Southern African Migration Project

Evaluating Refugee Protection in South Africa

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Editorial Note:

This brief by Jeff Handmaker updates an earlier article published in Africa Today 48.3 (2001). Additional feedback and input on this paper was gratefully received from Dosso Ndessomin of the Coordinating Body of Refugee Communities (CBRC) in Johannesburg and Jacob van Garderen, Refugee Rights Project Co-ordinator at Lawyers for Human Rights (LHR), South Africa.

Contents

1.0 Introduction

1.1 South Africa's policy on refugees has its origins in the country's much-criticized Aliens Control Act (96 of 1991) (ACA), which in numerous respects has failed to provide adequate guarantees to applicants (de la Hunt 1998,2002: 123; Human Rights Watch 1998:170; Handmaker 1999a, 1999b). Until the recent implementation of its first ever Refugees Act (Act 130 of 1998) in April 2000, South Africa's policy on refugees depended on the ACA, with the Department of Home Affairs (DHA) responsible for enforcement.[1]

1.2 This paper evaluates the process of refugee policy reform that began in 1996. This process led to the Refugees Act in 1998. The Act's accompanying regulations were only released one and a half years later in April 2000. More recently, the Chairperson of the Refugee Appeals Board released the first "Draft Rules" in June 2000, which have since gone through several additional drafts but have not yet been finalized. The Ministry of Home Affairs has furthermore proposed a Refugees Amendment Bill and accompanying explanatory Memorandum in 2001.[2]

1.3 This policy process has been controversial, both in its making and in the final product (but see Handmaker, de la Hunt, and Klaaren 2001). This paper focuses on several particularly contentious issues, notably temporary protection, repatriation, the proposal for containment of refugees in "reception centres," the arbitrariness of the refugee procedure as it currently operates and conflicts between the new refugee regime and proposed migration policies.

2.0 Refugee Movements to South Africa

2.1 After years of being systematically turned away, the office of the United Nations High Commissioner for Refugees (UNHCR) was permitted to establish a presence in South Africa in 1991. Once it gained a mandate to operate in South Africa, the UNHCR began addressing "durable solutions" for returning South African exiles, and an estimated 300,000 Mozambicans who fled the 1980s civil war in their country, but had never been formally recognized by the South African government. The return of exiles involved a burdensome program of re-integration, concerning in many cases the re-acquiring of South African citizenship. The problems facing the former Mozambican refugees proved to be even more complex.

2.2 To implement the program for former Mozambican refugees, the UNHCR facilitated the establishment of a tripartite commission, in co-operation with the governments of South Africa (represented by the Department of Home Affairs) and Mozambique (Handmaker 1999a:293). This Commission recommended two solutions. The first was for a repatriation programme between the two governments and coordinated by the UNHCR.

The second recommendation was for legal residence status ("regularization") to be granted to the former Mozambican refugees. Approval for this program was granted by the South African cabinet in 1996. After extended delays, implementation began in February 2000 (Johnston 2001) under quite controversial circumstances (Handmaker and Schneider 2002). As the Mozambicans had never formally been recognized as refugees by the apartheid government, it was necessary for them to be retrospectively

"recognized" for the purposes of the time-limited repatriation program. Legal recognition was achieved through a basic determination procedure, contained in Passport Control Instruction No. 20 of 1993 issued in terms of the Aliens Control Act. This procedure for establishing the refugee status of Mozambicans laid the basis for Passport Control Instruction No. 63 of 1994, which together with other instructions and a "Basic Agreement" signed by UNHCR and South Africa, became the basis of South Africa's pre-1998 refugee policy (Handmaker 1999a:292-303).

The repatriation program failed to meet its own, modest goals, resettling less than 35,000 refugees (Johnston 2001: 2). Its implementation was criticized in a number of respects, including reliance on certain wrong assumptions, misinformation and inadequate consultation (Dolan 1997). The failure of the repatriation program to provide a "durable solution" to the majority of Mozambican refugees meant that they ended up once again in a "legal limbo", which the regularization program equally failed to remedy (Handmaker and Schneider 2002).

2.4.1 Refugee movements to South Africa post-1990 have taken on a different character. Not long after the South African government introduced asylum determination procedures for individual applicants in 1993, a "trickle" of applicants began to arrive. The flow increased steadily between 1995 and 1998, later leveling off at approximately 20,000 per year (Table 1). Asylum-seekers came primarily from nearby countries such as Angola, and also from the Great Lakes area (Zaire (DRC), Burundi, and Rwanda) and the Horn (Sudan, Somalia, and Ethiopia). A smaller number arrived from West African countries, mainly Nigeria and Senegal, though also Côte d' Ivoire, Cameroon, and other countries (Table 2). A larger number of applicants have been arriving from India and Pakistan. In June 2000, they made up 18% of the total applications received, and 31% of applicants rejected (Table 3). Bearing in mind the current backlog, approved applications to date have overwhelmingly (88%) been from three countries perceived to be "refugee generating," namely Somalia, Angola, and Zaire/Democratic Republic of Congo (Table 4).

