Protecting Refugees, Asylum Seekers and Immigrants in South Africa during 2010

Johannesburg
April 2011
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www.CoRMSA.org.za
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 comprises member organisations and individuals dedicated to protecting the lives 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-raising, capacity building, and networking.

The Consortium’s members are:

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

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

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REMARKS FROM THE CHAIR

At the beginning of 2010, sub-Saharan Africa was home to some 2 million refugees. For the ninth consecutive year, the number of refugees continued to decline from a figure of 3.4 million in 2000. However, renewed armed conflict and human rights violations in the Democratic Republic of Congo (DRC) and Somalia led to new outflows of people from these countries. Some 420 000 individual asylum seekers were registered in sub-Saharan Africa in 2009, with more than half of these in South Africa, which has the highest number of asylum applications worldwide. The majority of these persons are from Zimbabwe, and many fall outside the definition of ‘refugee’ according to international law.

Zimbabwe Dispensation Project

CoRMSA commends the Cabinet and the Department of Home Affairs (DHA) for finally implementing the special dispensation for Zimbabweans in the form of the Zimbabwe Documentation Project (ZDP). This appeared to be an effective means to document Zimbabweans outside the asylum process. However, we have some serious concerns about the way that the process was rolled out and the limited number of Zimbabweans who benefited from the process. CoRMSA relies on empirically grounded figures of between 1 and 2 million Zimbabweans in SA. The ZDP process has reached 275 000 persons. This amounts to about 12% of the estimated number of Zimbabweans who are in South Africa. It stands to reason that the other 88%, if they do not have some form of alternative status (asylum seeker, refugee or work permits, etc), will be eligible for deportation as soon as the moratorium on deportations to Zimbabwe ends on 31 July 2011. We are concerned that there are a substantial number of persons who have not been able to apply due to lack of information, and indeed the unreliability of the information that emanated from various DHA offices and senior DHA officials during the application window.

CoRMSA remains concerned that the entire ZDP process was held to ransom by the Zimbabwean authorities’ ability to make passports available. We are also concerned about the deportation process which is likely to commence in earnest after August 2011. It is likely that we will see renewed violence against foreigners and particularly Zimbabweans, especially if there is an impression that the targeting and eviction of foreigners is tacitly supported by government policy.

Xenophobia

CoRMSA commends the South African Police Service (SAPS) for putting into place an early warning system to warn of imminent and possible outbreaks of xenophobic violence. There have been ongoing attacks on foreigners and looting of foreign-owned shops in 2010, and CoRMSA remains concerned that not enough is being done at a local and national level to deal with cases that are attributed to mere ‘criminality’.
Xenophobia and incidences of xenophobic violence are not decreasing. Many of these incidents do not receive coverage in the mainstream media, and this creates the impression that xenophobia is no longer a problem. The truth is far from that, as the report chapter ‘Responses to violence against foreign nationals’ attests. There is a pressing need for legislation specifically targeting hate speech and intolerance. This needs to be partnered with an active citizenry who are monitoring and reporting incidences and outbreaks of violence to the police, so that these criminal elements of our society are rooted out.

**Access to Banking Services**

In 2010, CoRMSA achieved an important victory on access to banking services for asylum seekers and refugees. In May 2010, the Financial Intelligence Centre issued a communication which effectively directed banks to cease accepting refugee and asylum seeker permits as proof of identification. This led to a number of asylum seekers and refugees being denied access to the funds in their previously existing accounts. It also prevented many from opening new bank accounts. This policy held the danger of driving even more people into informal banking structures, contradicting the very objective and purpose of the Financial Intelligence Centre Act. However, as a result of an agreement reached through the interventions of CoRMSA, refugees and asylum seekers are again able to access their bank accounts using refugee and asylum seeker permits issued by the DHA.

**Refugee and Immigration Act Amendments**

At the current time both the Refugees Act and the Immigration Act are being reviewed and are undergoing amendments. While these acts are still in the amendment process, the DHA has surprisingly already started implementing certain changes. Indeed, the department has begun implementing one of the most controversial elements of the Immigration Amendment Bill – the use of pre-screening procedures for asylum seekers at the border. While members of the department have issued conflicting statements over what this will mean in practice, the Minister has stated that asylum seekers will be subject to the ‘first safe country’ principle, and that those individuals who, *en route* to South Africa, passed through other countries where they could have applied for asylum will be turned away at the border. Nothing in South African law currently provides for this practice, and our courts have ruled to the contrary, holding that an individual cannot be denied asylum in South Africa because he or she first passed through another country. But there are increasing reports of individuals being turned away at the border on this basis, without any proper determination of their need for asylum protection.

Internationally, South Africa is bound by the 1951 United Nations Convention (and 1967 Protocol) Relating to the Status of Refugees, as well as the 1969 Organisation for African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa. These instruments prohibit the return of asylum seekers to countries where they may face persecution. The practice of turning away individuals at the border violates this non-refoulement principle. In January this year, the European Court of Human
Rights found this same practice illegal, and further ruled that returning an individual to a country whose asylum system was deficient constituted ‘indirect refoulement.’

CoRMSA and its members continue to monitor these processes and actively lobby for progressive change.

Kaajal Ramjathan-Keogh
Chair, CoRMSA Executive Committee
## ACRONYMS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACMS</td>
<td>African Centre for Migration and Society (formerly FMSP), University of the Witwatersrand</td>
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<tr>
<td>AIDS</td>
<td>Acquired Immunodeficiency Syndrome</td>
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<td>ANC</td>
<td>African National Congress</td>
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<tr>
<td>APRM</td>
<td>African Peer Review Mechanism</td>
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<td>ARASA</td>
<td>Aids and Rights Alliance of Southern Africa</td>
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<td>ART</td>
<td>Anti-Retroviral Treatment</td>
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<tr>
<td>CALS</td>
<td>Centre for Applied Legal Studies</td>
</tr>
<tr>
<td>CASE</td>
<td>Community Agency for Social Enquiry</td>
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<tr>
<td>CBO</td>
<td>Community-Based Organisation</td>
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<tr>
<td>CCMA</td>
<td>Commission for Conciliation, Mediation, and Arbitration</td>
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<tr>
<td>CFR</td>
<td>Case Fatality Rate</td>
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<tr>
<td>CIPRO</td>
<td>Companies and Intellectual Property Registration Office</td>
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<tr>
<td>COJ</td>
<td>City of Johannesburg</td>
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<tr>
<td>DCoGTA</td>
<td>Department of Cooperative Governance and Traditional Affairs</td>
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<td>DHA</td>
<td>Department of Home Affairs</td>
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<td>DBE</td>
<td>Department of Basic Education</td>
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<tr>
<td>DoH</td>
<td>Department of Health</td>
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<td>DoJCD</td>
<td>Department of Justice and Constitutional Development</td>
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<td>DoL</td>
<td>Department of Labour</td>
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<tr>
<td>DSD</td>
<td>Department of Social Development</td>
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<tr>
<td>FMSP</td>
<td>Forced Migration Studies Programme</td>
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<tr>
<td>HANSA</td>
<td>Humanitarian Assistance Network of South Africa</td>
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<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<tr>
<td>HSRC</td>
<td>Human Sciences Research Council</td>
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<tr>
<td>IAB</td>
<td>Immigration Advisory Board</td>
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<td>IDP</td>
<td>Internally Displaced Person</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>IOM</td>
<td>International Organisation for Migration</td>
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<td>IPEC</td>
<td>International Programme on the Elimination of Child Labour</td>
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<tr>
<td>ISS</td>
<td>Institute for Security Studies</td>
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<td>JMAC</td>
<td>Johannesburg Migrants’ Advisory Committee</td>
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<td>JRS</td>
<td>Jesuit Refugee Service</td>
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<td>LHR</td>
<td>Lawyers for Human Rights</td>
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<td>LRC</td>
<td>Legal Resources Centre</td>
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<tr>
<td>MSF</td>
<td>Médecins Sans Frontières / Doctors Without Borders</td>
</tr>
<tr>
<td>NAFCOC</td>
<td>National African Federated Chamber of Commerce and Industry</td>
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<tr>
<td>NDMC</td>
<td>National Disaster Management Centre</td>
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</tbody>
</table>
NGO  Non-Governmental Organisation
NIB  National Immigration Branch
NPA  National Prosecuting Authority
NSP  National Strategic Plan (The HIV and AIDS and STI Strategic Plan for South Africa)
OHCHR  Office of the High Commissioner for Human Rights
RAB  Refugee Appeal Board
RCP  Refugee Children’s Project
SACTAP  Southern African Counter-Trafficking Programme
SADC  Southern African Development Community
SAHRC  South African Human Rights Commission
SALGA  South African Local Government Association
SALRC  South African Law Reform Commission
SANAC  South African National AIDS Council
SANDF  South African National Defence Force
SAPS  South African Police Service
SARS  South African Revenue Service
SCA  Supreme Court of Appeal
SMG  Soutpansberg Military Grounds
SOCA  Sexual Offences and Community Affairs
SWEAT  Sex Worker Education and Advisory Taskteam
TB  Tuberculosis
TIP  Trafficking in Persons
TIRRO  Tshwane Interim Refugee Reception Office
UNDP  United Nations Development Programme
UNHCR  United Nations High Commissioner for Refugees
UNICEF  United Nations Children’s Fund
UNOCHA  United Nations Office for the Coordination of Humanitarian Affairs
VCT  Voluntary Counselling and Testing
WHO  World Health Organisation
WLC  Wits University Law Clinic
SUMMARY OF FINDINGS AND RECOMMENDATIONS

The movement of people into, within and through South Africa raises fundamental questions about the country’s commitments to human rights, regional integration, security, and economic development. Where it was once a side issue occupying minor corners of government and civil society, a combination of domestic debates and global trends has put the country’s response to migrants at the heart of South Africa’s policy agenda. In the coming year, the government will debate amendments to the Immigration Act and has committed to continue efforts to regularise migrants from across Southern Africa who have been living and working in the country. Elsewhere, the South African Local Government Association (SALGA) will begin enlisting municipal authorities in a campaign to plan for and protect refugees along with domestic and international migrants. The Department of Health (DoH) has recognised the need to build systems that promote people’s access to basic health services regardless of their migration status. The innovative ‘Protection Working Group’ – a body bringing together the police, line ministries, civil society and international agencies – has done impressive collaborative work to combat xenophobic violence and continues to identify hotspots and pre-emptively respond to threats of xenophobic violence. CoRMSA has played a central part in putting these issues on the agenda, and will continue to work tirelessly to ensure that they are effectively addressed.

Despite positive developments and an opening of space for discussion with local and national government representatives, there is much work to do. In early 2011, a United Nations delegation called on South Africa to “improve social cohesion and measures against discrimination, exploitation, a tendency by the police to ignore the rights of migrants, and the overall lack of a comprehensive immigration policy that incorporates human rights protection.”1 Statements by the Minister of Home Affairs, Nkosazana Dlamini-Zuma, suggest that there is ambivalence, even at the highest levels, about the protection of migrants and refugees in South Africa.2 Part of this uncertainty stems from the fallacy that migrants’ interests run counter to positive economic and political transformation. Moreover, many continue to feel that South Africa cannot effectively combat xenophobia until we have banished inequalities and racism within the citizenry. CoRMSA takes the position that efforts to build a system of policies and laws that protect migrants and refugees cannot be separated from the objective of building a just and transformed South Africa.

South Africa remains part of the larger region of the Southern Africa Development Community (SADC) and cannot close its borders. Nor should it. Not only is South Africa obliged by international law to protect refugees and asylum seekers, but the movement of people within the region helps to foster prosperity and human security. Similarly, efforts to arrest, detain, or inhibit the migrants’ economic activities within the country only hinder investment, job creation, and social cohesion. To be sure, some

1 South Africa: UN expert calls for better protection of migrants, http://radio1812.net/es/node/5255
2 For instance, the Minister’s intention to apply the ‘first safe country’ principle contrary to court judgments ruling that asylum cannot be denied on this basis. See press release at http://www.sangonet.org.za/press-release/home-affairs-minister-defends-use-controversial-measures-exclude-asylum-seekers-sa
South Africans lose out when foreigners move in. But all evidence suggests that migrants’ skills, entrepreneurship and investment helps South African business and creates jobs for locals. Continued myth-making and scapegoating will only take us backward. By accepting that migrants and refugees are part of the country’s population, we can develop pragmatic policing, urban development, and health policies.

South Africa’s inability to come to terms with Zimbabwean migration continues to tarnish the country’s reputation and reveals more fundamental questions about the commitment to protect non-nationals within its borders. While marketed as a generous offer to help Zimbabweans secure legal status in South Africa, 2010’s ‘regularisation’ process was characterised by bureaucratic ineptitude and dissimulation. The result was that approximately 10% of the Zimbabweans in the country have obtained some kind of durable legal status. The remaining 1 million or more have been left in limbo, uncertain whether they will be arrested, deported, or simply left to find their way through the overwhelmed asylum system. This scenario suggests that the South African government’s approach to migration is Janus-faced: offering a friendly, embracing vision to the world while in reality shutting out the non-nationals crossing its borders or living within them. While there is reason for considerable disquiet, the possibility of extending similar amnesties to other SADC nationals hints at a gradual recognition of the need to build a regional migration framework.

This report provides a summary of some of the most significant developments affecting the rights of refugees, asylum seekers, and other migrants in South Africa. The point is not to suggest that migrant rights should take priority over those of citizens: protection of those who move will only be achieved through strengthening the broader systems of administrative and criminal justice that serve all who live in South Africa, and improvements in the quality of care and services provided to the country’s poor and marginalised populations. For those concerned with the rights and welfare of non-nationals in South Africa, this document provides the best available data and analysis. For others, it offers a snapshot of South Africa’s strengths and weaknesses in protecting one among many vulnerable populations.

This year’s report focuses on key elements of refugee and migrant rights protection in South Africa. Based on extensive research by CoRMSA and its partners, each section offers a series of recommendations to promote positive and pragmatic reforms. The points below provide a summary of the report’s primary findings and recommendations.
Developments in Law, Policy and Local Government Practice

Policy Developments

- More than two years after the Department of Home Affairs (DHA) commissioned a migration policy review, there are few signs of substantive shifts in policy direction. One of the most potentially important developments of 2010 involved the re-constitution of the legally-mandated Immigration Advisory Board (IAB). While offering the opportunity for greater coordination on migration issues, the board’s operations remain opaque, with ad hoc meetings, unclear agendas and members restrained by confidentiality clauses on the board’s discussions.

Recommendations

As reforms continue, CORMSA recommends that South Africa should:

- Develop policy frameworks that exploit the social and economic benefits of migration, and mainstream the issue across policy sectors, departments, and spheres of government.

- Supported by effective interdepartmental data gathering and capacity-building mechanisms, tailor immigration policy to South Africa’s actual needs, challenges and capacities, while working within the SADC multi- and bi-lateral frameworks.

- Develop a policy framework for social cohesion and the integration of all migrants.

- Better capacitate local government for mobility management.

Legal Developments

- Over the past year, several recent cases have advanced the rights of asylum seekers and other migrants in detention. There are also a number of cases addressing other forms of discrimination against asylum seekers and refugees that are currently underway. After conflicting high court interpretations, the Supreme Court of Appeal (SCA) in Arse\(^3\) clearly stated that individuals being detained as illegal foreigners may not be held for over 120 days. It also upheld a decision confirming that DHA cannot detain an asylum seeker as an ‘illegal foreigner’ regardless of where they are in the application or appeals process.

- In 2010, CoRMSA successfully launched a case against South African banks, seeking to overturn the Financial Intelligence Centre’s (FIC’s) decision to advise banks against opening accounts for

\(^3\) *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA).
asylum seekers and refugees or allowing them to transact on their already existing accounts. The case (CoRMSA vs Absa and others) was successful and the court ordered the banks to allow asylum seekers and refugees on s22 and s24 permits respectively to open bank accounts on condition that the DHA verifies the authenticity of these documents. FIC was further ordered to communicate the court’s decision with the banks. Despite this, reports have been received of asylum seekers and refugees experiencing challenges in certain branches of particular banks.

Recommendations

- The Financial Intelligence Centre should ensure that the court order resulting from CoRMSA vs Absa and others has been disseminated to all banking institutions.
- Banking institutions should ensure that bank officials are aware of the change in the FIC guidelines and implement the CoRMSA vs Absa and others court order in all branches.
- Civil society should use public awareness and information campaigns to spread news of this change as widely as possible.
- DHA should ensure swift verification of s22 and s24 permits on request by banks.
- DHA should post notices of the FIC decision at all refugee reception offices.
- In light of the numerous court actions taken against it, and the Supreme Court of Appeal judgment in Abdi¹ chastising the department’s lack of respect for individual rights and its use of spurious legal arguments, the DHA should review its defensive approach to litigation, which consumes limited departmental resources in defence of actions that violate the rights the department is tasked to uphold.

Developing Local Government Responses to Migration

- Constitutionally empowered to be a leading force for development, provincial and municipal authorities have nevertheless been wary of addressing population movements or acknowledging human mobility as a fundamental driver of or response to development. Rather than take a proactive approach that plans for mobility in all of its forms, South African local authorities have typically shied away from addressing concerns related to migration, including inter-group conflict, economic marginalisation, and the inability to access suitable housing and services. These are concerns that directly affect the rights and welfare of both domestic and international migrants, who often struggle to find their way in a new location. Yet failing to meet the very real challenges of domestic and international migration creates the risk of increasing conflict, violence, poverty and social exclusion, thus negatively affecting all urban residents.

• One of the most fundamental challenges to local government in protecting the rights and welfare of migrants is how little municipalities know about the people living in their cities. This is generally true regarding the urban poor and all the more so with geographically mobile people. While larger cities have been able to develop their own research departments, smaller municipalities have struggled to make sense of their communities’ population dynamics. Without a proactive perspective on what can be done to address human mobility, the common refrain – ‘We can’t cope with this influx of people!’ – threatens to become a self-fulfilling prophecy.

• Failure to manage migration is yielding undesired consequences for all residents of South Africa. However, when properly managed, domestic migration can bring people closer to services, enrich the labour market, and open important opportunities for reducing poverty and protecting rights. Similarly, international migration need not lead to conflict and tensions, but can help to provide much-needed skills and entrepreneurial energy while boosting regional trade and integration and helping to facilitate post-conflict reconstruction.

**Recommendations**

• Statistics South Africa (StatsSA) should: review its data collection system and its interface with municipalities and provinces in order to standardise data at national and municipal level; ensure that methods are credible to all stakeholders; allow longitudinal tracking of trends over time and appropriate levels of aggregation – including at local level – to inform planning; and ensure that staff are appropriately trained in both data management and use, and on relevant migration issues.

• The Department of Cooperative Governance and Traditional Affairs (DCoGTA), Treasury, and Local Authorities, should:
  o Mainstream population (including migration) dynamics into IDPs, and cater for highly mobile populations wherever necessary.
  o Use evidence in a more balanced way for policy formulation, and include spatial planning tools to facilitate the use of population data for policy and planning.
  o Review budgeting processes including the Local Government Equitable Share (LGES) allocation to include forward-looking population dynamics and allow for more regular population re-assessments and correction effects on revenue allocation.
  o Establish closer relations with researchers and data analysts to assist in the rethinking of decision making and implementation mandates with regard to mobile populations.
  o Improve coordination of all relevant partners at national, provincial and local levels towards a more effective management of migration. These include all spheres of government, civil society, private sector, research agencies, and academic institutions.
  o Facilitate the institutionalisation of the local government response to migration in order to improve communication and coordination between municipalities and migrant
communities. This would need to include the establishment of dedicated capacity to deal with migration, such as a migrant desk in each municipality.

- The DHA should develop immigration policy to promote the goals of regional integration, counter-poverty, social justice and human rights, including developing appropriate means for people to enter the country legally and with appropriate documentation.

- Reforms in migration policy should be carried out in collaboration with municipalities.

- DCoGTA should build capacity among local authorities by training staff to enable them to understand, interpret and use population data for their planning and programming.

- Toward protecting the labour market, the Departments of Home Affairs and Labour should consider sanctions against employers who violate immigration and labour laws and more regular inspection of workplaces to ensure that the basic conditions of employment are being upheld.
Current Issues 2009-2010

Responses to Violence against Foreign Nationals

- Xenophobic violence continues to be a serious ongoing concern and foreign nationals continue to lose their lives and/or livelihoods. This is not only an urban issue, but is increasingly affecting smaller towns and agricultural areas. Since May 2008, there has been at least one attack on groups of foreign nationals in the country almost every month. Despite denials, numerous incidents took place around the end of the 2010 Soccer World Cup.

- On the positive side, there have been important shifts in perceptions, particularly among local government and the police. This has helped facilitate sustained engagement and consultation with civil society, which has resulted in examples of quick and decisive response to early signs of violence.

- However, challenges remain. In many instances, government officials continue to argue that xenophobic violence is simply the result of crime. While there have examples of swift and decisive response, security responses have generally been late and reactive despite clear warning signs. Where violence has occurred, we continue to see impunity, lack of accountability and little effort to address the community leadership and local governance issues raised as direct causes of the violence. Moreover, although social cohesion is a recognised political priority, there is little concrete programming at the local government level.

Recommendations

- The Department of Justice and Constitutional Development (DoJCD) should regularly publish statistics regarding the number of arrests and convictions relating to crimes and violence against foreign nationals. It should also finalise and operationalise the National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

- The Department of Cooperative Governance and Traditional Affairs (DCoGTA) should identify and implement effective and legally sound conflict resolution mechanisms to prevent communities’ recourse to vigilantism and mob justice.

- DCoGTA should also evaluate the roles and actions of community leadership structures, and adjust functioning and/or oversight measures in accordance. On a case-by-case basis, it should scrutinise the relationships between elected officials, street committees, civics, community policing forums, and other entities implicated in some cases of xenophobic violence.
DCoGTA should develop more clearly operational programming around social cohesion at local government level, establishing specific responsibilities for specific local officials.

DCoGTA should intensify efforts to address institutionalised xenophobia and discrimination.

DCoGTA should establish effective early warning and response systems through the National Disaster Management Centre.

The South African Police Service (SAPS): should maintain and strengthen existing initiatives to collate and interpret information about violence against foreign nationals; continue efforts to coordinate contingency plans and information-sharing with other government departments; and develop means of regularly exchanging information with civil society organisations that are monitoring incidents of violence against foreign nationals, as not all cases may be reported to the police.

The South African Human Rights Commission (SAHRC) should strengthen ongoing oversight processes, going beyond making recommendations to ensure their implementation. The SAHRC should be capacitated, in terms of budget, personnel and political support, to follow up on these commitments, as well as enforcing compliance from departments which fail to cooperate with its investigations.

International organisations should support government efforts to effectively manage migration and protect the rights of non-nationals, and support local civil society’s capacity to monitor and influence government policies and practices with regard to protecting the lives and rights of all the country’s residents.

Civil society should: initiate and support mechanisms to hold government accountable; support civic education about human rights and immigration policies; and continue to develop independent technical disaster response capacities within civil society, as well as coordination and communication mechanisms for humanitarian interventions.

**Xenophobia and the Media**

Historically, the media has tended to misrepresent non-nationals and reinforce stereotypes about immigrants among the South African population.

Since 2008, there have been improvements in the reporting of xenophobia and deliberate efforts to capacitate journalists to report in a more balanced and fair manner in this regard.
Recommendations

- In reporting on non-nationals, xenophobia and related violence, journalists should adhere to the basics of good journalism, such as balance, fairness, independence, proper research and fact checking, critical thinking and wider sourcing. CoRMSA’s guidelines towards meeting these fundamental criteria are presented in the body of the report.

Responses to Zimbabwean Migration

- Since the mid-2000s, Zimbabweans have been the largest nationality among foreign nationals in South Africa. CoRMSA believes that any policy aimed at managing Zimbabwean migration should be oriented toward facilitating and regularising mobility between South Africa and Zimbabwe in the long term, ideally as part of a larger strategy towards regional facilitated movement for work and trade.

- After many years in which South Africa attempted to address Zimbabwean migration through general migration policies, there has been a recent shift towards specifically adapted policies for the management of Zimbabwean mobility, including a 90-day no-cost visa and a moratorium on deportations in April 2009.

- An initiative to regularise Zimbabweans in South Africa was announced in September 2010, making work, study and small business permits available to Zimbabweans with relaxed application requirements. CoRMSA welcomed the special permitting process and supports the DHA in its willingness to relax the requirements for accessing these types of permits.

- However, there have been significant and fundamental flaws in the implementation of the permitting system. The short application period, along with administrative bottlenecks, prevented many potentially eligible Zimbabweans from obtaining the permits. Those with special humanitarian needs who had not been able to work in the past were excluded. Asylum seekers were required to surrender their asylum permits in order to apply, with no guarantee that their application would be successful, putting them at risk of being left undocumented and subsequently subjected to refoulement— the return of an asylum seeker to a country where he or she may face persecution or a threat to his or her life.

- In the end, roughly 275 000 out of the estimated population of 1 to 1.5 million Zimbabweans in South Africa\(^5\) were able to apply within the three-month period. This suggests the programme had significant limitations in addressing Zimbabwean migration to South Africa.

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Recommendations

- The DHA should clarify the strategic and political long-term purpose of the current and all future documentation processes, and align the operational decisions regarding time frames with these strategic objectives.

- The DHA should emphasise regular communication as an integral part of any special permitting process. This includes clear communication about standard procedures within the department, as well as communication with other government departments, civil society, the permit process target group and the general public.

- The DHA should urgently develop a policy, in consultation and coordination with the departments of Social Development, SAPS, international agencies and local civil society, regarding the protection of particularly vulnerable groups of Zimbabweans, particularly the disabled, unaccompanied children and those in need of chronic medication, so that they are not subjected to arrest and deportation due to their ineligibility for the permitting process.

