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# The subversion of politics: Political prohibitions on refugees and asylum seekers in South Africa

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**Summary:** *South Africa's domestic refugee legislation and regulations have expanded the grounds of cessation of and exclusion from refugee status by introducing prohibitions on the political participation of refugees and asylum seekers. These political prohibitions place significant barriers in the way of democratic participation in one's country of origin and ban outright any 'political activity' in the Republic. The prohibitions infringe on constitutional and international human rights, although their position under international refugee law is more uncertain given the latter's reticence to codify clear political rights for refugees. Political activity of refugees and asylum seekers in host nations is often seen in an antagonistic light, ranging from being viewed as a sign of ingratitude to potential subversion. Currently, the only justification for the broad political prohibitions is that they domesticate the prohibitions against subversive activities as found in the OAU/AU framework, as part of a means to secure relations among South Africa and other member states. While this domestication has not yet explicitly found its way into South African law, the justification nonetheless reveals an inclination to view the political activity of refugees and asylum seekers as potentially subversive. Such an association is concerning for South African as well as African refugee law, as it lends itself to political suppression.*

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**Key words:** *refugees; asylum seekers; political activity; prohibition on political participation; OAU Refugee Convention; South Africa*

## 1 Introduction

> [T]here is an aspect of that for the first time, refugees and migrants whilst they were now gaining some sort of voice and that voice has now been silenced quickly and they are brought into a second set of persecution whilst they are running away from another one.[1]

In October 2019, refugees staged protests at the United Nations High Commissioner for Refugees (UNHCR) offices in Cape Town and Pretoria, South Africa in response to the xenophobic violence threatening their lives and livelihoods. The refugees demanded greater efforts by the UNHCR to secure their protection or to facilitate their resettlement to countries other than South Africa, citing fears of xenophobia. Police dispersed the crowds using water cannons and riot shields, arresting approximately 100 refugees in the process.[2] These protests would continue in Cape Town into 2020. The political mobilisation of refugees and asylum seekers is often met with unfavourable or antagonistic responses. Regulations[3] to the Refugees Act,[4] passed in late December and coming into operation on 1 January 2020, make refugees and asylum seekers who participate in this kind of mobilisation vulnerable to the cessation of their status and treatment as illegal foreigners. Regulation 4 has introduced several bans on electoral participation and 'political activity' of refugees and asylum seekers, both in their countries of origin and in South Africa, that threaten foundational political and civil rights at the international, regional and national levels.

Contemporaneous with the political prohibitions in the Regulations, anti-immigrant and anti-refugee sentiment has flourished in South Africa's politico-media arena as a mechanism of scapegoating.[5] The general elections held in May 2024 saw a cacophony of political figures and organisations leverage and exacerbate this mechanism

1 Interview with Humanitarian Organisation, Johannesburg, February 2020, quoted in reference to the new political prohibitions in the Regulations to the Refugees Act 130 of 1998, in K Moyo & F Zanker 'Political contestations within South African migration governance' Working paper, Arnold-Bergstraesser Institut (December 2020) 30.

2 C Anna 'South African police arrest over 100 after refugees protest' 30 October 2019, https://apnews.com/general-news-1d5d404653df45308ac046cd379dfd61 (accessed 8 September 2024).

3 Refugees Act Regulations, 27 November 2019, *Government Gazette* 42932 (Regulations).

4 Act 130 of 1998.

5 J Machinya 'Migration and politics in South Africa: Mainstreaming anti-immigrant populist discourse' (2022) 8 *African Human Mobility Review* 59-78.

by blaming immigrants for various shades of socio-economic underdevelopment and criminality while misrepresenting the number of immigrants, particularly those without documentation, in the country.[6] Reflecting the ascendency in global politics of irregular migration and border control not only as central political issues but as existential problems over which decisive victory is required,[7] South African politicians from virtually every point of the political spectrum have woven antagonism towards immigrants and certain types of migration into ordinary electioneering, party manifestos and social media campaigns. Not surprisingly, political rhetoric that depicts immigrants as threats generates stronger support for restrictive and exclusionary refugee policies in the citizenry.[8] The political prohibitions of Regulation 4 undercut the possibility of authoritative representation and advocacy by those who are antagonised and excluded by South Africa's political economy.

This article attempts to examine, first, the meaning and scope of Regulation 4 as they pertain to political rights. It will be shown that the Regulations are marked by vagueness and uncertainty, using capacious and undefined terms. Political action is not only a vital avenue for expression and autonomy for individuals and groups in general, but is particularly important for refugees and asylum seekers, groups that are often consigned to the fringes of society and made the subject of political scapegoating. These groups require the freedom and facilitation to engage with the state and the broader public on the material conditions of their sojourn and lives. This discussion is contextualised within the international, regional and national political rights of refugees and asylum seekers. Political rights are not well codified in international refugee law and represent a lacuna in refugee protection. Instead, reliance is placed on so-called 'universally applicable international human rights' and South Africa's Bill of Rights, which together provide for freedom of association, assembly and demonstration.

6 See Human Rights Watch 'South Africa: Toxic rhetoric endangers migrants' 6 May 2024, https://www.hrw.org/news/2024/05/06/south-africa-toxic-rhetoric-endangers-migrants (accessed 20 June 2025); K Cosser 'Are there 15 million undocumented immigrants living in South Africa? No, another ActionSA party member repeats old claim' *AfricaCheck* 7 July 2023, https://africacheck.org/fact-checks/spotchecks/are-there-15-million-undocumented-immigrants-living-south-africa-no-another (accessed 26 June 2025).

7 M Rosina 'Criminalising migration: The vicious cycle of insecurity and irregularity' (2024) 13 *Social Sciences* 1-19; D Kerwin & DE Martinez 'Forced migration, deterrence, and solutions to the non-natural disaster of migrant deaths along the US-Mexico border and beyond' (2024) 12 *Journal on Migration and Human Security* 127-159.

8 SL Gordon 'South African attitudes towards refugee settlement: Examining the importance of threat perceptions' (2024) 37 *Journal of Refugee Studies* 486-502.

While 'political activity' is not defined in the Regulations or the Act, the erstwhile Minister of Home Affairs has stated that what is meant by the term is synonymous with the prohibition on subversive activities.[9] Such a prohibition is itself a poorly defined and elusive term that came to find its place in the African regional framework during a period of post-colonial and post-independence instability. While initially a state-to-state obligation, the prohibition against subversive activities became overly focused on the individual conduct of refugees. Further, the crime of subversion carries with it the historical baggage of repressive colonial governance and the apartheid regime's security system, casting further doubt as to the intentions of the political prohibitions in the Regulations. This article problematises the linking of the political activity of refugees and asylum seekers with subversion using South Africa as a case study, although this linking has consequences for the political activity of refugees and asylum seekers across the continent of Africa.

## 2 Political rights of refugees and asylum seekers

In order to access the framework of rights and protections intrinsic to asylum, a person must be recognised as a refugee according to the appropriate status determination process. The 1951 United Nations (UN) Convention Relating to the Status of Refugees (UN Refugee Convention) and its 1967 Protocol[10] defines a refugee as a person who has fled their country due to a well-founded fear of persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion.[11] The 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) expanded the refugee definition to any person who has fled their country due to external aggression, occupation, foreign domination or events seriously disturbing public order.[12] South Africa's Refugees Act incorporates and expands on the international and regional definitions in sections 3(a) and 3(b), respectively.[13] Under South

9 SABC interview, originally aired in 2020, https://www.youtube.com/watch?v=tYSmGogpztA (accessed 7 September 2024).

10 Protocol Relating to the Status of Refugees, 1967. The 1967 Protocol gave states the option to extend the scope of the UN Refugee Convention beyond its temporal and geographic limitations; art 1(A)(2) initially restricted the application of the Convention's definition to events occurring in Europe before 1 January 1951.

11 UN Convention Relating to the Status of Refugees, 1951 (UN Refugee Convention) art 1A(2).

12 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (OAU Refugee Convention) art 1(2).

13 Refugees Act 130 of 1998. Sec 3(c) adds that refugee status is granted to a spouse or dependent of any person contemplated in sec 3(a) or (b).

