

Human Rights in Context

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Research on human rights, or social and political issues closely related to human rights, is nowadays carried out in many academic departments, from law to anthropology, from sociology to philosophy. Yet, there is surprisingly little communication amongst scholars working in these different disciplines, and research that takes more than one perspective into account is seldom encouraged. This new series aims to bridge the divide between the social sciences and the law in human rights scholarship.

Books published in this series will be based on original empirical investigations, innovative theoretical analyses or multidisciplinary research. They will be of interest to all those scholars who seek an audience beyond the confines of their academic subjects.

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Edited by Jeff Handmaker, Lee Anne de la Hunt and
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ADVANCING REFUGEE PROTECTION IN SOUTH AFRICA

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Jeff Handmaker, Lee Anne de la Hunt
and Jonathan Klaaren



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Obviously, any errors or omissions remain the responsibility of the authors and co-editors and the views and opinions stated in this collection are those of individual authors and ought not to be ascribed to any particular institution.

Jeff Handmaker, Lee Anne de la Hunt
and Jonathan Klaaren
2007

INTRODUCTION

*Jeff Handmaker, Lee Anne de la Hunt
and Jonathan Klaaren*



New Perspectives

In one sense, almost any perspective on refugee protection in South Africa is bound to be new.¹ The protection of refugees is still a relatively new experience to South Africa. Indeed, it is only since September 1993 that South Africa began formally to deal with refugees who were not its own citizens forced into exile by the policies of apartheid. The country's first Refugees Act came into force only in April 2000.

Several months before the first non-racial elections, representatives of the government of South Africa and the United Nations High Commissioner for Refugees signed a Basic Agreement.² This followed on the United Nations High Commissioner for Refugees (UNHCR) gaining of a formal legal mandate in 1991 to operate within South Africa. The purpose of this Basic Agreement was to facilitate a durable solution, through temporary recognition, for an estimated 300,000 Mozambicans who fled the civil war in their country of origin and continued to reside in South Africa, primarily in former 'homelands'. The agreement provided first for a UNHCR-led voluntary repatriation programme³ and secondly for integration in the form of a (cabinet-approved) recommendation that those former refugees from Mozambique who did not take advantage of repatriation have their status regularised. Although a cessation clause has been in place in respect of Mozambique since December 1996, the status regularisation element of this 'durable solution' was implemented only towards the end of 1999, in somewhat controversial circumstances.⁴

This initial refugee policy only benefited Mozambicans, just a few months after South Africa's 1994 elections. A Passport Control Instruction⁵ was then issued by the South African Department of Home Affairs, providing the broad guidelines by which the Department would receive and process applications for political asylum from applicants from any country. This administrative regime has now been replaced by comprehensive refugee legislation, the Refugees Act 130 of 1998, which came into force by way of presidential proclamation⁶ on 1 April 2000 with the issuing of regulations.⁷ In this sense, as detailed more fully below, the South African refugee protection experience has barely spanned seven years' time, and is at least as new as the South African experience of democracy.

Nonetheless, perspectives on refugee protection in South Africa can claim to be new in a sense beyond being freshly minted. South Africa offers several variations on themes of refugee protection replicated elsewhere in the world. For one, the recent establishment of constitutional democracy in South Africa has been accompanied by an increasing emphasis on international human rights. Some of the essays below ask whether this emphasis on international human rights has influenced refugee protection in South Africa, and, if so, how. Moreover, South Africa may be the site of one of the first interactions between an institutionally established judicial branch and the legal provisions of the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa: its provisions formed part of a legal challenge in 1998.⁸

Perhaps most importantly, refugee protection in South Africa shows close linkages to policies of international migration as well as to apartheid. Prior to 1994, South Africa was infamous throughout the world for its racialised policies and seemingly limitless measures of social control. Despite pressure from the international community, the previous government showed itself to be stubbornly resistant to change, reinforcing its control through a police force that was 'always in the front line in the enforcement of apartheid ... [and] ensured that black South Africans were kept in their places in segregated and inferior institutions'.⁹

This unforgiving attitude of the apartheid government automatically extended to (black) foreigners, including refugees from the war in Mozambique.¹⁰ Despite these blanket restrictions, many refugees braved a collection of horrors, including dangerous journeys through the Kruger National Park (which borders both countries) and a fence that once generated a lethal electric voltage in their desperation to avoid border control officials and reach relative safety in neighbouring South Africa.

