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Policy Shifts in the South African Asylum System: EVIDENCE AND IMPLICATIONS



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ACKNOWLEDGEMENTS

This report was researched and written by Tara Polzer Ngwato for the African Centre for Migration & Society at the University of the Witwatersrand and Lawyers for Human Rights. Important inputs were provided by Jacob van Garderen, Kaajal Ramjathan-Keogh, Rosalind Elphick, Roni Amit, Lee Anne de la Hunt, Jens Pedersen, Mia Greenblo, the Scalabrini Centre Cape Town, the members of the Umoja 2 women's group and Johanna Kistner at the Sophiatown Community Psychological Services, and Braam Hanekom at PASSOP. Thanks also go to the members of the Home Affairs Portfolio Committee who took the time to be interviewed.

This report was enabled by support from the European Union, the Sigrid Rausing Trust and Atlantic Philanthropies.

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Policy Shifts in the South African Asylum System:
EVIDENCE AND IMPLICATIONS

A REPORT BY THE AFRICAN CENTRE FOR MIGRATION & SOCIETY
AND LAWYERS FOR HUMAN RIGHTS



ACRONYMS

ANC	African National Congress
RAB	Refugee Appeal Board
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SCRA	Standing Committee on Refugee Affairs



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EXECUTIVE SUMMARY

This report is motivated by evidence of recent changes in practice within the asylum system in South Africa, as well as statements concerning intended shifts in policy. Since early 2011, these shifts have occurred in five areas:

1. **Group Exclusion:** *a priori* restrictions on groups of persons (by nationality) seeking to enter the country to apply for asylum. This includes practices similar to a 'first/third safe country' principle for persons seeking to enter South Africa to apply for asylum, as well as the unlawful denial of entry to Zimbabwean asylum seekers without travel documents;
2. **Access barriers:** ad hoc and unlawful use of asylum transit permits (Section 23 permits) to limit access to asylum by not issuing such permits to self-declared asylum seekers at border posts and by requiring asylum applicants to present such permits to gain access to Refugee Reception Offices;
3. **Limitation of basic rights:** declared intention to reconsider the right to work and study for asylum seekers as well as limit the right to freedom of movement;
4. **Refugee Reception Offices:** closing existing Refugee Reception Offices and declaring an intention to move Refugee Reception Offices to international border areas rather than retaining them in primary urban centres;
5. **Appeals:** increased backlogs due to the restructuring and under-capacitation of the Refugee Appeals Board as well as the introduction of increased administrative hurdles for lodging an appeal.

Taken together, these existing and emergent changes represent a **major shift in the approach to asylum** – the most significant since the asylum system was established in the mid- to late 1990s. The recent changes amount to a significant reduction of asylum seeker and refugee protection, culminating in increased danger of *refoulement* of people seeking to apply for asylum in South Africa, in contravention of domestic and international law.

The report documents the following broad concerns across the above areas of policy and practice:

- The **changes in practice have not been preceded by explicit policy documents** setting out the nature and purpose of these practices.
- There is **no clear statement of the intended strategic aims** of shifts in practice and proposed policy. Where strategic aims have been identified, there is either **no evidence that the problem exists** to a significant degree (such as asylum seekers posing a security threat to South Africa), or there is **no logical connection between the problem and the proposed solution** (such as moving Refugee Reception Offices to the border to avoid legal challenges from neighbouring businesses, when these could be avoided through better RRO administration or moving within the urban metros).
- The recent practices are either in **contravention of the law** (international and domestic) and/or they **clash with the spirit of the law**. In several cases, the Department of Home Affairs is acting against and in contempt of specific court orders.
- There is evidence that current shifts in practice are **already showing counterproductive effects** for both asylum seekers and for South Africa and South Africans, and that these negative effects are likely to increase.
- There has been **little substantive consultation with stakeholders**, whether in affected Government departments, civil society or communities (South African and foreign) regarding either the changes in practice or the underlying policy intentions.

The report further documents the following concerns and implications for different areas of the asylum system.

Group Exclusion: 1st or 3rd Safe Country

- The 'first safe country' principle states that an asylum seeker is expected to apply for asylum in the first safe country where they have an opportunity to apply for asylum, and that this country is responsible for assessing the asylum claim. If they first apply for asylum in a subsequent country, that country can return them to the first country in order to adjudicate their asylum claim there.¹ Some regions, such as the European Union, also have 'safe third country' arrangements based on bilateral or multilateral agreements between countries. Under this principle, a destination country can return an asylum seeker to another country through which the asylum seeker passed if there is a safe third country agreement with that country. Such arrangements are agreements between specific countries and are not enshrined in international law in any way.
- The DHA has repeatedly expressed the intention to introduce a 1st/3rd country principle for accepting asylum seekers, but no policy to this effect has been presented for public or Parliamentary consideration even though it represents a significant change from existing legislation which requires individual assessment of all asylum claims. In spite of a lack of policy, 'pre-screening' practices based on a 1st/3rd safe country logic are already being implemented in an ad hoc fashion, in contravention of the Refugees Act.

¹ Hathaway, J. C. (2005). *The Rights of Refugees under International Law*. Cambridge, Cambridge University Press.

- South Africa's current application and discussion of 1st or 3rd country principles does not fulfil the basic conditions established by UNHCR and domestic law, including the need for individual considered assessment rather than blanket 'pre-screening' practices; and multilateral rather than unilateral application.
- The inappropriate and ad hoc application of 1st/3rd safe country practices may result in *refoulement*, in contravention of international and domestic law.
- The development of a multilateral, regional 1st/3rd safe country framework is a long-term process and is likely to result in an asylum system which is more costly and administratively complex for South Africa than the current system.

Group Exclusion: Refusal of Entry based on Nationality and Lack of Travel Documents

- Between March 2011 and July 2012, immigration officials at Beitbridge and Lebombo border posts have denied Zimbabwean asylum seekers without valid travel documents entry at ports of entry.
- Denial of entry constitutes *refoulement* and is therefore in contravention of South Africa's international legal commitments. It also violates individuals' rights to apply for asylum under the Refugees Act.
- There is no effective remedy through which an asylum seeker can resist denial of entry or seek recourse for an unjust decision, which is against South Africa's Constitutional principles.
- Denial of entry is an administrative injustice in that border officials are taking decisions, especially decisions with significant human rights consequences, which are outside their scope of authority under South African law.
- Allowing state officials to exercise ad hoc authority outside their mandated powers erodes the rule of law and public confidence that government institutions are accountable to those they serve.
- Denial of entry pushes people to enter the country irregularly, exposing them to the concomitant dangers of rape, gang rape, assault, people smuggling, human trafficking, theft and death during passage.
- Such practices invite international scrutiny of South African asylum processes and the fulfilment of commitments under international law.

Administrative Barriers to Access: Section 23 Permits

- Since early 2011, there have been episodes in which the Immigration Act's asylum transit permit (known as a Section 23 permit) was used to deny asylum seekers access to asylum. Either immigration officials at border posts were not issuing Section 23 permits to asylum seekers, in contravention of the Immigration Act, or Refugee Reception Offices were turning away new asylum applicants if they did not have a Section 23 permit, in contravention of the Refugees Act, or both.
- Non-issuance of a Section 23 permit to asylum seekers at the border may lead to *refoulement* if such asylum seekers are arrested and deported as illegal immigrants once in South Africa.

- Both the illegal non-issuance of Section 23 permits at the border and the illegal requirement of Section 23 permits to apply for asylum at RROs reflect a lack of basic legal knowledge, coherence and oversight among DHA officials at different levels.
- These practices have recurred repeatedly in spite of legal challenges in the past and the admission from DHA that the practices are unlawful.
- There is no effective remedy through which an asylum seeker can resist denial of entry or seek recourse for an unjust decision, which is against South Africa's Constitutional principles.
- Denial of entry is an administrative injustice in that border officials are taking decisions, especially decisions with significant human rights consequences, which are outside their scope of authority under South African law.
- Allowing state officials to exercise ad hoc authority outside their mandated powers erodes the rule of law and public confidence that government institutions are accountable to those they serve.
- Denial of entry pushes people to enter the country irregularly, exposing them to the concomitant dangers of rape, gang rape, assault, people smuggling, human trafficking, theft and death during passage.
- Such practices invite international scrutiny of South African asylum processes and the fulfilment of commitments under international law.

Limitation of basic rights for asylum seekers

- Currently, asylum seekers have the right to work and study in South Africa and the right to move freely within the country. There have been indications that the DHA and other stakeholders are considering limiting these rights. Such limitations have not yet been formulated in any written policy statement or legislative draft, but there have been ad hoc attempts to implement limitations without such a policy basis (e.g. DHA communication with SAPS to close foreign businesses in townships).
- The Constitutionality of limiting the right to freedom of movement and freedom to work is questionable.
- There is no coherent plan regarding the consequences of limiting asylum seekers' rights to work on the rest of the current system of self-sufficient self-settlement. Alternatives to self-sufficient self-settlement are likely to have additional cost implications for the tax payer as the government has to pay for shelter, food, clothes and dedicated health and education services. Neither international organisations nor local NGOs would be able to foot this bill given South Africa's middle income country status.
- The reasons given for limiting asylum seekers' rights to work confuse the reasons why people apply for asylum, and basic rights once they have applied.

Refugee Reception Offices: Closure of Existing RROs

- The Refugee Reception Offices (RROs) are the primary point of contact between asylum seekers/recognized refugees and the DHA. Since mid-2011, the Department of Home Affairs has closed several existing RROs – in Johannesburg, Port Elisabeth and Cape Town – and expressed its intention to all RROs from their current locations

in major cities to the country's international land borders. **This intended move and the closure of existing offices is not merely a technical, operational decision, but one which impacts on the basic principles of the asylum system**, namely access (for initial applications, renewals, status determination interviews and appeals) and administrative efficiency and fairness.

- Johannesburg, Port Elisabeth and Cape Town RROs were closed in an unlawful manner (as established by court cases in each city) due to a lack of substantive consultation with the Standing Committee on Refugee Affairs or with affected groups. Such legal challenges will continue if DHA continues closing urban RROs.
- It is of grave concern that in all three cases, DHA has ignored direct court orders to reopen RROs or to provide equivalent services in these municipalities. This constitutes contempt of court and suggests that the DHA has little regard for the rule of law.
- RRO closures are placing significant financial burdens on asylum seekers and refugees, even though the courts have established the Department's duty to support rather than hinder access.
- The increased pressure on the remaining RROs in Tshwane (Marabastad and TIRRO) have led to increased access challenges, delays, corruption and violence (including at least four deaths) for new asylum seekers and those needing to renew permits.
- The ensuing inability to lodge applications or renew documents has left asylum-seekers and recognized refugees at risk of becoming undocumented and therefore being subjected to fines, detention and direct or indirect *refoulement* in violation of South Africa's obligations under domestic and international refugee and human rights law and standards.
- The closure of urban RROs constitutes the implementation of policy before the completion of policy formulation. As stated in DHA's answering affidavits to the Johannesburg, Port Elisabeth and Cape Town court challenges, the closure of urban RROs has been motivated by DHA's intention to move all RROs to border areas, but there is as yet no well-developed policy regarding the border move.

Refugee Reception Offices: Move to Borders

- The impact of moving RROs to international land borders depends on the details of the plan. The following questions remain unanswered, based on public statements about the move to date:
 - Would all existing asylum management functions be moved out of current urban areas and to offices located at ports of entry, or only functions relating to registering new arrivals?
 - Where would the 'port-of-entry' RROs be located, given that while most asylum seekers enter the country through Beitbridge and Lebombo land borders, significant numbers also enter through other land borders (from Swaziland, Botswana, etc.), through sea ports or through airports?
 - Given that domestic and international law prohibit penalising asylum seekers for entering a host country by irregular means, how will asylum seekers be treated who only declare their intention to apply for asylum once inside the country's territory?

- What adjudication processes are intended to be completed at the port of entry RROs, and in what timeframes?
- Given that any documentation process takes time, how will DHA manage the welfare requirements of asylum seekers while waiting to access and complete documentation processes?
- Would asylum seekers be required to remain in the vicinity of the border RRO for the duration of the permit adjudication and processing period? If so, would some form of detention be required for some or all asylum seekers?
- As argued in the RRO closure cases, the decision to close existing RROs without replacement amounts to administrative action which 'materially and adversely affects the rights of the public.' As the decision to relocate RROs to ports of entry at land borders is a direct correlate of the closure of existing RROs and has been described by the DHA as within its existing administrative purview (under the authority of the Director General based on the Refugees Act), it can be seen as administrative action and must therefore fulfil PAJA criteria. The justifications provided for the move, however, do not fulfil these criteria.
- There has not been substantive consultation with affected groups and stakeholders.
- If all RRO functions are moved to the borders, especially those affecting asylum seekers and refugees already in the country, this would impose an unreasonable burden of costs on existing asylum seekers and refugees to complete administrative processes such as permit renewals, status interviews, assistance with lost permits, verification of permits for banking purposes, etc. to which they have a right in terms of efficient service provision, and regarding which the courts have established the Department's duty to support rather than hinder access.
- In contradiction to its stated aims, the policy is likely to increase the number of genuine asylum seekers who remain undocumented, either because new arrivals avoid port-of-entry-based RROs, or do not know to access them and are giving no other in-land options, or because existing asylum seekers have their status lapse due to their inability to access distant RROs.
- Since more stringent asylum application processes are well known not to deter migration, moving RROs to the border will not reduce the number of economic migrants seeking to enter and remain in South Africa.
- The provision of shelter and basic services will necessarily be a central aspect of keeping large numbers of newly arrived asylum seekers in a remote border area with limited opportunities for self-sufficiency for the period of time needed to have some or all aspects of their status applications processed. If adequate provisions are not made, a humanitarian emergency is likely to result, as was the case in Musina in 2009. The Refugees Act only provides for the establishment of temporary reception centres for asylum seekers in the case of a 'mass influx', so establishing such centres without such conditions would require a change in the Act.
- It is likelihood that moving RROs to remote ports of entry will be coupled with the detention of asylum seekers. South Africa has a non-encampment policy but there are several indications that some form of *de jure* or *de facto* detention is planned, even if such detention may not be called a 'camp'. It is important for DHA to state

openly whether it intends to detain asylum seekers in the border area while their applications are being processed, and what form such detention would take.

- The necessity of providing welfare support, in addition to the costs of new premises and moving staff, mean moving RROs to the border will come with a significant cost to the tax payer. Detaining asylum seekers is also very costly.
- There will be resistance from the municipalities and local communities where new RROs are to be located.
- It is likely that moving and consolidating RROs would lead to severe disruptions in services due to the initial movement of files and systems and longer term administrative problems due to the remoteness of the border locations.
- It is likely that DHA will struggle with staffing, as experienced and senior DHA staff and Refugee Status Determination Officers may not wish to move to remote border towns.
- South Africa is likely to continue to be questioned in international fora such as the UN's Universal Periodic Review and the African Union Peer Review Mechanism if the border move leads to asylum seeker detention, severe humanitarian crises due to lack of adequate shelter and welfare provision, or extreme hardship for existing asylum seekers and refugees in keeping their documentation up to date.

Appeals

- Slow appeal completion rates due to low capacity and the need to rehear many cases after the non-renewal of Refugee Appeal Board (RAB) judges means that a new backlog has developed, increasing appeal waiting times.
- New RAB judges are inexperienced in Refugee law. While they are all legally trained, they have only received half a day of training in refugee law by UNHCR since they were appointed.
- New procedures make it harder for asylum seekers to manage their own appeals, disadvantaging those without access to legal service providers, including especially those not based in the major metro areas where legal service providers have their offices.
- The division of responsibilities between DHA and the RAB, and the extent of the latter's independence, is of concern, as questions to the Home Affairs Minister regarding the appeals process were answered by the RAB.

In conclusion, this report seeks to provide a basis for further engagement between the Department of Home Affairs and other stakeholders regarding the future of the asylum system in South Africa.

Such stakeholders include government institutions with mandates to uphold and monitor Constitutional rights and ensure effective government services, such as the Monitoring and Evaluation Department in the Presidency, the Public Protector, the Department of Justice and Constitutional Development, and the South African Human Rights Commission. It also includes departments whose work is directly affected by DHA choices and actions within the asylum system relating to tax payer costs (Treasury) and international reputation (Department of International Relations and Cooperation). Relating specifically to the intention to move

RROs to border areas, this affects the host municipalities in border areas (probably Nkomazi in Mpumalanga and Vhembe and Limpopo), and therefore the Department of Cooperative Governance and Traditional Affairs and SALGA as representatives of the interests of those municipalities.

A further key stakeholder is the African National Congress. Some of the key policy shifts relating to limiting asylum seeker rights to work, moving RROs to the borders, and detaining asylum seekers, are reflected in party policy discussion documents. More broadly, these documents suggest an increasingly strong security paradigm as informing asylum and immigration management. This document can support continued internal ANC discussions as to the desirability of such approaches as well as debates between the ANC and broader South African society.

Another important stakeholder is the UNHCR, as the international organisations mandated with the protection and asylum seekers and refugees.

South African and regional civil society (given the regional impacts of a 1st/3rd safe country policy) can use this report to coordinate discussions about advocacy approaches. The concerns raised are of interest to civil society organisations dealing with Constitutional rights and administrative justice, broadly speaking, as well as with refugee rights specifically. For organisations providing services (whether legal or welfare) to asylum seekers and refugees, this report can assist in considering responses to predictable impacts on their own activities, in so far as many of these are oriented around the presence of self-settled and self-sufficient asylum seekers and refugees in urban areas rather than in remote rural border areas.

Finally, in congratulating Minister Nkosazana Dlamini-Zuma on her election as Chair of the African Union Commission, we hope that her replacement as Minister of Home Affairs will take the concerns raised in this report into account when considering her or his strategic direction in relation to South Africa's asylum system.

1. INTRODUCTION

This report is motivated by evidence of recent changes in practice within the asylum system in South Africa, as well as statements concerning intended shifts in policy. Since early 2011, these shifts have occurred in five areas:

1. **Group Exclusion:** *a priori* restrictions on groups of persons (by nationality) seeking to enter the country to apply for asylum. This includes practices similar to a 'first/third safe country' principle for persons seeking to enter South Africa to apply for asylum, as well as the unlawful denial of entry to Zimbabwean asylum seekers without travel documents;
2. **Access barriers:** ad hoc and unlawful use of asylum transit permits (Section 23 permits) to limit access to asylum by not issuing such permits to self-declared asylum seekers at border posts and by requiring asylum applicants to present such permits to gain access to Refugee Reception Offices;
3. **Limitation of basic rights:** declared intention to reconsider the right to work and study for asylum seekers as well as limit the right to freedom of movement;
4. **Refugee Reception Offices:** closing existing Refugee Reception Offices and declaring an intention to move Refugee Reception Offices to international border areas rather than retaining them in primary urban centres;
5. **Appeals:** increased backlogs due to the restructuring and under-capacitation of the Refugee Appeals Board as well as the introduction of increased administrative hurdles for lodging an appeal.

