



# Protect

The Right to International Protection

From global to community: The availability  
of protection mechanisms for refugees in  
South Africa



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# FROM GLOBAL TO COMMUNITY: THE AVAILABILITY OF PROTECTION MECHANISMS FOR REFUGEES IN SOUTH AFRICA

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## 1. Introduction

Protection mechanisms aimed at assisting refugees emerge at different scales, from the global to the local. In host countries such as South Africa, formal mechanisms are meant to support refugees in finding various forms of protection, including legal and social protection. Yet, research over the last few decades has repeatedly shown that in regions such as southern Africa ‘current mechanisms are not offering effective and efficient access to refuge for those in need’ (Papademetriou, 2015). As a result, refugees and other forced migrants are regularly required to locate more informal mechanisms at the ground level, through social networks and civil society. This paper is interested in the range of formal and informal protection mechanisms available to refugees in South Africa, and how these mechanisms interact with each other. Specifically, using a multi-scalar approach, the paper investigates the reality of protection for refugees in South Africa, and the role different key scales of analysis (the global, the national and the ground) play in how refugees locate forms of protection.

With no recognised definition, existing literature typically frames protection mechanisms quite narrowly, seeing them as formal types of protection offered to refugees which originate from the global refugee regime. These include, but are not limited to, *emergency* protection mechanism (often set up at times of mass influx, such as creating emergency camps etc.), *legal* protection mechanisms such as Refugee Status Determination (RSD) procedures, and *social* protection mechanisms that relate to access to key rights such as health care. In terms of implementation, these mechanisms in regions such as southern Africa are either expected to be implemented by the host state, by global organisations such as the Office of the United Nations High Commissioner for Refugees (UNHCR) or a combination of both. In South Africa, RSD procedures are run by the state, and by ratifying the 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention), the state is expected to offer other forms of protection that relate to the rights of refugees set out in Convention, such as access to healthcare and education.

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When these formal protection mechanisms fail or are simply not implemented, other individuals and bodies at the ground level must step in. In South Africa, failures at the global, national and local level regularly create the necessity for two key responses on the ground. First, civil society regularly steps in to fill the role of the state to offer more informal forms of protection for refugees and other forced migrants. Second, refugees are also obliged to find alternative *de facto* protection mechanisms through their social networks. These actions based on human agency, mobility, and survival instincts are often done completely independently from more formal systems or structures. Thus, protection mechanisms exist at different levels of analysis (from the international to the national and the ground), take different forms, and are implemented by a variety of state and non-state actors.

To investigate these multifaceted issues, the paper asks three pertinent questions i) what is the relevance of formal protection mechanisms for refugees in South Africa today?; ii) what is the relevance of informal protection mechanisms that exist outside of formal state structures?; and iii) what is the relationship between these different formal and informal mechanisms at the different scales of analysis? There is real value in adopting this approach to exploring refugee protection in South Africa. Firstly, it develops existing research by exploring the availability of different forms of protection for refugees in South Africa, and importantly investigating where they are located. Secondly, in doing this, the paper is also able to highlight serious protection gaps in both the national and global refugee regime. Thirdly, by taking a multi-scalar approach, the research also examines the interconnectedness and complexity of the relationships between each scale.<sup>3</sup> Finally, by investigating these issues before and during the Covid-19 pandemic, the paper can scrutinise the stability and reliability of such mechanisms (both formal and informal) during a period of national emergency.

The paper draws on two and a half years of research undertaken by the authors between August 2020 and January 2023 in South Africa and the wider southern African region, which involved extensive desk-based reviews of contemporary academic literature and grey literature, participant observations of key stakeholder meetings and events, and virtual interviews with key stakeholders involved in migration governance in the region. Participants in the meetings and interviews included officials from UN agencies, international NGOs and civil society who work directly with refugee and migrant populations and have been responding to protection concerns related to the impact of Covid-19 on migrant groups.

In terms of the structure of the paper, after the introduction, the paper gives a concise overview of the impact of South Africa's responses to COVID-19 on refugee and migrant populations. Sections 3 to 5 then focus on three key scales (the global, the national and the ground level) involved in producing and/or implementing protection mechanisms in South Africa. The sections study the mechanisms importance to refugees and their ability to withstand the external shock of Covid-19.<sup>4</sup> Section 3 specifically analyses the impact of the global in urban spaces and border areas. In doing so, it critically engages with previous literature that presumes that UNHCR, as the guardian of the global refugee regime, has a

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<sup>3</sup> See Williamson (2015).

<sup>4</sup> Other scales of analysis, namely the regional and local level (meaning local government or city level) are not covered in this paper. This is due to space constraints but also the case study suggested their role in refugees locating forms of protection in South Africa is minor in contrast to the three scales selected. For work on the role of the city, see Blaser Mapitsa and Landau (2019). More academic work is needed on these two scales.

responsibility to engage actively in urban spaces in a democratic country like South Africa. Section 4 then turns to the national level and examines two key formal mechanisms, namely legal and social protection mechanisms. While other forms of protection are discussed, these two examples are well equipped to highlight i) the importance of protection mechanisms that are embedded into national systems; and ii) the numerous issues that have emerged within South Africa around refugee affairs over the last decade, that mean refugees are often unable to locate *any* form of protection at the national level. Finally, Section 5 turns to the ground level to investigate more informal types of protection mechanisms, which are often essential for survival because formal ones continue to fail. The role of civil society as the reluctant guardian of refugee protection in South Africa is also explored, as well as the interaction between informal mechanisms on the ground and the more formal ones located at higher scales.

This paper demonstrates that protection mechanisms originate from all key levels of analysis from the global to the ground. In turn, they interact with each other, with top level ones informing lower ones and lower ones attempting to reinforce and support ones higher up the scale. Nevertheless, in South Africa today, the most vital protection mechanisms for refugees and other forced migrants are likely to be located at the ground-level. These are accessed through human agency and mobility as well as civil society, and almost entirely exist outside of formal protection mechanisms and formal structures. Yet, these approaches should not be over-emphasised, with the case study of Covid-19 emphasising the limits of these more informal survival or ‘hustling’ - type approaches. Concerningly, with mechanisms produced from the global and national levels continuing to shrink or disappear altogether, state and global actors appear to be reinforcing these more informal approaches by demanding the self-integration of refugees in urban spaces in South Africa and evoking global policy terms such as ‘self-reliance’ and ‘resilience’.

Ultimately, the paper shows that the current political environments around forced migrants at the different scales (global, national and ground levels) in South Africa means that existing protection mechanisms (both formal and informal) all appear fragile and prone to rupture. Funding concerns and a lack of engagement in urban areas by UNHCR; a host state that is focussed on shrinking the asylum space and removing foreign African nationals from its territory through law and policy; and growing xenophobia within communities and at the point of service, all mean that it is becoming harder and harder for refugees to locate forms of protection. Covid-19 only exacerbated these issues, with even formal protection mechanisms unable to resist, or successfully adapt to, new stresses and shocks created by the global pandemic.

## **2. South Africa’s Response to The Covid-19 Outbreak and Its Impact on Migrants**

On 26<sup>th</sup> March 2020, South Africa went into its first lockdown due to the outbreak of Covid-19.<sup>5</sup> This was one of the most severe lockdowns seen on the continent, with measures including restrictions on local and interprovincial travel, and only key essential service workers allowed to work outside of their homes (Moyo, Sebba, and Zanker, 2021). While the state has a robust National Constitution, which sets out civil, political and socio-economic

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<sup>5</sup> A National State of Disaster was implemented on 15 March 2020.

rights of all persons in South Africa,<sup>6</sup> at times, state entities went beyond emergency provisions set out in the law, and the reach of the state expanded ‘at the expense of these rights’ (van Staden, 2020). For example, there were frequent reports of human rights violations, such as the police being accused of excessive force when imposing lockdown regulations (HRW, 2020; SANews, 2020).

