Scalabrini Centre of Cape Town

Submission on the

White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa

30 January 2024

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Introduction

The Scalabrini Centre of Cape Town (SCCT) is a registered NPO whose mission is to welcome, to protect, to promote and integrate people on the move in local society. In providing assistance to people on the move, we advocate respect for human rights and use a holistic approach that considers all basic needs. We strive to challenge, influence, and improve law, policy and practice impacting people on the move, and to ensure their agency, belonging and integration, in order to achieve a welcoming South Africa where the rights of people on the move are realised. The SCCT works with asylum seekers, refugees and other migrants on a daily basis, addressing obstacles many face to meaningfully contribute to society. We draw on this experience, along with relevant and contemporary research on migration, to offer our input on our input on the Department of Home Affairs' White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa (hereafter 'the White Paper'). We appreciate the opportunity to share our knowledge and contribute to this process.

We support the Department's attempts to address some of the current gaps in law, policy and practice regarding international migration and human mobility in South Africa. Our experience has shown that often the developmental power of migration has been squandered due to policies and practices that do not speak to each other or are not effectively implemented.[1] Developing and implementing a practical, consistent and rights-based policy on human mobility and citizenship has the potential to assist in South Africa's development and enhance our security and economic prospects. At the same time, a more coherent policy can strengthen regional ties and integration across a number of sectors. Such a development would enhance the lives of both South Africans and non-nationals and establish South Africa as a leader in a more integrated and developed region.

Toward this end, we support the Department's emphasis on the need to properly train officials and on the urgent need to root out the endemic corruption that has become widespread within the current framework. It is without a doubt that effective border control measures are essential for the purposes of combating serious international crime such as smuggling and trafficking, and we support the Department's efforts to improve these critical functions. We also agree there is a need to align legislation and practices as the existing gaps have significant impacts on the lives of individuals – both citizens and non-nationals – and on governance.

However, we are gravely concerned that the current iteration of the White Paper does not establish a solid foundation for an effective legislative and policy reform process. Many of the issues with the current framework cited in the White Paper are

[1] See for example our short film on the challenges skilled refugees face in practising their profession in South Africa, Critical Skills (April 2021).

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more related to bureaucratic challenges than legislative deficiencies, and many of the major proposals – such as withdrawing from the 1951 *Convention relating to the status of refugees*[2] and entering reservations – would result in a significant reduction of many fundamental constitutional rights and represent a retrogression in working towards the full realisation of those rights. Such a move would violate our obligations to work towards the 'full realisation of rights' as under international law, including the *International Covenant on Economic, Social and Cultural Rights*,[3] and is hard to reconcile with our recent application to the International Court of Justice to ensure the international human rights law framework is upheld and respected for the protection of a vulnerable group. What's worse, as explained below in our submission, is that the proposed move to reduce the rights of refugees, for whom our highest Court has confirmed as a vulnerable group,[4] is based on an incorrect interpretation of international law and the Bill of Rights in our Constitution. Unfortunately, many of the White Paper's proposals are put forth based on misinterpretations of law, fact and practice, lacking careful consideration and empirical evidence to justify the restrictions. In general, there is little engagement with available data and research on migration and scant reference to the regional and economic aspects of migration in our region. To say the White Paper is a negative document in tone and ideas is an understatement.

As the current legislative and policy development process unfolds, we hope that a meaningful public consultation and engagement process leads to a more constructive and positive policy framework for human mobility and citizenship. We hope that our submission assists the Department in rectifying some of the inaccuracies and miscues, and that our suggestions for a migration framework that engages our continent and region positively are taken seriously. We thank the Department for the opportunity to contribute.

Our submission is structured as follows; in Section 2, we first set out our view of the developmental potential of migration and the need for a coherent and accessible regional migration visa scheme and provide general comments on some of the misconceptions, gaps, and inaccuracies in the current White Paper. We then provide specific comments on the proposals surrounding refugee protection in Section 3, on issues surrounding citizenship in Section 4, and on immigration matters in Section 5. At the conclusion of each section, we make recommendations as to how government

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[2] 189 UNTS 137. Hereafter '1951 Convention'.

[3] States have a primary obligation under universal human rights standards to work towards the progressive achievement of the full realisation of these rights to the maximum available resources, and to ensure that core obligations are met. For more detail on the progressive achievement of rights, see: Pia Oberoi, 'Defending the Weakest: The Role of International Human Rights Mechanisms in Protecting the Economic, Social and Cultural Rights of Migrants', *International Journal on Multicultural Societies* 11(1) (2009) at p. 20.

[4] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395, at para 28.

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could more appropriately deal with its concerns. **Annexure 1** contains our consolidated recommendations for ease of reference.

2. Towards a pragmatic and evidence-based migration policy to constructively engage with our region and harness the power of migration positively

A major gap in the current White Paper is the lack of reference to the need to align our migration policies with regional integration and regional migration patterns. While we disagreed with some of the proposals and visions in the Department's 2017 White Paper on International Migration (hereafter the '2017 White Paper'), we strongly supported the Department's vision of an African-centric migration policy squarely positioned within the African development agenda. The 2017 White Paper endorsed the notion that migration can play a role in nation-building and social cohesion, and that this can strengthen regional integration and ties. Importantly, it noted all of this can be done in a secure manner.

In doing so, the 2017 White Paper sought to align our policy to the developmental goals set out in the National Development Plan (NDP), developed and adopted by the African National Congress and government in 2012/13, with the goal to eliminate poverty and reduce inequality by 2030 through drawing on the energies of the South African people and growing an inclusive economy. It engages with cross-border and internal migration through a pragmatic and constructive lens, identifying the need to harness migration as a means to address poverty and create more opportunities for decent work. Writing about the possibilities of migration, the NDP recognises that:

> If properly managed, migration can fill gaps in the labour market and contribute positively to South Africa's development. Energetic and resourceful migrant communities can contribute to local and national development, and diverse, cosmopolitan populations are often the focus of cultural, economic and intellectual innovation. If poorly managed, however, the skills and potentials of migrants will be neglected. Migration will remain a source of conflict and tension, and migrants will be increasingly vulnerable, subject to continued abuse, exploitation and discrimination.[5]

The NDP further recognizes that human mobility will continue to feature prominently in South Africa and will likely become more diverse and complex.[6]

Building on the vision of the NDP, the 2017 White Paper contained a section on the management of international migration in the African context that addressed some of

[5] National Planning Commission, National Development Plan 2030: Our future – make it work (Pretoria, Presidency of South Africa, 2012), p. 105.

[6] Ibid, pp. 98, 103.

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the gaps in current policy and put forth a vision for managing migration in a manner that aligns with our African-centred foreign policy by aligning our migration policy with continental processes advancing intra-African trade, sustainable development and increased regional integration.[7]

This policy proposal was summarised as:

> a **pragmatic management approach** which balances acceptance of the reality that some economic migration to South Africa is inevitable with the need to ensure unemployed, poor and working class South Africans are the primary beneficiaries of employment and other economic opportunities in the country.[8]

The 2017 White Paper's vision emphasises the need for a pragmatic approach and aims to both harness the developmental power of migration while also ensuring that citizens also see these benefits.

To execute this pragmatic and balanced approach, it balanced strengthening certain aspects of border control focused on high-level crime along with proposing specific, achievable policy prescriptions such as *inter alia*:

- The elimination of visa requirements for African citizens in a secure manner;
- The introduction of regularisation programmes for undocumented migrants currently residing in South Africa subject to certain requirements such as possession of passports, lacking a criminal record and proof of valid basis for residing in South Africa; and
- The expansion of a regional visa regime – modelled on special dispensation visas established for nationals of Zimbabwe and Lesotho – to manage economic migration from key regional neighbours in the South African Customs Union as well as major source countries with deep historical ties to South Africa such as Malawi, Mozambique and Zimbabwe.[9]

Some aspects of this proposal have been implemented in part, such as the visa-free travel arrangement concluded with Kenya which has boosted intra-African tourism.[10]

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[7] 2017 White Paper, p. 52.

[8] Ibid, p. 53. Emphasis added.

[9] Ibid, pp. 55-57.

[10] Vahangwele Nemakonde, 'Kenya and Zimbabwe drive African tourism boom in South Africa' (*The Citizen*, 24 December 2023).

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Indeed, the Department's previous regularisation projects and exemption permits, such as the Zimbabwean, Lesotho and Angolan dispensations, have largely been successful at their policy objectives. Other similar examples of pragmatic and development-focused policy from within our region highlight the potential of migration such as the 2022 Namibian-Botswanan visa-free deal which has fostered cross-border mobility through removing the requirement of passports, lessening the burden on government, and opening new avenues for tourism and trade.[11] These examples highlight the role migration can play in regional development and how practical, straight-forward policies can make migration more easily managed and reduce backlogs and our reliance on costly but ineffective policies such as detention and deportation.

It is our belief that the creation of more legal pathways for those in the region is the most critical gap in the current framework. Establishing a practical and accessible regional visa scheme would greatly enhance the Department's ability to more effectively manage some of the challenges listed in the White Paper such as limited departmental capacity and an overburdened asylum system. It would also align our migration policy with continental initiatives such as the African Union's Agenda 2063 and SADC's ongoing integration efforts. It would create possibilities for other bilateral arrangements with our neighbours. This gap has also been recognised by the National Planning Commission, who has called for strengthened and harmonised border policies and that the SADC protocol on the free movement of persons be implemented to assist in alleviating domestic challenges as well as to improve access to regional and continental markets.[12]

We therefore believe the current White Paper falls short in this respect and does not offer a practical vision for a more holistic and balanced migration policy, nor for a more integrated region. We strongly recommend the Department include a regional visa plan in any reform of the migration framework and align future policy with the goals and benchmarks of the NDP. If such a scheme can be implemented and made accessible, many of the challenges listed in the White Paper – corruption, limited capacity, costly and ineffective detention and deportation, issues of border control – would be made more manageable. At the same time, South Africa would effectively

Recommendation #1: The SCCT recommends that the Department adopt a pragmatic approach to migration management that emphasises regional integration and development as the basis of an African-centric migration policy.

[11] Gerhard Erasmus and Trudi Hartzenberg, 'Botswana and Namibia concluded an agreement on the movement of persons' (*Tralac*, 8 March 2023); Edith Mutethya, 'Visa-free travel seen as key to opening up African tourism' (*China Daily*, 27 November 2023).

[12] National Planning Commission, '10 year review of the National Development Plan 2012-2022' (Pretoria, Presidency of South Africa, October 2023), p. 54.

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harness the benefits of migration and emerge as a leader of a more integrated and developed region.

Recommendation #2: The SCCT recommends that any new immigration legislation include mechanisms that account for and facilitate legal pathways for low to mid-skilled migration within the region as an integral component of a holistic and secure migration policy.

