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Articles

“Civil Liability for Delicts Caused by Emerging Digital Technology: A Suggestion to South Africa”
by *Jacqui Meyer* 296–335

“The State of Psychiatric Health Care in South Africa 30 Years into Democracy”
by *Hoitsimolimo Mutlokwa* 336–355

“The Conceptualisation of an Essential Facility: A Comparative Analysis
of the Positions in South Africa and the European Union”
by *Ndivhuwo Ishmel Moleya and Tapiwa Shumba* 356–383

“The Presentation of Witness Testimony in Civil Matters — Time for a New Approach? (Part 1)”
by *Thino Bekker* 384–405

“Creating a Corporate Governance Expectation Gap”
by *Werner Schoeman* 406–418

“The Cybercrimes Act 19 of 2020, Section 7 versus Civil Proceedings”
by *Nombulelo Queen Mabeka* 419–436

“The ‘Silent War’ of the COVID-19 Pandemic on the Realisation of
the Right to Quality Education in South Africa”
by *Siyabulela Christopher Fobosi and Nomthandazo Ntlama-Makhanya* 437–451

“Rethinking Women’s Roles in Pastoral Governance: Empowering Women
to Mitigate Pastoralism-Related Conflicts in Nigeria”
by *Jane Ezirigwe* 452–469

Notes and Comments

“Kukithi La (“This is Our Home”): An Interplay Between Common Law and Customary Law in
“Family House” Disputes in Shomang v Motsose NO and Others 2022 5 SA 602 (GP)”
by *Maphuti Tuba and Refilwe Makaleng* 470–483

“Cession and the Application of the Consumer Protection Act 2008: A Discussion
of the South African Securitisation Programme (RF) Ltd v Jaglal-Govindpershad
and South African Securitisation Programme (RF) Ltd v Lucic Cases”
by *AM Tait* 484–496

“The Concept of Public Trusteeship and the Water-Energy-Food-Climate (WEFC)
Nexus in Discretionary Decision-Making: Insights from Thungela Operations v
Department of Water and Sanitation (Water Tribunal, 26 April 2023)”
by *Germarie Viljoen* 497–513

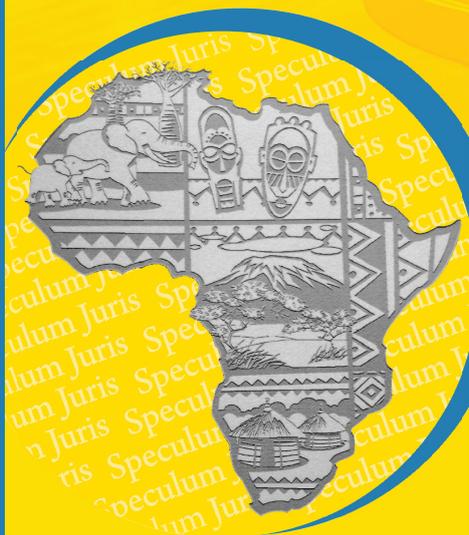
“Determining the “Proper” Application and Scope of Section 45 of the Companies Act through the Lenses
of Trevo Capital Ltd v Steinhoff International Holdings (Pty) Ltd [2021] 4 All SA 573 (WCC)”
by *Justice Mudzamiri and Arthur van Coller* 514–527

“Premeditated Murder and Private Defence: From Life Imprisonment to Acquittal,
Khan v S (A89/2023) [2024] ZAGPPHC 190 (15 February 2024)”
by *Jolandi Le Roux-Bouwer* 528–537

“Telling the Untold in Rape: Khamphepe J’s Separate Judgment in Tshabalala v S; Ntuli v S”
by *Pamela Nyawo* 538–549

“A Discussion of the Power to Impose “Provisional Measures” During a Trade
Remedy Investigation in South Africa: Association of South Africa v the International
Trade Administration Commission Case Number: 2022/010681”
by *Clive Vinti* 550–563

“Comment on the White Paper on Citizenship, Immigration and Refugee
Protection, the Constitution and International Law”
by *Gabriella La Foy* 564–572



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Comment on the White Paper on Citizenship, Immigration and Refugee Protection, the Constitution and International Law