African refugee law, a 'refugee' is someone with refugee status, and an 'asylum seeker' is someone seeking refugee status.[14]

While the UN Refugee Convention encodes a selection of socio-economic and administrative rights, it has been described as 'silent'[15] and 'indifferent'[16] to the political rights of refugees. Indeed, the drafting of the UN Refugee Convention saw a concerted effort to limit the political rights of refugees afforded through the convention's rights framework. The Convention makes no reference to asylum seekers. States considered several proposals to include explicit bans on the political activity of refugees under article 2's general obligations.[17] While these certainly were assertions of state sovereignty, they also reveal early linkages between prohibiting political activity and the maintenance of public order.[18] Some states were concerned that granting refugees freedom of association may lead to them having the right to engage in political activity.[19] After debate over the nature and scope of political involvement sanctioned by the Convention, the following minimalist provision was adopted in article 15: 'As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.'[20]

It is clear from the *travaux préparatoires* that states sought to limit the political involvement of refugees in host nations, although it is not clearly delineated what is meant by 'political activity'. The desire to reinforce citizens' exclusive claim to political rights suggests that 'political activity' here refers to participation in the internal electoral and electioneering mechanisms of a state.[21] 'Political activity' could also have described acts antagonistic towards the host nation, which is decidedly more vague.[22] Nonetheless, opting for the most favourable treatment clause deferred the regulation of the political activity of refugees to the particular host nation; refugees are given the same political freedoms as foreign nationals.

14 Sec 1 Refugees Act.
15 R Mandal 'Political rights of refugees' UNHCR: Legal and Protection Policy Research Series: Department of International Protection: PPLA/2003/04 November 2003 iii.
16 JC Hathaway *The rights of refugees under international law* (2005) 119.
17 The French draft proposed that states have the right to restrict the political activity of refugees. See the Refugee Convention, 1951 Travaux Préparatoires analysed with a commentary by Dr Paul Weiss 32-33.
18 Refugee Convention (n 17).
19 Refugee Convention (n 17) 90.
20 Refugee Convention (n 17) 94.
21 Refugee Convention (n 17) 91 & 246-252.
22 See the Venezuelan representative's comment: 'In fact, the reference to public order could be considered as a warning to refugees not to indulge in political activities against the state'; Refugee Convention (n 17) 222.

In contrast to the UN Refugee Convention's limited approach to political rights, international human rights law has established a plethora of protections afforded to 'everyone' regardless of national origin or status. This article uses 'political rights' to describe the rights that facilitate political participation in the broadest sense. While they include voting rights, political rights are more often exercised informally through resistance, protest, dialogue and other forms of organisation. 'Electoral rights' or 'voting rights' describe those rights that allow for formal participation in elections and referendums through voting and standing for office, predominantly limited to citizens. The International Bill of Rights pays particular attention to the political rights of 'everyone', although it has been argued that there is an asymmetry between the development of voting rights compared to broader political rights.[23] The rest of this part will briefly outline the major political rights encoded in international human rights law and constitutional law, in the case of South Africa.

As per the asymmetrical focus, 'political activity' most commonly refers to electoral rights; the right to vote or stand for office in a country's elections, which is almost always limited to citizens.[24] At the international level, the International Covenant on Civil and Political Rights (ICCPR)[25] and the Universal Declaration of Human Rights (Universal Declaration)[26] provide citizens only with the right to elect or be elected as a public representative in their government. Regionally, the African Charter on Human and Peoples' Rights (African Charter)[27] limits the right to participate in one's own government through elected representatives to citizens. Domestically, the South African Constitution (Constitution) provides:[28]

> (1) Every citizen is free to make political choices, which includes the right –
>
> (a) to form a political party;
>
> (b) to participate in the activities of, or recruit members for, a political party; and
>
> (c) to campaign for a political party or cause.

Section 19 of the Constitution also provides for the right of citizens to vote for legislative bodies and stand for public office.[29] Refugees and asylum seekers are equally excluded from this right. Political

23 HJ Steiner 'Political participation as a human right' (1988) 1 *Harvard Human Rights Yearbook* 77.
24 Electoral participation is understood to be an 'expression of one's intimate relationship with the state, evidenced by citizenship'. See Mandal (n 15) 3.
25 Art 25 International Covenant on Civil and Political Rights, 1976 (ICCPR).
26 Art 21 Universal Declaration of Human Rights, 1948 (Universal Declaration).
27 Art 13 African Charter on Human and People's Rights, 1979 (African Charter).
28 Sec 19(1) The Constitution of the Republic of South Africa, 1996 (Constitution).
29 Secs 19(2)-(3) Constitution.

participation, however, extends beyond electioneering and persists outside of the election period.

On the furthest side of the continuum, 'political' describes 'patterns of human relationships that involve control, influence, or power over allocations of spiritual values or material goods'.[30] Taking a stance on these distributive issues constitutes a form of political activity. Under this distributional justice lens, 'political' activity includes trade union membership and participation, strike participation, agricultural land reform and undertakings at the grassroots level.[31] Political activity outside of electoral participation includes 'boycotting certain products, attending party rallies, posting political statements online, volunteering, signing petitions, consuming certain products, and expressing one's political views in music or arts'.[32] Indeed, 'political activity' beyond voting can be an all-encompassing term to describe nearly every component of public or even private existence, and bleeds very easily into social, cultural and economic life as it is at its core a manifestation of one's preferences and values.[33]

International human rights law protects many, if not all, of the above-listed activities. Further, the right to freedom of association, assembly, expression and opinion, provided for by the Universal Declaration and ICCPR, applies to 'everyone' and not only citizens.[34] The Human Rights Committee, established to monitor the implementation of ICCPR, has declared that the rights in ICCPR apply to everyone 'regardless of nationality or statelessness, such as asylum seekers [and] refugees'.'[35] The same political rights are encoded in the African Charter. Further buttressing political rights are the non-discrimination clauses in the Universal Declaration,[36] ICCPR[37] and the African Charter.[38] The International Convention on the Elimination of Racial Discrimination (ICERD) prohibits any 'distinction, exclusion,

30 LD Bevis 'Political opinions of refugees: Interpreting international sources' (1988) 63 *Washington Law Review* 395 412-413.
31 As above.
32 M Jacobi 'How the political participation of refugees is shaped on the local level: Self-organisation and political opportunities in Cologne' German Development Institute, Discussion Paper 34/2021 (2021) 7.
33 JW van Deth 'What is political participation?' (2021) *Oxford Research Encyclopedia of Politics,* https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-68 (accessed 29 September 2025).
34 Arts 19 & 20 Universal Declaration; arts 19, 21 & 22 ICCPR.
35 UN Human Rights Committee General Comment 31: The nature of the general legal obligations of state parties to the Covenant (2004) UN Doc HRI/GEN/1/Rev.7, 12 May 2004 192 para 10.
36 Arts 2 & 7 Universal Declaration.
37 Arts 2, 14 & 26 ICCPR. Hathaway argues that, although not a listed ground in art 2, 'nationality' falls within the umbrella of 'other status'; Hathaway (n 16) 120.
38 Art 2 African Charter.

restriction or preference' on the grounds of race, colour, descent, or national or ethnic origin with the purpose or effect of impairing the equal enjoyment of any human rights or freedoms in the 'political, economic, social, cultural or any other field of public life'.[39] However, ICERD keeps open the possibility for distinctions between citizens and non-citizens to the extent permitted under international law;[40] any distinction must be pursuant to a legitimate aim and proportional to this aim.[41]

In addition to international law, the political activity of refugees and asylum seekers is governed by the domestic laws of their host nations. South Africa's constitutional framework provides for the right to freedom of opinion and expression, including freedom of the press and freedom to receive and impart information or ideas,[42] as well as the right to peaceful assembly, demonstration, picket and petition[43] and the right to freedom of association.[44] Constitutional rights generally apply to 'everyone' unless explicitly limited to citizens, such as voting rights mentioned above.[45] South Africa's Constitution contains its anti-discrimination clause in section 9 which applies to refugees[46] and asylum seekers.[47] However, there does not exist a wealth of jurisprudence affirming the political rights of refugees and asylum seekers.

