

Protection Working Group South Africa

Advisory Note

Promoting Protection during the resumption of the Deportation of Zimbabweans from South Africa

18 August 2011

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1. Introduction

- 1.1. Applications for the Zimbabwean Documentation Process (ZDP) - a regularisation process for Zimbabwean passport holders in employment, running businesses or undergoing studies - ended on 31 December 2010. The regularisation programme carried out from 20 September to 31 December 2010 reportedly enabled 275,000 Zimbabweans to register their application for a four year residence permit (study, work or business permit). The processing of the applied-for permits was intended to be completed between January – July 2011. The Department of Home Affairs (DHA) had initially announced that the moratorium on deportations of Zimbabweans from South Africa, in place since April 2009, would cease on 31 July 2011. As a consequence of this measure, the deportations of Zimbabweans without documentation legalising their stay in the country was scheduled to resume from 1 August 2011.
- 1.2. On 1 August 2011, the DHA announced that it would not resume deportations until the complete ZDP had been finalised, including the process of issuing permits (acknowledging the delays caused by applicants still needing to receive travel documents from the Zimbabwean government), and including “a review process, with a view to ensuring those applications that were not successful were not unduly rejected.” No date has been set for the end of the review process. The same statement states: “Minister Dlamini Zuma is on record having stated that once the Zimbabwean documentation project is finalised, the country will revert to the normal processes of immigration in line with domestic and international prescripts. Such processes will seek to ensure compliance with South Africa’s immigration laws and will not target Zimbabweans but will deal with illegal immigrants of all nationalities. Accordingly, we wish to place on record that no such plans to engage in mass deportation of Zimbabweans are on the agenda of the South African government.

The government is bound by domestic laws and is a signatory to various international protocols and conventions which regulate the conduct of the government in dealing with illegal immigrants.”¹

- 1.3. The Protection Working Group (PWG) acknowledges the right of the Government of South Africa to deport illegal migrants.
- 1.4. The PWG believes that the uncertainty of the economic and political situation in Zimbabwe, and the emergence of new facts of persecution in the country, justify the extension of the moratorium of deportations from South Africa to Zimbabwe. The uncertainty concerning the timing and nature of elections in Zimbabwe is of particular concern. The resumption of deportations, while being within the GoSA’s legal right, entails humanitarian risks and in the current situation in Zimbabwe could destabilise the fragile economic recovery, the still unstable political agreement, and the delicate social stability.
- 1.5. If the GoSA intends to implement deportations to Zimbabwe in the near future, even if within the context of “normal processes of immigration”, the PWG highlights the Government of South Africa’s responsibility to implement the deportation process in a way which respects and protects the basic rights of the deported persons and prevents the deportation of those in need of protection and with the right to claim the protection of South Africa, as defined by international law and the South African Constitution.
- 1.6. There are no reliable estimates of the number of Zimbabweans in South Africa who may remain undocumented after the conclusion of the ZDP and are therefore potential candidates for arrest and deportation. In 2008/2009, before the moratorium on deportations, around 300,000 Zimbabweans were deported per annum.
- 1.7. In addition to the protection of basic human and Constitutional rights for all affected by the deportation programme, the resumption of deportation of Zimbabweans is likely to create protection needs for specific vulnerable groups of Zimbabweans. These include: **children**; persons with **health-related** vulnerability, specifically persons with AIDS receiving ARVs; and persons with **legal** vulnerability, including stateless persons and asylum seekers (see below for more detailed analysis and discussion to the extent to which these vulnerabilities are general to deportation of all nationalities or particularly acute for Zimbabweans at this time).
- 1.8. The PWG believes that the GoSA should work together with international organisations and especially with South African civil society to ensure effective protection during the deportation process. This document aims to provide a shared basis for discussions and planning between government and other actors and among civil society actors.

2. About the Protection Working Group

- 2.1. The Protection Working Group (PWG) South Africa was established in June 2008 as a response to the widespread xenophobic violence and attendant displacement in May 2008. Its members include UN agencies, international NGOs and South African NGOs and academic institutions: African Centre for Migration and Society (ACMS), Amnesty International SA, Caritas, Consortium for Migrants and Refugees in South Africa (CoRMSA), Centre for the Study of Violence and Reconciliation (CSV), International Organisation for Migration (IOM), Jesuit Refugee Service

¹ Department of Home Affairs press release, 1 August 2011, Home Affairs concludes adjudication of applications from Zimbabwean nationals
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(JRS), Lawyers for Human Rights (LHR), OXFAM GB, Save the Children Foundation, South African Council of Churches, South African Human Rights Commission, South African Red Cross Society, UNDP, UNFPA, UNHCR, UNICEF, UN OCHA, UN OHCHR, UNOPS. The International Committee of the Red Cross (ICRC) and Médecins Sans Frontières (MSF) attend as observers.

- 2.2. PWG member roles include: advocacy, monitoring, technical assistance to government, and direct service provision to migrants and deportees. The PWG aims to coordinate the protection-related work of its members, including through the preparation of contingency plans and joint programmes and facilitate relationships with government.

