NEW ISSUES IN REFUGEE RESEARCH

Research Paper No. 175

National and international responses to the Zimbabwean exodus: implications for the refugee protection regime

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July 2009

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ISSN 1020-7473

Introduction

This paper examines the implications of responses to the Zimbabwean exodus between 2005 and 2009 for the international refugee protection regime. The case poses a particular challenge for the regime because the majority of people leaving fall neither within the legal definition of a 'refugee' nor are they voluntary, economic migrants. Rather, the article suggests that they fall within a broader category of 'survival migration', fleeing an existential threat to which they have no domestic remedy. The reasons for their flight have mainly been a combination of state collapse, livelihood failure, and environmental disaster.

Drawing upon empirical research in South Africa and Botswana, the paper highlights the inadequacy of the national and international response to address the protection needs of Zimbabweans. It shows how, although some protection needs have been met, this has been on an *ad hoc* and insufficient basis, with significant variation between the South Africa and Botswana cases.

The paper argues that, given that the situation is not unique and is likely to re-emerge in the context of environmental, livelihood and state collapse elsewhere, there is a need for the refugee regime to adapt by developing a new multilateral normative and institutional framework on subsidiary protection, drawing upon states' existing commitments under international human rights law.

People on the move

The 1951 Convention was created to provide protection to people fleeing individualised persecution in their country of origin. Increasingly, however, large numbers of people are leaving their country of origin for reasons that fall neither within the 1951 Convention definition nor within the category of voluntary, economic migrant.

As High Commissioner Antonio Guterres has recognised, there are now a range of 'people on the move' who fall outside of the 1951 Convention but who nevertheless have protection needs.[1] Meanwhile, the International Federation of the Red Cross and Red Crescent Societies (IFRC) has made reference to people moving as a result of severe economic and social distress.[2] The combination of livelihood collapse, environmental disaster, and state failure is increasingly contributing to non-refugees leaving their country of origin because of an existential threat for which they have no domestic remedy.

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[1] Crisp, J (2008), 'Beyond the Nexus: UNHCR's Evolving perspective on Refugee Protection and International Migration', *New Issues in Refugee Research*, Working Paper No. 155, (UNHCR: Geneva); Betts, A (2008), 'Towards a Soft Law Framework for the Protection of Vulnerable Migrants', *Issues in Refugee Research*, Working Paper No. 162 , (UNHCR: Geneva); High Commissioner's Opening Statement, High Commissioner's Dialogue, December 11-12 2007.

[2] News Release, 'Red Cross and Red Crescent Conference Rallies International Community to Tackle Humanitarian Challenges', 30/11/07; Resolution 5 on 'International Migration' passed by the Council of Delegates at the 30th International Conference of the Red Cross and Red Crescent, 23-24 November 2007.

In some host countries, forms of subsidiary or temporary protection have emerged to address such groups, but they have emerged on a largely *ad hoc* and unpredictable basis that varies between countries and regions, leaving significant protection gaps.

This paper examines national and international responses to one of the most high profile cases of non-refugee migrants who have been forced to flee their country of origin: the exodus of around two million Zimbabweans to countries with the SADC region between 2005 and 2009. Although the immediacy of the crisis may be mitigated if South Africa implements the Temporary Immigration Exemption Status for Zimbabweans proposed in April 2009,[3] and if the formation of a Government of National Unity within Zimbabwe in February 2009 leads to greater stability,[4] the national and international institutional failures that took place between 2005 and 2009 nevertheless provide important wider lessons for the refugee protection regime.[5]

The case highlights the regime's inability to respond to the protection needs that arise from the contemporary realities of forced migration. The main purpose of this paper is not to criticize the governments and organizations concerned, nor to speak to policy debates within the region on which a number of other people have already written extensively,[6] but rather to examine what wider lessons can be derived for the future of the refugee protection regime.

The paper argues that the Zimbabwean exodus exemplifies a new concept of 'survival migration', which describes people who flee an existential threat to which they have no domestic remedy.[7] Refugees represent one group of survival migrants but the category of survival migration is broader than the legal definition of a refugee. It also includes people who are forced to cross an international border to flee state failure, severe environmental distress, or widespread livelihood collapse.

Such categories of people are becoming increasingly common and include many Zimbabweans, Congolese, and Somalis in Africa, as well as many Haitians, North Koreans, and Iraqis outside of Africa. The problem is that few universally accepted sources of subsidiary protection exist to address the needs of non-refugee survival migrants. Where subsidiary protection has been made available, it tends to apply on a regional basis and in narrow and contested ways. Furthermore, subsidiary protection

[3] At the time of publication the Temporary Immigration Exemption Status for Zimbabweans, announced on 3 April, had still not been implemented.

[4] There has been a continued exodus since the creation of the Government of National Unity (GNU). This is partly because the economic and services (especially health) crisis in the rural areas has not changed very much since the GNU.

[5] The term 'refugee protection regime' is used to mean both the normative and institutional elements of the regime (primarily the 1951 Convention and UNHCR).

[6] NGO reports already exist highlighting the protection failures in relation to Zimbabweans in South Africa. See, for example: Human Rights Watch (2008), 'Neighbors in Need: Zimbabweans Seeking Refuge in South Africa'; MSF (2009), 'No Refuge, Access Denied: Medical and Humanitarian Needs of Zimbabweans in South Africa'. Meanwhile, the work of Tara Polzer has highlighted the protection gaps that exist in South Africa in relation to Zimbabweans, demonstrating the nature of the 'mixed motives' of those leaving, and suggesting a range of policy options within South Africa for responding to the exodus. See, in particular: Polzer, T (2008), 'Responding to Zimbabwean Migration in South Africa: Evaluating Options', in *South African Journal of International Affairs*, Vol. 15:1, pp. 1-15.

[7] The aim of the paper is not to create a new category of migrants *per se*, but rather to develop a concept that can shed light on a group of migrants who are unable to consistently access their rights guaranteed under the international human rights law because they fall outside the scope of the 1951 Convention.

has primarily focused on flight from generalized violence or armed conflict[8] to the exclusion of survival migrants fleeing from environmental disasters and economic collapse.

The paper examines the national and international response to the exodus within South Africa and Botswana. On the basis of interviews conducted with government representatives, IOs, NGOs, academics, refugees, and migrants during recent fieldwork in South Africa and Botswana, it shows how the existing refugee regime has been ill-adapted to address the crisis. The almost exclusively 'refugee-centric' lens of international and national actors in dealing with the exodus has led to perverse consequences for protection and the denial of rights to many Zimbabweans. The national and international response within Southern Africa has been entirely unprepared and ill-adapted to address a situation that falls outside the refugee/voluntary economic migrant dichotomy.

In both South Africa and Botswana, responses have been *ad hoc*, unpredictable and inadequate, failing to ensure the most fundamental human rights of Zimbabweans. The comparison between South Africa and Botswana is useful because the contrasting situations in the two countries demonstrate the arbitrary and inconsistent nature of the response and the lack of guidance provided by the existing international institutional framework.

Drawing upon the case study, it is argued that there is a need to develop a coherent normative and institutional framework on subsidiary protection in order to meet the needs of non-refugee survival migrants. The paper divides into five main sections. Firstly, it outlines the challenge of survival migration and the emergence and relevance of 'neither/nor' situations like the Zimbabwean exodus. Secondly, it outlines the situation in Zimbabwe in order to explain the underlying causes of the exodus. Thirdly, it assesses the national and international response in South Africa. Fourthly, it assesses the national and international response in Botswana. Fifthly, and most importantly, it examines the implications of the case for the refugee protection regime, making concrete recommendations for reform.

The challenge of 'survival migration'

The existing refugee protection framework implicitly assumes that there are broadly two groups of people who cross borders in an undocumented manner: refugees and voluntary, economic migrants. The former group benefits from a collective commitment by states to guarantee admission on to their territory and to provide substitute protection *in lieu* of the country of origin. The latter group has few guarantees because their movement is assumed to be voluntary.