South Africa also has a progressive national refugee regime, which includes the internationally praised Refugees Act 130 of 1998 (the Refugees Act) (Handmaker, 2001) and has ratified key international human rights conventions, including the United Nations Convention Against Torture (UNCAT), which prohibits returning a person to countries where they may be subject to torture.<sup>7</sup> Yet over the last 15 years, national policy and practice has shifted away from governance frameworks based on human rights and international norms, to a more securitised approach to most forms of cross-border migration (Carciotto and Mavura, 2022). As a result, the asylum space has rapidly shrunk and a dominant ‘detain and deport’ policy has prevailed (Maunganidze, 2021). This more restrictive approach continued in state responses to Covid-19, with the constant blurring of global health, immigration governance, and national security agendas seen from 2020 to 2022 (Vearey, de Gruchy and Maple, 2021). For example, the state increased the arrest and detention of migrants for petty crimes and simultaneously the arrest, detention, and deportation of undocumented migrants (Global Detention Project, 2021). During the first lockdown in 2020, South Africa deported a total of 1,376 persons to neighbouring countries (MiCoSA, 2020a). The justification given for these actions was an attempt to contain the spread of the virus, yet mass deportations are likely to only spread the virus further. Indeed, the first reported case of Covid-19 in Malawi was due to deportations from South Africa (MiCoSA, 2020a). There were also reports that South Africa conducted more clandestine mass deportations of migrants in the earlier stages of the lockdown to Mozambique and Zimbabwe (Club of Mozambique, 2020). Expulsion practices of international migrants also occurred at the level of the city, with the state attempting to ‘thin’ informal settlement residents in the name of health and migrants forcibly evicted from informal settlements in Durban (Kihato and Landau, 2020; Wicks and Patrick 2020).

Against this backdrop, refugees, and other forced migrants, as well as local communities still found ways to survive, often entirely through the informal economy. Indeed, it is important to note that the impact of the pandemic, including the nationwide lockdowns and its broader socioeconomic and political impacts, were felt across all communities in South Africa. Many of the issues faced by refugees and asylum-seekers were also experienced by citizens living and working in the same urban and peri-urban spaces, border regions, and rural areas (MiCoSA, 2020a). Yet, in addition to the collective impact, refugees and other forced migrants may have still experienced a heightened level of precarity. This is predominantly due to the exacerbation of pre-existing issues related to their status and related challenges in South Africa including, as explored below, numerous state and community level barriers and exclusion policies to existing or newly created protection mechanisms. In the majority of cases, Covid-19 did not create unique issues for migrant populations but rather, it highlighted

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<sup>6</sup> See the Constitution of the Republic of South Africa 1996, No. 108 of 1996, 10 December 1996.

<sup>7</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html> [accessed 29 January 2023]

(or made more visible) existing challenges (MiCoSA, 2020a), including a reliance on alternative and unsafe migratory routes; difficulties in accessing documentation, healthcare and other social protection systems; and xenophobia, stigmatisation and discrimination. Thus, many refugees experienced a multitude of overlapping and interconnected concerns. As examined in the next three sections, the inability to locate sources of protection from a range of scales, raises serious questions about the availability of protection mechanisms for refugees and other forced migrants in South Africa, as well as the ability of existing mechanisms to withstand an external shock or stress such as a global pandemic.

### **3. The Role of the Global**

This first section investigates the role of the ‘global’ in producing, supporting and/or implementing protection mechanisms for refugees and other forced migrants in South Africa. Specifically, it explores whether protection mechanisms emanate from, and are implemented by, the global in South Africa. This is achieved by investigating two sites at the ground-level, namely the urban space and border areas. In doing this, the section also explores how global approaches to refugees in South Africa coped and responded to the external shock of Covid-19 and state-based responses to the pandemic.

The section itself is divided into two parts. The first part, building on existing literature on the topic, analyses the role of UNHCR as the main actor within the global refugee regime that operates in South Africa, with a specific focus on the urban space. In doing this, the section queries whether the global has (or should have) a role or responsibility for implementing protection mechanisms for refugees who are granted fundamental rights such as freedom of movement and the right to work in democratic countries like South Africa in the majority world?<sup>8</sup> The second part turns to look at the border areas, specifically between South Africa and Zimbabwe, where often the presence of the global is more visible than the urban space. This was particularly true during the early stages of Covid-19, with additional emergency assistance at the border provided by organisations such as Médecins Sans Frontières (MSF), UNHCR and the International Committee of the Red Cross (ICRC). A small case study of a new pilot project started by ICRC at the Zimbabwe border is explored to show the potential value of developing new global protection mechanisms, while also raising questions about the overall effectiveness of global initiatives that have not been developed with, or at least engaged with, existing national state systems and existing barriers to protection.

#### **3.1. Role of UNHCR in Producing and Implementing Formal Protection Mechanisms in Urban Spaces**

As the guardian of the global refugee regime,<sup>9</sup> UNHCR has traditionally remained a key focus of the literature over the last 30 years on refugee protection within Africa. This is at least in part due to the significant influence of the UN agency in refugee camps, with UNHCR

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<sup>8</sup> This article replaces the term global north with minority world and global south with majority world, to emphasise how the privileged global north actually holds the minority of the global population; while the global south holds the majority (Alam, 2008).

<sup>9</sup> The global refugee regime is primarily understood to be made up of the 1951 Refugee Convention (which over time has been supplemented by regional agreements, such as the 1969 OAU Refugee Convention) and UNHCR (Loescher, 2014).

frequently given the responsibility by hosting states to run and maintain these spaces of encampment (Schmidt, 2003). In more recent years, with academic attention broadly shifting to urban displacement, academics in regions such as southern Africa have started questioning the ongoing influence of the global refugee regime and by extension UNHCR on how refugees and other forced migrants find protection in urban spaces. This is particularly the case when refugees prefer to remain ‘invisible’ from state and international agencies and structures, instead opting to find alternative forms of protection within local networks (Landau and Freemantle, 2010). This has led to several critiques of the role of UNHCR in cities in the majority world, with the agency being perceived as generally slow to react to trends in the urbanisation of refugee movement on the continent (Landau, 2007; Landau and Amit, 2014; Jacobsen, 2006).<sup>10</sup> Today the agency still struggles to generate and implement programming and interventions aimed at the urban space (Crisp, 2017).<sup>11</sup>

South Africa has been a party to the global refugee regime since the 1990s, when in 1995 and 1996 it ratified the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), and the 1951 Refugee Convention and its 1967 Protocol, respectively. Since permitting UNHCR a presence on its country around that time,<sup>12</sup> the UN agency has, however, adopted a non-interventionist policy in cities and towns, meaning it is not a key source of protection mechanisms for refugees in these spaces.<sup>13</sup> Indeed, refugees only have very limited access to the ‘global’ in urban spaces with assistance or forms of protection generally only given to those deemed most vulnerable, via implementing partners such as the Jesuit Refugee Services.

In part this approach is because the agency retains a delicate relationship with the post-Apartheid state, with the government keen to keep UN agencies very much at arm’s length. Equally, reduction in funding to the South African office has hindered the ability to support refugees, with UNHCR’s small cash assistance programme run through the implementing partners being halted during Covid-19 in 2020 (UNHCR, 2020). Although, it should be noted the agency was quite active during the pandemic, and before the cash assistance programme was stopped, nearly 12,000 people received one-off cash payments during 2020. In addition, UNHCR conducted information-sharing and awareness-raising programmes, as well as distributing small health protection products to refugee populations (UNHCR, 2020).

Nevertheless, the non-interventionist approach remains the dominant approach, with a key assumption underlying this being that if a refugee required protection or urgent humanitarian assistance, they would have stopped at a refugee camp in a neighbouring state in the region rather than continuing their journeys to the southern-most country in Africa. This approach by the global agency infers sufficient agency onto ‘urban refugees’ as to essentially waive any perceived obligations imposed by the global refugee regime to provide concrete protection mechanisms. In essence, by moving into cities there is an expectation of self-

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10 This indifference to the urban space is also highlighted by UNHCR only publishing its first workable global urban policy in 2009.

11 Even though the agency has been pushing for self-reliance programs for over forty years (Gammeltoft-Hansen, 2018; Carciotto and Ferraro, 2020).

12 South Africa actually permitted UNHCR a presence in the country just before signing the regional and international conventions in 1993, with a tripartite agreement made with Mozambique, and UNHCR, which accorded ‘group refugee status’ to Mozambican nationals in South Africa (Maluwa and Katz, 2020).

13 UNHCR’s South Africa Multi-Country Office (SAMCO) serves nine countries in southern Africa: Botswana, Comoros, Eswatini, Lesotho, Madagascar, Mauritius, Namibia, Seychelles, and South Africa.



reliance and resilience. While many refugees choose to avoid state and international actors preferring to self-settle in cities such as Johannesburg, they have little choice in the matter with the state (discussed in the next section) and UNHCR electing to not engage in meaningful ways in the urban space.

