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# Country Report

# SOUTH AFRICA

Complementary pathways and the  
Zimbabwean Dispensation Project

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## *D4.2 Interim Country Reports*

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## Executive Summary

In or around 2005, Zimbabwe began to experience political and economic crisis, which led to many Zimbabwean migrants and asylum seekers entering South Africa for protection. It is estimated that around 1.5 million Zimbabweans are living in South Africa, the majority of whom were and are living irregularly. South Africa responded to the migration and asylum seekers from Zimbabwe with draconian immigration restrictions which forced people into irregular migration channels.

It was only in 2010 that the South African government responded to the crisis with a dispensation program in terms of the Immigration Act 13 of 2002 in an attempt to regularise the stay of Zimbabweans in South Africa. The 2010 statistics show that 242 731 Zimbabweans successfully applied for the dispensation and were provided with a permit that would allow them to work and study for four years in the country. The dispensation was continued up until 2021 when the South African government decided to discontinue it. The dispensation was criticised for being complex, haphazard, and characterised by long queues and processing times. Furthermore, it did not confer any right to permanent residence. The dispensation posed issues concerning non-refoulement, as it did not provide a safety net for refugees within the system and protection generally in the country. The dispensation was focused on migration management and the circumvention of the rights and entitlements in terms of the Refugees Act 130 of 1998. The consequence of such an approach was the relabelling of Zimbabwean refugees to ordinary migrant status and the government ignoring their obligation to protect against non-refoulement.

Many Zimbabweans who had chosen to apply for asylum felt compelled to transfer onto the dispensation because the permit issued was valid for four years as opposed to the asylum seeker permit that was only valid for three to six months at a time. Asylum seekers who wished to transfer or had applied were inadvertently relabelled as ordinary migrants rather than refugees in need of protection, potentially placing at risk the principle of non-refoulement in terms of international and human rights instruments, the OAU Refugee Convention and the Refugees Act 130 of 1998.

The large-scale migration and asylum from Zimbabwe also had a major effect on the asylum system in South Africa, which negatively impacted the ability of asylum seekers to access protection. Before the introduction of the dispensation, the crisis in Zimbabwe led to numerous applications for asylum —by 2009 South Africa saw the highest number of



applications for asylum in the world. This immense burden on the system led to backlogs and delays in the adjudication of claims for asylum. The backlogs have enabled persons without claims to live and work in South Africa for extended periods while waiting for their claims to be adjudicated. The abuse of the asylum system by economic migrants unable to regularise their stay in South Africa was raised in each interview.

Despite popular uptake of this narrative in South Africa, the interviews revealed the complexities of this narrative. The research highlighted these complexities as a lack of quality data to support this position, the restrictive immigration policies leaving many without a choice but to turn to the asylum system, and the use of the narrative by the government to justify the rejection of refugees and limit their international obligations.

In addition to the use of the narrative by the South African government, interviewees indicated that they believe there to be nefarious reasons that were leading to the 98% rejection rate of refugees in South Africa. They noted the possibility of direct orders to reject refugees, restrictive practices to limit access to asylum and institutionalised xenophobia within the Department of Home Affairs.

The interim country report further considers whether the OAU Refugee Convention and Refugees Act 130 of 1998 extended definition of a refugee could respond to the Zimbabwean crisis. The situation in Zimbabwe is complex: while some fled due to political persecution, others left because of the economic crisis that was humanitarian in nature. While it is argued that the Refugees Act in South Africa and the OAU Refugee Convention's extended definition has the potential to alleviate the humanitarian crisis, it will ultimately fall on the state to determine whether to expand the extended definition of a refugee to all persons in dire situations.

The study of the relationship between the Zimbabwean crisis, dispensation, and asylum provides the contextual background to determine whether the dispensation can be considered a complementary pathway to protection as encapsulated in the United Nations Global Compact for Refugees (UN GCR). The objective of the UN GCR (2018) in relation to complementary pathways is to increase third-country solutions to refugees, create a commitment to increase the availability and predictability of complementary pathways to protection, and provide durable solutions to refugees as well as sustainable and gender-appropriate protection safeguards. The GCR does not, however, define what a complementary pathway is. The report identifies core objectives of complementary



pathways which are used to consider whether the Zimbabwean dispensation is a complementary pathway to protection.

Two themes emerged from the responses of interviewees. Firstly, the rights of persons on the dispensation and secondly, admission and mobility of the dispensation. The greatest criticism was the lack of durable solutions or protection overtones of the Zimbabwean dispensation, leaving Zimbabweans on the dispensation with an uncertain future and no option to naturalise. The lack of durable solutions can be strongly linked to the dispensations depoliticising the situation in Zimbabwe by framing them as temporary economic migrants who do not require durable solutions. While the permit did allow for a person to sustain him- or herself through the right to work, it masked a failure to address the indefinite precarious situation Zimbabweans found themselves in.

The depoliticization and lack of acknowledgement of the crisis in Zimbabwe by the South African government further led to the dispensation ignoring the international protection needs of Zimbabweans and the need to protect against refoulement. The dispensation constructed Zimbabwean migrants and asylum seekers as temporary sojourners in South Africa, indirectly hampering access to the robust protections of the Refugees Act.

Those who wished to transfer or apply for the dispensation were further hampered by the cumbersome eligibility criteria and limited reach, leaving many Zimbabweans undocumented and vulnerable. The dispensation was meant to regularise Zimbabweans in South Africa and relieve the burdens on the asylum system, but it undermined its key aims by creating barriers to mobility and admission to protection.

While the circumstances in which the dispensation arose meant that it inadvertently operated as a pathway to temporary refugee protection, the protection it provided cannot be said to be adequate nor to have met the core objectives of a complementary pathway to refugee protection. A key finding of this research is that the dispensation was a pathway to regularisation and not complementary to refugee protection.

The interviews also uncovered findings that spoke to the reduction of contained mobility and expansion of free movement policies in Southern Africa. Contained mobility is a concept used to describe instruments that, while providing admission to a country (thus mobility), are contained by limiting access to that instrument or qualifying such mobility with restrictive practices or highly selective criteria for admission.



Interviewees mentioned the need for a comprehensive approach to migration and asylum, the expansion of the dispensation program to other Southern African Development Community (SADC) nationalities, and the introduction of a SADC or African Union (AU) visa based on the obligations South Africa has as a member of the SADC and the AU.

While these suggestions were made, interviewees doubted the dispensation being extended to more Zimbabweans or utilised to support the protection of asylum seekers and refugees. The reasons given for this stance were related to South Africa's political context. The interviewees highlighted the following issues: foreign nationals lacking the right to vote (making them less of a priority), the fact they are treated as scapegoats for the government's failures in service delivery, pervasive xenophobia, and high unemployment rates.

While compiling this report, the South African government announced the discontinuation of the Zimbabwean dispensation a month before it is due to expire on 31 December 2021. They further granted a 12-month grace period for Zimbabweans to return home or regularise their stay in the country through the Immigration Act. This critical development is therefore included in the report in the final section on developments, next steps, and further research.

