

Living on the Margins

Inadequate protection for refugees and asylum seekers in Johannesburg

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I. Summary

The principles of human dignity and equality for all are enshrined in South Africa's constitution. Since 1994, the country has become a party to most major international refugee and human rights conventions. The Refugees Act 130 of 1998, which came into force in 2000, was South Africa's first comprehensive legal framework for refugees and asylum seekers. On paper, the Refugees Act and the constitution provide comprehensive protections for the rights of those fleeing persecution, including the rights to fair and efficient status determination procedures, registration and documentation, to freedom from arbitrary detention and threat of deportation, and to services such as health care, shelter and education.

However, these legal guarantees have not yet been fully put into practice by those South African institutions responsible for the protection and promotion of these rights. Although South Africa now has in place a good formal legal regime for the protection of refugees and asylum seekers, serious flaws remain in its implementation. Refugees and asylum seekers in Johannesburg continue to experience problems in realizing their rights and gaining access to services.

The inability of the Department of Home Affairs (DHA) to process asylum applications within the legally stipulated six-month period has resulted in prolonged insecurity for asylum seekers, in some cases for up to five years. During this waiting period, Human Rights Watch found that asylum seekers are living on the margins. They are often unable to work or study, although they are legally entitled to seek employment and education. Refugee reception officers appear to be arbitrarily applying a ruling that lifted a prohibition on work and formal education for asylum seekers, sometimes only removing the prohibition after bribery or intervention by lawyers. The inability to seek employment and work prevents asylum seekers from meeting their own basic needs.

Refugees and asylum seekers also face harassment, mistreatment and the risk of arbitrary arrest and detention by law enforcement agencies. This restricts their freedom of movement and association, their access to services to which they are entitled, and to enjoy their right to work. Corrupt practices within DHA and the police services in Johannesburg are a further obstacle to effective protection for refugees and asylum seekers in Johannesburg.

This report examines the obstacles asylum seekers encounter in access to the refugee status determination process and the lack of protection that asylum seekers and refugees

receive in Johannesburg. The Johannesburg refugee reception office was selected as the focus of research for this report because, until May 2005, it received the largest number of applications for asylum. For a significant number of asylum seekers, the Johannesburg office was the first office approached on arrival in South Africa. The Johannesburg office currently has the largest number of pending asylum seeker applications—approximately 75,000 out of 115,000 applications as at the end of 2004. The challenges in the refugee status determination process in Johannesburg are representative of similar challenges at other refugee reception offices across the country, particularly with regard to corrupt practices, delays in the determination of refugee status and access to the office.

Human Rights Watch calls on South Africa, in line with its international and domestic obligations, to take further measures to provide effective protection to refugees and asylum seekers. These measures should encompass not only protection from *refoulement* but also protection of the fundamental human rights of the 142,000 or so refugees and asylum seekers South Africa hosts.

Human Rights Watch interviewed dozens of asylum seekers and refugees, including unaccompanied children, as well as nongovernmental organizations (NGOs) that provide services to asylum seekers and refugees, United Nations High Commissioner for Refugees (UNHCR) representatives, and South African government officials between July 2004 and February 2005. The names of refugees, asylum seekers, and NGO workers have been withheld to protect their security and privacy.

II. Recommendations

To the government of South Africa

- Ensure that DHA in Johannesburg verifies in a timely manner the status of asylum seekers and refugees who have been arrested or detained. All staff having contact with migrant populations should be trained to identify asylum seekers and channel them into the asylum procedure.
- Substantially increase the number of appropriately trained staff and the facilities at refugee reception offices for more efficient processing of asylum applications, the determination of status, and the issuing of refugee identity documents.

- Strengthen the anti-corruption unit within DHA to urgently address incidents of corruption in the refugee status determination system. Investigate and prosecute any officials alleged to be involved in corrupt practices.
- Provide competent, official interpreters to assist refugees and asylum seekers through the asylum application and status determination process, including any appeals.
- Establish an information desk at refugee reception offices to assist with queries from asylum seekers and refugees. Appropriately trained officials and interpreters at the information desk should explain to refugees and asylum seekers their rights and obligations, and assist with providing information about local service providers.
- Prominently post signs at refugee reception offices in the main languages of asylum seekers that clearly state that all services are to be provided free of charge and that any request by reception office personnel for money or other favors should be reported immediately.
- Provide a clear complaint mechanism for asylum seekers and other clients to register complaints. Provide means to assure that complaints will be considered without prejudice to refugee status claims. Assure that the staff member about whom the complaint is directed is not involved in receiving or processing the complaint. For example, complaints could be submitted directly into a secure complaint box that would be opened regularly by the head of office and a DHA official from outside the office. Assist illiterate clients in submitting complaints.
- Increase coordination and cooperation between DHA and other government departments to facilitate access to social services for refugees and asylum seekers. In particular, refugees or asylum seekers who act as foster parents or guardians for unaccompanied refugee or asylum-seeking children should receive government financial support for the care of children.
- Improve administrative procedures to ensure that unaccompanied children seeking asylum are able to enter the refugee status determination process as soon as possible and be immediately referred to the Department of Social Development for assistance.

- Develop a protocol for refugee reception office officials on processing asylum applications of unaccompanied children. Such a protocol should include, at a minimum, standards for interviewing children, meeting their special needs, performing best interest determinations, and undertaking family tracing.
- Based on the general principle that children should not be detained, establish a referral system for unaccompanied children detained at Lindela deportation center in order that they are moved to more appropriate, alternative accommodation as soon as possible.
- Ensure that recognized refugees are not forced to resubmit the substance of their claims periodically, when extending their refugee identity documents or their refugee status permits, but are instead granted a secure legal status that cannot be withdrawn without proper application of the cessation clauses contained in the Refugees Act.

To the United Nations High Commissioner for Refugees

- Assist the South African government to devise strategies aimed at better integration of refugees and asylum seekers into the South African community. This should include instructing private institutions and employers to recognize DHA documents pertaining to refugees and asylum seekers.
- Assist the government to develop written and video materials that clearly outline the rights and obligations of refugees and asylum seekers. These materials should be in the languages widely spoken by the refugee community.
- Advise DHA on developing official protocols for assisting and protecting refugee and asylum-seeking children, including unaccompanied minors, to promote the best interests of the child.
- Develop a wider and deeper network of implementing partners to ensure that all refugees and asylum seekers in need of assistance are adequately supported.

III. Background

The Aliens Control Act of 1991¹ was the only piece of legislation regulating the movement of non-nationals into South Africa when, in 1993, South Africa signed a first “Basic Agreement” with UNHCR.² As detailed by Human Rights Watch in its 1998 report *Prohibited Persons*,³ the Aliens Control Act dealt with refugees and asylum seekers in an ad hoc manner. Without statutory basis for determining refugee status, procedures were instead contained in internal DHA circulars. The procedures could not readily be challenged in court and there was little recourse to either administrative or judicial appeal.

Although the number of *prima facie* refugees⁴ has declined from its peak in the early 1990s, South Africa has, since 1994, experienced a steady increase in the number of individuals seeking asylum. The ratification of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol⁵ (1951 UN Refugee Convention) and the Organization of African Unity’s 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU)⁶, as well as the growing number of asylum seekers in the territory, necessitated the creation of a comprehensive legal framework for refugees and asylum seekers in South Africa.

¹ Government of the Republic of South Africa, Aliens Control Act, Act 96 of 1991 (hereafter, “Aliens Control Act”).

² Prior to the government’s signing of the 1951 Convention relating to the Status of Refugees, South Africa and UNHCR signed a Basic Agreement (1993) binding the country to observe international refugee norms, such as the right to seek asylum.

³ Human Rights Watch, *Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (New York: Human Rights Watch, 1998).

⁴ *Prima facie* refugees are those who are immediately recognized as refugees in the absence of any evidence to the contrary; a practice usually relating to persons fleeing conditions of insecurity and conflict and arrive as part of a large-scale influx. In such situations it is not always possible for the receiving country to ascertain the claim of refugee status for each and every individual. See also UNHCR Executive Committee (ExCom) Conclusion No. 22 of 1981 which provides that persons who “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country,” are asylum seekers who must be “fully protected,” and the fundamental principle of non-refoulement including non-rejection at the frontier—must be scrupulously observed.”

⁵ 1951 Convention Relating to the Status of Refugees, 189 UNTS 150; and the 1967 Protocol Relating to the Status of Refugees, 606 UNTS 267 (hereafter, “1951 Refugee Convention”).

⁶ Organization of African Unity, 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45 (hereafter, “OAU Refugee Convention”).

South African civil society long debated legislation that became the Refugees Act No. 130 of 1998 (Refugees Act),⁷ which did not come into force until its regulations were published in April 2000. The Refugees Act and its regulations define the legal standard for refugee status, establish South Africa's asylum procedure, and set out the rights and obligations of refugees and asylum seekers. In spite of a comprehensive law, however, many refugees and asylum seekers continue to face significant obstacles to their right to seek and enjoy effective protection in South Africa.⁸

As of 1999, before the Refugees Act came into force, 54,759 asylum applications had been lodged.⁹ Out of this number, 8,504 were recognized as refugees, 25,020 were rejected, and 21,295 applications were pending. By end 2004, the provisional number of asylum applications pending according to the UNHCR had risen to 115,224 of which 32,600 were new applications.¹⁰ In addition, the Department of Home Affairs granted refugee status to 27,683 asylum seeker applications largely from the Democratic Republic of Congo, Somalia, Angola and Rwanda. This brought the total of the asylum seeker and refugee population to 142,907 by the end of 2004.¹¹ The asylum application backlog makes up a large proportion of this group.

Poor planning and inadequate preparation for the coming into force of the Refugees Act has largely been responsible for the backlog of asylum applications. The government did not adequately manage the transfer of asylum applicants issued under the Aliens Control Act to the new system. Too few immigration officials were hired and trained to administer the Refugees Act.¹² DHA and UNHCR implemented a Backlog Project to reduce the number of pending asylum applications issued under the Aliens Control Act between 2000 and 2001. In addition to reducing the number of pending asylum applications, this project was intended to equip DHA with a roster of well-trained

⁷ See, for example, the work of the Southern African Migration Project (SAMP), <http://www.queensu.ca/samp/>; Jeff Handmaker, "No Easy Walk: Advancing Refugee Protection in South Africa," *Africa Today* Vol. 48, No. 3, 2001, pp. 91-113; and Michael Barutciski, "The Development of Refugee Law and Policy in South Africa," *International Journal of Refugee Law*, Vol. 10 (1998), pp.700-724.

⁸ Universal Declaration of Human Rights, article 14.

⁹ UNHCR Statistical Yearbook, 2003, pp 318-9.

¹⁰ UNHCR 2004 Global Refugee Trends4 (provisional)—Overview of refugee populations, new arrivals, durable solutions, asylum seekers, statelessness and other persons of concern to the UNHCR, June 2005 pp 5-8. The statistics can be sourced at:<http://www.unhcr.ch/cgi-bin/texis/vtx/events/opendoc.pdf?tbl=STATISTICS&id=42b2834744>.

¹¹ Ibid.

¹² Fedde Groot, UNHCR, "Challenges of the UNHCR's Programme for Urban Refugees in South Africa," in Loren B. Landau (ed.), *Forced Migrants in the new Johannesburg: Towards a Local Government Response* (Johannesburg: Forced Migration Studies Programme, University of Witwatersrand, 2004), p. 38.

refugee affairs officers.¹³ The UNHCR embarked on another backlog project from August 2005 (see below).

IV. The Legal Framework

International principles

Following its first democratic elections in 1994, South Africa acceded to and ratified several refugee and human rights treaties, most notably the 1951 UN Refugee Convention and the OAU Refugee Convention.¹⁴ The OAU refugee definition expands the 1951 Refugee Convention's narrow "well-founded fear of being persecuted" standard by including other grounds for refugee status, including flight across borders caused by "external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality."

Both the UN Refugee Convention and OAU Refugee Convention impose certain obligations on host states to protect the rights of refugees and asylum seekers, including with regard to status determination and documentation, and uphold certain social and economic rights for refugees. Article 2 of the OAU Refugee Convention recognizes the granting of asylum as a mechanism to protect refugees; in particular, it notes that states shall "use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees, who for well-founded reasons, are unable or unwilling to return to their country of origin of nationality,"¹⁵

The African Charter on Human and Peoples' Rights (African Charter), to which South Africa is a party, guarantees for the rights of every individual, "when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions."¹⁶ The International Covenant on Civil and Political Rights

¹³ Human Rights Watch interview, Mr. Mbilinyi, UNHCR, Pretoria, op cit.

¹⁴ South Africa acceded to the OAU Refugee Convention in 1995 and the 1951 Refugee Convention and its 1967 Protocol on January 12, 1996.

¹⁵ OAU Refugee Convention, article 2(1).

¹⁶ African Charter on Human and Peoples' Rights (African Charter), article 12. South Africa ratified the African Charter on July 9, 1996.

guarantees the right to the security of the person and prohibits “arbitrary arrest and detention.”¹⁷

The UN Convention on the Rights of the Child and the OAU Convention on the Rights and Welfare of the Child, to which South Africa is a party,¹⁸ protect the rights of refugee and asylum-seeking children, and place obligations on states parties to ensure that such children are protected and assisted and have access to services such as legal defense, education, and others. Article 22 of the UN Convention on the Rights of the Child calls on state parties to take appropriate measures to ensure that children seeking asylum, including unaccompanied minors, receive “appropriate protection and humanitarian assistance.” Provision is further made for states to facilitate the tracing of family members or parents of any refugee child for family reunification.¹⁹

The International Covenant on Civil and Political Rights, to which South Africa is a party, also protects refugees and asylum seekers from arbitrary detention.

South African law

Underlying the various international refugee and human rights conventions are the principles of non-discrimination and dignity, core tenets of South Africa’s constitutional democracy.²⁰ The 1996 South African constitution guarantees fundamental rights to all individuals, including refugees and asylum seekers. The Bill of Rights entrenches the rights (among others) to human dignity, freedom and security of the person, and the right of everyone in South Africa to have access to housing and health care. The Constitutional Court of South Africa has interpreted with regard to access to social assistance that “everyone” includes nationals and certain non-nationals in particular permanent residents.²¹ The constitution further guarantees due process of law for all.²²

¹⁷ The International Covenant on Civil and Political Rights, article 9(1). South Africa ratified the Covenant on December 10, 1998.

¹⁸ South Africa ratified the UN Convention on the Rights of the Child on June 16, 1996; the African Charter on the Rights and Welfare of the Child on January 7, 2000.

¹⁹ UN Convention on the Right of the Child, article 22(2). A similar provision is contained in article 23 of the African Charter on the Rights and Welfare of the Child.

²⁰ The Constitution of the Republic of South Africa Act 108 of 1996, section 7 (1) states that, “[the] Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

²¹ The Constitution of the Republic of South Africa, sections 10, 23, 29, 26 and 27, respectively. On the interpretation of access to social and economic rights for non-citizens under the South African constitution see *Louis Khosa and others v The Minister of Social Development and others*, CCT 12/03; *Saleta Mahluli and another v The Minister of Social Development and others*, CCT 13/03 at para 47. Also see footnote 242 below.

²² The Constitution of the Republic of South Africa of 1996, sections 33 and 34.

Under the constitution, international law must be considered in the interpretation of the Bill of Rights and other national legislation.²³ International law becomes legally enforceable in South Africa once it has been enacted into domestic law.²⁴

The Refugees Act, which came into effect in 2000, provides the first specific refugee law framework for South Africa. It is a marked shift from the previous Aliens Control Act, which, as noted above, was essentially silent on refugee protection. The Refugees Act sets up the ‘refugee reception offices’ which are tasked with issuing temporary permits to asylum seekers and with conducting eligibility and refugee status determination interviews. It also outlines the system of administrative appeals and judicial review, and establishes the Standing Committee for Refugee Affairs and the Refugee Appeals Board. Lastly, the Act outlines the rights and obligations of refugees and asylum seekers, including protection from *refoulement*,²⁵ access to documentation, limited use of detention, and special provisions for unaccompanied children and the disabled. The Refugees Act is supplemented by its regulations,²⁶ which provide detail on implementing the asylum application and refugee status determination processes.

V. Obstacles in the Refugee Status Determination Process

Overview of the process

The refugee status determination process outlined in the Refugees Act sets out a detailed system for individuals seeking asylum in South Africa. Under the regulations to the Refugees Act, asylum seekers must present themselves in person at a refugee reception office “without delay.” Also, the regulation 2(2) provides that when a person indicates his or her intention to seek asylum upon entry into South Africa, officials will issue him or her a temporary permit valid for fourteen days. During this period, the person should approach the nearest refugee reception office where a refugee reception officer will conduct an initial eligibility interview, in practice, to establish identity and the general reason for applying. The officer will issue a temporary asylum seeker permit, which sets the date for a full refugee status determination hearing (this is a non-adversarial process). There, a refugee status determination officer interviews the applicant and decides

²³ The Constitution of the Republic of South Africa of 1996, section 39(1) (b) and section 233.