Of course, the idea that UNHCR would take a step back in a democratic host state, which has taken responsibility for its own national refugee reception policy is not unheard of, indeed it is consistent with international norms. Thus, the question emerges as to whether UNHCR actually has obligations in terms of providing protection for refugees in a country South Africa? From the agency's perspective, it seems quite comfortable with this approach. This suggests in different contexts UNHCR develops different relationships with host states. So, in contrast to countries where UNHCR has been invited to run RSD procedures or manage refugee camps, in countries where the state manages refugee affairs, there is perhaps an implication that UNHCR's role is one of advisory partner. This understanding would suggest some of the critiques of UNHCR's role in urban spaces in the majority world in the past have perhaps been slightly extrapolated from an understanding of the role of the agency in states with encampment policies. Although, as the guardian of the regime in a country where the host state consistently fails to provide genuine access to vital protection mechanisms, civil society in South Africa strongly argue that UNHCR has an obligation to engage more with, and provide protection for, their target population. Equally while UNHCR's website notes that the agency's role in South Africa is predominantly to provide "operational support, capacity development and technical advice to the South African authorities", it also states that as the lead refugee agency, it also "coordinates the efforts of UN agencies and partners to support South Africa's refugee response and to avoid gaps in assistance." (UNHCR, 2023). Meaning, at least on paper, UNHCR sees itself as having a role in coordinating and responding to protection gaps in the country.

A contemporary example of the dominant advisory approach taken by UNHCR is the recent March 2021 agreement between the agency and Department of Home Affairs (DHA). This emerged from pledges made by South Africa at the Global Refugee Forum in 2019 to improve the RSD procedure for asylum-seekers (UNHCR, 2019). The intention of the project is to revamp the refugee management system, with the aim of eliminating delays and the backlog in asylum decisions (Khan and Rayner, 2020). A core element of the agreement was the financial commitment by both parties, with USD 2.6M committed by the Department of Home Affairs and USD 7M from UNHCR (UNHCR, 2021). It nevertheless remains unclear as to how efficient and effective this project will be in the long-term. UNHCR appears to see itself more of donor and advisor than implementing partner in this project. The onus is, therefore, on the DHA (and the wider national government) to implement the proposed changes. It has been nearly two years since the agreement was signed, with minimal impact seen on the ground by civil society in terms of improved procedural efficiency and proficiency. While some allowance should be made for the impact of Covid-19 global pandemic, decades of corruption, limited funding and poor staff training within the RSD system in South Africa have left many stakeholders working with refugees highly sceptical of the commitments made by the DHA ((Amit 2015; Amit and Gastrow 2015; Landau and Amit 2014; Vearey and Gandar 2020).

Another instance highlighting UNHCR's role in urban spaces in South Africa is the protests in Cape Town's Greenmarket Square that started in 2019. Due to increases in xenophobic violence against refugees and asylum-seekers, combined with a lack of perceived protection from the state or UNHCR, hundreds of refugees amassed at a Methodist church in Cape Town's Greenmarket Square. The refugees demanded UNHCR offer more protection and resettlement to other countries 'because they no longer feel safe in xenophobic South Africa' (Mail and Guardian, 2020:1). Three years and the emergence of a global pandemic later, over 500 migrants and refugees remain in makeshift camps around Cape Town, many of whom are children. Without attempting to go into the full complexities of this protracted, desperate, and highly political situation, the situation does highlight clearly UNHCR's understanding of its role in South Africa and the limits of its ability to provide or support the implementation of protection mechanisms (Washinyira, 2021). In the early days of the protests, UNHCR was actively involved and worked with civil society to return several of the original protestors to host communities. Nevertheless, as of late 2021, the agency no longer has a presence at the site (PMG, 2012). In addition, and perhaps understandably, the agency has not been able to offer the durable solution of resettlement to the group of refugees (with resettlement programmes run on an individual basis) (Washinyira, 2021). Instead, as a UNHCR spokesperson recently commented, 'We do not wish to see refugees, particularly the children, living in these unsanitary conditions, which is why we are urging refugees to either reintegrate into communities, or to take up the offer of voluntary repatriation [to their country of citizenship]' (Washinyira, 2021). Yet the two options offered to the protestors do little, if nothing, to engage with the fears raised by the protestors around the ongoing threat of xenophobic violence and a lack of access to genuine protection mechanisms on the ground in South Africa.

### **3.2. The Role of the Global at the Border**

Unlike the urban space, the presence of the global is clearly felt in border spaces in South Africa, particularly at the border with Zimbabwe. Large scale movement of migrants and refugees from Zimbabwe have been seen since the 2000s due to Zimbabwe's rapid slide into a fragile or failed state (Betts, 2014). Many of these people on the move cross the border and apply for asylum, with Zimbabweans accounting for over half of the 778,600 new asylum applications between 2008-2012 in South Africa (Pugh, 2014). Others enter the country via its porous border, and travel onto urban areas, finding more informal ways to settle in South Africa (Pugh, 2014). Finally, many settle in border areas, like the town of Musina, which is around 15km from the border with Zimbabwe, to convalesce, find work and/or save money for onward journeys.

As Vanyoro (2023) notes, due to their difficult journeys and often challenging experiences crossing the border, Musina can in many ways be understood as a safe haven for many Zimbabwean migrants. In turn, this gathering of cross-border migrant populations led to "an influx of humanitarian actors," including the opening of a UNHCR field office in 2008 (Vanyoro, 2023). In terms of protection offered in these spaces, UNHCR in the 2000s provided humanitarian assistance via two transit centres, by providing food and essentials and paying the staff and security in the centres (Vanyoro, 2023). While the agency was still working within the same national political environment, where you have a host state that is

not keen on allowing too much assistance to refugees and forced migrants and retains suspicion around the UN, nevertheless, these forms of emergency protection mechanism were present and served a vital function.

The presence of the global at the border did shift in 2019, when UNHCR left their offices in Musina and passed over a more scaled down approach to assisting persons crossing the border to their implementing partners (Vanyoro, 2023). Yet when the border was closed between South Africa and Zimbabwe in early 2020, many international agencies stepped up their presence. For example, MSF responded to the many emerging protection issues, including migrants and refugees encountering gangs, armed robbery sexual violence as border closures meant using more irregular routes to South Africa. Key officials in UN agencies and INGOs also observed difficulties in continuing existing programmes, due to access issues (both travelling to target populations, and target populations travelling to them) and funding issues due to changing donor priorities (MiCoSA, 2020a).

Finally, an example of a new protection mechanism implemented at the border was the launch of REDSAFE by ICRC. Introduced as a global pilot during the second year of Covid-19 in southern Africa, REDSAFE is a free digital platform for migrants effected by violence and displacement and designed as a protection tool. In terms of purpose, first, migrants can find reliable information on key areas such as health, transport and legal rights, with over 30 organisations working on migrant issues contributing to the platform. Second, it has a digital vault, which has been designed for the safe storage of documents. These can include, copies of passports, ID and health cards, as well as employment and educational documents. Inevitably when refugees and migrants leave their country of origin there are often issues with documentation, including forgetting to take them, losing them or having them stolen or damaged during the journey. Migrants can upload these documents on to the platform, where they remain safe and secure and can be accessible offline. The project was launched on 21<sup>st</sup> May 2021 at the border between South Africa and Zimbabwe, and after one week had 1,000 downloads. By 31<sup>st</sup> October 2022, it had 92,000 downloads and 18,000 active users, which suggests migrants, at least in the early days of the project, see the value of the platform, both in terms locating reliable and trustworthy information and as a trusted place to save vital documentation.

A possible limitation of the project though is the lack of discussion or engagement with host states and state entities during the planning stage about the potential role the secure vault could play in the country of asylum/destination. Certainly, any digital uploads will not be legally recognised or be able to be verified. As such the value of the scanned copies when engaging with law enforcement or service providers in South Africa remains unclear. ICRC officials are hopefully that they will at least help at key moments, such as when a refugee or migrant is arrested, or when they apply for asylum, or when reporting a crime. Yet, without engaging with state structures and departments that have a mandate related to refugees and migrants, it is uncertain if this new protection mechanism will be able to remove any of the barriers that exist at the national and local level that are preventing refugees accessing legal and social protection mechanisms discussed in the next section. As such, follow ups are needed with users on the ground to understand the platform's true worth in terms of helping remove blockages to key services or in preventing arrest and detention.