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## Introduction

Pre-colonial African cultures and societies were built upon human mobility, yet most of this migratory history remains unwritten (Klaaren, 2018). With colonialism and thereafter the formation of the Union of South Africa in 1910 came the introduction of borders and migration laws and policies that excluded African immigrants from settlement. African migrants who were allowed entry into South Africa were largely relegated to working in the mines and commercial farming as cheap labour. Apartheid laws continued to influence the history of African migration, allowing settlement only to those who were considered assimilable to white society in South Africa (Ntlama, 2018). With the fall of apartheid, the new constitutional era brought with it a culture of human rights, yet with fears of large-scale migration and hostility towards immigration (xenophobia), the new constitutional South Africa approached migration in a manner that sought to restrict human mobility and ensure national security (Ntlama, 2018).



Migration policies in democratic South Africa focused on critical and skilled labour,<sup>1</sup> ending the over 100-year policy of allowing for low-skilled<sup>2</sup> and cheap labour from neighbouring states. With no new laws in place for low-skilled labour from neighbouring states and restrictive policies that focus on selective critical skills, the progressive Refugees Act, 130 of 1998 came under pressure as migrants and asylum seekers who did not fall within the selective category of critical skills, utilised the Act to regularise their stay in South Africa (Crush and Chikanda, 2014). The South African government has exploited this narrative of “bogus asylum seekers” and as a result, the progressive refugee laws have failed to provide the protection they were intended to even for genuine refugees who were classified as economic migrants (Crush & Chikanda, 2014). This approach to immigration has mostly affected African migrants, which coupled with South Africa’s porous borders, has resulted in most entering South Africa through irregular channels (Thebe & Maombera, 2019).

This brief synopsis of South Africa’s history with migration provides the context to the discussion in this report on the Zimbabwean dispensations, a regularisation program for Zimbabweans in South Africa. Zimbabwean migration into South Africa has a long-standing history stretching back to before the fall of apartheid in the 1990s, where migration was predominantly temporary and circular (Crush, Chikanda & Towawdzera, 2015). However, in or around 2005, as neighbouring Zimbabwe experienced a political and economic crisis, the kind of migration and asylum shifted to that of forced and permanent in nature (Crush et al, 2015). South Africa responded to this crisis in 2010 with a regularisation dispensation in terms of the Immigration Act 13 of 2002.

The 2010 statistics show that 242 731 Zimbabweans were successful in applying for the dispensation and provided with a permit that would allow them to work and study for four years in the country (Carciotto, 2018). Statistics show that 49 255 Zimbabweans forfeited their asylum applications for the dispensation and 13 000 fraudulent documents were

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<sup>1</sup> A critical skill, for the purpose of immigration, can be defined as a skill that is not easily sourced from local South African labour.

<sup>2</sup> Skilled labour is a segment of the workforce with specialized know-how, training, and experience to carry out more complex tasks. Unskilled labour is the conceptual opposite of skilled labour. Unskilled labour is a workforce segment associated with a limited skill set or minimal [economic value](#) for the work performed.



surrendered. When due to expire in 2014, the permit was not extended, but rather a new permit was created for another 4 years, to 2017. This was repeated in 2017, and a new permit was created, which expired in December 2021 (Nyakabawu, 2021). The Government announced in November 2021 that the dispensation would be discontinued. It is estimated that there are around 1.5 million Zimbabweans living in South Africa, many of whom do so irregularly (Carciotto, 2018). The effects of this discontinuation are yet to be seen.

The first part of this interim country report will provide a brief overview of the migratory history of Zimbabweans to South Africa, the reasons for migration, and the treatment of Zimbabwean migrants by the South African government. The report will then determine the extent to which the asylum system in South Africa could respond to the refugee crisis from Zimbabwe. The report further provides insight into the interrelationship between the dispensations and the asylum system in South Africa. The context is used to examine the Zimbabwean dispensation within the complementary pathway framework. The report concludes by looking at further findings from the interviews that speak to the development of complementary pathways to protection in line with the United Nations Global Compact on Refugees (GCR, 2018) in South Africa.

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## Methodology

This country report forms part of the broader work package for the ASILE research project, which is exploring themes of access to protection, rights, and refugee self-reliance in refugee protection around the world. In South Africa, the research team explored these themes in relation to specific laws and policy instruments, which included the Zimbabwean dispensations. More specifically the study attempts to critically understand the dispensations through a complementary pathway to protection framework — a framework intended to facilitate safe and orderly refugee mobility to protection (United Nations Global Compact on Refugees, 2018).

Research for this report included interviews and desktop research. Interviews were conducted with refugee community leaders, civil society actors, and international organisations in South Africa. Twelve interviews were done online over MS teams, Zoom and WhatsApp between April and July 2021. The interviews remain anonymous and confidential, and participants were assigned research codes. Participants were chosen for



their expertise on the South African asylum system. The interviews broadly look at access to protection, rights, and self-reliance of refugees and the relationship between the dispensations and complementary pathways to protection. The interview questions were based on a common questionnaire developed and shared by the work package coordination teams to ensure consistency on themes and issues covered by each country team. For South Africa, the questionnaire was adapted to focus on specific instruments and issues in South Africa.

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### Contextualising migration and asylum from Zimbabwe and the Zimbabwean dispensation program

From the 1920s, the Union of South Africa sought cheap labour from the neighbouring countries on its border, which included Zimbabwe. Cheap labour was actively sought by the state until the ban on this in 1986 (Thebe, 2017). However, many African migrants, mainly from the Southern African Development Community (SADC),<sup>3</sup> continued to enter South Africa through irregular channels (Thebe, 2017). Therefore, from about 1995 to 1997, when South Africa became a constitutional democracy, the government approved three immigration amnesties for non-South Africans living in South Africa (Thebe, 2017). It was estimated that around 25 000 Zimbabweans applied for amnesty with about 20 000 being approved between 1995 and 1997. Despite the government's efforts to grant amnesty to persons who had entered South Africa during apartheid, the government did not address the continuation of migration from SADC states post-apartheid (Thebe, 2017). The focus of the immigration policy post-apartheid was on critical skills, with specific and burdensome procedures to qualify for this visa. The strict application and focus on critical skills left little to no options for skilled workers unable to prove as such and workers looking for low-skilled labour<sup>4</sup> to seek regular admission into South Africa.

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<sup>3</sup> Member States of SADC: Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Tanzania, Seychelles, South Africa, Zambia, Zimbabwe.

<sup>4</sup> The term low skilled labour is use cautiously, and to describe the type of labour and not to describe the person doing the labour as low skilled.





The only exception to the focus on skilled migration was in the agricultural sector (Thebe, 2017). Special dispensations were used to allow farmers to continue to employ Zimbabweans outside the special work permit procedures and corporate permits. The predominant type of migration from Zimbabwe at this point was seasonal and circular. Zimbabweans would enter South Africa during the farming seasons and return to Zimbabwe on completion.

With the increase in migration from Zimbabwe in the early '90s, coinciding with the economic decline of Zimbabwe, South Africa began to see the first of many inflated claims by the government of Zimbabweans “swarming” the country (Thebe, 2017). In 1996, South Africa introduced stricter visa requirements for Zimbabweans, such as the discontinuation of visas on arrival, which is contrasted to the more relaxed visa requirements for other SADC states who benefit from a 30-day visa on arrival. This was done to reduce the number of Zimbabweans crossing into South Africa. The policy reduced legal crossing while pushing migrants and asylum seekers further into irregular channels (Crush et al, 2015).