3. Institutional Context

- 3.1. An effective and rights-based process of arrest and deportation of large numbers of Zimbabweans in South Africa involves collaboration and coordination by both the South African and Zimbabwean governments as well as by several departments in each government. Coordination and collaboration between governments and their respective civil societies (including international and domestic organisations) will also facilitate an effective and rights-based process.
- 3.2. The South African Government has made significant efforts to address the protection needs of Zimbabweans in its territory through the issuance of asylum seeker certificates, the suspension of deportations and the ZDP, even if the 2007 proposed measure of providing documentation through Section 31.2.b of the Immigration Act would have been technically more adequate.
- 3.3. While having the right to deport illegal migrants, the Government of South Africa has the responsibility to implement the deportation process in a way which respects basic rights, as defined by international law and the South African Constitution. It should also consider the potential impact on the humanitarian equilibrium in Zimbabwe and therefore on regional stability.
- 3.4. The Government of Zimbabwe has the responsibility to receive and assist its citizens on their return to Zimbabwe.
- 3.5. Regarding coordination among GoSA departments: DHA, SAPS, DSD, and SANDF are the key government actors in the arrest and deportation of undocumented migrants. In relation to vulnerable groups, the Civics Directorate of DHA is responsible for cases of stateless persons and others needing special legal protection, including asylum. The Department of Social Development (DSD) is responsible for protecting the rights of children, including unaccompanied minors, as well as the special protection needs of women at risk or victims of sexual and gender-based violence (SGBV). The Department of Health (DoH) has a mandate regarding the protection of persons requiring and receiving public healthcare, and persons who may pose a public health risk (including to regional public health) if treatment is interrupted through un-managed mobility.
- 3.6. The Musina area and Vhembe District Municipality are key places for the effective management of the deportation process and protection issues within this process. A Standard Operating Procedure has been drafted by a Task Team for the Resumption of Deportation for Vhembe District, which sets out and coordinates the protection of vulnerable groups. The current document reflects many of the standards included in the Vhembe SOP.
- 3.7. The PWG and its members have a range of mandates and activities which relate to protection. This includes a special pillar of action regarding the response to Zimbabweans with humanitarian

needs in South Africa. This includes Zimbabweans affected by the planned deportation process. IOM protects migrants, UNHCR protects internally displaced persons, returnee refugees and the stateless. UNICEF protects children. UNHCHR addresses situations where human rights issues could be affected. Civil society members have also direct areas of intervention and responsibility.

4. Summary of Protection Implications in Deportation Process

- 4.1. **Protection Needs:** There are two broad kinds of protection need (see sections below for more detailed analysis of the protection needs for each group):
 - 4.1.1. Maintenance of **basic rights** for all affected by arrest and deportation;
 - 4.1.2. Protection of three especially **vulnerable groups (children;** persons with **health-related** vulnerability, specifically persons with AIDS receiving ARVs and with TB undergoing tuberculosis treatment; and persons with **legal** vulnerability, including stateless persons).
- 4.2. **Why does the resumed deportation of Zimbabweans create a need for protection activities?**
 - 4.2.1. Zimbabweans have the same protection needs as other nationalities (e.g. basic rights during deportation process, protection of unaccompanied children, etc.) but potentially large numbers of arrests/deportations within a short time period create challenges in maintaining and monitoring basic rights and in identifying and supporting vulnerable groups.
 - 4.2.2. South Africa has a direct interest in protecting against health-related vulnerabilities among Zimbabweans since significant numbers of people with interrupted HIV/AIDS and TB treatment due to a deportation process which is not sensitive to health issues can have regional public health effects which also impact on South African public health.
 - 4.2.3. There are some vulnerabilities specific to Zimbabweans, especially the problem of statelessness due to an inefficient civil registry in Zimbabwe with discriminatory practices and the exclusion of large numbers of persons in the application of the citizenship laws of 2001 and 2003 in Zimbabwe (see below on Legal Vulnerabilities for more detailed analysis).
 - 4.2.4. Some current legal protection challenges in the RSD system in South Africa affect those Zimbabweans and who do not yet have the protection of the asylum system in South Africa, whether due to an inability to access the overcrowded process; due to the high rejection rate of Zimbabwean asylum applicants (sometimes without adequate consideration of the merits of the case); or due to an individual's decision to give up their asylum status (in spite of being a genuine applicant) in favour of the special work or study permit but not having received this permit or being unable to complete the documentary requirements due to a modality of de facto statelessness.
 - 4.2.5. As shown by experience with deportations to Zimbabwe before the moratorium, it is highly likely that a significant percentage of deported individuals will attempt to re-enter South Africa. This is especially the case if the economic and political situation in Zimbabwe remains unstable. Many will not have access to legal entry options, especially given ongoing difficulties in accessing Zimbabwean passports. This means irregular border crossing will increase, bringing with it a return to the high levels of sexual and gender based violence and other forms of assault associated with irregular border crossing, which had been reduced during the moratorium period. This will require dedicated law enforcement and protection measures in the border area.

4.3. Forms of Protection

The provision of protection can take many forms, depending on the nature of protection challenge:

- 4.3.1. Pre-arrest preparations to enable smooth reintegration in Zimbabwe (health documentation, birth documentation for children born in South Africa, Zimbabwean identity documentation, etc.). Applies to majority of undocumented Zimbabweans with potential for arrest and deportation.
- 4.3.2. Respect and response to basic rights (to due process, dignity, freedom of physical harm, protection of personal documents and property, etc.) during the normal arrest and deportation process. Applies to majority of undocumented Zimbabweans with potential for arrest and deportation.
- 4.3.3. Special consideration for vulnerable groups during normal arrest and deportation process (re health care needs, etc.). Applies to limited number of those arrested and requires screening upon arrest.
- 4.3.4. Provision of interim care and assisted return options for some vulnerable individuals (as alternatives to standard arrest and deportation process), e.g. survivors of SGBV or those with special health care needs or unaccompanied children seeking to return to families in Zimbabwe. Applies to limited number of those arrested and requires screening upon arrest.
- 4.3.5. Identification of individuals who cannot be deported, prevention of arrest and deportation (e.g. those with fear of persecution on return (refoulement); stateless persons whose deportation to Zimbabwe will deepen their statelessness and further affect other rights) and provision of alternative documentation and residence options. Applies to limited number of those arrested and requires screening upon arrest.

