

WORKING PAPER SERIES

[Paper 2 of 2011]

University of Cape Town

Refugee Rights Unit



EXPANDING THE PROTECTION SPACE FOR REFUGEES IN SOUTH
AFRICA

Criminal Case Watching Briefs for Access to Justice for

Refugee Victims of Crime



Working Paper

2011

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This is a pre-publication working paper. Please send comments on this working paper to the Refugee Rights Unit at refugeelawclinic@uct.ac.za

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ACKNOWLEDGEMENTS & CONTACT

The authors and the University of Cape Town Refugee Rights Unit would like to extend their grateful acknowledgements for assistance in this research project to:

- The UNHCR who generously contributed towards the fieldwork and the writing of the report.
- The Foundation for Human Rights, which is funded by the Department of Justice and Constitutional Development and the European Union under the Sector Budget Support Programme – Access to Justice and the Promotion of Constitutional Rights, who generously contributed towards the fieldwork and the writing of the report.
- Colleagues at the Refugee Rights Unit who gave of their time and expertise.
- Members of the refugee and asylum seeker communities, officials from the CJS and the many others who generously contributed their time and expertise to the research project.

A significantly increased number of refugees and asylum seekers approached the Refugee Law Clinic of the Refugee Rights Unit at the University of Cape Town, after the brutal spate of xenophobic attacks in South Africa in May 2008 as victims of crime, generally claiming that ‘we the Refugee Law Clinic are *their*’ lawyers. These refugees were also demanding that we find *protection* for them. The word protection is synonymous to our overall guiding mandate toward refugees, however actualising the provision of protection has many challenges in an urban setting such as that of South Africa’s.

Thirteen years ago when the Refugee Law Clinic began operating at the University of Cape Town, UNHCR’s Urban Policy was in its infancy, and it has just recently been refined. UNHCR in its 2009 updated Urban Policy has stated that its primary objective is to *expand the protection space* for urban refugees. The question to be asked is what can UNHCR’s implementing partners do to expand this protection space in South Africa? Protection, in our opinion, is to be understood in terms of the range of activities through which refugee rights are secured. The Refugee Law Clinic’s watching brief programme for refugee victim support in the criminal justice system can be viewed as one such protection activity.

As practicing attorneys in South Africa we are fully aware that an aggrieved victim may in certain circumstances proceed with a private prosecution (that is, proceeding in lieu of the State). We did not feel that the circumstances warranted such an intervention in 2008. However, as human rights attorneys there was an immediate sense that we had to do something to assist such a large number of vulnerable people who suffered horribly and who desperately needed to be reassured of the value of their lives. This was a unique situation to be in and the type of assistance provided to refugee victims of crime by the Refugee Law Clinic needed to reflect this reality and thus began developing rapidly from this period onwards.

We initially responded by assisting refugee victims in reporting crimes, when it came to our attention that the police failed to assist in the opening of cases and at the same time persuading refugees that they had to take the first step in seeking the justice they deserve. Many reported that they did not trust the police and we took it upon ourselves to, in the very least, ensure that crimes were reported. It soon became clear that we if we did not step up our

interventions these matters would simply be a case of attrition, not an unknown phenomenon in South Africa's Criminal Justice System (CJS). It therefore became necessary to explain to our clients that justice must be viewed as a process and that each stage of the CJS has its own set of characteristics and requirements. Faced with victims who understandably often demanded rather than we assist with their repatriation or resettlement to a third country, our actions at times appeared as a desperate plea to the refugee victims to have faith in the CJS. The enormity of the task of convincing victims that crime ought to be reported cannot be underestimated.

This activity of providing assistance in accessing the CJS for refugee victims of crime and providing support throughout the investigative and court procedures came to be referred to as our criminal case *watching brief programme*. It was labelled as such because we could not actively be involved in the prosecution of a case. It soon became clear, however, that we were not merely passive —watchers, but rather active participants in this process, above all ensuring that our clients had the best possible opportunities to access justice.

Not only did many of our clients express gratitude when they realized the value of our interventions, but the Refugee Clinic's attorneys also experienced enormous satisfaction from being able to assist individual victims of crime in accessing justice while at the same time advocating for and educating justice officials about the rights and special needs of refugee victims. This confirmed that the watching brief programme had the potential for significant impact at various levels, from addressing protection gaps such as the refugee community's lack of knowledge and understanding of the CJS, to strengthening relationships with key institutional role-players.

The importance of expanding the Refugee Clinic's legal services to provide these watching briefs for refugee victims and of assessing the value of same, as well as our desire to share and reflect on this watching brief initiative with significant role-players, such as criminal justice officials and policy-makers, the UNHCR, and fellow legal practitioners, ultimately led to the commission of this research and report.

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Refugee Law Clinic

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TABLE OF ACRONYMS

BACSA	Business Against Crime South Africa
CCID	Central City Improvement District
CJS	Criminal Justice System
CPO	Court Preparation Officer
DOJCD	South African Department of Justice and Constitutional Development
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
DSD	Department of Social Development
GoSA	Government of South Africa
ICD	Independent Complaints Directorate
IHRL	International Human Rights Law
IO	Investigative Officer
IRL	International Refugee Law
NGO	Non-Governmental Organisation
NPA	National Prosecuting Authority
OHCHR	United Nations Office for the High Commissioner for Human Rights
RRU	Refugee Rights Unit of the University of Cape Town
SAPS	South African Police Services
UNHCR	United Nations High Commissioner for Refugees
VEP	Victim Empowerment Programme

TABLE OF INSTRUMENTS

- 1951 United Nations Convention Relating to the Status of Refugees (the ‘1951 Convention’), 189 UNTS 150
- 1967 Protocol to the United Nations Convention Relating to the Status of Refugees (the ‘1967 Protocol’), 6 ILM. 78 (1967)
- *1969 Organization of African Unity Convention* Governing Specific Aspects of Refugee Problems in Africa (the ‘OAU Convention’), 8 ILM. 1288 (1969)
- Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights, Nairobi, Kenya, 21-24 October 2008 (‘The Nairobi Declaration’)
- Cartagena Declaration on Refugees, adopted at a Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984
- Constitution of the Republic of South Africa (Act 108 of 1996)
- National Road Traffic Act (93 of 1996)
- Refugees Act (130 of 1998)
- Refugees Amendment Act (33 of 2008)
- Refugees Amendment Bill (30 of 2010)
- Immigration Amendment Bill (32 of 2010)
- Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000)

TABLE OF CASES

- *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Others* 1998 (1) SA 745 (CC)
- *Minister of Home Affairs and Others v. Watchenuka and Another* 1 All SA 21 (SCA)
- *Zimbabwe Exiles Forum & Others v Minister of Home Affairs & Others* [2011] ZAGPPHC 29 (17 February 2011)
- *Fanta and Another v The Minister of Safety and Security and Others* (EC10/08) (unreported)
- *Osman v The Minister of Safety and Security and Others* (EC9/08) [2010] ZAEQC 1 (15 December 2010)
- *Said and Others v The Minister of Safety and Security and Others* (EC13/08) (sub *judice* at the time of writing)

- This report evaluates the University of Cape Town Refugee Right Unit - Refugee Law Clinic's *watching brief* programme in which it provides refugee victims of crime with the necessary legal support services they require within the various stages of the CJS in their attempts to access justice.
- The report is intended to provide guidance and stimulus for further deliberation to a broad range of policy and practice actors, including the UNHCR, which are involved in the protection of refugees and in ensuring that refugee victims of crime are appropriately served by South Africa's CJS. It is intended to promote discussion on improvement of policy for victim support services and its implementation, alongside critical deliberations about the scope and value of a watching brief model of justice support.
- The report examines a number of multifaceted issues including the protection of refugees living in urban environments, access to justice for refugee victims as an integral aspect of both refugee protection and the local integration of refugees, and barriers to access to justice for refugees in South Africa.
- The report also reviews relevant aspects of the international and domestic refugee and human rights legal frameworks applicable to refugee victims of crime seeking access to justice. In particular, South Africa's progressive *Refugees Act* and *Constitution*, and government's *Service Charter for Victims of Crime* and relevant policies, all of which promote refugee victims' right to equal treatment before the law.
- The report argues that legal service providers, such as the UCT Refugee Rights Unit, have a particular role to play in ensuring access to justice for refugee victims of crime and that the UCT RRU Refugee Law Clinic's watching brief activities fall within the envisaged activities in UNHCR's *Policy on refugee protection and solutions in urban areas*. More specifically, as they relate to one of the policy's key principles - the need to ensure that refugees have access to justice systems, are treated as equals before the law and are not subjected to any form of discrimination.

- The report discusses some key access to justice barriers for victims of crime in South Africa and draws attention to the specific needs and vulnerabilities of refugee victims of crime, such as lack of trust of the police and language and cultural barriers, all of which have informed the UCT Refugee Law Clinic's watching brief interventions.
- The above-noted contextual issues reviewed in the report underlie the goals and objectives of the UCT Refugee Law Clinic in offering extended legal services aimed at supporting refugee victims with navigating and comprehending the various stages and requirements of the CJS. The issues have also informed the UCT Refugee Law Clinic's development of a specific watching brief *framework of interventions* to guide its interventions on behalf of refugee victims of crime.
- The report outlines the development of the UCT Refugee Law Clinic's watching brief program and its successes and challenges in implementing such a program. The report's analysis of the watching brief interventions is intended to identify further access to justice barriers and accordingly specific areas in need of improved interventions to support and promote refugee victims' access to justice.
- The report concludes by providing some observations, contextualized within the limitations of the research, aimed at assessing the effectiveness and value of the watching brief interventions, with the understanding that these observations are provisional and initiatory, presented as a basis for discussion and further development of this important area of protection provision for refugees in South Africa. A significant observation relates to the apparently pervasive levels of institutional xenophobia found within the South African Police Services.
- Lastly, the report provides three sets of recommendations, once each for the UCT Refugee Law Clinic, the UNHCR and for the government of South Africa, on the way forward, in particular as to how these entities must continue providing or supporting access to justice initiatives for refugee victims of crime.
- Recommendations, which are necessarily open-ended at this time, focus on the mainstreaming of victim support service provision for this particular vulnerable group of victims of crime, as well as the need to continue educating the refugee community

and institutional role players of the legal rights and obligations of refugees as well as their special needs as victims within the CJS.

- The continued support of, and extension of victim services for refugees is deemed to be critical in combating the mounting impunity with regard to crimes perpetrated against refugees in South Africa.
- Broad recommendations for future research, training, institutional and service provision reform are also suggested.

PART I – INTRODUCTION AND RESEARCH OBJECTIVES

The Refugee Law Clinic of the UCT Refugee Rights Unit (RRU) has been providing free legal assistance to refugees and asylum seekers in the Western Cape for over a decade. As a UNHCR legal implementing partner in South Africa, the UCT Refugee Law Clinic of the RRU has as its principal objective the facilitation of local integration of refugees and asylum seekers through its rights-based programme of legal assistance. This is built around upholding the provisions of international refugee law and South Africa's Constitution and Refugees Act. Legislation in South Africa lends itself to local integration and the failure of refugees to integrate is not due to lack of rights but rather obstacles that need to be overcome, such as lack of knowledge about rights, lack of capacity to implement programmes, or xenophobic attitudes.

The UCT Refugee Law Clinic views one of its functions as providing legal advice and support to refugee¹ victims of crimes with steps in the necessary engagement with the criminal justice system (CJS). Although the Refugee Law Clinic has a particular interest in xenophobia related crimes, legal advice and support has been provided to refugee victims of a wide range of crimes that extend beyond those related specifically to xenophobic sentiments.² In the course of the past several years, with the marked increase in the number of refugees and asylum seekers in South Africa and the concurrent rise in crimes perpetrated against this group, highlighted by the May 2008 large-scale xenophobic attacks and the xenophobic attacks that coincided with the football World Cup in 2010, the UCT Refugee Law Clinic has been developing and largely expanding its programme of legal assistance services provided to refugee victims of crime. This expansion addresses a gap in services that exists in terms of support for refugee victims of crime.

The UCT Refugee Law Clinic watching brief programme for interventions to uphold the access to justice needs of this group serves to more proactively assist refugee victims of

¹ The UCT Refugee Law Clinic of the Refugee Rights Unit provides legal assistance to refugees and asylum seekers, whether documented or undocumented. In South Africa, a refugee is someone who has been granted refugee status from the Department of Home Affairs (DHA) and an asylum seeker is someone who has lodged an application for asylum with the DHA which has not been finalized. For the purposes of this report, the term refugee or refugee victim, shall refer to refugees or asylum seekers (undocumented or not) who have been the victims of crime in South Africa.

² The UCT Refugee Law Clinic has also assisted victims in seeking damages for losses incurred as a consequence of being a victim of crime by representing clients in civil delictual claims against perpetrators of violence and constitutional damages claims in the Equality Court.

crime with their navigation through and comprehension of the various stages of the CJS. In addition to the increase in demand for legal support services from refugee victims of crime, the Refugee Law Clinic's extension of its legal services into the criminal justice sphere results from its manifest acknowledgement of the significance of the need to uphold access to justice for the effective protection and local integration of refugees in South Africa.

This evaluation report intends to assess the early effectiveness of the UCT Refugee Law Clinic's watching brief interventions. It will begin by providing a brief overview of the basis for protection to persons of concern to UNHCR, including relevant aspects of international, regional and domestic law. This will be followed by a discussion of protection and local integration of urban refugees. The requirements for access to justice, as an important and complex component of protection for urban based refugees, will be explored, taking into account the needs of this vulnerable group and the role of lawyers in seeing that those needs are upheld. The following section will outline the development of the UCT Refugee Law Clinic's legal support services for refugee victims of crime including its formulation of a model of watching brief interventions designed specifically to assist this beneficiary group with accessing justice in the various stages of the South African CJS. The early experience of using this model at the UCT Refugee Law Clinic will be related and analysed, and some conclusions and recommendations will be reported. The research process that formed the basis of this report is outlined in detail in the Methodology section attached as Appendix A.

In light of the relative novelty of the activity, the UCT Refugee Rights Unit felt it important to document the development of their approach to providing watching brief interventions for refugee victims of the crime. In the process it would be possible to conduct a preliminary analysis with respect to the value of the exercise in combating what is perceived as mounting impunity with regard to crimes committed against refugees and asylum seekers in South Africa. Not only do some of these crimes contain elements of xenophobia within them, but the sense of impunity for crimes against foreign nationals in itself supports the further development of xenophobia.

Given the frequency of crimes targeting foreign nationals in South Africa over the past few years, studies are beginning to emerge that address issues of justice.³ Our aim in

³ Such as the HRC 'Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals' (2010) at p. 21, available at

this report is to contribute to this research in two significant ways. Firstly, the intention is to focus on the “everyday” experience of refugees who are victims of criminal acts, with the impact of their victimizations on attempts to locally integrate being of particular significance. This contrasts somewhat with the experiences of victims of mass violence (upon which the majority of studies to date focus), where the relevant responding authorities are, on the one hand, particularly overstretched in terms of resources and, conversely, have at least some sense of an operational plan (mindful of the potential for the public scrutiny of their response).

Secondly, it is intended, through analysis of case studies, to identify both the facilitators and barriers to access to justice and the way in which the Refugee Law Clinic’s watching brief framework developed might provide a model for effective intervention. Thus, in addition to identifying gaps in the delivery of access to justice by state institutions, the study will consider the potential role for legal aid and NGO advocacy interventions to improve refugee access to justice. A further crucially important objective is to begin to interrogate the needs and opportunities within communities of refugees for possible direct engagement with actors within the CJS in order to support effective investigation and prosecution of crimes, which in turn has the potential to advance the local integration of refugees into South African society.

Evaluation of the watching brief activities of the Refugee Law Clinic provides an important contribution to the debate on the development of mechanisms and practices of victim support in the CJS in South Africa. To this end, this report is intended to provide guidance and stimulus for further deliberation to a broad range of policy and practice actors, including the UNHCR, which are involved in ensuring that refugees who are victims of crime are appropriately served by the CJS and assisted in this regard by capacitated victim support legal service providers. The report serves as a starting point for consideration of frameworks and standards that should apply in seeking to meet the particular needs of this vulnerable community. Recommendations are necessarily fairly open at this stage, given the lack of previous published work on this topic and the nascent character of the work. The report will

<http://wits.academia.edu/Tamlyn-Monson/Papers/155372/Report_on_the_SAHRC_Investigation_into_Issues_of_Rule_of_Law_Justice_and_Impunity_arising_out_of_the_2008_Public_Violence_against_Non-Nationals>; HSRC ‘Citizenship Violence and Xenophobia in South Africa: Perceptions from South African Communities’ (June 2008), pp. 17-21, available at <<http://www.hsrc.ac.za/Document-2807.phtml>>; IOM ‘Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa (February 2009) at p. 7, available at <http://iom.org.za/site/index.php?option=com_docman&task=doc_details&gid=129>.

feed into future exercises designed to further advocacy, training and capacity building to uphold the access of foreign nationals to justice as victims of crime. Ultimately, this report and the efforts and activities that are spawned in its wake, will support efforts to secure the best possible conditions to improve the delivery of justice to refugees and asylum seekers who are victims of crime in South Africa.

Officials from state institutions, tasked with the delivery of justice, will be assisted through the insights provided that will facilitate the mainstreaming of service provision of this particular vulnerable group in South African society. Civil society partners, both within and beyond the refugee service provider sector, will benefit from the insight the report offers into the potential for victim support interventions for foreign nationals. Most obviously, legal practitioners and refugee rights advocates will be able to access practical information on approaches to ensuring that criminal cases related to crimes against refugees are followed through to successful conviction and sentencing. The report will serve to encourage and inform both civil society entities and community based organisations to develop a watching brief capacity, in partnership with relevant expert organisations.

In sum, the intention is to engage, through the research process and the dissemination of the research report, with a broad range of stakeholders to promote discussion on improvement of policy on victim support and its implementation, alongside critical deliberations about the scope and value of a particular model of justice support. In the process, it is intended to raise awareness of the need for watching brief interventions for victim support purposes and to raise the profile of one particular approach to meeting that need. The broader aim is to make a contribution to upholding the human rights of refugees in South Africa, which includes reducing (albeit indirectly), the incidence of xenophobia in communities and state institutions through more successful investigation and prosecution of xenophobia related crimes.

PART II – REFUGEE PROTECTION AND ACCESS TO JUSTICE

I International and Domestic Legal Frameworks for Refugee Protection

(a) *International Law*

The global legal framework in which refugee rights and protection are placed is multifaceted. It includes an amalgam of international refugee law (IRL), and the constantly evolving field of international human rights law (IHRL), the case-law of human rights courts,⁴ international humanitarian law,⁵ customary international law⁶ and so-called “soft law”.⁷ In addition, case law from regional bodies⁸ and from domestic courts both influence and are influenced by the international legal framework.⁹

The 1951 Convention Relating to the Status of Refugees (the ‘1951 Convention’),¹⁰ and the 1967 Protocol Relating to the Status of Refugees (the ‘1967 Protocol’),¹¹ are the ‘principal international instruments established for the protection of refugees and their basic character has been widely recognized internationally’.¹² As the main source of IRL the 1951 Convention provides ‘the most comprehensive codification of the rights of refugees yet

⁴ In particular, the European Court of Justice and the Inter-American Court of Human Rights.

⁵ International humanitarian law only applies in situations of armed conflict. For a detailed discussion see the International Red Cross ‘War and International Humanitarian Law’, available at < <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm>>; See further Solis G.D. *The law of Armed Conflict, International Humanitarian Law in War* (2010), and Ben-Naftali O. (ed.) *International Humanitarian Law and International Human Rights Law* (2011).

⁶ Customary international law, or the common law of the international community, refers to a customary rule, the consent to which is inferred from the conduct of states. The courts have identified two main requirements for the existence of such a rule: [1] settled practice (*usus*) and [2] the acceptance of an obligation to be bound (*opinion juris sive necessitates*) (Dugard J. *SC International Law A South African Perspective* 3rd ed. (2005) at p. 29).

⁷ “Soft law” refers to standards generated by declarations adopted by diplomatic conferences or resolutions of international organisations, which are intended to serve as guidelines for State conduct, but which lack the status of “law” (Ibid. at pp. 37-38).

⁸ For example, the African Commission on Human Rights and the Inter-American Commission on Human Rights.

⁹ In a discussion of the “refugee regime complex”, Betts A. describes a range of regimes that increasingly have effect on different aspects of the protections that States provide to refugees and asylum seekers, which includes the human rights regime (affecting complementary protection), the travel regime (affecting access to spontaneous arrival asylum), the security regime (affecting durable solutions), the humanitarian regime (affecting protection of internally displaced persons), and the labour migration regime (affecting access to labour markets), (Betts A. ‘The Refugee Regime Complex’ in *Refugee Survey Quarterly* 2010, Vol 29, NO 1).

¹⁰ 1951 United Nations Convention Relating to the Status of Refugees 189 UNTS 150.

¹¹ 1967 Protocol to the United Nations Convention Relating to the Status of Refugees 6 I.L.M. 78 (1967). The 1951 Convention entered into force on 22 April 1954 and the Protocol entered into force on 1 October 1967. The provisions contained therein are supported and extended by the relevant standards, guidelines and case law that have been adopted over the years.

¹² The Office of the UNHCR ‘Introductory Note to the Convention and Protocol Relating to the Status of Refugees’ (2007) at p. 6.

attempted on the international level'.¹³ Regional instruments provide a further set of protections in terms of IRL, in particular the *1969 Organization of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa*¹⁴, and although it is not formally legally binding, the *1984 Cartagena Declaration on Refugees*¹⁵ (for Latin America).

The rights¹⁶ provided under the 1951 Convention set the minimum standards for contracting States, who are nonetheless encouraged to exceed the benefits and rights prescribed.¹⁷ The defining right of all in refugee protection is the principle of *non-refoulement* (non-return),¹⁸ while the other 1951 Convention rights particularly relevant to the issues being addressed in this report include: justice rights, including non-discrimination¹⁹ and free access to the courts of law;²⁰ freedom of movement;²¹ livelihood rights, including rights to wage-earning employment and self-employment and certain welfare rights.²²

Notably, a comparison of standards of treatment applicable to refugees for the rights conferred by the 1951 Convention reveals that the *only* right for which there is *unqualified* access for refugees is that of '*free access*' to the courts of law in the Contracting State.²³

¹³Ibid. at p. 5.

¹⁴ *1969 Organization of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa* 8 I.L.M. 1288 (1969).

¹⁵ Cartagena Declaration on Refugees, adopted at a Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984.

¹⁶ Importantly, the 1951 Convention also confers certain obligations on refugees. In this respect Art. 2 provides that '[e]very refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to the measures taken for the maintenance of public order.'

¹⁷ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at <<http://www.unhcr.org/refworld/docid/40a8a7394.html>>.

¹⁸ The principle is codified in Art. 33 of the 1951 Convention, and Duffy suggests that *non-refoulement* is considered to be customary international law, meaning that it applies to all states irrespective of whether they have ratified a relevant treaty (Duffy A. 'Expulsion to Face Torture? *Non-refoulement* in International Law' *Int. J. Refugee Law* (2008) 20 (3) 373-390 at p. 373.

¹⁹ Article 3 of the 1951 Convention.

²⁰ Article 16 of the 1951 Convention. Subsection 16(2) specifically states that '*a refugee shall enjoy...the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi*' ("payment of security for legal costs").

²¹ Article 26 of the 1951 Convention.

²² Articles 17-19 of the 1951 Convention.

²³ Thereafter, the gradation of standards of treatment range from '*same treatment as is accorded to nationals*' (for rights to intellectual property, rationing, elementary education, public relief and assistance and labour legislation); to '*treatment as favourable as possible*' but '*not less favourable than that accorded to aliens generally in the same circumstances*' (for rights to property, self-employment, participation in the liberal professions, housing and education other than elementary). Finally, treatment in line with the basic standard, '*the most favourable treatment accorded to nationals of a foreign country in the same circumstances*', is secured by the 1951 Convention in respect of rights of association and of wage-earning employment.

Furthermore, whilst not a right, the 1951 Convention urges contracting States to facilitate the ‘assimilation and naturalization’ of refugees.²⁴

While IRL provides a specific set of guarantees for refugees, IHRL refers to the body of international law designed to promote and protect all human rights at the international, regional and domestic levels. Few would argue, however, with the contention that IHRL and IRL are irrevocably imbricated. The application of IHRL²⁵ to the protection of refugees has assisted in setting standards for identification of and protection mechanisms in relation to a range of violations, including persecution, *refoulement*, expulsion, arbitrary detention, threats to life and physical security and deprivation of socio-economic rights. Under IHRL, refugees and asylum seekers are automatically accorded the most basic human rights—namely, the right to life; to not suffer torture, degrading treatment or discrimination; to equal treatment; to due process; to respect for one’s dignity and to the preservation of one’s family.

As a legal framework, therefore, IHRL is complementary to the protections provided by IRL, extending and clarifying norms established in the 1951 Convention, thereby offering greater protection to persons of concern to UNHCR.²⁶ Human rights standards are particularly relevant for clarifying norms of legal, physical and material security which are central prerequisites for successful local integration of refugees in their host countries.²⁷ Application of human rights standards enhances the capacity of States to respect, protect and

²⁴ Article 34 of the 1951 Convention.

²⁵ The principle instruments of international human rights law that confer rights on refugees are those that constitute what is known as the International Bill of Rights—namely the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and related protocols, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Other important international human rights instruments include the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). In addition there are a number of human rights instruments (and related supervisory decision-making bodies), that result from regional initiatives, such as the African Union (AU) and the Organization of American States (OAS). The human rights treaties within the African system of human rights law, as well as those of the Inter-American system and the European system thus stand in addition and complementary to international refugee law.

²⁶ The value to refugee protection of norms established in IHRL is extensive. IRL protections are extended by IHRL due to the fact that some human rights instruments have been ratified by more countries than refugee provisions: some envisage a broader range of rights than in IRL; human rights instruments generally provide for the same treatment for nationals and non-nationals; human rights instruments support a wider principle of non-discrimination and provide different supervisory mechanisms (promoting a broader range of supervisory mechanisms). Finally, human rights instruments are particularly valuable for undocumented migrants as they offer protection to everyone within the jurisdiction of a particular State (see Gorlick B. ‘Human rights and refugees: enhancing protection through international human rights law’ *New Issues in Refugee Research*, Working Paper No. 30, available at <<http://www.jha.ac/articles/u030.htm>>).