In *My Vote Counts v Minister of Justice and Correctional Services,*[48] the Constitutional Court stated that 'everyone' under section 32(1) on the right to information includes natural and juristic persons, and that the same meaning of 'everyone' must apply to the right to freedom of expression. The Court's encompassing interpretation of 'everyone' was applied to the right to information regarding 'private funding that is essential for the meaningful participation in

39 Art 1(1) International Convention on the Elimination of Racial Discrimination (ICERD) 1969.
40 Arts 1(2) & (3) ICERD. See the judgment by the International Court of Justice in Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v United Arab Emirates*) 4 February 2021 which found that 'national origin' does not include current nationality.
41 CERD Committee General Recommendation 30: Discrimination against non-citizens (1 October 2004) para 4.
42 Sec 16 Constitution.
43 Sec 17 Constitution.
44 Sec 18 Constitution.
45 Sec 7(1) of the Constitution provides that the Bill of Rights applies to 'everyone in [the] country'. See *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* 2004 (6) SA 505 (CC).
46 Sec 27(b) Refugees Act.
47 Sec 27A(d) Refugees Act. See C Kavuro 'The disappearance of refugee rights in South Africa' (2022) 43 *Obiter* 54.
48 *My Vote Counts NPC v Minister of Justice and Correctional Services & Another* [2018] ZACC 17 paras 20 & 56.

the electoral process',[49] a process that excludes foreign nationals. In the context of electoral participation, 'everyone' remains limited by citizenship. The same Court in *Mlungwana*[50] confirmed that section 17 of the Constitution – the right to assembly, demonstration, picket and petition – applies to 'every person or group of persons – young or old, poor or rich, educated or illiterate, powerful or voiceless'.[51] 'National or non-national' would have been a welcome inclusion to this list, although the Court in *Mlungwana* was not asked to pronounce on the rights of non-nationals.

The Court confirmed the declaration of constitutional invalidity by the High Court that section 12(1)(a) of the Regulation of Gatherings Act[52] (Gatherings Act) criminalised the failure to give notice or the giving of inadequate notice by any person who convened a gathering. For the Court, the right to assembly is indispensable to a democratic society and any limitation placed thereon by criminalisation is unjustifiable.[53] There is still scant explicit judicial confirmation that refugees and asylum seekers, and non-nationals generally, are political rights holders in South Africa. This is of particular necessity given that, as the Constitutional Court has recognised, foreign nationals are a minority with 'little political muscle'. [54] Political rights of refugees and asylum seekers thus rest in a liminal space; recognised by international human rights but looked at with suspicion from international and regional refugee law; supposedly protected by constitutional law but usurped by legislative amendment. The following part will expand on this liminality by tracing the political prohibitions in the Regulations to the Refugees Act and their potentially debilitating effects.

## 3 Political prohibitions in the Refugees Act and Regulations

Section 5(1)(a) of the Refugees Act provides for the cessation of one's refugee status when a refugee 'voluntarily re-avails himself or herself in the prescribed circumstances of the protection of the country of his or her nationality'. The 2019 Regulations extend these circumstances in Regulation 4(1), including where a refugee:

49 As above.
50 *Mlungwana & Others v The State & Another* [2018] ZACC 45.
51 *Mlungwana* (n 50) para 43.
52 Act 205 of 1993.
53 *Mlungwana* (n 50) paras 73 & 101.
54 *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* 1998 (1) SA 745 para 19.

(g) stands for political office or votes in any election in respect of his or her country of nationality, without the approval of the Minister; [or]

…

(i) participates in any political campaign or activity related to his or her country of origin or nationality whilst in the Republic without the permission of the Minister.

Regulation 4(2) establishes a more general prohibition on political activity, stating that '[n]o refugee or asylum seeker may participate in any political activity or campaign in furtherance of any political party or political interests in the Republic'.

Political activity directed towards one's country of origin is now subject to the approval of the Minister of Home Affairs, while any activity directed towards South Africa as the host state is completely prohibited. Terms such as 'political activity' and 'in furtherance of any political interests' are broad and vague[55] and not defined in the Act or the Regulations. Further, there is inconsistent reference to refugees and asylum seekers in the prohibitions. This is likely due to legislative oversight and it is assumed that the political prohibitions will apply equally to refugees and asylum seekers by triggering the cessation and exclusion clauses, respectively.

Regarding the requirement of ministerial permission, two issues arise. First, no guidance is provided as to the procedure one must follow to request permission from the Minister in terms of Regulations 4(1)(g) and 4(1)(i). It is currently also unclear what criteria the Minister will use in exercising their discretion to grant permission. As will be explored below, political activity may be assessed against its potential for causing tension between OAU/AU member states. Comparatively, the Gatherings Act establishes a clear process to obtain permission from a local authority[56] before convening a gathering, which is defined as an assembly of more than 15 people.[57] Second, this requirement infringes on the right to demonstration. Under the RGA, permission is not required for a demonstration – an assembly of 15 people or less.[58] The ambit of the Gatherings Act is to provide for the realisation of the constitutional rights of 'everyone' to freedom of expression and peaceful assembly, demonstration, picket

55 J McGovern 'Limitations on political rights of refugees and asylum seekers in South Africa: Perspectives from international law' (2022) 35 *Harvard Human Rights Journal* Print Journal, https://harvardhrj.com/2021/01/limitations-on-political-rights-of-refugees-and-asylum-seekers-in-south-africa-perspectives-from-international-law/#_ftn1 (accessed 23 September 2021).

56 Regulation of Gatherings Act 205 of 1993 (RGA) sec 3(2) read with sec 4(1)(a). The RGA also provides for judicial review and appeal in sec 6.

57 Sec 1 RGA.

58 As above.

and petition, discussed above. As *Mlungwana* reiterated, the right to assembly is foundational to a democratic society and any limitation on it must be closely circumscribed. Regulations 4(1)(i) and 4(2) are thus at minimum in contravention of the RGA, and the Constitution, to the extent that they prohibit refugees and asylum seekers from exercising their constitutional right to demonstration.

The Regulations also pose a serious risk to *non-refoulement,* the right not to be returned to a country where one may face persecution or serious harm.[59] *Non-refoulement* is the cardinal right of refugee protection[60] and is largely considered a customary international law norm.[61] As the political prohibitions in Regulation 4 trigger the cessation clause in section 5 of the Refugees Act, this allows for a refugee enjoying refugee status to have their status revoked. The Standing Committee for Refugee Affairs is given the explicit discretion to revoke the status of any refugee who has engaged in political activity in terms of Regulation 4(1)(g), 4(1)(i) or 4(2),[62] and such a person must subsequently be dealt with as an illegal foreigner and deported in terms of the Immigration Act.[63] While this decision is subject to judicial review, a decision of this kind would allow for a person with refugee status to be thrown back into a system of appeals and reviews in order to re-secure their status.

The position is less clear for asylum seekers, who do not yet enjoy refugee status. As it is assumed that the political prohibitions in Regulation 4 will function similarly to the exclusion clauses in section 4 of the Refuges Act, this means that a person who does otherwise qualify for refugee status would be excluded on the basis of engaging in political activity. They would thus be treated as an illegal foreigner under the Immigration Act. A decision taken on the basis of an exclusion clause should be subject to appeal and other internal remedies of the Refugees Act.[64] As the amendments that brought these and other restrictive changes to the asylum framework came into effect in 2020, and only certain aspects have begun to be implemented since 2023, it remains unclear how these prohibitions

59 Sec 2 Refugees Act. See also art 33 of the UN Refugee Convention.
60 E Lauterpacht & D Bethlehem 'The scope and nature of the principle of *non-refoulement*: Opinion' in E Feller, V Türk & F Nicholson (eds) *Refugee protection in international law: UNHCR's global consultations on international protection* (2003) 87.
61 UNHCR Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007) para 15; GS Goodwin-Gil, J McAdam & E Dunlop *The refugee in international law* (2021) 514.
62 Regulation 4(3) of the Regulations and sec 36(1)(c) of the Refugees Act.
63 Regulation 4(4) of the Regulations.
64 *Gavric v Refugee Status Determination Officer, Cape Town & Others* 2019 (1) SA 21 (CC) paras 51-53.

will be operationalised in practice. What is clear, is that they create a pathway for the exclusion of otherwise deserving refugees and asylum seekers from asylum protection, as a consequence of their participation in political activities, which severely compromises the principle of *non-refoulement.*

Engaging in political activity, although now a ground for the cessation of and exclusion from refugee status, does not indicate that the circumstances in one's home country have changed so as to put an end to the cause of their flight. It does not devalue their deservingness for protection. Importantly, Mathew characterises *non-refoulement* as injunctive relief as it is designed to protect against the threat of return, rather than function only as a remedy once actual return has taken place.[65] Thus, it is argued, the genuine threat of *refoulement* that accompanies the political prohibitions in Regulation 4 could constitute a well-founded fear of persecution on the grounds of political opinion,[66] essentially risking a 'second persecution'.

