

**THEMATIC REPORT ON THE RIGHTS OF MIGRANTS, ASYLUM SEEKERS AND
STATELESS PERSONS IN SOUTH AFRICA**

A submission to the UN Human Rights Committee in response to the Initial Report by South Africa under the International Covenant on Civil and Political Rights, the list of issues in relation thereto and the replies of South Africa to the list of issues at the 116th session of the Human Rights Committee

(Geneva March 2016)

By the following organisations:

Lawyers for Human Rights (LHR)

Legal Resources Centre (LRC)

The Scalabrini Centre of Cape Town (SCCT)

Introduction

Introduction

This thematic report is submitted jointly by Lawyers for Human Rights, The Legal Resources Centre and The Scalabrini Centre of Cape Town. We welcome this opportunity to make submissions to the Committee. The submissions pertain to the rights of migrants, asylum seekers and stateless people in South Africa. It draws on the collective and extensive experience of the organisations in the area of refugee and migrant rights through direct assistance and legal services, research and community outreach.

Lawyers for Human Rights is an independent human rights organisation with a 35-year track record of human rights activism and public interest litigation in South Africa. LHR provides free legal services to vulnerable, marginalised and indigent individuals and communities, both non-national and South African, whose constitutional rights are unlawfully infringed upon.

The LRC is a public interest, non-profit law clinic in South Africa that was founded in 1979. Through strategic litigation, advocacy, education and training, the LRC has played a pivotal role in developing a robust jurisprudence in the promotion and protection of rights of asylum seekers and refugees. A significant proportion of the LRC's work, since 1996, has been in the sphere of refugee law.

The Scalabrini Centre of Cape Town (SCCT) is a registered NPO that perceives migration as an opportunity and is committed to alleviating poverty and promoting development in the Western Cape while fostering integration between migrants, refugees, and South Africans. The SCCT have been providing welfare services in Cape Town to displaced communities since 1994. In providing assistance, the SCCT advocates respect for human rights and utilises a holistic approach that considers all basic needs including advocacy, development, and welfare services.

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Executive summary

The submissions contained in this report are aimed at providing the Human Rights Committee with additional information on the Government of South Africa's compliance with the International Covenant on Civil and Political Rights (ICCPR or Covenant) with regards to the treatment of migrants, asylum seekers, refugees and stateless persons in preparation of the 116th Session to be held in March 2016.

The submissions are also a response to the initial report of the Government of South Africa, the list of issues identified by the Human Rights Committee and the Government's response to the list of issues.

The submissions address the following rights and the level of access to these rights:

1. The right to equal protection (Art 2)
2. The equal rights of men and women (Art 3)
3. The right to life (Art 6)
4. The right to liberty and security of the person (Art 9)
5. The right to humane treatment in detention (Art 10)
6. The right to not be expelled unlawfully (Art 13)
7. The right to be recognised as a person before the law (Art 16)
8. Prohibition of advocacy of national, racial or religious hatred (Art 20)
9. The right to family unity (Art 23)
10. The right of every child to a name and a nationality (Art 24)
11. The right of every citizen to take part in the conduct of public affairs and to have access to public service (Art 25)

The current South African legal framework does not adequately protect the rights of migrants, asylum seekers and stateless persons enshrined in the Covenant. We are concerned by the on-going plans by the GOSA to amend the current legislative framework which will limit these rights further. In addition, the current legal protections are not being implemented, and when the GOSA attempts to implement these protections, they are wholly hampered by corruption. As such, the Committee is urged to request the Government of South Africa to;

- Amend current legislation to meet international standards and abide by its obligations under international law;
- Implement current legislative protections and prevent any abuse of the law;
- Develop legislative measures to prevent, reduce and resolve statelessness;
- Accede to both the 1954 UN Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness;
- Properly address and prosecute instances of xenophobia and prevent future incidents through re-integration;
- Ensure equal access to Refugee Reception Offices and procedures without discrimination, including re-opening the Cape Town and Port Elizabeth offices;
- Provide training to government officials in the treatment of vulnerable migrants;
- Develop policies which reflect a dedication to the rights of these vulnerable persons; and
- Eradicate corruption in the immigration system.

Acronyms

DHA	Department of Home Affairs
DSD	Department of Social Development
GOSA	Government of South Africa
ICCPR	International Covenant on Civil and Political Rights
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
RAB	Refugee Appeal Board
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SCCT	The Scalabrini Centre of Cape Town
UNHCR	United Nations High Commissioner for Refugees

Equal Access to Asylum Protection and the Right to Life (Art 2, 3 and 6)

LGBTI persons

1. Article 3 of the Covenant obligates state parties to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant. With the equality context in mind, we are concerned about the nature in which certain vulnerable groups' applications for asylum are adjudicated on by the Department of Home Affairs Refugee Reception Offices. One of the main groups of concern is LGBTI persons seeking asylum based on persecution suffered because of their sexual orientation.¹
2. In approximately 78² countries homosexuality or any associated act is a criminal offence, with 35 of those 78 countries in Africa.³ As a result of the constitutional democracy in South Africa, South Africa is one of only 19 countries in Africa that does not criminalise homosexuality and any associated behaviour and activities. For this reason, South Africa receives a significant number of asylum seekers who have fled their country of origin because of persecution suffered as a result of their sexual orientation.
3. The United Nations High Commissioner for Refugees ("UNHCR") has recognised that lesbian, gay, bisexual, transgender and intersex ("LGBTI") persons constitute a "particular social group". A "social group" refers to a group of people that share a definitive characteristic other than persecution, or a collective that is considered to be a group by society. LGBTI persons constitute a "social group" because one's sexual orientation and/or gender identity is a fundamental and essential component of their identity. In spite of this, individuals who have fled their country due to a well-founded fear of persecution on the basis of their sexual orientation and/or gender identity are faced with great difficulty when seeking the protection of the South African government. Many of them are rejected and face the possibility of being deported to countries where they could be arrested, persecuted, and in some instances killed because of their sexual orientation.
4. Some of the letters informing LGBTI asylum seekers of such rejections often indicate that the refugee status determination officers (RSDOs) did not undertake the objective country assessment as is required to ascertain a well-founded fear of persecution. Further, the misunderstanding of well-founded fear by the RSDOs is of concern. Generally, RSDOs consider fear to be well-founded only in regards to direct and immediate violence. They do not take into account fear as an intangible state and the pervasive effects fear can take one's quality of life. In many instances, LGBTI refugees live in constant fear of physical, verbal, mental, and emotional attack both on an intimate and a structural level. As homosexual activity is illegal in most African countries, an atmosphere of potential violence persists,

¹ This submission is based on the research being undertaken by LRC; thus far about 50 LGBTI rejection letters have been reviewed.

² The number varies depending on if one takes into account provinces within federal countries that have outlawed homophobia, and which laws have been used to determine that homophobia has been outlawed.

³ 76crimes '78 Countries where Homosexuality is Illegal', available at <http://76crimes.com/76-countries-where-homosexuality-is-illegal/>, accessed on 16 April 2015.

often engulfing LGBTI refugees in such anxiety that they cannot walk down the street, socialize with friends, open businesses, have comfortable relationships, freely, or safely.

5. More worryingly, some LGBTI applicants are in some instances informed that they should simply return to their home country and keep their sexual orientation a secret. In one case, a homosexual man fled from Kenya following being imprisoned for two weeks after being arrested while at a restaurant with his boyfriend. In rejecting the applicant's claim for refugee status the RSDOs in some cases will reject the claim because no-one knew of the applicant's sexual orientation and/or that the applicant was only persecuted because they informed other of his/her sexual orientation.

