38. 'When people want to go home, they don't let you be deported until you pay them money. Home Affairs wants you to pay 100 to 400 Rands, whatever you've got. Otherwise, you just stay here [in detention]. They let people go without ID, just give them some money.' Quoted in Human Rights Watch, *'Prohibited Persons': Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa* (New York, 1998), 59.
39. N.D. Innocenti, 'A Magnet for the Rest of the Continent', *Financial Times*,13 April (2004): A5.
40. See I. Palmary, *Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government*, (Johannesburg, Centre for the Study of Violence and Reconciliation 2002); Leggett, *Rainbow Tenement*; Harris, *A Foreign Experience*.
41. One of the most organised of these is *Mapogo a Mathamaga*, a national investigation and 'goods recovery' company that works largely outside the law, but regularly draws on police information and muscle.
42. J. Crush, 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa', *International Migration* 38 (2000): 110.
43. Palmary et al, 'Violent Crime', 112.
44. Interview with D. Louw, Director, Hillbrow Police Station, Johannesburg, South Africa, 18 July 2003.
45. A. Mbembe, *On the Post Colony* (Berkeley, 2002), 58.
46. New Partnership for African Development (NEPAD), 'Nepad in Brief' (http://www.nepad.org/en.html) (accessed 2 November 2004).

3

Talking a New Talk: A Legislative History of the Refugees Act 130 of 1998

Jonathan Klaaren, Jeff Handmaker and Lee Anne de la Hunt

Introduction

This chapter does not write the legislative history of the Refugees Act 130 of 1998 but rather a legislative history. The scope of this chapter extends only to relatively formal developments, such as the drafting of legislation and official policy documents, although we have supplemented these with other background materials as available. We argue that the legislative history of the Refugees Act demonstrates that non-state actors made a major contribution in establishing both the form and the content of legislation on refugee protection separate from migration policy in South Africa. Through this process as well as its result (the first South African Parliamentary statute), a new subject was inserted into the South African policy arena: refugee protection.[1]

Starting Points

The principal piece of legislation dealing with cross-border entry effective in South Africa when the government and the United Nations High Commissioner for Refugees (UNHCR) signed the 1993 Basic Agreement[2]

was the apartheid-era Aliens Control Act 96 of 1991. This Act was a manifestly unsuitable legislative framework for the purpose of refugee protection.[3] Even in respect of international migration issues apart from refugee protection, immigration and constitutional lawyers widely regarded this Act as an unworkable, authoritarian and inaccessible piece of legislation.[4] Above all, in the light of the 1993 Constitution, it was clear that the Aliens Control Act was unconstitutional in many respects.[5]

Amending legislation enacted in 1995 and which took effect in mid-1996 eliminated several sections of the Aliens Control Act that were of serious concern (including a prohibition on judicial scrutiny of Home Affairs actions).[6] Nonetheless, even after the 1995 amendments, it remained clear that more substantial legislative reforms were needed. Indeed, in 1996, the then Deputy Minister of Home Affairs, Lindiwe Sisulu, was recorded as saying that a 'complete overhaul of immigration policies is indispensable for the new democracy of South Africa'.[7] In respect of refugee protection, more than an overhaul was needed – an entirely separate legislative framework would need to be drafted in a policy area previously unknown in South Africa.

In 1995, the Regional Office of the United Nations High Commission for Refugees provided the Department of Home Affairs with a suggested draft Refugee Bill.[8] This document was similar in form and content to the Zimbabwe Refugees Act of 1983, which the UNHCR had a role in drafting.[9] The UNHCR was thus closely involved in the South African legislative drafting efforts from the beginning. To some extent, this UNHCR involvement flowed directly from its involvement in the repatriation of liberation movement exiles. The UNHCR involvement was also consistent with several of the international agreements that the new post-apartheid government was busy acceding to. In 1996, the South African government acceded to the 1951 United Nations Convention and 1967 Protocol Relating to the Status of Refugees, as well as to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter referred to as the 1969 OAU Convention).[10]

Towards the end of 1996, the Department of Home Affairs produced its own internal draft, known as the Second Draft of the Refugee Bill. The Department made the Draft available to individuals and organisations in civil society.[11] This step was an unusual one for this department, which had not been known for its participatory processes. Civil society responded enthusiastically to the opportunity to comment. In a series of meetings facilitated by the South African Human Rights Commission (SAHRC) and Lawyers for Human Rights, members of a nascent consortium on refugee affairs met, workshopped and followed up with representatives of the Department. These meetings aimed to discuss drafting points regarding the Second Draft Refugee Bill as well as other issues of refugee protection policy.[12] The attendance of Department of Home Affairs senior officials at events within this series of contacts was significant albeit inconsistent.[13]

