



CoRMSA

**Consortium for
Refugees and Migrants
in South Africa**

Protecting Refugees, Asylum Seekers and Immigrants in South Africa

**Johannesburg
18 June 2008**



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www.cormsa.org.za

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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 currently includes the following members:

- Amnesty International, South Africa Chapter
- 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 Centre
- University of Cape Town Law Clinic
- University of the Witwatersrand Law Clinic
- Planned Parenthood Association of South Africa
- Refugee Pastoral Care
- South African Red Cross
- Southern Africa Centre for Survivors of Torture
- Tutumike Refugee Network, Cape Town

Membership in the organisation is open to any South African-based organisation or individual with an established record of work on behalf of refugees, asylum seekers, or other migrants in the country.

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Remarks from the Chair

As this report goes to press, tens of thousands of displaced people in Gauteng, the Western Cape, and elsewhere face uncertain fates. What we already know is that the trials they have faced at the hands of criminal thugs and long-time neighbours are far from over. To their long histories of exclusion, exploitation, and extortion in South Africa, we now add impoverishment and indignity. In the cold of winter, they now huddle in settlements, make their way back to potentially hostile communities, or leave the country in search of protection elsewhere. Our hearts are with them and the hundreds of thousands of people throughout Southern Africa who depend on them.

The recent wave of violence has upset us all. Those who have long campaigned for non-citizens' rights and welfare are particularly unsettled. Clearly, we have not done enough to ensure that people's rights, lives, and livelihoods are not imperilled by those who would do them harm. Many of us feel discouraged or despondent. But rather than resign, we will draw strength and guidance from what we have witnessed. Let this be a turning point where we recognise and transcend the limits of citizenship by extending assistance to all who live in South Africa.

We have already begun this campaign, but we have a long journey ahead. Over the past two years, the Consortium for Refugees and Migrants in South Africa (CoRMSA) has built a coalition of people and organisations dedicated to the welfare and dignity of foreigners in South Africa. The addition of two full-time staff members—Sicel'mpilo Shange-Buthane and Duncan Breen—has brought stability, creativity, and energy to this collective just when we need it most. Although we face resistance to our efforts, we draw succour from the millions of South Africans who share our outrage at the past months' events.

Through collaboration and advocacy, we must redouble our efforts to open space for the non-nationals who have always been, and always will be, part of South African. Our duty to assist is more than an obligation to refugees fleeing violence, oppression, and persecution elsewhere in the world. Nor should we embrace strangers in our midst solely to repay them for contributing to apartheid's demise. Our debts are real, but whether someone is from Zimbabwe, Tanzania, Somalia, China, or India should make no difference. If they are here, ready to contribute, and ready to obey our laws, then we have no grounds to wish them ill.

Even more than this, our commitment to protect the rights of foreigners is a responsibility to ourselves. Twelve years ago, South Africa created one of the world's most remarkable Constitutions. This document not only swears to right past injustices, but also to protect the lives and human dignity of all who live here. These promises are nothing if we do not make them real. This means fighting discrimination and exclusion in all of its forms, whether due to race, gender, class, or nationality. As the past months illustrate, allowing any member of our society to be alienated from the economic and political rights—including the right to life—that we extend to all South Africans threatens everyone's self-respect and economic and physical security. That almost one third of those killed in the recent xenophobic attacks leaves little doubt of the danger.

Without migrants—people fleeing poverty or violence and those simply looking for a better life—South Africa would be a much poorer place. Throughout the country's history, gold extracted from the Witwatersrand has been carried to the surface on the backs of workers from Mozambique, Zimbabwe, Zambia, and South Africa. With today's skills shortages, agriculture, industry, and education can only thrive by drawing on the energy and skills of those from outside the country. And as these industries grow, so too will opportunities for South African citizens. They will expand further as remittances from South Africa spread wealth throughout the region in ways that promote political stability and nourish markets. The welfare of South Africa has always depended—and always will—on its neighbours and those from much farther away. By neglecting, denigrating, and excluding foreigners living here, we erode those bonds.

Although CoRMSA and this report are dedicated to promoting the rights of foreigners in South Africa, our campaign is not only about the rights of refugees, asylum seekers and other immigrants. Nor is this a campaign that we can fight alone. Only when international organisations, government, and the South African citizenry work together to protect non-nationals' rights will we be able to achieve the justice and prosperity for which we all long.

Loren B. Landau
Chair, Executive Committee

List of Acronyms

ART	Anti-Retroviral Treatment
BCOCC	Border Control Operational Coordinating Committee
CCMA	Commission for Conciliation, Mediation, and Arbitration
DFA	Department of Foreign Affairs
DHA	Department of Home Affairs
DoE	Department of Education
DoJ	Department of Justice
DHA	Department of Home Affairs
DPLG	Department of Provincial and Local Government
DRC	Democratic Republic of Congo
DSD	Department of Social Development
JRS	Jesuit Refugee Service
LHR	Lawyers for Human Rights
MCC	Mennonite Central Committee
NCOP	National Council of Provinces
NCRA	National Consortium for Refugee Affairs
NDOH	National Department of Health
NGO	Non-Governmental Organisation
NIB	National Immigration Branch
NICOC	National Intelligence Coordinating Committee
PSIRA	Private Security Industry Regulatory Authority
RAB	Refugee Appeal Board
ROC	Republic of Congo
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SANAC	South African National AIDS Council
SAPS	South African Police Services
SAQA	South African Qualifications Authority
UAMS	Unaccompanied Minors
UNCTD	United Nations Convention Travel Document
UNHCR	United Nations High Commissioner for Refugees

Summary of Key Findings and Recommendations

Issued annually in commemoration of World Refugee Day (20 June), this report represents research by members of the Consortium for Refugees and Migrants in South Africa (CoRMSA), a national network of service providers and research bodies. The findings have been compiled over a six-month period using surveys, in-depth interviews and a review of relevant documents, legislation and policies. In-person and telephone interviews were also conducted with officials and service providers in Johannesburg, Pretoria, Durban, Cape Town, and Port Elizabeth, and in border areas near Mozambique and Zimbabwe. The report also draws on extensive engagement with migrants across the country.

The report finds that South Africa still has far to go in its efforts to ensure the protection of non-nationals is in line with its commitments to protect the rights and dignity of all. Violence against non-nationals—while by no means new—reached unprecedented levels in 2008 in a wave of attacks that left many dead; thousands displaced; and permanently damaged South Africa’s moral authority at home and abroad. As horrific as they were, these attacks are but an extreme sign of how non-nationals are treated as ‘outsiders’ by various elements of our society, from members of the public, to civil servants, service providers, and government leaders. This report outlines many of the ways non-nationals—refugees, asylum seekers, and other immigrants—are excluded from the services, welfare, and dignity they are guaranteed by South African law and Constitutional commitments.

Migration and migrants have gained much prominence over the past year. Two primary concerns have dominated migration debates – those of Zimbabwean migration and xenophobia. These have been given vastly increased media and public attention while thrusting South Africa’s immigration and refugee policies into the limelight. Too late to avert the crises we have seen, measures have also been introduced to reform the current refugee system with the introduction of a Refugee Amendment Bill, part of a ‘Turn Around Strategy’ designed to aggressively and comprehensively reshape the Department of Home Affairs.

Despite the continuation of the crisis in Zimbabwe beyond the March election, there is still no official policy from government as to how it intends regularising and assisting the large numbers of Zimbabwean nationals in the country. Instead, Zimbabweans have been forced to eke out a living in whatever fashion they can with many relying on the kindness of a few under-resourced organisations and the goodwill of the South African citizenry. This is not sustainable and clear leadership needs to be provided urgently from government to outline a comprehensive plan of assistance until such time as there is consensus on stability in Zimbabwe.

One positive development has been the increased discussion about the need to shift away from policies aimed at **controlling migration** to policies aimed at **managing migration**. The rights and well being of non-nationals do not have to be to the detriment of South African citizens. Such new thinking around *managing* migration, reflected in recent comments by the Deputy Minister for Home Affairs, is enlightened in that it recognises the value of migration in local and regional social and economic development. Such an approach would provide further opportunities for regional trade at various levels and promote skills sharing across the region. In this way, South Africa’s development would have positive benefits for regional development. Similarly, regional stability can only be beneficial for South Africa’s development. Those in the Department of Home Affairs that are responsible for this shift in thinking need to be congratulated.

At present, there remain significant migration-related challenges that South Africa needs to address as a matter of urgency. Many of these challenges require increased leadership and greater engagement from various government departments to take responsibility for the well being of non-nationals as well as South African citizens. Below is a summary of the key research findings and recommendations to government departments and other key actors. As the findings demonstrate, the sometimes-violent exclusion of migrants from South African society is not new. Nor can it be resolved by closing the border, better policing, or public appeals to pan-African fraternity. Ensuring that the rights of non-nationals are protected requires recognising that migrants are a perennial part of South African society. Only by ‘mainstreaming migration’ throughout public policy can we help ensure that one day South Africa will truly belong to all those who live in it.

Key findings:

Xenophobic Violence:

- There has been a long history of violence against non-nationals in South Africa without effective steps being taken by various government departments to address this conflict;
- The attacks that began on 11th May 2008 have resulted in at least 62 deaths and the displacement of over 200 000 people;
- Government responses have differed across the country and civil society has played a major role in providing and co-ordinating humanitarian aid;
- Large numbers of non-nationals have returned to their countries of origin despite many having been in South Africa for many years;
- The violence was fuelled by numerous factors including disaffection and anger by South Africans at worsening economic conditions and lack of service delivery; perceived competition with non-nationals for jobs and scarce business opportunities; as well as incitement by organised criminal elements;
- The failure to regularise the large number of foreign nationals in South Africa and the absence of a humanitarian programme for Zimbabweans have heightened anti-foreigner sentiments and tensions. Undocumented migrants have been the subjects of labour exploitation. This has fostered a perception that they are stealing jobs by working for less than the minimum wage. The heavy handed way in which police have conducted immigration raids has also led to a perception by perpetrators of violence that they are assisting in removing 'illegals' from the country;
- Previous responses to xenophobic violence include arresting and deporting the undocumented non-national victims of violence who had sought refuge at police stations. This amounted to a tacit condoning of the violence in that government action was assisting residents to forcibly remove non-nationals from particular areas.

Arrests, Detention and Deportation

- Large-scale police raids have resulted in the illegal arrests of South Africans, asylum seekers, refugees and other legal migrants. The raid on the Central Methodist Church in Johannesburg highlighted the abuses and corruption that can take place during such an operation. This operation did not generate a single deportation or criminal conviction;
- Police in various urban centres continue to extort bribes from undocumented migrants in systematic and regular—yet illegal—ways. This undermines the SAPS' capacity to fight crime, pillories the organisation's reputation and victimises individuals who may in fact be in need of police protection;
- The SAPS-run detention centre in Musina is reason for significant concern due to the illegal detention and deportation of minors from the centre, the sub-standard detention conditions, the lack of recourse or access to legal representation for detainees, and the lack of adequate monitoring by DHA officials to screen for potential asylum claimants;
- South Africa deported more than 300 000 people in 2007, up from close to 250 000 in 2006. This is an expensive, embarrassing, and ineffective means of managing migration. In many instances, deportations were conducted in violation of the country's own immigration laws.

Access to the Asylum Determination process

- Whilst DHA has initiated a Turn Around Strategy that is also intended to improve the running of the Refugee Reception Offices, access to the asylum determination process remains difficult. Whilst survey research conducted with asylum seekers provided some positive reflections of DHA performance, there were still numerous challenges to be addressed;

- Among the greatest challenges for would-be asylum seekers is gaining access to one of the country's five Refugee Reception Offices. As long as these offices remain understaffed and effectively inaccessible, asylum seekers remain undocumented and vulnerable to exploitation, arrest, and deportation;
- The Asylum system remains effectively closed to new arrivals fleeing violence, instability, and persecution in Zimbabwe. Not only are there reports of border officials turning away Zimbabweans attempting to enter South Africa, but police have also regularly arrested and deported would-be asylum seekers before they can travel to Johannesburg or Pretoria in order to formally apply.

Access to Government-Funded Social Services

- Under South African law, people—regardless of nationality or legal status—are entitled to a range of basic social services including emergency medical treatment. All documented migrants are entitled to health care and education. Refugees are also entitled to disability grants and social assistance under the still inactive Refugee Relief Fund. Despite these legal provisions, few Departments or public service providers have adequate policies and practices relating to the inclusion of refugees, asylum seekers and migrants;
- The lack of effective policy implementation is due to a deficit in co-ordinated governmental self-monitoring, either by a lead agency such as the DHA, or by a dedicated cluster of departmental representatives;
- Many refugees, asylum seekers, and other migrants report being refused access to treatment at public clinics and hospitals. Many face discrimination and ignorance of their rights when they try to access these services;
- Refugees and asylum seekers report being unable to access ART because they do not have green, bar-coded ID documents. This is a violation of law. Many non-nationals are also referred out of the public sector to NGOs to access ART, despite a directive from the NDoH to the contrary;
- Close to one third of school age non-national children are currently not enrolled in schools due to an inability to pay fees, the costs of transport, uniforms and books, or explicit exclusion by school administrators. This is a violation of the law;
- Non-national children in schools report being regularly subjected to xenophobic comments by teachers or other students;
- Despite legislative and administrative provisions for certain forms of social assistance for non-nationals from the government, in practice such assistance is almost never available;
- The DSD has not yet made the provisions for refugees to access Disability Grants despite being legally compelled to do so;
- In the absence of direct assistance from the government, many non-nationals are heavily reliant on assistance from under-staffed and under-resourced NGOs, refugee self-help organisations and religious organisations.

Access to Accommodation

- The vast majority of non-nationals seek housing through the private sector. However, non-nationals renting privately are regularly discriminated against by landlords who do not distinguish between documented and undocumented foreigners. In many instances, landlords refuse to rent to non-nationals regardless of their legal status. Others take advantage of non-nationals' vulnerability and charge them higher rental rates than South Africans;
- Whilst South Africa's refugee policy encourages integration, the complete exclusion of legally resident asylum seekers and refugees from various national housing policies is an obstacle to migrants' social and economic integration into the communities in which they live;

- There are new housing challenges for foreigners who have been displaced due to xenophobic violence in informal settlements around the country. Ensuring that the displaced are able to return to communities without fostering further resentment will require tact, public education, and other forms of protection.

Access to Employment

- According to recent decisions undocumented migrants can now seek recourse for labour abuses through the CCMA and the Labour Court. It is vital that undocumented migrants can bring their concerns to the attention of the Labour Court or the CCMA without fear of arrest and deportation;
- The primary factor limiting the employment of migrants is the delays in the processing of documentation by the DHA;
- Despite South Africa's skills shortages, few attempts have been made to target the skills of non-nationals already inside the country. This amounts to severe wastage of skills.

Land Ownership

- Proposed prohibitions on foreign land ownership promote the perception that non-nationals are not welcome in South Africa. This is a major barrier to attempts at integration and reinforces xenophobic ideas that non-nationals—regardless of their legal status—cannot be full members of South African society.

Banking Financial Services

- Many migrants continue to lack access to credit or banking services;
- Migrants are more likely to be victims of crime and police extortion because their assets remain in cash;
- Without access to credit, large numbers of entrepreneurial non-nationals are prevented from starting businesses that would generate further job creation for South Africans;
- A number of financial institutions continue to refuse to open accounts for asylum seekers due to concerns regarding the validity of such documentation.

Women and Gender-based Persecution

- The current mechanisms to address gender-based persecution in the refugee status determination process are inadequate. Refugee Status Determination Officers require further training to empower them to make informed decisions in cases of gender-based persecution.

Children and Unaccompanied minors

- Research illustrates that children as young as seven are migrating alone from neighbouring countries due to the death of their parents, lack of money, or not being in school;
- Once in South Africa, children face exploitation by the police who deport them illegally or detain them in illegal conditions – such as detention with adults or for extended periods of time;
- Children also work in exploitative conditions in various sectors, including farming and domestic work.

Small and Medium Towns

- There is generally very little information about non-nationals in small or medium towns. This thus extends to local officials who are not aware of the rights of non-nationals as well as to non-nationals who are not aware of the rights and services to which they are entitled;
- In some areas, traditional authorities become important role players in granting non-nationals access to housing and services;

- The process of renewing permits is expensive and time-consuming for non-nationals who must personally travel to major centres to renew their documentation;
- Migrants in smaller towns—like many in larger urban centres—feel that the police are not willing to protect them. This is especially the case for small businessmen whose shops are robbed on a regular basis.

Special groups

- There is still no comprehensive government plan towards documenting and assisting the significant number of Zimbabwean nationals in the country;
- Many Zimbabweans cross the border informally due to various fears. As a result, they are vulnerable to robbery, rape and even murder by criminal elements in the border-crossing process;
- The current deportation process for Zimbabweans is ineffective and an inefficient use of taxpayer money as many deportees are likely to return to South Africa. The lack of effective screening in the deportation process means that individuals deserving of refugee status may be deported back to Zimbabwe to face renewed persecution;
- Migrants of Asian descent also report being targeted for robberies due to a perception that they are 'soft targets';
- Some corrupt government officials appear to target migrants of Asian descent to extort bribes.

Recommendations

To the Department of Home Affairs

- Initiate a thorough review of immigration policies in accordance with the Deputy Minister's recent comments that South Africa needs to move from a migration-control to a migration-management policy framework. Push for migration reforms that would enable job-seekers and foreign workers to remain legally in the Republic of South Africa;
- Continue to pursue procedural reforms in the arena of refugee reception to ensure that prospective asylum seekers are not unduly exposed to arrest and detention;
- Standardise and/or extend the validity period of Section 22 asylum seeker permits and print the forms on a durable medium;
- Ensure continued access to the asylum process for Zimbabweans who have experienced persecution;
- Liaise with SAPS to ensure that all orders to detain and deport non-nationals at the Musina detention centre are monitored and authorised by DHA officials and that prisoners at the facility are afforded the opportunity to claim asylum. Liaise with SAPS to improve the conditions of detention at the Musina detention centre and ensure that detainees have access to legal representation;
- Immediately investigate cases of abuse at the Lindela detention centre and provide access to researchers and human rights monitors who wish to speak to detainees;
- Introduce a temporary permit for Zimbabweans that would confer the legal right to remain in South Africa, access basic public services, and work, for a limited period of time. Immediately stop the deportation of Zimbabweans in border areas and elsewhere until adequate systems to prevent *refoulement* are in place;
- Significantly bolster the Counter-Xenophobia Unit's funding, its level of authority within departmental structures, and its powers to investigate instances of violence, conduct conflict resolution and initiate interdepartmental responses at a local and provincial level;
- Provide training for refugee status determination officers and introduce measures to specifically cater for cases of gender-based persecution. Keep records and statistics on cases involving gender-related persecution, or where gender is an aspect of the claim, as well as the decisions on those claims, in order to track patterns in decision-making.

To the South African Police Services

- Thoroughly investigate instances of recent and past attacks against foreigners including police collusion in these criminal activities;
- In consultation with relevant stakeholders, prepare national guidelines regarding the protection of migrant rights in the enforcement of immigration law;
- Incorporate training on the rights of non-nationals into police training college syllabi;
- In consultation with relevant stakeholders, prepare national policies to address police corruption arising from immigration enforcement activities;
- Ensure that all deportations from the Musina detention centre accord with status determination processes as defined in the Immigration and Refugees Acts and improve the conditions of detention at the Musina detention centre;
- Immediately cease the illegal deportation of Zimbabweans from the border area without screening by DHA officials; and
- Issue a strong statement that police may not deport migrants, particularly not child migrants and that all deportation must be conducted in line with the law and in collaboration with the DHA.

To the Department of Foreign Affairs

- Relax visa requirements for Zimbabweans in line with SADC commitments and existing arrangements for other SADC citizens, such as 30, 60 or 90-day visa-free entry.

To the Department of Provincial and Local Government

- Coordinate local government responses to migration and immigration, ensuring that foreigners are able to participate in community meetings and are incorporated into broader political and social planning;
- Make use of existing disaster management structures and processes to provide emergency and replacement housing for legal foreigners displaced from informal settlements through xenophobic violence.

To the National Department of Health

- Ensure that departmental staff, as well as those of complementary departments at the provincial, local and district level, uniformly implement national directives. 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 applied to South African citizens, and have access to free ART;
- 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;
- Provide ongoing experiential training for all healthcare professionals, including facility managers, on xenophobia and issues relating to the rights of refugees and asylum seekers: this is urgently required and CoRMSA suggests that medical and nursing school curricula be developed to incorporate these issues as pressing public health challenges within South Africa;
- Implement specific HIV prevention, care and treatment activities (including awareness campaigns and the promotion of treatments for all non-citizen groups, including refugees and asylum seekers);
- Continue and strengthen NGO/CBO support to the NDOH, particularly relating to the provision of foreign counsellors (often themselves refugees and asylum seekers) who are able to provide necessary language skills that enable refugees and asylum seekers to access VCT, ART and support in their home language.

