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**GREEN PAPER ON THE INTERNATIONAL MIGRATION**

I, MKN Gigaba, Minister of Home Affairs, intend in terms of section 85 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) to publish the Green Paper on International Migration for public comments.

Interested persons and organisations are invited to submit any substantiated comments or representations by no later than 30 September 2016. Written submissions can be sent to the following address:

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**REPUBLIC OF SOUTH AFRICA**

## **GREEN PAPER ON INTERNATIONAL MIGRATION IN SOUTH AFRICA**

**21 JUNE 2016**

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**LIST OF ABBREVIATIONS**

AEC: African Economic Community

AMU: Arab Maghreb Union

AU: African Union

BMA: Border Management Authority

CENSAD: Community of Sahel-Saharan States

CFTA: Continental Free Trade Area

COGTA- Department of Cooperative Governance and traditional Affairs

COMESA: Common Market for Eastern and Southern Africa

DHA: Department of Home Affairs

DHET: Department of Higher Education and Training

DIRCO: Department of International Relations and Cooperation

DOH: Department of Health

DSD: Department of Social Development

DTI: Department of Trade and Industry

EAC: East African Community

EC: European Community

ECCAS: Economic Community of Central African States

ECOWAS: Economic Community of Western African States

HRDCSA: Human Resource Development Council of South Africa

IAB: Immigration Advisory Board

IGAD: Intergovernmental Authority on development

IGRFA: Intergovernmental Relations Framework Act

ILO: International Labour Organisation

IOM: International Organisation for Migration

LSA: Lesotho Special Permit

NDP: National Development Plan

NEDLAC: National Economic development and Labour Council

OAU: Organisation of African Unity

OSBP: One-Stop Border Post

POE: Ports of Entry

RAB: Refugee Appeal Board

ROSA: Registration of South Africans Abroad

SADC: Southern African Development Community

SANDF: South African National Defence Force

SAPS: South African Police service

SARS: South African Revenue Services

SCRA: Standing Committee for Refugee Affairs

TEBA: The Employment Bureau of Africa

UN: United Nations

UNHCR: United Nations High Commissioner for Refugees

ZSP: Zimbabwe Special Permit

**DEFINITION OF COMMON INTERNATIONAL MIGRATION TERMS**

- a) **Asylum seeker:** refers to a person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status.
- b) **Border management:** commonly defined as the government functions of immigration, customs and excise, and policing, with the aim of controlling and regulating the flow of people and goods across a country's border in the national interest (particularly economic development, security and peace).
- c) **Critical skills list:** refers to a legislated list of scarce skills that are in demand for growing the economy.
- d) **Economic migrant:** refers to foreign nationals who migrate for economic reasons such as seeking employment or to conduct business.
- e) **Emigration:** refers to the act of departing or exiting from one's country (country of origin or of habitual residence) with a view to settling in another (host country).
- f) **Family reunion / family reunification migrants:** refers to people sharing family ties joining people who have already entered an immigration country under one of the above mentioned categories.
- g) **Forced migration:** in a broader sense, this includes not only refugees and asylum seekers but also people forced to move due to external factors, such as environmental catastrophes or development projects.
- h) **International migration:** refers to any movement by a person across an international border, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is. Short-term international migration refers to at least three months duration of stay in the country, or away from the country of habitual residence. Long-term international migration exists when the period of stay is at least one year.<sup>1</sup>
- i) **Irregular migrants (or undocumented / illegal migrants):** these are people who enter a country, usually in search of income-generating activities, without the necessary documents and permits.
- j) **Migration management:** this term is used to encompass numerous governmental functions within a national system for the orderly and humane management of cross-border migration. It refers to a planned approach to the development of policy, legislative and administrative responses to key migration issues.
- k) **Naturalization:** refers to an act of granting of citizenship by a state to a non-national through a formal act on the application of the individual concerned.
- l) **Permanent residence permit:** refers to authorisation granted to certain categories of foreign nationals by the state to reside in the country permanently.
- m) **Port of entry:** refers to a place designated by the Minister in the RSA where all persons have to report to an immigration officer before entering or leaving the country.

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<sup>1</sup> International Organization for Migration

- n) **Refugee:** a person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.
- o) **Resettlement:** refers to the relocation and integration of people (refugees, internally displaced persons, etc.) into another geographical area and environment, usually in a third country.
- p) **Temporary residence visa:** refers to any of the visas issued to a foreign national to enter and temporarily reside in the country. These include transit, visitors, work and business visa.
- q) **Visa exemption:** refers to the act of exempting any person or category of persons from requirements of obtaining a visa.
- r) **Xenophobia:** At the international level, no universally accepted definition of xenophobia exists, although it can be described as attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity.

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## **CHAPTER 1: OVERVIEW OF INTERNATIONAL MIGRATION IN SOUTH AFRICA**

### **Introduction**

South Africa (SA) as a sovereign state has defined borders that are recognised by approximately two hundred other states into which the political and legal world is divided. The policy on international migration that we adopt through a democratic process will reflect how our nation of fifty-five million people understands that world and wants to relate to the rest of the seven billion humans who share planet Earth.

Humans have always moved, and will always move, to where they are secure and can develop to their potential. The global movement of people, information, technology and capital across the globe gives us huge opportunities as a nation and at the same time presents very serious risks. According to the 2013 United Nations population report at least 3% (232 million) of the human population are international migrants who have moved across borders to live in other countries for twelve months or more. A random sample would include labourers, unqualified artisans, highly qualified professionals, families and mass migrations caused by violence or natural disasters. People migrate for complex and varied reasons.

Young men have constituted a major proportion of those migrating annually, but increasingly women and children are migrating. The overall number of migrants has been increasing steadily owing to opportunities offered by rapid transport, accessibility to communications as well as 'push and pull' factors. 'Pull' factors include economic and professional opportunities and safety. 'Push' factors include large economic inequalities (domestic and international), conflicts, persecution, degraded environments and climate change. To discuss migration meaningfully we must think nationally (across sectors and spheres of government), regionally and globally while understanding that the policy adopted will impact on every community and individual in SA including our citizens visiting or residing in other countries. No nation in a world with a globalised economy can survive or thrive in isolation; or without due regard for international laws, conventions, treaties and agreements.

In general, South Africans are proud of the role we are playing internationally to strengthen collective peace and security and confront problems such as climate change, pandemics and poverty. A war or the collapse of a state anywhere in a highly globalised world impacts directly on global security and how much we pay for fuel or food and insurance. There will be mass migration and a rise in risks, threats and costs if all or part of a state collapses. Examples are Somalia, Libya, Iraq and Syria. The largest instance was Europe in the 1940s.

We also celebrate and are proud of the international achievements of our athletes, scientists and entrepreneurs. None of these achievements would be possible if international migration was not possible and states closed their borders. As a member of the family of nations, our chances of peace and prosperity are far greater in a world where states cooperate and their citizens are free to travel, work, study, research, enjoy culture and build relationships.

The Green Paper argues that the current international migration policy must be replaced as it does not enable SA to adequately embrace global opportunities while safeguarding our sovereignty and ensuring public safety and national security.

National thinking and attitudes to international migration are currently influenced by an unproductive debate between those who call for stricter immigration controls and those who call for controls to be relaxed. The discourse is in general characterised by strong emotions, stereotypes and contested statistics. Discussions are usually limited by “us and them” thinking that either sets in opposition the rights of immigrants to the rights of citizens and the state; or focuses on either our domestic or our global interests.

SA has not yet built a consensus at policy, legislative and strategic levels on how to manage international migration for development. What is proposed in the Green Paper is that by adopting a managed migration approach we can work together to achieve common goals.

### **The limitations of the current policy and approach**

The current policy on international migration is set out in the 1999 White Paper on International Migration and its approach characterises a problematical way of thinking and acting about immigration that is summed up below.

#### International migration is regarded as a routine administrative function of the state

The approach to international migration in the 1999 White Paper is largely static and limited to compliance rather than at managing international migration strategically. As a result, there is a lack of a pro-active management of international migration and this does not advance the national security and development agenda of the country.

Home Affairs has historically been regarded as performing routine administrative functions in a low-value, low-security environment. Consequently, its systems are outdated, there is grossly inadequate capacity and the entire operational budget for immigration functions is less than a billion rand. The focus is biased towards formal rights rather than on understanding that international migration must be managed professionally, securely and strategically to achieve national priorities.

The current Green Paper proposes that international migration must be managed proactively and strategically in order to contribute to national priorities such as nation building and social cohesion, inclusive economic growth and national security. SA needs to start a conversation on the importance of international migration so that there can be consensus on its contribution to meeting broadly supported national goals. For example, the National Development Plan (NDP) prioritises the acquisition of skills, some of which must be recruited internationally, in

order to achieve national priorities such as inclusive economic growth. However, SA has not put in place adequate policy, strategies, institutions and capacity for attracting, recruiting and retaining international migrants with the necessary skills and resources.

#### Lack of a risk-based approach to international migration

The current White Paper relies on the mechanical application of rules to manage risks, rather than the integrated intelligence-based approach that is best practice globally. SA has consequently invested little in the effective and secure management of international migration so that risks can be evaluated and mitigated adequately. To obtain a business or residence visa in SA certain formal conditions must be met, including proof of financial resources, police clearance and checks against Interpol and other watch-lists. Countries that effectively manage risks have in addition put in place the people, systems and awareness needed to monitor and assess risks, starting with a complete official history that the applicant or traveller has with the destination country. The capacity to analyse and take strategic decisions is fundamental together with the availability of the necessary information from other departments, such as the State Security, Transport, SAPS, SARS, the DTI and Health.

Countries with a similar risk profile to SA that effectively manage immigration apply, to a far greater extent, the basic principle of keeping risks outside their borders. This includes doing adequate checks at missions and by airline liaison officers at key airports. The cost of these measures is far lower than that of dealing with threats such as fugitive crime bosses once they have established themselves in SA. The same measures, such as the use of biometrics, allow for the much more rapid processing of legitimate travellers, and the economic benefits exceed by far the cost of maintaining modern systems that are managed and operated by specialists.

In the Republic of South Africa (RSA) risks have to be managed within the framework of the Constitution and the human rights of both citizens and other nationals must be respected and protected. Immigration that is not managed through a risk-based approach is poorly managed. This gives rise to systemic corruption as well as exposing all who live in the country to serious risks such as terrorism and the smuggling of drugs. Instability will increase and skilled migrants will not be recruited efficiently, thus undermining development. Job opportunities will not expand and this in turn will generate xenophobia and more instability.

### Little awareness of historical and geo-political contexts

The 1999 White Paper was an important instrument for deracialising apartheid immigration legislation and it adopted the formal principles of immigration administration that are promoted by the United Nations (UN) and found in middle or higher income countries. However, the largest specific policy gap in the White Paper is that there is no sense of SA being an African state situated in the Southern African Development Community (SADC), which is one of the eight regional Communities recognised by the African Union [AU].

Under colonialism and its apartheid manifestation, immigration linked to citizenship was strictly limited to persons deemed to be “Europeans”. Africans were classified as “Natives” and consigned to the migrant labour system that maintained colonial economies across southern Africa. The 1999 White Paper opened our borders to Africa and the world but reserved the right to immigrate largely to those with high level skills or capital. Workers with low to mid-level skills from SADC countries can only be recruited by farmers, the mines and other companies under a temporary Corporate Work Visa that has roots in the migrant labour system.

In general, the White Paper is conspicuously silent on the need to manage historic flows of labour within SADC in a way that will break with the colonial past by promoting regional integration and industrial development. Because of our shared colonial history, the development gap between SA and its neighbours is larger than in any other region globally – SA’s GDP per capita is five to seven times that of the rest of SADC<sup>2</sup>. The Green Paper seeks to address this historical and geographical reality and put forward options that would help enable SA, Southern Africa and Africa to develop its own markets, industries and skills base.

### Lack of a holistic approach to immigration policy leading to policy gaps

The first Green Paper on International Immigration (1997) covered immigration, asylum seekers and refugees. The White Paper excludes policy on asylum seekers and refugees, which is covered in the Refugees Act. The approach taken in the 2016 Green Paper is that international migration must be dealt with holistically as many aspects are interconnected and this manifests in concrete processes and the lives of people. For example, providing protection to refugees and asylum seekers falls in the human rights domain; but it also carries security risks for the host country that must be managed using the same security systems that

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<sup>2</sup> TIPS Annual Forum 2015

cover immigration. More skilled refugees could successfully apply abroad to work and stay in SA under the immigration act if the required systems were established.

The White Paper is also not holistic because it does not deal with emigration, defined as the settlement of South Africans in other countries. These South Africans represent both a loss to the country as well as potential skills and resources which could be harnessed creatively to advance our development. The 2016 Green Paper thus addresses the question of how to engage with South African emigrant communities abroad.

#### Serious policy gaps regarding asylum seekers and refugees

At the level of policy, legislation, strategy and systems, the asylum seeker and refugee regime that was established through the 1998 Refugees Act has serious gaps that have only been partially addressed through amendments. A contributing factor was the assumption that numbers of asylum seekers would be low, given the relative stability of SADC and the distance from typical refugee sending countries. In part, this was a consequence of not considering historical flows of labour within SADC and thus not being prepared for hundreds of thousands of SADC citizens claiming asylum so they could work while their claims were being adjudicated. The largest influx came as result of economic collapse in Zimbabwe but there is a strong underlying trend from across the region. Another factor is the high level of activity of human smugglers and traffickers who bring in people under the guise of being asylum seekers from as far as Asia and North East Africa.

While the policy of non-encampment can be fully justified there was no provision made for providing indigent asylum seekers with basic food and accommodation, leading to the courts obliging the DHA to consider issuing deserving cases with permits allowing them to work or study. This has become a powerful “pull factor” which further burdens the asylum system leading to many adjudication cases being delayed for years. There has been no additional funding to increase capacity in areas such as the two boards dealing with appeals, even though this would be a fraction of the additional burden that is placed by long-stayers on social services. Besides policy gaps, this points to the need for the state to move more quickly to a more integrated and strategic approach to planning and budgeting.

### Capacity constraints to manage international migration

In this context the definition of “capacity” should be understood to include all major factors that enable a state to manage international migration. This includes the vision, understanding and attitudes that are prevalent amongst leaders and the public; policy and regulatory frameworks; and the institutional and administrative resources required to implement the policies. It also includes capacity to secure and defend the people, systems and institutions involved in the management of international migration. Amongst other serious threats, the systems of the DHA are under continual attack by criminal syndicates. Critical to ensure both security and efficiency, and to protect human rights, are the quantum and quality of human resources that manage immigration systems.

The limited capacity of SA to manage international migration is due to a lack of appreciation of its positive role and strategic importance. Contributing to the situation described above has been a tendency to regard the DHA as the sole department responsible for the management of international migration. This has contributed to the lack in SA of approaches involving the whole of the state and civil society<sup>3</sup>, which is contrary to best practice globally. A strong international trend is for countries to move to an integrated approach, with departments working together and in harmony with civil society stakeholders in order to achieve common security and developmental objectives.

In SA, because there is little national consensus around the importance and goals of international migration, government and civil society often decide on matters in court and those decisions often drive policy. This can be disruptive and have unintended consequences, such as the 2004 Watchenuka judgement which entitles asylum seekers to work and study - a major pull factor that overwhelmed the asylum system. The Green Paper proposes that SA should adopt an approach to immigration that is strategically managed and which involves the whole of the state and civil society led by the elected government.