- The South African Human Rights Commission, the Office for Monitoring and Evaluation in the Presidency, and the Public Protector should use all mandated oversight mechanisms to ensure that the DHA, SAPS and all other government departments involved in the permitting process and its effects (such as the resumption of deportation) are fulfilling their obligations in terms of administrative justice. Especially ensure that the protective function of the asylum system remains in place and that Zimbabweans are not excluded from applying for asylum.

- Civil society should build coalitions to lobby government regarding the alignment of short-term permitting processes with longer term regional integration agendas and work collaboratively to monitor the implementation of permitting processes and ensure that arrest and deportation processes fulfil all requirements of administrative justice.

Human Trafficking and the 2010 World Cup

- Over the past ten years, human trafficking has received increasing attention nationally and internationally. The South African government is obliged, by several international agreements to which it is party, to act to counter and prevent trafficking. This includes the Palermo Protocol and the ILO’s Convention 182 on the Worst Forms of Child Labour.

- There is uncertainty about the extent of trafficking in South Africa, and data suggesting that trafficking may not be the vast problem many believe it to be. Despite this, South Africa was placed on the Tier-2 watch list of the US Department of State’s Trafficking in Persons report in 2004 and only in 2009 moved onto Tier 2: “Countries whose governments do not fully comply with the TVPA’s
minimum standards, but are making significant efforts to bring themselves into compliance with those standards”.

- The 2010 Soccer World Cup sparked sensational fears of 40 000 to 100 000 women and children being trafficked for the event, yet the Department of Justice and Constitutional Development reported at a Parliamentary meeting in August 2010 that it did not find a single case of human trafficking during the World Cup.

- The Prevention and Combating of Trafficking in Persons Bill, released in March 2010, aims to give effect to South Africa’s international commitments to counter and prevent human trafficking and provide the basis for the prosecution of offenders and protection of victims of trafficking. However, aspects of the Bill remain contentious and a number of definitions ambiguous. As a result, the Bill risks equating human trafficking with voluntary sex work, and inappropriately defines various other abusive and/or illegal practices as trafficking, so that it becomes unclear exactly what the legislation aims to counter. More precise drafting will be necessary to ensure an unambiguous bill that translates into clear and unambiguous roles for the various government departments and agencies whose cooperation will be essential for the implementation of the legislation.

- With regard to the status of foreign victims of trafficking, the Bill places an unfairly onerous burden on the victim of trafficking in requiring him or her to prove that s/he may be harmed, killed or trafficked again if returned to his/her country of origin or the country from where he or she has been trafficked.

**Recommendations**

- Parliament should resolve the inherent contradictions between the intentions of counter-trafficking legislation and the continued criminalisation of sex work.

- The Department of Labour (DoL) should promote fair working conditions for potential victims of trafficking.
Protecting Human Security

Unaccompanied Minors

- Numbers of independent migrant children coming into South Africa have increased in recent years, with the majority of unaccompanied children coming from Zimbabwe. Many of the children coming into South Africa face considerable risks that are not being adequately addressed by current policy frameworks and practices.

- Although child labour is illegal in South Africa, many migrant children come to South Africa in search of work. Children often end up working on farms, as domestic workers, running errands, and sometimes selling sex.

- Children often have no choice but to work in order to survive, and thus often work under abusive and exploitative conditions. Providing protection for children who have to work under these conditions is an issue that needs urgent attention.

Recommendations

- The Department of Social Development (DSD) should: facilitate access to schools and shelters for permanent and circular migrant children; investigate whether there are sufficient numbers of shelters to accommodate such children; increase the number of social workers assisting migrant children and train them in these children’s rights; and initiate discussion on the possibility of extending social grants to unaccompanied migrant children.

- The South African Police Service (SAPS) should investigate the human smuggling system along South Africa’s land borders towards mitigating related human rights violations and train police in the rights of migrant children and in how to assist them legally and compassionately.

- The Department of Basic Education (DBE) should: issue a strong statement that all children of qualifying age, regardless of income or documentation status, must be admitted to schools; investigate reports where schools have excluded migrant children; and explore options for funding the ‘hidden’ costs of schooling, such as uniforms and transport.

- The Department of Labour (DoL) should acknowledge that there will inevitably be children who come to South Africa in search of work and that special provision needs to be made to protect them from exploitation and abuse.

- Civil society and migrant communities should develop and/or support programmes that: protect children who must work in order to survive; facilitate migrant children’s access to schools;
provide health education to child migrants, especially those engaged in sex work; educate communities about the rights of migrant children to education and protection from abusive labour conditions; provide training that will expand work opportunities for older children; and/or support integration in schools.

- Civil society and migrant communities should encourage the participation of children in programmes designed to assist them.

- Civil society and migrant communities should advocate for:
  - Labour courts to monitor exploitative labour conditions for children.
  - Campaigns to educate communities about the rights of migrant children.
  - A police focus on eradicating human smuggling and related abuses.
  - A directive from the DBE to all schools clarifying that no child, regardless of documentation status, is to be excluded from education.
  - An extension of social grants to migrant children.

- Civil society and migrant communities should use regional structures such as the Southern African Development Community (SADC) to highlight the barriers to South Africa’s implementation of children’s rights for migrants.

**Migrant Workers and Labour Conditions**

- International migrant workers have been part of South African economic development for over a century, and migrant workers continue to participate at different levels in many sectors. The government now recognises the importance of recruiting skilled international migrants in many sectors where there are ‘scarce skills’. However, it appears that the majority of international migrants (skilled or unskilled) are involved in informal employment and provide services in labour-intensive sectors such as mining, construction, farming, hospitality, and security. As with other people working in these sectors, they are highly vulnerable to exploitation and abuse.

- Migrant workers, especially those at lower skills levels, who are often employed on a casual or informal basis, have little opportunity to claim work-related benefits and rights. Exclusion from South African unions only exacerbates their vulnerability.

- Steady transformation of the labour market toward casual, informal employment and outsourcing has created the negative labour conditions that currently prevail. While there is a need to look at the gaps in terms of legislation, the main focus should be on capacitating the Department of Labour (DoL) to conduct inspections and ensure compliance, as lack of protection for migrant workers also ultimately impacts on the labour rights of local workers.
Recommendations

- The DoL should strengthen regular labour inspections and expand these to reach far more workplaces; and abandon plans to involve police in these inspections, as this will discourage undocumented workers from reporting abuses.

- Labour unions should review membership procedures and payment conditions to allow casual and informal workers to access membership; and should proactively engage migrant workers to participate in collective mobilisation and bargaining processes.

- The South African Police Service (SAPS) should consider the labour rights of arrested undocumented migrants and, wherever possible, allow them to make efforts (such as phone calls) to secure their due benefits from their employers before they are removed to Lindela for deportation.

- The Department of Home Affairs (DHA), in its efforts to regularise Zimbabweans (and possibly other migrants) in the country, should recognise self-employment, informal employment and casual employment as bases for work permit applications.

- In reviewing the Immigration Act, the DHA should make provision for procedures to protect the labour rights of undocumented workers and allow those arrested and detained for immigration offences to claim any outstanding payments or benefits from their employers.

- In partnership with the DoL or the Planning Commission, the DHA should conduct a national skills audit, improve accreditation procedures, and streamline skills recruitment.

- Civil society should raise awareness among migrants of their labour rights and the institutions that guarantee those rights, that is, the Commission for Conciliation, Mediation and Arbitration (CCMA) and labour courts.

- The CCMA should raise awareness among migrants of its existence and functions; and keep records of assistance rendered to non-nationals of various documentation statuses to enable data to be collected on the numbers of non-nationals accessing CCMA assistance, and the outcomes of such cases.

Migrant Sex Workers

- Internationally, the links between migration and sex work have been well-established. Engaging in sex work becomes a viable option for migrants for a number of reasons: it pays relatively better than other service work, has flexible working hours, often means that the sex worker is self-employed, and does not require formal qualifications or documentation.
• The stigmatised – in South Africa, illegal – nature of sex work, and the unhelpful tendency of governments and NGOs to equate sex work with human trafficking, means that this population is often misunderstood and excluded. In part because sex work in South Africa is illegal and highly stigmatised, little information or research is available on the number of sex workers in South Africa, where they come from, and what their migration patterns are.

• Available data indicates that the majority of sex workers are migrants from either elsewhere in South Africa or from within the southern African region. The vast majority of sex workers are female. Many women enter sex work because they have a number of dependants (both children and adults) to provide for.

• A range of human rights violations are regularly perpetuated against male, female and transgender sex workers, sometimes by rogue members of the police force. As human beings and as workers, sex workers have rights regardless of the fact that their work is illegal. As such high proportions of sex workers are migrants, CoRMSA is concerned to ensure that these rights are considered and protected.

• Negative social attitudes create barriers to sex workers in accessing social services, healthcare and legal services, while making them vulnerable to exploitation and to high levels of violence. Cross-border migrant sex workers, especially those who are undocumented, face compounded exclusion and vulnerability.

• To promote the health of both the individual and the region, it is important to empower sex workers to demand safe sex and ensure their access to healthcare services. However, sex workers, and migrant sex workers in particular, experience difficulties in obtaining the healthcare they need, and struggle to negotiate safe sex due to the uneven power relationship with clients.

• Migrant sex workers are at a high risk of contracting HIV. Although South Africa’s national AIDS Plan recognises the vulnerability of sex workers and provides for mitigation through the decriminalisation of sex work among other things, none of these provisions have yet been implemented.

• The ongoing criminalisation of sex work has multiple detrimental impacts on migrant and other sex workers. However, despite over eight years of work on sex work legal reform, the South African Law Reform Commission (SALRC) has not yet recommended a specific legal model that Parliament should adopt. CoRMSA supports the rights-based call for the decriminalisation of sex work.
**Recommendations**

- The Department of Health (DoH) should sensitisie health service providers on patients’ rights, migration, and health in general, through specialised training sessions and materials about the right to access healthcare; and implement the sex work provisions of the National Strategic Plan 2007-2011. The NSP recommends the implementation of sex-work-specific healthcare services, non-discrimination and the decriminalisation of sex work.

- The Department of Justice and Constitutional Development (DoJCD) should recommend the decriminalisation of sex work in current law reform processes. The SALRC should release its recommendations and model legislation as a matter of urgency.

- The South African Police Service (SAPS) should discipline police who harass and unlawfully arrest sex workers and, across all provinces, support the Western Cape High Court’s April 2009 interdict against the practice of arresting sex workers without the intention to charge or prosecute them.

**Refugees and Asylum Seekers**

- Over the last two years, the Department of Home Affairs (DHA) has made significant progress in alleviating the pressures at the refugee reception offices. In addition to opening interim offices in Musina and Pretoria, the implementation of the Turnaround Strategy has improved processing times at these offices. However, reform efforts that have countered corruption and promoted efficiency have severely affected the quality of status determination decisions.

- Problems with access have improved significantly, with the exception of the Cape Town refugee reception office, although asylum seekers continue to report problems at the other offices, including inability to lodge appeals, loss of appeal requests, and being turned away on arrival for appeal hearings. Asylum seekers have also reported problems renewing their documents.

- Gaps in the immigration system mean many economic migrants enter the asylum system as a means of regularising their stay. This has created a perception within DHA that most asylum seekers are economic migrants who do not require full status determination interviews. CoRMSA is concerned that the DHA’s focus on efficiently removing these perceived economic immigrants and addressing the application backlog has supplanted the fundamental rights protection mandate of the asylum system.

- CoRMSA is also concerned with DHA’s practice of fining asylum seekers who have not renewed their permits on time, and refusing to renew permits until the fine has been paid. While DHA is entitled to address the issue of late renewals, the current practice is not authorised under the Refugees Act, does not afford asylum seekers any procedural rights, and is being implemented in an arbitrary manner.
• As noted in CORMSA’s 2009 report, the prioritisation of speed in the asylum process has afforded little time for status determination interviews, and virtually no time for adequate country research or quality decision-making. Nor do the reception offices effectively communicate the nature and details of the status determination process to asylum seekers.

• In addition, DHA has continued its practice of scrutinising all positive decisions to ensure that corruption was not a factor. Given that status determination officers do not have sufficient time to produce a quality decision that can properly support a positive determination, they have a strong incentive to issue negative decisions, even when confronted with a strong asylum claim.

• A review of over 300 status determination decisions from the country’s five permanent refugee reception offices found a range of problems that question the system’s legitimacy and ability to protect rights. These include substantial errors of law, failure to meet the requirements of administrative law and the Refugees Act; and decisions that do not meet standards of reasonableness. Although it was presented with these results, DHA has not taken steps to improve the quality of decision-making in the status determination process.

• The poor quality of status determination decisions has increased an already high backlog at the under-resourced Refugee Appeal Board (RAB). Due to this burden, some individuals have been unable to get a hearing date because the board has been booked so far into the future that it has stopped taking appointments. The DHA has done little to address this backlog.

**Recommendations**

• The DHA should carry out the review of legal action against the DHA and its staff as recommended by the Human Rights Commission in its 2010 report on issues pertaining to the 2008 violence against non-nationals.6

• The DHA should ensure that status determination officers are given sufficient time and resources to interview an asylum seeker, do the necessary country research, and write a well reasoned decision that includes an individualised assessment of the asylum claim and the reasons for the rejection. This means reviewing the targets currently in place requiring status determination officers to process a certain number of claims per day.

• The DHA should provide status determination officers with adequate training so that they can produce administratively fair and individualised decisions based on a proper application of the law.

The DHA should establish a review mechanism that ensures that status determination decisions are fulfilling the requirements of administrative justice and are properly applying the elements of refugee law.

The DHA should eliminate the current review procedures that focus on checking only positive decisions and establish a system of random reviews of both positive and negative decisions that ensures that decisions are being administered in accordance with the Promotion of Administrative Justice Act and the Refugees Act.

The DHA should reduce the burden on the Refugee Appeal Board by ensuring that the status determination officers are able to operate effectively and without sacrificing quality for efficiency.

The Refugee Affairs Directorate should strengthen oversight of the everyday operation of refugee reception centres and institute disciplinary measures against staff that do not adhere to established policies and practices.

Detainees and Deportees

While deportation remains a central part of immigration management in South Africa, the processes leading to it often occur outside of the law and violate the procedural guarantees put in place by legislation. CoRMSA is concerned that there is no independent monitoring of DHA’s detention facilities, and individuals working at these facilities are largely unaccountable for violations of the law and of the rights of detainees.

According to a 2009 survey of detainees at the Lindela Detention Centre, the procedural rights of migrants have been consistently violated. Police generally did not allow individuals to retrieve nearby documents that could confirm their legal status. Detainees also reported that the police were either unwilling or unable to verify their status with the Department of Home Affairs (DHA), and many of them were sent to the Lindela Detention Centre without having been classified an illegal foreigner. Xenophobia, violence, and corruption also remain significant features of the arrest process.

The Lindela Detention Centre is a DHA holding facility for illegal foreigners. While conditions at Lindela are generally satisfactory, violence and corruption continue to be a problem, and there are systemic failures to adhere to the legal procedures established by the Immigration Act and also required under the Constitutional guarantee of administrative justice. Lack of oversight, and

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the delegation of operations to the private contractor Bosasa, has made it more difficult to establish accountability for abuses.

- The detention and deportation of asylum seekers raises particular rights concerns. According to the 2009 survey, over one-third of detainees at Lindela are asylum seekers. In the absence of outside legal intervention, these individuals are eventually deported without a proper assessment of their asylum claim, in violation of the non-refoulement principle.

- The Soutpansberg Military Grounds (SMG) is located just south of the Beitbridge border. Deportations were occurring from this facility, but these have stopped after a court ordered its closure on 15 May 2009. Nevertheless, SAPS continues to detain asylum seekers, including children and pregnant women, at SMG until they can be taken to the refugee reception office to apply for asylum. The conditions of detention declared unlawful by the High Court have not improved, and detainees are held in conditions that fail to meet the minimum standards of human dignity.

**Recommendations**

- The Department of Social Development (DSD) should provide social workers to attend to unaccompanied minors detained at SMG.

- The South African Police Service (SAPS) should: improve conditions of detention at the SMG; address illegal arrest practices by implementing accountability and disciplinary measures against officers who arrest individuals carrying valid immigration documents; and avoid the costs of unnecessary detentions by taking measures to encourage police and immigration officers to allow suspected illegal foreigners to retrieve documents that verify their immigration status when these are nearby, and/or contact family members and others who can assist in verifying their status.

- The DHA should:
  - Improve centralised record keeping from the various DHA offices to ensure that police and immigration officers can easily verify an individual’s status within the legally required 48-hour period.
  - Streamline operations at its offices so that individuals are able to access these offices and maintain valid documents without encountering bureaucratic obstacles.
  - Ensure that all illegal foreigner classifications are done properly and are accompanied by the required notification, and implement checks to this end.
  - Release any individuals at Lindela who are not being held for the purposes of deportation, and present all detainees with the forms required by law.
  - Provide detainees with the means and opportunity to exercise their legally mandated rights, including their rights of appeal and review.
• Eliminate illegal detentions by ensuring that the proper warrants are obtained before any detention is extended.

• Avoid the illegal delegation of authority by making sure that all detainees have access to immigration officials inside Lindela, particularly individuals who claim that they will face grave danger if deported.

• Train Bosasa staff on the law and the rights of detainees, and hold them accountable for rights violations and contraventions of the law.

• Establish monitoring and oversight of Lindela and Bosasa staff to prevent violence against detainees.

• Adhere to the requirements requiring judicial oversight of all detentions in excess of 30 days.

• Bosasa should provide three meals per day at the legally prescribed intervals; increase the provision of basic items to detainees; improve access to clinic and chronic medications; and extend the variety of medications held by the clinic.

• Parliament should establish an independent monitoring body for immigration detentions, in line with the Optional Protocol to the Torture Convention.
Access to Services and Livelihoods

Access to Health Services

- While the South African public health system faces many financial and human resource constraints, evidence suggests that foreign migrants suffer disproportionately from the challenges of accessing healthcare. Undocumented migrants are found to face the greatest challenges in accessing public healthcare services. Over the last four years, CoRMSA has provided evidence-informed updates on the challenges faced by migrant communities that restrict their access to public healthcare services in South Africa, including treatment for HIV/AIDS.

- While the problems reported in previous years have not disappeared, there is an increasing awareness in government of the need to attend to the healthcare needs of migrants, along with efforts to improve the health status of the whole population. CoRMSA celebrates the creation of a Migration and Health Forum in Limpopo Province with the participation of the provincial government, the district and local spheres of government, and various local and international NGOs.

- CoRMSA is pleased to report on a national process that has begun to engage with healthcare access challenges and respond to international agreements on the need to improve migrants’ health globally. This was expressed by the World Health Assembly in 2008 through the WHA 61.17 Resolution, which was ratified in a 2010 consultation in Madrid that brought together international migration and health actors, including the United Nations, non-governmental organisations (NGOs), academics, policy makers, and programmers.

Recommendations

- The Department of Health (DoH) should develop, implement and monitor an evidence-based, coordinated, multilevel national response to migration and health. This includes acknowledging the developmental benefits of migration, ensuring ‘healthy migration’ and engaging with a ‘place-based’ approach to addressing the diverse health needs and health impacts of the multiple migrant groups present within South Africa.

- The DoH should work towards developing a coordinated regional response to migration and health. South Africa should take the lead, to ensure that “healthy migration” is facilitated for developmental benefits, and work with the SADC secretariat to finalise, ratify and support the implementation of a regional framework for communicable diseases and population mobility.
• Local government should develop localised responses to migration and health. Although local government is not specifically mandated to deal with migration, municipalities can incorporate activities relating to migration and health into their broader ‘developmental mandate.’

• All spheres of government, stakeholders and migrant communities, should acknowledge, ratify and make efforts to implement the recommendations that emanated from the 2010 consultation, which are included in Appendix 1.

• Government and other health stakeholders should address issues of migration and health beyond the traditional areas of focus, for example hospitals, clinics and the DoH. The areas where migrant health issues are most prominent may be in areas such as farms, border areas, and informal settlements.

• Government and other health stakeholders should focus on ensuring the correct and consistent implementation of the policies and platforms already in place, rather than developing new legislation or policies.

• Government and other health stakeholders should increase communication across disciplines and governmental actors and bring in new stakeholders. For instance, forging connections with international organisations and NGOs would help the DoH serve a broader population and reach invisible groups, as could partnerships with other government departments.

• Government and other health stakeholders should ensure that action responds to the voice of migrants, and to the situation on the ground. This can be achieved through research; consultations with migrant populations and organisations; and partnerships with new stakeholders.

Access to Education

• Access to primary education is a positive right guaranteed by Section 29 of the South African Constitution. Still, asylum seekers, refugees and migrant learners often find themselves out of the public education system in the country. Although no nationally representative studies have been done of migrants’ access to education, smaller-scale studies have indicated that high levels of school-age migrant children remain outside the school system (for instance, 24% of asylum seeker children in 2009).

• Challenges include applications for enrolment and a limited number of no-fee schools in predominantly migrant-populated areas. Schools also regularly refuse admission to asylum seekers and refugee learners whose permits might be due for extension before the start of the new school year. Other challenges that continue with regard to access to education include being refused the opportunity to apply for fee exemption; inability to pay school fees; inability to
afford to send children to schools in their feeder area where such schools are private; or inability to pay for related costs such as uniforms, transport and subsistence for food during school hours. Access to pre-school education is another challenge faced by these groups.

- CoRMSA and Lawyers for Human Rights made both written and oral submissions to the Portfolio Committee on Basic Education in 2010 focusing on the challenges facing asylum seeker, refugee and migrant children with regard to access and quality of education. It is hoped that the Portfolio Committee will work together with the Department of Basic Education in addressing the concerns raised and implementing many of the recommendations made. The submission can be accessed at http://www.cormsa.org.za/wp-content/uploads/2009/05/lhr-cormsa-submission_on_education-february2010.pdf

**Recommendations**

- The Department of Basic Education (DBE) should ensure that all schools comply with its policy that no school may deny a learner access based on the fact that they do not have the relevant document; issue a clear policy on the admission of undocumented learners into public schools; ensure that non-national parents are advised of the social protection measures taken to ensure that asylum seeker, refugee and migrant children benefit from programmes like the Bana Pele Campaign in Gauteng; consider means of subsiding pre-school education, especially Grade R; intensify the promotion of social cohesion in schools; and develop information material in predominant migrant languages to ensure that information on access to schooling reaches these groups and that refugee and migrant parents and learners are able to engage effectively with the schooling system.

- The Departments of Basic Education and Home Affairs should clarify the contradiction between the provisions of the South African Schools Act on provisional admission and Section 39 of the Immigration Act. This is especially important as many schools rely more on the Immigration Act than the DBE policies and prescriptions with regard to access to education.

**Access to Social Assistance**

- The provision of social assistance to those who are unable to support themselves is catered for in Section 27 of the South African Constitution. While CoRMSA applauds the extension of disability grants to refugees and the continued access to Foster Child Grant for refugee children, there are still major gaps that need to be filled to improve the lives of non-nationals who are unable to provide for themselves.

- Reports from organisations in the field indicate that there is a low level of uptake of social grants within the non-national groups. Part of this is rooted in the length of time it takes to finalise the court processes of placing unaccompanied minors with foster parents. There have also been
reports of some of the grants being stopped because refugees have failed to produce identity documents within the required time. It also appears that some refugees have failed to apply for government grants because of a perception that partners of the United Nations High Commissioner for Refugees (UNHCR) hold the responsibility of providing grants to refugees.

- CoRMSA continues to believe that there is a need to extend the Child Support Grant to refugee children in light of the dire conditions under which some refugee families live, as well as a need to afford asylum seekers the opportunity to apply for the Social Relief of Distress Grant. CoRMSA welcomes the DSD’s intention to bring the Social Relief Bill before Parliament this year and hopes that the Bill might extend the social assistance opportunities available to refugees and asylum seekers.

**Recommendations**

- The Department of Social Development (DSD) should: finalise the Social Relief Bill and submit it to Parliament for deliberation and public hearings; finalise the Standard Operating Procedures for placing unaccompanied minors with foster parents, while clarifying the respective roles of DSD and Department of Home Affairs (DHA); consider extending Child Support Grants to refugee children as the beginning of a long-term process reviewing social welfare provision to vulnerable refugees, asylum seekers, and other migrants; clarify the criteria which would qualify asylum seekers or other migrants for Social Relief of Distress Grants; improve outreach to refugee and other migrant communities; and publish information on access to social assistance in predominant refugee/migrant languages to improve the take up of grants by those who qualify.

- The DHA should speed up the process of issuing refugee identity documents to prevent unnecessary suspension of refugees’ social grants.
DEVELOPMENTS IN LAW, POLICY AND LOCAL GOVERNMENT PRACTICE
Policy Developments

Fifteen years into the post-apartheid dispensation, several constituencies (rights NGOs; academics; representatives of the business sector; unions; migrants’ organisations; local government entities; international organisations) have expressed the need to review and rationalise South Africa’s migration policy framework. This last occurred in 1995 with a broad consultation process that resulted in the Draft Green Paper on International Migration, published in 1997. Following several rounds of nationwide public comments it became the White Paper on International Migration approved by Cabinet on 31 March 1999 and, three years later, the Immigration Act of 2002 (which came into force in 2003 and was amended in 2004).

In the eyes of many of those who participated in the initial Green Paper consultative process, the final Act did not reflect the consensual points which had been reached during consultations, nor did it mark a significant rupture with past legal conceptualisations or practices. As such, the 2008 attacks on non-nationals were seen by many, from different perspectives, as a symptom of failing immigration policies. **Over two years after the former Minister of Home Affairs commissioned a migration policy review (see CoRMSA Report 2009), which was to be tabled in Cabinet in late 2009 or early 2010, there is little sign of any substantive shift in policy direction.** The Department of Home Affairs (DHA) has remained relatively silent on the issue. Officials maintain that the review process is still underway.