2.5 Many in official circles hold the view that the majority of applicants are bogus[3], and the DHA has consequently introduced a variety of restrictive policies, including one that prohibits asylum seekers from work or study[4]. While the government has persistently denied its existence (de la Hunt 2002: 49) the much-rumored introduction of a "white list" (of non-refugee generating countries), or at least the well-documented practice of consistently denying asylum to nationals of certain countries with limited justification, has been resisted by NGOs who challenge the notion that any one country can be considered "safe," particularly in relation to individuals targeted for persecution.

2.6 There have been calls for an improvement in the efficiency of the Department of Home Affairs' management of the asylum determination procedure, which has so far led to incredibly long delays, and a substantial backlog in applications. In combination with a cumbersome, inefficient and restrictive migration and immigration policy and implementation this has led to a situation where migrants (many of whom are highly skilled) seek residence in South Africa through the asylum system, irrespective of whether they may be suffering persecution.

Table 1: Refugee Applications in South Africa, 1995-2001

Source	Dated	Received	Approved	Refused*	Outstanding
UNHCR (State of the World's Refugees)	May 1995	3,644	383	517	2,744
DHA/UNHCR (recorded figures)	June 1996	16,967	1,915	5,649	9,403
DHA/UNHCR (recorded figures)	August 1997	32,510	4,002	6,118	22,390
DHA**	November 1998	47,612	7,927	19,031	20,654
DHA/UNHCR (recorded figures)	June 1999	54,759	8,504	25,020	21,235
DHA/UNHCR (recorded figures)	April 2000	60,278	15,006	29,219	16,053
DHA/UNHCR (recorded figures)	April 2001	64,341	17,198	34,184	12,959

* Refused includes: Rejected, cancelled, referred, extended, withdrawn or manifestly unfounded applications

** Speech by Deputy Minister of Home Affairs to Parliament, 5 November 1998

Table 2: Receipt of Refugee Applications by Country of Origin, To April 2001		
Country	**Number**	**%**
1 Zaire/DRC	7,677	11.9
2 Angola	6,859	10.7
3 India	6,385	9.9
4 Somalia	5,952	9.3
5 Pakistan	5,336	8.3
6 Nigeria	5,302	8.2
7 Senegal	4,507	7.0
8 Ethiopia	3,239	5.0
9 Burundi	2,031	3.2
10 Congo-Brazzaville	1,618	2.5
11 Tanzania	1,473	2.3
12 Bulgaria	1,441	2.2
13 Ghana	1,400	2.2
14 Bangladesh	1,310	2.0
15 Rwanda	1,203	1.9
Others	8,608	13.4
Top 15	55,733	86.6
TOTAL	64,341	100.0

Source: UNHCR/Department of Home Affairs

Table 3: Rejected Applications, To April 2001			
Country	**Number**	**% Total**	**% Applications**
1 India	5,625	17.5	88.1
2 Nigeria	4,338	13.5	81.8
3 Pakistan	4,174	13.0	78.2
4 Senegal	3,686	11.4	81.8
5 Ethiopia	1,934	6.0	59.7
6 Angola	1,640	5.1	23.9
7 Bulgaria	1,217	3.8	n/a
8 Ghana	1,076	3.3	n/a
9 Bangladesh	946	2.9	72.2
10 Tanzania	868	2.7	58.9
Others	6,695	20.8	n/a
TOTAL	32,199	100.0	50.0

Source: UNHCR/Department of Home Affairs

Table 4: Approved Applications, To April 2001			
Country	**Number**	**% Total**	**% Applications**
1 Somalia	5,330	31.0	89.5
2 Zaire/DRC	4,886	28.4	63.6
3 Angola	4,471	26.0	65.2
4 Burundi	941	5.8	46.3
5 Congo-Brazzaville	661	3.8	40.9
6 Rwanda	604	3.5	50.2
Others	305	1.5	
TOTAL	17,198	100.0	26.7

Source: UNHCR/Department of Home Affairs

3.0 Making the Refugees Act

3.1 The first proposal to introduce refugee legislation came in 1996, with the preparation of an initial draft refugee bill by the DHA. This was followed by the circulation of a second draft, which received substantial critical public commentary.

The DHA also showed itself, at the outset, to be open to criticism and debate[5] by its circulation of proposed policy documents and other meetings with civil society representatives. In November 1996, the departmental process was put on hold, pending the appointment of a Task Team by the Minister of Home Affairs. The Task Team produced a Draft Green Paper on International Migration in May 1997 (Republic of South Africa 1997). The Green Paper devoted a whole chapter to the refugee issue.