Recommendations:

- **We urge the GOSA to ensure that there is no discrimination in the manner in which LGBTI persons applications for asylum are adjudicated on to ensure that those at risk of further persecution and/death are not rejected and deported to countries where they would suffer persecution.**
- **We urge the GOSA to provide training to RSDOs in order for them to understand the refugee laws applicable as well as the application of these laws to all applications for asylum.**

Refugee Status Determination Processes (In response to paragraph 17 in the list of issues)

6. Access to meaningful refugee status determination processes remains difficult throughout the asylum system in South Africa. The decision-making process at the first-instance continues to produce low-quality decisions that contain serious flaws such as errors of law, failure to consider and apply the principle of *non-refoulement*, a failure to apply the mind ('copy and paste' decisions which do not consider individual claims), and a failure to apply the African Union refugee definition.⁴ The decisions produced have seriously undermined the asylum system and has given rise to numerous human rights violations. To date, the government has not attempted to address these challenges in any meaningful way, severely compromising asylum seekers' rights to a fair hearing in a non-discriminatory manner.
7. These challenges, coupled with the restriction in access to Refugee Reception Offices (RRO) through closures and administrative obstacles, have resulted in the entrenchment of networks of corruption within the asylum system and recent research indicates that asylum seekers are subject to corruption at all stages of the asylum process.⁵ The government has attempted to address these matters by engaging on individual cases but has largely avoided addressing the root causes and conditions leading to corruption. The emergence of endemic

⁴ Roni Amit, 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' *International Journal of Refugee Law* (2011) 23 (3): 458-488.

⁵ Roni Amit, 'Queue here for Corruption' ACMS Research Report (July 2015); available at: <http://www.migration.org.za/uploads/docs/lhr-acms-report---queue-here-for-corruption---july-2015.pdf>

corruption has implications for effective governance more broadly. Corruption exists at all levels of the asylum application process- access to documentation, refugee status and renewals are all linked to a payment as are many other services tied to the asylum process. Inefficiency in the DHA system contributes to the levels of corruption among officials with a duty to provide a specific service. Persons who report corruption are often burdened with building a case against the official concerned and left feeling at risk of retaliation from such official.

8. The difficulties noted above often result in individual asylum seekers having no recourse for international protection other than through the judicial system, where asylum seekers are able to challenge decisions under the Promotion of Administrative Justice Act (PAJA) which gives effect to section 33 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). Within the past year, a number of cases have been brought before the High Court revealing the extent of dysfunction within the asylum system: in *Bolanga v Refugee Status Determination Officer and Others*⁶ the court granted refugee status to the applicant after the Department rejected his claim after 10 years; the decision and adjudication process resulting in the rejection of the applicant was found to be 'deplorable' and 'one shudders to think of the many thousands of refugees in similar situations who have been or are being subjected to the same treatment as the applicant has been by those to whom the law has entrusted their fate'.⁷
9. LHR has recently launched a case in the High Court regarding the rejection of Somali asylum seekers by the Refugee Appeal Board. The rejections are the result of an undue reliance on section 3(a) which focusses more on the individual circumstances of persecution and a failure to take into account the broader AU definition contained in section 3(b) of the Refugee Act which makes provision for refugee status based on external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order. The case is pending before court.

Recommendations

- **We urge the DHA to address the unacceptably poor quality of decision making at both RSDO and RAB level and to train officials to properly assess claims in terms of section 3(b) of the Refugees Act;**
- **We urge the DHA to take a more proactive role in investigating corruption, one that does not place the burden solely on individuals experiencing corruption to substantiate their claims. This can be achieved by implementing better operational systems that eliminate the space for corruption, as well as expanding services to meet demand while creating alternative mechanisms for economic migrants.**

⁶ (5027/2012) [2015] ZAKZDHC 13 (24 February 2015).

⁷ *Ibid.*, at para 53.

RRO Closures in Cape Town and Port Elizabeth (In response to paragraph 19 of the list of issues)

10. Access to RROs remains a challenge for both recently arrived asylum seekers, asylum seekers who have already lodged asylum applications and refugees who have attained formal recognition of refugee status in South Africa. Since 2011, the capacity for new applications has been halved by the closing of three RROs to new applicants (Johannesburg – closed entirely in 2010; Port Elizabeth, closed to new applicants in 2011; and Cape Town, closed to new applicants in 2012).⁸ To date, each closure has been found unlawful by the courts although none of the closed RROs have been reopened to new applicants. The government indicated in 2012 that it would open a new RRO on the Mozambique border in line with its RRO relocation policy but no facility has been opened to date.
11. The Cape Town RRO closure was found unlawful by the Western Cape High Court in 2012 and 2013.⁹ In both judgments, a court order was issued requiring DHA to re-open the RRO to new applicants although neither order was abided by. DHA appealed the matter to the Supreme Court of Appeal (SCA) which upheld the High Court's finding of the closure being unlawful but did not uphold the interim order requiring the Cape Town RRO to be reopened. The SCA instead ordered the Department of Home Affairs to reconsider the decision after public consultations which were held in December 2013. A new decision was made and the Cape Town RRO was subsequently closed on 31 January 2014 and it remains closed at the time of writing; litigation remains ongoing on the most recent closure decision and should be heard in the Western Cape High Court during 2016.¹⁰
12. As part of the series of closures of urban refugee reception offices, in October 2011 the Department of Home Affairs announced the closure of the Port Elizabeth Refugee Reception Office with one day's notice to the asylum seeker and refugee community that no new applications would be accepted at that office. This was despite ongoing engagements with local service providers on alternative sites for an office to serve the community. The closure was challenged and the High Court found that the decision to close was unlawful due to a lack of consultation with the Standing Committee for Refugee Affairs, a statutory body meant to oversee the refugee system in South Africa. Despite an order to re-open and a failed appeal to the Supreme Court of Appeal, the office remained closed necessitating a new court challenge against the Department's continued refusal to re-open the office. This new decision was also determined to be unlawful by the High Court and later by the Supreme Court of Appeal, due partly to the prejudice suffered by the local asylum seeker community and partly due to the Department's failure to abide by previous court orders. The Constitutional Court refused leave to appeal the decision in 2015 and upheld the SCA decision which required the office to be re-opened within three months, with

⁸ See generally Lawyers for Human Rights and the African Centre for Migration & Society 'Policy Shifts in the South African Asylum System: Evidence and Implications' (2013) at pp. 37-50. Available at:

<http://www.lhr.org.za/publications/policy-shifts-south-african-asylum-system-evidence-and-implications>

⁹ *Scalabrini Centre Cape Town v Minister of Home Affairs and Others* (11681/2012) [2012] ZAWCHC 147 (25 July 2012) and *Scalabrini Centre, Cape Town and Others v The Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC) (19 March 2013).

¹⁰ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (8132/14)

monthly progress reports on steps taken to ensure its opening. The office was due to be open by 9 February 2016. In contempt of the court order the office was not opened on 9 February 2016.