In sum, the presence of the global in South Africa in terms of protection mechanisms, varies depending on the geographical space. First, UNHCR either does not feel it has a role to play in offering protection in urban spaces or is unable to do so due to financial constraints. While its relationship with the state remains delicate and urban spaces remain highly politicised spaces, the reduction in services and assistance over the years within this space appears more down to internal decisions rather than pressure by the host state. A question also remains as to whether given the host states decision to manage refugee affairs within its territory, the UN agency has a moral, if not legal, obligation to be more active in terms of implementing protection mechanisms when national protection mechanisms are failing so badly.

In turn, with the state turning more to the UN agency in recent years for support, including the recent agreement in March 2021 between the DHA and UNHCR which commits to removing the backlog of asylum claims in the country, perhaps there is new political space for the UN agency to get more actively involved in refugee protection on ground. Although, it should be noted that the lack of impact of recent global initiatives such as the Global Compact on Refugees (GCR) suggests that increased pressure ‘from above’ alone is unlikely to have lasting impact on how the state responds to refugees. While interviewees from UNHCR and other UN agencies were confident that the GCR could still play a positive role in southern Africa, civil society and academics in South Africa remain largely unconvinced about public commitments and shifts in government approaches based on the Compact. Equally, direct assistance in urban spaces in the past has not been sustainable, with funding allocation often changing, as well programmes specifically for refugees creating additional tension with local communities who are also in precarious situations (Landau, 2014). Certainly, more inventive or ‘stealthy’ approaches by UNHCR are therefore urgently needed. Perhaps ones that engage in different ways with a range of government departments that impact on refugees and other forced migrants rights, beyond the existing and tense relationship with the DHA, with a focus on removing barriers to accessing national services for all (see Kihato, and Landau, 2017).

Finally, using a multi-scalar approach (both vertically and horizontally), it is evident that the presence of the global is felt far more in border areas than in urban centres in South Africa. For international agencies such as UNHCR, the delicate national political environment broadly remains the same with the agency working within a context where nearly all international migration is currently seen through a securitised lens. Yet, perhaps due to what Hovil (2016) describes as paradoxical situation whereby border areas can be seen as the space where the state is *most* present and *least* present, meaning the state is concerned with who is crossing into its territory, but is less interested and or has less capacity to engage with issues relating to migrant and refugee populations who remain in border towns such as Musina. As a result, the global still plays a vital role in offering forms of protection to migrants as they cross the border from Zimbabwe, either formally or informally. In turn, it is also possible that UNHCR is simply better suited and more comfortable working with new arrivals in these spaces, where their approach (such as assisting with temporary shelters) is more in line with its traditional emergency humanitarian programming on the continent. In contrast, integration and capacity and skill building development-style programmes for migrants that are urgently needed in cities like Johannesburg and Cape Town, require specialised expertise and

considerable long-term funding; and both areas remain a concern in terms of shortfalls, for the agency in recent years.

#### **4. The Role of the National Government**

The paper now turns to explore the significance of formal protection mechanisms for refugees and other forced migrants in South Africa at the national level. Given the lack of mechanisms offered by the global, particularly in the urban setting, the availability of formal mechanisms at this level would appear crucial. The section focusses on two important areas. First, the role of RSD procedures and the subsequent provision and use of legal documentation by asylum-seekers and refugees as a form of legal protection is examined. A great deal of literature exists on the difficulties (procedurally and practically) refugees and asylum-seekers face in trying to obtain legal status in South Africa (Amit, 2012a; Johnson, 2015; Segatti, 2017). As such, while this literature will be explored in relation to the themes of the paper, the section aims to build on this body of work by developing new lines of analysis through an exploration of the role of legal protection mechanisms during a period of national stress and shock, namely the emergence of the Covid-19 pandemic.

Second, the section then moves to analyse the role of key formal protection mechanisms at the national level for refugees after they have found a way to formalise their stay for the short to medium-term in South Africa, either by obtaining an asylum-seeker or refugee permit. To do this, the paper narrows in on social protection mechanisms, specifically the availability and potential role of social insurance and social assistance programmes for refugees in South Africa. These were selected in part because South Africa has one of the most comprehensive social protection systems in the majority world, and at least in law, recognises refugees, and to a lesser extent asylum-seekers, have rights to a number of these services (Nzabamwita and Dinbabo, 2022). In addition, social protection, specifically social insurance and social assistance programmes, are an area of refugee protection within the context of southern Africa and the wider continent that has received less attention within academia than perhaps one might expect, given their enormous potential to help migrants settle and prosper in a host state. This is starting to change though (Khan and Kolabhai, 2021), particularly with increased attention being brought by international actors such as the International Labour Organization (ILO) on the importance of including social protection in long term protection and development programming. Although it should be noted that civil society in South Africa has been engaging in this area of protection for a long time on the ground. Finally, this topic was selected as it can illustrate broader issues around the role of formalised protection mechanisms in South Africa, and particularly their ability or inability to withstand the impact of external pressures such as Covid-19.

##### **4.1. RSD as a Core Legal Protection Mechanism**

The institution of asylum is “among the most basic mechanisms for the protection of refugees” (Nicholson and Kumin, 2017). In essence, the gaining of asylum through RSD procedures grants legal protections by regularising the stay of that individual in the country of asylum (Mandal, 2005). This section is interested in the role of RSD as a legal protection mechanism for asylum-seekers and refugees in South Africa, with a specific focus on the role legal

documentation can act as a form of protection against arrest, detention and deportation, but also as a gateway to further legal, social and economic rights in the country.

There are three main types of legal documentation issued to asylum-seekers and refugees in South Africa. First, once a asylum-seeker crosses the border into South Africa and registers her intention to apply for asylum, she should be issued with a temporary permit. These temporary or ‘transit’ permits provide a form of temporary protection as they legalise the person’s right to be in the country for three weeks or until they formally lodge their claim (Vigneswaran, 2008).<sup>14</sup> When they lodge a claim at an Refugee Reception Office (RRO), an officer should then issue them a temporary asylum-seeker permit (named a Section 22 permit – after the relevant section of the Refugees Act). This section states that asylum-seekers are entitled to a six-month renewable permit and with these permits, asylum-seekers are granted freedom of movement, certain employment rights and limited access to social protection mechanisms (Jones and Houle, 2008).<sup>15</sup>

Finally, if after the RSD procedure, the asylum claim is successful, the formally recognised refugee is then issued with a refugee status document which is valid for four years (unless it is withdrawn or ceases before that). At which point, they should also apply for a Refugee ID card (which will have the same expiry date as the refugee document). Finally, with these documents, they can also apply for a refugee travel document that should allow them to leave and return to South Africa (Scalabrini, 2020). With this status and accompanying documentation, on paper, recognised refugees have access to a considerable amount of social, economic rights including the right to work and access to several social protection mechanisms (discussed in the next sub-section). In theory therefore the process of RSD and the accompanying legal documentation remains a vital protection mechanism in South Africa. Furthermore, this approach can be understood as a generous welcome to refugees, particularly in the context of alternative approaches by neighbouring states in the region and on the continent, which focus more on encampment and the restriction of key rights such as freedom of movement and right to work.

Yet as examined extensively in the literature, over the last 15 years the implementation of national and international refugee law on the ground has faulted severely, with policy and practice diverging far from the norms set out in legal instruments (Johnson and Carciotto, 2018; Carciotto, 2021). For example, gaining access to an RRO to apply for asylum or renew existing legal documentation has become incredibly difficult (Khan and Lee, 2018). Many RROs in the past set up ‘pre-screening’ processes in RRO car parks with DHA officers able to reject cases on the spot based on answers to a few questions (Vigneswaran, 2008). In addition, between 2011 and 2020 only three RROs (out of six) were functioning properly, with others either shut or partially closed (Moyo, Sebba and Zanker, 2021). Despite numerous court orders demanding they reopen, Cape Town office for example, (which was shut in 2012) had still not fully reopened by late 2022 (PMG, 2022).