3.2 The Green Paper recommendations on refugee policy were heavily influenced by the work of the international "Reformulation of Refugee Law Project."[6] The proposals were commented on by various organizations and government departments, providing feedback from a wide range of perspectives and raising a number of substantive concerns. Particular attention was focused on the Green Paper's recommendations for temporary protection; its "solution-orientation" and proposals for "burden-sharing" within the region (UNHCR 1997; Rutinwa 1997; Handmaker 1998, 1999a:299-304; Handmaker, de la Hunt, and Klaaren 2001).

3.3 The Green Paper also recommended separate policy processes for migration and refugees. In May 1998, the Department of Home Affairs appointed a Refugees White Paper Task Team. The task team consisted of members from the Department, civil society and UNHCR, which was provided with a "Working Draft White Paper and Refugee Bill" drafted by the DHA. The working draft of the bill closely resembled the problematical 2nd Draft Bill circulated in 1996, indicating that little progress had been made within the DHA in the interim. However, the White Paper Task Team was also under a mandate to draw reference from the recommendations of the Draft Green Paper.

3.4 Based on the recommendations of the Task Team, the DHA presented the Refugees White Paper to the public in a relatively short space of time on 19 June 1998 (Republic of South Africa 1998). The Department received public submissions, and the Task Team made further amendments and recommendations to the Draft White Paper and Refugees Bill. These in turn were presented to the Parliamentary Portfolio Committee on Home Affairs. However, before the Committee received these documents, the State Law Advisors office extensively revised the Draft Bill, making changes to the refugee definition (which originally had repeated that contained in the International Conventions) and providing a more restrictive approach to determination.

3.5 The Portfolio Committee's amendments to the Draft Bill eventually resulted in the Refugees Act being passed by a consensus of the National Assembly on the 5th of November 1998. There was broad-based political support for the Bill. Following assent by the Council of Provinces on the 20th of November, the Bill became law when President Nelson Mandela gave his signature on the 2nd of December 1998. However, enthusiasm over the new legislation quickly turned to frustration, as the Act did not come immediately into force. Hence, the asylum determination regime

continued to be administered in terms of the Aliens Control Act, with all of its accompanying problems (Klaaren 2000).

3.6 The Regulations to the Refugees Act were eventually issued by the Department of Home Affairs in April 2000. While the bringing into force of the Refugees Act was generally welcomed, this was overshadowed by the contents of the Regulations themselves, again raising concerns over implementation and the rights which refugees and refugee applicants ought to be entitled to, both during the course of the determination procedure, and following the granting of refugee status. In particular, the DHA has consistently failed to issue refugee identity documents[7] and travel documents to recognized refugees who need it to access services, apply for jobs, open bank accounts and avoid being arrested and deported on suspicion of being illegal in the country. The Refugee Appeals Board's Draft Rules, released in June 2000 were less contentious.

4.0 Temporary Protection and Repatriation

4.1 There has been considerable political resistance in South Africa to refugee integration. The granting of refugee status has, since its inception, been temporary, and indeed the DHA has still been 'sending refugees back' to have their asylum applications reconsidered after their refugee permits have expired, despite court orders to the contrary[8]. Beginning with the former Mozambican refugees, it has always proved much easier (politically) to justify a program for refugee repatriation than one regularizing their status and integrating them into the South African community (Handmaker and Schneider 2002; Johnston 2002). Following the Mozambican repatriation program, and with the introduction of asylum determination procedures on an individual basis in 1994, it became quite clear that the government would be reluctant to grant a more permanent status to new refugee arrivals as well (Handmaker 1999a:299).

4.2 The Refugees Act provided (in section 27c) that a refugee: "is entitled to apply for an immigration permit … after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely." This provision has yet to be fully tested[9], and is likely to prove controversial, not least because it is notoriously difficult to ascertain whether a refugee will remain so indefinitely, though situations which lead to refugee status rarely resolve themselves within a period of five years (Handmaker 1998:7, 1997:967).

4.3 The Green Paper insisted that it did "not endorse an understanding of refugee protection as an alternative means to immigrate permanently to South Africa" (4.2.2). No commentator fundamentally disagreed with this statement. However, some maintained that, notwithstanding inevitable abuse of the procedure, attempts to stay integration in all cases until after five years (given that a significant number already experienced long delays in the determination procedure) would be inhumane. Furthermore, such a measure would be contrary to domestic and international human rights standards (Handmaker 1999a:301-2). Advocates of the Green Paper's model of temporary protection, including Barutciski (1998), argued that such concerns relied on "false" comparisons with the application of temporary protection in Europe, which he said was "characterised by the absence of individualised status determinations because

they involved perceived mass inflows. Protection was granted to groups deemed to require protection, rather than individuals determined to satisfy the criteria for refugee status" (Barutciski 1998: 713).

