

## THEMATIC ARTICLES – GENDER AND MIGRATION

### Sexual Violence against Migrant Women: a Study of the Prevalence of and Responses to the Rape of Migrant Women in South Africa<sup>1</sup>

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**Abstract.** This article investigates the prevalence of and responses to the rape of migrant women in South Africa through the analysis of legislation, secondary sources and interviews conducted by the author with migrant women raped in South Africa. The article considers the legal protections afforded to migrant women in South Africa and the extent to which these safeguard migrant women from rape. The article also assesses whether these legal protections are implemented in practise. It additionally suggests how migrant women could be better protected from rape in South Africa.

**Keywords:** *sexual violence, migrant women, South Africa*

#### Introduction

Rape and xenophobia are both huge problems in South Africa. While rape of migrant women intersects these problems, little research has been carried out into the issue. This article aims to investigate the prevalence of rape of migrant women, the legal protections guaranteed to them and the extent to which the existing legal instruments are implemented in practice. This study also suggests ways in which migrant women could be better protected from rape.

South Africa has the highest prevalence of reported rape in the world<sup>2</sup>. A

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<sup>1</sup> The research assistance and supervision of the staff at the Projects Abroad Human Rights Office, and in particular Theodore Kambwimbi and Lyndon Metembo, is acknowledged and much appreciated.

<sup>2</sup> Human Rights Watch, “No Healing Here: Violence, Discrimination and Barriers to Health for Migrants in South Africa”, December 2009, p35 (1.2 per 1000 people according to the United Nations Office on Drugs and Crime, Centre for International Crime Prevention

study by the Medical Research Council of South Africa, published in June 2009, revealed that 27.6% of the men interviewed had perpetrated rape<sup>3</sup>. This is despite the fact that it is likely that many rapes go unreported and that for those that are, that the prosecution rate is very low: the website of the *One in Nine* campaign, which was set up at the time of Jacob Zuma's rape trial in 2006, states that "only one in nine women who are raped report it to the police" and that "for rape cases that are prosecuted there is an under five percent conviction rate"<sup>4</sup>. The South African Police Services ("SAPS") figures on reported cases of sexual offences in the period April 2008 to March 2009 reveal that 71,500 cases were reported throughout South Africa. Should the estimate of the *One in Nine* campaign prove correct, it would mean that 639,000 people were raped in South Africa, annually.

Xenophobia is also rife as highlighted by the May 2008 racist attacks. In less than a month these led to 135 separate violent incidents being reported, 62 people (including 21 South African citizens) dead and 670 wounded; more than 100,000 displaced<sup>5</sup>. More conservative estimates suggest that only 40,000 were displaced, with 13,872 individuals, on 27 June 2008, in safety sites for internally displaced persons<sup>6</sup>. The attacks were so severe that the army had to be deployed to bring them to an end. The Consortium for Refugees and Migrants in South Africa ("CORMSA") have reported that "in many cases violence stopped only when there were no nationals left to attack or property remaining to loot or destroy"<sup>7</sup>. Violence against migrants did not cease with these attacks: a recent BBC article, from July 2010, reported that foreigners had been injured in one of the townships in xenophobic attacks<sup>8</sup>. The United Nations High Commission for Refugees ("UNHCR") recognises that "xenophobia in the country poses a serious challenge"<sup>9</sup>.

The extent of xenophobia is widespread in the context of population

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"Seventh United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, covering the period 1998 – 2000".

<sup>3</sup> Jewkes, R; Sikweyiya, Y; Morrell, R and Dunkle, K - Medical Research Council, "Understanding men's health and use of violence: interface of rape and HIV in South Africa", June 2009, p1.

<sup>4</sup> <http://www.oneinnine.org.za/ipoint>

<sup>5</sup> Consortium for Refugees and Migrants in South Africa ("CORMSA") "Protecting Refugees, Asylum Seekers and Immigrants in South Africa", June 2009, p40

<sup>6</sup> Marsh, M (UNICEF) "A Rapid inter-Agency Assessment of Gender-based Violence and the Attacks on Non-Nationals in South Africa", July 2008, p2

<sup>7</sup> CORMSA, "Protecting Refugees, Asylum Seekers and Immigrants in South Africa", June 2009, p41

<sup>8</sup> BBC news: <http://www.bbc.co.uk/news/world-africa-10696292>

<sup>9</sup> <http://www.unhcr.org/cgi-bin/texis/vtx/page=49e485aa6>

estimates: the total population of South Africa was estimated at 49,320,500 by Statistics South Africa in mid 2009 and UNHCR currently assess that there are 47,974 refugees and 309,794 asylum seekers in South Africa, but do not assess undocumented migrants<sup>10</sup>. In January 2010 Human Rights Watch estimated that there could be up to 1.5 million<sup>11</sup>. Many undocumented migrants are from Zimbabwe and do not apply for refugee status because of the low rate of success of their applications. Human Rights Watch estimates that South Africa only accepted about 1.5% of asylum claims from Zimbabweans in 2007<sup>12</sup>. Human Rights Watch also states that this is despite the fact that “many are fleeing persecution including rampant political violence and routine arbitrary arrests and detention of political opponents” and because “others are forced to migrate because inflation has made their salaries worth so little that they cannot provide basic needs for their families”<sup>13</sup>.

