



Blind Alleys

PART II
Country Findings:
South Africa

February 2013

The Unseen Struggles
of Lesbian, Gay, Bisexual,
Transgender and Intersex
Urban Refugees in Mexico,
Uganda and South Africa



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Cover art is by **Marconi Calindas**, an accomplished Filipino artist based in San Francisco. His paintings use vibrant colors and lines to express social and environmental concerns. The cover art, "To Carry You," emphasizes the support that LGBTI refugees desperately need on the complex path to safety. More information about the artist is available at www.marconicalindas.com.

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SIGRID RAUSING TRUST



Blind Alleys

The Unseen Struggles of Lesbian, Gay, Bisexual, Transgender and Intersex Urban Refugees in Mexico, Uganda and South Africa

PART II Country Findings: South Africa

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Glossary of Terms

SEXUAL ORIENTATION AND GENDER IDENTITY

Bisexual refers to an individual who has the capacity for profound emotional, affectional, and/or sexual attraction to and/or intimate and sexual relations with people regardless of their gender or sex.¹

Gender Identity is each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth.²

Gay refers to a self-identifying man who has the capacity for profound emotional, affectional and/or sexual attraction to and/or intimate sexual relations primarily with other men.³

Homophobia refers to a hatred or fear of homosexuals – that is, lesbians and gay men – sometimes leading to acts of violence and expressions of hostility.⁴

Intersex refers to a person who is born with reproductive or sexual anatomy and/or chromosome patterns that do not fit typical definitions of male or female.⁵

Lesbian refers to a self-identifying woman who has the capacity for profound emotional, affectional, and/or sexual attraction to and/or intimate and sexual relations primarily with other women.⁶

LGBTI is the acronym for “lesbian, gay, bisexual, transgender, and/or intersex.”

Sexual Orientation refers to a person's capacity for profound emotional, affectional, and/or sexual attraction to and/or intimate and sexual relations with individuals of a different gender, the same gender, or more than one gender.⁷

Sexually and Gender Non-conforming (SGN) is an umbrella term used to refer to individuals whose sexual practices, attractions, and/or gender expression are different from the societal expectations based on their assigned sex at birth.⁸

Transgender is “[a]n umbrella term for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth.”⁹

A **transgender woman** is a person who was assigned male at birth but identifies as a woman.¹⁰

A **transgender man** is a person who was assigned female at birth but identifies as a man.¹¹

Transphobia refers to negative attitudes and feelings toward transgender people. Transgender people feel that their gender identity (self-identification) does not correspond to one's assigned sex (identification by others as male or female based on genetic sex).¹²

1 See *Media Reference Guide – Transgender Glossary of Terms*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION (GLAAD), [hereinafter *GLAAD Guide*] <http://www.glaad.org/reference/lgb> (last visited Nov. 5, 2012).

2 INT'L COMM'N OF JURISTS, THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6 n.2 (2007), available at http://yogyakartaprinciples.org/principles_en.pdf (last visited Nov. 5, 2012).

3 *GLAAD Guide*, *supra* note 1.

4 *Homophobia*, ANTI-DEFAMATION LEAGUE, <http://www.adl.org/hatepatrol/homophobia.asp>

5 *FAQ*, ADVOCATES FOR INFORMED CHOICE, <http://aiclegal.org/faq> (last visited June 6, 2012)

6 *GLAAD Guide*, *supra* note 1.

7 INT'L COMM'N OF JURISTS, THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6 n.1 (2007), available at http://yogyakartaprinciples.org/principles_en.pdf.

8 See *Trans Basics: Glossary of Terms*, GENDER IDENTITY PROJECT OF THE LESBIAN, GAY, BISEXUAL, & TRANSGENDER COMMUNITY CENTER, <http://www.gaycenter.org/gip/transbasics/glossary> (last visited Nov. 5, 2012).

9 NAT'L CTR. FOR TRANSGENDER EQUAL., TRANSGENDER TERMINOLOGY 1 (2009), available at http://transequality.org/Resources/NCTE_Trans-Terminology.pdf.

10 *Id.* at 1.

11 *Id.*

12 *GLAAD Guide*, *supra* note 1.

REFUGEES AND ASYLUM

An **asylum seeker** is someone who has applied for or is in the process of seeking asylum from the government of the country of asylum, but who has not yet been granted that status.

Information Systems refer to the combination of people, processes, data, and technology. A website with job postings is an example of an information system.

Persecution, for the purposes of this report, refers to serious harm or threats of harm perpetrated on account of race, religion, nationality, political opinion, or membership of a particular social group. There is no universally accepted definition of “persecution.” Threats to life or freedom and/or other serious human rights abuses always amount to persecution; however, lesser harms or threats may cumulatively constitute persecution. Adjudicators should generally apply a totality-of-the-circumstances test to assess persecution.¹³

A **refugee** is a 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”¹⁴

Refugee Status Determination (RSD) is the process through which state officials in the country of asylum or UNHCR determine if an asylum seeker is a refugee based on “eligibility criteria under international or regional refugee instruments, national legislation or UNHCR's mandate.”¹⁵

Social Network refers to a group of individuals who share a commonality. The common element of the social networks discussed in this report is the bond between refugees based on their common SGN status.

ACRONYMS

AIDS	Acquired Immunodeficiency Syndrome
AMCS	African Centre for Migration and Society
ANC	African National Congress
APRM	African Peer Review Mechanism
CoRMSA	Consortium for Refugees and Migrants in South Africa
DHA	Department of Home Affairs
HIV	Human Immunodeficiency Virus
IAM	Inclusive and Affirming Ministry
LGBTI	Lesbian, Gay, Bisexual, Transgender, and Intersex
NGO	Nongovernmental Organization
ORAM	Organization for Refuge, Asylum & Migration
PRM	U.S. Department of State's Bureau of Population, Refugees, and Migration
RAB	Refugee Appeal Board
RRO	Refugee Reception Office
RSD	Refugee Status Determination
SGN	Sexually and Gender Nonconforming
SGBV/P	Sex and Gender Based Violence or Persecution
UNHCR	United Nations High Commissioner for Refugee

13 UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 51, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992).

14 Convention Relating to the Status of Refugees art. 1 § 2, July 28, 1951, 189 U.N.T.S. 150.

15 UNHCR, Self-Study Module on Refugee Status Determination 2 (Sept. 1, 2005), <http://www.unhcr.org/refworld/pdfid/43141f5d4.pdf>.

I. Executive Summary

South Africa is home to one of the most progressive constitutions in the world, as well as an exemplary refugee status determination law. However, this progressive legislation is undermined by a severely overburdened asylum system and widespread discrimination against outsiders and the SGN¹⁶ community. These challenges prevent SGN refugees from accessing rights and services to which they are entitled, impact their ability to integrate into South African society, and even make it difficult to survive.

To better understand these challenges and develop solutions, ORAM – Organization for Refuge, Asylum & Migration, conducted a series of interviews with SGN refugees, NGO staff, and other stakeholders. These interviews confirmed reports of victimization and discrimination against SGN refugees and asylum seekers by both official and non-state actors. Many of the refugees who participated in our study reported experiences of arbitrary arrests, harassment, and discrimination from the authorities. A few interviewees reported needing to bribe security guards or other government officials in order to access the refugee status determination system. While xenophobia was cited as the primary motivation for the abuse, some interviewees felt compelled to hide their sexual orientation or gender identity from government officials due to perceived homophobia.

These SGN interviewees also reported abuse and marginalization at the hands of non-state actors. These participants suffered mistreatment primarily while waiting in queues outside the Refugee Reception Offices (RROs) or while living among communities comprised of refugees from their countries of origin. Discrimination within these refugee communities hinders SGN individuals' abilities to form social and community bonds and results in isolation and exclusion.

Xenophobic violence and rampant discrimination against SGN refugees and asylum seekers also impacts their ability to find work and to meet their needs for basic subsistence. Unable to find jobs, some SGN refugees turn to sex work in order to survive.

SGN refugees, and particularly transgender individuals, also face obstacles in obtaining housing. While their experiences with shelters were mixed, some interviewees reported suffering xenophobic violence, prejudice, and crime. In some cases, SGN refugees face the possibility of eviction if their landlords, family, or flatmates become aware of their sexual orientation or gender identity. Interviewees also reported barriers to accessing basic health care, as well as discrimination in the provision of these services. Many face prejudice in public health facilities and abuse from healthcare providers due to their status as foreigners.

While these interviews revealed a number of problems faced by SGN refugees in South Africa, they also provided much needed guidance as to how protection of this vulnerable population can be improved. To this end, ORAM has developed a detailed set of recommendations aimed at improving the quality of services provided to SGN refugees and closing those protection gaps which currently exist.



This publication introduces the term “sexually and gender nonconforming” (“SGN”) to refer to refugees of variant sexual orientations and gender identities. “SGN” is offered as an alternative to the prevalent Western agglomeration “LGBTI” (Lesbian, Gay, Bisexual, Transgender, and Intersex). While the LGBTI rubric has been adopted in many communities worldwide, most members of sexual and gender minorities are either unaware of the terminology or actively avoid such self-identification. “SGN” is an attempt to encompass all sexual and gender minority refugees, including those who do not conform to Western constructs.

¹⁶ The acronym “LGBTI” is used increasingly in the refugee field to refer collectively to individuals of variant sexual orientations or gender identities. See, e.g., U.N. High Comm’r for Refugees, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/12/01 (Oct. 23, 2012), available at <http://www.unhcr.org/refworld/docid/50348afc2.html>. The “LGBTI” agglomeration is based on modern Western constructs which are unknown or are avoided in many areas of the world. “LGBTI” further presumes that members of its constituent groups identify within the fixed categories of “lesbian,” “gay,” “bisexual,” “transgender,” and “intersex.” In actuality, SGN persons worldwide are largely unfamiliar with or decline to adopt these identities. When refugee adjudicators and others require conformance to these narrow categories in order to qualify applicants as “members of a particular social group,” those who do not conform may be excluded from protection. See Laurie Berg & Jenni Millbank, Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants, 22 J. REFUGEE STUD. 195 (2009).

II. Purpose of Study and Methodology



To identify protection gaps and major issues facing LGBTI asylum seekers and refugees in South Africa, ORAM conducted interviews in Johannesburg, Pretoria, and Cape Town with a wide variety of stakeholders:¹⁷

- SGN asylum seekers and refugees
- Human rights authorities and government asylum authorities
- Police, educational, and health authorities
- Local NGOs and service providers
- International refugee NGOs
- SGN organizations and community members
- Academic Institutions

This research was designed and conducted by ORAM to develop field-based tools to enhance the identification and protection of SGN refugees. Researchers sought to find links between SGN social and support networks, on the one hand, and those specialized in human rights, migration, and asylum issues, on the other. Researchers also examined ways in which networked organizations and advocates achieved their protection and service goals.