Between 2000 and 2004 it was estimated that around 300 000 people were victims of human rights violations in Zimbabwe, making politically-motivated reasons for fleeing a major driver for migration and asylum for the first time (Crush et al, 2015). From 2005 onwards, which coincided with the economic collapse of Zimbabwe and political crisis in the country, migration and asylum was characterised as *permanent*, with people seeking to start a new life in South Africa, as opposed to temporary economic relief (Crush et al, 2015).

The reasons for the forced displacement in Zimbabwe were complex and there is no clear delineation of the types of migrants entering South Africa. Despite this, Zimbabwe was deemed the classic example of “mixed migration” by UNHCR and the South African state, a notion which oversimplifies the complexities of protection and forced displacement. The use of this term in refugee law circles is used to express difficulty in differentiating between refugees and economic migrants in one migration stream (Crush et al, 2015; Polzer, 2010). Many scholars and experts have rejected this classification of Zimbabweans and highlighted the complex nature of Zimbabwean migration during this time (Polzer, 2010; Crush et al, 2014). Furthermore, the term in South Africa should be used with caution as Crush and Chikanda (2014) note that it is used by the state as a way of justification for not fulfilling duties to protect refugees and asylum seekers within streams of economic migrants. South Africa’s response to migration from 2005 onwards was one of intensified efforts to arrest and deport undocumented Zimbabweans back to Zimbabwe. In 2007,



around 200 000 Zimbabweans were deported. This was about two-thirds of all deportations for this year. The policy resulted in Zimbabweans dispersing across South Africa or turning to the asylum system to regularise their stay or seek protection (Nyakabawu, 2021).

It was only in 2009 when the South African government realised that the approach of deportation was not working that it decided on a new response. The deportations raised the ire of human rights activists, cost South Africa billions of Rands, had the potential to upset neighbouring countries, and harmed South Africa's image as a human rights country in SADC and Africa. In 2009, a moratorium on deportations was announced and there was abolition of visa requirements for Zimbabweans. South Africa introduced a 90-day visitor's visa for Zimbabweans to enter South Africa. In 2010, to relieve the overburdened asylum system and regularise the stay of Zimbabweans in South Africa, the first of three Zimbabwean Dispensations was announced with the third dispensation expiring in December 2021 (Crush et al, 2015). As stated above, only around 242 731 Zimbabweans were successful in applying for the dispensation when it was estimated that around 1.5 million Zimbabweans were living in South Africa.<sup>5</sup>

The restrictive implementation of the dispensation has left many Zimbabweans undocumented. Furthermore, Zimbabweans have continued to enter South Africa. Martin Murray (2003) noted that South Africa's borders with its neighbours are extremely porous, with little to no deterrence of such flows of migration from Zimbabwe. In an interview with an attorney based near the border, the interviewee confirmed the continued border-crossing of Zimbabwean nationals, despite the closure of the borders due to COVID-19 (SAF6 WP4, 2021). Zimbabweans in South Africa are socially active and physically present but lack legal recognition, existing in a space of nonexistence or liminality.<sup>6</sup> They have limited rights and are vulnerable to precarious situations and exploitative work conditions (Moyo, 2020).

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<sup>5</sup> This statistic is an estimation that was made in 2010, however with no new estimations or statistics as to Zimbabweans living in South Africa, this estimation is still applicable in 2021.

<sup>6</sup> See Shinhirai Nyakabawu (2021) *Liminality in incorporation: regularisation of undocumented Zimbabweans in South Africa*, *Anthropology Southern Africa* for further reading on the concept of liminality.



The situation in Zimbabwe from 2005 onwards could be described as a humanitarian crisis. Crush et al (2015) describe the motivations for migration from Zimbabwe as a situation where there is an existential threat with no domestic remedy (Crush et al, 2015) — a refugee-like situation. Zimbabwe is still facing major economic challenges, worsened by the COVID-19 pandemic, forcing people to flee the country out of desperation. Reports are also beginning to note the increase in political violence (Human Rights Watch, 2020). While this information helps to paint a picture as to why Zimbabweans are leaving, the reliance on irregular entry of Zimbabweans to South Africa, barriers to asylum (discussed below), and a restrictive immigration policy make it hard to pinpoint the exact motivations for migration. What is acknowledged however is that Zimbabweans are entering South Africa, some of whom are and were refugees and others who are and were more broadly understood to be forcibly displaced. This raises the question of whether migrants and asylum seekers from Zimbabwe could fall within the scope of refugee protection in terms of the OAU Refugee Convention and Refugees Act 130 of 1998.

The following section seeks to provide an analysis to the question raised above. Through this analysis, clarity is provided on the extent to which Zimbabwean nationals are refugees or not — providing a segue into the discussion as to whether the dispensation was complementary to protection or regularisation.

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### Was the OAU Refugee Convention and Refugees Act capable of responding to the Zimbabwean crisis?

Section 3(a) of the Refugees Act domesticates the 1951 Refugee Convention definition of a refugee into South African law. Many Zimbabweans who fled due to political persecution would fall within this definition of a refugee. The nuance, however, arises when considering section 3(b) of the Refugees Act.<sup>7</sup> This section domesticates the 1969 OAU convention's

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<sup>7</sup> Refugees Act section 3. Refugee Status

Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or



extended definition of a refugee into South African law and raises the question of whether broader forced migrants from Zimbabwe would qualify for protection in terms of Section 3(b).

Tamara Wood (2019), in her discussion on the relevance of the 1969 OAU Refugee Convention to future contexts, notes that the extended definition of a refugee (which is domesticated into South African law) can respond to current reasons for forced migration. She notes examples of “modern” reasons, such as the effects of weak governance; political instability; inter-communal violence; and natural disaster, which impact the most vulnerable populations and prompt them to seek safety and livelihoods elsewhere. This approach is in line with Crush et al’s (2015) characterisation of the motivations for migration from Zimbabwe — an existential threat with no domestic solutions. Wood (2019) considers that for the extended definition to be used, it would require a flexible and dynamic interpretation to respond to refugee flows. Furthermore, in terms of the Vienna Convention on the law of treaties, treaties must be interpreted in light of the context in which they operate to respond to the violation of human rights.

The situation in Zimbabwe is complex. While many fled due to political persecution, other Zimbabweans, although forced, left Zimbabwe because of the economic crisis that was humanitarian in nature. This crisis resulted in food shortages, record inflation rates, and unemployment. Schreier (2014) has also considered whether widespread violations of socio-economic rights, as opposed to political or civil rights, would fall within the extended definition in terms of the 1969 OAU Refugee Convention or Section 3(b) of the Refugee’s Act. Schreier ultimately finds that at the heart of the matter is the extent to which the South African government is willing to extend Section 3(b) of the Refugees Act to persons in more severe situations than the country’s own nationals.

The South African Refugee Appeal Board (2006) has defined ‘events disrupting public order in terms of the Refugees Act, and thus the OAU Refugee Convention, as a scenario where law and order have broken down and the government is unwilling or unable to protect its citizens. It appears important that there is a loss of control of a government that threatens the civilian

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- (b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or
  - (c) is a spouse or dependant of a person contemplated in paragraph (a) or (b).



population. While this definition is quite broad, there is doubt as to whether Zimbabweans generally could qualify for refugee status in terms of 3(b). It is, however, the opinion of the author that section 3(b) and the 1969 OAU Convention should be interpreted (in light of current contexts) to extend to modern forms of migration and asylum mobility.