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<sup>14</sup> Although according to new amendments to the Act (the Refugees Amendment Act 2017), asylum-seekers have just 5 days between getting a transit permit and reporting to a Refugee Reception Office (RRO) (Moyo, Sebba, and Zanker, 2021)

<sup>15</sup> Note that after the Refugees Amendment Act 2017 recently came into force, the right to work for asylum-seekers has been restricted. However, interviews with civil society in 2021 confirmed that these provisions are yet to be implemented.

There have also been frequent allegations from academia, civil society and international NGOs that the RSD procedure in South Africa is seriously flawed. Reports observe how the ‘status determination process continues to be marked by scant evidence of individualised, well-reasoned decision-making’ and errors of law, for example by misapplying the concepts of persecution, social group and well-founded fear, improper use of the credibility standard and wrong burden of proof’ (Amit, 2012b). Concerns have also been raised about the failure to regularly provide adequate reasons for a rejection (Amit, 2012b) and a recent report on LGBTIQ+ asylum-seekers in South Africa found that the DHA frequently saw these asylum-seekers as dishonest and frequently denied their applications based on the assumption that they were fabricated (Mudarikwa et al. 2021). This latest report also highlighted that there are clear issues of religious and cultural prejudices that exist as barriers to protection within RSD processes in South Africa.

In addition, regardless of what is prescribed in national law, asylum-seekers and refugees in South Africa generally only obtain legal documents that are valid for periods of up to six months (Moyo, Sebba and Zanker, 2021). Even in stable times, this creates numerous challenges, including having to travel vast distances to an RRO, waiting in long queues to get renewals, and dealing with issues around corruption and bribery at RROs (Khan and Lee, 2018; Khan and Rayner, 2020). Equally, policies relating to the issuing of documentation is prone to sudden and frequent change (Vigneswaran, 2008). In 2022, UNHCR reported that some asylum-seekers were not being issued a Section 22 permit after registering their claim, but rather had to wait until they lodged an appeal against a first instance rejection before getting a permit (PMG, 2022). Finally, due to a lack of resources, poor management and corruption within the DHA, large backlogs in asylum claims remain (Landau, 2006). These long delays result in applicants waiting on decisions for years, if not decades (Khan and Lee, 2018; Khan and Rayner, 2020).

These issues have resulted in a marked divergence between law and practice and leave refugees and asylum-seekers regularly being denied protection. Many become undocumented due to an inability to obtain correct and current documents or merely give up working within the national asylum system all together, preferring to remain ‘invisible’ in urban spaces (Landau, 2018). Without documents, forced migrants regularly face forms of discrimination and abuse and the risk of being detained and deported (Amit 2015; Blaser and Landau 2014; Mthembu-Salter et al. 2014). The problems attached to RSD in South Africa also have the effect of delegitimising the asylum system (and by extension existing legal protection mechanisms for refugees and asylum-seekers), adding further barriers at points of service, whereby refugee or asylum papers are not recognized or deemed as valid legal documents (Landau and Segatti, 2009).<sup>16</sup> For example in the case of access to health care, refugees and asylum-seekers are frequently turned away from having treatment for not having the ‘correct’ documentation, even though they are entitled by law to free emergency health care (Mukumbang, Ambe, and Adebisi, 2020; White and Rispel, 2021)

Regrettably, these range of issues were only exacerbated by Covid-19. The closure of RROs and DHA offices for long periods during 2020 and 2021 meant that many forced migrants were unable to obtain or renew documentation, which left many in precarious

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<sup>16</sup> Also see Handmaker, De La Hunt and Klaaren (2008); Araia and Breen (2008).

situations (Tesfai and de Gruchy, 2021).<sup>17</sup> As an example, there was no legal avenue for asylum-seekers who newly arrived in South Africa to lodge applications. Equally, as a transit visa is needed to obtain a ‘Section 22’ permit, asylum-seekers who arrived during a lockdown were ‘effectively rendered irregular and liable to arrest and deportation’(Moyo, Sebba and Zanker, 2021).

For refugees and asylum-seekers who were already in the country with documentation, the DHA did grant blanket extensions for permits expiring on or after 15 March 2020. On 15 April 2021, an online system to renew documentation was also set up, with refugees told to renew their documentation by 31 December 2021 (Washinyira, 2021). Civil society confirmed the online extension and online system to renewal documentation did help to a certain degree, yet equally created new and often insurmountable challenges. For example, there was a lack of communication about how to complete the renewal process and a lack of acknowledgement once the application was submitted. With many reporting long timeframes before hearing anything back, refugees were left in the dark for long periods about their legal status in their host country. Others also reported technical and bureaucratic issues with the online system, meaning many refugees missed the deadline (Washinyira, 2021).

Furthermore, there were knock-on effects to the blanket extensions and online renewal systems in terms of accessing services on the ground, with civil society reporting that private institutions and organisations were not recognising the ‘expired’ paper documents and had not been aware of the blanket extensions. As Khan and Kolabhai (2021) note, many landlords, banks and employers were simply not willing to accept the risk of relying on permits that on paper were expired. Broad blanket extensions were also problematic given the disconnect between government policy and practice in South Africa. In other words, regardless of clear directives publicly given by the DHA, asylum-seekers and refugees continued to get arrested, detained or forced to pay bribes to the South African Police Service (SAPS) and other law enforcement officers because either the officer did not know the about the blanket extensions or chose to ignore them (MiCoSA, 2020b). Refugees and asylum-seekers were also regularly being turned away from key government services because their documents were not accepted, with parents reporting issues with government-run schools not admitting children on ‘expired’ physical documents (MiCoSA, 2020b).

While Covid-19 and state-based responses to the pandemic caused a great deal of hardship for the refugee and forced migration population, as this section has shown, most of the issues around accessing and retaining legal protection mechanisms were not new. Rather the pandemic heightened many pre-existing barriers to protection, while also placing a new spotlight on them. For example, issues linked to xenophobic responses to refugee documentation that resulted in constant threat of eviction, police harassment and accessing basic services reported during 2020 and 2021 (HRW, 2023) have been present in South Africa long before Covid-19 (Misago, 2016; Misago, Monson, Polzer and Landau, 2010; Landau and Amit, 2014). Similarly, barriers created by front line staff has remained a constant issue for refugees and asylum-seekers when attempting to access services. These findings raise real concerns about the current ability of legal protection mechanisms to provide adequate protection for refugees in South Africa. While the role of legal documentation should never

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17 Services remained suspended to 30 September 2021(Khan and Kolabhai (2021).



be dismissed in terms of providing a base level of protection, the increasing occurrences of refugees being refused services based on their legal status and documents and the ongoing problems with the RSD system, which is ultimately delegitimising and shrinking the asylum space, suggest their value is diminishing over time, and state measures adopted during Covid-19 have done nothing to improve the situation.

#### **4.2. Social Protection Mechanisms**

Beyond RSD procedures and the granting of legal documents, the national government follows the approach of UNHCR by broadly maintaining a policy of non-interference in refugees' attempts to settle in the host country. As such, there are no integration programmes in large cities like Johannesburg, Durban, or Cape Town, with an open question remaining around which (if any) department within the national government has responsibility for the welfare of refugees. Nevertheless, as examined below, while there are no unique programmes aimed at assisting this population, based on the National Constitution and other national laws, asylum-seeker, and particularly recognised refugees, should be eligible to access various national social protection programmes.<sup>18</sup>

South Africa has one of the most sophisticated and comprehensive government social protection systems on the continent (Nzabamwita and Dinbabo, 2022; UNHCR, 2021), which consists of two pillars, social insurance and social assistance (Devereux, 2010). The first pillar, social insurance, entails government funds for areas such as assisting workers during periods of income loss (Unemployment Insurance Fund (UIF)) and medical care for injured or sick workers (the Compensation Fund (CF)) (Nzabamwita and Dinbabo, 2022). The second pillar, social assistance, involves social grants, regularly in the form of cash or food transfers to persons in need (often outside of the formal labour market and not eligible for private insurance or who receive sufficient benefits) (UNHCR, 2021). Uptake on these programmes is sizeable, with around one-third of South Africans being a direct beneficiary of a social grant, and nearly two-thirds of the population are either a direct or indirect beneficiary of the national social protection system (World Bank, 2021).

