties before resolving an eviction order.²⁴² This is evident in the cases of *PE Municipality v Various Occupiers* (“*PE Municipality*”)²⁴³ and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (“*Olivia Road*”).²⁴⁴ In *PE Municipality*, the court before issuing an eviction order advised that parties “engage with each other in a proactive and honest endeavour to find mutually acceptable solutions”.²⁴⁵ In *Olivia Road*, the court issued an interim order, which required both parties to engage meaningfully to bring about an outcome in lieu of a final court judgement. These two court cases highlight the South African constitutionally democratic approach which involves the participation of the affected parties in the legal process which leads to more effective protections of rights by encouraging dialogue and inclusive decision-making.

However, this democratic process has not been meted out to vulnerable immigrant groups on the verge of homelessness in South Africa. For example, in 2017, during widespread xenophobia attacks in Pretoria West which led to forced evictions where immigrants were forced out of their homes and businesses, often without due process.²⁴⁶ Also, In 2018, the Marikana informal settlement in Cape Town, which housed many immigrants, was targeted. Many immigrants were removed from this settlement arbitrarily by the South African government.²⁴⁷ Many criticized this government action because the city had failed to meaningfully engage with the residents and provide alternative accommodation as required by law. The opposite action by the state in response to immigrants only acerbates the vulnerability of the immigrant population in informal settlements, on the risk of homelessness and unequal, inadequate housing policies. South Africa should look into other countries’ approaches to evictions relating to immigrants and refugees. Kenya provides a good case for these matters.

²⁴² S Liebenberg ‘Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law (2014) *Nordic Journal of Human Rights*

²⁴³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC).

²⁴⁴ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA (CC).

²⁴⁵ (n 247) para 39.

²⁴⁶ Xenowatch 2017. <https://www.xenowatch.ac.za/xenophobic-attacks-report-2017> (accessed 28 June 2024).

²⁴⁷ GroundUp 2018. <https://groundup.org.za/article/residents-marikana-informal-settlement-left-dark/> (accessed 28 June 2024).

5.2.1 Kenya's response to arbitrary eviction

Kenya is of importance for emulation due to its commendable stance on migration and the protection of victims of unlawful evictions. Forced evictions are prevalent in Kenyan urban areas. These evictions are often devised and implemented by municipal authorities to advance urban developmental plans. In some cases, the residents who are evicted are not consulted, and they are given as little as a two-day notice to vacate without the provision of alternative accommodation or any form of compensation. Violent measures are usually employed by perpetrators to overcome resistance. Sometimes shops, schools, and health clinics are destroyed overnight with the use of bulldozers.²⁴⁸

In the Medina Community case study, more than 1200 families under Garissa District have been living informally since the early 1940s on land that officially belonged to the government. At the end of 2010, the government gave a 20-day notice to the residents of the area to vacate the place as it had been marked for a developmental project. About one hundred and fifty houses were demolished, rendering the affected families homeless and living in open air. Children had to drop out of school while their families were in the process of seeking alternative accommodation. In the following year, further threats of demolition were conveyed, and this was brought to a halt by a nongovernmental organization that approached the court for an interdict and at the same time filed a case alleging that Section 43 of the country's Constitution had been violated.²⁴⁹

Following the guidelines provided for under international law and the Kenyan Constitution, the court ruled that forced evictions are a violation of the right to adequate housing as provided under Section 43 of the Constitution. Section 35 of the Constitution also provides for the right for the residents of Garissa to be informed about the 'the plans of urban development affecting their settlement'.²⁵⁰ Applicants should have been given 'reasonable notice' before the initiation of the project, and alternative accommodation should have been made available. It further decided that the affected

²⁴⁸ UN Habitat (n 222) 44

²⁴⁹ Section 43 of the Constitution of the Republic of Kenya consists of the Bill of Rights which outlines, among others, that '*Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.*'

²⁵⁰ UN Habitat (n 222)..

communal members should have been timely consulted and given a reasonable period to vacate. The court declared that the relevant authorities had an obligation to rebuild the destroyed houses or provide alternative accommodation with the same conveniences that the occupants were enjoying, and damages were to be paid to the affected parties as these demolitions were violently carried out.²⁵¹

In 2011, a similar case was brought before the Constitutional Court of Kenya, where residents were given a 24-hour notice to vacate their area of residence.²⁵² The Court declared the conduct of the authorities to be a violation of the occupants' right to housing and the 24-hour notice to be unconstitutional. It adopted a human rights-based approach (HBA) and declared that;