5. General Interventions needed to enable protection of basic rights and vulnerable groups

- 5.1. *Contribute to establishment of protection standards for the arrest and deportation process:* The written standard operating procedures for SAPS, DHA and SANDF officials should include protection issues and the treatment of vulnerable groups during the deportation process. This document should include the roles of other Departments such as DSD and DoHealth.
- 5.2. *Coordination among departments:* Given that several departments are involved in the arrest and deportation process, there should be regular coordination among these departments, especially DHA, SAPS and SANDF but also DSD and DoH. This coordination should ensure coherence of protections standards, interdepartmental protection monitoring (eg SAPS/DSD interactions regarding unaccompanied children, and women victims of SGBV etc.) and planning regarding maximum arrest and deportation volumes and timeframes.
- 5.3. *Training on protection standards and vulnerable groups for DHA, SAPS and SANDF officials conducting and managing/overseeing arrest and deportation process.*
- 5.4. *Integrated monitoring of protection standards, especially regarding vulnerable groups:* There should be a formal information collection and management process by DHA, SAPS and SANDF regarding the identification and treatment of vulnerable groups in the deportation process. This is so that issues and trends can be traced and managed by the coordination task team as they arise. This information should be shared among affected departments and between GoSA and civil society organisations participating in the process.

Civil society organisations have mandates and capacities to conduct protection monitoring at police stations, detention centres and the border. GoSA should work with civil society in relation to monitoring, so that agreed standards are used and clear information sharing lines are set to enable the achievement of mutually desired protection outcomes. This will be in the interest of both civil society and government actors and reduce the frictions and capacity waste which may arise from a lack of consultation and coordination.

- 5.5. *Information Campaigns*: In addition to affecting Zimbabweans in South Africa, a large scale arrest and deportation process will impact on many other actors in the country. A clear information campaign is therefore important. This will allow Zimbabweans who feel they would be affected to prepare for smooth reintegration in Zimbabwe (by organising their identity, health, education, work and property documentation, for example) and potentially make decisions about voluntary return. It would also enable those with special protection needs to come forward voluntarily. It would also ensure that the general public in South Africa understands the process, including who it targets and who not, rights within the process, etc. This is important to avoid vigilante ‘arrests’ and expulsions by members of the public who may misunderstand the process.

A clear information campaign for other government departments is also needed, to ensure that all government employees with front-line engagement with Zimbabweans and with the general public are aware of the process and of its protection dimensions. This includes DSD (social workers, child protection officers, etc.), DoHealth (nurses, etc.), DoEducation (teachers and school heads of schools with Zimbabwean children), municipal officials, community development workers, ward councillors, etc.

- 5.6. *Management of Volumes*: Basic standards during normal arrest, detention and deportation processes are hard to maintain if high volumes of people are detained and deported in a short period of time. High volumes also make it hard to identify and monitor vulnerable groups. At key locations such as Johannesburg (Lindela), Musina and Beitbridge, there are limited reception and care facilities for vulnerable groups, such as unaccompanied children and persons with special health care needs. The existing deportation reception centre in Beitbridge (run by the IOM) also has its capacity limits. Organised reception and reintegration assistance in Zimbabwe, which is also more likely with predictable numbers of returnees, will reduce numbers immediately returning to South Africa informally. For these reasons, it would be beneficial to adapt deportation volumes to reception capacities at key points, especially at the border.

Volume management requires coordination and planning between DHA, SAPS and SANDF and among Provinces and Municipalities, so that aggregate volumes at Lindela Repatriation Centre and the border do not exceed agreed-upon limits.

- 5.7. *Avoiding long periods of detention while awaiting deportation*: Due to an inability to complete the deportation process to Zimbabwe within these time periods, the officials and/or representatives of SAPS, DHA or any government body or agent should minimise or prevent large-scale arrests and detention occurring between 16:00 on Fridays and 08:00 on Mondays and during Public Holidays.
- 5.8. *Screening for vulnerable groups at points of arrest and in transit/detention*: Protection of vulnerable groups requires a screening and referral process to be built into the arrest and transit/detention and deportation process. Ideally, screening should occur at several points in the process to ensure that vulnerable individuals are not overlooked. These points include the initial point of arrest by the arresting officer; the initial point of detention such as the police station as part of the detention registration process; the Lindela Repatriation Facility, SMG or other detention facilities assigned to the process; and the final DHA confirmation before deportation. Screening will also occur by IOM at the deportee reception centre in Beitbridge.

An effective integrated screening process requires clear screening templates to be used by all actors in the process (especially SAPS and DHA), as well as clear processes to follow when different forms of vulnerability are identified, including referral systems outside the deportation process for identified vulnerable individuals (especially unaccompanied children and persons with serious chronic medical conditions and medication needs).