Similarly, the DHA approached a variety of different organisations in October 2009 to produce discussion documents on an “integration” policy. Although this process was initiated by the then Deputy Minister, Malusi Gigaba, it has not been followed by any specific policy or legislative initiatives.

One of the most potentially important developments of 2010 involved the re-constitution of the legally-mandated Immigration Advisory Board (IAB). Intended to review policies and procedures related to cross-border movements in South Africa, the IAB brings together representatives from various government departments, business, and civil society. While offering the opportunity for greater coordination on migration issues, the IAB’s operations remain opaque, with ad hoc meetings, unclear agendas and members restrained by confidentiality clauses on the Board’s discussions. Such restrictions preclude them from consulting others in the sector, which undoubtedly compromises the board’s ability to collate and disseminate information. **Without a clear policy direction within the Hoar opportunities for external actors to engage the DHA on policy development, there seems little prospect for progressive reform.**

That said, local government, through the voice of the South African Local Government Association (SALGA), seems increasingly willing to play a more prominent role with regard to immigration issues, as does the Department of Labour (DoL) and the Department of Social Development (DSD).

South African official figures from the past three years confirm a consistent post-apartheid trend towards limiting non-citizens’ access to the permanent legal labour market. Due to regional economic
disparities and the desirability of foreign labour, such restrictions have resulted in increases in temporary permits of various types as well as in undocumented migration.8 While permanent residence permits decreased substantially from 9 235 in 2006-2007 to 3 817 in 2007-2008, work permits went from 19 601 to 32 344. Study permits also decreased from 19 912 to 13 005. On the contrary, visitors’ permits almost doubled from 34 360 to 63 460. It is quite likely that the refusals or delays in permanent residence and decrease in student permits transformed into either work permits (for applicants to permanent residence) or visitors’ permits (for students and others).

This is not a sustainable situation, nor one that serves the long-term interest of either South Africans or international migrants. CoRMSA considers the following areas as priorities in a reform process. Such reforms will both protect migrant rights and promote South Africa’s economic and institutional development.

Using Migration as a Tool for South African Social and Economic Development

Reform in this area requires:

• Policy frameworks which recognise that migration and immigration are critical to South Africa’s prosperity.

• Effective interdepartmental data gathering and capacity-building mechanisms.

• The mainstreaming of migration in various policy sectors and across departments and spheres of government.

• Tailoring of immigration policy to South Africa’s actual needs, challenges and capacities, while working within the SADC multi- and bi-lateral frameworks.

Developing a Policy Framework for Social Cohesion and the Integration of all Migrants9

Reform in this area requires:

• Strong condemnation of violence against foreign nationals, and promotion of migration as a tool for South Africa’s development, in order to unify public positions on xenophobic violence.

• Allocation of substantial resources to the education of communities and community leadership.

• Further development of early warning mechanisms to monitor and prevent violence.

8 Figures for 2009 have not been published yet by the South African Department of Home Affairs.
9 This is further elaborated in the section on violence against foreign nationals.
Capacitating Local Government for Mobility Management

Reform in this area requires:

- Greater sub-national engagement with immigration management through intergovernmental structures.
- Redefinition of competencies on migration issues through the introduction of a spatial component.
- Ongoing contextualised research that impacts on resource allocation systems.
- Pragmatic approaches to service delivery, countering exclusion and discrimination.

See detailed discussion and recommendations in the section on the local government response to migration.
Legal Developments

Despite strong constitutional and legislative protections for asylum seekers and refugees, legal organisations must regularly turn to the courts to ensure that those rights are realised. Although legal processes are slow and often acrimonious, they remain important avenues for protecting the marginalised and excluded. Ensuring compliance with existing laws, while extending the rights of migrants, is important in developing an equitable society and effective legal system. Since 2009, several cases have advanced the rights of asylum seekers and other migrants in detention. There are also a number of cases addressing other forms of discrimination against asylum seekers and refugees that are currently underway.

Detention and Deportation

Over the past year and a half, Lawyers for Human Rights (LHR) has brought a series of urgent applications leading to the release of over 70 unlawfully detained migrants. These cases have also resulted in significant judgments upholding and clarifying the rights of foreigners in detention.

The Immigration Act authorises the detention of illegal foreigners, with certain procedural guarantees, for a period up to 120 days. The DHA has on numerous occasions spuriously defended both the legality and the necessity of detaining illegal foreigners beyond this 120-day period. After conflicting high court interpretations, the Supreme Court of Appeal (SCA) in *Arse*\(^\text{11}\) clearly stated that individuals being detained as illegal foreigners may not be held for over 120 days.

DHA has also detained asylum seekers as illegal foreigners, defending this practice on various grounds, including arguments that:

1) asylum seekers who allow their permits to expire become illegal foreigners;
2) an individual ceases to be an asylum seeker following the initial rejection of his or her claim, regardless of any appeals;
3) an asylum seeker permit merely allows an individual to ‘sojourn’ in the country, but this sojourn may take place in detention; and
4) an asylum seeker permit issued or renewed from detention does not entitle an individual to be released from detention.

The SCA’s decision in the *Arse* case rejected all of these views. The court stated that an individual remains an asylum seeker throughout the appeal and review process and that the granting of a permit to an ‘illegal foreigner’ renders that person an asylum seeker. **In other words, DHA cannot detain an asylum seeker as an ‘illegal foreigner’ regardless of the stage they have reached in the application or**

\(^{11}\) *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA).
appeals process. This view was later applied by the High Court in Amadi,\textsuperscript{12} where the court stated that an asylum seeker could not be detained for the purposes of deportation, thus negating any possibility that asylum seekers can be detained at Lindela.

In February 2011, the North Gauteng High Court declared unlawful DHA’s policy of detaining asylum seekers, including those asylum seekers who apply for asylum while in detention or who are awaiting the outcome of the appeals.\textsuperscript{13} DHA had denied that such a policy existed, despite explicitly defending the practice in previous legal cases. Judgment is also outstanding in the Bakamundo case. Having previously ruled that the department’s deportation of a Congolese asylum seeker was unlawful, this case considers whether the department acted in constructive contempt by deporting him following the filing of court papers, two days before his unlawful detention was to be challenged in court.

In sum, recent cases on the issues of detention, deportation, and the rights of asylum seekers have highlighted procedural irregularities and illegalities in DHA’s practices. Despite repeated judicial rejections of DHA’s interpretations of the law, DHA has continued its illegal practices. In a recent decision against the department, the SCA chastised it for its failures to respect individual rights, and for putting forth spurious legal arguments. The court stated that the department’s actions called for punitive costs, although the applicants had not requested them.\textsuperscript{14} In a decision that went beyond simply ensuring the realisation of legislated rights, the court suggested that the department did not show sufficient respect for the judicial process. CoRMSA hopes that the DHA will recognise and review its defensive approach to well-founded legal challenges as a result of this judicial censure.

Cases Stemming from the 2008 Attacks on Foreign Nationals

In 2008, more than 150 000 people were displaced and sixty-two people were killed during two weeks of anti-outsider violence. The majority of those killed were non-South Africans and the attacks have been broadly characterised as ‘xenophobic’. Since the May 2008 attacks, there has been continued violence against foreigners throughout South Africa (see ‘Responses to violence against foreign nationals’ later in the report). The University of Cape Town (UCT) Law Clinic is currently pursuing a case in the Equality Court stemming from a series of incidents during the 2008 xenophobic attacks in which asylum seekers and refugees in the Western Cape were attacked by their neighbours. The case, Said and others v the Minister of Safety and Security and others (EC 13/08), alleges that the police did not fulfil their mandate to protect the victims and their property, by failing both to control the criminal conduct of the crowds, and to properly investigate the crimes that occurred during these attacks. These omissions, according to UCT Law Clinic, amount to unfair discrimination and violate provisions of the Constitution, the Equality Act, and international law. Judgement is pending in this case, which will be an important statement on the obligation of state institutions to protect the rights of foreigners.

\textsuperscript{12}\textit{Amadi v Minister of Home Affairs} (unreported, no 101/2010) SGHC (12 January 2010).
\textsuperscript{13}\textit{Zimbabwe Exiles Forum and 34 Others v Minister of Home Affairs and 2 Others}, [27294/2008] [2011] ZAGPPHC 29 (17 February 2011)
\textsuperscript{14}\textit{Abdi and Another v The Minister of Home Affairs and 4 Others}, [734/2010] [2011] ZASCA 2 (15 February 2011).
Access to Financial Services

In 2010, CoRMSA successfully launched a case against South African banks, seeking to overturn the Financial Intelligence Centre’s (FIIC’s) decision to advise banks against opening accounts for asylum seekers and refugees or allowing them to transact on their already existing accounts. The public communiqué from FIC was issued in June 2010. After this communication, CoRMSA and member organisations began receiving complaints from asylum seekers and refugees who were unable to open bank accounts or access money in existing accounts because their S22 asylum seeker and S24 refugee permits were no longer considered to be acceptable proof of their identity. Transaction restrictions were instituted despite the banks having previously permitted accounts to be opened using the same identification.

In the end CoRMSA, UCT Law Clinic and LHR engaged on litigation in this matter. The case (CoRMSA vs Absa and others) was successful. The court ordered the banks to allow asylum seekers and refugees on s22 and s24permits respectively to open bank accounts on condition that the DHA verified the authenticity of these documents. FIC was further ordered to communicate the court’s decision to the banks. Despite this, reports have been received of asylum seekers and refugees experiencing similar problems within certain branches of particular banks.

Labour Rights

UCT Law Clinic is challenging the Health Department’s policy of hiring only South African nationals. In a case that will soon be heard by the Labour Court, the law clinic is seeking a declaration that this policy is discriminatory and unlawful under the Employment Equity Act.

Migrant skills are a resource that has been underutilised for many years, to the detriment of skilled foreign nationals and the South African public service and industries. Resolution of this case could have significant implications in addressing skills gaps in the government health system and putting the skills migrants bring with them to South Africa to sound developmental use.

Recommendations

To the Financial Intelligence Centre

- Ensure that the court order resulting from CoRMSA vs Absa and others has been disseminated to all banking institutions.
To Banking Institutions

- Ensure that bank officials are aware of this change in the FIC guidelines regarding refugee and asylum seeker bank accounts, and implement the CoRMSA vs Absa and others court order in all branches.

To the Department of Home Affairs

- In light of the numerous court actions taken against it, and the Supreme Court of Appeal judgment chastising the department’s lack of respect for individual rights and its use of spurious legal arguments, review the department’s defensive approach to litigation which consumes limited departmental resources in defence of actions that violate the rights the department is tasked to uphold.

- Ensure swift verification of s22 and s24 permits on request by banks, as delays in verification have been cited among the reasons why they fail to open bank accounts for refugees and asylum seekers within a reasonable time period.

- Post notices at all refugee reception offices, making asylum seekers and refugees aware of the revision of the FIC decision and the fact that they can continue using their asylum and refugee permits to open bank accounts and transact.

To Civil Society

- Use public awareness and information campaigns to spread news of this change as widely as possible.
Developing Local Government Responses to Migration

Constitutionally empowered to be a leading force for development, provincial and municipal authorities have nevertheless been wary of addressing population movements or acknowledging human mobility as a fundamental driver of or response to development. Rather than take a proactive approach that plans for mobility in all of its forms, South African local authorities have typically shied away from addressing concerns related to migration, including inter-group conflict, economic marginalisation, and the inability to access suitable housing and services. These are concerns that directly affect the rights and welfare of both domestic and international migrants, who often struggle to find their way in a new location. Yet failing to meet the very real challenges of domestic and international migration creates the risk of increasing conflict, violence, poverty and social exclusion, thus negatively affecting all urban residents.

While local authorities and the South African Local Government Association (SALGA) have begun to recognise the importance of mobility for the rights and welfare of all residents, municipalities still face numerous obstacles in creating inclusive and equitable communities. Building on almost a year of original research across South Africa, this section outlines some of the major issues preventing local government from promoting the wellbeing of migrants, including refugees, in South African municipalities.

The Scope and Limitations of Municipal Responsibility

While national governments are responsible for developing national strategic plans and general policy frameworks, the work of local governments demands focused and context-specific interventions. Municipalities in South Africa are constitutionally assigned a primary role of providing basic services to communities, regardless of race, gender, and in many instances, national origin. National or provincial governments are responsible for the primary needs of migrants, such as access to shelter, healthcare, education, and economic opportunities; safety and security – including proper treatment in detention; and administrative justice. Despite this, under Section 153(a) of the Constitution, each municipality does have a responsibility to “structure and manage its administration, budgeting and planning processes to give priority to the basic needs of their communities and to promote the social and economic development of the community.” Where migrants are present, this means considering them as part of the community.

The success of municipalities depends on the ability of authorities to develop and respond to a nuanced and dynamic understanding of their constituencies. Due to a range of factors, including poor data collection and analysis, few municipalities are able to do so. Indeed, one of the most fundamental challenges to local government in protecting the rights and welfare of migrants is how little

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15 This section is based on research conducted with support from the South African Local Government Association (SALGA), the Programme to Support Pro-poor Policy Development (PSPPD) based at the office of the Presidency, Republic of South Africa; the Institute of Research for Development, France; and the Atlantic Philanthropies.
municipalities know about the people living in their areas of jurisdiction. There is a lack of information about the urban poor generally, and even less about geographically mobile people. To some extent, larger municipalities have been able to develop their own research departments and monitoring systems. Smaller municipalities continue to struggle to make sense of their communities’ population dynamics.

Part of the challenge associated with data collection and management emerges from a degree of confusion over who is mandated to collect and manage data. As such, planning departments typically act as a mere interface with Statistics South Africa (StatsSA) but have no capacity to conduct such research themselves. Despite a widespread recognition of the value improved data collection, research and analysis could hold for municipal planners, the current capacities and data processes in municipalities limit their ability to use empirical data in planning and decision making. In this context, local planners continue to be influenced by stereotypes and misreading or incomplete reading of data. Without a proactive perspective on what can be done to address human mobility, the common refrain – “We can’t cope with this influx of people!” – threatens to become a self-fulfilling prophecy.

Recent research by the African Centre for Migration and Society (ACMS), with the support of SALGA, demonstrates that there are at least three primary areas that work against municipalities developing a sound and proactive approach to migration.

**Perceptions and Capacity**

Migrants are members of the community entitled to government resources, and are potential resources for communities, but in many cases, government officials see them as an illegitimate drain on public resources. In some municipalities, there is a distinct sense that current residents or ‘ratepayers’ deserve to be privileged over new arrivals or temporary residents. In others, officials hold fast to the idea that migration worsens violent crime, disease, and unemployment. Still others insist that matters related to migration and human mobility are exclusively the responsibility of national government. These perceptions place migrants outside of the local government constituency, and therefore prevent officials from adopting pragmatic policies to address their developmental impact and provide for their needs.

Other obstacles to the development of appropriate frameworks for dealing with migration include staffing, transitions, and coordination within municipalities. In some municipalities, leadership and staff turnovers have resulted in the redeployment of staff into positions where they do not have adequate technical background or knowledge to manage migration and urbanisation. The rapid turnover within some municipalities has also resulted in the loss of institutional knowledge that could provide important insights into municipal population dynamics. Perhaps most critically, different departments or divisions within local government often disagree over the validity of data or ongoing population dynamics. Often these disagreements are tied to broader concerns about performance targets and evaluation. Consequently, even where relatively accurate data exist, they may be selectively ignored by officials.
Consultation, Planning and Budgeting Processes

Participatory planning emerged in the post-apartheid dispensation as a way of realising democratic transformation at the local level. It currently constitutes the basis for the preparation of Integrated Development Plans (IDPs), five-year plans which flag the main directions for municipalities to attain the development goals they have set for themselves. While laudable on many grounds, the emphasis on participatory planning has created incentives for excluding the interests of migrants and discouraging officials from considering them in forward planning. In some instances, these processes have created ‘backward-looking programming,’ a situation in which planning represents the prior needs of the specific section of the current poor population that has accessed consultation forums. Few communities can project future demographic trends, and thus they rarely push for plans that consider these. More importantly, few communities ask that municipalities dedicate resources to future, potential residents over their own acute sense of need. Given negative public attitudes towards migrants, officials are unlikely to insist that resources be dedicated to unwanted future residents, especially when they are equipped with only a limited knowledge of migration dynamics.

This bias against planning for migration issues is cemented by the *de facto* exclusion of migrants, both domestic and international, from public consultations for planning purposes. In the areas visited for the ACMS study, outsiders were generally not invited to participate in Community Policing Forums, Stakeholders’ Forums, Residents’ Associations, or meetings held by local ward councillors. While participation was not necessarily prohibited – as anecdotal reports have claimed in some municipalities – the vast majority of government and community respondents reported a glaring absence of foreigners and recent migrants in such fora. That said, some positive steps have been taken to promote migrant participation. The City of Johannesburg, for instance, has launched a number of initiatives to foster and encourage migrants’ participation in dialogue platforms and other activities at the ward level. These include the Migrant Help Desk, created in April 2007, and the Johannesburg Migrants’ Advisory Committee (JMAC), created in 2010. However, it is yet unclear how these initiatives will incorporate migrants into local-level planning given the prevalence of community-level exclusion mechanisms. There is also the danger that such consultation – like many forms of participatory planning – will be used simply to legitimate decisions made through other means.\(^\text{16}\)

The pitfalls in planning that result from exclusion are perpetuated at the level of budgeting. While both sending and receiving communities are influenced by the costs and benefits associated with migration, population dynamics are rarely factored into the distribution of national resources by the National Treasury. Budgeting processes perpetuate the shortfalls of planning in the following ways:

1. Backward-looking planning for the needs of permanent residents leads financial planners to generally overlook population and migration trends, despite the fact that future residents will ultimately demand resources and interventions.

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(2) If significant efforts were made to ‘forward plan’, they would be largely unsupported by the current system of resource allocation to local government (Local Government Equitable Share – LGES).

(3) The planning and budgeting modalities generally reflect a limited capacity to cater for the poor in general and, in particular, the most indigent sections of the population.

**Intergovernmental Coordination on Planning and Service Delivery**

Municipal authorities are often frustrated by the relationships between municipalities and other spheres of government. At the heart of this discontent we find the issue of mandates and the purported monopolistic tendencies of other spheres of government. Recent research has confirmed that municipalities often feel – in many cases justifiably – that failures in national and provincial government policies and processes undermine their credibility and effectiveness. Another finding has been that the system of intergovernmental relations is not effective in coordinating planning across the three spheres of government, or in strengthening accountability towards achieving critical and targeted development outcomes.

These findings support two challenges that the Department of Cooperative Governance and Traditional Affairs (DCoGTA) has already identified. First, they highlight the problem of “intergovernmental conflict and competition over powers and functions between provinces and their local governments.” Second, they confirm that “national targets for service delivery that apply uniformly irrespective of the economic and institutional differences between municipalities simply set municipalities up to fail.”

ACMS research points to a series of more specific frustrations and tensions regarding:

- The absence of consultation of local government structures in national migration policy-making;
- The lack of clarity on roles of the different levels of government (provincial and local in particular) across various sectors;
- A perception of exclusion from planning and budgeting processes, particularly from National Treasury;
- Frustration with shifting priorities and goalposts (in terms of service provision to the poor in particular); and
- Changes in policies regarding immigrants and asylum seekers (including relocating offices, lifting work prohibitions, and formally enabling access to services) without consultation with or forewarning to local authorities.

Although municipal authorities are often frustrated at not being consulted on issues related to the populations they are responsible for, the study found that municipalities were rarely proactive advocates for their populations. Many blamed the hegemony of party structures for closing avenues for ‘upward’ communication. Regardless of the reason, the study did not reveal strong leadership initiatives in terms
of lobbying for either an individual or a collective rethink of the LGES or other policy issues directly affecting municipalities’ ability to address population dynamics.

**Recommendations**

Failure to manage migration is yielding undesired consequences for all residents of South Africa. However, when properly managed, domestic migration can bring people closer to services, enrich the labour market, and open important opportunities for reducing poverty and protecting rights. Similarly, international migration need not lead to conflict and tensions, but can help to provide much-needed skills and entrepreneurial energy, at the same time boosting regional trade and integration, and helping to facilitate post-conflict reconstruction in countries of origin. The following recommendations are intended to help achieve those ends.

**To Statistics South Africa**

- Rethink the data collection system and interface between municipalities, provinces and Statistics South Africa (StatsSA) so that:
  - A degree of standardisation at national and municipal level is maintained to allow comparability and developing a standard tool kit for planning.
  - Data collection methods at municipal level are agreed upon, familiar, and considered legitimate, useful and reliable by all stakeholders.
  - Data builds up into longitudinal data bases informing municipalities’ on trends over time. This data is then aggregated at multiple levels and incorporated into municipal, district, provincial and national planning strategies.
  - Management of migration and migrant communities is led by staff that has been trained on data management, use and related migration issues.
  - Data can be better disaggregated at the local level. This should include better coordination with municipalities and other data collection agencies.

**To Treasury, Department of Cooperative Governance and Traditional Affairs, and Local Authorities**

- Mainstream population (including migration) dynamics into IDPs (social cohesion, economic growth, safety and security), and cater for highly mobile populations wherever necessary.

- Use evidence in a more balanced way for policy formulation.

- Include spatial planning tools to facilitate the use of population data for policy and planning.
• Review budgeting processes including the LGES allocation to include forward-looking population dynamics. Ensure that LGES allows for more regular population re-assessments (including indigent population) and correction effects on revenue allocation.

• Establish closer relations with researchers and data analysts to assist in the rethinking of decision making and implementation mandates with regard to mobile populations. Such collaboration may take the form of a migration ‘think tank’.

• Improve coordination of all relevant partners at national, provincial and local levels towards a more effective management of migration. These include all spheres of government, civil society, the private sector, research agencies, and academic institutions. Facilitate the institutionalisation of the local government response to migration in order to improve communication and coordination between municipalities and migrant communities. This would need to include the establishment of dedicated capacity to deal with migration, such as a migrant desk in each municipality.

To the Department of Home Affairs

• South Africa needs an immigration policy that promotes its goals of regional integration, counter-poverty, social justice and human rights. This means developing appropriate means for people to enter the country legally and with appropriate documentation. Considering that South Africa, like all other migrant receiving countries, cannot completely seal its borders, it must find ways to manage cross-border mobility in a manner that is humane and promotes the legal migration of people who wish to cross.

• Reforms in migration policy should be carried out in collaboration with municipalities. Municipalities should also find ways of formulating and articulating their interests with regard to immigration policy and practice.

To the Department of Home Affairs and Department of Labour

• If improved regulation of the labour market is required, the government should consider sanctions against employers who violate immigration and labour laws and more regularly inspect workplaces to ensure that the basic conditions of employment are being upheld.

To the Department of Cooperative Governance and Traditional Affairs

• Build capacity among local authorities by training staff to enable them to understand, interpret and use population data for their planning and programming.
CURRENT ISSUES
2009-2010
Responses to Violence against Foreign Nationals

As 2008 taught South Africa that violence against foreign nationals is a serious threat to local and national security, 2009 and 2010 have illustrated two important lessons: that violence targeting non-citizens is ongoing, but that large-scale violence can be prevented and stopped. Widespread popular sentiment against foreigners remains a reality in South Africa: threats of violence were publicly expressed and attacks planned for the days after the FIFA World Cup in July 2010; hundreds of foreign-run shops have been looted throughout the past year; and at least 20 foreign nationals have been killed. On the other hand, there are many examples where timely interventions by local community leaders, police, and political and civil society groups have prevented persons who were inciting violence from carrying out their threats to attack and displace foreign nationals.

Debates about ‘xenophobia’ in South Africa have shifted to some extent, moving from denial of its existence, confusion over its sources, or largely moral condemnation, to a more nuanced discussion of appropriate responses. This is at least partly due to an increase in research on the issue, but also because many governmental and non-governmental agencies have taken on ‘xenophobia prevention’ as part of their mandate, and have spent two years developing concrete programming options. In some departments, such as Social Development, Cooperative Governance and Traditional Affairs, and Education, this mandate has been integrated into a broad new policy concept, namely the promotion of ‘social cohesion.’

These institutional developments are positive in that they show a recognition of the systemic and long-term nature of violence against foreign nationals. Such government initiatives, at least potentially, enable the integration of responses to violence against foreign nationals into broader concerns with supporting a less violent and more diversity-tolerant society. In other parts of government, however, there is still denial that ‘xenophobia’ exists in South Africa. CoRMSA emphasises the importance of maintaining momentum in building systems and institutions which are effective in addressing and preventing continued violence against foreign nationals and other perceived outsiders.

Understanding the Terms: Xenophobia and Social Cohesion

The term ‘xenophobia’ has become highly contested in popular and policy debates. This is partly because the literal translation and definition which is often quoted – a hatred or fear of a foreigner or ‘stranger’ – is misleading. Repeated attitudinal surveys have indeed shown the existence of widespread and entrenched prejudices against non-nationals in South Africa, and these attitudes are held equally across race, class, gender, age and education level.17 Systemic discrimination and group and individual violence

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against foreign nationals is, however, rarely motivated only or mainly by sentiments such as fear or hatred. Motivations often include the material or political gain of the attackers. The targets of such discrimination or crimes are nonetheless not random but defined by the real or perceived vulnerability of foreign nationals because they are seen to be less likely to have the support of the communities in which they live or equal protection by law enforcement agencies. CoRMSA therefore advocates that xenophobic actions should be defined as any discriminatory or criminal action which is targeted at a foreign national because of the systemic disadvantages associated with being ‘foreign’ (including difficulties in accessing banking, police protection, community protection, etc).

