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Victims of Armed Conflict and Persecution in South Africa: Between a Rock and a Hard Place

BY EDWIN ODHIAMBO ABUYA* AND DULO NYAORO**

When police arrested me, they kicked me... telling me, you f—ked up your country and you come here to f—k this country.¹

We, the people of South Africa,... [aim] to—

... establish a society based on... fundamental human rights.²

I. Introduction

As of 1 January 2008, there were some three million refugees and asylum seekers in Africa.³ Despite hosting over one-fifth of the

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¹ Interview with Guuleed in Johannesburg, S. Afr. (Oct. 8, 2005).
² S. AFR. CONST. 1996, Preamble.
global population of refugees and asylum seekers, most African States lack domestic legislation to protect this category of persons. Rather, two categories of legislation typically address the plight of refugees and asylum seekers. First, during the postcolonial era, many African states passed legislation that treats refugees as part of immigration policy; however, there were not any specific provisions for particular issues pertaining to individuals in need of surrogate protection. Such legislation, which focuses mainly on entry, residence, and departure of non-citizens, thus failed to provide any special rights for refugees and asylum seekers. The second category relates to legislation designed to control the entry of asylum seekers. These laws, which deal mainly with the detention of asylum seekers, grant of refugee status and refugee settlements, are also fairly short on rights due to refugees and asylum seekers.

In contrast to the lack of protective legislation, a vast majority of African states are party to the main international refugee treaties — the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention"), as amended by its 1967 Protocol Relating to the Status of Refugees, ("Refugee Protocol"), and the 1969 African Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Refugee Convention"). However,
domestic legislation is almost always required to implement the promises contained in these instruments, because a number of African states follow the dualist principle in relation to treaties. A state's mere ratification of a treaty is insufficient to create rights, duties, obligations or expectations on the domestic plane. In 1998, South Africa went a step further in its commitment to protect persons who have been forced to flee their home States by passing the Refugees Act. South Africa, which acceded to OAU Refugee Convention and Refugee Convention in 1995 and 1996 respectively, further promulgated the Regulations to the South African Refugees Act ("Refugee Regulations") in 2000. These regulations were designed to compliment the Refugees Act.

This article takes up the challenge earlier put forward: the need to monitor the implementation of refugee-specific legislation in Africa. South Africa, which has had formal experience with refugees and asylum seekers, is used as a case study. In particular, the article examines the extent to which South Africa has cemented its asylum commitment. It reports the results of field research conducted in Johannesburg from September to December 2005. Eighteen refugees and asylum seekers from Somalia were interviewed. The

11. See, for example, CONSTITUTION, Art. 12 (1999) (Nigeria); The Judicature Act (1967) Cap. 8 § 3(1) (Kenya).


17. See Refugees Act s. 1(xxiii).


19. Details of the interviewees are available in Appendix One. Most interviews were conducted in English, and thus there was no need for translators. In accordance with standard ethical practice, pseudonyms are used in this article.
study examined their experiences at the hands of South African Police ("SAP")\(^{20}\) who, like police in many societies, occupy a central role. Based on the sample size, it is apparent that these findings are not a reflection of the national trend. However, they do provide valuable insight into the challenges facing refugees and asylum seekers in transitional societies like South Africa.

Although law enforcement officials are legally required to protect every person in the society, citizens and non-citizens alike,\(^{21}\) the experiences of refugees and asylum seekers at the hands of SAP shows a considerable distance between the law in the books and actual practice. Ultimately, as the words of Guuleed\(^{22}\) point out, this state of affairs undermines the right of refugees and asylum seekers to enjoy asylum in South Africa. It is also inconsistent with the country's international and domestic obligations to protect those who have fled their homes due to armed conflict and/or persecution.

Section two outlines the procedures used to assess refugee claims in South Africa. Section three evaluates the value of the identity documents that are issued to asylum seekers and refugees in South Africa. Simply issuing written documents is not enough; these documents must be respected if refugees and asylum seekers are to be accorded effective protection. The constitutional rights to privacy and security, which are promised to all in South Africa, are examined in sections four and five respectively. These sections assert that acts of harassment and intimidation by law enforcement officials have compromised refugees and asylum seekers enjoyment of these rights. To conclude, section six argues that states must take practical steps to effectively protect victims of persecution and armed conflict.

\(^{20}\) See S. Afr. Const. 1996 s. 199 (establishing the police service).

\(^{21}\) See Van Heerden, A.J., in Dawood, Shalabi, Thomas v. Minister of Home Affairs (2000) 1 SA 997 at 1044 (S. Afr.) ("[U]nder the South African Constitution an alien who is inside this country is entitled to all of the fundamental rights entrenched in the Bill of Rights, except those expressly limited to South African citizens."); see also, Booyse, J., in Patel v. Minister of Home Affairs (2000) 2 SA 343 at 349 (S. Afr.) ("[A]liens have the same right under the [South African] Constitution that citizens have unless the contrary emerges from the Constitution.").

\(^{22}\) Supra note 1.
II. Towards Protection: The Assessment of Applications

Multiple procedures govern the asylum process. An asylum seeker makes an initial application for protection by registering at any of the designated Refugee Reception offices. A Refugee Reception Officer, an official of the Department of Home Affairs ("DHA"), then completes a standard asylum application form. All asylum seekers are entitled to an asylum seeker permit pending the determination of their claims. The permit grants refugee applicants temporary legal residence in South Africa. A Refugee Status Determination official will then decide whether a claimant meets the definition of a refugee in the Refugees Act. The Act has adopted the definition of refugee that is found in the 1951 Refugee Convention and the OAU Refugee Convention. Accordingly, an individual must demonstrate that he or she fled their home state due to "a well-founded fear" of persecution in their home state or country of habitual residence based on "race, religion, nationality, membership of a particular social group or political opinion."

In addition, section 3(b) of the Refugees Act has adopted the

23. See Figure two.
24. Refugee Regulations, supra note 16, s. 2(1). Refugee Reception offices are located in Cape Town, Durban, Johannesburg, Pretoria, and Port Elizabeth.
25. Refugees Act s. 22(1); Refugee Regulations, supra note 16, s. 2(2).
26. See Refugee Regulations, supra note 16, s. 7(2) (An asylum seeker permit is "proof" of one’s "legal status.").
27. See Refugees Act s. 3.
28. See Refugee Convention, supra note 8, art. 1(A)(2) ("Refugee" means any person who "owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.").
29. See OAU Refugee Convention, supra note 10, art. 1(1) ("[T]he term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.").
30. Refugee Regulations, supra note 16, s. 11(1) (placing the burden of proof on an applicant).
31. Refugees Act s. 3(a).
expanded definition of 'refugee' of the OAU Refugee Convention. Specifically, to qualify for asylum, a person must prove that they sought sanctuary in South Africa owing to armed conflict. According to this sub-section, the term refugee refers to any person who:

Owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either part or 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 in [South Africa].

Dependants of refugees are also eligible to apply for asylum status. The term dependant is defined broadly to include spouses, children 'or any destitute, aged or infirm member' of the applicant's family.

Refugee Status Determination officials conduct personal or interpreter-aided interviews to determine whether a person is a genuine refugee within the meanings of the above definitions. The entire asylum application is required to be adjudicated within 180 days of the filing of a complete application. Interviews before Refugee Status Determination officials must be held within 30 days of the lodgment of the initial application. The interviews are non-adversarial in nature, and include issues such as the identity of the applicant and any dependants, the reasons for seeking surrogate protection in South Africa, and whether the claimant is a person who ought to be excluded from enjoying refugee status. Applicants may appear in person or via a legal representative. To obtain the most recent country of origin information, officials consult a wider range of sources. They may seek information from the United Nations High Commissioner for Refugees ("UNHCR") and "reputable sources."

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32. OAU Refugee Convention, supra note 10, art. 1(2).
33. Refugees Act s. 3(b).
34. Refugees Act s. 2(c) and s. 33; Refugee Regulations, supra note 16, s. 16(1).
35. Refugees Act s. 1(ix).
36. For procedural matters relating to interpretation of asylum proceedings, see Refugee Regulations, supra note 16, s. 5.
37. Id. s. 3(1) and s. 3(3).
38. Id. s. 3(1)(b) and s. 4(1)(b).
39. Id. s. 10(1).
40. Id.
41. Refugee Regulations, supra note 16, s. 10(4).
42. Id. s. 12(1)(b). See also, Refugees Act s. 24(1)(b).
43. Refugee Regulations, supra note 16, s. 12(1)(c).
Although the Refugee Regulations are unclear on the latter category, practise suggests that these sources of data will include domestic and international databases that are maintained by governments, the United Nations and international human rights organisations. In terms of content, the databases will usually contain information on the human rights situation in an asylum seeker’s country of origin.

Those applicants who fall within the definition of refugee and are able to show that there are no grounds for exclusion are granted refugee status. Recognised refugees are subsequently issued an identity document, which contains:

- the holder’s identity number;
- biographical data – full name, gender, date and place of birth as well as state of origin; and
- photograph and finger prints.

On the other hand, applicants who fail to meet either of these criteria are rejected. Notably, written reasons must accompany unsuccessful claims.

Rejected applicants have a right to appeal. Interestingly, and unlike the practise in many refugee-receiving states, depending on the basis of the rejection, appeal may be taken to one of two bodies. Those whose claims are rejected because they are “manifestly
unfounded, abusive or fraudulent\textsuperscript{50} may seek a merits review of their cases to the Standing Committee for Refugee Affairs ("SCRA"),\textsuperscript{51} a quasi-judicial tribunal. The SCRA can either affirm or set aside the primary decision. If the latter option is exercised, the matter is returned to the official who heard the initial application for reconsideration in accordance with the terms outlined by the SCRA.\textsuperscript{52} Applicants that are rejected on grounds of being "unfounded," on the other hand, can appeal their claims to the Refugee Appeal Board ("RAB")\textsuperscript{53} within 30 days of receipt of the decision.\textsuperscript{54} Like the SCRA, the RAB may affirm or set aside the primary decision.\textsuperscript{55} In addition, and in contrast to the SCRA, the RAB can substitute the initial decision with its own finding.\textsuperscript{56} However only Refugee Status Determination officials can accord status to an applicant. In \textit{AOL v. Minister of Home Affairs},\textsuperscript{57} Justice Swain stressed that a determination official is "the only person authorised" to grant refugee status under the "terms" of the \textit{Refugees Act}.\textsuperscript{58} It is apparent that the basis upon which an application is rejected is therefore material in determining what rights of appeal, or automatic review, an applicant therefore possesses.\textsuperscript{59} The basis of the rejection also determines the remedies available to an aggrieved party and the nature of award that a reviewing tribunal can grant. Rejected asylum seekers at this stage become subject to deportation.\textsuperscript{60} Their successful counterparts are referred back to a Refugee Status Determination official for further reconsideration under the terms of the RAB or SCRA.\textsuperscript{61}

\textbf{Figure One} plots the number of refugees and asylum seekers who have sought sanctuary in South Africa from 1999 to the beginning of 2006. \textbf{Figure Two} is a diagram of the procedures South Africa uses to determine asylum claims. The nationality of refugees

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{50} Refugees Act s. 24(3)(b).
\item\textsuperscript{51} Refugee Regulations, \textit{supra} note 16, s. 13(1); Refugees Act s. 11(e).
\item\textsuperscript{52} Refugee Regulations, \textit{supra} note 16, s. 13(2) and s. 13(3); Refugees Act s. 25 (3).
\item\textsuperscript{53} Refugees Act s. 14(1)(b) and s. 26; Refugee Regulations, \textit{supra} note 16, s. 14.
\item\textsuperscript{54} Rule 4 (1) of the \textit{Refugee Appeal Board Rules}, 2003.
\item\textsuperscript{55} Refugees Act s. 26(2).
\item\textsuperscript{56} \textit{Id}.
\item\textsuperscript{57} \textit{Supra} note 44.
\item\textsuperscript{58} \textit{Id}. at 12.
\item\textsuperscript{59} \textit{Supra} note 44, at 12.
\item\textsuperscript{60} \textit{See} figure two.
\item\textsuperscript{61} \textit{Id}.
\end{enumerate}
\end{footnotesize}
residing in South Africa as of 1 January 2006 is outlined in Table One. Whereas one would have thought that South Africa receives asylum seekers from Africa, it is apparent that those seeking protection come from outside of Africa as well.