Recommendations for General Protection Systems during Deportation

1. *Establishing and Adapting Standards:* PWG suggest that the standard operating procedures for deportations be adapted to address the specific protection needs of Zimbabweans.
2. *Coordination:* PWG recommends a high level coordination task team of all affected departments to meet not less than weekly in preparation for deportation resumption and not less than bi-monthly to monitor deportation trends once deportation have resumed.
3. PWG recommends *devolved task teams* at Provincial level and in key metros/ municipalities (eg Johannesburg, Pretoria, Cape Town, Musina, Polokwane, etc.). PWG recommends participation of local civil society organisations at these local task teams duly trained and conversant on the defined standards for screening and response.
4. *Training on Protection Standards:* PWG recommends that all DHA, SAPS and SANDF officials responsible for managing/overseeing officers conducting arrests and deportation processing should receive training on protection standards and processes.
5. *Protection Standards Monitoring:* PWG recommends that DHA, SAPS and SANDF formally work with PWG civil society members to monitor protections standards at police stations, detention centres and the border. This collaboration would be based on agreed monitoring standards and specified information sharing lines.
6. *Information Campaigns:* PWG is available to assist with information campaigns, including drafting information materials and creating links with Zimbabwean organisations and South African civil society organisations who can help spread information to the general public.
7. *Volume Management:* PWG recommends that overall daily volumes of persons deported through the Zimbabwean border not exceed 1000. The number of unaccompanied children reaching Musina as part of the deportation process (if not already diverted into care arrangements before reaching Musina) should not exceed 30, and persons in need of specialised health care assistance 30. PWG recommends that volume management processes be put in place as part of the national coordination task team.
8. *Screening for vulnerable groups:* PWG recommends that a rapid screening form be developed and used at all stages of the arrest and deportation system. Information captured on these forms should be regularly centralised within Departments and shared across Departments as the basis for trend monitoring (point 5.5.)

6. Basic Protection for all affected by Arrest, Detention and Deportation Process

- 6.1. Basic rights during arrest and deportation include the rights to:
 - 6.1.1. life, dignity, freedom from bodily harm;
 - 6.1.2. due process and administrative justice;

- 6.1.3. confirmation of legal documentation status if a person is arrested without their documents on them;
 - 6.1.4. collection of payments for work done, and other valuables;
 - 6.1.5. non-refoulement (not returning a person to a country where their life or fundamental rights may be in danger);
 - 6.1.6. not returning a stateless person to a country which does not recognise them as a citizen.
- 6.2. The deportation process should not interfere with the enjoyment of other basic Constitutional rights such as basic health care, basic education and access to justice. Arrests of undocumented persons should therefore not take place on or near the premises of institutions providing such services (e.g. schools, clinics and hospitals), or as part of unrelated justice processes (e.g. if an undocumented migrant reports a crime committed against them to the police).
- 6.3. International conventions establish that in the context of a disaster (natural or man-made), migrants should receive the same basic humanitarian assistance as nationals. In such contexts, affected undocumented migrants should therefore not be arrested and deported.
- 6.4. Rights of Detainees and Conditions of Detention

These conditions are stipulated in Section 35 (2) of The Constitution of the Republic and should serve as a minimum standard for all detained persons within The Republic. For practical reasons, some of these conditions have been further elaborated.

Every detained person has the right to:

- 6.4.1. Be informed promptly of the reason for being detained;
- 6.4.2. Choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
- 6.4.3. Have a legal practitioner assigned to the her/him by the state at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - To give practical effect to the right to legal consultation, the officials and/or representatives within the SAPS and DHA are encouraged to:
 - 6.4.3.1. Inform detained persons to seek the services of any relevant humanitarian organisation that provides legal services free of charge; and/or
 - 6.4.3.2. Notify any relevant humanitarian organisation that provides legal services free of charge to such detained persons that require assistance.
- 6.4.4. Challenge the lawfulness of the detention he/she experiences before a court and if the detention is unlawful, to be released;
- 6.4.5. Conditions of detention that are consistent with human dignity: meaning –
 - 6.4.5.1. Have access to: Drinking Water; Ablution facilities; and Food
 - While access to food, etc. is only required if detention lasts beyond a certain number of hours, the deportation process may involve detention and transport in a series of locations. Basic needs such as food, water and ablutions should therefore be provided based on the cumulative time spent within the deportation system,

including transit periods, and not based on the period of time spent within only one leg of the system.

6.4.5.2. Be detained in a structure that:

6.4.5.2.1. Has areas that are physically separated for detaining:

6.4.5.2.1.1. Females over the age of 18;

6.4.5.2.1.2. Males over the age of 18;

6.4.5.2.1.3. Females under the age of 18 who are unaccompanied by a parent or guardian; and

6.4.5.2.1.4. Males under the age of 18 who are unaccompanied by a parent or guardian.

6.4.5.2.2. Has good lighting;

6.4.5.2.3. Has good ventilation;

6.4.5.2.4. Have appropriate measures in place – to safeguard against injury to detained persons – in the event of fire, flooding or other similar emergency.

6.4.5.2.5. Is free of infestations of insects and rodents;

6.4.5.2.6. Is free of persons who are suspected of, charged with or accused of Criminal Offences in terms of Schedule 6 and Schedule 7 to the Criminal Procedure Act 77 of 1951 (as amended).

6.4.6. Communicate with and be visited by her/his: Spouse or Partner; Next of Kin; Chosen Religious Counsellor; and Chosen Medical Practitioner;

Recommendations on Basic Protection during Arrest and Deportation Process

1. *Monitoring* of general protection standards is part of the monitoring process described in point 5.5
2. Define *standard operating procedures* for each of the protection responses .
3. *Screening* for danger of refoulement is part of the screening process referred to in point 5.7 and recommendation 7. above.

7. Vulnerable Groups: Children

7.1. UNICEF is the lead PWG agency for child protection related interventions.

7.2. There are significant numbers of unaccompanied and separated children from Zimbabwe in South Africa seeking poverty alleviation or educational access. Some are genuine asylum seekers but have difficulties accessing the asylum system. Some children may be seeking assisted voluntary return to Zimbabwe.