### 3.1 Electoral participation and out-of-country voting

Regulation 4(2) insofar as it excludes refugees and asylum seekers as non-citizens from electoral participation in the Republic conforms with the dominant practice of citizenship qualifications to the right to vote, and does not fall foul of any anti-discrimination provision. While it is the dominant practice, it is not necessarily so, and it has been argued that the exclusive rights historically contingent on citizenship have been gradually granted to non-citizens – what Benhabib calls the disaggregation of citizenship.[67] Further, South Africa has in the past extended the constitutional right to vote in elections to non-citizens, including refugees.[68] While membership of South African political parties is usually limited to citizens, there are notable exceptions. The African National Congress (ANC) Constitution extends membership to non-South Africans who are resident in South Africa and have 'manifested a clear identification with the South African people and their struggle'.[69]

65 P Mathew 'Constructive *refoulement*' in SS Juss (ed) *Research handbook on international refugee law* (2019) 220.
66 *FNM v Refugee Appeal Board* 2019 (1) SA 468 (GP).
67 S Benhabib 'Twilight of sovereignty or the emergence of cosmopolitan norms? Rethinking citizenship in volatile times' (2007) 11 *Citizenship Studies* 19-36.
68 Sec 6 of South Africa's interim Constitution provided for the right of non-citizens to vote if they had been granted such a right under an Act of Parliament. See T Polzer 'Adapting to changing legal frameworks: Mozambican refugees in South Africa' (2007) 19 *International Journal of Refugee Law* 27-30.
69 African National Congress Constitution as amended and adopted at the 54th National Conference, Nasrec, Johannesburg 2017.

Regulations 4(1)(g) and 4(1)(i), however, interfere with the rights of refugees and asylum seekers to participate in the elections of their home countries. While refugeehood assumes a breakdown in the relationship between an individual and their state, necessitating surrogate protection,[70] this does not result in the automatic loss of their citizenship in their home country. Refugees thus retain their right to participate in their home country elections, even where their citizenship links have been severed and they are no longer resident because, as Ziegler and Long have observed, the relinquishment of their citizenship was not voluntary.[71] Non-resident electoral participation has been facilitated by increasingly common out-of-country voting (OCV) procedures, which require significant and sustained investment and cooperation between asylum states, countries of origin and potentially international organisations. One major obstacle to OCV, therefore, is the organisational requirements, such as administrative capacity and voter education programmes, including issues relating to eligibility and access, such as acquiring legal and valid documentation.[72]

This organisational requirement is frustrated by Regulation 4(1)(b) which provides for the cessation of refugee status of any refugee who applies for any assistance or official document, including a citizenship document, at a diplomatic mission representing their country of origin in or outside of the Republic. Such documentation would likely be a prerequisite for any refugee or asylum seeker attempting to vote in the elections of their home country. While seeking diplomatic assistance from one's country of origin may indicate the normalisation of relations between a refugee or asylum seeker and their state, this is not always the case.[73]

As noted above, a refugee claim in South Africa can be based on persecution on various grounds; external aggression, occupation, foreign domination or events seriously disturbing public order; and dependence. These reflect sections 3(a), 3(b) and 3(c), respectively, of the Refugees Act. In the case of a section 3(a) claim, participating in the election of one's home country or applying for documentation to do so at an embassy may indicate re-availment. This is axiomatic

70 Hathaway (n 16) 5.
71 R Ziegler *Voting rights of refugees* (2017) 152; K Long *Voting with their feet: A review of refugee participation and the role of UNHCR in country of origin elections and other political processes* UNHCR PDES/2010/12 (September 2010) para 126.
72 J Grace & ED Mooney 'Peacebuilding through the political participation of displaced populations' (2009) 28 *Refugee Survey Quarterly* 103; A Bekaj & L Antara 'Political participation of refugees: Bridging the gaps' (2018) International Institute for Democracy and Electoral Assistance.
73 Mandal (n 15) 17.

where the state is the source of persecution.[74] In a section 3(b) claim, the same participation cannot be seen as *de facto* re-availment. The state may be engaged in warfare with an external force or protracted political transition where political involvement of potential returnees is possible or necessary.[75] Presumably, ministerial permission as per Regulation 4(1)(g) requires an exercise of discretion on a case-by-case basis on the part of the Minister. Yet, it is not clear which factors, including the nature of the refugee claim, will be taken into consideration.

While regular participation in quadrennial elections of one's home country would strongly indicate re-availment and, thus, the cessation of a refugee's protection needs, this should not be the case for peace-building and reconstructionist processes that seek to bring conflict to an end and restore normalcy. Indeed, such processes can benefit massively from the political participation of displaced populations, resulting in more sustainable repatriation.[76] Peace agreements, such as the 1992 General Peace Agreement for Mozambique,[77] incorporate provisions to (re)establish the rights – including political and civil – of returning refugees and displaced persons.[78] Prior to repatriation, refugee engagement in OCV procedures can exacerbate an already precarious and uncertain situation; political involvement while in the host state may be met with harassment at polling stations or intimidation by political actors connected to the country of origin.[79] Further, host states may seek access to the voter registration data used for OCV procedures in order to surveil the activity of the displaced community.[80]

The mechanisms and frameworks for OCV procedures, in particular as they pertain to refugees, are still developing. That these procedures require further development, or that they rely on financial resources and logistical and administrative capacity, cannot reasonably justify the introduction of political prohibitions on the kinds of participation that OCV procedures seek to facilitate, let alone prohibitions that lead to the deportation of refugees and asylum seekers. Both the Global Compact on Refugees and the Global Compact on Safe,

74 F Khan & J de Jager 'Persecution: Acts, agents and grounds' in F Khan & T Schreier (eds) *Refugee law in South Africa* (2023) 74-77.
75 Bekaj & Antara (n 72).
76 Mandal (n 15) 21.
77 General Peace Agreement for Mozambique, 4 October 1992, Protocol III arts 4(c) & (d).
78 See Grace & Mooney (n 72) 101.
79 Grace & Mooney (n 72).
80 See, eg, B Goldsmith 'Out-of-country voting in post-conflict elections' ACE Project: The Electoral Knowledge Network, https://aceproject.org/today/feature-articles/out-of-country-voting-in-post-conflict-elections?set_language=en (accessed 29 September 2025).

Orderly and Regular Migration recognise the need for refugee and migrant participation in transitionary and peace-building processes of their home countries.[81] Yet, the Regulations add to the obstacles placed in front of democratic participation, rather than attempt to ameliorate them, and seem to have made a concerted effort to dislocate refugees from the democratic process of their country of origin. Participation in the elections of one's home country should not in and of itself trigger the cessation of their refugee status as Regulation 4(1)(g) now facilitates.[82] However, as this article argues, voting is one element of a larger matrix of political participation that allows individuals and communities to engage with the material conditions of their own lives.

### 3.2 Political non-belonging

Absent any definition of 'political activity' and 'in furtherance of political interests' in the legislative framework relevant to refugees, as it currently stands it is unclear whether the prohibitions in Regulation 4 will interfere with regular forms of protest that take place outside of electoral participation and campaigning. Regulations 4(1)(i) and 4(2), if interpreted broadly, may therefore have debilitating effects on the ability of refugees and asylum seekers to organise, express dissent and influence policy – mechanisms of engaging with government that are inherent human capacities. The political prohibitions have yet to be used as cessation and exclusion clauses in practice and, thus, it is unknown how broadly they could be interpreted. The above discussion on distributional justice reveals perhaps the worst case scenario, of Regulation 4 being leveraged to interfere with regular and necessary political and industrial activities. In this part, it is suggested that the prohibitions may be used to pacify frustrations against South Africa's poor asylum governance. Given the inherently collaborative nature of political activity, prohibitions thereon may sever refugees and asylum seekers from the larger network of institutions and groups with aligned interests, further exacerbating their social and political isolation.

The prohibitions may interfere with the functioning of civil society organisations (CSOs) engaged directly or by implication in political activity. Civil society forms a significant component in the lives of refugees and asylum seekers, in particular through education,

81 Global Compact on Refugees, 2018; Comprehensive Refugee Response Framework paras 12(d) & (e); Global Compact on Safe, Orderly and Regular Migration, 2018 Objective 19(g).
82 Mandal (n 15) 17.

dialogue with the state and other actors and providing social services and other assistance. These are not necessarily political forms of action, although civil society does play a role in maintaining political participation in countries of origin. The Union for Democracy and Social Progress, a Congolese opposition party with a branch in Johannesburg, engages in lobbying and advocacy relating to the Democratic Republic of the Congo (DRC).[83] Civil society and grassroots activism have long been vital modes of organisation for refugees and asylum seekers, where protest action expresses discontent towards the politics of the home country as well as the exclusion, xenophobia and difficulty accessing asylum procedures in South Africa.[84] There have been reports that refugee-led and constituted CSOs have been hampered by the political prohibitions in the Regulations.[85] Even in the absence of direct interference, CSOs will be forced to operate within the bounds of a vaguely defined prohibition backed up by the threat of the cessation of protected status and potentially *refoulement* of its members.