If CORMSA are correct that 100,000 migrants were displaced in the xenophobic attacks, this would amount to nearly 5.4% of the total migrant population in South Africa, based on the estimates of refugees, asylum seekers and illegal migrants, given above. This percentage is likely to be on the low side because the estimate was reached using Human Rights Watch’s highest estimate of undocumented migrants within South Africa (1.5 million). In addition it is not clear how the estimate, that 100,000 were displaced, was reached by CORMSA, if it was reached by monitoring numbers in safety sites this would not reflect the total amount of the migrant population displaced, as most illegal migrants would not have gone to safety sites, for fear of deportation. Nevertheless in such a context rape of migrant women is likely to be prevalent.

## **Definitions**

The definition of the term rape is found in South Africa under the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.

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<sup>10</sup> Statistics South Africa: “Statistical Release: Mid Year population estimates 2009”, 27 July 2009, p4

and <http://www.unhcr.org/pages/49e485aa6.html>

<sup>11</sup> Human Rights Watch, “Country Summary: South Africa”, January 2010, p1

<sup>12</sup> Human Rights Watch, “No Healing Here: Violence, Discrimination and Barriers to Health for Migrants in South Africa”, December 2009, p15

<sup>13</sup> Human Rights Watch, “No Healing Here” p 16

Section 3 of the Act provides that: *“Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B is guilty of the offence of rape”*<sup>14</sup>.

The term migrant is used in this paper to encompass three definitions: refugee, asylum seeker and undocumented migrant. A refugee is a person that has been approved as a refugee in South Africa in accordance with the provisions of the Refugees Act 1998. Qualification for such status is met if a person:

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

*(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or*

*(c) is a dependant of a person contemplated in paragraph (a) or (b)*<sup>15</sup>.

The term asylum seeker denotes a person with a pending application for refugee status<sup>16</sup>.

An illegal foreigner is a foreigner in South Africa in contravention of the Immigration Act 2002<sup>17</sup>. Broadly, this is any foreigner in the country without a passport or valid temporary residence, or, with a passport but who is in the country for more than 30 days after the expiry of their intended stay and without a valid temporary residence (e.g. asylum seeker permit) or, any person defined as prohibited under section 29 of the Immigration Act 2002<sup>18</sup>. The latter section, for example, includes people with convictions in South Africa, or in countries which have diplomatic relations with South Africa, and those with certain prescribed infectious diseases<sup>19</sup>.

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<sup>14</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, clause 3.

<sup>15</sup> Refugees Act 1998, clause 3.

<sup>16</sup> *ibid.*, clause 22 (1)

<sup>17</sup> Immigration Act, 2002, clause 1 (1) (xviii)

<sup>18</sup> *ibid.*, clause 9 (4).

<sup>19</sup> *ibid.*, clause 29

## **The prevalence of rape of migrant women in South Africa**

No data specifically relating to the rape of migrant women in South Africa is available. However, in July 2008 a report by UNICEF stated that only 8 cases of rape had been enrolled by the National Prosecuting Authority in relation to the xenophobic attacks<sup>20</sup>.

Various organisations have however commented on the issue: Human Rights Watch states that, "South Africa suffers very high levels of rape and other sexual violence, and migrant women are at intense risk throughout their journey and their residence there" and notes that although "sexual violence is a serious threat to the lives and well being of all women in South Africa, migrants are particularly vulnerable to certain forms of sexual and gender based violence because of the risks involved in cross border travel, fear of the authorities, lack of knowledge of rights and risks, and barriers to accessing both the justice system and the health system"<sup>21</sup>.

In addition CORMSA state that, "during the 2008 attacks sexual violence was used as a weapon to displace migrant women and girls from their homes. Such acts included attempted, threatened and real incidences of rape and gang rape" and that "research by FMSP (Forced Migrant Studies Program) on conditions of Zimbabweans in Musina (a border town) reveals that a significant number of cross border migrant women and girls from Zimbabwe continue to be exposed to rape by informal border transporters and smugglers while trying to enter South Africa through clandestine channels due to lack of legal entry requirements"<sup>22</sup>.