Various government departments have adopted the term ‘social cohesion’ to describe an ideal state of being without xenophobia or other forms of violence and discrimination. In practice, however, this term is also difficult to define. Many of the places where foreign nationals have settled, including inner-city neighbourhoods and peri-urban informal settlements, have also seen radical and ongoing changes in the South African population because of urban transformation and rural-urban migration. This means that instead of a stable ‘local’ population with established and generally respected institutions, there is a shifting and diverse population with contested institutions. Efforts to prevent violence must take this reality into account rather than seeking to ignore or reverse it.

**Ongoing Violence against Foreign Nationals**

The May 2008 violence against foreign nationals¹⁸ was met by widespread domestic and international outcry and promises of ‘never again’ by political leaders, security and law enforcement agencies, civil society and ordinary members of the public. Despite these condemnations, predictions that such violence would continue because no effective preventive measures had been put in place, have unfortunately proven true. Since mid-2008, almost every month there has been at least one attack on groups of foreign nationals in the country. Table 1 below gives a list of reported incidents of violence against foreign nationals from June 2009 to September 2010.¹⁹ The table is likely to be incomplete as there may be additional incidents which have not been reported to any institution or in the media.

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¹⁹ The list of incidents from June 2008 to May 2009 is provided in the 2009 report referred to above.
### Table 1: Incidents of Violence against Foreign Nationals: June 2009 –November 2010

<table>
<thead>
<tr>
<th>Month</th>
<th>Year</th>
<th>Province</th>
<th>Place</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jun</td>
<td>2009</td>
<td>Western Cape</td>
<td>Delft</td>
<td>Businesspeople hold meetings to discuss ways of evicting foreign shop owners. Three Somali shop assistants are shot and injured.</td>
</tr>
<tr>
<td>Jun</td>
<td>2009</td>
<td>Western Cape</td>
<td>Masiphumelele</td>
<td>Businesspeople hold meetings to discuss ways of evicting foreign shop owners.</td>
</tr>
<tr>
<td>Jun</td>
<td>2009</td>
<td>Western Cape</td>
<td>Samora Machel</td>
<td>Businesspeople hold meetings to discuss ways of evicting foreign shop owners.</td>
</tr>
<tr>
<td>Jun</td>
<td>2009</td>
<td>Western Cape</td>
<td>Gugulethu</td>
<td>Businesspeople hold meetings to discuss ways of evicting foreign shop owners. A letter is delivered to all foreign-owned shops on 14 June saying they must leave the area by 20 June.</td>
</tr>
<tr>
<td>Jun</td>
<td>2009</td>
<td>Western Cape</td>
<td>Khayelitsha</td>
<td>Two Somali shop assistants are burnt to death when their shop is set alight in the night. A Zimbabwean and a Bangladeshi are murdered.</td>
</tr>
<tr>
<td>Jun</td>
<td>2009</td>
<td>Limpopo</td>
<td>Giyani</td>
<td>Local business owners announce over the radio that foreign shop keepers must leave the town. The local police commissioner intervenes and they withdraw the threat.</td>
</tr>
<tr>
<td>Jun</td>
<td>2009</td>
<td>Limpopo</td>
<td>Mpeni</td>
<td>Zimbabwean nationals are chased out of the village.</td>
</tr>
<tr>
<td>Jun</td>
<td>2009</td>
<td>Western Cape</td>
<td>Nyanga</td>
<td>An Angolan man approaching the Nyanga Refugee Reception Centre is stabbed to death after resisting a group of men who mugged him and told him to return to his country.</td>
</tr>
<tr>
<td>Jun</td>
<td>2009</td>
<td>Western Cape</td>
<td>Franschhoek</td>
<td>A large group of residents stones foreign-owned businesses during a dispute over food prices.</td>
</tr>
<tr>
<td>Jul</td>
<td>2009</td>
<td>Mpumalanga</td>
<td>eThandukukhanya/Piet Retief</td>
<td>A service delivery protest turns violent and participants loot shops and chase away foreign shop keepers.</td>
</tr>
</tbody>
</table>

The information below was compiled from civil society, media and United Nations (UNHCR and UN OCHA) reports and has not been directly verified by CoRMSA.
<table>
<thead>
<tr>
<th>Date</th>
<th>Province</th>
<th>Metropolitan Area</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jul 2009</td>
<td>Mpumalanga</td>
<td>Siyathemba / Balfour</td>
<td>Service delivery protests result in attacks on foreign nationals owning shops in the area. 122 people are displaced, including Ethiopians, Indians, Pakistanis, Bangladeshis and Malawians. Protestors stone police cars and police officers trying to protect the shops. 123 protesters are arrested. Victims of the violence are later intimidated into dropping charges against looters.</td>
</tr>
<tr>
<td>Jul 2009</td>
<td>Limpopo</td>
<td>Mashau</td>
<td>South African residents attack and displace 20 Zimbabwean nationals from the village. Local police are alerted the day before but fail to prevent the attack. Witnesses claim police transported the perpetrators. The displaced men had all not been paid for work they had been doing in the village; one man had worked without pay for a year.</td>
</tr>
<tr>
<td>Jul 2009</td>
<td>Mpumalanga</td>
<td>Sakhile</td>
<td>Residents attack foreign-owned shops during service delivery protests.</td>
</tr>
<tr>
<td>Jul 2009</td>
<td>Western Cape</td>
<td>Gugulethu</td>
<td>The Anti-Eviction Campaign brokers a peace deal after South African shop owners issue eviction notices to their Somali counterparts.</td>
</tr>
<tr>
<td>Jul 2009</td>
<td>Gauteng</td>
<td>Diepsloot</td>
<td>A housing protest turns violent resulting in Pakistani-run shops being looted.</td>
</tr>
<tr>
<td>Oct 2009</td>
<td>Northern Cape</td>
<td>Barkley West</td>
<td>A number of Somali nationals are displaced by xenophobic violence.</td>
</tr>
<tr>
<td>Nov 2009</td>
<td>Western Cape</td>
<td>De Doorns</td>
<td>Around 2500 Zimbabwean nationals are displaced from the small farming town, reportedly due to competition among labour brokers for facilitating jobs on the nearby farms. Several hundred people remained in shelters until the end of 2010.</td>
</tr>
<tr>
<td>Nov 2009</td>
<td>Free State</td>
<td>Bothaville</td>
<td>Somali traders are threatened and told to leave the area.</td>
</tr>
<tr>
<td>Nov 2009</td>
<td>KwaZulu-Natal</td>
<td>Msinga</td>
<td>Zimbabwean teachers at the local high school are threatened with violence over a number of days. Police are forced to maintain a presence at the school.</td>
</tr>
<tr>
<td>Nov 2009</td>
<td>Western Cape</td>
<td>Imizamo Yethu</td>
<td>Foreign nationals in two streets of the informal settlement are told to leave after three foreign nationals are arrested for raping a child.</td>
</tr>
<tr>
<td>Nov 2009</td>
<td>Limpopo</td>
<td>Seralo View / Polokwane</td>
<td>Residents evict Zimbabwean residents and workers from the area because they are blamed for causing a high number of house break-ins.</td>
</tr>
<tr>
<td>Month</td>
<td>Year</td>
<td>Province</td>
<td>Location</td>
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<tr>
<td>Dec</td>
<td>2009</td>
<td>Limpopo</td>
<td>Westernburg / Polokwane</td>
</tr>
<tr>
<td>Jan</td>
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<td>Cape Town</td>
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<td>2010</td>
<td>Mpumalanga</td>
<td>Siyathemba/ Balfour</td>
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<tr>
<td>Feb</td>
<td>2010</td>
<td>Gauteng</td>
<td>Orange Farm</td>
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<tr>
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<tr>
<td>Mar</td>
<td>2010</td>
<td>Gauteng</td>
<td>Mamelodi</td>
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<tr>
<td>Mar</td>
<td>2010</td>
<td>Mpumalanga</td>
<td>Mhluzi / Middleburg</td>
</tr>
<tr>
<td>Month</td>
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<tr>
<td>Mar</td>
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<td>Eastern Cape</td>
<td>Kuyga</td>
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<tr>
<td>Mar</td>
<td>2010</td>
<td>Gauteng</td>
<td>Diepsloot</td>
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<td>Apr</td>
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<td>2010</td>
<td>Western Cape</td>
<td>Malmesbury</td>
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<tr>
<td>Apr</td>
<td>2010</td>
<td>Gauteng</td>
<td>Benoni</td>
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<td>Apr</td>
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<td>May</td>
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<td>Western Cape</td>
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<tr>
<td>May</td>
<td>2010</td>
<td>Mpumalanga</td>
<td>Leandra</td>
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<tr>
<td>May</td>
<td>2010</td>
<td>Free State</td>
<td>Iraq phase 2, Sasolburg</td>
</tr>
<tr>
<td>May</td>
<td>2010</td>
<td>Western Cape</td>
<td>Wolsley</td>
</tr>
<tr>
<td>Jun</td>
<td>2010</td>
<td>Gauteng</td>
<td>Mamelodi East</td>
</tr>
<tr>
<td>Jul</td>
<td>2010</td>
<td>Western Cape</td>
<td>Cape Town</td>
</tr>
</tbody>
</table>

*21 Cases marked with * were reported in the Gauteng Legislature on 24.08.2010 by Gauteng Acting MEC for Community Safety in a written response to a question regarding xenophobic incidents since May 2010.
<table>
<thead>
<tr>
<th>Date</th>
<th>Province</th>
<th>Location</th>
<th>Incident Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Mayfair</td>
<td>A group of around 15 people attack three Somali houses around 4am. They run off when a police car approaches.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Nyanga</td>
<td>Foreign-owned shops looted. Seven men arrested and charged with public violence.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Klapmuts</td>
<td>Foreign-owned shops are looted.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Khayelitsha</td>
<td>A Somali shop is looted on 9 July nearby where Police Minister addressed an anti-xenophobia rally. Three Somali men are hijacked on 10 July on their way to stock their shop. Driven to a remote area, one is shot dead and two end up in hospital. Foreign-owned shops are looted on 12 July.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Masiphumelele</td>
<td>Residents threaten to evict all foreign nationals by 3 am on 12 July, after the final game of the Soccer World Cup.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Philippi</td>
<td>Foreign-owned shops are looted.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Mbekweni</td>
<td>Foreign-owned shops are looted. 70 people seek shelter at the police station.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Wellington</td>
<td>Foreign-owned shops are looted. 22 people seek shelter at the police station.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Franschhoek</td>
<td>Foreign-owned shops are looted on 11 July. 11 Somalis and 20 Malawians seek shelter at the police station.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Du Noon</td>
<td>A foreign-owned hair salon is attacked.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Worcester</td>
<td>Two Somali nationals are shot dead and two others injured. Police suspect rival traders.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Daveyton</td>
<td>Two Somali nationals are attacked in their shop on 11 July.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Etwatwa</td>
<td>A Somali-owned shop is looted but community members assist in chasing away attackers.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>KwaZulu-Natal</td>
<td>Bottlebrush</td>
<td>One person is hospitalised in violence against foreign residents.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Mpumalanga</td>
<td>Delmas</td>
<td>14 youths are arrested for trying to extort money from foreign shop owners. Shop owners were allegedly told that they would be attacked if they did not pay.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Nyanga</td>
<td>A Malawian man is murdered and his genitals cut off.</td>
</tr>
<tr>
<td>Date</td>
<td>Location</td>
<td>Suburb/Place</td>
<td>Event Description</td>
</tr>
<tr>
<td>------</td>
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</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Grabouw</td>
<td>Foreign-owned shops are looted.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Kya Sands</td>
<td>Sixteen people are injured after foreign-owned shops are looted in Kya Sands. Two are seriously injured. Police arrest 10 people in connection with the looting and government officials visit the area to calm the situation.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Nyanga</td>
<td>A Somali shop keeper is shot in the face. Assailants flee without stealing anything.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Eastern Cape</td>
<td>Walmer</td>
<td>Two Ethiopian shopkeepers are shot dead in their shop. No goods are taken.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Kuyga</td>
<td>A Somali national is shot dead in his shop after receiving threats warning him not to trade. Police suspect other Somali traders.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Wallacedene</td>
<td>Two Somali nationals are burnt to death in their shop and another shot in the head. 15 suspects are arrested and local business leaders are suspected to be involved.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Mamelodi East</td>
<td>A ‘xenophobic attack’ case is opened. No arrests.*</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Rabie Ridge</td>
<td>One person is arrested for incitement to commit public violence against foreign nationals.*</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Mabopane</td>
<td>Police arrest one person for intimidation relating to threats against foreign nationals.*</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Tsakane</td>
<td>Five cases of possession of suspected stolen property are opened and 23 suspects are arrested in relation to looting of foreign businesses.*</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Reiger Park</td>
<td>Eight people are arrested in connection with malicious damage to the property of foreign nationals.*</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Mamelodi</td>
<td>Four people are arrested in connection with the robbery of a foreign-owned business.*</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Tsakane</td>
<td>Two people are arrested in connection with malicious damage to the property of foreign nationals.*</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Gauteng</td>
<td>Bronkhorstspruit</td>
<td>Two people are arrested for the robbery of a foreign-owned business.*</td>
</tr>
<tr>
<td>Date</td>
<td>Region</td>
<td>Location</td>
<td>Event Description</td>
</tr>
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</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Khayelitsha</td>
<td>A Zimbabwean man is threatened with eviction by a group of local men.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Philippi East</td>
<td>A ‘shebeen queen’ is accused of ordering that two Somali men be shot and their shops burnt.</td>
</tr>
<tr>
<td>Jul 2010</td>
<td>Western Cape</td>
<td>Claremont</td>
<td>Burundian national is attacked on a train near Claremont station by people reportedly singing ‘get out foreigner.’ He later dies in hospital.</td>
</tr>
<tr>
<td>Aug 2010</td>
<td>Western Cape</td>
<td>Samora Machel</td>
<td>A Congolese woman is raped by two assailants. Attackers inform her they will be doing the same to all other foreign women in the area.</td>
</tr>
<tr>
<td>Aug 2010</td>
<td>KwaZulu- Natal</td>
<td>Pietermaritzburg</td>
<td>Three Ethiopian men and a South African woman are injured in a fight between foreigners and locals.</td>
</tr>
<tr>
<td>Sep 2010</td>
<td>Western Cape</td>
<td>Worcester</td>
<td>At least two Somali nationals are killed in what is reported as xenophobic violence.</td>
</tr>
<tr>
<td>Oct 2010</td>
<td>Western Cape</td>
<td>Khayelitsha</td>
<td>Zanokhanyo Retailer Association shuts three new Somali-owned businesses claiming a 2008 agreement between them and the Somali Retailers Association prohibits any new Somali traders from operating in the area.</td>
</tr>
<tr>
<td>Oct 2010</td>
<td>Western Cape</td>
<td>Strand Village</td>
<td>One Somali trader killed and one injured when local gangs shot at them in their shops.</td>
</tr>
<tr>
<td>Nov 2010</td>
<td>Western Cape</td>
<td>Khayelitsha C-Section</td>
<td>One 23 year old Somali trader shot dead outside his shop.</td>
</tr>
<tr>
<td>Nov 2010</td>
<td>Western Cape</td>
<td>Du Noon</td>
<td>A Congolese man is repeatedly stabbed in a Du Noon tavern because he refused to buy beer for a trio of South Africans.</td>
</tr>
<tr>
<td>Nov 2010</td>
<td>Western Cape</td>
<td>KwaMagxaki</td>
<td>One Somali is killed and another seriously injured in an armed robbery of their spaza shop.</td>
</tr>
</tbody>
</table>

This list of incidents shows several trends:

- Between mid 2009 and late 2010, there were at least 20 deaths, over 40 serious injuries, and at least 200 foreign-run shops looted due to violence targeting foreign nationals. While there has not been large-scale displacement of foreign nationals as in May 2008, apart from in De Doorns, smaller groups of foreign nationals have been displaced in many places around the country, adding up to more than 1000 persons.
• Gauteng and the Western Cape are the most affected provinces, although there have been serious incidents in almost all parts of the country.

• Attacks on foreign-run shops, especially shops run by Somalis, have been a common form of violence, especially in the Western Cape. Some of these attacks are clearly motivated by more than a desire to steal, since they involve prior political mobilisation and excessive violence, and/or take place without any corresponding theft of goods.

• The 2008 and 2009 CoRMSA reports presented most cases of violence against foreign nationals as triggered by localised competition for political and economic power, especially in locales where local government structures are absent, weak or considered illegitimate by local communities. Many of the cases documented in 2009 and 2010 follow this same pattern. In De Doorns, for example, violence was triggered by business competition between local and Zimbabwean labour brokers (rather than direct competition between local and Zimbabwean farm workers), with complicity and support from the ward councillor and ward committee members, intent on protecting their political and economic interests in the local labour broking system.22

Post-World Cup Xenophobic Violence: Did ‘Nothing’ Happen?

In the months leading up to the 2010 Soccer World Cup, foreign nationals around the country reported that they were being threatened with violence and eviction after the sports event. Those making the threats included local leaders, neighbours, strangers in the street, and some state employees such as nurses or police officials. These threats were documented by the police, intelligence services and NGOs, and were covered extensively in the media. There are several important lessons to be learned from this episode:

• The threats of violence were taken seriously enough by many foreign nationals that they decided to leave South Africa. Research by the African Centre for Migration and Society (ACMS) in Johannesburg and Musina confirmed media reports of a significant increase of people travelling to Zimbabwe between 8 and 11 July 2010 (that is, just before the final game of the World Cup), including people transporting all their possessions. The dominant reason given for leaving the country was fear of violence, directly contradicting claims by some government sources that the people leaving were ‘seasonal workers.’23 Movement out of the country therefore constituted an indirect form of displacement, disrupting the lives and livelihoods of people fleeing due to fear.

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23 Police Minister Nathi Mthethwa’s claims to this effect were covered by various newspapers, including ‘Tackle Xenophobia Now,’ Sunday Times, 11 July 2010, http://www.timeslive.co.za/sundaytimes/article543613.ece/Tackle-xenophobia-now
• In May and June 2010, civil society networks formed during the May 2008 violence were partially re-established, as were connections between civil society and government. Even though the threats illustrated the continued lack of established contingency plans and coordinated response mechanisms, these networks enabled preventative mobilisation to take place much faster than in 2008.

• In contrast to the public perception that ‘there was no violence’ after the World Cup, the table above shows that there was a concentration of violent incidents in July 2010. The Western Cape MEC for Community Safety reported to the provincial legislature that there were 55 incidents of xenophobia in his province alone between 1 May and 30 July. 24

• Mobilisation of preventative interventions and quick response mechanisms by government and civil society actively prevented post-World Cup violence against foreign nationals from causing widespread harm and displacement. Even though some government leaders dismissed the threats and presented them as malicious ‘rumours’ invented by people wishing to discredit the country during the World Cup, other parts of government, including the police and defence force, took the threats seriously enough to deploy significant resources and personnel to prevent violence from being perpetrated. This included arresting significant numbers of people (at least 40 in the Western Cape, for example), for crimes such as arson, intimidation, attempted murder, damage to property, assault, public violence, and theft or looting. Public meetings and interventions by political party branches, trade unions, NGOs and community-based organisations also played a crucial role in signalling to would-be perpetrators that violence against foreign nationals is not acceptable.

CoRMSA commends all the actors who contributed to preventing large-scale violence after the World Cup and urges government departments and civil society organisations to build on this experience by learning lessons about how to successfully prevent violence through timely mobilisation.

Responding to and Preventing Xenophobic Violence: Lessons Learned Since 2008

Responses to the post-World Cup violence are part of a more systemic, albeit incomplete, process of institutionalising mechanisms for the prevention of and response to violence against foreign nationals, both in government and in civil society. In March 2010 the South African Human Rights Commission (SAHRC) presented a report on issues of rule of law, justice and impunity, based on a formal enquiry into government responses to the 2008 ‘xenophobic’ violence. 25 The report commended progress and identified continued gaps. CoRMSA commends the SAHRC for conducting the enquiry, as called for in the

2009 CoRMSA report, supports the recommendations of the SAHRC report, and urges government departments to follow up on its recommendations.

Positive developments in government, as noted in the SAHRC report and by CoRMSA, include:

- The National Prosecuting Authority has committed to monitoring cases related to ‘xenophobia’ on an ongoing basis. This information is, however, currently not shared publicly or with other stakeholders, which reduces its effectiveness in holding the justice system accountable and serving as a public deterrent to future violence.

- The South African Police Service (SAPS) is developing an early-warning system for anti-foreigner violence. To this end, SAPS has established a special unit in the Visible Policing Directorate to collate information on crimes against foreign nationals, and has provincial coordinators with the mandate to collect timely information and coordinate timely responses. SAPS is collaborating with UN agencies and civil society institutions in improving its early warning capacity.

- Several provinces and municipalities have developed their own early warning systems and contingency plans to prevent and respond to violence against foreign nationals.

- Departments such as Social Development, Cooperative Governance, Education, and Sports, Arts and Culture have adopted the promotion of social cohesion as part of their core mandates.

Continued gaps include:

- **Coordinated planning:** There is still no coordinated contingency planning and evaluation by the National Disaster Management Centre (NDMC), SAPS and the South African National Defence Force (SANDF).

- **Department of Home Affairs:** The Department of Home Affairs did not submit a self-evaluation report to the SAHRC enquiry in spite of its central role in elements of violence prevention and response in cases of displacement. This was due either a lack of introspection in the department and/or a lack of respect for independent oversight mechanisms such as the SAHRC, both of which do not contribute to the development of an effective and accountable inter-departmental response to violence.

- **Intervention evaluation:** There is still a lack of institutional memory or evaluation of past awareness campaigns and conflict resolution initiatives implemented to address tensions between citizens and non-nationals. Reflecting on its own work, the SAHRC acknowledged its failure to systematically monitor past recommendations with regard to xenophobia as a social issue.
Denialism: While some departments have significantly shifted toward recognition of the reality of xenophobic violence, some prominent government leaders, such as the Minister of Police, Nathi Mthethwa, continue to make public pronouncements that attacks on foreign-owned shops are ‘pure crime.’ The denial of specific forms of vulnerability among foreign nationals hinders the building of consensus against such victimisation.

Late and reactive security responses: While there have been increasing examples of swift and decisive responses to violent threats by police, there are also many cases where security responses have been late and reactive despite clear warning signs. In De Doorns, numerous planning meetings (which the local authority attended) were held prior to the attacks but nothing was done to prevent the violence.

Operational sing social cohesion: Where social cohesion has become a recognised political priority, there is still little concrete programming at the local government level. This includes continued gaps in holding ward councillors and other local government actors accountable for acts of commission or omission in inciting or failing to prevent violence.

There has also been some progress within civil society, based on an increased awareness of xenophobia as a social problem to be urgently addressed:

An increased number and variety of stakeholders (including domestic and international NGOs, labour unions, faith-based organisations, academic and research institutions) are now involved in monitoring and early warning activities, and there is an increased number and variety of programmes and initiatives (such as the Dialogues for Social Change by the Nelson Mandela Foundation) to promote tolerance and social cohesion. The effectiveness of such interventions, however, remains to be assessed, as there is often a lack of rigorous self-evaluation of these interventions, as also seen with government initiatives.

There are early signs of better coordination and collaboration, especially through the newly established Humanitarian Assistance Network of South Africa (HANSA).
Recommendations

Continuing to build on lessons learned since 2008 remains particularly important as there is a strong potential for violent mobilisation against foreign nationals in the run-up to the 2011 local government elections. Some of our recommendations from 2009 have been addressed, while others remain relevant.

To the Department of Justice and the National Prosecuting Authority

- Regularly publish statistics regarding the number of arrests and convictions relating to crimes and violence against foreign nationals. This will assist in reducing the public perception of impunity for attacks on foreign nationals and will hold the justice system accountable in effectively prosecuting xenophobia-related cases.

- Finalise and operationalise the National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

To the Department of Cooperative Governance and Traditional Affairs

- Identify and implement effective conflict resolution mechanisms. There is need to establish trusted and prompt conflict resolution mechanisms to avoid communities’ recourse to vigilantism and mob justice. Such mechanisms should be accessible from community level to the highest level of the country’s administrative and justice systems. These conflict resolution measures must not violate the law as certain past initiatives have done (for instance, extra-legal restrictions on migrant trading or sites of residence).

- Evaluate the roles and actions of community leadership structures, and adjust functioning and/or oversight measures in accordance. This might involve capacitating local government (for example through Community Development Workers) to report on the quality of community leadership, and provide guidance, coordination and monitoring to community leadership and security initiatives. Government should on a case-by-case basis scrutinise the relationships between elected officials, street committees, civics, community policing forums, and other entities implicated in some cases of xenophobic violence.

- Develop more clearly operational programming around social cohesion at local government level, establishing specific responsibilities for specific local officials.

- Address institutionalised xenophobia and discrimination. Government must intensify its efforts towards eliminating xenophobic and discriminatory practices in public institutions.

- Establish effective early warning and response systems through the NDMC.
To the South African Police Service

- Maintain and strengthen existing initiatives to collate and interpret information about violence against foreign nationals.

- Continue efforts to coordinate contingency plans and information sharing with other government departments, including the SANDF, the NDMC, the DHA, and others.

- Develop means of regularly exchanging information with civil society organisations monitoring incidents of violence against foreign nationals, as not all cases may be reported to the police. This will assist in identifying areas where further violence is likely to occur and broader conflict resolution interventions are needed.

To the South African Human Rights Commission

- Strengthen ongoing oversight processes. CoRMSA acknowledges efforts made by the SAHRC but would like to see the organisation go beyond making recommendations to ensure their implementation. The Departments of Justice and Constitutional Development, Home Affairs, and Cooperative Governance and Traditional Affairs, as well as SAPS, pledged to provide written responses to the SAHRC report recommendations. CoRMSA applauds SAPS in particular for its prompt and detailed response to the commission. However, the SAHRC should be capacitated, in terms of budget, personnel and political support, to follow up on these commitments, as well as enforcing compliance from departments which have not cooperated with its investigations.