- 7.3. With the exception of those unaccompanied children who have an appointed guardian and/or legal representative, unaccompanied minors at large were not able to regularize their status during South Africa's 2010 regularization process for Zimbabweans or through the regular channels of asylum. In addition, undocumented children without a guardian and/or legal representation cannot effectively access asylum seeker permits (Section 22s) if they are asylum seekers. As guardians can only be appointed by the High Court and access to the High Courts is difficult at best, undocumented children are left defenceless if they cannot enter the statutory system. There is a need to revise the DHA Standard Operating Procedures for Registering an Unaccompanied Minor at a Refugee Reception Centre (2007) in light of the Children's Act.
- 7.4. Basis of right to special protection: all children found within South Africa are to be afforded the Constitution's protection. Unaccompanied minors are classified as children "in need of care and protection" according to the National Practice Notes of the Children's Act and should have access to the statutory system. Children cannot be removed from the Republic without parental permission or a court order.
- 7.5. All deportation, reunification and other decisions about placements of the child must go through the Children's Court to ensure that the best interests of the child in those matters are properly and fully considered.
- 7.6. According to the *National Department of Social Development Guideline for Services for Unaccompanied and Separated Children Outside their Country of Origin in South Africa*, all stakeholders are responsible for fully implementing the provisions of the Children's Act, as well as the guidelines, to secure statutory placements of non-South African unaccompanied minors.
- 7.7. These measures can protect children from possible deportation once a child has entered the statutory system; they are ensured a legal status while under the state's care.
- 7.8. Existing protection measures in place: Currently there are two provincial-level steering committees/task teams in Gauteng and Limpopo, composed of government, UN, and civil society actors, to coordinate the integrated response to unaccompanied and separated children. In addition, the National Department of Social Development, with support from UNICEF, has developed the *National Department of Social Development Guideline for Services for Unaccompanied and Separated Children Outside their Country of Origin in South Africa*. A nascent family tracing and reunification system exists in South African and Zimbabwe but needs significant strengthening.
- 7.9. There are no reliable estimates of the overall numbers of Zimbabwean children or unaccompanied children in South Africa. Since the Beitbridge Reception Centre's inception in July 2006, it has assisted 8631 unaccompanied children, of whom the majority are male. The current capacity of care placement options for unaccompanied children in Beitbridge are limited to 30 at any one time. This means that if in the deportation process larger numbers of unaccompanied children are arrested and detained in or transported to these areas and then released due to vulnerability screening, there will be difficulties in providing adequate protection while statutory processes and family reunification are under way.
- 7.10. Unaccompanied children reaching the age of majority (18 years in South Africa and 21 in Zimbabwe), and whose court orders have not been extended, while no longer covered by statutory protective measures, deserve and require special assistance on their return to Zimbabwe. This may include supervised independent living, foster care, skills training, employment facilitation, and other measures to facilitate an effective and non-traumatic reinsertion into their society. UNICEF together with the members of the Protection cluster in Zimbabwe expressed their interest in

developing these types of responses. On the South African side there is a need to screen for these cases and refer them to the proposed receiving structures.

7.11. Deportation-related protection challenges for children include:

- For unaccompanied children, being unlawfully arrested, detained and deported along with adults;
- For children, being separated from family, carers or other social support systems through the arrest and deportation of the child or of family, carers and others;]
- Verification of civil registry for foreign-born children to avoid de facto statelessness upon deportation
- Potential loss of documentation on education records which may affect the continuation studies
- Potential loss of vaccination and other health records.

7.12. In practice there are significant road blocks for vulnerable unaccompanied and separated children to access care, protection and justice in South Africa and these may be exacerbated through a resumption of deportations unless specifically addressed within the arrest and deportation process:

7.12.1. *Children detained with adults:* children continue to be detained in South Africa with adults. In March of 2009, South African Police Services (SAPS) announced that the arrest, detention and deportation of children would cease with immediate effect, and that all undocumented children found by SAPS would be referred to the Department of Social Development. Yet, in Musina, Limpopo, children have still been taken to Soutpansberg Military Grounds (SMG) for detention. Unaccompanied minors should not be taken to detention facilities and housed with adults, and yet both SAPS and the South African National Defense Force (SANDF) have done this.

7.12.2. *Lack of consensus on age determinations as key to identifying children in screening processes:* Older teens are currently at a risk of being erroneously identified and deported as an adult. As the majority of unaccompanied and separated children do not have birth certificates or other identification documents to prove their age, there is a need to ensure child-friendly age determinations. Government agencies currently struggle to assess children's ages as part of their provision of services. According to the Children's Act, the Children's Court can estimate a child's age and Presiding Officers often rely on District Surgeons' recommendations. However both Presiding Officers and Medical personnel have refused to conduct age determinations in the past. The global recommendation is that medical examinations are best left as a last resort due to issues related to efficacy. Thus age determination procedures must be clarified with key role players in line with the Children's Act and the Child Justice Act.

7.12.3. *Reluctance of social workers to bring older children's cases to Children's Court:* Some social workers are reluctant to bring foreign unaccompanied and separated children's cases before the Children's Court. Amongst some, there is a misunderstanding that non-South African unaccompanied or separated children cannot enjoy the same rights as South African children. In addition, some social workers are reluctant to bring an older child into the statutory system as some older children have migration objectives that cannot be accommodated by existing social service providers. Nevertheless, social workers must bring all children in need of care and protection to the Court's attention in

order that their best interest is protected, highlighting the need for practice protocols for social workers at the provincial level.