²⁷ *Ibid.*

fulfil the rights of refugees and asylum seekers, at the same time as it empowers refugees, asylum seekers and their advocates to combat violations of those rights.²⁸

(b) South African Law

In South Africa, domestic legislation provides the basis for *extensive* protection of the rights of refugees and asylum seekers, largely in accordance with international norms. The principal legislations in this respect consist of the Constitution of the Republic of South Africa (“the Constitution”)²⁹ and the Refugees Act.³⁰

The Constitution provides refugees and asylum seekers with the most direct access to securing their rights. The basic human rights upheld by the Constitution, which apply universally,³¹ include freedom from unfair discrimination, the right to life, the right to human dignity and the right to freedom and security of the person. Chapter 2 of the Constitution, the Bill of Rights, ‘enshrines the rights of all people in South Africa and affirms the values of human dignity, equality and freedom.’³² The State has a duty to ‘respect, protect, promote and fulfil the rights in the Bill of Rights,’³³ which are subject only to the limitations referred to in section 36 of the Constitution.³⁴

Accordingly, refugees and asylum seekers in the Republic have the right to equality before the law and to equal protection and benefit of the laws of South Africa. Furthermore, they enjoy the right to be free from all forms of violence;³⁵ the right not to be tortured;³⁶ the right not to be treated or punished in a cruel, inhuman or degrading way;³⁷ the right to freedom of movement;³⁸ the right to fair labour practices;³⁹ the right not to be deprived of property;⁴⁰ the right to access to information;⁴¹ the right to administrative action that is

²⁸ Ibid.

²⁹ Act 108 of 1996.

³⁰ Act 130 of 1998.

³¹ In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* ((2002 (8) BCLR 891 (T)), the court confirmed that the Bill of Rights applies to all persons except with express exceptions (at 897C-D).

³² Section 7(1).

³³ Section 7(2).

³⁴ Limitations may be only in terms of ‘law of general application’ and must be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’ and taking into account designated ‘relevant factors’.

³⁵ Section 12(1)(c).

³⁶ Section 21(1)(d).

³⁷ Section 21(1)(e).

³⁸ Section 21(1).

³⁹ Section 23(1).

⁴⁰ Section 25(1).

lawful, reasonable and procedurally fair;⁴² the right to have fair access to courts;⁴³ and all the specified rights of arrested, detained and accused persons.⁴⁴

The Refugees Act provides certain protections to refugees and asylum seekers in South Africa. It sets out South Africa's asylum claim procedure and the rights and obligations of refugees and asylum seekers in the Republic. Section 27 of the Refugees Act specifically sets out the rights of recognized refugees and asylum seekers, which includes full protection of the Constitution's section 2 Bill of Rights.⁴⁵ Although the Refugees Act did not originally delineate the rights of *asylum seekers*, rather only recognized refugees, the Refugees Amendment Act,⁴⁶ now includes section 27A, wherein the protection and general rights of asylum seekers are stipulated. In addition to rights to formal written recognition as an asylum seeker and the right to remain in South Africa pending finalisation of an application for asylum without being unlawfully arrested or detained, section 27A(c) provides that an asylum seeker is entitled to 'the rights contained in the Constitution of the Republic of South Africa, 1996, in so far as those rights apply to an asylum seeker.'⁴⁷

Building upon South Africa's progressive refugee legislation, the South African courts have also made some significant pronouncements on the rights of refugees and asylum seekers. In the recent High Court decision of *Zimbabwe Exiles Forum v Minister of Home Affairs*⁴⁸ Kollapen AJ confirmed that:-

'The legal regimes that apply to migrants, asylum seekers and refugees have their foundations deeply rooted within the Constitution and in particular within the chapter of the

⁴¹ Section 32(1).

⁴² Section 33(1).

⁴³ Section 34.

⁴⁴ Section 35.

⁴⁵ In terms of s 27 'A refugee – (a) is entitled to a formal written recognition of refugee status in the prescribed form; (b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act; (c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely; (d) is entitled to an identity document referred to in section 30; (e) is entitled to a South African travel document on application as contemplated in section 31; (f) is entitled to seek employment; and (g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.'

⁴⁶ Act 33 of 2008. The Amendment Act was passed in 2008 but, has to date not yet been brought into force.

⁴⁷ This is a welcome extension of the principal Act, however until such time as the Refugees Amendment Act becomes operational; the above argument on the universal application of the Bill of Rights applies to asylum seekers.

⁴⁸ *Zimbabwe Exiles Forum & Others v Minister of Home Affairs & Others* [2011] ZAGPPHC 29 (17 February 2011).

*Bill of Rights. Given that what is often at stake is the liberty of an individual, their freedom and security and their right to just administrative action including their right to seek and receive the protection of the state in appropriate circumstances it is therefore essential that in all such matters the policy and practice followed by the State and its organs are consistent with both the values of the Constitution and the human rights imperatives set out therein....the right to dignity, the right to freedom and security, the right to movement and the right to just administrative action all are relevant.*⁴⁹

The Court's duty to apply the Constitution to the interpretation of all laws in the Republic⁵⁰ has resulted in judgements that have further expanded the rights of refugees and asylum seekers in South Africa, especially in areas where legislation was found to be deficient or unconstitutional. For example, the Supreme Court of Appeal in the case of *Minister of Home Affairs v Watchenuka*⁵¹ confirmed an asylum seeker's right to work pending finalization of the asylum application, based on the foundational values of right to life and dignity as stipulated in the Bill of Rights of the Constitution.

In conclusion, there are a range of spheres of legal provisions available to apply to the protection of the rights of refugee and asylum seekers. In South Africa, domestic law provides for comprehensive legal protections for refugees and asylum seekers. In their interpretation and application, the principal relevant legal instruments explicitly acknowledge the international sphere as being the source of guidance.⁵² As subsequent sections of this report will indicate, in the context of reasonably comprehensive rights, the challenges to the realisation of refugee rights lies in the implementation of the norms and standards enshrined in the law. This is particularly so in middle and low income countries, such as South Africa, where there are challenges to service provision, both in the resourcing of the justice system itself and in the delivery of other rights that the justice system might be seen to enforce as part of an expanded notion of access to justice.

⁴⁹ Ibid. at paras [9]–[10].

⁵⁰ Section 8 of the Constitution.

⁵¹ *Minister of Home Affairs and Others v. Watchenuka and Another* [2004] 1 All SA 21 (SCA).

⁵² It is stipulated, for example, that the provisions of the Refugees Act must also be interpreted and applied with due regard to the 1951 Convention and its 1967 Protocol, the OAU Refugee Convention, the Universal Declaration of Human Rights and any other relevant convention or international agreement to which South Africa is a party (s 6 of the Refugees Act).

II Local Integration and the Protection of Refugees in Urban Environments

(a) A Broad Meaning of Protection

The focus of this report lies within the scope of activities aimed at protection of refugees and asylum seekers. Being both a ‘global concern and a common trust,’⁵³ responsibility for the protection of refugees is shared amongst the international community, individual states, international bodies such as UNHCR⁵⁴ and, ultimately, refugee and host nation communities themselves. Fundamentally, however, refugee protection is both the primary responsibility of the State and the core mandate of UNHCR.⁵⁵ As UNHCR’s legal implementing partner in the Western Cape, UCT’s Refugee Law Clinic has a central role to play in the protection of people of concern to UNHCR.

Formally, protection is defined as all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law, namely human rights law, international humanitarian law and refugee law.⁵⁶ Included within the *broader* understanding of protection are interventions aimed at the creation and sustenance of an enabling environment so that basic and other rights ‘have a reasonable chance of being enjoyed, pending a durable solution to the problems at issue.’⁵⁷

Protection activities may be responsive (aimed at addressing emerging or established patterns of abuse of fundamental rights), remedial (taken to restore the dignity of victims of violations through rehabilitation, restitution and repair), and/or aimed at capacity building

⁵³ Sixty-first Session of the Executive Committee of the High Commissioner’s Programme. Agenda item 5(a). Statement by Ms. Erika Feller, Assistant High Commissioner – Protection, ‘Rule of Law 60 Years On’ (6 October 2010) at p.1, available at <<http://www.unhcr.org/4cac7f2f9.html>>.

⁵⁴ In terms of its statute, the Office of the High Commissioner is tasked with promoting international instruments for the protection of refugees, and with supervising their applications. Individual contracting states are bound to cooperate with the Office of UNHCR in the exercise of its functions, not least by facilitating UNHCR’s supervisory duties in respect of the application of international instruments of protection (The Office of the UNHCR ‘Introductory Note to the Convention and Protocol Relating to the Status of Refugees’ (2007) at p. 7).

⁵⁵ UNHCR’s protection mandate is, foremost, contained within the body’s statute. However, the evolution of the functions and activities are supported by the General Assembly, the Economic and Social Council, the organisational practices of UNHCR itself and the ‘*corresponding acquiescence by states as well as implied powers*’ (Evans Barnes A. ‘Realizing protection space for Iraqi refugees: UNHCR in Syria, Jordan and Lebanon’ *New Issues in Refugee Research. Research paper no. 167* (January 2009), at p. 2 available at <<http://www.unhcr.org/4981d3ab2.html>>.

⁵⁶ From the *Inter-Agency Standing Committee (IASC) Handbook for the Protection of Internally Displaced Persons*. Cited in Evans Barnes (note 55 above) at p. 8.

⁵⁷ UN High Commissioner for Refugees, *8th Annual Forum on Human Rights, Dublin, Ireland: Global Human Rights Protection - the way forward*. Erika Feller, Assistant High Commissioner - Protection: Keynote address - “Towards a culture of protection”, 30 June 2006, available at: <<http://www.unhcr.org/refworld/docid/44aba8d-54.html>>.

(towards creating a situation where it is possible to uphold adequate protection norms in society as a whole).⁵⁸ An important aspect of promoting protection entails forms of action aimed at influencing relevant authorities to fulfil their obligations.⁵⁹ Consolidation of political, cultural and institutional norms supportive of protection can also be furthered by provision of direct services to victims or technical support for local facilities.⁶⁰

Notwithstanding existing provisions, worldwide the UNHCR identifies significant gaps in the protection afforded refugees and asylum seekers. Noting the prevalence of ‘asylum fatigue’, UNHCR cites ‘inadequate adherence to proper practices and implementation deficits as regards the principles’⁶¹ as the basis of protection gaps. Further, it is stated that ‘at the heart of these problems are misperceptions, deliberate or otherwise, which have come into play not least because refugee and asylum issues are now so deeply mired in the broader issues of international security, irregular migration, transnational law and order, and crime.’⁶²

It should also be recalled that fulfilling broader understandings of protection rests upon realisation of the State’s duty to respect, protect and fulfil legal obligations and norms. Complementary to this, interventions providing protection need to respond to the specific requirements and challenges of urban refugees. Within the many ways of actualising protection interventions, agencies upholding access to justice—in its broader understanding—have an obligation to protect the legal, economic and social dimensions of refugee and asylum seeker rights. As will be argued below, legal service providers have a particular role to play in ensuring access to justice for vulnerable groups, such as refugees and asylum seekers.

⁵⁸ Evans Barnes (note 55 above) at p. 10.

⁵⁹ Possible interventions include public disclosure and/or denunciation of violations, dialogue with relevant authorities to build agreements through persuasion, and mobilisation of third parties (through information sharing) so that they may play a role in enhancing adherence to meeting obligations (Reach Out Refugee Protection Training Project. ‘Module 1: What is Refugee Protection?’ Available at <<http://www.unhcr.org/437-1d9482.pdf>>).

⁶⁰ Evans Barnes (note 55 above) at p. 11.

⁶¹ UN High Commissioner for Refugees, *The responsibility to protect - closing the gaps in the international protection regime and the new EXCOM Conclusion on Complementary Forms of Protection*, Presentation by Erika Feller, Director of International Protection, UNHCR, to the "Moving On: Forced Migration and Human Rights" conference, NSW Parliament House, Sydney, Australia, 22 November 2005, 22 November 2005, available at <<http://www.unhcr.org/refworld/docid/43a692122.html>>.

⁶² UN High Commissioner for Refugees, *The responsibility to protect - closing the gaps in the international protection regime and the new EXCOM Conclusion on Complementary Forms of Protection*, Presentation by Erika Feller, Director of International Protection, UNHCR, to the "Moving On: Forced Migration and Human Rights" conference, NSW Parliament House, Sydney, Australia, 22 November 2005, 22 November 2005, available at <<http://www.unhcr.org/refworld/docid/43a692122.html>>.

(b) Within the Context of Local Integration

Following the institution of the democratic dispensation in April 1994, the South African government's policy in relation to refugee protection was re-aligned, with a considerable rights-based focus, so as to promote local integration.⁶³ According to the UNHCR, local integration is one of the three durable solutions promoted for refugees and asylum seekers subject to long-term displacement.⁶⁴

Moving beyond the more narrow definition of local integration, which refers to this durable solution being obtained only when a refugee becomes naturalized in his country of asylum, local integration is currently understood to be a *process* with three interrelated dimensions: legal, economic and socio-cultural.⁶⁵ In order for local integration to take place refugees must be able to demonstrate a measure of self-reliance and preparedness to adapt to the host society. As a corollary, host communities need to demonstrate a willingness to respond positively to the presence of refugees. To support both refugee and host nation communities in this process, local public institutions must be capacitated and, importantly, motivated to meet the needs of the inclusive communities.⁶⁶ Institutional discrimination and xenophobia are noted to be significant barriers to effective local integration.⁶⁷

The legal aspects of local integration include rights and entitlements, in line with those enjoyed by citizens, to freedom of movement; access to education, labour opportunities, health facilities and public relief and assistance; the possibility of acquiring and disposing of property; the realization of family unity; and the capacity to travel with valid travel and identity documents.⁶⁸ Other rights which citizens would normally enjoy, such as freedoms of

⁶³ A central consideration at the time was to avoid the curtailment of rights, particularly to freedom of movement that follows from accommodating refugees in refugee camps. In good measure, this was in recognition of the suffering that many South Africans had endured through restrictive policies of successive apartheid-era governments.

⁶⁴ Repatriation to country of origin and resettlement to a third country are the other two durable solutions.

⁶⁵ Crisp J. suggests that as a legal process, local integration refers to when refugees attain a wider range of rights in the host state; as an economic process, it refers to the refugees' establishing sustainable livelihoods and a standard of living comparable to the host community; and, as a social and cultural process, it refers to the adaptation and acceptance that enables refugees to contribute to the social life of the host country and live without fear of discrimination (Crisp J. 'The local integration and local settlement of refugees: a conceptual and historical analysis' *New Issues in Refugee Research*, Working Paper No.102 (2004) at pp. 1-2, available at <<http://www.unhcr.org/407d3b762.html>>).

⁶⁶ UNHCR, *Local Integration*, Global Consultations on International Protection, EC/GC/02/6, 25 (April 2002), paras. 14-17 as cited in da Costa R. 'Rights of Refugees in the Context of Integration: Legal Standards and Recommendations' *Legal and Protection Policy Research Series* (2006) at p. 8, available at <<http://www.unhcr.org/44bb90882.pdf>>.

⁶⁷ UN High Commissioner for Refugees, *Local Integration and Self-Reliance*, 2 June 2005, EC/55/SC/CRP.15, available at <<http://www.unhcr.org/refworld/docid/478b3ce12.html>>.

⁶⁸ Da Costa (note 66 above) at p. 8.

speech, freedom of assembly and rights to acquire licenses should not be subject to reservations for recognized refugees.⁶⁹ International and regional human rights standards, as a complement to the 1951 Convention, remain the guiding principles for defining and enforcing integration rights.⁷⁰

As stated above, local integration is more than the legal process of granting of rights and entitlements by the host State more or less in line with those granted to citizens, however. Local integration also requires the attainment of economic and socio-cultural freedoms to support sustainable livelihoods through interactive processes that are based on the principles of non-discrimination and non-exploitation.⁷¹ In this regard, refugees typically face a range of obstacles to attaining sustainable livelihoods, particularly urban refugees, who often lead ‘very marginal’ lives in the informal sector ‘through petty trade and the provision of services’.⁷² These include limitations in their legal status and a concomitant lack of rights, restrictions in their freedom of movement⁷³ and ‘negative perceptions towards refugees amongst the local population, host governments, the refugee regime and aid organisations’.⁷⁴

It can be stated that local integration is the *preferred* durable solution for refugees in South Africa. Unlike in many parts of the continent, South Africa does not have an encampment policy for refugees. Refugees and asylum seekers live mainly in South Africa’s urban centres among the local community. The majority of refugees and asylum seekers in South Africa are from other African countries and many are destined to remain in South Africa for a long period of time, due to the protracted nature of the conflicts which forced them to flee their countries of origin. Although voluntary repatriation is the ideal durable solution, as it implies that a refugee can return in safety and dignity to his or her country of origin, this is often not possible. Furthermore, the resettlement programme in South Africa is a relatively small one and although it is often the most sought after solution by the refugee, it is not attainable for the majority of refugees. Significantly, though, it should be noted that one of the UNHCR criteria for resettlement includes if a refugee is “without local integration

⁶⁹ Ibid. at p. 21.

⁷⁰ Ibid. at p. 14.

⁷¹ Ibid. at p. 9.

⁷² Horst C. 'Refugee livelihoods: Continuity and Transformations', *Refugee Survey Quarterly* (2006) 25(2): 6-22 at pp. 17-18.

⁷³ Importantly for non-restriction of livelihood opportunities, freedom of movement entails movement beyond the host country, as well as within the host country (Ibid. at p. 15).

⁷⁴ Ibid. at p. 14.

prospects.”⁷⁵ This necessarily implies that there are prospects for local integration in the first place and more importantly that efforts have to be made for local integration.⁷⁶

As will be reviewed in the analysis section below, the differing motivations of refugee victims of crime in requesting legal assistance from UCT’s Refugee Law Clinic need to be borne in mind, as the desire for resettlement has often presented itself as a driving force for reporting their criminal victimizations and their inability to access justice to the Law Clinic, as ‘evidence’ of their inability to locally integrate. This particular motivation must be appreciated within the context of the refugee victims’ experiences, which includes repeat, traumatic victimizations in many cases and the persistent lack of assistance by the police, all of which impact severely on efforts to locally integrate, and leave many refugees with the desire to seek resettlement to a third country.

(c) UNHCR’s Urban Refugee Policy

The broadening of the scope of protection that is implicit in local integration of refugees produces a particular set of demands that have forced a reorientation of UNHCR policy and provision in respect of services to address the protection needs of urban refugees. The increasing numbers of refugees living in urban areas (rather than in camps), presents specific challenges to meeting protection obligations.⁷⁷ These challenges are on-going as urban refugees and asylum-seeker ‘numbers increase, programmes to secure protection, health, housing and education are costly and not always supported, and resettlement and repatriation remain realistic solutions for very few.’⁷⁸

In recognition of protection gaps in respect of urban refugees, in 2009 UNHCR produced policy guidelines to address this deficit, applicable in developing and middle income countries where UNHCR has a presence.⁷⁹ In harmony with IRL and IHRL, protection provided to refugees in urban areas should support the exercise of all the rights to

⁷⁵ The criteria for resettlement are set out in Chapter 4 of the UNHCR Resettlement Handbook (2004) available at <[http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=46f7c0ee2&query=resettlement handbook](http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=46f7c0ee2&query=resettlement%20handbook)>.

⁷⁶ Khan F. ‘Local Integration: Lessons Learnt and the Way Forward’, paper presented at the 2007 UNHCR Annual Consultations with NGOs, available at <http://www.refugeerights.uct.ac.za/downloads/refugee-rights.uct.ac.za/local_intergration_sa_context.doc>.

⁷⁷ Jacobsen K. ‘Refugees and Asylum Seekers in Urban Areas: A Livelihoods Perspective’ *Journal of Refugee Studies* (September 2006) 19 (3): 273-286.

⁷⁸ The Executive Committee of the High Commissioner’s Programme (note 53 above), at p. 2.

⁷⁹ UN High Commissioner for Refugees, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, (September 2009), available at <<http://www.unhcr.org/refworld/docid/4ab8e7f2.html>>.

which they are entitled, including, but not limited to ‘the right to life; the right not to be subjected to cruel or degrading treatment or punishment; the right not to be tortured or arbitrarily detained, the right to family unity; the right to adequate food, shelter, health and education, as well as livelihoods opportunities.’⁸⁰

The UNHCR Urban Policy sets out the underlying principles of UNHCR’s engagement with urban refugees, whilst recognising that local circumstances require local adaptations of those principles.⁸¹ The UNHCR acknowledges that to achieve its intended goals necessitates ‘effective cooperation and support from a wide range of other actors, especially [the] host government.’⁸² To this end, UNHCR undertakes to work closely with ‘the national authorities, the police and judiciary, the private sector, NGO’s, legal networks, other civil society institutions and development agencies.’⁸³

In setting out the principles of protection in urban areas, UNHCR state their primary objective to be ‘to preserve and expand the amount of protection space available to [refugees] and to the humanitarian organizations that are providing such refugees with access to protection, solutions and assistance.’⁸⁴ Further key principles include upholding refugee rights, supporting the principle of state responsibility, and creating and sustaining effective partnerships.⁸⁵ The Policy aims to support the promotion of the dignity, self-esteem, and productive and creative potential of refugee communities,⁸⁶ the development of the social and economic standing of refugees to uphold their self-reliance,⁸⁷ and the positive interaction between host and refugee communities.⁸⁸

Most relevant specifically to the UCT Refugee Law Clinic’s watching brief interventions is the key principle of the Policy that confirms that ‘UNHCR will strive to ensure that refugees have access to justice systems, are treated as equals before the law and are not subjected to any form of discrimination by law enforcement agencies and other

⁸⁰ Ibid. at para. 17.

⁸¹ Ibid. at para. 11. For an account of the implementation of the policy see UN High Commissioner for Refugees, *Navigating Nairobi: A review of the implementation of UNHCR’s urban refugee policy in Kenya’s capital city* (January 2011), PDES/2011/01, available at <<http://www.unhcr.org/refworld/docid/4d6ca-8302.html>>.

⁸² UNHCR Urban Policy (note 79 above) at para. 12.

⁸³ Ibid. at para. 31.

⁸⁴ Ibid. at para. 19.

⁸⁵ Distilled from Ibid.

⁸⁶ Ibid at para. 39.

⁸⁷ Ibid. at para. 43.

⁸⁸ Ibid. at para. 40.

representatives of the state.⁸⁹ Activities that the UNHCR suggest as supportive of their role in upholding the legal and political dimensions of local integration (and thereby the access to justice in a general sense), include public information and media campaigns that combat xenophobia and racism, as well as information, training and integration programmes for refugees to develop a better understanding of the society in which they live.⁹⁰ The Law Clinic's watching briefs, therefore, fall within the scope of activities envisaged by UNHCR as supporting and expanding the protection space for refugees in an urban environment.

III Access to Justice: An Integral Aspect of Refugee Protection

As reviewed above, protection has to be understood in terms of the activities through which refugee rights are secured. Protection is often a series of interventions, requiring a comprehensive and integrated response. On an international scale, protection has included humanitarian assistance and supervisory engagement to ensure the well-being of refugees and the proper functioning of the refugee regime in states where people of concern to UNHCR have sought protection.⁹¹ Effective legal protection cannot be separated from ensuring safeguards to guarantee basic material wellbeing (in the form of shelter, food, water, sanitation and medical care). Protection also entails those activities that go into creating durable solutions for refugees.

Since access to justice, in terms of refugee protection, is seen as *'the product of an interconnected, dynamic and multidimensional system'*,⁹² justice has both "legal" and a "non-legal" dimensions.⁹³ Whilst the former include the rights and legitimate claims that may

⁸⁹ Ibid. at para. 26. The Policy does not offer any specific suggestions on how to achieve this goal, other than in the event of large-scale security incidents that have the potential of disrupting the public order (paras. 95-8).

⁹⁰ Ibid. at para. 141.

⁹¹ In this respect, protection activities include (but are not limited to), *'securing admission and asylum, respect for basic human rights and an appropriate standard of treatment (which often includes the provision of assistance), as well as 'achieving a durable solution'* (Evans Barnes (note 61 above) at pp. 7-8). Protection also includes the direct provision of services and/or material assistance; the support of already existing structures in making such provisions; and the management of assistance programmes in such a way as to enhance refugee community engagement in their own protection. This does not negate the fact that the fundamental essence of protection provided by UNHCR was at the outset and remains today related to interventions to uphold the provision of legal protection. Capacity building and training, particularly to contribute to the sustainability of national systems of protection, are important aspects of refugee protection, as is the provision of timely information (The Executive Committee of the High Commissioner's Programme (note 59 above), at p. 4).

⁹² Murray J. & Steinman J. 'A systems Approach to Access to Justice: Exploring Fundamental Causes, Common Themes and Solutions' (July 30, 2010), available at <<http://ssrn.com/abstract=1670053>>.

⁹³ Amongst the range of approaches to understanding access to justice identified by one review of literature was the understanding that access to justice should have similar priority to access to health care or education; that access to justice is an essential aspect of democratic society; and that lack of access to appropriate and timely

be pursued and enforced through the judiciary, the latter encompass the legitimate claims pursued through other channels (including political branches of government and civil society institutions, including NGOs).⁹⁴

UNHCR's support of legal implementing partners in South Africa, such as the UCT Refugee Rights Unit, that provide legal assistance and advice to refugees is a key activity for upholding the legal and political dimensions of local integration for refugees. In this regard, the RRU Refugee Law Clinic services' aimed to assist refugees with accessing justice, more broadly speaking (i.e. obtaining enabling documentation, ensuring fair status determination, challenging various rights based violations), as well as accessing justice as victims of crime are critical.

As noted above, the UNHCR Urban Policy dictates that refugees should be assisted to realise various access rights to justice. The importance of upholding access to justice has been proclaimed in the Nairobi Declaration⁹⁵, wherein the rule of law and administration of justice are recognised as having '*fundamental importance*' in '*ensuring the promotion and protection of human rights.*' The United Nations Office for the High Commissioner for Human Rights (OHCHR), has identified as a strategic priority for 2010-2011 the need for improved access to justice for those affected by discrimination and poverty and for marginalised and minority groups, including those who are victims of violations of economic, social and cultural rights. Importantly, one of the challenges identified by OHCHR to which this need responds is that presented by 'unprecedented' levels of migration.⁹⁶

In South Africa, access to justice is also understood as having various aspects,⁹⁷ starting with the constitutionally enshrined (collective), rights to equality (s 9), just administrative action (s 33), access to the courts (s 34), arrested, detained and accused

legal advice in a contributing factor in creating and maintaining social exclusion, not least due to the effects of negative engagements with the CJS on reducing trust and confidence. Furthermore, social exclusion is positively correlated with the likelihood of experiencing barriers to access to justice (Mason P., Hughes N. & Norman A. 'Access to Justice: A review of existing evidence of the experiences of minority groups based on ethnicity, identity and sexuality' (2009) available at <<http://www.justice.gov.uk/about/docs-/access-justice-minority-groups-ii.pdf>>.

