



Protecting Refugees, Asylum Seekers and Immigrants in South Africa

**Johannesburg
June 2009**





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About the Consortium for Refugees and Migrants in South Africa

The Consortium for Refugees and Migrants in South Africa (CoRMSA) is a non-profit, non-governmental organisation committed to the promotion and protection of refugee and migrant rights. It is comprised of member organisations and individuals dedicated to protecting the life and welfare of refugees, asylum seekers, and other international migrants entering or living in the Republic of South Africa.

CoRMSA uses its membership network to advocate for rights-based refugee and immigration policies and laws, promote best-practice models, and encourage compliance with minimum international and national constitutional standards. In order to achieve these objectives, the CoRMSA programme includes advocacy, research, public awareness, capacity building, and networking.

The Consortium's members are:

- Amnesty International, South Africa Chapter
- The Black Sash
- Centre for the Study of Violence and Reconciliation
- Christians for Peace in Africa
- Coordinating Body of Refugee Communities
- Durban Refugee Service Providers Network
- Forced Migration Studies Programme, University of the Witwatersrand
- Jesuit Refugee Service
- Lawyers for Human Rights
- Musina Legal Advice Office
- Planned Parenthood Association of South Africa
- Refugee Children's Project
- Refugee Ministries Centre
- Refugee Pastoral Care
- South African Red Cross Society
- Southern Africa Centre for Survivors of Torture
- Tutumike Refugee Network, Cape Town
- University of Cape Town Law Clinic
- University of the Witwatersrand Law Clinic

Membership in the organisation is open to any South Africa-based organisation or individual with an established record of work on behalf of refugees, asylum seekers, or other migrants. CoRMSA is managed by an executive committee comprised of eligible members elected at the annual general meeting.

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REMARKS FROM THE CHAIR

CoRMSA welcomes President Zuma's new administration. We hope that the restructuring of the Cabinet will mean positive and proactive changes in policy with regard to the integration and protection of migrants, asylum seekers, and refugees. We also look forward to constructive engagement with the new Minister of Home Affairs, Nkosana Dlamini-Zuma. The previous Minister of Home Affairs, Nosisiwe Mapisa-Nqakula, announced a drastic shift in policy towards Zimbabweans shortly before she left office. This includes visa-free entry for Zimbabweans and a special dispensation which will permit Zimbabweans to remain in the country for six months at a time with the ability to engage in casual work. The most significant change in respect of Zimbabweans was the announcement of a moratorium on deportations in April. This change in policy was long overdue and CoRMSA applauds this initiative. We now await the roll-out of the special dispensation permit. The announcement was made in April but, as this report goes to press, we remain uncertain about the implementation date of this permit.

Former Minister Mapisa-Nqakula also initiated a process of migration policy review and we hope the new administration will continue with this process and be mindful of contemporary international and domestic developments in the migration arena. CoRMSA also encourages the new administration to sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearances and the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families. Despite assurances from the Department of International Relations and Cooperation in 2008 that South Africa would sign both these conventions, no steps have been taken in this direction.

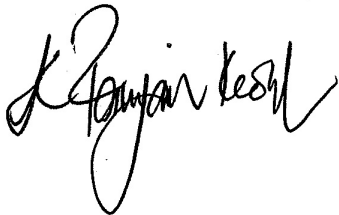
More than a year has elapsed since the outbreak of the xenophobic attacks of 2008 and not much has changed for the thousands of people who were affected and displaced during the violence. Instead we have seen displaced persons being evicted from safety camps and the deportation of victims of violence. The state has been largely silent in the aftermath of this violence, which was of a level and intensity of violence not seen since the 1994 elections. Almost as many people were killed and injured during this violence as in the 1960 Sharpeville attack, yet the xenophobic violence has not attracted the same level of scrutiny or sustained public outrage. Despite the arrest of many perpetrators in the days immediately following the attacks, only a small number have been successfully convicted. What kind of message are we sending out as a result of this response from the institutions that are tasked with meting out justice? If the state effects such a low level of retribution, does it mean that this kind of discrimination is acceptable in South Africa?

In the years leading up to our first democratic elections, our leaders worked tirelessly to ensure that we had a watertight constitution so that we would never again endure the discrimination and prejudice of the apartheid era. However, it seems that this protection is only intended for wealthy immigrants; citizens; and those who display local accents and style or have mastered a dominant South African language. What about everyone else? From the sentiment expressed by those involved in purging our communities of non-citizens, it seems that non-citizens should not be protected by the very instruments which we use to protect ourselves. Racism, sexism, homophobia, xenophobia—all are forms of prejudice directed at different groups in our society. We have laws to

protect us from this kind of discrimination. Where were these laws during May 2008, and where, indeed, are they now? This leaves me with an uncomfortable feeling: after local communities have directed their venom at non-nationals, who will be next?

There are days when I am embarrassed to call myself a South African. I cannot understand how people can turn on their neighbours and friends, unleashing hatred and violence, and feel justified in doing so. I am disgusted and disappointed by fellow South Africans who participated in and incited the violence. I am also disappointed by the state's response in the aftermath of this violence and by its failure to ensure that we never again witness the level of violence, destruction of property, looting and mayhem that we saw in 2008. I applaud those individuals and communities who refused to participate in the violence, or worked to prevent or curtail it. And to those who offered help and support to displaced persons, I thank you.

We hope that this new administration ensures that countering xenophobia remains a priority. I dedicate this report to the memory of those persons who lost their lives during the 2008 xenophobic attacks and encourage the new administration to ensure that these lives were not lost in vain.



Kaajal Ramjathan-Keogh
Chair, CoRMSA Executive Committee

ACRONYMS

AIDS	Acquired Immunodeficiency Syndrome
ANC	African National Congress
APRM	African Peer Review Mechanism
ARASA	Aids and Rights Alliance of Southern Africa
ART	Anti-Retroviral Treatment
CALS	Centre for Applied Legal Studies
CASE	Community Agency for Social Enquiry
CBO	Community-Based Organisation
CCMA	Commission for Conciliation, Mediation, and Arbitration
CFR	Case Fatality Rate
COJ	City of Johannesburg
DHA	Department of Home Affairs
DoE	Department of Education
DoJ	Department of Justice
PEP	Post-Exposure Prophylaxis
DoL	Department of Labour
DPLG	Department of Provincial and Local Government
DSD	Department of Social Development
HANSA	Humanitarian Assistance Network of South Africa
HIV	Human Immunodeficiency Virus
HSRC	Human Sciences Research Council
IDP	Internally Displaced Person
ILO	International Labour Organisation
IOM	International Organisation for Migration
IPEC	International Programme on the Elimination of Child Labour
ISS	Institute for Security Studies
JRS	Jesuit Refugee Service
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
MSF	Médecins Sans Frontières / Doctors Without Borders
NAFCOC	National African Federated Chamber of Commerce and Industry
NDOH	National Department of Health
NDoSD	National Department of Social Development
NGO	Non-Governmental Organisation
NIB	National Immigration Branch
NSP	National Strategic Plan for HIV, AIDS, & Sexually Transmitted Infections
OCHA	Office for the Coordination of Humanitarian Assistance (UN)
PEP	Post-Exposure Prophylaxis
PHC	Primary Health Care
PMTCT	Preventing Mother-to-Child Transmission (of HIV)
RAB	Refugee Appeal Board
RCP	Refugee Children's Project

RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SALRC	South African Law Reform Commission
SANAC	South African National AIDS Council
SANCO	South African National Civic Organisation
SAPS	South African Police Services
SAQA	South African Qualifications Authority
SCA	Supreme Court of Appeal
SMG	Soutpansberg Military Grounds
SOCA	Sexual Offences and Community Affairs
SWEAT	Sex Worker Education and Advisory Taskteam
TB	Tuberculosis
TECL	Towards the Elimination of the Worst Forms of Child Labour Project
TIP	Trafficking in Persons Report
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNOCHA	United Nations Office for the Coordination of Humanitarian Assistance
UNODC	United Nations Office on Drugs and Crime
VCT	Voluntary Counselling and Testing
WHO	World Health Organisation
WLC	Wits University Law Clinic

SUMMARY OF FINDINGS AND RECOMMENDATIONS

CoRMSA welcomes President Zuma's new administration and looks forward to positive and proactive policy changes to protect migrants, asylum seekers, and refugees in South Africa. Former Department of Home Affairs (DHA) Minister Mapisa-Nqakula initiated a process of migration policy review and we hope the new administration will continue with this process. Pragmatic policy reforms will not only assist migrants, but will encourage investments in South Africa, help build the country's economy, and promote the universal principles of human dignity to which South Africa is committed.

The following report outlines a series of migration dynamics and critical issues that should inform any policy review. As the May 2008 violence against non-nationals starkly illustrates, effectively addressing migration is critical to human security, the country's developmental trajectory, and South Africa's international reputation. As the economy slows and South Africans begin to lose jobs, there will be growing pressure for even more restrictive migration policies. However, bowing to these pressures would be backward-looking, regressive, and self-defeating.

We will find no answers to South Africa's problems by halting migration. Substantively restricting migration is neither possible nor is it a solution. Migration is not a threat to South Africans' economic or physical security. Managed properly it can lead to investment, job creation, and a more productive economy. Only through thorough policy reform and effective protection of migrant and citizen rights will South Africa be able to address its population's need for economic and physical security. Moreover, as past years have demonstrated time and time again, allowing any segment of the population to remain marginalised and outside of social and legal protection puts us all at risk. A new policy framework should focus on the efficient import of skills; rights-based management of asylum seekers and refugees; management of economic immigration that promotes national and regional development; management of a variety of risks associated with the different policy options; and ensuring effective and distinct macro- and micro-level refugee and migration management.

This year's report focuses on key elements of refugee and migrant rights protection in South Africa. Based on extensive research by CoRMSA and its partners, each section offers a series of recommendations to promote positive and pragmatic reforms. The report draws particular attention to how little has been done to address violence against non-nationals and the country's limited ability to provide humanitarian assistance. The lack of resources and humanitarian coordination augurs poorly for the country's ability to protect anyone, citizen or otherwise, should we face a natural or man-made disaster. The report also considers policy towards Zimbabwean migrants and what are often ill-informed and dangerous policies to curb human trafficking and smuggling.

The points below provide a summary of the report's primary findings and recommendations.

Violence Against Non-Nationals

- Violence against non-nationals has been a long-standing and increasingly prominent feature of post-Apartheid South Africa. The May 2008 attacks reflected fundamental tensions and

dysfunctions in contemporary South African society and politics. More than a year on, the factors that led to the violence have not been addressed. There is little reason to believe that violence against non-nationals and other 'outsiders' will not happen again.

- Anti-foreigner violence is not a consequence of a 'third force', poor border control, changes in national political leadership, rising food and commodity prices, or poor service delivery. Nor was the violence a direct result of poverty or joblessness. Instead, the violence was fundamentally the result of institutional marginalisation of some poor and non-citizen residents, and of local government failures.
- In almost all cases where it occurred, violence was organised and led by identifiable local groups and individuals—primarily official or self-appointed community leaders—who used the attacks to further their political and economic interests.
- Officials' visible ambivalence regarding the violence and its victims has helped entrench public convictions that non-citizens are not equal before the law. There are also indications that some police officers supported or passively tolerated the violence and others were involved in looting.
- Claims that the post-violence reintegration has been peaceful and unproblematic are false. While many non-nationals who fled in fear of the violence have returned to South African communities, these are typically to communities where violence did not occur. There is evidence that those returning to communities where attacks took place face threats of further violence. Since May 2008, local leaders have made numerous public statements that they did not want non-nationals back in their communities and have continued to make overt threats against them.
- Non-nationals have been repeatedly attacked and killed in South Africa over many years with few being held accountable for these hate crimes. Actual and perceived impunity only encourages further attacks.

Recommendations

- Initiate ongoing, systematic enquiries into anti-migrant and anti-outsider violence.
- Encourage a speedy, thorough, and independent enquiry into the May 2008 attacks.
- Ensure prosecutions and strengthen justice mechanisms.
- Identify and implement effective and law-bound conflict resolution mechanisms and establish effective early-warning and response systems.
- Evaluate the roles and actions of community leadership structures, and adjust functioning and/or oversight measures in accordance.

- Address institutionalised xenophobia and discrimination.

Humanitarian Responses to Displacement

- The events following May 2008 revealed serious shortcomings in the country's ability to respond to people in need. We must learn lessons from the experience in order to improve responses in the case of future displacement.
- The role of civil society organisations in reacting quickly and flexibly to humanitarian needs and providing a wide range of crucial services was impressive. There were also many government employees who invested time, energy and care beyond their formal duties.
- One of the most important barriers to effective disaster response in May was the lack of government leadership. Coordination and communication were among the most important issues and those managed least effectively. Indeed, there was little or no effective national coordination of responses from government and civil society.
- There were no generally accepted norms and standards for humanitarian service provision. This lack of emergency preparedness puts all South African residents at risk.
- The continuation of 'immigration control' approaches during the initial phases of the emergency led to protection failures. This included the arrest and deportation of some displaced persons who did not have documentation.
- The government's 'reintegration' programmes for the displaced were particularly problematic, in that they did not engage with the protection needs of people returning to violent areas, nor with the complexity of migrants' livelihoods and township politics.

Recommendations

- Conduct a formal evaluation of the governmental disaster response to the May 2008 violence.
- Review the National Disaster Management Framework in relation to its applicability to civic disturbances and displacement due to violence.
- Include civil society representation on governmental disaster management structures both prior to and during disasters and develop clear protocols for information exchange and coordination with civil society.
- Continue strengthening and expanding the Humanitarian Assistance Network of South Africa (HANSA) as a network dedicated to early warning, capacity building, information sharing and—in the case of an ongoing disaster—coordination, communication and monitoring.

- Engage constructively with governmental disaster management structures towards the development of clear protocols for information exchange and coordination both prior to and during disasters.

Zimbabwean Migrants in South Africa: Legal and Humanitarian Responses

- Zimbabwe's temporary political stabilisation has neither stopped nor slowed new arrivals of Zimbabweans in South Africa. We should expect to see similar levels of migration for the next two to five years. If the Government of National Unity collapses, even larger volumes of migration could occur.
- After many years of ignoring the particular needs of Zimbabwean migrants, in April 2009, the South African government announced a new migration management regime in relation to Zimbabweans, including a moratorium on deportations, a 90-day free visa for Zimbabweans entering South Africa, and a 12-month special dispensation permit for undocumented Zimbabweans already in the country. The deportation moratorium and free visa were implemented immediately, while the special dispensation permit has not yet been implemented. However, the moratorium on deportations has not meant a complete stop to the arrest of undocumented Zimbabweans.
- CoRMSA strongly supports the new permits and hopes that Cabinet will recognise the importance of these initiatives for the protection of human rights and for development in South Africa and the region. If fully implemented, this three-pronged policy to regularise movement between Zimbabwe and South Africa is likely to have a range of positive impacts for both South Africans and Zimbabweans.
- The primary barrier to the success of this otherwise extremely useful initiative is likely to be the difficulties Zimbabweans continue to face in accessing the forms of identification that South Africa has agreed to recognise.
- Recent research has shown that on aggregate, Zimbabweans face more acute social and human security challenges than either South Africans or other non-nationals. These challenges include access to public services, assets and income, physical insecurity, and feeling threatened because of their nationality. Many Zimbabwean organisations report rising xenophobic threats.
- Although most Zimbabweans are young adults, Zimbabwean children in the border area are especially vulnerable. The largest concentrations of Zimbabweans are in the Limpopo province border areas and Gauteng, but many have also settled in other parts of the country, including small towns and rural areas.
- The arrival of large numbers of Zimbabwean nationals in smaller municipalities has illustrated shortfalls in inter-departmental cooperation. There appears to have been little support or ongoing engagement from better resourced tiers of government to ensure that

the needs of a vulnerable population are met. Temporary shelter, especially in Musina and in metros with high concentrations of Zimbabwean residents and transients, remains a critical need.

Recommendations

- The DHA should push for strong, inter-ministerial political and administrative support for the special dispensation permit for Zimbabweans. It should also continue engaging with SAPS to ensure the appropriate implementation of nationality verification and the release of Zimbabwean nationals arrested for being undocumented.
- The DHA must provide access to the asylum process for Zimbabweans who have experienced persecution, independently of alternative documentation options made available.
- The Department of Cooperative Government and Traditional Authorities should actively engage the Musina Municipality to address the ongoing need to provide shelter for newly arrived migrants in Musina.
- The Department of International Relations and Cooperation should encourage the government of Zimbabwe to support the provision of reasonably priced travel documentation to Zimbabwean citizens.
- The Departments of Social Development, Health, Education and Human Settlements should ensure that Zimbabwean and other migrants have access to the basic welfare services to which they are entitled by educating and monitoring ground-level staff of the rights of documented and undocumented migrants.
- The Department of Social Development (DSD) should work with municipalities and civil society to provide temporary emergency shelter and humanitarian assistance to the most vulnerable Zimbabweans, integrating all such services with mechanisms already in place for vulnerable South Africans.
- The police should verify the nationality of Zimbabweans and release those arrested for being undocumented.
- Municipalities should follow the initiative of the City of Johannesburg and Gauteng Province in integrating temporary emergency shelter provision for vulnerable South Africans and non-nationals.
- The UNCHR, the South African Human Rights Commission (SAHRC) and civil society should monitor the asylum system to ensure that Zimbabwean asylum seekers are not discriminated against due to the introduction of the special dispensation permits.

Human Trafficking

- The current South African discourse on trafficking remains primarily informed by just two pieces of research: a study by Molo Songololo (2000)—a Cape-Town based NGO—on the sexual exploitation of women and children in the Western Cape; and an investigative study by the IOM. However, the numbers of trafficking victims quoted by these seminal reports were not based on rigorous, quantitative research, but rather on estimates that were likely inflated.
- While many organisations and government departments were concerned about child trafficking and prostitution, few had encountered cases of this form of abuse. It seems apparent from these assessments that child trafficking and even child prostitution are not commonly encountered by organisations or government departments in these areas in South Africa. As such, the problem may not be as severe as concerned parties have claimed it to be.
- New research has found that trafficking was not prevalent in the sex work industry in Cape Town. Indeed, two years of intensive research in the industry failed to reveal a single victim of trafficking.

Recommendations

- Civil society and international organisations should spend less time developing counter-trafficking strategies and more time and effort on ensuring that the sex work industry itself is decriminalised and regulated to prevent exploitative situations that result from the vulnerabilities of migrant women. Similarly, the Department of Labour (DoL) should improve monitoring of other potentially affected sectors.
- Parliament should resolve the inherent contradictions between the intentions of counter-trafficking legislation and the continued criminalisation of the sex work.
- The DoL should promote fair working conditions for potential victims of trafficking.

Human Smuggling

- Whereas human trafficking is relatively rare, human smuggling is a common practice along South Africa's borders. Smuggled migrants often experience horrific forms of exploitation and physical violence. In some cases, border smuggling operations involve individuals within the police or immigration departments. Migrants smuggled across the border are vulnerable to abduction, rape and murder by criminal elements that are difficult to distinguish from smugglers themselves.
- Generally, human smuggling in South Africa does not seem to be connected to the practices of goods-smuggling or human trafficking.

- Increasing the police presence along the border is unlikely to alter long-term migration patterns, but it is likely to encourage corruption, human smuggling, and other trans-national black market activities.

Recommendations

- The South African Police Service (SAPS) should institute measures to identify and address corruption and smuggling-related abuses within its ranks.
- Police should enhance the assistance its officers provide in accessing the refugee reception system to potential asylum seekers who are apprehended during undocumented crossing .
- Police should shift the emphasis of border-control policing towards control of smuggling-related criminal activity and away from apprehending undocumented border-crossers.
- DHA and others should continue working toward a regulatory framework that eases the legal and documented entry of non-nationals into South Africa.

Arrest, Detention, and Deportation

- CoRMSA has been encouraged by Home Affairs' tentative decision to provide a free 90-day visa to Zimbabweans and by the court decision declaring the police detention centre on the Zimbabwean border unconstitutional and illegal. But, while lawmakers have been scrambling to adjust the rules to handle the realities of migration, ordinary officials continue to invent new and often illegal ways of controlling migration on the ground.
- Individual police stations and officers often decide for themselves how to treat suspected 'illegal foreigners', leading to multiple irregularities and rights abuses. Perhaps the most obvious and long-term problem has been police officers' extortion of migrants for bribes, which appears particularly pronounced in inner-urban areas and amongst police reservists.
- Recognising that policing immigration detracts from the policing of crime and encourages corruption, the SAPS has issued a National Level Instruction stating that immigration control should not be a policing priority.
- Over the past year, CoRMSA has noted an increase in the use of punitive measures in the immigration enforcement system. The DHA has been increasingly using the criminal offence provisions of the Immigration Act to impose fines for expired asylum seeker and refugee permits. In addition to the problem of fines, asylum seekers are often arrested on their way home from a day queuing unsuccessfully outside a Refugee Reception Office. In many instances, both the DHA and SAPS unnecessarily prolong the detention of suspected 'illegal foreigners'.

- Every year, approximately 50,000 non-nationals are detained at the Lindela Detention Centre before being deported to their countries of origin. Based on legal service providers' interaction with clients, there appear to be few improvements in the problems with Lindela highlighted in previous CoRMSA reports. These include: routine violence; disciplining with tear gas; corruption and bribery; insufficient food; lack of reading and writing materials; lack of access to telephones; denial of medical care; indefinite detentions without judicial review; and detention of asylum seekers. Apart from sub-standard detention conditions, CoRMSA is concerned over detainees' almost complete lack of access to legal protection.
- In many cases, the police detain and deport people without due process and in violation of the Immigration Act.
- In the rare cases where detainees at Lindela have access to legal representation, it is not uncommon for DHA to ignore correspondence, deport asylum seekers pending court hearings, and even disregard court orders.
- While the moratorium on deporting Zimbabweans is being adhered to in the main, the DHA has done a poor job of communicating this decision to SAPS, which continues to detain arrested undocumented Zimbabweans even after their nationality has been determined.

Recommendations

- The government should ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which calls for a system of independent visits by national and international bodies to places of detention.
- DHA should investigate and address cases of abuse and improve conditions at the Lindela detention centre and put mechanisms in place to ensure that detainees are not held in indefinite detention without legal process or subjected to any form of detention that may amount to cruel and unusual treatment.
- SAPS should liaise with the DHA to ensure that appropriate processes are followed in order to prevent the detention of undocumented Zimbabwean nationals after their nationality has been determined.
- The SAHRC should conduct frequent, unannounced monitoring visits to places of immigration detention including the Lindela Deportation Centre.

Gender-Based Violence

- A significant number of cross-border migrant women and girls from Zimbabwe continue to be exposed to rape by informal cross-border transporters, smugglers, and criminals while trying to enter South Africa through clandestine channels due to lack of legal entry options.

- During the 2008 attacks, sexual violence was used as a weapon to displace migrant women and girls from their homes. Such acts included attempted, threatened and real incidences of rape and gang rape.
- Migrant women seeking assistance with cases of domestic or gender-based violence (GBV) face the double obstacle of a society that is at once xenophobic and patriarchal. Non-national women also face sexual and other harassment, including threats of various kinds, in public spaces such as streets or modes of public transport.
- Two thirds of South African organisations that provide services to GBV survivors stated that they did not provide gender-based violence services to migrants. Such discrimination excludes a significant proportion of migrant women, both documented and undocumented. Although services responding to the health needs of displaced women are available, they are insufficient to respond to sexual violence.

Recommendations

- Organisations should work to include migrant women in services for victims of gender-based violence.
- SAPS should issue a directive to all police stations that police officers should not ask for the documents of those reporting sexual and gender-based violence. This will help ensure that everyone has access to legal protection from domestic and sexual violence.
- The police in border areas should prioritise the security and shelter needs of women without shelter, recognising the particular risks non-national women face of abuse at the hands of smugglers and others.
- The police and other law enforcement bodies should investigate the operations of the *amalayisha* and *amagumaguma* in Musina, attending not only to their activities in assisting undocumented migration, but also to the rights violations such actors commit against women in particular.
- The DSD should amend policy conditions that demand a South African identity number in exchange for service access—for instance, the funding of shelters for homeless and abused women.
- The Department of Health should ensure that non-national women have equal access to family planning services, voluntary counselling and testing for HIV, and anti-retroviral treatment.

Unaccompanied Migrant Children

- The lives of unaccompanied migrant children are characterised by physical violence, exploitation, and denial of basic rights. The major perpetrators of physical and sexual violence against children are the *amalayisha*, the *amagumaguma*, and some of the state authorities charged with protecting them.
- Although there is a well developed legal and policy framework for securing the rights of migrant children in South Africa regardless of their documentation, the framework is poorly implemented and significant abuses of migrant children's rights continue.
- A significant proportion of children are illegally deported by the police, who are not authorised to deport anyone. Elsewhere, the police are often poorly equipped to deal with unaccompanied minors, and unaccompanied children report ongoing difficulties with them.
- What limited access children have to rights is almost entirely facilitated by NGOs in South Africa, with migrant children having very limited direct access to government departments and services. Few organisations supporting migrant children exist outside of urban areas.

Recommendations

- The DSD should facilitate access for permanent and circular migrant children to schools and shelters.
- The DSD should increase the number of social workers who can assist unaccompanied minors and work closely with humanitarian agencies, including community-based organisations. It should also support the development of in-house training for social workers on the rights of migrant children.
- SAPS should develop in-house training for police on the rights of migrant children, and capacitate them to deal legally and compassionately with children in general, and unaccompanied migrant children in particular. They should also investigate smuggling activities that endanger children and other migrants.
- The DoL should investigate child labour in the construction, domestic work, and farming industries. Where children are of legal age to work, the DoL should monitor conditions of labour in border towns closely for human rights abuses.
- Civil society and government should work to extend services for children to areas near the borders with Lesotho and Mozambique.

Refugee Reception Offices and Status Determination

- Despite capacity-building efforts, there are still significant problems with how the Refugee Reception Offices (RROs) operate and in their ability to protect those in need. RROs frequently fail to adhere to published procedures and deny the rights of potential asylum seekers and refugees.
- Despite some improvements, asylum seekers still struggle to access the offices and secure adequate services once inside. After numerous failed attempts to access the reception offices to renew their permits, asylum seekers are regularly arrested and detained, and are placed at risk of deportation or refoulement.
- For a variety of reasons related to both attitude and undercapacity, status determination processes continue to be administratively unfair, denying asylum seekers a full and fair hearing and an individualised, well-reasoned decision based on the details of their asylum claims. Indeed, Refugee Status Determination Officers (RSDOs) are incentivised to reject asylum claims.

Recommendations

- The DHA should improve monitoring of security guards working outside refugee reception offices (RROs). It should also develop effective queue management procedures that do not compromise the rights of asylum seekers, and increase the provision of interpreter services at the RROs.
- The DHA should significantly decrease the daily target numbers for RSDOs to ensure that there is sufficient time to conduct the status determination interview and to engage in the deliberative process before issuing a decision.
- The DHA should provide training to RSDOs to generate individualised, quality decisions that adhere to the requirements of administrative justice.
- The DHA should extend the validity period of asylum documents to six months in order to reduce the burden on the DHA, reduce costs for migrants, and improve asylum-seekers access to rental accommodation and employment.

Access to Healthcare

- Refugees and asylum seekers continue to have negative interactions with, experiences of, and treatment by public healthcare providers. Ambiguity persists within the public system on refugees' and asylum seekers' rights to access healthcare in general and anti-retroviral therapy (ART) in particular.

- As in 2008, CoRMSA remains concerned that public healthcare institutions continue to determine their own policies that may counter existing legislation and disadvantage all categories of non-nationals in South Africa.
- It is important to recognise that TB, along with HIV, is a regional issue that urgently requires a coordinated regional response to diagnosis and management. CoRMSA hopes that the SADC Regional Framework will assist to this end.

Recommendations

- The National Government should adopt the SADC Policy Framework for Population Mobility and Communicable Diseases.
- CoRMSA call on the Provincial and National Health Departments to ensure that refugees and asylum seekers—with or without a permit—are not charged ‘foreign patient’ rates, are assessed according to the current means tests as applied to South African citizens, and have access to free ART.
- Strengthen referral systems to ensure people non-nationals referred by primary healthcare institutions are not turned away from the higher-level institutions that should assist them.
- The Department of Health, potentially working with civil society and international organisations, should develop and distribute posters relating to the rights of refugees and asylum seekers to access healthcare, including ART, and the stipulations of the recent directive regarding paperwork requirements and fee schedules for refugees and asylum seekers. These bodies should support these posters with adequate training.
- Ensure that HIV prevention, care and treatment activities—including awareness campaigns and the promotion of voluntary counselling and testing (VCT), antiretroviral treatment (ART), prevention of mother-to-child transmission (PMTCT) and post-exposure prophylaxis (PEP)—do not exclude non-citizen groups, including refugees and asylum seekers.
- Formally incorporate the UNHCR/Southern African HIV Clinicians Society guidelines into National Department of Health ART guidelines.
- Continue to allow refugees and asylum seekers to use a counsellor or other healthcare provider as a treatment buddy in order to qualify for ART.

Cholera and Migration

- Illustrating the region’s poor humanitarian response systems, Southern Africa continues to be affected by a preventable cholera outbreak that began in August 2008. According to the latest figures, the number of cholera cases in the region reached 155,708, with the total number of deaths standing at 4,686. The South African cholera outbreak provides a stark

reminder of how infectious diseases cross borders and require coordinated emergency responses.

- CoRMSA welcomes the regional response to the growing dimensions of the cholera epidemic. CoRMSA supports the approach of this platform, which sees migration and displacement as a consequence of more structural problems affecting the region and not as the cause of the disease.

Recommendations

- Strengthen surveillance, preparedness and responses, particularly in districts with high transmission risk and border districts affected by cholera.
- Closely monitor migrants' right to access to healthcare in the region.

