

Responding to Zimbabwean Migration in South Africa – Evaluating Options

**Background document prepared for a meeting on
27 November 2007
at the Chalsty Centre, University of the Witwatersrand**

Revised Version – 28 November 2007

**hosted by Lawyers for Human Rights, the Wits Law Clinic,
and the Wits Forced Migration Studies Programme**

Prepared by the
Forced Migration Studies Programme



The **University of the Witwatersrand Law Clinic** has been in operation for almost thirty-five years. The Clinic provides free advice services to indigent clients from greater Johannesburg, in cooperation with the Legal Aid Board, while playing a crucial role in the training of students and candidate attorneys. Today, the Wits Law Clinic is one of the biggest law clinics of its kind in South Africa, and is renowned for its work, particularly in areas of public interest law. The Clinic has a particular programme to provide assistance and legal advice to asylum seekers and refugees and is a partner organisation of the UNHCR. For more information, see <http://www.law.wits.ac.za/>.



Lawyers for Human Rights is a non-governmental organisation that strives to promote, uphold and strengthen human rights. The organisation has had a proud history since its inception in 1979 of fighting oppression and the abuse of human rights in South Africa. LHR's Refugee and Migrant Rights Programme provides legal advice and carries out strategic litigation on issues concerning asylum seekers and refugees. For more information, see <http://www.lhr.org.za>



The **Forced Migration Studies Programme, University of the Witwatersrand** is an Africa-oriented, Africa-based centre of excellence for research on displacement, migration, and humanitarian assistance that helps shape global discourse on migration, humanitarian aid and social transformation. Established in 1998, it offers the only post-graduate training programme on the African continent dedicated to a multi-disciplinary study of migration issues. For more information, see <http://www.migration.org.za>

This background paper was researched and written by Tara Polzer at the Forced Migration Studies Programme (FMSP). This document draws on over a decade of research into migration in Southern Africa and the programme's recent work on Zimbabwean migrants in South Africa, including previously published FMSP reports compiled by Ingrid Palmay and Darshan Vigneswaran. Thanks also go to Prof. Jonathan Klaaren (Director) and Magda van Noordwyk (Administrator) of the Mandela Institute for hosting and organising the meeting and to Shula Mafokoane for her administrative assistance.

For further information, please contact Tara Polzer:

tara.polzer@wits.ac.za

tel: 011-7174033

fax: 011-7174040

<http://www.migration.org.za>

Table of Contents

1. Introduction	4
2. Zimbabwean Migration to South Africa – Characteristics and Needs	5
3. Evaluating Current Responses	9
4. Factors to Consider when Designing a Response	15
5. Range of Potential Responses.....	19
6. Policy Approach Scenarios	26

Abbreviations

DHA	Department of Home Affairs
DFA	Department of Foreign Affairs
FMSP	Forced Migration Studies Programme at the University of the Witwatersrand
LHR	Lawyers for Human Rights
MSF	Médecins sans Frontiers (Doctor without Borders)
SANDF	South African National Defense Force
SAPS	South African Police Services

1. Introduction

"As to this... inflow of illegal people, I personally think that it's something we have to live with... it's difficult; you can't put a Great Wall of China between South Africa and Zimbabwe to stop people walking across." President Thabo Mbeki, speech to Parliament, 17 May 2007

"Clearly we must do more to see what we can do to deal with this large influx of refugees"
Deputy Minister of Foreign Affairs Aziz Pahad, *Mail & Guardian*, 2 August 2007

Zimbabwean migration into South Africa is testing the country's legal and institutional infrastructure for migration management and refugee protection. As democratic South Africa's first large-scale immigration from a neighbouring country, there is no institutional experience to draw on in developing and implementing responses. Even though large numbers of Zimbabweans have been entering the country for the past five years, South Africa continues to implement its normal migration management strategies, including arrest and deportation of undocumented Zimbabweans and the options of individual work permit or asylum applications. These fragmented responses are not addressing the scale or specific nature of Zimbabwean immigration. Furthermore, the future outlook for Zimbabwe is uncertain, with an imminent shift in the scale and form of migration a possibility that cannot be excluded. Finally, the lack of a coherent response is attracting increasing local and international attention.¹

The lack of a coordinated response does not only have negative impacts for Zimbabweans, but also for South African citizens and South African institutions. While a clear and coordinated policy response poses challenges in terms of regional and domestic politics, cost and institutional capacity, the stakes of inaction are also high, including impacts on South Africa's economy, welfare system, public health, safety and security, as well as its regional and international reputation as a rights-respecting country.

A range of potential responses have been suggested by the South African government, international organisations and civil society. Some, such as refugee camps, have already been rejected by the government, while others, such as relaxing visa requirements or granting temporary protection permits, have not yet been openly rejected or adopted.

This background paper is intended to contribute to the discussion by presenting a summary of key issues and response options, on the basis of expert analysis of international experiences. Without prescribing a specific governmental response, this document argues that some kind of coherent response is necessary at this point in time, and sets out a framework for evaluating the appropriateness and potential impacts of different responses.

Effective responses to migration flows, as with any effective policy, are always context specific and so the 'ideal type' policy options outlined below are intended as possible points of departure rather than as models to be adopted whole-sale. South Africa has a history of innovative policy development, and its policy decision regarding Zimbabweans will continue to attract attention from the continent and beyond.

2. Zimbabwean Migration to South Africa – Characteristics and Needs

There are several characteristics of the movement of Zimbabweans into South Africa since 2000 which point to the importance of a coordinated response. For any combination of responses to be effective, in the interests of both South Africans and Zimbabweans, they must address the needs arising from the specific nature of the migration flow.

Any attempt to describe current Zimbabwean migration is characterised by a lack of comprehensive data. While there is a growing (if still limited) number of studies of Zimbabwean migrants, including several which provide some statistical data,² these studies all focus on one specific location (inner-city Johannesburg or the border) or one specific group (refugees or deportees). They therefore only provide part of the overall picture of the dispersed and heterogeneous Zimbabwean population in South Africa. Nonetheless, there is enough information about the basic nature of the Zimbabwean population in South Africa to show the need for and the basic contours of a response.

2.1. Large numbers

Much attention has been paid to estimating the number of Zimbabweans currently in South Africa. Most of the commonly quoted statistics, which range from one to three million Zimbabweans, are extrapolated from ungeneralisable data (including deportation numbers, border crossing statistics or asylum statistics) or are based on conjecture.³ A likely estimate, based on a range of data sources, is around one million Zimbabweans in South Africa.⁴ However, accurately establishing the number of Zimbabweans in South Africa, as with all largely undocumented migration flows, is virtually impossible, since even a large-scale survey such as the census regularly fails to capture many of the country's migrants.

In fact, knowing the exact and total number of Zimbabweans in the country is not necessary for recognising the need for or planning a response. Firstly, even the lowest estimates confirm that there are now more Zimbabweans in the country than any other migrant group in South Africa's recent history, including Mozambican refugees during that country's civil war. Such large numbers in themselves suggest the need for a response beyond the standard migration management tools. Secondly, the need for a response is created not by the absolute numbers of migrants, but by their vulnerability and level of impact on the host country. Not all Zimbabweans will be equally vulnerable or have the same kinds of impacts on the South African society or economy. Finally, Zimbabweans are neither all collected in one part of the country nor dispersed evenly across it. Planning and costing humanitarian responses therefore depends on the numbers in a specific location, rather than a national total.

2.2. Humanitarian crisis

To date, the issue of Zimbabweans in South Africa has not been discussed as a humanitarian crisis. However, it is increasingly clear that there are severe humanitarian implications of the Zimbabwean migration. The humanitarian needs faced by Zimbabweans in South Africa result partly from a lack of basic humanitarian services in South Africa and partly from the growing humanitarian crisis in

Zimbabwe itself. The key humanitarian needs experienced by Zimbabweans are **accommodation, food** and access to **health care**.⁵ A lack of documentation makes it difficult for many to find work or start small businesses to be able to provide for themselves, and even those with asylum or refugee documents often struggle to find employment. Due to its policy of self-supported integration, the government is currently not providing any dedicated humanitarian services to documented Zimbabweans or other migrants, and accessing mainstream governmental and non-governmental services is difficult for undocumented migrants. Therefore, basic humanitarian needs are currently being covered mostly by kinship- and community-based social support networks, with some limited NGO and church-based assistance, but all these mechanisms are increasingly overwhelmed. Furthermore, the humanitarian needs of Zimbabweans in South Africa are increasing as the humanitarian situation in Zimbabwe deteriorates, with decreasing access to food and health care. Many Zimbabweans currently arriving in SA are therefore already weakened for lack of food and medication. If the humanitarian situation in Zimbabwe continues to deteriorate, this is likely to reflect on migration to South Africa, with the possibility of more women, children and elderly moving to join the still predominantly young male Zimbabweans currently in South Africa. A key goal of a comprehensive response must therefore be to address the humanitarian needs of the most vulnerable Zimbabweans in the country.