If the South African government was willing to adopt such an interpretation of section 3(b) and section 35 of the Refugees Act, which allows the Minister to declare a group or category of persons as refugees, a solution could have been reached through refugee law. The UNHCR was also slow to account for the refugee situation in Zimbabwe and maintained that most migrants were not refugees and thus did not warrant a group application for refugee status in terms of the extended definition found in the OAU Refugee Convention (Polzer, 2010). It was only in 2008 that the UNHCR acknowledged the situation in Zimbabwe as a “serious disturbance of the public order,” yet no public pressure was placed on South Africa to scale up its response (Polzer 2010). This situation echoes sentiments held by the refugee community leaders and civil society organisations who felt that UNHCR does not do enough to advocate on behalf of refugees in South Africa (SAF1 WP4; SAF2 WP4; SAF4 WP4; SAF5 WP4; SAF11 WP4; SAF12 WP4). Most of the interviewees noted UNHCR’s compromised position in taking a stance against the government because it is in the country by invitation,<sup>8</sup> making its role diplomatic. In response to the crisis in Zimbabwe, UNHCR could have been more vocal in ensuring that South Africa meets its international and domestic obligations to protect Zimbabwean refugees.

South Africa missed its opportunity to develop the operation of the extended definition of refugee law in South Africa. Instead, the country hesitantly relied on the Immigration Act to document the many Zimbabweans living in South Africa. In the opinion of the author, this exposed its intentions: control and migration management as opposed to human rights and protection encapsulated in the Refugees Act. Furthermore, the response in terms of the Immigration Act was slow and restrictive, which placed an immense burden on the asylum system where individuals continued to exercise their right to apply for asylum.

While the political will was not present for the protection of Zimbabweans in terms of the Refugees Act, the extended definition could have responded to the humanitarian crisis.

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<sup>8</sup> As stated in the agreement between the government of the republic of South Africa and the United Nations High Commissioner for Refugees (UNHCR) governing the legal status, privileges and immunities of the UNHCR office and its personnel in South Africa. - <https://www.refworld.org/pdfid/3ee726024.pdf>



Despite the lack of utilisation of the Refugees Act, the slow response to the crisis in Zimbabwe and dispensations had an immense impact on the asylum system in South Africa. The following section looks at these interrelationships, highlighting problems that arose.

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### The interrelationship between the Zimbabwean crisis, the dispensation, and the asylum system in South Africa

While the South African government was not willing to utilise a group application of Section 3(b), the asylum system in South Africa was still affected by the large-scale and complex forced migration from Zimbabwe. Among the forced migrants, some qualified for refugee status in the narrow understanding, however others, who did not necessarily qualify for refugee status, with no other options to regularise their stay, turned to the asylum system and exercised their right to apply for asylum. The introduction of the Zimbabwean dispensation in terms of the Immigration Act did bring some relief but at the same time had an unintended consequence that undermined the protection of Zimbabwean refugees.

#### Zimbabwean crisis and effects on South Africa's asylum system

The asylum system in South Africa is given effect to through the Refugees Act 130 of 1998 and is implemented by the Department of Home Affairs.<sup>9</sup> For purposes of the following discussion, there are a few aspects of the Refugees Act that must be highlighted. First and foremost, every foreign national present in South Africa has the right to apply for asylum. Once an application for asylum is made, the individual, and family members, are provided with a temporary asylum seeker visa, on which they remain pending the finalisation of their application (a process that can take up to 10 years). The visa is renewed every six months and generally allows for the right to work and study.<sup>10</sup> If granted refugee status, they received a refugee status document that is renewed every four years. If the individual remains on this document for 10 years, they can apply for permanent residence.

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<sup>9</sup> See ASILE Country Fiche for detailed information of the asylum system in South Africa

<sup>10</sup> The Refugees Amendment Act introduced a limitation on the right to work for asylum seekers. See South African country fiche for explanation.



Before the introduction of the Zimbabwean dispensations, as suggested above, the crisis in Zimbabwe led to a large number of applications for asylum in South Africa. Many interviewees confirmed the fact that the asylum system was used by Zimbabweans to regularise their stay. In 2004, there were 6000 asylum applications made by Zimbabweans (Crush et al, 2015). From 2008 to 2011, there was a dramatic increase in asylum applications, and South Africa received the highest number of individual asylum applications in the world, peaking at 223 324 in 2009, the majority of which were by Zimbabweans (Department of Home Affairs, 2016). In 2016, the Department of Home Affairs Asylum Metrix showed 561 240 inactive<sup>11</sup> asylum applications by Zimbabweans, signifying the extent of applications being made since the crisis in Zimbabwe (Department of Home Affairs, 2016).

The large number of asylum claims, spurred on by the crisis in Zimbabwe, led to long delays in the system due to backlogs. The backlogs have enabled persons without claims to live and work in South Africa for extended periods while waiting for their claims to be adjudicated. Some scholars believe there has been a tactical use of the system by economic migrants to legitimise and extend their stay in South Africa (Crush et al, 2015). With the asylum seeker permit conferring the right to reside and work, it is an appealing — and often the only — document to regularise the stay of a low skilled migrant who may not meet the definition of a refugee. In the interviews, this trend was highlighted, creating the impression that the asylum permit has become synonymous with a work permit for migrants in South Africa (SAF13 WP4; SAF6 WP4; SAF11 WP4).

The debates on economic migrants' abuse of the asylum system were raised in each interview, with participants providing differing views. Despite the wide uptake of this narrative by South Africa, the complexity of the situation must be understood. Firstly, there is no reliable data to indicate the extent of the problem,<sup>12</sup> which is perpetuated by poor RSDO decisions that skew the rejection rates (98%) — a statistic used to justify the narrative. Furthermore, the interviewees highlighted further complexities that look at the

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<sup>11</sup> Inactive asylum applications are applications made for asylum, but have not been renewed by the permit holder. However, because the Department of Home Affairs does not know why the file is inactive, it is not closed.

<sup>12</sup> The most recent statistics posted by DHA were in 2016.



reasons (discussed below) as to why the system could be abused and the correlated effect of this abuse on refugees seeking protection.

Some interviewees remarked that the asylum system is being used by migrants from non-refugee producing countries (SAF13 WP4; SAF4 WP4; SAF11 WP4), while others noted the abuse but highlighted the lack of options for these low-skilled migrants to obtain work permits (SAF6 WP4; SAF3 WP4; SAF13 WP4). The lack of options made most interviewees appear sympathetic towards the “economic” migrants using the refugee system to regularise their stay. SAF3 WP4, while showing understanding that the asylum system is overburdened by economic migrants, spoke about the vulnerable situation people have been left in because they are unable to access adequate documentation. SAF11 WP4 (2021) felt it was unfair that economic migrants and refugees were lumped into the same box. A key theme taken from interviewees was that the restrictive immigration policies, however, have left many without any choice but to turn to the liberal provisions of the Refugees Act to ensure safety.<sup>13</sup> Some blamed the government for this situation: they were slow to respond to migration that is happening in South Africa and lack the policy to deal with the different types of migration and asylum.