Moyo and Zanker report that some have argued that the political prohibitions in Regulation 4 were a 'curtailing response' to the Cape Town protests, adopted expeditiously over the December period.[86] However, it is more likely that the political prohibitions are part of a much larger project of inaccessibility and deterrence that is increasingly coming to define asylum in South Africa.[87] Regulation 4 further entrenches the inaccessibility of asylum in South Africa,[88] making refugees' and asylum seekers' stay and concomitant protection conditional on their passivity and silence.[89] In response to the 2019-2020 protests, the asylum claims of several protest leaders were fast-tracked by the Department of Home Affairs and eventually rejected, leading to their deportation.[90] Amisi and Ballard have also observed that the threat of deportation can have a chilling effect

83 M Mpeiwa 'Political participation: The case of Congolese refugees in South Africa' (2018) International Institute for Democracy and Electoral Assistance 19.
84 Mpeiwa (n 83) 20. See also B Amisi & R Ballard 'In the absence of citizenship: Congolese refugee struggle and organisation in South Africa' (2005) Globalisation, Marginalisation and New Social Movements in post-Apartheid South Africa, School of Development Studies and Centre for Civil Society, University of Kwa-Zulu Natal.
85 Moyo & Zanker (n 1) 30.
86 As above. Moyo and Zanker doubt that there is any direct link between the protests and the new Regulations.
87 J Crush, C Skinner and M Stulgaitis 'Rendering South Africa undesirable: A critique of refugee and informal sector policy' (2017) *SAMP Migration Policy Series* 79.
88 Moyo & Zanker (n 1) 10.
89 CJ Bakwasega 'Forced migration in Africa and the OAU Convention' in H Adelman & J Sorenson (eds) *African refugees: Development aid and repatriation* (1994) 11.
90 Moyo & Zanker (n 1) 29.

on refugee protest action.[91] The Regulations therefore legislate and legitimise a pre-existing antagonism towards refugee resistance.

The conditions of sojourn for refugees and asylum seekers must be kept in mind when considering the necessity of protecting their rights to political participation. Under a broad interpretation of political activity, protests against the xenophobic violence and vitriol at the hands of private individuals and government officials that have become commonplace in South Africa may be prohibited,[92] as may be political action against the erosion of socio-economic rights, particularly employment, of refugees and asylum seekers.[93] Additionally, it is well documented that South Africa's asylum system is plagued with administrative delays and incapacity.[94] Applications for permission for political participation as per Regulations 4(1)(g) and 4(1)(i) may add to the already delayed asylum system. Delays leave many asylum seekers awaiting the final outcome of their claims for years, and expressions of dissatisfaction or attempts to challenge official policy during this time, if considered 'political activity', may trigger the exclusion clause. While the discussion above focuses on the capaciousness of the concept of 'political activity', the only explanation offered thus far of the specific scope of the prohibitions suggests that it is designed to prohibit subversive activities.

## 4 Political activity and subversion

The then Minister of Home Affairs, Aaron Motsoaledi, in an interview with the SABC in 2020 argued that what is meant by 'political activity' in Regulation 4 is the same as article 23 of the African Charter.[95] Article 12(3) of the African Charter guarantees the right to seek and obtain asylum, when persecuted, in other countries subject to their laws and international conventions. Article 23 places on states a duty to ensure that those enjoying the right of asylum under article 12 of the African Charter do not engage in subversive activities against their country of origin or any other state party to the Charter. The Minister stated that 'countries should not allow their areas to be used

91 Amisi & Ballard (n 84) 6.
92 AE Okem & LE Asuelime 'An insight into South Africa's xenophobia: Impacting on Africa's integration' (2015) 4 *Journal of African Union Studies* 35.
93 C Kavuro 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 232.
94 R Amit 'All roads lead to rejection: Persistent bias and incapacity in South African refugee status determination' African Centre for Migration and Society Research Report, June 2012.
95 SABC interview (n 9).

as a springboard [for] attacks', presumably by dissidents against their country of origin.[96]

The following part uses the comments made by the then Minister as an opportunity to investigate the emergence of 'subversive activities' in the African refugee framework as a consequence of post-colonial independence turmoil. Given the particular conditions of its emergence, its continued presence is questioned and ultimately problematised. Further, the statutory crime of 'subversion' is a relic of colonial security governance directed at suppressing independence and liberation movements. Subversion thus carries with it historical baggage that is uniquely repressive and antagonistic toward political activity with contemporary consequences, whether or not the then Minister's comments concretise as official policy.

### 4.1 Subversive activities in Africa's regional relations

The temporal and geographical restrictions of the UN Refugee Convention rendered its protections inadequate for large swathes of refugees[97] and put the Eurocentricity of early international refugee law on full display. It was the desire to fill the lacunae left by the UN Refugee Convention that gave birth to Africa's regional refugee instrument, the OAU Refugee Convention. The inception of the OAU Refugee Convention has thus often been characterised as a project of 'Africanisation' of international refugee law.[98]

Rankin argues that while the expanded refugee definition mentioned above was an important development in the regional framework, it fell under three broader aims. Two of these were filling the gaps left by the temporal and geographical limitations of the UN Refugee Convention and creating a framework that provided for the specific needs of African refugees – where the expanded refugee definition was at centre stage.[99] The top priority of drafters, according to Rankin, was the 'balancing of Africa's traditional hospitality toward strangers with the need to ensure security and peaceful relations among OAU member states'.[100] The 'Africanisation' of refugee law also contained a securitisation agenda as the OAU

96 As above.
97 E Arboleda 'Refugee definition in Africa and Latin America: The lessons of pragmatism' (1991) 3 *International Journal of Refugee Law* 186.
98 EO Awuku 'Refugee movements in Africa and the OAU Convention on Refugees' (1995) 79 *Journal of African Law* 80.
99 MB Rankin 'Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on' Working Paper 113, UNHCR Evaluation and Policy Analysis Unit 3.
100 Rankin (n 99) 2; Arboleda (n 97) 192.

Refugee Convention was responsive to the continued challenges of colonial presence in Africa. It was the specific concern of refugees from colonial and white minority-ruled territories, as Okoth-Obbo argues, that guided the expanded definition.[101] Their presence stoked fears that host nations would be used as bases for launching subversive activities against OAU member states.

The concern over colonial subversion arguably is the defining characteristic of the OAU Refugee Convention, expressing itself in various provisions, including the expanded definition and the prohibition against subversive activities. The latter, found in article 3, reads:

> (1) Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.
> (2) Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.

The prohibition against subversive activities exists as an additional duty to the more general duty to abide by the host nation's laws, owed not only to the host state or state of origin but to 'all member states of Africa's continental system'.[102] According to Odinkalu, article 3(2) denotes an undertaking by member states to domesticate the prohibition against subversion.[103] Article 3(2) can therefore provide at least a minimalist definition of 'subversive activities': the use of arms, press or radio to attack a member state or cause tension between member states.

Subversion has no universally accepted definition.[104] It has been criticised as opaque and nebulous.[105] It describes 'real or more fanciful clandestine efforts' that are perceived as undermining oneself

101 G Okoth-Obbo 'Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *Refugee Survey Quarterly* 111.
102 CA Odinkalu 'Article III of the OAU Refugee Convention in context: The emergence of subversion in the African inter-state system' (2023) 42 *Refugee Survey Quarterly* 4.
103 As above.
104 W Rosenau *Subversion and insurgency: RAND Counterinsurgency Study Paper 2* (2007) 4.
105 J Porter 'No rebels allowed: The subversion bar in Canada's immigration legislation' (2018) 81 *Saskatchewan Law Review* 25.

or one's allies.[106] Townshend characterises subversion as representing the 'enlarged sense of the vulnerability of modern systems to all kinds of covert assaults'.[107] Where there is consensus, subversion describes any attempt to overthrow, undermine or destabilise a state or government. This may occur through open warfare or through covert operations, the latter being where the term's ambiguity becomes most evident. Instead, the British Army describes subversion as efforts short of actual force that seek to overthrow or undermine government, often accompanied by or antecedent to efforts that are violent such as terrorism.[108] The most comprehensive definition comes from the 'comparative politics, international relations, and governance' perspective:[109]

> The overthrow of the legal, political and social order of the state, which another state attempts or achieves by propagating its ideology among the political forces of the state that is the target of this undertaking. It converts those forces to its ideology by supporting them in their efforts to capture power.

