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‘Who Determines Refugee Policy? Promoting The Right of Asylum in South Africa’

Jeff Handmaker*

1. Introduction

As Africa continues to claim the dubious reputation of sheltering the largest number of refugees world wide, South Africa has been fortunate, in recent years, not to witness the long-term, large-scale refugee movements on the scale experienced by other countries on the continent. However, this was not always the case. Prior to 1994, when asylum determination procedures were introduced, the largest refugee displacement into South Africa was from Mozambique. This was the disastrous result of South Africa’s extensive and deliberate policy of regional destabilisation, largely military but also economic in nature; this displacement now comprises a significant proportion of undocumented migrants currently resident in the Republic, following application of the cessation clause in respect of Mozambique on 31 December 1998¹. Of course, destabilising events in South Africa itself also generated refugees, and many students, academics, activists, members of political movements and others lived abroad in exile for years². In addition, South Africa has experienced massive internal displacement, largely due to political violence and the previous government’s domestic policies of influx control and forced removals³.

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¹ “Prohibited Persons” Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa, Human Rights Watch, March 1998, p. 26.

² Following a number of historic political agreements, in 1991 the UNHCR launched an international programme to facilitate the voluntary repatriation of hundreds of thousands of these exiles.

³ This has also been the result of widespread political violence and generalised poverty. It also appears to be continuing. See, Catherine Cross, Tobias Mngadi, Themba Mbhele, ‘On the Move: Poverty and the Impact of Migration in KwaZulu-Natal’, *Indicator SA*, Vol 15, No. 1, April 1998.

Neither of these earlier experiences of forced migration have been helped by the lack of a coherent policy. Like many other aspects of South Africa's previous government, the country's largely unchanged migration policy has been decidedly control oriented⁴, influenced by the previous government's overall strategy of separate development. A number of concerns and criticisms have been raised in recent years over the treatment of foreigners generally and refugees in particular, by the local South African media as well as international and local organisations⁵. These concerns have largely related to the enforcement of the Aliens Control Act⁶ and accompanying regulations which, in the case of refugees, has had particularly negative consequences, as is shown below.

Official responses to these concerns and criticisms have ranged from open acknowledgement that serious structural and implementation problems exist in the immigration system, to a more defensive response which holds that there are 'irregularities in implementation', that is, 'this shouldn't be happening'. However, some steps have been taken to respond to many of these concerns and criticisms, and the government of South Africa has in the last couple of years been actively motivating for structural changes in the immigration / migration systems⁷. It has, allowed training of its administrative officers⁸ and, most significantly, produced various policy documents aimed at fundamental changes in policy and legislation.

With regard to refugees, this latter initiative has reached an advanced stage of development,

⁴ J. Handmaker, 'Refugees, Migrants, Immigrants and Policy Development: A Critical Look at the South African 1997 Draft Green Paper on International Migration', LHR, 1998, at p. 1 (www.lhr.org.za/refugee/green.htm) and Sello Ramasala, *Aliens*, 'Immigration and Refugees' Control Laws, LHR (unpublished), 26 May 1994

⁵ See, for example, 'Immigrants fleeced in last-chance throng at home affairs', *The Sunday Independent*, 29 Sept. 1996; 'How I joined the alien flood into SA', *The Sunday Independent*, 8 June 1997; 'Slipped bucks and blind eyes', *The Sunday Times*, 19 October 1997; '13 cops held over corruption', *Sowetan*, September 10 1998, 'Refugees find no place to hide in Cape Town', *Cape Argus*, June 1998, also Prohibited Persons, above n.1

⁶ Republic of South Africa Act 96 of 1991

⁷ 'Transformation Policy Framework', Department of Home Affairs, January 1998.

⁸ s.39 of the *Refugees Act* goes even further, and specifically provides for the training of staff.

with the passing of a Refugees Act⁹ by the South African Parliament at the end of 1998 although at the time of writing it was not yet in force. Since 1996, an interesting debate has taken place, both directly related and parallel to this process, involving a number of local and foreign specialists, service providers and international and local organisations.

A critical discourse has evolved in South Africa, involving a number of local and foreign-based non-governmental organisations (NGOs) and academics, each offering independent, and occasionally conflicting, perspectives and interventions. The substantial number of civil society interventions and the willingness of government to consider these interventions, are still relatively new phenomena in South Africa and deserve both elaboration and recognition. Equally, this dynamic and critical discourse has raised a number of still unresolved issues, either in terms of substantive content, or as likely to arise out of the practical implementation of the South African Refugees Act.

2. South Africa's Policy on Asylum and Refugees (*Pre-Refugees Act*)

South Africa is reported to be experiencing a pronounced (and worsening) climate of anti-foreigner sentiment, extending to widespread social discrimination, which has occasionally translated into violent attacks¹⁰. Although the reasons for this are not unique, and indeed common of most refugee receiving States, the recent extensive given to the treatment of foreigners in South Africa, both by NGOs and in the media, has stimulated a growing awareness of the *presence* of foreigners in the country, and negative reactions to this by the South African public. Although much prejudice appears to be directed at foreigners in general, refugees and asylum seekers, by reason of their "legal" residence in the country, tend to be more visible and therefore more likely than other foreigners to be the subject of

⁹ No. 130 of 1998: Refugees Act, 1998, Gazette No. 19544, Received Assent from the South African Council of Provinces on 2 December 1998, but at the time of writing (Dec. 1999) not yet in force.

¹⁰ See *Botshabelo* magazine, Lawyers for Human Rights (LHR), first issue, January 1998, 'Foreigners must be thrown out', *Sowetan*, 6 October 1997, 'Rioting city hawkers target foreign traders', *Star*, 14 August 1997 and Prohibited Persons, Human Rights Watch, March 1998.

discrimination and violence¹¹.

On top of these growing perceptions of xenophobia, there has been much criticism raised by individuals and organisations, over South Africa's obligations in international law, and related tensions in the enforcement of the Aliens Control Act and its accompanying regulations. This situation ultimately demanded, as the government itself recognised in 1996, 'a complete overhaul'¹² of existing policy and legislation.

Following the signing of a basic Mandate in 1991 allowing for the presence of UNHCR in South Africa, in 1993 the Tripartite Commission, consisting of UNHCR and representatives from the Mozambican and South African governments, signed what is known as the Tripartite Agreement¹³. Around the same time, the South African government and UNHCR signed what was known as the Basic Agreement¹⁴ and by January of 1996, South Africa had become a party to the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa¹⁵ and the 1951 Convention and 1967 Protocol relating to the Status of Refugees¹⁶.

However, in the absence of corresponding asylum legislation, the Department of Home Affairs (the relevant authority responsible for immigration/migration matters) has been

¹¹ This point was raised by various participants attending a Consultative Workshop on Racism and Xenophobia organised by the SA Human Rights Commission, Johannesburg, 15 October 1998.