In March 2010 at the Projects Abroad Human Rights Office in Cape Town I interviewed four migrant women who had been raped while in South Africa to find out about their experiences and their views on the prevalence of rape of migrant women in South Africa. The Projects Abroad Human Rights Office had previously helped these women. Two of them were interviewed in the presence of their husbands who translated for them. The husbands added their own comments on their wives' experiences. It was agreed that I would not use names

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<sup>20</sup> M Marsh, "A Rapid Inter-agency Assessment of Gender-based Violence and the attacks on Non Nationals in South Africa", July 2008, p12

<sup>21</sup> Human Rights Watch, "No Healing Here", p6 and p36

<sup>22</sup> CORMSA, "Protecting Refugees, Asylum Seekers and Immigrants in South Africa" p17 and p27

but could report the women's views and experiences. In addition two institutions, the Trauma Centre for the Survivors of Violence and Torture in Cape Town ("the Trauma Centre") and the Saartjie Baartman Centre for Women and Children ("SBC") answered a set of questions that I had prepared on the issue of the rape of migrant women in South Africa. Both organisations have worked with migrant women who have suffered sexual violence. The Trauma Centre indicated that it works with 50 migrant women, on average, each year. The SBC indicated that it assisted 12 migrant women from March 2008 to March 2009. Both institutions have approved this article.

Of the migrant women that the Trauma Centre had worked with in 2009, 13 disclosed that they had been raped. Five of these women had been "raped locally and felt it was part of the xenophobic attacks". One of the twelve women housed by the SBC reported that she had been raped in South Africa. Two of the interviewees who spoke to me were raped in May 2008, during the attacks. The other two were both raped in December 2007. In addition two of the women have been attacked since, though not raped, one during the May 2008 xenophobic attacks, when men entered her house, slapped her baby and pushed her. The other was attacked by the same men who had raped her. They beat her with an iron bar and only stopped when people arrived in the vicinity.

Of the women interviewed three were raped by two men and one by four men. One was threatened with a gun, two with knives and one with a gun and knife. One said that a knife had been held to her neck while she had been raped. All the women were of the view that they had been raped because they were foreigners. At the times the rapes were perpetrated one of the women was told "you are foreign: you must go back to your country". Another was told "go home", "this is not your country" and "you are stealing our jobs". Another woman was told "you are foreigners we do not like you". The final woman recalls being told to return to her country.

All the women, except one, knew other migrant women that had been raped. One knew of "loads". This woman had attended counselling after the rape and said that many of the other women at counselling were migrants. Another woman reported that many of the women in the safety site for internally displaced persons in which she was residing had been raped. Another commented that in Phillipi (a suburb of Cape Town) that people were "really raping women" at the time of the xenophobic attacks which she knew because

some of her friends had been victims and because a friend had said this to her.

All four of the women were not surprised that migrant women were raped in South Africa. One commented that it was common for migrant women to be raped, another three of the women said they thought migrant women were more likely to be raped than South African women. One said that this was because “there was little they (migrant women) could do because the country belongs to them” and the husband of another said that migrant women were “soft targets” because “there was no one they could run to for help”. The Trauma Centre however was of the view that the amount of migrant women raped was “not any different to the abhorrent high level of abuse of local women and children”.

It would appear from all the responses that rape of migrant women is prevalent. It is difficult, in view of the small number of women and organisations questioned, to say whether migrant women are raped more often than South African women. The Trauma Centre believes this is not the case, however all the women thought it likely. The SBC said that it was unable to comment but added that “rape is a serious problem in South Africa” and “migrant women may be at a greater risk because of their added vulnerability”. As migrants are often the target of violence (as evidenced by the scale of the May 2008 attacks) it is, in my view, probable that they will be raped more often. Further investigation is however needed to establish if migrant women are at greater risk of rape in South Africa than South African women.

## **Legal Protection against Rape and Xenophobia**

### ***Rape***

Both international and domestic legislation protects against rape. South Africa ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women on 15 December 1995. This convention does not state that signatories have a duty to prevent rape but it does obligate parties to take “*all appropriate measures, including legislation to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise of human rights and fundamental freedoms*”. Clearly rape is at odds with human rights and fundamental freedoms and this provision therefore obligates the state to legislate against it and take other “appropriate

measures”<sup>23</sup>.

The 1996 Constitution of the Republic of South Africa provides legal protection for all persons in South Africa from rape. The two most important provisions of the Bill of Rights (contained within the Constitution) which obligate the state to protect persons in the Republic from rape are clause 12 which states, *“every person has the right to freedom and security of person”*, which includes the right, *“to be free from all forms of violence whether from either public or private sources”* and clause 10 that *“everyone has inherent dignity and the right to have their dignity respected and protected”*.