⁹⁴ Murray & Steinman (note 92 above).

⁹⁵ The *Nairobi Declaration*, para. 16, adopted by the Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights held in Nairobi, Kenya, adopted, available at <<http://www.ohchr.org/Documents/Countries/NairobiDeclarationEn.pdf>>.

⁹⁶ United Nations High Commissioner for Human Rights 'Strategic Management Plan 2010-2011' at p. 16, available at <<http://www.ohchr.org/Documents/Press/SMP2010-2011.pdf>>.

⁹⁷ DOJCD 'HIV/AIDS, Human Rights and Access to Justice' Draft Discussion Paper 1, (May 2009), available at <http://www.justice.gov.za/vg/hiv/docs/2009_discussion-paper7.pdf>. Though a draft paper, the continued availability of this paper on the Department's website suggests that the views expressed therein retain the support of the Department.

persons (s 35), and other matters concerning administration of justice (s 180). The South African Department of Justice and Constitutional Development's (DOJCD), description of the concept of access to justice extends to considerations of a 'restorative approach' to justice⁹⁸ and to considerations of those deprived of choices, opportunities and access to basic resources—principally through poverty and other factors creating marginalisation. In sum, access to justice, in this approach, entails (1) access to courts and the personnel, information, process and procedures that relate to them; and (2) access to information about the justice system (courts, police, prosecutors and correctional services). These dimensions are contemplated in the broader framework of differences in the capacity to access justice—specifically in relation to women.⁹⁹

(a) Access to Justice Barriers and the Protection Needs of Refugee Victims of Crime

Barriers to access to justice are commonly identified as financial constraints;¹⁰⁰ the social, cultural and employment characteristics of poverty that create marginalization and social exclusion;¹⁰¹ ignorance of rights and access to information to support participation in the justice procedures;¹⁰² and physical and cultural barriers.¹⁰³ In respect of the latter, it is noted that:-

*'Cases involving immigrants, asylum-seekers and ethnic minorities are revelatory, since cultural and language barriers compound the already precarious situation in which they find themselves in regard to the effective exercise of their rights before the courts.'*¹⁰⁴

The structure and functioning of the judicial system is also an important aspect of access to justice. Levels of trust and confidence in exercising the right to access to justice are affected by the types and characteristics of courts; the conditions of professional practice

⁹⁸ In the paper, the "restorative" approach is considered to be distinct from the "restorative justice" approach (Ibid. at pp. 12-13).

⁹⁹ Ibid. at pp. 13-14.

¹⁰⁰ Financial constraints exist at the institutional level (in terms of funding for resources, training and infrastructure for the CJS) and at the individual level. United Nations Human Rights Council, 'Report of the Special Rapporteur on the independence of judges and lawyers' EHRC/8/4 (13 May 2008), at paras. 24-25, available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/134/14/PDF/G081341-4.pdf?OpenElement>>.

¹⁰¹ Obstacles to access to justice for the very poor result from their condition of indigence; illiteracy, low levels of education and lack of information; complexity of procedures; mistrust and fear of the justice system; the slow pace of justice; and the lack of support in criminal proceedings (Ibid. at para. 26).

¹⁰² Ibid. at paras. 27-28.

¹⁰³ Ibid. at paras. 29-32.

¹⁰⁴ Ibid. at para. 29.

relating to judges, prosecutors and lawyers and by levels of corruption and judicial delay.¹⁰⁵ Importantly, perceptions of the functioning of the justice system (rather than actual conditions of functioning), are the salient contributor to levels of trust and confidence.¹⁰⁶

Reflecting the social complexity of justice and access to justice issues, in a systems approach to analysing access to justice, justice seekers (whether individuals or groups), are identified as being constrained in their justice seeking activities by the nature of their justice needs,¹⁰⁷ their preferences in pursuing those needs,¹⁰⁸ and their personal endowments, resources and capabilities.¹⁰⁹ Each of these variables is affected by the history of the justice seeker's past engagement(s) with the justice system.¹¹⁰ In this respect, particularly where xenophobia and institutional discrimination prevail, it is important to bear in mind the possible existence of bias-inducing characteristics of refugees (or sectors of the refugee population), that have the potential to undermine the ability of justice seekers 'to receive an empathetic and fully responsive hearing from justice providers.'¹¹¹

In seeking to address constraints to access to justice, it is necessary to seek clarification of vulnerability and the recognition of vulnerable groups. This latter is a difficult area of deliberation as the potential outcome—especially in a country with widespread poverty and socio-economic marginalisation such as South Africa—is for the vast majority of the population to be designated as eligible for inclusion in one or more vulnerable

¹⁰⁵ Ibid. at paras. 33-43.

¹⁰⁶ AfriMAP and Open Society Foundation for South Africa 'South Africa: Justice Sector and the Rule of Law' Discussion Paper (2005), available at <http://www.soros.org/resources/articles_publications/publications/sa-justice_20060223/afriMAPdiscussion_20060223.pdf>.

¹⁰⁷ Importantly, objective justice needs are reliant, in the first place, on the resources to identify the problem experienced as relevant for "legal" remedies (Murray & Steinman (note 92 above) at p. 5).

¹⁰⁸ Preferences relate to '*values about how disputes ought to be conducted, and preferences for particular forms of dispute resolution*' (Ibid. at p. 6).

¹⁰⁹ Endowments and resources delineate the susceptibility of justice seekers to barriers inherent in the various components of any system of justice. Available financial resources, geographical distance to justice providers, employment status and job flexibility, child-care responsibilities, levels of self-confidence and self-efficacy, vulnerability to coercion and perceptions of the justice system are amongst the endowments and resources that affect the ability of justice seekers to gain access to justice. Further endowments that affect the ability of justice seekers to obtain their goals are human capital (education, information and awareness, communication skills and legal know-how), combine with social capital (social networks, group cohesion and personal connections), (Ibid.).

¹¹⁰ Importantly, these 'feedback processes' include 'prior outcomes of other justice seekers who are in an analogous social or legal position.' (Ibid. at p. 8). Groups of justice seekers may find themselves subject to prior legal-justice outcomes that establish precedents that 'enhance or diminish the substantive rights and remedies of similarly-situated group members' (Ibid.). Equally, dispute resolution preferences are affected by prior experience and the levels of trust or distrust that previous engagements with the justice system have fostered (Ibid.).

¹¹¹ Amongst the potential bias-inducing traits identified by the authors are race, nationality, religion, economic status, sex, sexual orientation, and disability (Ibid. at p. 7).

groups. Nonetheless, as much as policy is addressed to redress of inequalities through special attention to vulnerable groups, discussion of the matter cannot be sidelined.

The Nairobi Declaration upholds the promotion of equal access to justice and assistance of victims seeking redress ‘particularly in relation to marginalized or vulnerable groups as well as migrants.’¹¹² In this respect, refugees are acknowledged as belonging to a vulnerable group. Refugees and migrants are identified as a group experiencing difficulties in gaining equitable access to justice.

The South African DOJCD recognises that stigma and prejudice often override legal protections designed to diminish vulnerability. With this in mind, vulnerability is understood as ‘the absence of legal protection as well as social exclusion.’¹¹³ Vulnerability is associated with discrimination and stigma, social marginalisation, human rights violations, and practices and beliefs related to certain social and cultural norms.¹¹⁴

South African jurisprudence establishes that refugees are a vulnerable group. In the matter of *Larbi-Odam*¹¹⁵ foreign nationals are recognised as a vulnerable group who lack ‘political muscle’ and are vulnerable to having their rights overlooked.¹¹⁶

The DOJCD has recently acknowledged in a departmental policy paper on the *South Africa Service Charter for Victims of Crime*¹¹⁷ that refugee victims have particular issues that need to be addressed, such as being ‘more susceptible to revictimisation by other immigrants, service providers and communities.’¹¹⁸ The paper reviews the case of *Takesure*, a foreign national requesting assistance following a xenophobic attack, which illustrates the needs of such victims and the challenges that the DOJCD faces in implementing the Victims’ Charter for non-nationals. Noting that the DOJCD failed to deliver an appropriate response to *Takesure*, the paper recognizes that:-

¹¹² The *Nairobi Declaration* (note 95 above) at para. 33(a).

¹¹³ DOJCD (note 97 above) at p. 16.

¹¹⁴ These factors are highlighted in UNAIDS discussions of violations. Though specifically related to those infected or affected by HIV/AIDS, they are equally applicable to refugee and asylum seekers in so far as they constitute marginalised and socially excluded sectors of the population.

¹¹⁵ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745.

¹¹⁶ *Ibid.* at para. [19].

¹¹⁷ DOJCD ‘Service Charter for Victims of Crime in South Africa’ (2007), (“the Victims’ Charter”), available at <<http://www.justice.gov.za/VC/docs/vc/2007%20Service%20charter%20ENG.pdf>>.

¹¹⁸ DOJCD ‘Understanding the South African Victims’ Charter: Contextual Issues’ (September 2008) at p. 34, available at <http://www.justice.gov.za/VC/docs/2008Understanding%20victims_concept.pdf>.

*'He needed someone to listen to him, to empathize with his situation, to tell him how to get his belongings, without putting him in danger of revictimisation. He needed to be provided with relevant information why it was important to report the matter to the police, what services are available to him, such as shelters, what immediate support is available from social workers (such as clean clothing, food, medical examination, etc). He needed an opportunity to determine what action he would take based on information provided to him. Thereafter he needed referrals to all of the service providers. [He] didn't need a Victims Charter brochure. He needed the Victims Charter to be a living and practical intervention in his trauma. The reassurance of rights is meaningless if victims are not empowered.'*¹¹⁹

Further, South Africa's National Policy Guidelines on Victim Empowerment¹²⁰ which provide the framework for inter-governmental collaboration for the integration of effective institutional arrangements for a multi-pronged approach in managing victim empowerment services, acknowledges the 'heightened vulnerability' that victims of xenophobic-motivated crimes may have. More specifically, the Guidelines state that:-

*'...[I]nternational literature on hate crime consistently indicates higher levels of psychological distress of the victim as one of the reasons these crimes require unique services, legislative and policy responses, and prioritisation. Other reasons include evidence of decision-makers de-prioritising hate victimisation and service providers neglecting, and sometimes even overtly discriminating against, survivors of hate crimes within the CJS and health system. This has the effect of exacerbating, rather than addressing, the vulnerability of survivors of hate victimisation. Further, limited policing and barriers to accessing the legal system exacerbate vulnerability. These social dynamics are compounded by self-stigmatisation and the hesitancy, as a result of fear, of survivors of hate victimisation to approach service providers for support or redress.'*¹²¹

The Guidelines are intended to promote the establishment of partnerships in the South African victim empowerment sector to effectively address the diverse needs of victims.¹²² At

¹¹⁹ Ibid.

¹²⁰ DSD 'National Policy Guidelines on Victim Empowerment' available at <<http://www.info.gov.za/view/DownloadFileAction?id=111693>>. The guidelines are part of the national Victim Empowerment Programme (VEP), launched by the national DSD in July 2009 with the primary objective to improve the quality of services for victims of violence and crime in South Africa.

¹²¹ Ibid. at pp. 11-12.

¹²² Ibid. at p. 1.

the same time, the guidelines also acknowledge the concerning lack of services available to victims of crime, in that:-

*'While services to and empowerment of victims in South Africa has increased somewhat in recent years, these services have not been managed as an integrated whole within and between the various government departments, nor with other stakeholders. Many services are also not yet comprehensive, or of the required standard. Role players render pockets of services without guidance from an institutional framework, thus often exposing the client to further victimisation and discontent with service delivery. The manner in which the programme currently operates has limited impact in creating a victim-friendly criminal justice and associated system and reducing the negative impact of victimisation.'*¹²³

In addition to the negative treatment from criminal justice sector officials that leads to refugee victims' distress or secondary victimization, other specific needs that refugee victims in South Africa possess, as identified by the UCT Refugee Law Clinic in the course of its engagement with this client group, include: refugee clients' lack of knowledge and information about the South African CJS; language and cultural barriers; trauma emanating from the cause of their flight from country of origin, and, social exclusion experienced in the local community which prevents them from properly accessing services to which they are entitled.

Understandably, refugee victims' specific needs must to be considered in the context of the major challenges that face South Africa's CJS in relation to its engagement with *all* victims of crime. Such challenges include the need to protect victims from intimidation and threats to their safety in relation to their role as witnesses in the criminal justice process, the need to have more consistent standards of service delivery to victims in order to assist them to access services and to minimize secondary victimisation; the need to provide information to victims regarding their cases and their participation in the criminal justice process; and the need to improve the collection and use of victims' evidence by officials of the CJS.¹²⁴

¹²³ Ibid.

¹²⁴ Bruce D. 'Challenges of the CJS in Addressing the Needs of Victims and Witnesses' in Davis L. & Snyman R. (eds.) *Victimology in South Africa* (2005) at p. 25.

(b) Role of Legal Service Providers in Upholding Refugees' Access to Justice Rights

Access to justice for refugees and asylum seekers in the CJS, where their non-national status has the potential to set them apart from state justice provision and their lack of local knowledge makes negotiating access particularly burdensome often requires the support of legal service providers. The role of NGOs, including UNHCR legal implementing partners in refugee rights protection—not least in the development of policies, standards and norms—and the ability of NGOs and civil society organisations to achieve progressive results in communities that governments and UN bodies would not be able to achieve is documented.¹²⁵ Legal aid organizations play a crucial role in the elaboration and diffusion of legal norms and human rights principles relating to foreign nationals.¹²⁶

As a UNHCR legal implementing partner in South Africa, the UCT Refugee Rights Unit has as its principal objective the facilitation of local integration of refugees and asylum seekers through its rights based programme of legal assistance. This is built around upholding the provisions of the 1951 Convention, in conjunction with the South African Refugees Act and the Constitution of South Africa. Legislation in South Africa lends itself to local integration and the failure to integrate is not due to lack of rights but rather obstacles that need to be overcome, such as lack of knowledge about refugee rights, lack of government capacity to implement programmes, or xenophobic attitudes. More specifically, in relation to the current project on access to justice for victims of crime, development of the capacities of 'duty bearers' to meet their obligations are parallel to the development of the capacities of 'rights-holders' to claim their rights.¹²⁷

The Refugee Law Clinic's interventions are guided by the recognition of the State's primary responsibility to protect, promote and respect human rights and to 'ensure that the administration of justice is in full compliance with both international and domestic human rights obligations.'¹²⁸ As a formally recognised legal aid provider, the UCT Refugee Law Clinic is ideally placed to enhance access to justice for refugees, as a vulnerable group, and, where resources are available, to provide appropriate out-reach services (in accordance with

¹²⁵ Lester E. 'A Place at the Table: The role of NGOs in Refugee Protection: International Advocacy and Policy-Making' *Refugee Survey Quarterly* Vol. 24. Issue 2. (2005).

¹²⁶ Guiraudon V. 'European Courts and Foreigners' Rights: A Comparative Study of Norms Diffusion' *International Migration Review*. Vol. 34. No. 4. (Winter 2000) 1088-1125.

¹²⁷ UNFPA and Harvard School of Public Health 'A Human Rights-Based Approach to Programming' (2010) available at <<http://www.unfpa.org/public/publications/pid/4919>>. See further the United Nations 'Towards a Common Understanding Among the UN Agencies' available at <http://www.hreoc.gov.au/social_justice/conference/engaging_communities/un_common_understanding_rba.p>.

¹²⁸ The *Nairobi Declaration* (note 95 above).

the recommendations of the Nairobi Declaration).¹²⁹ Given the challenges of refugee victims of crime in accessing effective justice, the Refugee Law Clinic and other agencies that have the resources to dedicate to crime victim support, have a vital role to play in ensuring that refugees and asylum seekers in South Africa have the best possible opportunity to see that those individuals and institutions who commit crimes against them are appropriately prosecuted. In addition, access to mechanisms of compensation and restitution that address the material and welfare damages borne by refugee victims of crime needs to be promoted and supported by relevant legal advocacy bodies.

With the significance of the need to uphold access to justice for the effective protection and local integration of refugees in South Africa confirmed, as well as the consequent increase in demand for legal support services from refugee victims of crime, the UCT Refugee Law Clinic recognized a specific need to more proactively assist refugee victims with their navigation throughout and comprehension of the various stages of the CJS. This includes providing support in their negotiations with the various institutional actors within the process, such as officials within the SAPS and the NPA. The following section of the report will outline in more detail the development of the UCT Refugee Law Clinic's criminal case watching brief support services programme, with a special focus on its *proposed* watching brief framework of interventions. Thereafter the report will analyse the primary research conducted, that of refugee victims' direct experiences within the CJS and the effectiveness of the Refugee Law Clinic's interventions in terms of supporting refugee victims' access to justice needs.

¹²⁹ Ibid. The conference, and the resulting declaration, was devoted to the role of national human rights institutions in the administration of justice. The recommendations are, nonetheless, relevant for local human rights NGOs and legal aid organisations.

PART III – ANALYSIS OF THE WATCHING BRIEF INTERVENTIONS

I Introduction

(a) Overview of the Development of the Watching Brief Approach

At the UCT Refugee Law Clinic, the demand for legal support services for refugee victims of crime has dramatically increased in the past three years.¹³⁰ Since the Refugee Rights Unit and its Law Clinic has been in existence, clients have reported getting unsatisfactory responses from police stations following being victims of crime. Reports were received of delay or failure to respond to calls for emergency assistance and/or attendance at the scene of a crime; of police refusing to open cases or dismissing reports of crime as not ‘real’ cases; and of a poor and/or rude reception from police personnel. Some clients brought to the Refugee Law Clinic torn slips of paper with a case number written on it, sometimes with a police station rubber stamp imprint, and would express confusion and doubt as to whether this paper represented a genuine registration of their case.

In response to these reports, the practice of the UCT Refugee Law Clinic was to call the police station concerned and request verification of the case number, together with information on the charges and on the progress of the investigation. Often clients were reassured by receiving confirmation that their case was formally recorded. Thereafter they apparently presumed that the investigation process would run its proper course. Where there was a refusal to open a case, the procedure usually adopted by Refugee Law Clinic personnel was to send a fax to the Station Commander requesting assistance. In response the Station Commander would often indicate willingness to arrange for case to be opened, and the Refugee Law Clinic attorney advised its clients accordingly.

Following the xenophobic violence in 2008, a large number of victims of crime requested legal assistance from the UCT Refugee Law Clinic. Some complained about the assistance they had received when reporting crimes. Many were afraid to go to their local police stations to open a case. They reported that they did not trust the police and some viewed the police as complicit in the violence and, in some cases, as direct perpetrators of

¹³⁰ Observations that inform the following account of the development of victim support services at the UCT Refugee Law Clinic were provided by Fatima Khan, Director of the RRU, during an interview with the researcher (notes on file).

criminal actions. Many also expressed little faith in the capacity or the willingness of the CJS to respond effectively in upholding their justice rights.

In response, Refugee Law Clinic staff would, where possible, accompany clients to police stations to assist them in opening a case, making direct representations to the duty officers in the station. If unable to accompany the client to the police station, attorneys would write a letter stating the reasons the client wished to open a case and requesting assistance. Whilst these interventions were, in most cases, effective in getting cases opened, it soon became apparent that little progress was being made on investigations of these cases. Clients returned to the UCT Refugee Law Clinic and complained that they had not received any follow-up notification from the SAPS and/or had not been able to get any information when requesting assistance at the police station.

In 2009, in the light of the developing catalogue of unresolved cases reported by clients, the UCT Refugee Law Clinic started to make representations directly to Investigating Officers (IOs), assigned to individual cases to enquire, on behalf of clients, what progress had been made with investigations. In general, the experience of engaging with IOs indicated that they appreciated the support that the UCT Refugee Law Clinic was providing to the complainants. At the same time, it became clear that clients lacked information and understanding of the type of information required by the IO to make a valid case and to have a reasonable chance of conducting a successful investigation. Increasingly, personnel at the UCT Refugee Law Clinic took on an educational role, with individual clients, preparing them for a more effective engagement with SAPS and the CJS generally.

When the 2008 xenophobia cases started to appear in court in 2009 attorneys from the UCT Refugee Law Clinic did not, initially, attend court. However, in some cases, they received reports from clients that they were apprehensive about attending court as they feared intimidation and/or retribution from the accused or their associates. At this stage Refugee Law Clinic attorneys started to engage State Prosecutors to inform them of the Clinic's interest in the matters, to offer any assistance should the Prosecutor feel there was a need, and to inform the Prosecutor of the challenges that the complainants were facing in respect of their participation in the CJS. In addition, further education interventions were necessary as clients expressed shock and confusion on learning of the release of people they believed to be guilty. Individual clients were made aware of bail provisions and prosecution options,

including the withdrawal of a case for further investigation, and the possibility of a case being struck off the roll as a result of undue delay in the completion of investigations.

In July 2010, the UCT Refugee Law Clinic was consulted by a large number of clients who reported attacks with an apparently underlying xenophobic motivation.¹³¹ Following consultations, some of the legal issues could clearly be identified as crimes—such as assault, robbery, intimidation and extortion—and others were civil matters, such as forced evictions from business or residential premises. For criminal matters clients were urged to open cases at the police station nearest to where the crime occurred. Where clients were afraid to open cases or to return to the area where they were attacked, attorneys at the UCT Refugee Law Clinic arranged for the victims to make a statement at a police station that they could safely visit. Thereafter, to the extent that it was possible, the Refugee Law Clinic attorneys followed up by:-

- Liaising with the Station Commanders as well as the IOs assigned to the cases;
- Attending Court, introducing themselves to both the Magistrate and the Prosecutor and informing them of their presence for the purposes of a watching brief for the complainant(s); and
- Reporting criminal matters to the Provincial Police Commissioner.

It is unclear what level of success resulted from the early watching brief interventions of the UCT Refugee Law Clinic. As a free legal aid service, the Clinic rarely receives feedback from clients unless they need further assistance. Furthermore, given the demand for services and the limited resources of the Refugee Law Clinic, there is limited opportunity to follow up on cases where the complainant does not maintain active contact with the Clinic.¹³²

¹³¹ There had been extensive media reports in the Western Cape in 2010, both in the run up to the World Cup and during the event, of threats of xenophobic attacks that were planned to take place once the World Cup ended on 11 July. Foreign nationals had for some time been reporting receiving individual threats, particularly at their business premises and on public transport, that following the World Cup foreigners would be “chased out” of the communities in which they were living and/or working. Although not on the scale of the May 2008 attacks in the Western Cape, xenophobic attacks did take place in July 2010 in a number of township locations in the Western Cape. In particular, there was looting and destruction of business and residential premises of foreign nationals.

¹³² During the period of this research, the UCT Refugee Law Clinic employed four attorneys and three candidate attorneys, all of whom consulted with clients. Clients may be referred to the Clinic, but the majority make self-referrals. In addition to the attorneys, a legal assistant deals with routine information matters related to applications for documentation. It is to be emphasised that the majority of consultation time is spent dealing with documentation and status issues. Court matters include family and child protection matters (including those related to unaccompanied foreign children), unlawful detention and related matters.

The need to consider formalising a watching brief programme at the UCT Refugee Law Clinic became apparent in 2010, for a number of reasons. Firstly, attorneys were increasingly receiving complaints from clients about long outstanding unresolved cases and individual clients were asking for legal support in seeing their cases through the CJS. It became evident that the practice of sending letters of request to police stations and of attempting to make telephone contact with the IO's was proving to be insufficient in a large number of cases.

Secondly, concern had been expressed by members of the refugee community and significant sectors of civil society that South African citizens were rarely being successfully prosecuted for violent crimes against refugees and asylum seekers. The widely reported impunity that followed the criminal violence against foreign nationals in May 2008 further underlined the need to act to improve the justice outcome of cases involving violent crimes against foreign nationals.¹³³ In the light of this, since the latter half of 2009, the UCT Refugee Law Clinic had undertaken a number of comprehensive watching briefs to attempt to raise public awareness that South Africans, whether as private citizens or as public officials, cannot act against refugees and asylum seekers in an unlawful manner with impunity. Our initial interventions had suggested that the exercise was useful because not only did the Presiding Officer/Magistrate act with an awareness that legal advocates for the complainant were present in court, but attorneys from the Clinic reported that they were often able to engage with the Presiding Officer, the IO and the Prosecutor to good effect.

As its criminal case watching brief programme was expanding in response to its clients' needs, the UCT Refugee Law Clinic continued to seek access to justice for refugee victims of crime through various other legal means. For example, following the xenophobic violence that affected the whole of South Africa in May 2008, the Clinic represented a number of clients in the Equality Court seeking damages in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act ("the Equality Act"),¹³⁴ on the grounds that the police unlawfully omitted to take the necessary actions to protect the safety of the complainants and their belongings during the xenophobic attacks.¹³⁵ In addition, the Refugee

¹³³ Despite the promise of special courts to deal with these matters, reports of attempts to effect prosecutions were negligible.

¹³⁴ Act 4 of 2000.

¹³⁵ The clients, a number of refugees and asylum seekers in Zwelethemba and De Noon townships in the Western Cape, were the victims of xenophobic attacks by community members in 2008. In their claims, it was alleged that the police's omissions in providing safety and security to the complainants by preventing the criminal conduct of the crowds; and investigating the criminal acts that occurred, amounted to unfair

Law Clinic acted in a civil litigation matter in which it successfully obtained damages from the Minister of Safety and Security resulting from the unlawful abuse of a refugee by SAPS officials in the course and scope of their duty. Whilst the Refugee Law Clinic was representing victims of violence as applicants in these cases, and continues to do so presently, it brought to the Refugee Rights Unit a heightened awareness of the practical challenges which faced refugees who are victims of violence as they sought to uphold their rights in the CJS.

In sum, an earlier objective of the UCT Refugee Law Clinic for several of the watching briefs that it undertook was to launch delictual claims to obtain damages for clients where the court had found in their favour. However, as the Clinic's watching brief programme developed in the latter half of 2010, the focus grew to reflect the overall need to ensure that access to justice was upheld by the 'simple' guarantee that crimes against refugees are effectively investigated and prosecuted. This necessitated more active engagement by the Refugee Law Clinic attorneys with the various institutional actors within the CJS through every stage of the justice process.