¹² Comment from the Deputy Minister of Home Affairs, L. Sisulu, *Mayibuye*, August 1996.

¹³ Tripartite Agreement Between the Government of the Republic of South Africa, the Government of the Republic of Mozambique and the UNHCR for the Voluntary Repatriation of Mozambican Refugees from the Republic of South Africa, 1993.

¹⁴ Basic Agreement Between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and Its Personnel in the Republic of South Africa. Although these *Agreements* are of dubious legal status, they did form the partial basis of an unusual court challenge in *Baramoto and others v. Minister of Home Affairs and Others*, Witwatersrand Local Division, (unreported), 1998.

¹⁵ 1000 UNTS 46; South Africa acceded to this Convention on 15 Dec. 1995.

¹⁶ 189 UNTS 150; 606 UNTS 267; South Africa acceded to the Convention and Protocol on 12 Jan. 1996.

obliged to issue Regulations and Passport Control Instructions¹⁷ in terms of the 1991 Aliens Control Act¹⁸, in order to give effect to international obligations. These Regulations and Instructions were initially designed to provide a policy framework for the ‘retrospective recognition’, aimed at the voluntary repatriation, of several hundred thousand former refugees from neighbouring Mozambique. Up until then, these persons had never officially been recognised as refugees by the South African government, but nevertheless fled to the Republic as a consequence of widespread hostilities in Mozambique¹⁹.

These Agreements and further Instructions²⁰ also laid the basis for the current asylum determination regime which, since 1994, has not been met with a substantial number of applications, certainly not a situation of ‘mass influx’²¹. Nevertheless, it has been difficult for the government to cope with the relatively small numbers of applications as it had originally been provided with a severely limited administrative component responsible for asylum determination²². The instructions provided for ‘procedures for handling asylum-seekers and refugees’ as well as associated measures to deal with ‘stowaways who are or who

¹⁷ Passport Control Instruction No. 20 of 1994 (“Guidelines for Refugee Status Determination of Mozambicans in South Africa”) and Passport Control Instruction No. 23 of 1994 (“Amendment to . . . No. 20 of 1994”), Forms BI-1590 (“Eligibility Determination Form”), BI-1594 (“Information Leaflet”), BI-1595 (“Status Determination Questionnaire”) and Guidelines BI-1596 (“Status Determination - Mozambican Refugees in South Africa”).

¹⁸ Aliens Control Act (ACA) No. 96 of 1991 (as variously amended in 1993 and 1995)

¹⁹ The Tripartite Commission purportedly further recommended to the South African government that, for those who did not take advantage of the voluntary repatriation programme, there should be a procedure put in place to regularise their legal residence in South Africa. The procedure, approved by the South African cabinet, permits the government “to grant on application, right of residence in South Africa to about 90.000 Mozambican (former) refugees”. See Media Briefing by Minister M G Buthelezi, Minister of Home Affairs, 12 February 1998. This procedure has yet to be implemented, although a cessation clause has been in place in respect of Mozambique since 31 December 1996.

²⁰ Particularly Passport Control Instruction No. 20 of 1994.

²¹ Between 1994 and June 1999, South Africa received 54,759 applications for refugee status, 8,504 of which have since been approved. Source: Department of Home Affairs (DHA), June 1999.

²² The backlog of applications currently stands at around 21,235 (DHA Statistics, above, no. 21) an overall reduction from 1997 figures of 21,704 (DHA, Dec. 1997), and probably due to staff increases. When the asylum determination system was introduced, it had a staff capacity of two.

claim to be refugees’²³ and ‘documents for travel purposes to refugees’²⁴.

South Africa’s asylum and refugee determination regime has always fit uncomfortably within a legislative structure designed to severely restrict access to, and within its borders. What is described here existed from the introduction of asylum procedures in 1994 up until late 1998, before enactment of the Refugees Act, a situation which proved to be very contentious and which the Act aimed to remedy.

South Africa’s Aliens Control Act was clearly not designed with refugees in mind²⁵. It is legislation that, as its name signifies, is highly restrictive in nature, placing an inordinate degree of administrative discretion in the hands of the Minister and Director-General of Home Affairs, with relatively few administrative ‘checks’ on its exercise²⁶. Before being amended in 1995²⁷, s. 55 of the Aliens Control Act even provided that no decision of the Department was reviewable by a court or tribunal, and persons could be held in detention indefinitely, without judicial review. The 1995 Amendment removed this provision and provided that detention for periods beyond 30 days ought to be subject to review²⁸, although in practice it appears that this is rarely happening²⁹.

²³ Respectively, Passport Control Instructions No. 63 of 1994 and No. 33 of 1995.

²⁴ Addition: Passport Manual, dated 1995-03-07

²⁵ For more on South Africa’s immigration and asylum policy regime, see Lee Anne de la Hunt, ‘Refugees and Immigration Law in South Africa’, in J. Crush, ed., *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, Southern African Migration Project, 1998, pp.123-148.

²⁶ Most of the provisions contained in the ACA would probably not withstand a test of constitutionality. For critical analyses of the Aliens Control Act No. 96 of 1991, see Jonathan Klaaren, ‘Immigration Law and the South African Constitution’, in *Beyond Control*, 1998, above n. 25, 55-78.

²⁷ Aliens Control Amendment Act, No. 76 of 1996

²⁸ ACA as amended, s. 55.

²⁹ This was one of the results of a Human Rights Commission inquiry which, from March 1998, investigated the manner in which persons are apprehended and detained under the Aliens Control Act. Participating NGOs included Wits Law Clinic, Centre for Applied Legal Studies and Lawyers for Human Rights. ‘Report on the apprehension and detention of suspected undocumented migrants’, South African Human Rights Commission, February 1999. Available at <http://www.lhr.org.za/refugee/hrcreport.htm>

Moreover, until the present time, the legal status of an asylum seeker has been temporary residence³⁰, subject to conditions specified by the Department. These conditions have included the right of applicants to seek employment or study in the Republic³¹, and the right not to be *refouled* while the application remains outstanding.

2.1 The Asylum Determination Procedure (pre- Refugees Act)

The *ad hoc* nature of the asylum determination procedure has been a particularly troubling aspect of the asylum regime, emphasising the need for specific refugee legislation. The Refugees Act makes provision for a hearings based determination procedure, though it remains to be seen exactly how this will work in practice.

According to the current regulations, any person who wishes to apply for refugee status must approach the Department of Home Affairs, as the relevant government authority³², as soon as they enter the country, or as soon as possible thereafter. Depending on the method of entering the country, potential asylum applicants may be classified under the Aliens Control Act as ‘prohibited persons’³³, that is illegal immigrants, and are liable to be apprehended and detained. A prohibited person may be held until deported, though this is subject to review by a high court judge every 30 days³⁴. If the applicant applies for asylum after having been apprehended and detained as a prohibited person, then they may still be held in detention, though it is the Department’s policy to release them if the application is successful, or it will

³⁰ ACA, ante, section 41. This will change under the Refugees Act; see further below.

