



# An Unenforceable Law

Policy, practice and political narratives shaping the detention and protection of migrant women and children in South Africa



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# Contents

|   |           |  |           |
|---|-----------|--|-----------|
| <b>I. Introduction</b>  | <b>5</b>  | <b>V. Legal protection of migrants: The experiences of women and children</b>  | <b>32</b> |
| 1.1 Methodology   | 6         | 5.1 Women and children in the migrant detention estate                         | 32        |
| <b>II. Migration in South Africa</b>  | <b>8</b>  | 5.2 The vulnerability of migrant women and children                            | 34        |
| 2.1 Trends in migration   | 8         | 5.3 The provision of protection  | 35        |
| 2.2 Migration patterns: Exploring why and how women and child migrants enter South Africa | 10        | 5.4 Protection failures: Disappearance of children and women from the shelters | 36        |
| <b>III. Law and policy regulating immigration, asylum and migrant detention</b>           | <b>13</b> | 5.5 Risk of abuse by non-state actors  | 39        |
| 3.1 The development of migration and refugee policy in South Africa                       | 13        | 5.6 Risk of abuse by state actors  | 42        |
| 3.2 The Immigration System  | 14        | 5.7 Exclusion from the immigration and asylum system                           | 43        |
| 3.3 The Refugee and Asylum System   | 16        | 5.8 The double exclusion of migrant children: Pathways into detention          | 46        |
| 3.4 Legal framework for the arrest and detention of migrants                              | 18        | 5.9 The limits of protective frameworks  | 47        |
| 3.5 Legal framework for unaccompanied child migrants                                      | 20        | <b>VI. Conclusion</b>  | <b>49</b> |
| <b>IV. Pathways to Detention: The mythology of immigration categories in South Africa</b> | <b>22</b> | <b>APPENDIX A: List of interviews</b>  | <b>51</b> |
| 4.1 Experiences and practices of immigration detention                                    | 22        |  |           |
| 4.2 The systemic nature of unlawful detention   | 23        |  |           |
| 4.3 The limits of legal interventions   | 25        |  |           |
| 4.4 The economic migrant / 'legitimate' asylum seeker dichotomy                           | 26        |  |           |
| 4.5 The limits of legal categories  | 30        |  |           |

**Cover:** A woman crosses the bridge spanning the Limpopo River at the Beitbridge border post. The Limpopo River forms the political border between Zimbabwe and South Africa, and Beitbridge is said to be the busiest border post in sub-Saharan Africa.

**Photo:** Kara Apland, Coram Children's Legal Centre

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## Who we are

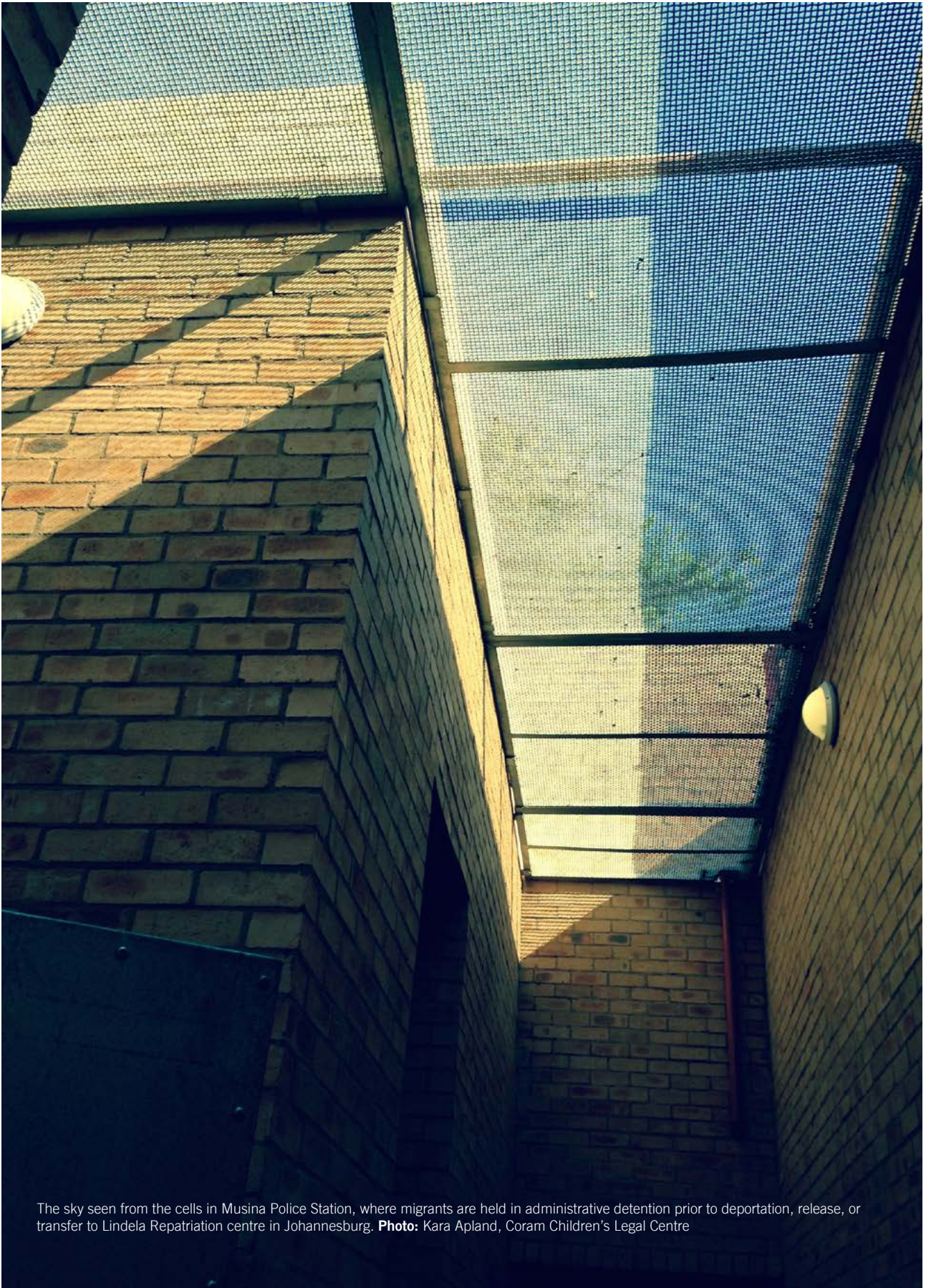
Coram Children's Legal Centre (CCLC), part of the Coram group of charities, is the UK's leading children's legal charity, committed to promoting children's rights in the UK and worldwide. CCLC works in the UK and around the world to protect and promote the rights of children and young people through the reform of law, policy and practice, and through the provision of free legal information, advice and representation to children, their families, carers and professionals.

The Legal Resources Centre (LRC) is one of South Africa's largest public interest, human rights law clinic. Established in 1979, LRC uses the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless and landless people. The LRC has four offices, in: Cape Town, Durban, Grahamstown and Johannesburg.

In 2012, Coram Children's Legal Centre and the Legal Resources Centre initiated an EU-funded project, 'Ending unlawful deprivation of liberty of women and children in South Africa' which aimed to improve protections for migrant women and children by assisting them to access justice. The project comprised of: a legal service delivery pilot designed to improve access to justice for migrant women and children in Gauteng and Limpopo provinces; advocacy and capacity building activities aimed at promoting migrants' legal rights in the context of migration processes; and qualitative research on the extent and nature of the (unlawful) detention of migrant women and children in Gauteng and Limpopo.

The research component of the project was designed to complement and strengthen the projects' other activities, and included the following:

1. A baseline study was conducted in order to get an initial sense of the extent and nature of unlawful detention, identify advocacy priorities and map the need for legal advice and assistance;
2. On-going data was collected through a case management system applied to the legal assistance pilot scheme in order to track cases of (unlawful) migration detention addressed through the pilot scheme, and to monitor the outcomes of legal assistance interventions. This data, which includes 462 people in immigration detention, also provides some level of insight into the types of illegalities to which (women and children) migrants are subjected;
3. In depth, qualitative research was conducted with migrants (in shelters and detention centres) in Johannesburg and Musina Town to establish an understanding of the unique pathways into (unlawful) detention for migrant women and children and their access to protection within South Africa's immigration and asylum systems more broadly. This consisted of: a literature review of relevant secondary sources; primary data collected through in depth interviews with international organisations working on migration issues, practitioners (including migrant and refugee rights advocates) and government officials; and site visits to shelters and detention facilities.
4. Research was ultimately aimed at identifying the nature and causes of unlawful detention of migrant women and children as well as gaps between refugee and immigration law and practice in order to inform advocacy and reform efforts to encourage government and support civil society to address the problem of migrant detention in South Africa.



The sky seen from the cells in Musina Police Station, where migrants are held in administrative detention prior to deportation, release, or transfer to Lindela Repatriation centre in Johannesburg. **Photo:** Kara Apland, Coram Children's Legal Centre

# 1. Introduction

Since its emergence from apartheid, South Africa has been lauded for its progressive Constitution and Bill of Rights<sup>1</sup>; the South African legal framework is regarded as highly compliant with international law<sup>2</sup> and among the most ‘human rights friendly’ in the world. South African refugee law is no exception, and has been hailed by the United Nations High Commissioner for Refugees as ‘one of the most advanced and progressive systems of protection in the world today.’<sup>3</sup> In particular, South Africa’s legal framework gives refugees and asylum seekers many of the same rights and protections as South African nationals, including the right to work and access public services.

In many respects, South Africa’s model approach to legislating for human rights has failed to deliver: the practical realisation of the rights and protections enshrined in South African law has been both markedly slow and starkly inequitable.<sup>4</sup> In practice, migrants, including persons seeking asylum, refugees and trafficked persons,<sup>5</sup> remain among the most vulnerable people in South Africa. Migrants are subjected to persecution, exploitation and abuse within their communities, and systematic rights abuses and protection failures by the State;<sup>6</sup> of these systematic rights abuses, unlawful detention practices are among the most extreme.<sup>7</sup> Migrant women and unaccompanied children<sup>8</sup> are in a particularly precarious position given their subordinate social position and relative marginalisation from protective frameworks.

The Immigration Act 2002 and the Refugees Act 1998 aim at granting immigrants procedural guarantees to ensure that they are treated in a fair manner and that their basic human rights are protected. This legislation is poorly implemented and has left migrants exposed to a range of human rights abuses, including unlawful arrest and detention, prolonged periods of administrative detention and *refoulement* (illegal deportation to countries whether they face risk of persecution or harm).<sup>9</sup> This is despite important efforts by legal advocates and civil society to hold the South African government accountable to its legal commitments. Women and child migrants, in particular, struggle to access even the most basic protections to which they are entitled by law, even in circumstances where they have been the intended recipients of significant humanitarian assistance.

This report draws upon research conducted as part of an EU-funded project, ‘Ending unlawful deprivation of liberty of women and children in South Africa’, to explain the systemic violation of migrants’ rights in South Africa and to explore the impact of protection systems designed to promote those rights for migrant women and unaccompanied children. The research demonstrates how a tightly restricted immigration system, an overburdened and poorly functioning asylum system, and an under-resourced and unsuitable child protection system, place migrant women and children in an extremely vulnerable position: at risk of arrest, detention, exploitation and abuse.

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- 1 See for example: Danie Brand and Cristof Heynes, ed. *Socio-economic Rights in South Africa* (2005), Pretoria: Pretoria University Law Press; Jonathan Klareen, ‘An Institutional Interpretation of Socio-Economic Rights and Judicial Remedies after TAC’, in *Rights and Democracy in a Transformative Constitution*, ed., Henk Botha, Andries Johannes Van der Walt, and J. C. Van der Walt (2003), Stellenbosch: Sun Media, 2003, Chris Landsberg and Shaun Mackay ‘South Africa 1994–2004’, in *Reflections on Democracy and Human Rights: A Decade of the South African Constitution*, ed., Nasila Rembe (2006), Johannesburg: South African Human Rights Commission.
  - 2 See for example; John Dugard, ‘International Law and the South African Constitution’, *European Journal of International Law* 8, no 1 (1997): 77-92.
  - 3 UN News Centre, ‘Top UN official lauds South Africa’s ‘progressive’ refugee policy’, UN News Centre, August 27, 2007: <http://www.un.org/apps/news/story.asp?NewsID=23599&Cr=South+Africa&Cr1=refugee#.VUJoYMI5VhHw>
  - 4 See e.g. Sandra Leibenburg, Community Law Centre, *Human Development and Human Rights: South African Country Study* (2000), available at: <http://communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/research/Socio-Economic>
  - 5 Throughout this report, these categories of persons are referred to collectively as ‘migrants’, for ease of reference.
  - 6 See e.g. Human Rights Watch, ‘Keep your Head Down’: *Unprotected Migrants in South Africa* (2007), available at: <http://www.hrw.org/reports/2007/02/27/keep-your-head-down>; Human Rights Watch, *South Africa: Zimbabwean Migrants Vulnerable to Abuse* (2006), available at: <http://www.hrw.org/news/2006/08/07/south-africa-zimbabwean-migrants-vulnerable-abuse>; UNICEF, *For Better Implementation of Migrant Children’s Rights in South Africa* (2009), available at: [http://www.unicef.org/socialpolicy/files/UNICEF\\_South\\_Africa\\_Migrant\\_childrens\\_rights.pdf](http://www.unicef.org/socialpolicy/files/UNICEF_South_Africa_Migrant_childrens_rights.pdf)
  - 7 See e.g. Lawyers for Human Rights, *Submission to the Special Rapporteur on the Rights of Migrants on the Situation of Immigration Detention in South Africa* (2012), available at: <http://www.lhr.org.za/publications/lhr-submission-special-rapporteur-human-rights-migrants>
  - 8 The research looked specifically at women migrants and migrant children who are unaccompanied (those aged 18 years and under who are not accompanied by an adult relative / carer). When we refer to ‘migrant children’ in this report, we refer to children who are unaccompanied, unless otherwise specified.
  - 9 See generally, Lawyers for Human Rights, *Monitoring Immigration Detention in South Africa*, December 2008; Consortium for Refugees and Migrants in South Africa (CoRMSA), *Protecting Refugees, Asylum Seekers and Immigrants in South Africa*, June 2009.

In sum, neither South Africa's exemplary refugee legal framework, nor significant energy by international humanitarian actors and a vibrant domestic human rights community, have translated into meaningful protection of migrant women and children or promotion of their human rights. Understanding the nature of this contradiction may provide insight into the limits of current dominant approaches to advocacy and programming.

**Section I** sets out the methodology for the research, and situates it within the broader EUJDL project.

**Section II** gives a brief historical overview of migration in South Africa and the legal frameworks which regulate it.

**Section III** contains a comprehensive analysis of the content of legal frameworks applied to women and children migrants in South Africa.

**Section IV** explores the nature and extent of unlawful detention of migrants in South Africa, and argues that its systemic nature and the limits of legal intervention are rooted in the application of an incoherent and unenforceable legal framework.

**Section V** focuses on the particular vulnerabilities of migrant women and children and assesses how and why immigration, refugee and child protection systems fail to protect them from detention, and other violations of their basic rights.

### 1.1 Methodology

The analysis in this report draws on data from several sources; including quantitative data collected through the case management system of a pilot legal advice project established in Musina and Johannesburg in 2012 ('Legal Advice Pilot')<sup>10</sup> and in-depth qualitative life history interviews with women and child migrants in (or at risk of) immigration detention. Interviews were also carried out with other key stakeholders, including: staff at detention centres, police stations and children's homes in which women and child migrants were residing; representatives of NGOs providing

services to women and child detainees; immigration lawyers; social workers; police officers and immigration officials.

Given the targeted nature of the pilot legal advice project, the data - collected from the case management system - cannot be considered proportionally representative of the total population of migrants in detention. Nevertheless it does provide an indication of the profile of women and children in immigration detention in Guateng and Limpopo and the reasons for their detention.<sup>11</sup> Meanwhile, the qualitative research offers a contextualised understanding of the purpose, causes and contexts of detention of migrant women and children in South Africa.

Research was initially intended to establish an understanding of: *the unique pathways into (unlawful) detention for migrant women and children and their access to legal and social protection within South Africa's immigration, asylum and child protection systems*. Initial desk based research and preliminary interviews indicated that unlawful detention of migrants by the Department of Home Affairs (DHA) may be widespread and systemic.<sup>12</sup> Whilst researchers and civil society organisations have struggled to determine the exact number of migrants in detention due to tight restrictions on access to detention facilities, the extent and nature of unlawful detention of migrants and other illegal practices by the DHA, the treatment and experiences of migrants in detention and the dysfunctional nature of the asylum system, have been well documented and discussed.<sup>13</sup> Our data reinforces the findings presented in existing research, thus we have focussed our analysis on attempting to understand and explain these realities. In addition to addressing our original question set out above, we have also asked: *why does unlawful immigration detention appear to be inherent to the legal regulation of migration in South Africa, and how are existing protection systems failing to address the vulnerabilities of migrant women and children?*

### Basic Profile of Data

Research was carried out across a number of sites in two research locations: Johannesburg (Guateng) and Musina (Limpopo). These locations were selected as they are known

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10 In 2012, Coram Children's Legal Centre and the Legal Resources Centre initiated an EU-funded project, 'Ending unlawful deprivation of liberty of women and children in South Africa', which aimed to improve protections for migrant women and children in or at risk of immigration detention, by assisting them to access justice. As a component of this project, a legal advice project was established in Musina town and Johannesburg, to deliver legal services to women and children in or at risk of immigration detention.

11 Restrictions on access to migrants in detention proved to be a serious barrier in the collection of data for this report as well as the provision of legal advice and assistance. The Legal Advice Pilot focussed heavily on migrants held in detention in Musina Town, thus this group is disproportionately represented in the case management data set.

12 Lawyers for Human Rights, *Immigration Detention Report* (2010), available at: <http://www.lhr.org.za/publications/immigration-detention-report>; <http://www.lhr.org.za/publications/immigration-detention-report>; Lawyers for Human Rights, *Monitoring Immigration Detention in South Africa* (2012), available at: <http://www.lhr.org.za/publications/lhr-detention-report-2012>

13 See, for example, research reports published by Lawyers for Human Rights, *ibid*, n 12

to host a large number of migrants, including women and children. Johannesburg hosts the country's only dedicated immigration detention facility: Lindela Repatriation Centre. These locations were also the pilot sites of the legal service delivery component of the EU-funded project under which the study was carried out.

A total of 462 migrants were assisted by the pilot schemes between January 2013 and August 2014. Of these migrants, 252 received direct legal assistance with migration issues, while a further 210 received general legal information on a range of legal issues. Between January 2013 and August 2014, 48% of migrants assisted were men, 42% were women and 10% children<sup>14</sup> (see figs below). The most common nationality assisted was Zimbabwean (66%). It is important to reiterate that these proportions do not accurately reflect the demographics of migrants in detention in these locations, as the Legal Advice Pilot was specifically targeted at assisting women and children.

In-depth interviews were conducted with 95 individuals in December 2012, and May – July 2013. This included 23 migrant women and children in Musina, and 49 migrant women and children in Johannesburg. As with the Legal Advice Pilot, the vast majority of respondents interviewed were from Zimbabwe, however migrants from Somalia, the Democratic Republic of Congo and Malawi were also included in the research. Finally, in depth interviews were conducted with 25 key stakeholders, including immigration lawyers; social workers; police officers; immigration officials; NGO representatives; border officials; and academics. A complete schedule of interviews conducted can be found in Annex A of this report.

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14 It is important to note that these numbers do not accurately reflect the demographics of migrants in detention in these locations.



## 2. Migration in South Africa

### 2.1 Trends in Migration

Migration, and in particular, migrant labour, has shaped the economies of South Africa and the Southern African region for decades. Historically, and throughout the apartheid era, South Africa's mining-based economy relied heavily on cheap migrant labour, especially from neighbouring countries; bi-lateral agreements were established to facilitate large group flows of migrants into the country to meet this demand.<sup>15</sup> The political upheaval and economic opening of the 1990s transformed migration in South Africa: in addition to migrant labour flows, more diverse patterns of mobility emerged and developed, transforming migration patterns from collective mining-based labour migration into migration that is 'largely informal and individual based'.<sup>16</sup>

By 2000, South Africa came to be seen as a 'the new migration hub at the southern-most tip of the continent, drawing hundreds of thousands of new migrants from Central, East and West Africa as well as Bangladesh, China, Eastern Europe and Pakistan'.<sup>17</sup> When asked to speak about migration, many respondents involved in this study characterised South Africa as exceptional: a country attracting large "waves" or "floods" of migrants, most commonly believed to be in search of economic opportunities; "a better life". The perception of South Africa as being a 'migration hub' continues to pervade public and government narratives.

The exact extent of migration into South Africa, however, is not known. While estimates put current net migration

in South Africa at around 3 million,<sup>18</sup> as migration data is scarce and poorly maintained, and a considerable number of migrants are undocumented (estimates range from 1 to 3 million),<sup>19</sup> it is impossible to determine the exact number of migrants in South Africa.<sup>20</sup> Data does indicate that migration rates in South Africa have risen significantly in recent years as its economy stabilised and it transitioned from being a 'refugee producing country' to a 'refugee receiving country'. According to the UN Department of Economics and Social Affairs, South Africa's Migrant Population dropped 3.3 percent between 1990 and 2000, but has increased by 7.2 percent between 2000 and 2010, and 5.1 percent between 2010 and 2013.<sup>20</sup> These rates of change are unusually high in comparison to rates of change in migrant populations globally, which the UN reported at 1.2, 2.3 and 1.6 percent for the same time periods.<sup>22</sup> It is apparent, therefore, that South Africa has experienced an unusual change in rates of migration over the past 15 years.

This trend is reflected in data on the proportion of the population who are migrants: this has more than doubled since 2000.<sup>23</sup> Despite the perception that numbers of migrants in South Africa are exceptionally high, however, these proportions are low in comparison to migrant populations in 'most developed nations', as demonstrated by the table below. Indeed, in a study on 'Contemporary Migration to South Africa', Aurelia Segatti and Loren B. Landau note that the percentage of migrants in the country remains low compared with other "global" cities and regional powers.<sup>24</sup>

15 Aurelia Segatti, 'Migration to South Africa: Regional Challenges versus National Instruments and Interests', in *Contemporary Migration to South Africa: A Regional Development Issue*, ed. Aurelia Segatti and Loren Landau (2011) Washington: The International Bank for Reconstruction and Development / The World Bank

16 Ibid, 9

17 Ibid, 9

18 Aurelia Segatti and Loren Landau (ed), *Contemporary Migration to South Africa: A Regional Development Issue*, (2011), Washington: The International Bank for Reconstruction and Development / The World Bank, 148

19 Jonathan Crush and David A. McDonald, 'Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid' (2011), Vol 48(3), *Africa Today*, 1

20 Aurelia Segatti, 'Migration to South Africa: Regional Challenges versus National Instruments and Interests', in *Contemporary Migration to South Africa: A Regional Development Issue*, ed. Aurelia Segatti and Loren Landau (2011) Washington: The International Bank for Reconstruction and Development / The World Bank, 12

21 UN Department of Economics and Social Affairs, *International Migration Report* (2013), available at: [http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full\\_Document\\_final.pdf](http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full_Document_final.pdf)

22 Aurelia Segatti and Loren Landau (ed), *Contemporary Migration to South Africa: A Regional Development Issue* (2011) Washington: The International Bank for Reconstruction and Development / The World Bank, 145

23 UN Department of Economics and Social Affairs, *International Migration Report* (2013), available at: [http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full\\_Document\\_final.pdf](http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full_Document_final.pdf)

24 Aurelia Segatti and Loren Landau (ed), *Contemporary Migration to South Africa: A Regional Development Issue* (2011) Washington: The International Bank for Reconstruction and Development / The World Bank, 146

Figure 2: Migrants as percentage of total population in South Africa and in ‘most developed nations’

|                                      | 1990 | 2000 | 2010  | 2013  |
|--------------------------------------|------|------|-------|-------|
| South Africa                         | 3.8% | 2.2% | 4.0%  | 4.5%  |
| Most developed nations <sup>25</sup> | 7.2% | 8.7% | 10.5% | 10.8% |

The emergence of distorted perceptions on the extent of South African migration have both influenced and emerged from public and government narratives that frame migration flows into South Africa as a threat, which must be controlled. Furthermore, establishing a clear evidence based picture of migration trends and patterns has not been a priority of the South African government, whose response to migration is largely inconsistent with both the realities of migration trends, and their relationship to the South African economy and its labour needs. Indeed, according to Segatti and Landau, ‘policy makers responsible for the reform of migration policy in South Africa have struggled to ground their decisions in sound evidence’.<sup>26</sup>

Qualitative research also revealed perceptions that South Africa receives an exceptionally large population of refugees and asylum seekers; several respondents described the country as “the number one refugee-receiving country in the world”. As demonstrated by UNHCR global data sets, however, South Africa does not grant an unusually high number of individuals with refugee status.<sup>27</sup> What is remarkable about South Africa is its number of pending asylum cases, which is significantly higher than any other country in the world, and proportionally higher than that of countries with similar economies.