Subversive activities include 'legitimate political and industrial activity', which meet the threshold of 'subversive' when they carry the intention to undermine the strength of a state.[110] 'Subversive activity' and 'political activity' overlap, therefore, in their attempt to fundamentally alter the political arrangement of a state. Assessing when 'political activities' become 'subversive' is most clear when they fall within a larger, coordinated operation employing insurgency and terrorism. As the nature of subversion is clandestine, it is also closely associated with sedition, espionage and treason. It is evident that subversion or the threat thereof is of particular concern when governance is unstable and seeking legitimacy. In such cases, any political activity critical of the ruling government is imputed to an intention to overthrow or undermine it.

### 4.2 Post-colonial instability and subversion

The prohibition against subversive activities was initially an inter-state obligation – reflecting the international relations framing above – rather than a duty to impose certain restrictions on those seeking protection under the refugee system. On this, Odinkalu

106 Rosenau (n 104) 4.
107 C Townshend *Making the peace: Public order and public security in modern Britain* (1993) 116.
108 British Army Field Manual vol 1: Combined Arms Operations, Part 10: Counterinsurgency Operations (2001) A-3-2; Rosenau (n 104) 5.
109 ER Mbaya 'Political asylum in the Charter of the OAU: Pretensions and reality' (1987) 35 *Law and State* 74-75.
110 British Army Field Manual (n 109) A-3-2.

offers a comprehensive analysis of the drafting of the OAU Refugee Convention – pertinent as there are no *travaux préparatoires* – which demonstrates that the prohibition against subversion emerged as a result of post-colonial instability and the subsequent rise in authoritarianism.

As colonial powers retreated from formal governance, they sought to establish structural constraints on the powers of newly independent majority-ruled governments.[111] This despite the fact that colonial regimes were constrained by no such structures, such as constitutional bills of rights, during their rule.[112] Disregarding these constraints and the structures that empowered them, leadership was instead focused on entrenching its own political authority and legitimacy.[113] Mazrui has noted that achieving political legitimacy was one of two major challenges facing newly independent African states.[114] According to Odinkalu:[115]

> Africa's post-colonial political elite drew upon extra-constitutional recesses of coercion to address perceived threats to their political legitimacy. In their relations with one another, African governments quickly rallied behind sovereignty and domestic jurisdiction as the only effective doctrinal shields against threats of subversion, both real and imagined. In support of this mission, the continent's post-colonial landscape witnessed a proliferation of 'nation building' projects, the prosecution of which left a considerable number of institutional and human casualties in their wake.

Mazrui makes explicit that the concern with subversion is heightened when political legitimacy is insecure.[116] In this heightened state of insecurity, rooting out 'subversives' was a preoccupation in relations between African states and between states and their own population. In their rallying behind sovereignty, states sought to protect themselves against any foreign interference from neighbouring states. At the same time, states engaged in cross-border operations against their own diaspora, emigrants, exiles and dissidents to thwart political dissent.[117] Hostile relations between states were seen as confirmation of their fears of foreign interference, materially impacting the codification of the prohibition against subversion. Togo's President Sylvanus Olympio was assassinated in a military *coup*

111 Odinkalu (n 102) 9.
112 As above.
113 As above.
114 AA Mazrui 'Thoughts on assassination in Africa' (1968) 83 *Political Science Quarterly* 40-58.
115 Odinkalu (n 102) 10.
116 Mazrui (n 115) 48.
117 Odinkalu (n 102) 11.

in 1963 and Ghana's involvement aggravated pre-existing conflict.[118] The ramifications of the assassination 'virtually dictated' the inclusion of article III of the OAU Charter only three months later.[119]

### 4.3 From inter-state duty to restrictions on refugees

In article III of the OAU Charter member states commit to an 'unreserved condemnation, in all its forms, of political assassination as well as subversive activities *on the part of neighbouring states or any other states*'.[120] The first appearance of subversion in the OAU framework was as a 'peer-to-peer act of hostility between states' and its prohibition was an inter-state duty.[121] This is consistent with international law that places a duty on a state to prevent and suppress subversive activities in the form of 'armed hostile expeditions or attempts to commit common crimes against life or property' against foreign governments.[122] This duty does not extend to the suppression of revolutionary propaganda or conduct critical of a foreign state by private individuals.[123] This, however, is at odds with the definitions traced above which describe 'subversion' as acts short of actual force. Prohibited conduct under the OAU framework, specifically the use of radio and press, is broader than that under international law.

The prohibition would transmute from an inter-state duty to restrictions on the conduct of individual refugees. Odinkalu argues that this shift in focus was a result of the Ethiopia-Egypt conflict and the widespread accusations of harbouring insurgents on both sides.[124] Again, the provisions on subversion were tangibly impacted by the heightened geopolitical tensions of the time. Not surprisingly, there was and still is little evidence that refugees receiving protection were engaged in genuine subversive and related activities.[125] The simultaneous adoption in 1965 of the Declaration on the Problem of Subversion and the Resolution of the Problems of Refugees in Africa 'effectively link[ed]' the two issues.[126] The Declaration bifurcated refugees into two classes: political refugees from non-independent African states deserving of support in their struggle for liberation and

118 Mazrui (n 115) 56.
119 Mazrui (n 115) 57.
120 Art 3(5) Organisation of African Unity Charter, 1963 (OAU Charter) (my emphasis).
121 Odinkalu (n 102) 8.
122 L Oppenheim *International law: A treatise* (1955) 292-293.
123 As above.
124 Odinkalu (n 102) 16.
125 Odinkalu (n 102) 8 & 17.
126 As above.

political refugees from OAU member states who were to be treated as subversives.[127] The machinery of the securitisation agenda animating the African inter-state system that was initially concerned with colonial subversion and interference would gradually be directed at African refugees and migrants.

There no longer exists this former 'legitimate' class of political refugees. In proposing reforms to the OAU Refugee Convention more broadly, Okoth-Obbo reflects that the 'specific revolutionary situations for which the expressions "external aggression", "occupation" and "foreign domination" were coined no longer prevail'.[128] The OAU Refugee Convention emerged as a distinctly post-colonial document, reflecting the unique problems facing African states in their efforts for liberation while also codifying a securitisation agenda that could be and was vulnerable to misuse and overly broad interpretation. However, the immediate period of post-colonial governance has passed, leaving only political refugees from OAU member states who are still vulnerable to characterisation as subversives. It appears clear that the inter-state interpretation within the OAU framework was subsumed by a refugee-specific securitisation agenda such that any reference to the prohibition against subversive activities automatically implicates the 'refugee problem'. The prohibition against subversion and its undercurrent of political repression, therefore, is anachronistic, resting uncomfortably in contemporary asylum policy. It continues to be vulnerable to broad and mercurial interpretation.[129]

Vadachalam has argued that the prohibition unjustifiably limits the freedom of expression of refugees in South Africa, but the political rights of refugees are well protected.[130] The discussion above has shown that the political rights of refugees exist in a liminal space, and thus their protection is not as ironclad, as Vadachalam suggests, particularly in light of the 2020 Regulations. Critics of the prohibition against subversive activities have suggested that it may lead to the excessive use of exclusion and cessation clauses against refugees and asylum seekers,[131] and renders the stay of refugees 'contingent upon their passivity and silence'.[132] Mbaya warns that the prohibition

127 As above.
128 Okoth-Obbo (n 101) 115-116.
129 Lawyer's Committee for Human Rights, African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention, New York, July 1995 94.
130 A Vadachalam 'Does the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa article III provision prohibiting "subversive activities" unjustifiably limit the freedom of expression of a refugee? A South African answer' (2014) University of Cape Town: Refugee Rights Unit Working Paper Series.
131 Awuku (n 98) 83-84.
132 Bakwasega (n 89) 11.

against subversion may render the African refugee a non-political being or a 'subhuman species'[133] unable to engage with the affairs of their home country or their own conditions during their sojourn.