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Abstract

This commentary is a critical discussion of certain aspects of the White Paper on Citizenship, Immigration and Refugee Protection. The objective of the White Paper is to completely overhaul the migration system in South Africa. At the international level, South Africa is a signatory to the 1951 United Nations Refugee Convention and the 1967 Protocol relating to the Status of Refugees. South Africa is also a signatory to the Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa 1969. At the municipal level, the existing legislation consists of three separate Acts (the Citizenship Act, the Immigration Act and the Refugees Act). The White Paper proposes that these Acts be rationalised into a single piece of legislation. In addition, a raft of policy proposals aimed at institutional and systemic reform is outlined in the document. The drafters devote a considerable chunk of the paper to discussing South Africa’s accession to the 1951 United Nations Refugee Convention and the 1967 Protocol relating to the Status of Refugees. The White Paper contends that many states ratified the United Nations Refugee Convention and its Protocol with reservations. These reservations limit the obligations placed on these

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states, particularly in relation to the provision of socio-economic rights such as health care and education to refugees. However, South Africa did not enter any reservations at the time of signature. Accordingly, the White Paper proposes that South Africa must review and/or withdraw from the 1951 United Nations (UN) Convention and the 1967 Protocol with a view to accede to them again, but this time with reservations. The implication is that this will allow South Africa to bring about changes to the existing legislative framework in order to limit the provision of the socio-economic rights which the UN Convention requires member states to provide to refugees. This comment examines the proposal to withdraw from the 1951 United Nations Refugee Convention and the 1967 Protocol relating to the Status of Refugees from the viewpoint of the Constitution and international law. It argues that the proposal may not pass constitutional muster.

Keywords: Immigration; refugees; Refugee Convention; reservation; Constitution

1 INTRODUCTION

The White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa was published by the Department of Home Affairs in late 2023.¹ The issues addressed by the policy proposals in the Paper are important and weighty social issues. At the outset, it is important to clearly delineate the boundaries of the discussion. Within international refugee law, there are two principles that must be balanced: the obligation of states to protect their territorial sovereignty and the obligation to provide refuge and humane treatment to persons who may be fleeing human rights abuses in their home countries. The paper brings these two principles into stark relief.

Refugees in South Africa are governed by a legal framework drawn from international law, on the one hand, and South African domestic law on the other. There are two United Nations (UN) Conventions and one regional Convention:

1. The United Nations Convention Relating to the Status of Refugees, 1951 (1951 UN Convention)²; and its
2. Protocol Relating to the Status of Refugees of 1967 (1967 Protocol).³
3. The OAU Convention on the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention),⁴ at the regional level in Africa.

At the outset, it is important to note that these Conventions do not confer rights on refugees. They impose obligations on signatory states. In other words, signatory states agree to treat

1 *Government Gazette* 49690 (10 November 2023).

2 189 UNTS 137 (adopted on 28 July 1951 and entered into force on 22 April 1954).

3 606 UNTS 267 (adopted on 31 January 1967, entered into force on 4 October 1967).

4 1001 UNTS 45 (adopted on 10 September 1969, entered into force on 20 June 1974). The OAU has been replaced by the African Union. The Constitutive Act of the AU preserves the application of the instruments adopted by the OAU.

refugees according to the standards set out in the treaties.

At the municipal level, the applicable legislation consists of three acts:

- The Refugee Act ⁵;
- The Immigration Act,⁶ and
- The Citizenship Act.⁷

The Paper contends that these Acts require redrafting because they are cumbersome and difficult to implement. In addition, the Paper proposes numerous changes to the existing legislative framework governing immigration control and refugee protection in South Africa. The Paper suggests that the prerequisite for these legislative changes is the need for South Africa to withdraw from the 1951 UN Convention⁸ and the 1967 Protocol.⁹ South Africa will remain bound by the complementary regional instrument — the OAU Convention governing the specific Aspects of Refugee Problems in Africa (1969 OAU Convention).¹⁰ According to the Paper, this will pave the way for an overhaul of the existing domestic legislation.