The interviewees, while acknowledging the use of the system by non-refugees, still felt that refugees were applying for asylum and incorrectly being rejected (SAF1 WP4; SAF2-WP4; SAF3 WP4; SAF4 WP4; SAF5 WP4; SAF6 WP4; SAF13 WP4). The effect of the claim that the asylum permit is being used as a work permit has been detrimental to genuine asylum seekers, who need protection (SAF6 WP4,2021). Scholars such as Crush and Chikanda (2014), when speaking about the South African government abusing the narrative of bogus asylum claims, are likely speaking about the situation described by interviewees: while economic migrants may be using the system, the inflated claims of these applications are used to justify the rejection of refugees and limit international obligations. An interviewee, who is an attorney working for a civil society organisation, confirmed this situation by stating the extent of judicial reviews against the Department of Home Affairs to reject asylum seekers (SAF2 WP4). Two interviewees from NGO legal organisations assisting refugees further confirmed this finding by commenting on the extent of refugees they assist who have been rejected by the Department of Home Affairs. (SAF1 WP4; SAF4 WP4).





In South Africa, NGOs who provide legal assistance are trained to do RSD interviews before such assistance is rendered. The relevance of what the interviewees said is that they have first-hand confirmation that persons, as determined by them to be refugees, are being rejected as refugees by the state, showing the complexity of the narrative of economic migrants.

One interviewee (SAF13 WP4) and the South African government believe that the majority of migrants and asylum seekers applying for asylum are economic migrants, justifying this belief on the high rejection rate of asylum seekers in South Africa (estimated to be at 98%). As shown above, this interviewee was in the minority with this opinion.

In addition to the theme of the use of the narrative by the South African government, interviewees further felt that there were nefarious reasons that were leading to the rejection of refugees, suggestions of direct orders to reject and purposely under-resourcing asylum management (SAF5 WP4; SAF2 WP4; SAF4 WP4; SAF5 WP4), poor decision making (SAF1 WP4; SAF2 WP4; SAF3 WP4; SAF4 WP4; SAF7 WP4; SAF12 WP4), restrictive practices to limit access to asylum and incentives to reject were some of the issues mentioned in the interviews. SAF1 WP4 and SAF4 WP4 further noted the institutionalised xenophobia within the Department of Home Affairs.

Linking this back to the situation with Zimbabwean migrants, these exact sentiments are echoed in the literature. Amit and Kriger (2014) blame the increase in applications for asylum on the South African government due to its failure to appreciate the nature of the migration: people were being driven out of Zimbabwe because of the crisis. This failure meant that the South African government did not initiate an adequate response. South Africa was partly reluctant to acknowledge the situation in Zimbabwe because of the political repercussions of doing so. South Africa was involved in the mediation of the political crisis in Zimbabwe – thus it wanted to complement and not undermine its role in reconciliation in Zimbabwe (Polzer 2010).

Instead of acknowledging the dire political and economic situation in Zimbabwe, the response of the Department of Home Affairs (DHA) was to reject the majority of Zimbabwean applications for refugee status. Around 44 000 asylum applications by Zimbabweans were filed by the end of 2007, with only 1000 Zimbabweans being granted refugee status (Nyakabawu, 2021). Around 98% of Zimbabweans were rejected. The DHA “whitelisted” Zimbabwe, implying that it was a safe and non-refugee producing country.



SAF2 WP4 (2021) felt that Zimbabweans were treated differently compared to other nationalities by the Department of Home Affairs who view them as economic migrants. The South African government effectively adopted a narrative that allowed it to ignore its protection obligations. The high number of rejections, with rights to appeal and review, resulted in a top-heavy system with long backlogs at the appeal and review stages. The Department of Home Affairs also used restrictive tactics, like requiring the possession of the asylum transit visa—a visa that was not being issued at the time—to deny Zimbabweans from applying for asylum (Crush et al, 2015). Refugee scholars believe that recognising Zimbabweans would amount to a recognition that Zimbabweans are legitimate refugees, a stance South Africa did not want to take (Crush et al, 2015).

SAF6 WP4 (2021) believes that the dispensation needs to be expanded to more Zimbabweans to prevent the inappropriate use of the asylum system. He noted that the permit allows Zimbabweans to return home and visit family, a feature that the asylum visa does not allow. While not all interviewees believed that the asylum system (through a group application of the extended refugee definition) was the solution (SAF6 WP4; SAF13 WP4, 2021), all agreed that the inaction by the government resulted in an overburdened asylum system. The large number of applications by Zimbabweans has contributed to the asylum system backlogs that have placed the system under immense pressure. As noted by Amit and Kriger (2014), the system already had flaws that were only exacerbated by the crisis. Interviewee SAF1 WP4 (2021) remarked that South Africa lacks the political will to improve the system, which for decades has been in crisis, noting that this is the bread and butter of the work of legal organisations that assist refugees in South Africa. With the current backlogs, family unity applications take years, asylum seekers can wait up to two years to make an application for asylum, and people can wait up to 10 years for a final decision as to their status. All the interview participants noted these problems in the asylum system, which has left people vulnerable and lacking proper documentation, as they are unable to access adequate protection.

### **The relationship between the dispensations and the asylum system**

With the growing pressures on the asylum system and advocacy by human rights activists, South Africa finally introduced the Zimbabwean dispensation in 2010. An interviewee suggested when asked about the slow response of the government, that the reason for the dispensation not being implemented at the beginning of the crisis was because the introduction of dispensation would have ‘political connotations to the voting bank.’ For



the government to use “extraordinary powers” to assist foreigners, would create the impression of treating foreigners better than its citizens, a major component of xenophobia (SAF13 WP4, 2021).

The first dispensation was finally approved and launched in 2010 in terms of Section 31(2)(b) of the Immigration Act 13 of 2002. Following the first dispensation, two more dispensations were approved, with the last dispensation now expired and not extended at the end of 2021. SAF1 WP4 suggested that the dispensation let Zimbabwe off the hook, as South Africa did not have to acknowledge the refugee crisis in Zimbabwe (2021). At the time when the project was launched, there were approximately 1.5 million undocumented Zimbabweans living in South Africa (Carciotto, 2018). This indicates that many Zimbabweans did not apply.

Despite the approval of another dispensation after four years, the dispensations were only available to Zimbabweans who were granted a permit on the original dispensation in 2010. In addition to this, a condition of each dispensation was that persons would not qualify for permanent residence despite their long and continued stay in South Africa, restricting their access to social assistance, unemployment insurance, housing, or grants. Carciotto (2018) believes that this “close and replace” policy was to prevent claims for permanent residence. SAF4 (2021) believed that fact that Zimbabwean dispensation holders do not have a right to apply for permanent residence was a political decision and not an oversight.

In addition, Zimbabweans who came to seek asylum in South Africa felt compelled to transfer onto the Zimbabwean dispensation as the permits issued were valid for four years as opposed to the asylum seeker permit that was valid for only three to six months at a time (Khan, 2014).

The dispensation had the potential to create issues concerning non-refoulement in terms of international refugee and human rights instruments, the OAU Refugee Convention and the Refugees Act 130 of 1998, as it did not provide a safety net for refugees within the system if the dispensation were to be discontinued. A second concerning aspect was that Zimbabweans were not informed that if they were to apply for the dispensation they would have to reapply for asylum. Interviewee SAF2 WP4 (2021) mentioned that Zimbabweans were misinformed and uninformed about the dispensation and ended up abandoning their claims for refugee status. Asylum seekers that remained on their permits remained entitled to the full protection afforded by the Refugees Act, including rights to non-refoulement



and durable solutions if recognised as refugees. Not only does the dispensation have the potential to circumvent the rights and entitlements of asylum seekers in South Africa, but it also has the effect of relabelling refugees to ordinary migrant status (Khan, 2014). The effect of this issue is likely to play out in the coming years with the discontinuation of the dispensation.

