



Submission from Lawyers for Human Rights and the Consortium for Refugees and Migrants in South Africa to the second cycle of the South African Universal Periodic Review 2012

The situation of the rights of refugees and migrants in South Africa: follow-up since 2008

Contact information:

Kaajal Ramjathan-Keogh, Lawyers for Human Rights

Kaajal@lhr.org.za

Tel +27 11 339 1960

Fax +27 11 339 2665

2nd Floor Braamfontein Centre 23 Jorissen Street (corner of Jorissen and Jan Smuts) Braamfontein 2001

www.lhr.org.za

Roshan Dadoo, Consortium for Refugees and Migrants in South Africa

roshan@cormsa.org.za

Tel +27 11 011 403 7561

Fax +27 11 403 7559

2nd Floor Braamfontein Centre 23 Jorissen Street (corner of Jorissen and Jan Smuts) Braamfontein 2001

www.cormsa.org.za

**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**

1. Introduction

This is a joint submission on South Africa's Country Report to the Human Rights Council's Universal Periodic Review Mechanism. This report is submitted by Lawyers for Human Rights and the Consortium for Refugees and Migrants in South Africa.

Lawyers for Human Rights is an independent human rights organisation with a thirty-year track record of human rights activism and public interest litigation in South Africa. Lawyers for Human Rights uses the law as a positive instrument for change and to deepen the democratisation of the South African society. To this end, it provides free legal services to vulnerable, marginalised and indigent individuals and communities, both non-national and South African, who are victims of unlawful infringements of their Constitutional rights.

The Consortium for Refugees and Migrants in South Africa (CoRMSA), is a registered Non Profit Organisation tasked with promoting and protecting refugee and migrant rights. CoRMSA is comprised of a number of member organisations including legal practitioners, research units, and refugee and migrant communities.

We have not had access to South Africa's most recent Country Report so we are responding to the 2008 Country Report as part of our submission to the Human Rights Council. We are also highlighting some of the areas in which refugee and migrant rights are frequently violated, in spite of South Africa having developed a policy of integration of non-nationals. We are also deeply concerned by recent indications from the South African Government that it is moving away from a rights-based approach to immigration.

Further, South Africa has made statements in their 2008 report about the monitoring which takes place at the Lindela Repatriation Centre. Lawyers for Human Rights does carry out monitoring at this facility on a weekly basis. However, our access is severely limited in that our access to weekly statistics of the details of the detainees at the facility has been curtailed. In addition, the Department of Home Affairs is unwilling to liaise with us on the release of unlawfully detained individuals and we are obliged to engage in litigation to secure the release of unlawfully detained individuals. We are not permitted to monitor the conditions of detention and must rely on the statements made by detainees who we consult with in order to obtain this information. There are inadequate medical services available at the facility and no routine medical screening takes place. There is a need for independent oversight at this facility. While the South African Human Rights Commission does visit the facility, these visits are ad hoc and infrequent and do not address the serious violations which occur routinely at the facility.

2. International Commitments

South Africa committed to signing certain international human rights instruments in 2008 and signature of these instruments is still pending:

- i. Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- ii. International Convention for the Protection of all persons from Enforced Disappearance
- iii. The International Covenant on Economic, Social and Cultural Rights
- iv. The Optional Protocol to the CRC on the use of Children in Armed Conflict
- v. Furthermore, South Africa has not made any commitments regarding the conventions on migrant workers and statelessness.
- vi. South Africa has also not signed or ratified the African Union Kampala Convention on Internally Displaced People (2009).

3. Invitations to Special Procedures of the Human Rights Council

The Working Group on arbitrary detention undertook a country visit to South Africa yet the recommendations made by the Working Group have not been implemented and arbitrary detention particularly of asylum seekers, refugees and other migrants continues without any independent oversight.

The Special Rapporteur on the Rights of Migrants visited South Africa in January 2011. The report stemming from his visit outlined a number of recommendations which have yet to be considered or implemented by the relevant authorities.