2 BACKGROUND / RATIONALE FOR THE POLICY

According to the explanatory memorandum, the Paper has been drafted against the backdrop of increased immigration and excessive numbers of migrants and refugees who have entered South Africa since the advent of democracy.¹¹ The Department of Home Affairs (DHA) concedes that it cannot account for the number of undocumented migrants in the country.¹² According to the UN, between 2006 and 2011, South Africa received the highest number of new asylum applications in the world.¹³ To date, it remains one of the top 10 receiver states in the world).¹⁴ The DHA highlights the fact that the migration crisis has led to violent clashes between foreign nationals and citizens, which threaten state security. This has led to consistent vocal calls for effective policy and legislative interventions to deal with migration in South Africa.¹⁵

At the level of domestic legislation, the Paper contends that the current legislative framework is fragmented, weak, ineffective, outdated and difficult to implement.¹⁶ This has allowed asylum seekers, refugees and foreign nationals to exploit the gaps in the law in order to acquire citizenship irregularly and prematurely.¹⁷ Perhaps more worrying is the fact that criminal syndicates are able to use their networks to exploit the refugee and immigration systems.¹⁸ The

5 Refugees Act 130 of 1998.

6 Immigration Act 13 of 2002.

7 Citizenship Act 88 of 1995.

8 189 UNTS 137 (adopted on 28 July 1951, entered into force on 22 April 1954).

9 606 UNTS 267 (adopted on 31 January 1967, entered into force on 4 October 1967).

10 1001 UNTS 45 (adopted on 10 September 1969, entered into force on 20 June 1974).

11 White Paper on Citizenship, Immigration and Refugee Protection, Explanatory Memorandum para 4.

12 *Ibid* para 49–50 and 89–90.

13 UN High Commissioner for Refugees *Global Trends 2012: Displacement – The New 21st Century Challenge* (June 2013) 26 <http://www.unhcr.org/statistics/country/51bacbof9/unhcr-global-trends-2012.html> (accessed 20-01-2024).

14 Republic of South Africa, Department of Home Affairs White Paper on International Migration (July 2017) 59. See also UN High Commissioner for Refugees *Global Trends 2017: Forced Displacement in 2017* (2018) 41 <http://www.unhcr.org/globaltrends2017/> (accessed 17-01-2024).

15 White Paper on Citizenship, Immigration and Refugee Protection, Explanatory Memorandum para 9.

16 *Ibid* para 10.

17 *Ibid* para 10.2.

18 *Ibid*.

Paper highlights the fact that the operation of the system is bedevilled by apparent conflation between the asylum system and economic migrants, which results in over-burdening of the asylum system.¹⁹ The DHA states that its objective is to put a policy framework in place which recognises and protects genuine refugees whilst closing legislative loopholes that allow persons without a legitimate claim to abuse the system.²⁰

In order to achieve the policy objectives outlined above, the DHA contends that South Africa (SA) must revisit its unconditional accession to the UN convention and its protocol. The argument goes that SA acceded to a number of international conventions in the early democratic period, but unlike other countries, SA did not enter any reservations. These conventions require South Africa to provide socio-economic rights to refugees, which it cannot afford.²¹

3 POLICY PROPOSALS CONTAINED IN THE WHITE PAPER

Against this backdrop, the Paper makes a number of policy proposals: In the first place, it proposes that the government must review and withdraw from the 1951 Convention and 1967 Protocol with a view to acceding to them again, but this time with reservations, as other countries have done. Once this has been accomplished, new legislation must be drafted to provide for “reservations and exceptions as contained in the 1951 Convention and the 1969 OAU Convention”. The implication is that this will allow SA to change the existing legislative framework to limit the provision of the socio-economic rights that the UN Convention requires member states to provide. The rationale for this change is that the state does not have the resources to grant refugees the socio-economic rights envisaged in the UN Convention.²²

The Refugee Act²³, the Immigration Act²⁴ and the Citizenship Act²⁵ will be repealed and replaced with a single law covering citizenship, immigration and refugee protection in order to comprehensively address institutional and structural challenges. The policy framework provides for the establishment of an advisory board, which comprises representatives of the Department of Trade, Industry and Competition, Labour and Employment, Tourism, Education, the South Africa Police Service, the South African Revenue Service, Education, International Relations and Cooperation, Defence and Military Veterans and the director-general of the Department of Home Affairs. This board will tackle issues related to immigration that are managed by government departments other than the DHA²⁶