Access to Education

- While relatively few refugee and migrant families have children of school-going age, severe obstacles remain for migrant children to access education. New national research suggests that 24% of the school-age children of asylum seekers are not in school. The reasons for this include, in order of importance, being unable to afford school fees; being without documents; being unable to afford transport, uniforms or books for school; and finding the local schools full.
- The May 2008 attacks created obstacles to children's access to education due to, among other things, parents' fears of allowing their children back into unstable communities and the cost of transport for those sheltered far from their original schools.

Recommendations

- Clarify the conflict between the South African Schools Act and the Immigration Act to ensure that children are not excluded from their right to basic education as a result of the ambiguous wording in section 39 of the Immigration Act.
- Revise the Admission Policy for Ordinary Public Schools to reflect the right of children without South African birth certificates to access education.
- Remove the reference to the Aliens Control Act from the Admission Policy for Ordinary Public Schools, replacing it with reference to the Immigration Act of 2002.
- Ensure that all schools are trained to recognise the various forms of refugee and asylum documentation and grant children access on the basis of these documents.

- Issue a directive to all schools to ensure that their admission policies do not require study permits from children who did not enter the country under such a permit.

Access to Social Assistance

- Most asylum seekers use their South African-based professional and social networks to establish independent livelihoods and very few migrants apply for government grants. However, refugees generally do not benefit from even the social grants that the law allows.
- CoRMSA believes that the Constitutional right to social welfare should be extended to refugees and asylum seekers. This is particularly true where delays and capacity constraints within the DHA leave asylum seekers undocumented for long periods, creating a barrier to their ability to work. In many cases it is in the interest of South African communities to extend protection to all categories of international migrants

Recommendations

- The National Department of Social Development (NDoSD) should confirm whether mechanisms are in place to issue disability grants to recognised refugees. It should also confirm and circulate a policy on non-citizen access to the Social Relief of Distress grant, to ensure consistent access around the country.
- The NDoSD should inform civil society stakeholders of the fate of the Social Relief Bill that was to consolidate funds for refugees and other vulnerable groups.
- Parliament should move forward with the Bill that was to consolidate a variety of relief funds, including the Refugee Relief Fund.

Access to Accommodation

- While almost all international migrants compete in the private market for housing, they are disadvantaged in doing so. The high cost of formal rented accommodation places a disproportionate burden on immigrant tenants because non-nationals do not compete on an equal footing with South African tenants.
- There is little evidence to support the assumption among many South Africans that the shortage of 'RDP' and other publicly provided housing is due to international immigrants and refugees.
- Those displaced by 2008's attacks have faced acute challenges in accessing accommodation. The government made no attempts to assist non-nationals evicted from the camps to identify affordable accommodation options in relatively safe communities. There is also the cumulative challenge of sheltering the growing numbers of Zimbabwean nationals in the country's urban areas.

- Research shows that a substantial proportion of non-nationals are turned away from faith-based and NGO shelters because of their documentation status. As such, the DSD needs to urgently revise the policy that demands ID numbers in exchange for funding, as this causes the exclusion of even those non-nationals whom the state welcomes into its refugee reception system.
- Any long-term housing solution—whether state or private—must recognise the full size and diversity of a community’s population, including refugees, asylum seekers, and other migrants.

Recommendations

- The government should explore barriers that appear to exist regarding the right of provinces and municipalities to claim emergency housing grants to support victims of xenophobic attacks. This is particularly important given the reported difficulties provinces have had in reclaiming the unbudgeted monies spent assisting victims of the May 2008 attacks.
- Include explicit consideration of non-citizens’ rights along with citizens’ rights in any future measures to monitor and regulate private-rental housing provision.
- Actively engage the Musina Municipality to address the ongoing need to provide shelter for newly arrived migrants in Musina.
- The DSD should reconsider the current conditions for per-bed funding claims from shelters to ensure that South Africans and non-nationals without identity documents are not excluded from this form of assistance.
- Faith-based organisations should investigate the reported prevalence of anti-foreigner sentiments within some quarters of the sector and work against this form of discrimination, especially where it impacts upon the provision of shelter to non-nationals.

Access to Employment

- Most migrants are economically active and do not require social assistance or assistance in finding work. Importantly, 20% of refugees and asylum seekers surveyed have at some point employed someone else. In many cases, the people hired are South African citizens.
- Enhanced efforts to protect the basic conditions of employment would benefit citizens and non-nationals.
- Police and officials checking for documents is a significant problem and many non-citizen workers report discriminatory treatment from employers.

- Non-nationals regularly report being rejected as job applicants because of being a foreign national—regardless of their legal right to work.
- While the Commission for Conciliation, Mediation, and Arbitration (CCMA) now serves undocumented employees, few migrants are able to make use of the commission's services.
- Often acting outside their official powers, police continue to raid the businesses of migrants who depend on informal trading in South African towns and cities.
- The May 2008 violence destroyed countless livelihoods based on informal trading. Violence against foreign shop owners has been prevalent for many years, with few repercussions for the perpetrators. Unfortunately, migrant entrepreneurs, and shopkeepers in particular, continue to be murdered in informal settlements across the country. 2008 reportedly saw 52 murders of Somali traders, 31 of which took place after the major xenophobic attacks

Recommendations

- Parliament should ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
- SAPS and other law enforcement bodies should fully investigate attacks on foreign-owned businesses and develop appropriate strategies to protect all informal traders, regardless of nationality.
- SAPS and the Metro Police should evaluate by-law enforcement mechanisms and accountability structures to ensure that police officers spend their time fighting crime instead of harassing and extorting non-nationals and other informal traders.
- The CCMA should conduct public information campaigns to inform migrant workers and their employers of their employment rights and the avenues of recourse open to non-citizens. An essential aspect of this will be assuring prospective claimants that they will not be subject to detention or deportation, regardless of their legal standing.
- The UNHCR should continue, with partner NGOs, to lobby the National Department of Housing and the South African Nursing Council to enable qualified refugees and asylum seekers to register as nurses and work within the South African public health system.
- The South African Qualifications Authority (SAQA) should reduce, waive, or defer fees for certification of qualifications for recognised refugees and asylum seekers.
- Labour unions should monitor labour rights abuses against non-national workers in the same way as abuses against citizens.

Access to Financial Services

- Access to credit and banking services remains a challenge for many non-South Africans, reducing their physical and financial security. Part of this is due to the challenge many poor citizens and non-South Africans face in providing proof of address.
- In many cases, banks have refused to allow those with expired permits to access their own money. This is particularly unjust given the enormous difficulties asylum seekers and refugees face in renewing permits.
- Following advocacy from CoRMSA and others in 2007 and 2008, First National Bank (FNB) and ABSA clarified their policies regarding refugees and asylum seekers opening bank accounts at their offices. FNB allows asylum seekers to open Smart Accounts and refugees to open a variety of accounts depending on individual conditions. ABSA's national policy means that it currently allows only recognised refugees to open bank accounts. Standard Bank has also announced plans to open accounts for asylum seekers and refugees.

Recommendations

- The Banking Council should encourage standardisation of the policies of the major banks for the opening of accounts for asylum seekers, refugees and migrants, in order to prevent discrimination.
- The Banking Council should explore alternative forms of acceptable proof of address to ensure South Africans and non-South Africans subletting informally or living in informal accommodation can still open accounts.
- Banks should enable people with expired permits to access or at least close their accounts, and ensure that asylum seekers are advised in advance of the effects of permit expiry on the use of their bank account.

Elections and the Economy

- In general, the major contenders in the 2009 general elections did not express anti-foreigner sentiment or promises of anti-immigrant policies in their manifestos or at their rallies. However, there are reports that a number of local political leaders have resorted to fallacious promises about ridding areas of non-nationals. CoRMSA calls on political parties to quickly and firmly condemn such anti-immigrant or xenophobic statements and ensure all officials demonstrate their commitment to the South African Constitution.
- Given popular perceptions that non-nationals are behind joblessness and housing shortages—a link regularly repeated in past service delivery protests and xenophobic attacks—there is a grave risk that politicians will scapegoat non-nationals to build support and defuse criticisms. These risks are all the more acute given the current economic

downturn. Rumours of groups mobilising to ‘finish the job’ started in May 2008 support CoRMSA’s concern that blame-shifting may easily lead to further violence and displacement.

Legal and Legislative Updates

- To protect the rights of non-nationals, legal frameworks need to be accompanied by an effective judicial response. Unfortunately, there has been a general disregard of legal process with regard to non-nationals, from premature closure of displacement camps to DHA disregard for court orders, and the maintenance of an illegal police detention facility in Musina.
- Although a series of Supreme Court of Appeal rulings affirm the notion that immigration officials are strictly bound to follow the rules and regulations in the Refugees and Immigration Acts, rights violations and unlawful arrests and detentions have continued.
- In a strongly worded decision, the North Gauteng High Court held that the use of the Soutpansberg Military Grounds (SMG) near Musina as a detention facility under the Immigration Act was unlawful. The judge also found that the conditions of detention at SMG were unlawful and unconstitutional; and that the conditions of detention and treatment of children were unlawful and unconstitutional. However, at the time of writing, Musina police continued to detain people at SMG before taking them to a Refugee Reception Office, a direct violation of the court’s ruling.
- Accountability for the perpetrators of the 2008 xenophobic attacks also remains a pressing issue. According to the National Prosecuting Authority (NPA) 1,627 people were originally arrested in relation to the violence. Of 469 cases, just 105 have been finalised, with only 70 guilty verdicts. The convictions were mostly for theft and assault, and the most common sentence has been direct imprisonment with the option of a fine. There have been no reported convictions for rape or murder associated with the 2008 attacks. CoRMSA is also concerned that the SAHRC and other official bodies have done little to ensure that perpetrators are held accountable.

INTRODUCTION

Human mobility, in all its forms, is transforming South Africa's population and economy as never before. As the May 2008 violence against non-nationals starkly illustrates, the movement of people may present significant risks to human security, South Africa's international reputation, and the country's developmental trajectory. But South Africa is unlikely to meet its development targets without significant level of migration of skilled and semi-skilled labour into the country. And if it cannot protect the migrants living within its borders, it will struggle to recruit the people it needs, to say nothing about meeting its obligations under international and domestic law.

Despite the evident need to build an effective system to manage international migration and protect migrant rights, the South African government and civil society possess perilously limited capacity to improve the migration regime or ensure the peaceful integration of migrants into development processes. Rather than promote the domestic and regional benefits of mobility—which are substantial—official discussions continue to dwell on the possible risks migration may present to citizens' economic and physical security, and, on occasion, the rights of relatively small numbers of recognised refugees, asylum seekers, and victims of human trafficking. **Anti-immigrant sentiments within and outside of government hinder efforts to develop progressive, developmental migration policies**

In fulfilling its mandate to promote the rights and welfare of refugees, asylum seekers, and other non-citizens living or working in South Africa, the Consortium for Refugees and Migrants in South Africa (CoRMSA) monitors national and local policies and laws, and promotes compliance with international and national constitutional standards. This report aims to:

- Help identify gaps between South Africa's obligations in terms of migrant-rights protection on the one hand, and, on the other, implementation by government and other bodies;
- Draw attention to the positive and negative efforts of those working with, for, or against non-nationals in South Africa;
- Raise new issues and concerns surrounding human mobility, human rights, and development; and
- Help inform advocacy activities by CoRMSA, its partner organisations, and other concerned parties.

Following the May 2008 attacks, migration policy and our responsibility to protect foreigners in South Africa were at the centre of popular and political debate. While the government and civil society rallied together to condemn last year's xenophobic attacks, migration and migrant rights have largely shifted off the policy agenda. The Department of Home Affairs (DHA) continues to consider reforming the country's refugee and asylum system but has made little progress. As it now stands, the country is neither able to protect migrants living in South Africa nor effectively recruit the skills it needs from across the region. Some government departments at local and national levels have begun to realise that migrants and refugees are an important part of their populations, but few have the resources or knowledge to move far beyond this initial recognition.

In last year's report, we highlighted two issues that were at the centre of national debates: xenophobia and Zimbabwe. Although xenophobia—and xenophobic violence—remains as significant a threat as it was last year, this issue has largely dropped from the public agenda. As our chapter on xenophobia suggests, this is a grave mistake. Little has been done to follow up on the DHA's broad commitment to social cohesion made at a national indaba, and without investigations into the last year's murders, many of those responsible for the violence remain on the streets. If we learned any lessons from the May 2008 attacks it is that **you can rob and murder foreigners and get away with it.**

On the other hand, **migration from Zimbabwe remains an acute concern for citizens, policy makers, and Zimbabwean migrants themselves.** Despite a national unity government, politics in Zimbabwe remain tenuous and the lives of millions insecure. There are some small and tentative signs of improvement, but violence, health crises, and abject poverty continue. Figures are scanty and highly politicised, but it is clear that conditions in Zimbabwe continue to encourage thousands of Zimbabweans each month to migrate, however temporarily, to South Africa.

While South Africa offers the prospect of jobs and protection to desperate Zimbabweans, neither is guaranteed. In the face of repeated calls from CoRMSA and others, **the South African government and civil society have not yet developed a capacity to collaboratively and sustainably address the humanitarian needs of displaced people from Zimbabwe.** The unconstitutional treatment of Zimbabweans held near Musina, the inadequate public health response to warnings of cholera, and the lack of any other concerted public relief effort should be an embarrassment to a country so proudly dedicated to the values and principles of *ubuntu* and the protection of human dignity. Offering Zimbabweans a 90-day visa and suspending the deportation of Zimbabweans are two initial steps to regularising the position of Zimbabweans in South Africa. However, if the government does not go further, these welcome initiatives will be too little and too late to achieve the envisioned management and protection goals. Implementing publicised commitments to provide a longer-term special dispensation permit (a status offered under section 31(2)b of the Immigration Act of 2002) will address many of the most egregious rights abuses against Zimbabweans and will bring many benefits for South Africa. CoRMSA urges government to follow through with this policy, and offers the active collaboration and support of civil society. In the interests of the country, the government must communicate its policy goals to the general public to allay uninformed, alarmist views and to reiterate its commitment to human rights, regional recovery, and effective national migration management.

As the economy slows and South Africans begin to lose jobs, there will be growing pressure to for even more restrictive migration policies. However, bowing to these pressures would be backward looking, regressive, and self-defeating. We will find no answers to South Africa's problems by halting migration. **Substantively restricting migration is neither possible nor is it a solution.** As the table below illustrates, the number of migrants in South Africa is rising, but **South Africa's foreign-born population is still far lower than many imagine.** Importantly, migrants are not distributed evenly throughout the country: they compose 4.1% of the urban population, but only 1.6% of rural residents. While a small number of these international migrants have humanitarian needs, most are self-sufficient. Many bring skills and resources that generate jobs. As such, **migration is not a threat**

to South Africans' economic or physical security. Managed properly it can lead to investment, job creation, and a more productive economy.

Population Estimates for Foreign-Born and Total Populations in South Africa 2001-2007*

	2001	2001, as % of total	2007	2007, as % of total
Foreign-born	1,334,050	3.0	1,648,821	3.4%
Total Population	44,768,685	100.0	47,850,294	100.0

Source: Stats South Africa, 10% sample of the 2001 Population Census, 2007 Community Survey

* Foreign-born population is weighted at +30% to reflect possible undercounting of foreign-born residents.

What we need now, as we have for a number of years, is to consider, in a sustained and pragmatic way, how the country's policy frameworks address international migration and other forms of human mobility. The Department of Home Affairs has commissioned IDASA to undertake such a review, but the results have not yet been published. Given the current political climate, it is unclear what direction the new Minister of Home Affairs wishes to take migration policy. Regardless of her intentions, we must recognise that **effective policy reform can not be achieved by the DHA alone**, but must involve the Presidency, local government, the South African Human Rights Commission (SAHRC), the Departments of Justice (DoJ) and Social Development (DSD), Provincial and Local Government bodies, and the Ministry of Police. This year, the United Nations Development Programme (UNDP) will release its annual *Human Development Report* outlining the critical role migration and effective migration policies play in promoting development. Migration is not a silver bullet, but cross border migration will not stop. **Only through thorough policy reform and effective protection of migrant and citizen rights will South Africa be able to address its population's need for economic and physical security.**

With this report, **we call on the country's new leadership to ensure that migration is treated as the pressing economic and social development issue that it is.** This will mean moving away from an approach that sees protecting migrants' rights and welfare as levying a necessary cost on South Africans. **Properly managed, migration could—as it has done in the past and is doing elsewhere in the world—promote the welfare of all living in the country.** To realise this end, we need to move beyond the deceptive goal of sealing off the South African border. This has not been possible anywhere in the world, and to attempt to achieve the impossible would require massive expenditures and produce human rights abuses too great to tolerate. We already spend millions deporting people who are working and paying taxes. South Africa and the region depend on regular, often circular, movements across the border. Rather than prevent such crossings, we must ensure that people can cross in safety, without becoming victims of smugglers, traffickers, corrupt officials, or other criminals.

But improving border controls and migration policy is not enough to promote the integration of migrants into South African society. The Constitution recognises that building a healthy society means protecting the civil, political, and economic rights of all. This must apply to residents regardless of their nationality or reasons for being in South Africa. One need not prioritise migrants over citizens, but instead recognise that, **as long as they live side by side, the welfare of one group can not be separated from the wellbeing of the other.** As the past years have demonstrated time

and time again, **allowing any segment of the population to remain marginalised and outside of social and legal protection puts us all at risk.**

This year's report focuses on key elements of refugee and migrant rights protection in South Africa: security, documentation, and access to basic services. In each section, we offer a series of recommendations to promote positive and pragmatic reforms. The report begins by providing a review of key legislative and legal decisions affecting refugees and other migrants living and working in South Africa. It then turns to key current issues, including anti-foreigner violence and government responses to it, the link between migration and cholera, and responses to Zimbabwean migration. Next, the report considers a range of additional issues related to migrants' human security, including arrest, detention and deportation; gender-based violence; the issue of unaccompanied migrant children; and the problems of human trafficking and smuggling. Finally, the report turns to issues of access to important areas of public service provision, as well as to accommodation, employment, and banking services. **The report draws particular attention to how little has been done to address violence against non-nationals, and the state's limited ability to provide humanitarian assistance.** The displacement that followed last year's xenophobic attacks painfully illustrated the poor state of South Africa's humanitarian response mechanisms. **The lack of resources and humanitarian coordination augurs poorly for the country's ability to protect anyone, citizen or otherwise, should there be a natural or man-made disaster.**

CoRMSA is also concerned about the quality of decisions being made by refugee status determination officers across the country. There are improvements in this regard, but they lack the needed urgency. Due to a combination of poor training and performance, understaffing, and unrealistic performance targets within the refugee reception system, **many asylum seekers with legitimate claims to refugee status are rejected and threatened with deportation.** In some instances this has resulted in people being returned to situations of danger. It has also generated an enormous number of appeals, creating yet another backlog.

Asylum Numbers at a Glance¹

Asylum processing backlog at the start of 2008	89,033	
Number of Asylum applications made in 2008	207,206	
Number of Asylum applications finalised in 2008	69,114	
Applications approved	7,049	(10%)
Applications rejected	62,065	(90%)
Asylum applications outstanding at the end of 2008	227,125	

Together with its partners, CoRMSA compiled the information for this report over several months through a combination of in-depth interviews; fieldwork; reviews of relevant documents, legislation and policies; and participation in public debates and dialogues. This involved in-person and telephone interviews with officials and service providers in Johannesburg, Pretoria, Durban, Cape Town, and Port Elizabeth, and in border areas near Mozambique and Zimbabwe. The section on xenophobic violence and responses to it derives from new research by CoRMSA partners in Gauteng,

¹ Based on statistics provided by the UNHCR.

the Western Cape, the Eastern Cape and elsewhere. The report also draws on extensive engagement with migrants and migrant organisations across the country.

The 2009 report has expanded and improved due to better information flows between CoRMSA and government and other stakeholders. Over the past two years, CoRMSA members have established agreements with SAPS, DHA, and Bosasa that provide access to information and research sites. We have also worked closely with partners throughout the country to collect information on public and private service provision. These collaborations are central to improving the welfare and rights of non-nationals and citizens living in South Africa. **We encourage the new administration to maintain a willingness to share information and engage with those offering constructive criticism. Increased transparency has helped to calm some civil society doubts about government non-compliance or malfeasance** and will always promote a more constructive relationship between civil society and government.

LEGISLATIVE AND POLICY UPDATES

Legal Updates

Beginning in 1998, South Africa began implementing a new legal framework to protect the rights of migrants, refugees, and asylum seekers. This framework, which incorporates international treaty norms and is in line with constitutional principles, includes South Africa's first refugee and asylum legislation. However, despite its domestic and international commitments, South Africa has made little progress over the last decade in terms of applying the law and affording migrants access to administrative justice. Law enforcement officials and immigration officers consistently ignore the letter and spirit of the law and to violate the legal rights of migrants. This chapter examines legal advocacy efforts and strategic litigation since June 2008, highlighting the major issues over the last year. Many of these concerns are explored in more detail elsewhere in this report. Our fundamental concern is over the levels of legal impunity enjoyed by those who violate the rights of non-nationals, and the general disregard for the rule of law. **To protect the rights of non-nationals, legal frameworks need to be accompanied by an effective judicial response. Unfortunately, there has been a general disregard of legal process with regard to non-nationals**, from premature closure of displacement camps to DHA disregard for court orders, and the maintenance of an illegal police detention facility in Musina.

Arrest, Detention, and Deportation

The Supreme Court of Appeal (SCA) issued two significant decisions affirming the procedural protections governing the arrest and detention of 'illegal foreigners'. In *Ulde v Minister of Home Affairs*, concerning a Pakistani national whose detention continued despite the granting of bail by a magistrate, the court confirmed non-nationals' constitutional right not to be arbitrarily detained. The court further held that Section 34(1) of the Immigration Act does not oblige immigration officers to detain every 'illegal foreigner'.² Instead, officers must exercise their discretion in favour of liberty.³ In *Ulde's* case, for example, the granting of bail should have weighed against his detention as an 'illegal foreigner'. According to the court, an official must apply his or mind to the individual facts before ordering detention; a blanket policy by the government to arrest and detain any 'illegal foreigner' is unlawful.

Jeebhai v Minister of Home Affairs related to the illegal deportation of Pakistani national Khalid Rashid from a Pretoria airbase in the absence of the appropriate warrants. The court recognised the serious consequences of deportation, in that they affect the life and liberty of an individual, and ruled that immigration officials are bound to observe strictly and promptly the administrative justice safeguards of the Immigration Act.⁴ The court also emphasised that the government has an

² See para 6 of *Ulde v Minister of Home Affairs* (320/2008) [2009] ZASCA 34 (31 March 2009). [online] Available from: http://www.saflii.org/_za/cases/ZASCA/2009/34.pdf Also para 25 of *Jeebhai v Minister of Home Affairs* (139/2008) [2009] ZASCA 35 (31 March 2009). [online] Available from: http://www.saflii.org/_za/cases/ZASCA/2009/35.pdf

³ *Ulde*, para 7.

⁴ *Jeebhai*, para 21.

obligation to establish sufficient facts to justify its actions with respect to arrest and detention.⁵ Finally, the court held that a person may be arrested and detained prior to exhausting his or her rights of appeal and review under Section 8 of the Immigration Act, a point on which the lower courts had issued various and conflicting rulings.⁶

In February 2009, the Constitutional Court heard arguments in a case involving an ‘illegal foreigner’.⁷ Lawyers for Human Rights submitted an amicus brief challenging whether there is a requirement to exhaust all remedies within the Immigration Act before bringing a detention matter to court. In lay terms, the brief argued that a person who has been unlawfully detained by the state should not be subject to all the procedural requirements laid out in Section 8 of the Immigration Act, because of the urgency of a situation where an individual has been unlawfully deprived of liberty. The Court has not yet issued a judgment in the case.

Although the Supreme Court of Appeal rulings affirm the notion that immigration officials are strictly bound to follow the rules and regulations in the Refugees and Immigration Acts, rights violations and unlawful arrests and detentions have continued. Lawyers for Human Rights (LHR) recently brought a series of urgent cases against the DHA seeking the release of unlawfully detained individuals. In all 15 of these cases, the DHA ultimately agreed to drop its opposition and settle. In thirteen of the cases, LHR obtained a court order demanding that the DHA release the unlawfully detained asylum seeker and ensure that he or she was in possession of an asylum seeker permit upon release. The DHA’s compliance with these orders was often slow and incomplete. Unfortunately, these few cases represent only a small fraction of the asylum seekers currently being detained unlawfully. They are indicative a regular practice of violating established legal procedures and the guarantees of administrative justice with respect to detention. **Asylum seekers continue to be regularly detained and threatened with deportation.**

An example of this is the illegal deportation of a Congolese asylum seeker on 10th May 2009, two days before his case was due to be heard in the South Gauteng High Court. Under domestic and international law, it is illegal to deport an asylum seeker to a country where he or she faces a high risk of persecution. DHA was aware that the detention of the individual was being challenged and therefore aware of its legal obligation not to deport the individual prior to the matter being heard.

In February of this year, LHR launched an urgent case against the DHA, the Department of Social Development (DSD), and the South African Police in Musina, alleging that the arrest, detention and deportation of Zimbabwean nationals from the Soutpansberg Military Grounds (SMG) was unlawful and unconstitutional.⁸ LHR asked that the facility be closed because it had not been designated as a detention facility for purposes of deportation under the Immigration Act, and because conditions at the facility did not meet the minimum standards for detention. In May, the North Gauteng High Court ordered SMG’s immediate closure. **In a strongly worded decision, the court held that: 1) the use of the military grounds near Musina (i.e., SMG) as a detention facility under the Immigration**

⁵ *Jeebhai*, para 22.

⁶ *Jeebhai*, para 29 – 34.

⁷ *Koyabe v Minister of Home Affairs* (CCT53/08) [2009] (18 February 2009) [online] Available from: <http://www.constitutionalcourt.org.za/Archimages/13271.PDF>

⁸ See *Lawyers for Human Rights v Minister of Safety and Security & 17 Others* (5824/2009) North Gauteng High Court. (15 May 2009) [online] Available from: http://www.saflii.org/_za/cases/ZAGPPHC/2009/57.pdf

Act was unlawful; 2) the conditions of detention at SMG were unlawful and unconstitutional; and 3) the conditions of detention and treatment of children were unlawful and unconstitutional.

Despite the declaration that use of the SMG holding facility is unlawful and unconstitutional, the **Musina police continue to detain people at SMG before taking them to a Refugee Reception Office**—a direct violation of the court’s ruling.

Legal Responses to the Xenophobic Attacks

Several legal matters arose in connection with the May 2008 xenophobic attacks against non-nationals. The Wits Law Clinic (WLC) brought an urgent application on behalf of CoRMSA and several others in the Pretoria High Court to prevent the closures of the protection camps that were established after the attacks of May 2008. The application argued that the camps should remain open pending the development and implementation of an appropriate reintegration plan by the government. After the High Court dismissed the application, the WLC appealed directly to the Constitutional Court on an urgent basis, given that thousands would be left homeless and at risk of further xenophobic persecution if the matter was not resolved.⁹ The Constitutional Court ordered the parties to meet in order to resolve the manner in which the camps would be dismantled, ensuring that the rights of the individuals concerned were protected at all times. The Court would then consider rendering a final decision on the matter. Despite this clear interim order from the court, the government closed the camps on 30 September 2008 while negotiations were pending. In the face of this disregard for legal process, WLC withdrew the matter. The case illustrates what appears to be a general climate of impunity in the government’s approach to non-nationals.

Several other issues also arose in relation to the xenophobic attacks. After the establishment of the ‘Centres of Safe Shelter’ (CoSS) for victims, the government initiated a registration process of the individuals at these sites. This process met particular resistance at the Rifle Range camp in Glenanda, Johannesburg, where individuals feared that registration would reverse their existing rights as asylum seekers and refugees. After their refusal to register, approximately 750 people were removed to the Lindela Detention Centre under threat of deportation as ‘illegal foreigners’.

With the exception of fourteen individuals who had not lodged asylum applications, all of these individuals were released once their documents had been verified. Having nowhere to go and no transport, the group remained on the side of the R28 highway near Lindela. A few days later, the police arrested the men in the group on criminal charges of obstructing traffic and sent the women and children to a nearby shelter. The 208 men were held in custody for one week while LHR and the Krugersdorp Legal Aid Board secured the withdrawal of criminal charges. Once released, the men were transported back to Lindela, despite their status as asylum seekers and recognised refugees. The vast majority were then reportedly ‘voluntarily repatriated’ with the assistance of the United Nations High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM). By the time that LHR secured their release from Lindela, only 37 of the original 408 remained. These men disputed the voluntary nature of the repatriations. They allege that immigration officers at Lindela coerced the men into signing deportation documents under threat of indefinite detention,

⁹ *Mamba v Minister of Social Development and Others* (CCT65/08)(21 August 2008) [online] Available from: <http://www.constitutionalcourt.org.za/Archimages/12830.PDF>

beatings and forced deportations. The DHA also admitted in court papers to having illegally deported 35 men in the group, in defiance of an interim court order barring the government from carrying out any deportations while the case was pending. **The DHA has thus far not been held accountable for contravening a court order and violating the domestic and international ban against refoulement.**

Accountability for the perpetrators of the xenophobic attacks also remains an issue. CoRMSA has been in communication with the National Prosecuting Authority (NPA) to clarify how many perpetrators of the xenophobic violence have been prosecuted. **The NPA responded in February and indicated that 1,627 people were originally arrested in relation to the violence. Of 469 cases, just 105 have been finalised, with only 70 guilty verdicts.** The convictions were mostly for theft and assault, and the most common sentence has been direct imprisonment with the option of a fine. **There have been no reported convictions for rape or murder** despite the frequency of these violations during these attacks. The NPA also indicated that three special courts were set up in the Western Cape to deal with the xenophobia and other provinces were instructed to prioritise xenophobia-related cases. No additional cases have gone forward since February, although the number of cases that have been withdrawn increased from 208 to 231. CoRMSA is concerned by the high rate of attrition evidenced by the number of cases being dropped, and by the fact that most of the convictions have been for the lesser crimes of theft and assault, with no rape or murder convictions. CoRMSA is also concerned that the Human Rights Commission and other official bodies have done little to ensure that perpetrators are held accountable.