(b) The Watching Brief Framework

When the monitoring exercise that is the foundation of this research report commenced in September 2010, it was evident that the first task was to formalise the Refugee Law Clinic's understanding of the possible components of a Watching Brief exercise. The purpose of developing such a framework (see **Table 1** below), would be both to guide future practice and to serve as a basis for monitoring and evaluation.¹³⁶

Background research conducted for this report indicated that watching brief mandates have the potential to play a major role in supporting the proper functioning of the CJS. This is particularly so where proceedings relate to the rights of members of vulnerable groups, such as refugees, who are victims of violent crime and of crimes committed by powerful institutional actors. From the perspective of the UCT Refugee Law Clinic the conduct of

discrimination and a violation of the provisions of the Constitution, the Equality Act and International law. The complaints of *Fanta and another v The Minister of Safety and Security and others* (EC10/08, unreported), and *Osman v The Minister of Safety and Security and others* (EC9/08) [2010] ZAEQC 1 (15 December 2010)), which were joined due to similar cause of action were dismissed without costs, due to evidentiary issues. At the time of writing this report, the judgment in the complaint of *Said and others v The Minister of Safety and Security and others* (EC13/08) remains *sub judice*.

¹³⁶ For a discussion on the parameters that informed the design of the watching brief framework see the Methodology section in Appendix A to this report.

watching briefs is an important instrument for improving the rate at which clients who are victims of crime have effective access to justice.

In developing the UCT Refugee Law Clinic watching brief framework, the RRU reviewed various victims support service models¹³⁷ used in South Africa that specifically interface with the CJS. In line with victim empowerment priorities in South Africa, these for the most part tend to focus on legal support for women and children, however.¹³⁸ The specific support services provided by each NGO may differ, but commonalities exist in relation to the objectives of the services—the overriding goal being to support victims (particularly those from designated vulnerable groups), in obtaining justice by protecting and promoting their rights and interests during the various stages of the criminal justice process.

The UCT Refugee Law Clinic determined, from its review of victim support services and watching brief models that the watching brief framework that it was to adopt had to speak to three dimensions of the work at the UCT Refugee Law Clinic: (i) existing resources and practices of the CJS as well as the Clinic; (ii) the expressed needs of client victims of crime, and (iii) the need to uphold access to justice for refugee victims of crime, within the terms of the UCT RRU - Refugee Law Clinic's mandate to contribute to refugee protection as legal implementing partner for UNHCR. Furthermore, the UCT Refugee Law Clinic concluded that the core relevant characteristics of its watching brief activities would include addressing the need to monitor and audit the conduct, content and outcome of justice proceedings, as well as the need to encompass detection and organisation of relevant information, opportunities and resources to support strategic interventions and create and/or maintain relationships or partnerships with the relevant institutional actors.

The ultimate aim of the UCT Refugee Law Clinic watching brief interventions is to enhance the probability of refugee victims of crime gaining effective access to justice in the extended set of processes that begin with the reporting of a crime and end with final

¹³⁷ For Example, Rape Crisis Cape Town provides volunteer “court supporters” for victims of sexual offences. Based at courts, they provide information on the process of the trial, together with an introduction to the geography of the court and the role players involved in the trial. Court supporters also provide emotional support and referrals for counselling. The aim is to improve services both prior to and during the criminal justice procedures, with the objective of both minimizing secondary victimisation and increasing the effectiveness of trials (measured in successful conviction rates). Witnesses and victims (and their families), are assisted with their preparation to testify and are eligible for pre-trial consultation once they have been subpoenaed. It is reported that *‘Rape survivors who receive this support are much calmer and more confident than those that do not and some have even claimed that in the end the experience of testifying was an empowering one for them’* (Rape Crisis ‘Court Support’ available at <<http://www.rapecrisis.org.za/court-support>>).

¹³⁸ In the Western Cape a number of such organisations are members of the Western Cape Victim Support Working Group, the membership of which includes SAPS and the Department of Community Safety.

conviction and sentencing. Crucial to the efficacy of the exercise is the assessment of needs and available resources to support the victims of crime, bearing in mind the range of extra-legal needs that vulnerable group victims of crime are likely to have. Equally, as an NGO with limited resources, assessment of risks and opportunities during the extended process is essential—not least in view of the vulnerability and potential fragility of victims of crime as they face the court process and the potential for secondary victimisation, as well as harassment and intimidation from external parties. It should always be a prime consideration, in assessing whether to undertake a legal support watching brief, to determine whether an undertaking can be seen through to its completion (whether completion of the trial or a decision by the victim/client to withdraw from the process). Given the vulnerability of victims of violent crime, it is contrary to the empowerment objective to withdraw support prior to completion of the process. This can of course be a difficult calculation as it depends on the functioning of the CJS and the resilience of the client to manage developments that are hard to quantify in advance.

The “soft” support services related to trauma and personal well-being of refugee victims of crime are difficult to quantify, as they rely so fundamentally on individual circumstances and such services are not within the mandate of the UCT Refugee Law Clinic. They are therefore not featured among the identified range of potential interventions that might be made with respect to UCT Refugee Law Clinic watching briefs in criminal legal proceedings. These latter are set out in **Table 1** below and are arranged according to the stages that a criminal case is likely to pass through in its journey through the CJS. Thus, whether at the time of the commission of the crime, the recording of the crime report or the investigation, UCT Refugee Law Clinic legal practitioners might play a watching brief role in supporting the victims and IOs building a case to submit to the Prosecutor. Thereafter, there are potential interventions that might be of assistance in getting the case onto the court roll and in achieving effective prosecution and sentencing.

Table 1: UCT Refugee Law Clinic Watching Brief Framework

Stages of Progress through CJS	Possible Procedures or Experiences within the CJS	WATCHING BRIEF ROLE : Potential Interventions
1. Commission of Crime	<ul style="list-style-type: none"> • Response to request for assistance • Conduct of scene of crime investigation – including initial interaction with victim 	<ul style="list-style-type: none"> • Response to incident : victim may make contact with designated UCT Refugee Law Clinic staff
2. Recording of Crime Report at police station, or at scene of crime	<ul style="list-style-type: none"> • Reception at police station or scene of crime • Taking of Statement (at scene of crime or at SAPS station) – including • Appointment of officer to take statement • Explanation of rights • Accurate listening to & recording of victim’s account • Communication of Case Number (by person / on site or by SMS) • Informing complainant that there is no case as: • A crime was not committed, or • Information provided is insufficient to open a case 	<ul style="list-style-type: none"> • Assist with opening case • Assist with taking of statement • Provision of interpretation for statement giving • Suggest/explain what charges can be raised with the police • Provide realistic assessment of likelihood of success of case • Pursue provision of case number • Provide affidavit to assist IO / Prosecutor
3. Investigation <i>NB: In practice, this interaction should be happening at various stages</i>	<ul style="list-style-type: none"> • Keeping victim informed of progress • Obtaining 3rd party statements • Obtaining physical evidence • IO interaction with Prosecutor • Opening of Docket 	<ul style="list-style-type: none"> • Make/maintain contact with IO and/or Prosecutor to: • Inform of UCT Refugee Law Clinic’s involvement • Enquire as to progress of investigation • Ensure continued attention to investigation

		<ul style="list-style-type: none"> • Offer to assist, where possible, with facilitating investigation [eg: chase medical reports, facilitate appointments with witnesses, provide contact numbers & affidavits, etc] • Motivate IO and/or Prosecutor to do best job possible • Contact IO where a case is dropped to enquire why &, if appropriate, provide motivation to reinstate investigation.
<p>4. Prosecutor : Investigating Officer interaction</p> <p><i>NB: In practice, this interaction should be happening at various stages.</i></p>	<ul style="list-style-type: none"> • Interaction with IO • Draft pleadings : making arguments • To establish nature of case • Against the granting of bail • Q & A with IO • Determine which charges the State will pursue • Witness protection • Victim protection 	<ul style="list-style-type: none"> • Follow-up with prosecutor to see if there is anything that can be provided to assist (eg: contact details, affidavits, etc) • Assist with technical matters where easily done—particularly where the matter lies within UCT RRU (eg: research, etc). • Assist complainant/victim/witness to obtain witness protection if it is considered that there is a serious risk of harm
<p>5. Arrest of suspect</p>	<ul style="list-style-type: none"> • Detainee to be advised of rights • Requirements for lawful detention to be met (as defined in Criminal Procedures Act and S 35(1) Constitution) • Requirements for lawful conduct of suspect identity parade (similarity of participants, etc) 	<ul style="list-style-type: none"> • Pressure prosecutor or IO to arrest if it appears that there is sufficient available evidence. Where appropriate, press for explanation why arrest has not been made. • Check appropriate procedures followed, to avoid release/withdrawal of charge on technicality and/or claim of unlawful arrest • Referral of victim for

		trauma counselling in instances where identity parade proves disturbing
<p>6. Court personnel</p> <p>1: First appearance¹³⁹ / bail application¹⁴⁰</p> <p>2: Trial proper¹⁴¹</p>	<ul style="list-style-type: none"> • State prosecutor’s interaction with complainant & witnesses for prosecution— maintenance of correct procedure (language, exclusion of witnesses from court, provision of letter to witnesses to get them off work, etc) • Demeanour of Court Officials – Clerk of the Court, Court Orderly/ies, Magistrate, Prosecutors / State & Defence witnesses • Abuse in conduct of cross-examination • Behaviour of witnesses and of accused during proceedings • Magistrate • Introduction of the matters at issue • Conduct of hearing • Interpretation: • Available & appropriate • Accurate 	<ul style="list-style-type: none"> • Facilitate briefing of State prosecutor, including State prosecutor’s consultation with complainant & prosecution witnesses • Advise and/or assist victim & victim community with producing a petition against granting bail • Monitor whether procedures during hearings and trial are properly addressed [eg: were accused’s witnesses excluded from court at appropriate moment] • Assist with making sure appropriate interpretation is provided • Ensure that, where appropriate, objections on the part of the prosecution are raised and that they are appropriately addressed • Assess whether objections raised by defence are valid • Maintain interaction with the prosecutor for evidence that can be

¹³⁹ *First appearance*: Once a Court date is allocated by the IO, the docket goes to the Court to a dedicated office, where the case is allocated to a specified Court. Only then, at the first appearance, does the Prosecutor have sight of the docket. In most cases the matter will be postponed for seven days to continue the investigation. Generally the IO has not engaged with the prosecution at the time of drawing up the docket. Only in exceptional cases would there be private representation at this stage.

¹⁴⁰ *Bail application*: It can take a long time to assess bail, and the witnesses and/or victims can lose hope. If the accused is released, it would be on one of three grounds: (1) released on warning; or (2) released on bail, or (3) case dismissed or thrown out (because (a): the defence attorney raises jurisdictional arguments; (b) there are no statements; (c) procedural matters pertain; or (d) the charge sheet is absent). If the case concerns Schedule 6 or Schedule 7 offences (i.e. serious crimes), the accused may be held in custody. Conditions that can be placed on the accused when released, for the protection of the victim, include: warning, bail, warning with conditions, and bail with conditions. Decisions on the granting of bail rest on (a) the seriousness of the crime; (2) the personal circumstances of the accused; and (3) the convictions of the victim(s) with regard to their security should the accused be released.

¹⁴¹ Investigation can entail up to three postponements. A good defence attorney will ask for the next appearance to be a final one.

		<p>anticipated in advance.</p> <ul style="list-style-type: none"> • Clarification of witness evidence during breaks in proceedings, including raising matters for clarification and for objection. • Motivate for a matter which has been withdrawn or otherwise finalised without completion of trial to be reinstated¹⁴² • Report breaches of fundamental conditions of bail or conditions of release on warning
<p>7. Findings: 1: Guilty 2: Not guilty 3: Diversion ¹⁴³</p>	<ul style="list-style-type: none"> • Magistrate or Judge discusses witness evidence • Magistrate or Judge declares findings and give reasons 	<ul style="list-style-type: none"> • Consideration to be given to: • Application for compensation as a civil matter • Impact on victim of trial and findings • Possibility of appeal (generally on substantive issue) or of review (generally on procedural issue) • Ongoing victim support • Media coverage
<p>8. Sentencing</p>	<ul style="list-style-type: none"> • Prison term • Compensation / Recompense • Damages / Fine • Community Service / Correctional Supervision – with conditions] 	<ul style="list-style-type: none"> • Opportunity for representation to the Prosecutor in relation to sentencing¹⁴⁴ • Matters in mitigation and/or aggravation • Provision of Victim Impact Statement ▪ Consideration of options

¹⁴² A matter that is to be struck off the roll can be brought back to the court. A UCT Refugee Law Clinic attorney may advocate for reinstatement of the case.

¹⁴³ Representation for the defence may raise diversion as an alternative at any time from the first appearance until judgement. It is usually only taken up in minor cases or cases where there is a specific mechanism to address the crime—most commonly “Say Stop” programme (for first offenders for sexual offences), and first offenders on substance abuse charges.

¹⁴⁴ Statements to support the convictions of the community are very important. They could be given to the Prosecutor who would look over it, time permitting.

		for recourse available to victim [mediation, community rehabilitation, restorative justice mechanisms
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The proposed UCT Refugee Law Clinic interventions are designed specifically to meet the needs of target beneficiaries in the Clinic’s watching brief programme. These are refugees and asylum seekers who are victims of criminal acts and who are seeking justice through the formal procedures of the CJS. For the most part, cases that were supported were those of individuals who were already clients of the UCT Refugee Law Clinic or who became clients following fieldwork interviews by the researcher. It is to be emphasised that rarely would a client need all the interventions listed in the framework. The needs of a particular client vary according to the characteristics of their particular case and the response that they had had to their independent attempts (if any), to access justice. As is evident from discussions above, each client has different levels of personal and community resources and capacities upon which they could draw in negotiating the CJS and their access to justice.

The intention, in setting out the framework, was that the clients’ legal support needs at any stage in the progress of a case through the CJS would be addressed alongside facilitating the victim’s meaningful participation in the process and providing opportunities for their voices to be heard. Professionally informed and timely engagement with key role-players, particularly police and prosecutors, should contribute to supporting the drive for improved case-flow management, thereby assisting the refugee victim directly and, indirectly, contributing to the effective operation of the CJS. Sensitive to the needs of victims of crime, the need for psychosocial support are as far as possible identified, and, where appropriate, the necessary referrals are made.

It should be noted that the above framework does not specifically address cases of unlawful detention and/or malpractices by SAPS and other state security agents. Historically, the UCT Refugee Law Clinic has received a relatively small number of representations from clients who have lodged complaints against the police with the Independent Complaints Directorate (ICD), or has assisted a number of clients with referrals to the ICD. When the UCT Refugee Law Clinic has engaged with the ICD, it has had relatively minimal success as

often the ICD investigation process takes over, and to date the Clinic has had limited capacity to intervene.¹⁴⁵

II Analysis of the Watching Brief Interventions

The following analysis results from the research conducted to evaluate the UCT Refugee Law Clinic watching brief interventions in assisting refugee victims of crime to access justice. The evaluation seeks to assess the effectiveness of the Clinic's watching brief model in the context of the protection and justice needs of refugee victims of crime in the Western Cape and the available resources of the existing legal environment and the CJS.

As part of the research undertaken for the evaluation of the watching brief interventions, victimisation histories were taken from refugee victims of crime who were referred to or made direct contact with the researcher. Interviewees were invited to share information on their experiences of victimizations in South Africa and of their engagement with the various actors in the CJS. This research was central in order to understand refugees' needs as victims of crime, their challenges in accessing justice and the impact of the crime and their inability to access justice on their protection needs and local integration. Some of these individuals were already clients of the UCT Refugee Law Clinic. Others became clients following interview with the researcher, and yet others wanted no assistance.

The victimisation histories relate to victims of a range of crimes. The watching brief intervention was considered as a potential tool of support for any crime against a refugee victim, whether perpetrated by an individual of South African or foreign nationality or by an official of the State or some other private institution. Although the majority of the watching briefs included in the review were in respect of cases that came to the attention of the UCT Refugee Law Clinic during the research period, some ongoing watching brief cases that arose prior to the commencement of the research were included in the review.

The accounts of victimisation that are included in the review have been divided into two principal groups—firstly, crimes perpetrated by members of the public and, secondly, crimes that involved abuse of power by state or private security officials.

¹⁴⁵ In a communication with the researcher and a UCT Refugee Law Clinic attorney (notes on file). Despite the Clinic's limited interactions with the ICD thus far, a watching brief framework for unlawful police behaviour, which would include Clinic interventions directed at the ICD, the Police Inspectorate and the Office of the Public Protector is still deemed necessary, as would be additional research into this important area.

(a) Victims of Violent Crime Perpetrated by Members of the Public

Victimisation histories were provided by 39 victims of violent crime, of whom four were women.¹⁴⁶ Those interviewed in this group were all Somali nationals. They ranged in age from 19 years old to senior members of the community. They were, for the most part, shop keepers and traders, running small informal ‘tuck’ shops or grocery stores. A number of those interviewed were currently without employment and were being supported by friends, associates or by their local mosque community. Some, having lost or given up their shops, were making a meagre living using their vehicle to transport stock for shop keepers who did not have access to a vehicle.

A total of 136 victimisation events were reported by this group¹⁴⁷—a mean of 3.5 incidents per person.¹⁴⁸ Victims gave information on assailants in just under half of the events reported. The most frequently reported perpetrators were crowds of looters from the community, being a little over a third of the cases where perpetrators were described.¹⁴⁹ A breakdown of the characteristics of assailants (see **Table 2** below), gives some indication of the extent to which victims of crime in this group are subject to attacks where they are numerically overwhelmed by their assailants.

¹⁴⁶ Watching briefs were undertaken by the UCT Refugee Law Clinic for victims of crimes perpetrated by members of the public for a range of nationalities. Victimisation histories, however, were largely limited to Somali nationals, for reasons discussed in the methodology section in Appendix A to this report.

¹⁴⁷ As many of those interviewed have histories of high levels of mobility, not all the crimes committed were in the Western Cape.

¹⁴⁸ The incidents reported in the victimisation histories are those recalled by the victims, who were free to recount what they regarded as significant. Significance might be in terms of the impact of the incident, or of the response to the incident. Further, significance might, in some instances, have been determined by what the respondent felt the purpose of the research exercise was. The information provided by individuals in their victimisation histories also reflects their own resilience and state of well-being. In this research no attempt was made to quantify what was relevant and what was not relevant information – the point was to get a sense of people’s perceptions of their own levels of vulnerability and the extent to which justice was attainable.

¹⁴⁹ Whilst there can be no doubt that looting has played a very significant role in the victimisation histories of refugee victims of crime in South Africa, it is possible that their relative preponderance is slightly over-stated in this data. Arguably, the most traumatic attacks were those most likely to be described.

Table 2: Reported Characteristics of Assailants

Assailants reported in victimisation histories		No. of cases	Details
Crowd	<ul style="list-style-type: none"> Men, women and youth 	25	<ul style="list-style-type: none"> In 2 instances neighbours were identified as looters
Males	<ul style="list-style-type: none"> Armed with one or more guns 	22	<ul style="list-style-type: none"> Numbers in group: <ul style="list-style-type: none"> 3 males in 13 incidents 2 males in 2 incidents 5 males in 2 incidents 7 males in 1 incident
	<ul style="list-style-type: none"> Armed with knives, pangas and or stones, sticks, etc 	3	<ul style="list-style-type: none"> 9 males in 1 incident 6 males in 1 incident
	<ul style="list-style-type: none"> Armed with police uniforms or other accoutrements of police authority¹⁵⁰ 	5	<ul style="list-style-type: none"> Groups of 2, 3, 4 and 9 ‘police’
	<ul style="list-style-type: none"> Unarmed, or not specified if armed 	11	<ul style="list-style-type: none"> 2 males in 3 incidents 3 males in 4 incidents 4 males in 2 incidents 5 males in 1 incident 7 males in 1 incident
TOTAL:		65	

Males armed with one or more guns were responsible for just under one-third of the incidents described. In the majority of cases, this was a group of three males, generally with one gun between them. Reports of groups armed with knives and/or pangas were few, although the groups involved were large in number. Although relatively small in number of events, the phenomenon of criminals posing as police officers is of concern as it constitutes an extremely traumatising experience to be robbed by what the victim believes to be an official designated to provide protection. More broadly, it contributes to undermining refugee confidence in the CJS and constitutes a serious counteraction to efforts to build trust in SAPS officials.

The crimes reported are overwhelmingly property crimes—robbery, burglary, theft, arson and malicious damage to property. These crimes are often reported to be accompanied by ‘personal relations’ crimes such as assault, and, in some cases, murder. Given the high

¹⁵⁰ A police uniform, or other accoutrements claimed to indicate police authority, are instruments of crime in so far as they are used unlawfully, in these crimes, to force the victims to relinquish control over their space and goods.

levels of property-related crimes reported, the financial impact on victims of crime—often subject to serial victimisation—is significant.

Many victims reported loss of all or part of their business stock and, in some instances, the physical structure of the business premises was also removed. Total loss of stock was reported in 30 cases and partial loss in 54 cases. Ten individuals reported that they had suffered total loss of their business twice during their residence in South Africa, while one had suffered a similar fate three times and one four times. In the case of total loss, where the value of the loss was indicated, it ranged from R20,000 to R60,000 for small tuck shops and between R100,000 and R150,000 for larger shops.¹⁵¹ In a few instances interviewees reported the loss of a vehicle, which represents not only a loss in terms of the value of the vehicle but a loss in terms of severe restriction in capacity to conduct business. The high level of victimisation of Somali traders supports the observation of Business Against Crime South Africa (BACSA), that robberies that target small businesses should be a priority for attention.¹⁵²

Of those interviewed who indicated the duration of their stay in South Africa (31 in total), one third had been in South Africa for 3 years or less and one third had been here for 7 or 8 years. Even though the length of stay in South Africa ranged from less than one year to 14 years, the mean number of experiences of victimisation remained at 3, irrespective of the duration of the stay. This appears to provide some support for the contention made by Somali community spokespersons that the likelihood of being the victim of crime has increased in recent years for this refugee group.¹⁵³ Certainly, Somali respondents expressed that view. In June 2010 the Somali Retailers Association recorded that, in the Western Cape in one week alone, nine foreign shopkeepers were murdered, twelve were seriously injured

¹⁵¹ Police and others often express disbelief at the valuations given by Somali shop owners. It should be borne in mind, however, that, the estimated value of the loss often includes what is termed “key” money—that is, the value of the business itself. Somali shop owners have a comprehensive system of assessing value of individual businesses as there is an active market in buying and selling shares in businesses. Where a shop is destroyed and/or the owner no longer has a commercial interest to sell as a result of crime, the value of the business itself is legitimately identified as a loss resulting from crime. In some instances, for example, landlords—particularly those who live on the property—discontinue renting their properties to Somali shopkeepers due to fear of their properties being targeted again.

¹⁵² BACSA ‘Brochure’ at p. 4, available at <<http://www.bac.co.za/assets/files/bacsa%20brochure%202009-2012.pdf>>.

¹⁵³ The distribution of numbers of events in relation to years of residence does not give conclusive support to the other possible conclusion that people are more vulnerable in the early years of their residence in South Africa, when they are unfamiliar with community social dynamics. Those who have lived in South Africa for five years or more do not show a concentration of victimisation in the first three years of their residence.

and there were three arson attacks on shops owned by refugees.¹⁵⁴ One respondent, who came to the Western Cape in 2002, said that:-

*“No Somalis were here at that time. It was peaceful and no much robberies and all those things. But later Somalis came from all over and people got our weakness—they started killing us and complaining we are taking their business....A lot of problems were happening around Khayelitsha and Mitchells Plain. The problems started in 2005, maybe 2006 or 7. There were 28 killings in 2006.”*¹⁵⁵

Some respondents suggested that they are particularly vulnerable when they are new in an area and do not know the community they are serving. This may well be so in the contemporary context, but, from the information provided by individuals interviewed for this research, it does not seem to have been the case for individuals arriving prior to, say, 2005.

From the above information it is clear that the rationale for considering these victims of crime as a group lies in the fact that they were, for the most part, victims of property crimes directed at business premises. The crimes were often violent and of a traumatising nature. Very few of those interviewed had not been the victim of crime on several occasions. Of the 27 who had been in South Africa for a year or more, only 4 reported being victimised only once. Finally, the respondents’ accounts created the sense that foreign nationals—or, more accurately, particular categories of foreign nationals—are chosen as targets, and there are therefore implications for identifying aspects of these crimes as hate crimes and/or motivated by xenophobia.

(i) The Effects of Violent Crime on Refugee Victims

From the case histories given, foreign nationals—specifically Somali nationals—are most likely to be victims of mass looting or of armed robbery by three black or coloured males with one gun between them. In assessing the impact of these crimes, it is necessary to bear in mind that most of the shops attacked have one or two Somalis working in them at any one time. Although there may be one or two colleagues resting in the back of the shop, it is common that one person working in the front of the shop is faced with three or more armed

¹⁵⁴ Data provided to the Authors by Somali Retailers Association, Cape Town. January 2011 (notes on file).

¹⁵⁵ In an interview with the researcher (notes on file).

robbers. The trauma of the events is often magnified by the experience of being so hopelessly outnumbered in communities where neighbourly support and/or protection is rarely forthcoming.¹⁵⁶ Although it is by no means unheard of that South African neighbours assist foreign nationals that are being attacked,¹⁵⁷ many of the victims of crime that gave their histories in the research had been looted and robbed by their neighbours and, indeed, by their customers.

Another factor to be taken into account in recognising the levels of trauma is the constant petty harassment and conflict that occurs on a day to day basis. Somali shop keepers have acknowledged that they are ‘too soft’ with certain of their South African customers and allow them daily indecencies that they believe no South African would be expected to tolerate.¹⁵⁸ There is a very widespread practice of creating a dispute over the amount of money that has been proffered for goods.¹⁵⁹ On occasions, violent attacks can follow these disputes as South Africans, who feel they have been cheated, return with associates to mete out retribution. One man, a refugee in South Africa for two years, who reported having been robbed several times, explained the experience thus:-

“What is more worse than robbery? Every day we have to give amounts of money to the people who are buying by us, because we are scared. If you refused, you are worried that maybe you get more problems.”¹⁶⁰

The trauma of the murder of family and friends is heightened by the lack of a clear motive for some of the killings. One man explained how his brother, Ibrahim,¹⁶¹ had been killed in what

¹⁵⁶For a detailed discussion on the impact of the xenophobic attacks on the victims see Matzopoulos R., Corrigan J. and Bowman B. ‘A health impact assessment of international migrants following the xenophobic attacks in Gauteng and the Western Cape’ (January 2009), Wits Forced Migration Studies Programme.

¹⁵⁷ During the course of this research, refugee victims of crime report being assisted by South African citizens in a number of ways. This included calling the police, rescuing people from burning shops, giving witness statements, assisting with information to identify perpetrators, and accompanying victims to police stations to lay a charge.

¹⁵⁸ Refugee, in an interview with the researcher (notes on file).