13. For new asylum applicants, there remain considerable challenges regarding access to documentation stemming in large part from the closure of urban RROs in Johannesburg, Port Elizabeth, and Cape Town which has resulted in applications only being accepted at Musina, Pretoria, and Durban RROs. Many new applicants are dependent upon social networks and support from other members of the diaspora who may be settled in Cape Town or Port Elizabeth. The Pretoria RRO remains the most-used facility indicating the importance of urban locations for asylum seekers. The protracted nature of the adjudication process coupled with physical access issues at RROs requires asylum seekers to make multiple trips to RROs over a several year period during the asylum process which causes undue financial hardship on asylum seekers and many asylum seekers have their documentation expire in the process.¹¹
14. The closure of these RROs then effectively makes certain parts of the country, such as cities like Cape Town and Port Elizabeth which host significant refugee populations, impossible for refugees to reside in in certain parts of the country. As Rodgers J noted of the decision by the government to close the Cape Town RRO in 2013:

*“The resultant decision is also grossly unreasonable in its effect. Thousands of asylum seekers will either have to abandon the idea of residing in the Cape Town area while their asylum applications are assessed, or they will need to spend time and money to travel on a number of occasions to RROs in the north of the country. If they have work in Cape Town, they may lose it because of the need to take off three or four days for each attendance at an RRO. If they have dependants, they would need to leave them in the care of others or travel with them.”*¹²
15. The result of this policy is as described, with large numbers of asylum seekers having difficulty with access to RROs and asylum procedures. To ensure that asylum seekers are able to realise their right to a fair and dignified process, several High Court applications have been lodged in Cape Town seeking to allow asylum seekers with permits from other offices the opportunity to have their claim finally adjudicated in Cape Town. In *Abdullahi and Others v Director-General of the Department of Home Affairs and Others*¹³ the court ordered that 1123 asylum seekers have their refugee claims adjudicated in Cape Town. Further litigation on the matter is also ongoing seeking to broaden access to the Cape Town RRO to all asylum

¹¹ See Ra'eesa Pather, 'Cape Town refugees in limbo: "You can't stay here without your paper" ' *Daily Vox* (30 June 2015) Available at: <http://www.thedailyvox.co.za/cape-town-refugees-in-limbo-you-cant-stay-here-without-your-paper/>; 'Cape Town's asylum seekers struggle to get documented' *IRIN News* (Cape Town: 16 May 2013) Available at: <http://www.irinnews.org/report/98051/cape-town-s-asylum-seekers-struggle-to-get-documented>.

¹² *Scalabrini Centre, Cape Town and Others v The Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC) at para 110.

¹³ (7705/2013) [2015] ZAWCHC 131 (27 February 2015).

seekers residing in the Western Cape requesting to have their claims finalised in Cape Town.¹⁴

Recommendations:

- **We urge the GOSA to re-open both the PE and Cape Town refugee reception offices in accordance with the orders handed down by several courts**

Unaccompanied migrant children

16. The closures also negatively affect unaccompanied minors who are placed in Child and Youth-Care Centres (CYCC) by protection orders from the Children's Court. If an unaccompanied minor is thought to require protection through the refugee regime, the Children's Court will direct the Department of Home Affairs to assist the minor with the application in terms of Section 46(h)(viii) of the Children's Act.¹⁵ If a child is placed in a city without an RRO, or in a city without a fully-functioning RRO, then the child, along with a social worker, will be required to travel to a fully-fledged RRO to lodge the application and then be required to travel back to the RRO of application for further assistance and permit extensions. This system is both financially and logistically unwieldy for the state¹⁶ but also heightens the chances of the child remaining without asylum documentation and prejudices the child's asylum claim due to the delay between arrival in South Africa and application for asylum. When the child reaches the age of majority without having applied for asylum, they face difficulties in securing documentation and are prejudiced for having delayed their application. These issues elevate the risk of children in the asylum system remaining undocumented and vulnerable to exploitation, detention and deportation, and difficulties in accessing services such as education and healthcare.
17. Such children are at severe risk of statelessness. Barriers to access to the asylum system coupled with the complete lack of an immigration status for unaccompanied migrant children who have been placed in care create an unacceptable risk of statelessness when these children reach the age of majority. The current legal framework does not make provision for naturalisation as citizens for unaccompanied migrant children and foundlings.
18. The GOSA is in the process of amending the current Refugees Act. The proposed amendment bill has been published and has been opened up to a first round of comments. The proposed amendment to section 3(c) is worrisome as it has a profound negative effect

¹⁴ *Ntumba Guella Nbaya and Others v The Director General of the Department of Home Affairs and Others* (6534/15) [2015]. At the time of writing, judgment is pending.

¹⁵ If an unaccompanied minor is considered to have an asylum claim they must, in terms of Sections 32(1)-(2) of the Refugees Act, be brought before the Children's Court in the district in which they are found.

¹⁶ In the Western Cape, DSD has indicated it is unable to cover travel costs to assist minors and an accompanying social worker in applying for asylum in another province. These difficulties also apply to separated minors residing with extended family members in which the designated social worker is unable to assist with the application for asylum.

on refugee and asylum seeker children. Section 3(c) makes provision for refugee status of the “dependants” of refugees.

19. Section 1(b) of the proposed Refugees Amendment Act limits the definition of “dependent” to include only unmarried biological minor children (younger than 18 years old) as well as children “legally” adopted *in the asylum seeker or refugee’s country of origin*. This definition will essentially exclude children who were not formally adopted in the country of origin. For example, it will exclude children who are adopted in South Africa or another country and will require those children to be documented in another manner. However, the Immigration Act and the Citizenship Act provide few alternatives for foreign children who are adopted by refugees or asylum seekers.
20. In addition, it may exclude children who have not been adopted, but who are under the care of a refugee or an asylum seeker as contemplated by the decision of the North Gauteng High Court in *Mubake* (see below). Children adopted in countries in a state of war may not be able to access formal adoption procedures and even if these procedures were available, documentation to prove such adoption may be lost in the process of fleeing the country of origin.
21. The amendment to the definition of ‘dependant’ in the Refugees Amendment Act is contrary to the ICCPR insofar as it excludes minors that have been separated from their biological caregivers and are being cared for by a relative who has not formally adopted them. The definition of ‘*dependant*’ should encompass separated children who accompany their related caregivers into the Republic, including children who have not been formally adopted.
22. These submissions have been accepted by the High Court of South Africa (Gauteng Division, Pretoria) in the case of *Mubake & 7 others v the Minister of Home Affairs and 3 others* Case No: 72342/15 where the Court declared that the separated children are dependants of their primary caregivers in terms of the definition of ‘dependant’ in section 1 of the Refugees Act and its accompanying regulations. The Court also declared that the Department of Home Affairs should inform all Refugee Reception Offices by way of departmental directive to issue the relevant permit to separated children as dependants of their care givers.
23. The amended definition of ‘dependant’ is contrary to the order that was made in the abovementioned case. Minors separated from their biological parents are already at risk of statelessness. Their inclusion as a dependant in a care-takers asylum claim is a way of preventing statelessness. It can also facilitate return to their country of origin if such an option becomes available. It helps them to prove their identity upon return to their country of origin for purposes of resettlement on their family lands or when attempting to reclaim land before courts. It is also crucial for family reunification in situations where family members have been dispersed to various places. Proper registration of children aids the voluntary return of refugees to their home country.
24. If separated children are not included as dependants in their care-taker’s claim, they will be unable to obtain the protection of the asylum system. If such separated children are

stateless as a result of separation from not only their country of origin, but also their parents, they should be able to access refugee status and eventually a nationality through the asylum system. Refugee status may grant them a pathway to status and eventually if necessary, citizenship. Generational statelessness should be taken into account. If these separated children are not registered and their statelessness is not prevented, they may have children in the country that will also become stateless.