³¹ No emergency relief assistance is provided by the South African government.

³² The Basic Agreement (1.1) states that ‘the Minister of Home Affairs. . . will be the central authority for purposes of this document on matters relating to refugees’.

³³ Under the ACA (ante), section 39, a person who does not hold a valid visa to enter South Africa, or for various reasons is deemed an ‘undesirable inhabitant’, may be dealt with as a prohibited person.

³⁴ ACA, s. 55, and Aliens Control Regulations, by way of Presidential Proclamation, 1 December 1995, s. 29

take ‘unreasonably long to process’³⁵.

The applicant is referred to the offices of a Regional Subcommittee for Refugee Affairs where officials trained by the Department and UNHCR process applications for asylum³⁶. At the first interview, which often taking place several months later, the interviewer who is nearly always an immigration officer,³⁷ completes what are called a ‘Nationality Questionnaire’ and ‘Eligibility Determination Form’, in which the applicant is required to respond to a series of questions relevant to his or her application for asylum. Language difficulties pose a particular problem, although the Department provides a very limited number of persons as interpreters from amongst asylum applicants or recognised refugees.³⁸

During the course of the interview, the applicant is permitted to provide his or her own interpreter and a supporting statement in their chosen language. Following the interview, the applicant is provided with a ‘section 41’ temporary residence permit, usually for a period of 3 months, which is automatically renewed while the application is being processed, but also requires many hours of queuing, also placing substantial administrative burdens on the seriously under-resourced Department. A recent departmental instruction, purportedly designed to combat fraud, requires applicants to renew their permit within the designated

³⁵ Confirmed by the Department of Home Affairs at the Asylum and Naturalisation Workshop, Human Rights Commission, Johannesburg, 14 Nov. 1996.

³⁶ Persons are normally given a date for an appointment and first interview, with only a standard form letter confirming this. Permits are usually not granted at this stage (which means that an applicant is legally unable to work) and waiting periods for interviews can be several months. ‘Interview letters’ issued by district offices have left applicants vulnerable to apprehension, detention and removal as prohibited persons, which led to Passport Control Instruction No. 32 of 1995, stating that ‘interview letters are no longer be issued’.

³⁷ Responses to questions put to Department of Home Affairs officials at the November Workshop (above n.35), in respect of various allegations and concerns over the treatment of asylum applicants related to the fact that while the procedure was still new, interviewers had very little understanding of what was expected of them. Though matters appear to have been improved in recent months, South African NGOs have several outstanding concerns, particularly regarding the Department's lack of capacity in handling the large number of applications and whether immigration officers are, in fact, suitably trained persons to do this sort of work. Under the Refugees Act the current procedure is set to be replaced by a ‘hearings based’ system, and applicants will report to a ‘refugee receiving office’ and be interviewed by ‘refugee receiving officers’; see further below.

³⁸ According to item 6.2.2 of the *Basic Agreement*, an applicant should be provided ‘with an interpreter if necessary’, and in terms of Passport Control Instruction No. 63 of 1994, ‘must be allowed to make a written statement in his own language and must be assisted to do so as far as possible’.

period and at the same place at which the application was lodged. The instruction further provides that failure to do so will result in one's application being withdrawn and renders the applicant liable to detention and removal as a prohibited person. In September 1998, the removal provision of this instruction was successfully challenged in the Cape Town High Court and is now subject to mandatory review³⁹. However, the ability of the Department to *detain* asylum applicants who do not comply with this instruction still stands.

As stated earlier, it is this *ad hoc* nature of the procedure which has been of main concern, resulting in a lack of predictability in the administration of the asylum regime, a fundamental feature of administrative justice which, again, it is hoped the Refugees Act shall remedy.

2.2 Processing of Applications⁴⁰

Following the initial interview, officials of the Standing Committee or Subcommittee ('Committees') decide firstly whether the applicant fulfils the definition of a refugee contained in the expanded OAU Convention,⁴¹ and the Department then decides whether it will grant the applicant asylum. At this stage, the Department takes account of those countries through which the applicant passed en route to South Africa, deciding whether, (and if not for what reason), any of those countries could have provided protection.

2.3 Decisions⁴²

³⁹ Court ordered settlement agreement between asylum applicants and the Department of Home Affairs, Cape Town, June 1999

⁴⁰ Consistent with the 'Basic Agreement', UNHCR is consulted in circumstances where the Department deems UNHCR 'better positioned', Item 3.4 of the 'Basic Agreement' provides that 'where necessary (the Standing Committee shall) consult with and invite the UNHCR to present its opinions and to inform on matters'.

⁴¹ In addition to the Eligibility Determination Form and applicant's statement obtained at first interview, departmental officials rely on the UNHCR's Centre for Documentation and Research (CDR), in particular the *REFWORLD* CD-Rom database on country information. Reports of international Human Rights Organisations, the Africa Institute in Pretoria, International Organisation for Migration and information supplied by the Department of Foreign Affairs are used, and the interviewer's 'credibility statement' in the 'Eligibility Form' is taken into account. The applicant is occasionally (albeit rarely) re-interviewed if further information is required to confirm additional information received by the Department.

⁴² The Refugees Act provides for the establishment of 'refugee receiving offices', with decisions on status to

The period for decisions on applications from certain countries appears to be related to whether or not the applicant comes from what is confusingly referred to as a ‘refugee generating country’⁴³. If they do, their application can be processed relatively quickly. Others have been known to take up to 2 years or more to process.

2.4 ‘Manifestly Unfounded’ Applications

There is a procedure for dealing with applications deemed to be ‘not at all related to the refugee criteria’ or an ‘abuse of process’⁴⁴. A recommendation by a senior immigration official that an application is manifestly unfounded is reviewed by a Deputy Director of Refugee Affairs. Should they support this determination, the applicant will be informed that asylum has been refused and that they must leave the country⁴⁵. No appeal is allowed to any other body within the Department of Home Affairs, although reasons must be given for such a determination. The decisions may also be challenged in the High Court by way of judicial review.

2.5 Appeal

If the application is unsuccessful, but has not been declared manifestly unfounded, then the applicant is informed that their application has been rejected and that they must leave the country, but also that they may lodge an appeal with the Department’s Appeal Board against

be taken by ‘refugee status determination officers’.

⁴³ See ‘Prohibited Persons’, above n.1, 174.