Systemic problems will be addressed by increasing the monitoring capacity and procedures through the introduction of integrated Information Technology (IT) systems capable of flagging fraudulent activities in the issuing of visas, identity documents, marriage certificates and passports.²⁷ The qualifications of personnel who staff the refugee protection and appeal bodies will be addressed by the introduction of appropriate minimum standards and the provision of training.²⁸ In relation to refugees, existing structures will be replaced by a structure similar to the Canadian Refugee Protection Division, which will take decisions on asylum applications. A dedicated appeals body will replace the current process whereby ministers and directors-

19 *Ibid* para 10.4.

20 *Ibid* para 29.8.

21 *Ibid* para 16–20 and 23.1.

22 *Ibid* para 23.1–23.2.

23 Refugees Act 130 of 1998.

24 Immigration Act 13 of 2002

25 Citizenship Act 88 of 1995.

26 *White Paper on Citizenship, Immigration and Refugee Protection*, Explanatory Memorandum para 53.3.

27 *Ibid* para 53.7.

28 *Ibid* para 23.3.

general decide appeals.²⁹

A further proposal involves the relocation of refugee reception offices to ports of entry to facilitate immediate assessment of asylum claims, together with the establishment of dedicated immigration courts to streamline and shorten procedures.³⁰ Border control and immigration will be combined under the new system. The Border Management Authority will be reviewed to align it with the new Immigration, Citizenship and Policy Framework.³¹ Finally, the Paper makes proposals to improve enforcement. It proposes that the powers of immigration officers and inspectors must be increased.³² In addition, it provides that members of the Anti-Corruption Unit should be seconded from the SAPS (the rationale being that SAPS officers have wider statutory powers than existing immigration enforcement officials, including search and arrest without a warrant).³³

4 EVALUATION OF POLICY PROPOSALS

It is submitted that most of the policy proposals relate to systemic improvements. If implemented, they will likely have a positive impact on immigration control and border management. However, the proposal that SA must withdraw from the 1951 Convention and 1967 Protocol and then accede to them again with reservations requires closer scrutiny. Here, the apparent premise is that if reservations are recorded, SA will then be in a position to limit the protections given to refugees in terms of the conditions stated in the reservation. The Paper is not clear on which socio-economic rights it intends to limit.

Unfortunately, there are several difficulties with this assumption. Firstly, South Africa is a constitutional democracy founded upon the rule of law and respect for human rights.³⁴ This means that the country's legal and governance systems must comply with the requirements of the Constitution and the Bill of Rights.³⁵ When the courts make decisions on matters that are related to human rights, they are required by the Constitution to promote constitutional values and the spirit and purpose of the Bill of Rights. The courts must also consider international law.³⁶ The foundational clause, supremacy and interpretation clauses of the Constitution impact and shape the manner in which the courts reason in favour of human rights protection.³⁷ It is for this reason that the Department feels that whenever they are involved in court matters "they come off second" to use the words of the Paper.

Secondly, refugee matters are intertwined with human rights matters. This is so at the international level and at the domestic level. This means that both domestically — in terms of the Constitution and internationally, refugee law and human rights law are inextricably intertwined.

29 *Ibid* para 25–26.

30 *Ibid* para 53.17–53.18.

31 *Ibid* para 53.1 and 53.2.

32 *Ibid* para 53.10.

33 *Ibid* para 53.8.

34 Constitution of the Republic of South Africa, 1996 s 1 and s 2

35 *Ibid*.