In practice, however, this legal and normative distinction is based on a false dichotomy that fails to recognize the diversity of reasons why people may be forced to cross borders in an irregular manner, and often require substitute protection by another state. In many states, the shortcomings of this dichotomy have been

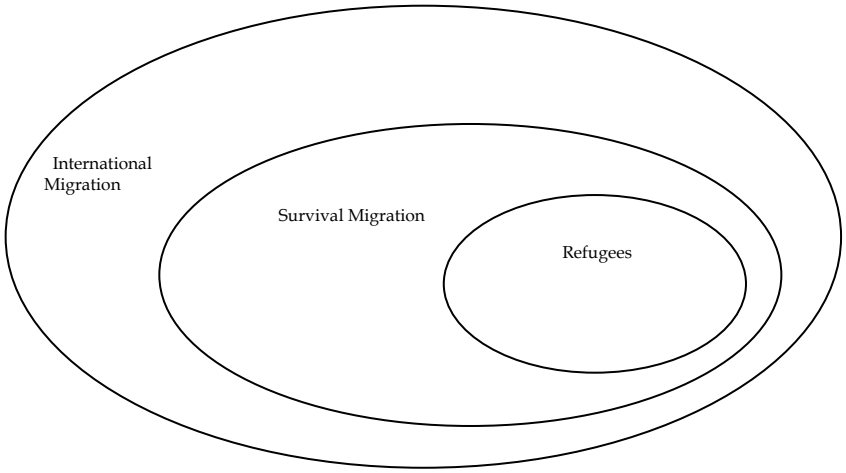
[8] See for example, Article 1(2) of the OAU Convention or Article 15 (c) of the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 19 May 2004, 2004/83/EC.

recognized and subsidiary protection has been granted. However, the practice of granting subsidiary protection outside of the framework of the 1951 Convention has been *ad hoc* and access to subsidiary protection varies radically across different countries and regions, often leaving significant protection gaps.

The legal category of the 'refugee', set out in the 1951 Convention, was created at a very particular juncture of history to address the plight of Holocaust victims as well as other remaining refugees from the Second World War and new refugees from Central and Eastern Europe. It was defined narrowly to relate to people fleeing individual and discriminatory persecution by their own governments because this was the underlying reason for flight in Europe at the time.

Yet it is important to note that the 1951 Convention, though narrow in its scope, arose out of a much broader recognition that where states are unable to offer *de facto* or *de jure* protection to their citizens, the international community has an obligation to offer protection. Because of the context in which it was negotiated, the Convention does not fulfill this broader purpose. In practice, the category does not and never has captured the totality of circumstances under which people are forced to cross an international border and are unable to return as a result of an existential threat faced at home.

Refugees represent one aspect of a broader phenomenon that may be described as 'survival migration'. Meanwhile, survival migrants represent one category of international migration but the category of international migration is far broader than that of survival migration. Survival migration occurs for reasons other than just individualized persecution. For example, people may be forced to cross an international border to flee state collapse, severe environmental distress, or widespread livelihood collapse. Conceptually, the relationship between refugees, survival migration, and international migration can be illustrated below:[9]



[9] Adapted from Trygve G. Nordby, IFRC Special Envoy on Migration, Keynote Speech, High Commissioner's Dialogue on Protection Challenges, Geneva, 11-12 December 2007.

Sources of survival migration are likely to proliferate in the context of climate change and the transmission of the global economic meltdown, for example. Very few universally accepted sources of subsidiary protection exist to address the needs of people fleeing for reasons other than political persecution. Where they do exist, they tend to apply on a regional basis and in narrow and contested ways.

For example, the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration offer protection for those fleeing generalized violence, while the EC Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, (henceforth EC Qualification Directive) offers subsidiary protection to people who are likely to face torture or a threat to their right to life upon return.

The Zimbabwean exodus draws attention to the absence of protection available to non-refugee survival migrants. The majority of Zimbabweans are in a 'neither/nor' situation, not being Convention refugees, but also not being voluntary, economic migrants. As will be argued, the Zimbabweans can be conceived to fall within the broader category of 'survival migration', of which refugees are just one part.

'Survival migration' can be used to refer to people who flee their country of origin because of an existential threat and lack the possibility of a domestic remedy. This definition has three components of i) being outside one's country of origin; ii) fleeing an existential threat; iii) lacking domestic remedy. The definition is analytically useful because it highlights a set of protection needs that are currently unmet, and offers a non-arbitrary and politically realistic framework through which to institutionally address those needs. Each of these three components requires some explanation.[10]

Firstly, being outside one's country of origin (i.e. alienage) is an important aspect of survival migration. Not only is it the aspect of the definition that defines it as international migration but alienage also provides physical access of the international community to the unprotected person and places the obligation to protect on the specific state on whose territory the migrant is based.[11]

Secondly, flight from 'an existential threat' offers a non-arbitrary means to prioritise between competing claims to protection. The challenge, though, is to define the threshold of what constitutes an 'existential threat'. It would include not only the right to life but also elements of quality of life that are fundamental to human dignity. Henry Shue's concept of 'basic rights' – rights without which one cannot enjoy other rights – offers a possible starting point for considering what constitutes an existential threat.[12] He claims that there are three basic rights: a minimum level of security, subsistence, and liberty.

Andrew Shacknove has drawn upon this concept of basic rights to demonstrate that persecution is a significant but not a necessary condition for what should define the

[10] James Hathaway similarly disaggregates the components of the refugee definition in Hathaway, J (1997) 'Is refugee status really elitist? An answer to the ethical challenge' in Carlier, J-Y and Vanheule, D (eds) *Europe and Refugees: a Challenge*, Kluwer Law International.
[11] Hathaway, J (2007), 'Forced Migration Studies: Could We Agree Just to 'Date''?, *Journal of Refugee Studies*, 20(3):349-369.
[12] Shue, H (1996), *Basic Rights* (Princeton: Princeton).

circumstances under which the refugee protection regime operates. He argues, following Shue, that there are three circumstances under which protection should be available i) persecution; ii) the absence of vital (economic) subsistence; iii) natural disasters.[13] Furthermore, whether the threat emerges from state, economic or environmental factors, it should not matter whether such a threat is to an individual (as with persecution) or to a group. From either a basic rights or a human rights law perspective, this distinction would be arbitrary.

Thirdly, the lack of a domestic remedy is an important element because it highlights the conditions under which migration represents the only realistic adaptation strategy of those fleeing an existential threat. This again enables prioritisation, ensuring that states' commitment to protecting non-refugee survival migrants does not become an open-ended commitment. In situations in which a realistic in-flight alternative was available or basic rights could be accessed through the state within the country of origin, movement would not reach the threshold of survival migration.

These characteristics of survival migration make it almost impossible to ethically or normatively distinguish between the validity of the claim of a refugee and that of another non-refugee survival migrant. As with refugees, other survival migrants are in a situation of alienage. As with refugees, they also have no access to domestic remedy. The only qualitative difference is that the underlying cause of their flight may be broader and include deprivations of basic rights that relate to the interaction of livelihoods, the environment, and the state. Non-refugee survival migrants are in need of substitute protection – albeit possibly temporary in nature - in the same way as refugees.

Estimates vary radically, but, it is conceivable that over two million Zimbabweans may have left Zimbabwe are a result of the desperate situation in the country. They have fled for a combination of inter-related reasons – most notably mass livelihood collapse, state failure, and environmental catastrophe. For many, emigration has represented the only available survival strategy. Yet there has been a refugee recognition rate of less than 10% in South Africa.[14]

The case studies analyzed in this paper reveal the ways in which the Zimbabweans have been rendered invisible to the international community as result of the 'neither/nor' status of not being refugees nor voluntary, economic migrants. As a result, there has been a systematic inability to identify and address needs and the absence of a coherent normative framework or institutional response to address their plight.

It is important to consider this case not only because it is unresolved but also because it is not and will not be isolated. For example, in the Democratic Republic of Congo (DRC), a similar nexus of livelihood collapse, environmental crisis, and state failure are making survival migration an increasingly likely strategy for significant proportions of the population.

[13] Shacknove, A (1985), 'Who is a Refugee?', Ethics 95 (2): 274-284.
[14] Interview with Florencia Belvedere, Director of the Johannesburg Refugee Reception Office, DHA, Johannesburg, 30 March 2009.

Furthermore, the prospects of survival migration throughout the developing world are dramatically increased as a result of environmental change within the context of climate change. Poor governance structures in some of the countries most affected by economic and environmental crisis reduce the likelihood of an adequate domestic remedy. Outside of Africa, it could also be argued that many people fleeing countries such as Haiti, North Korea and Iraq represent non-refugee survival migrants.

