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# SOUTH AFRICA

## “TALK FOR US PLEASE”

### LIMITED OPTIONS FACING INDIVIDUALS DISPLACED BY XENOPHOBIC VIOLENCE

“Talk for us please”

(A Burundian asylum-seeker, displaced by the violence in May 2008)<sup>1</sup>

### **Introduction**

Over several weeks in May 2008 a wave of violent attacks against individuals - identified on the basis of their perceived nationality, ethnicity or migrant status - led to the displacement of tens of thousands of people from their homes and communities. Over 60 were killed and more than 600 others were injured. The attacks, which may have had an organized component, began in Alexandra Township in Johannesburg, and spread rapidly to other townships, informal settlements and inner-city areas in Gauteng province. The violence flared briefly in Durban and led to the flight of an estimated 20,000 people from their homes in the greater Cape Town area. Over 30,000 people fled to Mozambique or to other countries of origin. Although the areas affected geographically were relatively small, as observed by the Task Team of Members of Parliament, the “impact of the violence and attacks was severe as many people were gripped by fear and experienced the trauma of people being evicted from their homes, being physically assaulted, killed and in some instances burnt”.<sup>2</sup>

The scale and intensity of the violence in May 2008 was unusual and caused widespread shock, but there had been sporadic incidents of attacks on refugees and migrants earlier in 2008, including in Mamelodi, Atteridgeville, Shoshanguve and Cape Town, as well as a number of serious incidents of violence in previous years in the Eastern Cape and the Western Cape.<sup>3</sup> Inquiries by parliamentary bodies, research institutions and human rights organizations have highlighted, as contributing factors, strong xenophobic sentiments amongst the South African population; feelings of resentment towards and competition with foreigners over jobs, housing and social services, combined with anger and frustration over the slow pace of delivery of these services and the persistence of high unemployment levels particularly amongst younger people; perceptions of corruption amongst the police service and Department of Home Affairs officials in relation to refugees and migrants, and of a lack of effective policies on migration. The role of criminality, of an organized (politically-motivated) element behind the violence, and limits on the police services’ organizational capacity to respond to large-scale violence have also been considered in official inquiries and government comments on the May violence.<sup>4</sup>

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<sup>1</sup> Interviewed by Amnesty International at Akasia camp, near Pretoria, 29 August 2008.

<sup>2</sup> Report of the Task Team of Members of Parliament Probing Violence and Attacks of Foreign Nationals, May 2008 <http://www.parliament.gov.za/content/Tast%20Team%20Report%20Xenophobic%20Attacks.pdf>

<sup>3</sup> Report of the Parliamentary Task Team, p.1; UNHCR News Stories, “Xenophobic attacks drive hundreds from homes in South African suburb”, 28 March 2008; “Refugees in South African city tell UNHCR they need help”, 7 November 2006; Report on Open hearings on Xenophobia and problems related to it, Hosted by the South African Human Rights Commission and the Parliamentary Portfolio Committee on Foreign Affairs, November 2004 AI interview with Somali Community Board, Johannesburg, 27 August 2008; Mail&Guardian, 5 September 2008 [Nafcoc calls for Somali purge, <http://www.mg.co.za/article/2008-09-05-nafcoc-calls-for-somali-purge>

<sup>4</sup> Citizenship, Violence and Xenophobia in South Africa, June 2008, see <http://www.hsrc.ac.za/Document-2807.phtml>

While the national government's response was initially slow, members of the public, humanitarian and UN agencies, local charities and other civil society organizations provided immediate assistance to those displaced and sheltering at police stations, community halls, churches, mosques and other temporary shelters. Provincial and city governments mobilised the Disaster Management services to co-ordinate the humanitarian response. The situation was formally declared as a "disaster" in Gauteng and Western Cape provinces, eventually leading to the establishment of official sites [referred to in this report as camps] in both provinces to provide protection and safety for displaced individuals. Some of the officially-identified sites were unsuitable, such as the intended site near Wadeville in Gauteng and Soetwater on the Cape Peninsula. There was a need for training on standards and principles for the establishment of Displaced Persons camps, and development of a budget from the humanitarian community, but there was also political pressure to act quickly. In the Western Cape, there was also a difference of opinion for a period of time between the leadership of the Cape Town city government and the Office of the Provincial Premier which affected the delivery of essential services and other decision-making. The South African state, with the advice and support, including financial, of UN agencies<sup>5</sup>, humanitarian and charitable organizations and a wide range of other civil society organizations, largely funded the response to this emergency. As one member of the Gauteng provincial government expressed it in a meeting with Amnesty International, it was a "good South African response" at a time when "brand South Africa" had been damaged. No international appeal was issued by UN agencies, although this option was discussed.<sup>6</sup>

Amnesty International is concerned, however, that since July certain trends have begun to emerge in the government's response to this crisis which are threatening to or have violated the rights of affected individuals, including refugees and others in need of international protection. The trends, particularly in Gauteng province, include:

- the implementation of accelerated asylum procedures, without sufficient procedural safeguards and consequently creating the possibility of forcible return to countries where the person may be at risk of persecution (refoulement);
- the misuse of criminal charges, unlawful detention and threats to deport individuals who failed to co-operate with administrative procedures at the camps;
- obstruction from time to time of access by humanitarian, legal and other support organizations;
- threats of premature closures of camps and
- the reduction in the level of essential services, including access to food.

The threats and reduction in essential services amount to a coercive influence that risks leading to "constructive refoulement", particularly while the conditions for safe and sustainable return to

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<sup>5</sup> There were problems in the coordination and effectiveness of the response within the UN community in South Africa partly due to the lack of a permanent Resident Coordinator and also the lack of clarity over the responsibilities of different agencies concerning the displaced population.

<sup>6</sup> Amnesty International interview with OCHA, Johannesburg, 26 August 2008; AI interview with the MEC for Local Government Gauteng Provincial Government, Qedani Dorothy Mahlangu, Pretoria, 3 September 2008.

local communities are not present and other options such as resettlement are yet to be adequately provided.<sup>7</sup>

Amnesty International is not advocating for the permanent establishment of camps for internally displaced persons and is not opposed to 'consolidation' of sites - a process which is currently underway in Gauteng and the Western Cape - provided that it is conducted in a manner consistent with international human rights and humanitarian law.<sup>8</sup> There is currently great sensitivity on the part of government not to appear to be "privileging" "foreigners" in terms of access to essential services in the context of high levels of poverty and unemployment in South Africa. In its continuing response to the circumstances of those displaced by the violence, however, the government must uphold its international, regional and domestic human rights obligations towards refugees, asylum-seekers, migrants and internally displaced persons.<sup>9</sup>

### **Population of concern**

The May 2008 violence was targeted at non South African nationals, including refugees, asylum-seekers, and migrants from a range of African countries including Zimbabwe, Somalia, Mozambique, Ethiopia, Democratic Republic of Congo, Kenya, Tanzania, Burundi and Rwanda. In addition, a small number of South African nationals were also reportedly caught up in the violence. Whilst many individuals with differing entitlements to enter and remain in the country were affected by the violence, all affected individuals are entitled to a range of protections under international law and the South African Constitution. Certain protections apply to all regardless of legal status, while other protections, including for internally displaced persons, refugees and asylum-seekers, also apply.

In particular, all of those displaced by the violence are properly regarded as internally displaced persons.<sup>10</sup> National authorities have the primary duty and responsibility to provide internally displaced persons protection and humanitarian assistance, including essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services and sanitation. National authorities also have the primary duty to establish conditions and provide the means to allow displaced individuals either to return voluntarily, in safety and with dignity, to their homes or places of habitual residence or to resettle voluntarily in another part of the country.

In addition, displaced individuals who are refugees and asylum-seekers hold additional rights under international, regional and domestic refugee law. These rights include the absolute

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<sup>7</sup> Constitutional Court of South Africa, In the matter between Odinga Mamba and others Applicants and Minister of Social Development and others Respondents Constitutional Court case number cct 65/08, order dated 21 August 2008.

<sup>8</sup> See further below for information on the applicable standards.

<sup>9</sup> South Africa: Amnesty International calls on government to protect those at risk of "xenophobic" attack, Amnesty International, 23 May 2008 <http://www.amnesty.org/en/library/asset/AFR53/007/2008/en/faa3ac36-2bdd-11dd-9841-4945a95d6397/afr530072008eng.pdf> and South Africa: Displaced people should not be forcibly removed from temporary camps, Amnesty International, 23 July 2008 <http://www.amnesty.org/en/for-media/press-releases/south-africa-displaced-people-should-not-be-forcibly-removed-temporary-c>

<sup>10</sup> The UN Guiding Principles on Internal Displacement defines internally displaced persons as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border." (Introduction, para 2)

prohibition on the return of a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”<sup>11</sup> and a similar prohibition on the return of an individual where there are substantial grounds for believing that the individual would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.<sup>12</sup>

A more detailed overview of South African’s obligations towards these groups appears in the appendix to this report.

### **Research Methodology**

Amnesty International gathered information for this report through field research, interviews, meetings, reports by other organizations working directly on the issues covered in this report, press reports, legal pleadings as well as public statements made by various state officials. Amnesty International conducted two research missions to look at the situations of those displaced by the May xenophobic attacks, one in June/July and the second in August/September.<sup>13</sup> During their visits, Amnesty International delegates visited and conducted interviews in the following displacement camps in the provinces of Gauteng, KwaZulu-Natal and the Western Cape: Glenanda (Rifle Range Road),<sup>14</sup> Rand Airport,<sup>15</sup> Wit Road,<sup>16</sup> DBSA<sup>17</sup> (Johannesburg), Akasia<sup>18</sup> (Pretoria), Albert Park<sup>19</sup> (Durban), Soetwater<sup>20</sup> and Blue Waters<sup>21</sup> (Cape Town).<sup>22</sup> Amnesty International conducted one-to-one and group interviews with over 150 individuals affected by the violence.<sup>23</sup> Amnesty International also interviewed provincial and national government officials, various UN agencies and non-governmental organizations (NGOs) and others involved in the humanitarian, medical, psycho-social, legal, monitoring and human rights responses to the violence and subsequent displacement.

### **Harassment and misuse of force by agents of the state following the May displacement**

Amnesty International received reports of several incidents of misuse of force by law enforcement officials. On 30 August Amnesty International delegates interviewed a number of individuals displaced by the violence in Durban and sheltering at Albert Park. The group, originally about 186 adults and children, had initially been sheltered at a local church for about four weeks. When the

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<sup>11</sup> UN Convention relating to the Status of Refugees, art. 33(1).

<sup>12</sup> See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1); ICCPR, art. 7.

<sup>13</sup> See also statements issued by Amnesty International on 23 May 2008 and 23 July 2008.

<sup>14</sup> Camp visited by Amnesty International on 5 July 2008

<sup>15</sup> Camp visited by Amnesty International on 25 August 2008.

<sup>16</sup> Camp visited by Amnesty International on 26 August 2008.

<sup>17</sup> Camp visited by Amnesty International on 27 August 2008.

<sup>18</sup> Camp visited by Amnesty International on 29 August 2008.

<sup>19</sup> Camp visited by Amnesty International on 30 August 2008.

<sup>20</sup> Camp visited by Amnesty International on 4 July 2008.

<sup>21</sup> Camp visited by Amnesty International on 2 September 2008.

<sup>22</sup> Several of the camps have since been closed and their residents transferred to other camps.