The former right is derogable but only to the extent that: *“the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:*

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose”* <sup>24</sup>.

This right must be derogable as South Africa, along with every state, is not equipped to protect those within its boundaries from all violence from private sources. The latter right is however non-derogable and obliges the state to protect human dignity.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (“the Act”) is the legislation that explicitly prohibits rape and that puts in place provisions to deal with the investigation and prosecution of rape allegations. It has far reaching aims, set out in clause two, which are to: *“afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures that seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and ultimately eradicate the relatively high incidence of sexual offences committed in the Republic”*. The means by which these goals are to be achieved include, for example, *“protecting complainants of sexual offences and their families from secondary victimisation and trauma by establishing a co-operative response*

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<sup>23</sup> UN Convention on the Elimination of All Forms of Discrimination Against Women, Article 3.

<sup>24</sup> South African Constitution 1996, Bill of Rights, clause 36



*between all government departments involved in implementing an effective, responsive and sensitive criminal justice system related to sexual offences” and by “promoting the spirit of batho pele (“the people first”) in respect of service delivery in the criminal justice system”. This latter goal involves, for example, “entrenching the accountability of government officials; minimising disparities in the provision of services to victims of sexual offences” and “giving proper recognition to the needs of victims of sexual offences through timeous, effective and non-discriminatory investigation and prosecution”.*

The Act also provides that all women who report an alleged sexual offence, either at a health establishment or to SAPS, within 72 hours of the offence, are entitled to post-exposure prophylaxis (“PEP”) at the state’s expense and in accordance with the prevailing treatment protocol<sup>25</sup>. PEP is an antiretroviral drug which helps to prevent a person catching HIV, if they have been exposed to potentially HIV infected blood or body fluids, if administered within 72 hours of such exposure.

This Act also establishes an Inter-sectoral Committee for the Management of Sexual Offences Matters which is responsible for developing and compiling a draft national policy framework<sup>26</sup>. This framework has to: *“(a) ensure a uniform and coordinated approach by all Government departments and institutions in dealing with matters related to Sexual Offences; (b) guide the implementation, enforcement and administration of this Act; and (c) enhance the delivery of service as envisaged in this Act by the development of a plan for the progressive realisation of services for victims of sexual offences within available resources”*<sup>27</sup>.

The Minister responsible for the administration of justice, after consultation with relevant specified departments is, under the Act, responsible for adopting and tabling the policy framework in parliament within one year after the implementation of the Act<sup>28</sup>. This Act was implemented in 2007.

In addition the Act provides that the National Commissioner of SAPS, the National Director of Public Prosecutions and the Director General: Health must publish either directives or instructions (depending on the service). The

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<sup>25</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, clause 28 (1) and (2)

<sup>26</sup> *ibid.*, clause 65

<sup>27</sup> *ibid.*, clause 62

<sup>28</sup> *ibid.*, clause 62 (a)

Act deals with the subject matter of these directives and instructions in broad terms. The national instructions to be published by the Commissioner of SAPS must, for example, deal with *“all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials who are tasked with receiving reports of and the investigation of sexual offences cases, in order to achieve the objects of the Act”*<sup>29</sup>.

All directives and reports were to be submitted within six months of implementation, which occurred in 2007<sup>30</sup>. The National Instructions published by the National Commissioner of SAPS were brought out in 2008. These guidelines are extremely comprehensive and cover the areas specified in the Act<sup>31</sup>.

### ***Xenophobia***

Clause 9 (3) of the Bill of Rights prohibits the state from unfair discrimination directly or indirectly on one or more grounds including: *“race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”* and clause 9 (4) states that *“no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3”*<sup>32</sup>. Both rights are non-derogable in respect of *“race, colour, ethnic or social origin, sex, religion or language”*<sup>33</sup>.

The Immigration Act 2002 provides that the Department of Home Affairs is responsible for: *“preventing and deterring xenophobia within the Department any sphere of government or organ of state and at community level”*<sup>34</sup>. In order to achieve this goal the Department of Home Affairs must *“educate communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees and to conduct other activities to prevent xenophobia”*<sup>35</sup>. To reduce xenophobia the Department may *“organise and participate in community fora or other community based organisations to deter xenophobia and involve the citizenry in the application and implementation of*

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<sup>29</sup> *ibid.*, clause 66 (1) (a)

<sup>30</sup> *ibid.*, clause 66 (4) (a) (i)

<sup>31</sup> National Instruction 3/2008 Sexual Offences

<sup>32</sup> South African Constitution 1996, Bill of Rights, clause: 10, 9 and 37.