4.4 Barutciski's description of temporary protection in Europe actually very closely describes how asylum determination procedures operate in practice in South Africa. Despite the limited number of applications received, the government seems to believe that the country is experiencing a "mass inflow," and has expressed its desire to introduce reception centres. The government's concern appears to be related more to a seriously under-resourced department than anything else. Further, applications relating to individual persecution take many years to decide, and are often rejected on unsustainable grounds (Kerfoot 2001). It is now fairly well established that the large majority of positive decisions granting refugee status in South Africa are based either on assumptions of whether a country is "refugee generating" and falling within the broader OAU definition (van Beek 2001) or considered "safe."[10]

4.5 The asylum determination procedure in South Africa, and indeed the rule of law in general, has for some time operated in a climate where rights entitlement (particularly prior to 1994) has traditionally been quite limited, and indeed is constantly being tested. Yet the asylum procedure has, by turns, become more and more restrictive. In other words, there has been no "nexus" established in South Africa between a limited rights regime, and the liberalizing of asylum procedures. In fact, the primary issue is the lack of basic administrative justice in the administration procedure itself (Klaaren 1996, 2000).

4.6 A further argument put forward challenging the viability of "temporary protection" concerns the "psycho-social risk" to refugees. In this sense, the period in which one's status in a country was uncertain could itself give rise to concern. Psychologists have concluded that a prolonged period of uncertainty in one's residential status can result in considerable psycho-social harm to refugees (Silove 1997).

4.7 It has been noted that "most refugee movements have tended to result in permanent exile of the displaced populations" (Rogge 1994). In recent years, the notion of repatriation as the "best solution" has been challenged, with some arguing that *why* refugees might want to return home is as important, if not more so, than *how* they return (Bakewell 1998). Others maintain that repatriations are often impossible to satisfactorily implement, since programs often ignore the *causes* which led to displacement in the first place (Voutira 1998). Finally repatriations are in many cases undertaken in circumstances where "conditions of absolute safety" are seriously questioned (Handmaker 1997). Even the UNHCR, traditionally very much in favor of repatriation as a solution has recently advocated in favor of local integration, particularly for "urban-based" refugees (Geddo 2001).

4.8 In short, it is no longer realistic to *assume* repatriation is the ideal solution, though there may well be occasions in which repatriation can be a viable solution, provided programs are conducted in conditions of dignity, and recognize certain practical obstacles (Handmaker 1999b). Such programs ought to at least benefit from past experience, recognizing that "repatriation is anything but problem free" (Rogge 1994:22).

5. 0 Proposed Reception Centres

5.1 Section 35(1) of the Refugees Act allows for the designation of "areas, centres or places" for the temporary reception of asylum seekers or refugees in situations of "mass influx." In 1999, the Department of Home Affairs released a "Discussion Document" to civil society organizations and the UNHCR, proposing the establishment of "Reception Centres," where asylum seekers would be required to stay while their applications for asylum were being processed (Department of Home Affairs 1999). This Document was informed by a desire to "curtail rampant corruption, crime and abuse, that have made the refugee program in South Africa a backdoor for illegal migration by persons seeking primarily economic betterment." The Department went on to say that "it is therefore understood that decisive measures should be taken, consistent with international refugee law and protection principles, to curb such abuse and restore the credibility of the institution of asylum" (Department of Home Affairs 1999:1).

5.2 The intention was to get civil society organizations to endorse this proposal, with the view to having centres established in far-off, rural areas (van Garderen 1999b:14). Instead, the proposal faced strong resistance, particularly from human rights organizations who feel that the project was not feasible, not least on economic grounds (van Garderen 1999a:3). It is also felt that the establishment of centres would "have serious implications on some of the fundamental rights currently enjoyed by asylum-seekers." From an administrative law point of view, the main contention against centres has been that the provision of the Act, ought only to be used in circumstances of a sudden "mass influx" (van Garderen 1999a:3), which in the current situation is clearly not the case.

5.3 The issue of reception centres again became an issue during the period leading up to the March 2002 elections in Zimbabwe. Preparations for a reception centre began approximately 8 months before the election in anticipation of a possible 'mass influx' of refugees, though these were abandoned after it became evident that no such 'mass influx' would take place and indeed no formal declaration of this was made by the Minister of Home Affairs, as required by the Refugees Act Regulations. However, as these preparations were being undertaken, DHA officials in regional refugee reception offices confirmed that no applications for asylum from Zimbabwe nationals would be accepted and applicants were instead referred to Beitbridge border post. Officials at the border post had, meanwhile, not been prepared for receiving refugee applications.