¹⁵⁹ Reports of such activities are widely encountered across the Western Cape. The researcher has had similar practices described in, for example, Worcester, George, Mossel Bay, Knysna, Plettenberg Bay and Vredenburg. South Africans, for their part, have often made claims that Somalis cheat them by short-changing them.

¹⁶⁰ In an interview with the researcher (notes on file).

¹⁶¹ Throughout this report, all names have been changed to protect the identities of interviewees and the persons to whom they refer.

is believed by the local Somali community to be a campaign orchestrated by a local business association.¹⁶²

“It was night. The shop was open. We normally close at 9.00. The scollies¹⁶³, they call him. They say: ‘We want matches.’ The security door [to the shop] was closed. Hassan, my brother here—he is my half brother—he was sitting about 3 metres away from him [Ibrahim]. Normally, what happens, the people knock on the door. They shout: Sautenga—which is like: Anybody at home? Ibrahim was serving the customers. He approached them: ‘How can I help you?’. They say: ‘We want matches.’ When he came to give the matches they grab his hand with the matches. Hassan saw him and he saw the firearm. Ibrahim shouted. When he spoke loud Hassan kicked out and shifted himself to hide away from the firearm. And they shot Ibrahim. Hassan heard the noise of the bullet and asked: Did you get hit by the bullet, brother? Ibrahim said: ‘Yes, call others, I am with the bullet’.”¹⁶⁴

Equally alarming for the community is the tally of people who are seriously injured by violent crime. Injuries are often serious and cause the victim physical disability and psychological trauma, and disrupt their ability to earn, often permanently. Some of the victims who were interviewed for this research were seriously injured in the course of armed¹⁶⁵ robberies. The uncle of a young Somali victim, now a paraplegic, commented:-

“He didn’t think it would be like that. He was thinking he would be here to be safe. He said: I do not think when I am coming to South Africa I will be like that. He also told me he has lost most of his life. He told me he had lost all his future in South Africa.”¹⁶⁶

Some victims reported being injured in retaliatory attacks following arguments over change in the shop. A worker in a shop was blinded in one such incident. His brother explained:-

“Two people came to the shop and they fight with my brother. They ask for money for cigarettes. They fight and then they left. It was two people—maybe 25 to 30 years old. Coloured guy. He knows their names—they were customers. They went away. A few days

¹⁶² Police investigations in this community have linked a series of violent attacks targeting Somali shop keepers to a local business association, certain members of which, it is alleged, paid young members of the community to attack shops viewed as competition to shops run by South Africans. All names have been changed.

¹⁶³ A South African colloquial term used to describe a “hoodlum”.

¹⁶⁴ In an interview with the researcher (notes on file).

¹⁶⁵ In an interview with the researcher (notes on file).

¹⁶⁶ In an interview with the researcher (notes on file).

later the same people came back. About 5 in the afternoon. They never said anything. My brother, he came to the window and they threw acid at him. He ran to the toilet to wash his face. And then he was feeling his eyes burned. And he screamed for help. Someone sleeping in the shop helped him. The guy looked at his face and called the police. The police called the ambulance and they took him to hospital.”¹⁶⁷

Another interviewee suffered severe burns to the head and neck as a result of a petrol bomb attack on a tuck shop where he was working. A 34 year old man with refugee status, he came to South Africa in 2008. As a result of his injuries, he has not been able to support himself nor his wife and three children, who are still in Somalia, since May 2010. He reported:-

“I was in the shop at 3 in the afternoon. One guy—a coloured—he just came in the shop and lit the petrol bomb and threw it at me. The guy—he fight the other guys in the shop—they fight over change on the same day. 20 rand or 10 rand. I know him. He start fire from me and then all the shop was burning. He burn my face and my hair. We were three in the shop—the other guys, they were sleeping in the other room. I got the jacket on fire and I took the jacket off and I ran out and the neighbours helped. And the whole shop burned. The others, they run out of the back of the shop.”¹⁶⁸

The phenomenon of using petrol bombs and acid to attack and thereby intimidate local businesses is a recent trend identified by crime intelligence personnel.¹⁶⁹ In tandem with this, demands from refugees for complex medical care for the treatment of burns has also increased dramatically.¹⁷⁰

Some of the foreign nationals interviewed reported being victims of violence intended to intimidate shop owners and cause them to close their shops or to withdraw cases that had been reported to the police. One victim of crowd looting of stock, cash and personal belongings (valued at over R40,000), reports that, following the arrest of leaders of the crowd, he was visited by associates of the accused who warned him to drop the case against them. He reports that:-

¹⁶⁷ In an interview with the researcher (notes on file).

¹⁶⁸ In an interview with the researcher (notes on file).

¹⁶⁹ In an interview with the researcher and the Crime Intelligence Office of SAPS, March 2011 (notes on file).

¹⁷⁰ In a communication between the researcher and a consultant at Tygerberg Hospital Burns Unit, February 2011 (notes on file).

“Then the leaders came and said: ‘If you don’t stop the case, we are going to do something about it ourselves.’ Two of the leaders came to the shop. I know who they are...I said: ‘I am not going to close the case’. I didn’t tell the police. But they also threatened a neighbour—a South African woman—because she was a witness of the incident...A few days later I was sleeping in the shop. They came and burned the shop. Me and two others were in the shop. When I woke up the whole shop was on fire. There was lots of smoke. It was terrifying. I couldn’t see. I was still conscious but my two other friends fell unconscious. So they [the neighbours] broke in the back of the shop—neighbours helped me take the two guys out. One of the guys got better [just there]. But the other one stayed unconscious. The neighbours called the ambulance. They took that one to hospital. Then the police came. The fire engine also.”¹⁷¹

In some communities, campaigns of violent intimidation have been waged to make trading conditions intolerable for refugee traders. The 21 year old victim of an armed attack believed to be part of one such campaign had been in South Africa less than three months when he was shot. Speaking via an interpreter, he explained the events that lead to his paralysis as follows:-

“When I went to close the shop – there were three men. The three men said: ‘Help me’. They ask me to sell cigarette. I got the cigarette for him and then he shoot me in the right shoulder, from the front. I fell over, onto the floor. Then he took a second shot. It went past my head. I have a scar on my head. While I was on the floor, I managed to close the door with my left hand. Then they run away...Then I became unconscious. I woke up next day in...Hospital.”¹⁷²

Another victim of this same alleged campaign, an elderly refugee, reported that:-

“Midday, about 14.00. We were attacked by 7 or 8 guys—aged, say 20 to 30 years...If I saw them maybe I will recognise some of them...They were armed with a gun and pangas.¹⁷³ Luckily the gun did not work. They tried to use it but it did not work. They used the pangas and knives. They stabbed me. I was hit on the head with an axe, several times. I was stabbed at the back several times, until I fell to the ground. They kicked me in the back when I was on the ground. So I have nerve damage—I cannot properly walk...They came in the door [of the

¹⁷¹ In an interview with the researcher (notes on file).

¹⁷² In an interview with the researcher (notes on file).

¹⁷³ A “panga” is a term for a large bladed weapon.

shop] ...They didn't ask anything. They only start beating us and hitting. They just came to attack—not to talk. It was just sudden—we [the people in the shop] were not expecting it at that time. It was me and another worker they attacked...We became unconscious. There was a lot of blood. Then they robbed—the money and the airtime. And they left. And then the police came...The neighbour called the police. The police took me to hospital, but I don't know where because I was unconscious...Then I woke up in...Hospital.”¹⁷⁴

Of the 39 victims for whom victimisation histories were provided, 10 had suffered serious injury. Aside from the devastating physical, material and psychological effect that these attacks have on the individuals, their families and dependants, and on the sense of security of the Somali community as a whole, the attacks have significant consequences for the South African fiscus in terms of the cost of medical care and rehabilitation, as well as specialised equipment and often long-term medication. In addition, many of these individuals are likely to qualify for disability grants, owing to the long term debilitating effects of their injuries.

The toll of violent crime on refugee victims gives clearly impacts the material, physical and psychological well-being of individuals and the community as a whole. The consequent impact on the ability of these victims to effectively locally integrate into society is also significant. Living with the day-to-day insecurity generated by the likelihood of being targeted by overpowering forces (whether large numbers of people, lethal weapons or fire), and an inability to be confident that triggers for violence can be accurately assessed, alongside persistent harassment, threats and acts of intimidation significantly undermine the capacity of refugees interviewed in this programme to integrate into their communities and to create sustainable livelihoods. The threat of serious injury or, worse, death remains uppermost in the minds of many refugees in this study. Repeat victimisation—of both individuals and communities of a particular nationality or livelihood group—means that individuals and communities need to constantly remain vigilant with regard to their security and the potential risks that they may lay themselves open to in the conduct of their lives. In such an atmosphere, it is difficult to create alliances with local communities and to maintain a calm and co-operative engagement with communities and with state security officials.

¹⁷⁴ In an interview with the researcher (notes on file).

(b) Victims of Abuse of Power Perpetrated by State and Private Security Officials

Victims of crime that involved abuse of power by state or private security officials constituted the second major group of refugee victims of crime that were provided watching brief support services during the course of the research. Within this category, there were two distinct subgroups, identified according to the nature of the incidents reported. The first includes victims of one-off incidents that entailed assault (sometimes of a serious and/or brutal nature), kidnapping and theft. The second category includes low key, persistent harassment of, for the most part, informal traders.

Legal support was provided to ten victims of one-off incidents, two of whom were women.¹⁷⁵ Of these, six were Somali nationals, two were Burundian and two were from the Democratic Republic of Congo (DRC). The youngest individual was 19 years old. Eight individuals reported being abused by SAPS personnel, one reported being abused by railway security personnel and one by City Improvement District security personnel. Incidents reported to have been perpetrated by police and/or security officials included assault, kidnapping, theft of property (cash, jewellery and cell phones), and discrimination.

During the period of the research, fourteen individuals requested assistance with experiences of ongoing harassment by police or security personnel at their places of work. They were all male informal car guards working at night in central areas of the City of Cape Town. All claimed DRC nationality. As informal workers, trading on the street, the majority of individuals in this group are among the most marginalised of the refugee community in Cape Town. They tend to have limited language and technical skills, with poor understanding of their rights and of institutions that exist to protect their rights.

The informal night-time car guards conducted their livelihood activities in the context of ongoing tension between opposing groups of ratepayers and business owners. On the one hand, there is support for informal car guards in the light of the security value they provide and/or recognition of the necessity of allowing informal traders to participate in the city's night-time economy. Against this, there are those who resent the very presence of the

¹⁷⁵ This does not include the reported thefts at business premises by individuals who either were members of SAPS or were thought to be members of SAPS. Victims of such crimes were included, largely for categorical reasons, in the reporting of victims of violent crime perpetrated by members of the public. In this regard, it must be re-emphasized that the limitations in terms of the nascent stage of the UCT Refugee Law Clinic's watching brief programme and its limited capacity necessitates further research into watching brief interventions aimed at confronting the misconduct of SAPS officials including the use of existing processes to lodge complaints regarding the police actions i.e. the ICD and the Police Inspectorate.

informal night-time car guards, who are variously accused of being noisy, criminal, illegal, disorganised and (at best), superfluous.

Tension between those that support and those that would like to exclude informal car guards from operating has existed over succeeding years in the city of Cape Town. The inability to find an effective resolution that satisfies the conflicting demands of the various stakeholders without contravening the complicated mesh of by-laws and other legislation has provided fertile ground for cycles of bullying and harassment. In the course of this car guards are erroneously informed by state and private security personnel that their livelihood activity is illegal.¹⁷⁶

In the period under review both individuals employed by security organisations contracted to City Improvement Districts and certain SAPS personnel engaged in systematic harassment of targeted informal car guards. Despite advising the targeted individuals that the activity was illegal and that they should “*go home*”, the officials concerned neither charged those individuals for any crime nor did they inform all those engaging in car guarding that it was illegal. In other words, instructions that the activity is illegal were given to selected individuals only¹⁷⁷. Furthermore, for the most part, the allegations were made only in respect of certain officials whose persistent harassment became a matter of routine for the car guards working on the streets at night.

Although charges were not laid—other than in one case¹⁷⁸—several allegations were made by car guards that they had been arrested (often with the use of pepper spray), and either detained in a police cell and then released without charge or, alternatively, driven around in the police or security van for several hours and then dumped in the streets in the early hours of the morning. Other activities reported included police or security guard confiscation of the fluorescent vests worn by car guards and various instances of cursing, insulting and making xenophobic statements to car guards.¹⁷⁹ In effect, the reported activities

¹⁷⁶ Since 2002 various actors in Cape Town local government and civil society have attempted, on several occasions, to address the question of formalisation of or banning of the informal night-time car guards, without success.

¹⁷⁷ In some instances, those working in a particular street were targeted repeatedly, while car guards in adjacent streets were not instructed to cease their activities.

¹⁷⁸ One car guard was charged with contravention of the National Road Traffic Act but, following representations by the UCT Refugee Law Clinic attorney, the case was withdrawn.

¹⁷⁹ It was also regularly reported by the informal night-time car guards that certain members of both police and private security personnel habitually demanded money for a “cool drink” from the car guards. It was alleged that, in respect of some officials, as long as they were provided with such small sums of money on demand they would allow the car guards to work without further harassment.

of the police and security officials amounted to curtailment of the livelihood activities of those targeted.

Aside from the disruption of livelihoods, victims of abuse of power by state and private security officials suffered physical injury and loss of property. Furthermore, as indicated above, to be victimised by security officials—especially police officials—is a particularly traumatising experience as the normal avenues for accessing state protection against abuse appear to be annulled. Moreover, for those subject to cyclical harassment, the ongoing insidious erosion of liberty, security and wellbeing generated considerable levels of anxiety amongst car guards as they worked in anticipation of impending harassment.¹⁸⁰

(c) The Watching Brief for Refugee Victims of Crime

As the preceding account has illustrated, there are, broadly speaking, two quite different groups of refugee clients who seek assistance at the UCT Refugee Law Clinic in connection with their experiences of being victims of crime. Where access to justice (in the form of effective completion of procedures of the CJS), is sought, the first group seek to have members of the public appropriately censured for their criminal acts, while the second group seek to have censure and, in some cases, recompense for abuse of power by state and private security agents.

The stated motivation for the refugee victims of crime to contact the UCT Refugee Law Clinic and/or to participate in the research varied. Out of 45 cases where respondents expressed the nature of the assistance they were seeking,¹⁸¹ just under half those interviewed requested assistance with the CJS, despite the fact that almost all respondents had unresolved cases with SAPS. The majority of the requests for assistance with the CJS related to lack of information from the police regarding the progress of the investigation of cases that had been opened. Nine respondents were clear that they wished to have no further engagement with any processes related to the CJS. Five of these were amongst the twelve respondents that

¹⁸⁰ Although not exclusively so, detainment or displacement of car guards would typically take place on Friday and/or Saturday nights. This would have maximum negative impact on the car guards as these were the periods during which they had the potential to achieve their highest earnings of the week and they would not be able to access legal assistance until after the weekend.

¹⁸¹ It should be noted that some of the victims of crime who were assisted under the watching brief programme referred themselves directly to the UCT Refugee Law Clinic or were clients of the Clinic prior to the commencement of the research project. They were not, for the most part, interviewed for the research purposes, although the interventions made in their cases were reported by the attorneys concerned.

stated that they were seeking resettlement. In almost half the cases, victims requested assistance with issues other than dealing with the CJS.¹⁸²

Where support was requested that involved the CJS, victims of crime who approached the UCT Refugee Law Clinic were assisted in terms of the watching brief framework developed for this purpose. The experience of using this framework is recorded below.

(i) Watching Brief Victim Support at the Time of the Commission of the Crime

Assistance from UCT Refugee Law Clinic staff at the time of the commission of crime is, in practice, a rare occurrence. In effect, the only times that attorneys from the Clinic have intervened at such an early stage is when there is a major incident, such as xenophobic looting. This was not the case during the period of the research project.

(ii) Watching Brief Victim Support for Recording of Crime Report

The South African Victims' Charter affirms the rights of victims throughout all stages of the criminal justice process. The basic rights stipulated in the Charter that relate specifically to the initial phase of reporting of the crime include the right to be treated with fairness and respect, the right to offer information, the right to receive information and the right to assistance.¹⁸³ More specifically, therefore, victims should be assured of a helpful reception at police stations, or at the scene of the incident. They can expect the appointment of an officer to take their statement, in the process of which their rights should be explained as well as police procedures. The officer should listen and record accurately the victim's account. If there is insufficient cause to open a case, the complainant should receive a clear explanation of the reasons.

In some instances, complainants reported that police refuse to open a case on the grounds that the victims did not suffer significant personal damage. A victim of arson that partially destroyed his shop in January 2010 reported that the response of the police officer

¹⁸² These included requests for referrals for social welfare assistance, assistance with identity documentation renewal and with applications for disability grants.

¹⁸³ The Victims' Charter highlights, *inter alia*, the right to be treated with fairness and respect for dignity and privacy, to offer information, to receive information, to protection and to assistance (DOJCD (note 117 above) at pp. 8-12).

who attended the scene of the crime was: *“Nothing much happened to you guys and everything seems OK, so there is no point opening the case.”*¹⁸⁴

The complainant reports that the following day he went to the police station and a different officer took a statement and opened a case. The same complainant, reporting to the same police station, complained that when he called the police five months later to assist immediately following theft, assault and being taped and blindfolded, there was no response. Subsequently, he went to the police station. He admitted to being extremely agitated when he asked the police why they had not attended to the call for help. He reported that the police response and justification for the status quo was: *“This isn’t Somalia. This is South Africa.”*¹⁸⁵

In the course of giving their victimisation histories, it was not unusual for victims to declare that they had not opened a case at the police. A spokesperson for a group of men who were robbed, handcuffed and taped reported that, despite the fact that the police had attended the scene of the crime, they had not opened a case:-

*“Because even the police they saw my case and they didn’t help me. Nobody helped me. They see my case and they don’t say anything. Nobody even asked me what happened. He just tell me: You are alive and just leave it.”*¹⁸⁶

Aside from those that were refused the option to open a case by SAPS officials, some traders made a conscious decision not to open a case as they felt that their circumstances would be compromised by doing so. Having had all his stock taken from his tuck shop for a second time in four years, one respondent reported that ‘I didn’t open a case because I am tired of being disappointed’¹⁸⁷ Another trader declined to open a case for fear of intimidation. He explained that:-

¹⁸⁴ In an interview with the researcher (notes on file).

¹⁸⁵ In an interview with the researcher (notes on file).

¹⁸⁶ In an interview with the researcher (notes on file). With regard to the police response, it is significant that this crime was allegedly committed by men posing as police officers, thought to be security personnel in fact. In terms of maintaining working relations with refugee communities, police should be particularly concerned to solve crimes where assailants claim to be police officers. However, there may be collegial relationships that discourage police from taking action against such perpetrators.

¹⁸⁷ In an interview with the researcher (notes on file).

“If we follow the case now and the people catch the person—maybe after a week the person is going to come out. And then we worry about that. Some Somalis gave me the advice: Don’t follow the case. They are going to come out tomorrow and they will shoot you.”¹⁸⁸

In some instances the shop workers who live through the experience of the crime are prevented by the owners of the shop, who do not maintain a physical presence at the business premises, from opening a case. One shop worker explained that, following several robberies at the shop he was working in:-

“[T]hen I asked the owner [of the shop]: We must open a case? The owner said: ‘No, I don’t want to open a case. Because the robbers will come back and will avenge’ ...[And the second time]: I asked again the owner: ‘Why not open the case, because it is the same people?’ He said ‘No’ again. So I left working for him. Because if you don’t open a case and have a case against them they will just keep coming back.”¹⁸⁹

With regards to victims of crime in the ‘security’ group, individuals on the margins of the informal economy, such as informal car guards and street traders, frequently report having difficulty in opening cases with the police. They reported, during the course of the research, that they were often told to return at another time or they were flatly told that they could not open a case. In many instances complainants did not have adequate information as to the identity of the perpetrator and other details that would assist an investigator to build a suitable case for prosecution.

In terms of the watching brief framework adopted for the purpose, possible interventions by UCT Refugee Law Clinic attorneys at this stage of the criminal justice process include assisting the victim with opening a case and with giving a statement to police (including making sure that appropriate interpretation is available). There is also, where circumstances permit, scope for discussion and/or explanation of what charges might be raised and an assessment of the likelihood of the success of the case.

In respect of violent crime, there was only one case reported of a request to the UCT Refugee Law Clinic to open a case at the police station. This related to alleged robberies of a tuck shop at a location on the periphery of metropolitan Cape Town. The complainant

¹⁸⁸ In an interview with the researcher (notes on file).

¹⁸⁹ In an interview with the researcher (notes on file).

reported that he had been robbed twice within the course of a week and on both occasions the local police station had refused to open a case for him. The request for assistance was made at a weekend and an immediate response was not possible. When subsequently followed up with the complainant, he no longer wished to engage with personnel from his local police station. In general, it would seem that, at least in the Somali community, many individual victims call upon their own community leaders who are familiar with the process of opening a case and who are better able to speak English to assist them.

With regard to the second category of victims—the security crimes group—assistance with opening a case was provided on four occasions to victims of alleged crime during the research period. On two occasions informal car guards were assisted. In one instance the guard had been assaulted by a security guard who forcibly took the complainant's vest and in the process injured the car guard with a knife. The RRU researcher assisted the complainant by taking him to hospital for treatment of the wound and then taking him to the local police station to open a case.

The second case was a request from a car guard who reported repeated harassment by a police officer and his shift partner, a police cadet. In a recent assault he alleged he had been assaulted and, whilst on the ground, kicked by the police officer, resulting in a fracture to the forearm. He reported having been to the police station on several occasions and having been refused the opportunity to open a case. The researcher took the car guard, a witness and an interpreter to the police station and requested that a case be opened. In the course of giving the statement, the victim identified the perpetrators who came into the police station and the researcher assisted in getting the name of the officers concerned, thereby assisting the victim to clearly identify his assailant in the statement. A senior police officer was assigned to the case and investigations were made. UCT Refugee Law Clinic personnel were advised that there was more than one complaint against this police officer. They were further advised by the sector manager of visible policing that the culprit would not be working again in that sector. However, the officer continued his campaign of harassment against this particular car guard, including allegedly making intimidating statements in connection with the charge that he had laid against him. Further engagement with the sector manager resulted in assurances that the officer would be confined to working only in the station. Shortly thereafter the client was arrested for car breaking and spent 2 months in prison. On his release at the end of March 2011 he requested that he continue to receive support for his case against the police officer from the UCT Refugee Law Clinic.

The third case involved a refugee youth who reported being searched, arrested, and transported in a van to a nearby street where there was neither street lighting nor CCTV cameras. He reports that he was then taken out of the van and attacked by a group of security guards who stole the phone and cash that they had found on his person when they originally searched him. Known to the researcher, this individual called the researcher whilst being transported in the van. The researcher went to the relevant local police station and assisted the complainant with opening a case. See Case Study I (below), for the fourth case.

In some of these security crimes cases, watching brief victim support was provided outside normal office hours, as the UCT Refugee Law Clinic was contacted by victims who already had the contact details of the researcher, who they knew was available outside of office hours.¹⁹⁰

During the period of this research, three refugee victims of crime approached the UCT Refugee Law Clinic for assistance with complaints to the Independent Police Directorate (ICD), in connection with police behaviour. One client, having lodged his ICD complaint through another legal aid clinic, wanted to inform the UCT Refugee Law Clinic, as implementing partners for UNHCR, that he feared for his safety as he still lived in the area where the police who he alleges assaulted him work. On several occasions he reported to the UCT Refugee Law Clinic attorney that he was scared and feeling unsafe. Following an occasion when he threatened suicide, he was referred by the UCT Refugee Law Clinic for trauma counselling and reported that he felt better for that intervention.

A refugee woman reported having achieved little progress having opened a case with her local police station regarding physical and verbal assault and theft by a policeman. Having opened the case, she was then threatened in several places by the same police officer, who informed her that he was aware of her complaint. The complainant had been unable to establish whether an IO had been assigned to the case two months after reporting the incident. The UCT Refugee Law Clinic attorney referred the case to the ICD, following which the client reported that she felt that the matter was being actively investigated by relevant authorities.¹⁹¹

¹⁹⁰ Except for extreme cases, the attorneys of the UCT Refugee Law Clinic are not generally available for consultation outside of normal clinic hours.

¹⁹¹ In an interview with the researcher (notes on file).

In another matter, the police instigated a charge of assault and resisting arrest against a refugee who himself claimed that he was brutally assaulted by the two police officers in the course of an unlawful arrest and detention. The victim requested assistance with lodging a complaint with the ICD. However, on the advice of the UCT Refugee Law Clinic attorney, the complaint to the ICD was not lodged until the finalisation of the charge laid by the police. In the event, the police case was dismissed, whereupon the UCT Refugee Law Clinic lodged the complaint on behalf of the victim with the ICD.¹⁹²

As noted in the watching brief framework section of this report, the substance of the process of monitoring ICD complaints has not been fully ascertained by the UCT Refugee Law Clinic. In this regard, the Clinic attorneys have identified a need to determine the most effective way to engage with the ICD to support the access to justice for refugee victims of crime.

On the whole, complainants reported that the SAPS system of advising complainants of their case number via SMS was reported by victims to work relatively well. There were a few clients who reported having lost their case numbers and, inevitably, some who reported not having received their numbers in the first place. There are still some complainants, however, who are being given their case numbers written on a scrap of paper, with or without an official police stamp on it. Understandably, such complainants are often uncertain about whether or not they were properly assisted by the police in these cases.

(iii) Watching Brief Victim Support through Assistance with Information about the CJS

The complexities of the South African system of criminal law and related procedures—with the various role-players and stages that form part of a successful investigation and prosecution of a crime—is bewildering for the vast majority of people in South Africa. It could be argued that popular perceptions of the workings of the CJS in South Africa come from three sources. The first is television ‘cop dramas’ that depict, for the most part, the workings of American and British CJSs. Being almost a global genre, constructed according to a well understood formula, this information is accessible to nationals and non-nationals alike, and has the tendency to establish unrealistic expectations of what resources are available to victims of crime in South Africa. Refugees, many of whom come from countries

¹⁹² In an interview with the researcher (notes on file).

where the CJS and systems of state protection are repressive and/or barely functional, view South Africa as a highly resourced and well developed country and therefore may presume that the CJS has the capacity to meet the standards apparently available overseas.