Recommendation #3: The SCCT recommends that concurrent to the introduction of an expanded regional visa regime, that the Department implement a Regularisation Programme to allow for SADC migrants currently residing in South Africa to access documentation, and that such a programme is implemented in a secure manner and based on strict criteria. Any regularisation programme should be accompanied by a moratorium on deportation for individuals that may qualify to broaden the project's reach and ensure it is effective.

2.1 Conceptual concerns

We have several conceptual concerns that ground the White Paper's arguments and its proposals for a legislative overhaul. We believe it is critical that these are addressed as basing policy and legislation on misinterpretations of data will send us down the wrong path, squandering more time and resources on developing unworkable or ineffective policies.

2.1.1 Inaccurate claims and lack of evidence-based proposals

The White Paper regrettably frames migration in terms of 'crisis' and presents a picture of high numbers of irregular migrants. However, the most reliable data set on migration in South Africa – Statistics South Africa's census figures – is not referenced. Figures from the 2022 census place the numbers of non-nationals in South Africa at around 2.4 million, **roughly 3% of the population**, and in line with previous census figures. This figure includes all foreign nationals in the country,

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documented or otherwise.[13] While this figure is an estimate, and we acknowledge the difficulties of population estimates generally and particularly in regards to people on the move, the White Paper instead, at paragraph 89, refers to unsubstantiated claims about undocumented migrant figures by stating the website Africa Check has 'come across many claims' of between five and 13 million migrants within South Africa. In reality, Africa Check debunked these claims as baseless and the 13 million figure as 'wildly incorrect'.[14] The White Paper's reference to this article frames these figures as credible, thus misrepresenting the facts.

Similarly, the White Paper presents a figure of 150,997 individuals acquiring South African citizenship through naturalization under the current framework and that it 'opens the door for foreign nationals and refugees to obtain citizenship at some point'. It argues that this figure demonstrates a need for more stringent requirements. In reality, the acquisition of citizenship is in practice lengthy and difficult – it is not easily accessible under the current framework by any measure. And this is borne out by the figures, which translates to just under 0.2% of South Africans. While the White Paper suggests that other countries are more stringent and restrictive in granting citizenship in terms of timelines and processes, it ignores the fact that the United States provide refugees with the option to apply for permanent residence after 1 year of residence and citizenship after being a permanent resident after five years.[15] Canada's framework sets out a pathway where individuals can apply for permanent residence after five years and then apply for citizenship after being a permanent resident for five years.[16] Canada has even embarked on a programme where undocumented residents can access permanent residency as a means to 'regularize' an estimated 300,000 - 600,000 people.[17] Each country, which the White Paper references as having more 'strict' laws in terms of citizenship, have demonstrably much more accessible frameworks than the current Refugees Act process, where a recognised refugee can only apply for certification to apply for permanent residence after 10 years of being recognized as a refugee.

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[13] 'Census 2022 indicates that foreign nationals make up only 3% of SA's population' (*South Africa Labour News*, 12 October 2023).

[14] Kate Wilkinson, 'Claim that 13 million international migrants live in SA wildly incorrect', (*Africa Check*, 21 February 2017).

[15] Information obtained from *USA Facts*, 'The path to citizenship in the United States' (5 October 2023).

[16] Information obtained from the *Department of Immigration, Refugees and Citizenship Canada*'s website: 'Applying for Permanent Residence from within Canada: Protected Persons and Convention Refugees' [IMM 5205].

[17] 'Canada to create citizenship path for undocumented immigrants' (Reuters, 14 December 2023).

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From our experience – and in the rare cases that we see refugees become citizens – it would realistically take at least ***20 to 25 years in the Republic*** before a refugee 'foreign national' formally obtains Citizenship. Furthermore, **asylum seekers with asylum seeker visas cannot obtain permanent residence and citizenship** as the White Paper intimates. We have detailed the long road a refugee must take to acquire citizenship in ***Annexure 2.***

Similar mischaracterisations regarding the resources that foreign nationals are said to take away from South African citizens have unfortunately been observed in the consultation process. For example, in the consultation that occurred on 15 January 2024 in East London, it was remarked that withdrawing from the 1951 Convention and re-entering with reservations would address strain in the provision of RDP housing. Specifically:

> Can we as South Africa, can we as South Africa be able to give everybody an RDP house when they come from another country? Can we do that? Are we able to give all South Africans RDP houses? Is there any country on earth that is giving free houses for anybody who comes there?[18]

This is simply not the case, as only permanent residents are eligible for subsidised housing under the Housing Act (No 107, 1997). While there are reports of foreign nationals buying RDP houses, such sales (whether they comply with legislation or not) will not be impacted in any way by withdrawing from the 1951 Convention. The challenges in supplying housing are significant, and the ANC government has made extraordinary strides in this regard, but the challenges we face in housing cannot be pinned on migration.

This idea – that migration is harming the South African economy – is an undercurrent spread throughout the White Paper and underscores much of its' proposals. The White Paper intimates that much of the societal tension surrounding migration is due to the fact that migrants are taking jobs from citizens and syphoning off resources. It suggests the 'harsh' reality is that there are simply insufficient resources in South Africa to accommodate non-citizens. There is no data or empirical evidence presented in the White Paper to support this. There are, however, a number of studies that highlight the developmental potential of migration, that point out the gains that can be had for citizens and migrants alike. These include:

- A 2017 study of the informal sector in Johannesburg found that migrant entrepreneurs create jobs and often employ South Africans, contribute to the

[18] Minister of Home Affairs Dr Aaron Moetsoladi, Remarks at the East London Convention Centre Consultation, 15 January 2024.

'formal' economy through sourcing supplies from local retailers and factories and through renting business properties from South African citizens;[19]

- a 2018 World Bank quantitative analysis of the impact of immigration on local economies in South Africa found that one immigrant worker generates approximately two jobs for South Africans;[20] and

- a 2013 qualitative research report on Somali Spaza shops in the urban and rural Western Cape found that shop keepers pay rent to South African homeowners, employ South Africans, offer low prices, and potentially open up opportunities for small scale suppliers and manufacturers who lack capacity to supply large supermarkets as well as being a current and potential source of tax revenue.[21]

By citing these studies, we do not suggest that there are not any costs associated with migration, but rather to show the developmental aspects of regional migration even under a framework not aligned to facilitate this. Such studies can provide a strong basis for which to improve future policy and should be considered if we are to improve our migration framework and developmental prospects.

Recommendation #4: The SCCT strongly urges the Department to consult the available research and data on migration and that sound, empirical evidence be used to guide the policy-development process.

2.1.2 Misinterpreting constitutional rights, jurisprudence and the role of international law

The White Paper suggests that many of the challenges associated with immigration and refugee protection are squarely due to legislation (such as acceding to the 1951 Refugee Convention without reservations) and the judiciary's development of jurisprudence in the absence of exceptions and reservations. We vehemently

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[19] Sally Peberdy, 'Competition or Co-operation? South African and Migrant Entrepreneurs in Johannesburg'
(SAMP Migration Policy Series No. 75, 2017).

[20] Shoghik Hovhannisyan et al, 'Mixed migration, forced displacement and job outcomes in South Africa' (World Bank Working Paper, vol 2).

[21] Vanya Gastrow and Roni Amit, 'Somalinomics: A case study on the economics of Somali informal trade in the Western Cape' (African Centre for Migration and Society, University of Witwatersrand, 2013).

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disagree with this view. On the contrary, many of our challenges are questions of administration and management, and regardless of the legislation in place, constitutional rights, international law and the courts will continue to play a role in managing migration.

Such statements misrepresent the role of the judiciary and the applicability of constitutional rights to all people present in South Africa, regardless of nationality. The rich jurisprudence that has developed in relation to the migration framework is based in constitutional rights, and reservations will not change constitutionally-based jurisprudence. The *Watchenuka* judgment was based not on the 1951 Convention, but rather on the right to dignity and the possibility of a mother and child starving due to their inability to conduct work in the midst of a protracted asylum process.[22] Far from being a 'problem', we should be proud of the careful and considerate work done in the courts to address the very complex challenges we face in terms of socio-economic rights and service provision.

The constitutional jurisprudence that has developed since the advent of democracy has made clear that the state should prioritise the most vulnerable in society and work towards the full realisation of rights, what has been termed 'progressive realisation'.[23] In doing so, there should not be regression from the status quo and 'any regressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights' in our Constitution.[24] As outlined above, the White Paper does not provide the justification or evidence for such a regression. And regardless, withdrawing from the 1951 Convention will simply not change jurisprudence or the precedents set that flow from the Constitution, nor will it eliminate the role of customary international law in South Africa.

Beyond being misguided, we submit that the White Paper's major thrust – that international law, rights and legislation are to blame for challenges in migration – is fundamentally misguided and is not a position from which to base a policy and legislative overhaul. Should the Department continue down this path, there is the real danger of wasted time and resources with no material gain.

Recommendation #5: The SCCT urges the Department to ensure any legislative or policy adjustments are in line with our jurisprudence, international law and best practice.

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[22] *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) (hereafter '*Watchenuka*').

[23] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 para 36.

[24] Ibid, para 45. Here the court draws on General Comment 3 on the International Covenant on Economic, Social and Cultural Rights and affirms its application to the Constitution.

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2.1.3 Risks of attempting a major legislative overhaul initiative based on unsound foundations

We point out the conceptual concerns above to caution against building policy and legislation from an unsound foundation. An ineffective, unimplementable or unlawful legislation will not fix the critical gaps in our framework.

The case of the 2020 Refugees Amendment Act[25] demonstrates the possible outcomes of adopting an overly restrictive and impractical piece of legislation. During the legislative development process of the Refugees Amendment Act, many individuals and civil society organisations pointed out the unconstitutional aspects of many of the proposals as well as their unfeasibility, both to the Department itself as well as during parliamentary deliberations.[26] Much of this input was disregarded, and subsequently when the legislation went into effect many of these proposals were either blatantly unlawful, such as sections 22(12) and (13) read with regulation 9 that sought to exclude individuals from refugee protection if their documentation expired for 30 days or longer,[27] or so impractical (aside from being unlawful), as sections 12(6)-(11) in relation to the right to work or study, that to date they have not been implemented. The result is an ineffective and half-implemented piece of legislation that has not addressed the very serious challenges in the refugee protection framework.

The White Paper intimates this state of affairs is due to the legislation itself and is not connected to the policy development process, and that this deficiency requires a wholesale legislative overhaul. While we agree that the new regulations are highly problematic and that the long lag time between the initial 2008 amendment to the Refugees Act and their implementation in 2020 is unacceptable, this outcome is due in part to the Department's policy development process and an ineffective development process in Parliament. Even in instances where the courts have ordered very specific sections of legislation to be re-drafted to be constitutionally

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[25] No 11, 2017. Hereafter 'Refugees Amendment Act'.

[26] Natalie Pertsovsky, 'Refugee Amendment Bill "restricts and excludes" says attorney William Kerfoot', (GroundUp, 21 April 2017). See also the discussions on the Draft Amendment Bill: Parliament of South Africa, Portfolio Committee on Home Affairs, 'Draft Refugee Amendment Bill: consideration of submissions' (Parliament, Cape Town, 28 July 2015).