Migrants Rights Issues

In early 2009, the Legal Resources Centre (LRC) assisted the Central Methodist Church in defending a matter against neighbours complaining of problems associated with the Church's decision to provide shelter to needy migrants and refugees.¹⁰ Direct neighbours of the Central Methodist Church launched an application in the High Court alleging that the portable toilets outside the church and the number of predominantly Zimbabwean refugees that resided in the Church and its surrounds violated several public health by-laws. The applicants demanded that the City of Johannesburg (COJ) and the church remove the toilets and reduce the number of persons residing in and around the church, and demanded that the COJ and other respondents take necessary steps to correct the violation of the public health by-laws. The church responded by asserting its right as a religious sanctuary to offer shelter to persecuted persons. The church pointed out further that the socio-economic circumstances of the refugees made it impossible for most to seek rental accommodation in the city and that city officials had done little or nothing to take responsibility for finding accommodation for this constituency. By agreement, the toilets were removed and a settlement was reached between the parties through which various role players would try to find accommodation for many of the refugees staying outside and inside the Church. The applicants have withdrawn the matter. However, the LRC continues to monitor the situation and the progress of the COJ in providing alternative accommodation to the refugees living in and around the Church.

¹⁰ *Pitje Chambers (Pty) Ltd v City of Johannesburg Metropolitan Municipality & Others* (09/9411) South Gauteng High Court. [online] Available from: <http://www.lrc.org.za/images/stories/CourtPapers/20090320prelimaffidavitcmc.pdf>

The University of Cape Town Law Clinic has launched a matter in the Equality Court¹¹ on behalf of eleven non-nationals whose property was destroyed in the xenophobic violence in Worcester in March 2008. The applicants claim that police acted in a discriminatory manner in that they protected citizens' property but stood by while non-nationals' property was being looted and destroyed. The applicants are claiming financial damages, an unconditional apology and an order compelling the police to provide protection to all persons in that area. This matter is currently before the court.

Legislative Updates

On 3 April 2009, the Minister of Home Affairs announced that the DHA would issue 'special dispensation permits', under Section 31(2)(b) of the Immigration Act, affording temporary status to Zimbabweans on economic and humanitarian grounds. The temporary permit would entitle Zimbabweans to stay and work in South Africa and would be valid for one year. Depending on circumstances, it would be renewed or extended at the Minister's discretion. The national elections and the selection of a new minister have delayed the implementation of these measures. At the time of writing, the new Minister of Home Affairs had referred the matter to Cabinet for further deliberation. **While the Cabinet decides what documents to issue Zimbabwean migrants in South Africa, many Zimbabweans remain undocumented and continue to be subject to arrest and detention.** That said, a general moratorium on deportations of Zimbabweans has been implemented since May and the government has instituted a free visa for Zimbabweans. This brings visa policy towards Zimbabweans in line with other neighbouring countries where free visa regimes already exist. While the new visa does not affect the Zimbabweans already in the country, those arriving at a port of entry receive a 90-day temporary residence visa free of charge, which also entitles them to work. The visa is renewable once inside the country for a fee of R450 and there is no limit to the number of times an individual may receive a new visa by exiting and re-entering the country.

The free visa is a very welcome measure, but people are likely to continue crossing the border illegally due to difficulties in obtaining the three forms of identification recognised by South Africa: a Zimbabwean passport, an emergency travel document, or a border pass. Zimbabwean passports are estimated to cost in the region of US\$670, an emergency travel document costs in the region of US\$40, and a border pass is only valid for travel for a radius of 20 kilometres around the border. The Departments of Home Affairs and of International Relations and Cooperation are reportedly engaging with their Zimbabwean counterparts on the fast provision of affordable Zimbabwean passports. **CoRMSA recommends continued bilateral discussions over the need to provide an alternative form of acceptable documentation that is free or inexpensive. An affordable and accessible visa system will encourage greater numbers of people to cross into South Africa via the official border posts.**

Finally, legislation relating to trafficking is also in development. The chapter Human Trafficking covers this in more detail.

¹¹ *Mohamed Said & 10 Others v Minister of Safety and Security & Others*, being heard in the Cape High Court. This is the first time that the Cape High Court is considering a matter sitting as an equality court.

Policy Updates

In May 2008, the Department of Home Affairs (DHA) issued a tender to research organisations for a wide-ranging migration policy review with the intention of updating the policy framework developed in the late 1990s (i.e., the White Paper on International Migration and Draft White Paper on Refugees). Conceived as an attempt to take into account both domestic and international developments on migration issues, the terms of reference of that tender mentioned as priorities: legal amendments (to the Refugees and the Immigration Acts); the growing number of refugees and asylum seekers; skills loss through emigration; growing xenophobia; and the potential regional destabilising effects of large inflows of undocumented migrants. **The new policy framework should focus on the efficient import of skills; rights-based management of asylum seekers and refugees; management of economic immigration that promotes national and regional development; management of a variety of risks associated with the different policy options; and ensuring effective and distinct macro- and micro-level refugee and migration management.**

While CoRMSA is broadly supportive of efforts to improve the country's migration regime, there is no indication that the government is serious about reform that will protect migrant rights and promote development in Southern Africa. The outgoing Minister, Nosiviwe Mapisa-Nqakula, intended to submit that policy review to Cabinet before the end of her ministerial mandate (30 April 2009). For reasons unclear to CoRMSA, she was not able to do so. At a migration policy debate held in March, the Deputy Minister, Malusi Gigaba, indicated that the ANC had developed a new set of policy propositions that would be released soon after the elections. **CoRMSA calls on the DHA to circulate concrete proposals for reform and to organise a series of public hearings to debate their merits and shortcomings.**

In reformulating the country's immigration regime, the newly elected government will need to consider a number of critical points. These include:

- Clarifying existing regulations;
- Implementing temporary protection for Zimbabweans;
- Setting up a regularisation programme under the auspices of the National Protection Working Group;
- Consolidating the Humanitarian Assistance Network of South Africa (HANSA);
- Providing clarity on progress made around the DHA's Turnaround Strategy roll-out; and
- Assessing the impact of the opening and closing of offices (Crown Mines / Musina / Pretoria Office for Asylum seekers and Refugees).

Recent information collected among migrants' associations in Gauteng ten months after the May 2008 attacks demonstrate that there are **few institutional channels of communication between the DHA, government in general and migrants' organisations.** Without these, there is little chance of amicably resolving conflicts or developing durable programmes for promoting social and economic integration. CoRMSA urges government, wherever possible, to consult a wide range of actors in developing policy. Consultation must include representatives of South African civil society, including migrant associations.

Elections

CoRMSA has been active in warning against the use of anti-foreigner sentiment as an electoral platform. **In general, the major contenders in the electoral race did not use anti-foreigner sentiment or promises of anti-immigrant policies** through their manifestos nor at their rallies. However, there are reports that a number of local political leaders have resorted to fallacious promises about ridding areas of non-nationals. A South African National Civic Organisation (SANCO) official in Ward 95 in Diepsloot told us, for example:

It can happen again. During election campaigns, some political leaders say: 'we will vote for Zuma because he will help us get rid of foreigners. Lekota did nothing; foreigners were pouring into the country.'

Should leaders issue statements like these—during elections or at other times—**CoRMSA calls on political parties to quickly and firmly condemn such anti-immigrant or xenophobic statements and ensure all officials are demonstrate their commitment to the South African Constitution.**

CoRMSA is also deeply concerned about the possibility of violence and hate speech emerging from political leaders in the post-election period. The election of Jacob Zuma as national president has raised popular expectations of improved financial security and service delivery. Given the almost 10% decline in South Africa's economy over the past nine months, it is unlikely that material improvements for the poor will be forthcoming. This is a dangerous combination and service delivery protests have already been reported. **Given popular perceptions that non-nationals are behind joblessness and housing shortages—a link regularly repeated in past service delivery protests and xenophobic attacks—there is a grave risk that politicians will scapegoat non-nationals to build support and defuse criticisms.** Rumours of groups mobilising to 'finish the job' started in May 2008¹² support CoRMSA's concern that blame-shifting may easily lead to further violence and displacement.

Disappointing Commitment of South Africa to the APRM

In January 2009, South Africa published its *First Report on the Implementation of its African Peer-Review Mechanism Programme of Action*. Parts of this document deal with the causes behind and management of the May 2008 attacks (see the chapter 'Violence Against Non-Nationals'). The report is mostly based on that of the Parliamentary Task Team appointed in May 2008 which conducted a one-day visit to several areas affected by the violence in Gauteng. The report all but ignores an abundance of available, and in some cases more robust, empirical evidence gathered by research and advocacy organisations. Rather than an objective analysis of the events, it primarily reflects the ANC's official position on the events and on migration policy in general. It hardly acknowledges, let alone responds to, the critical assessments that were made at the time or emerged after the attacks. **Instead, the official APRM report reflects gross inaccuracies regarding the number of deaths and nationality of the victims and contains misleading language questioning the actual xenophobic nature of the attacks.**

¹² Misago, J-P; Landau, L.B.; & Monson, T. 2008. *Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa*. Report for the International Organisation of Migration. Pretoria: International Organisation of Migration.

Diverting attention from the political basis of the attacks, the report overemphasises class and economic causes despite independent analyses pointing to the role of local leadership in driving the attacks and the inadequacy of unemployment and poverty as explanations for the violence.¹³ The government response also fails to properly assess the humanitarian and political responses to the attacks despite numerous reports available and, finally, offers an unclear assessment of action and sanctions taken in the aftermath of the attacks. In January 2009, the South African Human Rights Commission (SAHRC) committed to investigate the violence, but little progress has yet been made. **CoRMSA is encouraged by this approach and we hope that the SAHRC will provide some clarity on what concrete measures it will take to fight the climate of impunity surrounding the attacks.** CoRMSA deeply regrets the South African government's failure to use the APRM process to assess objectively the shortcomings of its management of the 2008 crisis.

¹³ The role of local-level politics is explored in detail in Misago, J-P; Landau, L.B.; & Monson, T. 2008. *Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa*. Report for the International Organisation of Migration. Pretoria: International Organisation of Migration.

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Violence against Non-Nationals

Vivid memories of the horrors of xenophobic and anti-‘outsider’ violence South Africa witnessed in May 2008 lead many to forget that **violence against non-nationals has been a long-standing and increasingly prominent feature of post-Apartheid South Africa.**¹⁴ It did not begin with the May 2008 attacks, nor did it end with the deployment of the army in June 2008. However, the May 2008 attacks were unprecedented in their ferocity, intensity and rapid geographic spread. They were also remarkable for the scale of damage they caused to people, property, and South Africa’s international reputation. Indeed, in less than a month (mid-May to mid-June 2008), 135 separate violent incidents were reported,¹⁵ leaving at least 62 people (including 21 South Africa citizens) dead,¹⁶ 670 or more wounded; dozens raped; more than 100 000 displaced; and millions of rand worth of property looted, destroyed and/or appropriated by local residents.¹⁷ While shocking, even these stark numbers cannot reflect the trauma and suffering experienced by individuals affected by the attacks. Along with the immediate threats to life and property, the attacks resulted in the separation of families, some of whom may still be uncertain of the fate of their loved ones. Across Southern Africa, the loss of livelihoods continues to hurt Southern African communities whose welfare depends on migrant workers.

The May 2008 attacks reflected fundamental tensions and dysfunctions in contemporary South African society and politics. They also exposed weaknesses in the country’s ability to protect its residents. More than a year on, **the factors that led to the violence have not been addressed. There is little reason to believe that violence against non-nationals and other ‘outsiders’ will not happen again.**

Causes of Violence against Non-Nationals

In response to the violence, CoRMSA and a number of its partners commissioned research into the root causes and triggers of the violence. The findings reveal that:

- **The violence was not a consequence of a ‘third force’, poor border control, changes in national political leadership, rising food and commodity prices, or poor service delivery.** These factors may have contributed to general tensions, but did not trigger the violence; they can not explain why violence appeared in some areas and not others with similar socio-economic and demographic characteristics.

¹⁴ Bekker, Simon; Eigelaar-Meets, Ilse; Eva, Gary & Poole, Caroline. 2008. *Xenophobia and Violence in South Africa: A Desktop Study of the Trends and a Scan of Explanations Offered*. Unpublished: University of Stellenbosch, p.46.

¹⁵ Bekker et al 2008.

¹⁶ The total number of people killed during the violence is still an object of investigation. Some unconfirmed reports suggest that there may have been more deaths than reported by the police and media.

¹⁷ Misago, J-P; Landau, L.B.; & Monson, T. 2008. *Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa*. Report for the International Organisation of Migration. Pretoria: International Organisation of Migration. The bulk of the information presented here is drawn from this report and/or the interviews collected during the fieldwork upon which the report is based.

- The **violence was not a direct result of poverty or joblessness**. The areas in which the attacks took place were neither the poorest nor did they have the highest rates of unemployment.
- The **violence was fundamentally the result of institutional marginalisation of some poor and non-citizen residents and of local government failures** resulting in:
 - Generalised mistrust among citizens, police, and elected leaders;
 - Localised political leadership vacuums and institutional frailty, allowing violent parallel and self-serving leadership structures to emerge;
 - The absence of effective conflict resolution mechanisms, resulting in vigilantism and mob justice; and
 - A culture of impunity with regard to public violence in general and xenophobic violence in particular.

In almost all cases where it occurred, **violence was organised and led by identifiable local groups and individuals**—primarily official or self-appointed community leaders—who used the attacks to further their political and economic interests.

Responses to the Violence

While government officials generally condemned the violence, the late and indecisive response to earlier attacks, threats of eviction, and the eventual outbreak of the May 2008 violence effectively endorsed perpetrators' intentions to rid their communities of 'outsiders.' Indeed, **despite visible warning signs, of which local police were often aware in advance of attacks,¹⁸ the government did not intervene to prevent the violence.** Such failures are not surprising given that more or less extreme cases of xenophobic violence had occurred across the country in the preceding years with little response from police, politicians, or Chapter Nine institutions like the SAHRC.

When the violence broke out in May 2008, local police and officials in many areas concentrated on evacuating non-nationals from communities rather than protecting their lives and property. The late intervention of the army helped the violence from spreading further, but was not the primary factor that ended the violence. In many cases, **violence stopped only when there were no non-nationals left to attack or property remaining to loot or destroy.** At the national government level, the Department of Home Affairs (DHA) laudably issued instructions to halt deportations, but in some cases this instruction was not followed.

Officials' visible ambivalence regarding the violence and its victims has helped entrench public convictions that non-citizens are not equal before the law. Local leaders and police were typically reluctant to intervene on behalf of victims. In some cases, this was because they supported the community's hostile attitudes towards non-nationals. In others, they feared losing legitimacy and political positions if they were seen as defending unpopular groups. **There is evidence that some police officers supported or passively tolerated the violence and others were involved in looting.¹⁹**

¹⁸ Misago et al 2009.

¹⁹ Misago et al 2009.

Police and local leaders also demonstrate a worrying conviction that their interventions were effective despite the widespread displacement, violence, and thievery. Due in part to such self-assessments, there has been little done to develop new or more effective intervention strategies.

Reintegration

There is a pressing need to build mechanisms to protect the rights of non-nationals in South African communities. **Claims that the post-violence reintegration has been peaceful and unproblematic are false.** While many non-nationals who fled in fear of the violence have returned to South African communities, these are typically to communities where violence did not occur. There is evidence that those returning to communities where attacks took place face threats of further violence.²⁰ In some instances, they have been killed or assaulted. **On the same day that leaders in Masiphumelele were receiving commendations for promoting reintegration, an Ethiopian man was killed trying to reclaim his former home.**²¹ CoRMSA sponsored research found that most of the displaced population in the Johannesburg area have decided to settle in new areas. Even so, many still live in fear. Since May 2008, local leaders have made numerous public statements that they did not want non-nationals back in their communities and have continued to make overt threats against them.²²

Accountability

Non-nationals have been repeatedly attacked and killed in South Africa over many years with few being held accountable for these hate crimes. In most of the previous cases, no arrests were made, and even where a few were made, suspects were released without charges and in some cases with the assistance of local and provincial authorities. Similarly, following the May 2008 attacks, arrests were made but, as the National Prosecuting Authority (NPA) indicates, most cases were dropped due to lack of sufficient evidence or unconvincing excuses such as, ‘the interpreter could not be found.’ Research indicates that police and the courts have regularly released suspects due to the pressure from communities and their local (and sometimes provincial) leaders. The NPA reported to CoRMSA that 105 cases had been finalised with 70 guilty verdicts, but did not report any convictions for rape or murder. Instead, the NPA notes that ‘most of the accused were charged with theft and assault and the most common sentence was direct imprisonment with an option of a fine.’ Research indicates that **many of the groups and individuals who instigated the attacks are still free and on the streets.** In some instances, they have actively and successfully resisted judicial responses and likely to organise violence again when it suits their material or political interests.²³ **Actual and perceived impunity only encourages further attacks.**

²⁰ Observations of fieldworkers involved in Forced Migration Studies Programme research into the causes of the May 2008 attacks, who noted that few, if any, displaced non-nationals had returned to areas where violence broke out. Preliminary findings of the Forced Migration studies Programme’s Vulnerability study in Alexandra support this observation.

²¹ Hweshe, Francis. 2008. ‘An award for living in peace with foreigners’ *Cape Argus* 10 November 2008. [online] Available from: http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20081110111843873C458851

²² Observations of fieldworkers involved in Forced Migration Studies Programme research into the causes of the May 2008 attacks.

²³ Misago et al 2009.

Violence since June 2008

Violence against non-nationals is not behind us: international migrants continue to be killed and assaulted as they return to communities and new incidents are regularly taking place. The list below indicates some of the incidents reported in the media post-May 2008.

Outline of Xenophobic Incidents since End-June 2008

DATE	LOCATION	INCIDENTS
12 Aug 08	Umbilo, Durban	Congolese man who returned to his Umbilo home and job the previous week after assurances of safety from the municipality was beaten by locals and hospitalised as a result.
16 Aug 08	Caradale Settlement, Bokdale, North West	Two Zimbabwean-owned shacks, valued at R10,000, burnt down after a tavern brawl. Police consider it to be a xenophobic attack.
19 Aug 08	Soetwater, Western Cape	A Somali spokesperson claimed that seven 'reintegrated' Somalis had been killed and 20 injured after returning to their communities.
20 Aug 08	Khayelitsha, Cape Town	Somali shop owner shot three times by robbers when he refused to open the shop gate. He died on the scene after returning to Khayelitsha from Soetwater two weeks previously.
22 Aug 08	Khayelitsha, Western Cape	Zanokhanyo Retailers' Association, claiming affiliation with the National African Federated Chamber of Commerce and Industry (NAFCOC), issues a warning letter to Somali shopkeepers to keep their businesses closed for three weeks while the Association seeks a solution to the 'influx of Somali shops' into the area.
28 Aug 08	Nemato Township, Port Alfred, Eastern Cape	Two Tanzanian men in their twenties shot dead in their backyard accommodation.
29 Aug 08	Wallacedene, Western Cape	Media reports that the Kraaifontein Small Business association is complaining about low-priced immigrant-run shops being run from rented RDP houses and has informed the Somali community that the situation 'could be dangerous to them'.
6 Sep 08	Western Cape	Media reports eviction-type notices issued to Somali shopkeepers in Khayelitsha had spread to Du Noon and Grabouw.
7 Sep 08	Western Cape	ACDP and provincial arm of NAFCOC reported to support drive to evict Somali shopkeepers.
20 Sep 08	Delft, Western Cape	Somali Shopkeeper Yusuf Sheekow shot dead by armed robbers.
3 Oct 08	Queenstown, Eastern Cape	A woman, along with her two teenage sons and daughter, were bludgeoned to death.
7 Oct 08	Mitchell's Plain, WC	Anonymous threatening letters issued to Somali shopkeepers.
8 Oct 08	Western Cape	DA condemns a 'barbaric attack' near Queenstown, and the torching of 20 shops in Jeffrey's Bay where about 200 people looted Somali-owned shops.
15 Oct 08	Masiphumelele, Western Cape	A dozen shops looted by 40-50 youths, including women and their children, after a child's murder. Community apparently believed the culprit to be an immigrant, but police countered that the man arrested was in fact South African.

22 Oct 08	Koeberg Station, Cape Town	Two female Zimbabwean students on a train were harassed, 'thrown about', detained, and later locked in a holding room by 8 Metrorail security guards spurred on by xenophobic comments by another passenger.
3 Nov 08	Athlone & City Centre, Cape Town	Bolivian doctor claims he was subjected to insults and xenophobic attacks during his work at two hospitals.
7 Nov 08	Masiphumelele, Western Cape	Ethiopian Abdi Sirej, who appeared in the film 'Baraka' (Film-Makers against Racism festival) murdered.
5 Dec 08	Khayelitsha & Nyanga, Western Cape	UNHCR reports in media that just over a week prior a Somali shop owner was killed in Khayelitsha and a Congolese family attacked in Nyanga, their house ransacked and their children admitted to hospital.
22 Dec 08	Klerksoord, Tshwane	Media reports that internally displaced persons (IDPs) remaining at Klerksoord, a closed down IDP camp, were recently threatened with murder by a group of armed men.
3 Jan 09	Maude Mfusi street, Durban	Non-national, his three year old son and a friend allegedly attacked by a group of 30 people.
4 Jan 09	Broad Street, Durban	Local mob of 40-50 men and women (apparently the local CPF) attacks non-nationals, ransacks their rooms, pushes a Tanzanian national out of a sixth floor window at Venture Africa, a shelter for refugees, and forces two other immigrants out of a third storey window..
21 Jan 09	Motherwell, Eastern Cape	A Somali trader is shot execution style, apparently by a rival South African trader.
22 Feb 09	Stofland, Western Cape	Seven Zimbabwean nationals burnt to death after being locked in a shack which was set alight, apparently by a group of youths.
25 Feb 09	Du Noon, Western Cape	Two Ethiopian men shot dead in their spaza shop by assailants who stole an apple and a banana from the shop.
30 Jan 09	Bellville, Western Cape	Community holds a crime protest targeting, among other things, refugees and buildings occupied by them.
13 Apr 09	Delft, Western Cape	Robbers accost three Somali men outside their shop and fire a gun, killing one man and wounding two.
16 May 09	Delft, Western Cape	Assailants fire on Bangladeshi shopkeepers in two separate incidents, killing one and injuring three. Nothing was demanded or stolen in either incident.
24 May 09	Darling, Western Cape	Two Somali shopkeepers burned to death in their shop in what the community described as a xenophobic attack.

In many of these cases, the police have been quick to rule out 'xenophobia' as a motive for the attack. However, there is a major overlap between crime and xenophobia when non-nationals are targeted due to perceptions that they are less likely to access police protection, or because they keep large amounts of cash in their shops or on their persons because they are unable to open bank accounts.

Recommendations

Stopping ongoing and preventing future violence will require more than just condemnation and public awareness campaigns. The following issues must be addressed and solutions attempted if there is a genuine commitment to stop the ongoing xenophobic violence and prevent future recurrences.

To the Presidency, the Department of Cooperative Governance and Traditional Authorities, and the Department of Justice

- *Initiate ongoing, systematic enquiries into anti-migrant and anti-outsider violence.* It is crucial to invest more effort and resources in systematic enquiries to understand and explain what happened in the past and continues to happen. Intervention strategies designed without a clear understanding of the violence and the reasons behind it will not only be ineffective but risk doing more harm than good, and the findings of the Parliamentary Task Team's brief investigation do not suffice as a reliable basis for preventative action.
- *Encourage a speedy, thorough and independent enquiry into the May 2008 attacks.* CoRMSA has repeatedly called for a Commission of Enquiry to be led by the South African Human Rights Commission or other competent institution, but although steps have been made toward an SAHRC enquiry, nothing has yet been done over a year after the May 2008 attacks.
- *Open an Office on the Status of Migrants within the Presidency:* Similar to the existing Office on the Status of Women within the Presidency, this would assist with ensuring that non-nationals are integrated into the programmes of different government departments as provided by the law. This would also ensure oversight within the Presidency of the emerging challenges and would demonstrate the South African government's commitment to addressing discrimination and violence against non-nationals.

To the Department of Justice

- *Ensure prosecutions and strengthen justice mechanisms.* The Department of Justice together with the Department of Provincial and Local Government (DPLG), and the National Prosecuting Authority (NPA) should lead an initiative to prosecute community leaders and others involved in the xenophobic violence and to strengthen justice mechanisms to protect the rights of minority and marginalised groups. The impunity the perpetrators of xenophobic violence continue to enjoy in some areas only encourages further violence. Evidence shows that prosecution and retribution exert some deterrent force on criminal intent and behaviour.

To the Department of Cooperative Governance and Traditional Authorities

- *Identify and implement effective conflict resolution mechanisms.* There is need to establish trusted and prompt conflict resolution mechanisms to avoid communities' recourse to vigilantism and mob justice. Such mechanisms should be accessible from community level to the highest level of the country's administrative and justice systems. These conflict resolution measures must not violate the law as certain past initiatives have done (for instance, extra-legal restrictions on migrant trading or sites of residence).
- *Develop mechanisms to make 'grassroots' community structures more visible to the state.* Xenophobic incidents have often resulted from the emergence in affected areas of 'grassroots' power-bases founded on violence and discrimination. To realise the ideals of equality, security and service delivery in poor areas, government needs to ensure that these grassroots bodies are made visible to the state, so that their functioning can be monitored to prevent or address abuses of power or antidemocratic/unconstitutional practices. This might involve capacitating local government to report on the quality of community leadership, assess the suitability of specific community leaders as partners in participatory government structures, and provide guidance, coordination and monitoring to community leadership and security initiatives.
- *Evaluate the roles and actions of community leadership structures, and adjust functioning and/or oversight measures in accordance.* With information about grassroots structures at hand, government should on a case-by-case basis scrutinise the relationships between elected officials, street committees, civics, community policing forums, and other entities implicated in the xenophobic violence. In the interests of the security of both locals and migrants, the role and functions of these community leadership structures may need to be reconsidered in the light of their vulnerability to abuse by competitors for local government authority.
- *Address institutionalised xenophobia and discrimination.* Government must intensify its efforts towards eliminating xenophobic and discriminatory practices in public institutions. This also means avoiding initiatives that will further empower the people and institutions responsible for the violence.
- *Establish effective early-warning and response systems.* Mitigating future violence requires structures and institutions that are able to effectively respond to the warning signs. Warning signs for xenophobic violence have existed for years, but have often been ignored or dismissed as 'just crime'.

To the Department of Education

- *Introduce information about the African continent's states, its peoples and their struggles, into primary and secondary school curricula.* This would foster tolerance and understanding of the citizens of neighbouring countries, and could instil in South African youth a greater sense of their place beside others on the African Continent.

To the South African Police Services

- *Investigate claims that some police were reluctant to intervene to stop violence in their jurisdictions and that some of their members were involved in looting or assisted perpetrators.*
- *Evaluate the reasons why police intervention was not effective in stopping the May 2008 violence and develop new strategies to promote a faster and more effective response in the event of future violence.*
- *Establish mechanisms to monitor and record threats and incidents of violence that target potentially vulnerable groups including non-nationals, homosexuals or other groups who are in a minority within a particular area. This will assist in identifying areas where further violence is likely to occur and broader conflict resolution interventions are needed.*

To International Organisations

- *Support government efforts to effectively manage migration and protect the rights of non-nationals. This could take the form of providing resources and sharing expertise and best practice with relevant departments.*
- *Support local civil society's capacity to monitor and influence government policies and practices with regard to protecting the lives and rights of all the country's residents.*

To Civil Society

- *Initiate and support mechanisms to hold government accountable. While acknowledging its constructive efforts, civil society must continue to hold government accountable for its failures to protect the rights of all South Africa's residents. The efforts of civil society watchdogs are particularly important given the disincentives government faces in terms of public resistance towards assistance of a stigmatised group such as non-citizens.*
- *Support civic education about human rights and immigration policies. Community leaders' and officials' limited knowledge of human rights in general and the country's immigration laws and policies in particular are among the factors that contributed to continued tensions and poor response. Government and civil society should work together to address such gaps.*

Humanitarian Responses to Displacement

This section reviews South Africa's response to the humanitarian crisis following the May 2008 attacks. The attacks, discussed at length in the previous section, displaced at least 100,000 people, probably many more. Close to 30,000 of these individuals left the country, largely migrating to Mozambique. Another 30,000 to 35,000 sought protection in shelters and camps, largely in Gauteng and the Western Cape. After almost a year, the last of these shelters closed, although some people remain unable to return to their communities or find accommodation elsewhere.

While this humanitarian crisis may be behind us, **the events following May 2008 revealed serious shortcomings in the country's ability to respond to people in need.**²⁴ While some of the characteristics of the May 2008 disaster response were specific to the unique situation of displaced non-nationals, many of the technical and organisational experiences apply to all humanitarian emergencies, including those affecting South Africans. We must learn lessons from the experience in order to improve responses in the case of future displacement.

Many aspects of South Africa's humanitarian response were laudable. During the initial emergency phase, the police, churches, and individuals provided shelter, with NGOs and individuals providing large amounts of donated food, clothes and other goods to the displaced. **The role of civil society organisations in reacting quickly and flexibly to the humanitarian needs, and providing a wide range of crucial services, was impressive.** There were also many government employees who invested time, energy and care beyond their formal duties.