### **Motivation for a new White Paper on international migration**

It has been over 17 years since the White Paper on International Migration approved by Cabinet in March 1999, became the basis of immigration legislation and regulations. Although there have been significant economic, social, legislative and regulatory changes

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<sup>3</sup> Civil society can be defined in this context as those social formations that have a claim upon the state.

since then, there has not been a comprehensive review of policy. Essentially, the country's formal international migration policy has remained in place since 1999 despite significant changes in the country, region and world. Notable developments include the following:

- SA is a major international player in various international (multilateral and bilateral) platforms that deal with peace keeping missions and development;
- SA has become a major destination and transport hub for the continent and the world. Most SADC nationals, for example, are transiting through SA to the continent and the world. World leaders, including politicians and business persons, travel through SA to the region.
- SA has become a platform for investment into Africa. South African companies are also increasingly expanding their businesses into Africa and other continents.
- Migrants from the African continent, as far as North Africa, are transiting through SA to their preferred destination countries in Europe and North America. This has been exacerbated by the tightening of borders and political instability in North Africa, the Middle East and Europe.
- SA continues to receive a high number of individual asylum seekers from almost all the regions of the world, including asylum seekers from countries that are politically stable.
- SA attracts tourists from all regions of the world because of its climate, developed infrastructure and various tourist attractions; and it has become a major venue for international events.
- African countries continue to liberalise their immigration regimes in line with the African Union 2063 vision.
- Many South Africans have taken advantages presented by globalisation and have migrated to various developing and developed countries. More of these South Africans can contribute to achieving national priority goals than is the case presently.
- SA has become a global player in certain areas of the sciences and arts, such as astronomy and film-making.
- The rate at which the global economy is being driven by scientific and technological change is accelerating, as is the impact of climate change. This requires capable states that manage international migration strategically to maximise its benefits and minimise its risks.



These developments necessitate that SA reviews the current international migration policy in line with the above developments as well as in line with the new macro policy frameworks. SA has adopted the National Development Plan (NDP) as an overarching policy framework for all national policies and legislation. The NDP essentially argues that, if we are to end poverty and create decent work we must use migration to break these patterns by growing our skills and knowledge base and by removing barriers to regional development. This requires SA to invest strategically in the further development of an efficient and secure immigration system.

## **Vision for a new international migration policy in SA**

### **Introduction**

The Green Paper contends that it is neither desirable nor possible to stop or slow down international migration. What is argued is that international migration in general is beneficial if it is managed in a way that is efficient, secure and respectful of human rights. International migration is part of what makes us human: we are by nature mobile and move in search of safety or opportunities. We are also social beings and build complex societies that have rules defining who can belong or visit and under what conditions. Managing international migration in the interests of states or nations is not a new idea. As states developed, these were codified into laws and the earliest legal texts concern the right and duties of citizens<sup>4</sup> and treaties governing relationships between states. All nations today are a product of historical migration flows that were partly influenced by earlier decisions taken by leaders of states. In general, nations flourished where people with different origins, skills, resources and cultures were able to live, work and trade peacefully.

### **Vision and Key principles**

#### Proposed vision:

South Africans embrace international migration for development while guarding sovereignty, peace and security

<sup>4</sup> The Code of Ur-Nammu is at least 4000 years old and deals with the rights of Sumerian citizens.



What SA urgently needs in a highly connected world is a robust, progressive vision of the benefits of well-managed international migration. This vision must be based on the crucial contribution inward and outward migration makes and will make to growing our economy and to the transformation of Africa. The deep historical roots that must nourish this vision include the following:

- Our commitment to the values of humanism and internationalism through our struggle for human worth and dignity
- Our commitment to overcoming the legacy of colonialism and building a prosperous, peaceful and united Africa
- Building a nation of active citizens of SA, Africa and the world.

The new vision will be underpinned by sound principles of international migration which are briefly discussed below.

**Constitutional principles:** The following Constitutional principles frame the vision and must be understood in context and in the spirit of the Constitution in order to enable the country to manage international migration strategically and securely:

- The duty of the state and every citizen to defend our sovereignty, the security of the state and the integrity of our society;
- Equal respect for human rights for all;
- All who live in SA have to respect the laws;
- The obligation to honour the international commitments of the Republic;
- The right every citizen has to choose their trade, occupation or profession freely;
- Citizens have the right to international travel if they comply with relevant laws;
- The right everyone has to freedom of movement within SA;
- Development to realise the potential of every citizen and to ensure redress and equity;
- Striving for global peace, security and a better life for all humankind.

### **Principles that define our approach to international migration**

1. SA has a sovereign right to manage international migration in its national interests:
  - The national interests of SA should be defined in accordance with
    - The principles underpinning the Constitution;
    - National priorities such as national security and development;
    - Promotion of human rights, peace and stability in order for South Africans to live in a secure, stable and prosperous world.

2. SA's international migration policy must be oriented towards Africa:
  - SA can play an important part in making regional economic integration happen and in the unification of post-colonial Africa. No country can maintain a stable development trajectory that is independent of the region in which it is located. Our future lies, together with others, in being part of the African continent that has a knowledge-driven industrial base, thriving trade and a free flow of people, goods, information and capital. In this regard it is important to note three significant developments that have implications for future international migration Africa. These are: the adoption of the AU Agenda 2063 by the Heads of States and Governments in June 2015; establishment of the Continental Free Trade Area (CFTA); and negotiations for a continent-wide visa free regime.
3. SA's international migration policy must contribute to nation building and social cohesion:
  - One of the purposes of a migration policy is to determine which foreigners can become part of the community of SA people either on a temporary or on a permanent basis. In doing so, the migration policy shapes the future composition of the South African population. A diverse nation can build its knowledge base by attracting leading thinkers; release the creative potential of many cultures; and find new synergies. This gives it a critical advantage in world economy that is knowledge-driven and highly connected.
4. SA's international migration policy must enable South Africans living abroad to contribute to national development priorities.
  - Like many other developing countries, SA loses a significant proportion of its skilled workforce every year. This has both negative and positive consequences that must be managed. South Africans who have migrated to other countries can be a source of development in terms of skills, capital and connections. Countries that are confronted with a similar challenge have established various institutional mechanisms for engaging with their respective diasporas.
5. The efficient and secure management of international migration is the responsibility of individual countries, all countries collectively as well as regional structures:
  - On the domestic level, the policy should make explicit the principles that indicate the rights and responsibilities of the state, civil society, individual citizens and foreign nationals living in SA:
    - The whole of the South African government and political formations; and
    - Civil society partners - organised labour, business, communities and immigrant communities
    - Informed and aware citizens and immigrants.

- On the international level migration is a complex process involving two or more sending, receiving and transit states. The policy should therefore provide a framework of principles for promoting shared responsibility for managing international migration. In this regard SA must:
  - Actively strengthen international efforts to promote and implement good practice and the principles of shared and collective responsibility and cooperation;
  - Proactively engage with relevant states and build bilateral and multi-lateral partnerships.
  - Ensure that this policy framework articulates with SA's foreign policy.

## CHAPTER 2: EVOLUTION OF INTERNATIONAL MIGRATION POLICY IN SA

### Introduction

In order to understand the challenges confronting the country in managing international migration today it is necessary to gain an understanding of its historical roots and our current policy environment.

Specific historical and geographical contexts are crucial in understanding migration patterns in any country. As a nation, South Africans are the product of migration. Much of the economy was built by migrant workers who extracted raw materials, with most of the wealth going to Europe or America. This has left post-colonial states with massive structural inequalities and under-developed health and education systems. Several scholars<sup>5</sup> have written extensively on this subject and they argue that ignoring this history would obscure its impact on SA's immigration policy and practice; and our long-standing economic and political links with the region.

### Colonial and pre-1948 international migration policy

South African international migration policy is based on our post-1994 Constitution and it should be understood in the context of our history and geographical location. In the colonial era the countries that now form the South African Development Community (SADC) were linked through a system of labour migration. Migration was probably the single most important factor tying together all of the various colonies and countries of the sub-continent into a single regional labour market during the twentieth century. SA has been the main destination for migrant labour on the continent since the 19<sup>th</sup> century, following the discovery of the region's natural resources. As the supply of indigenous labour within SA was insufficient to meet the growing demand of the mines, the Chamber of Mines recruited from surrounding colonies and across Southern Africa.

Even before the apartheid era, immigration policy in SA was based on racial discrimination. As illustrated above, much of the immigration policy paradigm in SA in the late 19<sup>th</sup> and the early 20<sup>th</sup> centuries was dominated by the discourse of recruiting "desirable" whites and excluding migrants from Asia and India in particular. In terms of acquiring citizens, formal

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5 Peberdy, S., Crush, J. and Williams, V. (1997,1998, 1999, 2000, 2001, 2005, 2008, 2009), Maharaj, B (2004)

immigration under colonial and apartheid regimes was essentially conceived of as being for whites only. With regard to African migrants, domestic and foreign, the primary concern of apartheid and pre-1948 South African governments was to ensure colonial domination and an abundant supply of cheap migrant labour.

The Immigrants Regulation Act of 1913, the first nation-wide immigration legislation passed in SA, had a major aim of excluding those Indian immigrants who had followed Indians who had entered after 1860 as indentured labourers to work in the sugar cane plantations. The growing Indian population was considered a major threat to the ideology of white supremacy.

At the end of the First World War, SA was the destination for a rapidly increasing number of European immigrants, often from Eastern Europe. Many were Jewish or Catholic and poor – all characteristics considered undesirable on political and racial grounds. The Immigration Quota Act of 1930, aimed at excluding such unwanted immigrants, also established the concept of discriminating between immigrants who were ‘desirable’ and ‘undesirable’.

The Aliens Act of 1937 left the door open for migrants with ‘desirable’ characteristics. Until recently, all immigration legislation since this Act has been influenced by the principles laid down in 1937, including use of the term “alien” to describe those who were not South African nationals or British citizens.

### **Apartheid international migration policy**

Under apartheid, immigration control manifested chiefly in tight border security and restrictions on Africans considered politically undesirable and others entering the country; and on Africans travelling abroad. Ports of entry were under the control of police directed by an intelligence unit until 1992 when immigration officers were introduced. The fragmented departments of “Home Affairs” (variously named) were responsible both for general control via the pass laws as well as delivering modern services largely to whites.

The apartheid government encouraged or turned a blind eye to clandestine migration in order to ensure an abundant supply of cheap labour, but was opposed to black migrants applying for citizenship. The Aliens Control Act of 1991 was based on a 1913 Act that excluded blacks and was amended in 1930 and 1937 to exclude Jews. The racist orientation of South African immigration policy became very evident when the government welcomed whites from neighbouring states in Southern Africa who felt threatened by white majority rule.

Between 1960 and 1980, skilled and semi-skilled white migrants from Zambia, Kenya and Zimbabwe were given citizenship to boost the local white population.

Between 1913 and 1986 black people could only enter SA illegally or as contract workers as they were not allowed to apply for temporary or permanent residence permits. Historically, labour migrants were concentrated in their largest numbers in the South African mining industry. The mix of source countries varied over time. Mozambique, Lesotho, Swaziland, Botswana, Zimbabwe and Malawi were the major suppliers. All migrants were recruited by a single Industry-financed monopoly, The Employment Bureau of Africa (TEBA), which operated an extensive network of recruiting offices in supplier states. At the end of a stipulated period, migrants had to return home to renew their contracts.

### **Post-1994 international migration policy**

From 1994, the vision of SA's first democratic government was to reverse racially-based and exploitative laws, and integrate SA into the SADC region, the African continent and the world. The transition to democracy has enabled SA to play a full and active role in the family of nations. This is one of the fruits of a struggle in which the mobilisation of international support played a critical role. International migration was a key factor in SA's relatively high level of economic growth until the global economic crises of 2007/8.

The struggle against colonialism has deep roots in humanism and internationalism which found expression in the Freedom Charter and in our Constitution. The Constitution does not mention immigration, leaving specific immigration policy decisions to democratic processes. However, the Constitution lays down certain relevant principles. The right of the South African people to self-determination and sovereignty is fundamental and this includes the right to security and control of our resources. Other basic principles that have migration policy implications are respect for human rights, the honouring of international agreements and the promotion of peace, security and prosperity for all peoples.

SA has undergone a protracted process of developing policy and legislation on migration and refugees since 1994. This process has included the drafting of a Green Paper on International Migration in 1997, a White Paper on International Migration accompanied by a Draft Immigration Bill, and the adoption of the first comprehensive Immigration Act in 2002, which has subsequently been amended. A Refugees Act was also legislated in 1998, and

amendments to this Act are currently underway. The discussion below highlights key areas of these documents and legislation.

Since 1994 several million South Africans have used their new passports to visit, study, work and to do business abroad. Tourists and skilled migrants have helped grow our economy and knowledge base. Even so, while the international migration policy framework was formally deracialised, the 1999 White Paper has in part a colonial outlook. For instance, the White Paper argues that technically, the migration policies of the old SA could be applied if adapted to comply fully with the Constitution and the administrative practices developed under it. This would in theory ensure that they do not unfairly discriminate against certain foreigners on the basis of origin, ethnicity or religion. In essence, however, the current policy framework is based on rules that in practice disadvantage Africans and favour immigrants from Europe and other developed regions over African countries.

#### **Amendment of the Aliens Control Act No. 96 of 1991**

The first migration policy reform came in 1995, with a statutory amendment to the Aliens Control Act No. 96 of 1991. It was Parliament's intention to bring the Act more in line with the country's new constitution. Before being amended in 1995, Section 55 of the Act provided that no decision of the DHA was reviewable by a court or tribunal, and persons could be held in detention indefinitely, without judicial review. The 1995 Amendment removed this provision and provided that detention for periods beyond thirty days ought to be subject to review. In short, despite the reforms, there were still concerns that the Aliens Control Act fell far short of constitutional expectations. Clearly, more comprehensive reforms were and are necessary.

#### **Green Paper on International Migration**

In May of 1997, SA published a Green Paper on International Migration. Underscoring the Green Paper were the dual principles that a planned and efficient system of immigration would be in SA's national interest and that unauthorised migration is undesirable. The Green Paper suggested that planned immigration would create opportunities for economic growth and development, and as such could be viewed as a potential tool for nation-building, rather than an impediment. It further argued, however, that realising the benefits of immigration

would require a broader vision of the role of population movements in economic growth, and that the implementation of such a vision would require a simple, achievable and manageable plan of action. The Green Paper also maintained that as a sovereign state, SA would reserve the right to determine who would be allowed entry into the country, and under what conditions. At the same time, the Green Paper proposed that the design and implementation of immigration policy should be faithful to the 1996 Constitution, and should be consistent with the national commitments to upholding universal human rights, administrative justice, and the guarantee of certain basic rights for all people affected by the South African state.

### **White Paper on International Migration**

The White Paper on International Migration was published in March 1999 and its Executive Summary provides an overview of its focus, contents and recommendations, as follows:

In this White Paper administrative and policy emphasis is shifted from border control to community and workplace inspection with the participation of communities and the cooperation of other branches and spheres of government. Procedures related to the issuance of permits are simplified to shift resources towards enforcement. An Immigration Service would be established with monitoring and investigative capacity at community level and there would be an Immigration Review Board drawn from different sectors.