While difficult to find a universally agreed definition of social protection, broadly speaking the purpose of social protection is allowing and promoting for human development by engaging with social risk, responding to basic needs and/or implementing core human rights (Barrientos and Hulme, 2008; ILO, 2021). South Africa's system appears to be at least moderately successful in these regards, with the World Bank noting that in terms of impact, it is evident that the social assistance transfers have 'significant positive impacts on reducing poverty and inequality in South Africa and boosting development outcomes' (World Bank, 2021).

In terms of migrant inclusion, from a legal access perspective, an argument can be made that refugees, asylum-seekers and other forced migrants should have equal access to social protection mechanisms based on 'the constitutional rights to equality (s9), human dignity (s10) and access to social security (s27(1)(c)) (RSA, 1996). These rights apply to 'everyone' (RSA 1998 – Refugees Act section s27A(c)), not only to citizens' (Khan and Kolabhai, 2021).

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<sup>18</sup> For example, the national social protection system is referred to within Chapter 2 of the National Constitution (Nzabamwita and Dinbabo, 2022).

In reality, on paper at least recognised refugees have much broader access to these mechanisms than other forced migrants and asylum-seekers. For example, recognised refugees are permitted to apply for the UIF when they lose employment. Equally, health insurance is also available if they have been enrolled in a national scheme that requires contributions (UNHCR, 2021). In addition, recognised refugees are also eligible to numerous social security grants (including child support, disability, and care dependency grants) through the South African Social Security Agency (UNHCR, 2021).

In terms of the implementation of these formal mechanisms, while they generally work well for nationals, numerous problems and barriers emerge for asylum-seekers and refugees. As a result, asylum-seekers are excluded from most forms of social assistance and most recognised refugees, while eligible, are unable to access the different forms of social grants (Nzabamwita and Dinbabo, 2022). Barriers emerge at the various stages of the process. At the national level, application processes through government departments can be very slow and overly bureaucratic (UNHCR, 2021). At the point of service, refugees regularly face xenophobic attitudes or key staff who lack the knowledge or training to assist refugees and their legal documents. Finally, on the ground, many refugees are often unaware of the availability of these social protection mechanisms or have lost faith or trust in the state so prefer not to apply (Nzabamwita and Dinbabo, 2022).

In terms of obstacles around employment benefits, most recognised refugees are forced to work in the informal sector due to barriers around xenophobic attitudes of employers, a lack of knowledge around the legal right to work or the lack of current documents (Khan and Kolabhai, 2021). As such, it remains incredibly difficult to be added to a UIF, and thus not eligible for its benefits. Similarly carrying out informal work means refugees are ineligible for unemployment insurance (Khan and Kolabhai, 2021). Also, while South Africa does offer support to informal businesses (such as Spaza shops), these forms of support are not available to asylum-seekers and most informal businesses run by refugees are unable to comply with the requirements of the scheme (which include tax certificates and formal business registration) (UNHCR, 2021). The result of these multiple barriers is starkly represented in the official number of international migrants who receive social grants. As Nzabamwita and Dinbabo (2022) note, of the 3 million recorded migrants living in South Africa, only 1% of them (including 11,602 refugees) were receiving social grants as of July 2021, compared to over 30% of the 57 million South Africans who benefit from social grants (Republic of South Africa, 2021).

Based on the above analysis, perhaps predictably interviews with civil society noted that these formal protection mechanisms were unable to adequately support refugee populations during the first few years of Covid-19. In addition, in certain incidences one could argue the situation got worse with deliberate policies created to exclude refugees and other international migrants from new social protection mechanisms during a period of national emergency. Firstly, as Khan and Kolabhai (2021) observes, access to existing social protection mechanisms did not improve for refugees during the first few years of the pandemic. For example, UIF's were not fully accessible to recognised refugees or asylum-seekers, with exclusionary measures emerging within the online systems set up to assist the processes while government offices were closed. For example, the Department of Labour's system only allowed for the input of 13-digit South African IDs so excluding refugees without

identity documents and all asylum seekers (Khan and Kolabhai, 2021). Khan and Kolabhai (2021) also observed how due to their refugee permits having expired during lockdown, many refugees had problems obtaining pre-existing social grants by the Department of Social Development, even though there was a blanket extension on their legal documents.

Secondly, in April 2020, soon after lockdown measures were implemented in South Africa, several new Covid-19 related social relief grants were made accessible. These included support to small and informal business, a special Covid-19 relief of distress grant and a topped-up Child Support Grant. These forms of relief, however, were only made available for people with a South African identity document or who had permanent residence (MiCoSA, 2020c). This suggests an intentional plan by the government to exclude most refugees, asylum-seekers, and other international migrants from these formal protection mechanisms through law and policy.

With strict lockdown measures meaning freedom of movement was severally curtailed, this left many forced migrants, who relied entirely on the informal economy to survive, without any source of income or access to any assistance (Oliveira and Walker 2021, MiCoSA, 2020c; Washinyira, 2020, 2022). The measures were, however, subject to legal challenge and with some eventually amended, allowing some asylum-seekers and recognised refugees the ability to apply for the Covid-19 Social Relief of Distress grant (Scalabrini, 2020). While this improved the situation for some, problems still persisted, with complaints around the complexity of the application process, systems crashing regularly due to the high demand and the system not accepting refugee permits, with it only being set up for the 13-digit national identity documents (Nzabamwita and Dinbabo, 2022). Even when applications were accepted, there were further reports of issues with front line staff not recognising their documents (ANA, 2021). In addition, the reliance on online applications certainly excluded a high number of refugees and other forced migrants in South Africa, who either did not have the sufficient information technology skills or access to computers and WIFI.

This section has highlighted several key legal and social rights that are available to refugees in South Africa. Yet, with the state essentially maintaining a policy of non-interference post an initial welcome, there is frequently little to no attempt at implementing them by the state or state bodies. This lack of formalisation of law into implemented policy, in conjunction with the DHA appearing unable to run reliable and competent RSD procedures, creates huge barriers on the ground to refugees accessing legal and social protection mechanisms. These include refugees being refused services at the point of service by front-line staff who either remain unclear of policy, retain xenophobic attitudes towards international migrants or receive conflicting information or instructions from government officials and departments.

As noted in previous sections, the introduction of state-based measures aimed at responding to Covid-19 only really managed to further highlight these existing flaws at the point of implementation. There is an urgent need, therefore, to bring in more formality to the implementation stage. This requirement is made particularly stark in terms of social protection programmes, when you consider how the system works relatively well for large portions of the national population. Yet concerning in recent years, shifts in law and formal policy are also creating new barriers to the existing ones at the implementation stage. This can be seen

in the restrictive amendments to the 1998 Refugee Act which recently come into force, which further obstructs the ability of refugees to be self-reliant and generates new problems in relation to the production and reliability of legal documentation (Ziegler, 2020). It can also be seen in responses to Covid-19, with refugees and other forced migrants being deliberately excluded from many social protection programmes set up to reduce the impact of Covid-19 on less advantaged sections of the population.

Part of the issue remains that no state department retains responsibility for the welfare of refugees and so with no one claiming responsibility, individual departments regularly passes issues relating to refugees back to the DHA, which sees itself more as an agency concerned with national security, than retaining any rights-based mandate towards refugees.<sup>19</sup> As a result of this broad malaise towards refugees at the government department level, an overarching securitised approach to most forms of international migration is allowed to dominate the framing and policy creation relating to refugees.

## **5. Role of Ground-Level Dynamics**

When formal protection mechanisms from the global and national level fail or are simply not implemented, other individuals (including refugees themselves) and bodies at the ground level must step in. Thus, the failures set out above at the global and national level create the necessity for responses by refugees themselves and civil society on the ground. This section investigates the role of informal protection mechanisms in South Africa and their relationship with formal mechanisms at the national and global level, with a specific focus on these mechanisms in the context of an external stress or shock such as the Covid-19 pandemic. The section starts with a discussion on the obligations imposed on refugees in urban spaces such as Johannesburg and Cape Town to find alternative de facto protection mechanisms through social networks. The section then turns to examine the role of civil society in South Africa which regularly fulfils two roles in relation to the paper's topic. First, as a reluctant 'guardian' of formal protection mechanisms in the country, and second by filling-in for an absent host state by offering forms of informal protection that should be offered via formal state-based mechanisms based on legal obligations.