<sup>23</sup> Including individuals who had been attacked, threatened, or fled violence.

church could no longer assist them, they sought assistance from the Durban municipality on 25 June. The municipal authorities arranged for their transfer to another shelter and paid for their accommodation for five days. After 15 days the manager asked them to leave as the situation was financially unsustainable. On 10 July the group went to Durban's City Hall and were able to speak briefly to a manager from Disaster Management, but he could not assist them. The group stayed near the City Hall area overnight. On 11 July members of the Durban metro police and security guards forced the group into police vans. Film footage of the incident showed security personnel repeatedly pushing a pregnant woman from the group, throwing her to the ground and at one point violently slapping her in the face. Amnesty International delegates interviewed her, several days after she had been discharged from hospital. She was seven months pregnant, and was still experiencing bleeding in the nose and mouth area from the assault. Amnesty International has been informed by medical experts that the results of the medico-legal examination were consistent with the alleged assault. Another woman, G, from the Democratic Republic of Congo, told Amnesty International that during the incident on 11 July she had fallen to the ground and the security personnel had deliberately stamped on her hands and kicked her in the chest and that police used pepper spray on her eyes. Her medical records indicated soft tissue injuries and treatment to reduce swelling in her hands and wrists.

In July, Amnesty International had expressed concern to the government at the forcible removal of more than 700 people, including refugees and asylum-seekers, from the Glenanda (Rifle Range Road) camp to the Lindela Repatriation Centre. The removals happened after officials began to implement the camp registration and temporary resident permit system. Those removed from the camp on 22 July had failed or refused to register, apparently out of fear that to do so would jeopardise their rights as refugees or asylum-seekers. Five days previously the South African Police Service had intervened in response to a situation where the camp residents had surrounded five men who had entered the camp on the night of 16 July and prevented them from leaving. Only one of the men was known to the residents who were suspicious of their intentions. The men were released unharmed on 17 July, but during the tense situation police fired rubber bullets, injuring 23 people who were shot at close range.

While a number of residents of Glenanda (Rifle Range Road) camp were subsequently arrested on charges of kidnapping, Amnesty International reiterates its call to the government to conduct a full investigation into the circumstances of the police use of force on 17 July.

### ***Situation of displaced persons camps as of August-September 2008***

In the wake of the violent attacks in May, many of those who were displaced initially sought shelter and safety with friends and family, while others sought refuge at various sites including police stations, churches and mosques.<sup>24</sup> At the height of the displacement in May, there were nearly 40,000 internally displaced persons at 140 sites in the Gauteng, KwaZulu-Natal and Western

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<sup>24</sup> UNHCR briefing notes, *South Africa: UNHCR aid provided to displaced*, 30 May 2008. Online at: <http://www.unhcr.org/news/NEWS/483fef5b2.html> last visited on 9 September 2008

Cape provinces.<sup>25</sup> Temporary shelters or camps were then set up in various locations across South Africa to provide protection and safety for displaced individuals.<sup>26</sup>

By mid-August 2008, prior to the threatened closure of camps by the Gauteng provincial authorities, the number of displaced individuals residing in camps had reduced to some 8,500: There were 4,340 in 10 locations in Gauteng province, 3,958 in 40 locations in the Western Cape province, and 258 in 3 locations in KwaZulu-Natal province.<sup>27</sup> By the end of August, a total of 5,999 individuals remained in 35 locations in the three provinces.<sup>28</sup> On the first of September, DBSA, River Road and Wit Road camps were consolidated into Glenanda (Rifle Range Road) camp<sup>29</sup> with residents being moved to the latter; two other camps remained open in the Johannesburg area: Rand Airport and Boksburg.<sup>30</sup> There are several sites also in the Pretoria area, including Akasia; the management of which has been under dispute. By the end of August, displaced persons in the Western Cape province were being relocated to two sites: Blue Water and Harmony Park;<sup>31</sup> this process was interrupted by severe weather but resumed thereafter and at the time of publishing was yet to be completed. A third camp in Western Cape province, at Youngsfield Military base, was set to remain open at the time of publishing this report. In KwaZulu-Natal, internally displaced persons remained in three locations.<sup>32</sup>

### **Access to services in camps**

The official safety sites for displaced persons, which were set up after the May violence, provided adequate shelter in most cases and access to essential services. NGOs also played a vital role in the provision of food and other basic assistance as well as psycho-social support.<sup>33</sup> In addition, particularly in the Western Cape, NGOs monitored the conditions in the various camps and pressed for improvements where necessary.<sup>34</sup>

Amnesty International is concerned, however, by a recent trend of reducing access to services in camps. The organisation views such a practice as both an inappropriate response to the present situation and the consequences of this practice as potentially unlawful.<sup>35</sup>

In Gauteng province, authorities decided in August to close the camps, by force if necessary. A legal challenge prevented provincial authorities from carrying out these closures as planned. Even

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<sup>25</sup> UN Office of the Resident Coordinator, Situation Report 12 – Violence against Foreigner in South Africa, 5 September 2008, see <http://ochaonline.un.org/>

<sup>26</sup> These locations will hereafter be referred to as camp(s).

<sup>27</sup> Centres of Safe Shelter and Ad Hoc Shelters in South Africa - Monitoring of Sites for Needs & Gap, Analysis Report No. 7. United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 12 August 2008, see <http://ochaonline.un.org/>

<sup>28</sup> Ibid.

<sup>29</sup> All four camps are in Gauteng Province

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> For example charities like Gift of the Givers provided rapid and comprehensive humanitarian assistance and the Centre for the Study of Violence and Reconciliation, the Trauma Centre for the Survivors of Torture and Violence and Médecins Sans Frontières assisted with medical support and counselling.

<sup>34</sup> See for instance the report of the South African Human Rights Commission, *SAHRC Report on Refugee Camps: Blue Waters, Harmony Park, Silverstroom, Soetwater, and the Youngsfield Military Base*, 22 July 2008; the web-based reports of the *eMzantsi Ubuntu Coalition* and *Hirsi and Another v Provincial Government of the Province of the Western Cape and Others* at <http://www.tac.org.za/community/node/2387>

<sup>35</sup> See above note 7

so, a series of operational decisions by provincial authorities has reduced the services provided to the camps with the likely aim of encouraging the departure of displaced individuals. Such actions, undertaken without plans for safe and sustainable re-integration, or other options as outlined below, risk further human rights violations, including situations of constructive refoulement, and as such violate South Africa's legal obligations.

### **Access to food**

In the initial period following the setting-up of the camps, residents predominately received three regular meals every day. By August when Amnesty International visited camps in Gauteng province, residents of several camps reported that meals had then been reduced to two and in some cases ceased, or only irregularly provided by virtue of donations from private individuals of charities. In some camps, for example, Wit Road, DBSA and Akasia, milk for infants had stopped being provided around mid-August.

In Akasia camp residents informed the organization that food assistance had ceased as of 15 August, which is the date on which the Gauteng provincial authorities had intended to close the camps prior to the Constitutional Court order of 21 August that temporarily interdicted their closure. This absence of food assistance lasted for at least a week. During this time, residents told Amnesty International that they had mixed sugar and water together to try and sustain themselves. Some residents also sold their clothes in a local township to obtain money to purchase food. A local faith-based charity was able to provide some food on several occasions at the end of August.

The provision of essential services for Akasia camp were being affected by continuing disputes regarding responsibility for the camp between the Gauteng provincial government and Tshwane (Pretoria) municipal authorities. Amnesty International was told by the Member of the Executive Committee (MEC)<sup>36</sup> for Local Government for Gauteng province on 3 September that the provincial government did not accept that the displacement site at Akasia was their responsibility. The MEC told Amnesty International, "We did not want to deal with them". In early September the UN-coordinated protection working group began to develop a plan for addressing the immediate humanitarian needs, as well as a staged process for the humane closure of the camp.<sup>37</sup>

### **Humanitarian assistance**

During August, humanitarian organizations and organizations providing legal advice and other forms of support were prevented on a number of occasions from entering the camps in Gauteng province. This occurred particularly when the Department of Home Affairs (DHA) officials, with police support, were visiting the sites. At Wit Road camp, for instance, residents told Amnesty International that the camp management did not allow journalists and some NGOs to visit the camp and that on 25 August, the camp manager had ordered for the camp committee, made up of camp residents, to be disbanded. They reported that the camp manager threatened them that they would be arrested if they talked to NGOs. It is worth noting that Amnesty International delegates met camp residents outside the camp and that when they asked to visit the camp, the

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<sup>36</sup> An MEC is also referred to as a provincial government minister.

<sup>37</sup> Amnesty International meeting with UNDP representatives, Johannesburg 3 September 2008.

camp manager told them they could walk around the camp but not interview any of the residents. Security personnel accompanied them during their presence in the camp.

It is vital that these humanitarian organizations are able to maintain contact with people being affected by the closures and to ensure continuity of care and follow-up support after the closures. This is in accordance with the UN Guiding Principles which specify that “All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to displaced persons to assist in their return or resettlement and reintegration”. It is also consistent with South Africa’s human rights obligations to respect and protect the rights of refugees, asylum-seekers and others requiring international protection.

### **Adequate shelter and access to medical and psycho-social support**

While most camps had UNHCR, military or Disaster Management tents<sup>38</sup>, the situation differed in some locations. The camp in Albert Park, Durban, when Amnesty International visited it, consisted of two large tents pitched in a public park where the displaced people had been moved by police (see further below). While there were initially 186 people in the camp, by the end of August this number was down to 97, including 42 children under the age of 18. Camp residents did not initially have tents and slept in the open. A tent was set up by a private individual but she was reportedly pressured to take it down after ten days. Two tents were then set up by a local organization, but camp residents reported to Amnesty International that the organization was being pressured by the local authorities to take the tent down. The tents as well as the nearby portable toilets were removed on the morning of 8 September. At the time of publishing of this report, the group was without any shelter.

In Akasia, a camp near Pretoria that in early September had about 900 residents, most displaced persons were housed in army-provided tents that appeared adequate. Somali refugees and asylum seekers, however, were housed in a smaller part of the camp, separated from the main camp by a small empty plot of land. They predominantly have makeshift tents, mostly made of plastic sheets and blankets set up on thin pieces of wood. This part of Akasia is in a markedly worse condition than the other, larger part of the camp. Overcrowding in the tents increased after the authorities took down a large tent that was used as both shelter and as a mosque; 40 people who slept in this tent had to relocate to the smaller, overcrowded tents in the camps. Camp residents reported that the authorities had told them that they had to take the tent down as the lease on the tent had expired.

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<sup>38</sup> The Western Cape authorities also utilised established holiday camp buildings.

O, a 29 year old wife and mother from Burundi is currently living Akasia camp with her husband and three children aged 7 months, 4 years and 6 years. Life is increasingly difficult for O as she battles with medical problems while trying to care for her children in the difficult camp conditions.

O and her family came to South Africa seeking asylum. They had been living in Mamelodi township near Pretoria. They fled in May fearful for their safety in light of the xenophobic attacks. O told Amnesty International she and her family continue to fear for their safety and feel it is still not safe for them to leave the camp at the moment. O has recently been diagnosed with tuberculosis (TB) and also suffers from a heart problem. O has had difficulty getting access to medical assistance. She worries about her children, about their education and their future as they are not attending school at the moment. She also worries about how she can provide the basics of life for them, such as food, which had recently been cut-off in Akasia camp for a period of nearly two weeks.

*Interviewed by Amnesty International delegate, 29<sup>th</sup> August 2008, Akasia camp, Gauteng Province*

Medical assistance in the camps has been provided by the Department of Health clinics as well as by NGOs, in particular Médecins Sans Frontières which has been providing emergency and ongoing medical and mental health services using mobile clinics for the displaced communities in Gauteng and Western Cape provinces.