²⁴ The Constitution of the Republic of South Africa of 1996, section 231(4).

²⁵ The principle of *non-refoulement* prohibits the return of a refugee to a country where his life or freedom would be threatened, and is the cornerstone of international refugee law. In addition to being incorporated into various international and regional instruments, the principle forms a part of customary international law.

²⁶ Refugee Regulations No. R 366, April 6, 2000 under the Refugees Act 130 of 1998.

whether he or she should be granted refugee status. If refugee status is granted, DHA issues a permit, and subsequently, a refugee identity document. If the application is denied, the asylum seeker may appeal to the Refugee Appeals Board.

Overall, the refugee status determination system in the Refugees Act and regulations is a marked improvement over the *ad hoc* process used during the era of the Aliens Control Act. However, the day-to-day implementation of the system in Johannesburg—and thus the ability of refugees and asylum seekers to fully access and benefit from it—remains problematic.

The obstacles in the system in Johannesburg are apparent from the first moment the asylum seeker tries to enter the refugee reception office to the moment—often years later—when he or she receives a decision on refugee status. For example, given the difficulty asylum seekers have in gaining access to the Johannesburg refugee reception office, the fourteen-day permit issued at initial points of entry does not provide enough time for most asylum seekers to obtain asylum seeker permits under Section 22 of the Refugees Act. This is the first of several ‘documentation gaps,’ which can leave asylum seekers in situations of insecurity and jeopardy

Lack of clear, easily available rules regarding the asylum process and the operation of the Johannesburg office and the lack of official interpreters complicate the process and contribute to the pervasiveness of corrupt practices in and around the office.

Insufficient staff and inadequate equipment, such as functioning computers, are major causes for long delays in the asylum procedures. This situation is made worse because of inconsistent DHA decisions regarding work authorization. Many asylum seekers unable to support themselves are left destitute. There has also been insufficient public education regarding the asylum seekers’ right to work and study.

Once a formal refugee status hearing does take place, refugees benefit from a broad refugee definition outlined in South African law. However, when refugees are recognized and granted status, the issuance of refugee documentation is not automatic, which hampers the individual’s full access to his or her rights.

Lastly, some recognized refugees are denied “indefinite” refugee status and instead are required to resubmit their claims every two years to renew their permits—a practice which ignores UNHCR expert guidance on the importance of the Refugee Convention’s

cessation clauses as the sole grounds for withdrawing Convention refugee protection from an individual.

The next sections set out in more detail some of the key obstacles in the refugee status determination process in Johannesburg.

Applying for asylum

The fourteen-day permit to report to a refugee reception office

An immigration officer at a border crossing must issue an asylum seeker entering South Africa a temporary document, valid for fourteen days, requiring the person to apply for asylum at the nearest refugee reception office.²⁷ At present there are five reception offices in the country, located in Johannesburg, Pretoria, Cape Town, Durban, and Port Elizabeth—with Johannesburg being the busiest with the largest number of applications.

The issuing of the fourteen-day permit is meant to give an asylum seeker adequate time to reach the nearest refugee reception office and to apply for asylum without risk of arrest for being “illegal” (that is, present on the territory without authorization). An assumption exists that the asylum seeker will find the refugee reception office within the prescribed two-week period, be able to present him/herself before a refugee reception officer, and be issued with a permit.

However, as Human Rights Watch found, and as confirmed by NGOs working with refugees and asylum seekers, the fourteen-day document often expires long before many asylum seekers have been issued with an asylum seeker permit. In Johannesburg, this is due largely to the difficulties asylum seekers have in gaining access to the refugee reception office.²⁸

The Immigration Amendment Act 19 of 2004, which came into force on July 1, 2005, provides that a person automatically becomes an “illegal foreigner” (and therefore

²⁷ The Immigration Act 13 of 2002, section 23; Immigration Regulation No. R487 under the Immigration Act, regulation 32. Similar provision is contained in Regulation No. R366 under the Refugees Act 130 of 1998, regulation 2(2) which states that: “any person who entered the Republic [of South Africa] and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant sub-regulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a refugee reception office to complete an asylum application.

²⁸ Human Rights Watch interview, Lawyers for Human Rights, August 23, 2004.

subject to detention and deportation) if this temporary document expires before the bearer is able to appear before a refugee reception officer.²⁹

Inability to gain access to the refugee reception office

The regulations to the Refugees Act state that an application for asylum must be lodged “without delay” at a designated refugee reception office.³⁰

Through visits to the Johannesburg reception office and interviews with asylum seekers and NGOs working on their behalf, Human Rights Watch found that factors preventing access to the office include gaining physical access to the refugee reception office; lack of information about the location of the office; how the office and asylum process functions; the need for most newly arrived asylum seekers to wait in long lines—sometimes overnight—in the hope that they might be admitted the next day; and the constantly changing system of admitting new arrivals seeking asylum.

An asylum seeker from Zimbabwe told Human Rights Watch about his experience in trying to gain access to the Johannesburg refugee reception office:

I went to Home Affairs one Monday evening in order to be in the front of the queue the following morning. The Tuesday—the day they admit Zimbabweans—they told me that they can only admit thirty applicants from Zimbabwe. I got into the office at 1100 when I received assistance. The refugee reception officer interviewed me. He took down basic information from me [the eligibility form]. He did not issue me with a paper as the printer was not working. I was told to return the following day.³¹

An October 2004 report by the Office of the Public Protector in South Africa found that DHA “has acted in an unlawful and improper manner in denying refugees access to the building and services rendered at the Braamfontein Refugee Reception Office (now Rosettenville premises)” and that “refugees have been improperly denied the right of access to the asylum system and procedures.”³²

²⁹ Immigration Amendment Act 19 of 2004, section 24.

³⁰ Refugee Regulations No. R366 under the Refugees Act, regulation 2(1)a.

³¹ Human Rights Watch interview, asylum seeker, August 27, 2004.

³² Office of the Public Protector of South Africa, “Report on an investigation into allegations of undue delay, unlawful and improper conduct and prejudice in the rendering of services at Braamfontein refugee reception centre (now Rosettenville premises).” Report in terms of section 182(1)(b) of the Constitution of the Republic of

The Johannesburg refugee reception office moved locations three times in a period of six months between 2003 and early 2004 before settling at its now permanent address in Rosettenville, south of Johannesburg's central business district. During this period there were no notices indicating where the office had moved. This created confusion and, potentially, the risk of arrest, detention, and deportation for those who were due to renew their permits but found the former offices shut.

The absence of available information at the office on either the asylum process or on the rights of asylum seekers in general further opens the process to potential corrupt practices by unscrupulous actors within and outside the system.³³ One refugee told Human Rights Watch, "Look for a friend, give him money, and he will know what to do."³⁴

To address the problems asylum seekers experienced in gaining access to the reception center, during 2004, some asylum seekers were being issued with appointment letters when the refugee reception officers were unable to process their applications. These letters, which indicate that the asylum seeker has presented him or herself to the refugee reception office, however, are not provided for under the Refugees Act or accompanying regulations and have no legal standing. Without a legal document, the asylum seeker has no certain protection from potential arrest. Also, the bearer of such a letter is unable to obtain certain social services. A Congolese asylum seeker, who arrived in Johannesburg in December 2003, showed Human Rights Watch an appointment letter issued to him, and explained:

I went to Home Affairs and was given this paper. They said I should return for the Section 22 paper. For a long time the computers were not working. The computers started working from April 2004. I still did not get the permit.³⁵

South Africa Act 108 of 1996, and Section 8(1) of the Public Protector Act, 23 of 1994, October 12, 2004, pp.3-4, Sections 4.1 and 4.3." The report can be sourced at <http://www.publicprotector.org>.

³³ Though it stopped short of saying outright that refugee reception officers were themselves involved in corrupt practices, the Public Protector's report (op. cit.) strongly censured the department for various delays in the refugee status determination process and recommended that all refugee reception officials receive and wear name tags while performing their official duties (p.14, section 2.6; p.24, Section 5.6).

³⁴ Human Rights Watch interview, refugee, Johannesburg, September 1, 2004.

³⁵ Human Rights Watch interview, asylum seeker, Johannesburg, July 14, 2004.

He renewed the paper each time he went to the Johannesburg refugee reception office from December 2003 to July 2004.

The University of the Witwatersrand (Wits) Law Clinic reported in November 2004 that one of its client's appointment letters had been renewed repeatedly for a year and a half, contravening section 22 of the Refugees Act, which states that asylum applicants should be issued with asylum seeker permits.³⁶

In addition, between November 2004 and March 2005, the Johannesburg refugee reception office introduced a system of accepting new asylum applications on specific "intake days." According to an official at the office, there were two intake days each in November and December 2004 and one each in January and February 2005. On the intake day of February 4, 2005, approximately 2,000 asylum seekers presented themselves at the office.³⁷ The DHA official told Human Rights Watch that the next intake day was scheduled in April 2005. Refugee reception officers issue all new asylum seekers presenting themselves on intake days with "tokens" requiring them to come back to the office for their eligibility interview at a later date.³⁸ This intake system was suspended following a DHA review.³⁹

In the last week of April 2005, the Johannesburg refugee reception office began to direct all new applicants to the Pretoria refugee reception office owing to health and safety concerns raised by the local municipal authority.⁴⁰ In the meantime, the Johannesburg refugee reception is continuing with its other tasks, such as renewing asylum seeker permits. DHA has established a task force to look for an alternative suitable location for the Johannesburg refugee reception office.⁴¹ As of September 2005, the Johannesburg refugee office was not admitting new arrivals and DHA had not found a new location.

³⁶ Human Rights Watch interview, Wits Law Clinic, Johannesburg, February 22, 2005.

³⁷ Human Rights Watch telephone interview, Mr Ngozwana, head, Johannesburg refugee reception office, February 28, 2005.

³⁸ On these dates, the office processes sixty applications per day.

³⁹ In a written communication to Human Rights Watch (April 4, 2005), Mr. Fraser, Deputy Director General for Immigration (DHA) noted that the department has developed and adopted standard operating procedures across all refugee reception offices in an effort to address some of the problems of intake days, appointment letters and so on. He stated that "any asylum seeker who approaches a Refugee Reception Office will be immediately assisted" but added that "this must be taken with the understanding that DHA is engaged in the capacitating of these offices."

⁴⁰ Human Rights Watch telephone interview, Mr Ngozwana, head, Johannesburg refugee reception office, May 17, 2005.

⁴¹ *Buanews* (South Africa), "Task team set up to look at relocation of Rosettenville Refugee Office," April 24, 2005.

Neither the “tokens” nor appointment letters are legally recognized documents and therefore do not give the asylum seeker legal status in the country. These measures are not in keeping with UNHCR Executive Committee (ExCom)⁴² Conclusion No. 35 (1984) recommended that if an asylum claim cannot be decided “without delay,” the asylum seeker should be issued with temporary documents to ensure his or her legal protection.⁴³

Neither the tokens nor appointment letters are provisional documents sufficient to ensure that the bearer will not risk detention. Asylum seeker permits, as provided under the Refugees Act and regulations, are the only legal documents that afford some legal protection by allowing the bearer to stay in South Africa.

In responding to concerns about access to the Johannesburg refugee office, DHA told Human Rights Watch that it would institute a uniform system on June 30, 2005 across all refugee reception offices in South Africa. Under the new system, reception and interview of asylum seekers should be completed within four or five working days.⁴⁴ In addition, DHA said it would recruit fifty permanent staff members across all the five refugee reception offices. However, as of October 2005, the Johannesburg refugee office had not opened its offices to new arrivals thereby implementing the new system.

Corrupt practices

Corruption in the refugee reception office and the failure by officials to restrict the activities of “brokers” and unofficial “interpreters” further hinder the ability of asylum seekers to gain access to refugee status determination procedures and protection. As an asylum seeker told Human Rights Watch, “Without [bribe] money, I cannot get a paper [asylum seeker permit].”⁴⁵ He claims to have paid R400 (U.S. \$67) to a person not in uniform at the Johannesburg refugee reception office in order to gain access to the

⁴² The Executive Committee of the Programme of the UNHCR comprises largely countries that produce or host refugees, or important donors to UNHCR’s programs. The terms of reference of the ExCom are to advise the High Commissioner for Refugees in the exercise of his/her functions, to approve the High Commissioner’s programs, and to set financial targets. Its conclusions on refugee protection serve as guidelines for government practices regarding refugees and asylum seekers.

⁴³ UNHCR ExCom, Conclusion No. 35 on identity documents to refugees, October 18, 1984, para. (d) recommends that “asylum applicants whose applications cannot be decided without delay be provided with provisional documentation sufficient to ensure that they are protected against expulsion or *refoulement* until a decision has been taken by the competent authorities with regard to their application.”

⁴⁴ Department of Home Affairs, National Immigration Branch, *Plan for Facilitating Reception of Asylum Seekers at Refugee Reception Offices*, May 10, 2005.

⁴⁵ Human Rights Watch interview, asylum seeker, Johannesburg, July 14, 2004.

office. Another asylum seeker from the DRC told Human Rights Watch that someone not in uniform at the Johannesburg refugee reception office told him, “If you want a paper, you must pay R 400 (U.S. \$67).”⁴⁶ When Human Rights Watch asked about allegations of corruption at the Johannesburg refugee reception office, the head of the office would not confirm or deny the allegations.⁴⁷

Corruption is notoriously difficult to prove, for a variety of reasons.⁴⁸ Asylum seeker victims of corruption may be reluctant to come forward with their complaints since they are dependent on the very people they may be accusing to grant them legal status to remain in the country. Moreover, until late 2004, officials at the Johannesburg office did not wear nametags, adding to the difficulties for asylum seekers in lodging formal complaints against them. Regardless, however, most asylum seekers and service providers interviewed by Human Rights Watch as well as various reports by the National Consortium for Refugee Affairs, the Human Rights Committee (a South Africa-based NGO)⁴⁹, and the Public Protector, an independent statutory body,⁵⁰ contend that corruption within DHA as a whole is a problem (see examples below).

First interview

The Refugees Act establishes a procedure for refugee reception officers to receive asylum applications presented to them and submit them to a refugee status determination officer. The asylum seeker should be given “notice in writing to appear before a status determination officer for an interview... not later than thirty working days after the initial lodging of the application.”⁵¹ Additionally, UNHCR’s ExCom has stressed that states should ensure that individual asylum seekers are “registered

⁴⁶ Human Rights Watch interview, asylum seeker, Johannesburg, August 31, 2004.

⁴⁷ Human Rights Watch interview, Mr Ngozwana, head, Johannesburg refugee reception office, September 9, 2004.

⁴⁸ See Lee Anne de la Hunt, *Tracking Progress: Initial Experiences with the Refugees Act 130 of 1998*, researched for the National Consortium for Refugee Affairs [NCRA; South Africa], September 2002, p.39: “...it is difficult to prove corruption. There is a problem that the same quality of vulnerability that makes asylum seekers ‘easy targets’ for corrupt officials makes it impossible for them to seek redress. Their lives are literally in the hands of those they accuse. On the other hand, aggrieved applicants may allege corruption in response to a negative outcome.”

⁴⁹ Human Rights Committee [South Africa], *Access to Justice: Focus on Refugees and Asylum Seekers*, *Human Rights Committee Quarterly Review*, March 2001, pp.73-5.

⁵⁰ Public Protector’s report, op. cit.

⁵¹ Refugee Regulation No R366 under the Refugees Act, regulation 4(1)(b); and Refugees Act, Section 21(1)(a),(d).

and...issued appropriate documentation reflecting their status as asylum seekers, which should remain valid until the final decision is taken on the asylum application.”⁵²

The refugee reception officer conducts an initial interview to gather the applicant’s personal information and reason for seeking asylum and then issues the applicant an asylum seeker permit commonly referred to as a Section 22 permit. It is valid for one month, subject to renewal.⁵³

At each renewal, the asylum seeker must return to the refugee reception office. With each visit, asylum seekers may be exposed to corrupt practices. The Forced Migration Studies Programme of the University of the Witwatersrand (Wits) found that every one of the more than fifty applicants interviewed at the refugee reception office in Johannesburg over a two-week period in December 2004 reported engaging in or being approached to participate in corrupt behavior.⁵⁴ The study found that each of the various services provided at the refugee reception office, such as acquiring an “interpreter,” receiving an asylum seeker permit, and having the permit renewed involved a potential demand for a bribe.⁵⁵ The costs of bribes found by the Wits researchers ranged from R 400 (U.S. \$67) to R 4,000 (U.S. \$667) for interpreters and from R 100 (U.S. \$17) to R 800 (U.S. \$133) for other “services”.⁵⁶

An asylum seeker from Ethiopia told Human Rights Watch:

I paid someone at Home Affairs R 400 (U.S. \$67). They guess what to write on the form. Even my name is incorrect. The church said I need a paper to continue living there. They give me money and we give it to someone in plain clothes. I think this is a broker...Sometimes they charge R 600 (U.S. \$92.31) for applicants from Ethiopia. If you do not pay, you cannot get a paper.⁵⁷

⁵² UNHCR ExCom Conclusion No.93, “Reception of asylum seekers in the context of individual asylum systems,” October 8, 2002, para. (b) (v).