⁴⁴ This point was also confirmed by the Department of Home Affairs at the 14 Sept. Gauteng Refugee Forum meeting in Johannesburg (ante). Deputy Minister of Home Affairs Lindiwe Sisulu further confirmed that, in the Refugees Bill then before parliament, ‘provision had been made . . . to fast track manifestly unfounded and fraudulent claims’. She went on to say that ‘the majority of applications fell into this category’. SAPA, 5 Nov. 1998.

⁴⁵ The Refugees Act makes provision for dealing with ‘manifestly unfounded, fraudulent or abusive applications’ by way of Regulation, see s.38

this decision within 30 days⁴⁶. Furthermore, reasons for such refusal must be given in light of a December 1996 decision of the High Court in Cape Town⁴⁷. This Board currently consists of two individuals and is normally a closed procedure.

The Refugees Act provides that the new Appeal Board shall consist of at least three persons, including the Chairperson, one of whom must be legally qualified⁴⁸.

2.6 Representation

The applicant is permitted to be represented throughout any stage of the proceedings, though during the first and subsequent interviews the representative must remain silent and not intervene⁴⁹. In fact, it is extremely rare for asylum seekers ever to be represented, given their lack of means and the NGO community's lack of capacity to assist asylum seekers⁵⁰. Nevertheless, a small number of rejected applications have been taken up by NGOs, including a limited number of cases taken to the High Court on administrative review⁵¹.

2.7 Rejected Applicants

Asylum seekers whose applications are finally rejected are currently given a letter, normally upon renewal of their section 41 permit, notifying them that they have 30 days to leave South

⁴⁶ The appeal must be submitted in writing and in English within 14 days, along with any new evidence which goes to support the credibility of the application.

⁴⁷ *Pembele (and others) v. Minister for Home Affairs (and others)*, Case No. 15931/96, High Court of South Africa, Cape of Good Hope Provincial Division (unreported).

⁴⁸ Refugees Act, s. 13

⁴⁹ This too was confirmed by the Department of Home Affairs at the 14 Nov. Gauteng Refugee Forum Meeting. Alarming, the amended Refugees Act has removed specific reference to the Status Determination Officers' obligation to hear oral evidence and allow legal representation; s. 24 as amended by the Portfolio Committee.

⁵⁰ In a limited number of confirmed instances, Legal Aid has been made available to an asylum applicant.

⁵¹ Reported decisions include *Eddie Johnson v. Minister of Home Affairs*, 1997 (2) SA 432 (CPD) and *Kabuika and Others v. Minister of Home Affairs and Others*, [1997] 2 All SA, 335(c)

Africa. Applicants who do not leave or appeal (if it is still possible to do so), within the time period, are liable to be apprehended as prohibited persons and are often detained, subject to the '30 day rule' requiring magisterial review⁵². They are then deported once funds are made available by the Department of Home Affairs, which might take some time. Applicants are permitted to leave on their own initiative if they have independent means, and the Department has shown itself to be flexible in this regard.

2.8 Access to Permanent Residence

As noted above, the legal residence status which refugees have received up until now, with few exceptions, has been temporary. The Department has expressed its concern to curtail the numbers of refugees and asylum seekers applying for permanent residence (permanent immigration status), and has issued a number of circulars in this regard. In June 1997, the Department of Home Affairs took steps to prevent asylum seekers cancelling their applications and applying for permanent residence⁵³.

In April 1998, the Department released a Policy Document on permanent residence, confirming a previous instruction prohibiting section 41 permit holders (usually asylum seekers) from applying for permanent residence, yet made no mention of whether refugees could apply. Though recognised refugees did not appear specifically to be excluded by this policy, it would seem that the substantial fee involved (equivalent to over \$1,500), in addition to the requirement that an application be lodged in one's country of origin, by implication excluded refugees from obtaining permanent residence⁵⁴.

This particular concern has been partly addressed by s. 27 of the Refugees Act, which

⁵² This '30 day rule' provision has been preserved in the Refugees Act, s. 29

⁵³ Departmental Instruction to All Regional Directors dated 27 Jun. 1997.

⁵⁴ It did, however, require the lodging of a R 7,750 (\$ 1,550) non-refundable application fee and, excepting those who possessed a valid temporary residence permit, required that the applicant lodge an application for permanent residence in their country of origin, 'Policy Document: Permanent Residence', Department of Home Affairs, Apr. 1998. This fee has since been successfully challenged in the High Court in the case of Dawood (and others) v. Minister of Home Affairs (and another), September 1999, Cape Town High Court.

provides that refugees are ‘entitled to apply for an immigration permit in terms of the Aliens Control Act 1991, after five years’ continuous residence in the Republic’, although the Standing Committee must certify that the refugee “will remain a refugee indefinitely”.⁵⁵

3. Draft Green Paper on International Migration

In response to increasing pressure from civil society organisations, the South African Human Rights Commission and others, and following the Deputy Minister of Home Affairs’ earlier acknowledgement that a ‘complete overhaul of immigration policies’ was needed⁵⁶, the Department of Home Affairs appointed a Task Team on International Migration at the end of 1996. Its brief was ‘to prepare a green paper on migration policy to be completed and presented by the end of May 1997’⁵⁷; the Task Team’s mandate was broadly defined ‘to include all areas of migration’ and stipulated that, ‘Any new migration policy or legislation derived from the green paper process will have to be premised on the **Rule of Law**; a **Bill of Rights** culture and established **international norms**.’ (sic)

The Draft Green Paper on International Migration was published on 30th May 1997⁵⁸, around 6 months after the Task Team was formed. This was preceded by hearings before the Green Paper Task Team and submission of various ‘Research Briefing Papers’⁵⁹ commissioned by the Task Team. The ‘Southern African Migration Project’, an initiative led by Queen’s University in Canada and the Institute for Democratic Action in South Africa (IDASA), a

⁵⁵ Refugees Act, s. 27(c)

⁵⁶ In 1996, Deputy Minister of Home Affairs L. Sisulu was recorded as saying that ‘a complete overhaul of immigration policies is indispensable for the new democracy of South Africa’. *Mayibuye*, Aug. 1996.

⁵⁷ The Mandate of the International Migration Green Paper Task Team can be at: http://www.polity.org.za/govdocs/green_papers/migration/mandate.html

⁵⁸ Draft Green Paper on International Migration, Notice 849 of 1997, No. 18033, 30 May 1997.

⁵⁹ Some of these Briefing Papers can be accessed via the government website at: http://www.polity.org.za/govdocs/green_papers/migration

South African NGO, provided the Secretariat to the Task Team⁶⁰.