There is a clear need for psycho-social support for those displaced by the May violence, both inside and outside the camps. The displaced have been affected in different ways by the attacks: some were direct victims, having been physically assaulted; others have lost friends or family and many have lost property. The common element to all is that their sense of safety and security has been severely affected. It is crucial to recognize that many of these displaced persons have come to South Africa having fled wars, violence and persecution in their own countries and that the xenophobic violence may have aggravated their sense of vulnerability and their need for safe accommodation and psycho-social support. Issues identified by mental health professionals as affecting the displaced included a sense of deprivation, feelings of exclusion and lack of care, stress related illness and suicidal thoughts, as well as fears for safety and vulnerability to crime arising from the May violence. Amnesty International delegates were told by camp residents of Akasia that one Somali man who had struggled with depression died after he walked into traffic in July, in an apparent suicide.<sup>39</sup>

Amnesty International was informed by NGO service providing organizations in the Gauteng and the Western Cape provinces that they have struggled to obtain sufficient support for mental health services from the state sector. Amnesty International believes that re-integration will be facilitated and made more durable if adequate psycho-social support or funding for such support is provided to the displaced population.

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<sup>39</sup> Interview with residents of Akasia, 29 August 2008

## **Access to information relating to asylum procedures**

Displaced persons, including asylum-seekers interviewed by Amnesty International, had little information on their rights including those relevant to processing of their asylum applications, legal advice or appeal rights.<sup>40</sup>

At the end of August, Lawyers for Human Rights, a non-profit NGO providing legal assistance to asylum-seekers and a UNHCR implementing partner, started attempting to distribute leaflets explaining the appeal procedures and information on how to obtain legal assistance in camps in Gauteng and KwaZulu-Natal provinces.<sup>41</sup> A state official at a camp in Western Cape province told Amnesty International that there had been no information provided by the government, especially the DHA, regarding the asylum procedures and the timing of any visits by DHA officials to the camps.

The provision of sufficient and clear information in a language the IDPs can clearly understand is essential for the enjoyment of their rights, including procedural rights relating to their asylum claims. It is also crucial that in any information provided is unambiguous and does not contradict other information provided to those who are seeking asylum. In this regard, Amnesty International believes that the South African authorities have an obligation to provide such information and that UNHCR has a responsibility under its protection mandates for refugees, asylum-seekers and IDPs, to ensure that these groups have access to such information.

## **Safety and Security in the camps**

Whilst Amnesty International is not aware of reports of xenophobic attacks occurring in the camps, certain camps were noticeably lacking any security personnel or perimeter fencing, for example Albert Park and a section of Akasia, leaving the residents feeling vulnerable to potential attacks. Other camps, for example Glenanda (Rifle Range Road) and Rand Airport, had low fences which could be easily crossed.

## **Right to remain in South Africa**

In South Africa all individuals, regardless of their legal status, are entitled to various protections under domestic and international law, including protection of civil and political rights,<sup>42</sup> and certain economic and social rights including basic health care and education.<sup>43</sup> As displaced persons they also receive additional protections in line with the UN Guiding Principles on Internal Displacement (see appendix). However, the right to enter and lawfully remain in the country is

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<sup>40</sup> For more information see below

<sup>41</sup> See below for further information about limitations in legal access which affected the distribution of the pamphlet

<sup>42</sup> Under the South African Constitution's Bill of Rights civil and political protections under sections 9-21 and 32-35 including the right to be free from all forms of violence and not to be arbitrarily detained, unequivocally apply to everyone in the country. These apply whether they have a legal right to remain in the country like a refugee or not.

<sup>43</sup> South African Constitution's Bill of Rights provides: Section 27. Basic health care in South Africa is fee-based for South Africans and foreigners alike. Emergency health care is free and section 27.3 states that "no one may be refused emergency medical treatment."

either granted through an immigration status<sup>44</sup> or provided through human rights and refugee law in the form of the principle of non-refoulement.

### **Six-month temporary immigration status in camps**

Under South African immigration law, individuals are permitted to enter and remain lawfully in the country if they are granted an immigration permit. In addition to the standard temporary residence permits such as visitor or work permits,<sup>45</sup> under section 31(2)(b) of the Immigration Act the state may grant exemption permits for a specific period. It was using this provision that, in a positive development, the South African government, responding to calls from UNHCR and others, decided in July to issue a six-month temporary exemption permit to residents of the displacement camps. This was introduced to ensure the immediate protection, including against deportation, for displaced individuals and to allow for them a period of time in which to make decisions about their options and/or replace or extend documents lost in the violence. In Amnesty International's view there was poor communication about the implications of camp residents signing the "Individual Data Collection Form"<sup>46</sup> which stated that "[a]s a holder of an exemption certificate issued by the Department of Home Affairs, I understand that I cannot apply for the following: Social Grants, Government Housing, South African Identity Documents and Passports." Residents were advised that the registration exercise was compulsory. In at least one instance, in Glenanda (Rifle Range Road) camp, residents were explicitly warned verbally and in a circulated notice by officials,<sup>47</sup> that "[f]ailure to register [would] have negative consequences including the termination of assistance and protection by government, and may lead to your removal from the Republic of South Africa." Such a statement constitutes a clear threat on the part of the South African state to breach its legal obligations. Many residents who had status as refugees or asylum-seekers, and as such are ordinarily entitled to register for certain social grants and the right to remain in the country for time periods greater than six months,<sup>48</sup> were concerned about the implications of signing a document and the effect this would have on such rights. With very little information available to individuals about the consequences of signing such forms,<sup>49</sup> and faced with the invidious choice to register for camp benefits and curtail their period for lawfully remaining in the country; or refuse to register

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<sup>44</sup> For example temporary or permanent residence permits as provided for under South African immigration law. Relevant temporary permits include permits, cross-border trading permits, work permits, and special permits issued under the corporate permit system (used to employ large groups of people mostly on farms as provided for in sections 10-24 of the Immigration Act, 2002, No. 13 of 2002, <http://www.info.gov.za/gazette/acts/2002/a13-02.pdf> (accessed March 9, 2008), as amended by the Immigration Amendment Act, 2004, No. 19 of 2004, [http://www.dha.gov.za/legislation\\_admin.asp](http://www.dha.gov.za/legislation_admin.asp) (accessed March 9, 2008), and the Immigration Regulations adopted under the 2002 Act, Immigration Regulations No. R616, June 2005, [http://lnw.creamermedia.co.za/articles/attachments/02112\\_regulation616.pdf](http://lnw.creamermedia.co.za/articles/attachments/02112_regulation616.pdf) (accessed April 23, 2008). Together they set the conditions for entry and residence of all non-nationals who are not asylum seekers or refugees (who are covered by the 1998 Refugees Act). Immigration Regulation 21(1) establishes Cross Border Permits.

<sup>45</sup> Ibid.

<sup>46</sup> Whilst it is acknowledged that the Minister for Home Affairs and UNHCR did visit Glenanda (Rifle Range Road) camp to verbally reassure residents that the registration process would not have implications for their rights, this information was not clearly understood, and the signing a document to the contrary was the only option presented to individuals.

<sup>47</sup> Notice on file with Amnesty International and entitled "Attention: All Residents of Rifle Range Site"

<sup>48</sup> Refugees and asylum-seekers had lawful status to remain in South Africa in accordance with the length of time stipulated on their permits as renewed from time to time. Refugee permits are subject to renewal every two years and asylum-seeker permits are subject to renewal on a one-month to six-monthly basis pending finalisation of the asylum process which is usually far in excess of six months. Founding Affidavit in the matter between Lawyers for Human Rights and Minister for Home Affairs, Director-General Home Affairs, Bosasa (PTY) LTD T/A Leading Prospects Trading and Director of Deportations, in the High Court of South Africa Transvaal Provincial Division, Case No. 41276/08

<sup>49</sup> For example NGOs were restricted from accessing Glenanda camp on or about 17 July 2008

and forego the camp services<sup>50</sup> many did not wish to sign the documents. In the case of Glenanda (Rifle Range Road) camp, a group of such individuals were forcibly removed from the camp and taken to the Lindela Holding Facility with the stated aim of verifying their legal status.<sup>51</sup>

Despite the temporary permit providing for the lawful stay for up to six months for holders of the permit, in August government authorities publicly stated that the purpose of the six-month exemption permit was not to necessarily allow individuals protection against deportation and the right to remain in the country for the full six months, but to only allow time to enter another process, for example the asylum process. As is highlighted below, real concerns exist about the way in which asylum cases have been assessed in the accelerated procedures used in camps, and the potential for breaches of the principle of non-refoulement occurring. As such, Amnesty International calls for those displaced to be allowed to remain in South Africa at a minimum until the end of the six-month period of the exemption permit, irrespective of whether a person is in the asylum process or not.

### **Principle of non-refoulement**

As noted above the right to enter and lawfully remain, receiving protection against forcible return, is also found under the principle of non-refoulement. This principle, which is contained in international, regional and South African domestic law attaches to a specific group of individuals considered in need of international protection. This group contains refugees,<sup>52</sup> asylum-seekers, and others protected under the non-refoulement provisions of the ICCPR,<sup>53</sup> CAT<sup>54</sup> and customary international law.<sup>55</sup>

### **Determining who is eligible for protection against refoulement**

Amnesty International is gravely concerned that individuals in need of international protection have not been adequately identified in the accelerated processing procedures conducted by DHA officials on-site in camps in Gauteng. Amnesty International considers that due to the severe procedural irregularities in the processing of these asylum applications, if not rectified, a real risk exists that South Africa may breach its obligations under domestic, regional and international refugee and human rights law, in particular the fundamental principle of non-refoulement.

In particular Amnesty International is concerned about the following inadequacies in the accelerated procedures used in Gauteng camps:

- the lack of legal advice or assistance

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<sup>50</sup> Founding Affidavit in the matter between Lawyers for Human Rights and Minister for Home Affairs, Director-General Home Affairs, Bosasa (PTY) LTD T/A Leading Prospects Trading and Director of Deportations, in the High Court of South Africa Transvaal Provincial Division, Case No. 41276/08

<sup>51</sup> See below in Detention and Deportation section for further information on this group of refugees and asylum-seekers

<sup>52</sup> As provided for under article 2 1998 Refugees Act, article 33 of the 1951 Convention relating to the status of refugees, article 2(3) of the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa

<sup>53</sup> Article 7

<sup>54</sup> Article 3

<sup>55</sup> The protection provided by article 7 of the ICCPR and article 3 of CAT against refoulement is broader than the protection provided in the 1951 Refugee Convention and the Refugees Act 130 of 1998. Non-refoulement as contained in these instruments do not require nexus to a convention ground, or limiting clauses.

- absence of interpreters
- very high rejection rate (98 per cent)
- inability to claim asylum
- quality of decisions including mistakes of fact
- lack of effective access to appeals

During the first two weeks of August, DHA officials conducted first-instance refugee status determinations in camps in the Gauteng province. It is understood these officials arrived at the camps without prior notification to undertake the interviewing. Interviews were conducted with most asylum-seekers in the camps and have resulted in a rejection rate of 98 per cent.<sup>56</sup> At the time of writing, processing of asylum applications had not taken place in Western Cape and Durban, however Amnesty International understands that it is planned.