To the National and Provincial Departments of Education

- Revise the Schedule relating to the Admission Policy for Ordinary Public Schools to reflect the right of children without South African birth certificates to access education, and remove any penalties against school principals who grant such children their right;
- 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;
- Until the policy of 'no-fee schools' has been completely implemented, ensure that non-citizens who are unable to pay school fees have equal access to school-fee exemptions as indigent South Africans, and introduce means of subsidising the 'hidden costs' of schooling, such as transport, uniforms and materials;
- Enhance capacity-building and training of all school staff members to address issues of xenophobia and to improve different groups of foreigners' access to education;
- Include consideration of foreign children in ongoing debates on state-sponsored pre-school education provision;
- Issue a strong statement that all children of qualifying age, regardless of income or documentation status, can and should attend school;
- Investigate reports where schools have excluded migrant children;
- Circulate a policy statement to all schools on the process for employing non-nationals as teachers; and
- Work with the Council of Educators to speed up the process of registering qualified foreign teachers.

To the National Department of Social Development

- Finalise plans to extend disability grants to recognised refugees, and implement the application process as soon as possible;
- Confirm and circulate a policy on non-citizen access to the Social Relief of Distress grant, to ensure consistent access around the country;
- Compile a database of unaccompanied minors who have migrated permanently to South Africa; and
- Facilitate access to schools and shelters for permanent and circular migrant children.

To the National and Provincial Departments of Housing

- Review the National Housing Code for discriminatory phrasing against asylum seekers and refugees;
- Ensure the explicit inclusion of asylum seekers and refugees as a specific category of foreigners 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; and
- 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 Labour

- Lobby 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 where demand for scarce skills is high. 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 or waive 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;
- Investigate child labour in the construction and farming industries.

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 for 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 Local Government Authorities

- Follow the initiative of Johannesburg Metro Council in offering dedicated information services and possibly temporary housing arrangements for especially vulnerable Zimbabwean migrants.

To Labour Unions

- Conduct information campaigns among members and employers on the rights of non-citizen workers (including undocumented workers); and
- Monitor labour rights abuses against foreign workers in addition to current monitoring of abuses against citizens.

To Financial Institutions

- Review current policies to make provision for new clients to present non-South African identity documents in order to open new bank accounts;
- Review current policies to make provision for clients with valid immigration documents—including refugee and asylum seeker permits—to access small loan schemes on an equal basis with South African citizens.

To the Banking Council of South Africa

- Ensure that all financial institutions have policies in place to address all categories of non-nationals opening accounts (including refugees and asylum seekers) and ensure that these policies are not discriminatory.

To the United Nations High Commissioner for Refugees

- Increase levels of funding to NGO implementing partners for basic material welfare support, especially for newly arrived asylum seekers, or lobby other donors to do so;
- Continue, with partner NGOs, to lobby the NDoH and the South African Nursing Council to enable qualified refugees and asylum seekers to register as nurses to work within the South African public health system;
- Ensure adequate training in gender sensitivity and interview techniques for all RSDOs. Training should take into account the cultural biases of the RSDOs themselves, including their gender, ethnic background and overall attitude toward non-citizens;
- Conduct regular refresher training on gender sensitivity for implementing partners, but especially for South African asylum officials, including the Refugee Appeal Board, the Standing Committee and the RSDOs; and
- Strengthen efforts to work with the South African government to develop a temporary permit scheme for Zimbabweans.

To the South African Human Rights Commission

- Increase capacity to monitor the rights of non-nationals across the country and introduce specific programmes within each regional office to do so;
- Find mechanisms to work collaboratively with civil society to promote the rights of all migrants—regardless of legal status—who live or work in South Africa.

1. Introduction

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; and
- inform advocacy activities by CoRMSA and its partner organisations.

Over the past year, the rights of non-citizens—refugees, asylum seekers, and other immigrants—has been the centre of discussions, debates, and mobilisation as never before in post-apartheid South Africa. In advance of the recent attacks, the Department of Home Affairs (DHA) had already sought reform to the country's refugee and asylum system. Parliamentary and ministerial discussions have also resulted in new policies to recruit skilled workers from across the region. At the local level, Johannesburg opened a Migrant Help Desk and other cities have begun making slow progress in mainstreaming migration into their spatial development programmes. But it is not these ongoing concerns or the slow process of political and institutional change that have snared the country's attention. More than anything else, it is two issues that have drawn the eye of leaders, citizens, and the international community: Zimbabwe and xenophobia.

As Zimbabwe continues on its ever more violent path towards a presidential run-off, hundreds of thousands of Zimbabwean citizens have been displaced. Although figures are scanty and highly politicised, every reasonable estimate is that the majority of the displaced remain within the country—taking flight from their homes and trying to eke out a living any way they can. Hundreds of thousands of others have been forced to flee the country—due either to violence, persecution, or the extraordinary poverty that now shrouds the once prosperous country. While South Africa offers the prospect of jobs and protection, neither is guaranteed. Despite repeated calls from CoRMSA and others, the South African government remains woefully unable to address the humanitarian needs of the displaced. Not only has the government continually denied the existence of political factors behind the exodus from Zimbabwe, but it has also failed to coordinate even the most basic framework to assist those coming across the border. Instead, Zimbabweans must make their own way, or rely on the kindness of a few under-resourced organisations and the goodwill of the South African citizenry. Despite working behind the scenes, the United Nations High Commissioner for Refugees (UNHCR), the South African Human Rights Commission (SAHRC), and others have stood by in relative silence as Zimbabweans continue to be deemed illegal and repatriated to an uncertain future.

Within South Africa, the hostility and exclusion that foreigners have faced in past years reached an unprecedented scale in May's eruption of xenophobic violence. At one level, these attacks are not an immigration issue, but rather a sign of widespread disaffection with South Africa's transformation: with the state's apparent inability to create jobs or provide services and the resultant alienation of people from the country's politicians. It also highlights government's failure to address people's needs and responsibly account for these failures. Perhaps the most alarming illustration these attacks provide is the absence of mechanisms through which people with legitimate frustrations can resolve conflicts and concerns. But, of course, it is also a migration issue: the majority of the victims of these attacks were foreigners who now fear for their lives—sometimes on both sides of the South African border.

But let us be clear: despite widespread claims that the solution to these problems lies in halting migration, this is neither possible nor is it a solution. What is needed is a sustained reconsideration of how the country addresses migration and other concerns of social importance. This is not something to be done by the DHA alone, but must involve the Presidency, local government, the SAHRC, the Departments of Justice (DoJ), Social Development (DSD), Provincial and Local Government (DPLG) and Safety and Security (DSS). It is worth noting that, more than a year ago, CoRMSA requested that the SAHRC take the lead in addressing the acceleration of hate crimes against foreigners and holding officials responsible for their inaction. The response: their agenda was set for the year and they would

see what they could do. In hindsight this was clearly not enough. Other calls for proactive responses have been similarly ignored. Instead, officials have allowed the hatred to simmer while foreigners have increasingly become scapegoats for their shortcomings.

In last year's report, we argued that there had been 'a lack of political will for institutional or legislative reforms that would protect the rights of non-nationals.' The events of recent months have underscored the urgent need for action in this regard. But, instead of arguing for reform in his long-awaited speech on 25 May, President Mbeki argued that there is no need to revisit the legislation governing immigration and asylum. Indeed, he and many other leaders have maintained that the country's policies have always promoted the peaceful integration of migrants in our midst. For government, the violent failures that we have witnessed are not failures of policy, but of policing and tolerance. While **South Africa must improve its policing practices and promote tolerance, it must also revisit and fundamentally revise the way it manages migration from the region and further afield.**

We call on the country's existing and emerging leadership to ensure that migration is treated as the 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. Realising this end means moving beyond the goal of sealing the South African border. This is not only impossible, but efforts to do so will require massive expenditures and produce human rights abuses too great to tolerate. This is simply not a realistic approach in a globalised era. More importantly, South Africa and the region depend on regular movements across the border. Rather than prevent such crossings, we must ensure that people can cross in safety, without becoming victims of smugglers, traffickers, and other criminals. Doing so will require us to revisit border management and, most importantly, the legal frameworks intended to regulate movement within the region. For instance, **providing a regional work permit would be unlikely to significantly increase the number of people moving into South Africa. Rather, it would help legalise foreigners' activities and allow them to join unions, access banks, and become better integrated socially, in line with government commitments to building unified and peaceful communities. This would also further enhance mechanisms such as labour standards, workers' rights and human rights protection in South Africa.**

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 all, 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 months so tragically demonstrate, **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. It begins by reviewing the degree to which the South African government and other actors have addressed recommendations made in last year's report. It then provides a review of key legislative and legal decisions affecting refugees and other migrants living and working in South Africa. The report then turns to issues of implementation and rights protection. It first considers asylum seekers' and refugees' ability to access legal documents to protect their physical security and help safeguard them from possible arrest, detention and *refoulement*¹. It then addresses concerns over migrants' and refugees' ability to access a number of key social services including health, education, social assistance, housing, and employment. As in our last report, **we draw attention to the increase in violence against foreigners, some of which has resulted in murder—the ultimate human rights violation.** In other instances, such violence has resulted in the effective ethnic cleansing of particular communities. **Although this report does not fully explore the causes of the violence, it helps illustrate shortcomings in the protection of non-nationals that create an environment conducive to this phenomenon.** In each section we offer a series of recommendations and conclusions.

¹ *Refoulement* is the forced return of an individual to a country where he or she faces a likely risk of persecution.

Working through CoRMSA's partners across the country, we compiled the information for this report over a six-month period using in-depth interviews and a review of relevant documents, legislation and policies. We conducted 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 report also draws on extensive engagement with migrants across the country.

The 2008 report has benefited from significant improvements in information flows amongst CoRMSA, government, and relevant stakeholders. This is mostly due to the increased transparency of government bodies. Prior to this report, CoRMSA was heavily dependent on client anecdotes and/or members' observations to identify improvements and failures in migration policy. Over the past year, 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. This is but one sign of the collaboration needed to protect and promote the rights of everyone who lives, however temporarily or tenuously, in South Africa.

Beyond facilitating information exchanges among CoRMSA members and other partners, our recent collaborations have generated higher quality information than in years past—information that allows us to offer more targeted suggestions for reform and improved services. Unfortunately, our members are still blocked from several key sites and documents. We specifically call on the South African Police Services (SAPS) and DHA to open access to detention facilities at Lindela and Musina, and urge the DHA to respond to long-outstanding Promotion of Access to Information Act (PAIA) requests. Such openness will be all the more critical as South Africa addresses the horrors of the mass violence and displacement that wracked South Africa in May. We hope this report helps to convince relevant decision-makers that **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.

Numbers at a Glance

New Asylum Applications in 2007:	45,673
Number of New Asylum Applications Decided in 2007:	5,879
Percentage of Applicants Given Refugee Status:	29%
New Backlog in Asylum Cases in 2007:	39,758
Pre-2007 Backlog in Asylum Cases:	49,275
Total Asylum Case Backlog:	+89,000

Asylum applications from selected countries:

Zimbabwe:	17,667
Democratic Republic of the Congo:	5,582
Ethiopia:	3,413
Malawi:	3,341
Somalia:	2,041
Bangladesh;	1,982
Pakistan:	918

Unconfirmed Estimates of Zimbabweans in South Africa: 1-9 million

Estimates of People Displaced by Violence in South Africa: 30,000-125,000

Estimates of Mozambicans and Zimbabweans who Fled South Africa after Violence: 25,000-35,000

Approximate Number of People Deported in 2007: +300,000

Despite our best efforts, there are undoubtedly issues and concerns not fully addressed in these pages. The most obvious absence relates to our **pressing concerns over the government's post-violence assistance programmes and efforts to promote the reintegration of migrants into South African communities**. And while we are encouraged by more sympathetic media reports on the conditions of refugees and other migrants, **we are nevertheless concerned by the role of the media in promoting xenophobic discrimination and violence**. Despite these omissions, CoRMSA believes that the study's findings are generally representative of the experiences of migrants in the country. Moreover, since the study aims to provide an informed assessment of the level of government compliance with its national and international obligations towards asylum seekers, refugees, and other migrants, this report does not provide a detailed account of the different types of assistance provided by NGOs and other organisations within civil society to asylum seekers and refugees. NGO interventions are highlighted only where relevant to the issue being addressed.

2. Legal Updates

South Africa's legal framework is critical to promoting migrants' rights and welfare and their integration into South African society. Despite widespread public commitment to promote integration and re-integration in the wake of recent xenophobic violence, South Africa's law—and the application of that law—often works against such ends. That said, there have been significant improvements over the last year, although serious problems remain. The remainder of this section reviews the areas of progress and highlights some issues of concern.

Access to Asylum

DHA 'Turn Around Strategy'

DHA has embarked on a number of procedures designed to introduce significant structural change into the Department including the Refugee Reception Offices as part of a 'Turn Around Strategy'. This has led to numerous changes including the introduction of new information technology. Whilst in many cases major improvements in the service delivery have not yet been reported by CoRMSA members, CoRMSA is hopeful that this process will ultimately result in major changes and address the many challenges civil society has raised with the DHA.

DHA pre-screening process unlawful ²

The Wits Law Clinic challenged the DHA pre-screening process that was being employed at certain refugee reception offices (RROs). DHA then appealed the decision of the Transvaal Provincial Division of the High Court. On appeal, the Supreme Court confirmed the decision of the lower court in declaring that the practice and policy of receiving applications for asylum at the Marabastad and Rosettenville RROs was unconstitutional and unlawful both in the manner of scheduling appointments and in the pre-screening method employed. The DHA was ordered to re-assess the asylum applications of all persons who had been subject to this process.

Difficulties accessing the asylum process

There is an ongoing problem at the Marabastad RRO in Pretoria, where new asylum applicants are not being immediately issued with temporary asylum seeker protection (Section 22 permits). Instead they are permitted to lodge their applications for asylum and are thereafter issued with an appointment date to return after 30 days or longer to collect the asylum seeker permit. This is placing asylum seekers in a vulnerable situation: left undocumented and without legal standing, they may be subjected to arrest, detention and deportation. It is quite difficult to confirm whether an asylum seeker has lodged an application for asylum and detainees may face deportation while waiting for assisting in obtaining this confirmation.

The access problem experienced by most refugees at various RROs continues to be exacerbated by the lack of capacity at the DHA. During the initial months of the reporting period, a High Court decision forced the DHA to abandon its policy of issuing appointment slips for future interviews and for the issuance of asylum seeker permits. This situation was untenable as many clients, having entered the country clandestinely, are without formal documents legitimising their presence in the Republic.

Moreover, as a result of the closing of the Rosettenville RRO in Johannesburg (for the second time) in January 2007, the Marabastad RRO experienced a major increase in prospective applicants. It is important to note that despite the appointment of a process engineer (as a consequence of the Pretoria High Court order in the *Somali Refugee Forum* matter) to advise the DHA on possible mechanisms to facilitate adequate access to the asylum procedure, and the subsequent filing of the process engineer's final report and recommendations, Lawyers for Human Rights (LHR) has seen no evidence of any implementation programme. Unfortunately, it is increasingly likely that further litigation in this regard will be necessary.

² Minister of Home Affairs v Tafira and others, (2007) SCA case 155/07

However, between mid-May and the beginning of June, prior to the public service strike, the Marabastad RRO made a concerted effort to increase its daily intake. Unconfirmed reports place the number of new applicants attended to during this two-week period at approximately 200 persons per day, with preference given to women and minors. It must be stressed that these figures need to be verified. There were still complaints related to inconsistent queue-management practices and the office seemed to arbitrarily prioritise persons from certain countries for access to the asylum process. These may be related to pragmatic considerations on the part of DHA management, flowing from increasing violence between different asylum-seeker communities and ubiquitous allegations of corruption.

LHR believes that this increased intake was directly related to a strategic decision, taken in early April, to refer a number of undocumented asylum seekers to private *pro-bono* attorneys in order that their cases can be dealt with on an individual basis. Faced with a deluge of litigation, the Marabastad RRO had little choice but to increase its daily intake numbers. Unfortunately, the well-publicised public service strike interrupted proceedings in this regard and it is not clear whether the Marabastad office will continue with its apparent increased-intake drive. Indications are that such an increased intake, without the necessary capacity, will be unsustainable.

Access to Asylum in Cape Town

In February 2008, the Legal Resources Centre (LRC) in Cape Town re-enrolled the Kiliko case relating to access to the Refugee Reception Office in Cape Town. The case was originally brought to court in 2005 and was re-enrolled due to the ongoing challenges around access to the Refugee Reception Office and the difficulties asylum seekers face in obtaining Section 22 asylum seeker permits. In the judgment handed down by Judge van Reenen on 4th March, the judge described the current situation as one of “gross inhumanity” and recognized the “failure of the South African authorities to adhere to the international instruments as regards the treatment of refugees”. Given that the DHA is undergoing changes in relation to its Turn Around Strategy to improve access to the Refugee Reception Office, the judge granted the DHA until 5th December 2008 to illustrate that services had improved at the office following the Refugee Reception Offices’ relocation and the integration and improvement of information technology. The DHA would have to demonstrate that the changes which had occurred had had a positive impact on the increasing backlog of applications for Section 22 permits.

Policy Change on Asylum Seekers or Refugees who Make Immigration Applications

In April the DHA changed an aspect of its policy after extensive advocacy by a number of organisations especially William Kerfoot of the Legal Resources Centre in Cape Town. Prior to this, DHA was not allowing non-nationals to hold a refugee or asylum seeker permit at the same time as making an application for a temporary residence permit or permanent residence (for example, on the basis of marriage to a South African citizen). DHA was requiring refugees or asylum seekers applying for temporary residence or permanent residence on this basis to cancel their asylum seeker or refugee permits first. DHA has now reverted its policy to comply with the court order in the case *Dabone and Others vs the Minister of Home Affairs and Another* so that asylum seekers or refugees now applying for temporary or permanent residence need not cancel their permits before making these applications.

Detention and Deportation

Review and extension of detention warrants in respect of illegal foreigners³

In an unreported judgement from the Transvaal Provincial Division of the High Court, Judge Preller held that warrants of detention in terms of section 24 (1) (d) of the Immigration Act may be extended for a further period of 90 days and confirmed that the total period of detention envisaged by the section is 120 days. This is deeply concerning and reflects a punitive approach to dealing with migration issues, as well as threatening to make detainees bear the burden of government administrative incapacity.

³ Adela Mbalanga Aken v Minister of Home Affairs case 46875/07 TPD

Detention and deportation of foreign unaccompanied children from South Africa

Pursuant to an application brought by the Centre for Child Law and LHR, the Pretoria High Court handed down a judgement in September 2004 that held that the legal mechanisms for the protection of South African children, found in the Constitution and the Child Care Act of 1983, apply equally to unaccompanied foreign children present within South Africa's borders. Before this judgement, many unaccompanied foreign children were simply dropped off at the borders of Mozambique, Zimbabwe and other countries without attempts to reunite these children with their families or to reintegrate them into society. Although the Pretoria High Court's judgement held that this practice was unlawful, there is still no proper government policy or procedure providing for the lawful and dignified deportation of children from South Africa.

Thus, the next step in the case is to ensure that the South African government formulates legal and humane policies for the deportation of foreign unaccompanied children. To this end, LHR met with the government's lawyers recently to discuss the adoption of a policy circular that would set out a procedure and safeguards to be followed. This matter will be set down for mid-2008 when the Curator will submit her report to court. LHR will also request the court to make a final order regarding the deportation of unaccompanied children.

Police raids on the Central Methodist Church

The unlawful and heavy-handed police raid on the Central Methodist Church in Johannesburg on January 31, 2008, appeared to be directed at vulnerable homeless people and those seeking asylum and sanctuary at the church. Many of those arrested are asylum seekers from Zimbabwe, who left their country due to ongoing political persecution, human rights violations and extreme poverty caused by the actions of Zimbabwe's political regime.

A number of documented individuals were arrested along with people who had either received an appointment to lodge their asylum claims at the DHA or were in the process of lodging these claims. The problem, however, was that the DHA failed to issue any documentation to these persons indicating their immigration status in the country. Foreign nationals who come to South Africa seeking refuge from persecution are entitled to apply for temporary asylum seekers permits which enable them to remain in the country lawfully until their claim has been adjudicated and a decision is made regarding their refugee status. However, in reality most asylum seekers find it extremely difficult to make asylum applications due to the inaccessibility of the RROs. Arrest and detention of bona fide asylum seekers is unlawful, and South African law specifically prohibits their deportation. In fact, the Refugees Act prohibits refoulement, or the deportation of asylum seekers to countries where they risk further insecurity and persecution.

Refoulement of a *Refugee Sur Plus*

LHR has intervened in a matter involving a Kenyan national who has applied for asylum as a *refugee sur plus*. His asylum application was initially rejected in 2007. However, after the elections in Kenya he was unable to return to his country due to the civil strife that erupted there. He attempted to lodge a fresh asylum application but was arrested and sent to Lindela to be deported. LHR managed to secure his release; however, he has not yet been permitted to lodge a fresh asylum application.

Release of persons who have made asylum applications while in detention ⁴

LHR brought a matter before the Johannesburg High Court challenging the DHA procedure of detaining persons who have made asylum claims while in detention. While the court ordered the immediate release of the asylum seekers in detention, it did not find that the DHA had a policy of continuing to detain asylum seekers on the grounds that they applied for asylum only after finding themselves in detention.