Communication and Coordination

Nonetheless, from an organisational point of view, the initial humanitarian response was chaotic. Throughout all response phases and in both affected provinces, it is clear that **coordination and communication were among the most important issues and those managed least effectively.** This includes coordination and communication within government and within civil society, as well as between the sectors. While a lack of immediate coherence is normal to some extent in disaster situations, there were several reasons for the high levels of initial disorganisation. These include **1) lack of experience and established systems and 2) a lack of planning for displacement and humanitarian needs caused by civic disturbances and violence.**

CoRMSA also notes that **there was little or no effective national coordination of responses from government,** leading to a lack of coordination between Gauteng and the Western Cape in this case. This led to differences of response standards, waste of time and resources due to the duplication of structures and processes, and confusion concerning the rights of the displaced. Also, civil society actors were not included in a regular consultative capacity in governmental disaster management structures, either at national, provincial or municipal level.

²⁴ The outline of responses-related issues presented here is drawn from Igglesden, V; Monson, T; & Polzer, T. 2009. Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008. Oxfam/University of the Witwatersrand.

Norms and Standards

Perhaps most worryingly, **there were no generally accepted norms and standards for humanitarian service provision.** There was no document outlining South Africa's own service provision standards, nor were widely accepted international standards, such as the *Sphere Handbook*, widely used or even known. Even most permanent disaster management staff lacked knowledge of international standards, and there had been no regular training or even emergency training of other governmental officials or civil society actors in common standards. With the World Cup around the corner and the possibility of natural or artificial disaster always present, **the lack of emergency preparedness puts all South African residents at risk.**

Government Leadership

One of the most important barriers to effective disaster response in May was the lack of government leadership. This was due both to a lack of clarity in the Disaster Management Framework regarding displacement caused by civil violence and to problems of political leadership. The fact that most of the displaced were non-nationals complicated the adoption of overall responsibility and political dedication in this case. The lack of a clear and pro-active governmental lead agency hindered effective coordination between:

- Municipal, provincial and national levels of government;
- Different operational government departments (for instance, Health, Social Development, Home Affairs and the South African Police Service); and
- Governmental and civil society actors.

Civil Society Capacity

As this was the first disaster of this scope since 1994, South African civil society lacked professional disaster response experience and capacity. Consequently, its response, while important, remained fragmented. In contrast to government's Disaster Management Act and Framework, **there was no institutionalised basis for the coordination of civil society for disaster response.** Civil society organisations from a wide range of sectors contributed to the disaster response, dedicating staff time and resources—usually without specific funding for such work—in high volumes and over long periods of time. The organisations involved came from a variety of backgrounds, including faith-based groups, social movements, migrant-rights legal organisations, and health and trauma organisations, as well as individual volunteers. Most of these organisations had never done emergency welfare work or monitoring before and most had never worked together, having different structures, mandates and approaches.

As a result of the response experience, several civil society organisations established the Humanitarian Assistance Network of South Africa (HANSA) in April 2009. The network aims to address many of the challenges faced in terms of enabling communication and coordination within civil society and between civil society and government, identifying capacity gaps and standardising information collecting mechanisms. CoRMSA is a founding member of this network.

The Issue of Citizenship

The disaster response was in many ways affected by the fact that most of the displaced persons were not South African citizens. In a strict humanitarian sense, the nationality of the affected persons, and indeed their legal status, should be irrelevant, since humanitarianism is based on the concepts of human rights and non-discrimination. **The continuation of 'immigration control' approaches during the initial phases of the emergency led to protection failures. This included the arrest and deportation of some displaced persons who did not have documentation.** Even the 'voluntary' return of victims of the attacks to their home countries represented a breakdown in protection and compromised the implementation of justice against perpetrators.

Solutions for ending the emergency situation and response were especially affected by questions of legal status for the displaced. The most significant, and at times violent, conflicts between government agencies and the displaced concerned questions of documentation. These included anxieties by displaced people who had existing refugee or asylum seeker documentation that temporary documents would reduce their rights, and the concerns of previously undocumented IDPs about the quality and time-period of protection they would receive from temporary documents once they left the camps and 'reintegrated'.

'Reintegration'

The government's **'reintegration' programmes for the displaced were particularly problematic, in that they did not engage with the protection needs of people returning to violent areas, nor with the complexity of migrants' livelihoods and township politics.**

Recommendations

Recognising that mass displacement is likely to happen again as a result of violence or natural disaster, CoRMSA recommends the following steps to help prepare:

To All Tiers of Government

- *Conduct a formal evaluation of the governmental disaster response to the May 2008 violence:* This evaluation should include the actions of all levels of government (municipal, provincial and national) and especially the interactions between them. The findings of this evaluation should be made public and discussed with civil society.
- *Review the National Disaster Management Framework in relation to its applicability to civic disturbances and displacement due to violence:* In particular, a clear lead department should be defined for such cases.
- *Include civil society representation on governmental disaster management structures both prior to and during disasters and develop clear protocols for information exchange and coordination with civil society.*

To Civil Society and International Organisations

- *Continue strengthening and expanding HANSA as a network dedicated to early warning, capacity building, information sharing and—in the case of an ongoing disaster—coordination, communication and monitoring.* This structure can also act as a mechanism through which civil society representatives on governmental DM structures are identified and/or held accountable.
- *Engage constructively with governmental disaster management structures towards the development of clear protocols for information exchange and coordination both prior to and during disasters.*
- *Build an operational domestic disaster response capacity within civil society, especially expertise and experience in the provision of material and personal welfare.*
- *Assist government and civil society to build disaster management capacity by offering ongoing and ideally joint training in international humanitarian standards, and by facilitating practical learning experiences in other parts of the region and continent.*

To Government, Civil Society and International Actors

- *Conduct a joint evaluation of the post-emergency reintegration process and mechanisms.*

Cholera and Migration

Illustrating the region's poor humanitarian response systems, Southern Africa continues to be affected by a preventable cholera outbreak that began in August 2008. Cholera has spread into nine neighbouring countries, with outbreaks reported in Angola, Botswana, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. **According to the latest figures, the number of cholera cases in the region reached 155,708 with a total number of deaths standing at 4,686.**²⁵ The latest figures reported for Zimbabwe, the worst affected country, were of 97,872 cases with 4,270 deaths.²⁶ Within Zimbabwe, cholera has spread to all ten provinces, and numbers of cases and deaths continue to rise. The case fatality rate (CFR) has been unacceptably high—at the start of the epidemic the CFR was over 5%. It is now estimated at 3.2%. This is lower but still too high and the situation remains out of control. The disproportionate impact of the cholera outbreak in Zimbabwe is a symptom of a collapsed health system in that country and the failure to maintain water purification measures and manage sewerage systems.²⁷ With appropriate access to clean water and medication, the case fatality rate would be below 1%.

The Effects in South Africa

Cholera has been reported in South Africa since mid-November, affecting both Zimbabwean migrants and South Africans. Though cholera is concentrated within the border town of Musina, reports indicate that it has spread through the Limpopo and Mpumalanga provinces. Overall, according to latest figures reported **in South Africa there have been 12,740 cholera cases reported and 64 deaths with a case fatality rate of less of 0.5%.**²⁸ The current South African cholera outbreak provides a stark reminder of how infectious diseases cross borders and require coordinated emergency responses.

Regional Response to the Outbreak

CoRMSA welcomes the regional response to the growing dimensions of the cholera epidemic. A regional meeting was held on 19 and 20 February 2009 convened by the World Health Organisation (WHO) and the United Nations Children's Fund (UNICEF), with support from the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA).²⁹ The meeting was aimed at strengthening the cholera response in Southern Africa, with key representatives of the United Nations (UN), non-governmental organisations (NGOs) and the Red Cross movement attending—from both the regional and national levels of the nine affected countries and Lesotho. An analysis of

²⁵ United Nations Office for the Coordination of Humanitarian Affairs. 2009. *Regional Update No. 9 – Cholera/Acute Watery Diarrhoea Outbreaks in Southern Africa, 17 April 2009*. Johannesburg: OCHA. [online] Available from: [http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/EDIS-7RBKUU-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/EDIS-7RBKUU-full_report.pdf/$File/full_report.pdf)

²⁶ Ministry of Health and Child Welfare & Office of the WHO Representative in Zimbabwe. 2009. Daily Cholera Update and Alerts 6th May, 2009. [online] Available from: <http://ochaonline.un.org/CholeraSituation/tabid/5147/language/en-US/Default.aspx>

²⁷ Physicians for Human Rights. 2009. *Health in Ruin: A Man-made Disaster in Zimbabwe*. [online] Available from: http://us-cdn.creamermedia.co.za/assets/articles/attachments/18623_2009-health-in-ruins-zim-full.pdf; Health: A Focus on Cholera, TB and HIV. Background brief prepared for Zimbabwe-South Africa Futures Conference, December 2008.

²⁸ United Nations Office for the Coordination of Humanitarian Affairs 2009.

²⁹ *Strengthening Cholera Preparedness and Response in South Africa* (Narrative Report) Regional Workshop to Strengthen Cholera Response, 19-20 February 2009, Johannesburg, South Africa.

the causes of this epidemic in the region identified migration³⁰ among the various contributing factors. This meeting led to resolutions to improve the countries' preparedness to address or contain the outbreaks. The meeting recognised the importance of multi-faceted, holistic, multi-country and integrated responses to the complex set of causes.

CoRMSA supports the approach of this platform, which sees migration and displacement as a consequence of more structural problems affecting the region and not as the cause of the disease. Furthermore, it has been acknowledged that the root causes identified in the cholera outbreak will require cooperation on cross-border issues among bordering countries—among them policies oriented toward improving livelihoods and food security and addressing the difficulties non-nationals face in accessing healthcare

From a South African perspective, the situation raises questions over what is hampering more efficient prevention, provision of care and treatment of those affected. As for migrants, there is a need to investigate the link between health seeking and human mobility. In particular, we must critically review South Africa's response to the cholera outbreak and its relation to domestic and international migration patterns.

Monitoring the Situation in Musina

CoRMSA has been coordinating with various NGOs and international aid institutions in order to monitor the cholera situation in the town of Musina. This is important because:

- It has implications in terms of migrants' rights (specifically their right to healthcare) that need to be monitored;
- It has implications in terms of the public health situation for South Africa and Zimbabwe; and
- It assists stakeholders to gain a better understanding of the interaction between migration and health in a health emergency situation.

Recommendations

To National Departments of Health in South Africa and Across the SADC Region

- *Strengthen surveillance, preparedness and responses, particularly in districts with high transmission risk and border districts affected by cholera.* Here, CoRMSA echoes the recommendation of UNOCHA.³¹
- *Closely monitor to migrants' right to access to healthcare in the region.* In South Africa in particular it is important to remain vigilant to potential further acts of violence against non-nationals which may involve similar patterns of displacement as observed in May 2008. The

³⁰ Factors identified are: lack of access to safe drinking water and adequate sanitation; economic reasons, climate change, migration; food insecurity and HIV/Aids.

³¹ United Nations Office for the Coordination of Humanitarian Affairs 2009.

potential risk of that scenario would be worsened by the current threat of the cholera epidemic.

Zimbabweans in South Africa: Legal and Humanitarian Responses

Since 2000, levels of Zimbabwean migration to South Africa have been rising steadily. Today, Zimbabweans are by far the largest group of migrants, refugees, and asylum seekers in South Africa. After many years of ignoring the particular needs of Zimbabwean migrants, **in April 2009 the government introduced an initiative to facilitate and regularise movement between South Africa and Zimbabwe—a move that CoRMSA welcomes.** The introduction of a free visa to enable legal movement between the two countries and the possibility of ‘a special dispensation permit’ to enable legal employment for Zimbabweans already in South Africa reflect two key recommendations included in the 2008 CoRMSA report.

Migration Patterns

The contested Zimbabwean elections of March and June 2008 and the associated political instability did not lead to a new mass influx of Zimbabweans into South Africa as some expected. Nor has the establishment of a Government of National Unity in Zimbabwe in February 2009 resulted in the large-scale return of Zimbabweans from South Africa. Indeed, Zimbabwe’s temporary political stabilisation has neither stopped nor slowed new arrivals, and the volume of circular migration remains high. This is primarily because of the continued economic crisis in Zimbabwe, including the ongoing collapse of the public education and health systems. **We should expect to see similar levels of migration for the next two to five years.** If the Government of National Unity collapses, even larger volumes of migration could occur.

Due to the high levels of irregular border crossing and poor record keeping on both sides of the border, there continues to be no solid empirical basis for estimating the number of Zimbabweans in South Africa. The prevalence of short-term circular migration also makes estimation more difficult. The potential introduction of the free visa and the special dispensation permits would assist in developing better estimates of migration volumes and trends. Until such figures are available, new surveys provide some information about the gender and age distribution of the Zimbabwean population in South Africa. The gender breakdown differs by location, in that two-thirds of Zimbabweans in the border area around Musina³² and in Alexandra Township³³ are male, while men make up between half and one-third of Zimbabweans in central Johannesburg.³⁴ In all locations, the vast majority of Zimbabweans are young adults, with over 85% between 20 and 40 years old.³⁵ **Although most Zimbabweans are young adults, Zimbabwean children in the border area are especially vulnerable.** The largest concentrations of Zimbabweans are in the Limpopo province border areas and Gauteng, but many have also settled in other parts of the country, including small towns and rural areas.

³² Elford, L. 2009. Migrants’ Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa: Report on Phase One, November - December 2008. Pretoria: IOM.

³³ Analysis of data from the Forced Migration Studies Programme’s SARCS/OCHA Vulnerability Study dataset (2009).

³⁴ Analysis of data from the Forced Migration Studies Programme’s SARCS/OCHA Vulnerability Study dataset (2009).

³⁵ Analysis of data from the Forced Migration Studies Programme’s SARCS/OCHA Vulnerability Study dataset (2009).

Legal Regularisation

In April 2009, the South African government announced a new migration management regime in relation to Zimbabweans, including a moratorium on deportations, a 90-day free visa for Zimbabweans entering South Africa, and a 12-month special dispensation permit for undocumented Zimbabweans already in the country. The deportation moratorium and free visa were implemented immediately, while the special dispensation permit has not yet been implemented at the time of publication (June 2009).

On the basis of an agreement between the South African and Zimbabwean governments, a 90-day free visa will be issued at ports of entry to all Zimbabweans holding valid travel documents. Furthermore, the visa allows holders to seek and carry out casual work in South Africa. The visa can be renewed once while in South Africa for an additional 90 days, at a cost of R450. By exiting the country within the visa's validity period and then re-entering, an individual can receive a new 90-day visa. There is no limit to the number of times Zimbabwean nationals will be allowed to leave and enter the country, and thus receive new visitor's permits. **The primary barrier to the success of this otherwise extremely useful initiative is likely to be the difficulties Zimbabweans continue to face in accessing the three forms of identification that South Africa has agreed to recognise as valid (a Zimbabwean passport, emergency travel document, or border pass), due to the cost of the former two documents and the fact that the latter is only valid for travel in a radius of 20 kilometres around the border.** The South African government has agreed to support Zimbabwe in issuing more affordable passports to citizens currently without valid travel documents, but consideration of alternative forms of acceptable documentation may also be necessary to optimise the uptake of the free visa and minimise the persistence of irregular border crossing.

While the new visitor's permit does allow for the right to work, having this permit will not allow Zimbabwean nationals immediate access to all work opportunities. As discussed in the chapter Access to Employment, South African labour regulations place a number of restrictions on non-nationals including the need to advertise widely for the position before hiring a non-national in some occupations. In other occupations, there is a need to register with the particular practitioners' council before one can obtain work in that profession. The visitor's permit is therefore predominantly aimed at short-term visitors, shoppers, persons seeking short-term casual work, or persons seeking long-term work who can then apply for other permits once they have secured an offer of employment. The free visa is an important step towards regional integration and is in line with the provisions of the SADC Protocol on the Facilitation of Movement of Persons.

The moratorium on deportations has not meant a complete stop to the arrest of undocumented Zimbabweans. In line with the Immigration Act, undocumented people will continue to be arrested. However, Zimbabweans whose nationality has been confirmed are to be released and, reportedly, provided with a temporary Section 23 permit or other documentation that legalises their stay until they can apply for more long-term documentation such as the new 'special dispensation permit'.

As a final, and crucial, element of the regularisation package, the former Minister for Home Affairs announced plans to provide a longer term permit to Zimbabwean nationals who are in South Africa already. This special dispensation permit is to be issued on the basis of 31(2)(b) of the Immigration

Act. This allows for the Minister of Home Affairs to 'grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision'. As initially announced, the Section 31(2)(b) permit would be valid for up to 12 months from the date of issue and allow the bearer the right to work and study and to access basic healthcare and other rights. Despite the introduction of the new permit, Zimbabweans would still be allowed to apply for asylum or for normal work and study permits. While the implementation details were still under discussion at the time of writing, initial indications were that the Department of Home Affairs would assess conditions in Zimbabwe and make an announcement regarding whether permits would be renewed beyond the initial 12-month validity period. The permit would allow the permit holder to move back and forth freely between South Africa and Zimbabwe during the period of its validity. Permit application centres are likely to be located within the major urban centres.

At the time of writing, the new Minister of Home Affairs has referred the package of policy reforms regarding Zimbabweans to Cabinet for further deliberation. **CoRMSA welcomes the process of ensuring strong political support for these policies and hopes that Cabinet will recognise the importance of these initiatives for the protection of human rights and for development in South Africa and the region.** If fully implemented, this three-pronged policy to regularise movement between Zimbabwe and South Africa is likely to have a range of positive impacts for both South Africans and Zimbabweans:

- The free visa will help reduce levels of robbery, rape and even murder by criminal smuggling gangs in the illegal border-crossing process, as well as reducing levels of corruption among border officials.
- The moratorium on deportation will save tax-payers' money and reduce opportunities for abuse and corruption in the immigration policing process.
- The special dispensation permit will reduce pressure on the asylum system, enabling more efficient processing for those Zimbabweans and other asylum applicants who remain in the system.
- The ability of Zimbabweans to work legally with the special dispensation permit will allow skilled Zimbabweans to contribute their much-needed skills to the South African economy.
- The ability for Zimbabweans to work legally under the visa and special dispensation permits will also enable better monitoring of labour standards, reducing exploitation and entrenchment of a dual labour market.
- The documentation of persons entering and residing in the country will allow the government to plan responses and public service delivery more effectively.
- The documentation of Zimbabweans will allow better law enforcement by allowing Zimbabwean victims of crime to report cases to the police and by allowing police to identify Zimbabwean perpetrators of crime.

- Legal status for Zimbabweans will enable international organisations and civil society to contribute more effectively to providing humanitarian support to the most vulnerable Zimbabweans in South Africa.
- The ability of Zimbabweans to work and travel legally will facilitate remittances and the reconstruction of the Zimbabwean economy.

Despite the obvious advantages, there are also some continued challenges in relation to the new regime:

- Continuous and effective communication with the South African public will be necessary to create an understanding and recognition of the new legal documentation and its positive impacts for South Africa. Given widespread xenophobic sentiment in the country and a lack of knowledge of migration law, it is possible that the general public, employers, and service providers will not recognise the new documentation or indeed reject its legitimacy, thereby undermining its effectiveness both for South Africa and for Zimbabweans.
- Effective coordination between government departments is crucial to the effective implementation of the new documentation. In particular, this includes coordination between the Departments of Home Affairs, International Relations and Cooperation, Labour, Social Welfare and Health as well as the South African Police Services.
- Effective and open consultation with Zimbabwean organisations will be necessary to inform Zimbabweans settled around the country about the conditions of the special dispensation permit and about application locations.
- While more legal documentation options will help facilitate economic self-sufficiency for many Zimbabweans in South Africa, it will not on its own enable skilled Zimbabweans to enter into professional sectors where South Africa has particular skills shortages, nor will it address the humanitarian needs of the most vulnerable Zimbabweans unable to work to support themselves. In the former case, it would be in South Africa's interest to expedite the recruitment, qualifications-recognition and issuing of work permits for skilled Zimbabweans (and other SADC citizens) in sectors of the economy with skills deficits. The next section discusses the need for specific humanitarian interventions.

Humanitarian Challenges

Recent research has shown that on aggregate, **Zimbabweans face the more acute social and human security challenges than either South Africans or other non-nationals**. These challenges include access to public services, assets and income, physical insecurity, and feeling threatened because of their nationality.³⁶ Many Zimbabwean organisations report rising xenophobic threats from members of the public where their members live and work, due to the expectation that Zimbabweans should

³⁶ Analysis of data from the Forced Migration Studies Programme's SARCS/OCHA Vulnerability Study dataset (2009).

'go home' after the establishment of the Government of National Unity in their country.

While the vast majority of Zimbabweans are able to support themselves, a small percentage of especially vulnerable people will continue to require dedicated humanitarian support. Some welfare assistance is provided through religious organisations and NGOs, yet they often do not have sufficient funding or capacity to respond to the levels of need in high-concentration areas like Musina and inner-city Johannesburg. As noted earlier in this report, **unaccompanied children in the border area are a particularly vulnerable group, and although there are already legal welfare provisions in place through the Department of Social Development, these are not always effectively implemented.**

Temporary shelter, especially in Musina and in metros with high concentrations of Zimbabwean residents and transients, remains a critical need. There are currently ongoing discussions among international agencies and government about establishing a transit centre for new arrivals in Musina, with short-term shelter and welfare support, but no concrete agreement is yet in place. Two potential sites have previously been identified and then rejected, and now a third site is under discussion. There is a need for leadership from the Musina Municipality on this issue, with support from other tiers of government to ensure that there is an effective response to providing shelter for vulnerable newly-arrived migrants.

The arrival of large numbers of Zimbabwean nationals in smaller municipalities has illustrated shortfalls in inter-departmental cooperation. There appears to have been little support or ongoing engagement from better resourced tiers of government to ensure that the needs of a vulnerable population are met. Instead, the arrival of large numbers of migrants has often resulted in a police response, with raids on places of humanitarian assistance and people being restricted to certain areas, as was the case in the Musina Showgrounds. Such a response is not appropriate given the humanitarian crisis in Zimbabwe and there is a clear need for a coordinated inter-departmental approach to ensuring that the humanitarian needs of Zimbabweans in South Africa are included at the same time as addressing the needs of vulnerable South Africans.

The example of the Central Methodist Church in Johannesburg illustrates both the difficulties and the opportunities in responding effectively to the need for emergency shelter in areas with large populations of Zimbabwean migrants. The Central Methodist Church has provided shelter to thousands of people, predominantly Zimbabweans, for many years. In March 2009, local businesses in the neighbourhood took the Church and the City of Johannesburg to court for violating by-laws by providing basic services such as toilets to people sleeping on the streets around the church. While the court case clearly illustrated the lack of a coherent municipal policy relating to shelter for vulnerable groups in general and Zimbabwean migrants in particular, the City and Gauteng Province responded positively by establishing an inter-departmental task team, including representation by the UN and civil society, to develop a sustainable shelter solution. Planning is ongoing at the time of publication, but **CoRMSA applauds the initiative to bring different levels of government, international agencies and local civil society resources together to upgrade and integrate temporary emergency shelter provision for vulnerable South Africans and non-nationals and to combine shelter provision with social support services to facilitate self-sufficiency.**

Recommendations

To the Department of Home Affairs

- *Push for strong, inter-ministerial political and administrative support for the special dispensation permit for Zimbabweans.*
- *Continue engaging with SAPS to ensure the appropriate implementation of nationality verification and the release of Zimbabwean nationals arrested for being undocumented.*
- *Ensure continued access to the asylum process for Zimbabweans who have experienced persecution, independently of alternative documentation options made available.*
- *Ensure clear communication with Zimbabweans in South Africa concerning the various documentation options open to them.*
- *Engage with civil society (including South African and Zimbabwean NGOs and faith-based organisations) concerning information dissemination and logistical support concerning special dispensation permits.*

To the Department of Cooperative Government and Traditional Authorities

- *Actively engage the Musina Municipality to address the ongoing need for the provision of shelter for newly arrived migrants in Musina. This is an area that will require effective inter-departmental cooperation and thus needs intervention from the National Department of Cooperative Government and Traditional Authorities.*
- *Revive the National Coordination Task Team on the Humanitarian Crisis in Musina. The Task Team last met in March 2009 and provided a useful forum for inter-departmental engagement with international organisations and civil society.*

To the Department of International Relations and Cooperation

- *Continue engaging with the Government of Zimbabwe to support the provision of reasonably priced travel documentation to Zimbabwean citizens.*

To the Departments of Social Development, Health, Education and Human Settlements

- *Ensure that Zimbabwean and other migrants have access to the basic welfare services to which they are entitled by educating and monitoring ground-level staff of the rights of documented and undocumented migrants.*
- *Introduce systems for hiring skilled Zimbabweans into areas of the public service where there are skills shortages.*

- *Especially in the case of the Department of Social Development, work with municipalities and civil society to provide temporary emergency shelter and humanitarian assistance to the most vulnerable Zimbabweans, integrating all such services with mechanisms already in place for vulnerable South Africans.*

To the Department of Labour

- *Ensure sufficient staff and resources to monitor employers so that the new forms of legal documentation for Zimbabweans result in a reduction in exploitative labour practices.*
- *Work with SAQA and the DHA to expedite recruitment, qualifications-recognition and issuing of work permits for skilled Zimbabweans (and other SADC citizens) in all sectors of the economy.*

To the South African Police Services

- *Ensure the appropriate implementation of nationality verification and the release of Zimbabwean nationals arrested for being undocumented.*

To Municipalities

- *Follow the initiative of the City of Johannesburg and Gauteng Province in integrating temporary emergency shelter provision for vulnerable South Africans and non-nationals.*

To the United Nations High Commissioner for Refugees

- *Monitor the asylum system to ensure that Zimbabwean asylum seekers are not discriminated against due to the introduction of the special dispensation permits.*

PROTECTING HUMAN SECURITY

Arrest, Detention, and Deportation

The past 12 months have seen some dramatic shifts and reversals in the immigration control regime. This began with the attempt to secure, reintegrate or repatriate migrants affected by the xenophobic attacks. CoRMSA has been encouraged by Home Affairs' tentative offer of a free 90-day visa to Zimbabweans and by the court decision declaring the police detention centre on the Zimbabwean border unconstitutional and illegal. But, **while lawmakers have been scrambling to adjust the rules to handle the realities of migration, ordinary officials continue to invent new and often illegal ways of controlling migration on the ground.**

While South African laws allow the government to arrest, detain and deport people who do not have the right to remain in the country, there are important limitations on these powers. Officials must ensure that suspected 'illegal foreigners':

- Have their status determined by a qualified official or court;
- Can access representation, asylum and appeal; and
- Are not detained for longer than the statutorily prescribed periods (maximum 120 days).

In addition to these general protections for all, asylum seekers and refugees receive special protection. Most important is their right to not be face *refoulement*—that is, deportation to a country where they may face persecution or harm.

Police Abuses of Non-Nationals

Police perform the 'frontline' functions of South Africa's immigration enforcement system with almost no instruction or oversight from the Department of Home Affairs (DHA). **Individual police stations and officers often decide for themselves how to treat suspected 'illegal foreigners', leading to multiple irregularities and rights abuses.** Perhaps the most obvious and long term problem has been police officers' extortion of migrants for bribes, which appears particularly pronounced in inner-urban areas and amongst police reservists. About one in every seven (14%) asylum seekers who have been stopped by a police official have also paid a bribe to secure their release.³⁷

Recognising that policing immigration detracts from the policing of crime and encourages corruption, **the South African Police Service (SAPS) has issued a National Level Instruction stating that immigration control should not be a policing priority.** At least one Station Commissioner has gone further, instructing all of his officials not to ask suspected 'illegal foreigners' for their documents.³⁸ CoRMSA is monitoring the implementation of these instructions to determine their policy implications for policing.

³⁷ Analysis of the Forced Migration Studies Programme's 2007-2008 survey of Refugee Reception Offices.

³⁸ Data from research in Alexandra by the Forced Migration Studies Programme.

Arrest and Detention at Police Stations

Over the past year, CoRMSA has noted an increase in the use of punitive measures in the immigration enforcement system. The DHA has been increasingly using the criminal offence provisions of the Immigration Act to impose fines for expired asylum seeker and refugee permits. Due to the extreme difficulties involved in accessing Refugee Reception Offices (RROs)—both in terms of the financial and livelihood costs of a trip to the RRO and the lengthy queues—asylum seekers' permits regularly expire. Fifteen percent of asylum seekers interviewed nationwide have experienced this problem.³⁹ Despite the fact that this is a problem created by DHA incapacity, many asylum seekers were fined or arrested for having an expired permit, without being given the opportunity to explain their circumstances or contest the fine. This procedure not only violates due process, but demonstrates bad faith on the part of the DHA. **In addition to the problem of fines, asylum seekers are often arrested on their way home from a day queuing unsuccessfully outside an RRO.** Despite the fact that these asylum seekers are, in a number of cases, arrested while in possession of a permit and a sworn affidavit attesting to their frustrated attempts to renew it, they are regularly deported, or detained for months pending finalisation of their claims.

Both the DHA and SAPS unnecessarily prolong the detention of suspected 'illegal foreigners'. When a person is arrested for being in the country illegally they are often detained in a police cell or prison before being sent to Lindela. In many cities across the country, officials have charged detainees with a Section 49 offence under the Immigration Act. The courts have then imposed large fines and prison sentences on those convicted. While this procedure is not illegal, it is wasteful and leads people who have committed only administrative offences to be detained for long periods in the company of dangerous criminal offenders.

Detentions at police stations in Polokwane and Musina are even more problematic. Here, non-nationals who wish to press charges against abusive or corrupt police officials have been kept in detention in the hope that they will eventually withdraw the charges. These individuals are told that they must remain in detention because they are potential witnesses. No legal provision exists for the detention of individuals on these grounds.