2.3. Dispersed settlement

Zimbabweans are dispersed throughout the country rather than being concentrated along the border or in a particular part of the country. The large numbers living in Gauteng and increasingly other major urban centres have received the most media and NGO attention, but Zimbabweans are also settling in townships and informal settlements around large cities, in smaller provincial towns (such as Polokwane, Nelspruit, Bloemfontein, Port Elisabeth, etc.), and in rural villages.

Therefore a response which focuses only on a single area, e.g. a camp or reception centre near the border, will not be appropriate to the nature of the migration flow. There are at least 6 geographical areas to consider when designing a response:

- The immediate border area
- Large town centres
- Townships and informal settlements
- Industrial and mining areas
- Small and medium towns
- Rural villages in Limpopo and elsewhere

2.4. 'Mixed' migration

One of the greatest challenges in structuring a clear policy response to Zimbabweans in South Africa relates to their various motivations for migrating, which translates into eligibility for a range of legal statuses. Some of the 'types' of Zimbabwean migrants include:

- Refugees: who are fleeing *individual* persecution, and those who are fleeing *group* 'political' persecution such as Murambatsvina, etc.;

- Humanitarian migrants: who are fleeing extreme deprivation or starvation for themselves or their families;
- Economic migrants: including highly skilled and unskilled, who are often aiming to work in order to support struggling families in Zimbabwe;
- Traders: who move back and forth between SA and Zimbabwe regularly to buy and sell goods;
- Shoppers: who enter SA to shop for food and basic goods and return to Zimbabwe almost immediately;
- Borderland residents: who move back and forth regularly while remaining in the border area;
- Transit migrants: who come into South Africa with the intention of moving on to another country relatively soon;
- Unaccompanied minors: who either remain in the border area or move to the urban areas;⁶

To date, South Africa's immigration institutions only perceive some of these motivations to be legitimate (including individually persecuted refugees, skilled economic migrants on work permits and legal shoppers), while some are largely ignored (unaccompanied minors, traders, transit migrants, borderland residents) and others are actively rejected (most humanitarian and economic migrants).

The mixed nature of the migration poses three problems for responses:

- A one-size-fits-all response will not be appropriate. A response which enables assistance for humanitarian migrants will still need to include legal protection for refugees, for example;
- Many individuals are not easily categorised into one 'type' or legal status. For example, refugees, people seeking work and traders may also have humanitarian reasons for moving, such as needing to feed starving families;
- It may be more difficult to galvanise public and official support for a wide-spread response due to the continued perception that many Zimbabweans are 'only' economic migrants. However, simplifying the situation by claiming that all Zimbabweans are refugees or humanitarian migrants for the purpose of creating public support also has drawbacks.

2.5. Lack of documentation options

One of the key characteristics of the current Zimbabwean presence in South Africa is that the majority of Zimbabweans enter the country through informal border crossings and remain undocumented within the country. This stems from a migration management framework which provides few options for Zimbabweans to cross the border legally or attain legal documents once inside the country, as described further below. This impacts on all other aspects of the migration crisis, including:

- The inability to generate dependable data on cross-border movements and numbers of Zimbabweans in the country;
- Exacerbating the humanitarian crisis by making it difficult for Zimbabweans to access public welfare services and to support themselves through gainful employment;
- Enabling victimisation of Zimbabweans by criminals and exploitation by employers due to undocumented migrants' fear of reporting abuses to the authorities;
- Hindering the control of those Zimbabweans who commit crimes.

2.6. Regional political and humanitarian dynamics

South Africa's (lack of) responses to Zimbabweans in South Africa is closely associated with its role in mediating the political crisis within Zimbabwe. Responses within South Africa must therefore be designed to complement rather than undermine South Africa's supportive role in reconciling and reconstructing Zimbabwe. Furthermore, humanitarian issues can and should be separated from regional political considerations, as they affect basic human rights as well as the direct security and welfare interests of South Africans. Regionally supportive response priorities might include:

- Enabling remittances: Various studies suggest that remittances by Zimbabweans in South Africa already contribute significantly to maintaining basic livelihoods in Zimbabwe, helping to avert famine and economic collapse. This effect could be strengthened by legalising Zimbabweans in South Africa and providing humanitarian assistance within South Africa. This might also reduce the pressure of future humanitarian migration into South Africa.
- Retaining skills: Zimbabwean reconstruction would be aided by the retention of skilled Zimbabweans in the region. Without means of being incorporated into the South African economy, skilled Zimbabweans either move out of the region or face de-skilling in informal sector or less qualified jobs.
- Building a regional legal framework and culture of good neighbourliness and mutual respect: Various SADC protocols already envision a progressive development toward regional integration, including facilitated movement and employment. This could provide the basis for a regionally developmental response to Zimbabwean migration throughout the region, as discussed further below.

2.7. Uncertain Duration and Future Migration Patterns

In spite of positive signs from the current negotiations between ZANU-PF and the MDC in Zimbabwe, there is no guarantee of a quick resolution or a peaceful election in 2008. Zimbabwean migration to South Africa has already occurred at heightened levels for seven years without a coherent response, even though a visible solution to the push-factors was not in sight. Even if the political contestation in Zimbabwe is resolved soon, the economic reconstruction of the country will require a longer period of time. Therefore, both legal and humanitarian responses must take into account a potentially protracted time frame for a large-scale Zimbabwean presence in South Africa.

In addition to a consideration of a potentially protracted duration of Zimbabwean migration into South Africa, response planning should also take into account how changes in Zimbabwe may lead to changing migration patterns into South Africa. Since mid-2007, there are already indications of changing demographics, including more women and families with children. There are at least three possible scenarios with differing migration implications:

- Resolution of political contestation, peaceful elections, sufficient harvest, slow reconstruction of the economy.
- Drought, complete breakdown of food distribution and economy, humanitarian crisis expands.
- Failure of negotiations, violent elections, armed resistance or pre-emptive violent repression.

The key needs which a response must therefore address include:

- Be substantial enough to respond to the scale of the migration flow;
- Address humanitarian needs;
- Address the dispersed settlement pattern by being accessible around the country, not only in the major urban areas or the border area;
- Provide legal status arrangements which address different motivations for migration, especially respecting the right to apply for asylum;
- Take regional humanitarian dimensions into account while separating humanitarian issues from regional political relations;
- Be prepared for a significant duration of Zimbabwean presence in South Africa.
- Be prepared for a change in future migration patterns, including worst-case humanitarian and civil war scenarios.

3. Evaluating Current Responses

Current responses to Zimbabweans in South Africa are mainly continuations of existing mechanisms for managing migration. Since the volume and nature of Zimbabwean migration are different from all previous migration flows into South Africa, this is not succeeding in addressing either Zimbabwean or South African needs. There are problems with each of the responses individually, and the overall response menu leaves significant gaps. Some of these gaps are specific to the Zimbabwean situation, while others reflect weaknesses in South Africa's migration management framework overall.

3.1. Current Responses

- UNHCR
- Restrictive entry conditions
- Deportation of undocumented Zimbabweans
- Individual access to asylum under the 1998 Refugees Act
- Individual access to temporary residence permits under the 2002 Immigration Act
- Disaster Management plans at national, provincial and municipal levels under the 2002 Disaster Management Act
- Responses by service provision Departments (Education, Health, Housing, Social Development, Labour, SAPS)
- Municipal initiatives to provide basic welfare services
- Non-governmental welfare services
- Traditional Leaders
- Employers
- South African citizens

3.2. Concerns with current responses

3.2.1. UNHCR

The UNHCR has to date taken a conservative position regarding Zimbabweans, maintaining that the vast majority are not refugees and that the situation in Zimbabwe does not warrant a group application of the OAU Convention-based refugee definition. The UNHCR has therefore no put significant or public pressure on the South African government to scale up its responses to Zimbabweans.