- 7.12.4. *Accessing the Children's Court for best interest determinations and documentation:* Even when social workers are willing to bring these cases to court, the Children's Court can be difficult to access, especially in rural areas. In addition, some Presiding Officers have refused to make best interest determinations on children's cases involving non-South Africa unaccompanied and separated children due to the fact that they lack identification documents. Yet, there is existing precedent for the Department of Home Affairs with support from the Department of Social Development to respond to the documentation needs of this population of children when ordered by the Children's Court. Nevertheless, this relies on the court being accessible to social workers and Presiding Officers understanding their remit. These types of implementation challenges require advocacy efforts at all levels and platforms for consensus making.
- 7.12.5. *Lack of alternative care placement options for older children:* In addition, when children's cases are brought to the Children's Courts in border areas like Musina, there is a lack of appropriate alternative care placement options for older children if family tracing and reunification efforts fail. Aside from the limited beds available in temporary safe care facilities, there are almost no adequate care options. Within the Children's Act, there is a provision for cluster foster care that theoretically could fit older children, but there is a lack of clarification in terms of what the law means by this concept. Models are needed to clarify what cluster foster care would entail.
- 7.12.6. *Weak cross-border family tracing and reunification services:* For unaccompanied and separated children who are seeking assisted voluntary return, family tracing and reunification services are required to ensure that a child's best interests are upheld. However there are clear gaps with the current system as unaccompanied and separated children continue to return to South Africa despite initial reunifications.

7.13. Child Protection Recommendations.

1. *Preventative support for children of Zimbabweans in South Africa to access basic identity documentation, including birth certificates if born in South Africa, school records, Road to Health card:* PWG recommends that DHA facilitate the ability of children travelling with their parents to access identification documents (road to health chart, birth certificate, vaccination and education records) before returning to Zimbabwe (whether through deportation or voluntary assisted or spontaneous return), especially for children who were born in South Africa. Without these documents, children will not be able to access education, health, and other critical services in their country of origin.
2. *Practice Protocols for Social Workers:* PWG recommends that DSD should develop practice protocols for social workers on services to be provided to unaccompanied and separated children in the context of large-scale arrest and deportation campaigns, including cross-border family tracing and reunification services in the case of assisted voluntary returns. Protocols developed during the 2010 Soccer World Cup can be used or adapted in this context. These practice protocols should be included in the Protection Standards (point 5.1) and training on these standards (point 5.2) for all DHA and SAPS officials involved in deportations.
3. *Standard Operating Procedures:* PWG recommends that DHA Standard Operating Procedures for Registering an Unaccompanied Minor at a Refugee Reception Centre (2007) should be revised to

- ensure that they correlate with the Children’s Act and cross-border SOPs between South Africa and Zimbabwe.
4. *Training*: PWG recommends that DSD and other child protection actors should be trained in monitoring the arrest and deportation process and in screening/ rapidly assessing whether there are children in need of protection and how to assist them.
 5. *Coordination of monitoring and referrals in South Africa*: PWG recommends that DSD should be included in the coordination task team (point 5.2), including devolved provincial and municipal task teams, to ensure smooth monitoring (5.4) of child protection and smooth referral of unaccompanied and separated children to alternative care facilities if identified through screening during arrest and deportation processes (5.7). Such coordination should result in a working consensus on age determinations, best interest determinations and children’s rights (including children’s right to documentation) to statutory service providers, including the Department of Social Development, Child Protection organizations, the Department of Justice, amongst others
 6. *Coordination of monitoring and referrals with Zimbabwe*: PWG recommends that coordination mechanisms between South Africa and Zimbabwe should be strengthened to ensure a coordinated response. Improve communication between child protection actors on both sides of the border, and specifically between government counterparts. Non-government child protection actors can facilitate this process with additional available personnel. Support greater, targeted reintegration services that encourage returned unaccompanied and separated children to remain with their customary caregivers if this is determined to be in their best interest. This will require not only monitoring of the availability of current services, but also targeting newly created services where customary caregivers are currently residing.
 7. *Access to Children’s Courts*: PWG recommends that the Department of Justice should be specially approached by DHA, SAPS and DSD regarding the facilitation of efficient access to Children’s Courts in key locations (Johannesburg, Pretoria, Cape Town, Polokwane, Musina) to assist children identified as part of the deportation-related screening process.
 8. *Alternative care models for older children*: PWG recommends that DSD, together with other Musina-based child protection actors, prioritise the establishment of alternative care options for older children in the Musina area.
 9. *Maintaining family units*: in circumstances where an arrested parent or guardian claims that their child (or children) is situated within South Africa in the care of another person, such persons should be afforded the opportunity to collect their child or children prior to being deported.

8. Vulnerable Groups: Health

- 8.1. IOM, UNHCR and the USAID regional HIV-ADIS programme constitute the institutions leading the medical protection response of the PWG.
- 8.2. This section applies to persons who are:
 - 8.2.1. Infected with or suffering from a communicable disease;
 - 8.2.2. on Anti-retroviral Treatment;
 - 8.2.3. Suffering from a chronic illness or condition requiring medical care;
 - 8.2.4. Persons suffering from severe mental health disorders;
 - 8.2.5. Any other condition which requires urgent medical attention.