The second source of publicly available information on the workings of the CJS is the embedded knowledge that exists in communities in South Africa. This is the knowledge that citizens have from having grown up in communities where members of that community have, from time to time, participated in the CJS, both as victims and as defendants. Finally, those that have the oral and literacy skills to monitor media will also, implicitly if not explicitly, absorb knowledge about the workings of the system from this source. For example, media reporting of high profile cases regarding the prosecution of politicians and popular entertainment personalities serves to conscientise the media-consuming public of the workings of the justice system. The knowledge from the last two domains is largely unavailable to refugees, many of whom have only been in the country for a few years and do not have the necessary skills to be critical consumers of media.

The lack of accurate information on the workings of the CJS in South Africa amongst much of the refugee community leads to a range of misapprehensions for engaging in the system. The kinds of misunderstandings that were commonly expressed by refugee victims of crime during the course of the research include:-

- **SYSTEMIC CONSTRAINTS:** Lack of appreciation of the constraints under which the SAPS and the CJS are working in terms of skills, resources and caseloads;
- **ROLE OF THE VICTIM:** Poor appreciation of the necessity for the victim to take an active role in assisting with the investigation, including providing detailed information about the circumstances of the crime, maintaining contact with the IO, and actively requesting information on the progress of the case if it is not automatically forthcoming. For some, the significance of being subpoenaed to appear as a witness is not understood;
- **PROSECUTION:** Misunderstanding of the fact that the NPA may exercise its discretion as to whether to prosecute or not, and of the criteria that need to be met in order for a prosecution to be made;

- **BAIL:** Some refugee victims of crime did not understand that bail is not the trial itself.¹⁹³ The rationale for the early release of individuals who have allegedly committed violent crimes without apparently undergoing trial or serving a sentence is alarming for many. The ‘innocent until proven guilty’ principle is, for the most part, understood but the implications of keeping an individual on remand, without trial, for long periods are not well understood;
- **WITNESS PROTECTION:** Unrealistic assumptions were expressed with regard to the State’s capacity to provide protection to those whose security appears to or is perceived to be threatened on account of their participation as complainants in the criminal justice process. Criteria for providing protection are also not well understood; and
- **THE TRIAL:** The adversarial nature of witness cross-examination comes as a shock to those unfamiliar with the South African CJS. Furthermore, the various sentencing options available to the court are commonly misunderstood.

In the light of the above, it is of little surprise that many refugee victims of crime expressed the view that the CJS is not geared to assisting them as victims. The perceived ease with which the accused avoid detention and return to continue victimising foreign nationals detracts from the possible gains of participating in the prosecution process. In part, the lack of understanding of the constraints of the various components of the CJS and of the expectations that the system has with regard to the active participation of the victim leads to frustration and disappointment. Additionally, as some victims make unrealistic demands of the system, they are likely to be met with belligerence from state officials who apparently resent such requests being made by foreign nationals. In effect, both parties display a level of misunderstanding that is often an obstacle to effective co-operation towards what is ultimately a shared goal—the reduction of crime.

In the course of the UCT Refugee Law Clinic’s watching brief interventions there were many instances when the opportunity was taken to educate individual victims in respect of the procedures and range of role-players in the CJS, and the victims’ rights, roles and responsibilities. Whilst this is often of considerable value on a one-to-one basis, it does not

¹⁹³ A court interpreter reported that many foreign nationals for whom she had provided interpretation services believed that the amount paid in bail surety was, in fact, a fine for the crime with which they were charged. They failed to appreciate, despite instructions, that they were required to return to court for trial (In an interview with the researcher (notes on file)).

address the searing need for improved literacy amongst refugees with regard to the workings of the CJS in South Africa and the manner in which victims of crime may effectively engage with that system in order to have access to justice. Given the high levels of victimisation that certain communities amongst the refugee population experience, initiatives to improve this knowledge deficit are critical to efforts to improve the security and protection of refugee communities.

(iv) Watching Brief Victim Support Assistance with Completion of Investigation

Victims of crime who have opened cases with the SAPS can expect to be kept informed of the progress of the investigation. Once again, the victim's right to information and assistance from the police as set out in South Africa's Victims' Charter is instructive in this regard.¹⁹⁴ Initially, after a case is opened, the police IO should be engaged in obtaining physical evidence, taking third party statements and, in opening a docket once it is believed that sufficient evidence exists to arrest and charge perpetrator(s). At this time, the police bring the matter to court and whereas the charge sheet, which is the court's record of the matter, remains with the prosecution, the docket remains with the police until the investigation is concluded.

According to the analysis of victimisation histories for those subjected to violent crimes, many of the refugees interviewed for this research reported a high number of unresolved criminal cases. From the victimisation histories, respondents gave information on 49 cases that were reported to have been opened with the police. For over half of these cases, the victims reported that they had received either no information at all following opening the case or that the only information they had received was notification of the case number.¹⁹⁵

For victims of crimes perpetrated by 'security' officials, following up on the progress of the investigations is often extremely difficult as it frequently requires interaction with colleagues of the alleged offenders. In such cases, victims of crime do not want to physically identify themselves at the police station for fear of becoming targets of intimidation and harassment by police colleagues of the alleged accused. In the case of informal car guards and street traders, their workplace is often located within the precinct of the station at which

¹⁹⁴ DOJCD (note 117 above).

¹⁹⁵ Many of these cases dated back to 2008, although a few preceded 2008. None were more recent than November 2010.

their case is being investigated. They are therefore particularly vulnerable to harassment and intimidation by police accused and their colleagues who can regularly pass by the victim's workplace in the course of police work shifts. A similar dynamic pertains where security guards are accused of crime against foreign nationals. Whilst this phenomenon applies equally to foreign nationals and South African citizens, the UCT Refugee Law Clinic has a particular role to play in such cases given that it is clear, from the experiences reported by refugee victims of crime, that they have additional difficulties in accessing justice that emanate specifically from their status as refugees and their membership of this vulnerable group.¹⁹⁶

In terms of the UCT Refugee Law Clinic's watching brief framework of interventions at this stage of the justice process, Clinic attorneys might make and maintain contact with the IO and/or the State Prosecutor with regard to the progress of the investigation. Interventions are designed to get information for the victim with regard to progress of the case; to apply pressure to revive a stalled investigation; or to offer assistance to the IO with information (such as outstanding medical reports, contact numbers of witnesses and so on). The police might also be contacted to discover why a case had been closed and, if appropriate, the Clinic attorney may motivate for the case to be reopened.

It was common procedure at the UCT Refugee Law Clinic during the research period for attorneys to attempt to contact SAPS IOs on behalf of clients. In the majority of cases, attorneys reported very little success with trying to make contact by telephone. One such report is not untypical. Requested by the client to follow up on the progress of two cases of robbery, opened by the complainant in June and July 2010, the attorney reported that:-

*"In the space of one month I tried to at least ten times to contact [the IO]. On most occasions he was out in the field. I then faxed his office, and after two more telephone calls was able to speak to him.' Asked about the value of this intervention in January 2011, the attorney reported that 'No action was taken as a result of our interventions, but it did serve to give the client some small consolation that, as far as could be ascertained, investigations had had some outcome.'"*¹⁹⁷

¹⁹⁶ In an interview between the researcher and Fatima Khan, Director, RRU, 17 March 2011 (notes on file).

¹⁹⁷ In an interview with the researcher (notes on file).

Subsequently, the attorney followed up again with the IO, who advised that the case had been referred to SAPS Organised Crime as similar incidents had been recorded in a number of other locations. Ultimately, however, the case was closed by both units after two months as identikit pictures had produced no responses.

In another case, two clients had been told by SAPS that in order to be provided with the details of the progress of four unresolved cases (dating from January to June 2010), at the police station they must provide a letter from their lawyer requesting the information. The Clinic attorney reported trying, without success, to contact the station commander by phone. Failing this, a fax was sent to the station commander and the two IOs assigned to the unresolved cases to request that information be given to the complainants. The fax was sent a second time one month later, again without any response. Contact was then made with a senior official in SAPS Crime Intelligence in Cape Town and information was provided on the cases, now four months after the original request for information.¹⁹⁸ By the time this information was received, the attorney was no longer able to make contact with the complainants to inform them. Furthermore, further attempts to contact the IO to find out the progress of the one case still under investigation (for murder), were unsuccessful. As the attorney observed:-

“In this instance, our escalating this to our new contact at SAPS intelligence assisted us in overcoming the challenge of getting information from [the SAPS station], although not so much in ‘accessing justice’.”¹⁹⁹

The challenges that the UCT Refugee Law Clinic has experienced in following up with the police on the status of an investigation by phone or facsimile indicates both a greater need to educate and capacitate refugees in this arduous task and the need for legal support services in the field to attend with the victim at a police station in order to get a sufficient and timely response from the IO. Unfortunately, the UCT Refugee Law Clinic is currently under-capacitated to effectively respond to refugee victims’ need for proper status updates on the investigation of their crimes, especially in the field. The above examples from the Clinic’s practice, however, point to the significance of the its continued engagement with institutional actors within the CJS, as the relationships that have been developed through the course of the

¹⁹⁸ Two cases were noted as “un-detected” one as withdrawn and one (a murder), still under investigation.

¹⁹⁹ Email communication, 15 February 2011 (notes on files with the authors).

watching brief programme have led to invaluable contacts being made with key role-players that support the watching brief programme. Members of SAPS Crime Intelligence and SAPS Organized Crime are now able to be called upon to assist the Refugee Law Clinic attorneys in obtaining information on investigations for clients.

It is of ongoing serious concern to the UCT Refugee Law Clinic that there were several murder investigations amongst those cases where clients or victims' associates reported that they had received no information following the opening of the case. Relatives or associates of victims who had died as the result of violent crime accordingly often expressed ambivalence about pursuing justice through the CJS. Similarly, in cases of severe injury, the main concern was often stated to be to have assistance with applications for social welfare and for documentation and/or applications for state disability grants.

Some of the relatives and associates of refugees who had died as a result of violent crime were not interested in engaging with relevant authorities to find out even what the case number was. Others who had earlier elected to give statements to open cases stated that they were no longer interested in pursuing the matter. One respondent wanted no further action on the murder of his brother as he believed that the police were connected to the killer. Another, whose brother died from his bullet wounds after a month's hospitalisation, stated that he only wanted resettlement. He explained that, having been robbed three times in eight years, he felt:

“We do not have nothing. We are not going to stay long in this country. When we lose our brothers and everything from the shop. We need to go out of this place.”²⁰⁰

In respect of abuses perpetrated by state or private security officials, two of the cases that came under the watching brief mandate during the period of research related to security officials employed by Central City Improvement District (CCID),²⁰¹ structures. In addition to assisting the clients follow up with the police regarding the investigation, the senior manager at the CCID was contacted by the UCT Refugee Law Clinic and, in both cases, assisted with identification of the security guards involved. This information was passed to

²⁰⁰ In an interview with the researcher (notes on file).

²⁰¹ 'The Central City Improvement District is a private-public partnership formed by the property owners of a defined geographical area to provide top-up or complementary services over and above what the City of Cape Town provides' (available at <<http://www.capetownpartnership.co.za/ccid/>>).

police. In one case the complainant, an informal car guard, is no longer in touch with the Clinic and there is no further information on the progress of the case. Investigations on the second case have been completed and the culprits charged. The complainant was supported by the Refugee Law Clinic with information to guide him in participating in the investigation process so as to get the culprits prosecuted.

In two different cases, victims requested assistance with obtaining progress on the investigation of their complaints against police officers. In one case, repeated calls to the station in question produced no relevant information, until the UCT Refugee Law Clinic attorney established, five months after the initial enquiry, that the case had been closed due to lack of evidence. By this time the complainant proved to be uncontactable.²⁰²

In contrast, in the second case the complainant reported that he was receiving an appropriate response from the SAPS with the investigation into his complaint against four police officers allegedly guilty of a series of abuses, including assault and theft, perpetrated in the course of searching for illegal substances. The complainant requested guidance and support from the UCT Refugee Law Clinic as the matter approached court appearances. In another case of abuse committed in the course of a raid for illegal substances, a refugee reported that the police had taken appropriate action following his reporting the case—specifically taking a statement and assisting him with obtaining a medical report—but that they had stated that the lack of evidence made it difficult to pursue the investigation. In this instance the uniforms that the officials were wearing were not police uniforms, but the victim was not able to provide sufficient information to identify the organisation to which the assailants belonged.²⁰³

In a limited number of cases, respondents reported having established good relationships with certain officers in local police stations, which facilitated keeping abreast of developments in investigations.²⁰⁴ This largely related to key representatives of refugee interest group networks, particularly township trading networks. Through these relationships

²⁰² In an interview with the researcher (notes on file).

²⁰³ In an interview with the researcher (notes on file).

²⁰⁴ One particular police station was notable for the positive reports received from a group of refugees who had been victims of violent crime. This group expressed satisfaction with the investigations being carried out, which had resulted in the identification of a South African business organisation as the instigator of many of the incidents of violence. Detectives had been assigned specifically to address outstanding dockets identified as ‘xenophobia cases’. A measure of the satisfaction of this community is indicated by the fact that victims, or their associates, only requested assistance from the UCT Refugee Law Clinic in respect of social welfare or documentation issues. Furthermore, the refugee community continued to look to SAPS for assistance with resolving disputes between foreign and citizen business operators.

they co-operated in completing investigations through the provision of information, contact details and interpretation services. This contrasts to the widely expressed distrust and disappointment in services offered by police.

Clearly, the magnitude of the erosion of opportunity for access to justice that results from the absence of an effective and sustained flow of information between the IO and the victim of crime cannot be overstated. From the perspective of the UCT Refugee Law Clinic attorneys, as representatives of refugee victims of crime, the difficulty in getting information from IOs creates a huge drain on resources, in terms of time. In many cases the investment had no positive effect. For victims of crime, such systemic intransigence fosters anger, cynicism, despair and alienation. As a refugee in South Africa, subject to discrimination and xenophobia in a variety of contexts, the frequent inability of the SAPS, as the face of the CJS, to provide support for victims of crime in the apparently simple matter of providing information is often understood to be just one further aspect of the manner in which institutional xenophobia plays out in South Africa.

In many of the cases discussed in the victimisation histories, victims were unable to identify their assailants. Suspects were reportedly identified by the victims at the time of the incident in only nine cases and they were subsequently arrested and/or charged in seven of these cases. Awareness of the kind of information that would assist the successful investigation of a reported crime was often minimal.

With regard to providing support for victims and witnesses of crimes who are called to participate in identity parades, the UCT Refugee Law Clinic watching brief assistance that may be given is largely limited to providing information on the process and to arranging support for those that find the process traumatising. During the research period Refugee Law Clinic attorneys were involved in the matter of identity parades in one important case where encouragement was provided to the IO to uphold appropriate procedures and to victims and witnesses to commit to taking part in a live identity parade (see Case Study III below).

As part of the process of refugee victim of crime support, assistance may be given to empower complainants to make their own contribution to furthering the investigation of cases they have opened. A refugee who was being harassed in respect of a dispute over the ownership of property consulted the UCT Refugee Law Clinic for assistance both with the charge the former owner of the property had laid against him and with the related

harassment.²⁰⁵ The Refugee Law Clinic attorney identified that her client had relevant information that he had not provided to the police to counter the complainants claim, and she therefore explained to him that the information he had would assist the police. Further the attorney contacted the complainant to instruct him to desist from harassing her client. Following the interventions of the attorney, the client reported that the harassment had ceased.²⁰⁶

Some refugees may be, in normal circumstances, relatively well skilled and experienced in engaging with the various role-players in the CJS. However, the experience of crime—particularly where they suffer serious assault in circumstances that they find traumatising—can radically undermine their capacity to pursue their case without considerable support. Moreover, being experienced in engaging with the system also means being familiar with the manner in which certain actors within the system are able abuse complainants.

In the matter reported in Case Study I, the complainant was supported and encouraged by the Refugee Law Clinic attorney to play an active role in ensuring the progress of the investigation of his case. His success in doing so was likely aided by his pre-existing knowledge of the CJS and his existing relationships with senior SAPS personnel, as well as his determination to ensure that the crime did not go unpunished.²⁰⁷

²⁰⁵ The refugee client in this matter was formally the defendant. However, from the information provided to the UCT Refugee Law Clinic Attorney, it appeared that he was in fact the victim of a criminal scam.

²⁰⁶ In an interview with the researcher (notes on file).

²⁰⁷ The complainant was a graduate of the UCT Refugee Rights Unit SAFER refugee rights training course.

CASE STUDY: *“The IO did a good job yesterday. He drove me for one hour. He showed me all the places...The IO, he is doing very good work. Really good...Last week I met with the Prosecutor. She was helpful. ... The way the case was investigated, it was done very well. I really appreciate the police investigation...”*



VICTIM INTERVIEWS: DECEMBER 2010 & JANUARY 2011

Hussein has several years experience of working with SAPS and other institutional structures in South Africa. He is a good speaker of English and is articulate in demanding recognition and respect for refugee rights. In the process of doing just that he was detained by a number of personnel he understood to be police officers and subjected to what he described as a terrifying series of events that involved his unlawful detention and assault.²⁰⁸

Immediately following the experience, Hussein reported the matter to the UCT Refugee Law Clinic, requesting guidance and support to take this matter through the criminal justice process. He was clearly extremely traumatised by the incident and admitted to being fearful of going to the police station, where he felt he risked an encounter with members of the group of assailants or poor reception by their colleagues. With support of members of his community, a representative of the Community Policing Forum and of UCT Refugee Law Clinic attorneys, he was able to open a case at his local police station. Subsequently, he:

- Arranged with the station commander that a senior investigator be assigned to his case and, when he found that the investigation was not proceeding at the speed he felt necessary, to have the investigator changed. Throughout the investigation, he made regular contact with the IO and pressed for speedy completion of the docket.
- Arranged for witnesses to meet with the IO. He also provided vital evidence to assist with identifying the assailants and with building the case against them, including participating in both photo and live identity parades.
- Argued successfully for additional charges to be added to the charge sheet.
- Met with the prosecutor to press for prosecution to proceed. The prosecutor explained that the matter would be referred to the DPP for a decision. In the event, the DPP deemed the matter sufficiently serious to warrant proceeding to the Regional Court.

The SAPS commander had communicated clearly that he regarded the incident to be an extremely serious one and that he intended to make the necessary resources available to identify and prosecute those responsible. The prosecutor reportedly commented on the fact that the docket had been exceptionally well prepared. From the perspective of the Refugee Law Clinic, the attorney involved in the case observed that this was one of the best police investigations seen in the practice of the clinic.

The role the UCT Refugee Law Clinic played in supporting Hussein included:

- Providing information on the criminal justice and civil justice processes and advice on how to proceed, with a view to the fact that there might well be cause for a civil action following the outcome of the criminal case. Hussein was advised how he could support SAPS in completing the investigation and what he could expect in terms of legal support from the Refugee Law Clinic to uphold access to justice as a refugee victim of crime. At several stages during his engagement with the process, the Clinic attorney advised him on what he could reasonably expect and demand of the various role-players in the process.
- Contact with the DPP to establish the reasons for the delay in making a decision on prosecution.
- Discussion with Hussein on the nature of trauma and the likely effects of such a devastating experience on the victim
- Discussion of witness protection opportunities and Hussein’s declaration that he feared his safety was compromised by the continued presence of the culpable unit in his locality.

²⁰⁸ The extent of the abuse, which was extensive, cannot be described for confidentiality and legal reasons.

The UCT Refugee Law Clinic attorney noted that the complainant understood that:-

“...[T]he matter can only go forward if he provides good evidence. So he made a concerted effort to provide the best evidence and made note of things around him while he was being attacked. Most people are not so alert as he is. He also understands the process needs support. And he is not afraid of the system. He is not afraid of the police. People need to be trained that they do not have to be afraid...”²⁰⁹

The complainant was assisted in the pursuit of his investigation by the station commander’s declared interest in seeing a speedy and effective investigation. He was also able to benefit from the apparent willingness of a range of stakeholders to entertain the victim’s demands to have regular audiences with actors and decision makers. Other factors that conceivably contributed to the success of the investigation include the fact that the reputation of the SAPS was at stake²¹⁰ and that the Community Policing Forum was also concerned to see effective prosecution. Consultations with the attorney assigned to his case at the UCT Refugee Law Clinic helped to focus the demands of the victim on outcomes that were reasonable and achievable.

On the whole, UCT Refugee Law Clinic attorneys reported that, where they made contact with IOs, their involvement in the case was appreciated for the potential it provided to assist with maintaining the involvement of victims in effective prosecution. However, given the large number of unsuccessful attempts to contact IOs, it is conceivable that in many instances they do not welcome or understand the possible advantages of establishing contact with victim support services. In this respect, it can only be speculated that the policy drive for civil society engagement in victim support is not well understood at the operational level—at least in so far as refugees are concerned.²¹¹

As noted at the beginning of this section, engagement with IOs to assist refugee victims of crime achieving access to justice through the diligent investigation of their

²⁰⁹ In an interview with the researcher (notes on file).

²¹⁰ The alleged assailants were identified to be members of a unit within the police service, though not (at the time of the incident), under the command of the local SAPS station. However, the fact that they were employees of SAPS meant that their actions reflected on the Service as a whole.

²¹¹ Much of the current provisions and understanding of victim empowerment in South Africa relates to gender based and sexual crimes involving women and children as complainants. The DOJCD has recently, however, recognized that refugees in South African are a marginalized and vulnerable group in need of support services (DOJCD ‘2011-2016 Medium Term Strategic Framework’ at p. 58, available at <<http://www.justice.gov.za/-MTSF/mtsf.pdf>>).

complaints was by far the most common intervention made during the research period. At one level, this is only to be expected as it is the starting point of the progress of a criminal case through the CJS. It is also, arguably, the stage at which the greatest level of resource constraint exists in the CJS and, importantly, the locus of considerable resistance to service delivery for refugee victims of crime. Although in the course of the research encouraging examples of professional and diligent investigation of crimes against refugees were identified (as illustrated in Case Study I), in far too many cases it appears that investigation of such crimes are simply ignored.

A senior member of SAPS, charged with improving the standard of SAPS investigation of crimes against foreign nationals, admitted that in some precincts there was a particularly poor response from detectives assigned to cases where foreign nationals were complainants. He reported finding poorly prepared dockets and claims by IOs that they are unable to get hold of the victims. On the contrary, he reported, he had had no difficulty in contacting victims, particularly once he made contact with key community leaders. The solution, he declared, was to make sure that investigations were run by loyal, motivated detectives specifically assigned to address the backlog of unsolved crimes against foreign nationals at a particular station. The purpose was also to improve the investigation so as to be in a better situation to successfully oppose bail applications.²¹²

Contact with the Prosecutor at the investigation stage was largely limited, in the course of the research period, to enquiries regarding scheduled court dates. Prosecutors are often difficult to contact, due to their court hours. However, when contact was possible, UCT Refugee Law Clinic attorneys were able to obtain and then share with victims essential information regarding the progress of the investigation of their case so that they could prepare for court dates. Only in one instance during the research period did attorneys make contact with prosecution officials with regard to motivating for prosecution (see Case Study I).

As mentioned above, the account of the UCT Refugee Law Clinic's engagement with IOs regarding the investigation of criminal cases involving refugee complainants attests to the enormous amount of time such interventions take. Were the resources available, visits to police stations (rather than telephone calls), to meet with the IOs and/or station commanders would be preferable. Following on from this, victim support attorneys would be in a better position to assist with providing outstanding or missing information to support the

²¹²In an interview between the researcher and Crime Intelligence personnel, January 2011 (notes on file).

investigation as well as motivate for completion of investigations, arrest of suspects and, where appropriate, for the reinstatement of investigations prematurely closed.

(v) Watching Brief Victim Support Assistance with Court Procedures

The various court appearances that a refugee victim of crime can and may be required to attend and thus potentially needs watching brief support include the following: First appearance for bail information, then further appearances for bail proceedings (provided that bail is not forfeited). Thereafter, in most cases, there are various postponements for further investigation of the crime. Prior to the trial date being set, there may be a series of postponements for trial, until the presiding Judge or Magistrate declares that s/he is granting a final postponement. If parties are not in a position to proceed with the trial at this point, the case is likely to be struck off the roll. A trial may take place over several court dates and over the course of a lengthy period of time. Finally, following the trial's conclusion, appearances may be required for the court's sentencing.

Victims of crime can expect to have access to the State Prosecutor for meaningful participation in the prosecution of the offence,²¹³ together with due attention to their rights to maintenance of correct procedures for exclusion of witnesses from court, appropriate language interpretation, and provision of confirmation of attendance documentation (for employers). They may expect to have their dignity upheld by court officials and other stakeholders,²¹⁴ including the presiding Judge or Magistrate, and to have explanation of the matters at issue and the conduct of the hearing appropriately handled by the presiding officer.

Refugee victims of crime share the frustration of other stakeholders in the South African CJS in so far as the delays in the process and the likelihood of a case not reaching the trial stage are concerned. That aside, it is relatively rare that the UCT Refugee Law Clinic has a victim of crime client whose case successfully reaches the trial stage. It follows, therefore, that during the period of the research there were few opportunities to engage with clients who

²¹³ The Victims' Charter confirms, that a victim has '*the right to offer information during the criminal investigation and trial*'; that the '*...prosecutor...will take measures to ensure that any contribution you make to the investigation, prosecution...is heard and considered when deciding on whether to proceed...or ion the course of the hearing. This right means that you can participate (if necessary and where possible) in criminal justice proceeding by attending bail hearings, the trial sentencing proceedings*' (DOJCD (note 117 above) at s. 2).

²¹⁴ In accordance with the Victims' Charter a victim has the right to be treated with fairness and with respect for dignity and privacy by '*the police (during investigations), the prosecutors and court officials (during preparation for and during the trial proceedings)*' (Ibid. at s. 1).

were in a position to make observations on their experience of access to justice during criminal court procedures.

In terms of the watching brief framework, possible interventions by UCT Refugee Law Clinic attorneys to support refugee victims of crime at the trial stage include being present in court to monitor proceedings and to consult with the Prosecutor and/or the IO in order to provide assistance as might be necessary or appropriate at bail hearings and the pre-trial hearings and the trial itself. Clients may be prepared for bail hearings to present their views, as victims and as members of the community, in connection with the possible release on bail of the accused. Issues of victim and witness protection might also be raised with either or both of the Prosecutor and the IO.

Clients who are facing the prospect of attending court as a victim or witness in a criminal trial are often unaware of the fact that there is no formal role for a private attorney for the complainant in a criminal trial in South Africa. In some cases they report that, when told by the police that as a complainant they do not need an attorney, they felt that they were being misled. Education regarding the CJS, the victim's role therein and the extent and limitation of their rights to participation in criminal justice procedures was therefore an important part of the support provided by UCT Refugee Law Clinic attorneys. In addition, most of the refugee victims of crime that ask for assistance do so because they feel unable to engage with the system without assistance (see Case Study II).