In contradistinction, Okoth-Obbo argues that some of these criticisms may be alarmist while simultaneously 'diminishing the seriousness of the devastation that can be visited upon an entire refugee situation once politicisation and militarisation are allowed to take root'.[134] He states that the prohibition against subversion does not extend to the 'natural, relatively benign oracular interest' in the affairs of refugees' countries of origin.[135] These kinds of 'political activities' are ineluctable to refuge. Rather, 'permissible activities' must be clearly defined so as to avoid 'shutting down … the humanitarian asylum and refugee protection regime'.[136] This more measured approach may have merit at first glance, as there intuitively exists a clear distinction between 'natural, benign and oracular' political acts and acts designed to undermine and overthrow government. However, OAU member states have shown a propensity to interpret the prohibition against subversion broadly, essentially prohibiting all political activity of refugees.[137]

The political prohibitions in Regulation 4, which supposedly give effect to the prohibition against subversion, contain no clearly defined permissible activities. It is precisely their ill-definition that is of concern. Regulations 4(1)(g) & (i) threaten the 'natural, benign, oracular' interest in the political affairs of a refugee's home country. Regulation 4(2) similarly contains no clearly defined permissible activities. As they currently stand, the political prohibitions risk 'shutting down the refuge protection regime'. Exemplifying this, elsewhere, in Zambia, the prohibition against subversion has been domesticated in its Refugees Act as an exclusion from refugee status.[138] 'Subversive acts' are defined as any attempt to overthrow the government, lumping together acts of treason, sabotage, sedition or 'any act likely to cause tension through the use of arms, press or radio' in a UN or African Union (AU) member state.[139] This legislative definition is broad, indeterminate and threatens legitimate political acts taken through press and radio.[140]

133 Mbaya (n 110) 76-77.
134 Okoth-Obbo (n 101) 133.
135 As above.
136 As above.
137 Mandal (n 15) 73-74. Mandal uses the examples of Zimbabwe which has expelled refugees for criticising the regime of the host or origin state and Tanzania which prohibits the gathering of more than five refugees.
138 Sec 14(1)(c) Refugees Act 1 of 2017.
139 Refugees Act (n 139) definitions.
140 Odinkalu (n 102) 8.

## 5 Subversion, securitisation and colonialism

The prohibition against subversive activities as it is found in the OAU framework is the progeny of the socio-legal and historical context of post-colonial Africa. Anti-subversion laws, however, had already been implanted into the domestic legal systems of many African countries by colonial powers. These laws were broadly used to quell any dissension, protest politics, liberation movements, or any other conduct antagonistic towards colonial regimes. They were often one element in an alloy of overlapping offences such as terrorism, sabotage, sedition and, historically, communism, that formed a state's security system. Subversion in this context does not necessarily entail the instrumentalisation or co-opting of a host nation's asylum system, as it does under the OAU/AU framework.

Many of these anti-subversion laws remained in the legal system after formal decolonisation and continued to be used in the post-colonial context by nascent governments to suppress and antagonise a wide scope of conduct, sometimes rooted out by judicial or legislative intervention. In Kenya, the High Court of Nakuru in 2023 declared unconstitutional section 77 of the Penal Code CAP 63 which made it an offence to do, attempt, prepare or conspire with anyone to do any act with a subversive intention.[141] 'Subversive' was defined broadly in the impugned section 77(3), including the undermining of public order or the administration of justice, as well as inciting disorder or expressing an affinity for unlawful society. The High Court found that section 77 was overly broad and vague, limited freedom of expression and represented a remnant of colonial rule in Kenya.[142]

In 2002 the Constitutional Court in Uganda[143] declared the offence of sedition and promoting sectarianism to be null and void for infringing on the constitutional right to freedom of expression. The Court found the crime of sedition – which included subversion[144] – to be vague and opposed to freedom of expression. Contrastingly, in Eswatini, the Supreme Court[145] in 2024 upheld provisions of the Suppression of Terrorism Act[146] and the Sedition and Subversive Activities Act[147] which have been argued to be incongruous with

141 *Katiba Institute & 8 Others v DPP & 2 Others* HCCHRPET E016 of 2023.
142 *Katiba Institute* (n 142) paras 135-137.
143 *Charles Onyango Obbo & Andrew Mujuni Mwenda v Attorney General of the Republic of Uganda* Constitutional Appeal 2 of 2002.
144 Sec 39(1) Penal Code Cap 120.
145 *Prime Minister of Eswatini & Another v Thulani Maseko & 6 Others* [2024] SZSC 88.
146 Act 3 of 2008.
147 Act 46 of 1938.

human rights standards.[148] While the constitutional challenge was directed at the provisions dealing with sedition and terrorism, the provisions on subversion mirror section 77 of the Kenyan Penal Code by criminalising any acts prejudicial to public order, the security of Eswatini or the administration of justice.[149]

South Africa's apartheid era security legislation exemplifies the ways in which the prohibition against subversion can serve a brutal and repressive security system. Section 54 of the Internal Security Act[150] defined subversion as criminal conduct with the intent to 'overthrow or endanger state authority, to bring about specified forms of change, to induce the government to refrain from acting or to change a standpoint, or to put in fear or demoralise the general public or parts of it'.[151]

Mathews's analysis of the criminal conduct component of the crime of subversion shows a broad and almost unknowable scope of punishable conduct listed in the Act.[152] The crime of subversion was forged from the pre-existing crimes of terrorism and sabotage, yet was more 'complex and obscure'.[153] When considering that unlawfulness was not a requirement for the offence of subversion, Mathews posits that section 54 expressed a 'manic desire to criminalise every form of public human activity'[154] and covered 'much of the protest politics of opposition groups'.[155] Section 54 of the Internal Security Act was eventually abolished by the Abolition of Restrictions of Free Political Activity Act.[156]

It is evident from apartheid jurisprudence that the accusation of subversion was most commonly levelled at anti-apartheid liberation movements.[157] In *S v Essack* the Appellate Division described pamphlets distributed by the applicant as extremely subversive for containing 'highly inflammatory matter exhorting the non-white people of South Africa to fight, and by force of arms to overthrow what is called in the pamphlet "The White Régime" in the Republic'.[158]

148 Amnesty International 'Suppression of Terrorism Act: Undermines human rights in Swaziland' (2009), https://www.amnesty.org/en/documents/afr55/001/2009/en/ (accessed 8 January 2025).
149 Sec 5 Sedition and Subversive Activities Act 46 of 1938.
150 Act 74 of 1982.
151 Secs 54(1)(a), (b), (c) & (d) Internal Security Act (n 151).
152 A Mathews *Freedom, state security and the rule of law* (1986) 38-39.
153 As above.
154 As above.
155 Mathews (n 153) 41.
156 Act 206 of 1993.
157 *S v Cassiem & Another* [1993] ZASCA 136; *Minister of Law and Order & Another v Parker* [1989] 2 All SA 246 (A). See also the Re-opened inquest into the death of Dr Hoosen Mia Haffejee [2023] ZAKZPHC 93.
158 *S v Essack & Another* 1974 (1) SA 1 (A) 6.

There is a dearth of post-apartheid case law on the interpretation of 'subversive activities'[159] and, thus, no clear precedent on the precise meaning and scope of the term in South African jurisprudence. Subversion remains mostly in contemporary national intelligence legislation where it is understood as any attempt to undermine the constitutional system.[160]

The historical irony of suppressing the political action of refugees under the auspices of prohibiting subversion must be noted, although perhaps not belaboured here. Regulation 4 may have the effect of prohibiting the same kinds of activities that anti-apartheid groups such as in which the current ruling party, the ANC, engaged. Neighbouring African states were pivotal in providing training and assistance to freedom fighters who engaged in their own forms of 'subversion' to overthrow a racist regime. Contemporaneously, to thwart the achievement of political and economic independence of neighbouring states, the apartheid regime undertook the Destabilisation Campaign that saw it commit just about every offence found in its security legislation against the people and governments of its neighbours, resulting in devastating economic loss, death and displacement.[161] This is not to suggest that a new government is precluded from adopting and enforcing laws that were flagrantly violated by a previous regime. Rather, close scrutiny must be deployed toward the marginalisation of transnational diasporic politics under the banner of national security.