On the Regulations to the Refugees Amendment Act, see our submission to the Department: Scalabrini Centre of Cape Town, Comments on the Draft Refugees Regulations and Draft Rules of the Standing Committee (2018).

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compliant, as pointed out in numerous submissions prior to the provisions becoming law, change has been slow and well outside of court-ordered timelines.[28]

We make these points now not to chide the Department, but to caution against a massive overhaul of legislation that does not align with our constitution, context, capacity or best practice. It is well known by all that resources are already stretched. We simply cannot afford to spend time and resources on policymaking that will not pass constitutional muster nor be effective. We therefore suggest that the Department also consider critical reforms that can be achieved without a complete overhaul, such as prioritising high-level crime and upskilling and capacitating officials to fulfil their obligations in an effective and lawful manner.

Recommendation #6: The SCCT recommends that the Department consider more targeted and specific interventions to address the current gaps in policy in light of the severity of challenges, our finite resources and the significant length of time these gaps have been unaddressed.

3.0 Comments on proposals relating to refugee protection

As mentioned at the outset, we are deeply concerned by the White Paper's proposals in relation to the management of South Africa's asylum seeker and refugee regime. We recognise that the Refugees Act is not perfect and requires readjustments, as does any piece of legislation, but a drastic and major policy change is unnecessary, especially if a practical and accessible regional work visa programme is implemented. The current challenges are more challenges of capacity and commitment, not legislative. As mentioned earlier, if a more accessible regional visa regime is implemented, then the challenges associated with implementing the Refugees Act will become more manageable. The Refugees Act was once lauded as 'one of the most advanced and progressive systems of protection in the world today,'[29] and, despite its flaws, we still believe it represents the best of South Africa's commitments to international solidarity and human rights. Even amongst the challenges, one can see the thousands of people who have benefited from the

[28] *Ex Parte Minister of Home Affairs and Another in re Minister of Home Affairs v Lawyers for Human Rights* (CCT 38/16). For more insight and context, see: Diane Hawker, 'ConCourt hits Home Affairs minister, DG with personal costs order over immigration law case', (Daily Maverick, 30 October 2023).

[29] Pumla Rulashe, 'UNHCR chief commends Pretoria's refugee policy, pledges cooperation' (UNHCR, 24 August 2007).

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protection the Refugees Act offers as well as the benefits we have gained in terms of social, cultural and economic life.

3.1 On the potential withdrawal from the 1951 Refugee Convention and reservations

We point out above in section 2 that many of the difficulties existing within the South African refugee system are not the result of law at all (whether domestic or international). Rather, these difficulties arise from capacity constraints, unwise policy choices, and inefficient administration within the Department itself.

Nonetheless, in this section we address directly the question:

> *Would the withdrawal from, and/or excepting to or reserving from, the 1951 Convention or the 1967 Protocol benefit South Africa in any way?*

This is an important inquiry, because one of the central claims made in the White Paper is that it is South Africa's adherence to international law which has led it to its purportedly-untenable position in relation to refugee protection. This claim appears, *inter alia*, at paragraphs 31-32 of the White Paper (after a lengthy recitation of reservations made by other countries), where the following conclusions are emphasised:

> 31. South Africa did not make any reservations in respect of the 1951 Convention and 1967 Protocol. This was a serious mistake on the part of government.
>
> 32. It is not surprising that South African courts developed jurisprudence regarding asylum and refugee protection (in the absence of exceptions and reservations) [which protects refugee rights].

With respect, these conclusions are fundamentally incorrect. They flow from a misunderstanding of the impact of international law on South Africa's domestic refugee jurisprudence.

The White Paper appears to contend that it is because of international law that refugees and/or asylum seekers hold the rights listed at paragraphs 32.1 to 32.6 of the Paper. Yet an examination of these rights demonstrates that they do not arise from international law, but rather from the South African Constitution itself. Consequently, adopting a different stance at the international legal level will have no impact on the scope of these rights in South Africa.

Paragraphs 32.3 and 32.6, for example, refer to refugees' rights to dignity and to just administrative action. These rights are protected by sections 10 and 33 of the Constitution, which apply to all people (including refugees and asylum seekers). No withdrawal from any international instrument would or could limit these rights.

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Paragraph 32.4 refers to the rights of asylum seekers and refugees to work or study in South Africa. As noted in the footnote in that paragraph, these rights were recognised in the Supreme Court of Appeal's (SCA) decision in *Watchenuka*.

But the SCA in *Watchenuka* did not grant these rights because of any international legal provision. In fact, the Department argued that international law supported the imposition of limitations on the rights to work or study. The SCA held, however, that the relevant international instruments '*are neutral on this issue*'.

This finding cannot be overemphasised: International law played no part in the conclusions reached in *Watchenuka*. It was because of South Africa's constitutional provisions that the SCA held that asylum seekers must be permitted to work. Specifically, the SCA held:

> In my view, there is no justification for limiting beyond that degree the protection that is afforded by s 10. As pointed out in *Makwanyane* (supra at para [102]), it is for the party relying upon the limitation to satisfy a court that the limitation is justified and not for the party challenging it to show that it was not justified. The appellants made little attempt to show why such a limitation would be justified. It was alleged that the prohibition on employment is consistent with art 17 of the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol but those instruments are neutral on this issue . . . A prohibition against employment in those circumstances is a material invasion of human dignity that is not justifiable in terms of s 36.[30]

The SCA recognised that human dignity requires an ability to earn a living, because without such rights, asylum seekers residing in South Africa for any length of time would be doomed to penury and destitution. As the SCA concluded at paragraph 32:

> But where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation.

This problem will persist regardless of South Africa's position at the international level. It is thus irrelevant and unhelpful to note, as the White Paper does at paragraphs 32.7 and 32.8, that many countries have made reservations to Article 17 of the 1951 Convention (concerning refugees' rights to work). It is the constitutionally-recognised right to dignity which grants asylum seekers (and refugees in a similar position) their rights to work, not international law.

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[30] *Watchenuka* at para 33. Emphasis added.

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Paragraphs 32.1, 32.2, and 32.5 of the White Paper concern the right to *non-refoulement* or its necessary consequences: That illegal entry into a country or delay does not bar a person from seeking asylum.

Non-refoulement does have its origins in, *inter alia*, the 1951 Convention. But here too, reservations would be of no assistance, and/or are not legally possible.

First, reservations are not permitted concerning the right to *non-refoulement* as it is the centrepiece of refugee law. *Non-refoulement* is contained in Article 33 of the 1951 Convention, which is protected against reservations by Article 42(1) of the same Convention.

Secondly and in any event, *non-refoulement* has been recognised by the Constitutional Court in *Ruta* as 'a deeply-lodged part of customary international law'.[31] Accordingly, in terms of section 232 of the Constitution, it would remain part of South African law even if South Africa was not a party to any multilateral refugee convention. The assertion at paragraph 35 of the White Paper, that *Ruta* was based on '*article 33(1) of the 1951 Convention*', incorrectly overlooks the customary basis of *non-refoulement*.

But thirdly, even if no international law applied whatsoever, the Constitution itself protects individuals against being returned to countries in which their constitutional rights will be violated. Such protection has typically been offered through the mechanisms of refugee law, but even where refugee law was not applicable, the Constitution applies. For example, in *Minister of Home Affairs and Others v Tsebe and Others,*[32] the Constitutional Court prohibited the return of convicted murderers to Botswana for fear that they may be subjected to the death penalty (which is unconstitutional in South Africa). The Court explained the principles underlying this decision as follows:

> In this context the state has s 7(2) obligations and the person, who has the legal right to the state's protection, promotion and fulfilment of his right to life, right to human dignity and right not to be subjected to cruel, inhuman or degrading punishment, is the person sought by the other state for extradition. If the position were that, after South Africa had asked such a state for the requisite assurance and such state had refused, South Africa might extradite, deport or surrender such person to such state, that person would be entitled to say: the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading punishment and the state's obligations under s 7(2) are not worth anything. That would be untenable.[33]

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[31] *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) (hereafter 'Ruta') at para 26.

[32] 2012 (5) SA 467 (CC) (hereafter '*Tsebe*').

[33] *Tsebe* at para 66.

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Identical logic applies to refugees. They, too, have rights protected under section 7(2) of the Constitution, and cannot be returned by South Africa to countries where such rights would be violated. They have, in other words, a constitutional right to *non-refoulement*.

For these reasons, it makes no sense to blame international law for the nature and ambit of South African refugee law. At its heart, refugee law is protective, and the ultimate protection of human rights in South African derives not from international law but from the inalienable provisions of the Constitution.

A similar error can be identified at paragraph 32.10 of the Paper, which makes the complaint that the courts have granted the right to education to undocumented children. The White Paper notes that:

> other countries restricted the right to education and/or impose conditions on asylum seekers and refugees through reservations in both the 1951 Convention and the 1967 Protocol. Most of the reservations deal with socio-economic rights which most of the countries in the African Continent felt that [such] rights cannot be extended to asylum seekers and refugees.

The implication in the above quotation is that it is due to international refugee conventions that South Africa allows refugee and asylum seeker children to study in South Africa.

But this is erroneous. The judgment in question makes **no reference** to either the 1951 Convention or the 1967 Protocol.[34] In fact, it does not refer to refugees or asylum seekers at all. In that case, the majority of the 37 applicants were South African citizens by birth and had been denied birth registration by the Department, highlighting the challenge of documentation for children regardless of nationality.[35]

Accordingly, that judgment was based on the rights of the child, and in particular the requirement in section 28(2) of the Constitution that the interests of children be treated as paramount.[36] Insofar as it refers to any international treaties, it is those enshrining the rights of children.[37]

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[34] *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG) (hereafter '*Centre for Child Law'*).

[35] Centre for Child Law, Submission on the Basic Education Laws Amendment Bill [B2-2022]. 2023.

[36] *Centre for Child Law* at paras 75-77.

[37] *Centre for Child Law* at para 78.

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Once again, the unavoidable conclusion is that international law cannot be blamed for legal outcomes that have their primary basis in South Africa's own protective and human rights-oriented Constitution. Not only would withdrawing and re-entering from the 1951 Convention have no effect on the rights of refugees and migrants (and their children), it would be another un-wise policy choice that does not address the root causes of the challenges we face in immigration. It would further likely have a negative effect of international reputational damage.

Recommendation #7: The SCCT strongly urges the Department remain party to the 1951 Convention and use its finite resources in a constructive manner to ensure legislation and policy align with international human rights conventions, customary international law and the Constitution.

3.2 The need for an effective and efficient refugee status determination process

Paragraphs 122.2 – 122.3 of the White Paper propose an overhaul to the refugee status determination process to establish a new system along the lines of the Canadian system complemented by a mechanism to conduct 'quick and virtual hearings' at Ports of Entry such as found in the Netherlands. The rationale for this policy change is that the South African structures in the Refugees Act – refugee status determination officers, the Standing Committee for Refugee Affairs and Refugee Appeal Authority of South Africa are not found in other systems, and that Refugee Status Determination Officers are ill-prepared for the complexities of refugee law and issue poor quality decisions that complicate appeal and review processes.