CASE STUDY: *“I really wanted to open a case because this was more damaging and more heinous than the xenophobia. Because I understand the people who are robbing our shop are unemployed and hungry people. But the police—it is more heinous.”*



VICTIM INTERVIEW: DECEMBER 2010

In a case referred to the UCT Refugee Law Clinic by UNHCR, the complainant, Said, requested support for two criminal cases. One concerned common robbery and attempted murder. The second related to an incident involving two police officers, resulting in Said laying a charge of attempted murder and common robbery. Said said he had sought help from the UCT Refugee Law Clinic because:

“I know we Somalis are not good at following up the case. Also, I could not afford to pay a lawyer to follow my case. Knowing that UCT law clinic helps the refugees like me, when you are in trouble, when it comes to legal issues, I asked them to help me.”

With regard to the support he received from the UCT Refugee Law Clinic, Said stated that giving a statement to the attorney, having the investigation of his case monitored and keeping him informed of the court processes was very helpful ‘*Because I could not speak for myself*’—this despite the fact that Said had a good command of English and was a student at one of Cape Town’s tertiary institutes.

With respect to the attempted murder and common robbery charge, UCT Refugee Law Clinic staff attended four court hearings (in September, October and December 2010 and January 2011). Contact was made with the Prosecutor, who was advised of the Clinic’s interest in the case and of the Clinic’s availability to assist in any matters. In January 2011 the Clinic attorney had an opportunity to speak with the Prosecutor regarding the importance of the case, in terms of its commission during the xenophobic violence in 2010. At this hearing it was decided that the matter should be referred to the Regional Court. The UCT Refugee Law Clinic attorney reported:

“I think if there had not been anybody to remind the prosecutor it was important and all you hear is why the defence thinks it is important to drop the case against two police officers, then you will get it dropped because there are plenty of other fish to fry that are a lot easier to do.”

Meantime, the complainant has moved out of the Cape Town area. Prior to leaving, he had repeatedly expressed fear for his safety. In research interviews he said: ‘*I am very scared these days around [where I live] because those police guys are in search of me.*’ Noting that he no longer felt safe to walk in the streets, he declared: ‘*I don’t even know how I will go to court. I am really, really scared. It is scaring me out of hell. You know how hectic these people are.*’

He stated that his situation reminded him of:

“The case that happened in [the location]. There was an incident where the robbery of a Somali shop was involving police. They come in. They say they are looking for illegal firearm and are going to search for drugs and illegal cigarettes. And when they saw money and airtime they took everything. ...So they opened a case against SAPS. According to reports we are getting, the police officer who they identified was suspended from duty and was called to come to the court. Before the court date the officer, together with other gunmen, attacked the owners of the shop and the witness while they were in their bakkie, going to buy stock from the wholesalers. They hijacked [the bakkie] and killed them ...”

Although the facts of this above case have not been verified, it is significant for the fact that accounts such as this are widely shared through refugee information networks and have great influence on the extent to which victims are willing to risk laying charges and following through with the investigation and prosecution of the perpetrators.

*(1) Bail & Pre-trial Hearings*²¹⁵

During the period of research the UCT Refugee Law Clinic attended bail hearings for two cases. For both cases the Clinic attorney was asked to assist the victim and his community members with producing a petition to request that the accused would not be released on bail. In one instance the request was made by the IO, who urged the Clinic attorney to support the community in producing the petition. In the second case, a community leader requested assistance with the format of a petition. In both instances community leaders were provided by the UCT Refugee Law Clinic with wording that addressed the relevant issues and a suggested format for the petitions.

Where a prominent community advocacy organisation took an interest in one of the proceedings, the UCT Refugee Law Clinic attorney was able to introduce the organisation to the IO and to attest to the legitimacy of the organisation concerned, thereby assisting the process of establishing the significance of the case to the affected communities.

IOs also encouraged the victims' communities to be present in court, to assist with impressing upon the Magistrate the importance of the continued detention of the accused. UCT Refugee Law Clinic attorneys liaised with victim community leaders on this matter. However, in both instances, as the proceedings progressed, members of the victim community expressed discomfort at attending the hearings. (See Case Study III).

The attendance of family members and associates of the accused at bail hearings, particularly for serious crimes, presents a challenge for refugee victims of crime to exercise their right of participation. Clients of the UCT Refugee Law Clinic reported that they feared that, by presenting themselves at the hearing, they laid themselves open to retribution from individuals connected to the accused.

The issue of intimidation of complainants and witnesses has already been raised in this report in connection with the investigation phase of the criminal justice process. During the research period the UCT Refugee Law Clinic was requested by several clients to arrange for provision of protection. The response of the attorneys concerned was usually to inform

²¹⁵ As stated above, bail proceedings may take place over several appearances (for example, for bail information, for postponements for representations etc.), and there are similarly various pre-trial hearings that also may take place (for example, postponements for further investigations, for referrals to the Regional Court etc.).

the applicant of the state provisions in this respect. In effect, the provisions did not meet the needs of those who requested protection assistance, not least because they were not willing or able (due to work and/or family commitments), to leave the communities in which they were living. In addition, from a formal witness protection needs assessment perspective, none of those who requested consideration were able to provide appropriate evidence of intimidation, in terms of specified events and/or identifiable perpetrators. Nonetheless, the complainants did clearly articulate high levels of fear and anxiety. Where appropriate, these individuals were referred for trauma counselling. These and other interventions designed to provide psycho-social support are discussed further below.

CASE STUDY

“The IO? Is he honest? Is he competent? Are those above him giving him support? For the case to stay in the system for two years shows how good the people are at messing up the investigation.”



Somali community leader on lack of progress with investigations

into serial armed robberies. NOVEMBER 2010

Somali community leaders contacted the UCT Refugee Law Clinic to request support in connection with the prosecution of an individual who, along with his accomplices, had been arrested in connection with a series of armed robberies. Their concern was to have assistance with ensuring that the leader of this group, Ananda, was not released on bail. They reported that he had been arrested in the past on several occasions and, on each occasion, had been released on bail pending trial. On each occasion the robberies, which all followed a distinct modus operandi, ceased while Ananda was in detention but resumed on his release. There were four main areas of support that the RRU provided in response to the request for support.

1: *Data collection:* The RRU researcher worked with two members of the Somali retailer community in the field to compile from their disparate records, both oral and written, a schedule of incidents that victims attribute to Ananda and his accomplices. This amounted to over 30 incidents committed over a period of 12 months. A total of 22 cases were reported to have been opened at five different SAPS stations. Records indicate that in eight instances no case was opened. It is claimed that the actual number of unreported cases far exceeds this number. This data collection exercise was important as a background to establishing the importance of the case and its possible qualification for referral to the Organised Crime Unit for investigation.

2: *Attendance at court:* personnel from the UCT Refugee Law Clinic attended 4 bail hearings in the first 3 months of 2011 to monitor developments in the case, identify issues of concern as they arose and to maintain cooperative relations with the IO and the prosecutor. It was evident that the Magistrate and court officials understood the significance of the case. Attorneys discussed details of the case with the IO conferred on matters relating to the conduct of identity parades and the use of the victim community petition in support of application not to grant bail. Being at court also allowed the Clinic attorneys the opportunity to meet and liaise with senior crime investigation officials who had been involved in monitoring the progress of the investigations. The presence of the Clinic attorney was critical at one hearing where the IO failed to appear. The attorney was able to alert senior personnel at SAPS and a substitute officer was sent to argue for a postponement, which was granted.

3: *Assistance with investigation:* The UCT Refugee Law Clinic attorney liaised with the IO and with victims of Ananda and his accomplices with regard to providing statements for those witnesses and victims who had not given statements but who were involved in the cases currently in court. On several occasions the IO expressed that he was under intense pressure to complete the investigations relating to the cases on the roll and that the task was causing him stress.

4: *Assistance to victims:* the victim community expressed appreciation that UCT Refugee Law Clinic personnel were available at the hearings. Consultation between Clinic attorneys and the victims took place both during and after the hearings to explain the procedures and to encourage the victims to continue their participation in the process. One aspect of this was to support the IO's declaration that further identity parades would be necessary. Victims were assisted with the wording for the petition to the Magistrate regarding bail. Large numbers of family and associates of the accused attended each hearing. As the process progressed, the victim community decided that they felt too exposed to potential intimidation by showing themselves at court and they took a decision not to attend future bail hearings. One victim, who had been involved in coordinating the victim community engagement with the IO and the court process felt particularly vulnerable to intimidation (following a visit of unknown males to his home) and approached the UCT Refugee Law Clinic requesting protection.

In another matter in which a client had expressed a great deal of anxiety about being subpoenaed to attend a case in which he and a friend had been assaulted by a gang of youths, resulting in the death of his friend, the UCT Refugee Law Clinic attorney took the opportunity of a pre-trial hearing to identify and speak with the Prosecutor. The Prosecutor was extremely reluctant to even speak with the attorney, stating that to do so would constitute a conflict of interest. However, stating that she would speak briefly as a concession to ‘collegial’ relations, the Prosecutor merely advised that the case was far from being committed to trial and that this was no time to be concerned about the victim’s safety as he was unlikely to be subpoenaed for some time to come. The Prosecutor further advised that witnesses do not need lawyers.²¹⁶

In this particular case, the protection of the victim presented a particular challenge. Witness protection concerns are, formally, to be addressed by consultation with the Prosecutor or the police. This case is one of those in which the UCT Refugee Law Clinic attorney reported that it had been extremely difficult to get any information from the IO. Each time she phoned the police station, an officer would confirm that only one particular IO was able to provide information on the case and that the officer concerned was always out of the station. The victim, who had met with the IO on visits to the station, expressed grave concern that the IO had connections with the family and/or associates of the accused. The prospect of receiving effective support on victim protection matters from the IO assigned to this case was therefore considered to be minimal. In effect, there was no avenue for the complainant to discuss his concerns about his safety other than with the UCT Refugee Law Clinic staff.

In another matter, a very anxious refugee client, with a history of several experiences of victimisation, was provided with considerable support from UCT Refugee Law Clinic staff. He appeared to be unable to provide a coherent testimony of the various experiences that had befallen him, including the murder of two of his close associates. To assist him with organising his thoughts around the process of recalling events, the UCT Refugee Law Clinic attorney dedicated an extensive amount of time to preparing with the client an affidavit, which he was then assisted to get sworn at a police station. He was also assisted by a number of “soft” interventions (see below), which included encouraging him to follow up on information he had received about identifying the whereabouts of his one remaining brother;

²¹⁶ In an interview with the researcher (notes on file).

discussing his concerns about his health; communicating with the local council to assist him in obtaining a market trading licence, and, ultimately, in recommending him as a candidate for resettlement.

In contrast to the above reported interactions, the experience of engagement with the Prosecutor at bail and pre-trial hearings was reported, in most instances, to have been fruitful (see Case Studies II and III). Through introducing themselves to the Prosecutor at the first hearing, UCT Refugee Law Clinic attorneys were able to establish a relationship with the Prosecutor that assisted supporting the client through regular communication on the progress of the prosecution. In particular, such relationships were helpful in being able to check on the scheduling of cases with the Prosecutor so as to keep the victim and witnesses properly advised.

(2) Trial & Sentencing

For those victims or witnesses of crime that come to the UCT Refugee Law Clinic with a request for support during the trial, the first task would usually be to explain the manner in which cross-examination is conducted. Clients are also advised to try to approach the IO prior to the court date to request sight of or a copy of their victim/witness statements. This is important so that the testimony that they will make on the witness stand during the trial will not conflict with the statement they previously made. It is also often necessary to explain that failure to attend court following being subpoenaed will lead to arrest. This is particularly so where clients state that they fear appearing in court or that they are impatient with the time that they are expected to take off to attend court.

A victim of assault and malicious damage to property approached the UCT Refugee Law Clinic, asking to have an attorney act for him during his court case, for which he had been subpoenaed. He was advised of the role of the State Prosecutor and of what he should expect in terms of the progress of his case through the CJS. He was also assisted with information on how to lodge a Small Claims Court application to claim recompense for costs of repair of his property. Once aware of the processes involved, the client reported receiving good support from SAPS officers involved in his case.

In 2010 the UCT Refugee Law Clinic was approached by a victim of the 2008 xenophobic violence who had successfully followed through on the prosecution of two

people who had robbed him.²¹⁷ As they had failed to meet the terms of the court ordered settlement, the claimant applied for the case to be reopened and contacted the UCT Refugee Law Clinic for assistance. On two occasions the UCT Refugee Law Clinic attorney attended court on what was supposed to be the trial date. On the first, the trial did not go ahead due to the absence of witnesses. The victim reported that he had been clearly told by the prosecutor that the witness would not be needed at the hearing. On learning that the witness was required, the victim brought him to court. The police officer who was a witness was also not in court, and the prosecutor was reluctant to summons him, despite the fact that the police station was adjacent to the court. The case was therefore postponed for a final hearing. The Clinic attorney stated that:-

*“The prosecutor very clearly wanted to have the matter thrown out altogether. It was just excuse, after excuse, after excuse’. The prosecutor ‘wanted to use their absence as an excuse for not going ahead with the trial. We brought everybody there and all that was waiting was the police officer, who was just across the road.”*²¹⁸

In the interim, the Clinic attorney’s attempts to contact the Prosecutor regarding the scheduled final hearing were unsuccessful. On the day of the hearing, the Clinic attorney attended court with the victim and the witness. The matter was not on the roll and, on checking with the clerk of the criminal court, it was established that the charge sheet reflected that the matter was on the roll for the 30th March but that the IO had been warned to attend for the 3rd March. On the latter date the matter had been marked as ‘Withdrawn’ but the charge sheet had not been signed by Senior Prosecutor to confirm the withdrawal. In the event, following the intervention of the UCT Refugee Law Clinic attorney, the Clerk said that she would have the matter reinstated and have fresh summonses issued for the accused, but that it would take about 4 months to get the matter back on the roll. Summing up his experience of the case, the attorney for the victim said that: *“It appears that there is no impetus on the part of the Prosecutor to see justice done.”*²¹⁹ He noted that:-

²¹⁷At the trial at the end of 2009 the accused pleaded guilty and had been ordered to pay the complainant, at the rate of R200 per month, a sum of R15,000 as compensation for his loss. Their release was dependent upon them honouring this arrangement. Subsequently, not a single payment had been made to the victim.

²¹⁸ In an interview with the researcher (notes on file).

²¹⁹ In an interview with the researcher (notes on file).

*“No matter how many times the complainant is very diligent about coming to court, about communicating with the Prosecutor and making sure the witnesses are there, it does not seem to make any difference if the Prosecutor is not motivated to pursue the case.”*²²⁰

Where commitments permit, UCT Refugee Law Clinic attorneys will make contact with the Prosecutor prior to the trial to ensure that case is still on the roll for the agreed date and will provide clients with the appropriate confirmation. The UCT Refugee Law Clinic attorney may also play a role here in encouraging victims and witnesses to sustain their commitment to the criminal process.

The scope for liaising with the Prosecutor in a trial depends, to a large extent, on the attitude of the Prosecutor to victim support interventions. In a case in which the UCT Refugee Law Clinic supported the victim and a witness at the trial, the Prosecutor requested that the Clinic attorney arrange for the completion of victim impact statements²²¹ to assist with the sentencing. In this instance, there was extensive liaison between the Prosecutor and the Clinic attorney on a number of matters to assist preparing the victim and witness to support an effective prosecution. These included arrangements over provision and timing of transport to and from the court for the victim and witness; scheduling pre-trial consultations with the victim, assisted by the court interpreter; and victim and witness consultations with the Court Preparation Officer (CPO). The CPO reviewed the docket with the victim, particularly his statement, and prepared him for cross-examination and how to handle his responses.

The Refugee Law Clinic attorney was requested by the Prosecutor to sit in on a pre-trial session between the Prosecutor and the defence attorney, at the instigation of the latter for the purposes of a plea bargain. The victim, witness and court interpreter participated in the plea bargain pre-trial session. A provisional settlement was reached and the Clinic attorney was asked then to consult with her clients to canvass their views on the proposed terms of the settlement and to report back to the defence attorney and the prosecutor. The victim in this trial, an elderly refugee who spoke little English, reported that he was treated

²²⁰ In an interview with the researcher (notes on file).

²²¹ “Victim impact statement” refers to a statement containing the particulars of the personal harm suffered by the victim as a direct result of the offence or the impact of the primary victim’s death on the members of the primary victim’s immediate family (DOJCD ‘Draft Discussion on Victim Impact Statements’ pp. 7-10, available at <http://www.justice.gov.za/vg/sxo/2008%20DRAFT%20Discussion%20Document_Victim%20impact%20statements.pdf>).

well by all parties, including the SAPS who were diligent in provision of transport and accommodation so that he could travel from Gauteng to take part in the trial.

In respect of the victims of security crimes, during the research period one UCT Refugee Law Clinic client was provided victim support at a trial. The victim was an educated, professional female refugee and was the victim of an assault by a Metrorail official in an apparent xenophobic attack at the Bellville train station. The incident occurred in the evening and the victim was only able to open a case in the police station with the assistance of her husband and the insistence of a South African friend who was the Director of a refugee social service provider NGO in Cape Town. The Refugee Law Clinic took instructions from the client and is currently issuing a civil claim for damages against Metrorail as the employer responsible for the unlawful actions of its employee. In terms of watching brief interventions in this matter, the victim and her friend (who witnessed the incident), have been supported throughout the course of their court appearances in the criminal case against the accused. They have been well educated about their role and their rights as victim and witness during a trial. Other specific interventions undertaken include the UCT Refugee Law Clinic attorney introducing herself to the prosecution and monitoring the court sessions, as well as engaging with the court's managing interpreter to successfully ensure that a specific Swahili interpreter would be present for the trial to be able to proceed.

A refugee informal car guard requested assistance with regard to a scheduled appearance at the Community Court in respect to a charge for contravention of the National Road Traffic Act²²², allegedly committed in the course of his performing his car guarding activities. Over the period of the research programme, the UCT Refugee Law Clinic received many complaints from car guards that they were being told by police and security personnel that their activities were illegal and that car guarding was illegal. They would report being told to go home, with the threat of arrest for failure to comply. This campaign by police and CCID security personnel was limited to a small section of the centre of Cape Town and therefore affected only a relatively small group of the greater population of informal car guards working in the city centre at night.

This matter is part of what amounts to a long-standing effort in Cape Town, that waxes and wanes over time, to stop night-time informal car guards operating in the city. Currently, night-time informal car guarding on public roads is not illegal in Cape Town. A

²²² Act 93 of 1996.

complex set of interacting By-Laws and existing parking contracts have frustrated any attempts to either ban the activity or to impose controls on it by formalising it. Despite numerous representations to SAPS and CCID officials the harassment continues. It is almost always confined to the activities of one or two rogue officials (as illustrated in the case against a SAPS officer discussed earlier in this report).

In this instance the UCT Refugee Law Clinic attorney met with the Senior Prosecutor in charge of the Community Court on the matter. She was asked by the Senior Prosecutor to prepare representations on the legal position regarding informal car guarding in Cape Town. Following consideration of the submission, the Senior Prosecutor withdrew the case. Although this has not stopped the harassment of car guards in the area in which the complainant works by the same police officer, it has at least, for the moment, indicated to police and security personnel, who share information on the issues, that there are currently no legal avenues for denying informal night-time car guards access to their livelihoods.

This matter is, clearly, not strictly within the terms of the research focus in so far as the client is not formally a victim of crime. However, the constant harassment and the resultant illegal denial or curtailment of livelihood opportunities renders the affected car guards victims of the illegal actions of individual police and security personnel. Refugees who apply to the UCT Refugee Law Clinic for assistance in this matter for the most part request that the police be simply requested to desist from harassing, assaulting and insulting the car guards. However, at the UCT Refugee Law Clinic, we are faced with a dilemma because our experience has found that when we lodge charges against individual police they (or their colleagues), merely, in the words of one Clinic attorney, “*make life hell*”²²³ for the complainant. This is particularly so for car guards, who are on the street at a regular place and time and are therefore easily accessed. They are also a population of refugees who are particularly vulnerable. Usually francophone, with poor command of English, they are at the margins of a hand-to-mouth survival economy. Although some are highly educated, there are also many who have little or no education. And it is more often the latter that become victims of serial harassment. Inevitably, amongst them there are some criminals, for the most part small-time. However, we have argued with SAPS officials that they must deal with the criminals and not seek to exclude the whole group from access to their livelihoods through their activities.

²²³ In an interview with the researcher (notes on file).

One aspect of the trials that UCT Refugee Law Clinic attorneys observed as particularly problematic for some of our clients is that of interpretation services. On the whole, attorneys reported that Prosecutors were diligent with noting interpretation needs for refugee victims of crime. However, provision was not always so successful. In some instances trials were postponed as a suitable interpreter was not available. As mentioned above, in one watching brief matter the interventions of the Clinic attorney in engaging with the Court's interpreter manager were instrumental in ensuing that a suitable interpreter was found for the trial to begin, failing which the matter would have had to be postponed. In this same case, interestingly, at the next trial date the matter was postponed for another interpreter due to a complaint made by the defence attorney about the quality of the interpretation.

There is an acknowledged shortage of sworn interpreters for some foreign languages in Cape Town, such as Kinyarwanda. This particular shortage resulted in one of the UCT Refugee Law Clinic clients having his case postponed three times. This is a serious barrier to access to justice as the defendant's right to a timely conclusion of the trial may result in the case being thrown out as it was unable to proceed without an appropriate interpreter. In one instance one of the Clinic's clients offered to bring a Kinyarwanda interpreter with him, but this was not acceptable as interpreters must be properly trained and sworn in.

Refugees (in common with South African nationals), who are victims and witnesses of crime, often become reluctant to participate in the ongoing criminal justice process as they become fearful of—or actually experience—intimidation and/or harassment.²²⁴ It is extremely difficult for refugees and asylum seekers to commit to the court process when they are victims of serious crime. Apart from the time (and therefore resources), that such a process consumes, they often have very real fear of further victimisation in a system that they have frequently experienced as displaying an unwillingness to offer them the same protection that they believe is afforded to South African citizens. Many of the participants in this research programme gave accounts of having been intimidated to drop their cases. One married couple who reported that an individual who had been caught by the police breaking into their car returned to their shop, on his release on bail, and threatened to kill them. It was reported that: *“He came, swearing to them. He said: You think you can keep me inside. I will show you what I can do.”*²²⁵

²²⁴ In an interview with the researcher and a member of the Cape Bar (notes on file).

²²⁵ In an interview with the researcher (notes on file).

Another respondent reported that only 2 weeks after he returned to his shop that had been looted in July 2010, he was threatened by leaders of that crowd. He was told:-

*“If you don’t stop the case, we are going to do something about it ourselves. 2 of the leaders came to the shop. I know who they are...I said: I am not going to close the case. I didn’t tell the police. But they also threatened a neighbour—a South African. woman—because she was a witness to the incident.”*²²⁶

In an action against his landlord, a trader reported that when the accused saw the court papers:-

*“He and his family, they telephone me. ‘We warn you, if I see you in the Court you are going to die’. And I know that Somali people die every day. And I am scared, so I ran away. The lawyer telephoned me: ‘Why don’t you come to the court?.’ I said: ‘I am scared because the life is very important and the man and his family telephone me and said you are going to die immediately.”*²²⁷

A Somali community leader reported that a case against police who were asking for protection money was now in the court, but: *The Somalis do not want to attend as witnesses. One has already been killed who has opened a case against police.*²²⁸

(vi) Watching Brief Non-legal Victim Support Assistance

Given the high levels of trauma reported by many of the refugee victims of crime who were assisted in terms of the watching brief for access to justice, victims often had needs that did not directly relate to the operation of the CJS. Several of the clients assisted in this programme were referred by the UCT Refugee Law Clinic for trauma counselling and for psycho-social support. Some clients obtained significant support from sharing their histories with either the attorney or the researcher on the project. For those that had follow-up meetings with Clinic attorneys, it was not unusual for the crime victims to express appreciation of the opportunity to speak about their experiences. Accompanying clients to

²²⁶ In an interview with the researcher (notes on file).

²²⁷ In an interview with the researcher (notes on file).

²²⁸ In an interview with the researcher (notes on file).

court was often a matter of great reassurance, particularly where the client feared intimidation from the accused.

For victims who had lost their livelihoods as a result of crime, there was often a grave need for financial support. To the extent that resources might be available, they were referred to appropriate social services agencies. For those that had suffered debilitating injuries, processes were put in hand to assist them with accessing the necessary documentation prior to referral for assistance with applications for a disability grant. Some of the participants in the programme were assisted with fulfilling their needs for medical care that were a direct outcome of their victimisation—such as additional treatment for burns. There would appear to be considerable scope for advocacy on access to health and rehabilitation services for refugee victims of crime, but this was not deemed to be part of this particular victims assistance programme.

The trauma experienced by refugee victims of crime, and its consequent effects on the ability of this group successfully locally integrating into South Africa cannot be underestimated. As the research indicated, a number of clients seen by the UCT Refugee Law Clinic for watching brief assistance expressed significant levels of despair and trauma. Significantly, victims of business crime who had not requested assistance from the Refugee Law Clinic were included in the research. In these instances, frustration and despair was often expressed in relation to experiences of poor response of the CJS. In addition, many of these refugees expressed profound fear of intimidation by accused and their families and/or associates. A twenty five year old male refugee who had been in South Africa for less than twelve months recounted how his father and two elder brothers had been killed in Somalia and that despite his attempts to get away from danger he felt he was no better off in South Africa. He asked:-

“How many people came here with their common sense and their life? And now they are shot and they are in the wheelchair. I am losing hope. You can have a heart attack. You are losing your memory...I left the location because of safety. I do not have formal education. I do not have degree to apply for a job. The only way that Somalis can go is to go to risk areas. But then we die. Here we have basic rights. But the people don’t know...All we see is the hatred and the fear.”²²⁹

²²⁹ In an interview with the researcher (notes on file).

Somalis who had been victims of crime often expressed the wish to return home as they considered it preferable to die in their homeland than in South Africa. Again recalling the experience of violence in his home country, he recalled:-

“My mother and father—in front of my eyes—they were killed inside their house, with a big grenade. I was saying ‘No’ when I saw that. But now I am saying better the way my father and my mother died [than what we face here].”²³⁰

Describing his anxiety following losing his business to a looting crowd in 2008, a 27 year old man stated that he was too scared to ever to back to the location. He recalled:-

“I was there when they were grabbing my stuff. I know they don’t like Somali people and I don’t want to go back. Every night I come across news of Somalis being shot. It is a headache now. I am looking to go somewhere. People who sleep have a happy heart. I don’t sleep. I forget even what I have. If I survive I am lucky. I don’t want to die in such a place. From 2004 until now, most of my friends died here. I cannot even count. More than 30 people I have seen die. Neighbour, friend. Friend, neighbour. It is better to go back to Somalia...”²³¹

A married man interviewed in September 2010 had experienced four violent attacks in just over two years in which he (and his business partners), lost goods of an aggregate value of R238,000. Totally unable to find the courage to start a business for the fifth time in such a short time, he sought social assistance as he was destitute and required assistance for rent and food. Despite no income, he was responsible for supporting his wife and the two male relatives that had been his employees in his last shop. During his consultations, he expressed despair and helplessness, and was often tearful. Given his depression and levels of fear, he was considered sufficiently vulnerable to make recommendation for consideration for resettlement by UNHCR.