The basic shortcoming of the White paper is discussed above in Chapter 1. In summary, it adopts an approach that is not aligned to SA's historical and geographical realities; or to using international migration strategically to achieve development goals. The approach is also one of mechanical compliance to requirements rather than ensuring national security through the management of risks. Lastly, it assumes immigration is a routine function that falls mainly under Home Affairs rather than adopting a 'whole of the state and society' approach. This contributed to the classification by National Treasury of Home Affairs as a general administrative department that does not need to operate in a highly secure environment. The White Paper did advocate establishing an immigration service and the Immigration Services (IMS) branch of the DHA was duly established; but it only receives a budget sufficient for routine administration, with limited funding for enforcement of immigration legislation.



## **Immigration Act No 13 of 2002**

The Immigration Act (Act 13 of 2002) was legislated following the tabling of the White Paper on International Migration (1999) and the Immigration Bill (2001). The Act represented a significant policy and legislative departure from the Alien's Control Act of 1991, namely the previous statute governing the entry, residence and departure of foreign nationals in SA.

The Preamble of the Act emphasised a number of principles, including: simplified requirements and procedures, and the expeditious issuing of residence permits; security and state control over immigration; inter-departmental coordination; cognisance of globalisation and GATS; strengthening border monitoring and deterring illegal immigration; efficiently managing and administering border posts; efficiently and effectively enforcing immigration law, "thereby reducing the pull factors of illegal immigration"; accessing scarce skills, while protecting South African workers; maintaining a policy connection between foreigner workers and the training of citizens; addressing migration issues with other states; ensuring human rights protection in immigration control; and preventing and countering xenophobia within government and civil society.

## **South African refugee policy and legislation**

### **Refugee White Paper, 1998**

The Refugee White Paper was developed in 1998 as a first step towards developing a system of protection for refugees and asylum-seekers, following South Africa's ratifying of the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol, and the 1996 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The White Paper also included a Draft Refugee Bill which, following amendments was adopted and legislated as the Refugees Act (Act 130 of 1998), later in the same year.

Cognisant of the obligations imposed by international instruments, the White Paper defines the conditions of eligibility for refugee status in SA, as well as conditions for exclusion from this status. The White Paper also outlines a number of principles guiding the treatment of refugees in SA, including: the international principle of non-refoulement<sup>6</sup>; non-prosecution on the basis of illegal entry into the country; non-deportation, except where there is a threat to

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<sup>6</sup> Refoulement essentially refers to returning a person to a place where his/her life would be threatened.

national security or the public order; basic security rights; basic human dignity rights; and, basic self-sufficiency rights, including the rights to work and education.

The White Paper also outlines the conditions of residence for persons granted refugee status, placing emphasis on the creation of an “enabling” environment for self-sufficiency through access to identity and travel documents, the rights to work and study, as well as a speedy determination process. In the event of a mass influx of refugees, the White Paper recommends that the Minister be empowered to determine refugee status on a group basis, and make regulations related to accommodation and treatment of refugees in these circumstances.

### **Refugees Act No 130 of 1998**

Following on the Refugee White Paper and Refugee Bill, the Refugee Act was adopted in 1998 with the main aims of giving effect to international instruments, providing for the reception of asylum seekers, establishing conditions for the refugee application and determination processes, and defining rights and conditions of residence for refugees in SA. Consistent with the White Paper, the Act outlines circumstances under which an applicant may qualify for refugee status, or be specifically excluded. The Act also provides for the establishment of a Refugee Reception Office staffed by refugee reception officers and refugee status determination officers.

The Act also provides for the establishment of both a Standing Committee for Refugee Affairs and a Refugee Appeal Board, and provides specific guidance on the composition, powers, duties, and conditions of office of members of both bodies. The Act came into force in 2000 after the adoption of the Refugee Regulations.

## CHAPTER 3: STATISTICAL PROFILES OF INTERNATIONAL MIGRANTS

### Introduction

International population movements are complex to measure, as they are influenced by a variety of socioeconomic, political, environmental and other factors. There are, in fact, no official figures available on the total number of foreign residents in SA other than projections based on census data. Figures from the 2011 Census suggest that 3.3% or about 1.7 million of the country's 51.7 million population are foreign-born. According to AfricaCheck, data collated by the World Bank and the UN, suggests a migrant population of about 1.86 million people. The IOM estimates that the total migrant population (legal and irregular) rose from 2% of population in 2000 to over 5, 5% in 2015, which aligns with the census projections.

SA continues to attract a high volume of various categories of international visitors and migrants from almost all regions of the world. For instance, in 2011 more than 12 million arrivals of foreign nationals were recorded on the Movement Control System (MCS). This figure increased to 15 million in 2014. More than 90% of the movements involve SADC nationals, with those living in border towns making frequent crossings. For more details, please refer to **Table 1** below:

**Table 1: Trends on international movements through the POE**

	2011	% total arrivals 2011	2012	%	2013	%	2014	%	31 Aug 2015	% total arrivals (2015)
Lesotho	3231147	26%	3159037	24%	3179290	22%	3192012	21%	2276815	22%
Zimbabwe	2400421	19%	2947721	22%	3486327	24%	3599136	23%	2241543	22%
Mozambique	1564316	13%	1732197	13%	1980892	13%	2133012	14%	1385464	14%
Swaziland	1120876	9%	1232634	9%	1413618	10%	1602200	10%	1117444	11%
Botswana	659269	5%	683747	5%	863321	6%	989935	6%	691789	7%
UK	515160	4%	504714	4%	504483	3%	517505	3%	338003	3%
USA	314583	3%	328557	2%	353100	2%	371964	2%	239491	2%
Germany	254294	2%	268247	2%	289744	2%	314233	2%	174913	2%
Zambia	177830	1%	180497	1%	193290	1%	200791	1%	126595	1%
Namibia	177495	1%	223807	2%	258829	2%	272281	2%	184474	2%
Malawi	152217	1%	154918	1%	189329	1%	186868	1%	104482	1%
Netherlands	126573	1%	127535	1%	131221	1%	150575	1%	88596	1%
France	117325	1%	125385	1%	133037	1%	154700	1%	97130	1%
Australia	114564	1%	120152	1%	121664	1%	127129	1%	72653	1%
India	110188	1%	120567	1%	131774	1%	124450	1%	82200	1%
China	97689	1%	119096	1%	139228	1%	112727	1%	69044	1%
Nigeria	65554	1%	61298	0%	82490	1%	64051	0%	36385	0%
Italy	64859	1%	65728	0%	69037	0%	74761	0%	44057	0%
Canada	64222	1%	68104	1%	70512	0%	70881	0%	41291	0%
Portugal	63273	1%	68447	1%	68232	0%	66857	0%	43765	0%
<b>Arrivals (top 20)</b>	<b>11391855</b>	<b>92%</b>	<b>12292388</b>	<b>92%</b>	<b>13659418</b>	<b>93%</b>	<b>14326068</b>	<b>93%</b>	<b>9456134</b>	<b>93%</b>
<b>Total arrivals</b>	<b>12370534</b>	<b>100%</b>	<b>13314243</b>	<b>100%</b>	<b>14758649</b>	<b>100%</b>	<b>15427689</b>	<b>100%</b>	<b>10129763</b>	<b>100%</b>

Over the years, there have been significant shifts in the sectors where migrants are employed from primary sectors such as mining and farming. Notions that we are being overwhelmed by immigrants are wrong. An analysis of data from the 2012 Quarterly Labour Force Survey shows that South Africans make up over 90% of those employed in every sector, including in self-employment. Migrants tend to be concentrated in self-employment (30%), followed by services and construction (both 12%) and domestic work (11%).

**Table 2: Employment of migrants by sector**

Sector	Distribution of migrants (%)	Migrants as % of total	South Africans as % of total
Trade	30	8	92
Services	12	3	97
Construction	12	9	91
Private households	11	8	92
Manufacturing	10	5	95
Financial	10	5	95
Agriculture	6	7	93
Transport	4	4	96
Mining	3	8	92

Source: *Budlender (2014)*

### Visa and permitting regime

Between 2010 and 2013, over 91,000 applications for work-related temporary residence visas were received. General work visa applications accounted for over 55% of work related temporary residence visas whilst intra company transfers (section 19 (5) work visas) accounted for 18%. Corporate work visa applications were the lowest at 3.6%. There were more intra company transfers as compared to quota work permits and corporate permits.

In terms of country of origin, China accounted for the highest number of applications followed by Zimbabwe, India, Pakistan and Nigeria. These top 5 countries constituted over 65% of applications between 2010 and 2013. The top 15 countries account for 81% of all applications. This would seem to suggest that SA is attracting international migrants from a relatively small group of countries out of over 200 countries that constitute the global community.

The statistics on of all other visas that were issued by the DHA between June 2014 and January 2016 provides another view of the foreign national population. A total of 124,453 temporary residence visa applications were received. Importantly, 24% were family related; in other words, relative's visas. Nationals from Bangladesh, Nigeria, and Pakistan were the most likely to apply for such visas. Applications for relative's visas were followed by applications for study visas and visitor's visas which made up 18% and 14% of all applications for temporary residence visas received. Nationals from Zimbabwe (20%), followed by those from Nigeria (15%), DRC (9%) and Angola (6%) accounted for half of the study visa applications.

### **Permanent residence Permits**

Some categories of international migrants apply for the largest proportion of permanent residence permits. For instance, between 2010 and 2013 there were over 6,400 applications for permanent residence under section 26(a) of the Immigration Act. These applications are in respect of foreign nationals who have been holders of general or corporate work permits for more than five years. The highest number of applications for permanent residence was from Zimbabwean nationals followed by foreign nationals from China, India, Nigeria and Pakistan. The top five countries accounted for 68% of all applications whilst the top 15 accounted for 84%. This suggests that permanent residency and citizenship are, to a large extent, granted to international migrants with relatively low levels of skills and little capital.

Data for the 2014/2015 and 2015/16 financial years (to mid-January 2016) shows that permanent residence applications on the basis of being a spouse totalled 9,975 of all applications received (30,098 applications) and represented 33% of all permanent residence applications. Applications on the basis of being a dependant and a relative accounted for 26%. These figures would seem to indicate that relationships form the basis of the majority of applications (59%) for permanent residence in the Republic. For more details, please refer to **Table 3** below:

**Table 3: Applications for Permanent Residence Permits**

Permanent Residence Category	Total applications	%
26(b)Spouse	9975	33%
26(a)Worker	5799	19%
26(c)Dependent(<21)	5271	18%
27(g)Relative	2298	8%
27(b)Extra Ordinary Skills	2175	7%
27(d)Refugee	1115	4%
27(e)Retired	953	3%
27(C)Business	875	3%
26(d)Dependent(>21)	621	2%
27(a)Worker	520	2%
27(f)Financially Independent	249	1%
26(c)Dependent(<18)	156	1%
26(d)Dependent(>18)	91	0%
<b>Grand Total</b>	<b>30098</b>	<b>100%</b>

*Source: VFS System (16 June 2014 – 14 Jan 2016)*

During the 2014/15 financial year, 1,955 applications for Permanent Residence based on marriage grounds were referred to Central Law Enforcement (Inspectorate). A total of 1,838 investigations into such applications were finalised. Based on the outcome of the finalised investigations, 74% of these applications (1,362) were recommended for rejection on the basis that the marriages were found to be fraudulent, whereas 26% (476 applications) were recommended for approval. These figures highlight the need to strengthen the Inspectorate capacity and ensure that sufficient checks are conducted prior to the granting of visas and permits based on relationships, as there is a trend of misusing this visa and permit category.

### **Refugee regime**

SA continues to receive a high volume of asylum seekers, over 90% of whom do not qualify for refugee status. When the Refugees Act was enacted in 1998, the numbers of asylum applicants were very low; with about 11000 people applying for asylum in 1998. This number has ballooned over the years due to various ‘pull’ and ‘push’ factors. In 2013, a total of 70 010 new applications for asylum were recorded, whereas this number increased

marginally in 2014, when a total of 71 914 new applicants were registered. There are about 15 African countries that account for 71% of applications that were received in 2015. **Table 4** below provides more details.

**Table 4: Top 15 African countries of origin asylum seekers**

Country	numbers
Zimbabwe	20,405
Ethiopia	10,176
DRC	8,029
Nigeria	7,431
Bangladesh	5,110
Somalia	2,595
Pakistan	2,460
Malawi	2,310
Ghana	2,271
India	1,781
Congo Republic	1,485
Lesotho	1,437
Mozambique	1,220
Uganda	753
Burundi	678

*NIIS 31 January 2016*

In May 2015 the Department undertook an analysis of the National Immigration Information System (NIIS) which records data on asylum seekers and refugees. The analysis showed that 1 061 812 Section 22 permits (asylum seeker temporary permits) had been issued to asylum seekers. Most of these permits were not active (983,473) with only 78,339 still active. The analysis also showed that 119,600 Section 24 permits (formal recognition of refugee status permits) had been issued to refugees. Most of the refugee permits were active; that is, 96,971 were still active while 22,629 permits had expired. The expiration of these permits could be explained by the fact that refugees might have moved onto an immigration permit (permanent residence, for instance) and have allowed their refugee permits to lapse. It could also indicate that the asylum process might be a stepping stone to obtaining other immigration visas or to use SA as a transit country.

**Irregular migration and deportation**

SA is also confronted with the challenge of a high level of irregular migration, included meeting the high cost of deportations. The majority of irregular migrants come from neighbouring countries. For instance, of the total number of migrants that were deported in the 2014/15 financial year, nationals from Mozambique, Zimbabwe and Lesotho made up 82% of those deportations, whilst in the current financial year (to date), they account for 83% of all deportations.

The above statistics confirm the need to find a solution for the documentation of migrants from SADC with lower-level skills since they account for a large proportion of the yearly deportations conducted by the Department. This puts a large strain on the budget of the DHA. Whilst conclusive data is not available on whether these deportations amount to 'revolving door' movements (i.e. the same person being deported several times in a year) there are strong indications that this is the case.

**Conclusion**

One of the capacity gaps discussed in Chapter 5 is the lack of the systematic research and the collection of statistics related to international migration and migration in general. This limits knowledge and analysis that could inform policy and strategy and help identify risks and opportunities. Socio-economic and geographic data on immigrant communities and data on countries of origin is one priority area in this regard. Another is analysis of trends in migration in terms of local, regional and global labour demand and supply.



## CHAPTER 4: POLICY AND STRATEGIC OPTIONS

### Introduction

There are specific areas of international migration that represent serious challenges at the levels of policy, strategy and implementation. In the sections that follow, the policies and strategies that are suggested and the formulation of options are guided by the principles set out in Chapter 1 under “Vision for a new international migration policy in SA”.

In each policy area a situational analysis is undertaken. This in turn informs the policy and strategic options that are put forward. In developing these options a clause-by clause analysis of the Immigration and Refugees Acts was undertaken to determine the adequacy of the legislation in addressing the challenges. Furthermore, the experiences of officials in administering the Acts were also taken into account, as well as engagements with other departments and with a range of thought-leaders and stakeholders.