⁴ CoRMSA and Others vs. Minister of Home Affairs and Others WLD: CASE 08/6709

Rights of Children

Reconsideration of the asylum application of three Congolese children

This High Court review application challenged the rejection of the asylum application for three Congolese children. The children's father died after they arrived in South Africa and the children were placed in foster care. They applied for asylum and the DHA subsequently dismissed their asylum applications; the Refugee Appeal Board confirmed this dismissal. LHR director, Advocate Jacob van Garderen, was appointed as curator *ad litem* in a high court review of the decision to reject their asylum application⁵. The court found that the Appeal Board had erred in requiring too high a standard of proof from the children in proving their claim for asylum. The court also found that the Appeal Board made an incorrect factual finding that the situation in the DRC did not pose a danger to the children. The decisions taken by the Refugee Status Determination Officer (RSDO) as well as the Appeal Board were set aside and the children were granted asylum.

Representing the best interest of the child: Sudanese refugee child burn survivor

Jacob van Garderen has been appointed as curator *ad litem* in respect of a young Sudanese boy in an application brought by the Centre for Child Law. The boy is a burn survivor who was living in a refugee camp in Chad and was brought to South Africa at the end of last year for medical treatment. There are a number of different organisations and individuals who are interested parties in this matter, and due to the severity of the disputes amongst them—ranging from their respective authority to take decisions on behalf of the child to decisions regarding his best care options—a curator was appointed to make recommendations to the court. Arrangements were subsequently made for the child to be relocated to Tunisia to continue his medical treatment. Tunisia was selected for having a language, religion and culture that the child would be able to identify with. The level of specialist medical treatment required by the child was readily available in Tunisia. It is also closer to the child's extended family members who are in Chad. LHR has filed the curator's report in court and the matter is due to be finalised soon.

Integration

Permanent residence based on right to just administrative action

In March 2008 the Pretoria High Court handed down judgement in the matter *Kamelia Tcherveniakova v The Minister of Home Affairs and Others* granting the applicant and her dependents an exemption for permanent residence in terms of Section 31(2) (b) of the Immigration Act based on their individual circumstances.

The applicant and her dependents came to South Africa in 1996, prior to the existence of any legislative framework to deal with asylum seekers and refugees. In 2003, their application for refugee status was refused. They then brought an application for an exemption before the Minister of Home Affairs. This application was finalised in November 2006. The court took into account the length of time taken for the process to be finalised in accordance with the applicant's right to just administrative action.

Social grants for disabled refugees

Disabled refugees in South Africa are excluded from accessing government-provided social assistance grants. Following a Constitutional Court judgement that held that the exclusion of permanent residents from the welfare scheme is discriminatory and unfair and infringes the right to equality, LHR pursued the extension of grants to disabled refugees. LHR's Strategic Litigation Unit represents a number of individual refugees who are disabled, and two refugee organisations that have disabled refugee members. These clients were assisted in launching an application challenging the constitutionality of their exclusion from disability grants.

An interim settlement agreement concluded with government provided that LHR's clients were allowed to apply for Social Relief of Distress grants, and that government filed a comprehensive *Social*

⁵ Van Garderen v Refugee Appeal Board case no: 30720/2006, High Court review application brought by the Wits Law Clinic on behalf of the minor children. Advocate Jacob van Garderen (Lawyers for Human Rights) was appointed as a curator *ad litem* in the matter.

Assistance Plan for Refugees with the Court by March 31, 2006. In its plan, government was required to set out the exact manner in which it intended to fulfil its obligations towards all disabled refugees.

During April 2006, government applied to Court for an extension of time to file its report. An extension was granted and the plan was subsequently filed at the beginning of October 2006. The plan, amongst other things, provides that disabled refugees will receive disability grants to the same value as social grants received by South African citizens. The plan stipulates that the Government intends to have access to disability grants generally available for all disabled refugees within eight months.

In April 2007, LHR provided a draft order to the Department of Social Development requesting it, by 3 August 2007, to gazette regulations stating that a refugee identification document or a Section 24 Recognition of Status Permit are sufficient for the purposes of obtaining social assistance grants, since the Identification Act does not recognise refugee documents as valid documents. LHR is awaiting a response from the DSD. Despite assurances that this grant would be effective by mid-2008, the DSD has still not confirmed when access to these grants will become available.

Broader Legislative Updates

The Convention for the Protection of All Persons Against Enforced Disappearances

LHR, in association with Dutch-based NGO Aim for Human Rights, hosted a conference on 'Enforced Disappearances' in February 2008. The conference was attended by the DHA, the Department of Foreign Affairs (DFA), the National Prosecuting Authority (NPA), the International Committee for the Red Cross, the Ambassador of Argentina, and numerous legal experts and representatives from organisations with an interest in this field. Discussions revolved around South Africa's ratification and domestic implementation of the UN Convention that debated the benefits that should accrue to victims of enforced disappearances and the legal means to prosecute the perpetrators, as well as possible challenges of the retroactive effect of the UN Convention in light of South Africa's Truth and Reconciliation Commission process. The Department of Justice (DoJ) confirmed that South Africa was taking steps to sign the convention in April. So far, DFA has made no announcements on the progress of their intention to sign.

Labour rights for migrant workers

There have been recent progressive changes in the position of migrant workers in South African law. South African employers have the same duty to care for illegal foreign employees as they do for citizens, according to a precedent-setting Labour Court judgement, which ruled that illegal foreigners have the same labour rights as South African workers⁶. The Johannesburg Labour Court ruled in favour of Lanzetta, an Argentinean national, dismissed by Discovery Health when his work permit expired. The company dismissed him because the Immigration Act prohibits the employment of an illegal immigrant. However, Judge Andre van Niekerk ruled that Lanzetta was still an employee for the purposes of the Labour Relations Act. The judgement is significant in that it would mean that all employment contracts are valid, irrespective of whether an employee is a legally or illegally in the country according to the Immigration Act. It means employers cannot abuse foreigners, regardless of whether or not they are in SA legally. The court's action follows a change of heart by the Commission for Conciliation, Mediation and Arbitration (CCMA) in March 2008, when it agreed to consider cases involving the workplace rights of foreign nationals without proper documentation. This development could be significant in cooling xenophobic sentiments around the commonplace that undocumented foreigners affect citizens' job opportunities through their amenability to work below minimum wage.

⁶ Discovery Health vs. CCMA and others, Labour Court, case JR 2877/06

Refugee Amendment Bill process

CORMSA, as well as many affiliate members, have attended discussions on the Refugee Amendment Bill since early 2007 and made oral and written submissions to the DHA Portfolio Committee on the Bill in March 2008. The submissions will be discussed at Parliament before any further changes to the Bill are published.

The salient issues which emerged from the new Bill and the submissions on the amendment Bill are as follows:

- Recommendation of a specific procedure for the treatment of unaccompanied children in the asylum process;
- Recommendation for clarity as to the derivative status of family members;
- Concerns raised about the removal of the office of the Refugee Reception Officer;
- Concerns were raised about the dissolving of the Standing Committee for Refugee Affairs as well as the Refugee Appeal Board and the creation of the Refugee Appeals Authority;
- Recommendations for the refugee identity document to conform to the South African identity document in accordance with the Identification Act;
- Concerns raised about the recoding of certain biometric information such as DNA as an invasion of privacy and dignity;
- Recommendations for the rights and obligations of asylum seekers and refugees to be clearly listed in the Act, Regulations to the Act on the permits;
- Issues around the arrest and detention of asylum seekers and refugees raised as concerns; and
- Xenophobia and the recent xenophobic attacks discussed at great length.

Detention of non-nationals

Section 32 of the Immigration Act (Act no 13 of 2002, as amended) states that an 'illegal foreigner' shall be deported from South Africa. An illegal foreigner is defined in the Act as 'a foreigner who is in the Republic in contravention of this Act.' This broad definition of an illegal foreigner often results in the arrest and detention of asylum seekers and recognised refugees, who have no status under the Immigration Act.

Detentions are governed under section 34 of the Immigration Act. This section allows for two types of detention: detention for the purposes of deportation and detention for purposes other than deportation.

Detention for the purpose of deportation allows an immigration officer to declare someone an 'illegal foreigner' and detain that person without a warrant for 30 days. The law contemplates that an 'illegal foreigner' will be deported within that time period. If further time is required, the immigration officer may approach a magistrate's court for a warrant extending the detention 'for a period not exceeding 120 calendar days.' The detainee does not have the right to appear before the magistrate but must be given notification of the application for a warrant and an opportunity to make written submissions to the magistrate as to why the warrant should not be granted. In practice, immigration officers rarely implement these procedural safeguards and detentions may last far beyond the prescribed periods in the Act.

Detention for purposes other than deportation includes people who have been criminally charged under the Immigration Act and must appear before a magistrate. It is also used for verification of identity documents where the legal status of the individual is in question but the immigration officer has not decided to declare him or her an 'illegal foreigner'. This type of detention may not exceed 48 hours.

Detentions under the Refugees Act are far more limited and detainees are protected by more procedural safeguards. An asylum seeker may be detained under section 23 of the Refugees Act for breaching a condition of his or her asylum seeker permit or if that person's application for asylum has been rejected. This detention, however, is subject to section 29 of the Act that requires that any detention must be

reviewed by a judge of the High Court after each 30-day period of detention. This section also makes provision that the detention of a child may only be used as a last resort. The Immigration Act is silent as to children, although children are protected from unnecessary detention by the Constitution.

A person who is charged under section 37 of the Refugees Act may be detained according to the provisions of the Criminal Procedures Act (Act no 51 of 1977).

The nexus between the Immigration Act and the Refugees Act occurs at section 21(4) of the Refugees Act, which states that no proceedings may be instituted or continued against any person for unlawful entry or presence in South Africa if that person has made an application for asylum. This provision should prevent the use of the Immigration Act to detain asylum seekers, but due to the lack of systems between immigration, the police and RROs, applicants' files are not verified to determine if they have made applications for asylum. This protection, however, is not extended to those who have attempted to obtain asylum seeker permits, but have been unable to gain access to the system such as those detained while awaiting their appointment dates at the Marabastad RRO. In this case, detainees must rely on section 2 of the Refugees Act and the principles of non-refoulement to prevent deportation.

Is xenophobia a hate crime?

The last year has seen a massive increase in incidents of foreigners being attacked, their wares destroyed, and their homes demolished by South Africans, culminating in the horrific surge of violence in May. Although this has led to an increase in the number of applications being made to the UNHCR for resettlement, it should not be seen as an immediate or long-term solution. The most recent spate of attacks affirms that sporadic assistance from the police is an insufficient response to the problem. The threat to migrant security must be addressed as a picture that extends beyond the immediate details of individual cases.

South Africa is party to the United Nations Convention on the Elimination of All Forms of Racial Discrimination. According to the convention, the country has an obligation to protect all people within its borders, and not to allow foreigners' rights to be infringed.

A hate crime is defined as violent intolerance which is intended to hurt and intimidate someone on account of their race, ethnicity, national origin, religion, sexual orientation, disability or other ground for prejudice. Hate crimes are usually defined as crimes motivated by prejudice or hatred. The term covers a wide range of actions and it describes victims who are identified by their actual or perceived membership of a hated group.⁷ A hate crime is an offence that is coupled with a bias motivation, but in most countries, hate-crime legislation does not criminalise hate speech.

South Africa does not define hate crimes in any domestic legislation, but **by virtue of being party to the Convention on the Elimination of All Forms of Racial Discrimination, the state has an obligation to protect persons who are facing discrimination.** The committee established under this convention recommended that South Africa pass legislation which would criminalise hate crimes and hate speech by August 2007. The SAHRC echoed this call⁸.

Further, in 2001 South Africa hosted the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which issued the Durban Declaration. This declaration highlights xenophobia and states that any 'persecution against any identifiable group . . . on racial, national, ethnic or other grounds . . . constitute serious violations of human rights and, in some cases, qualify as crimes against humanity.'⁹ The Durban Declaration also acknowledges that national actions need to be implemented to combat xenophobia, as this is one of the main contemporary sources of violations of human rights. **CoRMSA calls on the government to see xenophobia as a hate crime and for the SAHRC to take stronger action—as demanded by the law—to protect the rights and dignity of non-nationals in South Africa.**

⁷ Hate Motivated Violence: Is it linked to hateful expression? AM Anderson, University of Limpopo

⁸ South African Human Rights Commission NHRI submission to the Universal Periodic Review Mechanism

⁹World Conference Against Racism, Racial Discrimination, Xenophobia and related Intolerance, Durban Declaration Section 28

3. Xenophobic Violence

Background and recent history

While the government appears to have been caught unaware by the recent wave of violence kicked off by attacks in Alexandra township, Johannesburg, instances of anti-foreigner violence in townships and informal settlements have increased steadily over the past year. In many cases, protests over service delivery have ended with attacks on foreign nationals. Elsewhere, gangs have systematically targeted, attacked, and in a number of cases killed foreign shopkeepers and residents. Between September 2007 and May 2008, we have recorded attacks in the following places, though there are undoubtedly many others that have not received attention from researchers and journalists. Many of the incidents strongly foreshadow the nature of the triggers that sparked the recent violence, as well as the nature of the attacks that ensued.

- Delmas (MP)—September 2007. Following a service-delivery protest by residents, shops owned and staffed by non-nationals were attacked and looted. Forty non-nationals fled and were temporarily accommodated at mosques and with friends.
- Mooiplaas (GP)—December 2007. Minor clashes between South African and Zimbabwean nationals led to retaliatory attacks resulting in over 100 shacks being burned.
- Duncan Village (EC)—January 2008. Two Somalis were found burned to death in their shop. Police later arrested seven people in connection with the incident after they were found in possession of property belonging to the deceased.
- Jeffrey's Bay (EC)—January 2008. After a Somali shop owner allegedly shot dead a suspected thief, a crowd of residents attacked Somali-owned shops, and many Somali nationals sought shelter at the police station.
- Soshanguve (GP)—January 2008. Attacks started after four non-nationals allegedly broke into a spaza shop owned by a local trader. Residents apprehended the suspects and allegedly burnt one of the suspects to death. After this incident, residents called for foreigners to leave. Shacks were burnt and shops belonging to non-nationals looted. Many non-nationals fled the area.
- Albert Park (KZN)—January 2008. The community forum held a meeting to address the issue of non-nationals living amongst them. The community indicated during this meeting that they wanted foreign nationals living in the area to leave.
- Laudium (GP) February 2008—At a community meeting in the informal settlement of Itireleng some members encouraged residents to chase the non-nationals out of the area. Violent clashes took place. Shacks and shops belonging to non-nationals were burnt and others looted.
- Valhalla Park (WC)—February 2008, residents of Valhalla Park forcefully evicted at least five Somali shop owners from the area after having apparently 'warned' the shop owners to leave three months before.
- Atteridgeville (GP)—March 2008. At least seven lives were lost in a series of attacks that took place over a week. The deceased included Zimbabwean, Pakistani and Somali nationals as well as a South African who was mistaken for a foreign national. Approximately 150 shacks and shops were burnt down, destroyed or vandalized. Approximately 500 people sought refuge elsewhere.
- Worcester (WC)—March 2008. A large group of Zwelethemba informal settlement residents went on a rampage, destroying foreign-run shops and leaving a large number of foreign nationals homeless.
- Mamelodi (GP)—April 2008. In a similar pattern to the attacks in Itireleng and Atteridgeville, residents of Mamelodi went from house to house attacking non-nationals and setting alight the shops and houses abandoned by non-nationals. This was again violence on a major scale, resulting in large numbers of displaced non-nationals.

Dramatic increases in xenophobic violence

On May 11, violent attacks began in the symbolically significant township of Alexandra and then rapidly spread to many separate settlements across Gauteng, before flaring up at sites across the country. After a slow initial reaction, the South African government responded strongly, if not entirely effectively. Once it was realised that police in Gauteng could not provide adequate protection, the armed forces were called on to provide logistical and manpower support. The DHA then introduced a temporary moratorium on the deportation of victims of violence, although it is not clear whether this has been universally enforced—certainly 32 foreigners were reported to have been remanded to Lindela Repatriation Centre for deportation on May 15 despite Minister of Home Affairs Nosiviwe Mapisa-Nqakula's statement on the same day that such deportations would not take place. Though this worst outbreak of xenophobic hatred and violence may have ground to a halt, CoRMSA has every expectation that similar violence will continue elsewhere. Indeed, migrants continue to report isolated attacks around the country.

According to the most recent SAPS reports, 62 people have lost their lives since May 11, with another 670 wounded during the attacks. Most of the victims were non-nationals from Southern Africa and further afield. Some were South African citizens. Tens of thousands were displaced and/or forced to flee to their countries of origin. It is unclear the scope of damage to properties burned and looted during the unrest, but estimates are that migrants and South Africans lost millions of rand in the course of a few weeks.

The initial security crisis rapidly transformed into a humanitarian emergency as thousands of people were left without shelter, protection, food and clothing. In an ironic turn, the police, who have for many years held notoriety among migrant communities for their involvement in harassment, deportation and sometimes extortion of vulnerable foreigners, became their protectors as police stations were transformed into makeshift shelters. As the inadequacy of this arrangement became apparent, the government decided to establish temporary settlements to house displaced people with the support of the UNHCR and several international and domestic non-governmental organisations (NGOs).

Recognising the inadequacy of the government response, civil society groups have spearheaded a multi-pronged emergency relief and assistance campaign. Co-ordinated in part by the joint initiatives of the SAHRC and Commission on Gender Equality, NGOs have provided primary care to victims of attacks, provided food, shelter, water and clothing for displaced people, initiated programs to collect legal testimony and lobbied government in various ways to ensure better performance and protection.

Led by the government of Mozambique, and in some cases assisted by international organisations, foreign governments have initiated programmes to assist their nationals to return home. There are unconfirmed estimates that more than 30 000 non-citizens have left South Africa since the attacks.

Speculation about the nature and causes of the violence has been rife and in many cases poorly informed. Despite the overwhelming dominance of foreign nationals in the lists of victims, many commentators have disputed whether the violence is the product of xenophobia. Several senior government officials have blamed the attacks on an as yet unidentified 'Third Force', despite the lack of any hard evidence in the public domain to support their claims.

While more research on this issue is needed and is currently underway, more sober and accurate assessments of the violence are already possible. As the record suggests, most incidents have taken place in townships and informal settlements. A variety of factors appear to have contributed to the attacks, including:

- Increasing disaffection and anger amongst South Africans at worsening economic conditions and lack of service delivery;
- Perceived competition between non-nationals and South Africans for jobs and scarce business opportunities;
- Increasing xenophobic attitudes towards non-South Africans among South African citizens and long-standing government acceptance of extortion, violence, and abuse levelled against non-nationals;

- Incitement by organised criminal elements and exploitation of the situation by other disaffected members of the community;
- Perceptions that under the new ANC leadership xenophobic violence will be tolerated.

As described above, various wings of the South African government have responded proactively to the violence since May 11. CoRMSA welcomes the various initiatives by government officials aimed at ensuring that:

- the violence is decisively brought to an end;
- the victims of attacks are offered sustained assistance; and
- a thorough review is undertaken of the policies that have helped to foster xenophobic attitudes.

Policy and procedural problems

As the government works to prevent further violence, it is vital to acknowledge the wide range of policy and procedural failures that created a setting for and/or actively encouraged the violence:

Failure to distinguish between undocumented and illegal migrants

The DHA Directorate for Admissions and Aliens control continues to treat 'undocumented' as a synonym for 'illegal' in a context in which the DHA's failure to adhere to the procedural requirements of the legislation governing refugee reception leaves large numbers of asylum-seekers undocumented for extended periods. By failing to make a distinction between those who have entered the country with criminal intent and those who have fallen foul of DHA incapacity, the department allows non-nationals to pay the price for its internal failings in the public discourse on illegal immigration.

Failure to regularise the increasing number of foreign-born nationals in South Africa

Divides between South Africans and foreigners have been exacerbated by the 'illegal' status of many of the latter. Perpetrators of violence have justified their actions as vigilante efforts to remove 'illegals' from the country. Local government officials have washed their hands of responsibility for the fate of 'illegals'. The 'illegal' status of foreigners has fostered discrimination and exploitation in the labour market, encouraging suspicions of 'job-stealing'. Key opportunities to regularise significant numbers of non-nationals—and hence 'legalise' them in the eyes of the South African public—have been missed. For example, the Minister of Home Affairs never followed through on her 2007 undertaking to the UNHCR to investigate the possibility of group temporary protection status for Zimbabwean nationals.

Failure to respond to local grievances

Several instances of violent attacks on foreigners prior to the May acceleration followed similar public campaigns to threaten foreigners and/or inform local officials of grievances of which non-nationals were in many cases made the scapegoat. These grievances have often been ignored and rarely passed on to higher levels of government. Prior to May 11, local officials failed in many instances of significant attacks to call for support from Provincial or National level security or development agencies. This inattention might help to explain how government could claim to have been caught off guard by the recent attacks despite similar smaller-scale incidents having occurred nationwide in the preceding months.

Failure to respond to evidence of increasing attacks

As the National Intelligence Agency recently acknowledged, government officials at the highest level have been aware of the growing number and scale of attacks on foreigners. Despite consistent lobbying by civil society groups for the adoption of emergency preparedness and relief strategies, government's departments bearing statutory responsibility for combating xenophobia (DHA) and maintaining law and order (SAPS) have not initiated comprehensive prevention and emergency response strategies.