⁵³ Recent practice at refugee reception offices has been to extend the validity of the asylum seeker permit for three months in order to manage the backlog.

⁵⁴ Human Rights Watch interview, University of the Witwatersrand Forced Migration Studies Programme, February 21, 2005.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Human Rights Watch interview, asylum seeker, Johannesburg, July 14, 2004.

Human Rights Watch discovered that some asylum seekers had paid bribes to acquire a renewal of their asylum seeker permit or to be granted a refugee status document expeditiously by DHA. An asylum seeker from Rwanda told Human Rights Watch:

From the time I began renewing my [asylum seeker] permit since my arrival in the South Africa in 2002, I noticed a number of other applicants receiving the refugee status permit quickly. When I inquired, I was informed that I could get it for a fee. So I paid R 1,000 (U.S. \$170) for me and my family.⁵⁸

UNHCR officials have noticed that false documentation appears to be provided by mobile or other informal (and completely illegal) parallel “immigration offices” located near DHA offices and the refugee reception offices, including in Johannesburg.⁵⁹ At these parallel offices, pre-processed documents are given out or asylum permits renewed for a fee. There is a semblance of legitimacy to the transactions, although the individuals involved remain—often unknowingly—undocumented since the transactions are never entered into the DHA system.

Response of Department of Home Affairs

DHA has publicly acknowledged the existence of corruption within its ranks and has punished some officials implicated in illegal schemes such as creating mobile or “back door” immigration offices.⁶⁰ Two DHA officials, for example, were arrested in February 2005 for offering fake South African identification documents to undocumented Zimbabwean immigrants.⁶¹ More comprehensively, DHA has begun to take steps through a “Turnaround Strategy,”⁶² announced in November 2003, to reduce the

⁵⁸ Human Rights Watch interview, asylum seeker, Johannesburg, September 1, 2004. The man told Human Rights Watch that he made the inquiry to someone posing as an interpreter in the hallway where refugees or asylum seekers sit while awaiting an interview. The individuals who pose as interpreters, according to the man, walk around carrying papers and “looking official.” Most refugees and asylum seekers are not aware that the individuals are, in fact, *not* DHA officials.

⁵⁹ Human Rights Watch interview, Mr Mbilinyi, UNHCR, Pretoria, *op. cit.*

⁶⁰ See, for example, John Battersby, “Corrupt from Top to Bottom,” *Pretoria News*, November 6, 2003, in which Barry Gilder, Director-General of DHA, states: “Corruption is widespread and endemic.”

⁶¹ South African Department of Home Affairs Media Release, “Statement by Home Affairs on *Special Assignment*,” February 22, 2005.

⁶² Barry Gilder, Director-General of DHA, “Address by the Director-General of Home Affairs, Barry Gilder, at Media Briefing, Sandton, 5 November 2003.” Available at: <http://www.info.gov.za/speeches/2003/03110611461006.htm>, viewed on March 24, 2005.

“corruptibility” of its officials.⁶³ The DHA Director-General has called for a “holistic approach to countering corruption,” aimed at stopping the “syndicates that are perpetually corrupting our officials.”⁶⁴ According to the DHA website, the Turnaround Strategy is “aimed at improving efficiency in the department across all the sectors,” including personnel. With specific reference to the problem of corruption, the Turnaround Strategy is to be led by the National Intelligence Agency, with the goals of improving morale and working conditions; educating and motivating DHA officials; dealing with the people attempting to bribe DHA officials and officials seeking bribes; improving service delivery; and establishing a chief directorate to focus on counter-corruption and security.⁶⁵ On April 12, 2005, DHA launched the National Immigration Branch as part of the Turnaround strategy to “professionalize the exercising of control over the entry, stay, and departure of foreigners in the country as regulated by the Immigration and Refugee Acts.”⁶⁶

Lack of official interpreters

The Refugees Act regulations provide for government-funded interpreters at all stages of the asylum process “where practicable and necessary.”⁶⁷ UNHCR also makes clear that interpreters are a key component of fair refugee status determination procedures, and stresses in its *Handbook on Procedures and Criteria for Determining Refugee Status* (hereafter, *UNHCR Handbook*) that asylum applicants “should be given the necessary facilities, including the services of a competent interpreter, for submitting [their] case to the authorities concerned.”⁶⁸ The competency of interpreters is not only a matter of their technical linguistic ability, but also a matter of their impartiality, and training in cultural and child-sensitivity in the context of refugee status interviewing.

Despite the regulations and UNHCR’s guidance, however, there are no officially recognized interpreters at the Johannesburg refugee reception office. While the refugee reception office in Pretoria employs two official interpreters, an informal network of

⁶³ Barry Gilder, Director-General of DHA, discussed the “corruptability” of DHA officials on the SABC investigative television program *Special Assignment* on February 22, 2005.

⁶⁴ Matome Sebelebele, “Home Affairs’ Turn-Around Plan,” *BuaNews* (South Africa), November 27, 2003.

⁶⁵ See <http://www.home-affairs.gov.za/dg/Turnaround%20Strategy.pdf>, viewed on February 22, 2005. See also Address by Hon N.N. Mapisa-Nqakula, Minister of Home Affairs, July 30, 2004. Find at <http://home-affairs.pwv.gov.za/speeches.asp?id=99>, viewed on March 7, 2005.

⁶⁶ “SA Improves Immigration Services,” *Buanews* (South Africa), April 12, 2005.

⁶⁷ Refugee Regulation No R366 under Refugees Act, regulation 5(1).

⁶⁸ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR), revised 1992, Part Two (A), para. iv. The UNHCR *Handbook* sets out guidelines on evaluating the substance of refugee claims based on interpretation of the 1951 UN Refugee Convention.

“volunteer” interpreters in Johannesburg double as intermediaries in and around the refugee reception office. Because of the lack of professional, official interpreters, refugees and asylum seekers who are unable to understand interviews in English are obliged to use the services of these informal networks. DHA acknowledges that these networks are facilitating bribes and accepting monies for services that should be provided for free and rendered by the office itself.⁶⁹ The head of the refugee reception office in Johannesburg acknowledged to the Office of the Public Protector that he has, on occasion, found it necessary to “dismiss” several of the informal interpreters who had been taking fees from asylum seekers for their services, and added that the interpreters “are in no manner accountable to the [DHA].”⁷⁰

In September 2004, a DHA official told Human Rights Watch that DHA planned to employ officially recognized interpreters by 2005.⁷¹ As of August 2005, the Johannesburg refugee reception office did not have official interpreters.

Delays in the determination of refugee status

After an asylum seeker has gained access to the refugee reception office and been issued with an asylum seeker permit, procedural delays continue. UNHCR, supported by the UN General Assembly,⁷² has consistently noted the need for asylum procedures to be “efficient, expeditious and fair.”⁷³ As part of the Global Consultations on International Protection,⁷⁴ UNHCR sought to identify the key elements central to all asylum seeker reception and refugee status determination systems, recognizing the inherent differences in states’ capacities and resources. The key elements identified by UNHCR included “stay in dignity, freedom of movement, respect for family life, access to education, access to health, information on procedure and rights in a language [the asylum seeker]

⁶⁹ Public Protector, op. cit., p.7, Section 1.2.1.2; p.14, Section 2.8.

⁷⁰ Public Protector, op. cit., p.18, Section 3.5.2.

⁷¹ Human Rights Watch interview, Mr Ngozwana, Johannesburg refugee reception office, September 9, 2004.

⁷² See, for example, the 1997 UN General Assembly Resolution on UNHCR, which “[u]rges states to ensure access, consistent with relevant international and regional instruments, for all asylum seekers to fair and efficient procedures for the determination of refugee status and the granting of asylum to eligible persons.” UN Doc A/RES/51/75, February 12, 1997, para. 4.

⁷³ See, for example, UNHCR ExCom, Global Consultations on International Protection, 2nd meeting, “Asylum Processes (Fair and Efficient Asylum Procedures).” UN Doc EC/GC/01/12, May 31, 2001, para. 49.

⁷⁴ The Global Consultations on International Protection were a series of meetings organized by UNHCR in 2000-2001 aimed at reinvigorating the international refugee protection regime. The meetings involved key stakeholders such as governments, refugee experts, NGOs and UNHCR’s Executive Committee and aimed to address various issues in the field of refugee protection where further clarity was needed. Some of the key issues addressed during the Consultations included reception, cessation, non-refoulement, and gender. See <http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations>.

can understand, *swift and fair processing of cases* to address some of the more difficult conditions of reception, and appropriate arrangements to meet special vulnerabilities” [emphasis added].⁷⁵ ExCom Conclusion 30 calls on countries to “allocate sufficient personnel and resources to refugee status determination bodies so as to enable them to accomplish their task expeditiously.”⁷⁶

South Africa’s domestic refugee law also recognizes the need for refugee status determination procedures to occur with relative speed; as noted above, the regulations to the Refugees Act envision status determinations to be finalized within six months (180 days) of the submission of an asylum application.⁷⁷ In practice, however, Human Rights Watch and others have found that this is generally not the case.⁷⁸ A survey commissioned by UNHCR in 2003, for example, found that 70 percent of respondents (in this case, all of whom were asylum seekers) had not had their claims adjudicated within 180 days of submitting their asylum applications.⁷⁹

In practice, waiting periods for refugee status determination are often one year or longer. Examples of such lengthy waiting periods include an asylum seeker from Burundi who had been in South Africa since 2001 and a Congolese asylum seeker in the country since 2000, both still awaiting the determination of their status at the time of Human Rights Watch’s August 2004 visit.⁸⁰ A Burundian asylum seeker applied for asylum in July 1997, and as at September 2004 when he was interviewed by Human Rights Watch he was still waiting for a decision on his application. With no access to any form of state-funded social assistance, asylum seekers are left to fend entirely for themselves during the long determination proceedings.

DHA, including an official at the Johannesburg refugee reception office, has acknowledged the problems encountered in finalizing cases within the 180-day period

⁷⁵ UN General Assembly, Executive Committee of the High Commissioner [for Refugees], *Global Consultations on International Protection: Report of the Meetings within the Framework of the Standing Committee (Third Track)*. UN Doc A/AC.96/961, June 27, 2002, p.23, para. 9.

⁷⁶ UNHCR ExCom Conclusion No. 30, “The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum,” 1983.

⁷⁷ Refugee Regulation No. R366 under the Refugees Act, regulation 3(1).

⁷⁸ A point which is supported by the fact that DHA found it necessary to put in place a second “Backlog Project” in four years, with the goal of reducing the number of pending applications.

⁷⁹ Community Agency for Social Enquiry (CASE), *National Refugee Baseline Survey: Final Report*, researched for UNHCR and the Japan International Cooperation Agency, November 2003, p.98.

⁸⁰ Human Rights Watch interview, asylum seekers, Johannesburg, August 31, 2004.

stipulated under the Refugees Act regulations.⁸¹ The long delays in the process have resulted in a national backlog of between 80,000 and 115,000 pending applications.⁸² As of late 2004, DHA has, with assistance from UNHCR, embarked on its second project in four years to deal with the backlog of applications at the Johannesburg refugee reception office.⁸³ In addition, UNHCR and DHA recognize that the staffing at the Johannesburg office was barely adequate to process the large numbers of asylum seekers, and that computer equipment was insufficient and unreliable for processing applications efficiently.⁸⁴

As of November 2004, the number of refugee reception officers in the Johannesburg office increased from five to twenty three, and refugee status determination officers from six to eight, according to a DHA official. However, despite these increases, the continuing backlog of applications and an inefficient system of admitting new applicants indicate that neither human resources nor equipment are yet adequate to meet the need.

The long delays in processing claims in South Africa are of concern in large part because of the precarious legal situation and living conditions in which many asylum seekers find themselves during the year or more that their claims are pending—including the common denial of access to work or study, often based on employers wrongfully refusing to accept a Section 22 permit issued by the DHA that allows asylum seekers to work and study during the refugee status determination period, harassment by police and other government officials, lack of recognition on the part of both public and private authorities of their documents, and difficulties in finding accommodation.

In recounting the problems experienced while waiting for refugee status to be determined an asylum seeker told Human Rights Watch, “Before it was okay to find

⁸¹ Human Rights Watch interview, Mr Ngozwana, head, Johannesburg refugee reception office, September 9, 2004; see also Hon N.N. Mapisa-Nqakula, Minister of Home Affairs, Statement of the Minister of Home Affairs on the occasion of networking breakfast meeting with editors, July 30, 2004. Find at <http://www.home-affairs.gov.za/speeches/asp?id=99>. Viewed on September 11, 2004.

⁸² Human Rights Watch interview, UNHCR Pretoria Office, op. cit.; Fedde Groot, UNHCR, “Challenges of the UNHCR’s Programme for Urban Refugees in South Africa,” in Loren B. Landau (ed.), *Forced Migrants in the New Johannesburg: Towards A Local Government Response* (Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand, 2004), p. 38; Barry Gilder, Director-General of DHA, Media Briefing, Johannesburg, November 5, 2004.

⁸³ Human Rights Watch interview, Mr Mbilinyi, UNHCR, Pretoria, op. cit. UNHCR assisted with the first “Backlog Project” in 2000-2001.

⁸⁴ Though the computer system and some of the computers are new, the system as a whole is still insufficient and prone to breakdowns. Procedural delays have occurred as a result of, among other problems, lack of toner for printers or broken cameras for taking pictures of applicants.

security guard work. Now you cannot get authorization from the security officers' board to work. They want refugee status.”⁸⁵ The asylum seeker had been on a Section 22 permit since 2001.

Another asylum seeker from the DRC who acquired an asylum seeker permit in 2003 told Human Rights Watch, “When I went to the licensing office in Johannesburg to register to take a test to be able to drive a lorry, they did not accept the asylum permit. [The authorities] said it was not proper identification. They say I must have refugee status in order to register for the license.”⁸⁶

UNHCR recommends that the reception conditions outlined in domestic refugee law “take careful account of the length of asylum procedures.”⁸⁷ According to the UN agency, the benefits accorded asylum seekers should be “commensurate with the anticipated length of the procedure.”⁸⁸

Failure to recognize the legal right to work and study

Under South African law, asylum seekers are permitted to work and study during the refugee status determination period. DHA officials are required to issue asylum seeker Section 22 permit that clearly indicate the bearers' entitlement to work and study.

In the first few years of the administration of the Refugees Act (2000-2003), bearers of asylum seeker permits were not legally entitled to work or study pending determination of status. If a decision was not made within the 180-day period, an applicant could approach the Standing Committee for Refugee Affairs to have the prohibition lifted, and gain permission to engage in these activities.⁸⁹

⁸⁵ Human Rights Watch interview, asylum seeker, Johannesburg, August 31, 2004.

⁸⁶ Human Rights Watch interview, asylum seeker, Johannesburg, September 1, 2004.

⁸⁷ UNHCR ExCom, Global Consultations on International Protection, “Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems.” UN Doc EC/GC/01/17, September 4, 2001, para. 25(ii).

⁸⁸ Global Consultations, September 2001, op.cit.

⁸⁹ Refugee Regulations No. R366 under the Refugees Act, regulations 3(1), (3). The Standing Committee for Refugee Affairs is an independent oversight body within the Refugee Directorate, comprising four persons. It is charged with monitoring the implementation of the Refugees Act, advising on interpretation of the Act, and meets periodically to review matters of law referred to it by refugee status determination officers.

Following a legal challenge to the prohibition in *Watchenuka v Minister of Home Affairs*,⁹⁰ however, the Standing Committee for Refugee Affairs ruled on March 30, 2004 that all asylum seekers should be allowed to work and study.⁹¹

All refugee reception offices are required to implement the decision. In theory, therefore, asylum seekers in South Africa now have the legal right to work and study. However, the Johannesburg refugee reception office inconsistently implements the Standing Committee for Refugee Affairs' decision to lift the prohibition on work and study from asylum seeker permits. It appears that refugee reception officers are applying the ruling arbitrarily and in other cases the prohibition is lifted only after bribery or intervention by lawyers.