### **5.1 The Role of Human Agency in Finding Localised Forms of Protection**

The lack of reliable formal protection 'from above' means refugees and other forced migrants in South Africa have adopted their own more informal approaches to finding protection. A robust body of literature focussed on the majority world has shown how human agency and mobility allows refugee to regularly find their own form of de facto acceptance at the local level (Long, 2014, 2010; Adepoju et al., 2007; Sturridge, 2011; De Haas, 2009) and/or 'urban citizenship' via local networks (Basok, 2009; Varsanyi, 2006; Akcapar and Simsek, 2018; Landau, 2014; Sanyal, 2017; Porter et al., 2019). In South Africa, this is often achieved through local negotiations and creating social networks in a chosen community, with these approaches between refugees and locals meaning refugees become political actors using political leverage like other local groups or communities (Polzer, 2009). For example, Polzer (2007) demonstrates how a range of local responses between Mozambique refugees and locals

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<sup>19</sup> See Maple, Vanyoro and Vearey (2023 – forthcoming).

allowed for forms of ‘local’ integration, even without legal recognition. This was achieved through ethnic and cultural ties and finding acceptance through local chefs. Landau and Amit (2014) go further and suggest that ‘urban success’ for refugees in cities like Johannesburg (which would include access to jobs, housing, food and physical security) is far more dependent on social networks than legal status or international assistance. Migrants and refugees who join family and friends in urban areas are given ways to navigate the city, such as evading the police as well as being provided some material support. As such, these migrants seem to fair far better than migrants who arrive without any networks (Landau and Amit 2014).

There are though inevitable limits to these informal approaches to locating protection that regularly work around or ignore state systems bodies and formal structures. Equally not every refugee and forced migrant who makes it to an urban space like Johannesburg is immediately equipped with the skills to survive without the need for protection and assistance ‘from above’. Indeed, many decide to leave South Africa and return to neighbouring states and even refugee camps where there is aid and other humanitarian assistance. There is also the danger that a picture of the urban space emerges from existing literature, whereby the city is conceptualised as a place of social cohesion and abundant opportunity. In reality of course, cities are regularly very dangerous places for newly arrived visitors (nationals and locals alike), particularly if they arrive with little in the way of resources or pre-existing social networks. Many refugees and other migrants often have limited options but to live in mainly deprived areas of the city, such as informal or illegal settlements and townships (Blaser Mapitsa and Landau, 2019).

In recent years the enclaves of cities where refugees and other international migrants settle have become harder to navigate and find local acceptance, due to the raise of xenophobia feelings among nationals (Misago, 2016). Xenophobic attacks regularly erupt in townships, acutely seen after anti-immigrant comments made by politicians and high-ranking government officials at the city and national level (Ngwane, 2018). Numerous attempts at improving social cohesion between local communities and migrant communities appear to have had little impact (Misago, 2016). This increase in xenophobic violence against refugees and other international African migrants combined with a perceived lack of protection mechanisms offered by the state and UNHCR, accumulated in 100’s of refugees amassing at a Methodist church on Cape Town’s Greenmarket Square in late 2019. These protestors were later moved to the ‘temporary’ camps in Camp Town discussed above, with many of refugees remaining in the camps in protest to this day, demanding resettlement because they no longer feel safe in South Africa (Mail and Guardian, 2020). For these purposes, this example highlights the clear limitations of a non-interventionist approach whereby all refugees in the urban space are framed as being able to find or create their own informal protection mechanisms.

Turning to the situation in cities in South Africa during Covid-19, the lack of assistance or offer of formal protection mechanisms for refugees and other forced migrants reinforced the existing themes that emerge from the literature and the discussion above. Namely refugees and other forced migrants were able to locate their own forms of protection, even when the environment changed dramatically. Although these approaches appeared to have their limits, with refugees often forced into very dangerous situations, when no formal structures or

systems were in place to assist them. For example, the lack of protection and assistance offered to migrants in South Africa, resulted in deteriorating personal situations which saw many migrants and forced migrants attempting to leave the country. Yet, the shutting of borders, restrictions on movement within transit counties and poorly run quarantine procedures at border crossings left many travelers in the Southern African region stranded for long periods of time (IOM 2020; ILO 2020). By late 2020 the International Organization for Migration (IOM) estimated that since the outbreak of Covid-19, over 78,500 migrants had been stranded in southern Africa (IOM 2020).

In an example of the global offering protection during COVID-19, IOM and UNHCR created a regional task force with SADC member state ambassadors. The aim of the platform was to assist in the return of migrants to their country of origin. Yet, by the time states and UN agencies had organised a system for assisting stranded migrants to travel back to Mozambique from South Africa, there was little need for the platform. Indeed, thousands had already crossed (often informally) the border from South Africa into Mozambique by their own accord at the time the platform was launched. Although, while this often involved careful decision-making and negotiating modes of travel and assistance, crossing irregularly and not having correct documentation inevitably increased risks both en route and once in the host or third country.

Chekero (2022) explored similar examples of human agency and resourcefulness during the outbreak of Covid-19, by examining how refugees during the lockdowns in South Africa were able to keep working (for example for delivery service jobs around Cape Town) by finding ways of ignoring or working around state restrictions, such as befriending local policeman through sporting or religious activities, and working with others within their social networks to avoid check points and law enforcement officers. Given the lack of social protection options available to many refugees in South Africa during this time, many were left with an impossible choice. Remain at home and abide by the regulations with little to no assistance from the state, or breach or bend regulations to find work and money to sustain themselves and their families.

## **5.2 The Role of Civil Society in Providing Informal Protection Mechanisms and Acting as a Guardian of Formal Ones**

Civil society in post-Apartheid South Africa has a robust track record of holding the state to account for breaches of refugee and migrant rights. This has mainly been achieved through the courts (Segatti, 2011), with public interest litigation related to refugee protection being a staple in South Africa for the last 20 years (Handmaker and Nalule, 2021). Famous examples include the DHA being taken to the Supreme Court in the Watchenuka case, with the court confirming the department's policy of prohibiting asylum-seekers right to work conflicted with the Constitution and violated the right of dignity (Carciotto, 2021). Further, after RROs started closing from 2011, the DHA was taken to the court and eventually the Constitutional Court to order the reopening of the centres (Moyo, Sebba and Zanker, 2021). Through these tactics, civil society can be understood as the guardians of formal protections mechanisms or 'de facto custodians of refugee protection' in South Africa (Maple, Vanyoro, Vearey, 2023).

The previous mentioned examples of recent regressive amendments to the 1998 Refugees Act and the creation of Covid-19 social grants that explicitly excluded large groups

of migrants and forced migrants, means civil society's role in this regard is sadly becoming more and more vital. Meaning, failures related to formal protection mechanisms are now not just occurring at the implementation stage, but also at the preceding legal and formal policy stages. Certainly, one of the only remaining constants in refugee matters in South Africa is the active role of civil society in attempting to hold the state to account. For example, if on-going threats by the government to withdraw from the 1951 Refugee Convention, and then re-ratify with new reservations on such rights as freedom of movement are followed through,<sup>20</sup> these actions would swiftly be followed by legal action by civil society, based on universal rights contained within the National Constitution. Finally, it should be mentioned that the implementation of court orders rarely occurs quickly or entirely successfully, with the DHA often either dismissing court orders or finding alternative ways to fight back through new policy and practice (Johnson and Carciotto, 2018).

Beyond being the perhaps reluctant role of guardian of formal protection mechanisms for refugees in South Africa, given the approach of non-interference in urban centres (shared by the national government and UNHCR), responsibility for providing alternative and more informal forms of protection regularly falls on civil society in cities such as Johannesburg. This can range from giving legal advice, information about government services, finding ways to circumvent barriers to access rights such as education and health, language classes and vocational training and skills. In many ways the services civil society provide can be seen as functioning as an 'arm of the state' or as an 'implementing actor'.