We agree with the Department that there are major challenges with the refugee status determination process – this is without question. We agree with the White Paper that there is a need to capacitate the officials who are tasked with decision-making, especially in the first-instance determination process. We can confirm that many of the challenges in the determination process identified by Roni Amit over a decade ago remain,[38] and we continue to see decisions that reject deserving refugees and confine them to an extremely protracted appeal process, routinely lasting a decade or longer.

Beyond the impacts on the individual, these delays contribute to access challenges at Refugee Reception Offices (RRO), and severely hinder the implementation of durable solutions. Beyond the impact on refugees, the current system's delays result

[38] See Roni Amit, 'All Roads Lead to Rejection: Persistent Bias and Incapacity in the South African Refugee System' (African Centre for Migration & Society, June 2012).

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in further complications – for the children of refugees and on accessing services to name but two.

But we believe they are challenges of political will and capacity and that attempting a complete overhaul of legislation would be unwise. Rather, the Refugees Act would benefit from a more balanced immigration regime with accessible SADC visa options and targeted adjustments to the implementation of the current legislative framework. Already there are policy mechanisms to address these issues, such as s 31 (2) (b) of the Immigration Act that was used successfully in the late 2000s to address increased migration from Zimbabwe, and s 35 (1) of the Refugees Act which provides for the Minister to declare that any group or category of persons qualify for refugee subject to certain conditions. We have suggested that 35 (1) may be of use to the Department in relation to the extreme backlog in adjudication, but to date this aspect of the Refugees Act has not been used. Rather than building new structures from scratch, at great cost and time, more pragmatic and practical changes might be more financially viable and beneficial than a complete overhaul.

Paragraph 51.5 of the White Paper emphasises the need to make immediate determinations ('immediate assessment of asylum claims') at Ports of Entry. There is an implicit assumption that locating RROs and assessment processes at Ports of Entry will drastically improve refugee status adjudication timelines despite there being no evidence to support this. This suggestion unhelpfully focuses on the location of where the determination is made rather than the training and capacity of the individual making the determination. Even in more well-resourced states, refugee status determination processes still require time to be completed. The Immigration and Refugee Board of Canada (Canada being a country cited as a model for which South Africa should follow) states that – *after increased capacity* – projected wait times are approximately 24 months for refugee claims and 12 months for refugee appeals.[39]This amounts to **two years for a decision and three if there is an appeal**.

In the United States, a similar situation exists. According to the Transactional Records Access Clearinghouse (TRAC) of Syracuse University, as of the end of 2021, adjudication times currently stretch over **four years**:

> Over four out of every ten Immigration Court cases in which asylum applications have been filed since October 2000 are still pending. That means that of the **1.6 million Court cases** in which asylum applications were filed, **two-thirds of a million asylum seekers (667,229) are still waiting for hearings to resolve their cases**.

[39] See the Immigration and Refugee Board of Canada's website on 'wait times' for more information.

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> These wait times have ballooned. Current wait times for cases in the asylum backlog now average 1,621 days. This translates into 54 months or **nearly four and a half years**.[40] [Emphasis added]

Significant delays are also present within the Netherlands, the country cited in the White Paper as having a model for quick determination systems at Ports of Entry, which as of January 2024, has adjudication periods of 9 months.[41]

As cited in the White Paper itself, refugee status determination and international refugee law are complex. We believe there is a role for refugee protection systems at Ports of Entry, such as protection sensitive entry systems, mechanisms for profiling and referrals, and differentiated processes and procedures, as set out by the UNHCR.[42] It is worth noting that all of these aspects of refugee protection and border control would be made more manageable with the introduction of a SADC visa regime scheme. But to base policy on 'immediate' status determination processes is unwise and unworkable. Rather, we encourage the Department to undertake consistent refugee status determination training processes, improve legal pathways for people across our region, and develop a flexible system for adjudicating refugee determination that is based on realistic time frames.

Recommendation #8: The SCCT recommends that the Department invest in more efficient training in refugee status determination and develop determination systems and processes that can adapt to protection needs and capacity constraints. Such systems should be accompanied by increased developing legal pathways for migration within the SADC region and specific, targeted amnesty projects to alleviate pressure on the asylum system.

3.3 Establishment of Refugee Reception Offices on physical land borders

RROs function as a lynchpin of the asylum system – they are the facilities where most of the asylum process will take place and are thus critical to an efficient and functional protection system. Paragraph 51.5 of the White Paper states that 'refugee reception offices must be located at Ports of Entry to facilitate immediate assessment of asylum claims, as opposed to the current configuration where they are found in urban locations.

[40] TRAC, A Mounting Asylum Backlog and Growing Wait Times (n.d.).

[41] For more detail and the latest developments, see the Netherland's Department of Immigration website: https://ind.nl/en/asylum-latest-developments.

[42] UNHCR, Refugee Protection and Mixed Migration: A 10-point plan of Action (2007).

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We have addressed the potential hazards of basing a refugee protection system on 'immediate assessments'. In this section, we discuss the potential challenges and implications of relocating refugee protection facilities and processes to our border areas. The details and rationale for this are sparse despite the significant costs and implications of establishing new facilities such as staffing, infrastructure, file management, and the potential impact to border communities. This proposal disregards the long history of this policy proposal, including the lengthy litigation surrounding it, and the strategic importance of having facilities and processes in major urban areas. We also outline some of the other challenges this policy is likely to encounter. We agree that there is a role for refugee protection mechanisms in border areas and Ports of Entry, but as mentioned in the previous section, these must be protection-sensitive and in line with international legal guidelines and best practice.[43]

This policy has been proposed a number of times, dating back to the early 2010s.[44] The thrust of the idea has been that urban areas are not conducive to operating RROs (or strategic), and that facilities on our borders would assist in separating economic migrants from refugees quickly. Closures of the Johannesburg Crown Mines RRO, Port Elizabeth RRO, and Cape Town RRO followed, resulting in lengthy litigation challenging the legality of the closure decisions, and in each case the closures were found unlawful. New facilities were established per the orders of the court in both PE (now Gqeberha) and Cape Town. In that litigation, the courts held that border areas were not necessarily where facilities for asylum seekers and refugees would be needed, taking into consideration *inter alia* the realities of refugee status determination along with the needs for individuals to support themselves and lead dignified lives.[45] Given this history, it is difficult to understand why the Department continues to push for a policy it has been unable to implement and that has not passed constitutional muster.

Beyond the legal aspects, there are also substantial risks to locating these facilities exclusively at border areas. There are significant cost implications of relocating staff, files and establishing new infrastructure. And given realistic timeframes for refugee status determination processes as outlined above, it remains unclear how asylum seekers would be able to live dignified lives in border towns for extended periods of time. With this comes the real risk of humanitarian crises developing where facilities are unable to cope with demand. Already we have experienced the development of

[43] Ibid.

[44] For an excellent overview of the situation at the time see Lawyers for Human Rights and the African Centre for Migration & Society, Policy Shifts in the South African Asylum System: Evidence and Implications (2013).

[45] Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others (1107/2016) [2017] ZASCA 126; [2017] 4 All SA 686 (SCA); 2018 (4) SA 125 (SCA) (29 September 2017) at para 63.

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makeshift informal camps outside of asylum facilities in Musina causing serious safety and health issues.[46] This situation was resolved in part by utilising section 31(2)(b) of the Immigration Act and the creation of the special dispensation for Zimbabweans, and we urge the Department to use the tools it has at its disposal to address the current backlogs and access issues rather than attempt a lengthy and complete overhaul based on inaccurate claims and evidence.

Recommendation #9: The SCCT recommends the Department adopt a more flexible and adaptable policy position to address refugee protection, using all of the policy options available to it, and that facilities are strategically located in urban areas. These facilities should be complemented by protection-sensitive entry systems at Ports of Entry to establish a holistic system that is realistic, pragmatic and accounts for the needs of refugees.

3.4 On cessation of refugee status and durable solutions

The White Paper states at paragraphs 47-50 that 'legislative intervention should be developed to deal with issues of voluntary and involuntary repatriation' and that the cessation clause – section 5(1) of the Refugees Act and Article 1C(5) of the 1951 Convention – should be 'used much more frequently in order to lessen the burden that comes with recognition of refugees'. It states further that 'a disturbing trend has emerged in South Africa in which asylum is regarded as a permanent and an easy path to citizenship'.

We believe the cessation clauses, both in the 1951 Convention and as found in our legislation, are critical components of any protection regime. We do not support an expansion of these clauses and instead suggest that UNHCR's guidelines be used to structure any legislative amendments to the cessation clauses.[47] We do so as UNHCR notes that 'since the application of the cessation clauses in effect operates as a formal loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation.'[48]

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[46] Shantha Bloemen, 'Migrants face humanitarian crisis on South Africa's border with Zimbabwe' (UNICEF Press Release, 22 January 2009).

[47] UNHCR, The Cessation Clauses: Guidelines on their Application (UNHCR, Geneva, April 1999).

[48] Ibid, para 2.

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Beyond the need for a restrictive interpretation, we note that determining if a fundamental, lasting change has ended persecution fears poses significant challenges – it is both resource-intensive and legally complex.[49] This aspect of implementing a cessation process came to the fore during the Department's implementation of the Angolan cessation in 2013, where initially the Department attempted to implement an individualised protection assessment to determine potential return to Angola. This process was scrapped, and temporary visas were issued to all recognised refugees from Angola, and eventually granted these individuals the opportunity to apply for permanent residence.[50] We believe that this outcome, in the specific circumstances, was a just and durable solution to the protracted refugee situation stemming from the conflict in Angola. The granting of special permits, and now permanent residence, has led to a number of Angolans to return to Angola and establish cross-border enterprises between South Africa and Angola, thus further developing economic links between our countries.[51]

A singular focus on implementing cessation clauses is also impractical due to the nature of conflict in our times. Present-day conflicts are marked by more significant uncertainty, intractability, and volatility compared to the Cold War era. Very few nations can be deemed 'post-conflict,' as many remain trapped in recurring cycles of violence, exclusion, and fragility.[52] Perhaps no state demonstrates this more than the Democratic Republic of Congo, which despite having a multilateral UN-brokered international peace deal signed in 2003, continues to be marked by cycles of violence and instability, where war has become a 'social condition', entrenched and self-perpetrating.[53]

We acknowledge that return to one's country after exile is the most preferrable solution and it should be pursued where possible under conditions of safety and

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[49] Marissa E. Cwik, 'Forced to Flee and Forced to Repatriate? How the Cessation Clause of Article 1C(5) and (6) of the 1951 Convention Operates in International Law and Practice' 44 (711) *Vanderbilt Law Review* (2011).