### Management of admissions and departures

#### Situational analysis

This section seeks to address policy gaps that compromise the secure and efficient facilitation of the movement of persons, goods and conveyances. The management of arrivals and departures goes beyond South African borders; that is, the journey of a traveller does not start or end at a POE. It starts when a person applies for a travel document, then makes a travel reservation and boards a conveyance *en route* to his or her final destination. Each of these choices, including the travel route, provides information about the traveller, which enables receiving states to form a picture of the identity and intention of the traveller.

Being faced with an ever-increasing number of travellers, the balance between efficient and effective traveller facilitation and security considerations becomes critical. . In the 2014-2015 financial year, DHA recorded 39, 5 million movements (citizens and foreign nationals) across the country's borders. SA has a large number of service points internationally and domestically for facilitating secure and efficient movement of persons, goods and conveyances. Internationally, SA has a presence in 124 missions though only 30 missions are currently serviced directly by the DHA<sup>7</sup>. There are 71 places designated as POE in SA.

<sup>7</sup> At other missions DIRCO consular officials carry out Home Affairs functions on behalf of the DHA

The DHA plays a leading role in the management of the border environment because of its mandate to regulate and facilitate the movement of persons through POEs and the issuing of passports and visas to citizens and foreign nationals. Other important role players are the SANDF, which has the primary responsibility for securing the borderline; SARS which regulates the movement of goods and money; the SAPS which combats crime; and the departments of Transport, Health and Agriculture, Forestry and Fisheries which regulate entry and exit according to their respective mandates.

Within the framework of the Constitution and legislation the state has to safeguard territorial integrity and ensure that there is security and public safety for the people of SA. The human rights provisions in the Constitution and legislation must also be observed at all times. South African citizens have a right to travel and return; and only the DHA has the authority to approve or deny entry or exit to foreign nationals. Internationally, border security is a shared responsibility and SA has entered into a wide range of international, regional and bilateral agreements that it is constitutionally bound to honour.

SA has well-developed infrastructure, communication systems and international transport hubs which enables international travel. The broad policy objectives are to ensure security and public safety while efficiently and strategically facilitating the movement of legitimate persons, conveyances and goods in support of national goals. The key issues discussed below have much to do with the capacity of the state and specific policies aimed at delivering against this mandate in the context of a globalised world, African development and a post-colonial region characterised by highly uneven development.

### **Proposed and/or on-going interventions**

#### ***Adoption of a Risk-Based approach***

At the heart of efficient and secure traveller facilitation is traveller identification management where travel documents accepted for border integrity purposes underpin the ideals of safety and security. The importance of secure travel documents to international security cannot be overstated. Travel documents are, however, only as secure as the identification-related systems behind their production, issuance, control and inspection. Technology and process innovations (biometric verification) are required to achieve effective and efficient security and facilitation measures; and as enablers of future security screening regimes.

In order to facilitate movement whilst ensuring that security considerations are satisfied, the DHA must follow a layered approach in order to manage risk. The key methodology and international best practice for managing immigration risks, is to build a complete history of the visits of all those who visit SA. This should be linked to effective screening of visitors to the RSA before they leave their country of origin or enter South Africa.

Currently, the people and systems needed to apply this methodology are only partly in place with gaps in capacity and systems that create risks. Apart from the quantum and quality of staff and management, there is a lack of integrated systems and a security envelope protecting people, facilities and systems from active threats such as criminal syndicates.

The importance of adequately applying a risk methodology is to ensure that persons travelling to the country can be identified and connected to an official record before arriving in the country. This enables the testing of the credibility of travel documentation, personal identity; and allows for the running background checks on any the possible listings against national or international stop-lists.

The risk-based approach ensures that undesirable persons are prevented from travelling to SA at source countries; i.e. a process known as *externalising the borders*. This is accomplished ideally through screening for visa issuance at a mission abroad, followed by Airline Liaison Officers (ALOs) document inspection at the foreign airport. Advance Passenger Processing (APP) clearance and airline document inspection is already carried out; but the budget of the DHA does not allow the maintenance of airline liaison offices at high-risk airports abroad.<sup>8</sup>

The Department should be empowered to access the magnitude of data available in the travel industry for use in risk and threat assessment and should continue to hold conveyors accountable for performing document checks prior to conveying passengers to a POE in accordance with the international regulatory frameworks.

The risk-based approach does not imply that deterring irregular movement and facilitating the movement of legitimate travellers in order to promote trade and tourism are mutually exclusive. In fact, once their risk and threat profiles have been confirmed to be low, *bona fide* tourists, academics and business people can be granted **a long-term multiple entry visa**. This could include *self-service immigration clearance* through automated gates whilst border control personnel focus their attention on those with higher risk profiles. Security and efficiency can be complementary if the approach is right and resources are adequate.

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<sup>8</sup> During the 2010 Soccer World Cup the DHA made effective use of temporary airline liaison officers.

***Establishment of a Border Management Authority***

In response to the situation described above, the Government of SA has acknowledged that the circumstances of modern travel and trade require a single agency to be responsible for POE and the borderline of the Republic and to balance facilitation of legitimate trade and travel with security. Hence, in 2009, during the State of the Nation Address, President Zuma announced that SA would start the process of setting up a Border Management Authority (BMA). In 2013 Cabinet confirmed the establishment of the BMA in SA and, in 2014, Cabinet decided that DHA should be the lead agency for the BMA. Cabinet also resolved that the scope of the BMA will be POE as well as the borderline.

The rationale for BMA establishment is to create an operational balance between security, trade facilitation, tourism promotion and socio-economic development both within SA and the SADC region. It will provide for an integrated border control under the BMA with officials having a strong common identity while rigorously carrying out the mandates of their respective area, such as health or customs. The authority will be equipped with the necessary skills and knowledge in law enforcement, and the core functions of the relevant departments, to ensure the efficient and humane delivery of secure services. The intention is to establish the authority formally by March 2017.

***Rationalisation and designation of POE***

It is important to note that the mandate of the Minister of Home Affairs in the Immigration Act, 2002 relates to the designation of a place as a POE for persons to enter and depart from the country whilst other State entities have similar mandates relating to their spheres of control. For instance, the Commissioner of SARS is mandated by the Customs and Excise accepted change Act, 1964 (Act No. 91 of 1964) to appoint or prescribe places to be places of entry for the RSA for commercial purposes (importing and exporting of goods). The International Health Regulations Act, 1974 (act No. 28 of 1974) provides for the designation of any part in the RSA as an approved port. Therefore, any request for the designation of a POE is dealt with ultimately as a collective decision by the Cabinet. However, there is a need for the alignment of processes for the declaration of POE. There is also a need for a provision that would enable the Minister to determine and specify areas within a POE where a person shall present himself or herself for examination by an immigration officer. This is

needed especially at some of the maritime ports where there are various terminals and at some land POE where passenger segmentation is applied, e.g. pedestrians, truck drivers, etc.

Various Ministers of Home Affairs have indicated that the current number of POE should be reviewed in order to improve the management of the remaining ports as well as the associated risk. The high number (71) is mainly a legacy of the police under apartheid setting up posts to stop infiltration of cadres by the liberation movement. To date, such a rationalisation process has only taken place in the airports environment when during the early 1990s the number of international airports was reduced from 38 to 10. More recently, a study was conducted to establish a scientific method to support decisions regarding the opening / closing of a POE, using Multi-Criteria Decision Analysis (MCDA) methodology.

While the Immigration Act (2002) mandates the Minister of Home Affairs to designate POE, it is silent on the criteria or condition that must be met before a POE could be officially opened by the Minister. One of the preconditions could be that, at maritime and rail POE, the legislation should compel the landlord of the port to provide facilities and infrastructure for the immigration officials to exercise their mandate, based on set standards, similar to what is in place in the aviation environment.

In order to be able to rationalise the number of POE in a justifiable manner and deal with new requests for the creation of POE and community border crossings, criteria should be defined as to when a place may be designated as a POE; or an existing POE be closed or reduced in size or prominence (e.g. from commercial to non-commercial). Criteria could include economic factors, trade, the needs of the community, traffic volumes and levels of cross-border crime and or corruption. Creative options must be considered, but in the end difficult decisions will have to be made on economic and security grounds after due consultation domestically and with the applicable neighbouring country.

### ***Maritime POE***

Policy areas that require attention in the sphere of the maritime POE are Off-Port Limits (OPL) and stowaways. Ships unable or unwilling to enter harbours in RSA moor the vessels offshore within 12 nautical miles. These operations include boarding from either a small boat (called a launch) or helicopter to perform crew changes or load supplies on a ship that is transiting and not berthing in the harbour. These operations are not regulated by legislation

and are being exploited by conveyors to save money at the expense of security and what is referred to as the untapped “economy of the sea”.

A clear definition of stowaways is needed in line with the international regulatory framework as well as appropriate punitive measures for those who stow away or attempt to do so at our harbours on ships destined for foreign shores. However, this phenomenon is not only limited to the maritime environment, it is prevalent in the land border environment as well. Exploitation of the practice also occurs in that the shipping agent pays the fare for a flight to the country of origin as well as compensation fee in order to buy clothes, etc. This can lead to persistent offenders who should be dealt with.

### ***Land POE***

#### ***Establishment of One-Stop Border Posts***

The main objective of one-stop border posts is to enhance trade facilitation, without compromising national security or revenue collection. The implementation of the one-stop concept requires that the border agencies of each state involved are able to apply their national laws in the territory of the adjoining state. As national laws cannot automatically be applied in other territories, specific provisions should be developed to give such agencies extra-territorial jurisdiction.

A study has been commissioned on the establishment of a One-Stop Border Post (OSBP) in SA. The concept of an OSBP is being piloted at the Lebombo / Ressano Garcia POE between SA and Mozambique. Operationalisation of an OSBP entails the joint inspection of South African and foreign border control authorities of travellers, goods and conveyances in order to eliminate duplication of effort by the customer concerned. The concept implies that either or both of the countries’ authorities must operate in the territory of the other. The principle of extra-territorial jurisdiction (i.e. exercising of the law outside the borders of the State) is already encapsulated in the BMA Bill. Future international migration policy should reinforce and strengthen this concept, which may be applied not only between SA and its neighbouring states, but also in any other country that dispatches uninterrupted flights to SA. Lesotho might be an ideal candidate for this scenario in view of the fact that it is land-locked within SA and all traffic to and from that country must necessarily transit SA.

As a pre-requisite for being functional and sustainable, one-stop border posts must be rooted in sound policy and underpinned by an enabling legal framework, solid international agreements, compatible systems and a feasible implementation strategy.

### ***Pre-Clearance of persons***

In order to enforce port of entry security, there is a need to strengthen the regulatory framework to empower the BMA to perform basic document checks of travellers at the perimeter of the POE, similar to the manner in which airlines check documents before a person is allowed into the secure area of an airport. Systems and infrastructure should be adequate for efficient facilitation while ensuring that there is adequate pre-screening of travellers. There must be provision for holding facilities when there is a need for additional checks and for quarantine. The drive for efficiency to achieve economic goals is important but these same goals will be undermined and create serious risks for South Africans if there is weak national security.

### ***Regulation of community border crossings***

According to section 9 (1) of the Immigration Act No. 13. of 2002 “no person shall enter or depart from the Republic at a place other than a port of entry”. However, there are several informal border crossings along the South African border that are not designated by the Minister and are not managed by Immigration officers as required by the Act. Most of these informal border crossings are a colonial legacy that left divided communities along the borderline. They are often associated with markets and other forms of local trade; or with communities on either side of the border making use of the nearest facilities, such as schools. The challenge in the RSA is that informal border crossings are not managed and as a result they are being exploited by syndicates who use them to traffic and smuggle persons and goods. Other countries have adopted controls that allow for the movement of community members who reside along the borderline while managing the risks involved.

The Department has initiated a study on communities along the borderline, in part to understand the nature of movements and challenges experienced by such communities. The concept has been piloted at the border with Botswana during 2015 with the opening of the Tshidilamolomo border crossing, where cross-border movements of members of the local



community are facilitated through pre-registration and biometric verification upon each movement.

### ***The challenge of mass illegal migration***

Enforcement of the Immigration Act requires that persons who have entered or remain in the country illegally either to return voluntarily to their countries or to be deported. In 2014-2015 a total of 54, 169 persons were deported, out of which 44,536 (82%) of deportees were from three neighbouring countries: Mozambique (19, 562), Zimbabwe (13, 962) and Lesotho (11, 012). The socio-economic realities that drive this situation will continue until there is less disparity between the economy of SA and the rest of SADC. In the medium term a key policy objective is to put in place a border management system that responds to the development and security needs of SA and its neighbours. The following strategic interventions are underway.

- a. Establishment of a Border Management Authority;
- b. Promotion of the development of reliable population registers in SADC;
- c. Special dispensations to regularise the stay of nationals from certain neighbouring countries for a specified period and thereafter regulate according to a standard Immigration Act regime;
- d. Introduction of biometrics at ports of entry, linked to a trusted traveler programmes;
- e. Regulation of community border crossings; and
- f. Deepening of bilateral cooperation through bilateral commissions and other mechanisms.

## **Management of residency and naturalisation**

### **Situational analysis**

In many countries the granting of residency or citizenship to foreigners is taken very seriously as either status is valued highly and is understood in relation to national values, rights and responsibilities, development goals and nation building. Factors taken into account when granting the status typically include the ability of the immigrant to function appropriately in their host societies and a sound assessment of actual and potential risks and benefits.

In SA the current approach to the granting of residency or naturalisation is mechanical and compliance-based rather than to achieve strategic goals or to build the nation. It also



undermines the value of the status of being a permanent resident or a citizen. Serious risks are not managed effectively, thus creating opportunities for the widespread abuse of the system and the granting of residence status persons who put the nation at risk.

A general principle that was observed in countries such as UK, Canada and Australia is that the relationship between temporary visas and permanent residence permits and naturalisation depends on the type of temporary visa with which the recipient started. The type of temporary visa determines the trajectory to naturalisation, including the time it takes, and the conditions that can result in the change from one status to the other.

There is a misconception that immigrants have a constitutional right to progress towards residency or citizenship status. A sovereign state has the prerogative to determine who enters its territory and to enact laws accordingly. States also have right to protect themselves from risks, such as the entry and stay of fugitives from justice who are linked to organised crime.

In South Africa controls are weakened because there is currently a linkage between certain Temporary Residence Visas (TRV) and Permanent Residence Permits (PRP) which, provided certain conditions are met, effectively creates automatic qualification for PRPs and subsequently for citizenship. Thus one of the main criteria used to qualify for permanent residence is the period of stay in the country, irrespective of the type of visa. For instance, during the 2014/15 financial year PR applications on the basis of being a spouse accounted for one third of all PR applications received. The high demand for relative's visas for spouses is to a significant extent due the high levels of fraudulent marriages and marriages of convenience.

Refugees are also allowed to apply for permanent residence even though their status is inherently temporary. This is because refugees are expected to return to their country of origin once conditions there allow them to return safely. This should not be regarded as automatic but linked to finding durable solutions in the event of conditions changing, such as developments in the country of origin of the refugee.

Conversely, the current approach does not allow the granting of residency or naturalisation to be used strategically. An example is the offer of a fast-track to permanent residence when recruiting international migrants with critical skills who could make valuable contributions to SA's economic, social or cultural development. Provided that they meet appropriate criteria, such immigrants could be looked at as a valuable resource who could enrich our society and build our nation.