5.4 The Discussion Document undertakes that there be a "maximum delay of four months" (Department of Home Affairs 1999:4). Internationally, the period of time in which a refugee is normally confined to a reception centre, which is dependent on the efficiency of the asylum determination procedure, is very often longer. It is very common for asylum seekers to be in such centres for one year, or even longer, as it is inextricably linked to (often lengthy) asylum procedures (Dutch Refugee Council 1997:3). Freedom of movement concerns and financial considerations aside, given the current state of the asylum determination procedure in South Africa (where decisions can take up to 3 years) it would not seem advisable (even in terms of the Department's own, stated principles) to introduce reception centres.

5.5 The asylum determination procedure in South Africa is characterized by a high degree of arbitrariness, which fails to achieve acceptable standards of administrative justice (Klaaren 1996; Handmaker 1999a:295; Klaaren and Sprigman 2000; Kerfoot 2001; Tuepker 2001). Applications tend to be decided favourably with regard to the general conditions in certain countries perceived as "refugee generating," or rejected on the grounds that conditions are perceived as "safe" — in other words on a "group" basis, rather than on individual assessment (van Beek 2001; Klaaren 2000). Indeed, 85% of positive decisions on applications are being decided in favor of three countries, namely Angola, (former) Zaire, and Somalia. By contrast, only 141 applications out of 5,000 from Somalians have been out-right rejected or declared manifestly unfounded as of April 2000. Similarily, the majority of rejected applicants are from four countries: India, Senegal, Pakistan, and Nigeria.

5.6 Other concerns over procedure include: the interviewing process (including the absence of qualified translators); inadequate access to country information; and the sheer lack of staff available to conduct interviews and make determinations. These are in most respects resource and training issues which need to be urgently corrected. However, the structure of the procedure itself causes serious problems, up to and including the appeals procedure. This is a policy question.

5.7 There have been numerous allegations of corruption received by human rights NGOs and refugee support organizations (Human Rights Watch 1998), both involving the police and DHA officials. The Department of Home Affairs has attempted to address this problem by setting up an internal anti-corruption unit, but it remains to be seen what impact this will have.

5.8 In order to address concerns over due process in the asylum determination procedures, two approaches have been recommended. One approach, recommended by the Green Paper, argued for a "streamlined, one-step investigatory status determination procedure" (Republic of South Africa 1997: 4.4.2), endorsed by those who favored a "reformulation" of refugee law. The other approach, endorsed by locally based organizations, favored a "hearings-based" determination procedure (Klaaren and Sprigman 2000). Ultimately, the Refugees Act adopted the latter, although there remains a great deal of capacity-building work to be done both amongst refugee applicants, legal advisors and DHA officials to ensure that the procedure operates fairly, accurately and efficiently[11].

5.9 The Discussion Document was eventually overtaken by a proposed Refugees Amendment Bill, released at the beginning of 2001 along with an explanatory 'Memorandum.' It is clear that the Bill aimed to do two things: firstly to provide a legislative framework for the introduction of government-run Reception Centres for asylum seekers in South Africa and, secondly, to introduce legal mechanisms for the purposes of restrictively interpreting the extension of refugee status in terms of the Refugee Act 1998. It is abundantly clear that the amendments proposed by this Bill would not only fail to stand up to a constitutional challenge, but would violate fundamental principles of international law. Indeed, one of the restrictive mechanisms proposed, namely the Department of Home Affairs' policy of refusing admission to asylum applicants who passed through a purportedly 'safe third country,' was recently (and successfully) challenged in the courts by Lawyers for Human Rights in May 2001.[12] Soon afterwards, the Minister of Home Affairs publicly called the Director-

General to task for implementing a legally questionable asylum policy without his knowledge.[13]

5.10 Thus, judging by recent events, the proposal to introduce reception centres for asylum seekers in South Africa will at the very least be delayed for some time. It is hoped that South Africa take due warning of the dreadful experience of compulsory detention of asylum seekers in other countries and scrap the idea altogether, an idea which, in the opinion of two researchers who have comprehensively researched the subject, "would constitute the fourth successive trauma" experienced in South Africa (Jenkins and de la Hunt 2000:63).

6.0 Contradictions Between Refugee and Migration Policy

6.1 In February 2000, the DHA released a Draft Immigration Bill, which after numerous subsequent versions was passed into law in 2002 (although it remains to be seen when the Act will come into force). Even though the Green Paper specifically recommended separate white papers for refugees and migration (Republic of South Africa 1997:1.5.7), and the white paper indicated that it "would not deal with the issue of refugees" (Republic of South Africa 1999:3.3), it is clear that refugees will be affected by this new migration policy.