Tacit endorsement mob justice

In several instances of violence against foreigners, SAPS and DHA officials have tacitly endorsed the actions of violent mobs. Police officials have assisted evacuations of foreigners prior to attacks, without ensuring protection for property, protection subsequent to the attacks or possibility of reintegration. Worse, the media has cited several instances where police were alleged to have stood by during attacks or even to have voiced their own xenophobic sentiments. Added to that, DHA officials have arrested and deported victims seeking refuge, confirming the perception that it is the foreigners themselves, rather than their attackers, who should be punished.

Recommendations

To the Presidency

- Guarantee that any body set up to investigate and respond to the violence includes civil society representation;

To the South African Police Services

- Thoroughly investigate instances of recent and past attacks against foreigners;
- Develop a campaign to educate police officers of their responsibility to suppress any personal anti-foreigner sentiments while on duty and institute disciplinary procedures for those reported to have demonstrated xenophobic attitudes in the field; and
- Initiate a national campaign to inform witnesses of attacks of opportunities to provide testimony, providing firm guarantees of witness protection.

To the Department of Home Affairs

- Place a moratorium on all deportations of illegal foreigners until the security situation in South Africa has been normalised;
- Significantly bolster the Counter-Xenophobia Unit's funding, its level of authority within departmental structures, and its powers to investigate instances of violence, conduct conflict resolution and initiate interdepartmental responses at a local and provincial level; and
- Initiate a thorough review of immigration policies in accordance with the Deputy Minister's recent comments that South Africa needs to move from a migration-control to a migration-management policy framework.

To the Department of Justice

- In many instances, citizens and police officers further threaten migrants who report extortion or threats to the police or magistrates. Ensure that justice centres are able to assist with legal issues affecting foreigners.

To the Department of Provincial and Local Government

- Coordinate local government responses to migration and immigration, ensuring that foreigners are able to participate in community meetings and are incorporated into broader political and social planning;

To the African National Congress

- Investigate all charges of xenophobia against local councillors and officials. Where elected officials are guilty of hate speech—whether motivated by race, homophobia, or xenophobia—they should be severely disciplined.

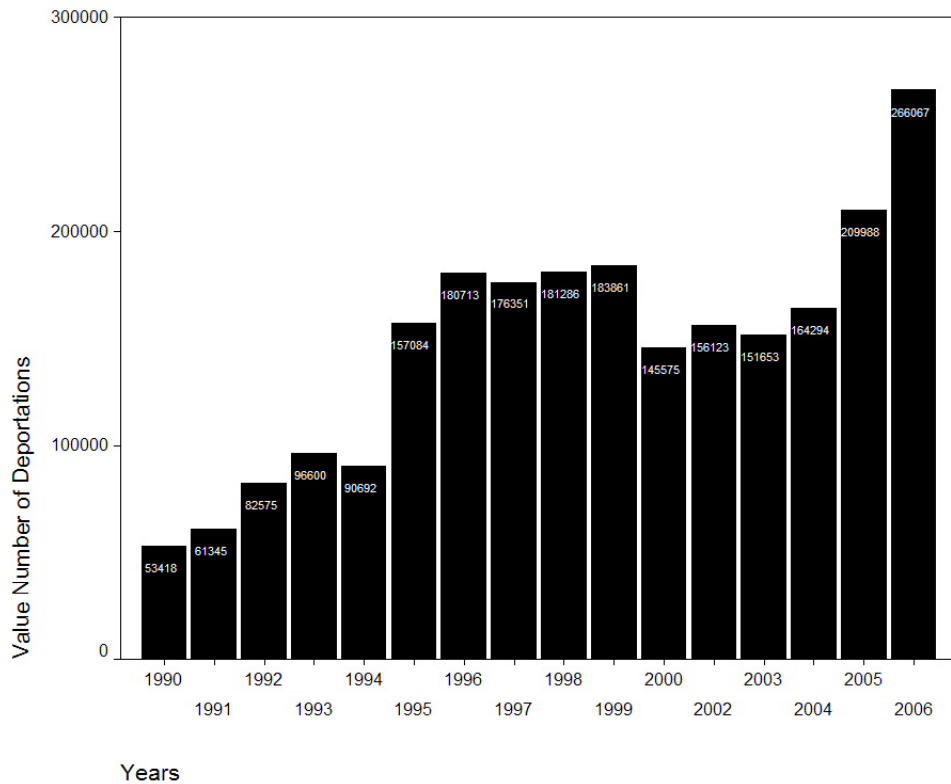
4. Arrests, Detention, and Deportation

The arbitrary arrest, detention, and deportation of people living in South Africa disrupts communities, limits investment, and diverts police resources and personnel away from the task of fighting crime.

Under current law, if police or immigration officers have reasonable grounds to believe that someone is not entitled to be in the Republic of South Africa, they may interview a person and remand that individual to custody without a warrant. Immigration officers are also empowered to arrest illegal foreigners and deport them. However, the Immigration Act provides a range of procedural limitations on enforcement activities. These include provision of adequate opportunity for suspects to claim asylum, rights to appeal administrative actions, and time limits on detention for the purposes of deportation. **Our findings suggest that in many—if not most—cases, police detain and deport people without due respect for the law. This is in addition to regular police engagement in harassment and extortion during their dealings with foreigners.**

The past years have seen a significant increase in the number of deportations from South Africa.

Deportations from South Africa 1990-2006



The main reason for the rise in the number of deportations has been the heightened activity of the police in immigration enforcement. This has increased the vulnerability of migrants to unlawful arrest, detention and deportation in several ways, particularly given the capacity limits of RROs and the resultant delays in accessing the asylum system, which leave many foreigners undocumented through no fault of their own. CoRMSA notes with concern the following developments in enforcement policy:

Police raids in Johannesburg

Ostensibly linked to efforts to fight crime and enforce city by-laws, police have increased their raids on buildings in downtown Johannesburg. We recognise the importance of addressing 'bad' or 'hijacked' buildings, and the legitimacy of creating a secure environment for residence and business. At the same time, **we note that the strategy of 'mass arrests' used in these raids often results in the illegal arrest of South Africans, asylum seekers, refugees and other legal migrants and considerable corruption and abuse of migrant rights.** These raids often privilege law enforcement agendas over the humanitarian and development issues the police and city leaders are trying to address. This inappropriate balance was plainly evident in the raid on the Central Methodist Church on 31 January, 2008, where the police undermined the security of Johannesburg's largest Zimbabwean relief effort, stealing goods, extorting bribes from migrants, and arresting 500 people without generating a single deportation or criminal conviction.

Corruption and abuse in the arrest process

While inner-city Johannesburg may be home to the most corrupt and abusive police activity, our findings that corruption continues to be a standard facet of inner-city migration policing are confirmed by reports from Cape Town, Durban, Musina, and elsewhere in the country. The activity of extorting bribes from undocumented migrants is not only illegal; it also consumes a significant amount of police time and resources. In doing so, it **undermines the police's crime-fighting activities and reputation while denying migrants even the limited protection the law provides.**

The lack of clear national guidelines on immigration policing exacerbates the problem. Individual precincts often use their own spurious suspicions of linkages between undocumented migrants and crime to use immigration policing as a crime-fighting strategy. This creates multiple opportunities for unscrupulous officials to use immigration enforcement to generate illicit wealth. Since many migrants are unable or afraid to complain about these forms of abuse or illegality, mechanisms such as the Independent Complaints Directorate are rarely notified of these practices. While many police were exemplary in protecting migrants during the recent attacks, foreigners continue to report extortion and abuse by police in the stations where they sought shelter at the time.

Imprisonment of 'illegal foreigners'

Section 49 of the Immigration Act provides for the criminal prosecution and detention of 'illegal foreigners'. As noted in last year's report, officials have in certain cases opted not to simply deport many 'illegal foreigners' but to charge them with a Section 49 offence and plead to the court for the imposition of a prison sentence prior to deportation. While our previous report noted this practice in Cape Town, we can now confirm that SAPS and DHA units in Johannesburg and Durban have also adopted this strategy. Furthermore, due to the lack of representation afforded to many clients, judges have imposed sentences for immigration offences in excess of those mandated by the Immigration Act. It is unclear what the aim of this additional detention strategy is. However, the results of this approach are to place migrants in detention with ordinary criminals, creating additional demand for South Africa's overburdened correctional facilities while doing little to discourage immigration or criminal activity. The human rights implications of such detentions are grave, especially considering that the 'crime' of failing to produce documentation cannot be clearly separated from the DHA's failures to fulfil its legal obligations in the arena of refugee reception.

Musina Detention Centre

Responding to the perceived rise in the number of Zimbabwean migrants crossing South African borders, SAPS has established and is currently running its own detention facility in Musina, Limpopo. Among its failings, this facility:

- Illegally detains and deports minors without providing adequate access to social development workers;
- Does not adequately consider the needs of children and unaccompanied minors;
- Detains migrants under sub-standard conditions;
- Does not provide migrants with adequate access to lawyers and appeal mechanisms; and
- Is not adequately monitored by DHA officials, particularly as regards screening of potential asylum claimants.

It is unclear whether it is legal for SAPS to be running a detention facility for illegal foreigners without more direct and consistent DHA monitoring and oversight. Given the poor record of Limpopo police officers in respecting migrants' rights to claim asylum it is likely that the facility generates multiple cases of *refoulement*—illegality returning refugees to situations of danger—endangering the lives of many people fleeing persecution in Zimbabwe.

Lindela Detention Centre

Our capacity to report accurately on conditions at the Lindela remains constrained by DHA's denial of access to our monitoring officers and researchers. However, based upon interactions with clients, we have concluded that conditions at the centre have not improved:

- Officials continue to use teargas on inmates to deal with protests and/or 'strikes';
- The quality and quantity of food, blankets and access to health services has declined;
- No measures have been taken to improve recreational facilities; and
- Inmates continue to be detained for periods in excess of what is permitted under the Immigration Act.

Smuggling and abuse

Increased surveillance of the Zimbabwean border by the army, police, and vigilante groups has increased the risk faced by those seeking to cross informally into South Africa. For would-be refugees who are often afraid to report at border posts, this is a particular threat. This has helped to create demand for the services of professional smugglers. **Human smuggling across the border has become a lucrative business that involves the exchange of tens of thousands of rand every day. Border control authorities, especially the police and immigration officials, have been involved in aiding and abetting smugglers.** Migrants are commonly robbed, cheated and sometimes even killed. About a third of asylum seekers who cross the border informally indicated that they were deceived or abused by criminal groups that operate across the border. One in ten said they were abused or had money extorted by border control authorities.

The status quo of immigration enforcement in South Africa involves shared responsibility between DHA and SAPS. This situation has led to a relatively random and unchecked enforcement picture where regional units and individual police officers decide for themselves how and when they will enforce immigration laws. **South Africa current deports more than a quarter of a million migrants per year, but has no comprehensive system to account for who these people are, whether they have adequate access to the rights they are entitled to, and who should be responsible for ensuring legal procedures are followed.** When taken together these findings suggest a need for a thorough review of the way in which immigration enforcement is administered in South Africa. Ideally, this would incorporate the following recommendations:

Recommendations

To the Department of Home Affairs

- Continue to pursue procedural reforms in the arena of refugee reception to ensure that prospective asylum seekers are not unduly exposed to arrest and detention. This might include avoidance of deferral procedures such as the issuing of appointment slips and extension of the validity periods of asylum seeker permits;
- Liaise with SAPS to ensure that all orders to detain and deport non-nationals at the Musina detention centre are monitored and authorised by DHA officials and that prisoners at the facility are afforded the opportunity to claim asylum;
- Investigate cases of abuse at the Lindela detention centre and ensure that the practice of using teargas to ensure compliance is immediately ceased;
- Review procedures for detaining and deporting non-nationals for criminal offences;
- Push for migration reforms that would enable job-seekers and foreign workers to remain legally in the Republic of South Africa;
- Ensure detainees are not held beyond the statutorily defined 120-day limit; and
- Liaise with SAPS to improve the conditions of detention at the Musina detention centre and ensure that detainees have access to legal representation.

To the South African Police Services

- In consultation with relevant stakeholders, prepare national guidelines regarding the protection of migrant rights in the enforcement of immigration law;
- Incorporate training on the rights of non-nationals into police training college syllabi;
- In consultation with relevant stakeholders, prepare national policies to address police corruption arising from immigration enforcement activities;
- Ensure that all deportations from the Musina detention centre accord with status determination processes as defined in the Immigration and Refugees Acts;
- Improve the conditions of detention at the Musina detention centre; and
- Investigate the abuse of migrants smuggled across the Limpopo River.

5. Access to the Asylum Process and Status Determination

Migrants fleeing their countries of origin rarely have the time or resources to legalise their terms of stay in destination countries. In South Africa, this means that asylum seekers often enter the country as undocumented migrants who are vulnerable to arrest by the police for offences under the Immigration Act. The Refugees Act attempts to prevent this outcome by providing asylum seekers with the means to promptly verify their status. This section examines the implementation of these provisions at each stage of an asylum seeker's exposure to the immigration regulatory processes: beginning with entry, going on to accessing permits, and finishing with possible arrest, detention and deportation. Despite considerable progress at some levels, challenges such as **problems within the DHA, poor communication between the DHA and security services, and the overzealous enforcement of the Immigration Act, as well as breakdowns in the refugee reception process, often result in illegal government actions and the transgression of migrants' rights.**

A year of progress at the policy level, 2008 has unfortunately also been marked by stasis in implementation and official attitudes in South Africa's refugee reception system. As part of the transformation process, the refugee reception system has been targeted for reforms including a proposed transformation of the reception system. The Refugees Amendment Bill (B-11 2008), before Parliament at the time of writing, seeks to streamline administrative practices, primarily through the removal of the Standing Committee for Refugee Affairs. More significant than the new legislation are plans for an infrastructural and administrative overhaul of the reception system. Consulting company Fever Tree (a local affiliate of AT Kearney) was contracted to prepare a 'Reception Offices Network Integrated Plan,' which was finalised in September 2007. The plan, which focuses on human resources, information technology, case-flow management and budget, is primarily designed to reduce the backlog and improve the physical infrastructure of the offices. CoRMSA welcomes these long-overdue efforts to capacitate the RROs. We support the department's early moves to implement the plan, particularly the replacement of the Rosettenville RRO with new refugee reception facilities at Crown Mines, Johannesburg. However, we also note that **reforms have been almost exclusively focused on the 'business side' of refugee reception, to the neglect of the issue of rights protection.** We are concerned that these costly reforms may not achieve their intended results if they are not accompanied by the set of recommendations outlined below.

As we wait for the DHA to implement its new policies, **access to the refugee reception system remains difficult and the status determination process fraught with difficulties.** Drawing on data from a nationwide survey, we are able to quantify these issues for the first time, providing the department with a series of performance benchmarks that can be used to gauge how the reforms outlined above have impacted on rights protection. Our new research suggests that although there are positive signs, there are also deeply worrying trends in the asylum system. Among the positive elements:

- Most applicants who request asylum at an official border post are granted a transit permit;
- Reception and status determination officers do not appear to discriminate on the basis of gender or nationality;
- Most applicants felt they were able to tell their story in their applications and interviews;
- Most applicants who needed an interpreter to assist them in lodging their claim or to sit an interview were able to obtain some sort of assistance;
- Interviewers are more likely to be friendly than hostile to applicants in the interview, rarely ask inappropriate questions and usually write notes of their conversations; and
- Corruption, while clearly a problem, does not appear to be endemic to the system.

These findings give us good reason to hope that there are functioning components of the reception system and that the turnaround project might be able to improve the remainder. At the same time, our research shows that there is a range of problems in the system that threatens asylum seekers' rights. Asylum seekers experience difficulties in the following areas.

Registering presence in South Africa

South African refugee legislation requires asylum seekers to report their presence to officials upon entry into the country, and obliges government representatives to assist them in obtaining a transit permit that legalises their stay for a period of three weeks. **Most asylum seekers enter South Africa informally—which is legal under the Refugees Act—and never receive a transit permit.** Those who enter through an official border post often don't register their asylum claim because they are not informed about their rights or, particularly in the case of Zimbabweans, because they fear the presence of Zimbabwean Central Intelligence Office officials at the post. Although officials are supposed to issue permits to everyone who asks, significant numbers of requests are refused, indicating a significant deviation from legal obligations.

Entering reception offices

Once in South Africa, asylum seekers must report to an RRO to lodge their asylum claim. Since the reception offices only accept a small number of applications per day due to their current capacity constraints, applicants spend longer waiting to enter the offices than the two weeks allotted by the transit permit. Many spend at least one night sleeping outside an office, sometimes with children in their care. Many are subjected to some form of violence, threat or theft while in the queue. **As highlighted throughout this report, without improved capacity in processing new arrivals, the asylum system cannot fulfil its protection mandate. This is a fundamental issue in addressing the protection of non-nationals in South Africa.**

Lodging accurate claims

Once an applicant enters the office, an official must assist him or her to complete the application forms. Service delivery in this respect remains extremely poor. RRO officials:

- Often do not receive or process claims on the same day;
- Rarely provide assistance to those who need it most;
- Inform applicants of their obligations (renewing, respecting permit conditions, etc) but not their rights (to legal representation, to adequate interpretation services, etc);
- Rarely offer interpretation services as they are legally bound to, leaving applicants to access these services at their own cost and at risk to the accuracy and confidentiality of their claims;
- Are unable to guarantee ensure the confidentiality of applicants' claims, due both to use of unofficial interpreters and RRO layout; and
- In many cases issue applicants with inaccurate documents.

Acquiring and maintaining permits

After officials receive completed applications, they are obliged to issue asylum seekers with a Section 22 asylum seeker permit that legalises their stay for an additional and renewable period. Officials must renew asylum seekers' Section 22 permits until such time as they are either awarded or refused refugee status. Applicants experience fewer problems in renewing permits than obtaining them. However, the validity periods granted at officials' discretion remain short despite the protracted length of the determination process, meaning asylum seekers are obliged to renew their permits multiple times per year. On each occasion, they may have to go to the RRO more than once to do so, and experience difficulties replacing lost or stolen permits. This influences their capacity to seek and maintain employment. This is particularly problematic in the case of non-nationals who have found employment outside of the five major cities where the RROs are located (Pretoria, Johannesburg, Cape Town, Durban and Port Elizabeth), as they must incur significant travel expenses associated with regularly renewing their permits.

Completing the status determination process

Officials are mandated to interview applicants and process their applications in accordance with the rules on just administrative action, as outlined in the Constitution. This process is also fraught with problems. Status determination officers usually:

- Do not give applicants advance warning to allow them to prepare for the interview;
- Do not provide applicants with copies of their original application forms to review before the interview [a significant problem since many filled out the original forms many months or years earlier];
- Do not inform applicants of their right to request a female interviewer;
- Do not explain to applicants why they are being interviewed;
- Do not provide interpreters;
- Do not go through the contents of application forms with applicants;
- Do not understand conditions in applicants' countries of origin; and
- Require applicants to sit through multiple interviews with different officials.

Receiving prompt decisions

The DHA is obliged to make a determination regarding the validity of a claim within 180 days. However, on average the applicants we spoke to are waiting far longer than that.

It is possible that some of the above problems will be rectified by the reforms being introduced via the Fever Tree consultancy. However, much will depend upon the spirit in which these reforms are taken up and implemented. Refugee service delivery must be transformed in accordance with the principles of *Batho Pele*¹⁰ and the Minister's aim of making the DHA a world leader in service delivery. On this note, CoRMSA registers its concern at the alarmist and suspicious attitude towards asylum seekers in communications from DHA's Directorate of Refugee Affairs. Despite the decline in asylum seeker applications last year, a recent report by the Directorate of Refugee Affairs has speculated on numbers increasing radically in coming years: 'Certain people foresee the number registered in 2007 escalating to a possible double in 2008, treble in 2009 and even quadruple [sic] in 2010.' While the graph shown below illustrates a general rise in applications over the last five years, the trend indicated is clearly not exponential.