### **Lack of legal advice or assistance**

Interviewees did not have effective access to legal advice or assistance either prior or during interviews. Due to the complexities of refugee status determination (RSD), access to legal advice is of utmost importance. Amnesty International understands that the absence of legal advice in this circumstance exists due a number of compelling factors:

- the limited capacity of legal advice provision for refugee applicants in South Africa.
  - At present, asylum-seekers in South Africa only have access to a very small number of legal advisors. This is due to the inability of many to pay for legal assistance rendering them unable to access the services of private practitioners. Moreover, there are currently no legal aid board providers doing refugee work and only a very small number of NGOs doing legal service provision in this area. Such low numbers mean that both generally and in the specific setting of the camps the capacity to provide legal advice and assistance to individuals in need is far from meeting the demand.
  - UNHCR, whose mandate requires it to oversee and ensure protection of refugees, asylum-seekers and internally displaced persons, is responsible for ensuring respect for refugee rights by *inter alia* overseeing that correct decisions on refugee status are made, refoulement does not occur and refugees and asylum-seekers have their rights respected.<sup>57</sup> At times, UNHCR ensures their role in relation to this is met by implementing partners. Amnesty International delegates were told by UNHCR South Africa that this is the situation they currently operate. However the severe lack of funding for increasing the capacity of legal service providers as implementing partners at present means the needs are not being met to the degree required. For example, Amnesty International was informed that Lawyers for Human Rights, who work as an implementing partner for UNHCR in Gauteng, however has only 4 positions funded by this program.

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<sup>56</sup> Meeting with UNHCR in Pretoria on 28 August 2008.

<sup>57</sup> UNHCR recognises that access to legal advice is an important part the RSD process. UNHCR policy governing its own mandate RSD procedures explicitly allows asylum-seekers to obtain their own counsel, either as advisors or legal representatives. UN High Commissioner for Refugees, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate (Procedural Standards)*, 20 November 2003, § 4.3.3

Similarly in Western Cape only a few positions are funded for the University of Cape Town law clinic to perform this role.

- While UNHCR does have a hotline available, Amnesty International delegates were informed by camp residents that when they have attempted to phone the hotline they have not been able to get through, which suggests that the hotline is unable to meet the needs of individuals attempting to receive assistance from UNCHR.
- the limited access to camps.
  - Amnesty International has been advised that legal service providers have had great difficulty in accessing residents in the camps and have been prohibited from entering to speak to residents in Gauteng province. This has meant that access to legal advice has become increasingly dependent on individuals accessing the offices of a legal service provider. Due to the location of camps, cost in reaching the offices and lack of understanding about their existence, this has effectively resulted in an inability to access legal assistance for those in camps.

### **Absence of interpreters**

Interpreters were not adequately provided to assist with the accelerated asylum determinations in the camps despite many of the residents not speaking English. Amnesty International delegates were informed by individuals interviewed at Wit Road camp that no interpreters were present for the processing of their claims. Residents of Akasia told Amnesty International that in the fast track processing of their claims one interpreter was brought for the whole group. The absence of providing interpreters or adequate interpreting services places the state in a position of potentially breaching its obligations towards refugees, asylum-seekers and others in need of international protection. While it is the individual who arrives seeking protection, the state stands as the body obliged to provide protection. The state remains obliged to not forcibly return individuals to situations of persecution, and as such the state must ensure it makes the correct decision. Where an individual is unable to communicate with a refugee status determination officer (RSDO) in a language they are comfortable with, the state may miss vital information and make an incorrect decision. The absence of state provided interpreters is an issue not limited to determination in displacement camps, it is a systemic issue of concern that Amnesty International considers as creating a real risk that South Africa is in breach of its obligations to people in need of international protection.

In Wit Road camp and Akasia camp for example, other camp residents did ad-hoc interpretation during interviews. Those interviewed received rejection letters approximately 3-4 days later. Amnesty International interviewed one Ethiopian man who is a recognized refugee and was not interviewed as he already had status. However, he received a rejection letter with other residents of his camp.

## **Inability to claim asylum**

Some individuals who had lost their asylum-seeker permit having fled the May xenophobic violence and wished to claim asylum again have faced difficulty in doing so. Amnesty International spoke with individuals who, due to the location of camps -for example Blue Waters, found it difficult to travel to the Refugee Reception Office (RRO). Once there, they faced severe difficulties in gaining access due to extremely long lines. As such some had been unable to obtain or replace asylum-seeker permits, making them undocumented and vulnerable. In one situation Amnesty International interviewed an individual who feared persecution upon return to his country but whose asylum-seeker permit had been lost in the violence. He attempted to claim asylum again and be interviewed by DHA officials when they visited Wit Road camp, however was refused the ability to do so and as such was left without an asylum-seeker permit.

## **Quality of decisions and mistakes of fact**

Amnesty International is concerned that irregularities in the accelerated procedures in camps have contributed to incorrect determinations being made on refugee applications. This concern is supported by a number of rejection letters seen by Amnesty International during research conducted in camps in Gauteng. Some of these decisions had what appeared to be a standardized analysis of the law, a very brief statement on conditions in the country of origin, and a very short statement of the claim (only a few lines in statements). Amnesty International saw rejection letters that had the following statement at the beginning of the reasoning section: "You have no objections in returning to your country of origin. It is therefore clear that you did not leave [relevant country] as a result of fearing persecution in any sense." One of those rejection letters was for an asylum-seeker from Ethiopia whose claim was based on a fear of persecution due to his status as a student opposed to the government and the killings of his brother and sister. The applicant had very poor English and had not had access to any proper interpretation during his interview. He confirmed to Amnesty International that he **did** have an objection to returning to Ethiopia due to his fear of persecution and this is what he had tried to communicate in the interview. The reasoning did not appear to be supported by any other elements in the rejection letter and the credibility of the applicant's claims was not disputed. As such, Amnesty International considers this rejection to include a serious mistake of fact which, if not rectified through access to a new hearing or on appeal, may lead to a breach of the principle of non-refoulement should he be deported from South Africa.

Amnesty International also saw a rejection letter from a Zimbabwean individual (see section on Zimbabweans in the appendix) at Rand Airport camp who fears persecution based on imputed political opinion grounds at the hands of Zanu-PF. This fear stems from his father's support of the Movement for Democratic Change (MDC), the awareness of his relationship to this father and threats he personally received. The decision cited a country guidance note indicating that not every MDC supporter, or perceived supporter, was known, or at risk and as such the profile of the applicant was not sufficiently high to make him a target. The decision did not dispute his credibility or the fact that he was perceived to be an MDC supporter. Amnesty International considers that the reasoning and country guidance information is at odds with its most recent research on Zimbabwe. Findings from a recent Amnesty International research mission to the

country<sup>58</sup> has identified that the human rights situation has deteriorated since the 29 March 2008 election and the targeting of supporters and those perceived to support MDC is much more widespread. There is now unprecedented targeting of low-level members, or perceived supporters of the MDC and their families. During its research Amnesty International identified 165 people who had been killed and 5000 injured by Zanu-PF or its supporters, the majority of whom were low level MDC activists. MDC activists continue to experience threats of violence and within the country 30,000 have been internally displaced. Amnesty International interviewed perceived MDC activists and members of their families who were tortured or ill-treated by state security agents as well as by ZANU-PF supporters. The police are either unwilling or unable to offer protection. Many perpetrators enjoy state protection and the victims live in constant fear of abduction. As such, Amnesty International considers this asylum determination, and others like it, to have been made erroneously and if not corrected to put South Africa in the position of breaching its non-refoulement obligations.

Amnesty International is also concerned more generally about the overall standard and quality of refugee determinations made at first instance level, specifically in relation to:

- the extremely high workload of the RSDOs and the failure to provide for suitable time to make assessments in this complicated area of law<sup>59</sup>
- concerns about the limited training provided to RSDOs; UNHCR does provide training to RSDOs however this is reportedly limited to international instruments
- high turnover rate of decisions once they are heard *de novo* on appeal by the Refugee Appeal Board
- concerns about the quality of decisions at first instance level.

### **Appeals of rejections from accelerated processing in camps**

Of the asylum-seekers whose applications were processed in the camps, 98 per cent received rejection letters (either manifestly unfounded or unfounded).

While formally South African law does provide for a right to appeal, or to a review of the decision,<sup>60</sup> the actual ability to exercise this right has been severely restricted for individuals residing in camps rendering it unable to be effectively exercised. Practical obstacles such as the location of camps, a lack of clarity about where appeals needed to be lodged<sup>61</sup> and the cost of travelling to an RRO stand as serious impediments to exercising this right. Furthermore the absence of available

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<sup>58</sup> August 2008. Report forthcoming

<sup>59</sup> Amnesty International was advised by a Refugee Reception Office and RSDOs present they saw at the office approximately 10 applicants per day and were expected to make decisions as soon as possible after these interviews.

<sup>60</sup> Under South African refugee law asylum seekers whose applications for refugee status are rejected either receive notification that their application has been found to be a) unfounded or b) manifestly unfounded. Following a rejection letter, a right to appeal the decision to the Refugee Appeal Board within 30 days of the date of decision exists for unfounded decisions. For applications determined to be manifestly unfounded a review by the Standing Committee for Refugee Affairs occurs automatically with the opportunity for the applicant to submit supplementary information within 14 days.

<sup>61</sup> Under standard procedures appeals should be lodged where the rejection letter was served and the refugee status determination took place. This generally occurs in a Refugee Reception Office, however for residents of displacement camps the first instance refugee status determination took place in the camps and no provision for receiving appeals in the camps appears to have been established.

legal advice explaining both the procedural and substantive aspects of appeals has impacted on its ability to be exercised. Amnesty International was advised by Lawyers for Human Rights that they had been restricted from entering and advising residents in camps in Gauteng. In addition an attempt to reduce the time period for submitting further information to the Standing Committee on manifestly unfounded rejections from 14 days to two days occurred (See 'Review by the Standing Committee for Refugee Affairs' section below), compounding difficulties in the appeal or review process.<sup>62</sup>

### **Appeals to the Refugee Appeal Board<sup>63</sup>**

Amnesty International was informed by the Refugee Appeal Board (RAB) on 29 August that they had received eight appeals, but only from individuals detained at Lindela Holding Facility following the forcible removal from Glenanda (Rifle Range Road) Camp. At that stage they had not received any appeals from individuals in the camps. On 10 September Amnesty International was informed by the RAB that it had received about 300 appeals from the various camps and that hearings would begin on 22 September and may take until late in the year to conclude. There are estimated 870 "unfounded" cases which are appealable.

Amnesty International is concerned that the gap between potentially appealable cases and the actual number of appeals lodged with RAB as of 10 September may be indicative of the aforementioned obstacles to realising one's right to appeal. During its research, Amnesty International delegates found that those that have received rejection letters following accelerated procedures did not appear to fully understand the asylum procedures including the importance of lodging appeals. In addition most had not had access to any legal advice explaining to them the process or assisting with their individual cases. Some informed Amnesty International delegates that at the time of receiving the rejection letters they were told to sign a form that they thought may have been an appeal or an intention to appeal, but they were not sure what they were signing. In one camp, residents told Amnesty International that DHA officers informed those who wanted to appeal that they would return in 14 days to take their appeals and that they did not need to go to the RRO office in Johannesburg to submit them. However, two weeks after they had received their rejection letters, the residents reported to Amnesty International that the DHA had still not returned.<sup>64</sup>

### **Review by the Standing Committee for Refugee Affairs<sup>65</sup>**

While the review of manifestly unfounded decisions occurs automatically, it is very important that applicants understand the need for representations or new information to be submitted to the Standing Committee. If representations are not submitted the first instance rejection will generally

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<sup>62</sup> While the Standing Committee does have the option of providing for a different notice period, this must only be set by the Standing Committee.

<sup>63</sup> Decisions on appeal cases with the RAB are usually taken within 3-6 months. However, the RAB also has a large backlog and only four members who hear all "unfounded" cases. The recognition rate at the RAB is four times the rate at RROs, at approximately 40%.

<sup>64</sup> Interviews at Wit Road camp on 26 August 2008.