Recommendations:

- **We recommend that the State provides protection against statelessness for unaccompanied migrant children by facilitating better access to the asylum system and by providing a mechanism to regularise the status of unaccompanied migrant children placed in care through both a temporary immigration status as well as pathway to nationality through naturalisation;**
- **We recommend that the GOSA reconsider their plans to limit the scope of the term “dependent” in the Refugees Act in order to ensure that all refugee children are able to access refugee status through their care-taker;**
- **In addition, and in light of the above, it is also recommended that the Refugees Act make provision for the individual permitting of children of all ages.**

Asylum Transit permits

25. The proposed Refugee Amendment Act that relates to the undertaking by the Department of Home Affairs to issue asylum seekers with asylum transit permit at the port of entry it is a noble initiative, provided that it is implemented in a manner that is fair and non-discriminatory. Unfortunately, from LHR’s observations at various ports of entry, this is often not the case.
26. Section 23(1) of the Immigration Act of 2002 provides for the issuing of an asylum transit permit that is valid for five days. However from our observations of the general practice currently, such permits are no longer issued at the port of entry, especially at Beitbridge Border Post. The underlying problem that is associated with transit permits appears to be that officials deliberately do not provide these permits to asylum seekers at the port of entry. A baseless excuse that is often stated is that those individuals who enter the country do not use the official port of entry. But the reality is that if the individual concerned approaches the officials and present such a request, it risks being summarily refused in the absence of valid passport / visa. Such *non-entrée* practices are clearly unlawful.
27. The deliberate refusal by DHA officials to issue transit permits at the port of entry to asylum seekers has had extreme severe consequences which will be exacerbated by the provisions of the Amendment Act. We have observed that more often than not people who are refused entry at the border resort to desperate and dangerous measures of opting to use irregular routes in order for them to enter South Africa in order to present themselves as a refugee reception office.

28. Hence they risk being robbed and assaulted by gangs who operate along the border. In addition to these concerns there is high rate of sexual gender based violence incidents that mainly affects vulnerable groups such as women and children who become victims. Hence other service providers such as Thutuzela which is aligned to National Prosecuting Authority can attest to a number of people whom they assisted who were violated when they were trying to enter the country through irregular routes.
29. Asylum seekers who are not in possession of transit permits have a limited choice when it comes to access to the refugee reception offices. For example an individual who entered into the country through Beitbridge border may be forced to lodge his application in Musina, despite having intention to apply in places such Pretoria, Port Elizabeth and Durban because if he or she attempts proceeding inland without any form of identification he might be arrested and face deportation.
30. In places like Musina many asylum seekers are arrested and detained before they could reach Refugee Reception Office which is located only 8 kilometres away from the border. However if transit permits were issued promptly and efficiently to asylum seekers at the port of entry such arbitrary arrest would be avoided, as they would be in position of documents that give them legal right to remain in the country pending their application for asylum at the refugee reception office closest to where they intend to reside.
31. Apart from the abovementioned scenarios we have also witnessed cases were individuals were taken hostage and kept in houses until they pay ransom in order for them to access the refugee reception office.
32. The proposed amendment in section 13 (amending section 21 (a) of the Principal Act) provides that an application for asylum must be made in person in accordance with the prescribed procedures, within five days of entry into the Republic. The limitation of five (5) days for an individual to report to the nearest Refugee Reception Office for the purpose of applying for asylum is of substantial concern. This development will have a negative impact for asylum seekers who had intention of applying for asylum in other areas such Pretoria, Durban and Port Elizabeth as compared to RROs based on the border. As file transfers are either not allowed or inconsistently granted, it will require asylum applicants to return to Musina on a regular basis at great expense and prejudice.
33. Individuals who fail to lodge their claims within the prescribed period due to reasons beyond their control will be excluded from refugee status as stated above. Section 2 of the Refugees Act would clearly still protect such individuals from return to their country of origin, but there would be no permit either under the Refugees Act or the Immigration Act to regularise their sojourn in the Republic. It cannot be the intent of the legislation to prevent the return of people at risk of persecution, but leave them undocumented and subject to harassment, arrest and / or indeterminate detention. Such a situation would clearly be unconstitutional.
34. In addition, South Africa cannot afford to dismantle its international obligations to provide protection to asylum seekers and refugees. At present, immigration officials at ports of entry

tend to conduct *de facto* status determination that may prevent asylum seekers from accessing refugee reception offices by not issuing asylum transit permits. Clearly, only properly trained refugee status determination officers are permitted to conduct refugee status determinations and either grant or refuse refugee status. In other words the duties of the official at the port of entry must be to facilitate access of asylum seekers in the country and not to embark on a screening process to limit access to refugee reception offices.

Recommendations:

- **We recommend that transit permits be issued promptly and efficiently to asylum seekers at the port of entry**

Access to health and psychosocial support (In response to paragraph 17 of the list of issues)

35. Refugees, asylum seekers and undocumented migrants continue to face significant barriers to accessing medical services, especially ante-natal services and emergency medical treatment. There are departmental policies in place, meant to regulate access for foreign nationals but these are hardly implemented and instead foreign nationals are met with hostility and xenophobic attitudes displayed by hospital staff, from doctors, nurses and admin personnel.
36. In the past year, following the most recent xenophobic attacks, statements were made by the MEC for the Department of Health (Xedani Mahlangu) stating that foreign nationals come to South Africa to give birth and abuse medical services meant for South Africans in general. This statement was made publicly on radio in response to an incident at a hospital in Gauteng Province where a foreign mother was forced to give birth to her child by herself on the hospital floor, leading to the death of the child.
37. Refugees, asylum seekers and undocumented persons requiring psychosocial support experience obstacles obtaining such support due to a number of issues such as failure to access legal documentation; fear of discrimination and stigma; lack of knowledge around issues related to mental health among human rights practitioners, Refugee Status Determination Officers and Refugee Appeal Board judges; no proper policies and practices are in place within government departments and bodies – this is particularly true of the Department of Home Affairs and RAB; the refugee claim assessment takes an incredibly long time instead of the six months prescribed by the law; mentally ill applicants are mistreated and discriminated against at refugee reception offices.
38. Before the implementation of LHR's Mental Health Project, there was no dedicated informed legal service provider to uphold and enforce the rights of mentally ill foreign migrants.

Recommendations:

- **The GOSA is urged to improve policies regarding access to health and psychosocial services and develop monitoring procedures to strengthen the protection of foreign migrants.**

Assessment of Refugee Claims

39. South Africa is dealing with a backlog with regards to adjudication of pending asylum applications. As a result there are applicants who have been asylum seekers for over 15 years, who continue to report to Refugee Reception Office for an extension of the asylum permit every three months with no sense of stability or finality, forced to carry on with life and establishing South Africa as their home pending the finalisation of their matter. Once the Department of Home Affairs eventually finally rejects or grants an appeal the person is so well integrated into the country with no means to go back to a country they left 15 years ago, or chances of appealing a once valid claim are now non-existent due to passage of time and the possible change in circumstances in the country they once fled.
40. Currently, in an effort to manage the backlog we are seeing a large number of rejections issued to applicants in an effort by the DHA to finalise applications expediently. This results in the rights of applicants to be fairly assessed being violated in that decisions are recklessly given, cases finalised and applicants notified informally and sent on to Lindela Repatriation Centre immediately without following procedures in terms of just administrative action.
41. We submit that at this stage of development of the asylum adjudication process it would be better to focus internally on capacity development and efficiency as a means to prevent abuse of the system. At present, research has shown that the level of decision-making lacks quality and does not meet the basic standards of administrative justice.¹⁷ This creates backlogs in the review and appeals processes which, in the end, results in extended sojourns of applicants with asylum seeker permits. This has negative consequences for:
- The Department which must renew temporary status for extended periods;
 - The Standing Committee which must review extremely high numbers of manifestly unfounded cases with little resources and an extended mandate;
 - The Refugee Appeal Board which must hear numerous appeals without the benefit of a good first instance decision; and
 - Asylum seekers who may have had valid claims at the time of arrival but for whom the situation in their country of origin changes and may not qualify for refugee status by the time a final decision is taken, but are included in the statistics as “abusers” of the asylum system.
42. Good quality RSDO decisions would prevent much of the backlog in the system. Adequate counter-corruption capacity which, in our experience, does not exist within the Department

¹⁷ Amit, R., “All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination,” African Centre for Migration and Society, June 2012.

at the moment, would also prevent abuse. Finally, an asylum system which is properly situated within a reformed migration policy, as outlined above, would allow for reforms which would alleviate pressures on both with the realities of Southern African migration.