Although it contained several important innovations, the Second Draft did not represent a fundamental break with refugee determination policy as then practised at the Department of Home Affairs. For instance, the draft would have empowered the Minister of Home Affairs, in issuing asylum-seekers and refugees with permits, to impose such conditions as he or she saw fit and to amend these conditions.[14] Nonetheless, some provisions satisfied long-standing demands of refugee lawyers for elements of transparency and rationality. For instance, the Second Draft Refugee Bill assured an asylum-seeker access to information concerning his or her application, as well as reasons for a negative decision.

Soon after the Second Draft Refugee Bill had been produced, the drafting process was put on hold. At the end of 1996, then Minister of Home Affairs Mangosuthu Buthelezi, appointed a Green Paper Task Team to consider all aspects of migration and immigration, including forced migration. The Task Team, chaired by Dr Wilmot James, then Director of IDASA (Institute for a Democratic Alternative in South Africa), included politicians, academics and representatives from labour and civil society. This Task Team further involved civil society by its decision to commission research reports on a number of relevant topics.[15] The Team also held a seminar in the province of Mpumalanga in February 1997 to discuss refugee policy. Input at this seminar was in part provided by Professor James Hathaway, a Canadian legal academic.[16] Hathaway also acted as a consultant to the Task Team in drafting its report. While the initial effect of the appointment of the Green Paper Task Team was to put the Department-based drafting process for refugee protection legislation on hold, the content of its resulting report gave a powerful impetus to even more broadly based drafting efforts.

In May 1997, the Task Team submitted its Draft Green Paper on International Migration. One chapter of the Draft Green Paper, Chapter Four, dealt specifically with refugees. This chapter was heavily influenced by Hathaway and proposed a model of refugee protection that was rights-regarding, solution-oriented and temporary, with the sharing of the burden across all SADC member states.

Indeed, the model of refugee protection contained in the Draft Green Paper largely reflects the thinking of Hathaway's Centre for Refugee Studies at York University (Toronto, Canada). As a reaction to what was seen by many as a crisis in international refugee law, the ambitious 'Reformulation Project' was convened there under Hathaway's leadership. The aim of this project was to re-conceive refugee protection 'in a way that is reconcilable with the legitimate concerns of states, yet does not sacrifice the critical right of at-risk people to seek asylum'.[17] Two fundamental principles of the model of refugee protection proposed by the project are: (1) collectivised protection based on the notion of 'equal but differentiated responsibility' and (2) a system of 'solution-orientated, temporary protection'. Significantly, the model elaborated was a comprehensive one. Those associated with the Project stressed that no single aspect of the proposal

should be considered in isolation from other aspects. While the Green Paper attempted to portray this holistic quality of its suggestions on refugee protection, this aspect did not always appear to be understood by the Green Paper's audience.[18]

The Drafting Process

The Draft Green Paper (which did not contain an actual draft bill) was published in the Government Gazette on 30 May 1997 with a request for public comments.[19] In our view, this was the proximate start of the drafting process towards the eventual passage of the Refugees Act. A significant number of individuals and organisations responded to this request for feedback.[20] All organisations and interested parties who made these submissions welcomed the Green Paper initiative towards establishing a coherent refugee policy and legislative regime. NGOs and representatives from the refugee community stated that the process should continue to be widely consultative, and that civil society should thereafter be involved through established structures in monitoring refugee policy and legislation.

Every submission endorsed the proposal that refugee protection be separated from migration and immigration management. Nonetheless, the submissions did more than merely reflect back the content of Chapter Four of the Draft Green Paper.

The human rights and constitutional focus of the Green Paper was strongly supported and there was general agreement that a flexible definition of refugees would facilitate the stated purpose of protecting refugees who had been victims of human rights abuses in other countries. The constitutional focus was demonstrated by the unanimous support for the proposal that persecution on grounds of gender and sexual orientation, disability and caste be incorporated into the definition. In supporting a rights-based approach, many submissions stated that refugee definitions and refugee rights should be clearly set out in legislation.