South Africa has seen dramatic political changes in recent years, and Mozambique too has at last achieved some degree of political stability.¹¹ During this time, migration to South Africa from Mozambique and other countries has continued and has perhaps even increased. The true numbers of migrants entering South Africa in recent years continue to be heavily contested, however. Figures that have been cited range from conservative

estimates of several hundred thousand, to heavily exaggerated numbers ranging into the 'millions', supported by 'pseudo-scientific' data.¹² Whatever the numbers, it is clear that the nature of most regional migration is 'circular', with migrants expressing little wish to remain permanently in South Africa.¹³

Nevertheless, popular perceptions of a 'flood' of foreigners, reinforced by a sometimes overtly xenophobic media,¹⁴ the lack of institutional capacity to make timely, reliable determinations on refugee status, and numerous other factors have presented considerable challenges to the South African government's stated desire to reformulate migration policy. Refugee protection policy has been caught up in these larger and more powerful policy currents.

The 1994 Government of National Unity inherited a framework of immigration legislation, consolidated in the Aliens Control Act 96 of 1991, that had been conceived in racist circumstances and used to further apartheid and its exclusionary policies. Minor amendments to the Aliens Control Act in 1995 removed several obvious unconstitutional features of the Act, such as the prohibition or 'ouster' of judicial review, and added a couple of rights-based protections. Otherwise, the Aliens Control Act was left intact. Apart from the development and passage of the Refugees Act in 1998, the migration policy-making process since 1995 has moved at a glacial pace.

To be fair, South Africa shares the difficulty of legislating on this topic with a number of other countries, particularly in the current global climate of heightened security. Immigration issues are, even at the best of times, emotive and difficult ones around which to form consensus. Further, immigration issues often implicate fundamental interests in many different parts of government as well as the private sector. These factors make immigration legislation a difficult proposition under any circumstances. But, perhaps especially when the legislation is under the charge of a Minister of a minority political party, the Inkatha Freedom Party (IFP), in coalition with a majority party the African National Conference (ANC), immigration legislation can easily get stalled. Every step for the Immigration Bill from Green Paper to White Paper has been full of confusion and empty of consensus or clear understanding. On 29 April 2004, the era of political deadlock was ended when Minister Buthelezi stepped down and the ANC appointed Mrs Nosiviwe Mapisa-Nqakula as the new Minister of Home Affairs.

In 2001, President Mbeki pinpointed migration policy for real progress at the beginning of the year – in his opening speech he stated: 'Immigration laws and procedures will be reviewed urgently to enable us to attract skills into our country.' Nonetheless, it became a constitutional issue that forced Parliament's attention to focus on the policy area of immigration. In June 2000, the Constitutional Court declared a part of the Aliens Control Act unconstitutional for a lack of precise policy to guide the discretion of officials in limiting fundamental rights, such as the right to dignity of spouses to live together in the same country. The order in the *Dawood v. Minister of*

*Home Affairs*¹⁵ case gave Parliament 24 months to mend the problem. That deadline, and another one imposed by a similar case, forced the Parliament to act by early June 2002, passing the Immigration Act 13 of 2002. After the significant 2004 election, the Immigration Amendment Act 19 of 2004 amended, indeed, largely replaced, this legislation.

Even a preliminary assessment of the Immigration Act is beyond the scope of this collection of essays. Our conclusion briefly canvasses its effect on the Refugees Act only. The relevant point for the present purposes is that the first significant development in South African post-apartheid migration policy belongs not to the issue of immigration, but to that of refugee protection. It is this development that the present collection both chronicles and analyses.