**Proposed and/or on-going interventions*****Delinking of residency from citizenship***

There should be no automatic progression or right to permanent residency or citizenship in law or in practice; and the granting of permanent residency and citizenship should be delinked. For reasons given above, refugees should not be allowed to apply for permanent residence on the grounds of the number of years spent in the country. Refugees may still qualify under the Immigration Act to apply for permanent residence on other grounds, such as meeting skills and investment requirements.

The granting of citizenship should be considered as being exceptional. A list of those who have become citizens through naturalisation would be approved by the Minister and published periodically. Steps should be taken to ensure due weight is given to the value of the status of permanent residence and of citizenship, including the level of approval necessary. The process for awarding citizenship should ensure that rights and responsibilities are explained, understood; and ensure that the conditions attached to them are accepted by those to whom the status is conferred.

It is proposed that induction or orientation programmes should be one compulsory step in the naturalisation process or the awarding of citizenship. It should be followed by a certification ceremony or the ceremony for the awarding of citizenship. The certification ceremony or the ceremony for the awarding of citizenship should be designed to impress upon on the new citizens on their rights, obligations and conditions attached to citizenship, and it should deal with issues of their integration into our society. The taking of the prescribed oath of allegiance and the induction or orientation programmes should be designed to provide new citizens with information about the history of the country in terms of its culture and norms as well as key socio-political and economic aspects.

The process of granting residence and citizenship status should allow strategic and security considerations and the national priorities of SA to be taken into account. It should be noted that the 2002 Immigration Act (section 31 (2)(b)) already provides for the Minister of Home Affairs to “grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision”.

**Management of international migrants with critical skills and capital****Situational analysis**

The NDP predicts that migration will, in future, be driven more by skilled and better resourced people rather than those responding to economic and political instability. Skilled workers are a critical resource for industrialised and knowledge-based economies. For example, a McKinsey Global Institute (MGI) report projects that by 2020 the global economy may have 40 million fewer workers with university degrees than required. A Study undertaken by the Trade and Industrial Policy Strategies (TIPS) in 2015 found that unemployment for graduates, irrespective of field, was low (5.9% on average). Unemployment rates seem to be higher for matriculants (29%) and for those with less than 12 years of schooling (42%)<sup>9</sup>. This shows that the economy is desperately short of skills. To contribute to the economic transformation envisioned by the NDP, SA should have an effective regime for attracting these types of migrants to the country. The programme should be linked to building our skill and knowledge base; as well as enabling South Africa to compete for critical skills that are in high demand internationally.

The current international migration policy is aimed at granting visas to those with critical skills; skills that cannot be obtained in the South African labour market; or substantial amounts of capital. The DHA publishes a list of critical skills from time to time after consultation with the Departments of Labour, Trade and Industry and Higher Education and Training. General work visas are only granted if there is no response to an advert placed in a national newspaper. Other types of work visas are for categories such as intra-company transfers and corporate visas typically used in mining and farming to recruit migrants from SADC countries.

There is criticism of the system outlined above in terms of its enabling SA to compete internationally for skills because of administrative inefficiency and lack of flexibility. A broader criticism is that international experience shows that value is gained by granting visas to migrants with high level artisanal or professional qualifications and experience regardless of field. In a dynamic global economy workers or entrepreneurs with generic skills are valuable because they can respond to changing needs. A similar criticism is that the

<sup>9</sup> 'Graduate unemployment in South Africa: A much exaggerated problem'. Centre for Development and Enterprise. April 2013

requirements for starting a business should be more flexible as highly skilled professionals and artisans can start SMMEs with relatively little capital and create jobs.

### **Proposed and on-going interventions**

Within the limits of the current policy framework the DHA has amended legislation, regulations and processes. An example is setting up a Corporate Accounts unit to fast track the issuing of visas for high priority national projects and sectors. A partnership with a visa facilitation service has improved efficiency and security and a one-stop business centre has been opened with more to follow. The immediate family of a visa-holder is now granted work and study visas without undue delays. Graduating foreign students in certain fields can apply for work visas. All of the above measures are assisting on a small scale, but there is an urgent need to make larger changes in approach, capacity and regulations in order to address the serious skills gaps that are holding back development, training and job creation.

### ***Establishing an inter-departmental capacity***

SA can learn from countries as they have established effective systems and institutions for making strategic decisions based on national interests and for competing in the global skills market. Typically, an inter-departmental commission in countries such as Brazil and Canada facilitates implementation of proactive recruitment approaches and publishes a list of skills that are required based on national and sectoral priorities, strategies and plans. There are elements of such systems in SA but they are limited and fragmented. For instance, a skills planning institutional mechanism is being established by the Department of Higher Education and Training (DHET). One component is a research project called “Labour Market Intelligence Project (LMIP)”. The Sector Education and Training Bodies are also mandated to plan for skills provision in their respective sectors. The Human Resource Development Council of South Africa (HRDCSA) has undertaken studies on the recruitment and retention of international migrants with critical skills. What is lacking in South Africa is an institutional arrangement that ensures that information is analysed and used to make strategic decisions on the recruitment and retention of skills within an agreed and responsive framework. One focus should be on taking concrete steps to apply the principle of being oriented to Africa and the African diaspora, such as building skills development partnerships and programmes.

***Points-based system***

It is proposed that the attraction of migrants with skills, investment and business interests should be linked to a point-based system. A points-based system, sometimes combined with a critical skills list or quotas, is used to respond flexibly to demand in countries such as Canada, Australia and the UK and facilitate the proactive recruitment and retention of migrants with skills. Points can be adjusted from time to time in consideration of factors such as qualifications, work experience, age, amount of money to invest in the country, type of business to invest in, ability and willingness to transfer skills; working in regions/sectors of high skills need; South Africa's labour market and skills development strategies; and BEE requirements. The advantage of a points-based system is that it is transparent and can be used strategically and flexibly in response to changing situations and needs.

***Long-term visa (family oriented)***

Migrants with the needed skills, investment and business interests must be allowed access to a long-term visa that will allow easy access to permanent residence. This must be a special visa that is fast tracked and enables the applicant and the immediate family to apply as one unit. The family members must be able to work and study using the long term visa without the need to apply for other appropriate visas as currently required.

***Strategic use of visa and permitting to retain international students post-graduation***

The NDP states that, "all graduates from foreign countries should be granted 7-year work permits." In line with the NDP, it is proposed that SA use the visa and permitting regime strategically to retain international students in SA post-graduation. In 2013, there were 20 962 international students at postgraduate level, and 35 813 at undergraduate level according to data from the Department of Higher Education and Training (DHET).

Retention of international students after graduation is an important opportunity that many countries are exploiting. Firstly, it largely overcomes one of the critical challenges associated with leveraging skilled foreign nationals, the non-recognition of qualifications. Secondly, that section of the international talent market (international students) is already in your country. It does not make sense to plan on attracting skilled foreigners while losing those

graduating from your universities. Finally, countries expend some of our limited resources on educating international students at its institutions of higher learning even if they pay higher fees than citizens. If the international student leaves upon graduating, the return on that investment is lost to the host country.

A number of countries grant residence visas and permits to international students (including to South African students) after graduation as an incentive for attracting students to stay in the country. SA however, has not adopted a similar approach to attract students to stay in the country post their graduation. In implementing this strategy effectively, a number of factors must be considered. Students may not necessarily want to live in SA permanently, but may want to gain work experience before returning to their home countries. It is also important to note that while many may look for salaried work, some are aspiring entrepreneurs who will look to start businesses in SA because of its attractive business environment and market.

It can be argued that this policy would not necessarily contribute to a brain drain from less developed countries. Workers move for complex reasons based on their assessment of conditions at home and abroad. Migration of skilled workers is therefore fluid. A person may choose to live abroad for a variety of reasons and may transit from SA to a third country. Students who are sponsored by their governments and enter under bilateral agreements are a category that can be dealt with under those agreements.

In planning to attract and retain international students, it is important to think about what they want. In addition to the overall value proposition of the country, graduating international students are typically concerned about two main things. These are sufficient time to look for work post-graduation and long-term stability. We should note that things citizens take for granted such as buying a vehicle, a home or obtaining business funding are extremely difficult if not impossible, if one is not a holder of a predictable long-term visa or a permanent residence permit. The following options are therefore put forward for consideration:

**Option 1: Granting of permanent residence to qualifying international students upon graduation from university.** This option is based on its attractiveness to international students interested in staying, and the assumption that SA has an interest in ensuring all skilled workers and potential entrepreneurs produced by its universities.

**Option 2: Granting of Post-graduate visas to qualifying international students upon graduation from university.** This visa should allow qualifying international students to remain in-country for one to two years post-graduation to look for work.

As to which international students should qualify, the following questions arise:

- a) Should the visa regime distinguish between undergraduates and postgraduates?
- b) Should all graduates be eligible or only graduates in disciplines linked to the critical skills list?

The following factors should be taken into consideration when deciding upon the qualifying measures:

- Firstly, while accepting that specific skills may be of particular importance in the economy at various times, research shows that industrialised and knowledge-based economies benefit from having a high proportion of university graduates in the population. As our economy desperately needs skilled workers, it would be generally beneficial to try to retain all graduates produced by our universities;
- Secondly, a graduate's first or second degree does not strictly determine the field in which they will eventually make the biggest contribution. Skilled workers frequently have non-linear careers as they discover different interests and opportunities. Industry does not only employ STEM and commerce graduates. Social Science graduates frequently find employment and add value in the private sector, in part due to the critical thinking, analytical and communication skills they hone as part of their training; and
- Finally, it is difficult to predict the skills that will be necessary in the future. Therefore it is prudent to avoid assuming that critical skills lists compiled by immigration, labour and economic management authorities can be so accurate and comprehensive as to be rigidly adhered to. This is not to say that these lists are without value: they are certainly a helpful guide for identifying skills which are scarce *right now*, and informing which skilled workers abroad should be prioritised. They should not be used to effectively predict which international students graduating from South African universities will benefit our economy *in the future*.

### *Training and transfer of skills*

If the purpose of recruiting migrants with critical skills from abroad is to close skills gaps in the domestic labour market, a mechanism is required for the transfer of skills. One of the requirements should be, where appropriate, to ensure the transfer of skills to citizens. Examples of strategies employed in other countries include such measures as requiring the employment of understudies and the funding of the training of citizens directly or via a levy. Therefore, the recruitment of skilled migrants must be linked to a mechanism that ensures the direct or indirect transfer of skills to citizens. Where skills are not easily transferable, a training scheme must be established where employers of foreign nationals are required to contribute funds that will be used to train South Africans in the required skills. This has been successful in other developing countries.

### **Management of ties with South African expatriates**

#### **Situational analysis**

Migration policy is often equated with immigration policy, but every immigrant is also an emigrant with ties to a sending state. Many sending states are active in managing these ties, with some deriving a significant portion of their revenue from remittances.

Like many other developing countries, SA loses a significant proportion of its skilled workforce every year. However, little attention has been paid to maintaining links to South Africans who have settled in other countries. The current international migration policy framework does not include citizens who have migrated to other countries in terms of their contribution to the development of SA. Apart from economic incentives, many emigrants maintain links with SA and there are various ways in which they can contribute to national development.

Using receiving country censuses and other data, one study estimated that more than 520 000 South Africans had emigrated between 1989 and 2003, with the numbers growing by about 9 per cent a year. About 120 000 of those emigrants had professional qualifications. This represents about 7 per cent of the total stock of professionals employed in SA and is more than eight times the number of professionals immigrating to SA in the same period.

Another factor to note is that many persons classified as white under apartheid emigrated,



mostly in the 1990s, due to push factors that include fear of change and opportunities open to professionals. In recent years, however, white emigrants appear to be outnumbered by growing numbers of Black professionals who have joined the global skills market. The positive side of emigration and citizens working abroad for extended periods is that such relationships can be critical in growing our knowledge base and creating business opportunities in a highly competitive knowledge-based, global economy.

The implementation of any diaspora policy must clearly take into account the diverse nature and geographical spread of South African expatriate communities. Given the African orientation of the policy framework, a strategy should be developed for engaging with citizens who reside in other African countries. Such strategies should be flexible and may involve working with existing structures that migrants may have created. There also needs to be strategies aimed at maximising the possible benefits to South African's leaving to work or study abroad, such as gaining knowledge and experience and developing business and cultural relationships. Much will depend on South Africans having a positive attitude towards interacting with and learning from their host countries,

Other countries have long realised the benefits of maintaining ties with their diaspora populations and have created dedicated institutions to manage these ties. Despite this trend, SA has not established a consensus on how to harness the diaspora to contribute to achieving development goals.

Institutions created in other countries include full Ministries, shared Ministries, Departments, interdepartmental committees, special directorates and advisory councils. These institutions perform at least four functions:

- Promotion of emigration to meet varied national goals such as labour and investment exportation and student exchange programmes;
- Tapping into the resources of the diaspora – remittances, investment, tourism and the sharing of skills and knowledge;
- Embracing of diaspora communities through multinational citizenship, consular services, country ambassadors and re-integration programmes; and
- Reintegration of returnees.

Despite the fact that SA has not established a diaspora institution that performs the above functions, there have been programmes that can be evaluated as part of developing emigration policy and programmes. Some of these are highlighted below.

**Brand South Africa (Brand SA)**

Brand SA established the Global South Africans (GSA) programme which enlists the talent, experience and credibility of South Africans living abroad. GSA aims to promote SA by enlisting the help of South African living or travelling abroad because they are often the first point of contact and reference for people overseas and this can affect international visitor's decisions. Brand SA also keeps records of individual success stories of South Africans living abroad. These individuals are *de facto* flying the SA flag and can serve as an inspiration for other South Africans. Brand SA also host events in various countries and engages with Global South Africans in those countries, thus providing them a platform to network and exchange their shared experiences of South Africa as their country of origin.

**Department of International Relations and Cooperation (DIRCO)**

The DIRCO has established a unit that facilitates the implementation of the AU diaspora programme. The AU aims to mobilise the African Diaspora, which it defines as “people of African descent and heritage living outside the continent, irrespective of their citizenship and who remain committed to contribute to the development of the continent and the building of the AU”. The DIRCO facilitates dialogues with the African Diaspora in SA. In 2012 DIRCO hosted a Summit on the Global African Diaspora.

DIRCO also keeps the records of citizens that are travelling abroad. South African travelling abroad for any period of time are encouraged to register with DIRCO on the Registration of South Africans Abroad (ROSA) system in order for the government to be aware of the number of South Africans living abroad. This system is underutilised due to the fact that registration on it is discretionary.

**South African Network of Skills Abroad (SANSA)**

In 1998, SANSA was created by the University of Cape Town in collaboration with the Institute of Research and Development, and within two years of existence, SANSA had already built a membership of 2000. SANSA was established to mobilise highly skilled South Africans including academics, researchers and practitioners working in the science and technology field, who live and work outside of the country. In 2001, it was estimated that over 20 000 South African university alumni lived abroad. Unfortunately, SANSA has been discontinued due to a lack of a policy framework to guide its work.