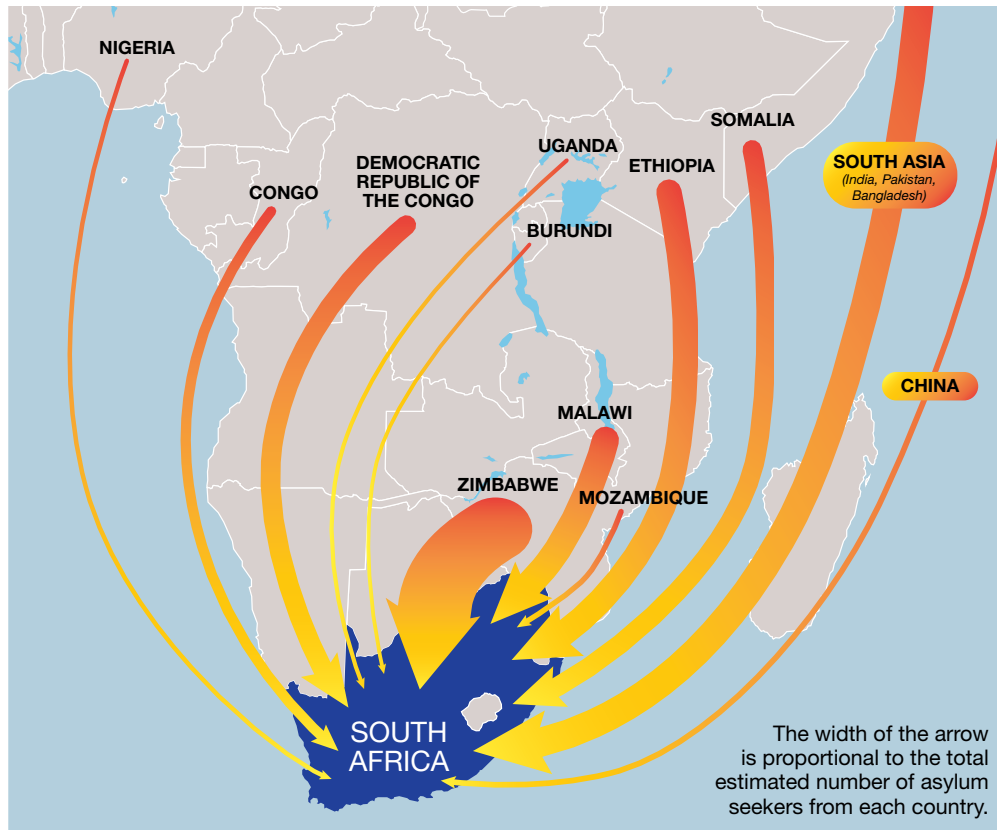
ORAM also conducted desk research on background country conditions and key protection gaps for the SGN community in general and SGN refugees in South Africa in particular. Its investigations identified stakeholders and local organizations in major urban areas throughout South Africa relevant to the study. ORAM staff then solicited these stakeholders for interview participants and referrals.

From September 2011 to October 2011, ORAM staff conducted seventy-four in-depth and in-person interviews with SGN international migrants, service providers, government-agency representatives, NGOs, and agencies in South Africa.¹⁸ All interviews followed thematic questions and were conducted in English. In sixty-eight cases, interviews were audio and/or video recorded with research participant permission, and the strictest standards of confidentiality were upheld in the documentation and collection of those interviews. Many of the immigration authorities were reluctant to go on record in this study, with all four of the Refugee Status Determination Officers interviewed requesting not to be recorded. Two other governmental authorities from the Department of Home Affairs agreed to be interviewed, but declined to be

¹⁷ Interviews cited in this report are coded in the following way: Country abbreviation – Interviewee identity abbreviation & Number interview with that particular identity within that country. For example: MX - G1 means the interview is from Mexico and it is the first interview with a gay refugee. The following country abbreviations are used in this report: South Africa = SA; Uganda = UG; and Mexico = MX. The following identity abbreviations are used in this report: G = gay; L = lesbian; TW = trans woman; TM = trans man; and S = stakeholder.

¹⁸ Interviews cited in this report are coded in the following way: Country abbreviation – Interviewee identity abbreviation & Number interview with that particular identity within that country. For example: MX - G1 means the interview is from Mexico and it is the first interview with a gay refugee. The following country abbreviations are used in this report: South Africa = SA; Uganda = UG; and Mexico = MX. The following identity abbreviations are used in this report: G = gay; L = lesbian; TW = trans woman; TM = trans man; and S = stakeholder.

ASYLUM SEEKERS ENTERING SOUTH AFRICA



Source: UNHCR Statistical Online Population Database.
All figures based on average number of asylum seekers entering South Africa annually between 2008 and 2011.

Many of the immigration authorities were reluctant to go on record in this study, with all four of the Refugee Status Determination Officers interviewed requesting not to be recorded.

recorded. Those interviews are not presented within the data for this study. However, the interviews did yield further insight and contacts for researchers.

Of the seventy-four recorded interviews, sixty were conducted with stakeholders, including UNHCR staff as well as local and international NGOs, and fourteen interviews were conducted with SGN refugees, asylum seekers, and migrants. Two of the refugee interviewees were lesbian, three identified as transgender, and eight were gay men.

All interviews were transcribed by ORAM staff and volunteers. Once interviews were completed, the data was compiled for analysis. Interview transcripts were analyzed to compare responses, determine patterns in protection gaps, and identify best practices. Information gathered during interviews was coded by thematic protection area in a large database identifying language, gender, gender identity, sexual orientation, asylum access, deportation experience, detention experience, immigration status, police protection, violence from non-state actors, housing, medical care, mental health care, employment, sex work, legal and social service provisions, religious or communal organizational support, and social networking information. These themes form the basis of the report findings and recommendations.

III. *The Law of Refugee Status Determination in South Africa*



South Africa's domestic refugee law is among the most progressive in the world. The Refugees Act of 1998 prescribes a relatively simple procedure through which an individual can obtain asylum in South Africa. The asylum process prescribed by the Refugees Act can be divided into three stages: entry, application, and status determination. The first step in the procedure is to lodge an asylum claim at the border, where the asylum seeker is given a Section 23 permit (also known as a "transit permit"). Then the applicant is interviewed at a Refugee Reception Office (RRO) and given a Section 22 permit (also known as an "asylum seeker permit") which legalizes his or her stay in South Africa and grants an array of economic, social, and protection rights.¹⁹ The final stage is an interview conducted by a Department of Home Affairs (DHA) official (also referred to as a Refugee Status Determination (RSD) officer), who determines whether or not the asylum seeker has a valid asylum claim. This interview determines whether or not the applicant will be granted refugee status (also known as a Section 24 permit).

According to the law, at each stage in the process asylum seekers should be given documentation that proves the legality of their presence in South Africa and confers certain rights and obligations. Throughout the RSD process, various officials and bodies established under the DHA are responsible for issuing this documentation, assisting individuals in their applications for refugee status, and adjudicating RSD claims.²⁰

UNHCR agrees that "South Africa's national refugee legislation is exemplary."²¹ In theory, refugees and asylum seekers enjoy full freedom of movement into and within the country, access to health services and employment, and "a panoply of other rights."²² However, this progressive legislation is undermined by a severely overburdened asylum system and widespread discrimination against outsiders (xenophobia), including refugees and asylum seekers.²³ At each stage of the RSD process, from the initial request for asylum to permanent integration into South African society, barriers prevent individuals from accessing the RSD system, legal rights, and services to which they are entitled.²⁴ These barriers create protection gaps that place refugees and asylum seekers in increased danger of deportation to a country of persecution.²⁵

¹⁹ Refugees Act 130 of 1998 §3, 7-8 (S. Afr.).

²⁰ Darshan Vigneswaran, *A Foot in the Door: Access to Asylum in South Africa*, 25 REFUGEE 41, 43-48 (2008).

²¹ U.N. HIGH COMM'R FOR REFUGEES, UNHCR STATISTICAL YEARBOOK 40 (2009).

²² *Id.*

²³ UNIVERSITY OF THE WITWATERSRAND, FORCED MIGRATION STUDIES PROGRAMME, NATIONAL SURVEY OF THE REFUGEE RECEPTION AND STATUS DETERMINATION SYSTEM IN SOUTH AFRICA 22 (2009) [hereinafter NATIONAL SURVEY].

²⁴ Jeff Crisp & Esthe Kiragu, UNHCR, *Refugee Protection and International Migration: A Review of UNHCR's Role in Malawi, Mozambique and South Africa* (Aug. 2010), <http://www.unhcr.org/4c629c4d9.html>.

²⁵ Vigneswaran, *supra* note 2, at 11; see also *Lawyers for Human Rights Criticize DHA's Use of Unlawful Measures to Exclude Refugees from South Africa*, CoRMSA NEWSLETTER, at 4-5 (Apr. 2011), <http://www.cormsa.org.za/wp-content/uploads/2008/06/CoRMSA-Newsletter-1-April2011-Edition1.pdf>; see e.g., HUMAN RIGHTS WATCH, NEIGHBORS IN NEED: ZIMBABWEANS SEEKING REFUGE IN SOUTH AFRICA 8 (June 2008) [hereinafter NEIGHBORS IN NEED] at 85; Press Release, *Lawyers for Human Rights, Detention and Deportation of Zimbabweans Costly and Does Not Deter – New Handbook on Alternatives to Detention* (July 14, 2011) available at <http://www.lhr.org.za/news/2011/detention-and-deportation-zimbabweans-costly-and-does-not-deter-new-handbook-alternatives->; Alex Bell, *South Africa: Country Says Zimbabwean Deportations Will Not Resume, Yet*, ALLAFRICA.COM (Aug. 2, 2011), <http://allafrica.com/stories/201108030029.html>.

A. DANGERS AND PROTECTION GAPS IN THE SOUTH AFRICAN REFUGEE STATUS DETERMINATION SYSTEM

Sometimes asylum seekers encounter precarious situations on their journey into South Africa. Some are attacked at border crossing by local gangs, such as the *Guma Guma*, that are known to rape, rob, and sometimes kill migrants crossing the border.²⁶ For this reason, some asylum seekers make this crossing outside an official border post, and therefore do not receive a temporary transit permit (Section 23 permit), which leaves them vulnerable to arrest and *refoulement* (forced return to their country of persecution) before they have the opportunity to formally lodge an asylum claim.²⁷

Even those asylum seekers who manage to reach an RRO are often victimized and discriminated against by private and official actors. The backlog of undecided asylum cases, coupled with limited capacity at RROs, forces individuals to wait in lines with hundreds or even thousands of other asylum seekers in order to access documentation.²⁸ In addition, travel between the RROs and places where the asylum seekers live is potentially problematic given high rates of crime.²⁹ These challenges prevent many asylum seekers from lodging their claims, which leaves them open to further exploitation and abuse.³⁰ During their time in the queues, asylum seekers are vulnerable to unlawful deportation due to ex-

pired documentation;³¹ extortion and bribery by security guards, officials, and translators;³² arbitrary arrest; harassment and physical abuse at the hands of police;³³ and theft, rape, and beatings by armed criminals.³⁴

Once an asylum seeker is able to enter an RRO and formally lodge a claim, the DHA is responsible for providing the applicant with an asylum seeker permit (also called a Section 22 permit). The permit legalizes one's stay in South Africa until a RSD official finalizes a decision on the claim for asylum. The Section 22 permit entitles the holder to access health care, employment, and education.³⁵ During the RSD process the asylum seeker is subject to obstacles that can prevent them from having their claims fairly adjudicated or from obtaining all the rights and benefits to which they are entitled. For example, the RROs often use inconsistent and illegal procedures that prevent refugees from receiving documentation. The African Centre for Migration and Society (ACMS) states that “the most troubling phenomenon [at RROs] was the continuation of two practices that were specifically challenged in court and ruled illegal: 1) Continued use of appointment slips; and 2) Continued application of work and study restrictions to permits.”³⁶

The regulations accompanying the Refugees Act clearly state that a Refugee Reception Officer “must” issue an asylum seeker with a Section 22 permit in the prescribed

The backlog of undecided asylum cases, coupled with limited capacity at RROs, forces individuals to wait in lines with hundreds or even thousands of other asylum seekers in order to access documentation.

26 See generally HUMAN RIGHTS WATCH, NO HEALING HERE: VIOLENCE, DISCRIMINATION, AND BARRIERS TO HEALTH FOR MIGRANTS IN SOUTH AFRICA 18 (Dec. 2009) [hereinafter NO HEALING HERE], at 33-34; see e.g., *Zimbabwean Refugees Face Further Hardship in South Africa*, AMNESTY INTERNATIONAL (July 1, 2009) <http://www.amnesty.org.au/refugees/comments/21261>.

