LAWYERS FOR HUMAN RIGHTS

Lawyers for Human Rights Situation Report:

Refoulement of Undocumented Asylum-seekers at South African Ports of Entry

With a particular focus on the situation of Zimbabweans at Beitbridge

September 2011

Executive Summary

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

This right is enjoyed by all persons who face persecution, a determination which, under South African law, only the Refugee Status Determination Committee (RSDC) is qualified to make.[1] As a result, no South African official who is not a Refugee Status Determination Officer (RSDO) is authorised to prevent an asylum-seeker from making an application for protection in South Africa. Preventing an application is akin to refusing protection, a decision which is not within the authority of any person or body other than a duly appointed RSDC and risks violating the right of *non-refoulement* held by an asylum-seeker.

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

Furthermore, asylum-seekers who are unlawfully prevented from entering South Africa through a recognised border post are left with no choice but to enter the territory by irregular means in order to seek asylum. Though no prejudice is visited upon these irregular migrants upon their arrival at a RRO, their journey to these offices through the border regions between South Africa-Zimbabwe and South Africa-Mozambique puts them at high risk of violations to their rights to personal security, dignity, health, bodily integrity and life. The borderline between Zimbabwe and South Africa is of particular concern as the site of a humanitarian crisis; reports of rape, gang rape, assault, people smuggling, human trafficking, drowning and theft in these zones abound as asylum-seekers traversing

[1] See s24 of the South African Refugees Act 130 of 1998, as amended by the Refugees Amendment Act, No. 12 of 2011. Hereafter referred to as the 'Refugees Act'.

the border on foot continue to be vulnerable to exploitation and attack from gangs of thugs operating along both sides of the border. Lawyers for Human Rights considers that, for as long as the state continues to practice the unlawful refusal of entry to Zimbabwean asylum-seekers at the Beitbridge border post, it is indirectly responsible for all violations which are visited upon these persons as they enter the country irregularly.

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1. Introduction

Zimbabwean society has for the last decade faced a myriad of crises on the economic, social, humanitarian and political fronts. While it's economic and social crises have received careful analysis, numerous other human rights abuses have also taken place. Lawyers for Human Rights wishes to place particular emphasis on the credible and verifiable reports of ethnic discrimination and mass de-nationalisation. Furthermore, cases of intimidation, harassment and violent attacks on human rights defenders, political opponents and other dissenting voices opposed to the Zimbabwean government continue to be reported.

At the year-end in 2010, UNHCR reported that, globally, 24,089 persons of Zimbabwean origin had been recognized as refugees under the 1969 OAU Convention or the 1951 UN Convention. This represents the number of persons who have been definitively determined as meeting the criteria set out in these international conventions relating to refugees. It is thus definitive proof that Zimbabwe remains, as it has long been[2], a "refugee-producing country".

Despite this, the refugee character of the flow of Zimbabwean migrants across the border is often denied.[3] Furthermore, the rhetoric that all Zimbabweans are "economic migrants" is used to justify the non-admittance of Zimbabwean asylum-seekers who approach South African immigration officials at the Beitbridge border post. While asylum-seekers are legally entitled to enter the country and gain access to our Refugee Reception Offices using a transit permit known as a 'section 23 permit' (its origins being in section 23 of the Immigration Act[4]), South African immigration officials have been refusing to issue to these to Zimbabweans on the grounds that they are not *genuine* asylum-seekers. As a result, Zimbabweans not in possession of a valid travel document are refused entry to South African territory irrespective of their potential protection needs.

Such reasoning on the part of our immigration officials ignores the fact that, regardless of our interpretation of the situation in Zimbabwe, we are under an obligation to assess the protection needs of any person claiming asylum. Sending asylum seekers back to their country of origin without examining their *individual* claim is contrary to the

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[2] Lawyers for Human Rights *A Written Submission Prepared by Civil Society Organisations Working On the Refugee and Asylum Seeker's Human Rights Issues in South Africa (2006):* http://cormsa.org.za/wp-content/uploads/Research/SADC/REPORT%20ON%20THE%20TREATMENT%20OF%20ZIMBABWEAN%20REFUGEES%20_3.pdf

[3] Ibid.