To International Organisations

- Support government efforts to effectively manage migration and protect the rights of non-nationals. This could take the form of providing resources and sharing expertise and best practice with relevant departments.

- Support local civil society’s capacity to monitor and influence government policies and practices with regard to protecting the lives and rights of all the country’s residents.

To Civil Society

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

• Continue to develop independent technical disaster response capacities within civil society, as well as coordination and communication mechanisms for humanitarian interventions. This will benefit all residents of South Africa who are potential future victims of either civil violence or natural disasters.
Xenophobia and the Media

The media has an important role to play in raising awareness about xenophobic violence, challenging popular perceptions of foreign nationals, holding government officials accountable for taking action to address xenophobic violence, and putting pressure on police and justice officials to hold perpetrators of xenophobic violence accountable.

The media can also play a very negative role in fuelling xenophobic sentiments, by perpetuating stereotypes about foreign nationals, reinforcing misperceptions that foreign nationals are responsible for various social problems in South Africa, or creating the impression that xenophobic violence is simply about people expressing frustration.

In recent years, there has been increased scrutiny of the media’s role in promoting tolerance and helping to overcome conflicts, and this has been particularly acute since the large-scale outbreaks of violence against foreign nationals in 2008. While it is quite clear that many South Africans have negative attitudes towards foreign nationals, the central question has been whether the media is perpetuating these attitudes or challenging them. Although there are always exceptions, past research strongly suggests that, by reproducing xenophobic attitudes and ideas, the media has reinforced such attitudes among the South African populace.26

Distorted Reporting

For a number of years, there has been a tendency in the media to media has —with some notable exceptions — tended to perpetuate half-truths, myths and misinformation about foreign nationals in South Africa. Various researchers have concurred that that the majority of print media articles, for instance,

- Make negative references to migrants and immigration;
- Provide superficial analysis of migration issues;
- Uncritically apply negative labels to immigrants — terms such as ‘illegals’ or ‘aliens’; and
- Identify migrants with negative phenomena such as crime and competition for social resources.27

The use of emotive language suggesting that South Africa is being ‘swamped’ or ‘flooded’ by migrants and refugees has been common. African migrants in particular have often been portrayed as “illegal,

criminal, threats to social and economic prosperity or carriers of diseases,” according to research by the Media Monitoring Project.28

Underlying the negative stereotypes about African migrants is the idea that these members of the South African population are a burden to host communities and a liability to the country’s development. Their potential as a source of scarce skills in sectors affected by ‘brain drain’, and their contribution to development through the establishment of small businesses, has been generally overlooked.

Although there was some coverage of violence against foreigners prior to May 2008, it generally failed to recognise in separate cases the consolidation of a grave and growing social problem. Often, these cases were reported as simple criminality instead of as crimes based on hate or prejudice.

At the same time, foreign nationals were often represented as both inherently illegal and as a vector of crime in South Africa. The high levels of undocumented migration into South Africa saw reporters portraying all migrants as ‘illegals’, and putting the ‘crime’ of ‘border-jumping’ – although only an administrative offence and not an offence at all in the case of asylum seekers – in the same category as serious and violent crimes in South Africa. Reporting also tended to create the impression that foreigners commit a disproportionate number of crimes. When crimes were committed by foreign nationals, stories unfailingly noted their nationality, worsening the negative profile of migrants in public opinion. On the other hand, when South Africans are arrested for crimes, their nationality is never mentioned.

Foreign nationals are often scapegoated as a drain on the limited resources of the South African state, and blamed for the country’s developmental challenges. In part, this is due to a misled notion of the economy as a finite pie being swiftly consumed by immigrants, leaving nothing but crumbs for citizens. Grossly inflated figures on the numbers of foreign nationals in the country – lent credence through frequent repetition by officials ranging from cabinet ministers to police commissioners – portray a country overwhelmed by a so-called ‘human tsunami’29 of parasitic migrants.

News media often uncritically report that there are more than 3 million Zimbabweans in South Africa.30 It is not clear what this figure is based on or how officialdom arrived at it, but it has been repeated so often that it has come to be regarded as an absolute truth. However, projections based on 2001 census and 2007 survey data put the total foreign-born population at a ceiling of 2 million people


(3-4% of the South African population), and the Zimbabwean population at a maximum of 1.5 million.31

Irresponsible reporting can have disastrous consequences for foreign nationals, such as when mob attacks are portrayed as local communities fighting back against crime.32 This not only legitimises the actions of the perpetrators but also publicises these actions in a manner that could inspire copy-cat attacks in other communities. Similarly when orchestrated attacks on unarmed civilians by armed mobs are described as “clashes”, or “battles”33 it accords a moral equivalency to the attacker and the attacked.

Challenges in the Newsrooms

However, this sort of reporting is generally motivated less by malice than by ignorance and inexperience. Newsrooms are becoming increasingly ‘juniorised’, and young reporters and young news editors often lack the institutional memory, political nous and general knowledge to report on complex, multi-faceted issues. Critical thinking is often the first casualty of overstretched, juniorised newsrooms and many reporters simply do not know how to ask the right questions, of the right people, at the right time.

With budgets and resources slashed in many newsrooms, journalists have increasingly come to rely on desk-bound reporting, which often consists of regurgitating press releases and phoning up easily accessible sources. Thus, ‘official sources’ are often heard in the media, while the less accessible refugee and migrant communities, whose voices might overturn stereotypes, are not. Nuances and contradictory points of view are also often lost in hard-news reporting, where priority is given to meeting deadlines and beating the competition to a story.

Improvements in Reporting on Foreign Nationals and Xenophobia

Since 2008, however, many journalists have improved their reporting on xenophobia, and many publications have made a conscious decision to portray foreign nationals in a more holistic manner.

For example, each of Gail Smith’s columns titled “The Foreigner” in the City Press profiles the lives and stories of immigrants to South Africa, explaining where they are from, why they came, the contribution they are making, and what their plans and dreams are. Her intention with the column was to challenge stereotypes of foreigners and reveal commonalities between citizens and non-citizens living in South Africa.

Similarly, the reporting around a threatened outbreak of xenophobic violence after the 2010 World Cup was markedly better than the coverage in 2008. It was more challenging (particularly towards officials

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32 For example, residents’ claims that attacks led to a drop in crime reproduced in Mbanjwa, X, “‘Things are better without foreigners’”. Independent Online, 26 May 2008.
33 For example, in Gifford, G. 2008. ”‘We’re back to hell’”. Independent Online, 18 May 2008.
who had a duty to prevent a recurrence); it focused much more on the rights of the communities under threat; emphasised community initiatives to fight back against xenophobic attacks; and often took a clear advocacy standpoint. For example Ufrieda Ho’s full page feature in The Star on a threatened renewal of xenophobic violence bore the headline “Choose the future... Choose peace... Choose life!” and included interviews from researchers, community members who are working for change, and foreign nationals.

The Mail&Guardian dedicated a special online report to the issue, updated with a stream of breaking news stories as well as a series of multi-media features in which refugees and migrants told their own stories. This was done as a partnership with Oxfam, and allowed both the publication and the NGO to contribute in their respective areas of expertise, and to facilitate dialogue on the subject.

It is vital that this momentum is sustained and extended across the media industry. The workshop ‘Reporting Xenophobia’, hosted by CoRMSA, the African Centre for Migration and Society (then the Forced Migration Studies Programme), and Oxfam on 6 July 2010, was a great success and more of this sort of training would be extremely beneficial. It would also be helpful to look at training on socio-economic issues in general, as well as on human rights and the Constitution. Less formal interactions could also be valuable, such as holding monthly ‘brown-bag lunches’ at various media houses, allowing journalists to pop in and have a casual chat with refugee and migrant leaders and activists. This would serve not only to break down stereotypes but to increase journalists’ contacts and broaden the range of sources when reporting on the issue.

While it is important to recognise the role the media may play in promoting a tolerant society, we should also remember that it is unhelpful to simply disparage “the media” without seeking meaningful engagement, offering to share knowledge and skills, or highlighting progressive examples of reporting alongside problematic examples. Where the media do act irresponsibly, civil society should seek to engage robustly either by writing letters to the editor or the Press Ombudsmans.

**Recommendations**

While the ideal is that reporting on such topics be done through a ‘human rights lens’, many of the weaknesses in reporting on xenophobia and foreign nationals could be addressed by adhering to the basics of good journalism such as balance, fairness, independence, proper research and fact checking, critical thinking and wider sourcing. Toward ensuring balanced reporting in line with the Press Code, and realising the media’s potential to assist in efforts to address xenophobic, we present some reporting guidelines below.

- **Challenge popular perceptions of foreign nationals in media stories.** Provide a balanced picture when reporting on matters involving foreign nationals. Look for evidence to support or disprove negative claims about foreign nationals. Present the positive contributions of migrants along with

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34 Ho, U. “Choose the Future... Choose Peace... Choose Life!” The Star, 8 July 2010.
Providing a more accurate understanding of xenophobic violence in South Africa requires a careful examination of the myths and stereotypes surrounding the issue. The negative. This will help to challenge the various myths and stereotypes about foreign nationals in South Africa.

- **Avoid empathising with perpetrators of xenophobic violence.** Despite the many frustrations people have with unemployment and slow service delivery, reporting should carefully avoid suggesting that these conditions justify violence against foreign nationals.

- **Use more than one source when reporting on cases of xenophobic violence.** For instance, try to obtain the views of both police and victims with regard to the motive for any attack on a foreign national, and/or ensure that ‘local’ accounts of the event include the views of both citizen and non-citizen residents.

- **Explore local motives for xenophobic violence.** An important body of research on 11 sites of conflict in 2008 showed that violence was generally instigated by specific local leaders or personalities. Try to probe beyond general claims that attacks are due to economic or other forms of competition, exploring the possibility that people were deliberately mobilised to serve specific political or economic interests in the local area.

- **Provide a broader personal context for victims of xenophobic violence.** Many of those affected by xenophobic violence have had to flee wars or violence in their home countries or else have been victims of xenophobic violence on previous occasions in South Africa. Provide a ‘human face’ for victims of xenophobic violence to personalise the issue and prevent the victims from appearing as faceless population or simply another service burden for the state.

- **Avoid using negative or discriminating words when reporting on foreign nationals.** The Press Code states that the right to freedom of expression, does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Avoid using terms such as ‘aliens’, ‘makwerekwere’, or ‘illegals’ when referring to migrants.35

- **Provide reference to ongoing incidents of violence against foreign nationals when reporting on a new outbreak of xenophobic violence.** When reporting on new incidents of violence it is important to note the ongoing trend of xenophobic incidents in the country. Incidents of xenophobic violence where foreign nationals are specifically targeted have occurred at an alarmingly high rate with almost one incident of mob violence against foreign nationals per month taking place since the end of 2008.

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35 In October 2008, CoRMSA, Media Monitoring Africa (MMA) and a prominent tabloid settled a matter after a complaint by MMA and CoRMSA to the Press Ombudsman and Press Council. The settlement resulted in the tabloid agreeing not to use the word ‘alien’ when referring to foreign nationals.
Follow up with the police and justice officials on arrests and prosecutions of perpetrators. The media can play an important role in ensuring accountability for perpetrators of xenophobic violence by making regular enquiries to police and justice officials regarding the progress of arrests and prosecutions of perpetrators of xenophobic violence. The South African Human Rights Commission investigation report following the violence of May 2008 noted that very few people were successfully prosecuted for their role in the violence (including for the ‘necklacings’ that received much attention from the media) and there is therefore a need for ongoing pressure to address impunity for perpetrators of xenophobic violence.

Include voices of refugees and migrants when reporting on threats or outbreaks of xenophobic violence. It is useful to include perspectives from foreign nationals that can help to challenge or balance often negative South African perspectives. CoRMSA can facilitate contact with a number of refugee or migrant organisations that could assist.

Protect the confidentiality of victims of xenophobic violence. Many victims of xenophobic violence report being too scared to report matters to the police for fear of being targeted for further violence. Some victims of violence left their home countries because their lives were in danger due to their political beliefs or activism. In order to remain safe from further persecution, they may not want people to know their whereabouts. It is important to remember this when reporting so that the identity of the person is protected.

Treat victims of xenophobic violence with respect and sensitivity. People who have been victims of violence may be traumatised by what they have experienced. It is important to remember that it may be very difficult for them to talk about what they have been through. Sometimes the very act of talking about something traumatic can further traumatising a person. When interviewing a victim, it is wise to proceed with sensitivity and pause or end the interview if you see that the interviewee is uncomfortable. Ensure that you have obtained not just consent for an interview or pictures but that this is informed consent. Similarly, think carefully about the ethics of publishing pictures that may further traumatising victims, their families, or children who view them.

Extend the focus beyond perpetrators. Focus also on the people who working to prevent violence, on groups that are assisting survivors of violence and on researchers and activists who can provide valuable insight and real facts.

Contextualise xenophobia within the larger picture – whether it is globalisation, local or continental politics, or socioeconomic rights at a time of global recession.

Take a stand. While the myth of objectivity continues to be debated, the truth is that the media is not always ‘neutral’ about issues – for example, no media house would claim to be neutral on issues such as child-abuse, rape or hijacking, so it makes sense to take a principled stand on
violence against foreign nationals. It is also important to help the reader or viewer understand why this is a hate crime and not an ordinary act of criminality.

- **Make sure your ‘facts’ have a sound basis.** Useful resources providing objective information on migration trends and xenophobic violence can be found at:
  
  - [http://www.migration.org.za/research-outputs/reports](http://www.migration.org.za/research-outputs/reports)
Responses to Zimbabwean Migration

Since the mid-2000s, Zimbabweans have been the largest nationality among foreign nationals in South Africa. In addition to larger numbers, Zimbabwean mobility has had a specific impact on South Africa’s society and economy, compared with other groups of migrants. The Zimbabwean migrant population has a distinct character, influenced by the proximity of the home country, strong ethnic and linguistic links with South Africa, and generally high education levels. Especially important is the diversity of political and economic factors that form the context for Zimbabwean migration. As a result, Zimbabwean migration experiences in South Africa, for all their diversity, have been different from the experiences of other nationalities, and they have had particular needs. From the perspectives of both South African society and Zimbabwean migrants, therefore, specially adapted policies have been required.

For many years, no specific policies were put in place. However, the past year and a half has seen a positive, if incomplete, shift towards specifically adapted policies for the management of Zimbabwean mobility. As described in the last CoRMSA report, this included the introduction of a 90-day no-cost visa and a moratorium on deportations in April 2009. In September 2010, the previous time-bound policy package (originally planned for only one year) was augmented with a three-month programme to document Zimbabweans who had been studying, working or running small businesses in South Africa. The documentation process was to be followed by a resumption of deportations of undocumented Zimbabweans from 1 January, 2011. However, delays in the process of documenting Zimbabweans forced the Department of Home Affairs (DHA) to postpone the resumption of deportations until August 2011. The 2010 documentation process is described in more detail below.

Migration Patterns

The shift in policy with regard to Zimbabwean migration is occurring against a backdrop of continued high levels of circular migration between Zimbabwe and South Africa. In the past year, there has been a welcome move in public, political and media discussions of Zimbabwean migration, away from reliance on inflated and unfounded estimates of over 3 million Zimbabweans in South Africa, towards more empirically grounded estimates of between 1 and 2 million. However, exact calculations of migration volumes remain elusive. While the introduction of a no-cost visa, available at the border, has doubtless increased the percentage of legal rather than undocumented border crossings, simple border-crossing statistics are not helpful in calculating the number of Zimbabweans in South Africa. We cannot tell how many people are moving in and out because multiple entries and exits by a single individual are captured as if they represent a series of individual movements. Furthermore, due to continued challenges in accessing Zimbabwean passports and temporary travel documents, there are still significant numbers of Zimbabweans who cross the border in an irregular fashion, whether through smugglers or through paying bribes to border officials.
It is significant that high volumes of movement out of Zimbabwe continue, in spite of the gradual political and economic stabilisation of the country since the 2008 Government of National Unity. This is because there are still limited basic social services, scarce formal employment opportunities, continuing food insecurity, ongoing displacement of informal urban residents, and ongoing low-profile political violence in Zimbabwe. Overall, there is limited confidence among Zimbabweans staying in South Africa about the long-term political stability of their country. Uncertainties around potential Zimbabwean elections in 2011 may lead to further displacement.

Mobility between South Africa and Zimbabwe may not reduce even when the latter country has stabilised politically and economically. South Africa’s policies towards Zimbabwean mobility should therefore not be based on the assumption that migration volumes will soon drastically decline, or that mobility can be reversed through deportation. CoRMSA believes that any policy aimed at managing Zimbabwean migration should be oriented toward facilitating and regularising mobility between the two countries in the long term, ideally as part of a larger strategy towards regional facilitated movement for work and trade.

Legal Regularisation

The DHA has been debating the possible regularisation of Zimbabwean migrants for several years. This has been motivated in part by the conviction that, since most Zimbabweans have few options for legalising their stay in the country under existing work permit conditions, many were either turning to the asylum system or acquiring fraudulent South African identity documents. In both cases, this was creating problems for the integrity of South Africa’s identity documentation systems.

The first initiative for a ‘special dispensation permit’ to legalise residence and work for Zimbabweans (based on section 31 (2) b of the Immigration Act) was announced by the Minister of Home Affairs in April 2009, but was never implemented. The second initiative was announced in early September 2010. At first, it applied only to persons who could prove that they had been in the South Africa prior to 31 May 2010. At some point after the commencement of the initiative, this condition was dropped, but as there was no official announcement of the change, it was not applied consistently across all DHA offices.

The September 2010 initiative offered work, study and small business permits (as per the Immigration Act) to Zimbabweans, under relaxed application conditions. Zimbabweans who were in any form of employment – including unskilled jobs such as domestic work or farm labour – and could provide an affidavit from their employer to this effect could apply for a work permit. Zimbabweans who were currently studying at a recognised institution could apply for a study permit provided they show proof of registration. Zimbabweans who were running businesses (including informal businesses) could apply for a business permit provided that they could show proof of registration with the South African Revenue Service (SARS) or the Companies and Intellectual Property Registration Office (CIPRO). Applications closed on 31 December 2010.
Initially, only persons holding a valid Zimbabwean passport were permitted to apply for these permits, though the passport requirement was relaxed during the last two weeks. Through an agreement between the South African and Zimbabwean governments, Zimbabwean consulates in South Africa agreed to assist Zimbabweans already in South Africa with applying for passports, and reduced the cost of a Zimbabwean passport to US$50. Because of the backlog in processing passport applications, Home Affairs waived the passport requirement during the last two weeks of the documentation process, stipulating instead that individuals could apply if they were in possession of a receipt confirming their passport application. During the last few days of the process, even the receipt requirement was dropped, and individuals were allowed to apply with any kind of proof of Zimbabwean nationality. Zimbabweans holding fraudulent South African identity documents were given amnesty against prosecution if they turned these documents in to the DHA before applying for the new permits.

All permits were to be issued for four years (or the validity duration of the holder’s passport) with the possibility of renewal. The permit options do not replace the asylum system – Zimbabweans may still apply for refugee status. However, many individuals were required to surrender their asylum status in order to apply for an alternative permit, and DHA has not indicated whether these individuals will be able to re-enter the asylum system if their permit applications are unsuccessful.

Now that the documentation application window has ended, undocumented Zimbabweans face the risk of deportation once again when the moratorium is lifted in August 2011.

**Lessons Learned**

DHA has suggested that a similar but simplified permitting process could be rolled out to South Africa-based nationals of other countries in future. **CoRMSA welcomes the special permitting process and supports the DHA in its willingness to relax the requirements for accessing these three types of permits.** However, the 2010 process raised several areas of concern:

- **Strategic vision:** This permitting process could be an important step towards developing a regional system for facilitated movement, as envisioned in the SADC Protocol on the Facilitated Movement of Persons. Even though this Protocol still lacks the requisite number of state signatories to come into force, various bilateral arrangements (such as free visas with South Africa’s neighbouring states) have already been implemented based on the Protocol’s template. The short time period of the special permitting process and the intended return to deportations seem to suggest, however, that there is no strategic vision towards longer term regional mobility.

- **Time period:** DHA provided very little time between the announcement and implementation of the permitting process, leaving many Home Affairs offices unprepared. The department also stubbornly refused to extend the 31 December 2010 deadline, despite long queues and insufficient capacity to process applications. As a result, many Zimbabweans were simply unable to submit their applications and may be vulnerable to deportation as a result.
• **Zimbabweans with humanitarian needs:** The special permitting programme only applied to persons who could prove that they had already been working, studying or running small businesses. While this is a significant percentage of the Zimbabwean population in South Africa, it nonetheless excludes certain groups with special humanitarian needs and who may therefore not have been able to work in the past. These particularly include disabled migrants and unaccompanied children. In addition to being ineligible for the permits, these groups are likely to be particularly vulnerable if they are deported to Zimbabwe, since the health, education and welfare systems there remain largely dysfunctional.

• **Protecting the integrity of the asylum system:** It is problematic to require work or study permit applicants to give up their asylum status before receiving an alternative permit. Many asylum seekers may have genuine asylum claims, but still prefer to have a work or study permit – which does not require constant renewal – to facilitate their integration in South Africa. By losing one status without necessarily receiving another, they may become vulnerable to deportation in spite of having a well founded fear of persecution in their home country. Secondly, there have been reports that Zimbabwean asylum applicants have been turned away from refugee reception offices since the introduction of the new permitting system, even though the new permits were voluntary and not intended to replace the asylum option for Zimbabweans. It is worth noting that a Cape Town court ruled in 2003 that asylum seekers were not required to give up their asylum permits in order to apply for temporary or permanent residence permits.

• **Passport bottleneck:** The Zimbabwean government has experienced problems in issuing passports for many years and they have been very expensive. Many Zimbabweans therefore do not have valid passports. In spite of the special agreement with the Zimbabwean Consulate in South Africa to issue passports quickly and for a reduced fee, in practice this has been a slow process. As a result, the majority of applicants in the documentation process were Zimbabweans who had possessed passports in advance of the process.

• **Application acceptance bottleneck:** The DHA made 45 offices available nationwide to accept the special permit applications, and deployed a significant number of officials to process applications. While this scale of resource commitment is commendable, the short time frame for the initiative led to severe bottlenecks in submitting and processing applications. For example, at the main DHA office in Johannesburg (Harrison Street), there were several weeks when only 100 applicants per day were being processed, in spite of thousands of applicants waiting in the street to submit their papers. Such delays and the fear associated with the strict deadline led to people sleeping outside DHA offices for several days in order to keep their places in the queue, which in turn led to serious security and sanitation problems.

• **Communication:** Regular and open internal and external communication by the DHA could have improved the consistency and fairness of the application process. Within DHA itself, for instance,
there do not seem to have been clear DHA guidelines on the supporting documents to be accepted for permit applications – each DHA office instituted its own criteria, leading to confusion and unfair extra documentation burdens on applicants in some places. There was also limited communication and coordination between DHA and other government departments such as SAPS, the Department of Labour, and so on. This led to reported arrests of Zimbabweans with fraudulent documents while they were waiting to submit them to DHA as per the amnesty, for example. Communication between DHA and civil society has also been sporadic, limiting the ability of civil society organisations to support DHA in advising Zimbabwean applicants and the broader public about the correct application procedures. Finally, communication with the general public, including employers and places of study, was not very effective, even though the collaboration of these actors is crucial to enabling the success of the permitting process.

- **Corruption:** Due to the fear instilled by the short time period, the passport and application access bottlenecks, and the lack of clear information, corruption and misinformation rackets sprang up around the permitting process.

**The Situation following the Conclusion of the Zimbabwe Documentation Process**

The DHA is currently processing the roughly 275 000 applications it received as part of the Zimbabwe Documentation Process. These efforts are being hampered by the Zimbabwean government’s inability to meet the demand for passports. Nonetheless, DHA has stated that all permit applications will be finalised by 31 July, and deportations will resume on 1 August, 2011. DHA has not stated how the appeal and review process will function under these deadlines, although it has stated that all initial rejections will be reviewed.

There have also been reports of Zimbabweans being detained, both at police stations and at the Lindela Detention Centre for illegal foreigners. Some of these individuals have receipts verifying their permit applications. Moreover, individuals may only be detained at Lindela pending deportation, and Zimbabweans cannot be deported because the moratorium is still in effect. This means that they are being illegally detained at Lindela, and also raises the risk that they will be held beyond the 120 days allowed by law.

**Recommendations**

**To the Department of Home Affairs**

- Clarify the strategic and political long-term purpose of the current and all future documentation processes, and align the operational decisions regarding time frames with these strategic objectives.
• Emphasise regular communication as an integral part of any special permitting process. This includes clear communication about standard procedures within the department, as well as communication with other government departments, civil society, the permit process target group and the general public.

• Ensure that the protective function of the asylum system remains in place and that Zimbabweans are not excluded from applying for asylum.

• Urgently develop a policy, in consultation and coordination with the departments of Social Development, SAPS, international agencies and local civil society, regarding the protection of particularly vulnerable groups of Zimbabweans, particularly the disabled, unaccompanied children and those in need of chronic medication, so that they are not subjected to arrest and deportation due to their ineligibility for the permitting process.

To the South African Human Rights Commission, the Office for Monitoring and Evaluation in the Presidency and the Public Protector

• Use all mandated oversight mechanisms to ensure that the Department of Home Affairs, SAPS and all other government departments involved in the permitting process and its effects (such as the resumption of deportation) are fulfilling their obligations in terms of administrative justice. Especially ensure that the protective function of the asylum system remains in place and that Zimbabweans are not excluded from applying for asylum.

To Civil Society

• Build coalitions to lobby government regarding the alignment of short-term permitting processes with longer term regional integration agendas.