3.2.2. Entry conditions – Visa regulations

Zimbabwe is South Africa's only neighbouring country which does not have a free visa policy, after this was introduced for Mozambique in 2005. A combination of South African visa policy and Zimbabwean conditions (difficulty in accessing passports and hard currency) have made it virtually impossible for poor Zimbabweans, especially those living in the southern parts of the country, to enter South Africa with legal visitors' documentation. In contrast, other countries such as Zambia, have already opened up their entry requirements, introducing the 90-day visa envisioned by the SADC Protocol for the Facilitated Movement of Persons which is renewable by re-crossing the border, providing this visa without the requirement of a passport, and stopping deportation.

In South Africa, the three main results of high levels of informal border crossing are:

- Abuses during border crossing including robbery, physical abuse, sexual abuse and death;
- The inability of the state to accurately record movements and compile statistics;
- The increased vulnerability of undocumented Zimbabweans once they are in South Africa.

3.2.3. Deportation

While annually deporting over 200,000 Zimbabweans for the past several years, the current deportation system is neither deterring Zimbabweans from entering the country nor reducing the total number of Zimbabweans in the country, due to the immediate return of most deportees to South Africa. The enforcement of deportation of Zimbabweans in the current situation is, however, having a range of problematic effects, including:

- Breaking international and domestic law against *refoulement*, since effective screening for potential asylum seekers is lacking, especially during deportation from the border areas;
- High levels of corruption during the arrest, detention and deportation process.

3.2.4. Asylum System

The use of the asylum system as a response to Zimbabwe immigration is a crucial element of any composite response, since it fulfils South Africa's international and domestic legal obligations to provide protection for individuals and groups who have experienced political persecution. However, the current implementation of the asylum system poses several problems:

- Only a limited proportion of Zimbabweans have experienced individual political persecution and therefore qualify for the current, narrowly interpreted conditions for asylum. A wider interpretation of rights to asylum, including persecution as a 'special group' or use of the OAU Convention

definition related to non-individual persecution and general social unrest, would increase this proportion, but it is a question of debates whether this would apply to all Zimbabweans.⁷ Of the estimated one million Zimbabweans in the country, for example, only 44,000 have applied for asylum. This means that the asylum systems leaves the majority of Zimbabweans without options for legal documentation.

- For several years, including before the large-scale arrival of Zimbabweans, the asylum system has been experiencing institutional difficulties so that many asylum seekers cannot gain physical access to Refugee Reception Offices (RROs) or have to wait long periods for their papers to be processed. Of the 44,000 Zimbabwean asylum applications that have been filed to date, only c.1000 have been granted, with c. 9000 rejected.⁸ This leaves 34,000 pending applications.
- The legal border crossing mechanism envisioned in the Refugee Act, e.g. the provision of a Section 23 temporary permit at the border which allows a two-week period to access Refugee Reception Office, is not working for Zimbabweans. For various reasons, virtually no Zimbabweans are declaring their intention to apply for asylum at the border post, making them vulnerable to arrest and refoulement until they can reach an RRO.
- Although all asylum applicants should by law be judged on the individual merits of their case, there are some indications that Zimbabwean asylum applications may be being discriminated against in some cases. The 'white listing' of Zimbabwe by DHA (2002) and several 'manifestly unfounded' asylum rejections (2007) have been challenged in court.⁹
- The Refugee Relief Fund Board, while mandated to provide humanitarian assistance to asylum seekers and refugees, is not active.

3.2.5. Immigration Law

The Immigration Act of 2002, as amended by the Immigration Amendment Act of 2004 (a19), regulates the conditions of entry and residence for all non-citizens who are not asylum seekers or refugees. It also provides for the possibility of a ministerial exemption from standard permit requirements for specific groups of foreigners (Section 32), which potentially provides the legal basis for various legal responses but has not yet been employed as such (see below).

While some skilled Zimbabweans continue to apply for and receive normal work and study permits, as was the case before the escalation of the Zimbabwean crisis, the Immigration Act:

- Provides limited opportunities for persons from neighbouring countries to migrate legally. There are, for example, no traders permits, job seekers permits or permits for unskilled workers which are not attached to an employer;
- The general structural impact of this gap, which also reflects on Zimbabweans, is both an increase in undocumented migration and increased pressure on the asylum system, which is used as an alternative means of accessing permission to remain in the country and work.

3.2.6. Disaster Management

The Disaster Management framework provided by the 2002 Disaster Management Act has been used to prepare a national disaster management contingency plan as well as a Limpopo provincial plan and a municipal-level plan in Musina. While a disaster management approach has the potential of

providing the framework for certain kinds of humanitarian support, there are several weaknesses in the current system, including:

- A lack of clear triggers for commencing an intervention;
- A lack of implementation capacity at the provincial and municipal levels;
- A focus only on situations where Zimbabwean settlement “causes or threatens to cause: (i) death, injury or disease; (ii) damage to property, infrastructure or the environment; or (iii) disruption of the life of a community; and (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.” It does not, therefore, provide a broader framework for enabling assistance to Zimbabweans in situations where the negative impacts of their presence have not reached crisis level.

3.2.7. Departmental Responses

Most government departments are affected in some way by the presence of Zimbabweans in the country, especially the departments which provide social services such as education, health, housing, social development, security and employment even though this is rarely acknowledged in current debates concerning appropriate responses. While there have been some positive initiatives from these departments, responses remain fragmented and ad hoc and general service provision access for Zimbabweans remains very limited:

- The Department of Education has introduced an initiative to facilitate the employment of qualified Zimbabwean teachers; however, many schools make it difficult for children of undocumented Zimbabweans to enrol, in spite of the Constitutional right to basic education;
- The Department of Health has recently instituted a directive that Antiretroviral Treatment for HIV and AIDS should be made available to refugees and asylum seekers irrespective of whether they hold documents; however, the Department has made no effort to facilitate the recruitment of qualified Zimbabwean medical personnel who are already in the country, in spite of a dire shortage of skills in this area;
- The Department of Social Development has so far made no active response to Zimbabwean migration, even though its Social Relief of Distress grant is not limited to citizens and could be applied as an emergency humanitarian relief mechanism. The DoSD is mandated to provide services to unaccompanied minors but has not implemented a sufficiently large-scale programme for the increasing numbers of Zimbabwean unaccompanied minors;
- The Department of Housing has taken no action in response to Zimbabwean migration;
- The Department of Labour has taken no action in response to Zimbabwean migration, although its various programmes for attracting skills and protecting labour standards would be relevant;
- The South African Police Services impact strongly on Zimbabweans in South Africa, through their role in enforcing the Immigration Act (e.g. arrest and facilitation of deportation on behalf of DHA), and through well-documented practices of street-level corruption which seems to often be targeted at Zimbabweans.¹⁰

3.2.8. Municipal Responses

Apart from the potential use of the Disaster Management framework, local governments can apply their discretion in providing various localised services to migrants. For example, the Johannesburg City Council has debated allocating a municipal building as accommodation for Zimbabweans in the city. Such initiatives are an important potential contribution to the overall combination of responses. A current weakness of municipal level responses is their ad hoc nature, since they are not embedded within a wider national policy framework in relation to Zimbabweans. This means it is left to the discretion of municipal counsels whether to increase protection and services for migrants, including Zimbabweans, or whether to harden exclusion, arrests and deportations.

3.2.9. Non-Governmental Responses

The non-governmental sector plays an important part in the overall set of responses, now and in future, but currently has a limited overall impact in terms of welfare support. There is a strong church-based contribution to providing food and shelter as well as changing South African citizens' perceptions about Zimbabweans. Several effective Zimbabwean self-help organisations provide welfare support. However, there are several factors currently limiting the effectiveness of non-governmental responses:

- Most services are limited to the main urban areas, excluding Zimbabweans scattered in other parts of the country;
- Many of the self-help organisations, church-based initiatives and smaller NGOs have limited institutional capacity and financial sustainability;
- The more established NGOs often limit their assistance to recognised asylum seekers or refugees, leaving out the most vulnerable Zimbabweans who have not been able to access documentation;
- There are virtually no domestic NGOs with capacities for large-scale humanitarian responses, except to a limited extent the Red Cross;
- International emergency response NGOs such as Oxfam, MSF and World Vision have recently started considering the possibility of playing a greater role in providing services to Zimbabweans in South Africa, but they require a clear policy framework from the government.