[4] Immigration Amendment Act 13 of 2011

international refugee law principle of *non-refoulement* (defined as: the principle that a country must not return a person to a place where they would face persecution), guaranteed by South Africa, as a party to the 1951 Convention Relating to the Status of Refugees (Article 33). Furthermore, refusal of entry is expressly prohibited by Section 2 of South Africa's Refugees Act (No. 130 of 1998) and is an unlawful exercise of the function of a RSDC.

Further, those asylum-seekers who are denied safe passage into South African territory which the s23 permit guarantees are compelled to enter the territory irregularly in order to make their application for asylum in South Africa. This places these persons at high risk of exploitation and abuse at the hands of the violent muggers and trafficking agents that operate along the borderline. Police and SANDF remain incapable of protecting migrants from harm as they journey through the bushes and the Limpopo River into South Africa. The state cannot ignore its compliance in this violence for as long as it refuses to issue s23 permits to undocumented Zimbabwean asylum-seekers. The same is true for Somalis trying to enter South Africa through Mozambique, even though asylum seekers entering along the Komatipoort border line do not experience the same levels of violence and criminality as in Beitbridge.

The following paper will outline these arguments by analysing the law as it relates to s23 permits in the Immigration Act and examining the illegality of the current practice of refusal of entry to undocumented Zimbabweans in the light thereof. We will then turn our attention to our protection concerns; the sensitivity of the issue of documentation in the Zimbabwean context and the risks which those who are denied entry face in crossing irregularly into South Africa.

2. The Law Relating to Section 23 Permits

People fleeing persecution do not normally travel with identification documents; they may have fled too quickly to gather their belongings, have lost the documents during the course of their journey or have left them behind out of fear of being identified while in transit to a safe country. In other circumstances, the very nature of the persecution faced by the asylum-seeker may have resulted in identity documents being withheld. It is thus inappropriate to require an asylum seeker to produce a valid passport or other identity document in order to enter South Africa.

The possibility that asylum-seekers may well be undocumented, and hence unable to secure passage into the country by ordinary means, is specifically provided in South African law relating to asylum-seekers access to the territory. The law makes two concessions for asylum-seekers, protecting them from ordinary standards for migration:

Firstly, the Refugees Act does not require asylum seekers and refugees to have entered the Republic through a border post.[5] Secondly, and most importantly for the purposes of this report, s23 of the s 23 of the Immigration Act No. 13 of 2002 (as amended by s15 of the Immigration Amendment Act No. 13 of 2011), which states that:

"The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum."

The purpose of this provision is to ensure that undocumented asylum-seekers are allowed safe passage into South Africa, despite their lack of a travel permit issued from their own authorities, so as to register their claim at a Refugee Reception Office within the territory. In theory, thus, any person who presents at the Beitbridge border post is able to approach South African officials and declare their intention to apply for asylum in South Africa. Immigration officials should then issue the asylum-seeker with a non-renewable 5-day asylum transit permit in terms of s 23 of the Immigration Act.

The prescribed procedure under which an asylum transit visa may be granted is outlined in Section 20 of the Immigration Regulations GN R616, GG 27725, 27 June 2005 as follows:

"A person claiming to be an asylum seeker contemplated in section 23(1) of the Act shall apply for an asylum transit permit by completing a form substantially corresponding to Form 17 contained in Annexure A."

Form 17 asks only for some personal details of the asylum-seeker, a photograph, fingerprint and a signed acknowledgement of understanding that he or she is under an obligation to present within the prescribed time-period (now 5 days) to the a designated RRO. Not a single question relates to the substantive content of the asylum-seekers claim to refugee status.

The Immigration Act and its Regulations thus bestow no authority on border officials to conduct interviews relating to the validity or otherwise of the asylum-seekers claim. Furthermore, border officials are given no authority to withhold the s23 transit permit to any person who vocalises the desire to apply for asylum. Once a person claims to be an asylum seeker to an official at a South African port of entry, s23 of the Immigration Act and its Regulations are triggered, removing all discretion for denial of entry and necessitating the issuance of the asylum transit visa.