The shifts in practice regarding access barriers and the appeals process are largely administrative in nature and continue similar kinds of problems experienced with access and appeals for many years. Group exclusion, limitation of basic rights and the proposed move of Refugee Reception Offices, however, go to the heart of the asylum system's nature and spirit and are qualitatively different than many past challenges with the asylum system.

Taken together, these existing and emergent changes represent a **major shift in the approach to asylum** – the most significant since the asylum system was established in the mid- to late 1990s. In contrast to the 1990s, however, the current policy shift has not been preceded by public debate and transparent policy-making processes. There has been no Green Paper, White Paper, strategic report or policy review document with which stakeholders could

engage publically. While the Department of Home Affairs has stated for several years that it is in the process of conducting a strategic policy review on which basis it aims to revise asylum legislation and practice, no such document has ever been made public.

On 28 February 2012, the Director General of Home Affairs reported to the Parliamentary Portfolio Committee of Home Affairs that a White Paper on International Migration, focussed on 'policy options for managing the migration of skilled and unskilled migrants' was in process, and that a draft paper had been approved for further development by the Executive Management Committee.² Most recently, the Minister of Home Affairs, in her budget speech on 25 April 2012 noted that, in terms of prioritizing the management of immigration, "we will later this year gazette an immigration policy document that will present a coherent set of proposals for discussion by both stakeholders as well as members of the public."³ This is an important announcement, especially if it includes a long promised integrated approach to immigration and asylum. We nonetheless present this report in advance of this policy document's release for two reasons:

- To document concerns that significant changes in the asylum system are being implemented in advance of a public policy discussion, thereby presenting a *fait accompli*, rather than enabling substantive consultation;
- To constructively contribute to policy debates by identifying strategic, legal and operational challenges with recent practices and proposed policies.

This report is based on the belief that **new or revised government policies and significantly revised practices**, especially if they affect the exercise of basic human rights, **should meet basic criteria to enable South Africa to meet its domestic and international legal and normative commitments.**⁴

Policies and practices should:

- Be **clearly formulated, justified and communicated before implementation**. All practices should be based on an explicit policy, rather than practices commencing *ad hoc* before a policy has been formulated or debated;
- Respond to clear and transparent **strategic aims**, e.g. what overall purpose the policy or practice aims to achieve and the needs and interests of which actors the policy or practice aims to address. These strategic aims should be clearly communicated as part of the policy-making process;

² http://www.pmg.org.za/report/20120228-department-home-affairs-performances-and-expenditures-forthird-quarte?utm_source=Drupal%3Chttp://www.pmg.org.za/report/20120228-department-home-affairs-performances2and-expenditures-forthird-quarte?utm_source=Drupal&utm_medium=email&utm_campaign=Free%20Alerts%3E%20&utm_medium=email&utm_campaign=Free%20Alerts

³ Minister of Home Affairs Dr Nkosazana Dlamini Zuma's Budget Speech, National Assembly, Cape Town, 25 Apr 2012, <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=26918&tid=65811>

⁴ South African courts (President of the Republic of South Africa v South Africa Rugby Football Union (3) 2000 (1) SA 1 (CC)) have concluded that there is a distinction between the formulation of policy and administrative action, and that the formulation of policy is therefore not governed by the criteria set out in the Promotion of Administrative Justice Act (PAJA) (Act 3 of 2000). We therefore only apply PAJA criteria (see below) to practices established to be administrative actions. There has also, however, been case law suggesting a distinction between policy formulation in a broad and a narrow sense, where the narrow sense relates to decisions regarding the implementation of legislation. 'The formulation of policy in the exercise of such powers may often constitute administrative action.' (para 18, *Permanent Secretary, Department of Education and Welfare, Eastern Cape vs Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC)). While the judgment on whether a particular decision or set of decisions by DHA regarding the asylum system constitutes narrow or broad policy formulation rests ultimately with the courts (were such a case to be brought), this report argues that most of the decisions under discussion in this report amount to narrow policy formulation and therefore should be held accountable to criteria substantially similar to administrative justice criteria and generally with the Constitutional requirement that decisions be lawful, reasonable and procedurally fair (Section 33, Constitution of 1996)

- Be **consistent with existing laws**, including the basic rights enshrined in the Constitution, existing domestic acts, and international law to which South Africa is a signatory;
- Help build institutions which **effectively fulfil their stated functions**, as per the overall strategic aims of the policy, based on all available evidence regarding a policy's or practice's likely effects. This means **avoiding predictable adverse or counterproductive impacts**;
- Be developed in **substantive consultation** with affected and interested constituencies. In addition to being a legal requirement in the case of administrative action,⁵ if applied to policy development such consultation helps to ensure that new policies are grounded on the best possible sources of evidence regarding their likely impacts, and that they do not face preventable legal and popular challenges.

We are concerned that the shifting practices within the asylum system do not fulfil these criteria.

- The **changes in practice have not been preceded by explicit policy documents** setting out the nature and purpose of these practices.
- There is **no clear statement of the intended strategic aims** of shifts in practice and proposed policy. Where strategic aims have been identified, there is either **no evidence that the problem exists** to a significant degree (such as asylum seekers posing a security threat to South Africa), or there is **no logical connection between the problem and the proposed solution** (such as moving Refugee Reception Offices to the border to avoid legal challenges from neighbouring businesses, when these could be avoided through better RRO administration or moving within the urban metros).
- The recent practices are either in **contravention of the law** (international and domestic) and/or they **clash with the spirit of the law**. In several cases, the Department of Home Affairs is acting against and in contempt of specific court orders.
- There is evidence that current shifts in practice are **already showing counterproductive effects** for both asylum seekers and for South Africa and South Africans, and that these negative effects are likely to increase.
- There has been **little substantive consultation with stakeholders**, whether in affected Government departments, civil society or communities (South African and foreign) regarding either the changes in practice or the underlying policy intentions.

In relation to most of the changes discussed below, especially regarding the closure of urban Refugee Reception Offices and their intended move to the international borders, the Department of Home Affairs has claimed that it is not changing policy but merely implementing existing policy through administrative decisions. In the case of administrative action, the Promotion of Administrative Justice Act (PAJA) sets out clear criteria to give effect to the Constitutional right⁶ to administrative action that is lawful, reasonable and procedurally fair.⁷

⁵ Promotion of Administrative Justice Act (PAJA) (Act 3 of 2000) Section 4

⁶ Section 33, Constitution of the Republic of South Africa (1996)

⁷ Promotion of Administrative Justice Act (No 3 of 2000)

To the extent that the changing practices in the asylum system described below constitute administrative action,⁸ these criteria apply:

- The decision-maker must provide clear reasons for the decision;
- The decision must correctly apply the law;
- The decision must be based on relevant considerations;
- The decision must not be based on irrelevant considerations;
- The decision must not be arbitrary; and
- The decision must be rational and reasonable, and demonstrate a logical connection to the information and reasons presented by the decision-maker.⁹

As discussed in detail below, we are concerned that recent shifts in practice do not fulfil these legal requirements.

This report therefore aims to:

- Summarise the dispersed evidence of changes in asylum practice. This will create a shared information base about current practices, as monitored by various civil society organisations. This will provide a basis for discussion among different agencies in Government, among different civil society actors, and between government and civil society;
- Summarise and analyse the limited statements available in which the Department of Home Affairs and other key decision-makers set out their medium and long term strategic aims;
- Relate both practices and policy aims to existing domestic and international law;
- Relate both practices and policy aims to existing evidence (domestic and international) of likely (unintended) consequences

The overall aim of the report is to establish a basis for substantive discussion about the future of asylum policy in South Africa so that this policy is strategic and legal, does not have unintended negative consequences and is transparent.

There are several reasons why the nature of South Africa's asylum policy development should be of concern to actors beyond the Department of Home Affairs, asylum seekers/refugees, and specialized NGOs representing refugee interests. While immigration policy is a relatively low priority area in South African domestic policy-making (as compared with employment generation, poverty alleviation, combatting crime, etc.), it impacts on a wide range of stakeholders in the country, beyond asylum seekers, refugees and migrants themselves. There are implications for the principles of Constitutional rights and administrative justice, for the rational use of tax money, and for public health among others. This is detailed further in the course of the report. Furthermore, South Africa's treatment of foreign nationals has become a focus of South Africa's international reputation on the continent and beyond. It is significant that the first question posed to South Africa after its presentation to the United Nations Human Rights Council Universal Periodic Review on 31 May 2012 regarded the treatment of

⁸ Section 1 of PAJA defines an administrative action as a decision made or a failure to make a decision by an organ of state exercising public power or performing a public function or a natural or juristic person exercising a public power or performing a public function.

⁹ Amit, R. (2012). *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination*. Johannesburg, African Centre for Migration & Society. p.9

foreign nationals.¹⁰ Since its adoption in 1998, South Africa's asylum policy framework has been consistently hailed as one of the best on the continent and in the world. As discussed below, **we believe that the shifts in practice and policy analysed in this report will undermine the positive aspects of existing policies (cost effectiveness, positive international reputation, etc.) while not addressing existing implementation challenges (use of the asylum system by economic migrants, corruption, etc.).**

The effects of the changes in practice and proposed changes in policy are already being felt. While the stated intention, according to Department of Home Affairs officials, is to increase security, **the actual effect has already been to increase insecurity**, for asylum seekers and refugees but also for South Africa. Asylum seekers, including new arrivals and people who have been in the country for some time, are hearing rumours of policy change and are increasingly experiencing the asylum system as a threat rather than a source of protection. The perceived danger of arrest and deportation to countries they fled in fear, as well as the logistical and financial challenge of accessing increasingly distant Refugee Reception Centres, is preventing many asylum seekers from applying for or renewing their permits. They therefore remain undocumented, not out of ineligibility for protection but out of fear and because of the inaccessibility of the system. It is well documented, and has recently been observed by health service providers,¹¹ that migrants who feel insecure, due to lack of legal status or due to an atmosphere of uncertainty and threat, are less likely to seek needed health care, resulting in a public health challenge for all.¹² Increased vulnerability in the labour market and reduced investment in small businesses by asylum seekers harms the economy. International research has shown that limiting asylum seekers rights does not act as a deterrent for new arrivals, so **the main result of the package of current and planned asylum policy shifts is likely to be an increase in undocumented and vulnerable residents in South Africa.**

This report does not cover all aspects of the asylum system. Specifically, it does not deal with on-going administrative and implementation challenges in the status determination process, as this is not a change in policy or practice but a longstanding concern. Furthermore, this aspect has recently been exhaustively documented in a report by the African Centre for Migration & Society.¹³

The information on which this report is based was collected in a variety of ways including the review of public verbal and written statements by DHA officials, presentations and debates in parliament, interviews with DHA officials and Home Affairs Portfolio Committee members, media coverage, material related to court cases, monitoring data and individual case files collected by NGOs working with asylum seekers and refugees, and meetings with refugee groups.

¹⁰ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights31May2012pm.aspx>

¹¹ Personal communication, Medecins sans Frontiers, Johannesburg

¹² Veary, J. and I. Palmay (2008). Assessing non-citizen access to antiretroviral therapy in Johannesburg. Migrant Rights Monitoring Project Report. Johannesburg, Forced Migration Studies Programme, IOM (2010). Migration and Health in South Africa. Background paper for the National Consultation on Migration and Health in South Africa: Realising migrants' right to health in South Africa. Pretoria: South Africa, IOM Regional Office for Southern Africa.

¹³ Amit, R. (2012). All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination. Johannesburg, African Centre for Migration & Society. See also Amit, R., T. Monson, et al. (2009). National survey of the refugee reception and status determination system in South Africa. Johannesburg, Forced Migration Studies Programme, Amit, R. (2010). Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions. Johannesburg, Forced Migration Studies Programme.

2. CONTEXT OF ASYLUM POLICY SHIFTS

The current asylum system was developed through a policy formulation process which included a Green Paper (1997) and a White Paper (1999) before the promulgation of the Refugees Act (103 of 1998). The Immigration Act (13 of 2002) included complementary provisions around entry to the country for asylum seekers. South Africa's asylum policy, based on individual status determination and the self-settlement and self-sufficiency of asylum seekers and refugees in local communities, has been generally recognised as one of the best in the world, judged against international standards of refugee law and human rights instruments.¹⁴ In 2011, the Refugees Act and the Immigration Act were amended (Refugee Amendment Act, 12 of 2011, and Immigration Amendment Act, 13 of 2011), both with relatively minor changes. The Immigration Amendment Act (13 of 2011) introduced several measures making access to asylum more difficult. The validity of the asylum transit permit was reduced from 14 days to 5 days. As discussed further below, it also includes an unclear provision through which immigration officials at border posts may be empowered to make an initial assessment of whether an individual is eligible to apply for asylum. The Act does not specify what criteria are to be used in this 'pre-screening' process.¹⁵ The Refugee Amendment Act revisions were mostly positive in extending rights. Gender was included as an explicit form of persecution and documentation processes for unaccompanied children were revised. This report does not engage in detail with the amended acts because the concerns lie not with written policy but with practices that have no legal or policy basis and with proposed future policy.

Since the 1998 Refugees Act came into effect, there has been a crisis of implementation. From the beginning, even when the number of asylum seekers was relatively small, this included access challenges to Refugee Reception Offices, corruption, large backlogs in the processing of asylum applications and appeals, and low quality refugee status decision-making.¹⁶ Many

¹⁴ Handmaker, J. (2002). "Evaluating Refugee Protection in South Africa." SAMP Migration Policy Brief 7, Landau, L. B. (2007). Regional Integration, Protection and Migration Policy Challenges in Southern Africa. *Advancing Refugee Protection in South Africa*. J. Handmaker and J. Klaaren. New York, Oxford, Berghahn: 27-46, Handmaker, J., L. A. De la Hunt, et al. (2008). *Advancing Refugee Protection in South Africa*, Berghan Bookes.

¹⁵ IRIN (2011). South Africa: New laws mean new hurdles for asylum seekers. Johannesburg. 25 March 2011.

¹⁶ Human Rights Watch (1998). "Prohibited Persons": Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa. New York, Washington, London and Brussels, Human Rights Watch, Handmaker, J., L. A. de la Hunt, et al., Eds. (2001). *Perspectives on Refugee Protection in South Africa*. Pretoria, Lawyers for Human Rights, Human Rights Committee (2001). Access to Justice - Focus on Refugees and Asylum Seekers. Johannesburg, Human Rights Committee, de la Hunt, L. A. (2002). Tracking Progress: Initial Experience with the Refugees Act, 130 of 1998. Johannesburg, National Consortium of Refugee Affairs: September 2002, Handmaker, J. (2002). "Evaluating Refugee Protection in South Africa."

'turn-around programmes', including assessments and recommendations by external process engineers and consultants, have not been implemented effectively over the years, leading the Director General of Home Affairs to admit to the Home Affairs Portfolio Committee on 22 May 2012 that "with regard to the asylum system, we know we are still struggling". There is no question that the current asylum system is dysfunctional and requires significant intervention. The question is whether the answer lies in changing the legal and policy framework, as now envisioned by the Department, or in implementing measures to improve the administrative of the current legislative framework.

There are two broad developments which seem to be driving the changes in the asylum system: **an increased focus on security** and a **preoccupation with asylum seeker numbers**.

Since 2011, the South African government and the ruling party have increasingly viewed the management of asylum as predominantly a question of security, and have re-oriented the Department of Home Affairs as primarily a security department. As stated in the ANC's 2012 policy discussion document on 'Peace and Security', 'as a security department, Home Affairs will contribute to achieving two overriding goals: national security and public safety.'¹⁷ While acknowledging the DHA's multiple mandates as 'the backbone of security, service delivery and the developmental state'¹⁸ the security aspect is consistently placed first. An ANC policy discussion document is not a formal government policy statement, as it represents the party's internal deliberations rather than the governments final position. Nonetheless, as a statement by the ruling party regarding the intended strategic orientation of the Department of Home Affairs, it has important signal value. The DHA has also since 2010 been moved from the Governance and Administration cluster of government departments into the Justice and Crime Prevention Cluster (JCPS). **The implication of this focus on security is that the imperative of asylum system management has become to protect South African security by limiting access to asylum, rather than to provide protection to asylum seekers.**

References to security threats remain vague, however. Asylum seekers and refugees are often conflated with immigrants in general in discussions of labour market competition as a national security threat, or persons who may be a threat to security because they are not captured in national identity and fingerprint databases. No evidence is provided of how asylum seekers and refugees, including individuals who are supposedly accessing the asylum system without having valid asylum claims, pose a security challenge to South Africa at large. There is no evidence that a disproportionate number of asylum seekers are convicted of crimes (apart from administrative arrests relating to residence status), for example, or that any groups of asylum seekers have political agendas inimical to the South African government (as is the case in some other countries hosting large numbers of refugees from neighbouring countries).

A further factor motivating changes in the asylum system, as noted repeatedly by DHA officials in meetings and in presentations to the Portfolio Committee of Home Affairs, is the question of numbers. According to UNHCR global statistics, South Africa has been the country with the largest number of asylum seekers annually since 2008, the year in which new

SAMP Migration Policy Brief 7, Amit, R. (2010). Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions. Johannesburg, Forced Migration Studies Programme, Amit, R. (2012). All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination. Johannesburg, African Centre for Migration & Society.

¹⁷ African National Congress (2012). Peace and Stability - Policy Discussion Document. p.11

¹⁸ Ibid, p. 2

asylum seeker numbers quadrupled compared with the previous year.¹⁹ This has reinforced the perception that South Africa is being ‘flooded’ with asylum seekers, and that the country is carrying more than its fair share of the continental or even global burden of refugee protection. Simultaneously, and somewhat in contradiction, there is a strong belief that the vast majority of persons entering the asylum system are economic migrants ‘abusing’ the system. This reasoning “has given rise to an anti-asylum seeker bias.... As a result, migration control has displaced protection as the primary goal of the asylum system.”²⁰

The perception that South Africa is ‘flooded’ is, however, based on a false interpretation of the numbers and the trends. South Africa’s place at the top of the UNHCR list for new asylum seekers per annum is due to choices of administrative categorisation and does not reflect actually higher numbers of people fleeing persecution than many other countries:

- South Africa is at the top of the UNHCR’s list of new asylum seeker receiving countries because it counts all arrivals as individual asylum applications rather than conferring group status. Many other countries hosted much larger numbers of refugees and other displaced persons in 2011, but did not figure on the same UNHCR list (although they top other lists) because they categorise new arrivals differently. Some of these countries are the Democratic Republic of the Congo (hosting 2,700,000 displaced persons), Kenya (921,000), and Guinea (754,000).²¹
- The vast majority of new asylum seekers since 2008 have been Zimbabwean. In 2011, for example, Zimbabweans made up 48% of all new asylum applications, while the percentage was 78% in 2010. Many of the system’s problems can be addressed by dealing differently with this one neighbouring nationality, as indeed was partially done through the 2009-2011 special dispensation for Zimbabweans, including the moratorium on deportation and the Zimbabwean Documentation Project to grant easier access to work and study permits. Given the continued and probable medium-term significance of Zimbabweans in the asylum system, if proposed policy changes do not address the Zimbabwean situation adequately, they will also not solve the broader problems of the asylum system.