The critical analysis of the relationship between the Zimbabwean crisis, dispensation, and asylum system provides a basis in which to discuss whether the dispensation can be considered a complementary pathway to protection. The following sections will begin with a brief discussion on the literature on complementary pathways, which will underpin the findings from the interviews.

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### Complementary Pathway Framework

The literature on complementary pathways to protection for refugees overwhelmingly reveals an approach developed and applied in the Global North, where countries have impermeable borders or policies that externalise the borders. The language of the Global Compact on Refugees (GCR) as “complementary pathways to resettlement” already places the discussion within a specific context, as most African countries, including South Africa, do not offer resettlement and require the presence of the individual in the country to seek protection. While this should be kept in mind in the following discussion, it also indicates a need to develop literature that speaks to complementary pathways to protection within the African context. The objective of the GCR (2018) in relation to complementary pathways is to increase third-country solutions to refugees, create a commitment to increase the availability and predictability of complementary pathways to protection, and provide durable solutions to refugees as well as sustainable and gender-appropriate protection safeguards. The GCR does not, however, define what a complementary pathway is. Wood (2020) notes that the lack of a clear definition and vast degree of differentiation between programs makes complementary pathways hard to identify. Complementary pathways can range from family reunification, private or community sponsorship programs, humanitarian admissions programs, and education and labour mobility opportunities (GCR, 2018).



The UNHCR defines complementary pathways as safe and regulated avenues that complement resettlement which allow for refugees to be admitted into a country and have their international protection needs met. Even with this definition, there is still no clear understanding of what exactly a complementary pathway is. They vary significantly in eligibility criteria, with some being “needs-based” and others “qualification-based” (Wood, 2020).

Although there is a lack of clarity on the definition of complementary pathways, Wood (2020) identifies core objectives of complementary pathways and reminds us that there is a critical need to better understand their role in refugee protection. These objectives bring the discussion back to basics and provide a framework to consider how states can develop and expand on complementary pathways in a way that ensures that they promote, and not undermine, the overarching objectives of international refugee protection.

The core objectives identified by Wood (2020) include, first and foremost, that a complementary pathway to protection should meet the international protection needs of people who are at risk. It should aim to provide safe and lawful pathways to protection to persons who otherwise might be vulnerable to smuggling, exploitation, or dangerous travel routes. Along with the need to be refugee-sensitive, it should also provide independent access for refugees. A refugee-sensitive approach looks at mobility and other considerations that account for the situation of a refugee. For instance, not accounting for the fact that refugees may not have certain documents required for admission to such a pathway. Other objectives include the need for a complementary pathway to provide durable solutions for refugees, the ability for them to achieve self-reliance, and promote responsibility sharing amongst states. The complementary pathways should maintain a principle of additionality to the core protection instruments, have clear eligibility criteria, which includes protection needs, preserve the principle of asylum, uphold the principle of non-refoulement and lastly provide for opportunities for the program to increase in size and reach a broader portion of society.

In the interviews, participants aligned with four core objectives, which will briefly be expanded upon in this section. The four objectives were durable solutions, accessibility, additionality, complementarity to asylum and distinction between migration management policies and refugee protection. A pathway to a durable solution requires that it is both sustainable and a lasting solution (Wood, 2020). The temporary status must come to an end and provide for some form of permanency. Wood (2020) argues that we must be



aware that temporary complementary pathways can be used to mask failures to address the persistent precariousness of forcibly displaced persons. The principle of additionality on the other hand requires that the pathway be “additional” to protection, and increase solutions as opposed to limit. In Woods’ (2020) analysis, she speaks about the additionality to resettlement, which was adapted in this report to be applicable in South Africa, a country without resettlement. The principle of additionality requires that the complementary pathway should not undermine protection. Additionality is closely linked to the preservation of asylum rights, most importantly the protection from refoulement (Wood, 2020). This requires a mechanism that protects refugees from being returned to a country of origin or blocked from accessing the asylum system. The last objective that must be highlighted is scalability and accessibility. Wood (2020) notes the disparity of many complementary pathways between the supply and demand and accessibility barriers created by language and documentation. It is important that a program is not only able to eliminate barriers but also that it is able to extend its reach to the intended beneficiaries for it to be a meaningful contribution towards the protection of refugees.

The core objectives provide a framework with which to analyse the Zimbabwean dispensation as a complementary pathway to protection while considering access to protection, rights, and vulnerability.

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### Did the Zimbabwean Dispensations provide a complementary pathway to protection?

The South African government saw the dispensation as a humanitarian act, a helping hand to a neighbouring country; however, it was not willing to describe the dispensation within the protection framework. The dispensation at first glance, from both context and language, appears to fall within the complementary pathway framework as a “humanitarian visa/corridor,” thus seemingly acting as a complementary pathway. However, one interviewee rejected the classification of the dispensation as a complementary pathway to protection, stating that it was a complementary pathway to the *regularisation* of Zimbabweans in South Africa (SAF2 WP4). The interviewee highlighted the fact that the asylum system had come under pressure because it became the unofficial way for regularisation of stay: “they needed to regularise movement that was not going to stop... the government needed to manage Zimbabweans.”



The response of the interviewee reveals a tension: does the dispensation qualify as a complementary pathway to protection (possibly a humanitarian corridor) or was the dispensation simply a pathway to get out of irregular status? The core objectives and the interviewee's responses are used to guide this analysis. The analysis will be divided into key components, firstly looking at the rights of persons on the dispensation, e.g., residence and work, and secondly, elements of admission and mobility of the dispensation.

In the interviews, when asked about the dispensation and its relationship to complementary pathways, the greatest criticism was the lack of durable solutions or protection overtones (SAF13 WP4; SAF7 WP4; SAF6; SAF4 WP4; SAF2 WP4; SAF1 WP4; SAF4 WP4), leaving Zimbabweans on the dispensation with an uncertain future and no option to naturalise. This relates to the core objective of providing a durable solution. Moyo (2019) argues that the humanitarian logic hid the draconian intentions of the management of unwanted migrants by placing conditions on the permit that exclude the renewal and applications for permanent residence. Without durable solutions for persons on the dispensations, it provided them with a patchwork of rights and belonging. Carciotto (2020) argues there is a moral argument to be made for Zimbabweans in that, regardless of a person's immigration status, a migrant that has spent numerous years in a society should be included in a state. The lack of durable solutions can be strongly linked to the dispensation depoliticising the situation in Zimbabwe by framing them as temporary economic migrants who do not require durable solutions. While the permit did allow for a person to sustain him- or herself through the right to work, it masked a failure to address the indefinite precarious situation in which Zimbabweans found themselves. With the dispensation coming to an end, Zimbabweans who have lived and worked in South Africa, and built lives in the country for over 10 years, will have little option but to leave or turn to the asylum system once again to regularise their stay.

The depoliticization and lack of acknowledgement of the crisis in Zimbabwe by the South African government further led to the dispensation ignoring the international protection needs of Zimbabweans and the need to protect against refoulement. SAF1 WP4 stated that the permit depoliticised the real reason people were fleeing, letting Zimbabwe and South Africa off the hook. The dispensation constructed Zimbabwean migrants as temporary sojourners in South Africa. If the dispensation is withdrawn, the dispensation holders, some of whom may still qualify for refugee status, would not benefit from the protections afforded in terms of the Refugees Act.