[5] Section 21(4) of the Refugees Act (Act no 130 of 1998)

3. The Current Practice: Refusal of Entry at Beitbridge and Komatipoort

The Beitbridge Border Post remains the main port of official entry for Zimbabweans travelling to South Africa. It processes the vast majority of the persons travelling between the two countries. Musina, a South African town based 18 kilometres from this port of entry, hosts a Refugee Reception Office (RRO) where claims for asylum can be lodged. Beitbridge is thus a natural port of entry for any person from Zimbabwe wishing to seek asylum in South Africa. Even for those who do not wish to make their application for asylum in Musina, Beitbridge remains the most logical crossing point; it is connected only to the national road which directly links the border to Johannesburg, Durban and Cape Town. These cities host the only other Refugee Reception Offices in the country and transport running between these centres and the border is easy to access. By comparison Komatipoort as well as Beitbridge have been the primary entry points for Somali asylum seekers who enter South Africa.

In the last decade, the number of persons crossing from Zimbabwe to South Africa to seek asylum in our territory has steadily increased. According to the UNHCR, South Africa has been receiving the largest numbers of new asylum seekers for the last four years. As a result, the Beitbridge border post is an extremely busy centre.

Combining the dual factors of (1) the number of Zimbabweans that are present in our territory as asylum-seekers, and (2) the fact that Musina is the natural crossing point from Zimbabwe into South Africa and strategically located only 18kms from a RRO, one would assume that the number of s23 permits being issued out of this border post would closely match the number of Zimbabwean asylum-seekers present in the territory, or at least in Musina.

However, LHR was informed in an interview held in August of 2011 by a key official at the Musina RRO that no more than 6 Zimbabweans had presented in Musina with a s23 permit in the last six months. This was confirmed by an interview with a senior Immigration Official at Beitbridge border post who confirmed that s23 permits are no longer issued to Zimbabweans. A recent spot survey conducted of those present at the Musina RRO confirms that no Zimbabwean asylum seeker was in possession of a s23 permit.[6]

On the basis of interviews conducted with Zimbabwean asylum-seekers present in Musina and key immigration officials employed at Beitbridge, it is our understanding that, as of March/April 2011, the Department of Home Affairs has begun systematically refusing entry to Zimbabweans who are not able to produce a valid travel document. Persons who identify themselves as asylum-seekers are treated no differently to an ordinary traveller wishing to gain access to the territory without the requisite documentation.

[6] The methodology and findings of this survey are dealt with in more detail under section 3(a).

Dating back to June 2011, LHR has been collecting the testimonies from Zimbabwean asylum-seekers who attest to the following:

- Upon approaching the first gate of entry into the South African side of Beitbridge (known locally as 'foot and mouth'), South African immigration officials or policemen request to see a passport.
- The Zimbabwean makes it clear that he or she is not in possession of a passport, but that he or she wishes to seek asylum in South Africa.
- The Zimbabwean is told that without a passport he or she will not be allowed entry into South African territory. The Zimbabwean is denied entry into the Republic of South Africa and forced to return to Zimbabwe or cross into South Africa by irregular means.

Despite this evidence, in our interviews with DHA officers operating at a high management level at Beitbridge border post, the fact that this practice is occurring regularly/as a matter of procedure has been denied. One of the explanations offered for the complete lack of s23 permits being issued to Zimbabweans at Beitbridge was that "no Zimbabwean has requested a s23 permit in the last few months." One official stated that if a *genuine* asylum-seeker claims asylum they will "of course" be granted with a s23 permit. When pressed as to why Zimbabweans are no longer issued with such documents the response was that this was because "Zimbabweans are *not genuine asylum-seekers*".

To return to the situation at Komatipoort, LHR is aware of a group of Somalis who intend to apply for asylum and who are currently detained at a police station in Komatipoort. They have been detained since the 10th September and have been advised that they will be sent to the Lindela Repatriation Facility to be deported. Despite requests for an intervention from the Refugee Affairs Directorate these asylum seekers continue to languish in detention pending deportation. While this is not a refusal of entry, they have been refused s23 permits and their request to lodge asylum applications has not been considered. They are being treated as ordinary illegal foreigners without any recourse to the protections afforded to them in the Refugees Act.

4. Illegality of the current practice

The practice of refusal of entry to undocumented Zimbabwean asylum-seekers is unlawful. There are two lines of reasoning for the illegality of this practice:

a. Refusal of Entry as *Refoulement*

Within the framework of the 1951 Convention[7], to which South Africa is signatory, the principle of non-refoulement constitutes an indispensable and non-derogable element of international refugee protection.[8] It is significant, in so far as the issue of refusal of entry is concerned, that the principle of non-refoulement reaches beyond the protection of recognised refugees only. Indeed, asylum-seekers, at every stage, are equally entitled to *non-refoulement*.