[50] Tariro Washinyira, 'Home Affairs to renew Angolan Special Permit as deadline looms' (GroundUp, 6 August 2021).

[51] Sergio Carciotto, 'Angolan refugees in South Africa: Alternatives to permanent repatriation', vol 2(1) *African Human Mobility Review* (2016) pp. 362-382.

[52] The World Bank, 'World Development Report 2011: Conflict, Security, and Development' (World Bank, 2011).

[53] Jason K. Stearns, *The War That Doesn't Say Its Name: The Unending Conflict in the Congo* (Princeton University Press 2022).

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dignity, and when refugees themselves believe they can safely return. We recommend that the Department consider ways to implement all of the 'durable solutions': voluntary repatriation, local integration in the country of first asylum or resettlement in a third country.[54] The cessation clauses can play a role in these processes, but their role may be limited by resource constraints and, more importantly, the realities of conflict.

Recommendation #10: The SCCT recommends that the Department utilises all of the 'Durable Solutions' available to end refugee protection in a dignified and safe manner.

3.5 On the 'first safe country principle' and burden-sharing

The White Paper refers to the 'first safe country principle' at paragraph 122.7, stating that it must be strictly applied to discourage asylum seekers who deliberately fail to apply for asylum at the safe country' which is a signatory to the 1951 Convention and 1969 OAU Convention. In international law, there is no established mechanism to refuse asylum applicants who have transited other countries without an assessment of refugee protection needs.[55] Already the Refugees Act provides that those formally recognised as refugees in other states are not eligible for refugee protection as under s 4(1)(d), but such an exclusion would require a thorough assessment of the individual facts and refugee protection needs.[56]

While the first safe country principle is not a mechanism of international law, there do exist a number of bilateral agreements and administrative practices codified by states regarding jurisdiction and protection responsibility, but neither the 1951 Convention nor the 1969 OAU Convention require refugees to seek protection in the nearest country they encounter after fleeing their country of origin. Instead, bilateral agreements between states have codified procedures that set out individual determinations for each case where an asylum seeker has transited one of the states party to the agreement. Examples of these sorts of arrangements include the *Safe Third Country Agreement* between the United States and Canada and the *Dublin III Regulation* formulated by the European Union. The first safe country

[54] UNHCR, Framework for Durable Solutions for Refugees and Persons of Concern (UNHCR Core Group on Durable Solutions, May 2003).

[55] Roni Amit, The First Safe Country Principle in Law and Practice (Migration Issue Brief 7, African Centre for Migration and Society, June 2011).

[56] UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-seekers (September 2019) at para 26.

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principle cannot simply be applied through compiling a list of supposed safe states, or through an asylum seeker simply transiting another state. Even these codified arrangements do not absolve states from responsibility for the rights and safety of asylum seekers, such as ruled by the European Court of Human Rights in *M.S.S. v Belgium*.[57] Further, there is evidence that these agreements in effect produce less secure borders through increasing the prevalence of human smuggling.[58]

In South Africa, jurisprudence in the Supreme Court of Appeal case *Abdi v Minister of Home Affairs* around this issue has been developed affirming that individuals cannot be sent to a third country without an agreement that the individual will not be returned to their country of origin where they may face harm or persecution.[59] In that case, the SCA found that the removal of two Somali nationals to Namibia without protection guarantees unlawful. The Court held that the 'deportation to another state that would result in the imposition of a cruel, unusual or degrading punishment is in conflict with the fundamental values of the Constitution'.[60]

The White Paper's assertion that implementing the 'first safe country principle' into domestic law will somehow absolve protection obligations is simply not accurate. That is not to say that South Africa should alone bear the burden of refugee protection, but we believe South Africa should rather work within the region to strengthen international protection standards, reinforce the rule of law, and increase cooperation and coordination in relation to refugee and migration arrangements. The White Paper unfortunately takes a singular approach based on an erroneous reading of refugee law with little mention of international cooperation. We simply cannot address issues of refugee protection without engaging with our neighbours.

Recommendation #11: The SCCT recommends that the Department, working with relevant government departments, engage within the region to strengthen international protection standards, reinforce the rule of law, and increase cooperation and coordination on the continent to improve refugee and migration policy.

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[57] Full judgment available at: https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609.

[58] Efrat Abel and Alletta Brenner, 'Bordering on Failure: Canada-U.S. Border Policy and the Politics of Refugee Exclusion', (Criminal Justice and Citizen Research Paper No. 2420854, Harvard Law School, 2013).

[59] 2011 (3) SA 37 (SCA). Judgment available in full at: https://www.saflii.org/za/cases/ZASCA/2011/2.html.

[60] Ibid, para 26.

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4.0 Comments on proposals relating to citizenship

Having accessible mechanisms for citizenship and birth registration is crucial for social cohesion and allows the State to take advantage of the skills and capabilities of all persons in the State.[61] Citizenship is an integral part of human security by providing both a sense of national belonging as well as ensuring legal protections and access to the exercise of civil and political rights, and birth registration itself is a critical component of citizenship, providing children with proof of birth, a nationality, and a name and place of birth. Statelessness, and lack of proper documentation, impede economic and social development, a fact that was recognized in the Sustainable Development Goals which lists as a target for the year 2030 the 'legal identity for all, including birth registration'.[62]

In South Africa and our region, the lack of adequate and secure civil registration systems has been highlighted as an obstacle to development and regional integration with some countries having birth registrations below 10% of the population.[63] It is therefore critical that we establish accessible and secure processes that conform to our Constitutional principles, Convention the Rights of the Child and the African Charter on the Rights and Welfare of the Child, both of which have been ratified by South Africa, and provide the right of nationality to children in an accessible manner.

The White Paper submits that citizenship regulations should be tightened; however, as with many of its proposals, it does so based on a misinterpretation of existing law and practice and without providing empirical evidence to back its assertions. As elaborated on in section 2.1.1, the White Paper's aversion that citizenship processes are being exploited is not borne out by the evidence. Further, the White Paper seems to contend that the granting of citizenship is an undesirable outcome. This runs contrary to best practice as well as the findings of the High Level Panel that recommended that citizenship and immigration legislation be amended so as not to discriminate against foreign nationals.[64]

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[61] Statelessness and the Right to a Nationality in Europe: Progress, Challenges, and Opportunities (International Conference and Technical Meetings of Experts, Strasbourg, 23-24 September 2021).

[62] Ibid.

[63] 'Minister calls for action', *CRVS Daily Newsletter* 1(1) (September 2012).

[64] Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, November 2017. pp. 352-355.

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However, our experience shows how aquiring citizenship helps unlock the potential of individuals. The clients we assist with applications for citizenship have goals and ambitions to study further and make important societal and economic contributions to South Africa upon the approval of their applications.[65] The clients we have assisted to prepare applications for citizenship have described feeling socially isolated and left behind as they watch their peers advance ahead of them while they await the outcome of their applications – particularly as these applications can sometimes take several years. These applicants have not known any other country but South Africa as home and are impeded from personal advancement due to their documentation status. Not only are they entitled to a nationality, but granting them citizenship ensures they become productive members of society and contribute positively to South African society.

For these individuals, citizenship thus provides a crucial link between the individual and the state and as the Constitutional Court has remarked:

> goes to the core of a person's identity, their sense of belonging in a community and, where xenophobia is a lived reality, to their security of person. Deprivation of, or interference with, a person's citizenship status affects their private life and family life, their choices as to where they can call home, start jobs, enrol in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement.[66]

We wholeheartedly agree with the Constitutional Court and argue in this section that citizenship and birth registration processes must set out a process

As set out below, more efficient asylum claims processing as well as universal birth registration and improved opportunities for children to join their parents' status would all result in children attaining the nationality of their parents while ensuring protective measures are in place to allow children an avenue for citizenship and avoid potential statelessness. South Africa's citizenship laws should allow for all children to be given a nationality at birth, including for children who cannot obtain their parents' nationality or in cases where the parents' nationality is not known.[67]

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[65] For one example, see our short video on one individual's experience in this process: Scalabrini Centre of Cape Town, 'Migration and Citizenship' (June 2022).

[66] *Chisuse and Others v Director-General, Department of Home Affairs and Another* (CCT155/19) [2020] ZACC 20 at para 18.

[67] Bronwen Manby, 'Citizenship Law in Africa: A Comparative Study' (Open Society Foundations, 2016).

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Section 28 of the South African Constitution provides for an explicit right for each child to a name and a nationality, which is affirmed in the White Paper. The White Paper argues that extending the meaning of Section 28 to include all children born in South Africa, irrespective of the child's legal status or that of the parent, goes beyond the intended meaning of the clause. This interpretation is reflected in current citizenship rules and regulations, particularly in that South Africa does not provide for birthright citizenship, except partially under Section 2(2) of the Citizenship Act, 88 of 1995 (herein after Citizenship Act).

However, although the Citizenship Act at Section 2(2) makes provisions for stateless children to acquire citizenship, this must be done by application. As a result, in practice, stateless children often face lengthy and difficult legal efforts to acquire citizenship.[68] Much like the process for acquiring citizenship through the Refugees Act, this process is not easy or without safeguards.

In lieu of birthright citizenship, the Citizenship Act does provide avenues for citizenship for children born in South Africa to parents who are foreign nationals, under Sections 2(3) and 4(3). These applications can only be made once a child has reached the age of majority and can prove continuous residency in the Republic. All of these provisions depend on the child's birth being registered. For undocumented parents or in the case of children who have been abandoned, birth registration may not be possible – thereby closing this pathway and potentially exposing those children to statelessness.[69]

In arguing against a broad interpretation of Section 28 of the Constitution, the White Paper cites an example of a child born to a failed asylum seeker liable to be deported, who, under a broad interpretation of Section 28, would be granted citizenship. As South Africa generally does not provide birthright citizenship, this is an unlikely scenario under current laws and regulations. This example also lacks consideration for the reality of many children born to foreign nationals in South Africa. At present, this example would only be conceivable should an asylum claim be rejected more than 18 years after a child is born, as South Africa only allows for citizenship applications based on birth in the Republic to be made after a child has reached the age of majority.

The White Paper cites an example of a child born to an asylum seeker whose claim has been rejected and who is liable to be deported as an example of the citizenship process being abused.

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[68] Jamaine Krige and Yeshiel Panchia, 'The Families Facing Generations of Statelessness in South Africa' (Al Jazeera, 28 January 2020); Lawyers for Human Rights, 'South Africa Belongs to All Who Live in it" but stateless and undocumented children are still fighting to belong', (13 January 2020); Fatima Khan, 'Exploring Childhood Statelessness in South Africa', PER/PELJ 2020(23).

[69] Khan, above n 72.

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Firstly, practical examples of this nature are of little relevance as no practical example will alter the clear meaning of section 28(1) of the Constitution. This is a matter of interpretation and not consequence.