3.2.10. Traditional Leaders

In rural areas, especially in Limpopo Province, Traditional Leaders have been playing a significant role in allowing Zimbabweans to settle in rural villages. This parallels the role played by Traditional Leaders during the large-scale influx of Mozambican refugees in the 1980s. This role should be acknowledged and supported.

3.2.11. Employers

Certain sectors employ large numbers of Zimbabweans, including commercial agriculture, construction, hospitality and the security industry. This makes employers in these sectors an important group of actors, in deciding on legal or illegal employment and working conditions, and as a

potential interest and pressure group in relation to the Department of Labour and the South African government in general. Similarly, trade unions in these sectors could have an important role to play, but have not yet taken in active stance in relation to Zimbabwean workers.

3.2.12. South African citizens

South African citizens are an often overlooked group of actors, even though their responses to Zimbabweans are potentially among the most important. There has been much focus on xenophobic attitudes among South Africans, which may result in the refusal of basic services, access to private housing and employment, and in extreme cases, physical violence. While a formal governmental response regarding documentation and/or humanitarian assistance may partly change public perceptions of Zimbabweans, if negative public feels persist, then a formal response may still fail to protect Zimbabweans from violence or exclusion. On the other hand, there are also many South African citizens who have been assisting Zimbabweans with shelter, food and employment opportunities. Such support is a crucial element of the informal welfare mechanisms which are often much greater in aggregate than formal humanitarian mechanisms, and should be acknowledged and encouraged.

3.3. Gaps in current responses

In addition to concerns with the individual responses listed above, this combination of responses leaves significant gaps in addressing the above-mentioned challenges posed by Zimbabwean migration.

3.3.1. No humanitarian response

As noted above, there are currently no dedicated humanitarian services for Zimbabweans, access to mainstream housing, health care and emergency welfare services (such as the Social Relief of Distress grant) is limited, and non-governmental humanitarian responses are insufficient. Implications of a lack of humanitarian assistance include:

- The prospect of deaths from starvation and exposure,¹¹ undermining the basic human rights to life, food and dignity, as enshrined in the South African Constitution, as well as impacting negatively on South Africa's international reputation;
- Increased homelessness and overcrowded accommodation, with their concomitant social, public health and infrastructural impacts;
- The potential increase of survival crime;
- Public health dangers associated with people with communicable diseases not being able to access medication, and the development of resistant strains of diseases such as TB and HIV due to interrupted treatment.

3.3.2. Legal options do not address mixed migration

The current combination of restrictive visa regulations, narrowly interpreted asylum conditions and standard temporary residence permits on the basis of the Immigration Act do not address several aspects of the mixed migration adequately, especially the range of circular and short-term migration forms, including traders, economic migrants and especially humanitarian migrants.

3.3.3. The lack of a clear national framework for addressing Zimbabwean migration hinders effective departmental, local government and non-governmental responses

The fragmented combination of responses without a clear legal or humanitarian principle and without a clear lead agency has made it difficult to galvanise and coordinate effective responses by the various service provision departments, local governments and domestic and international non-governmental organisations.

3.3.4. Non-governmental responses are fragmented

Non-governmental actors have not yet developed effective coordination and information sharing mechanisms, nor is there a strong connection between advocacy (including towards government and towards the general South African public) and welfare based responses in the sector.

3.3.5. No use of regional mechanisms or long-term regional impact planning

In using its standard domestic migration management mechanisms to deal with the Zimbabwean influx, South Africa has so far failed to make use of existing regional mechanisms and protocols, such as SADC and the SADC Protocol on the Facilitation of Movement of Persons. The current combination of responses is also mainly reactive, aimed at enforcing the various laws and regulations in relation to migration management, rather than taking a pro-active stance toward medium- and long-term regional development planning and the role which humanitarian aid, facilitated legal movement and the future reconstruction of Zimbabwe can play in that regard.

4. Factors to Consider when Designing a Response

Around the world, host countries have responded differently to situations of large-scale migration and South Africa can learn from this variety of responses. However, in order to be effective, a policy response must be adapted to the specific conditions at hand, and be appropriate to the wider policy goals and values of a host society. This section lays out a series of factors which should be considered when weighing different policy response options to Zimbabweans in South Africa. They include legal, operational, impact mitigation and political factors.

4.1. Legal Factors - Rights Framework and Legal Basis for Action

SA has a strong Constitutionally encoded rights framework for all persons residing in South Africa, most of which are also set out in various instruments of international law to which South Africa is signatory. Any response must adhere to these basic rights which include, inter alia, dignity, life, equality before the law, freedom of expression, assembly and association, and freedom of movement as well as the socio-economic rights to adequate housing, health care (especially emergency medical treatment), sufficient food and water and social security, and basic education. Significantly, these rights must be protected for South Africans and non-citizens equally.

- Policies which break international and domestic law – such as deportation policies which lead to *refoulement* – are of serious concern.
- Ad hoc arrangements such as ‘leave to remain’ or ‘complementary protection’ regimes (see below), should be given a clear basis in domestic law, if there is not already such a legal basis.

4.2. Operational Factors

Operational factors determine whether a policy can in fact be effectively implemented. These considerations need to be taken into account before a policy is chosen, to avoid predictable implementation failures.

4.2.1. Institutional Capacity and Coordination

Any response or combination of responses will require a clear lead department. Which department takes this role depends to a large extent on which legal framework is selected. In the case of the Refugee and Immigration Acts, the Department of Home Affairs is the mandated lead department. In the case of the Disaster Management Act, it is the Department of Provincial and Local Government. In either case, many other departments are implicated, including the South African Police Services, the Departments of Social Development, Health and Education, as well as local municipalities. Given the ongoing role of South Africa in intra-Zimbabwean political negotiations, the Presidency and the Department of Foreign Affairs also have important roles to play. This means that a lead department has to have the authority and capacity to coordinate a wide range of governmental actors with divergent interests and mandates.

The choice of lead department should also take into account the capacities of specific actors. For example, the DHA recognises its capacity limitations and is in the process of large-scale internal restructuring through the ongoing ‘Turn-around Strategy’. Until this process has been fully implemented, it will affect DHA’s ability to act quickly and decisively if given a new legal process to administer, for example the documentation of Zimbabweans under a temporary or complementary status regime. In terms of responses under the disaster management system, capacities at the municipal level, for example in Musina, are also limited to implement and manage effective large-scale responses without significant national or international assistance.

Different legal responses will require different levels of administrative capacity to administer. For example, any group-based legal status, whether as refugees, temporary status or permanent residence, will still require a process for establishing the nationality of each applicant (unless it is a regional amnesty or free movement arrangement) and the provision of documentation for that applicant. Such group-based processes nonetheless require less institutional capacity per person than the current individual asylum process.

Finally, different responses will be able to mobilise external capacities in different ways, including domestic and international non-governmental expertise and resources.

4.2.2. Cost

When considering the cost of a possible set of responses, the calculation should include both direct costs for implementing a policy and indirect costs. Indirect costs include the costs of ineffective responses such as the current experience with deportation, as well as the less easily quantifiable costs associated with a lack of responses, including effects such as public health threats, economic impacts, impacts on mainstream service provision mechanisms, and strains on informal, social welfare systems and coping mechanisms.

4.2.3. Time Frames for Commencement and End of Responses

A consideration of time-frames includes the amount of time required to establish the institutional and legal prerequisites for an intervention, as well as the criteria for starting and ending a response. Any response which requires the development of a new legal framework or the revision of an existing one will take more time to commence than the use of an existing legal framework. For example, while there is an in-principle framework for SADC-wide facilitated movement, negotiating a regionally agreed framework for concrete legal protection of Zimbabweans in all SADC countries is likely to take a significant amount of time. Setting clear triggers and conditions to starting and ending a response is important for time-specific legal responses such as temporary status, and also applies to targeted welfare responses such as camps.

4.3. Impact Mitigation Factors

Impact mitigation factors concern the ways in which different responses may add to or prevent negative impacts on the host society. Negative impacts on the host society are often portrayed as a direct result of the migration flow itself, while in fact the scale and form of the impact are often just as much a result of the *responses* or lack of responses to the migration flow. Common concerns about the negative impacts of migration may, therefore, indeed come true, or they can be averted or mitigated by well-planned responses. Experience shows that increasing the legal and social security of migrants is the most effective way of increasing the security of hosts.