In an important aspect, the submissions demonstrated a clearly divergent viewpoint from that apparently held by the drafters of the Green Paper. Most of the submissions criticised the notions of temporary protection and collectivised protection put forward in the Green Paper. The content of this critique came in several forms. The critics of the Green Paper position on these issues noted that asylum is by nature temporary, since a refugee only requires protection for as long as he is unwilling or unable, for defined reasons, to avail himself or herself of the protection of his or her country of origin or nationality. When circumstances change, protection may no longer be required. Critics also pointed out that, in the South African (and African) context, 'temporary protection' may mean something different from how the term is understood in European and North American countries that have not ratified the 1969 OAU Convention, but which have

taken its definition and used it to afford a minimalist form of protection to certain refugees (for example, refugees forced to flee the Balkans). Taking this line of criticism even further, some comments argued that the adoption of the Green Paper model would increase confusion and result in the lowering of protection standards.[21] These critics held the view that moving to a regional protection of refugees as proposed by Chapter Four of the Green Paper and its underlying model would inevitably lead to standards of the lowest common denominator in terms of refugee rights.

Both as a matter of politics and as a matter of principle, the authors of a number of comments on this part of the Draft Green Paper were thus sceptical of the concept of collectivised protection. Nonetheless, no one questioned the benefits of cooperation between members of the Southern African Development Community (SADC) with regard to refugee protection. Indeed, a number of submissions noted that burden-sharing, as contained in the 1969 OAU Convention definition, should remain a goal, and that countries of the region should work together to prevent refugee flows and to find solutions to existing problems. Still, these critics stressed that South Africa could not compromise its obligations to refugees within its borders.

The debate around the proposals and ideas contained in Chapter Four of the Green Paper begun in the process of public participation then moved to a Conference on the Green Paper organised in Cape Town by the Southern African Migration Project/IDASA and held in Cape Town in October 1997. Up until this event, the public dialogue had encompassed both the migration policy and the refugee protection aspects of the Green Paper. However, as the Draft Green Paper itself recognised, a consensus was developing to the effect that issues relating to refugee policy and legislation needed comprehensive discussion in a separate forum. The Draft Green Paper recommended that two separate White Papers (leading to separate projects of legislative reform) be written: one on migration policy and one on refugee protection.[22] While the Department of Home Affairs later made it clear (in a move widely perceived as backtracking on reform of migration policy apart from refugee protection) that the Draft Green Paper was to be regarded as a 'consultative document' and was not the government's official policy position on migration matters, the Department nonetheless committed itself to the Draft Green Paper's suggestion for dual-track White Paper processes. Indeed, Home Affairs Director-General Piet Coleyn made this commitment publicly at the October 1997 'Green Paper Conference'. This confirmation and its acceptance by civil society set the stage for further development in terms of drafting South African refugee protection legislation.

In May 1998, the Minister of Home Affairs appointed a White Paper Task Team for Refugee Affairs. The Team included five representatives from (collectively) UNHCR, the South African Human Rights Commission, the Commission on Gender Equality and civil society,[23] together with three representatives of the Department of Home Affairs. The relatively high

proportion of civil society personnel in the composition of the Task Team was mirrored in the non-Departmental influence and participation in the work of the Task Team. Although the Task Team was pressed into finishing its work within a very short space of time, there was nevertheless a substantial amount of input from civil society during the process. To a great extent, this input and resulting influence occurred by virtue of the direct participation of civil society members on the Task Team.

An additional instance of civil society influence was a workshop held by the Legal and Policy subcommittee of the National Consortium for Refugee Affairs (NCRA)[24] in Pretoria on 29 May 1998.[25] This workshop[26] critically addressed issues presented by a Third Draft Refugee Bill. This Third Draft was initially drafted by the Department and was then presented to the Refugees White Paper Task Team. While it differed substantially from the Second Draft Refugee Bill, it nonetheless underwent substantial revision itself through the attentions of the White Paper Task Team. By the end of this process, the resulting legislation of the Task Team covered topics that either had not been present in earlier drafts or that had been very briefly treated, such as re-conceiving the administrative structure for status determination, a fast-track procedure to deal with claims felt to be manifestly unfounded, abusive or fraudulent, detention of asylum-seekers and refugees, gender issues, legislative incorporation of a refugee-rights regime, and local integration and repatriation issues. The Task Team devoted attention to specific wording and drafting, and produced a detailed and comprehensive piece of draft legislation.