²³⁰ In an interview with the researcher (notes on file).

²³¹ In an interview with the researcher (notes on file).

PART IV: DISCUSSIONS AND CONCLUSIONS

The foregoing parts of this report argued substantially that legal service providers, such as the UCT Refugee Law Clinic, have a key role to play in expanding the protection space for refugees in South Africa by assisting refugee victims of crime to access justice within the CJS. Such support contributes to the local integration efforts of refugees by upholding their human rights and by reducing the incidence of community and institutional xenophobia.

Notwithstanding certain limitations to the research as discussed above, data recorded during the monitoring of the watching brief program at the UCT Refugee Law Clinic during the research period allows some important observations to be made on the objectives, structure and value of such a programme. It has to be borne in mind that observations in this report are made on the understanding that they are provisional and initiatory, presented as a basis for discussion and further development of this important area of protection provision for refugees and asylum seekers in South Africa.

I Impact of Access to Justice Barriers

The research undertaken for this report confirms that barriers to access to justice within the CJS result in protection gaps for the urban refugee population in South Africa. The research specifically noted that institutional xenophobia, in particular, that of the SAPS, remains perhaps the most significant access to justice barrier for refugee victims of crime. Xenophobia was reported as a strong disincentive to reporting crime and violence. Examples, such as police officials refusing to open up cases, neglecting to follow up on individual charges and commonly interrogating and thus further victimizing the refugee victim were provided. As a consequence, the attitudes of victims to the police and the operation of the CJS, which is informed by victims' past experiences, disappointments and misunderstandings of the processes, are also barriers to accessing justice. One of the key objectives behind the UCT Refugee Law Clinic's expansion of its legal services to include watching brief victim support was its veritable sense, alongside that of refugee victims that a large number of police officials were refusing to treat refugees equally and without discrimination.

For victims of crime to participate in the CJS, they need to have confidence in that system. Refugee victims interviewed for this study often had little confidence in the capacity

of the CJS to protect them by effectively prosecuting perpetrators of violent crime. It could be said that, given the minimal engagement that most of the respondents had had with the process of being a claimant in the CJS, their experience of the system was largely limited to their engagement with officials of the SAPS.

There are several reasons that contribute to high levels of distrust and lack of confidence that are attached to SAPS officers by the refugee victims interviewed. Many clients of the UCT Refugee Law Clinic were victims of xenophobic violence in May 2008. In common with other reports on the SAPS response to the protection demands of those incidents,²³² several of those interviewed reported that their property had not been protected when it came under attack, although the police had assisted foreigners to leave the area. Some of the traders who took part in this research had also been victims of looting in July 2010, following the football World Cup.

The issue of lack of confidence in the police as the face of the CJS extends further than merely creating an access to justice barrier. A recent trend that has been identified in response to lack of police protection, and which requires further attention, is the bold radicalization of Somalis who are feeling the need to defend themselves from attacks, by either attempting to obtain gun licences or otherwise resorting to acquiring illegal firearms.²³³

Other distinct barriers to access to justice that exist for refugee victims of crime that have been reviewed in this report include language or communication barriers, where the lack of understanding of English or Afrikaans and of the ‘language of the law’ often impedes a refugee’s ability to be able to successfully navigate through the CJS. Further, refugees’ lack of embedded knowledge of bureaucracy and institutional culture in South Africa results in a deficit in terms of refugee victims’ tacit knowledge of the CJS. This is likely something that is taken for granted by South Africans. Finally, lack of resources to be able to easily participate within the various processes of the justice system is another barrier to accessing justice.

²³² See HRC (note 3 above) at p. 50; CORMSA ‘Protecting Non-Citizens in South Africa 2009’ at p. 36, available at <<http://www.cormsa.org.za/wp-content/uploads/Resources/CoRMSA%20Report%202009%20-%20Protecting%20Refugees,%20Asylum%20Seekers%20and%20Immigrants%20in%20South%20Africa.pdf>>.

²³³ Interview with the researcher and Alphonse Munyaneza, UNHCR Senior Regional Community Service Officer (notes on file with the researcher). One refugee describes the dilemma as follows: “*If you don’t take illegal gun, the other one he come and shoot you like a woman. We are becoming cowards here because of the democratic law. The police are arresting us because of the guns. And you are a businessman—you stay in one place and they know where you are... You are not walking around on the streets like these people [South Africans]*” (in an interview with the researcher (notes on file).

The pursuit of access to justice as part of the UCT Refugee Rights Unit's protection activities and through which refugee rights are secured is particularly important for urban refugees and their successful local integration in South Africa. The challenges to refugee victims' local integration, in particular to refugee traders and businessmen as described in this report, are significant. In this regard, the government of South Africa, the UNHCR and its partners, and other members of civil society must interrogate how they are meant to effectively promote the economic development, self reliance and local integration of refugees when many of these experienced entrepreneurs become so disillusioned at the levels of victimisation, violence and lack of appropriate institutional response that they are no longer able to pursue their livelihoods. For refugees subjected to repeat victimisations, the despair and trauma relating to the cycle of 'build and destroy' are explicable as are the difficulties of a legal service provider seeking justice for these much traumatized (and therefore difficult to understand) victims.

II Challenges to Watching Briefs

There were certainly considerable challenges experienced by the UCT Refugee Law Clinic to undertaking watching brief interventions, as envisaged in the framework developed for this program, for access to justice for refugee victims of crime. One difficulty arose from questions over the motivation that underlay people's decision to participate in the programme. As noted in this report, many refugee victims of crime opt not to pursue access to justice through the CJS as they view the personal costs and burden of participation as a complainant punitive and greatly outweigh the negligible potential gains and their desire to see justice done— both for themselves and for the ongoing security of their community at large.²³⁴

However, for those who are focussed on qualifying for resettlement to a third country, the prospect of having their criminal victimisation a matter of record with a UNHCR legal implementing partner was viewed by some as potential for acceleration of their acceptance

²³⁴ One client very honestly stated "...*what's the point [of pursuing a case through the CJS] if I am not going to get my money back?*" in an interview with the researcher (notes on file). In this instance the client lost R80,000 in latest attack, also experienced several previous losses and is now left unable to support his family. It should be noted that in most cases, even if an accused is caught and convicted of a crime, due to the fact that the offender is often impecunious, there is likely no chance for compensation for the victim for losses suffered.

for resettlement. Lack of clarity about the motives for requesting assistance would sometimes lead to confusing and vague instructions being issued to the Clinic attorneys.²³⁵

Another difficult aspect of the UCT Refugee Law Clinic representing clients in the watching brief interventions was that it often dealt with experiences that the victims had found highly traumatising. For those severely affected by violent crime or by persistent or extreme abuse by security officials, their needs were often complex. Whilst the attorneys at the Clinic might prefer to direct their practice strictly in terms of the law in criminal matters, watching brief interventions for access to justice demanded a much broader understanding of justice than the mere application of the law. The holistic approach to addressing the range of rights that may be contravened through inability to access criminal justice does not necessarily resonate with all legal practitioners and, indeed, requires an investment of resources—time, knowledge, information, empathy, and patience to name but a few—that are rarely available in a highly pressurised legal aid clinic context.

One of the most significant constraints in relation to the undertaking of criminal case watching briefs from the UCT Refugee Law Clinic's perspective is that of lack of dedicated personnel, including legal field workers, to such a program.²³⁶ It was strongly felt that additional resources to better capacitate such a programme would be worthwhile and beneficial to the target beneficiary group. The Clinic staff particularly recognized the importance of the watching brief interventions for the majority of the court appearances and direct interactions with the police and the prosecutors. These interventions necessitated being outside of the office for extensive periods of time. An individual watching brief requires significant time expenditure from an attorney, as many of the required interventions go well beyond merely calling or sending a fax to a police station to follow up on the investigation of a case. The number of court appearances for each matter and the amount of time spent in court at each appearance is great. A successful watching brief programme as envisaged therefore requires at least one full time dedicated attorney or programme manager, who will not only appreciate the need for the holistic approach to addressing the clients' needs, but will

²³⁵ This ambivalence around clients' motives would sometimes play out in the following manner. Some refugee victims of crime requested assistance with following up their cases with the CJS and then would be unavailable to receive feedback once they had established that the process was not going to assist them with resettlement. For the attorneys, it was sometimes difficult to commit the considerable resources that the watching brief interventions often demanded if it was thought that the request was motivated merely by resettlement goals.

²³⁶ The UCT Refugee Law Clinic acknowledges it was in a position to be able to pursue many of its current watching briefs only because the Refugee Appeal Board of South Africa (the body that hears and adjudicates appeals from rejected asylum seekers), had cancelled its appeal hearings from August 2010 until July 2011.

also be able to conduct the amount of field work that is required in order to receive appropriate responses from CJS officials.

III Value of the Watching Brief Programme

Analysis of the watching brief interventions should be assumed from various perspectives, including those of the refugee victims, the institutional stakeholders and officials, and the UCT Refugee Law Clinic attorneys. Overall, it can be stated that attitudes of the refugee victims of crime that sought assistance from the Refugee Law Clinic with the CJS were positive. Like the majority of crime victims in South Africa, refugees are bewildered by having to navigate the CJS on their own. As a result of their fear, inexperience, mistrust and possible disappointment from past negative engagements with officials in the CJS, they require dedicated victim support services. Without such assistance, they often forgo or compromise their rights, which has a negative impact on their ongoing integration efforts in South Africa. While victim support services preferably should be provided from the State (or be State supported), the overburdened South African CJS as well as other CSOs are currently not in a position to sufficiently provide these services for vulnerable refugee victims of crime. The criminal case watching brief support that the UCT Refugee Law Clinic provides to refugee victims of crime therefore helps to fill a gap in services and proves meaningful to many of those refugees seeking access to justice in the CJS. One refugee victim, assessing the impact of the Clinic's watching brief on him, stated that:-

“...we are happy you are calling- because we do not see before people following our cases. You feel pain for us. Because that's why you follow our stuff. Maybe you are doing your job-but also you feel pain for us.”²³⁷

The value of the UCT Refugee Law Clinic watching brief interventions to the CJS institutional stakeholders was felt by the Clinic to be positive, at least on the surface. The UCT Refugee Law Clinic's presence and interventions were generally appreciated by IOs and prosecutors, although for IOs in particular there was concern that in some instances that

²³⁷ In an interview with the researcher (notes on file).

presence was oversight rather than support.²³⁸ This observation should serve to inform the Clinic's means of intervening with the police when assisting refugee victims in their required interactions with the police.

The response to the UCT Refugee Law Clinic's interventions from senior SAPS officials, however, such as those within SAPS Crime Intelligence was very positive, as these officials understood the significance of cooperation between the police and organizations that provide victim support services, especially in the light of the scarcity of these services.²³⁹ These sentiments are echoed in South Africa's VEP guidelines, which confirm CSOs' importance as 'defenders of vulnerable groups and as partners in [victim] policy development and service delivery.'²⁴⁰

In terms of the value that the watching brief programme carried for the Refugee Law Clinic attorneys, at the outset it can be stated that formalization of the watching brief model assisted in raising the profile of such interventions amongst the Clinic staff members. As the watching brief programme developed it was quickly understood that in many cases, if a refugee victim was not assisted with considerable support, the prosecution of their case would fall apart and therefore the Clinic needed to devote as much time to such cases as it does to any other rights facilitation work that it undertakes.

In the past, consultations at the UCT Refugee Law Clinic with refugee victims of crime may have resulted in once-off calls or letters to the police to assist victims in opening cases. These were not normally followed up on, especially in cases where the victim did not maintain active contact with the Clinic. This practice has greatly transformed in that many refugee victims who currently approach the UCT Refugee Law Clinic for support are kept informed by the attorney of case updates and of their rights and obligations as the case proceeds within each stage of the CJS. While some of the interventions on the part of the Clinic attorneys proved overly time-intensive and frustrating, especially in relation to attempting to reach IOs and Prosecutors by phone or waiting in court for a matter to be heard, often once direct engagement was made, there was a sense that the efforts served some purpose.

²³⁸ In an interview with the researcher (notes on file).

²³⁹ Interview with the researcher and a SAPS Crime Intelligence Senior Official (notes on file).

²⁴⁰ DSD (note 120 above) at p. 21.

Certainly, attendance of the UCT Refugee Law Clinic attorneys in court led to engagement with the relevant officials to good effect. Clinic attorneys felt that their presence raised awareness with Prosecutors and Magistrates that legal advocates for the victims were supporting them and monitoring the progress of their cases. In many cases, the attorneys' interventions assured that the victim's and the community's voices were properly heard, that a court hearing would actually be able to proceed or that an important postponement was granted, rather than the matter being struck off the roll. The opportunity to informally educate justice officials about the rights and needs of refugee victims in every interaction was also extremely gratifying for the Clinic attorneys. In terms of the watching brief framework, it was noted that the use of this guide depends on the attorney's knowledge of the CJS, the extent to which the justice officials are willing to work with civil society and the perseverance of the attorney.

Lastly, the effectiveness of the watching brief interventions must be assessed within the context of the current resource constraints of the UCT Refugee Law Clinic. In such an environment, the Clinic is required to make strategic decisions about what interventions are necessary for each refugee victim of crime that requests its assistance. Currently, factors affecting such a decision may include the goals and the capacity of the client, the strength of the case, the workload of the attorneys, and the relationship with and confidence in the particular IO, SAPS station or Prosecutor. Notably, if the watching brief program is to be better capacitated, many of these factors would still be applicable in determining whether and in what form to assist a client in achieving the ultimate goal of access to justice.

IV Recommendations

(a) For the UCT Refugee Law Clinic & Other Refugee Legal Service Providers

- Continue to undertake watching brief interventions on behalf of refugee victims of crime.
- Given the lack of current resources/capacity, ensure that strategic decisions are taken for each refugee victim that requests support (and for those that are already being assisted), taking into consideration the client's needs, capabilities and objectives, the complexity of the case, the workload of the attorney, the necessity for a particular intervention, and the prospect of that intervention being successful.

- If a decision has been taken that the Refugee Law Clinic's attendance may not take place,²⁴¹ ensure that the client is informed of the decision, advised of any likely occurrence, and if appropriate, that feedback is provided to the community.
- Engage with partner legal service providers to exchange information about best practices, to encourage the use of the UCT Refugee Law Clinic watching brief model as a guide for interventions, and to develop strategies to promote access to justice for refugee victims of crime.
- Strengthen relationships with senior SAPS officials with a view to develop streamlined protocols for intervention where attorneys are experiencing lack of cooperation from particular SAPS IOs or Stations Commanders in opening up or investigating cases involving refugee victims of crime.
- Be aware of and continue to advise refugee victims of the various complaint mechanisms or channels that exist to hold justice officials accountable for their actions and provide assistance to those who are willing to follow with these processes to completion.
- Research and develop a watching brief model for matters where police misconduct or unlawful police behaviour targeting refugees are reported, including engaging with and following closely on the processes of the ICD, the Police Inspectorate and the Public Protector.
- Conduct, coordinate and advocate for ongoing refugee law, immigration law and human rights training for SAPS, NPA and the judiciary.
- Lobby for improved government funding to CSOs providing victims services in support of government's stated VEP policy, in particular to make such services available to refugees as vulnerable victims of crime.
- Continue to provide education and training to refugees about the functioning of the CJS and the rights of victims through training of community leaders and distributing educational materials.

(b) For the Government of South Africa

- Recognizing the need to mainstream victims' services to include refugees, as well as recognizing that refugee victims also have specific needs, include refugee victims of

²⁴¹ For example, if the attorney confirms with the prosecutor ahead of time of a likely postponement.

crime as a constituency within wider victim empowerment initiatives, in particular when the crime is identified as xenophobic in nature.

- Ensure that remedial alternatives for victims of crime, such as complaints desks and/or toll-free telephone lines are implemented to tackle incidents of secondary victimisation and are available in the main refugee languages.
- Make proactive efforts to cultivate the cooperation of CSOs capable of providing victim services, including providing guidance on how the needs of vulnerable groups of victims will be responded to and to identify the role that GoSA expects CSOs to serve.
- Make clear guidelines for CSO participation and engagement with criminal justice actors, for example how to engage with the NPA's court preparation officers.
- Capitalize on the substantial expertise and experience of victim support service providers such as the UCT Refugee Law Clinic to develop the necessary strategies to ensure that refugee victims of crime are sufficiently supported.
- Make additional funding available to specialized CSOs, with proven track records of providing victim support services for refugee victims of crime.
- Ensure that crimes against refugees, including crimes motivated by xenophobia, and opportunistic crimes that exploit the marginal position held by non-nationals in society, receive adequate focus and judicial response.
- Provide ongoing training in refugee law, immigration law and human rights for SAPS and the NPA.
- Ensure that, at least in the major urban centres, sufficient court interpreters in the main languages of refugees exist.
- Increase coordination and cooperation between government departments to facilitate access to victims support services for refugees.
- Recognizing that the effective prosecution of crimes against refugee victims is insufficient on its own to counter xenophobic tendencies, develop interventions to promote accountability and counter the culture of impunity.²⁴²
- Increase efforts to educate the public on refugee rights in order to promote a human rights culture and raise awareness of refugee rights and obligations, focused on the law, on implications of not respecting the law, and on methods for combating discrimination and xenophobia.

²⁴² See IOM (note 3 above), for further discussions of what these interventions may entail.

(c) For the UNHCR in South Africa

- Encourage the government of South Africa (GoSA) that frontline officials in the criminal justice departments such as SAPS and the DOJCD require critical training on refugee law, immigration law, and in respect of challenging and overcoming attitudinal barriers.
- Assist the GoSA to train and educate CJS officials by developing training materials that outline the rights and obligations of refugees in general, and their specific needs and vulnerabilities as victims of crime.
- Assist the GoSA to devise strategies aimed at mainstreaming victim services to refugees.
- Support the GoSA in its efforts to address xenophobic and discriminatory practices in public institutions and amongst the South African public, in order to combat the impunity with regard to crimes committed against refugees.
- Develop a wider network of implementing partners to ensure that all refugee victims of crime in need of assistance are properly supported.
- Provide additional support to capacitate its legal implementing partners to undertake criminal case watching brief interventions for refugee victims of crime.

APPENDIX A: RESEARCH METHODOLOGY

The research is a qualitative study of the potential for a watching brief model of interventions in the CJS to improve access to justice for refugee victims of crime in the Cape Town area of the Western Cape. The model was developed by the Refugee Law Clinic of the Refugee Rights Unit at the University of Cape Town and its use evaluated during the research period, from September 2010 to March 2011.

The research proposal was submitted to the UCT Law Faculty's Research Ethics Committee for ethics clearance. As part of the commitment to conducting the research in an ethical manner and to ensuring appropriate protection of participants, a letter of introduction was provided to each potential interviewee prior to their agreeing to participate. The aims of the research and their freedom to choose not to participate, without penalty, were explained to each participant, using an interpreter where necessary.

Although the practice of support refugee victims of crime in various stages of their engagement with the CJS was not new at the UCT Refugee Law Clinic, the activities in this respect had been somewhat ad hoc prior to the commencement of the research programme. In order to document how such interventions might be programatised, it was necessary in the first place to develop a formal framework of possible interventions that related to the different stages of the progress of a case through the CJS. This was achieved through an iterative process of consultations between the researcher and the attorneys at the UCT Refugee Law Clinic.

At the outset it was decided that cases to be included in the watching brief research programme would be those where refugee or asylum seeker clients of the Clinic requested assistance in terms of any crime that had been committed against them. It was not the intention to limit the study to crimes that might be considered xenophobic in nature, although many of the crimes reported did have apparently xenophobic elements to them.²⁴³ No

²⁴³ The reasons for eschewing the label xenophobic were threefold: First, it was acknowledged that many police stations refuse to identify attacks against foreigners as "xenophobic", claiming that they represent "normal" crime against property; Secondly, the objective was to focus on a particular type of victim (refugees and asylum seekers), rather than a particular type of crime (hate-motivated); And finally, it is arguable that without knowing the motivation of the perpetrator (declared at the time of the incident or subsequently), it would not be possible to know whether the crime qualified as xenophobic. This is particularly so in the absence of agreed legal formulations in South Africa of xenophobia as a hate crime.

limitations were applied in terms of the alleged perpetrators of the crimes, who included nationals, non-nationals and private persons and state officials.²⁴⁴

Refugee victims of crime normally either refer themselves to the UCT Refugee Law Clinic or they are referred by NGOs and other UNHCR implementing agencies providing services to refugees. Some of those that took part in this research were referred to the Clinic by the researcher after being interviewed in the field. Twelve of the cases taken into the programme were already receiving victim support services from the Clinic prior to the commencement of the research.²⁴⁵

It is difficult to give an accurate number of people served during the period that the watching brief programme was reviewed. Some cases involved more than one complainant. For example, one case was brought to the UCT Refugee Law Clinic by three members of a community organisation but it involved a large number of complainants who were victims of several incidents of robbery by an armed gang. In total, thirty cases received watching brief interventions for the support of victims of crime during the period of the project. In addition, there were numerous advocacy interventions that precluded direct engagement with the formal processes of the CJS, such as those in relation to harassment of night-time informal car guards.

Four main **classes of data** were used for the research: (i) Open-ended interviews were conducted with refugee victims of crime; (ii) Observations were made during court hearings; (iii) Legal Practitioners at the UCT Refugee Law Clinic were interviewed; and, (iv) Officials involved directly or as stakeholders in the various stages of the CJS were also interviewed.

Refugee Victims of Crime: An important part of understanding the access to justice challenges for the refugee victims of crime was to have information on their histories of victimisation and their previous experiences of engagement with the CJS. Victims of crime who agreed to be interviewed for the research were asked to give a history of their experience of being victims of crime since their arrival in South Africa. In open-ended interviews, the

²⁴⁴ As the system by which abuse by police officers is investigated is somewhat different from criminal acts by citizens, the extent to which crimes committed by SAPS and other state officials were included in the analysis is limited to those cases that remained in the CJS. Observation of the operation of the Independent Complaints Directorate and the role of victim support for refugees making applications to the ICD was therefore excluded from the report.

²⁴⁵ Given the very slow progress of most cases through the various stages of the CJS, it was decided that including cases that had been brought to the attention of the UCT Refugee Law Clinic prior to the commencement of the research project was necessary in order to have an opportunity to report on UCT Refugee Law Clinic watching brief interventions in the later stages of the CJS.

information sought included the type of incidents, the victims' actions following the incident and their experience of working with elements of the CJS. Victimization histories were taken from thirty-nine respondents. Where necessary, interpreters were used.²⁴⁶ For the most part, these were provided by the interviewees themselves.

Refugee victims of crime were identified for these interviews initially through contact details provided by attorneys at the UCT Refugee Law Clinic. Thereafter, where conditions encouraged, victims of crime put themselves forward for interview. This was particularly the case in the Somali community where (a) they are particularly concentrated in certain suburbs; (b) they have strong community networks that share information; and (c) Somali nationals in Cape Town have been particularly prominent amongst foreign nationals targeted for violent crime.

Amongst the security crimes group of victims, the researcher had established networks with the largely Francophone African community of informal car guards in certain areas in Cape Town. In the light of having worked with members of this group in the past, she brought to the UCT Refugee Law Clinic existing data, in the form of records, on the circumstances of criminal victimisation of those included in the programme during the research period. During the course of the research, consultations were conducted with fourteen informal night-time car guards who were victims of harassment by security officials.

Observations: The researcher attended court, as an observer, for nine hearings—both bail applications and trials.

Legal Practitioners at the UCT Refugee Law Clinic: Attorneys with watching brief cases were interviewed twice during the research period regarding the progress of their cases. In addition, for some cases, regular updates were obtained from the attorneys.

Interviews with Officials and other Stakeholders: The report is informed by input from seventeen officials involved with the CJS, UNHCR and relevant NGOs. The data is from open ended interviews, telephone interviews and from various meetings convened by SAPS to address the problems of crimes against foreign nationals.

A number of **limitations** were evident in the conduct of the research. These relate both to the design of the research and to the conditions in which the research was conducted.

²⁴⁶ Interpreters were used only for Somali respondents who did not speak sufficient English, as the researcher was able to interview other participants in either English or French.

Motivation of interviewees: Despite clearly stating to each participant that being interviewed had no bearing on any claim for resettlement and would not be part of any resettlement adjudication, some of the Somali participants nonetheless subsequently demonstrated that they had considered the opportunity to tell their story of victimisation as a potential promotion of their resettlement claim.

Trauma of interviewees: A significant number of the interviewees had been traumatised, some severely, by their experiences of crime and of what they experienced as lack of assistance subsequent to their victimisation. In a few of these cases the researcher was able, due to her being in the field, to take up advocacy issues for individuals who had urgent needs that could not be immediately addressed by the UCT Refugee Law Clinic.

Demographics of interviewees: Somali males predominate in the interview population. This does not reflect the work of the UCT Refugee Law Clinic, or the intention of the watching brief programme for victims of crime. The Clinic serves the legal support needs of all refugees, regardless of nationality. However, issues such as the characteristics of those targeted for violent crime and for crimes of harassment by security officials, together with the work routines and residential location of refugee victims of crime shaped the profile of those included in the programme. Location shop-keeping and informal night-time car guards are livelihood niches occupied by Somali and Francophone African refugees respectively. While the former group are concentrated residentially in two suburbs of Cape Town, Francophone Africans live dispersed throughout the city. A further contribution to the high rate of inclusion of Somali victims in the programme relates to the activism of the community based organisations that serve the Somali community and their consequent self-referrals.

Types of crime included in the watching brief interventions: The vast majority of crimes included were property crimes, followed by abuse by security officials. There were no gender based crimes included in the programme. This is clearly not representative of victimisation experience and is therefore a matter that requires further reflection in relation to the practice of the programme.

Limited range of processes observed: The relatively short duration of the research and the extremely slow progress of cases through the CJS, together with the high attrition rates of cases, meant that the vast majority of watching brief interventions by the UCT Refugee Law Clinic related to the very early stages of the workings of the criminal justice process.