4.3.1. Impact on public health

A common perception about migration is that it contributes to spreading disease. Indeed, with the collapse of the public health system in Zimbabwe and the difficulties ill Zimbabweans currently face in accessing health care in South Africa, including TB and HIV medication, this may be the case. The cost of providing access to public health care must therefore be weighed against the social and financial costs of increasing the public health danger of untreated illnesses.

4.3.2. Impact on the economy

Similarly, common concerns relating to the impact of Zimbabweans on the South African economy and labour market include Zimbabweans 'taking jobs' from South Africans; undermining labour standards and wage levels in unskilled sectors; and being a burden on the public purse by adding to the number of poor and destitute in need of services. There is also the concern that legalising Zimbabweans in South Africa and permitting them to work will attract more Zimbabweans into the country, exacerbating the above problems. In fact, many of the economic concerns, especially regarding labour exploitation, are a result of the undocumented status of most Zimbabweans, since

labour standards can be enforced for the legally employed but not for the illegally employed. Zimbabwean organisations say that their members' main economic need is to be allowed to open their own businesses, rather than desiring existing jobs. Depending on the legal response option chosen, South Africa may therefore stand to benefit economically in the entrepreneurial and small business sector, which tends to create the largest number of new jobs among business sectors and which is a priority area for growth in governmental economic plans. Finally, enabling Zimbabweans to work and earn enough to remit money and goods to their families in Zimbabwe may in fact reduce future migration, since it will alleviate the humanitarian push factors forcing people to leave Zimbabwe.

4.3.3. Impact on safety and security

Crime is a key concern with regard to migration, with Zimbabweans both potential victims and perpetrators. As above, a lack of humanitarian responses and a lack of avenues for legal documentation are likely to exacerbate the safety and security challenges posed by large migration flows, since they create fertile ground for survival crime and criminal recruitment. Undocumented criminals are more difficult to pursue and track. Furthermore, legal insecurity prevents foreign victims of crime from reporting cases to the authorities.

4.4. Political Factors

Political factors are key in defining the priority goals of any intervention. Without political leadership and political will, no response or combination of responses will be effective. A political position relates to several constituencies, which may sometimes have different or even conflicting interests: in this case, domestic, regional and international constituencies.

4.4.1. Domestic Political Interests

A government's first priority is the welfare of its citizens. Any response to Zimbabweans in the country must therefore be consistent with the public interest of the citizens of South Africa. While it is often assumed that supporting Zimbabwean migrants and refugees is necessarily against the interests of South African citizens, given South Africa's inability to prevent Zimbabwean migration into the country, the question is rather whether documented or undocumented Zimbabwean migration is more harmful to the citizenry. Domestic political considerations also concern the ways in which decisions about potential responses to Zimbabweans are communicated to the public through the media and through (party) political platforms. An important priority of any coherent responses is to prevent widespread public rejection of the government's decision, since public dissatisfaction might be targeted (potentially violently) against Zimbabweans, or even against the government. The lack of a clear policy decision can also lead to popular disaffection.

4.4.2. Regional Impacts and Impacts on Zimbabwe

South Africa's role, as mandated by SADC, in mediating between the Zimbabwean political parties has strongly coloured debates on potential responses towards Zimbabweans in South Africa. The concern has been expressed that openly recognising and assisting Zimbabweans in South Africa will undermine South Africa's mediation role in Zimbabwe and will therefore undermine the negotiations

entirely. More generally, it has been argued that granting Zimbabweans the right to work and otherwise providing humanitarian support, will lead to more Zimbabweans leaving Zimbabwe, and therefore undermine future reconstruction efforts in the country. A consideration of the medium to long-term impacts of any response on Zimbabwean and regional reconstruction, as well as its immediate relationship to the ongoing political negotiations are indeed important when planning any response, but decisions on responses should balance the interests of South Africans and the rights of Zimbabwean citizens with bilateral political considerations.

4.4.3. International Political and Reputational Repercussions

Finally, there has been increasing international media and civil society attention to South Africa's response to Zimbabweans in the country. The focus has been on abuses which Zimbabweans experience in trying to access the asylum system and during deportation. As with South Africa's treatment of African foreigners more generally, this issue is significantly denting South Africa's international reputation as a rights-respecting African leader, and is reducing international recognition of South Africa's role in mediating the political crisis within Zimbabwe.

In addition to fulfilling the needs listed at the end of Section 2, **responses should therefore be judged by whether they:**

- Are legal under international and domestic law
- Respect the civil and basic socio-economic rights of both Zimbabweans and South African citizens
- Are implementable in terms of available institutional leadership and capacity
- Balance the direct costs of implementation with the indirect costs of ineffective or lacking responses
- Have clearly defined indicators for starting and ending an intervention
- Minimise negative impacts on public health, the economy, and the safety and security of South Africans
- Increase or decrease public xenophobia or acceptance of foreigners
- Contribute in the immediate, medium and long term to the maintenance and reconstruction of Zimbabwe
- Uphold South Africa's reputation as a rights-respecting African leader both on the continent and elsewhere

5. Range of Potential Responses

This section will briefly review a range of policies which have been adopted around the world in the case of large-scale migration flows. Several of these have already been brought up in relation to Zimbabweans in South Africa.

The Democratic Alliance called for the establishment of **camp**s or transit centres near the Zimbabwean border, which the DHA explicitly rejected as a feasible option.¹² Commentator Max Du Preez has advocated for **opening the borders** and providing **refugee protection** to all Zimbabweans on the basis of historical duty and dignity. He wrote: 'I really believe we should throw open our border

with Zimbabwe immediately so that whoever wants to come to South Africa can come, without the humiliation of having to crawl under barbed wire and run away from white farmers. They should be received in reception centres, registered as refugees and given proper food, medical attention and shelter.¹³ The NGO Jesuit Refugee Services has also advocated for all Zimbabweans to be recognised as refugees under the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The USA-based international NGO Refugees International has called on all host governments, including South Africa, to 'immediately **cease all deportation** of Zimbabweans.'¹⁴ The Harare newspaper *The Herald* reports that Zimbabwe has asked the South African government to review its current stringent **visa requirements**, and also mentions the possibility of a new 12-month multiple entry visitor's permit for cross-border traders.¹⁵ The Zimbabwean Diaspora CSO Forum suggests a **temporary status** that would allow Zimbabweans the right to be self-employed and start businesses, while still being allowed to apply for normal work permits if they are offered a formal job, and to open bank accounts. They explicitly reject eligibility for permanent residence in South Africa on the basis of this temporary status. Finally, after a visit by the United Nations High Commissioner for Refugees in mid-2007, Home Affairs Minister Nosiviwe Mapisa-Nqakula acknowledged that she was considering a **temporary protection** regime for Zimbabweans. A final decision on this has not yet been communicated to the public.

Below, we set out the basic characteristics of these and other possible response options that have been used around the world, including likely and less likely options for South Africa. As noted above, these briefs only describe simplified models and would need to be adapted and combined for the South African context. The discussion is separated into legal and humanitarian welfare responses. Addressing the conditions of mixed migration and humanitarian need described above will require a combination of several of the responses listed below.

Legal Responses

5.1. Closing the Border

Some countries officially close their borders if they feel threatened by a large-scale movement of people. Although closing the border is the sovereign right of a state, it contravenes international refugee law, and leads to human rights abuses. Furthermore, it is a very costly strategy and it is generally impossible to implement effectively. Examples include Kenya recently closing its border to Somalia and South Africa's closed border with Mozambique in the 1980s, where thousands died on the electrified fence but hundreds of thousands still managed to enter the country.