<sup>65</sup> It should be noted that under forthcoming legislation on refugee law in South Africa the Standing Committee and Refugee Appeal Board will cease to exist and be replaced by a new Refugee Appeal Authority. The function of reviewing manifestly unfounded decisions will go to Department of Home Affairs, essentially removing the right to an independent review or appeal of first instance decisions.

be upheld. Following an unfavourable decision by the Standing Committee the only other available option is for a judicial review, a costly endeavour that is generally unaffordable to most applicants.

The opportunity for submission of additional information to the Standing Committee in the current circumstance was restricted through procedural irregularities in refugee status determination for individuals in the camps. Amnesty International has been advised that most individuals who received manifestly unfounded rejection letters were given only two days to submit further information to the Standing Committee as opposed to the standard 14 days. Upon receiving the approximately 800 cases the Standing Committee determined that the two-day time limitation had been imposed incorrectly by the DHA and restored the correct 14-day time period.

### ***Detention and Deportation***

Attempts to coerce or unfairly influence the options available to displaced individuals can be seen acutely through actions taken in relation to the group of displaced persons, including refugees and asylum-seekers, who were forcibly removed from Glenanda (Rifle Range Road) camp on 22 July. Amnesty International is concerned about alleged abuse of process that has occurred in relation to this group including allegations currently before the High Court of unlawful detention, refusal of asylum applications, attempts to coerce individuals to relinquish their asylum-seeker or refugee permits and the threat of refoulement flowing from these actions.<sup>66</sup>

Following a series of incidents at Glenanda (Rifle Range Road) camp,<sup>67</sup> a group of approximately 700 individuals were arrested on 22 July for failing to register at the camp and taken to Lindela Holding Facility, ostensibly to verify their status. Initially Lawyers for Human Rights were denied access to the individuals. On the night of 23 July, those in possession of valid asylum-seeker or refugee permits were permitted to leave the centre. Uncertain of where to go, and waiting for family members or others to leave Lindela as the verification process continued, the group decided to establish a makeshift camp on the side of the R28 highway.<sup>68</sup> On 28 July the males in the group were arrested by the South African Police Service (SAPS) under the National Road Traffic Act and taken to Krugersdorp police station, while the women and children were taken to Riet Family Guidance Centre. Whilst in detention, *inter alia*, the men were reportedly coerced to relinquish their rights as refugees and asylum-seekers. Affidavits to this effect were brought by SAPS and provided to interpreters who were asked to have people sign such documents.<sup>69</sup> The detained individuals were told that if they signed the affidavit the charges against them would be dropped. On advice, none of the detainees is reported to have signed the affidavit. (The charges were later withdrawn in court (see below)).

While still in custody at Krugersdorp police station, some of the detainees were taken to Lindela where they were processed in an accelerated asylum determination procedure which was irregular

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<sup>66</sup> Amnesty International raised some of these concerns during a meeting with the Director of Deportations at DHA on 4 September 2008.

<sup>67</sup> For further information on the registration process see above at "6-month temporary immigration status in camps"

<sup>68</sup> It should be noted, around this time offers of assistance were reportedly made and refused by the group. It has been reported that certain leaders were directing decisions and that many may have been traumatised.

<sup>69</sup> Founding Affidavit in the matter between Lawyers for Human Rights and Minister for Home Affairs, Director-General Home Affairs, Bosasa (PTY) LTD T/A Leading Prospects Trading and Director of Deportations, in the High Court of South Africa Transvaal Provincial Division, Case No. 41276/08

and has been alleged to be unlawful. Irregularities are alleged to have occurred: the failure to explain the purpose of the proceedings, the failure to give an opportunity to contact or be accompanied by a legal representative, the timing and process of such interviews and indications of encouragement for individuals to return to their home countries, leading to them signing documents to this effect (not understanding this was to terminate their refugee or asylum-seeker status and lead to a deportation as opposed to a voluntary repatriation).

From 4 August decisions rejecting these asylum claims began to arrive. Detainees were at this point asked to acknowledge receipt of the decision. In some instances detainees refused to sign to acknowledge receipt, at which point an immigration official reportedly wrote “NO SIGN, NO APPEAL” in block letters on top of their decisions.

Attempts were also made to withdraw the asylum seeker permits of some of the detained individuals due to alleged breaches of their asylum-seeker permits. While a state can require asylum-seekers and refugees to meet certain conditions including to abide by the laws of their country, this cannot undermine the fundamental principle of non-refoulement as contained in international human rights law where an absolute prohibition on refoulement in certain circumstances exists under the Convention Against Torture. While exceptions to the principle of non-refoulement exist under refugee law, this is not applicable in this circumstance as it does not include withdrawing protection for minor offences.<sup>70</sup>

On 6 August the road traffic charges against the group were withdrawn, however none were released. Instead they were transferred under police and immigration control for “administrative processing.”

Finally, difficulties in accessing the appeal system appear to exist for this group. On 29 August Amnesty International was informed that the RAB had received eight appeals from this group. On 11 September Amnesty International learned that of these eight appeals, only three would be heard. These three would be heard in the Lindela Holding Facility, with determinations made immediately. Two other appellants had apparently left the country and another three appellants reportedly no longer wished to pursue their appeals and rather wanted to return to their countries of origin and were in the process of having their repatriation documents finalised.

Amnesty International regards the series of events and approaches taken towards these individuals as aimed at compelling them to leave the country through a variety of coercive means, in breach of legal obligations. Amnesty International believes the irregularities in processing claims for asylum, and pressure to relinquish rights places South Africa in a position of breaching its non-refoulement obligations. As such, a halt on deportations should immediately be imposed. The detainees should be released from detention and given access to a new first-instance determination of their asylum claims in a fair and satisfactory procedure with full procedural safeguards.

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<sup>70</sup> Article 33(2) of the 1951 Refugee Convention contains one exception to the principle of *non refoulement* as contained in the Convention “The benefit of the [ ] provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

## **Options facing displaced individuals**

An end to the situation of internal displacement through the availability of a durable solution is the preferred approach taken by Amnesty International and others including UNHCR. As already noted Amnesty International does not consider that camps should necessarily be a permanent solution to the situation of victims of the xenophobic violence, or refugees or asylum-seekers in South Africa.

Internally displaced persons should, under international standards, have the choice of a number of durable solutions available to them: return to the place of origin within the country, local integration in the areas in which displaced individuals initially take refuge or settlement in another part of the country.<sup>71</sup> In addition, under international refugee law, persons recognised as refugees are commonly understood to have three durable solutions relevant to their circumstance: local integration, voluntary repatriation to their home country and resettlement to a third country.

Despite the provision for a variety of options under international standards for internally displaced persons and refugees, the reality for individuals in South Africa is that very limited options exist. Amnesty International considers that some individuals are in fact being coerced into certain options that are both unsafe and in breach of South Africa's international obligations.

## **Re-integration**

South Africa, at national, provincial and local levels of government, has obligations to protect and to meet basic needs of all displaced, in addition to not forcibly returning refugees, asylum-seekers and others in need of international protection. Amnesty International is concerned that any closures of camps without the elaboration of a safe and sustainable alternative for refugees that fully protect their human rights would be a violation of South Africa's human rights obligations. While many of those displaced have returned to areas they were displaced from or re-integrated in other areas, the numerous reports of attacks against returnees indicate that a real risk against the safety of returning non-nationals exists. The promotion of re-integration must be accompanied by concrete steps from the South African authorities at all the appropriate levels of government to guarantee the safety of non-nationals against xenophobic attacks and the investigation and prosecution of attackers. Without a plan for the safe and sustainable re-integration of the displaced persons, they would still be at risk of further human rights abuses, including violations of their right to life and to physical and mental integrity.

In regard to re-integration with local South African communities, South Africa is obliged under international and domestic law to ensure the safety of all under its jurisdiction, including refugees, migrants and asylum-seekers. The right of internally displaced persons, including under these circumstances in South Africa, to make informed and voluntary decisions as to whether they want to remain in their current location, return to the local community where they had been residing in May or settling elsewhere in South Africa is one of the cornerstones of the Guiding Principles, which reflect international human rights law and obligations, and must be upheld. The Benchmarks for Durable Solutions for Internally Displaced Persons state clearly that "no coercion

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<sup>71</sup> (UN) Inter-agency Standing Committee Working Group (IASC), Benchmarks for Durable Solutions for Internally Displaced Persons, March 2007

– including physical force, harassment, intimidation, denial of basic services, or closure of IDP camps or facilities without an acceptable alternative – has been used to induce or to prevent return [re-integration] or resettlement”. The authorities are also required to ensure that the formerly displaced persons “do not suffer attacks, harassment, intimidation...or any other form of punitive action” upon their return to their homes. Protection against such acts is also required by South Africa’s obligations under domestic<sup>72</sup> and international law.<sup>73</sup> Amnesty International urges South Africa to also provide safe access to essential services as part of any re-integration plan.

### **Positive re-integration**

From the many thousands of displaced individuals who had sought shelter in South Africa after the May violence, by the end of August approximately 6,000 individuals remained in 35 locations in Gauteng, Western Cape and Kwazulu-Natal provinces. Reports have indicated that many of these individuals had returned to local communities. Information received by Amnesty International both from individuals who had re-integrated themselves, and from organisations working on this issue, suggests that such re-integration often occurred without any assistance from the government or UN agencies. For instance, the UNHCR funds provided through its implementing partner organization Jesuit Refugee Service (JRS) for people in the Gauteng sites to assist their search for accommodation only began to be provided in August.

A range of reasons appear to have compelled re-integration undertaken thus far. For some individuals interviewed by Amnesty International the living conditions in the camps had become increasingly difficult and uncomfortable. Other individuals had managed to re-integrate by moving to live in communities they had previously not inhabited or went to stay with friends. Some individuals had relocated to central urban areas where they felt they would be safer. Amnesty International was informed that relocation to new urban communities regarded as safer has required payment of rents significantly higher than those charged in townships or other previous arrangements in informal settlements.

In a meeting with the MEC for Community Safety for Gauteng provincial government, Mr Firoz Cachalia, on 3 September, AI was informed that certain initiatives promoted by his department had contributed to restoring peace in some communities, for instance Diepsloot, which had been affected by the May violence. The MEC referred to the activities of the Community Policing Forums, the “patrollers” and of African National Congress (ANC) structures in helping prevent further violence.

In Masiphumelele in the Cape Peninsula, a community driven approach, in co-operation with the police and the Western Cape provincial Premier’s office, and the support of NGOs, faith-based organizations and local-level political structures led to the re-integration of some of those who had fled and taken shelter at Soetwater camp. In late May members of the community and the police together undertook a drive to recover stolen property.

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<sup>72</sup> The Bill of Rights of the Constitution of South Africa Sections, 9-21 and 32-35 provide the right to be free from all forms of violence and not to be arbitrarily detained, and unequivocally apply to everyone in the country.

<sup>73</sup> For example under Articles 6 and 7 of the ICCPR.

The Somali Community Board informed Amnesty International that in Duduza there had been a combined effort for safe re-integration of displaced members of their community with the police station commissioner expressing commitment to ensure protection for the returnees, and involving the cooperation of the Community Police Forum, local councillors, faith leaders, traditional leaders and local political party representatives.