27 NO HEALING HERE, *supra* note 8.

28 Vigneswaran, *supra* note 2, at 12; see also NO HEALING HERE, *supra* note 8, at 19.

29 Charlayne Hunter-Gault, *Violated Hopes: A nation confronts a tide of sexual violence*, THE NEW YORKER, (May 28, 2012), http://www.newyorker.com/reporting/2012/05/28/120528fa_fact_huntergault (citing the International Criminal Police Organization that a South African woman is raped once every seventeen seconds); *South Africa: Call to End Police Brutality Against Gays*, INT'L GAY, LESBIAN, BISEXUAL, TRANS, AND INTERSEX ASS'N (Nov. 8, 2010), <http://ilga.org/ilga/en/article/mHeCoNz19u> (reporting an estimate by human rights organizations that over forty percent of South African women will be raped at least once in their lifetime, meaning that more South African women are raped than the number who graduate from secondary school).

30 NATIONAL SURVEY, *supra* note 5, at 25-26.

31 LAWYERS FOR HUMAN RIGHTS, LAWYERS FOR HUMAN RIGHTS' SUBMISSION TO PARLIAMENTARY PORTFOLIO COMMITTEE ON HOME AFFAIRS ON IMMIGRATION AMENDMENT BILL (Jan. 2011).

32 Vigneswaran, *supra* note 2, at 4.

33 *Id.*

34 *Id.* at 12-13; see also CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA, REPORT TO THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA ON THE HUMANITARIAN CRISIS IN MUSINA, SOUTH AFRICA 10 (Feb. 23, 2009) [hereinafter CRISIS IN MUSINA].

35 *Id.* at 25.

36 NATIONAL SURVEY *supra* note 5, at 33.

Refugees and asylum seekers often face mistreatment by the police, harassment, arbitrary detention, and extortion attempts, among other challenges.

form.³⁷ However, in many cases, asylum seekers are instead issued ‘appointment slips’ requiring them to return to the same office after a specified period of time, which can range from days to months.³⁸ Human Rights Watch reports that this practice has been “replaced by an even more questionable practice of ‘verbal appointments,’ which are given to the vast majority of applicants in place of the asylum seeker permit to which they are entitled by law.”³⁹ This practice results in genuine asylum seekers being denied documentation that proves the legality of their presence in South Africa, leaving them vulnerable to arrest, detention, and deportation.

Shortfalls in the RSD process extend to the first interview, as well as to decisions made by the DHA officials and RAB (Refugee Appeal Board). Many asylum seekers report being exposed to hostility and xenophobic prejudice during their status interview, despite the fact that the hearing was designed to be a non-adversarial process.⁴⁰ Furthermore, RSD interviews are cursory and brief, and many asylum seekers have less than ten minutes in which to fully express their claim.⁴¹ The result is that the DHA produces RSD decisions that have been sharply critiqued for their arbitrary or irrelevant reasoning, failure to properly apply concepts of refugee law, and careless cutting and pasting from one decision to another.⁴² One commentator states that the quality of the DHA’s decisions both violates refugee and administrative law and puts bona fide refugees at risk of *refoulement*, without fulfilling the protective goals of the South African RSD system.⁴³

37 Government Notice (GN) R366/2000 (S. Afr.).

38 NEIGHBORS IN NEED, *supra* note 7, at 88.

39 *Id.* at 88.

40 NATIONAL SURVEY *supra* note 5, at 44-45 (finding that while a majority of RSDOs conduct their interviews in a “friendly or neutral” manner, “over a fifth (22%) [of asylum seekers] confronted hostility [at the status determination interview]. Some respondents encountered anti-immigrant prejudice on the part of interviewers...Some interactions revealed the use of xenophobic stereotypes that cast doubt on the impartiality of the officer concerned.”)

41 Roni Amit, UNIVERSITY OF THE WITWATERSRAND, FORCED MIGRATION STUDIES PROGRAMME, LOST IN THE VORTEX: IRREGULARITIES IN THE DETENTION AND DEPORTATION OF NON-NATIONALS IN SOUTH AFRICA (June 2010) [hereinafter LOST IN THE VORTEX].

42 Roni Amit, FORCED MIGRATION STUDIES PROGRAMME, UNIVERSITY OF THE WITWATERSRAND, PROTECTION AND PRAGMATISM: ADDRESSING ADMINISTRATIVE FAILURES IN SOUTH AFRICA’S REFUGEE STATUS DETERMINATION DECISIONS 23-24 (April 2010) [hereinafter PROTECTION AND PRAGMATISM]; see also CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA, PROTECTING REFUGEES, ASYLUM SEEKERS, AND IMMIGRANTS IN SOUTH AFRICA DURING 2010 30 (Apr. 2011) [hereinafter PROTECTING REFUGEES, ASYLUM SEEKERS, AND IMMIGRANTS].

43 PROTECTION AND PRAGMATISM, *supra* note 24 at 77-78.

B. XENOPHOBIA AND LOCAL INTEGRATION INTO SOUTH AFRICAN SOCIETY

Even after an individual becomes recognized as a refugee in South Africa, official and societal discrimination can prevent that person from accessing their rights. Refugees and asylum seekers often face mistreatment by the police, harassment, arbitrary detention, and extortion attempts, among other challenges.⁴⁴ In many cases, police refuse to open cases on behalf of foreign nationals. In others, they conduct negligent investigations into crimes perpetrated against non-citizens.⁴⁵

Finally, xenophobic prejudice in South Africa hinders the ability of asylum seekers and refugees to locally integrate. In 2008, these societal attitudes erupted into a wave of property destruction and violence which left 62 people dead, over 670 wounded, and more than 100,000 internally displaced.⁴⁶ While the 2008 incidents received much attention in South African and international media, less publicized xenophobic violence continues. A 2011 report from the Consortium for Refugees and Migrants in South Africa (CoRMSA) states that “[x]enophobia and incidences of xenophobic violence are not decreasing. Many of these incidents do not receive coverage in the mainstream media, and this creates the impression that xenophobia is no longer a problem.”⁴⁷ However, the underlying causes of the 2008 violence have gone largely unaddressed, and attacks continue to occur with regularity.⁴⁸ “[P]redictions that such violence would continue because no effective preventive measures had been put in place, have unfortunately proven true. Since mid-2008,

44 JO VEAREY, AFR. CTR. FOR MIGRATION & SOC’Y, EXPLORING THE PSYCHOSOCIAL AND HEALTH RIGHTS OF FORCED MIGRANTS IN JOHANNESBURG: THE IMPACT OF “DAILY STRESSORS” ON THE EMOTIONAL WELLBEING OF FORCED MIGRANTS (2011).

45 See e.g., Amnesty International, *South African Police Negligent in Xenophobic Attack*, AMNESTY INTERNATIONAL (Feb. 1, 2010) <http://www.amnesty.org/en/library/info/AFR53/003/2010>. See generally CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA, CoRMSA SUBMISSION TO THE PORTFOLIO COMMITTEE ON POLICE: COMMENT ON THE INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE BILL AND THE CIVILIAN SECRETARIAT FOR POLICE SERVICE BILL (Aug. 2010) [hereinafter CoRMSA SUBMISSION].

46 Jean-Pierre Misago and Tamlyn Monson, *Non-Nationals Displaced in South Africa*, 34 FORCED MIGRATION Rev. 62, 62 (Feb. 2010).

47 PROTECTING REFUGEES, ASYLUM SEEKERS, AND IMMIGRANTS, *supra* note 24, at 9.

48 *Id.* at 58-64.

almost every month there has been at least one attack on groups of foreign nationals in the country.”⁴⁹ Furthermore, the stigmatization of refugees and asylum seekers can prevent them from obtaining employment, receiving an education, or accessing medical services.⁵⁰ The South African government has received much criticism for its handling of the xenophobia issue, with many civil society organizations alleging that government inaction puts refugees, asylum seekers, and other foreign nationals at constant risk of discrimination, harassment, and violence.⁵¹

49 *Id.* at 57.

50 See generally HUMAN RIGHTS WATCH, *LIVING ON THE MARGINS: INADEQUATE PROTECTION FOR REFUGEES AND ASYLUM SEEKERS IN JOHANNESBURG* 23-24 (Nov. 2005) [hereinafter *LIVING ON THE MARGINS*]; see also Caroline Hawley, *REFUGEES FLEE SOUTH AFRICA ATTACKS*, BBC (May 16, 2008) <http://news.bbc.co.uk/2/hi/africa/7404351.stm>.

51 See APRM MONITORING PROJECT, *IMPLEMENTING THE APRM VIEWS FROM CIVIL SOCIETY: SOUTH AFRICA REPORT 58* (June 2011) (citing that the monitoring group for the African Peer Review Mechanism (APRM), which evaluates government performance across several issues and indicators, gave the South African government a “red” rating on the issue of xenophobia, its lowest rating. “The evaluating group felt that the South African government is not doing enough to address the issue of xenophobia and pointed out that there is even an element of denialism (sic) on behalf of some officials.”); see also AMNESTY INTERNATIONAL, *South African Police Negligent in Xenophobic Attack*, Amnesty International (Feb. 1, 2010) <http://www.amnesty.org/en/library/info/AFR53/003/2010>; Press Release, Amnesty International, *South Africa: Grave Concern at Continuing Violence Against Refugees and Migrants* (Feb. 8, 2010) [hereinafter *Grave Concern at Continuing Violence*] (stating there remains a culture of impunity for crimes against refugees and migrants. There also persists low public awareness of the country’s human rights obligations towards refugees and others in need of international protection); see e.g., Loren B. Landau, *Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy*, 19 J. REFUGEE STUD. 308, 316 (2006); SA blames ‘illegal immigrants’ for crime, THE STANDARD (Mar. 13, 2010), <http://www.thestandard.co.zw/international/23677-sa-blames-illegal-immigrants-for-crime.html> (noting the statement of the South Africa’s Human Rights Commissioner that “[r]efugees, asylum seekers, migrant workers, undocumented immigrants, and other so-called ‘non-citizens’ are being stigmatized and vilified for seeking a better life. They are made scapegoats for all kinds of social ills, subjected to harassment and abuses by political parties, the media, and society at large.”).

iv. Context for Sexually and Gender Nonconforming Individuals in South Africa

The context for sexually and gender nonconforming (SGN) South Africans is analogous to that of refugees and asylum seekers in that each situation is defined by a stark dichotomy between rights enshrined in law and their practical enjoyment. South Africa’s legislation regarding SGN people, like its refugee law, is exemplary. With the inclusion of the Equality Clause in the South African Constitution,⁵² South Africa became the first country in the world to explicitly protect the equal rights of LGBT citizens in its national constitution.⁵³ Largely due to this constitutional provision, South Africa is often recognized as having one of the most liberal legal environments in the world for LGBT individuals. However, while LGBT rights groups have won significant gains through litigation and lobbying,⁵⁴ LGBT South Africans continue to be objects of discrimination, persecution, and violence.⁵⁵



While South Africa has created various laws and policies to address discrimination and violence against SGN individuals, what the nation “is sorely lacking is effective implementation of those provisions.”⁵⁶ In spite of the country’s progressive legislative and judicial actions, SGN people “continue to experience violence, oppression, marginalisation, discrimination and victimisation.”⁵⁷ This discrimination is widespread among both civilians and government officials, including police and teachers.⁵⁸ SGN citizens remain the victims of hate crimes, gender violence, and murder,⁵⁹ but official investigations into these acts seldom occur, and the investigations that do transpire

52 S. Afr. CONST., 1996 §9(3) available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#9> (approved by the Constitutional Court on December 4, 1996 and took effect on February 4, 1997, the Equality Clause reads: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”).