6.2 Apart from the proven ineffectiveness of punitive approaches to border control (Ghosh 1998:147), which the Act promotes, concerns over xenophobia are becoming ever more pressing. Refugees have, in recent years, been subject to multiple attacks on xenophobic grounds (Handmaker and Parsley 2001; Human Rights Watch 1998).[14] Refugees have linguistic, cultural and other differences which tend to be far more visible than other migrants. If anything, community-based enforcement will split "communities" further and exacerbate the current levels of xenophobia, perhaps even leading to a new kind of "vigilantism" (Lawyers for Human Rights 1999:4).

6.3 A general criticism of the Draft Immigration Bill was that it effectively brings refugee protection "back within the ambit of migration control," rather than distinguishing between the two (Klaaren 2000). In the case of general border control issues this distinction is important. In terms of the asylum determination regime and the migration regime, such a distinction is vital. Both the White Paper and Immigration Bill delved further into issues specifically affecting refugees than they should have. The case of the Bill even insists that it take "precedence" over the Refugees Act in the event of conflict (Republic of South Africa 2000:Schedule 3) and provides for 'asylum permits', without adequately explaining the circumstances under which such a permit would be issued. Furthermore, the Act seems to replace the functions of the Refugee Appeals Board with 'immigration courts' (yet to be established) and locates status determination within a new structure, both measures raising serious questions regarding independence of decision makers.

6.4 Inconsistencies between the Refugees Act and the Immigration Bill are highly relevant. In addition to concerns over the independence of decision makers, the White Paper and the Immigration Bill both refer to "repatriation," a term in international law with specific legal meaning attached to refugees (as opposed to migrants in general). Indeed, respected commentators have stressed that (voluntary) repatriation carries with it a *responsibility* on the part of the international community to find solutions for

refugees, while at the same time ensuring that the "interests of individuals and communities" are not disregarded (Goodwin-Gill 1996:271).

7.0 Conclusion

7.1 Migration policies have their origins in the government's attempts to *exclude* certain categories of persons. These will have little constructive effect in stemming the flow of migrants. Rather, an *inclusive* approach towards categories of persons whose skills are so urgently needed in South Africa, and a recognition of the "circular" nature of much contemporary migration, will go a long way towards redressing the negative effects of the Aliens Control Act, which have so often led to acrimony between civil society and government, rather than a constructive discussion of possible solutions. Such an inclusive approach will furthermore help reduce misuse of the asylum procedure as an alternative means of gaining entry to South Africa.

7.2 With regard to refugees, it can be argued that healthy debate has played a role in stimulating the search for a practical, efficient, yet rights-respecting determination procedure. There is nevertheless a real need for additional research. The principle of refugee protection is, as the government rightly states, derived from constitutional and international obligations. Indeed, this principle ought to ensure the integrity of refugee protection over and above considerations on migration in general. But there is a moral imperative as well, and distinguishing the justification for a fair and rights-regarding procedure on the basis of "principle" rather than "goodwill" is difficult to sustain in the current global climate, when the need for protection from human rights violations is as urgent as it as ever been. [15]

8.0 Recommendations

8.1 Both with regard to the formulation of refugee policy and its implementation, the government would be well advised to engage civil society and elicit their views.

8.2 Improving efficiency and due process in the asylum determination process can best be achieved by enhancing the skills of determination officials to conduct interviews, by broadly enabling opportunities in the procedure for refugee applicants (and their advisors) to present the elements of their case and by improving the quality and volume of country data.

8.3 Punitive measures to deter 'bogus' asylum seekers, including prohibiting the right to work or study, should be resisted, having only limited deterrent impact and posing an impossible situation for 'genuine' asylum seekers who have little or no means of survival.

8.4 While a generalized situation of conflict in a country of origin can be a strong and legitimate indicator for granting refugee status, **all** decisions on a refugee applicant's status should take due consideration of the individual nature of a particular case and certainly not assume a claim to be manifestly unfounded on the basis of nationality alone.

8.5 Refugee policy should provide clear, predictable guidelines for the obtaining of permanent residence by recognized refugees and should under no circumstances

continue sending recognized refugees back to the asylum procedure without adequate reasons.

8.6 Reception centres should only be introduced after broad consultation with all stakeholders, notably civil society organisations and UNHCR, and only in circumstances where the country would be faced with a situation of a sudden and mass influx of refugees. Such measures should not prohibit persons from applying for refugee status based on individual persecution.

8.7 A consultative process should be put in place to resolve all remaining inconsistencies between the recently-passed Immigration Act and the country's refugee policy.

ENDNOTES

[1] The Department of Home Affairs carries a great deal of "institutional baggage." Previously, the Department was responsible for enforcing the notorious "pass laws" and "Group Areas Act," key features of the previous government's policy of apartheid.