A DHA official at the Johannesburg refugee reception office assured Human Rights Watch that the prohibition was no longer in effect.⁹² Although the prohibition was deleted on some permits issued in June 2004 in Johannesburg, Human Rights Watch viewed others on which the prohibition is still firmly imprinted.⁹³ Service providers told Human Rights Watch that they continue to receive cases where asylum seeker permits are issued with the prohibition intact.⁹⁴ Although precise statistics are unavailable, estimates from the legal clinic of the University of the Witwatersrand as of February 2005 are that more than half of newly issued permits still have the prohibition imprinted on them.⁹⁵ In most instances, the prohibition will only be removed if the asylum seeker specifically requests its removal (through the assistance and intervention of lawyers or NGOs). This only occurs, however, if the asylum seeker is aware that the law has been changed.

⁹⁰ *Watchenuka v Minister of Home Affairs* 2003(1) SA 619 (c) was appealed by DHA in *Minister of Home Affairs v Watchenuka* Case No. 10 (2003). In a decision delivered November 28, 2003, the original decision requiring the lifting of the prohibition on work and study was upheld. The Standing Committee on Refugee Affairs issued a directive giving effect to the decision in March 2004.

⁹¹ Refugees Act, section 11(h) makes provision for the determination by the Standing Committee for Refugee Affairs of conditions relating to work and study in South Africa under which a permit can be issued. The Standing Committee for Refugee Affairs' decision was issued in a policy decision dated March 30, 2004.

⁹² Human Rights Watch interview, Mr Ngozwana, head, Johannesburg refugee reception office, September 9, 2004.

⁹³ The deletion of the work and study prohibition is accomplished through manually drawing a line across the words "work and study prohibited." The alteration on the permit is then countersigned by the refugee reception officer. According to an official from DHA, the electronic version of the template cannot be altered due to a technical problem.

⁹⁴ Human Rights Watch interview, Wits Law Clinic, Johannesburg, August 26, 2004.

⁹⁵ Human Rights Watch interview, Wits Law Clinic, Johannesburg, February 22, 2005.

An asylum seeker from Burundi who arrived in South Africa in 2001 told Human Rights Watch:

I am looking for a loan to start a small business, but I cannot because the permit says I cannot work. Jesuit Refugee Services [JRS] cannot give me a loan because they say my goods will be confiscated. Now I do not work. I do not know where to get food.⁹⁶

The failure to implement the legal right to work and study uniformly and to remove the prohibition on work and study from asylum seeker permits over a prolonged period prevents asylum seekers from engaging in legitimate economic activity to provide for their basic welfare needs. Since South Africa does not grant asylum seekers access to state financial support or assistance with food and shelter, denial of the right to work can threaten the health and life of particularly destitute asylum seekers.

Hearing before the refugee status determination officer and determination of claims

Once an asylum seeker has seen a refugee reception officer and been issued an asylum seeker permit, the officer transmits the applicant's file to the refugee status determination officer, who in turn makes a determination to grant refugee status. Under the Refugees Act regulations, the hearing—effectively the asylum seeker's second interview—should occur within thirty days of the completion of the initial application.⁹⁷

The refugee status determination officer interviews the asylum seeker⁹⁸ to verify the claim for asylum. Based on the evidence presented, the officer may either grant the applicant refugee status or deny the application on grounds that it is “manifestly unfounded, abusive or fraudulent”, or simply “unfounded.”⁹⁹ Where asylum has been denied, reasons must be furnished to the applicant in writing.¹⁰⁰

⁹⁶ Human Rights Watch interview, asylum seeker, Johannesburg, July 14, 2004.

⁹⁷ Refugee Regulation No. R366 under the Refugees Act regulation 3(2)b.

⁹⁸ A legal representative may assist the asylum seeker in presenting his or her case for refugee status (Refugee Regulation No. R366 under the Refugees Act, regulation 10(4)a,b and 10(5).

⁹⁹ A case may also be referred to the Standing Committee for Refugee Affairs for clarity on a legal question.

¹⁰⁰ Refugees Act, section 24(4)a. Legal advisers, however, note that “standard form” decisions are being used in many cases: the same reason, in precisely the same language, given for several rejected applications from the same country. Human Rights Watch has copies of four 2004 rejections of asylum applications from DRC, all using almost verbatim language to indicate the reason for rejection.

Under South Africa law, to be recognized as a refugee, the refugee status determination officer must find that the individual meets any one of the three components of South Africa's refugee definition:

- (a) [a person who,] owing to a well-founded fear of being persecuted by his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside of the country of his or her nationality, and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) [a person who,] owing to the external aggression, occupation, foreign domination, or events seriously disturbing or disrupting public order in either a part of the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) [a person who] is a dependant of a person contemplated in paragraph (a) or (b).¹⁰¹

The refugee definition in the Refugees Act incorporates terms from both the 1951 UN and OAU Refugee Conventions. This is important since the OAU definition expands the 1951 Refugee Convention's individualized persecution standard by also including flight caused by (among others) "events seriously disturbing the public order." This is widely interpreted to mean civil conflict and war—the situations from which most successful asylum seekers in South Africa have fled. The OAU definition further recognizes as refugees people who fled conflict "in either a part or the whole of a country." This means, in theory, that an asylum seeker from eastern DRC (for example) would not necessarily first have to seek safety (a so-called internal flight alternative) in Kinshasa before being considered as having a legitimate claim to protection in South Africa.¹⁰²

¹⁰¹ Refugees Act, section 3.

¹⁰² This policy was challenged by a 2001 draft amendment to the Refugees Act, which sought – among other things – to eliminate the "in part" clause of the definition. The draft amendment is yet to be tabled in the South African parliament.

No other criteria besides the two definitions are used in determining refugee status. Commentators suggest, however, that when full written decisions *are* issued, which is not always the case (see below), the definitions are generally interpreted broadly.¹⁰³ South Africa was one of the first states to accept suggested guidelines on gender-based asylum determinations.¹⁰⁴ In keeping with the principles of equality outlined in the South African constitution, the Refugees Act also defines “particular social group” quite inclusively; including, among others, gender, sexual orientation, disability, class and caste.¹⁰⁵

Appeal and review of refugee status determination decisions

The Refugees Act sets up a formal structure for administrative appeals and review of negative asylum decisions (a provision absent in the previous Aliens Control Act with regard to any immigration decision).¹⁰⁶

The Standing Committee for Refugee Affairs reviews decisions by the refugee status determination officers of cases found to be manifestly unfounded, abusive or fraudulent.¹⁰⁷ This body can either set the decision aside or confirm it the refugee status determination officer’s decision.

An applicant is entitled to appeal the decision before the Refugee Appeals Board where a claim for asylum has been rejected because it is simply “unfounded.”¹⁰⁸ Between receiving the initial rejection and formally lodging an appeal, however, DHA retains the asylum seeker’s permit. During this period the individual has only the rejection letter to indicate his or her legal status in the country. A notice of appeal must be lodged with the Refugee Appeals Board within thirty days from receipt of the rejection. Upon lodging an appeal, the asylum seeker is reissued his or her original asylum seeker permit.

¹⁰³ Human Rights Watch interview, Wits Law Clinic, Johannesburg, February 22, 2005.

¹⁰⁴ Nahla Valji and Lee Ann de la Hunt, University of Cape Town Legal Aid Clinic, for National Consortium on Refugee Affairs, “Gender Guidelines for Asylum Determination,” 1999.

¹⁰⁵ Refugees Act, section 1(xxi). In an interview with Human Rights Watch, however, a representative of Wits Law Clinic noted that asylum claims based on sexual orientation have not generally been successful in South Africa.

¹⁰⁶ Human Rights Watch, *Prohibited Persons*, op. cit., Section V; de la Hunt, *Tracking Progress*, op. cit., pp. 2-3.

¹⁰⁷ Refugees Act, section 25(1).

¹⁰⁸ Refugees Act, section 24(3) (c).

Lack of legal representation

A legal representative may assist in both the administrative appeals and judicial review processes.¹⁰⁹ But the Refugees Act does not provide for free legal assistance to applicants. Service providers expressed concern to Human Rights Watch that although many rejected asylum seekers do exercise their right to appeal, the majority do not have access to legal representation or assistance during the process, largely because they are unaware of their right to counsel, cannot afford it, or do not know how or where to find pro bono or low-cost legal assistance.¹¹⁰ A member of the Refugee Appeals Board confirmed to Human Rights Watch that the majority of refugees do not have legal representation when they appear before the board.¹¹¹

Growing backlog of appeals

On balance, the Refugee Appeals Board does not hear more than seven appeals a month from appellants registered at the Johannesburg refugee reception office. This is both because of the limited number of first decisions taken, and also the board's own limited capacity since it has received on average forty appeals per month since 2000.¹¹² Since a large proportion of rejected cases are now being appealed, however, a significant backlog is forming within the appeals board, in addition to the backlog of original applications.¹¹³

Since its inception in 1997 (the year South Africa began accepting asylum applications on an individual basis), the Refugee Appeals Board has received a total of 13,600 appeals, of which approximately seventeen percent (2,361 cases) have been successful. Since the implementation of the Refugees Act in April 2000, the appeals board has received 2,161 new appeals (which are part of the total received since 1997). At the time of writing, 1,721 of these cases have been finalized, with approximately twenty-one percent (365 cases) approved. More than 400 cases are still pending.¹¹⁴

The board comprises five adjudicators. One or two adjudicators generally preside over a hearing—though all five members will eventually make a decision on the case.¹¹⁵

Lawyers representing asylum-seeking clients have raised concerns that, despite rules

¹⁰⁹ Refugees Act, section 26(4).

¹¹⁰ Human Rights Watch interviews, Wits Law Clinic, Johannesburg, August 26, 2004 and February 22, 2005.

¹¹¹ Human Rights Watch interview, Refugee Appeals Board, Johannesburg, September 9, 2004.

¹¹² Human Rights Watch interview, Refugee Appeals Board, Johannesburg, September 9, 2004.

¹¹³ Human Rights Watch interview, Wits Law Clinic, Johannesburg, February 22, 2005.

¹¹⁴ A written communication to Human Rights Watch, Refugee Appeals Board, March 8, 2005.

¹¹⁵ Human Rights Watch interview, Wits Law Clinic, Johannesburg, February 22, 2005.

requiring a record of proceedings,¹¹⁶ there is no formal record keeper during the hearings, and that this may prejudice the outcome of a decision.¹¹⁷ The board convenes once a week to decide on cases. According to the Wits Law Clinic, the appeals board renders its decisions in a relatively short timeframe. However, delays occur in acquiring files from the department, as well on the part of the refugee status determination officers in relaying the appeal board's decision to the asylum seeker.¹¹⁸

Once the appeal board has considered a case, it may confirm, set aside, or substitute the decision of the refugee status determination officer. According to the South African constitution, everyone—including an asylum seeker—has the right to just administrative action, which includes judicial review and the right to appeal.¹¹⁹ The rules of the refugee appeals board further guarantee the right to judicial review of determinations.¹²⁰ Thus asylum seekers who have had their applications rejected by the appeals board may bring their case before a local high court. Doing so requires going through another lengthy and complicated process, which is rarely used by asylum seekers.¹²¹ Moreover, the Refugee Appeals Board has shown a preference to rehear any case that would otherwise be brought before the national judiciary.

Although an appeal is an inquiry on a matter of law, in South Africa all issues of law and fact are newly considered at the asylum seeker's appeal.¹²² This in part recognizes the inherent inadequacies of decision-making in the first instance, in that the appeal is sometimes *de facto* the first substantive examination of the asylum seeker's full application. Primary decisions are often based on less-than-complete information. According to a lawyer from the only free legal service provider for refugees and asylum seekers in Johannesburg (who appears before the refugee appeals board on a regular basis), and through Human Rights Watch's examination of files, in some cases files contain only the eligibility form, completed by the refugee reception officer when the asylum seeker first presented him or herself at refugee reception office. The Wits Law

¹¹⁶ Refugee Affairs Appeal Board, (Procedure) Rules 2000, Rule 17.

¹¹⁷ Human Rights Watch interviews, Wits Law Clinic, Johannesburg, August 26, 2004 and February 22, 2005.

¹¹⁸ Human Rights Watch interview, Wits Law Clinic, Johannesburg, August 26, 2004.

¹¹⁹ The Constitution of the Republic of South, sections 33, 34.

¹²⁰ Refugee Affairs Appeal Board (Procedure) Rules 2000, Rule 20.

¹²¹ One of the few cases where this has happened is *Aol v. Minister of Home Affairs and others*, High Court of South Africa, Durban and Coast Local Division, Case No. 6501/2004, October 28, 2004. The applicant appealed her case to the local high court after her asylum application was denied on appeal. The judge found in her favor and ordered a rehearing of the case at the first level.

¹²² Human Rights Watch interview, Wits Law Clinic, Johannesburg, August 26, 2004; de la Hunt, *Tracking Progress*, op. cit., p. 23.

Clinic reports that it has never seen a record of the appeals board using the refugee status determination officer's initial inquiry into the merits of the claim.¹²³ Without full documentation (namely, on what basis the refugee status determination officer decided to decline the application), it is difficult to properly appeal a case.

Refugee status entitlements

“The [refugees] have entitlements which they do not enjoy.”

- *Co-ordinating Body for Refugee Communities, Johannesburg, July 9, 2004.*

Once asylum seekers are recognized refugees in South Africa, they are entitled to documents that establish their identity as protected persons, as well as to several entitlements concomitant with having obtained refugee status in the country. Unfortunately, as with many of the steps along the way to achieving recognition as a refugee, obtaining identity documents is often very difficult. In addition, refugees often face obstacles in enjoying the entitlements they should be afforded under South African and international refugee law.

The Refugees Act provides that a refugee “enjoys full legal protection, which includes the rights set out in [the Bill of Rights] of the [South African] Constitution,” and “is entitled to seek employment and... to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.”¹²⁴ In general terms, with regard to the rights to work, to health services and primary education, these provisions bring South Africa's domestic law in accord with obligations under the Refugee Convention. These are: to give refugees the same treatment as nationals of South Africa with regard to elementary education; to give them the same access to rationed products or to public relief and assistance as is afforded to nationals; and to give refugees the most favorable treatment afforded to nationals of a foreign country in the same circumstances as regards the right to work.¹²⁵

¹²³ Human Rights Watch interview, Wits Law Clinic, Johannesburg, February 22, 2005. Human Rights Watch has copies of several full asylum application files, which contain only the initial eligibility form. The one file which does contain information “added” by the refugee status determination officer consists only of the eligibility form and one handwritten sheet of paper repeating the information contained on that form.

¹²⁴ Refugees Act, section 27 (b),(f),(g).

¹²⁵ See Refugee Convention, Articles 22, 20, 23, and 17, respectively.

Documentation and duration of refugee status

The formal recognition of refugee status is acknowledged in a permit on a single A4 piece of paper similar to the asylum seeker permit. The refugee status permit is valid for two years. The permit further states that the refugee shall apply for a refugee identity document within fourteen days of receiving the permit.¹²⁶ The issuance of the refugee identity document is not automatic on receipt of the refugee status permit. The refugee is left carrying the permit, which is not readily accepted by potential employers and private bodies,¹²⁷ until he or she is able to secure the refugee identity document from the head office of DHA in Pretoria.

As one refugee told Human Rights Watch, “one has to apply for a refugee identity document which is supposed to take three months, but it takes six to twelve months.”¹²⁸ In June 2005, Human Rights Watch interviewed a refugee who has been waiting since 2001 for DHA to issue him with a refugee identity document. He said:

I was granted status in November 2001. I applied for a refugee identity document [ID]...I visited the Braamfontein office every two and in some cases three months to find out if my ID had arrived. This went on for a year. Towards the end of the first year, the office told me that they could not give me an ID because my [refugee status] permit would be expiring in a year. They said I should wait until I am granted my new status.

My status expired in November 2003. I submitted my letter requesting that my refugee status be renewed three months before the date of expiry. On the date of expiry, my refugee status permit was extended for three months and at other times two months. Each time I had to travel from Pretoria to Johannesburg. They did not tell me anything when they extended my permit. I could not ask questions as to why my refugee status was not reinstated for the full two years. It is difficult. You stand in the queue, they take your paper with other papers, and they extend it in the office and give it back to you. There is no chance to ask

¹²⁶ Refugees Act, section 27(d).

¹²⁷ De la Hunt, *Tracking Progress*, op.cit., p. 27.

¹²⁸ Human Rights Watch interview, refugees, Co-ordinating Body for Refugee Communities, Johannesburg, July 9, 2004.

questions. I finally got my renewed status for a further two years in November 2004.¹²⁹

I again applied for my ID once I had the refugee status permit reinstated. I went to the office in February 2005. The office told me it was not ready. I returned to the office in March 2005. Still the ID was not ready. I decided to find help. I approached the human rights lawyers [LHR]. They are now helping me. It is now June and I still do not have the ID.