Furthermore, numbers of asylum applicants appear to have reduced in recent years. Whilst the DHA’s most recent annual report (2013/14) does not contain any data on asylum applications,<sup>28</sup> according to previous published figures, in 2012/13, 78,142 new asylum applications were received, in 2011/12, 81,708 applications were received, and in 2009/2010, 364,638 new asylum applications were received<sup>29</sup> (unfortunately, figures were not published for 2010/11). This reduction may be due in part to the increasingly prohibitive and inaccessible nature of the asylum system: in the words of one participant, “people just don’t apply [for asylum]. It is a strategy of exclusion by bureaucracy. People give up and take their chances.”<sup>30</sup>

It may also be due in part to the stabilisation of the Zimbabwean economy; South Africa’s ‘refugee problem’ gained prominence in the wake of the Zimbabwean political crisis and South Africa’s involvement in a humanitarian response. The influx of refugees from Zimbabwe peaked in 2008 as the population of urban poor was displaced due to crises in housing and public health. A major cholera outbreak in December of that year exacerbated the instability and suffering of many Zimbabweans.<sup>31</sup> In 2009, the Department of Home Affairs opened a Refugee Reception Office (RRO)

Figure 3: Proportion of pending asylum cases in South Africa, India, Brazil, China and the United States

| Country       | Number of Refugees | Number of pending asylum cases | Proportion pending cases/ refugees |
|---------------|--------------------|--------------------------------|------------------------------------|
| South Africa  | 65,668             | 243,998                        | 3.716                              |
| India         | 198,665            | 4,718                          | .024                               |
| Brazil        | 5,952              | 6,352                          | 1.067                              |
| China         | 301,033            | 409                            | .001                               |
| United States | 263,662            | 96,106                         | .365                               |

25 ‘Most developed nations’ is a categorisation used by UNHCR.

26 Aurelia Segatti and Loren Landau (ed), *Contemporary Migration to South Africa: A Regional Development Issue* (2011) Washington: The International Bank for Reconstruction and Development / The World Bank, 146

27 UNHCR, Table 1: *Refugees, Asylum-Seekers, Internally Displaced Persons (IDPs), Stateless Persons and Others of Concern to UNHCR by Country / Territory of Asylum, mid-2014 (or latest available estimates)* (2014)

28 Department of Home Affairs, Annual Report 2013/14 (2014) Pretoria: Department of Home Affairs, [http://www.home-affairs.gov.za/files/Annual%20Reports/Annual\\_Report\\_2013\\_14ss.pdf](http://www.home-affairs.gov.za/files/Annual%20Reports/Annual_Report_2013_14ss.pdf)

29 See South African Governments, Department of Home Affairs annual reports, available at: [http://www.home-affairs.gov.za/files/Annual%20Reports/Annual\\_Report\\_2013\\_14ss.pdf](http://www.home-affairs.gov.za/files/Annual%20Reports/Annual_Report_2013_14ss.pdf)

30 Interview, Associate Professor, African Centre for Migration and Society, University of Witwatersrand, Johannesburg, 27 July 2014

in Musina Town to process asylum claims, UNHCR opened a field office in Musina, and numerous (I)NGOs came to the region to provide migrants with humanitarian, medical and legal assistance. In recent years, as the Zimbabwean economy has begun to stabilise, respondents reported that the influx of Zimbabwean refugees has reduced.<sup>32</sup> Refugees and asylum seekers now come from a more diverse array of countries, including Somalia and the Democratic Republic of Congo.<sup>33</sup>

## 2.2 Migration patterns: exploring why and how women and child migrants enter South Africa

Despite limitations in data, existing research provides some insight into particular patterns of migration in South Africa. The majority of the migrants who enter South Africa at or near the Beit Bridge border crossing (18 km north of the town of Musina) are thought to be Zimbabwean, with significant populations from the Democratic republic of Congo, Ethiopia, Mozambique, Somalia, and Malawi.<sup>34</sup>

Official statistics indicate that there are fewer migrant women than men in South Africa, and even fewer migrant children.<sup>35</sup> This may be indicative of under-reporting of numbers of female and child migrants due largely to their relative invisibility within formal systems (an issue which is explored further in Section V of this report). Women and child migrants are less likely than adult men to seek formal employment in South Africa and/ or to engage with the formal economy. Women are particularly likely to travel for the purposes of informal and cross-border trade, and children for education. They are likely to stay for shorter periods of time (in comparison to men) and tend to have more limited access to social networks and sources of support.<sup>36</sup> One migrant women interviewed in Johannesburg described her experience, which is typical of other research participants: *“I came to South Africa in 1991. Since then, I come and go and come and go. I stay a month, three weeks, two weeks and then I go back to Zimbabwe. I started this going back and*

*forth in 1991 and I have continued until now”.*<sup>37</sup> And as an attorney summarised, *“Most [children] arrive from Zimbabwe, and enter South Africa for employment or education. Many come for one to two weeks to one month, get money and food and then head back to Zimbabwe. They will do this over long periods... unaccompanied children in Johannesburg tend to stay longer, for three months or more.”*<sup>38</sup>

According to professionals who were interviewed, children often cross the border unaccompanied, frequently in groups of two or three. They are often driven into South Africa as a means of survival; due to destitution and experiences of abuse and neglect at home. Some also plan to reunite with family members who are in South Africa. Our research indicates that many migrant children travel to South Africa without a clear purpose or destination in mind, and most are lacking documents, money or contacts, rendering them highly vulnerable to different forms of exploitation. There is rarely a single reason for unaccompanied children to migrate, rather an interplay of factors tend to propel their entry into South Africa.

*“I came to South Africa because I was not going to school in Zimbabwe. I was living in the streets. I was taken in by a lady who was abusing me. She forced me to beg in Harare and bring her money at the end of the day. I went to hospital because she was cutting me with cans. She is mentally ill and causing problems. We reported it to social services a long time ago, but no one was taking responsibility.”*<sup>39</sup>

*“I came by myself, alone. My parents passed away in a car accident. I was no longer going to school. I was staying with my grandmother, and I came after my grandmother passed away. There was poverty, so there were no organisations to help children (in Zimbabwe).”*<sup>40</sup>

*“My mother is in Zimbabwe and my father has passed away. I came here for a better life. I didn't*

31 Overseas Development Institute, *The Cholera Crisis in Zimbabwe: Understanding the Policy and Politics*, 28 January 2009, available at: <http://www.odi.org/comment/2812-cholera-crisis-zimbabwe-understanding-policy-politics>

32 Interview, Program Manager, Save the Children, Musina, 15 May 2014

33 Rosalind Elphick and Roni Amit, African Centre for Migration and Society, *Border Justice: Migration, Access to Justice and Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-Based Violence in Musina* (2012), available at: [http://www.academia.edu/8903928/Border\\_Justice\\_Migration\\_Access\\_to\\_Justice\\_and\\_the\\_Experiences\\_of\\_Unaccompanied\\_Minors\\_and\\_Survivors\\_of\\_Sexual\\_and\\_Gender-Based\\_Violence\\_in\\_Musina](http://www.academia.edu/8903928/Border_Justice_Migration_Access_to_Justice_and_the_Experiences_of_Unaccompanied_Minors_and_Survivors_of_Sexual_and_Gender-Based_Violence_in_Musina)

34 Ibid

35 UN Department of Economics and Social Affairs, *International Migration Report* (2013), available at: [http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full\\_Document\\_final.pdf](http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full_Document_final.pdf). These figures are estimates based on official data on the number of foreign born persons and foreign population.

36 This was reflected in qualitative data collected throughout the study.

37 Interview, Woman from Zimbabwe (32), Central Methodist Church, Johannesburg, 7 May 2014

38 Interview, Johannesburg Regional Director, Legal Resources Centre, Johannesburg, 6 May 2014

39 Interview, 2 Girls (12 and 17), MGM Women and Girls' Shelter, Musina, 9 May 2014

40 Interview, Boy (16), Boys' Shelter CWM, Musina, 12 May 2014

*even tell my mom. I wasn't going to school and we didn't have any money and... the situation at home... wasn't good. I don't want to say any more about that."*<sup>41</sup>

As illustrated by the interview excerpts quoted above, children's explanations for entering South Africa tended to focus on the pursuit of immediate and material needs, such as education, money, food and shelter. Nevertheless, children's decisions to leave their countries of origin were often influenced by experiences of abuse and neglect, or institutional failings that caused them to be placed in situations of danger or harm.

Data from the Legal Advice Pilot provides an indication of how migrants' stated reasons for entering South Africa may vary according to their age and gender.

As demonstrated, children reported a diverse spread of reasons for migration, particularly in comparison to adult men, who overwhelmingly reported to migrate for the purpose of 'work' or 'claiming asylum'. 'Work' was the most common reason for which children reported to be migrating. Women and children were more likely to say that they had entered South Africa in order to 'join relatives' than adult men; and (unsurprisingly) children were considerably more likely than men or women to say that they had entered South Africa for educational purposes. It is noteworthy that very few women and *no* children reported to have entered South Africa in order to claim asylum. This may be due to the significant barriers that women, and to an even greater extent, children

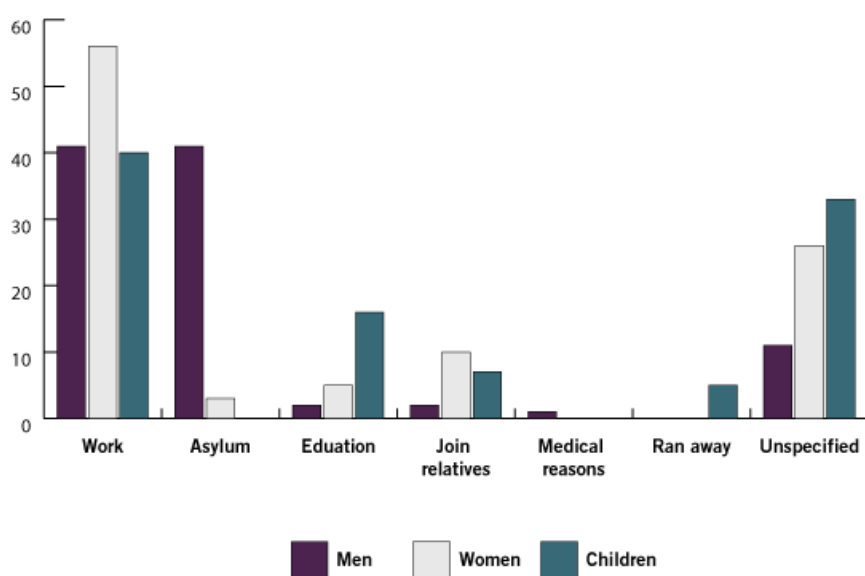
face accessing the asylum system, for reasons that are explored in-depth in chapters IV and V of this report.

Finally, it is highly significant that proportionally more children than women and men did not specify any particular reason or purpose for their passage into South Africa. This finding is reinforced by evidence gathered from the qualitative research; children's accounts of why they entered South Africa were often meandering and confused, and many expressed uncertainty about whether they wanted to stay. For example, an 18 year old boy, interviewed in a shelter in Musina, offered the following explanation of his travel to South Africa three years prior, when he was 15 years old:

*"I came to South Africa in 2011. I didn't decide, I was just influenced by some friends... I travelled by myself. When I left my home I didn't know I would end up in South Africa. My destination was not Musina. I stopped in places in Zim... on the south side... I was a street kid."*<sup>42</sup>

It is important to note the ambiguity and ambivalence of children's subjective experiences in relation to migration, given that legal categories often assume and require that migration experiences are conclusive and determinative.

**Figure 4: Reported reasons for entering South Africa for men, women and children**



41 Interview, 2 Girls (15 and 16), MGM Women and Girls' Shelter, 9 May 2014

42 Interview, Boy (18), Boys' Shelter CWM, 12 May 2014

### Crossing the border

Due to the restrictive border entry requirements in South Africa, lack of travel documents, and lack of information/ understanding of how to cross the border, large numbers of women and children cross the border to South Africa informally. The border crossing is notorious dangerous, policed by *Magumagumas*, armed bandits who prey on people crossing the border irregularly, systematically conducting theft, assault, rape and other acts of violence, sometimes in collusion with *malaishas* - border guides who facilitate people's passage across the border in exchange for money. Dangerous animals are also a threat. The data from the qualitative research revealed numerous disturbing accounts of the lawlessness and violence that characterises the bush area of the South Africa-Zimbabwe border.

*"I crossed by the Limpopo river. I didn't have money to get a ride to Musina. They left me in the forest. I didn't know anyone. There were just gumagumas and soldiers in the trees."*<sup>43</sup>

*"Women were coming in crowds, some were pregnant, some were coming with babies...Some were beaten – if you don't have money you pay by your body. They will rape you."*<sup>44</sup>

*"I needed 5,000 rand for a visa, and I couldn't pay, so I came illegally across the border through the Limpopo river. I came with a group of people with 'tots' (people smugglers). They took all of my money. They were also killing and raping people in the group. Some were taken by crocodiles while crossing the river."*<sup>45</sup>

Although the border is patrolled by the South African National Defence Force (SANDF), in practice, SANDF officials at the border do allow undocumented migrants to enter the country without official record, sometimes requiring bribes. Numerous participants in the research reported having paid someone to facilitate their crossing. Border officials appear to be particularly lenient in allowing the irregular passage of migrant women and children. A number of interviewees explained that they were caught by officials while crossing the border, but ultimately allowed to pass because of their status as women or children: *"I crossed the Limpopo river. It was quite difficult because there are South African soldiers along the river. But they didn't give me any trouble, they said 'she is just a poor lady', and let me go."*<sup>46</sup> As will be explored in Sections IV and V, the tendency of government officials to be more lenient in cases of migrant women and children is prevalent beyond the border as well. This approach does not confer women or children with access to formal legal status or social protection, however, and they remain vulnerable to exploitation by both State and non-State actors.

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43 Interview, 2 Girls (12 and 17), MGM Girls' Shelter, 10 May 2014

44 Interview, 2 Matrons, MGM Girls' Shelter, 10 May 2014

45 Interview, Women (32 and 24), Central Methodist Church, Johannesburg, 7 May 2014

46 Interview, Woman (24), MGM Women's Shelter, Musina, 9 May 2014

## 3. Law and policy regulating immigration, asylum and migrant detention

South Africa's legal and policy framework for the entry, stay, detention and expulsion of migrants, and the protection of refugees, is established by domestic laws, universal and regional treaty obligations and the overarching interpretive rights and protections afforded by the South African Constitution. In particular, two legal systems apply to the entry and stay of non-nationals in the country: the immigration system, which tightly restricts and controls the 'type' of persons permitted to enter and stay; and the refugee system, which provides significant protections and entitlements, but only for the small proportion of persons who are determined as qualifying for refugee status.

### 3.1 The development of migration and refugee policy in South Africa

In order to understand the purpose and function of the two separate systems for regulating migration, it is important to examine the historical context from which they emerged; and particularly the government's approach to migration law and policy that developed during the apartheid era, and was characteristic of the Southern African region during the 1900s. During this time, despite the heavy reliance of South Africa's economy on migrant labour, migration policy was 'essentially control-oriented'.<sup>47</sup> Throughout the 1900s, South Africa operated a so-called 'two gate policy' that distinguished between two classes of people: the front gate welcomed people deemed attractive by the ruling minority that was aimed at '*preserving a certain racist society*', whilst

the back gate prevented unwanted migrants from entering, and allowed '*cheap and relatively docile labour*' in on a temporary basis.<sup>48</sup> The 'back gate' regulation of temporary, cheap migrant labour was operationalised largely through opaque bi-lateral agreements, negotiated between business and government (predominantly involving business in the extractive and farming industries).<sup>49</sup>

This policy, which was inherited by the de Klerk administration in 1989, was disconnected from migration trends and any evidence of skills needs in the South African economy.<sup>50</sup> It was also characterised by an almost exclusive focus on the needs of the European minority and 'its corollary, a cheap black labour force maintained in a precarious position.'<sup>51</sup> In 1991, the de Klerk administration incorporated existing legislation into the Alien Control Act, which introduced tough penalties for unauthorised migration into South Africa, and gave extensive discretionary powers regarding entry, search, arrest and detention to immigration officials.<sup>52</sup> Despite the shift to a more progressive and justice oriented approach to policy, which accompanied the formation of the ANC Government in 1994, the Alien Control Act 1991 survived 12 years into the post-apartheid period; migration continued to be viewed as a security threat, in which 'waves' and 'floods' of immigrants from Africa posed a threat to South African citizens;<sup>53</sup> and the governments' focus remained on restricting the entry and stay of 'illegal aliens.'<sup>54</sup>

The delay of the post-apartheid government in reforming migration law and policy was thought not to be the result of active hostility or opposition to migration, but due to '*benign*

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47 Klinck, Jennifer A, 'Recognising socio-economic refugees in South Africa: A principled and rights-based approach to section 3(b) of the Refugees Act' (2009), 21 *International Journal of Refugee Law*, 653 at 658

48 Segatti, Aurelia, 'Reforming South Africa's immigration policy in the postapartheid period (1990 – 2010)', in Segatti, Aurelia and Landau, Loren (eds.) *Contemporary Migration to South Africa: A Regional Development Issue*, ed. Aurelia Segatti and Loren Landau (2011) Washington: The International Bank for Reconstruction and Development / The World Bank, 31 at 34

49 Ibid, 31

50 Ibid, 37

51 Ibid, 37

52 Jonathan Crush and David A. McDonald, 'Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid' (2011), Vol 48(3), *Africa Today*, 1

53 Ibid, 6

54 Segatti, Aurelia, 'Reforming South Africa's immigration policy in the postapartheid period (1990 – 2010)', in Segatti, Aurelia and Loren Landau (eds.) *Contemporary Migration to South Africa: A Regional Development Issue*, ed. Aurelia Segatti and Loren Landau (2011) Washington: The International Bank for Reconstruction and Development / The World Bank, 31 at 34

indifference': 'There is little evidence that the ruling African National Congress (ANC) saw any role for immigration in its social and economic transformation plans. Even the growing acceptance of neoliberal economic doctrine and the scurry for foreign capital did not produce any shifts in thinking about the potential value of immigration.'<sup>55</sup> Certainly, migration was not conceived strategically as an opportunity for South Africa's economic development.

In the late 1990s, the ANC government finally addressed immigration policy through the development of a Green Paper and two White Papers on immigration: one focused on development of a (separate) refugee and asylum system and the other set out the government's reform plans for the immigration system.<sup>56</sup> These papers inspired the development of the Refugees Act 1998 and the Immigration Act 2002. The two pieces of legislation were constructed on the presumption that they dealt with two very separate issues requiring two very distinct response systems. The refugee system was seen as the actualisation of international and regional commitments to ensure that 'deserving' persons were afforded rights and protection in South Africa. On the other hand, the immigration system was seen as protecting the national interest, a matter falling completely within the domain and prerogative of domestic law and policy: a mechanism through which the sovereign government is able to strictly control and regulate the entry and stay of foreigners in its territory.

The White Paper evidences the government's intention to draw a clear distinction between those entitled to seek asylum, and persons who try to enter South Africa for 'a better life': 'The government does not consider the refugee protection regime to be an alternative way to obtain permanent immigration into South Africa. It does not consider refugee protection to be the door for those who wish to enter South Africa by the expectation for opportunities for a better life or a brighter future.' It clearly states that migrants fleeing countries for economic and social reasons will not be included in the protective refugee legal framework: '[The government] does not agree that it is appropriate to consider as refugees, persons fleeing their countries of origin solely for reasons of poverty or other social, economic or environmental hardships...'

### 3.2 The Immigration System

The Immigration Act 2002 and Regulations that were introduced pursuant to the Immigration Amendment Act 19 of 2004 and 13 of 2011 provide the framework for lawful entry and stay in South Africa for foreign nationals and for the expulsion of those found to be illegally present in the country. The Act allows for the DHA to issue a range of permits/visas for entry into South Africa, including visitor visas, study visas, life-partner visas, business permits, work permits, critical skills permits, exceptional skills permits, and the like, which must be obtained through an application process prior to entry into South Africa.<sup>57</sup> The prescribed criteria for attaining visas is difficult to satisfy, except for persons who are highly educated, with a narrow 'critical skill' set (professional areas in which there is an identified critical need), and/or independently wealthy; thus, restricting pathways for 'lower skilled' economic migrants to lawfully enter and stay in South Africa. Notably, there are no specific legal pathways to regularisation for persons who entered South Africa as a child, unless they are a close relative of an existing citizen or permanent resident.

New Regulations published in May 2014, and currently in force, evidence the Government's aim to tighten border control further by imposing more onerous requirements on certain categories of visas, including restricting options for economic migration, and the conditions for entry and exit of persons; and through establishing more severe consequences for persons who breach conditions of their visas and permits. The New Regulations also impose more onerous evidentiary requirements for lawful entry and exit of children from South Africa, requiring persons travelling with a child to produce an unabridged birth certificate for the child, and proof of consent from any legal guardian who is not present, amongst other conditions.<sup>58</sup>

The Immigration Act allows for migrants to apply for permanent residence in limited circumstances, as set out in Box A. In practice, obtaining lawful and permanent residency in South Africa is beyond the attainment of the vast majority of migrants: opportunities for attaining permanent residence are tightly restricted, and favour persons with particular, advanced skills or knowledge, and / or those with independent wealth. There is a recognised 'absence of regularisation options for lower-skilled migrants.'<sup>59</sup> Also, satisfying the 'time in country' requirements for permanent

55 Jonathan Crush and David A. McDonald, 'Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid' (2011), Vol 48(3), *Africa Today*, 1, at 4

56 South African Government, Department of Home Affairs, *Draft Green Paper on International Migration* (1997); South African Government, Department of Home Affairs, *Draft White Paper on International Migration* (1997); South African Government, Department of Home Affairs, *White Paper on International Migration* (1999)

57 Sections 10 – 24, Immigration Act 2002

58 Regulation 12(a), Immigration Regulations 2014

59 Loren B. Landau and Roni Amit, 'Wither Policy? Southern African perspectives on understanding law, 'refugee' policy and protection', *Journal of Refugee Studies*, 30 June 2014, 1 at 8

**Box A: Existing pathway for regularisation: permanent residence in South Africa**

It is possible for non-nationals to obtain permanent residence, which is a legal status that confers certain rights and places certain obligations on permit holders,<sup>60</sup> in defined circumstances, normally where the applicant has spent a specified period of time (lawfully) residing in South Africa. According to the DHA, in granting permanent residency, ‘emphasis is placed on immigrants who are in a position to make a meaningful contribution to broadening the economic base of South Africa.’<sup>61</sup>

Permanent residence can be attained ‘directly’ by a non-national who has held a work permit for at least five years and has received an offer of permanent employment; where the person has been the spouse of a citizen or permanent resident for five years, in good faith; and in the case of a child of a citizen or permanent resident.<sup>62</sup> ‘Residence on other grounds’ may be granted to a non-national ‘of good and sound character’ who has received an offer of employment, though this is a difficult ground through which to apply for residence, as it must be shown that the job could not be fulfilled by any suitably qualified citizen, and the application must relate to a professional category which is defined as a ‘critical skill’.<sup>63</sup> Residence may also be granted for persons defined as having ‘extraordinary skills or qualifications’;<sup>64</sup> persons intending to establish a business (provided they have sufficient resources to invest in the business);<sup>65</sup> person who intend to retire in South Africa (though there is a means requirement for this category);<sup>66</sup> where the person has a minimum net worth and pays a prescribed amount to the Director-General;<sup>67</sup> and where the person is the close relative of a citizen or permanent resident.<sup>68</sup>

In addition, a person with refugee status has the right to apply for permanent residence after five years continuous residence in South Africa from the time that asylum is granted; provided that the Standing Committee certifies that the person will remain a refugee indefinitely.<sup>69</sup>

residency will be impossible for many migrants in South Africa, given their very limited possibilities for remaining in the country legally for extended periods.<sup>70</sup> It is also worth noting that there are no specific legal pathways to regularisation for persons who entered South Africa as a child, if they are not a close relative of an existing citizen or permanent resident.