The reasons for the presence of large numbers of economic migrants in the asylum system have been well-understood for many years, and involve not only ‘demand side’ factors from asylum seekers but also significant incentives from the institutional ‘supply side’ in the Department of Home Affairs:

- There remains a lack of alternative means for economic migrants to enter the country legally, particularly those without specific kinds of formal skills or large amounts of investment capital.²²
- Corruption in the system creates perverse incentives: individuals who may not have valid claims but who have sufficient cash can access the system while those with valid claims but no resources struggle.

¹⁹ UNHCR (2008). *Statistical Yearbook*. New York, UNHCR. p.43

²⁰ Amit, R. (2012). *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination*. Johannesburg, African Centre for Migration & Society. p.10

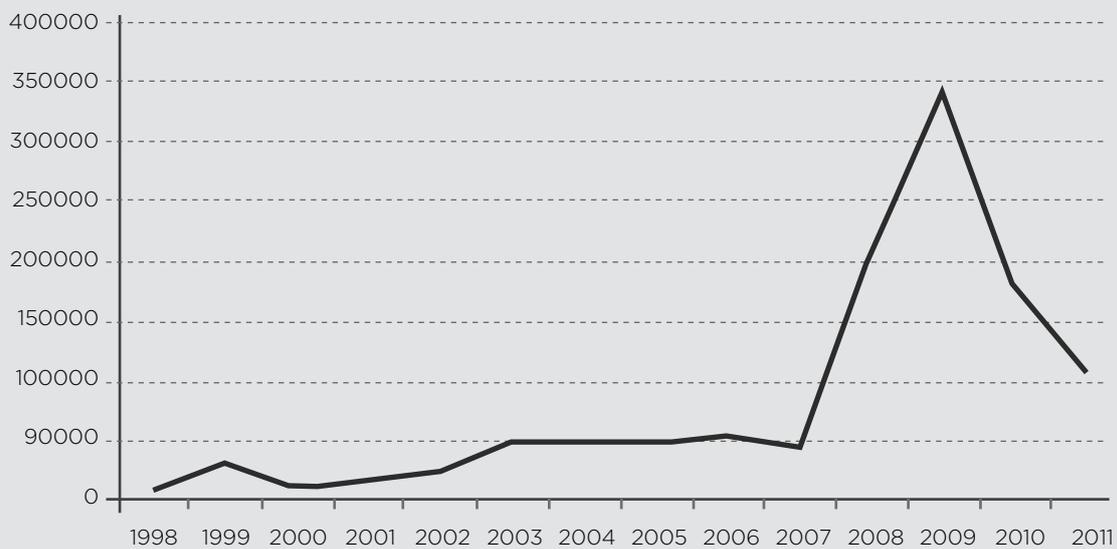
²¹ UNHCR (2011). *Statistical Yearbook*. Geneva, UNHCR.

²² Wa Kabwe-Segatti, A. and L. B. Landau, Eds. (2008). *Migration in post-apartheid South Africa - Challenges and questions to policy makers*. Paris, Agence Française de Développement.

- Slow processing times create an incentive for persons without valid claims to use the asylum system to regularise their stay for the period of time until their claim is processed. While processing times for first instance decisions have decreased significantly in recent months, the result has been very low quality decisions and almost universal rejection at the first instance,²³ creating a large backlog and long waiting times at the appeal stage.

It is important to emphasise that DHA's own statistics have shown a marked decrease in new asylum applications after the 2009 peak, down to a third of this number in 2011. The exceptional nature of the 2008/2009 spike in new applications is even more evident when looking at the longer trend-line (see Figure 1 below).

Figure 1: New Asylum Seekers 1998-2011, based on DHA Asylum Statistics



The DHA has not offered an explanation for this steep reduction (apart from possible administrative reasons such as not including all new applications processed at the Musina RRO in the statistics²⁴). It would require more research to establish the extent to which this reduction is related to increased restrictions in the asylum system, as outlined in this report, or is due to other factors such as a gradual stabilisation of Zimbabwe's political and economic condition (e.g. a reduction of the exceptional circumstances which led to the 2008-2010 peak in the first place). If it is due to the former, then the number of people who no longer show up in the asylum statistics are likely to still be in the country, but now in the more vulnerable position of being undocumented.

²³ Amit, R. (2012). *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination*. Johannesburg, African Centre for Migration & Society.

²⁴ Department of Home Affairs (2011). *Annual Report on Asylum Statistics*. Pretoria. p.2

3. GROUP EXCLUSION FROM ASYLUM ACCESS

South Africa is signatory to the instruments of international refugee law, including the 1951 UN Convention Relating to the Status of Refugees and its later protocols, which set out the obligations of states to provide protection to persons fleeing persecution and to prevent *refoulement*.²⁵ The United Nations General Assembly and UNHCR's Executive Committee have consistently affirmed that "the duty of non-refoulement encompasses the obligation not to reject asylum seekers at frontiers and that all asylum seekers must be granted access to fair and effective procedures for determining their protection needs."²⁶

As a correlate of its international obligations, South Africa's Refugees Act (1998) places no limitations on who may apply for asylum in South Africa. It explicitly states that no asylum seeker may be denied entry at a border post,²⁷ and that each individual's application must be judged on its individual merit and not according to any group-based characteristics. *A priori* limitations on the right to apply for asylum based on nationality or on proximity or distance of the country of origin from South Africa are therefore prohibited.

While the Refugees Act (1998 as amended in 2011) allows the Minister of Home Affairs discretion in granting refugee status to a group of persons in the case of "mass influx" (Section 35), there is no provision allowing the Minister or any other official to deny status to groups of persons. Any practices which introduce group-based decisions at any stage in the asylum process (including at entry to the country, initial lodging of asylum claim, first instance adjudication of asylum claim, and appeal board adjudication of claim), would therefore constitute a significant policy shift and therefore require a formal policy-formulation, consultation and ratification process.

It is therefore of concern that the Department of Home Affairs has started implementing various practices which introduce elements of group-based limitations on new and existing applicants for asylum, without any formal policy process or consultation. These practices

²⁵ Refoulement is defined as returning a person to a place where they may face persecution. Non-refoulement is therefore the principle that no country shall return a person to a place where they may face persecution.

²⁶ UNHCR (2001). Background paper No. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees. Geneva.

²⁷ Section 2

include the introduction of a '1st and 3rd safe country' logic (defined below) and denial of entry to the country for specific nationalities without travel documents

3.1 1st or 3rd Safe Country

Legal Position

There is no such thing as a 'first safe country rule' in international law. The use of such a principle has, however, evolved through bilateral and multilateral agreements in several jurisdictions in the past decades. The 'first safe country' principle states that an asylum seeker is expected to apply for asylum in the first safe country where they have an opportunity to apply for asylum, and that this country is responsible for assessing the asylum claim. If they first apply for asylum in a subsequent country, that country can return them to the first country in order to adjudicate their asylum claim there.²⁸

Some regions, such as the European Union, also have 'safe third country' arrangements based on bilateral or multilateral agreements between countries. Under this principle, a destination country can return an asylum seeker to another country through which the asylum seeker passed if there is a safe third country agreement with that country. This principle differs from the 'first safe country' principle because the third country is not necessarily the first safe country the asylum seeker passed on their journey.²⁹

The correct application and interpretation of 1st and 3rd safe country principles under international law has been set out in detail by the UNHCR.³⁰ Lawyers for Human Rights³¹ and the African Centre for Migration & Society³² have also issued notes on the application of the 1st and 3rd safe country principles in South Africa. This report therefore only briefly reiterates the key points of these discussions. Please see the above documents for a more detailed treatment of the issue.

There is no provision in international law which requires an asylum seeker to seek asylum in the first possible country outside their country of origin.³³ The claim by the Minister of Home Affairs that international law requires asylum seekers to seek refuge in the first safe country they transit³⁴ (a claim repeated in the ANC Peace and Stability policy discussion document)³⁵ is therefore a misunderstanding of international law.

1st and 3rd country agreements are not in principle unlawful. However, their design and implementation must adhere to the basic tenets of international and domestic law (particularly the Refugees Act), namely the obligation to protect and to prevent *refoulement*. 1st and 3rd

²⁸ Hathaway, J. C. (2005). *The Rights of Refugees under International Law*. Cambridge, Cambridge University Press.

²⁹ Ibid.

³⁰ UNHCR (2001). Background paper No. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees. Geneva.

³¹ Ramjathan-Keogh, K., W. Ncube, et al. (2011). Lawyers for Human Rights Legal Brief on the "First Safe Country" Principle. Johannesburg, LHR.

³² Amit, R. (2011). The First Safe Country Principle in Law and Practice. *Migration Issue Brief*. Johannesburg, African Centre for Migration & Society. 7.

³³ Ibid.

³⁴ Langeni, L. (2011). SA, Zimbabwe mull tighter border controls. *Business Day*, 23 February. And "South Africa: Home Affairs to Finalise Asylum Seeker Process." 24 March 2011, <http://allafrica.com/stories/printable/201103240076.html>.

³⁵ African National Congress (2012). Peace and Stability - Policy Discussion Document.

country agreements are particularly applicable in cases where a person has received refugee status in another state prior to reaching South Africa, if that protective status continues to be available. However, for persons whose asylum claims have not yet been formally determined in any state, international best practice has been established regarding a series of minimum conditions before a person can be returned to a 1st or 3rd safe country.

UNHCR Executive Committee Conclusions No. 15 (XXX) and No. 85 (XLIX) have established the following basic rules:

- i. the circumstance that the asylum-seeker has been in a third State where he could have sought asylum does not, in and by itself, provide sufficient grounds for the State in whose jurisdiction the claim has been submitted to refuse considering his/her asylum request in substance and return him/her instead to the third country;
- ii. the transfer from one State to another of the responsibility for considering an asylum request may only be justified in cases where the applicant has meaningful links or connections (e.g. family or cultural ties, or legal residence) with that other State; and
- iii. when effecting such a transfer there must be, in each individual case, sufficient guarantees that the person will:
 - o be readmitted to that country;
 - o enjoy effective protection against *refoulement*;
 - o have the possibility to seek and enjoy asylum; and
 - o be treated in accordance with accepted international standards.³⁶

The Dublin regulation,³⁷ which regulates which state in the European Union is responsible for assessing a person's asylum claim, also includes complex criteria for deciding which country carries the responsibility of assessing an asylum claim, such as the principle of family unity. Case law in all jurisdictions which have implemented 1st and 3rd safe country principles (European Union, USA/Canada and Australia) has confirmed that the "returning country must ensure that the asylum seeker will have access to fundamental rights around the asylum process, including a fair asylum determination procedure and protection against *refoulement*."³⁸ A key protection against *refoulement* is a means for asylum seekers to resist movement to a third state. In the European context, in the case of *MSS v Belgium and Greece*,³⁹ which deals with the application of the Dublin II regulation, the European Court of Human Rights found that an asylum seeker cannot be removed to another Dublin II participating state (in this case, Greece) if that state does not guarantee and practice access to effective asylum procedures and adequate reception conditions for asylum-seekers. Furthermore, there must be an effective remedy for applicants who wish to resist their removal to another state. While the merits of the asylum seeker request are being scrutinised, there is an automatic suspension of the removal procedure. Finally, the country seeking to return an asylum seeker to a third

³⁶ UNHCR (2001). Background paper No. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees. Geneva. See also UNHCR Department of International Protection (2002). *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers*. Lisbon Expert Roundtable, 9 and 10 December 2002.

³⁷ Council Regulation (EC) No 343/2003 of 18 February 2003

³⁸ Amit, R. (2011). The First Safe Country Principle in Law and Practice. *Migration Issue Brief*. Johannesburg, African Centre for Migration & Society. 7.

³⁹ *MSS vs Belgium & Greece*, European Court of Human Rights, application no. 30696/09, 21 January 2011

country (in this case Belgium) has a duty to verify how that country's authorities applied their asylum legislation in practice.⁴⁰

New Policy and Practice

There is evidence that South Africa is intending to introduce elements of 1st and 3rd safe country principles as part of its asylum system, and that it is indeed already implementing the principle to some extent. Rather than a clear statement of policy, this evidence appears in numerous, disparate sources as outlined below:

- In his 2011-2012 3rd Quarter Report to the Home Affairs Portfolio Committee, the Director General of Home Affairs reported that "asylum seeker and refugee management pertaining to 3rd country nationals" [e.g. nationals of non-SADC countries] was being placed on the SADC agenda, and that meetings with Mozambique and Zimbabwe were already taking place in this regard,⁴¹ suggesting an intention to negotiate bilateral or regional 3rd safe country agreements.
- The ANC's Peace and Stability Policy Discussion Document (May 2012) states the intention to "take robust steps to be able to refuse asylum to asylum seekers who have transited through one or more safe countries."⁴²
- The 2011 Immigration Amendment Bill⁴³ included a provision for 'pre-screening' by immigration officials at border posts regarding an individual's eligibility to apply for asylum and read: "the Director General may, subject to any terms and conditions, issue an asylum transit permit, valid for a period not exceeding 5 days, to a person who at a port of entry claims to be an asylum seekers, *after having established in the prescribed manner that such person qualifies to apply for asylum,...*".⁴⁴ The section in the final Act was changed to read: "The Director-General may, *subject to the prescribed procedure under which an asylum transit visa may be granted*, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum." Neither the Bill nor the Act gives an indication as to what the nature of the 'prescribed procedure' is.
- When responding to public hearing submissions on the Immigration Amendment Bill in February 2011, Home Affairs Minister Dlamini-Zuma stated that "there would not be pre-screening at ports of entry as such, but according to international best practices which required asylum seekers to go to the nearest safe country, asylum seekers would be asked questions concerning whether this was in fact the case. The Department would not be doing much screening, but would ask only questions concerning whether South Africa was indeed the first nearest safe country in cases of asylum seeking." The Minister further argued that "part of the rationale for instituting these checks was that many people were economic migrants and not actual asylum seekers. The granting of asylum status was therefore not correct and in some cases

⁴⁰ <http://www.amnesty.org/en/library/asset/EUR03/001/2011/en/0debe9db-3a62-41c0-a9c8-843ce4e2b11f/eur030012011en.pdf>

⁴¹ Department of Home Affairs (2012). Performance of the Department of Home Affairs 2011-2012, Quarter 3 summary. *Presentation to Portfolio Committee on Home Affairs, 28 February 2012*. Cape Town.

⁴² African National Congress (2012). Peace and Stability - Policy Discussion Document, p.6

⁴³ Immigration Amendment Bill (B32-2010)

⁴⁴ Section 23 of the Immigration Amendment Bill (B32-2010)

it prevented these people from having access to better opportunities that they would receive if they had received their visas under a different dispensation.”⁴⁵ This argumentation constitutes a clear misunderstanding of ‘international best practices’ and confirms the intention to collect and act upon 1st safe country-related information, as well as substantive asylum eligibility information, at ports of entry rather than as part of a considered status determination process. There was no indication of what action would be taken if South Africa was not found to be the ‘first nearest safe country’ or if a person was deemed to be an ‘economic migrant.’ In March 2011, however, asked again to comment on the ‘pre-screening’ clause in the Immigration Amendment Bill and the procedure mentioned in the Act, the Minister noted in Parliament that it would only consist of a criminal background check.⁴⁶

In spite of a lack of clarity on policy intentions, there is evidence that some border officials have been interpreting and applying pre-screening even before the Immigration Amendment Act Regulations, and therefore the Act, are in force. This pre-screening is furthermore based on a simplified 1st safe country logic, meaning the exclusion of asylum seekers assumed to have been able to seek asylum in another country before reaching South Africa, without any further assessment of their protection needs or experiences. This exclusion has particularly been targeted against certain nationalities, namely Somalis and Ethiopians. From early May 2011 to date, LHR’s Musina office has documented that there are almost no Somalis or Ethiopians entering through the Beitbridge border post and receiving Section 23 permits. Somali representatives estimate that in previous months up to 1500 Somalis were entering the country through Beitbridge. New arrivals are now being forced to cross the border by irregular means in order to access inland RROs⁴⁷

South Africa’s unilateral denial of entry to Somali and Ethiopian asylum seekers has already had **knock-on effects on neighbouring countries**. As reported by the Herald in Zimbabwe in July 2011, Zimbabwe was closing its northern border to Somalis and Ethiopians. As the UNHCR country representative in Zimbabwe noted, regarding the increased difficulties for Somalis and Ethiopians to enter South Africa: “many have been sent back to Zimbabwe and detained at Beitbridge [border post]. No one has shared any official change of policy from South Africa, but in practice there have been changes.”⁴⁸ Similarly in Mozambique, through which Somali and Ethiopian asylum seekers had previously transited on their way to South Africa, authorities changed their previously *laissez-faire* approach by intercepting asylum seekers at Mozambique’s northern border and deporting them to Tanzania. In August 2011, there were 833 Ethiopians and Somalis, 45 of them children, detained in Tanzania’s Mtwara Prison after being deported from Mozambique without having had any opportunity to apply for asylum in either country.⁴⁹

Individual asylum seekers have received rejection letters at the point of first adjudication as well as the Refugee Appeal Board stage, listing the 1st safe country principle as the reason for rejection. An example is the RAB case 1159/08, decided on 7 June 2011, in which a Congolese

⁴⁵ Minister and Department of Home Affairs’ responses to public hearing submissions on Immigration Amendment Bill (B32-2010), 7 February 2011, <http://www.pmg.org.za/report/20110208-responses-department-home-affairs-submissions-made-public-hearings-im>

⁴⁶ IRIN (2011). South Africa: New laws mean new hurdles for asylum seekers. Johannesburg. 25 March 2011.

⁴⁷ IRIN (2 August 2011). AFRICA: Horn migrants heading south “pushed backwards”. *IRIN Africa*

⁴⁸ Ibid.

⁴⁹ Ibid.

asylum seeker's appeal was rejected even though it was granted that "the appellant will face risk of harm in terms of section 3(b) of the Refugees Act 130 if he returns to his country of origin" (par. 20). The reason for refusal was an interpretation of Section 4(1)(e) of the Refugees Act ("a person does not qualify for refugee (sic) for the purpose of the Act if there is a reason to believe that he enjoys protection of any other country in which he has taken residence") as applying to brief periods of less than two months which the applicant spent in refugee camps in Tanzania, Malawi and Mozambique in 2006, all of which he left due to lack of adequate food provision in the camps. The claim was therefore rejected on the basis of the applicant having passed through other countries, but without substantive assessment of the nature of protection and basic human rights standards provided in those countries, as required by international standards for the application of the 1st safe country principle. Furthermore, there was no arrangement for returning the applicant to any of the mentioned countries, meaning that his asylum claim rejection in South Africa could only lead to his arrest and deportation to his country of origin in the RAB concurred that he would face danger.