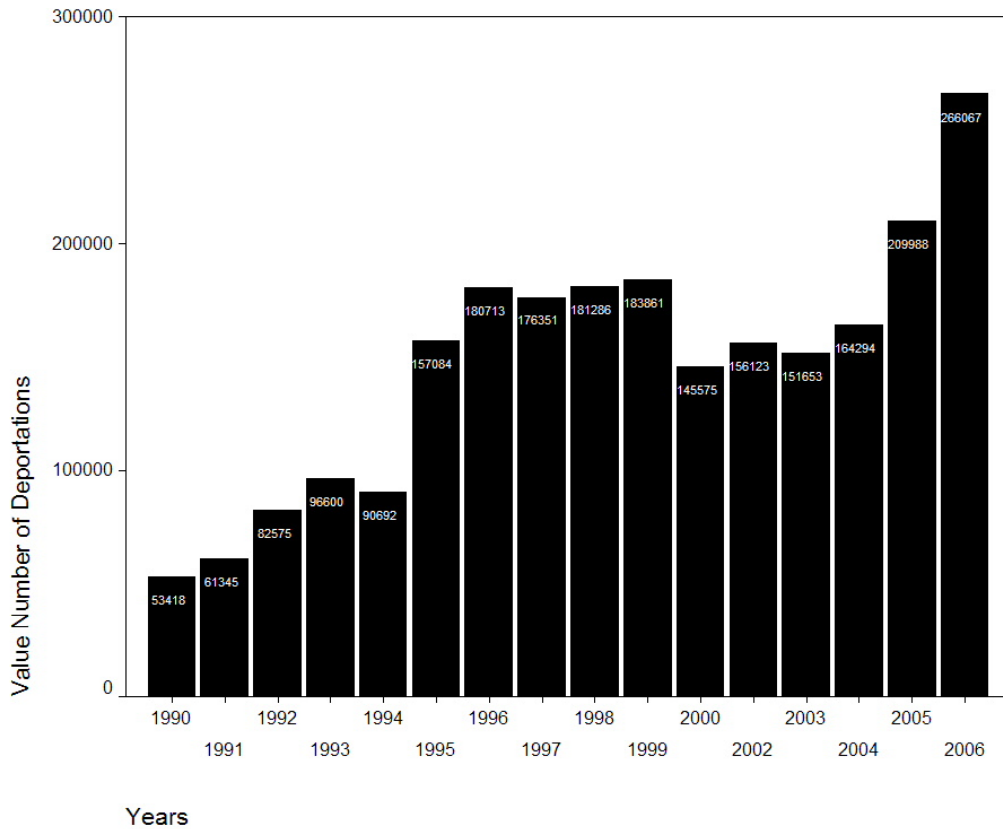
The DHA's rhetoric on this supposed mass influx is accompanied by an assertion that a large proportion of those applying for asylum are without legitimate claims (i.e., work seekers and other economic migrants). The Directorate of Refugee Affairs has argued that:

The influx observed throughout 2006 suggested that a massive population of people seeking asylum might increase in years to come although the majority are economic migrants as most of their claims are not aligned with the basic principles for asylum.

The findings of our research suggest that this portrayal of asylum seekers is misleading. Furthermore, it is likely that the Directorate of Refugee Affairs' continued negative attitude towards asylum seeker trends is contributing to the problems of poor service delivery and apparent resistance to legal obligations revealed above. Ordinary DHA officials seem to act upon an assumption that all applications are illegitimate, and as a result obstruct successful registration of asylum claims in a variety of ways. Given these findings, we suggest that **rather than blaming an increasing number of asylum applicants for the DHA's problems, emphasis should shift to transforming the practices of reception officials.**

¹⁰ *Batho Pele* is a set of principles designed by the South African government and targeting civil servants to put 'people first' in service delivery.

Number of Asylum Applications 1996-2007



Recommendations

To the Department of Home Affairs

- Initiate a two-pronged publicity campaign a) at the RROs; and b) through the media to inform prospective applicants of the meaning of asylum and the various stages of the asylum process;
- Issue clear instructions to all border officials to issue Section 23 transit permits to all those who request asylum at a border post;
- Extend the period of validity of Section 23 transit permits to allow adequate time to access RROs;
- Advise all applicants of their right to confidentiality and explicitly inform them that their information will not be shared with anyone outside the RRO;
- Consider the need for confidentiality of applications in redesigning spatial layout, movement controls, process, and case-flow management. When filling in forms, making use of interpreters or telling their stories to reception officers, applicants' confidentiality must be assured to enable them to provide the fullest possible details to support their asylum claim; and
- Standardise and/or extend the validity period of Section 22 asylum seeker permits and print the forms on a durable medium.

6. Access to Government-Funded Social Services

The protection for socio-economic rights provided by the South African Constitution is exceptional. The Bill of Rights extends many of these rights to 'everyone' living in South Africa, regardless of their nationality or legal status. These include access to basic education for children, emergency and basic healthcare, adequate housing, and basic social welfare protection. The Bill of Rights also enshrines the right to dignified work. Education and healthcare rights are absolute, while rights to housing and social welfare are constrained by the government's ability to 'progressively realise' those rights through the provision of infrastructure and social welfare programmes. This means that while non-citizens may not be discriminated against in any way in the provision of basic education and healthcare services, it is legitimate and legal to offer some level of privilege for South African citizens regarding the provision of housing and social welfare. While there is no generic right to employment, the right to fair and dignified working conditions once employed is universal.

The protection of basic socio-economic rights and access to public services is especially important for migrants in South Africa where even legally recognised refugees do not receive dedicated shelter, food, healthcare or education. Rather, refugees and all other non-nationals are expected to find work, source accommodation on the open market, and access education and healthcare services from mainstream public institutions. **While self-sufficiency and integration is a progressive policy that CoRMSA supports, its effectiveness relies on systems that promote, rather than block, access to employment, accommodation, basic welfare, health and education.**

This section of the report draws on new data collected by the Forced Migration Studies Programme's (FMSP's) Migrant Rights Monitoring Project on migrant access to social services. For the first time, this data allows national-level evaluation of migrants' level of access to public services. Across the board, the findings demonstrate **high levels of exclusion from the basic rights to education, basic healthcare and social welfare, as well as high levels of discrimination and abuse in private accommodation and employment markets. Furthermore, there are few avenues of recourse when such discrimination and abuse occurs.**

The exclusion we observe is due to gaps in both policy and implementation. To overcome these shortcomings, the primary departments responsible for social-service provision—including the Departments of Education, Health, Social Development, Housing and Labour—should have clear policies for the inclusion of refugees, asylum seekers and, where applicable, undocumented migrants, in their services. They should also ensure that all front-line staff are aware of the right of asylum seekers, refugees and undocumented migrants to access services. There has been very limited progress in this regard since our last report.

Even though institutional will to address these gaps has been weak, there have been some positive policy developments in the past year to increase access of non-citizens to basic socio-economic rights. These include:

- The Department of Health issued a directive in September 2007 that refugees and asylum seekers, including those without documentation, should have equal access to antiretroviral treatment (ART) at all public health providers; and
- The Commission for Conciliation, Arbitration and Mediation (CCMA) received a legal opinion confirming that the CCMA has a mandate to adjudicate cases of labour abuse against persons who are either not legally in the country or not legally allowed to work. The CCMA opinion stated that being illegal in terms of immigration legislation does not invalidate an employment contract or basic labour rights. In the *Lanzetta* case, the Johannesburg Labour Court decision of April 7, 2008, confirmed that contracts are not made automatically invalid when an employee is not legally in the country.

While these are positive achievements in terms of clarifying policy, implementation of these and other policies remains inadequate. We are particularly concerned about the following findings:

- The commitment by the DSD to provide social assistance in the form of disability grants to recognised refugees has not yet been implemented, even though a deadline was set for mid-2008;
- New research has found that public clinics and hospitals in Johannesburg are not implementing the Department of Health directive to provide ART to non-citizens, but are referring non-citizen patients to NGO health providers, thereby creating a dual healthcare system;¹¹
- New research has found that **35% of migrant children are not in school, which is a serious contravention of the Constitutional right to basic education**;
- Asylum seekers and refugees remain almost fully excluded from government-funded housing programmes for vulnerable groups—despite claims to the contrary by communities involved in May’s outbreak of xenophobia. Moreover, there are limited avenues for recourse when non-citizens experience abuse by private landlords. The need for creative accommodation responses has been heightened by the large number of Zimbabweans in South African cities, especially those in Gauteng; and
- Recourse mechanisms for labour abuse, such as the CCMA, will only be effective if there is consistent and effective monitoring of employers and if aggrieved employees do not have to fear arrest and deportation when they make their legal status known to a labour court or the CCMA.

While each service area is important, it is essential to understand how denial of access to one right can negatively affect the exercise of other rights. For example, access to housing affects the ability to realise educational and healthcare rights. Research illustrates that migrants living in informal accommodation are significantly more likely to need healthcare than those who are in formal accommodation, and their children are significantly less likely to be in school. For people who trade or run small businesses, proper accommodation is also critical as a place to assemble products, store goods, or conduct meetings. The heightened vulnerability of non-nationals living or working in makeshift structures was underlined by their disproportionate exposure to violence and loss during the recent wave of xenophobia.

In sum, although NGOs and the UNHCR have long worked with specific departments to raise awareness of migrant, asylum-seeker and refugee rights to services, **there is little evidence of consistent, systematic improvement in access to basic healthcare services, basic education, and labour rights protection—rights they are guaranteed under South African legislation.**

The lack of effective policy implementation is due to a deficit in co-ordinated governmental self-monitoring, either by a lead agency such as the DHA, or by a dedicated cluster of departmental representatives. As noted in our last report, the DHA’s Turn-Around Strategy commits it to establishing standing stakeholder fora to ensure the integration of refugees into society and to combat xenophobia. However, no coordinated or coherent programme for improving service access for non-citizens has been put in place. There is a similar lack of initiative by the Departments of Education, Health, Housing, Social Development and Labour to monitor service provision to non-citizens. None of these departments offer effective migrant-rights training programmes for their own front-line staff. In practice, access therefore remains largely dependent on the knowledge and attitudes of individual front-line staff in clinics, hospitals, and schools, and among private landlords and employers.

¹¹ Vearey, J. and I. Palmary (2008). Assessing non-citizen access to antiretroviral therapy in Johannesburg. Migrant Rights Monitoring Project Report. Johannesburg, Forced Migration Studies Programme.

6a. Access to Primary Healthcare: Key Challenges

'Some are referred from [government site], some by friends . . . They say they have got no IDs; they have IDs, but they are written, "Born in Zim," and they are not accepted . . . The government sites do not accept them; they only accept those with "South African citizen".'—Nursing Sister, Gauteng

The South African Constitution guarantees 'access to healthcare for all.' Everyone in the country, regardless of legal status, is entitled to life-saving care. Under the Refugees Act (1998), legally recognised refugees are entitled to much more than this, as are other non-citizens who are in the country with permits. However, CoRMSA is concerned with what the above quote illustrates: that the two key challenges outlined in both the 2006 and 2007 reports remain problematic in 2008: **(1) refugees and asylum seekers continue to experience negative interactions with, experiences of, and treatment by public health care providers; and (2) ambiguity persists within the public system on refugees' and asylum seekers' rights to access healthcare in general and anti-retroviral treatment (ART) in particular.**

CoRMSA welcomes the introduction of a **key financial directive from the National Department of Health (NDOH) that seeks to address the ambiguity around refugee and asylum seeker access to healthcare** that was outlined in the 2007 report¹². In particular, CoRMSA applauds the NDOH's recognition of challenges that individuals face in accessing documentation from the DHA, which is implicit in its clarification that refugees and asylum seekers—**with or without a permit**—should be assessed according to the current means test as applied to South African citizens when accessing public healthcare; they must not be charged 'foreign category' fees. Importantly, CoRMSA supports the inclusion of a clause indicating that migrants—**regardless of their legal status—shall be exempt from paying for ART**, irrespective of the site or level of institution where these services are rendered.

It is essential that the clarification outlined in the directive be implemented uniformly across all public health institutions to ensure that the right to healthcare is upheld for all.

Additionally, during 2008, CoRMSA has endorsed several key submissions to the South African National AIDS Council (SANAC)¹³; the SAHRC¹⁴, and the Refugee Amendment Bill¹⁵. These submissions call 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. CoRMSA also commends the June 2008 Joint Civil Society Monitoring Forum (JCSMF) meeting that focused on ensuring the rights of vulnerable groups, including international migrants, to HIV services, are upheld, including prevention, treatment and support¹⁶. **There is a need to ensure that the relevant bodies act upon these submissions.**

Primary healthcare services

Monitoring data indicate that **less than half of all international migrant respondents have ever needed healthcare in South Africa, with Zimbabweans being the group least likely to need healthcare services**¹⁷. The close geographical proximity of Zimbabwe to South Africa may be a possible explanation for this low demand on healthcare services; when healthcare is needed, Zimbabweans may return to their country of origin. Evidence for this pattern of movement has been supported in other FMSP research, with cases of Zimbabweans choosing to return home when they are sick, rather than seeking care in South Africa. Considering that, as a condition of their status, asylum seekers are not permitted to return to their countries, the fact that they are prepared to do so when facing health problems may be a strong indication of these migrants' lack of faith in provision of healthcare services to migrants by South African public facilities.

¹² BI 4/29 REFUG/ASYL 8 2007, 19 September 2007

¹³ Joint Submission to the National AIDS Council (SANAC) Plenary, 4 March 2008

¹⁴ 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

¹⁵ Joint ALP/TAC Submission on the Refugees Amendment Bill [B11-2008]

¹⁶ JCSMF Meeting, 30 May 2008: Johannesburg

¹⁷ Migrant Rights Monitoring Report Data, April 2008

Of those seeking care, **many refugees and asylum seekers report being refused access to treatment at public clinics and hospitals.** Predictably, migrants often confront the same understaffing, lack of medication and long waiting times at public health care providers as many South Africans do. **But in many instances, international migrants also face discrimination and ignorance of their rights when they attempt to access medical services.** Research reveals that many of the challenges presented in the 2007 report persist despite the progress made with the introduction of the 2007 NDOH directive. Data from the FMSP Migrant Rights Monitoring Project and other research indicates that:

- Almost half of all international migrants have sought healthcare since their arrival in South Africa; 75% of these sought care in the public health system;
- **One quarter of refugees, asylum seekers and other international migrants who have tried to access the public health system report challenges;**
- Lack of official documentation from the DHA continues to hinder access to healthcare;
- Confusion exists amongst healthcare providers over the rights different categories of migrants have to services and the fees to be paid;
- There are concerns over international migrants' access to emergency treatment and ambulances, with reports of individuals being charged. This indicates widespread ignorance of the fact that everyone in the country, regardless of legal status, is entitled to life-saving care;
- As first reported in 2007, some NGOs working with international migrants continue to report that they are required to intervene to ensure that refugees and asylum seekers are able to access the public health system. **Without intervention from civil society, some refugees and asylum seekers would not be able to access the health services to which they are entitled, indicating ignorance of or resistance to migrant rights within the public health structure;**
- Institutional-level policies appear to contradict the 2007 NDoH directive to provide ART services to all;
- There are reports of children of international migrant women dying as a result of poor treatment. Some of this is due to generally poor levels of service while others are a result of denying migrants access to services;
- There are reports that migrants have faced challenges in ensuring the dignified release and return of the bodies of deceased foreigners from morgues; and
- Overall, it appears that the recent directive from NDOH has not resolved the challenges presented.

CoRMSA has again outlined in this report the role DHA delays play in obstructing access to refugee and asylum-seeker documents, and urges the NDOH to engage with the DHA to encourage the timely issuing of documents in recognition of the fact that, despite the directive to the contrary, staff continue to examine passports and permits. The NDOH is also urged to ensure application of the directive's instruction that permits are not required for access to care and that 'foreign fees' must not be applied to refugees and asylum seekers, regardless of legal standing.

HIV services

Research confirms that **refugees and asylum seekers in need of ART do not generally migrate to South Africa to access therapy;** the majority first tested for HIV and discovered their status in South Africa. As was found for South Africans, the majority of these international migrants decided to test for HIV only when they were sick. Importantly, international migrants are no more prone than South Africans to non-collection of or non-adherence to ART—this fact supports the provision of ART to non-citizens¹⁸.

¹⁸ Vearey, J. and Palmary, I. (2007) Assessing non-citizen access to antiretroviral therapy in Johannesburg, Forced Migration Studies Programme, University of the Witwatersrand

As noted in the 2007 report, CoRMSA welcomes the specific inclusion of non-citizen groups, outlining their right to HIV prevention, treatment and support, within the current HIV and AIDS and STI Strategic Plan for South Africa (NSP)¹⁹. One of the 2007-2011 plan's guiding principle plan is '**ensuring equality and non-discrimination against marginalised groups**'; refugees, asylum seekers and foreign migrants are specifically mentioned as having '**a right to equal access to interventions for HIV prevention, treatment and support**'.²⁰

However, CoRMSA is concerned about recent research, which indicates that non-citizens in need of ART—including refugees and asylum seekers—report facing challenges in accessing ART within the public sector,²¹ much as they did in 2006. The NSP's Priority Area 4 encompasses human rights and access to justice, with Goal 16 attempting to ensure '**public knowledge of and adherence to the legal and policy provision**'.²² Research indicates that protective frameworks and NDOH directives are not applied uniformly, and CoRMSA is concerned that '**public institutions are determining their own policies, which may counter existing legislation**'.

Despite clarification from the National DoH in its 2007 report²³, research shows that '**significant challenges remain for refugees, asylum seekers, and other international migrants attempting to access ART**'.²⁴ CoRMSA is concerned about findings that:

- **Refugees and asylum seekers report being unable to access ART in the public sector** because of 'being foreign' and not being in possession of a green bar-coded South African identity booklet that indicates they are born in South Africa;
- Local government clinics and government ART sites refer refugees and asylum seekers out of the public sector and directly into the NGO sector in order to access ART;
- A dual healthcare system results, as public and non-governmental clinics are now providing ART through separate routes, to different groups of people: citizen and non-citizen. This raises concern around the sustainability of non-governmental services, as well as these services currently taking on the role that public health services should fill;
- As noted in the 2007 report, useful guidelines for ART provision among displaced populations have been produced—a result of collaboration between UNHCR and the Southern African HIV Clinicians Society²⁵, to supplement the NDOH ART Guidelines. However, research suggests that knowledge of and use of these guidelines is currently limited; and
- The impartiality of healthcare providers is threatened as healthcare providers find themselves practicing within politicised spaces at the institutional level.

As outlined in the 2007 report, it is **essential** that ART provision for non-citizens be supplemented with prevention, care and support programmes, in the same way 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 providing effective services for refugees and asylum seekers.

¹⁹ Department of Health (2007a) HIV & AIDS and STI Strategic Plan for South Africa, 2007–2011. April 2007. Pretoria: Department of Health

²⁰ HIV and AIDS and STI Strategic Plan for South Africa, 2007–2011, p56

²¹ Vearey, J. and Palmary, I. (2007) Assessing non-citizen access to antiretroviral therapy in Johannesburg, Forced Migration Studies Programme, University of the Witwatersrand

²² HIV and AIDS and STI Strategic Plan for South Africa, 2007–2011, p119

²³ BI 4/29 REFUG/ASYL 8 2007, 19 September 2007

²⁴ Vearey, J. and Palmary, I. (2007) Assessing non-citizen access to antiretroviral therapy in Johannesburg, Forced Migration Studies Programme, University of the Witwatersrand

²⁵ Southern African HIV Clinicians Society & UNHCR (2007). Clinical guidelines on antiretroviral therapy management for displaced populations. South Africa.

Recommendations

To the National Department of Health

- To ensure that departmental staff, as well as those of complementary departments at provincial, local and district levels, uniformly implement national directives at the institutional 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 applied to South African citizens, and have access to free ART;
- As outlined in the 2007 report, CoRMSA applauds the inclusion of refugees and migrants within the 2007–2011 NSP. To this end, CoRMSA endorses the recent submission made to SANAC and encourages SANAC to work to produce guidelines for specific programmatic action at the local level;
- 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;
- Provide ongoing training for all healthcare providers relating to the rights of refugees and asylum seekers to access healthcare, including ART. This must include training on the recent directive to combat confusion about paperwork requirements and fee schedules for refugees and asylum seekers.
- Provide ongoing experiential training for all healthcare professionals, including facility managers, on xenophobia and issues relating to the rights of refugees and asylum seekers: this is urgently required and CoRMSA suggests that medical and nursing school curricula be developed to incorporate these issues as pressing public health challenges within South Africa.
- Administrative procedures must be standardised across all public healthcare providers and referral systems must be strengthened;
- Encourage public health facilities to provide clear leadership that positively reinforces the rights of refugees and asylum seekers to access health care;
- Implement specific HIV prevention, care and treatment activities (including awareness campaigns and the promotion of treatments for all 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 DoH ART guidelines.
- Continue and strengthen NGO/CBO support to the NDOH, particularly relating to the provision of foreign counsellors (often themselves refugees and asylum seekers) who are able to provide necessary language skills that enable refugees and asylum seekers to access VCT, ART and support in their home language.
- 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 the South African Human Rights Commission

- CoRMSA reiterates the recommendation made in the 2007 report to follow up on the Public Hearings on Access To Health Services that SAHRC held in May 2007. To this end, CoRMSA encourages the SAHRC to follow up the letter submitted by the Law, Health and Human Rights Working Group in March 2008.
- To act upon the recommendations made in 2007 that refugee and asylum seeker health professionals should be able to work in the South African public health system, thereby assisting in reducing the current skills shortage as well as creating a climate more receptive to non-national patients.

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.