The difficulties in satisfying requirements for permanent residence are reflected in the low numbers of persons granted this status. Only about 20,000 – 25,000 people become citizens or permanent residents of South Africa every year, which is considerably low for a population of around

50 million (France, which has a comparable population size – 65 million – confers 200,000 with a comparable legal status every year).<sup>71</sup> This is despite the fact that the labour market continues to be highly dependent on foreign labour, and labour in South Africa remains crucial to the livelihood of millions of people in the region.<sup>72</sup>

With few alternatives available, significant numbers of migrants are turning to the asylum system to provide them with opportunities to obtain legal status and protection; acquiring the status of ‘asylum seeker’ is especially useful in the South African context as it confers the right to work.

60 Aurelia Segatti, “Reforming South Africa’s immigration policy in the postapartheid period (1990 – 2010)” in *Contemporary Migration to South Africa: A Regional Development Issue*, ed. Aurelia Segatti and Loren Landau (2011), Washington: The International Bank for Reconstruction and Development / The World Bank, 57

61 According to s. 25 of the Immigration Act 2002, permanent residence grants persons ‘all the rights, privileges, duties and obligations of a citizen’, save for those defined in law as explicitly applying only to those with citizenship.

62 Government of Republic of South Africa, Department of Home Affairs, *Permanent Residency (Immigration)*, <http://www.home-affairs.gov.za/index.php/permanent-res>

63 Section 26, *Immigration Act 2002*

64 Section 27(a), *Immigration Act 2002*

65 Section 27(b), *Immigration Act 2002*

66 Section 27(c), *Immigration Act 2002*

67 Section 27(e), *Immigration Act 2002*

68 Section 27(e), *Immigration Act 2002*

69 Section 27(f), *Immigration Act 2002*

70 Section 27(c) *Refugees Act 1998*; Section 27(d), *Immigration Act 2002*

71 Segatti, Aurelia, ‘Reforming South Africa’s immigration policy in the postapartheid period (1990 – 2010)’, in Segatti, Aurelia and Landau, Loren (eds.) *Contemporary Migration to South Africa: A Regional Development Issue* (2011), Washington: The International Bank for Reconstruction and Development / The World Bank, 57.

72 Aurelia Segatti, “Migration to South Africa: Regional Challenges versus National Instruments and Interests” in *Contemporary Migration to South Africa: A Regional Development Issue*, ed. Aurelia Segatti and Loren Landau (2011) Washington: The International Bank for Reconstruction and Development / The World Bank, 2011, 21.



### The Zimbabwean Special Dispensation Permit

In 2009 the South African government took an uncharacteristically pragmatic approach to the challenge of large number of undocumented Zimbabwean migrants present in South Africa. Between April 2009 and May 2010, a moratorium, known as the Zimbabwean Dispensation Project was put into place halting the deportation of Zimbabwean nationals. This was then followed by the Zimbabwean Documentation Process and a “forged documents” Amnesty, announced in June 2010, and implemented between September and the end of December 2010. The project offered Zimbabweans the opportunity to apply for up to four year business, work and study permits conditional upon withdrawing their asylum claims and provided they could supply a valid passport and letters confirming their employment or studies and agreed to submit bio-data. According to Home Affairs statistics<sup>73</sup> over 275,000 applications were received. A new dispensation scheme for Zimbabwean nationals is currently underway. Under this scheme, all applicants under the 2009/2010 scheme (both successful and unsuccessful) may apply for special dispensation. New permit holders will be entitled to live, work, conduct business and study in South Africa for the duration of the permit (until 31 December, 2017).

### 3.3 The Refugee and Asylum System

As previously discussed, the legal and policy framework relating to asylum-seekers and refugees in South Africa is generally regarded to be progressive, protective and compliant with international standards. The Refugees Act 1998 grants a wide range of rights and entitlements to those recognised as asylum-seekers and refugees. It not only guarantees the protections set out in international law, it also offers ‘remarkable freedoms to live and work’<sup>74</sup> and grants asylum seekers and refugees the right to access free health care and education. The Refugees Act also establishes a policy of urban integration, by which asylum seekers have freedom of movement and are permitted to live, work and study anywhere in the country.<sup>75</sup>

#### Definition of a ‘refugee’

The Refugees Act 1998 establishes a right to claim asylum and defines who may be considered a refugee. It establishes a general prohibition on refusal of entry, expulsion, extradition or return of persons who fall within the definition of ‘refugee’.<sup>76</sup> The definition of ‘refugee’ is expansive, and is largely drawn from the UN Convention relating to the Status of Refugees and the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. It provides that a person will qualify for refugee status if:

1. (Section 3a) They are outside their country of nationality or habitual residence and are unable or unwilling to return owing to ‘a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group’. Notably, South African law explicitly recognises gender in the legislative definition of ‘particular social group’, in contrast to the Refugee Convention.<sup>77</sup>
2. (Section 3b) Owing to ‘external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order’ in their country of nationality or habitual residence, they have been compelled to leave it and seek refuge elsewhere.<sup>78</sup>
3. (Section 3c) They are a ‘dependent’ of a person falling into the definition of refugee.<sup>79</sup> This is the way in which accompanied children may gain refugee status.

Section 3(b) is particularly interesting as it provides a considerably more expansive set of circumstances within which a person may seek asylum than is available in the Refugee Convention.<sup>80</sup> This category largely reproduces the definition of refugee contained in the African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)<sup>81</sup> and allows that the ‘objective conditions in the country of origin’ give rise to a

73 See DHA briefing presentation 19.09.11 – available on the Parliamentary Monitoring Group website at <http://www.pmg.org.za/report/20110920-department-home-affairs-zimbabwean-documentation-project>

74 Loren B. Landau and Roni Amit, ‘Wither Policy? Southern African perspectives on understanding law, ‘refugee’ policy and protection’, *Journal of Refugee Studies*, 30 June 2014, 1 at 6

75 Ibid. However, it should be noted that the rights and protections afforded to asylum seekers and refugees are not widely available in practice: see below.

76 Section 2, Refugees Act 1998

77 Sections 1 and 3(a), Refugees Act 1998. Section 1 also explicitly recognises ‘sexual orientation’ as a ‘particular social group’.

78 Sections 3(a) and 3(b), *Refugees Act 1998*

79 Section 3(c), *Refugees Act 1998*. One research participant from a legal NGO reported that many children arrive in South Africa with extended family members, particularly uncles and aunts. They perceived a need to initiate litigation to clarify that the legal definition of ‘dependant’ includes children who are accompanied by uncles and aunts, and this is based on understandings of family within South African customary law.

80 Convention relating to the Status of Refugees 1951 and 1967 Protocol.

81 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969

need for refugee protection,<sup>82</sup> such that a claimant need not prove an *individual* risk or fear of persecution. Furthermore, the phrase ‘events seriously disturbing or disrupting public order’, is sufficiently expansive, that it could be interpreted to include a range of events with political, social and/or economic dimensions and consequences. Unfortunately, section 3(b) of the Refugees Act has not been subject to rigorous interpretation, and it is difficult to draw broad conclusions on its meaning and application in practice.<sup>83</sup> One well-reasoned interpretation, based on the text in the Refugees Act, along with the construction of South Africa’s Bill of Rights and international human rights commitments, favours an approach that identifies this provision as entailing two requirements: ‘(a) *there are urgent and widespread deprivations of fundamental human rights; and (b) international cooperation is not an effective means of realising the rights which are deprived,*’ because, for instance, the government of a person’s origin cannot be relied on to ensure persons derive benefits from international assistance.<sup>84</sup> As South Africa’s Bill of Rights makes both civil-political and social-economic rights justiciable and indivisible, it reasonably follows that urgent and widespread deprivations of social and economic rights may amount to ‘events seriously disrupting public order.’<sup>85</sup> Whether a person will be taken to have been ‘compelled’ to leave their home country, within the meaning of s.3(b), however, may require experiences of ‘*threats to life, safety or freedom*’<sup>86</sup>.

### **Legal process for claiming asylum**

The Refugees Act and Regulations also set out the process for the submission, determination and review of asylum applications. This process is managed by the DHA, and is carried out through Refugee Reception Offices, and review bodies: the Standing Committee for Refugee Affairs and Refugee Appeal Board.<sup>87</sup> According to the Immigration Act 2002, a person should seek asylum by requesting an

‘asylum transit permit’ at their port of entry.<sup>88</sup> This permit is valid for five days, during which time a person seeking asylum must present themselves in person at a Refugee Reception Office (RRO) in order to apply for a temporary asylum-seekers permit (commonly referred to as ‘a section 22 permit’).<sup>89</sup> This permit does not confer refugee status but functions as an identification document pending a decision on the asylum claim. If a section 22 application is not made within five days following entry into the country, a person will be deemed an ‘illegal foreigner’ within the meaning of the Immigration Act 2002, and liable to detention and deportation, as set out below. A section 22 permit will normally be valid for three months at a time and must be renewed before it expires; otherwise, the person will become liable to detention and deportation as an ‘illegal foreigner.’<sup>90</sup> To have the permit renewed, a person must apply in person at the RRO in which the original claim was lodged.<sup>91</sup>

Once a temporary s.22 permit is issued, a date should be set for a ‘status determination hearing’ with a Home Affairs Department Refugee Status Determination Officer. This is a formal interview concerning the basis of the claim. This could take place within a matter of weeks or, more likely, it may take several years to have a date set. Subject to the renewal of asylum permits, an asylum seeker is legally entitled to remain in South Africa until a final decision is made on their claim. After the interview, it may take a further period before a decision, to recognise the person as a refugee or to refuse the claim.

In the event that the claim is accepted, a ‘section 24 *Refugees Act* refugee status permit’ will be issued. It is ordinarily valid for four years, but may be issued for shorter periods in practice.

A claim can be refused in two ways: by being considered ‘manifestly unfounded, abusive or fraudulent’; or by being considered ‘unfounded.’<sup>92</sup> There are different avenues and

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82 Eduardo Arboleda, ‘Refugee Definition in Africa and Latin America: The Lessons of Pragmatism’ (1991) 3 *International Journal of Refugee Law*, 185 at p. 189

83 Tal Hanna Schreier, ‘An evaluation of South Africa’s application of the OAU refugee definition’, *Refugee* (2008) 25(2), 53 at 53 – 4: ‘*The OAU refugee definition and the OAU Convention as a whole have not been subject to much interrogation; neither have they been the subject of much international jurisprudence. Similarly, South Africa’s analysis of the OAU refugee definition has been less than noteworthy. To date, there exist no published Refugee Appeal Board decisions, or reported or unreported South African High Court decisions that have interpreted the OAU refugee definition.*’

84 Landau in Jennifer A Klinck, ‘Recognising socio-economic refugees in South Africa: A principled and rights-based approach to section 3(b) of the Refugees Act’ (2009), 21 *International Journal of Refugee Law*, 653 at 673

85 Ibid, at 666

86 Ibid, at 677

87 These bodies are statutory: sections 8 – 20, Refugees Act 1998.

88 Section 23, *Immigration Act* 2002, as amended by s.15 of *Immigration Amendment Act* 2011

89 Section 22, *Refugees Act* 1998; Section 2(1), *Regulations to the Refugees Act* 1998.

90 However, see the leading case of *Arse v Minister of Home Affairs South African Supreme Court* 2010, limiting the use of detention against asylum seekers).

91 Section 3(2), *Regulations to the Refugees Act* 1998

92 Section 24(3), *Refugees Act* 1998

processes for review or appeal of a rejected claim depending on the type of refusal conferred.<sup>93</sup>

In practice, many migrants who wish to apply for asylum face being excluded from the system through an inability to meet onerous procedural requirements, or through excessive delays and failings in the system. A concern frequently raised by research participants is the ongoing inability of individual claimants to gain access to an RRO, at which permits are applied for and renewed, in a consistent, reliable and corruption free manner. The difficulties accessing RROs was heightened following a policy shift, in 2011, to move RROs from major cities to international borders. Since mid-2011, several RROs have been closed, including those in Johannesburg, Port Elizabeth and Cape Town.<sup>94</sup> Currently, there are only four RROs open across South Africa: Durban, Cape Town (subject to legal action to remain open), Tshwane and Musina. And of these, only three are accepting new permit applications. Accordingly, *'[a]sylum seekers now face significant queues at the remaining refugee reception offices, often struggling for days or weeks to gain entry...the Department has refused to re-open the closed offices despite court orders to do so.'*<sup>95</sup>

Many research participants commented on the difficulties in gaining access to RROs. The following account by one research participant appears to reflect the barriers faced by many migrants, and illustrates how in practice the dysfunctional bureaucracy of the asylum system may exclude potential applicants:

*"If you are given a permit [temporary asylum-seekers permit; s. 22 permit], they will stamp it, write your name and date of birth and everything and then say 'OK, you come back on 5th October to extend your permit.' On 5th October, you wake up early, because now we have to go to Pretoria. I wake up at half 12am and move out at 1.45am....I arrived in Pretoria [at the Refugee Reception Office] at 3am, and when I arrived, I realised that there are lines going all directions; this line going this way, this line going that way...thousands of people, and when Home Affairs comes in at 8am, there is huge disorder...there is a lot of stealing going on, there is a lot of confusion, and some people have*

*their papers stolen....by the end of the day, some are facing the challenge of being told 'I can't find your file' (something that happened to me about 10 times)...you use transport to get to Pretoria and they ask you to come back tomorrow, but now we have set days [on which Zimbabweans are able to access the RROs], which means that, if processing of your payment did not happen on Monday or Tuesday, then you have to wait until Monday or Tuesday next week.'*<sup>96</sup>

The consequences of the closures of RROs, along with policies designed to marshal asylum seeking populations to remain around the northern border region in Limpopo Province, unaffordable fines and the large backlogs of cases already in the system appear to have contributed to conditions whereby procedural flaws become a significant reason for claimants being excluded from accessing the asylum system and being exposed to re-categorisation as 'illegal foreigners'.<sup>97</sup> The difficulty obtaining a permit has serious implications; migrants who are without an updated, valid permit can be exposed to arrest and detention, and can also face other difficulties, like inability to make a bank transaction or access public services.

### 3.4 Legal framework for the arrest and detention of migrants

The immigration legal framework and refugee legal framework both regulate the circumstances in which non-national persons may be lawfully arrested and detained, and sets out the safeguards to which detained persons are entitled. The burden rests on the state to justify any detention. However, the South African constitution entrenches a long-standing principle that any interference with personal liberty is *prima facie* unlawful<sup>98</sup>, and administrative detentions are subject to the Constitutional guarantee of lawful, reasonable and procedurally fair administrative action.<sup>99</sup> Whether a person may be lawfully detained will depend on their legal status, and in particular, whether they are, according to the law, an 'illegal foreigner' or 'refugee' / 'asylum seeker'. Separate provisions apply to children (those aged under 18 years); both accompanied and unaccompanied.

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93 Sections 25 and s. 26, *Refugees Act 1998*

94 Lawyers for Human Rights and African Centre for Migration and Society, *Policy shifts in the South Africa Asylum System: evidence and implications* (2013)

95 Loren B. Landau and Roni Amit, 'Wither Policy? Southern African perspectives on understanding law, 'refugee' policy and protection', *Journal of Refugee Studies*, 30 June 2014, 1

96 Interview, Section 22 permit holder and Principal of a school for migrant children, Johannesburg, 8 May 2014

97 Lawyers for Human Rights and African Centre for Migration and Society, *Policy shifts in the South Africa Asylum System: evidence and implications* (2013)

98 Section 12(1), *Constitution of the Republic of South Africa*

99 Section 33, *Constitution of the Republic of South Africa; Promotion of Administrative Justice Act (PAJA) 2000*

According to s.34 of the Immigration Act 2002, an 'illegal foreigner' may be arrested without a warrant and may, pending deportation, be detained by an immigration official. It is worth noting that, although it is a mandatory feature of the Act that an illegal foreigner must be deported, a requirement to detain does not exist: the Act contains only the power to detain, in accordance with specified conditions and procedures. It is therefore not obligatory to detain in order to deport. According to case law, an official must use their discretion to detain based on the relevant facts of each case, and the law must be construed in favour of liberty,<sup>100</sup> though, according to a national NGO, officials frequently use their discretion under this provision incorrectly, leading to unlawful deprivation of liberty and court orders for release (with legal costs normally awarded against the DHA).<sup>101</sup>

The Refugees Act 1998 limits the detention of a person who has been recognised as a refugee to those refugees against whom the Minister has made an order for removal, provided that sufficient time has been given to allow the refugee to leave voluntarily.<sup>102</sup> An order for removal is discretionary and no person should be removed from South Africa to a country where they may be subjected to persecution or where their safety or freedom may be threatened by events that may seriously disturb or disrupt public order.<sup>103</sup> A dependant (including a child) can be included in such an order and detained, whether or not they have been recognised as a refugee themselves.<sup>104</sup>

Asylum seekers (all persons who have made a claim for asylum but have not had a final resolution of their claim, including those who have exercised the right of review and/or appeal and this is still pending), do not explicitly fall within this provision as they are not (yet) recognised as a refugee. However, a holder of a valid temporary asylum seeker permit ('s.22 permit') may not be detained, provided that they comply with the conditions for claiming asylum.<sup>105</sup>

The Refugees Act 1998 imposes strict limitations on the detention of children, providing that children may only be detained as a last resort and for the shortest appropriate

period of time,<sup>106</sup> in accordance with international human rights law.<sup>107</sup> While this provision appears to permit the detention of children (for the shortest appropriate period of time and as a last resort), case law has established the right of unaccompanied children to have their interests considered by the Children's Court and as a result, has held that immigration detention of children (at Lindela) was unlawful.<sup>108</sup>

The Immigration Act 2002 and Refugees Act 1998 place strict time limits on detention, and impose requirements for regular judicial review of detention. According to the Immigration Act 2002, a person can in the first instance be detained for up to 48 hours in order to verify their immigration status.<sup>109</sup> Individuals may at any time request that their detention for the purpose of deportation be confirmed by a warrant of the court, and must be immediately released if such a warrant is not issued within 20 days.<sup>110</sup>

Individuals may not be detained for longer than 30 days without a warrant of the court. The court may, on good and reasonable grounds, extend the detention for a period not exceeding 90 days<sup>111</sup> (i.e. 120 days total). The 30 / 120 day period will begin being calculated at the expiry of the initial 48 hours of detention, regardless of where the individual is detained or whether and at which point they are issued with a notice of deportation.<sup>112</sup> Individuals must be notified of the intention to extend their detention, and must be given an opportunity to make representations as to why the detention should not be extended.<sup>113</sup> Perceived impossibility on the part of DHA to comply with the legal time limits on detention and ensure that procedural safeguards are provided is no defence for non-compliance, as found in a recent High Court case: *'the respondents' conduct of detaining illegal foreigners beyond the maximum 120 days is unlawful and unconstitutional. There can be no basis for the argument, as the respondents do, that there is discretion to extend the maximum detention period beyond 120 days whenever it is necessary or justifiable. The contended necessity and the justification have no basis in law.'*<sup>114</sup>

100 *Jeebhai v Minister of Home Affairs* 139/08 [2009] SASCA 35; *Ulde v Minister of Home Affairs and Another* 2009 (4) SA 522 (SCA)

101 Lawyers for Human Rights, Submission on the Draft Immigration Act Regulations 2014 (2014), available at: <http://www.lhr.org.za/submission/lhr-submission-draft-immigration-regulations-2014>

102 Section 28, *Refugees Act* 1998

103 Section 2, *Refugees Act* 1998

104 Section 28 *Refugees Act* 1998

105 Section 22(6), *Refugees Act* 1998

106 Sections 29 (1) and (2), *Refugees Act* 1998

107 See section 37(b), UN Convention on the Rights of the Child 1989

108 *Centre For Child Law And Another V Minister Of Home Affairs And Others* 2005 (6) case no 22866/04

109 Section 34, *Immigration Act* 2002

110 Rule 33, *Immigration Regulations* 2014.

111 Section 34(d), *Immigration Act* 2002; see also *Mustafa Aman Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA)

112 *South African Human Rights Commission and others v Minister of Home Affairs and others*, 28 August 2014, 41571/12, para. 18

113 Rule 28, *Immigration Regulations*

114 *South African Human Rights Commission and others v Minister of Home Affairs and others*, 28 August 2014, 41571/12, para. 18

The Refugees Act 1998 limits the period of detention prior to deportation to 30 days, after which, to remain lawful, it must be renewed by the High Court and reviewed by the court within every 30 day period.<sup>115</sup> Persons may only be detained ‘pending deportation’; if there is no real possibility of a person being removed within a reasonable period of time (e.g. because a person is stateless), then deportation cannot be considered ‘pending’.

However, as will be examined throughout the report, time limits and procedural safeguards, such as the issuing of warrants, are frequently flouted in practice, and persons are often subject to unlawful detention. In a case decided in 2014, relating to the detention of 42 individuals detained in Lindela Repatriation Centre, the Court commented that ‘it is standard practice’ that illegal foreigners are detained beyond the 30 calendar day time limit, including those that are detained both with and without a warrant: ‘*the practice is so rife that more often than not, the warrant referred to in section 34(1) of the Act appears for the first time at court when the detainees challenge their unlawful detention.*’<sup>116</sup> The High Court referred to an extensive number of cases it had heard in relation to applicants who had been held in unlawful immigration detention, and comments that, ‘*despite numerous court orders requiring the Department to release people from Lindela, respondents’ unlawful and unconstitutional conduct persist.*’<sup>117</sup>

### 3.5 Legal framework for unaccompanied child migrants

South Africa’s child law framework, and in particular, its Children’s Act 2005, is widely regarded to be protective and compliant with South Africa’s obligations under the UN Convention on the Rights of the Child and other international legal obligations.<sup>118</sup> Children’s rights also feature prominently in the Bill of Rights in South Africa’s Constitution.<sup>119</sup>

The Children’s Act 2005 and its Regulations provide a comprehensive legal framework for the care and protection of children in both the public and private family law context and in matters of international movement and risks to children (abduction, international adoption, and so on). The Act applies to all children in South Africa who are unaccompanied, and other migrant children who are identified as being ‘in need’. According to the Act, any child identified as ‘in need of care and protection’ should be referred to a social worker for investigation and, if necessary, provided with support.<sup>120</sup> A child will be deemed to be ‘in need of care and protection’, where (inter alia) they have ‘been abandoned or orphaned or is without any visible means of support’... or they live in or are ‘exposed to circumstances which may seriously harm that child’s physical, mental or social well-being.’<sup>121</sup> The Act makes provision for such children to be brought before a Children’s Court at the earliest opportunity for their welfare needs to be assessed and reported to the court by a social worker and to be placed in temporary state care (including foster care) for the safety and well-being of the child.<sup>122</sup> Once an assessment has been ordered, a report must be completed within 90 days by a designated social worker identifying the extent of the child’s needs and measures to be taken to meet them. The court must then decide what order to make in the best interests of the child, including the placement of the child in safe and appropriate foster or residential care under the supervision of a social worker.<sup>123</sup> A court order must be made ‘aimed at securing stability in the child’s life,’<sup>124</sup> having considered the developmental and therapeutic needs of the child and a permanency plan.<sup>125</sup>

The Government’s Department of Social Development (DSD) is responsible for child welfare policy and strategy and the funding of provincial and municipal authorities to deliver statutory social work duties including child protection. A comprehensive 2010 report for UNICEF,<sup>126</sup> found that there

115 Section 29, *Refugees Act 1998*

116 *South African Human Rights Commission and others v Minister of Home Affairs and others*, 28 August 2014, 41571/12, para. 40

117 *South African Human Rights Commission and others v Minister of Home Affairs and others*, 28 August 2014, 41571/12, para. 44

118 See UNICEF UK, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (2012), 88, available at: [http://www.unicef.org.uk/Documents/Publications/UNICEFUK\\_2012CRCImplementationreport.pdf](http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationreport.pdf); John Tobin, ‘Increasingly Seen and Heard: The Constitutional Recognition of Children’s Rights’ (2005) Vol. 21, *South African Journal on Human Rights*, 99

119 Section 28, *Constitution of the Republic of South Africa*

120 Chapter 9, Part 1, *Children’s Act 2005*

121 Children’s Act 2005: Chapter 9, section 150 subsections (1) a & f

122 Sections 150 – 152, *Children’s Act 2005*

123 Section 156, *Children’s Act 2005*

124 Section 157, *Children’s Act 2005*

125 Section 157, *Children’s Act 2005*

126 UNICEF, *Government-funded programmes and services for vulnerable children in South Africa* (2010), available at: [http://www.unicef.org/southafrica/resources\\_8143.html](http://www.unicef.org/southafrica/resources_8143.html)

remains a profound gap in the ability of social services to meet their statutory duties to vulnerable children under the Children's Act 2005.<sup>127</sup>

There is no law that restricts an unaccompanied child's access to the immigration or asylum systems (e.g. the ability to claim asylum), and the Refugees Act 1998<sup>128</sup> makes explicit provision for unaccompanied children in need of care who appear to qualify for refugee protection, to be brought before the local Children's Court, and case law has confirmed this.<sup>129</sup> The Refugees Act 1998 also provides that the Court may order that a child be assisted in applying for asylum.<sup>130</sup> However, there appears to be a widely held view among professionals and children alike that children cannot apply for asylum while under the age of 18 years, as will be explored in **Section V** of this report.