The Draft Refugee White Paper and its accompanying Draft Refugee Bill 1998 were then published for comment by the Department of Home Affairs on 19 June 1998.[27] Comment on these documents was requested by 20 July. In spite of this limited time frame, no fewer than thirteen separate organisations and government departments made responses to the White Paper and Draft Bill.[28]

While the reaction to the work of the White Paper Task Team was on the whole favourable, there were both general and particular points of concern raised. On the whole, a shift in the discourse had taken place. The concerns raised were no longer focused on collectivised protection (which the Task Team's Draft Bill did not adopt) or temporary protection (which the Draft Bill did not clearly provide for). Instead, the issues raised were mostly about implementation. Thus, to a great degree unnoticed in the fray, an implicit rejection of the premises of the Reformulation Project had occurred. Without temporary protection and collectivised protection, refugee protection policy in South Africa was not falling into the line set out for it within the Draft Green Paper. Were we to identify the cause of this shift, we would point to the involvement of civil society (in the form of both legal professionals and non-governmental organisations) and the willingness of government (at least within this specific policy process) to partner with civil society.

As part of this focus on implementation, one set of responses reflected widespread concern that the refugee status determination body be assured of its independence from the Department of Home Affairs and that it be free from political interference.[29] These responses advocated that the Minister and Director-General's authority for making determinations on asylum, once delegated, remain final. The concern was that political officials not be permitted to over rule decisions made by a refugee determination officer.[30]

Likewise, a number of organisations expressed a general concern over the treatment that asylum applicants and recognised refugees would receive under the new legislative regime. These comments argued that specific legislative incorporation of certain rights (the list of rights guaranteed under the 1951 Convention) was necessary.

Additionally, the issue of detention and placement of refugees and asylum-seekers began at this time to emerge as a point of contention. The introduction of camps into South African refugee policy and practice was discouraged, with one commentator noting that Mozambicans who arrived in South Africa constituting a mass influx had been accommodated without resorting to such measures.[31] A further source of concern was 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 movement.[32]

Finally, there was concern raised over the right of persons to be naturalised within a reasonable period. Indeed, this point (which linked back to the temporary protection debate) remained a matter for debate, even though it was now stated in terms that emphasised certainty of the prospects for individual integration. In response to the lack of clarity of the Bill on this topic, it was proposed that, given the long wait for refugee status determination, a period of five years (after which one was entitled to apply for naturalisation) should commence from the time the asylum-seeker first established residence in South Africa.[33] A further proposal wished to clarify the process and urged that there be a 'specific and complementary set of criteria for refugees applying for naturalisation'.[34] Justifications for this insistence on naturalisation referred to the insecurity that temporary status accorded under the current system.

Other concerns raised in the public comments about the White Paper were more particular and specific. The perceived lack of administrative justice accorded to asylum applicants was raised. Some submissions argued that specific reference be made to the rights of fairness and transparency in decision-making.[35] Another concern revolved around exclusion, the suggestion being that the refugee determination procedure and criteria ought to specifically acknowledge developments in international law relating to war crimes.[36] Finally, there were also concerns over issues relating to cessation of refugee status. Some comments took care to point out that a decision by a refugee to return voluntarily to the country of origin to test the waters should not automatically lead to cessation.[37]

Considering and responding to these submissions, the Task Team amended the White Paper in several, mostly institutional, respects. Perhaps most importantly, the Team made several textual changes in order to bolster the independence of the Appeal Board. In addition, the Task Team proposed a national consultative body to act as a bridge between government and non-governmental organisations' concerns, a Refugee Council.

Following these amendments, the White Paper, together with a Draft Bill, was submitted to Cabinet for approval to be tabled in Parliament. Cabinet decided to remove the provision allowing naturalisation after five years, a change effected by the State Law Adviser, who revised the Draft Bill. The Minister of Home Affairs then presented a version of the Bill to the Parliamentary Portfolio Committee on Home Affairs in September 1998.

Parliamentary Consideration

The submission of the draft legislation in front of a parliamentary committee allowed another opportunity for further substantive comment from various organisations. Based largely on the March and May 1998 workshops, the NCRA presented a summary of outstanding concerns to the Portfolio Committee in October 1998. The concerns raised by the NCRA were largely technical and focused on certain definitions and language used in the Bill. It was believed that interpretation could have prima facie negative consequences for asylum applicants or recognised refugees.[38] Continuing 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 refugees,[39] powers of the Minister to intervene in the procedure,[40] an overly broad interpretation of exclusion[41] and the rights of refugees' dependants.[42] The NCRA made recommendations in respect of the proposed asylum procedure with the intention of making the procedure less costly 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 and to the UNHCR were the potentially 'far-reaching implications' of a clause in the Bill, that 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'.[43]