36 The Constitution s 39 provides that:

(1) When interpreting the Bill of Rights, a court, tribunal or forum –
must promote the values underlie an open and democratic society based on human dignity, equality and freedom;
must consider international law; and
may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

37 Constitution of the Republic of South Africa 1996 ss 1 2 and 39.

For instance, internationally — the UN Declaration on Human Rights³⁸ and the Convention for the Elimination of all forms of Racial Discrimination³⁹ contain provisions applicable to refugees.⁴⁰ At the domestic level, South African courts have already developed a considerable body of jurisprudence, which clarifies the rights of refugees and immigrants.⁴¹ These decisions will remain part of South African law even if the country withdraws from the UN Convention and will certainly be relied upon in any potential court challenges which may be brought against the new policy and legislation. One should also bear in mind that the provisions of the Promotion of Administrative Justice Act (PAJA) are applicable to all administrative processes.⁴² This means that the policy and resulting legislation must meet the test of rationality.

Thirdly, there is no discussion of the areas contained in the Convention, which have passed into the canon of customary international law. In some respects, the 1951 UN Convention and the 1967 Protocol merely codify existing principles of customary international law. For instance, the principle of *non-refoulement* or non-return which obliges states to refrain from forcibly returning refugees to a state where they are likely to suffer persecution or danger, constitutes a rule of customary international law.⁴³ In *Ruta*, the Constitutional Court further developed certain principles relating to *non-refoulement*.⁴⁴ Customary international law is binding, irrespective of whether we are signatories to the Convention or not. This means that policy provisions that are in conflict with international customary law, will more than likely be struck down by the Constitutional Court based on its own jurisprudence (such as the *Ruta case*) and the applicable

38 UNGA Universal Declaration of Human Rights (10 December 1948) 217 A (III) <https://www.refworld.org/docid/3ae6b3712c.html> (accessed 20 January 2024).

39 UNTS vol 660 195 (adopted on 21 December 1965, entered into force 4 January 1969) <https://www.refworld.org/docid/3ae6b3712c.html> (accessed .20 January 2024).

40 The UDHR provides that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” The CERD prohibits discrimination on the basis of origin.

41 *Abidi and Another v Minister of Home Affairs and Others* 2011 3 SA 37 (SCA); *Abore v Minister of Home Affairs and Another* 2022 2 SA 321 (CC); *Bula and Others v Minister of Home Affairs and Others* 2012 4 SA 560 (SCA); *Centre for Child Law, the School Governing Body of Phakamisa High School and Others v Minister of Education and Others* [2020] 1 ALL SA 711 (ECG); *Centre for Child Law v Director General: Department of Home Affairs and Others* [2021] ZACC 31; *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs* 2000 3 SA 936; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 12 BCLR 1399 (CC); *Ersumo v Minister of Home Affairs and Others* 2012 4 SA 581 SCA; *Ex parte Minister of Home Affairs and Others In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22; *Faqirzada and Others v Minister of Home Affairs and Others* Case no. B25/23 Gauteng Division, Pretoria; *Gavric v Refugee Status Determination Officer Cape Town and Others* 2019 1 SA 21 (CC); *Governing Body of the Juman Musjid Primary School and Others v essay N.O. and Others* 2011 8 BCLR 761 (CC); *Suzman Foundation and Another v Minister of Home Affairs and Others* Case no 32323/22, Gauteng Division, Pretoria; *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 1 SA 745 (CC); *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* (2004) 4 SA 125 (CC); *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 204 6 SA 505 (CC); *Koyabe v Minister of Home Affairs and Others* 2010 4 SA 327 (CC); *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 All SA (SCA); *Mulowayi and Others v Minister of Home Affairs and Another* 2019 4 BCLR 496 (CC); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30; *Ruta v Minister of Home Affairs* 2019 3 BCLR 383 (CC); *Saidi and Others v Minister of Home Affairs and Others* 2018 4 SA 333 (CC); *Somali Association of South Africa and Others v Limpopo Department of Economic Development and Others* 2015 1 SA 151 (SCA).

42 Act 3 of 2000.

43 Dugard *et al* *Dugard's International Law* 5edn (2021) 520.

44 *Ruta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC).

1. Once an illegal foreigner who claims to be a refugee expresses an intention to apply for asylum, he or she must be permitted to apply for such status in terms of the applicable Act.

2. A delay by an illegal foreigner in expressing an intention to apply for asylum does not bar him or her from applying for refugee status.

principles of customary international law.