*'... In interpreting the Constitution and the Bill of Rights, the Court shall seek to promote the values that underpin a democratic society, among which rule of law, human rights and fundamental freedom. The human rights of the residents, namely the right to life, to freedom, to food, to adequate housing, supersede the statutory duties of the Council with respect to the urban planning and eviction. The petitioners' fundamental right to adequate housing overrides city planning duties of the Nairobi City Council...'*²⁵³

This protection for its citizens has also been afforded to immigrant occupiers of land and property in Kenya. This is evident in *Makau*,²⁵⁴ where residents, including undocumented immigrant residents, were unlawfully evicted from an informal settlement in Machakos County. The High Court of Kenya emphasized the necessity of eviction processes to adhere to constitutional and legal safeguards and to provide alternative accommodation and compensation where necessary.²⁵⁵ This is important as it shows Kenya's non-differentiable treatment towards immigrants and highlights the state's obligation to protect the rights of occupiers, including immigrants, against

²⁵¹ UN Habitat (n 222) 46. To read the full judgment see *Ibrahim Sangor Osman & Ors v Minister of State for Provincial Administration and Internal Security and 3 Others* (with Global Initiative for Economic, Social and Cultural Rights and 2 Others intervening as Amici Curiae 2 (2011).

²⁵² High Court of Kenya, Nairobi, Petition 66 of 2010 (2011), KLR 1, *Susan Waithera Kariuki and 4 Others V Town Clerk Nairobi City Council and 2 Others*.

²⁵³ UN Habitat (n 222) 45-46.

²⁵⁴ *Makau and Another v Governor of Machakos County and Others* 2019.

²⁵⁵ (n 257) para 45.

arbitrary eviction. Additionally, during the COVID-19 pandemic, Kenya enacted regulations to protect vulnerable populations, including immigrant occupiers, from eviction due to economic hardship.²⁵⁶ These regulations demonstrated a temporary but significant policy response to safeguarding housing rights during a crisis.

Kenya's approach to protecting the rights of immigrant occupiers from eviction involves a combination of constitutional provisions, specific legislation, judicial decisions, and policy responses. While there are legal protections in place, challenges persist in their implementation, especially concerning vulnerable groups like immigrants. Continuous monitoring and adherence to legal safeguards are crucial to ensuring these protections are upheld effectively.²⁵⁷

5.3. Conclusion

In conclusion, South Africa has a laudable, progressive attitude toward the protection of citizens under international law. However, the lived realities of migrants in South Africa paints a rather opposite picture. Institutionalized and physical xenophobia persist alongside inadequate protections for migrants' rights under international law. The South African state is hesitant to apply and ratify or enact into national law specific provisions that protect undocumented immigrants against deprivation of housing rights and protection against unlawful, forced evictions.

As this chapter has outlined, South Africa's obligations under both international and regional frameworks compel it to respect, protect, and fulfil migrants' rights to adequate housing and shield them from unlawful evictions. However, the state's inconsistent adherence to these obligations, influenced by political rhetoric and socio-economic pressures, undermines its credibility on the global stage. The recent developments surrounding the WPIM and proposals to withdraw from key international conventions signify a troubling regression in South Africa's human rights

²⁵⁶ National Library of Medicine website '[Kenya's response to the COVID-19 pandemic: a balance between minimising morbidity and adverse economic impact - PMC \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/PMC7921885/)' (2021) [www.ncbi.nlm.nih.gov/pmc/articles/PMC7921885/](https://pubmed.ncbi.nlm.nih.gov/PMC7921885/) (Accessed 28 June 2024).

²⁵⁷ J Simatei 'Land Rights and Evictions in Kenya: An Examination of Legal Frameworks and Case Studies' (2015) *University of Nairobi Law Journal* 33.

commitments. It is imperative that addressing these challenges requires not only legislative reform but also a fundamental shift in political will towards inclusive policies that uphold the dignity and rights of all individuals, regardless of their migration status. Only through a concerted effort to align domestic practices with international standards can South Africa truly fulfil its potential as a leader in human rights and justice, ensuring that its laws protect all those within its borders equitably and justly

Chapter 6: Conclusion

This dissertation assessed the constitutional tenacity of the legal framework protecting undocumented immigrants in general and against evictions and assessed state obligations in protecting undocumented immigrants against forceful evictions in South

Africa. Evictions of (perceived or real) undocumented immigrants from their homes are often incited through xenophobic rhetoric, indirectly or directly supported by the government, state actors, state institutions, and emerging policies. The South African legal framework constituting the Constitution, the PIE Act, the Refugee Act, and the Immigration Act read with international instruments and treaties to protect undocumented immigrants against unlawful evictions.