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127 [Ibid.](#), at 70

128 Sections 31(1) and (2), *Refugees Act 1998*

129 *Centre For Child Law And Another V Minister Of Home Affairs And Others* 2005 (6), case no 22866/04

130 Section 32(2), *Refugees Act 1998*

## 4. Pathways to Detention: The mythology of immigration categories in South Africa

### 4.1 Experiences and practices of immigration detention

*“The police give us a hard time – if we are going outside they ask you for your passport. They take you to the police station and take you back to Zimbabwe. If you don’t have a permit they take you back. If you overstay, they deport you. Sometimes they just destroy your passport. Sometimes you go to the police station. There is a place called Lindela. Sometimes you stay three months.”<sup>131</sup>*

Immigration detention is one of the primary mechanisms for border control in South Africa, and is used to facilitate the deportation of ‘unlawful’ migrants. Respondents, including public security officials, reported that persons who do not have documentation that proves their immigration status or cannot demonstrate that they are in South Africa legally, are regularly detained by law enforcement officials and may eventually be deported.<sup>132</sup> Indeed, 74% of all persons assisted by the Legal Advice Pilot had been placed in immigration detention because they were undocumented.

Many migrants enter South Africa informally, without passing through official border control, and do not possess identification or travel documents. Unless they are able to pursue and obtain documents in South Africa, they are at significant risk of being detained, regardless of the amount of time they have spent in the country. In some cases, migrants are detained and deported after living and working in South Africa for years:

*“The first time I came with my baby. I snuck across. We just passed through the river...I was lucky I didn’t meet anyone. I don’t have any documents, or any legal status...I found a job selling clothes. I did this from 2007 until now. My daughter is in Zimbabwe – it is difficult, I always cross ‘that way’. Now is the first time that I’ve been caught. They got me at the job while I was working. The home affairs people told me I was coming here (police cells in Musina) because I did not have documents.”<sup>133</sup>*

Additionally, migrants who do possess travel documents may be fined, detained and deported if they violate the conditions of their stay, as was the case for many participants in the study; one Zimbabwean woman residing in a shelter in Johannesburg, described the common experience of many of these migrants: *“I have been deported more than three times because I stayed more than 30 days.”<sup>134</sup>* Similarly, migrants who have submitted an asylum claim, and received a temporary Section 22 asylum permit, may be subject to detention if they fail to renew the permit before it expires.<sup>135</sup> Crucially, our research indicates that many migrants fail to understand the terms of the Section 22 permit, an issue of increasing concern as the government has recently made the permit renewal process more inaccessible and onerous (through policies such as moving Refugee Reception offices to the borders). Finally, persons with legal status in South Africa (including South African citizens) may be arrested and detained until they are able to prove this status. Indeed 25% of migrants in detention assisted under the Legal Advice Pilot were in possession of valid documentation.

In both Guateng and Limpopo provinces, it appears that persons suspected to be ‘unlawful’ migrants are initially

131 Interview, Woman from Zimbabwe (27), Central Methodist Church, Johannesburg, 7 May 2014

132 Interview, South African Public Security, Musina, 14 May 2014. See also Nicola Whittaker, *Monitoring Immigration Detention in South Africa*, (2012), Lawyers for Human Rights

133 Interview, Woman from Zimbabwe (23), Police detention cells, Musina, 12 May 2014

134 Interview, Woman from Zimbabwe (28), Central Methodist Church, Johannesburg, 7 May 2014

135 Legal Advice Pilot case data; Burundian, Malawian, Somali, Zimbabwean Migrants in Police Detention, 2013-2014

detained at police stations whilst the DHA arranges for them to be deported. Migrants from Zimbabwe may be deported directly due to an official agreement with the Zimbabwean government, while migrants from other countries, or those with disputed/undetermined nationalities, will be brought to Lindela repatriation centre before being deported.<sup>136</sup>

Arrest and detention of migrants is usually carried out by police officers although Home Affairs maintains all legal (and decision making) authority regarding their detention and eventual release; as one police officer explained: *“you will find they are being arrested by a number of agencies. Our job is just to hold them in custody. Home Affairs must come to deal with deportation and going to Lindela. We just feed them and look after them.”*<sup>137</sup> Arrests at or near the border are frequently made by South African Defence Force and South African Public Security officials, as well as by police officers. Police and Home Affairs officials reportedly frequently stop and search individuals that they suspect to be (unlawful) migrants in public gathering places. Participants also reported that migrants are arrested at RROs, and that police routinely stop and search vehicles (such as buses) that carry migrants from border towns such as Musina to Johannesburg.

The particularly aggressive approach to detaining and deporting migrants was evidenced by interviews with officials and migrants alike; one senior official characterised arresting migrants as a legal duty, despite the fact that it is a power, not a duty, according to the law: *“if [someone] does not have a passport you ask for their asylum papers, and if they do not have asylum papers you have to arrest them- we take them straight to the cells. We are living in a country which is a democracy, we welcome these people here. But the fact is they must have legal documents. The fact is if they do not have legal documents the law says we must arrest them.”*<sup>138</sup>

Practices of arrest and detention appear to be implemented inconsistently, though according to respondents, men are the most likely candidates for arrest and certain public gathering places are targeted by the police.<sup>139</sup> Profiling is prevalent, perhaps unsurprisingly, given that police are seeking to arrest migrants based on their lack of identity documents. Respondents described xenophobic trends in arrests among SAPS and SANDF, and explained that groups of (often disadvantaged) men who ‘look or sound Zimbabwean’ are prime targets: *“The raids are directed at both foreigners and people who trade informally.”*<sup>140</sup> Others gave examples of corruption and abuse by law enforcement officials; *“There*

*are police raids in the markets. People are physically abused and issued tickets: even though the law says not more than 500.00 they charge 4,000.00.”*<sup>141</sup>

By contrast, respondents described a recent normative shift away from the practice of arresting and detaining children (which is, in most circumstances, unlawful), women with children, and pregnant women; this will be explored further in **Section V** of this report. Whilst the arrest and detention of women migrants is not unlawful, differential treatment may be due to the fact that women are perceived as vulnerable individuals who should receive special protection; the fact that they are less likely to be in public spaces (in groups); and the fact that they are less likely to be perceived as a threat to public safety/order.

In sum, data from qualitative interviews and from the Legal Advice Pilot revealed that there are a diversity of categories of persons in immigration detention, including: both persons who are in South Africa lawfully and those who are residing unlawfully; persons who are migrants as well as South African nationals; persons who do not possess identity documents, those whose identity documents are ‘invalid’ or ‘expired’, and those who do possess valid identity documents but do not have them on their person; as well as undocumented migrants who have lived and worked in South Africa for short or long periods of time. Furthermore, many persons had been subject to repeated periods in detention, whereby a cycle of entry, arrest, detention and deportation continued over a period of several years; as one immigration official explained: *“the greatest challenge is Zimbabweans, because we deport them today and tomorrow they come back. When you drive them back across the border they follow you in the car back... maybe we are wasting resources.”*<sup>142</sup> Together these findings are indicative of an arbitrary approach to detention, and call into question the effectiveness of this strategy as a form of border control.

### 4.2 The systemic nature of unlawful detention

*“Detentions are rarely reviewed by a court and have effectively become extra-legal. Many individuals are also detained in excess of the legally allowed 120 days.”*<sup>143</sup>

The extent of unlawful detention of migrants in South Africa has been well documented. While it is impossible

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136 Interview, Lawyers for Human Rights, Musina, 13 May 2014

137 Interview, South African Public Security, Musina, 14 May 2014

138 Interview, South African Public Security, Musina, 14 May 2014

139 Interview, legal service provider, Legal Resources Centre, Musina, 12 May 2014

140 Interview, Lawyers for Human Rights, Johannesburg, 16 May 2014

141 Interview, Lawyers for Human Rights, Johannesburg, 16 May 2014

142 Interview, South African Public Security, Musina, 14 May 2014

143 Loren B. Landau and Roni Amit, ‘Wither Policy? Southern African perspectives on understanding law, ‘refugee’ policy and protection’, *Journal of Refugee Studies*, 30 June 2014, 1 at 9



to determine levels with precision because of lack of transparency by DHA and poor data management practices<sup>144</sup>, interviews with respondents in detention, and data collected through the Legal Advice Pilot, suggest that in practice people with undetermined legal status are nearly always held in detention for over 48 hours, without a court order, in contravention of the law.

Procedural irregularities are extremely prevalent, and in practice migrants' basic due process rights are frequently violated. For instance, according to a recent survey of detainees at Lindela conducted by the African Centre for Migration Studies (ACMS), only 6% of respondents received statutory notification of their classification as an illegal foreigner and their right to request a review of the classification before being moved to Lindela.<sup>145</sup> 75% were not aware of their right to require the court to review their detention, 77% did not receive a Notice of Deportation Form (to which they are entitled under Section 34 of the *Immigration Act*) and 71% of those detainees who signed the form reported that they did not understand what they were signing.<sup>146</sup> Lawyers for Human Rights' most recent report on immigration detention states that, 'detention periods beyond the Statutory limit of 120 days as well as detentions beyond 30 days without the necessary warrants or court orders are frequent occurrences.'<sup>147</sup> It is particularly problematic that, according to the ACMS study, '5% of detainees had been in Lindela in excess of the 120 day statutory limit on immigration detention for purposes of deportation.'<sup>148</sup>

Furthermore, the explicit protections for refugees and asylum seekers provided by the Refugees Act are frequently violated. As discussed, Section 21(4) of the Act prohibits the arrest, detention and deportation, of refugees and asylum seekers. In practice, however, detention and deportation of refugees and asylum seekers occurs on systemic levels<sup>149</sup>; persons who may have, and intend to make, a legal claim to asylum, as well as those who have

made a claim but whom have faced procedural difficulties renewing and maintaining their temporary permits (while awaiting a status determination), are frequently detained as 'illegal foreigners'. A staff attorney at Lawyers for Human Rights explained, "*We are bringing two applicants next week – people who were arrested at the border post who do not get a chance to apply for asylum. This happens in the majority of cases. At Home Affairs they think that you need documents to come through and that if you don't have documents you are illegal. They just don't get it. They haven't read the Refugees Act.*"<sup>150</sup>

One woman, who reported having been denied any opportunity to visit a Refugee Reception Office and apply for asylum, explained her experience:

*"Those guys from the border, they delay a lot. They told me we must go to Lindela. They wanted to slap me. I prefer to go to Lindela than to go back to Somalia – it's terrible. They want me to go back. I don't want to go back to my country. My mother was killed inside the house in Somalia...it's like that everywhere. It's a war. I travelled by myself by road. I just walked across the border. I spoke to an immigration official and he said to show my passport. I tried to talk to them (DHA officials) – they just took me here and took my finger prints. I told them I wanted to apply for asylum status. They have not told me how long I will be here."*<sup>151</sup>

It is a particularly flagrant violation of the Refugees Act 1989 that persons seeking asylum held in detention, such as the woman quoted above, reported being actively denied their right to submit an asylum claim. It is also problematic that many others, while they may be familiar with the fact that asylum papers are useful if you wish to stay in South Africa, fail to understand what asylum is or how to establish a legal claim, and lack access to legal advice necessary to do so. Several respondents emphasised that in South Africa "*most*

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144 Aurelia Segatti and Loren Landau (ed), *Contemporary Migration to South Africa: A Regional Development Issue*, (2011), Washington: The International Bank for Reconstruction and Development / The World Bank, 12.

145 Roni Amit and Tamlyn Monson, *Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa* (2010), Forced Migration Studies Programme, University of Witwatersrand

146 Ibid

147 Nicola Whittaker, *Monitoring Immigration Detention in South Africa* (2012), Lawyers for Human Rights

148 See e.g. Roni Amit, *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010), Forced Migration Studies Programme, University of Witwatersrand, available at: [http://oppenheimer.mcgill.ca/IMG/pdf/FMSP\\_Protection\\_and\\_Pragmatism.pdf](http://oppenheimer.mcgill.ca/IMG/pdf/FMSP_Protection_and_Pragmatism.pdf)

149 Nicola Whittaker, *Monitoring Immigration Detention in South Africa* (2012) Lawyers for Human Rights; Roni Amit and Loren B. Landau, 'Wither Policy? Southern African Perspective on Understanding Law, 'Refugee' Policy and Protection', *Journal of Refugee Studies*, 30 June 2014, 1

150 Interview, Detention Unit, Lawyers for Human Rights, 16 May 2014

151 Interview, woman from Somalia, Musina police station cells, 12 May 2014

*people know nothing about the asylum system, especially actual asylum seekers [people with legitimate claims to asylum]”.*<sup>152</sup>

In an instance where refugees may not understand that they have a legal right to claim asylum under national law, or how to effectively do so, the protections that exist under the Refugees Act become meaningless in practice, and place people who are refugees at a high risk of unlawful detention and deportation. This also reflects the paradox that asylum-seekers and refugees are effectively ‘illegal foreigners’ until they are able to access domestic legal protection, given that there is no legal mechanism for a person fleeing persecution to lawfully enter a country of safety; their protected status is only conferred once they have arrived and declared themselves a refugee. This phenomenon, while existent in all refugee receiving countries, has particular implications in a context such as South Africa where refugees do not reside in a camp setting where they can be easily identified by humanitarian actors as people who (are likely to) qualify for protection under the law.<sup>153</sup> The inability of refugees to meaningfully access their rights under South African law is indicative of the mismatch between South African legal frameworks relating to migration and the realities of migration in South Africa, which will be explored and explained in the proceeding analysis.

Finally, procedural dysfunction in the system and poor quality decision making has rendered the asylum system in South Africa notoriously poor, arbitrary and in violation of the law, exposing persons who may qualify for refugee status to illegal detention; as one key informant explained: *“under the current system and the way it functions there is no investigation or interview going on!”*<sup>154</sup> Research has documented how migrants’ legal statuses are not ‘consistently associated with particular migration histories. Individuals who meet the refugee justification laid out in the Refugees Act are often rejected with little justification’.<sup>155</sup>

### **4.3 The limits of legal interventions**

It is clear that detention of migrants in South Africa is problematic, and that both substantive and procedural illegalities occur with impunity and on a systemic scale.<sup>156</sup> The frequency of illegalities was emphasised by NGOs, IOs and the South African Human Rights Commission, who attributed the high incidence of unlawful detention to a lack of institutional capacity, and inadequate knowledge about the law (particularly the Refugees Act 1998) among relevant officials.<sup>157</sup> Given DHA’s lack of concern for ensuring that its actions and decisions are taken according to the law, others pointed specifically to a culture of corruption and impunity within DHA, and lack of will or intention to conduct activities lawfully.<sup>158</sup> Indeed, DHA has appealed to policy priorities, particularly keeping ‘economic migrants’ out of the country, and security concerns, to justify blatant disregard for the law, maintaining that, “despite the legal framework, releasing asylum seekers, or other categories of migrants, would set a negative precedent and thwart immigration control.”<sup>159</sup> This approach of justifying unlawful practices in order to manage migration has been reinforced by increasingly hostile anti-immigrant attitudes among government and society, and a policy level focus on implementing more forceful control of borders.<sup>160</sup> In fact, the research suggests that for DHA, an arbitrarily restrictive approach to border control and systemic mistreatment of migrants is intentional, and may itself be a strategy for dis-incentivising migration through making the process of formal migration threatening and inaccessible.

In light of the extent of unlawful treatment of migrants, NGOs and civil society organisations have focussed energies on legal interventions to secure release for migrants who have been unlawfully detained, often by advocating for their rights as asylum seekers under the Refugees Act. As summarised by one legal advocate:

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152 Individual Interview, Academic, African Centre for Migration and Society, 27 July 2014

153 Whilst this is seen to be a progressive and ‘good practice’ approach to refugee protection, the South African context suggests that it may make this protection more difficult to access in practice.

154 Interview, Academic, African Centre for Migration and Society, 27 July 2014

155 Loren B. Landau and Roni Amit, ‘Wither Policy? Southern African perspectives on understanding law, ‘refugee’ policy and protection’, *Journal of Refugee Studies*, 30 June 2014, 1 at 5

156 Roni Amit and Tamlyn Monson, *Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa* (2010), Forced Migration Studies Programme, University of Witwatersrand

157 Interviews (2), Academics, African Centre for Migration and Society, 27 July 2014; Interview (3), Lawyers for Human Rights, Johannesburg, 16 May 2014

158 Interview, Official representative, South Africa Human Rights Commission, 27 July 2014

159 Lawyers for Human Rights, *Monitoring Immigration Detention in South Africa*, September 2010, 12.

160 Loren B. Landau and Roni Amit, ‘Wither Policy? Southern African perspectives on understanding law, ‘refugee’ policy and protection’, *Journal of Refugee Studies*, 30 June 2014, 1 at 7

*“When we intervene we seek a court order to get the person released and give them the opportunity to apply for asylum. This should not require a legal intervention. It is provided in the Refugees Act that regulates this... it includes a 14 day permit (s22) which allows the applicant 14 days to lodge their application. In other cases [the Refugee application] has a negative outcome when a negative decision has been taken. We bring these cases to the high court for review.”<sup>161</sup>*

Legal advocates generally apply the Refugees Act to migrants’ cases (rather than the Immigration Act, or other legislation), given the lack of alternative pathways through which migrants can regularise their status. The application of the Act is also potentially wide in scope as (technically) all migrants are entitled to apply for a temporary asylum permit and cannot be held in detention once they hold a valid permit. But while these efforts have been important in achieving outcomes for individual migrants, they have had little systematic impact on unlawful detention. As put by Loren Landau and Roni Amit in a recent analysis of the impact and implementation of law and policy relating to immigration in South Africa, “Legal NGOs have achieved countless victories on behalf of individual clients seeking to vindicate their legal rights; they have had far less success effecting change in broader policy and practice.”<sup>162</sup>

Furthermore, it is important to acknowledge that even if legal advocacy could successfully improve the DHA’s compliance with legal standards, where a migrant simply doesn’t have a legal claim to remain in South Africa, giving advice and assistance will simply result in the migrant being detained and deported in a lawful manner. Case notes by legal advocates providing assistance as part of the pilot legal advice project noted that: *“in many instances legal advice will not or cannot be heeded (because) the migrant is not in the country legally; even when a migrant is advised by LRC to apply for asylum, the application is rejected as unfounded or manifestly unfounded.”*<sup>163</sup> Indeed, given that immigration detention is being used primarily as a mechanism of border control, the majority of migrants in detention in South Africa are deprived of their liberty because the government wishes to deny them the legal right to stay in the country. Thus the provision of legal advice and assistance to individuals is failing to provide a sustainable solution to

the problem of immigration detention in South Africa for the majority of migrants.

In sum, the limits of legal action, both in terms of achieving lawful practices on a systemic scale, and in securing positive outcomes for migrants, are explained through the DHA’s application of legal frameworks first and foremost as a means of keeping migrants out of the country. This entails an overtly restrictive application and interpretation of the Refugees Act, and blanket approach to detaining and deporting ‘unlawful migrants’ under the Immigration Act. The incompatibility of these legal frameworks and their inability to effectively respond to the issue of migration in South Africa will be addressed in the following section. In order to understand the extent of unlawful detention, and the limits of legal intervention, however, it is important to acknowledge that unlawful practices will be systemic where the legal framework being applied to migrants does not match the realities of migration. This incoherence is perhaps most powerfully illustrated by the prominence of emergent narratives which categorise migrants as either ‘legitimate asylum seekers’ or ‘economic migrants.’

#### 4.4 The economic migrant / ‘legitimate’ asylum seeker dichotomy

*“Asylum seeker”- a person who is seeking recognition as a refugee, in the Republic.*<sup>164</sup>

*Musina has become a so-called ‘mixed migration’ context. The majority of people who come are so-called ‘economic migrants’. That is the challenge we normally face - few refugee claims are legitimate.*<sup>165</sup>

At present, the majority of migrants who pursue legal status in South Africa do so by submitting an asylum claim. Indeed, this is one of the only ways to obtain legal documents; *“everyone who comes here applies for asylum... in South Africa there are very few ways to regularise your status”*.<sup>166</sup> Again, in a context where migrants’ only pathway for regularising (‘legitimising’) their stay is to claim asylum, and where they are being systematically denied their legal right to do so, it is unsurprising that efforts to advocate on their behalf have focussed on supporting them to claim asylum. This has also arisen as a prominent strategy within migrant communities themselves. Research findings demonstrate

161 Interview, Attorney, Lawyers for Human Rights, Johannesburg, 16 May 2014

162 Loren B. Landau and Roni Amit, ‘Wither Policy? Southern African perspectives on understanding law, ‘refugee’ policy and protection’, *Journal of Refugee Studies*, 30 June 2014, 1 at 7

163 Mutengo Consulting, ‘Coram Children’s Legal Centre Programme Evaluation: Legal Assistance Pilot Scheme – Ending Unlawful Deprivation of Liberty of Migrant Women and Children in South Africa’, October 2014

164 Section 1 (v), *Refugees Act 1998*

165 Interview, Lawyer, Lawyers for Human Rights, Musina, 13 May 2014

166 Interview, Associate Professor, African Centre for Migration and Society, University of Witwatersrand, 27 July 2014

that migrants are also encouraged to pursue asylum permits from within their own trusted, and often preferred, networks. The pervasive nature of the strategy of applying for asylum permits as a temporary form of documentation has contributed to confusion about the exact terms of a Section 22 Permit. This was demonstrated by interviews with respondents, many of whom held misconceptions about the purpose and meaning of the document;

*“I got S22 here in Musina. I was encouraged to apply by the matron here. I do not know what it means. It will expire in 2013. The Home Affairs person did not explain – just that it would help me when they ask for documents.”<sup>167</sup>*

*“Many have what they call an asylum slip - I think someone explained about this to me, so I have a little bit of knowledge about it. It only allows you to be in a country for six months or so, seeking some work to do.”<sup>168</sup>*

*“I applied and the police destroyed my asylum status. The asylum paper is a permit [everyone gets one]. I applied in Pretoria in 2010, but the police found it and destroyed it and took me to Lindela. I was there three months.”<sup>169</sup>*

Ultimately, the vast majority of refugee claims (for a ‘s.24 permit’) are unsuccessful, with rates of successful applications in South Africa among the lowest in the world.<sup>170</sup> According to the most recent DHA data (the accuracy of which has been questioned), in 2012/2013, 78,142 asylum applications were received, of which only 7,998 or 10.24% were granted refugee status. This is up from 5,381 of 81,708, or 6.59% of applicants in 2011/2012.<sup>171</sup> Legal advocates argue that the low proportion of asylum

applicants who are granted refugee status is due to an overtly restrictive approach by DHA, and that legitimate claims are being rejected due to poor decisions making<sup>172</sup> and a broken system.<sup>173</sup> DHA retorts that the asylum system is being exploited by large numbers of ‘illegitimate’ migrants who are actually seeking to obtain legal status in South Africa for ‘economic reasons’, and in turn blames inefficiencies in the asylum system and poor decision making on the number of ‘economic migrants’ who are clogging the system.<sup>174</sup> Government officials accuse overly permissive lawyers of contributing to the problem by encouraging this. As put by one Refugee Reception Office Decision maker:

*“Lawyers don’t follow procedures. NGOs [lawyers] just come with their emotions. People are not following the rules. They just look at the vulnerable people. But you cannot apply discretion [as a judge]. When you allow these things you open the flood gates.”<sup>175</sup>*

Thus the battleground between government and civil society has become about contesting the legitimacy of asylum claims - on determining who is a ‘legitimate’ asylum seeker and who is not. A pervasive discourse has emerged that establishes two separate and opposing categories of migrants in South Africa: ‘economic migrants’ and ‘asylum seekers.’ The assumptions upon which this debate rests, primarily that the distinction between ‘legitimate’ asylum seekers and ‘economic migrants’ is coherent within the South African context, will be explored in the proceeding analysis. Yet regardless of whether migrants can be meaningfully categorised based on their experiences prior to coming to South Africa and their reasons for entering the country, the implication that migrants could self-regulate (which follows from the government’s position that they are exploiting

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167 Interview, Woman (23), MGM Women’s Shelter, Musina

168 Interview, Woman (26), MGM Women’s Shelter, Musina

169 Interview, Woman from Zimbabwe (27), Central Methodist Church, Johannesburg, 7 May 2014

170 UNHCR, Table 1: *Refugees, Asylum-Seekers, Internally Displaced Persons (IDPs), Stateless Persons and Others of Concern to UNHCR by Country / Territory of Asylum, mid-2014 (or latest available estimates)* (2014)

171 A gap of just over 10% of cases per year are not decided, presumably contributing to a significant backlog applications which Home Affairs has yet to address. This backlog in asylum applications is another example of the general incompetence and mismanagement which characterises DHA decision making in cases involving migrants.