The protection against *refoulement* under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention.[9]

Under the South African Refugees Act, a document issued in terms of section 24 of the Act confirms the status of acknowledged refugees. This document is, however, merely declaratory in nature. Given that a person becomes refugee within the meaning of the 1951 Convention just as soon as he/she meets the criteria contained in the definition of a refugee, "a person does not become a refugee because of recognition, but is recognized because he or she is a refugee."[10]

It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not yet had their status formally declared.[11] The principle of *non-refoulement* is thus of special relevance to asylum-seekers. As such persons *may* be refugees; it is a recognized principle of international refugee law that they must not be turned away, returned or expelled prior to a final determination of their status being made. Thus, as a general

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[7] *The 1951 united Nations Convention Relating to the Status of Refugees.*
[8] See Article 33 of the Convention.
[9] Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term "refugee" shall apply to any person who "owing to a 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 [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it".
[10] See: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, para. 28.
[11] This has been reaffirmed by the Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) "*Non-refoulement*" (1977). UNHCR Executive Committee Conclusions are available at http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=excom&id=3bb1cd174 (last visited on 23 September 2006).

rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair asylum procedures.

As such, safeguards against refusal of entry are a common feature in legal provisions dealing with non-refoulement. The Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967,[12] at Article 3, states that:

> "No person referred to in Article 1, para. 1, shall be subjected to measures such as **rejection at the frontier** or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

The OAU Convention Governing Specific Aspects of Refugee Problems in Africa[13], Article II(3) reads:

> "No person shall be subjected by a Member State to measures such as **rejection at the frontier**, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened..."

Section 2 of South Africa's Refugees Act 130 of 1998 expressly prohibits **refusal of entry** into the Republic of any person, if it would result in that person having to return to a country where he or she may be subjected to persecution or his or her life would be at risk on account of events seriously disturbing or disrupting the public order. Further, section 6 of Refugees Act specifically states that the Act must be read together with 1951 convention, OAU convention, the Universal Declaration of Human Rights and any other any other international agreement to which it is part.

b. Pre-screening

Pre-screening describes the act of making a determination as to the validity or otherwise of an asylum-seekers claim *prior to their being granted access to make representations to the refugee status determination committee* (RSDC). It occurs when state representatives make an initial assessment of whether an individual is eligible to apply for asylum. The aim of this vetting is to prevent certain would-be asylum-seekers, whose claims are found to be of a non-refugee nature, from accessing the asylum process.

[12] A/RES/2312 (XXII), 14 December 1967.
[13] 1969, 1001 U.N.T.S. 45 entered into force 20 June 1974 [hereinafter, "1969 OAU Convention"].

The practice of pre-screening is illegal. In terms of both the Refugees Act and the Immigration Act, no level of discretion is bestowed upon any government officials to make any decisions regarding the validity of a claim to refugee status. The relevant provisions of the Refugees Act and the Regulations make it clear that applications for asylum are to be received by refugee reception officers, at RROs, and that the decisions in respect of such applications for asylum are to be taken by a RSDC only. Such decisions must be taken on the basis of a duly completed B1-1590 form. This is a detailed questionnaire asking a broad range of questions pertinent to refugee status and appears as annexure B1-1590 of the Regulations promulgated in terms of the Refugees Act. These provisions are compulsory and a material prerequisite for a decision to be taken on any application for asylum.

It follows that state officials who are not RSDOs are also *not mandated to make decisions regarding who should or should not be granted access to the RROs/RSDCs*. This is because blocking access to an RSDC would be akin to making a decision to reject a person's application for asylum; both deny the asylum-seeker access to the protection that is owed to refugees. In fact, it is worse. In terms of the Regulations to the Refugees Act, the decision to reject an application for asylum is taken on the basis of the B1-1590 form and is made by a committee which qualified and duly appointed to do so. Refusal of entry, on the other hand, takes place solely on the basis of a brief interview held, without privacy, at the border post by an official who has no training in refugee law. There is no compliance with the procedures set out in the Refugees Act and Regulations prior to the decisions to reject these would-be applicants.