### **Challenges in re-integrating: threats to life and physical integrity**

Amnesty International is concerned that, notwithstanding these encouraging illustrations of peaceful returns, the processes to ensure safe and sustainable re-integration have not and are not being developed on a systematic basis with full support of relevant provincial and local government departments and in the context of the country's human rights obligations.<sup>74</sup> In addition, during interviews with individuals and groups in early July and late August and early September, Amnesty International was informed in all camps visited of instances whereby former residents who had attempted to return to local communities were driven away, verbally abused, threatened and in a few cases killed. They also expressed fears for their own safety.<sup>75</sup> A range of organizations reported to Amnesty International their concerns about patterns and specific incidents of violence against foreign nationals, including people attempting to return to local communities.<sup>76</sup> For example, Jesuit Refugee Services (JRS) noted that in Ramaphosa, an informal settlement near Johannesburg, there was still threats being made against displaced persons attempting to return and that in general there was evidence for threats against returnees in the Germiston and Ekurhuleni areas.<sup>77</sup>

Local human rights monitors expressed concern that not all incidents were being reported. Various nationalities have been targeted in the continued violence, in particular members of the Somali community. The media have also carried reports of incidents including the case reported in the Johannesburg Star of Francisco Nobunga, a 57-year-old Mozambican man with a South African identity document. He was attacked and hacked to death three weeks after returning to his South African wife and children living in Ramaphosa. The men, armed with an assortment of weapons, had stormed into the family's shack looking for the "kwerekwere" and demanding to see his identity document which contained an address in Mozambique.<sup>78</sup> As recently as 7 September an attack on eight shacks occupied by foreigners in Honeydew, Johannesburg, was reported; the occupants fled to the local police station for protection.<sup>79</sup> These reports contribute to the fears and concerns of those still staying at the sites and who may be confronted by their closure on 30 September. In addition, some displaced persons feared that the police and other local authorities would not act impartially in response to reports of violence.

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<sup>74</sup> AI has been informed by UN and NGO sources that the process for re-integration in the Western Cape has been receiving focussed support by the Office of the provincial Premier.

<sup>75</sup> Interview notes from visits to Gauteng sites: Glenanda/Rifle Range Road (5 July 2008); Rand Airport (25 August 2008), Wit Road (26 August), DBSA (27 August), Akasia (29 August); Durban: Albert Park (30 August); Cape Town: Soetwater (4 July 2008), Blue Waters (2 September); as well as interviews with some individuals who had returned to local communities.

<sup>76</sup> Jesuit Refugee Services, South African Human Rights Commission, AIDS Law Project, UNHCR, OCHA, Consortium on Refugees and Migrants in South Africa, Somali Community Board, Somali Association of South Africa, KwaZulu-Natal Refugee Council, Médecins Sans Frontières (MSF), among others

<sup>77</sup> Meeting with JRS on 27 August 2008.

<sup>78</sup> The Star, Johannesburg, 22 July 2008

<sup>79</sup> Information received from MSF on 9 September 2008.

### **The Situation of Somalis**

Amnesty International has a particular concern about the circumstances of Somalis displaced by the violence. A pattern of repeated attacks and an increasing trend of grave threats against Somalis appear to indicate a particular vulnerability for this group. Despite the clear risks currently being faced by Somalis, a failure to acknowledge these risks has been displayed by some governmental officials. During Amnesty International's meeting with the MEC for Local Government for the Gauteng province, the latter expressed scepticism that the Somalis staying at Akasia camp faced real risks to their physical safety.

There have been persistent reports of attacks on Somalis and businesses after May. One organization, the Somali Community Board which monitors incidents affecting their compatriots, told Amnesty International that 310 Somali-owned shops were looted and 11 Somalis killed in May and that some landlords would not accept re-renting to Somalis for fear of further attacks on their properties. According to the Somali Association for South Africa nine Somali traders had been murdered between June and early September 2008 in three provinces, including some who had attempted to re-integrate back into the communities from which they had fled in May.<sup>80</sup>

While in Johannesburg Amnesty International delegates received a report of an attack on a Somali-run shop in the Itwatwa area near Johannesburg.<sup>81</sup> They were informed by a witness who had assisted one of the injured Somalis that four men, at least two of whom were armed with a pistol and a pump-action shotgun, came into the grocery shop on 27 August 2008. One pointed the shotgun at a Somali man behind the till, the other two beat a second Somali man to the ground. However the Somalis managed to wrestle one of the guns away from the attackers. The attackers fled, but not before firing into the shop and injuring one Somali man. A Somali community member took him to a hospital in Springs. However his injury was not life threatening and he was discharged from hospital the same day. The incident was reported to police and two of the attackers were arrested on the day of the attack. Reportedly they had been involved in previous attacks on Somali businesses.

Amnesty International interviewed K, a Somali woman and mother of seven school-aged children whose brother had been robbed and killed at his garage business in Johannesburg during the May violence. He had been living in South Africa since 1998. K is a recognized refugee and the certificate of status is current until January 2010. Fearing for their safety, she and her family moved to Akasia camp where, in late July, they went through the registration process and obtained the six month exemption permits as well. At the camp she helped with cooking for a charity providing food for the residents. In early August the family returned to their Johannesburg home, but they were facing economic difficulties and security concerns. Her husband, also a recognized refugee, had had his shop looted and the equipment he used as an electrician stolen during the May violence. He had experienced similar losses in 2005 when trying to make a living in the Durban area. The family continued to experience verbal threats and abuse after returning from Akasia. "We don't feel safe in South Africa. Our distinctive dress marks us out". K was depressed and tearful. She described to AI one incident, on 22 August, when she was waiting at a

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<sup>80</sup> Amnesty International received reports about attacks against Somalis, including Somali traders, have occurred during the post-May period in various areas including the Eastern Cape Province, Khayelitsha and Shoshanguve.

<sup>81</sup> Phone interview; 27 August 2008.

taxi rank to travel to the JRS office. Someone at the rank asked her where she came from and then called her 'makwerekwere' (a derogatory term), 'you are not South African, you take our jobs, we are poor and you are rich, you have shops'.

Another Somali, M, who possessed a (UN Refugee) Convention Travel Document and was a recognized refugee in South Africa, told Amnesty International that he and his co-shareholders of a small shop they rented and had had to flee for their lives after armed men threatened them, attacked one of them and looted the shop. The co-shareholders had worked and lived on the premises. M stayed briefly in one of the displaced persons' camps and then went to stay with a friend in Johannesburg and had fallen heavily into debt while trying to re-establish some form of new business. Before fleeing Somalia he had experienced being threatened with death and having his business looted in Mogadishu. In South Africa he said that he had been physically attacked on four occasions and did not feel protected by the police who in his view had not done much to stop the violence in May. "They were with them [the attackers]." They say to us, "We don't want you in our country".

In early September a letter was distributed signed by a business organization based in Khayelitsha, Cape Town, threatening violence against Somali traders if they failed to leave the area. The letter stated that the organization was "under the banner of NAFCOC (the National African Federated Chamber of Commerce and Industry) Khayelitsha". Although the NAFCOC vice-president, Lawrence Mavundla, was reported to have repudiated the letter, the Western Cape Secretary of NAFCOC, Mandise Njoli, is reported to have accused Somalis of being illegally in the country, of undercutting wages and conducting unfair business practices. "Maybe we should start a civil war so that they will leave our communities".<sup>82</sup> One Somali refugee, Muhamed Ali Omar, who had fled to Soetwater camp with his family after his shops were destroyed in May, had moved back to Khayelitsha at the end of August. In the wake of this threatening letter he and other Somali traders were now calling on the police for protection and seeking safety at the newly consolidated Blue Water camp. The Western Cape Premier, Lynne Brown, requested the police to investigate the threats. However local police stations in Khayelitsha did not appear to have received any instructions for preventative action by the following week. In addition a minority political party with representation in parliament, the African Christian Democratic Party, publicly supported the call for the removal of Somali traders from the area. Similar threatening letters began to appear in other areas including the Strand, Kraaifontein and Stellenbosch. Following a series of urgent meetings between Somali organizations, civil society organizations and the provincial authorities, the MEC for Community Safety for the Western Cape provincial government, Mr Patrick McKenzie, issued a statement on 9 September stating that "such threats by local business owners are a display of xenophobia and a threat to peace and we condemn this." Amnesty International had appealed to the Western Cape authorities on 9 September for urgent steps to be taken to protect the life and physical integrity of the threatened individuals and welcomes the firm stance taken by the MEC. On 11 September, the press reported that the business association that had issued the threats had now publicly withdrawn them.

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<sup>82</sup> Mail&Guardian 05 September 2008, Pearlie Joubert

**Challenges in re-integrating: Accommodation costs and assistance provided**

Compounding concerns regarding security as an obstacle to viable re-integration at the present time, many individuals interviewed by Amnesty International cited economic constraints as impeding this process. Many of the individuals displaced in the May violence had their homes and possessions destroyed or damaged, and/or had been living in low-cost rent areas including townships and informal settlements. Individuals in Blue Waters camp near Cape Town, for example, described to Amnesty International how they had been living in areas where rent cost around 200 Rand, but no longer felt safe in these areas and needed to relocate to other areas where rents are higher, something out of their reach.

In response to a growing awareness of obstacles to re-integration including financial obstacles, UNHCR funded one of its implementing partners (JRS) to provide a one-off payment of financial assistance for the purposes of finding accommodation as part of the re-integration process. A one-off payment for two months of accommodation of either 1,500 or 3,000 Rand, depending on whether for an individual or a family, has been paid to assist in locating accommodation in the re-integration process. These payments were being made directly to “landlords” accounts.<sup>83</sup> The priority groups for these funds are recognized refugees, asylum-seekers and undocumented Zimbabweans. UNICEF funds were beginning to be made available in September for others outside of UNHCR’s mandate, such as vulnerable Mozambicans, some of whom possessed South African IDs but had been displaced by the violence. However due to high and increasing rent costs in inner city areas and others deemed safer, and the fact this stands as a one-off payment only, it is inadequate to meet the actual needs of displaced individuals.<sup>84</sup>

There appeared to be additional challenges, in locating accommodation or opening bank accounts, for those who only possessed the temporary exemption permits. Amnesty International also received reports of police refusing to recognize as valid these permits for movement outside the camps and of an arbitrary police arrest of one permit holder following his attempt to open a bank account in Cape Town.

Instead, or in addition to the current JRS/UNHCR payments, Amnesty International considers that there should be increased and sustainable assistance to facilitate a gradual and safe re-integration process, which amongst other things allows individuals to find employment or income generating activities which may have been lost due to the forced displacement.

***Voluntary repatriation***

As noted above, one option available to refugees during their time in a country of asylum is voluntary repatriation. This option sees a refugee deciding voluntarily to return to their home country to re-establish their life there. The option of voluntary repatriation stands as a durable solution when conditions have changed in the country of origin so that a return can occur in a situation of safety (physical, legal and material) and dignity. UNHCR can assist in the voluntary return process, however due to its role in refugee protection and ensuring that individuals are not directly or indirectly forced to return to a situation where they face persecution, clear guidelines

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<sup>83</sup> Amnesty International was informed that a flexible approach to “landlord” was being adopted to facilitate locating accommodation. Interview with JRS 28 August 2008, Pretoria

<sup>84</sup> interview with JRS 27 August 2008, Johannesburg

and constraints on this process exist and are outlined in the UNHCR Handbook on Voluntary Repatriation.<sup>85</sup> In addition to ensuring the conditions of safety and dignity are met for voluntary repatriation to occur, the fundamental element of full and informed consent must be established.