This framing, however, risks conflation and confusion between the roles of different entities. By way of illustration, a local Catholic organisation in Johannesburg runs a shelter for refugee women and children, while also assisting their clients with livelihood projects. As well as welcoming walk-ins from the street, the shelter also regularly receives referrals of refugees from national-level state entities. Civil society in this way is replacing the role of the state and even the global refugee regime by implementing key protection mechanisms normally originating from the national and/or global level at the ground level. Nevertheless, conceptually the paper argues it is important to understand civil society's work in producing protection mechanisms for refugees and other forced migrants as informal mechanisms found at the ground level. This is distinct from more formal approaches that should be implemented through government structures and systems at the national level. It is evident from the example, that the state is aware that there is an urgent need for these services but is happy to pass the responsibility onto civil society. Civil organisations in South Africa have numerous constraints such as limited resources, dependency on funding cycles and having to work within a narrowing political landscape and so it is vital to keep pushing the state and global organisations to re-engage with these protections concerns on the ground, rather than allowing these more informal approaches to become the sole norm.

In the context of Covid-19, state-wide lockdowns and the resulting loss of income and services saw the accountability of the state towards refugees and other migrants contract further (Mukumbang, Ambe and Adebisi, 2020). As a result, civil society was placed in a position where they again had to respond to the needs of persons of concern. One of the rare positives to come out of the pandemic was how civil society organised themselves via large

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<sup>20</sup> See for example the recent 2022 ANC policy document relating to international migration (ANC, 2022).

networks to support communities. For example, fourteen organisations (from civil society and local law firms) came together to form a collaboration and create initiatives such as the setting up of a hotline for migrants and marginalised citizens facing legal issues or concerns based on state responses to COVID-19. In addition, networks fought to ensure that many asylum-seekers were eligible for the Social Relief of Distress (SRD) grants (Scalabrini Centre, 2020).

Another key area of protection performed by civil society involved removing or circumventing existing barriers at the point of service during the pandemic. For example, certain post offices were not accepting refugee and asylum-seekers documentation when individuals went to collect social grants, and so organisations were able to locate more ‘friendly’ offices and send clients there. Similarly White and Rispel (2021) noted how civil society organizations played an important role in intervening and mediating access to health care for migrants. Again, these examples show the importance of maintaining a clear separation between the work of civil society and more formal state-based mechanisms. As noted by a member of civil society, while these approaches were vital in assisting refugees locate immediate social protection, they were unable to tackle the underlying systemic problems (i.e., a combination of lack of communication, training and xenophobic attitudes of key service staff). Inevitably the work of civil society on the ground has limits, yet arguably, it is not its role to bring about systemic change. These broader concerns need to be tackled at the national and global levels, with states not given a pass to shift responsibilities to civil society simply through non-action.

By adopting a multi-scalar analysis of the protection issues in urban spaces in South Africa, this section has shown that informal protection mechanisms interact and connect with higher level formal ones in interesting ways. First, the lack of implementation of formal state ones informs and essentially requires lower ones at the ground floor to emerge via human agency and civil society. Second, informal ground level mechanisms continue to try and reinforce and maintain ones at higher levels through the work of civil society and the courts. Yet, while informal ones continue to interact with more formal ones, their ability to influence has limits. First, due to their separation from national systems and structures, informal mechanisms can assist in removing some barriers to accessing rights, yet it is hard to see how these informal approaches are able to shift systematic problems within national systems. Second, street-level approaches to locating protection by refugees broadly remain about ‘hustling’ to survive in difficult conditions, with migrants regularly remaining in precarious situations without social safety nets. This is not to critique these approaches – they are essential, with refugees having no other options, as most formal protection mechanisms are currently not functioning. The point here is that these interactions between the informal and formal all move in one direction. National and global protection mechanisms continue to be reduced or passed on to civil society (unless the courts intervene), with little to no willingness to engage with lower-level approaches to improve the overall protection of refugees.

## **6. Conclusions**

This paper investigated the scope of formal and informal protection mechanisms available to refugees in South Africa, and how these mechanisms interact with each other. Specifically, using a multi-scalar approach, the paper investigated the reality of protection for refugees in South Africa, and the role different key scales of analysis (the global, the national and the



ground) play in how refugees locate forms of protection. By investigating these issues before and during the Covid-19 pandemic, the paper was also able to scrutinise the stability and reliability of such mechanisms (both formal and informal) during a period of national emergency.

The paper demonstrated that protection mechanisms originate from all key levels of analysis, from the global to the ground. Yet, the current political climate around forced migrants at the different scales (global, national and ground level) in South Africa means that all existing protection mechanisms (formal and inform) appear fragile and prone to rupture. First, the presence of the global in South Africa in terms of protection mechanisms varies depending on the geographical space. Nevertheless, in both the urban space and border areas, UNHCR has been withdrawing forms of protection due to financial constraints. In addition, a tense relationship with the host state and a lack of commitment to working long-term in the urban space means UNHCR's role in South Africa remains very much on the periphery.

Second, at the national level, while the role of legal documentation remains important as a protection mechanism, the frequency in which refugees are being refused services based on their legal status and documents, coupled with the ongoing problems with the RSD system, means in practical terms the value of legal status for refugees in South Africa is continuing to shrink. State measures adopted during Covid-19 have not improved the situation, with policies produced that excluded refugees and other international migrants from vital services during a period of national emergency. Thus, with no department taking ownership of refugee welfare, an overarching security lens has been allowed to dominate the framing around refugee affairs today. Third, due to the deficiencies at the higher levels, ground level informal protection mechanisms emerge as an essential survival tactic for refugees. Yet growing xenophobia within communities and at the point of service, means finding informal methods of protection at the community level is becoming more and more challenging. Again, Covid-19 only worsened these issues. The accompanying economic downturn and increased unemployment and poverty levels amongst the national population meant that anti-immigrant sentiments from fringe groups found increased legitimacy within the wider population (Musariri, 2022).

In terms of interconnectedness of the different scales, it is evident that formal and informal mechanisms regularly engage with each other. Yet as noted in the previous section, these interactions move in just one direction (from bottom to top). The lack of implementation of formal ones informs and essentially requires lower ones at the ground floor to emerge via human agency and civil society. Equally informal ground level mechanisms continue to try and reinforce and maintain ones at higher levels through the work of civil society and the courts. In contrast, there is little willingness 'from above' to engage with lower levels to improve the overall protection of refugees. Indeed, as discussed next, in addition to shifting responsibilities for protection onto civil society, the framing of 'urban refugees' has enabled the national and global levels to shift further responsibilities onto the individual refugee.

Given the shrinking asylum space in South Africa, it is likely that protection is best sort at the ground level. Protection mechanisms at this level are accessed through human agency and mobility, as well as civil society. Concerningly, state and global actors appear to be reinforcing and ultimately relying on these more informal approaches by maintaining policies of non-interference in urban spaces. As a result, access to the urban space is conditional on refugees being entirely self-sufficient. Current global policy approaches based on terms such

as resilience and self-reliance support this construction of the urban refugee in southern Africa. This approach while engaging with the agency and mobility of refugees, also adopts a neoliberal tactic of shifting responsibility away states (and a right-based approach) and onto the refugees themselves (Andre, 2022). A key issue in the context of South Africa is that these ‘acts of resilience’ remain outside of formal structures and policy, with no real attempts made by the state or global actors to support refugees settle, gain access to the labour market or build capacity to be self-reliant more broadly in these spaces.

Ultimately, the paper has drawn out a concerning picture of refugee protection in South Africa, with protection mechanisms at all levels appearing extremely volatile to external pressures and shocks. Equally, formal protection mechanisms are weakening, disappearing, or their function has shifted to more informal mechanisms at the ground level. While the approaches of refugees and civil society should be praised and often remain the preference for many, state-based protection mechanisms cannot be allowed to slowly retreat out of sight. For many refugees engaging with the national level and national systems is still essential in terms of obtaining legal documentation and gaining access to social protection programmes.

It remains unclear, however, what can be done to stop the slide. Frequent demands for more training and capacity building within the DHA and other government departments are unlikely to drastically improve the implementation of national protection mechanisms. More radical thinking is therefore urgently needed to improve refugee and forced migration protection in South Africa. One glimmer of positivity is the recent re-engagements between the DHA and UNHCR, which perhaps could be better leveraged by the UN agency to work on removing some of the barriers to accessing national services. In addition, civil society and local networks need to be better utilised and supported by government organs and UN agencies, as opposed to the status quo whereby national bodies are content with civil society performing essential (and often life-saving) functions. If South Africa, which is party to the Global Compacts is truly committed to new ‘whole of government’ and ‘whole of society’ approaches, then genuine engagement and open dialogue with organisations at the local level would be a positive step forward, with the interaction between formal and informal protection mechanisms working in both directions, rather than just one.

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