By refusing entry to the territory, the state official is not only denying access to the RRO by passing an unqualified judgement on the validity of the asylum-seekers claim, he or she is also acting as a block to the other procedural safeguards enshrined in the Refugees Act, the Immigration Act and the Constitution. For an asylum-seeker who was never granted access to the territory as a result of pre-screening at the border can never appeal the decision and thus suffers a violation of their rights to procedural justice and due process. Furthermore, the asylum-seeker would not be subject to the ordinary procedures and protective measures prescribed for deportation, having never officially entered the territory. With regard to screening asylum seekers with the aim of preventing some of them from accessing the asylum process, the High Court of South Africa in *Tafira and Others v. Ngozwane and Others 12960/06* ruled that the procedures adopted by the Johannesburg Refugee Reception Office that prevented or impeded asylum applicants from exercising their rights in terms of the Refugees Act was a violation of their Constitutional rights.

5. S23 as a guarantee of 'safe passage' into the territory

The humanitarian consequences of this breach of national and international law are grave. As a direct result of denial of entry, asylum-seekers are forced to cross borders irregularly in order to seek protection as refugees in South Africa, with grave implications on personal safety and health including:

- Death by drowning when trying to cross the Limpopo River.
- Rape and other forms of assault: reports of this nature are commonplace.
- Untreated malaria: being unable to access malaria services provided by the Department of Health at the formal border post results in people travelling for long distances within South Africa with untreated malaria.
- Theft of all chronic medication or health related documents held by asylum-seekers, making it difficult to for these persons to access chronic treatment in South Africa.
- Theft of identity documents (such as birth certificates) held by asylum-seekers, which documents may otherwise have assisted the asylum-seeker to discharge the burden of proof in making their claim to refugee status.
- Theft of all personal belongings: persons regularly arrive in Musina with reports of all of their savings, clothing and other personal effects having been stolen. These robberies are often accompanied by a high level of violence or threats thereof.
- An industry of corruption: persons, known locally as '*malaisha*', smuggle asylum-seekers across the border and extract exorbitant fees from asylum-seekers. Often, as asylum-seekers are led further and further into the bushes, *malaisha* demand more and more money. Those who are unable to pay report being robbed, assaulted and/or handed over to violent thugs waiting in the bushes.

6. Zimbabweans Unable to Access Documentation

Lawyers for Human Rights wishes to highlight that the issue of access to documentation is acutely sensitive in the Zimbabwean context. The assumption that Zimbabweans are not genuine asylum-seekers is not only an appropriate justification for refusal of entry – it is also untrue. In addition to the numbers of people who have sought asylum as a result of persecution and torture by the Zanu-PF regime, Lawyers for Human Rights has identified a new category of 'social group' which has been categorically discriminated against in a process of denationalisation in Zimbabwe:

In its original, post-independence Constitution, anyone born in Zimbabwe to a citizen, permanent resident or ordinary resident was a citizen by birth. In 1983, Zimbabwe amended the Constitution to prohibit dual nationality and introduced an amendment to the Citizenship Act requiring renunciation of foreign citizenship in order to retain Zimbabwean citizenship. In 2001[14] the government again required anyone with even a theoretical claim to foreign citizenship to renounce that citizenship, this time in accordance with foreign law, and to reapply for Zimbabwean citizenship by certification within a 6 month period. Critics report that this was a political measure designed to disenfranchise voters with questionable allegiances. It is estimated that several hundred thousand African migrants and their children born in Zimbabwe are currently stateless[15]; they were stripped of their citizenship by this amendment, which was advertised only in Harare and only to the white European population. If they did not access their parents' citizenship by descent, due either to their parents' death or lack of documentation or due to a conflict of laws, such persons were rendered stateless.

A 2009 Constitutional amendment seems to provide citizenship to persons with one Zimbabwean citizen parent and one foreign parent. However, these individuals continue to be denied protection and told that they are not citizens. In Zimbabwe, they are consistently unable to access citizenship without legal action. Even when a court orders the Registrar-General to recognise an applicant's citizenship, since 2002 the Registrar-General has consistently continued to deny individuals citizenship through (intentional) misinterpretation of the law. This procedure has been confirmed by human rights groups operating in Zimbabwe.[16]

Refugee law as regards the definition of 'persecution' is evolving constantly. The removal of the right to nationality is an issue which is increasingly being addressed in foreign courts and refugee tribunals as being treatment which reaches the definition of persecution. Persuasive precedent, emanating from a unanimous decision of the Appeal Board sitting in the United Kingdom, in the case of *EB (Ethiopia) v Secretary of State for the Home Department*[17] establishes that:

- *De facto* deprivation of nationality, and its attendant citizenship rights, is capable of amounting – in and of itself - to persecution within the meaning of the Convention, if done for a Convention reason.
- Removing a person's nationality on the grounds of their foreign ancestry, as happened in this case, amounts to persecution on the listed grounds of race and membership of a particular social group.