**Proposed and/or on-going interventions**

Research shows that many people who belong to diasporas often maintain close cultural, ideological, social and economic ties with the country of origin. It is for this reason that the Green Paper proposes the establishment of a diaspora institution with the following functions:

- Consolidation of existing initiatives under a single but multifaceted emigration strategy;
- Establishment of a formal and permanent mechanism to coordinate relevant government agencies public policies relating to the needs of SA expatriates;
- Registration of SA expatriates and provision of consular services;
- Establishment of diaspora forums in countries where there is a high number of SA expatriates;
- Establishment of diaspora ambassadorial and knowledge networks;
- Providing ways in which emigrants can transfer skills back in SA, such as visiting lectureships and public and private sector partnerships;
- Incentive scheme that will motivate SA expatriates to invest in the country. Such a scheme could also include modalities that support citizens who wish to emigrate or to return with their families;
- Reintegration programme for those who want to return home: for example, assistance with administrative processes and induction programmes;
- Support mechanisms for those who want to emigrate for study and work purposes.

Further research in this area needs to be undertaken and to inform proposals for the creation of a South African diaspora institution. Initial thinking is that it could be an Inter-Agency (state and non-state entities) Committee supported by a specialised Directorate within DIRCO or the DHA.

**Management of international migration in the African context****Introduction**

In the course of the 21<sup>st</sup> century, globalisation and increased interdependence between the fields of trade, migration and investment has more than ever challenged the capacity of states to autonomously manage such flows, thus giving rise to regionalism and multilateral solutions. Although international migration flows are becoming increasingly intercontinental, most international migrants move within major regions. In particular, migration seems to be influenced by regional processes<sup>10</sup>. For instance, Africa has at least eight regional bodies which are the building blocks of the African Economic Community (AEC) established in the 1991 Abuja Treaty which provides the overarching framework for continental economic integration. They include the Arab Maghreb Union (AMU); the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA); the Economic Community of Central African States (ECCAS); and the Community of Sahel-Saharan States (CENSAD<sup>11</sup>).

These regional approaches are usually based on the conclusion of free trade instruments between countries in a specific region with a view to enabling economic development. Such instruments may range from extensive free movement regimes applicable to all categories of persons to more limited provisions focusing on the movement of qualified individuals<sup>12</sup>. Africa as a continent is also experiencing an increase in intraregional migration and research has shown that, to a larger extent, these movements occur essentially within the Continent. However, these migratory flows are occurring in an African context still marked by the inadequacy of institutional capacities of some African countries to address migration challenges individually and collectively<sup>13</sup>. A policy position on the management of international migration needs to take these migration flows and institutional capacity factors into consideration.

<sup>10</sup> Regionalism as a Venue for Migration Governance ([www.nccr-trade.org](http://www.nccr-trade.org))

<sup>11</sup> The Regional Economic Communities of the African Union ([www.un.org/en/africa](http://www.un.org/en/africa))

<sup>12</sup> Regionalism as a Venue for Migration Governance ([www.nccr-trade.org](http://www.nccr-trade.org))

<sup>13</sup> African Common Position on migration and development 2006.

This section of the paper explores various policy instruments that have been developed by the African Union (AU) and SADC in order to facilitate the free movement of persons, goods and capital amongst the Member States. Free movement of persons encompasses three types of movements: visa-free entry for short visits and/or granting of visa on arrival; the right of residence (temporary and permanent), and the right of establishment (income generating activities such as work and starting a business). Regional policy instruments are generally used to guide Member States to develop their national policies on international migration. SA is in the process of developing a new White Paper on International Migration which is Africa oriented as opposed to the current one that is based on historical ties with Europe<sup>14</sup>. The main objective of this section is to develop a South African policy position for managing international migration in line with the African development agenda.

### **Continental migration policy framework**

The founding policy framework for the management of international migration in line with the African development agenda is the Abuja Treaty of 1991. In 1980, the Organisation of African Unity (OAU) (predecessor of the AU) Extraordinary Summit adopted the Lagos Plan of Action as a major step towards the goal of integration. The commitments in this Plan and the Final Act of Lagos were translated into concrete form in Abuja, Nigeria in June 1991 when the OAU Heads of State and Government signed the Treaty establishing the African Economic Community (AEC) during the 27<sup>th</sup> Ordinary Session of the Assembly. The aim of the AEC is to promote economic, social and cultural development as well as African economic integration in order to increase self-sufficiency and endogenous development and to create a framework for development, mobilisation of human resources and material<sup>15</sup>.

Freer movement of people across the continent is cited as a key long-term objective of the AU. Since the early 2000s, the relationship between migration and development has become increasingly important to the AU. In this respect, in 2006 the AU adopted the African Common Position on Migration and Development. The Common Position paper covers a

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14 As of April 2016, SA granted visa exemption to 14 African countries (holders of ordinary passports) - Benin, Cape Verde, Gabon, Lesotho, Malawi, Mauritius, Mozambique, Seychelles, Swaziland, Botswana, Namibia, Tanzania, Zambia and Zimbabwe. This is in sharp contrast to the number of the European countries that qualify for a similar exemption (29 countries) – **Source:** 2016 DHA list of visa exempted countries.

<sup>15</sup> [www.dirco.gov.za](http://www.dirco.gov.za)

number of areas including migration and development, human resources and the brain drain, remittances, trade, migration and peace, security and stability, migration and human rights.

The AU has taken the commitments of the Abuja Treaty a step further. At the 24th Ordinary Assembly held in Addis Ababa, Ethiopia, from 30-31 January 2015, the Heads of State and Governments of the AU adopted Agenda 2063 as both a Vision and an Action Plan for an integrated, prosperous and peaceful Africa. Agenda 2063 is a call for action to all segments of African society to work together to build a prosperous and united Africa based on shared values and a common destiny. The 25<sup>th</sup> Ordinary Session of the AU Assembly held on 14-15 June 2015 in SA made several declarations that require member states to develop programmes of action for implementation. At least two (2) declarations set clear parameters for the international migration policy in SA. That is, the establishment of the Continental Free Trade Area (CFTA), and the implementation of continent-wide visa free regimes including issuance of visas on arrival at ports of entry for African citizens.

### **SADC regional migration policy framework**

The goal of achieving the free movement of people, goods and capital in the region has long been a priority for SADC, and is seen as integral to promoting development, poverty alleviation, and prospects of greater integration. To this end, a number of protocols have been adopted by the SADC Member States. These are protocols that address the free movement of SADC nationals.

#### *Protocol on the Facilitation of Movement of Persons of 2005*

The overall objective of the Protocol is to facilitate the movement of persons. More specifically, it aims to facilitate the entry of citizens from SADC into other Member States without the need for a visa, for a maximum period of ninety (90) days. The Protocol makes reference to the provisions pertaining to residence and establishment. The ultimate objective of the Protocol is to develop national policies aimed at the progressive elimination of obstacles to the movement of persons of the region generally into and within the territories of State Parties. The Protocol will enter into force after it has been ratified by two-thirds of the

Member States. To date (2016) 9 Member States have signed while only 4 Member States (including SA) have ratified the Protocol.

The major gap that has to be addressed is not the ratification of a high-level policy framework; but a systematic programme to put in place critical enabling conditions. These include the development of compatible immigration policies, laws and systems and accurate population registers. The assumption is that SADC as a region will have limited capacity to manage the flows of migrants without these systems, particularly to SA.

#### *SADC Protocol on Education and Training of 1997*

The SADC Protocol on the Facilitation of Movement of People is not the only SADC Protocol that relates to the movement of people within SADC Member States. The 1997 SADC Protocol on Education and Training recognises that the human resources development is essential in promoting overall development and tackling the socio-economic problems facing the sub-region. The objectives of the Protocol include the relaxation and eventual elimination of immigration formalities in order to facilitate freer movement of students and staff within the region for the specific purposes of study, teaching, research and any other pursuits relating to education and training.

#### *SADC Protocol on Tourism of 1998*

The 1998 SADC Protocol on Tourism is based on the premise that SADC has rich tourism potential which can be developed for the benefit of Member States and their citizens by contributing to economic and social development. Its objectives include promoting the sub-region as “a single but multifaceted tourism destination” which can be assisted by facilitating intra-SADC travel through the easing or removal of travel and visa restrictions and harmonising immigration procedures. The Protocol calls for the complete abolition of visa requirements for SADC nationals, as well as the introduction of a tourism uni-visa for visitors from countries outside the region. Discussions are underway on the proposed uni-visa. However, security and income sharing considerations by Member States seem to have derailed the progress.

*SADC Protocol on Free Trade of 1996*

The 1996 SADC Protocol on Trade, while only partially related to the movement of people, has direct implications for migration. The Protocol on Trade argues that the development of trade and industry is essential to economic integration in SADC and that trade in goods and services and cross-border investment are major areas of cooperation. The objective of the Protocol is to create a Free Trade Area in SADC, and to promote trade between Member States. This Protocol has implication for business persons especially cross-border traders who frequently travel for business purposes. While the Protocol does not directly refer to small-scale cross-border trade, it will have a direct impact on activities of this kind as well.

**SA current policy position on the free movement of African citizens**

SADC arguably lags behind other RECs such as the ECOWAS and EAC in implementing the regional migration policy frameworks for the facilitation of freer movement of persons within the region. For instance, ECOWAS adopted the Protocol on Free Movement of Persons, Residence and Establishment in 1979. The Protocol grants ECOWAS citizens the right to enter, reside and establish themselves in member states, through a phased approach. The EAC has made significant progress on visa-free movement of EAC citizens, but has not implemented free residence and establishment. The EAC has begun harmonising and lowering requirements and fees for EAC applicants for temporary and permanent residence.

It should be noted that the gap in development between SA and other SADC states is much larger than differences between states in other regions. Most of the SADC Member States have not amended their policies in line with the above mentioned policy instruments. Consequently, SADC remains a slow work in progress towards the ideals of the Abuja Treaty. While SA continues to advocate for the implementation of these regional policy instruments in various SADC platforms, it has adopted both unilateral and bilateral approaches in removing visa conditions for SADC and other nationals outside of SADC. For instance, SA has implemented visa waivers which are in line with the spirit of the Abuja Treaty with nationals of 11 of the 14 SADC countries. SA also implemented the Zimbabwe Special Permit (ZSP) and Lesotho Special Permit (LSP) to regularise the large numbers of Zimbabwean and Basotho national residing in SA irregularly.



To ease movement into SA for Africans from farther afield, SA has begun offering 10 year multiple-entry visas to Africans from countries requiring visas to visit SA, who are frequent travellers, business people and academics.

### **SA envisaged policy position on the free movement of African citizens**

#### ***Elimination of visa requirements for African Citizens***

The AU Agenda 2063 has highlighted the importance of free movement by Africans in Africa for meaningful integration, and increased trade. One of the seven (7) overarching aspirations outlined in Agenda 2063 is “an integrated continent, politically united, based on the ideals of Pan-Africanism and the vision of Africa’s Renaissance”. The clauses that unpack this aspiration (23 and 24) mention free movement twice, locating it at the heart of political and economic regional integration. The AU Agenda 2063 goes on to call for action to introduce an African Passport, issued by Member States, capitalising on the global migration towards e-passports, and with the abolishment of visa requirements for all African citizens in all African countries by 2018. SA fully supports the vision of an Africa where its citizens can move more freely across national borders, where intra-Africa trade is encouraged and there is greater integration and development of the African continent. The current status is untenable. For instance, on average Africans need visas to travel to 55% of other African countries. They can get visas on arrival in only 25% of other countries. Finally, they do not need a visa to travel to just 20% of other countries on the continent<sup>16</sup>.

The movement of persons across national borders brings with it benefits and also creates risks that have to be mitigated by each country and multilaterally. SA has adopted a risk-based approach which advocates for an incremental removal of migration formalities for frequent and trusted travellers including diplomats, officials, academics, business persons, students, etc. The South African envisaged policy position on the elimination of visa requirements for African citizens can be summarised as follows:

- 1) African citizens should enter SA visa-free as a starting point on condition that returns agreements are agreed upon. Visas should be required only where objective risks are identified such as:
  - a. Overstaying and deportation of foreign nationals (Quantify the number per year which triggers consideration of visa implementation);

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<sup>16</sup> According to the first Africa Visa Openness Index launched in early 2016

- b. Security risks (organised crime; terrorism; political instability);
  - c. Civil registration risks (Documents frequently obtained fraudulently; countries unable/unwilling to identify their nationals when requested); and
  - d. Countries with a high number of nationals who abuse the asylum system.
- 2) Key elements of a visa-free regime would be:
- a. Visa-free entry of nationals for short visits up to 90 days.
  - b. Recognition of visas for 3<sup>rd</sup> parties (Univisa concept) on condition that security measures are put in place by participating SADC Member States. This should include the returns agreements for third country nationals.
  - c. Agreed standards on immigration and border management.
  - d. Agreed standards on civil registration.
  - e. Returns agreements.
  - f. Sophisticated, real-time risk management, information and intelligence sharing.
- 3) Where visas are required, SA should make it as easy as possible for *bona fide* travellers to enter SA.
- a. Standardise and expand use of long-term multiple-entry visas for frequent travelers, business people, and academics.
  - b. Identify additional proxies for easy approval, e.g. degree from SA university, university degree generally, family members in SA, etc.
  - c. Develop list of countries whose visa adjudication system and visas are recognised and trusted by SA.
  - d. Use of technology to establish trusted traveler schemes.
- 4) Where SADC is lagging, SA should work with countries that have similar priorities to implement measures to liberalise movement in a structured programme. The Schengen model could be considered in that the European Community (EC) was slow to agree a mechanism for liberalising movement. A subset of neighbouring countries – Belgium, France, Germany, Luxembourg, and the Netherlands – met and formed the Schengen agreement. Other countries joined later as its merits were proven, and eventually the EU recognised and absorbed the Schengen agreement.
- 5) At a regional level, SA should continue to advocate for a free movement of African citizens. It would be ideal for the region to work together to agree on common approaches for managing free movement of persons, goods and capital.

*Residence and establishment*

While the SADC Protocol on the facilitation of movement of persons covers the rights to residency and establishment (Article 16 and 18), it however leaves the granting of such rights to the discretion of Member States. This is a major drawback of the Protocol especially when compared with the ECOWAS and EAC Protocols. There is therefore no regional policy framework that guides SADC Member States in granting residence and establishment rights. It is against this background that SA has adopted both unilateral and bilateral approaches when dealing with the residency and establishment rights for SADC nationals.

At a bilateral level, SA is signatory to a number of bilateral agreements with other states governing migration, many of which relate to labour migration. SA has inherited a legacy of bilateral labour agreements with certain neighbouring countries and corporate work visas which supported the supply of cheap labour to various targeted economic sectors under colonialism and apartheid. Such agreements have not been reviewed in depth to take account of the post-apartheid dispensation and corporate work visas have, at times, been subject to abuse by various employers.

The avenues outlined above have proven insufficient in responding to the unique nature of migration from and within SADC, as well as the level of demand from SADC citizens wishing to work, study and establish businesses in SA. Focused bilateral agreements may allow for progress to be made on matters of mutual interest to both parties, and are often faster to implement than trying to negotiate multilateral agreements. The envisaged South African policy position on the granting of residency and establishment rights to African citizens is discussed briefly below.