[2] Draft Refugee Affairs Appeal Board (Procedure) Rules 2000, available: www.lhr.org.za/refugee/appboard.htm

[3] In his speech to the Ministerial Meeting on the 50th Anniversary of the 1951 Convention, Minister Buthelezi stated that the majority of asylum applications in South Africa are manifestly unfounded, at a rate of 80%.

[4] In the context of South Africa, where neither government, NGOs or UNHCR are in a position to adequately provide material assistance, this situation effectively forces asylum seekers into working illegally as the only means to survive.

[5] This situation, unfortunately, changed following the deliberations of the Green Paper Task Team. The policy debate was effectively "stalled" until May 1998.

[6] The Reformulation of Refugee Law Project was funded by the Ford and MacArthur Foundations and based for its duration at the Centre for Refugee Studies, York University, Canada; see Hathaway (1997a, 1997b). Professor James Hathaway of York University was a consultant to the Green Paper Task Team.

[7] Only 456 refugee identity cards have been issued since the Refugees Act came into force.

[8] See LHR's website: www.lhr.org.za

[9] To the knowledge of the author and contributors to this paper, no refugee has ever been granted permanent residence in South Africa.

[10] The 1969 OAU Convention on the specific aspects of refugee problems in Africa provides a broader definition of a refugee, extending to (e.g.) "situations seriously disruption public order," Art. I(2), 1000 *UNTS* 46; South Africa acceded to this Convention on 15 December 1995). This trend appears to be leading to the creation of a "white list" of countries. In the words of the Deputy Minister of Home Affairs, "We will draw up a list of countries we recognize as democracies, and we expect that people from those countries won't need to come to SA as refugees," *Cape Times*, 19 April 2000.

[11] A programme to deal with the administrative backlog in refugee applications and enhance capacity of determination officials, which was implemented in 2000/2001 in collaboration with UNHCR and local NGOs, made some positive contributions in this regard, but also highlighted an absence of political will on the part of senior DHA officials to ensure that recommendations were implemented.

[12] LHR v. Minister of Home Affairs, Case No.10783/2001.

[13] *Business Day*, 12 May 2001.

[14] One particularly publicized incident concerned the murders of 3 asylum seekers, on a train between Johannesburg and Pretoria. See: "Train from hell to Irene Station," *Pretoria News*, 4 September 1998. Subsequent articles were critical of the public's response, including "Public accused of being soft on mob killings," *Sunday Independent (SA)*, 6 September 1998. This incident was also reported in the international press, including the UK *Independent on Sunday*, "Xenophobic South Africa shrugs off train murders," 13 September 1998.

[15] On the day the Refugees Act was passed through South Africa's parliament, the Deputy Minister of Home Affairs made clear that: "When we give asylum to refugees, we do so because of our constitutional and international obligations. We do so as a matter of principle, not as matter of goodwill, and we are not doing anyone a favor" Thursday, 5 November 1998 (*Hansard*, beginning page 7747).

REFERENCES

Bakewell, Oliver. 1998. Repatriation and Self-settled refugees in Zambia: Bringing solutions to the wrong problems. Paper presented at the 6th IRAP Conference, 13-16 December 1998.

Barutciski, Michael. 1998. The Development of Refugee Law and Policy in South Africa: A Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill. *International Journal of Refugee Law* 10(4):700-24.

De la Hunt, Lee Anne. 1998. 'Refugees and Immigration Law in South Africa' in *Beyond Control*, edited by Jonathan Crush. Pretoria.

--------. 2002. 'Refugee Law in South Africa: Making the Road of the Refugee Longer?' in *World Refugee Survey 2002*, US Committee for Refugees, Washington D.C.

Department of Home Affairs. 1999. *Discussion Document on the Proposed Reception Centres for Asylum Seekers in South Africa*. Pretoria.

Dolan, Chris. 1997. 'The Changing Status of Mozambicans in South Africa and the impact of this on repatriation to and re-integration in Mozambique'. *Final Report to Norwegian Refugee Council.* Maputo.

Dutch Refugee Council. 1997. *Asylum Seekers — don't let them just sit and wait*. Amsterdam: Dutch Refugee Council and The Pharos Foundation.

Geddo, Bruno. 2001. Durable Solutions to the Refugee Problem: UNHCR'S Regional Strategy for Southern Africa. In *Perspectives on Refugee Protection in South Africa*, edited by Jeff Handmaker, Lee Anne de la Hunt, and Jonathan Klaaren. Pretoria: Lawyers for Human Rights.

Ghosh, Bimal. 1998. *Huddled Masses and Uncertain Shores: Insights into irregular migration.* Den Haag: Kluwer Law International.

Goodwin-Gill, Guy S. 1996. *The Refugee in International Law.* Oxford: Clarendon Press.

Handmaker, Jeff. 1997. Is it safe to return? *West Africa* 4154:967.