The situation in Zimbabwe

This section provides a brief background to the situation in Zimbabwe and the underlying causes of the exodus. This is important because it highlights that while the majority of those leaving are not refugees, they are not simply voluntary, economic migration. Instead, they may be considered to be 'survival migrants' in the sense that they are fleeing an existential threat to which they have had no domestic remedy. As a representative of Lawyers for Human Rights said, "most are escaping the economic consequences of the political system".[15]

The recent history of Zimbabwe is highly politicised and different versions of its past are frequently used for instrumental purposes. The purpose of this section is not to privilege one version of that past over another but to highlight the socio-economic and human rights outcomes of the underlying political and economic crisis. Zimbabwe was previously a British colony called Southern Rhodesia. In 1965, fearing a handover to black majority rule, white settlers' government proclaimed a Unilateral Declaration of Independence under the leadership of Ian Smith. This led to the continuation of a liberation war by the black majority until the British Government, the White Zimbabwean Government, and the Zimbabwean African National Union (ZANU) met at Lancaster House in order to agree the terms of Zimbabwean transfer to black majority rule under the presidency of Robert Mugabe.[16]

At Lancaster House an agreement was struck, whereby the British government would support independence and provide financial assistance in exchange for the new Zimbabwean leadership postponing land reform for ten years and allowing white settlers to retain their farms. This agreement was informally extended in 1990 and continued until, in 1997, New Labour came to power in the United Kingdom and repudiated the agreement and discontinued the transfer of money.[17]

With the discontinuation of financial assistance, there were greatly diminished incentives for ZANU to desist from land reform. Under mounting pressure from war veterans and tribal leaders, the government of Zimbabwe began a process of land reform, which accelerated dramatically from 2002. This led to land invasions, and the seizure of farms by people with little experience of large scale food production. According to one commentator, agricultural collapse, exacerbated by drought, began

[15] Interview with Kajaal Ramjathan-Keogh, Head of Refugee and Migrant Rights Programme, Lawyers for Human Rights (LHR), Johannesburg, 18 March, 2009.
[16] For history of Zimbabwe, see Martin Meredith (2002), *Robert Mugabe: Power, plunder and tyranny in Zimbabwe* (Michigan: Chicago).
[17] Interview with Ambassador Simon, K. Moyo, Zimbabwe House, Pretoria, 30 March 2009.

to transform a country previously dubbed 'the bread basket of Africa' into the 'basket case' of Africa.[18]

As the ZANU-PF government was increasingly challenged by the opposition MDC, reports of violence and intimidation grew. Economic sanctions were imposed on the country by the Commonwealth, the EU and the US.[19] This in turn contributed to the withdrawal of multinational corporations and foreign direct investment from the country.[20]

The combination of sanctions, capital flight, land invasions, and drought created a massive decline in agricultural productivity and led to economic collapse. Hyperinflation has run to millions of percent per year such that the Zimbabwean dollar was rendered worthless, and only the US dollar and the South African Rand represent viable sources of currency with which to purchase food. The majority of Zimbabweans lack access to foreign currency and therefore have been unable to purchase basic subsistence.

Along with mass livelihood collapse and food shortages which have left five million dependent on food aid, disease has been widespread, with HIV/AIDS in particular decimating families unable to access anti-retroviral drugs (ARVs) and often depriving families of their heads of household.[21] As a result of these conditions, which arguably violate the right to life, large numbers of people have left the country.[22]

The strategies and circumstances of different migrants have varied, and should not be seen to have been homogenous. Highly skilled Zimbabweans have had access to family and social networks in South Africa and so have been able to use these networks to ensure access to housing and employment without going through the asylum system.[23]

In many cases, male heads of family or adult male children leave their families in order to try to remit small amounts of money. In other cases, people have left as families. The field staff of NGOs and IOs we interviewed as well as the Zimbabweans we spoke with listed economic factors such as the absence of food, the inability to support their family, the need to remit money to support family members, and the lack of jobs among others as their reasons for flight.[24]

Recent research by Alice Bloch shows that, of a sample of 156 Zimbabwean migrants, only 9% cited the political situation as the main reason for their flight, while 24% cited the economy as their primary reason for moving. However, reflecting the fact that the political situation is intertwined with other factors such as economic and environmental collapse, a further 34% cited the political situation as one factor,

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[18] *The Times*, 'From Africa's bread basket to economic basket case, life in Mugabe's Zimbabwe', http://business.timesonline.co.uk/tol/business/markets/africa/article1790223.ece, May 15, 2007

[19] *The Economist*, 'Please do Something – But What?, 11/12/08.

[20] UNCTAD (2008), *World Investment Report: Zimbabwe*, www.unctad.org

[21] Human Rights Watch (2009), 'Crisis without Limits'.

[22] See, for example, United Kingdom Border and Immigration Agency Operational Guidance Notes, March 2009.

[23] Interview with Ambassador Moyo, 30 March 2009.

[24] Interviews with migrants, NGOs and IOs in Johannesburg, Pretoria, Musina, and Gaborone, 15 March-April 3 2009.

among others, that contributed to their movement.[25] Furthermore, work by Tara Polzer has highlighted the range of reasons underlying the Zimbabwean influx into South Africa, showing how in addition to refugees, many people have left for a range of humanitarian and economic reasons, some of which create protection needs that go unmet.[26]

The situation of Zimbabweans has attracted far less international attention than most refugee crises of similar numerical proportions because of the predominantly economic and social causes of movement, the fact that most have moved to a developed country and lived in urban areas, that the movement has not been concentrated in a single exodus and that some of it has been circular.

In both South African and Botswana, the language of "trickle over" or "trickle across" migration to describe the cross-border movement, given the gradual and prolonged nature of the flows.[27] Yet in almost any other situation, the movement of up to two million people across a border would be described as a 'mass exodus' or 'major humanitarian catastrophe'.[28] Indeed, the UK Border Agency, for example, recommends that Zimbabweans who will face extreme hardship on return be considered for complementary protection.[29]

With the creation of the Government of National Unity and power-sharing between Mugabe and Morgan Tsvangirai, there are indications of marginal improvement in the country. A SADC conference committed to provide Zimbabwe with development assistance to aid its economic recovery and the Zimbabwean Government has requested $5 billion USD. Food is now available in supermarkets, although the vast majority of people still lack access to the foreign currency required to purchase food. People continue to cross the borders in large numbers – although at a slower rate than at the peak of the outflow in 2008.[30]

National and international responses in South Africa

Estimates of the numbers of Zimbabweans in South Africa are highly contested. CoRMSA, for instance, notes that estimates of the number of Zimbabweans in South Africa in 2007 were as high as 9 million but suggested that 1-1.2 million might be a

[25] Bloch, A (2009), 'The (Un)intended Consequences of Policy', plenary address at IASFM Conference, University of Nicosia, Cyprus, 1 July 2009.
[26] Polzer (2008), 'Responding to Zimbabwean Migration in South Africa', pp. 4-5.
[27] The phrase "trickle across" appeared numerous times in the language of government and NGOs representatives that we interviewed, and appears to be a way of defining the movement in opposition to the notion of 'mass influx'.
[28]
[29] United Kingdom Border and Immigration Agency Operational Guidance Notes, March 2009 para 3.8.8:*(…) However, where the conditions on return will be so extreme that returning the applicant would, taking his or her individual characteristics and circumstances into account, give rise to a real risk of inhuman or degrading treatment, a grant of Discretionary Leave will be appropriate. Where the humanitarian conditions that the applicant faces on return have been exacerbated by politically discriminatory policies of the Zimbabwean government but the applicant is not facing denial of aid because of his or her individual (perceived) political opinion, a grant of Humanitarian Protection will be appropriate.*
[30] Newsnight report on Zimbabwe, by Sue Lloyd-Roberts, BBC2, 15 April, 2009.

more realistic estimate.[31] Because many are undocumented and do not even use the asylum permit system, it is difficult to be precise about numbers. However, even the South African Department of Home Affairs has quoted an estimated figure of around two million based on numbers coming through the asylum system.

Indeed, for obvious reasons, the Government of Zimbabwe vehemently contests the numbers. In the words of the Zimbabwean Ambassador to South Africa: "Nobody has ever come up with a survey or count. The figures are thrown left, centre and right depending on what one wants to achieve. Zimbabwe has been in the spotlight. There has been a lot of coverage of the political and economic situation. Some is negative and some is positive. Those who are negative will give you are frightening figure. Those who are objective will give you a far lesser figure."[32]

Nevertheless, it is clear that large numbers of people have been leaving Zimbabwe since 2005 and that the peak flow into South Africa was in 2008 before the formation of the Government of National Unity in Zimbabwe. In the summer of 2008, around 3000 per day were arriving just at the Johannesburg reception centre.[33] For 2007 around 45,000 new applications were published with a backlog of around 87,000. The 2008 figures are not yet available but there will probably be around 250,000 or so applications; most of which are from Zimbabwe.[34] Many do not go through asylum system but a greater number came forward following the xenophobic attacks that took place against immigrants in South Africa in May 2008.

Legal framework

In South Africa, it is almost exclusively migrants who are able to address a skills gap in particular sectors who can regularize their status through employment.[35] However, even in cases where this is possible, migrants face many bureaucratic challenges.[36] The asylum system has represented the only viable option for most Zimbabweans to regularize their stay in South Africa. In the post-apartheid era the legal framework for addressing human mobility is based upon the Refugee Act and the Immigration Act, both of which have been supplemented by Amendment Acts.