• Work together to monitor the implementation of permitting processes and to ensure that arrest and deportation processes fulfil all requirements of administrative justice.
Human Trafficking and the 2010 World Cup

In the last decade an abundance of publications have called attention to the issue of human trafficking, addressed by international legislation in the form of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention on Organised Crime.

The image most frequently associated with human trafficking, and indeed the subject of research reports, as well as popular films and novels, is that of young women lured or forced into prostitution in a country far from their state of origin by organised crime syndicates who profit from their exploitation. So emotive and compelling is the image that the subject of trafficking is fraught with contention, both in South Africa and abroad.

The Scale of the Problem in South Africa

As outlined in the 2009 CoRMSA report, until 2010, the South African discourse on trafficking was informed by just two pieces of research. Both studies considered cases of human trafficking in the region and drew very broad conclusions about the causal factors of trafficking and the nature of trafficking practices. While successful in capturing public attention, generating moral outrage, and placing human trafficking on the policy-making agenda, these reports were based on estimates rather than rigorous, quantitative research. A study commissioned from the Community Agency for Social Enquiry (CASE) in 2003 found that few organisations or government departments in South Africa had ever encountered trafficking cases, raising questions about the high estimations of the prevalence of this practice.

The International Organisation for Migration has been actively assisting victims of trafficking in Southern Africa for the past six years. The IOM’s Southern African Counter-Trafficking Programme (SACTAP) has during the past four years (2006 – 2010) excelled at training government officials and organisational representatives in recognising human trafficking and dealing with it, having trained 11000 people. Yet, during the six years from January 2004 to January 2010, the programme has provided assistance to only 307 victims of trafficking in Southern Africa, of which 57 were children. Given the level of awareness created through training, and the visibility of the IOM’s assistance (posters are displayed at all ports of entry and the IOM has a 24-hour hotline), it is likely that this figure is fairly representative of the scale of the problem.

This contention is supported by findings of the Institute for Security Studies (ISS) and the Sex Worker Education and Advisory Taskteam (SWEAT) in the sex-work industry in Cape Town. The research, based on a random sample of 10% of sex workers in Cape Town, found that trafficking was not prevalent in the sex work industry in Cape Town. Two years of intensive research in the industry failed to reveal a single victim of trafficking.\textsuperscript{39} Claims of trafficking of women and children as a serious and growing problem in South Africa should be seen in the light of the absence of large numbers of cases, which raises the possibility that the scale of the problem may not be as severe as it has been portrayed to be.

**Trafficking and the 2010 World Cup**

Surprisingly little research has been conducted into the demand and supply of paid sex during big sporting events,\textsuperscript{1} and where the topic has been explored, the focus tends to fall on human trafficking for the purposes of sexual exploitation rather than on adult, consensual sex work. A recent report setting out recommendations for the 2010 Winter Olympics to be held in Vancouver, Canada, concluded from the available data that “[t]he commonly held notion of a link between mega sports events, TIP (Trafficking in Persons) and sex work is an unsubstantiated assumption.”\textsuperscript{40} As evidenced by the media hype over trafficking in Germany during the 2006 World Cup\textsuperscript{41} however, the sensationalism associated with human trafficking often dwarfs the more mundane, everyday concerns of consensual, adult sex work – the demand for which may increase in host countries during big sporting events. This was echoed by research conducted in South Africa regarding the impact of the World Cup on sex work during the 2010 Soccer World Cup.\textsuperscript{42}

The experience of the 2006 World Cup held in Germany provided a blueprint for the 2010 experience in South Africa. South Africa saw a similar media frenzy over an anticipated link between the 2010 Soccer World Cup and levels of sex work and human trafficking.\textsuperscript{43} The media and anti-trafficking campaigns circulated fears that between 40 000 to 100 000 women and children would be trafficked into or around South Africa for the World Cup. Yet these anxieties were misplaced: the Department of Justice and Constitutional Development reported at a Parliamentary meeting in August 2010 that it did not find a single case of human trafficking during the World Cup.\textsuperscript{44} Anecdotal evidence showed that although demand for paid sex during the 2006 World Cup period increased slightly, it was minute in relation to the


\textsuperscript{41} International Organisation for Migration. 2007. “Trafficking in Human Beings and the 2006 World Cup in Germany”. In IOM Migration Research Series, No. 29.; Loewenberg S. 2006. "Fears of World Cup sex trafficking boom unfounded." *The Lancet* 368(9530):105-06.

\textsuperscript{42} Marlise Richter, Matthew Chersich, Dudu Ndlou, Gerrit Maritz, Marleen Temmerman & Sisonke Johannesburg, Rustenburg & Cape Town. 2010. “‘Maybe it will be better once this World Cup has passed’: Sex Work and the 2010 Soccer World Cup – Violation of sex worker human rights persists”. UFPA Research Launch, 30 November 2010, Johannesburg.

fears generated before the Cup,\textsuperscript{45} in part due to the proportions of low-budget tourists and the mixed rather than predominantly male character of World Cup tourists.\textsuperscript{46}

**Clarifying the Picture?**

To develop a clearer picture of the problem of trafficking in South Africa, at the end of 2008 the National Prosecuting Authority (NPA) put out a restricted tender for a mammoth research project to develop baseline data about trafficking. The contract was awarded to the Human Sciences Research Council (HSRC). Over the next 12 months, the HSRC conducted research to determine the nature and extent of trafficking in the country. The research endeavoured to uncover more information about both victims and perpetrators in the so-called trafficking chain.

In the 2009 CoRMSA report, the findings were eagerly awaited, as they promised to provide additional empirical work to clarify the picture of trafficking in South Africa. The research report was launched during 2010, ahead of the FIFA World Cup, but regretfully, it added little new knowledge about the prevalence of the problem and was fraught with methodological and conceptual problems. The report uncritically repeated many of the claims contained in earlier, poorly substantiated reports,\textsuperscript{47} and failed to provide any significantly new data about the phenomenon of trafficking in South Africa.\textsuperscript{48}

**Legislative and Policy Framework**

The South African government is obliged, by several international agreements to which it is party, to act to counter and prevent trafficking. This includes the Palermo Protocol and the ILO’s Convention 182 on the Worst Forms of Child Labour.\textsuperscript{49} In 2004, South Africa was placed on the ‘tier-two watch list’ of the US Department of State’s Trafficking in Persons (TIP) report. Since then, South Africa has worked hard to shake this status by putting in place structures, processes, and legislation. Some of the activities undertaken are discussed in detail in the 2009 CoRMSA report. In 2009, South Africa moved off the watch list and onto Tier 2, defined as “Countries whose governments do not fully comply with the TVPA’s minimum standards, but are making significant efforts to bring themselves into compliance with those standards”.\textsuperscript{50}

South Africa’s progress in the development of national legislation to counter human trafficking was outlined in the 2009 CoRMSA report. During March 2010 a second draft of the Combating of Trafficking


\textsuperscript{46} Gould C. “Moral panic, human trafficking and the 2010 Soccer World Cup.” *Agenda* 2010; 85: 31-44.


\textsuperscript{49} “Situation Analysis on the Commercial Sexual Exploitation of Children and Child Trafficking: Mpumalanga.” *Johannesburg: CASE.*

in Persons Bill was released, incorporating some of the changes suggested during the first round of public consultations, and the Parliamentary Portfolio Committee on Justice and Constitutional Development called for a second round of public comment on the Bill.

**Shortcomings of the Current Draft Bill on the Combating of Trafficking in Persons**

Although changes suggested in the first round of public consultation were incorporated into the second draft of the Bill, a number of issues remained contentious. Perhaps one of the greatest challenges facing the portfolio committee in finalising the legislation is determining how to accommodate the very divergent views of civil society organisations and other stakeholders. It also appears as if no costing has yet been carried out for the Bill.

In its current draft, the Bill still contains a number of ambiguities as far as definitions. For example, the definition of exploitation is drafted very widely, which creates a potential for confusion. In addition, the definition of ‘forced marriage’ read together with the definitions of ‘exploitation’ and ‘trafficking’ as they are currently drafted could lead to the traditional practice of *ukuthwala* (bride abduction) being criminalised as a form of trafficking. While legislation is essential to outlaw the abusive and illegal practice of bride abduction, it may not be fitting to attempt to do so in this piece of legislation. This became a focus for a number of discussions during the meetings of the portfolio committee.

Another problem relates to the definition of ‘sexual exploitation’, which, read together with the definitions of ‘exploitation’ and ‘trafficking’, deems all forms of adult sex work to be trafficking. Further, section 3(b) of the Bill deemed consent to be irrelevant, thus explicitly encompassing voluntary sex work. An approach that conflates trafficking with sex work renders all sex workers as victims, rationalises a fairly heavy-handed response to prostitution by the state, and ignores the economic and social contexts for sex work. Such a view assumes that most, if not all, people selling sexual services are women and girls who need rescue. As such, there is a risk that South Africa will follow the unhelpful historical trend among governments to equate trafficking with either the transporting of women and girls into sex work, or to sex work itself. This would likely divert focus and resources away from cases of coercion, turning counter-trafficking work into counter-prostitution work.

The definition of trafficking in this second version of the Bill was much expanded from the previous version. The definition as currently stated is that

 trafficking includes…..recruitment…. by means of …. (j) the giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person, or (k)

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the giving or receiving of payments, compensation, rewards, benefits or any other kind of advantage...for the purpose of any form of exploitation...including the commission of a sexual offence or any offences of a sexual nature....

This definition is so broad that, if it were to be accepted into legislation, all sex workers would become trafficking victims; brothel owners could be prosecuted as traffickers; and newspapers and internet sites that carry personal advertisements for adult sexual services could be prosecuted for the offence of involvement in trafficking of persons. In addition, the broad scope of the definition would imply that any woman who was exploited or raped by her husband after a marriage entailing a payment of lobola would also qualify as a victim of trafficking.\(^{53}\) The law could also be used to prosecute labour exploitation.

With regard to the status of foreign victims of trafficking, some concern was raised that the Bill placed the onus on the victim of trafficking to prove that s/he may be harmed, killed or trafficked again if returned to his/her country of origin or the country from which he or she was trafficked. Practically, the resources and information required to furnish such proof are not easily accessible to private individuals, making this an unfairly onerous burden.

The Prevention and Combating of Trafficking in Persons Bill is important. It will give effect to South Africa’s international commitments to counter and prevent human trafficking. It will also provide the basis for the prosecution of offenders and protection of victims of trafficking. While human trafficking may take several different forms, the definitions of the current Bill leave questions as to exactly what it is that the state wishes to combat through this legislation. More precise drafting will be necessary to ensure that the eventual Act serves a clearly defined purpose. An unambiguous bill will translate into clear and unambiguous roles for the various government departments and agencies whose cooperation will be essential for the implementation of the legislation.

The Bill makes provision for the establishment of an Integrated Information System which would include details of all cases of human trafficking in South Africa. Yet there is no mechanism provided in the Bill for the sharing of information collected with civil society. This is a shortcoming. NGOs, like government agencies, need information to inform their interventions and ensure they are of optimal quality. In addition, research organisations could assist in providing a contextual analysis of data to inform policy making.

Until the new legislation is finalised, prosecutions of individuals involved in human trafficking can be carried out using common law provisions and legislation relating to sexual offences, children, basic conditions of employment, organised crime, immigration, witness protection and extradition.

\(^{53}\) Ibid.
Recommendations

To Parliament

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

To the Department of Labour

• *Promote fair working conditions for potential victims of trafficking.* By definition, trafficking results in labour exploitation of one kind or another. It is thus vital that the Department of Labour (DoL) is brought into the discussion about preventing and detecting cases of trafficking, as regular inspections by the DoL of industries where trafficked labour is presumed to be found would both act as a deterrent and assist in detection. Unfortunately, until the DoL recognises sex work as a form of labour, it will be unable to investigate cases of exploitation in this industry.
PROTECTING HUMAN SECURITY
Unaccompanied Minors

Last year CORMSA reported that while the exact numbers of independent migrant children coming into South Africa were unclear, it was already evident that the numbers have increased. The largest proportion of those was from Zimbabwe.54 A year later, there is still no clarity on the numbers of independent (unaccompanied) migrant children coming into South Africa. What we do know is that while the majority are still primarily coming from Zimbabwe, some are crossing into South Africa from Mozambique and other neighbouring countries. Moreover, many of the children coming into South Africa face considerable risks that are not being adequately addressed by current policy frameworks and practices.

Research currently being conducted by the African Centre for Migration and Society (ACMS) for Save the Children UK and the United Nations Children’s Fund (UNICEF) indicates that the push factors for the migration of unaccompanied minors continue to be poverty, pursuit of education, or the illness or death of a parent. Young migrants are leaving home with or without the approval of their parents to search for better opportunities in South Africa.

Motivations for Migration

Many of the children in the Save the Children and UNICEF studies reported that their migration decision was influenced by friends and neighbours, older sibling and other family members. The material benefits displayed by returning or visiting migrants also had a major impact on some children.

Those coming from Zimbabwe often make long journeys, sometimes from as far north as Mutare to cross the border. They seldom cross at the border post, and the dangers they face as a result are well documented (see ‘Human Smuggling’ in the 2009 CoRMSA report). Little has been done to mitigate these dangerous conditions.

For many unaccompanied minors, the ultimate destination is Johannesburg, where making money is said to be easy. However, few children reach Johannesburg. Many find themselves in areas close to the borders and begin the difficult task of finding work and accommodation. As these are scarce and expensive, children rely on social networks to help them during the first few weeks or months in South Africa. Migrant children have formed networks to help newcomers.

For many unaccompanied migrant children, most of whom are undocumented, jobs are in short supply. Finding work as an undocumented adult migrant is difficult enough, and for an unaccompanied migrant child the prospects are bleak. In South Africa, children younger than 15 years are prohibited from

working, but this is nevertheless the intention of many migrant children. Many children reported working on farms, as domestic workers, running errands and sometimes selling sex.

In many cases, an unaccompanied child’s income must not only support him or her, but also family members in the country of origin. Their circumstances compel many children to work – sometimes under exploitative and abusive conditions. Many do not want to stop working, or cannot afford not to work. They continue working under conditions they consider to be exploitative because they feel they have no other option.

Access to Education

One of the main reasons Zimbabwean children cross the border into South Africa is in the hope of accessing education. Although children’s right to education is enshrined in both domestic and international law, many migrant children are not able to attend school in South Africa. The main barriers they cite are lack of documentation, and finances to pay for school and the costs related to attendance (for instance transport, uniforms, and stationary).

The South African Schools Act states that no child may be prohibited from attending school because they cannot pay fees (Section 5(3) (a)) and that there may be no unfair discrimination in school admissions, irrespective of whether the child is a citizen. Many migrants are not aware of this and neither are some principals. As a result, lack of documentation prevents many migrant children from attending school.

However, migrant children’s goal of earning money also prevents them from accessing educational opportunities. The current schooling system, and the harsh reality of having to support themselves and often their families back home, makes it unlikely that migrant children will attend school. If there is a real commitment to ensuring that all children have access to education, a creative solution is needed to accommodate the needs of children who face the dilemma of supporting themselves.

Recommendations

Most of our recommendations from 2009 remain relevant to date.

To the Department of Social Development

- Facilitate access for permanent and circular migrant children to schools and shelters.

- Investigate whether there are sufficient shelters to accommodate the needs of unaccompanied minors.

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• Increase the number of social workers assisting migrant children and provide them with training on the rights of migrant children.

• Initiate a discussion on whether unaccompanied migrant children should qualify for social grants.

To the South African Police Service

• Investigate the human smuggling system along South Africa’s land borders towards mitigating the human rights violations that characterise smuggling transactions.

• Support the development of in-house training for police on the rights of migrant children, and capacitate them to deal legally and compassionately with children in general and unaccompanied children in particular.

To the Department of Basic Education

• 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.

• Explore options for accessing funding that will cover hidden school costs like uniforms, transport, etc.

To the Department of Labour

• Understand that many children come to South Africa as economic migrants and that special provision needs to be made to protect them from exploitation and abuse. This can be done by consulting with NGOs working with unaccompanied migrant children and with the children themselves.

To Civil Society and Migrant Communities

• Develop and support programmes that facilitate access to schooling for those unaccompanied children who want to attend school.

• Assist with the development of integration strategies in schools.

• Provide training that will expand work opportunities for older children.

• Develop and support programmes that protect young children who are forced to earn a living.
- Intensify health education among child migrants, particularly among young boys and girls engaging in survival sex and sex work.

- Encourage the participation of children in programmes designed to assist them.

- Embark on a campaign to educate communities about the rights of migrant children especially with regard to accessing education and the protection of children from exploitative working conditions.

- Advocate for:
  
  o Labour courts to monitor exploitative labour conditions for children.
  o Campaigns to educate communities about the rights of migrant children, especially with regard to accessing education and protection from exploitative working conditions.
  o A police focus on eradicating human smuggling and related abuses.
  o A directive from the Department of Basic Education to all schools clarifying that no child, regardless of documentation status, is to be excluded from education.
  o Consideration to be given to extending child support grants to migrant children.

- Use regional structures such as the Southern African Development Community (SADC) to highlight the barriers to South Africa’s implementation of children’s rights for migrants.
Migrant Workers and Labour Conditions

The employment of international migrants has been part of South African economic development for over a century and migrant workers continue to participate at different levels in many sectors. The government now recognises the importance of recruiting skilled international migrants in many sectors where there are scarce skills: health, engineering, information technology and a range of other fields. While highly skilled professionals are critical to the South African economy, it appears that the vast majority of international migrants (skilled or unskilled) are involved in informal employment and provide services in labour-intensive sectors such as mining, construction, farming, hospitality, and security. Among them are many asylum seekers, refugees, and undocumented migrants. Most of these come from within the SADC region, especially Zimbabwe, Mozambique, Lesotho, Swaziland, and Malawi. These workers remain a critical component of the South African economy and, through their remittances and skills transfers, are central to building regional prosperity. They are also the most vulnerable to exploitation and abuse.

Migrant workers, especially those at lower skills levels, who are often employed on a casual or informal basis, have little opportunity to claim work-related benefits and rights. Rampant casualisation and informalisation of employment arrangements has made it difficult to create decent working conditions for many workers – including South Africans. The prevalence of this volatile category of labour has serious implications for the rights of workers and the standards of labour in South Africa. While there is a need to look at the gaps in terms of legislation, the main focus should be on capacitating the Department of Labour (DoL) to conduct inspections and ensure compliance.

Migrant Labour Rights and Policy Frameworks

As residents of South Africa, migrant workers are protected by the national Constitution and other human rights instruments. The Labour Relations Act, for example, protects the right of workers regardless of nationality or documentation status, so that even undocumented migrants have recourse to justice in cases of labour disputes or unfair labour treatment. Many are also protected under rules related to refugees and asylum seekers which guarantee these groups the right to work. South Africa is also a signatory to the International Labour Organisation’s (ILO’s) Migration for Employment Convention. The ILO Migrant Workers (Supplementary Provisions) Convention also provides a basis for protection of migrants.\(^{56}\) However, South Africa is yet to sign the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.\(^{57}\)

It is also important to recognise that while migrant workers are protected by certain aspects of South African law, the country’s immigration policy undermines the rights accorded to many undocumented

\(^{56}\)ILO.1949. "Migration for Employment Convention (Revised), No. 97"; see also "Migrant Workers (Supplementary Provisions) Convention, 1975, No. 143, available at: http://www.ilo.org/ilolex/english/subjectE.htm#s16

\(^{57}\)South Africa has not signed the Convention as of 04 October 2010.
migrants. The Immigration Act criminalises the employment of undocumented migrants,\(^5^8\) which means that undocumented workers may be reluctant to report unfair treatment at workplaces for fear of arrest, detention, and deportation. A large number of casual and unskilled workers come from neighbouring countries and a substantial number of these cross the border informally due to the restrictive conditions of work permits for South Africa. This category of migrants constantly faces the risk of deportation if apprehended by police or immigration officials. Many migrant workers who are arrested at their workplace or elsewhere are unable to claim their salaries or any other employment benefits to which they are entitled before their deportation, despite the broad embrace of labour protections.

Working Conditions

Despite a national legislative framework that aspires to standard and fair working conditions, many workers continue to experience various forms of labour exploitation and unfair treatment. Unfair employment practices are often wrongly attributed to the presence of migrant workers, but a recent pilot study by the African Centre for Migration and Society (ACMS) in the construction industry showed that citizens and non-citizens alike fall victim to such practices.\(^5^9\) The steady transformation of the labour market through casualisation, informalisation and outsourcing appears to be the real source of negative employment conditions.

International migrants are often desperate to make a living in the absence of the social support structures that allow nationals room to negotiate the host country’s labour market. As a result, they are more likely to be exploited by unscrupulous employers who understand the distinct challenges the migrants face.

The ACMS pilot study reveals an entrenched practice – virtually an explicit policy – of employing workers informally and on a temporary basis, without any written contract, with the specific aim of denying them the benefits and rights associated with employment. Many workers, for instance, continue to work long hours for less than the minimum wage. At the same time, health and safety is often compromised at workplaces. In the construction industry, many casual workers work under conditions that pose a risk to their health and safety. This situation is facilitated by the labour brokering transaction, which allows brokers to abdicate responsibility for the workers they provide, while workplace managers deny any official employment relationship to workers whose health and safety has been compromised. The proposed amendment bill to the Labour Relations Act is expected to provide a clear definition as to who is categorised as the ‘employer’ in such a situation.

Such unfair practices of employment have serious implications for the livelihoods of workers and standards in the South African labour market. The lack of employment security in a casualised labour

\(^5^8\) Department of Home Affairs, 2002, “Immigration Act of 2002”

market impedes social security, and the exploitation of migrant workers ultimately impacts on the labour conditions of local workers. Thus, efforts toward ensuring decent working conditions should focus both on ensuring employers’ compliance and on promoting rights awareness among all workers regardless of their immigration status.

Implementation and Awareness of Migrant Labour Rights

One of the ongoing challenges migrants face is that little has been done to ensure that legal principles are realised through employers’ compliance. However, there are also loopholes in the legislation with issues such as defining an ‘employer’ and ‘employee’. The new amendment proposal is meant to redress some of those concerns. However, the proposal on the issue of labour inspection proposes a role for the South African Police Service (SAPS) in workplace labour inspections.\(^6\) The proposal that police officers should accompany inspectors is likely to undermine the inspections, as undocumented workers may be unwilling to inform inspectors of their working conditions due to fear of arrest. There is also the possibility that police may take the opportunity to arrest undocumented workers under the Immigration Act, reinforcing the invisibility and related vulnerability of these workers.

There is also a lack of awareness with regard to labour laws, and institutions such as the Commission for Conciliation, Mediation and Arbitration (CCMA) and the labour courts, among migrant workers. Experiences of arrest by immigration officials who fail to consider the issue of labour rights may reinforce the assumption that they have no rights. Even among those who are aware of labour protection, there is a general disinclination to engage the relevant institutions. For undocumented migrants, government institutions are often seen as synonymous with arrest and deportation. Thus, such workers tend to avoid state institutions and may continue to work under unfair working conditions. This state of affairs can only be mitigated through initiatives by NGOs and the CCMA to promote migrants’ of their rights and the relevant labour laws and institutions.

Labour Unions

Unpublished ACMS research suggests that migrant workers are by and large not represented in local labour unions. This could generally be attributed to the failure of unions to reach out to such workers – and vice versa. While unions recognise the importance of protecting all workers,\(^6\) there are some technical and practical issues that prevent workers from accessing membership. For instance, unions expect workers to pay their membership fees electronically through their employers, which is impossible for the many who are employed casually and informally. The political identity of unions in South Africa deters many migrant workers from seeking to join – unions are perceived as too political to draw migrants into their constituencies. Furthermore, there were no outreach programmes targeting migrant


workers according to unions interviewed by the ACMS. Another reason why migrant workers do not join unions is that their employers threaten to terminate their employment if they do so, in which case they opt to keep their jobs. Fear of dismissal affects many casual workers, including South African nationals.

**Recommendations**

**To the Department of Labour**

- Regular labour inspections should be strengthened and expanded to reach far more workplaces. However the proposed involvement of the police in these inspections should be reviewed, since it would undermine the very purpose of such inspection by inhibiting the reporting of abusive conditions by undocumented migrant workers.

**To Labour Unions**

- Review membership procedures and payment conditions to allow casual and informal workers to access membership.

- Proactively engage migrant workers to participate in collective mobilisation and bargaining processes.

**To the South African Police Service**

- Consider the labour rights of arrested undocumented migrants and, wherever possible, allow them to make efforts (such as phone calls) to secure their due benefits from their employers before they are removed to Lindela for deportation.

**To the Department of Home Affairs**

- In its efforts to help Zimbabweans (and other undocumented migrants) regularise their stay in the country, the DHA should recognise self-employment, informal and casual employment as bases for work permit applications.

- In reviewing the Immigration Act, make provision for procedures to protect the labour rights of undocumented workers and allow those arrested and detained for immigration offences to claim any outstanding payments or benefits from their employers.

- In partnership with the Department of Labour or the Planning Commission, conduct a national skills audit, improve accreditation procedures, and streamline skills recruitment.
To Civil Society

- Raise awareness among migrants of their labour rights and the institutions that guarantee those rights, that is, the CCMA and labour courts.

To the Commission for Conciliation, Mediation and Arbitration

- Raise awareness among migrants of the CCMA and its functions.

- Keep records of assistance rendered to non-nationals of various documentation statuses to enable data to be collected on the numbers of non-nationals accessing CCMA assistance, and the outcomes of such cases.
Migrant Sex Workers

Internationally, the links between migration and sex work have been well-established. Migrants may enter a new city and look for various ways to establish a livelihood, to support both themselves and dependents that remain at home. The informal economy and service sector are often more accessible to migrant groups – particularly undocumented migrants. Engaging in sex work becomes a viable option for a number of reasons: it pays relatively better than other service work, has flexible working hours, often means that the sex worker is self-employed, and does not require formal qualifications or documentation.