It is difficult to find a job with only the paper. They ask you for an ID.¹³⁰

A 2003 study commissioned by UNHCR found that most refugees interviewed were unable to secure employment and open a bank account with only a permit and without a refugee identity document.¹³¹ As a refugee with a formal refugee status permit explained to Human Rights Watch: “I wanted to open a banking account. I went to one of the big banks in South Africa. They wanted South African identification.”¹³²

Nothing under international refugee law or in the Refugees Act suggests that refugee status should be anything other than continuous, unless and until the provisions analogous to the Refugee Convention’s ‘cessation clauses’ are invoked.¹³³ It would

¹²⁹ Human Rights Watch interview, refugee, June 4, 2005.

¹³⁰ Human Rights Watch interview, refugee, June 4, 2005.

¹³¹ CASE, *National Refugee Baseline Survey: Final Report*, op. cit., p.123.

¹³² Human Rights Watch interview, refugee, Johannesburg, August 31, 2004.

¹³³ Article 1(c) of the 1951 Refugee Convention, known as the cessation clauses, allows for withdrawal of refugee status in six cases: 1) if the refugee has voluntarily re-availed himself of the protection of his country of nationality; 2) if he has voluntarily re-acquired a nationality that was previously lost or 3) acquired a new nationality and is enjoying the protection of that new nationality; 4) if he has voluntarily re-established himself in the country from which he was originally seeking protection; or 5-6) if, either having lost prior nationality or being someone with no nationality “he can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality” or “former habitual residence.” [though such persons may still invoke “compelling reasons” as to why they refuse to avail themselves of such protection]. UNHCR stresses that the cessation clauses are “negative in character and exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.” See UNHCR *Handbook*, op. cit., para.116. South Africa has incorporated the 1951 and OAU Refugee Conventions’ cessation clauses into its domestic law.

therefore appear that the Refugees Act and its regulations are being misapplied, with officials forcing refugees to renew the refugee status permits periodically.

Regulation 15(2) and (3) provide:

The refugee identification document will be valid for an initial period of two years from the date asylum is granted...

To avoid lapses between the date of expiry and any renewal of the identity document, an individual must apply to the Standing Committee [for Refugee Affairs] for renewal of the document...

A refugee is required to re-apply ninety days prior to the expiration of the refugee identity document.¹³⁴ This requirement was apparently intended merely to monitor the whereabouts and confirm the continued presence in South Africa of refugee identity document holders, not to suggest that refugee status must be periodically reexamined. In practice, however, DHA requires a refugee to submit a letter re-asserting his/her claim for refugee status and requesting that the refugee identity document (or sometimes, erroneously, even the refugee status permit) should be extended. The Standing Committee for Refugee Affairs will then consider whether or not the applicant will remain a refugee “indefinitely”, which has been qualified by the Refugees Act as meaning “in the foreseeable future.”¹³⁵ If a favorable determination on this matter is not made, a recognized refugee may be required, in effect, to re-submit his or her claim every two years.¹³⁶

Such a refugee in Johannesburg, for example, must appear at the Johannesburg refugee reception office where the claim will be re-examined without an interview. The identity document (or sometimes, erroneously, the refugee status permit) will be extended for a further two years or withdrawn. Withdrawal could mean that the refugee would be treated thereafter as merely an “illegal foreigner” subject to arrest and deportation.¹³⁷ DHA was unable to tell Human Rights Watch how many refugees, if any, in South

¹³⁴ Refugee Regulations No. R366 under the Refugees Act, regulation 15(3).

¹³⁵ Refugee Regulations No. R366 under the Refugees Act, regulation 15(4)a.

¹³⁶ Refugee Regulations No. R366 under the Refugees Act, regulation 15(4)(C).

¹³⁷ Human Rights Watch telephone interview, refugee, Johannesburg, May 22, 2005.

Africa have had their status withdrawn in recent years and on what grounds, other than failure to appear.

The need to renew the refugee identity document every two years in the manner proscribed by the regulations effectively means that, for some refugees,¹³⁸ their status in South Africa is temporary in nature.

Where renewal of refugee status and/or a refugee identity document is not automatic, but requires the individual to repeatedly remake his or her case in a substantive way, even if only through a letter reasserting the reasons why he/she needs protection, the host State is ignoring the authoritative guidance of UNHCR on implementation of the Refugee Convention. South Africa's current practice therefore should be brought into line with UNHCR guidance and the overwhelming majority of state practice. Such reform would also be a matter of efficiency in a system already struggling to find the capacity to examine refugees' initial claims.

This need to renew refugee status repeatedly also creates a sense of insecurity and is an obstacle to integration into the community. As outlined in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, there is a "need to provide refugees with assurance that their status will not be subject to constant review."¹³⁹ Both the 1951 Refugee Convention and the UNHCR Statute, for example, call upon governments to "promot[e] the assimilation of refugees, especially by facilitating their naturalization."¹⁴⁰ The OAU Refugee Convention calls upon member states to "use their best endeavors...to secure the settlement of...refugees."¹⁴¹

At the time of the Human Rights Watch interviews, refugees expressed concern that refugee identity documents had a different color and appearance than identity documents issued to South African citizens and permanent residents. Refugee documents are maroon in color, in the form of a card that opens with a photograph of the bearer on one side and his or her personal details on the other. Some refugees say

¹³⁸ Human Rights Watch requested statistics from DHA concerning the numbers who have their refugee status permits and/or identity documents withdrawn under these rules, but was told that statistics are not available.

¹³⁹ UNHCR *Handbook*, op. cit., Chapter III(A), para. 112.

¹⁴⁰ Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), December 14, 1950, paragraph 2(e); see also the 1951 Refugee Convention, Article 34.

¹⁴¹ OAU Refugee Convention, article 2(1).

that their documents appear “fake” (simply because unfamiliar) to uninformed employers, civil servants, landlords, and others.¹⁴²

According to the UNHCR office in Pretoria, DHA will begin to phase out the existing refugee identification documents in favor of a generic “smart card” in the second half of 2005.

Permanent residency

A refugee can apply for permanent residence if he or she has been living in South Africa on a refugee status permit for a minimum of five consecutive years.¹⁴³ For a recognized refugee to receive a permanent residence permit, the standing committee for refugee affairs must have certified that that person will remain a refugee “indefinitely.”

On March 30, 2004, the Standing Committee for Refugee Affairs published a decision intended to circumscribe the conditions under which certification shall be issued, namely: “...Where the appellant is likely to remain a refugee for the foreseeable future and the “foreseeable future” should be one year.”¹⁴⁴

The Standing Committee for Refugee Affairs further recommends an amendment to the law to allow refugees with status to apply for permanent residency after five years in South Africa without having to undergo the certification process. An official from DHA told Human Rights Watch that this amendment is still under review.¹⁴⁵ The regulations to the Refugees Act also note that the Standing Committee for Refugee Affairs may, in certain exceptional cases, waive the certification process altogether and declare at the time refugee status is granted that the refugee will remain a lawfully present refugee in South Africa indefinitely, even if circumstances in the country of origin have fundamentally changed. According to legal service providers, however, the Standing Committee for Refugee Affairs rarely—if ever—uses this power.¹⁴⁶

¹⁴² Human Rights Watch interview, refugees, Johannesburg, July 9, 2004; see also de la Hunt, *Tracking Progress*, op. cit., p. 27.

¹⁴³ Refugees Act, section 27(c).

¹⁴⁴ Standing Committee for Refugee Affairs, policy decision, March 30, 2004.

¹⁴⁵ Written communication from Mr. Fraser, Deputy Director General – Immigration, (DHA) to Human Rights Watch, April 4, 2005.

¹⁴⁶ Refugee Regulation No. R366 under the Refugees Act, regulation 15(5); Human Rights Watch interview, Wits Law Clinic, Johannesburg, February 22, 2005.

As of January 2005, following the intervention of NGOs, the Minister of Home Affairs, recognizing that refugees in protracted refugee situations “have limited choices and are generally not able to pay the prescribed fees,” decided to “exempt all refugees who have been certified as likely to remain refugees indefinitely from payment of fees for an application of permanent residence.”¹⁴⁷ Prior to this waiver, certified refugees wishing to apply for permanent residence status were required to pay the prescribed application fee as other non-nationals of R 16,000 (U.S. \$2,670).

VI. Inadequate protection for refugees and asylum seekers

Harassment, mistreatment and extortion of asylum seekers and refugees by law enforcement agencies

Outside of the refugee status determination process, asylum seekers and refugees are often subjected to harassment, mistreatment and extortion by police. Numerous news reports have highlighted that a dark skin complexion or not sounding “South African” are common reasons why police may question and detain certain people.¹⁴⁸

Even refugees and asylum seekers with valid documentation are not protected from harassment and extortion by law enforcement officials. In one case, an asylum seeker with valid documentation told Human Rights Watch that the police advised him to “change the paper or we will arrest you.”¹⁴⁹

The Johannesburg Metropolitan Police Department and the South African Police Services (SAPS) are responsible for policing, enforcement of municipal by-laws, and crime prevention activities in Johannesburg. Refugees and asylum seekers living in neighborhoods with high immigrant populations such as Hillbrow, Yeoville, Doornfontein, and Berea tend to be patrolled more vigorously by police than others. In addition to random stops and searches, the police in joint operations with the other relevant government departments conduct crime prevention swoops in particular

¹⁴⁷ Hon N.N. Mapisa-Nqakula, Minister of Home Affairs, in a written communication to the Wits Law Clinic, dated December 17, 2004. This follows a successful intervention by the Wits Law Clinic on behalf of six Somali refugees applying for permanent residency in 2004.

¹⁴⁸ See, for example, Jasper van der Blik, “11th Hour Reprieve from Deportation,” *The Sowetan* (South Africa), September 30, 2004; Mmuso Pelesa and Wonder Hlongwa, “Focus on Home Affairs Bulges: Dark Skin nearly Lands Locals in Zim,” *The City Press* (South Africa), October 3, 2004.

¹⁴⁹ Human Rights Watch interview, asylum seeker, Johannesburg, September 1, 2004.

neighborhoods thought to be high-crime areas.¹⁵⁰ In reality, however, NGOs have found that such raids also occur because non-nationals are often assumed by the police to be illegal immigrants (rather than lawfully present refugees or asylum seekers).¹⁵¹ For refugees and asylum seekers, however, these raids cause considerable problems such as unlawful arrest on the suspicion that they are in the country illegally, even when they may possess documents authorizing their stay in South Africa.¹⁵²

Human Rights Watch interviewed one man who reported that he offered money to police to prevent his arrest and detention. Another asylum seeker informed Human Rights Watch, “I know the police here [in South Africa] are corrupt. I know that if I give money, things will be fine.”¹⁵³ He told Human Rights Watch that he paid R 140 (U.S. \$24) for the release of two friends who were charged with being in South Africa illegally.

An asylum seeker from Ethiopia told Human Rights Watch of the many times that police have harassed him. “The first time the police stopped me they asked me what this paper [asylum permit] was. They asked me where I got it. They said that I must make a plan for them not to worry me again. My friend told me that ‘a plan’ means money.”¹⁵⁴

Asylum seekers and refugees who assert their rights may be more likely to end up in detention. A refugee related to Human Rights Watch his treatment by the police on August 22, 2004:

At around 9:30 p.m. I decided to go downstairs to buy something to eat. I entered the lift, where there were six people; two of them were police officers. I greeted them. One of the police officers asked me for my

¹⁵⁰ A 2003 study by the Forced Migration Programme of the University of the Witwatersrand found that, of 343 non-nationals stopped by the police, 67 per cent of them were stopped to verify immigration documents, whereas only 12 per cent of the 388 South African respondents had been stopped for the same reason. See also Ingrid Palmary, Centre for the Study of Violence and Reconciliation, “City Policing and Forced Migrants in Johannesburg,” in Landau (ed.), *op. cit.*, p. 66; US Department of State, Bureau of Democracy, Human Rights and Labor, “South Africa Country Report,” in *Country Reports on Human Rights Practices – 2004*, February 28, 2005, section 1(c).

¹⁵¹ Palmary, in Landau (ed.), *op. cit.*, A study conducted by the Centre of Violence and Reconciliation shows that new police recruits perceive poverty and unemployment as key causes of crime, followed by the presence of non-nationals p.62-4.

¹⁵² Individuals with legal status in South Africa—including valid asylum seeker or refugee status permits—should not be detained except in cases of “necessity.”

¹⁵³ Human Rights Watch interview, asylum seeker, Johannesburg, August 27, 2004.

¹⁵⁴ Human Rights Watch interview, asylum seeker, Johannesburg, September 1, 2004.

papers. He searched me and squeezed my genitals. I asked him if this was the procedure of the police. I produced my permit. He took it and kept it. When we were in the foyer of the building, I told the police officer that I knew my rights. They said to me that I thought I know too much; this is South Africa. The police ordered a civilian who happened to be in the foyer to take me out to the police car. I protested. The police officer slapped me on my face. The other hit me under my eye with his head. The one police officer held me on one side and dragged me to the police car, which was some 100 meters from the entrance to the building. I and four other men, who it transpired were arrested by the same police, were taken to the Jeppe police station. In the van, the other four men proposed that we each contribute R 20 (U.S.\$ 3.30) in order to be released. I refused as I said I did not know why I was arrested. At the police station, I was told to get out of the van and my permit was returned to me. The others remained inside. I entered the charge office. I was charged for assaulting a police officer, resisting arrest, obstructing the police officer in the execution of their duties. I asked the police why they brutalized me. They replied that whatever they did, I did not have a witness to prove it. They said they would see me in court.¹⁵⁵

The refugee was released from police custody the following day and the charges against him were withdrawn. Those who were left in the van were released (according to the refugee) having paid a bribe to the police officers.

Human Rights Watch interviewed several asylum seekers from Zimbabwe, who claim to have been harassed by the police. This is what they remember:

Two weeks ago, a group of us were again arrested. Police asked us to produce papers. They told us that Home Affairs told them that they should arrest all Zimbabweans even if they have asylum papers. I was arrested and taken to Johannesburg central police station. At 3am the police called four of us. Three in the group each had R 600 (U.S. \$100) and were released. I was held. Around 8am the same officer called me. I showed him my permit. He told me that the permit did not work. He

¹⁵⁵ Human Rights Watch interview, refugee, Johannesburg, September 4, 2004.

was wearing black trousers, black jersey with gold bars on shoulders.¹⁵⁶ The police asked me how much money I had. I said I had R 400 (U.S. \$67). He took the money from me.¹⁵⁷

In another case of what appears to have been unlawful arrest and detention, an asylum seeker from Burundi explained to Human Rights Watch what happened to him:

Last week, seven of us were arrested by the police for allegedly drinking alcohol and selling drugs on the premises. The eight police officers took us to the police station in a big white car [van]. On arrival at the police station, they me asked for my documents. When I asked them why I was being arrested they replied “*Voetstek* [derogatory term meaning ‘go away’].” When I said I did not do anything wrong, they said “*Voetstek Kwerekwere* [a local derogatory term referring to other African nationals].” The charge sheet stated that I was arrested for drinking in a public place. They [the police] told us that if we have R 100 [U.S. \$17] each we will be released. As I did not have the money, I was detained at Jeppe police station for the weekend and released on Monday.¹⁵⁸

In response to allegations of corruption by police from the Jeppe, the head of the station informed Human Rights Watch:

One cannot deny corruption exists. Where people come forward to report it, we have arrested the police [officer] concerned. The problem is that illegals [non-nationals] will not come forward—even if they have given a bribe. We are taking corruption seriously but we need people to report the problem in order to solve it.¹⁵⁹

Human Rights Watch found that most asylum seekers and refugees do not report instances of corruption or abuse to the authorities. As discussed earlier, numerous reasons exist for why this may occur—a key concern is that asylum seekers and refugees

¹⁵⁶ This is the standard uniform of immigration officials in South Africa.

¹⁵⁷ Human Rights Watch interview, asylum seekers, Johannesburg, 19 August, 2004.

¹⁵⁸ Human Rights Watch interview, asylum seeker, Johannesburg, August 27, 2004.

¹⁵⁹ Human Rights Watch interview, Mr Zangwa, director, Jeppe police station, September 16, 2004.

are reluctant to accuse persons of wrongdoing on whom they rely for documentation and other needs.¹⁶⁰

The head of the Jeppe station also suggested to Human Rights Watch that many police officers at his station do not recognize all refugee-related documents,¹⁶¹ and that this can result in disputes and unwarranted arrest. However, a DHA official contested this statement and maintains that law enforcement authorities are familiar with the documents issued to refugees and asylum seekers.¹⁶²

Arrest, detention and the threat of deportation of refugees and asylum seekers as “illegal foreigners”

In daily life, judgment on the immigration status of any person in South Africa is made, in most cases, by police officers, who are rarely trained in the specifics of refugee and asylum law or procedures, are unwilling or unable to accept the validity of the array of official identity documents, and often must deal with asylum seekers and refugees who are evasive about their identity or legal status for fear of being deported to a place where they may face persecution or civil conflict. As a police official explained to Human Rights Watch:

We ask them [non-nationals] to identify themselves. In most cases a person will say that he is South African. We ask certain things to verify their claim. Normally they say that their father is Zimbabwean and mother South African. If a person alleges he has a valid document, it is our responsibility to find the document. We should do that within twelve hours from arrest. This does not happen.¹⁶³

Where a police officer has detained an individual on suspicion that he or she is an illegal foreigner, the Immigration Act requires that the officer issue an affidavit specifying the

¹⁶⁰ See de la Hunt, *Tracking Progress*, op. cit., p.39; Human Rights Committee, op. cit.