This last NCRA concern and others were addressed in public hearings held by the Parliamentary Portfolio Committee on Home Affairs. The Committee later incorporated changes based on many of these concerns in their amendments to the draft Bill.[44] Nonetheless, some aspects of the final legislation continued to be matters for concern to the NCRA. However, by this point in the process, members of civil society were primarily fighting to retain certain features of the Bill that they found favourable as well as attempting to address some of the implementation issues of concern already

identified in statutory language. One example of the former stemmed from the attempted removal (by representatives of the Department of Home Affairs) of the rights of asylum applicants to an oral hearing and to be legally represented.[45] An example of the latter was the NCRA's attempt to influence the decision to provide refugees not with South African identification documents similar in appearance to an identity card (as defined in the Identification Act 68 of 1997) but rather with 'an identity document ... in the prescribed form'.[46]

After passage by Parliament, President Mandela assented to the Refugees Act 130 of 1998 on 20 November 1998.

Conclusion

The NCRA continued to worry that the Act left significant matters to Ministerial regulations. These matters included the manner in which refugees are to be dealt with during a situation of 'mass influx' (and the criteria that will be used to determine such an 'influx'), the measures taken to deal with 'manifestly unfounded applications', the circumstances in which refugees will be repatriated and the method of implementing the Act. This worry turned out to be a founded one. An assessment of the regulations and the involvement (or lack thereof) of civil society in their drafting is beyond the scope of this chapter, which limits itself to the influence and effect of civil society within the drafting history of the Refugees Act itself.[47] Still, we can note here that the Refugees Act was only brought into effect nearly eighteen month after it was assented to.[48] The formulation and implementation of the regulations in terms of the Refugees Act stood in sharp contrast to the process of drafting the legislation itself. When the regulations were finally published on 1 April 2000, their content was a surprise to many in the field. Due to the involvement of several energetic American immigration officials in their drafting, the regulations were perceived more as a product of government to government (as well as UNHCR) drafting efforts than as the fruit of a public consultation process.

This contrast with the legislative drafting only deepened as refugee advocates within civil society began to examine the content of the regulations made. They identified at least four principal areas of criticism. Most infamously, the regulations prohibited asylum-seekers from working or studying while on an asylum-seeker permit. The regulations also essentially placed the burden on the refugees themselves to provide interpreters, allowing the Department to escape its obligation where not practicable. And they perpetuated the uncertainty of refugee status in South Africa, both by failing to provide clearly for the renewal of permits and by providing for refugee documentation to last for only a two-year period.

As the experience with the regulations as well as subsequent issues demonstrated, one can hardly say that the history of the Refugees Act was

complete at the point of enactment. Indeed, the history of the Act would not be finished even with a full account of its implementation.[49] For one thing, as has been shown in this chapter, the development of refugee protection legislation has always nested somewhat uncomfortably in South Africa within the development of migration policy legislation. This continued to be the situation with the Refugees Act through the highly contested passage of the Immigration Act 13 of 2002 in May 2002. Indeed, one of the early-published versions of the Minister of Home Affairs' Draft Immigration Bill clearly did not take into account the Refugees Act and its newly implemented system of refugee status determination. In several respects, critical commentators argued, the enactment of such a version of immigration legislation would have represented a severe setback for refugee protection in South Africa. If the Bill were enacted, immigration legislation would reassert its priority over refugee protection legislation, refugees' rights to permanent residence would be decided by regulations made in terms of the Immigration Act, the asylum-seeker permit would be eliminated and the independent specialised refugee protection appellate tribunal would be abolished.[50] While the worst of these problems were avoided or at least mitigated, the Refugees Act remains precariously positioned within a new set of structures and policies that remain at this point full of at least as much potential danger as promise, from the refugee protection point of view.

The lack of civil society involvement in the drafting of the regulations and the content of the regulations themselves may well be the result of a part of the law-making process that, due to a lack of public consultation, was more firmly within the control of the Department of Home Affairs, and thus less influenced by the norms of transparency and accountability introduced by South Africa's transition to constitutional democracy. Whatever the cause that social scientists and historians will ultimately ascribe to the recent state-society conflict over the implementation of the Refugees Act, we conclude that, after having talked the talk, the state did not walk the walk. Still, this should not cause one to lose sight of the significant degree of participation of civil society in the creation of the new talk, not least for the purposes of interpretation and advocacy within the policy realm thus created. In particular, we would argue that the civil society involvement in the drafting of the Refugees Act has provided refugee rights' advocates with a number of legal and rhetorical resources to use in these current and ongoing conflicts.