Lindela Detention Centre

Every year, approximately 50,000 non-nationals are detained at the Lindela Detention Centre before being deported to their countries of origin.⁴⁰ The centre is officially designated under the Immigration Act and operates under the control of the DHA, but is run by a private security company, Bosasa (Pty) Ltd. The DHA has denied legal service providers access to monitor the centre. On a more positive note, it has permitted research teams to conduct a survey of detainees at Lindela. This ongoing research will soon allow scholars to systematically examine performance at the centre.

³⁹ Analysis of the Forced Migration Studies Programme's 2007-2008 survey of Refugee Reception Offices.

⁴⁰ Bosasa statistics.

Based on legal service providers' interaction with clients, there appear to be few improvements in the problems with Lindela highlighted in previous CoRMSA reports. These include: routine violence; disciplining with tear gas; corruption and bribery; insufficient food; lack of reading and writing materials; lack of access to telephones; denial of medical care; indefinite detentions without judicial review; and detention of asylum seekers.

Apart from sub-standard detention conditions, CoRMSA is concerned over detainees' almost complete lack of access to legal protection. Detainees are not advised of their rights to review or appeal the decision to detain and/or deport them. When detainees approach immigration officers to verify their documentation or asylum applications, they are mostly met with indifference or ignored in direct breach of South African laws. This has resulted in a wide array of abuses:

- Non-nationals are unlawfully detained without proper warrants;
- Non-nationals are detained for periods far exceeding the 120 day limit; and
- Asylum seekers are routinely subjected to refoulement (illegally deported to countries where they face the risk of persecution or harm).

Notwithstanding the provisions of the Refugees Act, which prohibit the institution or continuation of proceedings against non-nationals once they have lodged asylum applications, there are a great number of asylum seekers detained at Lindela, pending deportation. Should an asylum seeker lodge an appeal against a negative decision, those appeals are conducted in the detention centre, and the asylum seekers will remain in detention until they receive a final decision from the Appeal Board, which can take over a year. An alarming practice that has developed in response to pressures against extended detentions and detentions without warrants is the 'release' of detainees, who are then immediately re-arrested at the gates of Lindela, and issued with warrants and new arrival dates.

In the rare cases where detainees have access to legal representation, it is not uncommon for DHA to ignore correspondence, deport asylum seekers pending court hearings, and even disregard court orders. This approach is evident in the treatment of a group of victims of the xenophobic attacks in May 2008. In July 2008 government began a process of registering displaced non-nationals for six-month exemption permits to remain in South Africa. This process was met with particular resistance at the Rifle Range site, where the majority of those resisting were already in possession of refugee and temporary asylum seeker permits. After refusing to register, approximately 750 people were removed to Lindela under threat of deportation. With the exception of 14 individuals who had never lodged asylum applications in South Africa, all of them were released once their documents had been verified or re-issued. With nowhere to go nor any means of transport, this group remained on the side of road on the R28 near Lindela until, a few days later, a group of 208 men were arrested on criminal charges of obstructing the traffic.

The men were detained at the Krugersdorp Police Station before the charges against them were withdrawn. They were then re-detained at Lindela. LHR launched an urgent application against the Department on 2 September 2008 calling for, amongst other relief, the halt of any deportations of this group of non-nationals, for their release from detention, and for the return of their asylum seeker and refugee permits. Nonetheless, the Department continued to deport several members of this group, until an interdict was granted on 11 September 2008. The DHA then deported a further

35 detainees in contempt of this interim order before an order for the release of the remaining 37 detainees was issued on 21 October 2008.

Detention of Undocumented Non-Nationals in Musina

One of the major successes of advocates for migrant and refugee rights has been the order for the closure of the SAPS detention facility for ‘illegal foreigners’ on the Soutpansberg Military Grounds (SMG) outside of the border town of Musina. Since it was first opened two years ago, conditions at the facility had been poor. **Detainees lacked access to toilets, adequate ventilation and healthcare. Children were illegally detained in the company of adults.** These conditions are exacerbated by the fact that detentions and deportations were conducted by police rather than the DHA, in violation of the Immigration Act. In fact, in November 2008, due to the unhygienic conditions at the SMG, DHA withdrew all of its personnel from the facility, illegally delegating responsibility for detentions and deportations to the police.

In February 2009, Lawyers for Human Rights (LHR) launched an urgent application in the North Gauteng High Court for the closure of the facility. The facility was challenged on three bases: firstly, the lawfulness of an immigration detention facility operated by the police and not designated as such by DHA; secondly, the conditions which detainees were forced to endure; and lastly, the grounds that the state has an obligation to care for children rather than detain and deport them without any investigation into their status or safety needs. An order was granted in May 2009 declaring that the facility was unlawful and unconstitutional, and directing that it be immediately closed down. The DHA and SAPS response to this order has been mixed. The facility is now being used to shelter suspected ‘illegal foreigners’ prior to transportation to the DHA, despite the fact that the facility’s continued operation is unlawful.

Deportations

The DHA has recognised that deportations do not offer an adequate response to South Africa’s informal migration patterns—as illustrated in the April decision to place a moratorium on the deportation of Zimbabwean nationals. While the moratorium on deporting Zimbabweans is being adhered to in the main, the DHA has done a poor job of communicating this decision to SAPS, which continues to detain arrested undocumented Zimbabweans even after their nationality has been determined.

Recommendations

To Government

- *Ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which calls for a system of independent visits by national and international bodies to places of detention.*

To the Department of Home Affairs

- *Investigate and address cases of abuse and improve conditions at the Lindela detention centre.*
- *Put mechanisms in place to ensure that detainees are not held in indefinite detention without legal process or subjected to any form of detention that may amount to cruel and unusual treatment.*
- *Continue to pursue reforms at Refugee Reception Offices to ensure that asylum seekers gain access.*
- *Liaise with the South African Police Service to ensure the issuing of extended s23 permits to arrested undocumented Zimbabwean nationals and prevent their unnecessary detention.*
- *Ensure that detainees are not held beyond the defined 120-day limit.*
- *Review the policy of detaining asylum seekers pending finalisation of their asylum claims.*

To the South African Police Services

- *Liaise with the DHA to ensure that appropriate processes are followed in order to prevent the detention of undocumented Zimbabwean nationals after their nationality has been determined.*
- *Investigate and address cases of abuse and corruption involving SAPS officials.*
- *In consultation with relevant stakeholders, prepare national policies to address police corruption in immigration enforcement activities.*

To the South African Human Rights Commission

- *Conduct frequent, unannounced monitoring visits to places of immigration detention including the Lindela Deportation Centre.*

Gender-Based Violence

International migrants across South Africa face risks of violence at the hands of the police, their neighbours, and their relatives. While these fears plague many South African residents regardless of race, place of residence, class and nationality, migrants face particular challenges and obstacles in protecting their physical security. **Migrant women seeking assistance with cases of domestic violence face the double obstacle of a society that is at once xenophobic and patriarchal.** A recent CSVR report notes that the effect of migration on gender relations in the family can result in domestic violence against non-national women, and that the xenophobic attitudes and practices of police prevent women from reporting such abuse, making them 'vulnerable to ongoing intimate partner violence.'⁴¹ Non-national women also face sexual and other harassment, including threats of various kinds, in public spaces such as streets or modes of public transport.⁴²

Findings from a Wits University study on access to gender-based violence⁴³ found that although more than a third of the (predominantly non-governmental) organisations surveyed provide services to both nationals and non-nationals, very few migrants make use of these services. The perception and experiences of being turned away due to lack of legal documentation, and the lack of awareness about available services, as well as negative attitudes among some of the service providers, were the main reasons advanced for low uptake of such services. It is also worrying that **two thirds of the organisations stated that they did not provide gender-based violence services to migrants.** Such discrimination in provision of gender-based violence services excludes a significant proportion of migrant women, both documented and undocumented.

Other forms of violence only exacerbate the risks facing migrant women. A UNICEF assessment conducted after last year's xenophobic attacks found that sexual violence was used as a weapon to displace migrant women and girls from their homes.⁴⁴ Such acts included attempted, threatened and real incidences of rape and gang rape. However, many cases went unreported due to a combination of the stigma associated with rape and the fear of arrest and deportation among some women without valid documentation. **The low report rates of sexual violence is also attributed to the lack of trust displaced migrant women have in service providers, especially in the health and police services.** The study further indicates that **although services responding to the health needs of displaced women are available, they are insufficient to respond to sexual violence.** Specifically, Post Exposure Prophylaxis (PEP) for HIV and emergency contraception services are not available in many sites, especially in the Western Cape.

Research by the FMSP on conditions of Zimbabweans in Musina also reveals that **a significant number of cross-border migrant women and girls from Zimbabwe continue to be exposed to rape by informal cross border transporters, smugglers and criminals while trying to enter South Africa** through clandestine channels due to lack of legal entry requirements. Organisations supporting

⁴¹ Sigsworth, R.; Nqwane, C. & Pino, A. 2008. The Gendered Nature of Xenophobia in South Africa. Centre for the Study of Violence and Reconciliation, supported by Heinrich Böll Stiftung, p. 20.

⁴² Sigsworth, R.; Nqwane, C. & Pino, A. 2008.

⁴³ Migrant women's access to gender based violence services in South Africa. Telephone interviews conducted with 65 services providers in Gauteng, KwaZulu Natal, Free State, Limpopo, Mpumalanga, western and Eastern Cape. 2008/2009.

⁴⁴ UNICEF (2008) Rapid Inter- agency Assessment of Gender Based Violence and the attacks on Non national in South Africa. Assessment conducted in Gauteng and Western Cape Provinces in internally displaced people sites.

these victims of abuse are few and lack the necessary resources to meet their needs. Whilst no substantive research has been conducted, **service providers also report high levels of exploitation within the domestic work industry including low wages and violence against migrant women.**

Recommendations

To Civil Society

- *Do not exclude migrant women from services for victims of gender-based violence.*
- *Engage in active networking with migrant communities and community leaders to break down some of the barriers that prevent migrant women from accessing services for gender-based violence.*
- *Conduct research into the conditions of migrant women in domestic work.*

To the South African Police Service

- *Issue a directive to all police stations that police officers should not ask for the documents of those reporting sexual and gender-based violence. Indeed, such a directive could also express the general principle that no-one seeking the help of police should be discriminated against on the basis of their immigration status, but gender-based violence should be specifically mentioned. This will help ensure that everyone has access to legal protection from domestic and sexual violence.*
- *Ensure that police in border areas prioritise the security and shelter needs of women without shelter, recognising the particular risks non-national women face of abuse at the hands of smugglers and others. To this end, forge or strengthen relationships with NGOs providing shelter, counselling and medical assistance to migrant women.*
- *Investigate the operations of the Amalayisha and Amagumaguma in Musina, attending to rights violations such actors commit against women in particular, in addition to the activity of assisting undocumented migration.*

To the Department of Labour

- *Monitor conditions within the domestic work industry for the exploitation of migrant women.*
- *Work with the CCMA to explore ways of publicising exploited domestic workers' right to assistance by the CCMA.*

To the Department of Social Development

- *Amend policy conditions that demand a South African identity number in exchange for service access—for instance, the funding of shelters for homeless and abused women.*

To the National Department of Health

- *Make Post Exposure Prophylaxis (PEP) for HIV and emergency contraception services more broadly available and ensure that these services are not denied to non-national women.*
- *Ensure that non-national women have equal access to family planning services, voluntary counselling and testing for HIV, and anti-retroviral treatment (see Access to Healthcare).*

Unaccompanied Migrant Children

Data on the exact numbers of independent migrant children coming into South Africa are unknown. However, we do know that the number has continued to increase. The greatest part of this increase is due to people coming from Zimbabwe. **The lives of unaccompanied migrant children are characterised by physical violence, exploitation (including labour and sexual exploitation), and denial of basic rights.** The major perpetrators of physical and sexual violence against children are the *amalayisha* (informal cross border transport operators), *amagumaguma* (criminals who masquerade as smugglers assisting irregular migrants to cross the border) and some of the very state authorities whose duty is to protect them. The results of a 2007 Save the Children study show that **a significant proportion of children had been illegally deported by the police, who do not in fact have the authority to unilaterally deport people.**⁴⁵

Sexual Violence and Exploitation

According to a March 2009 UNICEF report, many children, especially girls, are at the mercy of bus operators, truck drivers and traffickers who smuggle them into the country. The story of 18-year-old 'Brenda Moyo' represents that of many young women who are brutally abused in the wilderness around the border:

I paid someone a hundred rand to help me cross the border. On the way he asked me for more money; he said, 'Give me R200,' and I told him, 'I don't have any money'. We were many but the others run away after crossing the border. He was angry and he took all my clothes, shoes and everything. I cried and I cried. I begged him to leave me but he refused. He said he will kill me, I cried the whole day. He raped me many times; I was there for many days. After one week he gave me R15 and left me. He didn't kill me, but he did what he did. The doctor told me, 'You are pregnant,' and I am angry now. I don't know what to do. I am not prepared to have a child...⁴⁶

New research also suggests that sex work has become rampant in Musina,⁴⁷ and there are reports of very young girls becoming involved in sex work.

Response Challenges

A recent UNICEF review found that that, **although there is a well developed legal and policy framework for securing the rights of migrant children in South Africa regardless of their documentation,⁴⁸ the framework is poorly implemented and significant abuses of migrant children's rights continue.** There has been confusion among service providers about the different

⁴⁵ Hillier, L. 2007. Children on the Move: Protecting Independent Migrant Children in South Africa and the Region. Pretoria: Save the Children UK.

⁴⁶ Araia, T. 2009. Eviction of Zimbabwean Migrants from Musina Show Grounds Temporary Shelter. Johannesburg: Forced Migration Studies Programme.

⁴⁷ Araia 2009.

⁴⁸ Palmary, I. 2009. *For Better Implementation of Migrant Children's Rights in South Africa*. Pretoria: UNICEF. [online] Available from: http://www.unicef.org/southafrica/SAF_resources_migrantchild1.pdf

categories of migrants and their rights.⁴⁹ For example, there is inconsistent practice among hospitals when it comes to providing treatment. As earlier chapters have noted, although it is clear from the Refugees Act that refugees are entitled to treatment, there is less clarity about the rights of asylum seekers, those on work permits and undocumented migrants. There is also uncertainty over the right of children without documents to receive education, with many schools turning them away. All these issues impact upon unaccompanied migrant children.

Broadly speaking, South Africa lacks the capacity to intervene in the lives of child migrants in the country. Many of the migrant rights organisations that exist do not specifically address the rights of children, and many children's organisations lack the knowledge on migrant children's rights to intervene effectively. **Access to rights is almost entirely facilitated by NGOs in South Africa with migrant children having very limited direct access to government departments and services.** For example, Save the Children UK, which is assisting a large proportion of unaccompanied children in Musina, was overwhelmed after the 2009 eviction of migrants from the makeshift shelter at the local showgrounds, and did not know what to do with the children police brought to their attention. **In many places, the police seem to be poorly equipped to deal with unaccompanied minors, and this endangers the lives and rights of these children.**

Although there are significant gaps, a small number of organisations are working to improve the lives of migrant children. In response to the increased number of migrant children crossing into South Africa from Zimbabwe and the worsening humanitarian dilemma in Musina and its surroundings, a number of service providers, including community-based organisations such as churches, have established additional services, including temporary accommodation facilities for migrant children.⁵⁰ However, **few organisations supporting children exist outside of urban areas.**

Recent UNICEF estimates, made just before the destruction of the temporary shelter at the Musina Showgrounds in March 2009, indicated that between 1,000 and 2,000 children in Musina were in need of assistance.⁵¹ The sudden closure of the temporary shelter, which had housed over 3,000 migrants, worsened the humanitarian conditions in the town, and many affected non-nationals decided to move further inland—as far as Johannesburg. Hundreds of children sought temporary shelter at the Methodist Church in Central Johannesburg, thus further congesting the church, creating a humanitarian crisis in the vicinity, and prompting legal action against the church, as discussed in other parts of this report. At the time of writing, the Gauteng local government had moved some of the migrants to alternative sites in Johannesburg, but **CoRMSA wishes to emphasise that there is a particular need to ensure that unaccompanied minors are placed in safe accommodation. Girl children who are parents themselves need particular support to care for their children and seek a livelihood.**

Unaccompanied children also report ongoing difficulties with the police. As with other vulnerable victims of crime and abuse, the effect of this is the underreporting of crimes against children. The common reason for migrant children's failure to report cases of abuse is the fact that the process of

⁴⁹ Palmary 2009.

⁵⁰ Araia 2009.

⁵¹ Duncan, Y. 2009 In South Africa, few comforts await children fleeing Zimbabwe. South Africa: UNICEF. [online] Available from: http://www.unicef.org/infobycountry/southafrica_48340.html.

obtaining justice is tedious and risky. Anecdotal evidence indicates that many of the survivors fear either being delayed by the justice system if they report the case, or being deported to their home countries. Reporting is also greatly undermined by corruption, fear of stigma, and threats by the perpetrators. Thus, **many survivors of crime and abuse are not using the available care and support services.**

Unaccompanied migrant children typically have no form of documentation, which makes it difficult for them to obtain asylum which, in any case, is by no means guaranteed. **Many children, fearing deportation, avoid the local authorities altogether.**⁵²

Recommendations

To the Department of Social Development

- *Compile a database of unaccompanied minors who have migrated to South Africa.*
- *Facilitate access for permanent and circular migrant children to schools and shelters.*
- *Increase the number of social workers who can assist unaccompanied minors and work closely with humanitarian agencies, including community-based organisations.*
- *Support the development of in-house training for social workers on the rights of migrant children.*

To the South African Police Service

- *Issue a strong statement that all deportation must be conducted in line with the law and in collaboration with the Department of Home Affairs (DHA).*
- *Support the development of in-house training for police on the rights of migrant children, and capacitate them to deal legally and compassionately with children in general and unaccompanied migrant children in particular.*
- *Make every effort to ensure more effective enforcement of the laws that protect children, including arresting perpetrators of violence and exploitation of children.*
- *Improve monitoring to control the operations of Amalayisha and Amagumaguma—the main smugglers of children.*
- *Investigate corrupt and illegal detention practices in the border towns.*

⁵² Duncan 2009.

To the Department of Justice and Constitutional Development

- *Make every effort to promote successful prosecution of those who violate the rights of children—regardless of nationality and immigration status—and ensure the imposition of appropriate deterrent sanctions.*

To the Department of Education

- *Sensitise school authorities to the rights of all children, and particularly migrant girls who are more often out of school, regardless of income or documentation status, to access basic education (see Access to Education).*
- *Investigate reports about schools that have excluded migrant children.*

To the Department of Labour

- *Investigate child labour in the construction, domestic work and farming industries.*
- *Where children are of legal age to work, monitor conditions of labour in border towns closely for human rights abuses.*

To Civil Society and Migrant Communities

- *Support the structures that offer information on migrant rights and create new training and information services in under-serviced areas.*
- *Develop closer collaboration between organisations focusing on children's issues and organisations focusing on migration-related issues.*
- *Assist with the development of integration strategies in schools.*
- *Facilitate the development of community-based care and support structures for unaccompanied minors.*
- *Intensify emergency responses to help provide food, sanitation, shelter, and clothing.*
- *Scale up counselling and support services to survivors of sexual abuses and exploitation.*
- *Intensify health education among child migrants, especially importance of taking Post Exposure Prophylaxis (PEP) after having been exposed to HIV through unprotected sex. It is particularly important to scale up health education amongst young girls, including those engaging in sex work.*

- *Scale up programmes which discourage stigmatisation of and discrimination toward survivors of sexual and gender-based violence as this prevents many people from seeking psychosocial and medical assistance.*
- *Intensify efforts at engaging the media as a means of publicising and promoting the rights of mobile populations.*
- *Mobilise more resources to support unaccompanied children and scale up operations.*
- *Encourage the participation of children in programmes designed to assist them.*
- *Lobby the police for a legal and human-rights-based response to unaccompanied minors.*
- *Found or support organisations outside of urban centres, where migrant children are likely to be most vulnerable. In particular, around the borders with Lesotho and Mozambique.*
- *Advocate for:*
 - *Regional collaboration for responding to HIV and ensuring the rights of children to access education and health.*
 - *Labour courts to monitor exploitative labour conditions of children.*
 - *Police to focus on eradicating smugglers on borders.*
 - *Department of Social Development and the Department of Home Affairs (DHA) to establish a working agreement on the procedures for dealing with child migrants.*
 - *A directive to all schools from the Department of Education, clarifying that no child, regardless of documentation status, should be excluded from education.*
 - *Police and the DHA to investigate the illegal deportation of children.*
 - *Migrant children's access to child support grants.*
- *Use regional structures like SADC to highlight the barriers to South Africa's implementation of child rights for migrants.*
- *Build local capacity for high-level advocacy on child rights.*

Human Trafficking

Over the past ten years, human trafficking has received increasing attention nationally and internationally. An abundance of publications have called attention to what is presented as a huge (and growing) problem. Internationally the problem has been associated with organised crime. Indeed, international legislation in the form of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention on Organised Crime, frames trafficking as a problem caused by organised syndicates. The International Organisation for Migration (IOM) and others have claimed that trafficking is the second most lucrative form of organised crime in South Africa after the trade in illicit drugs.

The image most frequently associated with human trafficking, and indeed the subject of research reports, as well as popular films and novels, is that of young women lured or forced into prostitution in a country far from their state of origin by organised crime syndicates who profit from their exploitation. So emotive and compelling is the image that only **a small, but growing, community of researchers is questioning the alarmism and assumptions surrounding human trafficking in Southern Africa.**

Questioning the Scale of the Problem in South Africa

The current South African discourse on trafficking remains primarily informed by just two pieces of research: a study by Molo Songololo (2000), a Cape-Town based NGO, on the sexual exploitation of women and children in the Western Cape; and an investigative study by the IOM.⁵³ Both studies considered cases of human trafficking in the region and drew very broad conclusions about the causal factors of trafficking and the nature of trafficking practices. The IOM report identified South Africa as a source, transit point and destination for trafficking for purposes of sexual exploitation. The report by Molo Songololo focused largely on child prostitution and tended to equate child prostitution with trafficking.

The IOM and Molo Songololo reports were particularly significant because they reflected the only research on the nature of human trafficking in South Africa at the time. As such, they informed perceptions of the nature and scale of the problem. However, the intention of these reports was not to provide a clear understanding of the scale or nature of the problem, but to raise awareness about the need for a law enforcement and policy intervention. As such, **the numbers of trafficking victims quoted by these reports were not based on rigorous, quantitative research, but rather on estimates that were likely inflated.** While successful in capturing public attention and generating moral outrage, such overestimations do not provide a sound basis for policy making and resource allocation. Despite these shortcomings, the reports achieved their objective of placing trafficking on the policy-making agenda.

⁵³ Molo Songololo. 2000. *The Trafficking of Women into the South African Sex Industry*. Cape Town: Molo Songololo; Molo Songololo. 2000. *The Trafficking of Children for Purposes of Sexual Exploitation – South Africa*. Cape Town: Molo Songololo; Martens, J; Pieczkowski, M.; and Van Vuuren-Smyth, B. 2003. *Seduction, Sale and Slavery: Trafficking in Women and Children in Southern Africa*. Pretoria: IOM Regional Office for Southern Africa.

In 2003, a Child Labour Action Programme was developed by the South African government to deal with child labour problems. Government departments had various obligations in terms of the Programme and funding for this purpose was made available by the International Programme on the Elimination of Child Labour (IPEC) of the International Labour Organisation (ILO). A project titled Towards the Elimination of the Worst Forms of Child Labour (TECL) was established to manage this funding. The Community Agency for Social Enquiry (CASE) was commissioned to prepare situation analyses of the Western Cape, KwaZulu-Natal, Mpumalanga and Limpopo. These were intended to reflect the extent of child trafficking and the commercial sexual exploitation of children, and the extent of services available to victims. The reports added to the body of knowledge in South Africa by helpfully cataloguing the services available to victims of trafficking and offering an assessment of the level of awareness of trafficking by NGOs and government agencies in the four provinces.

Overall, CASE found that while many organisations and government departments were concerned about child trafficking and prostitution, few had encountered cases of this form of abuse. It seems apparent from these assessments that **child trafficking and even child prostitution are not commonly encountered by organisations or government departments in these areas in South Africa**, despite there being a high level of concern about child trafficking and prostitution. The contradiction between the claims by the Molo Songololo and IOM reports that the trafficking of women and children is a serious and growing problem in South Africa and the absence of large numbers of cases clearly suggests that **the problem may not be as severe as self-interested parties have claimed it to be.** Indeed, **despite the IOM's multi-million dollar financial investment in efforts to identify people in need of assistance, between January 2004 and May 2007, the organisation had assisted just 194 victims of trafficking.** All the victims were women and none children.⁵⁴

While proponents of the anti-trafficking lobby strongly argue that the small number of actual cases represents the 'tip of the iceberg' and that the bulk of the cases remain undetected, there are several reasons to question the veracity of these claims. For one, **despite the massive media campaign between January 2004 and May 2007—a campaign that included eye-catching posters and billboards posted in offices, at bus stations, and on street corners, with a toll-free 24 hour hotline—the IOM had assisted under 200 victims of trafficking in South and Southern Africa, which may in fact be a true reflection of the scale of the problem** (unfortunately the IOM has not released more recent data.) This seems to be confirmed by research conducted by the Institute for Security Studies (ISS) and the Sex Worker Education and Advisory Taskteam (SWEAT) in the sex-work industry in Cape Town. **The research that found that trafficking was not prevalent in the sex work industry in Cape Town. Indeed, two years of intensive research in the industry failed to reveal a single victim of trafficking,** although several cases of exploitation and abuse were uncovered, and two Chinese sex workers who responded to the survey (administered to a random sample of 10% of sex workers in Cape Town) may have been trafficked in the past.

Clarifying the Picture

At the end of 2008 the National Prosecuting Authority (NPA) put out a restricted tender for a mammoth research project to develop baseline data about trafficking. The contract was awarded to

⁵⁴ Personal communication from the International Organisation for Migration.

the Human Sciences Research Council (HSRC). Over the next 12 months, the HSRC will conduct research to determine the nature and extent of trafficking in the country. The research endeavours to uncover more information about both victims and perpetrators in the so-called trafficking chain. At the time of writing, the research manager, Adrian Hadland, was confident that the research would go to the field in June 2009. According to Hadland, the research is multi-faceted but will include at least a survey of 1,000 prosecutors (who have been trained on human trafficking) about their experience of prosecuting trafficking cases. It remains to be seen whether this project will be successful in shedding light on the extent of the problem, but **CoRMSA hopes that the HSRC research will clarify the scope of human trafficking in South Africa in order to ensure that the country's resources to address abuses against non-nationals are used to optimal effect.** It is at this stage unclear whether the whole report by the HSRC, intended for completion before the soccer World Cup in 2010, will be made public. However, Hadland expects that, at the end of the process, there will ultimately be a conference where the results will be discussed and debated.

Legislative and Policy Framework

Despite uncertainty about the extent of trafficking in South Africa, and despite the data suggesting that trafficking may not be the vast problem many believe it to be, the South African government is obliged, by several international agreements to which it is party, to act to counter and prevent trafficking. This includes the Palermo Protocol and the ILO's Convention 182 on the Worst Forms of Child Labour.⁵⁵

One important reason for the strong focus on trafficking by the South African government is that, since 2004, South Africa has been on the 'tier-two watch list' of the US Department of State's Trafficking in Persons (TIP) report. This is a status that any state, particularly one that is about to host a series of high-profile international sporting events, would wish to improve. Despite the fact that the TIP report is based on somewhat questionable data, the tier-two watch list means that as far as the Department of State is concerned, South Africa has not done enough to prosecute cases of trafficking, provide government protection to victims, or prevent trafficking. Certainly, in terms of putting in place structures, processes, and legislation, South Africa seems to be working hard to shake this status, but the fact remains that, **without knowledge of the extent of trafficking from, into and within South Africa, it is hard to evaluate whether in fact the low level of prosecutions is a result of inaction by the state, or a low number of cases.**

Currently, the process of developing national legislation specific to countering human trafficking is at an advanced stage and has moved quickly considering the length of time such processes usually take. In 2006, the South African Law Reform Commission (SALRC) released a discussion paper (Discussion Paper 111 2006) that included draft legislation—the Combating of Trafficking in Persons Bill. Public consultations about the paper and Bill were held nationally. Thereafter the SALRC draft Bill was amended to reflect the recommendations raised during the consultations. The purpose of the new legislation is twofold: to provide a basis for the prosecution of all those involved in the process of trafficking an individual, and to create a statutory framework for victim assistance. At a high-level conference held in Durban in early 2009, attended by Ministers from a range of

⁵⁵ Lopes, D. 2005a. Situation Analysis on the Commercial Sexual Exploitation of Children and Child Trafficking: Mpumalanga. Johannesburg: CASE.

departments, a commitment was made to fast-track the legislation. The draft legislation developed by the SALRC was given to the Department of Justice and Constitutional Development, and on Friday 8 May was released for public comment. The intention is for this to be one of the first pieces of legislation considered by the new government.