5.2. Relaxed legal entry (visa) requirements

The SADC Protocol on the Facilitation of Movement of Persons foresees the progressive harmonisation of entry requirements in the SADC region towards an extendable 90-day per year visa-free stay. While a regional harmonisation has not yet been achieved, South Africa has a series of bilateral agreements concerning visa requirements with its neighbours. A bilateral agreement could therefore be reached with Zimbabwe to introduce either a free 30 day visa (as is the case currently

with Mozambique), or an extendable visa-free 90 day stay as per the SADC Protocol. The experience of Mozambique has shown that as soon as the visa for travelling to South Africa was made free, there was a significant increase in legal border crossing and a corresponding reduction in illegal border jumping, with its attendant dangers. Even though a free visitor's visa does not address humanitarian needs or the concerns of Zimbabweans wishing to remain in South Africa for work (since persons on a visitors visa are not permitted to work), and would still require possession of a passport, it might immediately reduce some of the abuses and dangers of illegal border crossing and reduce levels of arrest and deportation. For those Zimbabweans entering South Africa to shop for food and basic goods for their families, a free visitor's visa would already suffice for their needs. It would also allow more time for asylum seekers to access the Refugee Reception Offices.

5.3. Non-asylum-based residence permits

There are a range of legal responses which have been used around the world in recent years to provide protection to specific groups of migrants who do not conform with the formal definition of a refugee but who nonetheless require protection and who cannot be sent back to their countries of origin. Most of these responses are not codified in international law, and most have been implemented on an ad hoc basis, using or creating new domestic legislation. The terminology around some of these response types (especially leave to remain, complimentary protection, temporary status, etc.) is not yet clearly defined in international usage and so these terms may be defined somewhat differently in other contexts.

5.3.1. Informal leave to remain

Informal leave to remain would be a minimum response, where deportation would be stopped, but Zimbabweans would not be given documentation nor formal access to public service, humanitarian assistance or the right to work. While this could be implemented immediately and with no direct costs, it does not address any of the humanitarian concerns, nor the need to avert negative impacts on South African society (public health, security, economic) resulting from these humanitarian needs.

5.3.2. Supplementary Protection

We are using supplementary protection¹⁶ to refer to a range of legal status options that have been used around the world - also known as 'subsidiary protection' in the EU, 'temporary protected status' and 'withholding (or deferral) of removal' in the USA, and 'exceptional leave to remain', 'humanitarian protection' and 'discretionary leave' in the UK. These kinds of status are generally conferred on the basis of a discretionary political decision in the host country and are not clearly codified in international law. While they may confer the same basic rights as those enjoyed by asylum seekers or refugees, the package of rights conferred is often less than full Convention-based asylum status, although more than the essentially undocumented 'informal leave to remain' option noted above. Thus, a supplementary protection arrangement might include the right to limited humanitarian services or limited access to public services, and it may or may not include the right to work. It may be combined with the right to seek work and then apply for a work permit. As suggested by the Zimbabwean Diaspora CSO Forum, such a status might include permission to be self-employed, while requiring additional application for a work permit in the case of formal sector employment.

Complementary protection arrangements are usually time-bound, either with pre-set time periods or a cessation arrangement dependent on conditions in the home country. There is currently no legal basis for such a complementary protection status in South Africa, and so would require time to develop and implement a framework.

5.3.3. Temporary Status

Temporary status, in contrast to complementary protection arrangements, confers both documentation and extensive rights (equivalent to the rights of refugees or permanent residents), but the status is given for a clearly delimited time period only. The legal basis for temporary status is given by the 2002 Immigration Act, Section 31 (2)(b), which enables the Minister of Home Affairs to grant a 'category of foreigners the rights of permanent residents for a specified or unspecified period when special circumstances exist which justify such a decision.' Temporary status is justified by South Africa's interest in documented persons resident in the country rather than being based on the concept of refugee rights, for example.

Since temporary status would confer the right to work and access to public services (including, potentially, social grants), it would address most of the needs currently experienced by Zimbabweans in South Africa. The existing legal framework, dependent on a Ministerial decision without the requirement for further parliamentary approval, means that temporary status could be implemented relatively quickly. Challenges in the implementation of temporary status will be deciding on an appropriate time period for the status, and institutional capacities required for the process of issuing documentation.

5.4. Asylum-based responses

5.4.1. Individual refugee status determination

As discussed above, enabling individual asylum applications is an ongoing response.

5.4.2. Group refugee status

Conferring group refugee status according to the 1969 OAU Convention is a common response to large-scale migration around Africa. South Africa is a signatory to this Convention and has included its broadened definition of refugee in the domestic Refugee Act of 1998, which includes persons who have been displaced due to 'events seriously disturbing public order.' The Refugee Act, Section 35, also provides for the Minister to 'declare [a] group or category of persons to be refugees either unconditionally or subject to such conditions as the Minister may impose...' This strategy has currently not received the support of the UNHCR and is considered to clash politically with South Africa's mediation role in Zimbabwe.

5.5. Transit Centres

Transit centres are not a response in themselves, but rather an institutional arrangement for implementing other responses. They are an initial reception point for migrants where they receive information and basic emergency assistance, and possibly where legal documentation can be applied for or provided. A challenge is that transit centres dealing with documentation, even if conceived of as

temporary, are likely to develop into semi-permanent camps or have unexpected impacts on the local communities where they are based, given the currently long time periods required for deciding on and granting documentation. Furthermore, Zimbabweans are likely to avoid transit centres (or camps, see below) unless they trust that they will not be deported or otherwise disadvantaged by them.

5.6. Zonal Assistance Programmes

Zonal Assistance Programmes have been used in various African countries with large numbers of refugees from neighbouring countries. Rather than allowing free movement throughout the country or limiting refugees to camps, Zonal Assistance Programmes designate a specific area (a Province or several municipalities) as a refugee settlement area. Within this area, humanitarian assistance is provided, along with the right to reside and (often) work the land or trade. Section 35 of the Refugees Act provides for the Minister, after consultation with the UNHCR and the respective Provincial Premier, to designate areas 'for the temporary reception and accommodation of asylum seekers.'

A Zonal Assistance Programme can be beneficial by bringing resources into an area which also benefit local residents by capacitating local services (clinics, schools, famine relief). However, it poses problems of policing movement into and out of the area. For those Zimbabweans already settled in other parts of the country, it would be difficult to force them to move into the designated zone. Finally, and if there are limited employment opportunities in that area, those people who are trying to support families in Zimbabwe are likely to try to move out of the designated area in search of employment, thereby repeating the problem of undocumented labour in other parts of the country, including the major cities.

5.7. Regional facilitated movement and permission to work

A final legal response strategy would be to speed up the process of fully implementing the provisions of the SADC Protocol on the Facilitated Movement of Persons. The Protocol's specific objectives (section 3) include facilitating '(a) entry, for a lawful purpose and without a visa, into the territory of another State Party for a maximum period of ninety (90) days per year ...; (b) permanent and temporary residence in the territory of another State Party; and (c) establishment of oneself and working in the territory of another State Party.' The final two objectives are currently seen as future 'phases' of the intended regional integration process, but could be accelerated. This would address the need for legal status and permission to work experienced by Zimbabweans, while not singling them out politically.

Benefits of such a response include easy administration if SADC citizens can move freely using their national identification cards rather than passports, since no additional status determination or documentation exercise would be necessary in SA. However, the response is likely to take a long time to implement if all SADC members have to agree, unless South Africa decides to unilaterally act as a vanguard by implementing free movement in advance or other SADC member states.

Humanitarian and Welfare Responses

Given the nature of the Zimbabwean migration to South Africa, meeting humanitarian and general welfare needs is a crucial element of any combination of responses, in the interests of both Zimbabweans and South Africans. There are several ways of organising humanitarian and welfare assistance, most of which can be combined with the various legal responses discussed above.

5.8. Camps

Refugee camps are common means of providing humanitarian assistance across the continent. They are usually established on the basis of group refugee status determination. In spite of their common use, camps are not enshrined in international law and generally abuse basic rights such as freedom of movement. Camps are also very costly and require high institutional investment. In relation to the specific nature of Zimbabwean mixed migration, camps do not address the different motivations for migrating, including the need to send food and money back to family members in Zimbabwe. They are therefore likely to be avoided by most Zimbabweans unless forcibly transported and confined to the camps. As noted above, the DHA have already rejected the proposal of establishing camps in South Africa.

5.9. Right to work and start businesses

South Africa has a policy of integration and self-support for asylum seekers and refugees which is based on their right to work and start businesses. This strategy reduces the cost to the public fiscus of providing wide-spread welfare, since those working can provide for themselves and their families. Furthermore, the right to start a business can inject entrepreneurial energy into the economy. Granting the right to work to currently undocumented Zimbabweans will also reduce the exploitation of Zimbabwean labour which undermines labour standards and wage levels for all. However, the right to work is not enough to deal with humanitarian needs on its own, since many Zimbabweans (just like many South Africans) will not be able to find employment immediately, especially those who arrive weakened by hunger or illness.