<sup>33</sup> *ibid.*, clause 37

<sup>34</sup> Immigration Act 2002, clause 2 (1) (e)

<sup>35</sup> *ibid.*, clause (2) (2) (e)

*this Act and educate the citizenry in migration issues*<sup>36</sup>.

### **Are there sufficient legal mechanisms to protect against rape and xenophobia in South Africa and to meet the needs of rape victims?**

#### **Rape**

Legislation is in place to prohibit rape and to provide mechanisms to standardise the way allegations of rape are dealt with, however the legislation is lacking in various ways. Writers have criticised the Act suggesting that it does not protect the victims of rape as well as it could. The authors of “Feminism vs the State?: A Decade of Sexual Offences Law Reform in South Africa”, for example, argue the Act “excised most of the extensive protective measures proposed for victims”<sup>37</sup>. One example cited is the removal of the provisions of Chapter 7 of the draft bill which provided for the use of close circuit television, intermediaries, support persons and non-disclosure of identity as the default position, to protect and support those alleging rape. The Act however provides that those alleging rape must prove their vulnerability in order to use these support mechanisms<sup>38</sup>. The authors therefore argue that “one of the most foundational and critical aspects of the bill (the protection of vulnerable witnesses during rape trials) was purged in favour of a discretionary policy/practice that – although available under the current law – has been inconsistently applied”<sup>39</sup>.

Furthermore the National Instruction on Sexual Offences provided by the Commissioner of SAPS does not contain provisions regarding implementation such as a mechanism for checking that it is being followed. The Act should have provided that the national instruction cover this. In addition, at the date of writing, the national policy framework has not been adopted, although this should have occurred in 2008. The Inter-sectoral Committee, given the task of compiling the draft framework, only convened for the first time on 17 February 2009<sup>40</sup>. As the national policy framework is required to implement and enforce the Act the delay in its adoption is disappointing.

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<sup>36</sup> *ibid.*, clause (3) (1) (f)

<sup>37</sup> Artz, L and Smythe, D “Feminism vs the State?: A Decade of Sexual Offences Law Reform in South Africa” pp8-9

<sup>38</sup> *ibid.*, p12

<sup>39</sup> *ibid.*, p12

<sup>40</sup> Parliamentary Monitoring Group, Summary of the Justice, Crime Prevention and Security Cluster, on the 5<sup>th</sup> March 2009 and published on 9 March 2009.

## ***Xenophobia***

It is surprising, in light of the May 2008 xenophobic attacks and ongoing xenophobic attacks since that date, that more has not been done legislatively to protect migrants against xenophobia. CORMSA recognise this and state that the Department of Justice should “strengthen justice mechanisms to protect the rights of minority and marginalised groups”<sup>41</sup>. The Immigration Act 2002, for example, does not set out how the broad requirements placed on the Department of Home Affairs, to deter and prevent xenophobia, should be implemented, which is needed.

### **Are such legal mechanisms from rape afforded to migrants?**

Refugees enjoy the same legal protections as citizens under the Refugees Act 1998<sup>42</sup>. The Refugees Amendment Act 2008 entitles asylum seekers to “*the rights contained in the Constitution of the Republic of South Africa in so far as those rights apply to Asylum Seekers*”<sup>43</sup>. This means that certain constitutional provisions apply to them (in particular clauses 10 and 12 of the Bill of Rights, mentioned above, which places a duty on the state to protect against rape). The rights that do not apply to asylum seekers are those restricted to citizens, for example: “*Every citizen has the right to choose their trade occupation or profession freely*”<sup>44</sup>. In addition provisions of the Immigration Act 2002 protect asylum seekers from deportation<sup>45</sup>.

Legislation does not explicitly stipulate that constitutional rights apply to illegal foreigners, however rights, in the Bill of Rights, couched in general terms apply to all people in South Africa. Illegal foreigners therefore equally have the right “*to be free from all forms of violence whether from either public or private sources*” and to the protection of their inherent dignity under clause 10. In addition all illegal foreigners are entitled to access health services with or without a permit and should not be charged higher fees for doing so<sup>46</sup>.

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<sup>41</sup> CORMSA. “Protecting Refugees, Asylum Seekers and Immigrants in South Africa”, p45

<sup>42</sup> Refugees Act 1998, clause 27 (b)

<sup>43</sup> Refugees Amendment Act 2008, clause 27A (d)

<sup>44</sup> South African Constitution 1996, Bill of Rights, clause 22.