It is important to note that some of the key motivators for 1st and 3rd safe country arrangements in other regions do not apply to South Africa. In some countries in Europe, for example, recognised refugees receive significant integration assistance packages, implying a cost to the host state. Reducing the number of persons actually hosted by a state therefore reduces the financial burden on that state. In South Africa, the only cost associated with recognised refugees is the claim adjudication process itself, as refugees receive no welfare assistance once recognised. An appropriately implemented 1st or 3rd safe country process requires the same individual claim assessment process as if the applicant were to remain in South Africa (as discussed below); indeed, costs and administrative processes may be higher, as a relationship with the third country must be maintained to ascertain that the asylum seeker will be guaranteed access to asylum and protection in the third country. Implementing a 1st or 3rd country process would therefore not be cost effective for South Africa.

Concerns

South Africa's current application and discussion of 1st or 3rd country principles (as described above) is concerning because it does not fulfil the basic conditions established by UNHCR and domestic law in several ways:

- Immediate rejection versus considered individual assessment: the practice of pre-screening by border officials and the immediately denial entry to any asylum applicant who has travelled through another country before reaching South Africa is a misunderstanding of a 1st or 3rd country principle for several reasons:
 - As noted by UNHCR "in some countries the [mere] existence of a 'safe third country' is sufficient ground to deny an asylum claim as abusive or manifestly unfounded. This constitutes a grave confusion between two fundamentally distinct aspects of the asylum procedure, namely: a decision on admissibility of the claim, which is made on purely formal grounds; and a decision on the substance of the claim, i.e., on the well-founded character of the fear of persecution or other harm invoked by the claimant. To collapse these two steps

is tantamount to denying the asylum seeker the opportunity, to which he/she is entitled, to present the grounds on which he/she seeks protection as a refugee.”⁵⁰

- The decision of whether a third country is ‘safe’ is not generic, but depends on the nature of each individual asylum seeker’s circumstances. For example, a person seeking asylum on the basis of persecution due to sexual orientation may not be ‘safe’ in a particular country, even if another person seeking asylum due to political persecution may be. UNHCR therefore “insists that the analysis of whether the asylum seeker can be sent to a third country for determination of his/her claim must be done on an individualised basis, and has advised against the use of ‘safe third country lists’.”⁵¹
- Unilateral or multilateral application: South Africa’s current unilateral application of the 1st safe country principle to turn away asylum seekers is concerning for several reasons, given the minimum requirements set out by UNHCR (above):
 - As stated by UNHCR, “unilateral actions by States to return asylum seekers to countries through which they have passed, without the latter’s agreement, carries the risk of refoulement...Indirect removal of a refugee from one county to a third country which subsequently will send the refugee onward to the place of feared persecution constitutes refoulement, for which both countries would bear joint responsibility. Therefore, a reliable assessment as to the risk of ‘chain refoulement’ must be undertaken in each individual case, prior to removal to a third country considered to be safe.”⁵²
 - The asylum systems of all countries of the Southern African region, and countries in Eastern and Central Africa through which most asylum seekers in South Africa have transited, grant refugees significantly fewer rights than South Africa, and often do not fulfil basic ‘accepted international standards’. It is therefore questionable whether these countries can be considered ‘safe’.
 - Regional integration and burden-sharing: “[Unilateral actions by states] is ... contrary to the spirit of mutual commitment that must prevail in mechanisms of responsibility-sharing and international solidarity.”⁵³ South Africa returning asylum seekers to neighbouring countries without their express consent is likely to be seen as going against processes of SADC integration and African solidarity.
 - The Department of Home Affairs is aware of the need for a multi-lateral approach, since the Director General noted in his 22 May 2012 presentation to the Home Affairs Portfolio Committee that the 1st safe country principle would be implemented “with neighbouring countries” and that South Africa is “participating in regional interventions to improve the management of asylum seekers and refugees in these countries.”

⁵⁰ UNHCR (2001). Background paper No. 2: The application of the “safe third country” notion and its impact on the management of flows and on the protection of refugees. Geneva.

⁵¹ Ibid.

⁵² Ibid. p. 3 (emphasis in original)

⁵³ Ibid. p. 3

- It is particularly concerning that any application of the '1st safe country' principle is taking place, whether in the form of pre-screening at the border, RSDO decisions at the first instance, or RAB decisions in the appeals process, without the existence of a formally formulated and mandated policy. All such actions are therefore unlawful, as they have no current basis in South African law.

Implications

- Since the current application of the 1st safe country principle to turn asylum seekers away at the border without granting them access to the asylum system and substantive individualised claim assessments is illegal under international law and in some cases may amount to *refoulement*, South Africa is likely to face domestic legal challenges as well as international condemnation while such practices persist.
- Inappropriate and unlawful application of the 1st safe country principle, especially when taking the form of 'pre-screening' at the border, may lead to *refoulement*.
- Applying an appropriately implemented 1st or 3rd safe country principle will require extensive and time-consuming work to establish bilateral and regional multilateral agreements with other countries. These agreements will have to be accompanied by substantive pressure and support on those countries to improve their asylum systems in order to fulfil the basic requirements of avoiding 'chain refoulement' and achieving 'accepted international standards' of protection. Such regional coherence in asylum systems is highly desirable, and it would be in South Africa's interest to lead such a coordination process, but it is a long-term enterprise.

3.2 Refusal of Entry based on Nationality and Lack of Travel Documentation

Legal Position

Preventing asylum seekers from accessing protection in South Africa is a violation of the fundamental human right, "to seek and enjoy in other countries asylum from persecution,"⁵⁴ and a violation of the 1998 Refugees Act's access guarantees.⁵⁵ As noted above, under international law, "the duty of non-refoulement encompasses the obligation not to reject asylum seekers at frontiers."⁵⁶ The Refugees Act furthermore provides that no South African official who is not a Refugee Status Determination Officer (RSDO) (or according to the Refugee Amendment Act, a member of a Refugee Status Determination Committee) is authorised to assess the validity of an individual's asylum claim. This means that 'pre-screening', e.g. "any determination as to the validity or otherwise of an asylum-seekers claim prior to their being granted access to make representations to the refugee status determination committee"⁵⁷ is prohibited by both the Refugees Act and the Immigration Act.

⁵⁴ Universal Declaration of Human Rights (1948)

⁵⁵ Refugees Act (No. 103 of 1998) Section 2

⁵⁶ UNHCR (2001). Background paper No. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees. Geneva.

⁵⁷ Elphick, R. (2011). *Refoulement of Undocumented Asylum-seekers at South African Ports of Entry, With a particular focus on the situation of Zimbabweans at Beitbridge. Lawyers for Human Rights Situation Report.* Johannesburg, Lawyers for Human Rights.

Section 23 of the Immigration Act 13 of 2002, as amended by Section 15 of the Immigration Amendment Act 13 of 2011, establishes that a person stating the intention to seek asylum when presenting themselves at a border post should be issued with an asylum transit permit (known as a Section 23 permit) with which he or she can travel to the nearest Refugee Reception Office to apply for asylum.⁵⁸ The process of issuing the asylum transit permit does not grant any authority or discretion to border officials to conduct interviews or otherwise establish or judge any information relating to the substance of a person's claim for asylum.⁵⁹ Indeed, the provision of an asylum transit permit is specifically intended to enable otherwise undocumented asylum seekers to travel through South African territory on their way to a Refugee Reception Office.

New Policy and Practice

Between March 2011 and July 2012, immigration officials have denied Zimbabweans without valid travel documents entry at ports of entry, especially Beitbridge and Lebombo border posts. This practice has also been applied to undocumented Zimbabweans who have explicitly stated their intention to apply for asylum. They have also been denied Section 23 permits. Immigration Officials at these borders have justified their refusal to allow undocumented Zimbabwean asylum seekers entry to the country by claiming that they are 'not genuine asylum seekers'.⁶⁰ As a result, virtually no Zimbabweans reporting to the Refugee Reception Office in Musina, just 18 kilometres from the border post, have been in possession of a Section 23 permit for much of 2011 and 2012. Lawyers for Human Rights documented this denial of entry and denial of access to Section 23 permits through interviews with Zimbabwean asylum seekers, and interviews with RRO officials in Musina. A senior border official at Beitbridge border post explicitly confirmed to LHR that Section 23 permits are no longer issued to Zimbabweans.⁶¹

Concerns

- Denial of entry constitutes refoulement and is therefore in contravention of South Africa's international legal commitments. It also violates individuals' rights to apply for asylum under the Refugees Act.
- There is no effective remedy through which an asylum seeker can resist denial of entry or seek recourse for an unjust decision, which is against South Africa's Constitutional principles.
- Denial of entry is an administrative injustice in that border officials are taking decisions, especially decisions with significant human rights consequences, which are outside their scope of authority under South African law.
- Denial of entry pushes people to enter the country irregularly, exposing them to the concomitant dangers of rape, gang rape, assault, people smuggling, human trafficking, theft and death during passage. The extremely high incidence of sexual and gender-

⁵⁸ Immigration Amendment Act (No. 13 of 2011) Section 15

⁵⁹ Elphick, R. (2011). Refoulement of Undocumented Asylum-seekers at South African Ports of Entry, With a particular focus on the situation of Zimbabweans at Beitbridge. *Lawyers for Human Rights Situation Report*. Johannesburg, Lawyers for Human Rights.

⁶⁰ Ibid. p.8

⁶¹ Ibid. p.8

based violence (SGBV) and other forms of violence in the process of irregular border crossing has been documented in detail.⁶² This is a violation of asylum seekers' Constitutional and basic human rights to personal security, dignity, health, bodily integrity and life. By denying asylum seekers the right to enter the country lawfully and thereby pushing them to enter the country through irregular channels, the South African government makes itself complicit in these criminal acts and abuses.

Implications

- *Refoulement* may be occurring, contravening South Africa's international and domestic legal obligations.
- Such practices invite international scrutiny of South African asylum processes and the fulfilment of commitments under international law. The denial of entry to asylum seekers is part of the NGO statement delivered to the Executive Committee of the High Commissioner's Programme Standing Committee 53rd Meeting (13 - 15 March 2012).⁶³
- Allowing state officials to exercise ad hoc authority outside their mandated powers erodes the rule of law and public confidence that government institutions are accountable to those they serve.

⁶² <http://www.msf.org.za/publication/msf-calls-attention-continuing-dangers-faced-survival-migrants-and-refugees-south-africa>

⁶³ <http://www.lhr.org.za/programme/refugee-and-migrant-rights-programme-rmrp>

4. ADMINISTRATIVE BARRIERS TO ACCESS: SECTION 23 PERMITS

Legal Position

As noted above, the Immigration Act (2002), in Section 23, states that persons who declare their intention to apply for asylum when presenting at a border post should be issued with an asylum transit permit (known as a Section 23 permit). This permit is intended to enable asylum seekers, especially those without other documentation such as passports, to travel to a Refugee Reception Office without danger of being arrested as an illegal foreigner while in transit. According to the Refugees Act (1998), however, an asylum seeker is not required to enter the country through a formal port of entry, nor may he or she be penalised for entering through irregular channels. Furthermore, the Refugees Act does not require any particular documentation to be presented by the asylum seeker as a pre-requisite for lodging an asylum application. The Section 23 permit is therefore intended to be an enabling and not a constraining measure within the asylum application process.

New Policy and Practice

Since early 2011, there have been episodes in which the Section 23 permit was used to deny asylum seekers access to asylum. There were two aspects to this denial:

- Periods in which immigration officials at border posts were not issuing Section 23 permits to asylum seekers, especially to particular nationalities such as Zimbabweans, as detailed above;⁶⁴
- Periods in which Refugee Reception Offices around the country were turning away new asylum applicants if they did not have a Section 23 permit (and in some cases a passport).

The practice of turning away new asylum applicants without a Section 23 permit was documented at the Maitland RRO by the Scalabrini Centre in Cape Town in January/February

⁶⁴ See also <http://www.msf.org.za/publication/south-african-immigration-policy-entraps-asylum-seekers> for examples of Congolese denied Section 23 permits in Beitbridge border post.

2011, and again in January and February 2012. As an indication of the range of nationalities affected, the Scalabrini Centre assisted eighteen individuals in early 2012 who had been denied access to Maitland RRO on these grounds, including 2 Cameroonians, 1 Congolese, 8 Somalis, 1 Zambian, and 6 Zimbabweans. The Legal Resources Centre represented a further 17 individuals (13 from Uganda, 2 from Malawi, 2 from Tanzania) who had all been denied access on a single day (12 February) for not possessing a Section 23 permit. CoRMSA documented similar access barriers at the Marabastad, Musina and Durban RROs in December 2011 and January 2012.⁶⁵ Based on LHR monitoring in Musina, Section 23 permits are still not being issued at the Beitbridgde border post as of the time of writing in June 2012, but Musina, Marabastad and Durban RROs are no longer requiring these permits as prerequisites for lodging new asylum claims.

When this practice was challenged in Cape Town by the Scalabrini Centre with the Legal Resources Centre in both 2011 and 2012, the response by the DHA was contradictory. In 2011, the DHA responded to a High Court application (launched on 21 February by the Legal Resources Centre) by stating that there was no policy to deny RRO access and that transit permits were not required (as is indeed the provision in law). After this statement there were no documented problems for newcomers without Section 23 permits for approximately one year. When the same practice reoccurred in 2012, the Maitland Security Manager confirmed that the section 23 requirement for asylum was official RRO policy, based on a directive issued to them from DHA headquarters in Tshwane. When challenged again by LRC, the State attorney's office faxed a letter on 1 March 2012 confirming that there is no border pass policy and that the border pass requirement was a 'misunderstanding' and that 'no such policy exists'.⁶⁶

Concerns

- As noted above regarding refusal of entry to asylum seekers, non-issuance of a Section 23 permit to asylum seekers at the border may lead to refoulement if such asylum seekers are arrested and deported as illegal immigrants once in South Africa. Also as above, it pushes people to cross the border by irregular means, exposing them to a range of abuses.
- There is no effective remedy through which an asylum seeker can resist non-issuance of a Section 23 permit or seek recourse for an unjust decision, which is against South Africa's Constitutional principles.
- Both the illegal non-issuance of Section 23 permits at the border and the illegal requirement of Section 23 permits to apply for asylum at RROs reflect a lack of basic legal knowledge, coherence and oversight among DHA officials at different levels, including at senior levels in headquarters if the practice was indeed based on a directive. Such 'misunderstandings' suggest not only a lack of knowledge of administrative procedures, but also a lack of understanding of the substantive principles and reasons behind these procedures. This has grave effects on basic human rights, and undermines confidence in the DHA's overall abilities to fulfil its legal obligations as a key department charged with protecting the rights of South African residents. It is also of grave concern that the practice has recurred repeatedly

⁶⁵ CoRMSA (23 January 2012). Home Affairs contradictions violate the right to seek asylum. *Press release*. Johannesburg.

⁶⁶ Information supplied by Scalabrini Centre, Cape Town, 7 June 2012

in spite of legal challenges in the past and the admission from DHA that the practice is unlawful.

Implications

- Refoulement may be occurring, contravening South Africa's international and domestic legal obligations.
- Such practices invite international scrutiny of South African asylum processes and the fulfilment of commitments under international law. Denial of RRO access without Section 23 permits is part of the NGO statement delivered to the Executive Committee of the High Commissioner's Programme Standing Committee 53rd Meeting (13 - 15 March 2012).⁶⁷
- The abuse of administrative barriers to accessing asylum violates individuals' constitutionally guaranteed right to just administrative action, which requires government actions to be fair, transparent, and accountable. Failure to adhere to this principle erodes the rule of law and public confidence that government institutions are accountable to those they serve.

⁶⁷ <http://www.lhr.org.za/programme/refugee-and-migrant-rights-programme-rmrp>

5. LIMITATION OF BASIC RIGHTS FOR ASYLUM SEEKERS

Legal Position

Currently, asylum seekers have the right to work and study in South Africa while they await the decision on their claims. Recognised refugees also have these rights. The right to work encompasses the right to enter into employment as well as to start a business and be self-employed. These rights are established through the Constitution,⁶⁸ the Refugees Act,⁶⁹ and the courts. In 2003, the *Watchenuka* case granted asylum seekers the right to work on the basis that prohibiting employment is in conflict with the Bill of Rights' protection of human dignity (Section 10).⁷⁰ The *Watchenuka* judgement furthermore found that "where employment is the only reasonable means for the person's support... the deprivation of the freedom to work ...threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment."⁷¹ As noted by LHR and CoRMSA, the right to work is the basis on which "refugees in South Africa have managed to sustain themselves and their families [and to] earn a living through honest means."⁷² Asylum seekers and refugees also enjoy the right to freedom of movement inside South Africa, a basic Constitutional right applicable to "everyone" residing in the Republic.⁷³ Freedom of movement and the right to work are necessary correlates of each other: without freedom of movement, asylum seekers and refugees are not able to find work, and without the right to work and earn an independent income, asylum seekers and refugees are dependent on receiving shelter, food and basic services from the state in specific locations (often in camps or detention centres).

⁶⁸ Constitution of South Africa (Act No. 108 of 1996), Chapter 3, Section 26(1).

⁶⁹ Refugees Act (130 of 1998), Section 27 (f)

⁷⁰ *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) (28 November. 2003), para 24, 25.

⁷¹ *Ibid*, para 32.

⁷² Joint Submission For The South Africa Universal Periodic Review, From Lawyers For Human Rights And The Consortium For Refugees And Migrants In South Africa, 28 November 2011, <http://www.lhr.org.za/publications/joint-lhrcormsa-submission-south-africas-universal-periodic-review-mechanism-2011>

⁷³ Constitution of South Africa (Act No. 108 of 1996), Chapter 3, Section 18

New Policy and Practice

There have been several indications that the DHA and other stakeholders (such as the African National Congress ruling party) are considering revising the rights of asylum seekers to work and study and to move freely in the country. Such limitations have not yet been formulated in any written policy statement or legislative draft, but as with the practices above, there have been attempts to implement limitations without such a policy basis.