[14] See Zimbabwe's Citizenship Amendment Act No. 12 of 2001
[15] See "Stateless Former Farm Workers in Zimbabwe," by KatinkaRidderbos of the Internal Displacement Monitoring Centre, available at http://www.fmreview.org/FMRpdfs/FMR32/73.pdf [last visited on 16 August 2011].
[16] See "Zimbabwe Citizenship Battles", by TichonaShoria of Institute for War & Peace Reporting, available at http://iwpr.net/print/report-news/zimbabwe-citizenship-battles [last visited on 19 August 2011].
[17] [2007] EWCA Civ 809; [2009] Q.B. 1 (CA (CivDiv)).

- Persecution may take the form of administrative and other measures which are implemented in a discriminatory manner. If a state arbitrarily excludes one of its citizens, cutting her off from the rights and benefits enjoyed under such citizenship, such person may legitimately say that he is being persecuted and that she fears persecution in the future.

At the very least, the issue of denationalisation in the Zimbabwean context, and it's very possible link with ethnic discrimination and persecution, is an issue which deserves to be adjudicated by a qualified refugee status determination officer.

Further, the lack of access that denationalised asylum-seekers have to valid documentation affirming their identity and their right to travel regularly ought to a make South African border officials particularly sensitive to the protective function of the s23 permit.

7. Additional Protection Concerns

Lawyers for Human Rights is concerned that the law at present protects only those who are informed of their rights and who voice their desire to apply for asylum. S23 of the Immigration Act specifically requires that any undocumented person who wishes to gain access to the territory as an asylum-seeker must, in accordance with s23 of the Immigration Act, actively claim asylum before the right to an asylum transit visa is triggered.

No mechanism is in place to safeguard against the *refoulement* of refugees who do not know to identify themselves as such. LHR's interviews with Zimbabwean asylum-seekers present in Musina reveal that many who have managed to reach the first gate of entry on the South African side of the border are turned away as soon as officials become aware that the person is undocumented. No further questions are asked and the person is not given the opportunity to make any further representations.

Lawyers for Human Rights thus wishes to raise the concern that officials at the Beitbridge border post are insufficiently trained in refugee law and procedures to ensure that migrants are given adequate opportunity to indicate their intention to claim asylum.

8. Dealing with economic migrants

While Lawyers for Human Rights acknowledges the inherent right of the state to limit economic migration, emphasis must be placed on the need to ensure that the mechanisms introduced therefore are compliant with the law relating to asylum and sensitive to the potential protection needs of migrants.

9. Conclusion

We submit that such a process is unlawful as it violates both local and international human rights law. Sending asylum seekers back to their country of origin without examining their individual claim is contrary to the principle of *non-refoulement* (the principle that a country must not return a person to a place where they would face persecution), guaranteed by South Africa, as a party to the 1951 Convention Relating to the Status of Refugees (Article 33) and the OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

More specifically, we submit that the determination of an asylum seekers asylum claim must be conducted by a properly trained Department of Home Affairs official, namely a RSDC as contemplated for in Section 24 of the Refugees Act and its Regulations, which body has the requisite knowledge of international and domestic refugee law and refugee status determination procedures. It cannot be stressed enough that it is not the responsibility of officials at ports of entry to conduct any sort of status determination that may prevent an asylum seeker from entering the territory and duly lodging an application for asylum at one of the designated RROs throughout the country.

Further, Lawyers for Human Rights wishes to highlight state compliance in the continued human rights violations which occur as asylum-seekers who have been denied asylum transit visas are forced to cross irregularly into the territory. For as long as the state continues to practice the unlawful refusal of entry to Zimbabwean and other asylum-seekers at border posts, it must accept a degree of complicity for the violations which are visited upon these persons as they enter the country through irregular means.

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