![Refugees and Asylum Seekers in South Africa (1999-2005)](image)

Figure One

Refugee Status Determination

South Africa

Asylum Seeker

Point of Entry

Primary Decision Process

Application Allowed

RSD Official

Decision Affirmed

Review ('SCRA')

Appeal ('RAB')

Claim rejected

No Review or Appeal

Granted Refugee Status

To be Removed

Figure Two
### Nationality of Refugees and Asylum Seekers Residing in South Africa at the Beginning of 2006

<table>
<thead>
<tr>
<th>Nationality</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Angolan</td>
<td>12,100</td>
</tr>
<tr>
<td>Bangladeshi</td>
<td>6,300</td>
</tr>
<tr>
<td>Burundian</td>
<td>5,900</td>
</tr>
<tr>
<td>Chinese</td>
<td>3,900</td>
</tr>
<tr>
<td>Congolese (Brazaville)</td>
<td>4,000</td>
</tr>
<tr>
<td>Congolese (Kinshasa)</td>
<td>29,700</td>
</tr>
<tr>
<td>Ethiopian</td>
<td>8,400</td>
</tr>
<tr>
<td>Indian</td>
<td>6,300</td>
</tr>
<tr>
<td>Kenyan</td>
<td>10,400</td>
</tr>
<tr>
<td>Malawian</td>
<td>3,800</td>
</tr>
<tr>
<td>Nigerian</td>
<td>9,700</td>
</tr>
<tr>
<td>Pakistani</td>
<td>9,900</td>
</tr>
<tr>
<td>Rwandese</td>
<td>2,000</td>
</tr>
<tr>
<td>Somalian</td>
<td>19,100</td>
</tr>
<tr>
<td>Ugandan</td>
<td>3,200</td>
</tr>
<tr>
<td>Tanzanian</td>
<td>5,200</td>
</tr>
<tr>
<td>Zimbabwean</td>
<td>16,100</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>156,000</strong></td>
</tr>
</tbody>
</table>

Table One

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63. Source of data: United States Committee for Refugees, World Refugee Survey 2006, available at [http://www.refugees.org/countryreports.aspx?VIEWSTATE=dWtOTMxNDcwOTk7O2w8Q291bnRyeUREOkdvQnV0dG9uOz4%2BUwqzZxIYL05IZCZue2XtA0UF EQ%3D&cid=1601&subm=&ssm=&map=&serachtext=](http://www.refugees.org/countryreports.aspx?VIEWSTATE=dWtOTMxNDcwOTk7O2w8Q291bnRyeUREOkdvQnV0dG9uOz4%2BUwqzZxIYL05IZCZue2XtA0UF EQ%3D&cid=1601&subm=&ssm=&map=&serachtext=) (last visited Jan. 19, 2007).
III. Identity Documents: Valueless Papers?

In virtually all states, refugees and asylum seekers, lawfully within the country, are issued identity documents. This position is consistent with the Refugee Convention, which requires states to issue identity papers to refugees lawfully staying in their territories. This duty is without exception. The South African experience suggests that most asylum seekers are keen to register their presence in the country. The Refugee Regulations require claimants to personally register their presence in the country "without delay." However, of the 18 research subjects, over one-fifth (4, or 22 per cent) had yet to register, despite being in the country for more than six months. Most of those who had registered subsequently obtained asylum seeker permits, which they have to renew upon expiry. One-quarter (4, or 25 per cent) of those who had registered had been granted refugee status. Generally speaking, the identity documents specify the length that their holders can reside in the country. Accordingly, asylum seekers who fail to apply for, obtain, or renew their documents within the statutory period are subject to deportation. This section examines the process of obtaining identity documents and the treatment accorded their holders.

A. The Rationale for Obtaining Identity Documents

What purpose do identity documents serve? These documents are useful for at least three reasons. First, they certify a person's refugee status. The pre- and post-Refugee Convention eras recognised this role. In a resolution passed in 1928, the League of Nations recommended that the mandate of the High Commissioner for Refugees be expanded to include "certifying the identity" and

64. See arts. 27 and 6(1) of the Refugee Convention and OAU Refugee Convention respectively.
65. Refugee Regulations, supra note 16, s. 2(1).
66. See Refugee Regulations, supra note 16, s. 7(1) (An asylum seeker permit “will be of limited duration and contain an expiry date”). See also, s. 22(3) (“A Refugee Reception Officer may from time to time extend the period for which a permit has been issued.”).
68. Refugee Regulations, supra note 16, s. 15(2).
69. Refugee Regulations, supra note 16, s. 15(4)(b). See also, Immigration Act 13 of 2002 s. 34, which deals with deportation of illegal foreigners.
“validity” of documents issued to Russian and Armenian refugees.\textsuperscript{70} At the \textit{Ad Hoc} Committee that was tasked to draft the Refugee Convention, Paul Weis, the representative of the International Refugee Organisation (later to become the first UNHCR representative), asserted that refugees and asylum seekers “should be provided with some sort of document certifying [their] identity.”\textsuperscript{71} In the context of the current international asylum framework, the Executive Committee of the United Nations High Commissioner stated in 1977 that identity cards “certify” the status of successful refugee applicants.\textsuperscript{72} As such, if a refugee or asylum seeker is stopped or arrested by the police or immigration officials, an identity card is prima facie proof that an individual is not in the country illegally. This is consistent with the South African Refugee Regulations, which provide that possession of an asylum seekers permit is “proof” of an individual’s lawful “status.”\textsuperscript{73}

The identity document also verifies that the holder is the person that he or she claims to be. Like the ‘Nansen passport,’ which was granted to pre-World War Two refugees,\textsuperscript{74} these documents provide evidence regarding the identity of an individual. The \textit{Ad Hoc} Committee that drafted the Refugee Convention, and contracting States that participated in the making of this treaty, both broached the question of identity papers. At the \textit{Ad Hoc} Committee, Mr. Juvigny, the French delegate, stated that an identity document would enable a refugee or asylum seeker to be “identified” by the authorities.\textsuperscript{75} Similarly, according to the \textit{travaux préparatoires} (drafting history), the Belgian representative, Mr. Herment, reiterated that the papers issued to refugees and asylum seekers “consist[ed] of a document showing the identity of the refugee.”\textsuperscript{76} The

\textsuperscript{70} Arrangement Relating to the Legal Status of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 53.

\textsuperscript{71} Paul Weis, Remarks at the Ad Hoc Committee on Statelessness and Related Problems: Summary Record of the Thirty-Eighth Meeting, E/AC.32/SR.38 (17 August 1950).

\textsuperscript{72} UNHCR ExCom Conclusion No.: 8 (XXVIII)-1977 paragraph (e) (v), available at http://www.unhcr.org/excom/EXCOM/3ae68c6e4.html (last visited Nov. 28, 2007).

\textsuperscript{73} Refugee Regulations, supra note 16, s. 7(2).

\textsuperscript{74} For a wider discussion, see Edwin Abuya, \textsc{Legislating to Protect Refugees and Asylum Seekers in Kenya: A Note to the Legislator} (Moi University Press 2004).

\textsuperscript{75} Supra note 71.

\textsuperscript{76} U.N. General Assembly, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Eleventh Meeting,
rationale of issuing refugees and asylum seekers with identity documents is based on the chaos that characterises forced migration: many people leave their homes without identity or indeed any documents at all. Unlike citizens who can turn to the central government for help to obtain identity documents, refugees and asylum seekers "do not have this option and are therefore dependent upon authorities" of the third State "for assistance in this regard." South Africa's asylum regime appears to have come to terms with this reality. Regulation 6(1)(d) of the Refugee Regulations requires asylum seekers to produce identity and travel documents only "if" they are in their "possession."

Third, possession of identity documents is key to the rights granted to refugees and asylum seekers. At the Conference of Plenipotentiaries, which adopted the Refugee Convention, Mr. van Heuven-Goedhart, the then High Commissioner for Refugees, observed that refugees and asylum seekers who did not possess identity papers were "often suspect for that very reason." In South Africa, the Refugee Regulations mandate that refugees with identity documents should be "entitled to full legal protection."

Identity documents are therefore expected to immunise asylum seekers from deportation while their claims are being processed at first instance or on appeal. Failure to hold a valid document can make refugees and asylum seekers vulnerable to police harassment, threats of refoulement, intimidation, extortion, arbitrary arrest, and detention. Arguably, identity documents allow refugees and asylum seekers to move freely, work without fear of arrest or exploitation, study, and claim medical and other benefits that a State grants to refugees and asylum seekers. In fact, the Executive Committee of the UNHCR reaffirmed the importance of states issuing travel documents to refugees lawfully in their territories. It argued that

79. Refugee Regulations, supra note 16, s. 15(1)(d).
80. See arts. 6(1) and 28 of the OAU Refugee Convention and Refugee Convention respectively.
81. See Refugee Regulations, supra note 16, s. 15(1)(f) and s. (15)(1)(g).
82. UNHCR ExCom Conclusion Nos.: 13 (XXIX)-1978 ¶ (a) and 35 (XXXV)-
these papers are crucial to refugees as they promote their rights to move to other countries for various reasons such as "resettlement in third states" and/or family reunion. Simply put, an identity document is a "significant protection" tool. It is thus apparent that identification documents offer several advantages to refugees and asylum seekers.

B. Obtaining Identity Documents: A Daunting Experience

While theoretically the process to obtain asylum (as set out above) appears fairly reasonable, the situation on the ground is markedly different. The registration process itself is fraught with irregularities and severe delays. While one application, Mahamut's, was determined within the prescribed statutory period of six months, many interviewees alleged that they experienced long delays, which involved making numerous trips to DHA. At the time of the study, nine asylum applications (50 per cent) had yet to be determined within the prescribed time limit. Three applicants (17 per cent) - Abdihakim, Mursal and Idi - had to wait for more than six months before receiving a decision. In fact, it took the government at least one year to review applications lodged by Abdihakim and Idi. Mursal's case is even more troubling: he had to wait three years to obtain a result. Fortunately, the outcome was positive for all three. Although this study did not focus on the effects of delayed adjudication, research conducted in Kenya shows that delays can cause trauma and anxiety to the already distressed victims of armed conflict and/or persecution.

In addition, the high premium that refugees and asylum seekers place on acquiring identity documents exacerbates the undesirable

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83. ExCom Conclusion No. 13.
85. See appendix one.
86. Id.
87. Id.
88. Id.
89. Id.
91. See also, Commey, supra note 103, at 29 (According to refugees and asylum
situation created by delays in the refugee assessment process. Corruption has crept into the system as desperate refugee applicants try to obtain these potentially life-saving documents at all costs. Many research subjects in this study cited bribery as the primary reason for not promptly applying for identity documents. For example, when asked why he had not applied despite being in the country for approximately ten days, Korfa replied:

*I hear [RSD officials] need money [to issue identity documents]... and people stand in the queue for days. I will go when I get money and camp there.*

The negative reputation of the South African refugee regime discourages forced refugees and asylum seekers from immediately registering their presence in the country. Research has shown that public attitudes are shaped by experiences with government officials. For example, a study conducted in Los Angeles, in the United States, \((N = 538)\) found that how people “feel about” police operations shapes the general perception of the police. Here, four asylum seekers (22 per cent) had yet to register with the authorities. For asylum seekers the need to obtain legal documents is of utmost importance: the longer an asylum seeker stays without papers, the higher the chances are of an individual of being arrested for being in the country illegally. Dalmar’s experience, which is evaluated below, affirms this assertion.