Getting the victim assistance aspect of the legislation right is perhaps the most difficult for several reasons. Reports of trafficking may come to any one of a number of government departments or agencies, including the police, and identifying which should take the lead and how the various agencies and departments should work together is complex. The legislation does make provision for an investigation to be carried out before a victim is repatriated, to ensure that it is safe for them to return home; however, how such an investigation will be carried out and whether the Department of Social Development (DSD) has sufficient capacity to undertake such investigations is far from clear. It is also not clear whether the 90-day period granted for the stay of deportation will allow sufficient time for the investigation of complex cases. Indeed, without better information about trafficking cases and the specific needs of victims, it will be extremely difficult to determine what such an investigation would comprise. These are just a few of the complexities, which will have to be addressed over time. More importantly, **if the findings of the ISS/SWEAT study accurately reflect the extent of human trafficking into the sex work industry, we should be spending less time developing counter-trafficking strategies and more time and effort on ensuring that the sex work industry itself is decriminalised and regulated to prevent exploitative situations that result from the vulnerabilities of migrant women.**

Although it may still be some time before the new legislation is enacted, there are several existing laws that can be used to prosecute those involved in trafficking. Common Law provisions can be used to prosecute cases of rape, kidnapping, indecent assault, abduction, murder, assault with intent to cause grievous bodily harm, common assault, *crimen injuria* and extortion. In addition the following legislation is relevant:

- The Sexual Offences Act criminalises the sale and purchase of sex.
- The Children's Act contains provisions for the identification of children in need of care, criminalises the trafficking of children and makes provision for international cooperation to prosecute child traffickers; assistance to child victims; and repatriation.
- The Basic Conditions of Employment Act addresses forced labour and makes it an offence to employ children.
- The Prevention of Organised Crime Act defines organised crime and racketeering.
- The Immigration Act deals with matters relating to immigration and the documentary requirements.
- The Witness Protection Act allows for the protection of vulnerable witnesses.
- The Extradition Act provides the basis for extradition.
- The International Cooperation in Criminal Matters Act allows for the facilitation of the provision of evidence from other countries for purposes of prosecution.

Several government departments and agencies have initiated activities to deal with human trafficking. In 2003, the NPA's Sexual Offences and Community Affairs (SOCA) unit established an inter-sectoral task team on human trafficking comprised *inter alia* of government departments, the

IOM, the United Nations Office on Drugs and Crime (UNODC) and a number of national NGOs. The SOCA unit has also established a specialised unit to deal with cases of trafficking, funded by the European Union. The IOM and UNODC have been involved in the training of government officials, including the South African Police Service (SAPS) and the officials from the DSD, in collecting information about trafficking and in informing the development of legislation.

A report to the NPA and a delegation from the European Union in June 2005 that set out to ‘design a programme of assistance to the South African Government to prevent and react to human trafficking and to provide support to the victims of the crime’ also provides an overview of the status of counter-trafficking activities. The report notes that the UNODC Regional Office for Southern Africa was reviewing current legislation and would bring out a report and planning to include this in their training for police officers regionally.

The NPA has also launched a programme on human trafficking, called Tsireledzani, to counter human trafficking. A baseline report, *Programme of Assistance to the South African Government to Prevent and React to Human Trafficking: Provision of Service in the Field of Prevention, Public Education and Awareness (127-108/D/SER/ZA)*, on understanding of Human Trafficking in South Africa, was released at the end of April 2009. This study refers to a three-pronged approach by the NPA to counter-trafficking. It involves the research conducted by the HSRC, a capacity-building programme being undertaken by the IOM, and an awareness-raising programme by the ILO’s International Training Centre (of which the report mentioned above is the first product). This report draws heavily on the IOM research in order to inform its approach to awareness raising, as well as on the TECL study mentioned earlier. The report seems to indicate that the focus will be on NGOs, schools, churches, and drop-in centres. On the basis of the IOM research, the report also identifies certain provinces as either source or transit locations for victims of trafficking. Unfortunately it does not go far enough to question the assumptions about how ‘vulnerable’ groups are identified, and relies on the conventionally accepted discourse that asserts that victims of trafficking are impoverished—an assumption that has been questioned by a number of researchers, including Jyoti Sanghera, advisor on trafficking at the office of the High Commissioner on Human Rights in Geneva.

Recommendations

To Parliament

- *Resolve the inherent contradictions between the intentions of counter-trafficking legislation and the continued criminalisation of the sex work.* Until sex work is decriminalised, it is unlikely that anti-trafficking legislation will have the effect of reducing women’s victimisation. At present there are real risks to sex workers, clients and brothel owners who come forward to report cases of abuse, exploitation or trafficking. Decriminalising sex work may also reduce the incentives for trafficking.

To the Department of Labour

- *Promote fair working conditions for potential victims of trafficking.* By definition, trafficking results in labour exploitation of one kind or another. It is thus vital that the Department of

Labour (DoL) is brought into the discussion about preventing and detecting cases of trafficking, as regular inspections by the DoL of industries where trafficked labour is presumed to be found would both act as a deterrent and assist in detection. Unfortunately, until the DoL recognises sex work as work, it will be unable to investigate cases of exploitation in this industry.

Human Smuggling

The 2008 attacks on non-nationals in South Africa have generated new debates over border control and migration management. While there have been repeated calls for tighter border controls, new research suggests that this is unlikely to control migration. Instead, boosting the number of border police in the existing context of poor regulation is only likely to result in increased human smuggling and human rights violations.⁵⁶ **Smuggled migrants often experience horrific forms of exploitation and physical violence. In some cases, border smuggling operations involve individuals within the police or immigration departments.**

It is the criminality, violence, and exploitation associated with human smuggling that have motivated CoRMSA to repeatedly call for policy reform to ease legal and documented across South Africa's external borders. The potential of a 'new dispensation' for Zimbabweans (see Zimbabweans in South Africa: Legal and Humanitarian Responses) is a step in the right direction—away from a fruitless preoccupation with border control and toward a border management regime that promotes safety and human rights. CoRMSA hopes that this special dispensation will eventually be normalised and extended to other SADC nationalities.

Defining Human Smuggling

According to Article 3 of the United Nations (UN) Protocol Against the Smuggling of Migrants by Land, Sea and Air, smuggling of migrants can be defined as:

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

Human smuggling is generally understood as a commercial transaction between a smuggler and a smuggled person enabling the client to cross a border illegally or clandestinely, with the consent of both parties. For present purposes, CoRMSA does not necessarily limit the definition to cash-based transactions, but, in trying to understand the role of human smuggling in irregular border crossing, allows for the possibility that undocumented border crossers may be assisted at no cost by family members, friends or fellow migrants.

By definition, human smuggling is different from human trafficking, a theme discussed in the previous section. Human trafficking involves, from the outset, an intention by the trafficker to profit from the forced exploitation (for instance, through sex, servitude or slavery) of the person smuggled illegally or clandestinely across a border. Smugglers, in contrast, generally do not exploit their clients once they have crossed the border. However, it is important to recognise that, **like human trafficking, human smuggling often involves forms of fraud, force and coercion, and the violation of human rights.**

⁵⁶ Evidence of the involvement of border police in corrupt activities that promote human smuggling is provided in Araia, T. 2009a. *Report on Human Smuggling across the South Africa/Zimbabwe Border*. Migrant rights Monitoring Project Occasional Report, Forthcoming.

Human Smuggling on the South Africa/Zimbabwe Border

A recent Wits University survey of applicants for asylum at South African Refugee Reception Offices (RROs) revealed that 53% of respondents entered South Africa informally (i.e., not through an official border post or with documents).⁵⁷ According to the law, anyone intending to apply for asylum is entitled to formal entrance. Although figures are not available, it is safe to presume that, to date, a significant percentage (if not the majority) of people migrating for non-asylum purposes have done so informally. The exception might be Mozambicans, who since April 2005 have enjoyed a visa-free system for stays of up to 30 days. Anecdotal evidence suggests that the amount of smuggling on the Mozambican border has significantly lessened following the introduction of the automatic visa.

Lack of access to accurate information, paired with the availability of human smuggling services, appears to play an important role in encouraging undocumented migration and human smuggling. Moreover, largely because of a general state of uncertainty about conditions at the border, human smugglers are able to charge high fees for their services. In a number of cases, smugglers also abuse their clients by extorting money from them or abandoning them in dangerous environments. Indeed, **migrants smuggled across the border are vulnerable to abduction, rape and murder by criminal elements that are difficult to distinguish from smugglers themselves** (thus, terms like *amagumaguma*, referred to in the chapter Gender-Based Violence, can refer to ‘bona fide’ smugglers or criminals masquerading as such).⁵⁸ A 17-year-old from Harare reported how she was raped after being unable to pay the *amagumaguma* she encountered while crossing the border alone. When a Wits University researcher visited a shelter in Musina in March 2009, he found further evidence of sexual abuses against undocumented women migrants during border crossing. One woman said she had been held at a ‘rape camp’ on the Zimbabwean side of the border, where Zimbabwean soldiers had cooperated with smugglers in order to violate women desperate to enter South Africa. Another respondent, an 18-year-old Zimbabwean woman quoted in the Gender-Based Violence chapter, is carrying the baby of the smuggler who abducted and raped her when she could not satisfy his demand for additional payment during the journey.⁵⁹

Other forms of exploitation also exist during the smuggling processes, including instances where migrants are beaten, and stripped of their possessions—including their clothes. There are also unconfirmed reports from authorities, local residents and migrants that some border-crossers die when crossing in the hands of smugglers: drowning in the Limpopo River during crossing or being killed by wild animals.

In reviewing potential responses to human smuggling on the Zimbabwe/South Africa border, CoRMSA notes that, **in South Africa, human smuggling does not seem to be connected to the practices of goods-smuggling or human trafficking.** Perhaps more importantly, the issue is not one of poor policing. Rather, the heavy levels of policing along the border leads to large numbers of arrests and deportations. It is precisely policing and strict controls that generate incentives for

⁵⁷ Amit, R. 2009. *National Survey of the Refugee Reception and Status Determination System in South Africa*. Migrant Rights Monitoring Project Research Report: February 2009. Johannesburg: Forced Migration Studies Programme, p. 22.

⁵⁸ These facts are drawn from Araia 2009a.

⁵⁹ Examples from Musina are drawn from Araia, T. 2009. *Eviction of Zimbabwean Migrants from Musina Show Grounds Temporary Shelter*. Johannesburg: Forced Migration Studies Programme.

smugglers. **Increasing the police presence along the border is unlikely to alter long-term migration patterns, but it is likely to encourage human smuggling.**

Recommendations

To the South African Police Service

- *Institute measures to identify and address corruption and smuggling-related abuses within SAPS.*
- *Continue to assist would-be asylum seekers who are apprehended during undocumented crossing to access the refugee reception system.*
- *Ensure that Zimbabweans apprehended while crossing informally are not deported but are assisted to obtain a section 23 permit valid until the special dispensation permits envisioned by the Department of Home Affairs are implemented (see Zimbabweans in South Africa: Legal and Humanitarian Responses).*
- *Shift the emphasis of border-control policing towards control of smuggling-related criminal activity and away from apprehending undocumented border-crossers. Where undocumented migrants approach the police after being physically or sexually assaulted, the gravity of the crime committed against them should not be diminished by their lack of documentation.*

To the Department of Home Affairs

- *To discourage would-be asylum seekers from entering South Africa informally, provide information at border posts regarding the process of applying for asylum and, for those nationalities that qualify, the process of applying for a free entry visa.*
- *Continue working toward a regulatory framework that eases the legal and documented entry of non-nationals into South Africa.*

ACCESS TO DOCUMENTATION AND LIVELIHOODS

Access Issues in the Refugee Reception and Status Determination System

Refugee Reception Offices (RROs) are a critical step in providing people asylum in South Africa. Recognising the incapacity of the existing centres to deal with increased applications, the government has opened a sixth RRO in Limpopo Province. There are now offices in Durban, Cape Town, Johannesburg, Musina, Port Elizabeth, and Pretoria. In addition, on 15 April 2009, DHA opened the Tshwane Interim Refugee Reception Office (TIRRO) at the Pretoria Showgrounds. This is currently providing services to newly arrived asylum seekers from within the SADC region and helping to ease the client load at the other Gauteng centres. **While CoRMSA supports the government's efforts to expand capacity, there are still significant problems with how the RROs operate and in their ability to protect those in need.**⁶⁰

The Refugees Act and accompanying regulations lay out the asylum process, including several procedural guarantees. **Unfortunately, RROs frequently fail to adhere to these procedures and deny the rights of potential asylum seekers and refugees.** The failure to fully and adequately implement the provisions of the Refugees Act leaves many asylum seekers without documentation and vulnerable to arrest, detention and deportation, despite having valid asylum claims. These failures stem from a combination of factors: lack of capacity; inadequate training; non-adherence to the rule of law; and a tendency to ignore the protective goals of the asylum system in favour of an approach aimed at keeping 'illegitimate' non-nationals out.

The Application Process

Asylum seekers must approach one of the country's five permanent refugee reception offices shortly after arrival in South Africa in order to apply for asylum. In an attempt to alleviate demand at the reception offices, the DHA opened a temporary office in Pretoria in April. This office is exclusively for SADC nationals, who make up 65% of all applicants. All new applicants from SADC countries who are applying in Gauteng are required to use this office. Applicants at the Zimbabwe border in Musina may approach the new office there. However, recent reports indicate that many asylum seekers in Musina are being held illegally at the SMG detention facility overnight before being taken to the reception office in Musina. This is occurring despite the fact that a court ordered use of the SMG facility unlawful and unconstitutional (see Legal Updates earlier in this report).

Once inside the reception office, asylum seekers are fingerprinted and fill out an eligibility form that includes questions about their personal data, country of origin, and reasons for coming to South Africa. As part of the DHA's Turnaround Strategy, most asylum seekers now receive their asylum seeker permit and undergo their status determination interview on the day that they first enter the office. This is a marked improvement over the previous system, where applicants often had to return

⁶⁰ Much of the discussion in this chapter derives from Amit, R. 2009. *National Survey of the Refugee Reception and Status Determination System in South Africa*. Migrant Rights Monitoring Project Research Report: February 2009. Johannesburg: Forced Migration Studies Programme.

numerous times before receiving their Section 22 permits, and waited several months or even years before having their status determination interviews.

The long waiting periods prior to implementation of the Turnaround Strategy meant that many asylum seekers were unlikely to remember exactly what they had written on their eligibility forms, giving rise to credibility issues. In addition, asylum seekers often were re-interviewed by different Refugee status Determination Officers (RSDOs), creating confusion over the process and leaving applicants unsure of precisely what information needed to be disclosed in subsequent interviews. Accordingly, applicants may not have repeated relevant information already disclosed at previous interviews, thus possibly jeopardising the outcome of their claims.

While eliminating many of these concerns, the new procedures have given rise to or exacerbated several other problems. Access also remains a concern at the RROs. **Asylum seekers still struggle to access the offices and secure adequate services once inside. After numerous failed attempts to access the reception offices to renew their permits, asylum seekers are regularly arrested and detained and risk of deportation or refoulement.** The under-provision of interpreters also remains a problem. Finally, corruption and intimidation, particularly in the queues outside the reception offices, persist as a significant cause of rights violations.

The comprehensive results of a nationwide survey of service provision at the reception offices reveal more deep-seated problems than those described in last year's report.⁶¹ **The results show that reception office staff do not fulfil their mandate to assist asylum seekers with the application process, explain the process to them, and provide protection to those applicants fleeing persecution. Instead, the emphasis has been on processing as many applicants as possible as quickly as possible with little consideration for applicants' rights under the law.** Within the DHA, negative attitudes toward asylum seekers and the belief that all those applying for asylum are an illegitimate drain on the country's resources are contributing to the problems with service delivery and the failure to implement the Refugees Act as a rights-regarding system.

Refugee Status Determination

The status determination process continues to be administratively unfair, denying asylum seekers a full and fair hearing and an individualised, well-reasoned decision based on the details of their asylum claims. The results of a national survey,⁶² together with follow-up research, reveal the following problems with the status determination process:

- Most eligibility interviews last for 30 minutes or less. Many asylum seekers indicated that they had insufficient time to fully explain the basis for their asylum claim. Moreover, the interview process is often not explained to asylum seekers. Many applicants do not understand the exact nature of the information that is sought during the interview, which affects their likelihood of success in the status determination process.

⁶¹ Amit, R. 2009. *National Survey of the Refugee Reception and Status Determination System in South Africa*. Migrant Rights Monitoring Project Research Report: February 2009. Johannesburg: Forced Migration Studies Programme.

⁶² Amit 2009.

- Asylum seekers who were in the system prior to implementation of the DHA's Turnaround Strategy are not given the opportunity to review their eligibility forms before their interviews. Given the significant time periods that may elapse between the date an asylum seeker fills out the eligibility form and the date he or she has a status determination interview, applicants may not remember exactly what they stated on the eligibility form, leading the RSDO to question their credibility and reject their claim.
- Lack of information regarding the interview process prevents most applicants from preparing for their interview or bringing supporting documents. Survey results revealed a high correlation between advance preparation and success in the asylum claim.
- Asylum seekers reported instances of anti-immigrant and xenophobic statements on the part of RSDOs.
- In many cases, RSDOs do not make individual decisions but simply cut and paste from previously written documents. Very few rejection letters contain more than a cursory consideration of the individual claim, suggesting that there is little effort made to evaluate cases.

Implementation of the **'turnaround strategy'** has alleviated some of the problems in the status determination process with waiting times being significantly decreased. New applicants now generally have their status determination interviews on the same day that they fill out their eligibility forms. In many cases, they receive their decisions within a few days of the interview. The faster decision-making time also means that new applicants generally do not undergo multiple interviews with different status determination officers while their claim is finalised. Asylum seekers who were in the system prior to the Turnaround Strategy, however, continue to experience long waiting times and to undergo multiple interviews with different reception officers.

While the new procedures have accelerated the status determination process, the focus on efficiency has exacerbated the existing problems of cursory interviews and poor quality decisions. Under the procedures implemented through the Turnaround Strategy, RSDOs generally issue their decision on the same day that they conduct the interviews. This process has been combined with the DHA's setting of targets of nine to ten interviews per day. Even under the most optimistic of calculations, this leaves less than an hour to conduct an interview and write a decision, and virtually no time to research the claim or the conditions in the applicant's country of origin. This might explain why, as suggested above, **rejection letters issued by the RSDOs are of questionable quality and violate many of the principles of administrative justice.**

In addition to the time constraints RSDOs face, existing review procedures inside the reception offices focus not on the quality of decisions, but on the possibility of corruption, which managers suspect whenever an approval is issued. Accordingly, approval letters receive greater scrutiny than rejections. The result is that **Refugee Status Determination Officers (RSDOs) are incentivised to reject asylum claims.**

The poor quality of RSDO decisions, coupled with review procedures that generate rejections, has resulted in an overwhelming backlog in the appeals process. By February/March of this year, the Refugee Appeal Board (RAB) had no remaining appointments for 2009. Moreover, the poor quality of RSDO decisions often means that the RAB must begin the case from the beginning. This increases the demand on the already over-burdened RAB. Because the RSDOs have largely failed to meet their administrative duties under the law, the RAB has effectively been functioning as the primary decision-maker on asylum claims—a role for which it is not adequately capacitated—rather than serving its intended review function.

Recommendations

To the Department of Home Affairs

- *Improve monitoring of security guards working outside refugee reception offices (RROs).*
- *Develop effective queue management procedures that do not compromise the rights of asylum seekers.*
- *Increase the provision of interpreter services at the RROs.*
- *Significantly decrease the daily target numbers for RSDOs to ensure that there is sufficient time to conduct the status determination interview and to engage in the deliberative process before issuing a decision.*
- *Provide training for staff at the reception offices to ensure that they understand their role with respect to the rights-regarding nature of the asylum seeker system.*
- *Provide training to RSDOs to generate individualised, quality decisions in adherence with the requirements of administrative justice.*
- *Improve oversight procedures to monitor adherence to the law and the quality of the decision-making process, while eliminating the incentive to reject asylum claims inherent in the current system of review. A possible solution might be to base reviews on those decisions that the RAB is obliged to conduct *de novo*.*
- *Expand the capacity and resources of the Refugee Appeal Board until the Regulations to the amended Refugees Act takes effect.*
- *Improve communication and consultation with SAPS so that Home Affairs policies which concern police activities are effectively implemented.*
- *Increase the validity period of asylum documents to six months in order to 1) halve the pressure on the renewals side of the reception system, 2) reduce the costs and livelihood barriers to migrants—especially those living in rural areas far from urban-based RROs—of*

three-monthly renewals, and 3) improve asylum-seekers access to rental accommodation and employment (see related discussion in Access to Accommodation).

Access to Healthcare

The South African Constitution guarantees ‘access to healthcare for all’ and everyone in the country regardless of legal status is entitled to life-saving care. Under the Refugees Act, legally recognised refugees are entitled to much more than this, as are non-citizens who are in the country with other permits. **Ensuring everyone in South Africa has access to health care will improve the health and welfare of all residents regardless of nationality.** However, CoRMSA remains concerned that that two key challenges outlined in the 2006, 2007 and 2008 reports remain problematic in 2009: **(1) refugees and asylum seekers continue to have negative interactions with, experiences of, and treatment by public healthcare providers; and (2) ambiguity persists within the public system on refugees’ and asylum seekers’ rights to access healthcare in general and ART in particular.**

Public Health Developments

In 2008, CoRMSA welcomed the introduction of a **key Financial Directive from the National Department of Health (NDOH) that seeks to address the ambiguity of refugee and asylum seeker access to health.**⁶³ In particular, CoRMSA applauded the recognition of challenges that individuals face in accessing documentation from the Department of Home Affairs (DHA) through clarifying that **refugees and asylum seekers accessing public healthcare—with or without a permit—should be assessed according to the current means test as applied to South African citizens, and that refugees and asylum seekers must not be charged ‘foreign category’ fees.** Importantly, CoRMSA supports the inclusion of a clause indicating that **refugees and asylum seekers—with or without a permit—shall be exempt from paying for antiretroviral treatment (ART) services,** irrespective of the level of institution⁶⁴ where these services are offered.

In 2009, CoRMSA reiterates the call for action made in 2008: **it is essential that the clarification outlined in the Directive is implemented uniformly across all public health institutions** to ensure that the right to healthcare is upheld for all. CoRMSA also endorsed several key submissions that were outlined in the 2008 report, calling for further clarification and investigation to ensure that the right to health, including ART, of refugees, asylum seekers and other migrants in the country is upheld.⁶⁵ In 2009, CoRMSA must highlight once again the need to ensure that these submissions are acted upon by the relevant bodies.

⁶³ National Department of Health Memo. 2007. BI 4/29 REFUG/ASYL 8 2007, 19 September 2007.

⁶⁴ ‘Level of institution’ refers to primary or tertiary healthcare institutions, including clinics, community healthcare centres and hospitals).

⁶⁵ AIDS Law Project; Legal Resources Centre; Lawyers for Human Rights; Treatment Action Campaign; Consortium for Refugees and Migrants in South Africa; Médecins Sans Frontières SA; Forced Migration Studies Programme; People Against Suffering, Suppression, Oppression and Poverty (PASSOP), AIDS and Rights Alliance of Southern Africa (ARASA), Centre for Applied Legal Studies; Wits Law Clinic; Southern African HIV/AIDS Clinician’s Society; South African Council of Churches; AIDS Consortium; Bowman Gilfillan Attorneys Pro Bono Department; & Webber Wentzel Bowens Attorneys Pro Bono Department. 2008. *Joint Submission to the National AIDS Council (SANAC) Plenary, 4 March 2008* [online] Available from: <http://www.pmg.org.za/files/docs/080326sanac.pdf>; Law, Health and Human Rights Working Group, c/o AIDS Law Project: Human Rights Abuses of Vulnerable Groups, including Refugees and Asylum Seekers in South Africa – Request for Investigation, Monitoring and Hearings, 14 March 2008; AIDS Law Project & Treatment action Campaign. 2008. *Joint ALP/TAC Submission on the Refugees Amendment Bill [B11-2008]*. [online] Available from: <http://www.pmg.org.za/files/docs/080326alptac.pdf>

CoRMSA welcomes the creation of a SADC Policy Framework for Population Mobility and Communicable Diseases.⁶⁶ This policy framework outlines the measures needed to address regional gaps related to the control and management of communicable diseases. These gaps include: inadequate harmonisation and coordination of disease management guidelines across different SADC countries; lack of cross-border referral mechanisms; barriers faced by mobile populations in accessing curative and preventive health services, as well as health information; and inadequate disease surveillance and epidemic preparedness.⁶⁷ The policy framework outlines the measures needed to address these gaps; including those specific to HIV/AIDS, tuberculosis (TB) and malaria, three major health challenges facing the region.

Importantly, the framework makes reference to the principles endorsed in the founding charter of SADC which under article 6 emphasises non-discrimination; the African Charter on Human and Peoples' Rights which stresses the right to health and the principles of equality and inalienability of rights; and resolution WHA61.17 of the 61st World Health Assembly of May 2008⁶⁸ which called on member states to promote equitable access to health promotion, disease prevention and care for migrants.

CoRMSA joins others in calling for the immediate adoption of the SADC Policy Framework for Population Mobility and Communicable Diseases, in order to benefit refugees, asylum seekers and other cross-border migrants.⁶⁹

Linked to this, the Migration Dialogue for Southern Africa (MIDSA) meeting, 'Promoting Health and Development: Migration Health in Southern Africa', has provided a welcome opportunity to discuss how to take positive action on migration and health within the region.⁷⁰ CoRMSA urges participants to translate the dialogue's recommendations into action.

Impact of Migration on the Healthcare System

Migration appears to have only a limited impact on the overall healthcare system. Ongoing research⁷¹ indicates that cross-border migrants are not health-seeking migrants, with the majority travelling to South Africa in order to pursue economic opportunities, or to escape persecution. Less

⁶⁶ Directorate for Social and Human Development and Special Programs. 2009. *SADC Policy Framework for Population Mobility and Communicable Diseases in the SADC Region: Final Draft April 2009*. SADC Secretariat: Gaborone. [online] Available from: http://www.arasa.info/files/pub_SADC%20Policy_Framework_FINAL.pdf

⁶⁷ Aids & Rights Alliance for Southern Africa. 2009. 'ARASA Calls For Adoption Of Policy Framework On Communicable Diseases in Mobile Populations.' [online] Available from: <http://www.arasa.info/news.php?article=107>

⁶⁸ Resolution WHA61.17 of the 61st World Health Assembly of May 2008 calls on Member States to, among other things, promote migrant-sensitive health policies; promote equitable access to health promotion, disease prevention and care for migrants; to establish health information systems in order to assess and analyse trends in migrants' health; gather, document and share information and best practices for meeting migrants' health needs in countries of origin or return, transit and destination; and promote bilateral and multilateral cooperation on migrants' health among countries involved in the whole migratory process. Available from: http://apps.who.int/gb/ebwha/pdf_files/A61/A61_R17-en.pdf

⁶⁹ See Aids & Rights alliance for Southern Africa 2009. A letter endorsed by 23 civil society organisations was sent to the SADC Chair by ARASA, calling for the immediate adoption of the SADC Policy Framework on Communicable Diseases in Mobile Populations.

⁷⁰ This meeting takes place in Dar es Salaam in June 2009.

⁷¹ Vearey, J., Nunez, L. and Palmay, I. 2009. *HIV, Migration and Urban Food Security: Exploring the Linkages*. Regional Network on AIDS, Livelihoods and Food Security (RENEWAL) South Africa Country Report. Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand and RENEWAL/IFPRI.

than half of all cross-border migrants interviewed report ever needing healthcare since their arrival in South Africa, and most report that they will return home should they become too sick to work. In addition, less than 5% of cross-border migrants report ever bringing a sick relative to join them in the country, indicating that they would either send money home or return home to care for the person in question. These findings challenge the prevailing assumptions that negatively associate cross-border migration with ill health, and as a drain on public health resources. However, of those that report seeking healthcare, a third report experiencing challenges.

Challenges Non-Nationals Face in Accessing Healthcare

Challenges experienced when attempting to access healthcare include:

- Being treated badly by a nurse;
- Experiencing language problems;
- Being denied treatment due to a lack of documentation or recognition of documentation;
- Being denied treatment because of being 'foreign';
- Being treated badly by a clerk, and
- Experiencing cost barriers.

Documentation status is related to barriers to accessing healthcare. Undocumented migrants are most likely to experience challenges when attempting to access healthcare, followed by asylum seekers and other documented migrants. Refugees are the least likely to experience challenges in accessing public healthcare.

Barriers to health access also vary across cities. Those residing in Johannesburg are the most likely to experience a problem; followed by those residing in Durban, Cape Town and Pretoria. Cross-border migrants residing in Port Elizabeth are the least likely to experience problems when attempting to access public health services.

CoRMSA is concerned by recent reports from the Western Cape that suggest that refugees, asylum seekers and other cross-border migrants will face increased challenges in accessing public primary healthcare (PHC) services.⁷² A new computerised system is being rolled out, requiring a South African identity number. This has resulted in the denial of PHC services to some cross-border migrants. It is important to explore whether this will have the same impact nationally. It is also important for government to note that the bureaucratic requirement for an identity number forms a structural barrier for refugees and asylum seekers in various areas of service provision⁷³ and that the necessity of including this condition in systems must be carefully weighed against the risk of entrenching unintentional systemic service biases against non-nationals.

⁷² Personal communication.

⁷³ For instance, the Department of Social Development requires identity numbers as a condition of its funding of beds in shelters. This has inadvertently become a form of systemic exclusion of non-nationals from shelters for abused women.

A Focus on HIV and Tuberculosis (TB)

As highlighted in previous annual reports, CoRMSA supports the inclusion of non-citizen groups—including refugees and asylum seekers—within the current HIV and AIDS and STI Strategic Plan for South Africa (referred to as the National Strategic Plan, or NSP)⁷⁴. **A key guiding principle to the successful implementation of the current (2007 – 2011) NSP is that of ‘ensuring equality and non-discrimination against marginalised groups’. Refugees, asylum seekers and other non-nationals are specifically mentioned as having ‘a right to equal access to interventions for HIV prevention, treatment and support’⁷⁵.** However, CoRMSA is concerned that—in 2009—a lack of implementation of the NSP is being observed: refugees, asylum seekers and other cross-border migrants continue to face challenges in accessing antiretroviral treatment (ART) in South Africa.

In particular, CoRMSA again draws attention to priority area 4 of the NSP, which encompasses human rights and access to justice, and goal 16, which aims to ensure ‘public knowledge of and adherence to the legal and policy provision’⁷⁶. **As in 2008, CoRMSA remains concerned that public healthcare institutions continue to determine their own policies that may counter existing legislation.**

The 4th Southern African AIDS Conference, hosted in Durban (31 March – 3 April 2009), provided an opportunity to engage with and reflect on several of the challenges highlighted above.⁷⁷ However, CoRMSA is alarmed at the confusion that seems to persist within healthcare providers around protective legislation that upholds the right to basic healthcare and ART. It is essential that copies of the 2007 Directive are provided for all public healthcare facilities nationally.