¹⁶¹ Human Rights Watch interview, Mr Zangwa, director, Jeppe police station, Johannesburg, September 16, 2004.

¹⁶² Human Rights Watch interview, Mr Ngozwana, head, Johannesburg refugee reception office, September 9, 2004.

¹⁶³ Human Rights Watch interview, Mr Zangwa, director, Jeppe police station, Johannesburg, September 16, 2004.

reason for the arrest and turn the individual over to an immigration officer within twelve hours.¹⁶⁴

According to the Act, immigration officers may not hold an individual in custody for longer than forty-eight hours without conducting an investigation and making a determination on his or her legal status.¹⁶⁵ If the individual is found to be in South Africa illegally, he or she may be deported.¹⁶⁶ However, the detainee may in fact have a valid document, such as a refugee status identification document or an asylum seeker permit. However, a poorly trained police officer might refuse or fail to recognize it. Also, the detainee might not be in possession of the document at the time of arrest. If that is the case and the individual is determined to be a refugee or in the process of seeking asylum, he or she should not be held in detention or deported.

To function properly, therefore, the process of determining whether or not a detainee is an illegal foreigner or a refugee or asylum seeker necessarily requires cooperation and communication between the police and DHA, including immigration officers. The police are not immigration officials; nor are they sufficiently trained in immigration and refugee law. Instead, they rely on the expeditious assistance of DHA to ensure that they act within the law when detaining persons in these categories. However, the head of Jeppe police station told Human Rights Watch that his staff does not receive the required cooperation from DHA, particularly in verifying the status of a person alleging to be an asylum seeker or refugee: “When you phone them [DHA], they say they are coming and do not come.”¹⁶⁷

Commentators have suggested that DHA should ensure that police services are adequately trained in refugee and asylum law, particularly to recognize documents and to understand the proper procedures used for refugees and asylum seekers, in contrast to those for illegal foreigners. Such training would be a useful step in ensuring that refugees and asylum seekers are not routinely, and mistakenly, arrested and detained as “illegal foreigners.”

¹⁶⁴ Immigration Regulation No. 487 under the Immigration Act, regulation 43(2).

¹⁶⁵ Immigration Act, section 34(2).

¹⁶⁶ Immigration Act, section 32.

¹⁶⁷ Human Rights Watch interview, Mr Zangwa, director, Jeppe police station, Johannesburg, September 16, 2004. This statement was contested by Mr. Fraser, Deputy Director General—Immigration (DHA), who stressed in a written communication with Human Rights Watch (April 4, 2005) that DHA “is continuously in co-operation with the SAPS.”

*Unlawful detention and the threat of deportation of refugees and asylum seekers at Lindela Deportation Center*¹⁶⁸

Where police doubt the nationality or status of an arrested person or a delay exists in determining status, they transfer the person to Lindela deportation center pending further investigation.¹⁶⁹ Therefore, refugees and asylum seekers sometimes find themselves at Lindela, despite the requirement that “reasonable” grounds must be produced to support the detention of any asylum seeker in South Africa, and that recognized refugees are protected from detention under South African law. Refugees and asylum seekers detained at Lindela are eventually released after verification of identity; as such, one immigration official referred to the center as a “holding facility”.¹⁷⁰ He explained to Human Rights Watch:

In the case of refugees, we give them a certificate to report to the nearest refugee reception office. The certificate is valid for fourteen days. On September 27, 2004, for example, we released 26 refugees.¹⁷¹

As an asylum seeker from Burundi told a Human Rights Watch researcher, “I was then taken to Lindela. I was released from Lindela on August 7, 2004. I was given a paper that said that I should report to the refugee reception office to apply for asylum.”¹⁷²

During a visit to Lindela in November 2003, a Human Rights Watch researcher interviewed an Angolan asylum seeker who had his asylum seeker permit. An NGO facilitated his release. In the first week of October 2004, a national from the DRC whose status as a refugee had already been recognized in South Africa was detained at Jeppe police station and transferred to Lindela, purportedly as an “illegal foreigner.” Again through the intervention of an NGO, the refugee was released two days later, after DHA verified his status.¹⁷³

¹⁶⁸ Following a 1996 agreement with DHA, Lindela is managed by Bosasa Operations (PTY) Ltd. Bosasa is responsible for accommodating people being prepared for deportation, whereas DHA is tasked with determining and verifying the status of those individuals being held at the center. The facility is located in Krugersdorp, southwest of Johannesburg.

¹⁶⁹ Human Rights Watch interview, Mr Zangwa, director, Jeppe police station, September 16, 2004.

¹⁷⁰ Human Rights Watch interview, Mr Norris, head of immigration, Lindela, September 29, 2004.

¹⁷¹ See above.

¹⁷² Human Rights Watch interview, asylum seeker, Johannesburg, August 27, 2004.

¹⁷³ A Human Rights Watch researcher assisted in facilitating the release of the refugee on October 6, 2004.

An asylum seeker from Burundi told Human Rights Watch that after several failed attempts to gain access to the Johannesburg refugee reception office and secure an asylum seeker permit he was arrested on August 16, 2004 for being an “illegal foreigner”.¹⁷⁴ He was initially detained at Jeppe police station, where he spent the weekend before being transferred to Lindela the following Monday. He was detained at Lindela for three weeks. Upon release, the asylum seeker was issued the standard form given to newly arriving asylum seekers at points of entry into South Africa, requesting that he present himself to the nearest refugee reception office within fourteen days.

In response to questions about unlawful detentions, DHA replied in a written communication to Human Rights Watch, “The National Immigration Branch will not transfer a person to Lindela before relevant information is validated.”¹⁷⁵

Detention beyond the thirty-day limit

Lawyers for Human Rights and the South African Human Rights Commission (SAHRC; a statutory body) have recorded hundreds of instances where persons, who the South African authorities are attempting to deport, including some asylum seekers, have been detained without judicial review beyond the thirty-day limit.¹⁷⁶ Following a legal action instituted by the SAHRC, the local High Court in 1999 ordered DHA and Lindela’s management to make reasonable arrangements to prevent prolonged detention and to report to SAHRC on these arrangements.¹⁷⁷ However, since this order was made, persons who are being threatened with deportation continue to be held for periods in excess of thirty days—placing DHA in contempt of the court order. The head of Lindela acknowledged that before August 2004 prolonged detentions were common.¹⁷⁸ However, he assured Human Rights Watch that systems were now in place to prevent prolonged detentions. The center is aiming to have detainees released or deported by the twenty-third day of detention and has also instituted a system to apply to the lower courts requesting for an extension of detention.

¹⁷⁴ Human Rights Watch interview, asylum seeker, Johannesburg, August 27, 2004.

¹⁷⁵ Mr. Fraser, Deputy Director General - Immigration (DHA), in a written communication to Human Rights Watch (April 4, 2005).

¹⁷⁶ Refugees Act, section 29(1) as noted above and Immigration Act, Section 34(1)(d). Lawyers for Human Rights noted in an October 10, 2003 interview with Human Rights Watch that, on September 30, 2004, there were 215 deportees at Lindela who had been there in excess of thirty days.

¹⁷⁷ *The South African Human Rights Commission v Minister of Home Affairs*, unreported no. 99/28367/WLD.

¹⁷⁸ Human Rights Watch interview, Mr Norris, head, Lindela DHA, September 28, 2004.

The International Covenant on Civil and Political Rights and the South African Constitution guarantee the right of every person not to be arbitrarily arrested and detained.¹⁷⁹ This applies equally to asylum seekers and refugees. In its guidelines on the detention of asylum seekers and in various ExCom conclusions, UNHCR adds focus to this prohibition specific to asylum seekers, emphasizing that “as a general principle asylum seekers should not be detained.”¹⁸⁰ Because such detention is “inherently undesirable,” it “should only be resorted to in cases of necessity.”¹⁸¹ The guidelines further note that for the detention of an asylum seeker to be considered lawful and not arbitrary, the detention must comply not only with the applicable national law, but with international law. Detention should be reasonable, non-discriminatory, and proportional to the objectives to be achieved.¹⁸² More generally, the guidelines suggest that “there should be a presumption against detention.”¹⁸³

In keeping with these international norms, the Refugees Act aims to limit the detention of asylum seekers, noting that they may only be detained in cases where it is “reasonable,” and even then it should not be for longer than thirty days unless reviewed by a judge.¹⁸⁴

The most egregious violation that results from these faulty procedures is the return of a refugee to a place where he or she faces persecution. Returning anyone to a place where persecution is feared without proper procedures to determine whether he or she is a refugee violates of the prohibition against *refoulement*—the most fundamental principle of international refugee law. The principle of *non-refoulement* is now an accepted principle of customary international law.¹⁸⁵ Section 2 of the Refugees Act states that, “no person may

¹⁷⁹ International Covenant on Civil and Political Rights, article 9(1); the Constitution of the Republic of South Africa, section 35.

¹⁸⁰ UNHCR, “Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers” (Geneva: UNHCR), February 1999, Guideline 2 (hereafter, “UNHCR Guidelines on detention of asylum seekers”). Find at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3bd036a74>.

¹⁸¹ UNHCR Guidelines on detention of asylum seekers, paras. 1, 3. “Necessity” has been limited by UNHCR’s ExCom in paragraph (b) of Conclusion No. 44 (1983) to cases in which states need to “verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.”

¹⁸² UNHCR Guidelines on detention of asylum seekers, guideline 3.

¹⁸³ UNHCR Guidelines on detention of asylum seekers, guideline 3.

¹⁸⁴ Refugees Act, section 29(1).

¹⁸⁵ The customary international law norm of *non-refoulement* protects refugees from being returned to a place where their lives or freedom would be threatened. (International customary law is defined as the general and

be extradited or returned to any country...if as a result of such extradition of return...he or she may be subjected to persecution...or his or her life, physical safety or health would be threatened..." Unfortunately, such returns have occurred from South Africa. UNHCR has stated that deportations of refugees or asylum seekers have occurred from Lindela, though the agency suggests that such deportations occur principally as a result of ignorance on the part of Lindela staff regarding the proper procedures and legal standards regarding refugees and asylum seekers.¹⁸⁶

Failure to adequately protect unaccompanied minors

"There is no clear procedure as to what to do when we receive unaccompanied minors."

– *Department of Home Affairs, Johannesburg Refugee Reception Office, September 9, 2004.*

Legal standards

In relation to children seeking asylum, Article 22 (1) of the UN Convention on the Rights of the Child provides that: "States parties shall take appropriate measures to ensure that a child...who is considered a refugee in accordance with international and domestic law...shall, whether accompanied or unaccompanied...receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention." Those rights include, among others, legal and administrative protection, basic health care, and education.

Additionally, UNHCR has elaborated guidelines to assist states in realizing appropriate policies and procedures for protecting unaccompanied children seeking asylum¹⁸⁷ and other refugee children.¹⁸⁸ The guidelines on asylum-seeking children define an unaccompanied child as "a person under the age of eighteen years...who is separated

consistent practice of states followed by them out of a sense of legal obligation.) See e.g. "Problems of Extradition Affecting Refugees," ExCom Conclusion No. 17, 1980; ExCom General Conclusion on International Protection, 1982; Encyclopedia of Public International Law, Vol. 8, p. 456. UNHCR's ExCom has stated that *non-refoulement* was progressively acquiring the character of a peremptory norm of international law. See ExCom General Conclusion on International Protection No. 25, 1982.

¹⁸⁶ Human Rights Watch interview, Mr Mbilinyi, UNHCR, Pretoria, op. cit.

¹⁸⁷ UNHCR Guidelines on policies and procedures in dealing with unaccompanied children seeking asylum, February 1, 1997.

¹⁸⁸ UNHCR, *Refugee Children: Guidelines on Protection and Care*. (Geneva: UNHCR), 1994.

from both parents and is not being cared for by an adult who by law or custom has responsibility to do so.”¹⁸⁹ Children should have access to social services such as education and health care regardless of their status.¹⁹⁰ Further, they should be given priority in the refugee status determination process,¹⁹¹ and, according to UNHCR’s Executive Committee reception standards, their particular vulnerabilities and needs—including education and medical attention—should be accommodated.¹⁹²

Equal access to education is provided for in Article 22 of the 1951 Refugee Convention, which states that, “the Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.” Both the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child further recognize a right to basic education.¹⁹³

In the South African constitution, the rights of all children, irrespective of nationality and origin, are enshrined in Section 28 (1). In particular, every child has the right to:

- (c) Basic nutrition, shelter, basic health care services and social services;
- (b) Family care or parental care, or to appropriate alternative care when removed from the family environment; and
- (g) Not to be detained except as a measure of last resort.

Family reunification is an important principle recognized by international law in relation to unaccompanied and separated children. Article 22 (2) of the UN Convention on the Rights of the Child calls on states to assist, in cooperation with UNHCR and NGOs, with the tracing of family members “in order to obtain information necessary for reunification with his or her family.” Finally, children seeking asylum in South Africa, like all asylum seekers who have obtained the necessary permit, have rights to work and study under Section 22 of South African law (see discussion above).

¹⁸⁹ UNHCR Guidelines on unaccompanied children seeking asylum, *op. cit.*

¹⁹⁰ In its Conclusion on Safeguarding Asylum No. 82 of 1997, UNHCR’s ExCom notes that “In receiving asylum seekers, states should consider specific needs, such as education, of unaccompanied and separated children.”

¹⁹¹ UNHCR Guidelines on unaccompanied children seeking asylum, *op. cit.*

¹⁹² Global Consultations, September 2001, *op. cit.*, para. 21.

¹⁹³ UN Convention on the Rights of the Child, article 28; O.A.U Convention on the Rights and Welfare of the Child, Article 11(3).

Children and the refugee status determination process in South Africa

The Refugees Act explicitly acknowledges that unaccompanied children may seek asylum in South Africa.¹⁹⁴ Children fleeing persecution are, like any adult asylum seeker, required to present themselves to the nearest refugee reception office. There, they are expected to queue with adults. Under the Refugees Act, however, once an unaccompanied child appears before a refugee reception officer, the child should “forthwith” be brought before a Children’s Court so that it may assess the needs of the child and order appropriate arrangements for the child’s care and guardianship.¹⁹⁵ In addition, section 32(2) also provides that the Children’s Court “may order that a child...be assisted in applying for asylum.” The refugee reception officer should also contact UNHCR to assist with tracing of family.

An official at the Johannesburg refugee reception office stated to Human Rights Watch that in practice it did not refer unaccompanied children to other agencies such as UNHCR or its implementing partner, the Jesuit Refugee Service (JRS).¹⁹⁶ The officer did not have guidelines on how to deal with children seeking asylum. The Refugees Act and its regulations both fail to clarify whether an asylum seeker permit should be issued *before* the referral or whether this will be done once the Children’s Court has assessed the needs of the child.

As not all unaccompanied children possess documents indicating their identity and age, it is not apparent who and how age determinations are made at the refugee reception office. While the provision places the burden of ensuring the best interests of the child on the Department of Social Development, it fails to recognize the role of DHA in protecting child asylum seekers, namely the confirmation of legal status of the child in South Africa to obtain social services.

Detention of unaccompanied children at Lindela Deportation Center

Under the Refugees Act, children should only be detained as a measure of last resort, and for the shortest appropriate amount of time.¹⁹⁷ This wording reflects language in the

¹⁹⁴ Refugees Act, section 32.

¹⁹⁵ Refugees Act, section 32(1) states that “Any child who appears to qualify for refugee status...and who is found to be under circumstances that clearly indicate that he or she is a child in need of care...must forthwith be brought before the Children’s Court...”; Human Rights Watch telephone interview, Mr Schraivande, head, Standing Committee for Refugee Affairs, Pretoria, September 3, 2004.

¹⁹⁶ Human Rights Watch interview, Mr Ngozwana, Johannesburg refugee reception office, September 9, 2004.

¹⁹⁷ Refugees Act, section 29(2).