6b. Access to Education

Children's rights to basic education are enshrined in international and domestic law. Section 29 of the Bill of Rights in the South African Constitution sets out that everyone has a right to a basic education. The South African Schools Act states that 'no child may be prevented from going to school because their fees cannot be paid' (Section 5(3)(a)) and that school admission cannot unfairly discriminate in any way. Section 19 of the South African Schools Act explicitly states that the 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.** Furthermore, children between the ages of 7 and 15 (or grade 1 to 9) have a duty to attend school in South Africa. **In spite of this strong legal and institutional framework, CoRMSA is highly concerned about new research showing that 35% of migrant and refugee children of school-going age are not in school.**

The main factor affecting school access is documentation, as the percentage of children of undocumented parents who are not in school lies at 50%, with 38% of asylum-seeker children excluded—and even 35% of children whose parents have recognised refugee status. In contrast, only 10% of children whose immigrant parents had permanent residence or citizenship documents were not in school. **School attendance is also affected by whether parents are working or not** (with 47% of children of unemployed parents not in school, compared with 30% of children of employed parents).²⁶ School attendance statistics also differ according to the city in which migrants and refugees live, with 71% of children in Durban attending school, 66% attending in Gauteng, but only 50% in Cape Town.²⁷ This is partly because there are more undocumented and unemployed migrant and refugee parents in Cape Town than in Gauteng and Durban. It is positive to note that school attendance levels are the same for girl and boy children, and so there does not seem to be gendered discrimination by either schools or parents in this regard.

In addition to documentation, **the main reasons given by parents for children's non-attendance at school relate to the cost of fees** (mentioned by 40% of parents) and **the costs of transport, uniforms and books** (mentioned by 22% of parents). This was also identified as a priority problem in CoRMSA's 2007 report. Even though schools are not allowed to discriminate against non-citizens in allocating fee exemptions, this is often the case in practice. In some instances, principals are not aware that foreign children are also eligible for fee exemptions; in others, they choose not to grant exemptions to foreign children. In other instances, foreign parents are not aware that they can apply for exemptions, or have difficulties managing the application process due to language differences. This means that continued advocacy is needed among schools and parents concerning access to fee exemptions. With the expansion of fee waivers around the country, this access barrier is likely to be reduced in future.²⁸ However, even once fees are addressed, the financial burden of transport and uniforms remains a barrier to education for foreign children, similarly as for poor South African children.

Once foreign children have gained access to schools, their right to a quality education is also often compromised by issues relating to language and discrimination, as noted in our last report. Many refugee and migrant children are unable to speak in the language of instruction, which reduces their ability to benefit from the content of education. This is also the case for many South Africans who move to areas where their native language is not spoken. Teachers and materials to assist children with non-South African language needs are scarce, as are initiatives to provide dedicated local language training to foreign children. More worryingly, **NGOs and researchers report that foreign children are sometimes subjected to xenophobic comments by teachers or other students.**²⁹ Finally, violent xenophobic attacks which have displaced hundreds of foreigners from informal settlements and townships around the country in 2007 and 2008 have also interrupted the ability of affected children to remain in education (see Chapter 4 of this report).

²⁶ Differences by documentation are statistically significant at the .00 level, and differences by employment at the .05 level. Regression shows that they are both significant independently of each other.

²⁷ This difference is statistically significant at the .05 level.

²⁸ The no-fees schools programme has already been extended in the Western Cape, Free State and Gauteng. In a recent speech to the ANC Youth League, ANC President Jacob Zuma furthermore 'resolved to progressively introduce free education for the poor until undergraduate level.' (3 April 2008)

²⁹ Such cases were documented by the Wits Education Policy Unit, the Refugee Children's Project, and by Crispin Hemson and Dennis Francis of UKZN.

In terms of interventions to address barriers to education access, **CoRMSA applauds the work of NGOs around the country in building relationships with schools** to facilitate access for non-citizen children. In one case, a new school was established in Johannesburg specifically for asylum seeker and refugee children who had been unable to access schooling elsewhere.³⁰ While such initiatives assist children who are not able to access education otherwise, the ideal is still to guarantee foreign children's access into the mainstream schooling system. In this regard, **CoRMSA welcomes the engagement of specific schools and school principals with refugee communities**, for example in Durban and Johannesburg, by taking the initiative in establishing additional language classes and projects to integrate foreign children.

Despite improvements, CoRMSA remains concerned that positive relationships between schools and migrant communities are often dependent on NGO-school relationships or individual school leaders, rather than being part of the Department of Education's (DoE's) overall monitoring of minimum standards. Education access for foreign children therefore remains haphazard in areas where there are fewer NGOs to facilitate access and where teachers and school administrators may be less aware of immigrant rights. Plans by the DoE to introduce stricter measures to monitor and sanction non-performing principals might improve this situation, but only if foreign children's rights to education are explicitly included in the monitoring. Otherwise, principals who erroneously believe, for example, that undocumented children do not have the right to access schools, might actually increase their exclusion.

A final important area of intervention is training and awareness-raising for migrant parents on their children's rights and duties in education, and on the administrative procedures for registration, fee exemptions, language training, etc. The South African schools system expects and requires parental input, for example through fee-exemption applications, which is not the case in many migrants' home countries. There are also reports that some parents keep or take their children out of school to assist in caring for younger siblings, in generating income, or in translation if the parent cannot speak a South African language. Doing so is in contravention of the parental duty to place children in schools until the age of 15, although South African parents often also neglect this duty.³¹ Language problems are another significant barrier for active parental involvement in children's schooling. Given that new migrants arrive in South Africa every year and at any time of the school year, this is an ongoing challenge for NGOs and refugee community organisations.

While the Constitution and the South African Schools Act set out only the right to basic education, there is a key aspect of education which falls outside this, but is nonetheless of concern for migrants and refugees in South Africa: **pre-school care**. Pre-school education, such as crèche and Grade R, are not considered part of the legally mandated 'basic education' and are not subsidised by the state. Nevertheless, facilitating access to this level of education is critical for parents who depend on hawking or informal work and who do not have an extended family structure to provide childcare. NGOs report that young children are sometimes left alone in unsafe accommodation while migrant parents are out working, due to their inability to access pre-school child care facilities. This is a similar difficulty for South Africans living in urban contexts without extended family networks.

Another area commonly of concern is eligibility of foreign children for the national senior certificate (formerly 'Matric') at the end of high school. While a child may not be prevented from writing the NSCE 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 foreign children with birth certificates, but many asylum seekers and refugees are not aware of this. Schools should educate foreign parents early about the need for their children to apply for birth certificates from the DHA so that they can complete their educations.

Finally, public debates on migrant access to services, including education, often claim that existing infrastructure cannot incorporate the 'flood' of foreigners. In fact, the new Migrant Rights Monitoring Project findings show that the overall numbers of foreign children in the school system are relatively small. Only 15% of surveyed non-citizens had school-age children with them in South Africa. The percentage among undocumented migrants was even lower (6%). Since migrants are not evenly

³⁰ This school was established as a partnership between the Sacred Heart College, the Refugee Ministries Centre and the Coordinating Body of Refugee Communities (CBRC).

³¹ Recent studies estimate that 5-15% of South African children are absent from school on some days. Community Agency for Social Enquiry and Joint Education Trust (2007). *Learner Absenteeism in the South African Schooling System*. Pretoria, Department of Education.

distributed around the country but tend to be concentrated in certain urban areas and in the border regions, it is important to recognise and address the challenges for schools in those areas, but not to assume that the entire school system is overwhelmed. **CoRMSA therefore calls for a more empirically informed public and policy debate on education access for non-citizen children.**

Recommendations

CoRMSA is concerned that none of the recommendations made to the DoE in the last report have been substantially addressed. They are therefore repeated here, with some additions.

To the National and Provincial Departments of Education

- Revise the Schedule relating to the Admission Policy for Ordinary Public Schools to reflect the right of children without South African birth certificates to access education, and remove any penalties against school principals who grant such children their right;
- 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;
- Until the policy of 'no-fee schools' has been completely implemented, ensure that non-citizens who are unable to pay school fees have equal access to school-fee exemptions as indigent South Africans, and introduce means of subsidising the 'hidden costs' of schooling, such as transport, uniforms and materials;
- Include explicit mention of non-citizen children's rights in information material produced for schools and parents on admissions and fee-exemption policies;
- Facilitate 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 children's education, in languages such as French and Somali to assist caregivers of foreign children who are not conversant in English to play a more active role in their children's education;
- Review internationally used mechanisms for assisting non-nationals in host-country language skills within primary and secondary school education and develop a staged plan to implement such assistance in South Africa;
- Enhance capacity-building and training of administrative and teaching staff in schools to address issues of xenophobia and the rights of different groups of foreigners to access education; and
- Include consideration of foreign children in ongoing debates on state-sponsored pre-school education provision.

6c. Access to Social Assistance

Section 27 of the South African Bill of Rights stipulates that *everyone* in South Africa has the right to sufficient food, water, and social security, and the government is required to show that it is making reasonable progress in providing assistance to realise these rights. Because of South Africa's policy of self-sufficiency for asylum seekers and refugees, the vast majority support their own needs for food and basic welfare through their own work or through social networks, just like the majority of South Africans. However, in those cases when the extremely vulnerable are unable to support themselves or their dependents, the constitutional right to social welfare should not exclude non-citizens. Levels of socio-economic vulnerability among refugees and asylum seekers are heightened by barriers to accessing employment, as described below, making access to social welfare provision even more important. In addition, barriers to accessing documentation in a timely fashion (see above) further constrain the ability of newly arrived asylum seekers to either support themselves through employment or to access social welfare assistance. CoRMSA is therefore concerned that, **while there are legal and administrative provisions making non-citizens eligible for certain forms of social assistance, there is virtually no such provision in practice.**

Legally, the courts have confirmed the eligibility of permanent residents for all social grants,³² and of refugees for foster-care grants³³ and disability grants.³⁴ The Social Relief of Distress grant does not initially require identity documentation for eligibility and so is theoretically applicable to anyone in dire need of food support. Crucially, however, almost none of these provisions are being implemented appropriately, leaving asylum seekers and refugees without access to a social safety net.

- As reported in our last report, the DSD filed a Social Assistance Plan for Refugees in October 2006 in response to a case by LHR in which refugees claimed the right to disability grants. In 2007, the DSD committed to providing refugees access to disability grants by the middle of 2008, yet appropriate administrative systems have not yet been put in place. CoRMSA is concerned about the continued delays in making this crucial resource available to the most vulnerable refugees;
- The Social Relief of Distress grant is intended to provide temporary relief from extreme hardship, especially in the case of persons waiting for documentation or other grant applications to be finalized. Although this grant does not require provision of identity documentation from applicants, its use to assist destitute non-citizens has been haphazard and inconsistent. Partner organisations report that they have been able to assist victims of xenophobic attacks to access the Social Relief of Distress grant in some locations (such as Tshwane), but not in others. CoRMSA encourages the DSD to clarify its policy in this matter so that access to the grant can be administered consistently around the country; and
- While a Refugee Relief Fund was established and a Board created to oversee its operations, the Fund has never been operative. DSD has confirmed that funds for refugees will be consolidated under the new Social Relief Bill that has been sent to Cabinet. It is therefore important that this Bill is processed as a matter of urgency.

In the absence of government welfare support, there is some welfare support for migrants, asylum seekers and refugees by NGOs, refugee self-help organisations and religious organisations. The UNHCR supports some NGOs to provide basic shelter, food and basic survival goods (such as blankets and cooking utensils) for asylum seekers and refugees. While these institutions provide a crucial service to some of the most vulnerable non-citizens, they do not begin to address the levels of need. New FMSP Migrant Rights Monitoring Project data shows that only 22% of surveyed migrants have ever received any material assistance from an institution in South Africa. Tellingly, 36% of those surveyed through NGOs around the country said they had received some kind of assistance, while this was only the case

³² *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* CCT12/03; CCT13/03

³³ *Bishogo, C. and Two Others vs. Minister of Social Development and Four Others*, Case No. 9841/05, High Court of South Africa, Transvaal Provincial Division, Consent Order, September 2005

³⁴ *Scalabrini Centre of Cape Town and Five Others vs. The Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another*, Case No. 32054/ 2005, Notice of Motion, High Court of South Africa, Transvaal Provincial Division, 19 September 2005.

for 10% of those surveyed at RROs in Pretoria and Durban.³⁵ This means that around 80% of asylum seekers and refugees in South Africa, including those who have not yet been able to apply for asylum, fulfil their basic needs for food, clothing and other material goods through their own work or through informal social networks. Of the 257 persons who had ever received material assistance from an institution, only seven had received assistance from a government social worker, while 77% had received help from NGOs, 65% from religious organisations (churches, mosques, etc), and 16% from refugee self-help organisations.

Recommendations

To the National Department of Social Development

- Finalise plans to extend disability grants to recognised refugees, and implement the application process as soon as possible;
- Confirm and circulate policy on non-citizen access to the Social Relief of Distress grant, to ensure consistent access around the country;

To the United Nations High Commissioner for Refugees

- Increase levels of funding to NGO implementing partners for basic material welfare support, especially for newly arrived asylum seekers, or lobby other donors to do so.

To Parliament

- Process the new Social Relief Bill that will consolidate funds for refugees and other vulnerable groups as a matter of urgency.

³⁵ This difference is statistically significant at .000.

7. Access to Accommodation

'There is no respect for this right [to housing]. In South Africa they accept refugees here but they don't do anything—we are just left like this.'

Congolese Refugee, Doornfontein, Johannesburg
June 2007

'We're not a refugee camp! No, I mean, at the end of the day we're a South African company and we have to look after our own first. A refugee is not necessarily a legal person—they can't work, they can't pay rent. In fact, it's illegal to rent to a refugee.'

Johannesburg Landlord, July 2007

Access to safe and secure housing is critical to human life and dignity. Hence, it is important to recognise barriers to housing for non-nationals and the false assumptions—such as that cited by the landlord above—that render these migrants vulnerable in unique ways. This chapter will aim to explore these barriers and the ignorance that contributes to many of them.

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, where rural-urban migration far outweighs international migration in placing an ever-growing burden on available housing.³⁶ South Africa's policy of migrant and refugee self-settlement and urban integration, rather than confinement to camps, means that migrants compete within the generally overburdened urban housing market. CoRMSA acknowledges the technical and political difficulties posed by the delivery of housing, and, as with other social services, does not believe that special services or preferential treatment for non-citizens are desirable in any way.

However, **the complete exclusion of legally resident asylum seekers and refugees from various national housing policies is an obstacle to migrants' social and economic integration into the communities in which they live.** The vast majority of urban-based migrants live in privately rented accommodation, and therefore, as in the case of poor urban South Africans, **effective recourse against abuse and unfair eviction by private landlords is the most important means of protecting rights. A key housing challenge relates to foreigners who have been displaced due to xenophobic violence in informal settlements around the country.** Finally, as with South African inner-city residents, foreign migrants should be included in and not ignored by or excluded from public and private urban regeneration and housing plans. Housing not only provides physical shelter; it impacts strongly on health and livelihood options and is therefore crucial in terms of wider questions of migrant integration.

Public housing schemes

Our last two reports have noted that non-citizens are comprehensively excluded from subsidized housing programmes for low income groups, including the National Housing Subsidy Scheme,³⁷ the National Housing Programme for the Upgrading of Informal Settlements,³⁸ the Emergency Housing Programme³⁹ and subsidised rental in Council properties. In all cases, no specific mention is made of refugees or asylum seekers, and so these legally resident groups are often conflated with undocumented migrants who are explicitly excluded by public housing policies. No change to the wording of the Housing Code or other housing guidelines has been made to clarify the distinction between legal and undocumented migrants, in spite of repeated recommendations to this effect.

³⁶ Centre on Housing Rights and Evictions (2005). Any Room for the Poor? Forced Evictions in Johannesburg, South Africa. Johannesburg, COHRE.

³⁷ *National Housing Programme: In Situ Upgrading of Informal Settlements*, instituted in terms of Section 3(4)(g) of the Housing Act, 1997

³⁸ National Department of Housing, *National Housing Programme: Upgrading of Informal Settlements*, June 2004 (Version Three), (Pretoria: National Department of Housing, 2004)

³⁹ National Department of Housing, *National Housing Programme: Housing Assistance in Emergency Circumstances. Policy Prescripts and Implementation Guidelines*. (Pretoria: National Department of Housing, 2004), 38

Privately owned housing markets

Findings from the Migrant Rights Monitoring Project at Wits show that 70% of urban migrants live in privately rented inner-city flats, of which 36% are main tenants and 64% are in sub-tenancy arrangements. Importantly, levels of sub-tenancy reduce significantly with more solid documentation (e.g. 52% of undocumented migrants are sub-tenants, but only 47% of asylum seekers and 34% of refugees). There is a similar pattern in decreasing levels of housing in informal settlements by documentation level. This shows the extent to which documentation is central to greater housing security. Refugees and asylum seekers also report fewer problems with their current housing than undocumented migrants, although more than half of all migrants have had problems with housing. This emphasizes how delays and inefficiency within the DHA in providing migrants with documentation affect all other aspects of their lives, and their ability to access their rights.

Housing insecurity is most strikingly illustrated by migrants' experience of overcrowding through sub-tenancy. Of survey respondents, 40% stated this as their main housing concern. Overcrowding impacts negatively on both physical and mental health, on the ability to build a sustainable livelihood, and on child development. Since overcrowding also contributes to the degeneration of buildings and urban infrastructure, it is in the interest of metropolitan councils to reduce housing insecurity.

As in previous years, migrant and refugee service-provider organisations report the following common forms of abuse in the private housing market, which are also confirmed by survey data:

- Large rental agencies and landlords are not aware of the differences between legal migrants (such as asylum seekers and refugees) and undocumented migrants, believing that it is illegal to engage in a contract with refugees and asylum seekers (see quote above);⁴⁰
- Landlords and rental agencies take advantage of migrants by extracting higher rents,⁴¹ refusing to maintain property,⁴² and failing to return security deposits;
- 43% of respondents to the Wits survey reported experiencing xenophobic abuse by either landlords or neighbours; and
- 24% reported that they had been evicted in the past. Although a common reason for eviction among foreign migrants is the same as for South Africans—inability to pay the rent—migrants also said they were evicted because their documentation was not recognized (32%) and 'because of being foreign' (20%).

As with other privately-provided services (such as employment, below), the main role of the state in protecting rights is in providing effective mechanisms of recourse in the case of abuse. CoRMSA applauds the Housing Tribunal in Johannesburg for assisting foreign migrants who have experienced abuse and unfair eviction by landlords. 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.

Informal settlements and violence against foreigners

Many migrants and refugees state that they prefer living in inner-city areas, in spite of high housing costs, because they perceive townships and informal settlements to be highly xenophobic and unsafe. This has been confirmed through many cases of xenophobic violence throughout the country in the past year, where foreign residents of informal settlements have been forcibly displaced from their shacks, which have in many cases also been burned to the ground. In most of these cases there has not been a satisfactory emergency or long-term housing solution for those who were displaced, even though they were legally in the country. Asylum seekers and refugees who lost their homes, belongings and incomes due to criminal assault and arson were therefore left to find alternative accommodation on their own and

⁴⁰ Greenburg, J. and T. Polzer (2008). Migrant Access to Housing in South African Cities. Migrant Rights Monitoring Project Special Issue Report 2. Johannesburg, Wits Forced Migration Studies Programme.

⁴¹ According to the Migrant Rights Monitoring Project survey, 42% of respondents felt that they paid more than South Africans for their accommodation, while only 30% felt they paid the same and the rest did not know.

⁴² 34% of respondents reported problems with bad services (water, electricity, refuse removal, etc.) in their current accommodation, suggesting relegation to badly maintained buildings.

at their own cost. **CoRMSA calls on the National Disaster Management Centre in the DPLG, as well as other departments tasked with assisting victims of disasters, to provide foreign victims of violent attacks with the same services as South Africans in a similar situation.**

NGO and religion-based shelters

The discrimination that refugees and asylum seekers face from both public and private-sector housing means that NGO and church-provided housing, though temporary, is an important site at which refugees and asylum seekers are provided some access to housing. 7% of survey respondents lived in NGO or church-based shelters, with men and undocumented migrants more likely to be in shelters than women and those with documentation. However, such options are inherently temporary, often overcrowded, and almost always under-resourced. Furthermore, since the January 31 police raid on the Central Methodist Church in Johannesburg, which was sheltering 1500 migrants, some migrants no longer trust the safety and sanctity of shelters, preferring the anonymity of overcrowded private accommodation. CoRMSA strongly condemned the raid on the Central Methodist Church and encourages metropolitan councils, Metro police services and SAPS to support, rather than target, such initiatives, which provide a minimum of shelter to destitute non-citizens.

CoRMSA is also concerned that many non-governmental homeless shelters in the inner cities continue to exclude non-citizens from their services. In some cases, this is due to a lack of knowledge of the rights of legal migrants, and others justify their exclusion because of budgetary constraints. However, some shelters explicitly reject providing assistance to foreigners, claiming they have no rights to space in the city. CoRMSA therefore calls on civil society to fight such xenophobic exclusion within its own ranks by recognising the human rights of all vulnerable people.

Recommendations

To the National and Provincial Departments of Housing

- Review the National Housing Code for discriminatory phrasing against asylum seekers and refugees, for instance the lack of clarity around who is determined to be an 'illegal' migrant;
- Ensure the explicit inclusion of asylum seekers and refugees as a specific category of foreigners 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; and
- 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 Provincial and Local Government

- 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;
- Make use of existing disaster management structures and processes to provide emergency and replacement housing for legal foreigners displaced from informal settlements through xenophobic violence.

To Local Government 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.

8. Access to Employment

South Africa does not grant a right to work per se, but the rights of workers are strongly protected. Furthermore, the South African policy of self-sufficiency for refugees and asylum seekers makes employment a crucial element of basic dignity and welfare. While there is a global skills shortage in some sectors (such as healthcare and engineering), the skills shortage in South Africa is one of the highest in the world, compared with the needs of the economy.⁴³ South Africa therefore has an interest in making the most of the skills brought into the country by foreigners.