4. Protection of the Rights of Refugees

There have been several emerging trends in the last year with regards to the States treatment and protection of refugees. The biggest concern remains the closures of the metropolitan refugee reception centres. The Johannesburg refugee reception centre has closed at the end of May 2011. The centre in Port Elizabeth has been closed at the end of October 2011 and it seems that Cape Town and Durban seem set to close over the next year. These closures are making way for the state to move asylum processing to the border regions. This decision has been poorly communicated and has resulted in much anxiety and uncertainty within the refugee population. The state has not carried out any consultation with the affected populations nor have they made available any contingency plans on how asylum seekers and refugees living in these areas will be serviced. The combined effect of a range of new policies has the effect of refusing access to asylum to asylum seekers. We list below the most significant issues affecting asylum seekers and refugees:

Preventing asylum seekers from accessing protection in South Africa is a potential violation of the fundamental human right “to seek and enjoy in other countries asylum from persecution,” which right, established by the 1948 Universal Declaration of Human Rights, now forms part of customary international law. The logical corollary of this right forms the basis of international refugee law – the principle of non-refoulement – which guarantees that no person who faces persecution in their country of origin will be returned thereto.

This right is enjoyed by all persons who face persecution, a determination which, under South African law, only the Refugee Status Determination Committee (RSDC) is qualified to make. As a result, no South African official who is not a Refugee Status Determination Officer (RSDO) is

authorised to prevent an asylum-seeker from making an application for protection in South Africa. Preventing an application is akin to refusing protection, a decision which is not within the authority of any person or body other than a duly appointed RSDC and risks violating the right of non-refoulement held by an asylum-seeker.

As a result, the current practice of systematic refusal of entry at ports of entry to all undocumented Zimbabwean asylum-seekers must be understood as an affront of the underlying principle of international refugee law. We are aware of this practise operating at the Beitbridge and Komatipoort ports of entry. This refusal of entry is directed primarily at Zimbabwean asylum seekers but not exclusively. We are also aware of cases where Somali asylum seekers have been refused entry and have been returned to Mozambique. Those who identify themselves as asylum seekers have the right to have their claim assessed in accordance with the South African Refugees Act. By denying undocumented Zimbabweans access to the proper procedure for status determination in South Africa, persons who may have very real protection needs are forcibly returned to their country of origin or to a third country.

Furthermore, asylum-seekers who are unlawfully prevented from entering South Africa through a recognised border post are left with no choice but to enter the territory by irregular means in order to seek asylum. Though no prejudice is visited upon these irregular migrants upon their arrival at a RRO, their journey to these offices through the border regions between South Africa-Zimbabwe and South Africa-Mozambique puts them at high risk of violations to their rights to personal security, dignity, health, bodily integrity and life. The borderline between Zimbabwe and South Africa is of particular concern as the site of a humanitarian crisis; reports of rape, gang rape, assault, people smuggling, human trafficking, drowning and theft in these zones abound as asylum-seekers traversing the border on foot continue to be vulnerable to exploitation and attack from gangs of thugs operating along both sides of the border. Lawyers for Human Rights considers that, for as long as the state continues to practice the unlawful refusal of entry to Zimbabwean asylum-seekers at the Beitbridge border post, it is indirectly responsible for all violations which are visited upon these persons as they enter the country irregularly.

5. Use of the First Safe Country Principle

An asylum seeker flees a country where he or she faces persecution and ultimately arrives at a country where he/she hopes to receive protection. However, the route taken between the country of

persecution and the country offering protection might lead through one or more countries. The ‘first safe country’ principle provides that once a person seeking asylum arrives in a safe country after fleeing persecution, that country is responsible for assessing the asylum claim. Consequently, an asylum seeker is expected to apply for asylum in the first safe country where they have an opportunity to apply for asylum. 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. The European Union encompasses this concept in the safe third party principle. Under this principle, an asylum seeker can be refused asylum and sent to a safe third country if the asylum seeker can be afforded protection in that safe third country.