53 UK HOME OFFICE BORDER AGENCY COUNTRY OF ORIGIN INFORMATION SERVICE, SOUTH AFRICA COI REPORT §19.03 (2010).

54 See e.g., Employment Equity Act 55 of 1998 §6 (S. Afr.) (explicitly prohibiting discrimination or harassment on the basis of sexual orientation in the employment context); Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 §1(xiii), 1(xvii) (S. Afr.) (prohibiting discrimination and harassment on a number of prohibited grounds, including sexual orientation); *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) (S. Afr.) (striking down criminal statutes prohibiting sodomy and other homosexual conduct as unconstitutional); *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) (S. Afr.) (striking down laws that deny equal benefits to same-sex partners of government employees, excluding same-sex partners from pension funds, and preventing same-sex couples from adopting children); *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.) (ruling that the Equality Clause demands same-sex couples be afforded the right to civil unions, and ordering the legislature to grant an appropriate remedy within a reasonable period).

55 HUMAN RIGHTS WATCH, *WORLD REPORT 2012: SOUTH AFRICA* 3 (2012), available at <http://www.hrw.org/world-report-2012/world-report-2012-south-africa> [hereinafter *WORLD REPORT 2012*]; see also HUMAN RIGHTS WATCH, *WE’LL SHOW YOU YOU’RE A WOMAN: VIOLENCE AND DISCRIMINATION AGAINST BLACK LESBIANS AND TRANSGENDER MEN IN SOUTH AFRICA* 4 (2011), available at <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> [hereinafter *WE’LL SHOW YOU*]; see also PRESS RELEASE, Univ. of the W. Cape Cmty. Law Ctr., Call on South African Government to redeem itself at UN by protecting the rights of LGBT People (Dec. 17, 2010), available at http://www.peopletoparliament.org.za/focus-areas/human_rights_democracy/press-releases/LGBT/view; US DEP’T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, 2010 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES IN SOUTH AFRICA (2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154370.htm> [hereinafter *US DEP’T OF STATE REPORT 2010*].

56 *WE’LL SHOW YOU*, *supra* note 38, at 4.

57 Press Release, Univ. of the W. Cape Cmty. Law Ctr., Call on South African Government to redeem itself at UN by protecting the rights of LGBT People (Dec. 17, 2010), available at http://www.peopletoparliament.org.za/focus-areas/human_rights_democracy/press-releases/LGBT/view.

58 *WORLD REPORT 2012*, *supra* note 38, at 3.

59 *US DEP’T OF STATE REPORT 2010*, *supra* note 38.



Despite the protections of the Equality Clause, discrimination still occurs during interactions with law enforcement, especially in the context of reporting sexual violence.

are generally inadequate.⁶⁰ Human Rights Watch reports that, “For the vast majority of people we interviewed, particularly young African lesbians and gay men living in cities, townships, and rural areas, the Equality Clause had not impacted the degree or depth of the discrimination and harassment they experienced.”⁶¹ Though the laws on the books may read like those of some of the most progressive states in the world, the daily experience of an SGN person in South Africa is more akin to that of SGN individuals in the repressive sub-Saharan states which surround them.

A. DISCRIMINATION IN SOUTH AFRICAN SOCIETY

While the South African government is generally supportive of LGBT rights, some individual police officers and government officials have contributed to the harms affecting the SGN community. Despite the protections of the Equality Clause, discrimination still occurs during interactions with law enforcement,⁶² especially in the context of reporting

sexual violence.⁶³ SGN individuals report harassment from the police, arbitrary detention, and, in some cases, violence and sexual assault perpetrated by police officers.⁶⁴

Homophobia and transphobia, the fear or hatred of an individual based on nonconforming sexual orientation or gender identity, respectively, are entrenched within South African society, and extend deeply into family and community life. SGN individuals, particularly youth, most often do not have safe places where they can be free of discrimination. A report by Atlantic Philanthropies reports that in South Africa, “[m]any LGBTI youth face emotional isolation and rejection from parents.... [and many have] even been evicted from their homes.”⁶⁵ According to a report in the *Journal of Homosexuality*, for many young people in South Africa, coming out can result in isolation from family and the community at large, and may create long-lasting seclusion that could negatively impact “future functioning as an adult within that community.”⁶⁶ In cases where SGN youth are not forcibly evicted from their homes, they can still suffer from discrimination and abuse from family members. This isolation from family and community can result not only in serious psychological repercussions for SGN youth, but also severe economic consequences, often leading to dire poverty⁶⁷ and further abuse.⁶⁸

⁶³ AsylumAid, *South Africa: Law Failing Lesbians who have Experienced 'Corrective Rape'*, WOMEN'S ASYLUM NEWS, Issue 87, Oct. 2009.; see also Robyn Dixon, *In South Africa's Black Townships, Being Gay can be Fatal*, LA TIMES (May 27, 2011) available at <http://latimes.com/news/nationworld/world/la-fg-south-africa-gay-killings-20110528.0,323045.story>; *Four Men Found Guilty of the Murder of Zoliswa Nkonyana, Int'l Lesbian, Gay, Bisexual, Trans, and Intersex Ass'n* (Oct. 10, 2011), <http://ilga.org/ilga/en/article/ncVRWcU1bS> [hereinafter FOUR MEN FOUND GUILTY].

⁶⁴ WE'LL SHOW YOU, *supra* note 38, at 52.

⁶⁵ ATLANTIC PHILANTHROPIES, *OUT OF THE BOX: QUEER YOUTH IN SOUTH AFRICA TODAY 13* (2011), available at http://www.atlanticphilanthropies.org/sites/default/files/uploads/Out_of_the_box_queer_youth_in_South_Africa_Today_0.pdf.

⁶⁶ Allister H. Butler & Gaynor Astbury, *The Use of Defence Mechanisms as Precursors to Coming Out in Post-Apartheid South Africa: A Gay and Lesbian Youth Perspective*, 55 J. HOMOSEXUALITY 223, 229-30 (2008).

⁶⁷ *Id.*

⁶⁸ AsylumAid, *supra* note 46.

⁶⁰ Press Release, Univ. of the W. Cape Cmty. Law Ctr., Call on South African Government to redeem itself at UN by protecting the rights of LGBT People (Dec. 17, 2010), available at http://www.peopletoparlament.org.za/focus-areas/human_rights_democracy/press-releases/LGBT/view.

⁶¹ HUMAN RIGHTS WATCH & THE INT'L GAY AND LESBIAN HUMAN RIGHTS COMM'N, MORE THAN A NAME: STATE SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA 179 (2003) [hereinafter MORE THAN A NAME].

⁶² Pumza Fihlani, *South Africa's Lesbians Fear 'Corrective Rape'*, BBC NEWS (June 29, 2011) <http://www.bbc.co.uk/news/world-africa-13908662>.

B. “CORRECTIVE RAPE” AND VIOLENCE AGAINST SGN SOUTH AFRICANS

Of great concern for SGN South Africans is the high prevalence of sexual violence.⁶⁹ In a phenomenon referred to as “corrective rape”, SGN individuals are raped and beaten, ostensibly to turn them straight or to punish them for stepping outside accepted sexual and gender norms.⁷⁰ Emily Craven of the Joint Working Group explains that “corrective rape” cannot be explained by homophobia alone, but is closely tied to the patriarchal and rigidly defined gender roles of South African society, stating:

*[We] understand hate crime broadly — it’s not just about one person saying I am a lesbian and another saying I hate lesbians and killing them or raping them. It’s about gender presentation, it’s about subverting male power in society, it’s about women who don’t need men either for financial support or sexual pleasure, it’s about women who wear clothes that are considered unfeminine or drink in taverns late at night or fight back when attacked.*⁷¹

The incidence of “corrective rape” ap-

pears to be increasing,⁷² and many of these sexual assaults end in murder.⁷³ One rights group estimated in 2008 that a lesbian was killed roughly once every three months in South Africa’s urban townships.⁷⁴ Despite this alarming rate of rape and murder, several sources report that the South African police have not curbed the problem, and perpetrators of sexual violence continue to walk free with impunity.⁷⁵ Of the at least thirty-one lesbians murdered in South Africa since 1998, only two cases had resulted in a conviction as of March 2011.⁷⁶

The case of Zoliswa Nkonyana was one of the first cases of homophobic violence to gain national attention. At the age of nineteen, Nkonyana was clubbed and stoned to death by a mob of about twenty young men who had taunted her and a lesbian friend, saying that the two women “wanted to be raped.”⁷⁷ In October 2011, four of her attackers were convicted of murder, while five others were ac-

The incidence of “corrective rape” appears to be increasing, and many of these sexual assaults end in murder. One rights group estimated in 2008 that a lesbian was killed roughly once every three months in South Africa’s urban townships.

69 *Id.* at 18 (“South Africa has among the highest rates of reported sexual violence against women in a country not at war. Some estimates predict that one woman in three in South Africa can expect to be raped at least once in her lifetime, and one in four will face physical assault by her domestic partner.”); see also AMNESTY INTERNATIONAL, ANNUAL REPORT 2011: SOUTH AFRICA (2011), available at <http://www.amnesty.org/en/region/south-africa/report-2011> (finding that “over 63,500 cases of sexual offenses, including rape, against women and children were reported to the police between April 2009 and March 2010.”); Dixon, *supra* note 46 (reporting on the corrective rape of three lesbians in the city of Kwa-Thema. Noxolo Nogwaza and Eudy Simelane were gang-raped and killed in brutal fashion, while Girlie Nkosi (a former teammate of Simelane’s) was stabbed in the back in a Kwa-Thema nightclub. “All played soccer as well as, or better than, most men. All of them dressed in a masculine style.”).

70 Corrective rape refers to sexual violence specifically targeting SGN individuals for the ostensible purpose of turning them straight or punishing them for stepping outside accepted sexual and gender norms. See J.A. Nel & M. Judge, *Exploring Homophobic Victimization in Gauteng, South Africa: Issues, Impacts and Responses*, 21 ACTA CRIMINOLOGICA, no. 3, 2008 at 19, 24 n.2 (“Corrective rape seeks to justify the rape of those people who are perceived to not conform—or to disrupt—expected gender roles, behaviour and/or presentation.”); Emma Mittelstaedt, Comment, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations*, 9 CHI. J. INT’L L. 353, 354 n.8 (2008) (“Corrective rape” is the term used to describe the practice of raping African women and girls thought to be lesbians with the claimed purpose of turning them into ‘real African women’—the underlying belief being that homosexuality is a ‘disease’ imported by the white colonial empire.”).

71 Nathalie Rosa Bucher, *Law Failing Lesbians on “Corrective Rape”*, INTER-PRESS SERVICE (Aug. 31, 2009) <http://www.ipsnews.net/news.asp?id-news=48279>.

72 ACTIONAID, HATE CRIMES: THE RISE OF CORRECTIVE RAPE IN SOUTH AFRICA (2009) at 8; see also UK HOME OFFICE BORDER AGENCY COUNTRY OF ORIGIN INFORMATION SERVICE, SOUTH AFRICA COI REPORT (2010) (stating that “corrective rape” continues to be reported with growing frequency across South Africa” and that “a culture of rape is already being passed down to younger generations of South African men. Last year a report by South Africa’s Human Rights Commission expressed alarm at the “growing phenomenon of ‘corrective’ rape” in schools across the country, with young boys believing that lesbian girls need to be raped in order to ‘correct’ their sexual orientation.”).

73 See generally U.N. Human Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights, In Accordance with Paragraph 15 c) of the Annex to Human Rights Council Resolution 5/1*, ¶118, U.N. Doc. A/HRC/WG.6/1/ZAF/3, (Mar. 11, 2008).