This Collection

In part due to the passage of the Immigration Act 13 of 2002, this collection of articles comes at a time of heightened interest, new directions and critical expansion of regional and international dialogue on refugee protection issues in South Africa. Of course, neither a conference (or a set of conferences)¹⁶ nor this collection of essays, can claim to represent all relevant issues. Nonetheless, the essays in this collection illustrate significant issues during this critical first phase of refugee protection and policy development and record a significant turning point in the national discourse in South Africa. As we illustrate in Chapter 1 of this collection, this is a development in which locally based and international academics and practitioners have played an active role.

The local continually interacts with the global in this discourse. The material of this collection overlaps with an intense period of policy development. This period of policy development has benefited both from considerable involvement of civil society organisations and from an emerging body of jurisprudence from the courts. The stage has been set for a refugee protection regime that may be seen as distinctively African. In recent years, interpretations of international treaty obligations by South Africa's courts have been made in the context of a vital (albeit young) constitutional democracy, articulated by an independent judiciary with a strong culture of constitutionalism.¹⁷ Moreover, South Africa offers an interesting case of refugee protection policy put into place by a government staffed in large part by former refugees. Indeed, many senior government figures formerly sought refuge in the same countries of origin of the present-day refugees in South Africa. Such persons were expected to bring a new understanding of old issues in refugee protection, such as refugee integration and regional dynamics.¹⁸ These facets add up to the possibility of refugee protection in South Africa being somewhat different from prior refugee protection regimes.

It is the aim of this collection to present perspectives on refugee protection that reflect on its newness in South Africa, and on the substantial degree of public participation in the policy development process. The primary emphasis is on presentation and analysis of the South African experience. This is achieved through a variety of methods including those of experience, advocacy and comparison. Frequently, that experience has offered insights that have travelled across borders and have presented challenges to established notions of community and democracy. It would be appropriate for a collection about refugee protection in South Africa to aspire to the same kind of challenges.

Many of the issues raised through the various processes of consultation and feedback (and some of the material presented at these workshops) are discussed in this volume. These essays thus represent the shifts and concerns of a tangible process of establishing policies, legislation and practice concerning refugees, in an ongoing effort to advance refugee protection in South Africa.

Part I: *The Development of Refugee Policy in South Africa*

Part I of this collection was inspired by a conference organised in March 1998 in Pretoria by the South African non-governmental organization (NGO) Lawyers for Human Rights (LHR) and partly documented in *Perspectives on Refugee Protection in South Africa*, also produced by the present co-editors.¹⁹

However, as we discuss more comprehensively in this collection, events took on great momentum and we felt obliged to record and comment on these developments which led to the passing of the Refugees Act 1998, later brought into force in April 2000 with corresponding Regulations. Both of these documents are included as appendices to this collection.

Developing the context in which these developments took place, in Chapter 1, Guy Goodwin-Gill discusses recent debates and policy developments that have taken place within an internationalist perspective. As reflected in our earlier *Perspectives* collection, many of these developments have featured extensively in South Africa's own debates. Drawing on his considerable experience as both a practitioner and an academic, Goodwin-Gill examines, first, certain developments relating to refugee movements at the international level (particularly in the Security Council); and secondly, the question of implementation at the national level.

In Chapter 2, Loren Landau deepens this context by outlining regional and migratory policy challenges faced in the construction of a migration/refugees discourse in South Africa. In particular, he points to two factors that have shaped this discourse, namely that migration is a perennial and indelible part of the Southern African political economy and that migration policy can no longer be formulated effectively only by national governments.

In Chapter 3, we outline the legislative history that led to the passing of the Refugees Act 1998. In particular, we highlight the complex roles of civil society in contributing to various processes that led to passage of the Act.