<sup>45</sup> Immigration Act 2002, clause 21 (4)

<sup>46</sup> F G Muller, “Refugees/Asylum Seekers with or without a permit”, Revenue Directive, 19 September 2007 and Dr I Bromfield, Chief Executive of City Health, Letter to Treatment Action Campaign (responding to their letter of 13 June 2008), access via <http://blacksash.org.za/images/media/healthdocument.jpg>

Legislation puts in place procedures to find and deport illegal foreigners. The Immigration Act 2002, for example, enables any police officer to request identity documents from any person in South Africa, if the officer believes, on reasonable grounds, that that person is not entitled to be in South Africa. That person can also be detained without warrant, until the person's status and or citizenship is ascertained<sup>47</sup>. Therefore illegal foreigners are extremely unlikely to approach the police for assistance if they have been raped, for fear of deportation. This probably means that they are more susceptible to rape and other violations.

### **Do migrants have adequate legislative protection from rape?**

Legislative provisions protect migrants from rape if they qualify for refugee status or have applied for it. However the definition of a refugee is political and does not cover economic refugees (which leaves most Zimbabweans, for example, unprotected). The solution to this is political. Groups such as CORMSA and Human Rights Watch argue that the proposal set out by Home Affairs Minister Nosiviwe Mapisa-Nqakula in April 2009 for special dispensation permits, for eligible Zimbabweans, enabling them to remain legally in South Africa for one year, should be implemented<sup>48</sup>. The current situation is untenable leaving many unable to enforce their constitutional rights.

It is clear that the rape of migrant women is commonplace and it is probable that the amount of migrant women raped in South Africa is greater than the amount of South African women raped, relative to their numbers. To protect migrant women and to send an anti-xenophobic message South Africa could introduce legislation to target hate crimes against foreigners as well as other vulnerable social groups.

This type of legislation has been introduced in both Belgium and Denmark. Articles 32-42 of Belgium's Law of 10 May 2007, for example, provide that "*hatred against, contempt for, or hostility to a person on the grounds of his so-called race, colour of skin, descent, national or ethnic origin, nationality, sex, sexual orientation, marital status, birth, age, fortune, belief or philosophy of life, current and future state of health, disability, language, political conviction or physical or genetic*

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<sup>47</sup> Immigration Act, 2002, Section 41 and section 34 (1)

<sup>48</sup> CORMSA, "Protecting Refugees Asylum Seekers and Immigrants in South Africa", p36 and Human Rights Watch "No Healing Here", p16.

*characteristics or social origin*” are aggravating circumstances that can double the penalty for certain specified offences which include indecent assault and rape.

### **To what extent is legislation implemented in practice?**

The Act has broad goals such as: *“to combat and ultimately eradicate the relatively high incidence of sexual offences committed in the Republic”*<sup>49</sup>. The Act does not explicitly state that it intends to increase reporting, however if the aim is eradicate sexual offences then this must also be a goal. The Act also expressly aims to achieve *“effective prosecution”* and thereby greater accountability<sup>50</sup>.

Prior to the coming into force of the legislation (when the common law offence of rape was most often used to prosecute sexual offenders) it appears that perpetrators of rape were often not held accountable<sup>51</sup>. A study carried out by the Tshwaranang Legal Advocacy Centre in 2008, which followed attrition in rape case through the criminal justice system in 2003 in Gauteng, showed that from the sample of 2047 cases reported at police stations only 359 were referred to trial and only 87 resulted in convictions (4.3%)<sup>52</sup>.

For those convicted prescribed minimum sentences (these differ according to the age of the victim and type of offence – for example, the prescribed minimum sentence for most rapists is 10 years imprisonment, unless specific features of the rape or victim mean that the rapist qualifies for a prescribed minimum sentence of life imprisonment, for example if the victim is under 16<sup>53</sup>) were not in all cases adhered to by magistrates who often used their power under section 51 (3) of the Criminal Law Amendment Act 1997 to distinguish “substantial and compelling circumstances” to depart from the prescribed minimum sentence<sup>54</sup>. The study shows that factors such as the perceived absence of harm to the victim, in particular physical harm, could in the view of certain magistrates amount to “substantial and compelling circumstances”<sup>55</sup>. The Criminal Law (Sentencing)

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<sup>49</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, clause 2

<sup>50</sup> *ibid.*, clause (2) (e) (i)

<sup>51</sup> [http://www.childlawsa.com/docs/mediaguides/sexual\\_offences\\_media\\_guide.pdf](http://www.childlawsa.com/docs/mediaguides/sexual_offences_media_guide.pdf), p 4

<sup>52</sup> Vetten, L and van Jaarsveld, F (acting for the Tshwaranang Legal Advocacy Centre to end violence against women) “The (Mis)Measure of Harm: An Analysis of Rape Sentences handed down in the Regional and High Courts of Gauteng Province”, January 2008, p 9

<sup>53</sup> Vetten, L and van Jaarsveld, F, “The Mismeasure of Harm” p1

<sup>54</sup> Criminal Law Amendment Act 1997, s51 (3)

<sup>55</sup> Vetten L and Van Jaarsveld, F, “The Mismeasure of Harm, p 13-15

Amendment Act of 2007 has attempted to address this issue by defining what circumstances are not “substantial and compelling” (which for example include a complainant’s sexual history)<sup>56</sup>. A further study is needed to show what effects this amendment and the coming into force of the Act are having on accountability and sentencing in cases where rape is reported.