Bribery and corruption have also been reported in the permit renewal process. Taban’s experience is illustrative:

*There is a middleman who we used to pay so that he can get for us the extension period we want. [I]f you go by yourself to Home Affairs, they [officials] deal with you inhumanely.*

Unfortunately, this situation is not exceptional. Upon further inquiry, many research subjects said they would have offered a bribe, directly or indirectly, to ‘grease’ the permit-extension wheels. Three of the interviewees (17 per cent) confessed to having made an illegal payment in order to have their permits renewed.

seekers in South Africa, an identity document is “the book of life”).


96. Cawale during an interview in Johannesburg, S. Afr. (Nov. 3, 2005); Jama
Corrupt practices undermine the fundamental due process requirement: justice should not only be done, but it should also be seen to have been done. Studies in the United Arab Emirates report that acts of misconduct on the part of officials is likely to threaten the "integrity and legitimacy" of the state.\textsuperscript{97} In addition, practices such as this can compromise the internal security of a country, especially when fugitives or terrorists hiding under the guise of asylum are admitted as refugees. Moreover, considering that not all asylum seekers can afford to make under-the-table payments, such actions are likely to create a disproportionate playing field.

Although asylum seekers enjoy almost equal entitlements as refugees, remaining in the same status indefinitely has become a source of frustration to many. Asylum seekers are required to renew their permits every three months at the DHA office where they lodged their applications. Aside from time concerns and the apparent restriction of movement rights, this requirement is quite expensive to refugee applicants, many of whom are struggling to make ends meet. Those who fail to renew their permits in time due to monetary, time, or other constraints are at risk of being arrested and detained. Dalmar's experienced this danger first hand:

I was arrested by the police because my papers had expired and I had not gone to renew them. I was in Police custody for three days. They treated me well. On the third day they gave me a letter to take to Durban to renew my [asylum seekers permit].\textsuperscript{98}

Dalmar's case raises a number of critical points. Primarily, these facts show that not all refugees and asylum seekers are mistreated. Although such cases are extremely rare, the failure to renew one's identity card is an offence that can carry a jail term of up to five years and/or fine under South African law.\textsuperscript{99} Further, while some police officers take a rather humanitarian approach, Dalmar's incarceration of up to three days does violate the statutory duty to bring a person who has been arrested to court "as soon as is reasonably possible but not later than 48 hours after the arrest."\textsuperscript{100}

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100. \textit{See} S. AFR. CONST. 1996 s. 35(1)(d); Criminal Procedure Act 51 of 1977 s. 50(1).
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Irregularities in the acquisition and renewal of legal documents negatively impacts how police treat refugees and asylum seekers.

C. (Dis)Respect for Identity Documents

Since states issue identity documents, it is reasonable to assume that state officials, in particular, will respect them. In common parlance the term respect means to “avoid harming or interfering with.” Thus a state is obligated to take measures that will enable individuals to enjoy the rights guaranteed by possession of a valid identity card. This obligation also bars a government from preventing refugees and asylum seekers from enjoying these entitlements (without lawful cause). In a nutshell, as long as a person can produce a valid document he or she should be free to enjoy the entitlements that are due to them. This perception accords with the expectations of refugees and asylum seekers who describe identity documents as “the book of life.” Although these papers should secure police protection for those who have them, practice paints a different picture.

Day-to-day policing entails a certain amount of discretion on the part of police officers because much of their work is not cut-and-dry. Rather, it “consists of endless shades of grey.” Discretion enables a police officer to assess a particular situation and decide, based on his or her judgment, on the best course of action. In Kenya, for instance, law enforcement officials can “bring . . . to justice” anyone whom they are “legally authorized to apprehend and for whose apprehension sufficient ground exists.” If no offence has been committed, generally speaking, a police officer will not seek to enforce the law. While police officers have discretion, this does not imply that an officer has a free hand to do whatever he or she likes. Rather, in societies governed by the rule of law, members of the police force should not exercise their discretion capriciously. In his article that reviews policing in Africa, Charles Mwalimu contends that the

102. See Refugees Act s. 27 and Refugee Regulations, supra note 16, s. 15(1)(c) (refugees are entitled to “full legal protection” and “the right to remain” in South Africa).
103. See Pusch Commey, South Africa: A Bad Way to Treat Fellow Africans, NEW AFRICAN, May 2007, 28 at 29.
powers that police hold need to be exercised reasonably. The author stresses the need for a balance "between peaceful enjoyment of individual rights and [State] interests." In reality, the very fact that police have such discretion invariably gives them considerable power over members of the public. Fredrik Leinfelt, an analyst at the Moorehead Police Department in Minnesota, U.S.A., found that police "discretion" and "judgment" in the context of minorities, are unevenly "distributed and that officer discretion leads to an unjust exercise of power." The frequency with which refugees and asylum seekers are stopped and asked for identity documents in South Africa suggests that the police use physiognomic differences to profile people. Most respondents (14, or 78 per cent) reported to having been stopped and searched by SAP. In fact, SAP officials frequently target areas inhabited by recently arrived asylum seekers.

South Africa's Immigration Act authorizes state officials to request that any person produce his or her identity document for inspection. This power is designed to check illegal migration into South Africa. The Immigration Act states:

When so requested by an immigration officer or a police officer any person shall identify himself or herself as a citizen, resident or foreigner when so requested by an immigration officer or a police officer, and if on reasonable grounds such immigration officer or a police officer is not satisfied that such person is entitled to be in the Republic, such immigration officer or a police officer may take such

107. Id.
person into custody without a warrant and if necessary detain him or her in a prescribed manner and place until such person’s prima facie status or citizenship is ascertained.\textsuperscript{111}

The act does not define when the immigration or police officer should request identification and therefore the verification is done randomly. Generally SAP stops pedestrians on the streets, or stops taxis, and demand the individuals produce their identity documents. Although there is no legal requirement to carry identity documents at all times, practise demonstrates that it is better for refugees and asylum seekers to have them at all times. Ideally those who do not have identity documents when stopped would be given sufficient time to procure them. However experience shows that this is not the case. Abdihakim shares his experience in the following words:

I was just around the corner near the house, then the police officers in a van stopped me, I knew one of them but he did not talk to me. His mate asked me for my ID and I told him it is in the house and I could get it. He told me threateningly to get in the van. They drove around with me for two hours before taking me to [Johannesburg] central police station. From there I managed to call somebody who brought my papers. That was when I was released.\textsuperscript{112}

This experience casts serious doubt on the ability of some SAP to exercise their discretion according to the law, or even logically. This state of affairs lends support to the claim that a refugee or asylum seeker “without papers [i]s a pariah subject to arrest for that reason alone.”\textsuperscript{113} Indeed, it is difficult to understand why the police in Abdihakim’s case were reluctant to give him an opportunity to return to his home, which was quite close to the place of arrest, to collect the identity document. Several possibilities come to mind. Was it because the police were pressed for time? Judging from Abdihakim’s narrative, it is apparent that proving his legal status in the country would have taken just a couple of minutes. Accordingly, this line of argument is difficult to sustain. Alternatively, were they unwilling because they are reluctant to accompany people to their homes? Similarly, this assertion must fail. As a matter of fact, South African law enforcement officials are always ready to enter the dwelling places of refugees and asylum seekers.\textsuperscript{114} A third possibility rests on

\textsuperscript{111. Immigration Act s. 41.}
\textsuperscript{112. Interview with Abdihakim in Johannesburg, S. Afr. (Oct. 8, 2005).}
\textsuperscript{113. Weis, supra note 71.}
\textsuperscript{114. See the discussion in part V below.}
the argument that perhaps the police wanted Abdihakim to offer them a bribe. Hence, the argument goes, they drove him around for two hours to wear him out. Although money did not exchange hands in Abdihakim’s situation, Ghedi’s experience below supports this assertion:

I was walking towards 10th street [Mayfair]... I was stopped by two police officers. They asked for my ID and I gave them the photocopy I had. They said it is forged and if I wanted it back I have to buy them a soda. I gave them R20 ... 115

Many refugees and asylum seekers believe that the request for identity cards is motivated by sinister intentions owing to both the frequency of requests and the verbal insults or demands for bribe that sometimes follow.

Even further, several interviewees believed that the possession of identity documents was insufficient to guarantee them protection. Naasir, for example, expressed the following sentiments:

The police don’t care even if you have an ID with you, if they suspect you... they just detain you... the way police arrest immigrants is unsatisfactory, because even if you have ID they just tear it up, they don’t want to listen to the explanation. 116

Aside from the frequent demands for identity documents, police have also been reported to express doubts over the validity of asylum claims. 117 Ghedi’s experience, when the SAP demanded a bribe because they thought the photocopy of the document was a forgery, is one such example. Unlike Ghedi, Mahamut presented his valid original identity document when he was stopped by a police officer. 118 However, the official still expressed doubts over the authenticity of his claim for asylum. 119 Specifically, the police officer asked Mahamut why he had sought sanctuary in South Africa “whereas there are many other [peaceful] countries who are [his] neighbours.” 120 This line of inquiry is not relevant because the police are hardly involved in the determination of claims for asylum. Indeed, in most cases applications are heard and determined by immigration (at first

120. Id.
instance) and judicial (on appeal or review) officials. Questions such as this, nonetheless, reflect a worrying attitude of SAP towards refugees and asylum seekers. Put in another way, if the police officers who are charged with the responsibility of protecting victims of war and persecution distrust this category of persons at the outset, how can they be expected to accord refugees and asylum seekers any reasonable form of safety?

This however is not a failure of the police alone. Sadly, and unfortunately, anti-immigrant attitudes have also been found within government circles. For example, Mangosuthu Buthelezi, former South African Home Affairs Minister, claimed:

Approximately 90% of foreign persons who are in [the country] with fraudulent documents i.e. either citizenship or migration documents, are involved in other crimes as well . . .

Notably, Mr. Buthelezi failed to cite any hard evidence in support of these allegations. Although the causal effect of such statements cannot be drawn conclusively, this language is likely to have an impact on how law enforcement officials and the general public perceive refugees and asylum seekers. In fact, considering the level of insecurity and xenophobia in South Africa, it is apparent that

121. For example, in the United States onshore asylum application are first heard and determined by Asylum Officers. Referrals - claims that are not granted - are heard by Immigration Judges. Appeals lie on the Board of Immigration Appeals [hereinafter BIA]. Dissatisfied parties can appeal BIA decisions to the Circuit Courts. Final appeals lie on the Supreme Court. For these procedures, see Asylum and Refugee Statute, 8 U.S.C. §1101 (a) (42) (1993); Judicial Review, 8 U.S.C. § 1282 (1964); Approval, Denial, Referral, or Dismissal of Application, 8 C.F.R. § 208.14 (1997).


123. This fact is well known. For instance, in S v. Makwanyane 1995 (6) BCLR 665 (CC) at 715 (S. Afr), Chaskalson, the President of the South African Constitutional Court, observed that “the police and prosecuting authorities have been unable to cope with . . . the crime wave” that has hit the country. See also, Justice Van Zyl in Director of Public Prosecutions: Cape of Good Hope v. Bathgate 2000 (2) SA 535 at 560 (S. Afr) (“there is no doubt that the [Proceeds of Crime Act (Act No. 76 of 1996) has a very important purpose, namely assist in fighting the ever burgeoning crime industry in South Africa”).

such uncorroborated sentiments do very little to promote the right of individuals to enjoy asylum in the country. On the contrary, using refugees as a scapegoat creates a recipe for exposing victim of armed persecution and conflict to some of the risks they fled in their home countries.