Jonathan Klaaren and Chris Sprigman then present historical overview of South Africa's attempts to grapple with its refugee problems in Chapter 4. They critique the procedures currently in operation and propose an institutional model of refugee determination procedures that is hearings-based, separates fact-finding and decision-making aspects, and allows applicants to exercise their constitutional right to legal representation. This paper was influential in persuading members of the Refugees White Paper Task Team in May 1998 to support such an institutional model of refugee status determination. The chapter has been updated to consider their model in light of the Refugees Act and Regulations.

Part II: The Implementation of Refugee Policy in South Africa

Part II of this collection focuses on challenges faced in the early implementation of the Refugees Act 1998 and corresponding Regulations, including additional challenges faced during the period of transition from the previous to the new policy regime.

Part One provides the background to Lee Anne de la Hunt and public-interest lawyer William Kerfoot's analysis in Chapter 5, of a number of practical problems and concerns associated with the implementation of the asylum procedure. It highlights the gaps between constitutional standards and Department of Home Affairs' practices, based on a number of court challenges to the refusal by refugee affairs officials to consistently follow just administrative procedures. These cases (many of them groundbreaking) have all sought to bring the refugee determination procedure into closer compliance with international law and the provisions of South Africa's constitution. The chapter then elaborates on specific difficulties faced in the implementation of the Refugees Act 1998 and its corresponding Regulations.

In Chapter 6, Jeff Handmaker analyses a UNHCR-funded project to deal with a backlog of asylum applications and build departmental capacity in South Africa, a project implemented by the South African government in collaboration with the UNHCR and local NGOs. This chapter also addresses issues regarding the transition from the Aliens Control Act to the 1998 legislation. It also offers some tentative reflections on a second backlog project introduced by the Department of Home Affairs in 2006.

Chapter 7 analyses another initiative designed to implement a durable solution for urban-based Angolan refugees in South Africa. Drawing partly on a 2003 demographic study of refugees in Johannesburg by the Universities of Witwatersrand and Tufts (Wits-Tufts), Jeff Handmaker and Dosso Ndesomin analyse the current treatment of refugees in South Africa's urban centres and relate this to the prospects of repatriation to Angola, integration in South Africa and resettlement in third countries.

Part III: Special Issues on Refugee Policy in South Africa

Part III of this collection addresses a variety of specific issues associated with refugee protection in South Africa. Each of the chapters in this part is based on research commissioned by the National Consortium for Refugee Affairs (NCRA) or UNHCR. This part of the collection thus provides an examination of the ongoing issues within the field of refugee protection in South Africa.

Chapter 8 by Frankie Jenkins and Lee Anne de la Hunt discusses the issue of confining asylum-seekers in reception centres, in the context of recent proposals presented by the South African government and encompassed in a controversial recent bill to amend the Refugees Act.

Victoria Mayer, Jeff Handmaker, Lee Anne de la Hunt and Jacob van Garderen continue in Chapter 9 with an essay focussing on refugee children. It addresses various aspects of policy relating to the reception of refugee children in South Africa, with a particular focus on unaccompanied minors.

In Chapter 10, Nahla Valji, Lee Anne de la Hunt and Helen Moffett focus on the government's policy relating to refugee women and propose gender guidelines for status determination officials. The chapter addresses relevant issues pertaining to assessing gender as a ground of persecution, cultural sensitivity, repatriation and detention.

Finally, in Chapter 11, Florencia Belvedere, Piers Pigou and Jeff Handmaker discuss prospects for a health and welfare policy for refugees and asylum-seekers in South Africa, based on international and comparative policy guidelines and the corresponding socio-economic conditions of refugees in South Africa. The essay is based on a research report authored by CASE and commissioned by the UNHCR.

We hope this collection will prove illuminating in how South Africa has confronted one of the biggest challenges in its nascent democracy. The process of developing migration and refugee policies has at times been hotly contested, though also a conscientiously debated field involving many different stakeholders. As South Africa continues to humbly share its experiences with the international community on how it extricated itself from a political regime bent on institutional discrimination, the results of this particular process of refugee policy reform may also be instructive to other countries grappling with similar issues.