Secondly, in any event, this example would only be conceivable should an asylum claim be rejected more than 18 years after a child is born, as South Africa only allows for citizenship applications based on birth in the Republic to be made after a child has reached the age of majority. Therefore, this scenario would not be of relevance if the Department adjudicated claims in under 18 years – not an unreasonable timeframe.

Thirdly, we would submit that it is appropriate to grant permanency to children when their stay in South Africa has been protracted due to the Department's failure to adjudicate their parent's claim for asylum timeously.

However, due to lengthy backlogs in asylum claim processing, children whose claims have been rejected could have access to citizenship under the current system. For example, we have assisted many asylum seekers who have waited over 18 years for their claims to be adjudicated, meaning that children born in the Republic to asylum seekers awaiting an outcome of their claim may reach the age of majority before their parents' asylum claim is finalised. Should that claim then be finally rejected and the parents issued with a deportation order, the children born, raised, and assimilated in the Republic will then be forced to return to a country to which they have no ties and have never known, through no fault of their own. Rather than tightening the criteria for granting citizenship, as the White Paper proposes, more timely and efficient processing of asylum claims would inherently prevent a situation in which children of failed asylum seekers may be entitled to citizenship. Further, this will also ensure that all children have access to a nationality, especially for those who otherwise may not have access to another nationality, thus mitigating the risks of statelessness.

It is important to keep in mind that the parent in the Department's example, may have had a valid claim for asylum at the time of application, but that the ultimate rejection may be owing to the change in circumstances lapse of time since the application and decision.

Fourthly, the circumstances of a child needing to acquire a nationality in South Africa need to be fully considered. Some children may also face challenges being joined to their parents' status due to delays or issues at the Department of Home Affairs regarding family joining, or in cases where parents are unaware that their children should be joined to their status. In such cases, once the child has reached the age of majority, family joining may no longer be possible – leaving those children, through no fault of their own, with no other recourse to regularizing their status in South Africa. Further, even if those children are joined to the status of their parents they may still be deprived of a nationality – particularly if the child is born to refugees or asylum seekers, as serious barriers exist for asylum seekers and refugees to give

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their nationality to their children. In order for the child of foreign nationals to be given the nationality of their parents, the parents would need to approach their embassy to request the birth be registered in their home country. As approaching their embassy could be considered as re-availing themselves to the protection of their home state, this could result in a withdrawal of status,[70] thus this avenue is closed off to them.

Currently, children in such situations have an avenue to citizenship via Section 4(3) of the Citizenship Act which rightly allows them to make an application upon turning 18. The parents of children who have been granted citizenship by Section 4(3) are not granted any benefits or additional immigration pathways by virtue of their children becoming citizens, however the benefits to the child are incredibly important as, having been born and raised in the Republic, these children already identify as South African and have known no other State as home. The importance of citizenship was also affirmed in *Minister of Home Affairs v Miriam Ali* which states that 'it is an affront to deny the respondent the right to apply for citizenship in a country where they were born, have lived and which is the only country they have ever known.'[71]

In terms of birth registration, the White Paper does not offer any specific proposals to improve the functioning of this critical process. A birth certificate is critical to a child's wellbeing and future and is equally important for the state as it allows the government to quantify the numbers of children born. Importantly, a birth certificate does not provide legal stay to a child's parents nor does it expressly provide for South African citizenship. Rather, it is an important document for establishing the nationality of the child and reducing the risk of statelessness. Overly strict requirements hamper this process and can lead to statelessness, creating a population that is invisible to the state. This is not in the best interests of the child, of the government, or of the region.

The current birth registration process is problematic as it requires valid immigration documentation for parents to register the births of their children. In effect, this functions as a form of immigration control and as a punitive measure directed towards the parent even if the child bears the negative consequences for the remainder of their lives. This is undesirable ... and we recommend that the Department ensure that birth registration processes are accessible and function in a non-discriminatory manner.

Recommendation #12: The SCCT strongly recommends that the best interests of the child be paramount in any reform of citizenship or birth registration legislation and/or policy.

[70] Ibid.

[71] *Minister of Home Affairs v Ali* (1289/17) [2018] ZASCA 169, para 24.

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In conclusion, the White Paper's proposals for the tightening of citizenship processes are vague and not based on empirical data.

Recommendation #13: The SCCT recommends that the Department follow the recommendations of the *High Level Panel Assessment on Key Legislation and the Acceleration of Fundamental Change* on birth registration and citizenship procedures and ensure that any future legislation and policy is accessible and non-discriminatory.

5.0 Comments on proposals relating to immigration

The White Paper sets out a number of proposals to address some challenges related to immigration and the Immigration Act. Among the challenges listed are an ineffective immigration inspectorate, delays and challenges in immigration matters resulting in litigation in the courts. To address these issues, the White Paper proposes to fortify immigration detention for deportation processes and establishing specialised Immigration Courts to more effectively address issues concerning immigration.

Regrettably, there is scant reference to the realities regional migration patterns and, as outlined in section 2, no reference to establishing a regional SADC visa system in any form.

In this section, we address the potential challenges associated with specialised courts for immigration and on the need for a strong codification of Alternatives to Detention in our future legislation. We also address how many of the proposals, which aim to add further restrictions to our immigration system, are likely to have detrimental impacts on children. Again, in making our submission, we point out the need for practical and pragmatic policy that can be implemented realistically, within our fiscal reality, and that a more progressive and forward-looking policy is needed to adequately harness the developmental potential of migration.

5.1 The potential benefits and pitfalls of establishing specialised immigration courts

The White Paper states that implementation of immigration, refugee and citizenship legislation in South Africa is challenging due to a number of factors such as abusive

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and corrupt activities involving state officials,[72] the lack of qualified officials,[73] and the delays and backlogs in the bureaucracy of appeals.[74] While there may be certain contexts in which it would make sense to introduce migration or immigration-specific courts, we believe the introduction of immigration courts in the South African context is problematic and impractical.

Research on immigration-specific courts in other contexts points to potential benefits of such a system but cautions that these potential benefits are dependent upon the form of specialisation adopted, the legislative structures, and available resources.[75] The literature reveals that resources, or lack thereof, are critical to the functioning of these courts. In the United States – again, a country with significantly more available resources – immigration caseloads remain high with minimal law clerk support. Commenting on the number and gravity of the cases allocated along with the lack of resources available, one immigration judge stated that '[t]hese are death penalty cases being handled with the resources of traffic court.'[76] The United States' immigration court system's resource-constraints are amplified by the disparity in resources compared to immigration enforcement (equaling roughly 3% of the budget given to agencies tasked with enforcement) resulting in immigration courts being the 'dumping ground' of the systemic failures of broader immigration policy.[77]

In our own context, questions of available resources and independence are also pertinent. The experience of the Equality Courts has shown that the lack of available resources and poor administration has had a detrimental impact on cases.[78] One benefit of the current system is that there is a connection between cases before magistrates and judges outside of immigration matters heard by the courts. If there are separate immigration courts established, then the a risk of the specialised court

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[72] At paras 9.5 and 98.

[73] Ibid, paras 9.7 and 104.

[74] Ibid, para 109.

[75] Lawrence Baum, 'Judicial Specialization and the Adjudication of Immigration Cases' 59 *Duke Law Journal* (2010) pp. 1501-1561.

[76] Ibid, at p. 1516.

[77] Donald Kerwin and Evin Millet, 'The US Immigration Courts, Dumping Ground for the Nation's Systemic Immigration Failures: The Causes, Composition, and Politically Difficult Solutions to the Court Backlog', 11 (2) *Journal on Migration and Human Security* (2023) pp. 194-227.

[78] Justin de Jager, 'Addressing Xenophobia in the Equality Courts of South Africa' *Refuge: Canada's Journal on Refugees*, 28(2), pp. 107–116.

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operating in a 'silo' becomes a possibility, as opposed to the more open manner that the system currently functions. This independence acts as an important safeguard. One cannot be the judge, jury and executioner as it were.

Regarding the current internal appeal process, paragraph 109 the White Paper suggests that an immigration court could address appeals that are currently reviewed by the Director General and other appeal bodies (such as the Standing Commitee for Refugee Affairs and the Refugee Appeal Authority of South Africa) and that this could be done 'more speedily' through a specialised court. As with other proposals offered by the White Paper, there is no evidence offered to suggest this assertion may come to fruition, and based on international experience and our own, the delays, corruption and capacity constraints in the current system would likely extend to any newly created system, but would come concurrently with the additional cost of financing new immigration courts and the time taken to establish these new mechanisms. We suggest there would likely be costs to the current judicial system as well which is under strain.[79] This is not to say that immigration courts are inherently a poor avenue to reform our framework, but that this route depends heavily on financial and material resources.

The argument for immigration courts also extends to the current system of judicial review where the White Paper, at paragraphs 109-111, alleges judicial review applications are lodged at the High Court simply to halt deportation processes and then the applicants 'disappear into thin air' and fail to pursue the application and that there is no IT system to track these cases.

While we are aware of instances where this occurs, there is no evidence offered as to the extent to which it is prevalent. Further, the White Paper fails to consider the numerous strong and genuine asylum cases in which the court recognises the procedural and/or substantive unfair administrative action of decision makers and thus operates as a critical safeguard.[80] These individuals are afforded protection by the current system and do not 'disappear'. If the challenge is the lack of an IT tracking system, the most practical and best solution would be to introduce one, as opposed to using our finite resources for a complete overhaul and establishment immigration courts.

The challenges of being under resourced or qualified, corruption, delays and backlogs **will not** be addressed simply by establishing immigration courts. On the evidence, a likely outcome is that these issues would be exacerbated at an increased cost.

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[79] Faizel Patel, 'SA has desperate shortage of judges and it's creating serious backlogs' (*The Citizen*, 27 July 2023).

[80] See for example: Carmel Rickard, 'Refugee wins asylum after 10 years in legal limbo' (*Mail & Guardian,* 26 February 2015).

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Recommendation #14: The SCCT recommends that any proposal to establish immigration courts or new processes to adjudicate reviews is based on transparent figures relating to cost and function, and that, if this policy direction is followed, that these courts be independent from the Department. In the interim, we strongly recommend that the Department pursue other targeted measures to increase efficiency within the current system.