South Africa's Refugee Act recognizes a person to be a refugee if they either fleeing persecution, or due to events which "seriously disturb or disrupt public disorder" in his/her country, in compliance with the 1951 and OAU Conventions respectively. Section 35 of the Refugee Act allows for the Minister of Home Affairs to grant prima facie recognition to a group of refugees using either definition. In practice, however, at least up April 2009, refugee status was only granted through individual RSD under Section 3(a) of the Act based on the 1951 Convention, and the OAU Convention was not applied to Zimbabweans.

[31] CoRMSA, 'Protecting Refugees, Asylum Seekers and Migrants in South Africa' (CoRMSA: Johannesburg), 18 June 2008, p.17.
[32] Interview with Ambassador Moyo, 30 March 2009.
[33] Interview with Florencia Belvedere, DHA, 30 March 2009.
[34] Interview with Sanda Kimbimbi, Regional Representative for Southern Africa, UNHCR, Pretoria, 17 March 2009.
[35] Interview with Vic Van Vuuren, Director ILO Office, Pretoria, 30 March 2009.
[36] Informal discussion with Loren Landau, Director of the Forced Migration Research Centre, University of the Witwatersrand, 18 March 2009.

Despite low recognition rates, many Zimbabweans apply for asylum in order to get the 'asylum seeker permit' granted under Section 22 of the Refugee Act, which confers asylum seekers the right to work and freedom of movement until an RSD decision. These permits can be obtained at one of the six Refugee Reception Offices (RRO), in Johannesburg, Pretoria, Port Elizabeth, Durban, Cape Town, and Musina. The Act does not specify a time limitation, the length of permits vary between one and six months. Given the backlog in the RSD process, an asylum seeker may have to renew their permit several times.

DHA can issue an asylum seeker with an 'Asylum Transit Permit' under Section 23 of the Immigration Act which is intended to enable an asylum seeker to travel from a port of entry to a Refugee Reception Office, where they can apply for asylum. While the Section 23 Permits are intended only for purposes of transit from points of entry to RROs, the RRO at the Musina showgrounds has issued asylum seekers with both permits, at varying times in the past year in order to manage the flow of Zimbabweans at Musina. The issuance of Section 23, rather than Section 22 permits, has exposed Zimbabweans to deportation due to the difficulty of obtaining financial resources to travel to the RRO at Pretoria or Johannesburg within the 14-day limit of the permit.

The South African government has introduced several measures to reduce the backlog of asylum seekers and to mitigate the impact of Zimbabwean asylum seekers on the asylum system. For example, on numerous occasions, it has altered the duration of Section 22 permits issued in order to streamline administrative processes. It also introduced a parallel system was also introduced in the Johannesburg RRO in March 2009, in which new arrivals were given immediate RSD with a 30 day right of appeal before the appeal board if they are rejected. However, the backlog was so long that as of March 2009 no more RSD or appeal appointments were available until 2010.[37]

These measures did little to address the underlying cause of the over-extension of the asylum system. Currently, and until the Temporary Exemption Visa proposal is implemented, the asylum system remains the only means by which the majority of Zimbabweans, and other survival migrants, can obtain temporary protection from deportation and right to residence through the Section 22 permits. An estimated 250,000 claimed asylum in 2008.

This has been of concern to UNHCR, whose Regional Representative explained, "we have a big problem here, primarily because you have only the asylum route as a way for people to regularise their stay. Of course, under the Immigration Act, there are possibilities for people to obtain different permits, work permits and student permits. But for whatever reason people are not resorting to that. So people just use the asylum system and become asylum seekers…. After the xenophobic attacks, many undocumented people sought to regularise their stay through asylum. The easiest way to stay is to go the asylum route. But this needs to be revisited. You cannot allow each and everyone to take the asylum route because you are penalising the genuine cases, and then this whole system becomes unmanageable."[38]

Both the Immigration Act and the Refugee Act have provisions, which would enable Zimbabweans to obtain protection and rights in South Africa without having to go

[37] Interview with Florencia Belvedere, DHA, 30 March 2009.
[38] Interview with Sanda Kimbimbi, UNHCR, 17 March 2009.

through individual RSD. Section 35 of the Refugee Act allows the Minister of Home Affairs to declare a 'mass influx' of people to be 'refugees' as defined in the Refugee Act.[39] Section 31(2) (b) of the Immigration Act allows the Minister to "grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances". Refugee rights advocates have been lobbying the government to grant Zimbabweans temporary residence permits under Section 31(2) (b).

The refusal of the South African DHA to use the domestic legal option of group-based recognition under the OAU Convention or to apply other aspects of the Immigration Act is itself an important issue. This is because it begs the question of whether a new normative framework would have been necessary to address the Zimbabwean influx or whether it could have been dealt with under existing legislation had that legislation been implemented. Indeed, the reluctance of the government to provide non-1951 protection to Zimbabweans may be attributed to a combination of the strong ties between the two states and bureaucratic inertia on the other hand.[40] Nevertheless, the fact that their application was sufficiently ambiguous to enable an inadequate response highlights a gap in the wider normative and legal framework in relation to survival migration.

Arrival and reception

The main border crossing point between the two countries is Beitbridge in Limpopo. Despite a multi-layered barbed wire security fence and the obstacle of the Limpopo River, there is little to stop people crossing with the assistance of smugglers. Nevertheless, crossing is dangerous. Migrants need to use smugglers, and are often robbed, raped, and assaulted in transit. Without exception, all of those that we interviewed in Musina had been robbed on the Zimbabwean side of the border.[41] Many people there arrived without money, identity documentation, their mobile phones, and sometimes even without their clothes.

The nearest town to Beitbridge is Musina, which has a population of around 30,000. In 2008, Musina became not only a transit centre but also a site of settlement for many Zimbabweans. DHA opened a sixth RRO in Musina at which, until February 2009, Zimbaweans were given section 22 permits. Large numbers therefore congregate in the unofficial camp at the 'showgrounds'.

With very little security or social provision at the showgrounds, rape and crime became endemic until, in February 2009, the Municipality cleared the showgrounds, DHA started to provide Zimbabweans with the shorter 14 day permits, and UNHCR became involved in arranging transportation to other cities with reception centres, where Zimbabweans could attain a longer asylum permit or RSD.

[39] Ingrid van Beek 'Prima facie asylum determination in South Africa: A description of policy and practice' in *Perspectives on Refugee Protection in South Africa* (2001) edited by J Handmaker et al, (LHR: Pretoria).
[40] Claims of DHA's lack of political will and engagement on the issue emerged from nearly all of the Johannesburg-based NGOs that we spoke to.
[41] Interview with NGO representatives, Musina, 3 April 2009; Interviews with migrants, Musina, 3 April 2009.

Consequently, after February 2009, the showgrounds had been cleared and only held a temporary DHA structure which remained to provide 14 day permits under Section 23. Now the only forms of settlement that exist are transit shelters, intended to be for a maximum of 48-72 hours, to enable Zimbabweans to get their section 23 permit from the showgrounds and arrange travel to urban centres such as Johannesburg. Local churches in Musina provide small plots of land to serve as shelters as a substitute for the absence of a formal transit camp. These are divided such that one shelter exists for women and children, one for UAMs and another for men.

The institutional response in Musina demonstrates significant protection gaps. Following the closure of the 'showgrounds', there was inadequate response in the area of material assistance. The transit shelters run by local churches are extremely basic and access to food and shelter are inadequate. For example, the transit shelter run by a local church for male Zimbabwean migrants is around 50m x 50m, had four portable toilets (in a context in which there had been a cholera outbreak), a single drinking water tank, and a tent canopy without a ground mat, which one of the Zimbabwean volunteers informed us sometimes hosts up to 1000 people at a time.

Every day, the South African Red Cross Society (SARCS) provides only a single evening meal, delivering enough maize meal for around three pots of 'pap'. The evening that we visited, though, the Red Cross had not planned for the provision of food and the other organisations like UNHCR had to cover the gap as best as they could. Furthermore, the shelter was located next to a large housing estate for the local population, and some of the Zimbabwean migrants claimed that they were afraid to leave the perimeter of the shelter after dark.

Within the Musina area, up until the proposal for the Temporary Immigration Exemption Status in April 2009, and the subsequent moratorium on deportations to Zimbabwe, there was a high risk of detention and deportation. On the day we were present, the police had rounded-up and detained several Zimbabweans, including approximately five heavily pregnant women. On 19 May 2009, the North Gauteng High Court ordered the permanent closure of the Musina detention facility in response to Lawyers for Human Rights (LHR)'s application on the grounds of factors such as poor conditions and the unlawful detention on minors.[42]

A range of IOs and NGOs were working in Musina at the height of the crisis, gradually forming an *ad hoc* but functional coalition to address basic protection needs. That this informal coalition became at all effective is a tribute to the individuals working on the ground. This is in spite of, rather than because of, a coherent international institutional response. UNHCR's focus in Musina has been ensuring access to the asylum system.