Historical records reveal that South Africa was one of the states that actively participated in the refugee protection scheme that existed before the 1951 Refugee Convention. The country was represented at conferences that drew the 1926 Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees,\(^\text{125}\) and the Final Act of the Intergovernmental Conference on the Adoption of a Travel Document for Refugees (1946).\(^\text{126}\) Current practice, however, shows a change of heart in the context of identity documents. The situation on the ground is incompatible with the recommendations the South African Government made in the 1920s and 1940s on the importance of an asylum state respecting identity papers issued to refugees and asylum seekers.

The provisions of international asylum law with respect to identity documents have for all practical purposes been incorporated into South Africa’s domestic legal framework. To comply with its international legal obligations, South Africa must ensure that these paper entitlements are turned into real rights. In addition there is a constitutional duty to “respect, protect, promote and fulfil”\(^\text{127}\) the rights of individuals in South Africa. This duty as well as the obligations of the Bill of Rights “binds all organs of the state”\(^\text{128}\) including the police. The failure to ensure that identity documents issued to refugees and asylum seekers in the country are respected constitutes a breach of these obligations.

IV. Security: Seeking Safe Haven, Finding Yourself in the Cold

Lack of security is one of the key factors that cause individuals to flee to a third country from their home state or state of habitual residence.\(^\text{129}\) Normally, asylum seekers hope to be protected from the

\(^\text{125}\) Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 1929 L.N.T.S. 48.


\(^\text{127}\) S. AFR. CONST. 1996 s. 7.

\(^\text{128}\) S. AFR. CONST. 1996 s. 8.

\(^\text{129}\) See Edwin Odhiambo-Abuya, Past Lessons, Future Insights: African Asylum
risks they fled in the state(s) that they seek sanctuary. Thus, security is a fundamental right to any refugee or asylum seeker, particularly because it directly affects an individual's right to life. Generally speaking, refugees and asylum seekers have meagre resources. Unlike locals, many are unable to afford private security services. Moreover, refugees and asylum seekers may be unable to effectively mobilise themselves to provide security in the form of vigilante groups, street committees or anti-crime working groups. They therefore have to rely on the police/state for protection. This section first examines the law relating to security of refugees and asylum seekers living in South Africa. It then evaluates the extent to which this obligation is met. While the right to security is guaranteed to every person in South Africa, the experience of refugees and asylum seekers at the hands of police shows a disconnect between the law in the books and actual practice.

A. The Legal Framework

Because a person’s right to security directly affects his or her right to life – arguably, the most important human right – it is crucial that a state take measures that will guarantee rather than inhibit the enjoyment of this right. Recognising this, article 13 of the 1948 Universal Declaration of Human Rights ("UDHR"), guarantees "everyone" the right to "security of person." An obligation to respect this right is also found in the International Covenant on Civil and Political Rights ("ICCPR"), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment ("CAT"), and, more recently, in the 1990 Convention on the Rights of the Child ("CRC"). South Africa has ratified the CAT (1993), ICCPR (1998)
and CRC (1995). International refugee law also guarantees the right of refugees and asylum seekers to security. Article 33(1) of the Refugee Convention, which contains the norm of non-refoulement, prohibits states from:

[E]xpel[ling] or return[ing] ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Similarly, South Africa's Bill of Rights, which came into operation in February 1997, seeks to protect the right to security of every person who is in the country. Owing to its importance, "the negotiating parties had no difficulty in agreeing to the entrenchment" of this right, as Lourens du Pleissis and Hugh Corder, who were members of the Technical Committee that drafted South Africa's Transitional Bill of Rights, state. Both the interim and final constitutions recognised as fundamental everyone's right to "freedom and security." Detention without trial, torture, and inhuman or degrading treatment are prohibited under both the interim and final constitutions. Currently, section 12(1)(c) of the South African Constitution disallows "all forms of violence from either public or private sources." Vivier ADP of the South African Supreme Court of Appeal argued in Van Eeden v. Minister of Safety and Security that this "subsection place[d] a positive duty on the State to protect everyone from violent crime." In the case of refugees and asylum seekers, domestic refugee legislation reinforces this constitutional guarantee. Section 27 of the Refugees Act entitles "full legal protection, which includes the rights set out in Chapter 2 [Bill of Rights] of the Constitution," to those who have been granted status. Further evidence is found in South African case law.

136. Refugee Convention, supra note 8, art. 33(1).
137. Lourens du Plessis & Hugh Corder, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 54 (Juta 1994).
141. See, e.g., Dawood and Patel, supra note 21.
B. Protectors or Violators? Police and Forced Migrant Relations

Fighting crime is one of the key functions of any police service. In French, they say: Le salut du peuple est la suprême loi (The safety of the people is the highest law).\textsuperscript{142} Lord Justice Watkins of the UK Court of Appeal noted that society expects law enforcement officials to “keep the peace.”\textsuperscript{143} The Kenyan High Court (Onyancha J.) argued that the society expects the police force to “prevent or detect crime as well as preserve life and property.”\textsuperscript{144} In South Africa, the duty of law enforcement officials to protect society derives both from the constitution and from statute. The South African Constitution sets out this role as follows:

[T]o prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.\textsuperscript{145}

Additionally, the preamble of the South African Police Service Act\textsuperscript{146} requires all members of the service to “ensure the safety and security of all persons and property” in South Africa.\textsuperscript{147} These objectives are consistent with duties of the police that are found in other states. For instance, the Kenyan Police Act requires the law enforcement officials to maintain “law and order”, to preserve “peace”, to protect “life and property,” to prevent and detect “crime” and to enforce “all laws and regulations” in the country.\textsuperscript{148}

Crime prevention is also set out as a core function of the South African municipal police service.\textsuperscript{149} Meeting this goal requires the police to:

[P]atrol the streets and make arrests and to cause the detention and prosecution of the persons so arrested on the charges for which they have been arrested. It is furthermore their duty to act as police investigation officers in regard to “events” (offences and suspected offences) occurring whilst on patrol and, where necessary and appropriate, to act as complainants and witnesses in the

\begin{thebibliography}{99}
\bibitem{142} Translation by authors.
\bibitem{145} S. AFR. CONST. 1996 s. 205(3).
\bibitem{146} Police Service Act 68 of 1995.
\bibitem{147} \textit{See also}, Police Service Act s. 64E (setting out crime prevention as one of the functions of the municipal police service).
\bibitem{149} \textit{See} Police Service Act s. 64E(c).
\end{thebibliography}
prosecution of the offences giving rise to the arrest, detention and prosecution. . . . It is also [their] duty . . ., whenever a crime is reported to the police, to find the offender, bring [them] before the court and place all available evidence before the court.\textsuperscript{150}

To realise the objectives of crime prevention and detection, it is crucial for law enforcement officials to combine forces with members of the community, citizens and non-citizens, being policed. Community policing, however, does not mean vigilante groups patrolling the streets with weapons. Rather, it means a joint endeavour between the police and society to ensure that members of the community not only feel safe, but are safe. The 1993 Interim Constitution of South Africa recognised the value of community policing.\textsuperscript{151} Although a similar provision is missing in the final document, the ultimate constitutional silence does not infer that the legal framework disregarded the role of community in policing. Rather, in accordance with the final Constitution, the 1995 South African \textit{Police Act} underlined the contribution that society plays in regulating law and order.\textsuperscript{152}

Recognising that we now live in mixed societies – in terms of race and nationality – “respect for diversity” is one of the principles of the Code of Ethics that SAP has undertaken to “perform their duties” in accordance with. This means that they will “acknowledge the diversity of the people of [South Africa] and treat every person with equal respect.” Further they have pledged to refrain from “unlawfully discriminate[ing] against any person.”

The aim of the SAP, to treat all persons equally, is consistent with the view of South African courts. Justice Ackerman emphasised in \textit{De Lange v. Smuts NO} that all those who are in South Africa, “citizens as well as non-citizens, are entitled to rely upon the State for the protection and enforcement of their rights.”\textsuperscript{153} In 2006, Justice

\textsuperscript{150} Per Justice De Wet in Malou v. Minister of Police 1981 (2) SALR 545 at 549 (S. Afr).

\textsuperscript{151} S. AFR. (Interim) CONST. 1993 s. 221(2) provided for the establishment of community-police forums. Under sub-clause 2 their functions were set out to include:

(a) the promotion of accountability of the [Police] Service to local communities and co-operation of communities with the Service;
(b) the monitoring of the effectiveness and efficiency of the Service;
(c) advising the Service regarding local policing priorities;
(d) the evaluation of the provision of visible police services;
(e) requesting enquiries into policing matters in the locality concerned.

\textsuperscript{152} See generally, chapter 7 of the Police Act.

\textsuperscript{153} 1998 (3) SA 785 at 800 (S. Afr.) (per Ackerman, J.).
Van Reenen underlined in *Kikiko v. Minister of Home Affairs* that the Governments must “respect the basic human rights of any foreigner who has entered” the country. The judge argued that the Constitution entitles outsiders to “all the fundamental rights entrenched in the Bill of Rights, save those expressly restricted to South African citizens.”

Generally speaking, members of a police service are permitted to use force whilst carrying out their duties. In South Africa, the *Police Service Act* authorizes any member of the service to use “force” in the discharge of his or her duties. However, the use of force is not absolute; rather, it is subject to certain limitations. In the first place, the force should be the bare minimum required to realize a particular objective. The facts must lead a reasonable person to conclude that use of force was necessary. Consistent with this position, the *Police Service Act* clearly limits this power by providing that the force used should be “reasonable in the circumstances.” To put it in another way, the force should be proportional and non-excessive.

Additionally, force should only be used as a last resort to ensure law and order. Thus, the police should first exhaust non-confrontational measures. Physical force should only be used “when the exercise of persuasion, advice and warning is found to be insufficient . . . .” Force may be used, for example, in circumstances where an individual who is suspected of having committed an offence resists arrest. A further limitation is found in section 13(1) of the *Police Service Act*, which obligates SAP to exercise their duties and functions “with due regard to the fundamental rights of every person” as set out in the Constitution. Moreover, under both the Code of Conduct and the Code of Ethics SAP undertake to “uphold and

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154. 2006 (4) SA 114 at 125 (S. Afr.).
155. Id. The view that citizens and non-citizens are entitled to equal protection of the law, save in specific circumstances, is widely held. In *Chu Lim v. Minister for Immigration* (1992) 176 C.L.R. 1, 29, the Australian High Court (Brennan, Deane, & Dawson, JJ.) asserted that the difference between the rights of aliens lawfully in the country and citizens rests on the fact that non-citizens, unlike nationals, are vulnerable to removal from the country.
156. Police Service Act s. 13(3)(b).
157. Police Service Act s. 13(3)(b).
Victims of Armed Conflict and Persecution in South Africa

As is the case with identity documents, the reality concerning the right of refugees and asylum seekers to security is extremely troubling. Field data exposes a wide gap between the law in the books and actual practice. Refugees and asylum seekers are exposed to situations where they are at risk of suffering bodily harm from police officers. For example, in the case of Guuleed, despite the lack of medical evidence, it is reasonable to assume that his injuries resulted from the kicks he claims the arresting officers inflicted upon him. While it is difficult to gauge with mathematical precision what amounts to "reasonable force," can one say that the actions of the police in Guuleed's case were reasonable? The response must be negative. There is no evidence to show that he resisted arrest either directly or by implication.