Chapter 4 of the Draft Green Paper proposed a model of refugee protection said to be ‘simple, practical and manageable’⁶¹, and proposed that refugee legislation ought to be based on a model that was ‘rights-regarding’ and ‘solution-oriented’⁶². It stressed ‘burden sharing across all SADC member states’ and claimed its objective was to provide, ‘*temporary* (sic) protection to persons whose basic human rights are at risk in their country of origin, until such time as they are able to return home in safety’.⁶³

Presumably based on an earlier reference to South Africa’s need to ‘regenerate (its) asylum capacity’, the Green Paper provided that this model would achieve either repatriation to a refugee’s country of origin or permanent residence (local integration), within a period of five years. Neither the need to ‘regenerate’ South Africa’s asylum capacity nor the legal or social justifications for a fixed period of five years, was adequately elaborated upon.

The model of refugee protection proposed in the Green Paper proved to be very contentious, with a great deal of concern raised over the Green Paper’s stress on temporary protection⁶⁴.

⁶⁰ Preparation of this Green Paper relied heavily on contributions from academics outside South Africa. The contributions of Prof. Jonathan Crush of Queen’s University, Canada for ‘co-ordination of research and the preparation of draft text’ and Prof. James Hathaway (then) of the Centre for Refugee Studies, University of Toronto, Canada as ‘consultant on refugee issues’, were acknowledged in the Draft Green Paper, 9.

⁶¹ Draft Green Paper (Ibid), Executive Summary, 11

⁶² As the Green Paper acknowledged, the model as proposed in the Green Paper was strongly influenced by the work of Prof. James Hathaway and the ‘Reformulation Project’, which was funded by the Ford and MacArthur Foundations and based for its duration at the Centre for Refugee Studies, York University, Canada. See further Hathaway, J., ‘Making International Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’, 10 *Harv. H.R.J.* 115 (1997) and Hathaway, J., ed., *Reconceiving International Refugee Law*, Martinus Nijhoff, 1997

⁶³ Draft Green Paper, s. 4.2.1

⁶⁴ See in particular, UNHCR, ‘Comments on Chapter 4 of the Draft Green Paper on International Migration’, 1997 at Part 4, 15(d); Bonaventure Rutinwa, ‘The Conceptual Basis and Practicability of the Chapter on Refugees in the South African Green paper on International Migration’, 26 Aug. 1997, 3: ‘the very concept of temporary protection may not be compatible with respect of basic rights’; Cape Town Refugee Forum, ‘Comments on Chapter Four of the Draft Green Paper on International Migration’, 1997, 4 and Handmaker, ‘Refugees, Migrants, Immigrants and Policy Development’, above n.4, 5: ‘refugee status is by its very nature temporary’.

Concern was also expressed regarding the model's stated 'solution orientation', with repatriation within five years being the most preferred solution⁶⁵, in order, as the Green Paper put it, to 'regenerate asylum capacity'. Some felt this would be a difficult objective to achieve, given that many situations leading to refugee flight do not resolve themselves within such a limited period⁶⁶. It was feared that the Green Paper's terminology would lead to uncertainty, particularly given the reference to the temporary protection as a 'legal status' and the emphasis on repatriation as the 'preferred alternative'. It was also feared that this formulation would unfairly discourage attempts to integrate recognised refugees into South African society, where they currently face much social and institutional discrimination.

One commentator claimed that concerns over temporary protection by South African NGOs were 'misplaced', and tantamount to advocating permanent residence for undocumented migrants⁶⁷. But this is unrealistic. As in all refugee receiving countries, there are bound to be persons applying for asylum who will not (or should not) qualify, but this should not be a justification for unreasonably restricting the rights of all refugees. In South Africa, the concerns which have motivated NGOs to lobby against temporary protection, and in favour of regularised status for the relatively small numbers of recognised refugees (many of whom have patently little prospect of returning to their countries of origin), have much more to do with domestic and international human rights obligations, and the psycho-social harm associated with insecurity of status⁶⁸.

⁶⁵ Draft Green Paper, s. 4.6

⁶⁶ Handmaker, 'Refugees, Migrants, Immigrants and Policy Development' above n.4, 7-8. See also Handmaker, 'Returning Home: Learning Lessons from the Past, and Promoting Safety and Dignity in Repatriation and Return', *AFLA Quarterly*, Africa Legal Aid (University of Maastricht), p. 19

⁶⁷ See Baruticksi, M., 'The Development of Refugee Law and Policy in South Africa: A Commentary on the 1997 Green Paper and 1998 White Paper / Draft Bill', 10 *IJRL*, 705 (1998), (hereinafter Baruticksi, 'Development of Refugee Law') who claims that this approach would result in a 'pyrrhic victory for human rights groups in South Africa concerned about the treatment of undocumented migrants'. An earlier draft of this article formed the basis of a submission to the South African Refugees White Paper.

⁶⁸ See earlier, on the current policy with regard to permanent residence. The psycho-social harm caused to refugees and asylum applicants by insecurity of residence status has long been an issue of concern to psychologists. See a recent article based on a comprehensive study led by Dr Derrick Silove, 'Anxiety, depression and PTSD in asylum-seekers: associations with pre-migration trauma and post-migration stressors', *British Journal of Psychiatry* (1997), No. 170, pp. 351.

South Africa's constitution requires that the government take steps to realise, or in the case of certain socio-economic rights 'progressively realise' access to certain rights. This may (by implication) include permanency of status for refugees, given that access to these rights often requires permanent status as a minimum⁶⁹. Although the right to residence specifically refers to citizens under the constitution, it clearly does not exclude foreigners, and indeed South Africa's courts have interpreted this particular provision quite liberally⁷⁰. It is even arguable that this provision in the Green Paper mandating temporary protection was contrary to the spirit and intention of the drafters of the 1951 Convention, in particular Article 34 on naturalization by deliberately delaying access to permanent residence.

Questions were also asked as to whether burden-sharing within a regional context could be 'logically supported'⁷¹, given the current lack of progress within the SADC political community on migration issues⁷² or, more critically, even whether it was 'well conceived' as a concept⁷³ for the region. Finally, concerns were raised over the Green Paper's stress on repatriation as the most desirable outcome of a refugee's plight, even to the extent of proposing mandated repatriation once the 'risk that gave rise to refugee status comes to an end'⁷⁴. Although some maintain that voluntary repatriation is not an obligation of

⁶⁹ The Constitution of the Republic of South Africa, Act 108 of 1996. Numerous regulations in South Africa bar non-permanently resident foreigners from access to health care, schools, universities, bank accounts, and so forth, or demand grossly disproportionate fees. Access to some services is restricted to citizens, and may not pass a constitutional challenge, see J. Klaaren in *Beyond Control*, above n.25, 68.

⁷⁰ Recent court decisions in South Africa, including a landmark decision by the Constitutional Court in the case of *Larbi-Odam and Others v Member of the Executive Council for Education and Another* 1996(12) BCLR 1612 (B), have ruled favourably for non-citizens' rights to residence in South Africa. See also J. Klaaren 'Non-Citizens and Equality: *Larbi-Odam v MEC for Education (North-West Province)*' (1998) 14 *South African Journal on Human Rights*, 287. For an earlier discussion on South Africa's jurisprudence relating to citizenship and residence, see J. Klaaren 'So Far Not So Good: An Analysis of Immigration Decisions Under the Interim Constitution' (1996) 12 *South African Journal on Human Rights* 605-616

⁷¹ Handmaker, 'Refugees, Migrants, Immigrants and Policy Development', above n.4, 7.