The specific nature of the South African Refugee Act creates a mandate for the Office with the Zimbabwean migrants because all of those who are present are eligible for an asylum seekers permit. This at least gave UNHCR a mandate to engage in the protection of the Zimbabweans, which it would not have done but for the very unique nature of the Refugee Act. However, with only two international staff, one national

[42] News Release, 'North Gauteng High Court Orders Permanent Closure to Musina Detention Facility, 4 June 2009. www.lhr.org.za/news/2009/north-gauteng-high-court-orders-permanent-closure-musina-detention-facility

staff and two drivers in Musina, UNHCR had a comparatively small staff in relation to the size of the influx.

IOM has no mandate or budget line to engage in the protection of undocumented Zimbabwean migrants. Given its 'projectized' nature, it can only engage formally in a particular activity if a specific budget line exists to undertake such activities. However, due to the commitment and creativity of the particular individual present in Musina, IOM was able to engage in some operational support by drawing upon its budget for the assisted return programme that is mainly present on the Zimbabwean side of the border.

SARCS provided basic food assistance to the Zimbabweans in transit. However, its budget is extremely limited and staff have acknowledged that they are over-stretched and that the availability of food has been insufficient.[43] This is starkly illustrated by the fact that they were only able to provide one meal per day to Zimbabweans staying within the church shelters and that, on the day we were present received no delivery. UNICEF only arrived in Musina in February 2009 in order to support the work of Save the Children UK, which was already present and working with unaccompanied minors (UAMs).

Save the Children UK has been working to identify UAMs and ensure that they are identified, registered and protected. Medecins Sans Frontieres (MSF) is present in Musina to provide basic medical assistance. A small number of doctors circulate around the shelters and the showgrounds area, providing assistance for those with immediate medical needs.

Lawyers for Human Rights (LHR) plays two core functions, engaging in advocacy in relation to the situation in Musina, and monitoring, especially in relation to the deportation centre and access to asylum.[44] In the absence of other actors providing monitoring and oversight, it expanded its work in this area. Musina Legal Advice Office (MLAO), a local NGO works to provide information to migrants, ensuring that they understand the process of obtaining access to the asylum system and the range of options available to them.[45]

The agencies have developed an informal coalition, working effectively under immense constraints. They communicate regularly at the local level. However, this working relationship exists in spite of rather than because of clear institutional framework or the support of national and international actors outside of Musina. It is far from an institutional model for the effective reception and protection of vulnerable irregular migrants.

Beyond Musina, access to the asylum system within urban areas has also presented a challenge to the Zimbabweans. The main RRO used by the Zimbabweans has been the Johannesburg Refugee Reception Office located at Rosettenville, 'Crown Mines', near Soweto. The Centre has the capacity to deal with up to 700 cases per day. However, in early 2009, over 2000 were arriving per day, and in 2008 the numbers peaked at around 3000 per day. Those wishing to seek asylum, or to acquire an

[43] Interview with Mandisa Kalako-Williams, President, South African Red Cross (SARC), 31 March 2009; interview with Kyetsta Nara and John Shiburi, SARC, Polokwane, 3 April 2009.
[44] Interview with Sabelo Sibanda, LHR in Musina, 3 April 2009.
[45] Interview with Jacob Matakanye, Musina Legal Advice, Musina, 3 April 2009.

asylum seekers permit are met on a 'first come, first served' basis each morning, with those outside the first 700 having to wait until the next day to try to make it to the front of the queue.[46]

Those awaiting access to the facility often sleep rough on wasteland near the reception centre, which is housed in an industrial park. Without the valid asylum seekers permits that they are attempting to obtain from within the reception centre, they face the risk of being detained and deported.[47]

Urban settlement

South Africa has an unofficial 'no camps' policy (a 'self-settlement' policy) and so the overwhelming majority of refugees and asylum seekers settle in urban areas, although it is likely that there are also large numbers in rural areas and smaller towns. The largest number of urban Zimbabweans probably resides in Johannesburg, followed by other cities such as Durban, Cape Town, and Pretoria. Asylum seekers – once they have access to permits - have the right to freedom of movement and the right to work. However, they lack access to economic and social rights, and frequently face threats to their physical security. There is also insufficient support for unaccompanied minors (UAMs).

Within Johannesburg, the Central Methodist Church, in downtown Johannesburg has been the most visible and highly publicized manifestation of the Zimbabwean exodus. Since May 2008 it has been occupied by Zimbabwean migrants, hosted by Bishop Paul Verryn. As of April 2009, there were around 3400 Zimbabweans living inside and outside the church. With no material assistance from the government or the international community, they have formed a functioning community under challenging circumstances.[48] The church provides daily services, bible study, dance group, adult education, and has worked to ensure access to a local school for children.[49]

Nevertheless, conditions in the church are dire and illustrate the desperate situation of the urban Zimbabweans. Within the church it is difficult to stroll around corridors and rooms without stepping over or treading on sleeping bodies strewn across the floor. The church is overcrowded and has extremely poor sanitation. Young mothers and pregnant women, and small children, were sleeping on the floor. We also found 102 UAMs as young as seven sleeping on the floor of one room of about 10m x 10m, with supervision from just one MSF volunteer. Meanwhile, a small, cramped upstairs room with foam mattresses was the only space for seriously ill Zimbabweans, looked after by Zimbabwean volunteers, suffering from illnesses including HIV/AIDS, cholera, and tuberculosis.

The Government's main response to the church has been to try to clear the building, while local businesses are litigating to have the church emptied. Meanwhile, there is no material support for the Zimbabweans in the church. The Department of Home

[46] Interview with Florencia Belvedere, 1 April 2009.
[47] Darshan Vigneswaran (2010, forthcoming), 'Criminality or Monopoly? Informal Immigration Enforcement in South Africa, *Journal of Southern African Studies*, 36
[48] Based on a visit to the Central Methodist Church, Johannesburg, 1 April 2009.
[49] Interviews with Zimbabwean migrants, the Central Methodist Church, Johannesburg, 1 April 2009.

Affairs (DHA) and UNHCR only entered the building for the first time in March 2009 – long after the church was occupied as early as 2005 - and this was simply for a registration exercise. MSF is the exception, running a small clinic in the same block as the church and providing a small number of volunteers with limited resources.

Beyond the Central Methodist Church, the majority of Zimbabweans are fairly hidden from public view. In Johannesburg, many stay in urban areas such as Hillbrow and Windsor, which have a reputation as being 'no go' areas. One of the reasons why the majority of Zimbabweans have been forced to live in such areas is that they are fearful of living alongside South Africans in townships, particularly in the aftermath of the xenophobic violence of May 2008.[50] In the absence of any kind of material assistance for the Zimbabweans, some have resorted to livelihood strategies that involve crime and prostitution.

Towards a temporary protection framework

Throughout the influx, the Government has depended upon the asylum system to address a situation for which it is ill-adapted. In particular, DHA has continued to rely on the granting of refugee status to a few Zimbabweans based on Section 3(a) of Refugee Act, while offering no other option to the majority of Zimbabweans, such as granting Zimbabweans prima facie status under Section 35 of the Immigration Act, or using Article 31(2)b of the Immigration Act to take pressure off the asylum backlog.

However, gradual progress has been made. In April 2009, DHA was due to open a new refugee reception centre – the SADC Reception Centre in Pretoria – especially for people claiming asylum from countries within the Southern African region. The main intention of this was to have a centre that could focus on providing asylum seeker permits to the Zimbabweans and so relieve the backlog on the Johannesburg and Pretoria RROs.[51]

Furthermore, there has been longstanding debate about application of Immigration Act article 31(2) b, allowing the Minister of Home Affairs to provide the discretionary right to remain. UNHCR and Human Rights Watch have been pushing hard for this since the xenophobic violence in May 2008. While the implementation of this article has been blocked, a series of announcements have been made by DHA in the aftermath of bilateral meetings between South Africa and Zimbabwe, the latest and most defining of which appears to have been the Victoria Falls meeting in March 2009.[52]

Firstly, on 3 April 2009, the Deputy Home Affairs Minister announced that South Africa would hand out "special dispensation permits" to legalize Zimbabweans' stay and give them work rights and access to basic health care and education. The six-month permits will be issued to anyone who can prove their Zimbabwean nationality and may be extended if conditions in Zimbabwe do not improve. This announcement appears to represent the use of Article 31(2)b.