The division of the refugee law and immigration law into two separate processes risks solidifying a distinction between the categories of ‘refugee’ and ‘migrant’ that has important consequences for refugee mobility and rights. An interviewee noted that the method of separating economic migrants from refugees has contributed to the crisis and the failure of the Department of Home Affairs to meet its mandate to protect refugees (SAF1 WP4). The relabelling of refugees as ordinary migrants also speaks to the core objective of additionality when devising a complementary pathway. The additionality objective provides that the pathway must complement or supplement the refugee system, and not hamper access to the recognition. By framing the dispensation as a solution to the economic migrants flooding the asylum system, it cannot be said to be additional.

Ignoring the principle of additionality and adopting cumbersome eligibility criteria, the government left many Zimbabweans undocumented and vulnerable. The dispensation was meant to regularise Zimbabweans in South Africa and relieve the burdens on the asylum system, but it undermined its key aims by creating barriers to mobility and admission (Moyo, 2019). To apply for this dispensation, a person was required to submit a valid passport, evidence of employment or self-employment or admission to a learning institution. Thebe (2017) notes that the process was complex, haphazard and characterised by long queues and processing times. Needing to show “formal” employment was likely the biggest barrier to the dispensation. Additionally, the applications for the dispensation were only open from 2010 to 2011, which was not enough time to reach the million Zimbabweans in South Africa – its reach was thus minimal and exclusionary, another objective noted by Wood (2020).

Amit and Kriger (2014) note the incongruencies in the approach to the dispensation. It was sold as a regularisation program for the largest migrant population in South Africa; however, in implementation, the barriers sought to exclude large groups of Zimbabweans through eligibility criteria: “These cross-purposes reflect the conflicting views toward documentation: on the one hand, as a mechanism of control, and on the other, as a device conferring benefits that the state would prefer not to provide.” Costello (2019) reminds us how migration control practices suppress refugee mobility and bear down particularly heavily on refugees and would-be refugees.

The interviews and literature reveal that the pathway did not provide durable solutions, accessibility or additionality making it both an exclusive and exclusionary mobility pathway. Despite this, the circumstances in which the dispensation arose meant that it inadvertently





operated as a pathway to protection. Refugees applied for the permit and gave up their claims for asylum, but this does not mean that the protection was either adequate or complementary to the asylum system in South Africa. It thus cannot be said to meet the standards of a complementary pathway to refugee protection in South Africa. Rather, it met the bare minimum for protection—that is, regularisation.

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### Further findings on the Zimbabwean dispensation based on the interviews.

What is clear from the above is that the dispensation failed in many aspects as a complementary pathway, ultimately discouraging refugee access to protection and diminishing refugee self-reliance and access to rights. The interviews also revealed further findings that spoke to the reduction of contained mobility,<sup>14</sup> promotion of refugee self-reliance and access to rights.

Overall, the interviewees revealed the need for a comprehensive approach to migration. What that might look like differed amongst participants. SAF1 WP4 (2021) argued that whatever the approach, it should avoid the strict delineation between economic migrants and refugees. The suggestion appears to link to two issues raised above. Firstly, if the dispensation was not classified as purely a solution to temporary economic migrants, it would have been able to integrate a protection mechanism for the complex nature of the migration and asylum streams from Zimbabwe. Secondly, abandoning strict categorisation as “either-or” (i.e., economic or refugee) within the asylum system may assist in understanding the complexities of migration and asylum streams.

Other suggestions by interviewees leaned towards a more pragmatic response, calling for the government to make a realistic choice that provides a way to manage people while acknowledging the movement of people (SAF2 WP4, 2021). SAF3 WP4 (2021) mentioned the need for there to be an increase in work permits in South Africa, like the Zimbabwean

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<sup>14</sup> See: Sergio Carrera & Roberto Continovis (2019) ‘The EU’s Role in Implementing the UN Global Compact on Refugees, Contained Mobility vs. International Protection. The authors make reference to this concept of contained mobility. These are migration and asylum pathways which have elements of both containment and mobility. Containment elements would be principles and practices that include safe third country rules, border surveillance or interception – policy and practices that prevent a person from accessing a pathway. The mobility element would be access to a pathway, but the mobility itself is highly selective or restrictive and thus contained.



dispensation. A suggestion made was for the introduction of a SADC visa (SAF1 WP4; SAF6 WP4). South Africa as a member of SADC has a duty to promote economic and social integration<sup>15</sup> and encourage free movement of labour, goods, services, and people.<sup>16</sup> An improved response should be motivated by South Africa's responsibility as a member of the SADC. SADC has proposed the Protocol on Free Movement of Persons, which would allow for the free movement of persons to work within the region under the protection of SADC. The proposal was strongly opposed by South Africa. The African Union has also proposed the Free Movement Protocol. South Africa has signed the protocol but is subject to very restrictive reservations—for example, the rejection of the African Union Passport and the retention of member states to control admissibility into the state.<sup>17</sup> In essence, South Africa wishes to retain control of its borders, ironically while it is not in control of them.

Despite the 2017 *White Paper on International Migration for South Africa* noting the need to use the dispensations for other SADC nationals, only one other country, Lesotho, has benefitted from the dispensation. Lesotho is a landlocked country within South Africa. The dispensation was introduced to regularise the stay of the Lesotho nationals who were living in South Africa irregularly because of the socio-economic problems in Lesotho.<sup>18</sup>

Interviewees, in their answers also saw the need for the utilisation of the dispensations to relieve the pressures on the asylum system. One participant noted the need for a more efficient and quicker way to identify individuals in need of protection and divert those who are not refugees away from the asylum system (SAF6 WP4). While the authors agree the dispensation should be extended, or a new dispensation be created, the dispensation should meet the objective of additionality, as proposed by Wood (2020). The complementary pathway should be careful not to relabel migrants as purely economic

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<sup>15</sup> See: SADC Treaty; SADC Regional Indicative Strategic Development Plan; SADC Protocol on Trade, 1996; SADC Protocol on Finance and Investment 2006

<sup>16</sup> See: SADC treaty; SADC Protocol on Facilitation of Movement of Persons, 2005)

<sup>17</sup> See: Department of Home Affairs (2017) “ South African Position on the Implementation of the African Union (AU) Agenda 2063 as it relates to migration, regional integration and Africa Passport.

<sup>18</sup> Further information can be found at: <http://www.dha.gov.za/index.php/immigration-services/lesotho-exemption-permit-lep>



migrants. This rhetoric will undermine rather than support persons who are seeking protection.

As noted above, the biggest critique of the dispensation as a complementary pathway is its lack of durable solutions. The implication of this is that dispensations would benefit from more permanent solutions, especially in situations where the beneficiaries of the permit are from a country facing a protracted humanitarian crisis. This could be solved by allowing for durable solutions, such as naturalisation after a 5- to 10-year period.

SAF5 WP4 (2021) felt that a broader more general amnesty needs to provide more people with documentation and decrease obstacles to documentation. This reflects the core goal to “scale up.” The interviews reveal that the Zimbabwean dispensations could be reopened and include less cumbersome eligibility criteria. The dispensation should have a goal of regularisation, which should justify having an extended reach. Part of the Department of Home Affairs’ mandate is to know who is within the country, a mandate it is currently failing to meet. There should also be the inclusion of the needs of women and children, considering the feminization of migration. The rights of children should guide the laws on birth registration and the crossing of borders with children so as to avoid irregular routes.