It has been suggested that the political prohibitions in regulation 4 were catalysed by diplomatic pressure to 'curtail the activities of political dissidents', particularly those from Rwanda, Zimbabwe and the DRC.[162] Although there is no evidence of this orientation in the drafting of the regulations, the political prohibitions have been praised by the Rwandan Foreign Minister for their potential to prevent the opposition party – the Rwandan National Congress – from 'fuelling terrorist activities' in the region.[163] Perhaps, in this light, Regulation 4 could be cast as South Africa's attempt to secure both itself and its relations with other member states. Yet, it must

159 *Thompson v Information Officer: Department of Defence and Military Veterans & Another* (8090/2020) [2024] ZAWCHC 136 (21 May 2024).
160 See, eg, National Strategic Intelligence Amendment Act 67 of 2002.
161 J Hanlon *Beggar your neighbours: Apartheid power in Southern Africa* (1986).
162 B Jalloh 'S Africa's new refugee laws "target dissidents"' *Deutsche Welle* 8 January 2020, https://www.dw.com/en/south-africa-new-refugee-laws-target-political-dissidents/a-51933065 (accessed 12 December 2025).
163 E Kagire 'Rwanda welcomes S Africa law barring refugees from engaging in politics' *KT Press* 6 January 2020, https://www.ktpress.rw/2020/01/rwanda-welcomes-s-africa-law-barring-refugees-from-engaging-in-politics/ (accessed 21 June 2025).

be seriously questioned whether there exists less restrictive means of achieving peaceful inter-state relations than the broad prohibitions on the political activity of refugees and asylum seekers. It must be further questioned whether South Africa is creating conditions more favourable to transnational repression by silencing political dissidents and exacerbating political hostility towards diasporic communities.[164]

## 6 The politics of subversion

Between late 2021 and early 2022, Egyptian police arrested and detained 30 Sudanese refugees and asylum seekers, some of whom had organised protests outside the UNHCR headquarters in Cairo against the lack of protection afforded to them and against the harassment and racist treatment they had experienced by Egyptian citizens.[165] The protest action was also aimed at showing solidarity with fellow Sudanese against the conduct of the military. Arrest warrants issued by the Egyptian police accused some of the arrested refugees of 'undermining the constitutional system'.[166] Legitimate protest politics of refugees – framed as subversive – were met with state violence and detention in an increasingly hostile environment for refugees in Egypt.[167] Both the refugee protests in Egypt and those in South Africa mentioned at the outset of this article were political actions against xenophobia and mistreatment by the host nation. The responses of both governments, although different in form, illustrate a predilection to invoke subversion as a means to justify political repression of non-nationals seeking protection.

Under the nation-state system, formal and informal political participation is the dominant method of engaging with the authorities that govern the material conditions of one's life. However, between a citizenship strained (in the home country) and a citizenship non-existent (in the host country) this engagement is rendered precarious, exemplifying both the enabling and limiting role that nation-state democracy plays. The breakdown in the relationship between an individual and their state, characteristic of asylum, entails political exclusion and non-belonging. Long, thus, argues that the 'very act

164 N Schenkkan & I Linzer 'Out of sight, not out of reach: The global scale and scope of transnational repression' Freedom House, January 2021, https://freedomhouse.org/sites/default/files/2021-01/FH_TransnationalRepressionReport2021_rev012521_web.pdf (accessed 21 June 2025).

165 Human Rights Watch 'Egypt: Police target Sudanese refugee activists' 27 March 2022, https://www.hrw.org/news/2022/03/27/egypt-police-target-sudanese-refugee-activists (accessed 3 January 2024).

166 Human Rights Watch (n 166) 157.

167 Amnesty International '"Handcuffed like dangerous criminals": Arbitrary detention and forced returns of Sudanese refugees in Egypt' 2024, https://www.amnesty.org/en/documents/mde12/8101/2024/en/ (accessed 4 July 2024).

of recognising refugees to have political identity is an important act of protection in its own right'.[168] Yet, the reality of politically active refugees and asylum seekers can disrupt the projected image of helplessness and passivity that accompanies seeking refuge. This projected image has been observed as a 'systemic, even if unintended' consequence of humanitarian aid, for which refugees and asylum seekers are often expected to 'display their need', which is then transnationally communicated through particular depictions.[169] In response, Vandevoordt has proposed the concept of 'subversive humanitarianism'; 'subversive' in that it upsets dominant practices and discourses by, first, allowing for a multiplicity of social and political subjectivities and, second, standing in opposition to government action (or inaction) that excludes refugees.[170]

Vandevoordt's analysis juxtaposes voluntary, grassroots citizen-led movements in Europe with established international humanitarian organisations, drawing attention to the former's willingness to embrace pro-migrant mobilisation and civil disobedience. In this context, it is citizens who engage in a politics of solidarity with refugees and asylum seekers, rejecting the humanitarian principles of neutrality and impartiality. While this can generate robust and anti-hierarchical – at least, aspirationally – solidarity, citizen-led movements can still project their own meanings and priorities onto the groups with which they wish to build a coalition.[171] This is why the political autonomy of refugees and asylum seekers – and, more broadly, forcibly displaced and stateless persons – must be a fundamental component of their protection. Political autonomy is about authoritative self-representation and the freedom to choose to engage (or not engage) in political activities, whether that is exercised through formal or informal avenues, as earlier parts of this article have explored. Where refugees and asylum seekers are expected to provide for themselves in host nations, such as South Africa, political autonomy requires and produces innovation as much as it does resistance.

This is evident in Mazani's study of informal food security programmes led by migrant-led organisations in Cape Town.

168 C Moulin '*Ungrateful* subjects? Refugee protests and the logic of gratitude' in P Nyers & K Rygiel (eds) *Citizenship, migrant activism and the politics of movement* (2012) 54-72.

169 LH Malkki 'Speechless emissaries: Refugees, humanitarianism and dehistoricisation' (1996) 11 *Cultural Anthropology* 386; B Stein 'The refugee experience: Defining the parameters of a field study' (1981) 15 *International Migration Review* 327.

170 R Vandevoordt 'Subversive humanitarianism: Rethinking refugee solidarity through grass-roots initiatives' (2019) 38 *Refugee Survey Quarterly* 245-265.

171 Vandevoordt (n 171) 254.

Through navigating socio-economic exclusion, one such instantiation being food insecurity, these organisations act as producers and disseminators of knowledge through their programmes and networks. In so doing, Mazani argues, migrant-led organisations are 'sites of epistemic resistance' that can 'subvert institutional imaginings of migrants as voiceless and inarticulate'.[172] The political functions of these and other migrant and refugee-led organisations and networks must not be overemphasised. The point here rather is to emphasise just how all-encompassing political activity, and prohibitions thereon, can be. The political prohibitions in Regulation 4 may not only infringe on constitutional and international human rights and domestic legislation, but may stifle political innovation, agency and collaboration. Indeed, displays of political autonomy by refugees can be seen by the host nation not only as contradictory to the display of need, but are liable to be interpreted as ingratitude, recalcitrance or destabilisation.[173]

Another point that bears repeating in this part is that political activity contains some element of subversion in that it can and does act as a countermeasure to the marginalisation inflicted by dominant structures – political, socio-economic or discursive. This is no more evident than in the anti-apartheid struggles discussed above and the various protests by refugees and asylum seekers that frame this whole article. Further, where it is possible, formal electoral participation in the country of a refugee or asylum seeker's origin may act as a countermeasure to the conditions that necessitated their flight and maintain their inability to return. These countermeasures exist in a realm separate from the armed, instrumentalised and criminal operations in which governments have a legitimate interest in thwarting and that, through a particular socio-historical unfolding, came to form part of the OAU/AU framework.

## 7 Conclusion

During the SABC interview, the then Minister acquiesced that the provisions in question were too vague and stated his intention to give instruction to amend the Regulations to reflect this domestication. This has not occurred at the time of writing. If the prohibition against subversive activities is domesticated, it should be clearly and narrowly defined. The comparative politics perspective would imply

172 P Mazani 'Cross-border solidarity: Migrant-led associations as spaces of epistemic resistance and food security innovation in South Africa' (2025) 11 *African Human Mobility Review* 88 & 100.

173 Nyers & Rygiel (n 169).

an operation with the involvement of an instrumentalising state or non-state actor, while the international law perspective requires that subversion entails 'armed hostile expeditions or attempts to commit common crimes against life or property'. Requiring either of these higher thresholds or both in combination would allow a state to protect itself against the actions that security crimes are supposedly designed to combat while limiting the intrusion on political freedoms. Without clear statutory definition, officials will be able to interpret and enforce the political prohibitions in Regulation 4 with a liquid understanding of the prohibition against subversive activities. Yet, it is argued that the prohibition against subversive activities itself is a liquid concept, only taking solid form temporarily.

If projected against the canvas of 'political activity' is a concern for subversion, it remains unclear what forms of political activity, if any, would earn ministerial permission. The Minister's comments suggest that permissibility of political conduct may come down to an international relations risk assessment, rather than a manifestation of any legitimate political right. Whether or not domestication does occur, the political prohibitions must be challenged not only to ensure that refugees and asylum seekers are not being denied access to protection on the grounds of legitimate political engagement, but to offer an opportunity for overdue judicial recognition of the political rights of non-nationals. Necessary as this is, additional judicial challenges to the amended legislative framework will likely add to the delays and uncertainties of the status determination process and the asylum system as a whole.