There have been several important policy developments in relation to migrant access to employment in the last year. These include:

- A legal opinion by the CCMA confirming that undocumented migrants who have experienced labour abuse by their employers are within the mandate of the CCMA, and stating that an employment contract is still valid even if the employee is in the country illegally;
- The April 7, 2008, Johannesburg Labour Court ruling that undocumented foreign nationals have the same labour rights as South African employees. In a case involving the dismissal of an Argentinean national after his work permit expired, the court ruled that the employment contract was still valid, thus setting a precedent that employment contracts are to be upheld regardless of the legal status of the employee in the country; and
- The DoE has started implementing initiatives to hire Zimbabwean and other foreign-qualified teachers in order to address the dire skills shortage in the education sector, especially of Maths and Science teachers.

However, the practical impact of these measures on the ability of migrants, asylum seekers, and refugees to be gainfully employed and have their labour rights respected remains to be seen. **It is especially important that undocumented migrants can seek recourse without fearing arrest and deportation if they bring labour concerns to the attention of the labour court or the CCMA.**

There are still many factors that constrain the ability of non-citizens to work productively in South Africa. **The most significant institutional factor limiting migrant employment is delays in the processing of documentation by the DHA**, which affects everyone from skilled foreign employees to asylum seekers and refugees. Furthermore, the documents issued to asylum seekers and refugees often hinder their ability to secure employment, even as they are intended to grant the right to work. This is because of the short time frames for which the documents are issued before they must be renewed (1–3 months for asylum seekers), limited public information for employers on the renewability of these permits and the timeline that applies if an application for asylum is eventually rejected and because of the format, which is not recognised by many employers. New research findings by the FMSP show the impact of documentation access on employment. Those without documents are much more likely to be without work, and those with documents are almost three times as likely to be self-employed as those without documents.

Certain employment sectors also explicitly discriminate against foreigners. As reported in our last report, the security industry continues to be explicitly discriminatory by only allowing citizens and permanent residents to complete the mandatory registration with the Private Security Industry Regulatory Authority (PSIRA).

CoRMSA welcomes the recent change in policy by the DHA allowing asylum seekers and refugees who wish to apply for a normal or quota work permit to do so without first cancelling their asylum applications or refugee status. Although asylum and refugee papers are supposed to suffice as proof of the right to work, the ability of qualified asylum seekers and refugees to also apply for quota work permits (see below) without endangering their asylum status will assist in their economic integration in South Africa.

⁴³ Surika van Schalkwyk (2008). The new chicken run. [Mail and Guardian Online](#). Johannesburg. **23 April 2008**.

Wasting skills

Recent FMSP research shows that 28.7% of migrant survey respondents in Gauteng, Durban and Cape Town have at least finished tertiary education, compared with only 3.2% of the total South African population holding a degree.⁴⁴ However, unemployment levels are higher and self-employment levels lower for those migrants with degrees than for those with only a primary education. These findings suggest that **valuable formal qualifications and skills are currently lying dormant and unused in the economy and the public sector**. Furthermore, the contribution of those with fewer formal skills, for example in the self-employed sector, should not be overlooked in policy discussions.

National policies to address the skills shortage, such as ASGISA, do not explicitly target the employment of skilled foreigners who are already in the country, such as asylum seekers and refugees. A **quota work permit** for people with scarce skills has been introduced which is intended to provide more flexibility for skilled foreign job seekers, as it does not require the applicant to have a job offer, does not tie the employee to a specific employer, and is not limited to a specific time period. However, permit holders are only given 90 days to find employment after the permit is issued, which is often insufficient time to locate vacancies in their field and go through the interview process. Furthermore, from 2008, it has become compulsory for professionals to register with practitioners' councils, such as the Engineering Council, before receiving a quota work permit. The process of registering with the Engineering Council can take up to 18 months, while the South African Council for Educators reportedly is not coping with the rising demand for registration. This is slowing down the quota-permit process.

As reported in the last CoRMSA report, difficulties in registering and recognising qualifications are especially severe in the **medical** field, in spite of extreme skills shortages in this sector. There has been no progress over the past year in facilitating registration for asylum seeker and refugee nurses with the Nursing Council, in spite of repeated advocacy attempts. The Department of Health is also currently alone in implementing a regional agreement not to employ nationals of SADC member states, with the justification that this would weaken the home-state health system. In the current context of Zimbabwean migration (see below), however, this policy results in qualified Zimbabwean medical personnel remaining unemployed in South Africa rather than returning to their home state.

The abovementioned initiative by the DoE to enable the employment of qualified foreign **teachers** is welcomed, as is the establishment of a centralised database of Maths and Science teachers, to which qualified foreign teachers are requested to submit their details. However, the implementation of this initiative remains slow and un-coordinated. CoRMSA has received reports from partners that many schools do not know what procedures to follow to appoint non-nationals, and the national DoE has not yet circulated a clear policy statement to all schools.

CoRMSA applauds NGO initiatives that make use of refugee and asylum-seeker skills for the benefit of the wider community. One such initiative was started this year by Africa Unite, a Cape Town-based NGO that has launched a Maths and Science project based at Dr Nelson Mandela High School in Crossroads. The project aims to address the shortage of artisans, engineers and accountants of colour in South Africa by training learners from the townships of Gugulethu, Nyanga, Phillipi and Crossroads. Qualified refugee and migrant volunteer teachers provide the training. The programme is partnering with Stellenbosch University and the MTN Science Centre that are providing access to laboratories.

Enforcing labour laws and recourse in cases of abuse

In terms of enforcement of the law, CoRMSA is concerned that immigration law is generally enforced with more zeal than labour law or refugee law. This means that undocumented migrants, and even in some cases documented asylum seekers and refugees, are more likely to be arrested and deported by organs of the state than to have their labour rights protected. The Department of Labour and the main unions, while recognising their mandates to do so, rarely monitor the labour conditions for foreign workers or act to protect them from SAPS or DHA officers enforcing immigration law. This means that to date there have been few avenues for recourse in cases of labour abuse against foreign workers (apart from those with high skill levels who have entered the country on work permits in formal industries). The

⁴⁴ The South African degree rate was calculated on the basis of data from Statistics South Africa 2007 Labour Force Survey (page 9)

recent decision by the CCMA to include undocumented migrants in its mandate, mentioned above, is potentially an important step in rectifying this gap, but it remains to be seen whether it will be effective in reaching abused undocumented foreign workers in practice. Some recourse is available through paralegal and legal-advice NGOs who specialise in assisting migrants, asylum seekers and refugees.

The need for effective monitoring and recourse is significant because of the lack of knowledge and high levels of xenophobia by employers, especially concerning asylum seeker and refugee rights to work. Also of grave concern are widespread xenophobic attacks on foreign traders and business people in townships and informal settlements around the country, as well as the targeting of foreign business people by criminals since they are (perceived to be) less likely to go to the police. This impacts most on self-employed entrepreneurs.

Convention on the Rights of Migrant Workers

CoRMSA is concerned that South Africa has not yet signed and ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Although South Africa's Constitution and domestic labour laws already provide extensive protection for migrant workers, signing this convention adds a set of binding international standards to address the treatment, welfare and human rights of both documented and undocumented migrants, as well as outlining obligations and responsibilities on the part of sending and receiving states. It is also in the interest of South Africa, as it aims to put an end to the illegal or clandestine recruitment and trafficking of migrant workers and to discourage the employment of migrant workers in an irregular or undocumented situation. The DFA has publicly committed to take steps to sign the Convention, a move that CoRMSA fully supports.

Recommendations

To the Department of Labour

- Lobby 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 or waive 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;
- 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 for 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;
- Consider extending the statutory period permitted to holders of a quota permit for finding employment; and
- Ensure that asylum seekers who wish to receive a quota permit or special skills 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; and
- Work with the Council of Educators to speed up the process of registering qualified foreign teachers.

To the United Nations High Commissioner for Refugees

- Continue, with partner NGOs, to lobby the NDoH and the South African Nursing Council to enable qualified refugees and asylum seekers to register as nurses to 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); and
- Monitor labour rights abuses against foreign workers in the same way as abuses against citizens.

9. Land Ownership by Non-Nationals

The freedom to own land in South Africa is critical to non-nationals' ability to integrate into society, build sustainable cities, and promote South African jobs. In August 2007, a report presented to the Minister of Agriculture and Land Affairs raised concerns that 'foreign' ownership of land would have a negative impact on South Africa's ability to address the question of land redistribution. While CoRMSA is sympathetic to the need to address land redistribution in South Africa, it questions the degree to which foreigner land ownership is a major obstacle to achieving this end. Given that most migrants purchase small residential properties, a blanket prohibition on foreign ownership is unlikely to have significant benefits for South African citizens. Moreover, these **prohibitions on ownership promote ideas that foreigners are not welcome in South African society**. Refugees and other migrants are often marginalised socially and economically and, as such, restrictions on land ownership would serve to further exacerbate such marginalisation.

The inability of all migrants to own land—regardless of their legal status—also prevents communities from stabilising, discourages investment, and heightens vulnerability. People who own land are more likely to invest, socially and materially, in the communities in which they live. Such insecurity ultimately limits job creation. It also means foreigners are less likely to pay for rates and services, or make other direct contributions to the South African fiscus.

In line with the comments above, CoRMSA recommends abolishing any prohibition on foreigners owning land. If the government insists on such prohibitions, they should apply only above a certain threshold determined by the value, size or nature of the property. Restricting the rights of any South African residents to own land in South Africa is not only unfair and discriminatory, but will prevent the creation of a vibrant and stable economy.

Recommendations

To the Department of Agriculture and Land Affairs

- Do not place restrictive measures on the ownership of land by non-nationals resident in South Africa

10. Access to Banking and Financial Services

Many migrants in South Africa lack access to credit or a safe place to keep their cash and assets. This seriously constrains their economic activities and, in turn, their ability to survive in and contribute to the communities in which they live. Without credit, it is almost impossible to start or expand a small business, and this affects the livelihoods of the many migrants in South Africa who are dependent on small business to make a living. These include skilled professionals (e.g., nurses, accountants) who are often unable to work in the 'formal sector' because they cannot acquire the necessary certification to work in South Africa or because employers simply do not recognise their foreign qualifications.

Lack of financial services also means refugees are at greater risk as targets for crime, since they are more likely to carry cash on their person. This hinders saving and investment, as well as increasing vulnerability to destitution and eviction. Banking services are vital for non-nationals to receive payments from employers, safely store savings or gain access to credit in order to start businesses. The benefits of finding a creative solution to this issue will extend to all South Africans.

Despite the evident need to provide migrants with banking services, a number of CoRMSA's partner organisations have reported non-national clients being prevented from opening accounts at various banks. Following discussions with CoRMSA, First National Bank (FNB) have confirmed that asylum seekers (with valid Section 22 permits) and refugees (with Section 24 permits, refugee identity documents or refugee travel documents) can open Smart Accounts at any FNB branch. Applications for other types of accounts will be assessed on a case-by-case basis. ABSA have also confirmed that refugees with Section 24 permits or refugee identity documents can open accounts, but the bank will not be opening accounts for asylum seekers at the present. Other migrants have few banking options. Further challenges also remain for those living in informal accommodation, who may struggle to provide the proof of residence required by the Financial Intelligence Centre Act (FICA) to open bank accounts.

Other financial institutions have not yet revealed plans to open accounts for refugees or asylum seekers except on a case-by-case basis. One challenge in this regard is that many financial institutions view migrants—including refugees or asylum seekers—as 'non-residents' who need valid passports and visas to open accounts. A number of financial institutions have also cited advice from the DHA as the reason for their refusal to open accounts for asylum seekers. This has raised concern amongst the banks regarding the authenticity of DHA-issued documents. **CoRMSA is extremely concerned that the DHA, which is charged with issuing documentation, may be advising banks not to open accounts for those bearing these permits.**

Recommendations

To Financial Institutions

- Review current policies to make provision for new clients to present non-South African identity documents in order to open a new bank account.
- Review current policies to make provision for clients with valid immigration documents—including refugee and asylum seeker permits—to access small loan schemes on an equal basis with South African citizens.

To the Department of Home Affairs

- Refrain from advising banks not to open accounts for asylum seekers, refugees, or others with valid documents.

To the Banking Council of South Africa

- Ensure that all financial institutions have policies in place to address all categories of non-nationals opening accounts (including refugees and asylum seekers) and ensure that these policies are not discriminatory.

11. Women and Gender-Based Persecution

'But for me, I want to forget.'

Miriam stayed at the university a little later than usual that night. It was almost dark by the time she got home, finding two police officers standing at the gate of her house. The house was where she had lived with her adopted family after her own was killed in the genocide. But when the father, a senior government official, was accused of plotting against the ruling party, the family was forced to flee. Although tormented by the regular harassment of police, Miriam and her uncle stayed in the house, until one day in April 2005, when a group of police officers took him away. With his disappearance, the police harassment intensified, and she was forced to report weekly to the station. Now, merely a month later, she was alone. There was no one but her left to confront the officers who stood at her gate. They spoke to her gruffly, asking how she managed to pay for the house, implying that she must still be in contact with her adopted father.

They didn't like her response. The two police officers proceeded to beat her and rape her, demanding information she didn't have. Two nights later, she crossed into Uganda, believing she might be attacked again if she stayed in Rwanda. A month later, she entered South Africa and applied for asylum.

Although she managed to find an interpreter to help her fill out the asylum application, during the actual interview there was no one around to interpret and she was left to struggle through the interview. Unlike many women who have suffered rape, she chose to tell her full story, made even more difficult through broken English. The rejection letter she received in February 2006, however, read, *'Concerning the reasons for leaving the country, the rape and interrogation by the police and the escape of [your father], you should have moved to another part of the country and you should have reported the rape matter to the state, which is something you never done.'*

Although she appealed, a later decision by the Refugee Appeal Board only reinforced this statement, saying that members of the family could not possibly be subject to persecution, and that she should have reported the rape to the police—the very same authorities from whom she feared further harm.

With the introduction of the Refugees Act, South Africa became the first country to explicitly state within its refugee law that gender-related persecution is grounds for asylum. Most other countries, including Canada, Australia, the US, the UK, New Zealand and a handful of other European states, which recognise gender-based persecution as a basis for asylum, have chosen not to amend their legislation, but have instead created non-binding guidelines on how gender can be incorporated within the existing law. In South Africa, however, gender is legally recognised and binding as a legitimate reason for asylum. Now, in 2008, new amendments to the Refugees Act are pending, which seek to give gender an even more prominent position within the law. Officials claim this change will reduce ambiguity and raise the status of gender within the Act, generating greater recognition of gender-related persecution cases.⁴⁵

⁴⁵ The Chairperson of the Standing Committee recalled a consultation regarding the amendments—"... [Participants] said rather put it in there; take out all the ambiguity, stop all the arguments that might take place in the future because not everyone sees gender as a particular social group."

A recent national study evaluated the extent to which South Africa was meeting this commitment to a gender-equal asylum system, and the kinds of claims that were being made on the basis of gender-based persecution.

The research clearly indicated that there was confusion among Refugee Status Determination Officers (RSDOs) about what constituted gender-based persecution. The decision-making was erratic and inconsistent both between cases and between RSDOs. This was made worse by the fact that country reports often contained little information on gender-based persecution. The RSDOs were generally unaware that the UNHCR had guidelines on handling gender-related persecution claims, and in some cases did not know what kinds of acts constituted gender-based persecution. Rather than assessing women's claims on an individual basis, RSDOs tended to make decisions based on whether a country was considered safe or unsafe; that is, at war or not. This ignores that fact that gender-related persecution might well take place in times of peace.

Different kinds of gender-based violence were treated differently, and the reasons why were often unclear. For example, cases of female genital mutilation were almost always successful whereas cases of rape were typically accepted only when the rape was perpetrated during war or by armed forces. Claims on the basis of domestic violence and sexual orientation were consistently denied. When pushed for reasons why, it became clear that there was a tendency among RSDOs and the Refugee Appeal Board to see domestic violence and rape as 'normal' and the other kinds of violence as more unfamiliar:

'The applicant claims that the rebels were raping girls in your [sic] area. There can be no well founded fear of persecution that be established [sic] from the fact that the rebels were raping girls. Rape is a crime that appears to be rampant all over the world. There appears to be no indication that the applicant experienced or witnessed the incidents that she claims was taking place...The circumstances that compelled the applicant to flee from the DRC are not justifiable considerations that would lead a reasonable person in the circumstances of the applicant to flee from her country of origin.'

'We see a difference; domestic violence would very seldom cause you to leave your country, whereas genital mutilation can quite easily cause you to leave your country. Domestic violence, you don't usually have to depend on any state assistance to avoid it, whereas mutilation you would almost definitely need state assistance to avoid it, active and successful state intervention. It's two very separate things. FGM is more of a cultural thing.'

In addition, applicants that were interviewed in this study complained that the interviewing process did not easily allow them to discuss gender-based persecution. For many women the interview was not held in private and women felt ashamed to discuss Gender-Based Violence (GBV) in public—a perception that can only have been confirmed by the normalising attitudes to such violence illustrated in the quotes above. Many people also said that they did not trust the interpreters to keep their information confidential and they feared that members of their communities would hear about it and they would be stigmatised. Finally, many people did not know that gender-based violence was a ground for applying for asylum and so simply thought those aspects of their experience were irrelevant and did not mention them.

In spite of these many challenges, the RSDOs showed a strong desire to understand gender-based persecution better and to deal fairly with such claims. They had also implemented some measures to make the asylum system more equitable, such as ensuring that pregnant women or women with young children be seen first or wait in a separate area. These are positive beginnings towards making the system more equitable.

Recommendations

To the Department of Home Affairs: Refugee Status Determination Officers

- RSDO decisions involving gender-related persecution should address and examine information concerning gender relations and gender-based violence in the country of origin. To facilitate this analysis the DHA should maintain a database relating to the status of women in any given state;
- The DHA should ensure training for RSDOs on adjudicating using section 3b of the Refugees Act and post-conflict analysis of real security, particularly in claims from women;
- Given the lack of disclosure of gender persecution evidenced by this research, alternate means of providing testimony should be explored and piloted. For example presenting testimony by means of affidavits, videotapes, or to a hearing officer specifically trained to deal with violence against women, and revising the refugee intake form so that the questions more successfully elicit accounts of gender-related persecution;
- Ensure the privacy of the interviews by carrying out interviews in a private room, and by explaining to the applicant that the contents of interviews will be kept confidential. It is also essential that applicants feel confident in the interpreters' ability and willingness to keep the interview confidential; and
- Keep records and statistics on cases involving gender-related persecution, or where gender is an aspect of the claim, as well as the decisions on those claims, in order to track patterns in decision-making.

To the Department of Home Affairs: Refugee Appeal Board

- Professional interpretation should be available for all individuals who appear before the Board, and the cost for this should be included within the Board's budget.
- At the moment, the Board is expected to do about 50% of its own research, detracting from the attention it can give to adjudicating the cases. A specific, well-qualified person should be employed to conduct research on behalf of the Board members, and to ensure updated information is readily available.

To the Department of Home Affairs/Parliamentary Portfolio Committee for Home Affairs

- Advocate not only for the inclusion of gender as a sixth category but actually propose and ratify provisions to allow for frequent training on gender sensitivity, as well as regulations pertaining to the provision of interpreters, among other issues.

To the United Nations High Commissioner for Refugees

- Ensure adequate training in gender sensitivity and interview techniques for all RSDOs. Training should take into account the cultural biases of the RSDOs themselves, including their gender, ethnic background and overall attitude toward non-citizens;
- Ensure that training on the adjudication of gender-related persecution claims includes an emphasis on persecution perpetrated by private citizens. Training should also discuss when and in what circumstances women should be expected to approach local authorities in the country of origin, and when such an option may neither be practical nor advisable;
- All officials should be provided with copies of the UNHCR Gender Guidelines during both initial and refresher training;
- Conduct regular refresher training on gender sensitivity for implementing partners, but especially for South African asylum officials, including the Refugee Appeal Board, the Standing Committee and the RSDOs; and
- Provide training as soon as possible for the Standing Committee (the current Committee has not received any training on any issues, including gender sensitivity, from the UNHCR).

To civil society organisations working with migrants

- Arrange regular casual meetings with RSDOs to provide information and guidance on gender-related claims, as well as updated information on countries of origin; and
- Offer to speak during the initial and refresher training sessions for the RSDOs, particularly in regards to the cases that are seen and the common errors made in decision-making.

12. Children and Unaccompanied Minors

'There was no food at home and I could not go to school, as my grandma had no money to pay for me. My parents are late [deceased]. I have relatives at home but they don't help very much with food. In South Africa I want clothes, food and work so that I can send money to my grandma'—Zimbabwean girl, 9 years old

The concerns around the rights of child migrants have intensified as the situation in Zimbabwe has deteriorated. Research conducted by FMSP for Save the Children UK in Musina, Komatipoort, and Johannesburg, indicates that children as young as seven years old are migrating alone, primarily from neighbouring countries such as Zimbabwe, Mozambique and Lesotho. Push factors for children's migration were the death of their parents, lack of money and not being in school. For many children, the attraction of South Africa is the strong currency (for children sending money back home) and the possibility of attending school. This is in spite of the fact that in the border areas as many as 94% of the children interviewed were not actually in school.