Notes

1. Some material in this chapter is drawn from J. Handmaker, 'Who Determines Policy? Promoting the Right of Asylum in South Africa', International Journal of Refugee Law 11, No.2 (1999), 290–309. For further discussion on the development of a South African refugee discourse, see L. de la Hunt, 'Refugees and Immigration Law in South Africa', in *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, ed. J. Crush (Cape Town, 1998); L. De la Hunt, 'Refugee Law in South Africa: Making the Road of the Refugee Longer?' in, *World Refugee Survey*, US Committee for Refugees (Washington, 2002), 46–51; J. Klaaren, 'Contested Citizenship in South Africa' in *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, eds. P. Andrews and S. Ellmann, Johannesburg, 2001: 304–325; '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, No. 4 (1998): 700–724; and T. R. Smith, 'The Making of the 1998 Refugees Act: Consultation, Compromise, and Controversy', *Wits Forced Migration Working Paper Series*, no. 5 (Johannesburg, 2003).
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. In Baramoto v. *Minister of Home Affairs* 1998 (5) BCLR562, 572 (W), the Department noted that this Basic Agreement was concluded on 6 September 1993.
3. The administrative arrangements that provided refugee protection from 1994 to 2000 are described in Chapter 4 of this collection on 'Refugee Status Determination Procedures in South African.
4. Human Rights Watch, *'Prohibited Persons:' Abuse of Undocumented Migrants, Asylum Seekers and Refugees in South Africa*, (New York, 1998) 160; J. Crush ed. *Beyond Control*.
5. J. Klaaren, 'Immigration and the South African Constitution', in Crush, ed., *Beyond Control*, 55–78.
6. Aliens Control Amendment Act 76 of 1995. Before its amendment, section 55 provided that a court of law was not to have jurisdiction over a decision taken under the Act. This was an example of a so-called 'ouster clause'. Subsequent to the elimination of this patently unconstitutional blanket prohibition on judicial review, a number of departmental regulations and decisions taken under the Act by the Department of Home Affairs were made the focus of administrative review. Indeed, it is arguable that the main driver of migration reform (as opposed to refugee protection development) in South Africa has been the judiciary. The 1995 Amendment Act also provided for several legislative provisions that aimed to protect human rights. One was the mandatory written review by a judge of the High Court in cases of detention of persons for more than thirty days in terms of the Act. This provision has largely been ignored by the Department of Home Affairs. See Human Rights Watch, *Prohibited* Persons, 98–102; see also *South African Human Rights Commission* v. *Minister of Home Affairs and Dyambu (Pty) Ltd t/a Lindela Repatriation Centre*, Case No. 1999/28367, Witwatersrand Local Division.
7. *Mayibuye*, African National Congress, South Africa, August 1996.
8. G. Al-Omari, 'Comments on the South African Refugee Act 1994, unpublished working draft, 1996.
9. For a regional and historical perspective, see B. Rutinwa, 'Asylum and Refugee Policies in Southern Africa: a Historical Perspective', unpublished paper presented at a workshop on 'Regional Integration, Migration, and Poverty' of the Southern African Regional Poverty Network, Pretoria, 25 April 2002.
10. The 1951 United Nations Convention on the Status of Refugees, the 1967 Protocol to the UN Convention on the Status of Refugees (both ratified in the Senate on 14 September 1995, Hansard col. 2966, and in the National Assembly on 11 October 1995, Hansard col. 4361), and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (ibid). These treaties were formally acceded to in January 1996. Section 6 of the Refugees Act states that that Act must be 'interpreted and applied with due regard to' these treaties among others.