UN Convention on the Rights of the Child.¹⁹⁸ UNHCR's guidelines on refugee children and on detention of asylum seekers state unequivocally that "children who are asylum seekers should not be detained."¹⁹⁹

While an immigration official at the Lindela deportation center told Human Rights Watch that "[it] does not detain children there,"²⁰⁰ in reality some children, including asylum seekers, have been and continue to be detained at the center. In November 2003, ten unaccompanied children between the ages of ten and fifteen were detained at Lindela.²⁰¹ Two of those were South Africans who were wrongfully apprehended by the authorities. These children, mostly boys, shared facilities with adult men. The few girls detained shared quarters with women.²⁰²

In 2004, Lawyers for Human Rights challenged the unlawful detention of fourteen unaccompanied children being held with adults at Lindela for the purposes of deportation.²⁰³ During the legal action, the children were instead held in a "place of safety,"²⁰⁴ Dyambo, which is located next to the deportation facility. On September 13, 2004, the Pretoria High Court ordered DHA not to admit unaccompanied non-national children at Lindela, and held that current detentions there were unlawful, invalid, and should cease immediately.²⁰⁵

Following this judgment, the head of immigration at Lindela told Human Rights Watch that a request had been transmitted to the Department of Social Development to assist with appropriate placement for the fourteen unaccompanied non-national children, but

¹⁹⁸ UN Convention on the Rights of the Child, article 37(b)

¹⁹⁹ UNHCR Guidelines on the detention of asylum seekers, op. cit., guideline 6. See also Abeda Bhamjee, *Aiding the Least and Loneliest: Developing Law and Best Practice for the Detection, Treatment and Deportation of Undocumented Foreign Unaccompanied Minors in South Africa*, researched for NCRA, South Africa, September 2004.

²⁰⁰ Human Rights Watch interview, Lindela official, November 19, 2003.

²⁰¹ Human Rights Watch interview, Lawyers for Human Rights, October 10, 2003. A Human Rights Watch researcher spoke to one of the children held at Lindela.

²⁰² Human Rights Watch visit to Lindela, November 19, 2003.

²⁰³ Khangale Makhado, "Rights Victory for Illegal Minors," *The Sowetan* (South Africa), March 4, 2004.

²⁰⁴ A place of safety is defined as a designated individual or a Department of Social Development -managed facility for children in need of care. However, children who have committed crimes and are awaiting trial are also being held at this facility.

²⁰⁵ Lawyers for Human Rights press release, "Pretoria High Court orders the Protection and Care for Unaccompanied Foreign Children," September 13, 2004.

that, as of September 2004, they had not yet received a response.²⁰⁶ At the time of Human Rights Watch's second visit to Lindela, the children were detained in a separate section from the adults, and, according to Lindela staff, the children ate at different times from the adult detainees.²⁰⁷ By January 2005, the children were moved to another "place of safety" on the outskirts of Johannesburg.

Children's lack of access to assistance and social services

Even when issued with an asylum seeker permit, children do not necessarily receive the assistance that the Department of Social Development is supposed to provide to all children in need of care, regardless of their status.²⁰⁸ Unaccompanied asylum-seeking children in particular experience difficulties in access to protection and social services, including education, due to their lack of well-recognized identity documents.²⁰⁹

Instead of being cared for by the Department of Social Development, unaccompanied children seeking asylum are taken in by or are informally placed with guardians—normally refugees or asylum seekers speaking the same language or from the same country who can assist them with their application.²¹⁰ However, these informal arrangements may not always provide a stable home for a child, particularly where living arrangements are precarious and the guardian's status has not been determined by DHA. A thirteen-year-old boy from the DRC, who speaks KiSwahili, went to the Johannesburg refugee reception office with an acting guardian. He had been in the country without a valid document for approximately two months. The boy explained to Human Rights Watch:

I do not have papers. The lawyers [Wits Law Clinic] gave me a paper to help me at Home Affairs. At Home Affairs they say they are waiting for the head [of the office]. They said I must return to the [refugee reception] office. I have been there five times.²¹¹

²⁰⁶ Human Rights Watch interview, Mr Norris, head, Lindela, September 28, 2004. Human Rights Watch saw a copy of the letter.

²⁰⁷ Human Rights Watch interview, Lindela management staff, September 28, 2004.

²⁰⁸ Jonathan Klaaren and Abeda Bhamjee, "Legal Problems Facing Refugees in Johannesburg," in Landau (ed.), *op. cit.*, p. 57; also Human Rights Committee of South Africa, *op. cit.*, p.127.

²⁰⁹ See, for example, Jackie Lofell, Johannesburg Child Welfare Society, "Access to Services: Legal and Related Issues," paper presented at Workshop on Unaccompanied Minors, Pretoria, August 3, 2001.

²¹⁰ Human Rights Watch interview, Mr Ngozwana, head, Johannesburg refugee reception office, September 9, 2004.

²¹¹ Human Rights Watch interview, asylum seeker, Johannesburg, September 4, 2004.

Through repeated queries by a Human Rights Watch researcher, it transpired that this boy was unable to gain access into the refugee status determination process in September 2004 because of technical problems at the office with the issuance of new asylum seeker permits.

Access to schooling is further hampered without documents. The Congolese boy interviewed expressed a desire to complete his schooling, but believed it was impossible without a Section 22 permit or other identity document. NGOs such as the Jesuit Refugee Service (JRS) provide certain assistance, such as school fees, only to children with a permit issued by DHA.

Yet even where a child is in possession of an asylum seeker or refugee permit, this is no guarantee that the child will be able to attend school. A 2003 study commissioned by UNHCR found that about twenty-five percent of children of respondents were denied access to education because the schools did not accept the asylum seeker or refugee permits.²¹² The Department of Education is formally responsible for ensuring that all children, regardless of nationality, gain access to a basic education. However, Department of Education officials are not necessarily familiar with the official documentation that DHA develops for refugee and asylum-seeking children. The failure to provide primary education to refugee children on a par with South African nationals is a violation of their rights as children, in addition to their rights as refugees under the Refugee Convention and domestic South African law.²¹³

According to NGOs dealing with refugee and asylum matters, shelters for children in need of care are reluctant to admit refugee and asylum-seeking children due to lack of identification and because family reunification is not easily realizable.²¹⁴ There appears to be no structured system on tracing family members of unaccompanied children for the purposes of reunification.²¹⁵ Yet, an official at DHA told a Human Rights Watch

²¹² CASE, *National Refugee Baseline Survey: Final Report*, op. cit., pp. 152-7.

²¹³ See Refugee Convention, Article 22 ("The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education."); Refugees Act, Article 27(g) ("a refugee. . . is entitled to the same. . . basic primary education which the inhabitants of the Republic receive from time to time.").

²¹⁴ Klaaren and Bhamjee in Landau (ed), op. cit., p. 56.

²¹⁵ Human Rights Watch interview, Lawyers for Human Rights, Johannesburg, August 28, 2004.

researcher that in the case of an unaccompanied child UNHCR would be informed in order to trace family members of the child.²¹⁶

Furthermore, a child is often unable to obtain government assistance when his or her guardian or caregiver is an also an asylum seeker, due to administrative blockages. In the words of the guardian, also an asylum seeker, of the Congolese boy mentioned above:

The JRS sent me and the boy to the Department of Social Development for assistance. After the first unsuccessful placement at a shelter for children in need of care, we returned to the social worker. She told me that [the department] does not have a place for the child. She suggested that the child be returned to the Democratic Republic of Congo. The boy is receiving a food parcel from JRS each month.²¹⁷

The Department of Social Development cannot process state financial support applications by persons with temporary status, as the computer system in use at the time of writing will only recognize the thirteen-digit numbers contained in the standard South African identification document. The deputy director for immigration at DHA told Human Rights Watch that DHA began issuing refugee children with certificates for social grants as early as May 2004.²¹⁸ While the certificates address the needs of a child who is a recognized refugee, they do not address the situation of a child whose status has yet to be determined. Further, as of August 2005, legislation regarding the rights of children (the Children's Bill) was under review in the South African parliament.²¹⁹ One of the proposed amendments in the bill includes formal recognition of the right of refugee children, including asylum-seeking children, to social services.

Until passage of the Children's Bill, however, the evident failure by the Departments of Home Affairs and Social Development to protect the rights of all refugee and asylum-seeking children adequately underlines fundamental flaws in policy and administration. The inability of the Department of Social Development to take refugee asylum-seeking

²¹⁶ Human Rights Watch telephone interview, Mr Schraivande, head, Standing Committee for Refugee Affairs, Pretoria, September 3, 2004.

²¹⁷ Human Rights Watch interview, asylum seeker, Johannesburg, September 8, 2004.

²¹⁸ Written communication from Mr. Fraser, Deputy Director General – Immigration, (DHA) to Human Rights Watch, April 4, 2005.

²¹⁹ Children's Bill B70B of 2003. See also <http://www.pmg.org.za>.

children within its purview of responsibility means that these children are denied rights and benefits to which they are entitled.

Social assistance for refugees and asylum seekers in Johannesburg

“Assistance is a big lacuna [in the government system]. Without [social] assistance, protection becomes less useful...What is a paper with an empty stomach?”

- UNHCR, Pretoria, February 18, 2005

Legal standards

Beyond the problems associated with access to refugee status determination procedures and the inadequate protection such individuals often receive, refugees and asylum seekers in South Africa also have difficulties gaining access to work, education, basic health care services, public relief and assistance, education beyond the primary levels, housing, and permission to practice their professions.

The ability of refugees and asylum seekers to secure such social and economic rights is particularly complex in countries like South Africa that face challenges in providing these rights to their own nationals. The insecure legal status of asylum seekers (and occasionally, due to administrative failures, of refugees), the lack of recognition of refugee and asylum seeker documentation by some of those charged with granting access to benefits and rights, as well as racial or ethnic discrimination and xenophobia, place this group in an especially vulnerable position. As an asylum seeker told Human Rights Watch, “They [South Africans] call us *chakarumbas* [a local derogatory term referring to other African nationals].”²²⁰

Moreover, unlike many poor nationals, refugees and asylum seekers often continue to experience the effects of the trauma of their flight from countries of origin. They may suffer from language barriers and are often without any supportive family or social networks. UNHCR has recognized these specific vulnerabilities and recommends that

²²⁰ Human Rights Watch interview, asylum seeker, Johannesburg, August 27, 2004. Other similar terms are “amakwerekwere” and “amagrigamba.”

refugees and asylum seekers be dealt with within a framework that understands their “particular difficulties.”²²¹

South African and international law recognize that asylum seekers are entitled to a limited range of social and economic rights. Once their status is recognized, refugees are entitled to a wider range of such rights in accordance with the South African Refugees Act and the Refugee Convention. With regard to asylum-seekers, section 22 of the Refugees Act grants individuals (adults and children) in possession of the asylum seeker permit the right to work and study. Though not binding law, UNHCR’s ExCom, in recognizing an obligation on states to safeguard the welfare of the asylum seekers, explicitly concludes that, “asylum seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs including food, clothing, accommodation, and medical care, as well as respect for their privacy, are met.”²²²

Once they have been recognized as such, all refugees in South Africa are entitled to the right to seek employment and to the same basic health services and primary education that inhabitants of South Africa receive.²²³ In accordance with South Africa’s obligations under the 1951 Refugee Convention, recognized refugees must also have access comparable to other foreign nationals to public relief and social security.²²⁴

In sum, under South Africa’s domestic and international legal framework the minimum social and economic rights that must be afforded to asylum seekers and refugees are the following:

- Asylum seekers in possession of a valid permit must enjoy the rights to work and study.²²⁵

²²¹ UNHCR *Handbook*, op. cit., Part 2(A), para. 190 states in part that “it should be recalled that an applicant for refugees status is normally in a particularly vulnerable position. He find himself in an alien environment and many experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own.”

²²² UNHCR ExCom Conclusion No. 93, op. cit., para. (b) (ii).

²²³ See Refugees Act, Art. 27 (g).

²²⁴ 1951 Refugee Convention, articles 17, 23, and 24.

²²⁵ Refugees Act, section 22.

- Recognized refugees (who are by definition lawfully present in South Africa) must enjoy the right to work and must enjoy the right to basic health services and basic primary education on a par with other South African inhabitants;²²⁶
- Recognized refugees must also enjoy the same rights as nationals to public relief and social security;²²⁷
- Recognized refugees must also enjoy the same access as other lawfully present non-citizens in South Africa to education beyond the primary levels, to housing, and to practice their professions.²²⁸

Despite the legal recognition of these rights, the government of South Africa is failing to meet them. Instead, NGOs, with limited resources, try to meet the basic needs of refugees and asylum seekers who approach them for assistance. While poor conditions are not unique to this category of non-nationals, they are exacerbated particularly for asylum seekers because of their uncertain legal status and fragmented welfare support networks.

The right to work

According to Human Rights Watch interviews, as well as a survey commissioned by UNHCR and published in November 2003, the temporary nature of the asylum seeker permit and the lack of a generally accepted identity document (that is, the green South African identity document for citizens and permanent residents) pose a barrier for both refugees and asylum seekers in enjoying the right to work.²²⁹ As noted above, this right is recognized for both asylum seekers and refugees under international and South African domestic law. The non-compliance by some DHA officials in lifting the employment prohibition on asylum seeker permits is a further obstacle to asylum seekers accessing employment.

A number of refugees and asylum seekers must work in the informal sector to survive. JRS if this is first reference a local NGO, attempts to assist refugees and asylum seekers to become self-sufficient by giving them loans to start small businesses. In most

²²⁶ See Refugees Act and Refugee Convention, Articles 17 and 22.

²²⁷ See Refugee Convention, Article 23.

²²⁸ See Refugee Convention, Articles 19, 21, and 22. It should be noted that in the terminology of the Convention, these rights are to be provided to "lawfully present" refugees. Under South African law, these are those refugees who are "recognized" as such by the proper authorities.

²²⁹ Human Rights Watch interview, refugees and asylum seekers, August 31, 2004; CASE, *National Refugee Baseline Survey: Final Report*, op. cit., p 133; see also Segale in Landau (ed.), op. cit., p. 52.

instances, these businesses involve selling foodstuffs from a makeshift stall comprising a folding table. However, local law-enforcement authorities, namely the Johannesburg Metropolitan Police Department, are on a campaign to clear Johannesburg's streets of informal traders. Many NGOs interviewed by Human Rights Watch are concerned that local authorities are confiscating goods which refugees and asylum seekers are unable to reclaim because they cannot pay the penalty fee. This, in turn, has an adverse effect on their ability to secure a livelihood.²³⁰ As an asylum seeker from Burundi explains:

I was selling sweets at my stall on the corner of Noord and Klein Street, when my goods were confiscated by the police. They told me I am not supposed to sell there. I must now pay R 315 [U.S. \$52.50] to have my goods released. I do not have this money.²³¹

UNHCR has, in the past, directly supported small income-generating projects for refugees. The initial project was considered a failure due to insufficient training of the refugees and lack of equipment. The agency is, however, at the time of writing, considering whether to begin a new livelihoods project, focusing on vocational training and ensuring that the refugees involved have better equipment from the early stages of the project.²³²

Access to housing

“You will find that the shelters are ‘full’, even if there is space...you do not know what to do [next].”

– *Jesuit Refugee Services, August 30, 2004.*

From interviews conducted by Human Rights Watch, the lack of adequate accommodation is the single most common concern for asylum seekers and refugees in Johannesburg. Lack of sufficient housing results in displacement, overcrowding, and ghettoization of specific nationalities.

²³⁰ Human Rights Watch interview, JRS, July 14, 2004; see also Cheche Selepe, “Hawkers take to the Streets,” *Mail & Guardian* (South Africa), September 3-9, 2004.

²³¹ Human Rights Watch interview, asylum seeker, Johannesburg, August 27, 2004.

²³² Human Rights Watch interview, Mr Mbilinyi, UNHCR, Pretoria, op. cit.

With regard to asylum seekers, some new arrivals to South Africa initially live on the streets or at churches until they can find more permanent accommodation.²³³

Unaccompanied children seeking asylum are in a particularly vulnerable position when finding shelter. The high cost of rentals in the city force people to share rooms or flats to minimize costs, and this results in severe overcrowding and squalid conditions.²³⁴

It is especially difficult for asylum-seeking families newly arrived in South Africa to find accommodation. A Congolese woman who at the time of the interview had been in South Africa for approximately two weeks told Human Rights Watch:

I arrived in Johannesburg with my husband, two children and a four-month-old baby on August 14, 2004. We did not know where to stay and we had no money. We slept in the same truck that has brought us to Johannesburg. The truck driver took us to the JRS offices on the following Monday where he told us we could receive assistance. After explaining our problem to them, we were told that they would have to separate my husband from us. This is because they did not have accommodation for married couples with families. I had no choice but to understand.²³⁵

NGOs that serve refugees and asylum seekers (in some cases the implementing agents for UNHCR) provide temporary shelter for some newly arriving asylum seekers, though large numbers of new arrivals combined with insufficient space and resources limit the total numbers that can be accommodated. Given this reality, UNHCR has set up a system for ranking individual cases in most urgent need of assistance—unaccompanied minors and women with children, for instance (see below). The agency uses a network of social workers deployed from NGOs to determine need.²³⁶

Women and children recently arrived in South Africa appear to have greater access to accommodation, albeit temporary, than their single male counterparts. In Johannesburg, for example, Bienvenu shelter offers temporary accommodation for up to six months

²³³ On July 14, 2004, Human Rights Watch interviewed an Ethiopian asylum seeker who had found accommodation in a church upon his arrival in Johannesburg. See also Tebogo Segale, "Forced Migrants and Social Exclusion in Johannesburg," in Landau (ed.), *op. cit.*, p. 51.