Fourthly, the policy refers to the OAU Convention as the solution because it allows “reservations and exceptions”. Nowhere does the policy mention that the OAU Convention is actually broader than the UN Convention and its Protocol. In terms of the 1951 UN Convention, refugee status requires proof of two elements — first, a well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion must be established. Secondly, the person must be unwilling or unable to avail themselves of the protection of that country owing to such fear. The OAU Convention was deliberately worded more broadly. This broadened definition of refugee includes persons who are forced to flee due to “events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality.”⁴⁵ It has been argued that this definition may be broad enough to include environmental and humanitarian disasters and public disturbances caused by internal unrest.⁴⁶ South Africa has adopted both the UN and OAU definitions into the Refugee Act.⁴⁷ This calls into question the rationality of the decision to withdraw from the 1951 UN Convention and the 1967 Protocol in order to enter reservations as it is set out in the Paper since the OAU Convention is broader in certain aspects than the UN Convention.

Fifthly, the policy objective of limiting the provision of socio-economic resources for citizens for financial reasons (which underlies the White Paper) was raised by the government in the case of *Khosa v Minister of Social Development*.⁴⁸ This case concerned a constitutional challenge to provisions of the social security legislation which excluded non-citizens from old age pensions, child-support grants and care-dependancy grants. The applicants were permanent residents. The court dismissed the argument, holding that the exclusion of permanent residents was unconstitutional, discriminatory and unfair.⁴⁹ The court reasoned that the Constitution provides that the Bill of Rights applies to “all people in our country” — accordingly, “everyone” cannot be interpreted to mean “citizens” only.⁵⁰ It held that the importance of providing access to social assistance to all who live in SA and the impact upon the life and dignity of a denial of access far outweighed the financial and immigration policy considerations which the state sought to rely upon as justification for the policy.⁵¹ The court concluded that the denial of access to social grants to permanent residents, who would qualify, but for their citizenship, did not constitute a

45 OAU Convention art 1 provides:

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

2. The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

46 Dugard *Dugard’s International Law* 508.

47 Refugees Act 130 of 1998 s 3.

48 *Khosa and Others v Minister of Social Development and others, Mahlaule and Another v Minister of Social Development* 204 6 SA 505 (CC).

49 *Ibid* para 80.

50 *Ibid* para 47.

51 *Ibid* para 82.

reasonable legislative measure within the meaning of the relevant constitutional provisions.⁵²

In *Centre for Child Law v Minister of Basic Education* the applicants successfully sought an order declaring a policy that required all learners in schools in the Eastern Cape to produce a valid identity, permit or passport number, inconsistent with the Constitution.⁵³ Again in this case, the respondents were unsuccessful in raising immigration policy and financial constraints as a rationale for the policy. The court emphasised that section 28 of the Constitution must be given a wide interpretation to encompass “every child” and not only citizens, children who are lawfully in the country and children with valid birth certificates.⁵⁴ The court pointed out that even children who had been detained as illegal foreigners pending deportation, were entitled to the constitutional rights afforded to children by section 28 of the Constitution.⁵⁵ The court held that “there is not one iota of evidence” to support the view put forward by the respondents that illegal immigrants come to SA in order to receive free basic education.⁵⁶ In rejecting the policy justification put forward by the government, the court emphasised the duty on the government to put proper immigration controls in place and to ensure that policies comply with constitutional precepts.⁵⁷

The final concern with this proposal relates to the legal position in international law regarding reservations entered by states in multilateral treaties. The Vienna Convention on the Law of Treaties defines a reservation as

a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.⁵⁸

The legal position with regard to reservations has been altered by state practice and decisions of the International Court of Justice over the years.⁵⁹ In general, a reservation must be compatible with the object and purpose of the treaty. The ICJ laid down the test for reservations in its advisory opinion with regard to the entry into force of the Genocide Convention.⁶⁰ The court declared that a state that has made a reservation to a treaty which has been objected to by some but not all state parties to that treaty, will be regarded as a party to that treaty if the reservation does not defeat the object and purpose of the treaty.⁶¹ In relation to the International Covenant on Civil and Political Rights (ICCPR) the UN Human Rights Committee has noted that the number, scope and content of reservations may weaken respect for the obligations contained in the Covenant. The committee was particularly concerned about widely drawn reservations that states use to negate treaty provisions that impose obligations on states within their municipal legal system.⁶² It identified certain categories of reservations which would be incompatible with the object and purpose of a treaty, including reservations which violate customary international law; reservations to non-derogable provisions of the Covenant and reservations to articles which

52 *Khosa v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 204 6 SA 505 (CC), para 85.