Recommendations:

- **We urge the GOSA to expedite appeal adjudication and invest in proper training for Refugee Reception Officers, ensuring that the country of origin information is up to date.**

Financial assessment of asylum seekers and the right to work

43. The proposed amendments to the Refugees Act seek to introduce provisions which would essentially divide asylum applicants into two groups – those who can sustain themselves and their dependants for a period of four months (with the assistance of family and friends) and those who cannot sustain themselves for a period of four months.
44. The amendments introduce a provision which states that those who cannot sustain themselves and their dependants may be offered shelter and basic necessities from the UNHCR and its partners. This amendment is problematic as set out below.
45. If it is found that the asylum seeker **can** sustain herself she is denied the right to work presumably for four months, although the amendments are problematically unclear on this. What is particularly unclear is how they can be thereafter granted authorisation to work. If it is found that the asylum seeker **cannot** sustain herself she “may” be offered shelter and basic necessities provided by the UNHCR and any of its participating partners. If she is able to obtain such assistance, she will too be denied the right to work. The amendments are not clear on whether, while the asylum seeker is ascertaining whether UNHCR and their partners can assist, they are granted authorisation to work.
46. It is not difficult to conclude that a meaningful sustainability determination is not possible under the circumstances and a finding that an asylum seeker **can** or **cannot** sustain herself cannot practicably be made. Under the circumstances a sustainability determination is neither viable nor capable of implementation.
47. As set out above, in order to become the holder of the right to work, an asylum seeker must be in a position to show the RRO that they have sought and have been denied the assistance of UNHCR or its partners. These are asylum seekers who do not have support from family or friends and who are unemployed. Exhausting these requirements could involve more than one trip to UNHCR or its partners under circumstances where some asylum seekers may not live in the same city as those agencies. Once UNHCR and its partners have confirmed they cannot assist the asylum seeker must make (possibly multiple) trips to the RRO on the day for their nationality (which is only once or twice weekly), before they are accorded the right for a period of six months.

48. As has been demonstrated above, the legislative scheme envisaged by the amendments is wholly impractical and is not capable of implementation without impairing the dignity of asylum seekers. To the extent that this can be done without a sense of desperation and degradation, we submit it is possible only for a minority of asylum seekers and again cannot be a reason to impose the overly broad restrictions on the majority of the asylum seeking population.
49. The Department would do far better in attempts to equip its officials with tools to properly consider applications for asylum in a timely manner than restricting the right of asylum seekers to work in the awkward fashion suggested in the amendments.

Recommendations:

- **We urge the GOSA to remove the “sustainability” provision from the proposed amendments thereby allowing all asylum seekers the right to work**

The right to liberty and security of the person (Art 9) – Detention of migrants, asylum seekers, refugees and stateless persons

50. Article 9 of the ICCPR safeguards the right to liberty and security of the person. In order to ensure protection of this right it is important that States introduce it into their domestic legal systems. Although this has been realised in many instances, the practicality of such realisation still proves difficult in many parts of the world. South Africa is one such country which has incorporated article 9 of the ICCPR into its domestic law.
51. The South African Constitution (section 11) provides all persons within the Republic with the right to freedom and security of the person. No person may be deprived of freedom arbitrarily without just cause. The Constitution guarantees certain rights of arrested, detained and accused persons. An arrested person must appear before a court within 48 hours of arrest or as soon as reasonably possible thereof. The Constitution also ensures that every person who is detained is informed promptly of his rights, the reason for his detention as well as the right to consult a legal practitioner. The Constitution affords prisoners the rights of dignity as well as the right to be treated in a dignified manner which is not inhumane or degrading. These rights are meant to be held at the helm of South African law regarding detention and imprisonment.
52. The above rights are domesticated in the Criminal Procedure Act¹⁸ which provides the procedures which need to be followed in order to achieve the above legal principles. However, immigration detention does not fall within the ambit of this Act and is solely regulated by the Immigration Act. Persons in immigration detention are deprived of their right to liberty in both law and practice.

¹⁸ Act 51 of 1977

53. Undocumented persons, those who do not have a visa or who have allowed their visa to expire, are considered “illegal foreigners” under the Immigration Act¹⁹ and are subject to arrest and detention. Asylum seekers are allowed to enter the country without any documentation as long as they report without delay to a refugee reception office.
54. Section 41 of the Immigration Act requires that every person who is approached *on reasonable grounds* by a police or immigration officer must be able to identify him or herself as a citizen, temporary or permanent resident. If the officer is not satisfied that the person is lawfully within the country, the person in question may be detained for up to 48 hours for an investigation into their status. If indeed the person does not have authorisation to remain in the country and is not an asylum seeker she may be detained for an initial period of 30 days without a warrant pending deportation. If the person is not removed from the country within the first 30 days a court may authorise an additional 90 day detention period. This authorisation is done without the detainee present. If the 120 day total period expires without the deportation taking place, the Supreme Court of Appeal has made it clear that he or she must be immediately released, although the deportation process does not necessarily have to end.
55. Despite the Act allowing for 5 days for a new comer to seek asylum, in reality many foreigners are arrested upon arrival due to the lack of documentation and ignorance of the law of police officials. Police and immigration officials often ignore these persons’ pleas on unfounded suspicion that they are economic migrants that are abusing the asylum system. They are not afforded the opportunity to seek legal representation, explained the charge and their rights in a language they understand or given an opportunity to seek asylum but are rather transferred to Lindela Repatriation Centre (“Lindela”) to be deported.
56. The legislation which deals with detention (The Immigration Act) has been ruled to be unconstitutional in the recent case of *Lawyers for Human Rights versus the Minister of Home Affairs*²⁰. In particular, Judge Janse Van Nieuwenhuizen held that section 34(1)(b) and section 34(1)(d) of the Act are both unconstitutional. Judge Janse Van Nieuwenhuizen went on to say that it is unconstitutional for a detainee to request confirmation of her detention from a court without making representation to that court. The judgement further states that extension of the detention period over and above the initial 30 days without an appearance before the court to make such an order is unconstitutional. This serves to prove that the discrepancies in the legal framework put non-nationals in a compromised position.
57. Besides the Act being unconstitutional and violating of certain rights the implementation of this particular law is often unlawful as well. Detainees are held for days, and in some cases even weeks, while the Department of Home Affairs verifies their documents. They are then transported to Lindela where they are kept for 30 days without being informed or presented with any order of the court. If anything is being communicated to them or they are asked to sign documents, the documents or communications are often in a language they do not understand and translations are not provided. In most cases, detention is automatically

¹⁹ Act 13 of 2002

²⁰ Case no. 39171/2014

extended beyond the initial 30 days without an order from a magistrate. Those who do not have legal representation to assist them are in some cases detained for longer than the 120 days and are kept in the facility until arrangements are made for them to be deported instead of them being released after 120 days knowing that the deportation process will still continue. The conditions at Lindela are extremely poor with overcrowding and hygiene being some of the detainees' main concerns. Detainees constantly highlight the lack of adequate medical services and the infestation of lice and other insects in the cells. Despite the Constitution making provision for the respect of dignity for all within the Republic, even those detained and imprisoned, it does not seem to be the current reality in South Africa.