172 As previously discussed, the integrity of DHA decision making in asylum cases has been criticised as extensively as their practices relating to detention.

173 Vigneswaran, Darshan, ‘A Foot in the Door: Access to Asylum in South Africa’ *25 Refuge*, 41, Available at: <http://refuge.journals.yorku.ca/index.php/refuge/article/%20viewFile/26030/24063>

174 Loren B. Landau and Roni Amit, ‘Wither Policy? Southern African perspectives on understanding law, ‘refugee’ policy and protection’, *Journal of Refugee Studies*, 30 June 2014, 1 at 10

175 Interview, Refugee Appeals Board official, Johannesburg, December 2013

the asylum system) is unreasonable. Data from the study indicates the extent to which migrants themselves do not understand the meaning of asylum status, the process of applying for it, or what their rights as asylum seekers include. Indeed, this has provided both legal advocates and DHA with ammunition in the debate about what is wrong with decision-making. Consider the following statements:

*“The problem is that people do not know how to present their story. I think people can be misunderstood. I do think they might have a well-founded claim, but they put it in economic terms. Lack of knowledge plays a role...if someone doesn't know the elements of the system.”<sup>176</sup>*

*“The majority (of applicants) think asylum is a work permit. They simply go to the RRO – I think this has to do with the way the system has been set up. It is too permissive.”<sup>177</sup>*

*“People are assuming countries they are not from. Nowadays we find people from Burundi and Rwanda saying they are from DRC. So you also have to verify where they are from. That is the challenge we normally face - few refugee claims are legitimate.”<sup>178</sup>*

From the perspective of legal advocates, migrants are honest but do not understand the system and are thus unable to successfully claim asylum. Meanwhile, from DHA's perspective, migrants are either misusing the system inadvertently – “the majority of applicants think asylum is a work permit” – or they are deliberately abusing the system by lying.

The debate between the DHA and legal advocates is not unique to the South Africa context. Scholars of refugee law have explored the problematic nature of refugee status determination processes, which, due to limited objective evidence, tend to rely on an assessment of the credibility of asylum seekers themselves.<sup>179</sup> The tensions between legal categories and lived experiences are especially powerful where motivations for migration are complex and multi-faceted. Particularly in a ‘mixed-migration context’,

asylum seekers are unlikely to perceive or portray their life experiences according to legal frameworks, particularly where they lack a clear understanding of the law and don't have access to legal support.

It is revealing to consider the ways in which migrants themselves describe their reasons for entering South Africa. As set out in section I, the qualitative data indicates that it is unlikely for a migrant to come to South Africa for a single reason. Furthermore, regardless of the circumstances they have left behind, migrants (including those who meet the definition of ‘refugee’ under the Refugees Act 1998) are likely to be focussed on future survival and achieving economic opportunity. This may particularly be the case if they are part of an integrated (non-camp) setting where asylum seekers and refugees have the right to work.<sup>180</sup> As put by one Zimbabwean young person in a shelter in Musina, “I don't think they leave home for the same reasons but they are looking for the same thing.. greener pastures.”<sup>181</sup> As previously discussed, both qualitative data collected for the research and interviews with migrants who accessed the Legal Advice Pilot reflect migrants' prioritisation of economic concerns. It is significant that every migrant who participated in the qualitative research presented at least some economic reasons for deciding to come to the country. Similarly, as demonstrated by figure 4 (above), the majority of migrants assisted by the scheme identified ‘work’ as their primary reason for entering South Africa, including when data was disaggregated for women, men, girls and boys.<sup>182</sup>

Again, fewer research participants (including those who received legal assistance through the Legal Advice Pilot) mentioned seeking asylum as their reason for coming to South Africa, and, significantly, the vast majority of those who did so were men. By contrast, women were much less likely to identify ‘seeking asylum’ as a primary motivation for migration and not a single child did so.<sup>183</sup> Research findings indicate that the way migrants present and perceive their experience will have particular implications for women and children, who are often less likely to access the asylum system or present claims effectively. This may reflect a number of factors: that men tend to have better access

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176 Interview, Lawyer, Lawyers for Human Rights, Musina, 13 May 2014

177 Interview, Lawyer, Lawyers for Human Rights, Musina, 13 May 2014

178 Interview, Lawyer, Lawyers for Human Rights, Musina, 13 May 2014

179 See, for example: Juliet Cohen, ‘Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers’ (2001) 13 *International Journal of Refugee Law*, 293

180 Jacobsen, Karen, ‘Local Integration: The Forgotten Solution’ (2003), *Migration Policy Institute*, available at: <http://www.migrationpolicy.org/article/local-integration-forgotten-solution>

181 Interview, Young Man (18), MGM Boys' Shelter (18), Musina, 12 May 2014

182 See Figure 4 above.

183 See Figure 4 above. For women, ‘work’ was closely followed by the need to join/ rejoin relatives; for boys, the second priority was education, and for girls, the second most frequently chosen reason was to ‘run away’.

to advice and information (about legal pathways); (mis) perceptions that women's experiences of violence and persecution do not constitute 'legitimate' asylum claims; and the fact that women are more likely to perceive their experiences as relational (coming to join/rejoin relatives, providing support for family).<sup>184</sup>

Yet, it is important to recognise that the failure of migrants to present their life experiences in a way that is relevant to legal decision making is not simply a 'knowledge' problem; a reflection of inadequate legal advice and assistance. The problem lies deeper than this: it is rooted in the assumptions that form the basis for refugee law itself.

## Political persecution vs economic suffering

A classic critique of refugee law is its failure to recognise social and economic rights and its emphasis instead on specific deprivations of civil and political rights violations experienced by individuals.<sup>185</sup> The 'economic migrant' vs 'legitimate' asylum seeker debate, which prevails amongst South African immigration officials, reflects a 'traditional tendency of international refugee law... to maintain a categorical distinction between economic migrants and refugees'. This is despite the fact that, as explored in Section III, South African refugee law is uniquely expansive in its definition of what entitles a person to refugee status and includes protections for victims of persecution, as well as experiences of conflict, disaster and 'events seriously disturbing public order', which arguably ought to incorporate socio-economic factors (especially given that, as argued by Jennifer Klinck, 'South Africa's constitutional doctrine of rights rejects the distinction between civil-political and socio-economic rights'<sup>186</sup>).

Regardless of interpretations of the law, however, when considering real people and their lived experiences, distinctions between 'economic suffering' and 'political persecution' become difficult to make. These distinctions fail to acknowledge that social and economic rights are often violated for political reasons or due to political conditions. Conversely, governments may commit civil and political rights violations in order to maintain power (and suppress

resistance) whilst committing sweeping violations of social and economic rights. In these cases, civil and political rights violations of those who resist may be symptomatic of more broadly experienced forms of persecution experienced by entire populations.

Violence of this nature, whereby economic deprivation cannot be separated from political persecution, was very much characteristic of the Zimbabwean crisis of 2008<sup>187</sup>; the problem of determining who is in need of international protection has become increasingly prevalent in the past decades as the sources and impacts of persecution and vulnerability associated with humanitarian crises become increasingly difficult to isolate. In an exploration of the changing nature of asylum, migration and refugee protection, Erika Feller notes that, 'globalisation has brought into sharper focus, even exacerbated, the gross disparities in wealth in the world, the miserable conditions in which countless people live, the prevalence of endemic conflict and the degeneration of the natural environment...'<sup>188</sup> Indeed, as human rights violations are increasingly caused by global structures of power and economy, the idea of providing protection to individuals on specific 'grounds' associated with particular experiences of violence and persecution becomes increasingly inadequate. This has particular relevance in South Africa given the level of disparity between the South African economy and many other parts of the African continent.

## Public vs private experiences of violence

### *Can rape constitute grounds for asylum status?*

*Yes, but it depends on who raped you. If you were raped by a soldier, that could be an asylum claim.*<sup>189</sup>

Another questionable distinction that forms the basis of refugee law is the distinction between 'public' and 'private' forms of violence; traditional refugee frameworks tend to 'privilege male dominated 'public' activities over the activities of women, which take place largely in the 'private' sphere'.<sup>190</sup> This distinction is likely to be particularly discriminatory in its effects on the rights and protection claims of women and

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184 Nicola Piper, *New Perspectives on Gender and Migration: Livelihood, Rights and Entitlements* (2013), Routledge

185 Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007), Cambridge University Press

186 Jennifer A Klinck, 'Recognising socio-economic refugees in South Africa: A principled and rights-based approach to section 3(b) of the Refugees Act' (2009), 21 *International Journal of Refugee Law*, 653 at 655

187 International Crisis Group, *Zimbabwe's Continuing Self-Destruction* (2006), available at: <http://www.crisisgroup.org/en/regions/africa/southern-africa/zimbabwe/B038-zimbabwes-continuing-self-destruction.aspx>

188 Erica Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come* (2006), Oxford University Press

children, whose experiences of violence are often confined within the so-called ‘private’ (domestic) sphere and/or at the hands of ‘private’ actors.

Once again, the letter of South African law is particularly progressive in this regard, specifically recognising ‘gender’ in the legislative definition of ‘particular social group’; if a person has ‘a well-founded fear of being persecuted’ based on their gender, this constitutes an asylum claim. Nevertheless these protections have failed to be realised in practice: systematic failings of South African refugee determination decisions in understanding and recognising gender-related persecution have been well documented, leading to ‘the widespread rejection of victims of gender-based persecution’.<sup>191</sup> This was supported by research participants:

*I have done interviews with status determination officers. They have a very poor understanding of GBV, and how it could constitute a claim for asylum. For instance, when it is a case of domestic violence, they will say ‘no way’....the decision-making is so bad that [the decision making process] is almost irrelevant – 60 per cent are cut and paste decisions, they get countries muddled up, you do not see in the letters that someone has applied their mind to the case. The complexities are lost.<sup>192</sup>*

*Refugee decision-making is of poor quality. Decisions reference outdated sources and there tends to be pro forma rejection letters. Decision making doesn’t take into account, for example, where rebels are using rape against women as a war crime or strategy as a ground of persecution. Individual grounds are not given careful attention – the same standard reply seems to be given in all cases.<sup>193</sup>*

The quotes above clearly demonstrate the arbitrary and unconsidered application of the Refugees Act by decision makers. Yet even if legal provisions related to gender persecution were understood and applied, establishing a lawful claim to refugee status would still depend on the victim’s ability to demonstrate ‘state culpability’ for her experience. The fact that women (and indeed children) are so often exposed to violence at the hands of those closest to them, and within the confines of the domestic sphere, render their claims to refugee protection especially hard to establish. Ultimately, incorporating an understanding of

‘gender’ and ‘gender based persecution’ into the law, will only offer limited protection to women and children fleeing violence and abuse, as long as refugee frameworks continue to rely on a false and discriminatory public/ private divide, insisting that victims prove persecution by the ‘state’ and dismissing the primary arena of persecution experienced by the majority of women – the private sphere.

### 4.5 The limits of legal categories

This section has explored the ways in which legal categories applied to migrants fail to meaningfully capture their experiences of persecution and need for protection. This is perhaps most powerfully illustrated through a consideration of the way in which legal categories should be applied to individuals’ particular stories. Consider the following excerpt, taken from an interview with ‘Ana’, a 17-year old Zimbabwean migrant girl:

*“I left Zimbabwe because my mother was selling me to men in the town. My family’s business was destroyed - my father owned a shop that was burned down because of the war. After that my parents divorced. My mother had no money and no food to eat. That was when my mother started forcing me to be with different men around the community – [for] food and money. That is why I decided to run away to come to South Africa.”<sup>194</sup>*

The excerpt above demonstrates how Ana’s reasons for migrating to South Africa are multifaceted. Ana was a victim of gender-based violence; she left for South Africa after being forced into prostitution by her mother. This occurred due to her family’s economic deprivation, which was a result of both political persecution targeted specifically at her father, and the broader humanitarian crisis experienced by her community. It appears that there are several grounds upon which Ana could claim refugee status in South Africa – she might draw upon her experiences of political persecution, gender-based persecution, or ‘events seriously disturbing or disrupting the public order’; yet Ana could also conceivably be accused of being an economic migrant or of being a victim of family violence and abuse, rather than state sponsored persecution.

Research findings which relate to ‘Ana’s’ ability to access legal and other forms of protection in South Africa will be addressed in chapter five of this report. Ana’s case illustrates a critical point; which problematises legal

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189 Interview, Refugee Lawyer, Johannesburg, December, 2013

190 Heaven Crawley, ‘Gender, persecution and concept of politics in the asylum determination process’, (2000) 9 *Forced Migration Review*, 17 at 17

191 Loren B. Landau and Roni Amit, ‘Wither Policy? Southern African perspectives on understanding law, ‘refugee’ policy and protection’, *Journal of Refugee Studies*, 30 June 2014, 1 at 10

192 Interview, Associate Professor, African Centre for Migration and Society, University of Witwatersrand, Johannesburg, 27 July 2014

193 Interview, Attorney, Community Advice Support Project at a Probono Legal Service, Johannesburg, 8 May 2014

194 Interview, girl from Zimbabwe (17), MGM Girls’ shelter, Musina, December 2013

## POLICY, PRACTICE AND POLITICAL NARRATIVES SHAPING THE DETENTION AND PROTECTION OF MIGRANT WOMEN AND CHILDREN IN SOUTH AFRICA

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advocates' argument for a 'principled, coherent and administrable' definition of a socio-economic refugee.<sup>195</sup> In an environment where reasons for migration are mixed and complex, experiences of suffering and exploitation that constitute an asylum claim are difficult to distinguish from other forms of suffering and exploitation. It follows that where the government is determined to take restrictive approach to border control, and migrants are unable to access alternatives to the asylum system for regularising their status, decision-making regarding migrants' legal status is likely to be arbitrary, and practices regarding their detention systemically unlawful.

In light of this analysis, it is the mismatch between legal frameworks and the reality of migration in South Africa that explains the systemic nature of unlawful detention and the limits of legal intervention. It seems the debate between the DHA and legal advocates – that either “the system is broken because migrants are abusing the system” or that “migrants are being abused because the system is broken” - is failing to confront an important implication of this analysis: in the context of South Africa, the government violates migrants' legal rights systematically because, so long as the government is intent on highly restricting the number of migrants granted legal status, the Refugees Act cannot be effectively enforced.



Legal advisors interview women held in immigration detention at Musina Police Station. **Photo:** Kara Apland, Coram Children's Legal Centre

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195 Jennifer A Klinck, 'Recognising socio-economic refugees in South Africa: A principled and rights-based approach to section 3(b) of the Refugees Act' (2009), 21 *International Journal of Refugee Law*, 653-196  
<http://www.saiia.org.za/news/in-southern-africa-women-are-changing-the-face-of-migration>



## 5. Legal protection of migrants: the experiences of women and children

*Women migrants are more likely to be disadvantaged by the migration experience than their male counterparts... women migrants suffer violence, overt hostility and social exclusion, as well as economic exploitation.*<sup>196</sup>

As discussed, the experiences of women and children in relation to migration are distinct from that of adult men (as well as from each other) in a number of respects. As a result of these differences, and because of the subordinate social positions of women and children more generally, there has been widespread recognition of the particular ‘vulnerability’ of these groups in the context of cross-border migration, and the need for special services and arrangements to guarantee their ‘protection’ in South Africa.

### 5.1 Women and children in the migrant detention estate

This has led increasingly to the emergence of a norm against the (formal) detention and deportation of undocumented migrants who are women or children, and this is especially the case for children, women with children in their care, and pregnant women. Meanwhile, the placement of unaccompanied children in immigration detention (in Lindela) has been held to be unlawful under case law<sup>197</sup> on the grounds that unaccompanied migrant children have a right to have their interests considered by the Children’s Court, entailing an assessment of their welfare needs, followed by the placement of the child in temporary state care.<sup>198</sup>

Perhaps as a result of this, migrant women and children are increasingly less likely than adult men to be found within

the official migrant detention estate. As a key advocate responsible for monitoring (unlawful) detention in Musina noted: “we try to focus [our services] on the most vulnerable groups, but the majority of the people who get detained are men – 90% of our referrals are men [although] we do look in particular for women and children.”<sup>199</sup> The DHA do not publish statistics on the numbers of migrants arrested, detained and deported, whether by age, gender and nationality, nor the length of time held in detention pending deportation or release, but sporadic and ad hoc data from monitoring visits does appear to confirm that there are considerably fewer women and children in detention than men. In July 2012 Justice Cameron of the Constitutional Court conducted an inspection visit to Lindela and found that of the detainees present, numbering around 2000 migrants, only 27 were women. Research published by the African Centre for Migration and Society in 2012 reported that a total of 78 boys, and 16 girls were detained for being illegal migrants between January through August 2012.<sup>200</sup> During a 2013 project evaluation conducted as part of the Legal Advice Pilot, access was gained to the South African Police Service detention register at the Musina Police station. According to the records a total of 563 people were detained that month, including 487 (87%) men and 76 (13%) women. The data did not include any record of the detention of children during this period. Importantly, however, these statistics failed to contain any indication of the number of age-disputed persons in detention. The lack of a reliable system for conducting age determinations of migrants without documentation in South Africa has been well documented,<sup>201</sup> and it is of course likely that the number of children in detention is under-reported.

196 Tim Hughes, ‘Gender, Remittances and Development: Preliminary Findings From Selected SADC Countries’. UN-INSTRAW and SAIIA (2007) available at [http://www.saiia.org.za/images/upload/saiia\\_instraw\\_sa\\_report.pdf](http://www.saiia.org.za/images/upload/saiia_instraw_sa_report.pdf)

197 *Centre For Child Law And Another v Minister Of Home Affairs And Others* 2005 (6) case no 22866/04

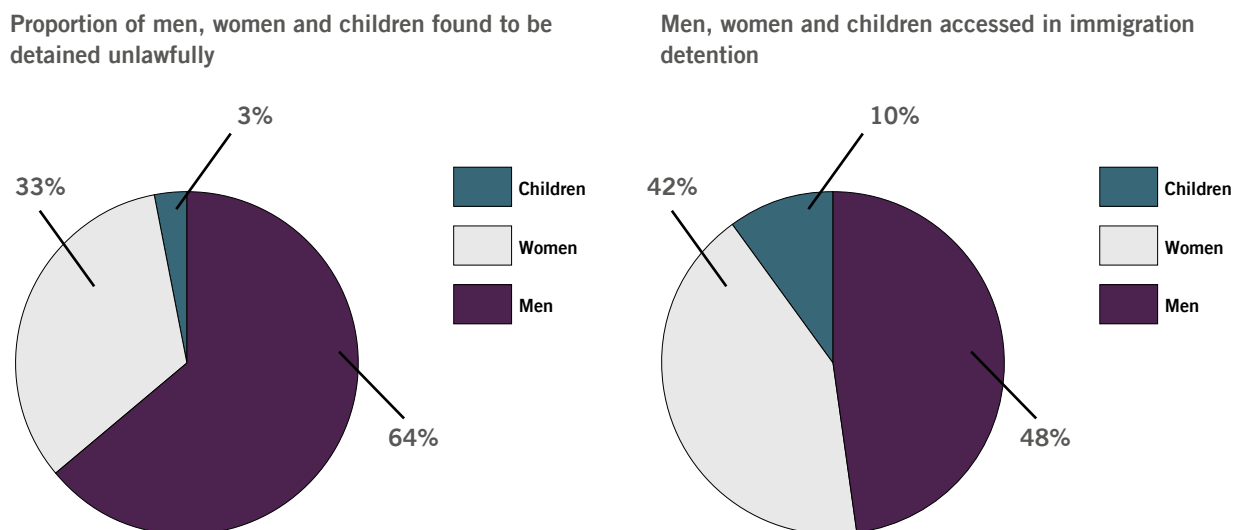
198 Whilst the Refugees Act 1998 makes explicit provision for unaccompanied children in need of care who appear to qualify for refugee protection, to be brought before the local children’s court, and the Children’s Act 2005 makes provision for the care of unaccompanied children, even if illegally present, neither provision prohibits/ excludes detention in specific terms

199 Interview, Lawyers for Human Rights, Johannesburg, May, 2014

200 Rosalind Elphick and Roni Amit, African Centre for Migration and Society, *Border Justice: Migration, Access to Justice and Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-Based Violence in Musina* (2012)

201 Ibid

Figure 5: Proportion of men, women and children accessed through the Legal Advice Pilot, and proportion found to be detained unlawfully



In addition to being less likely to be found in detention, in the case that women and children are detained, the experiences of participants in the Legal Advice Pilot suggest that it is less likely that they will be detained in contravention of the law. Statistics gathered during the implementation of the legal service delivery scheme as part of the EUDL revealed that whilst 48% of assisted migrants were men, men made up 64% of the group of migrants that were found to be detained unlawfully, compared to adult women who constituted 42% of those in detention but only 33% on those detained unlawfully. Finally, whilst children made up 10% of all migrants assisted, only 3% of those migrants found to be detained unlawfully were children.

The practice of prohibiting the (unlawful) detention of children, and discouraging the (unlawful) detention of particular groups of women (those with children and pregnant women) - appears to be the result of a relatively recent shift. One interviewee spoke of how police attitudes and practices have changed, compared to when she first started working on migration issues in the aftermath of the 2008/9 Zimbabwean election crisis: “in 2009 [children] were being arrested by SANDF and held [in detention]. Now the police and soldiers pick them up and bring them to the reception office here, run by DSD. DSD will place them in a shelter”<sup>202</sup>. Similarly, another interviewee explained: “we have seen a change in policy in child detention. This happened

in 2011. In late 2012, 2013 we saw few minors in detention in Lindela or in police stations. In 2011 we saw quite a few. Now there are procedures and policies in place. Now there is a system.”<sup>203</sup> A legal advocate interviewed for the research described how police do not actively target women migrants in public spaces, the way they target men: “[women] are not asked for documentation on the streets”.<sup>204</sup> A young migrant, age fourteen when he entered South Africa back in 2008, described his own experience: “at that time [deportation] was happening to everyone who did not have documents - these days if you are under 19 they take you to the shelter. [Back then] they held me at the police station for 1 or 2 days. I was deported three times. They did not separate minors from adults.”<sup>205</sup> These reports are supported by limited statistical data available on the numbers of children in detention, which has demonstrated a decline in the numbers of children held in migration detention.<sup>206</sup> This change is likely to be due in substantial part to the concerted efforts of NGOs and human rights advocates, who have tirelessly worked to ensure improved protections for women and child migrants on the grounds of their particular ‘vulnerabilities’. In other words, the norm discouraging detention of migrant women and children constitutes the protected ‘space’ carved out of the system, in concession of calls for Government to strengthen adherence to human rights principles within the migrant detention estate.