74 US DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, 2008 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES IN SOUTH AFRICA (2008), available at <http://www.state.gov/drl/rls/hrrpt/2008/af/119025.htm> (citing to a report by the NGO, People Opposed to Women Abuse, stating that attacks increased during [2008] and estimated that a lesbian was killed every three months in the country’s townships).

75 See e.g., *South Africa: Lesbians Targeted for Murder*, HUMAN RIGHTS WATCH (Aug. 7, 2007) available at <http://www.hrw.org/en/news/2007/08/07/south-africa-lesbians-targeted-murder> [hereinafter *Lesbians Targeted for Murder*] (documenting the case of Sizakele Sigasa, an activist who fought for the rights of LGBTI individuals, as well as the rights of those living with HIV/AIDS. She and her partner were subjected to homophobic violence by a crowd of people and found dead the following morning. Both women had been gang-raped and tortured before being shot to death. Police initially detained three men, who were later released, and another suspect committed suicide before police could arrive to make an arrest. Despite the fact that evidence pointed to more than one perpetrator, no one has been brought to justice for the crimes, and the case is effectively closed. This inadequate investigation sparked the 07-07-07 Campaign, a call from twenty-seven NGOs and community groups for justice for women targeted for hate crimes). See generally ACTIONAID, *supra* note 57, at 13 (finding that in a poll of hate crime survivors in the Western Cape region, sixty six percent of women said that they did not report their attack to the police because they would not be taken seriously. Also, members of the gay community indicated that it was common for police to ridicule LGBTI rape victims who attempt to report the crime. Reporting a corrective rape would also often result in further harassment and abuse.).

76 Lee Middleton, *Corrective Rape: Fighting a South African Scourge*, TIME (Mar. 8, 2011), <http://www.time.com/time/world/article/0,8599,2057744,00.html>.

77 *South Africa: Murder Highlights Violence Against Lesbians*, HUMAN RIGHTS WATCH (Mar. 1, 2006), <http://www.hrw.org/en/news/2006/03/01/south-africa-murder-highlights-violence-against-lesbians>.

quitted. In February 2012, after the case had been postponed at least fifty times, the four perpetrators were sentenced to eighteen years in prison, four of which were suspended.⁷⁸ In the case of Eudy Simelane, a former player on the South African national women’s soccer team and one of the most visible activists for the Ekurhuleni Pride Organizing Committee, a lesbian and gay rights organization, was gang-raped and brutally beaten before being stabbed twenty-five times.⁷⁹ Only one of her attackers was convicted and sentenced, although evidence suggests that some of her attackers are still at large.⁸⁰ Both of these cases garnered a great deal of media attention, which may explain why they resulted in con-

victions while so many similar crimes have gone unaddressed.

Violence against those who do not conform to traditional gender norms is not limited to attacks on “butch” lesbians, transgender men,⁸¹ and bisexual women. Gays, bisexual men, and transgender women⁸² also face persecution for not conforming to traditional gender norms.⁸³ Gay males in particular report that their complaints to the police concerning such assaults have resulted in ridicule, harassment, and inaction on the part of officers.⁸⁴

78 *Lesbian killers in South Africa get 18-year jail terms*, BBC (Feb. 1, 2012), <http://www.bbc.co.uk/news/world-africa-16835653>.

79 Annie Kelly, *Raped and Killed for Being a Lesbian: South Africa Ignores ‘Corrective’ Attacks*, THE GUARDIAN (Mar. 12, 2009) <http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa>.

80 Middleton, *supra* note 61.

81 Transgender is a term for individuals who are assigned one biological sex at birth, but have the sense of being a different gender. A transgender man is born with female biological characteristics but feels that he has the gender identity of a man.

82 *Id.* A transgender woman is born with male biological characteristics but feels that she has the gender identity of a woman.

83 Sarah Jackson, *Unpicking gender roles: Shared ground in the fight for equality*, WOMANKIND WORLDWIDE (May 2012), <http://www.womankind.org.uk/2012/05/unpicking-gender-roles>.

84 *More Than a Name*, *supra* note 44, at 191; *see e.g.*, Dixon, *supra* note 46.

v. Findings



A. ABUSE, MISTREATMENT, AND MARGINALIZATION BY AUTHORITIES

Despite a recent attempt by the office of the Minister of Justice to convene a national task team on the issue of crimes motivated by hate, with particular emphasis on “corrective rape,” abuse and inaction at the community level are mirrored by lukewarm or inconsistent support for SGN people at every level of government. According to a joint report prepared by Human Rights Watch and the International Gay and Lesbian Human Rights Commission:

*Despite the governing African National Congress (ANC) party’s formal commitment to gay and lesbian rights, the state has contested in court almost every single precedent setting case meant to define those rights under the Equality Clause — including defending the constitutionality of sodomy laws themselves. When the High Court has found against the government, it has regularly appealed.*⁸⁵

Some South African politicians do champion human and civil rights for SGN people. However, the government and opposing political parties have failed to actively support rights for SGN people, and have neglected to publicly and consistently condemn homophobic and transphobic violence as it occurs.⁸⁶

85 Scott Long et al., *STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA* 184 (2003).

86 *WE’LL SHOW YOU*, *supra* note 38, at 66, 68.

i. Harassment

Many of the refugees who participated in our study reported experiencing arbitrary arrests, harassment, and discrimination from the authorities, but none reported physical or sexual violence from them. Interviewees stated their convictions that most of these negative encounters occurred due to the refugees' foreign nationalities rather than because of their SGN identity. For example, due to one interviewee's Ugandan nationality, he was rejected before he even entered Home Affairs. While in line outside, he reports that "[someone in uniform] said, 'No, Uganda is a very free country. We shall not help you! Go away!'"⁸⁷

While most interviewees reported suffering such harassment due to their nationality, a few stakeholders reported that discrimination attributable to homophobia or transphobia also occurs at the Department of Home Affairs. One advocate reported witnessing homophobic practices among the officers such as "put[ting] [a gay refugee from Congo] in the queue with the females" with the intention of harassing him.⁸⁸

ii. Extortion

A few SGN refugees reported extortion at the hands of border control and while waiting at Home Affairs. For example, a transgender woman from Zimbabwe stated, "We...have to bribe...for that you to be able to get in, into that queue. Even have to bribe the officials.... That's the real world. That's exactly what's happening."⁸⁹ A stakeholder interviewee confirmed the practice of extortion, explaining,

At a certain stage of the morning, the police arrive, and the security guards arrive, and they basically fly into these people with sjamboks⁹⁰ and batons, right, and they scatter the people, so the people run. They create a barrier over here, like

a space, between this last area and the people over here who are waiting for services.... Now that is an ideal opportunity for them to extract money from the people who want to get past them and want to get into queues that then start forming over here. They say, 'If you want to get access, it's 100 bucks.' The average fee here is between 100 and 500 rand. That people pay....Just to get into that queue.... Once they get inside, now it's a question of how are they going to get services. These guys advertise their services, and say, 'If you'd like to get your papers today, it's so much.' Sometimes people pay per service, so you pay for your fingerprints."⁹¹

iii. Effects of official mistreatment on refugees' ability to survive

While several refugee interviewees stated that xenophobia was the primary motivation for such abuse, some felt they had to hide their sexual and/or gender identity in order to avoid further discrimination. For example, a Kenyan gay refugee hides his identity because "somebody gave [him] the advice just not say you're gay." He believes, "if I said that I was gay, I would not get asylum." Therefore, he told authorities that he ran away from his country "because of post-election violence."⁹² A Ugandan gay refugee also did not disclose his sexual orientation to "a Department of Home Affairs official, a security guard, or other people that [he was] standing with."⁹³ An advocate at ACMS confirms this attitude by saying, "Status determination officers sometimes respond with xenophobic comments, or with homophobic comments, so people then don't really [want to] disclose additional information and are not very comfortable disclosing that information."⁹⁴

A Kenyan gay refugee hides his identity because "somebody gave [him] the advice just not say you're gay." He believes, "if I said that I was gay, I would not get asylum." Therefore, he told authorities that he ran away from his country "because of post-election violence."

⁸⁷ Interview by ORAM with SA - G4.

⁸⁸ Interview by ORAM with SA - 47.

⁸⁹ Interview by ORAM with SA - TW2.

⁹⁰ A sjambok is a heavy leather whip.

⁹¹ Interview by ORAM with SA - 12/SA - 29.

⁹² Interview by ORAM with SA - G3.

⁹³ Interview by ORAM with SA - G4.

⁹⁴ Interview by ORAM with SA - S2.

A gay man stated that “it is very dangerous to be surrounded by... Congolese people” because other Congolese refugees “export homophobia from Congo to South Africa.”

B. NON-STATE ACTOR ABUSE, MISTREATMENT, AND MARGINALIZATION

As discussed in the previous section on state-actor abuse, SGN refugees in South Africa face double marginalization because (1) they are foreigners and (2) because of their sexual orientation or gender identity. This holds true in the non-state actor realm as well. Several refugees and stakeholders reported that many South Africans exhibit strong xenophobia. Some interviewees also stated that homophobia and transphobia remain strong among refugees within South Africa, as well as among South African citizens. In many cases, refugees harbor the prejudices that are endemic to their home countries and which force SGN refugees to flee in the first place. For this reason, many SGN refugees who live within refugee communities try to hide their sexual orientation or gender identity.

i. Descriptions of Abuse, Mistreatment, and Marginalization by Non-state Actors

While SGN refugees can be mistreated and marginalized by non-state actors across the various facets of South African society, two spaces in particular present a heightened risk of abuse: lines outside the RROs and refugee communities made up of homophobic or transphobic individuals from a refugee’s country of origin.

ii. Refugee Reception Office (RRO) Lines

Refugees are particularly vulnerable while they are waiting outside of the RROs to file for refugee status. In a study conducted by ACMS, more than a third of respondents reported being hurt, threatened, or robbed while in line outside an RRO.⁹⁵ According to the ACMS report, asylum seekers, particularly those at the Musina RRO, report that rape and sexual violence are common.⁹⁶

Of the eleven refugees who were inter-

viewed for this study, four reported difficulties while waiting in front of an RRO.⁹⁷ The four refugees, gay men and transgender women, experienced harassment based on their appearances. Refugees are frequently put into male and female lines in front of the RROs, and this can serve as impetus for other refugees to single out and harass refugees with variant gender identities. A Congolese gay man experienced difficulties in the queue when he was pushed out of the men’s queue by other Congolese refugees, who called him a witch.⁹⁸ Another gay man from Congo also reported verbal harassment from other refugees in the queues. He stated that he was embarrassed when other refugees questioned whether he was a man or a woman and said homophobic things.⁹⁹ A transgender woman from Zimbabwe stated that she went into the women’s line in front of the RRO and was recognized by another Burundian refugee, which made her uncomfortable.¹⁰⁰ A transgender woman from Burundi suffered from verbal harassment based on her appearance while in front of the RRO.¹⁰¹

iii. Refugee communities

SGN refugees often hide their sexual orientation if they live among other refugees who are homophobic or transphobic.¹⁰² A gay man stated that “it is very dangerous to be surrounded by...Congolese people” because other Congolese refugees “export homophobia from Congo to South Africa.” He reported being attacked by a Congolese man at a club after expressing that he liked him.¹⁰³ Another gay man stated that he had been beaten-up by two other Congolese refugees.¹⁰⁴ A transgender woman was attacked and robbed by a foreigner who had called her a dog and told her, “You think you’re a woman?”¹⁰⁵

97 Interview by ORAM with SA - G1; Interview by ORAM with SA - G2; Interview with ORAM with SA - TW2; Interview by ORAM with SA - TW3.