Arguably, this scenario supports the thesis that the use of violence to effect arrests in South Africa is common. This is also an example of the use of excessive force on the part of law enforcement officials. Indeed, the attitude of the officers towards refugees and asylum seekers, which is reflected in the words that they are claimed to have uttered on arrest — "you f—ked up your country and you come here to f—k this country" — lends credence to these assertions. This is inconsistent with the key obligations of SAP as expressed in the preamble to the Police Service Act, which, among others, requires members of the service "throughout the national territory," to:

(a) ensure the safety and security of all persons and property in the national territory; [and]

(b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution.

The cases of Guuleed, Jama and Mursal suggest that refugees and asylum seekers in South Africa will continue to be vulnerable, especially if law enforcement officials are unable to offer any


161. Supra note 1.


meaningful form of protection. It is therefore crucial for the police to treat refugees and asylum seekers with great caution in order to restore the trust that may have been lost in government officials.

Experience shows that members of the South African police are reluctant to take measures that will deal effectively with acts of criminality that involve refugees and asylum seekers. Cawale, for instance, reported a burglary to the police. He was able to supply all the evidence because he knew the offender. The offender was arrested but was released shortly after without charge. He then went back to threaten Cawale. This is not an isolated case as the research subjects in this study affirm. Many claimed that police rarely took any action when they lodged complaints. According to Sahal, a taxi operator:

I saw this guy trying to break into a nearby shop... just a cross the road and I raised an alarm. The man ran away. When the police arrived they questioned me if I could identify the person... I agreed and the person was arrested. A few days later the person was free and he threatened me... calling me "makwerekwere."

Acts of harassment or violence, such as those meted out against Guuleed, are likely to lead to hostility and, ultimately, refugees may close ranks against the police.

In addition, exposure to acts of violence resulted in most research subjects having very little faith in the police to offer them any reasonable protection. There was strong agreement that calling the police or reporting any crime is pointless because their response is quite slow generally. In the few instances where police turn up, they concentrate on side issues or, worst still, some engage in criminal activities. Mursal recounts his experience at the hands of the police in South Africa:

My cousin was coming from Cape Town and people whom he did not know tried to stop him. Since he has been a victim of

166. Id.
167. Id.
168. Id.
169. For example, Basra during an interview conducted in Johannesburg, S. Afr. (Nov. 8, 2005), Jama during an interview conducted in Johannesburg, S. Afr. (Nov. 5, 2005), and Sahal during an interview in Johannesburg, S. Afr. (Nov. 3, 2005).
170. Interview with Sahal in Johannesburg, S. Afr. (Nov. 3, 2005). "Makwerekwere" is a derogatory term that is used by South Africans to refer to foreigners.
carjacking several times, he refused to stop. These people then chased him all the way to [Mayfair]. We called for help from the police because we suspected they were robbers. When the police arrived they instead turned on us, ransacked our house claiming we are criminals. They took away all our cell phones and the money they could get.\footnote{171}

Sadly, and unfortunately, all eighteen research subjects were of the view that SAP cannot be trusted. In addition to Mursal’s, the following incidents may account for the extremely high level of police mistrust among refugees and asylum seekers. Jama had this to say:

I used to run a shop in Pretoria in a place called Garangwa. I was attacked by thugs in broad daylight and robbed of R4000. They were speaking local South African language. I reported the matter to the police immediately. When I went at the station the police asked me if somebody was hurt, that is, if somebody has been shot or bleeding. I said ‘no’ and they told me there is nothing they could do since nobody was hurt.\footnote{172}

Below are the words of Basra:

After we were attacked and robbed by a gang of four people, we met a police officer on patrol and we immediately informed him. He told us he could do nothing because he could not handle four armed people alone.\footnote{173}

A number of lessons can be drawn from these narratives. In the first place, they demonstrate that South African law enforcement officials are fast losing their grip on the war against crime in the country. The second lesson is drawn from the South African Constitution, which obligates the state not only to “respect,” but also to “protect, promote and fulfil” the right of refugees and asylum seekers to security.\footnote{174} Case law in South Africa also makes this point.\footnote{175} Further support is found in the jurisprudence that has developed from United Nations agencies like the Human Rights Committee. In its decision in \textit{William Páez v. Colombia},\footnote{176} the Human Rights Committee contended that state parties to the ICCPR “are under an obligation to

\footnotesize{171. Interview with Mursal in Johannesburg, S. Afr. (Nov. 5, 2005).}
\footnotesize{172. Interview with Jama in Johannesburg, S. Afr. (Nov. 5, 2005).}
\footnotesize{173. Interview with Basra in Johannesburg, S. Afr. (Nov. 8, 2005).}
\footnotesize{174. \textit{See} S. AFR. CONST. 1996 s. 7(2). \textit{See also}, S. AFR. CONST. 1996 s. 2, which requires the government to “fulfil” this obligation.}
\footnotesize{175. \textit{See} Vivier, A.D.P., in \textit{Van Eeden v. Minister of Safety and Security 2003 (1) SA 389 (SCA)} at 397 (S. Afr.).}
take reasonable and appropriate measures to protect the life of persons under their jurisdiction.

Fieldwork shows, nonetheless, that South Africa still has a long way to go towards meeting its legal duties. Basra’s experience highlights a key ingredient in the fight against criminal activities, namely the availability of adequate resources. In Basra’s situation there was a single law enforcement official walking the beat. This is quite unusual in view of the dangerous work the police are often involved with. In many States, police patrols comprise of at least two or sometimes three officers. However, it is doubtful whether the reasons given for failure to act on the part of the police officer in Basra’s experience are sufficient. Wouldn’t it have been prudent for the officer to at least call for reinforcements, as is standard practice?

The attempted justification that was offered in the case involving Jama, the robbery victim, likewise fails. The underlying message in Jama’s case appears to be: Unless a person suffers serious injury as a result of a criminal attack, it is meaningless to lodge a report with the police. The government should be disallowed from using lack of resources as an excuse for failing to meet its fundamental obligations. Rather, to borrow the words of Justice Westhuizen, the relevant authorities “must purpose-fully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances.” It is quite interesting that in both examples the police decided against taking any action.

Mursal’s experience of being robbed by the police themselves also raises serious concerns. Those who are expected to be at the forefront of enforcing the law are violating the very rules they had undertaken to uphold. One of the questions that must be asked is: when crime fighters turn into crooks, who can vulnerable members of the public turn to? Rather than watching over victims of persecution and armed conflict, some law enforcement officials in South Africa are shirking their duties, thereby breaching their positive obligation to eradicate crime. In fact, committing or failing to investigate acts of violence against refugees and asylum seekers is likely to re-traumatize individuals who are already distressed.

178. See S v. Jaipal 2005 (4) SA 581 (CC) at 602 (S. Afr.) (“Few countries in the world have unlimited or even sufficient resources to meet all their socio-political and economic needs.” (Van der Westhuizen, J.)).
The failure of the police to take any positive steps when criminal activity is reported can cause refugees and asylum seekers to lose confidence in law enforcement officials. Because the police failed to take any substantive steps to investigate previous incidents, most interviewees stated that they did not bother to report subsequent acts of criminality.\textsuperscript{180} Julie Berg examined issues relating to police accountability in commonwealth countries located in the southern part of Africa and concluded that when police fail to protect refugees and asylum seekers they "begin to lack legitimacy and [they] begin to lose faith in the police and consequently the government."\textsuperscript{181} Other studies have drawn similar conclusions. Migai Akech found in his study on Kenya that it is of utmost importance for members of the public to have goodwill towards the police.\textsuperscript{182} Research conducted in Belize suggests that victims' perception of whether police will act is one of the factors that affect reporting crime-related practices.\textsuperscript{183} Just over one-third (34 per cent) of the respondents ($N = 186$) who took part in the Belize survey cited the failure by the police to act as a reason for not reporting incidents.\textsuperscript{184} Yet the criminal justice system relies a great deal on victims and witnesses volunteering information to the police. The net result of the failure of refugees and asylum seekers to report acts of criminality in South Africa is troubling, especially if crime is to be fought with full force. Ultimately, this state of affairs is likely to seriously impede any strategies that the government may have put in place to combat crime.

In a decision that was handed down in 1995, Justice Langa of the South African Constitutional Court emphasized the importance of the government becoming a "role model" for society.\textsuperscript{185} He challenged it to "take the lead" with regards to the "respect" for human rights that were promised by the Constitution.\textsuperscript{186} Sadly, more

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\textsuperscript{180} Interview with Mursal in Johannesburg, S. Afr. (Nov. 5, 2005); Interview with Jama in Johannesburg, S. Afr. (Nov. 5, 2005); Interview with Basra in Johannesburg, S. Afr. (Nov. 8, 2005).
\textsuperscript{181} Julie Berg, POLICE ACCOUNTABILITY IN SOUTHERN AFRICAN COMMONWEALTH COUNTRIES 2-3 (2005), www.policeaccountability.co.za/File_Uploads/docs/File_Download.asp?ThisFile=PACommonwealth.pdf.
\textsuperscript{182} Migai Akech, Public Law Values and the Politics of Criminal (In)justice Creating a Framework for Policing in Kenya, 5 OXFORD COMMONWEALTH L.J. 225, 245 (2005) (Without goodwill the "legitimacy" of the entire force is at risk.).
\textsuperscript{183} See Richard Bennett & Bruce Wiegand, Observations on Crime Reporting in a Developing Nation, 32 CRIMINOLOGY 135 (1994).
\textsuperscript{184} Id. at 142.
\textsuperscript{185} See S v. Makwanyane 1995 (6) BCLR 665 (CC) at 715, 751 (S. Afr).
\textsuperscript{186} See S v. Makwanyane 1995 (6) BCLR 665 (CC) at 715, 751 (S. Afr).
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than a decade later South Africa is yet to become the example that the judge envisaged. While the South African Constitution may be "one of the most progressive in the world and enjoys high acclaim internationally," to maintain this position and status the challenge lies in implementing the constitutional ideals. 187

V. Privacy: Respecting the Space of Refugees and Asylum Seekers?

The right to privacy is another fundamental constitutional guaranty in any democratic state. It has been compared to the right to life 188 and the right to human dignity. 189 Although not an easy concept to define, privacy can be described as the right of "a person and the person's property to be free from unwarranted public scrutiny or exposure." 190 This includes the right to be free "from unjustified state intrusions" 191 and can be traced to the "feeling that we all need an area of defensible space within which we can live, if necessary shutting out an unfriendly world." 192 An individual's right to privacy dates to biblical times. The Old Testament underlines the importance of a person's home: "[w]hen thou dost lend thy brother any thing, thou shalt not go into his house to fetch the pledge. Thou shall stand abroad and the man to whom thou dost lend shall bring out the pledge abroad unto thee." 193 In this section, the right to privacy and the exceptions to this right under both international and domestic laws are first evaluated. The section also examines how the law plays out in practise, and the remedies that are available to an aggrieved refugee or asylum seeker.