- 8.3. Basis of right to special protection: Non-citizens, whether documented or not, have the Constitutional right to access basic health care through South Africa's public health care system. This right was reinforced in the case of HIV treatment by an explicit directive by the Department of Health in 2009. Many Zimbabweans therefore do access treatment for HIV and TB through the public health care system.
- 8.4. In spite of a legal right to basic health care and the fact that a large majority of refugees, asylum seekers and migrants enjoy access to health services in South Africa, there is widespread discrimination against foreigners by health care workers. This leads some patients to seek health care through NGO-run facilities or to avoid seeking health care entirely. Especially among the most vulnerable Zimbabweans living in overcrowded inner city buildings in Johannesburg, health seeking behaviour is further constrained by the mental health effects of living in squalid and insecure conditions and of the traumas experienced prior to and during migration to South Africa.
- 8.5. Nature of vulnerability during deportation and reintegration process:
- 8.5.1. Decreased access to public health care in SA: due to fear of identification and arrest and deportation, Zimbabweans may increasingly attempt to remain 'invisible' and therefore avoid seeking health care when needed, leading to increasing morbidity and mortality as well as increased public health risks in South Africa.
- 8.5.2. Interruption of medication due to deportation, leading to morbidity and mortality. For individuals receiving chronic medication (including but not limited to AIDS and TB patients), the arrest and deportation process is likely to interrupt medication by:
- lack of provision for medication accessibility during the arrest and deportation process
 - lack of availability and accessibility of medication on return to Zimbabwe. ART and other chronic medication (including for TB) remains insufficient in Zimbabwe through both the public health system and through NGO-supported health provision. In areas with high numbers of potential returnees, existing ARV provisions/stock will likely to be overburdened, unless advance provision is made in expectation of returnees.
 - Lack of documentation of treatment undergone in South Africa and the risk of the emergence of drug resistant strains when treatment regimes (drugs and dosages) are modified or broken off.
- 8.5.3. Public health challenges arising from health vulnerabilities during deportation:
- The interruption of medication due to deportation, leading to resistant virus strains: the interruption of chronic medication not only has negative effects on the individual patients but also has public health implications in that resistant virus strains are much more likely to emerge.
 - Loss of medical records and therefore discontinuity of treatment through deportation process & complications regarding different treatment regimes: even in cases where patients on ART are able to access treatment on their return to Zimbabwe, continuity of treatment is likely to be affected by the loss of medical records and the presence of different treatment regimes in South Africa and Zimbabwe. This also has an effect on the potential emergence of resistant virus strains.
- 8.6. Numbers: There are currently no reliable estimates of the number of Zimbabweans requiring or receiving treatment of HIV/AIDS and other chronic diseases (including diseases with a public

health impact). Estimates are difficult since many people are avoiding seeking health care due to fear of discrimination at health care facilities, or they seek and receive health care at dispersed locations and without disclosing their nationality or documentation status to health care providers.

8.7. Existing protection measures in place: the Vhembe District Municipality Standard Operating Procedures include health-related protection responses.

8.8. Health-related Protection Recommendations. PWG recommends that:

1. *Preventative awareness raising among Zimbabweans in South Africa and South African health care providers concerning importance of medical documentation:* Educate Zimbabweans in South Africa about the importance of having copies of their treatment regimes and medication prescriptions with them in case they are arrested and deported or in case they voluntarily return to Zimbabwe. Educate South African public and NGO health care service providers about the importance of giving Zimbabwean patients copies of their medical documentation.
2. *Collection of health documentation and medication:* persons who can prove that they are receiving treatment for a serious health condition should be afforded the opportunity to collect their medications and medical records before the commencement of deportation proceedings.
3. *Department of Health provide personnel at key detention and deportation points:* medical doctors and/or nurses should be present at key detention and deportation points, including Lindela Repatriation Centre, SMG and large police stations in areas with high numbers of Zimbabwean migrants. Such medical personnel should be able to:
 - screen for medical conditions and chronic medication requirements;
 - stabilize the medical condition before continuing with deportation procedures;
 - refer individuals to public health care providers (such as hospitals) as needed. It must be ensured that such referral institutions have the necessary capacities to provide care, especially in high impact areas such as Musina;
 - provide medication needed for the duration of the deportation process as well as the duration of initial reintegration in Zimbabwe (c. 2 months). PWG members are available to assist with the provision and funding of such medications, if necessary;
 - provide documentation regarding medical needs and treatment regimes to facilitate treatment continuity on return to Zimbabwe.

9. Vulnerable Groups: Legal Protection Needs

9.1. UNHCR and Lawyers for Human Rights (South Africa) are lead agencies concerning persons with special legal protection needs, including *de jure* and *de facto* statelessness.

9.2. There are three forms of legal protection needs in relation to the deportation process:

- *de jure* and *de facto* **stateless persons** who have not been able to access (proof of) Zimbabwean citizenship and have therefore also not been able to access the South African special regularisation process. There is also a group of stateless persons, whose statelessness is linked to marginalisation and discrimination in Zimbabwe and who also could be recognized as refugees on these grounds.