58. Stateless persons may be arrested and detained for 48 hours in order to establish their status. After 48 hours, the official must have finalised the investigation and will have determined that it is impossible to deport the person to any country. If that is the case, the person must be released. The official may not detain a stateless person for longer than 48 hours merely because he has not found a country to deport the person to. Stateless people may not be detained for purposes of deportation, because their deportation is impossible. In practice, however, the Act is not implemented in this way.
59. Often, people are arrested without much cause except their race or language. They are then held in detention at police stations for much longer periods than are allowed by law. Determination of status is often only done weeks into their detention at the Lindela. Many, including asylum seekers and refugees, are held in detention way past the 120 day maximum period, because status determination processes have not been followed. The practice is to request embassy officials to travel to Lindela in order to identify their citizens. Such identification is based on documentation, but if this is not available citizenship is assumed based on inconclusive factors such as language and inoculation marks.
60. Stateless persons in detention are often held indefinitely. They are not released once they have been interviewed by all possible embassies and are not "claimed" by any embassy. LHR has assisted two persons who were held in detention for 15 and 19 months respectively because there was no country who recognised them as citizens. Other clients were detained at Lindela for three to seven months at a time.
61. LHR intervenes by requesting their release based upon their statelessness after submitting applications for the rights to permanent residence on their behalf. This kind of application is available to foreigners under "special circumstances" (section 31(2)(b) of the Immigration Act). If the person is not released once we have submitted the application LHR will bring an urgent application to the High Court asking for the client's urgent release from detention. These applications are normally successful, but mostly only after 120 days of detention. The courts seem to be sympathetic towards the Department of Home Affairs in these matters and are lenient when there has been unlawful detention of foreigners.
62. LHR has represented two stateless persons who have been deported to countries where they are not recognised as citizens. One was an orphaned child who grew up in Johannesburg. He was arrested in Johannesburg as an adult, because he had no

documentation. He was detained at a police station for a week before being transferred to Lindela. Zimbabwean officials could not identify him as a Zimbabwean citizen, but he was nonetheless deported to Zimbabwe. LHR has not been able to make contact with him since. Another person was rendered stateless, because the Department of Home Affairs deported her to Zimbabwe even though Zimbabwean officials did not recognise her as a citizen. She was deported without taking into consideration that she has a minor child staying in South Africa who she has been separated from for two years since the deportation. The High Court found that she was deported too hastily and that she was not afforded the right to appeal the decision to find her to be an illegal foreigner. These are just a few examples of the irregular practice that the DHA follows in detentions in general and in particular with regards to stateless people or people at risk of statelessness.

Recommendations:

- **We urge the GOSA to amend the Immigration Act in order to allow a person arrested for immigration purposes to be brought before a court within 48 hours without having to request such an appearance and to ensure their right to be brought before the court again when the warrant of detention is sought to be extended;**
- **We urge the GOSA to put measures in place to ensure that persons are not detained for periods longer than is allowed for by the Immigration Act and to create policies regarding alternatives to detention.**

The right to humane treatment in detention (Art 10)

63. Article 10 of the ICCPR states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the person. The Constitution equally protects this right. The Immigration Act prescribes certain minimum requirements for detention for immigration purposes. These include *inter alia* the requirement to provide bedding, facilities to allow people to wash themselves and their clothes, adequate healthcare and access to sanitary goods.
64. LHR's detention monitoring project assists clients arrested and detained for immigration purposes. On average the project assists approximately 500 persons annually who are detained unlawfully. All assisted persons reported being detained at a police station before being taken to Lindela, the vast majority of them were detained at police stations for more than 48 hours and up to as much as three months. Some are not sent to repatriation centres at all but are held at police stations for the entire period of their detention. Police stations are not equipped with the facilities necessary to meet the minimum requirements for places of detention as set out by the Immigration Act. The manner in which they are detained at police stations for long periods of time when police stations do not meet the minimum requirements provided for in the Constitution and the Immigration Act violates their right to humane treatment in detention.
65. Article 10(2)(b) states that juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. However, LHR's detention monitoring project receives

complaints about minors held in immigration detention with adults on a regular basis. In 2015 LHR assisted 26 children in immigration detention (23 boys and 3 girls). They were held at police stations as well as Lindela. They were held together with adults. When the age of a juvenile person is unknown, children are held until their ages can be determined. Where the children should be regarded as children until proof of their majority is produced, in practice, children are treated as adults until they can be proven to be minors. The way that age is determined is by a medical practitioner through the Department of Social Development. The determination can only be done once a medical doctor and the social worker is available. This means that children are often held in detention for long periods of time until a practitioner is available or until the weekend has passed.

66. In February 2016 two detained persons were reported to have died in detention in Lindela. LHR together with MSF and the South African Human Rights Commission will be investigating the deaths through a series of visits to Lindela with the use of forensic pathologists. LHR is also pursuing a damages claim for a client who was detained in Lindela and lost his eye after being shot in the face at close range with a rubber bullet.

Recommendations:

- **We urge the GOSA to stop the practice of detaining persons for immigration purposes at police stations for longer than 48 hours;**
- **We urge the GOSA to ensure that children are assumed to be minors until proven to be majors, thereby preventing their detention with adults in cases of doubt**

The right to not be expelled unlawfully (Art 13)

67. Article 13 protects the right of an alien to lawfully remain in the territory of a state party and may be expelled only in pursuance of a decision reached in accordance with the law. Lawyers for Human Rights launched a Statelessness Project in 2011 in response to an influx of clients who are stateless or at risk of statelessness in South Africa. A stateless person is a person who is not recognised as a national by any state under the operation of its laws²¹.

68. LHR has represented two stateless persons who were deported to a country where they did not hold any citizenship. Both these cases were brought before court. The court held that a stateless person may not be deported and that the deportation was therefore unlawful. The DHA was ordered to produce a report with regards to the details of the deportation. DHA has not produced this report and the client has been missing since May 2015. In the other case, the court found that the client was deported too hastily and that she was not afforded her rights to an appeal of the decision to find her to be an illegal foreigner. In both these cases, the consulate officials from the receiving country did not recognise the client as a citizen and confirmed this in writing. Nonetheless, the clients were deported to the country.

Recommendations:

²¹ Definition found in article 1 of the 1954 UN Convention on the Status of Stateless Persons

- The GOSA is urged to prevent statelessness by ensuring that a person's nationality is properly determined and recognised by the receiving country, including issuance of identifying documentation, before the person is deported to such a country.
- The GOSA is urged to accede to the 1951 UN Convention on the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness as it pledged to do in 2011 in order to ensure that the rights of stateless persons are protected and that no person is rendered stateless through irregular deportation practices.

The right to be recognised as a person before the law (Art 16)

69. The GOSA submits that all persons in South Africa are recognised as a person before the law. However, extensive research by LHR's Statelessness Project has shown that there are many stateless persons living in South Africa²². Populations of concern also include non-nationals as well as those who may have a claim to South African nationality but are unable to access it because of barriers to birth registration and other identifying documentation. The GOSA has not signed and ratified the 1951 UN Convention on the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness despite a pledge in 2011 to do so. There is a total lack of legal mechanisms to determine statelessness and to provide basic rights to stateless persons in the national legislative framework. Stateless persons in South Africa are left to their fate without any assistance from the DHA.
70. LHR has been advocating for the accession of the UN Conventions since 2011 and has been assisting approximately 300 stateless persons or persons at risk of stateless per year since. There is no official data on the amount of stateless persons present in the country at the moment, but according to consulates of Mozambique there are a good 500 000 Mozambicans in South Africa who could be stateless. An influx of ex-Zimbabweans approached the LHR law clinic in 2011 seeking help because they had automatically lost their Zimbabwean nationality as a result of a change in the law in Zimbabwe. They were stuck in South Africa without a nationality. Since the project's inception in 2011 LHR has identified many more stateless populations.
71. In addition, the only remedy which could possibly apply to stateless people (called an exemption application) allows the Minister of the DHA to grant permanent residence to stateless persons, but the application is expensive (R1 340) and is adjudicated over long periods of time (as long as three years) if adjudicated at all. LHR is currently taking some of these applications to the High Court to compel an outcome and to declare the Immigration Act unconstitutional in as far as it does not make provision for stateless persons.
72. The DHA has announced that from 2016 no births will be registered after 30 days of birth, but it has not announced what the procedure will entail except to say that the requirements

²² Statelessness and Nationality in South Africa <http://www.lhr.org.za/publications/statelessness-and-nationality-south-africa>

will be extremely stringent. At the moment there is also a fee attached to late registration of birth further discouraging birth registration amongst persons in poverty.