- A statement issued following the Cabinet meeting held on the 23rd of November 2011, referred to the **intention to “review” the minimum rights of immigrants**, including refugee and asylum seekers’ rights to work and study.⁷⁴
- At a civil society stakeholder meeting on 21 December 2011, Lindile Kgasi, Director of Asylum Seeker Management in DHA, mentioned planned changes to the **nature of the right to work and study** currently attached to the asylum seeker permit (Section 22 permit). She noted that the Department planned “withdrawing the [work and study] conditions of Section 22 because the way they are drafted is wrong,” and that “a Section 22 is not a work permit but the permission to enter.” According to Ms Kgasi, permission to work and study should be issued by the Immigration Directorate on a case-by-case basis under the Immigration Act, and not automatically by the Asylum Management Directorate within DHA. This intention is confirmed in the ANC ‘Peace and Stability’ Policy Discussion Document which states that “improvements to the asylum system” include that “work and study permits with limitations will have to be applied for under the immigration act.”⁷⁵ It was not clear whether an asylum seeker who applied for the right to work under the Immigration Act and was granted this right would be able to hold both a Section 22 permit and a work permit, or how the work permit process would impact on the asylum process. It was also not stated how such a complex administrative practice would impact on the already large backlogs within both the Asylum Seeker Management department and the work permit processing processes. Ms Kgasi also noted that the right to work should not be general but should exclude certain kinds of work, such as jobs which involve carrying weapons. Regarding what would happen to asylum seekers not granted the right to work, Ms Kgasi responded that “there are South Africans who are not working and who are not receiving grants”, suggesting that a withdrawal of permission to work would not necessarily be matched by an increase in state welfare support.
- At the same stakeholder meeting, Ms Kgasi proposed a database of asylum seekers and refugees to see where they are living. This is also reflected in the ANC ‘Peace and Stability’ document, which states that “an important consideration will be receiving assurances that the whereabouts of the asylum seeker must be known. A monitoring system will be established to ensure that the whereabouts of asylum seekers and their situation is known.”⁷⁶ Asylum application forms already include the applicant’s address, which is reflected on the asylum seeker permit, so information about location is already available. Beyond this, it is not made clear why asylum seekers would need to be monitored as they have not broken any laws or conducted themselves in ways

⁷⁴ <http://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-23-november-2011>

⁷⁵ African National Congress (2012). *Peace and Stability - Policy Discussion Document*. p.5

⁷⁶ *Ibid.* p.6

which constitute a clear danger to wider society (as would be the case for registers monitoring the whereabouts of sexual offenders, for example). While not directly a limitation on **freedom of movement**, if such a database or monitoring system were to be made compulsory, it would impose different requirements on asylum seekers and refugees than on other migrants or citizens regarding surveillance of movement and settlement, which would be likely to contravene the Constitutional guarantee of freedom of movement.

- The ANC ‘Peace and Stability’ document also questions the right of asylum seekers to be self-employed in the informal trading sector: “an activity which should not be legal under the Refugees act (sic) given that asylum seekers are persons whose status has not been determined.”⁷⁷ The document correctly identifies the need for foreign owners and managers of small businesses and “spaza shops” to comply with bylaws and other “legislated prescripts”, but then asks: “Should by-laws apply equally to both asylum seekers and citizens?” suggesting the introduction of a discriminatory and therefore un-Constitutional treatment under the law.
- While such proposals about limiting asylum seeker (and indeed other non-citizen) rights to work or to be self-employed are still only found in draft discussion documents, and therefore have no legal force, there are already attempts to implement them in an ad hoc manner. As an example, on 14 May 2012, a UNHCR official received calls from senior SAPS officials seeking confirmation of the legality of an order they had received from DHA that all foreign-owned businesses in townships should be closed down on the basis of a new (unspecified) Act.⁷⁸ On the same day, an invitation from the SAPS Thembisa Cluster Office was sent out regarding a May 15th ‘Information Session iro status of refugees owning or applying for business licences’, noting the Second Hand Goods Act (Act 6/2009) as the applicable Act.⁷⁹ While this Act relates to the management of small businesses like “spaza shops” there is no mention of the nationality or legal status of business persons.

Concerns

- Asylum seeker rights to work are being limited (e.g. communication with SAPS to close foreign businesses in townships) in an ad hoc manner without due policy process or legal basis.
- There is no coherent plan regarding the consequences of limiting asylum seekers’ rights to work on the rest of the current system of self-sufficiency and self-settlement. Alternatives to self-sufficient self-settlement are likely to have additional cost implications for the tax payer.
- The Constitutionality of limiting the right to freedom of movement and freedom to work, and especially limiting both selectively, e.g. limiting what kinds of work and in what kinds of areas (e.g. townships) is questionable.
- The reasons given for limiting asylum seekers’ rights to work confuse the reasons why people apply for asylum, and basic rights once they have applied. The justifications given for limiting basic rights for asylum seekers is that the right to work is attracting

⁷⁷ Ibid.

⁷⁸ Personal communication with UNHCR official

⁷⁹ Copy of invitation available

“economic migrants using a back door.”⁸⁰ The aim is therefore to reduce incentives for abuse of the asylum system, which however results in reduced rights for all persons in the asylum system, including those with genuine claims. It is indeed justified to reduce incentives for abuse of the asylum system, but this would be achieved more effectively by improving the quality and speed of adjudications and combatting corruption in the system.⁸¹ The deterrent logic was explicitly rejected by the Judge in the Watchenuka case: “There was some suggestion that the rights that are accorded to applicants for asylum are abused by persons who are not genuine refugees but that provides no reason for limiting the rights of those who are genuine.”⁸²

Implications

- South Africa’s current policy of economic self-sufficiency through the right to work is very low cost for the government (e.g. the tax payer), as the government currently does not provide any financial or in-kind welfare assistance to asylum seekers or refugees. This stands in contrast to other countries where asylum seekers (and in limited cases, recognised refugees) are not given the right to work and where the government therefore has to pay for shelter, food, clothes and dedicated health and education services.
- In developing countries which do not grant the right to work, such services to asylum seekers and refugees are often subsidised by international (multilateral or non-governmental) organisations, while in developed countries, they are paid for by the tax payer. Given South Africa’s status as a middle income country, international organisations which often have an operational presence in poorer countries tend to only have an advisory or advocacy presence in South Africa and are struggling to fund even such limited activities. Such organisations have stated clearly that they would not be able to raise funding to work more operationally in South Africa, as the country is perceived to be able to fund its own compliance with international obligations such as refugee protection. Similarly, domestic NGOs are either dependent on international donor funding or government support (Department of Social Development, etc.), and would therefore either not be able to raise international funding for substantial shelter and welfare services or would simply be channelling tax money through different means. Should South Africa decide to limit the self-sufficiency of asylum seekers and refugees, it would therefore have to fund the necessarily larger costs itself out of tax revenue.

⁸⁰ Mkuseli Apleni, Director General of Home Affairs, at media briefing on 25 November 2011, quoted in IRIN (2011). South Africa: “Harsher regime” for asylum seekers, 29 November 2011, available at: <http://www.unhcr.org/refworld/docid/4ed8ad242.html> [accessed 10 April 2012].

⁸¹ Handmaker, J., L. A. De la Hunt, et al. (2008). *Advancing Refugee Protection in South Africa*, Berghan Bookes, Amit, R. (2010). *Protection and Pragmatism: Addressing Administrative Failures in South Africa’s Refugee Status Determination Decisions*. Johannesburg, Forced Migration Studies Programme, Amit, R. (2012). *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination*. Johannesburg, African Centre for Migration & Society.

⁸² *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) (28 November. 2003), para 33.

6. REFUGEE RECEPTION OFFICES: CLOSURE OF EXISTING RROS AND PLANNED MOVE TO THE BORDERS

Asylum applications, asylum permit renewals, refugee status determination interviews, refugee status renewals and appeal hearings in South Africa are all currently carried out at Refugee Reception Offices (RROs). The RROs are therefore the primary point of contact between asylum seekers/recognized refugees and the DHA.

Since mid-2011, the Department of Home Affairs has closed several existing RROs – in Johannesburg, Port Elisabeth and Cape Town – and expressed its intention to all RROs from their current locations in major cities to the country's international land borders.

Given the centrality of the RROs to the functioning of the overall asylum system, and the qualitative differences between urban and rural border locations, **this intended move and the closure of existing offices is not merely a technical, operational decision, but one which impacts on the basic principles of the asylum system**, namely access (for initial applications, renewals, status determination interviews and appeals) and administrative efficiency and fairness. It also has severe economic and safety implications for asylum seekers and refugees, especially as the continuation of administrative inefficiency and unfairness within the process is likely.

The administrative process of applying for asylum has been and will remain interlinked with the broader context of rights and services for asylum seekers/refugees. This is because asylum status determination processes take time, even if they are efficient, and in this time, asylum seekers have basic welfare needs. As noted above, asylum seekers/refugees are currently responsible for their own welfare (including shelter, food, and all other expenses) while they are applying for status and waiting for their status to be decided. They receive no government support apart from the right to access basic public health care and education services. Refugees' and asylum seekers' ability to support themselves financially is premised on the right to work (and study), and the right to freedom of movement (e.g. to disperse around the country) in order to be able to search for or create employment. Urban RROs spread around the country are relatively close to where most asylum seekers and refugees

are able to find the employment, accommodation and basic public services to sustain themselves, even though disruptions to livelihoods due to access challenges have also been a feature of the current urban-based system.⁸³ Moving RROs to border areas would de-link the asylum application process from asylum seeker livelihoods even further. **The move is therefore likely to incur new and significant costs for the government in terms of basic welfare support**, and/or implications for the welfare systems of communities located close to the proposed border region RROs. This is discussed further below.

Finally, moving RROs to the border regions will have impacts on a range of actors, including major impacts on DHA's internal operations, on asylum seekers and refugees, and on civil society organisations working with and on behalf of this constituency. Beyond these obvious stakeholders, other important actors whose positions need to be considered are government departments such as Health, Social Development, South African Police Services, and the local municipalities into which the RROs aim to move, as well as the local residents/businesses/employers of those target communities. All of these actors have an interest in giving input to and understanding the DHA's RRO plans.

There are three related aspects of the on-going processes relating to RROs which are addressed below:

1. The closure of existing offices in Johannesburg, Port Elisabeth and Cape Town, including DHA's refusal to implement court orders to reopen RROs in Johannesburg and Port Elisabeth and to continue accepted new applications in Cape Town, as well as the effects of these closures on asylum seekers and refugees to date;
2. The decision-making process with regard to moving RROs 'to the borders', including the lack of consultation, clear strategic aims or clear implementation details;
3. Likely impacts if all RRO functions are moved out of urban areas and located close to ports of entry, weighed against other possible locations of RRO functions.

All three aspects raise significant questions in relation to the five aspects of good policy development discussed in the introduction:

- **Implementation of policy is preceding policy development.** The closure of RROs in Crown Mines, Port Elisabeth and Cape Town has been implemented as part of the planned policy of moving RROs to the borders, without this policy having been clearly formulated or having undergone the requisite policy-making process (including inputs at the Parliamentary and Cabinet levels as well as substantive public consultation);
- The process of closing RROs, the effects this is having on asylum access, and the likely nature of operations at the borders all **contravene existing international and domestic law** either in letter or in spirit. The **decision-making processes** so far, specifically the lack of substantive consultation regarding RRO closures, have already been **confirmed to be unlawful**, as per the legal cases requiring the DHA to reopen RROs in Johannesburg and Port Elisabeth and requiring the DHA to continue accepting new applications in Cape Town;

⁸³ Amit, R., T. Monson, et al. (2009). National survey of the refugee reception and status determination system in South Africa. Johannesburg, Forced Migration Studies Programme.

- This policy shift is motivated by **narrow and inconsistent strategic aims**, mainly related to vaguely defined security threats, which clash with the wider interests of South Africa's development and regional integration and which are not based on a substantive analysis of the real reasons for the dysfunctionality in South Africa's asylum system.
- The **lack of substantive consultation** with civil society, affected communities (foreign and South African) and other stakeholders (including other government departments, affected municipalities, businesses in proposed border areas, etc.) means the discussion about the location of RROs will not be based on the best possible information and is therefore likely to face severe implementation challenges, resource wastage, continued legal challenges and lack of cooperation from stakeholders. It will also severely undermine positive working relationships between the DHA and these sectors;
- The policy will have **high costs and unintended consequences** for both the DHA and government more generally as well as asylum seekers/refugees and South African citizens in terms of finance, human rights, economic development, local community development, public health and international reputation.

Legal Position

Since 2000 when they were first established with the coming into force of the Refugees Act, RROs have been located in the large in-land metros of Johannesburg (originally in Braamfontein, then Rosettenville, then Crown Mines since 2007), Pretoria/Tshwane (Marabastad), Cape Town, Durban and Port Elisabeth. In 2009, an RRO was established in Musina near the Zimbabwean border to assist in processing the large numbers of asylum seekers entering the country through the Beitbridge border post. In 2010, an additional RRO, called the Tshwane Interim Refugee Reception Office (TIRRO), was established in Tshwane specifically to process asylum applications from SADC citizens. At the end of May 2011, the DHA closed the Crown Mines RRO in Johannesburg, the largest and busiest RRO in the country, on the basis of a legal challenge by businesses located in its vicinity. All of Crown Mines' existing case load was transferred to the TIRRO office. At the end of October 2011, the Port Elisabeth RRO was similarly closed, with less than one day notice to local stakeholders. Most recently, the DHA closed the Cape Town RRO in Maitland at the end of June 2012, opening a smaller office in the city centre (Customs House) to finalise existing claims but not accepting new applicants. These closures were challenged in court by Lawyers for Human Rights (Johannesburg and Port Elisabeth)⁸⁴ and the Legal Resources Centre (Cape Town)⁸⁵ and the decisions are reviewed below.

There are several aspects of the discussion regarding the appropriate location of RROs which are governed by existing legal frameworks and decision-making processes. The 1998 Refugees Act (section 8.1.) provides that the Director General of Home Affairs can decide on the number of RROs. "The Director General may establish as many Refugee Reception Offices in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of this act." The right to decide on the establishment of an RRO

⁸⁴ *CORMSA and others v Minister of Home Affairs and Others 573756 / 2011 (NGHC); Somali Association of South Africa Eastern Cape and another vs Minister of Home Affairs and Others 3759/2011 (EHC)*

⁸⁵ *Scalabrini Centre Cape Town vs the Department of Home Affairs and Others 11681 / 2012 (WCHC)*

also implies the right to disestablish one. The act does not mention the location of RROs or criteria for deciding on locations.

As the decision to establish or disestablish an RRO is an administrative action (as, by extension is the decision of where to locate an RRO),⁸⁶ such decisions may not be arbitrary but must fulfil the requirements of the Promotion of Administrative Justice Act (PAJA). Furthermore, South African case law has established the importance of the accessibility of RROs for the fulfilment of asylum seekers' and refugees' basic rights,⁸⁷ and has emphasised the duty of the Department of Home Affairs to "ensure that intending applicants for refugee status are given every reasonable opportunity to file an application with the relevant refugee reception office..."⁸⁸

The Johannesburg, Port Elisabeth and Cape Town RROs all faced legal challenges from neighbouring businesses for being a 'nuisance' to their business operations. In Johannesburg, the resulting court order required the DHA to close the existing Crown Mines RRO location, but also to find an alternative location for the RRO within the same city.⁸⁹ The DHA did not implement the second part of the court order. In Port Elisabeth, a court order of 2 November 2009 required the DHA to provide additional services to clients (including better sanitation and queue management) in order to reduce the 'nuisance' to neighbouring businesses, and did not require the closure of the office. The DHA did not fully implement the 2009 court order and then used it as a reason to close the RRO two years later.

The DHA's closure of the Johannesburg, Port Elisabeth and Cape Town RROs was in turn challenged in court by organisations working with refugees. These cases focussed on administrative justice and procedural issues in DHA's decision-making processes. In all three cases, the DHA lost the court cases due to its failure to follow procedures set out in the Refugees Act (Section 8.1.) by not (substantively) consulting with the Standing Committee on Refugee Affairs.⁹⁰ All three judgments furthermore note that DHA's decision to close the RROs without replacement constitutes procedural unfairness as per the Promotion of Administrative Justice Act (No 3 of 2000). In Johannesburg and Port Elisabeth, this procedural unfairness rested on the lack of public consultation as per Section 4 of PAJA. In Cape Town, the interim ruling of 25 July 2012 stated that the decision was neither rational nor reasonable as per PAJA requirements for administrative action. In Johannesburg and Port Elisabeth, the courts ruled that DHA's decision to close RROs without replacement was unlawful, and ordered DHA to reopen RROs with full services and functionality in the old or new premises within a specified number of days from the order. The DHA was also ordered to consult with interested parties regarding any relocation of the RROs. In Cape Town, the DHA was ordered to ensure a fully functional RRO was operational within the Cape Town Municipality, including the acceptance of new asylum applications.

⁸⁶ As confirmed by the courts, most recently by Justice Dennis Davis in his judgment regarding the closure of the Cape Town RRO in June 2012, <http://www.lhr.org.za/news/2012/scalabrini-press-release-court-orders-cape-town-refugee-reception-office-accept-new-asylum>

⁸⁷ *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) at para 27

⁸⁸ *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA) at para 22

⁸⁹ *Spuddy Properties (Pty) Ltd and Others vs Mapisa-Nqakula and Others*, South Gauteng High Court (25 March 2011)

⁹⁰ *Consortium for Refugees and Migrants in South Africa and others vs Minister of Home Affairs and others*, 2011, North Gauteng High Court, Case no. 573756/11; *Somali Association of South Africa Eastern Cape and another vs Minister of Home Affairs and others*, 2011, Eastern Cape High Court, Case no. 3759/11; *Scalabrini Centre Cape Town vs the Department of Home Affairs and Others*, 2012, Western Cape High Court, Case no. 11681 / 12

Concerns regarding RRO closures

- The process through which Johannesburg, Port Elisabeth and Cape Town **RROs were closed**, namely without consultation or communication with affected groups, is not only **unlawful** for reasons of administrative justice, as established by the court cases reviewed above, but also reflects a complete disregard on the part of DHA for the Department's substantive commitments towards asylum seekers and refugees, and for its clients' daily realities.
- It is of grave concern that in all three cases, **DHA has ignored direct court orders** to reopen RROs or to provide equivalent services in these municipalities. This constitutes contempt of court and suggests that the DHA has little regard for the rule of law.⁹¹
- While some of the personnel from the Johannesburg RRO were transferred to the Marabastad and TIRRO offices to help deal with the additional case load, it is evident that these RROs are not able to manage the number of new applicants or renewals resulting from the need to serve asylum seekers and refugees from most of the country. This means that new applicants and persons needing to renew existing permits have been facing **increased barriers to access the Marabastad and TIRRO RROs** in Tshwane due to long queues. As documented by LHR through research conducted in June-August 2011, clients seeking to access Marabastad or TIRRO averaged nine attempts and 126 hours of queuing if they succeeded to gain entry, while more than two thirds did not succeed at all. These barriers have been accompanied by an **increase in corruption and violence** (such as verbal and physical abuse by guards), including regular riots by waiting applicants, leading to at least four deaths of persons seeking entry to the RRO by August 2011.⁹²
- Having to travel to Tshwane from Johannesburg and further away, due to RRO closures, is placing **significant financial burdens on asylum seekers and refugees**, especially given the probability of not being served in one day. The costs of transport, accommodation and food for the trip are not affordable for many, especially for women or men who have to travel with their children due to lack of alternative care arrangements.
- The ensuing inability to lodge applications or renew documents has left **asylum-seekers and recognized refugees at risk of becoming undocumented** and therefore being subjected to fines, detention and direct or indirect *refoulement* in violation of South Africa's obligations under domestic and international refugee and human rights law and standards.⁹³
- It is of particular concern that the closure of urban RROs constitutes the **implementation of policy before the completion of policy formulation**. As explicitly stated in DHA's answering affidavits to the Johannesburg, Port Elisabeth and Cape Town court challenges, the closure of urban RROs has been motivated by DHA's

⁹¹ Regarding the disregard for the court order in Cape Town, see <http://www.scalabrini.org.za/images/stories/reports/homeaffairscourtcontempt.pdf>

⁹² These practices have been documented in evidence submitted to the North Gauteng High Court as part of the *CoRMSA and others vs Minister of Home Affairs and others* case.