Often a migrant’s social networks will assist in introducing her to the industry and assisting her with introductions to new hotels, agencies or clientele. Alternatively, sex workers in their place of origin may migrate to another country or to another province to seek greater economic opportunities or better working conditions in the sex industry. The stigmatised – in South Africa, illegal – nature of sex work, and the unhelpful tendency of governments and NGOs to equate sex work with human trafficking, means that this population is often misunderstood and excluded.

While discussions about migration and sex work are occurring worldwide, research gaps exist about the nature of sex work in South Africa and about the participation of migrants within the industry. Little information or research is available on the number of sex workers in South Africa, where they come from, and what their migration patterns are. The sex work research that captures information on migrancy in South Africa contains information on two areas only: Johannesburg and Cape Town. Systematic research conducted in Cape Town in 2008 found that 5% of sex workers working indoors were ‘foreign’. Research from Hillbrow in 1998 showed that a relatively small percentage of sex workers in Hillbrow were from other countries – only 11%, although recent evidence suggests this

66 Agustin, L. M. op cit, p11.
69 Reproductive Health Research Unit, Sociology of Work Unit University of the Witwatersrand; Vrije University Amsterdam. 2002. Women at Risk: A Study of Sex Work in Hillbrow.
percentage has increased substantially. A 2010 study conducted in Johannesburg, Cape Town and Rustenburg around the World Cup Soccer period, with the support of the African Centre for Migration and Society (ACMS), found that the majority of sex workers are migrants, having moved from either elsewhere in South Africa or from within the southern African region. The vast majority of sex workers are female. Many women enter sex work because they have a number of dependants (both children and adults) to provide for. The World Cup study found that female sex workers had on average two dependent children for whom they were financially responsible.

While the body of research work on migration and sex work is increasing, more work needs to be done. What is plain – from scholarly literature, reports from organisations working with sex workers, and cases that have been brought to court – is that a range of human rights violations are regularly perpetuated against male, female and transgender sex workers. As human beings and as workers, sex workers have rights regardless of the fact that their work is illegal. As such high proportions of sex workers are migrants, CoRMSA is concerned to ensure that these rights are considered and protected.

**Sex Work and Access to Services**

Sex work is a criminal offence in South Africa and in many neighbouring countries, making these workers a highly stigmatised and marginalised group in South African society and within the southern African region. Negative social attitudes create barriers to sex workers in accessing social services, healthcare and legal services, while making them vulnerable to exploitation and to high levels of violence.

**Cross-border migrant sex workers experience additional challenges in accessing services, which further exacerbates their vulnerability to exploitation and violence.** In South Africa this is linked to the challenges that cross-border migrants face in accessing documentation in order to regularise their stay. Harassment by the police, and police violence, are a common problem – as evidenced by the assault of a migrant sex worker around the time of a proposed march for sex worker rights on International Sex Worker Rights Day (3 March 2011). Like many migrant sex workers, the victim refused

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71 Richter et al. 2010. op cit.
73 AIDS Legal Network; Sex Worker Education and Advocacy Taskforce; Steve Biko Centre for Bioethics, University of the Witwatersrand; & Reproductive Health and HIV Research Unit, University of the Witwatersrand. 2009. “Submission to South African Human Rights Commission on sex workers on the public hearings into ‘The Millennium Development Goals and the realisation of economic and social rights in South Africa’”, 6 February 2009.
to seek healthcare services for her injuries for fear that she might be deported if exposed as an undocumented immigrant.  

For cross-border migrants more generally, documentation status and language barriers hinder access to government services. The barriers multiply for migrant women engaged in sex work; multiple challenges are experienced, including access to documentation, fear of the police, violence, and access to healthcare services.

**Police Victimisation**

Some rogue members of the police view themselves as custodians of women’s sexuality and lash out at sex workers with insults and brutality. Some examples from the World Cup research illustrate this:

She [sex worker respondent] had problems with cops because they beat her brutally and forced her into the [police] van and sprayed her private parts with a spray gun (Sex worker, aged 30, Cape Town)

I met the police just after I finished selling my body; they scared me and asked me what I am doing with a male person on the streets this late. He asked me what kind of a person am I and he insisted that I sleep with him. He asked me why am I not like other women and he hit me. (Sex worker, aged 21, Rustenburg)

It was bad because they say I bring HIV from Zimbabwe (Sex worker, aged 40, Cape Town)

I bumped into the police and they asked me if I know that prostitution is illegal. Just when I wanted to respond one of the cops, who was a female, hit me with a fist on my face and I bled lots of blood. I spent about three days not being able to talk, I was afraid of laying charges. (Sex worker, aged 25, Rustenburg)

A wide spectrum of complaints have been lodged against members of police who have raped, extorted, beaten, pepper sprayed and arrested sex workers without charging them. In 2009, the Western Cape

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78 Tswaranang Legal Advocacy Centre, Sex Worker Education and Advocacy Taskforce, Sisonke and Women’s Legal Centre “Strategy Meeting on Sex Worker Arrests” Braamfontein, 17 & 18 May 2010, available: http://sex-work-2010-reference-group.googlegroups.com/web/SexW_arrests+Workshop/report.doc?gda=gC81GVQAAAtVIVLPXz16c3NTFU2U2Jmg8po9p 2ETMGrhhxylzvhaaq6A96wVVaYMxPW0DHemJpgx82RD2cMoM73IB1q1FvervUohE3YdNn3Wm1Pnc30AW2C50hVifZ6-QcRqg
High Court issued a judgment against such harassment in which it interdicted the police from arresting sex workers while knowing they would not be charged or prosecuted.  

Sex Work, Health and HIV

If sex workers work under unsafe conditions and without proper access to healthcare services, sex work can have serious health implications both for the sex worker and for the broader society in which sex work takes place. As such, it is important to empower sex workers to demand safe sex and ensure their access to healthcare services. Yet the illegality of sex work creates a power imbalance between the men who buy sex and the women who sell it. This skewed power relationship, reinforced by patriarchal attitudes, makes it particularly difficult for sex workers to negotiate safer sex and increases their vulnerability towards STIs and violence from both clients and partners.

Migrant sex workers may also experience difficulties in obtaining the healthcare they need. For women sex workers who have multiple dependents to support, the pressure of providing for an extended family – particularly in dangerous context of the sex work industry – may prevent women from seeking healthcare in a timely manner. For cross-border migrants, lack of documentation is often a compounding factor preventing recourse to health services. For undocumented migrant sex workers, who are doubly ‘illegal’ – considered both illegal immigrants under the Immigration Act and offenders under the Sexual Offences Act – the possibility of accessing health services is severely constrained. This situation poses a threat to their personal health and their family’s livelihood, as well as to regional health.

Migrant sex workers face an increased risk of contracting HIV. Whilst the relationship between migration and HIV is acknowledged to be complex, the context of migration may place individuals at increased risk of acquiring the virus. In addition, the limited existing data shows that sex workers are very vulnerable to HIV. In studies done in 1998, HIV prevalence rates among different sex worker groups were between 45% and 69%. It is likely that HIV prevalence rates are now much higher. As they face the increased vulnerability associated with both migration and sex work, migrant sex workers once again face compounded risk.

82 Richter op cit.
Sex workers’ health is compromised by violence (perpetrated by clients as well as the police\textsuperscript{83}), stigma, the nature and danger of their work, economic difficulties, and their lack of access to services and support. All of these factors reduce sex workers’ ability to protect themselves against HIV, prevent HIV transmission to their sexual partners and clients, and access HIV-testing, treatment and support.

South Africa’s national AIDS Plan – The National HIV & AIDS and STI Strategic Plan for South Africa 2007–2011 (NSP) – recognises the vulnerability of sex workers and includes a number of provisions to mitigate the risk of HIV for sex workers, including the rolling out of customised HIV-prevention packages for sex workers and the recommendation that sex work in South Africa be decriminalised. None of these provisions have yet been implemented. Neither has the custodian of the NSP – the South African National AIDS Council (SANAC) – taken an official decision to support the decriminalisation of sex work\textsuperscript{84} despite mounting evidence that it is the most appropriate public health and human rights response to sex work.\textsuperscript{85}

Criminalisation and Rights

Public health and human rights approaches to sex work see the ongoing criminalisation of sex work as responsible for:

1. Increasing sex worker vulnerability to violence from clients, partners and police;
2. Creating and sustaining unsafe and oppressive working conditions;
3. Increasing the stigmatisation of sex workers;
4. Restricting access to health, social, police, legal and financial services;
5. A negative impact on safer sex practices; and
6. Impacting on the ability to find other employment.\textsuperscript{86}

The South African Law Reform Commission (SALRC) has spent more than eight years working on the issue of sex work legal reform. It has released an Issue Paper (2002) and a Discussion Paper (2009) on ‘adult prostitution’, but has not recommended a specific legal model that Parliament should adopt. Given the compounding effect of migration on sex workers’ risk of rights violations, CoRMSA supports the rights-based call for the decriminalisation of sex work.


\textsuperscript{85} Human Rights Council. 2010. “Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development”; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Fourteenth session, Agenda item 3 – A/HRC/14/20; Richter, M; Matthew F Chersich, Fiona Scorgie, Stanley Luchtens, Marleen Temmerman & Richard Steen. 2010. “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail.”\textit{Globalisation and Health} 6(1).

\textsuperscript{86} This is a summary of the arguments that were advanced in the Constitutional Court in Sex Worker Education & Advocacy Taskforce (SWEAT), the Centre for Applied Legal Studies (CALS) & the Reproductive Health & HIV Research Unit (RHRU) (2002) Amicus curiae submission in the case \textit{Jordan v State}. Johannesburg.
**Recommendations**

To the Department of Health

- Sensitise health service providers on patients’ rights, migration, and health in general, through specialised training sessions and materials about the right to access healthcare.

- Implement the sex work provisions of the National Strategic Plan 2007-2011. The NSP recommends the implementation of sex-work-specific healthcare services, non-discrimination and the decriminalisation of sex work.

To the Department of Justice and Constitutional Development

- Recommend the decriminalisation of sex work in current law reform processes. The SALRC should release its recommendations and model legislation as a matter of urgency.

To the South African Police Service

- Discipline police who harass and unlawfully arrest sex workers.

- Across all provinces, support the Western Cape High Court’s April 2009 interdict against the practice of arresting sex workers without the intention to charge or prosecute them.\(^\text{87}\)

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Refugees and Asylum Seekers

Over the last two years, the Department of Home Affairs (DHA) has made significant progress in alleviating pressures at the refugee reception offices. While asylum seekers still report some problems accessing these offices, CoRMSA is pleased to note that the notorious overnight queues outside most of these offices have disappeared. In addition to opening interim offices in Musina and Pretoria, the implementation of the Turnaround Strategy has improved processing times at these offices.

However, this progress has come at a price. Although reform efforts have countered corruption and promoted efficiency, they have also severely affected the quality of status determination, thus compromising the integrity of the asylum process.

Access to Refugee Reception Offices

Problems with access have improved significantly, with the exception of the Cape Town refugee reception office. According to the Cape Town centre manager, this office is considerably under-staffed and unable to meet the demand for services. Consequently, individuals continue to spend the night outside of the office in the hope of gaining access. The large crowds outside this office have prompted the surrounding businesses to file a nuisance lawsuit demanding that the office be moved. In a judgment issued in May 2010, the Western Cape High Court gave DHA until September 2010 to either deal with the nuisance issues or find a suitable alternative location. The department has requested additional time to find an alternative location.

While access problems at other offices are not as severe as in Cape Town, asylum seekers continue to report problems accessing the relevant services at these offices. Many report:

- being turned away by guards when they arrive for their appeal hearings,
- being unable to lodge appeal requests, or
- discovering that their appeal requests have been lost by the DHA.

The overwhelming demand for appeals, discussed below, exacerbates these problems. Asylum seekers have also reported problems renewing their documents.

DHA’s Approach to the Status Determination Process

Gaps in the immigration system have forced many economic migrants into the asylum system as the only means to regularise their stay. This has created a perception within the department that most of those applying for asylum are economic migrants who do not require full status determination interviews. At the Musina refugee reception office, for example, where most asylum applicants are Zimbabwean, organisations monitoring the situation have reported that refugee status determination officers do not
afford applicants the opportunity to recount the details of their asylum claims. Instead, based on their own assumptions about Zimbabwean applicants, officers record that the applicants left their country of origin for economic reasons. This view is not limited to the Musina office, but seems to be pervasive throughout the DHA. Even the former head of Refugee Affairs stated in meetings with legal representatives that no more than ten minutes was needed for status determination interviews involving Zimbabwean nationals, given that they were “all economic migrants.”

The DHA has made efficiency a priority as it has sought to remove economic migrants from the asylum system as quickly as possible and address the ongoing backlog of applications. As a recent review of refugee status determination decisions suggests, the goal of efficiency appears to have supplanted the fundamental rights protection mandate of the asylum system, resulting in significant rights violations for bona fide asylum seekers. Dismissing the significance of these rights violations, the department has continued to focus its efforts on combating perceived abuse of the asylum system by individuals whose real circumstances do not in fact qualify them for asylum. As a consequence of these priorities, the asylum system is failing to fulfil its primary purpose: offering safe haven to the bona fide asylum seekers it was designed to protect.

CoRMSA is also concerned about DHA’s practice of fining asylum seekers who have not renewed their permits on time. Refugee reception offices have refused to renew asylum permits until asylum seekers have paid the fine. While amounts seem to be arbitrary and vary significantly, a recent communication from the Chief Director of Asylum Seeker Management indicated the following fine amounts: failure to renew for six days to one year: R1000; failure to renew for more than one year up to two years: R2000. This leaves asylum seekers unprotected and at risk of arrest and deportation unless they are able to pay the fine, grossly undermining the asylum system's primary purpose of protection. While DHA is entitled to address the issue of late renewals, the current practice is not authorised under the Refugees Act, does not afford asylum seekers any procedural rights, and is being implemented in an arbitrary manner. The inappropriateness of such penalties is made all the more evident by the fact that many delays in seeking renewal are due to inefficiencies at the refugee reception offices. In addition, many asylum seekers are forced to travel long distances to renew their permits because of DHA’s incapacity to transfer files after they have relocated.

The use of fines underscores the punitive rather than rights-based approach that the DHA has adopted. Rather than addressing problems at the refugee reception offices, the policy targets asylum seekers for their failures to strictly comply with the terms of the Refugees Act. Similarly, efforts to combat corruption, such as the mandatory review of positive status determination decisions, have targeted the asylum seeker, while failing to address practices at the reception offices. In focusing on enforcement measures, DHA has failed to take into account the ways in which these actions affect the rights of asylum seekers.

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Procedural Deficiencies in the Status Determination Process

As noted in CORMSA’s 2009 report, the prioritisation of speed in the asylum process has afforded little time for status determination interviews, and virtually no time for adequate country research or quality decision-making. Nor do the reception offices effectively communicate the nature and details of the status determination process to asylum seekers. In addition, DHA has continued its practice of scrutinising all positive decisions to ensure that corruption was not a factor, creating a bias toward negative status determination decisions. Given that status determination officers do not have sufficient time to produce a quality decision that can properly support a positive determination in case of a subsequent review, they have a strong incentive to issue negative decisions, even when confronted with a strong asylum claim.

This situation has given rise to serious problems with the status determination process, including violations of administrative and refugee law. A review by the African Centre for Migration and Society (ACMS) of over 300 status determination decisions from the country’s five permanent refugee reception offices found the following problems, among others:90

- Errors of law, including
  - Failures to properly apply the concepts of persecution, well-founded fear and credibility;
  - Applying inappropriate standards of proof; and
  - Imposing arbitrary requirements that are not supported by the relevant law.91

- Failure to provide adequate reasons for decisions as the law requires;

- Practices that prevent decisions from meeting the standards of reasonableness, such as:
  - Ignoring information in the claim and relevant country information;
  - Failing to make any rational connection to the information in the claim;
  - Using the wrong claimant’s information;
  - Using unsupported facts, illogical conclusions and speculation;
  - Selective use of country information, use of outdated country information, and factual errors;
  - Naïve reliance on the existence of legal rights on paper in origin countries as evidence of their realisation in practice.

91 Specifically, status determination officers have incorrectly added an individual persecution requirement to Section 3(b) of the Refugees Act, which grants refugee status to individuals who have been compelled to leave their place of habitual residence ‘owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part of the whole of his or her country.’
Although ACMS presented the above findings to DHA in an April 2010 meeting, the department has not yet taken steps to improve the quality of decision-making in the status determination process. At present, it continues to prioritise anti-corruption measures and target perceived economic migrants in the asylum system without due regard for the effects that these priorities have on the core objectives of the system: the status determination process and the protection of asylum seeker rights.

**The Refugee Appeal Board**

The poor quality of status determination decisions has increased an already high backlog at the under-resourced Refugee Appeal Board (RAB). As noted in the 2009 report, the RAB must effectively act as the primary decision maker rather than as a review body because of the inadequacy of initial decisions. In some instances, individuals have been unable to get a hearing date because the board has been booked so far into the future that it has stopped taking appointments. Asylum seekers may wait for several months to get a hearing, and must wait significantly longer for a decision. The DHA has done little to address this backlog. Reforms aimed at expanding the board have been promised for at least two years, but still have not taken effect, leaving the board under-capacitated and unable to meet the demand for appeals.

**The Tshwane Interim Refugee Reception Office**

Practices at the country’s refugee reception offices vary significantly, despite strict laws governing these practices. CoRMSA is particularly concerned about operations at the Tshwane Interim Refugee Reception Office (TIRRO) in Pretoria, and its failure to fulfil its legal obligations. Legal clinics assisting asylum seekers and refugees have reported that the TIRRO office regularly refuses to issue documents in accordance with the law. It has consistently denied refugee status to dependents of recognised refugees, in contravention of Section 3(c) of the Refugees Act. It has also arbitrarily withdrawn and destroyed documents without providing reasons, and without any regard for the procedural justice requirements governing these actions. This office has even refused to implement court orders. In at least one instance, the centre manager refused to issue an asylum seeker permit in direct defiance of a court order demanding the immediate release of the unlawfully detained asylum seeker together with the issuance of an asylum seeker permit. The asylum seeker remained in detention for an additional number of days, in contravention of the court order and in violation of his fundamental right to liberty, because of the centre manager’s flouting of the law. In other instances, individuals have remained undocumented and subject to arrest, detention, and the risk of refoulement because of the TIRRO office’s refusal to carry out its legal obligation to issue documents. Individuals have also reported being arbitrarily detained in holding cells after approaching the office for assistance.

Organisations providing assistance to asylum seekers have repeatedly complained to the Refugee Affairs Directorate about problems at TIRRO. The directorate has acknowledged that the actions of TIRRO and its centre manager do not accord with the law. Nonetheless, the directorate has refused to take any

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92 A N v Minister of Home Affairs and 3 Others, SGHC, 2009/22901 (17 June 2009).
action and has allowed this state of affairs to continue. As a result of the DHA’s failure to address these serious deficiencies at its refugee reception office, LHR brought an action against the DHA and against the TIRRO centre manager in his official capacity for his failure to provide a refugee permit to the wife of a recognised refugee in accordance with the law. The manager denied that he was individually answerable to the court process for his actions and refused to accept service of court papers. In October 2010, in an unopposed action, the South Gauteng High Court declared the centre manager’s actions to be unlawful and ordered him to provide the applicant with a refugee permit.93

Refugee Affairs Directorate

The situation at the TIRRO office is indicative of a general gap between law and practice, and points to inadequate supervision by the Refugee Affairs Directorate (RAD) over operations at its refugee reception offices. The RAD often highlights the existence of certain policies and practices. However, these policies and practices are not in operation at the reception offices. Key among these is the ability of asylum seekers to report to any refugee reception office to renew their asylum seeker permits. The RAD has repeatedly emphasised that asylum seeker records are centralised, and that an asylum seeker can go to any office to renew an asylum seeker permit. In practice, offices are unable to locate asylum seeker records, and asylum seekers are told that they must report to the office where they initially applied, or arrange a file transfer to the new office. Because of its focus on questions of efficiency and corruption, the directorate has been largely unresponsive to complaints about issues at particular offices, and has not properly addressed problems that have a negative impact on the rights of asylum seekers. CoRMSA hopes that the new Director for Refugee Affairs will work to address these issues.

Recommendations

To the Department of Home Affairs

- Carry out the review of legal action against the DHA and its staff as recommended by the South African Human Rights Commission in its 2010 report on issues pertaining to the 2008 violence against non-nationals.94

- Ensure the status determination officers are given sufficient time and resources to interview an asylum seeker, do the necessary country research, and write a well reasoned decision that includes an individualised assessment of the asylum claim and the reasons for the rejection. This means reviewing the targets currently in place requiring status determination officers to process a certain number of claims per day.

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93 This is an unpublished case. In order to protect the identity of the asylum seeker in question, it has not been cited.
• Provide status determination officers with adequate training so that they can produce administratively fair and individualised decisions based on a proper application of the law.

• Establish a review mechanism that ensures that status determination decisions are fulfilling the requirements of administrative justice and are properly applying the elements of refugee law.

• Eliminate the current review procedures that focus on checking only positive decisions. Establish a system of random reviews of both positive and negative decisions that ensures that decisions are being administered in accordance with Promotion of Administrative Justice Act and the Refugees Act.

• Reduce the burden on the Refugee Appeal Board by ensuring that the Refugee Status Determination Officers are able to operate effectively and without sacrificing quality for efficiency.

To the Refugee Affairs Directorate

• Strengthen oversight of the everyday operation of refugee reception centres and institute disciplinary measures against staff that do not adhere to established policies and practices.
Immigration Detainees and Deportees

The legal and practical limits of South Africa’s immigration and asylum regime have left many migrants vulnerable to arrest, detention, and deportation. Despite claims to the contrary, the Department of Home Affairs (DHA) has done little to improve detention and deportation processes. While deportation remains a central part of immigration management in South Africa, the processes leading to it often occur outside of the law and violate the procedural guarantees put in place by both the Refugees and Immigration Acts, as well as the Promotion of Administrative Justice Act. CoRMSA is also concerned that there is no independent monitoring of DHA’s detention facilities, and individuals working at these facilities are largely unaccountable for violations of the law and of the rights of detainees.

Arrest and Detention at Police Stations

Under the Immigration Act, both police and immigration officers are empowered to arrest suspected illegal foreigners, and many initial arrests are conducted by police officers. But the Act and accompanying Regulations place certain limits on this power, including the following:

- Police and immigration officers must take reasonable steps to verify an individual’s status, including:
  - Allowing the individual to collect documents that are available nearby,
  - Allowing the individual to contact relatives who can assist in status verification, and
  - Attempting to verify the individual’s status through DHA records.
- Individuals may not be held for over 48 hours for purposes other than deportation, including for the purposes of verifying their immigration status.
- An immigration official must classify an individual as an illegal foreigner in order for the detention to be extended beyond 48 hours.

A recent survey of detainees at the Lindela Detention Centre showed that these provisions have been consistently violated. In general, detainees reported that police had not allowed them to retrieve nearby documents that could confirm their legal status. Detainees also reported that the police were either unwilling or unable to verify their status with DHA. Many had been detained for deportation even though they had not been classified as illegal foreigners by an immigration officer.

Xenophobic attitudes, violence, and corruption also remain significant features of the arrest process. The threat of violence is exacerbated by the fact that individuals arrested as suspected illegal foreigners are often held with ordinary prisoners and those awaiting trial, despite the fact that they are administrative

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detainees who have not been charged with a crime. Almost two-thirds of those arrested as suspected illegal foreigners, moreover, were held beyond the legally allowed 48 hours, further increasing the possibilities for abuse. On average, detainees at Lindela spent ten days at a police station before being sent to Lindela. Some were held for significantly longer.

**Lindela Detention Centre**

The Lindela Detention Centre is a DHA holding facility established under Section 34 of the Immigration Act, which authorises DHA to detain illegal foreigners. Although DHA has not published deportation numbers for 2009, the population at Lindela generally averages around 1000 detainees a day, but may be much higher at times. The Centre can hold between 4000 and 7000 detainees.\(^6\) Men and women are held in separate sections. Minors under 18 are no longer detained at the facility.

DHA has contracted daily operations of Lindela to Bosasa, a private contractor responsible for meals, accommodation and security. CoRMSA is concerned about the fact that this delegation has blurred the lines of authority. Detainees report that they are unable to access immigration officials once they are inside the centre. Detainees who wish to challenge their immigration status must register their complaints with Bosasa security guards. These guards act as gatekeepers, despite being neither trained nor authorised to deal with immigration and asylum questions.\(^7\) In the face of numerous requests, including one made under the Promotion of Access to Information Act, DHA has refused to provide a copy of the most recent contract with Bosasa, leaving the precise distribution of authority between DHA and Bosasa unknown.

Although there is no formal independent monitoring or oversight of the Lindela Detention Centre, Lawyers for Human Rights (LHR), a legal NGO, is allowed to consult with clients whose names it submits two days in advance. However, the Department has stopped providing LHR with lists of those detainees held for over 90 days, a practice that was implemented several years ago through an arrangement with the Human Rights Commission following a 1999 court decision. In addition, researchers from the African Centre for Migration and Society (ACMS; formerly known as the Forced Migration Studies Programme) were permitted to conduct a survey of detainees at the centre. The research was conducted periodically over a ten-month period until the DHA terminated the researchers’ access without notice or explanation.