73. A document, whether a birth certificate or an identity document, is necessary to access virtually every service in South Africa, from healthcare, to social grants to schooling and to voting. One can hardly be considered to be a person before the law if you have no legal identity.

74. Furthermore, the South African Citizenship Act is not implemented in its entirety and is often misinterpreted by DHA officials leaving would be South Africans stateless. Xenophobic attitudes at registration offices often bar persons perceived to be foreign from accessing citizenship.

Recommendations:

- **We urge the GOSA to bring national laws, regulations and policies in line with its obligations under international law; amend legislation that discriminates and creates barriers to birth registration; take further measures to reduce and eradicate existing cases of statelessness and accede to the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the reduction of Statelessness.**

Prohibition of advocacy of national, racial or religious hatred (Art 20)

Submissions in response to paragraph 2 of the list of issues in relation to the initial report of South Africa - 2015 Chatsworth Attacks

75. The GOSA's response to the Durban (Chatsworth) xenophobic attacks was characterised by a complete lack of understanding of the government's obligations and its role in refugee protection. In its report, the government refers to the activities of the United High Commissioner for Refugees ('UNHCR') as the main responsive measures while such were meant to be purely supportive in nature. The report makes no mention of concrete steps taken in order to halt the attacks.

76. In a country where there are no refugee camps the government bears the primary responsibility of providing refugee protection. While UNHCR may support the government in its activities, the burden cannot be entirely shifted to the UNHCR. The report indicates that the government lost sight of its role and as a result failed miserably in its refugee protection obligation.

77. The GOSA's response was bureaucratic in nature as evidenced by the publicizing of the Minister of Home Affairs' and the President's visit to a temporary refugee shelter for the first time during the attacks. There were also various meetings at the municipal level which appeared to be UNHCR solution dependent. Various task teams were formed but were unable to provide immediate solutions. A bureaucratic response amounts to no response in a time of crisis as it fails to filter down to robust activities on the ground. The GOSA was slow

to respond to the attacks and when it did respond, the response was improper and did not address the root cause of the attacks.

78. While the GOSA's report highlights a concern about violent attacks against foreign nationals, it neglects to detail any efforts from the police to ensure that those who have committed crimes are brought to justice. There was no due diligence when it came to the police's operations. Instead, all crimes committed were categorised as public violence which essentially prevented cases that could have been prosecuted from proceeding to trial. It appears from the GOSA's response that it has not made it its prerogative to deter future attacks by making sure that the perpetrators are held accountable.
79. The GOSA recognises that the attacks could have been avoided if there had been proper integration of refugees in South Africa. However, the report does not adequately address the means and implementation strategies that should be utilised in ensuring proper integration. The report fails to address how its own institutions will ensure that refugees and asylum seekers access government institutions without fear of institutional xenophobia.
80. In the GOSA's response to the list of issues xenophobic violence was attributed to the non-encampment policy which results in the 'competition for services, job opportunities, and other opportunities between locals and foreigners [...] which manifest in criminal elements of attacks'.²³ While there is no doubt that the acts are criminal, the response to the list of issues does not discuss other factors that contribute to xenophobic violence and attitudes and ignores previous research on xenophobic attitudes and violence. These findings include institutionalised attitudes and practices that dehumanise foreigners and minority groups, excluding them from access to social protection and rights; leadership competition in community structures that encourage the emergence of parallel and self-serving leadership structures; the lack of effective conflict resolution mechanisms that contributes to vigilantism and mob justice; and a culture of impunity regarding public violence generally which contributes to and encourages xenophobic violence.²⁴
81. In response to the 2015 violence, the government mentions it is addressing the most recent outbreak of violence in 2015 in part through the drafting of an 'integration strategy' to address integration of refugees. While the strategy is in the early stages of development, a draft strategy was released for public comment in December 2015 that revealed the exclusion of asylum seekers from the strategy. This exclusion ignores the challenges within the asylum system mentioned above and the protracted nature of the adjudication process. The narrow application will limit the impact of the strategy on social cohesion and anti-xenophobia.

Recommendations:

²³ Government response to LOI, para 10.

²⁴ Jean Pierre Misago with Loren B. Landau and Tamlyn Monson, 'Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa' IOM Regional Office for Southern Africa, Pretoria, February 2009. p. 8. Available at: www.migration.org.za/uploads/docs/report-12.pdf

- **Programs for integration should not just be targeted at community level, but it is pivotal that front-line-service civil institutions are properly trained and sensitized to allow for an integration process that filters down from state institutions to communities.**
- **Perpetrators of xenophobic violence must be properly prosecuted and incitement of violence, particularly at political level, should be adequately addressed and discouraged**

The Rights of Non-Nationals to Family (Art 23, 24)

82. In spite of Article 23 and 24 that recognise the family unit as a fundamental unit in society and mandate all state parties to ensure that every child has, without any discrimination as to nationality or social origin, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. It is submitted that this would entail among other things the ability to refrain from unnecessarily interfering in the ability of children with foreign parents to remain unseparated.

83. Section 27(g) of the Immigration Act 27 of 2002 (“Immigration Act”) provides that a foreigner may apply for permanent residence if they have a South African citizen relative within the first step of kinship. Therefore a foreign national who has a child with a South African partner, should be eligible to apply for permanent residence under section 27(g) based on their South African child. However, in practice, clients in this situation have had difficulty in making applications for permanent residence in terms of section 27(g) of the Immigration Act. These clients’ applications for permanent residence on the basis of their minor dependent child are rejected. Some of the clients are informed that it is not possible for them to submit such an application for permanent residence on the basis of their minor child at all. Both of these decisions are made because the Department of Home Affairs informs that:

“An application for permanent residence in terms of section 27(g) of the Immigration Act 13 of 2011, as amended, read together with Regulation 23(7) requires a citizen or permanent residence holder to satisfy the Director-General that he or she is able and willing to support applicant. Your dependent is not in a position to assume financial, emotional, medical and physical responsibility for you to the fact that he or she is a minor. You are unable to fulfil the abovementioned requirement and satisfy the Director-General accordingly”

84. As minor children are generally dependent on their parents and not vice versa, generally they are unable to provide this financial undertaking required consequently denying some parents the ability to continue residing in South Africa with their children. They would have to either continuously apply for temporary residence or leave the country which puts their children at risk of living without both parents. In some instances, this places children at risk of losing their breadwinner which threatens their ability to attend school, access health, food security among others simply because one of their parents is foreign.

85. It is our submission that the rejection of foreign parents' applications and/or their being prevented from making applications for permanent residence under section 27(g) of the Immigration Act is a violation of the ICCPR and the Constitution.

Recommendations:

- **We urge the GOSA to immediately amend the section 27(g) of the Immigration Act to the extent that it requires minor children to assume and provide financial undertaking for their foreign parents. Further, the government must be urged to review all the applications rejected on this basis without any further to the applicants.**

Spouses

86. The planned amendments to the Refugees Act exclude spouses who were not married in their country of origin. The amended definition of "dependant" as described above results in asylum seekers who have not married in their countries of origin being denied the opportunity to be recognized as each other's dependants.

87. Ultimately this definition has the fatal result of denying asylum seekers who are married to refugees in South Africa and whose refugee claims have been finally rejected from applying on new grounds in terms of section 3 (c) of the Refugees Act.