5.2 The pressing need to adopt alternatives to immigration detention

Paragraphs 102-106 of the White Paper state that immigration officers and the inspectorate should be well-capacitated, and a well-coordinated strategy should be developed to track down 'illegal foreigners'. We agree that the Department needs further capacity from both a resources perspective as well as knowledge on the complexities of immigration and refugee law. This would greatly assist the Department with implementing more efficient and effective and secure entry systems at Ports of Entry and in dealing with serious issues of cross-border crime that require interdepartmental coordination and specific skills. However, we are concerned that the White Paper suggests the primary issue confronting the immigration inspectorate revolves around the need to increase deportations, and the notion that deportation itself is an effective tool to manage migration. In this section, we set out the need for a balanced approach to migration management and the need for future policy to incorporate 'Alternatives to Detention' as our baseline for migration management.[81]

The fact that detention and deportation as a tool of migration management is ineffective is well-established; it does not address irregular migration in the country in

[81] We support and promote the International Detention Coalition's definition of alternatives to detention as *any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country*. For more information, see: International Detention Coalition, 'There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention' (2011).

any significant manner, nor does there exist any empirical evidence to show it acts as a deterrence.[82]

Our own experience in South Africa has borne this out, and the 2017 White Paper noted that the lack of an effective mechanism to address regional migration patterns led to a costly 'revolving door' deportation system.[83] Beyond being ineffective, a deportation-centric system syphons away resources from other priorities such as criminal investigations. One study of policing in Gauteng found that SAPS officers spent roughly 3.1 hours per 12-hour shift dealing with immigration issues, or 25% of their work time.[84] This is time spent away from other more critical investigations such as high priority crime. Beyond the opportunity costs, this dysfunctional system has additional fiscal costs, costing the Department millions in litigation costs and in claims for civil damages for those detained unlawfully.[85] The simple act of running the Lindela Repatriation Facility costs over R51 million annually, and a 2013 study found that the cost of detaining a person at Lindela was R100 per day and the average cost of a deportation by road was R725 and by plane R29,000.[86] These are high fiscal costs for an ineffective system.

This system is not only wasteful and ineffective, but it has also opened the door to corruption, with Bosasa, the private company at the heart of the state capture inquiry

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[82] Robyn Sampson, 'Does Detention Deter? Reframing Immigration Detention in Response to Irregular Migration' (IDC Briefing Papers, April 2015).

Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum seekers, Stateless Persons and Other Migrants' (UNHCR Legal and Policy Research Series, April 2011).

[83] The 2017 White Paper, p. 52.

[84] Darshan Vigneswaran and Marguerite Duponchel, 'One Burden Too Many? A Cost-Benefit Analysis of Immigration Policing in Gauteng' (Forced Migration Studies Programme, University of the Witwatersrand, 2009).

[85] For example, research has shown that unlawful practices in detention/deportation regime in 2009-2010 have resulted in litigation costs of at least R4.7 million and that in 2013 the Department faced roughly R500 million in claims against it, the majority of which arose from unlawful arrests of 'illegal foreigners' and failures to make timeous decisions on visa applications. Gregory Mthembu-Salter et al, 'Counting the Cost of Securitising South Africa's Immigration Regime' (Migrating out of Poverty RPC Working Paper 20, 2014) p. 11.

[86] Ibid, p. 12. Given inflation, these deportation costs are certainly higher today.

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and the company that operated the Lindela Repatriation Facility for decades, implicated in deeply entrenched corrupt practices surrounding the facility.[87]

Operating a deportation-centric system also has regional implications, from reputational damage to the health implications of detainees being unable to access critical medication for diseases such as tuberculosis or HIV/Aids that impacts our own and our neighbours' healthcare systems.[88] Detention and deportation also severely impacts the people caught in it, from the migrants themselves to the officials implementing it. One former guard has described severe overcrowding, violence and poor working conditions as constant factors at the Lindela facility that created an extremely unhealthy and traumatising working environment for staff.[89] The system has also routinely detained South African citizens for deportation with severe consequences.[90]

The above all shows the broad range of detrimental impacts a deportation-centric migration policy has that spreads well beyond the individuals it aims to remove; its impacts are societal, and we believe a more progressive approach based on alternatives is needed.

In line with our submission in section of this submission that our future migration policy be practical, holistic, and engage with the realities of our region, we advocate for an immigration policy that uses deportation as a matter of last resort. While a holistic approach can take many forms, we strongly recommend creating targeted amnesty programmes for those without documentation or expired documentation. This, along with accessible visa options, would support the Department in complying with its constitutional obligations supporting freedom and equality. It would further dovetail with the rich body of jurisprudence surrounding immigration detention.

These precedents set out what immigration officials must consider when addressing cases of foreign nationals lacking documentation that may result in detention for deportation. Rather than simply detain individuals for deportation, immigration officials must exercise their discretion *in favorem libertatis* (in favour of liberty) and

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[87] Jan Bornman, 'How Lindela became Bosasa's meal ticket' (Mail & Guardian, 11 December 2019).

[88] Medecins Sans Frontieres, 'The Times: Lindela "hell" ignored' (MSF News, 7 June 2012).

[89] As told to Matthew Wilhelm-Solomon in *The Blinded City – Ten years in inner-city Johannesburg* (Picador Africa, 2022) pp. 214-217.

[90] Joan van Dyk and Dylan Bush, 'This is how an SA toddler died at the #Bosasa-run Lindela' (Bhekisisa, 6 February 2019).

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instances of arbitrary detention lacking just cause are unlawful.[91] Recently, the Constitutional Court held that in exercising their duties, immigration officials must consider if the interests of justice permit that detention be discontinued and appropriate alternative conditions be imposed based on s 35(1) of the Constitution.[92] In regards to family considerations, the courts have held that the right to dignity must be interpreted to provide protection to family life.[93]

Having accessible immigration visas and alternatives to detention/deportation will assist officials in carrying out their duties and allow for them to more readily address immigration cases with more durable solutions. It would also reduce the strain on the police and on the Department's budget.

Recommendation #15: The SCCT recommends that Alternatives to Detention be incorporated into immigration policy and be considered the lens through which issues of immigration detention are approached. We recommend targeted amnesty projects, for those with expired or no documentation, along with increased legal pathways to facilitate legal regional migration as the pillars of our migration policy and law to lessen immigration detention and deportation.

5.3 On the need for migration and citizenship policy to address the rights of all children

The White Paper is largely silent in relation to how its proposals may impact the rights of children – both foreign and those with claim to South African citizenship – despite the fact that children are among the most impacted and vulnerable to restrictive immigration and birth registration policies. Recent jurisprudence has held that restrictive and provisions of the Refugees Act place refugee children at extreme risk of being undocumented and at risk of *refoulement* all due to actions and circumstances beyond their control, and that this runs 'counter to the protective goals and purpose of domestic and international refugee laws'.[94] The courts have also held

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[91] *Ulde v Minister of Home Affairs and Another* (320/08) [2009] 3 All SA 332 (SCA) at para 7.

[92] *Ex Parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2023] ZACC 34.

[93] *Dawood and Others v Minister of Home Affairs* 2000 (3) SA 936 (CC).

[94] *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* (5441/20) [2023] ZAWCHC 28.

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that every child has their own dignity, and he or she 'cannot be treated as **a mere extension** of his or her parents, umbilically destined to sink or swim with them.'[95] We are concerned that the White Paper's proposals do not adequately consider the impact on children and are likely to reduce access to documentation and would not be in the best interests of the child or our society.

It is imperative to note that the presence of undocumented, unaccompanied or separated migrant children impacts on the policies and service provision of both the Department of Social Development (DSD) and Department of Education (DOE), and therefore the aim of future policy should be to ensure that all children have pathways to documentation with the appropriate safeguards. We firmly believe that it is a much greater risk to have undocumented children than those with documentation – and thus known to the state and able to lead dignified lives. This is a principle that the courts have confirmed,[96] and we implore the Department to also enshrine this principle in its approach to the issue of children and documentation.

The White Paper's main thrust in relation to foreign children is that South Africa does not have the resources to provide socio-economic rights to undocumented children, yet as with most of its assertions, no empirical evidence is provided. And as pointed out above, the White Paper mistakenly interprets recent case law protecting the rights of all children to access education as pertaining only to foreign children, when in fact the judgment relates to undocumented children at large. In this section we set out some of the issues affecting undocumented children broadly and advocate for targeted reforms that ensures the rights of all children, including children on the move, are protected in all matters that relate to the child.[97]

As a part of our daily work, the SCCT regularly provides assistance to foreign children and children impacted by restrictive citizenship and birth registration policies. We provide advice to their caregivers, social workers or any interested party, on the legal framework, accessing services and documentation considerations for children in South Africa. The SCCT runs Lawrence House, a registered Child and Youth Care Centre (CYCC) that accommodates up to 25 children and youth and specialises in the care and protection of unaccompanied foreign minors and refugee children. The SCCT also facilitates workshops on the rights of foreign children and provides training to the Department of Social Development on this matter. The SCCT has undertaken and published research on the situation of foreign children placed in CYCCs in some provinces of the country to identify the challenges faced by this group of children. Through this work, we have become familiar with the challenges

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[95] *S v M* (2008) 3 SA 232 (CC) at para 18.

[96] *Mubake and Others v the Minister of Home Affairs and Others* ZAGPPHC 1037.

[97] As protected by section 28 of the Constitution and the Convention on the Rights of the Child.

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many children face, particularly those in alternative care settings, in accessing enabling documentation and rights.

Unaccompanied and separated children including those in alternative care settings encounter additional challenges in relation to documentation pathways and accessing rights. Practically, many, due to a lack of information about their parents or place of birth, find themselves stateless or at risk of statelessness. In terms of the legislative framework and policy, there are limited pathways for these children to access enabling documentation.

The number, demographics and circumstances of unaccompanied and separated foreign children living in South Africa are unknown. Recent surveys of CYCCs across the Western Cape,[98] Limpopo and Gauteng[99] found that the number of foreign children placed in institutional care is not overwhelming but rather proportional to the percentage of migrants estimated to be present in the country (between 3 – 4%). While the numbers in CYCCs are small, we are conscious of the significance of the issue in South Africa and on the impact restrictive policies can have on children and society. We are often approached by CYCCs, social workers, care givers and organisations regarding care, protection and documentation and access to services by unaccompanied and separated foreign minors. We strongly believe that the issue deserves increased attention as we are aware that there is a gap in concrete facts and knowledge about the particular challenges faced by this group of children – especially when it comes to documentation. The Committee on the Convention on the Rights of the Child states that unaccompanied and separated children are particularly vulnerable groups of children and implores State Parties to ensure that state obligations are met in terms of providing access to appropriate and effective services such as health, care and education.[100]

Recommendation #16: The SCCT recommends that any legislative overhaul or policy development process expressly consider how potential changes are likely to impact children and guard against negative outcomes in this process.

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[98] Julia Sloth-Nielsen and Marilize Ackermann, 'Unaccompanied and Separated Foreign Children in the Care System in the Western Cape–A Socio-Legal Study', Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad, 19 (2016) pp. 1-27.

[99] Scalabrini Centre of Cape Town, 'Foreign Children in Care: South Africa: A Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo and Western Cape Provinces of South Africa' (July 2019).

[100] Committee on the Rights of the Child, General Comment 6: Treatment of unaccompanied and separated children outside their country of origin (2005) at para 63.

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Recommendation #17: The SCCT recommends that the Department, along with other key stakeholders, consider mechanisms to address the documentation challenges unaccompanied and separated children face in South Africa.

6. Conclusion

We appreciate the opportunity to provide the Department with insights from our work. We confirm our availability to make further oral submissions and recommendations or to address any questions in relation to the comments on the White Paper setout above.
We hope that this submission is the beginning of a fruitful and effective migration policy development process.