Generally, South Africa has fulfilled its protection of undocumented migrants by ratifying the AU Convention, and passing laws such as the Refugees Act and Immigration Act. Nevertheless, these laws serve political and administrative purposes marred by corruption and the abuse of power by the DHA and law enforcement officials tasked with carrying out provisions of its immigration law and policy, due to human rights violations, a xenophobic environment, and the denial of access to protections and rights entrenched in the Constitution and international law.²⁵⁸ Exploring the adjudication of unlawful eviction cases before courts, we note the importance of adjudication against the tenets of the constitution, that in most cases xenophobic actions of the state and its actors are rejected by the courts. Courts have been highlighted to protect against unlawful removal or eviction from one's home, including undocumented immigrants, a positive step in a seemingly xenophobic climate.

Additionally, on the principle of equality and non-discrimination that one may not be unfairly discriminated against on the grounds listed in the Constitution,²⁵⁹ it is conclusive that forced evictions are considered gross violations of human rights, including the right to adequate housing based on nationality and citizenship.²⁶⁰

Exploring the existing legal frameworks and state obligations in protecting undocumented immigrants against forceful evictions reveals the importance of upholding internationally recognized human rights, and the Constitution and PIE Act should be the starting point. When it comes to protecting undocumented immigrants against forced evictions, it is essential to consider the internationally recognized human rights that apply to all individuals, regardless of their legal status. By adopting

²⁵⁸Alimohammadi & Muller (n 54) 796.

²⁵⁹ The Constitution, section 9.

²⁶⁰ <https://www.ohchr.org/en/special-procedures/sr-housing/forced-evictions> (accessed 24 February 2024)

a comprehensive and rights-based approach, states can address the challenges faced by undocumented immigrants while upholding fundamental human rights. States must fulfill their obligations under international law and domestic legislation to protect the rights of undocumented immigrants.²⁶¹ The South African state does play a critical role in abiding by the universal international human rights norms and its Constitution nationally.

Unlawful evictions of undocumented immigrants should be treated as a ‘xenophobic issue’ that requires a standalone, specific regulatory framework that tackles the root causes of xenophobia and the right to housing for all. It entails a holistic, multidisciplinary approach based on humanitarian considerations, legal and political concerns, national security concerns, and social cohesion strategies for both locals and migrants in the state.²⁶²

South Africa faces an implementation problem as it has yet to enact or implement the NAP bill or ratify and adopt CRMW. This dissertation recommends the enactment and implementation of the NAP bill: the CRMW and the Kampala Convention.

It is noted that South Africa grapples with its migration and refugee policy, often being tagged as a “failed migration policy”. South Africa needs a complete overhaul of its current migration policy and introduce policies that curb inadequacies of the DHA or RROs, by providing an amnesty period for all undocumented migrants, with an option to re-enter legally or re-apply for their visa within South Africa without negative consequences.²⁶³

Lastly, a series of consultations should also be held with individuals affected to determine possible alternatives, and legal remedies, including adequate compensation should be availed to those who would need to resort to them.²⁶⁴ If the

²⁶¹ The Constitution, section 233.

²⁶² <https://hsf.org.za/publications/hsf-briefs/policy-recommendations-for-the-south-african-migration-regime> (accessed 20 June 2023).

²⁶³ The South African. ‘Give undocumented immigrants amnesty’ <https://www.thesouthafrican.com/news/da-undocumented-foreigners-migration-policy-amnesty-latest-news/> (Accessed 04 March 2024).

²⁶⁴ OHCHR ‘Forced evictions: Special Rapporteur on the right of adequate housing’. Available at <https://www.ohchr.org/en/special-procedures/sr-housing/forced->

consultative processes with those affected lead to the result that evictions should be executed, alternative housing or access to 'productive land' should be provided to those affected.²⁶⁵ Alternative housing, whether temporary or permanent should be sufficient to protect the human dignity of the evicted persons and permanent accommodation should be of the same quality and should be close to the area where victims have been moved from to avoid a disruption of their economic activities. Both human rights and humanitarian law prohibit evictions that render people homeless. The South African government is obliged to provide alternative shelter or social responses to displaced migrants regardless of whether the evictions were carried out by state or non-state actors.²⁶⁶

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[evictions#:~:text=Forced%20evictions%20constitute%20gross%20violations,treatment%2C%20and%20freedom%20of%20movement.](#) (accessed 19 July 2023).

²⁶⁵ OHCHR Guidelines for the Implementation of the Right to Adequate Housing (2020).

²⁶⁶ United Nation's explanatory notes on *Ben Djazia and Bellini v. Spain* (E/C.12/61/D/5/2015) para.15 and *Lopez Alban v. Spain* (E/C.12/66/D/37/2018) <https://juris.ohchr.org/casedetails/2407/en-US> (accessed 23 March 2024).

1. African Charter on Human and Peoples' Rights 1981
2. Convention Against Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
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