*African academics and students*

SA intends to grant a special exemption for foreign graduates of South African universities in critical skills areas. This entails granting of permanent residence to international students immediately upon graduation with particular qualifications and skills. As the vast majority of international students in SA are African and SADC nationals, this measure is an important step towards free movement of students within SADC as espoused by the SADC Protocol on Education and Training. In addition, it allows for the retention of skills within the region as opposed to graduates with critical skills going to other regions and continents for

employment. Apart from this attempt in dealing with the ‘brain drain’ within the region and the continent, the vision is of building an African knowledge bases and resources.

#### *African Skilled workers*

In addition to granting permanent residence to graduate with critical skills, SA may also grant a long-term work visa for skilled workers from the continent with priority being given to nationals from neighbouring countries. This visa will accommodate those nationals whose skills are not included in the critical skills list. SA should in general favour workers from the SADC region before considering granting a visa to a worker from other regions and continents.

#### *Management of economic migration from SADC*

This is also perhaps the most challenging policy area to address and to build consensus around a clear policy and strategy despite that fact that SA is, to a great extent, a product of historical flows of migrants from Southern Africa, the rest of the African continent and beyond. These migration patterns flow into sectors which included mining, agriculture, hospitality, construction and domestic work. This has resulted in a rich and diverse society and culture and has contributed to SA having the most advanced economy in Africa. The South African economy remains by far the biggest in the region with a resultant economic pull factor. The South African economy still remains much bigger than the other countries in GDP terms. Wages received for the same work are on average five times larger than in other SADC countries<sup>17</sup>.

The current permitting regime limits the ability of the state to regulate and manage migrants with lower levels of skills and capital, including those from the SADC region, in spite of actual and historical migration flows. Lack of provision for dealing with SADC labour flows is one of the most serious policy gaps in the 1999 White Paper. This gap has been most acute for low-skilled workers from SADC. This is contrary to international practice which shows that where there is huge demand for migration for which a destination country’s formal immigration regime does not adequately cater, significant irregular migration is inevitable.

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<sup>17</sup> TIPS Annual Forum 2015

This is especially the case in a country such as SA that has long land borders with sending and transit countries that are still locked into colonial patterns of trade.

Strategic factors that have to be taken into account in formulating policy options in this area:

- There will be strong migration flows between certain Southern African countries and SA as long as there are large differences in levels of development and other major push and pull factors. Nowhere in the world has a country with a stronger economy than its neighbours managed to exclude migrants effectively from neighbouring countries seeking work, especially within sectors that require lower levels of skills and are largely informal.
- SA has the most extreme inequality of any middle income country and the highest unemployment rate. This is in part the result of the skewed structure of a post-colonial economy and low levels of education and skills. Economic migrants from SADC largely have low to middle levels of skills and they often compete directly with unemployed South Africans. They also settle in urban areas where South African migrants from rural or peri-urban areas are competing for scarce resources, services and opportunities.
- No country that wants to grow its economy has done so in isolation from its region. SADC member states, including SA, are committed to overcoming the legacy of colonialism by achieving a vision of an industrialised SADC with developed infrastructure, internal markets and free movements of people, goods and capital.

### **Current strategic initiatives**

SA has had to respond to realities on the ground, including periodic outbreaks of violence against foreign nationals in 1994 and subsequently. The three strategic initiatives outlined below are beginning to improve the situation regarding economic migration and this should be taken into account when considering the policy options set out below.

- Special dispensations for economic migrants from certain SADC countries. The reality is that a significant population of Zimbabwean and Lesotho citizens are living as irregular migrants or asylum seekers in SA. Some have acquired fraudulent documents and may live under false identities. Many of them work, study or run

businesses in SA. The special dispensations<sup>18</sup> provide an opportunity for Zimbabwean and Lesotho nationals to regularise their stay in SA. Amnesty may be given to those who declare fraudulently acquired documents and who do not have criminal records. Such dispensations take different forms in different countries but in general they have both security and developmental objectives. National security and public safety depend on knowing the identity and civil status of every person within a country. In addition, the presence of communities and individuals who are not known to the state but for whom the state has to provide, puts pressure on resources and increases the risk of social conflicts. Vulnerable migrants pay bribes and are victims of extortion and human trafficking. This increases levels of corruption and organised crime. Regularising relationships between states, however, improves stability, reduces crime and improves conditions for economic growth for both countries.

- The policy objectives of the Zimbabwe special dispensation have been realised to a significant degree (over 300 000 special visas were issued) and the Lesotho special dispensation is being rolled out. However, although the broad policy objectives are the same, the relationship between SA and each of its neighbours has complex features that will impact on each process and its outcomes.

### **Specific policy options to be considered**

**Option 1:** This option advocates for a status quo; that is, no legal avenue would be provided for SADC economic migrants with relatively low-level skills. The option supports the review of existing labour agreements with some neighbouring countries in line with the new vision of international migration. This will include stepping up of enforcement capacity, especially with regard to penalising employers who contravene labour and migration legislation. Proponents of this option argue that SA is confronted with serious economic challenges of high levels of unemployment, inequality and poverty. The concern expressed is that further opening of borders for this category of international migrants will bring economic migrants into direct competition for jobs and resources with South Africa's poor. Many of the poor have migrated to the same urban settlements from rural areas.

**Option 2:** This option advocates for free labour mobility by SADC nationals in support of regional economic development and integration. Proponents of this option contend that a

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18 Application for the Zimbabwe Special Permit commenced on 1 October 2014 while the Lesotho Special Permit commenced on 1 March 2016.

regional labour migration solution must be sought just as is the case in the ECOWAS. One argument that is often made in support of this approach is that development will accelerate as capital will have greater access to a large pool of labour.

**Option 3:** As the *status quo* is clearly not viable, and free labour mobility within the region is not yet a reality, SA should consider introducing a permitting regime for economic migrants from neighbouring SADC countries. In doing so, there must be due regard for the shorter and longer term socio-economic impact. This option will allow managed legal migration by economic migrants from Southern African Customs Union (SACU)<sup>19</sup> countries, including Zimbabwe, Mozambique and Malawi. Proponents of this option contend that while SA is confronted with her own economic challenges, economic migration from the neighbouring countries is historical and will persist as long as pull and push factors remain. If a solution is not found illegal migration will continue. An incremental implementation of at least three types of visas is recommended, supported by measures such as the robust enforcement of labour and migration laws to ensure that citizens are not disadvantaged by employers paying economic migrants lower wages.

- **SADC special work visa:** This is a visa will allow the holder to work in SA for a prescribed period of time. Holders of this visa will not qualify to progress to PR on the basis of years spent in the country. This would be a quota-based regime which will be implemented through bilateral agreements which will specify responsibilities for the signatory and contracting States. The number of visas to be offered is partly a political decision, but one which should be informed by a fact-based analysis of the labour market demand.
- **SADC traders' visa:** A long-term, multiple-entry visa for cross border traders who enter/exit the Republic frequently is proposed. These traders are an important component of intra-African trade, which benefits the regional economy. A trusted traveller/eVisa system can also be considered to cater for cross-border traders.
- **SADC SME visa.** This visa is for self-employed people, such as micro and small business owners. As long as these immigrants pay taxes and follow SA business regulations, they should be welcomed. SARS/company registration could form part

<sup>19</sup> Botswana, Lesotho, Namibia and Swaziland

of the visa application process. A quota can be considered for competitiveness concerns.

- **Regularisation programme.** The new SADC visas should be tied to a programme to regularize existing undocumented SADC migrants *currently residing in SA*, along the same lines as the ZSP and other amnesties SA has conducted over the years.

### Management of asylum seekers and refugees

#### Situational analysis

SA is among the top 5 countries that have received the most individual asylum seekers internationally. The reality is that about 90% of applicants do not qualify as refugees but are seeking work or business opportunities. This is due to a combination of push and pull factors.

Essentially, economic migrants and criminal syndicates take advantage of weak immigration systems, gaps in policy and legislation and corrupt officials. The majority are economic migrants from SADC, with the entry of significant numbers facilitated by criminal syndicates from as far as Asia and the rest of Africa. Rapidly increasing numbers have overwhelmed systems that currently are only funded at the level required for processing small numbers.

There is an important regional and international dimension to the large numbers of asylum seekers choosing SA as their destination. Most importantly, there is a lack of observance of the “safe third country” principle that those persons who claim asylum should do so in the first safe country they enter. This does not relate to asylum seekers originating from neighbouring countries; but to those asylum seekers who transit through one or more safe countries *en route* to SA, most of which are also signatories to the 1951 UN Convention. For instance, many of the nationalities that have been granted refugee status in SA originate from regions beyond SADC. Dealing with this problem is contingent on reaching agreements with relevant countries and robust national and international action to combat the syndicates that smuggle and traffic persons<sup>20</sup>.

<sup>20</sup> Countries with which there is no agreement can simply refuse to accept the return of an asylum seeker.



One major pull factor is that SA has adopted a policy of non-encampment of asylum seekers and refugees without putting in place mechanisms to regulate the free movement of asylum seekers. A serious challenge has arisen because, in the face of significant numbers of rejected claims, the appeals process has become protracted and is taking several years to finalise. This prolonging of the finalisation of asylum claims has proven to be a major pull factor because asylum seekers are allowed to earn a living and study while awaiting adjudication and if the process is lengthy then this amounts to a *de facto* work, business and study visa.

Entry into the economy and communities by asylum seekers therefore takes place in spite of their status being temporary. Effectively, this means that immigration controls and requirements under the Immigration Act that are designed to manage risks are circumvented. One major risk is the admission of large numbers of people into the country who claim asylum without any form of documentation that enables their identity to be verified. This situation is often exploited by criminal syndicates such as human smugglers and traffickers. The situation directly contributes to corruption, social instability and threats to national security. It also compromises budgeting and planning, especially for social services.

Due to the problems described above, genuine asylum seekers in particular are at risk of abuse, exploitation and forced recruitment by organised criminals. Another serious consequence is that the processing of legitimate refugees, including vulnerable groups such as pregnant women and children, is delayed. In addition, the resources of the state and civil society are focused on bogus asylum seekers and not on protecting and integrating genuine refugees.

### **Proposed and/or on-going interventions**

A number of steps need to be taken in order to manage the process effectively and minimise the risk to national security and the safety of citizens and foreign nationals in SA. Given the nature of the problem as described above, a wide range of responses is required, some of which have been initiated. The following points provide a high-level overview of what is suggested. An holistic approach should be adopted to ensure that initiatives can work together effectively.

*Admission of asylum seekers*

The current principle of an inclusive approach that allows any foreign national to claim asylum should continue with exceptions as stipulated in the current Refugees Act that excludes war criminals and other prohibited categories. However, this principle should not be applied in a way that compromises the rights of citizens to national security and public safety. The Immigration Act governs the right of entry and should be used to ensure an adequate assessment of risk of all those presenting themselves at POEs or apprehended after entering the country illegally and belatedly declaring an intention to apply for asylum.

Article 31.1 of the 1951 UN Convention on Refugees determines that State parties to the Convention "... shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence." States that have ratified the 1951 UN Convention often stipulate, through legislation, the meaning of the term "without delay" by requiring that asylum seekers lodge an asylum claim within a prescribed period, or else forfeit access to certain benefits<sup>21</sup>. Contrary to such international practice, RSA is yet to give effect to the lodging of asylum claim "without delay" principle.

As a result of not defining and prescribing the meaning of "without delay", opportunistic applications for asylum from illegal foreigners (i.e. over stayers, rejected applicants under the Immigration Act, deportable and apprehended persons) are processed without any sanction for having entered and/or resided illegally in the country. Thus, by merely pronouncing the intention to claim asylum, it becomes virtually impossible to implement immigration controls such as detention or deportation of foreign nationals that have contravened the law.

In order to admit asylum seekers in the refugee regime in a humane, secure and effective manner, it is recommended that Asylum Seeker Processing centres should be established closer to the borderline. The centres will accommodate asylum seekers during their status determination process. This will be a multi-stakeholder facility with stakeholders like DHA, RAB, SCRA, DSD, DOE, DOH, and UNHCR playing active and regulated roles.

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<sup>21</sup> Foreign nationals who wish to make an asylum application in the United Kingdom are required to make their claim at the first available opportunity. Section 55 of the UK Nationality, Immigration and Asylum Act (2002) prohibits support for those applicants who have not made their asylum application as soon as "reasonably practicable".

All relevant Departments would provide services at the centres, as well as international organisations such as the UNHCR and the Red Cross. Low risk asylum seekers may have the right to enter or leave the facility under specified conditions. Most asylum seekers who fall into low risk categories could be released into the care of national or international organisations and family or community members. One condition for releasing an asylum seeker into the care of an individual or an organisation would be to receive assurances on the welfare and the location of the asylum seeker.

Secure administrative detention centres could be established within the processing centres to accommodate certain categories of asylum seekers while their claims are being adjudicated. Apart from persons representing a security risk or needing quarantining under relevant health legislation, categories that might require temporary accommodation at the processing centre might be vulnerable groups and those whose identity needs to be established. These centres should not be considered as contrary to the policy of non-encampment, but as centres for mitigating security risks posed by irregular migration. Only refugees and not asylum seekers will be allowed to integrate into communities.

What has been described above, with variations, accords with best practice in countries that do not have encampment policies. What they have in common is a coordinated use of resources available domestically and internationally to process asylum seekers and to integrate refugees.

### ***Adjudication of the asylum claim***

Once properly cleared under the Immigration Act, efficient processing of asylum seekers under the Refugees Act will take place in the processing centres. This will enable risks to be managed for both SA and the asylum seekers. This is international practice in countries such as Canada, Australia, Switzerland and Brazil.

### ***Removal of automatic right to work and study for asylum seekers***

Following court judgements (notably the M. Watchenuka case (2004)) the Standing Committee for Refugee Affairs (SCRA) set conditions under section 22 of the Refugees Act that allow asylum seekers to work and study while awaiting adjudication. Many also conduct businesses such as the establishment of “spaza” shops. Many asylum applicants awaiting

adjudication or who have had their claims rejected endeavour to regularise their stay through other means such as fraudulent marriages, using false identities and the acquisition of fraudulent documents.

Asylum seekers would not have the automatic right to work or study since their basic needs will be catered for in the processing centres. However, asylum seekers may be granted such rights under the Immigration Act in clearly defined or exceptional circumstances.

### ***Change of residence status by refugees***

Section 27 (c) of the Refugees Act entitles a refugee to apply for a permanent residence permit after 5 years of acquiring refugee status. This creates confusion as a refugee with a PR status has two statuses in the country. A refugee who has a PR status can travel to his/her country of origin (re-availment) on a South African passport without any sanction. Should a refugee decide to take SA citizenship, he ceases to be a refugee and cannot be repatriated to his or her country of origin when the situation normalises. A foreign national is then subject to three Acts (Refugee, Immigration and Citizenship Act) making it difficult to enforce. This is one of the pull factors which is being dis-incentivised by the delinking of visas from permanent residence permits.

The status and processing of dependents of refugees must be time-bound and conditional on correct information being provided by the main applicant. Other countries, for example, only allow linked asylum applications if the family arrives together; otherwise the claims of dependents must be processed individually. SA could adopt this approach or specify a time period within which refugees can apply on behalf of specified dependents that are within SA or in another country.

### ***Non-encampment policy***

The current policy of non-encampment should continue as permanent camps in our context would create serious logistical, security and humanitarian problems. It is far better to integrate those given refugee status into communities, provided adequate mechanisms are put in place and there is coordinated support by relevant departments and other actors.