CoRMSA welcomes the initiative of the Aids and Rights Alliance of Southern Africa (ARASA) to highlight the challenges facing migrant workers from Lesotho, who contract TB while working in South African mines. CoRMSA supports ARASA’s call for a coordinated response to TB diagnosis and treatment between South Africa and Lesotho:

Cross-border management of TB involves special policy and programmatic considerations, which must be collaboratively determined and implemented by stakeholders in both countries. To date, there has been no coordinated action between Lesotho and South Africa on this issue. This has resulted in exacerbation of the TB crisis in Lesotho, lack of accountability of the South African mines in sharing the burden of this crisis, and serious weaknesses in the separate systems that seek to address TB in miners in both countries. Above all, it has contributed to the unnecessary loss of lives.⁷⁸

⁷⁴ Department of Health. 2007. *HIV & AIDS and STI Strategic Plan for South Africa, 2007 – 2011*. April 2007. Pretoria: Department of Health.

⁷⁵ Department of Health 2007, p.56.

⁷⁶ Department of Health 2007, p.119.

⁷⁷ IOM/UNAIDS parallel session on migrant access to HIV services. 1 April, 2009.

⁷⁸ AIDS & Rights Alliance for Southern Africa. 2008. *The Mining Sector, Tuberculosis and Migrant Labour in Southern Africa: Policy and Programmatic Interventions for the Cross-Border Control of Tuberculosis between Lesotho and South Africa, Focusing on Miners, Ex-Miners and Their Families*. ARASA. [online] Available from: http://www.arasa.info/files/pub_ARASA_Mines_TB_and_Southern_Africa.pdf

It is important to recognise that **TB, along with HIV, is a regional issue that urgently requires a coordinated regional response to diagnosis and management.** CoRMSA hopes that the SADC Regional Framework will assist to this end.

As outlined in previous reports, CoRMSA wishes to re-emphasise that it **is essential that ART provision for non-citizens be supplemented with prevention, care and support programmes,** as they are for South African citizens. **The NDOH must ensure that ART is implemented as part of an integrated programme** that is linked to other services, such as nutrition, food security, housing and social welfare.

Multi-sectoral programming is a challenge, since barriers that refugees and asylum seekers face in accessing public healthcare are mirrored when attempting to access other social services. It is imperative that the NDOH takes a lead to ensure that all social service sectors work together, in an integrated fashion, at the local level, to uphold their legal obligations to provide effective services for refugees and asylum seekers.

Recommendations

The recommendations outlined below are updated from previous CoRMSA reports, as little progress has been made to ensure that the right to health is upheld for all.

To National Government

- *Adopt the SADC Policy Framework for Population Mobility and Communicable Diseases.*

To the National Department of Health

- *CoRMSA reiterates the recommendation of the 2008 report to ensure that NDOH staff, and those of complementary departments, at the Provincial, Local and District level, are implementing National Directives uniformly at the facility level.* This includes ensuring that refugees and asylum seekers—with or without a permit—are not charged ‘foreign patient’ rates, are assessed according to the current means tests as applied to South African citizens, and have access to free ART.
- *Encourage the relevant institutions to act upon the content of health-related submissions endorsed by CoRMSA in 2008.*
- *To establish and maintain strong collaborative, multisectoral links to other social service departments, namely housing and social welfare, in order to deliver a holistic public health approach for all.*
- *To establish and maintain strong collaborative, multisectoral links to other social service departments, namely housing and social welfare, in order to deliver a holistic public health approach for all.*

- *Develop posters relating to the rights of refugees and asylum seekers to access healthcare, including ART, and the stipulations of the recent directive regarding paperwork requirements and fee schedules for refugees and asylum seekers, and require these to be displayed at all public hospital reception areas for the reference of staff and patients alike. With the assistance of civil society, support these posters with adequate training on these themes as well on the related issue of recognising the relevant refugee and asylum seeker documents.*
- *Provide ongoing experiential training for all healthcare professionals—including facility managers—on xenophobia and issues relating to the rights of refugees and asylum seekers. CoRMSA suggests that Medical School and Nursing College curricula be developed to incorporate these issues as pressing public health challenges within South Africa.*
- *Encourage public health facilities to provide clear leadership that positively reinforces the rights of refugees and asylum seekers to access healthcare.*
- *Standardise administrative procedures across all public healthcare providers and strengthen referral systems to ensure people access the appropriate care at the appropriate facility. Currently, non-nationals referred by primary healthcare institutions are often turned away from the higher-level institutions that should assist them.*
- *Ensure that HIV prevention, care and treatment activities—including awareness campaigns and the promotion of voluntary counselling and testing (VCT), antiretroviral treatment (ART), prevention of mother-to-child transmission (PMTCT) and post-exposure prophylaxis (PEP)—do not exclude non-citizen groups, including refugees and asylum seekers. Failure to provide such activities continues to undermine effective HIV prevention, care, and treatment efforts currently targeted at South African citizens.*
- *Formally incorporate the UNHCR/Southern African HIV Clinicians Society guidelines into National Department of Health ART guidelines.*
- *Continue to allow refugees and asylum seekers to use a counsellor or other healthcare provider as a treatment buddy in order to qualify for ART.*

To Civil Society Organisations

- *Implement awareness campaigns among refugees and asylum seekers about their right to healthcare with or without a permit, their right to access ART, and their right to be subject to the same means test as South Africans.*
- *Develop specific HIV prevention, care and treatment activities (including awareness campaigns and the promotion of VCT, ART, PMTCT and PEP) for non-citizen groups, including refugees and asylum seekers, and lobby for the inclusion of successful initiatives in government provision.*

To the South African National AIDS Council (SANAC)

- *As regards the welcome inclusion of refugees and migrants in the NSP, CoRMSA encourages SANAC to work to produce guidelines for specific programmatic action at the local level.*

To the South African Human Rights Commission (SAHRC)

- *CoRMSA encourages the SAHRC to follow up on the findings of the report on the SAHRC's May 2007 Public Hearings on Access to Health Services, to ensure that appropriate action is taken.*

To the United Nations High Commissioner for Refugees

- *Continue working towards the integration of the UNHCR/Southern African HIV Clinicians Society ARV guidelines into the National ARV guidelines.*

Access to Education

Access to education is a fundamental right guaranteed by the South African Constitution. **While relatively few refugee and migrant families have children of school going age—15% in a Wits University study⁷⁹—it is critical that all children be provided education. Unfortunately, severe obstacles remain for migrant children to access education.**

Given the small numbers, improving access to education for migrant children can be done without placing excessive pressure on the school system or national budgets. Moreover, as accessing education for children is not a primary motivation for international migration, providing such services will not result in further movements into South Africa. **By addressing the barriers migrant children face in accessing education, South Africa will improve its overall education system and benefit from a better educated, more effectively socialised population.**

Policy Framework

A strong legal framework protects the rights of all children to basic education in South Africa. Section 29 of the Bill of Rights lays out the universal right to basic education, while the South African Schools Act states that schools may not discriminate against learners in any way—including exclusion based on an inability to pay fees. Paragraph 19 of the Admission Policy for Ordinary Public Schools (Notice 2432 of 1998) explicitly states that the South African Schools Act applies equally to learners who are not citizens of South Africa or whose parents hold temporary or permanent residence permits. Therefore, no child may be refused access to schooling, whether on the basis of documentation, language, nationality or inability to pay school fees.

However, the terms of Section 39 of the Immigration Act create confusion about this issue. The Act states that no learning institution may knowingly provide training or instruction to an ‘illegal foreigner’ and entrenches the idea that access to ‘training or instruction’ is subject to a non-national’s immigration status. CoRMSA assumes that ‘training’ and ‘instruction’ exclude basic schooling, in line with the universal right to basic education, but because the terms are not defined in the Act’s definitions, there is nothing to confirm this to primary and secondary schools.

There also appears to be confusion about the need for study permits. The Admission Policy for Ordinary Public Schools states only that a ‘learner who entered the country on a study permit must present the study permit on admission to the public school.’ However, some schools incorrectly require study permits from all parents of non-citizens⁸⁰—a requirement which is in fact illegal. A further challenge is the fact that the Admission Policy for Ordinary Public Schools states that a learner must provide a birth certificate in order to be fully registered by a school. Conditional registration is allowed pending the issuing of a birth certificate by the Department of Home Affairs,

⁷⁹ Statistics cited here are based on an analysis of the Forced Migration Studies Programme’s Access to Services dataset.

⁸⁰ For instance, Hillcrest High School KwaZulu-Natal (see online admissions police at http://www.hhs.co.za/index.php?option=com_content&view=article&id=47&Itemid=41), Breschia House School, Gauteng (see admissions police at <http://www.brescia.co.za/doc/Admissions%20policy.pdf>), Jeppe High School for Girls, Gauteng (see admissions procedure at http://www.jeppegirls.co.za/page.php?p_id=52).

but the window provided by the policy is only three months, which can present problem for non-national children.

The Admission Policy for Ordinary Public Schools, promulgated in 1998, situates itself within the since-repealed Aliens Control Act of 1991. The National Education Policy Act needs to be amended to ensure that this artefact of the apartheid era is removed from the wording and replaced with the Immigration Act of 2002.

Challenges Accessing Education

Research conducted at Refugee Reception Offices (RROs) and with non-governmental organisations (NGOs) across the country suggests that 24% of the school-age children of asylum seekers are not in school.⁸¹ This may be an improvement on last year's figure (closer to 35%), or it may simply reflect the national level of attendance rather than city-based levels. Nevertheless, it remains at an alarming level. The most common reasons for non-school attendance were:

- Being unable to afford school fees (45%)—at least one civil society organisation working in the education arena confirms that refugee parents seem unaware of their rights with regard to fee exemption. Others note that certain schools in Gauteng are resistant toward enrolling refugees and migrants in large part due to the perception that they will not be able to pay school fees.⁸² In addition, there are few no-fee schools in the urban areas where many migrant children live. In 2008, the Director-General of the Department of Education (DoE) invited organisations to lobby provincial Education departments to apply to national government for schools to be re-categorised as no-fee schools. Organisations and individuals are requested to inform CoRMSA of areas where this would be particularly necessary.⁸³
- Being without documents (23%)—undocumented children are at a major disadvantage. In many instances, accessing education may require an asylum-seeker permit, a violation of the constitution, which states that 'every child has the right to education in South Africa' regardless of immigration status. Moreover, bureaucratic delays in the issuing of documentation by the Department of Home Affairs (DHA) are causing educational setbacks for migrant children. According to the Centre for Applied Legal Studies (CALs), a child who does not have the correct documents must be allowed into school and the parents must be given three months to provide the documents or an affidavit to the school.⁸⁴ However, the experience of some NGOs is that some undocumented children are turned away at the gate of schools and not given an opportunity to explain themselves to school management.⁸⁵
- Being unable to afford transport, uniforms or books for school (22%).

⁸¹ Analysis of the Forced Migration Studies Programme's Access to Services dataset.

⁸² Electronic interview with Germain Mukandama Mauridi of the Refugee Children's Project in Johannesburg: 19 May 2009.

⁸³ CoRMSA Newsletter No. 8. 7 March 2008.

⁸⁴ Tucker, Phillipa. 2008. 'Children's Access to Education.' CoRMSA Newsletter No. 8: 7 March 2008.

⁸⁵ Mauridi 2009.

- Being refused fee exemption⁸⁶ (7%)—more research is needed into the reasons why such parents are refused exemption. It may be that principals are not aware that non-national children are also eligible for fee exemptions or that they choose not to grant exemptions to non-national children.
- Finding the local school's full (6%).

Only 4% of respondents reported that their documents had been refused. However, as many parents may not even get to the stage of producing documents for the school, due to the perception that fees or costs related to schooling will be too high, it is difficult to measure this problem with a great degree of accuracy. During 2008, CALS noted in the CoRMSA newsletter that 'School staff members frequently prohibit non-South African children from accessing school at the start of every new school year using the cost of school fees or documentation as a reason to deny them access.'⁸⁷ It may be that this kind of gatekeeping contributes to the high proportions of parents who believe that fees are a barrier to their children's access to education.

The children of undocumented parents remain most at risk, with 42% of school-age children not attending school. Children whose parents hold asylum seeker permits are close to twice as likely to be in school, with 23% excluded. Even among children of recognised refugees, 21% are not attending school. On the other hand, among children of permanent residents, there is a much lower figure of 12% not attending school. Finally, of the few (14) individuals holding South African identity documents, all were in school.⁸⁸ Faced with access problems, 37% of parents approached an NGO for help, while 32% simply surrendered themselves to the situation, with the result that unacceptably high numbers of children remain without education.⁸⁹

School attendance statistics also differ according to the city in which migrants and refugees live, with 87% of children in Pretoria attending school, 76% attending in Gauteng, and 72% attending in Durban, but only 67% and 69% attending in Cape Town and Port Elizabeth respectively. The 67% in Cape Town is, however, a marked improvement on the 50% reported in last year's report.⁹⁰

Effects of the 2008 Xenophobic Attacks

The May 2008 anti-foreigner attacks throughout South Africa created obstacles to children's access to education due to, among other things, parents' fears of allowing their children back into unstable communities and the cost of transport for those sheltered far from their original schools. In Gauteng, the Refugee Children's Project (RCP) reports that the response of schools and educators to the plight of displaced children was laudable both in affected informal settlements and in areas where temporary shelters were established. The majority of displaced children in Gauteng were able to return to school in the wake of the attacks.⁹¹ However, obstacles appear to have been more

⁸⁶ Parents are entitled to full fee exemption if fees exceed 10% of their annual earnings, before deductions, and partial exemptions under a range of conditions.

⁸⁷ Tucker 2008.

⁸⁸ Analysis of the Forced Migration Studies Programme's Access to Services dataset.

⁸⁹ Analysis of the Forced Migration Studies Programme's Access to Services dataset.

⁹⁰ Analysis of the Forced Migration Studies Programme's Access to Services dataset.

⁹¹ Mauridi 2009.

severe in the Western Cape, where some children may have experienced setbacks of up to two years in their progress through the education system as a result of a combination of factors, including limited access to education during the 2008 school year (particularly in the Western Cape) and probable delays in registration for the 2009 school year.⁹²

Advocacy around Admission

Good relationships between schools and NGOs supporting refugees and asylum seekers appear to have positive effects, and this appears to be particularly so in Durban.⁹³ However, CoRMSA remains concerned about places where such relationships are not in place. Organisations are active in this area, with the RCP, for instance, conducting an annual admission advocacy campaign with the DoE and disseminating enrolment information to refugee and migrant communities.⁹⁴ But civil society has limited capacity and reach, and these problems need to be addressed by government interventions. Thus far, it is uncertain what the results of the DoE's planned monitoring of school principals may have done to address the problem of principals who bar migrant children from their schools. The Department did not respond to our enquiry in this regard.

Another problem reported by organisations working with migrant children is the issue of children arriving during the school year after the close of new registrations.⁹⁵

Language Barriers

Some civil society organisations working with migrant children find that language acts as a significant barrier to effective education;⁹⁶ others find that this is only a minor hurdle easily overcome by most children.⁹⁷ Few resources exist for assistance in this area. Thus far, it does not appear that the South African government has taken up CoRMSA's recommendation that it consider the kinds of language support programmes that are offered in other countries, despite the fact that many South African learners at English-medium schools could conceivably benefit from the support of such programmes. Together with the problem of midyear registrations, this issue might indicate a need for bridging programmes that can assist children until such time as they can be fed into the mainstream schooling system.⁹⁸

Awareness of Rights and Entitlements

Rights awareness is a core issue in accessing education. In many instances, both parents and school administrators are unaware of their rights and responsibilities regarding the education of non-national children. Research indicates that many parents are not aware of their duty to ensure their

⁹² Igglesden, V; Monson, T; & Polzer, T. 2009. Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008. Oxfam/University of the Witwatersrand.

⁹³ Mauridi 2009; Telephone interview with Yasmin Raajah of Refugee Social Services in Durban, 20 April 2009.

⁹⁴ Mauridi 2009.

⁹⁵ Electronic interview with Elinor Kern of Three2Six School for refugee children at Sacred Heart College in Johannesburg: 9 April 2009.

⁹⁶ Raajah 2009.

⁹⁷ Mauridi 2009.

⁹⁸ Kern 2009.

children are schooled up until the age of 15, and of their rights to fee exemptions. Schools and the DoE need to do more to raise awareness around these issues.

Government Support

Despite calls for government assistance, the responsibility for assisting non-South African children remains firmly with civil society organisations. CoRMSA looks forward to seeing the impact of advocacy groups that have recently been formed around the issue of refugee education access, in which representatives of the DoE are participating.⁹⁹

No-Fee Schools

There remain few no-fee schools in the city-centre areas where migrants live. The RCP notes that schools in urban areas where migrants reside tend to be very expensive in relation to the financial capacity of learner's parents or guardians.¹⁰⁰ In eThekweni also, there is a perception within civil society that government favours under-serviced areas for the implementation of no-fee schools, without the awareness that many learners from township communities have begun attending former model-C schools in the city centre and suburbs due to their perceived status as formerly well-resourced schools. On the other hand, some schools actively resist being declared no-fee schools.¹⁰¹ As a result, there is anecdotally a problem of overcrowding in such schools, with lower student numbers in township schools. At the same time, the economic profile of learners within schools in better serviced areas has dropped, yet there is no recourse in the form of no-fee schools for low-income parents. This is a problem affecting both local and migrant children. Government attention to the need for no-fee schools in inner-city areas would thus improve education access for local and immigrant children alike.

Pre-School Issues

Under current South African policy, pre-school education does not count as 'basic education' and consequently is not subsidised by the state. However, access to preschool services is crucial to the livelihoods of many migrant parents. NGOs continue to report that very young children are sometimes left alone at home while migrant parents are out working, due to their inability to access pre-school child care facilities.¹⁰² This is a similar difficulty for South Africans living in urban contexts without extended family networks.

It is not only the availability, but also the cost of pre-school facilities that forms a barrier to access. There is also an array of inappropriate, 'fly-by-night' type operations that pose their own risks to children. One organisation that is working to assist in this regard is Refugee Social Services in Durban, which has initiated a pilot home-based care programme. The organisation identifies suitable unemployed refugee women who have sufficient, safe and hygienic living space to care for six children, and provides them with training, a 'starter pack,' and hygiene products and food for six

⁹⁹ Kern 2009.

¹⁰⁰ Mauridi 2009.

¹⁰¹ Mauridi 2009.

¹⁰² Raajah 2009.

months to a year. Some problems have been experienced, such as bodies corporate objecting to the operation of the crèche, but CoRMSA looks forward to receiving ongoing feedback about this useful initiative.

Matric Certificates

CoRMSA is also concerned about the eligibility of non-national children for the national senior certificate (formerly 'matric') at the end of high school. While a child may not be prevented from writing the National Senior Certificate exam because of the lack of a birth certificate, the exam certificate cannot be printed without one—in effect leaving the learner without proof of their achievement. The DHA can issue non-national children with birth certificates, but many asylum seekers and refugees are not aware of this and few apply. Schools should encourage non-national parents to apply for birth certificates and facilitate the process to ensure all children can graduate.

Recommendations

CoRMSA urges government and civil society to act on the issues described above. Unfortunately, many of the recommendations below are being made for the third time. We hope that the new administration will include migrant children as they work to expand services for all of South Africa's population

To National and Provincial Departments of Education

- *Clarify the conflict between the South African Schools Act and the Immigration Act to ensure that children are not excluded from their right to basic education as a result of the ambiguous wording in section 39 of the Immigration Act.*
- *Revise the Admission Policy for Ordinary Public Schools to reflect the right of children without South African birth certificates to access education.*
- *Remove the reference to the Aliens Control Act from the Admission Policy for Ordinary Public Schools, replacing it with reference to the Immigration Act of 2002.*
- *Ensure that all schools are trained to recognise the various forms of refugee and asylum documentation and grant children access on the basis of these documents.*
- *Issue a directive to all schools to ensure that their admission policies do not require study permits from children who did not enter the country under such a permit.*
- *Introduce means of subsidising the 'hidden costs' of schooling, such as transport, uniforms and materials. This should apply to all children, including those with non-national parents.*
- *Include explicit mention of non-citizen children's rights in information material produced for schools and parents on admissions and fee-exemption policies.*

- *Facilitate the centralised production and annual updating of information materials on school registration procedures, exemptions from school fees, the need for a birth certificate for issuing of the senior certificate, and other important issues affecting the education of both South African and non-national children. This will help prevent schools from acting upon their own limited knowledge of the legal framework and policies governing basic education.*
- *Review international mechanisms for assisting non-nationals in host-country language skills within primary and secondary school education and, possibly with the assistance of civil society organisations, develop a staged plan to implement such assistance in South Africa for both non-national learners and South African learners in need of language support.*

To Civil Society Organisations

- *Investigate the possibility of translating education-related information materials produced by government into languages such as French and Somali to assist caregivers of non-national children who are not conversant in English to play a more active role in their children's education.*
- *Advise CoRMSA of schools in the organisation's areas of operation where learners would benefit from the declared of particular schools as no-fee schools.*
- *Present the needs of non-national children in ongoing debates on the more general issue of state-sponsored pre-school education provision.*
- *Where funds are available, consider initiatives to empower refugee women to embark on entrepreneurial projects offering day-care to local and migrant children.*
- *Investigate collaboratively the feasibility of developing bridging programmes to assist children who approach schools after the close of registration, or who have a poor command of the language of instruction.*
- *Where knowledge and resources are available, offer assistance to government in its consideration of a plan to support learners in the language of instruction.*

Access to Social Assistance

Most asylum seekers use their South African-based professional and social networks to establish independent livelihoods. However, there are those who need additional forms of social protection to which they should be entitled under Section 27 of the South African Bill of Rights. According to the Constitution, everyone in South Africa—regardless of nationality or legal status—has the right to sufficient food, water, and social security. Where extremely vulnerable migrants are unable to support themselves or their dependents, **CoRMSA believes that the Constitutional right to social welfare should be extended to refugees and asylum seekers.** This is particularly true where delays and capacity constraints within the Department of Home Affairs (DHA) leave asylum seekers undocumented for long periods, creating a barrier to their ability to work. In many cases it is in the interest of South African communities to extend protection to all categories of international migrants.

Court cases have established that permanent residents are eligible for all social grants, while refugees may access foster-care grants and disability grants. The Social Relief of Distress grant also applies to anyone in dire need of food support, since it does not initially require identity documentation for eligibility. However, CoRMSA remains concerned that these provisions are often not accessible in practice.

Nothing has come as yet of the Social Relief Bill that the Department of Social Development claimed would consolidate funds for refugees that were originally intended to be realised through the Refugee Relief Fund, which never came to existence. It remains of crucial importance that this Bill be processed as soon as possible.

Fate of Claims

In general, refugees do not benefit from even the social grants that the law allows. Refugee Social Services in Durban reports that of all the disability claims sent in by its clients thus far, none have yet received a response. It has managed to access a foster care grant through work with Lawyers for Human Rights (LHR), but the fact that legal action is necessary to obtain grants is a matter of concern to CoRMSA.

There are substantial backlogs in the processing of social grants, which makes it difficult to determine whether the delays in settling claims is due to the overall backlog or due to a continued lack of mechanisms through which to manage applications by non-citizens—a concern raised in last year's CoRMSA report. In addition, the Portfolio Committee on Social Development has noted that social assistance is not provided in a uniform manner across provinces,¹⁰³ and certainly CoRMSA has noted the uneven success experienced in securing Social Relief of Distress grants for victims of xenophobic attacks. Black Sash has also highlighted the lack of a uniform assessment tool to ensure

¹⁰³ Report on the Department of Social Development's Annual Report, Financial Statements and Auditor-General's report 2007/08, presented to the Portfolio Committee on Social development on 21-22 January 2009, in Parliament. [online] Available from: <http://www.pmg.org.za/docs/2009/comreports/090218pcsocdevreport2.htm>

consistent criteria are used to define eligibility for a disability grant, as well as the large backlog in the appeals process for these grants.¹⁰⁴

There are also difficulties associated with accessing documentation from the DHA. Refugee Social Services reports that this has interfered in attempts to obtain foster care grants for refugee clients.

Research Findings on Grant Access

Very few migrants apply for government grants, and those who do seldom obtain them. In Wits University research among 3,140 migrants at NGOs and refugee reception offices across the country, only 3% of respondents (96 individuals) had ever applied for a government grant. Just over half (52%) applied on their own, while 30% obtained assistance from an NGO.¹⁰⁵

Breakdown of Applications for Three Grants among the 3% of Migrants Who Had Applied

Type of Grant	Number (%)
Disability Grant	26 (30%)
Social Relief of Distress	19 (22%)
Foster Care	6 (7%)

Of those who applied for grants of any kind, 43% were rejected and 21% accepted. For 37%, the application was still pending. At the time the research was conducted, only a quarter of disability grant applications had been successful.

Part of the reason for the low rate of application is that more than half (51%) of respondents did not know that government grants existed. Of those that were aware of them, a fifth simply assumed they were not eligible because of their legal status. In the absence of government support, **NGOs and faith-based organisations are the main providers of food, clothing and money to needy migrants.**

Recommendations

CoRMSA is disappointed to have seen no movement on the new Bill relating to social relief funds that was to consolidate funds for refugees as well as for other vulnerable groups.

To the National Department of Social Development

- *Confirm whether mechanisms are in place to issue disability grants to recognised refugees.*
- *Develop a uniform assessment tool to ensure all doctors use the same eligibility criteria to assess eligibility for the disability grant.*

¹⁰⁴ Black Sash can help those struggling to get grants, *WITNESS*, 26 Feb 2009 [online] available from: http://www.blacksash.org.za/index.php?option=com_content&task=view&id=1156&Itemid=36

¹⁰⁵ Analysis of the Forced Migration Studies Programme's Access to Services dataset.

- *Confirm and circulate a policy on non-citizen access to the Social Relief of Distress grant, to ensure consistent access around the country.*
- *Take steps to reduce the backlog in the application and appeal processes for social grants.*
- *Inform civil society stakeholders of the fate of the Social Relief Bill that was to consolidate funds for refugees and other vulnerable groups.*

To Parliament

- *Move forward with the Bill that was to consolidate a variety of relief funds, including the Refugee Relief Fund.*

To Civil Society Organisations

- *Continue advising refugees and permanent residents of their rights to access government grants.*
- *Contribute to more general advocacy efforts relating to the administration of social grants.*

Access to Employment

South Africa depends on people from neighbouring countries to provide the labour and skills it needs. Moreover, unlike most African countries that spend millions providing assistance to refugees in purpose-built camps, South Africa encourages refugees and asylum seekers to be self-sufficient. Such a system not only promotes the human dignity and welfare of non-nationals in the country, but also that of their dependants elsewhere. It also ensures South Africa benefits from non-nationals' contributions to society at minimal cost to the tax payer.

Recent Wits University research indicated that 39% of non-nationals visiting Refugee Reception Offices (RROs) and non-governmental organisations (NGOs) nationwide were unemployed.¹⁰⁶ This is significantly higher than the most recent national estimate for South Africa, which put unemployment at 23.5%.¹⁰⁷ It also contradicts more general data on non-nationals in South Africa that show unemployment among non-nationals is closer to half that of South Africans. While these are only tentative conclusions, these findings suggest that **most migrants are economically active and do not require social assistance**. Of the refugees and asylum seekers surveyed who are working, 13% are in casual or temporary employment and 16% are self-employed.¹⁰⁸ Importantly, **20% of refugees and asylum seekers surveyed have at some point employed someone else**. In many cases, the people hired are South African citizens. That said, there are groups who do need assistance and **many workers—foreign and South Africa—would benefit from enhanced efforts to protect the basic conditions of labour**.

Conditions of Work

Police and officials checking for documents is a significant problem and many non-citizens workers report discriminatory treatment from employers. While working, 45% acknowledge that they probably earn less than a local doing the same job. **The survey found that 48% of refugees and asylum seekers report having been rejected as job applicants because of being a foreign national—regardless of their legal right to work**. The main reasons for these rejections are employers' failures to recognise documents and qualifications along with general reluctance to employ non-nationals. In many instances, this reluctance stems from ignorance about non-nationals labour rights and fear of punitive responses from the state.

Despite the fact that the Commission for Conciliation, Mediation, and Arbitration (CCMA) now serves undocumented employees, the majority of non-nationals simply accept the problems they face at work, leave their positions, or seek alternative employment. Only 1% of those surveyed have sought CCMA assistance, while another 2% seek the help of unions.

Because the CCMA does not separate out the complaints of non-national workers from those of South Africans, it was not able to provide specific information on its work with migrants. However,

¹⁰⁶ The statistics referred to in this chapter refer to an analysis of the Forced Migration Studies Programme's Access to Services dataset, which was collected among migrants at RROs and NGOs across South Africa.