--------. 1998. Refugees, Migrants, Immigrants and Policy Development: A Critical Look at the South African 1997 Draft Green Paper on International Migration. Unpublished Paper. Pretoria: Lawyers for Human Rights.

--------. 1999a. Who Determines Policy: Promoting the Right of Asylum in South Africa. *International Journal of Refugee Law* 11(2):290-309.

--------. 1999b. Returning Home: Learning Lessons From the Past, and Promoting Safety and Dignity in Repatriation and Return. *Africa Legal Aid Quarterly* 3:19-27.

Handmaker, Jeff, Lee Anne de la Hunt, and Jonathan Klaaren, eds. 2001. *Perspectives on Refugee Protection in South Africa.* Pretoria: Lawyers for Human Rights.

Handmaker, Jeff and James Schneider. 2002. The Status 'Regularisation' Program for Former Mozambican Refugees ("FMRs") in South Africa, RULA Working Paper 2002, University of Witwatersrand. Johannesburg.

Handmaker, Jeff and Jennifer Parsley. 2001. 'Migration, Refugees and Racism in South Africa'. *Refuge*. Volume 20(1): 40-51.

Hathaway, James. 1997a. Making International Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection. *Harvard Human Rights Journal* 10:115-211.

--------, ed. 1997b. *Reconceiving International Refugee Law.* The Hague: Martinus Nijhoff Publishers.

Human Rights Watch. 1998. *"Prohibited Persons" Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa*. New York: Human Rights Watch.

Jenkins, Frankie and Lee Anne de la Hunt. 2000. Detaining Asylum Seekers: Perspectives on Reception Centres for Asylum-seekers in South Africa. National Consortium on Refugee Affairs, South Africa, September.

Johnston, Nicola. 2001. 'The Point of No Return: Evaluating the Amnesty for Mozambican Refugees in South Africa'. *SAMP Migration Policy Brief No. 6*. Cape Town

Kerfoot, William. 2001. The Lack of Due Process in Asylum Determination in South Africa. Paper presented at Conference on Refugees in the New South Africa, Pretoria.

Klaaren, Jonathan. 1996. So Far Not So Good: An Analysis of Immigration Decisions Under the Interim Constitution. *South African Journal on Human Rights* 12:605-616.

--------. 2000. Refugee policy and law in South Africa. Workshop on Forced Migrants in the New Millennium, University of Western Cape, Cape Town.

Klaaren, Jonathan and Chris Sprigman. 2000. Refugee Status Determination Procedures in South African Law. Paper presented at Conference on Refugees in the New South Africa, Pretoria.

Lawyers for Human Rights. 1999. Comments on the White Paper on International Migration. Pretoria: Lawyers for Human Rights.

Republic of South Africa. 1997. *Green Paper on International Migration.* Government Gazette 383(18033), Notice 849 of 1997. Pretoria: Government Printer.

---------. 1998. *Draft Refugee White Paper.* Government Gazette 396(18988), Notice 1122 of 1998. Pretoria: Government Printer.

--------. 1999. *White Paper on International Migration*. Government Gazette 416(19920), Notice 529 of 1999. Pretoria: Government Printer.

--------. 2000. *Immigration Bill*. Government Gazette 416(20889), General Notice 621 of 2000. Pretoria: Government Printer.

Rogge, John. 1994. Repatriation of Refugees. In *When Refugees Go Home: African Experiences*, edited by Tim Allen and Hubert Morsink. Trenton, New Jersey: Africa World Press.

Rutinwa, Bonaventure. 1997. The Conceptual Basis and Practicability of the Chapter on Refugees in the South African Green Paper on International Migration. Unpublished.

Silove, Derrick. 1997. Anxiety, Depression and PTSD in Asylum-Seekers: Associations with Pre-Migration Trauma and Post-Migration Stressors. *British Journal of Psychiatry* 170(4):351-7.

Tuepker, Anais. 2002. Asylum Seekers, Recognisable Victims and National Identity in Contemporary South Africa. PhD Thesis, University of New South Wales.

United Nations High Commissioner for Refugees. 1997. Comments on Chapter 4 of the Draft Green Paper on International Migration. Unpublished paper. Pretoria: UNHCR.

van Beek, Ingrid. 2001. Prima Facie Asylum Determination in South Africa. In *Perspectives on Refugee Protection in South Africa*, edited by Jeff Handmaker, Lee Anne de la Hunt, and Jonathan Klaaren. Pretoria: Lawyers for Human Rights.

van Garderen, Jacob. 1999a. Editorial. *Botshabelo* 2(3):3.

--------. 1999b. Introducing reception centres. *Botshabelo* 2(3):14.

Voutira, Eftihia. 1998. Refugee Integration in Receiving Countries: Lessons From the Past and Contemporary Challenges. Paper presented at Conference on Refugees in the New South Africa, Pretoria.