11. See, for example, Second Draft: Bill (updated on 23 September 1996).
12. See, for example, Letter from N. de Villiers, Legal Resources Centre, to Director-General P. Colyn, 3 September 1996 (confirming aspects of a discussion held 29 August 1996); Minutes of a Meeting Held at the Offices of the South African Human Rights Commission with the Department of Home Affairs on 26 February 1997.
13. A senior official from the Department did attend a workshop held at the South African Human Rights Commission on 14 November 1996. LHR and Wits Refugee Research Programme, 'Asylum and Naturalisation: Policies and Practices', unpublished workshop report, 1996. However, senior officials of the Department were absent from a follow-up workshop specifically held to discuss the proposed legislation on 23 November 1996.
14. L. De la Hunt, 'Comments on the Second Draft of the Refugees Bill', unpublished paper presented at the *Human Rights Commission's Workshop* on the Second Draft Refugees Bill, Johannesburg, 1996.
15. The Southern African Migration Project successfully tendered for research support and assistance towards their project of drafting the Green Paper (SAMP) partners include IDASA and Queens University, Canada.
16. J. Hathaway, 'Towards the Reformulation of International Refugee Law: a Model for Collectivized Protection and Solution-oriented Protection', unpublished submission to the South African Green Paper Task Team on International Migration, 1997.
17. J. Hathaway and R.A. Neve, 'Making International Law Relevant Again: a Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal* 10 (1997): 115.
18. Some within the NGO community understood this interdependent aspect but opposed the model nonetheless. These advocates worried that government would pick and choose amongst the interdependent elements of refugee protection.
19. GG 18033.
20. Contributors included the Black Sash Trust, International Organisation for Migration (IOM), Committee of University Principals, Federation of Unions of South Africa, Old Mutual, European Parliamentarians for Africa (AWEPA), National Coalition for Gay and Lesbian Equality, Town Council of Midrand, Self-employed Women's Union, Amnesty International (South Africa), Cape Times, UNHCR, Centre for Development and Enterprise, Chamber of Mines of South Africa, Gauteng Refugee Forum, Lawyers for Human Rights, International Education Association of South Africa, the Transvaal Agricultural Union, Refugee Research Programme, Cape Town Refugee Forum, Cape Town Refugee Committee, Congress of South African Trade Unions (COSATU), Centre for Applied Legal Studies, South African Human Rights Commission and various national and provincial government departments and institutions, universities, employers' associations and individuals. In total, fifty-three separate sets of comments were received by the Department of Home Affairs.
21. A lively debate exists in the literature regarding this particular aspect. Compare Barutciski, 'The Development of Refugee Law', 714–17 ('international activists involved in the South African debate mistakenly believe the Green Paper is encouraging the Government to formalize the type of protection system reserved for refugees from Bosnia-Herzegovina in the European Union') with J. Handmaker, 'Who Determines Policy?', 301 ('concerns motivating NGOs to lobby against temporary protection were those of human rights and psycho-social harm and lobbying did not amount to advocating permanent residence for undocumented migrants') as well as J. Handmaker, 'No Easy Walk: Advancing Refugee Protection in South Africa', *Africa Today* 48, no. 3 (2001): 97–101.

22. On 31 March 1999, the South African White Paper on International Migration was released, followed by the Draft Immigration Bill on 15 February 2000. Both are available at: www.lhr.org.za (Refugee Rights Project).
23. The civil society members were members of the National Consortium for Refugee Affairs. One member was a representative of Lawyers for Human Rights and another, Lee Anne de la Hunt, was the Director of the Legal Aid Clinic at the University of Cape Town. An account of the history and development of the NCRA is available at http://www.ncra.org.za. Representatives of the UNHCR, the SAHRC and the Commission on Gender Equality (CGE) might be classed as civil society members and in any case were certainly receptive to proposals from the members of civil society. The UNHCR and to a lesser extent the SAHRC were heavily involved in the development of refugee protection policy.
24. With the assistance and continuing presence of the UNHCR, the regional service-provider refugee forums and the non-governmental organisations largely focusing on policy formed themselves into the NCRA. The first chairperson was Jody Kollapen, Commissioner of the SAHRC.
25. It was intended that 'consensus points arising from a Workshop at the African Window in Pretoria [would be] considered as approved policy guidelines of the NCRA', LHR, 'Workshop on the Third Draft Refugee Bill', unpublished report, Pretoria, 29 May 1998. A further seminar was held in Cape Town in September 1998 and hosted by the UCT Legal Aid Clinic.
26. Some of the material presented at that workshop is also contained in the present collection.
27. Draft Refugee White Paper, No. 18988, Notice 1122 of 1998 (South Africa).
28. 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 Southern African Migration Project.
29. See Lawyers for Human Rights, 'Comments on the Draft Refugee White Paper (Notice 1122 of 1998, South Africa)', unpublished, Pretoria, July 1998 and Centre for Applied Legal Studies, 'Comments on the Draft Refugee Bill', unpublished, Johannesburg, 21 July 1998.
30. Concern in this regard was over section 4(3) of the draft legislation, 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'.
31. Lawyers for Human Rights, 'Comments on the Draft Refugee White Paper', 6.
32. South African Human Rights Commission, 'Comments – Draft Refugee Bill', unpublished, Johannesburg, June 1998, at p. 7.
33. Human Rights Watch, 'Comments – Draft Refugee Bill', unpublished, London, 1998, at p. 8.
34. Lawyers for Human Rights, 'Comments', 13.
35. Legal Resources Centre, 'Comments by Legal Resources Centre', unpublished, Cape Town, 20 July 1998.
36. Human Rights Watch recommended that section 2(4)(a) of the draft legislation be expanded to include a wider definition of war crimes, developed since the drafting of the 1951 Convention. Human Rights Watch, 'Submission to the White Paper Task Group on Refugee Policy', unpublished, London, July 1998, at p. 4.
37. UNHCR, 'Comments on the Draft White Paper', unpublished, Pretoria, 20 July 1998, at p. 1, A2(b).