'I left because my father died and I decided to come and make money for my family back home. The first time I tried to come under the fence to South Africa I was caught and sent back the next day. I paid a [smuggler] to let me pass under the fence. Then I hitched a ride from a farm. When I arrived I just asked around for work.'—Mozambican boy, 16 years old

The report shows that the point of crossing the border is where children suffer extreme exploitation. A system of smugglers exists who regularly abuse children and extort money from them. In the Save the Children study, over 50% of children paid bribes to smugglers to cross the border and 80% of children made use of these smugglers when trying to cross.

'The Gomagoma they hit me while crossing because I had no money'—Zimbabwean boy, 13 years old

'The army hit me because we were in the bush jumping the border. They told us to return to the Zimbabwe side'—Zimbabwean boy, 17 years old

'I was raped by a Gomagoma from Zimbabwe. I don't know why. He was drunk; he had gone drinking with my landlord. He raped a girl from Zimbabwe before me and was not reported. I think he thinks that girls from Zimbabwe don't report'—Zimbabwean girl, 16 years old

Once in the country, children face exploitation by police who illegally send them back over the border and detain them in illegal conditions—such as with adults and for extended periods of time. Although many children in border towns may have legitimate asylum claims, they lack the resources needed to reach the urban centres where they could apply for asylum.

Children as young as seven years old work in exploitative conditions. Among the total sample, almost a quarter of the children in the Save the Children study had no income, while a similar number made money by collecting items for recycling. Farm work (for boys) and domestic work (for girls) were common forms of work. Children who are living in urban centres, however, are more likely than those on the borders to be in school and have access to accommodation and limited NGO support which prevents them entering this kind of work.

What is striking is the lack of response from the DSD to unaccompanied minors, particularly in the border towns such as Musina following the Zimbabwe crisis. Similarly, the lack of progress by the DHA in making sure that unaccompanied minors can access the asylum system is concerning.

'My family stayed in Kivu and the people in DRC said my father must go back to Rwanda. So one day the army came and took us to the army base where they killed my father. My family (mother, step-mother and half-brother) had to work for the soldiers and they used to hit us and not give us food. One day I went to get food and met a man who advised me to run. We met other people and continued with them but I couldn't go back for my mother. We walked from DRC to SA. We got a lift in a truck in another place and then walked again. My father was a politician.'—Congolese girl. 17 years old.

Recommendations

To the Department of Social Development

- Compile a database of unaccompanied minors who have migrated permanently to South Africa; and
- Facilitate access for permanent and circular migrant children to schools and shelters.

To the South African Police Service

- Issue a strong statement that police may not deport migrants, particularly not child migrants; All deportation must be conducted in line with the law and in collaboration with the DHA;
- Investigate the system of smugglers on the borders and their role in corruption and violence against migrants; and
- Investigate corrupt and illegal detention practices in the border towns.

To civil society

- Lobby the South African government for a humanitarian, rather than security, response to the crisis in Zimbabwe;
- Broaden children's activities to ensure that all children, not only those with asylum status, can gain access to basic services;
- Encourage the participation of children in programmes designed to assist them; and
- Lobby the police for a legal and human-rights-based response to unaccompanied minors.

To the Department of Education

- Issue a strong statement that all children of qualifying age, regardless of income or documentation status, can and should attend school; and
- Investigate reports where schools have excluded migrant children.

To the Department of Labour

- Investigate child labour in the construction and farming industries; and
- Where children are of legal age to work, monitor conditions of labour in border towns closely.

13. Migrants in Medium and Small Towns

Most discussions on migration in South Africa focus on migrants living in the country's large cities or its border areas. There are, however, increasing numbers of foreign migrants in South Africa's secondary and smaller towns, and there is to date very little information about who is moving to these towns, what kinds of impacts and contributions they are making, what needs they face, and what services are available to them. This section provides an initial overview of issues on the basis of three brief pilot studies in Polokwane (Limpopo province), Nelspruit (Mpumalanga province), and Worcester (Western Cape province).⁴⁶

As in the rest of the country, most migrants in smaller towns are young men. This may even be a stronger effect than in the larger towns, since migrants in smaller towns are often pioneers who are seeking economic opportunities rather than places to settle. There are variations by location, of course, with a long-established community of Mozambicans and Swazis in the Nelspruit area, as well as female seasonal farm workers and regular female cross-border traders. In Polokwane, the larger and more established community is Zimbabwean, increasingly including families and female traders. In Worcester, the largest group is also Zimbabwean, although more recently arrived than in Polokwane. In all three towns, Somalis are a visible group and there are other migrants from across East and West Africa as well as Asia. Consistently, the most visible migrant presence is in the small business sector, where both African and Asian migrants play an important role in retail and small-scale services. In Nelspruit and Polokwane, migrants are also critical for the vibrant construction industry.

Lack of information from local government and public service providers

In all three towns, local officials and government departments had virtually no information about the number or profiles of non-citizens resident in their areas. Most did not consider foreign migrants to be part of their constituencies or mandates, relegating the issue to the DHA or the national government level. In contrast to the large cities, where regular migrant forums have developed, there was also no evidence of communication or consultation between local governments and migrant communities, at least partly because the migrant communities were fragmented and not organised. In Nelspruit, officials had received some training on migrant rights, which was reflected in standard perceptions on migrant rights to basic healthcare and education, but did not extend to information about labour rights or the differences between asylum seekers, refugees and undocumented migrants. The lack of information and engagement leads to false assumptions by public actors, which constrains service provision. For example, the CEO of the Polokwane Low-Cost Housing Association estimated that there are between 500,000–1,000,000 refugees in the town which, according to the 2001 census, has less than half a million residents. Such inflated estimates clearly militate against planning appropriate service provision.

Lack of information and advice for migrants

In all three towns, refugees and migrants had virtually no sources of information on their rights or about services available to them, although in Polokwane the local SAHRC office provided some information. Information was also lacking about the relevant procedures to obtain documentation, permits and licences, and the means of accessing local government officials and services. In all three places, there are few civil society structures capable of or willing to lobby for the rights of foreign migrants.

Access to basic services

The provision of some services seems to be better in smaller towns than in the metropolises. Migrants did not report any problems in accessing healthcare from public or private hospitals or clinics, or in accessing education for their children. As in the major cities, asylum seekers and refugees are excluded from public housing provision. A particularity of many medium and small towns is the continued division between the centre of town and the townships, so that most (African) migrants are dependent on accessing housing, healthcare and other services in these generally under-serviced communities. In Nelspruit, where most black residents live in nearby former homeland areas, traditional authorities

⁴⁶ These studies were conducted by Tesfalem Araia (Polokwane), Alain Morice (Nelspruit) and Vicki Igglesden (Worcester).

become important actors in granting foreign migrants access to housing and welfare services. There are very few NGOs providing welfare services to migrants in these towns. Mosques and churches are therefore the main sources of assistance for the undocumented, as well as for asylum seekers and refugees, providing food, shelter, information, and sometimes the transport money needed to access RROs.

Access to documentation

For asylum seekers living in these towns, the process of renewing their permits every few months is onerous, requiring expensive and time-consuming travel. To an even greater extent in the smaller towns than in the metropolises, the Section 22 permit is not recognised by many actors, including officials, police and employers. Many foreigners living in these towns are married to South Africans and therefore have permanent residence documentation.

Crime and xenophobic violence

Migrants in all of the towns considered security their main problem. As in other parts of the country, criminals target foreign migrants, partly because they are perceived to carry cash due to barriers in accessing bank accounts. Migrants feel that the police are not willing to provide them with protection in cases of crime against them. This is especially the case for small businessmen whose businesses are regularly robbed. While it appears that SAPS, broadly speaking, recognises the obligation to provide security to the person of foreign migrants, they appear unable or unwilling to provide the required protection of foreign migrant property. The SAHRC in Limpopo has confirmed that police disregard for cases brought by migrants is ‘very concerning.’

In spite of large populations of non-citizens in both towns, there have been no cases of organised xenophobic violence in either Polokwane or Nelspruit. However, the recent violence directed at foreign nationals in Zwelethemba outside Worcester, prior to the May attacks, has highlighted the ongoing vulnerability of foreign migrants in medium and small towns. It illustrates a grave shortfall in migrant access to appropriate levels of security and protection. CoRMSA commends the church groups in Zwelethemba that initiated interventions to reinstall foreign migrants in the township—in part in solidarity with largely Zimbabwean fellow congregants and in part due to the understanding that township residents were suffering without the services normally provided by foreign entrepreneurs.

Recommendations

To the United Nations High Commissioner for Refugees and the South African Human Rights Commission

- Provide training to local government authorities in medium and small towns to raise awareness about migrant and refugee rights.

To non-governmental organisations concerned with migrants’ rights

- Institute information dissemination and advice programmes for migrants in secondary and smaller towns around the country.

14. Special Groups

14a. Zimbabweans in South Africa: Legal & Humanitarian Responses

Since 2000, levels of Zimbabwean migration to South Africa have been rising steadily, and today Zimbabweans are by far the largest migrant group in South Africa. CoRMSA is concerned that, in spite of years of high migration levels and the continuing humanitarian and political crisis in Zimbabwe, **the South Africa government has still not developed and implemented a coherent response to recognise and assist Zimbabweans in South Africa.**

Migration patterns

numbers are based on inflationary speculation rather than solid evidence. Realistic estimates suggest that there are around one million Zimbabweans currently in South Africa, although this may increase if post-election uncertainty, violence, and starvation escalate. To date, most Zimbabwean migrants are young men (with 90% between 20 and 40 years old)⁴⁷, although increasing numbers of women have been moving in the past few years. So far, there are very few families with children,⁴⁸ but there are unaccompanied children in the border area who 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.

Lack of a comprehensive legal and humanitarian response

The key public debate concerning Zimbabweans is whether they are primarily economic migrants seeking work or refugees fleeing violence and persecution. In fact, both are the case, and **CoRMSA believes that the humanitarian nature of current Zimbabwean migration to South Africa should be emphasised** and used as the basis for developing appropriate responses. Currently, the South African government is applying standard refugee and migration management tools to Zimbabweans, including individual asylum applications for those fleeing persecution, individual work-permit applications for skilled persons seeking employment, and deportation for the undocumented. However, **none of these responses are effectively addressing the scale of Zimbabwean migration to South Africa, the specific vulnerabilities of Zimbabweans, or South Africa's interests in terms of economic development or migration information and control.**

Zimbabweans are extremely vulnerable in South Africa. Due to difficulties in accessing passports and visas in Zimbabwe, as well as due to fear of rejection by border officials, most Zimbabweans cross the border using informal channels. This has led to **extremely high levels of robbery, rape and even murder by criminal smuggling gangs in the border-crossing process.** Once in South Africa, most Zimbabweans have few avenues for accessing legal documentation. Those who qualify for asylum are faced with the same access challenges and delays as other asylum seekers (as described earlier in the report). Explicit discrimination against Zimbabwean asylum seekers by the DHA was challenged in court in 2006, and now Zimbabwean applications are being processed on their individual merits, as the law requires. Zimbabweans were by far the largest group of new asylum applicants in 2007, with 17,665 new applications. The vast majority of Zimbabweans, however, are not applying for asylum and would probably not qualify on the basis of having experienced individual persecution. There have been calls by the UNHCR and various NGOs for the South African government to introduce a form of temporary permit for Zimbabweans in order to regularise their legal position in the country. These calls have, however, not yet received a response.

Because of the lack of legal residence options, Zimbabweans are especially vulnerable to deportation. Although the DHA no longer publishes a breakdown by nationality of its deportation figures, Zimbabweans have been the largest group of deportees for several years, with thousands deported monthly, often directly from the border areas. New research confirms that Zimbabweans in South Africa

⁴⁷ This is based on findings from the FMSP Migrant Rights Monitoring Project (MRMP)

⁴⁸ MRMP findings show that only 8% of Zimbabweans surveyed had children with them in South Africa

are much more likely to have been deported at least once compared with other migrant groups.⁴⁹ It is clear that the deportation programme is ineffective, since most Zimbabwean deportees return to South Africa immediately. The programme is thus a waste of tax money, as well as police and DHA capacity. Of most concern to CoRMSA, however, is that most Zimbabweans are being deported directly from the border area without appropriate screening by DHA officials. **It is therefore likely that persons with valid refugee claims are being returned to Zimbabwe, making South Africa guilty of refoulement:** the international legal prohibition against returning a person to their country of origin if their 'life or freedom would be threatened.'⁵⁰

The lack of a coordinated and comprehensive government response to Zimbabwean migration also means that Zimbabweans have very few sources of assistance for meeting their basic needs. Some welfare assistance is provided through religious organisations and NGOs. However, as illustrated by the January 2008 police raid on the Central Methodist Church in Johannesburg, which has provided shelter to many Zimbabweans, government does not support such civil society initiatives in a coordinated manner. CoRMSA applauds those municipalities, such as the City of Johannesburg, which have taken the initiative to provide welfare services to Zimbabweans, for example through providing shelter or centralising advice services.

Most Zimbabweans support themselves, and their destitute families in Zimbabwe, through their own work. Zimbabwean workers are potentially a valuable resource for the South African economy, due to relatively high education and skill levels. For example, 30.4% of Zimbabweans in the recent FMSP study had completed at least one tertiary degree. Because of the lack of legal status, however, many skilled Zimbabweans are working in casual or part-time employment or are not working at all. Because of their undocumented status, many Zimbabweans are hired by unscrupulous employers for low wages, which harms wage levels and labour standards for everyone. **CoRMSA therefore calls on the South African government to introduce a form of documentation for Zimbabweans that will allow them to work legally, since this will address humanitarian needs, make use of Zimbabwean skills, and protect labour standards by preventing exploitation.**

Finally, Zimbabweans have been targets of xenophobic violence in many parts of the country. While xenophobic violence affects many different nationalities, Zimbabweans are often affected because they are more likely to live in informal settlements and townships than many other migrant groups.

Recommendations

To the Department of Home Affairs

- Introduce a temporary permit for Zimbabweans that would confer the legal right to remain in South Africa, access basic public services, and work, for a limited period of time;
- Immediately stop the deportation of Zimbabweans in border areas and elsewhere until adequate systems to prevent refoulement are in place; and
- Ensure continued access to the asylum process for Zimbabweans who have experienced persecution.

To the Department of Foreign Affairs

- Relax visa requirements for Zimbabweans in line with SADC commitments and existing arrangements for other SADC citizens, such as 30, 60 or 90-day visa-free entry.

⁴⁹ MRMP data shows that 9.3% of Zimbabwean survey respondents had been deported at least once, compared with a 1.3% average for the other migrant nationalities.

⁵⁰ 1951 UN Convention Relating to the Status of Refugees, Article 33.

To the Departments of Social Development, Health, Education and Housing

- 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; and
- Follow the initiative of the DoE in introducing systems for hiring skilled Zimbabweans into areas of the public service where there are skills shortages.

To the Departments of Labour, Technology and Industry

- 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

- Immediately cease the illegal deportation of Zimbabweans from the border area without screening by DHA officials.

To municipalities

- Follow the initiative of Johannesburg Metro Council in offering dedicated information services and possibly temporary housing arrangements for especially vulnerable Zimbabwean migrants.

To the United Nations High Commissioner for Refugees

- Strengthen efforts to work with the South African government to develop a temporary permit scheme for Zimbabweans.

14b. Migrants of Asian Descent⁵¹

'Even those with proper documents are harassed [by police].'
Bangladeshi migrant, Free State, March 2008

'I hear every day that some shop was broken into, looted.'
Bangladeshi shopkeeper, Delareyville, North West Province, March 2008

At present, there are an estimated 300,000 to 350,000 people of Chinese descent, approximately 60,000 to 70,000 Pakistanis, and a further 30,000 to 40,000 Bangladeshis in South Africa. The numbers of recently arrived Indian nationals are not known. These Asian migrants to South Africa are often overlooked in debates about migration. Even though the total numbers of Asian migrants are not as large as African migrants, and they are not as visible in public or policy discussions, they have the same rights and experience some of the same difficulties in South Africa. While it is clearly the black African migrant to South Africa who suffers the brunt of violent xenophobic attacks, these diverse populations of Asian migrants are also increasingly vulnerable. This section therefore provides a preliminary overview of Asian migration to South Africa.

Migration patterns

The context for recent Asian migration has been significantly affected by the presence of historical migrant groups from China and the Indian subcontinent in South Africa. For the general South African public, new arrivals from the Indian subcontinent blend in with the local Indian South African population, and newly arrived Chinese are associated with the small population of second, third, and fourth, generation Chinese South Africans, or with Taiwanese who were invited to South Africa in the 1960s and 1970s. Apartheid-era constructions of Chinese—as 'honorary white'—also affect the way new Chinese arrivals are perceived by other South Africans.

While small numbers of Asian migrants began arriving in South Africa in the 1980s, prior to the end of apartheid, the vast majority of those currently in the country are relatively recent arrivals from the past 5 to 10 years. The newer Asian arrivals to South Africa are the most numerous, the most diverse and also the most vulnerable. The majority of those residing in the big cities are professionals, and they often blend into the increasingly international business communities, particularly in Johannesburg. Others live concentrated in and around old Indian neighbourhoods or new Chinatowns. A large proportion of recently arrived Asian migrants, however, have moved into small towns, townships, and rural areas where they tend to operate small shops. Recent research in the Free State indicates that almost every major town, secondary town, and most small towns had at least one Chinese shop and several Bangladeshi or Pakistani shops along the main road or in the adjacent township. **This dispersion outside the main cities, and the accompanying small-business entrepreneurship, is a key characteristic of Asian migration to South Africa.**

Most Asian migration is chain migration, in that family members, friends, and neighbours follow a few initial migrants. It appears that many of the newest Chinese arrivals to South Africa hail from Fujian province, a rural area that has experienced tremendous social and economic upheavals due to China's shifting economic policies. While further research would be required to confirm this, it also appears that the vast majority of Bangladeshi and Pakistani migrants to South Africa hail from one or two particular regions of those countries, where poverty and high population densities push people out to seek opportunities elsewhere. For example, one Bangladeshi informant reported that more than 50% of the Bangladeshis in South Africa come from the greater Noakhali district. One Bangladeshi man reported that he had one brother, seven brothers-in-law, and over 70 cousins scattered across South Africa, living in areas as diverse as Johannesburg, Umtata in the Eastern Cape, and Ficksburg and Clocolan in the Free State. A Chinese migrant reported that she had brothers, sisters, aunts, uncles and cousins operating small shops in small towns in the surrounding 100 kilometre-range from her own shop in the Free State.

Most Asian migrants reported that they aim to be in South Africa temporarily, and all were sending remittances back home to support elderly parents, younger siblings, and other relatives.

⁵¹ This section was researched and written by Dr. Yoon Park

Crime and harassment by South African officials

For Asian migrants in South Africa, particularly those engaged in shop keeping, the most serious and chronic problem they face is crime. **Crimes against Asian migrants seem to be on the rise.** One shopkeeper reported that in the past six months there had been a marked increase in murders, robberies and robbery attempts, lootings, and beatings against Pakistanis. He reported that, over the past several years, increasing numbers of bodies of the deceased had to be transported back to Pakistan. A Bangladeshi shopkeeper reported that in 2007 in the town of Delareyville in the North West Province, about 70 Bangladeshi shops were looted, and the shopkeepers beaten. He said, 'I hear, every day, that some shop was broken into, looted.'

The vulnerability of new Asian migrants to break-ins and lootings is high because they are seen to be engaged in small retail businesses and because they often do not use the formal banking system (see above), and are perceived as less likely to have strong private security provision or to go to the police. They are, in the words of one Asian migrant, 'soft targets'. There were also several reports of car hijackings after shopkeepers made weekly or monthly stock purchases at large warehouse/distribution centres.

While the vast majority of crimes seem to be carried out by South Africans, there is also ample evidence of Chinese-on-Chinese crime, mostly in the large cities, and often involving Chinese triads, as well as immigrant-on-immigrant crime. For example, in one small Free State town, a Chinese informant reported that she and her mother had been harassed and intimidated by local criminals, allegedly hired by an 'Indian' competitor in the adjacent township.

Corrupt government officials have also identified Asian migrants as potential targets from whom to extort bribes. Educated urban Chinese report that they are regularly stopped by police requesting bribes. A Pakistani shopkeeper said of the local officials (including SAPS and DHA): 'These people are troublemakers; they only know how to make trouble for us.'

The protection of people of Asian descent is no different from protecting everyone else in South African society. We must only recognise that discrimination is not something limited to African migrants, nor is the damage done by xenophobia.

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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Amnesty International, South Africa Chapter	Linda Mafu	012 320 8155 director@amnesty.org.za
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Cape Town Refugee Centre	Christina Henda	021 762 9670 christinactrc@telkomsa.net
Centre for the Study of Violence and Reconciliation	Marivic Garcia	011 403 5650 mgarcia@csvr.org.za
Christians for Peace in Africa	Pastor Thomas-Rene Kitutu	072 262 5302 Christianforpeaceinafrica@yahoo.com
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