188. Katz v. United States, 389 U.S. 347, 350-51 (1967) ("[T]he protection of a person's general right to privacy . . . is, like the protection of his property and his very life . . . ." (Steward, J.) (emphasis added)).
189. See Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd (2001) 208 C.L.R. 199, 226 (Austl.), (where the Australian High Court (Gleeson, C.J.) stated that the right to privacy seeks to protect "human dignity").
190. BLACKS LAW DICTIONARY 1350 (8th ed. 2004); see also, CONCISE AUSTRALIAN LEGAL DICTIONARY 347 (2d ed. 1998) (Privacy is "the interest of a person in sheltering his or her life from unwanted interference or public scrutiny.").
193. Deuteronomy 24:10-11 (King James).
A. International and Domestic Provisions

Privacy is also a well-known entitlement in international law. The importance and universality of this right is evident from the fact that it is recognized in key international human rights instruments. Commencing with the 1948 UDHR, treaties such as the 1976 ICCPR and the CRC in 1990 have formally guaranteed the right to privacy. These instruments recognize the value of this right and bestow an obligation upon states to safeguard the right to privacy. Specifically the UDHR provides that “no one shall be subjected to arbitrary interference with his privacy . . . .”\(^{194}\) A similar provision is found in the ICCPR\(^{195}\) and CRC.\(^{196}\)

According to the legislative history of the South African Constitution, the Bill of Rights was inspired by its counterparts in the 1949 German Basic Law and the Canadian Charter of Rights and Freedoms of 1982 (“Charter”).\(^{197}\) At the heart of the South African Constitution lies the right of every individual to be free from government intrusion in his or her home. The Constitution guarantees this right to “everyone,” citizens and non-citizens alike.\(^{198}\) South African case law supports this assertion as well. As Langa, Deputy President of the South African Constitutional Court, noted the “protection of the right to privacy [in South Africa] may be claimed by any person.”\(^{199}\) Specific guarantees include the right not to have:

(a) a person or their home searched;

(b) their property searched; or

(c) their possessions seized.\(^{200}\)

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194. UDHR, supra note 131, art. 12.
195. ICCPR, supra note 132, art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”).
196. CRC, supra note 134, art. 16 (“No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence.”).
197. See FUNDAMENTAL RIGHTS IN THE CONSTITUTION: COMMENTARY AND CASES 6, 14 (Dennis Davis, Halton Cheadle & Nicholas Haysom eds., 1997); du Plessis & Corder, supra note 137, at 47.
A similar provision was contained in South Africa’s Interim Constitution. Justice Sachs, of the South African Constitutional Court, outlined the historical justification for the Constitutional right to privacy:

The existence of the safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police State. South African experience has been notoriously mixed in this regard. On the one hand there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other hand, when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practises inconsistent with the standards of conduct now required by the Bill of Rights. Section 13 [of the Interim Constitution, now section 14] accordingly requires us to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values.

The right to privacy places both a positive and a negative obligation on the State. In the context of the former, the government is required to undertake measures that will promote the realisation of this right for everyone in the country. The government is also prohibited, under the terms of the negative obligation, from unjustified interference with the right to privacy.

Several domestic legal systems recognise the right to privacy. Like South Africa, the constitutions of Kenya and Namibia

201. See S. AFR. (Interim) CONST. 1993 s. 13 (“Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.”). See also, ANC’s Draft Bill of Rights for a New South Africa art. 2(31) (“No search or entry shall be permitted except for reasonable cause, as prescribed by law, and as would be reasonable in an open and democratic society.”).


203. Constitution, Art. 76 (2001) (Kenya) (“Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.”).

204. Constitution of Republic of Namibia art. 13 (“No persons shall be subject to
guarantee all persons the protection from unlawful search and/or seizure. In contrast, the German Basic Law and the Constitution of the United States do not expressly contain the right to privacy. But this should not be interpreted to mean that these States do not recognize this right. Rather, in Germany aspects of this right are protected in various articles of the German Basic Law such as articles 10 (on privacy of correspondence) and 13 (on the inviolability of home). Likewise, in the United States the right to privacy does not exist in any specific provision of the Constitution. However, the Fourth Amendment provides protection to “persons” as well as their “houses, papers, and effects” against “unreasonable searches and seizures.” This right to be free from unreasonable search and seizure has been extended to the States via the Fourteenth Amendment.

Thomas Cooley describes privacy as the right “to be left alone.” To use a well-known adage, an individual’s home is his or her castle. While a right to privacy is almost universally recognized it is hardly absolute; rather various statutes have eroded this entitlement. Let us now look at the instances where the law allows for the infringement of this right.

B. Lawful Infringement of a Person’s Privacy Rights

In South Africa, the right to privacy is subject to the general limitation clause of section 36 of the Constitution, meaning that the enjoyment of this right may be limited in appropriate circumstances. As Justice Ackerman of the Constitutional Court observed, that no right is “absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen.” The South African general limitation clause, which was modelled on the Canadian Charter, seeks to balance state interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety of the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.”

205. U.S. Const. amend. IV.
207. Bernstein v. Bester 1996 (2) SA 751 (CC) at 788 (S. Afr.).
208. Section 1 of the Canadian Charter of Rights and Freedoms seeks to guarantee the “rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
interests and individual rights. This balance rests on a proportionality test such that “[r]ights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . . .”209 The onus of proving that a limit on the right or freedom guaranteed by the Constitution is reasonable and justifiable in an open and democratic society210 rests on the party seeking to uphold the limitation.211

The South African interim Constitution also contained a limitation clause. Section 33(1) stated that the rights contained in the Bill of Rights “may be limited by law of general application, provided that such limitation”:

(a) shall be permissible only to the extent that it is:

(i) reasonable; and

(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question . . . .212

During the drafting of the South African Bill of Rights, different contingencies sought to impose specific limitations on the general right to privacy in order to allow invasions of domestic privacy for the purposes of criminal investigation or for the prevention of domestic violence.213 However, under the current legal framework a person’s right to privacy can be lawfully infringed if he or she is suspected to have engaged in practices that are likely to compromise the internal security of the state. Section 25(1) of the South African Criminal Procedure Act provides that the right to privacy can be lawfully interfered with if there are “reasonable grounds for believing”:

(a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises . . . ; or

209. S. AFR. CONST. 1996 s. 36(1).
210. Section 1 of the Canadian Charter uses the words “free and democratic society.”
212. S. AFR. (Interim) CONST. 1993 s. 33(1).
213. du Plessis & Corder, supra note 137, at 154.
(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises.

Accordingly, if it appears that an individual is a risk to society, law enforcement officials may lawfully search his or her property and premises, as well as seize any possessions that may be harmful to the safety of others.

Arguably, these powers are necessary because it is in the public interest to prosecute suspected criminals. In the absence of such powers, law enforcement officials may find it hard to marshal the evidence that they may need to arrest and charge those suspected of having engaged in criminal activities. In a nutshell, although the right to privacy is designed to protect an individual’s house from unlawful entry and search, a person is disallowed from invoking this freedom to defeat the course of justice. Consistent with this position, Justice Tebut in *Park-Ross v. Director: Office for Serious Economic Offences*, noted that “searches may have to occur at times and be permissible even if the right to privacy is affected.”

C. Warrants: Application Process and Warrantless Searches

Search and seizure powers in South Africa are subject to certain conditions. These restrictions regulate the way in which officials can enter and search a person’s premises. Safeguards attempt to limit instances of abuse by those who conduct searches. The rules are also designed to assure owners of premises that the law has been followed. The first requirement relates to prior authorization. The police must apply for and obtain a warrant before conducting a search or seizing any article.

The second safeguard relates to the evidence that the state needs to bring to court before a warrant is issued. In keeping with the doctrine of checks and balances, before an individual’s right to privacy is interfered with, the judiciary must first examine the state’s allegations to ensure that there is reasonable evidence against the person to justify entering and searching his or her premises. The purpose of this process, to borrow from Canadian jurisprudence, is to enable a “neutral and impartial” party to “assess the evidence” with

214. 1995 (2) SA (CC) at 168.
215. *Id.*
216. Criminal Procedure Act 51 of 1977 s. 21.
the aim of determining whether the “appropriate standard has been met.”217 Absent these procedural safeguards, arbitrary invasions and seizures could result. Eventually, this state of affairs could lead to “cowing a population, crushing the spirit of the individual and putting terror in every heart.”218 Warrants are granted subject to satisfaction that there are reasonable grounds to suspect that an offence has been or is likely to be carried out. The decision maker can then exercise discretion in favour of the State. This test is well established in South Africa.219

Thirdly, warrants must be specific. A warrant should not be imprecise and/or vague, but rather must specify or refer to the offense for which it is issued, the place to be searched, and the individual or items to be seized.220 Warrants should be explicit so that courts are able to exercise their supervisory powers. Additionally, this condition sets the boundaries of a search. Moreover, it enables a person to know the offence with which he or she is being suspected of having committed and the “object of the search.”221 Absent the requirement that warrants must be particular, police officers would potentially be given free range. Granting law enforcement officials unlimited power to wander around a suspect’s premises is inappropriate. Warrants that fail to describe the offence in respect of which they have been made create opportunities for arbitrary invasion and search and have been repeatedly challenged.222

217. Oakes, supra note 211 at 162.
218. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Vinson, Reed, Black, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Minton, JJ.) (Frankfurter, Murphy and Jackson, JJ., dissenting).
219. Seccombe v Att’y Gen. 1919 T.P.D. 270 at 279 (S. Afr.) (Mason and Curlewis, JJ., concurring) (explaining that warrants are issued when a judicial officer is satisfied that “an offence has been committed, or suspected of having been committed” as well as where there are reasonable grounds for believing that an item “is intended to [be use[d] . . . for the purpose of committing an offence”); Investigating Directorate: Serious Economic Offences 2001 (1) SA at 567 (S. Afr.) (describing that warrants are issuable “only when” a judicial officer is satisfied that “there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises”).
220. Pullen, N.O. & Orr, N.O. v Waja 1929 T.P.D. 838 at 850 (S. Afr.) (Tindall, J.) (explaining that a valid search warrant is one which “describes the specific thing or things to be searched for or identifies them . . . by reference to the offence”).
222. National Union of South African Students v. Divisional Commissioner, South African Police, Cape Western Division and Others 1971 (2) SA 553 (C.P.D.) at 555 (S. Afr.) (warrant challenged as invalid because it failed to “define the goods and
Fourth, once a warrant has been issued, the police must show the warrant to the individual against whom it is issued before invading their privacy.\textsuperscript{223} Upon gaining entry, all seized items must be recorded in an inventory.\textsuperscript{224}

Reasonable force can be used to gain entry into a house.\textsuperscript{225} For example, if the police produce a valid warrant and a person refuses to grant them entry to the house, the police are entitled to break any door or window to gain access.\textsuperscript{226} However, before force is used SAP must "first audibly demand admission to the premises and notify the purpose for which [they seek] to enter such premises."\textsuperscript{227} In sum, law enforcement officials must obtain a warrant, and have it at the time of the search. If the place to be searched is a dwelling house, they first need to request admission before they can use force to enter.

The rule that a warrant must first be obtained is not absolute. Rather, certain exceptions exist. Where there is an apparent likelihood that a person suspected of committing a criminal offence might escape, or the possibility that evidence might be destroyed, this requirement can be dispensed with. Usually, this kind of search is referred to as "no-knock search." The \textit{Criminal Procedure Act} authorizes SAP to search without a warrant "any person or container or premises" and/or enter any premises if they "on reasonable grounds" believe "that the delay in obtaining such warrant would defeat the object" of the search.\textsuperscript{228} Other domestic pieces of legislation like the \textit{Police Service Act}\textsuperscript{229} contain similar provisions. The reasoning rests on the argument that, by the time permission to

\textsuperscript{223} Criminal Procedure Act s. 21(4).

\textsuperscript{224} Criminal Procedure Act s. 24.

\textsuperscript{225} \textit{Id.} s. 26; \textit{see also}, s. 48 (allowing for the breaking open of premises for the purposes of arrest of persons suspected or known to have engaged in criminal activities).

\textsuperscript{226} Id. s. 26.

\textsuperscript{227} \textit{Id.} s. 27.

\textsuperscript{228} Criminal Procedure Act s. 22(b)(ii) and s. 25(3)(b).