### ***Regional refugee approach***

SA must take robust steps to be able to refuse asylum to asylum seekers who have transited through one or more safe countries. Building appropriate relationships and signing agreements with neighbouring countries is a key step towards resolving this problem as this is accomplished in Europe through the Dublin agreement. In the medium to long term there should be bilateral agreements with neighbouring countries and other transit countries that deal with this matter in the context of facilitating and securing migration for development and security.

The SADC initiative for Refugee Commissioners, of which SA is part, aims to create a common regional approach on the management of asylum seekers and refugees. It seeks to promote harmonisation of legislation and compliance to the provisions of the 1951 UN Convention Relating to the status of refugees and its 1967 Protocol. There is a draft Common Regional Framework which harmonises admission of asylum seekers, status determination and dealing with failed asylum seekers within SADC. The framework makes some recommendations on bilateral agreements to deal with third safe country principle.

SADC has an MOU with UNHCR which needs to be reviewed to ensure the common approach. The MOU provides for the following: Addressing social, economic and political issues in the region, particularly those which have a bearing on the root causes of forced population displacement, refugee protection, provision of humanitarian assistance and search for durable solutions.

### ***Durable solutions***

Following cessation of hostilities, for example, the UNHCR coordinates a process with the parties concerned and, if warranted, declares a cessation in terms of refugees. The policy, to which SA is party, is to find durable solutions, which typically involve voluntary repatriation; resettlement to a third country; or integration in the country of refuge. A policy framework is needed that clarifies South Africa's stance and the respective role of the parties involved including international organisations. The policy proposal could include the following aspects:

- The withdrawal of refugee status and the options available in different circumstances.
- Procedure for the repatriation of parolees and ex-offenders.

- Alternative for the deportation of failed asylum seekers who may be subjected to the death penalty if deported to their countries.
- The policy proposal should include establishing a committee that will adjudicate individual cases such as those applying to remain in SA.
- The respective roles that SA, country of origin and the UNHCR should play.
- The roles of respective Departments should be made explicit with regard to domestic and international processes and agreements.

### ***Conditions for exclusion of asylum seekers and refugees***

The policy on withdrawal of refugee status, on grounds of serious criminal convictions or breaking of specified conditions needs to be made explicit and communicated clearly to asylum seekers and refugees. Exclusion could include fugitives of justice: those wanted for committing crimes in a country that SA recognises as having a fair justice system.

Currently exclusions are largely restricted to those identified as certain classes of criminals. A new category could be those persons who have failed to apply in safe countries *en route* to SA, often termed “third countries”. The general principle is referred to in the 1951 UN Convention and it should be made explicit in domestic legislation. Those refugees who return to their country of origin should have their refugee status revoked. Conditions for travel of those granted refugee status should be more tightly regulated, including their use of South African or other travel documents.

## **Management of the integration process for international migrants**

### **Introduction**

Sovereign states have a right to determine which foreigners can become part of the community of people of SA either on a temporary or on a permanent basis. In doing so, the migration policy shapes the future composition of their populations. Some countries have made a conscious decision to use the migration policy to shape their society and demographics by giving preference to certain types of individuals who are deemed to be more strategic for nation building. In this respect, for instance, the migration policy could choose

to give preference to professionals or investors or, in addition, could give preference to people from certain age groups to be integrated into its value system and population.

Other countries do not discriminate between potential migrants in a structured way but set quotas to limit the intake of foreigners who may be integrated into their communities. These are some of the options that are adopted by various countries within the framework of their immigration policies and legislation. Over the last twenty years South Africa has become increasingly multi-cultural with diverse communities of foreign nationals finding different ways of integrating into our society. This has large actual and potential benefits in terms of enriching our cultural and social diversity and knowledge base. However, policy decisions have to be made in the interests of nation building and good government to maximise benefits while mitigating risks.

### **Situational analysis**

SA has not adopted a clear and coherent integration policy for the integration of foreign nationals into the country's value system and population. This could be attributed in part to a country's lack of a common vision on the value of international migration and in part to SA being in many respects a nation in formation. Consequently, communities have had to deal with the unregulated influx of migrants into their communities without proper preparation to create awareness and to induct the foreign nationals. In some communities this has contributed to discrimination and attacks on foreign nationals. Some categories of foreign nationals have also struggled to adapt and to integrate into host communities. As a result closed migrant communities have become isolated, with some areas being dubbed "no go areas" for citizens.

Contributing to the situation described above has been a tendency to regard the DHA as the sole department responsible for the management of international migration. This has contributed to the lack of development of integrated approaches across government, which is contrary to international best practice. A strong international trend is for countries to move to an integrated approach, with departments working together in harmony with civil society to manage the integration of migrants.

**Proposed policy interventions**

There are categories of migrants that will be excluded from the integration policy due to the temporary nature of their stay in the country. For instance, the policy should not apply to asylum seekers as they have temporary status while awaiting the outcome of adjudication. This policy also excludes holders of temporary visas who are in the country for a short time, such as tourists. However, the following services must still be extended to these categories of migrants:

- South Africa's profile information with key aspects of its society, economy and cultural norms;
- Information on the constitution with regard to the rights and responsibilities of migrants;
- Information on government services such as social assistance, safety, health and education; and
- Issuing of secure and recognized enabling documents such as asylum seeker permits and travelling documents where required by law.

The policy of integration should be applicable to holders of long term visas, permanent residents, naturalised citizens and refugees. These are the people who are in the country for extended periods and who will need to settle and interact with different institutions such as the financial institutions. Therefore, this policy seeks to facilitate a smooth adaptation of this category of foreign nationals into the country's value system, residence and establishment requirements. The following issues should be addressed by the integration policy:

- Granting of family-based visas to holders of business and critical skills visas;
- Granting of permanent residence to international migrants that are considered to be critical for the achievement of national priorities;
- Granting of citizenship to international migrants that are considered to be critical for the achievement of national priorities;
- Induction and naturalisation oath (of allegiance) ceremony for naturalised citizens;
- Granting of refugee status to qualifying refugees;
- Issuing of secure and recognisable enabling documents such as IDs and travelling documents to refugees; and
- Social security for qualifying refugees.



***Multi-stakeholder approach***

A serious policy gap in relation to the integration of migrants is the lack of a policy and regulatory framework that will ensure effective coordination across sectors and spheres of government. In this regard, the following is suggested:

- The respective responsibilities and roles of relevant departments in all three spheres of government must be made clear and reflected in procedures, regulations and formal agreements as appropriate;
- Due attention must be paid to linking with provisions in existing legislation from other departments;
- By-laws for managing settlement and integration of migrants into communities need to be reviewed and strengthened to provide guidance to migrants;
- Agreements would be reached with departments and provincial and local government in terms of the legal framework. There would also be engagement with national organisations and institutions such as banks to ensure those granted residence status have access to services.

## CHAPTER 5: CAPACITY FOR MANAGING INTERNATIONAL MIGRATION

### **Situational analysis**

The need for a ‘whole of government and society’ approach for the management of international migration is one of the main themes of this paper. The first theme is that international migration policy is cross-cutting and requires an inter-sectoral governance approach for it to succeed. A second theme is that Home Affairs needs to be capacitated as the department mandated to lead in the implementation of national policy and administer immigration legislation strategically and professionally. Thirdly, at the heart of the argument developed in this Green Paper is the proposition that for SA, the cost of a lack of investment in managing international migration is far higher than the cost of building the necessary capacity.

The main purpose of this final chapter is to indicate what factors must be taken into account when deciding on a feasible strategy for South Africa to build the capacity necessary to manage immigration strategically and securely. SA must address massive structural inequality and unemployment challenges through social and political transformation linked to restructuring and growing the economy. That is the most urgent national priority and must inform all policy and strategy development. The overall impact of the capacity building strategy must therefore be shown to have a positive impact on the fiscus and on advancing this national agenda.

### Defining a high-level strategy

Home Affairs is developing a business case for a professional, modernised department that will deliver identity and immigration services efficiently and strategically. A National Identity System (NIS) will protect the identity and status of all who visit or reside in South Africa. The NIS will interface with immigration systems for movement control, asylum, permitting and enforcement. Managed by professionals in a secure environment, this will give South Africa the core capacity it requires to administer international migration effectively at a national level.

However, administration of legislation is just one aspect of the holistic management of immigration. The scope of the impact of international migration policy on all the national, provincial and local spheres of the state is large. International migration policy must serve, among others, sectors involved in labour, business, peace and security, tourism, trade,

investment, education and skills development. Any inter-sectoral policy and strategies must serve the interests of all three spheres of the state and it must align with many relevant Acts, policies and programmes.

Policy on international migration, as with defence and foreign policy, clearly should be a national competence in a unitary sovereign state, with provincial and local spheres having to adapt and implement within coherent policy frameworks and programmes. The main legal instrument is the Intergovernmental Relations Framework Act (IGRFA) of 2005, which in effect relies largely on voluntary cooperation between the spheres. One implication is that capacity building strategies must be focused on building a strong consensus that is given expression by national planning and budgeting mechanisms and that is supported by appropriate legislation and institutional arrangements.

The building of consensus around international migration policy is critical and is the main reason for developing this Green Paper. Whilst agreement has not been achieved on all the various aspects of policy and strategy, there is a growing understanding between departments of the nature of the challenge and a willingness to confront them. The current levels and quality of inter-departmental collaboration are better than they have ever been since 1994.

Improved intra-governmental cooperation in SA has begun to impact positively in the capacity of the state to respond to the challenge of economic migration. This includes collaboration with the Department of Cooperative Governance and Traditional Affairs (COGTA) on developing policy for the integration of foreign nationals into communities; the DHA becoming fully integrated into the Security Cluster of Departments; the DHA making progress in leading the establishment of the BMA; and the formation of interdepartmental forums on immigration with representatives from all departmental clusters attending. Notwithstanding progress made, there is an urgent need for SA to adopt an approach based on a shared vision on the roles and responsibilities of all stakeholders who contribute to secure and effective management of international migration.

One forum that comes into play is the National Economic Development and Labour Council (NEDLAC) which was established through an Act of Parliament in 1994. As a statutory body NEDLAC brings together representatives from government, organised labour, organised business and the community to consider all socio-economic and labour policy and legislation. Each of the constituencies mentioned above must be engaged on the broad policy principles, including the need for SA to have the capacity to manage international migration.

Over the last ten years the state has developed more effective systems of planning, budgeting and monitoring linked to the programmes of departmental clusters. Priority is given to growing the economy by achieving the development goals of the NDP. Key actors are the National Treasury, the Department of Planning, Monitoring and Evaluation (DPME), the National Planning Commission (NPC) and Cluster and Cabinet structures including committees of provincial executive members (MECs) convened by national ministers that have a shared mandate.

All of these planning structures should engage with a proposed strategy and programme for building capacity to manage international migration. What should emerge are clearly defined outputs, targets and budgets for all three spheres of government. These outputs should include building partnerships and collaboration with key non-state actors nationally, regionally and internationally.

Most countries have well-established inter-departmental/agency structures for managing inter-sectoral policies that deal with international migration. For example, the RSA is alone in SADC for not having a commission that coordinates the processing, protection and support of asylum seekers and refugees. Such structures address not only the high level strategic and policy issues, but the detail of implementation and the allocation of responsibilities. In creating any additional structures the primary aim should be to enable the DHA and other Departments to execute their core mandates with regard to immigration in an effective manner. The first step should be to strengthen existing structures, such as the Immigration Advisory Board (IAB).

There is also an urgent need for capacity to research migration and generate reliable statistics. For instance, in Brazil the Brazilian National Immigration Council (NIC) located within the Labour Ministry is responsible for labour migration management. The NIC regulates foreign skills acquisition in the country. The NIC is constituted by the Departments of Labour, Foreign Affairs and Justice, labour unions and industry representatives.

SA is a new democracy and nation in which legislation and institutions were built on colonial principles for almost a century prior to 1994– and in areas of the country for three centuries. A strong case can be made for a more systematic and focused programme of legislative and institutional reform to remove the kind of implicit colonial principles that informed aspects of the 1999 White paper on International Migration. A key aspect of building national capacity to manage migration – domestic and international – is the development of laws that are

vertically and horizontally coherent. That is, they need to be coherent vertically from the policy to the Act, to regulations and standard operating procedures; and horizontally across legislation drafted by different departments. This is a complex undertaking that requires resources, detailed attention and commitment. Funds spent in achieving success, however, will be far less than those required to deal with the consequences of poorly drafted and poorly coordinated legislation. A strong brief to the drafters must be to pay due attention to creating legislation that will enable coordination across society and that protects human rights, including the right to safety and security of all who live in SA.

## CONCLUSION

Given the policy shortcomings of the current White Paper and much of the legislation based on it, this Green Paper argues that South Africans need to adopt a paradigm that sees international migration as enabling their own development and that of their country and region. In the new paradigm, South Africans would see themselves as responsible citizens of SA, Africa and the world and support efficient, secure and humane approaches to managing international migration. The current paradigm exposes SA to many kinds of risk in a volatile world and by default strengthens colonial patterns of labour, production and trade. It also serves to perpetuate irregular migration, which in turn leads to unacceptable levels of corruption, human rights abuse and national security risks.

Managing regional migration flows in the interests of security and development is a viable strategy. European economic growth benefitted hugely by capital and labour flows that created more economic parity in the region. This was the precondition for a common currency and free movement of labour. In post-colonial contexts, there are examples in Asia, Latin America and Africa of cooperation on migration that is making a significant contribution to economic growth and development across a region.

The broad understanding of international migration advocated in the Green Paper accords with principles adopted by international bodies such as the UN, the AU, the International Organization for Migration (IOM), International Labour Organization (ILO) and the United Nations High Commissioner for Refugees (UNHCR). It recognises the rights of nations to security and self-determination within a framework of universal human rights and shared responsibilities.

A world founded on these principles is one where – as the Freedom Charter envisaged – “All the cultural treasures of mankind shall be open to all, by free exchange of books, ideas and contact with other lands”. International migration is a reciprocal, two-way process and our students, workers, tourists and business persons want to be welcomed wherever they seek opportunities. Other nations expect the same of us.

What is put forward in the Green Paper is based on desktop research, interviews and discussions with internal and external stakeholders (workshops, roundtables and colloquia), as well as domestic and international study tours. It is also informed by a practical knowledge of problems that have emerged since the publication of the White Paper on International Migration in 1999.

It is important to note that the objective of a Green Paper is to build consensus and receive inputs before drafting the official policy document, a White Paper. Thus, the purpose of the Green Paper on International Migration is not to be definitive but to propose broad principles and raise key issues that need to be addressed by multiple stakeholders in each policy area.

The current draft of the Green Paper raises issues that require policy interventions in seven (7) broad policy areas. Some of the policy areas are more fully developed than others. Also, there are three policy areas that are not addressed in the 1999 White Paper on International Migration. They are: management of international migration in the African context; management of ties with South African expatriates and the management of the integration of international migrants. Consequently, these policy areas are the least developed in the entire document. In addition, the issue of building national capacity to manage international migration is addressed.

The Green Paper and public responses to it will be used as a basis for drafting the White Paper on International Migration. The White Paper on International Migration will contain definitive proposals for specific policy areas that must be grounded on sound research and consultation. This will provide a solid foundation for the drafting of the new legislation.

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