[50] IOM (2009), 'Towards Tolerance, Law and Dignity: Addressing Violence Against Foreign National in South Africa' (IOM: Pretoria).
[51] Interview with Florencia Belvedere, DHA, 1 April 2009.
[52] Interview with Burton Joseph, DHA, Pretoria, 19 March 2009; interview with Mashabane and Andreas Oosthuizen, DFA, Pretoria, 18 March.

However, there were reasons to be cautious: the proposal provides exemption for a limited period (initially 6 months in the April announcement and then extended to a proposed 12 months), it still requires a 'screening' process, and it will still not address the material needs of the Zimbabweans. However, if implemented, it represents a means to ease the pressure on the asylum system. Furthermore, the announcement is novel and sets an interesting precedent insofar as it effectively creates a temporary protection status for those fleeing for primarily economic reasons. This represents a clear acknowledgement of the inadequacy of the refugee regime for addressing the exodus and the need for temporary protection.[53]

Secondly, on 4 May, the South African and Zimbabwean departments of Home Affairs followed this up by signing a memorandum of understanding to facilitate the legal movement of people between the two countries. South Africa has lifted visa restrictions against Zimbabwean citizens visiting the country for periods of up to 90 days in line with similar agreements with other countries in the region as part of the implementation of the SADC Protocol on Facilitation of Movement.

If these proposals are implemented, the Zimbabwean departure permit, or border pass, will be accepted as a legitimate travel document. The reform measures are interesting because they represent an explicit acknowledgement of the need to guarantee Zimbabwean survival migrants – even if they are not asylum seekers or refugees – the ability to access the territory of South Africa as a means to receive the temporary protection afforded by the 3 April announcement.[54]

National and international responses in Botswana

As in South Africa, it is difficult to put a precise figure on the number of undocumented Zimbabwean migrants in Botswana. By virtue of being 'undocumented' they are attempting to avoid being identified by the authorities. Nevertheless, anecdotal evidence suggests that in early 2009, there are likely to have been around 40,000-100,000 undocumented Zimbabweans in Botswana, in addition to just under 1,000 Zimbabwean refugees.[55]

Although this number is much smaller than in South Africa, it is nevertheless a significant number for a country with a population of around 1.9 million. As in South Africa, the Zimbabwean migrants come from a range of backgrounds, some high skilled, some low skilled. However, according to Mary Ratau of Ditshwanelo, "the majority come because the situation is dire and Botswana is closer to Zimbabwe…It is survival migration."[56] They come in because of the absence of livelihood

[53] For a complete analysis of the challenges of implementing the new proposal, and a range of proposals for reform within South Africa, see Polzer, T (2009), 'Immigration Policy Responses to Zimbabweans in South Africa: Implementing Special Temporary Permits', Background Paper for Roundtable, Southern Sun Hotel, Pretoria, 9 April 2009, hosted by Lawyers for Human Rights (LHR) and Forced Migration Studies Programme, Witwatersrand University.
[54] *Business Day* 'SA signs MOU with Zimbabwe', 4/5/09; *Die Burger*, 'Forum: Zimbabwe en die leed van miljoene trekkers', 6/5/09.
[55] Interview with Beleme Gelafele, Programme Officer, UNHCR Botswana, Gaborone, 28 March 2009; interview with Khin-Sandi Lwin, UNDP Representative, 24 March 2009; interview with Marcus Betts, UNICEF Deputy Representative of UNICEF, 25 March 2009.
[56] Interview with Mary Ratau, Ditshwanelo, Gaborone, 25 March 2009.

opportunities in Zimbabwe and with the hope of remitting some basic source of income to support their family.[57]

Botswana has a contrasting legal framework to South Africa. In particular, there is an absence of free movement and the right to work for asylum seekers, and asylum seekers are kept in detention before being moved to refugee camps or deported depending on the outcome of RSD.[58] This legal framework changes the nature of national and international response to undocumented migrants. Unlike South Africa, where the distribution of asylum seeker permits to all arrivals, gives UNHCR a mandate to at least engage with the question of undocumented Zimbabweans, no such 'nexus' exists in the context of Botswana. This has made the international response to the exodus less developed than that in South Africa.[59]

Legal framework and reception

The legal framework is in many ways more rigid than that of South Africa. The 1967 Refugee Recognition and Control Act pre-dates the 1969 OAU Convention, and the Government entered reservations on the elements of the 1951 Convention relating to freedom of movement and the right to work. Consequently, asylum seekers are required to remain in detention during their RSD process. If they receive recognition, they are entitled to live in the refugee camp but can apply for a work permit if and when they find work. There is very little additional legal provision that relates to the situation of the Zimbabweans.[60]

In 2005, the government reviewed its immigration policy to increase deterrence, including penalties for illegal migration and harbouring migrants, introducing a $40 USD fine for unlawful entry. Those who are present illegally or are not recognized as refugees are liable to be detained and deported. Indeed, Botswana puts more money into deportation than any country in the region except South Africa, spending around 2 million Pula (approximately $285,000 USD) per month.[61]

Most Zimbabweans arrive at the country's eastern border. Upon arrival, they are transferred to the detention centre at Francistown for RSD. In practice, the Government of Botswana allows the most vulnerable, including pregnant women, children and those with medical needs, to be allowed to await RSD in the refugee camp rather than the detention centre. If refugees are recognized, they are transferred to the refugee camp at Dukwe. Those in the camp can apply for a work permit if and when they are able to find work. Once this takes place, they receive *de facto* local integration. Those who are not recognized as refugees are deported.

However, it is estimated that only a small minority of Zimbabweans in Botswana apply to be refugees. There are currently around 900 Zimbabwean refugees in the

[57] Interview with Mary Ratau, 25 March 2009.
[58] In practice, all Zimbabweans who claimed asylum in 2008-9 were granted asylum, and deportation were only applied to those who were illegally in the country.
[59] Interview with Beleme Gelafele, UNHCR Botswana, Gaborone, 28 March 2009.
[60] Interview with Beleme Gelafele, UNHCR Botswana, Gaborone, 28 March 2009; 1967 Refugee Recognition and Control Act.
[61] Quote from the Vice President of Botswana in May 2009. Information provided by Roy Hermann, UNHCR Representative, Gaborone, Botswana, personal correspondence, 25 May 2009.

country.[62] The majority bypasses the asylum system entirely and either cross the border illegally or use temporary visitors permits issued at the border. This places them outside of both a national and an international institutional response, rendering them largely invisible to the UN agencies in the country. For example, UNHCR does not have mandate to work with the Zimbabwean undocumented migrants, while UNICEF and UNDP's country programmes only work with citizens and to a limited extent with refugees, providing no programmatic framework or budget line within which the needs of the majority of Zimbabweans can be addressed.

Urban settlement

Since the undocumented Zimbabwean migrants fall outside of the national and international institutional response, there is only anecdotal evidence about their situation. They are difficult to identify because they do not wish to be visible to government authorities given the risk of deportation. Within Botswana, they are dispersed across the country. However, there are also small concentrated populations in areas such as the so-called 'Little Harare' in Gaborone.

There are significant protection gaps for the undocumented Zimbabweans in Botswana. Without material assistance, many are exploited in domestic or agricultural work.[63] There are also significant amounts of both male and female prostitution, sometimes under-aged, with Zimbabweans sometimes offering unprotected sex for as little as 30 South African Rand – around $3 USD.[64] Although there are no significant reports of xenophobic violence, the Batswana are often hostile to Zimbabwean immigrants because of their perceived association with crime and HIV. Health care services –including ARVs - are unavailable to undocumented migrants.[65]

Furthermore, the absence of material assistance means that there are no programmes for undocumented children.[66] There are no reliable figures for the numbers of UAMs and children among the Zimbabwean populations. However, extrapolating from the proportion of Zimbabwean refugees who are aged under 15 would suggest that, based on the most conservative estimate of 40,000 undocumented Zimbabweans, there would be around 3000 undocumented Zimbabwean children, who have no access to protection or services such as education or health care.[67]

[62] Interview with Beleme Gelafele, UNHCR Botswana, Gaborone, 28 March 2009.
[63] Interview with Mary Ratau, Ditshwanelo, Gaborone, 25 March 2009.
[64] Interview with Monica Kiwanuka, University of Witwatersrand, Johannesburg, 17 March 2009.
[65] However, there is currently an effort by some groups, non-UN, who are advocating for the private treatment of HIV positive migrants, though it is expected that they will have difficulties getting government approval. They want to provide Prevention of Mother to Child Transmission (PMTCT) to all pregnant HIV positive mothers, legal or illegal. Personal correspondence with Roy Hermann, UNHCR Representative to Botswana, 25 May 2009.
[66] Interview with Marcus Betts, UNICEF Deputy Representative to Botswana, Gaborone, 25 March 2009.
[67] This is based on UNHCR statistics of the number of refugees and the proportion which are children. However, extrapolation from the refugee population to the undocumented migrant population is not unproblematic because the proportion of children may be higher in the refugee population, whereas undocumented migrants may be more likely to be individuals seeking employment than families.