The safe third country rule differs from the ‘first safe country’ principle because an asylum seeker’s claim need not be lodged in the first safe country which they entered en route to their final destination. Various countries have adopted safe third country agreements with one another. These agreements provide that once a person fleeing persecution crosses into a country that is party to these agreements, that party will be responsible for assessing refugee status. The first country which is party to a safe third party agreement is not always the first safe country a refugee enters but it will bear the responsibility of assessing that refugee’s status.

The Dublin regulation dictates a more complex method of assessment regarding which country carries the responsibility of assessing an asylum claim. This involves criteria in addition to first country of entry including: the principle of family unity, the issuance of residence permits or visas, and illegal entry or stay in a member state. Therefore, under the regulation, the country responsible for assessing a claim will not always be the first safe country.

The application of the rule may result in the denial of meritorious asylum claims because an individual passed through a number of countries en route to his or her final destination. Ultimately this practice risks subjecting refugees to whatever persecution they sought to avoid. Potentially, it could establish a legal framework whereby no country is willing to offer them protection as refugees.

6. Citizenship Rights and Statelessness in South Africa

The concept of nationality represents a legal link between an individual and a particular State. Nationality underpins the enjoyment of all rights associated with the bond of citizenship: the right of

residence, the right to work, the right to education, the right to free movement, and the right to vote, to name but a few. Without such security, stateless persons live the lives of unwanted aliens, denied basic rights and in a state of legal limbo.

There are two international conventions that aim to prevent and reduce statelessness: the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These conventions define a stateless person as “a person who is not considered as a national by any State under the operation of its law” (also known as *de jure* stateless). The Final Acts include a recommendation that each Contracting State extend the provisions of the conventions to *de facto* stateless persons, who still technically hold a nationality but do not receive any benefits from it, due to failure to meet State administrative requirements, voluntary renunciation or intentional discrimination on the part of the State. South Africa already recognises the right to a nationality in various international and regional human rights instruments. The respect, protection and promotion of this right require that South Africa make a positive commitment to address statelessness. The statelessness conventions provide a set of comprehensive and authoritative guidelines from which South Africa will benefit in its quest to protect human rights and specifically, the right to nationality.

Lawyers for Human Rights has identified 8 main groups of concern in South Africa, who are either stateless or at high risk of statelessness:

- 1) Many Zimbabwean-born migrants are stateless due to discriminatory amendments to Zimbabwean citizenship law, beginning in 1984, which have systematically withdrawn citizenship from those with foreign parentage.
- 2) Orphans and vulnerable children in South Africa are at high risk of growing up to be stateless, due to barriers to birth registration and absence of parents and legal guardians to act on their behalf.
- 3) Unaccompanied foreign minors often enter South African with no enabling documentation and no legal status in this country; upon reaching adulthood many cannot prove their citizenship in their home country and yet do not qualify for South African citizenship.
- 4) Victims of ID fraud find themselves effectively stateless if they cannot meet Home Affairs’ requirements to prove they are the true South African citizen in cases of duplicate IDs.
- 5) Children born to migrants in South Africa face obstacles in accessing birth registration; without a birth certificate they can access neither their parents’ nationality nor South African citizenship provisions.

6) Children of single fathers remain unregistered due to Home Affairs' regulations, which prevent fathers from registering a child out of wedlock without the mother's consent and presence to acknowledge paternity.

7) Communities bordering neighbouring countries are faced with suspicion of being illegal foreigners at home Affairs in remote areas and thus face heightened barriers to accessing citizenship.

8) Stateless migrants that suffer from a conflict of laws and/or state succession in other African nations migrate to South Africa

It should be noted that South Africa, should it sign and ratify these conventions, should seriously consider extending its provisions to both de jure and de facto stateless persons. The mass migration, discriminatory practices around citizenship and low levels of birth registration common across Africa mean that de facto statelessness is not an issue which can be overlooked in our context.