The considerable concerns we have raised with the general policy direction of the White Paper are not meant to be critical of the Department, but rather are to ensure our future legislative and policy adjustments are based on sound evidence and logic, and equally, are realisable in our context.

We are concerned that if we do not get this right, we will waste more time and resources without addressing the considerable challenges we are facing in relation to migration.

Scalabrini Centre of Cape Town
30 January 2024

Comments Endorsed By:

1. Southern African Catholic Bishops' Conference, Migrants and Refugees Office
2. Congolese Civil Society of South Africa
3. Three2Six

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as a Child and Youth Care Centre (C7569) and as a Public Benefit Organisation with the South African Revenue Services (930075335) and governed by a Trust (IT2746/2006). Auditors: PKF Constantia Valley Cape Town Inc. VAT number: 4780251437.

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ANNEXURE 1 – CONSOLIDATED RECOMMENDATIONS

Recommendation #1: **The SCCT recommends that the Department adopt a pragmatic approach to migration management that emphasises regional integration and development as the basis of an African-centric migration policy.**

Recommendation #2: **The SCCT recommends that any new immigration legislation include mechanisms that account for and facilitate legal pathways for low to mid-skilled migration within the region as an integral component of a holistic and secure migration policy.**

Recommendation #3: **The SCCT recommends that concurrent to the introduction of an expanded regional visa regime, that the Department implement a Regularisation Programme to allow for SADC migrants currently residing in South Africa to access documentation, and that such a programme is implemented in a secure manner and based on strict criteria. Any regularisation programme should be accompanied by a moratorium on deportation for individuals that may qualify to broaden the project's reach and ensure it is effective.**

Recommendation #4: The SCCT strongly urges the Department to consult the available research and data on migration and that sound, empirical evidence be used to guide the policy-development process.

Recommendation #5: The SCCT urges the Department to ensure any legislative or policy adjustments are in line with our jurisprudence, international law and best practice.

Recommendation #6: The SCCT recommends that the Department consider more targeted and specific interventions to address the current gaps in policy in light of the severity of challenges, our finite resources and the significant length of time these gaps have been unaddressed.

Recommendation #7: The SCCT strongly urges the Department remain party to the 1951 Convention and use its finite resources in a constructive manner to ensure legislation and policy align with international human rights conventions, customary international law and the Constitution.

Recommendation #8: The SCCT recommends that the Department invest in more efficient training in refugee status determination and develop determination systems and processes that can adapt to protection needs and capacity constraints. Such systems should be accompanied by increased developing legal pathways for migration within the SADC region and specific, targeted amnesty projects to alleviate pressure on the asylum system.

Recommendation #9: The SCCT recommends the Department adopt a more flexible and adaptable policy position to address refugee protection, using all of the policy options available to it, and that facilities are strategically located in urban areas. These facilities should be complemented by protection-sensitive entry systems at Ports of Entry to establish a holistic system that is realistic, pragmatic and accounts for the needs of refugees.

Recommendation #10: The SCCT recommends that the Department utilises all of the 'Durable Solutions' available to end refugee protection in a dignified and safe manner.

Recommendation #11: The SCCT recommends that the Department, working with relevant government departments, engage within the region to strengthen international protection standards, reinforce the rule of law, and increase cooperation and coordination on the continent to improve refugee and migration policy.

Recommendation #12: The SCCT strongly recommends that the best interests of the child be paramount in any reform of citizenship or birth registration legislation and/or policy.

Recommendation #13: The SCCT recommends that the Department follow the recommendations of the *High Level Panel Assessment on Key Legislation and the Acceleration of Fundamental Change* on birth registration and citizenship procedures and ensure that any future legislation and policy is accessible and non-discriminatory.

Recommendation #14: The SCCT recommends that any proposal to establish immigration courts or new processes to adjudicate reviews is based on transparent figures relating to cost and function, and that, if this policy direction is followed, that these courts be independent from the Department. In the interim, we strongly recommend that the Department pursue other targeted measures to increase efficiency within the current system.

Recommendation #15: The SCCT recommends that Alternatives to Detention be incorporated into immigration policy and be considered the lens through which issues of immigration detention are approached. We recommend targeted amnesty projects, for those with expired or no documentation, along with increased legal pathways to facilitate legal regional migration as the pillars of our migration policy and law to lessen immigration detention and deportation.

Recommendation #16: The SCCT recommends that any legislative overhaul or policy development process expressly consider how potential changes are likely to impact children and guard against negative outcomes in this process.

Recommendation #17: The SCCT recommends that the Department, along with other key stakeholders, consider mechanisms to address the documentation challenges unaccompanied and separated children face in South Africa.

ANNEXURE 2

The pathway for a *recognized refugee* to obtain citizenship after permanent residence is as follows, with a typical but fictional '*applicant asylum seeker*' by way of example:

Step 1

After arrival in the Republic, the applicant asylum seeker reports to a Refugee Reception Office ("*RRO*") to apply for asylum. He / she / they are received by a Refugee Reception Officer ("*Officer*") and biometrics are taken. The asylum seeker is given a date to return to the RRO for their interview with the Refugee Status Determination Officer ("*RSDO"*). This "*RSDO interview*" or second interview date given is six months later.

Step 2

The RSDO interview takes place 6 months later for our applicant asylum seeker. According to s 24(3) of the Refugees Act 130 of 1998 (hereafter "The Refugees Act"), the RSDO must either grant asylum; reject the application as manifestly unfounded, abusive or fraudulent; or reject the application as unfounded.

2.1. If the application is rejected as '*manifestly unfounded, abusive or fraudulent*', the Standing Committee for Refugee Affairs ("***SCRA***") must review the decision of the RSDO and may *confirm, set aside or substitute such decision* (s24A). The applicant asylum seeker may write written representations to the SCRA for consideration. While waiting for the SCRA's decision, the applicant asylum seeker is issued with an '***asylum seeker visa***', valid for *6 months*, subject to renewal. He / she / they will commonly be referred to as an 'asylum seeker' rather than a refugee.

In our experience, we have come across many applicant asylum seekers with genuine and clear prima facie claims for refugee status whose applications for asylum are rejected by RSDOs as manifestly unfounded, abusive or fraudulent. These cases are usually thereafter substituted to *unfounded*, resulting in the process outlined below in paragraph 2.2 and thereby extending the time taken to obtain refugee status and the documentation outlined in paragraph 2.3.

2.2. If the application for asylum is rejected as unfounded, the applicant asylum seeker may lodge an appeal with the Refugee Appeals Authority of South Africa ("***RAASA***") (s24B) within 10 working days of receipt of the RSDO decision. He / she / they are then entitled to an appeal hearing. After the hearing, the RAA may confirm, set aside or substitute the decision of the RSDO. While waiting for the RAA's decision, the applicant asylum seeker is issued with an '***asylum seeker visa***', valid for 1 year subject to renewal. There are and have been significant delays with RAASA appeal hearings themselves due to issues of capacity. It is not uncommon to wait anywhere between one and 10 years for the hearing.

2.3 An applicant asylum seeker may obtain refugee status after their appeal hearing or SCRA review, after the decision is issued. The decision is, in most cases, not issued on the same day as the hearing – unless it is simple and/or procedural, such as a hearing for family joining.

Step 3

In an optimistic scenario, the *applicant asylum seeker is granted refugee status after the RSDO interview, **6 months** after reporting to the RRO*. The recognized refugee (hereafter the "***refugee***") is issued with a "***refugee visa"*** valid for four years, subject to renewal.

For a refugee to obtain permanent residence, he / she or they will first need to apply for and obtain a certification letter from the SCRA. Certification means the refugee will be a refugee indefinitely; that forward-looking, it is improbable or unlikely that the circumstances giving rise to the refugee's refugee status will cease to exist. It is subjective and objective; the refugee must fear returning to their country of origin and objectively, reputable country of origin information must demonstrate the conditions giving rise to the refugee's claim persist and are likely to persist in the near future. Furthermore, t*o qualify for certification, the refugee will need to have had refugee status/ the refugee visa for **10 years** at the time of applying.*

The refugees may write certification representations on their own. However, this could result in him, her or they being unsuccessful if they do not motivate well due to a lack of understanding, language or education barriers.

If the refugee is unsuccessful – in practice – the SCRA will issue a Notice of Intention to Withdraw Refugee Status which begins the process of the loss of refugee status. Therefore, it is a risky process and a double-edged sword resulting in the loss of documentation for many refugees and discouraging others from applying.

Step 4

The SCRA lacks capacity and takes a long time to consider applications for Certification. If an applicant refugee is successful, they are issued with a '**Certification Letter**' from the SCRA, stating that the refugee will remain a refugee indefinitely.

In practice from our experience, the SCRA may take between one and five years to reach a decision, but we have seen much longer delays.

*In this highly optimistic scenario for the fictional refugee, they are issued with a certification letter **one year** after applying.*

Step 5

After obtaining the Certification Letter, the refugee needs to go to VFS Global – the company contracted by the DHA – to apply for **permanent residence** in terms of s27(d) of the Immigration Act 13 of 2002. The time frame given is ***one year***, but the process usually takes longer.

In our optimistic scenario, the refugee gets permanent residence *one year after obtaining the Certification letter.*

The refugee / permanent residence will need to meet the criteria in s5 of the Citizenship Act 88 of 1995 to qualify for citizenship:

> *"5. Certificate of naturalisation*
>
> *(1) The Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister that –*
>
> *(a) he or she is not a minor; and*
>
> *(b) he or she has been* ***admitted to the Republic for permanent residence*** *therein; and*
>
> *[Para. (b) substituted by s. 5 of Act 17/2010]*
>
> *(c) he or she is ordinarily resident in the Republic and that* ***he or she has been so resident for a continuous period of not less than five years****; and*
>
> *(d) he or she is of good character; and*
>
> *(e) he or she intends to continue to reside in the Republic or to enter or continue in the service of the Government of the Republic or of an international organisation of which the Government of the Republic is a member or of a person or association of persons resident or established in the Republic; and*
>
> *(f) he or she is able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister; and*
>
> *(g) he or she has adequate knowledge of the responsibilities and privileges of South African citizenship; and*
>
> *(h) he or she is a citizen of a country that allows dual citizenship: Provided that in the case where dual citizenship is not allowed by his or her country, such person renounces the citizenship of that country and furnishes the Minister with the prescribed proof of such renunciation..."*

Step 6

Therefore, the refugee / permanent residence would need to reside in South Africa for an ***additional 5 years*** with permanent residence and then apply for Citizenship and go through the associated procedures.

In an optimistic scenario, the refugee / permanent resident *obtains Citizenship one year after applying*, in addition to the 5 years residing with permanent residence.

In our *highly optimistic scenario, the applicant asylum seeker / refugee and permanent resident obtains citizenship* ***17 and a half years after first attending an RRO to***

apply for asylum. In practice we more commonly encountered instances where the process takes **25 to 30 years**.