⁹³ Amnesty International (20 December 2011). Public Statement: South Africa: Call for South Africa to fulfil its international and domestic obligations in the protection of the rights of refugees and asylum seekers (AFR 53/007/2011). London, Lawyers for Human Rights (2011). *Asylum under Siege: Violence and Corruption in Pretoria's Refugee Reception Offices*. Tshwane, Lawyers for Human Rights.

intention to move all RROs to border areas, but there is as yet no well-developed policy regarding the border move.

Implications of RRO Closures

- Increased numbers of asylum seekers and refugees already in the country are likely to become undocumented, and therefore vulnerable to arrest and deportation (amounting to *refoulement*), since they will not be financially able to travel to the remaining RROs to renew their permits.
- The DHA will continue to face legal challenges domestically regarding the administrative processes of decision-making around closing RROs without the provision of effective alternatives. If it continues to ignore direct court orders to reopen closed RROs, it is also likely that individual DHA leaders will face contempt of court charges.
- The closure of RROs without the provision of viable alternatives, on the basis of a still-unconfirmed plan to move RROs to the borders, violates individuals' constitutionally guaranteed right to just administrative action, which requires government actions to be reasonable and rational. Failure to adhere to this principle erodes the rule of law and public confidence that government institutions are accountable to those they serve.
- DHA's lack of consultation and communication with affected groups regarding its plans, and the deteriorating services at the few remaining RROs, are leading to new strategies by asylum seekers, refugees and non-governmental organisations working with them. These strategies include public protests and marches, such as the picket of the Marabastad RRO on 19 June 2012, and a march to Parliament in Cape Town on 20 June 2012 to present a memorandum to the speaker of parliament. Such strategies will increase public awareness and scrutiny of DHA actions.

New Policy and Practice regarding moving RROs to the 'borders'

The intention of the Department to move Refugee Reception Offices to the 'border' has been stated publically in various forums, but no coherent written statement of policy, including strategic intentions and planned functioning, has been made public. This section therefore traces the policy making process to date and compiles the limited information which is available.

Given that moving RROs out of urban areas has significant substantive impacts on the nature of the asylum system, as well as large financial implications for the tax payer, the process followed in reaching such a decision is important. In evidence presented in the Crown Mines case, Mkuseli Apleni, Director General of Home Affairs, claims that the move to the borders was based on a Cabinet decision.⁹⁴ In fact, however, Cabinet had only decided on the need for a strategic process regarding border controls. In the answering affidavits to the Port Elisabeth case, DHA therefore backtracked and said that Cabinet was considering a *potential* move of asylum services to the border. There has also not been any substantive discussion

⁹⁴ CoRMSA and others vs Minister of Home Affairs and others, Respondent's answering affidavit, paragraphs 2.16 and 4.4

of a concrete border move plan in the Home Affairs Portfolio Committee, any other forum in Parliament, the Standing Committee on Refugee Affairs, or any other significant governmental consultation forum.

A meeting on 21 December 2011 between Lindile Kgasi, the Director of the Asylum Management Directorate in DHA, and civil society organisations was the first time the DHA had approached civil society on this subject, as confirmed by Ms Kgasi on that day. Invitations to the meeting were issued with two days' notice, just before the December holiday period. No substantive documentation regarding the planned border move was shared by DHA, with only limited information being presented verbally. This included the information that the decision to move all RROs to border regions had already been taken and only logistical details were still being discussed. A timeline was presented, showing that the process of moving all RROs to the border regions would be planned and costed in 2012, two offices would be moved in 2013 (to replace the Crown Mines and Port Elisabeth offices), and the move of all offices would be completed by 31 March 2015. The first new office to be established at a border post would be near the Lebombo post in Mpumalanga. The only request for input was on how civil society organisations intended to provide services to asylum seekers within the RRO move plans, including "welfare provision, sustainable livelihoods", rather than enabling any discussion of the nature of the plans themselves. This meeting did not, therefore, amount to substantive consultation on a draft policy.

Some limited indications of planned practices have emerged in documents such as the ANC's 2012 Policy Discussion Document on 'Peace and Stability', which notes the planned border move with approval. The ANC rejects the possibility of 'encampment', e.g. detaining asylum seekers while they await decisions on their applications and/or detaining recognized refugees, on the basis of "international experience... that permanent camps bring their own serious risks and challenges". It does, however, propose detention for certain unclearly defined categories of asylum seekers: "those asylum seekers who present a high risk must be accommodated in a secure facility, until their status has been determined. The low risk asylum seekers will be processed while they are assisted by various organisations."⁹⁵ A similar process of "risk assessment" was also mentioned verbally by Ms Kgasi at the 21 December 2011 meeting with civil society, but without further specification.

It is also significant that the Home Affairs Minister's 2012 budget speech did not mention moving RROs to the border, even though this would have significant budget implications.

The impacts of the RRO move to the border – for asylum seekers/refugees, the DHA and other government departments as well as communities in the border towns – depend to a significant extent on the details of how the RROs are moved to the border and especially what functions will be moved.

The following key questions remain unanswered to date:

- Would all existing asylum management functions be moved out of current urban areas and to offices located at ports of entry? If so, how would asylum seekers already in the country be affected in terms of permit renewals, status determination interviews, travel document and refugee ID applications, appeal hearings and other administrative processes? Or will some functions, specifically functions pertaining

⁹⁵ African National Congress (2012). *Peace and Stability - Policy Discussion Document*. p. 6

to asylum seekers and refugees already in the country, continue to be processed in urban centres?

- Where would the 'port-of-entry' RROs be located, given that while most asylum seekers enter the country through Beitbridge and Lebombo land borders, significant numbers also enter through other land borders (from Swaziland, Botswana, etc.), through sea ports or through airports? How would asylum seekers entering through other ports of entry be received and processed?
- Given that domestic and international law prohibit penalising asylum seekers for entering a host country by irregular means,⁹⁶ on the understanding that not all asylum seekers have enough information about asylum application processes to present themselves at border posts, or that they may have other reasons for irregular entry which do not invalidate their asylum claims, how will asylum seekers be treated who only declare their intention to apply for asylum once inside the country's territory?
- What adjudication processes are intended to be completed at the port of entry RROs, and in what timeframes? E.g. is the intention to issue Section 22 permits and then enable documented asylum seekers to move to other parts of the country while awaiting the status determination process, or is the intention to complete the first instance adjudication process and full status determination interview and issue Section 24 permits to those who qualify, or even the full adjudication process including appeals?
- Given that any documentation process takes time, especially if adjudication processes and not only the initial Section 22 issuing are envisioned, how will DHA manage the welfare requirements of asylum seekers while waiting to access and complete documentation processes? This would include the need, at minimum, for shelter, food, and health care, potentially for significant periods of time (e.g. weeks or months).
- Would asylum seekers be required to remain in the vicinity of the border RRO for the duration of the permit adjudication and processing period, given the likelihood of protracted processing times? If so, what mechanisms would be used to prevent or limit their movement to other parts of the country? Would some form of detention be required for some or all asylum seekers?

Strategic Aims

As noted in the introduction, the Promotion of Administrative Justice Act (PAJA) sets out criteria for administrative action affecting the public. As argued in the Crown Mines, Port Elisabeth and Cape Town RRO closure cases discussed above, the decisions to close existing RROs without replacement amount to administrative actions which 'materially and adversely affect the rights of the public.' As the decision to relocate RROs to ports of entry at land borders is a direct correlate of the closure of existing RROs and has been described by the DHA as within its existing administrative purview (under the authority of the Director General based on the Refugees Act), it can be seen as administrative action which affects the public. Such action must therefore fulfil the following criteria:

- The decision-maker must provide clear reasons for the decision;
- The decision must correctly apply the law;

⁹⁶ Immigration Act 2002

- The decision must be based on relevant considerations;
- The decision must not be based on irrelevant considerations;
- The decision must not be arbitrary; and
- The decision must be rational and reasonable, and demonstrate a logical connection to the information and reasons presented by the decision-maker.⁹⁷

It is therefore crucial for the Department of Home Affairs to provide clear and relevant reasons for the decision to move RROs to land ports of entry, as well as clearly and logically connecting these reasons with the nature of the decision taken. Even though no document has been made public setting out the Department's strategic aims and intentions, a range of statements have been made in presentations and court papers which can be judged against these criteria. **An analysis of these strategic aims shows that very few provide relevant considerations for moving RROs out of urban centres, as they can be more easily addressed through other means. Furthermore, the decision to move RROs to land ports of entry is based on largely irrelevant considerations and does not demonstrate a logical connection to the information and reasons presented by the decision-maker.**

The following reasons have been presented for closing urban RROs and for moving RROs to land ports of entry:

Reason	PAJA criteria
1. The need for premises appropriate to large numbers of applicants. The existing urban premises were not designed to serve the greatly increased numbers of asylum seekers since the early 2000s.	No logical link to border move. This can be addressed by finding suitable premises in urban areas, and has been thus addressed in the past.
2. The need for premises which are not open to legal challenge by neighbouring businesses/stakeholders.	No logical link to border move. This can be addressed by finding suitable premises in urban areas, and has been thus addressed in the past. If RROs were managed in a way which would not result in long and unruly queues, and would not necessitate people waiting overnight to access the premises, there would not be negative impacts on neighbouring businesses.
3. Separating 'genuine' asylum seekers from economic migrants (based on the contention that 95% of current asylum applications are from economic migrants) by expediting the processing of 'manifestly unfounded' applicants.	No logical link to border move. This can be addressed without moving out of urban areas. One could justify introducing a fast-tracked system of processing manifestly unfounded cases at RROs near ports of entry (while ensuring the retention of adequate controls, appeal processes and independent monitoring, as well as the option to lodge an initial asylum application at an inland location as well) on this basis, but this logic would not justify moving all renewals and other administrative processes to the ports of entry.

⁹⁷ PAJA, Act 3 of 2000

<p>4. Ensuring that 'asylum seekers gain lawful entry into the Republic.'⁹⁸</p>	<p>No logical link to moving all asylum administration processes to the border, as provisions such as the Section 23 permit already exist to facilitate asylum seekers gaining lawful entry to the Republic. One could justify issuing Section 22 permits to asylum seekers close to ports of entry (as is currently the case with the Musina RRO), but this logic would not justify moving all renewals and other administrative processes to the ports of entry.</p>
<p>5. Reducing 'security risk' to South African communities purportedly related to asylum seekers being "released" or "lost" into communities and being "untraceable" after entering the country,⁹⁹ or to address concerns such as a "United Nation report (sic) [which] has fingered the Republic as one of the weak links in the fight against terrorism and such serious offences as human and drug trafficking. This criticism arises principally from the record of the controls of our borders and our ports of entry."¹⁰⁰</p>	<p>Irrelevant consideration, as there is no evidence concerning a concrete security risk which undocumented or documented asylum seekers pose to South Africans. No logical connection is made between terrorism, human and drug trafficking and asylum seekers. Furthermore, if the security concern relates to asylum seekers who are either undocumented after crossing the border or who only hold a Section 23 permit, one could justify issuing Section 22 permits to asylum seekers close to ports of entry (as is currently the case with the Musina RRO), but this logic would not justify moving all renewals and other administrative processes to the ports of entry.</p>
<p>6. Providing a cost effective service.¹⁰¹</p>	<p>This could be a relevant consideration if sufficient costing information were provided and compared with the existing costs of managing urban-based RROs. Such costing would, however, have to include the correlated costs to moving RRO administrative functions, namely the added welfare support needs of asylum seekers in border areas, and the opportunity costs to asylum seekers and refugees forced to travel long distances and be away from contributing to the economy for long periods of time, etc. It would also have to include the costs associated with relocating DHA staff to outlying areas, including providing accommodation and other services generally available in urban areas.</p>
<p>7. Addressing "xenophobic attacks" and "burdens on the provision of housing, employment, health services and a tangential strain on correctional services" which are purportedly the result of an "increasing number of foreigners seeking asylum permits or refugee status."¹⁰²</p>	<p>Irrelevant consideration, as this purported causal relationship amounts to hearsay.¹⁰³ There is no concrete evidence that asylum seekers are placing a significant strain on housing, employment, health services or correctional services. These services are rather being strained by inadequate planning for domestic migration and population growth.¹⁰⁴ Furthermore, this argumentation suggests that the primary motivation of moving RROs to the border is to achieve a reduction in the "increasing number of foreigners seeking permits or refugee status," which contravenes South Africa's obligation to provide protection based on need rather than on a priori quotas.</p>

<p>8. To achieve a reduction in the “increasing number of foreigners seeking asylum permits or refugee status” by limiting incentives (such as the right to work and remain in the country legally while waiting for the processing of asylum claims).</p>	<p>This aim would have to be commensurate with the correct application of the law, which, in the case of asylum, is concerned with the provision of protection to eligible persons without an a priori focus on numbers, and which must fulfil basic Constitutional principles regarding human dignity while completing an administrative process such as asylum status determination. As noted above regarding the limitation of basic rights for asylum seekers, moving RROs to the border to reduce incentives for abuse would amount to punishing genuine applicants.</p>
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It is notable that none of the arguments made by Department of Home Affairs Officials, apart from ‘ensuring that asylum seekers gain lawful entry to the Republic,’ deal with how moving RROs to ports of entry would address key mandates and challenges of the asylum system, including how it would:

- enable protection;
- reduce or control for the danger of *refoulement*;
- increase administrative fairness and efficiency by addressing entrenched corruption, improving the quality of status determination decisions, improving management of queue management, basic infrastructure, file management, and processing times, and generally addressing the measures recommended by past process engineers’ reports and turn-around strategy aims.

As the above table illustrates, only some of the proposed reasons for moving RROs to ports of entry can be considered administratively relevant, namely elements of 3) and 4). **These aims could be achieved by processing some aspects of the asylum application process for new arrivals at RROs located close to ports of entry, but there is no clear justification for moving other services for existing asylum seekers. If new RROs are established, along the lines of the RRO established in Musina in 2009, this should augment rather than replace the existing urban RROs.**

⁹⁸ Mentioned in DHA’s Crown Mines answering affidavit

⁹⁹ Director General of DHA answering affidavit in *CORMSA and others v Minister of Home Affairs and Others 573756/ 2011 (NGHC)*, paragraphs 2.6, 2.8, 2.9, etc.

¹⁰⁰ Ibid, para 2.9

¹⁰¹ ibid

¹⁰² Ibid, para 2.4

¹⁰³ See CoRMSA answering affidavit in *CORMSA and others v Minister of Home Affairs and Others 573756 / 2011 (NGHC)*

¹⁰⁴ Landau, L. B., A. Segatti, et al. (2011). *Governing Migration & Urbanisation in South African Municipalities: Developing Approaches to Counter Poverty and Social Fragmentation* Johannesburg, SALGA.

Concerns regarding Planned Move of RROs to the Border

As discussed above, key concerns relating to DHA's decision to move RROs to the border include:

Process Concerns:

- The implementation of the policy before the development, public debate and formal adoption of a comprehensive policy position and plan;
- The lack of substantive consultation with affected groups and stakeholders. This includes asylum seekers, refugees and organisations working with them, but also municipalities where RROs are proposed to be located, local communities and businesses in these areas, as well as other government departments which will be affected by the move, including the Departments of Health, Social Development (with regard to unaccompanied children), SAPS, Public Works, and Treasury;
- The lack of justification for the move based on the criteria of just administrative action.

Substantive Concerns:

- The imposition of an unreasonable burden of costs (financial and time) on existing asylum seekers and refugees to complete administrative processes such as permit renewals, status interviews, assistance with lost permits, verification of permits for banking purposes, etc. to which they have a right in terms of efficient service provision, and regarding which the courts have established the Department's duty to support rather than hinder access.¹⁰⁵
- The likelihood of **severe disruptions in services** due to the initial movement of files and systems (as has been the case with moving files from one RRO location to another within Johannesburg in the past, or with moving files from Johannesburg to TIRRO in Pretoria after the closure of the Johannesburg office in 2010), and longer term administrative problems due to the remoteness of the border locations. The latter concern is based on the experience of the Musina RRO which for a long time was not linked to the central asylum seeker database, regularly ran out of security paper, and suffered from extensive corruption due to a lack of monitoring. It is also likely that DHA will struggle with staffing, as experienced and senior DHA staff and Refugee Status Determination Officers may not wish to move to remote border towns.
- The likelihood that moving RROs to remote ports of entry will be coupled with the **detention of asylum seekers**. South Africa has a non-encampment policy, which has been strenuously reiterated by Home Affairs Officials, as well as by the ruling party.¹⁰⁶ However, there are several indications that some form of detention is planned, even if such detention may not be called a 'camp'. The above-mentioned reference to detaining 'high risk' asylum seekers, without specifying the nature of such risk assessment or the nature of envisioned detention, is of particular concern. It is important for DHA to state openly whether it intends to detain asylum seekers in the border area while their applications are being processed, and what form such detention would take.

¹⁰⁵ *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA) at para 22

¹⁰⁶ African National Congress (2012). *Peace and Stability - Policy Discussion Document*.

- o **De jure detention** would be the explicit and legislated holding of asylum seekers, or some categories of asylum seekers, in closed facilities, with no freedom of movement. There is currently no legislative framework for such detention, or only in very limited circumstances as circumscribed by the Refugees Act, Section 23, which states that an asylum seeker may be detained only if their asylum seeker permit has been withdrawn because:
 - a. the applicant contravenes any conditions endorsed on that permit; or
 - b. the application for asylum has been found to be manifestly unfounded, abusive or fraudulent; or
 - c. the application for asylum has been rejected; or
 - d. the applicant is or becomes ineligible for asylum in terms of section 4 or 5 (of the Act).

These criteria require that the asylum application has been substantively assessed already. The Act therefore does not permit the detention of asylum seekers during the initial assessment process. The detention of asylum seekers during the initial claim adjudication process would therefore require a revision of the Refugees Act.