The absence of an institutional framework

The existing international response does little to address these needs, mainly because its agencies have neither the mandate nor the budget lines to do so. UNHCR has no mandate to work with the undocumented migrants, and most of its work and programmes focus on the Dukwe camps and Francistown detention centre. The Representative has engaged in dialogue with the Immigration Minister asking for deportations to be suspended after the March 2008 elections. However, the position of the government was that there is a procedure for Zimbabweans in need of protection in place – the asylum system, and that there are cases where illegal migrants, after being apprehended, have been allowed to make a successful claim for asylum.[68]

Meanwhile, UNICEF's work on child protection for refugees follows that of UNHCR, focusing on Dukwe. As UNICEF's Deputy Representative argued, "When people become refugees, a number of things kick in automatically. But for these undocumented, perhaps economic migrants, it is not clear that we have any clear policies, structures, and guidelines on how to work on this as UNICEF".[69] He suggested that the ambiguous data on the undocumented migrants and Botswana's position as a middle income country have further exacerbated the difficulty of programming or developing budget lines for the needs of undocumented migrant children.

The institutional response has been made even more inadequate by the absence of active NGOs in this field. The one NGO which is widely acknowledged to play an influential role in the human rights field, Ditshwanelo, acknowledges that this area is simply not a priority given its limited capacity.[70] In the absence of an international institutional response, churches and the Botswana Red Cross have been among the few organizations able to offer any degree of support to Zimbabweans outside of the asylum framework.

Therefore the needs of Zimbabweans who do not fall within the framework of the 1951 Convention are largely bypassed by the international community. The government and the main UN actors are confined to working within the dichotomous framework of refugees/economic migrants, which renders the realities of the Zimbabwean exodus all but invisible. While all of the UN agencies within the country acknowledge the issue and the protection gaps that exist, they are unable to address the issue because of the inadequacies of the national and international institutional framework.

Implications for the refugee protection regime

Responses to the Zimbabwean exodus have been inadequate. One of the reasons for this is that the situation falls outside the framework of the 1951 Convention. In South Africa the focus on using the asylum system has led to an *ad hoc* response, culminating in the creation of a response that may constitute a form of Temporary

[68] Information provided by Roy Hermann, UNHCR Representative, Gaborone, Botswana, personal correspondence, 25 May 2009

[69] Interview with Marcus Betts, UNICEF Deputy Representative to Botswana, Gaborone, 25 March 2009.

[70] Interview with Mary Ratau, Ditshwanelo, Gaborone, 25 March 2009

Protection for 'economic refugees'.[71] In Botswana, the government and international community have steadfastly upheld the refugee/economic migrant distinction. In both cases, though, it is clear that there have been significant protection gaps that neither the 1951 Convention nor the asylum system has been able to address.

It is important to learn lessons from this situation, and to avoid the need for equally *ad hoc* responses to emerge in similar contexts. There is good reason to believe that other cases of survival migration that do not fit within the 1951 Convention will emerge elsewhere in the world, probably with increasing frequency. Within Africa, the situation of many Congolese and Somalis do not fit the model of individualized persecution.

In countries like Kenya, this is partly addressed by according all Somalis prima facie recognition under their national legislation which borrows from the OAU Convention, but in situations like the Congolese in Angola, there is no coherent response to survival migration. Elsewhere in the world an increasing number of people are fleeing desperate situations that are not covered by the 1951 Convention. This, for example, applies to many people leaving Iraq or Afghanistan. Furthermore, the challenge of climate change and environmental displacement are likely to make a more comprehensive framework for addressing survival migration increasingly necessary.

The environment-livelihood-state collapse nexus is therefore likely to be a growing source of displacement, which requires a coherent international response. There is a need to develop a framework that can address the protection of people fleeing serious economic, social and environmental distress. It will have two core elements. Firstly, it will require a normative framework based on a multilateral international agreement on the subsidiary protection of vulnerable migrants. Secondly, it will require an institutional framework, setting out a clear division of labour between different international organizations. Developing a new normative and institutional framework has the potential to benefit both donors and host states by offering opportunities for greater predictability, clarity of responsibility, and reciprocity.

Normative implications

The existing international framework is inadequate to address situations of survival migration like that of the Zimbabwean exodus. Few Zimbabweans relative to the total exodus have fled individualized persecution; the majority therefore fell outside the scope of the 1951 Convention. Furthermore, the OAU Convention, which includes protection for those fleeing generalized violence was not invoked for political reasons and would, in any case, be of no relevance outside the African context. Although a range of approaches to subsidiary protection have emerged in different countries to fill such gaps, the belated and *ad hoc* emergence of some form of temporary protection in South Africa, demonstrates the need for a more coherent normative framework to ensure the protection of people who flee an existential threat for which they have no domestic recourse.

[71] The 3 April announcement was greeted as such by UNHCR and HRW, although both recognized that whether the announcement reaches this threshold in practice will depend upon implementation.

Internationally recognized and predictable standards of subsidiary protection for survival migration are urgently needed. Such standards would need to consider two core issues: i) the threshold of rights violations that would entitle a person to seek protection abroad (i.e. the definition of a survival migrant) and ii) the rights and conditions of stay (such as temporary protection) that would be made available in the host country.

Firstly, such standards would need to establish the threshold of rights violations that would entitle a person to seek protection abroad. When is it that domestic rights violations (within the area of economic, social, civil, or political rights), and the corresponding lack of domestic recourse to such rights, means that there is a need for another state to stand-in and provide subsidiary protection? Doing so, would establish a definition of who falls within the category of a non-refugee survival migrant.

There is growing jurisprudence, drawn from sources of international human rights law, on the conditions under which subsidiary protection should apply. This has been recognized, for example, in the expanding jurisprudence of the ECHR and CAT.[72]. Meanwhile, the EC Qualification Directive has consolidated some of this jurisprudence in a regional treaty through an inter-state agreement on subsidiary protection. However, standards and approaches to subsidiary protection vary between countries and regions, and a similar type of framework is needed at the international level to establish the conditions under which domestic human rights violations translate into a basis for subsidiary protection.

Secondly, the standards would need to establish the rights and conditions of stay that would be made available in the host country. In particular, what are the economic, social, civil, and political rights to which non-refugee survival migrants would be entitled? What types of documentation and registration might apply? Furthermore, the standards would need to clarify the determinants of the duration of stay, and whether protection would be temporary in nature. Standards and guidelines for temporary protection could be developed, just as they have been in the EU context. Another, related component of this could be to establish principles on the type of international burden-sharing that would apply – in terms of financial support and resettlement – in relation to the temporary protection of survival migrants in need of subsidiary protection.

There would be two main options for developing such normative standards. These options are examined below.

A soft law framework

International human rights law applies to migrants as it does to all other human beings. However, in the absence of significant legal opinion or jurisprudence relating human rights law to the situation of migrants, the understanding and implementation

[72] For example, in the cases of *Tapia Paez v Sweden* at the Committee Against Torture and *Chahal v UK* at the European Court of Human Rights (ECHR), the states against which the cases were brought were prevented from deporting asylum seekers excluded from refugee status under the exclusion clauses of the 1951 Convention if they were likely to face torture or inhuman or degrading treatment or punishment upon return. *Tapia Paez v Sweden*, CAT, Communication No. 39/1996; *Chahal v United Kingdom* (22414/93) [1996] ECHR 54 (15 November 1996).

of the rights of vulnerable irregular migrants remain underdeveloped. States have signed up to international human rights norms and, as such, have obligations towards non-citizens on their territory. However, there is a need to establish a consensus understanding on what this means for the situation of vulnerable irregular migrants – in terms of both the conditions under which subsidiary protection should apply, and the rights to which they are entitled while outside their country of nationality.

There has been an emerging body of jurisprudence. Most notably in the European region, highlighting the conditions under which non-refugees may be entitled to subsidiary protection. For example, ECHR Article 3 against torture has been used to highlight the obligation of states not to return certain non-refugee groups.[73] In line with their commitments to the ECHR European states have criteria for non-returnability of foreigners. Germany, for instance, grants protection against deportation for foreigners who may be subject to the death penalty or where 'a substantial concrete danger to his or her life and limb or property or liberty' exists.[74]

Similarly, the UK offers 'Humanitarian Protection' and 'Discretionary Leave to Remain' as a means of subsidiary protection. A Zimbabwean asylum seeker in the UK, for instance, may be granted Discretionary Leave to Remain if their health problems are so severe as to amount to inhuman treatment in the absence of medical care.[75] However, despite this gradually emerging jurisprudence, the range of possible applications and interpretations of international human rights law, as a basis for subsidiary protection, is far from exhausted.