Ratification and signature of the two statelessness conventions will allow South Africa a framework within which to prevent future cases of statelessness and to protect the stateless, which are among the world's most vulnerable persons. Currently, a number of policies and laws work to exacerbate the situation of stateless persons, endanger South African national security and increase instances of statelessness. By adopting these treaties South Africa will draw attention to statelessness, affirm its commitment to human rights and join the minority of forward-thinking states that recognise the importance of addressing statelessness and protecting the right to nationality.

7. The right to work for refugees and asylum seekers

CoRMSA is disappointed by the Government of South Africa's intention to "review" the minimum rights of immigrants, including refugee and asylum seekers' rights to work and study, as announced in the statement issued following the Cabinet meeting held on the 23rd of November 2011. Refugees in South Africa have managed to sustain themselves and their families because Section 27 of The Refugees Act, 1998, allows them to earn a living through honest means.

In addition, a legal precedent was set by the Court of Appeal in 2003 that established the right of asylum seekers to work and study while waiting for their status to be determined. Due to inefficiencies in the asylum management system, many asylum seekers wait unacceptably long periods of time – some up to five years – for their status to be adjudicated. Allowing asylum seekers to work allows people to support themselves while they wait to hear the outcome of their claim.

This prevents asylum seekers from needing more government assistance, which they surely would need if they were unable to earn a living. It also avoids a situation where people might be forced to turn to crime in order to survive. Overall it is of economic benefit to society as more people are involved and contributing to the economy, particularly in the case of many refugees and asylum seekers who have scarce skills that can be of great benefit to South Africa.

8. Towards Universal Birth Registration

South Africa has made a clear commitment to Human Rights principles through ratification of the relevant human rights treaties, as well as through constitutional and other legal standards. To be sure that South Africa honours this commitment, it is important that all children born on the territory are issued with a birth certificate without discrimination as to their or their parents' legal status in this country. Lawyers for Human Rights has noted through its work, that uncertainty and inconsistency exist on the Department of Home Affairs' policy in this regard. Applicants are routinely turned away when applying for their children's birth certificates due to failure to produce a passport or a South African ID document. The practical result is that asylum-seekers, refugees and undocumented persons are prevented from accessing birth certificates for their children. These children are at high risk of statelessness. Without a birth certificate, they can access neither the nationality of their parents nor the provisions of South African law which may offer citizenship if they are otherwise stateless or if they remain in the country until age eighteen.

9. Hate Crimes

South Africa has a long history of prejudice and discrimination. One of the major legacies of apartheid is that of intolerance towards 'difference' - be it in terms of race, religion, nationality, ethnicity, sexual orientation or other such factors. Sixteen years after South Africa's first democratic elections, the country is still grappling to find ways to better manage 'difference'. Media reports carry stories of race-related killings (such as the Skierlik shooting), the 'corrective' rape of black lesbians, regular incidents of xenophobic violence and occasional reports of religious intolerance.

In the last six months South Africa has witnessed several incidents of xenophobic violence such as the stoning to death of a Zimbabwean man by a mob in Polokwane, Limpopo in June 2011; the stoning to death of a Mozambican man in GaPhasha, Limpopo in July 2011; threats of violence against foreign nationals occupying government-provided housing in Alexandra as well as violence in

Laudium, Pretoria in October 2011; and threats of violence against foreign business owners in Ekurhuleni, Gauteng by South African business owners in November 2011.

During 2011 there have been a number of brutal attacks on black lesbians for example in September the body of Nontsikelelo Tyatyeka was found in a dustbin in Nyanga, Cape Town in what is suspected to be a homophobic case. In March this year, Nokuthula Radebe's body was discovered in a playground in Soweto. The 20-year-old victim's face was found covered in plastic and she was strangled with shoelaces. Nongovernmental groups believe the openly lesbian woman was a victim of "corrective" rape before she was murdered. A case has been opened at the Thokoza police station though no arrests have reportedly been made.

With South Africa's high crime levels, there is a tendency amongst policy makers to dismiss such incidents as being simply 'criminal' and an unfortunate part of life in South Africa. Such an approach however, fails to recognise the extreme damage such prejudice-related violence has on the victims, as well as the victim's broader community. This undermines social cohesion and fails to provide protection against crimes motivated by discrimination and prejudice.