As part of this process UNHCR has dictated that “[r]efugee repatriation is **not** voluntary when [*inter alia*] host country authorities deprive refugees of any real freedom of choice through outright coercion or measures such as, for example, reducing essential services, relocating refugees to hostile areas, encouraging anti-refugee sentiment on the part of the local population.”<sup>86</sup> Furthermore it is stated that “UNHCR must intervene where there is any evidence of coercion or pressure.”<sup>87</sup>

Since the May xenophobic violence “voluntary” repatriations have occurred from South Africa to a variety of countries. Recently UNHCR publicly highlighted the voluntary repatriation of a group of 46 Congolese and six Burundians, who flew back to their home countries with UNHCR assistance on August 18. According to UNHCR, they were “not convinced by [South African] government assurances that the situation has stabilized and they are now safe [in South Africa].” A second group of 23 Congolese and nine Burundians was reported to be departing in early September, with “[m]ore [] likely to follow.”<sup>88</sup>

Through its research Amnesty International has become aware of other individuals who have “voluntarily” repatriated. Amnesty International is concerned some of these may have occurred due to coercive circumstances. For example at least seven Somali nationals (four males, one female and two minors) have themselves decided to return since the May violence.<sup>89</sup> Amnesty International considers that in light of the extremely volatile situation within Somalia, the routine targeting of civilians as has been highlighted by recent Amnesty International research,<sup>90</sup> the absence of a functioning government and as such absence of state protection, and the position of UNHCR itself against forcible returns to certain parts of Somalia<sup>91</sup>, any voluntary repatriations to Somalia raise questions both in the sense of voluntariness, and conditions of safety.

Furthermore, during its research Amnesty International interviewed many refugees who expressed indications that they feel unable to cope with the current threats and arduous circumstances confronted by them in South Africa. Many told Amnesty International they wished to go home despite a continued fear of persecution in their home countries, as they “would rather die there than in South Africa”, raising questions about the voluntariness of any future repatriations.

As highlighted above, in many camps a reduction of essential services including food, shelter and security has occurred. In addition the failure to provide a plan for safe and sustainable re-integration into South African society in light of the on-going threat of xenophobic violence are all

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<sup>85</sup> 1996

<sup>86</sup> UNHCR, Voluntary Repatriation Handbook, 1996 at 4.1

<sup>87</sup> Ibid.

<sup>88</sup> UNHCR, UNHCR begins repatriating the victims of xenophobic violence, 27 August 2008

<sup>89</sup> Correspondence from Somali Community Board of South Africa (Reg No. 2008/004992/08) received 27 August 2008

<sup>90</sup> Amnesty International, Somalia: Routinely Targeted: Attacks on Civilians in Somalia, June 2008, AI Index AFR 52/009/2008

<sup>91</sup> UNHCR Advisory on the Return of Somali Nationals to Somalia, November 2005

actions regarded by Amnesty International as creating a situation of coercion with regards to voluntary repatriation decisions. The creation of such a coercive circumstance means that the requirement of voluntariness as outlined above may not have been met.

In light of this, Amnesty International considers real efforts need to be made to ensure that any proposed repatriation is fully voluntary and that displaced persons are not forced to repatriate due to reductions in essential services or the failure in ensuring their safety as such repatriation may amount to constructive refoulement (see below). To assist in this process it should further be provided that those considering voluntary repatriation have other meaningful alternatives such as safe and sustainable re-integration available to them. Amnesty International further calls on UNHCR to intervene as required by the Voluntary Repatriation Handbook to see that such actions are taken so as not to permit returns occurring in circumstances where they cannot be considered voluntary.

### **Constructive Refoulement**

Amnesty International considers that actions taken to reduce essential services or the failure to ensure the safety of displaced individuals not only raises questions regarding compliance with guidelines on voluntary repatriation, but also places South Africa in a situation of potentially breaching its non-refoulement obligations. This obligation prohibits actions that directly or *indirectly* force an individual to return to a situation of persecution in their country of origin. As such, actions such as the withdrawal of shelter and other basic services from refugees, asylum-seekers and others in need of international protection in camps without the presence of safe and sustainable alternatives could place some of them indirectly in an effective situation of forcible or coerced return to countries from which they had fled and where they may be again at risk of human rights violations. Amnesty International regards this as “constructive refoulement”, where refoulement occurs as a consequence of the deliberate denial of economic and social rights. As such, these actions and consequences would constitute a breach of South Africa’s obligations under international, regional and domestic law to not directly or indirectly return any individual to a country where they would face persecution.<sup>92</sup> To avoid such an occurrence and comply with legal obligations Amnesty International regards the provision of safe access to (without discrimination of any kind) essential food and potable water; basic shelter and housing; appropriate clothing; essential medical services, sanitation and safety and security (both within the camp and in terms of re-integration) as required.

### **Resettlement<sup>93</sup>**

The third option available to refugees is that of resettlement. Resettlement to a third country, the process by which states accept refugees still in the region at the request of UNHCR or private sponsors, can and should play a part in response to the needs of refugees within South Africa. Resettlement serves a number of crucial roles in any refugee crisis: it protects by removing

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<sup>92</sup> Article 33(1) of the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol, Article 2(3) 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, Article 2 of the Refugees Act 1998, Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the Convention Against Torture (CAT), as well as under international customary law to not forcibly return an individual to a situation of persecution.

vulnerable people from environments where they are at risk; it offers a durable solution for the individuals concerned; and it represents an important expression of international responsibility sharing.

Resettlement may be considered as a legal and/or physical protection measure (see below) or as a form of humanitarian protection.<sup>94</sup> Further, it may be considered based on lack of local reintegration prospects in specific situations. It is linked to legal and/or physical protection when a refugee meets one or more of the following conditions:

- 1) Security threat in the asylum country resulting from pursuit by persons from, or connected with, those involved with persecution in the country of origin;
- 2) Immediate or long-term threat of refoulement, forcible return, to the country of origin, or deportation to another country owing to non-accession or non-respect of (or reservations to) the 1951 Convention/1967 Protocol;
- 3) Threat to physical safety or freedom in country of asylum analogous to that considered under the definition of refugee and rendering asylum untenable;
  - a. The threat must be “real and direct,” not “accidental or collateral.” Past harassment, even if repetitive, would normally be insufficient. “The threat must still exist.” (Resettlement Handbook, IV/6.)
  - b. To meet the definition of refugee, the asylum-seeker must, under the 1951 Convention, have a well-founded fear of persecution.
- 4) Threat to physical protection arising from armed attacks in areas where asylum seekers or refugees are located.

Despite the existence of this durable solution, and the clear relevance for it to be used in this circumstance, particularly due to the on-going and real risk to the safety and physical integrity of many refugees in South Africa, it still is not being acknowledged or pursued in any meaningful way. In fact many have been told that this is not an option at all. Amnesty International has been advised that certain groups of refugees or asylum-seekers in South Africa have a “resettlement” agenda and have been pursuing this option through manipulative means, including through, for example, the prevention of access to food for individuals including children in groups by some refugee leaders. Whilst certain actions may or may not have been taken in moments of desperation by certain individuals, the experience of Amnesty International has been to the contrary, and have witnessed situations of real need both in terms of limited access to food and willingly receiving food donations, but also in terms of a real need for resettlement in certain cases due to the insecurity and targeting of some refugees in South Africa.

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<sup>94</sup> In addition to cases involving the guarantee of security, resettlement must be considered in providing humanitarian protection. Resettlement as a form of humanitarian protection relates predominantly to four categories of refugees defined by UNHCR as vulnerable groups, which would qualify for resettlement:

- 1) Women-at-risk
- 2) Victims of torture/violence
- 3) Physically or mentally disabled refugees
- 4) Medical cases where appropriate treatment in countries of asylum is inadequate

The Resettlement Handbook provides details regarding each category.

Amnesty International considers that resettlement must immediately be pursued as an option for the most vulnerable refugees in South Africa and calls on UNHCR and resettlement states in the international community to make this a reality in an expedited fashion. Amnesty International is pleased to learn that UNHCR may be considering this as an option and encourages resettlement states to support UNHCR in this work by providing significantly increased resettlement places in their quotas for refugees coming out of Southern Africa.

## **Recommendations**

South Africa at all levels of government has obligations to protect and to meet the needs of individuals present in the country. As outlined above, these include obligations to protect the rights of migrants, internally displaced persons, refugees and asylum-seekers. Accordingly Amnesty International wishes to make the following recommendations:

### **To the South African authorities at national, provincial and local levels:**

#### In relation to camps and other internally displaced persons sites:

- Refrain from forcibly removing internally displaced persons from camps and other shelters without a safe and sustainable re-integration plan in place;
- Allow unimpeded access to humanitarian assistance and legal advice for internally displaced persons;
- Refrain from pressuring NGOs and other organizations providing shelter and/or humanitarian assistance from ceasing such assistance;
- Restore levels of essential services including access to food, water, shelter, medical, until such time as a safe and sustainable re-integration plan is available, or other options presented to individuals, a failure of which may lead to constructive refoulement;

#### In relation to accelerated asylum procedures in camps:

- Ensure that no actions direct or indirect lead to a violation of the principle of non-refoulement;
- Halt any deportations or potential deportations of displaced asylum-seekers who have been processed in accelerated asylum determination procedures in camps or in Lindela;
- Due to the weakness of procedural safeguards, the very high rejection rate and the inconsistencies found in some rejection letters, provide the opportunity to resubmit their asylum claim at first instance in a fair and satisfactory asylum procedure with full procedural safeguards including interpreters, effective access to appeal rights and legal assistance for all asylum seekers in displacement camps (including those processed already, and those yet to be processed);
- Failing an opportunity to resubmit their claims at first instance, ensure that all those who have received rejection letters have effective access to a full appeal;
- In light of the difficulty faced by internally displaced persons in submitting asylum appeals, including difficulties in accessing RROs, ensure that all those rejected at first instance do not lose their appeal rights, if they exceed the allowed time limit for appeals, by extending this time limit to January 2009 (the end date of the temporary exemption permits);
- For any future asylum procedures in camps guarantee full procedural safeguards to ensure respect for the principle of non-refoulement, including but not limited to:
  - full information on the purpose and nature of the procedures in a language they can clearly understand;
  - adequate interpretation to those being interviewed as required;

- the opportunity to fully explain their asylum claim during the procedures in a setting that guarantees confidentiality;
- access to legal advice and assistance;
- individualised assessments supported by up to date country of origin information;

In relation to voluntary repatriation:

- Ensure that any such repatriation is fully voluntary and that internally displaced persons are not forced to repatriate due to reductions in essential services or the failure in ensuring their safety as such repatriation may amount to constructive refoulement;
- Ensure that those considering voluntary repatriation have other meaningful alternatives such as safe and sustainable re-integration;

In relation to re-integration:

- Establish the necessary conditions in areas where internally displaced persons will re-integrate to allow for their re-integration to take place in safety and with dignity, including through meaningful consultation with and dialogue between internally displaced persons and host communities;
- Ensure that internally displaced persons are not forced, either directly or indirectly through the closure of camps, to re-integrate without adequate safeguards to ensure their security and safe re-integration.