One means of establishing standards for the protection of survival migrants would be the development of a soft law framework on the protection of vulnerable irregular migrants. This would simply involve the interpretation and consolidation of the application of existing international human rights standards to the situation of vulnerable irregular migrants. Such a process could analogously draw upon the experience of the development of the Guiding Principles on Internal Displacement which, rather than being a new 'hard law' treaty, was simply based on the consolidation of existing international human rights and humanitarian law standards, and the universal recognition of those consolidated principles.[76]

A negotiated treaty

The alternative approach would be to develop a new inter-state treaty on the subsidiary/temporary protection of non-refugee survival migrants to supplement the existing refugee regime. Such an approach might be useful given that the existing jurisprudence on the application of international human rights law remains limited. In comparison to a soft law framework, it might also allow a stronger commitment among states to comply with obligations.

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[73] See, for example, *Soering v. United Kingdom*, Judgement of 7 July 1989, Series A, no.161; (1989) 11 EHRR 439; *Chahal v United Kingdom* (App. 22414/93) Judgement of 15 November 1996); *Jabari v. Turkey*. (App.40035/98) Judgement of 11 July 2000

[74] Section 60 (2)- (7) of the 2004 Residence Act.

[75] Section 4.4,6, United Kingdom Border and Immigration Agency Operational Guidance Notes, March 2009.

[76] For further elaboration see Betts, A (2008), 'Towards a Soft Law Framework for the Protection of Vulnerable Migrants', *Issues in Refugee Research*, Working Paper No. 162 , (UNHCR: Geneva).

The precedent for a negotiated treaty can be found at the regional level. The EC Qualification Directive is negotiated agreement between EU member states, which provides subsidiary protection to persons fleeing 'serious harm', on the basis of the member states existing commitments to human rights instruments and practices.[77] As such, the treaty is a consolidation and application of existing standards and practices derived from international human rights law, rather the creation of new norms.[78] Similarly, at the international level, states have already signed up to international human rights standards, from which the right to subsidiary protection could be derived, and then consolidated in a treaty.

Although it would be challenging to develop such a treaty on a global scale, it is conceivable that within specific regions (e.g. SADC) or continents (e.g. the AU) such treaties could be negotiated. A negotiated treaty approach might also have the advantage of clarifying how subsidiary protection for non-refugees would be linked to issues such as international burden-sharing.

The development of negotiated regional treaties on the subsidiary protection of non-refugee survival migrants would not be mutually exclusive from the development of a soft law framework based on the interpretation and application of international human rights law. Rather the creation of a soft law framework at the global level could provide the 'Guiding Principles' on which regional or continental treaties could be based.

Again such an approach could draw upon the precedent of how the international community has addressed the IDP issue, with the development of Guiding Principles at the global level leading to the negotiation of treaties at the regional level. The starting point for considering such issues could be a forum such as the annual High Commissioner's Dialogue.

Institutional implications

At the organizational level, the main weakness in responding to Zimbabweans has been the absence of a clear division of institutional responsibility for protection needs in relation to vulnerable irregular migrants. Both the South Africa and Botswana cases illustrate the relative 'invisibility' of the Zimbabweans and the low priority with which their protection needs were met. The default response was initially to try to address the influx as a 'refugee situation' and to engage in individualized RSD on the basis of the 1951 Convention. However, this has been inadequate, leading the protection needs of Zimbabweans to fall between the cracks of different agencies' mandates. Where needs have been met to some extent, this has occurred in spite of rather than because of a coherent institutional response, and has been a credit to the individuals on the ground adapting to circumstances.

[77] Preambular Paragraph 25 of the EC Qualification Directive

[78] Article 15 (a), which offers protection from the death penalty and execution, is a reiteration of the EU members states' commitment to the Protocol 6 of the ECHR and the Optional 2nd Protocol of ICCPR. Article 15 (b) recaps Art 3 of the Convention Against Torture and Article 3 of the ECHR. Article 15 (c), which prevents persons from being returned to national or international armed conflict, is similar to the OAAU Convention and Cartagena Declaration and reflects the already existing state practice for not returning individuals fleeing conflicts, such as the break-up of Yugoslavia.

There is therefore a need for a clearer and more predictable division of labour between international organizations to address non-refugee 'survival migration'. Here, some kind of collaborative agreement would be needed to divide responsibilities between relevant actors such as UNHCR, IOM, and IFRC. One option would be the application of the 'cluster' approach agreed in the Inter-Agency Standing Committee (IASC) in 2006 through which different agencies have responsibility addressing different aspects of the needs of IDPs.

Inter-agency coalitions to address issues relating to 'mixed migration' are already emerging in different field contexts such as the role of the Mixed Migration Task Force in relation to Somalia. It would be important to consider which agencies would have a monitoring and surveillance responsibility for new standards, which agencies would engage in protection activities, and who would provide material assistance. Within this framework, UNHCR might take on significant responsibility for the protection of all survival migrants, and so effectively become the UN's Forced Migration Agency. Alternatively, it might simply play a catalytic role in facilitating initial inter-state and inter-agency agreement.

Conclusion

Many vulnerable irregular migrants need subsidiary protection, at least on a temporary basis. The Zimbabwean case illustrates the inadequacy of the existing international framework for addressing the protection needs created by a combination of economic, social and environmental factors. The Zimbabwe situation has been a mass influx situation involving up to two million forced migrants and yet the international response has been extremely limited. In the context of environmental change and its multi-causal interaction with livelihoods and governance, there is good reason to believe that state collapse in Zimbabwe was not and will not be a unique situation.

There is a need think carefully about how build upon and develop existing normative and institutional framework to address such situations. There is a need to supplement the existing international protection regime with an additional normative and institutional framework that is capable of addressing the protection needs of people fleeing serious economic, social and environmental distress that threatens their most fundamental rights. Such a framework would have two core elements.

On a normative level, a multilateral framework on subsidiary protection could set out i) the threshold of rights violations that would entitle a person to seek protection abroad (i.e. the definition of a survival migrant) and ii) the rights and conditions of stay (such as temporary protection) that would be made available in the host country. Such a framework could initially take the form of a soft law framework based on an analysis and application of existing international human rights law to ascertain the conditions under which there is the basis of a claim to subsidiary protection. Such a soft law process would be analogous to that which created the Guiding Principles on Internal Displacement. The initial development of such a soft law framework might then lead to the development of negotiated regional treaties on subsidiary protection drawing on the precedent of the EC Qualification Directive.

On an institutional level, there is a need for a more coherent and predictable response to forced migration that are not based on conflict or political persecution. The responses that currently exist to deal with survival migration based on, for example, environmental displacement or economic and social distress are ad hoc and unpredictable. Of course, if UNHCR were to become involved to a significant degree, this would have significant resource implications due to the increase in its 'people of concern'. The challenge would be to ensure that expansion did not 'dilute' its work with refugees, and that additional resources were identified to address the wider challenges of survival migration.

The Zimbabwean situation demonstrates how serious the human consequences of this unpredictability can be in a mass exodus situation. A clear division of institutional responsibility is required. UNHCR, IOM, IFRC in particular, need to engage in discussion amongst themselves and with states about the appropriate operational response to such situations. This might take the form of a wider application of the 'cluster' approach within the context of the existing IASC agreement or it might begin with a more informal collaboration. However, the advantage of a more formal division of responsibility is that is will bring greater predictability and will make clear where additional state contributions to fund responses to survival migration crises should be directed.

Any attempt to develop new norms will require strong leadership from UNHCR, clear definitions and will need to be politically realistic. However, states can only benefit from additional normative guidance and organizational support in this area given that it is unpredictability and the absence of international support that is likely to impose the greatest costs on host states and the international community. Arbitrary and uncertain responses to survival migration represent not only a violation of human rights but also a threat to the security of states within and beyond the region of origin. A clear framework will benefit host countries in the region by providing clear normative guidance and ensuring more predictable international support. It will benefit countries outside the region by ensuring that new emergencies are met with a coherent institutional response before they become threats to regional or international security.

Although the refugee protection regime itself remains as important and relevant as ever, it does not provide full or adequate coverage for the range of new forced migration scenarios and protection needs that are emerging and will continue to emerge as the 21st Century unfolds. The world no longer resembles the Europe of 1951, and its current protection framework needs to be supplemented to ensure the protection of a wider range of forced migrants.