88. In addition, the new definition also restricts the definition of "spouses" to spouses who have been "legally" married in their country of origin. This presents numerous difficulties. Firstly, it excludes spouses married in South Africa thereby separating families. South African law permits the marriage of foreign nationals within South Africa and there is no reason to exclude such spouses from the definition of a spouse. This will further have negative effects for children of such families who may be forced to choose between one of the parents for legal status. Secondly, this may exclude spouses whose inability to marry is the basis of their claim for refugee status. This would include spouses of the same sex who could legally marry in South Africa, but whose same-sex relationship may be the basis of their claim for refugee status. Another basis may be where members of different tribes or races are prevented from marrying one another. Thirdly, the definition of "legally" is not prescribed by the Act. "Legal" marriages may include customary marriages which are recognised in their country of origin, but perhaps not in South Africa. The definition of "legally" should be defined as referring to the laws *and customs* of the country of origin.

89. The definition also limits the destitute, aged or infirm members of a family to the "parent" of the asylum seeker. This is a limitation which may not be the reality of many families who take care of the destitute, aged or infirm as members of the family, even if they are not biologically related. This limitation may be unfair and not reflective of the realities of many families, particularly those which arise from areas of conflict.

90. The inclusion of the qualification "and who is included by the asylum seeker in the application for asylum" intends to create a view of a family which is static at the moment of

application. This is certainly not the reality of the majority of families, and particularly those which come from areas of conflict.

91. It should be noted that exclusion in legislation cannot replace adequate investigations and evaluations by Departmental officials. By shifting the burden entirely to the asylum applicant rather than allowing for some discretion on the part of the Department to take into account the living and changing reality of many families, coupled with proper investigations to prevent fraud or abuse, is unfair and will violate the principle of family unity as enunciated by the UNHCR Handbook²⁵ and international best practice.

Recommendations:

- **We submit that the requirement to include members of the family at the time of application should not be included in the definition, but should rather be a requirement of the application form. This would allow a certain amount of discretion given to the RSDO or the Standing Committee to include dependant who may not have been included in the initial application for asylum (such as children born to the applicant or dependents who were previously presumed dead), but are dependent on the main applicant.**

The right of every child to a name and a nationality (Art 24)

92. While acknowledging the positive efforts by the South African government to increase birth registration and make legislative changes toward inclusive citizenship laws, there still remain vital gaps in the law and its implementation, which leave children stateless or at risk of statelessness in South Africa.

93. Children who are stateless face many challenges on a daily basis. Because of their lack of status and identification they have trouble enrolling in school, getting medical assistance, obtaining a birth certificate, registering for exams and, importantly, sharing in their community's identity. Over a prolonged period of time, stateless children are exposed to high levels of stress and may even become depressed and anxious. Their emotional state is aggravated by the thought of an uncertain future. They do not know what their fate will be once they reach adulthood. They fear that, if they do not obtain a nationality by the age of majority, they will not be able to study, pursue a career, be legally employed, provide for themselves and their families financially or that they may be deported to a country that they do not know. Access to the right to nationality is a critical part of preventing discrimination against the child, ensuring the best interest of the child and facilitating access to all their other rights.

²⁵ The UNHCR Handbook has been considered as "soft law" in asylum adjudications. In the case of *Tantoush*, the Handbook was considered in determining whether the proper appeal procedures had been followed. It was found that the UNHCR Handbook can be seen as soft law and may be used by courts in determining best practice. It would behove the Department to take cognizance of the Handbook to avoid unnecessary litigation.

94. South Africa is not a party to both the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness despite its pledge in 2011 to sign these conventions. Accession to these conventions is a necessary step towards ending childhood statelessness in South Africa.
95. The present legal framework discriminates against certain groups of children in that it disadvantages adopted children, children born to foreigners, stateless persons or irregular migrants as well as children born out of wedlock. Such children face disproportionate and arbitrary barriers when applying for nationality and identifying documentation.
96. The national citizenship law discriminates against children based on the status of their parents and their place of birth by imposing additional pre-requisites such as birth registration for acquiring citizenship. Given the barriers to birth registration that children at risk of statelessness face, the requirement of birth registration promotes rather than prevents statelessness.
97. The South African Constitution provides absolute protection against childhood statelessness, but there is a lack of implementation of protective provisions and national legislation contradicts the Constitution and creates barriers to citizenship. Of particular concern is the fact that there are no regulations to facilitate applications for nationality of otherwise stateless children; there are no safeguards to protect against statelessness of the child in the event of their parent's loss, deprivation or renunciation of nationality; birth registration is a pre-requisite for access to citizenship; and unaccompanied migrant children have no access to naturalisation procedures.
98. The current birth registration legal framework is inaccessible to the most vulnerable children, due to stringent and discriminatory registration requirements and the exclusion of certain vulnerable groups of children. This leads to statelessness in South Africa. While we encourage the attainment of universal birth registration, we also encourage the Government of South Africa to refrain from penalising those whose births have not been registered, by removing birth registration as a pre-requisite for the acquisition of nationality.
99. Birth registration is impossible for the children of irregular migrants or parents with expired visas; for children of temporary residents who were not registered within 30 days; for separated children living with guardians; children born outside of a hospital if no South African citizen is present to witness the birth; and children of unmarried fathers where the mother has passed away.
100. The GOSA in their initial report in paragraph 232 claim that all children born in the territory of South Africa are automatically granted South African citizenship under the South African Citizenship Act. This is in fact not the case. South African citizenship is obtained automatically if either of their parents are a South African citizen. Children born to non-citizens are not granted citizenship, unless they are born on the territory and do not have the nationality of another country. This provision, which was designed to prevent statelessness, is currently entirely inaccessible and is not implemented. LHR has brought

such a case before the High Court of South Africa. The child was born stateless in South Africa. When she attempted to obtain citizenship through this provision she was rejected, firstly, because there is no procedure or form through which to apply for recognition of such citizenship and, secondly, because the Department of Home Affairs refuses to implement this provision. The reason given to LHR was that too many children will apply for citizenship in terms of this section. Despite an order made by the High Court declaring the child's South African citizenship and ordering the DHA to provide forms and procedures to facilitate application, the DHA refuses to implement the order. The DHA is appealing to the Supreme Court of Appeal in order to deprive the child of citizenship.

Recommendations:

- **We urge the GOSA to bring national laws, regulations and policies in line with its obligations under international law; amend legislation that discriminates and creates barriers to birth registration; address the current gap in the law which allows children at risk of statelessness to reach adulthood without obtaining nationality; take further measures to reduce and eradicate existing cases of statelessness among children and accede to the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the reduction of Statelessness.**
- **We urge the Committee to request the Government of South Africa to implement these recommendations in order to eradicate childhood statelessness in South Africa so that every child may have access to the right to a nationality.**

The right of every citizen to take part in the conduct of public affairs and to have access to public services (Art 25)

101. The reality of statelessness in South Africa has been discussed above. LHR assists a growing number of South African citizens who cannot access birth registration and other identifying documentation, eventually leading to statelessness. These persons suffer because their nationality, right to be present in the country and a myriad of other civil and political rights are not recognised. People without documentation are not able to access their rights to healthcare, schooling, the right to vote or stand for office, the right to a passport and freedom of movement, the right to be employed. The fact that statelessness is not addressed in law or in practice violates the rights of would-be citizens to take part in the conduct of public affairs and to have access to public services.

Recommendations:

- **The GOSA should be urged to ensure that all citizens have equal access to documentation and particularly birth registration. The GOSA should remove all discriminatory provisions from the Births and Deaths Registration Act in order to remove barriers to birth registration for certain groups.**