While conditions at Lindela are generally satisfactory, violence and corruption continue to be a problem. The lack of oversight, and the delegation of operations to Bosasa, has made it more difficult to establish accountability for these abuses. Although conditions are not universally problematic, there are nonetheless **systemic failures to adhere to the legal procedures established by the Immigration Act and also required under the constitutional guarantee of administrative justice**. In several detention cases

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\(^6\) This range is based on the varying estimates provided by DHA and the private contractor running the Centre.

brought by LHR, DHA initially opposed the cases but ultimately released the individual in question a day or two before the court hearing, following several months of detention. This suggests that these individuals were being unlawfully detained, in violation of the fundamental right to liberty, for several months, and that their detentions would have continued if not for the threat of legal action.

The ACMS research found the following violations of the law:

- Detention of asylum seekers.
- Failure to properly notify detainees of their classification as illegal foreigners and of the decision to deport them.
- Failure to inform detainees of their rights of review and appeal.
- Violations of due process in the issuing of notices of deportation, including coercive strategies to ensure that detainees choose deportation rather than appealing the decision to deport them.
- Extensions of detentions beyond 30 days without providing the proper notifications or obtaining a magistrate’s warrant as required by law.
- Indefinite detentions in excess of the 120 days allowed by law.
- Failure to exercise discretion in the decision whether to detain.

The Immigration Act puts various procedures in place to limit the detention powers of immigration officers. The failure to follow these procedures means that these detentions are essentially occurring outside of the law, with no judicial oversight or protection of the rights of detainees. While officials have made some effort to respond, for instance by suddenly releasing asylum seekers or those detained for over 120 days, these efforts have been sporadic and inconsistent. They do not signal a more comprehensive change in practice or policy.

**Detention of Asylum Seekers**

The detention and deportation of asylum seekers raises particular rights concerns. Both international and South African law prohibit refoulement – the return of an asylum seeker to a country where he or she may face persecution or a threat to his or her life. According to survey research, over one-third of detainees at Lindela are asylum seekers. Where these individuals do not succeed in securing legal interventions, they are eventually deported without a proper assessment of their asylum claim, and in violation of the non-refoulement principle.

Asylum seekers are governed by the Refugees Act, not the Immigration Act, and thus cannot be held as illegal foreigners for the purposes of deportation. In addition, only a refugee status determination officer is authorised to make a determination on the validity of an asylum claim. Asylum seekers in Lindela, 

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however, are at the mercy of Bosasa security guards. Despite having no familiarity with asylum law, these guards nonetheless determine whether a detained asylum seeker will be permitted to access an immigration officer or avail him or herself of the protections provided by the Refugees Act. In addition to being illegal, this situation places the asylum seeker at grave risk of human rights violations if deported back to a country where he or she might face persecution or death.

**Detentions at the Soutpansberg Military Grounds (SMG) Facility in Musina**

The SMG detention facility is located in an old sports hall on the Soutpansberg Military Grounds in Musina, just south of the Beitbridge border. Following a legal challenge by LHR, the North Gauteng High Court ordered the closure of SMG on 15 May 2009. The facility was operated by South African Police Service (SAPS), and was not designated as an official DHA detention and deportation facility under the Immigration Act. The court declared the facility unlawful on these grounds, and also found that the conditions of detention, and the detention of children in the facility, were unlawful and unconstitutional.

Although deportations from the facility have stopped, SAPS continues to detain asylum seekers, including children and pregnant women, at SMG until they can be taken to the refugee reception office to apply for asylum. The detention of unaccompanied minors is particularly problematic. The Department of Social Development has not investigated or instituted children’s court procedures for these minors, as required by law. As a result, these minors receive no assistance from a social worker and remain undocumented, placing them at greater risk for exploitation and renewed detentions.

The conditions of detention declared unlawful by the High Court have not improved, and detainees are held in unhygienic surroundings that fail to meet the minimum standards of human dignity. In addition, medical care and basic medical facilities are lacking, a lapse made more serious by the detention of pregnant women, some of whom have given birth at SMG. There is also no provision for the needs of infants who are detained at the facility, such as nappies or milk formula.

With the lifting of the moratorium on deportations to Zimbabwe scheduled for the end of the year, CoRMSA is concerned about a potential return to the previous state of affairs in Musina, including mass detentions and deportations. The renewed deportations pose a risk that SMG will once again be used as a deportation facility, and that individuals will be detained in unlawful and inhumane conditions for longer periods before being illegally deported.

**Recommendations**

Full recommendations in respect of arrest and detention can be found in the report by the ACMS at http://www.migration.org.za/sites/default/files/reports/2010/Lost_in_the_Vortex--_Irregularities_in_the_Detention_and_Deportation_of_Non-Nationals_in_South_Africa_0.pdf
To the Department of Social Development

- Provide social workers to attend to unaccompanied minors detained at the Soutpansberg Military Grounds.

To the South African Police Service

- Address illegal practices by implementing accountability and disciplinary measures against officers who arrest individuals carrying valid immigration documents.
- Avoid the costs of unnecessary detentions by taking measures to encourage police and immigration officers to allow suspected illegal foreigners to retrieve documents that verify their immigration status when these are nearby.
- Avoid the costs of unnecessary detentions by allowing individuals to contact family members and others who can assist in verifying their status.
- Improve conditions of detention at the SMG.

To the Department of Home Affairs

- Improve centralised record keeping from the various DHA offices to ensure that police and immigration officers can easily verify an individual’s status within the legally required 48-hour period.
- Streamline operations at DHA offices so that individuals are able to access these offices and maintain valid documents without encountering bureaucratic obstacles.
- Make sure that all illegal foreigner classifications are done properly and are accompanied by the required notification.
- Implement checks to ensure that all illegal foreigner classifications have been done in accordance with the legal requirements of the Immigration Act.
- Release any individuals at Lindela who are not being held for the purposes of deportation. This includes detained asylum seekers who, by law, cannot be deported until final adjudication of their asylum claim.
- Alleviate illegal practices by providing every detainee with the notice of deportation form and allowing detainees to freely select from the options on the form, including challenging their deportation, without the threat of indefinite detention.
• Provide detainees with the means and opportunity to exercise their legally mandated rights, including their rights of appeal and review. This includes ensuring that they understand their rights, have access to pen and paper as well as legal counsellors, and are able to lodge appeals and requests for review while in detention.

• Eliminate illegal detentions by ensuring that the proper warrants are obtained before any detention is extended.

• Release any detainees held in excess of 120 days.

• Avoid the illegal delegation of authority by making sure that all detainees have access to immigration officials inside Lindela, particularly individuals who claim that they will face grave danger if deported.

• Train Bosasa staff on the law and the rights of detainees so that they do not improperly and illegally prevent detainees from exercising their rights.

• Hold Bosasa staff accountable for rights violations and contraventions of the law.

• Establish monitoring and oversight of Lindela and Bosasa staff to prevent violence against detainees.

• Adhere to the requirements requiring judicial oversight of all detentions in excess of 30 days.

To Bosasa

• Provide detainees with three meals per day at the legally prescribed intervals.

• Increase the provision of basic items to enable detainees to meet the minimum standards of cleanliness and to have access to clean and sufficient bedding.

• Ensure that detainees on chronic medications receive these medications while in detention.

• Improve access to and quality of care at the clinic, including the range of available medicines.
ACCESS TO SERVICES
AND LIVELIHOODS
Access to Health Services

Over the last four years, CoRMSA has provided evidence-based updates on the challenges faced by migrant communities that restrict their access to public healthcare services in South Africa. These problems persist. Although undocumented migrants face the greatest challenges in accessing public healthcare services, those with documentation also experience problems in accessing basic healthcare, including antiretroviral treatment (ART). Evidence suggests that foreign migrants are worse affected by the challenges linked to financial and human resource constraints in the public healthcare system, particularly the frustrations of frontline healthcare providers.

In addition, CoRMSA is concerned that the planned end to the moratorium on the deportation of undocumented Zimbabweans in mid-2011 will negatively impact access to public health and continuity of treatment for human immune-deficiency virus (HIV) and tuberculosis (TB) as migrants fearing arrest, detention and deportation will avoid public hospitals and other healthcare services.

On the positive side, there is an increasing awareness in government of the need to attend to the healthcare needs of migrants, along with efforts to improve the health status of the whole population. CoRMSA celebrates the creation of a Migration and Health Forum in Limpopo Province with the participation of the provincial government, the district and the local spheres of government, and various local and international NGOs.

A Way Forward?

While the problems reported in previous years have not disappeared, CoRMSA is pleased to report on a national process that has begun to engage with these challenges and respond to international agreements on the need to improve migrants’ health globally, which was expressed by the World Health Assembly in 2008 through the WHA 61.17 Resolution, which was ratified in a 2010 consultation in Madrid that brought together international migration and health actors, including United Nations, non-governmental organisations (NGOs), academia, policy makers, and programmers.

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http://hdl.handle.net/10539/8462
101 In 2008, the 61st annual World Health Assembly (WHA) adopted Resolution 61.17 on the Health of Migrants, which calls on member states (including South Africa) to promote equitable access to health promotion, disease prevention and care for migrants (World Health Assembly, 2008). Member states met in May 2010 at the 63rd WHA, to report on the progress made towards achieving Resolution 61.17. In preparation for this meeting, the WHO, the International Organisation for Migration (IOM) and the Ministry of Health and Social Policy of Spain, co-convened a Global Consultation on Migrant Health in Madrid, Spain. This meeting was held from 3 to 5 March 2010 at the National School of Public Health, Madrid.
http://www.who.int/hac/events/3_5march2010/en/index.html
To take this process further, and to address migration and health in South Africa, the Southern Africa office of the IOM (in partnership with the African Centre for Migration and Society (ACMS – then the Forced Migration Studies Programme), the national Department of Health, UNAIDS, and the World Health Organisation) hosted a two-day National Consultation on Migration Health in April 2010 to develop South Africa-specific recommendations.

Over 70 people actively participated from national and provincial government departments; academia; migrant groups; civil society; donors; organs of the United Nations; and health facility representatives. The final product of the consultation, found in the appendix to this report, is a series of actionable recommendations outlining a national response to the WHA 61.17 Resolution. The recommendations were structured around the four priority areas identified during the Madrid consultation:

1) Monitoring migrant health,
2) Partnerships and networks,
3) Migrant sensitive health systems, and
4) Policy and legal frameworks.

Key lessons have been mainstreamed into the recommendations, and include ensuring that migrants and migrant communities are involved in health and migration responses, and recognising the various types of migration: circular, linear, internal and cross-border.

The strength of the recommendations will only be as good as the actions taken as a result. The final framework provides a degree of accountability for stakeholders and demonstrates the commitment of organisations in South Africa toward improving healthcare for all, including migrants. CoRMSA urges the identified government and civil society actors to take action to improve the health of migrants in South Africa.

Recommendations

To the Department of Health

- Develop, implement and monitor an evidence-based, coordinated, multilevel national response to migration and health. This includes acknowledging the developmental benefits of migration, ensuring ‘healthy migration’ and engaging with a ‘place-based’ approach to addressing the diverse health needs and health impacts of the multiple migrant groups present within South Africa.

- Work towards developing a coordinated regional response to migration and health. South Africa should take the lead, to ensure that ‘healthy migration’ is facilitated for developmental
benefits, and work with the SADC secretariat to finalise, ratify and support the implementation of a regional framework for communicable diseases and population mobility.

To Local Government

- An effective response requires a localised response to migration and health. Although local government is not specifically mandated to deal with migration, municipalities can incorporate activities relating to migration and health into their broader ‘developmental mandate.’

Cross-Cutting Recommendations

The National Consultation on Migration and Health in South Africa illustrated that there is a great deal of overlap in terms of priorities to address, key actions and lead actors, highlighting the reality that achieving good health for all is a cross-cutting issue. CoRMSA invites all spheres of government, stakeholders and migrant communities, to acknowledge, ratify and make efforts to implement the recommendations that emanated from the consultation, which are included in Appendix 1.

- Operationalism the key recommendations generated from the National Consultation on Migration and Health (see Appendix 1).

- Address issues of migration and health beyond the traditional areas of focus, for example hospitals, clinics and the Department of Health. The areas where migrant health issues are most prominent may be in areas such as farms, border areas, and informal settlements.

- Ensure the correct and consistent implementation of the policies and platforms already in place, rather than developing new legislation or policies.

- Increase communication across disciplines and governmental actors and bring in new stakeholders. Forging connections with international organisations and NGOs would help the Department of Health serve a broader population and reach invisible groups, as could partnerships with other government departments.

- Ensure that action responds to the voice of migrants, and to the situation on the ground. This can be achieved through research; consultations with migrant populations and organisations; and the partnerships with new stakeholders recommended above.

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102 Vearey & Nunez. 2010. Migration and health in South Africa: a review of the current situation and recommendations for achieving the World Health Assembly Resolution on the Health of Migrants. IOM-FMSP. In Press

Access to Education

Access to primary education is a positive right guaranteed by Section 29 of the South African Constitution. Unlike other protected rights, such as the right to housing, this right is not subject to ‘progressive realisation’. It is a right accorded to all learners without any discrimination—irrespective of available resources or other constraints. It envisages a level of access in line with the recommendation of the Office of the High Commissioner for Human Rights (OHCHR) in its 2006 report on the Rights of Non-citizens, that “educational institutions must be accessible to everyone without discrimination, within the jurisdiction of a State party.”104

However, despite these provisions, asylum seekers, refugees and migrant learners often find themselves unable to access the public education system in the country. Although no nationally representative studies have been done of migrants’ access to education, smaller-scale studies have indicated that high levels of school-age migrant children remain outside the school system (for instance, 24% of asylum seeker children in 2009).105

Reports from various organisations indicate that some of the challenges that were noted in the 2009 CoRMSA report persist. These include challenges with applications for enrolment, and a limited number of no-fee schools in predominantly migrant-populated areas. This is a particular challenge in areas which are considered to be in a better socio-economic standing. The fact that many non-nationals live in the same socio-economic conditions in which poor South Africans live is one that is often overlooked.

Member organisations also report that schools regularly refuse admission to asylum seekers and refugee learners whose permits might be due for extension before the start of the new school year.106 Given the difficulty of accessing documentation—and DHA’s unwillingness to extend permits well in advance of their expiration—this tends to unfairly exclude people who are legally entitled to education. This takes place despite further provisions by the South African Schools Act that “a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.”

The challenges that non-national learners experience in accessing basic education is an indication that some schools do not adhere to the principle that primary education is compulsory in South Africa. CoRMSA and partner organisations appreciate the open engagement by officials from Gauteng Department of Basic Education in trying to resolve many of these challenges, but more needs to be done at a national level to ensure that challenges in the education system are addressed.

105 Analysis of the Forced Migration Studies Programme’s Access to Services dataset.
106 Email communication from Jeanette Lesisa, Advocacy and Communication Officer, Jesuit Refugee Service, September 2010
Other challenges that continue with regard to migrant childrens’ access to education include being refused the opportunity to apply for fee exemption; inability to pay school fees; not being able to afford to send children to schools in their feeder area where such schools are private; or being unable to pay for related costs such as uniforms, transport and subsistence for food during school hours.

Access to pre-school education is another challenge faced by these groups, and particularly where Grade R is not offered by the nearest public school. Children from families who have little or no means of support often are not able to attend pre-school, which puts them at an educational disadvantage to their peers.

CoRMSA and Lawyers for Human Rights made both written and oral submissions to the Portfolio Committee on Basic Education in 2010 focusing on the challenges facing asylum seeker, refugee and migrant children with regard to access and quality of education. It is hoped that the Portfolio Committee will work together with the Department of Basic Education in addressing the concerns raised and implementing many of the recommendations made. The submission can be accessed at http://www.cormsa.org.za/wp-content/uploads/2009/05/lhr-cormsa-submission_on_education-february2010.pdf

Recommendations

To the Department of Basic Education

- Ensure that schools comply with its policy that no school may deny a learner access based on the fact that they do not have the relevant document.

- Issue a clear policy on the admission of undocumented learners into public schools.

- Ensure that non-national parents are advised of the social protection measures taken to ensure that asylum seeker, refugee and migrant children benefit from programmes like the Bana Pele Campaign in Gauteng.\(^\text{107}\)

- Consider subsiding pre-school education, especially Grade R.

- Intensify the promotion of social cohesion in schools to ensure that issues of xenophobia and discrimination are addressed before having adverse effects on learners.

- Develop information material in predominant migrant languages to ensure that information on access to schooling reaches these groups and that refugee and migrant parents and learners are able to engage effectively with the schooling system.

\(^\text{107}\) This is a programme coordinated by the DSD in collaboration with the Gauteng Department of Education to assist all learners in acquiring necessities for school attendance, such as transport and uniforms
To the Department of Basic Education and Department of Home Affairs

- Clarify the contradiction between the provisions of the South African Schools Act on provisional admission and Section 39 of the Immigration Act. This is especially important as many schools rely more on the Immigration Act than the Department of Basic Education policies and prescriptions with regard to access to education.
Access to Social Assistance

Section 27 of the South African Constitution provides for social assistance to those who are unable to support themselves. While CoRMSA applauds the extension of Disability Gants to refugees and the continued access to Foster Child Grant for refugee children, there are still major gaps that need to be filled to improve the lives of nonnationals who are unable to provide for themselves.

Reports from organisations in the field indicate that there is a low level of uptake of social grants among non-national groups. It is also worrying that less than 100 refugees nationally are in receipt of Disability Grants or Foster Child Grants, although on the positive side this is almost double last year’s number, which stood at 55 in April 2010.108 This is of special concern in view of the fact that there are many refugee children who could be benefiting from foster care but are excluded from the system by bureaucratic hurdles.109

The burden of caring for asylum seekers, migrants and refugees who are not currently covered by social assistance has over the years been carried by NGOs, some of which receive financial support from the United Nations High Commissioner for Refugees (UNHCR). However, this assistance is often insufficient, covering a limited number of qualifying beneficiaries, and often for a short duration.

In the case of children, another challenge is the length of time it takes to finalise the court processes involved in placing unaccompanied minors with foster parents. This problem is also faced by children who are abandoned in South Africa – it takes time to decide who the new caregivers should be. The delay in placements has been compounded by fears of human trafficking. The Department of Social Development (DSD) has become more cautious about placing children with people claiming to be relatives who do not hold documentary proof of their relationship to the child.

There have also been reports of some grants being discontinued because refugees have failed to produce identity documents within the allotted time period. This has negatively affected the welfare of refugees who depend on social assistance for their survival. Organisations report that this happens primarily where refugees are not given clear information during their application about the requirement to produce a refugee identity document within three months, and the consequences of failing to do so. CoRMSA is concerned about this, particularly because the Department of Home Affairs has not been able to keep up with the issuing of refugee identity books. Lack of such documents is also a major barrier to accessing social assistance for those who qualify.

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109 These include difficulties establishing the child’s nationality, and contestation over whether DSD or DHA should take responsibility for assisting immigrant children.
Organisations in the sector have also reported that there is sometimes some reluctance from refugees to apply for government grants “because of a perception that UNHCR partners had the responsibility of providing grants to refugees.”

CoRMSA continues to believe that there is a need to extend the Child Support Grant to refugee children in light of the dire conditions under which some refugee families live, as well as a need to afford asylum seekers the opportunity to apply for the Social Relief of Distress Grant. CoRMSA welcomes the DSD’s intention to bring the Social Relief Bill before Parliament this year and hopes that the Bill might extend the social assistance opportunities available to refugees and asylum seekers.

Recommendations

To the Department of Social Development

- Finalise the Social Relief Bill and submit it to parliament for deliberation and public hearings.
- Finalise the Standard Operating Procedures for placing unaccompanied minors with foster parents, while clarifying the respective roles of DSD and DHA to end current contestations in practice over which department should assist unaccompanied minors.
- Consider extending Child Support Grants to refugee children as the beginning of a long-term process reviewing social welfare provision to vulnerable refugees, asylum seekers, and other migrants.
- Clarify the criteria which would qualify asylum seekers or other migrants for Social Relief of Distress Grants.
- Improve outreach to refugee and other migrant communities, and publish information on access to social assistance in predominant refugee/migrant languages to improve the take up of grants by those who qualify.

To the Department of Home Affairs

- Speed up the process of issuing refugee identity documents to prevent unnecessary suspension of refugees’ social grants.

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## APPENDIX 1: RECOMMENDATIONS OF THE NATIONAL CONSULTATION ON MIGRATION AND HEALTH

### 1) Monitoring Migrant Health: Strengthen migrant-sensitive data collection

<table>
<thead>
<tr>
<th>Priorities to address</th>
<th>Lead actors</th>
<th>Key actions</th>
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<tbody>
<tr>
<td>Ensure the standardisation and comparability of data on migrant health; support the appropriate aggregation and assembling of migrant health information; map good practices in monitoring and delivery of migrant health</td>
<td>NDoH, Stats SA, HSRC, FMSP, SafAIDS, Advocacy: IOM</td>
<td>1.1 Strengthen national health information data system in order to improve continuum of care for patients on the move and the consistency of data comparability for governmental planning purposes at all levels</td>
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<tr>
<td>1.2 Establish a set of standardised data collection tools to ensure the comparability of data collected on migration and health across sectors (i.e. Government, NGO, academia, etc.)</td>
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<td>1.3 Involve migration and health experts in planning for national surveys in order to collect specific data on migration and health and to address the challenges associated with collecting data from undocumented populations</td>
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</tr>
<tr>
<td>1.4 Key research needs: 1.4.1 Analyse how population movement could be prognosed 1.4.2 Map migrant population concentrations to better direct services 1.4.3 Map out existing resources/structures addressing or supporting migrants’ health 1.4.4 Develop monitoring tool for implementation of the WHA Resolution on the Health of Migrants 61.17 1.4.4.1 Report annually on progress made toward resolutions</td>
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<td>1.5 Document key good practices on: health passports; continuum of care; health promotion service delivery; ARV treatment protocols mental health; SGBV; migrants in detention; 1.5.1 Include best practices on migration health in the CoRMSA report for June 2010 1.5.2 Disseminate documented best practices in existing fora/meetings/seminars, journals, newsletters; 1.5.3 Use multisectoral platforms such as SANAC platform to share good practices, (e.g. inclusion Migration Health in SANAC position paper)</td>
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<td>1.6 Pilot, review and document capacity building activities and link to good practices</td>
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## 2) Partnerships, and networks: Strengthen existing partnerships and encourage new ones

<table>
<thead>
<tr>
<th>Priorities to address</th>
<th>Establish and support migration health dialogues and cooperation across sectors and among stakeholders</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Lead actors</strong></td>
<td>Use existing structures i.e. Migrant Health Forum (Gauteng and Limpopo), Migrant Help Desk, SALGA/FSMP, civil society networks, IOM</td>
</tr>
</tbody>
</table>
| **Key actions**       | 2.1 Facilitate/strengthen coordination platforms at various levels and stakeholders  
2.1.1 At national level: Inter-departmental working group on migration  
2.1.2 At provincial level, Lead: provincial ODA  
2.1.3 At local level, Lead: municipalities  
2.2 Compile e-mail ListServe of people/organisations involved in migration and health in order to better share information  
2.3 Increase public awareness around migration and health issues and rights  
2.3.1 Encourage migrants to join community committees / boards etc.  
2.3.2 Raise awareness among companies and individuals who employ migrants of migrants’ rights |
### 3) Migrant Sensitive Health Systems: Strengthen capacity building and service delivery

| Priorities to address | Ensure that health systems are delivered to migrants in a culturally and linguistically appropriate way; enhance the capacity of health and related non-health workforce to address the health issues associated with migration; deliver migrant inclusive services in a comprehensive, coordinated and financially sustainable fashion |
| Lead actors | NDoH and other organisations, using all existing structures |
| Key actions | 3.1 Sensitise (health) service providers around patients’ rights, migration and health in general through: 3.1.1 Specialised training sessions 3.1.2 Materials about rights to accessing the healthcare system 3.2 Display procedures on how the health system works at facilities 3.3 Address language barriers: 3.3.1 Translate “Patient Charter” and other public health into migrant languages 3.3.2 Strengthen/develop where necessary translation services available in the hospital and clinic setting 3.3.3 Post welcome signs at hospitals and clinics in South African and foreign languages 3.4 Care for the carers – Acknowledge that healthcare have a high work load and recognise that this can affect the quality of service provided 3.4.1 Establish debrief procedures for front-line hospital staff 3.4.2 Encourage recognition of the work done by hospital staff and particularly of those who stand in solidarity with migrants 3.5 Reduce burden of care on hospitals by sending mobile services to where they are most required 3.6 Strengthen capacity to use data in the hospital/clinic setting by training hospital staff on how to use and collect, analyse and disseminate data 3.7 Strengthen health infrastructure and capacity of district health system in order to provide services to everyone 3.8 Establish neutral body/entity for patients to report on quality of services and care |
## 4) Policy and Legal Frameworks affecting Migrants’ Health: Mainstream migration and migrants into health systems

<table>
<thead>
<tr>
<th>Priorities to address</th>
<th>Ensure implementation of national health policies that promote equal access to health services for migrants; extend social justice protection in health and improve social security for all migrants</th>
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<tbody>
<tr>
<td>Lead actors</td>
<td>NDOH, DHA</td>
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</table>
| Key actions           | 4.1 Strengthen adherence to policy  
4.1.1 Intensify the distribution of various directives that address health access  
4.1.2 Disseminate information to the general population including migrants, workers, etc. on how to access the healthcare system (i.e. healthcare provision; ID numbers; patients charter) in relevant languages  
4.1.3 Make national policy on health access rights understandable to the lay person  
4.1.4 Inform public and (healthcare) service providers on uniform billing system  
4.1.5 Verify means to ensure patient are not charged if eligible for free treatment  
4.2 Clarify protocol on medical referrals upon arrival at DHA  
4.3 Improve budget monitoring/budget development, through use of current local data  
4.4 Encourage consideration of migration in all relevant policies  
4.5 Ensure all role-players are aware of health rights of migrants (including but not limited to South African Police Services, correctional services; private sector)  
4.6 Advocate to soften regulations around foreign healthcare workers working in South Africa |
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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