²³⁴ See also CASE, *National Refugee Baseline Survey: Final Report*, *op. cit.*, p. 135. The CASE findings were echoed by a number of Human Rights Watch interviews with refugees and asylum seekers.

²³⁵ Human Rights Watch interview, asylum seeker, Johannesburg, August 27, 2004.

²³⁶ Human Rights Watch interview, Mr Mbilinyi, UNHCR, Pretoria, *op. cit.*

for refugee and asylum-seeking women and children. This shelter, run by JRS, housed seventeen women in August 2004; fifty-four people total including their children. JRS also runs a shelter for unaccompanied children, accepting not more than fifteen at a time. The children stay until they complete schooling.²³⁷ There is no specific accommodation for newly arrived male asylum seekers.

Once asylum seekers leave this temporary accommodation, they are forced to find housing on their own. No agency exists to assist them. Women at a temporary shelter for women and children told Human Rights Watch that they did not know where they would go once they are required to vacate the shelter. One said, “I was told that Yeoville is a good place,” but she did not know where the neighborhood was located.²³⁸ According to JRS, a number of refugees and asylum seekers live in inner city neighborhoods of Johannesburg city, namely Berea, Yeoville, Doornfontein, and Hillbrow.

Accommodation may also be sought from traditional establishments that provide shelter predominantly for homeless South African nationals. However, according to NGOs, these shelters sometimes decline to admit asylum seekers or refugees even if there is space available.²³⁹ This is particularly problematic from a legal perspective with regard to refugees, who have a right under international refugee law to housing subsidized or provided by the government on a par with other lawfully present non-citizens.²⁴⁰ This reluctance is in part due to cost, as well as concerns on the part of such shelters about attracting police raids that tend to occur wherever large numbers of non-nationals are thought to congregate. Further, most such shelters receive financial support grants based on the number of persons they are accommodating. Since refugees and asylum seekers are unable to obtain government grants, the shelters cannot reclaim expenses for them, and therefore will not receive as much funding as they would were they to be filled with South African nationals. Policies that result in less beneficial treatment to recognized refugees with regard to housing not only violate South Africa’s obligations under the Refugee Convention, they also contravene recent constitutional jurisprudence in South Africa finding that distinctions should not be made between lawful permanent residents (who are akin in many ways to recognized refugees), and South African citizens.²⁴¹

²³⁷ Human Rights Watch, interview, asylum seekers at Bienvenu Shelter, August 27, 2004.

²³⁸ Human Rights Watch interview, asylum seeker, Johannesburg, August 27, 2004.

²³⁹ Human Rights Watch interview, JRS, Johannesburg, August 30, 2004.

²⁴⁰ See Refugee Convention, Article 21.

²⁴¹ See *Khosa v. Minister of Social Development*, Constitutional Court of South Africa, Case CCT 12/03 (stating that “the Constitution vests the right to social security in ‘everyone.’ By excluding permanent residents from the

Shelters predominantly for South Africans charge daily rates of between R 3 (U.S. \$0.50) and R 10 (U.S. \$1.67).²⁴² In most cases, these are overnight shelters where lodgers have to vacate the premises during the day. Also, there is a limited period for which a lodger can stay—normally three months.

Access to health care and medical treatment

Refugees and asylum seekers also experience difficulties in access to health care and medical treatment for chronic diseases including HIV and AIDS in South Africa, particularly in the state hospitals. Access is often hindered owing to poverty, language barriers, and the failure of hospital staff to recognize refugee or asylum seeker documentation. In the words of a Congolese asylum seeker who was yet to be issued with an asylum seeker permit: “I cannot go anywhere if I am sick. I went to Hillbrow hospital in March 2004. They did not take me in because I did not have a permit.”²⁴³

The state hospitals require a fee and generally ask for national identification documents in order to receive medical attention and treatment. Clinics, on the other hand, provide free medical attention or primary health care.²⁴⁴

Johannesburg General Hospital—the closest hospital to many neighborhoods in which non-nationals live—instituted a policy of levying a fee of R 1,800 (U.S. \$300) for medical attention for non-nationals. The hospital instituted the fee because of resource pressures, in part caused by the large number of non-nationals seeking services there. However, the fee affects refugees and asylum seekers more than other immigrants, as they generally

scheme for social security, the legislation limits their rights in a manner that affects their dignity and equality in material respects. . . .Sufficient reason for such invasive treatment of the rights of permanent residents has not been established. The exclusion of permanent residents is therefore inconsistent with section 27 of the Constitution.”). While recognized refugees in South Africa are only granted the right to apply for permanent residency after five years, reading this Constitutional decision together with South Africa’s obligations under the Refugee Convention, recognized refugees should be considered to be in a similar position to permanent residents. Even the narrowest reading of these provisions argues for affording certain social and economic rights to recognized refugees who have been “certified” by the standing committee for refugee affairs as remaining a refugee “indefinitely.”

²⁴² At the time of writing, a loaf of bread or a half pint of milk in the Johannesburg area cost approximately R4.50 (U.S.\$0.75); a taxi fare in or around Johannesburg (to access a hospital or health clinic, for example), cost approximately R4.00 (U.S.\$0.67). Therefore, if the asylum seeker is not working and must pay these costs (shelter, food and transportation) all in one day, it can become expensive.

²⁴³ Human Rights Watch interview, asylum seeker, Johannesburg, July 14, 2004.

²⁴⁴ Rebecca Pursell, “Accessing Health Services at Johannesburg Clinics and Hospitals,” in Landau (ed.), *op. cit.*, p 95.

have fewer alternative options.²⁴⁵ An asylum seeker from Burundi told a Human Rights Watch: “Once my baby was sick, I went to JHB General Hospital. They told me they cannot help me unless I pay R 1,800.”²⁴⁶

Several NGOs have engaged public health care officials to ensure that health care is accessible to all migrants, refugees and asylum seekers, at all state hospitals. In response, the Gauteng Department of Health issued a circular in May 2004 that allows the following categories of non-nationals to receive medical treatment at public hospitals in the province:

- An immigrant permanently resident in the Republic of South Africa, but who has not attained citizenship;
- A foreigner with a temporary residence or work permit, and
- A citizen of a member country of the Southern African Development Community namely Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe, who enters the Republic of South Africa illegally.²⁴⁷

Asylum seeker and refugee status permits are by law temporary residence permits,²⁴⁸ this circular should allow access to health care for both groups. Moreover, under South Africa’s Refugees Act, recognized refugees should enjoy access to basic health services on a par with other South Africans.

VII. The Role of UNHCR

UNHCR has been active in South Africa for over a decade, following the “Basic Agreement” on the role of the agency in the country, signed by UNHCR and the South African government in 1993. Since then, South Africa has acceded to the 1951 Refugee Convention. As elsewhere, the agency has identified voluntary repatriation, local

²⁴⁵ According to UNHCR, Johannesburg General Hospital will now waive the fee if individual refugees and asylum seekers present a letter from JRS explaining their situation.

²⁴⁶ Human Rights Watch interview, asylum seeker, Johannesburg, July 17, 2004.

²⁴⁷ Gauteng Department of Health, Circular No. 18 of 2004, May 3, 2004.

²⁴⁸ Immigration Regulations No 487 under the Immigration Act, regulation 18.

integration, and resettlement to another country as “durable solutions” to the problems of refugees and asylum seekers in South Africa, including those based in urban areas.²⁴⁹

Unlike many other African countries (where UNHCR, under its mandate, takes a leading role in the absence of a national framework to meet obligations to protect refugees²⁵⁰), the South African government has a sufficient legal framework to manage its own refugee and asylum system.²⁵¹ Recognizing, however, that the capacity of South Africa’s refugee and asylum system is severely lacking in many respects, UNHCR directs the bulk of its activities toward building capacity within government (as well as among its implementation partners, service-providing NGOs). The agency particularly focuses on improving equipment and human resources, including training and “professionalisation” of refugee and asylum services.²⁵² As a follow-up to the first Backlog Project of 2000-2001,²⁵³ UNHCR has further assisted DHA by providing it with additional computers to manage the backlog of asylum applications yet to be finalized. The UNHCR began implementing a training program for approximately two hundred persons, including immigration officers, law graduates and researchers from all areas of the country on recognizing refugees, to avoid problems of unlawful and arbitrary detention and *refoulement* to tackle the backlog of cases.²⁵⁴ As noted earlier, the agency believes that cases of *refoulement*, as well as the detention of refugees and asylum seekers at Lindela, are largely a consequence of ignorance and lack of training rather than deliberate policy.²⁵⁵ The net effect of UNHCR’s previous training programs, however, is unclear, as there has been no post-training evaluation.

UNHCR also seeks to provide refugees and asylum seekers access to services and public relief, and to promote the local integration of refugees into South African society. On a limited scale, therefore, the agency provides short term, emergency assistance to some

²⁴⁹ Groot in Landau (ed.), op. cit., p. 41.

²⁵⁰ In Kenya, for example, UNHCR manages the refugee status determination procedures. See Human Rights Watch, *Hidden in Plain View: Refugees Living without Protection in Kampala and Nairobi* (New York: Human Rights Watch), 2002.

²⁵¹ Human Rights Watch interview, Mr Mbilinyi, UNHCR, Pretoria, op. cit.

²⁵² Human Rights Watch interview, Mr Mbilinyi, UNHCR, Pretoria, op. cit.

²⁵³ The project is aimed at reducing the tens of thousands of asylum applications then pending—many for years—in the system. UNHCR believes that many of the “new” cases are in fact individuals who had merely recycled back into South Africa.

²⁵⁴ UNHCR Press Release, *UN Agency Trains More South Africans in Refugee Registration*, September 27, 2005 at [HTTP://www.unhcr.ch/cgi-bin/texis/vtx/news/opendoc.htm](http://www.unhcr.ch/cgi-bin/texis/vtx/news/opendoc.htm).

²⁵⁵ Human Rights Watch interview, Mr Mbilinyi, UNHCR, Pretoria, op. cit.

refugees and asylum seekers, including assistance to new arrivals for a maximum of six months.

The bulk of UNHCR's financial assistance for refugees and asylum seekers in South Africa is channeled through a few key NGOs—the agency's implementing partners. In Johannesburg these are Jesuit Refugee Services (JRS) for service provision and, at the time of writing, the Wits Law Clinic for legal protection.²⁵⁶ Thus education for children, vocational skills courses, accommodation, and legal advice are some of the services to which refugees and asylum seekers with documents do have access.

While this is an important contribution towards the welfare of refugees and asylum seekers, many NGOs with whom Human Rights Watch spoke believe that UNHCR's funding of services is insufficient to meet the overwhelming need, particularly since nearly all refugees and asylum seekers in South Africa live in costly urban areas such as Johannesburg.²⁵⁷ It would appear that certain restrictions formulated by UNHCR on access to assistance, particularly the six-month time limit, do not take into account the amount of time it takes to gain access to the refugee reception office and acquire proper documents, as well as the inability of refugees to benefit fully from the rights to which they are entitled. Therefore, emergency funding for accommodation is in practice limited to a maximum of three months for new arrivals, to benefit the largest number of those in need. Thereafter, the majority of asylum seekers must fend for themselves. Refugees told Human Rights Watch that UNHCR's assistance was insufficient; they believed that the role of the agency was "to assist refugees and asylum seekers as a humanitarian organization."²⁵⁸ UNHCR's 2005 Global Appeal report on South Africa says:

Funding constraints oblige UNHCR to apply extremely restrictive criteria to ensure that assistance is provided only to those in greatest need. As a consequence, many vulnerable refugees who would in the past have qualified for assistance now remain without support. This problem is compounded by the increasing impact of HIV/AIDS on refugees and asylum-seekers, further stretching the capacity of UNHCR and its partners to provide adequate assistance.²⁵⁹

²⁵⁶ Human Rights Watch was informed by the Wits Law Clinic that, as of 2006, UNHCR funding for refugee and asylum seeker legal services would be directed to Lawyers for Human Rights rather than the Wits Law Clinic. Human Rights Watch interview, Wits Law Clinic, Johannesburg, February 22, 2005.

²⁵⁷ Human Rights Watch interview, JRS, Johannesburg, August 17, 2004.

²⁵⁸ Human Rights Watch interview, refugees, Johannesburg, July 9, 2004.

²⁵⁹ UNHCR *Global Report 2005*, p. 191.

UNHCR has recognized some problems inherent to refugee status determination procedures in South Africa. According to the UN agency, the key concerns are how quickly determinations are made, and how the most vulnerable cases are addressed. In an attempt to assist asylum seekers in gaining access to refugee reception offices, UNHCR has helped to expedite asylum applications where medical treatment is urgently required.²⁶⁰ However, given the once again increasing backlog and continual delays, UNHCR will need to do more in concert with DHA (such as further trainings, for example) if the refugee status determination process is to become part of a system of effective protection in South Africa. UNHCR has also rightly recommended to DHA that it employ more staff to increase effectiveness and efficiency in refugee reception offices.

UNHCR also plays an advocacy role, engaging in awareness-raising campaigns through which it works to inform relevant government departments of their roles and responsibilities in relation to refugees and asylum seekers. For example, a manual on the rights of the refugee child, geared toward social workers, was launched in March 2004.²⁶¹ The manual discusses international and domestic laws pertaining to the rights of foreign children (including refugees and asylum seekers) as well as the various issues that arise specific to this particularly vulnerable group, and then presents the most appropriate ways for social workers to assist them. UNHCR envisages that, through such campaigns, the various South African government departments addressing welfare issues will begin to ensure that refugees and asylum seekers, including children, are included in accessing the services to which they are entitled.²⁶²

During 2004-2005, UNHCR is also assisting with voluntary repatriation of Angolan, Congolese and Rwandan refugees from South Africa and with the processing of a limited number of emergency resettlement cases from South Africa to third countries.

A number of refugees and asylum seekers interviewed by Human Rights Watch were aware of the presence of UNHCR in South Africa, but were not sure where the agency's offices were located and were unclear about the limited service-provision role of the agency in the country. The agency has only one office in the whole of the country, the regional office for the Southern Africa region, located in Pretoria, the administrative

²⁶⁰ Human Rights Watch interview, Wits Law Clinic, Johannesburg, September 8, 2004.

²⁶¹ JRS, LHR, UNHCR and NCRA, *Working with Foreign Children: A Social Worker's Guide*. 2003.

²⁶² Groot, in Landau (ed.), *op. cit.*, p. 41.

capital of South Africa. It maintains a staff of thirty.²⁶³ As one refugee observed, “I know they [UNHCR] help people, but it is difficult to find them.”²⁶⁴

VIII. Conclusion

The Refugees Act is a vast improvement over previous legislation in South Africa. It formally recognizes refugees and asylum seekers as a group entitled to international protection. The Refugees Act outlines the rights and obligations of refugees and asylum seekers and creates relevant institutional bodies such as the Standing Committee for Refugee Affairs and the Refugee Appeals Board, as well as formalizing procedures for refugee status determination, documentation, appeals, and judicial review.

However, in practice there are significant disparities between the law as it is outlined in the Refugees Act and its regulations (as well as in the South African constitution and the various international refugee and human rights conventions to which South Africa is a party), and its implementation.

In Johannesburg, asylum seekers encounter significant obstacles in attempting to gain access to asylum procedures. This impedes their ability to enjoy protection through the possession of asylum seeker and refugee documents. It further hurts their ability to earn a livelihood through their legal right to work. Even with the relevant documents in hand, many asylum seekers face the constant threat of harassment, mistreatment, and unlawful arrest and detention.

The government’s obligations under international refugee and human rights law and the South African constitution, founded on the principles of non-discrimination and dignity, place a duty on the state to create an enabling environment that allows all persons, including refugees and asylum seekers, to have access to services. The state has a duty to protect the rights of children, particularly unaccompanied children seeking asylum, which includes providing special assistance at the refugee reception offices and access to services such as education and suitable accommodation. UNHCR, which is charged under its mandate with protecting refugees and asylum seekers, should increase its assistance to the South African government to better coordinate policy and administration throughout its various government agencies, (such as the Departments of

²⁶³ UNHCR, South Africa country profile, op. cit.

²⁶⁴ Human Rights Watch interview, refugee, Johannesburg, September 1, 2004.

Health, Social Development and Education) and so to facilitate access to services and assistance for refugees and asylum seekers without discrimination.

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