⁷² Apart from the Memorandum of Understanding, signed by representatives of the SADC Secretariate and UNHCR in 1993, and a Draft Protocol on the Free Movement of Persons, prepared by the SADC Secretariat, there has been little progress in terms of policy development on migration-related areas.

⁷³ B. Rutinwa, 'Conceptual Basis' above n.64, 8-16.

⁷⁴ Green Paper, 4.6.8

international law⁷⁵, comments to the Green Paper raised this as a substantial area of concern⁷⁶, drawing attention to the OAU Convention's provision that the, 'essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will'⁷⁷.

Aside from concerns raised over the proposals for 'Temporary, Solution-Oriented Protection', a number of other proposals contained in the Draft Green Paper **were** generally supported. These included the proposed treatment of 'vulnerable groups', who (the Green Paper said) ought to be 'diverted from the usual system of protection'⁷⁸ and treated as 'special cases'; that refugee status determination ought not in principle to be 'an alternative means to immigrate permanently to South Africa'⁷⁹; and that the refugee definition, in terms of current international practice, ought to reflect a broad interpretation, and reflect the country's obligations under various other international human rights conventions⁸⁰.

3.1 Lawyers for Human Rights (LHR) Refugee Conference

In March 1998, *Lawyers for Human Rights* (a South African NGO)⁸¹ held an 'International

⁷⁵ See M. Barutcsiki, 'Involuntary repatriation when refugee protection is no longer necessary: Moving forward after the 48th Session of the Executive Committee', 10 *IJRL*, 236 (1998).

⁷⁶ 'A Written Submission by the Refugee Committee (Cape Town) on the Draft Green Paper on International Migration', 29 Aug. 1997, 4; B. Rutinwa, 'Conceptual Basis', above n.64, 7; and Handmaker, 'Refugees, Migrants, Immigrants and Policy Development', above n.4, 2. The principle that 'repatriation must be voluntarily undertaken by those individuals who became the subject of a cessation clause, or who otherwise decided to return to their country of origin', was further confirmed by all parties present at a Policy Workshop on the 29 May 1998; see further below.

⁷⁷ Article V(1), 1969 OAU Refugee Convention.

⁷⁸ Draft Green Paper on International Migration, 4.6.6

⁷⁹ *Ibid.*, 4.2.2

⁸⁰ *Ibid.*, 4.3.1 - 4.3.4

⁸¹ The conference was financed by the Netherlands Institute for Southern Africa (NiZA), a Dutch NGO engaged in 'good governance and democracy' activities; see NiZA Mission Statement, 1997.

Conference on Refugee Protection'⁸². The Conference was attended by representatives from UNHCR, various South African government departments, South African Human Rights Commission, and NGOs, universities and research institutes based in South Africa, Zimbabwe, Mozambique, Malawi, Tanzania, Kenya the UK and Canada. It was the first time that such a broad meeting on South Africa's refugee policy had taken place, and was widely regarded by those who attended as an important development in the refugee policy discourse⁸³. It was also reflective of the interest generated within the international community (and extra-ordinarily high level of direct involvement by non-South Africans) in policy development in South Africa. The proposals contained in the Green Paper, and the current practice of asylum determination and treatment of foreigners, formed most of the content of this conference, and it can fairly be said that there was a substantial degree of antipathy towards the Green Paper's proposed model of refugee protection.

As it turned out, the model of refugee protection as proposed in Chapter 4 of the Green Paper was adopted by neither the South African government, nor the 'Refugees White Paper Task Team', the latter formed by the Department of Home Affairs in May 1998.

4. Draft Refugee White Paper and Refugees Bill (June 1998)

The Draft Refugee White Paper and Draft Refugees Bill⁸⁴, published by the South African Department of Home Affairs on the 19th June 1998, were the long-awaited follow-ups to the Green Paper⁸⁵. The Draft Refugees Bill was the third released by the Department, based

⁸² The Conference papers are expected to be published in early 2000.

⁸³ Although this view was shared by most who attended the Conference, there were some (ironically) foreign academics who disagreed, alleging that 'international activists (were) trying to influence the debate by introducing an agenda that is not necessarily related to the local situation': Baruticksi, 'Development of Refugee Law', above n.67, at 702.

⁸⁴ Draft Refugee White Paper, No. 18988, Notice 1122 of 1998 (South Africa)

⁸⁵ Human Rights Watch expressed its concern that the policy debate in South Africa had 'stalled' after publication of the Draft Green Paper on International Migration in May of 1997: 'Prohibited Persons', above n.1, 6.

partly on previous Drafts that had received critical comment after 1996⁸⁶; the second draft had also been the subject of a workshop organised at the Human Rights Commission in September of that year.

Publication of the White Paper was preceded by the appointment and meetings of the eight member 'Refugees White Paper Task Team'. This consisted of five representatives from NGOs, UNHCR and Human Rights Institutions and three representatives of the Department of Home Affairs. Outside input was extremely limited, and the Task Team were pressed into producing a white paper within a very short space of time, a deadline which they duly met, namely, within six weeks of the Task Team's first meeting⁸⁷.

Contrary to what has been claimed⁸⁸, and especially given the limited local expertise on asylum-related matters⁸⁹, since 1996 there has been a relatively high volume of critical input from civil society in respect of various drafts of the Refugees Bill. The Legal and Policy Sub-Committee of the National Consortium on Refugee Affairs (NCRA), a national body of policy specialists, NGO representatives and UNHCR formed in November 1997, some of whom were represented on the Refugees Task Team, held a further seminar in Pretoria on 29 May 1998⁹⁰.

⁸⁶ On the first draft, see Ghaith Al-Omari, Refugee Studies Programme, University of Oxford, Feb. 1996, 'Comments on the South African Refugees Act 1994 (Working Draft)'. On the second draft, see James Hathaway, 'Comments from the Perspective of International Refugee Law', 23 Sept. 1996; Lee Anne de la Hunt, UCT Law Clinic, 'Comments on the Second Draft of the Refugees Bill', presented at the Human Rights Commission's Workshop on the Second Draft Refugees Bill, Johannesburg, 23 Nov. 1996 and Dennis McNamara and Kemal Morjane, 'Comments on South Africa Draft Refugees Bill', 5 Aug. 1996.

⁸⁷ Attendance by some representatives of the Task Team was not always consistent.

⁸⁸ Cf. Barutciski, 'Development of Refugee Law', above n.67, 715: '. . . strikingly restrictive versions of the draft bill have been quietly pushed forward by the Department of Home Affairs and have drawn limited criticism from the NGO community.'