\textsuperscript{229} See Police Service Act s. 13(8)(d) and s. 13(8)(g)(ii).
search a suspect and/or seize any items in their possession is sought and obtained, the suspect may have fled or destroyed any evidence that may be used in a subsequent criminal trial. The protection offered by the *Criminal Procedure Act* was invoked in *S v. Boshoff* by the appellants, police officials, who stated that they believed that "if they had applied for a warrant . . . the delay in obtaining such a warrant would have defeated the object of the entry into the apartment of the complainant."23

**D. Experience on the Ground**

The right to privacy plays an important role in the life of refugees and asylum seekers. However, current writings in the area of refugee protection have not adequately addressed this entitlement. For instance, Guy Goodwin-Gill and Jane McAdam, in their book entitled *The Refugee in International Law*, do not touch upon the right of victims of armed conflict and persecution to privacy.23 Similarly, James Hathaway, in *The Rights of Refugees in International Law*, also fails to analyse this issue.23 Yet experience shows that refugees and asylum seekers are sometimes unable to enjoy their privacy rights. Often refugees and asylum seekers are subjected to treatment that is contrary to legal requirements that seek to protect the right of privacy for all in South Africa. This is demonstrated in the following accounts by refugees and asylum seekers narrating their experiences at the hands of SAP. According to Farah:

> I had bought a fax machine, which I wanted to use to make money. The following day a police officer came with somebody who claimed that his fax machine has been stolen. I explained that I bought the fax from a shop and not individual and I showed them the receipt. The officer insisted that they must go with the machine to the police station. I asked if I could I accompany them to the police station but he refused and told me if the machine is mine he will bring it back. I never saw him again and I never got my

230. 1981 (1) SALR at 393 (S. Afr.).

231. *Id.* at 397. *See also*, *S v Madiba* 1998 (1) BCLR 38 (S. Afr.) (The High Court found that the police were justified to enter and search the house of the accused without a warrant because there was reason to believe that an offence had been committed using a firearm, and the suspected perpetrator as well as firearm were in a particular place.).


machine back. 234

Idi shared his experience thus:

Just last month [October 2005] . . . police surrounded this building. They forced their way in when we refused to open because it was night. They said we are criminals and they know we have guns. They made us lie down as they searched the place. They took our phones, electronic goods and money that we had . . . we are not sure if they were actually police officers although they were in uniform. 235

While under the Constitution the South African government has undertaken to defend and vindicate the inviolability of the dwelling of every citizen, 236 the testimonies of Farah and Idi highlight a couple of issues. In the first place, contrary to the requirement that a warrant must always be produced, 237 the police failed to meet this legal obligation in both instances. It is unclear whether the police had a warrant. The assertion that they did not is premised on the fact that they failed to produce a copy of this document as is required by law. It may be argued that these were warrantless searches, and thus in the interests of justice for the police to conduct the searches without first applying for and obtaining a warrant. However, this argument is difficult to sustain. Specifically, it is questionable whether evidence could have been disposed off in the interim period whilst a warrant was being sought.

In the case of Farah in particular, he was able to produce a receipt. The name of the person appearing on a receipt, Farah, is prima facie evidence that he is the owner of the item. The fact that he volunteered to accompany the police to the station reinforces his ownership of the item. Chances are that he would not have extended this offer were he not its lawful owner. Moreover, if the police suspected that the receipt was a forgery, the onus is on them to prove this allegation. 238 The standard of proof to be applied is not that of a balance of probability. Rather, it is that of beyond any reasonable

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237. South African Criminal Procedure Act s. 21(4).
238. The common law position in this regard is instructive. The U.K. House of Lords (Viscount Sankey L.C., Lord Hewart L.C., Lord Atkin, Lord Tomlin, and Lord Wright) established in the famous decision of Woolmington v. Director of Public Prosecutions, (1935) A.C. 462, 481 (It is not for an accused person "to establish his innocence, but for the prosecution to establish his guilt.").
doubt. It is not upon individuals like Farah to prove at the outset that the receipt is genuine. The police failed to comply with this condition in Idi’s case. The police in this situation used excessive force than the circumstances required. In addition, Idi’s testimony is an example of the custodians of the law and order in society engaging in criminal activities. This experience is a manifestation of defenders harming the very members of society they are obliged to protect. While the Firearms Control Act prohibits persons without a licence from owning a firearm, Idi’s narration indicates that no firearms were found on the premises or persons in the house when the search was conducted. Irrespective, the Firearms Control Act requires searchers to comply with the search and seizure provisions of the Criminal Procedure Act.

E. Available Remedies

After a seizure has occurred, the Criminal Procedure Act empowers the police to explore various avenues. First, in cases such as Farah’s they can:

[I]f the article is stolen property or property suspected to be stolen, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of such police

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239. South African Criminal Procedure Act s. 105A(2)(a)(i) (The burden of proof in criminal cases is that of “beyond reasonable doubt.”).
240. S. AFR. CONST. 1996 s. 35(3)(h) (Everyone shall be “presumed innocent.”).
241. Criminal Procedure Act s. 29.
242. Section 1 of the Firearms Control Act defines ‘firearm’ to mean any:
(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);
(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
(d) device manufactured to discharge a bullet or any other projectile of [.22 calibre] a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant (inserted by the Firearms Control Amendment Act 2003, (Act No. 43 of 2003) section 1(b); or
(e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d) . . . . .
243. See supra note 216, s. 110.
official, such article was stolen, and shall warn such person to hold such article available for production at any resultant criminal proceedings, if required to do so.\textsuperscript{244}

Alternatively, the police can retain the item in their custody after seizure.\textsuperscript{245} However, if criminal proceedings are not instituted in connection with the seized item, the \emph{Criminal Procedure Act} provides that the article \textit{must be returned}\textsuperscript{246} to its lawful owner.

The situation involving Farah seems to recognise this fact. As at the time this research was conducted, neither Farah nor Idi had been charged of any criminal offence. Of concern is the fact that none of the items that had been seized from them had been returned. Further, the police in both instances failed to take an inventory of the seized items, as they were legally required to do. This is yet another example of SAP engaging in practices that are contrary to the law. These actions not only threatened the individuals' right to privacy but they also impeded their freedom of security. Doubtless, such actions are inconsistent with the right of refugees and asylum seekers to enjoy asylum. The experiences of Idi and Farah are examples of the sort of actions that the \emph{Criminal Procedure Act} was designed to check.

In sum, the misuse of police authority is unlikely to turn any refugee-host state into a sanctuary for victims of persecution and/or armed conflict.

Warrants that fail to meet any of the procedural requirements outlined above can be challenged on the grounds that they are unlawful. If a challenge is successful, the consequences of a court finding in a favour of an applicant can be grave. First, a court can declare inadmissible any piece of evidence that is obtained pursuant to an unlawful process. This principle follows on from the maxim of 'unclean hands' that courts of equity propounded.\textsuperscript{247} Courts of law have embraced the underlying principle of this equitable maxim.\textsuperscript{248}

\textsuperscript{244} Id. s. 30(b).
\textsuperscript{245} See supra note 216, s. 30(c).
\textsuperscript{246} Id. s. 31(a).
\textsuperscript{247} For an overview of this maxim, see George Bispham, \textsc{The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery} 60-62 (Kessinger Publishing Co.) (1882).
\textsuperscript{248} See, \textit{e.g.}, Colarruso v. The Queen, [1994] 19 C.R.R. (2d) 193, 208 (Can.) (evidence obtained without following the correct criminal law procedure "violated the guarantee against unreasonable search and seizure"); R v. Dyment, [1988] 2 S.C.R 417 (Can.) (Canadian Supreme Court (Dickson, C.J., Beetz, La Forest, Lamer, & Wilson, JJ.) excluded evidence that was illegally obtained); People v. Gerald O'Brien, [1965] 1 I.R. 142, 170 (Ir.) (Irish Supreme Court (Walsh, J.) termed
Thus, if the mode by which a particular piece of evidence was obtained is unlawful, law enforcement officials cannot be allowed to use the tainted evidence. United States jurisprudence describes this principle as the "poisonous fruit" doctrine.\(^{249}\) Once a wrongful action is taken, any evidence derived from such search is considered tainted and inadmissible. Some critics have argued that improperly obtained evidence is excluded on the grounds of public policy.\(^{250}\) Others assert that unlawfully obtained evidence is also rejected to "maintain respect for law."\(^{251}\)

If criminal proceedings are instituted against Farah or Idi, they can challenge any evidence that is the product of an unlawful search and seizure. The state should be thus precluded from benefiting from evidence that was obtained illegally. The exclusion of illegally obtained evidence rule seeks to promote one of the fundamental requirements of due process: the right to a fair hearing (expressed in the maxim: *audi alteram partem*). In *S v. Motloutsi*\(^{252}\) the High Court of South Africa recognised the argument that the mode by which a party marshals evidence is likely to affect the fairness of a trial.\(^{253}\) These sentiments are consistent with the common law position with respect to the process of obtaining evidence.\(^{254}\)

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\(^{249}\) See *Florida v. Bostic*, 501 U.S. 429, 434 (1985) (explaining that unlawfully obtained evidence "must be suppressed as tainted fruit") (Per O'Connor, J.; Rehnquist, C.J., White, Scalia, Kennedy, & Souter, JJ., concurring; Marshall, Blackmun & Stevens, JJ., dissenting); *Maryland v. Baxter Macon*, 472 U.S. 463 (1985) ("If [evidence] were obtained by means of an unreasonable search or seizure, or were the fruits of an unlawful arrest, the Fourth Amendment [to the U.S. Constitution] requires their exclusion" (per Justice O'Connor) (Brennan & Marshall, JJ., dissenting)).

\(^{250}\) See *Olmstead v. United States*, 277 U.S. 438, 484 (Brandeis, J., termed unlawfully obtained evidence as "contaminated.")


\(^{252}\) *Id.* at 589 ("once it is accepted that the Court has discretion ... to exclude illegally obtained evidence ... then it must follow that in a case where the violation of constitutional rights is involved the Court will also have a discretion to exclude evidence so obtained" (per Farlam, J.)).

\(^{253}\) See, e.g., *The Queen v. Ireland* (1970) 126 C.L.R. 321, 335 (Austl.) (Barwick, C.J., McTiernan, Windeyer, Owen, & Walsh, JJ., concurring) ("On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained with the aid of unlawful and unfair acts may be obtained at too high a price.") (emphasis added); *Brinegar*, 338...
Wrongful searches are also an offence in South Africa for which an innocent party like Farah could claim damages against the police for the losses that he incurred. Idi and his friends can also institute proceedings for the tort of trespass. Section 28 of the *Criminal Procedure Act* of South Africa deals with remedies for breach of the right to privacy that individuals are able to invoke. It provides that:

(1) A police official –

(a) who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25 (1); or

(b) who, without being authorized thereto under this Chapter -

(i) searches any person or container or premises or seizes or detains any article; or

(ii) performs any act contemplated in subparagraph (i), (ii) or (iii) of section 25 shall be guilty of an offence and liable on conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding six months, and shall in addition be subject to an award under subsection (2).

Jurisprudence from the European Court of Human Rights offers guidance on issues surrounding monetary compensation in situations where a court finds that a search has been conducted unlawfully. Citing article 8 of the European Convention on Human Rights, which provides for the inviolability of the home, the plaintiff in

U.S. at 181 (Jackson, J., dissenting) ("courts will exclude any evidence, if it is obtained in violation of the right to privacy").

255. *See also*, George Ragland, *The Right of Privacy*, 17 Ky. L.J. 85, 113 (1929) (an "action for damages" in tort is one of the remedies that is available "in case of the violation of the right of privacy," and the other remedy that is normally awarded is an injunction).


257. Article 8 of the European Convention on Human Rights provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of
Cremieux v. France\textsuperscript{258} alleged that the state had violated his right to privacy. In a unanimous decision the European Court of Human Rights found in his favour.\textsuperscript{259} It held that Mr. Crémieux had demonstrated that he had suffered ‘non-pecuniary’\textsuperscript{260} damage. It then awarded him FF 500,000\textsuperscript{261} (approximately 750,000 South African Rand). Precedents such as Cremieux can provide useful guides for the assessment of damages to refugees and asylum seekers in South Africa.