### **To what extent are the aims of the Act achieved for migrant women?**

Migrants are less likely to report rape than South Africans as most are illegally in South Africa. Many genuine asylum seekers are, according to Human Rights Watch, left without documentation, in any event, due to backlogs in the system and many genuine claims are unrecognised<sup>57</sup>. According to the “National Survey of Refugee Reception” carried out by the Forced Migration Studies Programme only 41 per cent of asylum seekers were able to obtain asylum seeker documentation within the 14 day window in which they are allowed to remain in South Africa without such documentation under a transit permit<sup>58</sup>. When migrants are undocumented they are extremely unlikely to report rape.

Even if migrants have the relevant paperwork many do not want to report rape. The Trauma Centre reported that of the 13 migrant women, that they had worked with in 2009, that had disclosed that they had been raped that, “very few reported it because of the shame and it is taboo in their particular culture”. No doubt shame is a factor preventing many women, both South African and migrant, from reporting rape, but cultural taboo is more likely to affect migrants. In addition to taboo the “Rapid Inter-agency Assessment of Gender-based Violence and the Attacks on Non-Nationals in South Africa”, conducted by UNICEF, in July 2008, records that one of the predominant reasons that health and security services were not accessed by migrant women that had been subjected to sexual violence during the attacks was due to “extremely low levels of trust of service providers”<sup>59</sup>.

Worryingly, the low level of trust in service providers may not be without foundation. CORMSA, for example, have found that of the 1627 originally arrested for the May 2008 attacks only 469 were prosecuted. Of those prosecuted only 70

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<sup>56</sup> *ibid.*, p 4

<sup>57</sup> Human Rights Watch, “No Healing Here”, p4

<sup>58</sup> *ibid.*, p18

<sup>59</sup> Marsh, M, “A Rapid Inter-agency Assessment of Gender-based Violence and the Attacks on Non-Nationals in South Africa”, p12

were found guilty. There were no convictions for rape or murder despite the fact that many such incidents occurred<sup>60</sup>. CORMSA also believe that “research indicates that police and the courts have regularly released suspects due to pressure from communities and their local (and sometimes provincial) leaders”<sup>61</sup>. Other evidence also suggests that SAPS may discriminate against migrants. For example, a police diversity survey, conducted in 2004, using a representative sample of police around Johannesburg, found that 87% of police believed that most undocumented migrants in Johannesburg were involved in crime. The author stated that “these perceptions could make undocumented migrants more vulnerable to police abuse”<sup>62</sup>. In addition CORMSA have found that some police officers supported or passively tolerated the violence and that others were involved in the looting<sup>63</sup>.

Of the four women who I interviewed, one reported that she had been well treated by the police, two had not reported the rape, and one felt that her case had not been dealt with properly because she was a foreigner. This woman said that the police, who had investigated her allegation, had not wanted to assist her but the inspector, whom she said was good, had ordered them to. Her husband reported that he had spoken to the police twice after the rape and both times the police had said that they would visit them in the safety site that they were staying in. The police did not visit, despite having their tent number. When the woman’s husband spoke to them on the phone the police had said they could not find the men responsible. In January 2009 this same woman reported that she had been seen by the men who had previously raped her, that they had followed her, and had hit with an iron bar repeatedly, which had only stopped when people arrived in the vicinity. The police told this woman that they could not do anything, as they did not know what the men looked like. They said that the woman should return to the camp and call again if she saw the men.

It was the view of this woman’s husband that the police may have “rejected” the case as it was a refugee’s case and therefore “had no value to them”. His view of the police may have been coloured by his own experience of police xenophobia: in 2005 he had been attacked and had called the police. When

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<sup>60</sup> Human Rights Watch, “South Africa”, January 2010, p 2, and CORMSA, “Protecting Refugees, Asylum Seekers and Immigrants in South Africa”, p35

<sup>61</sup> CORMSA “Protecting Refugees, Asylum Seekers and Immigrants in South Africa”, p42

<sup>62</sup> Masuku, T, “Targeting Foreigners: Xenophobia among Johannesburg’s Police”, SA Crime Quarterly No 15, March 2006

<sup>63</sup> CORMSA, “Protecting Refugees, Asylum Seekers and Immigrants in South Africa, p41



they arrived they said “if you stayed in your country those guys would not have attacked you. This is their country”.