202 Interview, Save the Children, Musina, May, 2014

203 Interview, Lawyers for Human Rights, Johannesburg, May, 2014

204 Interview, Detention Unit, Lawyers for Human Rights, 16 May 2014

205 Interview, boy from Zimbabwe (20), Boys’ shelter, Musina, 12 May, 2014

206 Rosalind Elphick and Roni Amit, ‘Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina’, African Centre for Migration and Society (2012)

Nevertheless, (unlawful) detention of women and unaccompanied children remains an issue of concern. Undocumented adult, migrant women without children in their care still face substantial risk of arrest and detention, as the norm discouraging detention of women seems to be primarily justified on the grounds of their reproductive and social roles as mothers. One participant spoke of how she had been arrested as part of an immigration raid and put in detention, until a disabled teenager told police that she was her mother, at which point she was released.<sup>207</sup> Another woman was released after it was established that she was pregnant.<sup>208</sup> And a third spoke of how she was spared from arrest during a police raid of a shelter housing illegal migrants because she was with her child. In their explanations of why it is increasingly considered unacceptable to detain migrant women, interviewees often characterised women's particular 'vulnerability' in terms of pregnancy, breastfeeding and caregiving responsibilities: "women's vulnerability makes it difficult for them to fight for themselves. She cannot leave [her] child. She needs food and accommodation for the child and for herself. She cannot produce milk and she has to undergo the torture of seeing her baby starve, whereas a man can survive without food for days."<sup>209</sup>

The Legal Advice Project data revealed few cases of detention of migrant children, apart from the occasional age-disputed male minor. Nevertheless, research interviews with key stakeholders revealed consistent allegations of continued detention of children in more clandestine, remote and hard to access police detention facilities. Interviewees often attributed this to a lack of knowledge of the law prohibiting detention of children, or 'complacency' on the part of authorities, in circumstances where there is limited civil society presence, which monitors the activities of law enforcement and state actors and holds them to account. Lack of knowledge, however, may not be the only issue: on-going detention of children may be a result of the perceived need to 'manage' the presence of unaccompanied migrant children in South Africa in contexts where social protection services are unavailable or overwhelmed. As one participant explained:

*"last year, all the cases involving minors came from outside of the Province... They bring them to Lindela. They have to take the minors because otherwise they will be destitute".<sup>210</sup>*

## 5.2 The Vulnerability of Migrant Women and Children

It is important to acknowledge that detention of undocumented migrant women and children does still take place, and that these groups are likely to be especially vulnerable in detention situations. The particular vulnerabilities of women and children in detention, especially those held in administrative (immigration) detention<sup>211</sup>, have been well documented:<sup>212</sup> because of the minority position of women and children in detention, facilities are often inadequate for catering for their gender and age specific needs. Furthermore, women and children are at particular risk of ill-treatment and abuse at the hands of detention staff and others, because cultures in detention often reflect broader social power relations and prejudicial attitudes which discriminate on the grounds of gender and age.<sup>213</sup> The EUDL research revealed many accounts of police maltreatment and abuse of migrants in detention, and particularly abuse of migrant women. One Somali woman in detention told researchers: *"they have been very harsh with me. They were threatening to slap me and to lock me up forever"*.<sup>214</sup> Another interviewee explained: *"there was a case of a lady who was arrested by the police. She is pregnant. She was held for three weeks and physically abused. Her husband is worried about the child."*<sup>215</sup>

These findings are especially concerning given that many of the women and girls who participated in research interviews reported experiences of rape and sexual exploitation: within their countries of origin, whilst crossing the border, and during their time in South Africa. For example, one migrant woman interviewed at a shelter in Johannesburg relayed her story: *"I came from the DRC after our town was looted by soldiers. They killed my son and they raped me. I came*

207 Interview, Woman, Central Methodist Church, May 2014

208 Interview, Woman, Central Methodist Church, May 2014

209 Interview, Matron, MGM Girls' Shelter, 10<sup>th</sup> May 2014

210 Interview, Lawyers for Human Rights, Johannesburg, May, 2014

211 Immigration detention is a type of administrative detention, whereby detention is the result of a decision made by an executive or administrative body.

212 Tomris Atabay, 'Women in Detention: A guide to Gender Sensitive Monitoring', Penal Reform International (2013) available at: [http://www.penalreform.org/wp-content/uploads/2013/06/Women-in-Detention-a-guide-to-gender-sensitive-monitoring\\_English\\_0.pdf](http://www.penalreform.org/wp-content/uploads/2013/06/Women-in-Detention-a-guide-to-gender-sensitive-monitoring_English_0.pdf)

213 Tomris Atabay, 'Women in Detention: A guide to Gender Sensitive Monitoring', Penal Reform International (2013) available at: [http://www.penalreform.org/wp-content/uploads/2013/06/Women-in-Detention-a-guide-to-gender-sensitive-monitoring\\_English\\_0.pdf](http://www.penalreform.org/wp-content/uploads/2013/06/Women-in-Detention-a-guide-to-gender-sensitive-monitoring_English_0.pdf)

214 Interview, Woman from Zimbabwe (23), Police Detention, Musina, 12 May, 2014

215 Interview, Woman from Zimbabwe (21), Central Methodist Church, May, 2014

with my baby daughter.”<sup>216</sup> A teenage girl in Musina told researchers: “I was living on the streets in Zimbabwe. I was taken in by a lady and she was exploiting me. My mom is not well – she is mad. She got pregnant on the street so I was raised on the street. The woman [who took me in] took advantage of me. She forced me to beg in Harare and bring back money at the end of the day...I went to the hospital because she was cutting me with cans”.<sup>217</sup> Many of these women and girls were suffering from significant health problems, including HIV infection, and all were very apparently affected by severe poverty. In 2009, Medicine Sans Frontiers reported treating 140 victims of sexual and gender based violence, more than half of whom had been abused whilst crossing the border north of Musina.<sup>218</sup>

The vulnerability, both real and constructed, of undocumented migrant women and children in South Africa was also reflected in occasional accounts of the irregular and uncharacteristically generous treatment of women and child migrants by police, border officials and others, who were sometimes moved by human concern to act in ways they may not have done if they had been presented with an adult male migrant. A number of accounts of this were relayed during the research. One adult woman explained how she had managed to cross the border through a formal point of entry without any documents: “they didn’t give me any trouble. They said ‘she is a poor lady’, and they let me go”.<sup>219</sup> An adolescent girl interviewed at a shelter in Musina similarly explained: “they let us pass the border... [They] wanted to send us back...but when we started crying they said we could pass”.<sup>220</sup> A migrant boy living on the streets gave a particularly moving account of one of his interactions with police in Johannesburg: “I was arrested by the police... but that officer saw that I was young and frail and shaking with hunger. After seeing that, he had a change of heart. He didn’t take me to the station – he took me to his home to eat with his family. I will never forget that police officer for his kindness to me.”<sup>221</sup> Existing research on migration experiences in South Africa has indicated that women and unaccompanied children are more likely than adult men to be able to negotiate their way into South Africa through

formal entry points, even without the correct documentation, and that most of the unaccompanied migrant girls known to social protection services had entered the country through an official crossing.<sup>222</sup>

### **5.3 The Provision of Protection**

*“Women and children were suffering when they came to South Africa...women are beaten and raped and have their things stolen at the border side. So we agreed to set up a women’s shelter”.*<sup>223</sup>

Recognition of the specific vulnerability of many migrant women and children, and their experiences of sexual violence and trauma, has led not only to an increasing norm against their detention (as discussed), but also, encouragingly, the development of specific structures and services to cater for their needs. In terms of law, children, irrespective of their immigration status, are explicitly protected by child welfare legislation and procedures under the Children’s Act 2005.<sup>224</sup>

Most particularly, a number of ‘shelters’ have opened in the townships, accommodating unaccompanied children, women who have small children in their care, as well as women who have been victim to sexual abuse or trafficking. There are three shelters in Musina housing migrant women and children: two that accommodate women and girls,<sup>225</sup> and one housing boys up until the age of 18 (although boys in education are permitted to stay until 21).

There are also several shelters in Johannesburg. These shelters are run by voluntary sector organisations<sup>226</sup> and are not registered as Child and Youth Care Centres under the Children’s Act. Nevertheless, in Musina, limited support and cooperation has been provided by the DSD who, along with the police and the Children’s Court, have a general practice of referring unaccompanied migrant children to the shelters. All children interviewed at the shelters in Musina appeared to have been issued a temporary care order, by the children’s court, which gives the court the power to make an order that a child be kept in ‘temporary safe care’ in one

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216 Interview, Woman from Somalia, Central Methodist Church, December 2012

217 Interview, Girl from Zimbabwe (12), MGM Girls’ Shelter, Musina, 10 May, 2014

218 Rosalind Elphick and Roni Amit, ‘Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina’, African Centre for Migration and Society (2012), page 80

219 Interview, Woman from Zimbabwe (24), MGM Women and Girls’ Shelter, Musina, 9 May 2014

220 Interview, Girl from Zimbabwe (16), MGM Women and Girls’ Shelter, Musina, 9 May 2014

221 Interview, Boy from Zimbabwe (17), Central Methodist Church, December 2012

222 Rosalind Elphick and Roni Amit, ‘Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina’, African Centre for Migration and Society (2012), 37

223 Interview, Matron, MGM Girls’ Shelter, 10<sup>th</sup> May 2014

224 *Children’s Act 2005*

225 Women are able to stay with their children, although boys are separated from their mothers once they are over 7 years old, and taken to the boys’ shelter.

226 The shelters have reportedly received a relatively high degree of attention and funding support from international human rights and development actors; such that some respondents felt that the financing of these institutions was ‘disproportionate’ when compared to other institutions in South Africa housing vulnerable children.

of a range of care options (including, e.g. a suitable person, foster carer, residential care and so on).<sup>227</sup> However, none of the children had actually attended a court hearing in person, and they appeared to have a limited understanding of the meaning and ramifications of the order. Furthermore, none of the children had reached the stage of being issued a final decision from the court resulting in a more long-term placement order; and children who had been residing at the shelter for over two years did not appear to have had their temporary care order renewed, in contravention of the Children's Act 2005.<sup>228</sup>

The shelters in Musina, and the significant NGO presence in this particular town, were formed in response to the humanitarian crisis caused by the 2008 election violence in Zimbabwe, and subsequent mass migration into South Africa. Since that time, migration rates have been falling and international partners are beginning to withdraw their support.

The conditions at the women's and children's shelters have been subject to a considerable amount of scrutiny and criticism both by government and civil society actors.<sup>229</sup> It should be acknowledged, however, that relative to other forms of institutional residential accommodation for vulnerable children in South Africa, many of the shelters (particularly in Musina) compare favourably.<sup>230</sup> Shelters provide (albeit limited) access to a range of welfare services, including a place to stay, regular meals, sanitary facilities, and educational and social support. Many children interviewed during the research reported to feel 'safe' and 'happy' in the shelters: *"I am happy here at the shelter, they look after me well and I am going to school"* [girls shelter];<sup>231</sup> *"I spent my first night in South Africa here (at the shelter) everything is alright; they provide me with food and a place to sleep"*<sup>232</sup> [Women's shelter]. A baseline assessment conducted at the beginning of the EUDL concluded that 'whilst the general conditions and facilities at shelters are rudimentary, they are nonetheless adequate and the staff clearly caring and supportive.'<sup>233</sup>

## 5.4 Protection failures: disappearance of children and women from the shelters

Despite these positive aspects, the shelters undoubtedly face significant shortcomings, many of which relate to a lack of reliable funding and support. The shelters are expensive to run, and there are serious doubts about their sustainability, especially as international donors are withdrawing funding support.<sup>234</sup> There is an additional hurdle presented by legislation which requires that the shelters meet a series of standards in relation to staffing, infrastructure and facilities in order to be registered as official child and youth care centres under the Children's Act, or face closure by July 2015.<sup>235</sup> Whilst a robust regulatory system is important for ensuring safe, suitable and quality care for children at risk, significant investment, not yet forthcoming, is required to bring the shelters in line with these standards; as one participant explained: *"we would need to build entirely new buildings"*.<sup>236</sup> There are particular problems associated with understaffing at the shelters. Caregivers at the shelters reported working for months without pay. As once caregiver described: *"we are looking after children who have undergone trauma, babies and mothers – but the agencies are not paying us – this is a serious challenge."*<sup>237</sup> Another explained: *"we need a lot of resources – we need people in the centres 24/7... We have not been paid for the last 15 months. Children are [left] on their own."*<sup>238</sup> Respondents also expressed serious concerns regarding the safety of the shelters. During interviews at the shelter for girls and women in December 2012, caregivers reported being fearful of a group of 'gunmen' who had recently raided the shelter and taken a number of residents.<sup>239</sup> One caregiver told researchers: *"our security is no longer coming because we haven't given the payment [to the security staff]. We cannot lock the gate and so guma gumas come. They come to steal and rape. We have been trying to ask for donations. We don't even have as many caretakers left - only 2."*<sup>240</sup> There were also concerns about safety at the boys' shelter. One child staying at the shelter explained: *"there was a time when...we didn't have a wall..."*

227 Section 151, *Children's Act 2005*

228 Section 159(1), *Children's Act 2005*

229 Interview, leading academic expert in migration, Johannesburg, July, 2014.

230 Interview, UNICEF, Johannesburg, July, 2014.

231 Interview, Girl (16), MGM Women and Girls' Shelter, Musina, December 2014.

232 Interview, Woman from Zimbabwe (24), MGM Women and Girls' Shelter, Musina, 9 May 2014.

233 Syd Bolton, 'Capacity Gap Analysis: Legal Protection for migrant women and unaccompanied children in South Africa', Coram Children's Legal Centre (2013)

234 Interview, Matron, MGM Women and Girls' Shelter, Musina, December 2012.

235 Rosalind Elphick and Roni Amit, 'Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina', African Centre for Migration and Society (2012)

236 Interview, leading academic expert in migration, Johannesburg, 27 July, 2014

237 Interview, Matron, MGM Girls' Shelter, 10<sup>th</sup> May 2014

238 Interview, Matron, MGM Girls' Shelter, 10<sup>th</sup> May 2014

239 Interview, Matron, MGM Women and Girls' Shelter, Musina, December 2012

240 Interview, Girl from Zimbabwe (15) MGM Women and Girls' Shelter, Musina, 9<sup>th</sup> May 2014

[people] could run in or out at night... [people] broke in. They were beating people for no reason. They were accusing us of stealing.”<sup>241</sup> There have been disturbing reports of night raids, where groups of men have managed to overpower unarmed security staff and enter the shelter, to allegedly ‘recruit’ children to work on farms.<sup>242</sup>

The shelters are easily accessible from the street, and clearly advertised with signs indicating that they house ‘unaccompanied’ and ‘vulnerable’ women and children. This is particularly concerning given that Musina has been identified as a primary location for human trafficking.<sup>243</sup> During one monitoring visit to the women and girls’ shelter, researchers observed as a police truck arrived, carrying three adult women and nine children who had been picked up close to the border. After only a brief negotiation, the migrants were loaded back into the truck and driven off. The police explained to researchers that they were taking the migrants back to Zimbabwe, on the grounds that they had been ‘trafficked’ across the border and it was not safe for them to remain.<sup>244</sup> The police indicated that they were intending to deliver the children to social work officials in Zimbabwe, as according to law unaccompanied children cannot be deported without the consent of the Children’s Court,<sup>245</sup> and the ‘best interest’ principle contained in the Children’s Act would appear to prohibit the deportation of an unaccompanied migrant child, without ensuring that plans are in place to guarantee the child’s safety and wellbeing.<sup>246</sup> Whether this actually happened in practice, however, is unknown. Research participants regularly spoke of the lack of concern that law enforcement have over what happens to children who are summarily deported; as one key informant put it: “authorities don’t take care that they [migrants] go back to the right place, they just shunt them across the border.”<sup>247</sup>

Children at the shelters face additional challenges: although they are encouraged and supported to go to school, lack of money presents a persistent difficulty, and many children reported missing classes and trips and failing exams as a result of being unable to afford equipment and pay fees: “we are failing subjects because we cannot bring the materials. We do not attend and so we do not get marks.”<sup>248</sup> Furthermore, migrant children are a target for discrimination, bullying and abuse at school, both from their co-students and from teachers; as one migrant boy explained: “it did not go smoothly at school since I didn’t have a uniform. And the others were kind of mean spirited to me.”<sup>249</sup> Another participant told researchers: “they [teachers] used to ask us for some rand and shout at us. It would make us feel that we are not like other people. We cannot afford to go on school trips, and after the trips they make us write a test, and we did not go on the trip, so we fail the test. Also, they will change the school uniforms and we cannot afford new [ones].”<sup>250</sup>

A number of children, as well as women residing at the shelters complained of a lack of food, clothing and access to health care. One boy explained: “there was a time when they said there are no donors – there was no money for food and uniforms. DSD stopped delivering money here. So when they stopped, obviously many things stopped.”<sup>251</sup> Another told researchers “we don’t have any clothes.”<sup>252</sup> The boys’ shelter, in particular, is characterised by significant overcrowding. A report published in 2012 noted that of the 97 boys staying in the shelter in September of that year, only 18 had beds.<sup>253</sup>

These inadequacies and shortcomings drive many children and women to leave the shelters. The research revealed consistent accounts of women and children disappearing from the shelters because available services are not meeting their needs; as one respondent observed: “they are throwing

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241 Interview, Boy from Zimbabwe (18) CWM Boys’ shelter, 12<sup>th</sup> May 2014

242 Rosalind Elphick and Roni Amit, ‘Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina’, African Centre for Migration and Society (2012)

243 Zosa De Sas Kropiwnicki, ‘Wolves in Sheep’s Skin: A Rapid Assessment of Human Trafficking in Musina, Limpopo Province of South Africa’ International Organisation for Migration (2010)

244 Visit to MGM Women and Girls’ Shelter, Musina, December 2012.

245 Protection Working Group in South Africa, Advisory Note, ‘Promoting Protection during the resumption of the Deportation of Zimbabweans from South Africa’ (2011), available at <http://www.cormsa.org.za/wp-content/uploads/2009/05/PWG-Advisory-Note-Protection-during-Zim-Deportations-110819.pdf>

246 Sections 2(a) and Section 7, *Children’s Act* 2005

247 Interview with the Human Rights Commission, Johannesburg, December 2012

248 Interview, Girl from Zimbabwe (15) MGM Women and Girls’ Shelter, Musina, 9<sup>th</sup> May 2014

249 Interview, Boy from Zimbabwe (18) CWM Boys’ shelter, 12<sup>th</sup> May 2014

250 Interview, Boy from Zimbabwe (18) CWM Boys’ shelter, 12<sup>th</sup> May 2014

251 Interview, Boy from Zimbabwe (18) CWM Boys’ shelter, 12<sup>th</sup> May 2014

252 Interview, Girl from Zimbabwe (13) MGM Women and Girls’ Shelter, Musina, 9<sup>th</sup> May 2014

253 Rosalind Elphick and Roni Amit, ‘Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina’, African Centre for Migration and Society (2012), page 49

[children] in the shelters and then they run away. Mostly it is a capacity issue".<sup>254</sup> A caregiver at the boys' shelter explained: "quite often we lose children from the system. No one can feed them, so they go looking for food".<sup>255</sup> Tellingly, some migrant children and women reportedly feel safer living on the streets than they do staying at the shelters.<sup>256</sup>

## The need to work

Yet it is not only under-resourcing and a lack of facilities that causes migrants to leave the shelters. There is an additional and more fundamental issue at play: that the structured lifestyle and care offered at the shelters is often incompatible with migrants' own priorities, which typically revolve the need and desire to work, travel and be mobile. For many children, the shelters are simply drop-in centres from which they come and go as they please, whilst they spend their days looking for 'piece jobs' and hawking or begging on the streets.<sup>257</sup> A caregiver at the boys shelter explained: "most are not going to school – they are opting to look for piece jobs."<sup>258</sup> She then went on to note that, in fact: "most [children] opt to live on the street because it is not restricted – they can beg for money."<sup>259</sup> A migrant boy told researchers: "some [children] only stay one or two nights. They go to work. They do not [want] to go to school"<sup>260</sup>; another explained: "they stay for a week then leave to find work to help their family".<sup>261</sup>

Migrants' need to work is at least partially linked to the poor standard of care provided at the shelters. When asked about the challenges associated with providing care to migrant women and children, one respondent replied: "we advise them [about services] but it's a challenge because they do not go. Normally they have their destitution in mind – they do not have time to get services."<sup>262</sup> The paradox contained within this statement, is of course, that whilst services at the shelters are intended to address migrants' destitution, it is

destitution itself that prevents access to services, leading to the unavoidable conclusion that these services are not fit for purpose. In their paper 'Border Justice' published in 2012, Roni Amit and Rosalind Elphick conclude that: 'the fact that many children either avoid the shelters entirely or treat them as drop-in centres suggests a need to redesign social services to better meet the needs of UAMs.'<sup>263</sup>

Interestingly, there appears to be a general rule that women and children living in the shelters ought not to be working. For example, one migrant women, staying at the women's and girls' shelter informed researchers: "the regulation for this place is that no one should be working".<sup>264</sup> Probed on the reasons for this, one of the matrons explained that migrants only have: "the right to stay here – not to move about. It is the law."<sup>265</sup> The legal position is actually somewhat nuanced. Most of the adult women staying at the shelters have applied for a section 22 permit, which authorises their legal right to work in South Africa, although it appears that many women have expired permits. Children on the other hand, typically do not possess asylum permits and therefore (even those over the legal minimum age for employment) lack the legal right to work: "there is nothing that applies to the majority of migrant children, who are on the move. There is a policy silence – most children are here to get work. There is no legal framework for the children that work."<sup>266</sup> Furthermore, there is a legal presumption that children should be prioritising their education; children placed in a Child and Youth Care Centre who are under 15 years of age must be attending full time education under the Schools Act;<sup>267</sup> and children over the age of 15 years may be provided access to education.<sup>268</sup> In any case, notwithstanding the finer points of law, there appears to be a general normative conviction among staff: that migrants staying at the shelters should not be working, that children ought to be attending school, and that the social welfare services available at the shelters come as a 'package deal' along with the structured care and supervision that this

254 Interview, leading academic expert in migration, Johannesburg, July, 2014

255 Interview, Matron, MGM Girls' Shelter, 10<sup>th</sup> May 2014

256 Rosalind Elphick and Roni Amit, 'Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina', African Centre for Migration and Society (2012)

257 Rosalind Elphick and Roni Amit, 'Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina', African Centre for Migration and Society (2012), 57

258 Interview, Save the Children, Musina, 15<sup>th</sup> May 2014

259 Interview, Save the Children, Musina, 15<sup>th</sup> May 2014

260 Interview, Boy from Zimbabwe (17), CWM Boys' shelter, December 2012

261 Interview, Girl from Zimbabwe (16), MGM Girls' Shelter, Musina, 10<sup>th</sup> May 2014

262 Interview, Lawyers for Human Rights, Musina, 13 May 2014

263 Rosalind Elphick and Roni Amit, 'Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina', African Centre for Migration and Society (2012), 59

264 Interview, Woman from Zimbabwe (24), MGM Women and Girls' shelter, 9<sup>th</sup> May 2014

265 Interview, Matron, MGM Girls' Shelter, 10<sup>th</sup> May 2014

266 Interview, leading academic expert in migration, Johannesburg, 27 July 2014

267 Section 3, South African School's Act No. 84, 1996

268 Government of South Africa, Department of Social Development, *Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa*, Guideline 6.3: 'children [persons under 18 years] should have full access to education, and be registered with appropriate school authorities and get assistance in maximising learning opportunities.'

supposedly entails. One participant even claimed: “*there is stigma for children who run away from the shelter and look for work*”, she also aptly noted: “*but if you are going to say that children mustn’t work, then you need to address poverty*”.<sup>269</sup> Perhaps most significant, however, is the reality that the shelters are not always conveniently located to support migrants’ access to work: many children and women prefer to sleep at markets, and truck shops, closer to where they look for informal jobs during the day.<sup>270</sup>

Finally, it is significant that many of the unaccompanied minors and women travelling into South Africa have been living and working on the streets for some time and often find it difficult to adjust to the more structured, supervised and restricted lifestyle at the shelters. A principal of a school for migrant children in Johannesburg explained: “*some children tell you [that] in the shelter they are always locked up – so it’s like they are in prison again. So the moment they just get a chance, they sneak out.*”<sup>271</sup> Another stakeholder pointed out: “*children are supposed to go into the care system – the children’s shelters. However, many children do not want to go into the care system. Children of high school age want to be fluid.*”<sup>272</sup>

## **5.5 Risk of abuse by non-state actors**

*“The problem in Musina is that kids come and disappear.”*<sup>273</sup>

*“Girls - they get pregnant, or they run away. People have started propositioning [them], and they are corrupted.”*<sup>274</sup>

*“A lady brought us to the shelter. She said we could go to school and live here and help our parents. They told us not to sleep with boys or we would get HIV. I listened to them because I was young, but my other friends went away. I’m going to school now – some of my friends, they are pregnant.”*<sup>275</sup>

Once a child has left the shelter, they tend to disappear altogether from the formal (legal) systems. Caregivers do not appear to reach out to children (or indeed women) who leave the shelters, nor do they typically make an attempt to contact DSD.<sup>276</sup> There appear to be no procedures in place in the research locations for attempting to trace and identify missing children. Migrant children living on the streets are generally ignored, except that they are highly prone to arrest for (alleged) criminal activity.<sup>277</sup>

Respondents expressed particular concern about the number of migrant girls who go missing. Fewer unaccompanied girls than boys are thought to migrate to South Africa,<sup>278</sup> although it may be that girls’ migration is more hidden. According to organisations in Musina, the ratio of unaccompanied boys compared to girls who cross the border is roughly 3:1, and yet the ratio of girls in social care is much smaller;<sup>279</sup> at the end of July 2012, for example, there were 97 boys staying in shelters in Musina, compared to only 19 girls.<sup>280</sup> Little is known about what happens to girls who go missing after crossing the border; but it is suspected that they may end up working as household help, within prostitution, or begging on the streets; indeed NGO outreach workers have reported that there are a number of pregnant girls, and girls with small babies, amongst the population of migrant street children sleeping in the truck shops in Musina town.<sup>281</sup> One representative of a children’s organisations in Musina explained to researchers:

*“Statistically, if you are to preview numbers of migrants] from 2008 you realise that there are more boys than girls – it could be that fewer girls take the risk of coming without documents, but the other issue is that they just disappear because they are more vulnerable. They are taken out of the system. They get married early. They are trafficked. They end up in prostitution. Their invisibility is not a result of them not existing.”*<sup>282</sup>

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269 Regulation 73 on the rights of all children in child and youth care centres, explained in: Lucy Jamieson, ‘Children’s Act Guide for Child and Youth Care Workers, Second Edition’ Children’s Institute, University of Cape Town and National Association of Child Care Workers (2013) available at <http://www.ci.org.za/depts/cj/pubs/pdf/images/covers/2013/Child%20and%20Youth%20Care%20Workers%20guide.pdf>, pages 71-72

270 Interview, leading academic expert in migration, Johannesburg, 27 July 2014

271 Interview, leading academic expert in migration, Johannesburg, 27 July 2014

272 Interview, Principle of St Albert’s School, Johannesburg, May 2014

273 Interview, Human Rights Commission, Johannesburg, December 2012

274 Interview, Lawyers for Human Rights, Musina, 13 May 2014

275 Interview, Girl from Zimbabwe (12), MGM Women and Girls’ shelter, 10 May 2014

276 Interview, Girl from Zimbabwe (14), MGM Women and Girls’ Shelter, 10 May 2014

277 Evidence from a series of interviews with migrant women and children at the Central Methodist Church, Johannesburg, December 2012-July 2014.