98 Interview by ORAM with SA - G2.

99 Interview by ORAM with SA - G1.

100 Interview by ORAM with SA - TW2.

101 Interview by ORAM with SA - TW3.

102 Interview by ORAM with SA - S15.

103 Interview by ORAM with SA - G1.

104 Interview by ORAM with SA - G2.

105 Interview by ORAM with SA - TW3.

95 Vigneswaran, *supra* note 2, at 12.

96 CRISIS IN MUSINA, *supra* note 16, at 14.

C. PARTNERSHIP, FRIENDSHIP, AND COMMUNITY

i. Partnership

Five of the eleven refugees interviewed mentioned one or more romantic relationships. Four of these refugees reported entering into a relationship in South Africa. Only one mentioned having a relationship in his country of origin, and he did not maintain contact with his former partner after leaving for South Africa. Because no refugees expressed an interest in partner reunification, these interviews did not reveal any difficulties in the reunification process.

One of the four refugees who entered into a relationship in South Africa expressed that it was practical for him to live with his partner. Another refugee, on the other hand, reported that he could not safely or practically live with his partner in South Africa, stating that he and his boyfriend had been severely harassed simply for being seen eating together at a restaurant. For the remaining two refugees who entered into relationships in South Africa, it was unclear from the information provided in the interviews whether or not they were able to live with their partners.

ii. Family

Just over half of the interviewees, or six out of eleven, reported maintaining positive relations with family and friends from their home country. Only one interviewee reported positive relations with his community of national origin in South Africa, which he believes would be compromised if anyone were to learn of his sexual orientation.¹⁰⁶ One stakeholder stated, “The trans[gender] person we helped from Burundi, she found a community of people from [Burundi in South Africa].... [S]he was welcome in that commune house for a short while, but obviously, once they start figuring out what is her story [that she is transgender], then she had to go.”¹⁰⁷ Fur-

thermore, no refugees reported current financial support from people in their country of origin, and only two had received financial support from people in their home country in the past.

iii. Community

The narratives of several refugees interviewed showed that fears of revealing sexual orientation and gender identity lead to social isolation. For example, one gay man began to hide his sexual orientation from other Ugandans after he was beaten by Ugandans. He stated that he hides his sexual orientation because he is afraid he might lose his life.¹⁰⁸ A transgender woman stated that she does not have any friends among refugees.¹⁰⁹ Another transgender female interviewee stated that she avoids interacting with other Zimbabweans who live in her township because “they are ignorant to the LGBT community; they don’t want to learn.”¹¹⁰ A lesbian interviewee stated she does not have many friends among other Ugandans because she stays at home.¹¹¹

Seven of the eleven interviewed refugees were “out,” or forthright about their SGN identity in at least some social contexts, and ten were socially acknowledged to be foreigners. Seven of the eleven refugees reported having at least one SGN friend in South Africa, and the same number noted that they received support from an SGN individual, organization, or community. However, one stakeholder interviewed stated that the “gay community in South Africa is not aware enough and not supportive enough of their gay and lesbian and transgender brother and sister from other African countries.”¹¹²

Notably, only one of the eleven interviewees reported positive relations with the non-LGBT community in South Africa. Seven refugees stated that these negative relations were due to their SGN identity, four due to their foreign or refugee status, and three due

“The trans[gender] person we helped from Burundi, she found a community of people from [Burundi in South Africa].... [S]he was welcome in that commune house for a short while, but obviously, once they start figuring out what is her story [that she is transgender], then she had to go.”

¹⁰⁶ Interview by ORAM with SA - G4.

¹⁰⁷ Interview by ORAM with SA - S17.

¹⁰⁸ Interview by ORAM with SA - G4.

¹⁰⁹ Interview by ORAM with SA - TW1.

¹¹⁰ Interview by ORAM with SA - TW2.

¹¹¹ Interview by ORAM with SA - L2.

¹¹² Interview by ORAM with SA - S33.

“South Africans are quite xenophobic and they are quite afraid of foreigners for many reasons, probably because there is this sort of misconception that foreigners coming in are going to come and live in our areas and take our jobs.”

to their race or skin color.¹¹³ One refugee said, “[E]ven here...[t]hey don’t like lesbian and gays. If they find out you are a lesbian they want to rape you.”¹¹⁴ Another reported:

I think what I find about South Africa is that they are hostile towards foreigners. It is very, very obvious wherever you go. Whether it is in a taxi or whether it is in a shop. You know how like you speak English and someone looks at you like, ‘You mean you speak only English?’ and...you just see the expression on their face like suddenly changing. It’s like you’re not welcome. And people are not scared to tell you that, ‘You foreigners come here to take my jobs. There’s nothing wrong in your countries, why don’t you go back?’ And this was told to me by a caregiver directly into my face.”¹¹⁵

While many of the interviewed SGN refugees reported that their environment in South Africa was an improvement over what they experienced in their countries of origin, many still expressed feelings of isolation and a lack of community in South Africa. Some refugees communicated that they experienced difficulty finding romantic or platonic relationships because they did not want their SGN identity revealed to others. One refugee service provider commented, “And when I asked him [a refugee] what are your problems here, like what are your challenges, he said, ‘Well I don’t have a lover, I can’t have a lover because I’m not gonna tell anyone I’m gay until I feel secure enough in the community.’”

D. ABILITY TO SURVIVE

Unemployment rates are high in South Africa generally (23.9% in early 2012),¹¹⁶ and a multitude of issues exacerbate the problem for refugees. This study indicates that job prospects

are especially dismal for SGN refugees, despite the fact that refugees and asylum seekers are legally permitted to hold employment in the country.¹¹⁷

Of the eleven refugees interviewed for this study, one reported currently being employed to do small odd jobs¹¹⁸ and two reported being employed as hairdressers.¹¹⁹ None of the interviewees reported having a steady or secure form of employment. Two of the interviewees¹²⁰ reported engaging in sex work to survive, and one reported being currently engaged in it.¹²¹ Although it appears most of the interviewees were unemployed, only three reported that they were looking for work, although this could be due to their lack of comfort in discussing those issues.¹²²

Xenophobia among South African nationals in their employment practices is a major obstacle for all refugees living in the country. According to one stakeholder interviewed, “South Africans are quite xenophobic and they are quite afraid of foreigners for many reasons, probably because there is this sort of misconception that foreigners coming in are going to come and live in our areas and take our job.”¹²³ One reason for the hostility towards foreigners is that many perceive refugees to be economic migrants.¹²⁴ One worker at a Refugee Reception Office stated, “You end up getting lots of people who should not be applying in the first place...you get tons of Nigerians coming with expired visitors’ visas who are just coming because it’s a free work permit.”¹²⁵

In addition to xenophobia, SGN refugees looking for work face homophobia and trans-

113 Some refugees reported discrimination for more than one reason.

114 Interview by ORAM with SA - L2.

115 Interview by ORAM with SA - L1.

116 Andres R. Martinez, *South Africa Unemployment Rate Drops to More Than 2-Year Low*, Bloomberg Businessweek (Feb. 7, 2012), <http://www.businessweek.com/news/2012-02-07/south-africa-unemployment-rate-drops-to-more-than-2-year-low.html>.

117 See Interview by ORAM with SA - S33 (“Asylum seekers — we have almost 400,000 in this country — are allowed to work.”).

118 Interview by ORAM with SA - L2.

119 Interview by ORAM with SA - G4; Interview by ORAM with SA - TW1.

120 Interview by ORAM with SA - G2; Interview by ORAM with SA - G3.

121 Interview by ORAM with SA - G2.

122 Interview by ORAM with SA - G1; Interview by ORAM with SA - G6; Interview by ORAM with SA - TW1.

123 Interview by ORAM with SA - S15.

124 See Interview by ORAM with SA - S33 (“The South African Department of Home Affairs has been trying to distribute work permits to Zimbabweans in this country, and in doing so they’re trying to distribute almost 300,000 work permits that people have applied for. Basically, trying to take the clogged up asylum seeker process and clean it up a bit. Because the government argues that almost all Zimbabweans are not refugees; they’re economic migrants. And the only option Zimbabwean migrants have is to apply for asylum, so that’s why this asylum seeker process is so backlogged.”).

125 Interview by ORAM with SA - S23.

phobia, both in the hiring stage and after they are employed. One refugee reported holding a job for two weeks, but being fired when his employers discovered that he was gay.¹²⁶ Even hiring managers who are SGN themselves may be reluctant to hire others who are SGN for fear of how they will be perceived. One gay interviewee reported his experience with a gay manager: “I went there and I took my CV [to] the manager of that place, he was also gay, so he just said, ‘No, I cannot hire you [redacted], because if I hire you, people will think that I want [you] to hook up [with] me.’”¹²⁷ One transgender applicant described finding a job as “the most difficult” challenge of being a refugee in South Africa.¹²⁸

Other obstacles faced by SGN refugees in South Africa trying to find work include bureaucratic complications and a lack of financial support from other sources. Work permits are notoriously difficult to acquire, and even those who are able to procure them may still have difficulty getting hired by employers who request additional forms of identification. One interviewee, a lesbian, stated that wherever she looked for a job, “[employers] tell you, ‘No, we don’t accept this, we need an ID.’”¹²⁹ Many of the interviewees stated that during South African winters, when the weather is cold and the country sees few tourists, the search for a job becomes even more difficult.¹³⁰ While there are a few nongovernmental organizations that offer some financial assistance to refugees unable to support themselves, limited funding¹³¹ means that many are in a race with the clock to find a job.

Unable to find employment, some SGN refugees turn to sex work in order to survive. Although only two of the interviewees report-



One transgender applicant described finding a job as “the most difficult” challenge of being a refugee in South Africa.

ed having done sex work for money,¹³² at least two others had considered it¹³³ and it is unfortunately a common survival tactic for many.¹³⁴ Universally, refugees point to financial difficulties and a lack of access to employment as their reasons for engaging in sex work.¹³⁵ As one interviewee put it, “I am just doing it because I don’t have any way to get money.”¹³⁶ One NGO interviewee reported that some refugees have agreed to do sexual favors in return for a place to live.¹³⁷ One refugee who began sex work to earn money for rent said, “I dislike [it] but I don’t have a choice.”¹³⁸

E. SUBSISTENCE NEEDS

A distressing reality for newly arrived refugees in South Africa is that it is usually difficult to find housing due to the prejudice they face. Xenophobic violence has often forced refugees from the few shelters to which they have access. One of the SGN refugees interviewed was attacked by a South African in his shelter who would say things like, “Oh, you foreigner, you have to go back to your country” and attempt to instigate fights with

126 Interview by ORAM with SA - G3.

127 Interview by ORAM with SA - G1.

128 Interview by ORAM with SA - S11.

129 Interview by ORAM with SA - L1.

130 Interview by ORAM with SA - G2; Interview by ORAM with SA - G5; Interview by ORAM with SA - G6; Interview by ORAM with SA - TW1.

131 Cf. Press Release, Lawyers for Human Rights, Social Relief is Made Available to Vulnerable Refugees (Apr. 5, 2012) available at <http://www.lhr.org.za/news/2012/social-relief-made-available-vulnerable-refugees> (noting that in June 2012 South African government benefits would be made available to refugees in South Africa as well); see also Government Notice (GN) R269/2012 (S. Afr.).

132 Interview by ORAM with SA - G2; Interview by ORAM with SA - G3.

133 Interview by ORAM with SA - G1; Interview by ORAM with SA - G5.

134 See Interview by ORAM with SA - S5.

135 The experience of the refugees contacted for this study has been confirmed by the work of other stakeholders. For instance, five out of 25 LGBTI refugees interviewed for a report by PASSOP (People Against Suffering Oppression and Poverty) reported having “to trade sexual favours in exchange for money necessary to fund daily existence.” PASSOP, A DREAM DEFERRED: IS THE EQUALITY CLAUSE IN THE SOUTH AFRICAN CONSTITUTION’S BILL OF RIGHTS (1996) JUST A FAR-OFF HOPE FOR LGBTI ASYLUM SEEKERS AND REFUGEES 14 (June 2012).