5.10. Active facilitation of skilled Zimbabweans into sectors with skills shortages and with labour shortages

Skilled Zimbabweans are already being recruited by the Department of Education to teach maths, science and English, but so far this is limited to people who have been able to access asylum papers. Various government programmes aim to fill skills gaps and even recruit from abroad in certain sectors. A programme could be developed to expedite the application for work permits in specific skills sectors (especially education, health care and technical jobs) for Zimbabweans already in the country. As with the general right to work, this will only address some of the overall humanitarian and welfare needs, but it will be of great benefit for South Africa, and also contribute to retaining skills in the region for the future reconstruction of Zimbabwe, rather than pushing them abroad from where they are less likely to return when Zimbabwe stabilises.

5.11. Access to public welfare services

Access to public welfare services, including especially clinics and schools, is one of the most effective strategies for addressing wide-spread welfare needs among a dispersed population. The right to basic health care and education is guaranteed in the Constitution for 'everyone' in South Africa, irrespective of legal status. There are some existing practices in the health care system which act on this right, such as a recent directive by the Department of Health which sets out the rights of refugees and asylum seekers, whether documented or not, to access ART through the public health care system.¹⁷ This is directly relevant to undocumented and documented Zimbabweans. However, practical access difficulties continue, with public service providers often not being aware of the rights of migrants to basic public services. An effective strengthening of this strategy would require strong leadership from the Presidential and Ministerial levels in the respective departments, to educate ground-level staff nationally that Zimbabweans have rights to services.

5.12. Support to specific public services which are overburdened

A common concern expressed in relation to granting Zimbabweans access to public services is that the services will be overburdened, reducing resources for South Africans. This is only likely to be the case in areas with high concentrations of immigrants, including Zimbabweans, rather than across the country, but in these places, it is indeed a major concern. An important strategy is therefore to provide specific support to public services in those high-concentration areas, such as Musina hospital and Hillbrow and Yeoville clinics and schools. This can be done through additional public funding or additional staffing. Some international NGOs have already expressed willingness to assist with strengthening public services in specific high-settlement areas.

5.13. Access to social relief of distress grant

An as yet untapped emergency welfare relief mechanism, which is specific to South Africa, is the social relief of distress grant. This grant is not limited by citizenship and can be provided in a dispersed fashion through the existing network of social workers around the country. It is commonly disbursed to destitute persons in the form of food parcels for the space of three months. There is no indication that this grant is currently being provided to Zimbabweans or other destitute migrants, but with additional resources from the Department of Social Development, it could constitute a highly effective, if short-term, humanitarian intervention.

5.14. Devolved responses – Provincial and Local Government

Local government is generally not considered a major actor in responding to migration, but most of the direct effects of large-scale migration impact at the local level. Several of South Africa's large cities, including Johannesburg, have already started developing their own migration and refugee policies, including responses to Zimbabweans. Some local government intervention options include making free or subsidised accommodation available, working with domestic or international NGOs to shore up public health care provision or provide food in certain areas, and curtailing the arrest and detention of Zimbabweans by metro police. Resource and capacity constraints are significant barriers to such action by smaller and more rural municipalities.

5.15. Devolved responses – Disaster Management

Finally, the Disaster Management Act provides a framework for providing humanitarian relief which does not depend on a declaration of legal status, but rather on the specific local conditions and needs of a Province or Municipality. Currently, the Disaster Management framework has only been used for the development of contingency plans in select municipalities, Limpopo Province and at the national level, in preparation for an additional, large influx of Zimbabweans. No plans have been put in place for providing services to migrants who are already in the country. In contrast to most other welfare-oriented responses, apart from camps, the disaster management approach can also provide for housing needs, in addition to food and medical attention. Disaster management-based responses can furthermore be adapted to the specific needs of each location. Challenges in using the disaster management framework are a lack of capacity at the municipal level to plan and implement such responses independently, and the need to free resources without requiring a general declaration of emergency. A key benefit of this response is that it depoliticises the question of legal status in the regional context.

6. Policy Approach Scenarios

As noted in the introduction, no single response will address the challenges posed by current Zimbabwean migration to South Africa. Therefore, a combination of responses will be required. Choosing a coherent set of responses will depend on a consideration of the institutional and political factors enumerated above and a decision on what is normatively and politically desirable as well as what is strategically feasible for South Africa at this point in time. On this basis, the response options listed above can be grouped into three broad policy approaches: working with existing domestic policy frameworks and institutions; creating new mechanisms for providing legal and humanitarian protection; or strengthening regional approaches. While each has a different emphasis, these approaches are not mutually exclusive.

Within these broad approaches, we suggest six potential policy approaches which represent realistic options in the current context. For each, we briefly note the main benefits and drawbacks, comment on the time frames and note some steps required for moving toward implementation.

Working with existing policy frameworks

6.1. Improve implementation of existing responses

This strategy would not involve adding or significantly changing the current menu of responses, but would address specific weaknesses among them and expand certain currently underutilised resources, for example:

- Implementing stricter controls within the deportation system to prevent *refoulement*.

- Broadening the interpretation of the Refugees Act to include victims of Murambatsvina and other categories of Zimbabweans as persecuted as a member of a 'particular social group' and applying the OAU Convention refugee definition more widely, as well as generally improving access to and speeding up processing of asylum applications, as already envisioned by the DHA's 'turn-around strategy'.
- Using various government initiatives and mechanisms to facilitate the work permit process and recruitment of skilled Zimbabweans into fields with skills shortages, including especially teaching, health care and technical fields (for example, by waiving SAQA and work permit application fees and shortening waiting periods).
- Encouraging the Departments of Health and Education to enable access for all Zimbabweans to basic services, irrespective of legal status, while especially ensuring full access for recognised asylum seekers and refugees.
- Encouraging the Department of Housing to develop a strategy for providing short- to medium-term housing for the destitute, and to open this equally to destitute South Africans and to recognised asylum seekers and refugees.
- Encouraging the Department of Social Development to make the Social Relief of Distress grant widely available to destitute Zimbabweans (and possibly other migrant groups) through their national network of social workers.
- Encouraging the Department of Labour to work with employers for a broader application for the corporate permit in relation to hiring Zimbabweans.
- Encouraging affected municipalities, especially Metropolitan Councils, to develop local arrangements for accommodation and other welfare needs, either through the Disaster Management framework or through local resources.
- Providing a framework for the coordination and support of domestic and international NGOs wishing to provide expertise and resources to augment public welfare provision to Zimbabweans.

Benefits:

- Can be implemented relatively quickly, since all the policies and institutions are already in place.
- Does not threaten regional political interests, since it is simply a continuation of existing policies.

Drawbacks:

- Requires a strong lead actor, such as the Presidency, to motivate and coordinate the various departments and non-governmental actors.
- Is unlikely to result in an adequate humanitarian response.
- Does not address the lack of documentation options for those Zimbabweans who do not qualify for asylum and who are not highly skilled.

Next Steps:

- Will require the lead agency to convene a high-level inter-departmental working group to agree on priority actions, coordinate information and push through practical changes in the respective departments.

6.2. Bilateral relaxation of entry requirements

This strategy would be based on the SADC Protocol on the Facilitation of Movement of Persons, but would be negotiated bilaterally between South Africa and Zimbabwe (as reportedly already initiated). It could introduce either a 30, 60 or 90 day visa, obtainable at point of entry without cost, renewable within South Africa. Such a visa would not confer the right to work, but would include the right to seek work. This strategy would need to be implemented alongside the current responses listed above, especially in tandem with continued individual asylum applications. Persons having overstayed or not renewed their visas would be deported, although with adequate protections against *refoulement*.