278 Julia Zingu, ‘Children Crossing Borders: Report on unaccompanied minors who have travelled to South Africa (2007), available at <https://www.crin.org/docs/children-crossing-borders.pdf>

279 Interview, International Organisation for Migration, Musina, December 2012

280 Rosalind Elphick and Roni Amit, ‘Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina’, African Centre for Migration and Society (2012), 36

281 Interviews with civil society partners, Musina, December 2013 & May 2014

282 Interview, Save the Children, Musina, 15<sup>th</sup> May 2014



### **Case study 1: Interview Girls' Shelter, December 2012**

Kayla<sup>283</sup>, 15 years, decided to travel from Zimbabwe to South Africa for a better future. Things were 'not good' at home, and she wasn't going to school. She travelled with her friend, Faith<sup>284</sup>, also 15 years. They crossed the border 'illegally' through the bush. On the way they encountered a man. He said he could help them cross the border, and he offered them a place to stay, food and money. Kayla and Faith went with the man to his home. When they arrived, Kayla asked for some soap so that she could wash her clothes. The man gave her some soap and a bucket, and she went into the garden, leaving Faith inside the house together with the man. After she finished washing her clothes, Kayla returned to the house. She found her friend "lying on the floor; naked and screaming". The man "chased" them both out of the house. He told them that if they ever told anyone what he had done, he would find them and kill them. Kayla and Faith never directly spoke about what had happened. In fact, Kayla said that Faith never told anyone what happened to her.

When Kayla and Faith arrived in Musina they were taken to a children's shelter and interviewed by a social worker. Kayla told the social worker what had happened to Faith, but Kayla explained that Faith had not wanted to talk about it; she refused to speak to the social worker about the event, and no further action was taken.

After some weeks passed, Faith became aware that she was pregnant. She told Kayla that she had to leave the shelter to find the man and ask him what he intended to do for her and the baby. Kayla begged Faith not to leave, but she couldn't persuade her to stay. Faith has been missing ever since.

When Kayla told this story she implied that had Faith had been willing to speak of her experiences, and had the social worker taken action, that the outcome of Faith's situation could have been different. This is consistent with conclusions from Roni Amit and Rosaline Elphick's research, 'Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina', that inaction by social workers and caregivers at the shelter, and a lack of adequate counselling is a direct causal factor in the disappearance of children from the accommodation, they write: 'no counselling is provided to ensure that shelter placements are effective, as well as to ensure that the best interests of the children are being met. Many [children] leave before counselling is considered.'<sup>285</sup>

### **Case study 2: Girls' Shelter, May 2013**

During one visit to the shelters in the summer of 2014, researchers witnessed a case whereby two girls went missing. Two girls, aged fifteen and twelve years, and two men were picked up by Lawyers for Human Rights (LHR) at the Refugee Reception Office. They all claimed to be Congolese, and stated their intention to apply for asylum. There was no apparent relationship between the girls and the men, although they said they had 'come together'. The LHR lawyer suspected that the girls had been trafficked, and took them to the shelter as unaccompanied minors.

Researchers interviewed the girls the next day and they relayed the following account of their experiences:

"We left Burundi and passed through Zambia to South Africa. There were five of us, including three boys. We left for money. Our father is dead, so we were going to Burundi to be with our mother. We met some people [on the way]. We were brought here by people who were trafficking drugs in a car, but we did not know the people. We only met them yesterday. They helped us to cross. They didn't cause us any problems. They left us at Home Affairs. They sent us to the police<sup>286</sup>, and the police brought us here."

It appears from this account that the girls believe the LHR lawyer to be a police officer. A few days later the girls had disappeared from the shelter. The caregivers speculated that they had gone with the two men who had 'trafficked' them across the border.

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283 Names have been changed to protect children's anonymity.

284 Names have been changed to protect children's anonymity.

285 Rosalind Elphick and Roni Amit, 'Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina', African Centre for Migration and Society (2012), 58.

286 It appears from this account that the girls believed the LHR lawyer to be a police officer.

## POLICY, PRACTICE AND POLITICAL NARRATIVES SHAPING THE DETENTION AND PROTECTION OF MIGRANT WOMEN AND CHILDREN IN SOUTH AFRICA

Significantly, there were several accounts of girls going missing, over the period of the research, which are revealing in terms of explaining some of the contexts surrounding the disappearance of girls, and the reasons why this may occur. Two illustrative examples are set out above.

The second case study is significant because it relates, of course, to allegations of 'child trafficking'; yet very little is actually known about the situations of these girls in practice: where they came from, how they came, who assisted them and for what purpose, why they disappeared and what has happened to them since.

Concerns about trafficking were consistently raised by stakeholders interviewed during the research. There is a general view amongst policy makers, law enforcement and service providers, that trafficking is a serious concern, especially in Musina which is alleged to be a (source, transit, and destination) hub for trafficking, and that "*systems for identifying and protecting victims are very, very weak.*"<sup>287</sup> According to the DHA, 30,000 minors are trafficked through South African borders every year, and 50% of these minors are under the age of 14.<sup>288</sup>

Significantly, very few children interviewed during the research relayed stories of crossing the border irregularly which did not involve the 'assistance' of adults, usually men, at some point along the journey. Some children disclosed that these men had raped or abused them ("*I came with a group of people. They took all of my money. They were also killing and raping people in the group.*",<sup>289</sup> "*I paid someone to help – a malaisha – to cross the border. It's very expensive. They are raping women.*")<sup>290</sup> Others merely said that they had helped them cross ("*We crossed with three men. We gave them money and they said we must cross on foot and not speak too much.*"<sup>291</sup>). Some women and children were reticent to speak directly about issues of violence, but alluded vaguely to providing 'services' or 'favours' in exchange for assistance across the border. (Women and girls also reported doing undisclosed 'favours' to men to facilitate their transport

on buses and trains around South Africa, particularly when attempting to travel from the border area to Johannesburg). The bush area of the South African-Zimbabwean border is notoriously policed by magumagumas - armed bandits who prey on people crossing the border irregularly – and malaishas – informal border 'guides' who facilitate people's passage in exchange for money. One key respondent aptly summarised: "*children do not come here on their own. This is organised by people.*"<sup>292</sup>

The international legal definition of child trafficking includes any smuggling or organised movement of a person under the age of 18 years for the purpose of exploitation, whether consensual or not,<sup>293</sup> and this definition is also reflected in South African domestic law.<sup>294</sup> This means that all children who cross into South Africa irregularly with assistance from adults, whether in exchange for money, sexual favours or otherwise, are, according to international and domestic law, victims of trafficking (provided it is for the purpose of exploitation), although some of this assistance may be conducted with the intention of harming the child, including for the purpose of selling children into forced labour or sex rings, and in other cases, adults may simply be helping children to navigate their way informally across the border. Among other factors, this has led to a considerable amount of confusion amongst law enforcement and civil society partners about the extent and nature of 'child trafficking' in South Africa and what this actually constitutes in practice; which in turn has arguably led to a degree of hyperbole concerning the problem<sup>295</sup> and consequent introduction of blunt, heavy handed policy measures which constitute a move towards further restrictions of children's migration and even greater securitisation of the South Africa's border.

For instance, concerns over the extent of child trafficking in and out of the country, has led to the development of a new provisions, which are scheduled to come into effect on June 2015.<sup>296</sup> These provisions require that all children under the age of 18 years have, in addition to their passport, an unabridged birth certificate when exiting and entering

287 Interview, Child Welfare South Africa, Johannesburg, December 2012

288 Briefing of the Department of Home Affairs, to the Portfolio Committee: 'Children travelling into and out of South Africa and Citizens Related Ability to Obtain Unabridged Birth Certificates' (2015), available at [https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&cad=rja&uact=8&ved=0CFkQFJAJahUKEwj00\\_nNw5bGAhVLuhQKHTrFC9E&url=https%3A%2F%2Fpmg.org.za%2Ffiles%2F150526dha.ppt&ei=CU2BvY6rH8vOUrqKr4gN&usq=AFQjCNF3YRtCa6uVATV4pGmUeyFLUstTfA&sig2=vir0VF\\_kJjMFISqt2veUcQ&bvm=bv.96041959,d.d24](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&cad=rja&uact=8&ved=0CFkQFJAJahUKEwj00_nNw5bGAhVLuhQKHTrFC9E&url=https%3A%2F%2Fpmg.org.za%2Ffiles%2F150526dha.ppt&ei=CU2BvY6rH8vOUrqKr4gN&usq=AFQjCNF3YRtCa6uVATV4pGmUeyFLUstTfA&sig2=vir0VF_kJjMFISqt2veUcQ&bvm=bv.96041959,d.d24)

289 Interview, Women from Zimbabwe (32), Central Methodist Church, Johannesburg, May 2014

290 Interview, Woman from Zimbabwe (27), Central Methodist Church, Johannesburg, May 2014

291 Interview 2 girls shelter.

292 Interview, Save the Children, Musina, 15<sup>th</sup> May 2014

293 Interview, Girl from Congo (15), MGM Women and Girls' Shelter, Musina, 9 May 2014.

294 Section 1, *Children's Act* 2005 (which prohibits child trafficking: s. 284).

295 Chandré Gould & Nicolé Fick, 'Selling sex in Cape Town: Sex work and trafficking in a South African city', Institute for Security Studies (2008) available at <http://www.issafrica.org/uploads/Book2008SellingSexInCT.pdf>

296 Pursuant to the Immigration Regulations 2014,. The provisions were intended to come into effect in October 2014 but after engaging stakeholders on the matter, the Department of Home Affairs has granted the postponement of the two particular requirements -- the unabridged birth certificate and written permission, to 1 June 2015. See <http://www.dha.gov.za/index.php/statements-speeches/522-statement-by-the-minister-of-home-affairs-mr-malusi-gigaba-mp-in-relation-to-the-implementation-of-new-immigration-regulations-on-16-september-2014-in-cape-town>, last accessed June 2015

South African ports of entry. In cases where the unabridged birth certificate is in a language other than English, it must be accompanied by a sworn translation issued by a competent authority in the country concerned. When a child travels with only one parent, the parent must also produce an affidavit (less than three months old) as evidence that the absent parent gives consent for the child to travel, or a court order granting full legal guardianship to that solo parent, or alternatively the death certificate of the absent parent.<sup>299</sup> If the child is travelling with a person other than their parent, they must produce affidavits from the parents or legal guardians confirming that the child may travel with that person, copies of the ID documents or passports of the parents or legal guardian, and the contact details of the parents or legal guardian. A child travelling as an unaccompanied minor must produce these documents as well as documentation relating to the person receiving the child in South Africa, including a letter stating the person's contact details and address, the address where the child will be residing, and an identity document relating to that person.<sup>297</sup>

These new provisions are extraordinarily onerous, and are unlikely to have any meaningful impact in terms of curbing the numbers of children trafficked in or out of South Africa, given that trafficking appears to largely occur through informal channels, across unofficial border points.<sup>298</sup> Instead, these rules are likely to have a significant discriminatory impact on children travelling alone or with single parents, as well as those from backgrounds where they do not have easy access to formal systems and legal documents; all of whom are likely to face significant barriers to exit and entry of the country across formal channels, once these rules come into play.<sup>299</sup>

## 5.6 Risk of abuse by state actors

*“There are a lot of people who are detained. The police raid the markets, People are physically abused, and issued tickets. The raids are directed at foreigners and people who trade informally.”<sup>300</sup>*

These failures in the protection system leave women and children vulnerable to various forms of exploitation, but also fail to protect them from (unlawful) detention. Women and children who leave the shelters remove themselves from the protective sphere that has been carved out of the system to cater for their needs. They are then at increased risk not only of immigration detention pending deportation as illegal foreigners, but also to detention within the criminal justice system. This is because of an increased trend of ‘criminalisation’ of migrants in South Africa,<sup>301</sup> a consequence and cause of widespread xenophobic attitudes and increased securitisation of South Africa’s border (both of which reinforce one another), and, perhaps, because the vast majority of women and child migrants in South Africa appear to end up living and working on the streets in highly vulnerable and precarious situations.<sup>302</sup> As one interviewee explicated: *“Foreign nationals are under huge pressure all the time to make 100% certain that they are legitimate, and in a sense, their [the authorities] constant pushing, pushing, pushing - it criminalises migrants. So there is an opinion in the mind of the public that these foreign nationals are up to no good, and this is why the police constantly harass them.”<sup>303</sup>*

The research revealed numerous, disturbing accounts of abuse, harassment and arbitrary arrest of women and child migrants by police: *“I get in trouble for being from Zimbabwe. [The police] humiliate me.”<sup>304</sup>* Sometimes encounters with the police reportedly led to fabricated criminal charges (subsequently dropped) and periods in detention. A migrant woman based in the Central Methodist Church in Johannesburg reported being detained in Sun City Prison for days without charge; and another spoke of how police at Park Station stopped her and threatened her with arrest and detention until her brother paid a bribe.<sup>305</sup> A third told researchers how she was arrested by ‘soldiers’ after entering South Africa and paid them 50 Rand to leave her alone.<sup>306</sup> A fourth explained how she had been arrested and detained in Sun City for two months without trial or bail application. She claimed that the reason was that she did not have proper permission to stay in South Africa. After two months she was

297 Department of home affairs, leaflet explaining new immigration regulations for the travel of children, available at <http://www.dha.gov.za/files/Brochures/Immigrationleaflet.pdf> last accessed June 2015.

298 Borgen Magazine, South Africa’s new border crossing regulations (2014), available at: <http://www.borgenmagazine.com/south-africas-new-border-crossing-regulations/>

299 Borgen Magazine, South Africa’s new border crossing regulations (2014), available at: <http://www.borgenmagazine.com/south-africas-new-border-crossing-regulations/>

300 Interview, Man from Zimbabwe (21), Central Methodist Church, Johannesburg, May 2014

301 CORMSA & LHR, ‘The Impact of the Criminalisation of Migration on the Protection of Human Rights’, *Submission to the Special Rapporteur on the Human Rights of Migrants* (2010), available at <http://www.cormsa.org.za/wp-content/uploads/2009/05/cormsa-and-lhr-submission-on-criminalisation-of-migration.pdf>

302 Rosalind Elphick and Roni Amit, ‘Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina’, African Centre for Migration and Society (2012); Julia Zingu, ‘Children Crossing Borders: Report on unaccompanied minors who have travelled to South Africa (2007), available at <https://www.crin.org/docs/children-crossing-borders.pdf>

303 Interview with a senior key informant, Central Methodist Church, Johannesburg, May 2014

304 Interview, Boy from Zimbabwe, Central Methodist Church, May 2014

305 Interview, Woman from Zimbabwe (21), Central Methodist Church, Johannesburg, June 2014

306 Interview, Woman from Zimbabwe (33), Central Methodist Church, Johannesburg, June 2014

transferred from Sun City to Lindela, where she stayed for five days before being deported.<sup>307</sup>

Children interviewed during the research also reported consistent instances of arrest, most particularly for crimes such as loitering and trespassing, yet as one migrant boy cogently pointed out: “*but we don’t even know what that thing is, because we don’t know how they are defining that thing of loitering.*”<sup>308</sup> Similarly, an interviewee accessed at a shelter in Johannesburg explained the bind that many migrant children living on the streets find themselves in: “*three to five [migrant] children were arrested. Two of them ran away and came here [to the shelter]. It was that issue of loitering. Children were just loitering - since [they] were unaccompanied, they didn’t have anywhere to go - so [police] have to take them to the court*”.<sup>309</sup> There is a children’s juvenile correction facility next door to Lindela and under the same administration, and several stakeholders made unconfirmed reports that migrant children are arrested and placed in this facility as an alternative to incarceration in the official migrant detention estate.

### 5.7 Exclusion from the immigration and asylum system

*DSD is not facilitating access to asylum for children under 18 – there is no process of documentation from DSD.*<sup>310</sup>

Migrants who are women and children in South Africa, therefore, have few options available to them. On the one hand services at the shelters are inadequate, or incompatible with migrants’ need to work, travel and be mobile. On the other hand, once women and children leave the shelters they experience little or no protection from social welfare services, and they are at the same time exposed to harassment, arrest and detention at the hands of state actors.

These difficulties are exacerbated by the significant barriers women and children (most particularly) face accessing the immigration and asylum systems in order to legalise their status and obtain admission to the full range of rights and protections that legal identity provides. As discussed in previous sections, women’s and children’s experiences in relation to migration often confound legal categories, and make it uniquely difficult for them to establish legal status. Furthermore women and children’s experiences in relation to persecution have tended to be excluded from mainstream

interpretations of refugee law, on the basis that they are more likely to experience forms of violence at the hand of ‘private’ actors and within the confines of the domestic sphere.

### Access to asylum

*“I have never heard of a child getting refugee status”*<sup>311</sup>

In fact, regardless of the nature of their claims, children in South Africa are systematically and directly excluded from claiming asylum, because of a widespread perception amongst law enforcement, service providers and migrants, that a person is unable to claim asylum until they are eighteen years old. This perception is (somewhat) misplaced; as with adults, children fleeing persecution or ‘external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order’ qualify for refugee status. Problematically, however, the law fails to positively set out or establish any provisions for unaccompanied children to claim asylum independent of external assistance.

The confusion about children’s access to the asylum system appears to come from a provision in the Refugees Act, which provides that unaccompanied migrant children who appear to qualify for refugee status must be brought before the Children’s Court, who may then assist the child in applying for asylum.<sup>312</sup> This provision appears to have been interpreted widely by law enforcement, advocates, civil society actors, and others as implying that children must have assistance from the children’s court in order for them to exercise their right to claim asylum:

*“Children should first go through the child protection system. The children’s court will appoint a ‘legal guardian’ to deal with the child’s asylum case. Without this guardian in place, a child does not have access to the system.”*<sup>313</sup>

Even to access a section 22 temporary asylum permit, a person under 18 should possess both an order from the Children’s Court, and be accompanied by a social worker.<sup>314</sup> The EUDL research revealed consistent accounts of children being turned away from refugee reception offices for being ‘underage’. “*They told me I was a minor, and they told me to go away*”; “*I tried to get asylum at home affairs – they said I was young and sent me away*”,<sup>315</sup> were typical ways in

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307 Interview, Woman from Zimbabwe (33), Central Methodist Church, Johannesburg, June 2014

308 Interview, Boy from Zimbabwe (17), Central Methodist Church, Johannesburg, June 2014

309 Interview, Man from Zimbabwe (21), Central Methodist Church, Johannesburg, June 2014

310 Interview, UNHCR, 14 May 2014

311 Interview, Musina Legal Advice Office, Musina, December 2012

312 Section 289(2), *Children’s Act* 2005

313 Interview, Refugees Appeal Board, Pretoria, December 2012

314 Section 32, *Refugees Act* 1998

315 Interview, Boy from Zimbabwe (17) Central Methodist Church, December 2012

which child respondents described their experiences.<sup>316</sup> In explanation of this, one legal advocate offered: “they say you can’t make a statement and sign a statement until you are 18 years”.<sup>317</sup>

The difficulty with this is that, in practice, it appears that very few children have access to services from either the children’s court, or from social workers, as one respondent commented: “they’re not supposed to let under 18s apply [without a social worker], but the next step never happens the way it should.”<sup>318</sup> Furthermore, social workers and those caring for children appear to have very limited knowledge or understanding of refugee law, and how it may apply to children in their care; it may not even occur to them to support children to access the refugee reception office. The following passage is demonstrative of the confusion displayed by caregivers at the shelters, regarding children’s right to asylum under the law:

*“Children have to be accompanied by an adult [to get asylum status]. The social worker has to determine whether they need asylum – most of them have been floppy cases. I haven’t heard of a case for the past five years. I’ve never seen a child actually recognised as an asylum seeker. There is a clause that says children cannot be asylum seekers - unless they are accompanied [in which case] they will fall under their parents’ status.”<sup>319</sup>*

There appears to be very little coordination and interaction between the DHA and the DSD in Musina; in the words of one NGO participant: “I don’t think there is any at all.”<sup>320</sup> Calls for improved coordination between the two departments was a constant recommendation provided by civil society partners who were interviewed: “I think once a child is identified there should be...cases being kept by home affairs. Home affairs only capture the asylum system. Home affairs and the DSD systems should be integrated.”<sup>321</sup>

In practice, only a tiny minority of children are likely able to navigate the system as unaccompanied minors.<sup>322</sup> Respondents in the research consistently acknowledged that they had never personally seen or experienced the law functioning as it was intended:

**Interviewee:** “When an unaccompanied minor comes to the attention of authorities they should be taken to a children’s court. There should be a court order to take them to a place of safety. After that the social workers should support them through the refugee determination process.”

**Researcher:** “How often does this happen in practice?”

**Interviewee:** “I have never personally come across this.”<sup>323</sup>

The Refugee Appeals Board claimed never to receive any appeals pertaining to cases of unaccompanied children. When pressed on why this might be, they made the extraordinary claim that: “there are no unaccompanied children seeking asylum in South Africa”.<sup>324</sup> There are of course, numerous unaccompanied children in South Africa who do attempt to claim asylum, and a number of these were interviewed as part of the research; they are simply not able to make their way through the system as minors.

Perplexingly, even in the case that a child does have the assistance of the children’s court and a social worker, it was reported that the DHA allegedly will not conduct refugee status determination interviews with persons under eighteen, but will rather extend the child’s asylum seeking permit until they reach the age of majority.<sup>325</sup> This is hugely problematic for several reasons, as well as being a violation of international law, which provides that the asylum claims of unaccompanied children should be prioritised within the system.<sup>326</sup> Delaying status determination for children is hugely problematic, both in the short term because children are left in a state of limbo, with precarious legal identity and limited access to rights associated with legal residency, and in the long term because waiting may compromise children’s ability to evidence their claim at a later stage. The situation from their country of origin may have substantially changed and children are likely to struggle to remember the details of why they left. One stakeholder explained: “status determination officers are not trained to interview children anymore. Where children do get placed in the system they hang out until they are over 18. But by that time they can’t remember the details of their claim. They can’t get asylum.”<sup>327</sup>

316 Interview, Boy from Zimbabwe (17) Central Methodist Church, December 2012

317 Interview, Musina Legal Advice Office, Musina, December 2012

318 Interview, leading academic expert in migration, Johannesburg, 27 July 2014

319 Interview, Matron, MGM Girls’ Shelter, 10<sup>th</sup> May 2014

320 Interview, Civil Society Partner, Musina, 15<sup>th</sup> May 2014

321 Interview, Matron, MGM Girls’ Shelter, 10<sup>th</sup> May 2014

322 Researchers were told about one case of 3 Congolese children obtaining asylum status after being supported through the system by UNHCR: interview, UNHCR, Pretoria, December 2012

323 Interview, Lawyers for Human Rights, Musina, December 2012

324 Interview, Refugees Appeal Board, Pretoria, December 2012

325 Interview, leading academic expert in migration, Johannesburg, 27 July 2014

326 UN High Commissioner for Refugees (UNHCR), *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, December 2009, 1975-2009 (Conclusion No. 1-109), available at: <http://www.refworld.org/docid/4b28bf1f2.html> [accessed 18 June 2015]

327 Interview, leading academic expert in migration, Johannesburg, 27 July 2014

The difficulties children have in accessing the asylum system, and their inability to make independent claims, has led to a general belief, particularly amongst migrants, that children are not permitted to claim asylum at all. Over the course of the Legal Advice Pilot, project workers and researchers were consistently told: “*asylum is for people over 18 years old*”<sup>328</sup>. Children appear to have very little understanding of their right to claim asylum in South Africa: “*asylum is not supposed to be done by people under 18 – I just have a court order done by social workers*”.<sup>329</sup> The research indicated that children often claim to be over 18 years, due to their belief that only over-18s can claim asylum. This in turn places them at greater risk of detention.