In relation to the xenophobic attacks of May 2008 as well as preceding and subsequent attacks:

- Take all appropriate measures to bring those responsible for the xenophobic attacks to justice;
- Encourage relevant political leaders to denounce all instances of xenophobia;
- Expand existing public education programmes and initiate new ones as necessary for the purpose of counter-acting xenophobic sentiments and increasing understanding about the rights of refugees, asylum-seekers and migrants and the country's obligations towards them
- Initiate and expand on programmes at the community level to increase dialogue and cohesion between South African citizens and other nationality groups

In relation to safety and security:

- Encourage the use of "tension monitoring" systems at local police station and community levels to help prevent further incidents of xenophobic violence
- Further develop the model of "Community Safety Plans" to incorporate specific reference to refugees, asylum-seekers and migrants as additional vulnerable groups for whom specific safety measures should be taken
- Encourage the inclusion on community policing forums of representatives of such vulnerable groups
- Review the organizational capacity within the South African Police Services for an effective response to a recurrence of large-scale violence
- Ensure that all members of the police services and private security guards employed in law enforcement roles are fully trained on their legal and human rights obligations to conduct their duties without discrimination on any grounds and to comply with international human rights standards in regards to the use of force

In relation to Zimbabweans in South Africa:

- Use section 31(2)(b) of the 2002 Immigration Act to introduce a new “temporary immigration exemption status for Zimbabweans” (TIES) which allows Zimbabweans to legally enter South Africa, regularizes their status, ends deportations of Zimbabweans, and grants them the right to work in South Africa

In the long term, in relation to the asylum determination system and acknowledging that the turn-around strategy is seeking to address some of the following concerns:

- Increase the capacity for the provision of free legal advice and assistance through increased funding and training of NGOs and independent legal professionals, with international assistance as appropriate;
- Establish a state-funded interpreter program which includes adequate training and monitoring to ensure that asylum-seekers have access to competent and unbiased interpretation;
- Ensure that RROs are adequately staffed with RSDOs and that they receive adequate training and support;
- Set realistic targets for RSD decisions at first instance to ensure that RSDOs have sufficient time to fully hear asylum claims and adequately assess them;
- Ensure that appeal authorities are adequately staffed to enable them to hear the large number of appeal cases in a timely manner;
- Significantly increase the country of origin and legal support services at both first instance and on appeal;
- Take steps to facilitate access to RRO services including through the creation of smaller local offices or service points to submit appeals and renew asylum-seeker and refugee permits, among others.

**To UNHCR and other UN agencies as appropriate:**

While the South African state is primarily responsible for human rights protections for individuals in its country, in circumstances where either they are unwilling or unable to meet these obligations, others including UN agencies also have duties to assist. The United Nations High Commissioner for Refugees (UNHCR) is responsible under its mandate for the protection of refugees, asylum-seekers, internally displaced persons (IDPs) and others in need of international protection. This responsibility can be met through supporting the state to meet its obligations. However in situations where the state fails to meet its own obligations, UNHCR has a duty to intervene to ensure respect for the rights of the aforementioned individuals. Amnesty International acknowledges that UNHCR has been attempting to work with and support the government in meeting its obligations under international law. However, in light of the evidence in this report detailing numerous failings on the part of the South African state in its response to the current crisis and the real risk of further breaches of human rights obligations, including the fundamental principle of non refoulement, Amnesty International makes the following recommendations:

In relation to the displacement crisis:

- Ensure there is strong leadership in the UN response to the displacement crisis in South Africa and its aftermath;

- Provide adequate and sufficient monitoring of the protection and human rights situation of all IDPs at all locations in South Africa, including monitoring of those that have re-integrated;
- Directly and meaningfully engage with all IDP communities, including in Akasia camp and other locations;
- Respond to the immediate humanitarian needs of IDPs such as food in a timely manner;
- Ensure that IDPs have adequate information about the options available to them;
- Ensure that all repatriations of asylum-seekers and refugees are truly voluntary and not a result of reductions in essential services or the failure in ensuring their safety or as a consequence of unfair processing of their asylum claims;
- Intervene in cases where the actions by the South African authorities may threaten the human rights or protection of refugees, asylum-seekers and IDPs, such as premature closure of the remaining camps without a safe and sustainable re-integration plans;
- Immediately identify the most vulnerable of the displaced individuals, whether among those residing in camps or returned to local communities, using the UNHCR Resettlement Handbook guidelines, in particular in relation to safety and protection in country of asylum and refer them for resettlement;
- Ensure monitoring of those returned following displacement in South Africa.

In relation to asylum procedures:

- Provide adequate monitoring of the accelerated asylum procedures undertaken in camps and at Lindela and provide adequate information to asylum-seekers on both the first instance and appeal procedures;
- Intervene in situations where the rights of refugees and asylum-seekers are at risk, including where there is a lack of access to fair and satisfactory asylum procedures, threat of refoulement or detention;
- Increase funding for legal aid and assistance to asylum-seekers;
- In the long term and in coordination with the South African authorities, initiate a programme of funding and training for interpreters to ensure that asylum-seekers have access to competent and unbiased interpretation.

## **To the international community**

Amnesty International calls on states with capacity in the international community, to:

- Support the resettlement of the most vulnerable individuals and groups in co-operation with UNHCR in the spirit of responsibility sharing and in recognition of the protection needs of certain refugees currently in South Africa;
- Significantly increase quotas for refugees currently in South Africa, or in the absence of current quotas or resettlement programmes to immediately institute the like.

## **APPENDIX**

### **International, regional and domestic legal obligations and standards**

South Africa's obligations towards refugees, asylum-seekers, migrants and internally displaced persons derive from international human rights and refugee law and standards, regional human rights and refugee law and South Africa's Constitution.

#### **Generally Applicable Standards (including to refugees, asylum-seekers and migrants):**

International human rights law: South Africa is a state party to various international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>95</sup>

The ICCPR guarantees, *inter-alia*, everyone's "right to liberty and security of person" (article 9(1)) under which "no one shall be subjected to arbitrary arrest or detention" and protection against forced evictions (article 17). ICERD guarantees "the right of everyone, without distinction as to race, colour, or national or ethnic origin" to, *inter-alia*, the "right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution" (article 5(b)) and the right to housing (article 5e(iii)).<sup>96</sup> Both CEDAW and CRC guarantee numerous rights to women and children, respectively.

South Africa's Constitution: the Bill of Rights in the Constitution protects various civil and political rights. These include the rights "not to be deprived of freedom arbitrarily or without just cause" (section 12(1a)), "to be free from all forms of violence from either public or private sources" (section 12(1c)), to have equal protection of the law (Section 9(1)). These rights are guaranteed to all those under South Africa's jurisdiction, regardless of their nationality or legal status. With regard to Economic, Social and Cultural Rights (ESCR), the Constitution guarantees access to health care (section 27(1a)), sufficient food and water (section 27(1b)) and protection from arbitrary eviction (section 26(3)). The South African Constitutional Court decided that, among non-citizens, rights such as access to adequate housing, food, water, and social security can be enjoyed by "permanent residents".<sup>97</sup> Section 28 of the Constitution protects children's rights to basic nutrition, shelter, basic health care services and social services. These rights are protected for all children, regardless of their nationality or legal status.

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<sup>95</sup> While South Africa has signed the International Covenant on Economic, Social and Cultural Rights (ICESCR), it has not ratified it. However, many of the rights contained in the ESCR are contained in the South African constitution.

<sup>96</sup> General Recommendation 30 of the Committee on Racial Discrimination states that the state must "guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices" (at para. 32).

<sup>97</sup> *Khosa and Others v. Minister of Social Development and Others*, Case CCT, 12/03; and *Mahlaule and Another v. Minister of Social Development and Others*, CCT 13/03.

### **Standards applicable to internally displaced persons (IDPs):**

As stated above Amnesty International considers that all those displaced by the May xenophobic violence should be regarded as internally displaced persons, regardless of whether they are refugee, asylum-seekers or migrants. IDPs are defined in the UN Guiding Principles on Internal Displacement (the Guiding Principles) as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.” While the Guiding Principles are in themselves not binding, “they reflect and are consistent with international human rights law and international humanitarian law. They restate the relevant principles applicable to the internally displaced, which are now widely spread out in existing instruments, clarify any grey areas that might exist, and address the gaps identified in the Compilation and Analysis. They apply to the different phases of displacement, providing protection against arbitrary displacement, access to protection and assistance during displacement and guarantees during return or alternative settlement and reintegration.”<sup>98</sup>

In relation to protection during displacement, The Guiding Principles state, *inter-alia*, that:

- National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction (Principle 3(1));
- At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
  - Essential food and potable water;
  - Basic shelter and housing;
  - Appropriate clothing; and
  - Essential medical services and sanitation (Principle 18(2));
- All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services (Principle 19(1));

In relation to humanitarian assistance, the Guiding Principles state, *inter-alia*, that:

- The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
- International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced... Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
- All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced. (Principle 25)

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<sup>98</sup> Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39 (Addendum, Guiding Principles on Internal Displacement). UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998 (at para. 9).

In relation to return, resettlement and reintegration, the Guiding Principles state, inter-alia, that:<sup>99</sup>

- Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country (Principle 28(1)).

### **Standards applicable to asylum-seekers, refugees and other persons in need of international protection:**

International refugee and human rights law: The UN Refugee Convention prohibits the return or expulsion of a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (article 33(1)) and also guarantees various rights to refugees and asylum-seekers. CAT and ICCPR provide an absolute prohibition on the return, expulsion or extradition of any person “to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” (article 3(1) CAT) or “torture , cruel, inhuman or degrading treatment or punishment” (article 7 ICCPR).<sup>100</sup> The principle contained in articles 33(1) of the UN Refugee Convention, article 3(1) of CAT and article 7 of ICCPR, and customary international law is known as the principle of non-refoulement. This principle prohibits actions that directly or indirectly force a person to return to a situation of persecution, and as highlighted below can occur in a variety of means including through deportation or constructive refoulement where essential services are removed and a person is essentially forced to return to persecution.

Regional refugee law: South Africa is a state party to the various treaties of the African Union, including the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention). The OAU Refugee Convention contains a similar definition of a refugee to the one contained in the UN Refugee Convention and similarly protects refugees against refoulement (articles 1(1) and 2(3)). However, in addition the OAU Refugee Convention is of particular importance as it widens the definition of a refugee with the added definition found in article 1(2), which states that a refugee is:

- every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

South African Refugee Law: The Refugees Act 130 of 1998 (the Refugees Act) protects refugees from refoulement and incorporates the refugee definitions of both the UN Refugee Convention and the OAU Refugee Convention (sections 2 and 3 of the Refugees Act). The Refugees Act also guarantees the rights set out in the Constitution’s Bill of Rights (section 27b), including equal access to basic health services and to basic education (section 27g).

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<sup>99</sup> See also IASC Benchmarks for Durable Solutions for Internally Displaced Persons, March 2007

<sup>100</sup> See General Comment 20 of the Human Rights Committee

### **Additional protection classes: Zimbabweans and the need for a temporary immigration exemption status (TIES):**

A significant number of Zimbabwean nationals who have fled their country looking for refuge in South Africa were affected by the May violence. A range of reasons for the forced migration of Zimbabweans exist, including persecution based on violations of civil and political rights, as well as economic and social rights. Amnesty International considers that many Zimbabweans in need of international protection under the principle of non-refoulement as provided under refugee and human rights law, are currently in South Africa. However as a result of the barriers in accessing and being properly recognised as refugees in the South African asylum system, coupled with an unlawful deportation policy, they are not at present receiving the protection they are eligible for.<sup>101</sup> Accordingly, Amnesty International believes that the South African government should use section 31(2)(b) of the 2002 Immigration Act to introduce a new “temporary immigration exemption status for Zimbabweans” (TIES) which allows Zimbabweans to legally enter South Africa, regularizes their status, ends deportations of Zimbabweans, and grants them the right to work in South Africa. Amnesty International considers this would assist South Africa in meeting its legal obligations as well as to meet a range of pragmatic aims including unburdening the asylum system.<sup>102</sup>

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<sup>101</sup> For a full discussion see Human Rights Watch, *Neighbours in Need*, June 2008

<sup>102</sup> In addition, the regularisation of Zimbabweans in South African through the grant of a temporary immigration exemption status would have the additional practical effects of offsetting the cost to the South African taxpayer of ineffective deportation and wasteful use of police resources, providing data, assisting the authorities to enforce work place protections and create a level playing field on which South Africans could compete fairly for jobs, to address Zimbabweans’ humanitarian needs by allowing access to workforce and in turn reduce pressure on social assistance programs, To help desperate families remaining in Zimbabwe through remittances, possibly reducing the number of Zimbabweans fleeing for South Africa. For more see Human Rights Watch, *Neighbours in Need*, June 2008.