Benefits:

- Can be implemented quickly through a unilateral decision by DHA and DFA
- Will drastically reduce abuses during border crossing and deportation
- Will drastically increase state knowledge of migration numbers, especially if it is possible to track multiple entries and exits by the same person
- Will address the needs of traders, shoppers, and transit migrants for legal documentation

Drawbacks:

- Will still require a passport, unless a visa can be conferred on the basis of a Zimbabwean national identity card
- Will not address the humanitarian needs of many Zimbabweans
- Due to the work prohibition, will not alleviate current concerns about illegal employment and will not greatly facilitate the entrepreneurial establishment of small businesses within South Africa

Next Steps:

- Decision by DFA and DHA to relax visa requirements

6.3. Temporary Status

Temporary status on the basis of the Immigration Act, section 31 (2)(b) would address the need for legal status and the right to work for all Zimbabweans in the country, while simultaneously allowing those who wish to apply for asylum to make use of this right. While the documentation process is ongoing, deportation of Zimbabweans would be stopped.

Benefits:

- The declaration can be made relatively quickly by the Minister of Home Affairs, although the preparation of the process for accepting and processing status claims may take some time to establish and implement.
- Will reduce pressure on the asylum system and ensure that genuine applicants can access the system more easily.
- Will address some of the main humanitarian needs by allowing work and access to public services, especially if it includes the right to social relief of distress grants.
- Will benefit the South African economy by harnessing Zimbabwean skills.

- The temporary nature of the status may assist in making the response politically acceptable to South African citizens.

Drawbacks:

- The time period established for the temporary status may become politically controversial (as experienced with similar provisions in other countries), depending on the duration of the crisis in Zimbabwe, as will the question of what residence rights Zimbabweans will have once the time period of the status elapses.

Next Steps:

- The Minister of Home Affairs to declare Zimbabweans a special group in terms of the Immigration Act, Section 31(2)(b).

6.4. Devolved humanitarian response through disaster management structures

This strategy would focus on providing emergency humanitarian assistance through local and provincial government structures to specific areas of high Zimbabwean concentration.

Benefits:

- Does not threaten regional political interests.
- Provides a framework for international humanitarian organisations to contribute and also build capacity among South African NGOs in emergency response.

Drawbacks:

- Does not address the need for legal documentation.
- Requires local government capacity which is not present in all affected areas.

Next Steps:

- The National Disaster Management Committee to develop a clear commitment and plan for immediate implementation of existing plans for the provision of humanitarian aid

Creating new mechanisms to target Zimbabweans

6.5. Supplementary Protection

Supplementary protection provisions would require the development of a specific mechanism through which to provide a new form of legal status to Zimbabweans. It would also require a debate on the level of rights, especially concerning the right to work. Such a mechanism could be developed either through a directive issued by the Department of Home Affairs, through a decision by Parliament, or through a court case requiring the introduction of such a mechanism on the basis of Constitutional rights. Supplementary protection should run in parallel with the existing asylum application system.

Benefits:

- Addresses the need for legal status of those who do not qualify for asylum

- May be more politically acceptable than temporary status, due to the more limited extent of rights

Drawbacks:

- Depending on the level of rights, it may not address welfare needs
- Depending on the level of rights, it may not reduce pressure on the asylum system, if asylum is perceived to confer more rights, and especially the right to work
- Will require a significant amount of time to develop and institute the new mechanism through any of the three executive, legislative or judicial routes

Next steps:

- Initiate a policy-making process through either the executive, legislative or judicial route.

Regional approaches

6.6. SADC-wide Free Movement

The acceleration or unilateral adoption of the full provisions of the SADC Protocol on the Facilitation of Movement of People would grant Zimbabweans as well as other SADC citizens the right to move freely in South Africa without the requirement of a visa and with the right to work and establish themselves. This would need to be combined with the existing right to apply for asylum in individual cases.

Benefits:

- Does not threaten regional political interests, since does not discriminate between Zimbabweans and other SADC nations.
- Contributes towards the existing programme of regional integration, which includes free trade and monetary unions within the next ten years.

Drawbacks:

- If negotiated at a regional level, this will require a long time to implement.
- If adopted as a unilateral strategy by South Africa, it may lead to increased overall migration from the region, although it is not clear whether this is necessarily the case.

Next steps:

- Proposal by South Africa to the SADC secretariat and the next SADC meeting on accelerating the implementation of the regional integration and facilitated movement protocol.

References

- (2007). Zimbabwe: South Africa Considers Relaxing Visa Requirements. The Herald. Harare. **20 November**.
- BBC reporter (2007). Zimbabwean dies queuing for visa. BBC News online. **12 November**.
- CRMSA, D. Cote, et al. (2007). Protecting Refugees and Asylum Seekers in South Africa - 2007. L. B. Landau. Johannesburg, Consortium for Refugees and Migrants in South Africa.
- Department of Health (2007). Revenue Directive - Refugees / Asylum Seekers with or without a permit, BI 4/29 REFUG/ASYL 8 2007, 19 September 2007.
- Department of Home Affairs (2007). Statement on Transit Shelter for Refugees. Media release. **5 October**.
- du Preez, M. (2007). We can't avoid our Zim duties any longer. The Star. Johannesburg. **2 August**.
- Forced Migration Studies Programme and Musina Legal Advice Centre (2007). Special Report: Fact or Fiction? Examining Zimbabwean Cross-Border Migration into South Africa. Johannesburg.
- IOM (2006). Beitbridge Migration Survey: Results from the second survey of deportees receiving humanitarian assistance in Beitbridge, Zimbabwe. Beitbridge.
- Makina, D. (2007). Survey of Profile of Migrant Zimbabweans in South Africa: A Pilot Study. Pretoria, University of South Africa.
- Refugees International (2007). "Zimbabwe Exodus: too little, but not too late..." RI Bulletin (7 November).
- Save the Children UK (2007). Children Crossing Borders; Report on unaccompanied minors who have travelled to South Africa. Pretoria.

¹ International NGOs Refugees International and Human Rights Watch have recently completed research missions to South Africa concerning the situation of Zimbabweans.

² See especially Makina, D. (2007). Survey of Profile of Migrant Zimbabweans in South Africa: A Pilot Study. Pretoria, University of South Africa. and IOM (2006). Beitbridge Migration Survey: Results from the second survey of deportees receiving humanitarian assistance in Beitbridge, Zimbabwe. Beitbridge.

³ Forced Migration Studies Programme and Musina Legal Advice Centre (2007). Special Report: Fact or Fiction? Examining Zimbabwean Cross-Border Migration into South Africa. Johannesburg.

⁴ Makina, D. (2007). Survey of Profile of Migrant Zimbabweans in South Africa: A Pilot Study. Pretoria, University of South Africa.

⁵ This is based on FMSP interviews with NGOs and Zimbabwean organisations in South Africa.

⁶ See Save the Children UK (2007). Children Crossing Borders; Report on unaccompanied minors who have travelled to South Africa. Pretoria.

⁷ The Jesuit Refugee Services is advocating that all Zimbabweans should qualify for asylum under the OAU Convention definition on the basis that the economic crisis which is driving many Zimbabweans to emigrate in search of work and food is in fact a politically created crisis. On the other hand, the UNHCR states that most Zimbabweans would not qualify under the OAU refugee definition.

⁸ UNHCR statistics (for Zimbabwean applicants up to 2006) and phone interview with UNHCR 31/10/07.

⁹ These legal challenges have been conducted by Lawyers for Human Rights and the Wits Law Clinic.

¹⁰ CRMSA, D. Cote, et al. (2007). Protecting Refugees and Asylum Seekers in South Africa - 2007. L. B. Landau. Johannesburg, Consortium for Refugees and Migrants in South Africa.

¹¹ See reports such as BBC reporter (2007). Zimbabwean dies queuing for visa. BBC News online. 12 November.

¹² Department of Home Affairs (2007). Statement on Transit Shelter for Refugees. Media release. 5 October.

¹³ du Preez, M. (2007). We can't avoid our Zim duties any longer. The Star. Johannesburg. 2 August.

¹⁴ Refugees International (2007). "Zimbabwe Exodus: too little, but not too late..." RI Bulletin (7 November).

¹⁵ (2007). Zimbabwe: South Africa Considers Relaxing Visa Requirements. The Herald. Harare. 20 November.

¹⁶ These kinds of status are also sometimes called 'temporary protection' or 'complementary protection', but we feel that these two terms already have more defined legal meanings relating to the expansion of 'refugee' rights to persons who do not fulfil the standard conditions for refugee status, while we take supplementary protection to be forms of protection which do not confer all the rights as those given to refugees.

¹⁷ Department of Health (2007). Revenue Directive - Refugees / Asylum Seekers with or without a permit, BI 4/29 REFUG/ASYL 8 2007, 19 September 2007.