- o **De facto detention** would include a variety of arrangements which would constrain asylum seeker movements but without a clear legal basis. Examples would be holding persons in a detention facility like the SMG in Musina with the argument that this constitutes ‘safe shelter’ in the absence of other shelter options in the town (as has been done in Musina in the past). A form of limited movement would also include practices such as granting asylum seeker permits for only very short periods of time (e.g. a few days or weeks), so that applicants have to remain in the vicinity of the border RRO to keep renewing their permits. While such practices might be legal, they would have significant impacts for asylum seekers and for communities surrounding the RROs, as discussed below.
- o More broadly, however, **the provision of shelter and basic services will necessarily be a central aspect of keeping large numbers of newly arrived asylum seekers in a remote border area with limited opportunities for self-sufficiency** for the period of time needed to have some or all aspects of their status applications processed. As noted in the section on limitation of basic rights above, it is highly unlikely that international organisations or domestic NGOs will be willing or able to provide and fund such services. These additional services would therefore have to be funded out of tax-payer money.
- o Section 35(2) of the Refugees Act provides for the establishment of ‘centres or places for the temporary reception and accommodation of asylum seekers or refugees’ at the discretion of the Minister, ‘after consultation with the UNHCR representative and the Premier of the province concerned’, but this is only envisioned for situations of mass influx and only for temporary reception and accommodation. Establishing such centres without the condition of ‘mass influx’ would therefore require a change in the Act.

- The experience of Musina in 2009, shortly after the establishment of the RRO in the town, is that not providing shelter or basic services to asylum seekers in a context with few or no alternative options for dignified accommodation results in a **humanitarian emergency**. Due to long delays in accessing the Musina RRO, a lack of governmental, NGO or private shelter facilities in Musina, and fear of arrest and deportation due to their inability to access documentation, up to 4000 asylum seekers were forced to stay on the open-air Musina Showgrounds without any shelter from the elements and inadequate sanitation, clean water, food or health care.¹⁰⁷ This situation posed a grave public health challenge, particularly given the outbreak of cholera in Zimbabwe around the same period. Any new RRO would need to ensure that this predictable and preventable situation does not recur.
- Should DHA intend to place asylum seekers in some form of detention or require them to remain in the border zone for long periods without adequate social welfare support, it is furthermore likely that asylum seekers will seek to evade and avoid such limitation on movement by bypassing the port-of-entry RRO and remaining undocumented, which is not in the interest of South Africa as a whole nor would it uphold South Africa's domestic and international legal obligations regarding the provision of protection.
- It is important to note that international research has shown that **detention does not deter irregular migrants**. As noted by the International Detention Coalition, "detention fails to impact on the choice of destination country and does not reduce numbers of irregular arrivals. Studies have shown asylum seekers and irregular migrants either are: not aware of detention policy or its impact in the country of destination, may see it as an inevitable part of the journey, or do not convey the deterrence message to other back to those in country of origin."¹⁰⁸

Implications of RRO Move to Border

The implications of moving RROs to international border lines will depend to a great extent on choices made in relation to the still-open questions noted on page 39-40. Negative implications in terms of costs, legal challenges, international reputation and impacts on the host community in border towns will be greater if all RRO services are moved to the borders (rather than only the processing of new arrivals), if new arrivals are not provided with adequate shelter and services, or if they are detained. The following implications are likely in any case:

- An indication of the significance of the planned border move, beyond a mere administrative decision, is that the rumours of the plan, and the lack of clarity and consultation, are **already having significant impacts on asylum seekers and refugees in the country**. The main fear among asylum seekers and refugees already in the country is that they will have to travel extreme distances to renew their current

¹⁰⁷ CoRMSA (2009). Report to the Government of the Republic of South Africa on the Humanitarian Crisis in Musina, South Africa. Johannesburg, Consortium for Refugees and Migrants in South Africa. http://www.cormsa.org.za/wp-content/uploads/Resources/Crisis_in_Musina.pdf.

¹⁰⁸ <http://idcoalition.org/cap/handbook/capfindings/>

permits, which many of them cannot afford therefore making them vulnerable to becoming undocumented. In Johannesburg, this fear is based on the existing experience of the closure of the Johannesburg-based RRO and the requirement that they travel to Tshwane to renew their permits.

Women asylum seekers and refugees in a support group at the Sophiatown Community Psychological Services NGO in Johannesburg shared their experiences and fears:¹⁰⁹

“Last year in July I went to Marabastad for my asylum permit extension. I got there at 4 am, having left home at 3 am. There was already a long line and I did not manage to extend my papers that day even though we had arrived early. So I looked at my children and said: what can we do? I have no money, only enough to travel back and forth once. To go to Pretoria with my children costs R600. There is no money at home for food or for transport. So we had to sleep there, me and my 8 children. We slept on the ground, without food and it was winter. How will I find money to go to Musina? It will cost R3000 to go to Musina with my children. I have never seen R3000 in one place in my life. Maybe it is just a way to say to foreigners: you must go home.”

“When we hear the rumours that they are closing the Reception Offices and moving them to the borders, our greatest fear is that they want to chase us out of the country because it is an impossibility to go to Musina. So this seems like a hidden agenda against us. I feel so sick all the time, I am so afraid of the situation.”

“My greatest fear is that this is going to encourage xenophobia because the people see the government chasing us out by making it impossible to have documents. If I had to choose, I would take 2008 (open violence) over this today, which is underground xenophobia.”

“It feels like a plan to make us undocumented so that we will be arrested and deported. If I am deported they will kill me and kill my family. When they informed people (refugees) at the Jesuit Refugee Services (NGO) about the RRO move people were crying, they were so afraid.”

Asylum seekers in Cape Town, faced with the imminent closure of the RRO to new applicants, expressed similar fears:

“We are not all rich, how can we go to the centre again? Last time they did not serve us and now they are telling us we have not applied? We can’t afford to go up and down for nothing. Now they want us to go to the border? We can’t afford that, and even if we did - how do we know we will be served. We are also hearing people are being deported in large numbers, why can’t we just be helped? We don’t want to be illegal and we don’t want to be deported. We are afraid.”¹¹⁰

¹⁰⁹ Discussion on 15 June 2012

¹¹⁰ Testimony collected by PASSOP, Cape Town

- In contradiction to its stated aims, the policy is likely to increase the number of genuine asylum seekers who remain undocumented, either because new arrivals avoid port-of-entry-based RROs (especially if these are coupled with detention), or do not know to access them and are giving no other in-land options, or because existing asylum seekers have their status lapse due to their inability to access distant RROs. As noted in the introduction, increased insecurity of asylum seekers has negative public health and economic effects on the entire community.
- Since more stringent asylum application processes are well known not to deter migration, moving RROs to the border will not reduce the number of economic migrants seeking to enter and remain in South Africa. It may, however, mean that more of these migrants remain undocumented, and therefore even more invisible to the state than when they were documented through the asylum system. This will be the case unless other permits and processes are made available to regularise the presence of economic migrants, especially from the region (such as the 2010 Zimbabwean Documentation Project).
- Moving RROs to the border will come with a significant cost to the tax payer. Not only will new facilities be needed (either newly built or newly renovated), but there will be significant staff relocation and accommodation costs as well as the need for new recruitment and training if experienced staff choose not to move themselves and their families to remove border towns. Most importantly, the necessary provision of basic shelter and welfare services to asylum seekers while they await their decisions will cost much more than current urban self-sufficiency. Detaining asylum seekers is also very costly.
- There will be resistance from the municipalities and local communities where new RROs are to be located. While one of the DHA's justifications for moving RROs out of urban areas is to avoid legal action by neighbouring businesses, such legal action can also be brought by businesses or communities in border towns, if the same mismanagement of RROs (including the lack of adequate queue management, corruption, and especially the lack of adequate shelter and welfare services) persist. Even if host communities do not take legal action, the impact large numbers of asylum seekers on a small town's public health care infrastructure, its housing rental market, and its business environment is likely to be much higher and more concentrated than the impact on a larger city (as evidenced by the example of Musina to date).
- The intention to move RROs to the border invites international scrutiny of South African asylum processes and the fulfilment of commitments under international law. As an example, Amnesty International has issued a public statement expressing concerns about the closure of RROs and the plan to move them to the borders.¹¹¹ South Africa is likely to continue to be questioned in international fora such as the UN's Universal Periodic Review and the African Union Peer Review Mechanism if the border move leads to asylum seeker detention, severe humanitarian crises due to lack of adequate shelter and welfare provision, or extreme hardship for existing asylum seekers and refugees in keeping their documentation up to date.

¹¹¹ Amnesty International (20 December 2011). Public Statement: South Africa: Call for South Africa to fulfil its international and domestic obligations in the protection of the rights of refugees and asylum seekers (AFR 53/007/2011). London.

7. APPEALS

Legal Position

Asylum seekers whose claims have been rejected as unfounded have the right, on application, to have their claims reviewed by the Refugee Appeal Board (RAB). Asylum seekers whose claims are rejected as manifestly unfounded automatically have their cases reviewed by the Standing Committee for Refugee Affairs (SCRA), which has been replaced with a Director General-led review process through the Refugee Amendment Act.¹¹² The RAB ceased being a national body headquartered in Tshwane in 2010 and RAB members began working out of the RROs around the country.

New Policy and Practice

During the decentralisation process of the RAB, several RAB members did not have their contracts renewed and a large number of cases they were working on were thus incomplete. Incomplete cases cannot be completed by a new RAB judge but have to be reheard from the beginning by a new judge. As reported by the Director General of DHA to the Home Affairs Portfolio Committee on 22 May 2012, the RAB has only had a capacity of three judges since early 2012, with an additional six to be appointed soon. As an example of recent challenges with the appeals process due to the decentralisation process and the lack of capacity, the following table shows the results of RAB cases in Cape Town over the past three years which were left as incomplete due to the decentralisation of the RAB process, as communicated by the RAB Registry Clerk.

Table 1: Refugee Appeal Board Cases Cape Town (2009-2012)

Pending	Referred Back	Finalised	No Record	Total
13	18	4	14	49

The 'Pending' category has yet to be clarified, but may refer to cases that still need to be referred back to a new RAB judge to be re-heard. It could also potentially be cases that are awaiting decisions to be written. 'Referred Back' means that the cases were heard by

¹¹² This provision only takes effect with the promulgation of the Refugee Amendment Act's Regulations.

an RAB member but a decision was never rendered. As that RAB member has since left the Department, the case must be reheard again at the RRO. 'Finalised' refers to cases that decisions have been issued on and the asylum seeker will collect their decision the next time they report to the RRO to have their document renewed. 'No Record' indicates that there is no record existing on the RAB database.¹¹³ The implications are unclear regarding whether the asylum seeker would therefore need to restart and appeals process from scratch, or whether they would be considered rejected and therefore at risk of being arrested and deported as an illegal immigrant.

The four finalised cases represent an 8% completion rate, with 66% of the cases needing to be reheard either due to the RAB member not finalising the case or due to administrative error. Nationally, the statistics are somewhat better in term of completion rates (22.6% over a four month period). A point of great concern, however, is the extremely low rate of cases upheld on appeal (.002% or 4 out of 1776 finalised cases), in spite of the well-known problems with the quality of the original decisions.¹¹⁴ This stands in contrast to an approximate 11-12% rate of upheld cases in previous years.¹¹⁵ This means that the appeal system is no longer acting as an effective control mechanism over the status determination process.

Table 2: Refugee Appeal Board Cases – Nationally (Jan – April 2012)¹¹⁶

Month	No. Appeals lodged	No. Cases booked	No. Hearings held	No. of RAB cases finalized	No. of Cases confirmed as unfounded	No. of Cases upheld	No. of Cases Referred back to RRO	Other (conditions cancelled, abandoned)
Jan	364	262	219	241	193	3	40	5
Feb	3014	364	162	616	212	0	445	50
March	2976	375	147	520	32	1	457	30
April	1512	299	24	399	54	0	328	17
Total	7866	1300	552	1776	400	4	1270	102

¹¹³ Information supplied by Scalabrini Centre Cape Town

¹¹⁴ Amit, R. (2012). All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination. Johannesburg, African Centre for Migration & Society.

¹¹⁵ Communication with UNHCR

¹¹⁶ From presentation on Presented to the Home Affairs Portfolio Committee on the Status of Ports of Entry and Asylum Seeker Management by the Director General of Home Affairs on 22 May 2012

Additionally, a new procedure for lodging appeals cases was introduced around August 2011. The rules were amended to require a refugee to file a notice of appeal with an affidavit attached to it setting out some biographical data and reasons for disagreement with the RSDO's decision. Until January 2012, RAB members had been hearing appeal cases *de novo*, in recognition of the bad quality of written decisions emanating from RSDOs.¹¹⁷ The new RAB members since early 2012, however, are limiting the appeal hearing to issues explicitly declared in the appeal request documentation.

The additional documentation requirement is in contrast with the previous process which allowed rejected asylum seekers to request an appeal by giving a simple statement at the RRO asking for an appeal. The new procedure means that rejected asylum seekers are more dependent on service providers as the appeals documentation is now too complex for most asylum seekers to prepare independently, especially if they are not well versed in English.

Finally, LHR has documented severe irregularities for asylum seekers who have received negative decisions based on their claims being unfounded, and are therefore awaiting appeal dates at the TIRRO RRO in Tshwane.¹¹⁸ In spite of mostly having submitted a Notice of Intention to Appeal, LHR clients in this position have experienced the following problems:

- Officials have denied that Notices of Intention to Appeal were submitted, refused to verify physical files or computer records, and told applicants that it is their responsibility to prove that they submitted the Notice (even though no receipts are issued for Notices);
- Officials have asked appeal applicants for bribes of between R500 and R1500 in order to have their Section 22 permits renewed while waiting for their appeal hearing or in order to have their Intention to Appeal processed in order to receive an appeal date.

Concerns

- Slow appeal completion rates due to low capacity and the need to rehear many cases means that a new backlog has developed, increasing appeal waiting times;
- New RAB judges are inexperienced in Refugee law. While they are all legally trained, they have only received half a day of training in refugee law by UNHCR since they were appointed. They have declined offers of additional training with internationally recognised experts in refugee law.
- New procedures make it harder for asylum seekers to manage their own appeals, disadvantaging those without access to legal service providers, including especially those not based in the major metro areas where legal service providers have their offices.
- Regarding challenges in lodging appeals at TIRRO, the division of responsibilities between DHA and the RAB, and the extent of the latter's independence, is of

¹¹⁷ See also Amit, R. (2010). Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions. Johannesburg, Forced Migration Studies Programme, Amit, R. (2012). All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination. Johannesburg, African Centre for Migration & Society.

¹¹⁸ Lawyers for Human Rights letter to Minister of Home Affairs and others Re: Renewal of Temporary Asylum Permits for Applicants Awaiting Appeal Dates at TIRRO Refugee Reception Office in Tshwane, 24 February 2012

concern. When LHR wrote to the Minister and Deputy Minister of Home Affairs to address the administrative failures and corruption at TIRRO, there was no response apart from a letter from the Refugee Appeal Board requesting a list of persons awaiting appeal dates. This suggests that the RAB was mandated to look into the complaint on behalf of the Minister, even though the RAB is intended to function as an independent institution, based on the Immigration Act (Section 23(3)) and not as an arm of DHA and the RROs. Furthermore, the RAB has no means or authority to investigate complaints around corruption and access to appeals at RROs.

8. CONCLUSIONS

In conclusion, this report seeks to provide a basis for further engagement between the Department of Home Affairs and other stakeholders regarding the future of the asylum system in South Africa.

Such stakeholders include government institutions with mandates to uphold and monitor Constitutional rights and ensure effective government services, such as the Monitoring and Evaluation Department in the Presidency, the Public Protector, the Department of Justice and Constitutional Development, and the South African Human Rights Commission. It also includes departments whose work is directly affected by DHA choices and actions within the asylum system relating to tax payer costs (Treasury) and international reputation (Department of International Relations and Cooperation). Relating specifically to the intention to move RROs to border areas, this affects the host municipalities in border areas (probably Nkomazi in Mpumalanga and Vhembe and Limpopo), and therefore the Department of Cooperative Governance and Traditional Affairs and SALGA as representatives of the interests of those municipalities.

A further key stakeholder is the African National Congress. Some of the key policy shifts relating to limiting asylum seeker rights to work, moving RROs to the borders, and detaining asylum seekers, are reflected in party policy discussion documents. More broadly, these documents suggest an increasingly strong security paradigm as informing asylum and immigration management. This document can support continued internal ANC discussions as to the desirability of such approaches as well as debates between the ANC and broader South African society.

Another important stakeholder is the UNHCR, as the international organisations mandated with the protection and asylum seekers and refugees.

Finally, South African and regional civil society organisations (given the regional impacts of a 1st/3rd safe country policy) can use this report to coordinate discussions about advocacy approaches. The concerns raised are of interest to civil society organisations dealing with Constitutional rights and administrative justice, broadly speaking, as well as with refugee rights specifically. For organisations providing services (whether legal or welfare) to asylum seekers and refugees, this report can assist in considering responses to predictable impacts on their own activities, in so far as many of these are oriented around the presence of self-

settled and self-sufficient asylum seekers and refugees in urban areas rather than in remote rural border areas.

Finally, in congratulating Minister Nkosazana Dlamini-Zuma on her election as Chair of the African Union Commission, we hope that the new Minister of Home Affairs will take the concerns raised in this report into account when considering her or his strategic direction in relation to South Africa's asylum system.

9. RECOMMENDATIONS

To Department of Home Affairs:

1. The Department of Home Affairs should improve its training programme and increase the capacity of its legal department as well as its internal monitoring and oversight systems to ensure that officials at different levels do not apply *ad hoc* practices which contravene the laws they are mandated to implement.
2. The Department of Home Affairs should immediately cease the use of the 1st safe country principle to deny asylum seekers entry into the country, to deny access to the asylum process, or to reject claims at any stage of the adjudication process, until a formal policy concerning 1st/ 3rd safe country principles has been developed, consulted on and passed into South African law.
3. The Department of Home Affairs should put in place internal and inter-departmental monitoring and oversight measures to ensure that border officials do not conduct any pre-screening which denies self-declared asylum seekers the right to enter the country through a border post and be issued with an asylum transit permit.
4. The Department of Home Affairs should allow and enable independent monitoring of border crossing processes by the South African Human Rights Commission, the UNHCR and South African civil society organisations, to ensure that the unlawful denial of entry to asylum seekers is not taking place.
5. The Department of Home Affairs should ensure that the unlawful requirement to produce an asylum transit permit as a prerequisite for RRO access does not recur at any RRO.
6. The Department of Home Affairs should not seek to change existing rights to work and study and to freedom of movement for asylum seekers and refugees as this would be unconstitutional and would necessarily be more costly to the tax payer than the current system of self-sufficient self-settlement.
7. With regard to asylum seeker and refugee rights to work (including the right to be self-employed and start businesses) and their right to move and settle freely throughout the country, the Department of Home Affairs with the Department of Justice and Constitutional Development, the South African Police Services, metro

police departments and municipalities should ensure that laws, including by-laws regulating businesses, are applied equally and without discrimination according to nationality or legal status.