- Individuals who have experienced persecution in Zimbabwe but have not been able to access the **asylum system** in South Africa or who have been incorrectly rejected by the asylum system. This also includes the large number of Zimbabweans currently appealing the first instance rejection as unfounded who need a careful review of their refugee claim.
 - Complainants, survivors or witnesses to crimes perpetrated within South Africa, including those of a sexual and violent nature (SGBV) and **parties to pending court proceedings**.
- 9.3. LHR's Statelessness Project has determined that as many as 40% of Zimbabweans in South Africa may be potentially de facto stateless. This may mean a case load of up to 480,000 persons (given an estimate of 1.2 million Zimbabweans in South Africa). It is not known how many Zimbabweans have genuine asylum cases but have not been able to access the asylum system or have been incorrectly rejected by the asylum system.
- 9.4. Statelessness: Basis for vulnerability
- For Zimbabweans born in Zimbabwe after 1984 to at least one foreign parent, this group remain largely unprotected by citizenship law in the country. In 2001 they were required to renounce this foreign citizenship (interpreted rather to be a right to citizenship as opposed to actual exercise or access to that right) and given only a 6 month window in which to do so. Furthermore, this policy was aimed at the white population in and around Harare and nearly no African Zimbabweans were aware of or attempted to meet this requirement of renunciation. Thus, even if they held a valid Zimbabwean ID or passport prior to 2001, this document may today be removed and destroyed if it is discovered (upon renewal of such document) that the person has a foreign parent and did not renounce this citizenship in 2001. This comes to light due to the requirement to produce a long birth certificate listing one's parents' names and nationalities upon application for a *new* ID or passport or upon application to *renew* such a document.
 - This group may, if they successfully renounce the foreign parent's nationality, apply for Zimbabwean citizenship by registration. However they are not guaranteed to succeed in their application. It is prohibitively costly as well as practically impossible for many people in this group to actually go through with renunciation of foreign citizenship and application for Zimbabwean citizenship by registration. One reason is that all these applications must be made in Harare, far from many rural areas where such individuals reside. Another reason is that the Consulates of their foreign parent may not accept that the person in question ever had a right to citizenship in their country; this must be proved in order to "renounce" such citizenship. Consulates may not accept the foreign parent's birth certificate, even if it is indeed available. Thus if the foreign parent is deceased or unavailable, such persons cannot in practice renounce the foreign citizenship. Furthermore, if the foreign parent themselves was never documented in their country of origin, their child born in Zimbabwe will likely not be able to "renounce" much less access such nationality.
 - In terms of documentation from Zimbabwe, many Zimbabweans based in South Africa returned to Zimbabwe during the Zimbabwe Documentation Project in 2010 to obtain a passport or other proof of citizenship that would allow them to apply for ZDP. Many found that the cost of a passport was beyond their financial means, or encountered some other barriers. Many did not even attempt due to lack of resources to travel back to Zimbabwe. Others still applied at the Zimbabwean consulate in South Africa and were issued with passports in recent months.

9.5. Stateless persons should not be deported to a country where they will be unable to enjoy the rights associated with citizenship. Rights potentially at stake in case of deportation to Zimbabwe include:

- Risk of imprisonment: Persons with undetermined nationality, including Zimbabweans, are at risk of prolonged detention in South Africa. Detention of illegal foreigners is meant to only be utilised for purposes of deportation; therefore persons who cannot be deported should not be held in detention. However if specially coordinated measures are not taken, in the development and implementation of which the PWG could play role, there is a high risk these problematic and damageable detentions and possible deportations will occur for many Zimbabweans in South Africa who do not have valid permits to be in the country, and who are also *de facto* or even *de jure* stateless.
- Access to employment: Without enabling documentation, verifying Zimbabwean citizenship, many avenues of employment are closed to individuals of Zimbabwean descent.
- Access to studies: Documents are required for registration at most, if not all, learning institutions in Zimbabwe. For lack of access to these, many would-be students are unable to enroll, with a serious consequence for their individual development..

9.6. Asylum Cases: basis for protection

9.6.1. While many Zimbabweans have applied for asylum in South Africa without strong cases of individual persecution, there are individuals who have experienced persecution in Zimbabwe yet have either been unable to access the asylum system or have been rejected by the system due to fast and precursory processing. These individuals are at risk of arrest and deportation since they do not have legal documentation to be in South Africa. In these cases, deportation would amount to *refoulement* and therefore be against international and domestic law.

9.7. Parties to pending court proceedings: basis for protection

9.7.1. Based on the Constitutional right to access to justice, complainants, survivors or witnesses to crimes perpetrated in South Africa (including SGBV) who are party to criminal proceedings in progress should not be deported while the case is ongoing.

9.7.2. In relation to persons who are party to ongoing court proceedings involving labour disputes or where there is a claim for unpaid monies, steps should be taken to ensure that the person facing deportation procedures is not financially or otherwise prejudiced.

9.7.3. Anyone identified to be in this situation should be referred to a legal organisation for assistance.

9.8. Recommendations on Legal Protection

1. *Screening for potential de jure or de facto statelessness*: the screening process for vulnerable groups should screen for the following types of cases:
 - Individuals born in South Africa to Zimbabwean parents, and who do not have access to documents proving their parents' Zimbabwean citizenship (either because their parents are deceased, unavailable, and/or never possessed such documents);
 - Individuals born in Zimbabwe after 1984, to at least one non-Zimbabwean parent, and did not renounce that foreign parent's nationality as was required in 2001;

- Individuals who have made efforts to obtain or renew enabling Zimbabwean documents (birth certificate, ID document or passport), and have failed in these attempts due to inability to provide required proof or failure to meet legal requirements.
 - For these cases, deportation should be avoided, as in Zimbabwe there are proven realities that they will not be able to obtain or document their Zimbabwean nationality. Alternative legal status options should be considered for these groups. On the other hand, there is also a group of persons who will be able to obtain proper Zimbabwean documentation if they receive legal assistance and support in documenting the missing elements of their claim for nationality. Duly documented, they will be able to rebuild their lives in Zimbabwe as full citizens. If they desire to return to South Africa, they will be able to do so in full compliance with the immigration rules.
2. *Screening for danger of refoulement:* the screening process for vulnerable groups should screen for the following types of cases:
- individuals who have been denied Zimbabwean nationality due to being a member of a particular ethnic or political group. These individuals may have a claim to refugee status based on such denial of nationality, which also renders them stateless;
 - individuals with a well-founded fear of persecution on their return to Zimbabwe.
 - For these cases, deportation must be avoided and access to the asylum system be provided.
3. *Screening for ongoing court proceedings:* the screening process for vulnerable groups should screen for individuals who are complainants, survivors or witnesses to ongoing criminal matters or labour disputes.