A number of bodies have called for interventions around hate crimes. The UN Committee on the Elimination of Racial Discrimination in August 2006 called on South Africa to introduce measures to address hate crimes as required by Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination. The South African Human Rights Commission has also called on government to address this area. In addition, a wide range of civil society groups are advocating for interventions to specifically address hate crimes in South Africa.

10. Recommendations

10.1 International Commitments

South Africa should sign, ratify and domesticate outstanding international commitments. The principles underlying these treaties compliment and add substance in implementation to the Bill of Rights in the South African Constitution. There is therefore no need to delay the process of acceding to Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; The International Convention for the Protection of all persons

from Enforced Disappearance; The International Covenant on Economic, Social and Cultural Rights; and The Optional Protocol to the CRC on the use of Children in Armed Conflict.

South Africa should also sign and ratify the AU Kampala Convention on Internally Displaced People. This is a landmark regional treaty, being the only one of its kind in the world, and the commitment shown by South Africa to the African human rights mechanisms is undermined by its failure to make progress in this regard.

10.2 Invitations to Special Procedures of the Human Rights Council

South Africa undermines its international human rights record by ignoring the recommendations made by visits from UN HRC Working Groups and Special Rapporteurs. The relevant government departments need to act upon the outcomes of such visits.

In addition, the failure, to date, of the government to produce a draft of its second-round UPR report and thus its inability to consult in a timely and meaningful manner with civil society stakeholders further creates the impression that South Africa is not taking seriously its responsibilities to the Human Rights Council.

10.3 Protection of the Rights of Refugees and the use of the First Safe Country Principle

The government should ensure that provision is made to re-open Refugee Reception Offices in Johannesburg and Port Elizabeth and refrain from closing the centres in Cape Town and Durban.

A full consultation process regarding moving the RROs to border areas must urgently be initiated by the government in order for affected populations and other service providers to be able to give accurate information.

The right of individuals to claim asylum within South Africa should be not be undermined by practices that result in people being turned away at borders or given inaccurate information. It is possible to implement a fair and rigorous border management system that is based on upholding the rights of asylum seekers and that complies with the obligations on South Africa under international law.

10.4 Citizenship Rights and Statelessness in South Africa

South Africa should sign, ratify and domesticate the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

10.5 The right to work for refugees and asylum seekers

The government should maintain the provisions that currently exist in South African domestic law which enable asylum seekers and refugees to seek and obtain employment.

10.6 Towards Universal Birth Registration

South Africa should eliminate confusion over the rules and regulations governing registration of births within its borders. Training and information should be a priority for officials at all levels that interface with non-nationals in an administrative capacity.

10.7 Hate Crimes

Senior government officials should speak out against hate crime violence against any vulnerable group whenever such acts occur to deter a culture of impunity for such offences and to encourage victims of hate crimes to feel confident to report incidents.

The Office of the Deputy President should establish a mechanism to ensure effective coordination of the various government departments' programs on social cohesion, addressing racism and xenophobia, and tackling hate crimes.

The government should strengthen measures to address hate crime violence by introducing legislation that expressly criminalizes violence against individuals or property on the basis of a person's race, nationality, religion, ethnicity, sexual orientation, or gender identity. In order to implement such legislation, training should be given to law enforcement agencies so that such crimes are thoroughly investigated and a monitoring system should be developed to track reporting of hate crimes and prosecutions for these offences.

10.8 Monitoring of Immigration Detentions at Lindela

There is a need for independent oversight at this detention and repatriation facility. Unlawful detentions of documented persons and unlawful prolonged detentions are commonplace. Further, there are no means to monitor the conditions of detention and there is a need for greater

transparency with regard to conditions, adherence to procedures and the right to administrative justice.

Contact information

Kaajal Ramjathan-Keogh, Lawyers for Human Rights

Kaajal@lhr.org.za Tel +27 11 339 1960 www.lhr.org.za

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roshan@cormsa.org.za Tel +27 11 011 403 7561 www.cormsa.org.za