⁸⁹ In 1996, with the exception of the Universities of Cape Town and Witwatersrand, some local NGOs and a loose alliance of organisations in the Refugee Rights Consortium (later to develop into the NCRA; see further below), there was virtually no discourse on asylum-related issues in South Africa.

⁹⁰ It was intended to develop 'consensus points arising from the Workshop (to be) considered as approved policy guideline of the NCRA', see 'Report', Workshop on the Third Draft Refugees Bill, 29 May 1998, African Window, Pretoria. A further 'policy sub-committee' meeting/seminar was held in Cape Town in Sept. 1998.

The Workshop critically addressed issues presented by the third Draft Refugees Bill, including: re-vamping the administrative structure, a ‘fast-track’ procedure to deal with claims felt to be manifestly unfounded, abusive or fraudulent; detention issues; inclusion and exclusion issues; gender issues; the rights regime which ought to be incorporated in the Bill; and integration and repatriation issues.

Submissions to the Draft Refugees White Paper and Draft Refugees Bill were requested by 20 July 1998, and despite the very limited time-frame, responses were forthcoming from no less than thirteen separate organisations and government departments⁹¹. Responses from organisations reflected widespread concern that the Status Determination Body be assured of its independence, free from political interference, and, in particular, that the Minister and Director-General’s delegated authority for making determinations on asylum remain final, in other words that they not be permitted to ‘over-rule’ a decision of a refugee determination officer⁹². Other responses concentrated on exclusion issues, recommending, for example, that the procedure acknowledge developments in international law relating to war crimes⁹³. Concerns were also raised over issues relating to cessation of refugee status, more specifically that a decision voluntarily to return to one’s country of origin not automatically lead to cessation⁹⁴.

⁹¹ These included the Department of Home Affairs (Refugees Section, Permanent Residence Section and Pretoria District Office), UNHCR, international NGOs such as Human Rights Watch, the Refugee Studies Programme at Oxford University, and South African organisations, such as the South African Human Rights Commission, Legal Resources Centre, Centre for Southern African Studies (University of the Western Cape), Centre for Applied Legal Studies (University of Witwatersrand), Lawyers for Human Rights, The Law Society of the Transvaal, and the Southern African Migration Project. LHR issued comments which focussed on matters relating to terminology, independence of the status determination structure, asylum seekers’ and refugees’ rights, detention issues, integration and repatriation, see Lawyers for Human Rights, ‘Comments to the Draft Refugee White Paper (Notice 1122 of 1988, South Africa), LHR, July 1998.

⁹² Concern here focussed on s. 4(3) of the White Paper, which provided that, while the Director-General ‘may delegate any power granted to him or her under this Act’, it did ‘not prevent the Director-General from exercising the power in question himself or herself’.

⁹³ Human Rights Watch recommended that s. 2(4)(a) of the White Paper be expanded to include a wider definition of war crimes, developed since the drafting of the 1951 Convention, ‘Submission to the White Paper Task Group on Refugee Policy’, Human Rights Watch, Jul. 1998 at 4.

⁹⁴ UNHCR, ‘Comments on the Draft White Paper’, 20 Jul. 1998, at p.1, A2(b)

A number of organisations expressed general concern over the treatment which asylum applicants and recognised refugees would receive under the new legislative regime, believing that specific incorporation of certain rights was necessary, to include at least the full list of rights guaranteed under the 1951 Convention. In addition, the current, perceived lack of administrative justice accorded to asylum applicants was raised as a critical concern, with commentators urging that specific reference be made to the rights of fairness and transparency in decision-making⁹⁵.

The introduction of camps into South Africa was discouraged⁹⁶, with one commentator drawing reference to the fact that Mozambicans who arrived during a period of mass influx were accommodated without resorting to such measures⁹⁷. Further concern was expressed that the provision for establishing 'reception centres' was unclear, particularly in terms of resource implications attached to such facilities, and might unjustly restrict freedom of movement⁹⁸.

Finally, concern was raised over the right of persons to be naturalised within a reasonable period. It was proposed that, given the currently long wait for status determination, a period of 5 years (after which one was entitled to apply for normalisation of their status) ought to 'commence from the period the asylum seeker first established residence in South Africa'⁹⁹. A further proposal urged the adoption of a 'specific and complementary set of criteria for

⁹⁵ See especially, comments by Legal Resources Centre, Cape Town, dated 20 Jul. 1998

⁹⁶ Cf. Baruticksi, 'Development of Refugee Law', above n.67, 719-720, who states that 'Keeping refugees in camps is an option available in all recent Government initiatives on refugee policy'. While recognising the UNHCR's warning against 'confining refugees permanently in refugee camps', Baruticksi commented that 'it is likely that the Green Paper's concern for respecting social structures which will facilitate the resumption of life in the country of origin, allowing the refugee population to remain vital and contribute to their home communities upon repatriation, and promoting contact between refugee communities and the country of origin, is easiest to achieve if the refugees remain in camps.'

⁹⁷ See for example, Human Rights Watch, 'Submission to the White Paper', 6.

⁹⁸ South African Human Rights Commission, 'Comments - Draft Refugees Bill, Jun. 1998, at 7.

⁹⁹ Human Rights Watch, 'Comments', at 8.

refugees applying for naturalisation'¹⁰⁰; this insistence on naturalisation was justified by reference to the 'insecurity' which results from temporary status under the current system¹⁰¹.

Following these submissions, the State Law Advisors reviewed the revised draft Refugees Bill of the Department of Home Affairs, which version was presented to the Parliamentary Portfolio Committee on Home Affairs in September 1998. This version of the Draft Bill drew further comment from organisations. Based largely on the two previous workshops, the National Consortium on Refugee Affairs (NCRA) presented a summary of joint concerns to the Portfolio Committee in October 1998¹⁰².

The NCRA's concerns focussed on certain definitions and language used in the Act, where it was believed that interpretation could have *prima facie* negative consequences for asylum applicants or recognised refugees¹⁰³. Concerns were also raised relating to the administrative and political independence of asylum determination and appeal structures, the rights of applicants in the determination procedure and of refugees¹⁰⁴, the powers of the Minister to intervene in the procedure¹⁰⁵ and the rights of refugees' dependants¹⁰⁶. Furthermore, the

¹⁰⁰ Lawyers for Human Rights, 'Comments', at 13.

¹⁰¹ See D. Silove, 'Anxiety, depression and PTSD in asylum-seekers', above n.68.

¹⁰² The National Consortium on Refugee Affairs is a national body in South Africa whose membership includes a cross-section of policy specialists, research-based organisations, service providers, other NGOs involved in working with refugees, the South African Human Rights Commission and UNHCR.