\textbf{VI. Conclusion: Walking the Talk – Some Proposals}

Many of the research subjects who participated in this study claimed they had been forced to flee owing to the civil war that has gripped Somalia since the fall of the central Government in 1990. A large percentage claimed that they had suffered harassment, persecution, torture, and acts of inhuman treatment at the hands of state and non-state agents. They fled to seek protection as refugees in South Africa. In order to meet their needs, asylum states must take specific measures. It is not enough for a refugee-receiving state to merely become party to international and regional human rights and refugee treaties, and pass domestic legislation in this area of law. Doubtless, these measures are important steps on the road towards the realization of the entitlements that are due to all human beings irrespective of status. However, cementing a country’s commitment to refugees and asylum seekers requires a combination of legal and non-legal measures, which will seek to promote the fundamental rights of those who have been uprooted from their home due to armed conflict and persecution. In other words, in order to become the “constitutional” state that Justice Ackerman described South Africa to be,\textsuperscript{262} more is required to ensure that legal entitlements trickle down to the beneficiaries. What is needed are dedicated, practical solutions.\textsuperscript{263} Both legal and non-legal measures are required to facilitate the enjoyment of core human rights. In the context of

\textsuperscript{259} Id. at 378.
\textsuperscript{260} Id.
\textsuperscript{261} Id. at 378-79.
\textsuperscript{262} See De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) at 799 (S. Afr.).
asylum, the experience of refugees and asylum seekers at the hands of SAP reinforces this argument.

In Swahili they say: Elimu ni taa, gizani huzagaa (Education is light, in darkness it shines).\textsuperscript{264} This wise saying can be interpreted to mean that refugees and asylum seekers should be given adequate information that will enable them to know their legal entitlements in the states where they have sought sanctuary. A field study on the refugee status determination process in Kenya found that many of the research subjects were unaware of the obligations the government owed them under international and domestic laws.\textsuperscript{265} Results from Singapore also show that, if victims are unaware of the process they can follow in order to realize their rights, it is likely that they will be unable to invoke available legal remedies.\textsuperscript{266} Yet this knowledge is crucial to ensuring that refugees and asylum seekers are aware they can seek civil and criminal relief for the violations that may have been committed against them. Having the necessary information is also one way of improving police accountability. In the cases involving Farah and Idi, if the victims knew of their rights, perhaps they would have sought remedies in the available courts and tribunals. If Abdi and Ghedi had made it known that they were aware of their legal rights perhaps the police would have acted professionally.

Accordingly, it is important for a government that is earnest about protecting refugees and asylum seekers to provide a ‘Rights Package’ upon arrival. The package should contain information in simple, non-legal language. It should also be translated into the various languages spoken by refugees and asylum seekers that come into the country. Pictorials, such as figure two above can be used to make the process for gaining refugee status easy to understand. Non-state organizations could complement state efforts by involving themselves in the formulation, updating or dissemination of these kits. However, legal services in many countries are expensive. Experience suggests that many refugees and asylum seekers are unable to afford legal representation in the countries to which they

\textsuperscript{264} Translation by authors.
flee. Thus, for a refugee or asylum seeker to effectively run a case in local, regional or international courts or tribunals, he or she will need legal aid from both state and non-state agencies. Otherwise, as is true of many of the research subjects in this study, many will ultimately be unable to realize their due process rights.

In light of the evidence of this study, we also need to question the training and retraining programmes of police in South Africa. Section 199 of the Constitution requires SAP to be conversant with issues surrounding human rights for citizens and others at all levels – international, regional and domestic. In societies that are governed by the rule of law, police are required to be accountable for their actions or inactions. Respect for human rights by law enforcement officials is one way by which a state can meet its international obligations towards its citizens and non-citizens. It is imperative for the police to see themselves as servants and guardians of the general public. To this end, law enforcement officials are required to comply with legal provisions that are contained in the Constitution and other relevant laws as well as any procedures and guidelines that may have been promulgated. The overall objective seems to rest on the desire to replace the culture of violence with a culture of human rights. Gordan Jackson, a former civilian member of the New South Wales (Australia) Police Board, writes that “better education and

267. For a further discussion of this theme, see Abuya & Wakira, supra note 18, at 184.
268. Id.
269. Sub-section 5 provides that SAP “must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.”
271. See Bruce Baker, Policing and the Rule of Law in Mozambique, 13 POLICING AND SOC'Y 139, 143 (2003) (“The principle of the rule of law is meant to restrain policing from behaviour that is partial, arbitrary or unnecessarily violent”). See also, Dorothy Bracey, A Cross-Cultural Consideration of the Police and Human Rights, 5 POLICE Q. 113 (2002); Wilbert Kapinga, The Police Force and Human Rights in Tanzania, 37 THIRD WORLD LEGAL STUD. (1990).
272. See Elaine Cumming, Ian Cumming & Laura Edell, Policeman as Philosopher, Guide and Friend, 12 SOC. PROBS. 276, 285 (1964-65) (if they are to meet their objectives, police need to take a “friendly” approach).
training” can “mitigate”\textsuperscript{273} some of the challenges that members of the police face when dealing with vulnerable individuals.

Although this research did not look into aspects relating to the initial training or refresher courses that SAP are required to undergo, one way of assessing the lessons learnt from these courses is by looking at the situation on the ground. As a Latin maxim counsels: \textit{non in tabulis et jus} (It is not in the books that the law is found). Granted, policing is never perfect. Indeed, there will always be a few “rotten apples” in any system.\textsuperscript{274} But can we afford to take comfort in this reality? This question must be answered in the negative. The experiences of refugees and asylum seekers that have been documented in this article question the effectiveness of the instructions that are provided to new recruits as well as to existing members of the police force. To fill some of the gaps that this study has highlighted, future empirical work should focus on, among other areas, the teaching objective that subsection 5 of section 199 of the Constitution sets out. Various studies have found that members of the South African police receive training in human rights.\textsuperscript{275} However, it is unclear whether the training that is offered in police colleges and/or training centres covers refugee-related issues. Thus, under the teaching-objective head, emphasis must be placed on the content and delivery of human rights and constitutional law modules, especially with regards to the rights of refugees and asylum seekers.\textsuperscript{276} In keeping with the constitutional requirement that members of the police must act in accordance with human rights values, further research in the area of asylum should seek to find answers to


\textsuperscript{274} For a further discussion of this subject, see Dale Sechrest & Pamela Burns, Police Corruption: The Miami Case, 19 CRIM. JUST. & BEHAVIOR 294 (1992); Mike Brogden & Preet Nijhar, Corruption and the South African Police, 30 CRIME, LAW & SOC. CHANGE 89 (1998); Arvind Verma, Cultural Roots of Police Corruption in India 22 POLICING INT’L J. 264 (1999).


\textsuperscript{276} See Ronald Tunehill, A Critical Analysis of Police Management, Education and Training, 4 Am. J. POLICE 154, 154 (1985) (training can improve the “chances for making a correct decision”).
questions such as why some members of the police force blatantly disregard human rights values that they are trained to uphold.

The aim of the international refugee protection regime is to offer surrogate protection to those who are unable to receive protection from their home country.\(^{277}\) This obligation arises when an individual's home state has failed to meet this duty. It is because of human rights abuses in their own countries that many asylum seekers are forced to seek shelter in other states. Whilst many hope to find protection,\(^{278}\) the experiences of individuals like Guuleed and Dalmar show that this dream is not always realised. Rather, life in South Africa is "nasty" and "brutish."\(^{279}\) To date, the all inclusive ('rainbow') nation that was envisaged in post-apartheid South Africa\(^{280}\) remains a pipedream for many victims of armed conflict and persecution.

### Appendix One

**List of Interviews With Refugees and Asylum Seekers**

<table>
<thead>
<tr>
<th>Interview Number</th>
<th>Participant Pseudonym</th>
<th>Date of Interview</th>
<th>Date of Arrival</th>
<th>Current Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>J 01</td>
<td>Abdihakim</td>
<td>8 Oct 2005</td>
<td>Feb 2004</td>
<td>Granted refugee status (Jan 2005)</td>
</tr>
<tr>
<td>J 02</td>
<td>Guuleed</td>
<td>8 Oct 2005</td>
<td>Dec 2004</td>
<td>Awaiting decision</td>
</tr>
<tr>
<td>J 03</td>
<td>Korfa</td>
<td>11 Oct 2005</td>
<td>18 Sept</td>
<td>Yet to register</td>
</tr>
</tbody>
</table>

\(^{277}\) See also, Horvath v. Secretary of State for the Home Department (2001) 1 A.C. 489, 495 (U.K.) (noting that "[t]he general purpose of the [Refugee] Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community" (per Lord Hope of Craighead)); Minister for Immigration and Multicultural Affairs v. Khawar (2002) 210 C.L.R. 1, 15 (Austl.) ("[T]he protection obligations imposed by the [Refugee] Convention upon Contracting States concern the status and civil rights to be afforded to refugees who are within Contracting States" (per McHugh and Gummow JJ of the Australian High Court)).

\(^{278}\) See Saad, Diriye and Osorio v. Secretary of State for the Home Department [2001] EWCA Civ 2008 (19th December, 2001), ¶ 2, (U.K.), (where Lord Phillips MR observed that refugees coming to the country are "anxious" to enjoy their "Convention rights").

\(^{279}\) Thomas Hobbes, **LEVIATHAN: PARTS I AND II** 107 (1958).

\(^{280}\) See S. AFR. CONST., Preamble ("We, the people of South Africa, Believe that South Africa belongs to all who live in it, united in our diversity").
<table>
<thead>
<tr>
<th>Interview Participant Number</th>
<th>Pseudonym</th>
<th>Date of Interview</th>
<th>Date of Arrival</th>
<th>Current Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>J04</td>
<td>Taban</td>
<td>11 Oct 2005</td>
<td>* 2003</td>
<td>Awaiting decision</td>
</tr>
<tr>
<td>J05</td>
<td>Dalmar</td>
<td>11 Oct 2005</td>
<td>Jan 2005</td>
<td>Awaiting decision</td>
</tr>
<tr>
<td>J06</td>
<td>Naasir</td>
<td>16 Oct 2005</td>
<td>May 2004</td>
<td>Awaiting decision</td>
</tr>
<tr>
<td>J07</td>
<td>Ghedi</td>
<td>16 Oct 2005</td>
<td>* 2004</td>
<td>Awaiting decision</td>
</tr>
<tr>
<td>J08</td>
<td>Mahamut</td>
<td>3 Nov 2005</td>
<td>Dec 2000</td>
<td>Granted refugee status (May 2001)</td>
</tr>
<tr>
<td>J09</td>
<td>Cawale</td>
<td>3 Nov 2005</td>
<td>Jan 2005</td>
<td>Awaiting decision</td>
</tr>
<tr>
<td>J10</td>
<td>Sahal</td>
<td>3 Nov 2005</td>
<td>Jan 2005</td>
<td>Awaiting decision</td>
</tr>
<tr>
<td>J12</td>
<td>Jama</td>
<td>5 Nov 2005</td>
<td>April 2004</td>
<td>Awaiting decision</td>
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<tr>
<td>J13</td>
<td>Basra</td>
<td>8 Nov 2005</td>
<td>June 2004</td>
<td>Awaiting decision</td>
</tr>
<tr>
<td>J15</td>
<td>Farah</td>
<td>8 Nov 2005</td>
<td>March 2005</td>
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</tr>
<tr>
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<td>June 2005</td>
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<tr>
<td>J17</td>
<td>Oriahe</td>
<td>9 Nov 2005</td>
<td>August 2005</td>
<td>Yet to register</td>
</tr>
</tbody>
</table>

*The interviewee was unable to recall the month of entry into South Africa*
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