¹⁰⁷ 'Unemployment rate rise to 23.5%'. *Independent Online*, 6 May 2009. [online] available from: http://www.iol.co.za/index.php?art_id=nw20090506183949263C380137

¹⁰⁸ Analysis of the Forced Migration Studies Programme's Access to Services dataset, which was collected among migrants at RROs and NGOs across South Africa.

the Scalabrini Centre in Cape Town observes that the Commission has indeed assisted undocumented migrants, with favourable outcomes, in the past year. **Some undocumented non-nationals won their cases and were awarded compensation**, although they have experienced difficulties in actually securing that compensation, for reasons that are not necessarily a consequence of documentation or nationality.¹⁰⁹ **While there have been positive moves to protect migrants' labour rights, there is still a long way to go.**

Professional and Highly Skilled Migrants

CoRMSA has previously expressed concern about international migrants' underemployment in South Africa, a trend that wastes valuable and much needed skills. Wits University research suggests that migrants defined as 'skilled' score lower than those categorised as 'unskilled' on all forms of employment, whether casual, part-time, full-time, or self-employed. Indeed, **the unemployment rate of skilled migrants was 6% higher than that of their unskilled counterparts, suggesting that South Africa is not yet making the most of this pool of skilled workers.**

The Scalabrini Centre in Cape Town reports that a significant development in the area of migrant access to employment in the past year is the fact that asylum seekers may now change their permit status to a work permit if they hold a passport. However, the requirements placed upon employers for general work permits are stringent, and include a demand for proof that there was no suitable South African candidate.¹¹⁰

Quota permits are obtainable by immigrants who have a qualification and five years' experience in a sector that has been identified as in need of scarce skills. Since last year, it has become compulsory to register with sectoral practitioner's councils prior to the issuing of a quota permit. However, the Department of Home Affairs (DHA) has found that some professional councils, including the South African Council for Educators, cannot cope with the demand for registration, which delays the process of issuing quotas to qualifying people. The process of registering with the Engineering Council, for instance, takes between 12 and 18 months. Role-players involved in the arena of employment access for immigrants note that the short term of asylum permits is also obstructing registration with professional bodies for various reasons. The Scalabrini Centre notes that the affected skilled migrants include nurses and radiologists. It adds that there exists a general prejudice against foreign qualifications even after accreditation by the South African Qualifications Authority (SAQA).¹¹¹

Quota permit holders currently have 90 days to find employment, a period that is often too short to identify a vacancy and complete the hiring process. This problem may be relieved by an initiative of the Department of Labour (DoL), which is establishing a database that will assist in matching applicants' skills to vacancies in particular sectors. While technocratic solutions are not without their problems, this may still be a useful initiative. CoRMSA encourages the DoL to make database operational soon.

¹⁰⁹ Electronic interview with Miranda Madikane of Scalabrini Institute, Cape Town, 11 May 2009.

¹¹⁰ Madikane 2009.

¹¹¹ Madikane 2009.

The SADC agreement not to poach member states' skilled workers has continued to work against refugees and asylum seekers, even though this is clearly against the spirit and intention of the regional agreement. This is most evident in actions by the Department of Health (DOH) which often fails to employ skilled asylum seekers and refugees in the country even though their employment would not amount to poaching. As CoRMSA has reported in the past, problems are particularly severe in the registration and recognition of qualifications in the medical field, despite skills shortages which are caused in part by the poaching of South African skills by developed countries.

The implementation of the Department of Education's (DoE's) initiative to make use of non-national teachers, especially in the areas of maths and science, remains unclear. CoRMSA requests that the DoE report back as soon as possible on the progress made toward realising these plans.

Informal Trading

Often acting outside their official powers, police continue to raid the businesses of migrants who depend on informal trading in South African towns and cities. For example, during a March 2008 raid in Mitchell's Plain, police were accused of using excessive force, assaulting traders and stealing money and goods from them. Those who attempted to complain at the local police station were allegedly told that police would not take statements from anyone regarding the raid.¹¹² Unfortunately, similar incidents are regularly reported across the country.

The May 2008 attacks destroyed hundreds of livelihoods based on informal trading. In many instances, the violence specifically targeted migrant business premises. As reported in the chapter 'Violence Against Non-Nationals,' the police often fail to protect property or assist victims in reclaiming stolen property. In at least one case, a police officer reportedly charged a fee to escort victims to retrieve their belongings.¹¹³ As a result, many years' worth of investment in informal businesses was lost, hurting both migrant entrepreneurs and the communities in which they work. **Violence against foreign shop owners has continued for many years with few repercussions for the perpetrators.**

Unfortunately, **migrant entrepreneurs, and shopkeepers in particular, continue to be murdered in informal settlements across the country. 2008 reportedly saw 52 murders of Somali traders, 31 of which took place after the major xenophobic attacks.**¹¹⁴ In many areas, including Diepsloot (Gauteng), Klipgat (North West) and Du Noon (Western Cape), **local business people and associations have issued threats or eviction letters to migrant traders.** Civil society actors claim that in Potchefstroom, the police supported the call to limit the number of immigrant-owned spaza shops in the area.¹¹⁵ Similar illegal and unconstitutional strategies appear to be in place in Motherwell (Eastern Cape) and elsewhere.

¹¹² CoRMSA Newsletter No. 9. 8 April 2008. [online] Available from: <http://www.cormsa.org.za/wp-content/uploads/2009/05/CoRMSA-NEWSLETTER-9.pdf>

¹¹³ These examples are drawn from a collection of interview transcriptions collected during FMSP's 2007/2008 research projects focused on the causes of xenophobic violence and the narratives of survivors.

¹¹⁴ Electronic Interview with Ahmed Dawlo, Director of the Somali Association of South Africa, 29 April 2009.

¹¹⁵ Dawlo 2009.

CoRMSA calls on government to strengthen checks against community initiatives that illegitimately evict migrants or make unconstitutional demands on the operation of their businesses, and to take a principled stance toward murders of migrant businesspeople in areas where these clearly outweigh the murders of South African traders. Too many of these attacks are dismissed as purely criminal, hiding the vulnerable position of migrants that enables this kind of victimisation to occur.

Delays in Securing Documentation

Access to documentation from the DHA remains a significant barrier to employment for migrants.

Delays in the issuing of quota permits have already been mentioned, but there are also delays in the issuing of asylum seeker and refugee status documents. The obligation to take time off from livelihood activities to renew asylum permits on a three-month basis is also a problem for workers and entrepreneurs, and CoRMSA has lobbied Refugee Reception Office (RRO) managers for the extension of this validity period, to little avail thus far. In addition, prospective employers often do not recognise documentation when it is issued. This may explain why research shows that migrants with university degrees have a similar—if slightly poorer—profile for part-time or full-time employment than those with a secondary qualification or less.¹¹⁶

International Conventions

South Africa has yet to sign or ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. CoRMSA awaits realisation of the Department of International Relations and Cooperation's commitment to sign the Convention.

Recommendations

To the Department of Labour

- *Encourage Parliament to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.*
- *Work with the DHA, SAQA, and other certification bodies (such as the Engineering and Nursing Councils) to develop a consistent approach to recruiting skilled refugees and asylum seekers into employment sectors requiring scarce skills. Qualified persons already in the country should be recruited before expensive campaigns are held to recruit people from other countries.*
- *Work with SAQA to reduce, waive, or defer fees for certification of qualifications for recognised refugees.*
- *Work with the CCMA and other bodies to encourage refugees, asylum seekers and other migrant workers to make use of mechanisms to protect their employment rights.*

¹¹⁶ Analysis of the Forced Migration Studies Programme's Access to Services dataset.

- *Consider the position of non-citizens working in the employment sectors where Sectoral Determinations are introduced. This does not mean special consideration for non-citizens beyond the normal conditions for legal employment, but it should include awareness-raising with employers that asylum seekers, refugees and persons on corporate permits have the right to be employed on the same minimum standards as citizens under the Sectoral Determinations.*

To the Commission for Conciliation, Mediation, and Arbitration

- *Conduct public information campaigns to inform migrant workers and their employers of their employment rights and the avenues of recourse open to non-citizens. An essential aspect of this will be assuring prospective claimants that they will not be subject to detention or deportation regardless of their legal standing.*

To the Department of Home Affairs

- *Ensure that undocumented workers who make use of the CCMA are not exposed to arrest and deportation as a result of their labour rights claims.*
- *Extend the statutory period permitted to holders of a quota permit for finding employment.*
- *Extending the validity periods of asylum seeker permits.*
- *Ensure that professional asylum seekers wishing to receive a quota permit are not subject to detention or deportation pending registration with practitioners' councils in South Africa.*

To the Department of Education

- *Circulate a policy statement to all schools on the process for employing non-nationals as teachers.*
- *Work with the Council of Educators to speed up the process of registering qualified non-national teachers.*

To the United Nations High Commissioner for Refugees

- *Continue, with partner NGOs, to lobby the National Department of Housing and the South African Nursing Council to enable qualified refugees and asylum seekers to register as nurses and work within the South African public health system.*

To Labour Unions

- *Conduct information campaigns among members and employers on the rights of non-citizen workers (including undocumented workers).*

- *Monitor labour rights abuses against non-national workers in the same way as abuses against citizens.*

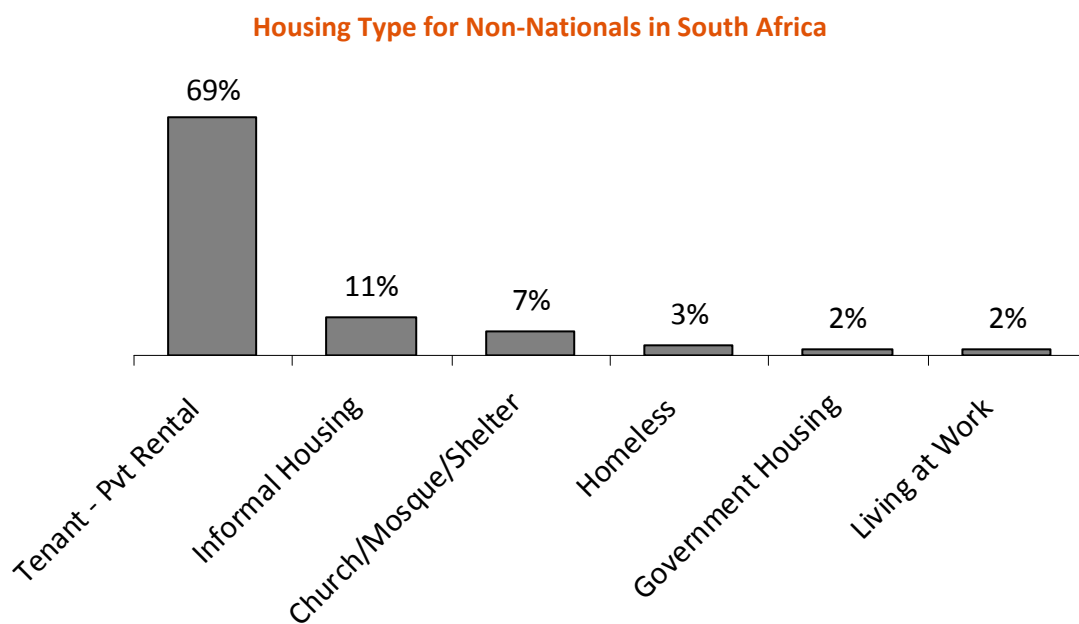
To the South African Police Service and Metro Police Services

- *Fully investigate attacks on foreign-owned businesses and develop appropriate strategies to protect all informal traders, regardless of nationality.*
- *Evaluate by-law enforcement mechanisms and accountability structures to ensure that police officers spend their time fighting crime instead of harassing and extorting non-nationals and other informal traders.*

Access to Accommodation

Access to safe and secure housing is critical to human life and dignity. It is also an important productive asset, as for many people—especially those facing insecurity on the streets—housing is a resource, providing premises from which to generate an income, a secure location to store possessions or stock, or a place to study in preparation for future employment. Unfortunately, **migrants continue to face more than the usual obstacles in accessing affordable and secure housing.**

There is little evidence to support the assumption among many South Africans that the shortage of ‘RDP’¹¹⁷ and other publicly provided housing is due to international immigrants and refugees. The diagram below illustrates the accommodation arrangements reported by respondents in a Wits University service access survey at non-governmental organisations (NGOs) and Refugee Reception offices across the country. Only 2% of respondents were living in government-provided housing. In most cases, those living in government provided housing were living with a South African citizen or had rented the accommodation from one.



Providing access to dignified and healthy housing is a key policy challenge for South Africa in relation to all its residents. This is especially the case in cities whose governments have not adequately planned for the large waves of rural-urban migration and the smaller ripples of international migration. South Africa’s policy of migrant and refugee self-settlement and urban integration—rather than confinement to camps—means that migrants jostle with locals within the generally tight urban housing market. **While almost all international migrants compete in the private market for housing, they are disadvantaged in doing so.** CoRMSA does not believe that special services or preferential policies for non-citizens are desirable, and supports the restrictions on non-national access to RDP houses. Nonetheless, efforts should be made to level the playing field to allow

¹¹⁷ The term ‘RDP housing’, derived from the Reconstruction and Development Programme that first provided for ownership of state-developed housing for historically disadvantaged citizens, has become a portmanteau for this kind of housing, despite the fact that the programme it is named for is no longer in operation.

migrants better opportunities to compete and to be more secure in their housing options.

While the issue of housing competition has been raised frequently in recent months, especially in relation to the May 2008 xenophobic attacks, the findings outlined in the table above demonstrate that only a small percentage of asylum seekers reside in the informal areas most affected, and a marginal number in government or RDP housing. In many cases, those in government-provided houses live there with a South African spouse or partner. Nevertheless, South Africa's policy of migrant and refugee self-settlement and urban integration undeniably means that migrants must find their place within an urban housing market that is unable to meet the demands of the country's residents.

Recent Accommodation Crises and Concerns

Those displaced by 2008's attacks on non-nationals have faced acute challenges in accessing accommodation. There is also the cumulative challenge of sheltering the growing numbers of Zimbabwean nationals fleeing the general disintegration of the human rights structure in a country where economic decline has decimated access to nutrition, health and education.

A court order demanding the removal of refugees staying at the Central Methodist Church in central Johannesburg was brought this year by law chambers in the area, which had become frustrated with the numbers of people sleeping rough around their business premises, and the placement of mobile toilets along a street in the area. This was after hundreds of Zimbabwean asylum seekers arrived at the church after being summarily evicted from an informal camp in Musina. The City of Johannesburg is currently working on identifying buildings that can be used to shelter the people staying at the Methodist Church, and some refugees have been moved to alternative accommodation. However, this is not without its own challenges, including the short-term nature of some of the accommodation.

Incidents surrounding the Central Methodist Church are but the most visible indication of the failure of government and civil society to plan for the accommodation of asylum seekers in particular. There is a dire need to plan for alternative accommodation when anyone is evicted from informal areas. Given the obstacles that migrants face in accessing housing, we need to be especially sensitive to their challenges. The politicised nature of any initiative appearing to assist immigrants is a particular obstacle. However, the political expediency of ignoring the accommodation needs of non-nationals creates conditions that will inevitably generate ongoing housing emergencies, as well as continually diverting police activity away from more serious crimes in their policing of vagrancy bylaws and immigration documentation.

CoRMSA supports ongoing initiatives by the City of Johannesburg, Gauteng Province and UN agencies to develop integrated, temporary shelter options for highly vulnerable 'new entrants' to the city. This includes both non-South Africans and South Africans. The need to develop programmes for new arrivals—regardless of nationality—reflects a positive move to mainstream migration into local government programmes. It also builds on the recognition that newly urbanised South Africans are often more vulnerable than cross-border migrants and require similar or additional support to

achieve economic self-sufficiency. Integrating social support services for vulnerable South Africans and non-South Africans is also in the interest of wider social cohesion and rights protection.

National and Provincial Housing Schemes

Although only a minority of immigrants live in informal settlements, they nevertheless constitute a portion of what is considered the ‘problem’ of informal settlement. It is therefore surprising and unfortunate that the alternative accommodation options proposed by government in its attempts to eradicate informal settlements often ignore non-nationals and insist on a South African ID document as the basis for assistance. Together with the evictions caused by regeneration projects, the question remains as to where non-citizens evicted from inner city buildings and informal settlements are expected to go. Effectively, the exclusion of non-nationals from housing policy can only displace the problem of high-rise slums and overcrowded squatter camps elsewhere. Alternatively, such policies render non-nationals homeless in a context where there is inadequate shelter provision. Indeed, shelters continue to be reluctant to house non-nationals, not least because bed-funding from the Department of Social Development (DSD) appears to be conditional upon the provision of a South African identity number. This makes non-nationals who are rendered homeless by eviction vulnerable to arrest on charges of vagrancy. Urgent attention needs to be paid to the policy gaps in this area. **Any long term housing solution must recognise the full size and diversity of a communities’ population, including refugees, asylum seekers, and other migrants.**

Private Housing Markets

The majority of migrants rely on privately rented accommodation outside of informal settlements. **The high cost of formal rented accommodation places a disproportionate burden on immigrants,** as Wits University research attests.¹¹⁸ Of those who experience problems with their accommodation, 7% are currently unable to pay their rent, and another 8% have been threatened with eviction for their inability to pay in the past. **Immigrants do not compete on an equal footing with South African tenants:** 3% report being threatened with eviction because of their documentation status and 8% simply because they are foreigners. Seven percent are forced to pay higher rents because they are non-nationals. Compounding these disadvantages is the fact that close to 20% report being treated badly by their landlord or neighbours because they are non-nationals.¹¹⁹

Research also indicates that **documentation has an important impact on tenancy conditions.** Undocumented migrants are less likely to live in rented accommodation than are other groups, and both undocumented migrants and asylum seekers are more likely to be subtenants than are those with refugee status or permanent residency. This is probably in part the effect of the greater permanency of the latter two types of status. **This supports previous calls for the extension of asylum seekers permit validity periods to 6 months in order to enable migrants to rent for longer periods.**¹²⁰

¹¹⁸ Analysis of the Forced Migration Studies Programme’s Access to Services dataset, collected in a survey of migrants at NGOs and refugee reception offices across South Africa.

¹¹⁹ Analysis of the Forced Migration Studies Programme’s Access to Services dataset.

¹²⁰ Amit, R. 2009. *National Survey of the Refugee Reception and Status Determination System in South Africa*. Migrant Rights Monitoring Project Research Report: February 2009. Johannesburg: Forced Migration Studies Programme.

The government provides mechanisms to which tenants can turn in cases of abuse. **Laudably, the Gauteng Housing Tribunal does not discriminate against undocumented non-nationals, but such tenants are often afraid to seek assistance because of their legal status.** As such, greater awareness-raising around this issue might improve their recourse to justice in cases of landlord abuse. Various legal NGOs also assist migrants and refugees faced with eviction. However, the vast majority of migrants and refugees faced with eviction do not seek assistance, but rather try to find alternative accommodation.¹²¹

A separate concern relates to the general living conditions at some of the buildings within which migrants rent accommodation. Overcrowding and lack of maintenance are among the concerns here. **Overcrowding and poor maintenance are exacerbated by sub-tenancy which prevents migrants from using legal or arbitration channels to address their concerns.**

Informal Settlements and Violence against Non-Nationals

The May 2008 xenophobic attacks in informal settlements across the country deprived thousands of non-nationals of their homes, possessions and livelihoods. Flung upon the charity of the state, many of these individuals were—and, in the Western Cape, some still are—sheltered in centres of safe shelter (CoSS). However, particularly in Gauteng, these safety camps were closed, in violation of a court order, without satisfactory integration planning to assist displaced people in returning to South African communities. Though funding was issued to many, the amounts granted could not hope to make restitution for the loss of homes, possessions and livelihoods. **The government made no attempts to assist non-nationals evicted from the camps to identify affordable accommodation options in relatively safe communities. With the level of funding granted, many displaced people returned to or established themselves afresh in informal settlements where their safety remains at risk.** Government has not made any visible attempt to prepare these communities or protect migrants living in predominantly South African communities.

CoRMSA calls on government to revise the national Disaster Management Act to make provision for medium-term displacements by civic violence and to provide for a reasonable level of assistance with the integration of displaced people into communities once such a disaster has drawn to a close. It also calls for renewed attention to the authority structures in areas with a history of xenophobic and other violence, which research has shown to have been involved in the eviction of non-nationals and the destruction and appropriation of their homes.¹²²

NGO and Faith-Based Shelters

Shelters have a limited capacity and cannot accommodate every individual. This is a problem for immigrants who find themselves homeless. Research into housing access found that, among respondents who had tried to access NGO or faith-based shelters, only 11% were successful.¹²³

¹²¹ Analysis of the Forced Migration Studies Programme's Access to Services dataset.

¹²² Misago, Jean-Pierre; Landau, Loren B; & Monson, Tamlyn. 2009. Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa. Johannesburg: IOM.

¹²³ Analysis of the Forced Migration Studies Programme's Access to Services dataset.

While a certain proportion of these refusals may have been based on shelters having insufficient space, **a substantial 47% of non-nationals seeking this kind of shelter were turned away because of their documentation status, and a fifth simply because they were not citizens.**

There is evidence that anti-foreigner attitudes are higher among faith-based organisations than among elites, which might be part of the explanation for the exclusion of non-nationals from shelters.¹²⁴ However, shelters for abused women have expressed a frustration that per-bed-per-day funding from the DSD is contingent upon provision of the occupant's South African ID number, revealing a second contributing factor. Presumably, DSD funding for other types of shelter are also conditional upon possession of an ID book. This creates a situation that is unacceptable, both for the marginalised locals (arguably the least likely to possess identity documents) and for all categories of non-national. **The DSD needs to urgently revise the policy that demands ID numbers in exchange for funding, as this causes the exclusion of even those non-nationals whom the state welcomes into its refugee reception system.** It is unreasonable to adopt a self-settlement (as opposed to camp) approach to refugees if no safety net is provided for this often vulnerable and impoverished population.

The lack of concerted action to address the housing needs of non-nationals—both in terms of shelter capacity and funding conditions, and in terms of slum and squatter clearing policies that leave those without ID books homeless—creates untenable situations for faith-based shelters. This was particularly the case after the closure of the Musina showgrounds where thousands of Zimbabweans had been sheltering. The fact that the grounds were cleared without any planning around the effects of rendering thousands of people homeless was symptomatic of South Africa's general policy blindness to the accommodation needs of non-nationals. The effects were felt in Johannesburg, where the Central Methodist Church—under strain at the best of times—could not accommodate the thousands of Zimbabwean nationals in need of shelter. The many homeless were forced to live rough outside the Johannesburg High Court in the vicinity, and the Central Methodist church faced both complaints and legal action about the situation. However, the visibility that this issue took on during March 2009 should serve as a catalyst for urgent policy action by government. Faith-based organisations should bear the brunt of a policy vacuum around housing for non-nationals.

Accommodation in Musina

There has not yet been a solution to the continuing need to shelter (largely) Zimbabwean migrants entering Musina to apply for asylum. Despite an initial plan to provide shelter at a nearby military base after the clearing of the Musina Showground area in early 2009, poor inter-departmental communication has led to a reality where only limited amounts of shelter are available through local NGOs and faith-based organisations. Many of the NGOs and faith-based organisations in the area raised concerns that those who were previously sleeping in the showgrounds had resorted to sleeping in the bush, heightening their vulnerability. There were also rumours that, although immigrants are not allowed to sleep in the showground area any longer, some had begun taking shelter there again. A sustainable solution to the very real need for accommodation in Musina needs to be found as soon as possible, and this requires leadership from the Musina Municipality with

¹²⁴ Kotze, H. & Steenekamp, C.L. 2008. *Democratic Consolidation in South Africa: Comparing Elite and Public Values*. Konrad Adenauer Stiftung Policy Paper No. 5. [online] Available from: http://www.kas.de/wf/doc/kas_15475-544-2-30.pdf

support from the District, the Province and national government. Any response should entail support to NGOs and faith-based organisations that currently draw on their own limited funds to support the shelter needs of the migrant population in the area.

Recommendations

Unfortunately, several of the recommendations listed here featured in last year's CoRMSA report, but have not yet received attention. We reiterate them here and ask for urgent attention to these outstanding issues in the coming year.

To the National and Provincial Departments of Housing

- *Revise the discriminatory phrasing of the National Housing Code and provincial housing policies—for instance, the lack of clarity around who is determined to be an ‘illegal’ migrant—to ensure that asylum seekers and refugees are not entirely excluded from the mandate of these instruments.*
- *Ensure the explicit inclusion of asylum seekers and refugees as a specific category of non-nationals in existing and future housing and urban regeneration policies.*
- *Explore the extension of housing assistance programmes to destitute refugees, following the example of the DSD in relation to social assistance grants for vulnerable refugees.*
- *Explore barriers that appear to exist regarding the right of provinces and municipalities to claim Emergency Housing Grants to support victims of xenophobic attacks. This is particularly important given the reported difficulties provinces have had in reclaiming the unbudgeted monies spent assisting victims of the May 2008 attacks.¹²⁵*
- *Include explicit consideration of non-citizens’ rights along with citizens’ rights in any future measures to monitor and regulate private-rental housing provision.*

To the Department of Cooperative Government and Traditional Authorities

- *Motivate national government for a revision of housing policies that limit the ability of asylum seekers and refugees to access housing and be fully integrated into cities.*
- *Lobby the Department of Housing to enable grant claims for victims of xenophobic violence under the Emergency Housing Programme.*
- *Actively engage the Musina Municipality to address the ongoing need for the provision of shelter for newly arrived migrants in Musina. This is an area that will require effective inter-*

¹²⁵ Igglesden, V; Monson, T; & Polzer, T. 2009. Humanitarian Assistance to Internally Displaced Persons in South Africa: Lessons Learned Following Attacks on Foreign Nationals in May 2008. Oxfam/University of the Witwatersrand.

departmental cooperation and thus needs intervention from the National Department of Cooperative Government and Traditional Authorities.

To the Department of Social Development

- *Reconsider the current conditions for per-bed funding claims from shelters to ensure that South Africans and non-nationals without identity documents are not excluded from this form of assistance.*

To Municipal Authorities

- *Motivate national government for a revision of housing policies that limit the ability of asylum seekers and refugees to access housing and leave non-nationals homeless when informal settlements or city-centre buildings are cleared.*

To International Organisations

- *Require that any funding assistance to housing-related projects is provided on condition that the needs of legal non-citizens are accounted for.*

To Faith-Based Organisations

- *Investigate the reported prevalence on anti-foreigner sentiments within some quarters of the FBO sector and engage in advocacy against this form of discrimination, especially where it impacts upon the provision of shelter to non-nationals.*

Access to Financial Services

Access to credit and banking services remains a challenge for many non-South Africans. Not only does this promote crime and extortion by opportunists who are aware that migrants carry cash, but it limits their ability to start new businesses that could provide employment and services to South Africans. It also limits the ability of non-nationals to achieve economic self-reliance and generate the savings required to invest elsewhere or return home.

In 2008, access to banking services came under the spotlight when the United Nations High Commission for Refugees (UNHCR) made money available through the Jesuit Refugee Service (JRS) and Cape Town Refugee Centre (CTRC) for the 'reintegration' of displaced non-South Africans from the centres of safe shelter (CoSS) in Gauteng and the Western Cape, respectively. The funds were initially intended to be paid into a landlord's bank account or the beneficiary's bank account, but given non-nationals lack of access to banking services, this was not always possible. Some were able to use the bank accounts of friends or associates, but CoRMSA received reports of cases where this money ultimately never reached the intended beneficiary.

The recognition that non-South Africans struggle to access banks also leads to greater threats to the security of non-South Africans. In a series of interviews about attacks on Somali nationals published in the *Daily Dispatch*, a man convicted murdering a number of Somali entrepreneurs highlighted the perception that Somali business owners kept large amounts of cash on their premises influenced his decision to attack their shops.

In the past year, the decision by the Department of Home Affairs (DHA) to concentrate its efforts on finalising asylum application cases rather than on renewing asylum permits has resulted in numerous cases of permit holders being unable to renew them. The knock-on effect in many cases is that **banks have refused to allow those with expired permits to access their own money at the bank.** This has thus resulted in extreme hardships in cases where people have complied with the law and attempted to renew their permits but have been penalised when DHA processes have made this impossible.

In 2008, a number of banks received communication from a DHA staff member indicating that they should not open bank accounts for those with Section 22 asylum seeker permits. However, this advice was provided by an employee of one of the Gauteng Refugee Reception Offices, and the national DHA has since confirmed to CoRMSA that this is not the national position—the DHA does not recommend that banks deny accounts to asylum seekers. However, the DHA has confirmed that it has offered to verify the asylum permits of applicants for new accounts for banks who need this service. There may thus be some delay in cases where some banks seek to verify the permits of new applicants with the DHA.

Following advocacy from CoRMSA and others in 2007 and 2008, First National Bank (FNB) and ABSA clarified their policies regarding refugees and asylum seekers opening bank accounts at their offices. FNB allows asylum seekers to open Smart Accounts and refugees to open a variety of accounts depending on individual conditions. ABSA's national policy means that it currently allows only recognised refugees to open bank accounts. Standard Bank has also announced plans to open

accounts for asylum seekers and refugees. CoRMSA thanks these members of the banking sector for their willingness to engage with the consortium, and their interest in addressing the needs of non-nationals in the country.

Providing proof of address remains a major challenge for many poor citizens and non-South Africans. Given many migrants' insecure accommodation conditions (see Access to Accommodation), they are particularly disadvantaged. Some banks have indicated that they will accept letters from local ward councillors (or on municipality letterheads) indicating that the ward councillor can confirm that the individual lives at the address he or she has indicated.

Recommendations

To the Banking Council

- *Encourage standardisation of the policies of the major banks for the opening of accounts for asylum seekers, refugees and migrants to prevent discrimination.*
- *Explore alternative forms of acceptable proof of address to ensure South Africans and non-South Africans subletting informally or living in informal accommodation can still open accounts.*
- *Encourage banks to enable people with expired permits to access or at least close their accounts, and to ensure that asylum seekers are advised in advance of the effects of permit expiry on the use of their bank account.*

To the Department of Home Affairs

- *Encourage banks to address to find mechanisms to allow people who have been unable to renew their permits to access their money.*
- *Consider extending the validity period of asylum permits to reduce the administrative efforts of banks in opening and maintaining bank accounts for non-nationals holding short-term permits.*
- *Ensure the process of verifying the permits of asylum seekers operates efficiently so that this does not result in further delays in the opening of accounts (for the banks that choose to use the verification process).*

CONTACT INFORMATION

For further information on this report or to learn more about the rights of refugees, asylum seekers, and undocumented migrants in South Africa, please contact the people and organisations listed below:

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CoRMSA

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