38. For more detail, 23 October comments of National Consortium for Refugee Affairs, 'Summary of Concerns, Draft Refugee Bill 1998: Version Reviewed by the State Law Advisors', unpublished, Pretoria, 1998.
39. The NCRA (unsuccessfully) advocated for the right to naturalisation within five years of lodging an application, the right of a child born to refugee parents in South Africa to South African citizenship, and the right of a refugee to be informed of the right to make a submission with regard to a decision to withdraw refugee status.
40. 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 (e.g. 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'.
41. Section 4 of the Bill (relating to exclusion from refugee status) provided that 'a person does not qualify for refugee status ... if there is reason to believe that he or she ...', whereas international law clearly requires serious reasons. Despite lobbying, this provision remained unchanged in the final Act.
42. Section 33 of the Bill differed substantially from a similar provision in a previous draft of the Bill that was believed to comply with international law and was later changed by the Portfolio Committee. Concerns that were raised by the NCRA related to serious, alleged breaches of international refugee law (and principles) and the family unit principle.
43. The text contained in this draft of the Refugee Bill differed substantially from previous drafts (including the Draft Bill annexed to the White Paper), which provided that one 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'.
44. Portfolio Committee Amendments to the Refugees Bill No. 135a of 1998.
45. Ibid., Clause 24, No. 2, p. 4.
46. Ibid., Clause 30, No. 1, p. 4.
47. The most notable feature of the regulations implementing the Act is undoubtedly their prohibition on work or study by asylum-seekers. This was one side of the 'bargain' that the regulations struck, with the other side being that of a fair, timely refugee determination process. Any evaluation of these regulations should, in our view, assess both the constitutional limits on the first side of the bargain and the apparent administrative and capacity shortfalls on the second side with respect to the practical implementation of the regulations. See also Watchenuka (identifying this issue within both the regulations and decisions of the Standing Committee).
48. On 31 March 2000, President Mbeki declared the commencement date for the Refugees Act to be 1 April 2000. See R 22 of 2000 in GG 21075 (6 April 2000). The Regulations were made on 6 April 2000.
49. An important part of the history of the Refugees Act is also the story of the backlog project: see Chapter 5 of this collection.
50. See J. Klaaren, 'Preliminary Analysis of the Effect of the Draft Immigration Bill on the Refugees Act', unpublished paper presented at the University of Western Cape workshop: 'Forced Migrants in the New Millennium: Problems, Prospects, and Solutions', Cape Town, 2001.

4

Refugee Status Determination Procedures in South African Law

Jonathan Klaaren and Chris Sprigman

Introduction

This chapter critically investigates the South African procedures for determining refugee status that were in force from 1994 until the 1 April 2000 implementation of refugee legislation, as well as the intended changes to these procedures introduced by the Refugees Act 130 of 1998. After a brief historical overview of its development, Part I sets out an understanding of how the administrative system of refugee status determination operated during the period from 1994 to 2000.[1] Part II then closely examines this system – which we term the centralised bureaucratic model – and develops an argument for an alternative, decentralised model of refugee determination based on individualised refugee determination hearings. From 1996, the refugee rights community offered a version of this decentralised hearing-based model in advocating for the refugee status determination system that was eventually adopted in the Refugees Act 130 of 1998. Part III then examines the provisions of the Refugees Act relating to refugee status determination procedures, as well as the subsequent implementing regulations. It argues that, properly interpreted in terms of a decentralised hearings-based model, the Act represents an important step forward in South African refugee protection.

The main thrust of this chapter is to show that the best interpretation of the Act requires that the Department of Home Affairs put into place a hearings-based system similar to the one outlined in this chapter. We believe that the Act – as interpreted against the background of the right to just