¹⁰³ For more detail, see 'Summary of Concerns of the National Consortium on Refugee Affairs (NCRA), Draft Refugees Bill 1998: Version Reviewed by the State Law Advisors', NCRA, 23 Oct. 1998.

¹⁰⁴ The NCRA unsuccessfully advocated for the right to naturalisation within 5 years of lodging an application, right of a child born to refugee parents to South African citizenship and on the right of a refugee to be informed of the right to make a submission with regard to a decision to withdraw refugee status.

¹⁰⁵ While it was acknowledged that the Minister ought to be able to intervene in circumstances where an applicant was a threat to national security (also provided for in the Bill), it was felt that, in other provisions (for example at the appeal stage), the power to intervene was too wide. Furthermore, in the making of Regulations, it was felt that they ought to 'be promulgated through a process involving the independent statutory authorities created by the Bill'.

¹⁰⁶ S. 33 of the Bill differed substantially from a similar provision in a previous draft of the Bill which **was** believed to comply with international law and was later changed by the Portfolio Committee. Concerns which were raised by the NCRA related to serious, alleged breaches of international refugee law and the principle of

NCRA made a number of recommendations in respect of the proposed asylum procedure, with the intention of making the procedure cheaper and administratively more efficient, and proposed that there be an obligation to report to Parliament on the number of persons detained under the Act. Of serious concern to the NCRA were the potentially ‘far-reaching implications’ of s. 37, which it was feared would ‘significantly widen the scope of exclusion and cessation’ by treating a refugee who contravened the conditions of his permit as a prohibited person (illegal alien)¹⁰⁷. This last concern, and indeed many others raised by organisations, were later addressed by the Portfolio Committee in their amendments.

4.1 Refugees Act

The Refugees Bill¹⁰⁸ was passed by Parliament in November of 1998, following hearings and amendments of the Portfolio Committee of Home Affairs¹⁰⁹. It was very encouraging to note the Portfolio Committee’s amendments to the Bill, addressing many of the concerns raised by the NCRA and other commentators. Although some outstanding concerns remain over certain provisions in the Act¹¹⁰ and especially in regard to its possible implementation, including issues not addressed by the Bill and those left to Ministerial regulations¹¹¹, the Act is very much to be welcomed.

family unity.

¹⁰⁷ The text in this draft of the Refugees Bill differed substantially from previous drafts (including the Draft Bill annexed to the White Paper), which provided that one would be ‘guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment’, rather than ‘be regarded as a prohibited person’.

¹⁰⁸ Refugees Bill, Republic of South Africa, Number 135 of 1998 (B 135 — 98).

¹⁰⁹ Portfolio Committee Amendments to Refugees Bill, B 135A — 98

¹¹⁰ Outstanding concerns include removal of the rights of asylum applicants to an oral hearing and to be legally represented, see Portfolio Committee Amendments, 4 as well as the change from South African ID’s to ‘documents in the prescribed form’, 4.

¹¹¹ In particular, there will likely be significant discussion and debate over the manner in which refugees are to be dealt with during a ‘mass influx’, including the criteria which will be used to determine such an ‘influx’, the measures which will be taken to deal with ‘manifestly unfounded applications’, the circumstances in which refugees will be repatriated, and other matters, including those contained in s. 38 of the Refugees Bill.

V. CONCLUSION

The historical context of South Africa's migration and border-control policies is highly relevant to current debates on asylum and refugee policy. The very same ideology which resulted in the country's notorious pass laws and influx control also permeated the country's border control and migration policies. Today, South Africa faces additional challenges, with the current social environment in South Africa becoming increasingly nationalistic and xenophobic, reflected to some extent by the murder in September 1998 of three Senegalese asylum seekers on a train between Johannesburg and Pretoria¹¹².

In light of these and other factors, one can appreciate the practical difficulties which the government has faced in managing a migration policy and legislation designed to expel and/or prevent the entry of individuals deemed 'undesirable'¹¹³. Further, one can appreciate that this implementation has been the subject of much local and international concern, while at the same time acknowledge the meaningful steps the South African government has taken to try and remedy this problem with a new policy.

Since 1994, the involvement and input of South African NGOs, Human Rights Commission and specialists in policy development have given the country's new democracy enhanced credibility and relevance, signalling a much welcomed break from the past. This input has by no means been limited to civil society in South Africa. Indeed, policy developments relating to migration and refugees have generated much interest among foreign academics and institutions, some of whom have received substantial financing, and international and local human rights organisations, which have tended to operate with more limited budgets. Input from a broad representation of interests is perhaps also a reflection of the growing tendency amongst communities of established refugee receiving countries to share or duplicate or even

¹¹² 'Train from hell to Irene Station', *Pretoria News*, 4 Sept. 1998. Subsequent articles were critical of the public's response, including 'Public accused of being soft on mob killings', *Sunday Independent (SA)*, 6 Sept. 1998. This incident was also reported in the international press, including the UK *Independent on Sunday*, 'Xenophobic South Africa shrugs off train murders', 13 Sept. 1998.

¹¹³ Previous versions of the Act were designed to prevent entry and/or expel 'undesirables' such as Jews from Europe, during World War II.

(in the case of the European Union) to attempt to harmonise, asylum policies¹¹⁴.

Though views on certain issues have frequently been divided, the discourse in South Africa has undoubtedly benefited from ‘cross-fertilisation’ and discussion by a number of individuals and organisations, many of whom provided learned commentary on international protection issues. Particularly valuable contributions were received from those who also possessed a strong practical understanding of the nature and implementation of the existing policy in South Africa.

South African NGOs¹¹⁵ in particular, have contributed to a consultative, locally-based discourse, allowing matters relating to refugee and migration policy to be discussed more openly. In light of the new *Refugees Act*, a relatively strong network of civil society organisations and growing number of specialists operating in South Africa, one can expect continued discussion and awareness of these very important issues, and hope that the cumulative effect is one which *strengthens* the right of asylum in South Africa.

However, given the outstanding concerns over the new legislation, as well as the formidable challenges in its implementation, the future asylum discourse in South Africa will no doubt also prove to be contentious.

¹¹⁴ For a discussion of European asylum policy, and especially the Inter-Governmental Conference, see Standing Committee of Experts in international immigration, refugee and criminal law, ‘Democracy, Migrants and Police in the European Union: The 1996 IGC and Beyond’, FORUM, Netherlands, 1997.

¹¹⁵ These include, but are not necessarily limited to: Lawyers for Human Rights, Centre for Applied Legal Studies, Centre for Policy Studies, Centre for Development and Enterprise, Centre for Southern African Studies, UCT Law Clinic, Southern African Migration Project, Jesuit Refugee Services, Refugee Studies Programme, Legal Resources Centre, Black Sash and Refugee NGO Forums in Durban, Cape Town and Gauteng, and many others.