136 Interview by ORAM with SA - G2.

137 Interview by ORAM with SA - TW3.

138 Interview by ORAM with SA - G2.

Transgender individuals often find access to shelters challenging... [S]treet shelters are structured to accommodate either men or women as those terms are traditionally understood, without allowances or flexibility for transgender people.

him.¹³⁹ When others in the shelter heard another gay male interviewee speak another language, they made comments about foreigners and how he had come to take their jobs.¹⁴⁰

A number of organizations in South Africa provide shelter or refer refugees to these services, and several of the refugees interviewed reported staying in a shelter.¹⁴¹ They also reported being fed by shelters they stay in, and being fed and clothed by churches. However, the experiences of the refugees living in shelters varied. One of the refugees reported a positive experience at the Inclusive and Affirming Ministry (IAM) shelter, saying that it was very safe and that “[t]hey take people without shelter and they provide for them until they can get on their feet, which I think is a great thing.”¹⁴² Other refugees reported negative shelter experiences.¹⁴³ One gay man had a particularly negative experience at IAM: a South African citizen staying there attacked him, and his laptop and other belongings were stolen. He reported that the “matron” of the shelter was racist and homophobic. Another gay man also described a negative experience at Havana Shelter, saying that it was not safe “because most of the people who stay in that shelter...they use drugs...so for me it’s a challenge because...my stuff gets stolen all the time.”¹⁴⁴

Transgender individuals often find access to shelters challenging. Liesl Theron, Director of Gender DynamiX, explained that street shelters are structured to accommodate either men or women as those terms are traditionally understood, without allowances or flexibility for transgender people. “This is becoming increasingly problematic as winter approaches and transgender people who are forced to sleep on the streets are often subject to prejudice and even violence.”¹⁴⁵

139 Interview by ORAM with SA - G1.

140 Interview by ORAM with SA - G6.

141 Interview by ORAM with SA - S3; Interview by ORAM with SA - S5; Interview by ORAM with SA - S8; Interview by ORAM with SA - S19; Interview by ORAM with SA - G1; Interview by ORAM with SA - G6; Interview by ORAM with SA - TW2.

142 Interview by ORAM with SA - TW2.

143 Interview by ORAM with SA - G1; Interview by ORAM with SA - G6.

144 Interview by ORAM with SA - G6.

145 INT’L GAY & LESBIAN HUMAN RIGHTS COMM’N, *South Africa: Transgender People Find No Shelter* (Apr. 26, 2007), <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/419.html>.

Most shelters put a limitation on the length of time individuals can stay. For example, one organization allows refugees to stay for a maximum period of one month.¹⁴⁶ This is used as an incentive and motivation for the refugees to find a job. Support is usually short-term, meaning six to twelve months. Such limitations can discourage some refugees from seeking out assistance and leaves many refugees out on the street, desperate to find food and shelter through whatever means necessary.

i. Vulnerability in Urban Centers and Townships

Although urban centers are generally more receptive to SGN migrants, few refugees can afford the high cost of living typical to major metropolitan areas. Instead, many live in townships and rural areas because the cost of living is more affordable. As one stakeholder interviewee reported, “[I]f you don’t have a very good job or you’re not employed, living in a township is a very viable option for you, but it also makes you a sitting duck. You could be facing stigmas based on your sexual orientation and the fact that you’re foreign, if you choose to live in a township.”¹⁴⁷

Those SGN refugees that remain located in urban areas tend to live in downtown areas with poor living conditions where members of their nationality group are concentrated (e.g., a Zimbabwean sub-neighborhood). Given the extremely vulnerable economic state of most SGN refugees, in order to subsist they must stay in these neighborhoods to receive community support and eke out a living. However, due to the discrimination and harassment SGN refugees would face if their fellow nationals discovered their sexual orientation or gender identity, many are forced to endure problems similar to those they encountered while in their own country of origin and they remain closeted as a result.

Regardless of the areas they might live in, SGN refugees face the possibility of eviction

146 Interview by ORAM with SA - S19.

147 Interview by ORAM with SA - S27.

if their landlords or flat-mates become aware of their gender or variant sexual identities.¹⁴⁸ In some cases, the individuals evicting the SGN refugees are fellow nationals of their countries of origin or members of their own families.¹⁴⁹ In other instances, eviction occurs at the hands of South Africans who harbor homophobic or xenophobic sentiments.

F. LACK OF ACCESS TO SERVICES

Refugees reported that they received assistance from several organizations. For example, one lesbian interviewee received services from the Refugee Aid Organisation (RAO),¹⁵⁰ which provides emergency grants to SGN refugees and asylum seekers for a period of one to three months. Other interviewees received services from Health4Men, which partners with the Department of Health to provide medical services to marginalized male populations such as displaced migrants, prisoners, male sex workers, and male drug users. Interviewees also reported receiving services from PASSOP (People Against Suffering Oppression and Poverty), which helps refugees, asylum seekers, and undocumented people solve labor disputes, obtain employment, and access government services.

Stakeholders identified a variety of ways in which service provision could be improved. For instance, many interviewees mentioned that training should be provided to government officials, NGO staff, and asylum applicants. As one stakeholder stated, “I think teaching the status determination officers how to effectively evaluate a claim based on gender identity or sexual orientation again ties in to the bigger problem of lack of training, so it’s not just that they are not trained on that particular issue, they’re also not trained on the law in general.”¹⁵¹ Stakeholders also mentioned that trainings should also be given to senior NGO staff who are able to imple-

ment suggestions for improvements.¹⁵² Other stakeholders suggested that LGBT foreigners should be made aware of their rights and where they can seek assistance.¹⁵³

Several stakeholders noted that coordination among NGOs should be improved. Organizations providing different forms of assistance to refugees or SGN people often do not communicate effectively. As one stakeholder put it, “I think another thing that might be useful would be to get the key organizations that are dealing with refugees and asylum seekers together to talk.”¹⁵⁴

Other interviewees stated that the process by which people obtain asylum in South Africa should be reformed. Stakeholders indicated that the confidentiality of the interview process is compromised because the Home Office does not provide interpreters so applicants often “grab someone outside or the status determination officer will grab another asylum-seeker and use them for the interview.”¹⁵⁵ Several stakeholders, including SA-S5, SA-S15, SA-S27, stated that, although the South African Constitution provides SGN people with protection, these rights are not recognized in practice. One stakeholder, SA-S23, who is a status determination officer, contended that the adjudication process should be reformed to eliminate the high rate of fraudulent claims, as “80 to 90 percent of the time is spent in adjudicating claims that are absolutely without substance.”

Of the eleven refugees interviewed, nine did not mention if they were open about their sexual orientation or gender identity with RSD officers. Similarly, most refugees did not disclose whether they had informed NGOs or refugee servicing organizations about their sexual diversity. One lesbian interviewee reported that she has not come out to the South African authorities.¹⁵⁶ Conversely, one gay male interviewee did inform the South

“I think teaching the status determination officers how to effectively evaluate a claim based on gender identity or sexual orientation again ties in to the bigger problem of lack of training, so it’s not just that they are not trained on that particular issue, they’re also not trained on the law in general.”

148 Interview by ORAM with SA - G1; Interview by ORAM with SA - G2; Interview by ORAM with SA - G3; Interview by ORAM with SA - L2.

149 Interview by ORAM with SA - G1; Interview by ORAM with SA - G2.

150 Interview by ORAM with SA - L1.

151 Interview by ORAM with SA - S2.

152 Interview by ORAM with SA - S16; Interview by ORAM with SA - S19.

153 Interview by ORAM with SA - S25; Interview by ORAM with SA - S32.

154 Interview by ORAM with SA - S21.

155 Interview by ORAM with SA - S2; Interview by ORAM with SA - S28.

156 Interview by ORAM with SA - L2.



One transgender woman interviewed said that when she went to local health centers and the main hospital where she was supposed to receive hormonal treatment pills, they asked for ID or a paper indicating refugee status. Without those materials, they refused to help her.

African Home Office about his sexual orientation.¹⁵⁷ He was also the only interviewee whose asylum claim was rejected.

Refugees may be reticent to disclose their sexual diversity because they could face discrimination when accessing services. As one stakeholder said, “[A] lot of LGBTI refugees are alienated from the organizations that are servicing refugees and the staff people. There are homophobic spaces, or there are spaces that are not sensitive to their issues, where they don’t feel they’re getting support if they do disclose.”¹⁵⁸ Interviewees noted a lack of overlap, communication, and coordination between refugee-assisting and SGN-assisting organizations. A representative from PAS-SOP stated that while there are “a considerable number of legal centers and civil society organizations that deal with refugees...very few of them engage and actively seek out LGBTI individuals.”¹⁵⁹

SGN refugees in South Africa face dual marginalization in that they are discriminated against both because of their sexual orientation or gender identity and because they are not native South Africans. One representative from the Lesbian and Gay Equality Project observed that, “xenophobia is as bad as homophobia.”¹⁶⁰ Indeed, many SGN refugees

157 Interview by ORAM with SA - G4.

158 Interview by ORAM with SA - S16.

159 Interview by ORAM with SA - S33.

160 Interview by ORAM with SA - S26.

face discrimination from the LGBTI community because they are not South African. One gay male interviewee contended that, “there’s lack of support group from South African LGBT community, because they still think that we’re not from the country.”¹⁶¹ Although the South African Constitution extends protection to refugees, “People respond out of their own prejudice often towards non-nationals in any case, even though that’s not the policy.”¹⁶² Thus, refugees are being denied access to their constitutionally guaranteed rights.

G. HEALTHCARE

Refugees and asylum seekers in South Africa are afforded the right to basic healthcare services:

*The South African Constitution guarantees the right to access to health care for all. In September 2007, the Department of Health (DOH) released a Revenue Directive reaffirming that refugees and asylum-seekers with or without a permit have the right to access health services and should be treated for free at any primary health care facility and exempted from hospital admission fees if without appropriate resources.*¹⁶³

However, one transgender woman interviewed said that when she went to local health centers and the main hospital where she was supposed to receive hormonal treatment pills, they asked for ID or a paper indicating refugee status. Without those materials, they refused to help her.¹⁶⁴

The reality is that refugees and asylum seekers in South Africa suffer from discrimination in the provision of medical services. Many face discrimination in public health facilities and abuse from healthcare providers due to their status as foreigners. In the story of one interviewee, these prejudices were ex-

161 Interview by ORAM with SA - G1.

162 Interview by ORAM with SA - S11.

163 DOCTORS WITHOUT BORDERS, NO REFUGEE, ACCESS DENIED: MEDICAL AND HUMANITARIAN NEEDS OF ZIMBABWEANS IN SOUTH AFRICA 10 (June 2, 2009).

164 Interview by ORAM with SA - TW2.

pressed through verbal harassment by medical staff. A caregiver in a clinic told her, “You foreigners come here to take my jobs. There’s nothing wrong in your countries, why don’t you go back?”¹⁶⁵ The interview did not reveal whether the caregiver refused to provide treatment or provided lesser services after these comments. However, it is undoubtedly difficult for a refugee to feel comfortable and safe seeking out and receiving treatment under these conditions.