Notes

1. See also J. Handmaker, L. De la Hunt, and J. Klaaren, eds, *Perspectives on Refugee Protection in South Africa* (Pretoria, 2001).
2. 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, February 1993.

3. For further details, see Dolan, *Report to Norwegian Refugee Council* (Oslo, 1995); C. Dolan, 'Aliens Aboard: Mozambicans in the New South Africa', *Indicator SA* 12, no. 3 (1995): 29; and K.B. Wilson with J. Nunes, 'Repatriation to Mozambique', in *When Refugees Go Home: African Experiences*, ed. T. Allen, and H. Morsink, (Geneva, 1994).
4. J. Handmaker, and J. Schneider, 'The Status 'Regularisation' Programme for Former Mozambican Refugees in South Africa', Working Paper for the Wits Research Unit on Law and Administration (Johannesburg, 2002).
5. Passport Control Instruction No. 63 of 1994. A number of other instructions from the Department of Home Affairs followed.
6. Proclamation No R 19 of 2000, contained in Government Gazette 21061 of 3 April 2000.
7. Proclamation No R 22 of 2000, contained in Government Gazette 21075 of 7 April 2000.
8. *Baramoto v Minister of Home Affairs* 1998 (5) BCLR 562 (W).
9. G. Cawthra, *Policing South Africa* (Cape Town, 1993).
10. It is by now very well established that this war, described by a US State Department official as 'one of the most brutal holocausts against ordinary human beings since World War II', was part-sponsored by the South African government itself Footnote 31 in Human Rights Watch, 'Prohibited Persons': *Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (New York, 1998).
11. However, since the achievement of a Peace Accord between warring forces in 1992, Mozambique has been beset with a crippling economy and environmental disasters generating a 'new generation' of forced migrants, not least the devastating floods that displaced hundreds of thousands in 2000.
12. Previous studies that suggested such large numbers were comprehensively critiqued by J. Crush *Covert Operations: Clandestine Migration, Temporary Work and Immigration Policy in South Africa*, SAMP Policy Series, No. 1 (Cape Town, 1997).
13. J. Crush, 'The Discourse and Dimensions of Irregularity in Post-Apartheid South Africa', *International Migration* 37, no. 1 (1999): 128.
14. Despite great efforts on the part of, amongst others, the South African 'Roll Back Xenophobia Campaign' to address xenophobia in media reporting, there remain significant challenges. See A. Harber, 'The Sun Bares its Rotten Teeth', *Moneyweb*, 25 April 2006, <http://www.moneyweb.co.za/economy/soapbox/265554.htm> last checked 9 August 2006.
15. *Dawood and another v Minister of Home Affairs and others* 2000 (3) SA 936; *Shalabi and another v Minister of Home Affairs and others* (CC) 2000 (8); *Thomas and another v Minister of Home Affairs and others* BCLR 837 (CC).
16. We refer here to a conference organised by Lawyers for Human Rights in March 1998 and a follow-up workshop organised by the National Consortium for Refugee Affairs (NCRA) in May 1998 on the proposed Draft Refugees White Paper and 'Refugee Bill'. Together, these meetings generated most of the material contained in a previous collection by the present co-editors (above, n. 1), as well as Chapters 3 and 4 of the current collection. The content of these workshops is discussed more thoroughly in Chapter 3 of this collection.
17. This is further reinforced by South Africa's progressive constitution itself, which provides in section 39 that 'When interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law.'
18. Unfortunately, this is not always the case. See 'Rights Groups Slam "Xenophobic Official"', *Mail and Guardian*, 5 to 11 November 1999.
19. Above, n. 1.

PART I

THE DEVELOPMENT OF REFUGEE POLICY IN SOUTH AFRICA