It seems doubtful that the intention of the law is to preclude or prohibit children without access to the Children’s Court, or the assistance of a social worker, from claiming asylum. The purpose of the law, rather, appears to be to ensure that vulnerable migrant children have access to social care and legal assistance to support them to navigate the system more effectively. Nevertheless, stakeholders at all levels within and outside the system (judges, lawyers, advocates, law enforcement, civil society and academics alike) appeared to believe this to be the case, or to at least to be uncertain of the ramifications of the law:

**Researcher:** *So just to clarify – Am I correct in thinking that it is not against the law for an unaccompanied child to independently claim asylum? This is a misinterpretation of the law?*

**Senior academic (working in migration):** *Umm... Well - no - I am not so sure. That would need to be tested in court.*”<sup>330</sup>

### Other pathways to regularisation

*“I don’t know what will happen to me after I turn eighteen.”*<sup>331</sup>

The failure to allow children access to the asylum system leaves them in a highly precarious position of uncertainty for their future. Children only qualify for social assistance and are exempt from deportation as unaccompanied minors until the age of eighteen years, at which point their order from the Children’s Court will expire. After this time they are left without any legal basis to remain in South Africa and are at risk of detention and deportation, often to a country where they may no longer have any meaningful ties.

In theory, caregivers at the shelters should have an exit strategy in place for the children in their care, but this is not happening in practice; not due to complacency or lack of concern on the part of caregivers, but simply because they are uncertain about what they realistically are able to do for these migrants once they become adults; as one caregiver explained:

*“So far only one [child] has left to go to university, the others leave to work. They cannot go to university because of the costs, and because of their legal status. It feels to us that we have failed the child. If you do not have proper documents, they do not count you at all.”*<sup>332</sup>

And another stakeholder summarised:

*“There is no systematic method for addressing what happens to children after they turn 18 years. It is likely that they will just be deported. The approach is piecemeal and disjointed. There are unaccompanied minors who have a genuine refugee case but because of the flaws in the system, their claim does not get properly considered.”*<sup>333</sup>

Of course, it is important to note that not all children will qualify for refugee status, and (as explored in Chapter IV) the asylum system is already overwhelmed, and characterised by gross inefficiency and dysfunction; providing one of the only avenues through which migrants can regularise their stay, and yet functioning incoherently. As such, it is highly unlikely that improving children’s access to the asylum system will result in reaching a sustainable outcome for more than a very few migrant children. Rather there is an urgent need for the development of alternative mechanisms for regularising children’s status and right to remain in South Africa.

As the situation stands, the law provides, albeit very limited, options for children who do not qualify for refugee status (after they turn 18 years). Children who are still in full time education when they turn 18 may apply for an extension of their court order until the age of 21 years. There are very few options for migrant children to gain permanent residence. Children who have been residing in South Africa for a period of time, and have a particularly compelling cause to stay, may qualify for permanent residence under the general exemption (to deportation) provided by 31(2)(b) of the Immigration Act. This provides the Minister with the power to grant a foreigner permanent residence ‘when special circumstances exist’. Problematically, the law does not provide any guidance on the types of claims that would satisfy this highly vague

328 Interview, Boy from Zimbabwe (16), CWM Boys’ shelter, December 2012

329 Interview, Boy from Zimbabwe (18) CWM Boys’ shelter, 12 May 2014

330 Interview, leading academic expert in migration, Johannesburg, 27 July 2014

331 Interview, Girl from Zimbabwe (17), MGM Women and Girls’ Shelter, December 2012

332 Interview, Matron, MGM Girls’ Shelter, 10<sup>th</sup> May 2014

333 Interview, International Organisation for Migration, Musina, December 2012

provision. Finally, there are provisions in law for repatriation of migrants after the age of 18 years should they wish to return to their countries of origin. Unfortunately none of these options appear to be exercised in practice. In the simple words of one caregiver, after a child turns eighteen: *“nothing is happening.”*<sup>334</sup>

In many cases, unaccompanied migrant children end up without legal status in any country because they lack legal identity; these children are undocumented, they may have few or no ties to their country of origin and (in any case) no means to prove any relationship to that country, as well as no legal right to remain in South Africa. Children who have been orphaned or abandoned to parents who have migrated informally are at particular risk of falling into this category.<sup>335</sup>

*“DSD will say: ‘after the age of 18 you are no longer ours’. Nobody in Zimbabwe can help. We have these young adults who came to South Africa as children. Nobody captured their stay exactly so they won’t acquire an ID. Nobody can attest to their story. Most young adults are undocumented. They fear detention and deportation. Some become young parents, and the next generation is stateless.”*<sup>336</sup>

Such cases were identified through the Legal Advice Pilot. During one monitoring visit to the women’s and girls’ shelter, caregivers expressed concern about the future of a three year old boy, who had been born in South Africa, to (informal) migrant parents from Zimbabwe, who subsequently died leaving him undocumented and without proof of ties to either country.

## 5.8 The double exclusion of migrant children: Pathways into detention

*“At the Refugee Reception Centre they told me I was a minor and told me to go away. They told me I must go to the shelters. But no one tells you where the shelters are.”*<sup>337</sup>

Migrant children in South Africa often find themselves in a double bind: On the one hand they are excluded from the immigration system because they are children; on the other hand they may be excluded from accessing social protection services because they have no legal status; as one respondent aptly noted: *“there is an issue of children getting lost between the asylum system and the child protection*

*system. But it shouldn’t work like this - the actions taken by one department shouldn’t be dependent on the actions of another.”*<sup>338</sup>

The research revealed many accounts of social welfare and public services turning children away because they lacked identity documents, and service providers interviewed during the research sometimes expressed a lack of knowledge of how to deal with cases of undocumented migrant children: *“unaccompanied migrant children without documents are a major headache for us. There is no protocol that we can follow. These children come into the system and we don’t know what to do with them”*.<sup>339</sup> Rights advocates and development partners consistently pointed to a general lack of knowledge about legal provisions which allow migrants access to services like healthcare and education as a major challenge for realising migrant children’s rights in practice. As one service provider explained: *“service providers don’t have proper knowledge of the law: for example at schools. They are unaware of legislation and turn children away for not having immigration status.”*<sup>340</sup>

The above sections have also explored how (even in cases where documentation isn’t an issue) children have difficulties accessing services for a range of reasons, including poor infrastructure and resources, a failure of services to respond to the realities and needs of migrant children, particularly in the context of informal work, and widespread xenophobia and discrimination directed at ‘illegal’ foreigners. In addition to these, there is a further hurdle: that many children are lying about their age in order to access the immigration system or to find work, which then in turn removes their right to special protection and services under the law as children.

The double exclusion of children creates a number of pathways to detention for migrant children. Children who leave the shelters place themselves at immediate risk of detention (as discussed) both within the migrant detention estate as ‘illegal foreigners’ and within the criminal justice estate (for crimes of loitering, illegal trading and so on). Those children who remain within the shelters face detention and deportation as ‘illegal foreigners’ after they turn eighteen because they typically remain undocumented and are excluded from accessing the asylum system. Finally – there is an additional complication – that many children are claiming to be adults in order to have access to RROs, and are then liable to detention as age disputed minors; as one asylum seeking child put it, in order to establish refugee status: *“children must clandestinely declare themselves to the State.”*<sup>341</sup>

334 Interview, Save the Children, Musina, 15<sup>th</sup> May 2014

335 Rosalind Elphick and Roni Amit, ‘Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina’, African Centre for Migration and Society (2012)

336 Interview, Matron, MGM Girls’ Shelter, 10<sup>th</sup> May 2014

337 Interview, Man from Zimbabwe (21) (17 when he entered South Africa), Central Methodist Church, Johannesburg, December 2012

338 Interview, Human Rights Commission, Johannesburg, December 2012

339 Interview, Child Welfare South Africa, Johannesburg, December 2012

340 Interview, Human Rights Commission, Johannesburg, December 2012

341 Interview, Man from Zimbabwe (21) (17 when he entered South Africa), Central Methodist Church, Johannesburg, December 2012

Significantly, interviewees in the EUDL research often identified a direct causal link between children's exclusion from the asylum system, and their vulnerability to arrest and detention. As one key stakeholder noted: "*the problem is, because children can't access the asylum system until they're eighteen years old, they say that they are eighteen in order to do so. This then removes certain rights and protections and exposes them to... detention at a later stage.*"<sup>342</sup> Similarly an immigration lawyer interviewed during the research explained: "*the police do know to refer a child [to DSD]. The only challenge is when a person claimed to be twenty – [then] in the cells starts to say 'I'm sixteen'. We've heard of those kinds of cases because according to regulations a minor cannot apply [for asylum] without a guardian. It comes back to us to say 'he lied'. We have to convince that the person is a minor.*"<sup>343</sup>

This challenge is exacerbated by the fact that most migrants, especially children, who enter South Africa informally, lack documents to prove their identity and age. Furthermore, the DHA are not implementing any reliable procedure or mechanism for conducting age determinations, and typically rely on subjective perceptions of age based on physical appearance, or the age claimed by the migrant him or herself.<sup>344</sup> Research conducted on the situation of unaccompanied migrants in Musina in 2012 noted that: "*children who claimed to be eighteen were not assisted as minors even if they were visibly younger than their stated age*".<sup>345</sup> Police, lawyers and advocates who were interviewed reported that the DHA is starting to introduce measures for determining age, such as medical tests including wrist tests and examining growth plates, but these are known to be unreliable: "*DSD has an age verification system in place with a local hospital, a dentist does the verification. It's a very recent thing – it's not being used yet as it was only introduced a week or two ago*".<sup>346</sup> There is no accurate science that can accurately determine age; even the most accurate and sophisticated tests can only provide an estimate of a person's age within a period of two years.<sup>347</sup> In addition, there are also ethical concerns about the use of invasive medical procedures, especially on children.<sup>348</sup>

The challenges associated with accurately proving age, and the presence of age-disputed cases emerging in detention facilities, have inevitably resulted in claims that there are adults in detention 'posing' as children in order to ensure

their release. This in turn increases the risk that children who do end up in detention will be disbelieved about their age. As one participant explained:

*"Police are finding that adults without legal documents allege that they are seventeen. [Police] have no way of verifying age. There was an instance in December when three people openly admitted that they had lied. There is a degree of consciousness around the safety net of saying 'I'm a child'. There was a case of a guy who had been turned away from the shelter because he was taking advantage of the system... He knows the dynamic, he knows [if he says he is a child] he can go to Save the Children to get help."*<sup>349</sup>

Many migrant children who were interviewed, especially boys and those interviewed in Johannesburg, had faced periods in detention as age disputed minors. One migrant interviewed at the Central Methodist Church in Johannesburg told researchers of how he first entered South Africa at the age of 17 years. He was arrested, detained and deported for being undocumented. He explained that he had tried to claim asylum but was turned away from the RRO for being underage, after which he ended up living on the streets until his arrest.<sup>350</sup>

### 5.9 The limits of protective frameworks

The double exclusion of children, and to a lesser extent women, from the social protection system and from the asylum and immigration systems ultimately places these groups of migrants at significant risk of detention: not only in immigration detention pending deportation as illegal foreigners, but also to detention within the criminal justice system. This is because social protection services are inadequate for meeting migrants' needs and incompatible with their priorities in South Africa, most particularly their need to work, be mobile and fluid: thus the vast majority of women and child migrants in South Africa end up living and working on the streets in highly vulnerable situations.

'Addressing' the presence of migrant women and children through a social protection response may be more politically palatable than calling for more flexible immigration rules, which permit women and children to regularise their status.

342 Interview, Human Rights Commission, Johannesburg, December 2012

343 Interview, Lawyers for Human Rights, Musina, 13 May 2014.

344 Interview, Human Rights Commission, Johannesburg, December 2012

345 Rosalind Elphick and Roni Amit, 'Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-based Violence in Musina', African Centre for Migration and Society (2012), 50

346 Interview, Save the Children, Musina, 15<sup>th</sup> May 2014

347 NewScientist, With No Paper Trail can Science Accurately Determine Age? (2012), available at <http://www.newscientist.com/article/mg21428644.300-with-no-paper-trail-can-science-determine-age.html#.VYKUavIviko>

348 Terry Smith & Laura Brownlees, 'Age Assessment Practices: a literature review & Annotated Bibliography' UNICEF (2011), 27-28

349 Interview, Save the Children, Musina, 15<sup>th</sup> May 2014

350 Interview, Man from Zimbabwe (21) (17 when he entered South Africa), Central Methodist Church, Johannesburg, December 2012



Thus it is not surprising that when it comes to addressing the cases of women and child migrants, the focus and strategy amongst law enforcement as well as development and human right actors, has been to seek to provide for their social welfare needs. Whilst this is commendable, and draws upon the particularly strong legal framework for

human rights, especially children's rights, in South Africa, it is insufficient to fully address the needs and struggles women and child migrants, and is unlikely to result in a meaningful or sustainable solution to promote dignity and rights for these groups.



A boy crosses the grounds of the CWM boys shelter at sunset. **Photo:** Kara Apland, Coram Children's Legal Centre

## 6. Conclusion

This report has explored law and practice regarding the detention of women and children migrants in South Africa. It has sought: to identify pathways to (unlawful) detention for women and children migrants; to explain the systemic nature of (unlawful) detention practices; and to explore the potential of existing protection frameworks for addressing the particular vulnerabilities of migrant women and (unaccompanied) children.

Our analysis demonstrates how exemplary legal frameworks for the protection of refugees, asylum seekers and unaccompanied migrant children are failing to result in meaningful legal or social protection in practice. Efforts by human rights advocates and humanitarian actors to provide protection to vulnerable migrants have had limited success. Whilst these failures are explained in part by problems of resources and government capacity, they are also a function of the government's approach to migration policy, which is characterised by an attempt to accommodate incompatible policy priorities through the implementation of separate legal systems (discussed in chapter II of this report) for governing migration. As explained by Jennifer Klinck:

*On the one hand, the policy is constructed so as to reflect but also to enable the fulfillment of the international and constitutional obligations and on the other it touches on a number of other directly and indirectly related state and national interests and priorities. The most important of these priorities concern the migration control objectives, law and order, ...various other aspects of national and state security, social and economic interests, as well as bilateral, regional and international relations.<sup>351</sup>*

A comprehensive assessment of whether the Immigration Act is in fact an effective means of pursuing this second set of policy goals is beyond the scope of this research (though this is a critical question, which must be explored and addressed). The point here is that the government has attempted to address conflicting policy goals through the application of separate legal frameworks, which rest on the assumption that 'refugee matters' and 'migration matters' are categorically distinct. Thus the refugee system ensures that international and regional refugee commitments are (or appear to be) met and that deserving persons ('genuine' asylum seekers) are afforded rights and protection in South Africa, whilst the immigration system allows the sovereign government to strictly control and regulate the entry and stay

in South Africa of 'undeserving' and unattractive foreigners, in the name of national interest.

This incoherence of this approach to regulating migration is particularly apparent when considering the cases of (unaccompanied) migrant children. The study demonstrated the extent to which children are systematically excluded from the asylum system, whilst the state alleges to 'take responsibility' for them in other ways. This approach, which is also applied to a lesser extent to cases of migrant women, allows the government to simultaneously avoid granting (permanent) legal status to children, whilst also appearing to adhere to basic human rights standards by ensuring that children are not detained or deported while they are children. The strategy of shuffling vulnerable people out of the asylum system and into other, less sustainable, forms of protection allows the government to limit numbers of persons granted asylum status, without drawing further attention to the fact that it is not prepared to implement the Refugees Act 1998.

Implementing border control through the application of two incompatible legal frameworks – a progressive Refugees Act that reflects South Africa's exemplary legal commitments to upholding human rights standards, and an Immigration Act that is highly restrictive and based on a desire to keep migrants out of the country – is an irrational approach to governing migration. In fact, South Africa's exemplary legal framework for refugee protection may paradoxically undermine its practical power (whilst potentially simultaneously serving to justify the implementation of a restrictive and inhumane legal framework for immigration). The analysis in this report seeks to explain the failure of the DHA to implement the law effectively; it does not justify it. Instead, it points to the need for an integrated and pragmatic approach to regulating migration that reflects South Africa domestic policy priorities and the country's human rights commitments together.

The South African government's approach reflects broader global trends of increasingly politicised and securitised immigration policy based on the (often false) assumption that restricting migration promotes domestic interests (economic and otherwise). Given the limited political will within the government to provide possibilities for legal migration into South Africa, advocates for migrants' rights have appealed to South Africa's strong legal frameworks for protection of asylum seekers and refugees. This report demonstrates how this tactic has had limited effects, and been used by the

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351 Klinck, Jennifer A, 'Recognising socio-economic refugees in South Africa: A principled and rights-based approach to section 3(b) of the Refugees Act' (2009), 21 *International Journal of Refugee Law*, 653 at 656

government to justify its implementation of an asylum system which is arbitrary, overtly restrictive, systemically unlawful and, ultimately ineffective. Meanwhile, given the arbitrary and restrictive character of the asylum system, efforts to promote the rights of unaccompanied migrant children have focussed on advocating for the provision of social assistance based on their vulnerability. Yet this assistance has proven to be of limited value when it is not accompanied by legal status, nor designed to fit the realities of migrant women and children's lives.

This analysis points to the need for a shift; to providing protection to migrant women and children through practicable policies and programmes which are based on the reality of their situation, rather than focussing on the implementation of legal provisions that have antithetical impacts within a broken system. It demonstrates the importance of an integrated approach to regulating migration which takes into account the practical realities of cross-border migration, economic integration and the labour market in South Africa, whilst also promoting South Africa's humanitarian and human rights commitments. In order for the South African government to effectively manage migration it must take 'approaches to socio-economic and political transformation that recognise that migration is, and will remain, an indelible feature of the region.'<sup>352</sup> Or in the words of one respondent; 'They should relax the work permit system and give them a way to legalise their status, because people will find their way in.'<sup>353</sup>

Finally, an analysis of the South African case may shed light on the limits of refugee law in the context of globalisation and regional integration, increasingly complex political and economic networks, and the pockets of suffering and persecution they produce. This context complicates the legal category of 'refugee' and suggests a need for the development of policies towards all forms migration that are both pragmatic and humane. In South Africa, this is likely to include an increase in legal opportunities (outside of the asylum system) for migrants who wish to regularise their status and the provision of protection services to vulnerable persons that respond first and foremost to their particular needs.

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352 Aurelia Segatti and Loren Landau (ed), *Contemporary Migration to South Africa: A Regional Development Issue*, (2011), Washington: The International Bank for Reconstruction and Development / The World Bank, 11

353 Interview, Legal Advocate, LHR Offices, Musina, 13 May 2014

## December 2012

### Interviews with migrant women and children

- Migrant child (boy) from Zimbabwe, 17 years, Johannesburg shelter
- Migrant young person (man) from Zimbabwe, 22 years (17 at time of entry to South Africa), Johannesburg shelter
- Two migrant children (boys) from Zimbabwe, 16 and 17 years, Musina children's shelter
- Migrant child (girl) from Zimbabwe, 17 years, Musina children's shelter
- Migrant child (girl) from Zimbabwe, 14 years, Musina children's shelter
- Migrant child (girl) from Zimbabwe, 16 years, Musina children's shelter

### Interviews with service providers, NGOs / CSOs and government representatives

- Head of Legal Services, South African Human Rights Commission, Johannesburg
- Assistant Director and Team Manager, Child Welfare, Johannesburg
- Chair, Refugee Appeals Board, Johannesburg
- United Nations High Commissioner for Refugees, Musina
- Attorney, Musina Legal Advice Centre, Musina
- Lawyer, Lawyers for Human Rights, Musina
- International Organisation for Migration, Musina
- Bishop and Director of shelter for migrants, Johannesburg

## May – July 2014

### Interviews with migrant women and children

- Migrant woman from Zimbabwe, 30s, Johannesburg shelter
- Migrant woman from Zimbabwe, 34 years, Johannesburg shelter
- Two migrant women, 32 years and 24 years, both from Zimbabwe, Johannesburg shelter
- Migrant woman from Zimbabwe, 30s, Johannesburg shelter
- Migrant woman from Zimbabwe, 35 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 29 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 22 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 21 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 32 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 34 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 33 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 20s, Johannesburg shelter
- Migrant woman from Zimbabwe, 61 years, Johannesburg shelter

- Migrant woman from Zimbabwe, 57 years, Johannesburg shelter
- Migrant woman from Zimbabwe and Mozambique, 21 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 39 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 43 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 23 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 57 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 48 years, Johannesburg shelter
- Migrant woman from Zimbabwe, 28 years, Johannesburg shelter
- Two migrant women, 27 years and 28 years, both from Zimbabwe, Johannesburg shelter
- Migrant woman from Zimbabwe, 24 years, Musina shelter
- Migrant woman from Zimbabwe, 26 years, Musina shelter
- Migrant woman from Zimbabwe, 23 years, Musina shelter
- Migrant woman from Somalia, 26 years, Musina police station
- Migrant woman from Zimbabwe, 34 years, Musina police station
- Migrant woman from Zimbabwe, 23 years, Musina police station
- Migrant child (boy) from Zimbabwe, 16 years, Johannesburg shelter
- Two migrant children (girls) from Zimbabwe, 15 and 16 years, Musina shelter
- Two migrant children (girls) from Zimbabwe and DRC, 13 and 15 years, Musina shelter
- Two migrant children (girls) from Zimbabwe, 14 and 16 years, Musina shelter
- Two migrant children (girls) from Zimbabwe, 13 and 14 years, Musina shelter
- Two migrant children (girls) from DRC, 12 and 15 years, Musina shelter
- Two migrant children (girls) from Zimbabwe, 12 and 17 years, Musina shelter
- Migrant child (boy) from Zimbabwe, 17 years, Johannesburg shelter
- Migrant young person (boy) from Zimbabwe, 18 years, Johannesburg shelter
- Migrant young person (boy) from Zimbabwe, 18 years, Johannesburg shelter
- Migrant young person (boy) from Zimbabwe, 20 years, Johannesburg shelter
- Migrant child (boy) from Zimbabwe, 16 years, Johannesburg shelter
- Migrant young person (boy) from Zimbabwe, 18 years, Johannesburg shelter
- Migrant child (boy) from Zimbabwe, 15 years, Johannesburg shelter
- Migrant child (boy) from Zimbabwe, 14 years, Johannesburg shelter
- Migrant child (girl) from Zimbabwe, 16 years, Johannesburg school / shelter
- Migrant young person (girl) from Zimbabwe, 18 years, Johannesburg school / shelter
- Migrant young person (girl) from Zimbabwe, 18 years, Johannesburg school / shelter
- Migrant young person (boy) from Zimbabwe, 18 years, Johannesburg school / shelter
- Migrant child (girl) from Malawi, 15 years, Johannesburg school / shelter
- Migrant young person (boy) from Zimbabwe, 18 years, Johannesburg school / shelter
- Migrant child (girl) from Zimbabwe, 17 years, Johannesburg school / shelter
- Migrant young person (boy) from Zimbabwe, 19 years, Johannesburg school / shelter

- Migrant young person (girl) from Zimbabwe, 17 years, Johannesburg school / shelter
- Migrant child (girl) from Zimbabwe, 13 years, Johannesburg school / shelter
- Migrant child (girl) from Zimbabwe, 17 years, Johannesburg school / shelter
- Migrant child (girl) from Zimbabwe, 16 years, Johannesburg school / shelter
- Migrant young person (girl) from Zimbabwe, 18 years, Johannesburg school / shelter
- Migrant young person (girl) from Zimbabwe, 17 years, Johannesburg school / shelter
- Migrant young person (boy) from Zimbabwe, 20 years, Johannesburg school / shelter

### **Interviews with service providers, NGOs / CSOs and government representatives**

- Attorney, Legal Resources Centre, Johannesburg
- Attorney, Community Advice Support Project, Probono.org, Johannesburg
- Attorney and Director, Centre for Child Law (CCL), University of Pretoria
- Two Attorneys, Detention Unit, Layers for Human Rights, Johannesburg
- Principal, school for migrant children, Johannesburg
- Bishop and Director of shelter for migrants, Johannesburg
- Associate Professor, African Centre for Migration and Society, Johannesburg
- Visiting Researcher, African Centre for Migration and Society, Johannesburg
- Head of Legal Services, South African Human Rights Commission, Johannesburg
- Two Matrons, Girls' Shelter, Musina
- Two Attorneys, Lawyers for Human Rights, Musina
- Associate Protection Officer, UNHCR, Musina
- Station Commander, South African Police Service, Musina
- Child Protection Officer, Save the Children, Musina