Further, interviewees, while seeing the need for the dispensations, believed that the documenting of irregular foreign nationals in South Africa is unlikely to happen (SAF4 WP4; SAF7 WP4). Interviewees doubted the dispensation being extended to more Zimbabweans or other nationals to assist the asylum system. The reasons given for this stance were related to South Africa’s political context. The interviewees highlighted the following issues: foreign nationals lack the right to vote (making them less of a priority), they are treated as scapegoats for the government’s failures in service delivery, pervasive xenophobia, and high unemployment rates. Specifically, SAF WP43 (2021) felt that it was popular amongst politicians to be xenophobic. A consensus amongst interviewees was that the government may never implement policies that allow for African mobility. SAF7 WP4 suggested that South Africa is not interested in documenting foreign nationals as it would legalise their stay.

A suggestion to counter this complex environment was to incentivise the government to formalise the stay of foreigners in order to increase the tax base within the country (SAF3 WP4). The finding from the interviewees, however, is that South Africa may need to resolve many more institutional issues before an environment can exist that is conducive to



complementary pathways being implemented. This context is further supported by the discontinuation of the dispensation (discussed below). Yet, it is important to remember that the government introduced the dispensation programme because the practical reality dictated such, outweighing the political context at the time. This suggests that the political context is not fixed and is subject to developments which may appear unrealistic.

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## Conclusion

Human mobility on the African continent is not a new concept. In particular, SADC country nationals migrating to South Africa for work is not a new phenomenon, nor are refugees entering South Africa for protection. However, in this decade, the nature of migration is shifting as the reasons for migration, asylum and refugee mobility expand and overlap. The report contextualises migration and asylum from Zimbabwe and asks whether refugee law instruments could respond to the crisis. The report finds that the asylum system in South Africa, which has adopted the extended definition of a refugee in terms of the OAU refugee convention, was humanitarian enough in nature to respond to the Zimbabwean crisis; however, it would have taken the political will of the South African government to utilise such a pathway. Furthermore, the report explores the relationship between the Zimbabwean crisis, dispensation, and asylum system, to lay the basis for the discussion on the extent to which the Dispensation Programme may or may not qualify as a Complementary Pathway as enshrined in the UN GCR.

With the contextual nature of the situation in mind, the analysis of the Zimbabwean dispensation within a complementary pathway framework revealed that the dispensation had many flaws in its implementation and did not adequately meet the core objectives of a complementary pathway. The dispensation was both exclusive and exclusionary and did not promote access to adequate protection. The consequence of this was overwhelmingly felt by the asylum system. The effect is the diminished access to protection, access to rights, and an increased vulnerability of persons in need of protection. The interviewees further provide input which reflects the core objectives outlined by Wood (2020). The interviewees provided a reflection on South Africa's state of asylum, with actors feeling overwhelmed by problems faced by forced migrants in South Africa. Ultimately, South Africa requires a political shift and re-energization before the complexities of migration in the country can be addressed.



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### Recent developments, next steps, and further research.

In late November 2021, Cabinet announced the discontinuation of the Zimbabwean Exemption Permit, which ended on the 31<sup>st</sup> of December 2021. Cabinet further granted a 12-month grace period after the expiry of the permit to provide persons with the opportunity to legalise their stay in terms of the Immigration Act (Department of Home Affairs, 2021). It is estimated that around 180 000 Zimbabwean nationals have the current dispensation permit (Yeats & York, 2021).

In media briefings, no explanation was given as to the decision to discontinue the permit nor has the cabinet responded to questions as to the effects of such discontinuation. Commentators have, however, drawn attention to the fact that the decision was likely linked to the governing party's poor performance in local elections on the 1<sup>st</sup> November 2021. ActionSA, a newly formed party, won 16% of the vote in Johannesburg in their first election. The party's campaign was focused on, amongst other things, stricter control on immigration and deportation of undocumented migrants (Squazzin, 2021).

In a statement by the Minister of Home Affairs in 2019, the Minister stated that the permits will and must be renewed if the reasons that led to the permits are yet to be resolved (Washinyira, 2021). This interim report shows that many Zimbabweans have and continue to be driven out of their country due to political persecution and economic collapse. Sharon Ekambaram from Lawyers for Human Rights, while speaking to Groundup, highlighted the inhumaneness of the decision to discontinue the permit and further the possible humanitarian disaster that could follow (Squazzin, 2021).

Reports on the consequences of this decision are already being reported in the news. While the Department of Home Affairs has clarified that Zimbabweans on the dispensation will be allowed to work during the grace period (Yeats & York, 2021), the Daily Maverick has reported that banks are refusing to grant loans, cancelling pre-approved bond applications, and employers are not renewing contracts because of the uncertain status of the permit holders (Washinyira, 2021). Persons who have been on these permits for over 10 years, living and working in South Africa, have had their lives turned upside down on one month's notice. With few options for regularisation in terms of the Immigration Act, it is once again unclear whether Zimbabweans on the dispensation will turn to the asylum system, and if they do, what the response of the government will be.



This development has changed the focus of the second phase of research for the ASILE WP4 South Africa. The second phase of the research will focus on issues associated with the discontinuation of a long-standing pathway to regularisation considering the complementary pathway framework. The discontinuation of the dispensation will further have implications on access to protection, vulnerability, and self-reliance, which will also be explored. In the second phase, we hope to speak to Zimbabweans on/previous on the dispensation, asylum, and refugee permits; international organisations; and government actors from the Department of Home Affairs, Department of International Relations, and the Department of Labour. We also plan to do follow-up interviews with certain participants considering the findings of this interim report and recent developments.

The research for this phase presented areas for further research. The first area identified would be the need for a large-scale study on the driving forces of migrations from Zimbabwe to South Africa in order to produce statistical data on Zimbabweans in South Africa. Secondly, the report identified the need for more research on complementary pathways in the context of Africa. Lastly, further research could explore the reasons for the discontinuation of the dispensation and the effects thereof.



## ANEXURE

### Interviews

Research code	Date of interview	Platform
SAF 1 wp4	22 April 2021	Ms teams
SAF 2 wp4	15 April 2021	Ms teams
SAF 3 wp4	9 July 2021	Ms teams
SAF 4 wp4	16 April 2021	Ms teams
SAF 5 wp4	15 July 2021	Ms teams
SAF 6 wp4	28 April 2021	Ms teams
SAF 7 wp4	14 April 2021	Ms teams
SAF10 wp4	15 April 2021	Zoom
SAF 11 wp4	9 July 2021	Ms teams
SAF 12 wp4	11 June 2021	WhatsApp
SAF 13 wp4	23 July 2021	Ms teams

### Research data plan

The South African Research team complied with the research data plan. The team used email to reach out to participants after identifying. The interviews were conducted online, via MS TEAMS, ZOOM or WHATSAPP CALLING. Where permission was given the interviews were recorded. Handwritten notes were also taken. In cases where permission was not given the researcher took typed notes during the interview. The recording and notes are stored on the office computer of the researcher at the Refugee Rights Unit, University of Cape Town. They are saved on the Units secure drive, which can only be accessed by the researchers involved in the ASILE project who are at the Unit. Furthermore, the computers are password protected. The interview notes and recordings were shared with the researchers at CEPS on google drive. This drive is not a personal drive, but a drive provided by the University of Cape Town and is password protected. Only the researchers specifically involved in the interviews know who the participants are in the study.



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