Those who are forced into sex work to survive face additional health risks, including possible exposure to HIV and other STIs. One SGN refugee interviewee who had to resort to survival sex, for example, said that in doing so, he feels he is risking his life because of the danger of contracting HIV.¹⁶⁶

While many challenges remain, several of the refugees interviewed for this report stated that they had received health services from NGOs,¹⁶⁷ and a number of NGOs have begun to offer health services that are specifically targeted to this vulnerable population. For example, one organization provides psycho-social support,¹⁶⁸ and another NGO has a clinic that provides counseling services to those traumatized by violence and war.¹⁶⁹ According to another stakeholder interviewee, what is necessary moving forward is “to find a safe place for those people to stay in first, and get proper counseling for those people, psychological or sociological counseling...and then try and understand their situation and try and get from them exactly what they want.”¹⁷⁰

H. EDUCATION

The Bill of Rights to the South African Constitution guarantees the right to access public education for SGN refugees and asylum seekers.¹⁷¹ Furthermore, educational programs

outside of the public education system can increase the ability of a refugee or asylum seeker to find steady and fulfilling work. Because of their potential to improve their lives and job prospects, many interviewees expressed a desire to participate in these programs in South Africa. However, interviewees also revealed a number of barriers preventing SGN refugees and asylum seekers from accessing these educational services.

Two of the refugees interviewed reported that they had attended post-secondary education in South Africa. Two participated in vocational training, and one received language training in South Africa. Five of the eleven interviewees said they wanted more education.

Several stated that they were interested in education in order to improve their employment prospects. One refugee commented, “If [I] go back to school...my life will be better... [I]f you have your diploma, and you have the work permit, you can work easily, you don’t have to worry.”¹⁷² Multiple refugees stated that they wanted to study law in order to become human rights lawyers and to fight for SGN rights.¹⁷³

Financial barriers were the single most commonly expressed obstacle to education for SGN refugees. Although public education is free in South Africa for citizens and non-citizens alike,¹⁷⁴ many refugees felt that they could not attend classes because they would then be prevented from working enough hours to earn a living.

In addition, some interviewees expressed that they experienced difficulty continuing with their education because of a lack of stability in their lives, including a lack of shelter. One refugee stated, “Because I also expect that I’m going to school, I don’t know where

Financial barriers were the single most commonly expressed obstacle to education for SGN refugees. Although public education is free in South Africa for citizens and non-citizens alike, many refugees felt that they could not attend classes because they would then be prevented from working enough hours to earn a living.

165 Interview by ORAM with SA - L1.

166 Interview by ORAM with SA - G3.

167 Interview by ORAM with SA - G1; Interview by ORAM with SA - S5; Interview by ORAM with SA - S22; Interview by ORAM with SA - S24.

168 Interview by ORAM with SA - S5.

169 Interview by ORAM with SA - S8.

170 Interview by ORAM with SA - S9.

171 S. Afr. CONST., 1996 §29, available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#9>.

172 Interview by ORAM with SA - G3.

173 Interview by ORAM with SA - G1; Interview by ORAM with SA - G3.

174 “In South Africa, access to education is guaranteed by the Constitution’s Bill of Rights (Chapter 2, Section 29) which states: ‘(1) Everyone has the right to a basic education, including adult basic Education.’ Everyone has been explicitly interpreted to include non-citizens.” LAWYERS FOR HUMAN RIGHTS & CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA, JOINT SUBMISSION TO THE PORTFOLIO COMMITTEE ON BASIC EDUCATION: SUBMISSION ON THE DIFFICULTIES FACED BY REFUGEES, ASYLUM SEEKERS AND OTHER FOREIGN MIGRANT CHILDREN IN ACCESSING EDUCATION 2 (Feb. 2010). Furthermore, under the South African Schools Act, “a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.”



SGN refugees who choose to try and scrape by in the expensive cities do so because the townships tend to be more conservative, and they experience more homophobic and transphobic harassment in them.

to stay, I don't know where to do my homework."¹⁷⁵ Another said, "Then what about going to school? Well I can't do that because I don't have a place to study."¹⁷⁶

Notably, no refugees reported that they could not access education in South Africa because of their sexual orientation or gender identity, and only one communicated that he could not access education because he was a refugee. However, several stakeholders noted that LGBTI minors and youth often face discrimination in the educational system. One gave the following example:

[A] transgender teenager was actually precluded from wearing trousers from a far more modest school.... And, you know that there is this orthodox way of doing things at school, that you are a girl, you are a girl who must wear uniform, and therefore a boy, a boy must wear trousers.... And this young girl said, 'No, I feel that I'm a boy. I want to wear trousers in this school.' It happened this year. And the school principal dismissed [expelled] the child."¹⁷⁷

¹⁷⁵ *Id.*

¹⁷⁶ Interview by ORAM with SA - S48.

¹⁷⁷ Interview by ORAM with SA - S9.

I. FREEDOM OF MOVEMENT WITHIN SOUTH AFRICA

SGN refugees in South Africa often can only afford to live in the townships outside the major cities (e.g., Johannesburg, Cape Town, Durban, and Pretoria).¹⁷⁸ However, since NGOs, social service providers, and hospitals are usually located in the cities, refugees have to make long trips to them on foot or by bus if they can afford the fare.¹⁷⁹ If they are unable to do so, they are unable to access services.

Those SGN refugees who choose to try and scrape by in the expensive cities do so because the townships tend to be more conservative, and they experience more homophobic and transphobic harassment in them.¹⁸⁰ However, this is not to say that the major cities are entirely safe spaces for SGN people to live in,¹⁸¹ particularly for SGN refugees residing in immigrant communities of their own nationality.¹⁸² For example, one refugee discussed how a relative followed him from the township where he was staying to a gay club in the city and subsequently kicked him out of the house.¹⁸³ The South African SGN community is reluctant to accept "foreigners" into its fold.¹⁸⁴ All of these factors serve to limit where, when, and how SGN refugees can move and reside within the country.

¹⁷⁸ Interview by ORAM with SA - L1; Interview by ORAM with SA - S27; Interview by ORAM with SA-S45.

¹⁷⁹ Interview by ORAM with SA - G5.

¹⁸⁰ Interview by ORAM with SA - G1.

¹⁸¹ Interview by ORAM with SA - G6.

¹⁸² Interview by ORAM with SA - S44.

¹⁸³ Interview by ORAM with SA - G1.

¹⁸⁴ *Id.*

J. SOCIAL NETWORKS & ACCESS TO INFORMATION SYSTEMS

*There's not a lot of public information available to refugees and asylum seekers at all...If somebody approaches an organization that specializes in asylum and refugee work, they may be able to get that kind of information. But because these categories of people are so invisible...case workers, field workers, NGOs don't know what to look for. And if they don't know what to look for, and they're uncertain how to deal with this category of claims, it's very difficult for that person to get the right kind of advice and to be able to [be] assisted in the way that they need to be assisted.*¹⁸⁵

Social networks and access to other information systems are important to SGN refugees' lives, both in South Africa and prior to arriving in the country. Before arriving in South Africa, some refugees manage to communicate with helpful individuals and NGOs in the country through the Internet and telephone. For example, one refugee from Uganda acquired the phone number of a contact in South Africa before his arrival.¹⁸⁶ One stakeholder reported that a gay Zambian national called their organization in order to get information after seeing their website.¹⁸⁷

Once in the country, SGN refugees use their social networks and technology to obtain emotional support, employment, housing, and access to the RSD system. One interviewee used the classifieds service website Gumtree to apply for jobs,¹⁸⁸ and at least two others used the internet during their job searches.¹⁸⁹ Another refugee used the internet to connect with an American activist, who eventually visited South Africa and helped him look for

housing and a job.¹⁹⁰ Another reported using the Internet and cell phone to communicate with her lawyers.¹⁹¹

Although it is an important tool for some, not all SGN refugees have access to the Internet.¹⁹² In addition, while internet cafés may be affordable for a short period of time for some refugees, buying a personal computer is usually not an option. Furthermore, using computers in a public space means SGN refugees need to be discreet about their internet activity:

*I've heard many times when a person access an internet café in a given other African country, you have to be really...computer smart, you have to delete all your tracks — the cookies, and not be traced to not be judged because you're in a public space, somebody can come and see what you look or searched or whatever.*¹⁹³

Whether it is achieved through the Internet or other means, access to information is critical for successfully navigating the RSD process. One stakeholder interviewee went so far as to state:

*I think the biggest challenge to someone fleeing persecution based on sexual orientation is lack of information on both sides. So the individual who is applying for asylum may not understand that that's a recognized basis for getting refugee status, and the status determination officer also doesn't necessarily understand that that's part of the law and this person is entitled to refugee status on that basis. So I think lack of information is the biggest problem.*¹⁹⁴

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185 Interview by ORAM with SA - S27.

186 Interview by ORAM with SA - G4.

187 Interview by ORAM with SA - S11.

188 Interview by ORAM with SA - G5.

189 Interview by ORAM with SA - G2; Interview by ORAM with SA - G3.

190 Interview by ORAM with SA - G1.

191 Interview by ORAM with SA - L2.

192 Interview by ORAM with SA - G4.

193 Interview by ORAM with SA - S17.

194 Interview by ORAM with SA - S2.

VI. *Conclusion*



Asylum seekers arriving in South Africa are quickly swept up in an overburdened refugee status determination system. While the goal of the system is to identify those in need of international protection, obstacles to its effective implementation expose refugees to violence, rape, theft, extortion, arbitrary arrest, police harassment, and potential return to a country of persecution. These problems are worsened for those individuals who are marginalized due to their status not only as foreign-born refugees, but also as members of the SGN community. The SGN refugees and asylum seekers interviewed for this report revealed shared experiences of victimization, exclusion, and isolation within the refugee status determination system, the network of service providers, and general South African society.

Despite these challenges, a concerted effort to increase protection for SGN refugees can bring the promise and potential of South African law closer to full realization. In this regard, ORAM has developed a detailed set of recommendations directed at NGO service providers, government actors, and other stakeholders. Implementing these recommendations will help to bring SGN individuals into the fold of refugee protection and eliminate protection gaps that limit the ability of SGN refugees to obtain international protection, integrate in South African society, and access the necessities for survival.

ABOUT ORAM

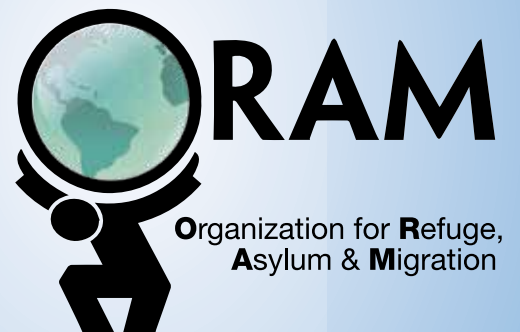
ORAM — Organization for Refuge, Asylum & Migration is the leading agency advocating for lesbian, gay, bisexual, transgender, and intersex (LGBTI) refugees worldwide. Based in San Francisco in the United States, ORAM is the only international NGO that focuses exclusively on refugees and asylum seekers fleeing sexual orientation and gender identity-based violence.

ORAM works to carry out its worldwide mission on multiple fronts, from direct client assistance and global advocacy to logistical support and training. Among ORAM's many groundbreaking undertakings are its comprehensive and innovative trainings and its work in the assisted resettlement of LGBTI refugees. Through these strategic activities, ORAM is expanding the international humanitarian agenda to include LGBTI persons and to secure LGBTI refugees' safety. Concurrently, ORAM advocates within a broad range of communities to include these refugees within their scope of protection.

Informed by its intensive legal fieldwork, ORAM conducts international and domestic advocacy to protect LGBTI individuals fleeing persecution worldwide through collaboration with a wide array of NGO partners. ORAM continuously provides educators, community leaders, and decision-makers with much-needed information about LGBTI refugees.

ORAM's publications meld legal expertise with research-based insights in the social sciences and thorough knowledge of current events. These are informed by ORAM's comprehensive community-based understanding of LGBTI issues. Together these three pillars yield an unsurpassed capacity to bring about real change.

As a steward and educator on LGBTI refugee issues, ORAM develops and provides targeted, culturally-competent trainings for refugee protection professionals, adjudicators, and other stakeholders worldwide. This report is intended to inform such trainings.



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