The fact that the woman and her husband were unhappy with the way the investigation was carried out may suggest that the police did not deal with the reported rape as well as they should have. The Trauma Centre also state that women who report rape only occasionally receive adequate treatment and support, but do not perceive a distinction between the treatment that migrant women and South African women receive.

Only two of the interviewees went to hospital after their attack. One was required to show her refugee status and the other was not asked for documents. The fact that one woman was asked for an identity document breaches the government’s 2007 Revenue Directive. Both women said they had been given AIDS medicine and HIV medicine and therefore the state met its obligation to provide PEP. It appears that one of the women may not have adequately understood the health care process: as she said that she went to hospital after the rape, but said that “there was no problem with HIV”. She did not attend the next appointment made for her at the hospital. In this case it appears that the interviewee probably misunderstood the person treating her. An HIV test taken close to the time of a rape does not, in most cases, show if the exposed person has contracted HIV, as a result of the rape; instead, it confirms that person’s HIV status prior to the rape. It is necessary for the victim to return to hospital for another HIV test, around six weeks after the rape, to establish if the victim has been infected<sup>64</sup>. This woman’s misunderstanding could mean that she has contracted HIV which in turn could mean that she has infected others. This misunderstanding could have resulted from the fact that the woman did not speak good English. This highlights the language barrier faced by some foreigners, raped in South Africa.

The interviews conducted and the questions asked of the two NGOs do not establish if South Africans and migrants receive the same treatment from the police and healthcare providers, because the sample of women and organisations that assisted is small. However the low level of prosecutions resulting from the May 2008 attacks suggests that the police may not have investigated migrants’ reports adequately. It certainly appears, from both the interviews, and this information

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<sup>64</sup> World Women’s Association training on HIV and AIDS in Cape Town in February 2010. Other organisations have said that women should take three HIV tests post rape, one six weeks afterwards, one three months afterwards and one six months afterwards, for example: <http://www.doh.gov.za/aids/docs/after-rape.htm>

that the Act's goals of *"entrenching the accountability of government officials; minimising disparities in the provision of services to victims of sexual offences"* and *"giving proper recognition to the needs of victims of sexual offences through timeous, effective and non-discriminatory investigation and prosecution"* have not been met.

## **Conclusion**

Although the Act aims to reduce the high level of sexual offences in South Africa and to provide effective and standardised investigation for those reporting rape further legislation is required to supplement its provisions and to assist victims. In addition the legislation in force to counter xenophobia is insufficient in the context of the magnitude of the problem. Legislation needs to be introduced that charges a body to draw up guidelines for the Department of Home Affairs on how to meet its legal obligation to prevent xenophobia. These guidelines should contain provisions relating to implementation and enforcement.

To deal with the high prevalence of rape in South Africa the national instructions to guide, implement and enforce the provisions of the Act must be brought into force soon, as publication is currently close to two years behind target. In addition legislation obligating SAPS, the Department of Public Prosecutions and the Department of Health to publish measures to enforce and implement the guidelines produced under the ambit of the Act, is required.

What legislation there is to deter xenophobia is not implemented properly. Likewise the more wide-ranging legislation intended to guide service providers, dealing with rape, is not implemented effectively. Rape victims and victims of xenophobic attacks are failed by low rates of reporting, which is, to an extent, due to distrust of service providers, and low rates of prosecution (for example, after the xenophobic attacks in May 2008).

This study suggests that it is likely that more migrant women are raped than their South African counterparts. A wide ranging research study is however required to investigate the extent of the problem. If this research concludes that migrant women are indeed more vulnerable to rape than South African women the government must provide targeted assistance to such women. The government could, for example, introduce legislation to extend sentences for hate crimes, including rapes perpetrated for xenophobic reasons. In terms of implementation,

the government should target more resources towards the migrant population and educate migrants about their rights. In addition as accountability is low, which is suggestive of institutionalised xenophobia, the Department of Home Affairs must do better to meet the obligation imposed on it by the Immigration Act 2002, to prevent and deter xenophobia in all spheres of government and organs of state<sup>65</sup>.

It is also necessary to address the issue of illegal foreigners, who seek asylum in South Africa, due to the economic situation in their country of origin (Zimbabwe, for example) as they can neither acquire refugee status, nor return home. If South Africa does not provide these people with short term residence permits, as the dominant economic power in the south of Africa, it must do more to stabilise the economic situation in Zimbabwe.

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<sup>65</sup> Immigration Act 2002, clause 2 (1) (e)