8. The Department of Home Affairs should respect and immediately implement court decisions requiring DHA to re-open RROs in Johannesburg and Port Elizabeth and to continue accepting new applications in Cape Town.
9. The Department of Home Affairs should not close or restrict the operations of any more existing RROs until a full strategic and operational plan regarding the proposed move of RROs to the borders has gone through substantive consultation with the Home Affairs Portfolio Committee, UNHCR and the public (including directly affected stakeholders). Such a strategic and operational plan should answer the questions listed above regarding: which functions would be moved including functions for asylum seekers and refugees already in the country; exact locations and treatment of asylum seekers arriving by other routes; provisions for asylum seekers who only declare their intent to apply for asylum once inside the country; number of adjudication processes to be completed at the border RROs and timeframes; provision of asylum seeker welfare requirements; and intentions regarding detention or limited movement within the border area.
10. Refugee Appeal Board (RAB) members should receive more training in refugee law.
11. The RAB should be capacitated through the appointment of more members.
12. The RAB should be capacitated through the provision of dedicated country of origin information research.
13. The independence of the RAB from Ministerial and Departmental pressures should be safeguarded.

To Home Affairs Portfolio Committee in Parliament

1. The Portfolio Committee should ensure that no practices relating to a 1st/3rd safe country principle are implemented before a policy proposal has been formally debated through the Portfolio Committee. The Committee should furthermore ensure that any policy regarding 1st/3rd safe country practices must be commensurate with domestic and international law and minimum standards established by UNHCR.
2. The Portfolio Committee should resist initiatives which seek to change existing rights to work and study and to freedom of movement for asylum seekers and refugees as this would be unconstitutional and would necessarily be more costly to the tax payer than the current system of self-sufficient self-settlement.
3. The Portfolio Committee should censure DHA for not respecting or implementing court decisions requiring DHA to re-open RROs in Johannesburg and Port Elizabeth and to continue accepting new applications in Cape Town.
4. The Portfolio Committee should insist on DHA presenting to the Committee a full strategic and operational plan regarding the proposed move of RROs to the borders, before any further steps to implement such a move (including the closure of existing

RROs) is taken. Such a strategic and operational plan should answer the questions listed above regarding: which functions would be moved including functions for asylum seekers and refugees already in the country; exact locations and treatment of asylum seekers arriving by other routes; provisions for asylum seekers who only declare their intent to apply for asylum once inside the country; number of adjudication processes to be completed at the border RROs and timeframes; provision of asylum seeker welfare requirements; and intentions regarding detention or limited movement within the border area.

5. The Portfolio Committee should probe the extent to which the proposed move of Refugee Reception Offices to border areas is a cost effective and administratively appropriate strategy for the fulfilment of DHA's commitments regarding refugee protection and whether policy planning processes fulfil statutory requirements.

To Monitoring and Evaluation Department in the Presidency:

1. The M&E Department in the Presidency should investigate DHA's repeated application of unlawful practices (such as denial of entry to asylum seekers, non-issuance of asylum transit (Section 23) permits and the requirement to produce a Section 23 permit to access Refugee Reception Offices), in spite of internal recognition that these practices are unlawful.
2. The M&E Department in the Presidency should investigate the extent to which the DHA has followed necessary processes of substantive policy development, including substantive consultation with stakeholders, in relation to asylum policy changes since 2011, or whether it has contravened administrative laws by implementing such changes before completing necessary policy making processes.
3. The M&E Department in the Presidency should probe the extent to which the proposed move of Refugee Reception Offices to border areas is a cost effective and administratively appropriate strategy for the fulfilment of DHA's commitments regarding refugee protection.
4. The M&E Department in the Presidency should investigate DHA's repeated non-compliance with court orders regarding the closure of RROs and other matters.

Beyond compromising the rights of refugees and asylum seekers, the existence of a government department that flouts the legislation which it is obligated to implement has serious implications for the rule of law, good governance, and service delivery.¹¹⁹

¹¹⁹ Amit, R. (2012). All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination. Johannesburg, African Centre for Migration & Society. p.8

To Public Protector:

1. The Public Protector should investigate the extent to which the DHA has followed necessary processes of substantive policy development, including substantive consultation with stakeholders, in relation to asylum policy changes since 2011, and whether it has contravened administrative law by implementing new practices before completing necessary policy making processes.
2. The Public Protector should investigate border officials denying entry to asylum seekers on the basis that they are undocumented or on the basis that they are deemed to be 'not genuine', as this denial is against international and domestic law and usurps the authority exclusively invested in Refugee Status Determination Officers or Committees to decide on the substance of an asylum claim.
3. The Public Protector should investigate the extent to which the proposed move of Refugee Reception Offices to border areas is a cost effective and administratively appropriate strategy for the fulfilment of DHA's commitments regarding refugee protection, and whether it fulfils statutory requirements, including just administrative action.
4. The Public Protector should investigate DHA's repeated non-compliance with court orders regarding the closure of RROs and other matters.

To Department of Justice and Constitutional Development:

1. The Department of Justice and Constitutional Development should work with the Public Prosecutor to investigate DHA's repeated non-compliance with court orders regarding the closure of RROs and other matters.
2. With regard to asylum seeker and refugee rights to work (including the right to be self-employed and start businesses) and their right move and settle freely throughout the country, the Department of Justice and Constitutional Development, with the Department of Home Affairs, the South African Police Services, metro police departments and municipalities should ensure that laws, including by-laws regulating businesses, are applied equally and without discrimination according to nationality or legal status.

To the South African Police Service:

1. With regard to asylum seeker and refugee rights to work (including the right to be self-employed and operate businesses) and their right to move and settle freely throughout the country, the South African Police Force, with the Department of Home Affairs, the Department of Justice and Constitutional Development, metro police departments and municipalities should ensure that laws, including by-laws regulating businesses, are applied equally and without discrimination according to nationality or legal status. This includes no arbitrary or unlawful arrests of foreign nationals or unlawful closure of foreign-operated businesses.

To Treasury:

1. The Treasury should investigate the extent to which the proposed move of Refugee Reception Offices to border areas, as well as proposed restrictions on the basic rights of asylum seekers and refugees to work (with the necessary correlate of state support for accommodation, food and other costs) is a cost effective strategy for the fulfilment of DHA's commitments regarding refugee protection.

To Department of International Relations and Cooperation:

1. The Department of International Relations and Cooperation should investigate whether the unilateral application of a 1st safe country principle, thereby returning asylum seekers to other countries in the region without the explicit consent of those countries and explicit bi- or multilateral agreements, is within the spirit of regional integration, continental solidarity and commensurate with South Africa's leading role in the African Union.
2. The Department of International Relations and Cooperation should work with the Department of Home Affairs and UNHCR to raise standards of refugee protection in the region to comply with UN and AU legal frameworks as a prerequisite for regional coordination of asylum policies and practices.
3. The Department of International Relations and Cooperation should consider inviting the African Commission for Human and People's Rights' Special Rapporteur so as to make use of the Special Rapporteur's mandate to "assist Member States of the African Union to develop appropriate policies, regulations and laws for the effective protection of refugees, asylum seekers, and internally displaced persons."¹²⁰

To all Municipalities, Department of Cooperative Governance and Traditional Affairs and SALGA:

1. With regard to asylum seeker and refugee rights to work (including the right to be self-employed and operate businesses) and their right to move and settle freely throughout the country, municipalities and metro police departments, with the Department of Home Affairs, the Department of Justice and Constitutional Development and the South African Police Services, should ensure that laws, including by-laws regulating businesses, are applied equally and without discrimination according to nationality or legal status. CoGTA and SALGA should support and monitor municipalities to ensure that there are no unlawful discriminatory actions against foreign-operated businesses.

To Municipalities in border areas (Nkomazi, Musina), Department of Cooperative Governance and Traditional Affairs and SALGA:

1. Municipalities in which new RROs are likely to be established or expanded (Nkomazi in Mpumalanga and Vhembe in Limpopo) should insist on substantive consultation and negotiation with DHA regarding the impacts of locating an RRO in the municipality

¹²⁰ <http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/>

and the kinds of services and welfare support the DHA intends to provide and fund, and which services are expected to be borne by the municipality. CoGTA and SALGA should support these municipalities in these discussions.

To Metros with recently or potentially soon-to-be closed RROs (Johannesburg, Port Elizabeth, Cape Town, Durban), Department of Cooperative Governance and Traditional Affairs and SALGA:

1. Metros in which RROs have been closed or might soon be closed should consider that asylum seekers and refugees are likely to continue living and working in the cities, but increasingly without accessible services from DHA to receive and renew their documentation. This means a likely increase in undocumented asylum seekers, who are therefore less able to contribute productively to the local economy. The financial and time costs to those asylum seekers who do manage to travel to renew their documents at the few remaining RROs in the country will also be a drag on their economic contributions to the city. Metros should insist on substantive consultation and negotiation with DHA regarding the impacts of closing RROs in the metro areas. CoGTA and SALGA should support these municipalities in these discussions.

To ANC:

- The ANC should reconsider its call to limit existing rights to work and study and to freedom of movement for asylum seekers and refugees (as proposed in the Peace and Security Policy Discussion Document of June 2012) as this would be unconstitutional and would necessarily be more costly to the tax payer than the current system of self-sufficient self-settlement.
- The ANC should reconsider its call to introduce the detention of some or all asylum seekers, as this would be unconstitutional, costly, and unlikely to have the intended effects in terms of security and deterrence.

To South African Human Rights Commission:

- The SAHRC should regularly monitor border processes, including monitoring refusal of entry to asylum seekers, to ensure that international and domestic human rights laws are not being flaunted or broken.
- The SAHRC should investigate reports of denial of entry to asylum seekers and access to asylum in terms of South Africa's refugee protection obligations, and report to Parliament on its findings.
- The SAHRC should investigate the effects of existing RRO closures and the planned move to the borders in terms of South Africa's refugee protection obligations, and report to Parliament on its findings.

To South African Civil Society:

1. Civil society organisations should seek to regularly monitor and document unlawful practices by officials in the asylum system, including at border posts and at RROs.

2. Civil society should increase its capacity to provide advice and assistance to asylum seekers and refugees in relation to changing RRO practices and DHA policies.
3. Civil society, in particular umbrella organisations such as CoRMSA, should seek to develop a common advocacy position with civil society organisations in neighbouring countries and throughout SADC regarding the principle and practice of 1st or 3rd safe country for asylum seekers.
4. Civil society organisations should form a broad advocacy coalition, including refugee rights organisations, socio-economic rights organisations and labour unions, to lobby against a reduction in asylum seeker rights to work and study and rights to freedom of movement.
5. Civil society organisations should regularly engage the relevant domestic, regional and international oversight mechanisms by providing information and requesting visits and investigations regarding refugee protection, including the South African Human Rights Commission, the Public Protector, and Parliamentary Portfolio Committees; the African Commission on Human and People's Rights and the African Peer Review Mechanism; and the UN Universal Periodic Review Process.

To International Civil Society

1. International civil society organisations should continue to document human rights violations affecting refugees and asylum seekers in South Africa.
2. International civil society should continue to publically express concerns regarding the lawfulness of proposed policy changes as well as their likely socio-economic impacts, particularly the proposed limitation of asylum seeker rights to work and freedom of movement, and the proposed move of RROs to the borders.

To UNHCR:

1. UNHCR should actively monitor denial of entry to asylum seekers at South African border posts, as this may constitute refoulement.
2. UNHCR should engage the South African government to prevent the unilateral implementation of practices relating to a 1st/3rd safe country principle, such as returning third country asylum seekers to other SADC member states, before a regional policy is formally in place, as such practices may amount to refoulement. UNHCR should furthermore advise South Africa and its neighbours regarding any regional collaboration and coordination of asylum policy to ensure the enhancement of refugee protection in line with UN and AU legal frameworks and UNHCR minimum standards. The minimum standards established by the UNHCR for 1st/3rd safe country practices must be built into bi- or multilateral agreements, including an individual claim assessment process prior to return to a third country, an assessment process regarding the standards of asylum adjudication and protection in the third country, an explicit agreement on re-entry and access to asylum adjudication for each individual with the third country, and a substantive assessment of the risk of refoulement from the third country.

3. UNHCR should strengthen its advisory and oversight role in relation to asylum policy making in South Africa.
4. UNHCR should support civil society in responding to changes in the national and regional refugee protection environment.

To SADC:

1. The Southern African Development Community should engage the South African government to prevent the unilateral implementation of practices relating to a 1st/3rd safe country principle, such as returning third country asylum seekers to other SADC member states, before a regional policy is formally in place. SADC should furthermore ensure that any policy regarding 1st or 3rd safe country practices be explicitly bilateral or multilateral. The minimum standards established by the UNHCR should be built into bi- or multilateral agreements, including an individual claim assessment process prior to return to a third country, an assessment process regarding the standards of asylum adjudication and protection in the third country, an explicit agreement on re-entry and access to asylum adjudication for each individual with the third country, and a substantive assessment of the risk of refoulement from the third country.

To African Union Peer Review Mechanism:

1. The African Union Peer Review Mechanism should continue to probe the extent to which South Africa's asylum system is fulfilling its domestic and international legal obligations towards the protection of asylum seekers and refugees.

To African Commission on Human and People's Rights:

1. The African Commission on Human and People's Rights should continue to probe the extent to which South Africa's asylum system is fulfilling its domestic and international legal obligations towards the protection of asylum seekers and refugees.
2. The ACHPR should encourage South Africa to invite its Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons to visit South Africa so as to make use of the Special Rapporteur's mandate to "assist Member States of the African Union to develop appropriate policies, regulations and laws for the effective protection of refugees, asylum seekers, and internally displaced persons."¹²¹

To UN Universal Periodic Review:

1. The United Nations Universal Periodic Review process should continue to probe the extent to which South Africa's asylum system is fulfilling its domestic and international legal obligations towards the protection of asylum seekers and refugees.

¹²¹ <http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/>

REFERENCES

- “South Africa: Home Affairs to Finalise Asylum Seeker Process.” **24 March 2011**, <http://allafrica.com/stories/printable/201103240076.html>.
- African National Congress (2012). Peace and Stability - Policy Discussion Document.
- Amit, R. (2010). Protection and Pragmatism: Addressing Administrative Failures in South Africa’s Refugee Status Determination Decisions. Johannesburg, Forced Migration Studies Programme.
- Amit, R. (2011). The First Safe Country Principle in Law and Practice. Migration Issue Brief. Johannesburg, African Centre for Migration & Society. **7**.
- Amit, R. (2012). All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination. Johannesburg, African Centre for Migration & Society.
- Amit, R., T. Monson, et al. (2009). National survey of the refugee reception and status determination system in South Africa. Johannesburg, Forced Migration Studies Programme.
- Amnesty International (20 December 2011). Public Statement: South Africa: Call for South Africa to fulfil its international and domestic obligations in the protection of the rights of refugees and asylum seekers (AFR 53/007/2011). London.
- CoRMSA (23 January 2012). Home Affairs contradictions violate the right to seek asylum. Press release. Johannesburg.
- CoRMSA (2009). Report to the Government of the Republic of South Africa on the Humanitarian Crisis in Musina, South Africa. Johannesburg, Consortium for Refugees and Migrants in South Africa. http://www.cormsa.org.za/wp-content/uploads/Resources/Crisis_in_Musina.pdf.
- de la Hunt, L. A. (2002). Tracking Progress: Initial Experience with the Refugees Act, 130 of 1998. Johannesburg, National Consortium of Refugee Affairs: September 2002.
- Department of Home Affairs (2011). Annual Report on Asylum Statistics. Pretoria.
- Department of Home Affairs (2012). Performance of the Department of Home Affairs 2011-2012, Quarter 3 summary. *Presentation to Portfolio Committee on Home Affairs, 28 February 2012*. Cape Town.

- Elphick, R. (2011). Refoulement of Undocumented Asylum-seekers at South African Ports of Entry, With a particular focus on the situation of Zimbabweans at Beitbridge. *Lawyers for Human Rights Situation Report*. Johannesburg, Lawyers for Human Rights.
- Handmaker, J. (2002). "Evaluating Refugee Protection in South Africa." *SAMP Migration Policy Brief 7*.
- Handmaker, J., L. A. de la Hunt, et al., Eds. (2001). *Perspectives on Refugee Protection in South Africa*. Pretoria, Lawyers for Human Rights.
- Handmaker, J., L. A. De la Hunt, et al. (2008). *Advancing Refugee Protection in South Africa*, Berghan Bookes.
- Hathaway, J. C. (2005). *The Rights of Refugees under International Law*. Cambridge, Cambridge University Press.
- Human Rights Committee (2001). Access to Justice - Focus on Refugees and Asylum Seekers. Johannesburg, Human Rights Committee.
- Human Rights Watch (1998). "Prohibited Persons": Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa. New York, Washington, London and Brussels, Human Rights Watch.
- IOM (2010). Migration and Health in South Africa. Background paper for the National Consultation on Migration and Health in South Africa: Realising migrants' right to health in South Africa. Pretoria: South Africa, IOM Regional Office for Southern Africa.
- IRIN (2 August 2011). AFRICA: Horn migrants heading south "pushed backwards". [IRIN Africa](#)
- IRIN (2011). South Africa: "Harsher regime" for asylum seekers, 29 November 2011, available at: <http://www.unhcr.org/refworld/docid/4ed8ad242.html> [accessed 10 April 2012].
- IRIN (2011). South Africa: New laws mean new hurdles for asylum seekers. Johannesburg. **25 March 2011**.
- Landau, L. B. (2007). Regional Integration, Protection and Migration Policy Challenges in Southern Africa. *Advancing Refugee Protection in South Africa*. J. Handmaker and J. Klaaren. New York, Oxford, Berghahn: 27-46.
- Landau, L. B., A. Segatti, et al. (2011). Governing Migration & Urbanisation in South African Municipalities: Developing Approaches to Counter Poverty and Social Fragmentation Johannesburg, SALGA.
- Langeni, L. (2011). SA, Zimbabwe mull tighter border controls. *Business Day*, 23 February.
- Lawyers for Human Rights (2011). Asylum under Siege: Violence and Corruption in Pretoria's Refugee Reception Offices. Tshwane, Lawyers for Human Rights.
- Ramjathan-Keogh, K., W. Ncube, et al. (2011). Lawyers for Human Rights Legal Brief on the "First Safe Country" Principle. Johannesburg, LHR.
- UNHCR (2001). Background paper No. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees. Geneva.
- UNHCR (2008). *Statistical Yearbook*. New York, UNHCR.

- UNHCR (2011). *Statistical Yearbook*. Geneva, UNHCR.
- UNHCR Department of International Protection (2002). *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers*. Lisbon Expert Roundtable, 9 and 10 December 2002.
- Veary, J. and I. Palmary (2008). Assessing non-citizen access to antiretroviral therapy in Johannesburg. *Migrant Rights Monitoring Project Report*. Johannesburg, Forced Migration Studies Programme.
- Wa Kabwe-Segatti, A. and L. B. Landau, Eds. (2008). *Migration in post-apartheid South Africa - Challenges and questions to policy makers*. Paris, Agence Française de Développement.

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