53 *Centre for Child Law v Minister of Basic Education* 2020 3 SA 141 (ECG).

54 *Ibid* para 76.

55 *Centre for Child Law v Minister of Home Affairs & Others* 2005 6 SA 50 (T).

56 *Centre for Child Law v Minister of Basic Education* 2020 3 SA 141 (ECG) para 99.

57 *Ibid* para 99

58 Vienna Convention art 2(1)(d). See Dugard *Dugard's International Law* 613.

59 Ferreira and Ferreira-Snyman “The Impact of Treaty Reservation on Establishment of International Human Rights Regime” 2005 *CILSA* 148 159.

60 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) ICJ Reports 15.

61 Ferreira 2005 *CILSA* 159.

62 Ferreira 2005 *CILSA* 152.

underpin or support specified rights in the Covenant.⁶³ The International Law Commission has endorsed the object-and -purpose test.⁶⁴

Human rights bodies have responded to the tendency of States to enter reservations that are incompatible with the object of a convention by rejecting such reservations, severing the reservation and instead holding the state bound by the treaty without the offensive reservation. Both the Human Rights Committee and the European Court of Human Rights have applied this approach.⁶⁵ In *Kennedy v Trinidad and Tobago*, the Human Rights Committee set aside a reservation to the acceptance of the First Optional Protocol.⁶⁶

The point is that the idea that withdrawing from the UN Refugee Convention and its Protocol will provide a workable solution does not lend meaningful consideration to the impact of the Constitution. A distinct possibility exists that a court challenge may be brought against future legislation enacted, on the basis of reservations lodged with the intention of limiting socio economic rights in the manner proposed by the White Paper. In this scenario, the Constitutional Court will be able to rely on international law to interpret the applicable law. This would include the principles of refugee law that have entered the canon of customary international law, together with the law related to reservations discussed above. In addition, the Constitutional Court would be able to rely on its own previous decisions, some of which were outlined above. Based on the preceding discussion, it is submitted that it is conceivable that the reservation could ultimately be held to be incompatible with the Constitution and consequently invalid.

5 CONCLUSION

The White Paper clearly states that institutional, capacity, systems and process issues in the Department of Home Affairs need to be addressed. The policy proposals aimed at improving systems and procedures are a welcome development as is the introduction of dedicated institutions based on the Canadian model. It is submitted that significant improvements could be attained by implementing the systemic and institutional policy reforms proposed by the Paper. The proposal to withdraw from a Convention which South Africa has acceded to during the early democratic period does not sit well with the foundational clause of the Constitution. It bears repeating that the Republic of South Africa is a constitutional democracy, founded on the rule of law, the supremacy of the Constitution and the values of equality, human dignity and non-racialism. The proposal to withdraw from the 1951 UN Convention and the 1967 Protocol is fraught with challenges — according to both international law and the South African Constitution. The Paper contains much-needed institutional and systemic reforms. However, the drafters should take care to ensure that the policy proposals contained in the Paper and the legislation that will be drafted to implement them do not violate the Constitution.

63 ICCPR General Comment 24 (4 November 1994) paras 8, 9, 10 and 11.

64 International Law Commission Report 49th Session (12 May to 18 July 1997) para 73(a).

65 Dugard *Dugard's International Law* 615–616 where he states that: “In General Comment 24, the Human Rights Committee declared, in relation to reservations to the ICCPR, that it had the power to determine whether a reservation was incompatible with the object and purpose of the Covenant, and that it would generally make such a finding where the reservation violated a norm of customary international law endorsed by the Covenant or a norm of *jus cogens*. In such a case, it stated that it would (like the European Court of Human Rights) sever the reservation from the state’s acceptance and hold it bound without the benefit of the reservation.”

66 CCPR/C/67/D/845/1999; (2000) 7 IHRR 315.